

Volume 100 Number 907/908/909

INTERNATIONAL REVIEW of the Red Cross

Humanitarian debate: Law, policy, action



150 years of
humanitarian reflection



ICRC

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.

International Committee of the Red Cross

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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Special thanks: Daniel Palmieri and
Cédric Cotter

International Review of the Red Cross
19, Avenue de la Paix, CH 1202 Geneva
CH - 1202 Geneva
t +41 22 734 60 01
e-mail: review@icrc.org

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Cover Photo: A variety of editions of the International Review of the Red Cross demonstrating the broad range of ideas found in the pages of the journal over the past 150 years. 2 May 2019. Credit: ICRC/ Sarah Roxas.

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**150 years of humanitarian
reflection**

CONTENTS

150 years of humanitarian reflection

- 1 **Editorial: *The International Review of the Red Cross: Witness to the humanitarian revolution***
Vincent Bernard, Editor-in-Chief

Voices and perspectives

- 11 **Three short essays in honour of the 150th anniversary of the *International Review of the Red Cross***
Jacques Meurant, Hans-Peter Gasser and Toni Pfanner
- 23 **Note: A brief history of the *International Review of the Red Cross***
- 37 **Photo gallery: The editors-in-chief of the *Review*, 1869–2019**

Articles

- 45 **Opinion note: The ICRC as seen through the pages of the *Review*, 1869–1913: Personal observations**
David P. Forsythe
- 71 **To inform or govern? 150 years of the *International Review of the Red Cross*, 1869–2019**
Daniel Palmieri
- 97 **Note: From the *Bulletin International des Sociétés de la Croix Rouge* to the *International Review of the Red Cross*: The Great War as a revelator**
Annette Becker
- 115 **The *International Review of the Red Cross* and the protection of civilians, c. 1919–1939**
Ben Holmes

Articles published by the Review reflect the views of the author alone and not necessarily those of the ICRC or of the Review. Only texts bearing an ICRC signature may be ascribed to the institution.

143 Reflections on the development of the Movement and international humanitarian law through the lens of the ICRC Library's Heritage Collection

Ismaël Raboud, Matthieu Niederhauser and Charlotte Mohr

Selected articles

165 Cyber operations and the Second Geneva Convention

Jeffrey Biller

185 The prevention of torture in Rio de Janeiro: A study on the role of public defenders

Étienne Chénier-Laflèche

211 French foreign fighters: The engagement of administrative and criminal justice in France

Sharon Weill

237 Still a blind spot: The protection of LGBT persons during armed conflict and other situations of violence

Alon Margalit

267 Exploring the “continuous combat function” concept in armed conflicts: Time for an extended application?

Sabrina Henry

287 More humanitarian accountability, less humanitarian access? Alternative ideas on accountability for protection activities in conflict settings

Natalie Klein-Kelly

315 Returning foreign fighters: The case of Denmark

Helene Højfeldt Jakobsen

Articles published by the Review reflect the views of the author alone and not necessarily those of the ICRC or of the Review. Only texts bearing an ICRC signature may be ascribed to the institution.

- 337 An environment conducive to mistakes? Lessons learnt from the attack on the Médecins Sans Frontières hospital in Kunduz, Afghanistan**
Françoise Bouchet-Saulnier and Jonathan Whittall
- 373 A balancing act: The revised rules of access to the ICRC Archives reflect multiple stakes and challenges**
Valérie McKnight Hashemi

Reports and Documents

- 395 Changing world, unchanged protection? Seventy years of the Geneva Conventions**
Speech given by ICRC President Peter Maurer to the Graduate Institute, Geneva, 13 March 2019
- 403 What's new in law and case law around the world?**
Biannual update on national implementation of international humanitarian law January–June 2017
- 423 What's new on *How Does Law Protect in War? Online***
Annual update on new content and case studies published from January–December 2018

Books and Articles

- 429 Leuven Manual on the International Law Applicable to Peace Operations**
Terry D. Gill, Dieter Fleck, William H. Boothby and Alfons Vanheusden (eds)
Book review by Tobias Vestner and Alessandro Mario Amoroso

Articles published by the Review reflect the views of the author alone and not necessarily those of the ICRC or of the Review. Only texts bearing an ICRC signature may be ascribed to the institution.

437 Taming Ares: War, Interstate Law, and Humanitarian Discourse in Classical Greece

Emiliano J. Buis

Book review by Marie-Louise Tougas

445 Law and Morality at War

Adil Ahmad Haque

Book review by Lisa Hecht

EDITORIAL

THE *INTERNATIONAL REVIEW OF THE RED CROSS*: WITNESS TO THE HUMANITARIAN REVOLUTION

Vincent Bernard, Editor-in-Chief

The *International Review of the Red Cross* occupies a unique position in the world of academic publications. First, of course, is its long history: 2019 marks the *Review*'s 150th anniversary, making it one of the oldest periodicals in the world to be published continuously.¹ The complete collection, including the Arabic, Chinese, Spanish, Russian and Turkish versions, fills nearly 12 meters of library shelves. The *Review* has published 23,686 articles covering more than 110,000 pages.

Another standout feature is the journal's editorial line: the *Review* has always been driven by the humanitarian imperative of the founders of the International Red Cross and Red Crescent Movement (the Movement). The changing nature of crises has constantly challenged humanitarian thinkers to come up with practical new solutions, be they of a political or a legal nature. Throughout its history, the *Review* has had the distinction of driving this debate forward at all levels, from practice to theory to policy – in other words, from the battlefield to the drawing board and then the negotiating table.

The *Review* has a rich history, and that is the focus of this issue.² The journal offers a unique perspective on the history of the Movement and the humanitarian sector more broadly, but also on that of contemporary conflicts and crises. From the Franco-Prussian War in 1870 to the ongoing war in Syria (the focus of our last issue), the *Review*'s archives offer insights into 150 years of tragedies, shortcomings and progress, written by visionary pioneers, inspired amateurs and seasoned experts – modern humanitarians all.

This anniversary issue of the *Review* gave the editorial team a chance to invite researchers to explore these various dimensions. It is also an opportunity for me to discuss my own experience with the *Review* since I joined it in 2010, my passion for this journal, the editorial decisions we have made, and the topics we will address in the coming years.

Expanding, informing and professionalizing through 150 years of humanitarian writing

The *Review* is by far the oldest publication in the humanitarian sector. This is no minor detail. For me, the journal's longevity is a tribute to the perseverance and tireless humanitarian commitment of successive generations of men and women who have used it as a platform for sharing their thinking, their new ideas and their experiences. On these pages, you can ponder technical drawings of the first-ever

field ambulances,³ treatises on war medicine, and proposals – whether visionary or utopian – on ways to limit human suffering in times of crisis. The *Review*'s staying power stems from a humanitarian commitment that turns its history into a narrative.

The *Review*'s content and layout have changed radically over the past 150 years. The journal helped to construct the International Committee of the Red Cross (ICRC) and the Movement, simultaneously or by turns; it has served as a forum for launching – and a vector for spreading – new ideas; and it has played a role in professionalizing humanitarian work.

The *Review* can trace its origins to the Second International Conference of the Red Cross and Red Crescent, which took place in Berlin in 1869. Originally entitled the *Bulletin International des Sociétés de Secours aux Militaires Blessés* (*International Bulletin of Relief Societies for Wounded Soldiers*), the publication had a crucial function: it was to deliver news and information for the fast-growing Movement. As British medical reformer John Furley noted in 1869, the *Bulletin* was the Movement's fountainhead, the place where people could find out more about common challenges.⁴ Its pages offered solutions to some of the earliest problems dealt with by National Red Cross and Red Crescent Societies (National Societies): how should wounded soldiers be transported from the battlefield to the hospital? How should first aid be administered to wounded soldiers on the battlefield? The first few issues of the *Bulletin* contain technical drawings of wheeled stretchers and suspended beds for rail cars – I find these examples particularly moving, during this period of creative fervour, this humanitarian big bang.

At a time when National Societies were being formed all over the world, the *Bulletin* published wonderful engravings of stretchers made from bamboo, fitted to camels or even mounted on skis. The scope of humanitarian action quickly expanded beyond caring for the war-wounded to include an ever-growing number of needs.

The ICRC did not have extensive field operations at the time. Rather, it served as the Movement's international secretariat and encouraged States to create a body of law to protect war victims. The *Bulletin* was the preferred communication platform for the ICRC and its second president, Gustave Moynier, whose writings reflect his political and organizational talents. David

1 The *Review* was established at a time when law journals were just beginning to be created. In the United States, for instance, the *University of Pennsylvania Law Review* is the oldest continuously published law review, and it started in 1852. It appears that numerous law journals were created in the United States at the end of the nineteenth century – the *Albany Law Review* (est. 1875), *Columbia Law Review* (est. 1885), *Harvard Law Review* (est. 1887), *Yale Law Journal* (est. 1891), *West Virginia Law Review* (est. 1894), and *Dickinson Law Review* (est. 1897). In the United Kingdom, the *Law Quarterly Review* was established in 1885 and is still published today. The oldest continuously published academic journal, *Philosophical Transactions*, dates back more than 350 years; it first came out in 1665. See Ignacio de la Rasilla, "A Very Short History of International Law Journals (1869–2018)", *European Journal of International Law*, Vol. 29, No. 1, 2018, available at: <https://doi.org/10.1093/ejil/chy005> (all internet references were accessed in June 2019).

2 See "A Brief History of the *International Review of the Red Cross*" in this issue of the *Review*.

3 For example, see *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 1, No. 2, 1870.

4 ICRC Archives, AF 8, 2 Courrier Reçu Grande-Bretagne 1863–1886, 2/51, letter from John Furley, Ashford, Kent, 30 November 1869. Cited in Jean H. Quataert, "A New Look at International Law: Gendering the Practices of Humanitarian Medicine in Europe's 'Small Wars'", 1879–1907", *Human Rights Quarterly*, Vol. 40, No. 3, 2018, p. 560.

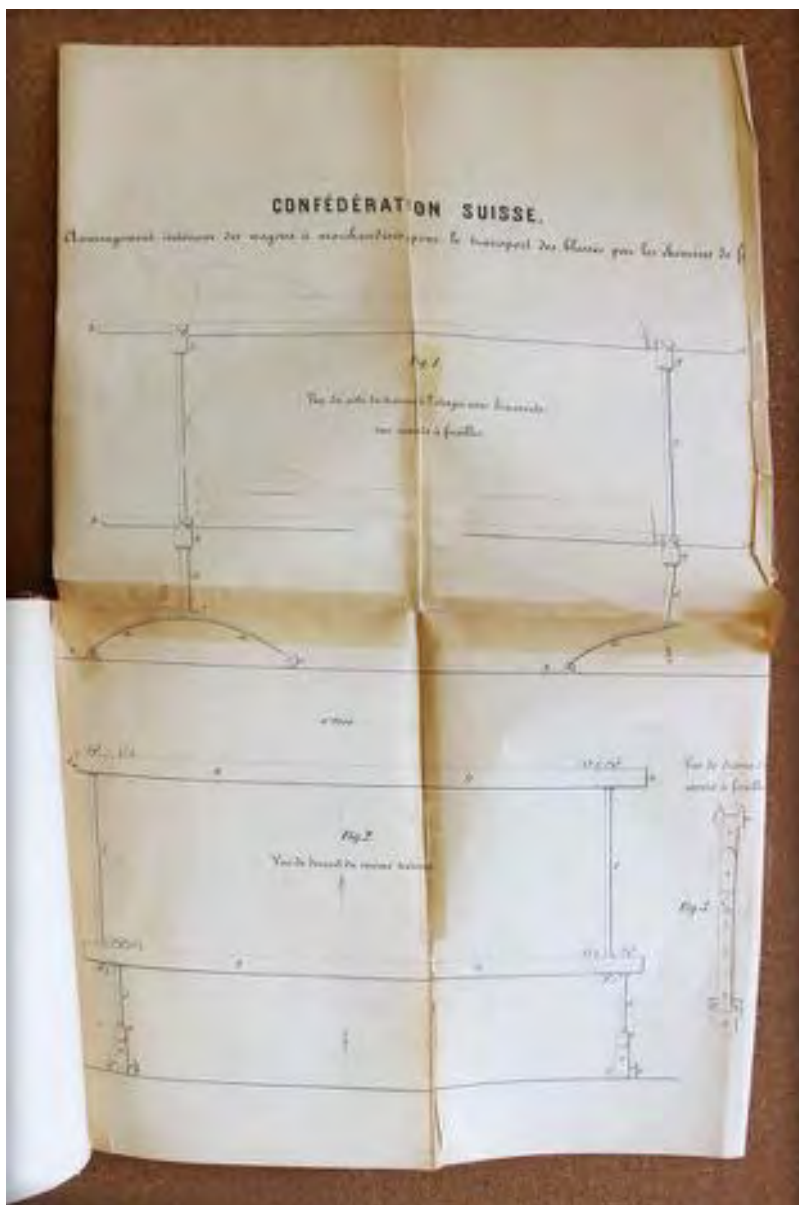


Figure 1. Technical drawing of wheeled stretchers and suspended beds for rail cars. *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 1, No. 2, 1870.

Forsythe and Daniel Palmieri’s articles in this issue clearly demonstrate that for the *Review*’s first 100 years, the ICRC employed it as a strategic tool in its relationship with the Movement.

The *Review* traces the gradual expansion of humanitarian action, first by the Movement and then by the humanitarian sector more broadly. But in some cases what the *Review* does not say speaks to the ICRC's failures, extreme caution and blindness to what was really happening in the world. In certain eras, we can detect biases towards this or that warring party – belying the principle of neutrality – or an overly restrictive interpretation of the ICRC's mandate. And in some instances, the journal's pages harbour colonialist prejudices, which are diametrically opposed to the current meaning of the word “humanitarian”.⁵

The ICRC greatly expanded its activities after the First World War broke out, and, in 1919, the section of the *Bulletin* that described its work in detail filled out and became the *Review*. The *Bulletin*, whose purpose was to report on the doings of the National Societies, was published into the 1950s, now as a subsection of the larger *Review*. Over time, the Movement's activities grew to such an extent that they could no longer be encapsulated in a print publication. The *Review* therefore gradually changed its focus: it served first as a platform for spreading knowledge of international humanitarian law (IHL) and the ICRC's views on humanitarian issues, and it then became an academic publication.

In addition to documenting the blossoming of the humanitarian sector, the *Review* has also been an incubator for new ideas over the years, particularly in the realm of IHL and humanitarian principles. Beginning with the first Geneva Convention, which was adopted in 1864, IHL as a body of law expanded as the years passed through a series of conventions. The *Review* published the first plan for a permanent international criminal court a full 130 years before the Rome Statute took effect and the International Criminal Court was created in The Hague.⁶ The journal was also used to inform the warring parties of the ICRC's stance against the use of combat gases in the First World War.⁷ As well, the Movement's Fundamental Principles, which form the basis of today's humanitarian action, were unveiled on these pages by their author, Jean Pictet.⁸

The 1960s and 1970s were marked by a series of conflicts fuelled by decolonization and the Cold War. The horrors of modern war were embodied in the photo of a little Vietnamese girl, naked and terrorized, her arms outstretched and her back burned by napalm.⁹ Images of violence raced around a restless world yearning for change – whether peaceful or violent in nature – and buffeted by competing societal models. This was also a period in which IHL was further developed and codified, with the adoption of the Protocols Additional to the

5 In this issue of the *Review*, Ben Holmes' article, “The *International Review of the Red Cross* and the Protection of Civilians, c. 1919–1939”, looks at how the treatment of civilians has changed over time.

6 Gustave Moynier, “Note sur la création d'une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 3, No. 11, 1872.

7 Lucien Cramer and Horace Micheli, “La guerre chimique et ses conséquences”, *International Review of the Red Cross* Vol. 7, No. 81, 1925.

8 Jean Pictet, “Les principes de la Croix-Rouge”, *International Review of the Red Cross*, Vol. 37, No. 440, 1955. Also see Jean Pictet, “Les principes de la Croix-Rouge”, Parts II–XIII, *International Review of the Red Cross*, Vols 37–38, Nos 441–452, 1955–56.

9 “The Terror of War”, *Time*, available at: <http://100photos.time.com/photos/nick-ut-terror-war>.

Geneva Conventions in 1977. At the same time, the humanitarian sector diversified and grew in size – a process that continues to this day. The idea of raising awareness of humanitarian rules and principles gained renewed impetus. Beyond its role in the Movement, the *Review* was one tactic in the ICRC’s effort to forestall violations of IHL and get its message through to a network of influential people in universities, governments and the military.

The *Review* was instrumental in instructing people about IHL via a legal positivist lens. As an international law student in the 1990s, it was surely from these pages that I picked up most of my early knowledge of IHL. But while the *Review* continues to provide such information, many other sources, such as manuals and online courses, fortunately exist today. Thanks in part to the ICRC’s efforts, IHL is taught much more widely in universities now than in the past.

It is striking that the humanitarian sector is adopting an increasingly evidence-based approach to its decisions and strategies. As one of the rare academic journals to publish the work of humanitarian researchers, the *Review* also contributes to the growing professionalism of the Movement and of the humanitarian sector as a whole.

“Humanitarian professionalism” – now that’s an ambiguous expression. For many years, describing humanitarian work as a job did not comport with its view as a charitable calling. That’s because humanitarian workers were, by definition, “amateurs” (according to this word’s etymology: “someone who loves”). Humanitarian organizations have always hired specialists (surgeons, logistics experts, lawyers, and so on), but being a “humanitarian” was never considered a job or a career – no more than being a “revolutionary” or a “missionary” was. In recent decades, however, the increase in the number and size of humanitarian organizations and the emergence of specialized degree programmes has resulted in the emergence of a humanitarian sector. Starting in the 1990s, significant improvements have been made in staff training, quality standards and transparency – alongside a growing bureaucracy.

It would therefore be tempting to view humanitarian work as any old field of work. Yet just as 150 years of experience show that aiding victims of conflict takes more than “good intentions”, humanitarian work cannot be reduced to a toolkit of methods borrowed from governments or multinational corporations. Human dignity cannot be reduced to a product or an algorithm.

In its articles, the *Review* seeks to distil the essence of humanitarian professionalism.

Our editorial line over the years

The second way in which the *Review* stands apart among academic publications is its editorial line. This is built on three pillars: (1) analysis of humanitarian topics or crisis situations, (2) the humanitarian response and its associated challenges, and (3) legal solutions.

By focusing on specific topics and juxtaposing multiple points of view, we aim to anchor humanitarian action and the further development of IHL in hard reality. Each issue has one topic, and the articles are carefully selected: we parse out the aspects of each topic and then seek the most qualified contributors.

The earliest issues contained a preponderance of articles on medical topics and relayed news of the Movement and its operations. Topics of humanitarian policy and law have gradually taken the upper hand. Today, the *Review* serves up a unique array of articles in the human and social sciences – law, the military, history, international relations and political science – as they relate to conflict.

Most humanitarian challenges are, alas, recurrent: the *Review* has devoted several issues to missing persons, nuclear weapons and forced displacement, for example. Revisiting these topics provides an opportunity to gauge progress and come up with new solutions. It is also striking to note that the terms of humanitarian debates tend to recur with each successive crisis. Depending on the types of crises faced by humanitarian organizations, some questions come up regularly, such as the link between development and humanitarian action and the use of aid as a political tool by governments or armed groups.

In the area of new technologies, the terms of the debate were already set out in the nineteenth century. Some people want to prohibit the use of new technology and new weapons, others would like to regulate their use, and a handful feel that these inventions will miraculously lead to full compliance with the law – for example, Alfred Nobel, the inventor of dynamite, perhaps surprisingly thought that the development of more powerful weapons would help usher in universal peace. Those actually working in the humanitarian sphere seek ways to shield themselves from these technological advances – or to somehow harness them in their aid work. After all, modern humanitarianism emerged alongside the industrial revolution and a belief in the power of science. The *Review* itself is a product of this ambition to combine “charity” with scientific rigour.

It is thus striking to note that the race to “progress” (or to “innovate”, in today’s lingo) which accompanied the development of humanitarian action in the nineteenth century was a necessary response to a string of crises and the immutable nature of the most basic humanitarian problems and war crimes. We are still seeing wounded people and medical workers and facilities coming under attack in Afghanistan, Iraq and Syria – as if Henry Dunant’s core tenet needed to be reinvented. Françoise Bouchet-Saulnier, who works at Médecins Sans Frontières and is a member of the *Review*’s Editorial Board, terms this a return to the pre-Solferino world.¹⁰

In the humanitarian debate, the *Review*, with its historical perspective, has a duty to identify signs of *progress* (moving forward by drawing on past experience) and avoid the trap of *change* (throwing out and starting again). The next hot thing, platitudes and empty neologisms – as meaningless as they are fleeting – now afflict a flourishing humanitarian sector filled with organizations competing for power and funding.

10 ICRC, “Prix Henry Dunant 2018: Comment traduire le droit en action?”, 2018, available at: www.icrc.org/fr/evenement/prix-henry-dunant-2018.

The Review and the ICRC

The *Review*'s mission 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 to contribute to the prevention of violations of rules protecting fundamental rights and values. This publication has always been supported by the ICRC, which finances it, translates it and distributes it around the world. While it was once the organization's official journal, publishing appointments, legal views and operational reports, the *Review* has evolved and is now an academic publication put out by Cambridge University Press and featuring articles from a wide range of sources.

Today the *Review* continues to help shape the debate over the humanitarian implications of new weapons and new loci of humanitarian work. Its articles are intended to influence not just researchers but also international tribunals, government decision-makers and military legal advisers on today's battlefields.

Thanks to its links with the ICRC, the *Review* can (1) tap into the organization's extensive field experience and benefit from its footprint in today's war zones, thereby buttressing the publication's relevance and credibility; (2) draw on the ICRC's global network of delegations, which can translate and promote the *Review*; and (3) propose constructive solutions to humanitarian problems through an approach based on information-sharing and prevention, on one hand, and planning and preparations, on the other.

The *Review* continues to publish experts' views on topics such as detention, IHL and relations with armed groups. Among the most influential pieces on IHL that we have run, we would mention Sylvain Vité's article on the typology of conflicts,¹¹ Marco Sassòli and Laura M. Olson's article on the relationship between IHL and human rights law,¹² and Cordula Droege's article on the applicability of IHL to cyber warfare.¹³ Not only ICRC staff but also academics and other humanitarian practitioners have published articles that have driven the debate forward. These include Daniel Bar-Tal, Lily Chernyak-Hai, Noa Schori and Ayelet Gundar on perceptions of victimhood in protracted conflicts,¹⁴ Beth Ferris on faith-based and secular humanitarian organizations,¹⁵ and Peter Asaro on autonomous weapon systems.¹⁶

11 Sylvain Vité, "Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations", *International Review of the Red Cross*, Vol. 91, No. 873, 2009.

12 Marco Sassòli and Laura M. Olson, "The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts", *International Review of the Red Cross*, Vol. 90, No. 871, 2008.

13 Cordula Droege, "Get Off My Cloud: Cyber Warfare, International Humanitarian Law, and the Protection of Civilians", *International Review of the Red Cross*, Vol. 94, No. 886, 2012.

14 Daniel Bar-Tal, Lily Chernyak-Hai, Noa Schori and Ayelet Gundar, "A Sense of Self-Perceived Collective Victimhood in Intractable Conflicts", *International Review of the Red Cross*, Vol. 91, No. 874, 2009.

15 Elizabeth Ferris, "Faith-Based and Secular Humanitarian Organizations", *International Review of the Red Cross*, Vol. 87, No. 858, 2005.

16 Peter Asaro, "On Banning Autonomous Weapon Systems: Human Rights, Automation and the Dehumanization of Lethal Decision-Making", *International Review of the Red Cross*, Vol. 94, No. 886, 2012.

Yet the ICRC's extensive field operations impose an important editorial constraint on the *Review*: at times, when discussing a highly sensitive topic for a party with which the ICRC is engaged in an operational dialogue, we must tread softly. The *Review* is thus confronted with the classic dilemma faced by many on-the-ground organizations: do we take a public stance at the risk of losing access to our beneficiaries?

While the *Review* benefits from this relationship, it is also clearly in the ICRC's interest to support this platform, where competing views can be expressed in accordance with the principle of academic freedom – whether or not the writers have links with the ICRC. The *Review* is still a breeding ground for new ideas. As Marko Milanovic noted in a blog post on *EJIL: Talk!*,¹⁷ when ICRC experts write for the *Review*, the work they put in often refines their views, which then result in official ICRC positions.

Still, the disclaimer that accompanies most of the articles must not be discounted: the opinions expressed in the *Review* do not necessarily reflect those of the ICRC. In fact, the ICRC sometimes uses the journal as a way to test new ideas. It then adapts them based on the feedback it receives from academics, governments and others.

Apart from its ties to the ICRC, the *Review* has been profoundly influenced by its successive editors-in-chief, starting with Gustave Moynier, the publication's creator. The journal has had sixteen editors-in-chief so far, with quite diverse professional backgrounds:¹⁸ some were legal experts or journalists, but there was also a chemist, a pastor, a colonel and a poet. For this issue, we asked three former editors-in-chief to share their views on how the journal has changed over the years.¹⁹

Today's *Review*

The journal's current editorial team seeks to maximize the range of views expressed and foster debate; expand the journal's readership and influence; and stimulate research into solutions that will promote acceptance of humanitarian action and IHL.²⁰ In recent years, our quest for diversity has translated into an active search for writers (and readers) all over the world. For every topic, we have sought out the best writers, travelling and holding conferences far and wide – from

17 Marko Milanovic, "The ICRC's Position on a Functional Approach to Occupation", *EJIL: Talk!*, 18 November 2015, available at: www.ejiltalk.org/the-icrcs-position-on-a-functional-approach-to-occupation/.

18 See the photo gallery "The Editors-in-Chief of the *Review*, 1869–2019", in this issue of the *Review*.

19 See "Three Short Essays in Honour of the 150th Anniversary of the *International Review of the Red Cross*", by Jacques Meurant, Hans-Peter Gasser and Toni Pfanner, in this issue of the *Review*.

20 Quality remains our primary concern: all articles have undergone peer review since 2011. The journal is also ranked among the most influential law publications by Clarivate Analytics.

Washington, DC to Beijing, and from St Petersburg to Abidjan.²¹ The *Review* solicits contributions from theorists and practitioners, but we also make an effort to let those who are helped by the ICRC have their say too. In the future, we hope to publish more articles from aid workers themselves, on their experience in crisis situations.

We make a systematic effort to strike a balance between the sexes, nationalities, perspectives and disciplines. We still have our work cut out for us in terms of geographical diversity, as most of our writers are European, North American or Australian. We do not publish enough articles from writers in Africa and Asia, despite the fact that these regions are affected the most by conflict.²²

Our insistence on debate and diversity is underpinned by an active Editorial Board, which is composed of non-ICRC experts. Selected for both their expertise and their enthusiasm, they meet every year in order to help the *Review*'s editorial team choose its topics and promote the journal. They also contribute articles.²³

We have also laboured to bring the *Review* out of its relative isolation within the ICRC – today the journal enjoys the active support of the ICRC's Department of International Law and Policy.²⁴ Furthermore, we have sought to increase the journal's online circulation, including through a blog.²⁵

Beyond questions of circulation and influence, however, we believe it is important to share our constructive and solution-oriented approach and to capitalize on our network of academic experts. Our team has conducted research into IHL success stories and the positive impact of compliance with IHL²⁶ as a way of demonstrating its relevance in ongoing conflicts, and we hope to encourage the adoption of this approach.

21 In 2018, for example, the ICRC held more than twenty-five conferences to promote the various editions of the *Review* on all five continents. In order to broaden the journal's impact, we organize launch events built around the given issue's topic (the *Review*'s very first launch event was in 2011 in London – see: www.icrc.org/en/international-review/article/london-icrc-talks-policy-makers-about-humanitarian-situation).

Since then we have held launch events for each issue, as well as online conferences (such as with Harvard University's Humanitarian Policy and Conflict Research programme) and research and debate cycles around the world (see: www.icrc.org/en/war-and-law/law-and-policy). The topics covered by the *Review* also serve as a basis for global conversations in the debate space managed by the Humanitarian forum in Geneva. Since the Humanitarian opened in 2013, four new Humanitarian centres have been created (in Moscow, Kigali, Abidjan and Dubai), and many ICRC delegations have participated in the debate cycles – proof of the delegations' receptiveness to outside views and to the topics debated in the *Review*. The Humanitarian in Geneva now hosts exhibitions on the topics selected by the *Review*: "War in Cities" took place in 2017, and "Protracted Conflict" in 2018. In 2019, we are putting together an exhibition marking the journal's anniversary.

22 See Gus Waschefort, "Africa and International Humanitarian Law: The More Things Change, the More They Stay the Same", Vol. 98, No. 902, 2016. In 2018, the *Review*'s editorial team supported several author workshops in order to boost contributions from underrepresented regions.

23 For a list of members of the editorial committee, go to icrc.org.

24 In 2013, we proposed creating a unit of some twenty staff members centred on the *Review*. This unit is called the Forum of Humanitarian Law and Policies, and its work has gradually expanded to include research, training, online promotion and debate on humanitarian law and policies.

25 The *Review* is distributed through Cambridge University Press's network of university libraries around the world, on the websites of Cambridge Core, the US Library of Congress, Lexis Nexis, China Law Info, HeinOnline, and the Swiss National Library, and in several legal indexes.

26 See "IHL in Action: Respect for the Law on the Battlefield", available at: <https://tinyurl.com/y4q42ex7>.

The *Review*'s topics in 2019 and 2020 include the following: memory and war, children and war, protracted conflicts, digital technology, war and the body, war and the mind, the Sahel, terror and counterterror, the development of IHL, and emotions and war.

Ten years, twenty years, fifty years, 100 years and 125 years: the *Review* has already published a number of anniversary issues and articles. "For a periodical devoted to such a narrow specialty to last this long without interruption, through times of peace and war, is irrefutable evidence of the Red Cross's vitality and sustained activity."²⁷ This quote conveys the wonder felt by the author of an article titled "The Past and the Future of the International Bulletin", framing the tenth anniversary of the *Bulletin* as quite the milestone.

Some, however, might see evidence of failure in the *Review*'s longevity. Shouldn't all this effort have been devoted to preventing wars rather than trying to reduce their horror? The editorial in the very first issue, in 1869, refutes this criticism: "until the friends of peace emerge victorious, wisdom advises remaining prepared for any event". There's still a place for humanitarian journals in today's world.

For this anniversary, the *Review* team is creating a new website that will make it easier for people to consult past issues. In fact, open access will now be provided to the entire digitized collection. Once the collection has been uploaded, researchers will be able to dig deeper into the history of humanitarian law, policy and action through the *Review*.

From this history – the study of which is still in its early stages – I would like to already draw one lesson. The protections accorded to victims have always advanced not linearly but in fits and starts, depending on the international climate. Yet this process has been punctuated by long periods of stagnation, paralysis, or even backsliding by international governance.²⁸ Still, the history of the *Review* shows that the progress that has been achieved is in no way accidental. Those who have been directly affected by war, researchers, legal experts, academics and government experts have always played a crucial role, tirelessly identifying new threats, coming up with and sharing solutions, and laying the groundwork for the next step forward by IHL. They have seized every opportunity they could to curb egotism and the sense that might is right. We need their contributions now more than ever.

27 "Le passé et l'avenir du Bulletin international", *Bulletin International des Societes de Secours aux Militaires Blesses*, Vol. 11, No. 41, 1880, p. 1.

28 See 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/>.

VOICES AND PERSPECTIVES

Three short essays in honour of the 150th anniversary of the *International Review of the Red Cross*

The Review is the oldest international publication devoted to international humanitarian law, policy and action, and it is now celebrating its 150th year. In honour of this momentous anniversary, the journal has invited three of its former editors-in-chief to reflect on their experience.

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Memoire of a faithful witness

Jacques Meurant

Editor-in-Chief of the *Review* from 1986 to 1995

It was a pleasant surprise to be asked to contribute to the *International Review of the Red Cross* on the occasion of its 150th anniversary, just as I did twenty-five years earlier in celebration of its 125th anniversary in 1994. I am grateful to have the opportunity to sift through my memory once more and reminisce about such a productive and rewarding period of my life.

During the ten years of my tenure, from 1986 to 1995, faced with an international community undergoing radical changes, I tried to remain true to the course charted by my predecessors, ensuring that the *Review* embodied and analyzed the work done by the International Committee of the Red Cross (ICRC) to protect and assist victims of armed conflict; promoted the norms and underlying values of international humanitarian law (IHL); and celebrated demonstrations of solidarity within the International Red Cross and Red Crescent

Movement (the Movement) in the quest to protect people's lives, well-being and dignity.

Throughout my time, I was fortunate to have the kind support of Jean Pictet, the great expert behind the Fundamental Principles of the Movement,¹ as well as of Jean-Georges Lossier, the poet and champion of solidarity, who was editor-in-chief of the *Review* for nearly thirty years.

As the old Swiss maxim goes, small is beautiful. In 1986, the *Review* team was reduced to one editor and an assistant, huddled together within the ICRC's vast communications department, although dependant on the legal department when it came to developing schedules and taking decisions. Our offices were small but became larger when they were made open-plan, which, although it tended to develop a capacity for eavesdropping, hardly helped concentration! It was not an editorial board but rather an interdepartmental committee that approved our proposed yearly plan. This "trial by fire" was in fact something of a safety net, given that I was granted a great deal of autonomy throughout the rest of the year. I took it as a show of confidence, for which I remain grateful to this day. As for my colleagues, I consider myself very lucky, as many of them – whether experienced legal experts or novices, theorists or practitioners – were among the core contributors to the *Review*.

Let us set the scene. The backdrop is bleak – the planet is ailing. At each of the Movement's three major international meetings, in 1986, 1993 and 1995, the assessment was the same: a proliferation of internal conflicts, their repercussions spreading outwards like tentacles; the use of prohibited weapons and tactics; an unacceptable increase in violations of the most basic rules of IHL. As the then-president of the ICRC Alexandre Hay noted at the opening of the 25th International Conference of the Red Cross and Red Crescent in 1986, the ICRC's mission was profoundly impacted by ideological radicalization and the normalization of violence, which steadily eroded core humanitarian principles. Worse still was the decision to suspend the South African government's delegation to the Conference, which jeopardized the Movement's principle of universality, and even that of unity. Humanitarian principles were coming up against political realities. The threat was serious and called for a considered response. As we said amongst ourselves at that time, this modern era required robust humanitarian diplomacy.

The ICRC understood that nothing worthwhile could be achieved without the willingness of all concerned with humanitarian action – States first and foremost – to respect, instruct and coordinate with each other, but also to take the initiative and try out possible solutions. It was a time when, as Gaston Bachelard wrote, "[t]he will must imagine too much to achieve enough".² So, the ICRC drew on the experience of its delegates in the field to develop a global

1 See Jean Pictet, "The Fundamental Principles of the Red Cross", *International Review of the Red Cross*, Vols 61–62, Nos 717–725, 1979–1980. This article was presented in nine parts across nine consecutive issues of the *Review*.

2 Gaston Bachelard (ed.), *L'Air et les Songes: Essai sur l'imagination du mouvement*, Le Livre de Poche Biblio Essais, Paris, 2007, p. 329 (*Review's* translation).

operational strategy that combined protection and assistance, two activities that are inextricably linked in emergency situations. This approach was essential to ensuring respect for a minimum standard of humanity in all circumstances. At the same time it became apparent that it was crucial to familiarize people with the activities and concerns of all parts of the Movement and to establish programmes to raise awareness of the norms and principles of IHL as well as the Movement's Fundamental Principles, especially among armed forces and the staff and volunteers of National Red Cross and Red Crescent Societies (National Societies). The aim was to help people better understand the values of humanity, impartiality and solidarity, and ultimately to foster within them a spirit of peace.

From then on, the role of the *Review* was to be the primary messenger for what had become a humanitarian call to arms. The ICRC Assembly, during its meeting on 16 and 17 March 1988, clarified and reaffirmed the nature and objectives of the *Review* as the ICRC's official mouthpiece at the service of the entire Movement, accurately reflecting the Movement's policies and reporting on its activities to the outside world. Moreover, as Alexandre Hay's successor as ICRC president, Cornelio Sommaruga, emphasized, it was increasingly important for the *Review* to echo the concerns of all the components of the Movement, to further open itself up to the pressing humanitarian issues of the day, to cover a more diverse range of topics and, finally, to encourage submissions from every corner of the globe.

How did these principles translate into action? The abundance of material and the complexity of current events made it possible to present topics from an array of angles and standpoints. And to inform and inspire different communities while respecting their habits and customs, the *Review*, already published in English, French, German and Spanish, broadened its audience by adding an Arabic-language edition, with Russian following shortly thereafter.

Of all that the *Review* did during those years, I will limit myself here to highlighting just a few achievements of which I was particularly proud. With the help of legal experts – including some of the big names of the 1974–77 Diplomatic Conference – and academics representing different schools of thought, the *Review* fulfilled its role as a forum for reflection by publishing several special issues dedicated to topics such as protection and assistance, and the implementation of IHL in light of escalating conflicts in the Middle East, Afghanistan and the South Caucasus. In certain cases, the journal published diverging opinions on contentious current events, the challenge being to start a discussion without avoiding controversy. One such topic was the right to intervene on humanitarian grounds,³ which introduced politics into humanitarian work in a somewhat underhanded way. The *Review* also broached new issues with a view to encouraging a debate within the ICRC, addressing, for instance, the types of violence committed in situations not covered by IHL.⁴ The journal

3 See, e.g., Maurice Torrelli, "From Humanitarian Assistance to 'Intervention on Humanitarian Grounds'?", *International Review of the Red Cross*, Vol. 74, No. 795, 1992.

4 Thematic issue on "Troubles et tensions internes", *International Review of the Red Cross*, Vol. 70, No. 769, 1988.

put out test balloons in the form of draft documents such as model declarations laying out the indispensable humanitarian principles to be applied in situations of internal conflict and codes of conduct recalling generally applicable norms. Finally, we created a new section titled “Humanitarian Policy and Operational Activities”,⁵ which contained a wide range of think pieces, analyses, case studies, narratives, experiences and first-hand accounts that looked at how the ICRC’s humanitarian policy was brought to bear in various elements of its operational activities. The aim was to help the reader better understand how the ICRC responded across operational contexts, how it prepared its legal interventions, diplomatic engagements and the logistics of its operations, and how it coordinated with other organizations.

Of the major themes that marked the Movement, particularly the International Federation of Red Cross and Red Crescent Societies (IFRC) and the National Societies themselves, the most important one can be summed up in a single word: solidarity. Gustave Moynier saw this as the motivation behind National Societies’ willingness to help one another. In an unstable international environment marked by, on the one hand, the severe disparity between needs and resources, and, on the other, by increasingly pronounced divisions in civil society, the concepts of development current in the 1970s and 1980s were called into question, and strategies had to be adjusted to prioritize aid to the most vulnerable communities – to women, children, refugees, displaced people and all those living on the fringes of society – who bore the brunt of the political, economic and social upset. The *Review* dedicated a special issue to the problem to mark the 75th anniversary of the IFRC.

The international community had tasked the ICRC with helping States to promote humanitarian law. “IHL dissemination” was the motto of that decade, the humanitarian rallying cry. This perhaps allowed the *Review* to further solidify its standing as a publication of reference by reinforcing its policy of openness. The *Review* was instrumental in publicizing the programmes set up by the components of the Movement already in peacetime and the guidelines drawn up to promote IHL, which were adapted to different target audiences, including armed forces. It also chronicled how the Movement, observing the proliferation of conflicts of all types, was led to adopt a new strategy for promoting the law, one that focused on the prevention of IHL violations not only before potential conflicts but also during crises and in their aftermath while peace was being re-established. Further, the *Review* reported on the output of numerous national and regional courses, seminars and other meetings for a wide range of audiences, from soldiers and officers to politicians, academics and media professionals. To make IHL understood is, after all, to show that its principles and rules are rooted in every civilization, religion and tradition. On many occasions, the *Review* published pieces on the origins of the respect for the human person in times of armed conflict found in Christianity, Judaism, Islam, Buddhism and traditional African religions.⁶ In

5 “Politique humanitaire et activités opérationnelles” in French.

6 See, e.g., Mutoy Mubiala, “African States and the Promotion of Humanitarian Principles”, *International Review of the Red Cross*, Vol. 71, No. 776, 1989.

pre-colonial Mali, for example, a sense of honour encouraged clemency towards prisoners. As the proverb went: “If God has spared you, the chief will spare you too.”

To close, I wish to pay tribute to the ICRC delegates who had to contend with increasingly perilous circumstances during that period. Many paid for their dedication with their lives. I would like to share with readers that one of the most wrenching experiences of my life as an editor was the death of Frédéric Maurice, an ICRC delegate sent to Sarajevo during the Bosnian War.⁷ A few hours before leaving for the field in May 1992, he gave me the final pages of an article meant for the *Review* titled “Humanitarian Ambition”. He wanted to go over his text again and polish it, but fate decided otherwise: he died in tragic circumstances on the outskirts of Sarajevo on 19 May 1992. The essay, published in the state he submitted it, was an off-the-cuff personal reflection on the problems of humanitarian relief in the late twentieth century.⁸ To my mind, it was one of the most beautiful pieces we published in my ten years as editor. It was absolutely representative of the mentality of ICRC delegates, who, not content simply to devote themselves to the humanitarian cause and to strictly carry out the duties inherent in that mission, strove to draw arguments from their experience in the field in order to overcome the obstacles to humanitarian action and find new ways to better aid affected populations. For the truth is that “humanitarian ambition” is sustained, above all, by hope.

May humanitarian ambition continue to inspire the Movement, and particularly the *Review*, to which I wish a long life.

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Adapting in the spirit of tradition

Hans-Peter Gasser

Editor-in-Chief of the *Review* from 1996 to 2001

I joined the ICRC in February 1970 and was immediately posted to Jerusalem as a member of the delegation to Israel and the territories occupied by that State since 1967. During this assignment, it very soon became clear to me that the ICRC’s work is rooted not “only” in the Geneva Conventions, but also in other areas of law – particularly those relating to the international protection of human rights and of refugees – as well as in international politics in general and, above all, in the practice of actors at the international level. After my return to Geneva, I

7 See Jean de Courten, “A Tribute to Frédéric Maurice”, *International Review of the Red Cross*, Vol. 74, No. 795, 1992.

8 Frédéric Maurice, “Humanitarian Ambition”, *International Review of the Red Cross*, Vol. 74, No. 796, 1992.

served as the head of the Legal Division for several years and, subsequently, as a senior legal adviser with a comprehensive mandate.

When I was appointed editor of the *International Review of the Red Cross* in 1995 (at that time the title of editor-in-chief did not exist), I knew that I was taking on a difficult job with a great deal of responsibility. Although the *Review*, first published in 1869 by the newly founded International Red Cross and Red Crescent Movement, had adapted over the years to the demands of the times, at its core it remained true to its founding spirit. It is not an easy task to carry such a publication forward and to adapt it to current expectations, but the *Review* cannot stay locked away in an ivory tower – it must address the realities of the day.

During my time as editor, the *Review* was published in paper form and there was no electronic edition. Six issues appeared per year until 1997, and only four per year from 1998. Until 1998, each issue was published in French and in English; from 1999 onwards, a single bilingual issue was published. The editorial team consisted of one editor and one assistant; the *Review* had no editorial board.

The foreword to the first issue of the *Review* (October 1869) – or, as it was known then, the *Bulletin International des Sociétés de Secours aux Militaires Blessés* – described the goal of the national relief societies that then formed the Movement: “It’s not about doing away with what exists, but rather complementing it.”⁹ Given that the *Review* had started life as a publication dedicated to the Movement, it was designed to support the practical application of IHL and the work of the Movement. Also in that first edition, Gustave Moynier wrote in his “Etude sur la Convention de Genève”: “One feels a need for books that, in various ways, belonging to many classes of readers, spread the necessary understanding to ensure the full observation and efficacy of the [Geneva] Convention.”¹⁰

Of course, Moynier was not referring only to books, but to all kinds of publications, including the *Review*. Today, he would doubtless have included electronic publications in that category. His target audience was vast:

Officers, soldiers, medical personnel, neighboring populations as well as those far from the theater of war are all categories of people who men of letters should address to expose them, each in their own language, to the basic ideas and humanitarian sentiments that it is so urgent to push into minds and hearts.¹¹

9 “Il n’est pas question cependant de supprimer ce qui existe, mais on vise à le compléter, et le but assigné au zèle des sociétés est seulement de venir en aide, par tous les moyens imaginables, à l’administration militaire.” *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 1, No. 1, 1869, p. 1 (*Review’s* translation).

10 “On sent le besoin de livres ad hoc qui, sous des formes multiples, appropriées à diverses classes de lecteurs, répandent les connaissances nécessaires pour assurer la pleine observation et l’efficacité de la Convention.” Gustave Moynier, “Etude sur la convention de Genève”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 1, No. 1, 1869, p. 9 (*Review’s* translation).

11 “Les officiers, les soldats, le personnel sanitaire, les populations voisines ou éloignées du théâtre de la guerre, forment autant de catégories de personnes auxquelles devraient s’adresser les hommes de plume, pour leur exposer, à chacune dans le langage qui les convient, ce fonds d’idées et de sentiments humanitaires qu’il est si urgent de faire pénétrer dans les esprits et dans les cœurs.” *Ibid.*, pp. 9–10 (*Review’s* translation).

Here I would like to draw particular attention to Moynier's observation that this awareness-raising work should be done to "each in their own language".

I took these words to mean that the *Review* should correspond in both content and form to expectations relating to the practical implementation of IHL. This was expressed in the journal in a variety of ways, always relating to humanitarian thoughts (in particular as embodied in international law) on how to improve knowledge of and the respect for IHL. In particular, we tried to address people working within the Movement, academics interested or even specialized in IHL, people working in the media and, of course, the general public.

Listed below are some of the essays published in the *Review* under my editorship (1996–2001), and some of the overarching themes covered by individual issues of the journal. These examples illustrate how the *Review* sought to fulfil its mandate. They speak for themselves to demonstrate the challenges of the time.

1996

- Thematic issue on the 26th International Conference of the Red Cross and Red Crescent, with keynote addresses, resolutions and final address
- Denise Plattner, "ICRC Neutrality and Neutrality in Humanitarian Assistance"
- Vladimir Pustagorov, "Fyodor Fyodorovich Martens (1845–1909) – a Humanist of Modern Times"
- David P. Forsythe, "The International Committee of the Red Cross and Humanitarian Assistance: A Policy Analysis"
- André Durand, "Gustave Moynier and the Peace Societies"

1997

- Thematic issue on "Dissemination: Spreading Knowledge of Humanitarian Rules"
- Thematic issue on the 20th anniversary of the 1977 Additional Protocols
- Thematic issue on "International Criminal Jurisdiction and International Humanitarian Law: The Tribunals for the Former Yugoslavia and for Rwanda"
- Rupert Ticehurst, "The Martens Clause and the Laws of Armed Conflict"
- François Bugnion, "ICRC Action during the Second World War"
- Norman Farrell, "Dissemination in Bosnia and Herzegovina"

1998

- Marion Harroff-Tavel, "Promoting Norms to Limit Violence in Crisis Situations: Challenges, Strategies and Alliances"
- Toni Pfanner, "The Establishment of a Permanent International Criminal Court"
- Stéphane Jeannet and Joël Mermet, "The Involvement of Children in Armed Conflict"
- Rainer Baudendistel, "Force versus Law: The International Committee of the Red Cross and Chemical Warfare in the Italo-Ethiopian War 1935–1936"

- “The ICRC Looks to the Future”
- “Council of Delegates, Seville, 25–27 November 1997”

1999

- Thematic issue on “Humanitarian Debate”
- Thematic issue on the 27th International Conference of the Red Cross and Red Crescent, with keynote addresses, resolutions and final addresses
- Thematic issue on “100 Years: Law of The Hague (1899) – 50 Years: Geneva Conventions of 1949”
- Paul Grossrieder, “Un avenir pour le droit international humanitaire et ses principes”
- Adam Roberts, “The Role of Humanitarian Issues in International Politics in the 1990s”
- Fasil Nahum, “The Challenges for Humanitarian Law and Action at the Threshold of the Twenty-First Century: An African Perspective”
- Jean Pictet, “De la Seconde Guerre mondiale à la Conférence diplomatique de 1949”
- William J. Fenrick, “The Application of the Geneva Conventions by the International Criminal Tribunal for the Former Yugoslavia”
- Dietrich Schindler, “Significance of the Geneva Conventions for the Contemporary World”
- Daniel Thürer, “The ‘Failed State’ and International Law”

2000

- Thematic issue on “The Kosovo Crisis and International Humanitarian Law”
- Thematic issue on “Humanitarian Action and Prevention”
- Pierre Krähenbühl, “Conflict in the Balkans: Human Tragedies and the Challenge to Independent Humanitarian Action”
- Djamchid Momtaz, “L’intervention d’humanité de l’OTAN au Kosovo et la règle de non-recours à la force”
- Pierre de Senarclens, “L’humanitaire et la globalisation”
- Marc-André Chaguéraud, *L’étoile jaune et la Croix-Rouge: Le Comité international de la Croix-Rouge et l’Holocaust 1939–1945*, book review by Nadine Fink
- Fred Tanner, “Conflict Prevention and Conflict Resolution: Limits of Multilateralism”
- Tigran S. Drambyan, “Des pages méconnus de l’histoire de la Seconde Guerre mondiale: Les prisonniers de guerre soviétiques en Finlande (1941–1944)”
- “Un nouveau Manuel de droit des conflits armés pour les forces armées françaises”

2001

- Thematic issue on “Asia and International Humanitarian Law”
- Thematic issue on “50th Anniversary of the 1951 Refugee Convention: The Protection of Refugees in Armed Conflict”
- Jean-Michel Monod, “The ICRC in Asia – Special Challenges?”

- He Xiaodong, “The Chinese Humanitarian Heritage and the Dissemination of and Education in International Humanitarian Law in the Chinese People’s Liberation Army”
- “Asia and International Humanitarian Law – a Bibliographical Note”
- Luigi Condorelli, “La Commission internationale humanitaire d’établissement des faits: Un outil obsolète ou un moyen utile de mise en œuvre du droit international humanitaire?”
- Gilles Carbonnier, “Corporate Responsibility and Humanitarian Principles – What Relations between the Business and Humanitarian Worlds?”
- Jelena Pelic, “The Right to Food in Situations of Armed Conflict: The Legal Framework”

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Limiting the effects of war in volatile times

Toni Pfanner

Editor-in-Chief of the *Review* from 2002 to 2010

The ICRC’s mandate, enshrined in the Geneva Conventions of 1949, is the backbone of the institution. Its ultimate goal is to alleviate the suffering of those affected by armed conflicts. The *International Review of the Red Cross* focuses on topics related to this goal and the mandate, and is closely linked to international humanitarian law. This branch of the law and its interpretation and possible future development form the anchor of the *Review*, and a majority of the articles published in the journal in the first decade of the third millennium dealt with the law of armed conflict.

The years from 2002 to 2010 had been marked by numerous terrorist attacks, including 9/11 in the United States, the Beslan hostage-taking in Russia, the Christmas massacre in Congo, indiscriminate attacks in the United Kingdom and Spain, and seemingly endless suicide attacks on civilians in Iraq, claiming thousands of victims. Asymmetric conflicts between unevenly matched parties and the so-called “war on terror” made headlines. The assumedly only remaining military superpower, the United States, became directly involved in both Afghanistan and Iraq. The concept of “unlawful combatants” reappeared, and Guantanamo and Abu Ghraib became infamous places. Religion as factor in war showed its ambivalent character, restricting warfare in some instances and fuelling it in others. On top of this, identity conflicts of an ethnic and economic character continued to rage, often forgotten, silently claiming ten or even a hundred times the number of victims as terrorist attacks, especially in the Kivu area in the heart of Africa.

International lawyers may have held different opinions on the balance between military interests and humanitarian considerations, but all agreed on the fundamental principles of humanitarian law. Despite this, many questions remained disputed, including the contours of the cardinal principle of distinction between combatants and civilians. The ambiguous reception by States of the ICRC study on international customary law in armed conflicts clearly showed this, as did the reaction to the ICRC's interpretation of the notion of "direct participation in hostilities", often linked to the edges of IHL and in particular the relationship between humanitarian and human rights law.

Diplomatic endeavours to regulate the use of particular weapons, namely anti-personnel mines and cluster munitions, culminated in newly adopted treaties to which major military powers did not become party, undermining the universal character of the law on the conduct of hostilities. New weapons to which no specific binding legal regulations exist, such as cyber weapons, autonomous combat systems, hypersonic missiles and long-range drones, appeared on the horizon.

However, the weak point of IHL lay, and still lies, in the field of its implementation. The current legal instruments would combat the worst excesses and alleviate the plight of the victims of armed conflict, but the mechanisms they provide for are not used or are even intentionally disrespected. The hope of combating impunity for war criminals through the creation of the International Criminal Court did not materialize. The lack of universality of the Rome Statute and/or unwillingness to cooperate with the tribunal hindered its development. Furthermore, political blockages in the United Nations Security Council prevented the international community from taking decisive action to stop even the most serious violations. The ICRC, as reflected in the content of the *Review*, retained its reluctance to speak out publicly and denounce violations of the law of war, giving priority to its operational activities through confidential interventions. The *Review* thus remained an academic journal, carefully illustrating general problematics without naming and shaming.

In the absence of political solutions and amid disrespect of IHL, humanitarian aid often remained the only means to help the victims of conflicts. Military actors and private security companies engaged in humanitarian activities appeared, especially in Iraq and Afghanistan. The articles published in the *Review* focused on humanitarian policy questions, mostly related to the fundamental principles governing humanitarian action. While the ICRC engaged in academic discussions about the most efficient delivery of humanitarian aid, priority was given to its own operational activities.

The creation of an editorial board with a multidisciplinary and multicultural composition facilitated the opening of the *Review* to non-legal and broader perspectives on armed confrontations, particularly in the historical, socio-psychological and humanitarian fields. Nevertheless, the stated aim of strengthening universality by a geographic and culturally balanced participation in the discussion largely failed. Humanitarian law and humanitarian action, and the reflections on it in the *Review*, remained essentially Western-oriented.

During my editorship, the *Review* systematically introduced a thematic approach, allowing the journal to take up many of the relevant issues which characterized the armed confrontations of the first decade of the millennium. This is illustrated by the topics chosen and analyzed on the angle of humanitarian law and humanitarian action by the contributors, including “Impunity”, “New Types of Conflict”, “Interpretation of International Humanitarian Law by the International Tribunals”, “Victims after the War”, “Africa and Humanitarian Action”, “Detention”, “Religion”, “Means of Warfare”, “Communication”, “International Criminal Tribunals”, “Truth and Reconciliation Commissions”, “Private Military Companies”, “Methods of Warfare”, “Humanitarian Actors”, “Catastrophic Events”, “Torture”, “Conflict in Iraq”, “Sanctions”, “Human Rights”, “Direct Participation in Hostilities”, “Typology of Armed Conflicts”, “Displacement”, “War Victims”, “International Conference of the Red Cross and Red Crescent”, “Women”, “Urban Violence”, “Environment” and “Conflict in Afghanistan”.

When I look to current events, I see that the global environment has changed significantly. If the conflictual landscape had previously been dominated by internal armed conflicts, often internationalized, and horrifying acts of terror, the beginning of the second decade of the twenty-first century is marked by the return of geopolitics. The United States no longer stands alone as a major military power; China and Russia are now main contenders. The “war on terror” of 2001 as an organizing principle in international relations has been given up, and the US administration now sees competition with China and Russia as the key challenge of US foreign policy. In Asia, in particular the South and East China Seas, Washington is entering into competition with China. Europe, with a focus on NATO’s “eastern flank”, seems to be another central venue of the confrontation, this time with Russia.

By contrast, regional conflicts – particularly in the Middle East, on which Bush’s “war on terror” focused, and Afghanistan – may have lost importance in this new politico-military scenario. Even the earlier turmoil originating from the Arab Spring was gradually considered to be contained. The value of allies and the strength of NATO States in this major strategy is measured by their ability to contribute to America’s success against its competitors. Similarly, China and Russia may reach out to influence States and non-State actors favourable to their cause. Armed confrontations in new geographic spheres, possibly fought with other means, may arise.

In this strategic setting, technological advances and unlimited access to arms may alter the face of armed conflicts, and even undisputed cardinal principles of humanitarian law may be put into question. In parallel, humanitarian activities may also be challenged and changed, becoming more complex and difficult to carry out as hybrid conflicts multiply.

In its 150 years of history, the *Review* has seen major developments and has adapted constantly to new environments. In the face of a changing world, it has remained committed to forwarding the ideals of the Red Cross in the midst of many tragedies. My hope is that going forward, the journal will continue to analyze and address the new challenges in humanitarian law and humanitarian action, and thus contribute to limiting the effects of warfare in the volatile future.

NOTE

A brief history of the *International Review* of the Red Cross¹

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The *International Review of the Red Cross* has gone through many evolutions since it was first published in October 1869. All told, it has had sixteen editors-in-chief from diverse professional backgrounds,² as well as many managing editors, thematic editors, editorial assistants and others, all working to support the production, promotion and distribution of the journal. It is now the oldest publication devoted to international humanitarian law (IHL), policy and action. Its collection represents a precious resource on the history of the International Committee of the Red Cross (ICRC) and the International Red Cross and Red Crescent Movement (the Movement), and on the development of humanitarian law and action at large. The *Review* continues to contribute significantly to these fields, so it is worthwhile to look back at the journal's role in the past to see how it has evolved and reflect on where it is now, and where it may go in the future.

A bulletin connecting National Societies and tracing the evolution of humanitarian relief on the battlefield

The *International Review of the Red Cross* began its history as the *Bulletin International des Sociétés de Secours aux Militaires Blessés*, founded at the Second International Conference of the Red Cross and Red Crescent (International Conference), held in Berlin in 1869.³ The Conference felt it “indispensable” to set up a journal “to link the central committees [of what became the National Red Cross and Red Crescent Societies] of the various countries and bring to their attention the facts, official and otherwise, that are pertinent for them to know”.⁴

Originally under the editorial direction of Gustave Moynier, the *Bulletin* was a newsletter featuring updates from the National Red Cross and Red Crescent Societies (National Societies), translated and published in French on a

quarterly basis. The *Bulletin* thus created a link among the central committees of different relief societies that preceded the National Societies, and between those societies and the ICRC (at the time the Comité International de Secours aux Blessés, or Comité International, which became the ICRC in 1875). With national relief societies carrying out operations in the field and the ICRC at that time being a small committee of a few members who worked on a voluntary basis as a type of secretariat, the *Bulletin* served as an important channel for the exchange of updates on relief operations, new medical techniques and innovative ideas, and reviews of publications.⁵ Moreover, it acted as the “official general monitor” of the Red Cross.⁶

Thus, the *Bulletin*

served as glue for the movement. Letters from leaders of relief societies show how important *Bulletin* content was to early national organizing efforts and many irritated notes complained to Gustave Moynier ... when names or founding organizations were omitted from the record. ... [T]he *Bulletin* was the movement’s “fountainhead” and source of information on common challenges. Gathering and publishing the medical field reports and letters of Red Cross personnel on the ground also allowed [International Committee] members to offer running commentary on actual experiences of medical provisioning, even in civil and colonial wars where the movement had no formal jurisdiction.⁷

The journal promoted new ideas in the field of humanitarian action: new medical inventions and innovations in the transportation of the wounded, but also legal developments and humanitarian best practices. It is worth noting that the legal articles and reviews of legal publications featured in the early years of the journal tied in with the growing importance of international law journals, a nascent trend.⁸

In her book about the history of the Red Cross, Caroline Moorehead notes:

- 1 This note was drafted by the *Review* editorial team. Special thanks to Ellen Policinski, Kvitoslava Krotiuk, Cedric Cotter, Eline Goovaerts and Safi van't Land.
- 2 See the photo gallery, “The Editors-in-Chief of the *Review*, 1869–2019”, in this issue of the *Review*.
- 3 “Publication d’un bulletin international”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 1, No. 1, 1869.
- 4 *Ibid.* See English translation in Annex 1 of this article. For further discussion on the foundation and evolution of the journal, see, e.g., Jean-Georges Lossier, “Comment naquit le ‘Bulletin international’”, *Revue Internationale de la Croix-Rouge*, Vol. 51, No. 610, 1969; Victor Segesvary, “Cinquante années de la ‘Revue’”, *Revue Internationale de la Croix-Rouge*, Vol. 51, No. 610, 1969; and the article by Daniel Palmieri in this issue of the *Review*.
- 5 See Jacques Meurant, “The 125th Anniversary of the *International Review of the Red Cross*: A Faithful Record. Part III: The International Red Cross and Red Crescent Movement: Solidarity and Unity”, *International Review of the Red Cross*, Vol. 35, No. 307, 1995.
- 6 Gustave Moynier, “Les dix premières années de la Croix-Rouge: III. Sociétés de secours”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 4, No. 16, 1873, p. 195.
- 7 Jean H. Quataert, “A New Look at International Law: Gendering the Practices of Humanitarian Medicine in Europe’s ‘Small Wars’, 1879–1907”, *Human Rights Quarterly*, Vol. 40, No. 3, 2018, p. 560.
- 8 See Ignacio de la Rasilla, “A Very Short History of International Law Journals (1869–2018)”, *European Journal of International Law*, Vol. 29, No. 1, 2018.

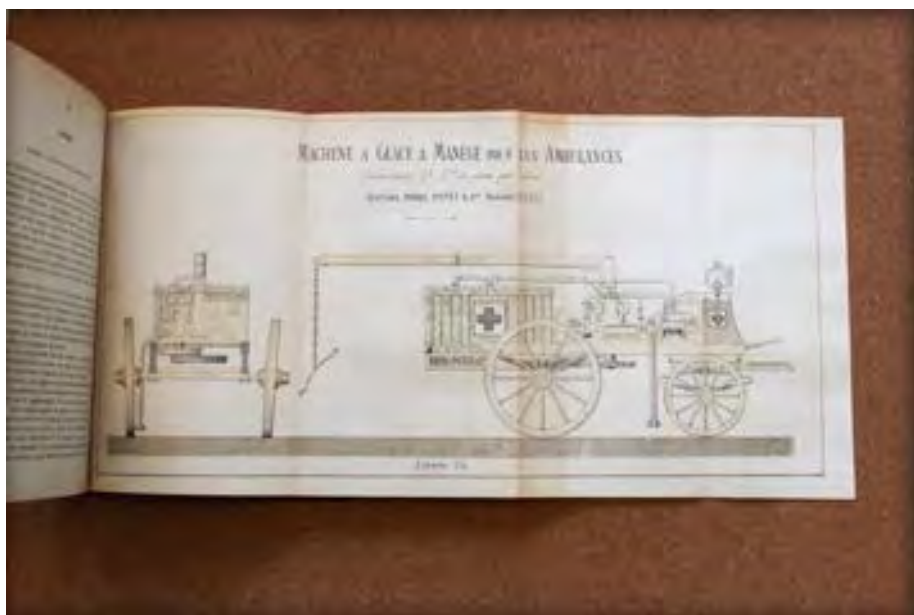


Fig. 1. Ice-making machine. *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 10, No. 37, 1879.

Imaginative, sometimes dotty, projects, with camels as stretcher bearers, or odd surgical instruments, filled the pages of a magazine, known as the *Bulletin*, launched in the late 1860s by the International Committee, and illustrated by charming black-and-white drawings. There was an ice-making machine, a device which claimed to turn salt water into fresh, and a portable kitchen which folded into a knapsack containing a spirit lamp, a rubber pipe for men too weak to drink from a cup, nails, rope, pots, towels, candles, rum and cognac, mustard powder, tea, salt, pepper and meat extract – the only trouble being that it was too heavy to carry more than a few paces.⁹

Typically, the *Bulletin* included communications which the International Committee or the central committees wished to bring to the attention of other members of the Movement and information on the activities of the various committees in times of peace or war, as well as bibliographical information, memoirs, speeches and letters on matters affecting the movement's functions and progress, and all sorts of communications concerning the subject of its work.

9 Caroline Moorehead, *Dunant's Dream: War, Switzerland and the History of the Red Cross*, Carroll & Graf, New York, 1999, p. 57. See also "Machine à glace pour les ambulances", *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 10, No. 37, 1879, p. 30; "Batterie de cuisine portative du colonel baron van Tuyll van Serooskerken", *Bulletin International de Secours aux Militaires Blessés*, Vol. 1, No. 2, 1870, p. 94.



Fig. 2. Advertisement for publications of the Red Cross, listing no author for *A Memory of Solferino*. *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 1, No. 1, 1869.

The journal was also used as a strategic tool for the ICRC and its second president, Gustave Moynier, to circulate their ideas and guide the Movement.¹⁰ In a letter published in 1872, Moynier in fact proposed the establishment of an international criminal court.¹¹ This proposal was revisited several times in the journal, with the Spanish national relief society responding in support and a second article from Moynier fleshing out the idea.¹²

Moynier being the main editor of the *Bulletin* for the first two years, and later a frequent contributor as president of the International Committee, the journal very much reflected his own personality, unfortunately including his racist and colonialist views.¹³ As for his well-known rivalry with Henry Dunant, this is revealed by the striking absence of any mention of the author of *A Memory of Solferino* during those years. The name of Dunant does not even appear on the advertisement for his book in the first issue of the *Bulletin*. As Moorehead remarks laconically: “The Red Cross was ever rivalrous.”¹⁴

10 See the articles by David Forsythe and Daniel Palmieri in this issue of the *Review*.

11 Gustave Moynier, “Note sur la création d’une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 3, No. 11, 1872, p. 122.

12 “Institution judiciaire internationale”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 3, No. 12, 1872, p. 203; G. Moynier, above note 11.

13 “La Croix-Rouge chez les nègres”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 11, No. 41, 1880.

14 C. Moorehead, above note 9, p. 57.

The *Bulletin International des Sociétés de Secours aux Militaires Blessés* was, without fanfare, renamed the *Bulletin International des Sociétés de la Croix-Rouge* in 1886, finally incorporating “Red Cross” in its title. This followed a consultation in which National Societies gave their input on how to improve the journal, which likely led to the title change.¹⁵ This title change did not signal a shift in the focus of the journal, whose contents remained the same.

The First World War and the first major evolution in the editorial line

The First World War fundamentally transformed the scope, methods of work and geographical area of operations of the International Committee: from a small committee of volunteers based in Geneva, the ICRC quickly became an entity hiring staff, setting up and running the Agence Internationale des Prisonniers de Guerre (International Prisoners of War Agency), regularly conducting missions in war zones to visit the prisoner-of-war camps, and taking care of the repatriation of prisoners at the end of the conflict. During the same period, the organization established its first delegations abroad and expanded its operations to previously unfamiliar territories in Africa and Asia.¹⁶

This expansion in the activities and geographical reach of the ICRC was reflected in the *Bulletin’s* content. The *Bulletin* published regular reports on the conditions of detained prisoners of war¹⁷ in addition to the continuing reports from National Societies on their activities and, interestingly, even allegations by National Societies on State parties’ violations of IHL.¹⁸ The ICRC perhaps did not yet have enough experience of field operations to anticipate that publishing such denunciations could jeopardize its perception as a neutral humanitarian

15 See *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 16, No. 62, 1885, p. 53. In this issue there is a discussion about an “enquête sur le rôle du Comité international et les relations des comités centraux”, and National Societies are asked for their input on how to improve the journal. The first issue of 1886 does not explain the name change.

16 For more on the ICRC’s evolution during and after the First World War, see Daniel Palmieri, “An Institution Standing the Test of Time? A Review of 150 Years of the History of the International Committee of the Red Cross”, *International Review of the Red Cross*, Vol. 94, No. 888, 2012; André Durand, *History of the International Committee of the Red Cross: From Sarajevo to Hiroshima*, Henry Dunant Institute, Geneva, 1984; Cédric Cotter, (*S’*)*Aider pour survivre: Action humanitaire et neutralité suisse pendant la Première Guerre mondiale*, Georg Editeur, Geneva, 2017.

17 See, for example, the periodic articles published by the Agence Internationale des Prisonniers de Guerre, including “La situation des prisonniers de guerre et des internes civils depuis la conclusion des armistices”, *Revue Internationale de la Croix-Rouge*, Vol. 1, No. 1, 1919. And see “Prisonniers russes”, *Revue Internationale de la Croix-Rouge*, Vol. 1, No. 5, 1919; “Prisonniers de guerre hongrois en Roumanie”, *Revue Internationale de la Croix-Rouge*, Vol. 1, No. 9, 1919.

18 See, for example, “La Croix-Rouge russe a communiqué deux mémoires tendant à établir des cas de violation de la Convention de Genève par les armées allemandes et austro-hongroises”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 47, No. 187, 1916, pp. 355–356; and the “Protestations” in e.g. *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 48, No. 189, 1917, pp. 15–35 (France against Bulgaria, Bulgaria against France and Great Britain, and Russia against Turkey), or Vol. 48, No. 191, 1917, pp. 384–397 (Great Britain and France against Germany, Bulgaria against France and Great Britain, Turkey against Russia).

actor and be detrimental to its capacity to access detentions facilities or conflict zones and generally to operate in the midst of conflicts.¹⁹

The first part of the *Bulletin* had always been dedicated to the activities of the ICRC. In 1919, the *Bulletin* became a monthly publication and this first section became the *Revue Internationale de la Croix-Rouge*, as it became apparent that the ICRC required its own section to report on growing operations in the wake of its surge in activities during the First World War. The *Revue* and the *Bulletin* were published and distributed simultaneously.

The changes were presented in Volume 1 of the new combined publication, emphasizing that the role of the ICRC was to connect the National Societies so as to coordinate their operations.

In order to better carry out this task, [the *Bulletin*] has decided to give more publicity to reports of charitable activities. The trimestral *Bulletin International*, which for 49 years has published reports of the central committees of the Red Cross Societies, will become monthly, and next to the official portion where news of each Red Cross Society will continue to appear. ... By enlarging its *Bulletin* and creating a *Revue Internationale de la Croix-Rouge*, the International Committee proposes to reinforce one of the few links that war has not broken and prepare the path for future International Red Cross Conferences that, in a future we hope is near, will once again reunite the representatives of all countries.²⁰

In addition to its leading articles, the journal also reported on the activities of the ICRC and the National Societies, as well as the newly established League of Red Cross Societies (later to become known as the International Federation of Red Cross and Red Crescent Societies), which had its own regular section.

In the following years, the *Revue* continued to publish official declarations, communiqués, reports and commentaries, as well as studies attesting to the Movement's activities in various theatres of operations, sharing to a certain extent the experience of ICRC delegates as they distributed aid, repatriated the wounded and sick, organized exchanges of prisoners and searched for missing persons.²¹

“The Great War is over!”: A period of anticipation

In the January 1919 edition of the journal, the ICRC announced in the *Bulletin* portion of the journal: “Elle est finie, la grande guerre!” (“The Great War is

19 To read more, see Lindsey Cameron, “The ICRC in the First World War: Unwavering Belief in the Power of Law?”, *International Review of the Red Cross*, Vol. 97, No. 900, 2015.

20 Paul des Gouttes, Etienne Clouzot and K. de Watteville, “Revue Internationale de la Croix-Rouge et Bulletin International des Sociétés de la Croix-Rouge”, *Revue Internationale de la Croix-Rouge*, Vol. 1, No. 1, 1919, p. 2.

21 See Jacques Meurant, “The 125th Anniversary of the *International Review of the Red Cross*: A Faithful Record. Part I: Protection and Assistance”, *International Review of the Red Cross*, Vol. 34, No. 303, 1994, pp. 533–534.

over!”)²² Although it was clear that many challenges lay ahead, the International Committee had come out of the war strong, prestigious and internationally respected.²³

In 1919, the League of Red Cross Societies was created. Although, as Paul Des Gouttes was keen to point out,²⁴ some form of federation of Red Cross Societies had long been discussed, the creation of the League was perceived as an attempt to replace the International Committee, and the early days of the latter’s relations with the new international organ of the Red Cross were tumultuous. The ICRC felt the need to continuously remind its readers that the journal was “Published by the International Committee, founder of this institution [the Red Cross and Red Crescent Movement]” on the cover of 415 editions of the standalone *Bulletin* and its continuation as a section in the *Revue* between 1902 and 1947. Eventually the complementarity of the ICRC and the League was officially recognized when the Statutes of the International Red Cross were adopted at the 13th International Conference in 1928.²⁵

By the 1930s, it had become clear that the world was once again “drifting towards war” on a global scale.²⁶ While the International Committee could do very little to prevent this, given its principles, its members seemed to be preparing themselves for what was to come. The *Revue* (and later the *Review*) was a reflection of this time. As Caroline Moorehead puts it:

[I]n the pages of the *Review*, which, month by month continued to monitor the activities and interests of the Red Cross world – which made it such an excellent monitor of the times – the talk was all of readiness. Read carefully, however, the *Review* could also be seen as a warning of things to come.²⁷

The *Revue* continued to publish on the activities of National Societies, but, as Moorhead also remarks:

The tone of the *Review* itself, however, was altering; gone were the ebullient, self-congratulatory reports of post-war years; in their place had come bald, tight-lipped warnings – about chemical warfare, about uncontrollable new weapons, about the need to protect civilians – that seemed to grow more urgent year by year.²⁸

22 “Comité International”, *Revue Internationale de la Croix-Rouge*, Vol. 1, No. 1, 1919, p. 69. See also C. Moorehead, above note 9, p. 256.

23 C. Moorehead, above note 9, p. 257.

24 Paul Des Gouttes, “De la Fédération des Sociétés de la Croix-Rouge”, *Revue Internationale de la Croix-Rouge*, Vol. 1, No. 8, 1919.

25 See Colonel Draudt and Max Huber, “Rapport à la XIII^{ème} Conférence internationale de la Croix-Rouge sur les status de la Croix-Rouge internationale”, *Revue Internationale de la Croix-Rouge*, Vol. 10, No. 119, 1928; J. Meurant, above note 5, pp. 463–465.

26 C. Moorehead, above note 9, p. 299.

27 *Ibid.*

28 *Ibid.*, p. 300.

The Second World War and its aftermath

During the Second World War, the *Revue* continued to publish on Red Cross activities, relief work, missions by delegates, violations of the Conventions, international gatherings, conditions in which prisoners of war were kept, new medical and military developments, and newcomers to the Red Cross world.²⁹ What is conspicuously lacking, however, is almost any mention of the concentration camps and atrocities being committed by the Nazis. Until the autumn of 1944, there was no discussion of them in the *Revue*, although they were actively examined by the International Committee.

In 1949, decades-long efforts to ensconce protections for civilians in IHL culminated in four Geneva Conventions with updated provisions providing protection for sick and wounded soldiers on land and at sea, for prisoners of war, and for civilians in the hands of the enemy.³⁰ The revolutionary Article 3 common to the Geneva Conventions extended their scope to include non-international armed conflict.³¹ The *Revue* reflected this evolution by publishing invaluable resources on the process: programmes, minutes of expert meetings and the Diplomatic Conference, speeches, resolutions, etc. Throughout the development, interpretation and implementation of IHL, “at each successive stage, the *Revue* has kept a record of developments in the law, while at the same time helping to clarify, explain and spread knowledge of its provisions”.³²

In the aftermath of the Second World War, the *Revue* began giving priority to the operational activities of the ICRC and its delegates, and in 1948 it introduced an English-language supplement to the original French version, reproducing a selection of the contents of each monthly issue in English. Spanish and German supplements were also introduced in 1949 and 1950 respectively.

In April 1961, the *International Review of the Red Cross* was born as a separate, fully-fledged English-language publication, and from July of that year the journal was published in French and English editions.

In addition to legal developments, the journal continued to feature ICRC operations. On a number of occasions, the *Review* published periodic overviews of ICRC operations in protracted conflicts – for example, in relation to Nigeria

29 *Ibid.*, p. 411.

30 Jean S. Pictet, “Les nouvelles Conventions de Genève et la Croix-Rouge”, *Revue Internationale de la Croix-Rouge*, Vol. 31, No. 369, 1949; “Conventions de Genève pour la protection des victimes de la guerre: Convention de Genève relative à la protection des personnes civiles en temps de guerre, du 12 août 1949”, *Revue Internationale de la Croix-Rouge*, Vol. 31, No. 386, 1949; “Observations générales sur l’élaboration de la Convention relative à la protection des civils, à la Conférence diplomatique de Genève”, *Revue Internationale de la Croix-Rouge*, Vol. 31, No. 386, 1949.

31 “Séance de Clôture. Discours de M. Max Petitpierre, vice-président du Conseil Fédéral suisse, président de la Conférence Diplomatique de Genève”, *Revue Internationale de la Croix-Rouge*, Vol. 31, No. 386, 1949, p. 552. See also Catherine Rey-Schyr, “The Geneva Conventions of 1949: A Decisive Breakthrough. Part I”, *International Review of the Red Cross*, Vol. 81, No. 834, 1999; Catherine Rey-Schyr, “The Geneva Conventions of 1949: A Decisive Breakthrough. Part II”, *International Review of the Red Cross*, Vol. 81, No. 835, 1999.

32 Jacques Meurant, “The 125th Anniversary of the *International Review of the Red Cross*: A Faithful Record. Part II: Victories of the Law”, *International Review of the Red Cross*, Vol. 35, No. 306, 1995, p. 286.

and Biafra between 1967 and 1970, in relation to which the *Review* published an overview of the organization's work in a monthly column.³³ As a result, the *Review* was home to discussions on the nature of humanitarian action, the risks of politicization of aid and the way in which the ICRC needed to adapt while remaining true to its basic mission.³⁴ From the late 1960s onwards, however, coverage of ICRC operations was gradually reduced in favour of more IHL-related content.³⁵

As the then editor-in-chief Jacques Meurant states, the reasons for this were twofold:

[I]n the first place, theatres of operations were becoming too numerous to be reported on comprehensively in time to remain of topical interest to the reader; secondly from 1977 on the *Review*, previously a monthly [publication], appeared every two months. Other periodicals [took] over this task, and the *Annual Report* gives a detailed account of ICRC's activities.³⁶

In 1969 the journal celebrated its 100th anniversary with a commemorative edition. In it, one author remarked that the *Review*

has not sought to be popular, but to remain what its founders wished it to be: the faithful and objective witness to the work of the Red Cross in Geneva and in the world, the reflection of the moral principles of the Red Cross and the elaboration of its doctrine, an echo of the constructive effort at all latitudes, in all civilizations, to defend man and his dignity.³⁷

1969 marked the start of a new era for IHL as disturbing trends such as indiscriminate bombing and new weapons technology led to the re-examination of so-called "Hague law" governing the conduct of hostilities and the ICRC pushed for more access in non-international armed conflicts.³⁸

The adoption of the 1977 Additional Protocols additional to the Geneva Conventions, based on drafts prepared by the ICRC, was a significant milestone in the development of the law after nearly ten years of negotiations.³⁹ During the

33 Jacques Freymond, "Aid to the Victims of the Civil War in Nigeria", *International Review of the Red Cross*, Vol. 10, No. 107, 1970; J. Meurant, above note 21, p. 535. See also "Help to War Victims in Nigeria", *International Review of the Red Cross*, Vol. 8, No. 92, 1968.

34 See, e.g., Walter Bargatzky, "Red Cross Unity in the World", *International Review of the Red Cross*, Vol. 14, No. 163, 1974; Jacques Freymond, "The International Committee of the Red Cross within the International System", *International Review of the Red Cross*, Vol. 12, No. 134, 1972; "Under the Presidency of Mr. Alexander Hay, the ICRC from 1976 to 1987: Controlled Expansion", *International Review of the Red Cross*, Vol. 27, No. 261, 1987. See also J. Meurant, above note 21, pp. 534–535.

35 Throughout the 1970s, in particular, there was a gradual increase in focus on dissemination articles (for example, the Jean Pictet Commentaries published in 1979–1980) and "Geneva news", so the coverage of specific operations, though still present, was comparatively reduced.

36 See J. Meurant, above note 21, p. 538, fn. 9.

37 J.-G. Lossier, above note 4.

38 J. Meurant, above note 32, pp. 285 ff; Cornelio Sommaruga, "The Protocols Additional to the Geneva Conventions: A Quest for Universality", *International Review of the Red Cross*, Vol. 27, No. 258, 1987.

39 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. 905, 2017. See also the Protocols Additional to the Geneva Conventions, resolutions of the Diplomatic Conference

negotiations of these two important texts, “the *Review* not only provided detailed accounts of the preparatory meetings and the sessions of the Diplomatic Conferences ... but also endeavoured to make a contribution by publishing pertinent studies, especially on new or sensitive issues”.⁴⁰

A powerful channel for dissemination of humanitarian law and principles

In the years that followed, the *Review* also took part in the campaign to persuade States to adopt and ratify the Additional Protocols.⁴¹ It continued to be used as a tool of influence and persuasion in the ICRC’s promotion of IHL, by clarifying how the law should be interpreted⁴² and providing guidance for those who would conduct their own IHL trainings.⁴³

In 1978 the *Review* started to be published every two months, and photographs and images were no longer printed in the journal for a time. The *Review* became a quarterly publication in 1998. It also extended its readership by adding Arabic- (1988), Russian- (1994) and Chinese-language editions (1997) to the existing versions in French, English, German and Spanish.

In the 1990s, reports of the Movement’s “external activities” and “news from headquarters” began to fade and the *Review* developed a predominantly legal – and more academic – focus under the editorial direction of Jacques Meurant and Hans-Peter Gasser. This is perhaps most notable beginning in 1997, with the January/February edition devoted to commentary and discussions on the International Court of Justice’s Nuclear Weapons Advisory Opinion.⁴⁴ The *Review* subsequently embraced a thematic approach during Toni Pfanner’s time as editor-in-chief, and this approach continues to be reflected in the journal to date.

The *Review* has also moved from a focus on explanation and awareness-raising of the law to generating legal and policy debate in view of current challenges and controversies, following growing interest in humanitarian policy and action among academia but also government and military experts, as well as

and extracts from the final act of the Diplomatic Conference, *International Review of the Red Cross*, Vol. 17, No. 197–198, 1977.

40 J. Meurant, above note 32, p. 288, citing, e.g., Claude Pilloud, “The Concept of International Armed Conflict: Further Outlook”, *International Review of the Red Cross*, Vol. 15, No. 166, 1975.

41 Hans-Peter Gasser, “Steps Taken to Encourage States to Accept the 1977 Protocols”, *International Review of the Red Cross*, Vol. 27, No. 258, 1987.

42 See, e.g., “Fundamental Rules of Humanitarian Law Applicable in Conflicts”, *International Review of the Red Cross*, Vol. 18, No. 206, 1978; Stanislaw Nahlik, “A Brief Outline of International Humanitarian Law”, *International Review of the Red Cross*, Vol. 24, No. 241, 1984; “Technical Note on the Protocols of 8 June 1977 Additional to the Geneva Conventions”, *International Review of the Red Cross*, Vol. 24, No. 242, 1984. See also J. Meurant, above note 32.

43 See, e.g., René Kosirnik, “Dissemination of International Humanitarian Law and of the Principles and Ideals of the Red Cross and Red Crescent”, *International Review of the Red Cross*, Vol. 32, No. 287, 1992; “Guidelines for the 90s”, *International Review of the Red Cross*, Vol. 32, No. 287, 1992. See also J. Meurant, above note 32.

44 *International Review of the Red Cross*, Vol. 37, No. 316, 1997.

the expansion of humanitarian action, the development of international criminal justice in the 1990s, and the repercussions of the so-called “war on terror” in the 2000s, among other developments.

From March 1999 to December 2004, the journal was briefly co-published in French and English, with content being made available in one language with a summary in the other. Starting in 2005, the *Review*’s primary language of publication has been English. A “French Selection” of articles has been published on a yearly basis between 2005 and 2010, and on a more regular, thematic basis beginning in 2011.

As of 2006, the *Review* is produced by the ICRC and published by Cambridge University Press. The move to a partnership with an established academic publisher and the introduction of an Editorial Board in 2004, signifying a shift towards academic independence, are indicative of the evolution of the *Review* into a more academic publication which no longer acts as a mouthpiece for the ICRC but instead acts as a platform for debate. This reflects the growing expertise in humanitarian law, policy and action outside the Movement, which is better influenced through engaging in discussion and debate than through repetition of the law and institutional positions. The journal received its first Journal Impact Factor in 2011 and instituted a formal double-blind peer review process in 2012 to guarantee the high academic quality of contributions.

The *Review* today

The *Review*’s current aim is to stimulate research and discussion related to humanitarian law, policy and practice. Via a thematic approach, the journal publishes multidisciplinary content related to the subject of each issue. The content is varied, including interviews and testimonies, articles, opinion notes, debate sections, *in folios*, book reviews and reports/documents. Another innovation in the editorial line has included the voices of those affected by armed conflict, left for too long on the fringes of humanitarian reflection.⁴⁵ The majority of contributions focus on recent developments in humanitarian law and policy, while others aim at providing the historical, sociological, political, economic or other analysis that complements the legal and policy debate. Starting in 2016 the *Review* has been published three times per year.

Today the journal aims to maintain the rigorous, academic nature of its content while at the same time hosting new perspectives in order to focus the discussion on various fault lines and key contemporary issues in IHL and humanitarian action. In terms of gender parity, in its issues published between 2015 and 2018, the *Review*’s authorship was 58% male and 42% female. Authors during that period came from a range of professional backgrounds, including academics, researchers, humanitarian practitioners, legal professionals and military personnel, but the largest source of contributors continues to be the

45 For more on how civilians as beneficiaries of humanitarian action have been represented in the journal, see the article by Ben Holmes in this issue of the *Review*.

ICRC. In terms of geographic diversity of authorship, *Review* authors in these three years came from thirty-six States, mainly in Western European and North America. The journal is engaging in efforts to solicit and publish submissions from Latin America, Africa and Asia, including calls for papers to be translated by colleagues who work on the language selections of the journal.

The journal is distributed widely. In addition to some 8,718 subscriptions via Cambridge University Press, the *Review* is distributed free of charge by the ICRC worldwide. In the initial distribution of each new issue, approximately 1,900 copies are distributed by ICRC delegations in the field.

It is interesting to note which editions are most frequently consulted online. The top three issues of the *Review* accessed on the ICRC's website in English (based on clicks and downloads) are "Scope of the Law in Armed Conflict" (2014), "New Technologies and Warfare" (2012) and "Sexual Violence in Armed Conflict" (2014). Across all of the language selections, the most popular issues have been those with a focus on IHL along with those focused on gender and technology-related issues.⁴⁶

As the *Review* commemorates its 150th anniversary, the ICRC is making the entirety of its archives available to the public free of charge via icrc.org. The hope is that this will encourage researchers to use this wealth of documentation to rediscover ideas, identify trends and inform future discussions and debates.⁴⁷

In honour of this momentous anniversary, it is important not only to remember the past and take stock of the present, but also to look to the future. The journal has kept pace with the times over the past century and a half, and it will continue to do so moving forward. Its evolution is a reflection of that of the humanitarian sector and the larger international community, adapting and changing to each new era in international relations to promote respect for the law and the creation of an environment conducive to respect for human dignity in armed conflict and other situations of violence. That this will happen is certain. How it will happen remains to be seen.

46 As of November 2018. Top issues determined based on clicks and downloads.

47 For more information, see Vincent Bernard's editorial in this issue of the *Review*.

Annex 1

Publication of an International Bulletin⁴⁸

The creation of an International Bulletin, consecrated to the movement for the relief of wounded soldiers, after having been proposed in Paris in 1867, studied by the International Committee in its Memorandum of 20 June 1868, was resolved by the Berlin Conference on 27 April 1869 in the following terms:

The Conference sees the creation of a journal as indispensable, to link the central committees of the various countries and bring to their attention the facts, official and otherwise, that are pertinent for them to know.

The editing of this journal is entrusted to the International Committee of Geneva, without any costs being incurred on these grounds at the expense of the members of the Committee.

The bulletins that it will publish will be periodical in nature, at a frequency determined by the members of the Committee.

One part of the publication may be reserved for announcements, reviews of significant works, and descriptions of devices or inventions relevant to the relief of wounded or sick soldiers.

Endowed with the confidence of the central committees, the International Committee considers itself lucky to be able to undertake useful work, in this way, toward the advancement of an institution to which it has pledged its full support. It is also pleased that its new functions will allow it to support the movement with the central committees.

It is these last, in fact, in the thinking of the Berlin Conference, who should provide the materials for the planned Bulletin. It was understood that the collection would serve as the voice of the central committees, to inform one another of all that could be of interest to them, and that *they alone* would have the right to include articles, which would enhance the value of the Bulletin in giving it an official character, of a sort. The International Committee will gather, coordinate and publish these documents, completing them as needed with specific information.

The result of this combination is that each central committee must make itself available to work on the Bulletin, by giving it *complete* information related to its own country. The elements of a substantial publication will certainly not be lacking, but only on the condition that those concerned take care to provide them. Additionally, the International Committee hopes that the central committees, inspired by this truth, will do all that is in their power to help, with their advice as well as their cooperation, so that the collective Bulletin may be worthy of the movement as it excels at the service to which it is destined.

The framework of the Bulletin will encompass not only the work of the central committees and the relief societies, their staff and their organization, but also facts surrounding the official health services, or charitable associations whose

⁴⁸ First published as “Publication d’un bulletin international”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 1, No. 1, 1869.

efforts work toward the same goal, new publications (books, brochures, journal articles), inventions for the amelioration of the fate of the wounded, etc., etc.

The central committees may also use the Bulletin to communicate their ideas to each other, ask each other questions, and search for solutions to problems that preoccupy them.

Each committee will take responsibility for the communications it publishes. The contents may be divided into as many distinct articles as needed.

The preceding lines are the core of the International Committee's 15 June 1869 circular addressed to the central committees of the various countries. We need not enter into further detail about the nature of the Bulletin that we undertake to publish today, which will contain the general archives of the movement, starting with the Berlin Conference.

PHOTO GALLERY

The editors-in-chief of the *Review*, 1869–2019*

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Since the *Bulletin International des Sociétés de Secours aux Militaires Blessés* was first published in 1869, the journal that eventually became known as the *International Review of the Red Cross* has had sixteen editors-in-chief. Each has shaped the journal in his own way. The following list of these editors-in-chief was compiled by ICRC historian Daniel Palmieri.



Gustave Moynier, Editor-in-Chief 1869–1871. Mr Moynier (1826–1910) was a member of the “Committee of Five” that founded what was to become the International Committee of the Red Cross (ICRC).

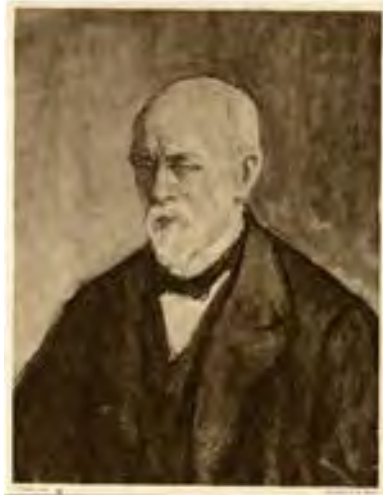
* Thanks to Kvitoslava Krotiuk for identifying the associated images.



Auguste Bost, Editor-in-Chief 1871–1872. Mr Bost (1815–1890) was a pastor and the editor of the *Journal de Genève* and other newspapers.



(Louis-)Arnold Nicolet, Editor-in-Chief 1872–1875. Col. Nicolet (1846–1914) was an instructor colonel of the Swiss Armed Forces.



Louis Théodore Wuarin, Editor-in-Chief 1875. Mr Wuarin (1846–1927) was a professor of sociology and social economy at the University of Geneva.



Philippe Plan, Editor-in-Chief 1875–1885. Mr Plan (1827–1885) was a photographer and the founder and editor of the newspaper *Le Genevois*.



Albert Henri Gampert, Editor-in-Chief 1885–1893.¹ Mr Gampert (1860–1929) was lawyer, politician and administrative adviser to the city of Geneva.



Paul des Gouttes, Editor-in-Chief 1893–1925.² Mr Des Gouttes (1869–1943) was a lawyer, secretary of the ICRC starting in 1893, and secretary-general starting in 1910. He was a member of the governing body of the ICRC from 1918 to 1943.



Etienne Clouzot, Editor-in-Chief 1919–1942.³ Mr Clouzot (1881–1944) was a graduate of the Chartes School, archivist, paleographer, head of the ICRC Secretariat, and editor of the *Revue Internationale de la Croix-Rouge* from 1919 to 1925 (in collaboration with Paul des Gouttes).

- 1 In 1886, the *Bulletin International des Sociétés de Secours aux Militaires Blessés* was renamed the *Bulletin International des Sociétés de la Croix-Rouge*. To read more about the history of the journal, see Daniel Palmieri's article in this edition of the *Review*.
- 2 In 1919 the *Revue Internationale de la Croix-Rouge* was created, appearing alongside the *Bulletin*. Paul des Gouttes was Editor-in-Chief alone from 1893 to 1918 and co-Editor-in-Chief in collaboration with Etienne Clouzot from 1919 to 1925.
- 3 Etienne Clouzot was co-Editor-in-Chief in collaboration with Paul des Gouttes from 1919 to 1925, and with Henri Reverdin from 1926 to 1942.



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Henri Reverdin, Editor-in-Chief 1926–1945.⁴ Mr Reverdin (1880–1975) was a philosopher and a professor of philosophy at the University of Geneva from 1919 to 1956.



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Louis Demolis, Editor-in-Chief 1943–1954.⁵ Mr Demolis (1876–1968), was a chemist, a high school teacher, and a technical adviser at the ICRC starting in 1926.



© ICRC Archives (ARJIS) N.

Jean-Georges Lossier, Editor-in-Chief 1955–1976. Mr Lossier (1911–2004) was a poet, literary critic, sociologist and member of the ICRC Secretariat.

4 In collaboration with Etienne Clouzot from 1926 to 1942 and with Louis Demolis from 1943 to 1945.

5 In collaboration with Jean-Georges Lossier from 1945 to 1954.



Michel Testuz (left), Editor-in-Chief 1977–1986. Mr Testuz (1922–1987) was a doctor of literature and a lecturer in Arabic, Hebrew and Hebrew literature at the Universities of Geneva, Lausanne and Rome. He was a resident staff member of the ICRC in Palestine and later an ICRC delegate, and was director of the Bodmer Foundation.



Jacques Meurant, Editor-in-Chief 1986–1995. Mr Meurant is a doctor of political science and was special adviser to the secretary-general of the League of Red Cross Societies starting in 1962. He was director of the Henry Dunant Institute starting in 1979.



Hans-Peter Gasser, Editor-in-Chief 1996–2001. Mr Gasser is a doctor of laws and was court clerk at the Winterthur District Tribunal, a lawyer at the Swiss Federal Department of Public Economy, and assistant secretary-general of the Swiss Science Council. He joined the ICRC in 1970.



Toni Pfanner, Editor-in-Chief 2002–2010. Mr Pfanner is a doctor of economics, adjunct professor of international law at St Thomas University School of Law and at the University of Lausanne, and visiting professor at the College of Europe. He joined the ICRC in 1984.



Vincent Bernard, Editor-in-Chief 2010–present. Mr Bernard studied political science, international law and international relations. He started in the ICRC in 1998 as resident staff in Dakar and specialized in integration and promotion of international humanitarian law in his ICRC career in the field and in Geneva. He is head of the Law and Policy Forum, which runs the ICRC’s engagement with academia and other sophisticated audiences.

OPINION NOTE

The ICRC as seen through the pages of the Review, 1869–1913: Personal observations

David P. Forsythe

David P. Forsythe is Emeritus University Professor and Charles J. Mach Distinguished Professor of Political Science, University of Nebraska-Lincoln.

Abstract

The early years of the Review, then called the Bulletin International des Sociétés de la Croix-Rouge, provide numerous insights into the International Committee of the Red Cross (ICRC), which edited the journal. Since the ICRC was very small in those days and without support staff, one learns a great deal, especially about Gustave Moynier, who led the organization and carried out most of the editing duties at the Bulletin. The reader can trace the role of religious and other motivations, attitudes toward colonialism, the evolving nature of the International Red Cross and Red Crescent Movement and the ICRC's place therein, and complex relations with States. This early era, as richly recorded in the journal, stimulates a number of questions about further research into ICRC and Red Cross history.

Keywords: Red Cross history, ICRC, Gustave Moynier, Christian charity, colonialism and racism, States and Red Cross actors, humanitarian affairs.

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I started looking into the record of the International Committee of the Red Cross (ICRC) in some detail during the early 1970s, and have continued to follow the activities of the organization since that time.¹ So I was pleased when the *Review* asked me to read through the early years of its publication and react to what I read about the founding agency of the International Red Cross and Red Crescent

Movement (the Movement). I did so without pretending to be a historian who was writing a complete history. For this project I visited no archives in person in order to supplement the journal. As a historically oriented political scientist with a concentration on international relations, I focused on what the early journal itself might tell us about the ICRC.

Quite a bit, it turns out, because the *Review* was a major instrument of the organization as it sought to shape the Movement *and* advance its own status. The major issues of that era, for both the Movement and the ICRC, were treated by the journal. The journal also revealed a great deal about the central figure of Gustave Moynier and some of his colleagues. The ICRC was very small back then, and the early *Review* was quite personalized. Some of the more personalized material should perhaps not have appeared in print, but it is too late for that concern now. We benefit from that lack of restraint.

I trust professional historians will forgive me for intruding on their turf. Perhaps they can use what follows to enhance their own studies. They may find that most of my observations confirm what they already know. That's fine, because confirmation is part of determining what we think is truth. But they, and especially the general reader, may find something new in what follows. For those who live at great distance from the ICRC's archives, they can certainly learn a lot from the early *Review*, which can be accessed via the internet.² I have chosen to focus on the early motivations of the ICRC, its role in the Movement, how the ICRC viewed States and public international law, and a number of other points that struck me as worthy of further research.

Some people are still confused about the founding of what became the ICRC in 1863, and the development of the global Red Cross and Red Crescent (RC)³ network of agencies. This is not the place to recount the key facts. Suffice it to say that the *Review*, appearing first only in French as the *Bulletin International des Sociétés de la Croix-Rouge* (though the precise title varied for a time), appeared from late 1869. Thus the journal had nothing to say in the present tense about events from 1863 to most of 1869.

Officially, the 1869 International Conference of the Red Cross and Red Crescent (International Conference), meeting in Berlin, asked the ICRC to undertake the task of editing a journal for the nascent network of private aid societies whose central mission back then was to supplement State authorities for better care of the war wounded. But even before 1869, the 1867 International Conference in Paris had discussed creation of a journal, and the ICRC had conducted a survey of interested parties about possibilities and then manoeuvred

1 Throughout the article, I use contemporary names for Red Cross organs and agencies even though it took time for such names to be adopted.

2 The archives of the *Review*, including when it was called the *Bulletin*, can be found online at the Hathitrust Digital Library, available at: www.hathitrust.org; and via Cambridge University Press, available at: www.cambridge.org/core/journals/international-review-of-the-red-cross/digital-archive. More recent issues can be found on the ICRC's own website, available at: www.icrc.org/en/international-review-past-issues (all internet references were accessed in March 2019).

3 Hereinafter I use "RC" to avoid spelling out "Red Cross and Red Crescent" in full each time, and to avoid prioritizing the Red Cross over the Red Crescent.

to get the journal published – and edited – in Geneva. The ICRC often operated in this way: taking an initiative but being sure to get agreement from the Conference or perhaps individual National Red Cross and Red Crescent Societies (National Societies) in order to legitimate what it wanted to do. The early ICRC, and above all Gustave Moynier, who was its president from 1864 to 1910, manifested persistent determination and not a little self-interest – but it tried to camouflage particularly the latter trait in a cocoon of modesty and service to others.

Moynier was not only ICRC president but also the editor of the *Bulletin* for about thirty years until age caused him to reduce his workload in the last decade of his life. The ICRC as an organization was tiny in those days, consisting of five to twelve persons. There were no support staff or delegates in the field. Moynier displayed many admirable traits, but a shrewd sense of communication and presentation was *not* one of them. The early issues of the journal constituted less than exciting reading for the most part, consisting of reports from the various National Societies about their central committees (or governing boards): who had died, who had been replaced by whom, their budgets, their statutes, where their sub-units were located, what medals had been designed, who their (upper class) patrons were, how many bottles of wine and cognac had been sent to the troops, etc. The various national units submitted their materials, and then the ICRC translated them into French if necessary, with apparently very little editing.

In a rare burst of candour and lack of diplomacy, the *Bulletin* (meaning Moynier, most probably) observed in print that a Spanish report was not very important.⁴ In this the Spanish were not unique. Even in the fall of 1914 after the outbreak of World War I, the *Bulletin* commenced in pedantic fashion with its usual list of past publications about aid to war victims arranged country by country. When the journal did present an interesting and broad essay, it was often buried in the middle of the issue rather than in a leading spot.

Moynier, the careful lawyer with a reputation for organizational detail, seemed to know well the nature of his journal but could not bring himself to change its format. Perhaps he felt bound by International Conference's resolutions saying the journal should focus on Movement issues. But the *Bulletin* shows no evidence that he lobbied the Conference to alter the journal. He acknowledged on several occasions that it was an in-network publication that was too technical, dealing with organizational details, and with little appeal to the public.⁵ Most national publics lacked knowledge early on about this new international network to aid the war wounded, but the *Bulletin* was obviously not going to correct that problem. For Moynier it was up to the National Societies to

4 “Nouvelles de la Société espagnole”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 27, No. 106, 1896, p. 88.

5 “Remplacement de M. le docteur Maunoir”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 1, No. 2, 1870, especially p. 61, part of a larger essay devoted to RC publications; “Aux abonnés du Bulletin”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 5, No. 20, 1874, pp. 193–194; “Le Bulletin international (41me circulaire)”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 9, No. 33, 1878, pp. 1–7, comprising a review of the journal up to that time; “L’avenir de la Croix Rouge, par M. Gust Moynier”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 13, No. 50, 1882, p. 74, where the journal is said to be important but not very powerful in overcoming critics of the RC idea.

speak to their publics. With a keen Swiss sense of finances, Moynier wanted more paid subscriptions but apparently knew why they were not forthcoming. It was clear he understood that the journal lacked broad appeal.

However, one starting a new National Society in say, Uruguay, could learn a great deal from the journal about how the more active units of the Movement – the various German-speaking units, or the Russians, or the Japanese, or the Dutch, or the Americans – did it. For those interested in Movement details about structure and function, one could learn a lot from the *Bulletin*, but for general readers it was a non-starter, because it was not designed for them. The *Bulletin* was serious but mostly pedantic, and Moynier was serious but not charismatic. Henry Dunant was the visionary, the crusader; Moynier was the builder,⁶ who laboured persistently, brick by brick. The *Bulletin* was to a great degree a manual about how to do RC masonry.

The ICRC and the Movement

There are essays in the *Bulletin* that make it worthwhile to slog through the other 80% of its contents. These essays clarify the values that animated the ICRC and hence the early years of the Movement. Other essays make clear the ICRC's vision for how to implement Dunant's dream⁷ of a system of private aid societies that would supplement national military establishments. Still others indicate blind spots or complexities in the views expressed in Geneva. On a number of points the views expressed by Moynier, or later president Gustave Ador, were widely shared within the North Atlantic area.

Religious conviction and organizational pride

The *Bulletin* does not hide the fact that the basic impulse driving early developments was the notion of Christian charity. The journal makes this abundantly clear on Moynier's part. Other literature indicates that the same held true for the other "Geneva gentlemen" who founded the ICRC. Henry Dunant was a deeply religious Christian for most of his life, and Dr Appia was similar in many respects to Dunant. Dr Maunoir and General Dufour were practicing Protestants.

According to the *Bulletin*, as age took its toll on Moynier, he collected the memorabilia of his life. A central position was given to a print (*gravure*) of Christ on the cross.⁸ The idea of a universal Christian charity was intended to challenge a

6 See, further, Jean des Senarclens, *Gustave Moynier: Le bâtisseur*, Slatkine, Geneva, 2000. There is no English edition, possibly because the book comprises more bland description than searching analysis.

7 I borrow the phrase from Caroline Morehead, *Dunant's Dream: War, Switzerland and the History of the Red Cross*, HarperCollins, London, 1999.

8 Gustave Moynier, Gustave Ador and Ad. D'Espine, "Fondation d'une Société de la Croix-Rouge au Chili (123me Circulaire aux Comités centraux de la Croix-Rouge)", *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 40, No. 159, 1909, p. 138.

“savage patriotism”.⁹ One could not count on the masses to naturally demonstrate this Christian internationalism; rather, it was a select few who would have to lead.¹⁰ An elite would have to develop a broad spirit of the fraternity of humanity that was necessary to stand up to barbarism and fanaticism.¹¹ As the Franco-Prussian war raged in 1870–71, Moynier noted that many obstacles to a dynamic Red Cross role had been overcome thanks to God.¹² In the activities of the specialized agency set up at Basel to coordinate Red Cross action in that war, God’s blessings were evident.¹³ Even when some considered that Christian charity had evolved into global humanitarianism, it was still a project designed by God.¹⁴

In the very first issue of the *Bulletin*, Moynier tried to answer a persistent and obviously long-standing criticism of the Red Cross idea. According to him, various anti-war groups existed and the ICRC was sympathetic to their cause, but since war had proven a mainstay of human history, the ICRC was justified in trying to limit its evils. Help for the war wounded was a good place to start.¹⁵ He followed up this opening defence a few issues later with an even clearer scepticism about peace groups.¹⁶ For him, writing in the midst of the Franco-Prussian war, it was clear that even civilized nations fought ferocious battles. He thought peace was just a truce between wars. For him, it was hard to know God’s plan for humankind, but sooner or later war occurred. Thus, he argued, the Red Cross is needed.¹⁷ By the 1880s Moynier was even more convinced that war would continue but that humanitarian progress could be made, even if the RC effort was only a palliative for a chronically bad situation.¹⁸ Moynier and the ICRC combined pessimism about the human condition with optimism about improvements at the margins. A long review of developments in the 1880s was basically optimistic about the RC’s future despite a critical view of State policies, citing such things as greater attention to humanitarian issues in the Crimean War and American Civil War.¹⁹

This original Christian impulse was both dynamic and problematic. The early ICRC was Christian, Protestant and strictly Genevan. Most of its early members, like Moynier, were serious and dedicated to the cause, determined to find a way to translate Dunant’s general vision into a pragmatic, effective and broad institution. Dunant left the ICRC, or was forced to leave it, in 1867, and

9 “Du double caractère, national et international, des sociétés de secours”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 1, No. 4, 1870, p. 160.

10 *Ibid.*

11 *Ibid.*

12 “Travaux du Comité international pendant le dernier trimestre de l’année 1870”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 2, No. 6, 1871, p. 78.

13 *Ibid.*, p. 79.

14 “L’avenir de la Croix Rouge, par M. Gust Moynier”, above note 5, p. 84.

15 “Avant-Propos”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 1, No 1, 1869, pp. 1–3.

16 “Les Sociétés de secours pendant la guerre de 1870”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 2, No 5, 1870, pp. 1–2.

17 *Ibid.*

18 “L’avenir de la Croix Rouge, par M. Gust Moynier”, above note 5, especially pp. 67–68.

19 *Ibid.*, p. 69.

the others doggedly carried on, probably satisfied if not happy to see the crusading visionary go.²⁰

But what was the fate of Christian charity when the Red Cross idea was projected into societies not even nominally Christian? The ICRC had universal aspirations for its work. Its humanitarian objectives fit relatively well with at least some sectors of what was often called the Christian West. But this attempt to organize aid societies for the war wounded met certain early obstacles in places like Turkey, Persia and Egypt.

These obstacles were clearly noted in the pages of the *Bulletin*. The Ottoman Empire claimed in the 1870s that its soldiers objected to the red cross emblem as a neutral and protective signage in war. The Sublime Porte said it was sympathetic to private aid societies for the purpose of aiding the war wounded (not that it consistently supported such action in an effective way) but that it wanted to use the red crescent, not the red cross, as the emblem for such work. So the ICRC's Christian origins led to problems, first with the Muslim Turks, then with the Muslim Egyptians (originally a part of the Ottoman Empire but with periodic autonomy), and also with the Muslim Persians. Moynier acknowledged that the cross was a symbol that could cause negative feelings in Muslims, even as he first asserted that the Ottomans were not allowed to change emblems on their own.²¹

It should be noted that various countries, like Japan and Thailand (Siam back then), became part of the Red Cross network without insisting on changes to the red cross emblem. They were obviously non-Western but ultimately had no problem with RC objectives stemming from Christian charity. It was too bad that Turkey, in particular, acted otherwise. The ICRC, reproducing a point made by the Swiss government, wished that Turkey had acted like Japan.²² But parties to conflict like Russia (officially Christian in the Tsarist era) agreed to respect the neutrality of the red crescent emblem in battle, on condition that the red cross was also respected. And the 1907 Hague Conference, in dealing with the laws of war, showed that many States accepted Turkey's red crescent.

So the ICRC, which itself did not use the words "Red Cross" in its title until 1875–76, had to be flexible about emblems. The ICRC had proposed use of the red cross emblem by all units of the network in the *Bulletin* in 1873, but did not incorporate "Red Cross" into its name until two years later.²³ By the 1880s

20 Dunant resigned when accused of financial improprieties in his business dealings, but he was apparently pushed out by Moynier. The two did not get along. Later Dunant continued to freelance in advocating for his ideas. In the mid-1870s he sought to create a new Red Cross society in Belgium, but it already had a society for aid to the war wounded linked to the ICRC. "Avis relatif à la Société nationale belge de la Croix rouge et Appel du Comité central serbe (42me circulaire)", *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 9, No 33, 1878, pp. 8–11. This type of lone-wolf advocacy by Dunant, leading to competing aid agencies in Belgium, must have driven Moynier mad.

21 Gustave Ador and Gustave Moynier, "Les Destinées de la Convention de Genève pendant la guerre de Serbie", *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 7, No. 28, 1876, p. 174.

22 "Considérations soumises par le Comité international de la Croix-Rouge aux membres de la Conférence", *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 37, No. 147, 1906, p. 180.

23 "III. Sociétés de secours", *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 4, No. 16, 1873, p. 180.

Moynier thought it had become too late to abandon the red cross symbol because “it had become dear to the Aryan race”.²⁴ Moreover, a question of form should not interfere with continuing humanitarian work.²⁵

According to the *Bulletin*, if RC actors were to have a global movement, pragmatism was necessary. Besides, the red cross on a white background, as defined in public international law by the 1864 Geneva Convention (drafted by the ICRC, meaning Moynier and Dufour), was merely the reverse of the Swiss national flag. The red cross emblem had no religious significance. Moynier had made this argument in print at least as early as 1873, even before Turkey challenged the red cross emblem in the 1876–78 war with Russia.²⁶ So the reality of the early ICRC being religiously motivated, with Protestant evangelism in the forefront, eventually yielded to the later ICRC as a secular humanitarian organization. A universal movement required downplaying Western Christian Protestant origins.²⁷

Christian charity was not the only value at work in the early ICRC. It was central, but there was also pride in being Genevan and Swiss. It is probably a fool’s errand to try to say which identity was stronger. Moynier was perhaps not fully diplomatic to have printed in the *Bulletin* a speech he gave to a group in Geneva in 1873. In that talk, he closed a review of ten years of ICRC activity by saying that especially Genevans and Swiss should be proud of what the ICRC had accomplished. He endorsed Swiss patriotism and tried to distinguish it from conceit.²⁸ He was even more undiplomatic or incautious to have printed in the journal another ode to Swiss virtues. In a celebration of twenty-five years of RC activity at the Hotel de Bergues in Geneva, he first recounted in flattering terms the accomplishments of the ICRC itself, saying that the ICRC had achieved a pre-eminent position without seeking it (though this is not entirely true). He then praised Swiss and Genevan authorities (among others), asserting that the Swiss had the best passports in the world. He closed with a toast to Switzerland, suggesting that the ICRC had contributed to the good name of Switzerland abroad.²⁹ In 1899, a book review in the *Bulletin* by Alfred Gautier of the ICRC referred to Switzerland as the chosen land of international philanthropy or charitable works.³⁰

The *Bulletin*, which commenced publication in 1869 as already noted, is largely silent about an early effort by the French to take over leadership of the

24 “L’avenir de la Croix Rouge, par M. Gust Moynier”, above note 5, p. 73.

25 *Ibid.*

26 “IV. Conclusion”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 4, No. 16, 1873, p. 242.

27 Insufficient documentation in 1863–64 has fuelled debate about the red cross emblem. Given the strong religiosity of Dunant, Moynier and others, it is hard to believe the cross had no religious symbolism. On the other hand, a red cross on a white background was in fact the reverse of the Swiss national flag, and the leaders of the early RC efforts were indeed Swiss.

28 *Ibid.*, p. 243. Later in this piece I comment on ICRC relations with Swiss officials in Bern.

29 “La journée du 26 octobre 1888”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 20, No. 77, 1889, especially pp. 15–17.

30 “Ouvrages reçus et publications nouvelles”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 30, No. 118, 1899, p. 65.

Movement and relocate its headquarters to Paris. This was in actuality successfully resisted by the all-Swiss, all-Genevan ICRC, despite some appearances of flexibility. While historical retrospectives were published by Moynier in the *Bulletin*, they never went fully into those details – and certainly not candidly.³¹

Later in the mid-1880s, when the Russians sought to replace the all-Swiss ICRC with an international body, the ICRC was clear in the journal about its opposition to what the Russians were proposing. The ICRC would first profess to be neutral about the proposal, then make clear it was opposed. The Russians would have had the members of the new central body elected by National Societies. The ICRC found the Russian proposals impractical, which they were in part because they would have also had the new RC central body pass judgment about State war crimes. Being the central node in RC communications, the ICRC could delay action – as well as having an important platform for its own views. The Russians complained repeatedly about the lack of timely action on their proposals, and the ICRC denied stalling, improbably blaming tardiness on force majeure.³² Crucially, the ICRC manoeuvred to keep the Russian proposals as one package. Thus, what was impractical – i.e., having a RC organ rule on State war crimes – was combined with what was not so impractical – i.e., replacing the ICRC with an international organ elected by the National Societies.³³ Once again, the ICRC manoeuvred effectively on behalf of its traditional position. Genevan and Swiss identity was at work. The shifting Russian package of proposals, launched about 1884, was finally voted down unanimously at the 1897 International Conference in Vienna.³⁴ The ICRC had planted so many seeds of doubt that even the Russian Red Cross Society did not vote for its own initiative.

The ICRC at one point used a power-politics argument to justify the *status quo*: whoever has legal authority has power to give orders, but who then would execute those orders? What material forces would be put at the disposal of this new authority? If it had no such resources, what would become of its authority? Existing arrangements, with the ICRC at the centre, were sufficient according to the ICRC. There were no big gaps necessitating other arrangements. According to this argument, one could study the Russian proposals in the future but the *status quo* should be continued.³⁵ This is a clear example of the ICRC using its central position in the Movement, and the *Bulletin*, to take a specific stand about itself and the Movement. It was not always hesitant to advocate for its own views and interests – absolute neutrality had its limits in Movement politics. Or as the author Anne Patchett, in her acclaimed novel *Bel Canto*, has the fictitious and

31 See, further, John F. Hutchinson, *Champions of Charity: War and the Rise of the Red Cross*, Westview Press, Boulder, CO, 1996, pp. 82–89 and *passim*. This is essential reading on RC history but is rarely quoted by ICRC authors, perhaps because of its acerbic tone.

32 “Travaux confiés au Comité international par la Conférence de 1884”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 16, No. 63, 1885, p. 98.

33 *Ibid.*

34 “La Conférence internationale de Vienne”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 28, No. 112, 1897, p. 308.

35 Edouard Odier, “La Troisième Conférence des Sociétés de la Croix-Rouge”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 15, No. 60, 1884, p. 190.

neutral Swiss ICRC delegate Messner say about a hostage situation in South America: “The Swiss never take sides We are only on the side of the Swiss.”³⁶

After the Russian initiative had been laid to rest, one could later find in the *Bulletin* some evidence of frustration over the fact that the Hague Conferences of 1899 and 1907 were dealing with subjects that overlapped with the 1864 Geneva Convention (GC), and thus that the all-Swiss ICRC and the Swiss government did not have a monopoly on being central to legal developments regarding the laws of war – particularly care of the wounded. This is not to deny that some developments of those Hague Conferences were helpful to the ICRC in trying to limit war’s evils, like the adoption of the Martens Clause.³⁷ Then there were other developments outside the RC (and Swiss) framework that proved beneficial to the development of humanitarian principles, such as the St Petersburg Declaration of 1868.³⁸ Still, the ICRC (or the Swiss government) was sometimes vexed by those outside the RC process taking up subjects covered in the 1864 GC, including even the revision of that treaty.

There are other articles in the *Bulletin* presenting a historical review in which the reader finds the ICRC praising the ICRC, or even Moynier praising Moynier. For example, in 1905, maybe still smarting from Dunant’s Nobel Prize in 1901, Moynier reproduced in the *Bulletin* his letter to the editor of the *Tribune de Genève*. In it he noted some of the accomplishments of the ICRC under his leadership. He also threw in a put-down to Dunant, who was said not to have even been a member of the Geneva Society for Public Welfare, a sub-committee of which became the ICRC (in fact, Dunant was a member of that sub-committee, without being a member of the parent body).³⁹ The immediate context was a fundraising effort by the Swiss Red Cross, the president of which was a Swiss German. Clearly Moynier wanted the Swiss public to know about himself and the ICRC, and its origins in Geneva, and not to get it confused with the Swiss Red Cross – with non-Genévans being prominent in the latter’s leadership.

36 Anne Patchett, *Bel Canto*, HarperCollins, New York, 2001, p. 88. Her novel is based on a real-life incident in which the ICRC was involved; see Michel Minnig, “The Lima Hostage Crisis: Some Comments on the ICRC’s Role as a ‘Neutral Intermediary’”, *International Review of the Red Cross*, Vol. 38, No. 323, 1998, pp. 293–303, available at: www.icrc.org/en/doc/resources/documents/article/other/57jpcg.htm.

37 “Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience.” See “Martens Clause”, *How Does Law Protect in War? Online*, available at: <https://casebook.icrc.org/glossary/martens-clause>.

38 “Considering 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 endeavor to accomplish during war is to weaken the military force of the enemy; That for this purpose, it is sufficient to disable the greatest possible 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 ...”

39 Gustave Moynier, “Appel en faveur de la Croix-Rouge suisse et lettre de M. G. Moynier”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 36, No. 143, 1905, pp. 209–210.

It is not irrelevant that Moynier's father, André, had been part of the Genevan political elite that was forced out of local office by more liberal political forces in 1848, with the son decamping to Paris to finish his legal studies. Gustave Moynier's return to Geneva, his rise in the world of social welfare work, and then his presidency at the ICRC offered an opportunity for his family and the conservative *haute bourgeoisie* of which it was a part to reclaim a certain status and prestige.⁴⁰ The point here is that Genevan and Swiss identity, and acceptance in those circles, was important to Moynier. Those identity factors, along with Christian principles, helped drive his work ethic and his determination to accomplish great things – which he did. The *Bulletin* did not often refer overtly to these Genevan and Swiss factors, but one could glimpse them now and then in the pages of the journal. Identity politics was also to affect the ICRC in the future.⁴¹

Christianity, colonialism and racism

The Christian impulses of the ICRC and Moynier had blind spots, as was true of much – but not all – of the rest of the nominally Christian West. Moynier fully bought into the view that the Christian West constituted a group of civilized nations⁴² which then undertook colonialism in large measure as a civilizing mission and “white man's burden”. It cannot be overstressed how widespread was this justification of colonialism. One of the ways in which non-Western nations like Japan, and then various nations in South America, proved that they were civilized was, to Moynier, by consenting to the 1864 GC and then taking seriously the establishment of National Societies. Moynier often utilized the dichotomy of civilized and uncivilized nations in the pages of the *Bulletin*, and non-Western elites, starting with the Turks and followed more effectively by the Japanese, could indeed enter the preferred group. It is fairly easy to deduce from those pages that sub-Saharan Africa was among the most “uncivilized” areas.

It is not unrelated that when Moynier summarized in the *Bulletin* the rules for recognizing new National Societies by the ICRC, applicant organizations had to, *inter alia*, serve the entire nation without regard to place of birth, gender, religion or political orientation – but one could discriminate on the basis of race.⁴³ The racially

40 See, further, Irène Herrmann, *L'humanitaire en questions: Réflexions autour de l'histoire de Comité International de la Croix-Rouge*, Cerf, Geneva, 2018.

41 After 1919, some in the American Red Cross tried to push the ICRC to the margins and create a more powerful and controlling Red Cross central organ, somewhat similar to the Russian proposals of 1884–97. This effort was strongly and successfully resisted (for the most part) by the ICRC, which had no trouble seeing that its future was endangered. The League of Red Cross Societies, now the International Federation of Red Cross and Red Crescent Societies, was created, but without overarching authority. See, further, David P. Forsythe, “The International Red Cross: Decentralization and Its Uses,” *Human Rights Quarterly*, Vol. 40, No. 1, 2018, pp. 61–90; Irène Herrmann, “Décrypter la concurrence humanitaire: Le conflit entre Croix-Rouge(s) après 1918”, *Relations Internationales*, Vol. 151, No. 3, 2012, pp. 91–102.

42 For one example among many, see G. Ador and G. Moynier, above note 21, p. 165.

43 “Conditions d'existence des Sociétés nationales de la Croix-Rouge”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 36, No. 143, 1905, p. 152, Rule 6.

segregated American Red Cross had been recognized by the ICRC in 1882. The International Conference could have objected to the rules for recognition practiced and then codified by the ICRC, linked to Conference resolutions in a circular process, but it did not. Racism was clearly widespread in the North Atlantic area in his time. One doubts that there was a black official in any of the National Societies then in existence. All of the major European powers were colonial powers and acted on the basis of an assumed white superiority.

Moynier and presumably the rest of the ICRC clearly had a dim view of people of colour, especially Africans. This was made embarrassingly clear in an article in which black Africans of that time were said to be too savage and primitive to associate with humanitarian values.⁴⁴ Humanitarian progress had certainly been achieved by “the Aryan race”, as shown by the widespread adoption of the red cross emblem;⁴⁵ Africans, however, were another matter. Let anyone still be in doubt about the view from Geneva, a later essay argued that the idea of the Red Cross was thought up by whites, who were at the top of the ladder of civilizations, whereas blacks, as in the Congo, were characterized by excessive and ingrained savagery.⁴⁶ In these views the white ICRC was a product of its times as part of the European upper classes – although there were occasional European voices criticizing colonialism and racism. It was not just in the US South that the Christian religion was broadly infected with racism.

The deeply troubling example of the Congo Free State is treated only incompletely in the *Bulletin*, with important points left out. King Leopold of Belgium took control of the Congo Free State as his personal property in 1885, selling commercial interests to investors who, like the king, were greatly interested in economic gain, mainly involving rubber. The result was horrific for the local inhabitants. One close observer later held that the murders, mutilations, torture and other widespread abuses added up to genocide.⁴⁷ Be that as it may, various Western sources generated such negative publicity about the Congo that in 1908 Leopold was forced to relinquish the territory to the Belgian State, which then ruled it in only slightly better condition until independence in 1960. Moynier was King Leopold’s consul general in Switzerland from 1890 to 1904. The *Bulletin* is silent as to whether negative publicity about the Congo Free State caused Moynier’s 1904 resignation as its representative based in Geneva.

The *Bulletin* recorded such facts as the creation of the Congolese and African Red Cross Society, controlled by white Belgians with offices in Belgium. It was supposed to be a National Society for all of black Africa, not just for the Congo – an idea accepted by the ICRC, since it could now claim that the RC idea

44 “La Croix-Rouge chez les Negres”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 11, No. 41, 1880, p. 5.

45 “L’avenir de la Croix Rouge, par M. Gust Moynier”, above note 5, p. 73, building on a discussion of RC progress “within the limits of the ‘civilized zone’” at p. 71.

46 “L’avenir de la Croix-Rouge au Congo”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 34, No. 136, 1903, p. 219.

47 Adam Hochschild, *King Leopold’s Ghosts: A Story of Greed, Terror, and Heroism in Colonial Africa*, Houghton Mifflin Harcourt, New York, 1998.

covered all of Africa.⁴⁸ Red Cross good deeds in the Congo basin were listed, such as hospitals created and medical missions dispatched, but the overall situation was never mentioned – not by the Belgian Red Cross and not by the ICRC, despite ample publicity given by various sources to the horrors taking place. Of course, Moynier’s close association with Leopold’s commercial objectives was never mentioned in the journal.

The situation was more or less comparable in Southwest Africa (now Namibia). As Imperial Germany moved into the area in 1884 as part of the great carve-up of Africa, the German military ruthlessly suppressed local opposition during the first decade of the twentieth century. The general consensus now is that the German action constituted genocide, particularly against the Herero people. Modern Germany appeared to accept this view in 2015, although various disputes continue.⁴⁹

In the *Bulletin*, one can read of the activities of the German Red Cross in assisting wounded and sick German soldiers both in Southwest Africa and upon their return back home. There is no mention of the German Red Cross treating wounded Herero under the principles of neutrality and impartiality. The German Red Cross finally mentioned the Herero in its report to the *Bulletin* in 1908 – as a menace to the German colony.⁵⁰ There is no mention of the overall context, either by the German Red Cross or by the ICRC.⁵¹

Then there was the matter of atrocities by British forces, or irregulars operating with British forces, after the battle of Omdurman in Sudan in 1898. It was a fact that many of the wounded Dervishes were killed after the battle, as the British Empire operating out of Egypt secured its control of the Upper Nile. European parties recorded the events, which led to much controversy back home. Moynier, for the ICRC, supported a dubious British official version of events, reprinting in the *Bulletin* pretty much the same debatable story that the British government offered to Parliament. According to these questionable accounts, the uncivilized Dervishes had committed atrocities themselves and tried to kill any

48 Gustave Moynier and Edouard Odier, “Formation d’une Société congolaise et africaine de la Croix-Rouge”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 20, No. 78, 1889, pp. 76–80.

49 Jason Burke and Philip Oltermann, “Germany Moves to Atone for ‘Forgotten Genocide’ in Namibia”, *The Guardian*, 25 December 2016, available at: www.theguardian.com/world/2016/dec/25/germany-moves-to-atone-for-forgotten-genocide-in-namibia.

50 “La Croix-Rouge allemande au Sud-Ouest de l’Afrique”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 39, No. 155, 1908, pp. 186–187.

51 One of the oddities about the *Bulletin* was that it reported the activities of not only the German Red Cross but also those RC units representing Prussia, Hesse, Bade, Württemberg and Bavaria. These latter were presented as independent units and not as sub-units of one German RC, even after early 1869, when the Germans agreed on one superior RC body sitting in Berlin. There was supposed to be only one National Society per State that had ratified the 1864 GC. Of course, in France for a time there were three aid societies using the RC name. Also, early on the *Bulletin* reported on the activities of an American sanitary (medical) commission even though the United States had not yet ratified the first GC and had no RC society by that name. It was as if Moynier was desperately eager to include the Americans in the RC network and skipped over inconvenient facts. Despite Moynier’s reputation for careful organization, there are quite a few oddities or inconsistencies evident in the journal. To cite another example, the complex and ever-changing British Red Cross was often referred to as the English Red Cross, a fact which probably did not aid RC expansion into Scotland.

medical persons who attempted to help them, so it was understandable that the British – who were not directly involved – had encountered difficulties.⁵² It seemed to be a case of the ICRC supporting colonial forces of whatever nationality in their “civilizing mission”, or displaying a preference for the Anglo-Saxons,⁵³ or both. British responsibility for war crimes against the wounded of a defeated “primitive” army seemed unimportant to the ICRC.

In general, as Britain, France, Germany and other European powers took control of non-Western areas by force in the glory days of colonialism, metropolitan National Societies followed. As auxiliaries to national military establishments, they organized RC branches in conquered areas. So, for example, as the French moved into Southeast Asia and North Africa, the *Bulletin* duly recorded French Red Cross activity in Indochina, Tunisia, Morocco, etc. There was no commentary from the ICRC about the Western violence and even atrocities that were at the heart of this expansion of “civilization” and “Christian” principles. Rather, via the *Bulletin*, the ICRC enthused over the spread of the RC idea to formerly uncivilized areas, noting that this was a positive benefit from war.⁵⁴

Some might object that one should not hold the nineteenth-century ICRC to the standards of the twenty-first century. That is a fair point. Much of the West at the time saw colonialism as having brought the rule of law, some economic development, and more education to colonized areas;⁵⁵ indeed, some in the West still consider this to be the case. The ICRC did not have delegates in the field in those days, and perhaps some candid reporting from the scene might have altered views in Geneva. In any event, there *were* nineteenth-century voices objecting to abuse of locals in places like the Congo Free State and other Western-dominated areas. The ICRC did not lend its voice to that chorus. As it helped organize RC assistance to various conflicts in the non-Western world, it had the opportunity to offer its comments, as it did on other subjects. But concerning the dark side of colonialism, Moynier and the ICRC and the International Conference were all silent – at least according to the pages of the *Bulletin*.

Structure of the Movement

From the beginning, the ICRC has been remarkably consistent about stressing the decentralized nature of the RC network. While the ICRC expressed pride in its accomplishments in nurturing and bringing to fruition the Red Cross idea as expressed by Henry Dunant, it never sought to command or control other RC

52 “Les Blessés de la Bataille D’Omdurman”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 30, No. 117, 1899, pp. 40–41; “Les Blessés de la Bataille D’Omdurman”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 30, No. 118, 1899, pp. 109–113.

53 See discussion below.

54 For a telling treatment of the “civilized” French supposedly spreading enlightenment values, including human rights, to Egypt via repression and atrocities, see Juan Cole, *Napoleon’s Egypt: Invading the Middle East*, St Martins Griffin, New York, 2007.

55 See, for example, Niall Ferguson, *Empire: The Rise and the Demise of the British World Order*, Penguin, London, 2002. In this book, Ferguson attempts a balance sheet of the positive and negative aspects of British and Western colonialism.

agencies. It vigorously and shrewdly defended its position as the central communications node in the network, and it did not hesitate to identify as the founding agency of the Movement and as having a special role to play regarding the Geneva Convention. As early as 1886 it referred to itself as the promoter and champion of that treaty, not leaving that activity to Swiss federal authorities. While it flirted with the idea of centralized enforcement of “Geneva law” as established by States, it did not push for centralized enforcement early on. It discussed the idea of some sort of union or federation of the National Societies, but it never showed in the *Bulletin* how to reconcile the idea of an RC union with the untrammelled independence of the National Societies.⁵⁶ The unity of the RC network remained strictly moral in these early days.⁵⁷

Back in 1864 at an informal meeting of individuals interested in the Red Cross idea, the American Charles S. Bowles—who was an observer at the diplomatic conference of that year—spoke in a favour of a hierarchical network of actors that would be regulated by an authoritative central organ. General Dufour, the first president of the ICRC, spoke strongly against the idea, arguing that the network should be decentralized; Dunant was present and did not object to this, indicating agreement with Dufour. For Dufour, uniformity of detail was unimportant.⁵⁸ This indicated that the ICRC as a whole was on the same page; it was not just Moynier that favoured a loosely organized network of humanitarian agencies.

In 1870 Moynier made clear in print his unwavering view of the various National Societies, saying that each was independent and manifested “self-government”.⁵⁹ The ICRC was merely the “intermediary” among these independent units, which derived their energy and support from being entirely national, not international.⁶⁰ At that time the organization said that its place was not on the battlefield; that role was for the national units. Moynier’s early position was that each National Society was free to use whatever emblem it wished. This position of course changed, but Moynier never changed his view about the independence of each national unit, whose accomplishments would be stifled by centralized authority.⁶¹ The ICRC would help with communications but sought no authority over others.⁶² The resolutions of International Conference were non-binding since the National Societies manifested complete autonomy.⁶³

56 “Congrès d’hygiène et de sauvetage, rapport de M. Gustave Moynier sur la VII^{me} question de la 2^{me} section”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 8, No. 29, 1877, pp. 13–25; “L’avenir de la Croix Rouge, par M. Gust Moynier”, above note 5, pp. 74–75.

57 Gustave Ador and Gustave Moynier, “Le Bulletin international (41^{me} circulaire)”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 9, No 33, 1878, p. 5.

58 “Une Conférence oubliée de la Croix-Rouge à Genève en 1864”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 15, No. 59, 1884, pp. 133–134.

59 Moynier used the English phrase, in “Du double caractère”, above note 9, p. 160.

60 *Ibid.*

61 “III. Sociétés de secours”, above note 23, p. 179.

62 *Ibid.*

63 “Projet de conférence internationale à Vienne”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 10, No. 39, 1879, p. 66.

Common ideals would hold the Movement together.⁶⁴ The only Conference resolutions that were binding were those from 1863, because they were essential; without those resolutions, there would be no RC network.⁶⁵ Otherwise, National Societies were totally independent.⁶⁶

The ICRC liked to project the view of itself as a disinterested actor with no legal authority and no special interests. In this self-image, it was an unofficial group from a small nation. It had simply been good at producing agreement within the RC network and had helped limit the scourge of war – including through the development of international law. It was completely independent of strategic politics and only sought to preserve its own freedom of action.⁶⁷ It is probable that the ICRC argued so strongly for the autonomy of National Societies in order to protect its own independence. If this was an early conscious strategy, it was to prove very useful not only in defeating Russian proposals for centralization but also after 1919.⁶⁸ It may also have been the case that the ICRC was influenced by the Swiss national political system, which manifested a relatively weak centre and relatively strong cantons.

A young and decentralized RC network did work tolerably well in the Franco-Prussian war and in the various Balkan wars. Neutral National Societies did send medical personnel and material – and money – to help victims. Specialized RC agencies created by the ICRC to collect information and coordinate aid were created and were busy in Basel, Trieste, Belgrade, Lourenço Marques, etc. The latter agency indicated some European interest in war victims in southern Africa due to the various Boer wars; of course, there was a European connection via the British and Dutch. Under the ICRC vision of the Movement, humanitarian aid did increase and war victims did benefit. The operation of the Movement in the 1912–13 Greek-Turkish war was sizable enough so that in retrospect it constituted a practice run in some ways for the Great War of 1914–18.

Despite its belief in a decentralized system, the ICRC spent much time and energy trying to get National Societies to implement the resolutions of the International Conference both in peace and in war. The ICRC view was paradoxical: the National Societies were totally independent, but they should follow the Conference's resolutions voluntarily. For example, in the late 1890s the Turkish Red Crescent considered what to do about a for-profit company using the red crescent emblem on its product, with a percentage of sales going to

64 *Ibid.*

65 “Organisation générale et programme de la Croix-Rouge”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 29, No. 116, 1898, p. 186.

66 *Ibid.*, pp. 186–187.

67 “Un dernier mot”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 31, No. 124, 1900, pp. 223–225.

68 See above note 41.

Turkey's National Society. The ICRC urged rejection of that idea, citing a resolution of the International Conference that had met in Karlsruhe.⁶⁹

From time to time Moynier slipped into the Mother Hen mode of pecking at various National Societies. The Turkish Red Crescent lacked vitality and had even collapsed at times. The Austrian Red Cross was disappointing in the lack of aid sent to the various Balkan wars. Montenegrin individuals had asked Geneva for help, but they were not a recognized RC society and had no local means for action.⁷⁰ All this was not terribly diplomatic; nor was it entirely diplomatic for Moynier to single out certain National Societies as good examples, such as those of Germany, the Netherlands and Russia, implying by contrast that other national units were not (and mentioning the French and the Swedes as among those trying to emulate the better examples).⁷¹ At times Moynier could let his righteous indignation overwhelm his sense of diplomacy, as when he chastised neutral National Societies for not caring enough about the Balkan wars compared to the Franco-Prussian war.⁷²

It is not clear what kind of feedback the Mother Hen articles triggered, but later issues of the journal were mostly more circumspect. However, in 1905 an unsigned piece castigated the Uruguay government for its lack of cooperation with the local National Society in an ongoing civil war.⁷³

Overall, while the ICRC might prod in various ways, such as by circulating questionnaires and otherwise asking if National Societies had done this or that, and while Moynier might even criticize with a tone of righteous indignation, the ICRC never sought formal authority over other RC agencies. The International Conference would pass resolutions as non-binding recommendations, and the ICRC would follow up in various ways to try to get them implemented.⁷⁴ It also manifested a right of initiative which included sending representatives *sur place*. For example, it decided on its own to send an observer to directly report on what was happening in the Greek-Turkish war of 1912–13.⁷⁵ It had sent an observer to the German-Danish war back in 1864. No other RC actor asked it to take such action.

69 Gustave Moynier, "Consultation sur l'emploi du Croissant-Rouge", *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 29, No. 114, 1898, pp. 62–65. Over time the ICRC and the National Societies were successful in legally limiting the red cross and red crescent emblems to humanitarian uses, mainly via national legislation but also by public international law – not that new laws prevented all misuse or scams.

70 "L'insurrection dans l'Herzégovine", *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 7, No 25, 1876, pp. 1–4.

71 "III. Sociétés de secours", above note 23, p. 182.

72 "L'insurrection dans l'Herzégovine", above note 70, especially p. 2.

73 "La Croix-Rouge uruguayenne pendant la guerre civile de 1904", *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 36, No. 142, 1905, pp. 144–145.

74 Morehead, above note 7, writes that the ICRC did not do much to shape National Societies. This is both true and false. The ICRC did not command, and it tolerated great variety in structure and function, but it did shape the National Societies in various ways. Without the ICRC's prodding and hectoring, the Movement would have been even more fractured than it was

75 "L'assistance aux prisonniers dans la guerre des Balkans: Visite à l'Agence internationale, aux Croix-Rouges serbe et grecque et au Croissant-Rouge", *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 44, No. 175, 1913, p. 201.

