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# INTERNATIONAL REVIEW of the Red Cross

Humanitarian debate: Law, policy, action

Generating respect  
for the law



ICRC

### Aim and scope

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

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The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and other situations of violence and to provide them with assistance. It directs and coordinates the international activities conducted by the 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 International Red Cross and Red Crescent Movement.

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# **INTERNATIONAL REVIEW** of the Red Cross

**Humanitarian debate: Law, policy, action**

## **Generating respect for the law**

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## EDITORIAL

### TIME TO TAKE PREVENTION SERIOUSLY

The *International Review of the Red Cross* seeks to address urgent humanitarian issues, with a view to offering solutions: beyond the necessary repressive or remedial measures, it is striking to note how many contributions in our pages actually point to the need to *prevent* certain patterns of violence and even put a halt to human suffering. These are not only calls for respect of human life and dignity; often, authors include practical suggestions on ways to achieve it. For instance, recent international efforts to address the issues of violence against health care<sup>1</sup> and sexual violence in armed conflict<sup>2</sup> have put forward a series of measures that States and non-State actors<sup>3</sup> can put in place to translate the relevant legal provisions into practice, train relevant personnel on that basis, or educate the public at large.

There is a growing realization that it is necessary to put a special emphasis on efforts to *prevent* violations of international humanitarian law (IHL) and other applicable norms in armed conflict. How can we ensure that respect for human life and dignity remains a common concern shared by the opposing parties? More specifically, how does one generate respect for the law in times of war? What are the tools and strategies for influencing the behaviour of those participating in war, and of political decision-makers?

With this issue, the *Review* wants to take stock of the lessons learnt in the field of influencing behaviour and developing strategies for enhanced respect for the law and, more generally, to recall the importance of taking preventive measures to avoid the loss of the lives, livelihoods and prospects of entire generations.

### Respecting and ensuring respect for the law

As a set of norms, IHL is the expression of an international consensus. It could be seen as a “social contract” between States to protect human life and dignity even in times when mortal peril could seem to justify all acts of violence.

It is in its faithful application by the parties to the conflict that the full power of IHL can unfold. States are the primary addressees of the obligation “to respect and ensure respect for IHL in all circumstances”.<sup>5</sup> Knut Dörmann and José Serralvo explain in their article that States are expected, first and foremost, to live up to their own obligations but also to abstain from assisting in the

commission of violations by others, as well as to take measures to put an end to ongoing violations and to actively prevent their recurrence.

At the level of the individual, the very existence of IHL and its continuous development could have been seen as a sufficient deterrence to IHL violations. After all, “ignorance is no excuse” (or “nul n’est censé ignorer la loi”): a person accused of having committed a crime cannot claim ignorance to avoid responsibility. Unfortunately, the existence of the law is not in itself a guarantee that it will be respected. Without proper implementation mechanisms, the law usually remains a rather weak tool for social order. Gustave Moynier, the first president of the International Committee of the Red Cross (ICRC) – and the founder of this journal – recognized this when he made the proposal to set up an international court back in 1872.<sup>6</sup>

Indeed, the *ad hoc* tribunals for the former Yugoslavia and for Rwanda, the International Criminal Court, and other international courts and tribunals have been seen as “actors of deterrence” against the commission of war crimes and other serious violations of international law, with prosecutions serving to dissuade potential perpetrators from committing violations.

This issue of the *Review* devotes its Debate section and one article to the concrete effects that international and domestic criminal justice have had on fostering compliance with IHL.<sup>7</sup> Though the discussion is not over, what can be said is that by virtue of their existence and jurisprudence, international courts and tribunals have significantly strengthened the international system of accountability for IHL violations.

Today, continuing efforts are put into the development of more effective compliance mechanisms in IHL.<sup>8</sup> And yet, recent conflicts demonstrate an

1 See the thematic issues on “Violence against Health Care I/II”, *International Review of the Red Cross*, Vol. 95, Nos 889, 890, 2013.

2 See the thematic issue on “Sexual Violence in Armed Conflict”, *International Review of the Red Cross*, Vol. 95, No. 894, 2014.

3 On this point, in particular, and in relation to the provision of health care, see International Committee of the Red Cross (ICRC), “Safeguarding the Provision of Health Care: Operational Practices and Relevant International Humanitarian Law Concerning Armed Groups”, June 2015, available at: [www.icrc.org/eng/resources/documents/publication/p4243.htm](http://www.icrc.org/eng/resources/documents/publication/p4243.htm) (all internet references were accessed in September 2015).

5 Article 1 common to the four Geneva Conventions of 1949.

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*, No. 11, April 1872, p. 122. Writing in the aftermath of the Franco-Prussian war, Moynier struggled with many of the questions we still ask today regarding the effectiveness and normative value of the law in armed conflict. He was particularly concerned with the lack of effective mechanisms for implementing the rules of the 1864 Geneva Convention.

7 On the deterrent effect of international criminal justice, see the debate between Chris Jenks and Guido Acquaviva in this issue of the *Review*. On the role of domestic courts, see Sharon Weill’s contribution in this issue. Also see the thematic issue of the *Review* on “Sanctions”, Vol. 90, No. 870, 2008.

8 The Swiss government and the ICRC in particular have undertaken a major consultation process on how to improve compliance with IHL. For more information, see ICRC, “Strengthening Compliance with International Humanitarian Law (IHL): The Work of the ICRC and the Swiss Government”, 21 April 2015, available at: [www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-compliance.htm](http://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-compliance.htm).

appalling disregard for elementary humanitarian considerations, and in some instances even intentional violations of the law as a war tactic. In the face of such violations, how can one hope to influence the behaviour of parties to the conflict?

## **If knowledge of the law can be a safeguard, sharing it is an obligation**

As early as 1869, Gustave Moynier wrote: “If the Convention is to be implemented, its spirit must be introduced into the customs of soldiers and of the population as a whole. Its principles must be popularized through extensive propaganda.” Moynier’s call seems to rest on two ideas: first, that the law must be known and understood, in order to be respected; and second, that there needs to be a proactive approach towards making the law known. Hence the quite unusual obligation for an international set of rules that IHL contains regarding its own dissemination. In legal terms, the importance of dissemination of IHL was first formally recognized in the 1906 Geneva Convention.<sup>9</sup> The Geneva Conventions of 1949 contain a more elaborate obligation for States,<sup>10</sup> which is reiterated and developed in the Additional Protocols.<sup>11</sup> It was also found to be a customary rule of IHL.<sup>12</sup>

There are several dimensions to this obligation to disseminate IHL. First, it is primarily a responsibility of States, though Red Cross and Red Crescent actors also have a support role to play in promoting the law and assisting States in their efforts to do so.<sup>13</sup> Second, unlike most other rules of IHL, it is also applicable in peacetime. Indeed, dissemination efforts are more likely to be successful when there is sufficient

9 Art. 26: “The signatory governments shall take the necessary steps ... to make [the provisions of this Convention] known to the people at large.” The 1929 Geneva Convention also contains a similar obligation, in Article 27: “The High Contracting Parties shall take the necessary steps ... to bring [the provisions of this Convention] to the notice of the civil population.”

10 See the obligation of States, in Articles 47/48 of the First and Second Geneva Conventions, to “undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains.” Articles 127/144 of the Third and Fourth Geneva Conventions have similar wording, but specify that dissemination should be carried out among authorities responsible for the care of prisoners of war and civilian protected persons respectively.<sup>10</sup> For a good overview of the obligation to disseminate the law, see Sandesh Sivakumaran, *The Law of Non-international Armed Conflicts*, Oxford University Press, Oxford, 2012, Chapter 10, section 2 on dissemination, pp. 434–437.

11 See Additional Protocol I (AP I), Art. 83; and Additional Protocol II (AP II), Art. 19. AP I asks for specific measures with a view to strengthening the general obligation (see Art. 6 on qualified persons, Art. 82 on legal advisers in armed forces, and Art. 87(2) on the duty of commanders). AP II extends the scope of application of the obligation to non-international armed conflicts.

12 See ICRC, “Customary IHL” database, Rule 142 (vis-à-vis the parties to the conflict) and Rule 143 (vis-à-vis the civilian population), available at: [www.icrc.org/customary-ihl/eng/](http://www.icrc.org/customary-ihl/eng/).

13 The ICRC’s mandate is given in Arts 5(2)(g) and 5(4)(a) of the Statutes of the International Red Cross and Red Crescent Movement (1986). The National Red Cross and Red Crescent Societies are mandated to disseminate IHL by Art 3 of the Statutes. Finally, the International Federation of Red Cross and Red Crescent Societies also has a role to play, as per Art 6(4)(j) of the Statutes.

time and calm to expose different actors in society to IHL and humanitarian principles, so that real norm integration can take place. Third, non-State actors are also the addressees of these rules.<sup>14</sup> Finally, the drafters of the text understood that military instruction was not sufficient and that the principles of IHL had to be known beyond the military, among the entire population.

But how does one effectively engage in the promotion, education and integration of IHL among the military and civilian population? While the 1949 Geneva Conventions specify the material, temporal and personal scope of the obligation to disseminate, they do not elaborate on the methods that have to be used to translate the legal obligation into actual respect and compliance by individuals.

## Understanding the roots of behaviour of combatants

Military strategies and tactics have been studied since time immemorial in military treatises,<sup>15</sup> mostly with a view to helping commanders and sovereigns win battles and wars. The systematic study of the factors that influence and shape the behaviour of individual combatants began much more recently.<sup>16</sup> This was not necessarily rooted in the need to better regulate their conduct; rather it was intended to increase their efficacy in killing the enemy after the Second World War, the US Army realized that a majority of soldiers would actually not fire their weapons, even in the heat of battle, out of a “fear of aggression” and the deeply rooted prohibition against killing.<sup>17</sup> The military training techniques that were subsequently developed apparently led to a significant increase in the firing rate of US soldiers in Korea and Vietnam, proving that individuals can be conditioned to adopt a more aggressive behaviour through “moral disengagement”.<sup>18</sup>

The horrors of the Shoah and other crimes committed by the Nazi regime led to a deep interrogation on the possibility of turning any individual into an agent of a criminal undertaking, independent of any psychopathic predisposition. This

14 Regarding non-State armed groups, see common Art. 3 and AP II, Art. 19, which bind the “parties to the conflict”. For a discussion on practical measures for encouraging armed groups to respect the law, see Michelle Mack, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, ICRC, Geneva, 2008; and the thematic issues of the *Review on “Understanding Armed Groups”* (Vol. 93, No. 882, 2011) and “Engaging Armed Groups” (Vol. 93, No. 883, 2011).

15 The military treatise *The Art of War*, by Sun Tzu, dates back to the sixth century BC.

16 In France, Charles Ardant du Picq was a pioneer of the study of the psychology of combatants in the nineteenth century. In his work, *Battle Studies*, he stated: “Let us then study man in battle, for it is he who really fights.” Ardant du Picq, *Battle Studies: Ancient and Modern Battle*, 1921, 8th ed., English translation available at: [www.gutenberg.org/files/7294/7294-h/7294-h.htm](http://www.gutenberg.org/files/7294/7294-h/7294-h.htm).

17 Brigadier General Samuel Lyman Atwood Marshall, *Men Against Fire: The Problem of Battle Command in Future War*, Infantry Journal, Washington, DC, 1947.