Moynier continued to put his faith in the spirit of the Red Cross as an international moral code that would triumph over bellicose nationalism – at least for RC agencies. This, despite seeing clearly in the Franco-Prussian war how difficult, indeed impossible, it was for the French and Prussian aid societies to act in a neutral way. Yet he continued to insist that the Movement should be decentralized, with totally independent National Societies and with no authoritative centralized body. It was a good formula for expanding the Movement and broadening humanitarian action in piecemeal fashion. It was not a good recipe for marshalling the putative resources of the Movement for maximum independent, neutral and impartial impact, as each National Society could decide to go its own way.

Moynier's views added up to an inconsistent position, papered over by a faith in RC ideas as a moral code. He consistently saw the dangers of narrow or even bellicose nationalism by *States*. He wanted to believe that the very same nationalism in *nations* could be checked by a universal and neutral humanitarian spirit as nurtured by social elites like himself. Yet that belief was undercut by the facts of the Franco-Prussian and other wars. Certain kinds of nationalism warped nations as much as States, and Moynier noted that not just State policy but also national public opinion could be belligerent.⁷⁶ The contradiction could only be resolved by stressing the role of social elites and *neutral* RC actors, even as the National Societies of belligerent States largely departed from independent, neutral and impartial assistance. Consistent with this view, the relatively neutral ICRC eventually became more active in the field, as each National Society became more and more a quasi-State agency and thus subject to the pull of militarized State interests.⁷⁷

This dogged optimism, leading to shifting ICRC policies, characterized the early ICRC as a whole. In 1906, the *Bulletin* published an erudite essay signed by Dr Adolphe Ferrière taking issue with pessimists about the human condition like Darwin, Spencer, Hobbes and Huxley. In a book review essay about the Russian Peter Kropotkin, Ferrière argued that RC history showed evolutionary progress in social cooperation. Christian charity had evolved into global solidarity. There was a social fraternity. There was more cooperation about humanitarian assistance. Savage competition could be limited by social development.⁷⁸ And there was indeed some humanitarian progress between 1863 and 1914, due in part to the dedication and even nagging of the ICRC.

The ICRC and States

Humanitarianism and social reform were “in the air” in the North Atlantic area in the middle of the nineteenth century – witness the activities of Florence Nightingale

76 “L’avenir de la Croix Rouge, par M. Gust Moynier”, above note 5, p. 67.

77 Hutchinson, above note 31, is exactly right that most National Societies became militarized and nationalized.

78 Adolphe Ferrière, “L’entr’aide et la Croix-Rouge”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 37, No. 147, 1906, pp. 191–195.

and Clara Barton, in addition to Henry Dunant. When the ICRC got started in 1863 as a spin-off of the Geneva Society for Public Welfare, there were numerous other private groups active to improve the human condition, whether focusing on the domestic results of the industrial revolution or international war or both. There was, for example, the Order of St John of Jerusalem, which was formally integrated into the British Red Cross for a time. There was the network of the Society of Samaritans, which often interacted with RC agencies in various nations. Most States lacked broad welfare policies, and a multitude of private agencies attempted to fill the void.

From the very start, the ICRC led by Moynier sought to link what became the Movement to State approval and support. In part the early focus on the war wounded made this necessary, because such a focus required the cooperation of national military establishments. In part it happened because the lawyer Moynier and the ICRC wanted to utilize public international law to endorse their values, and it was States that made that law. And in part it happened because the ICRC and other RC actors had a positive view of the governmental role. For the ICRC and many other RC actors, they were close to State authorities and in some cases inseparable from them. In any event, Moynier and the ICRC sought to create in each State *the* officially recognized aid agency. This status could only be conferred by governments speaking for States. The ICRC and the rest of the Movement were successful in these objectives, but their success came with a price – and that price was not being able to push States beyond what they were then willing to accept.

By the time the *Bulletin* commenced publication in 1869, the embryonic ICRC had already worked closely with the Swiss State to produce an international treaty to neutralize the war wounded and those that attended them. ICRC officials were close to, and sometimes part of, the Swiss state. Moynier and Dufour were part of the Swiss State delegation that voted for the 1864 GC. Moynier represented Switzerland in various conferences devoted to social welfare public policies. General Dufour had been high in the Swiss army, and Dr Appia had consulted with it on medical matters, as had Dr Maunoir. Dunant was an outsider, but the rest of the original ICRC was not. Moreover, almost all Swiss males were citizen soldiers, subject to call-up for military duty. This Swiss pattern found an echo in many of what became the National Societies. Members of the upper classes had the time and money to devote to social welfare, and they often overlapped with political elites. There were exceptions, as per Clara Barton and the conflicted evolution of the American Red Cross. At one point the *Bulletin* published a list of upper-class notables who had sponsored or endorsed various RC agencies,⁷⁹ and some of these notables were also State officials. Indeed, any number of RC officials were also State officials.

RC organizations were supposed to be independent and non-political in the context of partisan and strategic politics. They were to be private rather than public/governmental. The pages of the *Bulletin* indicate that rigorous attention to these

79 “Les protecteurs princiers de la Croix-Rouge”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 29, No 113, 1898, pp. 5–6.

points was often ignored by the early ICRC, both in its own policies and in its lack of commentary about other RC units. To take just a few leading examples (in addition to Moynier and Dufour being part of the 1864 Swiss delegation that adopted the first GC), ICRC member Edouard Odier was part of the Swiss delegation to the Hague Conference of 1899 – and Swiss ambassador to Russia. The Belgian minister of war was named head of Belgium’s National Society,⁸⁰ and President William Howard Taft became president of the American Red Cross. When the ICRC set up a coordinating agency in Belgrade for the Balkan war in 1912–13, it put in charge the local Swiss consular official, who remained Swiss consul general even as he put on his ICRC hat.⁸¹ We have already noted that Moynier himself became consul general for King Leopold and his Congo Free State. The examples could be expanded *ad nauseam*.

Then there was the matter of States being invited to the International Conference from 1867 on. True, State attendance provided an official endorsement for the RC network, and the RC network could not advance international humanitarian law without the cooperation of States. But how could the International Conference be private and non-political when States were involved – with voting rights? The ICRC for some reason turned a blind eye to, or at least had a loose conception of, the ideas of RC independence and non-political status as a private actor. One reason was that the ICRC was too close to, and overrated the humanitarian nature of, the Swiss government. This orientation was to come back and bite the ICRC during World War II.⁸²

When Moynier, in particular, strategized about how to build the Movement, he often carefully calculated how to deal with States – the above confusion notwithstanding. Almost immediately after the ratification of the 1864 GC, there was an effort to revise it. Certain wording needed to be clarified, and the changing nature of warfare meant that there were victims from naval warfare, not just from land armies. A set of proposed revisions to the 1864 GC existed from 1868, but certain important States were not enthusiastic about further legal obligations in armed conflict. The ICRC frequently consulted with the Swiss government about how to proceed, or even whether to proceed, and there were

80 F. Sigart and François Bougard, “Présidence de la Société belge”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 11, No. 41, 1880, p. 14.

81 “L’assistance aux prisonniers dans la guerre des Balkans”, above note 75, p. 200.

82 In the 1940s, the ICRC Assembly – the organization’s governing board – contained several individuals who were simultaneously Swiss federal officials in Bern. Swiss State policy was to cooperate with the Nazis, especially regarding banking and refugees, and not to antagonize Berlin unduly. The issue came up in the ICRC Assembly of how hard to press the Nazis on various humanitarian issues, and whether to do so publicly. All these ICRC top officials wearing two hats urged caution and discretion, as did a few other Assembly members. While the Swiss government *per se* did not pressure the ICRC to appease the Nazis, the situation *circa* 1942 indicated that ICRC independence as a private actor was compromised by the presence of these Swiss State officials. See Isabelle Vonèche Cardia, *Neutralité et engagement: Les relations entre le Comité international de la Croix-Rouge (CICR) et le Gouvernement suisse 1938–1945*, SHSR, Lausanne, 2012. The modern ICRC Assembly forbids outside memberships that present a conflict of interest with the organization’s humanitarian objectives. Of course, one still has to apply general rules to specific cases. See, further, David P. Forsythe, “A New International Committee of the Red Cross?”, *Journal of Human Rights*, Vol. 17, No. 5, 2018, pp. 533–549, about contemporary conflicts of interest among Assembly members including the president.

sometimes differences of opinion.⁸³ A second GC, revising the first, was not adopted until 1906. The *Bulletin* sometimes recorded the view that it was unwise to antagonize governments, since they were in a position to advance or hinder RC objectives⁸⁴ – one thus had to calculate, for example, when the time was right to seek more public law aimed at helping war victims. Moynier certainly tried to make such calculations.

Moynier could be sceptical about States, perhaps excepting the Swiss authorities in Bern. He recognized that States might indeed consent to the 1864 GC for the protection of wounded soldiers but then violate its terms. He was at least partially a political realist who understood the power of nationalism and governments' pursuit of amoral national interests. When a newly declared State located in the Amazon basin sent a letter to the ICRC offering to ratify the 1864 GC, Moynier understood clearly that it was not about pledging support for humanitarian values but about claims to independence for a new State because of profits to be made from the area. Rather than just pass on the letter to the Swiss authorities who registered State acceptance of humanitarian treaties, Moynier used the *Bulletin* to expose the game for what it was.⁸⁵

The early ICRC did not want the RC network to get involved in charges of State violation of the 1864 GC, arguing that an RC role would serve no useful purpose.⁸⁶ The ICRC did get involved, not in terms of passing judgment but in terms of publishing claims and denials in the *Bulletin*. The initial caution proved well founded. For a time, the *Bulletin* published charges and counter-charges arising from various wars, with no apparent benefit to anyone. It eventually stopped the practice at some point after the present era of study.⁸⁷

Moynier, however, did not hesitate to call out at considerable length the Ottomans for their violations of the 1864 GC in the war with Russia during 1876–78, especially after the first phase of that war, during a long truce.⁸⁸ In this he was reflecting the widespread European view that the Ottoman Empire was the sick man of Europe (it followed that the Turkish Red Crescent was also sick, which it was for much of the time). Moynier was much more critical of the Ottomans than about other parties to the conflict (including Serbia and Montenegro), whose records under the 1864 GC were not perfect, so there was some bias on the part of the ICRC against the Turks. Much later, the ICRC (i.e.,

83 “Une nouvelle démarche relative à la ratification des articles additionnels à la Convention de Genève”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 14, No. 54, 1883, pp. 59–63. The Swiss Red Cross also expressed its views on this matter.

84 See, for example, Gustave Moynier and Edouard Odier, “Congrès international des œuvres d’assistance en temps de guerre (103e circ.)”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 31, No. 123, 1900, p. 134.

85 “L’Etat libre de Counani et la Convention de Genève”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 35, No. 137, 1904, pp. 10–11.

86 “Conférence préparatoire à la Conférence Internationale de Vienne”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 2, Nos 7–8, 1871, pp. 181, 183–184.

87 See, further, Lindsey Cameron, “The ICRC in the First World War: Unwavering Belief in the Power of Law?”, *International Review of the Red Cross*, Vol. 97, No. 900, 2016, pp. 1099–1120, available at: www.icrc.org/en/international-review/article/icrc-first-world-war-unwavering-belief-power-law.

88 G. Ador and G. Moynier, above note 21, pp. 164–176.

Moynier) somewhat defensively tried to justify this tilt by saying that the events in question were uncontested.⁸⁹ It was also the case that the victims of some Turkish behaviour were Christians from Russia and the Balkan areas.⁹⁰

As the Franco-Prussian war unfolded, Moynier wrote a personal essay advocating the establishment of an international court to resolve claims about war crimes. He thought world public opinion would sustain such a court's judgments. He was affected by the Alabama claims arbitration stemming from the American Civil War, a successful arbitration panel that sat in Geneva. He even drafted a statute for such a court.⁹¹ But this was not a formal proposal in the name of the ICRC, and this personal thinking-out-loud did not result in concrete developments; States were not ready for such action. Later, with more experience, Moynier still recognized the need for an authoritative court to enforce humanitarian law, but he concluded that such a body was unattainable because States would not consent to it. They would not use arbitration or judicial settlement concerning themselves and the laws of war. Moynier then rethought his earlier optimism about courts; at best, he wrote, maybe some kind of mock court could educate.⁹² Nevertheless, he retained a strong belief in the role of international law, and he helped establish – and was active in – the Institute for International Law, originally based in Ghent.

In general, the ICRC and Moynier tried to be careful about projecting RC activity into situations where a key State was opposed. In the various Boer wars in southern Africa around the turn of the century, before any Boer State was formally recognized by other States, the ICRC was careful to obtain the consent of the United Kingdom before encouraging RC assistance from the Netherlands or elsewhere.⁹³

To cite another example of this caution, the Spanish Red Cross wanted the ICRC to act on behalf of Spanish citizens who had been taken prisoner during the fighting between rebels and the United States – the new sovereign in the Philippines after the Spanish-American War of 1898. Washington was predictably unenthusiastic about this outside involvement, especially by Spanish sources, and so was the ICRC. The ICRC (i.e., Moynier) declined to get involved on a variety of grounds: that the RC network should concentrate on the war wounded and not on all the ills that might arise from fighting (even though RC actors were already involved in all sorts of activities pertaining to prisoners of war (PoWs), natural disasters, etc.); that previous inquiries had not led anywhere, either with the American Red Cross or the rebels; and that only the US

89 “2. Questions de fait”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 31, No. 124, 1900, p. 219.

90 See discussion below, where I discuss the case of the Armenians.

91 “Note sur la création d’une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la convention de Genève, par M. Gustave Moynier”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 3, No. 11, 1872, pp. 122–131.

92 “L’avenir de la Croix Rouge, par M. Gust Moynier”, above note 5, p. 78.

93 “Les insurrections dans l’Afrique Australe”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 12, No. 45, 1881, p. 11. See, further, Daniel Palmieri, “How Warfare Has Evolved – a Humanitarian Organization’s Perceptions: The Case of the ICRC 1863–1960”, *International Review of the Red Cross*, Vol. 97, No. 900, 2015, pp. 985–998.

government could say what démarches might be allowed given the demands of military necessity.⁹⁴ Since part of the ICRC's position did not accord with the facts, namely that RC actors should concentrate only on the war wounded, it was fairly clear that Moynier did not want to run the risk of irritating the United States through further action.

In general, the ICRC was mostly deferential to States despite some scepticism about their policies, and Moynier was reluctant to have the RC involved in civil wars, which were not covered by the 1864 GC, during this era. He explicitly refused involvement in a civil war in Uruguay.⁹⁵ He tried to distinguish national uprisings and responses by a National Society, as in Spain during the Carlist unrest, from ICRC involvement as part of an international RC response. He was opposed to the latter in civil wars.

On the other hand, the American Red Cross and other RC actors jumped into the controversy in Turkey about the Armenians *circa* 1905. The ICRC, too, joined in the international chorus of criticism about Turkish policies. As already noted, most sectors of European opinion did not think highly of the declining Ottoman Empire, and in this case the ICRC showed little respect for Turkish sovereignty and domestic jurisdiction. Of course, the Armenians were considered to be Christian, which figured into the mix of motivations by some outsiders. There was a pattern of Europeans engaging in "humanitarian intervention" when it was a matter of Christian victims of the Ottoman Empire, whether in Greece, Bulgaria, Lebanon or Anatolia.⁹⁶

Over time the ICRC became well known to States because of practical and legal activity related to wars and other situations involving violence. It achieved considerable status in diplomatic circles. Moynier was named honorary president of the 1906 diplomatic conference for revision of the first GC. The price for this status was a continued caution or conservatism in the ICRC's policies. The ICRC proved reluctant to vigorously push States further than they wanted to go, at least in public diplomacy. It developed a long-term view, always hoping for future progress via cooperation with States even if the pressing issues of the moment went unresolved because of State non-cooperation.

Future research

The *Bulletin* is a rich source of material about the ICRC from its early days to World War I, and already this essay is longer than originally intended. In this section I

94 "Les Prisonniers de Guerre aux Philippines", *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 30, No. 118, 1899, pp. 90–91.

95 "La Croix-Rouge uruguayenne pendant la guerre civile de 1904", *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 35, No. 138, 1904, p. 128.

96 Gary J. Bass, *Freedom's Battle: The Origins of Humanitarian Intervention*, Knopf, New York, 2008. Money for the Armenians from the American Red Cross was channelled through US government officials, another breach of the line between public and private, non-political and political.

briefly mention a few points drawn only from this era that seemed important, but for which space and time compel me to omit full discussion and documentation.

From the *Bulletin* it is clear that the ICRC was extremely dedicated and serious about its work. Dr Ferrière authored a series of essays reviewing the literature on military medicine, and this series seems thorough and well informed. It would be interesting to know how much such efforts in the *Bulletin* led to improved medical practices, both in the RC network and among national military units. There was a prodigious amount of reading and translating done by various members of the ICRC related to wounded soldiers and other war victims. What impact did it have?

Relatedly, one theme evident in the *Bulletin* was how to get wounded soldiers off the battlefield quickly and on to proximate medical treatment. There were articles and drawings about stretchers carried in different ways – on bicycles, on pack animals, in mountainous terrain, on skis, on sleds, by vehicles, in train cars; with the injured sitting up rather than lying down; with the battlefield lighted up at night by new lamps; with different types of surgical field hospitals. I thought at one point that if I read one more essay about stretchers, I would collapse and need one myself. More seriously, it would be interesting to know if this concern by RC actors, coordinated and spread by the ICRC, was ahead of the curve of knowledge in national military circles, and if the published material actually improved the treatment of victims. Did anyone pay attention to the *Bulletin* on this important subject?

Did other members of the ICRC, or the Movement for that matter, express any concern or try to control in any way the evident personal biases of Moynier? He clearly did not like Henry Dunant, and when Dunant shared the first Nobel Peace Prize in 1901, the *Bulletin* published a churlish article pointing out that Moynier had really developed the ICRC and pushed the RC network forward, winning a prize from a French organization for his efforts. Moynier clearly favoured Clara Barton and publicly took her side when there was a brouhaha in the American Red Cross over leadership issues *circa* 1904. She was a friend of the ICRC, and the *Bulletin* gave more space to her death in 1912 than it had to Dunant's in 1910. But she was not a superb administrator, and the finances of the American Red Cross were not in order. Those trying to get her to retire had some valid reasons. The articles in the *Bulletin* took her side in a needless and heavy-handed way. For that matter, Moynier said such nice things about the American Red Cross – favourable comments not found in the *Bulletin* about any other National Society – that one might wonder why he developed such views. At one point Moynier saw the Americans as the new and powerful leaders of Christian civilization.⁹⁷ Yet he knew of brutal US policies in the Philippines, because he mentioned them in the journal.

97 Henry Dunant was born Jean-Henri Dunant; he came from an Anglophile family and preferred to be called Henry. Gustave Moynier also seemed to favour the Anglo-Saxons, but if he preferred to be called Gus, we have no record of it.

Early on it became clear that the Movement would focus on more than just the war wounded in international war. The National Societies needed something to do in peacetime besides think about the next war, and many of them were already active regarding national and international responses to natural disasters when recognized by the ICRC. For example, some RC units were active regarding industrial accidents. Dr Ferrière of the ICRC wrote about those rejected by the military because of mental health problems, and the lack of attention to that kind of health issue. Concern for the wounded fairly quickly led to interest in PoWs, refugees and other victims. When the ICRC set up an agency in Basel in 1870 to coordinate aid for wounded soldiers in the Franco-Prussian war, it collected information about PoWs. By 1913, Dr Ferrière was prescient in saying that attention to PoWs in the future would greatly augment the RC's good deeds. As early as 1909, the *Bulletin* used the general phrase "suffering humanity" to refer to RC concerns. Does the ICRC and/or the Movement have a particular focus or niche? Are there limits to ICRC and RC concern about individuals in dire straits? Where does the RC focus stop? Is there a debilitating "mission creep"?⁹⁸

It was evident that much of the actual work done by RC units was done by women. In a few cases the National Society was led by a woman, such as Clara Barton and then Mabel Boardman in the American Red Cross. Mostly the pattern was male leadership but with a heavy reliance on female staff. There was even the occasional remark, including by the Queen of England, about RC work being women's work. Some national RC units were virtually all female, such as France's Union des Dames and Association des Dames. Why was it, then, that all of the attention to, and recognition of, women in the *Bulletin* had no apparent impact on the ICRC, which had no female members on the top board during 1863–1917? Given this absence, it was ironic that an ICRC report in 1913 noted that the Serbs had failed to utilize women effectively in their National Society and health services, compared to some other Balkan organizations.

There are many other interesting points to be raised from reading the early days of the *Bulletin*, but not all readers of this article may be ICRC junkies – so perhaps it is time to stop for now.

Conclusion

Some readers may think I have been too critical about the ICRC, and particularly Moynier, for the period under review. In this regard I relate two personal anecdotes. I saw one internal ICRC document some years ago that referred to me as a friend of the organization – which was accurate. I also recall what one former

98 The author was part of a study team which asked these questions in the mid-1970s as part of the Tansley Report or "Big Study" of the Movement. Our conclusions and even our questions had little impact on anyone. For a brief introduction, see Donald D. Tansley, "Reappraisal of the Role of the Red Cross", *International Review of the Red Cross*, Vol. 14, No. 155, 1974, pp. 71–75. Tansley's final report, with supporting studies, was much longer, but length does not equate with influence.

ICRC official said to me – namely, that one has to do the objective analysis before one can praise.

There are several ICRC assertions about RC history in the *Bulletin* that are actually true. One of these was that the ICRC was the gearbox in the RC machinery. The ICRC and particularly Moynier were committed to limiting the destruction of war and dogged in their pursuit of that objective, with the very demanding goal of building an RC network recognized as *the* universal and official aid institution – initially for situations of violence. Two treaties on humanitarian law were concluded in 1864 and 1906, thus laying a big part of the foundation for what is today widely called international humanitarian law. The ICRC was deeply involved in both treaties and mostly responsible for the first. The ICRC and especially Moynier achieved a great deal in the era reviewed, all of which was then followed up by other ICRC leaders in subsequent eras. There is a lot to be proud of in the historical record up to World War I.

The fact that the ICRC and Moynier were indeed proud, and brimming with *amour propre*, and that as human beings they were imperfect and made mistakes common to their times, is simply part of the record. Subsequent eras are equally interesting, and the *Bulletin* and then the *International Review of the Red Cross* got much better. But that is grist for a future mill.

To inform or govern? 150 years of the *International Review of the Red Cross*, 1869–2019

Daniel Palmieri*

Daniel Palmieri is a historian who works with the ICRC. He has written several works on the history of the ICRC and the history of war.

Abstract

The International Review of the Red Cross (formerly the Bulletin Internationale des Sociétés de Secours aux Militaires Blessés) is celebrating its 150th anniversary in 2019, making it the oldest of the general publications produced by the International Committee of the Red Cross (ICRC). Originally created as a communication tool for the entire International Red Cross and Red Crescent Movement, the Review rapidly changed its course to become first the primary mouthpiece of the ICRC for many years, and finally an academic journal. This article will retrace the history of this evolution, during which, under cover of humanitarianism, political factors played a significant role.

Keywords: International Review of the Red Cross, *Bulletin Internationale des Sociétés de Secours aux Militaires Blessés*, International Red Cross and Red Crescent Movement, information, publications.

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“To read it is to become aware. To circulate it is a good deed.”¹ These were the words chosen by International Committee of the Red Cross (ICRC) president Marcel A. Naville in October 1969, as he paid homage to the oldest of the ICRC’s publications. The first issue of the *Bulletin Internationale des Sociétés de Secours*

* The views expressed here are those of the author and do not necessarily reflect the position of the International Committee of the Red Cross.

*aux Militaires Blessés Publié par le Comité International*² had been published 100 years previously, on 22 or 23 October 1869.³ Born simultaneously with what we now call international humanitarian law (IHL), the *Bulletin* – and from 1919 onwards, the *Revue Internationale de la Croix-Rouge* (*International Review of the Red Cross* since 1961) – is the oldest journal specializing in the field. At its inception, however, this periodical was not meant to follow and study the development of a new branch of law that aimed to “humanize” warfare. Like several other journals of the time, the *Bulletin* was intended to “be like the ‘official gazette’ of the Movement as a whole”.⁴ It may therefore seem surprising that this publication has made the transition from a Red Cross newsletter to an academic journal functioning as a think tank on humanitarian matters – and on IHL in particular. This transformation, which took place progressively over several decades, was possible only because the ICRC played a distinctive role, far beyond what was normally expected of a “mere” editor. For the first time, this article will attempt to explore this via the hidden underpinnings of the *Review*.⁵

A difficult birth

“Is it desirable to found an international journal of the Relief Societies?” This question appeared on the agenda of the very first International Conference of the Red Cross (International Conference), held in Paris in August 1867⁶ at the margins of the International Exposition. It is true that the International Red Cross and Red Crescent Movement (the Movement) had expanded considerably since its birth in 1863–64. Some twenty States – including the great European powers – had already signed up to the 1864 Geneva Convention and founded national societies for the relief of wounded soldiers, the forerunners of today’s National Red Cross and Red Crescent Societies (National Societies).⁷ But this was not enough. The more the charitable movement expanded, the more it needed to become known. There was

1 Marcel A. Naville, “The Centenary of our Publication”, *Revue Internationale de la Croix-Rouge*, Vol. 9, No. 103, 1969, p. 520 (*Review*’s translation). This article shall refer to the French-only *Revue* and its 1948–61 English supplement by the French title, reserving *International Review of the Red Cross* for the English edition that first appeared in 1961.

2 Here, “Comité” refers to the Comité International de Secours aux Militaires Blessés (International Committee for the Relief of Wounded Soldiers), the name by which the ICRC was known until December 1875.

3 The exact date of the first issue is unknown. In a letter, publisher Georg in Geneva mentions having received copies of the *Bulletin* on 22 October: see ICRC Archives (ICRCA), A AF 16, 2/202. The ICRC gives the date of 23 October: see “Compte des débiteurs pour annonces”, ICRCA, A AF 47, *Registre des abonnés au Bulletin International des Sociétés de Secours aux Militaires Blessés*.

4 “Aux abonnés du Bulletin”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 5, No. 20, 1874, p. 193.

5 This article cannot possibly deal with all the problems that one might associate with the history of the *Review*. For instance, it shall not address issues such as how the readership received or receives the publication, or the journal’s ability to influence the debate on IHL.

6 ICRC, *Conférences internationales à Paris: Sociétés de secours aux militaires des armées de terre et de mer*, Paris, Commission Générale des Délégués, 1867, p. XII.

7 *Mémorial des vingt-cinq premières années de la Croix-Rouge 1863–1888 publié par le Comité international à Genève*, Imprimerie B. Soullier, Geneva, 1888, pp. 284, 290–291.

therefore a constant need for what was then called “agitation” among the general population.⁸ At a time when the written word reigned supreme (and, indeed, alone), setting up a publication seemed the most logical way to achieve this.

Reading the minutes of the International Conference, it becomes apparent that the question was somewhat ambiguous. In fact, the initial idea was not to publish one single journal for all the relief societies, but rather for each of them to produce its own publication in an *ad hoc* manner. Some (France, Belgium, Prussia) had already done so,⁹ “but this is no longer sufficient for the European, international or national movement”.¹⁰ Happily for the very existence of the future *Review*, this interpretation of the question was abandoned in favour of discussion on an international journal “in several languages, [which] would inform the friends of the movement, in every country, of the progress that it achieved”.¹¹ All that remained was to decide who would be in charge of the new publication. But this simple point, which at first appeared to be purely practical in nature, would reveal itself to be problematic. In addition to the purely practical aspects was a geopolitical issue. Logically, a global journal should be published by a supra-national organization. The only such organization in existence at that time was the International Committee for the Relief of Wounded Soldiers, which had founded the Movement but had its seat in Geneva and was composed entirely of Genevan citizens. That point was a source of controversy during the debates of the Third Commission of the International Conference. The first shot was fired by one of the members of the central committee of the French relief society, Count Félix of Bréda, who claimed that the “international” Committee in Geneva, as it existed since 1863, was international in name only, due to the mono-nationality of its members. Furthermore, its status was not carved in stone as, for the time being, the Committee was merely a provisional body and existed only in the absence of a better option. The International Committee of Geneva, aware of its ephemeral character, had suggested that the International Conference reflect upon its “complete reorganization”¹² – all while advocating permanent status for the existing Genevan organization,¹³ supplemented by foreign members. The Count of Bréda held a very different opinion on this point,

8 At the time, the word “agitation” was more commonly used in its sense of “arousing public concern about an issue and pressing for action on it” than it is today.

9 ICRC, above note 6, p. XIV.

10 *Ibid.*, Work of the Third Section, Eighth Session, undated, report by Huber-Saladin, p. 42.

11 *Ibid.*, Seventh Session, 22 June 1867, p. 26.

12 *Ibid.*, Second Part, First Session, 26 August 1867, p. 21.

13 Moynier wished to add “a certain number of foreign members” to the Geneva Committee. However, he stated that “this international element should be attached to the Geneva Committee that founded the work, as otherwise its members would be excluded from active participation in that which has been their constant concern for over four years”. “Proposition relative à la création d’un conseil supérieur de l’œuvre internationale des secours aux militaires blessés, adressée par le Comité genevois fondateur de l’œuvre aux membres de la Conférence de Paris”, August 1867, ICRC, A AF 21/14, p. 7. The Geneva Committee would form an “executive committee that would recruit its own members and would distribute among its members the functions of president, vice-president and secretary, ... in view of the difficulty of having these persons chosen by electors scattered across the entire world.” *Ibid.*, pp. 9, 7.

maintaining that no international committee of the Movement could be located in a provincial town belonging to a State that played only a marginal role on the political chessboard. The conclusion was self-evident: Paris, international city *par excellence*, rich in resources of every kind and city of international diplomacy, must be the seat of a brand-new, authentically international committee. And Paris therefore was the city in which the international Red Cross journal should be published.¹⁴ This proposal was met with scepticism from the other members of the Commission,¹⁵ including members of the French central committee. Huber-Saladin, for instance, maintained that on the contrary, “Geneva, by all reports, ... appears to be the more preferable city”¹⁶ and that “an international journal published in Geneva [would be] one of the consequences generally recognized as inevitable of the necessary reorganization [of the International Committee]”.¹⁷ So alongside a welcome crop of new national publications, he wished to see the “creation of an international journal, the organ of the International Committee of Geneva”, simultaneously settling the question of the Committee’s location.¹⁸ Count Bréda did attempt to turn the opinion of the Commission in his favour by presenting a new report – this time more aggressive towards Geneva and Switzerland¹⁹ – but his attempt failed and the Commission decided in favour of Geneva.²⁰ To spare the feelings of certain French representatives, the International Conference decided in a vote held on 30 August 1867²¹ to both retain an International Committee in Geneva and set up an International Sub-Committee in Paris, which was intended to become “a kind of museum, a permanent exhibition of everything related to the relief societies; a type of repository”.²² The question of the journal remained unresolved, as there were those who continued to believe that “founding an international journal was hardly possible except in Paris”.²³

The following day, when he spoke on this question on behalf of the ICRC, its president Gustave Moynier was only partly reassured, because while an International Committee – of which the details remained to be clarified – was now certain to remain in Geneva, and a “Geneva Committee”²⁴ would continue

14 Véronique Harouel, *Genève-Paris, 1863–1918: Le droit humanitaire en construction*, Henry Dunant Society, ICRC and French Red Cross, Geneva, 2003, pp. 250–251.

15 “The members of the section accept the practical side of this report, but are not entirely in agreement with the ideas expressed therein concerning the choice of a city other than Geneva as headquarters of an international committee.” ICRC, above note 6, Work of the Third Section, Seventh Session, 22 June 1867, pp. 37–38.

16 *Ibid.*, p. 38.

17 *Ibid.*, Eighth Session, undated, p. 48.

18 *Ibid.*, p. 51.

19 “Original du rapport fait par le Comte de Bréda à la Conférence de Paris (1867) sur le choix de la ville qui devra être le siège du Comité international”, ICRC, A AF 6, 1/110.

20 “The geographical location of this city, the political neutrality of Switzerland to which it belongs, historical tradition and conscience of a duty towards the founders of the movement, would appear to have been the deciding factors.” ICRC, above note 6, Second Part, Sixth Session, 30 August 1867, p. 184.

21 *Ibid.*, p. 190.

22 *Ibid.*, p. 188.

23 *Ibid.*

24 This committee was intended to act as an “executive committee and to run the day-to-day affairs” of the ICRC. *Ibid.*, Seventh Session, 31 August 1867, p. 257.

to exist and to direct the Movement,²⁵ as he had hoped, it did not necessarily follow that the Committee would be running the future international publication. He therefore expressed himself in terms that he hoped would promote unity: “Publishing a journal on our own would be a weighty matter for us. Clearly, all the committees would need to work together. It would not be our journal – it would be the journal of all.”²⁶ And all would have to put their hands in their pockets, because as a good Genevan banker, Moynier immediately raised this “very prosaic” issue: “To establish an international journal, it must be collectively supported by all. ... We [the International Committee] could perhaps support the journal for one year or two, but not more... our resources would of course be limited.”²⁷ Clearly, the ICRC wished to control the journal, but at the same time it did not wish to bear the cost on its own.

The Conference did not take a final decision on this point, nor on the reorganization of the International Committee, leaving Geneva to sound out the National Societies on the subject. Moynier quickly did so, sending a circular to interested parties on 21 September 1867.²⁸ The question of the international journal “published in Geneva, in French”, appeared, particularly in terms of its budget. The circular closed with a questionnaire that, among other things, asked the National Societies if the International Committee should publish a journal and, if so, to what extent they were prepared to finance it.

The response was mixed. While the majority of the central committees accepted the idea of a journal, their financial contributions would be limited, and fell far short of the 4,000 Swiss francs that Moynier had budgeted to produce a monthly journal with a circulation of 500 copies.²⁹ Furthermore, the place of publication was still controversial, with the French central committee – supported by that of Belgium – accepting such a publication “on the condition that it be published in Paris”.³⁰ The idea was to link the presence of a journal to that of the Red Cross museum planned for the French capital. In the report on his survey that he sent to the National Societies in June 1868, the ICRC president noted that “it’s therefore between Paris and Geneva that the choice must be made”.³¹ In an effort to tip the balance, Moynier mentioned that the Third Commission of the Paris Conference had offered the management of the journal to the International Committee, and hence to Geneva. He also suggested – inaccurately – that the Conference itself had been in favour of this.³² His remaining arguments are a

25 “Comité international (avec les membres étrangers déjà désignés par plusieurs Comités centraux à la suite de la circulaire du 21 septembre 1867”, ICRC, A AF 21/11.

26 ICRC, above note 6, Second Part, Seventh Session, 31 August 1867, p. 243.

27 *Ibid.*, p. 244.

28 “Le Comité international de secours aux militaires blessés à MM. les Présidents et les Membres des Comités centraux dans les divers pays, 9^e circulaire, Genève 21 septembre 1867”, ICRC, A AF 48/2.

29 Moynier carried out complex calculations to determine the share that each National Society should pay. ICRC, A PV, Comité, meeting of 30 November 1867.

30 ICRC, A PV, Comité, meeting of 1 February 1868.

31 “Mémoire adressé par le Comité international de secours pour les militaires blessés à MM. les Présidents et les membres des Comités centraux dans les divers pays”, Imprimerie Soullier, Landskron & Wirth, Geneva, 20 June 1868, p. 12.

32 *Ibid.*

subtle mix of hypocritical false modesty (“If we are considered more qualified than others to do this work, we shall endeavour, out of devotion to the movement, to prove ourselves worthy of the confidence shown in us, but we wish to state that we would not solicit [the production of the journal] in any manner whatsoever”)³³ and a vigorous rejection of the arguments in favour of producing the journal in Paris, especially given that “those in favour of Geneva ... meet with hardly any objection”.³⁴ To conclude, however, Moynier left it to the forthcoming International Conference in Berlin to decide the matter.

The Conference agreed with the Geneva Committee on every point. Not only was the idea of an international museum in Paris abandoned – cutting the legs out from under any argument in favour of publishing an international journal in that city – but the “International Committee of Geneva”, in its original and hence exclusively Genevan form, was tasked with editing a “literary publication that will link the central Committees of the various countries and bring to their attention official or other information of which they should be aware”. Indeed, the ICRC had achieved total victory, as this publication was to be produced “without its members incurring any costs”.³⁵

The *Bulletin International*

Riding on its success in Berlin, the ICRC immediately got to work. The minutes show that the question of the journal was raised at every meeting of the Committee from May 1869 onwards. The title of *Bulletin International* was first mentioned at the meeting of 29 May 1869. This title was certainly suggested by Moynier himself, following discussions with the president of the French central committee, Count Sérurier.³⁶ However, it does appear that the ICRC would have liked to have changed the title before the first issue was published. This point is mentioned by two indirect sources: a letter from a regular contact of the ICRC – Théodore Vernes d’Arlandes, a Genevan citizen living in Paris – and an entry in the minutes of the Committee. On 9 October 1869, Vernes wrote:

The more I reflect on the title of your Bulletin, the more I am persuaded that it will not be favorably received. In France, as you know, red is very much the colour of revolution. ... I do not see why you need such a title. I should have understood it more readily if this were a daily newspaper for popular consumption, to be sold on the street.³⁷

33 *Ibid.*, p. 13.

34 *Ibid.*

35 *Compte rendu des travaux de la Conférence internationale tenue à Berlin du 22 au 27 avril 1869 par les délégués des gouvernements signataires de la Convention de Genève et des Sociétés et Associations de secours aux militaires blessés et malades*, Imprimerie J. F. Starcke, Berlin, 1869, p. 225.

36 Letter from Sérurier to Moynier, 14 June 1869, ICRC, A AF 6, 1/181.

37 Letter from Vernes d’Arlandes to Moynier, 9 October 1869, ICRC, A AF 16, 2/200.

The title in question was *Bulletin International de la Croix-Rouge*, but this was abandoned in favour of *Bulletin International des Sociétés de Secours pour les Militaires Blessés* (*International Bulletin of Societies for the Relief of Wounded Soldiers*).³⁸

On 15 June 1869, the ICRC officially announced the launch of the periodical to the central committees.³⁹ The *Bulletin* was to be published every three months, starting in October 1869. For the first, trial year, the annual subscription was set at 6 francs.⁴⁰ Surprisingly, the ICRC decided to cover the entire cost of the publication, merely encouraging the National Societies to take out subscriptions. It stated:

If the income from subscriptions should prove insufficient to cover the costs, then it will be time for the International Committee to inform the central committees and to request them, on the basis of the resolutions of the Berlin Conference, to furnish such pecuniary assistance as it might require.⁴¹

The ICRC had done its sums. Assuming 500 subscribers, “which are more or less already assured”, it even hoped to make “a profit of 800 francs per year, to cover any unexpected costs”.⁴² These figures proved too optimistic, however – on the eve of publication of the first issue, only half the subscriptions necessary to cover the costs had been received.⁴³ To publicize the new publication, the ICRC decided to print 1,000 copies of the first issue. These were distributed to various contacts and each copy was accompanied by a circular tasking the central committees, in particular, with spreading “propaganda in favour of the *Bulletin*, so as to generate subscribers”.⁴⁴ Perhaps following this appeal, the number of subscribers rose steadily, to 376 in November 1869, 450 in December and 491 in March 1870. To augment the number of subscribers, the first editor of the *Bulletin* mentioned by name, Auguste Bost, was even promised a bonus of 3 francs for each new subscription he acquired.⁴⁵ The first two years of the *Bulletin* yielded a profit of 1,700 francs,⁴⁶ but this positive trend was not to last. In 1874, not only was the number of copies reduced, but there was also a drop in the number of subscribers: 427 in February 1874 and only 397 in January 1878.⁴⁷ The budget remained balanced, however, as the cost of producing the *Bulletin*

38 ICRC, A PV, Comité, meeting of 18 October 1869. It took the subtitle *Bulletin de la Croix-Rouge* in January 1876 (Vol. 7, No. 25).

39 “A Messieurs les Présidents et les Membres des Comités centraux dans les divers pays”, 15 June 1869, ICRC, A AF 21/6.

40 *Ibid.*, p. 3.

41 *Ibid.*, p. 4.

42 ICRC, A PV, Comité, meeting of 5 June 1869.

43 ICRC, A PV, Comité, meeting of 5 October 1869.

44 “A Messieurs les Présidents et les Membres des Comités centraux dans les divers pays”, Circular No. 19, 19 October 1869, p. 3, ICRC, A AF 48/2.

45 ICRC, A PV, Comité, meeting of 30 August 1871.

46 ICRC, A PV, Comité, meeting of 23 August 1871.

47 “Le Bulletin international”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 9, No. 33, January 1878, p. 4.

corresponded exactly to income from subscriptions.⁴⁸ The ICRC's accounts reveal that from this point onwards, the periodical's revenue came not only from subscriptions but also, and indeed primarily, from the sale of older issues and complete collections. We may therefore suppose that in a good year, new issues of the *Bulletin* yielded no more than a small profit,⁴⁹ and that in the bad years, such as 1879, its publication cost considerably more than it brought in.⁵⁰

From 1903 onwards, the (separate) account of the *Bulletin* steadily decreased. To make matters worse, in 1908 it lost the exemption from postal charges that it had enjoyed when it was launched.⁵¹ It does not appear that there were ever enough subscribers to cover the publication cost on their own.⁵² Furthermore, the ICRC had long been aware of the fact that "the *Bulletin* is not sufficiently widely distributed", and it took a number of measures to remedy this situation over the years. General reminders of the *Bulletin*'s existence – such as that of September 1871⁵³ – were followed by targeted approaches to Red Cross branches,⁵⁴ authors, publishers and booksellers offering new publications about the Movement. The latter were offered the opportunity to advertise publications in the *Bulletin* free of charge.⁵⁵ ICRC members were themselves sometimes asked to help acquire new readers,⁵⁶ but with mixed results.⁵⁷ This difficult situation prompted the vice-presidents of the Ninth International Conference – spontaneously or otherwise⁵⁸ – to ask that all National Societies "serve to assist in the publication and dissemination of the International Committee's *Bulletin* ... by taking out a larger number of subscriptions, in proportion to their means".⁵⁹ The Conference adopted this proposal unanimously, without discussion.⁶⁰ Following this move, the ICRC noted with satisfaction that "several committees have increased the number of their subscriptions", the American central committee alone having taken out 200.⁶¹ On the eve of the First World War, the

48 ICRC, A PV, Comité, meeting of 11 February 1874. It is also worth noting that the ICRC supplied the *Bulletin* free of charge in exchange for foreign journals or publications.

49 ICRC, A PV, Comité, meeting of 17 January 1882.

50 ICRC, A PV, Comité, meeting of 7 February 1879.

51 ICRC, A PV, Comité, meeting of 1 June 1908.

52 In 1876, for instance, there were only 276. ICRC, A AF 21/5.

53 "Bulletin international des Sociétés de secours aux militaires blessés", 20 September 1871, ICRC, A AF 21/5.

54 "Monsieur le Président et messieurs les membres du Comité de secours aux militaires blessés", 30 April 1875, ICRC, A AF 21/5.

55 "Bulletin international de la Croix-Rouge", 8 December 1877, ICRC, A AF 21/5.

56 ICRC, A PV, Comité, meeting of 19 May 1905.

57 The October 1905 issue of the *Bulletin* was sent out free of charge to a list of some 150 persons, but this marketing operation yielded only five new subscribers. ICRC, A PV, Comité, meeting of 20 November 1905.

58 The proposal came from the Italian vice-president, Count della Somaglia. However, the chairman of the session during which he made his recommendation was none other than the president of the ICRC, Gustave Ador. One might therefore be inclined to doubt the spontaneous nature of the Italian request.

59 *Neuvième conférence internationale de la Croix-Rouge tenue à Washington du 7 au 17 mai 1912: Compte rendu*, American Red Cross, Washington, DC, 1912, p. 242.

60 This became the ninth resolution of the conference. *Ibid.*, p. 319.

61 ICRC, A PV, Comité, meeting of 5 July 1912. The Italian Red Cross increased its subscription six-fold: ICRC, A PV, Comité, meeting of 2 July 1913.

Bulletin – which had officially borne the title of *Bulletin International des Sociétés de la Croix-Rouge* since January 1886⁶² – counted 635 paying subscribers.⁶³

The contents of the Bulletin

In theory, the contents of the *Bulletin* should not have presented any problems. The ICRC had drawn up a reasonably complete summary in its September 1867 circular. The articles published were to cover

announcements that the International Committee or National Committees wished to bring to the attention of all members of the movement, information on the work carried out by the various Committees, be they in time of peace or time of war, bibliographical information concerning reports, notes, theses, letters, etc. on questions concerning the course and progress of the movement and communications of any sort bearing on the object of our work.⁶⁴

In summary, the *Bulletin* was to be “a collection that centralized all important information – historical, administrative, technical, bibliographical, etc., and that was sufficiently complete to keep its readers informed of all matters that could be of interest to the members of our associations”.⁶⁵ This programme had been approved by the Second International Conference, in Berlin, which had also specified that space could be reserved for “announcements or reviews of special publications, devices or inventions related to the relief of sick or wounded soldiers”.⁶⁶ In other words, to offset some of its costs, the *Bulletin* could sell advertising space.⁶⁷

The ICRC was therefore to occupy only a minimal space in the future publication. It would be the task of the national committees to supply the journal with information and articles. The Geneva Committee would merely “encourage their production, gather them together, coordinate them and publish them”.⁶⁸ At most, the ICRC could “if needed” supplement information received with “its own information”.⁶⁹ This was indeed the policy followed in the first three issues of the *Bulletin*. However, the fourth issue brought the first departure from this policy, which, according to the ICRC, offered a solid guarantee of impartiality. In that issue, under the seemingly innocent title of “Du double caractère, national et

62 “How the ‘Bulletin International’ Started”, *International Review of the Red Cross*, Vol. 9, No. 103, 1969, p. 534.

63 Author’s calculations, made on the basis of the subscription book for 1912–18, ICRC, A AF 47. In total, 750 individuals and organizations were receiving the periodical before the First World War. ICRC, A AF, Commission de Direction de l’Agence, meeting of 26 November 1918. After the First World War, this figure fell to 550.

64 “Le Comité international”, above note 28, p. 2.

65 “Mémoire adressé par le Comité international”, above note 31, pp. 11–12.

66 *Compte rendu des travaux*, above note 35, pp. 225–226.

67 The ICRC stated that an advertising form would be included with each issue. “A Messieurs les Présidents”, above note 39, p. 3.

68 “Mémoire adressé par le Comité international”, above note 31, p. 14.

69 “A Messieurs les Présidents”, above note 39, p. 2.

international, des sociétés de secours” (“On the Double Character, National and International, of Relief Societies”), the Geneva-based institution responded once and for all to criticism – from France in particular – regarding its international nature. “The existence of what is called an *international* committee in Geneva may indeed lead to differences of opinion on this point [the national character of all the relief societies]”, it wrote; “However, the term is appropriate, as its concerns are global.”⁷⁰ Thus did Moynier – for it was he that authored this article – attempt to neatly close the debate on the internationalization of the ICRC.

Far from being a simple informational periodical, the *Bulletin* also became a forum for debate where Geneva presented its ideas – or rather, those of its president. From 1872 onwards, it served as a platform for Gustave Moynier, ensuring “wide publicity”⁷¹ for his writings.⁷² Some of these, such as that concerning the creation of an international judicial body to prevent and punish breaches of the Geneva Convention,⁷³ had no more than an indirect connection with the work of the Red Cross – a point that earned the ICRC a sharp reproach from the French Red Cross.⁷⁴ There continued to be no love lost between Paris and Geneva, the former accusing the latter of denigrating it via articles published in the *Bulletin*. The ICRC replied that the French central committee “had no right to complain if we publish articles that are contrary to its view”.⁷⁵ When the Eastern Crisis erupted (1875–78), the *Bulletin* began to publish a new category of content: denunciations (and counter-denunciations) of breaches of the Geneva Convention and of failure to respect the protective emblem. The *Bulletin* published the various accusations, sometimes in gruesome detail, with “the greatest impartiality”.⁷⁶ Despite all claims of impartiality, however, the ICRC often expressed its own opinion in the comments that it printed alongside these pieces. And from an anthropological perspective, the ICRC’s opinion was not especially favourable to “the Other”. During the Eastern Crisis, for instance, the Turks were accused of the worst cruelty towards unarmed enemies and persons wearing the red cross emblem. In the view of the ICRC, the “source of evil” was to be found in “the religious antagonism between Muslims and Christians, or rather the inveterate hatred of Muslims for Christians.”⁷⁷

70 “Du double caractère, national et international, des sociétés de secours”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 1, No. 4, 1870, p. 161.

71 ICRC, A PV, Comité, meeting of 12 January 1872.

72 The *Bulletin* of July 1873 (Vol. 4, No. 16), for example, was dedicated entirely to a historical article by Moynier on the tenth anniversary of the Red Cross. See also Vol. 32, No. 126 of April 1901, in which Moynier set out the rules for recognition of new National Societies.

73 *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 3, No. 11, 1872.

74 ICRC, A PV, Comité, meeting of 1 October 1877. The Russian Red Cross maintained that this was a “matter of international politics, to which the solution was entirely in the hands of the governments”. Letter from the St Petersburg Committee to General Dufour, 29 April 1872, ICRC, A AF 15, 2/83.

75 ICRC, A PV, Comité, meeting of 31 July 1872.

76 “La Convention de Genève pendant la Guerre d’Orient”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 8, No. 32, 1877, p. 156.

77 “Les destinées de la Convention de Genève pendant la guerre de Serbie”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 7, No. 28, 1876, p. 174.

Muslims were not the only group to find themselves the targets of harsh comments in the *Bulletin*. “Negroes” were judged to be “too savage” to be associated with the humanitarian ideas that underpinned the movement.⁷⁸ The Boers were accused of being “semi-barbarians” until the *Bulletin* revised its opinion during the First Boer War.⁷⁹ The Japanese were described as a “pagan nation”⁸⁰ and the Chinese as insufficiently civilized to sign the Geneva Convention.⁸¹ These stereotypes remind us that the *Bulletin* was a contemporary of European colonialism, and its Genevan editors shared the racist ideology of that movement, sometimes to the point of making totally inappropriate statements. During the “reconquest” of Sudan, for example, the *Bulletin* maintained that “finishing off the wounded was almost necessary during the war against the Dervishes”.⁸² The Congo of King Leopold was another such case. The Congo “Free” State had ratified the Geneva Convention and had even set up a National Red Cross Society. Despite this status – unique in Africa at that time – the Congo Free State remained a colony, and it was run with such brutality as to provoke a massive international campaign at the end of the nineteenth century. Even so, as late as 1903, after reminding the reader of “the excessive and inveterate savagery of the Negroes”, the *Bulletin* opined that “the example and the education that the Belgians are giving to their African wards will no doubt have a long-term effect on their ideas and will gradually turn them into civilized people”.⁸³ The author of these words was none other than Gustave Moynier, unconditional admirer of Belgian colonialism and even the consul of the Congo Free State in Switzerland.

The *Bulletin*’s statements did not stop at promoting a Eurocentric, Judaeo-Christian view of the world, or the benefits of the white man’s “civilization”. On occasion, the *Bulletin* strayed into clearly political territory, which clashed with the “proper neutrality and absolute impartiality”⁸⁴ of which it claimed to be the messenger. This was particularly apparent during the First World War. While the ICRC showed no real preference for one side or the other during the first few months of the war, that all changed in spring 1915, when the German Occupying Power dissolved the central committee of the Belgian Red Cross. In a state of

78 “La Croix Rouge chez les Nègres”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 11, No. 41, 1880, p. 5.

79 “Les insurrections dans l’Afrique australe”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 12, No. 46, 1881, p. 53.

80 “Le Japon et la convention de Genève”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 8, No. 29, 1877, p. 3.

81 “La Chine et la croix rouge”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 13, No. 49, 1882, p. 37.

82 “Les blessés de la bataille d’Omdurman”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 30, No. 117, 1899, p. 40.

83 “L’avenir de la Croix-Rouge au Congo”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 34, No. 136, 1903, p. 220.

84 “La guerre européenne”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 46, No. 182, 1915, p. 122.

shock, the ICRC protested strongly against this act.⁸⁵ From that point onwards, the *Bulletin* became steadily more favourable to the Entente, for which several members of the ICRC – including its president, Gustave Ador – had never hidden their personal preference. As a result, the *Bulletin* was full of more-or-less veiled criticisms of Germany. That nation was “accused” of publishing dishonest propaganda via “a virulent press campaign, with denigrating headlines” on the situation of prisoners,⁸⁶ and of taking little notice of the reports of the ICRC’s delegates who were visiting “with impartiality and conscientiousness” the camps where prisoners were held and treated “with humanity”. “One would begin to despair of the influence and value of the Red Cross if the reports of official delegates [of the ICRC] were to be considered worthless.”⁸⁷ When the German Reich denounced the “atrocities” committed by Allied soldiers of colour and demanded that they be withdrawn from the European theatre “in the interests of humanity and civilization”, the ICRC delivered a stinging reply:

One cannot but sincerely deplore atrocities of this nature. But neither can one avoid regret... that the German government has not, ‘in the interests of humanity and civilization’ imposed very different conduct on its own troops in Belgium, on the Austro-German armies in Serbia and on its Turkish allies in Armenia.⁸⁸

The other Central Powers also fell victim to the *Bulletin*’s Germanophobia. When, for instance, Bulgaria or Turkey complained about the bombing of medical facilities by Allied aircraft, the ICRC regularly advanced the argument that these were accidents.⁸⁹ When it came to the “victims” of the Central Powers, the ICRC described the ordeal suffered by the population in the occupied territories of Belgium and the North of France, praised the “heroism” of Serbia⁹⁰ and denounced the massacre of Armenians by the Turks on the basis of information it had received from an Armenian committee.⁹¹ The “bloody”⁹² dissolution of the

85 “Protestation contre la dissolution du Comité central de la Croix-Rouge de Belgique”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 46, No. 183, 1915, p. 275 ff.

86 “La guerre européenne”, above note 84, p. 336.

87 “L’Agence internationale des Prisonniers de guerre (Cinquième article)”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 46, No. 184, 1915, pp. 488–489.

88 “La violation du droit des gens de la part de l’Angleterre et de la France par l’emploi de troupes de couleur sur le théâtre de la guerre en Europe”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 47, No. 185, 1916, p. 88.

89 “La guerre européenne”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 46, No. 184, 1915, p. 453; “La guerre européenne”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 47, No. 186, 1916, p. 181.

90 “La guerre européenne”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 47, No. 185, 1916, p. 16.

91 “La guerre européenne”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 46, No. 184, 1915, p. 438. Sadly, history was to reveal that this denunciation was correct. However, it was issued in haste and contravened the ICRC’s self-imposed rule of making public “only information that it knows to be absolutely certain”: “La guerre européenne”, above note 84, p. 122. The ICRC’s haste was due in part to its pro-Armenian tendency.

92 ICRCA, A PV, AIPG, meeting of 26 February 1918.

central committee of the Russian Red Cross in February 1918 had a lasting effect on the ICRC. The “unspeakable”⁹³ behaviour of the Russian revolutionaries helped solidify a strong anti-communist sentiment among the members of the Committee.

Even if the ICRC did use – and in some cases abuse – the *Bulletin* to propagate its own opinions, the publication also made it possible, more naturally, to highlight the Geneva organization’s work during the Great War. In what was a fundamental change, the *Bulletin* of the war years focused on the ICRC rather than on the National Societies. The ICRC had already used the *Bulletin* to talk about itself in the past, especially during such major armed conflicts as the Franco-Prussian war and the Eastern Crisis, but never to the same extent as between 1914 and 1918.⁹⁴ It is true that the scale of the First World War was unprecedented, as was the expansion of the organization – from about ten persons to over a thousand in just a few months. Notwithstanding, the ICRC was in the process of taking control of a publication that was supposed to represent the entirety of the Movement. This process continued with the creation of the *Revue*.

The *Revue*

There is only rough information regarding the transformation of the *Bulletin International des Sociétés de la Croix-Rouge* into the *Revue Internationale de la Croix-Rouge*. There are no real archival files for the period 1919–39, so what information we have comes from the minutes of ICRC bodies.

It would seem that the idea of transforming the *Bulletin* into a monthly journal emerged just after the Armistice. The idea was put forward by Étienne Clouzot, one of the secretaries of the International Prisoners-of-War Agency.⁹⁵ It is not currently possible to establish how the project originated, or whether it emanated solely from Clouzot. One could imagine that Clouzot, who was originally a French citizen, took his inspiration from publications in his own country such as the *Revue des Deux Mondes*, the *Nouvelle Revue* and the *Nouvelle Revue Française*. It would appear that the aim was to ensure the longevity of the *Bulletin*, but in a different form. Three arguments were put forward in support of the change. The first was related to content, and the recurrent need to make up for a lack of articles from external authors.⁹⁶ The editor, Paul Des Gouttes, explained that he “was the first to recognize the need to enlarge the publication. [He himself] had already attempted to expand it and ... had experienced considerable difficulty in obtaining articles.”⁹⁷ The second point was the need to adapt the journal to a changing world. Des Gouttes was aware of “the influence

93 “Dissolution violente du Comité central de la Société russe de la Croix-Rouge”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 49, No. 194, 1918, p. 298.

94 According to our calculations, over 300 of the *Bulletin*’s 570 pages were devoted to the ICRC in 1915.

95 ICRC, A PV, Commission de Direction de l’Agence, meeting of 23 November 1918.

96 Right from the early days of the *Bulletin*, Gustave Moynier complained that he received too few articles from the National Societies. ICRC, A PV, Comité, meeting of 27 February 1879.

97 ICRC, A PV, Commission de Direction de l’Agence, meeting of 26 November 1918.

that the course of events and political events will have on the *Bulletin*, requiring a broadening of its scope and creating a need for a living publication, open and not overly attached to the past”.⁹⁸ The new journal should prioritize “the works of peace” towards which the ICRC seemed to be turning.⁹⁹ Furthermore, there was the financial aspect – subscriptions had remained low (550 in 1918), while printing costs had doubled during the First World War, and it therefore made sense to try to broaden the journal’s readership. There was also agreement on the need to maintain the international element in the future publication’s title and to retain an “old style” *Bulletin*, either published separately or merged with the *Revue*. The new publication was intended not to kill off the *Bulletin* but, on the contrary, to make it “more than ever” alive¹⁰⁰ by increasing its importance and the frequency of publication.¹⁰¹ By the beginning of December 1918, it was done:

The title will be *Revue internationale de la Croix-Rouge*, with the subtitle *Bulletin international des Sociétés de la Croix-Rouge*. The format will be slightly larger than that of the *Bulletin*, published monthly, its appearance will recall that of the *Bulletin*, the price will be 20 francs per year, 2 francs per issue. The *Revue* will be managed by an *Executive Committee* [and] an *Editorial Board* ... [,] will consider the content of each issue and will decide on or have the ultimate say as to which of the articles proposed should be included. ... It is understood that naturally, it will accept only those articles that could be of interest to the Red Cross Societies, as the *Bulletin* has done hitherto.¹⁰²

The ICRC stated that it was prepared to cover the cost of the publication – estimated at several tens of thousands of francs – from the “revenue and if necessary the capital of the Nobel Prize” for peace, which it had been awarded in 1917. In order to cover the “considerable” printing costs involved, the ICRC also decided to “advertise in the most important of the appropriate newspapers, in an attractive but not flamboyant or overly American way, the publication of the *Revue* and encouraging subscriptions”.¹⁰³ The *Revue* was also itself authorized to feature advertisements.¹⁰⁴

The birth of the *Revue* was announced by circular on 4 December 1918.¹⁰⁵ The circular put forward an argument based on the “expansion of the field of action of both the National Red Cross Societies and of [the ICRC] itself”. The new periodical would

98 ICRC, AIPG, session of 27 November 1918.

99 *Ibid.*

100 ICRC, A PV, Commission de Direction de l’Agence, meeting of 26 November 1918.

101 ICRC, AIPG, session of 27 November 1918.

102 ICRC, AIPG, session of 4 December 1918.

103 ICRC, AIPG, session of 29 January 1919.

104 The first advert appeared in May 1919, and the *Review* continued to carry advertising until 1977.

105 “Revue internationale de la Croix-Rouge et Bulletin international des Sociétés de la Croix-Rouge (175ème circulaire)”, *Revue International de la Croix-Rouge*, Vol. 1, No. 1, 1919, pp. 75–77.

continue to focus above all on the direct victims of war, but could, in the part entitled *Revue internationale*, present more freely the experiences experienced in certain countries that could be instructive for others, while at the same time allowing space for original articles concerning the areas both broad and varied that already concerned the National Societies before the war or which will concern them at the start of the new era of peace.¹⁰⁶

As for the *Bulletin* (which now indicated that it was published by the ICRC, “the founder of the movement”), it would continue to play the role of “faithful narrator of the activities of the various Red Cross Societies”.¹⁰⁷ The monthly publication launched in January 1919 was therefore a two-headed animal.

The *Revue* turned out to be a financial black hole from the first year of its existence, recovering only 30% of the 54,322 francs that it cost to produce.¹⁰⁸ Clearly, the ICRC’s advertising had not had the desired results, as the *Revue* had only 965 subscriptions, 515 of which belonged to National Societies¹⁰⁹ – and even these figures appear doubtful.¹¹⁰ Subscriptions increased only slightly in 1920, to 1,005,¹¹¹ before falling again to 776 in 1921¹¹² and 610 in 1925.¹¹³ Advertising revenue followed a similar pattern. As a result, the publication remained firmly in the red, with deficits of 22,000 francs in 1920 and 25,000 francs in 1921. It was therefore suggested that costs be reduced by printing the *Revue* somewhere other than Geneva (perhaps even outside Switzerland) and on presses other than those of the *Journal de Genève*.¹¹⁴ This idea produced outcry from the members of the ICRC, led by Horace Micheli (who was also the political editor of the *Journal de Genève*), and was eventually abandoned.¹¹⁵ Less drastic cost-cutting measures were nonetheless taken, reducing the deficit to 7,000 francs in 1922. Thereafter, expenditure always exceeded receipts by some 6,000 francs, and the *Revue* was only able to balance the books thanks to an annual contribution from the ICRC to make up the difference. The situation was even worse coming out of the Second World War: at the end of the 1950s and the beginning of the 1960s, the *Revue* cost 60,000 francs to produce each year, but its revenue was only just over 13,000 francs, the majority of which came from advertising. Subscription

106 *Ibid.*, p. 76.

107 *Ibid.*

108 ICRC, A PV, Comité, meeting of 26 January 1920. A week earlier, figures had been announced indicating that revenue was covering less than 10% of costs: ICRC, A PV, Comité, meeting of 19 January 1920. It is difficult to understand how such different figures could be presented at two meetings only a week apart.

109 ICRC, A PV, Comité, meeting of 26 January 1920.

110 Given that an annual subscription cost 20 francs (according to the 175th Circular), the subscription revenue for the *Revue* in 1920 (15,027 francs) indicates that there were, at best, only 751 paying subscribers. See also above note 108.

111 ICRC, A PV, Comité, meeting of 7 March 1921.

112 ICRC, A PV, Comité, meeting of 25 November 1921.

113 “*Revue internationale de la Croix-Rouge. Budget pour 1925*”, ICRC, B CR 190/132.

114 ICRC, A PV, Comité, meeting of 23 February 1920. The *Journal de Genève* had been publishing the *Bulletin* since 1912: ICRC, A PV, Comité, meeting of 12 January 1872.

115 ICRC, A PV, Comité, meeting of 23 December 1921. The discussion came up again in 1925. While the Committee decided to continue to print the *Revue* in Geneva, it was transferred to the presses of another newspaper, the *Tribune de Genève*. ICRC, A PV, Comité, meeting of 12 November 1925.

revenue was only about 4,500 francs,¹¹⁶ indicating that the number of subscribers had fallen to just 225.¹¹⁷

It was also during the Second World War that the question of the language used in the *Revue* arose once again.¹¹⁸ Since its launch in 1869, the periodical had appeared in French only. However, it did not have “sufficient penetration in America”,¹¹⁹ and it was therefore proposed that the *Revue* be translated and printed in London and New York, to ensure its wide distribution in the English-speaking countries. The proposal was not implemented for financial reasons; it would have been too expensive to publish an edition in the United States with a sufficient number of subscribers.¹²⁰ In addition, the time needed for translation would have rendered the *Revue* less up-to-date, depriving it of “much value in the eyes of the public”.¹²¹ Finally – and this seems to have been the deciding factor – the *Revue* would not have been able to compete in the United States with the publications of the American Red Cross, which were often free. The ICRC did not totally abandon the idea, however, and from 1948 onwards the *Revue* translated its main articles into English, publishing them in a supplement of some twenty pages, in accordance with its undertaking to “keep up with the times”.¹²² A Spanish supplement followed in 1949 and a German supplement in 1950, but this solution was hardly satisfactory. Delegates and several National Societies called for a *Revue* in English or, at least, “a less skeletal supplement”.¹²³ Their wish was fulfilled when, in April 1961, an English version of the *Revue* was published which was “in principle ... identical with the French edition”.¹²⁴ In 1976, a full Spanish edition of the *Revue* was published, responding to wishes already expressed immediately following the Second World War. Special Arabic issues were occasionally published on an *ad hoc* basis.¹²⁵ In 1956, approximately 3,500 copies of the *Revue* were printed, including all the language supplements. Twenty years later, circulation had increased to over 6,000 in total (all languages included).¹²⁶

With three complete different-language versions plus an abridged German version (2,500 pages per year in total), it quickly became impossible for the ICRC to

116 Note regarding the publication of an English edition of the *Revue*, annexed to ICRC, A PV, Comité, meeting of 8 September 1960.

117 An annual subscription continued to cost 20 francs a year. The ICRC arrived at a figure of 254 subscribers: “Note à Monsieur J. Pictet. Diffusion de la *Revue*”, 30 August 1956, ICRC, B AG, 064-03.

118 The idea of publishing the periodical in several languages in order to “develop” it had been suggested as far back as 1919. ICRC, A PV, AIPG, meeting of 1 September 1919.

119 ICRC, A PV, Commission de l’Information, meeting of 24 June 1943.

120 ICRC, A PV, Commission de l’Information, meeting of 21 November 1944.

121 ICRC, A PV, Bureau, meeting of 29 September 1943.

122 *Report of the International Committee of the Red Cross on Its Activities during the Second World War (September 1, 1939–June 30, 1947)*, Vol. 1, Geneva, May 1948, p. 128, available at <https://library.icrc.org/library/search/notice?noticeNr=6962> (all internet references were accessed in May 2019).

123 “Note relative à la publication d’une édition anglaise de la *Revue*”, annexed to ICRC, A PV, Comité, meeting of 8 September 1960.

124 *International Review of the Red Cross*, Vol. 1, No. 1, 1961, p. 3.

125 In 1954 and 1955, for instance. An Arabic edition did not appear regularly until the May–June 1988 issue.

126 Including 3,000 in French and 2,000 in English. “Publications périodiques du CICR”, 20 October 1975, ICRC, B AG 064-11.

cover the costs involved. In December 1977, the ICRC therefore took a step which was “painful: that of reducing publication of the *International Review of the Red Cross* from twelve to six issues per year”.¹²⁷ Meanwhile, another decision had been taken very quietly: the *Bulletin* was to disappear. This happened gradually. The process started in July 1955, with a semantic change: the *Bulletin* – which had already lost a great deal of content – became “News of National Societies”. Its cover page disappeared and it was now included in the table of contents of the *Revue*.¹²⁸ However, the “News” did mention that it was the direct successor to the *Bulletin*. This link ended in 1965, when the “News” was replaced by a section titled “In the World of the Red Cross”. That title was used until 1998, though not without a mention – but only in 1988 – that the (small) part of the *Review* devoted to the National Societies also included the Red Crescent Societies.¹²⁹ In 1999, this section became “Red Cross and Red Crescent”; this natural link with the Movement disappeared altogether in September 2002, almost 133 years after the founding of the *Bulletin*. The transformation that occurred in the autumn of 2002 also affected the ICRC, as this was the point at which the *Review* became an academic journal. The space available to present the activities of the Geneva institution became more rare.

The contents of the Revue

In its editorial programme, the *Revue* extolled its “expansion” into new subjects and new authors. Reading the table of contents for its first year,¹³⁰ it is indeed apparent that the journal had opened up to include social topics, especially those related to children. That was no coincidence, as the ICRC was now devoting considerable attention to children as a category of war victims. The articles came from a range of sources, while maintaining a link with the world of the Red Cross or, more generally, with that of charitable works. Not until after the Second World War did the *Revue* begin to regularly feature articles from academic authors. The ICRC did, however, retain a degree of control over the contents of the journal. Of forty texts published in 1919, sixteen were by ICRC members or staff – 40% of the articles. The high proportion of internal ICRC authors – which at times reached or surpassed 50% – remained a constant, but for two exceptions, until the beginning of the 1930s.¹³¹ The ICRC also remained very well represented in the *Bulletin* section devoted to the National Societies and the new League of Red Cross Societies, created at the same time as the *Revue*. When the Second World War broke out, this dominance increased. Like the *Bulletin* in the First World

127 Alexandre Hay, “The Future of the International Review of the Red Cross”, *International Review of the Red Cross*, Vol. 18, No. 202, 1978, p. 3.

128 *Revue Internationale de la Croix-Rouge*, Vol. 37, No. 439, 1955.

129 From January 1988 onwards, this section was entitled “In the Red Cross and Red Crescent world” (author’s emphasis).

130 “Table de la Revue internationale de la Croix-Rouge”, *Revue Internationale de la Croix-Rouge*, Vol. 1, No. 12, 1919.

131 Author’s calculations, for the first twelve volumes of the *Revue*. The following decade was more mixed.

War, the *Revue* became the mouthpiece of the ICRC and was devoted almost exclusively to the ICRC's efforts on behalf of the victims of the war, for example including long extracts from reports on visits to prisoners of war and civilian internees around the world. The pages of the *Bulletin* followed the same tendency, highlighting the actions and statements of the ICRC. The same applied to the original articles, over 70% of which were written by ICRC members or staff.

As had been the case for the *Bulletin*, certain articles in the *Revue* gave rise to controversy. For instance, an article by Serge Bagotzky, who represented the (Soviet) Russian National Society in Switzerland¹³² (which was recognized as a National Society by the ICRC in 1921), led to fierce protests from the former (meaning "Tsarist") Russian Red Cross, with which the ICRC maintained close links, and which considered itself the only legitimate Russian National Society.¹³³ Conversely, Bagotzky complained about the fact that since 1933, the *Revue* had regularly published an annual report on the work of the former Russian Red Cross organization, at that organization's request.¹³⁴ The ICRC considered that it was entitled to publish "anything of a nature that could interest our readers on any Red Cross activity" in the *Revue*, but that at the same time it "was entirely free to cease any publication to which it had voluntarily consented".¹³⁵ Ultimately, however, it did not have to take a decision on this dispute, which fizzled out on its own at the beginning of the Second World War.

A new controversy involving communist National Societies erupted immediately after the end of the war, when the ICRC was accused of not having done enough to defend the interests of the victims of Nazism and Fascism, especially the civilian population – including Jews and partisans. The Eastern Bloc accused the ICRC of having "lost its neutrality because of its exclusively Swiss character ... [and of having] fallen into the Swiss government's service".¹³⁶ It is therefore not surprising that in response to the first of these criticisms the ICRC published *in extenso* a long study it had just completed, highlighting its work in concentration camps in Germany, in the March and April 1946 issues of the *Revue*.¹³⁷ It also published a report on its efforts to help partisans who had fallen into enemy hands.¹³⁸ To justify its existence, the ICRC published a long article recalling its origins and at the same time explaining at length the valuable work it

132 Serge Bagotzky, "L'organisation et l'activité de la Société russe de la Croix-Rouge", *Revue Internationale de la Croix-Rouge*, Vol. 5, No. 49, 1923.

133 ICRC, A PV, Commission de la Croix-Rouge, meeting of 2 May 1923.

134 ICRC, B CR 109, Annex 240, "Conflit Bagotzky/ancienne organisation de la Croix-Rouge russe", 14 April 1937.

135 *Ibid.*

136 Catherine Rey-Schyr, *From Yalta to Dien Bien Phu: History of the International Committee of the Red Cross, 1945 to 1955*, ICRC, Geneva, January 2017, p. 61, available at <https://library.icrc.org/library/docs/DOC/icrc-002-0907.pdf>.

137 "Documents sur l'activité du Comité international de la Croix-Rouge en faveur des civils détenus dans les camps de concentration en Allemagne", *Revue Internationale de la Croix-Rouge*, Vol. 28, Nos 327–328, 1946.

138 "Rapport sur l'activité du Comité international de la Croix-Rouge en faveur des 'partisans' tombés en mains de l'ennemi", *Revue Internationale de la Croix-Rouge*, Vol. 28, No. 334, 1946.

had undertaken during the war.¹³⁹ It hammered home that “the Committee is subordinate to no other institution, be it a Red Cross Society or a government, even the Swiss government. Its members, who receive no payment, are themselves wholly independent.”¹⁴⁰ Not long before, ICRC president Max Huber had emphasized the “complete political and administrative independence [of the ICRC] from the Swiss Confederation” in the pages of the *Revue*.¹⁴¹ In this context, when the question was raised of translating the *Revue*, a Russian version was suggested, alongside English and Spanish. Officially, the intention was to enhance the dissemination and influence of the periodical among readers from different countries, while avoiding the impression of “alignment with any of the blocs of States that currently exist”.¹⁴² Unofficially, one can well imagine that the aim was to convey the ICRC’s ideas directly to those who were criticizing it. The idea was not implemented, for reasons unknown.¹⁴³ The *Revue* later acted as a channel for replying to other accusations, such as those made during the Korean War.¹⁴⁴

The early days of the *Revue* coincided with those of the League of Red Cross Societies, which was founded in May 1919. Relations between the ICRC and the League quickly soured.¹⁴⁵ The ICRC was far from happy at the idea of a new organization stepping on its toes by taking over the programme of peacetime humanitarian activities that it had proposed to the National Societies.¹⁴⁶ The League, for its part, saw the ICRC as having become obsolete in view of the challenges that followed the First World War. This animosity became apparent as soon as the creation of the League was announced. The ICRC saw the League as an “association ... of a transitory nature” and demanded the right to remain “the central body for all the National Societies, as it has always been, by virtue of the successive decisions taken by the Conferences [of the Red Cross]. The organization that is being created should in no way supplant it, but should

139 Frédéric Sjordet, “*Inter Arma Caritas*”: *The Work of the International Committee of the Red Cross during the Second World War*, 2nd ed., ICRC, Geneva, 1973, available at https://library.icrc.org/library/docs/DIGITAL/DOC_00036.pdf. Sjordet was an ICRC employee. The original French version of this work appeared in the *Revue* under the title “‘Inter Arma Caritas’: L’œuvre du Comité international de la Croix-Rouge pendant la Seconde Guerre mondiale”, *Revue Internationale de la Croix-Rouge*, Vol. 29, Nos 339, 340, 342 and 344, 1947.

140 F. Sjordet, above note 139, p. 88.

141 Max Huber, “Principes d’action et fondements de l’œuvre du Comité international de la Croix-Rouge, 1939–1946”, *Revue Internationale de la Croix-Rouge*, Vol. 29, No. 337, 1947, especially p. 67.

142 ICRC A, A PV, Commission de l’Information, meeting of 13 May 1947.

143 A Russian edition of the *Revue* only appeared in November–December 1994.

144 At the Eighth International Conference in July–August 1952, communist representatives accused the ICRC of taking sides in the Korean conflict: see C. Rey-Schyr, above note 136, p. 105. The ICRC replied via an article in the *Bulletin* of September 1952 (“Le Comité international de la Croix-Rouge et le conflit de Corée”, *Revue Internationale de la Croix-Rouge*, Vol. 34, No. 405, 1952). An English summary appeared in the English-language supplement to the *Revue* in November 1952.

145 Irène Herrmann, “Décrypter la concurrence humanitaire. Le conflit entre Croix-Rouge(s) après 1918”, *Relations Internationales*, No. 151, Autumn 2012.

146 “La mission du Comité international de la Croix-Rouge pendant et après la guerre” (Circular 174), 27 November 1918, in *Revue Internationale de la Croix-Rouge*, Vol. 1, No. 1, 1919.

rather extend and expand its action.”¹⁴⁷ So while it allowed its sister organization to communicate through the *Revue*, the ICRC never missed an opportunity to comment on its rival’s articles.¹⁴⁸ Elsewhere it explained that the League was neither democratic nor universal.¹⁴⁹ However, contrary to the ICRC’s predictions, the League turned out to be a temporary phenomenon that became permanent. The ICRC had to live with the situation, while maintaining its dominant position – and that meant communicating. In March 1920, it was suggested that the *Revue* be made the joint publication of the ICRC and the League. While the two organizations were to share the management of the new periodical, the *Bulletin* would remain “the publication of the International Committee”, retaining the “universality and freedom it has always enjoyed”.¹⁵⁰ Negotiations followed, both internally and with the League. It is clear that the ICRC hoped such a merger would “bail out” the *Revue* by providing it with a wider distribution, while at the same time reducing the ICRC’s financial commitment. The ICRC also hoped that in exchange for this partnership regarding the *Revue*, the League’s journal – “21,000 copies of which [were] distributed free of charge”¹⁵¹ – would report on the ICRC’s peacetime work. However, the prospect of such an agreement raised a number of concerns, including the fear that the ICRC might ultimately end up being absorbed by the League, which, by virtue of the considerable funds at its disposal, could be “inclined to give the orders”. It was therefore emphasized that the *Revue* and the *Bulletin* would remain “the publication of the International Committee and the journal of the Red Cross Societies”.¹⁵² On the other side, it seems that the League was also somewhat hesitant, with the result that the idea of an agreement was eventually abandoned.¹⁵³ In 1928, the idea of merging the ICRC and League publications was raised once again, but the fear that the *Revue* might lose “its character” put a temporary end to the discussion.¹⁵⁴ The question of combining the *Revue* with the publications of the League or of other organizations resurfaced in the 1930s, without leading to any action.¹⁵⁵

To inform or govern?

In 1869, during the 2nd International Conference, French central committee delegate Jean Huber-Saladin recalled the genesis of the *Bulletin*:

147 “Le Comité international et la ‘League of Red Cross Societies’” (Circular 182), 20 May 1919, in *Revue Internationale de la Croix-Rouge*, Vol. 1, No. 6, 1919.

148 See *Revue Internationale de la Croix-Rouge*, Vol. 1, No. 6, 1919. At the beginning of an article by a member of the League’s Governing Board, the ICRC asks what use this new organization is (p. 621).

149 Paul des Gouttes, “De la Fédération des Sociétés de la Croix-Rouge”, *Revue Internationale de la Croix-Rouge*, Vol. 1, No. 8, 1919, p. 930.

150 ICRC, A PV, Comité, meeting of 15 March 1920.

151 ICRC, A PV, Comité, meeting of 14 April 1920.

152 *Ibid.*

153 ICRC, A PV, Comité, meeting of 14 June 1920.

154 ICRC, A PV, Comité, meeting of 20 September 1928.

155 ICRC, A PV, Comité, meetings of 19 September 1931 and 3 November 1938.

Charged with the report on ... the creation of new periodicals at the Paris Conferences, I made the entirely natural proposal to set up an international journal in Geneva. The Genevan Committee, taking into consideration what was a simple suggestion on my part, developed my idea as necessary, and made of it the object [of one of the proposals submitted to the Conference].¹⁵⁶

From the beginning, therefore, the ICRC had been most interested in the publication of a periodical that would become a kind of “official gazette of the Red Cross”.¹⁵⁷ Moreover, it had done all it could to ensure that the ICRC would be managing and publishing it, despite the significant financial sacrifice incurred and the additional workload for its president, Gustave Moynier, who became the lynchpin of the whole operation. Geneva’s enthusiasm provoked considerable friction with the French Red Cross, which was also keen to take on such a publication. Far from being a mere contest between rivals, taking possession of the *Bulletin* became a core issue for the ICRC. For Paris, being allowed to manage the global journal of the Movement was a question of prestige; for Geneva, it was a matter of survival. Under criticism for its mono-national makeup, uncertain as to its permanence and, above all, resistant to any change in its structure, the ICRC needed a strong argument to counter the threats it was facing. Publishing the *Bulletin* provided an unhopèd-for opportunity to ensure the long-term survival of this small Genevan entity while allowing it to maintain a certain degree of autonomy and, above all, to avoid changing that which constituted its *raison d’être* – acting as a link between the National Societies. This being so, it is easy to understand why the ICRC was so determined to seize Huber-Saladin’s “simple suggestion” and render it sufficiently viable to be accepted by the Berlin International Conference.

Seen against this background, the financial question was not insignificant. By refusing all funding from the National Societies to offset publication costs – despite such funding having been agreed in principle – the ICRC hoped to maintain absolute control over the *Bulletin*. All of this came as no surprise to the French central committee. Aware of the power that the future periodical would confer on whoever controlled it, the French committee attempted to limit that power once it realized that it had lost the battle for control. Its president, Count Sérurier, insisted at the 1869 International Conference that “communications of any sort, even scientific discussions, [could] only be published in the international journal of Geneva insofar as they had been submitted by the various [Red Cross] Committees”.¹⁵⁸ The aim was to stifle the voice of the ICRC and to limit its spread via the pages of the *Bulletin*.

The ICRC itself was fully aware of the advantages that such a periodical could bring. It therefore struck a reassuring tone, stating that it “would not be conferring upon the International Committee a worrying prerogative by investing it with the right to preside over the editing of the journal, given that the true

156 *Compte rendu des travaux*, above note 35, p. 223.

157 “Le Bulletin international”, above note 47, p. 1.

158 *Compte rendu des travaux*, above note 35, p. 226.

editors should be the national Committees themselves”.¹⁵⁹ Furthermore, the ICRC added, it had never desired, nor sought “in any manner”,¹⁶⁰ the production of the *Bulletin*, which “was in no way born of our initiative” and for which the ICRC had “assumed the burden of responsibility only to comply with a decision taken by the Red Cross Societies of all nations at the International Conference that they held in Berlin in 1869”.¹⁶¹ The ICRC’s role concerning the *Bulletin* would be limited to that of an auxiliary, which would “hold the pen to record the facts trimesterally, in the conviction that by so doing it was fulfilling a useful role, albeit humble”,¹⁶² and the periodical would serve to consolidate “the moral union of all the central Committees”.¹⁶³ That last point was crucial. The ICRC’s interest in the *Bulletin* was tied to the fact that it was the rallying point for all the National Societies. Since 1867 and the initial discussions on its composition and role, the ICRC had known that its salvation would come from the Movement, or more precisely from the disagreements between its components. It had already experienced this in Paris in 1867, when, faced with the destructive desires of the French Red Cross, it had been able to count on the support of the other central committees. It had also benefited from internal dissent at the Third and Fourth International Conferences of 1884 and 1887. On those occasions it had been confronted with a Russian Red Cross plan to internationalize the ICRC’s staff. That proposal had been refused by the vast majority of National Societies, who judged that “in the general interest of the Red Cross, it is useful to maintain the International Committee as it has existed since the beginning of the movement, with its headquarters in Geneva”.¹⁶⁴ Thanks to the *Bulletin*, the ICRC had “an entirely natural opportunity, and one that it would not otherwise have had, of communicating regularly with the central Committees”.

The future of the ICRC was therefore closely linked with control of the *Bulletin*. So it is not surprising that, at the Fourth International Conference in 1887, the ICRC wished the plenary to decide both about retaining the ICRC in its original form and also about the continuation of an international *Bulletin*, “published in Geneva”, under the sole responsibility of the ICRC.¹⁶⁵ Some thirty years later, the same situation arose once again, during the conflict between the ICRC and the League. In view of its hegemonic leanings, several National Societies were reluctant to join the new organization, or at least to comply with all of its wishes. The ICRC took advantage of this tension to position itself as the

159 “Mémoire adressé par le Comité international”, above note 31, p. 14.

160 “Le Bulletin international”, above note 47, p. 5.

161 “Monsieur le Président et messieurs les membres du Comité de secours aux militaires blessés”, 30 April 1875, ICRC, A AF 21/5.

162 “Le passé et l’avenir du Bulletin international”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 11, No. 41, 1880, p. 3.

163 “Le Bulletin international”, above note 47, p. 5.

164 “La conférence de Carlsruhe”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 18, No. 72, 1887, p. 164.

165 *Du rôle du Comité international et des relations des Comités centraux de la Croix-Rouge: Rapport présenté par le comité international à la Conférence internationale des sociétés de la Croix-Rouge à Carlsruhe, en 1887*, Imprimerie B. Soullier, Geneva, 1887, p. 23.

natural forum for coordination within the Movement, thereby garnering support in its battle with the League. When it became necessary to envisage some form of cohabitation between the two organizations, and the question arose of merging their respective journals, ICRC president Gustave Ador was of the opinion that in the future periodical, the *Bulletin* – which would remain in the hands of the ICRC – “should occupy the leading position, above that of the *Revue* [of the League]”.¹⁶⁶ This was a way of demonstrating the ICRC’s dominance within the Movement and its close, traditional links with the National Societies. The same tactic was deployed immediately after the Second World War, when the ICRC was confronted by accusations from communist National Societies. Rather than replying directly, the ICRC called the Movement as its witness, by publishing long extracts from its reports and other writings. This approach was successful, because at both the 17th and 18th International Conferences in 1948 and 1952, when the communist world once again attacked the ICRC on account of its all-Swiss makeup, the ICRC obtained the support of the rest of the Conference participants and was thus saved. Indeed, this contentious question – which had been a thorn in the ICRC’s side for almost 100 years – disappeared of its own accord during the same period.

It is therefore not surprising that from 1955 onwards the bonds that had united the ICRC with the world of the Red Cross thanks to the *Revue/Bulletin* began to weaken. From 1956, the *Revue* was considered the official journal of the ICRC and no longer that of the Movement as a whole.¹⁶⁷ The disappearance of the *Bulletin* was also a sign that the danger had passed, and that the ICRC had less and less need of the support of the National Societies to survive. The ICRC played the game for a few more decades, however. From May 1988, the *Review* even mentioned on its cover that it was “Published bimonthly by the International Committee of the Red Cross to serve the International Red Cross and Red Crescent Movement.”¹⁶⁸ Not until the brink of the new millennium did the mask finally slip and the close bond disappear between the *Review* and the Movement, a bond that had lasted for over a century.

Not only did the *Bulletin* and the *Revue* furnish the ICRC with a solid basis and even a shield against its adversaries within the Movement, but they also had a further major advantage for the organization that managed them; it was on the pages of those publications that the ICRC was able to proclaim and create IHL. Gustave Moynier’s 1872 article in the *Bulletin*, mentioned above, in which he presented his personal opinion in favour of the creation of an international criminal tribunal to punish breaches of the Geneva Convention, provoked negative reactions. But far from backing down, the ICRC – and its president – continued to use the periodical to communicate ideas on humanitarian law. For example,

166 ICRC, A PV, Comité, meeting of 24 March 1920.

167 “Note à M. Pictet. Diffusion de la *Revue*”, 30 August 1956, ICRC, B AG 064-003. This point was reaffirmed by the Assembly (the governing body of the ICRC) in March 1998: Cornelio Sommaruga, “The *International Review of the Red Cross* at the Service of the International Red Cross and Red Crescent Movement”, *International Review of the Red Cross*, Vol. 28, No. 264, 1988.

168 *International Review of the Red Cross*, Vol. 28, No. 265, 1988.

the ICRC spoke out against hasty revision of the Geneva Convention,¹⁶⁹ favouring prudent adjustments,¹⁷⁰ itself proposing a new draft.¹⁷¹ For a long time, the ICRC pushed for ratification of the additional articles of 1868,¹⁷² and was even prepared to “dictate” the procedure to the Swiss Federal Council.¹⁷³ As can be seen, the ICRC used the *Bulletin* to make its voice heard in a field where it had no official role. The ICRC had not been assigned a specific mission regarding IHL by the International Conferences that had decided its functions between 1867 and 1887.¹⁷⁴ It was therefore only as a result of personal initiative that the ICRC assigned itself the task of considering the law on behalf of the Movement. This approach was certainly based on historical precedent – the 1864 Geneva Convention, which had largely been drafted by two members of the ICRC, Gustave Moynier and Henry Dunant. This practice continued, becoming a sort of tradition thanks to the longevity of the ICRC’s first leader. Better still, it was made official by the circulars sent by the ICRC to the central committees on the progress and development of IHL, followed by the ICRC’s legal articles, also published in the *Bulletin* and later in the *Revue*.¹⁷⁵ This made the two publications the official channels through which the ICRC could highlight its commitment to and leading role in elaborating humanitarian law, strengthening the special relationship with States that it already enjoyed in this area.

Conclusion

To see the *Bulletin/Revue/Review* as an instrument of power in the hands of the ICRC is to understand more fully the organization’s dedication to a project that others would long since have abandoned if they had only looked on the surface at its components or financial criteria, such as the profitability of the publication or the number of subscribers. Indeed, generally speaking the *Bulletin* and the *Revue/Review* have been financial liabilities for the ICRC. The organization has never been under any illusions on this point, having recognized in autumn 1919 that the *Revue* would “never break even”.¹⁷⁶ Examining the accounts of the *Bulletin*

169 “La révision de la Convention de Genève”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 7, No. 27, 1876, p. 122.

170 “La révision de la Convention de Genève, d’après M. G. Moynier”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 30, No. 118, 1899.

171 “Projets de révision de la Convention de Genève”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 33, No. 131, 1902.

172 “Ratification des articles additionnels à la Convention de Genève”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 1, No. 1, October 1869.

173 “Une nouvelle démarche relative à la ratification des articles additionnels à la Convention de Genève”, *Bulletin International des Sociétés de Secours aux Militaires Blessés*, Vol. 14, No. 54, April 1883.

174 The final list of functions was adopted at the Fourth International Conference: *Quatrième Conférence internationale des Sociétés de la Croix-Rouge tenue à Carlsruhe du 22 au 27 septembre 1887: Compte-rendu*, Starke, Berlin, 1887, p. 102.

175 See, for instance, “Projet de Code des prisonniers de guerre, déportés, évacués et réfugiés”, *Revue International de la Croix-Rouge*, Vol. 5, No. 56, 1923.

176 ICRC, A PV, AIPG, meeting of 1 September 1919.

led to the same conclusion. The ICRC took various measures in response to this recurrent problem: it reduced the number of issues from twelve per year to six in 1978¹⁷⁷ and to four in 1998.¹⁷⁸ It closed the Arabic, Russian and Spanish editions in 1999, leaving only a bilingual French/English edition.¹⁷⁹ But at no time in its history did the ICRC consider abandoning publication of this periodical, which has acted as the voice of the ICRC since it was founded. While finding paying subscribers was essential in order to place the *Bulletin* on a solid footing – which explains the many attempts to acquire new subscribers¹⁸⁰ – this was not a priority for the *Revue/Review*, as long as it was widely disseminated. “The question of subscriptions is less important than that of distribution of the *Review* in places where it will be available to readers”, was the internal view.¹⁸¹ This explains print runs that were sometimes enormous in comparison with the actual number of subscribers. What mattered to the ICRC was reaching as wide an audience as possible – even a non-paying audience – in order to get its messages across or to ensure that it was accepted for what it was. The purpose of publishing the *Revue* in Spanish, for instance, was primarily to counter prejudices in Latin American countries regarding the ICRC stemming from “denominational questions”.¹⁸²

Over the years, there were two target audiences for the journal, reflecting two different priorities. The first priority was to anchor the ICRC firmly in the Movement, whether to ensure the very existence of the organization or to counter any threat of exclusion. In parallel, especially after the Great War, the *Bulletin* and the *Revue/Review* also targeted the political and academic world, with the aim of making the ICRC a preferred intermediary and essential partner in any discussion on IHL. A glance at the distribution lists in the ICRC archives shows that the ICRC’s distribution strategy – supported, incidentally, by the Swiss Confederation¹⁸³ – was geographically broad, yet targeted in terms of the organizations and individuals that the ICRC attempted to influence. This explains why, even before its transformation into an academic journal, the *Revue* (as with the *Bulletin* before it) was never a mainstream publication. It was always “aimed at an elite”,¹⁸⁴ and its contents were seen, even within the ICRC, as too technical and “not very attractive” to a general readership.¹⁸⁵

The *Bulletin* and the *Revue/Review* have undergone many transformations over their 150 years of existence, but none was as far-reaching as that of 2005, which

177 “International Review in 1978”, *International Review of the Red Cross*, Vol. 17, No. 201, 1977, p. 552.

178 “Announcement”, *International Review of the Red Cross*, Vol. 38, No. 322, 1998.

179 “To subscribers and readers of the International Review of the Red Cross”, *International Review of the Red Cross*, Vol. 38, No. 325, 1998.

180 See, for example, “Aux abonnés du Bulletin”, above note 4.

181 ICRC, A PV, Commission de l’Information, meeting of 11 November 1947.

182 ICRC, A PV, Commission de l’Information, meeting of 11 November 1947.

183 Swiss embassies and other diplomatic representations are tasked with verifying and adding to the distribution list for the *Review*. See, for example, the correspondence between the ICRC and the Swiss Ministry of Foreign Affairs, ICRC, B AG, 064-11.

184 ICRC, A PV, Commission de l’Information, meeting of 11 November 1947. Gustave Moynier had already raised this point: “Aux abonnés du Bulletin”, above note 4.

185 In the words of one of the members of the Committee: ICRC, A PV, Comité, meeting of 3 November 1938.

affected the form, content and editorial line of the *Review*. Firstly, the publication became monolingual and chose English as its official language. Only a selection of articles is translated now, even in the case of the French version. Secondly, each issue of the *Review* now addresses a specific theme. The *Review* became a true academic journal, a trend that was accentuated by the partnership set up with Cambridge University Press in 2006. Finally, an Editorial Board was created, consisting exclusively of persons from outside the ICRC.¹⁸⁶

Does this mean that the ICRC lost control of the *Review* fifteen years ago? Not necessarily. The editorial team still consists of ICRC staff, and it is they who have the last word on the journal's contents. Furthermore, the theme for an issue is often chosen in the light of the current concerns of the ICRC or of its strategic priorities. And while the *Review* has a global role, almost one third of its articles are still authored by ICRC staff.¹⁸⁷ While each author expresses their own views, it is clear that contributions also relay institutional messages. The percentage of content tied to the ICRC is even higher if one takes account of the institutional documents, reports and official positions that the *Review* continues to publish. To put it simply, the *Review* remains a policy platform for the ICRC.

The most significant change since the first issues of the *Bulletin* is, as we have seen, the disappearance of the Movement, both as the main recipient of the publication and as the supplier of raw material for its articles.¹⁸⁸ In that sense, the ICRC has laid down the mandate conferred upon it by the Berlin International Conference of 1869, transforming in accordance with its own wishes a publication intended to remain the "official gazette of the movement". And it is the National Societies that have been most affected by this change. Indeed, the words of Count Sérurier appear prophetic today, stating that he was "surprised and distressed" on reading the minutes that rendered the decisions of the Berlin Conference official, to see that they spoke of creating an international "journal" rather than the "bulletin" that the Conference had decided upon.¹⁸⁹ Despite Gustave Moynier's assurances addressing Sérurier's concerns,¹⁹⁰ the latter had understood full well that a power issue lay behind the choice of title. While a "bulletin" was ultimately no more than a receptacle in which one might deposit various pieces of information, the role of a "journal" was primarily to promote the words and thoughts of whoever managed it. The ICRC had most certainly understood this distinction from the very beginning, and turned it to its own advantage.

186 "Editorial", *International Review of the Red Cross*, Vol. 86, No. 856, 2004, p. 721.

187 Author's calculations, based on Nos 901–905 of the *Review*. The author counted only signed articles and did not include interviews or editorials.

188 Even though the ICRC complained regularly that the central committees rarely sent in notes for publication. See, for instance, ICRC, A PV, Comité, meeting of 23 August 1871.

189 Letter from Sérurier to Moynier, 14 June 1869, ICRC, A AF 6, 1/181.

190 Letter from Sérurier to Moynier, 16 June 1869, ICRC, A AF 6, 1/182CP.

NOTE

From the *Bulletin International des Sociétés de la Croix Rouge* to the *International Review of the Red Cross*: The Great War as a revelator

Annette Becker

Dr Annette Becker is a Professor of Contemporary History at the Université Paris-Nanterre and a specialist in wars and genocides. She is also a member of the Editorial Board of the *International Review of the Red Cross*.

Abstract

During the Great War, the Bulletin International des Sociétés de la Croix Rouge covered the immense work of the International Committee of the Red Cross (ICRC) and the National Red Cross and Red Crescent Societies (National Societies). This article focuses on one particular angle of that work: the tensions and even contradictions between the ICRC's duty of neutrality and impartiality, on the one hand, and the national and sometimes nationalistic commitments of National Societies, which were naturally opposed to each other in wartime, on the other. While some of the Bulletin's articles revealed real advances in thought on war and the protection of victims, others reflected the inertia caused by this fundamental contradiction.

Keywords: First World War, *Bulletin International des Sociétés de la Croix Rouge*, prisoners, civilians, National Societies, victims.



The year 1914 had been planned as a memorable one for the International Committee of the Red Cross (ICRC) and its main publication. Indeed, issue 179 of the *Bulletin International des Sociétés de la Croix Rouge, Publié par le Comité International Fondateur de cette Institution (International Bulletin of Red Cross Societies, Published by the International Committee, Founder of this Institution)*, which came out in July, celebrated both the 45th anniversary of the publication and the 50th anniversary of the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 22 August 1864. The articles featured in that issue focused on different aspects of the Convention, and for the first time the *Bulletin*, which was usually parsimoniously illustrated with grainy black and white photos, made use of colour in an image depicting a magnificent tree of the National Red Cross and Red Crescent Societies (National Societies) standing right on the banks of Lake Geneva at the foot of the Alps (see Fig. 1). The caption reads “1863–1913: The work of the Red Cross since its foundation, published by the International Committee on the occasion of the Swiss National Exhibition of 1914”.¹ The trunk – bearing the motto “*Inter Arma Caritas*” in red lettering, as it appeared on the white cover of all issues of the *Bulletin* – divides into three long, stout branches stretching proudly skywards. The central branch is labelled “The work of the International Committee” and is flanked by “Governments party to the Geneva Convention” on the left and “National Red Cross Societies” on the right. The branches are covered in flags, as multicoloured as they are diverse, arranged from bottom to top in chronological order of their respective countries’ accession to the Convention and formation of National Societies. Since the start of the century, accessions to the Convention had grown significantly in number, and the Red Cross seemed set for an ever more effective future in the service of peace and, in the event of war, in the service of those rendered lawfully *hors de combat* – neutral in the true sense of the word, being no longer able to continue fighting for their side – as a result of being wounded or captured.

Yet the flags, unlike the red cross on a white background, also (perhaps primarily?) represented governments, patriotism and even nationalism. Even at the moment that the July 1914 issue came off the press, the Sarajevo assassination, a spiralling succession of declarations and warnings and the interplay of alliances and colonial empires had drawn Europe and the world into war, utterly dashing the hopes raised by the Convention: on 22 August 1914, the toll of the dead and wounded and the numbers of prisoners were already mounting as other disasters unfolded, not least the atrocities committed against civilians during the invasions.²

Issue 180 of the *Bulletin*, which came out in October 1914, was the first issue published during the war. The writers and editors of the *Bulletin* strove to ensure that this issue came out on time, and they continued their endeavours

1 *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 45, No. 179, 1914, p. 173.

2 Annette Becker, “The Great War: World War, Total War”, *International Review of the Red Cross*, Vol. 97, No. 900, 2016.



Figure 1. Image published by the ICRC on the occasion of the 1914 Swiss National Exposition. *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 45, No. 179, 1914.

throughout the war at a rate of four issues a year – in January, April, July and October – right through to issue 197, published in October 1918. The war, in full swing from August 1914, inevitably filled the *Bulletin*'s pages, although this did not prevent previously planned articles from also being published, regardless of various technical delays. Such delays were clearly less important than the intellectual and political sluggishness and general tardiness in assessing new situations which affected not only the National Societies, as reflected in their *Bulletin*, but the whole world, now inextricably locked in the grip of a World War. In 1940, the historian and “oldest captain in the French army”, Marc Bloch, would posit that “we were thinking too slowly” to describe the reason for the defeat of his country. This delay was particularly apparent in decisions taken with a First World War mentality in the midst of the Second World War.³

This observation could equally be applied to the *Bulletin*, a reflection of the Red Cross and its National Societies, and to their anachronistic approach manifesting at times as inertia in the face of the shocking violence of the Great War. Nevertheless, there were also articles that revealed real advances in thought on war and the protection of its victims. There was hesitation and procrastination, but also declarations and articles of substance. The *Bulletin* provides an insight into just how firmly the ICRC clung, with the energy of despair, both to the Conventions of which it was the guardian and to its moral authority, fearing that they too would end up being violated and abolished.⁴ An approach based almost exclusively on law to solve problems, at a time when so many lives were at stake, may appear not only limited but also ethically untenable. It is important, however, to understand the logic underpinning the ICRC's reasoning and situate it in the correct historical and intellectual context. The ICRC drew its legitimacy solely from the Conventions that had already been ratified, its fifty years of history, the resolutions adopted, and the reciprocity between the signatories that had become enemy belligerents. The mandates governed humanitarian action, even if the moral authority that had, to some extent, been heeded in the Russo-Japanese War and subsequently in the Balkan Wars was sometimes sufficient to compel belligerents to show restraint or engage in negotiations. Although neutrality, humanity and compassion appeared to oppose, term for term, engagement, brutality and reprisals, there were many contradictions. Humanitarian organizations, the ICRC in particular, found themselves faced with a narrow choice between action on the ground and bearing witness by publicly denouncing violations. The options were to take action and bear witness, to take action without bearing witness, or to bear witness and not take action: there are countless traces of these three positions in the *Bulletin*, which is a public reflection of the cascading effects of contamination of and by the war.⁵

3 Marc Bloch, “L'Étrange défaite”, in *L'Histoire, la Guerre, la Résistance*, Quarto Gallimard, Paris, 2006.

4 See Lindsey Cameron, “The ICRC in the First World War: Unwavering Belief in the Power of Law?”, *International Review of the Red Cross*, Vol. 97, No. 900, 2016.

5 Irène Herrmann, *L'humanitaire en questions: Réflexions autour de l'histoire du Comité International de la Croix-Rouge*, Les Éditions du Cerf, Paris, 2018.

In spite of the war, the general structure and presentation of the *Bulletin* remained unchanged. Each one began under the heading “International Committee”, with a list of “New and Received Works” and “Bibliographical Summary”. This was followed by circulars addressed to members and statements by the president. For example, the October 1914 issue included the 158th circular reminding central committees of “[t]he international duties of National Red Cross Societies in the European war”. This was followed by a text by ICRC president Gustave Ador dated 15 August: “There will be enormous needs, but the International Committee is fully confident that the charitable zeal of all our Societies will be able to rise to the challenge.”⁶ The wartime issues did, of course, contain an extra regular section on the “European war”, which began by listing the activities of the ICRC. The first issue featured the following:

- I - Red Cross Societies of neutral countries;
- II - Observations on the Geneva Convention;
- III - Protests.⁷

The ever-thicker section devoted to the International Prisoners of War Agency, which was established in August 1914, clearly showed that the Red Cross’s main concern was prisoners and the wounded. Resolution 6, adopted at the International Conference of the Red Cross and Red Crescent in 1912, had proposed the creation of such an agency, although it could not have been anticipated at that time how crucial it would become by 1914. Soon the Agency section became one of the longest in the *Bulletin*, sometimes even longer than the Committee’s section.⁸

Next on the table of contents came the voices of the National Societies from both those States that were party to the conflict and those that were not, in alphabetical order. Right from the summary, the inevitable tensions arising from the contradiction between the neutral universality of the Red Cross and the aggressive nationalism of each of the belligerents leaps from the page. While some National Societies were satisfied with reporting fairly banal news, those of belligerent States used their space as a platform from which to attack their enemies. Each one firmly believed that it always complied with the Conventions and humanitarian principles but that those on the other side did not.

Reviews of publications as a sign of contradiction

Setbacks and advances can often be measured by the journal’s reviews of other publications, which were written either in Geneva or by the various National Societies. In the April 1915 issue, the French National Society contributed a piece

6 Gustave Ador, “Devoirs internationaux des Sociétés de la Croix-Rouge dans la guerre européenne”, *International Review of the Red Cross*, Vol. 45, No. 180, 1914, p. 226.

7 “La guerre européenne”, *International Review of the Red Cross*, Vol. 45, No. 180, 1914.

8 This is something that is clearly shown in the latest commemorative book by François Bugnion, *Confronting the Hell of the Trenches: The International Committee of the Red Cross and the First World War*, ICRC, Geneva, 2018.

entitled “The Investigation of the Carnegie Commission in the Balkans”,⁹ which commented on a report on the Balkan Wars published in April 1914. These were two horrific conflicts waged in 1912 and 1913 which were as short-lived as they were violent – three weeks in 1912 and six in 1913. These wars could have been a textbook example of violence, and the members of the International Commission of Inquiry (known as the Carnegie Commission) were in no doubt about what could be learned from it:

We know what we must think about the results of European abstention. It is the fear of compromise, the fear of displeasing one or another of the nations, the terror, in short, of intervening reasonably and in time, which has brought about a crisis, the gravity of which is not only of yesterday and today, but also of tomorrow.¹⁰

These international experts saw that the atrocities had been met with “silence” and “abstention”, and they wanted to tell the “truth” with complete “independence”. Convinced of the worthiness of their mission, they believed – a dark irony indeed – that their words had been heeded:

[T]oday the Great Powers are manifestly unwilling to make war. Each one of them, Germany, England, France and the United States, to name a few, has discovered the obvious truth that the richest country has the most to lose by war, and each country wishes for peace above all things.¹¹

Just a few months later, the Sarajevo assassination took place and the powder keg exploded; the 1914 war broke out like a third Balkan war, but this time the rest of Europe was drawn in, with far-reaching consequences. Peace had been lost, and there was no time to dwell on the conclusions of the Carnegie Commission: “The real culprits in this long list of executions, assassinations, drownings, burnings, massacres and atrocities furnished by our report, are not, we repeat, the Balkan peoples. Here pity must conquer indignation. Do not let us condemn the victims.”¹²

It was no coincidence that the authors of the note that appeared in the April 1915 *Bulletin* chose to comment on the Carnegie report; they were keen to recall the importance of both the law of The Hague and the law of Geneva at a time when the

9 “L’enquête de la Commission Carnegie dans les Balkans”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 46, No. 182, 1915.

10 Baron d’Estournelles de Constant, “Introduction”, in Carnegie Endowment for International Peace, *Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars*, Publication No. 4, Washington, D.C., 1914, p. 4. Expected at the end of 1913, this report’s publication was delayed, and it eventually came out in April 1914. The Carnegie Endowment was set up in 1910 by American millionaire Andrew Carnegie with a view to promoting peace and studying what might jeopardize it. Almost immediately, the Balkan Wars and the Great War would put it to a challenging test. Yet it continued its intellectual promotion of peace with a generally very American vision in keeping with its origins; during the Great War, its president was Nicholas Murray-Butler, who was also president of Columbia University, New York. See Nadine Akhund and Stéphane Tison (eds), *En guerre pour la paix: Correspondance Paul d’Estournelles de Constant et Nicholas Murray-Butler, 1914–1919*, Alma Éditeur, Paris, 2018.

11 Carnegie Endowment for International Peace, above note 10, p. 17.

12 *Ibid.*, p. 19. See Annette Becker, “Les victimes, entre ‘innocence’, oubli et mémoire”, *Revue Suisse d’Histoire*, Special Issue on “Victimes”, Vol. 57, No. 1, 2007.

ICRC and National Societies were once again in such great demand.¹³ This critique should be read as a *mise en abyme* of this period of wars that were so similar and yet so different between 1912 and 1914–15:

The provisions concerning prisoners are being violated. In general, apart from some exceptions who are entitled to protection, belligerents are allowed unlimited freedom to do harm. The inquiry conducted by the Commission revealed numerous cases in which the rules on respecting the sick and wounded and protecting hospitals and medical facilities were not respected. ... This leads to the lamentable conclusion that all the efforts to humanize war have faded and cease to exist now that this horrific war has unleashed human bestiality, giving it free rein, when such excesses are not encouraged by leaders or at least not officially tolerated.¹⁴

This “human bestiality”, strongly emphasized in the French National Society’s section in 1915, was obviously not considered to be universal: was it not the enemies of France in this World War, Germany in particular, that were the warmongers responsible not just for stirring up war but also for inciting untold violence?

The pages of the *Bulletin* particularly highlighted the extreme reciprocal aggression between France and Germany. The findings of the commissions investigating the atrocities committed in 1914 during the invasion of Belgian and French territory were rejected by the German National Society:

Refutation of the accusations made by the French government. ... These accusations are lies; the German army’s command has, on the contrary, succeeded in maintaining discipline in every respect and ensuring strict compliance with the rules of the law of war in all areas of combat. ... The German government alleges that the French people themselves are responsible for the acts of pillage that the Germans have been wrongfully accused of. It lays the blame on the French soldiers for killing the wounded and committing brutal atrocities against defenceless enemies.¹⁵

13 See the remarkable book by Maartje Abbenhuis, *The Hague Conference and International Politics, 1898–1915*, Bloomsbury, London and New York, 2019.

14 “Les dispositions relatives aux prisonniers sont violées. En général, et à part des exceptions qui font honneur à ceux à qui elles sont dues, la liberté de nuire, laissée aux belligérants, est illimitée. L’enquête de la Commission révèle bien des cas où le respect des malades et blessés, la protection due aux hôpitaux et installations sanitaires ne furent pas observées. ... Il en ressort la constatation lamentable que tous les efforts pour humaniser la guerre s’évanouissent et n’existent plus dès que la guerre atroce a réveillé la bestialité humaine en lui lâchant la bride, quand encore ce débordement n’est pas encouragé par les chefs ou tout au moins officiellement tolérée.” “L’enquête de la Commission Carnegie dans les Balkans (*Bibliographie*)”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 46, No. 182, 1915, pp. 229–230.

15 “Réfutations des accusations formulées par le gouvernement français ... Ces accusations sont des mensonges, le commandement de l’armée allemande a su au contraire maintenir, par tous les moyens, la discipline, et faire observer, strictement, sur tous les lieux de combat, les règles du droit de la guerre. ... Le Gouvernement allemand impute à la population française elle-même, les actes de pillage dont les Allemands sont à tort accusés. Il reproche aux soldats français d’avoir achevé des blessés et commis des cruautés atroces sur leurs ennemis sans défense.” “Réfutation des accusations formulées par le Gouvernement français (*Bibliographie*)”, *Bulletin International des Sociétés de la Croix Rouge*, Vol. 46, No. 183, 1915, p. 353.

Everywhere, it seemed, social Darwinism, a product of nineteenth-century thinking, was at work. Once war was declared, racism and ethnic and social contempt poisoned the systems of representation, whether this was deliberate or not, particularly in the period of anomie at the time of the invasions. As Pierre-André Taguieff remarked on the subject of anti-German sentiment between 1914 and 1918, “either one is a man or one is German – a formula of universalist exclusion”.¹⁶ If “good” is a human universal, “evil” must be rejected as inhuman or even “ahuman”, hence the dehumanization of the enemy, who is first banished from civilization to become a “savage” or a “barbarian” and then, in some cases, relegated to the level of an animal, a pest to be eradicated. Even in the National Society contributions published in the *Bulletin*, the belligerents showed themselves to be quintessentially anti-humanitarian.

What could the ICRC, which was fighting for the universal human, do in this context? The wisest course of action was to avoid publishing in the *Bulletin* any arguments that, while widespread, were far removed from the precepts of the Red Cross. This is undoubtedly why the atrocities committed during the invasions and those committed under the guise of war in the Russian Empire (namely, the pogroms and forced displacement of the population), as well as the extermination of the Armenians in the Ottoman Empire, did not find their way into the *Bulletin*, while the Red Cross archives in Geneva contained reams of information on them. It was as if sweeping these atrocities under the carpet, lying by omission, might really make them go away. And when it came to abuses within the Russian and Ottoman Empires, the Russian and Turkish National Societies were obviously not going to publish anything to denounce them. In fact, there were denunciations scattered throughout the *Bulletin*, slipped into remarks on the attitude of this or that particular country – for example, when the German occupation authorities wanted to dissolve the Belgian Red Cross, the German atrocities were brought up again and compared with the massacre of the Armenians – but there was never a full article devoted to such issues. In all respects, the primary aim, which was to ease the plight of the wounded and, above all, prisoners, took precedence over everything else.¹⁷

The International Prisoners of War Agency, the work of the National Societies, and the *Bulletin*

A look at one of the tables of contents of the *Bulletin*, which are all very similar, reveals the weight of the International Prisoners of War Agency. The following is from issue 186, published in April 1916:

16 Pierre-André Taguieff, *The Force of Prejudice: On Racism and Its Doubles*, University of Minnesota Press, Minneapolis, MN, 2001, p. 102.

17 Annette Becker, “The Dilemmas of Protecting Civilians in Occupied Territory: The Precursory Example of World War I”, *International Review of the Red Cross*, Vol. 94, No. 885, 2012.

International Prisoners-of-War Agency:

- I - Introduction
- II - Orders and general information on prisoners held by belligerents
- III - Application of the Geneva Convention
- IV - Activities in Copenhagen, Vienna, Rome, Petrograd, Constantinople and Sofia
- V - Work in Geneva
- VI - Civilians
- VII - Sanitary facilities
- VIII - The seriously injured and sick
- IX - Treasury and donations
- X - Statistics and results¹⁸

The quality and quantity of actions by the International Prisoners of War Agency, in fulfilment of the ICRC's main mission and duty during this war, should not be underestimated: the *Bulletin* devoted hundreds of pages to the plight of the wounded and prisoners, including, significantly, civilian prisoners, particularly those in occupied territories, on whose behalf the ICRC did not have freedom of movement or action, in spite of the Hague Conventions. Although the question of civilians had been raised at the various meetings in The Hague, as Gustave Ador rightly observed in 1917, it had never been envisaged that there would be such large numbers of civilian prisoners.¹⁹

The Great War was a turning point for the ICRC; the organization was able to put itself completely at the service of the wounded and prisoners, to provide information on prisoners of war, to protect them under past agreements, and to improve conditions for them in a present that was more horrific than anything that could have been imagined in the previous half-century.

The *Bulletin* focused on the three core strands of the difficult task assigned to the Agency: finding the names, drawing up lists, centralizing the information in Geneva and collating it in a file by country and then by place and regiment. This was a mammoth task carried out by 1,200 volunteers, most of them women, who appeared in a full-page photo taken in front of the Rath Museum and published in the *Bulletin* in 1915 (see Fig. 2). Making enquiries, centralizing information, contacting families – every issue of the *Bulletin* highlighted this unprecedented role and sometimes published the full reports on the visits of delegates to prisoner-of-war camps. There are plenty more reports in the archives on the

18 “Agence internationale des prisonniers de guerre: I- Introduction. II- Ordonnances et renseignements généraux concernant les prisonniers chez les belligérants. III- De l'application de la Convention de Genève. IV- L'Activité à Copenhague, Vienne, Rome Petrograd, Constantinople et Sofia. V- Le travail à Genève. VI- Les civils. VII- Les sanitaires. VIII- Les grands blessés et malades. IX-Trésorerie et dons. X-Statistiques et résultats.”

19 Speech at the International Conference of the Red Cross on the issue of civilian prisoners: “Introduction sommaire à la question concernant les civils”, September 1917, p. 1, ICRC Archives, 411/10. And see A. Becker, above note 2.



Figure 2. Image of volunteers of the International Prisoners of War Agency in front of the Rath Museum, which was closed from 1916 to 1919 to host the Agency. *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 46, No. 181, 1915.

activities carried out, and a look at the contents of the *Bulletin* clearly confirms the extent of these efforts, which were by no means a secondary endeavour.²⁰

The first reports were published in 1917, with an update in 1918. The numbers were staggering. Millions of letters, reply cards, packages and money orders were exchanged thanks to the Agency. Donations and expenditures were calculated to astronomical sums. It might be wondered, however, whether there is not something trivial about all these figures. None of the contemporary actors – belligerents, non-belligerents or, first and foremost, the ICRC – had yet conceived, for obvious reasons, the message that Arthur Koestler developed in the Second World War: “Statistics don’t bleed; it is the detail which counts.”²¹ At that time, unfortunately, they were too easily satisfied with the sheer weight of the statistics showing the thousands of letters and packages sent, the volunteers working at the Agency and the numerous visits to prisoner-of-war camps by delegates, and so on, while the extreme suffering visited on human beings, their perceptions, their emotions – the detail – were not really described. In this respect, the French National Society certainly took the prize for humanitarian intelligence in 1914 when it published an extract from a professional nursing

20 See Annette Becker, *Oubliés de la Grande Guerre: Humanitaire et culture de guerre, populations occupées, déportés civils, prisonniers de guerre*, Noësis, Paris, 1998; and more recently, Cédric Cotter, *(S’)Aider pour survivre: Action humanitaire et neutralité suisse pendant la Première Guerre mondiale*, Georg Éditeur, Chêne-Bourg, 2018.

21 Arthur Koestler, *Arrival and Departure*, Macmillan, New York, 1943.

bulletin (the *Bulletin Professionnel des Infirmières et Gardes Maladies*) which contained statistics (based on what?) showing that 54% of those wounded had been cured and could therefore return to the front, while only 3.5% had died. The journal must have failed to take into account the carnage that took place in August and September 1914, given that it concluded: “Such a low mortality rate was unheard of in previous wars.”²²

Rethinking humanitarian work, from soldiers to civilians

Beyond the figures, the ambiguities inherent in the Red Cross’s struggle to fulfil its mission, reflected in the *Bulletin*, largely arose from the inability of the belligerents to internalize neutrality and impartiality: if they treated the prisoners they took well, what would the evil enemy do? In January 1915, the Red Cross of Montenegro complained that while Austro-Hungarian prisoners were being well treated in Montenegro, Montenegrin prisoners were, by contrast, being abused by the dual monarchy, as they were not allowed to communicate with their families or receive packages.²³ The Austrians, however, considered that they were behaving correctly, a view substantiated by a favourable report from the Spanish ambassador.²⁴

How could the Red Cross, in the name of humanitarian neutrality, require a nation to do something that it was blatantly clear the other side would not? Neutrality and impartiality were not conceivable; they were inconceivable. There is no question that the ICRC’s narrow legalistic approach (reflected to some extent in the *Bulletin*), its stubborn determination to work only within the bounds of ratified conventions because of the risk of being prohibited from doing anything by the belligerents, sometimes undermined its efforts – for example, when it felt obliged to turn a blind eye to a particular national decision because it hoped to be able to take action in another area. The ICRC could accept on the one hand what it could clearly condemn on the other, for fear of jeopardizing all repatriation and relief efforts. Numerous ambulances, hospitals and hospital ships were bombed or torpedoed, but the protests were bound to fall on deaf ears in a world where each belligerent did what it wanted in the firm belief that it was only the other side that acted badly and violated minimum humanitarian standards.

Nevertheless, as is often said today by the excellent jurists who tirelessly reflect on international humanitarian law, one needs to know how to see the

22 “Un taux de mortalité aussi bas était inconnu dans les guerres précédentes.” “La statistique des blessures de guerre”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 45, No. 182, 1915, p. 230. Also see Jean-Michel Steg, *Le jour le plus meurtrier de l’histoire de France: 22 août 1914*, Fayard, Paris, 2014.

23 “La guerre européenne”, *Bulletin International des Sociétés de la Croix Rouge*, Vol. 46, No. 181, 1915, p. 21.

24 “Réponse du Comité central de Vienne à notre 163^e circulaire concernant l’égalité de traitement des prisonniers”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 46, No. 182, 1915; “Réponse à notre 163^{me} circulaire sur l’égalité de traitement des prisonniers”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 46, No. 182, 1915.

glass as both half-empty and half-full. For example, in the case of civilians exposed to extreme suffering precisely because they had not been included in the Conventions, the *Bulletin* promptly reported on their particular plight and on the constant efforts undertaken, more or less successfully, to assist them. In January 1916, a lengthy article by Dr Frédéric Ferrière, who headed the civilian section of the International Prisoners of War Agency at that time, clearly set out the various issues involved, particularly the question of equal treatment for military and civilian prisoners of war. He was aware that in occupied areas, isolated families in particular were subjected to double and even triple hardship: they were in occupied territory and therefore prisoners in their own region, they had no news of their military prisoners because the men had gone off to war before the enemy invasion and occupation, and some, particularly after 1915, were deported.

The civilian section of the Agency had become involved in a task that was much bigger than originally anticipated, although it had no intention of abandoning it if it could help to alleviate the suffering of these people who, in some respects, faced an even crueller fate than combatants, because they were often completely helpless when confronted with the horrors of war.²⁵

Henceforth, each issue of the *Bulletin* included developments related to civilian internees, which revealed the same commitment to assist them by all possible means. However, in the cross-cutting dichotomy of war, manoeuvring by the belligerents is again evident, with the National Societies always towing the party line. The following extract from Austria on civilian prisoners is one example:

At home, foreigners under suspicion – those not under suspicion can move around freely – are either held in special camps, in which case they are treated as prisoners of war, or simply confined to a certain area. ... According to reports we have received, it seems that these internees have been treated in a barbaric way in other States. We have learned from a trusted source in France that they are held in several concentration camps²⁶ and treated in the most appalling way; they are made to do the most demeaning work and exposed to the most intolerable iniquities. Reports from Russia are even more lamentable. The nationals of enemy countries are sent to remote regions and abandoned there to their fate, without care from the

25 “La section civile de l’Agence a donc été entraînée à une tâche bien plus étendue que ce n’était à prévoir au début, mais elle ne songe pas à s’y soustraire si elle peut contribuer à soulager des souffrances parfois plus cruelles, si possible, que celles des combattants, puisqu’il s’agit le plus souvent de victimes absolument désarmées en face des horreurs de la guerre.” “L’agence internationale des prisonniers de guerre (Sixième article)”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 47, No. 185, 1916, p. 70.

26 Concentration camps were invented in the nineteenth century, used by the Spanish in Cuba and, later, by the British during the Boer War. See Annette Becker, “A Great War Too Long Forgotten: Civilians as Targets”, in Kai Evers and David Pan (eds), *Europe and the World: World War I as Crisis of Universalism*, Telos Press, Candor, NY, 2018.

authorities. We have a well-founded reason to fear that a good many of our citizens in Russia have been left to freeze or starve to death.²⁷

Each nation was adamant that the rules of humanitarian law were being observed “at home”, while in other States, by contrast, barbarism was rampant. The Germans, with their siege mentality, went even further, accusing the Russians,²⁸ in particular, of ill-treating their nationals, especially children, and of de-Germanizing them, which constituted an attack on their cultural and national integrity:

To all the refugee children from East Prussia were combined those who flowed out of the civilian concentration camps in Russia in great numbers, via Sweden or Romania. These were perhaps even more wretched. Furthermore, it wasn't only the simple matter of keeping them in their country, but of giving them a new homeland, and all their education was to focus on this.²⁹

This doubtless refers to refugees of German origin whose families had, in some cases, been in Russia for two centuries or more. Children are victims of war, of that there is no doubt, and the ICRC did everything in its power to protect them. The German National Society, however, seized the opportunity to push its hyper-nationalism, the effects of which would be felt well into the 1930s and 1940s.

Conclusion

As observed above, since the belligerents engaged in the Great War regarded neutrality as essentially impossible, the ICRC could draw but one conclusion (as had another charitable transnational power, the Pope): there had to be peace. It therefore found itself, like so many other humanitarian organizations, out of step

27 “Chez nous les étrangers suspects – les non suspects peuvent circuler librement- sont, ou bien retenus captifs dans des camps spéciaux, auquel cas ils sont traités comme des prisonniers de guerre, ou bien simplement confinés dans un certain territoire... D'après les nouvelles que nous avons reçues, ces internés paraissent avoir été traités de façon barbare dans les autres Etats. Nous avons appris de source sûre de France, que les internés civils sont dans plusieurs camps de concentration, traités de la façon la plus misérable, qu'ils doivent remplir les fonctions les plus basses et sont exposés aux iniquités les plus intolérables. Les nouvelles venues de Russie sont encore plus lamentables : les ressortissants de pays ennemis sont déportés dans des contrées très éloignées et simplement abandonnés à leur malheureux sort, sans que les autorités s'inquiètent d'eux. Nous nourrissons les craintes les plus fondées qu'un grand nombre de nos concitoyens en Russie aient été anéantis par le froid et la faim.” “Réponse du Comité central de Vienne à notre 163^e circulaire concernant l'égalité de traitement des prisonniers”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 46, No. 182, 1915, p. 204.

28 To the Germans, the Russians were the barbarians of all barbarians, but this was yet another war invention; it was a well-known fact that progress had been made on the Russians' humanitarian issues, something that was clarified in The Hague with the Russian jurist Martens.

29 “A tous ces enfants réfugiés de la Prusse orientale vinrent s'ajouter ceux que déversaient en grand nombre, par la Suède ou la Roumanie, les camps de concentration de civils en Russie. Ceux-ci étaient plus misérables peut-être encore. En outre, il ne s'agissait pas seulement de les conserver à leur patrie, mais de leur en redonner une, et toute leur formation était à faire dans ce domaine.” “Allemagne: Les secours de la Croix Rouge aux enfants de réfugiés”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 47, No. 187, 1916, p. 315.

with the belligerents on two counts, advocating neutrality and peace in the storm of war where both were impossible. It did, however, remain coherent, albeit with a degree of bitterness, as illustrated by this insight offered by Frédéric Ferrière, who was, in particular, strongly opposed to reprisals:

All too often, a preoccupation with the harm you hope to inflict on the enemy outweighs any thoughts about the good you could do yourself; that is the war mentality. You reconsider it later, sometimes when it is already too late.³⁰

Written in the margins of his own copy of this issue of the *Review*, now held in the ICRC Archives, Ferrière continues this thought:

Even in ordinary times, telling the truth is no easy task ... but how much more difficult it becomes in these critical times, when passions are stirred by war and/or people are blinded by hate. A neutral person who judged matters of war from the point of view of a belligerent would no longer be neutral ... Yet let those who are neutral say this humble prayer, that they be trusted, for without this their work would be in vain and useless.³¹

Had the work of the ICRC during these four years been “in vain and useless”? Quite the opposite. In the end, it was the balance of suffering, perhaps what Henry Dunant referred to as the neutrality of the victim, that enabled advances to be made during the conflict, such as transferring the seriously wounded and prisoners, the little-understood fight to stop the use of “poisonous gases” and the torpedoing of hospital ships, not taking military or civilian hostages, and the medical recognition of “barbed-wire disease”, which affected so many prisoners.

In 1917, the ICRC was awarded the Nobel Peace Prize. In its January 1918 issue, the *Bulletin* was proud to announce this fact and to publish a photo of the medal (see Fig. 3). It was recalled that Henry Dunant had received the first Nobel Peace Prize in 1901 and that his successors were continuing his work “for the relief of suffering humanity”:³²

The ICRC sees this reward for its work and this appraisal of its efforts as a powerful incentive to persevere in the task assigned to it in international agreements, which is to undertake constant and effective efforts to improve

30 “La préoccupation du mal qu’on espère faire à l’ennemi prime trop souvent la pensée du bien qu’on pourrait se faire à soi-même; c’est la mentalité de la guerre, on en revient ... après; parfois quand il est trop tard!” “Agence internationale des prisonniers de guerre (Treizième article)”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 48, No. 192, 1917, p. 413.

31 “En temps ordinaire ce n’est déjà pas une tâche aisée de dire la vérité ... Mais combien cette tâche est-elle rendue plus difficile dans ces temps critiques où la guerre a surexcité les passions et où la haine aveugle les peuples. Un neutre qui jugerait les choses de la guerre du point de vue d’un belligérant, ne serait plus un neutre ... Pourtant qu’il soit permis au neutre de faire cette humble prière, qu’on ait confiance en lui, sans quoi son travail serait vain et inutile.” Dr Frédéric Ferrière, handwritten in his personal copy of the *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 48, No. 192, 1917, p. 413. Available for consultation at the ICRC Archives in Geneva.

32 “[A]u profit de l’humanité souffrante”. “Le Prix Nobel de la Paix au Comité International”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 49, No. 193, 1918, p. 17.



Figure 3. Image of the Nobel Peace Prize awarded to the ICRC on 11 December 1917. *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 49, No. 194, 1918.

the plight of the wounded, the sick and prisoners in a spirit of absolute neutrality and impartiality according to its motto *Inter Arma Caritas*.³³

It was no surprise that the opposite page featured a portrait of Florence Nightingale; the United Kingdom was also keen to provide evidence, with this picture of the

33 “Le Comité International voit dans cette récompense de son travail et cette appréciation de ses efforts, un puissant encouragement à persévérer dans la tâche qui lui a été indiquée dans les accords internationaux, à savoir celle d’une constante et agissante préoccupation de l’amélioration du sort des blessés, des malades et des prisonniers, dans un esprit de neutralité et d’impartialité absolues, conformément à sa devise, *Inter Arma Caritas*.” *Ibid.*, p. 18.

heroine of the Crimean War, of its humanitarian achievements, at a time when the world, the ICRC included, was reeling from the Russian Revolution and shocked by the woes of the Russian National Society.

On 15 January 1919, the publication, now over fifty years old, was renamed the *Revue Internationale de la Croix-Rouge* (*International Review of the Red Cross*), although it still included the *Bulletin*. It was now two publications in one and came out monthly; it had taken four years of war and paradoxes for the division between the ICRC and the National Societies, readily apparent from the content, to become institutional, although the fact that they remained physically united in the same volume prolonged the ambiguities discussed above. The founding editorial in the first issue of the *Review* was signed by a triumvirate from the *Bulletin* – Paul Des Gouttes, Etienne Clouzot for the Entente Powers Service of the International Prisoners of War Agency, and K. de Watteville for the Central Powers Service. In it, they stated:

Rather than just bandaging wounds, the Red Cross wants to remedy the ills arising from war; it will focus all its efforts on solving the big problems that have received scant attention as yet, such as rehabilitation for the injured and the fight against tuberculosis, and in a broader context it will constantly pursue its mission to alleviate human suffering.³⁴

The *Bulletin* kept its own numbering, so that the January 1919 issue was No. 197, and it maintained the same editorial line, with a view to

giving greater publicity to reports on charitable activities. ... Alongside the official part, which will feature news from each Red Cross Society, space will also be given to signed articles on matters of general interest relating to assistance activities in which authors can freely express their point of view, denounce injustices and appeal for support.³⁵

With the end of the war, the *Review* made its feelings known in very clear terms:

The Great War is over! ... The joy with which the International Committee embraces this great and happy event is evident, an event whose suddenness took it, like so many others, by surprise, but which it, and everyone, has longed for in the name of suffering humanity.³⁶

34 “Au lieu de panser seulement les blessures, la Croix Rouge veut remédier aux maux entraînés par la guerre ; elle appliquera toutes ses forces à résoudre les grands problèmes à peine abordés de la rééducation des mutilés, de la lutte contre la tuberculose, et, dans une acception plus large, elle aura désormais pour visée constante l’atténuation des misères humaines.” “Revue Internationale de la Croix-Rouge et Bulletin International des Sociétés de la Croix-Rouge”, *International Review of the Red Cross*, Vol. 1, No. 1, 1919, p. 1.

35 “[D]onner une publicité plus large aux compte rendus de l’activité charitable. ... A côté de la partie officielle où seront toujours insérées les nouvelles de chaque Croix Rouge, il fera place à des articles signés sur toute question d’assistance d’intérêt général où chacun pourra librement exposer son point de vue, dénoncer l’injustice, appeler à l’aide.” *Ibid.*, p. 2.

36 “Elle est finie la Grande Guerre! ... On devine la joie avec laquelle le Comité International s’est associé à ce grand et heureux événement, dont la soudaineté l’a surpris comme tant d’autres, mais après lequel, au nom de l’humanité souffrante, il soupirait comme tout le monde.” “Comité International”, *International Review of the Red Cross*, Vol. 1, No. 1, 1919, p. 69.

The question now was, what next? This was a time of joy and relief, but also time to take stock of the suffering, violence, “barbed-wire disease” and graves³⁷ that the war had inflicted upon humanity. And then there was the most pressing legacy of the war: the hundreds of thousands of refugees pouring out of the Russian and Ottoman Empires, the famine that engulfed all of Central and Eastern Europe and the reconstruction work needed.³⁸ The now monthly publication would scarcely suffice for the ICRC and the National Societies to highlight their work and reflect on what would enable them – even if it was wishful thinking – to enhance their potential interventions against reprisals or for the protection of civilians, while at the same time ensuring a return to the fundamental principles at their core. The first issue of the *Review*, published in January 1919, is typical: the article “Situation of Prisoners of War and Civilian Internees since the Conclusion of the Armistices”³⁹ was followed by one entitled “Appeal by the Evangelical Society of Geneva in 1859 for those Wounded in Solferino”.⁴⁰ The *Review* and the *Bulletin* had changed, but the work of the Red Cross remained Protestant and Genevan, whatever its involvement in the First World War had been.⁴¹

37 See “Les tombes” and review of *Die Stacheldraht-Krankheit, Beiträge zur Psychologie des Kriegsgefangenen* in *International Review of the Red Cross*, Vol. 1, No. 3, 1919.

38 Bruno Cabanes, *The Great War and the Origins of Humanitarianism, 1918–1924*, Cambridge University Press, Cambridge, 2014.

39 “Chronique sur la situation des prisonniers de guerre et des internés civils depuis la conclusion des armistices”.

40 “L’appel de la Société évangélique de Genève en 1859 en faveur des blessés de Solferino”.

41 See the article by Daniel Palmieri this issue of the *Review*.

The *International Review of the Red Cross* and the protection of civilians, c. 1919–1939

Ben Holmes

Ben Holmes is a postgraduate researcher based at the University of Exeter. His research specializes in the history of humanitarianism and warfare in the early twentieth century, and he is currently completing a project on the history of British humanitarian aid to German civilians during the First World War and its aftermath.

Abstract

This article will use past issues of the International Review of the Red Cross to examine how the International Red Cross and Red Crescent Movement (the Movement) has engaged with the issue of civilian protection over the course of its history. Although founded to organize humanitarian relief and legal protection for wounded and sick combatants, the International Committee of the Red Cross and the wider Movement have increasingly incorporated civilian war victims into their remit since their establishment. Yet, as this article will highlight, this process has not been straightforward. Focussing on the critical period between the two World Wars, the article will use the Review to illustrate why the Red Cross began engaging with the “civilianization” of conflicts in response to the threat of new technologies like gas and aerial bombardment. Using articles from the Review to highlight the key challenges faced by the Movement in protecting civilians over this period, it will also consider the gaps in the Red Cross’s initial conceptions of who “the civilian” was, why belligerents attacked them, and what was the best means of protecting them.

Keywords: aerial bombardment, chemical warfare, civilians, civilianization, First World War, Second World War, international humanitarian law, protection.

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“Why protect civilians?”, Hugo Slim asks in a simple yet provocative question.¹ The very concept of “the civilian” represents one of the implicit social contracts in wartime ethics: that armies should not inflict violence upon individuals who are unarmed and pose no threat to them. As Geoffrey Best surmises, it is not only immoral but counterproductive for belligerents to kill or injure populations who are “theoretically of no consequence in a military contest”.² Best’s use of the word “theoretically” is significant, however. In the complex realities of warfare, as numerous scholars have argued, simplistic distinctions between soldiers and “innocent” civilians are difficult to maintain. Whether knowingly or unwittingly, civilians can contribute to conflicts economically (by providing materials or money to belligerents), politically (by engaging in political decisions which may have a military impact) or militarily (by sheltering soldiers or guerrilla forces). Belligerents may thus inflict violence upon civilians because of the ways in which these “innocent” populations can “support” conflicts. Violence may also achieve other purposes, like inflicting chaos on an enemy’s society, which impacts their ability to wage war; or belligerents may regard violence as justified retribution for their enemies’ past “crimes”.³ While violence against civilians predates the twentieth century, Andrew Barros and Martin Thomas argue that the civil–military divide has become more “dynamic and unpredictable” in the last century. The changing nature of warfare and patterns of mobilization have complicated the lines between battlefield and home front, international and civil wars, and combatants and non-combatants.⁴

If these factors explain why civilians may need protection, a key follow-up question to Slim’s is: “How do we protect civilians?” What does protection actually cover? According to humanitarian scholars and practitioners like Jean-Luc Blondel and Frédéric Mégret, modern international humanitarian law (IHL), as well as other frameworks like human rights and refugee law, guarantees legal protection to civilians in war zones. IHL sets out the obligations due to “protected persons”, including civilians, and the respective responsibilities of belligerents, States, and

1 Hugo Slim, “Why Protect Civilians? Innocence, Immunity and Enmity in War”, *International Affairs*, Vol. 79, No. 3, 2003.

2 Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts*, Weidenfeld and Nicolson, London, 1980, p. 271.

3 On the dynamics of and justifications for violence against civilians, see H. Slim, above note 1; Andreas Wenger and Simon J. A. Mason, “The Civilianization of Armed Conflict: Trends and Implications”, *International Review of the Red Cross*, Vol. 90, No. 872, 2008. For violence in modern civil wars in particular, see Stathis Kalyvas, “The Ontology of ‘Political Violence’: Action and Identity in Civil Wars”, *Perspectives on Politics*, Vol. 1, No. 3, 2003; Christopher Cramer, *Civil War Is Not a Stupid Thing: Accounting for Violence in Developing Countries*, Hurst, London, 2006.