18 For an analysis of the impact of military training on the firing rate of the US soldier, see Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society*, Black Bay Books, New York, 1996. More recently, Michel Goya’s *Sous le feu: La mort comme hypothèse de travail*, Tallandier, Paris, 2014, analyzes the specific psychological conditions that combat in recent conflicts has created. On “moral disengagement”, see Albert Bandura, “Selective Moral Disengagement in the Exercise of Moral Agency”, *Journal of Moral Education*, Vol. 31, No. 2, 2002, pp. 101–119.

disturbing idea is best captured in the subtitle that Hanna Arendt gave to her account of the Eichmann trial: *A Report on the Banality of Evil*.<sup>19</sup>

Regarding obedience to authority figures, the most famous study remains the seminal work of Stanley Milgram.<sup>20</sup> It was based on a series of social psychology experiments measuring the willingness of study participants to obey an authority figure who instructed them to perform acts conflicting with their personal conscience by inflicting physical punishment on other people. Since then, several studies have been devoted to the reasons why IHL is violated in times of war based on psychological, economic, opportunistic or political arguments.<sup>21</sup>

In 2004, the ICRC published a study entitled “The Roots of Behaviour in War: Understanding and Preventing IHL Violations”; this study aimed to identify the factors which affect the behaviour of combatants in armed conflicts, with a view to better informing the ICRC’s own prevention activities.<sup>22</sup> According to the conclusions of the study, “disseminating” IHL (as the Geneva Conventions put it) has to be seen as a first step only, but one of crucial importance. Dissemination of information is rarely sufficient on its own, but should be seen as one aspect of a larger effort to *build an environment conducive to respect for the law*, which includes education, training, and integration of the law into instructions, orders and procedures. Just like in any military drill, which aims to create reflexive actions, military IHL training should aim to internalize norms through attitudinal change, discourse and repetition.<sup>23</sup> The study also found that, besides the training of the weapons bearers, IHL also needs to be integrated into orders and instructions, in order to be respected.<sup>24</sup> Consequently, the ICRC sought to integrate IHL into military doctrine and regulation, training, equipment and sanctions, rather than simply imparting knowledge on IHL.<sup>25</sup> The study is currently being updated, as explained by Prof. Emmanuele Castano, chair of psychology at the New School for Social Research in New York, in his interview for the *Review*. This issue also provides ample space to experts sharing the most recent lessons learnt and reflections in the field of military training and integration of humanitarian law into military orders, with a view to reinforcing the effectiveness of prevention efforts.

19 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Penguin Books, New York, 1963.

20 Stanley Milgram, *Obedience to Authority: An Experimental View*, Harper & Row, New York, 1974.

21 For instance, Eric David devotes a chapter of his book *Principes de droit des conflits armés*, Bruylant, Brussels, 1994, to this subject. On the behaviour of armed groups, see Olivier Bangerter, “Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011, pp. 353–384.

22 See Daniel Muñoz-Rojas and Jean-Jacques Frésard, “The Roots of Behaviour in War: Understanding and Preventing IHL Violations”, *International Review of the Red Cross*, Vol. 86, No. 853, 2004, pp. 189–206; Jean-Jacques Frésard, *The Roots of Behaviour in War: A Survey of the Literature*, ICRC, 2004, available at: [www.icrc.org/eng/resources/documents/publication/p0854.htm](http://www.icrc.org/eng/resources/documents/publication/p0854.htm).

23 See the contributions by Elizabeth Stubbins Bates and Raffaella Diana in this issue of the *Review*.

24 See the contributions by Andrew Carswell and Geoff Corn in this issue of the *Review*. Dale Stephens, also writing in this issue, challenges the assumptions made by the “Roots of Behaviour in War” study concerning the efficacy of the law; he argues that the role of identity and professional culture offers an effective means of ensuring restraint under the law.

25 See ICRC, *Integrating the Law*, Geneva, 2007, p. 17, available at: [www.icrc.org/eng/assets/files/other/icrc-002-0900.pdf](http://www.icrc.org/eng/assets/files/other/icrc-002-0900.pdf).

## Building an environment conducive to respect for the law

The drafters of the Geneva Conventions realized that generating respect for the law goes beyond working with those who fight, that it requires a holistic approach. It ranges from the incorporation of IHL treaties into domestic law<sup>26</sup> and the creation of a public discourse that is devoid of dehumanizing language aimed at any group, to ensuring appropriate knowledge, understanding and acceptance of the law by government officials, parliamentarians, academics, members of civil society, the media and so on.

Engaged in the promotion of IHL since its origins,<sup>27</sup> the ICRC captured its lessons learnt and best practices in its Prevention Policy<sup>28</sup> in 2007. The document synthesized the ICRC's actions as a constant effort to create "an environment conducive to respect for life and dignity (and for the ICRC's work)". This basic premise defines the organization's activities across different geographic regions and at different levels of dialogue with actors in society, while also aiming to ensure internal coherence of efforts.

Important prevention work can also be carried out with the highest government authorities bilaterally and in multilateral fora, as part of the diplomatic efforts by humanitarian organizations, at times supported by civil society campaigns.

Among all actors, the role of the media – and today social media – remains as important as ever. Even the most elusive groups are connected, and social media can be used to reach out to influential figures or networks which are sometimes impossible to access directly.

Still, nothing can replace direct face-to-face dialogue with the parties to the conflict and the civilian population, and this is closely linked to humanitarian operations. Growing insecurity due to crime and the radicalization of armed actors has created renewed interest in direct and personal interactions in the field in order to help gain access to conflict zones for humanitarian workers and pass IHL messages. The ICRC developed innovative approaches in the 1990s and 2000s, and tried to engage systematically with a maximum of influential groups at the local level, notably through its field communication set-up.<sup>29</sup>

26 See the work of the ICRC's Advisory Services, for example, available at: [www.icrc.org/en/war-and-law/ihl-domestic-law](http://www.icrc.org/en/war-and-law/ihl-domestic-law). See also Cristina Pellandini's contribution in this issue of the *Review*.

27 In this issue of the *Review*, Marion Harroff-Tavel describes and analyzes the evolution of ICRC activities in the field of prevention since the organization's origins. She traces how the ICRC developed increasingly more sophisticated approaches and IHL tools to address the military, youth, academia and civil society, and makes insightful recommendations for future orientations of the approach.

28 ICRC, "International Committee of the Red Cross: Prevention Policy", *International Review of the Red Cross*, Vol. 91, No. 874, 2009, available at: [www.icrc.org/eng/resources/documents/article/review/review-874-p415.htm](http://www.icrc.org/eng/resources/documents/article/review/review-874-p415.htm).

29 The ICRC's approach included SMS campaigns, campaigns to revive local customs on the conduct of hostilities, and systematic networking with local religious and tribal leaders, and so on. See, for instance, ICRC, "Somalia: Using Traditional Law in Disputes with Armed Groups", 11 November 2014, available at: [www.icrc.org/en/document/somalia-using-traditional-law-dialogues-armed-groups](http://www.icrc.org/en/document/somalia-using-traditional-law-dialogues-armed-groups). Recently, other organizations such as Geneva Call (in its engagement with armed groups) and Médecins Sans Frontières have also engaged in this type of work. See Geneva Call's mission statement at: [www.genevacall.org/who-we-are/](http://www.genevacall.org/who-we-are/); and, for instance, Saleem Haddad, "Perception and Acceptance at Community Level: The Case of MSF in Yemen", *Humanitarian Exchange Magazine*, No. 45, December

Finally, one should not forget the important role that academia plays, not just in its purely educational dimension but also in terms of producing expertise, facilitating debate and conditioning future decision-makers. The *Review* asked several authors from academic institutions and new NGOs engaged in the promotion or teaching of IHL to share their experiences on this thematic issue. While their number has been growing over the years, they are still too few, and it is hoped that their accounts will inspire others.

## Looking ahead: Taking prevention seriously

The objective of preventing IHL violations and encouraging respect for human dignity is an ambitious one. Following developments in research over the past decades, we now know much more about the various interrelated factors that could contribute to building an environment conducive to respect for the law. A wide range of pedagogical and academic tools have also been produced specifically tailored for the educational needs of the military,<sup>30</sup> youth<sup>31</sup> and higher education.<sup>32</sup>

Actors involved in the field of prevention can now move beyond the classic one-way dissemination approach and learn to embrace the complexity of factors influencing behaviour. This might require a series of measures.

First, a commitment to prevention needs political will, on the part of States and on the part of other actors involved in prevention. It requires the allocation of resources, the recruitment of competent staff, a concerted strategy and the capacity to coordinate with other actors so as to detect and reinforce complementarities. Investing in prevention means a commitment to continuity and long-term outcomes.

Second, there is a need for an increased emphasis on complementarity of efforts by actors involved in prevention. The goal of influencing behaviour clearly cannot be achieved by one actor alone. This means accepting that there is plenty of work to do for everyone, and looking at how to capitalize on complementarities, including with human rights organizations or actors involved

2009, available at: [www.odihpn.org/humanitarian-exchange-magazine/issue-45/perception-and-acceptance-at-community-level-the-case-of-msf-in-yemen](http://www.odihpn.org/humanitarian-exchange-magazine/issue-45/perception-and-acceptance-at-community-level-the-case-of-msf-in-yemen).

30 Throughout the years, the ICRC has published a number of reference publications with the aim of assisting armed forces in incorporating the applicable law into military strategy, operations and tactics. See, for instance, ICRC, *Handbook on International Rules Governing Military Operations*, Geneva, 2013, available at: [www.icrc.org/eng/resources/documents/publication/p0431.htm](http://www.icrc.org/eng/resources/documents/publication/p0431.htm). The ICRC also organizes annual workshops for senior military officers to discuss the legal framework applicable to modern military operations and is regularly invited to provide the humanitarian perspective in training scenarios and military exercises of armed forces around the globe. For more information, see: [www.icrc.org/en/armed-forces](http://www.icrc.org/en/armed-forces).

31 Exploring Humanitarian Law, for instance, is a resource pack for teachers aimed at introducing students aged 13–18 to the basic rules of IHL. It was designed by the ICRC in close association with the Education Development Center. The premise on which this project was built is that young members of society stand to benefit from discussions at an early age around respect for life and human dignity, civic responsibility, and solidarity. For more information, see: [www.icrc.org/eng/what-we-do/building-respect-ihl/education-outreach/ehl/exploring-humanitarian-law.htm](http://www.icrc.org/eng/what-we-do/building-respect-ihl/education-outreach/ehl/exploring-humanitarian-law.htm).

32 For more information on the ICRC's work with academia, see: [www.icrc.org/en/what-we-do/building-respect-ihl/education-outreach](http://www.icrc.org/en/what-we-do/building-respect-ihl/education-outreach).



in the development of the rule of law. Lack of coordination leads to duplication of efforts while leaving wide areas of needs unfulfilled.

Third, the rapid development of new technologies and global connectivity that the Internet provides are door-openers for actors working in this field to enhance their capacity to reach out to audiences worldwide. The crucial role of the Internet and the potential of digital education – while not remaining unexamined – should be harnessed to reshape and further strengthen the prevention approach. In aiming for a more impactful outreach via new technologies, it should not be forgotten that prevention work is results-driven, rather than tools-driven.

Fourth, the field of prevention could benefit from better defining measurable objectives. In this regard, academic institutions, for instance, could help improve the accountability of prevention by regularly taking stock of ongoing prevention work and its evolution, or by developing platforms where instances of respect for the law and positive outcomes (“success stories”) can be documented and shared.

Finally, it is important to acknowledge that prevention activities have a cost, especially in terms of maintaining qualified and well-trained staff, or the development of modern training and outreach tools. The costs are, however, symbolic compared to the money spent on remedial action during a conflict or on post-conflict rehabilitation activities. Interestingly, increasing donor emphasis on accountability over the last decade may have had the paradoxical effect of actors *reducing* the scope of more ambitious, long-term prevention programmes so as to deliver quick and highly visible results.

## People are people’s own remedy

“Hidden in this modest body of international law is an exhortation to knowledge, a call to study and understand, a demand that we take part in the rules”, writes Naz Modirzadeh in her Opinion Note for this issue of the *Review*, calling for a renewed engagement with IHL. The norms of IHL embody the high aspirations of the international community. The idea that a common ground of humanity can be found in the midst of war – at a time when human life seems to have so little value – should be reaffirmed as one tying the members of the international community together. “People are people’s own remedy” (“Nit nit ay garabam”), says a Senegalese proverb. It is time to act as our own remedy, reaffirm our trust in humanity and its future, and seriously commit to preventing abuses in armed conflict.

Over the past decades, actors working in the field of prevention have made considerable progress in understanding the roots of behaviour in war, and this knowledge should be put to good use. But more importantly, generating respect for the law is not simply a technical question – a matter of implementing a sound methodology in terms of influencing behaviour, military training or implementation of legal norms. It is also a matter of defending and regaining the moral high ground over those who want to turn crime into practice.

Vincent Bernard  
Editor-in-Chief





## Interview with Emanuele Castano

**Professor and Chair of  
Psychology, New School for  
Social Research\***

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***You are a social and political psychologist. Tell us a bit more about your area of expertise and your ongoing research projects.***

As a social and political psychologist, I have been doing research on issues of collective behaviour and collective identities for over fifteen years. One of my three lines of research focuses on conflict at the intergroup level, and specifically on the factors that allow individuals to behave in a violent manner or in violation of certain norms, such as international humanitarian law (IHL). My work has to do, among other things, with strategies of “moral disengagement”; in other words, all the psychological justifications that we give ourselves for our behaviour, particularly when it comes to immoral, unlawful and violent behaviour.

A lot of my research is conducted in the United States with individuals who have not been personally involved in violent intergroup conflict. We put them in “pretend” scenarios, or ask them to read about violence perpetrated by their fellow countrymen. However, I have also conducted studies with people who have experienced or are experiencing violent conflict themselves. In Bosnia-Herzegovina I studied the antecedents and consequences of forgiveness for intergroup violence with fellow scholars Sabina Cehajic and Rupert Brown. In Pakistan, with my former Pakistani student Gulnaz Anjun and Dr Giner-Sorolla,

\* This interview was conducted in Geneva on 18 June 2014 by Mariya Nikolova, Editor of the *International Review of the Red Cross*.

I looked at the effects of apologies provided to the civilian population by the US Army, following drone attacks by the latter which resulted in civilian casualties. In our research, we did not look at whether such casualties were lawful or not from an IHL perspective. We were interested primarily in how these deaths of people who are considered civilians by the population can increase anger among the population and boost support for, say, the Taliban, or more broadly fuel anti-Western attitudes.

About ten years ago, I started collaborating with the ICRC, and particularly with one of your colleagues, Daniel Munoz-Rojas, in the context of a study that was already under way, called “People on War”.<sup>1</sup> At the time, Daniel and his team had collected data in four conflict areas: the Republic of the Congo (at the time, Congo-Brazzaville), Colombia, Georgia and Bosnia-Herzegovina. He and I then looked at this data and tried to identify patterns that could help us understand why people behave the way they do during conflict. More specifically, we drew a series of conclusions about the social and psychological factors that determined the behaviour of combatants. When I say “combatants” I mean active, but also former combatants, and not only soldiers of State armies but also members of non-State armed groups.

Ten years later, I am back at the ICRC to launch a second study. To some extent, I will try to follow up and see whether some of the conclusions we drew still stand today. In essence, I will see if we can gain more knowledge of the behaviour of combatants in today’s conflicts, which have certain similarities to old ones but also their own idiosyncratic characteristics. The aim is to identify how to help the ICRC and other humanitarian organizations and actors to effectively engage in prevention and protection strategies to reduce the amount of atrocities and violations that occur during armed conflicts.

***What are some of the concrete elements of this upcoming research collaboration with the ICRC?***

I hope that over the next two years, we will be able to create a synergy with the ICRC, where we as scientists can gain an understanding of the reality on the ground and then provide an analysis that could enhance our understanding of how psychological, sociological, political, economic and religious factors affect conduct in violent conflict. Ultimately, we want to help with operational guidance, particularly in the field of prevention.

The research project is led by myself and includes two other team members, who are sociologists with somewhat different backgrounds. One of them, Professor Anna Di Lellio, has spent a lot of time in the field, particularly in Kosovo, where she

1 Editor’s note: The “People on War” project was launched in 1999 and constituted a series of consultations conducted with the general public in twelve conflict-affected contexts, in which people were asked to air their opinions on the many facets of war. The general report of the study is available at: [www.icrc.org/eng/assets/files/other/icrc\\_002\\_0758.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0758.pdf). Individual country reports are also available on the ICRC’s website.

is still very active in various research and intervention projects. The other colleague, Robin Wagner-Pacifici, is an expert in content analysis.

We have a two-year plan for this project, which we have divided into four phases. The first phase is dedicated to a review of the literature across several social science disciplines. This phase is completed. Now we are developing what we call the empirical tools for this research project. These consist of structured interviews that we are planning to have with about 100 respondents in each context. We are focusing on four to five contexts across the globe. Respondents answer questions using what we call a Likert-type scale; scales from, say, one to five, indicating agreement or disagreement. We couple this with a more qualitative approach, which consists of in-depth interviews and focus groups with a smaller amount of participants. We are aiming at twenty to thirty interviews per context and one focus group with eight to ten participants per context.

The third phase will be a year of data collection, hopefully to be completed by mid-2016. We are giving ourselves quite a bit of time given that we are going to work in contexts that are very volatile and in which access sometimes may be delayed. Obviously prior to research in the field, we will also educate ourselves on the specific historical, political, economic and social contexts in which we are going to work.

The last phase will involve analyzing and interpreting data. We will most likely spend the second half of 2016 in an effort to produce a report and share our findings.

***In a previous article in the Review on the behaviour of combatants in war,<sup>2</sup> you argued that group identities have a profound influence on the way combatants decide to respect the law, or not. Is this still the case today?***

These “group identities” are also often referred to as “collective identities” or “social identities”. Such identities depend on the many groups to which any individual belongs. A “group” can be a national group, a gender, a profession, and so on. In our daily social interactions, we act not only – or not exclusively – as individuals, but also as members of a group. Whether or not we are conscious of it does not really matter. Often this belonging – this collective identity – influences our behaviour profoundly because it gives us the lens through which we interpret social reality and offers us norms and values that influence our attitudes, our perception of reality and ultimately our behaviour.

Conflict situations are all the more regulated by social identities. Apart from criminal cases, in which an individual acts out of his/her own interest or motivation, in large-scale armed conflicts, it is a collective fighting against another collective. The underlying causes and motivations for the conflict might

2 Emanuele Castano, Bernhard Leidner and Patrycja Slawuta, “Social Identification Processes, Group Dynamics and the Behaviour of Combatants”, *International Review of the Red Cross*, Vol. 90, No. 870, 2008, pp. 259–271.

be different, but it is always an armed collective pitted against one or more other armed collectives.

So when we try to read these realities, we have to understand them not just as a phenomenon of individual behaviour, but rather as one of individual behaviour driven by membership within a social group. When combatants act in armed conflict, they do as members of a specific group. This can be a religious, national or ethnic group, or it can be a group defined in many other ways. I am sure that some of the research that we are planning to conduct will shed light on some other forms of categorization that people use and with which they enter the conflict, such as nomads versus settlers. This collective aspect is fundamental and if we want to understand what guides behaviour in these contexts, we have to understand the content of the collective identities that are relevant in said contexts.

***Are there other factors that could play a role in determining how a person behaves in war?***

There are many other factors, of course, and some of them may be the very same that one would expect to regulate behaviour at the individual level. A “do not harm” norm, for instance, can be held at the individual level, although it is probably being in some way internalized through socialization in a specific society. We are social animals – we are not individual entities that learn and become humans in isolation – so we are always somehow the product of a specific cultural context, and it is that context which gives us norms.

Some norms are shared across groups, such as human rights, for example. We all have human rights. However, there are two important aspects here. First, a general notion of “human rights” is difficult to discern, because it is filtered through the cultural understandings of each community. Second, and perhaps more importantly, there are many situations in which we end up excluding certain groups from what we define as “humanity”. It is in this context that most atrocities can and in fact do occur. Examples in history abound. The classic example is the Second World War, in the course of which certain groups were literally – through metaphors and through direct denigration – excluded from the “moral community”, understood as the community of people toward which moral standards apply. Once this psychological operation occurs – primarily through propaganda or references to long-held beliefs – violence against a given group is very much facilitated. It is not that the norm of “do not harm” is thrown out of the window; it is simply not applied to this specific group of people.

The dehumanization of the enemy is perhaps the most important factor in determining violence against the enemy, either as a precursor to violence or as a justification of violence that has already occurred. Once we get into the cycle of violence, we need to justify to ourselves why we behave in a certain manner. Entire groups of people engaged in violent actions become very motivated to

maintain a certain narrative, part of which is the distinction between “us” and “them” and the dehumanization of the other. As the cycle of violence goes on, it becomes increasingly difficult for an organization such as the ICRC to intervene and change the dynamic. You have to re-humanize one party in the eyes of the other party. It is not an easy task.

It is important to keep in mind that the above factors contribute and foster violence in general, regardless of its collective or individual nature. Of course, there are many situations in which an individual suddenly “snaps out” of the identity or the role that he or she has adopted and realizes the absurdity of the violence. Most of the time, those who take part in or are affected by violence do not have the time or luxury to observe and realize its absurdity in a cool-headed way.

On the other hand, it is not necessarily the case that behaving as individuals is better than behaving as group members. In the same way in which norms and values can be used at a group level to implement violence, they can also be used to promote peaceful relations and respect for others. In other words, if there is a momentum at the collective level to, say, forgive a different ethnic group for a past conflict, and a desire to establish a new, positive relationship (ideally a momentum created or embraced by a respected leader of the in-group), acting in terms of our group identity will enhance positive and peaceful relations with the other group, and will reduce animosity, distrust, prejudice and so on.