4 Andrew Barros and Martin Thomas, “Introduction: The Civilianization of War and the Changing Civil–Military Divide, 1914–2014”, in Andrew Barros and Martin Thomas (eds), *The Civilianization of War: The Changing Civil–Military Divide, 1914–2014*, Cambridge University Press, Cambridge, 2018, p. 2.

intermediaries like the Red Cross to honour these obligations: fundamentally, Blondel argues, “it is the law that protects”.⁵ Yet, in the history of warfare, civilian populations are a relatively recent addition to IHL: the Fourth Geneva Convention (GC IV), the first comprehensive international legal framework to cover civilian protection, was only instituted in 1949. Moreover, as Barros and Thomas argue, while these legal frameworks have certainly influenced the history of warfare since the start of the twentieth century, the emergence of these legal codes have paralleled, rather than necessarily prevented, the “civilianization” of war.⁶

The 150th anniversary of the *International Review of the Red Cross* (and its predecessor the *Bulletin International des Sociétés de la Croix-Rouge*)⁷ provides an important moment to reflect on the history of civilian protection in the International Red Cross and Red Crescent Movement (the Movement). The journal itself provides a window onto the Movement’s complex history of protecting civilians. By considering when, how and why the *Review* framed civilian protection as a humanitarian problem, one can see the particular priorities and norms that motivated organizations like the International Committee of the Red Cross (ICRC) at particular historical junctures. To do this, this article will focus on the *Review* (and the *Bulletin*) in the early twentieth century. This focus represents a methodological decision. Given the breadth of the ICRC’s engagement with civilian protection since the early twentieth century, this article chooses to provide a more detailed study of the period when the Movement first began to engage with the protection of civilian populations.

The first section of the article, exploring the years between the *Bulletin*’s founding in 1869 and the First World War, will illustrate how civilian protection was a low priority for the Red Cross prior to 1914, and how the Great War changed this situation. The second section will provide a closer examination of the *Review* in the interwar period. The journal demonstrates how the Movement framed civilian protection in regard to the rise of new technologies like chemical warfare and aerial bombardment, and also how the Movement sought to build a transnational network of scientific and technical expertise aimed at limiting these weapons’ harmful effects upon civilians. The third section will assess what selected articles from the *Review* reveal about the early history of the Red Cross’s work on civilian protection, including the ambiguities in, and limits of, the way the Movement defined the very ideas of “civilian” and “protection”. The final section will provide an overview of the subsequent history of civilian protection since 1945, and will analyze what those early articles from the *Review* tell us about civilian protection today. In particular, it will stress that a key “lesson”

5 Jean-Luc Blondel, “Assistance to Protected Persons”, *International Review of the Red Cross*, Vol. 27, No. 260, 1987, p. 452; Frédéric Mégret, “The ‘Protection of Civilians’: Peacekeeping’s New Raison d’Être?”, in A. Barros and M. Thomas (eds), above note 4.

6 A. Barros and M. Thomas, above note 4, pp. 8–9.

7 Henceforth, this article will refer to the *Bulletin International des Sociétés de la Croix-Rouge* (published between 1869 and 1918) as the *Bulletin*. It will refer to the *International Review of the Red Cross* (or the *Revue Internationale de la Croix-Rouge*, published from 1919 to the present) as the *Review*. All quotations from French-language articles have been translated by the author.

from the interwar period is the importance of being attentive to the needs of *all* civilians, rather than a singular concept of “the civilian”. The history of the Red Cross’s civilian protection efforts provides no straightforward “models” for current practice, but it does illustrate the importance of being attentive to local contexts and different voices, including civilians’ own, as a way for practitioners to construct appropriate protection mechanisms.

The Bulletin and civilian protection, c. 1869–1921

As indicated in the introduction to this article, while civilians have invariably been victims of conflict throughout history, the “civilianization” of warfare increased rapidly over the course of the ICRC’s history. From the first publication of the *Bulletin* in 1869 through to the outbreak of the First World War in 1914, numerous conflicts provided an early warning for the kinds of trends that later emerged in the twentieth century. In this period, colonial conflicts in Cuba, South Africa and the Philippines, for instance, demonstrated how civil–military distinctions can break down during asymmetric wars.

In these conflicts, civilians constituted a key focus of both rebels’ and imperial armies’ strategies. For insurgents, civilians (either willingly or through coercion) provided key economic support, such as food and shelter to highly mobile guerrilla troops, as well as political support; aware of this, imperial armies adopted counter-insurgency strategies which employed ostensibly liberal “hearts and minds” policies alongside highly repressive tactics like the destruction of civilian property, the displacement of these populations into camps, and the use of summary violence against suspected rebel supporters.⁸ If these colonial wars demonstrated how belligerents’ strategies and civilians’ own actions eroded civil–military distinctions, a more troubling trend from Germany’s “war of annihilation” against the Herero people of Southwest Africa was how, in certain conflicts, genocidal conceptions of race led belligerents to seek the complete extermination of their enemies, both combatants and non-combatants.⁹

While these conflicts foreshadowed issues which would plague efforts at civilian protection during the twentieth century, they also indicated the ICRC’s lack of attention to civilian war victims during its first fifty years. This is exemplified by the silence in the *Bulletin* regarding the “civilianization” of these conflicts, even if the journal did note issues surrounding persons *hors de combat*,

8 For an overview of these colonial conflicts, see Iain R. Smith and Andreas Stucki, “The Colonial Development of Concentration Camps 1868–1902”, *Journal of Imperial and Commonwealth History*, Vol. 39, No. 3, 2011. For an overview of the US strategies in the Philippines, see Brian McAllister Linn, *The US Army and Counter-Insurgency in the Philippine War 1899–1902*, University of North Carolina Press, Chapel Hill, NC, 1989. For a recent and detailed history of British concentration camps and the humanitarian and coercive ideas that underpinned them, see Aidan Forth, *Barbed-Wire Imperialism: Britain’s Empire of Camps, 1876–1903*, University of California Press, Oakland, CA, 2017.

9 Isabel Hull, “The Military Campaign in German Southwest Africa, 1904–1907”, *Bulletin of the German Historical Institute*, No. 37, 2005.

like medical care for wounded soldiers.¹⁰ A handful of articles on civil wars examined the potential difficulties of defining rebels who were not members of regular military forces, and the journal did call attention to the “nameless massacre” of Armenians in 1909; it also appealed to National Red Cross and Red Crescent Societies (National Societies) to send material aid to refugees in Macedonia in 1904.¹¹ At the same time, the ICRC remained cautious about intervening on behalf of civilians in colonial conflicts. For instance, in 1899 the Spanish Red Cross asked the ICRC to intercede on behalf of Spanish citizens who were being held prisoner in the Philippines since the start of the anti-colonial revolution in the archipelago. In the *Bulletin*, the ICRC stated that the situation of these prisoners was “worthy of interest” but outside the scope of its work; in fact, the reply went on, it would “jeopardise the existence of this institution [the ICRC] to make it an instrument for the solution of all the humanitarian problems that war can raise”.¹² According to Matthias Schulz, before 1914 the ICRC was generally anxious about potentially diluting its humanitarian mission and principles by extending its remit beyond its core concern: establishing legal protection for wounded and sick soldiers.¹³ However, caution about its mandate may not necessarily have been the sole factor inhibiting the ICRC’s engagement with civilian protection. In particular, the way it overlooked civilian suffering in colonial warfare may have reflected its broader anxiety about intervening in these particular conflicts. According to Daniel Palmieri, the ICRC was primarily concerned with humanizing war between “civilized nations” prior to 1914. As Palmieri elaborates, the ICRC’s early conceptions of warfare were shaped by fairly simplistic binary distinctions of “war/peace”, “international/national”, “civilization/barbarity” and “soldier/civilian” – theoretical distinctions which did not necessarily equate to the realities of warfare as experienced by its participants.¹⁴ The attitude that colonial warfare constituted an “exception” to the normative rules of “civilized” warfare was widespread beyond the ICRC, and may explain why the organization was so concerned about regulating wars between European powers but not wars between European imperialists and “barbarous” populations.

10 See, for instance, the report by Frederic Ferrière on the South African War: Frederic Ferrière, “Pertes de l’armée anglaise dans le sud de l’Afrique et ressources sanitaires”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 32, No. 126, 1901.

11 See for instance, “La charité dans les guerres civiles”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 1, No. 4, 1870. For Armenia, see “Le Comité de Constantinople et les massacres en Arméniens”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 40, No. 159, 1909. For the appeals for Macedonia, see “Appel en faveur des victimes de l’insurrection macédonienne”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 35, No. 137, 1904.

12 “Les Prisonniers de Guerre aux Philippines”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 30, No. 118, 1899, p. 90.

13 Matthias Schulz, “Dilemmas of ‘Geneva’ Humanitarian Internationalism: The International Committee of the Red Cross and the Red Cross Movement, 1863–1918”, in Johannes Paulmann (ed.), *Dilemmas of Humanitarian Aid in the Twentieth Century*, Oxford University Press, Oxford, 2016.

14 Daniel Palmieri, “How Warfare Has Evolved – a Humanitarian Organization’s Perception: The Case of the ICRC, 1863–1960”, *International Review of the Red Cross*, Vol. 97, No. 900, 2015.

Whatever the precise reasons for the ICRC's lack of engagement with civilian protection before 1914, Palmieri argues that the First World War shattered many of the organization's hitherto simplistic attitudes about warfare.¹⁵ While the ICRC had made significant contributions to IHL in the decades prior to the war, civilian populations remained poorly defined in the Geneva and Hague Conventions, and their legal protection was confined to the more nebulous area of "customary law".¹⁶ Most European contemporaries regarded the separation of civilians from conflict as a tacit agreement of warfare between "civilized" nations. The nature of industrial warfare soon challenged this assumption. In part, the patterns of mobilization for war in 1914 problematized separations between battlefield and home front, as entire societies willingly rallied behind their national war efforts.¹⁷ Additionally, the dynamics of violence that the Great War generated saw civilians directly targeted by belligerents on both sides.¹⁸

The importance of "home fronts" to battlefield operations, and the development of increasingly aggressive wartime cultures, encouraged the breakdown of civil–military distinctions: the fact of whether an individual was a soldier or a civilian mattered less than their nationality or ethnicity in defining who was an "enemy", an "ally" or a "neutral".¹⁹ Germany's violent suppression of occupied territories and its Zeppelin bombardment of British cities, Britain's own attempts to starve the German population through its naval blockade, and (most extreme of all) the Ottoman Empire's genocide of its Armenian population²⁰ – all these examples demonstrated to contemporaries that the supposedly self-evident moral distinction between "innocent" civilians and soldiers, so critical to pre-war notions of "civilized warfare", was actually inherently unstable.²¹

15 *Ibid.*, pp. 992–993.

16 A. Barros and M. Thomas, above note 4, pp. 8–9; Isabel Hull, *A Scrap of Paper: Breaking and Making International Law during the Great War*, Cornell University Press, Ithaca, NY, 2014, pp. 88–94.

17 John Horne (ed.), *State, Society, and Mobilization in Europe during the First World War*, Cambridge University Press, Cambridge, 1997.

18 Annette Becker, "The Great War: World War, Total War", *International Review of the Red Cross*, Vol. 97, No. 900, 2015; Alan Kramer, *Dynamic of Destruction: Culture and Mass Killing in the First World War*, Oxford University Press, Oxford, 2007.

19 For one case study of this dynamic of the war, see Nicoletta Gullace's study of wartime communities in Britain, which showed how nationality and ethnicity supplanted pre-war liberal attitudes about immigration: Nicoletta Gullace, "Friends, Aliens, and Enemies: Fictive Communities and the Lusitania Riots of 1915", *Journal of Social History*, Vol. 39, No. 2, 2005.

20 Note that the use of the term "genocide" reflects the majority of current historical interpretations of the Ottoman State's killing of Armenians, although contemporary publications tended to refer to the "massacre of" or "atrocities against" Armenians. The term "genocide" was itself coined in Raphael Lemkin's 1944 study *Axis Rule in Occupied Europe*. See Keith Watenpaugh, *Bread From Stones: The Middle East and the Making of Modern Humanitarianism*, University of California Press, Oakland, CA, 2015, pp. 76–86.

21 For an examination of the respective legality of German and British actions against civilians according to contemporary international law, see I. Hull, above note 16, pp. 317–332. On the Armenian genocide, see Donald Bloxham, *The Great Game of Genocide: Imperialism, Nationalism, and the Destruction of the Ottoman Armenians*, Oxford University Press, Oxford, 2005.

The *Bulletin* itself provides a window onto how belligerents and the ICRC understood and responded to this upsurge in violence against civilian populations. Throughout the First World War, the *Bulletin* gave nations the opportunity to publish their own reports and perspectives on the conflict. In practice, this meant the journal often functioned as a space in which belligerents attempted to convince neutral international opinion about the moral legitimacy of their own wartime conduct, and to accuse their enemies of violating IHL or customary law (often referred to as the “laws of civilized nations”). For example, it allowed Germany to respond to the Entente’s accusations about its army’s alleged atrocities against civilians in the occupied territories of Belgium and northern France, such as in 1916, when the German Foreign Office used the *Bulletin* to publish a report defending its military’s action in Belgium. This report argued that any civilians who took up arms against the invading German army could not be regarded as combatants, since they were not part of a recognized military, and thus were not entitled to the obligations guaranteed to military personnel.²² The majority of recent historical interpretations have argued that the mass reprisals initiated by the German army against civilians in occupied territories were disproportionate to the actual limited guerrilla resistance against that army. Historical explanations of the German army’s reprisals have debated whether violence developed “on the ground”, from German troops’ exaggerated perceptions of the prevalence of *francs-tireurs*, or through the culture of German militarism.²³ While the *Bulletin* does not provide a definitive answer to this question, it does indicate how belligerents exploited the lack of legal clarity about the identity of civilians in war zones to justify attacks against populations, even unarmed ones, whom they interpreted as a “threat”.

The *Bulletin* also indicated how the ICRC was recognizing that soldiers were not the only victims of industrial warfare. While the organization did not take action on behalf of all civilian war victims, the experiences of 1914–18 showed that it could respond to these “new” war victims without damaging its core concern for persons *hors de combat*. Specifically, the ICRC’s work on wartime detention, through its Prisoners of War Agency, demonstrated how the organization could tackle a problem which affected both combatant and non-combatant populations. The war saw civilian detention increase on an unprecedented scale, as belligerents interned enemy nationals within their own borders, or took forced labourers or hostages from occupied territories. Besides its work for military prisoners of war (PoWs), the Prisoners of War Agency made itself responsible for protecting and collecting information about the various categories of civilian prisoners, from internees housed in larger prison camps to the deportees and hostages that belligerents had seized from occupied

22 “La conduite de la guerre en Belgique”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 47, No. 186, 1916.

23 John Horne and Alan Kramer, *German Atrocities, 1914: A History of Denial*, Yale University Press, New Haven, CT, 2001; I. Hull, above note 16, pp. 51–57.

territories.²⁴ The *Bulletin* was a key instrument in the Agency's work. In January 1915, the journal published Gustave Ador's request that all belligerents provide equal treatment to both military and civilian prisoners.²⁵ Subsequent volumes of the *Bulletin* published summaries of ICRC delegates' reports to civilian internment camps.²⁶ By sharing information on conditions in respective nations, and hopefully showing belligerents that their enemies were providing "humane" care for civilian detainees, the ICRC hoped to curb the cycles of reprisals and counter-reprisals which developed in response to stories of alleged ill-treatment of prisoners.²⁷ Besides monitoring camps and making recommendations for improvements to internment authorities, the ICRC also made more forceful declarations against the practice of civilian internment. In 1917, Dr Frederic Ferrière, the head of the ICRC's civil internee department, used the *Bulletin* to denounce the continued practice of civilian internment by all sides. He urged nations to repatriate all civil prisoners, who were being "held in violation of the principle accepted at all times under the law of nations", or at least provide them with the same treatment afforded to military PoWs.²⁸ While Ferrière's pleas did not result in belligerents abolishing internment, they demonstrated how authors in the *Bulletin* were engaging with the key problems facing civilian war victims and were attempting to alter belligerents' behaviour and actions towards these war victims.

In the years immediately after the war, the ICRC continued to organize aid for civilian war victims. As Bruno Cabanes has noted, the transition from war to peace posed additional challenges to nations "already deeply shaken by the war", such as population displacement, famine, disease and paramilitary violence.²⁹ In a circular addressed to National Societies just days after the war ended, the ICRC stated the necessity of the Red Cross doing "something on behalf of the unfortunate victims" of these various disasters.³⁰ Alongside new transnational humanitarian bodies like the International Save the Children Union (whom the

24 For more on the various categories of civilian prisoners during the war, and the ICRC's response, see Matthew Stibbe, "The Internment of Civilians by Belligerent States during the First World War and the Response of the International Committee of the Red Cross", *Journal of Contemporary History*, Vol. 41, No. 1, 2006.

25 Gustave Ador, "Egalité de traitement pour les prisonniers de guerre militaires ou civils (Cent soixante-troisième circulaire aux Comités centraux)", *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 46, No. 181, 1915.

26 See, for instance, "Les internés civils en Hongrie", *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 46, No. 183, 1915; "Rapports de MM. Ed. Naville et J. Martin sur leur voyage en Angleterre; MM. Blanchod et Speiser, Vernet et de Muralt, Schazmann et Cramer sur leurs voyages au Nord de l'Afrique, Maroc, Tunisie, Algérie; de MM. Thormeyer et Ferrière sur leur voyage en Russie", *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 47, No. 186, 1916.

27 The ICRC's reports, however, were mainly confined to the larger civilian internment camps; gaining access to smaller battalions of forced labourers proved harder to achieve, meaning that the abuses against these prisoners received less international attention.

28 "Les Civils Rapport présenté par M. le Dr Ferrière à la Conférence de Croix-Rouges neutres à Genève", *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 48, No. 192, 1917, pp. 374–376.

29 Bruno Cabanes, *The Great War and the Origins of Humanitarianism, 1918–1924*, Cambridge University Press, Cambridge, 2013, p. 5.

30 Quoted in John Hutchinson, *Champions of Charity: War and the Rise of the Red Cross*, Westview Press, Boulder, CO, 1996, p. 604.

ICRC patronized) and the League of Red Cross Societies (LRCS), the organization helped coordinate some of the largest international relief efforts for civilians in the early 1920s, including those for the 1921 Russian Famine and refugees displaced during the Greco-Turkish War.³¹ As numerous historians have demonstrated, beneficence was not the only reason why the ICRC began providing post-war assistance to civilian populations. The emergence of new, rival organizations, the LRCS in particular, threatened to make the ICRC obsolete in what many contemporaries expected would be a new era of peaceful international relations.³² The ICRC's interest in "new" war victims, according to this analysis, represented a campaign to make itself more visible and relevant in the post-war humanitarian system: its motive, Irène Herrmann argues, was "not only to relieve victims but also to nibble away at the prerogatives and popularity of the League [of Red Cross Societies]".³³

Over its fifty-year lifespan, the *Bulletin* had been silent on civilian suffering in conflict. For at least three key reasons, the Great War and its aftermath had challenged this silence: it demonstrated that civilians required as much protection from the horrors of war as soldiers did; from an organizational perspective, it demonstrated that the ICRC could practically incorporate concern for civilians into its wider mission of "humanizing" war; and the competition of new rivals provided another incentive for demonstrating that the organization could adapt to the new realities of warfare. Exemplifying the Movement's new concern for civilian populations, the 10th International Conference of the Red Cross (the first since the war's end) agreed that one of the key ways to make future wars "less inhuman" was by protecting "the civilian population from the effects of armed struggle, in which it should not be implicated".³⁴ The Conference also called upon all governments to modify the current Hague Regulations in order to ban all use of poison gas; to limit the potential of aerial warfare in order to prevent aerial bombardment; and, in direct relation to this, to more strictly enforce Article 25 regarding the bombardment of "undefended territories".³⁵ As the next section will show, the Red Cross's connection of these issues (civilianization of

31 For the ICRC's leadership role in coordinating relief for Soviet Russia, see "La famine en Russie soviétique", *Revue Internationale de la Croix-Rouge*, Vol. 3, No. 32, 1921; B. Cabanes, above note 29, pp. 191–194. For the organization's work for civilian refugees in Greece, see Davide Rodogno, "The American Red Cross and the International Committee of the Red Cross' Humanitarian Politics and Policies in Asia Minor and Greece (1922–1923)", *First World War Studies*, Vol. 5, No. 1, 2014. The ICRC delegate in the Near East, Comte de Chabannes la Palice, also helped coordinate material relief for Armenian refugees: see "Les actions de secours en faveur des Arméniens!", *Revue Internationale de la Croix-Rouge*, Vol. 2, No. 15, 1920.

32 M. Schulz, above note 13, pp. 60–61; J. Hutchinson, above note 30.

33 Irène Herrmann, "Décrypter la concurrence humanitaire: Le conflit entre Croix-Rouge(s) après 1918", *Relations Internationales*, No. 151, 2012, p. 22; see also Francesca Piana, "Photography, Cinema, and the Quest for Influence: The International Committee of the Red Cross in the Wake of the First World War", in Heide Fehrenbach and Davide Rodogno (eds), *Humanitarian Photography: A History*, Cambridge University Press, Cambridge, 2015.

34 "Résolutions et vœux de la Xme Conférence internationale de la Croix-Rouge", *Revue Internationale de la Croix-Rouge*, Vol. 3, No. 28, 1921, p. 336.

35 *Ibid.*

war, chemical warfare, and aerial bombardment) influenced how the Movement approached civilian protection during the interwar period.

The *Review* and civilian protection, 1919–39

In 1919, marking the dawn of the new post-war era, the ICRC published the first edition of its new journal, the *Revue Internationale de la Croix-Rouge* (later to be also published in English as the *International Review of the Red Cross*). The *Review*'s editors argued that the new journal would strengthen "one of the only links [between nations] that the war has not broken".³⁶ Their emphasis on the *Review* as a way for preserving and developing transnational cooperation within the Movement was not empty rhetoric. The aftermath of the war was marked by the emergence, or re-emergence, of internationalist groups and movements: international cooperation, to these organizations, was fundamental for mitigating the nationalist rivalries that had contributed to the outbreak of war in 1914.³⁷ Between the two World Wars, articles in the *Review* showcased the Red Cross's attempts to use connections within the Movement and with a wider network of international technical, military, political and legal "experts" to solve what they saw as the key problems of civilian protection.³⁸ As will be shown, the journal itself played a role in linking this transnational network by communicating information across the Movement; equally though, these articles illustrate the frustrations and obstacles that the Red Cross faced in its mission.

The first half of the 1920s appeared to herald progress for contemporaries seeking to prevent and humanize warfare. Article 5 of the 1922 Washington Treaty relating to the Use of Submarines and Noxious Gases in Warfare (Washington Treaty), signed by the United States, Britain, France, Italy and Japan, affirmed that chemical warfare was contrary to international law and "the general opinion of the civilized world".³⁹ Although this aspect of the Washington Treaty was not ratified by the signatory powers, it was followed up by the more comprehensive Geneva Protocol on the Prohibition of the Use in War of Asphyxiating,

36 Paul Des Gouttes, Etienne Clouzot and K. de Watteville, "Revue Internationale de la Croix-Rouge et Bulletin International des Sociétés de la Croix-Rouge", *Revue Internationale de la Croix-Rouge*, Vol. 1, No. 1, 1919, p. 2.

37 For recent works on interwar internationalism, see Daniel Gorman, *The Emergence of International Society in the 1920s*, Cambridge University Press, Cambridge, 2012; Patricia Clavin and Glenda Sluga (eds), *Internationalisms: A Twentieth Century History*, Cambridge University Press, Cambridge, 2016.

38 The use of quote marks around the term "expert" throughout this article reflects the fact that humanitarian organizations and individuals often used somewhat tenuous definitions of their "expertise" or experience to justify their control of humanitarian operations, thus maintaining this control in the face of potential opposition from other humanitarian organizations, governments or recipients.

39 See Article 5 and the full Washington Treaty at the ICRC Treaties, States Parties and Commentaries Database, available at: <https://tinyurl.com/yxmjcs2u> (all internet references were accessed in March 2019).

Poisonous or other Gases, and of Bacteriological Methods of Warfare (Geneva Protocol), signed in June 1925 by thirty nations.⁴⁰

Articles in the *Review* in the early 1920s highlight the mixture of optimism and trepidation with which ICRC members viewed the developments in arms limitations. Reviewing the Washington Treaty and Geneva Protocol, Lucien Cramer and Horace Micheli praised the “important work” done by these treaties. However, drawing upon the assessments of the “experts” who contributed to drafting these treaties, their article also displayed the continued anxieties that these international agreements were overly reliant on the goodwill of the signatories to enforce these standards.⁴¹ Evidencing how the Great War had undermined faith in the practical viability of IHL, Cramer and Micheli argued that belligerents were likely to violate legal frameworks like the Hague Conventions in the context of large-scale and total war.⁴² Referencing the work of Joaquin Enrique Zanetti, a member of the League of Nations’ mixed commission on chemical warfare, the article argued that it was relatively easy for nations with well-developed chemical industries and infrastructure to produce weapons “overnight”. Moreover, referring to the recent Geneva conference on the international arms trade, Cramer and Micheli reported the delegates’ opinion that it would be objectionable, if not impossible, for international authorities to police the private industries of individual nations.⁴³ Given that not all nations signed the Geneva Protocol, and the fact many nations reserved the right to use chemical weapons in retaliation for attacks upon themselves, the authors were pessimistic about the prospect of chemical weapons not featuring in future wars. Even ostensibly progressive nations, they argued, “[despite] having signed the most solemn commitments, would not hesitate to resort, in a moment of despair and as a last means of defence, to chemical weapons”, given the potency of these weapons and the relative simplicity of producing them.⁴⁴

Cramer and Micheli’s article focussed on chemical warfare in general, rather than these weapons’ significance for civilians in particular. Nevertheless, their assessments represented the blueprint for subsequent articles on civilian protection in the *Review*, most of which shared their pessimistic assessment that chemical weapons would almost inevitably feature in future conflicts, despite treaties like the Geneva Protocol. The key difference between these future wars and the First World War, these articles argued, was that chemical warfare would

40 On the non-ratification of the Washington Treaty’s article on “noxious gasses”, see Dietrich Schindler and Jifi Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, 3rd ed., Kluwer Academic, Dordrecht, 1988, p. 113.

41 For another author’s assessment of the successes and limits of the Geneva Protocol, see Andrew Webster, “The League of Nations, Disarmament and Internationalism”, in P. Clavin and G. Sluga (eds), above note 37, pp. 159–160.

42 Lucien Cramer and Horace Micheli, “La guerre chimique et ses conséquences”, *Revue Internationale de la Croix-Rouge*, Vol. 7, No. 81, 1925, pp. 678–679.

43 *Ibid.*, pp. 687–689. For more on the precise reasons why the delegates at this conference dismissed the possibility of policing the industry and the trading of chemicals, see “Conference for the Control of the International Trade in Arms, Munitions and Implements of War; General Committee Chemical and Bacteriological Warfare”, League of Nations Archive (LNA), R188/8/32639/43927.

44 L. Cramer and H. Micheli, above note 42, p. 692.

not solely affect front-line combatants. According to Baron Drachenfels, a member of the ICRC's secretariat, the Great War had taught the world that "in modern wars ... the whole population of a country is more or less directly engaged", meaning that "unscrupulous belligerents will make no difference" between combatants and non-combatants.⁴⁵ As Drachenfels argued, there was no difficulty, "from the technical point of view", in using airplanes or long-range artillery to attack large cities with bombs loaded with gas.⁴⁶ Prefiguring the British politician Stanley Baldwin's assessment that "the bomber will always get through", Dr Sieur of the French Red Cross argued that improvements in aircraft technology had revolutionized warfare: now belligerents could pass over front lines to attack "the morale of the [enemy] population and the war industry of the country".⁴⁷ The fact that belligerents now had the means to attack civilians with chemical weapons was concerning for humanitarians like Cramer, who regarded it as highly probable that "the prohibitions contemplated by the diplomatic conferences could be violated".⁴⁸ Similarly, Professor L. Demolis, who played a major advisory role to the ICRC's work on civilian protection in the 1930s, argued that the Red Cross needed to proceed on the presumption that "legal prohibitions" like the Geneva Protocol, while "duly initiated and solemnly ratified, would be violated" in future international conflicts.⁴⁹

With the benefit of hindsight, one can see that these pessimistic assessments did not come to fruition: while there have been a number of violations of the Geneva Protocol since 1925, chemical weapons have remained an exceptional, rather than conventional, aspect of modern warfare. Yet these gloomy predictions indicate, firstly, the Red Cross's increasingly complex understanding of how nations mobilized for total war, and how these mobilizations placed civilian populations at greater risk in conflict. Secondly, these articles also demonstrated the pragmatism and pessimism which underlined these writers' internationalism. The experiences of the Great War had broken any naivety that "civilized" nations would inevitably respect IHL under the pressures of total warfare. The increasing destructive capacity of weapons was concerning in itself, but what individuals like Sieur were particularly worried about was what the development of techniques like aerial bombardment revealed about the changing "purpose" of warfare.⁵⁰ These weapons seemingly indicated the zero-sum nature of modern warfare, which could justify any methods and target any populations to achieve victory:

45 K. de Drachenfels, "La Croix-Rouge et la guerre chimique", *Revue Internationale de la Croix-Rouge*, Vol. 9, No. 107, 1927, pp. 817–818.

46 *Ibid.*, pp. 818–819.

47 Dr Sieur, "Des instructions à donner aux populations civiles par conférences, affiches, tracts et films, sur les moyens de se protéger contre la guerre chimique", *Revue Internationale de la Croix-Rouge*, Vol. 11, No. 125, 1929, p. 349.

48 Lucien Cramer, "La guerre chimique", *Revue Internationale de la Croix-Rouge*, Vol. 10, No. 110, 1928, p. 93.

49 L. Demolis, "IIe réunion de la Commission internationale des experts (Rome 1929)", *Revue Internationale de la Croix-Rouge*, Vol. 11, No. 121, 1929, p. 22.

50 Sieur, above note 47, p. 350.

they threatened civilians, but also the Red Cross's fundamental mission of humanizing warfare.

The key question which these articles posed, therefore, was that if current IHL did not guarantee civilians complete protection from chemical attacks, how could the Movement improve this protection? Cramer and Micheli proposed that the ICRC should build up a network of civilian and military experts in different nations to formulate practical suggestions for protecting "its [Red Cross] personnel, the belligerent armies and, especially, the civilian populations" in the event of a chemical attack.⁵¹ The following month, the 12th International Conference of the Red Cross backed this proposal.⁵² Over the next year, the ICRC invited National Societies to nominate "experts" to attend a conference in Brussels in April 1927.⁵³ Unlike the previous League of Nations commissions on chemical warfare, Drachenfels explained in the *Review*, this commission would "only deal with the point of view of the protection of the civilian population". Moreover, it would consult individuals with a wide range of "expertise", from "eminent chemists" and doctors to air force staff, town planners, engineers, police and fire brigades; these experts could provide advice on "technical" protection measures like communal shelters and gas mask designs, and how civil and medical authorities could respond to attacks.⁵⁴ The purpose of the commission, Cramer reminded readers in his report of the Brussels meeting, was that

since humanity has so far found only a very imperfect means of protecting itself against [chemical weapons] ... the Commission considers that there is only one practical way to counter this formidable danger: by pursuing without delay the means which will save the greatest number of human lives in case of a gas attack.⁵⁵

This first meeting of experts offered only preliminary recommendations on each of these issues, but recommended two general steps: that all nations should immediately establish "mixed commissions" of civil and military personnel to formulate measures for protecting civilians in their own nations; and that these "mixed commissions" should share the technical information they generated on civilian protection from their own nations with the ICRC, who would collect and distribute as many relevant materials as possible through the *Review*.⁵⁶ Subsequent editions of the *Review* testify to the response of National Societies to this appeal, with numerous European National Societies establishing commissions

51 L. Cramer and H. Micheli, above note 42, p. 693.

52 "Résolutions et vœux votés par la XIIe Conférence internationale de la Croix-Rouge", *Revue Internationale de la Croix-Rouge*, Vol. 7, No. 82, 1925, pp. 818–819.

53 See the circular letter distributed to National Societies, in "Letter, ICRC to M. Dronsart (Belgian Red Cross), 3 October 1927", ICRC Archive (ICRCA), CR159/120.

54 K. de Drachenfels, above note 45, pp. 812–813.

55 L. Cramer, above note 48, p. 109.

56 *Ibid.*, pp. 100–101.

of military, municipal, medical and charitable “experts”.⁵⁷ Besides reporting on the establishment of these commissions, the *Review* also disseminated the information that different National Societies sent in to the ICRC, such as gas mask designs,⁵⁸ the reports of exercises carried out by National Societies to rehearse civil and medical responses to a gas attack,⁵⁹ and bibliographies of other publications relevant to civil protection.⁶⁰

The decision to focus the Red Cross’s efforts on saving civilians’ lives in the event of a chemical attack represented the aforementioned pessimism of humanitarians like Sieur, who argued that since “chemical warfare will undoubtedly play a major but decisive role in future conflicts ... it would be futile to be indignant at what cannot be prevented”.⁶¹ At the same time, this strategy did not necessarily reflect complete cynicism with regard to the ability of international institutions and treaties to prevent “inhuman” warfare. While Cramer, Micheli and Drachenfels’ concerns about international law reflected a certain pragmatism, they also held faith that the Red Cross could contribute to the “moral struggle” to humanize warfare.⁶² Like other contemporary internationalists, the ICRC expressed hopes that international cooperation could promote “moral disarmament”: the belief that societies not only had to stop building armaments, but should also “disarm” the cultures and mentalities which fostered support for war.⁶³ Ultimately, Cramer and Micheli argued, “the only way to kill chemical warfare is to kill the very idea of this war”.⁶⁴ Thus, the decision to focus efforts on “technical” protection for civilians did not mark a strict break from the ideals of “Genevan internationalism”. By using networks of “experts” to educate general publics, the Red Cross would demonstrate the dangers they faced in future conflicts, thus contributing to the process of “moral disarmament” and making the use of aero-chemical warfare less likely. Besides peace-building, this “expert” network also reinforced the ICRC’s central role within the Movement:

57 See for example, “Protection des populations civiles contre la guerre chimique”, *Revue Internationale de la Croix-Rouge*, Vol. 10, No. 114, 1928; L. Demolis, “A propos des Commissions mixtes nationales”, *Revue Internationale de la Croix-Rouge*, Vol. 10, No. 118, 1928; “Commissions mixtes nationales pour la protection des populations civiles contre la guerre chimique”, *Revue Internationale de la Croix-Rouge*, Vol. 12, No. 141, 1930; “Commissions mixtes nationales pour la protection des populations civiles contre la guerre aéro-chimique Commission internationale des experts”, *Revue Internationale de la Croix-Rouge*, Vol. 13, No. 156, 1931.

58 See, for instance, Rudolf Hanslian, “L’appareil de protection contre les gaz à l’usage de la population civile”, *Revue Internationale de la Croix-Rouge*, Vol. 11, No. 126, 1929; Anton Wagner, “La fabrication, le depot et l’entretien des masques contre les gaz et des vêtements de protection”, *Revue Internationale de la Croix-Rouge*, Vol. 11, No. 126, 1929; L. Demolis, “Le masque de protection contre l’oxyde de carbone”, *Revue Internationale de la Croix-Rouge*, Vol. 12, No. 144, 1930.

59 See for instance, “Défense aérienne et protection des civils”, *Revue Internationale de la Croix-Rouge*, Vol. 14, No. 160, 1932.

60 See, for instance, L. Demolis, “Une bibliographie de la guerre chimique: Publication de la Croix-Rouge espagnole”, *Revue Internationale de la Croix-Rouge*, Vol. 13, No. 152, 1931.

61 Sieur, above note 47, p. 349.

62 L. Cramer and H. Micheli, above note 42, p. 693.

63 On the importance of moral disarmament in interwar internationalism, see Andrew Barros, “Turn Everyone into a Civilian: René Cassin and the UNESCO Project, 1919–1945”, in A. Barros and M. Thomas (eds), above note 4.

64 L. Cramer and H. Micheli, above note 42, p. 689.

Cramer and Micheli's initial proposal emphasized that the ICRC's moral authority and its connections to all National Societies (unlike its rival, the LRCS) made it the natural choice to lead this project.

However, both in terms of educating the public and suggestions for "practical" protection measures, the committee of experts ran into key difficulties. Firstly, while general publics appeared to provide the path to "moral disarmament", humanitarians like Sieur remained cautious about how the Movement should "educate" the public about the threat of aero-chemical warfare. In an article outlining the different methods of publications, public talks and films that National Societies could use to disseminate information about aero-chemical warfare, Sieur emphasized that National Societies should be "cautious and moderate in exposing potential hazards to avoid panic and excessive fear".⁶⁵ Although Sieur's main concern may have been to maintain public order, other contemporaries feared that education about the dangers of aerial warfare, if done incorrectly, could encourage civilians to demand increased armaments to protect them from enemy forces, effectively working against the "moral disarmament" that the Movement sought.⁶⁶ One can also question whether the various rehearsals of aerial attacks and the emphasis on "preparing" civilians for attacks necessarily encouraged peace-building or kept societies on a permanent war footing. Greater attention to National Societies is required to uncover the exact reasons why particular nations carried out rehearsals of bombing raids – for instance, the *Review* shows how the future Axis powers of Germany and Japan carried out such trials as early as 1929, but Britain, France and Norway carried out their own tests in this period as well.⁶⁷

A greater problem with the proposal to focus on "practical" or "technical" defence, however, was that it did not obviate the complexity of protecting civilians: quite the opposite, in fact. At the Brussels meeting, the German delegate de Moellendorff argued that the commission's task was too narrow in only considering the use of chemical weapons during an aerial attack: presciently, considering the development of strategic bombing during the 1930s and the Second World War, de Moellendorff argued that aerial bombardments were more likely to use conventional explosives that would pose as much or even greater harm to civilian life.⁶⁸ While the Brussels meeting ignored de Moellendorff's

65 Sieur, above note 47, p. 357.

66 See such concerns in the 1932 British draft aeronautical disarmament proposal, as outlined in Andrew Barros, "The Problems of Opening Pandora's Box: Strategic Bombing and the Civil–Military Divide, 1916–1939", in A. Barros and M. Thomas (eds), above note 4, pp. 169–170.

67 For Germany, see the exercises carried out before and after the birth of the Third Reich: "Défense aérienne", above note 59; L. Demolis, "Les manœuvres aériennes et la protection des populations civiles", *Revue Internationale de la Croix-Rouge*, Vol. 17, No. 196, 1935. For Japan, see L. Demolis, "Exercices de protection de la population civile contre l'aérochimie effectués au Japon", *Revue Internationale de la Croix-Rouge*, Vol. 10, No. 120, 1928. For Britain and France, see L. Demolis, "Les manœuvres aériennes et la défense des populations civiles", *Revue Internationale de la Croix-Rouge*, Vol. 16, No. 188, 1934. For Norway, see "Exercices de protection aérienne en Norvège", *Revue Internationale de la Croix-Rouge*, Vol. 14, No. 166, 1932.

68 Sidney H. Brown, "La protection de la population civile contre les dangers de la guerre aéro-chimique par des instruments diplomatiques", *Revue Internationale de la Croix-Rouge*, Vol. 13, No. 153, 1931, p. 702.

remarks, by the second meeting of “experts” in Rome in 1929, the commission emphasized that the problem of chemical attacks on civilian populations could not be divorced from the wider problem of aerial bombardment.⁶⁹ This second meeting agreed that the use of conventional explosives greatly complicated their task. While agreeing that “it would be possible to shelter a large part of the civilian population” from a gas attack within specially constructed shelters, the commission agreed it was unlikely that such shelters would also be able to withstand high-explosive bombs; similarly, although individual gas masks may protect individuals from gas, they offered no protection from conventional explosives, and other “practical” measures like the large-scale evacuation of cities would also be almost impossible to organize effectively at short notice.⁷⁰ Given these limitations of any “technical” measures of protection, the commission recommended that the ICRC also consider “diplomatic instruments” for protection.

This advice forced the ICRC to reconsider its earlier scepticism of legal approaches to protection. The organization appointed a new commission of independent legal experts from European nations to meet in Geneva in December 1931, in anticipation of the 14th International Conference of the Red Cross and the World Disarmament Conference (WDC) the following year. This meeting re-emphasized many of the complexities and likely insufficiencies of protecting civilians through legal measures, and appeared to raise more questions and problems than solutions.⁷¹ However, if the meeting did not necessarily achieve immediate results, it did represent a key moment in the ICRC’s history of civilian protection. The commission’s discussions and findings indicated the key legal areas which the ICRC and international community needed to redress if they were to improve international conventions on civilian protection. These included defining who civilians actually were, and their role in warring societies; determining how legal conventions could delineate “legitimate” targets, such as military bases and military industries, from “protected zones” or buildings, such as refugee camps or hospitals; and deciding what were the most effective ways to police possible conventions or to enforce sanctions in cases of violations.⁷² The meeting did not find answers to these issues, but they did open questions to which the ICRC would return in later years, and which provided far greater nuance to how the organization framed civilian protection.

The Movement did not abandon the “technical” approach to protecting civilians. The 15th International Conference in 1935 emphasized that the ICRC should “continue the technical research undertaken up to now”, and that National Societies should continue sending information to the documentation

69 *Ibid.*, pp. 702–703.

70 “Commission internationale d’experts pour la protection des populations civiles contre la guerre chimique. IIe Session — Rome, 22–27 avril 1929. Résolutions”, *Revue Internationale de la Croix-Rouge*, Vol. 11, No. 125, 1929.

71 For the proceedings of this meeting, see “Commission internationale d’experts pour la protection juridique des populations civiles contre les dangers de la guerre aero-chimique. IIeme séance, mardi 1er decembre 1931”, ICRC, CR159j.

72 S. H. Brown, above note 68.

centre in Geneva. However, the Conference also emphasized the importance of securing “the means of legal protection of the civilian population”.⁷³ At the opening of the WDC in 1932, the ICRC submitted an appeal to delegates to improve legal protection for civilians, emphasizing how the Movement’s research had exposed the limits of technical protection: while acknowledging that legal measures banning aerial bombardment may have appeared “utopian” and would encounter resistance, the organization nevertheless urged the WDC to try and reach a settlement which would effectively ban aerial attacks on civilian populations.⁷⁴

For reasons beyond the ICRC’s control, however, the WDC failed in most of its objectives, and no agreement on civilian protection was reached.⁷⁵ This further setback led writers in the *Review*, like the Swiss physician Heinrich Zangger, to urge National Societies to increase preparations for civil (or passive) defence of urban areas.⁷⁶ By the middle of the 1930s, National Societies were continuing to send in reports and information on such defence measures, allowing the *Review* to continue to share information between nations on the measures that societies could take to protect civilians.⁷⁷ Nevertheless, these transnational information networks were becoming increasingly difficult to maintain. As Zangger also noted, National Societies were proving reluctant to share information on more technical data like gas masks, being unwilling to divulge potential weaknesses to enemies.⁷⁸ The documentation centre was also reliant on donations from National Societies, and the *Review* issued various appeals for donations.⁷⁹ While the centre limped on until 1938, lack of funds eventually forced it to close.⁸⁰

The outbreak of civil war in Spain brought further dispiriting news. In particular, Demolis noted, the aerial attacks on civilian populations, and the mass refugee problems which resulted from them, appeared to confirm humanitarians’ worst fears about aerial warfare, with the exception of the use of chemical weapons. Civilians were not simply collateral damage to violence, but were directly targeted by belligerents: quoting Phillipe Petain, Demolis noted that in

73 “Résolutions et vœux adoptés par la XVe Conférence Internationale de la Croix-Rouge Tokio, 20–29 octobre 1934”, *Revue Internationale de la Croix-Rouge*, Vol. 16, No. 191, 1934, p. 898.

74 “Projet l’appel a la conference de desarmement”, ICRC, CR159j.

75 The WDC sought to reach major agreements on arms limitations, and while delegates from national governments agreed on the necessity of reducing arms, they failed to agree on the precise mechanisms for achieving this. The withdrawal of Nazi Germany from the conference, according to Zara Steiner, marked “the end of the inter-war movement to disarm”: see Zara Steiner, *The Lights that Failed: European International History, 1919–1933*, Oxford University Press, Oxford, 2005, p. 796.

76 Heinrich Zangger, “Considerations sur les taches des Societes nationales de la Croix-Rouge dans le domaine de la sauvegarde des populations et du secours aux gazes de guerre”, *Revue Internationale de la Croix-Rouge*, Vol. 16, No. 190, 1934, pp. 790–791.

77 For just a sample of the many articles devoted to “civil defence”, see “La défense passive en Italie”, *Revue Internationale de la Croix-Rouge*, Vol. 16, No. 192, 1934; “La défense passive en France”, *Revue Internationale de la Croix-Rouge*, Vol. 17, No. 194, 1935; “La défense passive en Allemagne”, *Revue Internationale de la Croix-Rouge*, Vol. 17, No. 199, 1935.

78 H. Zangger, above note 76, p. 792.

79 See, for instance, “Résolutions et vœux adoptés par la XVe Conférence Internationale de la Croix-Rouge Tokio, 20–29 octobre 1934”, *Revue Internationale de la Croix-Rouge*, Vol. 16, No. 191, 1934, p. 898.

80 D. Palmieri, above note 14, pp. 994–995.

modern warfare, the objective was “the destruction not of an army, but of a nation”.⁸¹ The reports of aerial bombardments of Republican territories in Spain aroused international outrage, and renewed commitments by diplomats to seek the limiting or banning of aerial bombardment on civilian territories. In September 1938, almost a year before the outbreak of the Second World War, a League of Nations commission met to discuss “putting a stop to this inhuman practice”.⁸² In hindsight, this commission may appear to herald the final, futile attempt of interwar internationalists to halt what by now seemed an inevitable march to conflict, and with it the destruction of civilian life. Similarly, given the destructive strategic bombing which belligerents waged between 1939 and 1945, the ICRC’s appeal in 1940 for combatants to avoid bombing civilians appears ineffectual in retrospect.⁸³ However, as the final section of this article will argue, the ICRC’s interwar work on civilian protection was more complex than the classic “declinist” narrative would reveal.

Assessing the ICRC’s interwar efforts, 1919–39

Over the interwar period, the Movement attempted to improve civilian protection by, firstly, seeking technical measures to limit the effects of aerial and chemical weapons, and later by appealing for more comprehensive legal measures like the banning of aerial bombardment. Given the immense civilian casualties from aerial bombardment alone during the Second World War, these attempts may appear to have failed.⁸⁴ However, there are problems with this perspective, given the events of 1939–45. Certainly, there were key problems within the Movement’s early attempts at civilian protection, but these were wider than can be understood through a simplistic “success” or “failure” narrative.

On the one hand, one can argue that the war demonstrated the validity of the Red Cross’s concerns over these new weapons of war. The much-feared chemical attacks on urban areas did not occur, but Cramer and Micheli’s essential argument, that the pressures of warfare would lead nations to justify the mass killing of “enemy civilians” in spite of any pre-war agreements or liberal ideologies, was realized in horrifying detail: the Allies’ bombing campaigns against Germany and Japan emphasized that the “dehumanizing” of “enemy civilians” was not confined to the Axis nations. Besides the accuracy of its predictions, it is also misleading to blame the Movement for failing to protect civilians. As Blondel rightly argues, the ultimate responsibility for protection falls

81 L. Demolis, “A propos de la ‘Guerre Totale’”, *Revue Internationale de la Croix-Rouge*, Vol. 19, No. 222, 1937, p. 603.

82 “Records of the Nineteenth Ordinary Session of the Assembly”, p. 14, LNA, R424/30988/36395.

83 “Appel concernant la protection de la population civile contre les bombardements aériens”, *Revue Internationale de la Croix-Rouge*, Vol. 22, No. 256, 1940.

84 The most comprehensive account of the strategic bombing campaign during the Second World War is Richard Overy, *The Bombing War: Europe 1939–1945*, Allen Lane, London, 2013. See also “Interview with Richard Overy”, *International Review of the Red Cross*, Vol. 97, No. 900, 2015.

on nation States: the ICRC can encourage States to respect humanitarian laws or norms, but it cannot take responsibility for when those States choose to ignore this encouragement.⁸⁵ Neither, to refer to the classic “realist” critique of internationalism, can one accuse the Red Cross’s attempts to limit civilian suffering from aerial bombardment of being particularly naive or overly idealistic.⁸⁶ As shown, much of this interwar work was premised on the perception that international institutions would not necessarily limit belligerents’ behaviour: both pessimism and optimism in the efficacy of international cooperation were key dynamics within the Movement’s approach to civilian protection.

Besides considering the “success” (or “failures”) of the Red Cross’s work protecting civilians from aerial bombardment, it is also important, from a broader intellectual perspective, to consider what this interwar work reveals about how the Movement (and the ICRC in particular) framed the wider concept of civilian protection. In doing so, one can see the ambiguous “progress” of the Movement’s approach to this issue. On the one hand, the *Review* highlighted the greater nuance in the ICRC’s understanding of the challenges and complexities in protecting civilian populations at the end of the interwar period.⁸⁷ The meeting of legal experts in Geneva had pointed many of these out, and the ICRC attempted to follow these discussions with another meeting of international lawyers in October 1937. This meeting discussed amending the current Geneva Conventions to include civilian populations. However, the commission decided that “the number of points on which the Geneva Convention of 1929 deserves to be improved or clarified is not sufficient to justify a complete revision”, and that due to the complexities of civilian protection, the issue justified its own convention.⁸⁸

In 1939, one of the ICRC’s legal experts, Jean Pictet, provided a comprehensive summary of the key gaps in international law which threatened civilians in conflicts, these being the insecure definitions which delineated civilians and soldiers, the obsolete concepts of “battlefront” and “home front”, and the incomplete laws regarding aerial warfare.⁸⁹ Pictet stressed that the most “delicate but urgent task” was to define comprehensively who the civilian population was, as a basis for any future legal treaty. Moreover, he urged the necessity of outlawing the bombing of any non-military target and the importance of establishing an international institution or framework with sufficient moral and political authority to enforce these measures.⁹⁰ As a

85 J.-L. Blondel, above note 5, p. 464.

86 The original “realist” critique of interwar internationalism as “utopian” comes from the British civil servant and historian E. H. Carr’s work: see E. H. Carr, *The Twenty Years’ Crisis: 1919–1939: An Introduction to the Study of International Relations*, Macmillan, London, 1939.

87 D. Palmieri, above note 14.

88 “Résolutions et vœux adoptés par la XVIe Conférence internationale de la Croix-Rouge, Londres 20–25 juin 1938”, *Revue Internationale de la Croix-Rouge*, Vol. 20, No. 235, 1938, p. 637.

89 Jean Pictet, “La protection juridique de la population civile en temps de guerre”, *Revue Internationale de la Croix-Rouge*, Vol. 21, No. 244, 1939.

90 *Ibid.*, pp. 283–286.

temporary measure, Pictet proposed a “modest extension” of the Geneva Conventions in order to guarantee sick and wounded civilians the same rights as sick and wounded combatants, with the former retaining their separate “non-combatant” status from the latter.⁹¹ In another *Review* article the same year, Pictet provided his own proposed definitions for “civilians” and “soldiers”. What was significant about these definitions was that they acknowledged that not all civilians were the same: there were key differences between those who played an “active” part in wars (such as munitions factory workers) and the “passive” population who contributed virtually nothing to their nation’s war efforts (such as the elderly or children).⁹² Pictet acknowledged that certain “active civilians” could be legitimately considered as collateral damage when they were carrying out activities which contributed to a nation’s war effort, such as when they were working in a munitions factory. However, he argued, as soon as those civilians ceased these activities or left spaces where they could be considered “active”, they could not be targeted: in other words, while buildings could be the target for bombardments, the individuals who worked within them could not.⁹³ For Pictet, delineating which identities and spaces constituted legitimate and illegitimate targets for military attack provided a way to reconcile the classical distinctions between civilians and the military in modern warfare.⁹⁴ Although Pictet’s interventions came too late in regard to the Second World War, he did play a major role in drafting GC IV in 1949, which defined civilians as “protected persons” under international law.⁹⁵

While Pictet’s articles indicate the greater nuance that was appearing in the *Review*’s treatment of civilian protection, it is important not to over-emphasize the progression in the Movement’s approach to this issue. One of the major gaps in Pictet’s article, which he acknowledged, was the situation of civilian detainees.⁹⁶ Civilian detainees had represented the ICRC’s first intervention into civilian protection in the First World War. However, during the interwar period, the organization devoted far less attention to this problem compared to its concern about protecting civilians from aero-chemical warfare. The 11th International Conference of the Red Cross in 1923 resolved to establish parity in international law for protecting civilian and military prisoners.⁹⁷ In an article for the *Review* in 1921, Frederic Ferrière provided a detailed outline for the reasons why belligerents imprisoned civilians, the hazy legal categories in which these

91 *Ibid.*, p.273.

92 Jean Pictet, “La protection juridique de la population civile en temps de guerre”, *Revue Internationale de la Croix-Rouge*, Vol. 21, No. 246, 1939.

93 *Ibid.*, pp. 468–469.

94 *Ibid.*, p. 469.

95 On Pictet’s role in the drafting of GC IV and his commentaries on the Convention, see Robert Heinsch, “The International Committee of the Red Cross and the Geneva Conventions of 1949”, in Robin Geiß and Andreas Zimmermann (eds), *Humanizing the Laws of War: The Red Cross and the Development of International Humanitarian Law*, Cambridge University Press, Cambridge, 2017.

96 J. Pictet, above note 89, p. 268.

97 “Résolutions et vœux votés par la XI^{me} Conférence internationale de la Croix-Rouge”, *Revue Internationale de la Croix-Rouge*, Vol. 5, No. 53, 1923, pp. 899–900.

prisoners sat, and the particular humanitarian problems that different types of civilian detainees faced. While declaring that “there should be no civilian prisoners other than those who can bear arms”, Ferrière nevertheless recognized the incredible difficulties faced by humanitarians in a new era in which “modern war is no longer a war between armies, but a struggle between peoples”: as such, he continued, “the civilian is likely, in the future, to be as little spared as he was in the last war”.⁹⁸

In 1934, the 15th International Conference of the Red Cross resolved that the ICRC should “take all necessary steps” to draw up an international convention to protect civilians in occupied territories, and to bring the matter to the attention of national governments.⁹⁹ The so-called Tokyo Draft (named after the city which held the conference) provided a basis for the 1949 GC IV.¹⁰⁰ Nevertheless, its adoption in the Movement in 1934 was a response to the failure of the 1929 Geneva Convention relative to the Treatment of Prisoners of War to include civilian detainees.¹⁰¹ The Movement’s attempts to resolve this gap in international law failed to conclude any international convention before the Second World War, however.¹⁰² Besides this particular failure to promote international agreements on civilian prisoners, one can also argue that Ferrière’s nuanced analysis of civilian protection was lacking in the Movement’s work in protecting civilians from aero-chemical warfare, which did not really engage with the complexities of civilian identity in war zones until the 1931 meeting of legal experts.

One of the significant omissions from the *Review*’s pages, particularly during the 1920s, was the issue of civilian protection for non-European populations. As argued already, the ICRC had generally ignored colonial warfare prior to 1914, and subsequently the suffering of civilian populations exposed to these particular forms of conflict. While the First World War had opened the organization’s eyes to the suffering of civilian war victims, it took several years for the ICRC to shed some of its Eurocentrism. The fact that the “experts” consulted by the Red Cross almost overwhelmingly represented European powers is one indication of this: at the first Brussels commission, Japan and Brazil were the only non-European powers present.¹⁰³ The Movement framed civilian protection in this period in terms of protecting urbanized and industrialized populations. While this concern was not explicitly Eurocentric, approaching civilian protection in this way effectively blinkered the Movement from the less spectacular yet more prevalent use of air power in colonial settings. In particular, it failed to anticipate the methods of “colonial policing”, where imperial nations like Britain used air power to intimidate and attack dispersed and isolated

98 Frederic Ferrière, “Projet d’une Convention internationale réglant la situation des civils tombés à la guerre au pouvoir de l’ennemi”, *Revue Internationale de la Croix-Rouge*, Vol. 5, No. 54, 1923.

99 “Résolutions et vœux adoptés par la XV^e Conférence Internationale de la Croix-Rouge Tokio, 20–29 octobre 1934”, *Revue Internationale de la Croix-Rouge*, Vol. 16, No. 191, 1934, pp. 899–900.

100 R. Heinsch, above note 95, p. 31.

101 D. Palmieri, above note 14, p. 994.

102 R. Heinsch, above note 95, p. 31.

103 “Liste des experts”, *Revue Internationale de la Croix-Rouge*, Vol. 10, No. 110, 1928.

populations.¹⁰⁴ More broadly, in the 1920s the ICRC struggled to respond effectively to colonial conflicts which did not fit the classic definitions of international wars, and which imperial powers were keen to dismiss as internal security matters. Examples like the Rif War, where the Spanish military used gas against civilian populations, highlighted the double standard in the Movement's concerns about chemical weapons and civilians.¹⁰⁵ The *Review* did not find space for any specific condemnation of these chemical attacks. In 1926, however, it did publish a self-congratulatory report from the Spanish Red Cross about the hospitals that it had installed in Morocco, which had brought "the benefits of modern medical science" to the region: these had not only helped "propagate ... the basic principles of hygiene" to "the natives" (once their "instinctive mistrust" had been overcome), but were also "[contributing] in the noblest way to the final pacification" of previously hostile areas of the country.¹⁰⁶

This is not to say that the ICRC completely ignored the suffering of non-Europeans. In 1921, ICRC delegate Maurice Gehri accompanied the inter-Allied commission that investigated atrocities against Muslim civilians in Anatolia. In the *Review*, Gehri concluded that "elements of the Greek occupation army had been pursuing for two months the extermination of the Muslim population of the [Yalova] peninsula".¹⁰⁷ In 1936, the ICRC also published protests from the Ethiopian Red Cross against Italy's use of mustard gas and aerial attacks on both towns and rural communities.¹⁰⁸ The ICRC used the same issue of the *Review* to reiterate its support for the banning of chemical weaponry and reminded readers of its work aimed at protecting civilians from such weapons.¹⁰⁹ Yet, despite this new development in the *Review*'s coverage of civilian protection, the ICRC did not expressly condemn Italy's violation of the Geneva Protocol, despite the urgings of the League of Nations. While a desire to uphold political neutrality, rather than overt racism, may have explained this silence, it highlighted the organization's ineffectiveness in approaching belligerents, like Fascist Italy, who lacked respect for international law.¹¹⁰

104 David Killingray, "A Swift Agent of Government': Air Power in British Colonial Africa, 1916–1939", *Journal of African History*, Vol. 25, No. 4, 1984.

105 For more on the Movement in the Rif War, see Francisco Javier Martínez-Antonio, "Weak Nation-States and the Limits of Humanitarian Aid: The Case of Morocco's Rif War, 1921–27", in Johannes Paulmann (ed.), *Dilemmas of Humanitarian Aid in the Twentieth Century*, Oxford University Press, Oxford, 2016.

106 Rodolphe Haccius, "L'œuvre de la Croix-Rouge espagnole au Maroc", *Revue Internationale de la Croix-Rouge*, Vol. 8, No. 93, 1926, pp. 663–664. The following year, the *Review* published news of the commemorative postage stamps that the Spanish government issued to celebrate the Spanish Red Cross's contribution to the conflict, but again, it made no mention of civilian casualties during the war. See Florian Wexel, "Timbres de Croix-Rouge", *Revue Internationale de la Croix-Rouge*, Vol. 9, No. 97, 1927.

107 "Mission d'enquete en Anatolie (12–22 mai 1921)", *Revue Internationale de la Croix-Rouge*, Vol. 3, No. 31, 1921, p. 723.

108 "Protestation Ethiopienne", *Revue Internationale de la Croix-Rouge*, Vol. 18, No. 208, 1936.

109 "Le droit des gens dans le conflit italo-éthiopien", *Revue Internationale de la Croix-Rouge*, Vol. 18, No. 208, 1936, pp. 340–341.

110 Rainer Baudendistel, "Force versus Law: The International Committee of the Red Cross and Chemical Warfare in the Italo-Ethiopian War 1935–1936", *International Review of the Red Cross*, Vol. 80, No. 829, 1998, pp. 103–104.

This and the inattention to non-European populations is indicative of wider issues in the Red Cross's conception of civilian protection. While the ICRC's understandings of the complexities of "civilianization" and modern warfare had grown over the interwar period, its thinking continued to be dominated by binary categories like civilians and soldiers, combatants and non-combatants. This mindset, Palmieri argues, indicates the "traditionalist" ideas of warfare that maintained a grasp on the organization.¹¹¹ While talking of "the civilian population", the Movement primarily engaged with the threat facing one type of civilians: urbanized populations close to industrial centres. Moreover, while authors wrote of "new" forms of warfare, in reality the Movement remained wedded to the notion that belligerents attacked civilians because it fulfilled particular "military objectives", such as destroying a nation's war economy. They did not consider how other identities like race, political affiliation or gender could encourage particular forms of violence against specific civilians. In 1922, the ICRC's delegate in Greece, Rodolphe de Reding Biberegg, noted the gendered dynamics of violence he encountered among refugees arriving into Piraeus after the Greco-Turkish War. In the *Review*, de Reding commented that there were few men or young women among the refugee population, since the Turkish army had massacred the former and taken the latter into sexual slavery.¹¹² However, despite the euphemistic references to sexual violence in the Hague Conventions, the Movement did not seek to address and more clearly define these gaps in IHL.¹¹³ In the 1930s, during the Spanish Civil War and the Second Sino-Japanese War in particular, atrocities against civilians, including sexual violence, torture and summary executions, were largely fuelled by the racial and political identities of these civilians.¹¹⁴ The ICRC's responses to this violence were uneven. Its large-scale material efforts for Spanish refugees and political detainees were not replicated in invaded territories in China.¹¹⁵ Perhaps more significantly, while the organization sent out pleas for belligerents not to bombard civilian areas, its response to reports of more intimate face-to-face violence was one of silence.¹¹⁶ As Palmieri argues, the organization appeared to ignore, or failed to realize, the key difference between belligerents who sought merely to defeat their enemy and those who sought to destroy their enemy on the basis of the latter's ethnic, national or political identity.¹¹⁷ These conceptual gaps

111 D. Palmieri, above note 14, pp. 995–996.

112 "Secours aux réfugiés grecs", *Revue Internationale de la Croix-Rouge*, Vol. 4, No. 47, 1922, p. 956. See also a follow-up report on the sexual exploitation of these refugees, in "Traite des femmes et des enfants parmi les réfugiés d'Asie mineure", *Revue Internationale de la Croix-Rouge*, Vol. 5, No. 54, 1923.

113 On contemporary IHL and sexual violence, see Gloria Gaggioli, "Sexual violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law", *International Review of the Red Cross*, Vol. 96, No. 894, 2014, pp. 511–513.

114 On the "Red" and "White" atrocities committed during the Spanish Civil War, see Antony Beevor, *The Battle for Spain: The Spanish Civil War, 1936–1939*, Phoenix, London, 2006.

115 On the ICRC's response to these two conflicts, see David Forsyth, *The Humanitarians: The International Committee of the Red Cross*, Cambridge University Press, Cambridge, 2005, pp. 39–41.

116 For these appeals, see, for instance, "Conflit sino-japonais", *Revue Internationale de la Croix-Rouge*, Vol. 20, No. 233, 1938, pp. 468–469.

117 D. Palmieri, above note 14, p. 995.

prefigured the organization's inadequate response to the Nazis' genocidal violence, in which killing civilians was not simply about fulfilling a particular military objective but about annihilating an entire "race" of people from existence.¹¹⁸

Conclusions: Lessons learned?

Between 1939 and 1945, the Movement once again had to respond to a cataclysmic and inhuman war. As in 1919, the post-war period appeared to herald the prospect of an even deadlier weapon that placed civilian populations under the threat of even greater levels of harm: the atomic bomb. Following the successful signing of GC IV in 1949 – the first comprehensive treaty to define civilian populations as "protected persons" – the Movement's attention turned once more to solving the problems posed by the technological development of "indiscriminate" weaponry.¹¹⁹ Even today, the problems posed by new technology continue to frame discussions around civilian protection. In 2012, the *Review* published an issue on the subject of new technologies, in which editor-in-chief Vincent Bernard noted how "the dazzling scientific and technical progress of recent decades has given rise to unprecedented means and methods of warfare".¹²⁰ There are clearly striking echoes between Bernard's quote and individuals in the 1930s, like Demolis, who claimed to be living "in an era of scientific and technical progress of armaments unparalleled in history".¹²¹

Further continuities between the pre- and post-1945 period can be seen in civilian protection in colonial settings. In spite of the introduction of GC IV, the ICRC faced key difficulties in protecting civilians during the process of European decolonization and the violence which accompanied or followed the end of formal imperial rule. When the ICRC intervened in the anti-colonial wars in Algeria and Kenya in the 1950s, it encountered colonial States who sought to circumvent GC IV by defining certain civilian populations as "terrorists", and these rebellions as "internal security" matters rather than civil war.¹²² Although the ICRC's concern for non-European populations certainly increased after 1945, the limits of international law continued to impact its ability to translate this concern into action.¹²³

118 On the ICRC and the Holocaust, see Jean-Claude Favez, *The Red Cross and the Holocaust*, Cambridge University Press, Cambridge, 1999.

119 "Réunion d'experts pour la protection juridique des populations civiles", *Revue Internationale de la Croix-Rouge*, Vol. 36, No. 424, 1954. See also the extensive archival files on the ICRC's attempts to limit or ban nuclear weapons: ICRC, BAG049-022.

120 Vincent Bernard, "Editorial: Science Cannot Be Placed Above Its Consequences", Vol. 94, No. 886, 2012, p. 458.

121 L. Demolis, "Les armements modernes et la protection des populations civiles", *Revue Internationale de la Croix-Rouge*, Vol. 21, No. 245, 1939, p. 403.

122 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.

123 The introduction of the 1977 Additional Protocols helped refine some of these legal gaps in civilian protection in non-international armed conflicts.

The history of the *Review* and the Movement's engagement with civilian protection is ambiguous, challenging either triumphalist or declinist narratives. There is no doubt that the structures of international humanitarian governance have become more sophisticated over the second half of the twentieth century, thanks to the proliferation of NGOs, the growth of international institutions and legal frameworks, and the increasingly "unimpeachable" moral authority of "humanitarian reason" in global and national politics.¹²⁴ Moreover, recent articles in the *Review* on civilian protection highlight the more nuanced scholarly literature from political scientists, anthropologists, historians and practitioners, which underpins the Movement's approach to the problems facing civilians in warfare.¹²⁵ Yet such developments cannot hide the fact that civilians remain as vulnerable to wartime violence as ever before. While scholars and humanitarians now understand the greater complexities of protecting civilians, this does not mean the international community is any closer to solving these problems. To refer to Andreas Wenger and Simon Mason's recent contribution to the *Review*, in modern civil and asymmetric wars and in new high-tech "digital warfare", the lines between civilians and combatants, war and peace, the battlefield and "the home", are increasingly fluid and unstable.¹²⁶ Humanitarians and peacekeepers thus face particular difficulties applying current IHL frameworks in contexts where State authority is weak, or virtually non-existent in the case of the Internet. Singular recommendations to humanitarian organizations, such as to focus more/less on peacekeeping or to abandon/strengthen traditional humanitarian principles like political neutrality, cannot alone solve these complex issues. Indeed, an understanding of the multifaceted reasons why belligerents target civilians demonstrates the difficulties of any single approach to protecting these populations.¹²⁷

What, then, can we draw from the Red Cross's early approach to civilian protection, given the vastly different contexts in which today's Movement operates? The first "lesson" is the need to pay attention to these aforementioned "complexities", and to be attentive to the various threats that civilians face in different contexts. The Red Cross's approach to civilian protection in the interwar period demonstrates the problems that can emerge from interpreting civilians as a singular population, which can lead to humanitarians prioritizing the requirements of certain civilians over others. The Movement's belief that

124 Didier Fassin, *Humanitarian Reason: A Moral History of the Present*, trans. Rachel Gomme, University of California Press, Berkeley, CA, 2012.

125 See, for instance, A. Wenger and S. J. A. Mason, above note 3; Haidi Willmot and Scott Sheeran, "The Protection of Civilians Mandate in UN Peacekeeping Operations: Reconciling Protection Concepts and Practices", *International Review of the Red Cross*, Vol. 95, No. 891–892, 2013.

126 A. Wenger and S. J. A. Mason, above note 3.

127 For a summary of the debates about the role of principles of neutrality and the political role of humanitarianism, see Kate M. Bridges, "Between Aid and Politics: Diagnosing the Challenge of Humanitarian Advocacy in Politically Complex Environments – The Case of Darfur, Sudan", *Third World Quarterly*, Vol. 31, No. 8, 2010. For a close analysis of this debate, see also Stuart Gordon and Antonio Donini, "Romancing Principles and Human Rights: Are Humanitarian Principles Salvageable?", *International Review of the Red Cross*, Vol. 97, No. 897–898, 2016.

aerial bombardment represented a significant threat to civilians in future wars was not incorrect, but by prioritizing the threat to civilians in urban areas, it lacked the conceptual tools for responding to violence against civilians in other contexts. While the *Review* noted instances of ethnic or gender-based violence against civilians before 1939, these findings did not translate into more concerted efforts to redress gaps in international law or to educate National Societies on these particular forms of “face-to-face” violence. Moreover, while the First World War had demonstrated some of the problems facing civilian detainees, the ICRC’s failure to distinguish the Nazis’ extermination camps from more typical sites of detention highlighted the gaps that continued to underpin the organization’s understandings of why belligerents targeted civilians, and the particular forms of violence this entailed. As the ICRC’s work on gender-based violence over the last twenty years has shown, while civilians possess common needs like food and water, “the effects of armed conflict impact differently on men [and] women”, to which one may add other identities such as nationality or ethnicity: far from representing an abandonment of the principle of impartiality, appreciating these differences allows humanitarians to recognize the “specific needs and vulnerabilities of each category of victim in order to be able to reach, assist, and protect them appropriately”.¹²⁸

If the Red Cross’s understandings of civilian populations and warfare in this period were far too narrow, it is important to remember that its proposed solutions to protecting civilians were more expansive. Recognizing the specific problems posed by aero-chemical warfare, the Red Cross sought technical and legal solutions, and consulted a range of “experts” both within and outside the Movement. This flexible approach to protection is the second “lesson” from the past. The pragmatism and idealism that informed the Movement’s proposed solutions to civilian protection remains a fundamental requirement for practitioners today. Humanitarians must remain committed to the legal principles and wider values underlying IHL, which explain why civilians must be protected. But, as in the interwar period, humanitarians operate in a world where belligerents may not share this same respect: indeed, the chemical attacks in Syria provide damning evidence that the Movement’s concerns about the legal protocols on gas warfare were by no means fanciful. In these circumstances, it is vital that those seeking to protect civilians embrace a range of legal and “technical” means which must vary according to specific circumstances: these measures may range from the delegate’s traditional role of maintaining a “presence” in war zones to more proactive steps like negotiating “safe zones” with local warlords and “peacekeeping” forces, or engaging in forms of development work which can prevent the material and psychological factors that encourage violence against civilian populations.

The Movement’s attempts to build networks of expertise in the interwar period may have been marked by their narrow conception of civilians and warfare, but they reflected a valid observation: that efforts to solve the problems

128 Charlotte Lindsey, *Women Facing War*, ICRC, Geneva, 2001, pp. 36–37.

of civilian protection must go beyond the powers of humanitarian actors alone. With the benefit of hindsight, one can see that the interwar Red Cross needed to go further than consulting legal “experts” working for the League of Nations or the military leadership and scientists connected to National Societies. The limits of these early networks serve to reiterate the widespread calls in recent years for humanitarianism to address accountability to its “recipients” and to incorporate these populations, local NGOs and national staff into the decision-making process.¹²⁹ There are obviously key challenges to incorporating “local actors” and civilians themselves into the structures of international humanitarian governance,¹³⁰ but if international humanitarian actors hope to generate targeted protection measures, they must first understand the specific factors that shape violence against civilians in those contexts. To do this, they must make the effort to incorporate the views and perspectives of the key actors in these conflicts, which includes the agency of civilians themselves.¹³¹ As Charlotte Lindsey rightly points out in regard to women in conflict, there is incredible diversity among groups that humanitarians may traditionally view as passive “victims”. While “civilian population” may be a convenient label, it is more accurate to distinguish *civilians* (in the plural) from *the civilian* (as a singular concept). Doing so allows us to appreciate the exact “needs” of particular individuals and the specific social or economic skills they may possess which can enable their resilience in the face of war, and to understand exactly how such individuals participate directly or indirectly in wars (and thus why they may be targets of violence).¹³² In regard to the *Review*’s role in supporting this process, the articles in the journal from the 1920s and 1930s are filled with experts and humanitarians who speak on behalf of civilian populations. The voices of civilians themselves are strikingly absent, however. In this regard, recent issues of the *Review* that contain civilian “voices” from the battlefield represent an important step in re-dressing the implicit power imbalances in humanitarian action.¹³³

129 See, for example, International Federation of Red Cross and Red Crescent Societies, *World Disasters Report: Focus on Local Actors, the Key to Humanitarian Effectiveness*, Geneva, 2015, available at: http://ifrc-media.org/interactive/wp-content/uploads/2015/09/1293600-World-Disasters-Report-2015_en.pdf.

130 Claudia McGoldrick, “The State of Conflicts Today: Can Humanitarian Action Adapt?”, *International Review of the Red Cross*, Vol. 97, No. 900, 2015, pp. 1200–1206.

131 On the agency of civilians in war zones, see A. Wenger and S. J. A. Mason, above note 3, pp. 841–846.

132 C. Lindsey, above note 128, pp. 212–213.

133 See, for example, “Life in a War-Torn City: Residents of Aleppo Tell Their Stories”, *International Review of the Red Cross*, Vol. 98, No. 901, 2016.

Reflections on the development of the Movement and international humanitarian law through the lens of the ICRC Library's Heritage Collection

Ismaël Raboud, Matthieu Niederhauser and Charlotte Mohr*

Ismaël Raboud holds an MA in international relations and an MS in information science. He joined the ICRC Library in 2007, where he currently occupies the position of Reference Librarian for the collections related to both the Diplomatic and International Conferences, as well as the State Practice collection. He also oversees the digitization and preservation activities of the Library. Prior to that, he worked at the Decentralised Cooperation Programme of the United Nations Institute for Training and Research.

Matthieu Niederhauser is a PhD Candidate at the University of Lausanne's Institute of Political, Historical and International Studies. Prior to that, he was an IHL Reference Librarian at the ICRC Library. He has also worked at the ICRC Law and Policy Forum and at the IHL and human rights sections of the Swiss

* The views expressed in this article are those of the authors and do not necessarily reflect the position of the International Committee of the Red Cross.

Federal Department of Foreign Affairs.

Charlotte Mohr joined the ICRC Library in 2018 after graduating with an MA from the University of Lausanne. She is currently its Reference Librarian for the collections on the ICRC's history and activities, and is also in charge of the institutional repository of ICRC publications.

Abstract

The International Committee of the Red Cross (ICRC) Library was first created at the initiative of the ICRC's co-founder and president, Gustave Moynier. By the end of the nineteenth century, it had become a specialized documentation centre with comprehensive collections on the International Red Cross and Red Crescent Movement, international humanitarian law (IHL) and relief to war victims, keeping track of the latest legal debates and technological innovations in the fields related to the ICRC's activities. The publications collected by the Library until the end of the First World War form a rich collection of almost 4,000 documents now known as the ancien fonds, the Library's Heritage Collection.

*Direct witness to the birth of an international humanitarian movement and of IHL, the Heritage Collection contains the era's most important publications related to the development of humanitarian action for war victims, from the first edition of Henry Dunant's groundbreaking *Un souvenir de Solferino* to the first mission reports of ICRC delegates and the handwritten minutes of the Diplomatic Conference that led to the adoption of the 1864 Geneva Convention. This article looks at the way this unique collection of documents retraces the history of the ICRC during its first decades of existence and documents its original preoccupations and operations, highlighting the most noteworthy items of the Collection along the way.*

Keywords: ICRC Library, Heritage Collection, ICRC history, International Red Cross and Red Crescent Movement, IHL, 1864 Geneva Convention, Gustave Moynier.

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The International Committee of the Red Cross (ICRC) Library's collections¹ are constantly updated with new acquisitions covering international humanitarian law (IHL) and the work of the organization. However, one of these collections

1 In addition to the Heritage Collection, the ICRC Library includes collections on the National Red Cross and Red Crescent Societies (National Societies), the International Federation of Red Cross and Red Crescent Societies (IFRC), State Practice, International Conferences and Diplomatic Conferences, together with a current collection to which is added every new French and English-language document on the ICRC and/or international humanitarian law. The Library is also the official repository of the ICRC's own publications. For further information about the Library and to consult the catalogue, see: www.icrc.org/en/library (all internet references were accessed in May 2019).

has remained unchanged since the end of the First World War. The *ancien fonds*,² as it is known in French, is a Heritage Collection, comprising almost 4,000 books, brochures, reports, manuals and press cuttings from over forty countries. The ICRC began to carefully assemble and classify these resources when the organization was founded, and they form its original library. This Heritage Collection is a unique witness to the first decades of the ICRC's work, the emergence of IHL and the development of what is now the International Red Cross and Red Crescent Movement (the Movement).⁴

The ICRC Library today

The ICRC Library is a specialized library with exhaustive collections on IHL and the ICRC's humanitarian action, providing a continuous record of those fields' development over the past 150 years. Together with the ICRC Archives, it constitutes the leading documentary resource on the ICRC and IHL. In line with Gustave Moynier's original vision, the Library is public: it serves both ICRC staff members and any interested visitor, and supports them through a range of reader services. It aims to reach a global public, notably by making more and more resources directly available online. It thus carries on its illustrious founder's mission, wishing to remain "a source of information both comprehensive and accessible to all".³

In this article we shall retrace the history of the ICRC from its inception to the end of the nineteenth century by examining the development of the Heritage Collection, which is closely linked to the *Bulletin International des Sociétés de la Croix-Rouge*.⁵ This unique collection of documents is a mine of information on the principal concerns of the ICRC at the time of its founding, including the development of new medical techniques and means of transport, and the situation of prisoners of war. It also includes precious documents that bear witness to the main events of the ICRC's early history, such as the mission reports from its first two delegates, the records of the first International Conferences of the Red Cross and Red Crescent (International Conferences), and the writings of the first National Red Cross and Red Crescent Societies (National Societies). The richness of the Collection also stems from the diversity of the types of documents that it houses. These include manuscripts, rare books full of illustrations or engravings,

- 2 To make it easier for readers to find publications mentioned in this article, call numbers are provided in the footnotes. The call numbers for all items in the Heritage Collection begin with "AF", which stands for "ancien fonds". Internet links to some items are included in the footnotes. In cases where no link is provided, please contact the Library (library@icrc.org) if you wish to consult the referenced documents.
- 3 Gustave Moynier, "La bibliothèque du Comité international", *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 9, No. 35, 1878, p. 199 (quote translated from French).
- 4 The International Red Cross and Red Crescent Movement, the world's largest humanitarian network, has three main components: the ICRC, the IFRC, and the 191 National Societies that are currently members of the IFRC.
- 5 Published between 1869 and 1918, the *Bulletin International des Sociétés de la Croix-Rouge* was distributed to the Movement's different members as its official journal. It is the ancestor of the *International Review of the Red Cross* as we know it today.

and books signed by their authors. While we cannot provide an exhaustive account of the Collection's contents in these few pages, we nonetheless hope to give some idea of its richness and to encourage its consultation by researchers interested in the history of the ICRC, the Movement and humanitarian endeavours in general.

This article starts by discussing the creation of the ICRC's first library and introducing its founder, Gustave Moynier, before moving on to present the topics that the collection covers, from the birth of IHL to the development of an international Movement. Along the way, we shall examine some of the most important works in the collection and highlight how they embody the Movement's first milestones. The article also contains a section on publications related to the ICRC's first field activities, which were mainly medical as two of the ICRC's five founding members were doctors (Drs Théodore Maunoir and Louis Appia). Finally, we shall look at the way the Heritage Collection has transformed over time, and how the ICRC Library team works today to ensure its preservation and facilitate its use.

Gustave Moynier: President of the ICRC and founder of the ICRC Library

The ICRC Library and its Heritage Collection came about through the initial establishment of the Red Cross's first library, which was created and maintained by Gustave Moynier, ICRC president from 1864 to 1910. Even though he played a crucial role in the birth and development of the ICRC, Moynier's contribution is often underestimated today and bears some explanation.⁶

When we imagine the founding of the ICRC, the first name that comes to mind is that of Henry Dunant. In 1862, when he so eloquently portrayed the horrors of war in *A Memory of Solferino*, this Genevan businessman convinced both statesmen and the general public of the need to change the way wounded soldiers were treated, as at the time, they were often left to die on the battlefield.⁷ To make up for the shortcomings of the army medical services, Dunant proposed that every nation create a volunteer society that would train in peacetime to treat wounded soldiers in time of war. Gustave Moynier was not just one of the first to read Dunant's book, he was also responsible for founding the organization that would implement Dunant's innovative proposals – the future International Committee of the Red Cross.⁸

6 Works devoted to Gustave Moynier include the following: Jean de Senarclens, *The Founding of the Red Cross: Gustave Moynier Its Master Builder*, Slatkine, Geneva, 2005; François Bugnion, *Gustave Moynier: 1826–1910*, Slatkine and Henry Dunant Society, Geneva, 2012; Philippe Ryfman, “Gustave Moynier, pionnier méconnu de l'action humanitaire et du droit international humanitaires”, *Questions Internationales*, No. 36, March–April 2009. Moynier's obituary, which was written by the ICRC and appeared in the October 1910 edition of the *Bulletin International des Sociétés de la Croix-Rouge*, can be found in the Heritage Collection of the ICRC Library (AF 2851).

7 Henry Dunant, *Un souvenir de Solferino*, Imprimerie J. G. Fick, Geneva, 1862 (AF 3051). English translation: *A Memory of Solferino*, American National Red Cross, Washington, DC, 1939.

8 François Bugnion, “Birth of an Idea: The Founding of the International Committee of the Red Cross and of the International Red Cross and Red Crescent Movement: From Solferino to the Original Geneva Convention (1859–1864)”, *International Review of the Red Cross*, Vol. 94, No. 888, 2012, available at: <https://library.icrc.org/library/docs/DOC/irrc-888-bugnion.pdf>.

In 1855 Gustave Moynier became the chairman of a local philanthropic organization, the Société Genevoise d'Utilité Publique (Geneva Society of Public Utility), which brought together “the great and the good” of the Geneva region. Its activities revolved mostly around supporting the publication of works on education, poverty and the situation of workers.⁹ As one of its most active members, Moynier founded its journal, the *Bulletin Trimestriel de la Société Genevoise d'Utilité Publique*. He also reorganized the Society's library so that its collections would follow the latest advancements in the social sciences and support the work of its members. Convinced by the ideas presented in *A Memory of Solferino*, Moynier shared them with the Society's members, who, after some initial hesitation, agreed to set up a committee to consider how Henry Dunant's proposals might be implemented. The five members of this first committee – Henry Dunant, Gustave Moynier, Doctors Louis Appia and Théodore Maunoir, and General Guillaume-Henri Dufour – became the founders of the International Committee for Relief to the Wounded, which is today known as the ICRC.¹⁰

Gustave Moynier was a lawyer by profession and combined a passion for the physical and natural sciences with an unshakable philanthropic vocation – he was especially drawn to statistics and sociology, the emergence of which he followed with great interest. As a man of science, he firmly believed in the field's potential to improve the lives of his contemporaries. In a work he co-authored with Dr Louis Appia in 1867, he wrote that “sentiment calls science to its aid”.¹¹ To this end, he based his concept of charity on the study of the ills of society and on the exchange of publications and knowledge. Moynier considered the written word to be of vital importance and was himself a prolific author. There were few subjects in the fields of society and public health that he had not studied to the extent of penning a few lines, be it on orphans, the situation of workers, social security or the abuse of alcohol.¹²

While he may have lacked the impact of Dunant's declarations or the affinity with fieldwork of Dr Appia (another co-founder who is often overlooked), Gustave Moynier was an untiring administrator of the ICRC. He

9 Jean de Senarclens, *La Société genevoise d'utilité publique: Creuset des réformes sociales à Genève aux XIXe et XXe siècles*, Slatkine, Geneva, 2003.

10 In 1873, Moynier recounted the history of the founding of the Committee to a meeting of the Société Genevoise d'Utilité Publique. The text of this account is in the Heritage Collection: Gustave Moynier, “Les dix premières années de la Croix-Rouge”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 4, No. 16, 1873 (AF 2815), available at: https://library.icrc.org/library/docs/AF/AF_2815.pdf. See also the first volume of a five-volume series on the history of the ICRC: Pierre Boissier, *History of the International Committee of the Red Cross: From Solferino to Tsushima*, Henry Dunant Institute, Geneva, 1985, available at: https://library.icrc.org/library/docs/DIGITAL/BIB_00005.pdf.

11 Quote translated from French (“Le sentiment appelle la science à son secours”). Gustave Moynier and Louis Appia, *La guerre et la charité: Traité théorique et pratique de philanthropie appliquée aux armées en campagne*, Librairie Cherbuliez, Geneva and Paris, 1867 (AF 3062), p. 139, available at: https://library.icrc.org/library/docs/AF/AF_3062.pdf.

12 In December 1860, for instance, he presented a study on how to assist abandoned or orphaned children to the Société Genevoise d'Utilité Publique. In 1866, at the request of the Swiss government, he wrote a paper in anticipation of the International Exposition in Paris: Gustave Moynier, *Les institutions ouvrières de la Suisse*, Librairie Cherbuliez, Geneva and Paris, 1867.



Figure 1. Portrait of Gustave Moynier, co-founder and president of the International Committee for Relief to the Wounded. © Frédéric Boissonnas/Geneva City, ICRC Archives (ICRCA), V-P-HIST-0354903.

ensured its smooth day-to-day running and until 1898 signed most of its letters, circulars and general publications. As Jean de Senarclens put it in his biography of Moynier, “it was he who took the decisions and, most of the time, it was also he who carried them out, after consultation with the Committee”.¹³

As president and administrator of the International Committee, Gustave Moynier created its Library. He seems to have conceived it as an integral part of the Committee’s main office in Geneva, which it has remained over time, following the organization in its successive moves.¹⁴

¹³ J. de Senarclens, above note 6, p. 109.

¹⁴ The Committee – and its Library – moved at the end of the First World War from 3 Rue de l’Athénée, where its office had been established in 1871, to the Promenade du Pin. In the summer of 1933, it moved to what is now the Villa Moynier, by the Geneva Lake. At that time, the *Review* published an article describing the Committee’s past and new offices: Étienne Clouzot, “Anciens et nouveau sièges du Comité international de le Croix-Rouge”, *Revue Internationale de la Croix-Rouge*, Vol. 15, No. 176, 1933. Today, the Library is located at ICRC Headquarters on Avenue de la Paix.

From the outset, the Library's mission was to bring together what Moynier called "the literature of the Red Cross".¹⁵ In keeping with this vision, he collected essays on philanthropic and charitable activities, international law treaties and military manuals, together with works by the Committee and its members. From the time of its inception, the Heritage Collection included numerous works on first aid, military surgery, the transportation of the wounded and the training of medical personnel. Over time, the collection also came to hold what are now historical sources of great value to the study of the conflicts of the second half of the nineteenth century and the beginning of the twentieth.¹⁶

Moynier not only founded the International Committee's Library, he also strove to develop its services and its collections. As a true nineteenth-century documentation centre, the Library's role was to serve as a resource for those who sought to advance the fields of military medicine, transportation and care of the wounded, and the humanitarian endeavour. The Library was therefore open to outside visitors, and a succession of researchers and doctors used its services in the years following its creation, as we can see from the minutes of the Committee's meetings. The minutes first mention the Library on 12 January 1875, when Moynier announced that it had been used by "Dr Prévost, a hospital doctor, who is looking for a type of vehicle to carry the wounded".¹⁷ This visitor could very well have been the famous Genevan doctor Jean-Louis Prévost (1838–1927), who was then deputy chief medical officer at the Cantonal Hospital, and whose work contributed to the invention of the defibrillator. In 1877, the Library was visited by "Dr Schramm, a Prussian living in New York, who was visiting Geneva and consulted the Library in connection with an essay on the Red Cross that he was preparing".¹⁸ As well as consulting documents in the Library, readers could borrow them, and in 1878, Gustave Moynier wrote that "there have already been frequent opportunities to lend books to researchers from Geneva and abroad, and the Committee has been able thereby to render some modest service".¹⁹ Unfortunately, these first indications of the existence of a library open to researchers at the Committee's headquarters do not allow us to fix the date of its creation with any certainty. As its holdings include earlier works, we may suppose that it was born at the same time as the organization, initially perhaps simply taking the form of a collection of works belonging to the Committee's founders.

15 Gustave Ador and Gustave Moynier, "Les huit premières années du Bulletin international", 41st circular of the ICRC, 8 December 1877.

16 The collection comprises, for example, lists of prisoners of war held in France during the 1870–71 Franco-Prussian War. ICRC, *Liste des prisonniers de guerre allemands internés en France*, 1871 (AF 4290).

17 Meeting of the Committee, 12 January 1875, in Jean-François Pitteloud (ed.), *Procès-verbaux des séances du Comité international de la Croix-Rouge: 17 février 1863–28 août 1914*, Henry Dunant Society and ICRC, Geneva, 1999, p. 332 (quote translated from French), available at: https://library.icrc.org/library/docs/DIGITAL/BIB_00009.pdf. Also see the review of this work by Patrick Haas in *International Review of the Red Cross*, Vol. 82, No. 838, 2000.

18 Meeting of the Committee, 24 November 1877, in J.-F. Pitteloud (ed.), above note 17, p. 426 (quote translated from French).

19 G. Moynier, above note 3, p. 199 (quote translated from French).



Figure 2. The ICRC Library Catalogue handwritten by Gustave Moynier in 1878. © ICRC.

As the Library collected more and more works over the years, the need for a formal organization and a registry of the publications became apparent. Moynier tackled this issue in 1878 and completely reorganized the Library's collections. He drew up a handwritten catalogue (see Fig. 2) showing the date of publication, title, author and call number of each item. The Heritage Collection remains to this day organized according to the classification system that he set up. Items are shelved first by source, then by subject, author and date of publication. This classification system makes it possible to follow the spread of Red Cross action across the world and the creation of a network of National Societies first in Europe and then further afield. The largest number of items in the Heritage Collection come from Germany, Switzerland, France, Italy and the United Kingdom. As well, the Collection includes publications from China, Cuba, Brazil, the United States and Mexico, and even one from a short-lived micro-nation, the Free State of Counani.²⁰

20 Raoul Aubry, *Le livre rouge concernant la création de l'organisation du gouvernement Counanien jusqu'au 1er janvier 1903*, 1903 (AF 1338).

In the words of Moynier, the manner in which the Library was organized made it possible to “highlight the contribution of each people to this rich literature One need only see the space on the shelves occupied by the various countries, arranged in alphabetical order, to appreciate the fertility of each one.”²¹ While most works arrived in the form of gifts or exchanges, Moynier was keen to ensure that the collections were exhaustive. In an article he published in the *Bulletin International des Sociétés de la Croix-Rouge*, he reported that “as regards the work of the Red Cross itself, that is to say the Societies for the relief of military wounded and the Geneva Convention, the Library is well-stocked, and it is probable that few gaps remain”.²² Moynier’s efforts to keep track of the Movement’s geographical expansion and chronological development are apparent in the contents of the Heritage Collection, going back to its emergence in the 1860s.

From an idea to reality: The birth of the Movement and international humanitarian law reflected in the Heritage Collection

Since it was conceived by Moynier as a comprehensive collection on the “work of the Red Cross”, it is not surprising that the Heritage Collection includes many important documents related to the early history of the Movement. Three in particular illustrate the rapidity of its initial development. The Collection holds the first edition of *Un souvenir de Solférino* from 1862 (published in English as *A Memory of Solferino*),²³ the report of the International Conference which took place in Geneva at the initiative of the International Committee in 1863,²⁴ and the handwritten report of the first Diplomatic Conference of 1864,²⁵ which led to the adoption of the original Geneva Convention. The Heritage Collection also contains publications that informed the Committee’s work for the redaction of the 1864 Geneva Convention, as well as titles showing members of the Movement’s efforts to promote the development and application of IHL in the following years.

In *Un souvenir de Solférino*, Dunant called for the creation of national societies of volunteers prepared to assist the wounded in time of war. Convinced by this idea, Moynier and the other founders of the International Committee started to work on its implementation the year after Dunant published his memoir. To this end, they organized in 1863 an International Conference which was attended both by government delegates and by private individuals, as it

21 G. Moynier, above note 3, p. 197 (quote translated from French).

22 *Ibid.*, p. 199 (quote translated from French).

23 H. Dunant, above note 7.

24 Henry Dunant, “Compte rendu de la Conférence internationale réunie à Genève les 26, 27, 28 et 29 octobre 1863 pour étudier les moyens de pourvoir à l’insuffisance du service sanitaire dans les armées en campagne”, extract from the *Bulletin de la Société Genevoise d’Utilité Publique*, No. 24, 1863 (AF 3012), available at: https://library.icrc.org/library/docs/AF/AF_3012.pdf.

25 Adrien Brière (ed.), *Conférence internationale pour la neutralisation du service de santé militaire en campagne*, 1864 (AF 688), available at: https://library.icrc.org/library/docs/AF/AF_0688_01.pdf.

aimed to establish aid societies capable of raising funds from both public and private sources. The report of that Conference (AF 3012) is the second of the aforementioned documents kept in the Heritage Collection that note down the Movement's first milestones. It contains the Conference's resolutions, but also the minutes of the sessions and the invitation to the Conference written by Henry Dunant and finalized with the help of Gustave Moynier. The resolutions drawn by members of the Conference, which laid the foundation for the future aid societies, were to form the statutory basis of the Movement for the next sixty years. The first notably stipulated: "Each country shall have a Committee whose duty it shall be, in time of war and if the need arises, to assist the Army Medical Services by every means in its power."

Support of the States would be required for those newly founded aid societies to do the work with which they were entrusted in the 1863 Conference's resolutions. Participants at the Conference therefore adopted a number of suggestions addressed to governments. They demanded that States extend their patronage to relief committees and that in time of war they proclaim the neutrality of ambulances, military hospitals, official and voluntary medical personnel, inhabitants of the country who went to the relief of the wounded, and the wounded themselves. The Conference also suggested that a uniform distinctive sign be recognized for the medical corps of all armies and that a uniform flag be adopted in all countries for ambulances and hospitals.

A Diplomatic Conference was then organized to transform the aforementioned suggestions into legally binding instruments for States. After the end of the 1863 International Conference, the Swiss government, at the request of the International Committee, sent letters of invitation to the governments of the European nations, the United States, Brazil and Mexico, for the purpose of adopting a convention for the amelioration of the condition of the wounded in war.²⁶ In August 1864, a mere two years after Dunant published his memoir and one year after the report of the Committee's first International Conference was drafted, delegates from sixteen States met in Geneva for a Diplomatic Conference.

Two months before the Conference opened, the Committee produced a publication entitled *Secours aux blessés: Communication du Comité international faisant suite au compte-rendu de la Conférence internationale de Genève*.²⁷ Its aim was probably to ensure that the nations of Europe would attend the Conference

26 "Lettre du Comité international au Conseil fédéral (requête en faveur de la convocation d'un congrès diplomatique)", 26 May 1864, in *Actes du Comité international de Secours aux Militaires blessés*, Imprimerie Soullier et Wirth, Geneva, 1871, pp. 15–16 (AF 4291).

27 Comité International de Secours aux Militaires Blessés, *Secours aux blessés: Communication du Comité international faisant suite au compte rendu de la Conférence internationale de Genève*, Imprimerie J. G. Fick, Geneva, 1864 (AF 3014), available at: https://library.icrc.org/library/docs/AF/AF_3013.pdf. It is interesting to note that *Secours aux blessés* mentions several studies held in the Heritage Collection. For instance, it cites André Uytterhoeven, *Encore un mot sur les moyens de porter immédiatement secours aux blessés sur les champs de bataille*, J. B. Tircher, Brussels, 1855 (AF 1283). In *Secours aux blessés*, the Committee relied on Dr Uytterhoeven's work to argue that the wounded were not properly evacuated during most battles because there were not enough medical orderlies present. His book also proposed giving soldiers first-aid training, something of which the International Committee strongly approved.

and support the draft convention.²⁸ The Committee wished to “encourage the men of this age to be no less compassionate than their predecessors”.²⁹ To that end, it highlighted the success of the 1863 Conference, emphasizing the large number of national committees – the first National Societies – that had been set up by then.

With an eye to the Diplomatic Conference that would shortly be taking place, the Committee also wished to show that it was realistic to grant neutrality to the wounded and to those who were assisting them, as the 1863 Conference had shown this to be a sensitive topic. To support its case, the Committee quoted several historical examples of such a practice in the *Secours aux blessés* publication, where they were cited as precedents. The Committee's publication also quoted an article from a German newspaper, the *Allgemeine Militär-Zeitung*, published on 9 March 1864, which presented such precedents.³⁰ Furthermore, the Committee used that article to address in advance certain points that might be raised during the Diplomatic Conference, such as the concern that granting neutrality to medical personnel could facilitate espionage.

It is therefore clear that the members of the Committee used many of the Heritage Collection's works during the first few years of the Committee's existence, particularly in the follow-up to the first Geneva Convention. Indeed, it is likely that some of the Collection's resources were used during the drafting of that Convention, as it was the Committee that prepared the “draft concordat” (draft convention) which served as the basis for discussion at the Conference. Unfortunately, few details are known regarding the drafting process. Moynier is often cited as the draft convention's author, but even he gave different accounts of this episode in his writings. In a letter written in 1864, he said that General Dufour had produced the draft. In 1900, in an article in the *Bulletin International des Sociétés de la Croix-Rouge*, he spoke of a joint effort involving General Dufour and himself. Finally, in his 1902 autobiography, he presents himself as the sole author of the draft.³¹ Sadly, one cannot draw on the minutes of the Committee's meetings to discover more about the drafting of the convention, as those for the meetings that took place between March 1864 and September 1867 have disappeared.³²

Ultimately, the Geneva Convention was signed on 22 August 1864. The draft convention produced by the International Committee became the Geneva Convention, with a few minor modifications. The only controversial issue was the

28 Roger Durant, “Louis Appia, un rebelle”, *Cahiers de Genève Humanitaire*, No. 5, 2013, pp. 56–57.

29 *Le Congrès de Genève: Rapport adressé au Conseil fédéral par MM. Dufour, Moynier et Lehmann*, Imprimerie J. G. Fick, Geneva, 1864 (AF 2810), p. 4 (quote translated from French), available at: https://library.icrc.org/library/docs/AF/AF_2810.pdf.

30 “Der Kriegheildienst als internationale Frage”, *Allgemeine Militär-Zeitung*, No. 10, 9 March 1864. This was in fact a series of articles, many of which are available in the Heritage Collection: “Über die militärische und völkerrechtliche Bedeutung des bevorstehenden Genfer Congresses” (AF 411–415).

31 André Durand, “Gustave Moynier”, *Cahiers de Genève Humanitaire*, No. 5, 2013, pp. 50–51. In 1870, in his “Étude sur la Convention de Genève”, Moynier wrote that “[the Geneva Committee] went so far as to write the draft, unofficially”. Gustave Moynier, *Étude sur la Convention de Genève pour l'amélioration du sort des militaires blessés dans les armées en campagne: 1864 et 1868*, J. Cherbuliez, Paris, 1870 (AF 3063), p. 65, available at: https://library.icrc.org/library/docs/AF/AF_3063.pdf.

32 J.-F. Pitteloud (ed.), above note 17.

neutral status of volunteer nurses. The Conference's members found a compromise: volunteer nurses would be assimilated to the personnel of the army medical services. This ensured that they would enjoy neutral status, even though they were not mentioned in the Convention.³³ The handwritten report of the Diplomatic Conference, signed by Gustave Moynier, is to be found in the Heritage Collection.³⁴ The volume includes the minutes, the "draft concordat" prepared by the Committee, and the 1864 Geneva Convention. This publication is the third document in the Heritage Collection that reflects the Movement's rapid expansion during the early years of the International Committee's formation.

The Heritage Collection also holds other publications linked to the first Geneva Convention that can be interesting from a historical perspective, such as the report produced for the 1864 Diplomatic Conference by Guillaume-Henri Dufour, Gustave Moynier and Samuel Lehmann, entitled *Le Congrès de Genève: Rapport adressé au Conseil fédéral*.³⁵ One will also find a few newspaper clippings, such as "La Suisse et le Congrès international de Genève", which provides a critical account of the Diplomatic Conference by an elected official from the Canton of Vaud, Colonel Ferdinand Lecomte, whose arguments Gustave Moynier later refuted in an article.³⁶ The fact that these documents were kept in the Library shows that the Committee wished to keep track of the way its actions were received and to engage with both its critics and its supporters.

Another Heritage Collection document that is related to the first Geneva Convention is a work entitled *Étude sur la Convention de Genève pour l'amélioration du sort des militaires blessés dans les armées en campagne (1864 et 1868)*.³⁷ Authored by Moynier, the text is an article-by-article commentary on the Convention (similar to those that the ICRC produces today) and includes a section on the history of the Convention. In his study, Moynier at last raised the question of the penalties that should be imposed for breaches of the Convention. His conclusion was that these should be set out in the military law of each State. Two years later, seeing how unwilling the States were to specify such penalties, he changed his mind and wrote a note proposing the creation of an international judicial body.³⁸

Many of the publications in the Heritage Collection not only evidence the history following the adoption of the first Geneva Convention, but also bear witness to Moynier's activities in the field of international law. Notably, Moynier was

33 F. Bugnion, above note 8, p. 1325. See also Daniel Marc Segesser, "Le concept de neutralité et la Convention de Genève de 1864", in Jean-François Chanet, Annie Crépin and Christian Windler (eds), *Le Temps des Hommes doubles: Les arrangements face à l'occupation, de la Révolution française à la guerre de 1870*, Presses Universitaires de Rennes, Rennes, 2013.

34 A. Brière, above note 25.

35 *Le Congrès de Genève*, above note 29, p. 3.

36 Ferdinand Lecomte, "La Suisse et Le Congrès international de Genève", *Nouvelliste Vaudois*, No. 232, 28 September 1864, No. 234, 30 September 1864, and No. 237, 4 October 1864. And see the refutation by Gustave Moynier, published in the same newspaper on 25 September 1864 (AF 4279).

37 G. Moynier, above note 31.

38 Gustave Moynier, "Note sur la création d'une Institution judiciaire internationale propre à prévenir et à réprimer les infractions à la Convention de Genève", Soullier et Wirth, Geneva, 1872 (AF 622), available at: https://library.icrc.org/library/docs/AF/AF_0622.pdf.

behind the creation of the Institute of International Law. The Heritage Collection includes the statutes for this Institute, which was set up in 1873 as an independent body that brought together eminent lawyers with the primary aim of promoting the progress of international law. The Institute still exists today. Its members meet every two years in a different city and adopt resolutions, which are then brought to the attention of governmental authorities and other relevant actors.³⁹ In 1880, the Institute published the *Manuel des lois de la guerre sur terre*,⁴⁰ written by Moynier, which would influence military regulations in several countries and the 1899 Hague Convention Respecting the Laws and Customs of War on Land.⁴¹

The *Manuel des lois de la guerre sur terre* was acquired by the Library and is thus now part of the Heritage Collection. Indeed, in the decades following the adoption of the Geneva Convention, the Committee worked to support its implementation and encouraged research on the laws applicable to armed conflict. The Library, on its end, kept collecting related works, in particular those commenting on or interpreting the Convention's articles and their application on the battlefield. These efforts culminated in July 1903 with the publication of a bibliography covering all the existing works dealing with the Geneva Convention, which appeared in the *Bulletin International des Sociétés de la Croix-Rouge*. It was based partly on publications presented in earlier issues of the *Bulletin* and partly on the catalogue of the Library. This bibliography was drawn up for the conference to revise the Geneva Convention, to be held in September of that year. It bears a certain resemblance to the International Humanitarian Law Bibliography that the ICRC Library now publishes three times a year.⁴² The introduction to the 1903 bibliography mentions that the works listed will be available to the members of the conference in the Committee's offices. The Library thereby ensured that the conference participants had access to every publication concerning the Geneva Convention available at the time.

Selected publications included in the Heritage Collection also reveal that other members of the Movement were committed to studying how the law could be adapted to the realities of war. The organization of literary competitions, a common practice of the time, was another way to encourage research on the emerging field of IHL. The publications winning these competitions were given a place on the shelves of the ICRC Library. The Prussian committee, for instance, announced at the 1869 Berlin International Conference that it was offering a prize for a study on the application of the work of the Red Cross to war at sea. Two years later, this prize was awarded to J. H. Ferguson of the Dutch Navy for

39 See "Communication et documents relatifs à la fondation de l'Institut de droit international", *Revue de Droit International et de Législation Comparée*, 1875 (AF 1293).

40 M. Bernard and Gustave Moynier, *Les lois de la guerre sur terre: Manuel publié par l'institut de droit international. Rapport de la cinquième commission chargée de préparer un manuel relatif aux lois de la guerre*, C. Muquardt, Brussels and Leipzig, and C. Schuchardt, Geneva, 1880 (AF 1298).

41 F. Bugnion, above note 6, p. 62.

42 Available at: www.icrc.org/en/document/international-humanitarian-law-bibliography.

his work entitled “The Red Cross Alliance at Sea”,⁴³ which the interested reader could have consulted in the ICRC Library as a part of the Heritage Collection. Three decades would pass before the provisions of IHL were adapted to war at sea, with the adoption of the first Hague Conventions in 1899.⁴⁴ Notwithstanding, the competition held by the Prussian committee in 1869 showed that this matter had already been under consideration decades before, and is testimonial to actors of the Movement’s long-time commitment to the development of IHL.

How the Heritage Collection reflects the expansion of the International Red Cross and Red Crescent Movement

The Heritage Collection is a rich source of information on how the resolutions of the 1863 Conference, which gave birth to what would become the Movement, were implemented by the newly founded National Societies. These aid societies were invited to put pen to paper, and they contributed to the Library’s growing collections. Moynier frequently encouraged them to produce and send regular reports on their work to the International Committee. These reports document how the 1863 resolutions were adapted to new operational situations and put into practice on the battlefield. The languages used in the publications sent to Geneva reflect the geographic expansion of the Movement. They include, for example, reports by the Prussian Red Cross on its work during the 1870–71 Franco-Prussian War.⁴⁵ Similarly, when the Serbian Red Cross held public conferences on ratification of the Geneva Convention in 1876, it sent the texts of the speeches to the Library, where they are shelved alongside other documents from the same Society.⁴⁶ In some cases, such as the Serbian Red Cross speeches, the original in the Heritage Collection is accompanied by a handwritten French translation. While the sources of these translations are generally undocumented, their presence indicates a clear desire to render the publications of the national committees accessible to users of the Library.

The Heritage Collection reflects the development of the Movement, but also reveals the challenges that its expansion posed to the Committee. It became necessary to define the structure of the Movement and the role of the ICRC within it, and to permit communication between the committees of these diverse nations, to ensure the coherence and cohesion of the work at an international level. While defending the independence of the National Societies, Moynier emphasized the need for them to get to know one another and to keep one another informed of their activities. It would be a mistake to see this merely as an

43 J. H. Ferguson, *The Red Cross Alliance at Sea*, Martinus Nijhoff, The Hague, 1871 (AF 2429).

44 Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, The Hague, 29 July 1899.

45 These reports are entitled *Bericht über die Thätigkeit des Anhaltischen Landes-Vereins zur Pflege im Felde verwundeter und erkrankter Krieger und seine Kreisvereine etc. im Kriegsjahr 1870–1871* (AF 2489) and *Verwaltungs-Bericht des Landesvereins zur Pflege im Felde verwundeter und erkrankter Krieger für das Herzogthum Altenburg 1870–1871* (AF 2490).

46 Vladan Georgevitch, *Conférences publiques sur la Croix-Rouge*, 1876 (Serbian original: AF 2783; handwritten French translation (translator unknown): AF 2784).

expression of noble sentiment – the aim was to ensure that these different organizations could work side by side, if not together, during times of war.

Selected items in the Heritage Collection highlight the role played by the ICRC as an intermediary between the various parts of the Movement and document its initiatives to facilitate the circulation of information. Most notably, in 1867 Gustave Moynier and Louis Appia examined the role and activities of the National Societies and set up the first framework for their work in the form of a publication entitled *La guerre et la charité: Traité théorique et pratique de philanthropie appliquée aux armées en campagne*.⁴⁷ In the pages of this ancestor of today's *Handbook of the International Red Cross and Red Crescent Movement*,⁴⁸ these two co-founders of the ICRC identified “an area eminently propitious for the exchange of communications [between the committees:] ... the theoretical and technical study of the relief to be given to the victims of war, and the development of human rights in accordance with humanitarian ideas”. Pointing out that “science has no nationality”, they wrote that “the committees have not only the right, but the duty to undertake such work together, and to exchange their ideas”.⁴⁹

Two initiatives played a central role in facilitating communications between members of the Movement and cementing its unity: the publication of a journal, the *Bulletin International des Sociétés de la Croix-Rouge*, and the recurring organization of the International Conferences.

The ancestor of the *International Review of the Red Cross*, the *Bulletin* was first imagined in 1869. Until 1919, it was the main means of communication and coordination within the Movement. Each issue contained material from the national committees and their branches. From the start, it included reviews of new publications on the activities of the Movement and the development of international law. The Library and the *Bulletin* fed into one another, in that publications sent to the Committee for inclusion in the *Bulletin* were then added to the Library and made available to anyone interested.⁵⁰ Right up until the 1940s, these two aspects of the Committee's work were in the hands of the same person. Initially that was Gustave Moynier; he was later succeeded by the secretary of the Committee, Paul Des Gouttes, followed at the end of the First World War by Étienne Clouzot. Under Moynier's influence, publications and the press became the driving forces behind the Committee's work and its international dissemination. This meant that the Library had a clear role to play, not only as a repository of the books collected by the Committee, but as a growing centre of knowledge on the Movement and its global development.

47 G. Moynier and L. Appia, above note 11.

48 This important publication contains all the basic texts on which the activities of the ICRC, the IFRC and the National Societies are based, such as the Fundamental Principles of the Movement, its statutes and regulations, the instruments of IHL, and the most important or most recent resolutions passed by the International Conferences. The *Handbook* is updated and re-issued periodically.

49 G. Moynier and L. Appia, above note 11 (quotes translated from French).

50 The practice of listing the Library's latest acquisitions in the *Bulletin* and later in the *Review*, along with new publications produced or received by the ICRC, continued for many years, although the title and the content of this section did change over time. Today, one can discover the Library's latest acquisitions via its online catalogue, available at: www.icrc.org/en/library.

Along with the *Bulletin*, the organization of the International Conferences reflected the desire to develop a cohesive, universal Movement. The International Conferences allowed representatives of the national committees to share their experiences with each other and facilitated coordination and communication between the various parts of the Movement.⁵¹ The Heritage Collection holds the reports of the first ten International Conferences, from the 1863 inaugural Conference in Geneva to the Washington Conference of 1912, as well as documents of various nature submitted to the Conferences.⁵²

The records of the International Conferences featured in the Heritage Collection allow readers to follow the discussions and debates between the delegates from the various National Societies. For example, in 1867, delegates from the National Societies met in Paris while the International Exposition⁵³ was under way there. As part of the Heritage Collection, a bound volume contains the records of the Conference, together with the detailed minutes of preparatory meetings on the topics that the delegates would be discussing.⁵⁴ The volume highlights how the delegates studied the motor ambulances presented at the Champ de Mars (near the Eiffel Tower) and the best types of artificial limb or stretcher. Subjects discussed included the revision of the Geneva Convention, the dissemination of humanitarian principles to the armed forces and the best means of repatriating wounded military personnel. The volume ends with illustrations on a number of topics, including stretchers. The delegates endeavoured to pool their expertise and to advance technical and medical research, in line with the principle of exchanging knowledge that Moynier was promoting.

The Committee made the Library available to the delegates during the first International Conferences as a resource to aid them in their work. The Heritage Collection also evidences how the Library was perceived, through the documentation on the International Conferences. Specifically, a report submitted to the 7th International Conference of 1902 devotes a few lines to the Library:

The Library of the Committee has undergone quite substantial development, while remaining specialized and containing only works related to the Red Cross or the Geneva Convention. It is consulted often, especially by visitors from abroad, who find within it documents and series that are absent from

51 Gustave Moynier first became interested in the international dimension of social issues when he represented the Société Genevoise d'Utilité Publique at the International Philanthropic Conference in Brussels in 1856. He took a particular interest in the idea of setting up a correspondence network that would link charitable organizations in several countries. The success of this first initiative undoubtedly played a role in the importance he attached to the International Conferences throughout his presidency.

52 The final acts of the International Conferences from 1863 to 1912 are held in the Heritage Collection under the call numbers AF 3012 (1863), AF 250 (1867), AF 509 (1869), AF 4292 (1884), AF 130 (1887), AF 423 (1892), AF 128 (1897), AF 2728 bis (1902), AF 403 (1907) and AF 211 (1912).

53 The 1867 International Exposition was a world fair held in Paris from April to October, with exhibitors from around the world displaying the latest scientific, technological and artistic innovations. Delegates of the International Conference took advantage of the Exposition to look for inventions and technological improvements that could help transport and care for the war wounded and thus serve their mission.

54 *Première Conférence Internationale des Sociétés de la Croix-Rouge à Paris 1867: Documents divers*, 1867 (AF 250).



Figure 3. ICRC secretary Paul des Gouttes at ICRC headquarters in 1900. ICRC, V-P-HIST-03046-30. © ICRC.

the majority of public collections. The handwritten catalogue has been compiled with care over a number of years, and facilitates research.⁵⁵

In order to ensure that the Library could be used as a resource, the Committee made it available to the delegates during the first International Conferences. In 1907 for instance, at the opening of the 8th International Conference, Committee secretary Paul Des Gouttes (see Fig. 3) was asked to bring to the Library any delegate who was interested.⁵⁶

The Heritage Collection and the International Committee's first operating activities for war victims

On top of documenting the role played by the International Committee in the birth and development of the Movement and IHL, the Heritage Collection also reflects the Red Cross's early operating activities. In particular, it comprises the very first mission reports ever written by ICRC delegates, notably by Dr Louis Appia. Before becoming a member of the original "Committee of Five", Appia had been present during the July

55 *Le Comité international de la Croix-Rouge de 1892 à 1902: Rapport communiqué à la VIIème Conférence internationale des Sociétés de la Croix-Rouge, à St-Pétersbourg, mai 1902*, ICRC, Geneva, 1902 (AF 2842) (quote translated from French), available at: https://library.icrc.org/library/docs/AF/AF_2842.pdf.

56 Committee meeting, 18 May 1906, in J.-F. Pitteloud (ed.), above note 17, p. 655.

1859 Italian campaign, and helped care for the wounded after the battle of Solferino. A true pioneer of first aid, Appia had distributed at Solferino a document to the Italian and French doctors entitled *Le chirurgien à l'ambulance ou quelques études pratiques sur les plaies par armes à feu*. When he returned to Geneva, he added to this document the *Lettres à un collègue sur les blessés de Palestro, Magenta, Marignan et Solférino*, which were extracts from his correspondence with Théodore Maunoir, another doctor and member of the “Committee of Five”. In those letters, he detailed his experiences and the conclusions he drew from them. In particular, his view had been strengthened that amputation was a sound course of action and that it was best to amputate immediately. Published in August 1859, this work would become part of the Heritage Collection.⁵⁷

In April 1864, just six months after the International Conference of 1863, Appia was sent as a delegate to the Prussian army and Captain Van de Velde of the Netherlands was sent to the Danish army, as the two countries were at war over Schleswig. This made them the first two ICRC delegates in mission.⁵⁸ It was Appia who suggested wearing a white armband, to which the Red Cross emblem was later added. In June 1864, Appia and Van de Velde’s reports were published together by the Committee in *Secours aux Blessés*, the publication that the Committee produced in the lead-up to the 1864 Conference.⁵⁹ The Committee probably wanted these reports to play a role in the drafting of the first Geneva Convention. These first mission reports from ICRC delegates included detailed descriptions of the medical equipment that the armies were using and the care provided for wounded soldiers. They also discussed the possible activities of voluntary first-aiders and the implementation of Dunant’s propositions on the battlefield.

Highly interested in the medical and technological advancements of the time, the International Committee studied how they could serve its action for the relief of sick and wounded combatants. This concern is reflected in the Heritage Collection, as it holds many documents on military medicine, war surgery, the training of medical personnel and the transportation of casualties, all of which were central topics for the Committee during its early years. This part of the collection also dates back to Henry Dunant’s publication of *A Memory of Solferino*. As the book circulated throughout Europe, Dunant received in return publications on similar topics, particularly military medicine and the transport of the wounded.⁶⁰ Some of these seem to have been later given to the Committee’s

57 Louis Appia, *Le chirurgien à l'ambulance ou quelques études pratiques sur les plaies par armes à feu: Suivi de lettres à un collègue sur les blessés de Palestro, Magenta, Marignan et Solférino*, J. Cherbuliez, Geneva, 1859 (AF 3017).

58 See, especially, Daniel Palmieri and Brigitte Troyon, “The ICRC Delegate: An Exceptional Humanitarian Player?”, *International Review of the Red Cross*, Vol. 89, No. 865, 2007.

59 Comité International de Secours aux Militaires Blessés, above note 27.

60 See, for instance, Giovanni Rossa, *Parole in suffragio dei soldati caduti nella battaglia di San Martino e Solferino* Tip. della Sentinella Bresciana, Brescia, 1862 (AF 456), which contains a handwritten dedication to “the author of the book *A Memory of Solferino*”. The author of *Parole in suffragio*, Canon Don Giovanni Rossa, played an active role in caring for the wounded following the Battle of Solferino in 1859 and probably knew Henry Dunant. He later helped set up the Red Cross sub-committee in Brescia: see Carolina David and Livia Giuliano, “Storia del Comitato di Brescia”, in *Storia della Croce Rossa in Lombardia (1859–1914)*, Franco Angeli, Milan, 2014, pp. 93–94.

Library, which explains why the earliest of the items in the Heritage Collection, publications of the 1840s and 1850s, cover these subjects (see, for example, André Uytterhoeven's *Encore un mot sur les moyens de porter immédiatement secours aux blessés sur les champs de bataille*, dated 1855).⁶¹ Several works present in the Collection highlight technological advances in the transportation of the wounded, such as "Du transport des malades et blessés" by Dr C. de Mooij,⁶² who submitted photographs of what he called a *léchophore* (a stretcher on wheels) (see Fig. 4).

Finally, this part of the collection also comprises manuals for first-aid teams operating on the battlefield. From their format, these were clearly intended to be carried into battle and used at the front. Examples include the *Surgeon's Pocket-Book* published in 1875 by British surgeon-major J.-H. Porter.⁶³ For the volunteer nurse who might have to treat wounded soldiers of many nationalities, there is a small Italian/French/German pocket dictionary.⁶⁴

The ICRC's commitment to adapting its work to the reality of the field is apparent in the documentation on its early action included in the Heritage Collection. The same motivation also prompted the organization to extend the scope of its action to include prisoners of war from 1870 onwards. At the outbreak of hostilities between Germany and France, the ICRC set up the Basel Agency to organize the collection and dispatch of aid to prisoners. Its delegates visited the camps, enquired as to conditions of detention and endeavoured to ensure that the parcels did indeed reach the prisoners. The reports of the Basel Agency are included in the Heritage Collection, reunited in a volume bearing the green cross emblem.⁶⁵ These documents are of clear historical value and tell how the ICRC adapted to changes in the means and methods of warfare, so as to best assist the victims of conflict. Gustave Moynier and, later, ICRC secretary Paul Des Gouttes⁶⁶ added to the Library the reports produced by the ICRC, its delegates and its associated bodies. This reflected the clear intention of the Committee to maintain a record of its work and its development over

61 A. Uytterhoeven, above note 27.

62 C. de Mooij, "Du transport des malades et blessés, aussi bien durant la paix qu'en temps de guerre, avec un léchophore, un brancard et un lit de camp", Maastricht, 1866 (AF 2414).

63 J. H. Porter, *The Surgeon's Pocket-Book: Being an Essay on the Best Treatment of Wounded in War*, C. Griffin, London, 1875 (AF 1993).

64 *Il piccolo dizionario per l'infermiere volontario dei feriti in guerra/Das kleine Wörterbuch für den freiwilligen Verpfleger der Verwundeten im Kriege/Le petit dictionnaire pour l'infirmier volontaire des blessés en guerre*, F. Lao, Palermo, 1866 (AF 2301–2302).

65 *Berichte des Internationalen Hilfscomité für Kriegsgefangene in Basel*, 1871 (AF 3016).

66 In 1898, Gustave Moynier was on the point of resigning as president for health reasons. His nephew and future successor Gustave Ador, who was also a member of the Committee, persuaded him to stay on as president but to hand over his administrative duties to a secretary. Paul Des Gouttes (1869–1943), a lawyer, took up the position at the end of 1898. The minutes of the Committee meeting of 11 October 1898 describe his duties in these terms: "In particular, Mr Des Gouttes will publish the *Bulletin*, for which he will be responsible. In addition, he will look after the offices of the Committee, will continue the cataloguing of the Library and will sort through the papers left by Mr Appia. ... His title will be 'secretary to the office of the President'." Committee meeting of 11 October 1898, in J.-F. Pitteloud (ed.), above note 17, pp. 602–603 (quote translated from French). In 1943, following the death of Paul Des Gouttes, his widow donated his personal library to that of the Committee.



Figure 4. Photograph of the *léchophore* invented by Dr C. de Mooij, 1869. © ICRC.

time, both to ensure that this history was preserved and to provide a resource for future decisions.

Continuing Moynier's heritage: The Heritage Collection and the ICRC Library from 1919 to today

The year 1919 marks the end of the development of the Heritage Collection. The ICRC's headquarters moved to the Promenade du Pin that year, as part of the organizational changes following the end of the First World War. No further works were added to the Heritage Collection, and a new current collection was created in the Library under the direction of Étienne Clouzot⁶⁷ to meet the needs of the organization's staff. The Library's services diversified over the next few decades. In addition to acquiring the documentation that the members of the

⁶⁷ Étienne Clouzot (1881–1944) was an archivist palaeographer with a diploma from the *École des Chartes* in Paris. As director of one of the Entente sections of the International Prisoners of War Agency during the First World War, he drew up the rules that would be used to classify its millions of index cards. He became head of the ICRC Secretariat in 1919, and therefore took over the running of the Library. In 1939, fuelled by his experience in the International Prisoners of War Agency, he helped organize the Central Prisoners of War Agency, becoming a member of its Technical Directorate. He helped produce the *Nouvelles de l'Agence Internationale des Prisonniers de Guerre* and the *Revue Internationale de la Croix-Rouge*. He was also the ICRC's archivist. See, in particular, Louis Demolis, "Étienne Clouzot", *Revue Internationale de la Croix-Rouge*, Vol. 26, No. 308, 1944, pp. 649–651; Henri Lemaître, "Étienne Clouzot", *Bibliothèque de l'École des Chartes*, Vol. 105, 1944, pp. 359–363.

ICRC required for their work, the Library was involved in the dissemination and promotion of its content to the general public. By distributing and exchanging publications, it helped spread the principles of the Red Cross and of IHL around the world. The Library's staff responded to requests for information about the ICRC and sent copies of works such as the *Movement Handbook* and *A Memory of Solferino* to an interested public, including many professors and students.

Étienne Clouzot and his staff maintained a regular correspondence with authors, researchers and representatives of international organizations whose work intersected with that of the ICRC. As we can see from letters in the ICRC Archives,⁶⁸ Clouzot developed a system for exchanging publications and reports for the *Review*, based on a network of authors and specialists. The publications of National Societies continued to enrich the Library, with a collection dedicated to reports, periodicals, handbooks and other documents produced by the National Societies of almost eighty countries. The collection also includes commemorative publications produced by the National Societies.

Today, the Heritage Collection is used by researchers studying the history of the Movement, military medicine, the law of armed conflict, and humanitarian action and its underlying principles. To facilitate their research, the Library is adding the documents from its Heritage Collection to its online catalogue, building on Moynier's handwritten catalogue. In the first semester of the year 2019, more than 500 additional documents have been recorded.

Digitization projects carried out by the staff of the Library and the publication of research guides and online articles also contribute to making the Collection more visible and accessible. An initial digitization programme undertaken in conjunction with the Swiss National Library covered the works in the Heritage Collection concerning the signing of the original Geneva Convention, and was carried out in connection with the Convention's 150th anniversary. The Library is also responsible for the preservation of this unique collection, which forms part of the ICRC's institutional memory. The whole collection was reconditioned in 2017, and the documents will shortly undergo a de-acidification process to counter the deterioration of the paper and to ensure that they are preserved for posterity. Finally, the ICRC Library team hopes to raise researchers' interest in this collection and looks forward to welcoming those wishing to consult the documents presented in this article, and the many more included in the Heritage Collection.

68 ICRC, CR 91.

Cyber operations and the Second Geneva Convention

Jeffrey Biller

Lieutenant-Colonel Jeffrey Biller, USAF, is the Associate Director for the Law of Air, Space, and Cyber Operations at the Stockton Center for the Study of International Law at the United States Naval War College.

Abstract

The recently released updated ICRC Commentary on the Second Geneva Convention (GC II) recognizes significant changes in both the conduct of naval conflicts and interpretations of the governing law. One such significant change is the addition of cyber operations to the conduct of naval operations. Modern vessels increasingly utilize computer networks to control critical ship systems, but discussions of how potential cyber operations should be viewed under GC II are understandably limited. This article aids in addressing that gap by analyzing how cyber operations could have implications for certain provisions of GC II.

Keywords: cyberspace, naval warfare, Geneva Conventions, prisoners of war, hospital ships.



Introduction¹

As much as any other aspect of warfare, technological leaps periodically revolutionize the manner in which naval warfare is conducted. The digitalization and automation of modern warships have the potential to create another such leap as the result of offensive cyber operations against those systems. Real-world examples of how potential cyber operations target these systems are increasingly found in news reporting. In one example, the Electronic Chart Display (ECDIS)

system on an 80,000-ton ship was infected via a malware-containing USB stick.² ECDIS is a Windows-based computer system installed with navigation software that is utilized in vessels worldwide. These systems generally employ obsolete versions of Windows and rarely use anti-virus software. An unsophisticated cyber adversary could easily breach such a system, with potentially severe effects on navigation. Perhaps even more troubling, at least twenty ships near the Russian port of Novorossiysk reported that their ships' GPS systems had placed them at an inland position 25 nautical miles from their actual position.³ This incident appears to be part of a trend in Russian waters of potential GPS disruption.⁴

Just as technology continues to evolve, so too does the law, requiring a constant re-evaluation of its tenets. In May 2017, the law of naval warfare took a significant step forward when the International Committee of the Red Cross (ICRC) released an updated Commentary on the Second Geneva Convention (GC II).⁵ This convention constitutes a significant percentage of the rules applicable to naval warfare in international armed conflicts.⁶ The focus of GC II is on the protection of wounded, sick and shipwrecked members of armed forces at sea, and the document builds upon provisions in the 1889 and 1907 Hague Conventions. The 2017 Commentary on GC II is the first produced by the ICRC since the original Commentary was released in 1960, and recognizes significant changes in both the conduct of naval conflicts and interpretations of the governing law. The latter half of the twentieth century featured major technological developments that contributed to both manner of changes. One such significant technological development is the advent of the cyber domain as a key component in military operations.

Naval forces are already planning for cyber operations to play a significant role in future naval conflicts.⁷ This planning is a recognition of the tremendous possibilities and vulnerabilities that increasingly "wired" military forces present. Modern naval vessels utilize, and rely upon, programmable logic controllers to interface hardware components with the physical systems on board

1 This article builds upon a series of posts related to the subject that appeared in November 2017 on the website *Opinio Juris*.

2 Chris Baraniuk, "How Hackers Are Targeting the Shipping Industry", *BBC News*, 18 August 2017, available at: www.bbc.com/news/technology-40685821 (all internet references were accessed in March 2019).

3 David Hambling, "Ships Fooled in GPS Spoofing Attack Suggest Russian Cyberweapon", *New Scientist*, 10 August 2017, available at: www.newscientist.com/article/2143499-ships-fooled-in-gps-spoofing-attack-suggest-russian-cyberweapon/.

4 *Ibid.*

5 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., 2017 (2017 Commentary on GC II), available at: <https://ihl-databases.icrc.org/ihl/full/GCII-commentary>.

6 It should be noted that GCII does not apply to non-international armed conflicts (NIACs), despite the fact that non-State armed groups may possess significant naval and cyber capabilities. Although not the focus of this article, certain provisions of GC II may apply to NIACs through customary international law.

7 See, generally, United States Navy, *Fleet Cyber Command Strategic Plan 2015–2020*, available at: www.navy.mil/strategic/FCC-C10F%20Strategic%20Plan%202015-2020.pdf.

a ship.⁸ This creates valuable crew efficiencies, more accurate weapon systems, and pinpoint navigation. However, these networked control systems also create vulnerable attack vectors against power, hydraulic, steering, propulsion and other critical systems. While operations utilizing cyber methods may appear quite different from traditional kinetic operations in the maritime environment, they nevertheless have potential implications for protections under the Geneva Conventions.

The 2017 Commentary on GC II does recognize the potential impact of cyber operations on naval warfare. However, discussion of the impact of cyber operations on GC II protections is limited to a small number of topics. This is not to criticize the Commentary – consensus as to the applicability of international law to the cyber domain is in its infancy, and States have been reluctant to make anything more than rudimentary statements as to their interpretations. Given this lack of consensus, it is understandable that the authors of the updated Commentary would hesitate to include in-depth interpretations regarding the impact of cyber operations on GC II.

Helpfully, the 2017 Commentary does contain a lengthy discussion of cyber operations in the context of two important areas: GC II’s scope of applicability provisions found in Article 2 common to the four Geneva Conventions,⁹ and the prohibition on the use of secret code by hospital ships.¹⁰ As common Article 2 is not concerned with naval warfare specifically, this article will not directly address the issue. The updated Commentary addresses the important question of cyber communications and Article 34, which prohibits hospital ships from “possess [ing] or us[ing] a secret code for their wireless or other means of communication”,¹¹ but as the Commentary provides a lengthy discussion of this question, it is not covered in this article.

Scope of applicability and encrypted communications may be among the most obvious ways in which cyber operations impact GC II rights and obligations, but many additional questions remain unanswered by the 2017 Commentary. This article will address four specific articles of GC II in light of potential offensive cyber operations. First, the article discusses Article 12 and the protections afforded to those shipwrecked at sea; specifically, the question of whether a crew may be “shipwrecked” through purely cyber means is analyzed. Second, the article considers Article 16 and the protections that must be afforded to naval crews who “fall into enemy hands”. This section views the possibility of crews falling into enemy hands as the result of a cyber operation taking control of vital ship functions. Third is an analysis of Article 18’s “end of engagements”

8 Office of Naval Research, United States Department of the Navy, “A New Defense for Navy Ships: Protection from Cyber Attacks”, *Phys.org*, 17 September 2015, available at: <https://phys.org/news/2015-09-defense-navy-ships-cyber.html>.

9 2017 Commentary on GC II, above note 5, paras 275–278.

10 *Ibid.*, paras 2389–2403.

11 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. 34.

clause; although similar to the common Article 2 scope of applicability question, it contains elements unique to naval operations. Fourth and last, the obligation to “respect and protect” hospital ships and coastal rescue craft, found in Articles 22, 24, 25 and 27, raises many questions in the light of potential cyber operations. Here, the updated Commentary briefly addresses this requirement as related to cyber operations, and this section will build on that analysis.

Each section addresses two primary questions: one, how are obligations and rights under the relevant article impacted by potential cyber operations; and two, what steps should navies, particularly those increasingly reliant on networked systems, take in anticipation of cyber operations impacting naval engagements?

Cyber shipwrecks and Article 12

Major threats to modern navies through cyber operations include such attack vectors as the previously discussed ECDIS, as well as automatic identification systems, which are non-encrypted transponder systems that have shown vulnerability to spoofing attacks.¹² The next level of threat is the ability to manipulate, or even take over, the aforementioned programmable logic controllers by manipulating the supervisory control and data acquisition (SCADA) software that assists in controlling modern ships. This type of capability was demonstrated by researchers from the University of Texas’s Cockrell School of Engineering in 2013, when they gained control over a modern 213-foot superyacht’s navigational controls via a creative GPS-spoofing operation.¹³ The research team was able to steer the yacht to a new course by altering positional inputs, while the ship’s navigational systems showed the yacht maintaining its original course heading. This capability has the potential to put ships at risk from natural and human dangers alike and demonstrates but one potential cyber-related vulnerability of modern SCADA systems controlling vital ship functions. One of these potential dangers is that a crew could become shipwrecked through cyber means; in this situation, the crew would therefore receive protections under GC II.

Article 12 of GC II provides that “[m]embers of the armed forces ... who are at sea and who are wounded, sick or shipwrecked, shall be respected and protected in all circumstances”. Most importantly, Article 12 affords crews protection from further attack once they qualify as “shipwrecked”. As indicated in the article, this entails two obligations: one restrictive and one protective. The restrictive obligation is against any violent actions directed at those enjoying the protection, and against indiscriminate violence that may affect them.¹⁴ This obligation should be read broadly given the particularly vulnerable position of

12 Glenn Hayes, “Manipulating AIS”, *Marine Electronics Journal*, 23 November 2015.

13 “Spoofing a Superyacht at Sea”, *University of Texas News*, 30 July 2013, available at: <https://news.utexas.edu/2013/07/30/spoofing-a-superyacht-at-sea>.

14 2017 Commentary on GC II, above note 5, para. 1400.

those wounded, sick and/or shipwrecked.¹⁵ The protective obligation is highly dependent upon the circumstances ruling at the time, including the level of potential harm to those protected and the resources available to those with the obligation. Of particular importance to the following discussions, the 2017 Commentary states that “once wounded, sick and shipwrecked persons are in the power of a Party to the conflict, the Party will have better options to protect them against the worsening of their medical condition and other dangers”.¹⁶

Traditional notions of shipwreck conjure up images of ships ablaze and beginning to sink as the result of cannons, torpedoes or aerial bombs. However, Article 12 states that “the term ‘shipwreck’ includes shipwreck from any cause”. Given the reliance of many modern warships on cyber-controlled critical systems, this begs the question: can the crew of a warship be shipwrecked, within the meaning of GC II, by purely cyber means, thereby affording protections from further attack? Although no State has yet officially addressed this specific question, a review of the 2017 Commentary’s Article 12 analysis suggests an answer in the affirmative, but it is by no means clear.

Part of the difficulty in answering this question lies in ambiguities related to the determination of when a crew should be considered shipwrecked.¹⁷ It may initially seem counterintuitive that the crew of a ship with no apparent physical damage and which has not been kinetically engaged by an opposing force can be thought of as shipwrecked. However, the 2017 Commentary is quite helpful here, stating that “to qualify as shipwrecked the person must be in a situation of peril at sea”, and that “in all cases the person must refrain from any act of hostility”.¹⁸ Thus, we can break the analysis down into two separate elements: establishing whether the crew of a ship disabled by cyber means is in “peril at sea”, and if so, how to determine whether that crew has refrained from engaging in hostilities. These elements will be examined individually below.

Peril at sea

Framing the analysis of whether a ship’s crew disabled through cyber means can be considered in peril is the 2017 Commentary’s guidance to read the term shipwreck “as being broad”,¹⁹ which reiterates the 1960 Commentary’s exhortation for the term to be “taken in its broadest sense”.²⁰ Despite a broad reading of the term “shipwrecked”, it can initially be difficult to accept that a ship’s crew should be considered in peril when aboard a ship with no outwardly apparent damage.

15 *Ibid.*, para. 1404.

16 *Ibid.*, para. 1411.

17 For additional discussion of the meaning of the term “shipwrecked”, see Steven Haines, “Who is Shipwrecked?”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, pp. 767–780.

18 2017 Commentary on GC II, above note 5, para. 1379.

19 *Ibid.*, para. 1383.

20 Jean Pictet (ed.), *Commentary to the Geneva Conventions of 12 August 1949*, Vol. 2: *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea*, ICRC, Geneva, 1960, pp. 84–92.

However, the loss of propulsion, steering, life-support and other critical systems is enough to create a dangerous situation, even if not immediately life-threatening. To this point, the 2017 Commentary finds that “[p]ersons on a fully disabled ship ... whose situation is dangerous but not necessarily imminently life-threatening, are also covered, as long as they refrain from any act of hostility”.²¹ Furthermore, the Commentary states: “Situations that are *potentially* life-threatening ... also render persons on board ‘in peril’ at sea.”²²

While it appears clear that a ship disabled through cyber means can result in a legal determination of the crew being in “peril at sea”, the primary practical difficulty is that the extent of the damage may be unknown, initially even to the crew itself. The damage to networked systems may require extensive repair, necessitating new equipment, or may require that information technology experts be brought on board for damage assessment. Conversely, it is possible that the damage might quickly be repaired and that the ship’s weapon systems would thus again pose a deadly threat to opposing warships.

Furthermore, the factual attribution of who or what is responsible for the disabling of the ship’s networks may initially be unclear. Indeed, it may be that the damage is entirely self-inflicted or unintentionally caused by malware previously and unknowingly introduced by a member of the ship’s crew, as was the case with the malware-infected ECDIS updates mentioned above.²³ In these situations, the 2017 Commentary’s inclusion of “shipwrecks caused by human error or a malfunction” in its definition of “any other cause” makes it clear that a ship’s crew could be rendered shipwrecked through cyber means even if the damage to the ship’s networks is self-inflicted or caused by means other than enemy action.²⁴ Accordingly, a determination of factual attribution as to the cause of the network malfunction is legally unnecessary in evaluating whether protections should be afforded. However, the potential confusion over the extent of damage caused through cyber means makes the requirement of “refraining from hostilities” even more important in assessing whether the crew must be afforded protections.