***Do you notice any qualitative evolution in the conflicts fought today? Are the features of modern armed conflicts really “new”?***

Over the last ten years, a lot has happened all over the world, and situations of conflict, as with any other situations, present some new features, although it is unclear to what extent the conflicts are really different, and to what extent it is our discourse on them that is different. For instance, there has been a lot of talk about “new wars” and “asymmetric wars”. But the extent to which these wars are really new is questionable, and of course asymmetric wars have always existed. Certainly 9/11 has affected the way we look at certain types of non-State armed groups, particularly in the West. And the way we look at them, as psychologists have long known, affects our and their behaviour. So our discourse can, in fact, have an effect on conflicts and on the way they are conducted. For instance, in a forthcoming article in the journal *Political Psychology*,<sup>3</sup> we show how the “image” that, say, an American holds of another country influences their reaction to a confrontation with that country. Depending on the image, the reaction to the exact same event varies between conciliatory and very aggressive. In a literature review that we recently prepared for the ICRC, we discuss this question in more detail.

3 Emanuele Castano, Alain Bonacossa and Peter Gries, “National Images as Integrated Schemas: Subliminal Primes of Image Attributes Shape Foreign Policy Preferences”, *Political Psychology*, forthcoming 2015.

***What does research tell us so far about the motivations of non-State armed groups (as opposed to State armies) to respect IHL, or not?***

This is a difficult question. It very much depends on what kind of non-State actor we are looking at. There are many hundreds of them, if not thousands, all over the world, varying dramatically in size and motivations: ideological, religious, political, economic and sometimes purely criminal. Some of them are comparable to State armies, some are not. Their motivations will be vastly different. One mistake we have to avoid is quickly labelling them based on our preconceived images, as I pointed out earlier.

This being said, the goal of this research project is also to understand whether some common themes underlie some of these different realities. I see us approaching this task by identifying “clusters of realities”. Such clusters may display a level of homogeneity and therefore allow for some generalization. Across these clusters, generalizations will likely be difficult, because what works in one set of specific situations will probably not work in another.

So, I think that we will have to strike a balance between recognizing the specificities and the idiosyncrasies of each context and actor, and at the same time identifying common underlying themes. At the end of the day, the goal is to develop policy, and to produce policy for every single conflict in the world is not going to be feasible. We need guidelines but we also need to ensure that these guidelines are respectful of the different contexts involved.

***Are there, at this stage, any recent findings in sociology and psychology that you want to share with humanitarians engaging with parties to armed conflicts today?***

Over the past decade or so, there has been a renewed interest in the concept of empathy, among social psychologists and neuroscientists. One question being debated is the role of empathy in moral behaviour. Are empathic feelings important for moral behaviour, or are they a distraction, and norms are what we need?

One of the scholars contributing to this debate is the eminent psychologist Steven Pinker. In his book, *The Better Angels of Our Nature*, he analyzes what he sees as decreasing violence over our evolutionary history, and his main argument is that the development of norms is responsible for this decreased violence. It is difficult to disagree with Pinker, but I am also asking, what is behind norms?<sup>4</sup> How does the suffering of others influence the development of norms? If I remember correctly, the founding of the ICRC itself came as a result of witnessing large-scale, extensive suffering. This is what I would define as an empathic reaction: witnessing all this suffering and wanting to do something about it, and certainly wanting to do something to prevent it from reoccurring in the future or to alleviate it.

So one area of research that I believe we should monitor is the study of empathy: how it is developed through our childhood, how we socialize our

4 Editor's note: See Emanuele Castano, “The Attack on Empathy”, *Public Seminar*, Vol. 1, No. 1, 2013, available at: [www.publicseminar.org/2013/10/the-attack-on-empathy/#.VVw9HOkcTct](http://www.publicseminar.org/2013/10/the-attack-on-empathy/#.VVw9HOkcTct).

children to experience empathy and to act in a certain way – with compassion, for instance – and implement actions to relieve the suffering of others, and especially the mechanisms that allow us to somehow curtail empathy for certain others – minorities, people from different religions or cultures. This is an essential question in psychology today, with a remarkable number of scientific articles on it published every month.

By and large, unless you have experienced a very traumatic and unusual upbringing as a child, you develop a natural empathic reaction to others. Unfortunately, there are circumstances in which we are very much able to curtail our empathic reaction and take part in the process of dehumanization or exclusion from the moral community of certain groups, a process I referred to earlier. There are conditions under which we prevent ourselves from feeling this empathic reaction towards others. I think this may be a crucial mediating factor that explains violence in general and – given our specific interest here – violations of international humanitarian law.

To the extent that I perceive other individuals as humans, my empathic reaction will probably prevent me from harming them. Of course, in war where there is a sense of emergency; there is fear, anxiety and often, a desire for revenge. This may contribute to curtailing our empathic reaction. We also know from research that the very fact of distinguishing between *us* and *them*, a narrative oftentimes reinforced by politicians and leaders, may be very problematic because it really cuts off entire groups of people from our innate empathic reaction that we have towards them. There is an anecdote from a conversation with an IHL specialist who worked in Central America with a State army. A sergeant was training his soldiers in the laws of war – what they could and couldn't do. Things were going well, for the sergeant clearly knew what the rules were, for instance, with regard to distinguishing between combatants and civilians. At the end of the training, however, he said “*Recuerde, todos los campesinos son terroristas*” – in Spanish, meaning “Remember, all farmers are terrorists.” Once you apply that label, all the empathic reaction, as well as the protection that the law gives to the farmers as civilians, is annulled.

***The ICRC's “Roots of Behaviour in War”<sup>5</sup> study in 2004 put the emphasis on the integration of the law and norms, accompanied by an appropriate system of sanctions. It de-emphasized the importance of appealing to moral, religious or other values to encourage better respect. Is this finding still in touch with today's reality?***

I do not necessarily see these two as being in contradiction. I think that one of the important changes that has occurred in the way the ICRC has approached

5 Editor's note: See Daniel Munoz-Rojas and Jean-Jacques Fresard, “The Roots of Behaviour in War: Understanding and Preventing IHL Violations”, *International Review of the Red Cross*, Vol. 86, No. 853, 2004, p. 202: “We need to treat IHL as a legal and political matter rather than as a moral one, and to focus communication activities more on the norms than on their underlying values because the idea that the bearer of weapons is morally autonomous is inappropriate.”



prevention is the shift from simply imparting knowledge and explaining IHL towards a greater effort to *integrate* IHL within specific systems of knowledge, values and norms of a particular group.

So perhaps the differentiation between these two approaches is not as important as it seemed at the time. If we say that we are going to integrate IHL into the norms of a particular group, be it a State army or a non-State armed group, we are still generally trying to understand what their social reality is shaped by – their principles, moral beliefs, their cultural, ethnic or religious references and so on. No individual lives in a vacuum. People and groups come from a specific cultural context, and I think that the integration of any norm has to pass through these cultural/religious filters to be able to have an impact on that individual's behaviour.

Today we are looking at how we can *further* integrate norms. Again, identifying different “clusters of realities” is perhaps one step towards doing this. If, instead of trying to impose on others what we believe are the norms that should be respected, we look at local traditions that sometimes go back hundreds of years, we can find elements that are very similar to what we believe in and the norms that we are trying to foster in other societies. It is important to recognize these connectors to specific contexts because they are crucial starting points for dialogue. I think this is perhaps the most promising way ahead. The most interesting documents I have seen in this regard come from the ICRC delegations themselves, with delegates taking it upon themselves to interview the locals about their rules for violent conflict.

***As a psychologist, do you think the prevention of IHL violations is a cause worth pursuing? Is it effective? How can we know?***

I think prevention is perhaps the only thing we have. As we know from different contexts, preventing always seems better than trying to cure and fix a situation after the fact. In the specific context of violence, I think the data that we do have today seem to show that it is indeed very important.

There is one specific finding that is emerging from the re-analysis of the data from ten years ago: once people get into the cycle of violence, it becomes more and more difficult to eradicate it. One of the reasons for this seems to be that once you engage in violence, you have to start justifying the action to yourself. Even if the narrative that led you to perform acts of violence in the first place is not very strong or credible, it becomes more so as a consequence of your psychological need to justify your own actions, and those of your fellows.

This is what we call “moral disengagement” and it has to do with the dehumanization of the enemy, the exaggeration of their negative actions in the past. When we analyzed the Srebrenica massacre, for instance, and the Balkan wars in general, the rhetoric oftentimes went back to events that had occurred hundreds of years ago. Once people have the motivation to produce and maintain a narrative that depicts them as victims and gives them the psychological



weapons to justify their actions, intervening to *change* this narrative becomes very difficult because it really means changing their view of the world and of themselves.

So prevention is key. To make a parallel with medicine, we know that intervening as soon as the first symptom of a disease occurs increases the chance of success exponentially. I think this is very much true for conflict as well. In fact, I am a firm believer in early-warning initiatives that monitor discourse and try to identify early signs of degeneration of the debate and the rhetoric by one group vis-à-vis another.

All of the research that I have done and that I am aware of suggests that it is difficult, once people have engaged in a particular sort of behaviour, to change their behaviour in the future. This is why I agreed to collaborate with the ICRC almost ten years ago and why I agreed to lead this project today. Hopefully, we are a little smarter now, we have more knowledge, and we have more empirical findings from various areas of psychology and other social sciences to build upon.

In the meantime, the ICRC and other organizations have kept a very close reading of conflict dynamics in the field, and so I very much look forward to a true collaboration to better understand specific contexts and identify relevant principles for future prevention strategies and policies.



# Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations

**Knut Dörmann and Jose Serralvo\***

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## Abstract

*Common Article 1 to the four Geneva Conventions lays down an obligation to respect and ensure respect for the Conventions in all circumstances. This paper focuses on the second part of this obligation, in particular on the responsibility of third States not involved in a given armed conflict to take action in order to safeguard compliance with the Geneva Conventions by the parties to the conflict. It concludes that third States have an international legal obligation not only to avoid encouraging international humanitarian law violations committed by others, but also to take measures to put an end to on-going violations and to actively prevent their occurrence.*

**Keywords:** Common Article 1 to the Geneva Conventions, ensuring respect, obligation *erga omnes*, compliance, third States' responsibility, Stockholm Conference, treaty interpretation, preventing IHL violations, stopping IHL violations, prevention, Arms Trade Treaty.

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\* This article was written in a personal capacity and does not necessarily reflect the views of the ICRC.

## The importance of compliance

Contemporary armed conflicts – such as those in Syria, the Central African Republic and South Sudan, to name just a few – continue to be marked by enormous human suffering. They also illustrate how complex armed violence has become nowadays. Despite the emergence of new actors of violence, and new means and methods of warfare, all of which may put existing international humanitarian law (IHL) rules to the test, IHL continues to provide an adequate framework to attenuate the effects of armed conflict and to establish a judicious balance between the principles of humanity and military necessity.<sup>1</sup> Treaty and customary law provisions set limits to the waging of war, but the single biggest challenge facing IHL today lies in persuading parties to the conflict to comply with the rules by which they are bound. Violations of the most fundamental and uncontroversial rules remain a sad reality.<sup>2</sup> Stricter compliance with existing IHL rules would considerably improve the plight of persons affected by armed conflicts.<sup>3</sup> Thus, there is a pressing need to generate respect for the law and, as one important avenue in this context, to re-emphasize and clarify the extent to which, as provided by common Article 1 to the four Geneva Conventions (CA 1), as well as by Article 1(1) of Additional Protocol I (AP I), the High Contracting Parties thereto are bound to “respect and ensure respect” for their provisions “in all circumstances”.