Refraining from hostilities

The 2017 Commentary indicates that a crew does not receive the protections of Article 12 unless, in addition to being in peril, they also refrain from any further act of hostility. Determining whether a warship’s crew has complied with this requirement can be difficult even when the evidence is visually observable, such as when the crew can be seen abandoning the ship. A ship’s weapon systems may remain functional even while other systems are severely damaged, and there may still be members of the crew operating those systems. Recall that the ship itself

21 2017 Commentary on GC II, above note 5, para. 1384.

22 *Ibid.*, para. 1385 (emphasis in original).

23 See above note 2 and accompanying text.

24 2017 Commentary on GC II, above note 5, para. 1386.

remains a military object subject to attack throughout; it is only the crew that receives protections in a shipwreck situation. The 2017 Commentary recognizes this difficulty:

However, it will likely be very difficult or even impossible for an enemy to know whether the crew is working to repair weapons with the aim of continuing hostilities without an outward sign indicating otherwise. Furthermore, as the sailors are on board a military objective, it is likely that a disabled or damaged warship would need to surrender (e.g. by striking its colours) in order for protection to be secured.²⁵

A question specific to the cyber domain is what cyber measures a crew may take to repair or prevent further cyber damage to the ship, while still refraining from hostilities. Here, the distinction between active cyber defences and passive defences may hold the answer. Active defences, sometimes referred to as “hack-backs”, consist of operations taken outside one’s network against an opposing network, but with a defensive intent: for example, disabling a portion of the network through which the cyber operation against you is conducted in order to prevent further intrusion. Passive defences such as firewalls, anti-virus programs and intrusion detection programs, however, occur entirely within one’s own system and do not affect the enemy network. Because active cyber defences may include operations against opposing actors in the conflict, they are likely to be viewed as a continuation of hostilities. However, passive defences pose no such threat and are akin to trying to save a damaged ship from sinking. Whereas refraining from further hostilities includes no requirement that a crew stop trying to save a damaged ship, there is an obligation to refrain from acts that pose a threat to opposing forces. Therefore, ship commanders should be aware that taking active cyber measures to defend their ship’s networks may prevent the crew from receiving protected status.

Finally, determining whether a crew is refraining from hostilities in this context will likely require some communication to other forces taking part in the engagement. Unfortunately, the same cyber event that damaged other critical systems may also have damaged the disabled ship’s communications equipment. Although the 2017 Commentary suggests the time-honoured method of signalling surrender by lowering one’s battle ensign or national flag – “striking the colours” – as a means of signalling the cessation of hostilities, most naval engagements of the future are likely to be fought at standoff range and visual signals may be of limited value.

Future considerations

Whereas many practical difficulties inhibit the determination of whether the crew of a ship disabled by cyber means should be afforded Article 12 protections, the 2017 Commentary suggests that it is clearly possible. GC II makes no requirement as to

²⁵ *Ibid.*, para. 1390.

how a crew becomes shipwrecked, and the Commentary stresses that the protections are quite broad. This difficulty does raise several interesting questions for naval forces who operate warships largely dependent on networked systems. These naval powers may need to retain non-digital methods of communication such as analogue radios or high-range visual systems which can indicate that a ship's crew is in peril and refraining from hostilities. If possible, these methods should be made known to opposing forces at the beginning of the conflict.

Commanders of ships belonging to States employing cyber methods in an attempt to disable enemy warships should be particularly attuned to the fact that, despite the lack of visible damage, there may be crews that are nonetheless entitled to protections should they become shipwrecked. Concerted cyber campaigns against warships in armed conflicts raise not just the potential for shipwrecks, but also the potential to take physical control over opposing warships by cyber means. This raises a host of legal questions, but one question specific to protections under GC II is the status of the crew in such a scenario. The potential for such "cyber captives" is addressed in the following section.

Cyber captives and Article 16

Those familiar with naval history, or even Patrick O'Brian's Aubrey–Maturin series of novels, will know that the boarding and seizure of ships was a common feature of naval warfare in the Age of Sail.²⁶ However, modern naval conflicts more typically involve the sinking or disabling of ships as opposed to their capture. Although the standoff range of most modern weapons weighs against an imminent change of this situation, cyber warfare raises the question of capture once again. The previous section examined the question of whether a crew can be "shipwrecked" within the meaning of GC II for the purposes of Article 12 protections. This section takes that scenario one step further and examines the status of a crew on a ship commandeered by the enemy through cyber means.

Although probably more difficult from a technical standpoint, it stands to reason that if a ship could be completely disabled through an offensive cyber operation, those same networked systems could also be controlled by an outside entity. As previously mentioned, this possibility was demonstrated by the University of Texas researchers. Given the increasing reliance on network control of vital ship functions, a ship could theoretically be transformed into a remotely operated vessel, similar to other drone-type vehicles.²⁷ The first question to ask is whether the analysis differs from a ship disabled by cyber means. This could simply be a situation where the crew is "in peril" and, if they refrain from

26 See, generally, Brian Lavery, *Jack Aubrey Commands: An Historical Companion to the Naval World of Patrick O'Brian*, Naval Institute Press, Annapolis, MD, 2003.

27 Rolls-Royce, "Rolls-Royce Demonstrates World's First Remotely Operated Commercial Vessel", press release, 20 June 2017, available at: www.rolls-royce.com/media/press-releases/yr-2017/20-06-2017-rr-demonstrates-worlds-first-remotely-operated-commercial-vessel.aspx.

hostilities, must be afforded Article 12 protections. However, if someone is in control of the ship and it is otherwise operating as normal, are they really “in peril”?

This question would be void if the crew decided either to abandon the ship or to disable it through mechanical means in order to prevent enemy forces from gaining control. However, assuming the crew chooses to stay on board the ship and not disable it through mechanical means, what is the status of the crew that remains on board but without control over the ship? Does the enemy’s control over the ship result in a requirement to afford prisoner of war (PoW) protections to the crew? Article 16 states that “the wounded, sick and shipwrecked of a belligerent who fall into enemy hands shall be prisoners of war, and the provisions of international law concerning prisoners of war shall apply to them”. Breaking that article down into its parts, we must first examine the phrase “wounded, sick and shipwrecked of a belligerent”. It may be tempting to suggest that, at this point, the crew is not wounded, sick or shipwrecked, so Article 16 would not apply. However, the 2017 Commentary states that:

Although in setting down who is a prisoner of war Article 16 uses the looser formulation ‘the wounded, sick and shipwrecked of a belligerent’ rather than the more technical terms used in Article 13, the definition of prisoners of war in the Second Convention is not meant to diverge from that in the Third Convention.²⁸

Article 4 of the Third Geneva Convention (GC III) clearly states that “[p]risoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy”;²⁹ this is interpreted to cover those “soldiers who became prisoners without fighting”.³⁰ Essentially, this means that in whatever manner a sailor comes into the power of the enemy, regardless of being wounded, sick, or shipwrecked, they are then considered a PoW. Prior to the advent of cyber operations, falling into the “power of the enemy” was a fairly straightforward proposition and was difficult to imagine taking place without the physical presence of enemy forces. Whether, and how, a crew could come under the power of the enemy through purely cyber means, however, requires further analysis. Perhaps the determinative factor in the analysis is that of proximity and whether the physical presence of the enemy is required.

Capture and proximity of enemy forces

The primary difficulty here is understanding the phrase “who fall into enemy hands” and whether this is possible when the enemy is not physically present. The 2017 Commentary on GC II states that “the phrase ‘fall into enemy hands’

28 2017 Commentary on GC II, above note 5, para. 1575.

29 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. 4.

30 Jean Pictet (ed.), *Commentary to the Geneva Conventions of 12 August 1949*, Vol. 3: *Geneva Convention (III) relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960, Art. 4.

is sufficiently broad to cover capture or surrender”.³¹ Here, let us assume that although the ship in question has been commandeered by cyber means, the crew has neither chosen to leave the ship nor made an affirmative action of surrender. Although the 2017 Commentary suggests that “[n]o active ‘capture’ is necessary”,³² the enemy certainly seems to have captured the ship, so if the crew is unwilling or unable to abandon the captured ship, are they also captured? The updated Commentary makes no further definition, which is understandable. Capture without the physical presence of the enemy is a novel concept with few, if any, analogies.

One potential analogy is the case of aerial combat systems, such as helicopters or drones, when unaccompanied by ground forces. If the operator of an attack drone witnesses a group of enemy combatants with weapons dropped and waving a white flag, should those soldiers be considered *hors de combat* and no longer subject to attack?³³ This question was considered by the Harvard Program on Humanitarian Policy and Conflict Research (HPCR) Group of Experts in the *Manual on International Law Applicable to Air and Missile Warfare* (HPCR Manual), but was left unresolved as some members believed such a rule “could easily lead to misuse”.³⁴ Although not expounded upon further in the HPCR Manual, the basic rule on surrender indicates that there would need to be some reason to suspect the surrender was not clearly expressed or was other than genuine.³⁵ This reading would be consistent with the ICRC Commentary to Additional Protocol I to the Geneva Conventions, which finds that an air force “can certainly have enemy troops in its power without being able, or wishing, to take them into custody or accept a surrender (for example, in the case of an attack by helicopters)”.³⁶

There seems to be little qualitative difference over the potential case of a helicopter having power over forces on the ground and the degree of control exercised over those aboard a remotely controlled ship at sea. It may be the case that the cyber operator with control over a ship at sea holds even greater power over the enemy than that of an aircraft over a defenceless group of soldiers on the ground. The crew of a ship they no longer control is subject to the whims of the ship’s controllers while they remain on board the ship. The crew could potentially be driven into a perilous situation, or perhaps the gunnery controls could be manipulated to internally detonate the ship’s munitions if the weapon

31 2017 Commentary on GC II, above note 5, para. 1568.

32 *Ibid.*, para. 1571.

33 For a definition of persons *hors de combat*, see Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, Rule 47.

34 HPCR, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare*, 2010, comment accompanying Rule 15(b), para. 8.

35 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).

36 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, para. 1612.

systems control networks have been accessed. However, the case of cyber control over a ship remains distinct in that there is no physical presence. Thus, further analysis into the question of power and control is necessary.

Full and effective control

Given the difficulty of defining what is required for capture without the presence of enemy soldiers, it may be instructive to turn to a separate, but related, body of law: international human rights law (IHRL). Although this article does not delve into the controversial question of IHRL applicability in armed conflicts, IHRL can offer a useful example in analyzing what level of control is required for certain protective obligations to attach under international law. For example, the European Court of Human Rights (ECtHR) held in *Al-Skeini and Others v. The United Kingdom* that the European Convention on Human Rights applies extraterritorially either through the exercise of effective control over an area or through the exercise of control over a person by a State agent.³⁷ In an earlier case, *Medvedyev and Others v. France*, the Court had also held that human rights obligations attach to civilians on board a ship when military forces place the crew under guard and gain control of the ship's navigation, thereby exercising "full and effective" control.³⁸ In *Al-Skeini*, the ECtHR ruled that the "exercise of physical power and control over the person in question" was critical in establishing jurisdiction.³⁹

Although "full and effective control" is a human rights concept and ECtHR case law is only applicable for States party to its governing convention, it illustrates that physical power and operational control of a ship's navigational functions are potential factors in determining what level of power is required by enemy forces before corresponding obligations are placed upon them. If that level of control can be obtained by the use of cyber means, then the crew should be considered as PoWs with the corresponding GC II Article 16 protections, requiring that "the provisions of international law concerning prisoners of war shall apply to them".

Potential obligations to cyber PoWs

Although the legal provisions regarding PoWs are primarily contained in GC III and are therefore not the focus of this article, the 2017 Commentary on GC II does comment on certain provisions. Of note, it states that "the time a person is held on board is limited to the absolutely necessary", referring to the GC III Article 22 requirement that prisoners be interned on land.⁴⁰ However, this does not necessarily mean a direct return to port. Rather, the determination is made based

37 ECtHR, *Al-Skeini and Others v. United Kingdom*, Appl. No. 55721/07, 2011, paras 133–140, available at: <http://hudoc.echr.coe.int/eng?i=001-105606>.

38 ECtHR, *Medvedyev and Others v. France*, Appl. No. 3394/03, 2010, paras 66–67, available at: <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-97979>.

39 ECtHR, *Al-Skeini*, above note 37, para. 136.

40 2017 Commentary on GC II, above note 5, para. 1579.

upon “what is ‘expedient’ in the ‘circumstances’”.⁴¹ These circumstances include “operational reasons that do not permit a ship to change its course immediately”.⁴² There is nothing in this analysis that wholly precludes the possibility of combat operations while the crew remains aboard, although other areas of the law of naval warfare will play a role in this determination.⁴³

Future considerations

If the potential exists for PoWs to be taken under such circumstances, what should navies do to prepare? First, navies looking to employ cyber operations to gain control over ships should formulate a plan of what to do with the crew if they remain on board. The Geneva Conventions place certain obligations on how they are to be treated, and States must understand how they will transfer the crew to a more appropriate facility fulfilling the requirements established in GC III.⁴⁴ Second, navies that employ networked systems would be wise to ensure there is a mechanism to immediately revert to mechanical control or formulate clear plans as to their operating procedures in the event of a successful cyber-attack in order to avoid situations where the status of the crew may come into doubt. An additional aspect of naval warfare that may see an increase in ambiguity with the advent of cyber operations is the determination of when a naval engagement has ended. This is a determining factor in judging when certain GC II obligations begin, and this subject is therefore taken up in the following section.

Article 18’s end of engagements clause

On 27 May 1941, the British battleships *King George V* and *Rodney* engaged the German battleship *Bismarck*, which had been previously disabled by a torpedo attack from aircraft belonging to the British carrier *Ark Royal*. After almost two hours of fighting, the *Bismarck* and her 2,200-man crew were sunk, clearly marking the end of that particular naval engagement between the British and German navies. As the *Bismarck*’s escort ship, the *Prinz Eugen*, had previously detached, the shipwrecked crew was entirely dependent on the Royal Navy for rescue. The British ships *Dorsetshire* and *Maori*, acting in accordance with Article 16 of the 1907 Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, began rescue of the German crew.⁴⁵

41 *Ibid.*, para. 1579.

42 *Ibid.*, para. 1579.

43 For example, the prohibition on flying a false flag once the enemy is engaged, as presumably the crew aboard will not be changing the ensign. Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge, 1995, Rule 110.

44 GC III, Art. 12.

45 This article required, in part, that “[a]fter every engagement, the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked, sick, and wounded, and to protect them, as well as the dead, against pillage and ill-treatment”.

However, after 110 sailors were rescued, a U-boat alarm was sounded, forcing the Royal Navy to break off the rescue. All but five of the remaining German crew were lost at sea.⁴⁶

The legal obligation guiding the British rescue of the crew of the *Bismarck* was expanded upon in Article 18 of GC II. However, the extent of the obligation placed upon warship commanders to search for and collect the shipwrecked, sick and wounded following an engagement continues to be criticized as ambiguous and in need of clarification.⁴⁷ This section examines how the advent of cyber operations introduces an additional element of ambiguity.

Article 18 requires that “[a]fter each engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled”. The 2017 Commentary rightly recognizes that “Article 18(1) is among the most important provisions in the Second Convention”, and that it sets out the obligations flowing from the protections accorded in Article 12.⁴⁸ Although a detailed understanding of this article is key to a proper understanding of the entire convention, here we will look solely at the first element in the light of cyber operations.

Land versus naval obligations

Article 18 makes plain that, unlike land operations, the requirement to tend to the sick and wounded at sea does not arise until after the engagement.⁴⁹ This is understandable in the naval context given the increased risk of harm that a commander would face by breaking off an ongoing engagement to collect the shipwrecked, wounded and sick. As the 2017 Commentary notes, this obligation applies “without discriminating between their own and enemy personnel”.⁵⁰ Furthermore, at the time of GC II’s drafting, naval engagements tended to be very violent but short-lived affairs. In the case of the *Bismarck*, the engagement was clearly ended when the ship, though her ensign was never struck, went under the sea after two hours of fighting. However, for modern navies equipped with advanced long-range weapon systems, including cyber capabilities, the end of the engagement may be more difficult to discern.

The 2017 Commentary discusses Article 18’s post-engagement limitation, finding that whereas this element may limit the obligation temporally, it may also

46 For an in-depth treatment of this particular engagement, see C.S. Forester, *Hunting The Bismarck*, Academy Chicago Publishers, Chicago, IL, 1983.

47 Peter Barker, “The Sea is Still Cruel – A Mariner’s Perspective on Some Aspects of the Updated ICRC Commentary on the Second Geneva Convention”, *Opinio Juris*, 16 November 2017, available at: <http://opiniojuris.org/2017/11/16/the-sea-is-still-cruel-a-mariners-perspective-on-some-aspects-of-the-updated-icrc-commentary-on-the-second-geneva-convention/>.

48 2017 Commentary on GC II, above note 5, para. 1617.

49 Article 15 of the First Geneva Convention requires that “[a]t all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures ...”.

50 2017 Commentary on GC II, above note 5, para. 1618.

expand the obligation's material scope.⁵¹ It reasons that "since the particular engagement will have ceased, this may limit the extent to which a Party to the conflict may invoke security or military considerations as a justification for not undertaking search and rescue activities".⁵² Thus, determining the exact scope of the temporal requirement takes on increased importance.

Temporal scope of engagements

Fortunately, the 2017 Commentary provides guidance on interpreting the temporal scope clause of Article 18. It provides that "the term 'engagement' is 'a battle between armed forces', i.e. involving the use of methods and means of warfare between military units of the Parties to the conflict".⁵³ Pre-empting the question of whether these methods and means are limited to the naval forces, the Commentary suggests that the term "engagement" "covers any kind of engagement, including from the air or from land but inflicting casualties at sea".⁵⁴ Cyber operations are not explicitly mentioned here, although "any kind of engagement" suggests that cyber operations are covered as well. However, it should be noted that States have been reticent to apply international law obligations to cyber operations in all contexts. Therefore, it is worth discussing whether the cessation of cyber operations, in addition to the conclusion of more traditional kinetic operations, is required to "end the engagement" and initiate potential Article 18 obligations.

First, the Commentary's suggestion that "inflicting casualties at sea" is required for an engagement is most likely poorly worded. It may be more correct to state that the operation has the *aim* of inflicting casualties at sea. It is easy to imagine that ships may be engaged prior to actually inflicting casualties. Prior to her own sinking, the *Bismarck* sunk the *HMS Hood* in large part by achieving the "weather gauge", manoeuvring to gain an advantageous position in relation to the enemy prior to opening fire. Therefore, simply because a cyber operation does not inflict casualties, this should not signal that a cyber operation related to a kinetic strike is not part of the overall engagement. However, whether cyber operations, absent the kinetic portion, can constitute an engagement or the continuance of an engagement is a slightly different matter.

Although the Commentary to Article 18 does not refer specifically to cyber operations, they are discussed in relation to the scope of application provisions of common Article 2, specifically whether cyber operations alone can constitute "armed force", making the Geneva Conventions applicable. The Commentary states that "[i]t is generally accepted that cyber operations having similar effects to classic kinetic operations" would suffice.⁵⁵ However, it also recognizes the current reality that cyber operations falling beneath this threshold are legally

51 *Ibid.*, para. 1648.

52 *Ibid.*, para. 1648.

53 *Ibid.*, para. 1655.

54 *Ibid.*, para. 1655.

55 *Ibid.*, para. 277.

unsettled.⁵⁶ It is safe to say that cyber operations achieving a kinetic effect would therefore continue the engagement. But what of those cyber operations that affect network systems without achieving kinetic effects? This may again be determined by whether the cyber operation is a precursor, or enabler, of follow-on kinetic operations that intend to “inflict casualties”.⁵⁷

Until such time as the *jus in bello* develops more fully in this area, it may be necessary to leave the legal reasoning as to whether the engagement has ended to a good-faith assessment by the ship’s commander. Although this seems initially unsatisfying, it is consistent with the Commentary’s understanding of Article 18, which states that “[w]hat constitutes an engagement in any given case will remain context-specific” and that “those acting on behalf of the Party to the conflict, each at his or her own level of decision-making, will need to make a good-faith assessment as to the moment it becomes possible to take one or more of the measures referred to in Article 18”.⁵⁸ Such “good-faith assessments” are a common and necessary part of international humanitarian law (IHL), even if open to occasional abuse.

Future considerations

Given the potential for abuse, what are nations employing cyber operations as part of naval conflicts to do? Parties to a conflict still have a vested interest in ensuring that the shipwrecked, sick and wounded are recovered and cared for as quickly as possible. The Commentary once again provides a potential solution, suggesting that opposing commanders reach a “special agreement” on the rescue of those shipwrecked in the sense of Article 6,⁵⁹ allowing parties to fulfil Article 18 obligations without fear of attack, adding that “such an agreement may be concluded orally, between commanders on the spot”.⁶⁰ Alert commanders will be sure to add prohibitions on offensive cyber operations as part of any such agreement. Another area of naval warfare that benefits from increased coordination between the parties is the use of hospital ships and rescue craft. Although the vital function served by these vessels is widely recognized, their use has nonetheless been marred by repeated tragedies.

Cyber operations and obligations to “respect and protect”

The use of hospital ships and rescue craft in wartime has always been a contentious issue. These ships serve a humanitarian need recognized by most parties, and have

56 *Ibid.*, para. 278.

57 For a general discussion of cyber operations and the scope of IHL applicability, see 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), Rule 80.

58 2017 Commentary on GC II, above note 5, para. 1655.

59 Specifically, Article 6 states that “the High Contracting Parties may conclude other special agreements for all matters concerning which they may deem it suitable to make separate provision”.

60 2017 Commentary on GC II, above note 5, para. 1651.

therefore been afforded protections similar to those given to the shipwrecked and wounded.⁶¹ However, profound suspicion of their misuse has led to many attacks against these protected vessels, particularly during the First and Second World Wars. Although some attacks resulted from misidentification, many were quite intentionally targeted.⁶² Unrestricted maritime warfare campaigns often included deliberate attacks on hospital ships. One such example was the Soviet hospital ship, the *Armenia*.⁶³ On 7 November 1941, a German torpedo bomber attacked the *Armenia*, sinking her without warning. All but eight of the 7,000 on board died in the attack.

Although this was a tragedy by any measure, there were several questions as to the *Armenia*'s status as a hospital ship. It was clearly marked with large red cross symbols and, at the time, was certainly being used to transport the sick and wounded. However, it also had light anti-aircraft weapons on board, was under armed escort, and had previously been used in the conflict to transport military supplies. This tragic incident, and many others like it, demonstrated the need to clarify and progress the rules related to the protection of hospital ships in GC II. This section analyzes the obligation to “respect and protect” hospital ships and coastal rescue craft found in Articles 22, 24 and 27 of GC II, in the light of cyber operations. Hospital ships are those “ships built or equipped by the Powers specially and solely with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them”,⁶⁴ whereas coastal rescue craft are “small craft employed by the State or by the officially recognized lifeboat institutions for coastal rescue operations”.⁶⁵ However, the protections afforded to both are substantially the same and will be discussed below.

Attack and capture

First, it should be stated that Article 22's obligation to respect and protect includes the more specific language that protected vessels should “in no circumstances be attacked or captured”. Although the obligation to respect and protect is broader than these specific terms, it is helpful nonetheless because “attack” is an IHL term of art that has been frequently analyzed in the cyber context. The 2017 Commentary explicitly states that the prohibition on attack includes “the use of means and methods that, by whatever mechanisms or effects, severely interfere with the functioning of the equipment necessary for the operation of a military hospital ship, such as so-called ‘cyber-attacks’”.⁶⁶ Given that the Commentary

61 Article 22 of GC II, for example, provides that hospital ships “may in no circumstances be attacked or captured, but shall at all times be respected and protected”.

62 See, e.g., a statement by the German government in the First World War that it would “no longer suffer any hospital ship in the English Channel or parts of the North Sea”: Lassa Oppenheim and Ronald Francis Roxburgh, *International Law: A Treatise*, Vol. 2: *War and Neutrality*, 3rd ed., Longmans, London, 1921, p. 287.

63 Rupert Colley, *World War Two: History in an Hour*, London, Harper Collins, 2013.

64 GC II, Art. 22.

65 GC II, Art. 27.

66 2017 Commentary on GC II, above note 5, para. 1985.

references the *Tallinn Manual on the International Law Applicable to Cyber Warfare*'s (Tallinn Manual) Rule 70 here (incorporated into the Tallinn Manual 2.0 as Rule 131),⁶⁷ it is helpful to follow the reference for further analysis.⁶⁸

The black-letter rule in the Tallinn Manual 2.0, Rule 131, states that medical personnel and transports, including those vessels identified in GC II, “may not be made the object of a cyber attack”. Here we should recall that “cyber attack” is the exact phrase used in the Commentary, though it does not define the phrase. The Tallinn Manual 2.0’s Rule 92 defines a cyber-attack as “a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction of objects”. It is well understood that the Tallinn Manual 2.0 is only the opinion of a group of experts and is therefore not a binding source of primary law. However, Rule 92’s definition tracks with the Additional Protocol I definition of attack, requiring “acts of violence against the adversary”.⁶⁹ Thus, the 2017 Commentary and the Tallinn Manual 2.0 appear to agree that cyber operations resulting in injury or death, and (at least) physical damage and destruction, to a protected crew or vessel are prohibited. The logical follow-on question is whether “damage” to a network system includes the pure loss or degradation of functionality. The law here is unsettled, and thus the loss of functionality, on its own, cannot be read definitively to qualify as an attack.⁷⁰

Respect and protect

The 2017 Commentary and the Tallinn Manual 2.0 agree that the requirement to respect and protect goes beyond the prohibition against attack. The Commentary summarizes the extended obligation to respect and protect in para. 1996 as the obligation “to refrain from all actions that interfere with or prevent such ships from performing their humanitarian tasks”. Therefore, cyber operations are prohibited that result in loss or degradation of network functionality necessary to a protected vessel’s performance of its humanitarian function.

The Commentary does include a qualifier to that protection, referencing the Article 31 allowance for parties to the conflict to “control and search the vessels mentioned in Articles 22, 24, 25 and 27”.⁷¹ This includes the right to “control the use of their wireless and other means of communication” and “put on board their ships neutral observers who shall verify the strict observation of the provisions contained in the present Convention”. These “control and search” provisions are in place “to verify whether their employment conforms to the provisions of Articles 30 and 34 and to the other provisions of the Convention”, as the 2017 Commentary puts it.⁷² Recognizing that a physical presence is no

67 Tallinn Manual 2.0, above note 57, Rule 131.

68 See also Cordula Droege, “Get Off My Cloud: Cyber Warfare, International Humanitarian Law, and the Protection of Civilians”, *International Review of the Red Cross*, Vol. 94, No. 886, 2012, pp. 556–560.

69 AP I, Art. 49.

70 Tallinn Manual 2.0, above note 57, comment accompanying Rule 92, para. 10.

71 2017 Commentary on GC II, above note 5, para. 1996.

72 *Ibid.*, para. 2276.

longer required to verify compliance, it also suggests that “innocent employment of these vessels can often be ascertained by other means, at least to some extent, in particular by satellites and other means of reconnaissance”.⁷³ This could indicate that cyber intelligence operations are appropriate if, while not affecting the functionality of the vessel, they are used to verify its compliance with GC II. Indeed, this was the conclusion drawn by the Tallinn Manual’s Group of Experts in the commentary to Rule 132, governing the requirement to respect and protect computer systems related to medical units and transports.

Future considerations

This analysis leaves open questions regarding several potential categories of cyber operations – for example, cyber intelligence operations not for the purpose of compliance verification, but rather for the collection of intelligence regarding associated forces. Another potential category is the use of protected naval vessels as a pass-through to levy cyber effects against non-protected enemy systems. These and other examples may not explicitly violate the terms of protection in GC II, but they nevertheless open the possibility of protected vessels becoming a cyber battleground. This could divert protected vessels from focus on their missions and raise the likelihood of unintentional damage to network systems vital to the performance of their humanitarian mission. Given the ambiguity present in this aspect of the law, and the importance of protecting humanitarian missions, perhaps the obligation to respect and protect is an area where nations can work together to develop ever-elusive cyber norms.

Conclusion

Modern naval powers are awakening to the fact that, despite being a somewhat “closed system”, warships are not immune to malicious cyber operations. The advantages to be gained in efficiency and performance through network control of ship systems are clear. Electrical, propulsion, steering and life-support systems all benefit from SCADA and other network controls. The result is that ships require smaller crews while levying increased combat power. However, these same systems introduce critical vulnerabilities. Future conflicts between naval powers will undoubtedly include cyber operations, and such operations will target these critical network control systems.

Given that the ability to target these critical systems has already been demonstrated, States must begin thinking through the legal ramifications of offensive cyber operations on the law of naval warfare. Much of this law is contained within GC II. With the recent release of the updated 2017 Commentary and its recognition of military cyber operations, the present is the perfect time for States to begin this analysis. This article has identified four areas

⁷³ *Ibid.*, para. 2277.

of rights and obligations contained in GC II where cyber operations may have a significant impact, and has discussed some considerations for States in preparing for such a scenario.

First, the article considered the question of shipwrecks and whether a crew could be considered shipwrecked as the result of a cyber operation against their ship. This article reached the conclusion that this was a very real possibility under the law, that States should work through scenarios to indicate a cessation of hostilities in such a situation, and that opposing ships should be prepared to recognize that these shipwrecked crews must be afforded the corresponding protections. Second, the article presented the possibility that a ship's crew could fall into the power of the enemy as the result of an adversary gaining remote control over the ship. Again, technological advancements have demonstrated the potential to take control of vital ship functions, making the legal question quite relevant. Should the level of control over the ship result in the crew falling into the power of the enemy, the party gaining control over the ship must be prepared to deal with the crew as PoWs. Thirdly, the article analyzed the "end of engagements" clause in Article 18 of GC II. This vitally important clause signals when the obligation to search for, collect and protect the shipwrecked, wounded and sick attaches. Ongoing cyber operations could potentially extend an engagement past the cessation on kinetic operations, with a deleterious effect on those shipwrecked, wounded and sick. States would be wise to take this consideration into account when determining whether to continue cyber operations against an adversary. The final section contemplated the impact of cyber operations on the use of hospital ships and rescue craft. The somewhat anomalous legal position of these ships has resulted in severe consequences in past conflicts. The ways in which cyber operations further complicate their status must be reviewed by States in order to prevent future disasters. As the purpose of these ships remains entirely humanitarian, perhaps this is an area where coordination and understandings between navies may occur.

Although it is certain that cyber operations will be part of future conflicts, the extent to which these operations will succeed is unknown. However, as States will certainly attempt such operations, they must also prepare for the protections and obligations that the law of naval warfare will impose upon them should they succeed. With the 2017 Commentary providing a step forward in our understanding of GC II, this is a perfect time to start making such preparations.

The prevention of torture in Rio de Janeiro: A study on the role of public defenders

Étienne Chénier-Lafèche*

Étienne Chénier-Lafèche is a human rights lawyer. He is a member of the Quebec Bar and a graduate of the Université du Québec à Montréal and New York University School of Law.

Abstract

The attorneys of the Public Defender's Office of the State of Rio de Janeiro (PDORJ) are heavily present in the penitentiary system of Rio de Janeiro, individually meeting the vast majority of detainees and conducting monitoring visits. This article presents the work of the PDORJ in the prison system, focusing on its role in the prevention of torture. Based on semi-structured interviews with public defenders, the article explains the paradox between the extensive presence of the PDORJ in the prison system and the few instances of torture that are officially reported. It also presents recommendations aimed at better identifying and responding to accounts of torture.

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Keywords: prevention of torture, legal aid, prison, Brazil.

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Introduction

Conditions of detention and treatment of detainees are a chronic human rights problem in Brazil. Every day, four detainees die in custody in the country.¹ The total prison population of the country is now the third-largest in the world, behind only the United States and China.² According to international human rights bodies, torture³ remains a reality in Brazil's penitentiary system⁴ and is underreported,⁵ and impunity for the perpetrators is the rule.⁶ The Brazilian Supreme Court has recognized the situation as one of systematic violation of the rights of detainees.⁷

In that context, over the course of the past decades Brazil has developed a complex web of institutions tasked with preventing and redressing human rights violations in the penitentiary system. The Public Defender's Office (PDO), tasked primarily with providing legal assistance to those unable to afford it, is one of these institutions.

- 1 Conselho Nacional do Ministerio Público, "Sistema Prisional em Números", available at: www.cnmp.mp.br/portal/relatoriosbi/sistema-prisional-em-numeros (all internet references were accessed in June 2019 unless otherwise stated).
- 2 World Prison Brief, "Highest to Lowest – Prison Population Total", accessed 14 July 2018, available at: www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All.
- 3 In order to circumscribe its scope, this study focuses solely on torture and does not include acts or situations that would qualify as cruel, inhuman or degrading treatment or punishment. The study adopts the definition of "torture" provided in Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatments or Punishments. According to the Convention, "torture" refers to "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." Under the definition, torture constitutes the infliction of severe pain, or suffering, by public agents, for the specific purposes enumerated. However, it is contended that the purposive element of the definition is what distinguishes torture from other cruel, inhuman or degrading treatment or punishment. On that topic, see Manfred Nowak, "What Practices Constitute Torture? US and UN Standards", *Human Rights Quarterly*, Vol. 28, No. 4, 2006, p. 839; Malcolm D. Evans, "Getting to Grips with Torture", *International and Comparative Law Quarterly*, Vol. 51, No. 2, 2008, pp. 381–383.
- 4 Juan Mendez, *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment on His Mission to Brazil*, UN Doc. A/HRC/31/57/Add.4, 29 January 2016, para. 50.
- 5 *Ibid.*, para. 58.
- 6 Interview with Amerigo Incalcaterra, Regional Representative for South America of the Office of the UN High Commissioner for Human Rights, 24 January 2017, available at: <https://nacoesunidas.org/onu-impunidade-por-tortura-nas-prisoese-regra-no-brasil/>.
- 7 Supremo Tribunal Federal, *Medida cautelar na argüição de descumprimento de preceito fundamental 347*, 9 September 2015, available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=10300665>.

While access to legal aid for persons deprived of liberty in Brazil has often been described as “deficient”,⁸ the Public Defender’s Office of the State of Rio de Janeiro (PDORJ) stands out as an exception. In the State of Rio de Janeiro, public defenders are present on a weekly basis in every detention centre, meet with an estimated 90% of persons deprived of liberty (50,219 persons as of June 2016)⁹ two to three times per year, and conduct regular monitoring visits of detention centres. This article addresses the role of the PDORJ in the prevention of torture.

This study is based on semi-structured interviews with public defenders working in the penitentiary system, as well as observations of their interventions in detention centres. The interviews and observations sought to document how the public defenders implement the preventive measures for which the institution is responsible. In doing so, the interviews gave particular importance to the perception that public defenders hold of torture in Rio de Janeiro’s detention centres, as well as of their own role in preventing it. By highlighting how public defenders understand their roles and perform their duty in practice, this article explains the following paradox: despite the extensive presence of the PDORJ in detention centres, very few instances of torture are officially reported.

The emphasis on the practice of public defenders echoes the recent findings of Carver and Handley, who concluded that the primary factor determining the effectiveness of measures aimed at preventing torture is the way they are implemented.¹⁰ Taking into account the public defenders’ point of view about their mandate helps us to understand how they implement the preventive measures vested in the PDORJ.

It is important to mention that while this article provides a better understanding of the relationship between the PDORJ’s work and the prevention of torture, it does not seek to determine whether the activities of the Office succeed, or not, in reducing the risk of torture. Instead, it offers suggestions on why the PDORJ might be successful, or not, in achieving the tasks with which it has been entrusted that are related to the prevention of torture. In short, the article does not explain *if* the preventive measures adopted by the public defender succeed or fail in reducing the risk of torture; rather, it explains *why* the practitioners might succeed or fail in undertaking the measures related to the prevention of torture.

The article starts by briefly presenting the issue of torture in detention centres in Brazil. It then describes the normative framework within which the work inside the penitentiary system of the PDO operates, and presents a brief history of the work of the PDORJ in detention centres. The author then presents his research findings, describing the work of the PDORJ in detention centres and

8 Human Rights Watch, “Brasil: Eventos de 2017”, available at: www.hrw.org/pt/world-report/2018/country-chapters/313303.

9 Departamento Penitenciário Nacional, *Levantamento Nacional de Informações Penitenciárias: Atualização – Junho de 2016*, Brasília, June 2016, p. 10 (InfoPen 2016), available at : http://depen.gov.br/DEPEN/depen/sisdepen/infopen/relatorios-sinteticos/relatorio_2016_2211.pdf.

10 Richard Carver and Lisa Handley, *Does Torture Prevention Work?*, Liverpool University Press, Liverpool, 2016, p. 83.

revealing the views of public defenders in that regard. Finally, based on these findings, the author addresses the paradox of the intensive presence of public defenders and the low number of denunciations, and presents recommendations aimed at better identifying and responding to denunciations of torture by public defenders working in the penitentiary system.

Torture in Brazil's penitentiary system

Brazil's penitentiary system is often described as being in a state of collapse: detainees are held in overcrowded facilities, they lack access to health care, and they are exposed to violence. This section provides a brief account of the current situation relating to torture in the penitentiary system in Brazil and presents the institutional framework in place to respond to it. The PDO will then be discussed separately below.

Overview

Civil society, non-governmental, governmental and international organizations have documented that torture is practiced in Brazil, including in detention centres.¹¹ Violence by co-detainees is also a recurring peril in Brazil's penitentiary system. Brazil's Supreme Court recently recognized the systematic violation of the rights of people deprived of liberty in the country.¹² The UN Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) and the United Nations (UN) Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment have reported that they have received repeated and consistent accounts of torture and other forms of ill-treatment by penitentiary personnel.¹³ Additionally, according to the Brazilian government, most of the 2,100 communications received monthly by the national ombudsman of the penitentiary system referred to "negligence, ill-treatment, torture and degrading treatment".¹⁴ The government recognized the need to improve the conditions of

11 See, e.g., Mecanismo Nacional de Prevenção e Combate à Tortura, *Relatório Anual: 2016–2017*, 2017, pp. 18, 21, 22, 25; Mecanismo Nacional de Prevenção e Combate à Tortura, *Relatório Anual: 2015–2016*, 2016, para. 56; Pastoral Carcerária, *Tortura em tempos de encarceramento em massa*, 2016, p. 56, available at: http://carceraria.org.br/wp-content/uploads/2016/10/Relat%C3%B3rio_Tortura_em_Tempos_de_Encarceramento_em_Massa-1.pdf.

12 Supremo Tribunal Federal, above note 7.

13 J. Mendez, above note 4, para. 50; SPT, *Visit to Brazil Undertaken from 19 to 30 October 2015: Observations and Recommendations Addressed to the State Party*, UN Doc. CAT/OP/BRA/3, 16 February 2017, paras 16–17, 33–36.

14 Brazil, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21*, UN Doc. A/HRC/WG.6/27/BRA/1, 27 February 2017, para. 102.

detention in Brazil's detention centres during the last review of the country under the Universal Periodic Review of the UN Human Rights Council.¹⁵

According to the Brazilian Ministry of Justice, there were 726,712 persons deprived of liberty in Brazil in 2016.¹⁶ Accordingly, considering that the official capacity of Brazil's penitentiary system is 368,049 individuals, the prison occupancy rate in Brazil was 197.4%.¹⁷ In addition, the Ministry of Justice reported that there was an increase of 707% in the number of persons deprived of liberty since 1990.¹⁸ For the first half of 2016, the average mortality rate for detainees in Brazil was 13.6 per 10,000.¹⁹

The prison population of the penitentiary system of Rio de Janeiro has evolved similarly. Over six years, the state's prison population almost doubled, reaching 50,482 persons in December 2016,²⁰ from 25,514 in December 2010.²¹ Rio de Janeiro has the fourth-largest prison population in Brazil, behind the states of São Paulo, Minas Gerais and Paraná.²² The prison occupancy rate in June 2016 in Rio de Janeiro was 176.6%.²³ In just three years, the number of deaths in the penitentiary system of the state also almost doubled, from 133 in 2013 to 254 in 2016.²⁴

Institutional framework to respond to torture

Brazil is a party to the relevant international instruments related to torture²⁵ and has criminalized torture under its domestic law. In particular, Article 5(III) of the Federal Constitution provides that “no one shall be submitted to torture or to inhuman or degrading treatment”. Article 5(XLIII) provides that torture is not

15 Brazil, *Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State under Review*, UN Doc. A/HRC/36/11/Add.1, 6 September 2017, para. 136.75 (a).

16 InfoPen 2016, above note 9, p. 8. On average, detainees are young (74% of the prison population is between 18 and 34 years old: InfoPen 2016, above note 9, p. 30), Afro-Brazilian (64% of the prison population: InfoPen 2016, above note 9, p. 32), male (Departamento Penitenciário Nacional, *Levantamento Nacional de Informações Penitenciárias Infopen Mulheres: 2ª edição*, Brasília, March 2018, p. 11, available at: http://depen.gov.br/DEPEN/depen/sisdepen/infopen-mulheres/infopenmulheres_arte_07-03-18.pdf), and with little formal education (75% did not pursue education further than primary school: InfoPen 2016, above note 9, p. 33). 28% of the prison population is detained for drug trafficking offences (InfoPen 2016, above note 9, p. 43).

17 InfoPen 2016, above note 9, p. 8.

18 *Ibid.*, p. 9.

19 *Ibid.*, p. 52. Out of 10,000 detainees, 7.7 deaths were classified as “natural”, three as “criminal”, 0.8 as suicide, 0.4 as “accidental” and 1.6 as death with “unknown cause”.

20 *Ibid.*, p. 10.

21 Departamento Penitenciário Nacional, *Sistema Integrado de Informações Penitenciárias – InfoPen: Quadro Geral*, Brasília, December 2010, available at: <http://depen.gov.br/DEPEN/depen/sisdepen/infopen/relatorios-sinteticos/populacaocarcerariasintetico2010.pdf>.

22 InfoPen 2016, above note 9, p. 10.

23 *Ibid.*, p. 8.

24 Data collected by the PDORJ for the purpose of a class action brought against the State of Rio de Janeiro, on file with author.

25 The International Covenant on Civil and Political Rights, the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments, the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatments or Punishments, the American Convention on Human Rights, and the American Convention to Prevent and Punish Torture.

subject to bail, grace or amnesty. Article 5(XLIX) provides that “prisoners are ensured of respect to their physical and moral integrity”. Law 9455 of 1997 defines torture as a specific criminal act, and the Penal Code prohibits a number of acts that could also be considered to fall under Law 9455.²⁶ Victims and witnesses of crimes (including torture) at risk due to their collaboration with investigations or criminal proceedings can be admitted to the Federal Programme of Assistance to Victims and Witnesses in Danger and receive protection from the State. However, victims and witnesses deprived of liberty are explicitly excluded from the programme.²⁷ Therefore, persons deprived of liberty lodging a complaint for torture cannot benefit from it and are exposed to reprisals in the penitentiary system.

In addition to the PDO, a complex web of organizations is tasked with performing actions aimed at preventing torture in places of detention or seeking redress in cases of torture. These include institutions created under federal laws operating in all twenty-six states and the Federal District. State laws, as is the case in the State of Rio de Janeiro, also create institutions to prevent and combat torture.

First, to comply with its obligations under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatments or Punishments, Brazil created the National Mechanism on the Prevention and Combating of Torture, a national preventive mechanism that regularly conducts monitoring visits to places of detention.²⁸ The mechanism is part of the National System for the Prevention and Combating of Torture,²⁹ which also includes the National Committee for the Prevention and Combating of Torture.³⁰

Additionally, the National Penitentiary Department, placed under the auspices of the Ministry of Justice, is tasked with overseeing the implementation of national penitentiary policies.³¹ The National Council for Criminal and Penitentiary Policies is responsible for drafting guidelines relating to the

26 In particular, Articles 129 (bodily harm), 132 (“to expose the life or health of others to direct and imminent danger”), 135 (the omission to assist a person in danger) and 136 (ill-treatment). Torture is also considered to be an aggravating factor under the Penal Code: Código Penal, Decreto-Lei No. 2.848, 7 December 1940, Art. 61(II)(d).

27 Lei No. 9807, 1999, Art. 2(2). The law does not preclude public agencies from adopting protection measure for persons deprived of liberty on an *ad hoc* basis, but such measures would not be related to the programme. Also, Article 11 of Decreto No 3.518 of June 2000 provides that persons excluded from the federal protection programme can still count on the subsidiary protection of the Protection Service for Special Witnesses (Serviço de Proteção ao Depoente Especial). However, the admission to the programme was described as “very restrictive”: Lívia Tinóco, “O serviço de proteção ao depoente especial do departamento de polícia federal”, in *Cartilha sobre programas de proteção a vítimas e testemunhas ameaçadas*, 2013, p. 56, available at: http://pfdc.pgr.mpf.br/atuacao-e-conteudos-de-apoio/publicacoes/protacao-a-testemunha/cartilha_protacao_vitimas_testemunhas_pfdc_2013.

28 Lei No. 12.847, 2013, Arts 8–11.

29 The National System for the Prevention and Combating of Torture seeks to strengthen the prevention and combating of torture through the coordination of its members (the MNCPT, the National Committee for the Prevention and Combating of Torture, the National Council for Criminal and Penitentiary Policies and the National Penitentiary Department). *Ibid.*, Arts 1–5.

30 The National Committee for the Prevention and Combat to Torture is tasked, among other things, with monitoring and presenting initiatives and processes (judicial, administrative or legislative) related to the prevention and combating of torture. *Ibid.*, Arts 6–7.

31 Lei de Execução Penal, Lei No. 7210, 11 July 1984, Art. 72(I).

enforcement of sentences.³² Both institutions are also tasked with conducting monitoring visits in all states of the federation.³³

At the state level, the State Mechanism on the Prevention and Combating of Torture (Mecanismo Estadual de Prevenção e Combate à Tortura, MEPCT) of Rio de Janeiro³⁴ visits places of detention and conducts between fifty and sixty detention visits per year.³⁵ The State Committee on the Prevention and Combating of Torture is also tasked with ensuring the implementation of initiatives related to the prevention and combating of torture.³⁶

The Lei de Execução Penal (Criminal Enforcement Law), the legislation detailing the enforcement of criminal sentences, also tasks various actors with visiting places of deprivation of liberty: judges,³⁷ prosecutors,³⁸ the Penitentiary Council,³⁹ the Community Council⁴⁰ and public defenders.⁴¹

The Brazilian government, in a submission to the SPT, summarized the expected outcome of the presence of these actors in places of detention:

[T]he continuous monitoring of institutions where there is deprivation of liberty is essential to prevent torture. It is necessary that a network of different actors such as judges, public defenders, prosecutors, policemen and federal and State managers, engage in a tireless work on the facilities where there is deprivation of liberty, in order to decrease and discourage violations, as well as in order to punish its perpetrators.⁴²

Legal framework and history of the PDORJ in the penitentiary system

This section exposes the evolving legal framework of the PDO in Brazil and presents a short history of the activities of the PDORJ in the penitentiary system. It shows that the attributions of the PDO are solidly grounded in the Federal Constitution

32 *Ibid.*, Art. 64(I).

33 *Ibid.*, Arts 64(VIII), 72(II).

34 State Law No. 5778, 30 June 2010, Art. 1.

35 In 2016, the State Mechanism conducted fifty visits. Mecanismo Estadual de Prevenção e Combate à Tortura, *Relatório Anual do Mecanismo Estadual de Prevenção e Combate à Tortura do Rio de Janeiro*, 2017, p. 8.

36 State Law No. 5778, Art. 4.

37 Lei de Execução Penal, Art. 66(VII).

38 Lei de Execução Penal, Art. 68, para. 1.

39 The Penitentiary Council is an institution made up of professors, legal professionals and members of the community tasked, among other things, with monitoring the way in which detainees are serving their sentences. See *ibid.*, Arts 69, 70(II).

40 The Community Council is an institution present in all judicial districts that is composed of one representative of a commercial or industrial association, one lawyer appointed by the bar association, one public defender and one social worker. It is tasked, among other things, with submitting reports to the Penitentiary Council and with providing support to persons deprived of liberty. See *ibid.*, Arts 80, 81(I).

41 *Ibid.*, Art. 81-B(V).

42 Brazil, *Replies of Brazil to the Recommendations and Request for Information made by the Subcommittee*, UN Doc. CAT/OP/BRA/1/Add.1, 18 February 2013, para. 194.

of 1988 and other federal laws. While the PDO was originally tasked with providing legal aid to those most in need, its mandate grew over the years. In particular, in 2009 the PDO was explicitly tasked with promoting human rights and was granted unfettered access to the penitentiary system.

Legal framework

The first part of this section shows how the functions of the PDO were constitutionally recognized and were expanded over the years to put the protection of human rights at the core of its mandate. The second part focuses on the recognition of new prerogatives for public defenders working inside the penitentiary system.

The Constitution of 1988, its Amendment, and the general rules of the PDO

Article 5(LXXIV) of the Federal Constitution of 1988 recognizes the right to an attorney for persons unable to pay for it:

Art. 5. Everyone is equal before the law, with no distinction whatsoever, guaranteeing to Brazilians and foreigners residing in the Country the inviolability of the rights to life, liberty, equality, security and property, on the following terms: ...

LXXIV. the State shall provide full and free legal assistance to anyone who proves that he has insufficient funds; ...⁴³

The Federal Constitution also establishes that the PDO is the institution tasked with the implementation of the right to free legal assistance. Article 134 provides that “[t]he Public Defender’s Office is an essential institution to the State’s jurisdictional function and it shall be responsible for the legal orientation and the defence, at all levels, of the needy, as set out in art. 5, LXXIV”.⁴⁴

In 1994, Complementary Law No. 80 defined for the whole country the general rules governing the PDO. It focused on providing legal assistance and defence to the needy before the courts.⁴⁵ In 2009, the federal government adopted Complementary Law No. 132 to modernize the legal framework regulating the PDO.⁴⁶ The law substantially expanded the mandate of the institution and explicitly tasked it with the following objectives:

Art. 3-A. The objectives of the Public Defender are:

I - the primacy of the dignity of the human person and the reduction of social

43 Constitution of the Federative Republic of Brazil, 1988, Art. 5(LXXIV) (author’s translation).

44 *Ibid.*, Art. 134 (author’s translation). The autonomy of the institution was later guaranteed in 2004 through Constitutional Amendment No. 45, Art. 1.

45 Lei Complementar No. 80, 12 January 1994, Arts 1, 4.

46 Lei Complementar No. 132, 7 October 2009.

inequalities;

II - the affirmation of the Democratic State based on the Rule of Law;

III - the prevalence and effectiveness of human rights;

IV - the guarantee of the constitutional principles of full and complete defense and adversary system.⁴⁷

The 2009 law also completely revisited and expanded the institutional functions of the PDO, putting human rights at its core. Of particular relevance for preventing and combating torture are the following functions: to act in the preservation and reparation of the rights of victims of torture providing for the follow-up and interdisciplinary care of victims;⁴⁸ to promote the dissemination and awareness of human rights;⁴⁹ to offer multidisciplinary assistance to its beneficiaries;⁵⁰ to promote all human rights and to use all mechanisms able to ensure their protection, including to make representation to international human rights mechanisms;⁵¹ to present class actions;⁵² and to work in places of detention to ensure that the rights of all persons are respected under all circumstances.⁵³

Finally, in 2014, Constitutional Amendment No. 80 expanded the provisions relating to the PDO, drawing on the laws of 1994 and 2009 and seeking to expand the services of the PDO to the whole country.⁵⁴ Through Constitutional Amendment No. 80, the PDO is recognized as a “permanent institution” that represents “an expression and instrument of the democratic regime” and is explicitly tasked with promoting the human rights of those unable to afford legal representation.⁵⁵

Overview of the roles of the PDO in the penitentiary system

In addition to the expansion of its general mandate, the functions and prerogatives of the PDO in Brazil’s penitentiary system⁵⁶ grew after the adoption of the 1988

47 Lei Complementar No. 80, Art. 3 (modified by Lei Complementar No. 132) (author’s translation).

48 *Ibid.*, Art. 4(XVIII) (modified by Lei Complementar No. 132).

49 *Ibid.*, Art. 4(III).

50 *Ibid.*, Art. 4(IV).

51 *Ibid.*, Art. 4(X), 4(VI).

52 *Ibid.*, Art. 4(VII–VIII).

53 *Ibid.*, Art. 4(XVII).

54 For the objectives of the amendment, see Câmara dos Deputados, *Proposta de emenda à Constituição*, March 2013, p. 4, available at: www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=1064561&filename=Tramitacao-PEC+247/2013. Before the adoption of the amendment, there were several public defenders’ offices throughout the country. However, the amendment made clear that the services of the public defenders must be available in all judicial districts within eight years.

55 Constitution of the Federative Republic of Brazil, Art. 134, as modified by Constitutional Amendment No. 80, 4 June 2014, Art. 1.

56 It is important to note that at the state level, in Rio de Janeiro, Lei Complementar No. 6 on the PDO already granted the task of providing legal aid in detention centres to the public defenders (Lei Complementar No. 6, 1977, Art. 22, para 4). While it does not task the PDO with conducting

Federal Constitution. The adoption of Complementary Law No. 132 of 2009 and Law No. 12.313 of 2010 considerably expanded and detailed the functions of the PDO in the penitentiary system. This section details how the PDO became a fundamental component of the State infrastructure in place to prevent torture in detention centres and to ensure that the rights of detainees are respected.

In its initial 1984 version, the Lei de Execução Penal made no mention of the PDO. It recognized that legal aid must be provided to detainees unable to pay for an attorney,⁵⁷ but it left open who would provide the assistance.⁵⁸ With the adoption of the Federal Constitution of 1988 and the designation of the PDO as the institution entrusted with providing legal assistance, it became necessary to specify that the PDO would be entrusted with the legal aid of detainees.

The first step in that regard was the adoption of Complementary Law No. 80, which mentioned that the PDO could “act jointly with police and penitentiary establishments, in order to ensure to the person, under any circumstances, the exercise of their individual rights and guarantees”.⁵⁹ It also recognized the right of the public defender to communicate with his or her beneficiaries in person and in private, even when they are detained.⁶⁰

In 2009, with the adoption of Complementary Law No. 132, the PDO was specifically tasked with working in the penitentiary system, providing “permanent legal attention” to persons deprived of liberty.⁶¹ The law also provided that

it is incumbent on the State administration to reserve safe and adequate facilities for [the PDO’s] work, to grant access to all dependencies of the establishment independently of previous scheduling, to provide administrative support, to provide all requested information and ensure access to the documentation of those assisted [The State administration] cannot, under any circumstances, deny the right to interview with members of the Public Defender’s Office.⁶²

In 2010, Law No. 12.313 amended the Lei de Execução Penal to specify that the institution tasked with providing legal aid to detainees is the PDO.⁶³ It also provided that the states have to support the PDO in its work inside penitentiary units, that detention centres must provide a room for the interviews conducted by the public defender, and that the PDO should create a specialized unit to attend to released detainees and the family of detainees.⁶⁴ In addition to ensuring

inspections, this law provides that under no circumstance may the penitentiary administration impede the PDO from interviewing a detainee. Despite the normative framework in place, however, the PDO only started to provide legal aid to detainees permanently in 1999.

57 Lei de Execução Penal, Arts 10, 11, 15.

58 “The Federative Units must provide a service of legal assistance in penal establishments.” *Ibid.*, art. 16. This disposition allowed, as in the case of Rio de Janeiro up to 1999, that prison staff were in charge of providing legal aid and representation to detainees.

59 Lei Complementar No. 80, 12 January 1994, Art. 4(VIII).

60 *Ibid.*, Art. 128(VI).

61 *Ibid.*, Art. 108(IV), as modified by Lei Complementar No. 132, 2009.

62 *Ibid.*, Art. 108(IV), as modified by Lei Complementar No. 132 (author’s translation).

63 Lei de Execução Penal, Art. 16, as modified by Lei No. 12.313, 2010.

64 *Ibid.*, Arts 16, 83(5), as modified by Lei No. 12.313.

access to justice to persons deprived of liberty, the law was justified by the premise that

the constant presence of public defenders within prison units is an effective measure to reduce the rates of violence, corruption, torture and non-compliance with the law. ... The work of public defenders in prisons is fundamental to ensure effective enforcement of the Lei de Execução Penal, directly contributing to the reduction of the level of urban violence and the risks of rebellion.⁶⁵

Law No. 12.313 also modified the Lei de Execução Penal to recognize the PDO as a mechanism related to the enforcement of sentences and a formal part of the Brazilian penal system.⁶⁶ The Law specifically tasked the PDO with ensuring the legality of the manner in which the sentence is served,⁶⁷ and also drew a list of the functions of the PDO in relation to persons deprived of liberty. In particular, the institution is tasked with taking all necessary actions to ensure that the sentence is properly enforced. For instance, it can submit requests for the remission of sentence, request transfers of detainees to a different category of penitentiary establishment, apply for parole and pardon, ask for temporary absences from the detention centre, and request that the sentence should be served in a different district.⁶⁸ It can also appeal a judicial decision handed down during the sentence relating to a disciplinary offence⁶⁹ and make representations to the judge with the objective of initiating an administrative process in cases of violation of the rules relating to the enforcement of sentences.⁷⁰ Law No. 12.313 requires the PDO to regularly visit penitentiary units, to take adequate action to ensure their proper functioning, and to request that investigations about potential liability of State agents be undertaken;⁷¹ it can also request the deactivation, total or partial, of a detention centre operating in violation of the law or whose conditions of detention are inadequate.⁷²

As shown, the PDO's prerogatives related to access to justice for persons deprived of liberty and to the prevention of torture have been gradually expanded. In particular, ensuring that the human rights of detainees are respected, protected and fulfilled is at the core of the mandate of the PDO. To that end, it has been granted unfettered access to detention centres and can meet privately with all persons deprived of liberty. The Lei de Execução Penal now clearly states that the institution is competent to act on behalf of detainees for any matter relating to the enforcement of their sentence. It is also tasked with periodically visiting detention centres and taking action in case of irregularities.

65 Câmara dos Deputados, *Avulso: Projeto de Lei No 1.090-B de 2007*, 2008, para. 16, pp. 8–9 (author's translation), available at: <https://tinyurl.com/yxqlumca>.

66 Lei de Execução Penal, Art. 61(VIII), as modified by Lei No. 12.313.

67 *Ibid.*, Art. 81-A, 185, 186(IV), as modified by Lei No. 12.313.

68 *Ibid.*, Art. 81-B(I).

69 *Ibid.*, Art. 81-B(III).

70 *Ibid.*, Art. 81-B(IV).

71 *Ibid.*, Art. 81-B(V).

72 *Ibid.*, Art. 81-B(VI).

History of the PDORJ in the penitentiary system

The Public Defender's Office of the State of Rio de Janeiro did not have a regular presence in the penitentiary system before 1999.⁷³ Between the first time the PDORJ provided legal assistance in detention centres in 1982 and 1999, it visited detention centres only sporadically to conduct large numbers of interviews in a limited amount of time.⁷⁴ Legal assistance in detention centres was, at that time, regularly provided by prison staff;⁷⁵ this raised issues relating to the quality of the legal representation provided, stemming from the staff's lack of specialized training and alleged corruption.⁷⁶

In 1999, the State of Rio de Janeiro sought to ensure that police stations were not used to detain individuals for an extended period of time and started to transfer a large number of detainees to detention centres.⁷⁷ The PDORJ was asked by the state to provide legal assistance to the detainees inside the penitentiary system, a response to the growing overcrowding created by the transfer of detainees.⁷⁸ The state governor adopted Decree No. 25.685 of 8 November 1999, which sets out that public defenders will provide legal assistance to detainees in the penitentiary complexes Frei Caneca, Bangu and Niterói.⁷⁹ The PDORJ and the State Secretariat for Justice and Human Rights implemented the provisions of the decree through the adoption of Joint Resolution 01/1999. This resolution led to the creation of the Penitentiary System Unit (Núcleo do Sistema Penitenciário, NUSPEN) of the PDORJ, which was tasked with providing legal assistance to persons deprived of liberty in the state.

NUSPEN was initially composed of seven public defenders⁸⁰ but was expanded over the years, to thirty-six permanent public defenders at the time of this study. The State of Rio de Janeiro was the first to offer such services in detention centres and remains at the forefront in this regard today in Brazil.

In parallel to the work of NUSPEN, in 2004 the PDORJ created the Human Rights Unit (Núcleo de Defesa dos Direitos Humanos, NUDEDH), which was specifically tasked with providing legal assistance to individuals and groups whose human rights were violated.⁸¹ In 2011, NUDEDH was also tasked with conducting monitoring visits to places of detention.⁸² At the time of this study, both units were working with persons deprived of liberty: the public defenders of NUSPEN were representing detainees in their legal proceedings, while the members of NUDEDH were mainly conducting monitoring visits to places of detention.

73 Renata Tavares da Costa, "A atuação da Defensoria Pública no Sistema Penitenciário", in PDORJ, *Ideias para uma a construção de uma Execução Penal democrática*, Rio de Janeiro, 2010, p. 23.

74 Marcelo de Menezes Bustamante, "Histórico", in PDORJ, above note 73, p. 11.

75 R. Tavares da Costa, above note 73, p. 23.

76 Interview with Americo Grilo, former Coordinator of NUSPEN, Rio de Janeiro, 14 July 2016.

77 According to the coordinator of NUSPEN, the process only concluded in 2012.

78 Decreto No. 25.685, 8 November 1999, Preamble, para. 2; interview with Americo Grilo, above note 76.

79 Decreto No. 25.685, Art. 1.

80 Interview with Americo Grilo, above note 76.

81 PDORJ, Resolução 260, 11 February 2004, Art. 2a.

82 PDORJ, Deliberação CS/DPGE 82, 14 December 2011.

While the prison population of the State of Rio de Janeiro almost doubled between 2010 and 2017, it is noteworthy that the number of public defenders did not increase over this period.⁸³ It is estimated that the PDORJ now represents 90% of the prison population of the State of Rio de Janeiro.⁸⁴

Findings of the study: Practice and perception of the public defenders of the State of Rio de Janeiro

As mentioned above, several powers vested in the PDO are aimed at preventing torture. This section presents how, in practice, the public defenders of the State of Rio de Janeiro carry out their tasks and understand their own role in relation to the prevention of torture.

In this regard, Carver and Handley highlighted in their recent study the importance of the implementation of preventive measures related to the prevention of torture. Indeed, they found that

the way in which preventive measures are implemented is the main factor determining their effectiveness. ... [W]hile practice is determined partly by law, it is also affected by other considerations, such as the political and social environment and the level of knowledge and skills that practitioners have acquired through training.⁸⁵

The interviews and observations conducted for the present study were fundamental to understanding the way in which the public defenders can fulfil in practice the mandate vested in the PDORJ. In particular, the observations allow us to understand how the interviews between the public defenders and the detainees are conducted in practice, to witness the environment in which they take place, and to identify the constraints experienced by public defenders. The interviews also sought to highlight how the practitioners understand their own role in preventing torture, as well as their perceptions of the occurrence of torture in the penitentiary system of the State of Rio de Janeiro. The self-perception of the public defenders is a relevant element to understanding how they undertake their tasks in practice, as it helps to explain the choices and strategies they adopt.

Methodology

The findings of the present study are based on semi-structured interviews conducted between March and September 2016 with twenty-seven of the thirty-two public

83 Interview with Marlon Barcellos, Coordinator of NUSPEN, Rio de Janeiro, 29 August 2016.

84 PDORJ, *Convênio garante ao Verde a disponibilização de dados da Seap*, 25 May 2018, available at: www.defensoria.rj.def.br/noticia/detalhes/5943-Sistema-Verde-sera-implementado-no-Nuspen.

85 R. Carver and L. Handley, above note 10, p. 83.

defenders working for NUSPEN at the time,⁸⁶ as well as the public defender in charge of the monitoring visits conducted by NUDEDH, for a total of twenty-eight interviewees. All thirty-two public defenders of NUSPEN were contacted and invited to participate in the study. One public defender declined to take part in the interview, and four failed to respond. The three coordinators of NUSPEN were also interviewed, as were the public defender responsible for the area of criminal defence and a member of the Office of the Director of the PDORJ. Representatives of the National Penitentiary Department, the National Mechanism on the Prevention and Combating of Torture, the Public Ministry of the State of Rio de Janeiro, and civil society organizations (the Association for the Prevention of Torture and the Pastoral Carcerária Nacional) were also interviewed. The first coordinator of NUSPEN and the undersecretary of the Department of Justice of the State of Rio de Janeiro at the time of the creation of NUSPEN also accepted to be interviewed.

The interviews were conducted in Portuguese, without an interpreter; they were recorded and are on file with the author. All the persons interviewed consented, in writing, that the information provided would be used for an academic publication. The public defenders of NUSPEN were interviewed under the condition of anonymity. The other interviewees agreed to participate in the interview without having their anonymity preserved.⁸⁷

The author also participated in monitoring visits with NUDEDH, observed interviews conducted by NUSPEN with detainees, and attended meetings between public defenders and family members of detainees.

Practice and perception

The activities of the PDORJ can be divided into three parts: individual representation of detainees (under the responsibility of the public defenders of NUSPEN), monitoring visits to detention centres (under the responsibility of NUDEDH), and collective actions and public interventions (under the responsibility of the coordinators of NUSPEN).

Individual representation of detainees by public defenders of NUSPEN

As mentioned, Brazilian law entrusts public defenders with representing detainees before courts for any legal matter arising from their criminal conviction. In the case of the PDORJ, an internal regulation specifies that the public defender is also responsible for representing detainees with any other legal matter they might face. For instance, public defenders may seek to secure medical treatment for the

86 Of the thirty-six public defenders working at NUSPEN, four temporarily tasked with administrative functions were not considered for data collection as they were not conducting interviews at the time of the study.

87 The public defender in charge of prison visits within NUDEDH, the coordinators of NUSPEN and of the criminal defence section of the PDORJ, and the deputy head of the PDORJ consented not to have their identity kept confidential.

detainee, or represent him or her in family law procedures.⁸⁸ On average, one public defender represents 1,077 detainees.⁸⁹

Every week, the public defenders⁹⁰ conduct interviews in detention centres, meeting an average of sixty detainees per week.⁹¹ The interviews between public defenders and detainees are short (an average of five minutes) and focus mainly on legal matters relating to the enforcement of the sentence. The public defenders share information about transfers to a different category of penitentiary establishment and other related requests (parole, temporary absence from the detention centre, etc.). They also discuss disciplinary actions taken against detainees, as these may have further negative consequences for the detainee – they may lead, for example, to the postponement of a transfer to a different category of penitentiary establishment and ultimately the release of the detainee. The interview is normally conducted in a way such that the public defender shares basic information with the detainee (i.e., date of release, date of transfer) and provides information about any legal actions they may take on the detainee's behalf. They may sometimes also collect information from the detainee in order to better inform their legal strategy.

Occasionally, public defenders receive special requests from detainees not strictly related to the enforcement of the sentence. In particular, detainees denounce the lack of medical care, which prompts the public defenders to take action on their behalf in that regard. Other requests could relate to facilitating family visits, transfers to other detention centres, family law matters, etc.

The public defenders entrusted with the legal representation of detainees generally do not visit the cells. In fact, only three public defenders shared that they regularly visit the cells where detainees are held. The main reasons for not visiting them were because NUDEDH carries out inspections, because there is not enough time to visit cells regularly, and to avoid generating conflict with the authorities.

The interviews between public defenders and detainees are usually not conducted in private, although the public defenders were emphatic in stressing

88 The list of functions of the public defenders of the State of Rio de Janeiro is established by Deliberação CS/DPGE No. 80, 11 November 2011, Art. 7.

89 The PDORJ also meets with remand prisoners. The public defenders meeting with remand prisoners dealt with more than the double the number of detainees than those working with sentenced detainees, as they were each responsible for approximately 2,400 people. The interviews conducted by those public defenders are slightly different from those of the public defenders working with sentenced detainees. The interviews with remand prisoners seek to inform them of scheduled court hearings and to inform them that there is a public defender responsible for their case and that any question relating to the case should be addressed to him or her. The discussion is considerably shorter than those with detainees already sentenced. Indeed, while public defenders representing sentenced detainees met with an average of sixty detainees per day, public defenders working with remand prisoners met anywhere between 150 and 270 detainees per day.

90 At the time the interviews were conducted, the interviewed public defenders had been practicing law, on average, for the past 14.8 years. On average, they had been working with people deprived of liberty for 9.5 years. Nineteen public defenders interviewed were female, while nine were male.

91 Out of the twenty-five public defenders interviewed who work with convicted detainees, only four reported being able to visit each detainee at least every three months. Twelve public defenders stated that it takes at least five months to see someone again. According to internal regulations, each detainee should be visited at least every three months.

that the interviews are not conducted in presence of penitentiary staff. Twenty-three public defenders reported that they do not conduct interviews in private, and only three respondents said that they do.⁹² Indeed, other detainees are often attended to simultaneously by interns or support staff, under the supervision of public defenders. It is also common that detainees wait to be interviewed in the room where other interviews are already taking place, or not far from it, which allows them to eavesdrop on the conversations. Depending on the size of the room where public defenders meet with detainees, there can be anywhere from one to thirty detainees waiting in the room.

The authorities play a crucial role in facilitating the work of public defenders. In particular, public defenders have to share the list of the detainees with whom they want to meet one day in advance to allow smooth movement on the day of the interviews. The cooperation of staff is considered essential by public defenders because of the key role they play in facilitating the interviews by bringing the detainees to the public defenders' room. In that regard, nine public defenders spontaneously mentioned the importance of maintaining a good relationship with the penitentiary administration. These public defenders mentioned that the need for cooperation means they would refrain from personally confronting the authorities by being personally active in denouncing alleged acts of torture or by causing annoyance to the staff by visiting the cells.

It is not part of the routine of the public defender to actively inquire about occurrences of violence. As one public defender explained:

[If] we see signs of injuries or if we receive information about torture from a detainee, we ask questions. But if we do not have information, it is not part of our practice to act on that. That is because of the large number of interviews we have to complete.⁹³

According to another public defender:

[D]etainees see the public defender as their “exit door”. They might speak about torture if they have long sentences. They are interested in three things: appeal, release, and transfer to a better penitentiary establishment. When someone else from NUDEDH comes, the relationship is different. They talk to them to make denunciations. It rarely happened to me; when it occurs, it must be a very serious situation. Even when I ask, they mention that they do not want to talk about that; they want to address the issue of liberty.⁹⁴

One public defender stressed that “our focus is legal; it is not to identify torture”.⁹⁵

Although inquiring about torture is not part of their routine, public defenders identified various means through which they receive allegations of

92 The public defender responsible for the monitoring visits was excluded from this section. Also, one public defender did not share information about the privacy of the interview.

93 Interview with Public Defender 6, Rio de Janeiro, 22 June 2016.

94 Interview with Public Defender 10, Rio de Janeiro, 6 April 2016.

95 Interview with Public Defender 15, Rio de Janeiro, 16 June 2016.

torture: interviews in detention centres, appointments with family members, letters sent to the PDORJ, and notes sent through other detainees during interviews.

In general, however, public defenders seldom receive denunciations of torture during individual interviews. When public defenders collect allegations of torture, they notify the coordinators of NUSPEN, who are responsible for the follow-up.⁹⁶ Between October 2015 and August 2016, only eight accounts were shared by public defenders with the coordinators of NUSPEN.⁹⁷ None resulted in a formal denunciation to the Public Ministry.⁹⁸

Monitoring activities of NUDEDH

The PDORJ also conducts monitoring visits to detention centres.⁹⁹ At the time of the data collection, the NUDEDH was responsible for the organization of these visits. It counted on one public defender and two interns to organize and take part in the visits. As per internal regulations, two inspections were organized every month.¹⁰⁰ One member of NUSPEN usually takes part in the visit, as well as a structural engineer.

The inspection is based on observations and discussions with detainees, and seeks to assess conditions of detention and identify overarching issues. It does not seek to address individual cases. The discussions with detainees are conducted collectively and in common spaces in order to avoid reprisals. During inspections, individual interviews in private are conducted only exceptionally. The public defender in charge of such inspections considers that detainees are more scared to share their stories in private than in a group. A report is prepared for each visit conducted. The reports are confidential, shared within the PDORJ and with the MEPCT. The PDORJ can, however, decide to use them in judicial proceedings against the state.¹⁰¹

According to the public defender in charge of the inspections, detainees share accounts of torture in the vast majority of inspections.¹⁰² They are either shared spontaneously or after the public defender has asked questions about the occurrence of violence. However, according to this public defender, detainees usually do not want to officially lodge complaints because of fear of reprisals. When NUDEDH receives more substantiated denunciations, it shares them with

96 At the time the study was conducted, no protocol was in place to specify the steps that public defenders should take when they collect allegations of torture. However, in June 2018, the PDORJ adopted Resolução 932, which establishes a protocol detailing how public defenders should respond when they receive accounts of torture and other cruel, inhuman or degrading treatment or punishment. It establishes that NUDEDH is responsible for handling such cases.

97 Interview with Marlon Barcellos, above note 83.

98 *Ibid.*

99 At the time of data collection, only NUDEDH was conducting inspections. NUSPEN started to conduct monitoring visits in December 2016 and conducted six visits up until July 2018.

100 PDORJ, above note 82, Art. 12(2).

101 Interview with Marlon Barcellos, above note 83.

102 Interview with Robert Fraenkel, NUDEDH Public Defender, Rio de Janeiro, 11 August 2017.

NUSPEN for further internal consideration. NUDEDH shares an average of five to ten such allegations per month with NUSPEN.

Between 1 January 2015 and 11 August 2017, only three cases of torture involving four victims identified in the context of inspections were formally denounced to the competent authorities. The public defender responsible for monitoring visits also highlighted that NUDEDH received more denunciation of deaths considered “suspicious” (i.e., which might be the result of violence) than formal denunciations of torture.

Collective actions and political activities by NUSPEN

While public defenders of NUSPEN are responsible for representing detainees before the courts for their individual cases, the coordinators of NUSPEN, together with NUDEDH, are responsible for collective actions taken on behalf of detainees. For instance, collective actions challenging rules concerning visits by relatives, seeking the recognition of reading as an activity leading to remission, or requesting the deactivation of a detention centre are presented by NUSPEN.

Additionally, both NUDEDH and NUSPEN collaborate with other organizations to tackle the issue of torture in the penitentiary system. In particular, the PDORJ is a member of the State Committee for the Prevention and Combating of Torture, a forum for discussing policies and initiatives related to torture prevention. Since 2015, the PDORJ is also part of a working group on torture that includes the Public Ministry and the MEPCT. The working group seeks to improve coordination amongst these institutions when accounts of torture arise.

The PDORJ also advocates for the protection of the rights of people deprived of liberty in international human rights fora. It has denounced several situations before the inter-American human rights system and the Special Procedures of the UN Human Rights Council, and has met with representatives of the SPT. The PDORJ also frequently intervenes in the media, drawing the attention of the public to problems in the penitentiary system.

Public defenders’ perception of their role and of occurrences of torture in Rio de Janeiro

This section focuses on public defenders’ perception of their own role in preventing torture. It also seeks to present their perception of occurrences of torture in Rio de Janeiro, with particular attention placed on their perception of the impact that their actions have on the prevention of torture. The relevance of the findings in this regard rests on the conclusion by Carver and Handley that “the way the torture prevention measures are implemented is the main factor determining their effectiveness”.¹⁰³ In turn, the way the practitioner will implement the preventive measures is influenced by how they understand their role, as well as the potential

103 R. Carver and L. Handley above note 10, p. 83.

impact of their work. Indeed, their perspective on the prevalence of torture in the penitentiary system and their role in preventing it will inform the way they will address this issue. Highlighting these subjective considerations helps to explain the choices made by the public defenders.

First, all twenty-eight public defenders interviewed considered that it is part of the role of the PDORJ to prevent torture and identified various ways in which the institution plays this role. Being present inside all detention centres, meeting regularly with detainees and conducting monitoring activities were relevant actions identified by the public defenders. According to them, this regular presence and providing detainees with a channel for denouncing torture would, in turn, result in prison staff refraining from torturing detainees because of the possibility of denunciations and being found responsible for these acts. The public defenders also mentioned that their work helps to reduce tensions and risk of violence inside the detention centre by providing detainees with regular updates on the date of their release and transfer to other categories of penitentiary establishment.

It is important to mention that twenty-two out of the twenty-eight public defenders spontaneously shared their belief that the presence of representatives of the institution has the *effect* of preventing torture. While public defenders provided a variety of reasons for this belief, it is striking to see that such a high number of public defenders spontaneously mentioned this fact. This is interesting because public defenders do not actively seek to ascertain whether detainees are victims of violence, and they rarely receive such allegations during the individual interviews conducted. Indeed, the interviews primarily focus on the procedural aspects of the enforcement of the sentence, such as the date of release and the transfer to other penitentiary establishments.

When asked whether they consider that torture is underreported in the State of Rio de Janeiro, twenty-four out of the twenty-eight public defenders answered in the affirmative.¹⁰⁴ One of the twenty-eight public defenders said that torture was maybe underreported, and two did not share an opinion on the matter. Only one public defender considered that torture was not underreported in Rio de Janeiro.

The public defenders who considered that torture was underreported were asked the reason for such underreporting. Of these twenty-four public defenders, fourteen identified detainees' fear of reprisal as a reason. Nine of those public defenders also mentioned explicitly that the lack of protective mechanisms for individuals denouncing torture in detention explained why public defenders

104 The prosecutor in charge of collective rights in the penitentiary system of the Public Ministry of the State of Rio de Janeiro, Tiago Joffily, also considered that the cases of torture officially denounced represent a "tiny fraction" of all instances of torture in the penitentiary system of the State of Rio de Janeiro. Interview with Tiago Joffily, Prosecutor of the Public Ministry of the State of Rio de Janeiro, Rio de Janeiro, 27 June 2016.

could not ensure their safety.¹⁰⁵ Five public defenders identified the lack of accountability and possibility of getting redress as a reason why detainees do not denounce torture. Four public defenders held that detainees have often come to believe that torture is simply to be expected when one is detained. Three public defenders stressed that detainees often do not make the distinction between the judge, the prosecutor and the public defender – given the role of the judge and the prosecutor in the conviction of the detainees, this confusion may inhibit the trust that detainees have in public defenders. Finally, one public defender mentioned generally a possible lack of trust in the public defender on the part of detainees.

The public defenders were asked to identify the strengths of the PDORJ in preventing torture. Half of the public defenders identified their regular presence in all detention centres of the state. Seven public defenders highlighted the legitimacy of the institution in the eyes of detainees and staff. Five respondents stressed the ability of the PDORJ to act strategically, including through actions seeking to safeguard collective rights. Three persons identified the PDORJ's capacity to use the judicial system, two identified the competence of the public defenders, and two referred to the institution's capacity to provide legal information. Tellingly, only one public defender mentioned the capacity to identify torture.

Finally, the public defenders were asked to identify the weaknesses of the institution when it came to the prevention of torture. Sixteen of the twenty-eight public defenders considered that lack of resources (support staff, psychologists, structural engineers, material resources, etc.) is a shortcoming of the PDORJ. Three respondents considered that there is a lack of strategic action in relation to torture. Three public defenders cited the lack of a protocol to respond to accounts of torture shared by detainees. Three respondents considered that more monitoring visits should take place. Finally, three public defenders complained that they are dependent on other institutions, such as the Public Ministry, when it comes to following up on denunciations of torture.

Discussion

The activities undertaken by the PDORJ in detention centres, as reported by interviewees, are numerous and closely mirror the functions granted to it in the Lei de Execução Penal, Complementary Law No. 80 and the Federal Constitution of 1988. Most notably, the PDORJ regularly meets persons deprived of liberty unable to pay for an attorney, represents them before the courts, conducts regular monitoring visits, engages in public and international fora, and meets with their family members.

¹⁰⁵ The lack of a protective mechanism for detainees denouncing torture was also identified as a reason for underreporting of torture by Tiago Joffily, above note 104, and the Ombudsman of the National Penitentiary Department, Maria Gabriela Peixoto. Interview with Maria Gabriela Peixoto, Ombudsman of the National Penitentiary Department, Brasília, 26 July 2016.

In relation to torture, this study seeks to explain the paradox between the extensive presence of the PDORJ in detention centres and the very few instances of torture that are officially reported. In that regard, and as mentioned previously, it is important to note that while very few detainees lodge formal complaints of torture with the help of the PDORJ, public defenders do, in practice, receive accounts from detainees. In fact, the PDORJ received allegations of torture in the “vast majority of monitoring visits”. Public defenders also received eight accounts of torture over almost a year in the context of the individual interviews between the public defenders of NUSPEN and detainees. However, almost all public defenders still consider torture to be “underreported” in Rio de Janeiro.

This section will explain why the PDORJ might be more successful in receiving accounts of torture during monitoring visits than during individual interviews and why formal denunciations of torture are scarce. It will then present recommendations aimed at better identifying and responding to denunciations of torture.

Monitoring visits and individual interviews

It is interesting to note that the PDORJ is more successful in receiving accounts of torture during monitoring visits than in individual interviews with detainees. The way the interviews are conducted might explain why few public defenders receive allegations of torture during the interviews. Public defenders, as a general practice, do not inquire about violence and torture during the interviews. Due to the large number of detainees interviewed per day (an average of sixty), interviews are short (the average length is five minutes) and focus almost exclusively on procedural matters related to the detainee’s sentence. Some public defenders shared their opinion that there was no time to inquire about torture. Further, the lack of knowledge of the role of the public defender by detainees and the fact that public defenders are regularly confused with other actors like judges and prosecutors might explain why detainees do not share information about torture during interviews. Moreover, detainees often prefer to focus on the “exit door” – i.e., they prefer to discuss their sentence and details about when they might be released. All these factors could explain why the full potential of the regular presence of the public defender through the weekly interviews as a mechanism to receive denunciations of torture is not fulfilled.

On the other hand, during monitoring visits, public defenders clearly specify that the purpose of their visit is not to discuss a detainee’s individual sentence, but to assess the conditions of detention. Public defenders participating in the visits proactively seek information relating to possible human rights violations taking place in the detention centre. The fact that the public defenders from this team clearly state that they are concerned about potential human rights violations may result in detainees taking the view that monitoring visits are a more appropriate opportunity to share their experience. All in all, for the reasons mentioned, and despite the regular presence in the detention centre of public defenders responsible for the legal representation of detainees, monitoring visits

appear to be the channel that is more likely to result in receiving complaints of torture from detainees.

Absence of formal denunciation

It is also striking to note that while accounts of torture are not uncommon (taking into account the denunciations received during monitoring visits), very few detainees decide to lodge formal complaints and to seek redress with the help of the PDORJ. Rather, when detainees share their experience with the public defenders, they do it informally.

In this regard, many public defenders shared the belief that detainees' fear of reprisal, coupled with lack of trust in the justice system, explains why so few complaints are lodged for torture. One third of the respondents also considered that they are ill-equipped to adequately follow up on denunciations of torture. Indeed, because of the lack of effective protective measures for those who complain, they consider themselves unable to ensure the physical safety of detainees who may decide to go forward with a formal complaint.

In this context, it is possible that the public defenders prefer to focus on procedural matters related to the sentence of detainees because they consider this to be a more certain and efficient manner in which to concretely improve the situation of detainees. In particular, they believe they can secure tangible outcomes by focusing their efforts on the transfer of detainees to a better category of penitentiary establishment and on their release. This choice is understandable in light of the impact that overcrowding and lack of access to health care has on the well-being of detainees.

Additionally, public defenders pointed out that lack of resources is a weakness of the institution (the prison population of the State of Rio de Janeiro doubled between 2010 and 2017, while the number of public defenders remained stable). In other words, it is possible to suggest that focusing on procedural matters pertaining to the enforcement of the sentence is seen as a more efficient use of their limited time, resources and expertise, and does not present the risks related to formally denouncing acts of torture in the absence of an effective protection mechanism.

Recommendations to better identify and respond to denunciations of torture by the PDORJ

This study on the practice and perception of public defenders has highlighted a paradox between the presence of the PDORJ in the penitentiary system of Rio de Janeiro and the low number of torture complaints that were lodged officially. This paradox is particularly interesting as it collides with the assumptions of public defenders about their work.

On the one hand, public defenders believe that their presence has the effect of preventing torture as it has a deterrent effect on prison staff, who are afraid of denunciations and of being found responsible for acts of torture. On the other

hand, public defenders consider that detainees refrain from denouncing acts of torture because of fear of reprisal, and they recognize that even in their capacity as public defenders, they are in fact powerless to effectively protect detainees who decide to lodge a complaint. This situation raises the obvious question of whether the public defender is indeed able to “decrease and discourage violations, as well as ... to punish [the] perpetrator”.¹⁰⁶

As mentioned previously, this study does not seek to determine whether public defenders do, or do not, effectively prevent torture in the penitentiary system of Rio de Janeiro. However, it identifies certain elements that may hinder their capacity to do so, particularly relating to the effectiveness of individual interviews. In this regard, the PDORJ could take several steps to help strengthen the figure of the public defender in the individual interview as a channel for detainees to denounce torture.

First, the most straightforward (and costly) recommendation would be to reduce the ratio of detainees per public defender. By doing so, public defenders could spend more time with detainees, better explain their own role (including by differentiating themselves from prosecutors and judges), and address the issue of torture during the interview. Indeed, as provided for by the Criminal Enforcement Law, public defenders are not only responsible for issues related to procedural matters related to the sentence such as the progression of penitentiary regimes, but are also more broadly responsible for the regular enforcement of the sentence, including ensuring that detainees are not subject to torture. Sharing information about torture and the role of the public defender in preventing it and seeking redress are elements that could contribute to deconstructing torture as an unavoidable consequence of being detained.

Second, independently from any improvement in the ratio of detainees per public defender (which would likely be contingent on an increase in the budget allocated to NUSPEN), public defenders could seek to address the issue of torture strategically with detainees in the context of individual interviews. In fact, public defenders could discuss these issues with detainees when they meet for the first time, at the beginning of their detention. The issue of torture could also be addressed when detainees are transferred from one detention centre to another, during the first interview with a new public defender. Further, the PDORJ could decide to inquire more actively about such issues during individual interviews with detainees in detention centres that are considered more problematic, based on information shared by the Public Ministry, the MEPCT or NUDEDH.

These interventions should obviously avoid putting detainees at higher risk and creating expectations that cannot be met by the PDORJ. However, addressing the issue of torture in the context of individual interviews with detainees is necessary if the institution is to fulfil its role of holistically ensuring the regular enforcement of the sentence and protecting the human rights of the most marginalized.

106 Brazil, above note 42, para. 194.

Further, while the lack of capacity to ensure the protection of incarcerated victims of torture due to their exclusion by the relevant federal law from the protection mechanism severely limits the number of denunciations of torture, the PDORJ can take action and advocate for the adoption of a system that would take into account such victims. In this regard, more systematic collecting and compiling of accounts of torture received by the institution might allow the PDORJ to better advocate for legal reforms which could, in turn, contribute to ensuring that persons denouncing torture do not suffer reprisals. The information collected daily by public defenders relating to accounts of torture that cannot be used in legal procedures could nevertheless help provide a more accurate image of the reality inside Rio de Janeiro's penitentiary system. With this information readily available to the PDORJ, it could make use of its broad competence to advocate in public fora, both nationally and internationally, in favour of legal reforms related to the treatment and protection of detainees.

Additionally, public defenders could ensure that the information collected will be managed and used in a way that would avoid putting the detainees at risk of reprisals, by ensuring their confidentiality. Public defenders could also manage the expectations of the detainees, informing them that the information shared with the PDORJ will not be used to seek compensation or the punishment of the perpetrators.¹⁰⁷

Conclusion

This article sought to present the work of the Public Defender's Office of the State of Rio de Janeiro in the prevention of torture of persons deprived of liberty. It explained, based on the public defenders' practice and the perception they have of their role, why despite the significant presence of public defenders in detention facilities, few detainees reach out to them to formally denounce acts of torture. According to the interviews conducted for this study, public defenders believe that the limited resources allocated to the institution, in the context of a sustained increase in the population of the penitentiary system, severely hinder their capacity to inquire and follow up adequately on allegations of torture. Also, the lack of a protective mechanism for individuals denouncing torture while serving a sentence is seen as a significant obstacle to adequately handling denunciations of torture. Faced with these constraints, public defenders feel powerless and prefer to focus their attention and resources on issues over which they believe they can assert some influence – i.e., the transfer of detainees to better detention facilities, and the timely release of detainees. Taking into account overcrowding and lack of access to health care in the penitentiary system of the State of Rio de Janeiro, this appears to them to be a more efficient way of concretely improving the situation of persons deprived of liberty.

¹⁰⁷ The United Nations Subcommittee on the Prevention of Torture and the International Committee of the Red Cross use a similar mode of action.

The author identified suggestions for strengthening the position of the PDORJ as a reception channel for denunciations of torture. First, it could reduce the ratio of detainees per public defender. This would allow the practitioners to have more time to address issues like human rights violations in the penitentiary system. Second, the public defenders could inquire strategically about the incidence of torture, such as at certain specific moments of the sentence, or in specific detention centres where it is likely that higher number of victims of torture will be encountered. Finally, public defenders could systematically register all accounts of torture obtained during interviews, even those that cannot lead to formal complaints. With this information in hand, the PDORJ could better advocate for legal reforms leading to the adoption of a protective system for victims of torture who are incarcerated. It is argued that these steps would help the PDORJ to fulfil its mandate to protect the human rights of persons deprived of liberty.

This article did not seek to assess whether the presence of the PDORJ in the penitentiary system of Rio de Janeiro has had the impact of reducing torture. Throughout the interviews, several respondents shared the belief that the situation in the penitentiary system has gradually improved since 1999, in part due to their regular presence. In 2019, twenty years will have passed since the PDORJ assumed the responsibility of providing legal assistance in the state's detention centres. This will be an opportunity to fully assess the concrete impact of the PDORJ on the prevention of torture in the penitentiary system.

French foreign fighters: The engagement of administrative and criminal justice in France*

Sharon Weill

Sharon Weill (PhD, University of Geneva) is a Senior Lecturer and Associate Researcher at Sciences Po Paris (PSIA/CERI) and an Assistant Professor at the American University of Paris. Her research focuses on the engagement of courts with international law through a socio-legal approach. Currently she conducts empirical research on foreign fighters' trials in France, financed by the French Ministry of Justice. Since 2017 she has been an expert member of the French National Consultative Commission on Human Rights.

Abstract

Since 2012, it is estimated that 2,000 French nationals have joined jihadist armed groups listed by the UN as terrorist organizations in Syria and in Iraq. Consequently, a new prosecution policy has been introduced in France. To date, more than 200 persons have been prosecuted and 1,600 persons have been placed under criminal investigation. In parallel, after the 13 November 2015 terror attacks in Paris, a State of emergency was declared. Persisting for two years, it introduced

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derogative administrative measures that slowly transgressed into regular criminal law. Consequently, French administrative and criminal courts, with ordinary judges and professional routines, find themselves involved in matters related to armed conflicts – a completely new phenomenon for them. What role has been performed by French criminal and administrative judges in the global fight against terrorism?

This article takes a close look at France’s fight against terrorism and the engagement of its domestic legal system in the context of foreign fighters and suspects of terrorism. It outlines the radicalization processes of French administrative and criminal law along with their hybridization and complementarity. While the armed conflict in Syria and Iraq and the complex geopolitical context are clearly present in French courtrooms, international humanitarian law and international criminal law frameworks are almost entirely absent. At the same time, by granting a growing power to the administration, the repressive and pre-emptive approaches introduced within criminal and administrative law transform liberal conceptions of law and justice.

Keywords: foreign fighters, counterterrorism, French legal system, war on terror, domestic courts, criminal prosecution.

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Introduction

Since 2012, around 2,000 French nationals have joined jihadist armed groups in Syria and Iraq that are listed by the United Nations (UN) as terrorist organizations. Between 2014 and 2018, over 200 persons were prosecuted and 1,600 persons were placed under criminal investigation.¹ In parallel, after the 13 November 2015 terror attacks in Paris, a state of emergency was declared. Persisting for two years, this state of emergency allowed the government and the legislature to introduce derogative administrative measures that have slowly transgressed into regular law. Consequently, French administrative and criminal courts, with ordinary judges and professional routines, find themselves involved in global conflicts – a completely new phenomenon for them. What role has been performed by French criminal and administrative judges as transnationalized actors in the global fight against terrorism?

This article takes a close look at France’s fight against terrorism and the engagement of its domestic legal system in dealing with foreign fighters and suspects of terrorism. The first part of the article analyzes the transformation of administrative law through the study of two measures: imposing a prohibition on

1 As of May 2018, it was also estimated that over 300 French persons had been returned to France and 1,300 French individuals, including 500 children, were still present in Syria and Iraq. See Centre d’Analyse du Terrorisme (CAT), *La justice pénale face au djihadisme: Le traitement judiciaire des filières syro-irakiennes (2014–2017)*, May 2018, p. 10, available at: <http://cat-int.org/wp-content/uploads/2018/05/Rapport-Justice-p%C3%A9nale-face-au-djihadisme.pdf> (all internet references were accessed in June 2019).

leaving French territory, and house arrest. The second part of the article discusses the law, procedure and prosecution policies employed in the French criminal justice system. Together, the administrative and criminal systems form a centralized counterterrorism legal mechanism with a manifest logic of war but without specifically addressing the laws applicable in armed conflict. Instead, this mechanism introduces repressive and pre-emptive practices within domestic criminal and administrative processes that opt for their hybridization, thereby transforming liberal doctrines of law.

The radicalization of French administrative law

In recent years, new administrative measures on surveillance and control have been introduced in French law, granting more and more power to the Ministry of the Interior and security agencies. This phenomenon reached a peak during the two-year state of emergency declared immediately after the November 2015 terror attacks in Paris,² when extensive derogative powers such as house arrests, night raids and closing of religious sites were attributed to the executive. When the state of emergency ended, five new chapters (out of a total of ten) were introduced into the Law on Internal Security under the section “Fight against Terrorism”.³ A significant number of the state of emergency prerogatives were transported into regular law through this amendment, most notably in Chapter 8 of the Law on Internal Security, entitled “Individual Measures of Administrative Control and Supervision”.

The following part of this article discusses two administrative measures: the prohibition on leaving French territory, and house arrest. These measures are employed against foreign fighters and persons identified as potential foreign fighters or against suspects in terrorist-related activity in France. The discussion will illustrate (1) the constant expansion of administrative power in imposing restriction on liberties, and (2) the growing competence of administrative judges to review administrative measures *ex posteriori*, while it is the ordinary judges

2 The state of emergency was declared after the terror attacks of 14 November 2015 and lasted until 30 October 2017. The longest in French history, it was prolonged six times and further amended. Before that, a state of emergency was declared in France three times in the context of the Algerian war, in 1984 in New Caledonia, and in 2005 for five weeks following violent events in the suburban areas of Paris. The prerogatives of the government under a state of emergency are set out in the Law on State of Emergency, Law No. 55-385, 3 April 1955.

3 It is interesting to look at the process of amendments brought into the Law on Internal Security (Law No. 2012-351, 12 March 2012) under the section “Fight against Terrorism”. In 2012 the three first chapters were introduced: “Chapter 1: Fight against the Financing of Terrorist Activities”; “Chapter 2: Access to Automated Administrative Processing and Data Held by Private Operators”; “Chapter 3: Implementation of Video-Protection Systems”; in 2014 another chapter was added, “Chapter 4: Prohibition from Leaving the Territory”; in 2016, “Chapter 5: Administrative Control of Returns on the National Territory”; and finally in 2017, chapters 6–10: “Chapter 6: Perimeters of Protection”; “Chapter 7: Closing of Places of Worship”; “Chapter 8: Individual Measures of Administrative Control and Supervision”; “Chapter 9: Visits and Seizures” and “Chapter 10: Parliamentary Scrutiny”.

who should be entrusted with safeguarding individual liberties as established by Article 66 of the French Constitution.

The prohibition on leaving French territory

The law granting the Ministry of the Interior the authority to forbid individuals from leaving French territory states that “any French national may be subject to the prohibition on leaving the territory if there are serious grounds for thinking that (s)he is planning” to travel abroad in order to participate in terrorist activities or reach a territory where terrorist groups are operating, “in conditions likely to lead” the individual to be a threat to public safety after their return to French territory.⁴ In November 2014, when the measure was first codified, it could be imposed for up to six months and could be renewable for a maximum duration of two years. A year after it was passed, in October 2015, the Constitutional Court approved this law as constitutional. The Court based its ruling on the fact that a time limit was provided to guarantee an appropriate balance between the restriction of the liberty of movement and private life and security concerns.⁵ However, in July 2016, less than a year after this decision (and as the two-year limit was about to be completed in the first cases issued in November 2014), the time limitation was simply removed from the law. Today, the restriction on movement can be renewed without any limit.⁶ The following decree issued by the Ministry of the Interior may indicate that this is not merely a hypothetical scenario:

4 Appeal on the decision of prohibition against leaving the territory can be made within two months, and the administrative judge shall render his decision within four months. Law on Internal Security, Art. L. 224-1 (amendment of 13 November 2014). See Aurélie Cappello, “L’interdiction de sortie du territoire dans la loi renforçant les dispositions relatives à la lutte contre le terrorisme”, *AJ Pénal* 2014, 2014, p. 560; Hajer Rouidi, “La loi n° 2014-1353 du 13 novembre 2014 renforçant les dispositions relatives à la lutte contre le terrorisme: quelles évolutions?”, *AJ Pénal* 2014, 2014, p. 558.

5 Constitutional Council, *M. Omar K. (Interdiction administrative de sortie du territoire)*, Decision No. 2015-490 QPC, 14 October 2015, available in French at: www.conseil-constitutionnel.fr/decision/2015/2015490QPC.htm. The petitioners argued that this authority constituted a disproportionate infringement on the freedom of movement and the right to an effective judicial recourse by a judicial (and not administrative) authority as guaranteed by Article 66 of the Constitution. While rejecting the petition, the Constitutional Court based its decision on three main arguments. First, it considered the justificatory motives for the prohibition to be “precisely defined”. Second, it stated that “no constitutional exigency requires such a decision to be pronounced by a tribunal” rather than an administrative body. This point, however, is contentious since some interpretations of Article 66 have concluded that any measure impeding the freedom of liberty should be imposed and controlled by the judicial authority rather than the administration or administrative justice order. Third, to justify its final ruling, the Court insisted on the fact that a prohibition’s “total duration cannot exceed two years”, and that with this limitation “the legislator has adopted measures assuring a conciliation that is clearly not unbalanced between the freedom of movement and the protection from attacks on public order”.

6 Amendment introduced to Art. L224-1 of the Law on Internal Security by Art. 11 of Law No. 2016-987, 21 July 2016. According to a memo by the Ministry of Justice, “[t]he measure can now be renewed without limitation as long as the conditions for its delivery continue to be met”. See “Circulaire du 5 novembre 2016 relative à l’articulation des mesures administratives et des mesures judiciaires en matière de lutte contre le terrorisme et la prévention de la radicalisation”, *Bulletin Officiel du Ministère de la Justice*, 5 November 2016, available at: www.textes.justice.gouv.fr/art_pix/JUSD1633563C.pdf.

Personal data [of persons banned from leaving French territory] will be kept for three years, from the date of the issue of the prohibition from leaving the territory. In the case of a renewal of the prohibition within this three-year period, the retention period of the data is extended by three years from the date of this new decision. In all cases, the maximum storage period may not exceed twenty years.⁷

The National Commission on Informatics and Liberty (Commission Nationale de l'Informatique et des Libertés, CNIL), a national body entrusted, *inter alia*, with surveying the impact of legislation related to data collection on individual rights, gave a favourable opinion on the above decree prior to its issue. It observed that “in a context of expanding threat of terrorism, the use of prohibition from leaving the territory is becoming more and more frequent”.⁸ Still, there is little data available on how this prohibition has been imposed since 2014. According to a Senate report, the minister of the interior had imposed a total of 430 prohibitions on leaving the territory by November 2016, 150 of which had been renewed at least once after the first six months.⁹ In November 2017, a think tank reported that 500 French nationals have been under this regime.¹⁰ In the latest report from November 2018, the government confirmed that the use of this measure is declining: in 2018 only forty-nine measures were issued, compared to 181 new measures issued the year before. According to the government, this is a result of “a decrease in the inclinations towards the theaters of operations of terrorist groups, probably due to the evolution of the political and military situation in the countries housing these operations”.¹¹

House arrest: From state of emergency measure to a norm in administrative law

Until 2016, individuals suspected of terrorist activities, including foreign fighters, could be placed under house arrest only as a measure taken through a judicial criminal process (as a means of pre-trial detention or as punishment after a criminal proceeding). The only derogation authorized was set under the regime of a state of emergency, in the framework of a law passed during the French–

7 Article 3 of the Decree of 7 August 2017 authorizing the processing of personal data relating to the investigation and monitoring of exit bans, available in French at: www.legifrance.gouv.fr/eli/arrete/2017/8/7/INTD1708806A/jo.

8 CNIL, Decision No. 2017-229, opinion on draft order authorizing the processing of personal data relating to the monitoring of orders prohibiting leaving the territories, 20 July 2017, available at: <https://tinyurl.com/y6eya9mb>.

9 As of November 2016, 244 prohibitions were in force. See Alain Marc, “Projet de loi de finances pour 2017: Sécurités”, 24 November 2016, p. 30, available at: www.senat.fr/rap/a16-146-15/a16-146-151.pdf.

10 See CAT, “European Jihad Watch”, No. 4, November 2017, available at: <http://cat-int.org/wp-content/uploads/2017/11/EJW-Novembre2017-french.pdf>.

11 *Government Report to Parliament on the Implementation of Law No. 2017-1510 of 30 October 2017 Strengthening Internal Security and the Fight Against Terrorism*, 1 November 2018, p. 20, available at: www2.assemblee-nationale.fr/content/download/75798/778106/version/1/file/Loi+SILT+-+Rapport+au+Parlement+2018.pdf.

Algerian liberation war in 1955.¹² The administrative authority to place persons under house arrest was expanded during the 2015–17 state of emergency. The 1955 law has been amended a few times to grant more powers to the authorities, such as imposing limits on communication with certain individuals, requiring individuals to come to the police station up to three times a day, and allowing convicts of terrorism to be placed under “mobile electronic surveillance”.¹³ Until December 2016, the law limited house arrest to twelve months. However, an amendment was later added to allow the minister of the interior to request a prolongation from the administrative judge for another ninety days. Such a request can be renewed without limits.¹⁴ As with most administrative measures, the government has the power to enforce them without prior legal proceedings. The administrative judge can review the measure only *a posteriori*, if an appeal is made.¹⁵

House arrest as an administrative measure was first introduced in French law outside of the exceptional state of emergency measures on 3 June 2016. This new amendment gave the government the power to place individuals who are returning from Syria, and for whom there are serious reasons to believe that they pose a threat to public security, to be placed under administrative control, including house arrest, and to be required to periodically check in at police stations up to three times a day, for a period of a month. Another amendment quickly prolonged the period to two months.¹⁶ On October 2017, Chapter 8 on “Individual Measures of Administrative Control and Surveillance” was included in the Law on Internal Security. The chapter is known by its French initials MICAS (“Mesures individuelles de contrôle administratif et de surveillance”), which have become a synonym for the category of people to which it has been applied.

The new norms allow for different surveillance measures, including imposing house arrest for up to one year “for the sole purpose of preventing the

12 See Article 6 of the original Law on State of Emergency of 3 April 1955: “The Minister of the Interior and, in Algeria, the Governor General may order a house arrest in a territorial division or a specific locality of any person residing in the area fixed by the decree referred to in Article 2, whose activity proves to be dangerous for security and public order” (unofficial translation).

13 In November 2015, an amendment added the possibility of requiring the persons arrested to come to the police station up to three times a day and to be prevented from contacting certain persons, and allowing persons previously convicted of terrorism-linked offences to be placed under “mobile electronic surveillance”: Art. 4 amending Law No. 2015-1501, 20 November 2015. In December 2016, another amendment was introduced to regulate the prolongations. These were found to be in part unconstitutional by the Constitutional Court in March 2017 (Decision No. 2017-624 QPC, 16 March 2017).

14 See Art. 6(14–16) of the 1955 Law on State of Emergency as amended by Art. 2 of Law No. 2016-1767, December 2016.

15 Law on State of Emergency, Art. 14-1.

16 Law on Internal Security, Arts L225-1, L225-2 (amendments introduced in June and July 2016). The law empowers the government to limit a person’s movement into a defined geographical territory or to place him under house arrest for a maximum of eight hours; to require the person to check in at the police station up to three times a day, including during holidays and weekends; to prohibit communications with certain persons; and to impose an obligation to declare a change of address. These control measures will be abrogated if a criminal procedure related to terrorism (and only in this case) is opened; see Art. L225-5.

commission of terrorist acts”, and are not limited to returning foreign fighters.¹⁷ They may be imposed on a person fulfilling two cumulative conditions: (1) if their behaviour constitutes a threat of “particular gravity” for security and public order, and (2) if they have (a) been in habitual contact with persons or organizations inciting, facilitating or participating in acts of terrorism, or (b) disseminated or adhered to ideologies inciting the commission of acts of terrorism or apology for such acts.¹⁸ The government reported in November 2018 that the administrative courts interpreted “a behaviour of particular gravity” as including threats of death or violence against a person, especially against a public authority; comments promoting death as a martyr; staying in combat zones and participation in military training or in combat; the practice of combat sports; the possession of declared or undeclared weapons; and the diffusion of violent messages or images.¹⁹

Twelve hours of daily curfew, the prohibition against leaving a defined area and the requirement to come to the police station up to three times per day, every day, including during weekends, has a vast impact on all aspects of someone’s life – the possibility of working, taking care of the family, one’s health, etc.²⁰ These measures were commonly used during the 2015–17 state of emergency. Official data reports 400 persons placed under house arrest at the beginning of the state of emergency, and a total of 754 in November 2017.²¹ At the end of the state of emergency, forty-one house arrests were still in force (sixteen of them for more than a year).²² As of April 2019, measures under the new MICAS regime were used against 127 persons.²³ Between July and December 2018, the minister of the interior issued twenty-two individual measures of administrative control and supervision to persons released from prison who had been convicted of acts related to terrorism or reported as radicalized during the course of their incarceration.²⁴ As noted by the government, the control and surveillance measures taken with regard to those individuals are

17 See Art. L228(1–7) of the Law on Internal Security, introduced by Art. 3 of Law No. 2017-1510, 30 October 2017. The Ministry of the Interior, in practice usually upon the recommendation of the security services, can limit the movement of persons into a defined geographical zone, require them to come once a day to the police office and/or require them to declare movement beyond their municipality or any change of residency. Instead of these measures, the minister of the interior can propose to have the individual fitted with an electronic bracelet – previously only a judicial judge could impose this measure.

18 Law on Internal Security, Art. L228-1 (2017).

19 *Government Report*, above note 11, p. 42.

20 See Amnesty International, *Upturned Lives: The Disproportionate Impact of French State of Emergency*, February 2016; Commission Nationale Consultative des Droits de l’Homme (CNCDH), *Avis sur le suivi de l’état d’urgence (Assemblée plénière – 18 février 2016 – Adoption: unanimité, trois abstentions)*, 2016, p. 4, available at: www.cncdh.fr/sites/default/files/16.02.18_avis_suivi_etat_durgence_1.pdf.

21 Ministry of the Interior, “Bilan de l’état d’urgence”, 3 November 2017, available at: www.interieur.gouv.fr/Actualites/L-actu-du-Ministere/Bilan-de-l-etat-d-urgence.

22 For official data, see *Bilan statistique de l’état d’urgence (sur la base des données transmises par le ministère de l’intérieur)*, 14 November 2015, available at: www2.assemblee-nationale.fr/static/15/lois/bilan_AAR.pdf.

23 For official data provided by the Ministry of the Interior, see: <https://tinyurl.com/y4ag2scy>.

24 See *Government Report*, above note 11, pp. 48, 79.

of great interest, since it is difficult to anticipate their behaviour, based on the one they adopted in detention. This surveillance makes it then possible to observe their relationships ..., their religious practice (attending this or that mosque), their activity on social networks, their reintegration efforts, etc.²⁵

The imposition of house arrests without a proper judicial review procedure could potentially violate individual freedoms. The French *habeas corpus* is established in Article 66 of the 1958 French Constitution. It entrusts ordinary judges (and not administrative judges) with safeguarding individual liberty.²⁶ Placing a person under house arrest as a preventive measure without judicial oversight of an ordinary judge was argued by petitioners to constitute a violation of individual freedoms within the meaning of Article 66.²⁷ The Constitutional Court rejected this interpretation. According to the Court, house arrest was viewed as a limitation of freedom of movement, which is under the competence of administrative courts, and not a restriction of liberty, which is exclusively under the review competence of an ordinary judge. As house arrest is limited by law to twelve hours a day, the Court found that this provision did not constitute a deprivation of individual liberty, thus falling out of the exclusive scope of ordinary courts.²⁸ It noted, however, that if a legislation would allow for house arrest of more than twelve hours per day, it would constitute a deprivation of individual liberty, thus signalling to the government that an amendment of such a kind could be declared unconstitutional.²⁹

The judicial review by French administrative courts

The proliferation of administrative prerogatives not only confers more power to the executive authorities to limit individual liberties, but also transfers the competence of judicial review to the administrative judge, who has exclusive jurisdiction over acts by State authorities.³⁰ Thus, although administrative courts are structurally

²⁵ *Ibid.*, p. 79.

²⁶ According to Article 66 of the French Constitution of 1958, “[n]o one shall be arbitrarily detained. The Judicial Authority, guardian of the freedom of the individual, shall ensure compliance with this principle in the conditions laid down by statute.”

²⁷ Constitutional Council, *M. Cédric D.*, Decision No. 2015-52, Appeal for Judicial Review (QPC), 22 December 2015, available at: www.conseil-constitutionnel.fr/decision/2015/2015527QPC.htm.

²⁸ *Ibid.*, paras 5, 6. Later, the Council of State similarly found that the closure of places of worship does not necessarily impair individual liberties. Constitutional Council, *Ligue des Droits de l’Homme*, Decision No. 2016-535, Appeal for Judicial Review (QPC), 19 February 2016, paras 4, 6.

²⁹ “Considering secondly that, in relation to a house arrest order issued by the Minister of the Interior, the individual ‘may also be required to remain in the place of residence determined by the Minister of the Interior during specific hours set by the latter, up to a maximum of twelve hours out of every twenty-four hours’; that the maximum period of time during which an individual placed under house arrest is required to remain at home, which is set at twelve hours per day, cannot be extended, otherwise the placing under house arrest would then be regarded as a measure restricting freedom, and accordingly subject to the requirements laid down by Article 66 of the Constitution.” Constitutional Council, *M. Cédric D.*, above note 27, para. 6.

³⁰ This separation dates from the French Revolution, when the revolutionary powers sought to restrain the powers of the judiciary, who were represented by the bourgeoisie. Still today the French legal system is constituted as a dual system: administrative (public law) and judicial (civil and criminal matters).

less impartial and independent than courts with ordinary judges, they are gaining more and more competence through the expansion of administrative legislation and its legitimization by the Constitutional Court as demonstrated above.

Administrative judges have very different professional backgrounds from ordinary judges, who are trained at law school and the National School of Magistrates. Administrative judges are not required to hold a law degree. Many of them are graduates of the prestigious National School of Administration, which is difficult to access and trains many of the future French political elite. Others may be recruited after obtaining work experience in the administration. As for the Conseil d'État (Council of State), the highest administrative jurisdiction, the government nominates a significant portion of its administrator-judges. These educational and professional networks are likely to create a culture of proximity between the government and administrative judges, which may result in a general benevolence on the part of administrative judges when assessing the legality of a measure undertaken by State institutions.³¹

Administrative courts differ considerably from ordinary courts when it comes to procedural rules. For example, administrative courts rely on *notes blanches* (white notes) as evidence. These take the form of anonymous documents provided by the security and surveillance services of the Ministry of the Interior. They transform intelligence into evidence for use in the administrative courts. Such notes may contain information detailing suspicious behaviour or actions, including association with other suspected persons, but provide no information vis-à-vis the sources of that information, and are undated and unsigned. While white notes cannot be admissible before the criminal courts, their use has come to be legitimized in administrative courts by administrative jurisprudence.³² In practice, the administrative courts' treatment of white notes is underpinned by a presumption of truth, as can be seen in numerous decisions citing a white note as the sole evidence upon which a decision is based. As the president of the litigation section at the Conseil d'État, in a Parliamentary Committee on the state of emergency, stated: "We start from the principle that the intelligence services work honestly and they don't exaggerate the content of the white notes."³³ According to an administrative judge, "[Judicial review] is not easy to do [Y]ou have to determine the dangerousness of a person according to an uncertain factual basis, based on fears, on a number of assumptions The decision of the

31 For a fascinating socio-legal study on the Council of State, see Bruno Latour, *La fabrique du droit: Une ethnographie du Conseil d'État*, Collection Sciences Humaines et Sociales, Éditions La Découverte Poche, Paris, 2004.

32 The legality of the white notes was first approved by the Council of State in 1991 and 2003 (Council of State, *Ministre de l'Intérieur c. Diouri*, Case No. 128128, 11 October 1991; Council of State, *Ministre de l'Intérieur c. Rakhimov*, Case No. 238662, 3 March 2003). It was confirmed again by Council of State Case No. 394991 of 11 December 2015, where the Council upheld that there is no legislative provision or principle that prevents the administrative judge from considering facts provided by the white notes if they were submitted to an adversarial process and were not seriously disputed by the applicant.

33 Bernard Stirn, President of the State Council's litigation section, Report No. 3784, National Assembly, 25 May 2016, available at: www.assembleenationale.fr/14/rapports/r3784.asp.

administrative police, by construction, is prospective.”³⁴ There is a clear tendency to rely heavily on white notes in administrative jurisdictions without further proof being sought or established. As long as the white notes “are not seriously contested by the appellant”,³⁵ they are usually accepted and thus the burden of proof is *de facto* transferred to the individual, who has to convince the court that he is not dangerous – an uneasy task in light of a general hostility and prejudice against Muslim appearance and religious practices, which has been much reinforced in a post-terror-attack Paris.

As stated by French scholars Stéphanie Hennette Vauchez and Serge Slama:

The decisive value of these white notes and the weight they take in the majority of the cases related to the state of emergency constitute one of the most significant elements of the exceptionalism of the administrative judicial procedure And, except in the rare cases where the applicant, often thanks to good criminal lawyers, manages to “dismantle” the police version, the administrative judge generally endorses the factual elements reported by the white notes.³⁶

Researchers who studied the administrative decisions at lower levels during the state of emergency found that the administrative judges exercised only a “façade of control”. They found that in half of the cases, the judges based their decisions only on the white notes of the intelligence services.³⁷

According to State statistics, the jurisprudence of the Council of State, the highest administrative jurisdiction on house arrest, represented 75% of decisions concerning the State of emergency. Out of eighty-two decisions, sixteen reached total or partial satisfaction.³⁸ As for administrative courts at a lower level, it was reported by the Ministry of the Interior that from November 2015 until February 2016 the Ministry of the Interior indicated that 400 persons were placed under house arrest. Out of them, 179 persons had recourse to an administrative judge to review the decision; only twelve procedures ended in favour of the appellant revoking the house arrest.³⁹ It can be concluded that even if the Council of State has at times played its role of guardian of civil liberties and cancelled specific

34 Guillaume Odinet, “Le rôle du juge administratif dans le contrôle de l’état d’urgence”, *Les Cahiers de la Justice*, Dalloz, 2017, p. 278 (author’s translation). For background, see Pierre Alonso, “Notes blanches: Les corbeaux de la place Beauvau”, *Libération*, 15 February 2016, available at: www.liberation.fr/france/2016/02/15/notes-blanches-les-corbeaux-de-la-place-beauvau_1433587.

35 As required by the jurisprudence; see above note 32.

36 Stéphanie Hennette Vauchez and Serge Slama, “Harry Potter au Palais Royal? La lutte contre le terrorisme comme cape d’invisibilité de l’état d’urgence et la transformation de l’office du juge administrative”, *Les Cahiers de la Justice*, Dalloz, 2017, pp. 287, 288 (author’s translation).

37 Syndicat de la Magistrature, *Projet de loi renforçant la sécurité intérieure et la lutte contre le terrorisme: Observations du Syndicat de la magistrature devant la commission des lois de l’Assemblée nationale*, 26 July 2017, pp. 3–4.

38 See official data in *Bilan statistique de l’état d’urgence*, 14 November 2015, available at: www2.assemblee-nationale.fr/static/15/lois/bilan_contentieux.pdf.

39 National Assembly, *Mesures administratives prises en application de la loi n° 55-385 du 3 avril 1955*, 18 July 2016, available at: <https://tinyurl.com/y4x459c7>. For the next period, see: <https://tinyurl.com/y3bndqja>.

abusive house arrests, it has predominantly upheld and legitimized administrative decisions linked to the state of emergency and has generally supported and facilitated the State's actions.⁴⁰

Thus, under the state of emergency, the role and prerogatives of the administrative judge vastly expand at the expense of those of the ordinary judge, thereby broadening the scope of administrative procedures, which are generally less protective of defendants' rights, and blurring the frontier between the traditional roles of ordinary and administrative judges.⁴¹ The next part will address the function of the criminal law and judges.

Criminal justice: An expanding pre-emptive paradigm

Pre-emptive approaches are not domains reserved to administrative law. They are practiced in the French criminal justice system for the prosecution of French foreign fighters who have returned to France, and persons suspected of adherence to terrorist groups in France. This is not a new phenomenon, since it is based on legislation and policies from the 1980s that have their roots in earlier practices.⁴² In recent years, however, these practices have reached an unprecedented peak in their application and expansion because of the terrorist attacks committed in France and the growing engagement of young French persons with jihadist groups in the Iraqi–Syrian front. As noted by French vice counter-terrorism prosecutor, Camille Hennetier:

The current era is marked by the growing power of the judicial system in terrorism cases to neutralize the actors. The cursor seems to have moved back in time, as part of anticipation of risk, and also of a “political” management of the current crisis. We are confronted with a dilemma and condemned to efficiency ... to search for a balance between the criminal characterization of earlier preparatory elements, the search for a confirmed intentionality and the measuring of the risk.⁴³

40 See Carine Placzek and Camille Lucotte, *Terrorisme et état d'urgence – Jurisprudence des hautes juridictions françaises*, Capstone Course on International Crimes and Counterterrorism, under the direction of Sharon Weill, Sciences Po Paris, April 2017, available at: <https://tinyurl.com/y6c5ofpz>. This report compiles and provides an analysis of all highest French courts' decisions dealing with terrorism until 2017.

41 Thérèse Renaud, “Du rîfî chez les juges: Le juge administratif est-il le nouveau gardien des libertés publiques?”, *AJDA* 2016, 2016, pp. 1677–1678.

42 On earlier practices, see Jeremy Shapiro and Bénédicte Suzan, “The French Experience of Counterterrorism”, *Survival*, Vol. 45, No. 1, 2003; Olivier Cahn, “Le dispositif antiterroriste français, une manifestation du droit pénal de l'ennemi”, *Archives de Politique Criminelle*, Vol. 2016/1, No. 38, 2016, pp. 91–99.

43 Camille Hennetier, cited in Antoine Mégie, *La réponse judiciaire au terrorisme au regard de la Charte des droits fondamentaux de l'UE*, Brussels, February 2017, p. 18.

The institutional counterterrorism framework

Academic literature characterizes the French legal counterterrorism framework as centralized, specialized and adjustable.⁴⁴ In 1963, during the Algerian War of Independence, terror and political offences came under the competence of the State Security Court, a special court that operated for almost twenty years. Composed of military officers as judges, its proceedings were held behind closed doors and it had no provision for appeal.⁴⁵ This procedure produced thousands of cases, many of them in order to dissolve political groups. It was abolished in 1981 with the election of the socialist government, and a new counterterrorism framework was introduced in 1986: terror-related infractions were to be prosecuted within the regular judicial system, but in a centralized and specialized manner and with specific derogations in terms of procedure.⁴⁶ It created a specialized corps of investigating judges and prosecutors based in Paris to handle all terrorism cases. It is composed today of thirteen magistrates at the special National Antiterrorism Prosecution Service, and thirteen investigative judges.

Unlike investigations carried out by specialized magistrates, the trial of cases related to terrorism is done within regular criminal jurisdiction. The prosecution of terrorism-related offences, which incur a penalty of up to ten years' imprisonment, takes place before the 16th Chamber of the Court of First Instance in Paris, which is composed of a bench of three judges. The prosecution of terrorism-related crimes, which incur a penalty of over ten years, is judged by the Paris specially composed Assize Court (Cour d'Assises), which is composed of professional judges only, without popular jury, contrary to the composition of the Assize Court with respect to non-terrorism-related criminal matters.⁴⁷ Instead, its bench is composed of a president and four judges (and six on appeal). However, the Assize Court does not specialize in terrorism. It is composed of different judges in each trial. The presiding judge is chosen from the regular pool of assizes judges, and the four other magistrates ("assessors") can be any magistrate – investigative or sitting judges in all matters, without any particular experience in terrorism or radicalization. In contrast, the first instance trial

44 See, among others, Antoine Garapon, "Is There a French Advantage in the Fight against Terrorism?", *Analisis del Real Instituto Elcano*, No. 110/2005, 1 September 2005; Franck Foley, *Countering Terrorism in Britain and France*, Cambridge University Press, Cambridge, 2014.

45 Vanessa Codaccioni, *Justice d'exception*, CNRS, Paris, 2015, p. 143.

46 This includes the Paris public prosecutor, the counterterrorism investigative units and the trial courts, which hold concurrent jurisdiction over terrorist offences. See Code of Criminal Procedure (Code de Procédure Pénale, CPP), Art. 706-17, and Law No. 86-1020 of 9 September 1986. In practice, as a matter of policy all cases are held in Paris. This jurisdiction extends to cover terrorist acts committed outside France (see Criminal Code, Art. 113-13, amendment introduced in 2012).

47 The origin of the Cour d'Assises Spécialement Composée is a law of 21 July 1982 that established its competence over crimes related to the military and the safety of the State, thus replacing the Cour de Sûreté de l'Etat abolished in 1981. In 1986, following threats on members of the jury by the extreme left group Direct Action in a terror case, it was decided to extend the competence of this special chamber to cases dealing with acts of terrorism. Today it also includes a competence over organized crime. Until recently the Court was composed of seven magistrates, but due to the flow of terrorism cases it has been reduced to five – one president and four assessors – who can be any magistrate (investigating or sitting judges). Unlike the jury courts, decisions are adopted upon a regular majority.

chamber competent to hear terrorism and foreign fighter cases of up to ten years' punishment – the 16th Chamber – is composed of the same panel of three judges and has become very specialized since it has heard over 200 cases related to the Iraqi–Syrian conflict since 2015.⁴⁸ Thus, foreign fighters prosecuted in France are prosecuted upon their return within the ordinary French criminal justice system, yet within a centralized and to a large extent specialized system.

Main accusation: Association of wrongdoing in relation to a terrorist enterprise

Although the French Criminal Code has continuously evolved to include more and more criminal offences specifically adapted to the development and changing modes of international terrorism, such as the new offences concerning apology for terrorism, financial support of terrorism and recruitment, almost of all the prosecution of foreign fighters involves the long-standing offence of “association of wrongdoing in relation to a terrorist enterprise” (*association de malfaiteurs en relation avec une entreprise terroriste*, AMT).⁴⁹ Codified in Article 421-2-1 of the French Criminal Code, AMT penalizes as a terrorist offence participation in a group constituted for the purposes of the preparation of a terrorist act.⁵⁰ There is no requirement that the individual contributes materially to the commission of the terrorist act in itself, nor that the terrorist plan is executed.

AMT is sometimes translated in English as a conspiracy offence. At the same time, it resembles in many aspects the criminalization of a membership of an illegal organization, because the mere participation in a group that has a plan to commit a terrorist act, with the knowledge that the group has a plan to commit such an act, is enough to qualify as a terrorism-related crime.

According to the French Ministry of Justice, AMT is “the keystone of the fight against terrorism”.⁵¹ The prosecution of AMT is a central element in the

48 As indicated by the CAT, between 2014 and 2017, 238 people related to the Syria–Iraq zone were prosecuted. As of 15 May 2018, the Counter terrorism Prosecutor's Office had dealt with 513 files related to the Syria–Iraq zone, involving 1,620 individuals. See CAT, above note 1, p. 4. In 2017, only four cases related to the Syrian–Iraqi front were held before the chamber. However, this is going to change radically due to the new prosecution policy – see discussion below. Currently, ninety criminal cases are waiting to be heard by the Assize Court. For an article on first instance cases trials before the 16th Chamber, see Antoine Mégie and Jeanne Pawella, “Juger dans le contexte de la ‘guerre contre le terrorisme’: Les procès correctionnels des filières djihadistes”, *Les Cahiers de la Justice*, Dalloz, 2017.

49 This has always been the case. Franck Foley indicates, for example, that between 1995 and 2005 (for all forms of terrorism, including Basque and Corsican cases), out of 502 convictions by courts for terrorism, 403 were for AMT. See F. Foley, above note 44, p. 202.

50 Article 421-2-1 of the French Criminal Code defines “the participation in a group formed or in an agreement established for the preparation, characterized by one or more material facts, of one of the acts of terrorism referred to in the preceding articles” as a terrorism offence. Acts of terrorism are defined in Article 421-1 and include attacks on life and physical integrity; the hijacking of planes and other modes of transport; theft, extortions, destructions and degradations; membership in or support of dissolved armed groups and movements; offences in relation to armaments, explosives and nuclear materials; dealing in stolen goods related to these offences; and some aspects of money laundering and financing. These acts become “terrorist” if they occur with the additional qualification of “aiming to seriously trouble public order [*ordre public*] by intimidation or terror”.

51 Ministry of Justice, “La lettre du porte-parole: 23 novembre 2016”, 2016.

French counterterrorism judicial framework because it represses the criminal project at the stage of preparatory acts, and thus makes it possible to prevent the commission of terrorist acts. AMT, punishable today by a sentence of up to thirty years (and life imprisonment for AMT leaders), allows the judicial authority to intervene long before the act is committed. This was highlighted by Camille Hennetier, French vice counterterrorism prosecutor:

“The evolution of the threat in France, the attacks, the multiplication of the desire for action by individuals on the national territory, leads to the desire to judicialize as early as possible, to neutralize individuals deemed potentially dangerous, to achieve risk zero. In practical terms, with regard to the Iraqi-Syrian zone, this allows the judicialization of people at early stages – people who only wish to go there in a context of a radicalization process, even though the integration of a terrorist group in an area is not yet effective. Previously, the judicialization occurred once the integration into the terrorist group was established or presumed. In the case of projects for violent action on French soil, this allows the interpellation of suspects at the stage of intentionality, materialized by more or less operational exchanges, sometimes at the commencement of the preparatory act.⁵²

The elements of the crime

AMT has a long history in French criminal law, and its current formulation dates from 1996. The three core requirements necessary for a conviction based on AMT as defined in Article 421-2-1 of the Criminal Code are the following:

1. the existence of a *group* with a terrorist *aim*;
2. an *individual* act of participation in the group (without necessarily contributing to the terrorist acts in itself); and
3. the individual *intention* to participate in the group while being *conscious* of its terrorist project. The terrorist act therefore does not necessarily have to be committed for a conviction based on AMT.

First element: A group with a terrorist aim

When it comes to the first element, the existence of a group with a terrorist aim, both the notion of a “group” and the idea of a “terrorist aim” are ambiguous. Beyond the fact that a “group” must comprise at least two individuals, the precise degree of organization necessary remains unclear. While the Court of Cassation has asserted that the notion of terrorism “implies a minimum of organization”,⁵³ it has also ruled that AMT does not presuppose “a structured organization among

52 A. Mégie, above note 43, p. 18 (author’s translation).

53 Court of Cassation, Decision No. 93-14.837 (1st Civil Chamber), 17 October 1995, available at: www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007035042.

its members”.⁵⁴ Defence lawyers have highlighted that this ambiguity has allowed the prosecution of vast networks of suspects only very loosely related to one another. Comparable uncertainties persist with respect to the conceptualization of the “terrorist aim” that such a group must pursue. The only definitional indication given is that it must seek to “trouble public order through intimidation and terror” as stipulated in Article 421-1 of the Criminal Code, with the Court of Cassation noting that “Parliament and the Constitutional Court have left it to the judicial authority to interpret the outline of the notions of ‘intimidation’ and ‘terror’”.⁵⁵

In the context of foreign fighters, French persons who joined an armed group in Syria or Iraq have been prosecuted for AMT. In a recent case from 2018, the 16th Trial Chamber made a clear distinction between jihadist groups which are recognized terrorist organizations and those which are not, even if they are aiming at applying Sharia law.⁵⁶ The Court acquitted a person charged with AMT for joining the armed group Ahrar al-Sham, noting:

The group Kataeb Ahrar al-Sham appeared at the end of 2011, with the aim of overthrowing the government of Bashar al-Assad and replacing it with an Islamic emirate; it did not claim responsibility for suicide attacks or abuses committed against the civilian population.⁵⁷

The Court further noted that the UN has never recognized this group as a terrorist organization and concluded that Ahrar al-Sham is not a group “that can be qualified as terrorist”.⁵⁸ Since the accused was a part of this armed group, which did not employ terrorist actions, he was acquitted:

There is obviously a fundamental element missing to declare the accused culpable of the charges since ... if no terrorist act can be attributed to this organization, nothing allows the claim that joining this organization, becoming its member and even fighting for it, constitute a terrorist-related offence.⁵⁹

Interestingly, this person was prosecuted *in absentia*. While he was declared dead in combat by the armed group on 21 November 2013, an arrest warrant was issued by the investigative judge because of “the absence of irrefutable proof of death”, and

54 Court of Cassation, Decision No. 14-88.329 (Criminal Chamber), 8 July 2015, available at: www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000030869110.

55 Court of Cassation, Decision No. 16-84.596 (Criminal Chamber), 10 January 2017, available at: www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/5993_10_35897.html.

56 “The question that arises is whether or not, beyond his jihadist conception, which embraces diverse conceptions and which is not necessarily synonymous with terrorist involvement, such as his willingness to have Sharia law governing that country and to take up arms to ensure such an objective, X has actually carried out [terrorist] infractions ... In other words, did X join a terrorist organization, or at least, an organization that conducts operations that amount to acts of terrorism?” Paris Court of First Instance, Case No. 13099000941, Judgment (16th Criminal Chamber), 28 September 2018, p. 22. On file with author.

57 *Ibid.*, p. 22.

58 *Ibid.*, p. 23.

59 *Ibid.*, p. 23.

numerous previous incidents “in which a jihadist presumed dead had attempted to come back clandestinely to France”.⁶⁰

In another similar case heard on December 2018, the accused openly recounted how he acquired military training with Ahrar al-Sham in Syria and was willing to fight against al-Assad’s government. If such account was provided in the context of a different armed group, the act could amount to a crime according to French law. In this case, however, it was not, as the al-Sham group was not recognized as a terrorist group despite the request of the prosecution. The judge, moreover, criticized the prosecution’s request and clarified that it is not up to the court to take such a political decision, pointing out the relativism of the term “terrorist group”.⁶¹

An entity is not terrorist in essence; it is a relative qualification, which may vary according to the countries or international organizations called upon to decide on this point, and for the same country or international organization, the qualification may vary from one period to another. ... It is easy to understand that if the Court follows the prosecution’s request to recognize the terrorist character of the group Ahrar al-Sham, while ignoring the positions of certain Western countries, which, according to the prosecution, supported this group for realpolitik purposes, the Court would venture into the sphere of geopolitical debate that cannot be its own.⁶²

The Court, however, did not avoid ruling on the question.⁶³ It decided that al-Sham was not a terrorist organization, addressing in detail the different arguments of the prosecution. One of the prosecution’s arguments was that al-Sham’s members are allegedly responsible for numerous crimes against humanity, as affirmed by the submissions of reports by Human Rights Watch and the Independent International Commission of Inquiry on the Syrian Arab Republic. The Court distinguished the crime of terrorism from crimes against humanity and pointed out that an armed group which commits crimes against humanity is not necessarily a terrorist group. The Court further affirmed that commanders of armed forces may be found responsible for war crimes and crimes against humanity for the acts of their subordinates through the international criminal law doctrine of command responsibility. In contrast, regular fighters (such as the accused) who did not contribute by themselves to the commission of any of those

60 Paris Appeal Court, *Ordonnance de Renvoi devant le Tribunal de Correctionnel*, File No. 1309900941, 3 May 2017, p. 15 (on file with author). See also at p. 43: “An official proof of this death, coming from a country in war, with which the French authorities have cut all diplomatic relations, cannot be provided.”

61 “It appears to the court that it is not within the jurisdiction of the judicial authority to order or recognize that a group constitutes a terrorist group and that if it did, the court would encroach on the powers of the legislative and executive branches.” Paris Court of First Instance, Case No. 14108000203, Judgment (16th Criminal Chamber), 12 December 2018, p. 14.

62 *Ibid.*

63 For a discussion on avoidance doctrines, see Eyal Benvenisti, “Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts”, *European Journal of International Law*, Vol. 4, No. 2, 1993; Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law*, Oxford University Press, Oxford, 2014, pp. 13–67.

illegal acts cannot be held criminally liable.⁶⁴ The reader of this judgment may remain puzzled: joining a group which is listed as terrorist, even if no further act is committed by the individual, is a crime under French law, while joining an armed group which is not recognized as terrorist, but whose members commit war crimes and crimes against humanity, is not.

Oddly, the prosecution had appealed these two decisions rendered by the same judge. It seems that the appeal came as a result of a policy concern: the prosecution would otherwise have to close numerous investigations, as it is not always possible to prove which exact armed group the accused belonged to.

Second element: Act of participation

As for the second element of AMT, the individual act of participation, although the Court of Cassation has stressed that individuals need to “provide effective support” in order to be convicted for AMT,⁶⁵ it seems that the notion of effective support was broadly interpreted to enable convictions for what might be seen as minor and ineffective contributions to the terrorist enterprise.⁶⁶ In the case of foreign fighters, individuals have been convicted for AMT solely for joining a terrorist group in Syria and receiving training, whether they participated in combat or not.⁶⁷

Third element: Intention to participate in the group and being conscious of the project

Regarding the third element of intentionality, this need not imply an individual willingness to commit a terrorist attack oneself. Being “independent of the crimes prepared or committed by any of its members”, the offence of AMT is based on an “adhesion to a collective project of trouble to public order through intimidation”.⁶⁸ Put differently, the proof of participation in an AMT rests not on the individual’s personal terrorist intentions, but rather on the terrorist aim of the collective association, coupled with the individual’s knowledge of or adherence to that association.⁶⁹ In the case of Abdulkaher Merah and Fettah

64 *Ibid.*, p. 15. See also: “The fact of participating in an insurrection or an armed conflict, which is by nature disorganizing, prejudicial to public order, and likely to cause death and misfortune, cannot in itself be regarded as a terrorist act [S]uch an engagement can only be reprehensible if it is done within a group that is itself a terrorist group or if it is accompanied by specific acts of terrorism allegedly committed by the French citizen.” *Ibid.*, p. 20.

65 Court of Cassation, Decision No. 13-83-758 (Criminal Chamber), 21 May 2014, available at: <https://tinyurl.com/yy3zlym7>.

66 International Commission of Jurists, “International Commission of Jurists Submission to the Committee against Torture on the 6th Periodic Report of France”, April 2010, p. 2; Human Rights Watch, *Preempting Justice: Counterterrorism Laws and Procedures in France*, July 2008.

67 See, among many others, Paris Court of First Instance, Case No. 13099000941, Judgment (16th Criminal Chamber 2), 28 September 2018.

68 Court of Cassation, Decision No. 16-84-596 (Criminal Chamber), 10 January 2017, available at: www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/5993_10_35897.html.

69 As stipulated by the Court of Cassation in its Decision No. 13-83-758. In practice, however, evidence of a minor action showing that the suspect had knowledge of the terrorist activity concerned will suffice. See F. Foley, above note 44, p. 203.

Malki, the Assize Court went one step further.⁷⁰ Malki admitted that he had sold a weapon to Mohamed Merah, the brother of Abdulkader Merah, who committed the first jihadist attack on French soil in 2012 against Jewish children and French soldiers. He was accused and convicted of AMT despite the fact that he denied being aware of Merah's intention to commit a terrorist act. According to Malki, he sold the weapon following Merah's request in order to commit a robbery. The investigative judge noted that the elements in the file could not establish that Malki knew about a concrete plan and that this kind of weapon could indeed be used for "regular criminality".⁷¹ However, according to the prosecution, Malki should have known that there was potential for Merah to commit a terrorist act:

The prosecution never argued that Malki knew that Merah was going to hit soldiers and Jews, but he knew the terrorist potential of the two brothers ... [I]n fact, it is not necessary to share the terrorist ideology to be prosecuted for criminal association ...[;] just knowing that the project was potentially terrorist.⁷²

The Court followed this reasoning in its judgment, stating: "This Court was not convinced by the explanations of Fettah Malki that, when he entrusted the Micro Uzi and the protective jacket [to Merah], he was unaware of Mohamed Merah's radical Islamism".⁷³

According to the Court's assumption that Malki could not possibly ignore Merah's process of radicalization since they had been friends since childhood, selling Merah a weapon – even if Malki thought that it was for an ordinary criminal purpose – made Malki criminally responsible for being part of Merah's conspiracy, which aimed at waging armed jihad, since he should have known that Merah could potentially use the weapon to commit a terrorist act. This decision was ruled even though nothing pointed to the assumption that Malki actually knew about Merah's intention to commit a terrorist act. Quite the contrary, in fact: Merah was the first person to ever commit a jihadist terrorist attack on French soil. Even the security services, which had surveyed him for years and which testified during the trial, described Merah in their notes as a curious person who liked to travel, and whom they wanted to recruit as an informant.⁷⁴ Other policemen described him as a lone wolf and were surprised by the attack.⁷⁵

70 Specially Composed Assize Court, *Public Prosecutor v. Merah*, Case No. P/12079000/4, 2017. The court's decision is available at: www.dalloz-actualite.fr/sites/dalloz-actualite.fr/files/resources/2017/11/motivation.pdf.

71 Paris Appeals Court, Case No. 2016/0184, Appeal on Indictment (First Investigation Chamber), 17 June 2016, pp. 26, 27. On file with author.

72 Closing statement of the prosecutor before the Court, 30 October 2017, available at: <https://tinyurl.com/y6kc56wo> (author's translation).

73 Specially Composed Assize Court, *Merah*, above note 70, p. 9.

74 The testimonies were given before the Court on 16 October 2017. They are not available, as in France there are no official transcriptions of the proceedings. For a media report, see: "Quand le Renseignement voulait recruter Mohamed Merah", *Le Figaro*, 16 October 2017, available at: <https://tinyurl.com/y5bndkje>.

75 *Ibid.*

This decision was appealed, and on 18 April 2019 Malki was found not guilty of AMT.

Pre-trial detention

French returnees from Syria who are suspected of having joined a jihadist group there are in most cases detained until the end of the trial proceedings. The legislative innovations of 2016 brought procedural changes, including the prolongation of pre-trial detention exclusively for those who could be tried for AMT: those suspected of AMT can now be held for up to three years prior to trial in cases of offence and four years in cases of felony, compared to only two years for those suspected of any other terrorism-related offence. The term can be prolonged twice for an additional period of four months each time.⁷⁶ This underscores the fact that the notion of AMT serves the purpose not only of securing convictions but also of justifying and prolonging pre-trial detention.⁷⁷

In practice, the decision on pre-trial detention is taken by the liberty and detention judge,⁷⁸ in the nearby office of the investigative judge, behind closed doors, with the presence of defence lawyers. No public access to these procedures or to the decisions is available. In practice it is very rare for the detention and liberty judge not to follow the request of the investigative judge⁷⁹. Once the investigation is completed, the accused may await their trial for another year; this period can be prolonged twice for an additional six months.⁸⁰ As a result of the prolonged period of pre-trial detention and the waiting period to be judged, persons who are presumed innocent can be held in detention for an extremely long time. For example, in the *Merah* case that was ruled in first instance in 2017, the Assize Court adjudicated facts from 2012, and the accused was in pre-trial detention – and isolation – during this entire period. As of the beginning of 2019, the 16th Criminal Chamber of the Court of First Instance has been hearing cases dating from 2015–16.

76 See Article 706-24-3 of the CPP, modified by Law No. 2016-731 of 3 June 2016, Art. 7.

77 Julie Alix, “Réprimer la participation au terrorisme”, *Revue de Science Criminelle et de Droit Pénal Comparé*, Vol. 2014/4, No. 4, 2014.

78 The liberty and detention judge may order a provisional detention in the following circumstance (CPP, Art. 144): for the preservation of evidence, the prevention of pressure against witnesses or victims, the prevention of fraudulent consultation with co-perpetrators or accomplices, the protection of the person under investigation or the prevention of the renewal of the offence, or to end an exceptional and persistent disturbance to public order. It should be noted that the use of alternatives to detention – such as restriction of movement and house arrest – depend also on the political environment. For example, electronic bracelets have been practically abandoned in favour of pre-trial detention since the attack at Saint-Étienne-du-Rouvray, which was committed by an individual placed under such a judicial control measure (interview with a defence lawyer specializing in terrorist cases, 24 April 2018, on file with author).

79 Interview with a French counterterrorism magistrate, Paris, March 2018. On file with author.

80 CPP, Art. 181. Thus, a suspect in pre-trial detention, once indicted, can wait for his trial in detention for two more years. However, according to the Court of Cassation, an extension of the time period cannot be granted because of institutional material problems such as lack of judges. See Michel Mercier, Report No. 252, Senate, 21 December 2016, p. 13, available at: www.senat.fr/rap/116-252/116-2521.pdf.

The investigative judge or the liberty and detention judge can order the applicability of solitary confinement for detainees in pre-trial detention.⁸¹ A detainee in pre-trial detention (or a convict in prison) can be subject to solitary confinement also as a result of a decision taken by the penitentiary administration, where it could be justified on the basis of the threat posed by the individual as well as the risk of proselytism and influence over other detainees.⁸² There is no available data on how many people have been placed in solitary confinement, but it seems to be a growing practice.⁸³

Level of punishment

A constant legislative increase in the level of punishment for AMT, as well as a differentiation in punishments between those merely participating in AMT and those leading it, can be observed. Traditionally, AMT had been defined as an offence (*délit*) bearing up to ten years' imprisonment, and has fallen within the competence of the 16th Criminal Chamber. In 2004, for the first time in the history of French legislation, association of wrongdoing was set as a felony (*crime*) through a distinction that was made between the prosecution of simple participants, which remained defined as an offence punishable by ten years' imprisonment, and the leaders of the group, who could incur twenty years' imprisonment. Once this barrier was overcome, the escalation of sentences followed rapidly. Only two years later, in 2006, the punishment for mere participation in a group with a criminal aim (such as an attack on persons or destruction of property with an explosive, which could affect the life of persons) was raised to twenty years, and thirty years for the leaders. This harshening process reached its final peak in July 2016, with the punishment set at thirty years for participation and life imprisonment for directing the group.⁸⁴

The prosecution policy

As shown above, AMT is a very broad offence and allows for even remote acts to be qualified under its scope, with its perimeter still increasing. Significant for the prosecution of foreign fighters was the amendment of 2012 that provided for extraterritorial jurisdiction of AMT and thus enabled the prosecution of French

81 CPP, Art. 145-4-1.

82 This is for up to one year, with a periodic review every three months. Beyond one year, the confinement measure can be extended by the Ministry of Justice, in the absence of any maximum duration provided by the CPP. See CPP, Arts 726-1, R57-7-64 to R57-7-67, R57-7-68. The Council of State ruled in 2008 that solitary confinement could only be used in circumstances of strict necessity and that detainees had the right to appeal against a decision of solitary confinement. Council of State, Litigation Section, Decision No. 293785, 31 October 2008.

83 At the end of 2016, 15% of detainees convicted for terrorism-related offences were in isolation. Telephone interview carried out by the author's graduate student Joachim Stassart with the French Section of the International Observatory of Prisons, 28 March 2018. The author thanks Mr Stassart for his research assistance on this question.

84 Criminal Code, Art. 421-6.

citizens or residents for participation in AMT abroad based on the principle of active personality.⁸⁵ Further important expansions have been introduced by the legislation and the prosecution policy in 2016. Those reforms should be seen against the backdrop of the string of attacks that have hit France since 2015, which have placed tremendous public pressure on the counterterrorism magistrates of the prosecution office and the investigative judges. In the words of a leading magistrate, this pressure has led to “the comprehensible yet dangerous temptation to lock everybody up”.⁸⁶ This section will analyze the new prosecution policy introduced in 2016 and the recent amendments that defined a longer period of pre-trial detention in cases of AMT.

The 2016 shift: The presumption of foreign fighter’s criminal intention

Until 2016, AMT had been essentially prosecuted as an offence – i.e., up to ten years’ imprisonment, with administration of the following penalties: ten years’ imprisonment for those who had been integrated for several years into a terrorist organization abroad (in particular Daesh), and who were usually prosecuted *in absentia*; six to nine years’ imprisonment for foreign fighters who had returned to France, depending on the length of their stay in the Iraqi/Syrian conflict zone and their acts; four to six years for people who had joined a terrorist armed group in France and were about to travel to Syria or Iraq; and finally, two to four years for those who had logistically supported persons who travelled to Syria or Iraq to join terrorist armed groups.⁸⁷ In April 2016, however, this prosecution policy changed radically. From the perspective of the authorities, prosecuting very diverse profiles under AMT, with the ceiling of a sentence of up to ten years’ imprisonment, led to a situation in which the degree of punishment did not sufficiently correspond to the differences in gravity of behaviour. It was therefore decided to qualify the joining of a jihadist terrorist group in the Syrian–Iraqi front (or participation in combat, within a terrorist organization) as a felony in view of committing crimes of attack on persons (up to twenty or thirty years’ imprisonment), instead of prosecuting such acts as an AMT offence (up to ten years’ imprisonment) as had been done until then. It has been considered as a presumption that joining a terrorist group after January 2015 (the Charlie Hebdo attacks) means adhering to and knowingly participating in an organization that commits terrorist felonies against persons. Thus, all returning foreign fighters who had joined a jihadist armed group after January 2015 would be charged with AMT as a felony.⁸⁸ This prosecution policy, passed in April 2016, has been applied retroactively to cases already under investigation by investigating judges and was approved by the highest criminal court, the Court of

85 *Ibid.*, Art. 113-13 (amendment introduced in 2012).

86 Interview with a high-ranking French counterterrorism magistrate, Paris, February 2017. On file with author.

87 M. Mercier, above note 80, p. 14.

88 “François Molins annonce un ‘durcissement considérable’ de la politique pénale en matière de terrorisme”, *Le Monde*, 2 September 2016, available at: <https://tinyurl.com/z7yz78g>.

Cassation.⁸⁹ Interestingly, the prosecutorial office took this decision autonomously after the French National Assembly had explicitly rejected suggestions to elevate activity on the battlefields of Iraq and Syria with jihadist armed groups to the status of felony two months earlier.⁹⁰

This policy shift means that returnee foreign fighters face significantly higher prison sentences and will be judged by the specially composed Assize Court. In practice, however, the prosecution policy can still decide whether to prosecute a foreign fighter who has returned to France as a felony or an offence.⁹¹ The fact that “the prosecution retains a pragmatic appreciation”⁹² on whether to qualify certain behaviour as a crime or an offence may raise questions concerning the equality of treatment of defendants and the principle of legality. Also, as discussed in the next section, it is not clear on what basis the sentences have been imposed, as the penalty spectrum has significantly increased.

Prison sentencing: Between repression and prevention

Traditionally French counterterrorism criminal legislation relied upon a combination of sweeping legal prerogatives and low-intensity punishment: while many suspects were caught in the wide net cast by AMT, their prison sentences were comparatively light.⁹³ The 2016 prosecution policy, however, has disturbed this equilibrium, introducing a new practice of imposing highly severe punishment for relatively minor acts which necessitate little evidence and for which a defence is difficult to establish. Interestingly, in a number of cases judged before the Special Assize Court in 2017–19, the Court ordered less severe punishment than that required by the prosecutor, and even rendered several acquittals, which is

89 Court of Cassation, Decision No. 16-82.692 (Criminal Chamber), 12 July 2016, available at: www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000032900180. The Court ruled that there is no need to prove that the person accused of criminal AMT actively participated in the preparation or the realization of the crime itself, only that he was a part of that group. AMT as a criminal offence is “an independent offence and is distinct from the crimes prepared or committed by some of its perpetrators and from the crimes characterized by certain facts that concretize it” (author’s translation).

90 Colette Capdeville and Pascal Popelin, Report No. 3515, National Assembly, 18 February 2016: “This change in the scale of sentences would undoubtedly upset the balance established by the legislator to this day. Such a criminalization would have the effect of having these offences tried by the Paris Special Assize Court, with the risk of overcrowding of the antiterrorist justice system and a loss of flexibility for the magistrates. For these reasons, my opinion is unfavourable. The Commission rejects the amendment.”

91 See Catherine Champrenault, Attorney-General of the Court of Appeal of Paris, in a recent interview by Jean-Baptiste Jacquin, Soren Seelow and Elise Vincent, “Justice antiterroriste: ‘Nous constatons un durcissement de la repression’”, *Le Monde*, 29 March 2018.

92 M. Mercier, above note 80, p. 15. As of 1 December 2016, the prosecution had opened 183 criminal inquiries (i.e., inquiries on the grounds of a *crime* rather than a *délit*) under the future competence of the Special Assize Court, targeting 483 individuals for AMT in relation to the ongoing jihadist violence in Iraq and Syria. This represents a massive increase over the case numbers of previous years.

93 F. Foley, above note 44, p. 205.

extremely rare in the French legal criminal system.⁹⁴ This indicates that the judges of the Assize Court confirm their independence from the prosecution policy; it also shows that the prosecution (along with the investigative judges) is “over-charging” and requesting heavy punishments in a rather harsh manner.

Among the first cases resulting from the new policy is the case against D. that was adjudicated in March 2018 by the Paris Special Assize Court. The facts concern acts committed in 2014. The prosecution policy was applied retroactively to the investigation that started prior to 2015, with the Court of Cassation – France’s highest criminal jurisdiction – validating this policy to be applied retroactively, imposing on the investigative judge a duty to comply with the request of the prosecutor to submit an indictment for AMT as a felony (and not as an offence).⁹⁵ The indictment stated the following:

The terrorist nature of the two jihadist groups, Al-Nusra Front and ISIL, that commit criminal acts, such as suicide bombings, assassinations, and other summary executions, ... with the aim of disturbing public order through intimidation and terror, for the purpose of creating an Islamic state, cannot be disputed and could not be ignored by the accused persons, who share the same radical and pro-jihadist convictions. Integration in such a terrorist group, followed by religious indoctrination, military training and participation in criminal activities of these groups, in this case at least combat, constitutes association with criminal terrorist wrongdoers, with the intention of committing crimes of injury to persons. All that must be demonstrated is that the accused had knowledge of the criminal nature of the offences prepared by the group; the association does not have to be linked to the preparation of a specific act of terrorism.⁹⁶

The prosecutor requested twenty years’ imprisonment since the act was prosecuted as a crime. Interestingly, the Assize Court did not follow the prosecutor’s request and imposed fourteen years’ imprisonment.

In another similar case, an accused person, without any background of radicalization, joined the so-called Islamic State of Iraq and the Levant (ISIL) in Syria in 2014. According to the accused, he was shocked by the atrocities committed by ISIL in Syria, and he therefore volunteered to commit a terror attack in Lebanon as this was his only possibility of regaining possession of his confiscated passport and fleeing back home. Indeed immediately upon arrival in Beirut, he left for France. No evidence was found to prove the opposite, apart from the fact that for a few days upon his return to France, he was still in contact

94 See Antoine Garapon and Ioannis Papadopoulos, *Juger en Amérique et en France*, Odil Jacob, Paris, 2003, p. 98 (unofficial translation): “In France, the outcome of the assizes trial is often not in doubt, as indicated by the very low number of acquittals compared to that of the English courts Not because the French courts are more arbitrary, but because the cases that are heard are only those in which the facts are firmly established. The cases will reach this point after having been deliberated before by other judges, the investigating magistrate and the investigating chamber. Acquitting in the assizes trial is tantamount to invalidating the work of these magistrates, who have already taken decisions on the merits.”

95 Court of Cassation, Decision No. 16-82.692 (Criminal Chamber), 12 July 2016, available at: www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000032900180.

96 Indictment before the Assize Court, Investigation No. 2201/14/4, 20 June 2017, p 21. The accused have been detained since June 2014 and the trial started on 20 March 2018.

with ISIL members and was looking at jihadist websites. For the prosecution, this indicated that he was radicalized and dangerous, and it therefore requested fifteen years' imprisonment. The Court sentenced him to ten years' imprisonment, and the prosecution made an appeal.

These two cases demonstrate how due to the wide scope of AMT and its large spectrum of punishment, it is not entirely clear how the sentence is decided upon, especially in cases which are neither minor offences nor actual crimes. One of the main criteria for this decision seems to be the assessment of dangerousness and the level of radicalization of the accused person. This assessment is done through an "inquiry of the personality" by the judges during the trial hearings (procedurally done in most cases before looking at the facts) and through the examination of their behaviour in prison during the pre-trial detention, which usually lasts for two to three years. It appears that the sentence is imposed not only for acts committed, but also as a preventive measure, for acts that could potentially be committed. This raises several questions. First, it seems that the principle of legality is not entirely respected and that there is a risk of arbitrariness in decisions related to sentencing, as they lack clarity and objectivity. Second, while merging the goals of criminal repression and prevention (of future possible acts), liberal criminal law doctrines are being reshaped towards a hybridization. Pre-emptive criminal practices have introduced a broad understanding of risk assessments, accompanied by an evaluation of the predictability and dangerousness of the defendant. These are forms of categorization, where the individual, in his complex identity and reasoning for his actions, is reduced to a certain model or profile that will provide the basis for predicting his future actions through interpretation of his behaviour, beliefs and social habits. As a result, restrictions on liberty can then be imposed easily, and perhaps arbitrarily, as the material act is no longer at the centre of the analysis.

Global justice versus the war on terror paradigm

The current policy relating to the prosecution of foreign fighters has been put in place to systematically refer cases to the counterterrorism investigation unit and not the war crimes and crimes against humanity unit, as well as to avoid conducting joint investigations. This is despite the fact that the senior investigative judge in the counterterrorism unit was previously in the war crimes unit, and it was hoped that better cooperation would be achieved between the separated units.⁹⁷ Thus, French

97 The Lafarge case may illustrate well this tendency. The Franco-Swiss Lafarge company, in order to maintain the functioning of its cement factory in Syria within an ISIL-controlled zone, was "paying for passes issued by the jihadist organization and buying raw materials necessary for cement production such as oil and pozzolana in areas under ISIS's control". While the lawyers representing clients in a lawsuit against the company claimed that "[b]y having business relations with the terrorist group ISIS in Syria, this company may have taken part in the financing of the group, being therefore complicit in war crimes and crimes against humanity", the investigation was not opened within the war crimes unit; instead, a joint investigation was initiated in the financial investigative division. Sherpa, "Important Step in the 'Lafarge in Syria' Case: Nomination of Three Investigative Judges", 13 June 2017, available at: www.asso-sherpa.org/important-step-in-the-lafarge-in-syria-case-nomination-of-three-investigative-judges; Sherpa, "Lafarge Sued for Financing ISIS", available at: www.asso-sherpa.org/service/lafarge-sued-for-financing-isis-and-complicity-in-war-crimes-and-crimes-against-humanity-in-syria.

trials do not render accountability for international crimes that may have occurred in Syria. Proceedings are being focused on the prosecution of AMT, and as AMT is defined very broadly and requires relatively little burden of evidence, it can be prosecuted more easily and rapidly than war crimes, in which the investigative judge normally has to go on site to collect evidence and hear testimonies. This policy remains problematic at several levels. First, the victims will not see justice for the crimes committed; instead, persons are prosecuted merely for being a member of a terrorist group and the danger that they may represent in France in the future. Additionally, while not all acts committed are equal in gravity (some individuals may have committed or conspired to commit only very marginal acts, while others may have contributed to the commission of actual terrorist acts and other crimes), they are all prosecuted under the same offence, instead of according to the *actus reus* of each of the accused. While more and more resources are attributed to counterterrorism investigations, investigation of international crimes is marginalized. This phenomenon reached a new peak with the recent reform that merges the counterterrorism prosecution unit and the war crimes/crime against humanity unit into one structure, the National Antiterrorism Prosecution Service.⁹⁸

Conclusion: Complementarity, exclusivity and hybridization of legal regimes

As shown, the French administrative and criminal legal systems are complementary and back each other – when the criminal system cannot operate because of a lack of evidence, the administrative framework will take over; when a convict ends a prison sentence, administrative law will provide the option for follow-up surveillance. It also functions the other way around: when an administrative order is violated, a judge in criminal cases becomes competent to restrict one’s liberty more effectively. The dangerousness of individuals is assessed on a regular basis in both the administrative and criminal justice frameworks.

At the same time, the French counterterrorism legal system relies exclusively on criminal and administrative law. Even in cases directly linked to the armed conflict in Syria, and despite the fact that the geopolitical context is clearly present in the courtrooms and in the decisions of the judges, the French legal system refers neither to international humanitarian law (IHL) nor to international criminal law frameworks. Instead, administrative and criminal law keep being expanded to encompass the commission or prevention of all kinds of acts, with a growing spectrum of acts and punishments. No clear distinction is made for the treatment of persons who have committed (or who are suspected of having committed) violent criminal activity and those who participate in an

98 This reform was adopted in November 2018. Loi de la programmation 2019–2022 et de Réforme pour la Justice, No. 1349, 6 November 2018, available at: www.assemblee-nationale.fr/dyn/15/amendements/1349/CIION_LOIS/CL999.

armed conflict and violate IHL. As most, if not all, prosecutions are done under the security prism of France, no accountability is provided for grave IHL and international human rights law violations committed in Syria or Iraq.

In addition to IHL being overlooked, another important characteristic of the French counterterrorism legal architecture is its accommodation and hybridization. Security goals include not only repression but also pre-emption, and as Garapon and Rosenfeld have observed, by requesting the law to punish prior to the commission of a crime, the fight against terrorism challenges the very foundations of criminal law with the quite uncertain notion of pre-emption, relying on predictability and the assumptions of risk assessments.⁹⁹ As a result, domestic legal boundaries are being transformed and a process of hybridization of criminal and administrative legal doctrines and approaches is being put in place. This transformation, currently introduced in law, may quickly impact other domains, such as the repression of political protest. Indeed, this is one of the main manifested results that can be observed today in France.¹⁰⁰

Finally, while allowing little consideration to more liberal doctrines of criminology such as rehabilitation, it remains doubtful whether prosecuting and detaining persons under one broad category can provide a solution to the phenomenon of radicalization in the long run.

99 Antoine Garapon and Michel Rosenfeld, *Démocraties sous stress: Les défis du terrorisme global*, Presses Universitaires de France, Paris, 2016, p. 128.

100 See for example, CNCDH, “Quand la logique sécuritaire heurte la liberté fondamentale de manifester”, 10 January 2019, available at: www.cncdh.fr/fr/publications/quand-la-logique-securitaire-heurte-la-liberte-fondamentale-de-manifester; UN Office of the High Commissioner for Human Rights, “France: UN Experts Denounce Severe Rights Restrictions on ‘Gilets Jaunes’ Protesters”, press release, Geneva, 14 February 2019, available at: www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24166&LangID=E.

Still a blind spot: The protection of LGBT persons during armed conflict and other situations of violence

Alon Margalit*

Alon Margalit is an Israeli lawyer and humanitarian practitioner. He holds a PhD from the Institute of Advanced Legal Studies, University of London.

Abstract

This article draws attention to the situation of LGBT persons during armed conflict. Subjected to violence and discrimination outside the context of armed conflict, the latter aggravates their vulnerability and exposure to various abuses. Despite important progress made with respect to their protection under human rights law, a similar effort is largely absent from the international humanitarian law discourse. This article accordingly highlights some of the norms and challenges pertaining to the protection of LGBT persons in time of war.

Keywords: international humanitarian law, LGBT, sexual orientation, gender identity, armed conflict, protection, discrimination, *non-refoulement*, sexual violence.

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Introduction

The effects of armed conflict on lesbian, gay, bisexual and transgender (LGBT) persons¹ have made headlines in recent years, as human rights bodies, civil society and the media are increasingly documenting these effects in various conflicts around the world.

Looking at the accumulating reports, it is evident that LGBT individuals are exposed to violence and discrimination during peacetime and in situations of violence which do not amount to an armed conflict.² When it comes to circumstances of armed conflict, LGBT persons, who are often among the least protected of all groups,³ face additional perils created by the chaotic environment and breakdown of law and order. For example, the reality of LGBT Iraqis caught up in the conflict between the so-called Islamic State of Iraq and the Levant (ISIL) and pro-government forces has been described as follows:

While the conflict in Iraq has placed hundreds of thousands of Iraqis at risk of serious human rights violations, LGBT Iraqis face unique threats to their safety. In addition, escape to previously safer areas, such as Iraqi Kurdistan, has been curtailed by the conflict. Unlike other groups, such as women or ethnic and religious minorities, LGBT people have little communal safety or protection from family, tribal or community members. Once exposed, family and community members, along with the authorities, are often complicit in abuses against LGBT individuals.⁴

While it is clear that LGBT persons suffer serious humanitarian consequences as a result of armed conflicts, similar initiatives to those promoted under international human rights law (IHRL) with a view to improving their protection are quite rare

- 1 The practice reviewed in this article concerns the treatment of LGBT persons. The term “sexual orientation” refers to a person’s physical and emotional attraction towards others, while “gender identity” concerns a person’s self-perceived identity, as well as its expression, which may be different from the sex assigned at birth: see United Nations (UN) Office of the High Commissioner for Human Rights (OHCHR), *Report of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, UN Doc. A/HRC/72/172, 19 July 2017, para. 2. For further explanation of key terms and concepts, see OHCHR, *Living Free and Equal*, New York and Geneva, 2016, pp. 18–19, available at: www.ohchr.org/Documents/Publications/LivingFreeAndEqual.pdf (all internet references were accessed in March 2019).
- 2 See OHCHR, “Azerbaijan: UN Rights Experts Alarmed by Reports of Persecution of People Perceived to be Gay or Trans”, 13 October 2017, available at: www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22230&LangID=E; Human Rights First, “Raids in Belarus, Death in Chechnya Continue Alarming Assault on LGBT Community”, 24 October 2017, available at: <https://www.humanrightsfirst.org/press-release/raids-belarus-death-chechnya-continue-alarming-assault-lgbt-community>; Human Rights Watch (HRW), “Egypt: Mass Arrests Amid LGBT Media Blackout”, 6 October 2017, available at: www.hrw.org/news/2017/10/06/egypt-mass-arrests-amid-lgbt-media-blackout; Georgetown Law Human Rights Institute, *Uniformed Injustice: State Violence Against LGBT People in El Salvador*, Washington, DC, 21 April 2017, available at: www.law.georgetown.edu/human-rights-institute/our-work/fact-finding-project/uniformed-injustice/; Owen Bowcott, “Uganda Anti-Gay Law Led to Tenfold Rise in Attacks on LGBTI People, Report Says”, *The Guardian*, 12 May 2014.
- 3 Haeyoun Park and Iaryna Mykhyalshyn, “LGBT People Are More Likely to Be Targets of Hate Crimes than Any Other Minority Group”, *The New York Times*, 16 June 2016, available at: www.nytimes.com/interactive/2016/06/16/us/hate-crimes-against-lgbt.html.
- 4 Outright Action International, *Exposing Persecution of LGBT Individuals in Iraq*, 19 November 2014, available at: www.outrightinternational.org/content/exposing-persecution-lgbt-individuals-iraq.

in the context of international humanitarian law (IHL). It is therefore important to elaborate on the exact manner in which IHL applies to and protects LGBT people.

This article begins with a description of some of the humanitarian hardships experienced by LGBT communities in times of armed conflict. As both IHL and IHRL are relevant to their protection, it continues with an overview of prominent positive developments under IHRL in this regard. The article then examines the application of IHL to LGBT persons, considering both legal and practical aspects. Finally, it highlights the challenge of negative societal attitudes, hampering the protection of LGBT groups from violence and discrimination, including in the context of armed conflict.

LGBT persons in armed conflict and other situations of violence

Recent reports demonstrate the humanitarian suffering of LGBT people during armed conflict. In Syria, among other places, information has been gathered on the persecution of individuals assumed to be gay or lesbian.⁵ Many of the reports concern sexual violence, including forced stripping, rape and forced anal or vaginal examinations, perpetrated both by government forces and by armed groups, in particular in detention facilities.⁶ Incidents of physical assault and harassment against men and women, on the basis of their actual or perceived sexual orientation or gender identity, were also recorded in areas controlled by armed groups, notably ISIL and Al-Nusrah Front.⁷ Testimonies of LGBT individuals revealed that in some cases, as the conflict in Syria escalated, their neighbours, friends, former schoolmates and even family members had threatened them or “sold them out” to various armed groups.⁸

Indeed, the risk to LGBT persons in areas controlled by armed groups seems particularly grave. In Iraq and Syria, men accused of homosexuality or same-sex sexual relations were executed by ISIL, usually by throwing them off the roofs of high-rise buildings.⁹ A United Nations (UN) report recently submitted to the UN Security Council discusses violence against LGBT people in the context of

5 Human Rights Council (HRC), *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/25/65, February 2014, paras 67, 70.

6 OHCHR, *Discrimination and Violence against Individuals Based on Their Sexual Orientation and Gender Identity*, UN Doc. A/HRC/29/23, 4 May 2015, para. 31; Graeme Reid, “The Double Threat for Gay Men in Syria”, *Washington Post*, 25 April 2014.

7 Reports of the UN Secretary-General, *Conflict-Related Sexual Violence*, UN Doc. S/2015/203, 23 March 2015, para. 61, and UN Doc. S/2016/361, 20 April 2016, para. 69; Michelle Nichols, “Gay Men Tell UN Security Council of Being Islamic State Targets”, *Reuters*, 25 August 2015.

8 G. Reid, above note 6; Heartland Alliance International, *No Place for People Like You: An Analysis of the Needs, Vulnerabilities, and Experiences of LGBT Syrian Refugees in Lebanon*, Chicago, IL, December 2014, p. 15, available at: www.heartlandalliance.org/wp-content/uploads/sites/13/2016/02/no-place-for-people-like-you_hai_2014.pdf.

9 Outright Action International, “Timeline of Publicized Executions for ‘Indecent Behavior’ by Islamic State Militias”, 2 April 2016, available at: www.outrightinternational.org/dontturnaway/timeline; OHCHR, above note 6, para. 29; Office of the United Nations Assistance Mission for Iraq and OHCHR, *The Protection of Civilians in the Armed Conflict in Iraq: 1 November 2015–30 September 2016*, December 2016, p. 10.

violent extremism, suggesting that it is employed by radical armed groups in Syria, Iraq and elsewhere as a tactic of terror and control (i.e., spreading fear in order to suppress any resistance, ensure compliance of the local population, gain information or punish those who seem to support the adversary).¹⁰ Conflict-related sexual violence against men and boys has been documented during recent and ongoing armed conflicts in the Central African Republic, the Democratic Republic of the Congo and elsewhere.¹¹ In Afghanistan, pro-government militias subjected boys to sexual slavery and abuse, while the Taliban has used child sex slaves to infiltrate Afghan security ranks.¹² While an assailant may not consider a male victim to actually be an LGBT person, the motivation behind the violent act is to gain power and dominance over the enemy by imputing a feminine identity or “homosexual behaviour” to the victim, which is conceived as weakening and dishonouring the latter.¹³

Numerous complaints have been collected regarding attacks on the LGBT community, including against LGBT activists and human rights defenders, by government security forces and their militias, as well as by insurgent armed groups. These complaints have come from places like Colombia and Peru (during the 1980s and 1990s) in addition to the countries listed above, and have involved killings, torture and enforced disappearances.¹⁴ It has been reported that armed groups which have gained control over territory, for instance in Colombia and in Iraq, have distributed pamphlets demeaning those perceived to be LGBT persons or LGBT defenders, threatening to kill them or declaring them military targets.¹⁵

10 Report of the UN Secretary-General, 2015, above note 7, paras 6, 82–83.

11 *Ibid.*, paras 14, 23; Sandesh Sivakumaran, “Sexual Violence against Men in Armed Conflict”, *European Journal of International Law*, Vol. 18, No. 2, 2007 (discussing sexual violence against men in a number of conflicts, including in the former Yugoslavia).

12 Anuj Chopra, “Taliban Use Child Sex Slaves to Kill Afghan Police”, *AFP*, 19 June 2016, available at: www.yahoo.com/news/taliban-child-sex-slaves-kill-afghan-police-031230996.html.

13 Dustin Lewis, “Unrecognized Victims: Sexual Violence against Men in Conflict Settings under International Law”, *Wisconsin International Law Journal*, Vol. 27, No. 1, 2009, pp. 7–9; S. Sivakumaran, above note 11, pp. 270–272; Jamil Santos, “Duterte’s Claim that 40% of NPA Rebels Are Gay ‘Most Unbelievable’, Says Joma”, *GMA News*, 26 February 2019, available at: www.gmanetwork.com/news/news/nation/686188/duterte-s-claim-that-40-of-npa-rebels-are-gay-most-unbelievable-says-joma/story/.

14 Simon West, “Colombia’s LGBTQ Community: Victims of Armed Conflict”, *NBC News*, 7 September 2016, available at: www.nbcnews.com/feature/nbc-out/colombia-s-lgbt-population-victims-armed-conflict-n643861; Michael K. Lavers, “Colombian LGBT Groups Endorse Peace Deal”, *Washington Blade*, 27 August 2017, available at: www.washingtonblade.com/2016/08/27/colombian-lgbt-groups-endorse-peace-deal/; Rael Mora, “Peru: LGBT Community Targeted During Armed Conflict”, *Telesur*, 21 November 2014, available at: www.telesurenglish.net/news/Peru-LGBT-Community-Targeted-During-Armed-Conflict-20141121-0038.html.

15 Iraqueer *et al.*, *Dying to Be Free: LGBT Human Rights Violations in Iraq*, 2015, p. 4, available at: www.law.cuny.edu/academics/clinics/hrj/publications/ICCPR-Iraq-Shadow-Report-LGBT-ENG.pdf; HRW, *Audacity in Adversity: LGBT Activism in the Middle East and North Africa*, 2018, pp. 17–18, available at: www.hrw.org/sites/default/files/report_pdf/lgbt_mena0418_web_0.pdf; Inter-American Commission on Human Rights (IACHR), *Violence against LGBTI Persons in the Americas*, 12 November 2015, pp. 166–167, para. 296; IACHR, *Truth, Justice and Reparation*, 2013, pp. 406–408. Interestingly, the November 2016 Peace Agreement in Colombia recognizes that LGBT groups are among “the most vulnerable populations” who were victimized during the armed conflict, stressing the need to ensure their protection.

Reports by human rights bodies and civil society maintain that LGBT persons, especially trans women, are more vulnerable to violence by armed groups and organized crime in Central America.¹⁶ Among other forms of violence, many cases of “corrective rape” against lesbians and trans women have been documented, for example, in Colombia.¹⁷

Violence against LGBT persons has also led to their displacement – for instance, from the territory under armed groups’ control in eastern Ukraine¹⁸ and in Bangladesh.¹⁹ In Iraq and Colombia, LGBT individuals were specifically targeted due to their sexual orientation, gender identity and gender expression. They were forced to leave their homes after they had suffered intimidation and death threats in the course of “corrective violence” or “population cleansing” campaigns carried out by armed groups.²⁰ In some cases, the persecution of LGBT persons continued following their displacement. For example, Syrians who fled to Lebanon were later harassed on suspicion of being gay, and in some cases were arrested and allegedly tortured by Lebanese security forces while in detention.²¹ LGBT refugees in Kenya reported that they were assaulted and their shelters were set alight by members of the host community and by fellow refugees.²²

For the most part, the parties to armed conflict, if not themselves involved in the commission of these abuses, have failed to prevent them from occurring in the first place or to take appropriate accountability measures, namely an adequate investigation of the incidents and the prosecution of those responsible.²³ While

- 16 IACHR, *Violence against LGBTI Persons in the Americas*, above note 15, p. 159, para. 279, and p. 186, para. 345.
- 17 *Ibid.*, pp. 109, 194. In these cases, the individuals concerned were raped because of their actual or perceived sexual orientation or gender identity, with the perverse intention of “correcting” the individual’s sexual orientation or making them behave according to what is considered in conformity with their assigned biological sex.
- 18 Kate Bond and Anastasia Vlasova, *Gay and Displaced on the Frontlines of Ukraine’s Conflict*, UN Office of the High Commissioner for Refugees (UNHCR), Donetsk, 15 September 2017, available at: www.unhcr.org/news/stories/2017/9/597ef1fc4/gay-displaced-frontlines-ukraines-conflict.html?query=LGBT; Justice for Peace in Donbas Coalition, *LGBT Representatives in Donetsk Region Leave Their Homes Because of Persecution*, 22 January 2016, available at: www.jfp.org.ua/rights/porushennia/violation_categories/henderno-obumovlene-nasylstvo/rights_violations/lbti-persecution-yenakiyevo?locale=en.
- 19 HRW, *Country Profiles: Sexual Orientation and Gender Identity*, 23 June 2017, available at: www.hrw.org/news/2017/06/23/human-rights-watch-country-profiles-sexual-orientation-and-gender-identity (referring to an April 2016 killing of LGBT persons by Al-Qaeda in the Indian Subcontinent).
- 20 Report of the UN Secretary-General, 2015, above note 7, paras 20, 30; IACHR, *Violence against LGBTI Persons in the Americas*, above note 15, paras 29, 296, 360; Outright Action International, *When Coming Out is a Death Sentence: Persecution of LGBT Iraqis*, November 2014, available at: www.outrightinternational.org/sites/default/files/ComingOutDeathSentence_Iraq_0.pdf. According to Human Rights Watch, dozens of men were abducted and killed during 2009 by Ahl Al-Haq and Mahdi militias as part of this “social cleansing” campaign; see HRW, “*They Want Us Exterminated*”: *Murder, Torture, Sexual Orientation and Gender in Iraq*, August 2009, available at: www.hrw.org/report/2009/08/17/they-want-us-exterminated/murder-torture-sexual-orientation-and-gender-iraq.
- 21 G. Reid, above note 6; Heartland Alliance International, above note 8, pp. 21–22. For the risks faced by LGBT refugees in camps and urban settings, see Women’s Refugee Commission, *Mean Streets: Identifying and Responding to Urban Refugees’ Risks of Gender-Based Violence*, February 2016, p. 69, available at: www.womensrefugeecommission.org/gbv/resources/1272-mean-streets; UNHCR, *Protecting Persons with Diverse Sexual Orientations and Gender Identities*, December 2015, p. 28.
- 22 Nita Bhalla, “UN Moves LGBT+ Refugees to Safe Houses after Kenya Camp Attacks”, *Reuters*, 13 December 2018.

during peacetime such abuses – especially cases of sexual violence – are under-reported, it seems that armed conflicts make it even harder for the victims to seek justice. In peacetime, victims are often reluctant to complain due to, *inter alia*, the attached stigma, the risk of alienation by family members, fear for their personal safety and distrust of law enforcement authorities.²⁴ The circumstances of armed conflict present additional challenges to victims who wish to complain. These include security problems, disruption to essential services such as medical care, damage to infrastructure and to means of transportation and communication, and limited capacity of the local authorities, overwhelmed by the upsurge in violence, to assist victims and ensure their safety. In the context of an inter-State conflict, victims may need to interact with the authorities of the warring party and other individuals supporting the enemy. In this regard, reporting may be further curtailed by language barriers, cultural differences and hostile attitudes towards victims.

Positive developments within the international human rights law framework

Against this background, it is important to note the considerable effort by human rights bodies to strengthen the protection of LGBT persons. Although not necessarily in the context of armed conflict, the issue has gained momentum in both the legal and diplomatic spheres, especially in the last decade.

A number of treaty bodies, while interpreting specific provisions of their respective instruments, have pointed out that sexual orientation and gender identity are prohibited grounds of discrimination.²⁵ Despite the fact that human rights treaties do not contain an explicit reference to sexual orientation or gender identity, it has been increasingly recognized that existing rights and protections, enshrined in IHRL and granted “to all members of the human family”,²⁶ apply

23 E.g., Iraqueer *et al.*, above note 15; OHCHR, above note 6, para. 76.

24 Interestingly, outside the context of armed conflict, a survey conducted in the European Union in 2013 found that over a quarter of LGBT respondents were violently attacked or threatened in the preceding five years. This figure increases to more than one third (35%) for trans respondents, who appear to be the most victimized among LGBT persons. The survey further shows that most cases are not reported to law enforcement authorities as the victims assume the authorities will ignore the complaint, or they fear homophobic or transphobic reactions from the police. European Union Agency for Fundamental Rights, *Professionally Speaking: Challenges to Achieving Equality for LGBT People*, Luxembourg, March 2016, pp. 48–49, available at: www.fra.europa.eu/en/publication/2016/professional-views-lgbt-equality.

25 E.g., Committee Against Torture (CAT), General Comment No. 2, “Implementation of Article 2 by States Parties”, UN Doc CAT/C/GC/2, 24 January 2008, and General Comment No. 3, “Implementation of Article 14 by States Parties”, UN Doc. CAT/C/GC/2, 13 December 2012; Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 20, “Non-discrimination in Economic, Social and Cultural Rights (Art. 2)”, UN Doc. E/C.12/GC/20, July 2009; Committee on the Elimination of Discrimination against Women (CEDAW), “General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention”, UN Doc. CEDAW/C/GC/28, 16 December 2010.

26 Universal Declaration of Human Rights (adopted and proclaimed by UNGA Res. 217A(III) of 10 December 1948), Preamble.

also to LGBT persons. It was thus established that LGBT persons are protected from arbitrary deprivation of life and liberty, and from torture, cruel, inhuman or degrading treatment or punishment.²⁷ It was also confirmed that they are entitled to the equal protection of the law, to freedom of association, assembly and expression, and to health, employment, education, housing and other economic, social and cultural rights.²⁸

Human rights treaty bodies, such as the Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination against Women (CEDAW), have considered the criminalization of homosexuality and same-sex intimate relations between consenting adults to violate certain rights embodied in their respective treaties, namely the right to privacy and the prohibition against discrimination, as well as the protection from arbitrary deprivation of liberty in cases where arrest was effected on account of sexual orientation or gender identity.²⁹

It has further been affirmed that the use of lethal force on the basis of real or perceived sexual orientation or gender identity, including the imposition of the death penalty by domestic penal laws, constitutes arbitrary deprivation of the right to life.³⁰ Denouncing the violence against LGBT communities and the imposition of the death penalty for homosexual acts by a number of States Parties, both the Human Rights Committee and the Committee Against Torture have upheld LGBT persons' right to life and physical integrity and protection from ill-treatment, including from deportation to a State where there is a fear of the death penalty or torture.³¹

Regional human rights mechanisms have adopted a similar approach. The European Court of Human Rights (ECtHR) has opined that the European Convention on Human Rights applies to LGBT persons, who are accordingly

27 Human Rights Committee, *X. v. Sweden*, Communication No. 1833/2008, 1 November 2011; CAT, General Comment No. 2, above note 25, paras 21–22.

28 OHCHR, *Ending Violence and other Human Rights Violations Based on Sexual Orientation and Gender Identity: A Joint Dialogue of the African Commission on Human and Peoples' Rights, Inter-American Commission on Human Rights and United Nations*, Pretoria, 2016, pp. 12–13, 29, available at: www.ohchr.org/Documents/Issues/Discrimination/Endingviolence_ACHPR_IACHR_UN_SOGI_dialogue_EN.pdf.

29 Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, 31 March 1994, and *G. v. Australia*, Communication No. 2172/2012, 28 June 2017 (noting that the prohibition against discrimination encompasses discrimination on the basis of gender identity, and highlighting the protection of the transgender complainant from arbitrary interference with her privacy and family life); Human Rights Committee, *Concluding Observations: Ethiopia*, UN Doc. CCPR/C/ETH/CO/1, 2011, para. 12, and General Comment No. 35, "Article 9 (Liberty and Security of Person)", UN Doc. CCPR/C/GC/35, 16 December 2014; CESCR, *Concluding Observations: Kyrgyzstan*, UN Doc. E/C.12/ETH/CO/1-3, 2012, para. 8; CEDAW, *Concluding Observations: Uganda*, UN Doc. CEDAW/C/UGA/CO/7, 2010, paras 43–44; OHCHR, *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/2003/8, 2002, paras 68–70, 76.

30 UNGA Res. 71/198, 19 December 2016, para. 6; HRC, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on a Gender-Sensitive Approach to Arbitrary Killings*, UN Doc. A/HRC/35/23, June 2017, paras 45, 47–48.

31 Human Rights Committee, *X. v. Sweden*, above note 27; CAT, *J. K. v. Canada*, Communication No. 562/2013, 25 November 2015; Human Rights Committee, General Comment No. 36, "Article 6 (Right to Life)", UN Doc. CCPR/C/GC/36, 30 October 2018, paras 30, 36.

protected from violence, ill-treatment and discrimination.³² The High Contracting Parties are therefore required to provide LGBT victims an effective remedy in cases where their Convention rights are violated, in particular to conduct an effective investigation.³³ The Strasbourg Court has further concluded that the criminalization of same-sex sexual acts between consenting adults constitutes unjustified interference with the right to respect for a person's private life.³⁴ Notably, the Court has also recognized LGBT persons' right to family life.³⁵

In the Americas, the General Assembly of the Organization of American States (OAS) has adopted several resolutions calling for the effective protection of LGBT persons from violence and discrimination,³⁶ and in 2013 it included explicit references to sexual minorities, sexual orientation and gender identity and expression in the Inter-American Convention against All Forms of Discrimination and Intolerance.³⁷ Similarly, the Inter-American Court of Human Rights (IACtHR) has held that sexual orientation and gender identity of persons is a category protected by the American Convention on Human Rights.³⁸ Hence, any regulation, act or practice which is considered discriminatory based on a person's sexual orientation is prohibited. In 2014, the Inter-American Commission on Human Rights (IACHR) created a rapporteurship on the rights of LGBT persons whose mandate is to monitor their situation in the region.³⁹

The issue of human rights violations committed on the basis of sexual orientation or gender identity has also been addressed by the African Commission on Human and Peoples' Rights (ACHPR), monitoring compliance with the African Charter on Human and Peoples' Rights. In 2011, the Commission adopted the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter, making direct references to gender and sexual orientation as prohibited grounds of discrimination, and considering LGBT people among "vulnerable and

32 E.g., ECtHR, *Identoba and Others v. Georgia*, Appl. No. 73235/12, 12 May 2015; ECtHR, *Karner v. Austria*, Appl. No. 40016/98, 24 July 2003. For a comprehensive overview, see Paul Johnson, "The Council of Europe and the European Court of Human Rights" in Andreas R. Ziegler (ed.), *International LGBTI Law: Sexual Orientation and Gender Identity Law from an International-Comparative Perspective*, forthcoming.

33 ECtHR, *Identoba*, above note 32; ECtHR, *Alekseyev v. Russia*, Appl. No. 4916/07, 21 October 2010; ECtHR, *M. C. and A. C. v. Romania*, Appl. No. 12060/12, 12 April 2016.

34 ECtHR, *Dudgeon v. United Kingdom*, Appl. No. 7525/76, 23 September 1981.

35 ECtHR, *Vallianatos and Others v. Greece*, Appl. No. 29381/09, 7 November 2013; ECtHR, *Oliari and Others v. Italy*, Appl. No. 18766/11, 21 July 2015. The Court observed that the European Convention does not grant a right to same-sex marriage, but only access to "registered partnership" or "civil union". See also Council of Europe, Parliamentary Assembly Res. 1728, 2010.

36 E.g., AG/RES. 2435 (XXXVIII-O/08), 3 June 2008; AG/RES. 2887 (XLVI-O/16), 14 June 2016, sec. xix.

37 Available at: www.oas.org/en/sla/dil/inter_american_treaties_A-69_discrimination_intolerance.asp (not yet entered into force).

38 IACtHR, *Atala Riffo and Daughters v. Chile*, Judgment, 24 February 2012, para. 91. See also, recently, the Court's advisory opinion recognizing the right to rectify public records and identity documents in accordance with the person's self-perceived gender identity, as well as the equal rights of same-sex couples, including their right to marry: IACtHR, *Advisory Opinion OC-24/17 on Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples*, 24 November 2017.

39 OAS, "Rights of Lesbian, Gay, Bisexual, Trans and Intersex Persons", available at: www.oas.org/en/iachr/lgtbi/.

disadvantaged groups” that face significant impediments to their enjoyment of economic, social and cultural rights.⁴⁰ Notably, in 2014 the Commission adopted a resolution condemning systematic attacks by State and non-State actors against LGBT persons, and calling on States to ensure proper investigation and diligent prosecution of perpetrators and to establish judicial procedures responsive to the needs of victims.⁴¹

In the UN System, in 2003 the General Assembly urged States to ensure the effective protection of the right to life of those targeted because of their sexual orientation or gender identity, and to properly investigate all killings, including those committed in the name of honour.⁴² It further instructed States to ensure that such killings are not tolerated whether committed by security forces, police and law enforcement agents, paramilitary groups or private forces.⁴³ The Security Council acknowledged in a 2013 resolution on “Women, Peace and Security” that sexual violence in armed conflict and post-conflict situations is “also affecting men and boys”.⁴⁴ It is noteworthy that this statement, while important in itself, does not directly address the vulnerability of LGBT persons, given that men and boys are not necessarily assaulted because of their actual or perceived sexual orientation or gender identity.

In 2011, the UN Human Rights Council (HRC) adopted, for the first time, a resolution expressing grave concern “at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity”.⁴⁵ Recently, the HRC appointed a first-ever UN Independent Expert to monitor, raise awareness and report on violence and discrimination against LGBT people.⁴⁶ As part of this trend, twelve UN entities called on States to act urgently to end violence and discrimination against LGBT adults, adolescents and children,⁴⁷ and the UN Secretary-General, amid criticism from some member States, urged the international community to continue working for equal rights and fair treatment for LGBT people.⁴⁸

40 Available at: www.achpr.org/instruments/economic-social-cultural/. For a detailed overview, see OHCHR, above note 28, p. 20.

41 ACHPR Res. 275, “Protection against Violence and other Human Rights Violations against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity”, 2014, available at: www.achpr.org/sessions/55th/resolutions/275/.

42 UNGA Res. 57/214, 25 February 2003, para. 6.

43 *Ibid.* See also UNGA Res. 59/197, 10 March 2005; UNGA Res. 61/173, 1 March 2007; UNGA Res. 64/182, 16 March 2009; UNGA Res. 65/208, 30 March 2011; UNGA Res. 67/168, 15 March 2013; UNGA Res. 69/182, 30 January 2015.

44 UNSC Res. 2106, 24 June 2013.

45 HRC Res. 17/19, 17 June 2011; HRC Res. 27/32, 26 September 2014.

46 HRC Res. 32/2, 30 June 2016. The issue was also addressed by the Council’s Special Procedures: see OHCHR, above note 28, p. 19. For example, the Special Rapporteur on violence against women, its causes and consequences pointed out that sexual orientation is a contributory factor to the risk of violence against women: *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences: Mission to India*, UN Doc. A/HRC/26/38/Add.1, 1 April 2014, para. 19.

47 Joint UN Statement on Ending Violence and Discrimination against LGBTI People, 2015, available at: www.ohchr.org/EN/Issues/Discrimination/Pages/JointLGBTIstatement.aspx.

48 Remarks by the UN Secretary-General at High-level Side Event of the LGBT Core Group, 21 September 2016, available at: www.un.org/sg/en/content/sg/statement/2016-09-21/secretary-generals-remarks-high-level-side-event-lgbt-core-group.

Finally, a prominent civil society initiative, led by human rights experts, culminated in the Yogyakarta Principles, affirming the application of IHRL to LGBT persons in a manner which is sensitive to their specific needs.⁴⁹

The process of enhancing the protection of LGBT persons is not without difficulties or sensitivities. Suffice it to say that many States still criminalize homosexuality or same-sex intimate relations.⁵⁰ Violence and discrimination against LGBT persons, as well as their displacement, are often tolerated and even encouraged by the authorities on the grounds of protecting public decency, morality or religious values.⁵¹ This seemed to be clear to the HRC in its effort to promote the protection of LGBT people, as well as to obtain the necessary political support. The wording chosen to this end in its respective resolutions is an attempt to square the circle. For example, the 2016 resolution on “Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity” reiterates the duty of all States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.⁵² The resolution should be implemented “in full conformity with universally recognized international human rights”.⁵³ Yet, the HRC subjected such implementation to the concerned State’s “national laws” and to the “various religious and ethical values and cultural backgrounds of its people”.⁵⁴

Given the composition of the HRC, this compromise is understandable. Nonetheless, from a legal perspective, both religious convictions and societal customs cannot be pursued without limitation. The right to manifest one’s religion or belief may be restricted if necessary to protect, *inter alia*, the fundamental rights and freedoms of others.⁵⁵ Accordingly, discrimination, hostility or violence cannot be used in order to compel others to accept a certain religion or adhere to its rules.⁵⁶ It has been repeatedly affirmed by human rights bodies that cultural, religious and moral practices and beliefs, or mere negative social attitudes, cannot be invoked in order to justify human rights violations against any group, including LGBT persons.⁵⁷ This

49 The Yogyakarta Principles were updated in 2017. Available at: www.yogyakartaprinciples.org.

50 Same-sex sexual activity is currently criminalized in seventy States. In eleven States, the offence carries the death penalty. See International Lesbian, Gay, Bisexual, Trans and Intersex Association and Lucas Ramon Mendos, *State-Sponsored Homophobia 2019*, Geneva, March 2019, available at: https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019.pdf.

51 E.g., HRW, above note 15; HRC, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on His Mission to the Gambia*, UN Doc. A/HRC/29/37/Add.2, May 2015, paras 78–79. See also Jeremy Sharon, “200 Leading Rabbis Call Gays ‘Perverts’, Oppose Gay Surrogacy”, *Jerusalem Post*, 25 July 2018.

52 HRC Res. 32/2, 30 June 2016.

53 *Ibid.*

54 *Ibid.*

55 International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171, 16 December 1966, Art. 18(3).

56 Human Rights Committee, General Comment No. 22, “Art. 18 (Freedom of Thought, Conscience or Religion)”, UN Doc. CCPR/C/21/Rev.1/Add.4, 27 September 1993, paras 5, 7, 9.

57 E.g., ECtHR, *Lustig-Prean and Beckett v. UK*, Appl. No. 31417/96, 27 September 1999, para. 90; Joint UN Statement, above note 47; cf. Human Rights Committee, General Comment No. 28, “Article 3 (The Equality of Rights between Men and Women)”, UN Doc. CCPR/C/21/Rev.1/Add.10, 29 May 2000, para. 5 (“States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s right to equality before the law and to equal enjoyment of all Covenant rights”).

was firmly expressed by the UN Secretary-General in a denunciation of discrimination and violence against LGBT persons:

Where there is tension between cultural attitudes and universal human rights, universal human rights must carry the day. Personal disapproval, even society's disapproval, is no excuse to arrest, detain, imprison, harass or torture anyone – ever.⁵⁸

The tension between respecting religious and cultural attitudes and protecting the rights of LGBT persons also arises under the IHL framework, and will be discussed further in the following section.

The legal framework under IHL

Turning to the distinct situation of armed conflict and to IHL, while the latter is silent on sexual orientation and gender identity, its provisions pertain to *all* persons affected by armed conflict, in particular those who do not, or no longer, take active part in the hostilities. In addition, IHL recognizes that certain groups, such as women, children and the elderly, as well as the wounded and sick, become particularly vulnerable during armed conflict, and accordingly grants them special protection, instructing the belligerent parties to pay proper attention to their needs.⁵⁹ The same rationale is valid for LGBT persons. The following subsections will clarify the legal basis for their protection in time of armed conflict and present the IHL provisions relevant to their case.

It is widely accepted today that IHRL continues to apply during armed conflict and may complement IHL and inform its interpretation.⁶⁰ Although similar protective notions can be found in both legal regimes, at times it is the IHL framework – rather than the IHRL one – which is the most relevant or offers some advantages to LGBT persons in situations of armed conflict. It is recalled that in some instances IHL may take priority as the *lex specialis* and supersede otherwise applicable norms of IHRL,⁶¹ for example in matters related to the use

58 Statement by UN Secretary-General Ban Ki-Moon, 10 December 2010, available at: www.un.org/press/en/2010/sghsm13311.doc.htm.

59 E.g., 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), Art. 14; 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), Arts 14, 16, 89, 132; 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 70, 76–77; 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 134–135, 138.

60 International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, para. 25; Human Rights Committee, General Comment No. 31, “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 11.

61 See, for example, ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports 2004*, para. 106.

of force or detention during armed conflict. Further, the extent to which IHRL binds armed groups – which, as noted earlier, are infamously involved in various abuses committed against LGBT persons – is less clear. This is particularly true in circumstances where they do not control a territory in a stable and effective manner that allows them to exercise government-like functions.⁶² In comparison, IHL, notably Article 3 common to the four Geneva Conventions and customary law, binds both State and non-State parties to armed conflict.⁶³

Another reason for exploring the application of IHL to LGBT persons, notwithstanding their already-established protections under IHRL, is that there are several important elements which are specific to IHL and might have an important bearing on their protection. For example, IHL instructs States not only to respect but also to ensure respect for IHL – including for the norms which can be seen as pertaining to the safety and well-being of LGBT persons – by all those acting under their control and by other States involved in armed conflicts.⁶⁴ In addition, IHL presents concrete requirements regarding detention procedures and conditions, and treatment of persons held by the opposing party; it gives the International Committee of the Red Cross (ICRC) its authority to visit detainees and monitor detention conditions in international armed conflicts;⁶⁵ it considers certain harmful acts as grave breaches of the Geneva Conventions and Additional Protocol I (AP I) and regards them as war crimes;⁶⁶ and it imposes responsibility on the perpetrators of breaches of the Conventions or AP I, as well as on commanders and superiors who knew, or had reason to know, about the breaches but failed to take all reasonable measures in their power to prevent their commission or to punish those responsible.⁶⁷ Finally, IHL can be used to

62 E.g., Andrew Clapham, “Human Rights Obligations for Non-State-Actors: Where Are We Now?”, in Fannie Lafontaine and François Larocque (eds), *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour*, forthcoming 2019, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2641390; Marco Sassòli, “Two Fascinating Questions: Are All Subjects of a Legal Order Bound by the Same Customary Law and Can Armed Groups Exist in the Absence of Armed Conflict? Book Discussion”, *EJIL: Talk!*, 4 November 2016, available at: www.ejiltalk.org/book-discussion-daragh-murrays-human-rights-obligations-of-non-state-armed-groups-3/; Geneva Academy, *Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council*, December 2016, available at: www.geneva-academy.ch/joomlatools-files/docman-files/InBrief7_web.pdf.

63 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., 2017 (ICRC Commentary on GC II), para. 526 (Art. 3).

64 See subsection “Obligation to Respect and Ensure Respect for the Geneva Conventions” below. Article 1 common to the four Geneva Conventions; ICRC Commentary on GC II, above note 63, paras 165–205 (Art. 1); ICRC Customary Law Study, above note 59, Rule 139.

65 GC III, Art. 126; GC IV, Art. 76; ICRC Customary Law Study, above note 59, Rule 124. In non-international armed conflicts, the ICRC may offer its services to the parties to the conflict: 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) (AP II), Art. 18(1).

66 E.g., GC I, Art. 50; GC II, Art. 51; GC III, Art. 130; GC IV, Art. 147; AP I, Arts 11, 85; ICRC Customary Law Study, above note 59, Rule 156.

67 AP I, Art. 86(2). For war crimes specifically, see ICRC Customary Law Study, above note 59, Rules 151–153; Rome Statute of the International Criminal Court, 2187 UNTS 90, 17 July 1998 (entered into force 1 July 2002), Arts 8, 28.

establish the jurisdiction of international and domestic courts in order to initiate criminal proceedings against persons suspected of the commission of war crimes.⁶⁸ Given that most of these obligations constitute customary IHL, they apply in all armed conflicts and bind all parties to the conflict, including armed groups, irrespective of their treaty obligations.⁶⁹

As elaborated below, IHL protections may be afforded to LGBT persons simply based on their status as persons who do not, or no longer, take active part in the hostilities, as well as based on their membership in a certain group which becomes particularly vulnerable in circumstances of armed conflict. But in order to treat an incident in which an LGBT person was harmed as an IHL violation perpetrated on the basis of the victim's sexual orientation or gender identity, such an incident must satisfy two cumulative requirements. Firstly, there must be a causal link between the abuse and real or presumed sexual orientation or gender identity. Secondly, and given that IHL violations are distinct from ordinary crimes, there must be a sufficient nexus to the armed conflict.⁷⁰ The nexus requirement should be interpreted broadly in order to cover the range of circumstances in which a party to the conflict (or those operating under its control) takes advantage of the conflict situation to target LGBT persons. In other words, as submitted by this author, the existence of the armed conflict needs to be material to the perpetrator's ability to commit the harmful act, to his decision to commit it, to the manner in which it was committed or to the purpose for which it was committed.⁷¹ The concerned abuse needs to be linked, directly or indirectly, to the conflict, taking into account, for instance, its temporal and geographical dimensions, the profiles of the perpetrator and the victim, and the surrounding climate of persecution and impunity.⁷² While the common understanding is that IHL violations are committed against a person affiliated with the opposing party, there is some support for the position that at least a breach of the fundamental protections embodied in common Article 3 can be also directed at a person of the same

68 GC IV, Art. 146; ICRC Customary Law Study, above note 59, Rule 157.

69 See, generally, Jean-Marie Henckaerts, "Study on Customary IHL: 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, pp. 177–178.

70 Gloria Gaggioli, "Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law", *International Review of the Red Cross*, Vol. 96, No. 894, 2014, pp. 514–517.

71 Cf. International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgment (Trial Chamber), 7 May 1997, paras 572–573 ("The only question, to be determined in the circumstances of each individual case, is whether the offences were closely related to the armed conflict as a whole"); ICTY, *Prosecutor v. Kunarac*, Case No. IT-96-23&23/1 (Appeals Chamber), 12 June 2002, para. 58; but see International Criminal Tribunal for Rwanda, *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Judgment (Trial Chamber), 21 May 1999, paras 599–604, 623 (noting that the fact that the alleged crimes were committed during armed conflict is insufficient, and requiring a *direct link* between these crimes and the armed conflict).

72 Cf. Report of the UN Secretary-General, 2015, above note 7, para. 2 (defining conflict-related sexual violence).

party who is not taking active part in the hostilities.⁷³ For example, if during hostilities a soldier in enemy territory sexually assaults a detained member of the same armed forces or its allies because of his sexual orientation, the act might be considered a breach of common Article 3.

Underlying principles of IHL relevant to the protection of LGBT persons

As noted above, certain groups enjoy special protection under treaty and customary IHL.⁷⁴ Similar references to LGBT persons cannot be found in IHL instruments, but they can be inferred from the fundamental principles of humane treatment and the prohibition against adverse distinction.

The duty of humane treatment applies in all circumstances and extends to *all* persons taking no active part in hostilities – i.e., civilians and persons *hors de combat*. This obligation is absolute and prohibits, *inter alia*, murder, torture and outrages upon personal dignity, in particular humiliating and degrading treatment, at any time and in any place whatsoever.⁷⁵ The principle of humane treatment encompasses the obligation to respect the honour of those who do not, or no longer, fight and to protect them against violence (including sexual violence), insults and public curiosity.⁷⁶

The exact meaning of humane treatment in a given scenario is to be adapted to the situation of LGBT persons, taking into account their vulnerability and needs. Indeed, the requirement to consider the specific vulnerabilities of a certain group is reflected in the authoritative ICRC Commentary on the Geneva Conventions:

There is a growing acknowledgement that women, men, girls and boys are affected by armed conflict in different ways. Sensitivity to the individual's inherent status, capacities and needs, including how these differ among men and women due to social, economic, cultural and political structures in society, contributes to the understanding of humane treatment.⁷⁷

Apart from the obligation to afford humane treatment, IHL prohibits adverse distinction between protected persons based on race, colour, religion, sex, political or other opinion, birth or other status, or any other similar criteria.⁷⁸ Similarly, Article 13 of Geneva Convention IV (GC IV) states that Part II of the Convention covers “the whole of the populations of the countries in conflict,

73 ICRC Commentary on GC II, above note 63, para. 569 (Art. 3); International Criminal Court, *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06-1962, Judgment (Appeals Chamber), 1 June 2017. But see Kevin Jon Heller, “ICC Appeals Chamber Says a War Crime Does Not Have to Violate IHL”, *Opinio Juris*, 15 June 2017, available at: www.opiniojuris.org/2017/06/15/icc-appeals-chamber-holds-a-war-crime-does-not-have-to-violate-ihl/.

74 See above note 59.

75 Common Art. 3; GC IV, Art. 27; AP I, Art. 75; AP II, Art. 4; ICRC Customary Law Study, above note 59, Rule 87.

76 GC III, Arts 13–14; GC IV, Art. 27.

77 ICRC Commentary on GC II, above note 63, para. 575 (Art. 3).

78 GC III, Art. 16; GC IV, Art. 27; AP I, Arts 9, 75; AP II, Art. 2; ICRC Customary Law Study, above note 59, Rule 88.

without any adverse distinction based, in particular, on race, nationality, religion or political opinion". Hence, the list of prohibited discriminatory grounds is not exhaustive.⁷⁹ It has been recognized that sexual orientation or gender identity could be deduced from the grounds of "sex" or "any other similar criteria".⁸⁰

Importantly, the prohibition against adverse distinction is not absolute: it applies only with respect to discriminatory practices on the basis of certain impermissible grounds (e.g., race, religion, sex or, as submitted, sexual orientation or gender identity). Distinction with the aim of affording more favourable treatment may be justified by the different characteristics and needs of certain protected persons, in particular the vulnerable ones. Depending on the circumstances, this favourable treatment may include additional protective measures or better access to certain food and hygiene items, education or medical care. In light of their condition, such distinction may be required precisely in order to ensure that protected persons are treated fairly and humanely.⁸¹

As is the case under IHRL, some tension may arise between the duty to treat protected persons humanely and without adverse distinction and the duty to afford protection to people's religious convictions, manners and customs.⁸² Indeed, negative attitudes towards LGBT persons and their resultant legal exclusion are often justified by religious and traditional values. As already noted under IHRL, the fundamental protections of humane treatment and non-discrimination are granted to *everyone* in a universal manner, and they cannot be restricted on the basis of religious or public morals.⁸³ In a similar vein, the inclusion of the principles of humane treatment and non-adverse distinction in common Article 3 – as opposed to respect for religious convictions and customs – is consistent with the status of these principles as a "‘minimum yardstick’ that is binding in all armed conflicts as a reflection of elementary considerations of humanity".⁸⁴ Indeed, the importance and respect attached to the religious convictions and customs of certain protected persons cannot result in violence, discrimination or persecution against other protected persons. Harming a person's human dignity and denying him/her equal protection of the law on the basis of sexual orientation or gender identity run counter to the *raison d'être* of minimum humanitarian protections which apply to *all* persons who do not take part in hostilities.

In addition to the principles of humane treatment and non-discrimination, a number of legal and practical issues relating to the protection of LGBT groups in

79 ICRC Commentary on GC II, above note 63, paras 591–592 (Art. 3).

80 Cf. Human Rights Committee, *Toonen*, above note 29, para. 8.7; CESCR, above note 25, para. 32.

81 See ICRC Commentary on GC II, above note 63, paras 595–598 (Art. 3).

82 E.g., Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, 205 CTS 277, 1907 (entered into force 27 January 1910) (Hague Regulations), Art. 46; GC IV, Art. 27; AP I, Art. 75(1); AP II, Art. 4.

83 ICCPR, Preamble and Arts 2(1), 4, 6, 26.

84 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, *ICJ Reports* 1986, para. 218; 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*, Geneva, 1958 (ICRC Commentary on GC IV), p. 204 ("The obligation to grant protected persons humane treatment is in truth the 'leitmotiv' of the four Geneva Conventions").

armed conflict deserve elaboration. These issues, as well as the manner in which specific IHL provisions should apply to LGBT persons, are discussed below.

Obligation to respect and ensure respect for the Geneva Conventions

Serious violations of IHL are often perpetrated against LGBT persons with impunity and even with the endorsement of governmental authorities.⁸⁵ It is, however, recalled that the parties to the conflict have an obligation to respect and ensure respect for IHL.⁸⁶ This duty is of special importance when it comes to the treatment of all civilians and persons *hors de combat* – including LGBT persons – in a humane manner and without adverse distinction, given the fundamental character of IHL principles.

The obligation to ensure respect for the Geneva Conventions entails taking appropriate measures to prevent violations from happening in the first place.⁸⁷ In this context, proper orders and training should be given to the armed forces, and awareness-raising activities should be held among commanders, members of the security forces and the general public.⁸⁸ In cases where LGBT persons have been, or may have been, treated in breach of IHL, States must investigate the incident and prosecute those responsible for serious violations, if there is sufficient evidence.⁸⁹ This involves a due diligence obligation to use reasonable means available to prevent and repress IHL violations by private persons over which a State exercises authority or control.⁹⁰ Hence, the concerned State is not only responsible for IHL violations committed against LGBT persons by its armed forces and other persons acting under its directions or control, but may also be liable for its failure to take appropriate measures to prevent, investigate or prosecute these violations.

In accordance with Article 1 common to the four Geneva Conventions, States may neither encourage nor aid or assist the armed forces of a party to a conflict – e.g., in financing, equipping, arming, training or providing operational support – in the knowledge that such support will be used to commit violations by that party.⁹¹ This might be the case, for example, when such support facilitates monitoring and tracking down individuals due to their real or perceived sexual

85 Outright Action International, above note 20, p. 10; Iraqueer *et al.*, above note 15; OHCHR, above note 6, para. 76; Nick Duffy, “Russian Police Won’t Protect Gay People from Violent Threats”, *Pink News*, 19 September 2018, available at: www.pinknews.co.uk/2018/09/19/russia-police-homophobic-hate-speech/.

86 Common Art. 1; ICRC Customary Law Study, above note 59, pp. 495–498 (Rule 139).

87 ICRC Commentary on GC II, above note 63, para. 167 (Art. 1).

88 On commanders’ responsibility to suppress IHL violations, see AP I, Arts 86(2), 87; ICRC Customary Law Study, above note 59, Rule 153.

89 E.g., GC IV, Art. 146; ICRC Customary Law Study, above note 59, Rule 158.

90 ICRC Commentary on GC II, above note 63, para. 172 (Art. 1). See also Human Rights Committee, above note 60, para. 8.

91 ICRC Commentary on GC II, above note 63, para. 142 (Art. 1); ICRC Customary Law Study, above note 59, pp. 511–513 (Rule 144).

orientation or gender identity, followed by their arrest and abuse while in detention.⁹²

Further, third States have a positive obligation to exert their influence, to the degree possible, to stop IHL violations by other States and by non-State actors. They must do everything reasonably in their power to prevent such violations and bring them to an end.⁹³ States' ability to influence the parties to the conflict should not be underestimated. While an assertive political will is essential, the toolbox available to States contains various appropriate measures, both with regard to the responsible party (e.g., bilateral dialogue, denunciation, diplomatic pressure, suspension of membership or other privileges in international organizations, economic sanctions, armed embargos and other lawful measures under international law)⁹⁴ and with regard to individuals involved in serious violations of IHL (e.g., travel bans, asset freezes, arrest and the initiation of criminal proceedings in domestic or international courts).

Protection of LGBT persons in armed conflict: Applicable norms and practical challenges

Conduct of hostilities

When it comes to the use of force during hostilities, the fact of belonging to the LGBT community does not make any difference for the purposes of determining whether the person in question is protected by IHL provisions. LGBT persons may be lawfully attacked during armed conflict in accordance with the ordinary IHL rules governing targeting.⁹⁵ Clearly, actual or perceived sexual orientation or gender identity have no bearing on the question of whether a person is considered a civilian or a fighter. As will be seen below, most of the challenges related to the treatment of LGBT persons arise when the person is in the hands of a party to the conflict, as opposed to situations of conduct of hostilities.

Detention

Notwithstanding that homosexuality or same-sex intimate relations are criminalized in many States,⁹⁶ human rights mechanisms have concluded that detention on the

92 E.g., Hagar Shezaf and Jonathan Jacobson, "Revealed: Israel's Cyber-Spy Industry Helps World Dictators Hunt Dissidents and Gays", *Haaretz*, 20 October 2018; Nico Lang, "The Danger of Tinder's LGBT-friendly Upgrade: How the Dating App Could Be Used to Target Trans Users", *Salon*, 18 November 2016, available at: www.salon.com/2016/11/17/the-danger-of-tinders-lgbt-friendly-upgrade-how-the-dating-app-could-be-used-to-target-trans-users/ (describing the exploitation of dating apps by security forces in order to identify LGBT users and their exact location).

93 ICRC Commentary on GC II, above note 63, paras 142, 176, 182, 189 (Art. 1).

94 E.g., Outright Action International, "U.S.-Africa Trade Summit Must Not Ignore Cost of Denying LGBT Human Rights", 29 July 2014, available at: <https://outrightinternational.org/content/us-africa-trade-summit-must-not-ignore-cost-denying-lgbt-human-rights>.

95 In particular, see AP I, Arts 51, 57 (reflective of customary IHL).

96 See above note 50.

basis of sexual orientation, gender identity or same-sex consensual relations between adults amounts to arbitrary and discriminatory deprivation of liberty.⁹⁷ While this remains true during armed conflict, it is noteworthy that LGBT persons may be detained on other grounds, in line with IHL rules regulating internment.

LGBT individuals can be lawfully interned for security reasons, namely as prisoners of war or as civilians who pose a security threat.⁹⁸ In addition, LGBT civilians may be detained in the context of a criminal trial. They may be prosecuted for directly participating in the hostilities or for another conflict-related offence under domestic law.⁹⁹ Lastly, LGBT individuals, like any other person, may be prosecuted and punished in cases where they have committed a war crime.¹⁰⁰

Some additional issues associated with the detention of LGBT persons during armed conflict are addressed further below.

Ill-treatment

LGBT persons are particularly vulnerable while in detention. Various reports have documented ill-treatment, especially sexual violence, against LGBT persons held by government forces or by armed groups, including cases of rape, sexual slavery, forced genital and anal examinations, forced nudity, harassment and humiliation.¹⁰¹ The abuse may be perpetrated by the detention facility staff (e.g., guards, doctors) or by fellow detainees.

Under IHL, all detainees, including LGBT detainees, are entitled to humane treatment and protection from torture and humiliating or degrading treatment, including from sexual violence and unnecessary medical procedures which are not justified by the medical condition of the detainee.¹⁰² IHL also prohibits disciplinary penalties which are inhuman, brutal or dangerous for the health of internees, taking into account, among other factors, the internee's sex,¹⁰³ and by implication, his/her sexual orientation or gender identity.

In order to ensure the protection of LGBT detainees and minimize the risk of physical or sexual assault, it might be necessary to hold such individuals separately from other detainees or from specific staff members, in particular those who seem hostile to LGBT persons, and at least when it comes to sleeping or shower and toilet arrangements.¹⁰⁴ Information regarding such practice in the

97 E.g., OHCHR, above note 29; OHCHR, above note 2; OHCHR, "The Gambia: Zeid Criticizes Harsh Legal Amendment, Violence and Arrests Targeting Gay Men and Lesbians", 20 November 2014, available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15318&LangID=E.

98 GC III, Art. 21; GC IV, Arts 42, 78.

99 Common Art. 3; GC IV, Arts 68, 71, 76; AP I, Art. 75.

100 GC IV, Art. 146.

101 Report of the UN Secretary-General, 2015, above note 7, para. 6; OHCHR, above note 6, para. 36.

102 GC III, Art. 13; GC IV, Arts 27, 32, 37; AP I, Arts 11, 75; AP II, Art. 5; ICRC Customary Law Study, above note 59, Rules 89–91, 93.

103 GC IV, Arts 100, 119.

104 Similar detention standards apply to women and children: see GC III, Arts 25, 97, 108; GC IV, Arts 76, 85, 124; AP I, Art. 77; ICRC Customary Law Study, above note 59, Rules 119–120.

context of armed conflict is scarce. One example concerns the Israeli Prison Service, which recently issued a policy directive on dealing with transgender detainees.¹⁰⁵ The directive also applies to Palestinians held in Israeli detention on security grounds. The policy directive instructs that transgender detainees will be held separately from other detainees during the first five days of their detention in order to ensure their safety. During this period, the staff will assess the personal situation of the detainee, including his/her appearance and stage of transition, and consider any possible risks and the detainee's own views in order to determine whether to hold the detainee in a male or female facility. The directive mentions the possibility of placing the detainee in a separate cell in appropriate cases, bearing in mind the importance of his/her participation in well-being activities and social interaction enjoyed by other detainees.¹⁰⁶ Given that resources are limited, such a thorough assessment and other arrangements may not always be possible, especially during armed conflict. A high-intensity conflict may result in a high number of detainees who are held in various locations and for different periods of time. That said, the responsibility for the safety of the detainees lays with the detaining authorities. Due diligence efforts should therefore be made, in particular when the detainee has already raised safety concerns or complained about abusive treatment while in detention.

The importance of mitigating the suffering and distress experienced by detainees while held by the adversary is reflected in the requirement to accommodate internees, as far as possible, according to their nationality, language and customs.¹⁰⁷ The assumption here is that such an arrangement offers better social support to the detainee and eases tension between inmates and between detainees and staff. This provision can inspire a similar arrangement to accommodate LGBT detainees together, as a protective measure and given that “a moral solidarity” might have a positive effect on their mental health and elevate the suffering caused by internment.¹⁰⁸ An LGBT detainee should also have the possibility of choosing whether to be searched by a man or a woman, while searches must be conducted in a manner that is respectful of the dignity and privacy of the individual being searched.¹⁰⁹ The Israeli Prison Service's directive

105 Israel Prison Service, *Admission of Transgender Detainees and Guidelines for Their Admission: Policy*, 5 March 2018, available at: <https://tinyurl.com/y66ktvxl>; Lee Yaron, “Transgender Inmates Will No Longer Be Kept in Isolation, Israel Prison Service Announces”, *Haaretz*, 17 April 2018, available at: www.haaretz.com/israel-news/premium-transgender-prisoners-won-t-be-put-in-isolation-anymore-1.6009178.

106 Israel Prison Service, above note 105, Arts 3, 6, 11–12; Supreme Court of Israel, *Doreen Biliya v. IPS*, HCJ 5480/17, 4 July 2018; cf. IACHR, *Violence against LGBTI Persons in the Americas*, above note 15, pp. 102–103, para. 155 (describing the practice in OAS member States). See also US Federal Bureau of Prisons, *Transgender Offender Manual*, 18 January 2017, available at: www.documentcloud.org/documents/4327113-Bureau-of-Prisons-Transgender-Offender-Manual.html (recent changes to the Manual are available at: www.bop.gov/policy/progstat/5200-04-cn-1.pdf).

107 GC III, Art. 22; GC IV, Art. 82.

108 For a note on the importance of morale of internees, see ICRC Commentary on GC IV, above note 84, p. 380 (Art. 82).

109 Cf. the requirement to be searched by a person of the same sex as the detainee, in GC IV, Art. 97; see also UN Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), UNGA Res. 70/175, 17 December 2015, Rules 50, 52.

notes that a transgender detainee must be asked whether he/she prefers to be searched by a male or female guard. The directive also foresees the possibility of a two-person body search, conducted by both male and female staff members, each examining different parts of the body depending on the stage of the detainee's transition process.¹¹⁰ Lastly, the vulnerability of LGBT individuals may also be taken into account in the context of the obligation of the parties during hostilities to endeavour to conclude agreements for the release of certain classes of internees, given that such vulnerability might prioritize and support early release.¹¹¹

Detention staff should receive appropriate instructions and training designed to improve staff interaction with LGBT detainees and awareness of their needs, as well as the ability to prevent ill-treatment and detect signs of distress on behalf of LGBT detainees.¹¹² Preferably, training should already take place during peacetime, anticipating the possibility that the detention staff will have to deal with LGBT detainees at some point.¹¹³ It might be difficult, at times impossible, to carry out such training in States that criminalize homosexuality, same-sex activity or gender expressions which do not align with a person's assigned sex at birth. This, however, does not detract from the obligation of the detaining authorities to treat all detainees humanely and to prevent any abuse, including sexual violence, while in detention. Depending on the level of their engagement with the detaining authorities, the appropriate training may be provided by the ICRC, local or foreign humanitarian relief personnel (e.g., social workers, health professionals), or civil society groups.

While the detainees themselves shall be allowed to raise their concerns regarding the conditions of detention before the detaining authorities,¹¹⁴ the fear of being stigmatized, bullied or abused by staff or other detainees may prevent them from proactively disclosing their sexual orientation or gender identity and from expressing their related needs while in detention. The detaining authorities should therefore have a screening procedure in place to address any risk to the health and safety of vulnerable detainees.¹¹⁵ Visits by the ICRC are of the utmost importance in assessing the safety and well-being of LGBT detainees. While the obligation of humane treatment of detainees is binding in both international and non-international armed conflicts, it is recalled that the ICRC is mandated to visit detainees only in an international armed conflict.¹¹⁶ During a non-international armed conflict, the ICRC can offer its services to the detaining party.¹¹⁷ When the

110 Israel Prison Service, above note 105, Art. 14.

111 E.g., GC IV, Art. 132. See also GC III, Arts 109–110.

112 Mandela Rules, above note 109, Rules 75–76, 78.

113 For State practice in this context (not necessarily in the context of armed conflict), see above notes 105–106 (Israeli and US policy); IACHR, *Violence against LGBTI Persons in the Americas*, above note 15, p. 106, para. 161; United Nations Office on Drugs and Crime (UNODC), *Handbook on Prisoners with Special Needs*, 2009, Chap. 5, available at: www.unodc.org/pdf/criminal_justice/Handbook_on_Prisoners_with_Special_Needs.pdf.

114 GC III, Art. 78; GC IV, Art. 101.

115 For examples, see above notes 105–106 (Israeli and US policy).

116 GC III, Art. 126; GC IV, Arts. 78, 143.

117 Common Art. 3.

offer is refused, visits may still be held by independent inspectors appointed under domestic law,¹¹⁸ as well as by private or court-appointed lawyers, representatives of the national human rights commission, court judges, members of the local parliament or designated civil society groups.

Family life

The family life of protected persons shall be respected as far as possible and cannot be the object of arbitrary interference.¹¹⁹ Given the prohibition against adverse distinction, this applies also to LGBT protected persons. A number of entitlements granted to a protected person by IHL are dependent upon recognizing that his/her same-sex spouse is a member of the family.

As a result of such recognition, an LGBT individual should be able to correspond with his/her spouse wherever they may be, including while the former is in detention.¹²⁰ Other matters in this context concern the duty of the parties to the conflict to facilitate the restoration of family links, in cases where the couple has been separated because of the armed conflict.¹²¹ In addition, respect for LGBT family rights dictates that a party to the conflict should enable visits to a same-sex spouse in detention,¹²² accommodate same-sex couples together wherever possible in cases where both partners are interned,¹²³ and allow individuals to receive information when an LGBT spouse has gone missing¹²⁴ and to receive his/her human remains in the unfortunate eventuality that the spouse has died.¹²⁵

Granting these entitlements does not necessarily compel the formal recognition of same-sex couples under domestic law. They form part of the detaining party's obligations under IHL, and in this respect are limited to the situation of armed conflict. In fact, during times of armed conflict it might be easier to justify these entitlements by invoking the need to comply with the requirements of international law amid local opposition to such recognition. In addition, the ICRC and other humanitarian organizations may assist the authorities in implementing their obligations in this area.

118 E.g., Israeli Prisons Ordinance (New Version), 1971, Arts 71–72 (appointing official inspectors who are allowed to visit detention facilities at any time, inspect the detention conditions and conduct private and confidential interviews with any detainee). Such inspections are carried out in the United Kingdom by Her Majesty's Chief Inspector of Prisons (see: www.justiceinspectorates.gov.uk/hmiprison/about-hmi-prisons/terms-of-reference/), and in the United States by the Office of the Inspector General at the Department of Justice, which is responsible for monitoring the Federal Bureau of Prisons (see: <https://oig.justice.gov/reports/bop.htm>).

119 Hague Regulations, Art. 46; GC IV, Art. 27; ICRC Customary Law Study, above note 59, Rule 105; ICRC Commentary on GC IV, above note 84, p. 202 (Art. 27).

120 GC III, Arts 70–71; GC IV, Arts 25, 106; ICRC Customary Law Study, above note 59, Rule 125.

121 GC IV, Art. 26; AP II, Art. 4(3)(b); ICRC Customary Law Study, above note 59, Rule 117.

122 GC IV, Art. 116; ICRC Customary Law Study, above note 59, Rule 126.

123 GC IV, Art. 82; ICRC Customary Law Study, above note 59, Rules 119–120.

124 AP I, Art. 32; ICRC Customary Law Study, above note 59, Rule 117.

125 AP I, Art. 34; ICRC Customary Law Study, above note 59, Rule 114.

Non-refoulement and relocation

The issue of *non-refoulement* may arise when a State is looking to transfer a protected person, often a detainee, to another State. As noted above, LGBT persons may face heavy criminal sanctions such as prolonged imprisonment, or even the death penalty, in a significant number of States.¹²⁶ In those cases, a non-heterosexual sexual orientation or same-sex relations are grounds for the deprivation of liberty, which in many cases involves ill-treatment.¹²⁷ Even in the absence of formal criminalization, LGBT persons may suffer violence, abuse and harassment by State agents or by private actors in the receiving State, while their complaints are often ignored by law enforcement authorities.¹²⁸

According to IHL, protected persons may only be transferred to another State when the transferring State has satisfied itself of the willingness and ability of the receiving State to grant the protections embodied in the Geneva Conventions, including humane treatment and protection from adverse distinction.¹²⁹ Following the transfer, in the event that these safeguards are not granted, the transferring State shall take effective measures to correct the situation or request the return of the person transferred.¹³⁰ In any case, the transfer of a protected person – including for internment in the territory of another State, repatriation, returning to the country of residence or extradition – is prohibited where that person may have reason to fear persecution in the receiving State on the basis of his/her political opinions or religious beliefs.¹³¹ In these circumstances, the transfer cannot be effected even with the consent of the person concerned.¹³²

While these IHL provisions seem to have a limited scope of application,¹³³ they do not preclude a reference to the complementary norms of IHRL and refugee

126 See above note 50.

127 E.g., UNODC, above note 113; IACHR, *Violence against LGBTI Persons in the Americas*, above note 15, pp. 102–103, para. 155.

128 OHCHR, above note 6, paras 24–25; OHCHR, above note 2; HRW, “*They Said We Deserved This*”: *Police Violence Against Gay and Bisexual Men in Kyrgyzstan*, January 2014, available at: www.hrw.org/sites/default/files/reports/kyrgyz20114_forUpload.pdf.

129 GC IV, Art. 45.

130 *Ibid.*; see also GC III, Art. 12; AP II, Art. 5(4).

131 GC IV, Art. 45. This notion can also be found in Article 109 of GC III, noting that sick or injured prisoners of war shall not be repatriated against their will during hostilities. The Commentary explains that this is to protect them from risks and possible prosecution in case political changes have taken place in their State of nationality. It is also clarified that the rule prohibiting the Detaining State from repatriating prisoners against their will during hostilities is of a general nature and applies also to those who are not wounded or sick, 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. 512–513 (Art. 109).

132 GC IV, Art. 8.

133 For example, Article 45 of GC IV only applies to aliens in the territory of a party to an international armed conflict, and Article 12 of GC III to prisoners of war.

law dealing with the principle of *non-refoulement*.¹³⁴ This principle prohibits the transfer of any person in circumstances where there are substantial grounds for believing that there is a real risk of irreparable harm, such as a threat to the right to life or the risk of being subjected to torture, either in the receiving State or in any other State to which the person may subsequently be removed.¹³⁵ Similarly, the principle of *non-refoulement* under refugee law involves a well-founded fear of being persecuted.¹³⁶ While the term “persecution” is not expressly defined in the 1951 Refugee Convention, it involves serious human rights violations, including a threat to life or freedom, as well as other kinds of serious harm. Referring specifically to the risks faced by LGBT asylum-seekers, the UN High Commissioner for Refugees (UNHCR) and IHRL treaty bodies have held that threats of serious abuse and violence, arbitrary detention and criminal sanctions (which in some cases include the death penalty), as well as discriminatory restrictions on the ability to exercise human rights, would generally meet the threshold to establish persecution.¹³⁷

In order to be covered by the principle of *non-refoulement*, the potential persecution must be on the basis of certain grounds. GC IV requires that the fear of persecution is on account of a protected person’s religious beliefs or political opinions.¹³⁸ These grounds are also recognized by the Refugee Convention, and UNHCR observes that they are relevant to LGBT individuals who may face persecution on the basis that they, allegedly, do not conform to religious values, or due to negative attitudes promoted by religious groups.¹³⁹ Similarly, LGBT individuals may be persecuted because they are perceived as challenging government policy or prevailing social norms and values, often triggering anti-LGBT statements by government officials.¹⁴⁰ Importantly, the Refugee Convention also establishes the grounds of “membership of a particular social group”; these grounds are commonly recognized by UNHCR with respect to LGBT asylum-seekers, who maintain a well-founded fear of persecution.¹⁴¹

134 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984 (entered into force 26 June 1987), Art. 3; Convention relating to the Status of Refugees, 189 UNTS 137, 28 July 1951 (entered into force 22 April 1954) (Refugee Convention), Art. 33. IHRL applies to all persons in peacetime, as well as during international and non-international armed conflicts: see Cordula Droege, “Transfers of Detainees: Legal Framework, *Non-Refoulement* and Contemporary Challenges”, *International Review of the Red Cross*, Vol. 90, No. 871, 2008, pp. 675–676.

135 ICCPR, Arts 2, 6–7; Human Rights Committee, above note 60, para. 12, and General Comment No. 36, above note 31, para. 30; CAT, General Comment No. 1, “Implementation of Article 3 of the Convention in the Context of Article 22”, UN Doc. A/53/44, Annex IX, 16 September 1998, para. 3.

136 Refugee Convention, Arts 1(A)(2), 33(1).

137 UNHCR, *Guidelines for International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 2012, paras 16–22; CAT, *Uttam Mondal v. Sweden*, Communication No. 338/2008, 23 May 2011, para. 7.7; CAT, *J. K. v. Canada*, above note 31, para. 10.5; Human Rights Committee, *M. K. H. v. Denmark*, Communication No. 2462/2014, 12 July 2016, para. 8.8. See also ICRC Commentary on GC IV, above note 84, p. 269 (Art. 45).

138 GC IV, Art. 45.

139 UNHCR, above note 137, paras 42–43.

140 *Ibid.*, para. 50.

141 *Ibid.*, para. 46.

A different scenario involves LGBT civilians who are nationals of the adverse party or of a neutral State. In this scenario they are present in the territory of a belligerent party or in occupied territory (in the latter case, with the exception of nationals of the occupied State), and may wish to leave the territory due to fear of persecution. Under GC IV, they shall be allowed to do so “unless their departure is contrary to the national interests of the State”.¹⁴² Given that the “national interests” reservation is quite broad, there is a risk that the concerned State will not limit its refusal to the departure of those individuals who actually pose a risk to its security. The ICRC Commentary on GC IV therefore opines that this reservation should be invoked with moderation and only “when reasons of the utmost urgency so demand”.¹⁴³ Accordingly, when the safety of LGBT persons is at stake or when they are continuously subjected to discrimination and harassment, the concerned State should grant their request to leave the territory and limit its refusal only to security reasons.

Another question in this context relates to the responsibility of a belligerent party to relocate an LGBT civilian or detainee from a location under its effective control due to risk of persecution. This is in the event that IHL does not grant the concerned person the right to leave the territory or that such a request has already been denied, and the State has not initiated a transfer for reasons of its own security.¹⁴⁴ A positive obligation to relocate in these circumstances can be inferred from the general responsibility of a government, including a *de facto* government in occupied territory, for the well-being and safety of all those under its effective control, including enemy nationals.¹⁴⁵ It can also stem from the call to the parties to the conflict to facilitate the evacuation of civilians – in particular vulnerable civilians – from dangerous places during hostilities.¹⁴⁶ While the latter is not compulsory, taken together with the above responsibility for the well-being and safety of protected persons, it seems that the concerned party should take all feasible measures, as far as its security allows, to facilitate the relocation of LGBT persons within the territory under its control if there is a need. In the event that transfer is not feasible, the party concerned is not relieved of its obligation to take effective measures in due diligence to protect those at risk of persecution and to prevent any violence and abuse, including by private actors.

A relevant example from State practice concerns Palestinians who claim that they are in danger while in the occupied Palestinian territory due to their sexual orientation. An Israeli policy document stipulates that in these cases the person concerned may contact the welfare coordinator at the Israel Defense

142 GC IV, Arts 35, 48.

143 GC IV, Art. 35; ICRC Commentary on GC IV, above note 84, p. 236 (Art. 35).

144 See GC IV, Arts 35, 41, 49, 78.

145 E.g., Hague Regulations, Art. 43; GC III, Arts 13, 20, 46; GC IV, Arts 49, 55, 83, 85, 127; AP I, Art. 69. See also ICCPR, Art. 2; Human Rights Committee, above note 60, para. 10.

146 GC IV, Arts 14–17, 49; ICRC Commentary on GC IV, above note 84, p. 136 (Art. 16) (the list of vulnerable individuals in Article 16 is not exhaustive and may apply to “any civilians who while not being either wounded or shipwrecked are exposed to some grave danger as a result of military operations”). For a similar duty with respect to prisoners of war, see GC III, Arts 19, 22–23.

Forces' Civil Administration.¹⁴⁷ The latter will assess the circumstances and seek assistance from local and international bodies operating in the occupied territory. In appropriate cases, relocation outside of the occupied territory can be explored (but only exceptionally to Israel).¹⁴⁸ In these cases the ICRC and other humanitarian organizations may provide psychosocial and material support, shelter, medical care and assistance in facilitating relocation outside of the occupied territory.

Repealing anti-LGBT laws in occupied territory

One of the main obstacles to the protection of LGBT persons and their ability to fully enjoy their human rights is the criminalization of homosexuality and same-sex relations under domestic law.¹⁴⁹ Apart from heavy criminal sanctions, local laws may also prescribe discriminatory policies, denying LGBT persons equal and adequate access to employment, housing, education, welfare benefits and health services. In the context of armed conflict and provided there is occupation, this raises the dilemma of repealing such laws by the Occupying Power, notwithstanding the fact that they may be supported by the majority of the local population in the occupied territory.

The law of occupation instructs the Occupying Power to exercise restraint in administrating the occupied territory, and to refrain from introducing large-scale reforms that will change the basic characteristics – i.e., the social, economic, legal and political structures – of the territory.¹⁵⁰ There are, however, some exceptions to this rule. The Occupying Power may introduce legislative changes necessary for the security of its own armed forces or for the benefit of the local population, especially in a prolonged occupation.¹⁵¹ Article 43 of the 1907 Hague Convention instructs the Occupying Power to respect the laws in force in the occupied country, “unless absolutely prevented”. Accordingly, Article 64 of GC IV allows the Occupying Power to repeal or suspend the laws of the occupied territory when they constitute “an obstacle to the application of the present Convention”.¹⁵² It may similarly subject the local population “to provisions which are essential to enable the Occupying Power to fulfil its obligations under

147 This policy document was submitted by the Israeli Government to the Supreme Court in *Anon v. State of Israel*, HCJ 5200/09, submission of 9 December 2014, available at: <https://bit.ly/2WbCC40>.

148 *Ibid.* See also Kfar Saba Court, *State of Israel v. Anon*, 32463-03-17, Decision, 5 April 2017 (allowing the accused, a Palestinian man from the West Bank, to stay in Israel given the danger to his life in the areas administered by the Palestinian Authority because of his sexual orientation).

149 See above note 50.

150 Hague Regulations, Art. 43; ICRC, *Occupation and Other Forms of Administration of Foreign Territory*, Geneva, March 2012, p. 54. See also GC IV, Art. 64.

151 GC IV, Art. 64 and see generally, Supreme Court of Israel, *Gamiyat El-Iskan v. IDF Commander in the West Bank*, HCJ 393/82, 28 December 1983; Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, pp. 112, 115; ICRC, above note 150 p. 56.

152 While Article 64 refers to “penal laws”, the ICRC Commentary emphasizes that the legislative authority of the Occupying Power in this context concerns “the whole of the law (civil law and penal law) in the occupied territory”. ICRC Commentary on GC IV, above note 84, p. 335 (Art. 64); ICRC, above note 150, p. 58.

the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power”.¹⁵³

Undoubtedly, sensitive and controversial legislative changes may trigger tension among the local population, and even violent opposition which may threaten the security of the Occupying Power’s armed forces. Moreover, some might contend that repealing anti-LGBT laws is not for the benefit of the local population whose majority is opposed to such changes in the *status quo ante*. A common argument is that promoting the protection and equal treatment of LGBT persons in fact serves Western values, abruptly imposed on the occupied territory against the prevailing religious convictions and customs.¹⁵⁴

These concerns, however, do not justify thwarting the fundamental principles of humane treatment and the non-adverse distinction between protected persons. The ICRC Commentary on GC IV is unequivocal in this regard:

The second reservation [to the rule that the laws in the occupied territory must be maintained] is in the interests of the population and makes it possible to abrogate any discriminatory measures incompatible with humane requirements. It refers, in particular, to provisions which adversely affect racial or religious minorities, such provisions being contrary to the spirit of the Convention (Article 27), which forbids all adverse distinction based, in particular, on race, religion or political opinion. This means that when the penal legislation of the occupied territory conflicts with the provisions of the Convention, the Convention must prevail.¹⁵⁵

Repealing or suspending discriminatory laws in occupied territory, or introducing new laws in order to protect vulnerable groups, is not without precedent. Following the post-World War II occupation of Germany, the Allied forces announced that they would abolish “the cruel, oppressive and discriminatory laws and institutions” created by the Nazi Party, and determined that no German law shall be applied within the occupied territory “in any instance where such application would cause injustice or inequality”, including on the basis of “race, nationality, religious beliefs or opposition to the National Socialist Party or its

153 GC IV, Art. 64.

154 Cf. African Men for Sexual Health and Rights and Coalition of African Lesbians, *Violence Based on Perceived or Real Sexual Orientation and Gender Identity in Africa*, Pretoria, 2013, pp. 6–7; HRW, *Scared in Public and Now No Privacy: Human Rights and Public Health Impacts of Indonesia’s Anti-LGBT Moral Panic*, July 2018, p. 40, available at: www.hrw.org/sites/default/files/accessible_document/indonesia0618_lgbt_web.pdf; Rose Troup Buchanan, “Robert Mugabe Tells UN General Assembly: ‘We Are Not Gays!’”, *The Independent*, 29 September 2015; Josh Jackman, “Malaysian Prime Minister Says the Country ‘Cannot Accept LGBT+ People’”, *Pink News*, 21 September 2018, available at: www.pinknews.co.uk/2018/09/21/malaysian-prime-minister-says-the-country-cannot-accept-lgbt-people/; Tony Grew, “Nepalese Gays Face New Persecution”, *Pink News*, 4 January 2007, available at: www.pinknews.co.uk/2007/01/04/nepalese-gays-face-new-persecution.

155 ICRC Commentary on GC IV, above note 84, pp. 335–336 (Art. 64). Similarly, the Occupying Power may abolish courts or tribunals which have been instructed to apply inhumane or discriminatory laws. It should be noted that the extent to which the Occupying Power is authorized to change or repeal local legislation contrary to IHRL is a matter of dispute (e.g., ICRC, above note 150, pp. 58–59). Yet, the principles of humane treatment and non-discrimination are also part of the law of occupation and enshrined, *inter alia*, in the Geneva Conventions.

doctrines”.¹⁵⁶ The occupation forces in Iraq dismantled the Ba’ath Party, recognizing the large-scale human rights abuses suffered by the local population at the hands of the ousted regime.¹⁵⁷ The Coalition also introduced the principle of comparable pay for comparable work in the Iraqi public sector, eliminated child labour and established the Ministry of Human Rights.¹⁵⁸ More generally, the Israeli Supreme Court opined that the military commander in the occupied Palestinian territory is authorized “to take all necessary measures to ensure growth, change and development” and for this purpose to develop, among others, the education, health and welfare systems of the occupied territory, and in this context, to make necessary amendments to existing legal arrangements.¹⁵⁹

Clearly, a scenario in which the Occupying Power is inflicting and enforcing inhumane and/or discriminatory policies against women or racial or religious minorities – relying on the authorization in domestic law and on the conservationist principle of the law of occupation – cannot be accepted. The same applies to sexual minorities.

Acknowledging the constraints imposed by local customs and public opinion (to the extent that they impact the security of the Occupying Power’s forces), the Occupying Power shall endeavour to repeal, or at the very least refrain from enforcing, domestic law criminalizing non-heterosexual sexual orientation and gender identity, including same-sex relations between consenting adults. It shall therefore provide effective protection to LGBT persons from violence and detention based on these grounds. As a *de facto* government, the Occupying Power shall also abolish any adverse distinction in its own dealings with the local population, including when providing governmental services.

Resistance by States

In spite of multiple reports on violence and discrimination against LGBT persons, including during armed conflict, many States fail to implement their legal obligations in terms of prevention and accountability, a practice which results in widespread impunity and lack of protection.¹⁶⁰ Given that LGBT persons are often perceived by the dominant majority as challenging established gender patterns and the monolithic understanding of family life,¹⁶¹ even in States where

156 Control Council for Germany, Proclamation No. 1, “Establishment of Military Government”, 30 August 1945, and Law No. 1, “Abrogation of Nazi Laws”, 30 August 1945, Art. II.

157 Coalition Provisional Authority, Order No. 1, “De-Ba’athification of Iraqi Society”, 16 May 2003.

158 Coalition Provisional Authority, Order No. 30, “Reform of Salaries and Employment Conditions of State Employees”, 8 September 2003; Order No. 89, “Amendments to the Labor Code – Law No. 71 of 1987”, 30 May 2004; and Order No. 60, “Establishment of the Ministry of Human Rights”, 22 February 2004.

159 Supreme Court of Israel, *Gamiyat El-Iskan*, above note 151, paras 26, 30.

160 See above note 23.

161 E.g., Sylvia A. Law, “Homosexuality and the Social Meaning of Gender”, *Wisconsin Law Review*, Vol. 1988, No. 2, 1988; Susan Moller Okin, “Sexual Orientation, Gender, and Families: Dichotomizing Differences”, *Hypatia*, Vol. 11, No. 1, 1996; cf. OHCHR, *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, UN Doc. A/HRC/16/44, 20 December 2010, paras 23, 85.

non-heterosexual sexual orientation and same-sex relations are not criminalized, many governments are reluctant to address, let alone support, ways to improve the protection of LGBT groups amid strong opposition.¹⁶² Indeed, the UN Secretary-General recently stated that the conflict-related risks faced by LGBT minorities “[have] been a blind spot in the monitoring of civilian protection concerns”, implying a lack of adequate response by the international community.¹⁶³

Notably, a number of member States declined the invitation to attend an informal – first-ever – meeting of the UN Security Council to discuss the violence against LGBT persons by ISIL, and other States have refused to cooperate with the Independent Expert on sexual orientation and gender identity appointed by the HRC.¹⁶⁴ This practice is telling, as it contributes to a protection paradox in which the most vulnerable are abandoned by States. The latter are not only failing to acknowledge that LGBT persons are vulnerable and deserve protection, but are also delegitimizing them by criminalization, incitement, violence, discrimination and impunity – thus paving the way for recurring abuses.

Conclusion

Similar to other civilians and persons *hors de combat*, members of the LGBT community are protected by IHL norms – in particular by the obligation of parties to the conflict to afford humane treatment and by the prohibition against adverse distinction. These norms are sufficiently broad to be tailored to the needs and sensitivities of LGBT individuals during armed conflict.

Efforts to better protect LGBT persons entail a delicate and strenuous process, given that negative sentiments against the LGBT community are deeply rooted in domestic beliefs, practices and national law. Such an environment is likely to become more hostile and violent in circumstances of armed conflict, especially towards individuals perceived as belonging to the enemy. A positive change can be achieved gradually by collecting reliable information on their situation, raising awareness, and persuading and educating parties to the armed conflict, their authorities and the local population. It is essential to challenge “traditional” values and narratives¹⁶⁵ while offering alternative ones which support the notions of humanity, the inherent dignity of each and every human

162 OHCHR, above note 6, paras 24–26.

163 Report of the UN Secretary-General, 2016, above note 7, para. 14. It was also submitted that the humanitarian sector has paid little attention to LGBT victims of gender-based violence: see Chris Dolan, “Letting Go of the Gender Binary: Charting New Pathways for Humanitarian Interventions on Gender-Based Violence”, *International Review of the Red Cross*, Vol. 96, No. 894, 2014.

164 M. Nichols, above note 7; Letter from the Ambassador of Egypt to the President of the Human Rights Council, 29 July 2016, available at: www.unwatch.org/wp-content/uploads/2016/07/Amb.-Egypt-letter-to-HRC-President-29jul16.pdf; OHCHR, “Deep Concern at Bid to Block UN Human Rights Expert”, 21 November 2016, available at: www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20902&LangID=E.

165 For example, by challenging the narrative that homosexuality is “un-African” or a Western concept: see African Men for Sexual Health and Rights and Coalition of African Lesbians, above note 154, pp. 6–8.

being, non-discrimination and non-violence. In the meantime, concrete legal and practical measures must follow in order to provide effective protection.

States should be repeatedly reminded of their consent to be bound by international law and its supremacy over their domestic law. It should be emphasized that refusing to protect LGBT persons from violence and adverse distinction is tantamount to denying humane and equal treatment on the ground of, *inter alia*, race, colour, sex or religion. These basic principles are embodied in treaty and customary IHL, reaffirmed by IHRL and even recognized by some as peremptory norms (*ius cogens*).¹⁶⁶ All parties to the armed conflict, including armed groups, are continuously bound by them, and LGBT persons are not excluded from their scope of application. Ultimately, States, as well as human rights mechanisms, international and regional organizations, the ICRC, civil society and the media, have an important role in integrating the LGBT perspective into the law and humanitarian action.

166 IACtHR, Advisory Opinion OC-18/03, “Juridical Condition and Rights of Undocumented Migrants”, 17 September 2003, para. 101. See also Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force 27 January 1980), Art. 53; International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, *Yearbook of the International Law Commission*, Vol. 2, Part 2, 2001, pp. 85, 112–113; ICTY, *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgment (Trial Chamber), 14 January 2000, para. 520; ICRC Commentary on GC II, above note 63, paras 612, 624, 663 (Art. 3); ICRC Customary Law Study, above note 59, pp. 309–310 (Rule 88).

Exploring the “continuous combat function” concept in armed conflicts: Time for an extended application?

Sabrina Henry*

Sabrina Henry holds a bachelor’s degree in international relations and public affairs and a master’s degree in international and transnational law as well as an LLM from the Geneva Academy of International Humanitarian Law and Human Rights, Geneva. This contribution is an abridged version of the author’s LLM thesis, which was awarded the 2016 Henry Dunant Prize.

Abstract

This paper focuses on the “continuous combat function” concept and proposes to extend its application. First, the article will demonstrate that the continuous combat function concept should be extended to certain members of organized armed groups in cases where those groups do not belong to any of the parties to an international armed conflict and whose actions do not reach the level of intensity required for a separate non-international armed conflict (NIAC) to exist. Secondly, the paper will look at the extension of this concept in order to determine individual membership in State armed forces in the context of a NIAC, while arguing that the notion of “armed forces” should be interpreted differently depending of the nature of the conflict, be it international or non-international.

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Keywords: continuous combat function, direct participation in hostilities, organized armed groups, international humanitarian law, state armed forces.

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Introduction

The principle of distinction, a cardinal principle of international humanitarian law (IHL),¹ applies in the conduct of hostilities and determines who is a legitimate target under IHL, with a view to protecting civilians against the effects of hostilities. This principle, which is recognized in both international armed conflict (IAC) and non-international armed conflict (NIAC), establishes that the parties to a conflict must distinguish between combatants and civilians who are not taking a direct part in hostilities and direct their operations only against combatants.² In establishing the meaning of this principle, the drafters of the Geneva Conventions and their Additional Protocols chose to define “civilians” negatively, adopting articles that only define the terms “combatants” and “military objectives”.³ Although this principle is recognized in both IAC and NIAC, its interpretation differs slightly on account of the nature of the parties involved. This difference arises largely from the fact that combatant status does not exist in NIAC. In order to ensure that the principle is effectively implemented, a precise definition is required in the two types of conflicts, given that only certain categories of people are legitimate targets under IHL.⁴ Civilians are entitled to protection as long as they do not take a direct part in hostilities.⁵

For the purposes of the principle of distinction in IAC, Additional Protocol I (AP I) indicates that civilians are defined by default as “all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en*

- 1 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, para. 78.
- 2 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. 48; 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 1.
- 3 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) (GC III), Art. 4A; AP I, Arts 43, 52(2).
- 4 Under the law of IAC, only combatants and civilians who take a direct part in hostilities are legitimate targets (see GC III, Art. 4; AP I, Art. 51(3)). Under the law of NIAC, members of State armed forces, members of armed groups performing a continuous combat function (CCF) and civilians taking a direct part in hostilities are legitimate targets (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) (AP II), Art. 13(3); ICRC Customary Law Study, above note 2, Rules 1, 4).
- 5 AP I, Art. 51(3); AP II, Art. 13(3); ICRC Customary Law Study, above note 2, Rule 6.

masse”.⁶ Reference must be made to Article 4 of Geneva Convention III (GC III) to determine who is deemed to belong to the armed forces. This article makes a distinction between the regular members of State armed forces mentioned in Article 4A(1) and the irregular members referred to in Article 4A(2), who must meet four cumulative requirements to qualify as combatants.⁷ Article 43 of AP I, however, abolishes this distinction between regular and irregular armed forces.⁸ Knowing whether an individual qualifies as a combatant under IHL is vital, because only combatants have the right to take a direct part in hostilities.⁹

In the case of NIAC, the law does not provide an actual definition of the term “civilians”, but both State practice and the terminology used in Article 3 common to the four Geneva Conventions and in Additional Protocol II (AP II) indicate that “civilians” and the “armed forces” of the parties to the conflict are mutually exclusive concepts. As both States and organized armed groups are considered to have “armed forces”, common Article 3 can be said to implicitly establish a concept of “civilian” that comprises only those who do not bear arms on behalf of a party to the conflict.¹⁰ The *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC Interpretive Guidance) has, however, clarified the meaning of this term, specifying that for the purposes of the principle of distinction in NIAC, “all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians”.¹¹ In both NIAC and IAC, civilians are protected against direct attacks unless they take a direct part in hostilities, in which case they lose this protection, but only for the duration of their participation.¹²

As already mentioned, the principle of distinction in NIAC is somewhat ambiguous because of the lack of definition of the terms “civilian” and “armed group”. For the purpose of clarifying this principle, the ICRC produced its Interpretive Guidance following five informal meetings with experts on the subject.¹³ This paper will focus, in particular, on the “continuous combat function” (CCF) – a concept developed in the ICRC Interpretive Guidance as a means of establishing which individuals can be considered civilians for the

6 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009 (ICRC Interpretive Guidance), p. 20. See also GC III, Art. 4; AP I, Arts 43, 50(1).

7 See GC III, Art. 4. The four requirements listed in Article 4A(2) of GC III are: being commanded by a person responsible for his subordinates; having a fixed distinctive sign recognizable at a distance; carrying arms openly; and conducting their operations in accordance with the laws and customs of war. It is implicitly assumed that the requirements set out in this section are met by the members of regular armed forces.

8 ICRC Interpretive Guidance, above note 6, p. 21. Article 43 of AP I specifies that “[t]he armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates”.

9 AP I, Art. 43(2).

10 ICRC Expert Meeting, *Fourth Expert Meeting on the Notion of “Direct Participation in Hostilities under IHL”*, Background Document, Geneva, 27–28 November 2006, p. 12.

11 ICRC Interpretive Guidance, above note 6, p. 27.

12 AP I, Art. 51(3); AP II, Art. 13(3); ICRC Customary Law Study, above note 2, Rule 6.

13 ICRC Interpretive Guidance, above note 6, p. 9.

purposes of the principle of distinction – and will look at the point at which those individuals become legitimate targets under IHL and the duration of the loss of protection against direct attack.¹⁴ As there is no real incentive for members of armed groups to distinguish themselves, it is necessary to look at patterns of conduct in order to determine whether an individual can be considered to belong to an armed group under the principle of distinction in NIAC.¹⁵

While it seems that the ICRC uses the CCF concept to strengthen the principle of distinction in NIAC, the Interpretive Guidance does not rule out its use in IAC.¹⁶ Indeed, this concept is extended, for the purposes of the conduct of hostilities, to some individuals engaged by private military and security companies (PMSCs) and to irregular members of the armed forces. Contemporary armed conflicts involve actors whose participation was never envisaged by the drafters of the Geneva Conventions and their Additional Protocols. The first part of this paper will demonstrate why the CCF concept, developed by the ICRC Interpretive Guidance, should be extended to certain members of organized armed groups who are involved in an IAC without belonging to any of the parties to an IAC while their actions do not reach the level of intensity required for a separate NIAC to be deemed to exist.

The second part of the paper proposes that the application of this concept should also be used to determine individual membership in all State armed forces operating in the context of a NIAC, a possibility that is not envisaged in the ICRC Interpretive Guidance. It will be shown that the notion of “armed forces” should be interpreted differently in a NIAC than it is in an IAC, mainly because the parties to a NIAC are fundamentally different in nature from the parties involved in an IAC. The principle of equality of belligerents is invoked to support this argument, as the principle of distinction, used to determine who is a legitimate target in NIAC, should be applied in the same way for State armed forces as it is for organized armed groups. A brief analysis of the concept of CCF will first be provided, as this concept is the main focus of this paper.

The “continuous combat function” concept

Treaty IHL refers to the terms “armed forces”, “civilians” and “armed groups” without providing a definition of these terms. Knowing the exact meaning of these terms is essential for understanding the concrete application of the principle

¹⁴ *Ibid.*, p. 13.

¹⁵ Geoffrey Corn and Chris Jenks, “Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts”, *University of Pennsylvania Journal of International Law*, Vol. 33, No. 2, 2011, p. 338.

¹⁶ See ICRC Interpretive Guidance, above note 6, p. 25. Without explicitly stating that the CCF concept also applies in IAC, the ICRC specifies that “[m]embership in irregular armed forces, such as militias, volunteer corps, or resistance movements belonging to a party to the conflict, generally is not regulated by domestic law and can only be reliably determined on the basis of functional criteria, such as those applying to organized armed groups in non-international armed conflict”.

of distinction.¹⁷ As mentioned above, in order to clarify how this principle should be implemented, the ICRC published its Interpretive Guidance in 2009. The Guidance, which addresses the constituent elements of the notion of direct participation in hostilities (DPH), also makes reference to a category of individuals not covered by it, who may be attacked even if they are not taking a direct part in hostilities – that is, members of “organized armed groups”, a notion that lies at the heart of this paper. The principle of distinction may be relatively easy to understand in relation to IAC because the Geneva Conventions and AP I indicate who can be qualified as a member of State armed forces. In the case of NIAC, however, the interpretation of the principle of distinction is more ambiguous because treaty law provides no guidance as to who can be qualified as a member of an organized armed group.¹⁸ As the notion of membership in State armed forces cannot be extended to armed groups, the ICRC Interpretive Guidance clarifies this point, indicating that “organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (‘continuous combat function’)”.¹⁹ CCF is a concept that helps to determine the circumstances in which individual members of an armed group are deemed legitimate targets in NIAC even if they are not directly participating in hostilities at the moment of attack. The test is based on the individual’s membership in the group as well as the function performed by that individual within the group, and is not solely based on their individual conduct for a specific action, as is the case for the DPH test.²⁰

The ICRC Interpretive Guidance interprets the term “organized armed group” as referring exclusively to the armed or military wing of a non-State party.²¹ This means that the determination of membership of an armed group does not depend, as it does for members of State armed forces, on domestic legislation or the wearing of uniforms or distinctive signs, but is rather expressed through the performance of a certain function within the group.²² In order to strengthen the principle of distinction, membership in such groups must be based on a functional criterion and not on abstract affiliation or family ties. To reduce the risk of error, the Interpretive Guidance holds that “the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities”.²³ This distinction in the law of NIAC is critical as it allows us to differentiate between members of the fighting force of a non-State

17 *Ibid.*, p. 27.

18 For more information on the notion of organized armed groups, see International Criminal Tribunal for the former Yugoslavia (ICTY), *Haradinaj et al.*, Judgment (Trial Chamber I), 3 April 2008, para. 60; ICTY, *Prosecutor v. Ljube Boškovski and Johan Tarčulovski*, Judgment (Trial Chamber II), 10 July 2008, paras 195–205.

19 *Ibid.*, p. 27.

20 G. Corn and C. Jenks, above note 15, p. 332.

21 ICRC Interpretive Guidance, above note 6, p. 32.

22 *Ibid.*, pp. 32–33.

23 *Ibid.*, p. 33.

party, civilians who perform a non-combatant function in an armed group, and civilians who take a direct part in hostilities on a spontaneous and sporadic basis.²⁴ In its Interpretive Guidance, the ICRC states that CCF requires lasting integration into an armed group acting as the armed forces of a non-State party to an armed conflict.²⁵ This notion also encompasses individuals who are recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf.²⁶ The Interpretive Guidance considers that people who accompany or support an organized armed group but whose function does not involve direct participation in hostilities must be considered civilians and, as such, are entitled to protection from attacks unless they start to directly participate in hostilities.²⁷

Members of armed groups performing a CCF cease to be civilians and lose protection for as long as they continue to carry out that function.²⁸ The temporal scope of this loss of protection cannot be the same for members of armed groups carrying out a CCF as it is for civilians taking a direct part in hostilities – indeed, it would be absurd for members of armed groups to lose and regain protection as civilians each time they participate in a hostile act. Allowing members of armed groups to benefit from this “revolving door” of protection would give them a significant operational advantage over members of State armed forces who can be targeted on a continuous basis.²⁹ The notion of CCF therefore establishes a balance in the conduct of hostilities between State armed forces and members of armed groups.³⁰ The idea behind the CCF concept is that members of armed groups pose a continuing threat comparable to that posed by the State armed forces against which they are fighting. Given that members of armed groups participate in hostilities on a continuous basis, it must be permitted for them to be targeted in the same way as State armed forces are.³¹ The Interpretive Guidance specifies that they can regain protection as civilians when they stop performing a CCF.³² As explained by the Interpretive Guidance, “disengagement from an organized armed group need not be openly declared; it can also be expressed through conclusive behaviour, such as a physical distancing from the

24 *Ibid.*, pp. 71–72. The restriction of loss of protection to the duration of specific hostile acts was designed to respond to spontaneous, sporadic or unorganized hostile acts by civilians. This notion of DPH cannot therefore be applied to organized armed groups.

25 *Ibid.*, p. 34.

26 *Ibid.*, p. 34.

27 *Ibid.*, p. 34. For a civilian to be considered as directly participating in hostilities – and therefore lose his/her protection – three criteria need to be fulfilled: threshold of harm, direct causation and belligerent nexus. For more information, see *ibid.*, p. 46.

28 *Ibid.*, p. 72.

29 *Ibid.*, p. 72.

30 ICRC Expert Meeting, *Second Expert Meeting: Direct Participation in Hostilities under IHL*, Background Document, Geneva, 25–26 October 2004, p. 11.

31 ICRC Expert Meeting, *Third Expert Meeting on the Notion of Direct Participation in Hostilities*, Summary Report, Geneva, 23–25 October 2005, p. 64.

32 ICRC Interpretive Guidance, above note 6, p. 72.

group and reintegration into civilian life”.³³ If there is any doubt on the status, the person must be presumed to be entitled to civilian protection.³⁴

The “continuous combat function” concept in international armed conflicts

As already mentioned, the concept of CCF helps to clarify the principle of distinction and, more specifically, the concept of “civilian” in NIACs.³⁵ With a view to providing guidance on identifying individuals who are legitimate targets in NIAC under IHL, the ICRC Interpretive Guidance specifies that “organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (‘continuous combat function’)”.³⁶ According to this author, the CCF concept was developed *a priori* by the Interpretive Guidance for the explicit purpose of regulating the practical reality of NIAC.³⁷ However, the Guidance does not rule out the application of this concept in IAC and seems even to propose its application to PMSCs and “irregular members” of the armed forces.³⁸ The following sections will examine these two cases in which the Interpretive Guidance suggests the application of the CCF concept in IAC and will explore the possibility of extending the concept to other categories of actors, such as groups operating in an IAC without belonging to any of the parties to the conflict.

Private military and security companies

Recourse to PMSCs by the parties to a conflict is an increasingly common practice in contemporary armed conflicts. As the status of such companies is not specifically addressed in IHL, it has to be determined on a case-by-case basis. PMSCs are used to perform a variety of functions traditionally carried out by military personnel.³⁹ It is therefore necessary to distinguish between persons engaged by PMSCs to carry out non-combat functions, such as building infrastructure for the

33 *Ibid.*, p. 72. Also see 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., 2017 (ICRC Commentary on GC II), Art. 3, para. 543.

34 AP I, Art. 50(1).

35 ICRC Interpretive Guidance, above note 6, p. 16.

36 *Ibid.*, p. 16.

37 *Ibid.*, pp. 5–6: “In examining the notion of direct participation in hostilities the ICRC not only had to face longstanding dilemmas that had surrounded its practical application (e.g., can a person be a protected farmer by day and a targetable fighter at night?), but also had to grapple with more recent trends that further underlined the need for clarity. One such trend has been a marked shift in the conduct of hostilities into civilian population centers, including cases of urban warfare, characterized by an unprecedented intermingling of civilians and armed actors.”

38 *Ibid.*, p. 25, 39.

39 *Ibid.*, p. 37. For more information on PMSCs and their involvement in armed conflicts, see *Proceedings of the Bruges Colloquium: Private Military/Security Companies Operating in Situations of Armed Conflict*, 7th Bruges Colloquium, 19–20 October 2006; Alexandre Faite, “Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law”, *Defence Studies*, Vol. 4, No. 2, 2004.

armed forces, and those performing military activities, such as protecting military objectives.⁴⁰ Non-combat functions would not normally entail loss of civilian status, although the personnel performing them could be exposed to greater risks of incidental death or injury because of the type of activity they carry out or their location.⁴¹ On the other hand, PMSC personnel performing military activities must be categorized differently in view of the nature of the activities they undertake.

The question of the status of PMSC employees would be rapidly resolved if they were all formally incorporated into the armed forces of a party to the conflict or belonged to one of them.⁴² In that case, they would have combatant status under Article 4A(1) or (2) of GC III or Article 43 of AP I. However, incorporating such personnel into the armed forces would defeat the object of using PMSCs, an assumption confirmed by State practice.⁴³ The majority of PMSC employees would be considered civilians under IHL and would only lose their civilian immunity from attack when their conduct qualified as direct participation in hostilities, and only for the duration of their participation.⁴⁴ It is also argued by some that PMSC employees could be qualified as mercenaries within the meaning of Article 47 of AP I.⁴⁵ However, this question will not be addressed in this paper.⁴⁶ In its Interpretive Guidance, the ICRC does not explicitly clarify the status of PMSCs, but simply states that persons engaged by such companies are civilians unless they have been “incorporated into the armed forces of a party to the conflict, whether through a formal procedure under national law or *de facto* by *being given a continuous combat function*”.⁴⁷ Kenneth Watkin highlights the ambiguity of the language used by the Interpretive Guidance, pointing out that this wording does not specify whether these persons would, in such cases, qualify as members of the armed forces or as members of an organized armed group.⁴⁸

40 ICRC Expert Meeting, *First Expert Meeting: Direct Participation in Hostilities under IHL*, Background Paper, 2 June 2003, p. 18.

41 ICRC Interpretive Guidance, above note 6, p. 37.

42 In addition to belonging to a party to the conflict, they must also meet the four requirements listed in Article 4A(2) of GC III. See Lindsey Cameron, “Private Military Companies: Their Status under International Humanitarian Law and Its Impact on Their Regulation”, *International Review of the Red Cross*, Vol. 88, No. 863, 2006, p. 585. It is noted in this article that, in the majority of cases, such persons do not wear distinctive signs or uniforms. It is therefore very rare for PMSC employees to qualify as combatants. Also see P. R. Kalidhass, “Determining the Status of Private Military Companies under International Law: A Quest to Solve Accountability Issues in Armed Conflicts”, *Amsterdam Law Forum*, Vol. 6, No. 2, 2014.

43 ICRC Interpretive Guidance, above note 6, p. 38. See also L. Cameron, above note 42, p. 582.

44 ICRC Interpretive Guidance, above note 6, p. 38. See also L. Cameron, above note 42, p. 582.

45 L. Cameron, above note 42, p. 577. Such persons may therefore be prosecuted for the mere fact of their participation in hostilities.

46 For more information on this issue, see Françoise Hampson, “Mercenaries: Diagnosis before Prescription”, *Netherlands Yearbook of International Law*, Vol. 3, 1991, pp. 14–16; George Aldrich, “Guerrilla Combatants and Prisoner-of-War Status”, *American University International Law Review*, Vol. 31, 1982, p. 881. It should also be noted that Article 47 of AP I provides that mercenaries cannot be considered combatants. It might therefore be relevant to consider the possibility of applying the CCF test in the context of IAC. This question will not, however, be further addressed here.

47 ICRC Interpretive Guidance, above note 6, p. 39 (emphasis added).

48 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, 2010, p. 657.

Stating that membership in the armed forces of a party to the conflict can be determined, in the case of PMSC employees, by the assignment of a continuous combat function, the Interpretive Guidance does not rule out application of the CCF concept in IAC.⁴⁹

Irregular members of the armed forces

As established above, for the purposes of the principle of distinction in IAC, persons falling into one of the categories included in Article 4A(1) or (2) of GC III or Article 43 of AP I qualify as combatants and are therefore legitimate targets. Article 4A(2) provides that “[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict”⁵⁰ shall be deemed to belong to the State armed forces if the group fulfils the following four cumulative conditions: (1) being commanded by a person responsible for his subordinates; (2) having a fixed distinctive sign recognizable at a distance; (3) carrying arms openly; and (4) conducting their operations in accordance with the laws and customs of war. Members of militias and volunteer corps other than the regular armed forces, including those of organized resistance movements, that meet these conditions are considered the “irregular” armed forces of a party to an IAC.⁵¹ It should be noted that these conditions do not apply to the “regular” armed forces, as they are recognized as such in domestic law.⁵²

The requirements listed in Article 4A(2) are, *a priori*, conditions that must be met by “irregular armed forces” if they are to be entitled to combatant privilege and prisoner-of-war status when captured. However, failure to qualify as a combatant and prisoner of war does not mean that they do not belong to the armed forces or that they are regarded as civilians for the purposes of the conduct of hostilities.⁵³ According to the ICRC Interpretive Guidance, such a conclusion would contradict the logic of the principle of distinction by placing irregular armed forces under the more protective legal regime afforded to civilians.⁵⁴ The ICRC therefore takes the view that “all armed actors showing a *sufficient degree of military organization and belonging to a party* to the conflict must be regarded as part of the armed forces of that party”.⁵⁵

In the case of regular armed forces, the determination of individual membership is generally regulated by the State’s domestic law⁵⁶ and usually

49 ICRC Interpretive Guidance, above note 6, p. 39.

50 GC III, Art. 4A(2).

51 See *ibid.*, Art. 4(2); ICRC Interpretive Guidance, above note 6, p. 22.

52 ICRC Interpretive Guidance, above note 6, p. 22.

53 *Ibid.*, p. 22.

54 *Ibid.*, p. 22.

55 *Ibid.*, p. 23 (emphasis added). According to the Interpretive Guidance, “[t]he concept of ‘belonging to’ requires at least a *de facto* relationship between an organized armed group and a party to the conflict. This relationship may be officially declared, but may also be expressed through tacit agreement or conclusive behaviour that makes clear for which party the group is fighting”.

56 *Ibid.*, p. 25.

expressed through “formal integration into permanent units distinguishable by uniforms, insignia, and equipment”.⁵⁷ The same logic does not, however, apply to irregular armed forces because this category is not regulated by domestic law. The ICRC therefore proposes that membership in irregular armed forces be “reliably determined on the basis of *functional criteria, such as those applying to organized armed groups in non-international armed conflict*”.⁵⁸ In its Interpretive Guidance, the ICRC suggests using the concept of CCF – that is, the continuous function performed by an individual for the group involving his/her direct participation in hostilities – to determine individual membership in an organized armed group in IAC.⁵⁹ Here again, it seems that the Interpretive Guidance envisages the extension of the CCF concept to certain actors operating in an IAC.

Irregular members not belonging to a party to an IAC

While the ICRC Interpretive Guidance envisages the use of functional criteria – CCF – to determine individual membership in the case of irregular members, what would be the status of a group engaging in hostile acts against a party to the IAC without belonging to another party to the same conflict? The Interpretive Guidance is of the view that, in such cases, these persons cannot be regarded as members of the armed forces of a party to the conflict.⁶⁰ For the purposes of the conduct of hostilities, they must, then, be considered civilians.⁶¹ According to the Interpretive Guidance, any other view “would discard the dichotomy in all armed conflicts between the armed forces of the parties to the conflict and the civilian population”.⁶² However, if the group meets the two criteria required for a situation to be qualified as a NIAC (intensity and organization),⁶³ it will be regarded as a party to a separate NIAC occurring in parallel to the IAC, in which case the status of the members of the group will be determined in accordance with the law of NIAC.⁶⁴ Referring to situations in which the level of organization

57 *Ibid.*, p. 25.

58 *Ibid.*, p. 25 (emphasis added).

59 *Ibid.*, p. 33.

60 *Ibid.*, pp. 23–24.

61 *Ibid.*, pp. 23–24.

62 *Ibid.*, pp. 23–24.

63 The test for an armed conflict was set out by the ICTY Appeals Chamber in the *Tadić* decision as follows: “An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” See ICTY, *Prosecutor v. Dusko Tadić aka DULE*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70. The Trial Chamber in *Tadić* interpreted this test in the case of internal armed conflict as consisting of two criteria, namely (i) the intensity of the conflict and (ii) the organization of the parties to the conflict, as a way to distinguish an armed conflict “from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law”. See ICTY, *Prosecutor v. Dusko Tadić aka DULE*, Opinion and Judgment, 7 May 1997, para. 562. Following this, the ICTY developed factors that could be taken into account in order to assess the intensity and organization criteria. See ICTY, *Prosecutor v. Ljube Boškovski and Johan Tarčulovski*, Judgment (Trial Chamber II), 10 July 2008, paras 195–205.

64 For more information on the two criteria required for violence to qualify as a NIAC, see ICRC Commentary on GC II, above note 33, Art. 3, paras 415–459.

and intensity required to determine the existence of a NIAC is not reached, the Interpretive Guidance states that “organized armed violence failing to qualify as an international or non-international armed conflict *remains an issue of law enforcement*” however the perpetrators are regarded.⁶⁵ This type of scenario is not completely theoretical, as noted by Michael Schmitt:

The prospect of groups appearing in the battlespace that do not belong to any of the parties to an international armed conflict is far from hypothetical. For instance, during the international armed conflict phases in Afghanistan and Iraq, coalition troops regularly faced forces that were not allied with the Taliban or the Baathist regimes. In particular, certain Shia militia groups in Iraq opposed both the coalition forces and those of the Iraqi government in the hope of eventually seizing power themselves.⁶⁶

The author holds the view that, *a priori*, groups operating in an IAC context without belonging to any of the parties to the conflict and without a separate NIAC existing should be governed by the law enforcement paradigm. What happens, though, when the parties to an IAC are unable to exercise their law enforcement powers over the members of such a group? Do they become immune from attack? The following scenario can be used to illustrate this situation: State A is engaged in an IAC against State B in the territory of State B. In the context of this conflict, group C, which is in the territory of State B, does not belong to either of the parties to the IAC (as it is seeking to seize power itself and is therefore opposed to both State A and State B) and is preparing to conduct attacks on the territory of State A. Although the group is organized, its operations do not reach the threshold of intensity required to determine the existence of a separate NIAC. According to the ICRC, the acts of this organized armed group are “an issue of law enforcement”.⁶⁷ State A must respond to the threat posed by group C in accordance with law enforcement standards, but how can it do so outside its territory when it does not have a law enforcement presence in the territory of State B? Furthermore, State A cannot ask State B to use its law enforcement powers and arrest the members of this group, as it is engaged in an armed conflict against State B.⁶⁸ This shows that the application of law enforcement “to the conduct of hostilities ... can be both illogical and operationally debilitating” in some cases.⁶⁹

The author is therefore of the view that, in such a scenario, IHL should apply. As State A is unable to perform its law enforcement functions in the territory of State B and therefore has no control over the organized armed group,

65 ICRC Interpretive Guidance, above note 6, p. 24 (emphasis added).

66 Michael N. Schmitt, “The Status of Opposition Fighters in a Non-International Armed Conflict”, *Naval War College International Law Studies*, Vol. 88, 2012, p. 134.

67 ICRC Interpretive Guidance, above note 6, p. 24.

68 See Geoffrey Corn, “Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict”, *International Humanitarian Legal Studies*, Vol. 52, No. 94, 2010, p. 83; Samit D’Cunha, “The Notion of External NIACs: Reconsidering the Intensity Threshold in Light of Contemporary Armed Conflicts”, *Yearbook of International Humanitarian Law*, Vol. 20, 2017, pp. 93–94.

69 S. D’Cunha, above note 68, pp. 93–94.

the logical conclusion cannot be to prohibit State A from taking action against group C. The author submits that in this exceptional case in which the State cannot exercise its law enforcement powers to respond to the threat posed by the group, IHL should apply between State A and group C.⁷⁰ If, on the other hand, we follow the Interpretive Guidance's reasoning that the persons involved should be regarded as civilians, the principle of distinction would be diluted, thereby weakening the protection afforded to civilians. The aim of the Interpretive Guidance in developing the CCF concept was to clarify the principle of distinction by shedding light on the distinction that must be made between the members of State armed forces and organized armed groups on the one hand, and civilians on the other.⁷¹ Allowing such persons to be qualified as civilians would blur this distinction. It would also be contrary to the principle of equality of belligerents⁷² because they would benefit from a certain immunity from attack as a result of the State's inability to respond to the threat either through IHL or through law enforcement. In the example above, it would be absurd to conclude that group C could launch an attack against State A – who is involved in an IAC with State B – without State A being able to target those individuals that are part of group C. According to this author, the members of the group assigned a continuous function involving their direct participation in hostilities should be regarded as legitimate targets under IHL applicable to IAC in order to comply with the principle of distinction and the principle of equality of belligerents.⁷³ The idea of applying the CCF test to groups that do not belong to any of the parties to an IAC is not new, as experts raised the question during the preparation of the Interpretive Guidance:

However, to the extent that the other variation of the “membership approach”, which interprets mere “membership” in an organized armed group as a continuous form of “direct participation in hostilities”, was found to be theoretically defensible and practically viable in non-international armed conflict, it should be considered whether the same concept could also apply to organized armed groups failing to qualify for membership in the “armed

70 The problem of determining the intensity threshold in an armed conflict is addressed by Samit D'Cunha using an argument similar to the one presented here in relation to the loss of control by a State over an organized armed group. He uses this argument to show that, in certain cases, when there is a loss of control, the intensity threshold for determining the existence of a NIAC should be reconsidered (or even abolished). See *ibid.*, pp. 102–103. The present article puts forward a similar reasoning, arguing that a State's inability to control an organized armed group and exercise its law enforcement powers to respond to the threat it poses does not mean that the group is immune to action against it; in this case, IHL should apply.

71 ICRC Interpretive Guidance, above note 6, pp. 5–6.

72 Such persons could not be regarded as civilians taking a direct part in hostilities because it would be contrary to the intended purpose of the DPH concept, which was developed by the ICRC to cover spontaneous, sporadic and unorganized hostile acts and could not be applied to organized armed groups. The principle of equality of belligerents will be discussed in greater detail later in this article.

73 For more information on the principle of equality of belligerents, see Jonathan Somer, “Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict”, *International Review of the Red Cross*, Vol. 89, No. 867, 2007; Adam Roberts, “The Equal Application of the Laws of war: A Principle Under Pressure”, *International Review of the Red Cross*, Vol. 90, No. 872, 2008.

forces” in situations of international armed conflict. This would entail that both in international and non-international armed conflict “membership” in an organized armed group would be interpreted as a continuous form of civilian “direct participation in hostilities”, thus resulting in a loss of civilian protection against direct attack for the duration of such membership.⁷⁴

In a judgment delivered in 2006, the Israeli High Court of Justice implicitly supported this theory when it stated that, under the law of IAC, the members of an independent Palestinian armed group who had “made the group their home” and as part of their role in that group had committed “a chain of hostilities, with short periods of rest between them”, lost their immunity from attack for the time they were committing that series of hostile acts, including the breaks between them.⁷⁵ In its reasoning, it seems that the Court echoed in part the idea behind the CCF concept, stating that, under the law applicable in IAC, the members of this armed group lost their immunity for the duration of their involvement in it.⁷⁶

The view presented above is more adapted to the particularities of contemporary armed conflicts, as sometimes groups involved in an IAC do not belong to any of the parties to the conflict, the intensity threshold⁷⁷ required to determine the existence of a parallel NIAC is not met, and States are unable to exercise their law enforcement powers. For this reason, the author maintains that, in some specific cases, the CCF concept should be applicable to this type of actor. The next section will analyze the question of extending it to members of State armed forces involved in a NIAC.

The “continuous combat function” concept applied to State armed forces in a non-international armed conflict

As shown above, for the purposes of the conduct of hostilities in NIAC, a distinction must be made between the members of State armed forces, the members of organized armed groups performing a CCF, civilians who take a direct part in hostilities, and civilians who are entitled to protection. These distinctions are necessary to determine who is a legitimate target under IHL. It has been established above that members of armed groups who perform a continuous function involving their direct participation in hostilities are legitimate targets until they cease to undertake that function for the group. In the case of members of State armed forces, it is relevant to consider whether, for the purposes of the conduct of hostilities, the members of these forces who qualify as legitimate targets in NIAC should be identified in accordance with the same definition used

74 ICRC Expert Meeting, *Working Sessions IV and V – “Direct Participation in Hostilities” and Membership in Organized Armed Groups*, Background Document, Geneva, 23–25 October 2005, pp. 18–19.

75 Israeli High Court of Justice, *The Public Committee against Torture v. The Government of Israel*, HCJ 769/02, Judgment, 13 December 2006, para. 39.