The obligation to respect the Geneva Conventions means that a State must do everything it can to guarantee that its own organs abide by the rules in question.<sup>4</sup> In essence, this part of the provision reaffirms the basic principle of *pacta sunt servanda*, codified in Article 26 of the Vienna Convention on the Law of Treaties. In the case of a non-international armed conflict, the obligation to respect also binds organized armed groups, in accordance with Common Article 3. Indeed, compliance with IHL is the primary responsibility of the parties to a conflict. However, CA 1 goes one step further by introducing an undertaking to ensure respect in all circumstances, which, in turn, consists of an internal and an external component. The internal component implies that each High Contracting Party to the Geneva Conventions must ensure that the Conventions are respected

- 1 See the report presented by the International Committee of the Red Cross (ICRC) to the 31st International Conference of the Red Cross and Red Crescent, *Strengthening Legal Protection for Victims of Armed Conflicts*, ICRC, Geneva, October 2011, p. 4.
- 2 Even the most longstanding IHL obligation, which was at the heart of the early treaty IHL, i.e. the delivery of impartial healthcare in armed conflict, is affected by this lack of respect vis-à-vis existing rules. See ICRC, *Healthcare in Danger: Making the Case*, August 2011, available at: [www.icrc.org/eng/assets/files/publications/icrc-002-4072.pdf](http://www.icrc.org/eng/assets/files/publications/icrc-002-4072.pdf).
- 3 *Ibid.* See also International Institute of Humanitarian Law, *Strengthening Measures for the Respect and Implementation of International Humanitarian Law and Other Rules Protecting Human Dignity in Armed Conflict*, 28th Round Table, Sanremo, 2–4 September 2004; ICRC Vice-President Beerli, *Respecting IHL: Challenges and Responses*, 36th Round Table, Sanremo, 5–7 September 2013, available at: [www.icrc.org/eng/assets/files/2013/round-table-san-remo-beerli-2013-icrc.pdf](http://www.icrc.org/eng/assets/files/2013/round-table-san-remo-beerli-2013-icrc.pdf).
- 4 Luigi Condorelli and Laurence Boisson de Chazournes, “Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests”, *International Review of the Red Cross*, Vol. 82, No. 837, 2000, pp. 67–86.

at all times not only by its armed forces and its civilian and military authorities, but also by the population as a whole.<sup>5</sup> The existence of this internal obligation, as well as the possibility to hold States legally responsible in case of failure to comply with it, is widely accepted. The external component postulates that third States not involved in a given armed conflict – and also regional and international organizations<sup>6</sup> – have a duty to take action in order to safeguard compliance with the Geneva Conventions, and arguably with the whole body of IHL, by the parties to the conflict.

The purpose of this article is to cast some light upon this external component, which some authors have described as being beset by uncertainty.<sup>7</sup> In particular, emphasis will be placed on the nature and extent of the obligations of each High Contracting Party to the Geneva Conventions to ensure respect by the other High Contracting Parties, whether they are a party to the conflict or not.<sup>8</sup> If compliance with existing IHL constitutes the key element for averting current humanitarian problems during armed conflict, there is then a need to elucidate the extent of this obligation. For instance, in a conflict in which a State A systematically mutilates civilians from a State B, must a neutral State C endeavour to stop such mutilations? In a situation of occupation in which a State A prevents the occupied territory of a State B from receiving humanitarian assistance, what are the responsibilities of a non-belligerent State C with close diplomatic ties to State A? Is it lawful for a State C to sell weapons to a State A, if it knows that they are going to be used to commit serious IHL violations in a conflict against a State B? CA 1 is a sound basis for dealing with these matters.

By construing the scope of CA 1, this article will demonstrate that third States – that is, States not taking part in an armed conflict – have an international legal obligation to actively prevent IHL violations. First, it will examine the historical background of the obligation to ensure respect, in particular by revisiting the *travaux préparatoires* to the Geneva Conventions of 1949. Second, it will focus on an array of subsequent practice by States, intergovernmental organizations and international tribunals, supporting the view that third States indeed have a duty to ensure compliance with IHL, even in conflicts to which they are not a party. After having evinced the existence of this external

5 Final Record of the Diplomatic Conference of Geneva of 1949, Vol. 2, Section B, p. 53.

6 Adam Roberts considers that if States have an obligation to ensure respect, then regional and global international organizations are also bound by this very same obligation, since they are themselves composed of States. See Adam Roberts, “Implementation of the Laws of War in Late 20th Century Conflicts”, in Michael N. Schmitt and Leslie C. Green (eds), *The Law of Armed Conflict: Into the Next Millennium in Honour of Jean Pictet*, ICRC and Martinus Nijhoff Publishers, Geneva, 1984, p. 18.

7 Luigi Condorelli and Laurence Boisson de Chazournes, “Quelques remarques à propos de l’obligation des États de ‘respecter et faire respecter’ le droit international humanitaire ‘en toutes circonstances’”, in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC and Martinus Nijhoff Publishers, Geneva, 1984, p. 18; Tomasz Zych, “The Scope of the Obligation to Respect and to Ensure Respect for International Humanitarian Law”, *Windsor Yearbook of Access to Justice*, Vol. 27, 2009, p. 252; Carlo Focarelli, “Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?”, *European Journal of International Law*, Vol. 21, No. 1, 2010, p. 127.

8 For a more general overview of CA 1, including the obligation to respect, see e.g. L. Condorelli and L. Boisson de Chazournes, above [note 7](#).

component of the obligation, the article will assess its exact nature. In that sense, it will frame CA 1 within the context of an obligation of due diligence – as opposed to an obligation of result – and will briefly enumerate a series of measures available to States in order to comply therewith. Lastly, the article will look at the type of action that CA 1 requires from High Contracting Parties to the Geneva Conventions, or prohibits them from taking. This last part will emphasize the role that CA 1 can play in delineating a preventive approach to IHL violations. For these purposes, the recently adopted Arms Trade Treaty will be used as a case study.

## Historical background of the obligation to ensure respect by others

Article 25 of the 1929 Geneva Convention on the Amelioration of the Condition of the Wounded and Sick in Armies in the Field and Article 82 of the 1929 Geneva Convention on the Treatment of Prisoners of War already established that both texts “shall be respected by the High Contracting Parties in all circumstances”. These provisions have been unanimously read as imposing, for the first time, the obligation to abide by the rules of the Conventions regardless of the behaviour of other parties.<sup>9</sup> Apart from their unprecedented character within the law of treaties,<sup>10</sup> Articles 25 and 82 of the 1929 Geneva Conventions laid down the foundations of what is now known as the principle of non-reciprocity<sup>11</sup> – in other words, that reciprocity may not be invoked to disregard IHL obligations in case the adversary violates the law. If the 1929 Geneva Conventions marked a milestone in the efforts to safeguard compliance with IHL, CA 1 to the four Geneva Conventions of 1949 went a step further by asserting that “the High Contracting Parties undertake to respect and to ensure respect for the [Geneva Conventions] in all circumstances”. Three major diverging features need to be highlighted between CA 1 and its 1929 predecessors:

1. First and foremost, CA 1 introduced the obligation to “ensure respect” for the Geneva Conventions. Several of the numerous implications of this new commitment will be discussed below.

9 *Ibid.*, p. 19; Frits Kalshoven, “The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit”, *Yearbook of International Humanitarian Law*, Vol. 2, 1999, pp. 7–10; Alexandre Devillard, “L’obligation de faire respecter le droit international humanitaire: l’article 1 commun aux Conventions de Genève et à leur Premier Protocole Additionnel, fondement d’un droit international humanitaire de coopération?”, *Revue Québécoise de Droit International*, Vol. 75, 2007, pp. 77–79.

10 Note that, under the law of treaties, a material breach of a treaty by one of the parties allows the others to terminate the treaty or to suspend its operation in whole or in part. Article 60(5) of the 1969 Vienna Convention on the Law of Treaties recognizes the exception to this rule, anticipated by the 1929 Geneva Conventions, by providing that this regime “do[es] not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties”.

11 Also known as the prohibition of negative reciprocity. See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, reprint 2009 (ICRC Customary Law Study), pp. 498–499.

2. Second, unlike in 1929, when the obligation to respect in all circumstances was placed within the chapters dealing with the issue of execution at the very end of the Conventions, the 1949 Diplomatic Conference decided to place the more far-reaching obligation of CA 1 right at the beginning of all four Geneva Conventions. Such a decision should be seen as anything but trivial, in terms both of its purpose and of its imperative nature.<sup>12</sup>
3. Third, CA 1 is written in the active voice (“The High Contracting Parties undertake to respect and to ensure respect”), whereas its 1929 counterparts resorted to the passive voice (“shall be respected by the High Contracting Parties”). Regardless of whether the use of a particular grammatical construction entails any legal value, the wording of CA 1 helps to emphasize the system of protection underpinning the Geneva Conventions, and hence its interpretation.

The common Articles to the Geneva Conventions reflect matters that the drafters deemed significant enough “to merit emphasis through repetition”.<sup>13</sup> It is reasonable to assume that CA 1 goes beyond the mere obligation to respect the Geneva Conventions at the domestic level. After all, the above-mentioned customary principle *pacta sunt servanda* already acknowledges that any State ratifying a particular treaty is bound to respect it in good faith. If CA 1 represents such a breakthrough in the development of IHL, it is not because it reiterates an already existing and uncontroversial rule of public international law but rather due to its unprecedented creation of a legal obligation for each State to ensure respect towards the international community as a whole.<sup>14</sup> This is what can be deduced from a joint analysis of the *travaux préparatoires* and the subsequent application of CA 1 for over sixty years.

Before looking back at the inception of the Geneva Conventions, it is necessary to highlight that the *travaux préparatoires* are to be seen as a supplementary means of interpretation,<sup>15</sup> contrary to the ulterior behaviour of States in the application of a treaty, which constitutes a primary source in the analysis of conventional obligations.<sup>16</sup> Nevertheless, taking into consideration

12 See Fateh Azzam, “The Duty of Third States to Implement and Enforce International Humanitarian Law”, *Nordic Journal of International Law*, Vol. 66, 1997, p. 72 : “Article 1 ... is not preambular or introductory, it is an active provision of the Conventions and Protocol and indeed, its placement at the very beginning of both is an indication of its imperative nature.” See also Jean Pictet (ed.), *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 1958, p. 15.

13 Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press, New York, 2010, p. 84.

14 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols to the Geneva Conventions of 12 August 1949*, 1987, para. 45.

15 Vienna Convention on the Law of Treaties, Art. 32.

16 *Ibid.*, Art. 31(2). See also Giovanni Distefano, “La pratique subséquente des États parties à un traité”, *Annuaire Français de Droit International*, Vol. 40, 1994, p. 46 (emphasis in original):

Si le recours aux travaux préparatoires souligne le souci de connaître cette volonté dans la phase de gestation du traité, recourir à l'examen de l'application et de l'exécution de ce dernier souligne le besoin d'établir ladite volonté sur le terrain. Encore, les travaux préparatoires ne nous éclairent-ils qu'au regard des intentions embryonnaires des parties à un traité, alors que l'analyse de la pratique subséquente des États contractants constitue assurément une interprétation *authentique* et *pratique* de leur volonté commune véhiculée par l'instrument conventionnel.

that—as stated above—some authors have deemed the undertaking to ensure respect by others to be a norm surrounded by uncertainty, a study of both the origin and practice of this obligation will shed further light upon the nuances of the rule.

### *Travaux préparatoires*

According to François Bugnion, the *travaux préparatoires* to the Geneva Conventions are not conclusive when it comes to construing the scope of CA 1. He asserts that both the internal and external aspects of the duty to ensure respect were put forward and that the Diplomatic Conference of 1949 did not find it necessary to decide between them. The formulation retained would permit both interpretations.<sup>17</sup> Frits Kalshoven has gone one step further by stating that nothing in the *travaux préparatoires* justifies an interpretation of CA 1 whereby third States have an international legal obligation to ensure respect for the Geneva Conventions in conflicts to which they are not a party.<sup>18</sup>

In his analysis of the drafting history of CA 1, Kalshoven concluded that the drafters did not intend an interpretation whereby the phrase “to ensure respect” implied that each High Contracting Party undertook to ensure respect by all other parties.<sup>19</sup> In his view, there is “simply nothing to suggest that the authors of the proposed text, with Claude Pilloud as the key figure among them, were thinking along those lines”.<sup>20</sup> Kalshoven considers that CA 1 simply sought to address the issue of implementation of the Geneva Conventions in the event of non-international armed conflict (NIAC)—that is, to ensure that the non-State party to a NIAC also respects the basic precepts of IHL.<sup>21</sup>

The admittedly scarcely documented drafting history can also be understood differently. The obligation to ensure respect was first introduced in the opening articles of each one of the Draft Revised or New Conventions for the Protection of War Victims submitted by the ICRC to the Stockholm International Conference of the Red Cross in 1948.<sup>22</sup> The ICRC established the drafts with the assistance of government experts, National Red Cross Societies and other humanitarian associations.<sup>23</sup> The final text, presented in the form of a booklet, contained both the proposed articles and details on the meaning and justification of each provision. The exact proposed wording of CA 1 was the following:

The High Contracting Parties undertake, in the name of their peoples, to respect, and to ensure respect for the present Convention in all circumstances.

17 François Bugnion, *Le Comité International de la Croix Rouge et la protection des victimes de la guerre*, ICRC, Geneva, 2000, pp. 1080–1081.

18 F. Kalshoven, above [note 9](#), pp. 3–61.

19 *Ibid.*, p. 14.

20 *Ibid.*

21 *Ibid.*, pp. 13–16.

22 ICRC, Draft Revised or New Conventions for the Protection of War Victims, Geneva, May 1948, pp. 4, 34, 51 and 222.

23 *Ibid.*, pp. 1–2.



Next to this text, the ICRC introduced a series of remarks. The booklet was made available to all National Red Cross Societies and governments participating at the Stockholm Conference.<sup>24</sup> Due to its importance to understanding the original meaning of the obligation to ensure respect, it is worth reproducing the remarks made to CA 1 in their entirety (emphasis added):

The ICRC believes that this Article, *the scope of which has been widened*, should be placed at the head of the Convention. The new wording covers three points:

- (1) The undertaking subscribed to by High Contracting Parties to respect the Convention in all circumstances.
- (2) The undertaking subscribed to by the High Contracting Parties to ensure respect for the Convention in all circumstances.
- (3) A formal declaration stating that the two above undertakings are subscribed to by Governments in the name of their peoples.

Re (1) This stipulation corresponds to Art. 25, Sec. 1, of the 1929 Convention.  
Re (2) The ICRC believes it necessary to stress that if the system of protection of the Convention is to be effective, the High Contracting Parties cannot confine themselves to implementing the Convention. *They must also do everything in their power to ensure that the humanitarian principles on which the Convention is founded shall be universally applied.*

Re (3) By inviting the High Contracting Parties to make formal declaration of their undertaking, in the name of their peoples, the ICRC aims at associating the peoples themselves with the duty of ensuring respect for the principles on which the present Convention is founded, and of implementing the obligations which result therefrom. Another advantage of the present wording will be to facilitate the implementing of the present Convention, especially in case of civil war.<sup>25</sup>

Kalshoven argues that the authors used the word “universal” as a way to ensure compliance with the Geneva Conventions by all parties to a NIAC.<sup>26</sup> He submits that “for a concept belonging to the realm of international relations to figure without explanation between two elements relating to the domestic level would be very strange indeed”.<sup>27</sup> Kalshoven also considers that

precious little had ... remained of the original motives behind ... the new draft Article 1. For its authors, its main *raison d’être* now appeared to lie in getting populations involved in the process of creating and maintaining respect for the principles embodied in the Conventions, thus binding them to such respect even in time of civil war or non-international armed conflict.<sup>28</sup>

24 *Ibid.*, p. 2.

25 *Ibid.*, p. 5, (emphasis added).

26 F. Kalshoven, above note 9, p. 14.

27 *Ibid.*

28 *Ibid.*, p. 16.

The following elements, it is submitted, may also prompt a different understanding of the underlying intent:

1. The draft Article 2 presented to the Stockholm Conference by the ICRC already dealt with the issue of civil war (in paragraph 4), explicitly stating the binding nature of the obligation to respect for IHL for all parties to a NIAC; and draft Article 1, by maintaining the notion of “to respect the Conventions in all circumstances”, coupled with a statement in draft Article 2 confirming that the *clausula si omnes* contained in earlier IHL treaties would not govern the relations of parties to an armed conflict (in paragraph 3), restated the principle of non-reciprocity.<sup>29</sup> At the same time, the remarks made by the ICRC with regard to CA 1 (see above) began by spelling out that the scope of this provision was wider than that of its equivalents in the 1929 Geneva Conventions. Since both the principle of non-reciprocity and the issue of civil war were being dealt with elsewhere, one must presuppose that this enlarged scope mainly referred to the obligation to ensure respect universally.
2. The third paragraph of the remarks made by the ICRC already dealt with the issue of non-international armed conflict. Thus, the second paragraph thereof must have a different scope.
3. The ordinary meaning of the term “universal” used in the ICRC remarks is particularly univocal and one can comfortably assert that, at least in the domain of international law, it means the very opposite of domestic. Scholars like Eric David agree with the reading that a universal application of CA 1 can obviously not be restricted to a national level.<sup>30</sup> The Stockholm text and the related remarks may therefore well be read with such a wider understanding.

The *travaux préparatoires* of the 1949 Diplomatic Conference show that there was very little discussion on the issue of CA 1. Only Italy, Norway, the United States, the ICRC and France took the floor during the deliberations at the Special Committee.<sup>31</sup> Mr Maresca, representing Italy, pointed out that the obligation to ensure respect was “either redundant or introduced a new concept into international law”.<sup>32</sup> As shown above, there are good reasons to believe that the latter is true – otherwise, if it would merely have been redundant, one might have expected a deletion. The delegates

29 Paragraphs 3 and 4 of draft Article 2 stated the following:

Should one of the Powers in conflict not be party to the present Convention, the Powers who are party thereto shall, nevertheless, be bound by it in their mutual relations.

In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in nowise depend on the legal status of the parties to the conflict and shall have no effect on that status.

30 Eric David, *Principes de Droit des Conflits Armés*, Bruylant, Brussels, 2008, para. 3.13: “une application universelle ne se limite évidemment pas à une application nationale”.

31 Final Record of the Diplomatic Conference of Geneva of 1949, above note 5, p. 53.

32 *Ibid.*

from Norway and the US highlighted that the object of CA 1 was to ensure respect “by the population as a whole”, without elaborating on the issue.<sup>33</sup> After that, Mr Pilloud, on behalf of the ICRC, pointed out that

in submitting its proposals to the Stockholm Conference, the International Committee of the Red Cross emphasized that the Contracting Parties should not confine themselves to applying the Conventions themselves, but should do all in their power to see that the basic humanitarian principles of the Conventions were universally applied.<sup>34</sup>

None of the delegates opposed this statement, nor did they raise any issues regarding their accord – or discord – with the statements made by Norway, the US and the ICRC.<sup>35</sup> It may therefore be assumed that the universal application of a treaty should not be restricted to the domestic level.<sup>36</sup> Since a draft with clarifying remarks had been distributed to all the participants – and taking into consideration that a straightforward statement as to its meaning had also been made by the ICRC – it is unlikely that delegates had a narrow understanding of the undertaking to ensure respect. They chose a broad formulation that accommodates an external scope, be it in terms of an entitlement or a duty.

Interestingly, the Commentaries to the Geneva Conventions published by the ICRC in the 1950s support the view that CA 1 imposes an obligation to ensure respect by others:

[I]n the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.<sup>37</sup>

33 *Ibid.*

34 *Ibid.*

35 It is impossible to know in retrospect what the delegates had in mind at the time. The fact is that none of them contradicted the ICRC statement. In this sense, it might be interesting to remember that most scholars consider that silence can be used as supporting evidence for acquiescence. See 13 I. C. MacGibbon, “The Scope of Acquiescence in International Law”, *British Yearbook of International Law*, Vol. 31, No. 143, 1954, in particular pp. 146–147. See also G. Distefano, above [note 16](#), p. 48: “La doctrine, par ailleurs, tend à attribuer au silence valeur probatoire aux fins interprétatives par voie de comportement ultérieur des parties”.

36 E. David, above [note 30](#), para. 3.13.

37 J. Pictet, above [note 12](#), p. 16. Note that the original French version of Pictet’s Commentaries is clearer when it comes to delineating the dichotomy between the entitlement to act (*pouvoir*) and the obligation to do so (*devoir*): “Ainsi encore, si une Puissance manque à ses obligations, les autres Parties contractantes ... peuvent-elles – et doivent-elles – chercher à la ramener au respect de la Convention” (*ibid.*, p. 21). The original French version of Pictet’s Commentaries is even stronger in the case of the Third Geneva Convention, since it only refers to a duty: “Ceci vaut pour le respect que chaque État doit lui-même à la Convention mais, en outre, si une autre Puissance manque à ses obligations, chaque Partie contractante (neutre, alliée ou ennemie) doit chercher à la ramener au respect de la Convention”. Jean Pictet (ed.), *Commentaire: IIIème Convention de Genève Relative au Traitement des Prisonniers de Guerre*, 1960, p. 21.