76 *Ibid.*, para. 39.

77 See above note 63.

for IAC in GC III and AP I. The next section will look at common Article 3 and Additional Protocol II (AP II) to determine the meaning of the term “armed forces”, with a view to ascertaining whether the definition of this term should be the same in IAC and NIAC.

The term “armed forces” within the meaning of common Article 3 and Additional Protocol II

Common Article 3 and AP II both use the term “armed forces”. Common Article 3, which applies to “each Party to the conflict”, refers to “members of armed forces who have laid down their arms”. While the ICRC maintains that this article does not govern the conduct of hostilities,⁷⁸ a point still subject to controversy in the literature⁷⁹, its wording implies that the term can be interpreted as meaning that, in a NIAC, the different State and non-State parties to the conflict all have “armed forces”.⁸⁰ The Commentary on common Article 3 confirms this interpretation, indicating that the term refers to both the armed forces of a State and the armed forces of a non-State party.⁸¹ Furthermore, this article uses the expression “members of armed forces” as opposed to “members of *the* armed forces”, which suggests that the term is not limited to State armed forces.⁸² This interpretation of the term “armed forces”, as it appears in common Article 3, is completely different from the wording used in AP II, where the concept is referred to in other terms.

Article 1 of AP II is much more precise in the distinction it makes between the “armed forces” of a High Contracting Party and “dissident armed forces or other organized armed groups”. This distinction, which is absent from common Article 3, shows that AP II uses the term “armed forces” in a much more restrictive way; in this article, it refers only to State armed forces.⁸³ The ICRC Interpretive Guidance therefore maintains that the interpretation chosen for this term in AP II indicates

78 *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, 2016, para. 389.

79 For views supporting that common Article 3 contains some regulation of the conduct of hostilities see: James E Bond, “Application of the Law of War to Internal Conflict”, *Georgia Journal of International and Comparative Law*, Vol. 3, No. 2, 1973, p. 348; William H. Boothby, *The Law of Targeting*, Oxford University Press, 2012, p. 433 and Rogers, A.P.V., *Law on the Battlefield*, 3rd edition, Manchester University Press, 2012, p. 301.

80 ICRC Interpretive Guidance, above note 6, p. 28. Also see ICRC Commentary on GC II, above note 33, Article 3, paras 525–526.

81 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 (ICRC Commentary on GC I), para. 530.

82 *Ibid.*

83 Jann K. Kleffner, “The Beneficiaries of the Rights Stemming from Common Article 3”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 440. See also 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, para. 4462, which, on the subject of Article 1 of AP II, states that the term “armed forces” should be interpreted as covering “all the armed forces, including those not included in the definition of the army in the national legislation of some countries”.

that “comparable to the concept of armed forces in Additional Protocol I, State armed forces under Additional Protocol II include both the regular armed forces and other armed groups or units organized under a command responsible to the State”.⁸⁴ This definition echoes the one given for “combatant” in Article 4A(1) and (2)⁸⁵ of GC III and Article 43 of AP I.⁸⁶

It is observed that the Commentaries and preparatory work for these articles give no reason to assume that the term “armed forces” should be interpreted differently in international and non-international armed conflicts.⁸⁷ Nevertheless, the emphasis should be on the interpretation found in common Article 3, as shown above, which supports the theory presented in this section that the term “armed forces” should be interpreted according to the nature of the armed conflict. By including both State and non-State forces in the expression “armed forces”, common Article 3 shows that the interpretation of the term is different here than in IAC, thus supporting the theory put forward in this paper, which submits that the term “State armed forces” should be interpreted differently in NIAC. It will be shown below that this interpretation found in common Article 3 also bolsters the theory presented in this section, as it is in keeping with the principle of equality of belligerents.

In order to define the term “State armed forces” in NIAC, the ICRC Interpretive Guidance makes a distinction between members of regular and irregular armed forces. It indicates that membership in the regular armed forces of a State must be determined in accordance with the country’s domestic law.⁸⁸ With regard to the irregular armed forces of a State, it is specified that, as their membership in the armed forces is not regulated by domestic law, it can only be reliably determined “on the basis of the same functional criteria that apply to organized armed groups of non-State parties to the conflict”.⁸⁹

The analysis above suggests that in the case of regular armed forces, the criteria for determining who is a legitimate target in NIAC were simply transposed from IAC and applied to NIACs, which present very different realities on the ground.⁹⁰ The main danger with this approach, when it comes to the conduct of hostilities, is that it creates a bias against State armed forces in terms of who can be targeted. As soon as a person joins the regular armed forces of a State, they qualify as a combatant within the meaning of Article 4A(1) of GC III or Article 43 of AP I and are therefore considered legitimate targets under IHL. Hence, all members of the regular armed forces, from soldiers to cooks, are deemed to be military targets in NIACs. This is not the case for members of an organized armed group, as the ICRC Interpretive Guidance indicates that only

84 ICRC Interpretive Guidance, above note 6, pp. 30–31.

85 This article defines who qualifies as a prisoner of war and therefore, indirectly, as a combatant for the purposes of the conduct of hostilities.

86 The ICRC Customary Law Study, above note 2, states that, for the purposes of the principle of distinction in NIAC, the definition of “armed forces” also applies in NIACs (see commentary to Rule 4).

87 ICRC Expert Meeting, above note 10, p. 13.

88 ICRC Interpretive Guidance, above note 6, p. 31.

89 *Ibid.*, p. 31.

90 That is, referring to Article 4A (1) of GC III or Article 43 of AP I.

the military or armed wing of such groups constitutes a legitimate target in NIAC as long as they assume a continuous combat function to directly participate in hostilities.⁹¹ This creates an imbalance between State armed forces and members of an armed group in that those performing a support function in an armed group are considered civilians and are therefore entitled to protection, while members of State armed forces carrying out a similar function would be legitimate targets.⁹²

With regard to the irregular armed forces of a State, the ICRC Interpretive Guidance proposes establishing individual membership on the basis of functional criteria – that is, using the same test employed to determine individual membership in an organized armed group.⁹³ Such a proposal supports the central idea of this section, which is to use the CCF concept to determine who in the armed forces of a State (regular and irregular forces) constitutes a legitimate target in NIAC. This paper submits that in order to prevent the imbalance that would be caused by extending the concept of “armed forces” to NIAC, it should be interpreted differently in this type of conflict – that is, the CCF test should be also used to establish the individuals in regular State armed forces who are legitimate targets. The next section will set out the reasons justifying the use of the CCF concept for members of State armed forces in a NIAC.

Application of the “continuous combat function” concept to determine individual membership in State armed forces

Some authors, such as Kenneth Watkin, have criticized the ICRC Interpretive Guidance, arguing that the notion of CCF should have been more broadly defined to include members of organized armed groups who perform support functions.⁹⁴ In his critique, Watkin proposes righting the imbalance by using a broader definition of the CCF concept to correct the bias against State armed forces, whose members are all legitimate military targets. However, surely a more humanitarian argument would be to interpret the concept of “armed forces” differently in NIAC, rather than interpreting the concept of CCF more broadly? This would eliminate the imbalance between members of State armed forces and members of organized armed groups, as the same test – the CCF test – would be used to determine individual membership in the armed forces of the parties to the conflict in order to determine who is a legitimate target under IHL. Some members of State armed forces, such as cooks, carry out tasks that do not constitute a continuous function involving their direct participation in hostilities,

91 K. Watkin, above note 48, p. 694. They are only considered military targets when they perform a continuous function involving direct participation in hostilities.

92 Nils Melzer, “Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities”, *International Law and Politics*, Vol. 42, No. 831, 2010, p. 851.

93 ICRC Interpretive Guidance, above note 6, p. 25.

94 K. Watkin, above note 48, pp. 675, 691. Also see Michael N. Schmitt, “The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis”, *Harvard National Security Journal*, Vol. 1, 2010, pp. 23–24.

and these individuals should therefore not be considered legitimate targets under IHL – unless they start to directly participate in hostilities. Only individuals whose continuous function it is to take a direct part in hostilities as members of the State armed forces or an organized armed group should be legitimate targets in NIAC. The extension of the CCF concept to State armed forces would restrict the interpretation of the term “State armed forces” to those members who participate in hostilities on a continuous basis.⁹⁵

The application of the CCF concept to State armed forces is justified because these forces operate in a completely different type of armed conflict which involves non-State actors. In an IAC, the parties to the conflict are States, and individual membership in State armed forces is defined, for all the parties, by the domestic legislation of each State. This cannot be extended to NIACs because in such conflicts at least one of the parties to the conflict is a non-State actor, and individual membership in an organized armed group is not regulated by domestic law. Such asymmetry between the parties to a NIAC demonstrates why the criteria established in GC III or AP I should not be used to identify the individuals in the armed forces of a State who are legitimate targets in a NIAC. The fundamentally different nature of the parties involved in a NIAC is therefore an argument that supports the use of a similar test to determine who in State and non-State armed forces are legitimate targets according to the principle of distinction.

The equality of belligerents, which is a fundamental principle of IHL, also highlights the importance of interpreting the notion of “armed forces” differently in IAC and NIAC. This principle establishes that all the parties to an armed conflict have the same rights and obligations.⁹⁶ The idea behind the principle is that a party with binding obligations is less likely to fulfil them if the other party to the same conflict is not bound by similar rules. It is important to understand that this principle of equality of belligerents does not mean that the opposing parties must have equal standing, as its name might seem to suggest, but rather that they have equal obligations.⁹⁷ Jonathan Somer observes that the principle of equality of belligerents does not extend to status but establishes that the parties must have equal rights and obligations as far as compliance with IHL is concerned.⁹⁸ The parties to a NIAC are required to comply with the principle of distinction, and the way in which it is implemented – that is, the means used to determine which

95 It should be noted – although it is not addressed in detail in this paper – that in accordance with the theory presented in this section, members of police forces operating in a NIAC could be considered to be performing a CCF if their actions have a nexus with the conflict in question. It is proposed that when such individuals, who are not generally included in the armed forces of a State, are required to perform a continuous function that involves direct participation in hostilities, they should not be regarded as civilians taking a direct part in hostilities. This proposal would have the advantage of making the law of NIAC more realistic for organized armed groups, as it would allow them to target such persons on a continuous basis and not only when they are taking a direct part in hostilities.

96 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, p. 243.

97 *Ibid.*, p. 245.

98 J. Somer, above note 73, p. 663.

individuals are legitimate targets in a NIAC – should be defined in a similar way for State armed forces and organized armed groups in keeping with the principle of equality of belligerents. As mentioned above, the interpretation of the term “armed forces” found in common Article 3 adds weight to this argument based on the principle of equality of belligerents, as no distinction is made in this article between the “armed forces” of the parties to a NIAC, which should have the same rights and obligations under IHL.⁹⁹ It can therefore be said that the principle of equality of belligerents underlies common Article 3, as the term “armed forces” encompasses both State and non-State armed forces, further strengthening the theory that it should be interpreted differently for State armed forces in NIAC.

According to the *lex lata*, a more significant proportion of members of State armed forces can be targeted in the conduct of hostilities because their membership in these forces is determined differently than for organized armed groups in a NIAC. Therefore, if the principle of equality of belligerents is to be respected, membership in the forces of the parties to a NIAC should be determined using a similar test, so that the principle of distinction is implemented in the same way for State armed forces and organized armed groups. Any failure to respect the principle of equality of belligerents could adversely affect the willingness of the parties to the conflict to comply with IHL because their obligations are different. The arguments presented above demonstrate the importance of extending the CCF concept to State armed forces in NIAC, especially in order to ensure equal obligations for all the parties to the conflict, which could be an incentive for those parties to better comply with IHL.

Conclusion

The aim of this paper was to propose the extension of the CCF concept, developed by the ICRC Interpretive Guidance, to specific types of actors in IAC and NIAC. It was first established that the Interpretive Guidance has already envisaged the extension of this concept to two categories of actors specifically: certain individuals engaged by PMSCs and irregular members of the armed forces. This paper argues that the CCF concept should also be extended in certain cases to organized armed groups that do not belong to any of the parties to an IAC. The aim of this proposal is to take into account the realities of contemporary armed conflicts in which such situations can arise. The CCF approach would ensure that the principle of distinction and the principle of equality of belligerents are respected, with the actors involved in an IAC having the same rights and obligations.

The second proposal put forward in this paper was to interpret the term “State armed forces” differently in the context of NIAC. This approach is proposed as a means of ensuring the equality of the parties to a NIAC in order to resolve the imbalance created in terms of the members of the State armed forces

⁹⁹ ICRC Commentary on GC I, above note 81, para. 530.

and the members of an organized armed group who are legitimate targets under IHL. Based on the wording of common Article 3 and the principle of equality of belligerents, this paper suggests that individual membership in State armed forces should be established in the same way as for organized armed groups – that is, using the CCF test. This approach would allow the principle of distinction to be implemented in a more realistic way for all the parties to a NIAC.

More humanitarian accountability, less humanitarian access? Alternative ideas on accountability for protection activities in conflict settings

Natalie Klein-Kelly*

Natalie Klein-Kelly, MPhil, MSc, PhD, is a Protection Coordinator with the ICRC, working in various field positions in this function over the past decade.

Abstract

Ambitions to fulfil accountability demands in humanitarian action are high, including for protection activities in armed conflict settings. However, from a Dunantist position, meeting accountability demands is often not only unsatisfactory for practical reasons, but is also inappropriate in view of humanitarian principles and flawed from related ethical perspectives. Regarding accountability primarily as a technical exercise, rather than as being linked to ethical perspectives on humanitarianism and its principles, may thus inadvertently contribute to reduced acceptability of, and ultimately reduced access for, humanitarian actors. Dunantist actors wishing to stay true to their ethical approach need new ways of thinking about accountability, a reflection which can serve as an example for an ongoing need to consider differences between actors within the humanitarian–development nexus.

* The views expressed here are those of the author and do not necessarily reflect the position of the International Committee of the Red Cross.

Keywords: accountability, humanitarian access, humanitarian ethics, humanitarian principles, protection of civilians, armed conflict.



Introduction

Accountability is a key concept for humanitarian actors, but applying and fulfilling it is not without challenges. This article explores these challenges, the choices that need to be made and their consequences, as well as emerging ideas on how accountability can be met, by using the specific example of humanitarian protection activities in armed conflict settings.¹

As will be explored in greater detail below, accountability is currently understood as a largely technical exercise that explains to external stakeholders – i.e., donors and the affected population – how a humanitarian actor has used its resources and achieved its intended results. In the case of humanitarian protection activities – the example that this article is using – this means being accountable for ensuring that the rights of individuals affected by armed conflict are respected and that individuals are protected from the negative effects of war, which in turn often implies a change in the behaviour of parties to an armed conflict, or even larger social changes in the societies in which they live. With accountability focused on obtaining such broad change, this article argues that consequentialist ethical perspectives on accountability currently prevail. To quote Thomas G. Weiss, “consequentialist ethics are essential”.² This leads to the key question posed by this article: what does this primarily consequentialist understanding of accountability imply for those humanitarian actors whose perspectives, including ethical perspectives, on their actions are precisely not consequentialist but, rather, “Dunantist”?

Consequentialism and Dunantism are two key approaches in humanitarian action. While often referred to as two distinct approaches, this precise pair of terms may not necessarily be used.³ Consequentialism in normative ethics refers to the

1 This is also where the author has practical field experience. On the importance of context, see Dennis Dijkzeul and Dorothea Hilhorst, “Instrumentalisation of Aid in Humanitarian Crisis: Obstacle or Precondition for Cooperation?”, in Volker M. Heins, Kai Koddenbrock and Christine Unrau (eds), *Humanitarianism and Challenges of Cooperation*, Routledge, London and New York, 2016, p. 55.

2 See Thomas G. Weiss, “Humanitarianism’s Contested Culture in War Zones”, in V. M. Heins, K. Koddenbrock and C. Unrau (eds), above note 1, p. 34. Weiss does not offer a definition of consequentialist ethics, but explains that consequentialist ethics involve judging humanitarianism “by consequences and not intentions, by the quality of results and impacts and not merely inputs and outputs” (p. 31), and “thinking about goals and roles, ends and means, results and impacts” (p. 33).

3 Dijkzeul and Hilhorst have recently noted that “the two different ethical approaches have always been used in the humanitarian field”; they offer the definitions of consequentialism as “an ethic that focuses more on the outcomes of action than on the purity of its intentions” and see the International Committee of the Red Cross (ICRC) and Médecins Sans Frontières (MSF) as operating in a “Dunantist vein” and following “a deontological ethic”, meaning “duty-bound to alleviate suffering and save lives”. D. Dijkzeul and D. Hilhorst, above note 1, p. 56.

approach of justifying and evaluating an action by its consequences or ultimate aim, as opposed to the deontological or Kantian position that what makes an action “right” need not (only) be its consequences.⁴ In humanitarian academic literature, this latter, non-consequentialist position is also termed deontological,⁵ but it is also varied in nuanced ways by referring to value-,⁶ obligation-⁷ or duty-based⁸ rationality. In these discussions, specific reference to “Dunantist actors”,⁹ who follow the “Dunantist traditions”¹⁰ and “Dunantist principles”¹¹ of neutrality and independence, can often be found. As the use of different terminologies shows, the application of deontological ethics to humanitarian action is not straightforward.¹² As a determination of the various nuances in the application of deontological ethics in humanitarian action would go beyond the topic of this article, the term “Dunantist” will be used here to describe the non-consequentialist ethical perspectives that these actors embody.

Going back to the application of the concept of accountability, issues of a practical and ethical nature may arise when these Dunantist actors apply the current, primarily consequentialist understanding of accountability. There may be consequences to consider, particularly with regard to the principle of neutrality and the humanitarian access to conflict areas that this principle facilitates. Alternative approaches to the concept of accountability may be preferable for such actors.

To make its argument on the importance of considering the broader implications of how accountability is understood and applied, this article first discusses the concept of accountability and how it has evolved in the

- 4 Marcia W. Baron, “Kantian Ethics”, in Marcia W. Baron, Philip Pettit and Michael Slote (eds), *Three Methods of Ethics: A Debate*, Blackwell Publishing, Malden, MA, and Oxford, 1997, p. 18. For a general introduction, see Harry J. Gensler, *Ethics: A Contemporary Introduction*, 3rd ed., Routledge, London and New York, 2018, pp. 174–208.
- 5 Referring to the ICRC and MSF, “these two Dunantist organisations ... see humanitarian aid as an independent and duty-based activity. Put differently, they follow deontological ethics”. Dennis Dijkzeul, Ryan O’Neil and Zeynep Sezgin, “Conclusions: Convergence or Divergence?”, in Zeynep Sezgin and Dennis Dijkzeul (eds), *The New Humanitarians in International Practice: Emerging Actors and Contested Principles*, Routledge, London and New York, 2016, p. 340.
- 6 Chris Calhoun contrasts “value rationality” and “instrumental rationality” in “The Imperative to Reduce Suffering: Charity, Progress, and Emergencies in the Field of Humanitarian Action”, in Michael Barnett and Thomas G. Weiss (eds), *Humanitarianism in Question: Politics, Power and Ethics*, Cornell University Press, Ithaca, NY, and London, 2008, pp. 89, 95.
- 7 Janice Gross Stein describes how the search for impact on an outcome level replaces an “ethic of obligation” with one of “consequence” in “Humanitarian Organisations: Accountable – Why, to Whom, for What, and How?”, in M. Barnett and T. G. Weiss (eds), above note 6, p. 134.
- 8 Michael Barnett and Jack Snyder contrast “duty to aid” with “ethic of consequences” in “The Grand Strategies of Humanitarianism”, in M. Barnett and T. G. Weiss (eds), above note 6, p. 144.
- 9 Dijkzeul, O’Neill and Sezgin mention that international NGOs can be “Dunantist or Wilsonian multi-mandate ones”; D. Dijkzeul, R. O’Neill and Z. Sezgin, above note 5, p. 353.
- 10 See, for example, the use of this term in J. G. Stein, above note 7, p. 130.
- 11 See, for example, the use of this term in D. Dijkzeul and D. Hilhorst, above note 1, p. 57.
- 12 Dijkzeul and Hilhorst also mention that “in practice, both ethics interact” and are not “mutually exclusive”; *ibid.*, p. 57. As an example of a particular issue that will also be taken up later in this article, do deontological ethics imply a humanitarian imperative to act? For discussion on this, see Eva Wortel, “Humanitarians and Their Moral Stance in War: The Underlying Values”, *International Review of the Red Cross*, Vol. 91, No. 876, 2009.

humanitarian world over the past two decades. This first section culminates in a reflection on how the concept of accountability, as it is now understood, relates to normative ethics on humanitarian action, specifically regarding Dunantist traditions versus more consequentialist trends. The next section elaborates on issues following the logic of accountability *for what, how and to whom*, once the selected area of humanitarian protection activities in armed conflict settings is defined. Thereafter, the article expands on the consequences that stem from the application of accountability concepts and argues that accountability can and must still be achieved, only differently.

In conclusion, the paper will suggest that treating accountability from the currently dominant consequentialist, often technical, often developmental, one-size-fits-all perspective is a choice that can be made, but not without practical issues, larger consequences and trade-offs. This should be taken into consideration more seriously, particularly by humanitarian actors who wish to associate themselves with Dunantist ethical perspectives. This discussion can serve as an interesting example of how the current thinking around the humanitarian–development–peace nexus may require deeper reflection by humanitarian policy-makers with regard to the implications and consequences of this development of treating humanitarian and development action as one continuum, as well as potential exceptions and necessary alternative approaches for some actors.¹³

Setting the scene: What is humanitarian accountability?

The concept of accountability

Despite the ubiquity of the term “accountability”, a precise meaning or definition applicable to humanitarian action is evasive. Legalistic understandings, such as whether “parties to a transaction or compact have abided by its terms, performed their respective obligations, or delivered agreed-upon outcomes”,¹⁴ do not lend themselves well to non-governmental organizations (NGOs) in general, where the relationships between NGOs and donors or affected populations do not typically take the form of binding contracts with clear targets and the possibility of penalties.¹⁵ Legally speaking, the only accountability that applies may be between employee and employer, or consultants and contracting agencies – for example, for keeping to confidentiality clauses, for agreed-upon deliverables, or for reports

13 While not new at that point, the World Humanitarian Summit in 2016 gave key recent impetus to this movement to “transcend the humanitarian–development divide”. See United Nations General Assembly, *One Humanity: Shared Responsibility. Report of the United Nations Secretary-General for the World Humanitarian Summit*, New York, 2016, available at <http://sgreport.worldhumanitariansummit.org/>, p. 29, para. 110 (all internet references were accessed in January 2019).

14 John E. Tyler, *Transparency in Philanthropy: An Analysis of Accountability, Fallacy, and Volunteerism*, Philanthropy Roundtable’s Principles of Philanthropy, 2013, pp. 66–67.

15 Enrique Peruzzotti, “Civil Society, Representation and Accountability: Restating Current Debates on the Representativeness and Accountability of Civil Associations”, in Lisa Jordan and Peter van Tuijl (eds), *NGO Accountability: Politics, Principles and Innovations*, Earthscan, London and Sterling, VA, 2006, p. 52.

and tools, none of which typically include accountability for the humanitarian endeavour as such. The concept of power, rather than legalities, has been used to define accountability, but questions of where power really lies, particularly if one moves beyond contractual relationships to questions of political instrumentalization of humanitarian aid, make this definition largely impractical. Specifically for humanitarian NGOs, Hugo Slim offers a more convoluted definition of accountability in the humanitarian context: “the process by which an NGO holds itself openly responsible for what it believes, what it does, and what it does not do in a way that shows it involving all concerned parties and actively responding to what it learns”.¹⁶ In this definition, Slim takes accountability a step away from technical aspects and combines it with value-laden concepts of purpose, participation and transparency, and even links it to the concept of a learning organization. Lisa Jordan and Peter van Tuijl conclude that “accountability is a normative and socially constructed concept”, changing over time and open to reinterpretation.¹⁷

Though a clear definition of accountability is not easily attainable, key tenets of the concept can be identified. First, there is the element of being answerable to someone or some entity, generally for actions and maybe their results and consequences, penalties or sanctions. Given the closeness to the term “responsibility”, there is also an element of accountability to oneself contained in the concept. Second, accountability has an overarching objective in the sense of accountability *for something*, which is generally performance of a task or aspects of performance such as effectiveness, leading to these terms also sometimes being used interchangeably with accountability.¹⁸ Third, to show accountability, an element of making accountability apparent or visible must be included.¹⁹ This is also why accountability is often linked to transparency and reporting.²⁰ Finally, there is a question of the overarching purpose of accountability, which is generally the need for a control mechanism, in lieu of legally binding arrangements. These questions of accountability – to whom, for what, why, and how to demonstrate it – will serve as a theoretical framework for further elaboration.

Past influences on accountability in humanitarianism and development

In the 1990s and early 2000s, calls for more accountability and laments about a “lack of accountability” could increasingly be heard, in both development and

16 Hugo Slim, “By What Authority? The Legitimacy and Accountability of Nongovernmental Organisations”, *Journal of Humanitarian Assistance*, March 2002, available at: www.gdrc.org/ngo/accountability/by-what-authority.html.

17 Lisa Jordan and Peter van Tuijl, “Rights and Responsibilities in the Political Landscape of NGO Accountability: Introduction and Overview”, in L. Jordan and P. van Tuijl (eds), above note 15, p. 9.

18 J. E. Tyler, above note 14, Chap. II, section D, para. 1.

19 J. G. Stein, above note 7, p. 125.

20 Steve Charnovitz, “Accountability of Non-Governmental Organisations in Global Governance”, in L. Jordan and P. van Tuijl (eds), above note 15, p. 33.

humanitarianism.²¹ On the humanitarian side, this drive for more accountable and better performance is generally linked to the evaluation of the humanitarian response to the Rwandan crisis in 1994–95.²² Both sectors were also influenced by public sector innovations associated with results-oriented management schemes and ideas around “New Public Management”.²³ Business trends associated with “balanced scorecards” and similar concepts using increasingly available data implied that improved tools for accountability were available.²⁴

Between the two sectors of development and humanitarian action, it was probably the latter that was influenced by the former, with development perspectives being increasingly introduced to working in conflict settings.²⁵ By 2007, accountability could be labelled a “tenet of humanitarian action”, sitting as equally important alongside principles of neutrality, independence and impartiality, and concepts of dignity, sustainability and participation.²⁶ This general acceptance of accountability applies to two distinct meanings of the term: upward accountability to donors, and downward accountability to the affected population. For the humanitarian sector, the Sphere Project,²⁷ commencing in 1997, can be seen as an attempt to enable upward accountability through institutionalizing service delivery standards, while the Humanitarian Accountability Project (2002) was developed to enhance downward accountability.²⁸

The accountability drive of the past decades links to two more trends, both in humanitarian and development settings. First, there is the increased focus on results and consequences, as in results-based management, and on responsibilities for consequences, or the “broader impact” of humanitarian action.²⁹ These concepts link with accountability in the sense of defining what actors should be accountable for: results. The prevailing logic of framing activities in results-based

21 Adam Roberts, “Humanitarian Principles in International Politics in the 1990s”, in Humanitarian Studies Unit (ed.), *Reflections on Humanitarian Action: Principles, Ethics and Contradictions*, Pluto Press, London and Sterling, VA, 2001, p. 41.

22 Michael Barnett, *The International Humanitarian Order*, Routledge, London, 2010, p. 200.

23 “New Public Management” refers to the introduction of management practices from the private to the public sector – for example, linking resource allocation to performance, target setting, and internal competition between service providers. This style of management was introduced into the public sector in the 1970s and 1980s. See Rosalind Eyben, “Uncovering the Politics of Evidence and Results”, in Rosalind Eyben, Irene Guijit, Chris Roche and Cathy Schutt (eds), *The Politics of Evidence and Results in International Development: Playing the Game to Change the Rules?*, Practical Action Publishing, Rugby, 2015, Chap. 2, para. 20.

24 Janet Väkämäki, Martin Schmidt and Joakim Molander, *Review: Results-Based Management in Development Cooperation*, Riksbankens Jubileumsfond, 2011, available at: www.rj.se/globalassets/rapporter/2011/rbm_review_feb_2012.pdf.

25 Eleanor O’Gorman, *Conflict and Development: Development Matters*, Zed Books, London, 2011, pp. 13–19.

26 Thorsten Volberg, *Humanitarian Principles: Discourse on Neutrality and Independence of Humanitarian Aid*, Verlag Dr. Mueller, Saarbrücken, 2007, p. 24.

27 The Sphere Project’s handbook, first published in 2001 with an update in 2010, set a number of minimum standards that originally focused more on assistance provided in disasters, but was expanded to include other activities and other settings in later editions. See: www.sphereproject.org.

28 Agnes Callamard, “NGO Accountability and the Humanitarian Accountability Agenda: Towards a Transformative Agenda”, in L. Jordan and P. van Tuijl (eds), above note 15.

29 R. Eyben, above note 23, pp. 11–13.

management is linear, with a beginning and an end (inputs–outputs), and then asking about the consequences of activities (outcome–impact). It is now also the prevalent approach in protection activities.³⁰ Digitization and “big data” are expected to facilitate the quantitative measurement of such results and impacts.³¹ Second, with regard to questions on how to demonstrate accountability, the use and importance of evaluations has risen. Evaluations allow organizations to offer a critical analysis of achievements to external stakeholders, such as (State) donors or the wider public. For example, the Active Learning Network for Accountability and Performance (ALNAP) has focused on collecting and publicly sharing evaluations.³² Again, the ambition with both reporting and evaluations, as with accountability as such, is to be “evidence-based”.³³

Ethical perspectives on humanitarian accountability

In line with the “rise of the relief-development continuum” that started decades ago,³⁴ organizations increasingly interchange between development, relief and humanitarian work, becoming “multi-mandate organizations”, including in armed conflicts.³⁵ An influential definition of development is “good change”.³⁶ Asking for accountability therefore implies asking for evidence of what “good change” has been achieved. If humanitarian actors consider their activities as developmental, and themselves as “change agents”,³⁷ then accounting for change, over a certain period of time, is justified and necessary.

The *raison d'être* of humanitarian action from this change perspective is seen as the “impact” of an action rather than the “ethical value” of an action.³⁸ “Impact” leans towards linear models of thought, including strategic planning, a quest for effectiveness and efficiency, and the comparison between inputs, outputs, outcome and impacts. In contrast, “value” implies that an action is valuable *per se*, for example as an expression of empathy or sympathy, potentially even regardless of any eventual negative consequences of the action. Eva Wortel

30 Norah Niland, Riccardo Polastro, Antonio Donini and Amra Lee, *Independent Whole of the System Review of Protection in the Context of Humanitarian Action*, Norwegian Refugee Council and Inter-Agency Standing Committee (IASC), 2015, pp. 4–7, available at: https://interagencystandingcommittee.org/sites/default/files/independent_whole_of_system_protection_review_report_may_2015.pdf.

31 Katja Lindskov Jacobsen, *The Politics of Humanitarian Technology: Good Intentions, Unintended Consequences and Insecurity*, Routledge, London and New York, 2015, p. 131.

32 Monika Krause, *The Good Project: Humanitarian Relief NGOs and the Fragmentation of Reason*, University of Chicago Press, Chicago, IL, and London, 2014, p. 109.

33 Dennis Dijkzeul, Dorothea Hilhorst and Peter Walker, “Introduction: Evidence-Based Action in Humanitarian Crisis”, *Disasters*, Vol. 37, No. S1, 2013.

34 Joanne Raisin and Alexander Ramsbotham, “Relief, Development and Humanitarian Intervention”, in Humanitarian Studies Unit (ed.), above note 21, p. 142.

35 See Dorothea Hilhorst and Eline Pereboom, “Multi-Mandate Organisations in Humanitarian Aid”, in Z. Sezgin and D. Dijkzeul (eds), above note 5.

36 Robert Chambers, *Whose Reality Counts? Putting the First Last*, Intermediate Technology, London, 1997.

37 Jonathan Goodhand, “Preparing to Intervene: Working ‘In’ and ‘On’ War”, in Helen Yanacopoulos and Joseph Hanlon (eds), *Civil War, Civil Peace*, James Currey, Oxford, 2006, p. 278.

38 Ethical value here is not used in the same sense as in “value for money”, as used by some donors in recent years, which is about justifying the allocation of money through efficiently reaching impacts.

describes this differentiation as acting out of a “moral sense of the importance of human life” rather than acting due to a categorical imperative or for utilitarian reasons of achieving a greater good.³⁹

A controversial example may be alleviating hunger in situations where violent deaths occur – i.e., the “well-fed dead” that were raised as a key concern in the 1990s.⁴⁰ Simplified, the value-based approach would be to feed hungry people because they are suffering at this point in time, and because the means to do so are available. This does not imply naively disregarding the larger picture of other dangers these hungry people may be facing, but, provided this is feasible given other immediate priorities, alleviating the hunger would be an immediate and unavoidable step to take, largely regardless of its potential effectiveness and efficiency. Impact-based thinking, on the other hand, could be to accept that feeding a population under other deadly threats makes little sense. Instead, prioritizing efforts aimed at the resolution of the larger threats, which may affect more people than those hungry right now, may be the appropriate course of action, even to the extent of potentially ignoring alleviating hunger for this specific group at this same time. This may also include ultimately accepting that – even if the need for food is greatest right here, right now – it is simply a waste to use valuable (food) resources on people who are about to die for other reasons, and the resources have to be better used elsewhere to save the lives of people more likely to survive.

This has parallels to applying normative ethics to humanitarian action, where the terms of consequentialist and non-consequentialist or deontological ethics can be found.⁴¹ These perspectives have also been called “instrumental rationality” versus “value rationality”⁴² and an “ethic of consequences” versus an “ethic of obligation”.⁴³ Some humanitarian actors traditionally align more to one side than the other, resulting in the labels of “Wilsonian” (consequentialist) and “Dunantist” (deontological)⁴⁴ being used, with the International Committee of the Red Cross (ICRC), founded by Henri Dunant, being the key example of the latter.

The current approach to accountability leans in the direction of consequentialist ethics, which are classically more linked to developmental than humanitarian theory but are considered prevalent in today’s humanitarian

39 E. Wortel, above note 12, p. 783.

40 See, for example, the mention of this term in Roberta Cohen and Francis M. Deng, “Exodus Within Borders: The Uprooted Who Never Left Home”, *Foreign Affairs*, Vol. 77, No. 4, 1998.

41 M. Barnett, above note 22, pp. 216–218.

42 C. Calhoun, above note 6, pp. 89, 95, 97.

43 Michael Barnett and Jack Snyder, “The Grand Strategies of Humanitarianism”, in M. Barnett and T. G. Weiss (eds), above note 6, p. 144; J. G. Stein, above note 7, p. 134.

44 For use of the label “Wilsonian”, see Samir Elhawary, “Mirror, Mirror, on the Wall: Stabilizers, Humanitarians and Clashes of Perception”, in Caroline Abu-Said (ed.), *In the Eyes of Others: How People in Crisis Perceive Humanitarian Aid*, MSF and Humanitarian Outcomes, New York, 2012, p. 139. Also see M. Krause, above note 32, pp. 110–111, for use of the two labels, both referring back to Abby Stoddard, “Humanitarian NGOs: Challenges and Trends”, in Joanna Macrae and Adele Hammer (eds), *Humanitarian Action and the “Global War on Terror”: A Review of Trends and Issues*, Humanitarian Policy Group (HPG) Report No. 14, Overseas Development Institute (ODI), London, 2003, pp. 25–36.

world.⁴⁵ This weakens non-consequentialist concepts such as compassion, which may be “worthwhile” but not ultimately satisfactory, as it likely falls short of changing the situation that causes the need for compassion.⁴⁶ Similarly, non-consequentialist actions tend to have limited ambitions to “only” alleviate rather than eradicate suffering. The overarching reasons for accountability are also given from a consequentialist rather than a Dunantist logic: accountability is ultimately needed to justify the humanitarian action itself, assuming that it can demonstrate its achievement in the sense of results (as in positive change).

Currently, accountability demands on all actors, including Dunantist organizations, are based on the mainstream understanding described above. The International Red Cross and Red Crescent Movement, for example, claims to be committed to the mainstream concept of upward and downward accountability: Article 9 of its Code of Conduct specifies that “[w]e hold ourselves accountable to both those we seek to assist and those from whom we accept resources”.⁴⁷ This commitment to accountability may be limited by a requirement for confidentiality, which is particularly needed for carrying out sensitive protection activities, as will be expanded on in the next sections.⁴⁸ In any case, the ICRC is said to be facing pressure from donors to improve its accountability.⁴⁹

Therefore, the key question should be whether Dunantist actors can, and should want to, fulfil accountability demands that align more to the ethical point of view of consequentialism, and what the consequences of this decision might be with regard to adherence to humanitarian principles. The key principles that cause challenges in this regard are those of neutrality and independence. The objective of this paper is not to engage in a discussion on the necessity of adhering to these principles⁵⁰ or the related decisions on ethical positions, nor related realities on the ground such as the increasing militarization and politicization of humanitarian action; the objective is, rather, to show that choosing a Dunantist ethical stand, with its stress on neutrality and independence,⁵¹ entails consequences for the application of the concept of accountability.

45 For thoughts on how professionalization may further consequentialism, see Giles Carbonnier, “Reason, Emotion, Compassion: Can Altruism Survive Professionalization in the Humanitarian Sector?”, *Disasters*, Vol. 39, No. 2, 2014, p.197–199.

46 For a wider discussion on the concept of compassion, see Christopher D. Wraight, *The Ethics of Trade and Aid: Development, Charity or Waste?*, Continuum, 2011, especially p. 155.

47 International Federation of Red Cross and Red Crescent Societies and ICRC, *Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations (NGOs) in Disaster Relief*, Geneva, 1994, available at: www.icrc.org/eng/assets/files/publications/icrc-002-1067.pdf.

48 Claudia McGoldrick, “The Future of Humanitarian Action: An ICRC Perspective”, *International Review of the Red Cross*, Vol. 93, No. 884, 2011, pp. 978, 982.

49 Jock Baker, Ester Dross, Valsa Shah and Riccardo Polastro, *How to Define and Measure Value for Money in the Humanitarian Sector*, Sida Decentralised Evaluation No. 29, 2013, pp. 30, 43, available at: <http://reliefweb.int/report/study-how-define-and-measure-value-money-humanitarian-sector>.

50 For a brief summary of how these principles are being challenged, see Wolf-Dieter Eberwein and Bob Reinalda, “A Brief History of Humanitarian Actors and Principles”, in Z. Sezgin and D. Dijkzeul (eds), above note 5, p. 50.

51 The ICRC generally maintains the relevance of all humanitarian principles, including neutrality. See, recently, Jérémie Labbé and Pascal Daudin, “Applying the Humanitarian Principles: Reflecting on the Experience of the ICRC”, *International Review of the Red Cross*, Vol. 97, No. 897/898, 2016.

Challenges in applying accountability: For what, how, and to whom?

Accounting for humanitarian protection activities in armed conflict settings

It is notoriously challenging to apply the current understanding of accountability to humanitarian protection activities in armed conflict settings, which are generally considered to be “hard to measure”.⁵² Specifically for protection, operationalization of accountability requirements is acknowledged to be “extremely difficult”,⁵³ “a long way off”⁵⁴ or even “largely unachievable”.⁵⁵ The focus here is not to conclude that protection actors need to try harder, collect more data, and be more consistent in finding common frameworks.⁵⁶ Rather, this analysis seeks to unpack why it is difficult to account for protection activities, highlights the potential consequences of trying too hard and provides alternative approaches to accountability.

First, it is necessary to take a step back and examine what is meant by “protection activities in conflict settings” for the purposes of this discussion. These types of protection activities are carried out by humanitarian actors not only during armed conflict but also during “unrest, riots, rebellions, uprisings, and other domestic troubles and tensions falling short of war”.⁵⁷ Such situations are fundamentally different from disaster settings, as the violence that is inherent to them is being used by the participating parties. As a consequence, persons affected by the violence might be in need of protection. This kind of protection – from the actions of others – is thus different from protection from natural elements in a disaster setting, even if in practice conflict and disaster may coincide and mix with issues such as State collapse and fragility, resulting in so-called “complex emergencies”.

The second necessary clarification is what is meant by “humanitarian protection activities” themselves. In the ICRC, the term “protection” has traditionally derived from civilians being protected from the use of force in armed conflict. It takes a dignity-based perspective, being “any action, or set of actions, designed to maintain or restore human dignity” in armed conflict, while

52 Katja Lindskov Jacobsen and Kristin Bergtora Sandvik, “UNHCR and the Pursuit of International Protection: Accountability through Technology?”, *Third World Quarterly*, Vol. 39, No. 8, 2018.

53 Hugo Slim and Andrew Bonwick, *Protection: An ALNAP Guide for Humanitarian Agencies*, ALNAP, ODI and Oxfam, 2005, p. 104.

54 John Borton, “Trends and Challenges in Measuring Effectiveness”, in Sarah Jane Meharg (ed.), *Measuring What Matters in Peace Operations and Crisis Management*, McGill-Queen’s University Press, Montreal and Kingston, 2009, p. 167.

55 J. G. Stein, above note 7, p. 126.

56 Udo Reichhold and Andrea Binder, *Scoping Study: What Works in Protection and How Do We Know?*, Global Public Policy Institute, Berlin, 2013, p. 35, available at: www.gppi.net/publications/humanitarian-action/article/scoping-study-what-works-in-protection-and-how-do-we-know/; Hugo Slim, *Humanitarian Ethics: A Guide to the Morality of Aid in War and Disaster*, Hurst & Company, London, 2015, p. 101.

57 David P. Forsythe, *The Humanitarians: The International Committee of the Red Cross*, Cambridge University Press, Cambridge, 2005, p. 254.

stressing that related responsibilities lie with the parties to the conflict.⁵⁸ The current mainstream definition of protection is only partly aligned with this, as the following widely used definition, quoted by the ICRC, shows: “all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law, i.e. human rights law, international humanitarian law, and refugee law”.⁵⁹ This definition grounds protection activities not only in international humanitarian law (IHL), and thus in situations of armed conflict, but equally in human rights and refugee law, which also apply outside situations of armed conflict. Referring to these bodies of law broadens the application of protection, now framed in relation to “fundamental rights”. With a rights-based rather than dignity-based definition, protection can include references to social, political, cultural, gender and economic rights, linking it to issues such as democracy, justice, peace and civil society building.⁶⁰ Questions have been asked on whether stretching the concept of protection this far to include issues of social and developmental change has led it to “lose its distinctive meaning”.⁶¹ Possibly as a result, on a more operational or technical level, a common understanding of what “protective humanitarian action may mean in practice” is seen as lacking.⁶² There may also be a growing disconnect with efforts to counter the concrete threats that hostilities pose to affected populations. Questions around what protection does or does not encompass, starting with the dignity of individuals but now going as far as obtaining social change, will find an echo in the accountability discussion below.

Issues resulting from Dunantist ethical perspectives: Accountable for what?

The currently dominant understanding is that humanitarian actors should be accountable for achieving a desired change or result, taking into account concepts such as effectiveness, efficiency and timeliness. Depending on what protection by humanitarian actors is considered to encompass, achieving change can pose significant issues from a Dunantist ethical perspective.

To understand what change or results might be desired requires going back to the root meaning of the term “protect” itself, and how this relates to the role of humanitarian actors. Protection aims at protecting people from suffering, in the

58 Cornelio Sommaruga, “Humanity: Our Priority Now and Always. Response to ‘Principles, Politics and Humanitarian Action’”, *Ethics and International Affairs*, Vol. 13, 1999, p. 26. The reference to dignity also appears in the definition of protection that the ICRC has used since 2008: see ICRC, “ICRC Protection Policy: Institutional Policy”, *International Review of the Red Cross*, Vol. 90, No. 871, 2008, p. 752.

59 As quoted in ICRC, *Professional Standards for Protection Work*, 3rd ed., Geneva, 2018, p. 11; IASC, *Inter-Agency Standing Committee Policy on Protection in Humanitarian Action*, New York, 2016, p. 2, available at: <https://tinyurl.com/y3xdozd2>.

60 Elisabeth G. Ferris, *The Politics of Protection: The Limits of Humanitarian Action*, Brookings Institution Press, Washington, DC, 2011, p. 275; Michael Barnett, *Empire of Humanity: A History of Humanitarianism*, Cornell University Press, Ithaca, NY, and London, 2011, p. 195.

61 E. G. Ferris, above note 60, p. xii.

62 N. Niland *et al.*, above note 30, p. 16.

sense of putting an end to violent abuses or preventing them in the first place. This is the *raison d'être* of IHL, and this duty to protect lies with the parties of the conflict. While the mainstream definition of protection does not provide clarity on whose responsibility it is to offer protection, and insofar as this includes the humanitarian actors themselves, a definition used by the ICRC refers to (State) authorities as those responsible⁶³ and includes other (State) actors intervening with peace-building/keeping mandates.⁶⁴

According to this understanding, protection activities of humanitarian actors are in origin about reminding parties about their duties, rather than aspiring to directly protect persons affected by armed conflicts or other situations of violence. Unfortunately, the more literal meaning that protection actors should protect affected populations by stopping violence has predominated in recent years, and can be found in principal protection handbooks, with an admission that this may indeed be beyond the capacity of most protection actors or activities.⁶⁵ It also appears to be the measuring stick applied by some donors, who ask “what activities can be supported that will effectively afford protection to our affected communities”.⁶⁶ This literal understanding of protection by humanitarian actors is problematic. First, it is problematic simply because it is unrealistic: Marc DuBois goes so far as to call into question the idea that humanitarian actors can actually protect people affected by armed conflict because protection actors and their activities are helpless in the face of purposeful violence and will then be targets themselves.⁶⁷ Actually protecting civilians in an armed conflict is generally only within the power of military forces, implying that accountability of humanitarian actors – provided they are distinct from military actors – cannot be about providing protection in this sense. Following this logic, it has been suggested that military and other political (State) actors should be regarded as part of the overall mechanisms addressing humanitarian needs.⁶⁸ Second, the aforementioned understanding is problematic because it implies a level of involvement in military action that is likely to be in drastic contrast with any ambition to maintaining neutrality.

As explained above, protection activities can include action for social, political, cultural, gender and even economic rights, which can also be problematic from a Dunantist ethical perspective. This understanding implies

63 The IASC definition says that protection activities are aimed at obtaining respect for the relevant laws, but stops short of spelling out from whom this respect is to be obtained. The ICRC definition clarifies: “Protection aims to ensure that authorities and other actors respect their obligations and the rights of individuals in order to preserve the safety, physical integrity and dignity of those affected by armed conflict and other situations of violence.” See ICRC, above note 58, p. 752.

64 *Ibid.*, p. 752, footnote 2.

65 H. Slim and A. Bonwick, above note 53, p. 114.

66 U. Reichhold and A. Binder, above note 56, p. 49.

67 Marc DuBois, *Protection: The New Humanitarian Fig-Leaf*, Discussion Paper, Refugee Studies Centre, Oxford, 2009, available at: www.rsc.ox.ac.uk/publications/protection-the-new-humanitarian-fig-leaf.

68 On the humanitarian identity of increasingly present private military companies, see Jutta Joachim and Andrea Schneker, “Humanitarian Action for Sale”, in Z. Sezgin and D. Dijkzeul (eds), above note 5, p. 203. Taking a more critical position on this enlarged understanding of who is a humanitarian actor, see M. Barnett, above note 22, Chap. 9.

focusing on the root causes of a humanitarian problem, rather than on addressing symptoms, on making structural changes and being “agents of change” in order to create “just societies”.⁶⁹ If, however, such social change is contested, the pursuit of related goals will clash with the principle of neutrality, in its understanding of explicitly staying away from “controversies of a political, racial, religious or ideological nature”.⁷⁰ This, in turn, raises questions of who decides what the ideal society actually looks like: the donor, the beneficiary, the humanitarian actor, or a different stakeholder such as the government of the country in which protection activities are implemented? It seems fair to say that most humanitarian activities are not only funded by Western State donors and the Western public, but also pursue social values close to the Western model of society, such as the empowerment of women and children, and the importance of a (nuclear) family unit rather than larger kinship concepts. As long as such social values are not objects of dispute, there may be no problems from a Dunantist ethical perspective. Humanitarian actors not wishing to compromise this humanitarian principle – i.e., the Dunantist actors – might need to steer clear of engaging in accountability for achieving social change, despite or because of stakeholders’ expressed agendas. Stakeholders here include not only donors, who come to mind first in accountability discussions, but also parties to the conflict or groups of persons affected and beneficiaries of protection programmes.⁷¹ In addition, whether humanitarian actors believe in a humanitarian imperative to act versus an understanding of the humanitarian act as voluntary has implications for accountability.⁷² If there is an imperative to act, then the consequences or results of the action are what need to be measured, as the decision whether to act or not is a given. If one regards the humanitarian act as voluntary,⁷³ then the actor becomes accountable for the decision to act itself, at each point in time. As Fiona Terry has discussed in detail, this decision to act can have grave implications, and evaluating it is not a technical matter of using management models based on inputs and outputs, but a question of ethical judgements.⁷⁴ Indeed, she argues that the focus on linear accountability tools carries the danger of obscuring the more important discussion around “right” and “wrong” that needs to take place. From a classical Dunantist point of view, the humanitarian act is precisely not imperative, but voluntary.⁷⁵ Going back to the terms that are used to describe a

69 E. G. Ferris, above note 60, p. 188.

70 Jean Pictet, *The Fundamental Principles of the Red Cross: Commentary*, Henry Dunant Institute, Geneva, 1970, p. 56.

71 Ryan O’Neill explains this in relation to Al-Shabab: see “Rebels without Borders: Armed Groups as Humanitarian Actors”, in Z. Sezgin and D. Dijkzeul (eds), above note 5, pp. 138–139.

72 For an argument that accepts the application of a humanitarian imperative, but also names related dilemmas, see Beat Schweizer, “Humanitäre Dilemmata: Anspruch und Wirklichkeit der humanitären Prinzipien”, in Jürgen Lieber and Dennis Dijkzeul (eds), *Handbuch Humanitäre Hilfe*, Springer Verlag, Heidelberg, 2013, pp. 333–349.

73 H. Slim, above note 56, p. 3.

74 Fiona Terry, *Condemned to Repeat? The Paradox of Humanitarian Action*, Cornell University Press, New York, 2002, pp. 238, 244.

75 For a discussion on how the actions of Henri Dunant cannot be seen as developing out of a categorical imperative (i.e., he did not have to act, but he chose to act voluntarily), see E. Wortel, above note 12, p. 783.

non-consequentialist ethical approach, this shows how terms of duty-, obligation- or value-based rationality have different nuances in their application to humanitarian action.

For humanitarian actors choosing a classic Dunantist ethical approach that is more akin to value-based than obligation-based rationality, being accountable for actually protecting from harm (i.e., through the use of force), for change in the sense of addressing social root causes of suffering and for results following an imperative to act overreaches the purpose of the humanitarian endeavour of alleviating suffering. Indeed, going back to the basics of Dunantist ethics, this overlooks the potential intrinsic value of protection activities independent of any results and consequences, going beyond a need for justification, as a *voluntary* act of compassion.⁷⁶

Practical issues and their implications: How to be accountable?

The generally accepted means of being accountable, and how to show the worthiness of one's undertakings, is aligned with reporting on results, and this is generally presented in a linear logic of input–output–impact. As a starting point, therefore, two basic key requirements need to be met. First, measurable and quantifiable information is ideally needed to serve as hard data for such evidence. Second, a way to link this quantified impact back to the protection activities undertaken is required. This has already been identified as challenging in many fields in the humanitarian and development sectors,⁷⁷ but there are additional issues specific to protection activities in conflict settings that should be considered.

To begin with the issue of measurability, key problems revolve around protection activities being about social behaviour, and thus being a phenomenon that is complex to measure, due to “perceptual and psychosocial dimensions” of protection.⁷⁸ Even if protection activities are simplified to be understood as being about saving lives, deciding on where and on what kind of project to allocate aid requires a cost-benefit analysis with a monetary value assigned to each life,⁷⁹ which is clearly a challenge. Protection work that is, in principle, not quantifiable includes witnessing, being present, conferring dignity and demonstrating solidarity, or simply being compassionate.⁸⁰ Scientific methods of gathering measurable evidence are a challenge to apply in protection activities: scientific methodologies such as randomized control trials could be performed, for example, as a retrospective case-study-based analysis, but they are yet to be successfully applied in conflict situations, for practical and ethical reasons.⁸¹

76 *Ibid.*, p. 781.

77 J. Goodhand, above note 37, p. 260.

78 Francesca Bonino, *Evaluating Protection in Humanitarian Action: Issues and Challenges*, Working Paper, ALNAP and ODI, London, 2014, p. 28, available at: <http://www.alnap.org/resource/19237>.

79 David Miliband and Ravi Gurumurthy, “Improving Humanitarian Aid: How to Make Relief More Efficient and Effective”, *Foreign Affairs*, Vol. 94, No. 4, 2015, p. 126.

80 M. Barnett, above note 22, p. 216.

81 D. Dijkzeul, D. Hilhorst and P. Walker, above note 33, p. S15.

The commonly adopted solution to measurability issues is to refer to indicators. Protection handbooks provide general guidelines on how this can be done, and stress how important a good choice of indicators is.⁸² Realistically, however, finding and practically applying meaningful and comparable sets of standard indicators across contexts and actors is difficult not only due to the diversity of situations, but also because of the frameworks, approaches and activities relevant to protection action. Definitions of protection may be available, but comprehensive methodologies of “common protection problems and related modes of action” that allow for cross-context and cross-time indicators and standards are less so.⁸³ Here, the context of protection activities also matters, as activities in armed conflict situations may be subjected to significantly more, and even constant, situational shifts than one-off disasters, making the possibility of unchanging, standardized indicators even within one context unlikely.

Closely linked to this is the widespread lack of available baselines, benchmarks, best practices and data from other actors, or standards of some sort, which are a prerequisite for using indicators for comparative performance measurements that go further than output measurements. Again, this can be particularly challenging in conflict settings due to situational fluidity and the lack of readily available and updated information.

The other standard resource, and approach to accountability, is interviewing or surveying those who should be benefiting from programmes – i.e., what is often called the affected population. This approach also neatly ties into downward accountability towards the affected population. A practical but not insurmountable issue with using such interviews as a source of comparable data is that persons targeted for protection programmes in armed conflict settings may frequently and repeatedly change locations, and indeed situations, in some way or another, over a certain period of time, or access to them may become a challenge. Outside hostilities and armed conflict, one may typically find more settled groups, such as in a rural village or a particular group of persons in a similar situation in an urban setting – for example, pregnant women frequenting a particular clinic. These fluctuations that are more pronounced in armed conflict settings render monitoring a statistically representative group challenging, particularly over a larger time span.

More importantly, however, to undertake interviews, humanitarian actors require not only solid professional skills but also a certain degree of “objectivity” and “distance” to the situation that they themselves, and the persons they are interviewing, are in.⁸⁴ While objectivity may be a challenge in any setting, conducting interviews for the purpose of accountability rather than action can be a particular challenge in the face of the acute suffering that armed conflict can cause. Indeed, the principle of neutrality for humanitarian actors was also developed to counter the natural tendency to take sides and differentiate one’s

82 H. Slim and A. Bonwick, above note 53, pp. 106–108.

83 U. Reichhold and A. Binder, above note 56, p. 8.

84 Diane Abbott, “Doing ‘Incorrect’ Research: The Importance of the Subjective and the Personal in Researching Poverty ‘Footprints’”, in Alan Thomas and Giles Mohan (eds), *Research Skills for Policy and Development: How to Find Out Fast*, Sage, Los Angeles, CA, 2007, p. 212–213.

empathy between those considered perpetrators and those considered victims.⁸⁵ Furthermore, listening to beneficiary groups and transmitting their interpretation of events can even endanger the perception of neutrality by stakeholders, as beneficiary groups can hardly be neutral in a conflict that affects them.⁸⁶ Finally, still specifically in armed conflict settings, it is a lot to ask from a victim of violence to step back from his or her experience and to reflect on the performance of agencies – noting, moreover, that these agencies often operate at the margins of victims’ actual problems. To make useful comments on the performance of humanitarian actors, a victim would need to retain a realistic grip on the fact that these agencies are unable to address his/her most pressing needs, such as being free from violence and rectifying past grievances.⁸⁷ To sum up, using data from interviews and surveys of the affected population is thus unlikely to easily serve the purpose of collecting measurable data for accountability purposes, despite the fact that the exercise may have usefulness and be necessary from other perspectives.

A second set of practical challenges for demonstrating accountability, after measurability, are issues associated with attribution and causality. Protection issues are correctly recognized as being “intrinsicly linked to external factors” outside the influence of protection actors.⁸⁸ As such, applying a linear model to understanding cause and effect beyond inputs and outputs, already acknowledged to be a challenge in developmental situations,⁸⁹ is even more difficult the more unstable a situation becomes. “Theories of change” have been suggested to address this problem.⁹⁰ This approach may work for those protection actors who are aiming at change and therefore also wish to be accountable for change achieved – i.e., actors following consequentialist ethics. Such tools may also be useful to help Dunantist actors think through the possible implications of an action. However, they are ultimately unsatisfactory as an accountability framework for actions that are in principle not directly aiming at larger (social) change and related root causes, but wish to be accountable for the value of an action at a certain point in time only. Similarly, using theories of change can bring an over-focus on what the humanitarian actors can influence, thus exaggerating attribution and potentially minimizing the ultimate responsibility of the duty-bearer who is using force – i.e., the party to the armed conflict.

85 Raymond Aporthe, “Effective Aid: The Poetics of Some Aid Workers’ Angles on how Humanitarian Aid ‘Works’”, *Third World Quarterly*, Vol. 33, No. 8, 2012, p. 1554.

86 Ed Schenkenberg van Mierop, “Coming Clean on Neutrality and Independence: The Need to Assess the Application of Humanitarian Principles”, *International Review of the Red Cross*, Vol. 97, No. 897/898, 2016, p. 11.

87 F. Bonino, above note 78, p. 24.

88 U. Reichhold and A. Binder, above note 56, pp. 25, 32–35.

89 Ben Ramalingam, *Aid on the Edge of Chaos: Rethinking International Cooperation in a Complex World*, Oxford University Press, Oxford, 2013, pp. 107–111.

90 U. Reichhold and A. Binder, above note 56, p. 46. “Theory of change” refers to “a planning and evaluation method for social change”; it takes a more flexible and less rigid approach than, for example, the logical framework approach to explain how impact will be achieved. For more details, see S. J. Meharg (ed.), above note 54, p. 49.

To give a practical illustration of dilemmas around measurability and attribution, family reunifications are generally the key objective of protection actors in the context of separated and unaccompanied minors in conflict situations. There is, however, no benchmark to evaluate a process indicator of how many reunifications are facilitated, as this is dependent on the situation, the reasons for separation, and also cultural understandings of family/clan dynamics in the context concerned. Scientific control trials of offering service to one group of children but not the other are ethically unacceptable. Concerning prevention, a fall in new registrations of separated minors is far more likely to be causally related to the evolution of a conflict situation rather than the actions of protection practitioners. It is possible that information on separation, for example if related to child recruitment, will be politically sensitive and manipulated by parties to the conflict to suit their own agendas. Humanitarian actors are therefore unlikely to have full access to assess even such basic information as the actual number of separated children.

Finally, outside the context of child recruitment, proving whether the action of reunification was ultimately best for the child is a value-laden issue in itself: “There might simply be no straightforward answer to the question of whether the intervention [i.e., the reunification] enhanced or decreased the [child]’s well-being.”⁹¹ This is because the perspective of what “well-being” is may fundamentally differ between children, some of whom may, for example, prefer to remain in foster care, and other stakeholders, who may assume that true well-being can only be offered by biological parents or within the child’s own cultural and linguistic context. It may also differ over time, meaning that what caused “well-being” in the short term may turn out to be problematic in the longer term, in a situation where “alternative futures” are impossible to include in the analysis. For example, while a child may be perfectly well in a foster home while growing up, they may start struggling with their unconventional childhood situation as an adult, thus putting into question the original decision.

Evidence-based, consequentialist accountability to donors for this type of intervention is probably impossible, and the often-demanded remedy that humanitarian actors should just “try harder”, as quoted at the start of this section, is not promising. Turning to Dunantist ethics is more satisfying in this situation. From a Dunantist position, there is a need to account for the decision to proceed with the reunification at the specific point in time, in this specific context, for this specific child, based on all information that was available at the time when a decision to engage or not had to be taken. The accountability shifts to the protection actor having taken the “appropriate care and attention” when engaging, in view of the expected outcome, rather than being based on the ultimate outcome itself.⁹²

91 U. Reichhold and A. Binder, above note 56, p. 40.

92 For the concept of accountability for “care and attention” but from development action, see C. D. Wraight, above note 46, p. 130.

Practical challenges related to the complexities of beneficiary voices and lack of common indicator frameworks are likely here to stay. Hopes that technological advances will provide ultimate solutions to the issues mentioned above are most likely misplaced, and may result in other, new complexities arising.⁹³

Accountability to whom? Risks that come with fulfilling accountability externally

Another important, but often overlooked, set of issues associated with demonstrating accountability concerns the inherent requirement of the sharing or publishing of information, making it visible to those who are not the humanitarian actors concerned. The problem, specifically in conflict settings, is that the collection, the possession, the sharing, the publication and the interpretation of information relevant to protection activities likely carries a number of risks, as it will be politically sensitive. As such, there are two risks: first, for the persons who supplied the information, and second, for the humanitarian actor who collects and possesses the information.

In an armed conflict setting, people willing to talk to outsiders are taking certain risks. Risks to the affected population will be amplified in a situation of conflict, simply because “the control of knowledge and self-perception”⁹⁴ matters to parties to the conflict, who therefore might not wish certain information to be shared in any outside sphere. Typical examples are information on people supporting parties to the conflict directly or indirectly, which may be unacceptable for the other party, and mentioning or insinuating practices that are unacceptable or unlawful, such as torture, extrajudiciary detention or killings, or the already mentioned example of child recruitment. Such information may ruin the reputation, and thus the support, for a party to the conflict and may have legal consequences in international criminal prosecution, quite apart from potential military value of the information. Moreover, sharing any information can quickly raise suspicions in certain settings, regardless of what is actually said. These risks may not be visible at the time – they may be hidden from the sight of the practitioners (and the person sharing the information), may be too subtle to be noticed, or may only develop at a later point.⁹⁵ Negative consequences may be more acceptable to the person concerned because assistance or other aid is

93 On hopes placed in technological advances to increase accountability, see Kristin Bergtora Sandvik, “Stronger, Faster, Better: Three Logics of Humanitarian Futureproofing”, in V. M. Heins, K. Koddenbrock and C. Unrau (eds), above note 1, p. 131. On complexities in humanitarian technology, see K. L. Jacobsen, above note 31.

94 Judy El-Bushra, “Power, Agency and Identity: Turning Vicious Circles into Virtuous Ones”, in H. Yanacopulos and J. Hanlon (eds), above note 37, p. 210.

95 For considerations on power interactions within groups of beneficiaries spoken to by aid organizations – here as part of a participatory approach, but applicable also to protection activities where similar group interviews are frequently used, and also outside a conflict setting – and mentioning the inherent risks and hence responsibilities of aid actors to manage these, see Linda Mayoux and Hazel Johnson, “Investigation as Empowerment: Using Participatory Methods”, in A. Thomas and G. Mohan (eds), above note 84, especially p. 207.

provided in parallel, but probably less so when the encounter takes place for reasons of collecting evidence for the sake of accountability. Given that the concept of “do no harm” is considered an overarching principle in protection work,⁹⁶ humanitarian actors need to decide how much risk to affected persons is acceptable for the purposes of their accountability.

Next, protection agencies possess information. The treatment and storage of sensitive information needs careful and professional management, primarily in the interests of the affected population.⁹⁷ The protection agency can come under threat for having collected sensitive, protection-related information if a danger of this information being shared is perceived by others. Perception may be as important here as facts.⁹⁸ Retaining a principle of neutrality, if so desired by a protection actor, relies on confidence by all parties that sensitive information will indeed not be shared – including for accountability reasons. “Contextualized information-sharing protocols” – i.e., interagency agreements to share data that oblige, formulize and ensure the sharing between signatories⁹⁹ – have been suggested as a response to the scarcity of humanitarian data in conflicts but are unlikely to be the ultimate solution to this issue, as truly ensuring confidentiality across a number of humanitarian actors can be a challenge.

For the sake of accountability, there must typically be public reporting. Balancing this with the need to treat sensitive information with care, maybe even confidentially, can be challenging.¹⁰⁰ The importance of public reporting to maintain “moral purity”, and hence public support,¹⁰¹ may be another reason for a tendency to avoid being overly transparent, coinciding with a reluctance to share potentially deeply sensitive protection information. The simple fact that protection cases may exist can already constitute sensitive data, in the sense that reacting to a protection need proves that there is a protection need in the first place. Protection activities of humanitarian actors related, for example, to child recruitment, violence against civilians, or practices such as arbitrary detention or disappearances are activities directly related to actions prohibited under IHL. In the face of such issues, the parties to the conflict, as well as the international community, will desire to hide or publicize such atrocities. Stakeholders may profit from knowledge about protection issues reaching the public realm, making use of it to influence public opinion, or to justify sanctions, etc. If this happens through advocacy or *témoignage*, it can be presumed to be intended and serving a purpose, but it can also happen – typically unintentionally – through meeting accountability demands as they are currently understood.

96 ICRC, above note 59, pp. 27–28.

97 *Ibid.*, pp. 103–140.

98 Peter Redfield, “The Impossible Problem of Neutrality”, in Peter Redfield and Erica Bornstein (eds), *Forces of Compassion: Humanitarianism between Ethics and Politics*, SAR Press, Santa Fe, NM, 2010, pp. 66–67.

99 N. Niland *et al.*, above note 30, p. 49.

100 E. Wortel, above note 12, p. 789; M. DuBois, above note 67, pp. 7–9.

101 Kai Koddenbrock, “More than Morals: Making Sense of the Rise of Humanitarian Aid Organisations”, in V. M. Heins, K. Koddenbrock and C. Unrau (eds), above note 1, p. 93.

Thus, activity reports of protection actors – often funded by Western States or the general public of these countries – can become politicized. In certain situations, any public reporting, even if only related to activities rather than to observations or impact of activities, can already threaten the factual and perceived neutrality of the actor concerned, from the perspective of the parties to the conflict or other stakeholders. To conclude, while processes of identifying problems, gathering data, drawing conclusions and learning should and must take place within a humanitarian organization, there are reasons why such analysis should be invisible from the “outside”.¹⁰² Data and analysis of protection problems in armed conflict may indeed need to be kept inside the organization.

In practice, this dilemma between the need for accountability and the need to act responsibly with sensitive information for the sake of affected persons and the humanitarian actors themselves can result in extremely careful choices of words and formulations. To choose an arbitrary but not atypical example, the results can be phrases such as “reports of IHL violations and other abuses were rife”.¹⁰³ This type of phrasing does not actually confirm whether there were violations or not, nor what the humanitarian actor did about it, nor how it did it or with what success, and thus does not answer accountability demands – but it maintains a stance of neutrality.¹⁰⁴

Given the above-mentioned substantive issues around measuring, attributing, collecting, sharing and reporting on protection activities in conflicts, a final additional danger exists: the more difficult it is to collect and present information in a scientifically robust way, the easier it becomes, through ill intent, negligence or error, to misinterpret or even manipulate information. This applies both to statistical data beyond simple activity reports and to beneficiary voices, particularly when such information is provided to an external audience only selectively in an effort to maintain neutrality and independence. This has already been noted in discussions of a danger of the humanitarian actor himself manipulating or misrepresenting information in an attempt to further the actor’s own institutional agenda(s),¹⁰⁵ but it applies far more generally in conflict settings, where many stakeholders, including the parties to a conflict and the affected population themselves, make use of the voices of humanitarian actors – provided in the context of public accountability – for their own overarching agendas.

Accountability and access: More of one, less of the other?

Given the ethical, practical and risk-related issues that can arise when applying the currently dominant consequentialist understanding of accountability to protection

102 And possibly also invisible for academia: T. G. Weiss, for example, does not see internal accountability taking place, in “Humanitarianism’s Contested Culture”, above note 2, p. 27.

103 ICRC, *Annual Report 2013 for Syrian Arab Republic*, Geneva, 2014, available at: www.icrc.org/eng/assets/files/annual-report/current/icrc-annual-report-syria.pdf.

104 For more about the ICRC’s neutrality stance, see Fiona Terry, “The International Committee of the Red Cross in Afghanistan: Reasserting the Neutrality of Humanitarian Action”, *International Review of the Red Cross*, Vol. 93, No. 881, 2011.

105 D. Dijkzeul and D. Hilhorst, above note 1, p. 54.

activities in conflict settings, the question is what the consequences of such adherence – despite the above-mentioned issues – may be, specifically for Dunantist actors.

The problem of conforming to the principles of neutrality and independence has already been mentioned. One solution would be to delegate these principles to “second-order status” altogether,¹⁰⁶ given that they are indeed instrumental principles and have no moral value as such.¹⁰⁷ However, this should not be done lightly. Their primary value lies in the fact that they aim to enable parties to the conflict to trust that allowing humanitarian actors to operate will not negatively impact their chances of winning the conflict.¹⁰⁸ This includes practical considerations related to warfare, such as the impact of assistance provided, as well as broader considerations related to social norms present in humanitarian action, to which parties to the conflict may not agree. Accordingly, trust can be lost not only by humanitarian assistance being misused, but also by humanitarian actors – even inadvertently – being seen to be applying, representing or even furthering potentially contested social norms.¹⁰⁹ Trust can also easily be lost through public “words”, which can include public reporting on accountability: “the activation of ‘voice’ often entails being forced to ‘exit’ the field altogether”.¹¹⁰ To stress, perception is as important here as reality.¹¹¹

The consequence of losing the trust and confidence of parties to the conflict is losing what is generally termed “humanitarian access” or “humanitarian space”.¹¹² Humanitarian access is seen as necessary to allow the distribution of aid and assistance, and to prevent humanitarian workers becoming targets.¹¹³ In fact, the need for access goes far beyond this: access is also needed to understand a situation, and to be there and listen to the needs of the affected population.¹¹⁴ Access is necessary to ensure, as best as possible, that whatever activities are planned make sense from the perspectives of non-discrimination and impartiality – i.e., to have an approximate overview of needs in order to be able to prioritize the greatest and most urgent of them.¹¹⁵ Access may be needed for

106 T. G. Weiss, above note 2, p. 30.

107 E. Wortel, above note 12, p. 781.

108 H. Slim, above note 56, p. 68.

109 Christina Bennett, *Time to Let Go: Remaking Humanitarian Action for the Modern Era*, ODI and HPG, 2016, p. 69, available at: www.odi.org/hpg/remake-aid. For the concrete example of this problematic facing the ICRC in Afghanistan, see F. Terry, above note 104, p. 176.

110 Volker M. Heins and Christine Unrau, “Introduction: Cultures of Humanitarianism, Old and New”, in V. M. Heins, K. Koddenbrock and C. Unrau (eds), above note 1, p. 4.

111 J. Labbé and P. Daudin, above note 51, pp. 24–25.

112 For a description of the term “humanitarian space” and the idea of “humanitarian access” contained within it, see D. Hilhorst and E. Pereboom, above note 35, p. 87.

113 T. G. Weiss, above note 2, p. 18; K. B. Sandvik, above note 93, p. 100.

114 Fiona Terry calls listening to predicaments of beneficiaries a “first step to really respecting their dignity”: see F. Terry, above note 74, p. 242.

115 To expand on this, without direct access, humanitarian actors rely on information from other sources. As good and reliable as these may be, they may be biased in some way or another, and not sufficiently reflective of the needs and situations of different groups (such as tribes, genders or castes) of the affected population. This is not to suggest that such risks cannot be mitigated (for example, by triangulating different sources) or that having direct access is the ultimate panacea to such risks, which still need mitigating. The point here is that direct access in itself is one key mitigating factor to reduce the risk of misconceptions that could lead to discriminatory or non-impartial action.

living and expressing the “humane” and “altruistic impulse” that is part of what defines humanitarian staff.¹¹⁶ Access is important to ensure accountability to affected persons, to listen to their voices and to prevent instrumentalization by stakeholders, some of whom will falsely claim needs or atrocities to serve their own – legitimate or illegitimate – agendas.¹¹⁷ Without full access, aid and assistance distributions are in danger of not serving humanitarian purposes. If access is sought despite a loss of trust, consequences for the security of humanitarian staff may occur, which is an increasing concern.¹¹⁸

Whether or not to engage in acute conflict settings is a choice for many humanitarian actors, particularly the multi-mandate actors.¹¹⁹ This choice may be to either engage fully in such conflict settings, with the consequences that this implies for adhering to principles and not fulfilling customary accountability demands, or to focus on working outside these settings with a “wider” (focused on improving people’s lives) scope, which does not pose the same accountability-related issues.¹²⁰ In this case, humanitarian principles such as neutrality can, indeed, be delegated to second-order importance, but accountability for how humanitarian actors “will engage the state, the democratic process, local political actors and agendas for transformative social justice” should increase.¹²¹

It has been argued that any impartial actor has the right to engage in protection activities in crisis and conflict, over and above the ICRC as the classic actor.¹²² While this is correct, the sticking points are precisely the humanitarian principles of neutrality and independence, and how these can be reconciled with reporting demands usually linked to accountability.¹²³ Theoretically, humanitarian actors might choose to engage in activities inside *and* outside conflict settings, as well as some activities being more developmental, thus following a consequentialist ethic, and others more Dunantist, as is the case for many multi-mandate actors.¹²⁴ In practice, however, given that acting in conflict settings requires access granted by parties to the conflict, undertaking humanitarian action in both the wider and the more restrictive sense,¹²⁵ at the same time, could endanger the perception of

116 For the importance of altruism and humanity as well as professionalism in staff, see G. Carbonnier, above note 45, pp. 199–200; for a call for “appropriate care and attention” by development actors, as a key criteria for evaluation of their efforts, see C. D. Wraight, above note 46, p. 130.

117 For examples, see V. M. Heins and C. Unrau, above note 110, p. 4.

118 For claims of assaults, kidnappings and killings of humanitarian personnel increasing, see *ibid.*, p. 6.

119 For a discussion of the expansion of multi-mandate actors and issues that this poses, see D. Hilhorst and E. Pereboom, above note 35, p. 88.

120 See definition by W.-E. Eberwein and B. Reinalda, above note 50, p. 26: “Humanitarian organizations in a wider sense are those active in the domain of social welfare, such as development in general, the environment, peace and human rights.”

121 K. B. Sandvik, above note 93, p. 101.

122 Kate Mackintosh, “Reclaiming Protection as a Humanitarian Goal: Fodder for the Faint-Hearted Aid-Worker”, *International Legal Studies*, Vol. 1, No. 2, 2010, p. 396.

123 U. Reichhold and A. Binder, above note 56, p. 34.

124 On the possibility and necessity of both ethical strands, even within one organization, see D. Dijkzeul and D. Hilhorst, above note 1, pp. 57–59.

125 Wider as in “improving people’s lives” and more restrictive as in “saving lives”: see W.-E. Eberwein and B. Reinalda, above note 50, p. 25.

neutrality that is required to gain and maintain access to all populations affected by conflict.

Alternative ideas: Accountability from a Dunantist ethical position

This cannot sensibly mean that protection activities should escape accountability altogether, even if accountability to donors and the general public, particularly if provided through bilateral or public reporting, imposes specific and fundamental limitations. Accountability *can* and must be performed, for the sake of basic quality control and learning, as well as from the perspective of responsibility for the funds employed by donors and the access granted by parties to the conflict. Accountability is also necessary in view of the judgement calls that Dunantist humanitarian actors make each time principles such as neutrality are called for: these are difficult judgements, and accountability for them is necessary.¹²⁶

To find alternative ways of thinking about accountability, it may be useful to return to the original framework of accountability: to whom, for what, and how. The key first question is accountability to whom. Here, a few alternative entities come to mind. First, there is the organization itself. To enhance accountability between employee and employer, a strong internal discussion culture, with internal evaluations and audits and related learning loops, will be needed. A potential variation of this could be peer group accountability – i.e., accountability fostered between sub-entities within an organization. This could be – retaining the example of protection activities – between persons responsible for protection activities in different countries, or maybe even within a protection team of a country or context.

Second, there is the protection practitioner himself or herself. The present author undertook a series of interviews with twelve protection practitioners working in conflict settings, mainly for Dunantist humanitarian actors, and these interviews showed that the idea of accountability to one's own conscience ranks high in practitioners' awareness, often higher in importance than accountability to the organization one is working for and to donors, and on a par with accountability to affected persons. Practitioners stressed their need to be true to their own conscience, precisely because being accountable to outside entities is in practice restricted by issues of risk, associated with the sharing and publication of protection information, and the dangers of manipulation and misrepresentation of information.¹²⁷ Giving conscience a role makes particular sense for a Dunantist approach, as the compassion that such an approach values is, in essence, a personal virtue, while at the same time calling for emotionally restraining it in view of principles such as neutrality.¹²⁸ Here, an interesting

126 E. Schenkenberg van Mierop, above note 86.

127 Research by author for Open University course (MSc in development management), "Accountability in Humanitarian versus Development Management: Example of Protection Activities in Conflict Settings", April 2015. On file with author.

128 C. D. Wraight, above note 46, pp. 88–91; G. Carbonnier, above note 45, p. 198.

parallel is evident with the “personal accountability” of traditional Islamic aid organizations.¹²⁹

Third, even if risks to neutrality may limit reporting and hinder subsequent judgement by outside entities at the time of action, Dunantist actors do not necessarily escape a time-delayed, historical judgement: the historical judgement of the ICRC’s decision not to go public with its knowledge of the Holocaust during World War II is a well-known example.¹³⁰ The basis for such retroactive judgement could be formal documentation units and organizational archives, available internally and open to the public after an appropriate amount of time has elapsed. Unfortunately, not many humanitarian actors maintain such archives, and the ICRC’s are probably a grand exception.¹³¹

As for accountability for what, the aim of protection interventions from a Dunantist tradition has been described as typically being less ambitious: the change of acute symptoms of a protection issue and precisely not its underlying roots in the sense of wider social change, or in other words, “an effort to bring a measure of humanity, always insufficient, into situations that should not exist”.¹³² Taken from this perspective, the change that humanitarian actors should aspire to, and be accountable for, contains reactionary elements: to react to a situation and to do what is possible to address the immediate consequences of the situation, on “presentist” temporal terms.¹³³ If the aim is to react to a certain situation, then this point-in-time logic, rather than the linear logic currently prevalent, should be employed for the purposes of accountability: was the right action taken at the right time in a specific situation, and were all necessary components in place at this point in time to enable the action to be taken? This can make particular sense in crisis or conflict settings, with their iterative nature, where performance analysis has been aptly described as resembling a series of “framed photographs” as opposed to the feature-length, continuous film that development can be.¹³⁴ Such an understanding is also a departure from regarding actions as “simply good in and of themselves”,¹³⁵ as is sometimes suggested when talking about Dunantist ethics. The difference is that actions should be good—from the perspective of affected populations, so “beneficial to those who suffer”¹³⁶—at the point in time when action is taken.

129 Marie Juul Petersen, “International Muslim NGOs: ‘Added Value’ or an Echo of Western Principles and Donor Wishes?”, in Z. Sezgin and D. Dijkzeul (eds), above note 5, p. 266, quotes a staff member from a Muslim NGO differentiating between “the traditional and the modern” Islamic organization, with the traditional one depending only on “personal accountability. It’s about you as a spiritual person, about whether you are trustworthy or not. It’s not about the system; it’s about the person.”

130 D. P. Forsythe, above note 57, p. 44; E. Wortel, above note 12, p. 793.

131 Also calling for more documentation, see T. G. Weiss, above note 2, p. 30.

132 ICRC delegate Phillippe Gaillard, quoted in David Rieff, *A Bed for the Night: Humanitarianism in Crisis*, Vintage, London, 2002, p. 178.

133 Erica Bornstein and Peter Redfield, “An Introduction to the Anthropology of Humanitarianism”, in E. Bornstein and P. Redfield (eds), above note 98, p. 6.

134 E. O’Gorman, above note 25, p. 62.

135 M. Barnett, above note 22, p. 217.

136 J. Pictet, above note 70, pp. 24–25.

Accountability for a reaction in a point-in-time analysis implies that trying, even if not succeeding, has a certain value.¹³⁷ It means that an actor can only be accountable at an output rather than an impact level, and it avoids the above-mentioned potential clashes with neutrality and independence. It does not mean that the consequences of the action can be disregarded, but the focus shifts toward the point in time of the decision, and what was known at that time, and away from longer-term consequences as they subsequently developed. The duty to know all that could have been known at this time, to prove that one has taken the necessary “care and attention”, becomes of central ethical importance instead.¹³⁸ Despite all care, situations will exist in which humanitarian actions, undertaken with good will, nevertheless increase suffering. The implication that humanitarian actors are not accountable even if their actions increase suffering has been called “painfully paradoxical”.¹³⁹ Indeed, Dunantist practitioners will find that such an understanding of accountability, with adherence to neutrality, is far from a comfortable, easy way out of responsibility, as is sometimes implied,¹⁴⁰ but actually often leads to intense (internal) discussions, anguish and soul-searching.

Practically, these approaches imply reverting to accountability through less evidence-based means, such as reflection and judgement: more art than science.¹⁴¹ To do this, protection actors selecting the path of Dunantist ethics need to invest in strong internal accountability mechanisms to counterbalance the limits of external reporting and evaluations, and in recruiting and training staff to take account of the importance of their maturity, ability for reflective action, and conscientiousness, in order to foster internal accountability. To stress, this is a different facet to the often-demanded, and observed, building of technical expertise and professionalization of recent years,¹⁴² and is more about an ability for ethical reflection and judgement.¹⁴³ Dunantist actors also need to invest in documenting and specifically archiving their actions and reflections, an aspect that the majority of humanitarian actors – with a few notable exceptions – generally neglect at present. Good documentation of actions, as well as ethical considerations behind an action, will also strengthen academic study and evaluations of humanitarian action, whether from sociological, anthropological or historical perspectives, which will allow more rigorous scientific methods than an organization can currently employ in the context of a necessary monitoring of its actions.¹⁴⁴ However, accountability in

137 H. Slim, above note 56, pp. 43, 162.

138 C. D. Wraight, above note 46, p. 130.

139 Xabier Etxeberria, “The Ethical Framework of Humanitarian Action”, in Humanitarian Studies Unit (ed.), above note 21, p. 87.

140 See, for example, T. G. Weiss, above note 2, p. 33; Didier Fassin, “*Noli me Tangere*: The Moral Untouchability of Humanitarianism”, in E. Bornstein and P. Redfield (eds), above note 98, p. 36; Stuart Gordon and Antonio Donini, “Romancing Principles and Human Rights: Are Humanitarian Principles Salvageable?”, *International Review of the Red Cross*, Vol. 97, No. 897/989, 2016, p. 15.

141 R. Apthorpe, above note 85, p. 1550.

142 Pierre Gentile, “Humanitarian Organisations Involved in Protection Activities: A Story of Soul-Searching and Professionalization”, *International Review of the Red Cross*, Vol. 93, No. 884, 2011.

143 Stressing the importance of this ethical ability, see H. Slim, above note 56, p. 181.

144 For suggestions of such potential scientific approaches, see D. Dijkzeul, D. Hilhorst and P. Walker, above note 33, pp. S7–S13.

humanitarian action is more than a technical and scientific concept, as this paper has tried to demonstrate in detail.

Conclusion

This paper has elaborated that the current understanding of accountability risks being unsatisfactory, inappropriate and ultimately flawed from a Dunantist ethical perspective. This has been demonstrated specifically with regard to humanitarian protection activities in armed conflict settings. It is unsatisfactory due to many practical issues, such as measurability, attribution and danger of manipulation of data and voices – issues that will be encountered while seeking evidence of results. It can be inappropriate because assessing and accounting for protection activities carries risks for the affected population and for protection actors. Finally, attempts at results-based accountability can ultimately be flawed if protection is considered to be not only about the concrete change that is achieved, but also about the ethical value of the act itself, as a voluntary reaction to a humanitarian situation at a given point in time from the perspective of affected persons.

Fulfilling accountability from a consequentialist perspective means accounting for achieving results, which in turn often implies wider goals than Dunantist actors aim for, such as social change. Such change may be contested, particularly in armed conflict situations, and may therefore put into question the neutrality of an actor, which in turn can limit the access of this actor to the humanitarian space. Therefore, trade-offs need to be discussed within humanitarian organizations, and between them and their donors. For those actors who desire to maintain a Dunantist approach together with adherence to the principles of neutrality and independence, alternative ways of thinking about accountability have been presented. These include accountability for care and attention at the point in time of reaction, evaluated for specific situations through internal audit cultures, through cultivating the conscience and ethical reflections of practitioners, and through committing to historical judgements.

Complexities presented in this paper are specific to humanitarian protection in armed conflict situations. How they apply to other humanitarian activities that are potentially equally difficult to account for, such as prevention activities or advocacy in general, will need further exploration. Some issues, such as attribution and causality, may not be unique to the selected example of protection activities.¹⁴⁵ Other issues, such as the question of whether to account for the result of an action, are only relevant for acts or actors following Dunantist ethics, since this is not in question for actors applying more consequentialist ethics. The identified risks related to the collection and sharing of protection information are relevant only in conflict situations, and not generally elsewhere.

145 B. Ramalingam, above note 89, p. 107.

To quote Jean Pictet, “One must choose.”¹⁴⁶ Using consequentialist ethical approaches for accountability while maintaining Dunantist ethical perspectives towards one’s humanitarian activities is not fully compatible. Doing so may have significant consequences, particularly with regards to trust of others that principles of neutrality are being maintained, and thus access. Accountability is not a technical exercise free of ethical considerations, equally applicable to the full breadth of humanitarian endeavour. The nature and situation of activities matter. Understanding and differentiating each humanitarian actor’s or activity’s ethical position, and designing accountability accordingly, is a necessary starting point.

146 See J. Pictet, above note 70, p. 55: “If, in the general interest of everyone, we wish to have Red Cross institutions continue their work in occupied territories, their agents must, through irreproachable conduct, continue to maintain the full confidence of the authorities. One cannot, at the same time, serve the Red Cross and fight. One must choose.” See also p. 60 on choosing between justice and charity.

Returning foreign fighters: The case of Denmark

Helene Højfeldt Jakobsen*

Helene Højfeldt Jakobsen is a lawyer with the Danish Defence Command.

Abstract

This article considers which legal regimes apply in cases where a Danish citizen and/or resident returns from Syria or Iraq after having taken part in the armed conflict on behalf of the group known as Islamic State, and continues his/her affiliation with the armed group. The article argues that international humanitarian law currently applies to the Danish territory and that a Danish foreign fighter may continue to be considered as taking a direct part in hostilities after having returned from Iraq or Syria. The article then considers the application of Danish criminal law to returned foreign fighters and argues that Danish counterterrorism laws do not apply to members of the armed forces of an armed group that is party to an armed conflict with Denmark.

Keywords: Syria, foreign fighters, non-international armed conflict, geographical and personal scope of international humanitarian law, use of force, counterterrorism.

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Introduction

In March 2016, the Danish foreign minister, Kristian Jensen, informed the US secretary of State, John Kerry, that the Danish Parliament would soon vote to

* This article was written by the author in her capacity as a PhD fellow at Aarhus University and does not necessarily reflect the views of the Danish Defence Command. The author thanks Sean Watts, Claus Krefß, Anna Andersson and Lars Plum for their helpful comments on an earlier draft.

increase its participation in the American-led coalition in Iraq, making one of the highest per-capita contributions to the military campaign in Syria. Jensen said: “What we learned is that Daesh [another name for Islamic State] does not care about borders. They just move the troops around. If we want to push them back, if we want to defeat Daesh, we need to fight them wherever they are.”¹ A number of European States are today involved in armed conflicts in Iraq and Syria, parallel with the participation of their own citizens as members of organized armed groups.² Since the outbreak of the Syrian armed conflict in 2012, many European States have experienced a rise in the number of citizens and residents that travel across borders to take part in an armed conflict³ – so-called “foreign fighters”.⁴ According to the Danish Security and Intelligence Service, since the summer of 2012 at least 150 people have left Denmark to travel to Syria and Iraq, and some still remain in the conflict zone.⁵ A majority of the Danish foreign fighters have joined the armed group known as Islamic State (IS),⁶ while only a small number, including Kurds and Shiites, have gone to the conflict zone in Syria and Iraq to fight militant Islamist groups or other armed opposition groups.⁷

This article considers which legal regimes apply in cases where a Danish citizen and/or resident returns from Syria or Iraq after having taken part in the armed conflict on behalf of IS, and continues his/her affiliation with the armed group. First, a short factual overview of the conflict in Syria and the Danish contribution to the American-led coalition will be provided. This will serve as a basis for further assessment and evaluation of the applicable law. It will then be examined whether international humanitarian law (IHL) applies to Danish territory, considering, in particular, whether IHL is limited to the territory of the State in which the armed conflict originated or if it may also be applied outside

- 1 Carol Morello, “What Tiny Denmark Is Doing to Fight the Islamic State in Syria”, *Washington Post*, 9 March 2016, available at: <https://tinyurl.com/yb9v2xhl> (all internet references were accessed in January 2019).
- 2 Members of the international coalition against Islamic State (IS) include Belgium, Denmark, Estonia, Finland, France, Germany, Italy, Latvia, Lithuania, the Netherlands, Portugal, Romania, Spain, Sweden and the United Kingdom, all of which have reported citizens and/or residents taking part in the armed conflict in Syria and Iraq. The full list of members of the coalition is available at: theglobalcoalition.org/en/partners/. See also Thomas Hegghammer, “The Rise of Muslim Foreign Fighters”, *International Security*, Vol. 35, No. 3, 2010/11.
- 3 It was estimated in 2016 that about 4,000 people had left Europe to join the Syrian uprising against the Assad regime since its beginning in 2012, 30% of which returned to their countries of departure by 2016. See Bibi van Ginkel and Eva Entenmann, *The Foreign Fighters Phenomenon in the European Union: Profiles, Threats & Policies*, ICCT Research Paper, 2016, p. 3, available at: <https://tinyurl.com/ybc8akux>.
- 4 A foreign fighter is understood for the purposes of this article as an individual who travels to a State other than his or her own State of residence or nationality for the purpose of joining an organized armed group taking part in an armed conflict. See also the definition in Sandra Krähenmann, “Foreign Fighters under International Law”, *Geneva Academy of International Humanitarian Law and Human Rights*, Briefing No. 7, October 2014, p. 7.
- 5 Danish Security and Intelligence Service, *Vurdering af terrortruslen mod Danmark*, 12 January 2018, available at: www.pet.dk/Nyheder/2018/VTD%202018.aspx.
- 6 The abbreviation “IS” is used throughout the article when referring to the armed group also known as “the so-called Islamic State”, “ISIS”, “ISIL”, “Daesh”, etc.
- 7 Danish Security and Intelligence Service, above note 5.

its borders, extraterritorially in the territory of an intervening State. Attention then turns to the question of whether and to what extent a foreign fighter can be considered as taking a direct part in hostilities after having returned to the State in which s/he is a citizen and/or resident. The personal scope of application of IHL is seen in light of the geographical disjunction between the location of the foreign fighter and the primary battlefields. The second part of the paper considers the relationship between IHL and the law enforcement regime. This includes an analysis of Danish national laws and their application to persons who take part in an armed conflict.

The fight against IS on the territory of Syria and Iraq

In July 2012, the International Committee of the Red Cross (ICRC) concluded that there was “a non-international (internal) armed conflict occurring in Syria opposing Government Forces and a number of organised armed opposition groups operating in several parts of the country”.⁸ The conflict has now entered its eighth year, and with numerous armed groups and militias still active in the hostilities,⁹ of which many are supported by different alliances of States, the situation is fluid and characterized by a shifting pattern of alliances, cooperation and clashes between the various groups. In September 2014 an American-led coalition launched air strikes inside Syria in an effort to “degrade and ultimately destroy” IS.¹⁰ Iraq explicitly requested assistance in the conflict following the formalities of declaring an armed attack on its territory and invoking Article 51 of the United Nations (UN) Charter.¹¹ The Iraqi government has been supported on its

- 8 See ICRC, “Syria: ICRC and Syrian Arab Red Crescent Maintain Aid Effort amid Increased Fighting”, Operational Update, 17 July 2012. For an overview of the conflict in Syria, see Rule of Law in Armed Conflict Project, “Involvement in Armed Conflicts: Syria”, available at: www.rulac.org/countries/syria.
- 9 For an overview of the current conflict status, see, for example, Christopher M. Blanchard, Carla E. Humud and Mary Beth D. Nikitin, *Armed Conflict in Syria: Overview and U.S. Response*, RL33487, Congressional Research Service, 24 June 2014, available at: <https://fas.org/spp/crs/mideast/RL33487.pdf>.
- 10 White House Office of the Press Secretary, “President Obama: ‘We Will Degrade and Ultimately Destroy ISIL’”, 10 September 2014, available at: <https://obamawhitehouse.archives.gov/blog/2014/09/10/president-obama-we-will-degrade-and-ultimately-destroy-isil>.
- 11 Permanent Representative of Iraq to the UN, letter addressed to the President of the Security Council, UN Doc. S/2014/691, 20 September 2014. The Syrian government has not consented to the coalition’s operations within its territory and has characterized them as a violation of its sovereignty and as unlawful. At the same time, the Syrian government has not actively opposed the coalition air strikes and has refrained from taking action against coalition aircraft in its airspace. See Permanent Representative of the Syrian Arab Republic to the UN, identical letters dated 16 September 2015 addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2015/718, 17 September 2015. The legality of the intervention in Syria has been discussed by other scholars, focusing specifically on Syria’s “passive consent” and whether armed attacks carried out by a non-State actor can trigger a right of self-defence. See, for example, Terry D. Gill, “Classifying the Conflict in Syria”, *International Law Studies*, Vol. 92, 2016. Questions relating to *jus ad bellum* considerations will not be discussed in this article.

territory by several intervening States in the non-international armed conflict against IS.¹²

The current conflict in Iraq between the American-led coalition and IS has “spilled over” into the territory of Syria, from which non-State armed groups are operating. The analysis of this article is limited to the situation of armed conflict between the American-led coalition and IS.

A non-international armed conflict exists when there is “a resort to armed force between States or protracted armed violence” between governmental authorities and organized armed groups, or between armed groups within a State.¹³ The armed confrontation must reach a minimum level of intensity, and the parties involved in the conflict must show a minimum level of organization. Non-international armed conflicts are governed by Article 3 common to the four Geneva Conventions of 1949, the Second Additional Protocol (AP II) of 1977 (ratified by 168 States), and applicable customary law. If a situation of violence reaches the minimum level of intensity, and a group is considered organized, in accordance with the criteria laid out by the International Criminal Tribunal for the former Yugoslavia (ICTY),¹⁴ that group becomes a party to an armed conflict. The terms “terrorist group”,¹⁵ “non-State armed group” and “non-State party to the armed conflict” are not mutually exclusive. The application of IHL does not depend on the armed group’s conformity with the law, but rather on its organization and ability to uphold the law.¹⁶ An armed group may continuously and consistently violate the rules of IHL and still be considered a party to an armed conflict. No rules under IHL preclude non-State armed groups listed as terrorists at an international, regional or domestic level from being considered a party to an armed conflict within the meaning of IHL. Only if considered a party to an armed conflict can the State lawfully use force against the armed group, outside the law enforcement regime.

Before going into discussions of the application of IHL to Denmark, it has to be determined whether Denmark is a party to the armed conflict against IS in Syria and Iraq.

12 See, for example, Permanent Representative of Iraq to the UN, letter addressed to the President of the Security Council, UN Doc. S/2014/691, 20 September 2014. It was confirmed in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), paras 67–69, that a conflict is non-international where a State is fighting non-State armed groups in States other than neighbouring countries (“transnational armed conflict”). The US Supreme Court held that the term “armed conflict not of an international character” “bears its literal meaning and is used ... in contradistinction to a conflict between nations”.

13 International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Tadić*, Case No. ICTY-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70. The tribunal has confirmed and specified these criteria in later cases. See also ICTY, *The Prosecutor v. Limaj*, Case No. IT-03-66, Judgment (Trial Chamber), 30 November 2005.

14 ICTY, *Tadić*, above note 13, para. 70.

15 There are currently no widely accepted legal definitions of “terrorist” or “terrorism” under international law.

16 For a group to qualify as an organized armed group that can be a party to a conflict within the meaning of IHL, it needs to have a level of organization that allows it to carry out sustained acts of warfare and comply with IHL. Indicative elements were given in ICTY, *The Prosecutor v. Haradinaj et al.*, Trial Judgment, 2008, para. 60. See also ICTY, *The Prosecutor v. Boškoski and Tarčulovski*, Trial Judgment, 2008, paras 199–203; ICTY, *Limaj*, above note 13, paras 94–134.

IHL binds the parties to an armed conflict in the conduct of hostilities and the protection of the victims of war. Conduct of hostilities in the course of an armed conflict must inevitably make the responsible State a party to the conflict. However, when a third State intervenes in a pre-existing armed conflict in support of the territorial State, the scale and form of support may vary and may not necessarily include participation in hostilities. Many of the members of the American-led coalition against IS only provide training, counselling and other material and financial support to the Iraqi forces, including the Peshmerga forces in the north; others, such as the UK, Belgium, France and, up until recently, the Netherlands and Denmark, have in addition carried out air strikes against IS on Iraqi and Syrian territory.¹⁷ Various types of States' involvement raise the question of whether coalition members are bound by IHL based on a declaration of participation only, or if *de facto* participation in the hostilities is a prerequisite for the application of IHL.

By invoking Article 19(2) of the Danish Constitution,¹⁸ the Danish Parliament in September 2014 decided to take part in the American-led coalition in Iraq and Syria.¹⁹ Denmark's military contribution to the coalition's fight against IS consists among other things of a capacity-building contribution, including a total number of 180 soldiers.²⁰ The capacity-building force contribution counsels and trains Iraqi forces on Al Asad Airbase.²¹ In addition, Denmark supports the coalition with a radar contribution that provides airspace surveillance in support of the coalition's air operations.²² In August 2016, a force contribution comprising special operations forces was deployed in a training, counselling and support role in Iraq.²³ On 16 January 2018, a broad majority in the Danish Parliament approved the future deployment of a C-130J transport aircraft contribution. In addition, an emergency medical team will be deployed to the medical element already included in the capacity-building contribution.²⁴ Finally, Denmark also provided a combat contribution of F-16 fighter aircraft in 2014–16.²⁵

There is no binding procedure in Danish law for determining when Denmark is engaged in an armed conflict, and IHL includes very few guiding principles for determining when a State becomes party to a non-international

17 The contributions of members of the international coalition against IS are listed by country at: theglobalcoalition.org/en/partners/.

18 Article 19(2) of the Danish Constitution requires the consent of Parliament for the use of armed force "against any foreign State". The paragraph is generally interpreted to mean that the government can repeatedly repel an armed attack but must seek the approval of Parliament for further defensive action. Despite its wording, the article has been invoked in a number of non-international armed conflicts.

19 Danish Parliament, Proposal for a Parliamentary Resolution on Danish Military Contribution in Support of Efforts in Iraq, B 122, 27 August 2014.

20 Danish Ministry of Defence, "The Effort against ISIL", available at: www.fmn.dk/eng/allabout/Pages/the-effort-against-isil.aspx.

21 *Ibid.*

22 *Ibid.*

23 *Ibid.*

24 *Ibid.*

25 *Ibid.*

armed conflict through support of another party to the conflict. Two main approaches can be identified in international law.

First, though only applicable in international armed conflicts, laws on neutrality may indicate when a State's actions in a pre-existing armed conflict reach a form and scale which make that State a party to the armed conflict. Laws on neutrality prescribe protection and obligations on those States that do not take part in the armed conflict. Neutrality is defined by Lauterpacht as “the attitude of impartiality”²⁶ – any assistance to one of the belligerent parties will violate the neutrality of the State.²⁷ However, according to Lauterpacht, “a mere violation does not ipso facto bring neutrality to end”.²⁸ He distinguishes between “hostilities” understood as acts of war and “mere violations of neutrality”, and concludes that only conduct of hostilities, either by or against the neutral State, will bring the neutrality to end.²⁹ Michael Bothe concludes in Dieter Fleck's *Handbook of International Law* that “only where a hitherto neutral state participates to a significant extent in hostilities is there a change of status”.³⁰

Tristan Ferraro argues for a support-based approach, where the status of multinational forces as participants in a pre-existing non-international armed conflict depends on the nature of their involvement: “support that would have a direct impact on the opposing party's ability to conduct hostilities” assumes participation, while “more indirect forms of support which would allow the beneficiary only to build up its military capabilities” do not.³¹

26 Hersch Lauterpacht (ed.), *International Law: A Treatise*, Vol. 2: *Disputes, War and Neutrality*, Longmans, Green and Co, London, 1952, para. 293. Laws on neutrality are found in customary law as well as Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907, and Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, 18 October 1907.

27 This includes, according to Bothe, the engagement of military forces, massive financial support, the supply of any war material and the supply of military advisers to the armed forces of a party to the conflict. See Michael Bothe, “The Law of Neutrality”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, 2013.

28 H. Lauterpacht, above note 26, para. 312.

29 *Ibid.*, para. 312.

30 M. Bothe, above note 27, p. 558.

31 Tristan Ferraro, “The Applicability and Application of International Humanitarian Law to Multinational Forces”, *International Review of the Red Cross*, Vol. 95, No. 891/892, 2013. In a more recent article, Ferraro looks at the legal position of the ICRC, which, according to Ferraro, also advocates a “support-based approach”. Accordingly, the ICRC considers that military or logistical support provided by third parties to one of the parties to a pre-existing non-international armed conflict can influence the application of IHL if it is considered as contributing to the collective conduct of hostilities or, in other words, can be “regarded as an integral part of the pre-existing conflict”. Tristan Ferraro, “The ICRC's Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to This Type of Conflict”, *International Review of the Red Cross*, Vol. 97, No. 900, 2015. Also see David Tuck and Cordula Droege, “Fighting Together and International Humanitarian Law: Setting the Legal Framework (1/2)”, October 2017, available at: <https://blogs.icrc.org/law-and-policy/2017/10/12/fighting-together-international-humanitarian-law-setting-legal-framework-1-2/>; David Tuck and Cordula Droege, “Fighting Together and International Humanitarian Law: Ensuring Respect for the Law and Assessing Responsibility for Violations (2/2)”, October 2017, available at: <https://blogs.icrc.org/law-and-policy/2017/10/17/fighting-together-international-humanitarian-law-ensuring-respect-law-assessing-responsibility-violations-2-2/>; David Tuck and Cordula Droege, “Fighting Together: Obligations and Opportunities in Partnered Warfare”, March 2017, available at: <https://medium.com/law-and-policy/fighting-together-obligations-and-opportunities-in-partnered-warfare-362c9dfb741a>.

According to Ferraro's approach, it seems that training of the Iraqi armed forces and other general support at the coalition's headquarters would not make a State a party to an armed conflict, while the deployment of F-16 fighter jets, the deployment of the Danish Special Forces and operating the mobile radar at Al Asad Airbase would. Based on the Danish contribution to the coalition and for the purposes of further analysis, it is assumed that Denmark currently continues to be a party to the armed conflict against IS.

Does IHL apply to Danish territory?

Concluding that Denmark currently continues to be a party to the armed conflict with IS in Iraq and Syria, it must further be considered whether IHL applies to Danish territory.

The geographical scope of armed conflicts has not been clearly regulated in the Geneva Conventions and must be determined on the basis of an analysis of each provision. As regards *international* armed conflicts, it is generally accepted that IHL applies in the whole territory of those States that are party to the armed conflict.³²

When it comes to *non-international* armed conflicts, the applicability of common Article 3 is not contested and has been raised in a number of cases by the international tribunals.³³ Though there are some textual inconsistencies between the formulations of the court rulings, they all apply a broad interpretation of the geographical scope of application of IHL to the territory of parties to the conflict. IHL applies independently of the concept of hostilities and

32 See, for example, Yoram Dinstein, *War, Aggression and Self-Defense*, Cambridge University Press, Cambridge, 2011, p 19; Jan K. Kleffner, "Scope of Application of International Humanitarian Law", in D. Fleck (ed), above note 27.

33 When common Article 3 is applicable, other rules of IHL of non-international armed conflict, including rules of conduct of hostilities, apply. 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), para. 389, available at: <https://ihl-databases.icrc.org/ihl/full/GCI-commentary>. See ICTY, *Tadić*, above note 13, paras 67, 69, 70; International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Trial Chamber), 2 September 1998, paras 635–636; ICTY, *The Prosecutor v. Kunarac, Kovač, and Voković*, Case Nos IT-96-23 and IT-96-23/1-A, Judgment (Appeals Chamber), 12 June 2002, para. 57; Special Court for Sierra Leone, *The Prosecutor v. Brima, Kamara and Kanu*, Case No. SCSL 04-16-T, Judgment (Trial Chamber II), 20 June 2007, para. 245; International Criminal Court (ICC), *The Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-1/06, Judgment (Trial Chamber I), 14 March 2012, para. 533. See also ICTY, *The Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment (Trial Chamber), 3 March 2000, para. 64; ICTY, *The Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgment (Trial Chamber), 16 November 1998, para. 209; ICTY, *The Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Judgment (Appeals Chamber), 24 March 2000, para. 43–44. For a detailed analysis of the cases, see Noam Lubell and Nathan Derejko, "A Global Battlefield? Drones and the Geographical Scope of armed Conflict", *Journal of International Criminal Justice*, Vol. 11, No. 1, 2013.

extends throughout the geographical borders of the territorial State.³⁴ These cases, however, only consider the reach of IHL *within* the territorial State, while contemporary conflicts require us to consider whether IHL is limited to the territory of the State in which the armed conflict originated or if it may also be applied outside its borders, extraterritorially in the territory of an intervening State.³⁵

While AP II applies to conflicts that “take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”³⁶ (author’s emphasis), common Article 3 applies to non-international armed conflicts “occurring in the territory of one of the High Contracting Parties”. Thus, common Article 3 applies to any non-international armed conflict as long as there is a territorial link to one of the High Contracting Parties.³⁷ This reading is supported by the drafting history of the Geneva Conventions and has been

- 34 This expansive view has been supported by a number of legal scholars. See N. Lubell and N. Derejko, above note 33; Michael N. Schmitt, “Charting the Legal Geography of Non-International Armed Conflict”, *International Law Studies*, Vol. 90, No. 1, 2014; David Kretzmer, “Targeted Killings of Suspected Terrorists: Extra-Judicial Execution or Legitimate Means of Defence?” *European Journal of International Law*, Vol. 16, No. 2, 2005; Louise Arimatsu, “Territory, Boundaries and the Law of Armed Conflict”, *Yearbook of International Humanitarian Law*, Vol. 12, 2009; J. K. Kleffner, above note 32; Marco Sassóli, *Transnational Armed Groups and IHL*, Occasional Paper Series, No. 6, Program on Humanitarian Policy and Conflict Research, Harvard University, 2006.
- 35 The geographical scope of IHL may be subject to scrutiny by the ICC in the near future, if the investigation into the conflict in Afghanistan leads to the opening of a case on acts of ill-treatment of detainees allegedly committed since 2002 by the CIA in black sites in Poland, Romania and Lithuania, in connection with the armed conflict in Afghanistan. See: www.icc-cpi.int/afghanistan. For discussion on this, see Elvina Pothelet, “War Crimes in Afghanistan and Beyond: Will the ICC Weigh In on the ‘Global Battlefield’ Debate?”, *EJIL: Talk!*, 9 November 2017, available at: www.ejiltalk.org/war-crimes-in-afghanistan-and-beyond-will-the-icc-weigh-in-on-the-global-battlefield-debate/; Antonio Coco, “Freeing up the Rules on The Treatment of Detainees from the Debate on the Geographical Scope of International Humanitarian Law”, *EJIL: Talk!*, 3 January 2018, available at: www.ejiltalk.org/freeing-up-the-rules-on-the-treatment-of-detainees-from-the-debate-on-the-geographical-scope-of-international-humanitarian-law/. See also Andrew Clapham, Paola Gaeta and Marco Sassóli (eds), *The 1949 Geneva Conventions: A Commentary*, 1st ed., Oxford University Press, Oxford, 2015, p. 77–83; Jelena Pejic, “The Protective Scope of Common Article 3: More than Meets the Eye”, *International Review of the Red Cross*, Vol. 93, No. 881, 2011.
- 36 Protocol Additional (I) 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 1987), Art. 1. See also Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987 (ICRC Commentary on APs), paras 4489–4490: “The Protocol applies to all residents of the country engaged in a conflict ... Persons affected by the conflict within the meaning of this paragraph are covered by the Protocol wherever they are in the territory of the State engaged in conflict.”
- 37 Given the Geneva Conventions’ universal ratification, all non-international armed conflicts today are subject to common Article 3.

adopted by several legal scholars.³⁸ The material field of application of AP II does not leave the same room for interpretation. This is underlined by the additional requirement of an armed group exercising control over part of the State's territory. AP II “develops” and “supplements” common Article 3 “without modifying its existing conditions of application”.³⁹ Interpreting common Article 3 restrictively in accordance with Article 1 of AP II would thus run counter to the object and aim of the Geneva Conventions and common Article 3.⁴⁰

State practice after the Second World War confirms the application of common Article 3 to conflicts which have spilled over into the territory of a neighbouring State.⁴¹ Common Article 3 has, for example, been applied in the conflict between Colombia and the Revolutionary Armed Forces of Colombia on Ecuadorian territory,⁴² and in the Rwandan armed conflict on the territory of the Democratic Republic of the Congo.⁴³

When defining the geographical scope of IHL beyond the immediate sphere of hostilities, the ICTY, in the *Tadić* case, applied a nexus test. Reasoning that since the beneficiaries of common Article 3 are those taking no active part (or no longer taking active part) in hostilities and similarly that AP II applies “to all persons affected by an armed conflict”, the Tribunal argued that the application should be based on a potentially hostile or belligerent relation rather than on the exact

38 Nils Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford, 2008, p. 258: “The legislative novelty of Article 3 GC I to IV was that each contracting State established binding rules not only for its own conduct, but also for that of the involved non-State parties. The authority to do so derives from the contracting State's domestic legislative sovereignty, wherefore a territorial requirement was incorporated in Article 3 GC I to IV. This is not to say, however, that a conflict governed by Article 3 GC I to IV cannot take place on the territory of more than one contracting State. From the perspective of a newly drafted treaty text it appears more appropriate to interpret the phrase in question simply as emphasizing that Article 3 GC I to IV could apply only to conflicts taking place on the territory of States which had already become party to the new Conventions.” See also 2016 Commentary on GC I, above note 33, paras 115–120; A. Clapham, P. Gaeta and M. Sassóli, above note 35; Jelena Pejic, “Extraterritorial Targeting by Means of Armed Drones: Some Legal Implications”, *International Review of the Red Cross*, Vol. 96, No. 893, 2014; M. N. Schmitt, above note 34, pp. 11–12. See, however, 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 (ICRC Commentary on GC IV), p. 36: “Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities – conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country.” See also ICTR, *The Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgment (Trial Chamber), 27 January 2000, paras 247–248, where the Tribunal found that a non-international armed conflict is one in which the “government of a single state [is] in conflict with one or more armed factions within its territory”. Note, however, that the ICTR Statute specifically includes violations committed in any neighbouring states within its jurisdiction, spelled out in Article 1.

39 AP II, Art. 1.

40 ICRC Commentary on GC IV, above note 38, p 50. For further description of the preparative works for GC IV, see A. Clapham, P. Gaeta and M. Sassóli, above note 35, pp. 79–83.

41 See discussed in J. Pejic, above note 35; Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, in Elisabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012; Robin Gleiss, “Armed Violence in Fragile States: Low-Intensity Conflicts, Spillover Conflicts, and Sporadic Law Enforcement Operations by Third Parties”, *International Review of the Red Cross*, Vol. 91, No. 873, 2009.

42 Referred to in A. Clapham, P. Gaeta and M. Sassóli, above note 35, p 82.

43 ICTR, *Akayesu*, above note 33, paras 608–609.

location of the hostilities.⁴⁴ IHL may thus be applied where there is a direct link between the hostilities and the armed conflict. The application of a nexus test has generally been accepted in a traditional non-international armed conflict.⁴⁵

Where the conflict has spread to States other than neighbouring States, the application is more controversial. However, whereas the application of common Article 3 to hostilities taking place in third States not party to the conflict has gained little support in legal writings (with a few exceptions),⁴⁶ the application of common Article 3 to multinational conflicts in the territory of the “intervening States” seems to have received more acceptance among legal scholars.⁴⁷ Contrary to applying IHL in a third, non-belligerent State, the applicability of IHL in an intervening State rests not just on the status of the person as a participant in the conflict, but also on the presumption that IHL is equally applicable in the territory of all States party to the conflict.⁴⁸

Accepting that IHL is applicable in the whole territory of the State in which hostilities take place and arguing that a conflict remains non-international when several States take part in the hostilities extraterritorially in their fight against a non-State armed group, it also has to be accepted that the application of IHL does not depend on a continuous local level of violence and that common Article 3 is equally applicable in the territory of all parties to the conflict. Any other reasoning would enable intervening States to evade the operation of the principle of equality of belligerents under IHL once they have become party to an armed

44 ICTY, *Tadić*, above note 13, para. 69. See also ICTR, *Akayesu*, above note 33, paras 635–636: “[The applicability of the rules is] irrespective of the exact location of the affected person in the territory of the State engaged in the conflict.” This approach is supported by conventional IHL: Geneva Conventions I and III, as well as Article 75 of AP I (rules related to arrest, detention and internment), apply to persons “related to the conflict”. See also 2016 Commentary on GC I, above note 33, paras 110, 124–126.

45 See also 2016 Commentary on GC I, above note 33, para. 460.

46 The question of extraterritorial application of Common Article 3 has given rise to a great deal of debate among legal scholars and practitioners. The debate shall not be repeated here, but it is important to point out that the ICRC has rejected “the notion that a person ‘carries’ a NIAC [non-international armed conflict] with him to the territory of a non-belligerent state” on the basis that “[i]t would have the effect of potentially expanding the application of rules on the conduct of hostilities to multiple states according to a person’s movement around the world as long as he is directly participating in hostilities in relation to a specific NIAC”: ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2011, p. 22, available at: <http://e-brief.icrc.org/wp-content/uploads/2016/08/4-international-humanitarian-law-and-the-challenges-of-contemporary-armed-conflicts.pdf>. See also ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2015 (2015 Challenges Report), available at: www.icrc.org/en/download/file/15061/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf. See also 2016 Commentary on GC I, above note 33, paras 128–132. For a critique of this approach, see, e.g., M. N. Schmitt, above note 34; N. Lubell and N. Derejko, above note 33.

47 See T. Ferraro, “The Applicability and Application of International Humanitarian Law to Multinational Forces”, above note 31, p. 611; David Kretzmer, p. 195; M. N. Schmitt, above note 34, p. 16 on the ISAF operation in Afghanistan. See, however, the 2016 Commentary on GC I, above note 33, para. 473, in which the ICRC concludes that “[a]t the time of writing, there is insufficient identifiable State practice on its applicability in the territory of the home State”.

48 See also cases from the ICTY and the ICTR, in which the Courts find that IHL applies to the whole territory of the State affected by the conflict and cannot be limited to the battlefield: ICTY, *Kunarac et al.*, above note 33, para. 57; ICTR, *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment (Trial Chamber), 15 May 2003, para. 367.

conflict beyond their borders, contrary to the aim of laying down the same rights and obligations for all parties to a conflict.⁴⁹

With the above reasoning, it can be concluded that IHL also applies to Danish territory given that Denmark is a party to an armed conflict against IS.

Can a foreign fighter lose protection from attack after having returned to Denmark?

Assuming that IHL applies to Danish territory, the next question that can be asked is whether and to what extent a returned foreign fighter will lose his/her protection from attack while supporting IS in its fight against Denmark and the international coalition in Iraq and Syria.

Should a foreign fighter choose to return to Denmark while still being affiliated with IS, at least three groups of questions arise regarding direct participation in hostilities. First, when can an act be said to have been carried out on behalf of an armed group party to the conflict? Does it suffice that the armed group takes responsibility for the harm caused by the act, or does a link between the perpetrator and the armed group have to be identified in order to establish a belligerent nexus? Can the person be considered a “member” of the group in some way? What if the person claims links to the armed group, but these are not confirmed by the armed group? Second, does distance from the battlefield weaken the belligerent nexus between the person carrying out the act and the armed group? And third, for how long will a participant in the hostilities lose his/her protection against attack? Does it make any difference whether the person returned to Denmark specifically with the intention or instruction to commit an attack or only decided to do it once he/she returned?

When it comes to the conduct of hostilities, the principle of distinction protects those who do not take direct part in hostilities from being the target of an attack.⁵⁰ The notion of direct participation in hostilities determines when persons who are not members of armed forces of the party to the conflict may be subject to the use of force. In 2009 the ICRC issued its *Interpretive Guidance on the Notion of Direct Participation in Hostilities* (ICRC Interpretive Guidance),⁵¹ according to which each specific act by a civilian must meet three cumulative requirements to constitute direct participation in hostilities:

49 2015 Challenges Report, above note 46, p. 14. See also T. Ferraro, “The Applicability and Application of International Humanitarian Law to Multinational Forces”, above note 31, p. 611.

50 “The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.” 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 1, available at: ihl-databases.icrc.org/customary-ihl/eng/docs/home.

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

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict^[52] or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).⁵³

The majority of experts discussing the drafting of the ICRC Interpretative Guidance agreed that the requirement of a belligerent nexus should be based on the objective purpose of the act, rather than on the desire of the person to carry out the act. An act must have been “specifically designed to support one party to the conflict by directly causing the required threshold of harm to another party”.⁵⁴ Persons with no affiliation or with only a loose affiliation with a party to an armed conflict may thus be considered as taking a direct part in hostilities if the act nevertheless constitutes an integral part of the hostilities that is “specifically designed to support one party to the conflict”.⁵⁵ Should a party to an armed conflict claim responsibility for an attack, however, it will be difficult to determine whether the act was in fact “specifically designed” to support that party if there are no obvious links between the person carrying out the act and the party to the conflict.⁵⁶

Distance from the area of active hostilities may make it more difficult to determine when an act was carried out as an integral part of the hostilities of an armed conflict. However, since IHL applies in the territory of all the parties to an armed conflict, the notion of direct participation in hostilities is not geographically bound to the primary sphere of hostilities. This does not mean that a person directly participating in hostilities can carry the conflict with him/her, but rather that conduct amounting to direct participation in hostilities is regulated by IHL in areas in which the legal regime is applicable, including the territory of an intervening State, as discussed above. The physical placement of the person is no longer of importance to the application of IHL because due to advancements

52 This criterion caused some debate during the discussions on the Interpretive Guidance. See Michael N. Schmitt, “The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis” *Harvard National Security Journal*, Vol. 1, 5 May 2010.

53 ICRC Interpretive Guidance, above note 51, p. 50.

54 *Ibid.*, p. 46.

55 For more information see *ibid.*, p. 44.

56 During the drafting of the Interpretive Guidance, a number of experts opposed the requirement that an organized armed group should belong to a party to the conflict in order to qualify as an armed force and found instead that the belligerent nexus criterion should “be framed in the alternative: an act in support or to the detriment of a party”. This understanding opens up to a broader application of the notion of direct participation in hostilities according to which persons who do not belong to or support one of the parties to the armed conflict could lose protection.

in technology, military operations nowadays can be conducted from, on, or with effects that occur in the entire territory of the parties to the conflict.⁵⁷

A foreign fighter who, for example, travels to Denmark directly from an IS training camp with the intention of carrying out, or instruction to carry out, a specific attack, likely to adversely affect the military operations or military capacity of Denmark or to inflict death, injury or destruction on protected persons or objects, will continue to take a direct part in hostilities. According to the ICRC Interpretive Guidance, “[m]easures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act”.⁵⁸ However, it seems that once there is a longer period of time between the departure from Syria and the manifestation of the attack in Denmark, or this period is prolonged by further planning in Denmark, loss of protection from attack will depend on the State’s understanding of the temporal scope of the notion of direct participation in hostilities.

Deciding when an individual will regain protection has been the cause of much controversy and has not been settled in State practice. The ICRC Interpretive Guidance considers that individuals whose involvement in hostilities is spontaneous, sporadic or temporary will only lose protection “unless and for such time as” they are taking direct part in hostilities.⁵⁹ A number of States have, however, expressed a broader understanding of the temporal scope of the loss of protection from attack.⁶⁰

For members of the armed forces of a party to the armed conflict, in contrast to civilians, there is no issue of temporality. The ICRC Interpretive Guidance considers that fighters who maintain a continuous combat function are not civilians, meaning that “members of organized armed groups belonging to a non-State party to the conflict cease to be civilians for as long as they remain members by virtue of their continuous combat function”.⁶¹ The Danish Military Manual implements the notion of continuous combat function in a similar way to that introduced in the Interpretive Guidance, with the understanding that persons who have lost their protection as continuous participants in the activities

57 Michael Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 2nd ed., Cambridge University Press, Cambridge, 2017, p. 378. See also J. Pejic, above note 38.

58 ICRC Interpretive Guidance, above note 51, p. 65. According to Michael N. Schmitt, an alternative view popular among the group of experts discussing the Interpretive Guidance “looked instead to the chain of causation and argued that the period of participation should extend as far before and after a hostile action as a causal connection existed”: M. N. Schmitt, above note 52. According to this approach, any preparations causal to the act are considered direct participation, including, for example, the acquisition of materials, the construction of specific devices used for the attack, and their emplacement.

59 ICRC Interpretive Guidance, above note 51, p. 75. The same is reflected in Article 51(3) of AP I and customary law. See ICRC Customary Law Study, above note 50, Rule 6.

60 For example, see US Department of Defence, *Law of War Manual*, 2015, section 5.9. According to the Manual, the law of war as applied by the United States gives no “revolving door” protection, and considers that only when a direct participant has permanently ceased that participation will s/he regain protection, “because there would be no military necessity for attacking them”.

61 ICRC Interpretive Guidance, above note 51, p. 71.

of an armed group will only regain protection if they actively demonstrate that they have withdrawn from the armed group.⁶² The manual explains that this can, for example, be done by laying down one's weapons or by expressly renouncing one's membership and dissociating oneself from the armed group.⁶³

Though IHL applies to Danish territory, and while a foreign fighter who does not uphold a continuous combat function after having returned can, in theory, continue to take a direct part in hostilities in Denmark, given the nature of the situation in Syria and Iraq and the geographical disjunction between the location of the foreign fighter and the primary battlefields, it will be difficult to determine when the objective purpose of an attack is to inflict harm in support of a party to an armed conflict.

The relationship between IHL and the law enforcement regime

Concluding that IHL applies to Danish territory and that a returned foreign fighter may be considered as taking a direct part in hostilities on Danish territory, it is necessary to examine how IHL interacts with the law enforcement regime.

International human rights law

In armed conflict the use of force is governed by the conduct of hostilities paradigm, while international human rights law continues to apply at the same time.⁶⁴

The right to life applies without any territorial restrictions: all States⁶⁵ are bound by a negative obligation not to arbitrarily deprive someone of their life.⁶⁶ Denmark has ratified the European Convention of Human Rights (ECHR), and a Danish foreign fighter will be subject to the protections under the Convention while on Danish territory.

The rules governing the use of force in IHL and in human rights law are based on different assumptions. Under IHL, military necessity is presumed where force is used against legitimate targets. Thus, the assessment of necessity depends on the qualification of a person/object as a legitimate target. By applying the

62 Danish Ministry of Defence, *Military Manual*, September 2016, p. 144, available at: <https://tinyurl.com/ydg959x7>. An English translation of the Manual will be published in the beginning of 2019.

63 *Ibid.*, p. 144.

64 See, for example, International Court of Justice (ICJ), *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, p. 226, paras 24–25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para. 106. The applicability of human rights obligations during armed conflict is further confirmed by the presence of provisions for derogation in many human rights instruments, which allows States to derogate in times of war or public emergency.

65 It is debated whether non-State actors are also bound by human rights. See, for example, Andrew Clapham, "Human Rights Obligations of Non-State Actors in Conflict Situations", *International Review of the Red Cross*, Vol. 88, No. 863, 2006.

66 The prohibition of arbitrary deprivation of life is a *jus cogens* principle and customary norm. Human Rights Committee, General Comment on Article 6, 114th Session, 2015; Human Rights Committee, General Comment 6, "Article 6 (Sixteenth Session, 1982)", UN Doc. HRI/GEN/1/Rev.1, 1994, p. 6, para. 1.

principle of proportionality in IHL, however, an attack against a legitimate target is considered unlawful if it “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”.⁶⁷ In contrast, under human rights law the principles of absolute necessity and proportionality also protect members of the armed forces, and the use of force can only be undertaken exceptionally in order to maintain public security. The principle of proportionality in human rights law requires a balance between the risks posed by the individual and the potential harm to that individual, as well as to bystanders. Only if the person poses an imminent threat of death or serious injury, and this threat cannot be prevented through lesser means, will the use of lethal force be lawful.⁶⁸

Contrary to case law of the International Court of Justice⁶⁹ and the Inter-American Commission on Human Rights,⁷⁰ the European Court of Human Rights (ECtHR) has resolved cases on the use of force in armed conflict based exclusively on human rights law.⁷¹ The ECtHR has analyzed the right to life in a number of cases involving conduct of hostilities. In some cases where the victims were alleged terrorists, the Court applied the whole catalogue of human rights safeguards for the right to life, including the necessity to avoid force, to use weapons which will avoid lethal injuries and to give warning.⁷² In cases concerning security operations against Kurdish rebels in Turkey and Chechen rebels in Russia, however, the ECtHR has used language that is much closer to IHL than to human rights law.⁷³

In an analysis of human rights jurisprudence, Cordula Droegge finds that the case law of the ECtHR can be broadly distinguished in two kinds of situations: on the one hand, “situations like *McCann*, *Gül*, *Ogur* or *Kaplan*, in which individual

67 ICRC Customary Law Study, above note 50, Rule 14.

68 See the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 9, adopted by UNGA Res. 45/166, 18 December 1999.

69 ICJ, *Nuclear Weapons*, above note 64; ICJ, *Wall*, above note 64; ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment, 19 December 2005. See also Marco Milanovic, “The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law”, in Jens D. Ohlin (ed.), *Theoretical Boundaries of Armed Conflict and Human Rights*, Cambridge University Press, Cambridge, 2015.

70 E.g. Inter-American Court of Human Rights, *The Prosecutor v. Juan Carlos Abella*, Series C, No. 11.137, Judgment, 18 November 1997, para. 161.

71 A selection of cases has been described in Nils Melzer, *Targeted Killing in International Law*, 1st ed., Oxford University Press, Oxford, 2008; Cordula Droegge, “Elective Affinities? Human Rights and Humanitarian Law”, *International Review of the Red Cross*, Vol. 90, 2008; William Abresch, “A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya”, *European Journal of International Law*, Vol. 16, No. 4, 2005.

72 See European Court of Human Rights (ECtHR), *McCann and Others v. United Kingdom*, Appl. No. 18984/91, 27 September 1995, para. 194; ECtHR, *Gül v. Turkey*, Appl. No. 22676/93, 14 December 2000, para. 84; ECtHR, *Güleç v. Turkey*, Appl. No. 54/1997/838/1044, 27 July 1998, para. 67.

73 For more information, see ECtHR, *Ergi v. Turkey*, Appl. No. 23818/94, 28 July 1998; ECtHR, *Akkum and Others v. Turkey*, Appl. No. 21894/93, 24 March 2005; ECtHR, *Akpınar and Altun v. Turkey*, Appl. No. 56760/00, 27 February 2007; ECtHR, *Mansuroğlu v. Turkey*, Appl. No. 43443/98, 26 February 2008; ECtHR, *Özcan v. Turkey*, Appl. No. 46221/99, 5 December 2005; ECtHR, *Isayeva v. Russia*, Appl. No. 57950/00, 24 February 2005; ECtHR, *Bazorkina v. Russia*, Appl. No. 69481/01, 27 July 2006.

members of armed groups or alleged members of such groups are killed and insufficient precautions are taken to avoid the use of lethal force altogether, including against those persons”; and on the other, “situations like *Ergi*, *Özkan* or *Isayeva, Yusupova and Bazayeva* and *Isayeva*, in which the government forces are engaged in military counterinsurgency operations or fully fledged combat against an armed group”.⁷⁴

Droege concludes that the ECtHR appears to use standards that are inspired by IHL and points out that the Court applies the criterion of whether incidental civilian loss was avoided to the greatest extent possible: “[The Court] does not question the right of government forces to attack opposition forces, or require that lethal force be avoided even in the absence of an immediate threat.”⁷⁵ She finds, however, that the Court

appears to go a little further than traditional humanitarian law, in particular when it requires that the local population be warned of the probable arrival of rebels in their village, or that the fire from the opposition group which could endanger the villagers’ lives be taken into account.⁷⁶

The use of force against armed opposition groups during hostilities has so far not been considered a breach of Article 2 of the ECHR, and collateral damage is seen in light of the military advantage anticipated by the State. The understanding of when a person is taking part in an armed conflict, however, is not necessarily similar to that under IHL. It seems that the ECtHR restricts the notion of direct participation in hostilities to situations in which the person is militarily engaged, excluding any preparatory acts and limiting the time frame for when a person can be said to be taking part in the conflict.⁷⁷

Accordingly, one approach which (it seems) has been embraced by the ECtHR serves to restrict the use of lethal force by applying norms according to the existence of “hostilities”, in which there is a high intensity of violence and lack of control over the area and over the circumstances, and where the person is “militarily engaged”. Applied to the scenario laid out above, a returned foreign fighter could be considered to be directly participating in hostilities, and thus lose protection from attack, if the situation is such that the Danish authorities lack control over an area which is at the same time dominated by a high intensity of violence.

74 C. Droege, above note 71, p. 532. The cases referred to are ECtHR, *McCann*, above note 72; ECtHR, *Gül*, above note 72; ECtHR, *Ogur v. Turkey*, Appl. No. 21594/93, 20 May 1999; ECtHR, *Hamiyet Kaplan v. Turkey*, Appl. No. 36749/97, 13 September 2005; ECtHR, *Ergi*, above note 73; ECtHR, *Özcan*, above note 73; ECtHR, *Isayeva, Yusupova and Bazayeva v. Russia*, Appl. Nos 57947/00, 57948/00, 57949/00, 24 February 2005.

75 C. Droege, above note 71, p. 533.

76 *Ibid.*

77 See, for example, ECtHR, *Kononov v. Latvia*, Appl. No. 36376/04, 17 May 2010; and ECtHR, *Korbely v. Hungary*, Appl. No. 9174/02, 19 September 2008, paras 86–94, in which the Court discussed the notion of direct participation in hostilities and *hors de combat*. See also analysis by W. Abresch, above note 71; Philip Leach, “The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights”, *European Human Rights Law Review*, No. 6, 2008; C. Droege, above note 71.

Danish criminal law

By virtue of participating in a non-international armed conflict, foreign fighters are subject to domestic prosecution. Combatant immunity exists only in the context of international armed conflicts.⁷⁸ In the context of a non-international armed conflict, IHL makes no reference to combatants or prisoners of war, nor does it attach any other formal status to members of armed groups. Governments may choose to prosecute individuals under national law independently of whether or not the accused have complied with IHL.⁷⁹ A wide range of conduct normally committed in times of armed conflict is already criminalized by most domestic legal systems, and States are free to enforce their domestic regulations at times of non-international armed conflict.

Mere participation in hostilities does not violate IHL and would therefore not be subject to prosecution in the international courts, should they have jurisdiction. Participation in an armed conflict may, however, be subject to criminal prosecution under domestic law.

The Danish policy on countering foreign fighters includes a combination of coercive and preventive measures. In addition to initiating a number of de-radicalization programmes, such as the De-radicalization Targeted Intervention launched by the municipality of Aarhus in 2007 and the 2011 Back on Track programme aimed at tackling radicalization in prisons, the Danish Parliament has made changes to existing rules on revoking passports and residency permits. The risk that a person may take part in “activities” outside Denmark which “could involve or enhance an existing risk against the Danish State and society, or against other States and their societies”, allows for the revocation of passports and residency permits.⁸⁰ The new laws also allow the authorities to issue travel bans.⁸¹

Among the punitive measures adopted in light of the foreign fighters phenomenon, the Danish Parliament adopted a new law on treason in 2016, making it illegal for Danish citizens and residents to be affiliated with the armed

78 Combatant immunity implies that combatants remain protected from domestic prosecution for acts which, although in accordance with IHL, may constitute crimes under the national criminal law of the parties to the conflict. See ICRC Interpretive Guidance, above note 51, pp 83–84.

79 See Jean Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, p. 61; ICRC Commentary on APs, above note 36, p. 1359, para. 4489.

80 “Når der er grund til at antage, at den pågældende i udlandet vil deltage i aktiviteter, hvor dette kan indebære eller forøge en fare for statens sikkerhed, andre staters sikkerhed eller en væsentlig trussel mod den offentlige orden”: see Danish Aliens Act No. 1117, 2 October 2017, Art. 21(b), and Danish Law on Passports, Arts 1(2), 2(1)(4), 2(2–3) (Law No. 176 of 24 February 2015 Amending the Act on Passports to Danish Citizens, etc., the Aliens Act and the Code of Criminal Procedure (Strengthened Recruitment Against Armed Conflicts Abroad, etc.)).

81 Danish Law on Passports, Art. 2(b). Applied in two city court cases: City Court of Esbjerg, *The Prosecutor v. Jakobsen*, Case No. 31-2931/2016, 5 December 2016; and City Court of Copenhagen, *The Prosecutor v. Palani*, Case No. SS 2-30641/2015, 4 February 2015.

forces of a party to an armed conflict to which Denmark is also a party.⁸² While the law only applies to persons who are affiliated with the military wing of the party to the conflict, it is not required that the person in question takes part in hostilities, and conduct of hostilities is considered an aggravating circumstance. “Affiliation” does not refer to direct participation in hostilities or participation in other support functions outside the conduct of hostilities.⁸³ Article 101a of the Danish Criminal Code criminalizes mere entry into the armed forces rather than any specific conduct.⁸⁴

The implementation of UN Security Council Resolution 2178 on “Foreign Terrorist Fighters” in Danish law did not result in changes of the Danish Criminal Code, nor has a general ban on participation in armed conflict been adopted, as was, for example, introduced in Norwegian law.⁸⁵ The Danish Ministry of Justice concluded in a parliamentary report of 2016 that travelling with the purpose of committing terrorism, as well as “participation in an armed conflict”, is already covered by the broad scope of the Danish counterterrorism regulation.⁸⁶ In 2017, new laws on training for terrorism, participation in a “terrorist organization” and so-called “no-go zones” have been introduced in the Danish counterterrorism legislation.⁸⁷

Danish counterterrorism legislation is regulated by Articles 114–114(a–e) in the Danish Criminal Code. Articles 114–114(a) regulate terrorism acts, while different support acts are regulated in articles 114(b–e), including the financing of terrorism, recruitment for terrorism, training for terrorism and participation in a terrorist organization.

Danish counterterrorism laws implement, *inter alia*, EU Framework Decision 2002/475/JHA,⁸⁸ the UN International Convention for the Suppression of Terrorist Bombings (Terrorist Bombings Convention),⁸⁹ the UN International

82 Danish Criminal Code, Act No. 977, 9 August 2017, Art. 101(a): “During an armed conflict to which Denmark is a party, anyone who has Danish citizenship or residency in the Danish State and who is affiliated with the enemy armed forces of a party to the armed conflict will be punished by imprisonment for up to ten years. Under particularly aggravating circumstances, the penalty may increase to life imprisonment. Direct participation in the conduct of hostilities is considered aggravating circumstances” (author’s translation).

83 *Ibid.*

84 *Ibid.*

85 Parliamentary Report No. 44L, Prop. 44L (2015–2016), “Endringer i straffeloven mv. (militær virksomhet i væpnet konflikt m.m.)”.

86 Parliamentary Report No. 1556, *Betænkning om Straffelovrådets udtalelse om visse spørgsmål vedrørende deltagelse i og hvervning til væbnede konflikter i udlandet, som den danske stat er part i*, 2015. It is not explained in the report what is meant by “participation in an armed conflict”, but Danish counterterrorism legislation covers training, financing and recruiting for terrorism, public provocation, and incitement, as well as travelling for terrorism, in accordance with European Council Framework Decision 2002/475/JHA, 13 June 2002, amended in Decision 2008/919/JHA.

87 Danish Criminal Code, above note 82, Arts 114(c–e), 114(j) (Law No. 1880 of 28 December 2015 Amending the Criminal Code (Association for Hostile Armed Forces) and Law No. 642 of 8 June 2016 on the Amendment of the Criminal Code and the Repeal of the Law, which Prohibits the Danish Territory from Supporting War Crimes (Armed Conflicts Abroad, etc.)).

88 Framework Decision 2002/475/JHA, above note 86.

89 International Convention for the Suppression of Terrorist Bombings, No. 37517, 15 December 1997.

Convention for the Suppression of the Financing of Terrorism,⁹⁰ and the Council of Europe Convention on the Prevention of Terrorism, all of which include a clause restricting the scope of application in times of armed conflict.⁹¹ The restriction of the scope of application was confirmed in Parliament during the implementation process of EU Framework Decision 2002/475/JHA into Danish law.⁹²

The wording of the scope-of-application restriction, which in essence is repeated in all of the aforementioned conventions, was first introduced in Article 19(2) of the Terrorist Bombings Convention:

The activities of armed forces during an armed conflict, as those terms are understood under IHL, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.