Finally, the system of protection underpinning the Geneva Conventions as a whole seems to run counter to the arguments of those who dispute the external element of the obligation in CA 1. As pointed out by Frédéric Siordet:

The monstrous character of certain violations of the Conventions committed [during the Second World War] where there had been no scrutiny led to a modification of the very idea of scrutiny. It was no longer merely a question of recognizing the legitimate right of a belligerent to see that the Conventions were applied, and to facilitate his doing so. For the private right of belligerents was substituted the general interest of humanity, which demanded scrutiny, no longer as a question of right, but of duty.<sup>38</sup>

Siordet puts forward the existence of the Protecting Powers in Articles 10/10/10/11 of the Geneva Conventions as an example of a provision strengthening CA 1.<sup>39</sup> He adds that the legal obligations imposed upon the parties to a conflict no longer seem sufficient by themselves, which is why the Geneva Conventions “seek ... in addition to provide for scrutiny and cooperation from outside the Parties to the conflict”.<sup>40</sup> Indeed, the need for supervision had already been discussed at the 1929 Diplomatic Conference, but it was only fully developed and made mandatory in the Geneva Conventions of 1949.<sup>41</sup>

At any rate, the acceptance of an obligation to ensure respect by others for both international and non-international armed conflicts was expressly acknowledged after the adoption of the Geneva Conventions and is also what emanates from an analysis of the (more relevant) subsequent practice in the application of the treaty.<sup>42</sup>

## Sixty years of State practice

In the first years after the adoption of the Geneva Conventions, the idea of third-party responsibility did not arouse much interest among government officials or even among scholars. It was only in 1968, in Tehran, that the United Nations

38 Frédéric Siordet, *The Geneva Conventions of 1949: The Question of Scrutiny*, ICRC, Geneva, 1953, p. 21.

39 In his concluding remarks regarding common Article 10/10/10/11, Siordet considers that the reason for imposing such an obligation upon third States is precisely to “strengthen[] Article 1”. *Ibid.*, p. 71.

40 *Ibid.* Although Siordet focuses on the role of Protecting Powers, he makes the link between this new function and the existence of a legal obligation to ensure respect by others as enshrined in CA 1. Moreover, he broadly defines this obligation as one of due diligence—an issue that this article addresses in a later section. Siordet writes in *ibid.*, p. 44, that:

The Protecting Power, on the other hand, whose action takes place in the territory of a foreign country, has only limited means at its disposal. Nevertheless the Conventions make it compulsory, within the limits of these means, for the Protecting Power to lend its services and to exercise its scrutiny in the application of the Conventions, in so far as it is itself a Party to the Conventions. The formal obligation of Article 1 “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances” is as compulsory for it as for the Parties to the conflict. That is a situation heavy with consequences.

41 David P. Forsythe, “Who Guards the Guardians: Third Parties and the Law of Armed Conflict”, *American Journal of International Law*, Vol. 70, No. 1, 1976, p. 43.

42 Vienna Convention on the Law of Treaties, Art. 31(3)(b).

(UN) International Conference on Human Rights, in the preamble to Resolution XXIII, reminded States party to the Geneva Conventions of their responsibility to “take steps to ensure respect of these humanitarian rules in all circumstances by other States, even if they are not themselves directly involved in an armed conflict.”<sup>43</sup> Although the resolution was adopted by sixty-seven votes to none, with two abstentions, it is not absolutely clear whether the term “responsibility” referred to a legal obligation or something less.<sup>44</sup> However, the vast array of subsequent practice supports the imperative nature of the duty to ensure respect for States that are not party to an armed conflict.

The International Court of Justice (ICJ) has, on various occasions, asserted the imperative nature of the obligation to ensure respect. In the *Nicaragua case*, the Court considered that even though the United States was not a party to the NIAC, it had an obligation to ensure respect for the Geneva Conventions in all circumstances.<sup>45</sup> It further added that this obligation did “not derive only from the Conventions themselves, but from the general principles of humanitarian law”.<sup>46</sup> In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court underscored that “every State party to [the Fourth Geneva Convention], whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with”.<sup>47</sup>

Together with the ICJ, both the Security Council and the General Assembly have issued a myriad of resolutions<sup>48</sup> reaffirming the existence of a legal obligation for third States to ensure respect for IHL in conflicts to which they are not a party.<sup>49</sup> For instance, the Security Council has called upon third States to ensure compliance

43 International Conference on Human Rights, *Resolution XXIII: Human Rights in Armed Conflict*, Teheran, 12 May 1968, preamble, available at: [www1.umn.edu/humanrts/instree/1968a.htm](http://www1.umn.edu/humanrts/instree/1968a.htm).

44 Kalshoven has expressed doubts on construing Resolution XXIII as an implicit acceptance of the legal obligation enshrined in CA 1. F. Kalshoven, above note 9, p. 43. Other authors do not hesitate to support the opposite view. See e.g. F. Azzam, above note 12, p. 62.

45 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment (Merits), 27 June 1986, para. 220.

46 *Ibid.*

47 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Case)*, Advisory Opinion, 9 July 2004, para. 158. See also ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, paras 211 and 345. In this case, the ICJ did not analyse the issue of third States’ responsibility. However, it did indeed consider that the undertaking to ensure respect for IHL constituted a legal obligation under international law.

48 Condorelli and Boisson de Chazournes consider that “common Article 1 has in the last ten years [1990–2000] almost become a basic norm of behaviour ... within the framework of the United Nations”: see L. Condorelli and L. Boisson de Chazournes, above note 4, pp. 76–78, for a more detailed study on UN practice. See also Toni Pfanner, “Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims”, *International Review of the Red Cross*, Vol. 91, No. 874, 2009, pp. 305–306 and 314–323.

49 Similarly, other intergovernmental organizations have also called upon their members to comply with their duty to ensure respect under CA 1. See e.g. NATO, Parliamentary Assembly, Civilian Affairs Committee Resolution No. 287, Amsterdam, 15 November 1999, para. 7.

with IHL in Israel/Palestine,<sup>50</sup> Bosnia and Herzegovina<sup>51</sup> and Rwanda.<sup>52</sup> Furthermore, in a report submitted to the Security Council by the Secretary-General, it was unambiguously affirmed that:

Under [the Fourth Geneva Convention], each Contracting State undertakes a series of unilateral engagements, vis-à-vis itself and at the same time vis-à-vis the others, of legal obligations to protect those civilians who are found in occupied territories following the outbreak of hostilities ... the Security Council should consider making a solemn appeal to all the High Contracting Parties to the Fourth Geneva Convention that have diplomatic relations with Israel, drawing their attention to their obligation under article 1 of the Convention to "... ensure respect for the present Convention in all circumstances" and urging them to use all the means at their disposal to persuade the Government of Israel to change its position as regards the applicability of the Convention.<sup>53</sup>

A similar appeal was made in Resolution 45/69 of December 1990, entitled "The Uprising (Intifadah) of the Palestinian People". Therein, the General Assembly not only requested the Occupying Power to abide by the provisions of the Fourth Geneva Convention, but also called upon all States party to that Convention "to ensure respect by Israel ... for the Convention in all circumstances, in conformity with their obligation under article 1 thereof".<sup>54</sup> The same body has approved other quasi-identical resolutions in the last two decades.<sup>55</sup>

Within the framework of the United Nations, such appeals have also been issued by the Sub-Commission on Human Rights<sup>56</sup> and the Commission on Human Rights,<sup>57</sup> as well as its successor the Human Rights Council.<sup>58</sup>

The participants in the Diplomatic Conference of Geneva of 1974–1977 also included the obligation to ensure respect in Article 1(1) of the First Additional Protocol to the Geneva Conventions of 1949 and, as pointed out by

50 UN SC Res. 681 (1990), UN Doc. S/RES/681, 20 December 1990.

51 UN SC Res. 764 (1992), UN Doc. S/RES/764, 13 July 1992.

52 UN SC Res. 955 (1994), UN Doc. S/RES/955, 6 November 1994.

53 Report Submitted to the Security Council by the Secretary-General in Accordance with Resolution 605 (1987), UN Doc. S/19443, 21 January 1988, paras 24–27.

54 UN GA Res. 45/69, UN Doc. A/RES/45/69, 6 December 1990, para. 3.

55 See e.g. UN GA Res. 60/105, UN Doc. A/RES/60/105, 8 December 2005, para. 3; UN GA Res. 62/107, UN Doc. A/RES/62/107, 17 December 2007, para. 3; UN GA Res. 63/96, UN Doc. A/RES/63/96, 5 December 2008, para. 3; UN GA Res. 68/81, UN Doc. A/RES/68/81, 16 December 2013, para. 3; and UN GA Res. 68/82, UN Doc. A/RES/68/82, 16 December 2013, para. 7.

56 See e.g. UN Sub-Commission on Human Rights, Res. 1990/12, 30 August 1990, para. 4; Res. 1991/6, 23 August 1991, para. 4; Res. 1992/10, 26 August 1992, para. 4; and Res. 1993/15, 20 August 1993, para. 4.

57 See e.g. UN Commission on Human Rights, Res. 2005/7, 14 April 2005, preamble and para. 5. This resolution "[c]alls upon Member States to take the necessary measures that fulfil their obligations under the instruments of international human rights law and international humanitarian law to ensure that Israel ceases killing, targeting, arresting and harassing Palestinians, particularly women and children" (emphasis in original).

58 Human Rights Council, UN Doc. A/HRC/4/NGO/59, 7 March 2007.

Levrat, they decided to do so “with full knowledge of the facts”.<sup>59</sup> In 1993, the Final Declaration of the International Conference for the Protection of War Victims reiterated that the responsibility to respect and ensure respect encompassed the need to guarantee “the effectiveness of international humanitarian law and take resolute action, in accordance with that law, against States bearing responsibility for violations of international humanitarian law with a view to terminating such violations”.<sup>60</sup> Two years later, in 1995, Resolution 1 of the 26th International Conference of the Red Cross and Red Crescent, which was adopted by consensus, reaffirmed that “every State must respect in all circumstances the relevant principles and norms of humanitarian law and ... must ensure respect for the Conventions and Protocols”, thus leaving no doubt as to the imperative nature of this obligation.<sup>61</sup>

The ICRC has consistently and publicly emphasized this aspect of CA 1 and reminded States of their obligations thereunder. It has taken a number of steps, confidentially or publicly, individually or generally, to encourage States, including those not party to a conflict, to use their influence or offer their cooperation in order to ensure respect for IHL.<sup>62</sup> When it is deemed necessary in the interest of the victims to appeal to the responsibility of all High Contracting Parties regarding a specific situation, the ICRC chooses from a range of possibilities at its disposal, among which is the quite exceptional measure of making a public appeal. Appeals to High Contracting Parties expressly referring to CA 1 were made by the ICRC, for example, in 1974 (Middle East), in 1979 (Rhodesia/Zimbabwe), in 1980 (Afghanistan), in 1983 and again in 1984 (Iran and Iraq), in 1992 (Bosnia-Herzegovina) and in 1995 (Rwanda). Moreover, in a series of regional expert seminars organized by the ICRC in 2003 as preparation for the 28th International Conference of the Red Cross and Red Crescent, participants confirmed that by virtue of CA 1 third States are bound not only by a negative legal obligation to neither encourage a party to an armed conflict to violate IHL nor to take action that would assist in such violations, but also by a positive obligation to take appropriate action – unilaterally or collectively – against parties to a conflict who are violating IHL.<sup>63</sup>

It has often been said that, due to the intrinsically confidential nature of the diplomatic machinery involved, it is difficult to record practice of individual States

59 Nicolas Levrat, “Les conséquences de l’engagement pris par les Hautes Parties contractantes de ‘faire respecter’ les Conventions humanitaires”, in Frits Kalshoven and Yves Sandoz (eds), *Mise en œuvre du droit international humanitaire*, Martinus Nijhoff Publishers, Dordrecht and Boston, 1989, p. 269 (translation by the authors): “en connaissance de cause”. See also Y. Sandoz, C. Swinarski and B. Zimmermann, above note 14, para. 44: “[M]ost importantly, the Diplomatic Conference fully understood and wished to impose this duty on each Party to the Conventions, and therefore reaffirmed it in the Protocol as a general principle.”