Accordingly, Article 19(2) exempts from the scope of the Convention activities of armed forces during armed conflict, and activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law. Article 19(2) does not define “armed forces” or “armed conflict”, but refers to how they are understood under IHL. Recordings of the negotiations of the article indicate disagreement among the negotiating parties as to its scope, and the final wording was only introduced in the final hours by the representatives of the United States, who were looking to protect the right of peoples to self-determination.⁹³ Until then, the draft Convention had included only an exception of activities carried out by State military forces in the performance of their official duties. Several States advocated to ensure the right to

90 International Convention for the Suppression of the Financing of Terrorism, No. 38349, 9 December 1999. The Convention includes a slightly different wording to Article 19(2) of the Terrorist Bombings Convention.

91 Other conventions that include a similar clause to Article 19(2) of the Terrorist Bombings Convention are the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (Art. 4(2)), the 2010 Convention on the Suppression of Unlawful Acts relating to International Civil Aviation (Art. 6(2)), the consolidated text of the draft comprehensive convention (*Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, UN Doc. A/57/37, A/62/37, A/64/37, A/65/37, A/68/37; *Report of the Coordinator on the Results of the Informal Consultations on a Draft Comprehensive Convention on International Terrorism*, UN Doc. A/59/894; *Report of the Working Group 6th Committee*, UN Doc. A/C.6/60/L.6, A/C.6/65/L.10; *Summary Record of the 28th Meeting*, UN Doc. A/C.6/69/SR.28 7). See also EU Council GA Doc. 6655/16, preamble § 19(a); LIBE Orientation Vote Doc. 11169/16, preamble § 6(b).

92 See discussions at the Danish Parliament, FT 2001/02, 2. saml., A843; FT 2001/02, 2. saml., B.1466.

93 Proposal by the United States on Art. 3 of the Terrorist Bombings Convention, first draft, 30 September 1997. The negotiations are reproduced in Carlos Fernando Diaz-Paniagua, “Negotiating Terrorism: The Negotiation Dynamics of Four UN Counter-Terrorism Treaties, 1997–2005”, PhD diss., City University of New York, 2008.

self-determination,⁹⁴ but only the US proposal left the understanding of “armed forces” to be determined by IHL.

Under IHL the term “armed forces” refers to the armed forces of both State and non-State parties to the armed conflict. This view is shared by a number of legal scholars⁹⁵ and has also been adopted in domestic case law concerning foreign fighters.⁹⁶ The ICRC concluded in its 2016 Commentary on common Article 3 that “in the context of common Article 3, the term ‘armed forces’ refers to the armed forces of both the State and non-State Parties to the conflict”.⁹⁷ Therefore, by allowing the understanding of “armed forces” to comply with existing international law, it was ensured that non-State actors remain within the understanding of armed forces for the purposes of the Terrorist Bombings Convention.

In light of the above, Danish counterterrorism legislation would not apply to activities committed by members of armed forces in an armed conflict. A returned foreign fighter may be considered a member of an armed force of a non-State armed group and can be considered to be participating in hostilities even after having returned to Denmark, as discussed previously. Conduct of hostilities is not regulated by the national counterterrorism legislation, however. This restriction in the scope of application ensures a distinction between those who are taking part in an armed conflict and those whose actions are not connected to the hostilities of an armed conflict.

Deliberate attacks on civilians are always illegal under international law. IHL includes an absolute ban on terrorism in Article 51(2) of Additional Protocol

94 Proposals by Belgium, Syria, Pakistan, Argentina and New Zealand on Arts 1.4, 3, 5, 2bis, 10bis and 12ter, UN Doc. A/C.6/52/WG.1/CRP.11, 23 September 1997; by Belgium, China and Egypt on Art. 12ter, UN Doc. A/C.6/52/WG.1/CRP.28, 25 September 1997; and by Belgium on Art. 3, UN Doc. A/C.6/52/WG.1/CRP.39, 30 September 1997. The proposals are reprinted in UN General Assembly, *Report of the Working Group on Measures to Eliminate International Terrorism*, UN Doc. A/C.6/52/L.3, 3 October 1997, pp. 23–24. The negotiations are reproduced in C. F. Diaz-Paniagua, above note 93.

95 Marco Sassóli, “Joint Series – Direct Participation in Hostilities: What Are the Issues and Where Are the Controversies?” *ICRC Intercross Blog*, 8 September 2014, available at: <http://intercrossblog.icrc.org/blog/direct-participation-in-hostilities-what-are-the-issues-and-where-are-the-controversies/>; Stéphane Ojeda, “Global Counter-Terrorism Must Not Overlook the Rules of War”, *ICRC Humanitarian Law and Policy Blog*, 13 December 2016, available at: <http://blogs.icrc.org/law-and-policy/2016/12/13/global-counter-terrorism-rules-war/>. See also the discussion by the present author in Anna Andersson, Sofie A. E. Hogestøl and Anne Christine Lie (eds), *Fremmedkrigere: Forebygging, straffefølgning og rehabilitering i Skandianavia*, Gyldendal, Copenhagen, 2018, p. 111–117.

96 For example, in Norwegian case law, see Oslo City Court, Case No. 09-200483MED-OTIR/03, 6 December 2010; in Swedish case law, see Gothenburg City Court, Case No. B 9086-15, 14 December 2015; Attunda City Court, Case No. B 4352-15, 15 February 2017; and in Belgian case law, see Antwerp City Court, Case No. FD35.98.47-12, 11 February 2015; Court of First Instance of Brussels, Case No. FD.35.98.212/11, 6 November 2015; *The Turkish state v Fahriye Alptekin and 35 other Kurdish politicians*, Case Nos FD.35.98.634/06, FD.35.98.502/07, FD.35.98.54/09 (Brussels City Court, 3 November 2016), FD.35.97.8-15 (Brussels City Court, 18 July 2016), FD35.98.374-14 (Brussels City Court, 27 January 2016), FD.35.97.15/12 (Court of Appeal of Brussels, 14 April 2016), FD.35.98.374-14 (Court of First Instance of Brussels, 27 January 2016), FD.35.97.15/12 (Court of Appeal of Brussels, 14 April 2016), FD.35.97.8-15 M. R. (Court of First Instance of Brussels, 18 July 2016). The Danish courts have not considered the applicability of Danish counterterrorism legislation in armed conflict directly (however, on indirect application, see, among others, Danish Supreme Court, Case No. U2009.1453H, 2009).

97 2016 Commentary on GC I, above note 33, para. 180.

I and Article 13(2) of AP II. The definition of terrorism under IHL is, however, restricted in accordance with the principle of distinction, prohibiting only deliberate attacks on civilians.⁹⁸ The Statute of the International Criminal Court does not include a crime of terrorism, but deliberate attacks on civilians are criminalized as war crimes. The Danish Criminal Code does not include specific provisions on war crimes, and violations of the Geneva Conventions and customary international law are punishable only in accordance with the regular crimes of the Danish Criminal Code.⁹⁹

Contrary to the acts prohibited under counterterrorism laws, war crimes can only be committed in armed conflict. The difference between the Danish counterterrorism laws and the regular crimes of the Danish Criminal Code lies mainly in their protective scope of application: the counterterrorism laws are in general much broader in their scope of protection, criminalizing conduct which would normally not be covered by rules on attempt and aiding and abetting.

Attempting to commit a crime under Danish law is criminalized primarily according to the intention of the perpetrator. According to section 21 of the Danish Criminal Code, “acts that are aimed to promote or accomplish an offence shall when the offence is not completed be punished as an attempt”.¹⁰⁰ Conspiracy, financing of crimes, preparation of a crime (including travelling to the place where the crime is intended to be committed), offences relating to organizations whose main activities are criminal, etc., are criminalized as attempts under Danish law. Conduct that is not covered by the scope of the regular crimes of the Criminal Code, but is criminalized as terrorism, will presumably not include acts of participation in hostilities and will thus be subject to counterterrorism laws, even if committed during armed conflict. This author submits that conduct which indirectly harms the party to the conflict or creates room for harm at a later stage will not reach the requirement of direct causation under the notion of direct participation in hostilities.¹⁰¹ Examples of such conduct could be collecting information about Danish infrastructure or receiving training in conduct of hostilities, which will constitute direct participation in hostilities only if the information is used in the preparation of a specific attack or the person receiving the training is specifically recruited and trained for the execution of a predetermined hostile act. A Danish IS fighter who returns to Denmark and gets a job with the intention of financially supporting an armed group in Syria or Iraq likewise cannot be considered to be taking a direct part in the hostilities. Such acts could therefore be prosecuted under domestic counterterrorism laws.

98 Geneva Convention IV, Art. 33; AP I, Art. 51(2); AP II, Art. 13(2). See also ICTY, *The Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgment (Trial Chamber), 5 December 2003, para. 56.

99 Law on the International Criminal Court, No. 342, 16 May 2001. Genocide is criminalized in the Law on Genocide, No. 132, 29 April 1955.

100 Danish Criminal Code, above note 82, Art. 21 (author’s translation).

101 However, see ICRC Interpretive Guidance, above note 51, p. 55, according to which the temporal proximity of the inflicted harm does not influence the requirement of direct causation between the act and the harm inflicted.

Further, persons who are not sufficiently affiliated with a party to an armed conflict are not members of an armed force according to IHL and will therefore be subject to Danish counterterrorism laws. Persons, who, on the other hand, are considered members of the armed forces of a party to an armed conflict, and are therefore exempted from the counterterrorism laws, may be prosecuted for treason.

Those whose involvement in the hostilities is spontaneous, sporadic or temporary will lose protection from attack and may at the same time be prosecuted for both treason and terrorism, for otherwise lawful acts of war under IHL, as they cannot be considered members of the armed forces of a party to an armed conflict. An attack reaching the threshold of harm likely to adversely affect the military operations or military capacity of a party to an armed conflict will, in addition, be in breach of regular crimes of the Criminal Code, even if the attack does not constitute a war crime and the person carrying out the attack is a member of the armed forces of a party to an armed conflict.¹⁰²

Thus, though Danish counterterrorism laws do not apply to the conduct of hostilities, when a foreign fighter continues to take a direct part in hostilities or upholds the status of a continuous combat function after having returned to Denmark, domestic criminal laws would apply in most cases of returned foreign fighters acting on behalf of IS against Danish citizens or interests.

Conclusion

This article has attempted to point to some of the questions which arise regarding the application of different legal regimes, should a foreign fighter return to the State in which s/he is a citizen and/or resident and continue to take a direct part in hostilities or retain a continuous combat function. The fact that the State is a party to an armed conflict taking place on the territory of another State, parallel with the participation of its own citizens, dissolves the concept of an actual “battlefield” as it has traditionally been understood and creates new issues concerning a situation which is very scarcely regulated. While there are currently no active hostilities taking place in Denmark, and the appropriate legal framework to apply is the law enforcement regime, membership in the armed forces of a party to an armed conflict and even affiliation with an armed group may influence the legal assessment in the criminal prosecution, subsequent to an attack or other conduct committed with a nexus to the armed conflict in Iraq and Syria.

102 The implications of the present state of the law, caused by the lack of regulation in non-international armed conflicts, have been discussed, among others, by S. Krähenmann, above note 4.

An environment conducive to mistakes? Lessons learnt from the attack on the Médecins Sans Frontières hospital in Kunduz, Afghanistan

Françoise Bouchet-Saulnier and Jonathan Whittall*

Françoise Bouchet-Saulnier is the International Legal Director for Médecins Sans Frontières.

Jonathan Whittall is the Director of the Analysis Department for Médecins Sans Frontières in Brussels.

Abstract

On 3 October 2015, the Médecins Sans Frontières (MSF) Trauma Centre in Kunduz, Afghanistan was bombed during a US–Afghan joint military operation to retake the city. Even before that night, attacks on health-care facilities in war zones were already a worrying trend and a major concern for humanitarian organizations. Such attacks have led both MSF and the International Committee of the Red Cross (ICRC) to launch campaigns¹ addressing the need for greater protection of the medical mission in situations of armed conflict. Nonetheless, the scale and specific context of the attack on the Kunduz Trauma Centre have given rise to various specific investigations² and provoked many more questions that this article will explore. The article will delve into the “many mistakes” scenario that has been presented by the US investigation in order to critically analyze whether these mistakes may originate from either incorrect or biased interpretations or implementation of international humanitarian law.

Keywords: Afghanistan, Kunduz, Médecins Sans Frontières, IHL principles, attacks on health care, international military coalition, counter-terrorism, identification, self-defence, United States.

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The need to strengthen commitments to the protection of the health-care mission is evident in the fact that in 2016 alone, four out of five permanent members of the United Nations (UN) Security Council were involved in military coalitions that conducted air strikes on hospitals in Yemen, Syria and Afghanistan.³

According to the Geneva Conventions, medical personnel and structures, as well as the wounded and sick, are protected and immune from attack and punishment.⁴ It is mandatory to provide medical care to all patients, without any

* The authors thank Joanne Wong for her research assistance and contribution to the legal editing of this article.

1 The ICRC Health Care in Danger campaign was launched in 2011; see: <http://healthcareindanger.org/hcid-project> (all internet references were accessed in December 2018). The MSF Medical Care Under Fire campaign was launched in 2013; see: www.msf.org/en/article/medical-care-under-fire.

2 Following the Kunduz attack, four specific investigations were conducted: two domestic investigations (US and Afghan), a NATO (Resolute Support Combined Assessment Team) investigation and an internal MSF investigation. The results of the US investigation were temporarily made public: US Department of Defense, Army Regulation (AR) 15–6 Investigation, *Concerning a Potential Civilian Casualty Incident in Kunduz*, ordered on 17 October 2015, completed on 11 November 2015 and approved by the appointing authority on 21 November 2015 (AR 15–6 Investigation Report). The Afghan investigation, ordered by Presidential Decree No. 1348, 9 October 2015, was never made public (see Lynne O'Donnell, "Afghan President Orders Investigation into Fall of Kunduz" *AP News*, 10 October 2015, available at: <https://tinyurl.com/yaoo5fsh>); nor was the NATO investigation (see NATO, "Statement on the Kunduz MSF Hospital Investigation", 26 November 2015, available at: <https://rs.nato.int/news-center/press-releases/2015/statement-on-the-kunduz-msf-hospital-investigation.aspx>). The internal MSF investigation was made publicly available; see MSF, *Initial MSF Internal Review: Attack on Kunduz Trauma Centre, Afghanistan*, Geneva, 5 November 2015 (MSF Internal Review), available at: http://kunduz.msf.org/pdf/20151030_kunduz_review_EN.pdf.

3 See Human Rights Watch, "Hospitals, Health Workers Under Attack", 24 May 2017, available at: www.hrw.org/news/2017/05/24/hospitals-health-workers-under-attack; "At Least 11 Dead after Saudi-Led Coalition Bombs Yemen Hospital", *The Guardian*, 15 August 2016, available at: www.theguardian.com/world/2016/aug/15/saudi-led-air-strike-yemen-hospital-kills-at-least-seven; MSF, "MSF President to UN Security Council: 'Stop These Attacks'", 3 May 2016, available at: www.msf.org/en/article/msf-president-un-security-council-stop-these-attacks.

4 Medical personnel: 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), Arts 24–25; 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), Arts 36–37; 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), Arts 15–16; 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 25–26, available at: http://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul. Medical units: GC I, Arts 19–23; 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), Art. 18; 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 8(e), 12–14. Medical transport: GC I, Arts 35–37; GC II, Arts 38–40; GC IV, Arts 21–22; AP I, Arts 8(g), 21–31.

discrimination, to the fullest extent practicable.⁵ However, what the recent attacks on health-care facilities have demonstrated is that implementation of the international humanitarian law (IHL) protective framework has been both directly and indirectly impacted by the approach of the ever-expanding “war on terror” and more specifically by the increased intermingling of IHL and domestic security and anti-terrorist regulations which may not necessarily be in line with international law. It has also been affected by the increasing use of and reliance on aerial warfare by international military coalitions, coupled with the unconventional ground deployment of special forces to supplement, if not substitute, “regular” national armies, notably in Yemen, Syria and Afghanistan.

At a minimum, these mixed regulations create an environment that is conducive to mistakes, as was seen in the case of the bombing of the Médecins Sans Frontières (MSF) Trauma Centre in Afghanistan, which is explored in this paper. They may also result in the criminalization of the delivery of medical care in certain circumstances and allow some doctors and patients to be considered as “criminals” and as a threat to national security under domestic criminal law, in contradiction to IHL provisions forbidding the prosecution of medical personnel.⁶ Such situations are symptomatic of an overarching issue, especially in non-international armed conflicts (NIACs) – namely, the legal uncertainty surrounding the status and protection of non-governmental medical activities in areas controlled by non-State armed actors.

Although attacks on hospitals in Yemen, Syria and Afghanistan have more differences than similarities, there is a common factor in each. The States involved in these air strikes often justify their military actions as part of the fight against those labelled “terrorists”. These conflicts are also characterized by the involvement of international military coalitions comprised of multiple different military and security forces operating in the same territory yet under various command structures and according to different domestic rules incorporating varying interpretations of IHL. The national security imperative of the State is also

5 Respect for and protection of the wounded and sick: GC I and II, Art. 12; GC IV, Art. 3; AP I, Arts 10–11; AP II, Arts 7–8; ICRC Customary Law Study, above note 4, Rule 110.

6 General protection of medical duties – prohibiting, under any circumstances, the punishment of any person for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom: AP I, Art. 16.1; AP II, Art. 10.1. See Caroline Abu Sa’Da, Françoise Duroch and Bertrand Taithe, “Attacks on Medical Missions: Overview of a Polymorphous Reality: The Case of Médecins Sans Frontières”, *International Review of the Red Cross*, Vol. 95, No. 890, 2013, pp 327–329. See also Phoebe Wynn-Pope, Yvette Zegenhagen and Fauve Kurnadi, “Legislating Against Humanitarian Principles: A Case Study on the Humanitarian Implications of Australian Counterterrorism Legislation”, *International Review of the Red Cross*, Vol. 97, Nos 897–898, 2016, p. 246, n. 71, citing US District Court for the Southern District of New York, *United States v. Tarik Ibn Osman Shah, Rafiq Sabir and Mahmud Faruq Brent*, 474 F. Supp. 2d 492, 2007, to show that doctors providing medical support to Al-Qaeda were prosecuted and convicted under US domestic criminal law.

used – in some cases with the backing of the UN Security Council⁷ – to blur the limits of warfare set by IHL through the Geneva Conventions.⁸ Such prioritization of militarized law-and-order operations, often involving security and military actors from various countries, contributes to a blurring of the understanding of and respect for IHL and its relationship with the different legal concepts governing counterterrorism and national security.⁹

Aerial bombardment is not the only way in which the medical mission can come under attack in such an environment. Hospitals risk being part of the battlefield where State law-enforcement is given carte blanche to raid hospitals and “high-value” patients arrested or killed during “search and capture” operations. MSF is not the only medical organization to have experienced the full range of these attacks in Afghanistan or elsewhere.¹⁰ In addition to this, non-State armed actors have also been involved in incidents affecting health-care provision.

After decades of humanitarian practice, these events have raised fundamental questions for medical and humanitarian personnel. Are we running hospitals in war zones based on the same understanding of IHL as the various State armed forces that are waging these wars? What is at stake is the practicability of medical assistance to wounded and sick persons living in areas under the control of non-State armed groups. In other words, how can non-State armed groups maintain protected medical facilities under IHL while simultaneously being criminalized under domestic law?

The questions raised by the Kunduz incident echo far beyond the attack itself as humanitarian workers are increasingly confronted with environments in which States’ view of humanitarian aid (particularly the US view) has arguably shifted from that of contributing to legitimacy in stabilization operations to being seen by counterterrorism forces as an unacceptable benefit to a delegitimized enemy.

- 7 See, e.g., UN Doc. S/RES/1368, 12 September 2001, available at: www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1368%20%282001%29; UN Doc. S/RES/1465, 13 February 2003, available at: www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1465%20%282003%29.
- 8 For a primer on the protection of medical services under IHL, see: www.msf.org/article/primer-protection-medical-services-under-international-humanitarian-law. See also the entries on “Medical Personnel” and “Medical Services” in *The Practical Guide to Humanitarian Law* online, available at: <http://guide-humanitarian-law.org/content/article/3/medical-personnel/> and <http://guide-humanitarian-law.org/content/article/3/medical-services/>.
- 9 See, for example, Ellen Policinski, “Terrorism, Counter-Terrorism and IHL: Primer on a Recurring Conversation”, *Humanitarian Law & Policy*, 2 November 2016, available at: <http://blogs.icrc.org/law-and-policy/2016/11/02/terrorism-counter-terrorism-ihl/>; Laurie Blank, “Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications”, *William Mitchell Law Review*, Vol. 38, No. 5, 2011; Geoffrey S. Corn, “Self Defense Targeting: Conflict Classification or Willful Blindness?”, *International Law Studies*, Vol. 88, No. 1, 2012.
- 10 See UN Assistance Mission in Afghanistan, *Afghanistan: Annual Report 2015: Protection of Civilians in Armed Conflict*, February 2016, available at: <https://unama.unmissions.org/sites/default/files/poc-annual-report-2015-final-14-feb-2016.pdf>. See also “Israelis in Disguise Raid Hebron Hospital, Seizing Suspect”, *BBC News*, 12 November 2015, available at: <http://www.bbc.com/news/world-middle-east-34801195>; “Three Killed as Afghan Forces Raid Swedish-Run Clinic”, *Al Jazeera*, 19 February 2016, available at: www.aljazeera.com/news/2016/02/killed-afghan-forces-raid-swedish-run-clinic-16021904441899.html.

The impartial delivery of medical treatment – including to those wounded who are considered “terrorist” enemies – is at stake. If impartiality is made impossible by counterterrorism regulations, then so too is principled wartime humanitarian action. Being forced to “choose sides” will come with a different set of risks for both patients and medical service providers.

The events of the night of 3 October 2015 and the immediate reaction from coalition and government representatives raise many questions about the future ability of MSF and other medical humanitarian organizations to continue providing impartial and independent medical care to all wounded people, including those belonging to non-State armed opposition groups, in the midst of an intense battle fought by special forces with such high political stakes. Other contexts such as Syria and Iraq demonstrate that this scenario and its related questions are far from pure fiction.¹¹

The case of Kunduz in Afghanistan, where forty-two MSF staff and patients were killed in a US attack on the trauma hospital, offers a useful case study of the challenges of operating a health facility that treats wounded fighters, notably those belonging to non-State armed opposition groups, in the midst of a high-intensity urban battle. It also exemplifies how IHL principles can be distorted through their translation into rules of engagement referred to and applied in practice by military personnel on the battlefield. In the case of Kunduz, the rules of engagement allowed for the requesting of air strikes in situations of self-defence. The application of a “self-defence” framework tends to weaken the fundamental IHL principle of distinction, increasing the difficulty of appropriately responding to threats. In this case, discussions between the ground forces and the aircrew referred continually to “self-defence” despite argument from the aircrew, who identified that there was no sign of direct hostility or fire coming from the targeted building.¹² Finally, the Kunduz incident concretely demonstrates the challenges facing international independent fact-finding and the activation of accountability mechanisms in such circumstances.

Drawing from the extensive amount of information and documentation gathered over more than a year spent managing the investigation and following up on the Kunduz incident, this article raises questions that have resurfaced in other subsequent attacks on health-care facilities directly managed by MSF, notably in Yemen and Syria. The partial release of the US investigation’s report on the Kunduz attack confirms the existence of “grey areas” regarding the

11 See, among others, the Safeguarding Health in Conflict Coalition website, available at: www.safeguardinghealth.org/mission; Amnesty International, *Iraq: At Any Cost: The Civilian Catastrophe in West Mosul, Iraq*, 11 July 2017, available at: www.amnesty.org/en/documents/mde14/6610/2017/en/; Human Rights Watch, *All Feasible Precautions? Civilian Casualties in Anti-ISIS Coalition Airstrikes in Syria*, 24 September 2017, available at: www.hrw.org/report/2017/09/24/all-feasible-precautions/civilian-casualties-anti-isis-coalition-airstrikes-syria; Samuel Oakford, “More than 1,800 Civilians Killed Overall in Defeat of ISIS at Raqqa, Say Monitors”, *Airwars*, 19 October 2017, available at: <https://airwars.org/news-and-investigations/raqqa-capture/>; Amnesty International, *Syria: “I Won’t Forget this Carnage”: Civilians Trapped in the Battle for Raqqa*, 24 August 2017, available at: www.amnesty.org/en/documents/mde24/6945/2017/en/.

12 See AR 15–6 Investigation Report, above note 2, p. 75.

interpretation and implementation of IHL that jeopardize the effective protection of wartime medical care, particularly in situations where different military and security bodies act together in international coalition, as was the case in Kunduz. While the partial release of the findings of the US investigation falls short of the MSF request for an international independent investigation into the attack by the International Humanitarian Fact-Finding Commission (IHFFC), even this minimum has not been achieved by other States implicated in other instances of attacks against MSF health-care facilities. Unless interpretations of IHL are directly and systematically challenged through the independent establishment of the facts and circumstances of attacks or purported mistakes on medical facilities and civilians, IHL risks being turned into abstract theory.

Background

The capture of Kunduz City by the Taliban on 28 September 2015 was the first time that the armed opposition had controlled a provincial capital since its fall from power in 2001. International coalition forces pushed back against the Taliban advance, which resulted in a high-intensity urban battle.¹³ The consequences of this all-out battle were seen both in the medical injuries treated by MSF in the last week of September 2015, and in the attack on an MSF trauma centre on 3 October 2015. Not only was this attack one of the biggest losses of life in MSF's history, but it also had consequences which can be seen in the mounting death toll that continues to rise as a result of the closure of a trauma hospital previously conducting life-saving medical treatment for the entire province.

International forces in Afghanistan are organized into two separate operations under the same commander, albeit operating under different legal interpretations and rules of engagement. Resolute Support is a NATO operation to train, advise and assist Afghan forces, while Freedom's Sentinel is a US counterterrorism operation against Al-Qaeda and its affiliates in Afghanistan.¹⁴ On the ground, and in addition to the "regular" armed forces, it is the special forces, both Afghan and foreign, that are increasingly called on to directly intervene in a growing number of areas under armed opposition control. Confusingly, there are portions of the insurgency considered to be legitimate armed opposition (i.e., armed groups allowed to be partners in negotiations) while other insurgents are considered to be "terrorists" and are therefore politically excluded. A battle waged between an army and an armed opposition accepted by the United States and its allies as legitimately taking part in the hostilities is clearly governed by IHL rules. But in NIACs, such as the one taking

13 See Matthieu Aikins, "Doctors with Enemies: Did Afghan Forces Target the M.S.F. Hospital?", *New York Times*, 17 May 2016, available at: www.nytimes.com/2016/05/22/magazine/doctors-with-enemies-did-afghan-forces-target-the-msf-hospital.html.

14 See "Resolute Support (NATO)", *GlobalSecurity.org*, available at: www.globalsecurity.org/military/ops/resolute-support.htm; John F. Campbell, "Operation Freedom's Sentinel and Our Continued Security Investment in Afghanistan", *US Army*, 1 October 2015, available at: www.army.mil/article/156517.

place in Afghanistan, some States claim that military operations against groups considered “terrorist” or criminal fall into a hybrid legal area that mixes IHL with theories of self-defence and the legal regime applicable to law enforcement in the form of militarized counterterrorism operations.¹⁵

Adherence to the limits on the use of force with regards to the IHL principles of distinction, precaution and proportionality have been weakened by the blurring and overlapping of multiple military and security mandates and a vaguely defined enemy. The law itself has not changed when it comes to regulating the use of force between State and non-State parties to a conflict in a NIAC. What has changed, however, is the rise in criminalization of the non-State party and a trend of political expediency in interpreting and implementing IHL – most notably in contexts of counterterrorism. This has led some States to argue that there is greater room for manoeuvre in the way in which armed conflicts are fought.¹⁶

The attack on the Kunduz Trauma Centre was immediately justified by the Afghan authorities on the allegation that the hospital was a “Taliban base” and that “15 terrorists had been killed”.¹⁷ The US Army first said that it had attacked out of “self-defence”. It later claimed that it was requested to attack by its Afghan counterparts, before subsequently taking full responsibility for the attack, saying that it intended to strike a nearby building and hit the hospital by mistake.¹⁸

- 15 This confusion of legal frameworks can be seen in earlier statements by US officials. See, e.g., “Attorney General Eric Holder speaks at Northwestern University School of Law”, 5 March 2012, available at: www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law; “Remarks of John O. Brennan, ‘Strengthening Our Security by Adhering to Our Values and Laws’”, 16 September 2011, available at: <https://obamawhitehouse.archives.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>; Harold Hongju Koh, “The Obama Administration and International Law”, 25 March 2010, available at: <https://2009-2017.state.gov/s/l/releases/remarks/139119.htm>.
- 16 These claims can be linked to the so-called “erosion” of IHL norms. For more on the debate on the weakening of the norms of law versus the weakening of the application of the law, see Adama Dieng, “We Must Stop the Erosion of International Humanitarian Law”, *Justiceinfo.net*, 15 December 2015, available at: www.justiceinfo.net/en/component/k2/25124-we-must-stop-the-erosion-for-international-humanitarian-law.html; Benjamin Wittes, “Notes on the Erosion of Norms of Armed Conflict”, *Lawfare*, 14 January 2015, available at: www.lawfareblog.com/notes-erosion-norms-armed-conflict. A *contrario*, on lack of respect for the norms, see Marco Sassöli and Yvette Issar, “Challenges to International Humanitarian Law”, in Andreas von Arnould, Nele Matz-Lück and Kerstin Odendahl (eds), *100 Years of Peace Through Law: Past and Future*, Duncker & Humblot, Berlin, 2015; Helen Durham, “Atrocities in Conflict Mean We Need the Geneva Conventions More than Ever”, *The Guardian*, 5 April 2016, available at: www.theguardian.com/global-development/2016/apr/05/atrocities-in-conflict-mean-we-need-the-geneva-conventions-more-than-ever; “We Are Witnessing ... Erosion of the Protection of Civilians”, Opening Remarks by Jonas Gahr Støre to the Second Annual Trygve Lie Symposium, Norwegian Ministry and International Peace Institute, 24 September 2009, available at: www.ipinst.org/2009/09/we-are-witnessing-erosion-of-the-protection-of-civilians.
- 17 See May Jeong, “Death from the Sky: Searching for Ground Truth in the Kunduz Hospital Bombing”, *The Intercept*, 28 April 2016, available at: <https://theintercept.com/2016/04/28/searching-for-ground-truth-in-the-kunduz-hospital-bombing>.
- 18 *Ibid.*

Immediately after the attack, confronted with the contradictory US and Afghan explanations,¹⁹ MSF undertook its own Internal Review of the facts and the reality of the legal frameworks used by the various military forces operating in Afghanistan.²⁰ The intention was twofold: (i) to better learn and adapt medical operations based on the specific risks posed by working in a high-intensity urban battlefield, and (ii) to avoid being victimized again during the second part of the battle concerning the Kunduz attack – the battle for the truth of the faulty legal reasoning behind the bombing. This process is not over. The MSF Internal Review focused on establishing facts from MSF teams on the ground. The review was not intended to be an independent investigation, but rather a compilation of what the organization could determine as fact from its limited perspective as victim of the attack. Most notably, the Internal Review collected all information regarding the functioning of the Kunduz Trauma Centre not only to verify its actual function as a hospital, meaning that its intentional attack would be against IHL rules protecting medical facilities, but also to assess whether parties to the conflict could have had an understanding of those rules different to that of MSF.

Additional information was obtained from a redacted US military investigation,²¹ which has left a number of worrying questions about the way IHL is understood and implemented in contexts of armed conflict that remain haunted by the post-September 11 “with us or against us” counterterrorism military logic.

Negotiating access and the opening of a trauma centre

MSF has been operating in Afghanistan since its return to the country in 2009 through a negotiated agreement reached with all State and non-State parties to the conflict.²² This negotiated access has been based on the fundamentals of IHL, which include the ability to treat all sides to the conflict. MSF negotiated that all wounded would be treated in hospital and that no weapons would be allowed into health facilities. MSF reached agreements that its hospitals and other health facilities would not be targeted under any circumstances. These negotiated elements allowed the major deployment and presence of MSF, with full international teams operating from clearly identified hospitals. In a press release at the time of the opening of the Kunduz Trauma Centre in 2011, MSF stated that “it is the duty of all parties to a conflict to respect the rules of IHL, including those concerning the protection and respect of medical structures, medical personnel and patients”.²³

19 See box, “From Collateral Damage to Tragic Mistake: The United States’ Changing Narrative”, below.

20 MSF Internal Review, above note 2.

21 AR 15–6 Investigation Report, above note 2.

22 See Michiel Hofman and Sophie Delaunay, *Afghanistan: A Return to Humanitarian Action*, MSF USA, 11 March 2010, available at: www.msf.org/sites/msf.org/files/old-cms/fms/article-images/2010-00/return_to_humanitarian_action.pdf.

23 See MSF, “Afghanistan: MSF Opens a Surgical Hospital in Kunduz”, Kabul, 18 October 2011, available at: www.msf.org/afghanistan-msf-opens-surgical-hospital-kunduz.

The Kunduz Trauma Centre, in Kunduz City, was initially a fifty-five-bed privately funded trauma hospital and was the only trauma facility of its kind in northeast Afghanistan. In the run-up to the opening of the hospital, fighting had led to large numbers of people sustaining bomb-blast, shrapnel and gunshot wounds in addition to those in need of specialized surgical care.²⁴

The opening of such a facility was clearly linked to identified needs in northeast Afghanistan. These needs arose in an overall context of chronic systemic failures of the Afghan health-care system to adequately address the needs of a population still largely trapped in conflict, and even more acutely for those living in areas outside government control.²⁵

By 2015, the hospital employed 460 staff and was equipped with an emergency room, operating theatres, an intensive care ward, and X-ray and laboratory facilities.²⁶ From the date of opening, the MSF hospital treated both violent and accidental trauma cases.²⁷ Between January and August 2015, 3,262 surgeries were conducted.²⁸ The hospital had ninety-two beds, which increased to 140 beds in the last week of September 2015 to cope with the unprecedented number of admissions linked to the increase in fighting during that period.²⁹

MSF relied on patients being able to reach the provincial capital of Kunduz from all across northeast Afghanistan. While the hospital contributed to providing high-quality trauma care, it was largely confined to operating in the urban, government-controlled provincial capital. However, a small step was taken in June 2015 to improve access to health care in territories outside governmental control. When MSF opened a clinic in Chardara district, 15 kilometres from Kunduz, this district was largely under the control of the armed opposition. In this clinic, nurses provided immediate care to trauma patients before they were transported to Kunduz City.³⁰ However, such medical transfers depended on the ability of MSF to safely refer patients across the front line to the MSF hospital.

The negotiated access, aimed at securing the neutral, impartial and independent status of MSF medical care, notably enabled MSF to preserve its

24 *Ibid.*

25 See Jonathan Whittall, “The Operation Was Successful, but the Patient Died”, *Huffington Post*, 20 March 2014, available at: www.huffingtonpost.co.uk/jonathan-whittall/afghanistan-humanitarian-aid_b_4993451.html.

26 See MSF Internal Review, above note 2, p. 2.

27 For example, in 2014 alone more than 22,000 patients received care at the hospital and 4,241 surgeries were performed. *Ibid.*, p. 3.

28 *Ibid.*

29 *Ibid.*, p. 2. A June 2015 press release on the Kunduz Trauma Centre stated: “From 20 to 23 June, MSF’s medical teams treated 77 patients directly wounded in the fighting; one-third of these patients were women and children. The majority of wounded patients admitted to the trauma centre came from Chardara district, around ten kilometres from Kunduz city, which has been engulfed by fighting since Saturday 20 June. The bulk of patients had sustained bomb blast or gunshot wounds, with MSF surgeons treating severe abdominal, limb and head injuries.” MSF, “Afghanistan: Scores of Wounded Treated after Heavy Fighting in Kunduz Province”, Press Release, Kabul, 25 June 2015, available at: www.msf.org/en/article/afghanistan-scores-wounded-treated-after-heavy-fighting-kunduz-province.

30 For more information on the background of this medical post, see MSF Press Release, above note 29.

capacity to carry out its medical activities in areas not under governmental control. This was particularly important in a context where humanitarian organizations were being systematically incorporated into military stabilization strategies by the United States, Afghanistan and their allies. The logic of the inclusion of basic services into military stabilization strategies was elaborated in three ways: first, the provision of public services enhances government legitimacy; secondly, carefully targeted services help to reduce grievances; and thirdly, encouraging cooperation in health care can make it possible to also encourage cooperation on other issues.³¹

The enactment of this incorporation of health into stabilization could initially be seen in military personnel directly carrying out medical activities themselves and later in the more indirect building of State legitimacy as a way to undermine support for the opposition. The latter gained prominence as counter-insurgency thinking evolved away from a pure focus on winning hearts and minds to a strategy “that centres on supporting the legitimacy and the development of the core capabilities of the host state”.³²

The need to build the legitimacy of the State as part of a stabilization plan was facilitated by the multi-mandated approach of many NGOs whose aim to engage in longer-term State-building processes converged with the methods used in pursuit of the Afghan government and its allies’ stabilization objectives.³³

By 2015, the vast majority of the aid system in Afghanistan was entirely incorporated into a State-building logic. The health system was subcontracted to NGOs by the State.³⁴ The World Bank, USAID and the European Union provide resources to a trust fund that the Ministry of Health administers.³⁵ NGOs therefore receive direct funding from one of the parties to the conflict in the delivery of health services.

Through its negotiations in Afghanistan, MSF managed to a large extent to obtain an exemption from the incorporation of humanitarian action into the international and national objectives of State-building. However, the reach of the State still extended into MSF medical facilities. This was particularly evident in the extension of security forces operations into the hospital in search of patients considered to be criminals by the State. For example, in July 2015, Afghan Special Forces stormed the MSF Kunduz Trauma Centre. MSF immediately released a statement, which read:

31 See Stuart Gordon, *Winning Hearts and Minds? Examining the Relationship between Aid and Security in Afghanistan’s Helmand Province*, Feinstein International Center, Tufts University, April 2011, available at: <https://tinyurl.com/yd52wej6>.

32 Stuart Gordon, “The United Kingdom’s Stabilisation Model and Afghanistan: The Impact on Humanitarian Actors”, *Disasters*, Vol. 34, No. 3, 2010, p. S370.

33 See Jonathan Whittall, “Is Humanitarian Action Independent from Political Interests?”, *Sur International Journal on Human Rights*, April 2015, available at: <http://sur.conectas.org/en/is-humanitarian-action-independent-political-interests/>.

34 See Markus Michael, Enrico Pavignani and Peter S. Hill, “Too Good to Be True? An Assessment of Health System Progress in Afghanistan, 2002–2012”, *Medicine, Conflict and Survival*, Vol. 29, No. 4, 2013, available at: www.ncbi.nlm.nih.gov/pubmed/24494581.

35 *Ibid.*

On Wednesday 1 July at 14:07, heavily armed men from Afghan Special Forces entered the MSF hospital compound, cordoned off the facility and began shooting in the air. The armed men physically assaulted three MSF staff members and entered the hospital with weapons. They then proceeded to arrest three patients. Hospital staff tried their best to ensure continued medical care for the three patients, and in the process, one MSF staff member was threatened at gunpoint by two armed men. After approximately one hour, the armed men released the three patients and left the hospital compound.³⁶

This operation, carried out in the Trauma Centre by armed personnel, was conducted without a warrant, in contravention of due process as well as in violation of the neutral character of the hospital. The operation was based on false information that a “high-value” individual was being treated in the hospital. It also fuelled some authorities’ misperceptions about MSF’s mandate to treat wounded members of the armed opposition or individuals designated “terrorists”. Those authorities viewed such medical care provided without distinction as helping the “enemy” rather than complementary to their own IHL obligation to provide medical assistance without discrimination.

The July 2015 raid on the hospital may also have signified a shift in the military environment in Kunduz. Coalition troops were drawing down and there was a higher reliance on the use of special forces. Although MSF had negotiated its presence with all parties to the conflict, direct access to special forces remained a challenge.

As international troops withdrew, the armed opposition expanded its presence.³⁷ Military forces from the government may have also seen MSF shift from being a potential benefit in a provincial capital controlled by the government to an unacceptable benefit to the enemy in a context of opposition advancements.

This changing political and military environment raises questions on the extent to which the negotiated presence of MSF in Kunduz remained valid in the eyes of the government and coalition forces prior to the attack on the hospital. Aside from the July military intrusion and prior to the air strikes on the hospital, the agreement certainly *appeared* to remain intact. The rules of the hospital prohibiting bearing arms within the hospital and so on in order to maintain its purely medical function were well understood by all parties to the conflict, and MSF was able to treat the wounded from all sides in the weeks running up to the air strikes. Weapons were kept outside and fighters from each side lay in the same wards.

36 MSF, “Afghanistan: MSF Condemns Violent Armed Intrusion in Hospital in Kunduz”, Kabul, 3 July 2015, available at: www.msf.org/en/article/afghanistan-msf-condemns-violent-armed-intrusion-hospital-kunduz.

37 See UN Assistance Mission in Afghanistan, above note 10.

Shifting front lines

The medical data from the Kunduz Trauma Centre show that there was a cyclical pattern in the violent causes of trauma treated in the hospital that often correlated to the “fighting season”, according to MSF’s Internal Review. The Internal Review notes that “[s]ince the opening of the KTC [Kunduz Trauma Centre] in 2011, more than 15,000 surgeries were conducted and more than 68,000 emergency patients were treated”. The number of patients, particularly those admitted for violent trauma, steadily increased from 2011 to 2015.³⁸ 2015 recorded a notable increase in violent trauma when compared to previous years: between June and August 2015, the number of violent trauma cases averaged 105 cases per month – a 40% year-to-year increase.³⁹

Such data provide clear indicators of continued armed conflict, even if it appeared that the general discourse was shifting towards stabilization and normalization. In such a context, providing impartial medical care to all wounded persons is a duty under IHL.⁴⁰ However, depriving members of armed opposition groups of access to impartial medical care is a State practice often used to deter and weaken those groups.⁴¹ This takes the form of governmental regulations or practice restricting the authorization of humanitarian organizations to providing medical care only in government-controlled medical facilities or territories.⁴² This directly contributes to increasing the pressure and danger on health-care services, personnel and facilities as parties to the conflict vie for access to or control over life-saving resources.⁴³

In September 2015, the violence in Kunduz peaked. As noted above, the capture of Kunduz City by the Taliban on 28 September 2015 marked the first time that the armed opposition had taken control of a provincial capital since its fall from power in 2001. It must be noted that after the Taliban took control of Kunduz, they also came to the MSF hospital to inform the team that they would

38 MSF Internal Review, above note 2, p. 4.

39 Míguel Trelles *et al.*, “Averted Health Burden over 4 Years at Medecins Sans Frontieres (MSF) Trauma Centre in Kunduz, Afghanistan, Prior to Its Closure in 2015”, *Surgery*, Vol. 160, No. 5, 2016, available at: www.surgjournal.com/article/S0039-6060%2816%2930199-4/pdf.

40 GC I–IV, common Art. 3(2); AP I, Arts 10–11; AP II, Arts 7–8; ICRC Customary Law Study, above note 4, Rule 110.

41 See Leonard S. Rubenstein, “Global Health and Security in the Age of Counterterrorism”, *Journal of the Royal Society of Medicine*, Vol. 108, No. 2, 2015, p. 50: “The logic of employing health instrumentally to advance security has also led to practices that deny healthcare as a counterterrorism strategy and punish those who offer it.”

42 Human Rights Watch, *Attacks on Health: Global Report*, May 2015, available at: <https://tinyurl.com/m3cq3tf>; UN Office of the High Commissioner for Human Rights, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/28/69, 5 February 2015, p. 13.

43 See ICRC, *Safeguarding the Provision of Health Care: Operational Practices and Relevant International Humanitarian Law concerning Armed Groups*, Geneva, June 2015, pp. 30–35, available at: <https://shop.icrc.org/les-groupes-armes-et-la-protection-des-soins-de-sante-2106.html>.

not interfere with the hospital, that they respected the MSF rules regarding the neutrality of the hospital and that no weapons were allowed inside the facility. Since the opening of the Trauma Centre in 2011, the vast majority of the wounded fighters treated in the hospital were observed to be government forces and police.⁴⁴ However, the proportion of wounded from both sides varied according to the intensity of the fighting, the position of the front line and the ease of access to the Trauma Centre relative to other medical facilities. In the week starting 28 September 2015, this shifted to primarily wounded Taliban fighters.⁴⁵

By 10pm on the 28th September 2015, MSF's medical teams had treated 137 wounded. This included 26 children. The majority of patients had sustained gunshot wounds, with surgeons treating severe abdominal, limb and head injuries.⁴⁶

An MSF press release was issued stating that “the hospital is inundated with patients” and that

we have quickly increased the number of beds from 92 to 110 to cope with the unprecedented level of admissions, but people keep arriving. We have 130 patients spread throughout the wards, in the corridors and even in offices. With the hospital reaching its limit and fighting continuing, we are worried about being able to cope with any new influxes of wounded.⁴⁷

By Wednesday, 30 September, approximately half of the wounded fighters in the hospital were likely to have belonged to the Taliban forces.⁴⁸

The willingness and duty of MSF to provide medical treatment to all parties to the conflict and without discrimination had been explained not only prior to the opening of the hospital but also at multiple occasions during the week prior to the bombing of the hospital. On Thursday, 1 October,

MSF received a question from a US Government official in Washington, DC, asking whether the hospital or any other of MSF's locations had a large number of Taliban “holed up” and enquired about the safety of our staff. MSF replied that our staff were working at full capacity in Kunduz and that the hospital was full of patients including wounded Taliban combatants, some of whom had been referred to the MSF medical post in Chardara. MSF also expressed that we were very clear with both sides to the conflict about

44 MSF Internal Review, above note 2, p. 4.

45 *Ibid.*

46 *Ibid.*

47 *Ibid.*, p. 5; and quoted initially in MSF, “Afghanistan: MSF Hospital Overwhelmed with Wounded after Heavy Fighting in Kunduz” Press Release, Kabul, 30 September 2015, available at www.msf.org/article/afghanistan-msf-hospital-overwhelmed-wounded-after-heavy-fighting-kunduz.

48 MSF Internal Review, above note 2, p. 5.

the need to respect medical structures as a condition to our ability to continue working.⁴⁹

The attack on the Kunduz Trauma Centre demonstrates how misinterpretation of IHL can affect its implementation. Indeed, from an IHL point of view, a hospital full of wounded fighters is still a protected hospital⁵⁰ and wounded belligerents are themselves protected as persons *hors de combat*.⁵¹ The reason IHL provides protection to health-care facilities, transports and personnel is to guarantee that the sick and wounded will be able to receive treatment. However, from a military intelligence view, a hospital full of wounded fighters could mistakenly be interpreted as no longer being protected under IHL. This is not pure speculation, as the hypothesis that a hospital could be held “hostage” by the enemy was raised during trilateral discussions between MSF and the US and Afghan armies. According to the US and Afghan forces, a hospital could then be perceived as an enemy stronghold, which may affect its protected status either in terms of loss of protection or with regard to its civilian medical status. Such misinterpretation of law opens paths for misapplication of the law. Indeed, in a number of countries, military manuals apply different thresholds for precaution and proportionality when referring to incidental loss and damage affecting a military hospital or hospitals close to military objectives.⁵²

With regard to the armed opposition, when they took control of Kunduz they informed MSF that they would not interfere with the hospital, so it could continue to function as a hospital. They did not enter the hospital to search for wounded enemy forces, nor did they try to enter with weapons when bringing or visiting patients.

⁴⁹ *Ibid.*

⁵⁰ GC IV, Arts 16, 18–20; 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 (ICRC Commentary on GC IV), pp. 154 (particularly noting the phrase “outside their humanitarian duties” at Art. 19), 40–41; GC I, Arts 21, 22; GC IV, Art. 19; AP I, Art. 13; AP II, Art. 11; ICRC Customary Law Study, above note 4, Rules 28, 31. See also Dustin A. Lewis, Naz K. Modirzadeh and Gabriella Blum, *Medical Care in Armed Conflict: International Humanitarian Law and State Responses to Terrorism*, Harvard Law School Program on International Law and Armed Conflict, September 2015, available at: <https://tinyurl.com/ycmqahv5>.

⁵¹ GC I, Arts 3(1), 12(1); GC II, Arts 3(1), 12(1); 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. 3(1); GC IV, Arts 3(1), 16(1); AP I, Arts 10(1), 41(1), 85(3)(e); AP II, Arts 4(1), 7; ICRC Customary Law Study, above note 4, Rule 47.

⁵² For further discussion on this, see below. See US Department of Defense, *Law of War Manual*, December 2016 (US LoWM), para. 7.10.1.1, available at: www.hsdl.org/?abstract&did=797480. It is important to emphasize that military hospitals are not legitimate military objectives. Under IHL, military objectives are defined as “objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”. ICRC Customary Law Study, above note 4, Rule 8. See also Laurent Gisel, “Can the Incidental Killing of Military Doctors Never Be Excessive?”, *International Review of the Red Cross*, Vol. 95, No. 889, 2013, available at: www.icrc.org/eng/assets/files/review/2013/irrc-889-gisel.pdf.

A relentless and brutal attack

The US air strikes started between 2 a.m. and 2:08 a.m. on 3 October 2015. Despite the attack occurring in the middle of the night, the MSF hospital was busy and in full operation. According to the MSF Internal Review, medical staff were making the most of the quiet night to catch up on the backlog of pending surgeries.⁵³

When the aerial attack began, there were 105 patients in the hospital. MSF estimates that three or four of the patients were wounded government forces and approximately twenty were wounded Taliban. 140 MSF national staff and nine MSF international staff were present in the hospital compound at the time of the attack, as well as an International Committee of the Red Cross (ICRC) delegate.⁵⁴ It is estimated that the air strikes lasted approximately one hour.

A series of multiple, precise and sustained air strikes targeted the main hospital building. The GPS coordinates that were given to the parties to the conflict correlated exactly to the building that was struck.⁵⁵ When the first air strikes hit the main hospital building, two of the three operating theatres were in use. Three international and twenty-three national MSF staff were performing surgeries in this same main building, or caring for patients. Within this building, eight patients were in the intensive care unit and six were in the area of the operating theatres.⁵⁶ Many staff described seeing people being shot from the air as they tried to flee the main hospital building that was being hit with each air strike. Some accounts mention shooting that appears to follow the movement of people on the run.⁵⁷ The precision of the air strike and the deliberateness of the destruction stands in contrast with the initial reactions from international forces.

53 MSF Internal Review, above note 2, p. 7.

54 *Ibid.*

55 *Ibid.*, p. 8.

56 *Ibid.*, p. 9.

57 *Ibid.*, p. 10.

From collateral damage to tragic mistake: The United States' changing narrative

The changing narrative in the immediate aftermath of the attack reflects the diverging “raw” justifications presented by the various military bodies involved in the attack. It also becomes difficult to unequivocally reconcile the United States' immediate statements with the narrative presented in the final Investigation Report.

3 October 2015

“US forces conducted an airstrike in Kunduz city at 2:15am (local), Oct. 3, against individuals threatening the force. The strike may have resulted in collateral damage to a nearby medical facility.”

Colonel Brian Tribus, spokesman for US Forces-Afghanistan⁵⁸

4 October 2015

“US forces conducted an airstrike in Kunduz city at 2:15am (local), Oct. 3, against insurgents who were directly firing upon US service members advising and assisting Afghan Security Forces in the city of Kunduz. The strike was conducted in the vicinity of a Doctors Without Borders medical facility.”

Colonel Brian Tribus, spokesman for US Forces-Afghanistan⁵⁹

5 October 2015

“We have now learned that on October 3rd, Afghan forces advised that they were taking fire from enemy positions and asked for air support from US forces. An airstrike was then called to eliminate the Taliban threat and several civilians were accidentally struck. This is different from initial reports which indicated that US forces were threatened and that the airstrike was called on their behalf.”

General John Campbell, commander, US Forces Afghanistan and NATO's Operation Resolute Support⁶⁰

6 October 2015

58 “Kunduz Airstrike Reportedly Kills 19 at Doctors Without Borders Hospital”, *NPR*, 3 October 2015, available at: www.npr.org/sections/thetwo-way/2015/10/03/445435361/after-u-s-airstrike-3-dead-at-doctors-without-borders-hospital.

59 “US Strike on Afghan Kunduz Clinic ‘Killed 42’, MSF Says”, *BBC News*, 12 December 2015, available at: www.bbc.com/news/world-asia-35082350.

60 *Ibid.*

“Even though the Afghans request that support, it still has to go through a rigorous US procedure to enable fires to go on the ground. We had a special operations unit that was in close vicinity that was talking to the aircraft that delivered those fires.”

General John Campbell, commander, US Forces Afghanistan and NATO’s Operation Resolute Support⁶¹

7 October 2015

“President Obama spoke today by phone with [MSF] International President Dr. Joanne Liu to apologize and express his condolences for the MSF staff and patients who were killed and injured when a U.S. military airstrike mistakenly struck an MSF field hospital in Kunduz, Afghanistan. During the call, President Obama expressed regret over the tragic incident and offered his thoughts and prayers on behalf of the American people to the victims, their families, and loved ones. Acknowledging the great respect he has for the important and lifesaving work that MSF does for vulnerable communities in Afghanistan and around the world, the President assured Dr. Liu of his expectation that the Department of Defense investigation currently underway would provide a transparent, thorough, and objective accounting of the facts and circumstances of the incident and pledged full cooperation with the joint investigations being conducted with NATO and the Afghan Government.”

White House spokesperson⁶²

The call for an independent investigation

On 7 October 2015, MSF announced the call for an independent investigation under the IHFFC.⁶³ The IHFFC was established by Additional Protocol I to the Geneva Conventions as the only permanent body set up specifically to investigate violations of IHL.⁶⁴

61 “Doctors Without Borders Airstrike: US Alters Story for Fourth Time in Four Days”, *The Guardian*, 6 October 2015, available at: www.theguardian.com/us-news/2015/oct/06/doctors-without-borders-airstrike-afghanistan-us-account-changes-again.

62 White House Office of the Press Secretary, “Readout of the President’s Call with Doctors Without Borders International President Dr. Joanne Liu”, 7 October 2015, available at: <https://obamawhitehouse.archives.gov/the-press-office/2015/10/07/readout-presidents-call-doctors-without-borders-international-president>.

63 See MSF, *MSF: Even War Has Rules*, Geneva, 7 October 2015, available at: www.doctorswithoutborders.org/what-we-do/news-stories/research/msf-even-war-has-rules.

64 The IHFFC was established under Article 90 of AP I. When parties to a conflict are accused of violating IHL, experts from the Commission may investigate the allegations. Unlike a court, the IHFFC’s remit is limited to establishing the facts: it does not issue verdicts. The Commission informs the relevant parties of the results of its investigation and makes recommendations for improving compliance with, and implementation of, IHL. For further information, see the IHFFC website at: www.ihffc.org.

Although this body has existed since 1991, it only received its first conventional request to institute an enquiry in May 2017.⁶⁵ It requires one of the seventy-seven signatory States to sponsor an inquiry as well as the consent of the State(s) concerned. It can also work on the basis of good offices toward States that have not ratified it.⁶⁶ The confidentiality of its work and reports was initially intended to build confidence and to extract a situation from war propaganda.

In 2015, MSF called on this mechanism as a way to determine the facts surrounding the attack on the Kunduz Trauma Centre in terms of responsibility of both US and Afghan governments under IHL, and to go beyond apology as a sufficient endpoint. In a speech calling for this investigation, the MSF International president, Dr Joanne Liu, stated:

It is unacceptable that States hide behind ‘gentlemen’s agreements’ and in doing so create a free for all and an environment of impunity. It is unacceptable that the bombing of a hospital and the killing of staff and patients can be dismissed as collateral damage or brushed aside as a mistake.⁶⁷

It must be noted that while this situation was related to a NIAC and that neither the US nor the Afghan government has ratified the permanent competence of the IHFFC, the IHFFC considered that it was competent to offer its good offices to investigate this type of incident. It officially informed the US and Afghan governments of its readiness to proceed upon receiving their agreement.⁶⁸

The parties to the conflict never accepted the good offices offered to them by the IHFFC. Instead, the US military and Afghan government launched two separate investigations while NATO produced the mandatory but confidential report on civilian casualties. The Afghan investigation – which was never made public – concentrated on the fall of Kunduz City, while the US investigation focused on the attack on the Kunduz Trauma Centre and covered only the duration of the attack. The US Investigation Report under Army Regulation (AR) 15–6 was finished in November 2015, but its findings were only presented generally in a press conference by General Campbell and were not made public at that stage.⁶⁹ The 3,000-page report underwent an extensive redaction process and

65 Please refer to IHFFC News Archive, “International Humanitarian Fact-Finding Commission to Lead an Independent Forensic Investigation in Eastern Ukraine (Luhansk Province)”, 19 May 2017, available at: <http://www.ihffc.org/index.asp?Language=EN&page=news&do=-1%27>.

66 AP I, Arts 90(2)(c)(ii), 90(d). See also Ove Bring, “The Kunduz Hospital Attack: The Existence of a Fact-Finding Commission”, *EJIL: Talk!*, 15 October 2015, available at: www.ejiltalk.org/the-kunduz-hospital-attack-the-existence-of-a-fact-finding-commission/; IHFFC, “The IHFFC in a Few Words”, available at: www.ihffc.org/index.asp?page=aboutus_general.

67 See MSF, above note 63.

68 See IHFFC News Archive, “IHFFC Contacted by Médecins Sans Frontières”, 8 October 2015, available at: www.ihffc.org/index.asp?Language=EN&page=home&mode=newsarchive.

69 See US Department of Defense, “Department of Defense Press Briefing by General Campbell via Teleconference from Afghanistan”, 25 November 2015, available at: www.defense.gov/News/Transcripts/Transcript-View/Article/631359/department-of-defense-press-briefing-by-general-campbell-via-teleconference-fro.

in April 2016, only 721 pages of the report were made available to the public for a short time.⁷⁰

How facts matter in the interpretation and implementation of IHL

Whereas the United States shifted its explanation significantly, some Afghan officials remained consistent, claiming immediately after the attack that the MSF hospital was being used as some kind of command and control centre for the armed opposition. According to a report from *The Intercept*,

Sediq Sediqi, the spokesperson for the Ministry of Interior, said that 10 to 15 terrorists were hiding in the hospital. National security adviser Hanif Atmar said the government would take full responsibility, as “we are without doubt, 100 percent convinced the place was occupied by Taliban.”⁷¹

Reinforcing these claims was an ex-CIA official turned television pundit who claimed that MSF was providing material support to “terrorists” because the hospital treated wounded fighters.⁷²

More worrying than these false allegations and the questioning of MSF’s duty to treat all wounded equally is the insinuation that these circumstances would have made a functioning hospital – medical staff and patients alike – a legitimate target. This often-implied accusation has left the public to wonder whether this unacceptable attack on the hospital could have been permitted under other rules applicable to the conflict, such as counterterrorism laws, or under very permissive interpretations of IHL principles applicable in NIAC that have been adopted by some countries not party to Additional Protocol II (AP II), as explored further below.

This episode has been an alert to the practical consequences of the current blurring of the lines between IHL and the doctrine of counterterrorism. Some legal attention has been paid to analyzing the impact of counterterrorism regulations on

70 AR 15–6 Investigation Report, above note 2. The report was made available to MSF as well as publicly available on 29 April 2016 but is no longer publicly accessible. See also MSF, “Kunduz Hospital Attack: Initial Reaction to Public Release of U.S. Military Investigative Report on the Attack on MSF Trauma Hospital”, New York, 29 April 2016, available at: www.msf.org/kunduz-initial-reaction-public-release-us-military-investigative-report-attack-msf-trauma-hospital; MSF, “Kunduz Hospital Attack: Some of MSF’s Questions in Response to the U.S. Military Investigation into Their Attack on the Hospital”, New York, 29 April 2016, available at: www.msf.org/kunduz-some-msfs-questions-response-us-military-investigation-their-attack-hospital.

71 M. Jeong, above note 17.

72 Former CIA covert operations officer Joshua Katz appeared on a Fox News Channel segment entitled “Shepard Smith Reporting” on 5 November 2015, available at: <http://video.foxnews.com/v/4598798043001/?#sp=show-clips>.

human rights, as well as to the criminalization of humanitarian action,⁷³ but a lot more is still needed to determine how the protections afforded to medical care, the oldest of fundamental IHL principles, might be jeopardized by confusion between the legal frameworks of IHL and counterterrorism.

Among the potential confusions is the fundamental status of the wounded and sick as *hors de combat* (“out of combat”) under IHL. While persons *hors de combat* cannot be targeted under IHL, their protection from militarized law enforcement operations is weakened in the counterterrorism framework and the related targeted killing doctrine,⁷⁴ in which a number of human rights are implicated – notably to the right to life, judicial guarantees and due process.

MSF has witnessed how such confusion surrounding the protected status of patients *hors de combat* can adversely affect the medical facility in which they are supposedly located. In various contexts of armed conflict, MSF has been confronted with military operations where States claim that they do not target the hospital itself but then enact searches or strike legitimate objects inside the hospital. Such practice has grave consequences for the safety and the neutrality of the health-care facility, personnel and patients.⁷⁵

Protection and loss of protection of medical units

The gravity of the attack and the controversial explanations offered by US and Afghan officials point to the need for MSF to review the various scenarios in which its hospitals could be perceived to have lost their legal protection and be attacked.

The IHL rules regarding protection and loss of protection of medical units are clear, and their main principles are well known. Yet behind the broad consensus on these principles lie a diversity of “hidden details” in State interpretation of the

73 See Kate Mackintosh and Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, July 2013, available at: www.nrc.no/globalassets/pdf/reports/study-of-the-impact-of-donor-counterterrorism-measures-on-principled-humanitarian-action.pdf. See also D. A. Lewis, N. K. Modirzadeh and G. Blum, above note 50; Jessica S. Burniske and Naz K. Modirzadeh, *Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action*, Harvard Law School Program on International Law and Armed Conflict, Counterterrorism and Humanitarian Engagement Project, March 2017, available at: <http://blogs.harvard.edu/pilac/files/2017/02/Pilot-Empirical-Survey-Study-and-Comment-2017.pdf>; Naz K. Modirzadeh, *Comment on Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action*, Harvard Law School Program on International Law and Armed Conflict, Counterterrorism and Humanitarian Engagement Project, March 2017, available at: <http://blogs.harvard.edu/pilac/files/2017/02/Pilot-Empirical-Survey-Study-and-Comment-2017.pdf>; and the Harvard Law School Counterterrorism and Humanitarian Engagement Project website, available at: <https://pilac.law.harvard.edu/counterterrorism-and-humanitarian-engagement-project/>. And see Marine Buissonniere, Sarah Woznick, Leonard Rubenstein and Julie Hannah, *The Criminalization of Healthcare*, June 2018, available at: www1.essex.ac.uk/hrc/documents/54198-criminalization-of-healthcare-web.pdf.

74 See, e.g., Nils Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford, 2008.

75 *Ibid.* See discussion below. See also the Françoise Bouchet-Saulnier, “IHL and Counter-Terrorism: Tensions and Challenges for Medical Humanitarian Organizations”, speech given to the UN Security Council Counter-Terrorism Committee, New York, 2 June 2016, available at: <http://msf-analysis.org/ihl-counter-terrorism-tensions-challenges-medical-humanitarian-organizations/>.

law regarding not only the applicability but also the interpretation of each rule in a given situation. The MSF Internal Review was thus needed to delve into those details.

Indeed, a number of IHL provisions regarding the protection of medical duties have been implemented differently in international armed conflict (IAC) and in NIAC.⁷⁶ In addition, in the Afghan case, while the Afghan government has ratified AP II applicable to NIAC, the United States has not.⁷⁷ Defining the precise IHL legal framework effectively applicable to the situation is therefore not a simple question of determining the relevant treaty and customary rules of IHL. Much more is needed in order to ascertain the content of the rules that soldiers are trained on and theoretically operating under in Kunduz, including reference to domestic legal frameworks and military doctrine such as the US domestic *Law of War Manual* (LoWM).

The comparison of the US LoWM with conventional and customary IHL conducted by MSF during the Kunduz attack review raised a number of questions as to the precise content of the US rules meant to implement the IHL provisions protecting the medical mission, each of which will be outlined below. As discussed above, IHL clearly states that medical units and transports shall be respected and protected at all times and shall not be the object of attack. IHL further states that medical units and personnel may only lose their protected status if they are used to commit – outside their humanitarian function – hostile acts⁷⁸ or acts harmful to the enemy.⁷⁹ “Hostile act” is the term used by conventional IHL in NIAC, while reference to “acts harmful to the enemy” is used for IAC as well as in customary law. What might constitute a “hostile act” in NIAC is not expressly defined but seems to entail an active role and observable activities. IHL does not give a definition or a list of what could amount to an “act harmful to the enemy”;⁸⁰ on the contrary, it provides examples of what will clearly *not* amount to an “act harmful to the enemy”. This includes the fact that the personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge; the fact that the unit is guarded by a picket, sentries or escort; the fact that small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the units; and the fact that members of the armed forces or other fighters are in the unit for medical reasons.⁸¹ For years, MSF has translated

76 This is true for instance, in the treaty provisions regarding the principles of proportionality and precautions in attack, and regarding the definition of military and civilian medical units. Additionally, under customary international law there is arguably no requirement of advance warning in order for a medical unit to lose its protected status.

77 A list of States that have ratified AP II is available at: <https://tinyurl.com/y77xzvdf>.

78 AP II, Art. 11(2).

79 GC I, Art. 21; GC IV, Art. 29; AP I, Art. 13; ICRC Customary Law Study, above note 4, Rules 27, 29.

80 But there is some agreement on what constitutes a “hostile act” and “acts harmful to the enemy”. Please see 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, Art. 21, available at: <https://ihl-databases.icrc.org/ihl/COM/365-570026?OpenDocument>.

81 AP I, Art. 13(2).

these rules into its operational practice, including through a strict “no weapons policy” in order to guarantee the safety of its medical activities.

The MSF Internal Review showed that on the night of the attack on the Kunduz Trauma Centre, no fighting had taken place inside the hospital or close to it. It was also clear that no weapons were inside the hospital except for those collected by MSF from the wounded and stored under its control.

The LoWM takes a very permissive interpretation of IHL, providing a list of examples that would entail a loss of protection. One of the most problematic examples for health-care providers is that of a hospital used as a “center for liaison with combat forces”.⁸² While MSF strictly monitors the absence of weapons inside its hospitals as well as the absence of any visible hostile activity within its medical facilities, it has no possibility of verifying more invisible and ill-defined activities. In a period characterized by a concentrated presence of cell phones and extensive intelligence interception, it becomes almost impossible for a humanitarian organization to identify and challenge the reality of such harmful acts. Such criteria as enunciated by the LoWM have compelled MSF to query whether a permissive reading of the LoWM could conclude – based on possible phone intercepts from inside the compound – that the Kunduz hospital had become a command and control centre. Based on the specific wording of the LoWM, it was unclear whether a hospital full of wounded Taliban would still be protected as a hospital. These questions and concerns were again fuelled by the multiple references to a hospital and to a Taliban command and control centre (“TB C2 node”) which were identified as key targets in the US AR 15–6 Investigation Report.⁸³

82 This is an example given for the rules of IAC in both US LoWM, above note 52, para. 7.17.1.1; ICRC Commentary on GC IV, above note 50, p. 154.

83 AR 15–6 Investigation Report, above note 2, p. 80: “Prior to the engagement, the [redacted] reporting confirmed that as many as 65 Taliban had recently received care at the facility, and that unarmed Taliban were present at the time of the strike. [Redacted] confirmed that two senior Taliban officials had recently visited the hospital. No foreign persons of interest were observed at the trauma center”; pp 84–85: “Intelligence assessed that insurgent and potentially high value individuals were or had visited the MSF trauma center. There are no specific intelligence reports that confirm insurgents were using the MSF trauma center as an operational C2 node, weapons cache or base of operations”; p. 217: “our initial objective for the night of 29/30 September was the actual Kunduz city hospital (also known as the PRT) in Kunduz city ... as it had been taken by the Taliban. The mission was approved”; p. 271: “The plan was for [redacted] ... to clear a hospital in the south edge of the city. The hospital was reportedly held by the Taliban The hospital was one of the three that we knew about in addition to the MSF facility and an Afghan hospital on the west side of Kunduz city, in the same area as the MSF trauma hospital. With three hospitals and the language barrier, it was often difficult to determine which hospital was discussed in conversations”; p. 424: “It should be noted that the initial [operational plan] approved at the [Resolute Support] level on 29 sept had the Kunduz hospital as the clear [objective].” Nevertheless, the precise description of the MSF Trauma Centre was transmitted by the force on the ground to locate and target a Taliban command and control centre; pp. 241–242: “I had them describe the compound[, and] [redacted] said that it was a large T shaped structure with several smaller structures around it. I advised the [ground force commander] and he advised the [redacted] the description of the TBC2 compound and the [redacted] confirmed this was the structure. [Redacted] also advised that there was an arching gate on the compound which was also relayed to our [redacted] who confirmed this to be the TB C2 node.”

Another concern could be whether the presence of high-value individuals among the wounded would justify a strike on these individuals under the US LoWM even while they are inside the hospital. This question was motivated by the fact that the building hosting surgical wards and emergency rooms was the only one destroyed systematically by the attack, while all other buildings in the hospital compound full of patients were left untouched.

Finally, in the event that an act harmful to the enemy is being committed, IHL requires that a warning must be given allowing reasonable delay to remedy the situation or to allow the evacuation of the medical personnel and the wounded and sick. Without such a warning there will not be a loss of specific protection.⁸⁴ However, this conventional requirement does not appear as clearly in international humanitarian customary rules, creating some risk of permissive interpretation of IHL obligations by military commanders from countries such as the United States that have not ratified AP II.⁸⁵ This risk is further aggravated by the way in which relevant IHL provisions are translated into some States' domestic law, as seen for example in the US LoWM.

While IHL contains no exception to the warning requirement, the US LoWM limits this obligation by providing an explicit exception to the warning in cases of self-defence.⁸⁶ This reference to self-defence creates great security concerns for medical facilities. Self-defence remains a poorly defined concept more related to the *jus ad bellum* or domestic security law than to the *jus in bello*. Its extensive use to qualify or justify military action in situations of conflict raises additional concerns as to how reference to self-defence may also jeopardize and weaken the IHL obligations under the principles of precautions and proportionality.⁸⁷ It is interesting to note that these issues are not limited to a single domestic law of war manual but appear in many domestic military translations of IHL provisions.⁸⁸

Similar questions have been raised by MSF regarding the Saudi-led coalition in relation to the bombing of hospitals in Yemen in 2016.⁸⁹ In one case,

84 GC I, Art. 21; GC II, Art. 34 for hospital ships; GC IV, Art. 19; AP I, Art. 13(1); AP II, Art. 11(2).

85 ICRC Customary Law Study, above note 4, Rule 28. This rule, related to protection of medical units, does not explicitly mention (save in the Commentaries) the warning requirement. The requirement of warning is included in Rule 20, regarding attacks which may affect the civilian population.

86 US LoWM, above note 52, para. 7.17.1.2.

87 Geoffrey S. Corn, "Self-Defense Targeting: Blurring the Line between the Jus ad Bellum and the Jus in Bello", *International Law Studies*, Vol. 88, No. 1, 2012, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract-id=1947838>; Jasmine Moussa, "Can Jus ad Bellum Override Jus in Bello? Reaffirming the Separation of the Two Bodies of Law", *International Review of the Red Cross*, Vol. 90, No. 872, 2008, available at: www.icrc.org/eng/assets/files/other/irrc-872-moussa.pdf.

88 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. 1848 (particularly n. 22).

89 See MSF, "Yemen: Saudi-Led Airstrike on Abs Hospital Cannot Be Justified as 'Unintentional Error'", 9 December 2016, available at: www.msf.org/en/article/yemen-saudi-led-airstrike-abs-hospital-cannot-be-justified-unintentional-error; MSF, "Yemen: MSF Releases Detailed Documentation of Attacks on Two Medical Facilities Ahead of UNSC Closed Session on Protection of Medical Mission", 27 September 2016, available at: www.msf.org/en/article/yemen-msf-releases-detailed-documentation-attacks-two-medical-facilities-ahead-un-security.

MSF decided to impose a “no cell phone” policy inside its hospital. In another instance, MSF faced the issue of a car being targeted inside the hospital compound while transporting at least one wounded person to the hospital because it was considered by the military coalition as a legitimate military target. This incident raises once again not only the principles of distinction, precaution and proportionality, but also the issue of targeting high-value individuals inside hospitals.⁹⁰ There have been two other instances in which the issue of warning has been at stake. In the first instance the coalition acknowledged that the MSF hospital was considered to have lost its protected status and deplored having omitted to issue a warning before the strike.⁹¹ In the second instance the warning was issued in advance, allowing MSF to remedy the harmful act and to maintain the protected status of its hospital.⁹²

Distinction, precaution and proportionality

Direct attacks on health-care facilities are rarely claimed by any party to a conflict. There are political incentives for parties only to acknowledge mistakes in having attacked an erroneous target or to claim that they did not know the target was a health-care facility due to various technical problems of identification.⁹³

IHL prohibits deliberate attacks on medical units. It also contains broader obligations concerning indiscriminate attacks and collateral civilian damage in the conduct of hostilities. The duty of military commanders includes obligations of distinction, precaution and proportionality in attacks in order to avoid and limit indirect civilian loss and damage linked to attacks against legitimate military objectives.⁹⁴ However, these apparently clear IHL principles are met with complex debate when confronted with their translation and interpretation in domestic law of war manuals, military rules and doctrines.

One example of such debate became apparent during the MSF Internal Review, which found that the IHL obligations of precaution and proportionality

90 See for example Saudi Press Agency, “Official Spokesman of Joint Incidents Assessment Team (JIAT) Issues Statement”, Riyadh, 6 December 2016, available at: www.spa.gov.sa/viewstory.php?lang=en&newsid=1567351. The language used by the Joint Incident Assessment Team, “Houthi armed leaders” and “targeted the location of that gathering”, suggests that there was a subjective belief that there were high-value individuals involved in this incident.

91 This refers to the aerial bombardment of Haydan Hospital in Saada governorate. See Saudi Press Agency, “Joint Incidents Assessment Team (JIAT) on Yemen Responds to Claims on Coalition Forces’ Violations in Decisive Storm Operations”, Riyadh, 5 August 2016, available at: www.spa.gov.sa/viewstory.php?lang=en&newsid=1524799.

92 In this case, MSF was able to identify the presence of a military objective located next to the GPS coordinate provided for the hospital, and was able to request that it be moved away.

93 This argument is central in the attack on the Kunduz Trauma Centre. It was also presented by the Saudi-led coalition regarding the attack on the Abs Hospital in Yemen on 6 December 2016: see Saudi Press Agency, above note 90; Saudi Press Agency, “Joint Incidents Assessment Team (JIAT) Response to Doctors Without Borders, Amnesty International”, Riyadh, 6 December 2016, available at: www.saudiembassy.net/news/joint-incidents-assessment-team-jiat-response-doctors-without-borders-amnesty-international. Regarding the attack on the Haydan Hospital in Saada governorate in Yemen on 26 January 2015, see Saudi Press Agency, above note 91.

94 The words “collateral damage”, “incidental damage” and “unintended damage” are also frequently used.

were interpreted quite restrictively in their implementation in the US LoWM. For instance, the LoWM provides a distinction between civilian and military medical facilities and personnel that is not founded in IHL. Under IHL, the rules related to the loss of protection are the same for both civilian and military medical facilities and personnel, though the rules arguably differ when it comes to protection from collateral damage.⁹⁵ Indeed, some US LoWM provisions purport to weaken the principles of precaution and proportionality regarding incidental damage to military medical units and personnel when they are located close to a military objective.⁹⁶ They even go so far as to reverse the obligation by instead placing the duty on medical units and personnel to either distance themselves from military objectives or to accept the consequences, rather than on the armed forces to locate their military objectives away from medical units and personnel.⁹⁷

In light of the US view that incidental harm to *military* medical units is not prohibited, to determine whether US forces violated their own domestic law in the attack on the Kunduz Trauma Centre, it is therefore necessary to first determine the status – civil or military – of the MSF hospital and its medical personnel under the US LoWM.⁹⁸ This question becomes more complex as the LoWM does not aid in clarifying the status of a wounded combatant from a non-State armed group, and even more so given that these patients were being treated in a private hospital run by a medical humanitarian organization. The question therefore becomes whether, under the US LoWM, the presence of the wounded Taliban in the Kunduz Trauma Centre on the night of the attack may have adversely affected its civilian status under US military doctrine and thereby deprived it of the highest level of protection.

More generally, if under the US LoWM being situated in the proximity of a legitimate military objective supersedes the special protection of health-care facilities, notably when targeting mobile military objectives, it would be contrary to one of the main pillars of IHL. This is of very grave concern for humanitarian organizations whose presence in areas of conflict is fundamental and essential to providing vital medical care to the victims of the conflict. While a number of military objectives are by nature very mobile, it is unacceptable that the burden of

95 But see L. Gisel, above note 52.

96 US LoWM, above note 52, para. 7.8.2.1: “The incidental killing or wounding of such personnel, due to their presence among or in proximity to combatant elements actually engaged by fire directed at the latter, gives no just cause for complaint. Because medical and religious personnel are deemed to have accepted the risk of death or further injury due to proximity to military operations, they need not be considered as incidental harm in assessing proportionality in conducting attacks”; para. 7.10.1.1: “The incidental harm to medical units or facilities, due to their presence among or in proximity to combatant elements actually engaged, by fire directed at the latter, gives no just cause for complaint.”; para. 7.12.2.5 (acceptance of the risk from proximity to combat operations).

97 *Ibid.*, paras 7.10.1.1, 7.8.2.1, 4.10.1.

98 *Ibid.*, paras 5.12.3.2, 7.8.2.1, 7.10.1.1, 4.10.1, 17.15.1.1.

risk and the responsibility to maintain distance from military objectives be simply transferred to humanitarian medical facilities and personnel.⁹⁹

The application of such provisions would render IHL protection of medical units useless, particularly in a context like that of Kunduz, where the hospital was a protected medical unit yet located in a city turned battlefield. Such an interpretation would be writing a blank cheque to authorize attacks in contexts where a mobile military objective is in close proximity to a medical facility, or is even found inside the medical unit. This has been experienced and documented in Yemen with the Saudi-led coalition,¹⁰⁰ and it corresponds with current military targeting practices that are reliant on electronic intelligence and phone intercepts to locate and launch aerial attacks on mobile military objectives, including on so-called high-value individuals. In the aftermath of the Kunduz attack, this has been raised by MSF and more widely, including by specialized US lawyers involved in the drafting of the 2015 US LoWM.¹⁰¹

Identification of medical units, transport and personnel

Effectively implementing the IHL prohibition on attacking medical units, transport and personnel requires that such units are effectively known as being medical by the parties to the conflict. Ensuring that this crucial information is effectively communicated to the armed forces and non-State armed groups, as well as to the appropriate level within the chain of command, is an essential operationalization of this special IHL protection. The displaying of the protective emblems of the red cross, red crescent and red crystal is a well-regulated option in IAC but is legally and practically more complex in NIAC, notably with regard to medical facilities operating in territories beyond State control.¹⁰² However, it is worth mentioning that under IHL, identification can be effectuated not only with the emblems but also by other means agreed by the belligerents at the beginning of

99 This view is echoed by the Saudi-led coalition in a statement by the Joint Incidents Assessment Team regarding the bombing by coalition forces in Taiz province, Yemen, on 2 December 2015: “It is necessary to keep the [MSF] mobile clinic away from military targets so as to not be subjected to any incidental effects.” See Saudi Press Agency, above note 91.

100 See, for example, UN Panel of Experts on Yemen, *Final Report*, 27 January 2017, notably para. 128 and Appendix C to Annex 49 on the attack on Abs Hospital in Yemen, available at: www.un.org/ga/search/view_doc.asp?symbol=S/2017/81; Saudi Press Agency, “JIAT Response to Doctors Without Borders”, above note 93; Saudi Press Agency, above note 90.

101 Amongst these are Oona Hathaway, “The Law of War Manual’s Threat to the Principle of Proportionality”, 23 June 2016, available at: www.justsecurity.org/31631/lowm-threat-principle-proportionality; Geoffrey S. Corn and Andrew Culliver, “Wounded Combatants, Military Medical Personnel, and the Dilemma of Collateral Risk”, 13 December 2016, available at: <https://ssrn.com/abstract=2884854>; Jens D. Ohlin, “Was the Kunduz Hospital Attack a War Crime?”, 1 May 2016, available at: <http://opiniojuris.org/2016/05/01/was-the-kunduz-hospital-attack-a-war-crime/>.

102 See GC I, Arts 35–38; GC II, Arts 41–45; GC IV, Art. 18; AP I, Art 18; AP II, Art 12; AP I, Annex I, Arts 1–14. In NIAC the “competent authority” authorizing the use of the protective emblem may not allow its use by medical facilities in territories under the control of non-State opposition groups. See also Gérald C. Cauderay, “Les moyens d’identification des transports sanitaires protégés”, *International Review of the Red Cross*, Vol. 76, No. 807, 1994, available at: <https://doi.org/10.1017/S0035336100009734>.

or during the conflict.¹⁰³ In practice, humanitarian organizations largely comply with whatever means of identification are requested of them.

The debate on the identification of health-care facilities that have been the victim of attack in Afghanistan as well as in Yemen has focused not on the use of the emblems but rather on new means of identification such as electronic GPS identification that is foreseen by conventional IHL rules.¹⁰⁴ The practice of sharing GPS identification¹⁰⁵ has largely replaced the emphasis placed on displaying the protective emblems in the context of contemporary aerial warfare. GPS coordinates of health-care facilities are transmitted to the parties to the conflict, to be included on their no-strike lists. However, it must be noted that while the identification of humanitarian and medical facilities by displaying the protective IHL emblems remains essential, their usage is subject to specific authorization under *State* regulations, which may impact their use in NIAC, notably in areas under the control of non-State armed groups.¹⁰⁶

It must be recalled that hospitals benefit in theory from protection whether or not they use the emblems, and, furthermore, under the IHL general principles of distinction, precaution and proportionality, health-care facilities remain protected as civilian objects even if they do not display the protective emblems in any case.¹⁰⁷ In practice, however, the special protection of a medical facility is bound to the knowledge of its medical status by the belligerent. In the case of Kunduz, the presence of the MSF Trauma Centre had been negotiated with and agreed

103 AP I, Annex I, Art 1.4.

104 *Ibid.*

105 For more information regarding MSF's recent practice of sharing GPS identification, see Alejandro Pozo Marin and Françoise Bouchet-Saulnier, *The Moral Relativism of Subordinating Civilians to Terrorists*, MSF Centre for Applied Reflection on Humanitarian Practice, June 2017, p. 15, available at <https://arhp.msf.es/attacks-against-medical-mission/moral-relativism-subordinating-civilians-terrorists>. See also Michiel Hofman, "The UN Security Council Must Do More to Protect Syrian Civilians", *The Guardian*, 21 February 2016, available at: www.theguardian.com/commentisfree/2016/feb/21/medecins-sans-frontieres-plea-for-civilian-bombings-syria-stop. For more information regarding the general practice of sharing GPS identification, see Global Shelter Cluster, *Guidance for Submitting Humanitarian Location Information in Syria and Iraq*, rev. 21 January, 2015, available at: www.sheltercluster.org/sites/default/files/docs/deconfliction_of_movements_in_iraq_guide_for_ingos_ocha.pdf; UN Office for the Coordination of Humanitarian Affairs (OCHA), *Deconfliction Mechanisms of Humanitarian Organisations Operating in Yemen (Mission Movements and Static Locations)*, last update 29 March 2018, available at: <https://reliefweb.int/report/yemen/deconfliction-mechanism-humanitarian-organisations-operating-yemen-mission-movements>; OCHA, *No Strike List Guidelines*, 4 February 2018, available at: <https://reliefweb.int/report/yemen/no-strike-list-guidelines>.

106 The Afghan law regulating the use of the protective emblem was adopted on 8 October 2016, one year after the attack on Kunduz. It served to fill the legal gap regarding the designation of a domestic authority competent to authorize usage of the emblems. The law delegates this power to the Afghan Red Crescent Society. ARCS Regulative Law 1395/7/17 on Regulation Affairs of the Red Crescent Society, 8 October 2016, Part 2. See, generally, ICRC Customary Law Study, above note 4, Rules 1–10; ICRC, *Study on the Use of the Emblems: Operational and Commercial and Other Non-Operational Issues*, Geneva, 2011, available at: www.icrc.org/eng/assets/files/publications/icrc-001-4057.pdf; D. A. Lewis, N. K. Modirzadeh and G. Blum, above note 50, pp. 37–66.

107 AP I, Appendix I, Art. 1.2: "These rules do not in and of themselves establish the right to protection. This right is governed by the relevant articles in the Conventions and the Protocol." See also GC I, Chap. 7, especially Arts 38, 42; 2016 Commentary on GC I, above note 88, para. 2540; Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, paras 732–733.

upon by the Afghan authorities, who did not at any stage require that a red cross or red crescent emblem be displayed on the hospital. The nearby Kunduz Provincial Hospital, run by the Afghan Ministry of Health, was not marked by any IHL protective emblem either. The US investigation of the Kunduz attack never challenged the fact that the Trauma Centre was, at the moment of its attack, marked with the MSF logo on its roof rather than with the red cross or red crescent emblems. It simply concluded that the plane did not see the MSF logo and was also unable to access the no-strike list on which the GPS coordinates of the Trauma Centre had been recorded. It is thus the targeting process that failed in this instance rather than the identification process. Nevertheless, it is interesting to note that in some contexts of armed conflict, parties to the conflict have changed their practice after having “learnt lessons” from erroneous attacks on health-care facilities. Rather than one simple GPS coordinate, they now require the transmission of several coordinates indicating the perimeter of health-care facilities in order to better assess the consequences of targeting military objectives in their proximity.¹⁰⁸

Mistakes or systemic failure?

The legal “details” and discrepancies in implementation of the law identified through the comparison of IHL provisions and domestic military codes, especially the US LoWM, should not be underestimated as a major source of insecurity on the battlefield. This is significantly aggravated by the large number of foreign and national military and security forces who concurrently abide by different domestic legal frameworks and military doctrines on some of the contemporary battlefields occurring under a counterterrorism framework.

In the Kunduz case, the validity of these concerns has been made clear by the contradictory explanations given at the various levels of interaction between MSF and the various allied military forces involved in the Battle of Kunduz. Beyond the initial US assessment stating that the attack was due to a series of human and technical errors, the reading and analysis of the 721 declassified pages of the US AR 15–6 Investigation Report shows that a lot of so-called “errors” are in fact incorrect understanding and implementation of IHL and the military doctrine applicable to forces both on the ground and in the air. The analysis of the Kunduz attack made possible by the Investigation Report shows that the rules and procedures were not at all clear enough amongst the military forces. The first and most direct victims of this lack of clarity were the patients and staff of the Trauma Centre.

According to the United States’ own investigative findings, the Afghan forces on the ground in Kunduz on the night of the attack sought to target a

108 In a meeting between MSF and the Royal Court of the Kingdom of Saudi Arabia on 30 August 2016, this request was made directly to MSF. The minutes of this meeting state: “The Coalition would like that GPS are send [*sic*] with different points delimitating the perimeter to be protected.”

National Directorate of Security building taken over by the Taliban.¹⁰⁹ The AC-130 aircraft that was dispatched to target the building was diverted to Kunduz without receiving a briefing or the no-strike list. The United States claims that during the flight, “the electronic systems onboard the aircraft malfunctioned ..., eliminating the ability of [the] aircraft to transmit video, send and receive e-mail or send and receive electronic messages”.¹¹⁰ When the AC-130 arrived in Kunduz, General Campbell stated that the crew “believed it was targeted by a missile”.¹¹¹ The gunship then increased its altitude, which “degraded the accuracy of certain targeting systems”.¹¹² Although it looked entirely different, the United States claims that the intended target “roughly matched” the MSF Trauma Centre “as seen by the aircrew”.¹¹³ This is on top of the fact that when the crew entered the coordinates of the intended target into their grid location system, the coordinates correlated to an open field. When the AC-130 returned to its optimal altitude the system apparently corrected the coordinates to match with a different building, but “the crew remain[ed] fixated on the physical description of the facility”.¹¹⁴

The United States admitted through its own investigation that the force commander “was unable to adequately distinguish” between the building that the AC-130 intended to target and the MSF Trauma Centre.¹¹⁵ They also admitted that the AC-130 did transmit the exact coordinates of the MSF hospital back to Bagram Airbase before firing on the facility. Bagram Airbase did have access to the no-strike list but did not check whether the AC-130 was about to strike a protected facility. According to a response by the Afghanistan operations deputy chief of staff for communications, General Wilson Shoffner, during the question-and-answer session following General Campbell’s statement, “the investigation found that the actions of the air crew and the special operations commander were not appropriate to the threats that they faced”.¹¹⁶

Analysis of the AR 15–6 Investigation Report clearly shows that military personnel at all levels of the US chain of command – ground force commander, aircrew, headquarters, and the investigating officer – displayed a lack of knowledge or a misunderstanding of the scope and requirements of IHL. The Report shows a failure to implement fundamental aspects of IHL regarding the protection of medical facilities and civilians in Kunduz.

At a minimum, this failure can be explained by inappropriate or unclear writing, understanding and application of rules and procedures pertaining to the conduct of hostilities contained in the US LoWM as well as the Rules of Engagement and Standard Operating Procedures used by the troops on the

109 See US Department of Defense, above note 69.

110 *Ibid.*

111 *Ibid.*

112 *Ibid.*

113 *Ibid.*

114 *Ibid.*

115 *Ibid.*

116 *Ibid.*

ground.¹¹⁷ The absence of the no-strike list on board the aircraft undertaking the attack and the fact that the GPS coordinates of the intended attack were not verified against the coordinates provided for the no-strike list at command level point to a clear default in regards to the duty of distinction and precaution. This seems to be confirmed by the decision of General Campbell to issue a revised Tactical Directive and Targeting Standard Operating Procedure for the US Forces in Afghanistan. These documents emphasize tactical procedures to minimize the risk to civilians and civilian sites.¹¹⁸ However, this hypothesis cannot be verified since most of those documents, including the Rules of Engagement, are classified. A less charitable explanation would be to say that the decision reflects a reckless approach to the protection of civilians in conflict zones prior to the incident.

There are three areas of particular concern arising from the analysis of the AR 15–6 Investigation Report that have implications for the safety of hospitals in war zones. Firstly, the Report makes multiple explicit references to the fact that another hospital had been designated by the United States as a planned target of an operation during the week of 28 September 2015.¹¹⁹ Nowhere in the Report is it indicated that a specific procedure was activated with regard to this hospital within the US chain of command. On the contrary, the report indicates that the US operational plan in which the Kunduz Provincial Hospital was designated as a target (although eventually never actually attacked)¹²⁰ was reviewed by two levels of higher command and an operational law military attorney. The Investigation Report gives no indication as to how the Provincial Hospital may have lost its protected status and therefore became a lawful military target. And while it is mandatory under IHL to issue a warning in order to allow for evacuation or for any military use of the hospital to be ceased, there is no indication that any such warning was given or was going to be given to the hospital.

Secondly, the AR 15–6 Investigation Report admits that in the operation to retake Kunduz from the Taliban, US personnel considered entire swathes of the city to have been taken over by the Taliban and therefore void of civilians and designated as hostile.¹²¹ During the week preceding the attack on the Kunduz Trauma Centre, a US commander explained to their forces that the Taliban controlled the entire west of Kunduz city, and that therefore, everyone west of the city was considered

117 AR 15–6 Investigation Report, above note 2, p 72: “Throughout the investigation, it became clear that many commands have difficulty articulating an understanding of the Tactical Guidance, [Resolute Support] and [Operation Freedom Sentinel] ROE and the basic fundamentals regarding the use of force.”

118 See US Central Command, “April 29: CENTCOM Releases Investigation into Airstrike on Doctors Without Borders Trauma Center”, 29 April 2016, available at: <http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/904574/april-29-centcom-releases-investigation-into-airstrike-on-doctors-without-borde/>; US Department of Defense, “Department of Defense Press Briefing by Army General Joseph Votel”, 29 April 2016, available at: <https://www.defense.gov/News/Transcripts/Transcript-View/Article/746686/department-of-defense-press-briefing-by-army-general-joseph-votel-commander-us>.

119 AR 15–6 Investigation Report, above note 2, pp. 45, 270–271, 423–424, 429, 622.

120 *Ibid.*, p. 622, point 21.

121 *Ibid.*, p. 596: When asked about the purpose of the AC-130 fire, “he stated that the purpose was the ‘overall self-defense of our perimeter’ and that everything west of [redacted] was full of insurgents.”

hostile.¹²² In a briefing from the US ground force commander prior to the battle for Kunduz, he stated that “all civilians have fled and only Taliban remain in the city”, and that “everything is a threat”.¹²³ The assumption that there were no civilians left in Kunduz appeared to give the troops on the ground the mistaken belief that they were not required to follow the basic obligations of distinction, precaution and proportionality under IHL. For example, one of the basic ways forces can distinguish between military and civilian sites is to consult a no-strike list. What is particularly alarming is that the no-strike list – on which the Kunduz Trauma Centre and other protected sites were marked¹²⁴ – was either not available or not consulted by anyone at any level of the US chain of command in the hours leading up to the attack or during the attack itself.¹²⁵

The designation of the entirety of Kunduz City as “hostile” is also reflected in the exchanges between ground forces and the aircrew of the AC-130. The AR 15–6 Investigation Report found that there was no consideration for the possibility that there could be civilians in the compound that was targeted.¹²⁶ It states that the aircrew arbitrarily chose the building that they engaged and that the ground force commander authorized striking the building without confirming the lack of civilian presence. This is worrying considering that, according to the Investigation Report, the Kunduz Trauma Centre was observed and discussed by US forces for an hour and eight minutes before the strike without identifying any “hostile act or demonstrating a hostile intent”.¹²⁷

Thirdly, the AR 15–6 Investigation Report demonstrates that there is a systemic misunderstanding and abuse by US personnel of the rationale of self-defence. Under the controversial US theory of “self-defence targeting”, the targetability of individuals is determined by necessity and proportionality as understood in the *jus ad bellum*, rather than under the IHL principles applicable to the conduct of hostilities.¹²⁸ In accordance with IHL, the obligations of precaution and proportionality still apply in situations of self-defence, which entails limiting the means of warfare to what is necessary to eliminate the threat that troops are facing. However, both the US LoWM and Rules of Engagement applicable to these operations referred to self-defence authority in a way that was misapplied by troops in the field.¹²⁹ In an environment where “everything was considered as a threat”, US forces erroneously applied the logic of self-defence in the *jus ad bellum* sense to their operations. US forces were employing force in a manner much more aligned with the offensive conduct of hostilities while

122 *Ibid.*, p. 254.

123 *Ibid.*, p. 256.

124 *Ibid.*, pp. 32, 77–79.

125 *Ibid.*, pp. 52, 81–82, 424, 620.

126 *Ibid.*, p. 89.

127 *Ibid.*, p. 75.

128 See, for example, G. S. Corn, above note 9, p. 58.

129 US LoWM, above note 52, para. 5.8.3.3.

invoking “self-defence” as a justification.¹³⁰ For example, the Investigation Report shows that in the week preceding the attack on the Trauma Centre, both air and ground forces invoked and applied force under “self-defence” for pre-emptive attacks, notably including deploying close air support from an AC-130 against non-hostile targets of opportunity.¹³¹

This tactical shift from a defensive use-of-force authority to more of an offensive mindset (but still with the justification of self-defence) culminated in the pre-attack process for the strike on the Kunduz Trauma Centre. The attack against the Trauma Centre was justified by the US ground force commander through the invocation of Rules of Engagement pertaining to a self-defence situation, but was conducted in a manner entirely inconsistent with the measured and strictly necessary use of force authorized when acting in self-defence.¹³²

Crucially, although there were significant doubts raised by the aircrew of the AC-130 about the legality of the target they were about to strike due to the fact that no hostile act was observed coming from the Trauma Centre compound, these were ultimately overridden by the fact that the ground force commander invoked self-defence justifications for the attack.¹³³

Furthermore, during the exchanges between the ground and AC-130 aircrew in the minutes before the Kunduz Trauma Centre attack, the US ground force commander referred to “targets of opportunity”, a concept that in this context is legally ambiguous and can be inferred to mean a premeditated strategy to allow for opportune targeting that otherwise falls outside the scope of self-defence authority or approved military targets. This translated into the aircrew confirming the absence of hostile fire coming from the hospital yet ultimately reflecting the ground force commander’s perspective: “I mean when I’m hearing target of opportunity like that I’m thinking you’re going out and you find bad things and you shoot them.”¹³⁴

This may be explained by the ground force commander’s assertion in the AR 15–6 Investigation Report that he believed the National Directorate of Security compound – the supposed intended target that night – was within what he called his “integrated defense bubble”.¹³⁵ In other words, he authorized an attack on a non-

130 AR 15-6 Investigation Report, above note 2, p. 86: “Specific finding. [Redacted] willfully violated the ROE and tactical guidance by improperly authorizing offensive operations. The GFC [ground force commander] understood he had the operational authority to employ fire in self-defense of the [pre-deployment site survey] element against a hostile act under Resolute Support ROE and abused that authority to engage the [ground assault force] target objective with pre-assault fires”; p. 92: “The aircrew was told by the GFC that the building was under Taliban control. They were provided a self-defense authority by the GFC, which was inconsistent with their own observations. They were told to soften the target, suggesting pre-assault fires, but provided a self-defense authority. They were told to strike without any positive identification of a threat.”

131 *Ibid.*, pp. 59–61.

132 *Ibid.*, p. 29.

133 *Ibid.*, pp. 29–30. In response to concerns about the legality of the requested fire, the aircraft commander requested confirmation of the applicable Rules of Engagement; the response given was “collective self-defense ROE”.

134 *Ibid.*, p. 61.

135 *Ibid.*, p. 596. When asked about the purpose of the AC-130 fire, he stated that the purpose was the “overall self-defense of our perimeter”.

hostile target because it was located within this unspecified area that he subjectively considered to be his “bubble” (i.e., perimeter).

Such extensive reference to self-defence to cover an entire military operation indicates a systemic failure to adhere to the framework of IHL.¹³⁶ It ignores the IHL principles of distinction, precaution and proportionality, and the specific IHL framework regulating the protection and the loss of protection of health-care facilities. It raises serious questions about how IHL and the self-defence authority is understood and misused within the US and other forces involved in counter-insurgency and counterterrorism activities in the numerous contexts of international military coalitions. The complexity and uncertainty of the legal framework of such military operations played a central role in the tragedy of Kunduz. On the night of the attack, the US forces were operating with seven different partnered forces from different national contingents.¹³⁷ This complexity is acknowledged in the general findings of the US Investigation Report:

Throughout the investigation, it became clear that many commands have difficulty articulating an understanding of the Tactical Guidance, Resolute Support and Operation Freedom Sentinel Rules Of Engagement, and basic fundamentals regarding the use of force. ... Each unit provided training products which attempted to simplify what is recognized as an exceptionally complex authorities environment. However the investigation also discovered multiple instances of lack of understanding of the authorities. The most acute example was the fact that the tactical commander was unsure of the authorities he was operating under on the night of 3 October.¹³⁸

This was further aggravated by unclear communications between the different forces involved and their failure to refer to a common IHL language.¹³⁹

Conclusion

The attack on the MSF hospital in Kunduz did not happen in a legal vacuum but rather in a complex context of international military and security coalitions in which multiple legal regimes are concurrently applied by the various international and domestic actors. Overlapping areas of responsibility within military coalitions fuel such unregulated overlapping of applicable rules and practices, which is conducive to “mistakes”. This is not specific to the conduct of hostilities in

136 *Ibid.*, p. 93: “The use of military force failed to comply with the plain language of the applicable NATO/USFOR-A tactical guidance, was a departure from the [Resolute Support commander]’s intent, and did not comply with either the governing NATO or [Operation Freedom Sentinel] ROE or [Resolute Support] SOP. [Ground force commander] and aircrew failed to comply with [the law of armed conflict]” (citing AP I, Art. 57(2)(a)(ii)).

137 *Ibid.*, p. 374.

138 *Ibid.*, p. 72.

139 *Ibid.*, pp. 93, 84.

Afghanistan but is a pattern encountered in many other contemporary contexts of armed conflict.

The case of Kunduz illustrates the emergence of a conduct of hostilities that is at odds with the protection of the medical mission. Following the events in Kunduz, MSF engaged in substantial negotiations with Afghan government authorities and US military and civilian authorities as well as the armed opposition in Afghanistan. The questions raised in this article have also been directly discussed with the Afghan and US armies, as well as the armed opposition, in over eighty meetings, including high-level meetings held in 2016. The goal of these meetings was to clarify and reach a common humanitarian and military understanding of these key IHL principles, and more importantly on their practical translation into real wartime contexts and activities. The outcome of these negotiations was the signing of a Humanitarian Special Agreement with the government of Afghanistan and a statement of principles by the US Department of Defense, in which the fundamental tenants of IHL are reasserted in relation to the protection of impartial humanitarian assistance.¹⁴⁰ This has been a critical step, but there remains more to be done.

However, while the case of Kunduz can be seen as the catalyst for such debate, it is important to recognize that there have been numerous other contexts in which attacks on hospitals have not attracted as much attention and subsequent action.

MSF and the ICRC have raised these concerns to the UN Security Council both before and after the adoption of its Resolution 2286¹⁴¹ reaffirming the imperative protection of health-care facilities, staff and patients in contexts of armed conflict. Resolution 2286, unanimously adopted by the Security Council, expressed an international consensus that has not yet changed State practice, with attacks on hospitals continuing unabated. The resolution instructed the UN Secretary-General to make recommendations to operationalize its content. This is in itself a very important step, acknowledging that besides broad consensus and eloquent declarations of principles, specific details with practical effects must be elaborated on. Among those details requiring renewed attention, the Secretary-General identified¹⁴² some inglorious but stubborn facts already experienced by MSF in real-life situations of hospital attacks. The weak incorporation of IHL

¹⁴⁰ Islamic Republic of Afghanistan, Presidential Decree 2774, 10 December 2017, approving the “Host Country Agreement (HCA) signed between Médecins Sans Frontières (MSF) and the Government of the Islamic Republic of Afghanistan”, of which the mentioned Annex refers to the “Memorandum of Understanding between Islamic Republic of Afghanistan and Médecins Sans Frontières for Protection of MSF Operation in Afghanistan” signed on 17 July 2017; US Secretary of Defense, “Principles related to the Protection of Medical Care Provided by Impartial Humanitarian Organizations during Armed Conflict: Memorandum for Secretaries of the Military Departments”, 3 October 2016, available at: www.hsdl.org/?abstract&did=796930.

¹⁴¹ UNSC Res. 2286, 3 May 2016. See also UN, “Security Council Adopts Resolution 2286 (2016), Strongly Condemning Attacks Against Medical Facilities, Personnel in Conflict Situations”, 3 May 2016, available at: www.un.org/press/en/2016/sc12347.doc.htm.

¹⁴² Letter from the Secretary-General addressed to the President of the Security Council, “Recommendations of the Secretary-General, Submitted Pursuant to Paragraph 13 of Security Council Resolution 2286”, UN Doc. S/2016/722, 18 August 2016, available at: www.un.org/ga/search/view_doc.asp?symbol=S/2016/722.

provisions into domestic law and rules of engagement has been explicitly listed in the recommendations of the Secretary-General on the implementation of Resolution 2286.¹⁴³ This document requests member States to undertake comprehensive reviews of their domestic law and adopt any necessary reforms to ensure that they fully incorporate international legal obligations relevant to the protection of medical care in armed conflict. The resolution also recommends that parties to armed conflicts review their rules of engagement, military manuals, tactical directives, standard operating procedures and other similar operational rules or guidelines, and take necessary steps to ensure that such material clearly and adequately prohibits the targeting of protected medical staff, facilities and transport, including the taking of precautionary measures in the planning and conduct of military operations.

Recommendations toward the international investigation of incidents and accountability mechanisms have also been made by the Secretary-General.¹⁴⁴ States have shown a great consensus on this point but it is unfortunately a consensus against the activation of any such mechanisms. MSF has made special and repeated calls for independent investigations by the IHFFC or another independent body regarding the subsequent attacks on its medical facilities in Yemen and Syria in 2016. State reactions have thus far been divided by a simple line: on one side, some States admit their mistakes and claim to undertake their own internal investigations, the reports of which are only partially available;¹⁴⁵ and on the other, there are States that do not openly acknowledge mistakes or engage in internal investigations.¹⁴⁶ Rather than improving the protection of health-care facilities, this situation tends to feed the “propaganda war” regarding responsibility for violations that continue to prevail amongst parties to conflict.

The word “mistake” has appeared recently in the vocabulary of armed conflict. Referring to mistakes requires deeper attention to what makes such mistakes possible and to the role played by humans, but also to procedural and legal errors. The “mistake” argument is not reassuring for humanitarian workers and their organizations. It demonstrates all the more clearly just how vital it is for military alliances and humanitarian actors to reach a clear, simple and unambiguous understanding of the rules applicable to the battlefield, on paper and in praxis. IHL is easily accessible, while rules of engagement that are (besides

143 *Ibid.*, paras 8–9, 19–23.

144 *Ibid.*, paras 6, 28–31.

145 For example, the Joint Incidents Assessment Team responses regarding its investigations of Saudi coalition forces’ violations in Yemen: see Saudi Press Agency, above notes 90, 91 and 93.

146 For example, both the Russian and Syrian governments continued denying allegations of having intentionally targeted medical facilities in Syria in 2015–16, without ever engaging in official reviews of such attacks and sharing their conclusions. Despite the UN Independent International Commission’s recent findings that “Syrian and/or Russian forces continued to target hospitals and medical personnel”, neither the Russian nor Syrian governments have acknowledged responsibility or error. See *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/36/55, 6 September 2017, Summary and p. 13 available at: www.ohchr.org/EN/HRBodies/HRC/IIICISyria/Pages/Documentation.aspx; “Russia Has Denied Carrying Out Air Strikes that Killed Dozens of Civilians in Syria”, *Time*, 28 November 2017, available at: <http://time.com/5038762/russia-denies-airstrike-syria/>.

providing tactical and strategic instructions) supposed to simply translate IHL, domestic military manuals and military doctrines into practical procedures remain confidential. There must be a middle ground on secrecy to ensure that such vital rules are understood in an unequivocal and equal way by all military and civilian actors.

What was at stake in Kunduz goes far beyond Afghanistan. The interoperability of different military and security components requires a clear and simple common understanding of IHL rules governing the protection and loss of protection of medical facilities. Addressing this issue will determine the future ability of MSF and other medical humanitarian organizations to continue providing treatment to all wounded persons in the midst of intense, high-stakes special forces battles. This includes clarification over what kind of identification is sufficient, the warnings to be expected in the event that health-care facilities are considered to have lost their protected status, and the conditions under which protected status of the medical facility, staff and patients could be lost. Now more than ever, medical personnel operating in situations of conflict require a reassertion that medical care provided in accordance with medical ethics is explicitly excluded from any form of prosecution (e.g., for material support to terrorism), and that the IHL framework of protection in relation to medical activities will always prevail, regardless of whether the situation amounts to an IAC, a NIAC, or a counterterrorism or security operation in the context of armed conflict.

A balancing act: The revised rules of access to the ICRC Archives reflect multiple stakes and challenges

Valérie McKnight Hashemi*

Valerie McKnight Hashemi (née Meredith) holds a BSc (Hons) in politics and history from the University of Wales in Aberystwyth and an MA from Essex University. She has been a Delegate for the International Committee of the Red Cross in various contexts and at headquarters since 2006, specializing in the protection of separated families, missing persons and detainees. She currently works as an Archivist at the ICRC's Central Tracing Agency and Protection Division archives in Geneva.

Abstract

The International Committee of the Red Cross (ICRC) revised the access rules to its archives in 2017 for reasons that are complex, fascinating and deeply contemporary to our times. As these rules define when and to what extent the ICRC Archives are made available to the public, their contents are important for the institution as well as for wider audiences. The ICRC must ensure that it can implement its humanitarian mandate to protect and assist victims of armed conflicts and other situations of violence and preserve confidentiality, while sharing its past with the world at large. This article offers a historical overview of the ICRC Archives and

* The author wishes to thank the colleagues at the ICRC who showed interest in seeing this topic discussed and presented to a wider public, for their support and encouragement. The views expressed in this article are those of the author and do not necessarily reflect those of the ICRC. The author can be contacted by email at: vmcmeredith@gmail.com.

the development of their access regulations until their latest revision in 2017. It shows that both today and in the past, the rules of access to the archives have resulted from choices made by the ICRC on how to balance its mandate and long-standing interests with contemporary opportunities and risks related to independent scrutiny.

Keywords: access rules, archives, confidentiality, heritage, history, memory, protection.

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Introduction

The International Committee of the Red Cross (ICRC) revised the rules of access to its archives in 2017. Although this may seem an inconsequential development, it is worthy of attention since the ultimate purpose of archives, including the ICRC Archives, is their communication to internal and external audiences.¹ The interesting questions are: why were the rules revised, and in what ways?

This article focuses on the rules of access to the ICRC Archives and explores different factors that influenced the creation and the content of those rules, both today and in the past. It shows that the archives, and the rules governing access to them, are tools that support the ICRC in fulfilling its humanitarian mandate to protect and assist victims of armed conflicts and other situations of violence. As such, the access rules have been created and adjusted according to the circumstances at the time in order to serve institutional duties and interests, while embracing wider ambitions and opportunities. The access rules have nevertheless maintained the same purpose over time. They are aimed at protecting people, promoting research and preserving memory.

This article starts by recalling the main aspects that define the ICRC as a unique, independent and neutral humanitarian organization, and that influence the management of and access to its archives. It follows with a historical overview of the ICRC Archives and the development of their access rules from the mid-1990s to 2004. It then discusses the main contextual factors that led to the latest revision of the access rules. Finally, the article outlines key elements of the 2017 access rules and closes with concluding remarks. In addition to various

1 For more on the aim of archives, see the International Council on Archives (ICA), Universal Declaration on Archives, adopted by the 36th Session of the General Conference of UNESCO on 10 November 2011, available at: www.ica.org/en/networking/unesco/unesco-officially-endorses-uda (all internet references were accessed in May 2019). “Archives record decisions, actions and memories. [They] are a unique and irreplaceable heritage passed on from one generation to another. ... Open access to archives enriches our knowledge of human society, promotes democracy, protects citizens’ rights and enhances the quality of life. ... We undertake to work together in order that ... archives are made accessible to everyone, while respecting the pertinent laws and the rights of individuals, creators, owners and users.” And see ICA Code of Ethics, ICA, 1996, and Swiss Association of Archivists, 1998, available at: www.ica.org/en/ica-code-ethics. “Archivists should promote the widest possible access to archival material and provide an impartial service to all users” (Art. 6); “Archivists should respect both access and privacy, and act within the boundaries of relevant legislation” (Art. 7).

public sources, a number of internal sources were consulted in the drafting of this article.²

This article aims to be a useful reference for the general public and for colleagues within the ICRC and other organizations. Its purpose is not to justify decisions that were made, but rather to acknowledge them for the long-term record. By providing a historical perspective, the discussion provides an opportunity to put in context the current rules of access of the ICRC Archives by showing how the changing social context prior to 2017 had a comparable influence on the content, and very existence, of these rules.

The article also aims to promote and highlight the value of the ICRC Archives and encourage their use. The ICRC Archives represent an exceptional legacy and a unique source of information about the past, as they cover more than 150 years of the history of humanitarianism and warfare and account for the experiences of millions of people worldwide during armed conflict. The ICRC Archives therefore provide an invaluable source of reflection, debate, inspiration and learning for the present and future.

The ICRC and its archives

On 17 February 1863, Henry Dunant, as secretary, signed off the minutes of the first meeting of the International Committee for Relief to the Wounded, the precursor of the ICRC.³ Still unaware of what would follow but hopeful that Dunant's vision⁴ would bear fruit, the young Committee preserved this document and the ones that followed in order to account for their decisions and actions. Thus, as the ICRC was born, so were its archives.

The ICRC is an independent, impartial and neutral organization with the exclusively humanitarian mission to protect the life and dignity of persons affected by armed conflicts and other situations of violence, and to bring them assistance. The ICRC endeavours to prevent suffering by promoting and strengthening universal humanitarian principles, in particular through international humanitarian law (IHL) and its implementation in national law.⁵

Archives are comprised of records and other documentary materials produced in various formats through any human activity and selected to be

2 According to the current access rules to the ICRC Archives, documents created after 1975 cannot be cited in external publications. Some points are nevertheless paraphrased in the text in order to support the arguments made.

3 ICRC Archives (ICRCA), A PV PL (minutes of committee meeting), 17 February 1863.

4 Henry Dunant, *Un souvenir de Solferino*, Geneva, 1862, re-edited by ICRC, Geneva, 1950–1990. Following his experience of war and suffering during the Battle of Solferino on 24 June 1859, between the Franco-Sardinian Alliance and the Austrian Army, the Swiss businessman Henry Dunant proposed the creation of “voluntary relief societies” in every country to care for the wounded in times of war in conjunction with the formulation of an international principle, sacred and conventional, to support their duties. His vision led to the creation of the ICRC and the foundation of the International Red Cross and Red Crescent Movement (the Movement) and the Geneva Conventions.

5 For more information see ICRC, “The ICRC’s Mandate and Mission”, available at: www.icrc.org/en/mandate-and-mission.

preserved over time in order to attest to what was done in the past. Archives should contain authentic, reliable and complete information that, once made accessible to the public, can offer an authoritative source of knowledge and learning. Archives are an indispensable tool for decision-making through critical and transparent assessment and understanding of the past.⁶ Archives are set within specific regulatory frameworks⁷ derived from international public law, national constitutions, national, federal, State or municipal laws (e.g. cantonal law in a political confederation such as Switzerland), governmental decrees, and/or in the case of private archives, such as the ICRC Archives, internal rules and guidelines. Archivists ensure a professional process of evaluation, preservation, protection, description, exploitation and promotion of archives, according to internationally recognized norms and standards.⁸

Since 1863, the ICRC has created and preserved its unique archives that account for its actions and history as much as they document the history of IHL, the International Red Cross and Red Crescent Movement (the Movement) and the history of warfare over the last two centuries. As living archives, they also preserve the memory of beneficiaries who were assisted by the institution. And yet, the ICRC is first and foremost an operational humanitarian organization and the guardian of IHL. Based on its mandate, it has a duty to ensure the integrity of its humanitarian endeavours, to help ensure that the individuals it serves are protected through the respect of IHL, and to ensure the safety of its staff. Consequently, the institution must manage its archives and the access thereto in light of these priorities. It is useful therefore, as a start, to recall the main aspects of the ICRC that influence the management of and access to its archives.

The ICRC works according to the Fundamental Principles of the Movement⁹ and following a confidential approach.¹⁰ The willingness of parties to armed conflict to develop an open dialogue with the ICRC, to provide it with access to affected persons and to ensure the security of ICRC staff on the ground is dependent on the ICRC's respect of the fundamental principles of neutrality and independence, as well as on its commitment that information exchanged is treated in confidence and is not shared with third parties.

The international community has recognized confidentiality as an essential tool for the ICRC to fulfil its humanitarian mandate. In this respect, the institution benefits from a privilege of non-disclosure of confidential information based on

6 For more on the definition of archives, see ICA, "What Are Archives?", available at: www.ica.org/en/what-archive; Universal Declaration on Archives, above note 1.

7 Taken from Jürg Schmutz, Cantonal Archives of Lucerne, presentation at the Association Suisse des Archivistes, Bern, November 2017.

8 Archivists use common standards relating to the structure and content of archival fonds (e.g. the General International Standard Archival Description) and to other elements such as the producer, the process of archiving, and the processes of indexing and digital preservation (for an explanation of archival fonds, see note 14 below). For more on the responsibilities of archivists, see ICA, "Who Is an Archivist?", available at: www.ica.org/en/discover-archives-and-our-profession; ICA Code of Ethics, above note 1.

9 The ICRC is guided at all times by the fundamental principles of the Movement, which are humanity, impartiality, neutrality, independence, unity, universality and voluntary service.

10 See "The International Committee of the Red Cross's Confidential Approach", *International Review of the Red Cross*, Vol. 94, No. 887, 2012.

international and domestic law.¹¹ This privilege allows the ICRC to effectively work on the basis of a confidential approach and to live up to its commitment to confidentiality, requiring that the confidential nature of its information be respected. Such respect implies that the ICRC and its staff may not be compelled, including by way of testimony, to share information in the framework of judicial processes, public inquiries, transitional justice mechanisms or other proceedings of a legal nature.

The ICRC manages and preserves information, including personal data, relating to all aspects of its work.¹² In order to ensure adequate, legally sound and consistent processing of personal information through its various activities centred on helping individuals, the ICRC has developed a comprehensive framework of rules relating to the protection of personal data.¹³

It comes as no surprise that the key aspects of the ICRC's identity and ways of working have played an important role in discussions about making its archives public. Combined with contextual elements, they represent various stakes and challenges that had to be taken into account when the ICRC assessed opportunities to promote independent scrutiny into its past via the archives. In order to bring us up to 2017, when the rules of access were last revised, this article now takes a historical look at the ICRC Archives and the development of their access policies.

The history of the ICRC Archives

From operational tool to world heritage

As noted earlier, since its creation the ICRC has preserved documents that it has produced and received from parties involved in armed conflicts and other sources. The ICRC Archives cover the organization's history, activities and functioning, and preserve the memory of persons it assisted, spanning over 156 years without any major chronological gap. Institutional archives were constituted

11 See "Memorandum: The ICRC's Privilege of Non-Disclosure of Confidential Information", *International Review of the Red Cross*, Vol. 97, No. 897–898, 2016, available at: www.icrc.org/en/download/file/19024/irc_97_1-2-18.pdf.

12 ICRC activities, be they related to protection, assistance, cooperation, operational and public communication or humanitarian diplomacy, all require and produce information. Since the creation of the institution, different types of information have been collected, centralized, protected, shared in confidentiality, managed in accordance with their quality, quantity and the means available at the time, selected, preserved and constituted as archives. A significant portion of this information comprises personal data relating to individuals who were registered and followed individually by the ICRC such as prisoners of war and missing persons. See note 18 below.

13 ICRC Rules on Personal Data Protection, adopted by the Directorate of the ICRC on 24 February 2015, updated 10 November 2015, available at: www.icrc.org/en/publication/4261-icrc-rules-on-personal-data-protection. The term "personal data" refers to any information relating to an identified or identifiable natural person. This may include an identifier such as a name, audiovisual material, an identification number, location data, online identifiers, or one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of a data subject. It also includes data identifying or capable of identifying human remains.

over the years and throughout the wars of the nineteenth, twentieth and twenty-first centuries, up to today. Photographs joined paper documents in 1863; films arrived in 1921, and audio in the early 1950s. Some paper documents were copied onto microfilm in the 1980s, while electronic filing was systematized in 2010.

The ICRC Archives are constituted in different categories and archival fonds.¹⁴ They include the archives of the decision-making bodies of the organization, the general operations archives,¹⁵ the audiovisual archives and the archives of the various prisoner of war (PoW) agencies, regrouped today as the archives of the Central Tracing Agency and Protection Division.¹⁶

The ICRC Archives preserve the history of the institution and much more, including the history of humanitarian ideals and the humanitarian profession; the development of IHL; the history of captivity in war; the history of war's victims, particularly detainees; and the development of the Movement. The Central Tracing Agency and Protection Division archives hold personal information about families, men, women and children who were assisted by the ICRC, often in collaboration with National Red Cross and Red Crescent Societies around the globe since 1870, mainly to clarify the fate of loved ones and restore contact with one another. These archives constitute a memory of those individuals and attest to the burden they bore as victims of armed conflict or of other situations of

14 An archival fonds is a group of documents that share the same origin. The ICRC Archives are made up of seven main fonds: A/Committee (1854–ongoing); B/General Services (1917–ongoing); C/Central Tracing Agency and Protection Division (1870–ongoing); D/Delegations (1921–ongoing); O/Humanitarian Organizations (1921–ongoing); P/Private archives (1895–1991); V/Varia (1840–ongoing). Documents are managed by field delegations before being handed over to the archives. Finally, the administrative, financial, accounting, logistics and human resources files are managed by their respective units, who hand them over to the archives for evaluation and selection procedures.

15 The current ICRC general public archives cover the history of the institution since its foundation in 1863 until 1975. The periods covered include the initial creation, development and evolution of the Movement (1863–1914); the Schleswig–Holstein conflict between Prussia and Denmark (1864); the Franco-Prussian War (1870–71); the Great War (1914–18); the diverse armed confrontations during the 1920s and 1930s (such as the Greco-Turkish War, the struggle between China and Japan, the Italo-Ethiopian War and the Spanish Civil War); the Second World War (1939–45) and its aftermath; the decolonization process and the Cold War, including the French Indochina War (1946–56); the Korean War (1950–53); the Suez Crisis and the Hungarian Revolution (1956); the Algerian War of Independence (1954–62); the War of Independence of the Belgian Congo and the subsequent civil war that broke out in the country (1960–65); the civil war in Yemen (1962–64); the Middle East conflicts (1967 and 1973); the Nigeria–Biafra War (1967–70); the 1967 Greek military dictatorship; the military coup against President Allende in Chile (1973); and the end of the Portuguese colonial empire (1975). Other topics include the management and corporate transformation inside the ICRC itself; the implementation of IHL (particularly connected to the adoption and application of the Geneva Conventions ratified by the international community in 1864, 1906, 1929 and 1949); and legal and humanitarian improvements discussed during different International Red Cross and Red Crescent Conferences between 1928 and 1975.

16 The first PoW agency was the Basel Agency (1870), followed by the agencies of Trieste (1877) and of Belgrade (1912–13); the International Prisoners of War Agency was active during the First World War (1914–23), followed by the Spanish Civil War; then came the gigantic Central Prisoners of War Agency during the Second World War. This agency continued to respond to needs in the post-war period and in relation to the conflicts that followed the Second World War, such as in Palestine (1948–50). In 1960, the Central Prisoners of War Agency acquired a permanent status within the ICRC, and it has since become known as the Central Tracing Agency. For more information, see Gradimir Djurović, *L'Agence Centrale de Recherches du Comité international de la Croix-Rouge*, Institut Henry Dunant, Geneva, 1981.

violence.¹⁷ As such, they are of critical value to those directly concerned, along with their families and descendants. These are living archives that are still used today to clarify relevant experiences and to support individuals in their quest to obtain some form of compensation. In general, the ICRC Archives have a powerful and far-reaching historical and cultural value in addition to their significance to individuals. As they preserve the memory of millions¹⁸ of victims of war, they constitute a legacy for mankind.

Notions of historical memory and preserving memory for the sake of all humanity in relation to the archives only developed in the ICRC after the First World War. This is not unusual, as archives are not constituted primarily to serve history or the social sciences more generally. A comparatively small number of documents produced acquire a historical value over time. When they do, those documents become part of a broader legacy, beyond the institution that produced them – a national or even a global heritage.¹⁹

The ICRC Archives were initially conceived to account for the institution's humanitarian mandate; in recording diplomatic and State correspondence that was produced in the process, the archives ensured institutional accountability and operational continuity. The ICRC's Archives Commission initially oversaw the basic conservation of and access to the volumes of documents, which were preserved primarily for internal consultation and reference.²⁰

By the time the First World War (1914–18) had come to a close, the ICRC had assembled exceptional records, notably about PoWs.²¹ These documents testified to the experience of millions of persons during the Great War and to its tragic humanitarian consequences. The ICRC came to recognize the importance of its archives for history and for mankind around this time. Plans for long-term conservation of the archives were thus made, reflecting the acknowledgment of the perennial value of this patrimony.

The ICRC intended to centralize the archives relating to its humanitarian action during the First World War in Geneva. First, a request was made to the Danish Red Cross, who had been leading humanitarian activities on the Eastern Front, to send its archives to the ICRC. Second, the ICRC discussed with the municipal authorities of Geneva the opportunity to donate to them its archives

17 As a memory of events and experiences of individuals during different conflicts, the ICRC Archives also have an important value and role in countering theories of historical negationism and revisionism.

18 The Central Tracing Agency archives alone hold 36 million index cards with individual information in relation to the Second World War. Five million index cards relating to the First World War, now digitized, are available at: <http://grandeguerre.icrc.org>.

19 Association des Archivistes Français, *Abrégé d'Archivistique*, Paris, 2004, p. 11: "Ensemble de documents produits dans l'exercice d'une activité pour garder trace de certaines actions, les archives ne sont pas conçues à l'origine pour servir l'histoire. Ce n'est qu'au fil du temps qu'une partie d'entre elles acquiert une finalité historique, après avoir été considérées outil pour le fonctionnement des institutions. Elles deviennent dès lors un élément constitutif du patrimoine national."

20 ICRC, A PV, Commission des Archives, 27 May 1943: "La Commission a vérifié la mise en place ... dans des casiers appropriés des archives de 1863 à 1914 mises à plat; des archives de 1914 à 1918; des rapports des missions qui ont suivi la guerre de 1914–1918. ... La Commission a constaté avec satisfaction les progrès réalisés rendant possible la consultation des archives et a demandé que ce travail soit continué."

21 See note 18 above.

relating to the First World War, for the sake of preserving this information for posterity and providing access to interested families and researchers.²²

These steps echoed a general interest of the municipality of Geneva, as well as of the ICRC and the recently founded League of Nations, to make the emblematic city of peace a site of remembrance for all the victims of the Great War. With the hope that this global conflict would be the last of its kind, there was an ambition to constitute a comprehensive account of that war. A central element of that vision was the long-term conservation of the ICRC Archives and key documents from other sources in Geneva, rendering the city a universal library safekeeping the memory of the Great War for humanity.²³ While several aspects of this plan did not materialize, the recognition of the long-term historical value of the ICRC Archives was established.

The astronomical growth of the ICRC's activities during the Second World War, and in particular of its Central Prisoners of War Agency, gave rise to a large volume of valuable personal and operational data. By the end of the Second World War, moreover, a great part of the world's archives pertaining to the First World War had been partially or completely destroyed, further enhancing the extraordinary value of the well-preserved ICRC Archives.

The ICRC introduced its first filing system in 1942 and created an Archives Division in 1946 to manage what was by then a major institutional and international reference. A general comprehensive filing plan was then adopted in 1950 – the so-called “Pictet Plan”, in reference to its creator, Jean Pictet, who was then director of the Division of General Affairs, which included the archives. The filing plan comprised both thematic and geographic referential numbering.²⁴ It applied to the whole institution until 1972 and to the Archives Division until 1997. This was followed by a similar though more detailed filing plan which included computerized documents, providing new opportunities for indexation. In 2010, the ICRC formally adopted an electronic filing system.²⁵

Public access to the ICRC Archives

Even internal access to information was restricted according to levels of confidentiality attributed to documents. Moreover, since 1925, documents that were considered particularly sensitive at any given period were stored in a safe at ICRC headquarters, a procedure still in practice today.

22 See correspondences in ICRC, First World War General Documents, C G1 A 06-07, 10 April 1918–30 January 1919, “Projets de dépôt des archives de l’agence de la Croix-Rouge danoise au CICR et des archives de l’AIPG à la Bibliothèque publique de la ville de Genève. Inventaire des archives de la direction de l’Agence (série 400)”, including a correspondence dated 12 April 1918 to the Danish Red Cross and a correspondence dated 17 April 1918 to the Municipality of Geneva.

23 See correspondences in ICRC, First World War General Documents, C G1 A 06-07, 10 April 1918–30 January 1919, including a note from the Commission des Archives de la Guerre de la Bibliothèque Publique de la Ville de Genève dated 26 June 1918.

24 The filing plan is known as B AG (*Services généraux – Archives générales*).

25 Filing plan B AI (*Services généraux – Archives institutionnelles*) and since 2010, B RF (*Services généraux – Archives générales des unités, Reference Files*).

The general rule was that public access was not granted; nonetheless, the director of the ICRC's Division of General Affairs could consider individual requests on a case-by-case basis and decide to grant access in certain circumstances. Proposals to consider granting public access to the ICRC Archives based on a certain protection period had been evoked as early as 1943 but were not implemented.

As the ICRC celebrated its centenary in 1963, the institution developed an interest in making its archives available to external researchers, although specifically in areas where it saw an added benefit for itself. In 1973, the practice of considering case-by-case requests for access was formalized by the ICRC Assembly, its supreme governing body, in a first regulations document.²⁶ Case-by-case exceptions were to be granted by the executive committee of the Assembly.

The regulations of 1973 (revised in 1981) gave the ICRC full control over the information selected in the archives and shared with the researchers, and access to manuscripts before publication. While derogation from the general rule of non-disclosure was provided when this suited the interests of the ICRC, the objective was to prevent any prejudice towards the institution and to safeguard the ICRC's confidential approach. Both the (limited) research opportunities and the monitoring measures were therefore means for the ICRC to manage its image and reputation.

The system of *ad hoc* derogations allowing access to select archival materials was however denounced by researchers as being incoherent, partial and subjective. Furthermore, by the late 1970s and 1980s, the social mood began channelling growing criticism towards the ICRC's perceived role and stance during the Second World War, specifically regarding the Nazi genocide and concentration camps.²⁷ Voices were raised across society calling for accountability for the perceived lack of action by the ICRC, and for transparency in relation to its past.²⁸ The institution's reputation was being challenged from several angles.

If prior to this the ICRC had managed its image by mostly keeping its archives out of the public arena, it seemed that maintaining its reputation depended on bringing them to the fore, albeit with due respect for confidentiality. In terms of public image, transparency was becoming a stronger tool than secrecy.

Resonating with social pressure and in order to safeguard its interests and reputation, the ICRC thus changed its attitude towards independent research in its archives in 1979. For the first time, the ICRC gave unlimited access to the archives to

26 ICRC, PV HC A, 20 September 1973.

27 Criticisms were made in relation to the protection of civilian victims of the Nazi dictatorship. It must be noted that Geneva Convention IV of 1949, protecting civilians in armed conflict, had not yet been adopted, despite efforts by the ICRC to make that happen after the First World War. See also "Press Conference given by the President of the ICRC", Geneva, 30 May 1995, available at: <https://blogs.icrc.org/ilot/2018/04/03/press-conference-given-president-icrc-geneva-30-may-1995/>; "Remembering the Shoah: The ICRC and the International Community's Efforts in Responding to Genocide", speech given by ICRC President Peter Maurer, 28 April 2015, available at: www.icrc.org/en/document/rememering-shoah-icrc-and-international-communitys-efforts-responding-genocide-and.

28 Starting in 1945, the ICRC was put under pressure regarding its actions during the Second World War, namely its failure to obtain access to many concentration camps. The Jewish community in Europe and in the United States voiced most criticisms. See, for example, ICRC, Tartakower Case, B G59/7-329. See also Sébastien Farré, "The ICRC and the Detainees in Nazi Concentration Camps (1942–1945)", *International Review of the Red Cross*, Vol. 94, No. 888, 2012.

an independent researcher from Geneva, Professor Jean-Claude Favez, creating a precedent. Favez's study about the role of the ICRC in Nazi deportations during the Second World War, published in 1988, was acclaimed by the public as a sign of transparency and accountability by the ICRC with regards to its past.²⁹ The door was now open, and requests came flowing in from other researchers and institutions.³⁰ They asked for access to the archives for independent research, especially on the Second World War period.

The world wanted answers regarding the accountability of States and institutions during the Second World War. The ICRC showed that it understood this significant social, cultural and historical outcry and wanted to contribute to it as part of its humanitarian mission. It set out to formally discuss more decisively than ever before the need to have a public access policy for the wealth of archived material that it possessed since 1863.

The newly appointed president of the ICRC, Cornelio Sommaruga, sensing what was to come, gave the institution the opportunity to reform its archiving system in the late 1980s. The ICRC's first archiving policy was approved by its Assembly on 10 May 1990. It confirmed the mandate given to the Archives Division to organize, preserve and communicate the archives in line with principles of modern archiving. It recognized the ICRC Archives as a world heritage as well as a cultural heritage of Switzerland.³¹ It further underlined that the institution had, by virtue of its humanitarian mandate, a moral obligation to preserve this legacy and to be accountable for it to humanity. Crucially, the policy proposed developing rules of access for the archives.

The ICRC Assembly adopted the first access policy for the archives in its 17 January 1996 session. The 1996 rules of access provided that the general public had access to "public archives" – that is, files that had been inventoried by archivists so as to become available for research.³² Archives were classified as "public" after a protection period meant to ensure that public consultation did not prejudice the ICRC or the persons that it was mandated to protect, or any other public or private interest.³³ Protection periods were of fifty years for general archives and 100 years for material that contained mostly personal data.³⁴

It is worth noting that some within the ICRC had proposed even longer protection periods. However, those arguments were rejected and the ultimate

29 Jean-Claude Favez, *Une mission impossible? Le CICR, les déportations et les camps de concentration nazis*, Editions Payot, Lausanne, 1988.

30 E.g., the Yad Vashem Institute in Jerusalem and the United States Holocaust Museum in Washington. See also Arieh Ben-Tov, *Facing the Holocaust in Budapest: The International Committee of the Red Cross and the Jews in Hungary, 1943–1945*, Kluwer Academic Publishers, Dordrecht, 1988.

31 The ICRC's archives relating to the International Prisoners of War Agency during the First World War were granted UNESCO World Heritage status in 2007. See UNESCO, "Archives of the International Prisoners of War Agency, 1924–1923", available at: <https://tinyurl.com/yy7h58x3>.

32 ICRC, Rules Governing Access to the Archives of the International Committee of the Red Cross, adopted by the ICRC Assembly on 17 January 1996 and revised by the ICRC Assembly on 29 April 2004 (1996–2004 Access Rules), Art. 6.

33 *Ibid.*, Art. 6.

34 *Ibid.*, Art. 7. Information from individual files could, however, be shared after fifty years for autobiographical or biographical purposes via the services of an archivist.

protection periods corresponded to similar practices in Swiss and European legislation and those found in most Western democratic States at the time.³⁵ Some of these same files were already available to the public via other archives and historical research centres.

General archives from 1863 to 1950 were made accessible to the public in full, including all information that had been classified as confidential when it was created, or that had been stored in the safe at ICRC headquarters. The issue of data protection was addressed by requiring a signed, written statement from each person coming to consult the archives acknowledging that they were bound by Swiss law regarding the adequate use of personal data, with the aim of respecting the integrity and privacy of individuals concerned.

As one can see, in 1996 the first access policy for the ICRC Archives was already a balancing exercise. It was a political tool used to safeguard long-standing institutional duties and interests related to the protection of victims and the safety of staff while upholding integrity, confidentiality, accountability and the reputation of the organization. The access policy also provided a means to achieve wider contemporary ambitions related to transparency, a moral duty of memory towards victims, independent and critical research, allowing access to a world heritage, data protection issues, and so on.

The impact of opening the archives to the public

Under these new policies, information managed by the ICRC might be confidential and subject to restricted access; at the same time, some information might be openly shared with the public after the requisite number of years. Far from suffering from this apparent contradiction, the institution thrived on this practical combination of interests.

In the 1990s, the time was ripe for transparency in many parts of the world, including through the promotion of greater access to archives.³⁶ Several democratic States and organizations reflected this trend by giving wider access to their archives,³⁷ even though information and its management were increasing in

35 Jean-François Pitteloud, “Un nouveau Règlement d’accès ouvre les archives du Comité international de la Croix-Rouge à la recherche historique et au public”, *International Review of the Red Cross*, Vol. 78, No. 821, 1996, p. 595. The protection delays for consulting personal data in cantonal archives in Switzerland vary between fifty years or ten years after the death of the person concerned (e.g., canton of Lucerne, Archivgesetz, 16 June 2003) to 100 years or ten years after the death of the person concerned (e.g., canton of Vaud, Loi sur l’Archivage, 14 June 2011).

36 ICA, “ICA: 70 Years of International Influence – Timeline”, 9 June 2018, available at: www.ica.org/en/international-council-archives-0/ica-70-years-of-international-influence-timeline. From 1993 onwards, the ICA developed strong cooperation with the Council of Europe “to promote the modernisation of archives in Europe”. The ICA also promoted more extensively the importance of access to archives. In 1994, the ICA published its first standard, the International Standard on Archival Description (General), which was rapidly adopted by archivists around the world, including at the ICRC. In 1996, the ICA adopted its Code of Ethics for archive professionals across the world.

37 National legislations and policies of international organizations relating to archives generally evolved in the 1990s towards a trend of decreasing retention periods. The Swiss Federal Archives followed the principle of a thirty-year general retention period and fifty years for personal data, while the United Nations adopted a twenty-year general protection period.

stakes and complexity; the public interest was particularly tuned towards accountability and transparency.

For example, Switzerland's role during the Second World War underwent a critical reappraisal as the country faced criticisms for its links with the German National Socialist regime. There was such pressure to provide answers that in 1996 the Swiss Federal Parliament voted to set up an Independent Commission of Experts to research relevant issues and publish several reports. In 1998, a report was published on gold transactions in Switzerland during the Second World War; a report on refugees in Switzerland related to the Nazi regime came out in 1999.³⁸

The ICRC was, to its advantage, a few years ahead of others in this domain.³⁹ As the Swiss independent research project was unfolding between 1996 and 1999, the ICRC was drawn into many debates on pertinent matters. The organization found itself in a strong position to answer sensitive questions, thanks to the 1996 rules of access to its archives and to the hundreds of researchers who had since published the findings of their research.

Pointing to such concrete signs of transparency and an evident will to be accountable to the victims it served, and to the world at large, provided the ICRC with its best arguments. Moreover, open dialogue and partnerships established with other archive centres and institutions⁴⁰ were further constructive steps towards transparency taken by the ICRC.

The evolution of the rules of access to the archives, 2004–16

The rules of access to the ICRC Archives were never meant to be set in stone. Their initial content, indeed their very existence, was due to the fact that they served the ICRC's interests in a particular time and circumstances. The ICRC had a sustained and strategic interest in capitalizing on the world's positive response to the opening of its archives in 1996. Thus, in 2004, when the second set of materials from the archives (concerning the period from 1951 to 1965) was being declassified, the ICRC Assembly decided to modify the 1996 access rules by reducing the retention period on public access from a period of fifty years to a general period of forty years, and from a period of 100 years to a period of sixty years for documents containing mainly personal data.⁴¹ According to the ICRC's deputy archivist at the time,

38 Commission Indépendante d'Experts Suisse – Seconde Guerre Mondiale (ed.), *La Suisse et les transactions sur l'or pendant la Seconde Guerre Mondiale*, Berne, 1998, and *La Suisse et les réfugiés à l'époque du national-socialisme*, Berne, 1999.

39 See, for example, a recent study by the Dutch Red Cross on its actions during the Second World War: Regina Grüter, *Kwesties van leven en dood: Het Nederlandse Rode Kruis in de tweede wereldoorlog*, Uitgeverij Balans, Amsterdam, 2017.

40 For example, the Archiwum Poslki Podziemnej and Commonwealth Ex-Services Association of Pakistan.

41 See 1996–2004 Access Rules, above note 32, cited in Jean-François Pitteloud, "The International Committee of the Red Cross Reduces the Protective Embargo on Access to Its Archives", *International Review of the Red Cross*, Vol. 86, No. 856, 2004, pp. 959–962. These rules later included audiovisual material, most of which was and is created with a view to becoming public.

[by] reducing the embargo period, the ICRC is seeking to comply with current trends regarding public access to archives and is at the same time confirming its policy of openness and transparency as defined in 1996. It is also reasserting its wish to make the history of the ICRC known.⁴²

It is interesting to note that this public notice did not mention the ICRC's responsibility towards the integrity of its operations and the protection of victims of armed conflict or other situations of violence. It goes without saying that the protection periods, though shortened, aimed to continue to safeguard these duties;⁴³ it seems that the issue was simply taken for granted. The centre of the public stage was taken by concerns of openness and transparency, and apparently these were the focus of the ICRC and the public discourse.

In the years following 2004, the ICRC pursued its humanitarian responses in conflict-affected areas in a world undergoing rapid transformations in key sectors such as information and communication technology. The use of the Internet and social media boomed over the following decade.⁴⁴ Digital documents became the norm at the ICRC, and systematic electronic filing was adopted in 2010, alongside the continued use of paper documents.

Despite the new type of world that was dawning in terms of developments in information technology, in 2011 the ICRC Assembly re-confirmed its prior assessment that forty- and sixty-year protection periods, respectively, were adapted to the institution's interests. The protection periods were still deemed sufficient to reasonably exclude the possibility that declassified material would prejudice the ICRC, the affected persons it has the duty to protect or any other private or public interests. In 2011, the ICRC Assembly confirmed that general archives would be opened by chronological portions of ten years each.⁴⁵

Thus, in principle, the 1996 rules of access (as revised in 2004) would apply when the next ten-year period of general archives (from 1966 to 1975) was to be made public in 2015. In preparation, these archives were inventoried, so as to be more accessible for researchers. During this inventory phase, the ICRC also conducted an assessment of potential risks related to certain archives being made public at that time.⁴⁶ As a result, some files were in effect transferred into the

42 J.-F. Pitteloud, above note 41, p. 958.

43 1996–2004 Access Rules, above note 32, Art. 6: “The general public has access to archives classified as ‘public’ after a set period of time, to ensure that such access will in no way be detrimental to the ICRC, to the victims that it is its duty to protect, or to any other private or public interests requiring protection.”

44 “Global social networking audiences surpassed 2 billion users in 2016. The most popular social network worldwide is Facebook; with 1.86 billion monthly active users by the end of 2016.” Statista, “Daily Social Media Usage Worldwide 2012–2018”, available at: www.statista.com/statistics/433871/daily-social-media-usage-worldwide/.

45 By contrast, the individual archives of the Central Tracing Agency and Protection Division have instead a yearly opening time, based on the applicable protection period. See the document “Consultation of Agency Archives”, a procedure relating to the Central Tracing Agency archives as defined in the 2017 access rules, available at: www.icrc.org/sites/default/files/wysiwyg/About/history/access_to_the_icrcs_agency_archives_2017.pdf.

46 This was done taking into account the ICRC Rules on Personal Data Protection, above note 13, which were adopted in 2015.

category of documents to be declassified only after sixty years (rather than forty). This was made public, and each document that had been made unavailable for consultation for an additional twenty years was outlined in the public inventory in a transparent way.

The period of the ICRC general archives covering 1966 to 1975 was opened in June 2015, to the great interest of researchers and the general public. It is now possible to delve freely into fascinating reports relating to ICRC operations in the Middle East, Cyprus, South America or the Nigeria–Biafra conflict, among other contexts.⁴⁷

Having opened this latest section of its archives in 2015, the ICRC was prompted to engage in a review and analysis of the complex features that define the contemporary world, sensing that this exercise was becoming essential to adequately manage access to the archives in the future. Considerations that have always been key for the ICRC, such as ensuring confidentiality, security and the protection of personal data, now found themselves intertwined with several challenging realities, whether in relation to advances in information technology, ongoing armed conflicts or security concerns.⁴⁸ Reflection on these interconnected elements took place within the institution in 2015 and 2016, leading to a revision of the rules of access to the ICRC Archives in 2017.

The article will now look at the key elements that influenced the revision process. It will then lay out the new rules of access to the ICRC Archives, which aim to balance these multiple stakes and challenges.

Factors that influence today's access to the ICRC Archives

Ensuring confidentiality in operational settings and legal proceedings

Nowadays, many armed conflicts are considered to be more complex and last over several decades. They are colloquially known as protracted conflicts,⁴⁹ in which what is at stake for the population, the parties to the conflict and the ICRC

47 See above note 15. Today, the ICRC receives up to 250 external researchers per year at its headquarters in Geneva who work on the general public archives during an average of 600 days of consultation. Archivists respond annually to some 3,000 written requests from families of ex-PoWs and the public regarding both general and individual archives, which reflects only part of the total demand. The great majority of individual requests relate to the Second World War, though genealogical research relating to the First World War continues to be an important field of interest. Among the requests received yearly by the ICRC's individual archives, approximately 65% concern the Second World War, 25% concern the First World War and 10% concern conflicts since 1948. The majority of requests about the Second World War concern French PoWs, followed by British/Commonwealth, German and Italian PoWs. In 2018, the ICRC's website containing the individual records of prisoners of war during the First World War received more than 145,000 visits (see above note 18). Finally, the unique audiovisual archives of the ICRC also reveal many gems: see ICRC Audiovisual Archives, available at: <https://avarchives.icrc.org/>.

48 See "Message from the President of the ICRC", in ICRC, *Annual Report 2017*, Geneva, 2018, pp. 8–9 (ICRC 2017 Annual Report), available at: www.icrc.org/en/document/annual-report-2017.

49 ICRC, *Protracted Conflict and Humanitarian Action: Some Recent ICRC Experiences*, Geneva, 2016.

remains critical over a long period of time.⁵⁰ Examples include the armed conflicts and their decades-long humanitarian consequences in Colombia, Afghanistan and Iraq.⁵¹ Information relating to these types of conflicts, the authorities or armed groups involved and the needs of affected populations is likely to remain sensitive over many years. Keeping in mind the necessity of the ICRC's confidential approach to gain trust from authorities and access to beneficiaries, protecting confidentiality over longer periods may be required, meaning that the protection period effectively imposing an embargo on access to the ICRC Archives would need to be adjusted.

Whether armed conflicts are long or short, suspected war criminals may be prosecuted several decades on, for which information and testimonies are required. Transitional justice mechanisms emerging in post-conflict situations may also require information for judicial bodies and reconciliation processes.⁵² As mentioned before, the ICRC's confidential approach requires it not to share information forming part of bilateral and confidential dialogue with authorities and parties to armed conflict in the context of legal proceedings. The international recognition of the ICRC's confidential approach has further led to the recognition of the ICRC's privilege of non-disclosure of confidential information, which protects ICRC confidential information from being used, and ICRC staff from being compelled to testify, as part of legal proceedings.⁵³ It is therefore important for the ICRC to ensure that information contained in its classified archives is not used in such proceedings. Revised protection periods for access to the ICRC Archives are therefore also meant to address this issue, bearing in mind that the ICRC has no direct control over the use of the information once it is made public.

50 "Protracted armed conflicts are characterized by their longevity, intractability and mutability. This is not a new phenomenon, but some particular trends seen in today's protracted conflicts, such as emerging technologies, pervasive media coverage, and so on, are specific to our times. The lack of respect for international humanitarian law is a major source of suffering in protracted conflict. Due to the prolonged nature of these conflicts, they may fuel a cycle of revenge, undermining respect for the law. ... The needs of affected people are wide-ranging and extend over many years, sometimes even generations. As a result, humanitarian agencies need to adapt their programming to respond both to urgent and long-term needs. Effective operations in protracted conflicts are an institutional priority for the ICRC." ICRC, "Protracted Armed Conflict", 27 June 2017, available at: www.icrc.org/en/international-review/article/protracted-armed-conflict.

51 Colombia has experienced violence for more than fifty-four years; the ICRC has been working there since 1980. Iraq has experienced violence for more than fifty years; the ICRC has been working in that context since 1980. Afghanistan has experienced violence for more than forty years; the ICRC has been working there since 1978. For more details, see the exhibition "Stretched" at the Humanitarium, ICRC Headquarters, Geneva.

52 The ICRC promotes the right to justice and the right to know of victims of conflicts through transitional justice mechanisms and tribunals. It will act, for example, as a neutral intermediary and promote the issue of clarifying the fate of missing persons. It will not, however, share information in legal proceedings, in line with its confidential approach and privilege of non-disclosure, except in particular cases where the ICRC decides to waive its testimonial immunity. See "Memorandum", above note 11; Elem Khairullin, "5 Things that Make ICRC Confidential Information Unsuitable for Legal Proceedings", *Humanitarian Law and Policy Blog*, 31 January 2019, available at: <https://blogs.icrc.org/law-and-policy/2019/01/31/5-things-make-icrc-confidential-information-unsuitable-legal-proceedings/>.

53 For more information, see "Memorandum", above note 11.

Prior to being made public, ICRC documents are classified according to a scale ranging from “strictly confidential” to “confidential” to “internal”. When sections of archives are declassified, however, this should normally include the entirety of their contents. This means that, at a certain point in time, confidential documents are changed to a declassified status. The protection periods should therefore enable files to be made accessible to the public at a given time in their entirety, while ensuring that ICRC operations are not jeopardized.

Developments in technology and information management: The protection of personal data and the right to be forgotten

Current trends point to the dematerialization and, its corollary, the digitization of human activities. Data made available online is naturally more widely accessible than in paper format. Digitizing archives that were originally produced in a non-digital format is the favoured option for conservation and communication across borders, notwithstanding the complexity, length of time and cost of the exercise. Posting data online presents as many opportunities as risks, which are particularly prevalent with regards to personal data. Digitization brings additional challenges related to access and security. Managing access rights and the security of online data is a global concern today.⁵⁴

Digital information that includes personal data is being shared between people more than ever before via the Internet. Globally, people are becoming critically aware of the risks to privacy associated with this trend. Overall, the mood has shifted in just a few years from a desire to champion transparency and openness to a more individual-centred concern to protect privacy (despite the fact that the wide sharing of information simultaneously continues). Regional and national legal frameworks have been put in place with a view to protecting individuals’ right to privacy.⁵⁵

54 See, for example, “Switzerland Unveils New Measures to Fight Cyber Attacks”, *The Local*, 28 August 2018, available at: www.thelocal.ch/20180828/switzerland-unveils-new-measures-to-fight-cyberattacks. As we know, new technologies also allow for the widespread sharing of confidential data, through platforms such as Wikileaks. The ICRC is confronted with this risk and has experienced such incidents in recent years. While the past is less of a concern, it is recent or ongoing operations which could be put at risk if confidential information becomes public.

55 For example, EU data protection law: see Directive 95/46/EC, 1995, Art. 2(a), according to which “personal data” means “any information relating to an identified or identifiable natural person (‘data subject’); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity”; and Art. 8(1), according to which “sensitive personal data” are “personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and data concerning health or sex life”. Sensitive personal data are special categories of personal data that are subject to additional protections. See Detlev Gabel and Tim Hickman, “Chapter 5: Key Definitions – Unlocking the EU General Data Protection Regulation”, *White & Case*, 5 April 2019, available at: www.whitecase.com/publications/article/chapter-5-key-definitions-unlocking-eu-general-data-protection-regulation. See also, for example, the national Swiss law in this regard: *Loi fédérale sur la protection des données (LPD)*, 19 June 1992, available at: www.admin.ch/opc/fr/classified-compilation/19920153/index.html.

The ICRC Rules on Personal Data Protection, which were adopted in 2015, are applicable to all ICRC operations and activities whenever personal data are processed, including to its archives.⁵⁶ The rules of access to the ICRC Archives therefore necessarily reflect this framework.

Moreover, the ICRC believes that protecting individuals' personal data is an integral part of its mandate to protect their life and dignity. In order to offer guidelines in this important contemporary field of work, the ICRC published a *Handbook on Data Protection in Humanitarian Action* in 2017.⁵⁷

Clarifying the relationship between individuals and data pertaining to them promises to be a long and winding journey. It is likely to become the main highway of our reality, both in times of peace and conflict. Ongoing debates in various circles reflect this complexity – for example, in relation to the right to be forgotten,⁵⁸ which is supported by some and criticized by others as a challenge to freedom of expression and the right to know.⁵⁹ The right to be forgotten allows individuals to request that certain data relating to them be deleted or removed from internet search engines when the data's presence on the latter is perceived to harm their lives.⁶⁰ One risk is arguably creating an open door to “rewriting history” in a selective way, where key information about the past is erased. Those in favour of the concept promote instead the right of individuals to develop their life in the present without being hindered by sensitive information resurfacing that specifically relates to their own past. A related contemporary concept is the right to request rectification of one's personal data in open files and archives.⁶¹

Any private or public institution that holds archives is confronted with dilemmas and debates surrounding these rights, including the ICRC. As mentioned earlier, archivists are committed to respecting the code of ethics and professional standards in the practice of their profession. They preserve the memory of individuals and of society through the conservation of archives and their communication to the public. It would thus appear fundamentally contrary to archival ethics to change or remove information from archives, since this would affect their integrity. In this debate, the perspectives and duties of archivists have been highlighted.⁶² That being said, those who manage archives

56 ICRC Rules on Personal Data Protection, above note 13.

57 Christopher Kuner and Massimo Marelli (eds), *Handbook on Data Protection in Humanitarian Action*, ICRC and Brussels Privacy Hub, Geneva, July 2017.

58 See, for example, Valérie Junod, “Droit à l'oubli, archives numériques et respect de la vie privée”, *Le Temps*, 29 August 2018, available at: www.letemps.ch/opinions/droit-loubli-archives-numeriques-respect-vie-privee; Paul Chadwick, “Should We Forget about the ‘Right to Be Forgotten?’”, *The Guardian*, 5 March 2018, available at: www.theguardian.com/commentisfree/2018/mar/05/right-to-be-forgotten-google-europe-ecj-data-spain.

59 See, for example, Owen Bowcott, “‘Right to Be Forgotten’ Could Threaten Global Free Speech, Say NGOs”, *The Guardian*, 9 September 2018, available at: www.theguardian.com/technology/2018/sep/09/right-to-be-forgotten-could-threaten-global-free-speech-say-ngos.

60 See General Data Protection Regulation (GDPR), EU 2016/679, 2016, “Right to Be Forgotten”, available at: <https://gdpr-info.eu/issues/right-to-be-forgotten/>. A definition of this concept by Oxford Research Encyclopedias is available at: <https://tinyurl.com/y4vcolkp>.

61 *Ibid.*, Art. 16, “Right to Rectification”, available at: <https://gdpr-info.eu/art-16-gdpr/>.

62 “The scope and practical application of the right to be forgotten and the right to erasure ... have been the subject of heated debate, and these rights are not absolute. Obligations on data controllers to erase

today must integrate new norms and standards relating to the variety of rights of individuals concerning their data.

Since the ICRC Archives primarily contain personal data, they are at the front line of these contemporary debates. Furthermore, the nature of the ICRC's humanitarian mission to protect victims of armed conflicts and other situations of violence implies that the ICRC acknowledges these concerns and will find ways to protect individuals, their rights and their data.

Overall, the digitization of its operational activities, and of key sections of its archives, is currently a discussion point at the highest level of the ICRC. As the future points towards a more comprehensive digitization strategy for the institution, the challenges, risks and opportunities that will accompany it, such as issues around the protection of personal data, were considered in the discussion on the rules of access to the ICRC Archives.

Ensuring security and assessing risks

As discussed above, ensuring the protection of people affected by armed conflict and violence and the security of its staff are the highest priorities for the ICRC, even though these tasks involve major challenges for the institution today. Contemporary conflicts and other situations of violence are often complex because of the many different actors and vested interests involved. Compounding this, situations where IHL is not respected can create a volatile environment in which it is all the more difficult for the ICRC to ensure these priorities.⁶³

The ICRC is critically aware that stakes are high in terms of ensuring that no further harm is done to beneficiaries of its assistance and protection programmes, and ensuring the safety of its staff on the ground when managing trust and dialogue with parties to a conflict.⁶⁴ No effort can be spared by the institution in order to be perceived as a neutral and independent humanitarian actor and thereby gain the trust of parties to armed conflicts, including by ensuring confidentiality. In certain contexts and with certain armed groups, however, this is an arduous task; results are often imperceptible and are measured

personal data and inform third parties do not apply 'to the extent that processing is necessary' for various reasons, including: Exercising freedom of expression and freedom of information; Complying with Union or member state law; Performing a task for the 'public interest ... in the area of public health' or 'for archiving purposes [or] scientific or historical research purposes,' or 'in the exercise of official authority vested in the controller'; [and] Establishing, exercising, or defending legal claims." Müge Fazlioglu, "Top 10 Operational Responses to the GDPR – Part 7: Accommodating Data Subjects' Rights", 8 March 2018, available at: <https://iapp.org/news/a/top-10-operational-responses-to-the-gdpr-part-7-accommodating-data-subjects-rights/>.

63 See ICRC 2017 Annual Report, above note 48. Also see, however, the IHL in Action database on instances of respect for IHL by parties to conflict, available at: <https://ihl-in-action.icrc.org/>.

64 Among others in recent times, "[s]even ICRC staff members were killed in two incidents in northern Afghanistan [in 2017]. Six died in an attack on an ICRC aid convoy in February; two others travelling with the convoy were abducted and released seven months later. The seventh staff member was shot and killed at an ICRC-run physical rehabilitation centre in September." ICRC 2017 Annual Report, above note 48.

in the long term. Risks must be mitigated to the extent possible in both short- and long-term perspectives.

In relation to the rules of access to the ICRC Archives, which define to whom and when access to information will be granted, there is a need to assess security risks decades in advance. The objective is to preserve records of the past intact and make them accessible to public scrutiny as soon as this no longer involves security risks for individuals.

This being said, assessing risk is itself a challenge. Risks are to a large extent contextual and temporal. One issue that could be sensitive today may no longer be of concern twenty years on; or, on the contrary, what seems to be of less importance today may unexpectedly become a source of risk for individuals concerned in the future. There also need to be safeguards against subjective factors influencing the assessment, such as concerns for an individual's personal reputation.

Once archives are made available to the public, the institution must accept responsibility for what was said, written or done in the past and stand ready to explain how contextual circumstances prompted certain attitudes, choices of words or courses of action. There is dignity in accounting for one's past, a gesture that requires courage and humility but leads to a positive impact.

The new rules of access to the ICRC Archives

The discussions that took place within the ICRC in relation to the rules of access to its archives between 2015 and 2016 brought together multiple perspectives, from the operations and programme managers to the top hierarchy of the institution, to the archivists and historians. The various elements discussed in the article so far were laid out as a puzzle, presenting the challenge to identify adequate rules of access and protection periods that would ensure the security and integrity of the ICRC's humanitarian operations, maintain its reputation as a neutral, impartial and independent humanitarian actor, and promote transparency and accountability. The result of the discussions was a revised set of rules to govern access to the ICRC Archives in 2017.

Overall, the revised rules of access to the ICRC Archives⁶⁵ have similar objectives to their precursors: to continue to protect people, promote research and preserve memory. As stated, their aim is to ensure that the ICRC Archives "are preserved, shared and protected and that they are consulted in accordance with applicable standards, in particular regarding the protection of personal data, while safeguarding the integrity of the ICRC's work and the individuals and communities concerned".⁶⁶

65 ICRC, Rules Governing Access to the Archives of the International Committee of the Red Cross, adopted by the ICRC Assembly on 2 March 2017, in force since 1 April 2017, available at: www.icrc.org/sites/default/files/wysiwyg/About/history/rules_access_icrc_archives.pdf.

66 *Ibid.*, Art. 1.

The ICRC Assembly decided to maintain differentiated protective periods but increased them both by ten years each. The Assembly also reserved the right to extend either period in case of need.⁶⁷ The rules include the possibility of exceptions and derogations.

General archives can now be consulted after fifty years; archives that contain mostly personal data can be consulted after seventy years.⁶⁸ This being said,

[a]rchives digitized by the ICRC may be published online 90 years after the date of the last document included in the file. The ICRC nonetheless reserves the right to publish archives online early, namely 70 years after the date of the last document. Online publishing of ICRC archives digitized by third parties requires specific authorization.⁶⁹

The Assembly retains the right to extend the protection period for documents “containing information whose disclosure would violate the protection of personal data or jeopardize the safety and dignity of the individuals and communities concerned or the integrity of the ICRC’s work”.⁷⁰

Exceptional early individual access is granted to “any person who was the subject of individual monitoring as part of ICRC protection activities”; such persons are allowed to obtain information about themselves contained in the archives of the Central Tracing Agency, in line with the ICRC Rules on Personal Data Protection. The same applies to staff of the ICRC, who are entitled to access their personal file in the human resources archives at any time.⁷¹

Special access to certain archives may be authorized prior to their official opening for research purposes, based on a number of conditions and ensuring that the protection of personal data is guaranteed.⁷² The revised rules also recall that “[a]ny use of ICRC archives that jeopardizes the dignity or physical and mental integrity of the human person is strictly prohibited” and that “all forms of commercial use of ICRC archives are strictly forbidden”.⁷³

According to the rules of access, the next section of the ICRC general archives, covering the period from 1976 to 1985, will be opened to the public in 2035. Since January 2019, the ICRC’s Central Tracing Agency archives, containing mainly individual data, have been accessible by the public up to the year 1948.⁷⁴

The 2017 revision of the rules of access to the ICRC Archives can be seen as a positive sign from the institution, since it arguably reflects a sense of responsibility, perspicacity and pragmatism in the face of a reality made up of sometimes contradictory interests, stakes and challenges.

67 This possibility existed in the past rules but is not as explicit as in the new ones.

68 *Ibid.*, Art. 5.

69 *Ibid.*, Art. 12.

70 *Ibid.*, Art. 8.

71 *Ibid.*, Art. 6.

72 *Ibid.*, Art. 7.

73 *Ibid.*, Art. 11.

74 See “Consultation of Agency Archives”, above note 45.

This is the first time since the initial access policy to the ICRC Archives was drafted in 1996 that the protection periods have been raised. While this may reflect certain trends and challenges in today's world, it does not necessarily reflect increased embargo periods of archives at other institutions.⁷⁵

It is notable that the ICRC's 2017 rules of access contain an exception allowing the ICRC Assembly to bypass the defined protection periods and extend them for certain files, when deemed necessary. This could reflect that the institution is maintaining a form of ultimate control over access to some of its archives. This is the fair prerogative of a private institution, and the objectives presented are justified. Still, one could ask what specific criteria such a decision would be based upon, in order to remain objective and consistent over time. If previously unforeseeable risks were suddenly to surface, it is likely that a renewed internal discussion would follow, similar to the one held in 2016, aimed at reaching a new balance between transparency and accountability on the one hand, and the ability to provide protection and assistance to affected people and ensure the safety of ICRC staff on the other.

Conclusion

This article has outlined the history of the ICRC Archives and the development of the rules that govern their public access. It was demonstrated that both in 2017 and in the past, the rules of access to the archives resulted from a choice made by the ICRC on how to balance its duties and long-standing interests with contemporary opportunities and risks related to independent scrutiny. Overall, the access rules have continually aimed at protecting people, promoting research and preserving memory.

Archives have been a part of the ICRC since the day of its creation. More than a useful appendix, they are fully constitutive of this humanitarian institution as a comprehensive historical and living repository. The archives, and the rules that govern access to them, also support the ICRC in fulfilling its humanitarian mandate. The ICRC is under no legal obligation to communicate its operational archives to the public, but it has recognized over time that it has a moral duty to do so, given their unique historical and cultural value as well as their importance for individuals, as long as fundamental institutional requirements are also fulfilled.

The latest revision of the rules of access to the ICRC Archives arguably serves as a reminder of what the institution is confronted with today more globally: the challenge of decrypting multilayered dynamics and shifting front lines of armed conflicts and other situations of violence, but also in relation to new and evolving modes of communication, channels of trust, means of protection, and expectations from beneficiaries and from society.

75 For example, the archives of the United Nations (UN) are in principle opened to the public after a period of twenty years. See the UN Archives and Records Management website, available at: <https://archives.un.org/content/public-reference-services-0>.

In a rapidly changing world, it seems evident that ever-changing parameters will regularly prompt reflection that could possibly lead to further updates in the rules of access to the ICRC Archives. The balance reached in 2017 may not be the balance that is needed in the future. Ongoing critical reflection is therefore expected and encouraged on this issue. As the ICRC strives to protect people in armed conflicts and other situations of violence in the future, it might have to revise the rules of access to its archives in order to support its humanitarian mission in both possible directions: on the one hand, a stronger protection of documents containing personal data might be deemed necessary, with longer retention periods, while on the other, general documents might be declassified sooner, with due precautions for the use of data online.

The ICRC Archives undoubtedly have the standing and the potential to take centre stage at any future time. Considering the intensity today with which families, historians, genealogists, the media and the general public request information from the ICRC's archives relating to the Second World War, one may, for example, project an increased interest in that field in the coming twenty years, reaching the time of the centenary by 2039. At that time, hopefully part or most of those archives would be available online. In conclusion, the ICRC must continue to preserve, value and communicate its extraordinary historical archives in the decades and centuries to come and ensure that current activities are well recorded to become the archives of the future.

REPORTS AND DOCUMENTS

Changing world, unchanged protection? Seventy years of the Geneva Conventions

Speech given by ICRC President
Peter Maurer to the Graduate
Institute, Geneva, 13 March 2019

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It's always a pleasure to speak at the Graduate Institute and with an audience in Geneva. There may not be a topic closer to the heart of the International Committee of the Red Cross [ICRC] than tonight's discussion. Our mandate to protect and alleviate suffering in wartime effectively stems from the Geneva Conventions of 1949, even if our history dates back further.

For me, this discussion is not about anniversaries or debates on legal phrasing; it is about protecting people from the worst of the wars which rage today. It is about laws which assert that as long as conflict remains a reality, there also must be a limit to suffering.

Seventy years ago in this city, a diplomatic conference was convened by Switzerland. The conference opened on 21 April 1949 at the old Palais du Conseil Général, nowadays the Uni-Dufour. It brought together representatives from almost all States at that time and with the ICRC present as an expert.

Fresh in the minds of those present were the enormous horrors of the Second World War. The battlefields and the Holocaust had brought humanity to the edge of the abyss and laid bare the glaring gap in legal protection for civilians.

States shared a strong resolve to never see such destruction repeated, and binding obligations to protect civilians – everyday men, women and children – were set down in international laws in a comprehensive way.

Together the world agreed that even during armed conflict there remain limits as to what we – as nations, communities, brothers and sisters – can do to each other. This was a powerful concept brought into conventional law.

So strong was the humanitarian spirit, and the determination to reduce suffering, that the negotiations lasted only four months. This is almost unthinkable in today's shaky multilateral system – but it also shows us what is possible when States take responsible action and have the courage to uphold principles.

The success was of course also the result of professional long-term engagement, which allowed the drafters and negotiators to formulate a legal agreement that connected recent history with experiences, and in doing so, to transcend time and space.

The process was also not without difficulty. It recognized the dilemmas involved, including the legitimate rights for States to security, designing international humanitarian law [IHL] to navigate between military necessity and humanitarian concern, in order to achieve the best protection for people affected by conflict.

Today, the four Geneva Conventions are among the very few international treaties that have been universally ratified, not least because they reflect – more than just law – universal values of ethical behaviour.

While it is true that the Geneva Conventions are synonymous with the city of Geneva, they are designed for the dirty front lines of war.

International humanitarian law cannot be confined to words in glossy legal texts. Its power resides on the battlefields of the Syrias, Afghanistans, Iraqs, of the South Sudans and Central African Republics of our world.

It was militaries and humanitarians who devised these laws and principles for practical and pragmatic use in the field.

In February, I visited Mosul, the site of a key battle in the war in Iraq, which was characterized by intense, street-by-street, house-to-house fighting.

It is a shell of a city today and I was frankly shocked to see the extent of the destruction. Talking to families, I heard how the war has extracted a huge and painful toll. The whereabouts of so many people are unknown. I met many mothers desperately searching for their sons and husbands, feared dead or detained. Millions remain displaced within Iraq and in neighbouring countries.

Mosul, like Aleppo, Taiz or Maiduguri, is emblematic of the immense suffering that can occur when IHL is violated. Beyond the immediate impacts of death and injury, children have lost years of education; adults have lost their livelihoods and means of survival. Others suffer from mental scars. In this broken community, resentment and risks of reprisal lie under the surface.

When IHL is violated, it always bears the risk of cycles of violence.

Conflict shatters lives in so many ways. It ostracizes and it divides. Some people are shunned from societies – survivors of sexual violence, persons with disabilities. They are the ignored, the invisible, and the voiceless. They are excluded from basic services, from community life, education and work.

Others are excluded by design in the name of punishment – those accused of committing terrorist acts and detained without judicial process, those affiliated with the enemy, including families of foreign fighters.

These are enormously difficult dynamics to respond to, and we are seeing the world right now struggling to balance the security imperatives of States, justice for victims and survivors, legal obligations towards those associated with the enemy, and humanitarian needs.

But these are also the dilemmas where the robust frameworks of IHL and international human rights law can add great value. Like the ICRC, these bodies of law were built for these moments.

IHL makes no judgement on the motive of fighting. It states that every person who is not or is no longer actively participating in the hostilities is entitled to protection and must be treated with humanity. Everyone, even the enemy, must be seen as a human and protected.

What does this mean practically?

- No one shall be subjected to torture or other forms of ill-treatment;
- rape and other forms of sexual violence are prohibited;
- the wounded and sick must be given medical care;
- hospitals and medical personnel must not be attacked;
- people who are detained must be treated humanely;
- family members have the right to know the fate of their relatives; and
- the dead must be treated with dignity.

When IHL is respected, harm to civilians is drastically reduced. Every day we see IHL in action: when a wounded person is allowed through a checkpoint, when a child on the front lines receives food and other humanitarian aid, when the living conditions of detainees are improved or when they can receive contact with their families.

The 1949 Conventions were the first treaties to prohibit rape and other forms of sexual violence in armed conflict. In 1949, States made clear once and

for all that there is no place for the belief that sexual violence is unavoidable in war. Today, rape and other forms of sexual violence are recognized as war crimes in all armed conflicts.

We are painfully aware that this has not stopped sexual violence from being committed. It remains a brutal and unacceptable reality for women, men and children in many armed conflicts. But at the same time, continued violations of the law do not mean that the law is inadequate, but rather that efforts to ensure respect are inadequate. We can – and must – do more.

Indeed, in conflicts across the world we see enormous violations of IHL – tragic examples from Yemen, Somalia, Nigeria, Ukraine and elsewhere – which demonstrate that there are terrible failures to protect people every day.

These violations can lead to a perception that the principles of IHL are never respected or that they are not relevant. But it would be wrong – and indeed dangerous – to believe that IHL is always and only violated and is therefore useless.

The singular focus on violations of the law risks de-legitimizing the law over time and missing those hundreds and thousands of situations where the law is effectively respected: the hospitals and water systems not attacked, the civilians spared, the detained treated humanely.

Our collective challenge today is to find ways to ensure greater respect within the changing dynamics of conflict.

It is true of course that the wars of 2019 have changed significantly since the Second World War. We are all aware that there have been fewer international armed conflicts while non-international ones have multiplied.

Today, too, conflicts have become more intractable. The Second World War lasted six years – many of the conflicts we see today have lasted for years or decades, affecting generations.

Battles are fought in populated areas, risking too many civilian lives and destroying critical infrastructure. In protracted, urban wars we are seeing great numbers of people affected, for long periods and with deep needs: from food, water and shelter to health-care services, economic opportunities and the need for psycho-social support.

The global landscape of conflict has also changed. A vast array of armies, special forces, armed groups, private military and security companies, and criminal gangs now fight – directly or by proxy, openly or secretly. ICRC research shows that more armed groups have emerged in the last six years than in the previous six decades.

The ICRC talks to all parties to a conflict and strives to engage with an increasingly complex array of non-State armed groups. Currently we are in contact with around 200 groups worldwide linked to our operations or our humanitarian concerns, and we are discovering that the structure of these groups means we need new approaches.

Our research shows that decentralized groups, especially non-State armed groups, are often influenced by command structures but also by many other factors – community, political, spiritual. We need to do more to influence these networks, including at an informal level.

The ICRC must encourage groups to recognize that behaviour which flouts the law is against their own ideals: “It is not who I am.”

Today, wars also increasingly involve partners and allies who are outside of the theatre of conflict. Our contemporary experience shows us how this can lead to a dilution of responsibility, the fragmentation of chains of command and an unchecked flow of weapons.

As the trend towards allied and partnered warfare only increases, it has become urgent for States to look at how they can influence their partners and calibrate their support to ensure civilians are better protected.

And as States engage in new counter-terrorism activities, it is essential that their actions do not infringe on the vital work of humanitarian organizations, which seek only to help victims of armed conflict and violence.

While conflicts evolve in nature, likewise IHL is not static. Since its inception, the ICRC has observed the suffering caused by weapons and certain tactics of warfare and has sought to curb the worst excesses.

It made a public call against the use of chemical weapons during the First World War, and against nuclear weapons after Hiroshima and Nagasaki. It worked to expand the protective scope of IHL from combatants to civilians with the Fourth Geneva Convention. The inclusion of common Article 3 on non-international armed conflicts in 1949 somehow anticipated the massive shift to that type of conflict, with further development of those protections in Additional Protocol II.

In today’s battlefields, some particularly challenging developments have emerged:

- armed actors and civilians intermingling and individuals changing from fighters at night to civilians by day;
- different forms of violence blending together, on increasingly fuzzy battlefields, with military use of force, criminal violence and inter-community violence coexisting in the same space;
- the blurring of lines between international and internal armed conflict, between physical and virtual forms of violence, and between those participating in hostilities and those not;
- asymmetric warfare emerging as a predominant conflict environment;
- distinctions between weapons and dual-use goods and between military and civilian activities blurring;
- terrorism and counter-terrorism entrenched in dynamics of conflict;
- the increasing instrumentalization of humanitarian action for political purposes; and
- humanitarian action criminalized as strategic support for the enemy.

This means that it is increasingly difficult to look at IHL in isolation and forces us to also consider other sources of law when operating in complex environments –

human rights law, national and regional legal frameworks, soft law and policy guidance.

Today, we are also seeing rapidly developing technologies create new front lines in cyberspace, and new ways to fight, such as autonomous weapons systems and remote technologies. The ICRC is particularly concerned about the potential human cost of cyber operations and is therefore engaged in clarifying the significance of basic IHL concepts in view of these developments.

IHL is clear and prohibits cyber-attacks against civilian objects as well as indiscriminate and disproportionate attacks. But in cyberspace, which is almost entirely dual-use, what do these rules mean? How can we attribute attacks in cyberspace? What triggers a conflict? More tailor-made rules to protect civilians from conflict's future front lines may be needed.

Seventy years on, the Geneva Conventions are much more than a legacy, or simply something to be proud of and commemorate. A lot has been achieved since 1949 in spreading knowledge of the law, ensuring its implementation and incorporating it into military doctrine, education, training and sanctions mechanisms, and preventing its violation.

But much more needs to be done. This is what ICRC staff strive to do every day across the globe, as they witness the plight of children, women and men whose humanity and dignity is denied.

We would be worse without the Conventions. They are, at seventy, still fit for purpose in many respects, but they need better support, more powerful advocates and a spirit of innovation to charter new ways forward for enhancing the protection of populations through law in a new world.

The Conventions were made for all of us in the name of humanity. While States and belligerents first and foremost have the responsibility to implement them, the Conventions are also our collective responsibility to watch over.

On this anniversary, the ICRC calls on States and non-State actors to universally and unequivocally respect, implement and ensure respect for IHL.

But appeals do not suffice. What is most needed today is at the core of the ICRC's work at the front line of contemporary warfare: the ability to build more trustful relationships between belligerents so that a consensual space for enhanced behaviour is reclaimed and rebuilt.

Fierce public defence of these practical rules is crucial too. We all know how easy it is to be overwhelmed and turn away from ongoing suffering around the world.

When the ICRC last surveyed the public about their attitudes to IHL, we found that over two thirds of people think it makes sense to impose limits to war and violence. But we also saw how people are becoming resigned to the death of civilians as an inevitable part of war. We need champions for humanity – at all levels – to step forward.

We need people and organizations to support the humanitarian mission with their skills and knowledge, with their resources and with their voices. Students and the scientific community can greatly contribute to upholding respect for IHL. We need cutting-edge research to inform evidence-based humanitarian action and diplomacy.

We need scientists to help put innovations at the service of humanity and avert new means and methods of warfare eroding the protection enshrined in the Geneva Conventions.

And in this light, it is positive to see so many of you here tonight, to see strong academic engagement in so many universities around the globe and so many students and researchers engaging on IHL.

Let us remember that the spirit of the Conventions – to uphold human dignity even in the midst of war – is as important now as it was then. Let us always remember that the Conventions are law – but somehow transcend law – as what they require is not only legal but also just and right. Let all of us do what we can to ensure that this spirit prevails.

REPORTS AND DOCUMENTS

What's new in law and case law around the world?

Biannual update on national implementation of international humanitarian law* January–June 2017

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The biannual update on national legislation and case law is an important tool for promoting the exchange of information on national measures for the implementation of international humanitarian law (IHL).

In addition to a compilation of domestic laws and case law, the biannual update includes other relevant information related to accession and ratification of IHL and other related instruments, and to developments regarding national committees or similar bodies on IHL. It also provides information on some efforts undertaken by

ICRC Advisory Service

The ICRC's Advisory Service on International Humanitarian Law aims to provide a systematic and proactive response to efforts to enhance the national implementation of international humanitarian law (IHL). Working worldwide, through a network of legal advisers, to supplement and support governments' own resources, its four priorities are: (i) to encourage and support adherence to IHL-related treaties; (ii) to assist States by providing them with specialized legal advice and the technical expertise required to incorporate international humanitarian law into their domestic legal frameworks;¹ (iii) to collect and facilitate the exchange of information on national implementation measures and case law;² and (iv) to support the work of committees on IHL and other bodies established to facilitate the IHL implementation process.

* This selection of national legislation and case law has been prepared by Silvia Scozia, Legal Attaché in the ICRC Advisory Service on International Humanitarian Law, with the collaboration of regional legal advisers.

the ICRC Advisory Service during the period covered to promote universalization of IHL and other related instruments, and their national implementation.

Update on the accession and ratification of IHL and other related international instruments

Universal participation in IHL and other related treaties is a first vital step toward the respect of life and human dignity in situations of armed conflict. In the period under review, twelve IHL treaties or other relevant instruments (or amendments to them) were ratified or acceded to by ten States.³ In particular, there has been notable adherence to the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property. Indeed, three States have acceded to the said Protocol in the first half of 2017. In addition, two States have acceded to the Amendment to the Rome Statute on war crimes during the period in question. Furthermore, one State has ratified and another State has acceded to the International Convention for the Protection of All Persons from Enforced Disappearance during the first six months of 2017.

Other international treaties of relevance for the implementation of IHL include the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict – which has the ratification or accession of 129 States as of 30 June 2017 – and its first Protocol, the Convention on Certain Conventional Weapons and its Protocols, the Convention on Cluster Munitions, and the Arms Trade Treaty.

The following table outlines the total number of ratifications of and accessions to IHL treaties and other relevant related international instruments, as of the end of June 2017.

Ratifications and accessions, January–June 2017

Convention	State	Ratification/ accession date	Number of parties
1954 Hague Convention for the Protection of Cultural Property	Togo	24 January 2017	129

- 1 In order to assist States, the ICRC Advisory Service proposes a multiplicity of tools, including thematic fact sheets, ratification kits, model laws and checklists, as well as reports from expert meetings, all available at: www.icrc.org/en/war-and-law/ihl-domestic-law (all internet references were accessed in January 2019).
- 2 For information on national implementation measures and case law, please visit the ICRC National Implementation Database, available at: www.icrc.org/ihl-nat.
- 3 To view the full list of IHL-related treaties, visit the ICRC Treaties, States Parties and Commentaries Database, available at: www.icrc.org/ihl.

1954 Hague Protocol for the Protection of Cultural Property	Togo	24 January 2017	106
1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property	Togo	24 January 2017	73
	Liechtenstein	31 January 2017	
	France	20 March 2017	
2006 International Convention for the Protection of All Persons from Enforced Disappearance	Seychelles	18 January 2017	56
	Czech Republic	8 February 2017	
2010 Amendment to the Rome Statute of the International Criminal Court, amended Article 8	Portugal	11 April 2017	34
	Argentina	28 April 2017	
2008 Convention on Cluster Munitions	Madagascar	20 May 2017	101
2013 Arms Trade Treaty	Honduras	1 March 2017	92
1980 Convention prohibiting Certain Conventional Weapons	Lebanon	5 April 2017	124
2001 Amendment to Article 1 of the Convention on Certain Conventional Weapons	Lebanon	5 April 2017	84
1980 Protocol I to the Convention on Certain Conventional Weapons on Non-Detectable Fragments	Lebanon	5 April 2017	117
1996 Amended Protocol II to the Convention on Certain Conventional Weapons on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices	Lebanon	5 April 2017	103

Convention	State	Ratification/ accession date	Number of parties
1980 Protocol III to the Convention on Certain Conventional Weapons on Prohibitions or Restrictions on the Use of Incendiary Weapons	Lebanon	5 April 2017	114

National implementation of international humanitarian law

The laws and case law presented below were either adopted by States or delivered by domestic courts in the first half of 2017. They cover a variety of topics linked to IHL, such as the criminal repression of war crimes, the protection of the emblem, the protection of missing persons and their families, the protection of cultural property, the power to detain in non-international armed conflicts, and the establishment of national committees or similar bodies on IHL.

This compilation is not meant to be exhaustive; it represents a selection of the most relevant developments relating to IHL implementation and related issues based on information collected by the ICRC. The full texts of these laws and case law can be found in the ICRC’s Database on National Implementation of IHL.⁴

A. Legislation

The following section presents, in alphabetical order by country, the domestic legislation adopted during the period under review (January–June 2017). Countries covered are Afghanistan, the Central African Republic, China, Colombia, Kenya, Peru and the United Kingdom.

Afghanistan

Law on the Prohibition of Torture, 22 April 2017⁵

The Law on the Prohibition of Torture aims at preventing acts of torture from being perpetrated against suspects, accused persons, convicts and other individuals during investigation and detention, as well as against victims and witnesses. Besides providing a definition of what is considered “torture” for the purposes of the law – which

4 See the ICRC National Implementation Database, available at: www.icrc.org/ihl-nat.

5 Available at: <https://tinyurl.com/ycnqqoln>.

includes threat of torture, but excludes the enforcement of lawful sanctions – the law provides for the possibility of the victim, the relatives or the defence lawyer filing a complaint for an alleged act of torture to the Attorney General's office, the Independent Human Rights Commission of Afghanistan and/or the Higher Commission on Torture Prohibition, as well as to a Court and/or other competent entities. The Law, furthermore, recognizes the victim's right to compensation (Articles 5 and 18) and prescribes the obligation to adopt preventive measures.

Article 7 of the Law prohibits the invocation as a justification for torture of exceptional circumstances such as a state of war, risk of war or internal political instability, as well as superior orders.

Article 10 establishes the Commission of Prohibition of Torture, which will carry out its responsibilities with regard to the investigation of alleged cases of torture through a Torture Investigation Committee, in charge, *inter alia*, of reporting cases of alleged acts of torture to the competent authorities for prosecution. It refers to the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and to the Istanbul Protocol of 2004 (*Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*) to regulate the investigation of incidents of torture by the Committee.

*Afghanistan Penal Code, 15 May 2017*⁶

The new Penal Code of Afghanistan was approved through the Presidential Legislative Decree dated 4 March 2017, published by the Ministry of Justice on 15 May 2017 (*Official Gazette* No. 1260), and entered into force on 14 February 2018, nine months after the date of approval by the State president. It combines ten former separate criminal laws and also brings together the penal provisions of thirty-three laws of other scopes. With the application of this new Penal Code, the following shall be repealed: the Criminal Procedure Code, the Law on Detection and Investigation of Crimes and Oversight by the Prosecutor's Office on the Legality of Its Implementation, the Interim Criminal Procedure Code for Courts, and the provisions of Articles 161–171 of the 1976 Penal Code.

The 2017 Penal Code has 916 articles in two sections: general penal law and specific penal law (crimes and punishments). It criminalizes international crimes listed in the Rome Statute of the International Criminal Court, including war crimes, crimes against humanity, genocide and aggression, and it sets forth the criminal liability for civilian superiors or military commanders who fail to prevent or punish subordinates who commit these crimes. It further prevents an alleged perpetrator from invoking the defence of superior orders for genocide, crimes against humanity, war crimes, aggression and torture.

The Penal Code further punishes, *inter alia*, illicit manufacturing and trafficking in firearms; sexual abuse of boys, extending the prohibition to all related acts, including knowingly attending a performance that involves such

6 Available at: <https://tinyurl.com/ybtvs76b>.

practice; and forced virginity testing of women suspected of having engaged in consensual extramarital sex (clearly distinguished from rape).

Other novelties of the new Penal Code include the incorporation of alternatives to imprisonment (of up to five years) and incarceration of minors (of up to three years) with the discretion of the judge. War crimes are excluded from such alternatives. The number of death penalty offences is reduced from fifty-four to fourteen. Several crimes formerly liable for the death penalty are assigned a form of imprisonment called “first degree continued imprisonment (30 years)” in the new Code.

Finally, the Penal Code addresses topics such as the protection of cultural property, the protection of the dead, and the recruitment of children.

Central African Republic

Law 17.012 containing the Code of Military Justice, 24 March 2017⁷

According to the judicial system of the Central African Republic (CAR), the Permanent Military Tribunal is competent for all military offences as well as ordinary law offences committed by the military⁸ (or forces considered assimilated to the military⁹) in the exercise of their functions in the barracks, during service or in any military establishment in peacetime.

According to Article 23 of the Code of Military Justice, in times of armed conflict or during a state of emergency, the military tribunal¹⁰ is competent with regard to violations committed by any civilian or military person, although ordinary courts remain competent when a co-perpetrator or accomplice is not amenable to military jurisdiction, including minors. The definition of who is considered as part of the military under this law includes any member of the national army, including the national gendarmerie, as well as any prisoner of war. Considered as equal to the previous category are members of the CAR police force, customs agents, water and forestry agents, reservists, those ordered to join or to return to military service, military personnel exercising their functions in a hospital or in a penitentiary establishment, any civilian who has taken up arms or participated in an armed organization fighting against the State, and civilian personnel employed on a statutory or contractual basis by the armed forces.

7 Available at: <https://tinyurl.com/ycrvscxd>.

8 As defined by Article 25, Law 17.012 containing the Code of Military Justice.

9 *Ibid.*, as defined by Article 26.

10 The martial court is competent in criminal matters, while the military tribunal has jurisdiction in correctional matters. It should be noted that the Code of Criminal Procedure of 2010 applies in proceedings on correctional matters before the military tribunal, and in criminal proceedings before the martial court. Further differences between the two can be seen in the appeals procedure: for correctional matters (competence of the military tribunal), the appeal is made before the correctional chamber of the Court of Appeal, while for criminal matters (competence of the martial court), the appeal is made before the criminal chamber of the Court of Cassation. The Code of Criminal Procedure of 2010 is available at: <https://tinyurl.com/y9h3u4uu>.

The law defines a military establishment as any temporary or permanent installation used by the armed forces and assimilated bodies, as well as any military building or aircraft, wherever located.

China

*Amended Law of the People's Republic of China on the Red Cross Society, 24 February 2017*¹¹

The Law of the People's Republic of China on the Red Cross Society was originally promulgated on 31 October 1993, in accordance with Article 4 of the Statute of the International Red Cross and Red Crescent Movement (the Movement). As part of the reform initiative of the Red Cross Society of China (RCSC) and with the technical support of the ICRC, the RCSC advocated for an amendment in order to reaffirm its status and to change certain provisions, including its legal status, its legal mandate and the use and protection of the red cross emblem. The amendment was adopted on 24 February 2017 and came into force on 8 May 2017.

The Law defines the RCSC as the unitary Red Cross organization of China and a social relief and aid society that engages in humanitarian work. It provides that the RCSC shall adhere to the Fundamental Principles laid down by the Movement, and carry out its work independently in accordance with the Geneva Conventions and their Additional Protocols acceded to by China, and the Statutes of the RCSC. It prohibits any organization or individual from obstructing the RCSC from carrying out its duties of rescue, relief and first aid.

The Law also regulates the use of the red cross emblem and accords protection to the emblem to that effect, the violation of which will trigger civil, administrative or criminal liability. In particular, Articles 14 to 16 stipulate that the use of the red cross emblem must be in compliance with the Geneva Conventions of 1949 and their Additional Protocols.

The functions and duties of the RCSC include the dissemination of the Geneva Conventions of 1949 and their Additional Protocols, as well as of the Fundamental Principles of the Movement.

Colombia

*Legislative Act No. 1 of 2017 – Constitutional Reform – Establishing the System of Truth, Justice, Reparation and Non-Repetition, 4 April 2017*¹²

On 4 April 2017, the Congress of Colombia issued Legislative Act No. 1 of 2017 by means of which the Integral System of Truth, Justice, Reparation and Guarantees of

¹¹ Available at: <https://tinyurl.com/yb75vrbv>.

¹² Available at: <https://tinyurl.com/yaew3qu>.

Non-Repetition was created. This law, which modifies the Political Constitution, was adopted as a result of the Peace Agreement reached between the Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia—Ejército del Pueblo, FARC-EP) and the government of Colombia.

The System envisaged by the Act contemplates the creation of three entities: the Commission for Clarification of the Truth and Guarantees of Non-Repetition, the Search Unit for Missing Persons, and the Special Jurisdiction for Peace.

Being of a temporary and extrajudicial nature, the mandate of the Commission for Clarification of the Truth and Guarantees of Non-Repetition is to find out the truth of what happened during the armed conflict and to contribute to the clarification of violations and infractions in order to promote a shared understanding of the conflict in Colombian society. Given its extrajudicial nature, the Commission is not mandated to prosecute any of the actors involved in the armed conflict; its officials furthermore enjoy testimonial immunity with regard to the information acquired through the exercise of their functions.

The Search Unit for Missing Persons is an entity of a humanitarian and extrajudicial nature which directs, coordinates and contributes to the implementation of humanitarian actions aimed at searching for persons who have gone missing in the context and because of the armed conflict in Colombia.

The Special Jurisdiction for Peace is composed of: the Chamber for the Recognition of Truth, Responsibility and Determination of the Facts and Conduct; the Chamber for the Definition of Legal Situations; the Chamber for Amnesty or Pardon; the Tribunal for Peace; the Investigation and Prosecution Unit; and the Executive Secretariat. It has jurisdiction over crimes committed prior to 1 December 2016 (the date of the Peace Agreement), for cause, on occasion or in direct or indirect relation to the armed conflict, especially with regard to conduct considered a serious breach of IHL or a serious violation of human rights. To make such determination, the Legislative Act provides that IHL (in conjunction with domestic criminal law, international criminal law and international human rights law) will be among the parameters of interpretation for the legal qualification of the behaviour.

The Special Jurisdiction for Peace, besides investigating and punishing serious breaches of IHL, identifies those acts and conduct that are susceptible of being granted an amnesty. The Legislative Act further provides a special chapter on the differentiated treatment granted to members of the State forces who have carried out punishable conduct falling under the competence of the Special Jurisdiction for Peace, including command responsibility (Chapter VII). IHL is applied as *lex specialis* for the determination of the superior responsibility of members of the State forces of Colombia (Provisional Article 24).

*Decree No. 589 establishing the Search Unit for Missing Persons, 5 April 2017*¹³

13 Available at: <https://tinyurl.com/ycxy6p96>.

On 5 April 2017, Decree 589 establishing the Search Unit for Missing Persons in Colombia was promulgated by the president. The issue of missing persons was a central part of the negotiations between the government and the FARC-EP. The objective of the Search Unit is to fulfil the right to truth and reparation to victims and their families.

Article 2 of the Decree establishes that the functions and activities of the Unit will be deployed in the search for persons who went missing in connection to the armed conflict, with a particular focus on women and children. In the case of death, the Unit will contribute to the implementation of actions aimed at, when possible, the identification of the bodies and the dignified delivery of their remains.

The Unit will operate under the principle of confidentiality of its actions and its findings and, as a general rule, the activities of the Unit will not substitute or prevent investigations of a judicial nature that may arise in compliance with the obligations of the State, and the results of the investigations will not be used as evidence in judicial processes (Article 3).

Article 5 lays out the functions and competencies of the Search Unit, which include collecting information necessary to carry out the search for missing persons; designing and executing the national plan for the search, location, recovery, identification and management of the dead in the context and in connection with the armed conflict; coordinating with other technical scientific entities to reach its objectives; guaranteeing the participation of the family of the missing person in this process and coordinating with other institutions to provide the relatives with psychosocial assistance; and various reporting obligations.

Kenya

Prevention of Torture Act, 20 April 2017¹⁴

On 20 April 2017, the Prevention of Torture Act was issued in the Republic of Kenya. The Act implements Kenya's obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which Kenya ratified on 21 February 1997. It further provides for the prevention, prohibition and punishment of such acts as well as for reparations to victims.

Articles 4 to 8 of the Act define and criminalize torture and the offence of cruel, inhuman and degrading treatment or punishment, as well as aiding and abetting the aforementioned and using information obtained through torture.

Article 10 establishes that neither amnesty nor immunity shall be granted to persons accused of torture or cruel, inhuman or degrading treatment or punishment, and Article 6 confirms the applicability of the Act in times of armed conflict.

14 Available at: <https://tinyurl.com/yctnejz8>.

Section 4 of the Act provides a non-exhaustive list of acts that constitute physical and psychological torture. In addition, the Act establishes torture as an extraditable offence and guarantees that no one shall be expelled, returned or extradited to a location where there is reason to believe that the person will be in danger of being tortured (Article 21).

Finally, the Act confers upon the Kenya National Commission on Human Rights the duty to investigate alleged violations of the provisions of the Act upon receipt of a complaint or on its own initiative, and the power to monitor the compliance by the State with international treaty obligations relating to torture and cruel, inhuman and degrading treatment and punishment.

Peru

*Supreme Decree No. 013-2017-JUS Providing for the Regulation on the Organization and Functions of the Ministry of Justice and Human Rights, 22 June 2017*¹⁵

On 22 June 2017, Supreme Decree No. 013-2017-JUS was promulgated in Peru, establishing the new Regulation on the Organization and Functions of the Ministry of Justice and Human Rights.

Article 88 of the Regulation creates the General Directorate for the Search of Missing Persons, within the Vice-Ministry of Human Rights and Access to Justice, in charge of designing, approving and executing the National Plan on the Search of Missing Persons. It is also tasked with administering the National Registry of Missing Persons and Burial Sites.

Article 89 lays out the specific functions of the Directorate, which include promoting and participating in the search process, promoting the participation of the families of missing persons in the process, coordinating psychological and logistical assistance to the relatives of missing persons, and, more generally, supporting the technical capacity and State infrastructure involved in the search for missing persons.

Finally, Article 90 prescribes that the General Directorate be composed of two sub-directorates: the Registry and Forensic Investigation Directorate and the Care and Accompaniment Directorate.

United Kingdom

*Cultural Property (Armed Conflicts) Act, 23 February 2017*¹⁶

On 23 February 2017, the Cultural Property (Armed Conflicts) Act was enacted by the United Kingdom. This Act implements the Hague Convention of 1954 for the

¹⁵ Available at: <https://tinyurl.com/y8msj9u7>.

¹⁶ Available at: <https://tinyurl.com/ycwrtefq>.

Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention) and the Protocols to that Convention of 1954 and 1999.

Part 1 of the Act sets out key definitions, and replicates the definition of “cultural property” from Article 1 of the 1954 Hague Convention. Part 2 incorporates into domestic law the offences created by Article 15 of the Second Protocol to the 1954 Hague Convention (1999 Protocol) and establishes the appropriate penalties. In particular, the Act does not restrict the repression of such offences on the condition that these are committed in the territory of the United Kingdom. The Act authorizes the exercise of universal jurisdiction for intentionally attacking cultural property under enhanced protection, using cultural property under enhanced protection or its immediate surroundings in support of military action, or causing extensive destruction or appropriation of cultural property (1999 Protocol, Article 15(1)(a–c)).

For the offences outlined in paragraphs 1(d–e) of Article 15 of the 1999 Protocol – namely, making cultural property protected under the Convention and the 1999 Protocol the object of attack (para. 1(d)), and the theft, pillage or misappropriation of, or acts of vandalism directed against, cultural property (para. 1(e)) – the Act affirms that such offences will be committed only if the person is a national of the UK or is subject to the service jurisdiction of the UK, as defined by the Act.

Part 3 of the Act prohibits the unauthorized use of the cultural emblem, the symbol created by the 1954 Hague Convention to identify protected cultural property. The Act identifies what constitutes an authorized use of the emblem (e.g., to identify moveable cultural property) and gives the appropriate national authority power to designate further authorized uses.

Finally, Part 4 regulates the repression of unlawfully exporting cultural property from an occupied territory. Cultural property is considered unlawfully exported if the export was in contravention of the laws of the territory from which the property was exported or if it was in contravention of any rule of international law (Article 16(3)). For the assessment on whether a territory can be considered occupied, the Act refers to Article 42 of the Regulations respecting the Laws and Customs of War on Land annexed to the 1907 Convention respecting the Laws and Customs of War on Land, requiring that the territory is “actually placed under the authority of the hostile army”. At the time of the export, the occupying State must have been a party to the First or Second Protocol to the 1954 Hague Convention or the occupied territory must have been the territory of a State that was party to the First or Second Protocol of said Convention.

Part 5 provides immunity from seizure or forfeiture of cultural property that is entitled to special protection under Article 12 of the 1954 Hague Convention (namely, cultural property that is being transported for safekeeping during a period of armed conflict) and is being transported from outside the UK into its territory, through the UK to another destination, or to the UK as its depository, if it is under the control of the secretary of State or a person to whom the secretary of State has entrusted its safekeeping (Article 28(5)).

B. National committees or similar bodies on IHL

National authorities face a formidable task when it comes to implementing IHL within the domestic legal order. This situation has prompted an increasing number of States to recognize the usefulness of creating a group of experts or similar body – often called a national IHL committee or a national commission for IHL – to coordinate activities in the area of IHL. Such committees *inter alia* promote ratification of or accession to IHL treaties, make proposals for the harmonization of domestic legislation with the provisions of these treaties, promote dissemination of IHL knowledge, and participate in the formulation of the State’s position regarding matters related to IHL.

Ukraine

*Interdepartmental Commission on Questions of Application and Realization of Regulation of International Humanitarian Law in Ukraine*¹⁷

On 26 April 2017, the Cabinet of Ministers of Ukraine adopted Resolution No. 329 establishing the Interdepartmental Commission on Questions of Application and Realization of Regulation of International Humanitarian Law in Ukraine (replacing Resolution No. 1157 of 21 July 2000), its Annex on the structure of the Commission, and Regulations on its internal functioning.

Tajikistan

*Governmental Decree on the Composition of the Commission on the Implementation of International Humanitarian Law under the Government of the Republic of Tajikistan, No. 1666, 1 April 2017*¹⁸

In Tajikistan, the adoption of the Governmental Decree on the Composition of the Commission on the Implementation of International Humanitarian Law under the Government of the Republic of Tajikistan, No. 1666 of 1 April 2017, modified the Statute of the IHL Commission, including in its composition the director of the National Mine Action Centre.

17 Available at: <https://tinyurl.com/yaqxm5ee>.

18 Available at: <https://tinyurl.com/ybup8u7c>.

C. Case law

Chile

*Court of Appeals of Chile, Episode “Operation Colombo” – Victim “Francisco Aedo and Others”, 30 May 2017*¹⁹

Keywords: enforced disappearances, statute of limitations, superior orders.

On 30 May 2017, the Court of Appeals of Santiago de Chile convicted 106 agents of the Chilean secret police active during the government of Augusto Pinochet for their participation in “Operation Colombo”, specifically for the crime of aggravated kidnapping committed against sixteen victims.

In its judgment, the Court considered the said act a crime against humanity. The victims were politicians, workers, students and professionals accused after 11 September 1973 of belonging to, or being ideologically supportive of, Allende’s government – or opposed to the *de facto* government – and were for this reason the target of a large-scale policy of exclusion, harassment, persecution and extermination.

The Court, after highlighting that the Geneva Conventions do not need an explicit declaration of war to be applicable to a situation of armed conflict, affirmed the applicability of Article 3 common to the four Geneva Conventions to the situation in Chile between 1973 and 1974.

The Court further rejected the arguments related to statutes of limitations, on the basis of the continuative nature of the crime in question. As the victims were not proved dead or released, the crime is considered by the Court as “permanent kidnapping”: as long as the deprivation of liberty continues, the crime is still being committed, and criminal responsibility cannot be extinguished through the application of the statute of limitations. The Court reinforced its argument by stating the inapplicability of statutes of limitations to crimes against humanity.

The argument of the continuative nature of the crime was also used to reject the applicability of amnesties to the present charges. The Court further referred to the jurisprudence of the Inter-American Court of Human Rights regarding the inadmissibility of the amnesty when it pretends to impede the investigation and the punishment of grave violations of human rights, as in the case of enforced disappearances.

The Code of Military Justice of Chile allows for the defence of superior orders upon cumulative fulfilment of the following criteria: that the order has been issued by a superior, that the order regards the exercise of the official functions of the subordinate and that, if the order aims at the perpetration of a crime, it is noted and communicated by the subordinate and insisted upon by the superior. The Court addressed this issue, noting first of all that the crime perpetrated against the victims of this case cannot be considered as part of the

¹⁹ Available at: <https://tinyurl.com/y8fsjgiz>.

official functions attributed to the members of the armed forces by the law. The defence of superior orders was therefore dismissed by the Court.²⁰

Finally, the Court established that civil claims resulting from these crimes are not subject to statutes of limitations and ordered reparations to the relatives of the victims, including financial compensation.

Germany

*Berlin Higher Regional Court (Kammergericht), The Prosecutor v. Rami K., 1 March 2017*²¹

Keywords: respect for the dead, war crimes.

The defendant, a member of the Iraqi Armed Forces, allegedly posed for a photo holding the decapitated heads of two fighters of the armed group Islamic State, who had been killed during fighting in the north of Baghdad in 2015. He subsequently shared the image on his Facebook profile. In July 2016, when he was investigated for a separate charge, his tablet was confiscated and the images were discovered by the police.²²

The defendant was arrested on 29 August 2016 by the German police for having disrespected and degraded the dead, and later confessed to the crime. Two charges of war crimes for degrading treatment towards persons protected under IHL were confirmed, and trial opened on 22 February 2017 before the Berlin Higher Regional Court. On 1 March 2017, the Court found the defendant guilty of war crimes and sentenced him to 20 months' imprisonment.

20 See also Supreme Court of Chile, *Wenzel Salas, Hugo and Others*, 21 March 2017. First of all, the Court recalled that the jurisprudence – on the basis of the recognition of the international commitments of Chile enshrined in its Constitution – highlighted that human rights treaties to which Chile is a party take priority over national law. On the premises of the continuative nature of the crime of “permanent kidnapping” and its characterization as a crime against humanity, the Court ruled the inapplicability of statutes of limitations and condemned thirty-three former State agents for the illegal deprivation of liberty of five members of the Manuel Rodriguez Patriotic Front in 1987. The Court rejected the applicability of the defence of superior orders, on the basis that the act ordered could not be considered as belonging to the category of “official acts”, as required by the Code of Military Justice of Chile. Furthermore, with regard to some of the accused, the Court rejected the defence as it considered that they knew that the order was unlawful.

21 Available at: <https://tinyurl.com/yaouqkqp>.

22 See also Blekinge (Appeals) Court of Sweden, Judgment No. B 3187-16, 11 April 2017. The Court confirmed the first-instance judgment of 6 December 2016 against a former Iraqi soldier, but increased the penalty from six to nine months' imprisonment. The defendant was found guilty of inhuman treatment against the dead for having posed for a picture with a decapitated head on a plate next to other bodies with severed heads, and having posted the picture online.

Senegal

*Extraordinary African Chambers (EAC), The Prosecutor v. Hissein Habré, 27 April 2017*²³

Keywords: war crimes, command responsibility.

On 27 April 2017, the Court in Dakar, Senegal, rejected Hissein Habré's appeal and confirmed his trial conviction for crimes against humanity and war crimes, including murder and torture.

The Appeals Chamber upheld the life sentence decided by the Trial Chamber for the former president of Chad, and confirmed the amounts and types of reparations decided by the Trial Chamber to be granted to 7,396 victims.

The Appeals Chamber was satisfied that the Trial Chamber demonstrated that Hissein Habré had exercised effective control over the troops, since he had the material capacity to prevent and punish their actions. With regard to command responsibility, the Court highlighted that the hierarchical relationship between the superior and his or her subordinates does not need to be direct or immediate for the superior to exercise effective control and be responsible for the actions of the subordinates. However, the Appeals Chamber noted that it was under the joint criminal enterprise (JCE) doctrine that the Trial Chamber found Hissein Habré liable, and not for the responsibility of commanders or other superiors. According to the Appeals Chamber, the conclusions of the Trial Chamber on the responsibility of Mr Habré under JCE were not specifically challenged by the defence, and were therefore confirmed by the Court.

The Appeals Chamber acquitted the appellant of the charge of direct rape. It found that the Trial Chamber exceeded its power to re-characterize the crimes by convicting the accused for a crime that was not included in the indictment. However, this partial reversal of the trial judgment had no impact on the final sentence, in view of the exceptional magnitude and gravity of the crimes of which the accused had been found guilty.

Sweden

*Stockholm District Court, Judgment no. B 3787-16, 16 February 2017*²⁴

Keywords: non-State armed group, administration of justice, extrajudicial killings.

The District Court of Stockholm convicted a former member of an armed group active in Syria, the Suleiman Company, of serious crime against the law of the nation, for the killing of one Syrian soldier detained by the armed group.

²³ Available at: <https://tinyurl.com/ycg6owxy>.

²⁴ Available at: <https://tinyurl.com/ybpy78gn>.

In the context of the armed conflict in Syria, the defendant joined the armed group in the beginning of May 2012. He shortly thereafter participated in an attack in which seven soldiers from the Syrian armed forces were captured and, less than two days later, executed.

The defendant, a permanent resident of Sweden, argued that his actions were taken while executing superior orders received to enforce a death sentence adjudicated by a legitimate court, and that the accused had been granted a fair trial.

Such argument allowed the District Court to examine whether a non-governmental actor can establish its own courts to maintain law and order within the context of a non-international armed conflict. The Court has reached the conclusion that it may be possible during certain circumstances, provided that, at a minimum, it fulfils the criteria of independence and impartiality and is able to meet the basic requirements to guarantee a fair trial. However, in the present case, less than two days passed between the capturing of the soldiers and the execution. This contributed to the exclusion by the Court of the fulfilment of the requirement of fair trial, and to the sentencing of the defendant to life imprisonment.

The United Kingdom

*Supreme Court, Serdar Mohammed (Respondent) v. Ministry of Defence (Appellant), 17 January 2017*²⁵

Keywords: detention, non-international armed conflicts, procedural guarantees.

This case concerns the detention of Mr Serdar Mohammed in Afghanistan, following his capture by British armed forces.

The UK Supreme Court found that there is a lack of international consensus on the limits of the right of detention, as well as on the conditions of its exercise and the extent of the application of special provisions to non-State actors. The Court stated that common Article 3 “does not [as treaty law] in terms confer a right of detention”. In such circumstances, it argued, “the existence of a legal right in international law to detain members of opposing armed forces in a non-international armed conflict must depend on (i) customary international law, and/or (ii) the authority of the Security Council of United Nations”.

The Court concluded that the basis of a right to detain in non-international armed conflicts cannot yet be found in a crystallized rule of customary international law. However, the Court recognized that the UK forces had the power to detain individuals for periods exceeding ninety-six hours pursuant to a United Nations Security Council Resolution authorizing the use of “all necessary measures”, if the detention was found to be required for imperative reasons of security.

²⁵ Available at: <https://tinyurl.com/yd2dnnop>.

Nevertheless, the Court found that the procedural guarantees in place were not in compliance with Article 5(4) of the European Convention on Human Rights, as Mr Mohammed was not granted an effective right to challenge his detention.

Other efforts to strengthen national implementation of IHL

To further its work on implementation of IHL, the ICRC Advisory Service organized, in cooperation with respective host States, regional or sub-regional organizations, several regional conferences directed at engaging national authorities in the period under review.

From 12 to 16 June 2017, the ICRC, the government of Namibia and the Namibia Red Cross Society co-hosted, with the support of the Commonwealth Secretariat and the British Red Cross, the 4th Meeting of Representatives of National Committees on International Humanitarian Law of Commonwealth States, in Swakopmund, Namibia. The event brought together representatives from national IHL committees, civil servants, members of National Red Cross and Red Crescent Societies, representatives from the military forces and police, representatives from NGOs, and representatives from various ministries (foreign affairs, justice, defence, health, labour, education) of Commonwealth countries, to discuss the challenges and opportunities of national IHL committees in countries of the Commonwealth. In particular, the protection of cultural property from the Commonwealth perspective was discussed, as well as the relationship between national IHL committees and parliamentarians, the implementation of the resolutions and pledges of the 32nd International Conference, and the promotion and implementation of the Arms Trade Treaty in the Commonwealth. Participants from Australia, Bangladesh, Botswana, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Mauritius, Mozambique, Namibia, New Zealand, Nigeria, Papua New Guinea, Samoa, South Africa, Sri Lanka, Swaziland,²⁶ Tanzania, Trinidad and Tobago, Uganda, the United Kingdom and Zambia took part in the discussion. On this occasion, the national IHL committees shared their experiences and discussed their respective committees' roles. The event concluded with the adoption of a document entitled "Generating Respect for IHL: A Commonwealth Perspective", identifying points for further action, including considering the creation of mechanisms within national IHL committees aimed at ensuring the continuity of the work of those committees.

National IHL committees of Latin American and Caribbean countries shared their experiences at the "Weapons under IHL" regional meeting of national IHL committees in the Americas, in San José, Costa Rica, on 30 and 31 May 2017. The event was organized by the national IHL committee of Costa Rica and the ICRC, in collaboration with the Ministry of Foreign Relations and Worship of Costa Rica. The meeting facilitated an exchange on the challenges arising in the implementation of IHL rules that govern means and methods of

26 The official name of Swaziland was changed to the Kingdom of Eswatini on 19 April 2018.

warfare in armed conflicts, as well as on the challenges faced by some of the main treaties on weapons in Latin America and on solutions for their effective implementation at the domestic level of States Parties. Participants included members of national IHL committees, governmental officials, experts from NGOs, representatives from regional (CARICOM IMPACS, OAS) and international organizations (*inter alia*, UNLIREC, ICAN), from Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Dominican Republic, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay and Venezuela. The event further contributed to potentiating the effectiveness of the work of national IHL committees and, more generally, of IHL implementation processes in the region, including on the regulation of weapons.

Representatives from various governments, the diplomatic community based in Pretoria, and South African-based academics and think tanks from South Africa, Namibia, Nigeria, Algeria and Niger met in Pretoria, South Africa, on 24 and 25 May 2017, to discuss nuclear non-proliferation and disarmament, on the occasion of the Roundtable on the African Contribution to Nuclear Weapons Ban Negotiations in 2017, organized by the ICRC. By the end of the roundtable, participants agreed on the value of a nuclear ban treaty for the African continent, and adopted a number of outcome elements that could feed into the interventions made by African States during the second negotiation conference in New York.

To promote national implementation of IHL in East Africa and the Horn of Africa, the 5th Regional Seminar on IHL National Implementation was organized by the ICRC in Nairobi, Kenya, from 3 to 5 May 2017. On this occasion, participants from Djibouti, Ethiopia, Kenya, Somalia, South Sudan, Uganda and Tanzania met to discuss the prospects and perspectives of the domestic implementation of IHL in contemporary armed conflicts, including the role and work of national IHL committees. The participants identified suggestions and recommendations to advance and support domestic IHL implementation in the region.

Using in-house expertise on Islamic law, the ICRC contributed to discussions on the relationship between Islamic law and IHL, and protection in armed conflicts, at three regional events.²⁷ Among these, of particular interest is the Third Workshop on IHL and Islamic Law entitled “Protection of Civilians during Armed Conflict: An Overview of Islamic Law and International Humanitarian Law”, organized by the ICRC in Nairobi, Kenya, on 10–11 May 2017. Academics, teachers, judges, imams, researchers, human rights defenders and experts from Djibouti, Kenya, Nigeria, Sudan, Tanzania and Uganda discussed Islamic law’s principles and philosophy and their relationship with IHL, including Islamic law perspectives on the right of civilians to receive humanitarian assistance in times of armed conflict; protection of medical personnel, facilities and patients; protection of civilian persons detained in

27 Arabic Regional Course, Beirut, Lebanon, February 2017; Arabic Regional Course, Tunis, Tunisia, April 2017; Third Workshop on IHL and Islamic Law, Nairobi, Kenya, May 2017.

relation to armed conflicts; protection of cultural property and civilian property; protection of women and children; and protection of refugees and internally displaced persons. The discussion enhanced the participants' knowledge of the similarities and complementarities between the legal systems of IHL and Islamic law in the field of protection and assistance of civilians during armed conflicts. Participants identified good practices that can be an inspiration in promoting IHL among Muslim circles.

On 27 and 28 April 2017, civil servants, representatives from various ministries (defence, foreign affairs), diplomats, experts and academics from South Asian countries met at the IHL Regional Conference in East and South East Asia on "Generating Respect for the Law" in Singapore, jointly organized by the ICRC and the S. Rajaratnam School of International Studies. The participants, coming from Australia, Cambodia, China, Indonesia, Japan, Laos, Malaysia, New Zealand, Philippines, the Republic of Korea, Singapore, Switzerland, Thailand, East Timor and Vietnam, discussed the enduring importance of IHL in Asia today. Topics included the current humanitarian challenges in Asia, in particular generating respect for IHL in Asia through the International Humanitarian Fact-Finding Commission; the Philippines' experience with reducing attacks on civilians, health-care workers and health-care facilities; and IHL and the challenges of contemporary armed conflicts. Throughout the discussion, the participants proposed a wide variety of tools to ensure greater compliance with IHL and committed to addressing an identified range of issues in order to better regulate IHL domestically.

Another event of particular interest was the Expert Meeting on "Health Care in Danger: A Central and Eastern European Perspective", which took place in Olomouc, Czech Republic, on 11 and 12 May 2017. On this occasion, representatives from the Ministries of Defence, the Interior and Health, representatives from National Red Cross and Red Crescent Societies, NGOs, health professional associations and military medical agencies, as well as diplomats and academics, discussed the legal aspects of the protection of the wounded, sick and health-care personnel during armed conflicts and other emergencies; access to health care during emergency situations in peacetime, including migration; and military and emergency services in the context of armed conflict. The event, jointly organized by the Palacký University Olomouc, the Czech Red Cross and the ICRC, brought together participants from Austria, the Czech Republic, Hungary, the Slovak Republic, Ukraine and the UK. The plenary session that followed allowed for multidisciplinary discussions among all participants and the identification of key outcomes containing reflections on the way forward.

REPORTS AND DOCUMENTS

What's new on *How Does Law Protect in War? Online*

Annual update on new content and case studies published from January–December 2018*

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The annual update on *How Does Law Protect in War? Online* presents new international humanitarian law (IHL) content, including case studies and other teaching materials, that have been published on the platform. This issue's update covers the year 2018.¹

Some forty new case studies and three thematic highlights were published in 2018, bringing the total number of available case studies to 440. These new teaching materials are presented below. Case studies were prepared by students of the University of Geneva's Faculty of Law, and the Geneva Academy of IHL and Human Rights, under the supervision of Professor Marco Sassòli from the University of Geneva and Ms Yvette Issar, former research assistant at the University of Geneva. The International Committee of the Red Cross (ICRC), through its Law and Policy Forum, has provided technical and promotional support for this content and managed the platform.

Using case studies in IHL teaching

Teaching IHL with case studies offers many benefits. First and foremost, learning is acquired and integrated into long-term memory more easily when the methods used encourage participants to be actively involved. The fact that a case study is drawn from the realities of armed conflicts holds the students' attention because they can link it to daily life. It also allows them to understand the practical

* This selection of case studies has been prepared by Alexandra Cahen, ICRC Academic Sector Associate.

How Does Law Protect in War? Online

How Does Law Protect in War? Online is a platform adapted from the original reference Casebook published by the ICRC.² It was originally intended to support the teaching of IHL in universities in an interactive way, based on contemporary practice. The section on “The Law” features a general outline presenting IHL in fourteen chapters. It contains comprehensive bibliographic resources and links each theme to a range of related case studies and documents. The section on “The Practice” comprises more than 300 case studies and documents grouped either by theme or by region, or by type of document. They allow practice-oriented learning of IHL rules and interactive discussions through a series of questions. The “Pedagogical Resources” section provides useful advice on how to teach IHL, as well as twenty-nine model course outlines and other useful resources. The “A to Z” section presents 422 notions linked to IHL, their legal sources, the case studies in which they are addressed, and bibliographic resources for delving further into them. A [search engine](#) allows users to find rapidly the relevant pedagogical material they need on the platform.

implications of the law. Moreover, discussions in class or group work on case studies develop skills that are in high demand in the labour market and are too rarely taught in universities, such as critical thinking, problem-solving, negotiating and accepting diverse opinions. Finally, this method enriches the teacher–student relationship, which additionally stimulates the learning process.

New introductory texts in “The Law” section of *How Does Law Protect in War? Online*

The introductory texts for the chapters on “[Wounded, Sick and Shipwrecked](#)” and “[Criminal Repression](#)” were updated in 2018.

The introductory text on “[Wounded, Sick and Shipwrecked](#)” provides more detail on the role and protection of religious and medical personnel as well as medical transports, units and material.

The introductory text on “[Criminal Repression](#)” now offers more detailed explanations on the defences that are available to a person accused of war crimes. It also provides some additional insights on the international criminal courts.

1 Available at: casebook.icrc.org/.

2 Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, 3rd ed., ICRC, Geneva, 2011.

New case studies, January–December 2018 (selection)

Africa

- *International Criminal Court, The Prosecutor v. Germain Katanga* discusses the classification of the conflict taking place in Ituri between 1999 and 2003 as well as the war crimes perpetrated during that time.
- *Central African Republic/Democratic Republic of the Congo/Uganda, Lord's Resistance Army Attacks* discusses the classification of the situation in the Central African Republic as well as the different violations reported during these attacks.
- *Court of Justice of the European Union, Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides* decided on the notion of “internal armed conflict” as understood in the 2004 European Union refugee directive for the purpose of granting refugee status or subsidiary protection.
- *African Commission on Human and People's Rights, Democratic Republic of the Congo v. Burundi, Rwanda and Uganda* examines the violations of international law allegedly perpetrated by Burundi, Rwanda and Uganda on the territory of Congo.
- *Democratic Republic of the Congo, Attacks Against and Military Use of Schools* focuses on the issues regarding education in the eastern Congo, most notably the alleged military use of and attacks against schools as well as reported recruitment of children in these schools.

Asia and the Pacific

- *Afghanistan, Bombing of a Civilian Truck* examines a claim for compensation made by Afghan victims of an aerial bombardment requested by a German colonel. The case study discusses whether individuals have a right to compensation under IHL.
- *Sri Lanka, Naval War against Tamil Tigers* focuses on the challenges related to asymmetrical warfare as well as the principles governing conduct of hostilities, including in naval warfare, most notably the principle of distinction and the prohibition of perfidy.

Europe and Central Asia

- *Spain, Universal Jurisdiction over Grave Breaches of the Geneva Conventions* analyzes the notion of universal jurisdiction with respect to the Geneva Conventions and especially the extent of the obligation on the High Contracting Parties to locate war criminals found on their territory and bring them before their courts.
- *United Kingdom, The Case of Serdar Mohammed (Court of Appeal and Supreme Court Judgments)* examines the legality of the detention of Mr Serdar Mohammed in Afghanistan after his capture by British armed forces, from the point of view of IHL, international human rights law (IHRL) and UN Security Council resolutions. This case study follows from the previous case *United Kingdom, The Case of Serdar Mohammed (High Court Judgment)*.

- *Eastern Ukraine, Attacks Against and Military Use of Schools* discusses the status of schools and their military use as well as children's right to education during armed conflict.
- *Eastern Ukraine, Office of the United Nations High Commissioner for Human Rights Report on the Situation: November 2016–February 2017* outlines some challenges to IHL and IHRL posed by the situation in Ukraine, namely conduct of hostilities, detention and humanitarian access.
- *Eastern Ukraine: Disputed Prisoner of War Status* examines the status of captured fighters and whether they should be awarded prisoner of war status.
- *Eastern Ukraine: Detention and Death Sentences by Armed Groups* discusses detention carried out by non-State armed groups as well as implementation of IHL by such groups in general.
- *Switzerland, Gold Looting Case* discusses the claim that a Swiss refinery company may have laundered gold that had allegedly been pillaged in the Democratic Republic of the Congo. The case study discusses possible IHL violations by a private entity and the protection of public and private property.
- *Switzerland, The End of Private Armies* examines the status of private military companies during armed conflict and the prohibition of private security services from directly participating in hostilities under Swiss law.
- *Italy, Use of Force against Ambulances in Iraq* discusses possible violations of IHL, most notably attacks against medical vehicles and misuse of the red cross emblem.

Americas

- *USA, Guantanamo, End of "Active Hostilities" in Afghanistan* illustrates the impact that the notion of temporal scope of armed conflict can have on detention of individuals.
- *USA, Al-Shimari v. CACI Premier Technology, Inc.* highlights issues relating to private military companies under IHL as well as alleged abuses suffered by detainees.
- *USA, Jawad v. Gates* explores issues relating to minors in detention.
- *El Salvador, Supreme Court Judgment on the Unconstitutionality of the Amnesty Law* discusses the constitutionality of the Amnesty Law adopted after the non-international armed conflict in El Salvador, as well as its compliance with IHL.
- *Colombia, Peace Agreement* examines the peace agreement concluded as a special agreement under common Article 3 between the government of Colombia and the FARC.

Middle East

- *Syria, The Battle for Aleppo* analyzes alleged violations of IHL and IHRL committed by the parties to the conflict during the battle for Aleppo between 21 July and 22 November 2016.

- [Israel/Palestine, Accountability for the Use of Lethal Force](#) discusses the obligation of the armed forces and armed groups to ensure that IHL is respected and to repress violations committed by their members.
- [Syria: Medical Support for ISIS](#) examines the situation of British medical students offering medical assistance to wounded soldiers belonging to the so-called Islamic State group.
- [Syria, Syrian Rebels Treat Captured Filipino Soldiers As “Guests”](#) discusses the situation of Filipino UN peacekeepers captured by Syrian rebels and how they were treated while in captivity.

New thematic highlights, January–December 2018

“[War at Sea](#)” presents seven case studies that illustrate both the past and current challenges of naval warfare and maritime security. These cases allow lecturers, students and professionals to dig into some legal issues arising around the Second World War’s battles on the high seas, as well as various maritime questions related to contemporary conflicts, such as blockades and the distinction between civilian and military ships.

“[Detention in Armed Conflict](#)” underlines the need to strengthen IHL protection for detainees, specifically with regard to treatment and conditions of detention, protection of vulnerable individuals, grounds and procedures for internment, and transfer of detainees from one authority to another. This highlight presents seven case studies covering recent armed conflicts. They illustrate the treatment of detainees in general, detention of children and women, and the temporal scope of detention in particular.

“[“The Law”: Updated Introductory Texts and Users’ Survey](#)” gave the opportunity to users of the online casebook to fill out a survey and share their opinion on whether the introductory texts of the platform’s “The Law” section should be revised. The outcome of the survey showed a general demand to update the introductory texts.

“[Rights and Duties of Medical Personnel](#)” shows that people exclusively assigned to the performance of medical duties enjoy specific protections from attack and harm under IHL. They also have a duty to provide medical care to the sick and wounded without distinction, other than medical emergency grounds, and must treat these individuals humanely in all circumstances.

BOOK REVIEW



Leuven Manual on the International Law Applicable to Peace Operations

Terry D. Gill, Dieter Fleck, William H. Boothby and Alfons Vanheusden (eds)*

Book review by Tobias Vestner, Head of the Security and Law Programme at the Geneva Centre for Security Policy (GCSP), and **Alessandro Mario Amoroso**, Programme Officer of the Security and Law Programme at the GCSP.

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The *Leuven Manual on the International Law Applicable to Peace Operations* (Leuven Manual) belongs to the class of publications that deserve a prominent place in every bookshelf on peace operations and public international law. The Leuven Manual provides a restatement of all international norms applicable to peace operations,¹ thereby filling a gap in a field where political priorities and situational specificities hinder a comprehensive legal regulation. Its systematic analysis of the applicable international law responds to pressing calls by practitioners, policy-makers and academics, and will serve as an indispensable tool for better decision-making in future operations.

* Published by Cambridge University Press, Cambridge, 2017.

The book is solid and balanced, relying on robust research and an editorial process that involved input from many stakeholders. Prepared at the initiative of the International Society for Military Law and the Law of War, the Leuven Manual is the result of scrupulous research and drafting extended over six years. Terry D. Gill, Dieter Fleck, William H. Boothby and Alfons Vanheusden were general editors, supported by an international Group of Experts who jointly worked on the entire text, with the input of observers from the International Committee of the Red Cross (ICRC), the United Nations (UN) and several regional organizations.² The final version was adopted by consensus, which gives the work a high level of authoritativeness. This methodology was certainly necessary for the achievement of a proper restatement of the norms. Also, this was the most suitable approach for dealing with the bulk of difficult legal questions related to an area of law which, in addition to lacking any codification, has developed and continues to operate as the result of political compromise between respect for national sovereignty and maintenance of international peace and security.³

The Leuven Manual's main text is composed of 145 black-letter rules, each supported by an accompanying commentary. These rules comprise both existing law and best practices, sometimes blended in the same rule, but phrased so as to reflect the difference between legal obligations (“must”, “shall”, “have to”) and policy recommendations (“should”). The book is intended to be of assistance to those involved in the research, planning and conduct of operations. The audience thus includes national and intergovernmental policy-makers, military officers, policy officers in non-governmental organizations, and the academic community. The scope of the Manual, including its take on peace operations, is defined by its reaffirmation of the continuing validity of the principles comprising the “trinity of virtues”: consent of the parties, impartiality and limited use of force.⁴ Based on this framework, the Manual covers “consensual” peace operations. It does not cover “enforcement operations” (operations directed against a State and based on a UN Security Council resolution under Chapter VII of the UN Charter) or “peace enforcement operations” (operations mandated to participate as a party to a non-international armed conflict (NIAC) on the side of the government against

1 The Leuven Manual, and this book review, refer to “peace operations” as including both peacekeeping missions and peacebuilding and conflict resolution operations. This choice reflects current United Nations (UN) terminology. On 1 January 2019, the UN Department of Peace Operations (DPO) replaced the Department of Peacekeeping Operations (DPKO). The new DPO combines the functions of the former DPKO with responsibility over field-based political missions previously under the purview of the Department of Political Affairs. See *Restructuring of the United Nations Peace and Security Pillar: Report of the Secretary-General*, UN Doc. A/72/525, 13 October 2017, para. 20 (approved by UNGA Res. 72/262 C, 5 July 2018), available at: www.un.org/en/ga/search/view_doc.asp?symbol=A/72/525 (all internet references were accessed in March 2019).

2 The composition of the Group of Experts and Observers and of the Advisory Board can be consulted at the beginning of the book: Leuven Manual, p. ix.

3 Chapter 2 of the Leuven Manual presents a short history of the law of peace operations: Leuven Manual, pp. 6–24. For an extensive account of political and legal theories on peace operations, see Alex J. Bellamy, Paul D. Williams and Stuart Griffin, *Understanding Peacekeeping*, 2nd ed., Polity Press, Cambridge, 2010, pp. 18–41.

4 Leuven Manual, p. 3.

one or several armed groups).⁵ This choice is appropriate since enforcement and peace enforcement operations remain the exception despite the increasing robustness of peace operations' mandates.⁶ Yet, consensual peace operations for the purposes of the Leuven Manual are not limited to traditional peacekeeping, but extend to multi-dimensional operations tasked with peacebuilding and conflict resolution mandates. The rules apply to missions conducted by the UN as well as regional organizations and other arrangements. They aim to cover all relevant stages of the planning and conduct of an operation.

The Leuven Manual addresses all aspects of peace operations, from the mandate to specific legal issues related to the conduct of a mission. The chapters on the applicability of international human rights law (IHRL)⁷ and international humanitarian law (IHL),⁸ the responsibility of States and international organizations,⁹ and the individual criminal liability of peace forces' members¹⁰ are among the most complete overviews in the academic literature. Besides presenting the many settled aspects concerning the sources, scope and consequences of relevant international norms, these chapters do not hesitate to engage with unsettled questions and provide policy guidance. In this sense, they stand out for their ability to strike a balance between advocacy for a higher respect for the rule of law in peace operations, on the one hand, and the current practice of States and international organizations, which occasionally are still reluctant to acknowledge the full application of relevant norms, on the other. An extensive analysis is dedicated to the institutional frameworks of regional and sub-regional organizations conducting peace operations.¹¹ The chapter on the implementation of a gender perspective will hopefully be adopted as a point of reference to ensure compliance with recognized legal obligations and successful practices fostering the mainstreaming of gender issues throughout the entire life-cycle of an operation.¹²

5 The distinction between “peace operations”, “enforcement operations” and “peace enforcement operations” is today a conventional one. See Terry D. Gill, Dieter Fleck, Patrick C. Cammaert and Ben F. Klappe, “Peace Operations”, in Terry D. Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations*, 2nd ed., Oxford University Press, Oxford, 2015, p. 153; Trevor Findlay, *The Use of Force in UN Peace Operations*, Oxford University Press, Oxford, 2002, pp. 3–7.

6 There have been only two uncontroversial examples of enforcement operations (in Korea from 1950 to 1953 and Operation Desert Storm against the Iraqi invasion of Kuwait in 1991) and a few more cases of peace enforcement operations. The latter include the mandate of the UN Operation in the Congo between 1961 and 1963, and, more recently, the Force Intervention Brigade of the UN Stabilization Mission in the Democratic Republic of the Congo since 2013. It is still disputed whether the robust mandate attributed to the UN Multidimensional Integrated Stabilization Mission in Mali qualifies as peace enforcement. Examples of non-UN peace enforcement operations are the International Security Assistance Force in Afghanistan and the Kosovo Force, both led by NATO. See T. Findlay, above note 5, pp. 374–381; T. D. Gill *et al.*, above note 5, pp. 96–97.

7 Leuven Manual, pp. 76–90.

8 *Ibid.*, pp. 91–104.

9 *Ibid.*, pp. 267–287.

10 *Ibid.*, pp. 311–327.

11 *Ibid.*, pp. 52–75.

12 *Ibid.*, pp. 105–119.

The Leuven Manual does not have any major flaws in its legal findings. A limited number of issues, however, deserve closer scrutiny because of their considerable practical relevance for the establishment and conduct of peace operations. The following paragraphs of this review will selectively focus on some of them.

Rule 1.1, recalling the three principles of peace operations, should be read – and its commentary should eventually be reformulated – so as to reflect the distinction between the legal obligation for host State consent and the Manual’s policy recommendation to seek the consent of all major parties to the conflict before deployment. The rule defines the first of the three principles of peace operations as “consent of the parties”. The accompanying commentary explains that consensual peace operations “rely on consent of the Host State and at the outset also on the consent, or at least acquiescence, of all major parties to the former conflict”.¹³ However, this does not reflect existing law. Under *jus ad bellum*, military operations deployed abroad, absent Chapter VII authorization or self-defence justification, need only the consent of the host State to avoid violating its territorial integrity. The consent of other parties to an ongoing conflict is not a legal requirement to the extent that their territorial integrity is not at stake. This also applies for peace operations, both when deployed in or after an international armed conflict (IAC) and when deployed in or after a NIAC. In IACs, the mission is bound to operate on the territory of the States party to the conflict having consented to the mission. In NIACs, the prohibition against violation of territorial integrity does not affect non-State actors. The distinction, drawn by Christine Gray, between “the legal requirement of host-state consent and the practical requirement of cooperation from all significant parties involved”¹⁴ is decisive and reaffirmed by other legal literature.¹⁵ It does not deny the relevance of gaining the consent of the other parties to the conflict. As explained by Terry D. Gill and Dieter Fleck, “[i]n addition to the legal requirement of Host State consent, Peace Operations are *also* dependent upon the consent, or at the least acquiescence, of all the parties to the conflict or dispute, *in order to function and carry out their mandate*”.¹⁶ Accordingly, acceptance of a peace operation by all parties concerned remains a crucial condition to ensure success of the mission and the safety of its members but is not a requirement enshrined in law.

Similarly, the Leuven Manual is ambiguous when requiring a Security Council mandate for all non-UN operations using force beyond self-defence, even when they rely on the invitation or consent of the host State.¹⁷ Rule 3.1 correctly

¹³ *Ibid.*, p. 3.

¹⁴ Christine Gray, “Host-State Consent and United Nations Peacekeeping in Yugoslavia”, *Duke Journal of Comparative & International Law*, Vol. 7, No. 1, 1996, p. 242.

¹⁵ See, among others, Alexander Orakhelashvili, *Collective Security*, Oxford University Press, Oxford, 2011, p. 315; Patryk I. Labuda, “Peacekeeping and Peace Enforcement”, *Max Planck Encyclopedia of Public International Law*, September 2015, para. 21.

¹⁶ T. D. Gill *et al.*, above note 5, p. 154 (emphasis added).

¹⁷ As clarified above in the text, this would be the case for all non-UN operations covered by the Leuven Manual, whose scope of application is limited to consensual peace operations.

presents the mandate of an international organization and the consent of the host State as alternative rather than cumulative requirements. Rule 3.3 states further that “a mandate issued by the Security Council will complement and provide an *additional legal basis* alongside such consent”.¹⁸ Nevertheless, according to the commentary to Rule 3.1, in case of peace operations conducted by regional organizations or other arrangements, a Security Council mandate will not be sought “when the operation does not involve the proposed use of force beyond personal self-defence”.¹⁹ This latter sentence seems to place an unjustified limit on non-UN peace operations as it conflicts with the host State’s sovereign right to regulate the use of force on its territory by foreign troops. The host State can consent to the use of force by peace operations beyond personal self-defence, such as in defence of the mandate or to protect civilians. The consent of the host State also constitutes a sufficient legal basis for such use of force in the absence of a Security Council mandate. As clarified by Eric P. J. Myjer and Nigel D. White:

Without any UN authority a NATO or other regional organization peace support operation with a coercive protection mandate will be in conflict with the UN Charter provisions, but if force is used against spoilers and not the government then the prohibition on the use of force in Article 2(4) arguably is not being violated, since the use of force is not directed against the State.²⁰

The commentary to Rule 3.1 instead introduces an unnecessary burden to establishing non-UN peace operations.

Three additional issues strictly related to the application of IHL in the Leuven Manual are worth highlighting. To begin with, there appears to be no reason why the Manual should exclude from its scope of application peace operations deployed in IACs without taking part in the conflict. Surely, peace operations considered in the Leuven Manual can never become party to an IAC because this would turn the mission into an enforcement operation, falling outside the scope of the book. Rule 6.2 seems to stem from this logic when it maintains that “Peace Operations which are the subject of this Manual are operations deployed to situations of non-international armed conflict”.²¹ Yet the formulation used is misleading: peace operations can be deployed to situations of IAC and still remain consensual, provided they rely on the consent of the State on whose territory they are stationed. Going between warring States is notably the traditional peacekeeping function. Chapter 6 should therefore differentiate between deployment and participation in an IAC, and only exclude the latter.

Furthermore, the Manual associates the right to use force in personal self-defence with the right to use force in defence of others in Rule 12.3, though these two rights are based on different rationales. Their conflation risks hiding the different consequences that their exercise entails in terms of direct participation in

18 Leuven Manual, p. 29 (emphasis added).

19 *Ibid.*, p. 27.

20 Eric P. J. Myjer and Nigel D. White, “Peace Operations Conducted by Regional Organizations and Arrangements”, in T. D. Gill and D. Fleck (eds), above note 5, p. 197.

21 Leuven Manual, p. 93.

hostilities.²² Members of a peace force are considered civilians for the purposes of IHL, and civilians do not directly participate in hostilities if they use force in defence of themselves or others against violence prohibited under IHL.²³ While every attack directed against a civilian is prohibited under IHL,²⁴ and therefore the use of force in personal self-defence against such an attack does not amount to direct participation in hostilities, attacks against others are not necessarily unlawful. Thus, the use of force in defence of others might result in direct participation in hostilities and provoke the loss of protected status. The same applies for the protection of property, covered by Rule 12.4. Accordingly, members of a peace force directly participate in hostilities each time they use force for one of the following purposes related to the defence of others:²⁵ defence of another member of the peace operation who is directly participating in hostilities; defence of a member or the property of the military component of a peace operation which has become a party to an armed conflict (provided they are not already members of the military component); and defence of a member or the property of a State armed force with which the peace force is cooperating. Since all the described attacks are directed against lawful targets, they cannot be repulsed without losing protected status and therefore becoming legally targetable.²⁶ Moreover, when mandated to use force for the mentioned purposes on a regular basis, peace forces even risk becoming a party to the conflict, realizing the fear of most troop-contributing countries that they will be drawn towards enforcement action.²⁷ Given the very significant relevance of this consequence, the Manual should draw the attention of the readers more explicitly to these implications.

There is also a lack of clarity concerning the temporal scope of application of IHL to the military contingents of a peace operation that has become party to a conflict. Rule 6.4 recognizes that the conditions for the application of IHL to peace operations can be met not only by individual members of a peace force directly participating in hostilities, but also when the entire military component of an operation becomes a party to the conflict.²⁸ This statement is a decisive step forward regarding the law applicable to peace operations, with impact on the status of members of the military contingents involved. When IHL applies to the operation, they can be the object of attack at all times, as acknowledged by the accompanying commentary. Yet the Leuven Manual blurs

22 *Ibid.*, p. 147.

23 This is because these actions lack the necessary belligerent nexus. See Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009, p. 61.

24 Unless he or she is directly participating in hostilities.

25 Provided that notably the requirement of belligerent nexus is fulfilled.

26 In order to determine whether an attack is unlawful for the purposes of direct participation in hostilities, what must be taken into consideration is the nature of the target, not the nature of the attacker or the means used. For an extensive argumentation, see Lindsay Cameron and Vincent Chetail, *Privatising War*, Cambridge University Press, Cambridge, 2013, pp. 464–476.

27 It is noteworthy that this should not concern the active protection of civilians.

28 Leuven Manual, p. 98.

this conclusion by providing in the same rule that members of the military component lose their protection “if and for such time as the operation has become a party to the conflict”, a formula which is traditionally used to limit the temporal scope of loss of protection of individual civilians directly participating in hostilities.

With regard to the application of IHL to the military contingents of a peace operation, the Leuven Manual takes a similar approach to the UN Secretary-General’s 1999 Bulletin, which recognizes the application of IHL to UN forces engaged in a conflict as combatants only “to the extent and for the duration of their engagement”.²⁹ However, as explained by Tristan Ferraro, the Bulletin’s approach conflates the temporary and activity-based loss of protection by civilians with the continuous and status-based loss of protection of combatants.³⁰ The result for peacekeepers would be “an illogical disparity between them and their opponents and would give an operational advantage to the multinational forces, because the opposing party in the armed conflict would continue to be subject to lawful direct attack at any time.”³¹ The Leuven Manual misses the chance to rule out this disparity by excluding the notion that peace operations’ contingents can begin and end their participation in an armed conflict on their own terms by merely deciding to engage in and disengage from hostilities. This option creates a revolving-door mechanism for entire contingents. Taking a stance in this debate would have contributed to settling one of the thorniest practical issues associated with the application of IHL to peace forces.

With these considerations in mind, the ambitious objectives of the Leuven Manual can be considered altogether met. To date, there is no other contribution that has taken up the challenge of collecting, analyzing and restating the entire body of law applicable to peace operations.³² The Manual has therefore at least as much merit as comparable projects realized in other areas of international law, notably the San Remo Manuals,³³ the HPCR Manual³⁴ and the Tallinn Manual.³⁵ The choice to supplement the restatement of existing law with best practices in the form of policy recommendations goes even beyond the book’s main purpose

29 “Observance by United Nations Forces of International Humanitarian Law”, Secretary-General’s Bulletin, UN Doc. ST/SGB/1999/13, 6 August 1999, Section 1.1, available at <https://conduct.unmissions.org/secretary-general%E2%80%99s-bulletin-observance-united-nations-forces-international-humanitarian-law>.

30 Tristan Ferraro, “The Applicability and Application of International Humanitarian Law to Multinational Forces”, *International Review of the Red Cross*, Vol. 95, No. 891–892, 2013, p. 605.

31 Leuven Manual, p. 606.

32 The Manual does not cover the protection of personal data. This topic has been discussed at the international conference convened in Dublin by the International Society for Military Law and the Law of War, from 14 to 17 November 2018.

33 Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge, 1995; Michael N. Schmitt, Charles H. B. Garraway and Yoram Dinstein, *The Manual on the Law of Non-International Armed Conflict*, International Institute of Humanitarian Law, Sanremo, 2006.

34 Program on Humanitarian Policy and Conflict Research at Harvard University, *HPCR Manual on International Law Applicable to Air and Missile Warfare*, 2009.

35 Michael N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, Cambridge, 2013.

and will hopefully contribute to the settling and development of law by practice. Certainly, this process would be bolstered if States decide to endorse the Leuven Manual, or at least parts of it. To reach that aim, the involvement in a future revision process of relevant countries, including the top troop-contributing countries and financial-contributing countries, would be highly beneficial. Twenty years after the publication of the UN Secretary-General's Bulletin and ten years after the adoption of the Capstone Doctrine,³⁶ the adoption of the Leuven Manual as the leading guidance for the conduct of UN missions would also represent a great step forward.

As shown by Lise Morjé Howard, one key factor for successful peace operations is their capacity to learn from the environment in which they are deployed.³⁷ The Leuven Manual allows for a better understanding of the legal environment of operations, and as such, it will enable better decision-making and become an irreplaceable support for the success of peace operations.

36 *United Nations Peacekeeping Operations: Principles and Guidelines* (Capstone Doctrine), 18 January 2008, available at www.un.org/ruleoflaw/files/Capstone_Doctrine_ENG.pdf.

37 Lise Morjé Howard, *UN Peacekeeping in Civil Wars*, Cambridge University Press, Cambridge, 2008.

BOOK REVIEW



Taming Ares: War, Interstate Law, and Humanitarian Discourse in Classical Greece

Emiliano J. Buis*

Book review by Marie-Louise Tougas, IHL Expert for the UN Panel of Experts on Yemen established pursuant to Security Council Resolution 2140.

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From Hammurabi's Code to the Arms Trade Treaty and the Treaty on the Prohibition of Nuclear Weapons, humanitarian rules have continuously evolved as part of efforts to constraint belligerents' behaviour and provide protection for victims of armed conflicts. Historical analyses of humanitarian rules not only shed light on how wars, hostilities and their limits were conceived throughout history, but can also reinforce the customary nature of these rules.

More than a millennium before Henry Dunant's *A Memory of Solferino* was published, humanitarian ideas and principles were already present in the discourses and norms of the classical Greeks, and war among Greek city-States was regulated by a corpus of norms common to the Greek people. Emiliano Buis's book, *Taming Ares: War, Interstate Law, and Humanitarian Discourse in Classical Greece*, is one of the rare books to look at Classical Greece texts and norms from various religious, political, social, literary and artistic sources, through the prism of international

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humanitarian law (IHL), and offers a fascinating perspective on the historical roots of IHL.

This book allows readers to get an in-depth view into how norms, inter-city relations and laws common to the classical Greeks were conceived during the Peloponnesian War period (431–404 BCE), and provides an enlightening analysis of some of the precursory roots of what we know today as *ius ad bellum* and *ius in bello*. Not only is the book based on meticulous research, but each of its sections is also supported by numerous examples and quotations of the original texts used as reference sources, with their English translation, allowing readers to fully appreciate how the norms and ideas preceding modern-day IHL were expressed.

The first part of the book is dedicated to demonstrating that classical Greek inter-city relations were regulated by norms relating to the legal realm. In the first chapter, Buis introduces what represented the law in the ancient world and argues that this can only be understood when analyzed together with other social regulations such as religious, moral, political and international or inter-*polis* rules. In the ancient Greeks' conception of law, the performative aspect of justice, acts of legislation and citizens' participation were crucial, and are highlighted through the presentation of a shared structural logic between theatre and judicial activities. For instance, in Athens, where judicial functions were not professionalized, justice took the form of oral and public debates, allowing participation of citizens. Performance was a cultural value that allowed both theatre and law to be perceived as dynamic public creations.

In the second chapter, the author explores the notion of international subjectivity at the time of the Greek *poleis*. He argues that international law may have existed even before the theorization of its "subject".¹ His analysis extends from the domestic regulation of associations in Athens during the fourth and fifth centuries to the Greek city-States' conception of social groups and associations. In these contexts, the *poleis* were conceived as not only territories, but also as their people: "For men are the polis, and not walls or the ship empty of men."² To exemplify this, Buis presents a study of various treaties signed during the Peloponnesian War analyzing the denomination of the different parties. Indeed, in many treaties concluded between allies during the period, the texts refer to the people (such as Athenians and Rhegians) and not to the cities (such as Athens or Rhegium), showing that Greeks conceived the representation of their *polis* as being based on its people, and not as an entity separated from its members. Based on this analysis, Buis suggests that the idea of starting from subjectivity to conceive international law may have existed before the conception of "subjects", as we know of them today. Indeed, although Greek city-States were not conceived as subjects distinct from their people, they nevertheless concluded treaties and acted as autonomous and, to some extent, sovereign entities.

1 *Taming Ares*, p. 104.

2 *Ibid.*, p. 72, note 65, quoting Thucydes.

Buis also illuminates how the notion of the equality of parties was important in inter-*polis* treaties, along with the concept of reciprocal obligations.³ However, much like some contemporaneous treaties, abuses and hegemony of more powerful cities was evidenced in several inter-*polis* treaties. For instance, in 403 BCE, Sparta, using its privileged position, imposed a treaty obligation on the Athenians to destroy their walls, hand over their fleet and “have the same allies and enemies as the Spartans”.⁴ The creation of some international organizations, which for example took the form of religious or military associations, also contributed to the imbalance of power between theoretically equal parties. Indeed, although these associations guaranteed formal equality between city-States, they were in fact controlled by leaders who were entitled to take actions on behalf of the organization.⁵ When reading this part of the analysis, one cannot help but reflect on how this aspect of international relations seems to present certain present-day analogues.⁶

In the second part of the book, Buis examines the rules pertaining to the conduct of war and its limits in the normative corpus regulating Greek inter-*polis* relations. He starts by exploring the concept of just war in classical Greece and the grounds it laid for the notion of self-defence. Chapter 3 thus delves into the rhetoric of the use of force used by the ancient Greeks, shedding light on their need to limit military action to cases considered as just. In various sources analyzed by the author, the need to justify war, and to explain its causes through a discourse acceptable both at the political and at the religious levels, is evident. For instance, in *Politics*, Aristotle (384–322 BCE) presents different legitimate justifications for war, among which defence against aggression by others can be found.⁷ Also, in respect to the war between the Corinthians and the Corcyraeans (435–431 BCE), appeals to just war are evidenced in the arguments justifying the actions of one party because of prior harm caused by the other. As part of this discourse, the need to help victims of acts of aggression or of unjust or unfair actions of an enemy who had refused arbitration and insisted on the recourse to arms are both presented as justification for waging war in sources from the time.⁸ Through drawing on various sources that present the innumerable justifications offered for military action, the author demonstrates how the notion of self-defence was considered as a valid reason to wage war among the ancient Greeks and was often part of official discourses. Based on references to a *right*, or a *universal law*, to defend oneself when one is the victim of an aggression, as well as to a *common legal basis* on which to build a self-defence discourse, Buis traces

3 *Ibid.*, p. 76.

4 *Ibid.*, p. 81.

5 *Ibid.*, p. 82.

6 Indeed, this echoes the criticisms often levelled in recent years against the United Nations system and the role given to the five permanent members of the Security Council. On this issue, see, for instance, Peter Nadin, *UN Security Council Reform*, 1st ed., Global Institutions Series, Routledge, London, 2016.

7 See *Taming Ares*, pp. 126–127. The author quotes a passage from Aristotle’s *Politics*: “The proper object of practising military training is not in order that men may enslave those who do not deserve slavery, but in order that first they may themselves avoid becoming enslaved by others.”

8 *Ibid.*, pp. 128–131.

a possible source of the contemporary right to self-defence under international law. He further notes that “little progress has been made in terms of *ius ad bellum* for pragmatically establishing the grounds that would ‘authorize’ armed attacks against those who are identified as enemies”.⁹

In the fourth and final chapter, the normative framework surrounding the conduct of hostilities and the limits imposed by inter-*polis* law is examined. From an IHL point of view, this chapter is probably the most enlightening. It begins with a presentation of how military organizations developed at the time, and how, by the same token, these organizations shaped the formalities surrounding the conduct of war. Parallels can be drawn with the performative aspect of court proceedings or theatre: for the ancient Greeks, the conduct of war could also be perceived as a performance structured by formal and informal rules. The analysis of those rules and their possible affiliation with the ones of contemporary *ius in bello* compose the bulk of this chapter. For instance, the notion of military necessity¹⁰ was present in the discourse of the Greeks and was often used to explain or justify an attack. Thus, when the Athenians turned a Boeotian temple into a fortification and contaminated its sacred water during the Battle of Delium in 424 BCE, they were accused by the latter of acting contrary to the law. They argued that they were compelled to act in this way after the invasion by the Boeotians.¹¹

Buis also traces indications of the existence of a principle of distinction between those directly involved in hostilities and the civilian population to the time of the ancient Greeks. He does this through cited sources which stress the need to fight in a defined battlefield in order to avoid widespread violence that could have unjustifiable consequences for the population.¹² The protection of envoys and heralds was also recognized during inter-*polis* wars, and it was considered contrary to the common law of the Greeks to arrest them.¹³ Civilians or non-combatants in general also benefited from the protection of some rules. For instance, Thucydides reports that in the treaty between Argos and Sparta, it was established that all captured minors would be returned at the end of hostilities.¹⁴ Further, it was contrary to the common law of the Greeks to attack

9 *Ibid.*, p. 138.

10 The principles of IHL are based on a balance between considerations of humanity and of military necessity: see Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction*, ICRC, Geneva, 2016, p. 17. See also, for instance, 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.

11 See *Taming Ares*, p. 149.

12 See, in particular, *ibid.*, p. 146 ff. The principle of distinction is the cornerstone of IHL. See N. Melzer, above note 10, p. 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), Rule 1, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1> (all internet references were accessed in May 2019).

13 Non-hostile contact between parties to conflict, especially through the use of *parlementaires* is a long-established rule of IHL, as is the inviolability of *parlementaires* and the protection of the use of the white flag of truce. See ICRC Customary Law Study, above note 12, Rules 58, 66, 67.

14 See *Taming Ares*, p. 172. In 1977, Additional Protocols I and II to the Geneva Conventions set the minimum age of recruitment in armed forces at 15 and prohibit participation of children below that

temples and other religious facilities, or to engage in acts of pillage, illicit entry or destruction of these sites.¹⁵ Religious celebrations of the enemy were to be respected, and attacks during them were prohibited.

As for prisoners of war, an interesting reference in Xenophon's *Life of Agesilaus* mentions that prisoners should be treated not as criminals to be punished, but rather as men to be guarded.¹⁶ The book also offers some examples of prisoners of war exchanges in ancient Greece¹⁷ and cites a passage from Euripides' tragedy *Children of Heracles*, produced c. 403 BCE, suggesting that it was considered contrary to the law to kill a prisoner of war.¹⁸ Some sources studied by Buis also mention the importance of having doctors among Greek armies to take care of the wounded.¹⁹ The respect and honour due to fallen combatants, including enemy ones, was also part of Panhellenic *nomos*.²⁰

A fourth-century decree from Tralleis granting a right for supplicants to be accepted in the sanctuary of Dionysus suggests that supplicants and those who had surrendered benefited from some protection as well. This is illustrated by Aeschylus' tragedy *The Suppliants* (463 BCE), in which fifty women from Egypt, known as the Danaides, fled from a forced marriage with their cousin and sought asylum in Argos. In the play, the issue of whether the women can stay is submitted by the king to an assembly of the people, who vote to accept the women. A decree is passed granting them the status of foreign residents. In this case, the author highlights the similarity between arguments presented by the Danaides to advocate in favour of Argos granting them asylum, and present-day refugee status: having crossed an international border, persecution, *non-refoulement* and even the absence of commission of crime by the Suppliants.²¹

The ancient texts that Buis cites also point to how the classical Greeks imposed limits on the means and methods of warfare. For instance, around 595–585 BCE, after the Amphictyonic League contaminated the Pleistus river with a

age in hostilities: see Additional Protocol I (AP I), Art. 72(2), and Additional Protocol II (AP II), Art. 4(3) (c). The Convention on the Rights of the Child (UNGA Res. 44/25, Annex, UN Doc. A/44/49, 1989 (entered into force 2 September 1990)) also contains a similar disposition in its Article 38. The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (UNGA Res. 54/263, Annex I, UN Doc. A/54/49, Vol. III, 2000 (entered into force 12 February 2002), Arts 1, 2) raises this threshold to 18 years old. This rule is recognized as a customary rule: see ICRC Customary Law Study, above note 12, Rules 136, 137.

15 See *Taming Ares*, p. 173 ff. Cultural properties are protected by IHL: see AP I, Art. 53(1); AP II, Art. 16; and the Hague Convention on the Protection of Cultural Property (1954) and its Protocols (1954 and 1999). The protection of cultural property is also a rule of customary IHL: see ICRC Customary Law Study, above note 12, Rules 38–41.

16 See *Taming Ares*, p. 179. The same idea is behind the prisoner-of-war status and the combatant privilege granted by IHL: see, among others, N. Melzer, above note 10, p. 175.

17 See *Taming Ares*, p. 179.

18 Passage reproduced in Greek and English in *ibid.*, p. 180. See also p. 181.

19 *Ibid.*, p. 184.

20 *Ibid.*, p. 185.

21 See *ibid.*, pp. 190–200. For more details, see Emiliano J. Buis, "Hyendo a Argos: La proteccionjuridica de las mujeres refugiadas y el lenguaje del humanitarismo griego en *Supplicante* de Esquilo", in Julia Grignon (ed.), *Tribute to Jean Pictet*, Editions Yvon Blais, Montreal, 2016, p. 153.

poisonous plant named hellebore, Aeschines mentions an agreement to prevent such action in the future, suggesting a need to establish norms limiting unnecessary and superfluous suffering.²²

A passage from Plato's *Republic* (c. 380 BCE) illustrates the importance for the Greek people of respecting some limits in warfare. It also contains an original and innovative proposal: that barbarians – i.e., non-Greeks – receive the same treatment as Greeks, venturing the idea that all those not participating in hostilities should always be protected.

“They will not, being Greeks, ravage Greek territory nor burn habitations, and they will not admit that in any city all the population are their enemies, men, women and children, but will say that only a few at any time are their foes, those, namely, who are to blame for the quarrel. And on all these considerations they will not be willing to lay waste the soil, since the majority are friends, not to destroy the houses, but will carry the conflict only to the point of compelling the guilty to do justice by the pressure of the suffering of the innocent.” “I”, he said, “agree that our citizens ought to deal with their Greek opponents in this wise, while treating barbarians as Greeks now treat Greeks.”²³

In the last part of his book, Buis addresses post-conflict resolution, prosecution and transitional justice. While the author admittedly notes that there have been very few instances of prosecution for acts committed during armed conflicts in classical Greece, he does highlight these thought-provokingly rare cases. One example, found in Xenophon's writings, is the tribunal set up in 405 BCE by the Spartan general Lysander, to judge his enemies, especially the Athenians, who voted that if they were victorious they would cut off the hands of the vanquished. Another case is that of the “Trial of the Generals”, which took place in 406 BCE before the Assembly, rather than before a court. According to Xenophon's writings, the generals were put on trial on the basis of their failure to rescue the shipwrecked, but there are also indications that they were tried for treason.²⁴

The most interesting example of post-conflict resolution in ancient Greece put forth by Buis is probably the tribunal established to judge those leaders in positions of power during the four-month Thirty Tyrants reign. This reign ended with the killing of many Athenians and the displacement of about half of the city-State's population. The decision to judge only the main leaders and not everyone involved was praised by Aristotle in *The Constitution of the Athenians*:

22 *Taming Ares*, pp. 203–208. IHL prohibits the use of biological weapons. See Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 10 April 1972; Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, 17 June 1925. This is also a customary rule: see ICRC Customary Law Study, above note 12, Rule 73. IHL also protects objects that are indispensable to the survival of the civilian population such a water: see AP I, Art. 54(2); AP II, Art. 14; ICRC Customary Law Study, above note 12, Rule 54.

23 *Plato in Twelve Volumes*, trans. Paul Shorey, Vols 5–6, Harvard University Press, Cambridge, MA, and William Heinemann, London, 1969, reproduced, along with the Greek version, in *Taming Ares*, p. 172.

24 *Taming Ares*, pp. 217–220.

But [the Athenians] appear both in private and public to have behaved towards the past disasters in the most completely honourable and statesmanlike manner of any people in history; for they not only blotted out recriminations with regard to the past, but also publicly restored to the Spartans the funds that the Thirty had taken for the war.²⁵

Although it is incontestable that the rules governing classical Greek inter-city conflicts and relations were mainly developed and imposed by the most powerful political entities, and that the rules of armed conflict were – as they still are – subject to political manipulation, it is also evident that some inter-*polis* values and principles were the basis for several rules of restraint in respect to warfare. Buis’s meticulous analysis of various sources, including treaties, decrees, theatre pieces and literature, evidences that the basis of contemporary IHL can find roots in the distant and archaic humanitarian principles and rules of ancient Greece. It also provides a rich background for understanding the legal framework relating to the conduct of hostilities and the use of force at that time, and an excellent reference for a historical perspective on customary *ius ad bellum* and *ius in bello*.

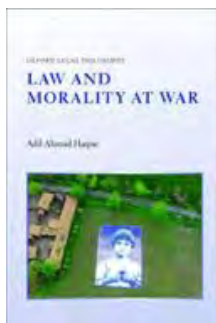
In a surprisingly strong manner, the remote legal norms of ancient Greece analyzed by Buis echo many of the contemporary rules of IHL and thus provide a relevant precedent for some current rules of *ius ad bellum* and *ius in bello*. The book also offers an occasion to reflect on the origin and nature of the elementary considerations of humanity as a general principle of law, and on the Martens Clause, which, for the first time, made explicit on the pages of a treaty regulating the conduct of hostilities something that may have always have been there – i.e., laws of humanity and the dictates of public conscience.²⁶ As Cassese has said: “Clearly, in spite of its ambiguous wording and its undefinable purport, [the Martens Clause] has responded to a deeply felt and widespread demand in the international community: that the requirements of humanity and the pressure of public opinion be duly taken into account when regulating armed conflict.”²⁷ Reading *Taming Ares* is also a journey into the genesis of this “deeply felt and widespread demand”.

25 Aristotle in 23 Volumes, trans. H. Rackham, Vol. 20, Harvard University Press, Cambridge, MA, and William Heinemann, London, 1952, reproduced, along with the Greek version, in *Taming Ares*, p. 223.

26 The Martens Clause was first introduced in the preamble of Hague Convention (II) on the Laws and Customs of War on Land in 1899. See International Court of Justice (ICJ), *Corfu Channel Case (United Kingdom v. Albania)*, Judgment (Merits), 9 April 1949, *ICJ Reports 1949*, p. 22; ICJ, *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment (Merits), 27 June 1986, para. 218; ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, paras 78, 84, 87. See also Matthew Zagor, “Elementary Considerations of Humanity”, in Karine Bannelier, Theodore Christakis and Sarah Heathcote (eds), *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case*, Routledge, London, 2012.

27 Antonio Cassese, “The Martens Clause: Half a Loaf or Simply Pie in the Sky?”, *European Journal of International Law*, Vol. 11, No. 1, 2000, p. 212.

BOOK REVIEW



Law and Morality at War

Adil Ahmad Haque*

Book review by Lisa Hecht, Postdoctoral Researcher at the Department of Philosophy, Stockholm University.

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Over the last decade, the philosophical study of war has turned into a flourishing research area. The ongoing debate on the morality of war challenges some widely accepted claims about how wars can be fought justly.¹ Notably, some scholars raise challenges to concepts like the equality of belligerents and civilian immunity, suggesting that there might be a large gap between law and morality. Insofar as international humanitarian law (IHL), also known as the law of armed conflict, is concerned, civilian immunity from direct attack applies equally to just and unjust combatants. However, IHL does not consider the moral considerations guiding just conduct in war. We need to know whether this omission is justified, or whether the law needs to change to better map onto morality.

Adil Ahmad Haque's book, *Law and Morality at War*, takes up this important question. Well-versed in both the philosophical and legal debates, Haque offers an insightful interpretation and critique of IHL. He argues that the law should enable those who adhere to it to better conform to their moral obligations not to kill unjustly. One problem with the current state of the law is the vagueness of some parts of IHL, which makes it difficult for combatants to know what their moral obligations are. Haque seeks to amend this by suggesting refinements of the law that build on moral principles.

Following the general trend in the ethics of war scholarship, Haque puts individual moral rights and duties at the centre of his philosophical thinking about war. He is committed to the doctrine of reductivism, which holds that "the moral norms governing violence in war are the same as the moral norms

* Published by Oxford University Press, Oxford, 2017.

governing violence outside of war”.² According to Haque and other reductive individualists, the use of violence is permissible only in defence of individual rights. Based on his line of reasoning, individuals can lose their rights and become subject to defensive harm if they are responsible for an unjust threat of harm. This explains the permissibility of individual self-defence as well as the morally permissible use of force in war, and provides the basis from which the arguments in the book proceed.

However, a commitment to reductive individualism is at odds with the symmetrical application of the legal rules governing the conduct of hostilities. While the *in bello* laws apply equally to all sides of a conflict, reductive individualists like Jeff McMahan, Helen Frowe and Cécile Fabre argue that, by and large, only combatants fighting a just war can fight justly. In this view, the principles of necessity and proportionality that constrain defensive harm make sense only for those pursuing just ends. Hence, unjust combatants cannot be moral equals of just combatants. In contrast, IHL accepts the legal equality of combatants: armed forces have the right to participate directly in hostilities irrespective of the party for which they fight.³ Furthermore, IHL “provides [lawful] combatants [belonging to all parties to the conflict] with immunity from domestic prosecution for acts which, although in accordance with IHL, may constitute crimes under the national criminal law of the parties to the conflict”.⁴

Haque’s defence of the symmetrical application of *in bello* rules rests on the service view of law. According to this view, the law “provides a service to moral agents by helping them to conform to their moral obligations better than they could on their own”.⁵ The law thus serves a valuable function in helping combatants on the unjust side to act less wrongfully, and in helping combatants on the just side to fight in accordance with their moral obligations. Crucially, it does this by imposing symmetrical rules. IHL is therefore not in need of substantial revision, even if reductive individualism is correct.

Haque’s elaborations show that the law and morality are not in conflict. He explains how, contrary to a widespread misconception among philosophers,⁶ the law does not grant combatants equal permission to kill. Rather, the law should more plausibly be read as granting equal immunity from prosecution to

1 Among them Jeff McMahan, *Killing in War*, Oxford University Press, Oxford, 2008; Cécile Fabre, *Cosmopolitan War*, Oxford University Press, Oxford, 2012; Helen Frowe, *Defensive Killing*, Oxford University Press, Oxford, 2014.

2 *Law and Morality at War*, p. 9.

3 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. 43(2).

4 Nils Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Law*, ICRC, Geneva, 2009, p. 83.

5 *Law and Morality at War*, p. 44.

6 McMahan, for example, interprets international law as permitting combatants to kill irrespective of the side they fight for. He writes: “This idea [that no one does wrong, or acts impermissibly, merely by fighting in a war that turns out to be unjust] lies at the core of the reigning theory of the just war and also informs the international law of war.” J. McMahan, above note 1, p. 3.

combatants who fight in accordance with the rules of law.⁷ This does not imply a permission to target opposing combatants. Thus, the symmetrical application of the rules governing the conduct of hostilities does not expose a deep disagreement between law and morality.

Having defended this view of the relationship between law and morality, Haque then spells out how law and rules of engagement can be refined in order to fulfil their service. Three chapters of the book are devoted to the legal and moral status of civilians (Chapter 3), combatants (Chapter 4) and human shields (Chapter 9). The third chapter, as well as the book's appendix, are particularly relevant for those interested in philosophical challenges to civilian immunity from targeted attack. Here, Haque defends the principle of civilian immunity on deep moral grounds. For practical purposes, the book is at its most valuable when offering refinements of the principles of distinction (Chapter 5), discrimination (Chapter 6), precaution (Chapter 7) and proportionality (Chapter 8). Here, Haque shows how deontological moral principles can help to make the sometimes vague formulations of legal principles more precise. For example, he invokes the moral asymmetry of *doing* and *allowing*, in order to defend the view that attacking forces may not forgo precautions and increase the risk of harm to civilians in order to expose themselves to a lesser risk of harm.

The legal standards that emerge from Haque's discussion are often more specific and more demanding than what is currently required by the law. Take the principle of distinction as an example. The law currently offers little guidance on the level of certainty that is required to lawfully attack a person and, as Haque argues, previous proposals of scholars and practitioners are either too permissive or too restrictive. As an alternative, Haque develops a deontological targeting approach. Individuals should be presumed to be civilians – and so immune to attack – unless there is *decisive reason* to believe an individual is a combatant. Only if there is a decisive reason may one consider whether killing the individual will prevent substantially greater expectable harm to others.⁸ This approach respects the moral status of the targeted individual as a rights-holder who may be targeted only if the attacker believes she has lost those rights. Haque's approach to targeting thereby accounts for the importance that deontological moral theory assigns to rights and the notion of respect. It also allows a balancing of the expected costs and benefits of the action once there is a decisive reason to believe an individual is a lawful target.

In the book's closing chapter, Haque turns to the prosecution and punishment of war crimes. He lays out the discrepancies between IHL and the Rome Statute of the International Criminal Court (ICC), and makes suggestions as to how these discrepancies could be minimized. As Haque shows, some violations of IHL are not criminalized by the provisions of the Rome Statute and so cannot be prosecuted by the ICC.⁹ Prohibiting only intentional attacks against

7 *Law and Morality at War*, pp. 23–30.

8 *Ibid.*, p. 136.

9 *Ibid.*, p. 237.

civilians, the Rome Statute could, for example, be read as not allowing the ICC to enforce the principle of distinction, since this principle is concerned with reckless, non-intentional endangering of civilians; Haque suggests that the mental elements of various war crimes should be expanded to include recklessness.¹⁰

With this detailed and comprehensive treatment of the central principles of IHL, Haque makes a valuable contribution to legal philosophy – but this is not all. Throughout the book, Haque competently moves between discussing deep moral principles and offering tangible suggestions for the improvement of law and rules of engagement. This makes the book as relevant for philosophers as for legal theorists and practitioners. While practitioners are offered concrete proposals for how to reform IHL, philosophers are presented with interesting arguments that invite further debate. In addition to his defence of civilian immunity, Haque's discussion of the permissibility of killing human shields and of actions under uncertainty are of high philosophical interest. Haque introduces new arguments and original ideas that are worthy of critical engagement. In what follows, I will discuss one such issue, namely civilian immunity.

Closing the book, Haque cautions that “[j]ust war theory must not become a forum for devising ingenious arguments seeking to show that intentionally killing defenceless civilians, though always unlawful, is often morally permissible”.¹¹ Though in agreement with Haque on the importance of protecting civilians, I want to raise a critical point about his defence of civilian immunity from direct attack. This is not devastating to Haque's argument in support of civilian immunity; it does, however, show that Haque's defence of civilian immunity is not entirely invulnerable. But only if we find convincing answers to challenges such as the one I will raise below will we succeed in convincing sceptics among just war theorists that the principle of civilian immunity is a moral principle and not just a legal one. Otherwise, the principle will continue to invite attacks from “ingenious arguments”.

According to Haque, the principle of civilian immunity can be based on the fact that most civilians make only superfluous contributions to the threats of unjust harm that combatants pose.¹² Individuals lose their protection and become liable to lethal defensive harm only if they unjustly threaten to kill or seriously injure innocent people or “are sufficiently responsible for similar unjust threats posed by others”.¹³ However, Haque argues that few civilians are sufficiently responsible for unjust threats – that is, for threats that innocent people have a right not to be subjected to. He writes that “the vast majority of contributing civilians make no one worse off through their individual political, material, strategic, and financial contributions to their governments and armed forces”.¹⁴ Presumably, this is because their contributions are small, because the outcome is already overdetermined or because individuals can be easily replaced if they do not contribute. The duty to

10 *Ibid.*, p. 251.

11 *Ibid.*, p. 270.

12 *Ibid.*, pp. 68, 268–269.

13 *Ibid.*, p. 9.

14 *Ibid.*, p. 68.

abstain from making such contributions is not very stringent and cannot be enforced with lethal force.¹⁵ Haque admits that the aggregate of civilian contributions enables combatants to pose threats, but even so, he argues, we lose our rights by our own actions, not by the independent actions of others.¹⁶ Therefore, voting, paying taxes and even working in a weapons factory does not make civilians morally or lawfully liable to be killed, even if these activities might collectively enable a threat of unjust harm.

Some civilians lose their immunity, namely those who directly participate in hostilities and those who enable unjust threats by making individually necessary contributions. Those who directly participate in hostilities will lose their protection if they directly threaten to harm innocent people and/or if they attack members of the armed forces, who are not “innocent” *per se*. With respect to civilians making necessary contributions to threats of unjust harm, Haque argues that while the duty not to enable is “different and less stringent than the duty not to kill”,¹⁷ it is still stringent enough that the contributors are “morally required to die rather than enable others to kill many innocent people”.¹⁸ Thus, a civilian’s liability varies with the kind of contribution she makes.

However, the distinction between civilians making necessary, versus superfluous, contributions is less clear than Haque suggests. The distinction rests on the idea that superfluous contributions are less morally problematic than necessary contributions. This seems morally suspect – sometimes very serious harm is brought about by many small and individually superfluous acts taken together. Therefore, it is worth asking whether by making a superfluous contribution, one does indeed escape moral responsibility.

To understand this, consider the following: the government holds an election on whether to fight an unjust war. An absolute majority of the people has to vote in favour. As it happens, it’s a close call and one vote makes a difference. One vote less and the election would have been lost, sparing the lives of many innocent victims. Everyone voting in favour is now an enabler – they make a necessary contribution to bringing a threat about.

The moral evaluation of contributions changes once a certain threshold is passed. It takes a few more people voting in favour and the outcome is overdetermined, thereby making any one vote a superfluous contribution to the outcome. In the overdetermined election, more people perform the same act, which they would have a very stringent duty not to perform were each action necessary for the outcome. Yet, while people have a stringent duty not to make necessary contributions to a threat, they only have a rather weak duty not to make superfluous contributions.

Inevitably, among those who make superfluous contributions are many sets of people who are necessary to bring about the outcome. Thus, it seems

15 *Ibid.*, p. 78.

16 *Ibid.*, p. 77.

17 *Ibid.*, p. 74.

18 *Ibid.*, p. 75.

counterintuitive that one could escape responsibility because more than enough people do what they should not do. How to assign responsibility in such cases remains a deep philosophical puzzle, and not everyone agrees with Haque's view that individuals can escape responsibility for superfluous contributions. The philosopher Derek Parfit, for example, suggests the following principle as a solution to overdetermination cases: "Even if an act harms no one, this act may be wrong because it is one of a *set* of acts that *together* harm other people."¹⁹ Parfit's principle is similar to the necessary element of a sufficient set (NESS) test,²⁰ which could be extended to explain liability in cases of overdetermined outcomes. In small-scale overdetermination cases, the NESS test does have more intuitive appeal than testing for the difference that the single contributions make. For example, if the decision to fight an unjust war requires a majority of a small committee to vote in favour, then the outcome is overdetermined when four out of five members vote in favour of going to war. No single vote contributes to the future victims of war being worse off. Instead of letting the committee members off the hook, it seems more appropriate to hold all four responsible for the outcome. Though no one individually is necessary for the overall outcome, each of them is a necessary element of a *subset* which is sufficient for the outcome. If we find this the more plausible approach to determining responsibility in small-scale overdetermination cases, it is unclear why it should not equally apply in large-scale overdetermination cases such as we find in the war context. This approach implies that superfluous contributors have the same moral status as those making a necessary contribution.

Even if one remains unconvinced that the NESS test is a good solution to overdetermination cases, there is further reason to think that the duty not to make superfluous contributions is more stringent than Haque suggests. The duty not to make superfluous contributions might be rather stringent because there is often at least a slight chance that one's contribution will make a major difference.²¹ For example, though unlikely, a single vote could be decisive, as in the hypothetical case given above, or there might not be an easy substitute for the worker in the weapons factory. Given the expected disutility of potentially making many people worse off, a civilian might be under a strict duty not to perform these acts even if the chances are very low that she would indeed make a difference. Such a probabilistic approach to difference-making might not imply liability to be killed, but again, it could make a superfluous contributor more similar to a necessary contributor. The costs they are required to bear might be higher than Haque suggests.

19 Derek Parfit, *Reasons and Persons*, Oxford University Press, Oxford, 1984, p. 70.

20 For formulation and discussion of the NESS condition, see Richard W. Wright, "Causation in Tort Law", *California Law Review*, Vol. 73, No. 6, 1985, p. 1790.

21 For such proposals, see, for example, Shelly Kagan, "Do I Make a Difference?", *Philosophy & Public Affairs*, Vol. 39, No. 2, 2011; Julia Nefsky, "How You Can Help, Without Making a Difference", *Philosophical Studies*, Vol. 174, No. 11, 2017; Christian Barry and Gerhard Øverland, "Individual Responsibility for Carbon Emissions: Is there Anything Wrong with Overdetermining Harm?", in Jeremy Moss (ed.), *Climate Change and Justice*, Cambridge University Press, Cambridge, 2015.

Although one could raise this issue and some other philosophical worries about the arguments in the book, Haque undeniably rests his case on firm grounds. He succeeds in making apparent the moral underpinnings of the law, and where clarity in the law is missing, he calls on morality to offer guidance. Thus, despite the suggestive title, the reader learns that law and morality need not be at war but can be brought into conversation geared towards mutual benefit. *Law and Morality at War* is therefore of great importance to scholars of international law as well as ethics.

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Three short essays in honor of the 150th anniversary of the *International Review of the Red Cross*

Jacques Meurant, Hans-Peter Gasser and Toni Pfanner

Note: A brief history of the *International Review of the Red Cross*

Photo gallery: The Editors-in-Chief of the *Review*, 1869–2019

Opinion note: The ICRC as seen through the pages of the *Review*, 1869–1913: Personal observations

David P. Forsythe

To inform or govern? 150 years of the *International Review of the Red Cross*, 1869–2019

Daniel Palmieri

Note: From the *Bulletin International des Sociétés de la Croix Rouge* to the *International Review of the Red Cross*: The Great War as a revelator

Annette Becker

The *International Review of the Red Cross* and the protection of civilians, c. 1919–1939

Ben Holmes

Reflections on the development of the Movement and international humanitarian law through the lens of the ICRC Library's Heritage Collection

Ismaël Raboud, Matthieu Niederhauser and Charlotte Mohr

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Jeffrey Biller

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Sharon Weill

Still a blind spot: The protection of LGBT persons during armed conflict and other situations of violence

Alon Margalit

Exploring the “continuous combat function” concept in armed conflicts: Time for an extended application?

Sabrina Henry

More humanitarian accountability, less humanitarian access? Alternative ideas on accountability for protection activities in conflict settings

Natalie Klein-Kelly

Returning foreign fighters: The case of Denmark Helene

Højfeldt Jakobsen

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Françoise Bouchet-Saulnier and Jonathan Whittall

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