60 Final Declaration of the International Conference for the Protection of War Victims, Geneva, 1 September 1993, at II(11), available at: [www.icrc.org/eng/resources/documents/misc/57jms8.htm](http://www.icrc.org/eng/resources/documents/misc/57jms8.htm).

61 See also 30th International Conference of the Red Cross and Red Crescent, Resolution 3, 2007, para. 2.

62 See e.g. F. Bugnion, above note 17, p. 1081.

63 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, December 2003, p. 47, available at: [www.icrc.org/eng/assets/files/other/ihlcontemp\\_armedconflicts\\_final\\_ang.pdf](http://www.icrc.org/eng/assets/files/other/ihlcontemp_armedconflicts_final_ang.pdf).



illustrating this obligation to ensure respect by third parties.<sup>64</sup> Scholars in the early 1990s, in particular, therefore voiced a word of caution as to whether governments felt themselves obliged to intervene when a party to an armed conflict violated IHL.<sup>65</sup> However, such passiveness was deemed “hard to justify, or even to understand”, considering the undeniable external component of the rule.<sup>66</sup> As of today, thanks to an ever-growing tendency that has been gaining momentum over the last two decades, it is doubtful that one can keep questioning the lack of State practice illustrating this duty. Interestingly, in this respect, the EU felt the need to adopt guidelines on promoting compliance with IHL.<sup>67</sup> As indicated under the section on purpose, it is emphasized that the “[g]uidelines are in line with the commitment of the EU and its Member States to IHL, and aim to address compliance with IHL by third States, and, as appropriate, non-State actors operating in third States”. The guidelines also state means of action at the disposal of the EU in relation to third countries.

Other, more contextual State practice also illustrates a sense of positive duty.<sup>68</sup> For instance, in 1980, the member States of the European Economic Community (ECC), predecessor of the European Union, issued a joint statement, known as the Venice Declaration, considering that Israeli settlements were illegal under international law. Through the Venice Declaration, the ECC “stress[ed] the need for Israel to put an end to the territorial occupation which it has maintained since the conflict of 1967”.<sup>69</sup> Since then, numerous European institutions, such as the European Council,<sup>70</sup> the European Commission<sup>71</sup> and the Council of the

64 Hans-Peter Gasser, “Ensuring Respect for the Geneva Conventions and Protocols: The Role of the Third States and the United Nations”, in Hazel Fox and Michael A. Meyer (eds), *Effecting Compliance*, British Institute of International and Comparative Law, 1993, p. 31; L. Condorelli and L. Boisson de Chazournes, above note 7, p. 27; N. Levrat, above note 59, p. 291; T. Zych, above note 7, p. 256.

65 H.-P. Gasser, above note 64, p. 32.

66 *Ibid.*

67 European Union, “Updated European Union Guidelines on Promoting Compliance with International Humanitarian Law (IHL)”, *Official Journal of the European Union*, Doc. 2009/C 303/06, 15 December 2009, pp. 12–15, available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52009XG1215\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52009XG1215(01)&from=EN).

68 In addition to the practice specifically referenced in this article, see the ICRC database on State practice for further examples, available at: [www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule144](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule144). As can be seen, and contrary to what is sometimes asserted (see Birgit Kessler, “The Duty to ‘Ensure Respect’ under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts”, *German Yearbook of International Law*, Vol. 44, 2001, p. 509), States have also acted and invoked CA 1 in situations of NIAC – see *infra* the cases of Syria, Libya and Sudan.

69 “The Venice Declaration”, *Palestine-Israel Journal of Politics, Economics and Culture*, Vol. 6, No. 2, 1999.

70 See e.g. European Council, *Presidency Conclusions of the European Council: Annex V*, 25 and 26 June 1990, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=DOC/90/2&format=HTML&aged=0&language=EN&guiLanguage=en>; *Presidency Conclusions Brussels European Council*, 17 October 2003, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=DOC/03/48&format=HTML&aged=0&language=EN&guiLanguage=en>.

71 See e.g. European Commission, *EU–Israel: Implementation of the Interim Agreement in the Framework of a Strengthened Regional Cooperation*, 13 May 1998, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/98/426&format=HTML&aged=0&language=EN&guiLanguage=en>; and *Jerusalem and Ramallah Heads of Mission Report on East Jerusalem*, 2005, available at: [www.nodo50.org/csa/agenda05/palestina/jerusalem-ue\\_eng.pdf](http://www.nodo50.org/csa/agenda05/palestina/jerusalem-ue_eng.pdf).



European Union,<sup>72</sup> as well as many EU representatives,<sup>73</sup> have repeatedly – and publicly – emphasized that the building of settlements anywhere in the Occupied Palestinian Territories, including East Jerusalem, is prohibited by IHL.

Continued violations of human rights and IHL in the Darfur region led the United States to put in place a series of economic sanctions against Sudan. In particular, the United States imposed a trade embargo against Sudan, prohibited the importation of goods and services of Sudanese origin, and put into effect “targeted sanctions against individuals and entities contributing to the conflict in the Darfur region.”<sup>74</sup> At any rate, as it will be seen below, economic sanctions are but one of the means available to ensure respect by others.

On the occasion of the armed conflict in Libya in 2011, countries from all over the world condemned indiscriminate attacks causing death among the civilian population and urged the Libyan government to respect IHL;<sup>75</sup> in February 2011 the European Union approved a package of sanctions against Libyan leaders, including an arms embargo and a travel ban.<sup>76</sup>

The current armed conflict in Syria has also given rise to a variety of situations in which third States have endeavoured to ensure respect for IHL by the belligerents. In May 2012, following the killing of civilians in the Syrian city of Houla, almost a dozen countries from the Americas, Europe and Australia expelled all Syrian diplomats from their respective territories as a means of protest.<sup>77</sup> The EU (in association with various candidate and non-EU States) has referred explicitly to CA 1 in its diplomatic *démarches* to put an end to the “terrible” IHL violations committed in Syria, such as the denial of humanitarian assistance, the attacks against humanitarian workers, the use of siege and starvation as a method of warfare, indiscriminate attacks causing death among the civilian population and the recruitment of children into the armed forces:

The lack of respect for international humanitarian law and human rights is appalling and concerns us all ... Common article 1 of the Geneva Conventions clearly requires that all the contracting Parties, and I quote, “undertake to respect and to ensure respect” for the conventions “in all circumstances”. Thus, it is a collective obligation on all of us not only to respect but also to ensure that the parties to the conflict respect their

72 Council of the European Union, *Declaration by the Presidency on Behalf of the EU on Israeli Settlements*, 9 September 2009, available at: [http://europa.eu/rapid/press-release\\_PESC-09-106\\_en.htm?locale=EN](http://europa.eu/rapid/press-release_PESC-09-106_en.htm?locale=EN).

73 See e.g. “EU’s Ashton Criticizes Israel for Approval of ‘Illegal’ Settlement Homes”, *Haaretz*, 23 February 2012, available at: [www.haaretz.com/news/diplomacy-defense/eu-s-ashton-criticizes-israel-for-approval-of-illegal-settlement-homes-1.414327](http://www.haaretz.com/news/diplomacy-defense/eu-s-ashton-criticizes-israel-for-approval-of-illegal-settlement-homes-1.414327).

74 Department of the Treasury, *An Overview of the Sudanese Sanctions Regulations*, 25 July 2008, available at: [www.treasury.gov/resource-center/sanctions/Programs/Documents/sudan.pdf](http://www.treasury.gov/resource-center/sanctions/Programs/Documents/sudan.pdf).

75 Human Rights Council, “Council Holds Interactive Dialogue with Commission of Inquiry on alleged Human Rights Violations in Libya”, 9 June 2011, available at: [www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11131&LangID=E](http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11131&LangID=E).

76 “EU Agrees Libya Arms Embargo, Travel Ban”, *Reuters*, 28 February 2011, available at: [www.reuters.com/article/2011/02/28/eu-libya-sanctions-idAFLDE71R1NI20110228](http://www.reuters.com/article/2011/02/28/eu-libya-sanctions-idAFLDE71R1NI20110228).

77 “Several Countries Expel Syrian Diplomats as EU Mulls Joint Expulsion”, *Al Arabiya News*, 29 May 2012, available at: <http://english.alarabiya.net/articles/2012/05/29/217206.html>.

humanitarian obligations. We need to ensure actual enforcement of the obligations.<sup>78</sup>

All in all, taking into consideration both the drafting history of CA 1 and the subsequent practice of States, international tribunals and intergovernmental organizations,<sup>79</sup> States not party to an armed conflict have a legal obligation to ensure respect for the Geneva Conventions, and for applicable IHL more broadly,<sup>80</sup> through taking positive steps. What needs to be elucidated are the exact nature and extent of this legal obligation.

## Nature of the obligation to ensure respect

Article 48 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts provides that any State other than an injured State is entitled to invoke the responsibility of another State if the obligation in question is “owed to the international community as a whole”—this is indeed the case with the Geneva Conventions, which lay down legal obligations of an *erga omnes* nature.<sup>81</sup> That said, the obligation to ensure respect in its external dimension, imposed by CA 1, is distinct from the right of third States to act vis-à-vis the breach of *erga*

78 EU Statement, with the alignment of Iceland, Montenegro, Serbia, Albania, Bosnia and Herzegovina and the countries of the Stabilization and Association Process, *United Nations General Assembly: Humanitarian Situation in Syria*, 25 February 2014, available at: [www.eu-un.europa.eu/articles/en/article\\_14647\\_en.htm](http://www.eu-un.europa.eu/articles/en/article_14647_en.htm).

79 For a brief analysis on how resolutions, declarations and other normative instruments adopted by international organizations can be constitutive of the *opinio juris* of IHL rules, see Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, Clarendon Press, Oxford, 1989.

80 ICJ, *Nicaragua v. United States of America*, above note 45, para. 220.

81 See International Criminal Tribunal for the Former Yugoslavia (ICTY), *The Prosecutor v. Zoran Kupreskic and Others*, Case No. IT-95-16-T, Judgment (Trial Chamber), 14 January 2000, para. 519:

As a consequence of their absolute character, these norms of international humanitarian law do not pose synallagmatic obligations, i.e. obligations of a State vis-à-vis another State. Rather – as was stated by the International Court of Justice in the Barcelona Traction case (which specifically referred to obligations concerning fundamental human rights) – they lay down obligations towards the international community as a whole, with the consequence that each and every member of the international community has a “legal interest” in their observance and consequently a legal entitlement to demand respect for such obligations.

See also Tihomir Kamenov, “The Origin of State and Entity Responsibility for Violations of International Humanitarian Law in Armed Conflicts”, in Frits Kalshoven and Yves Sandoz (eds), *Implementation of International Humanitarian Law*, Martinus Nijhoff Publishers, Dordrecht and Boston, 1989, pp. 193–194; Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge and New York, 2002, p. 245; ICJ, *Wall Case*, above note 47, paras 155–157; ICJ, *Barcelona Traction Light and Power Company Limited*, Judgment, ICJ Reports 1970, paras 33–34, states:

An essential distinction should be drawn between the obligations of the State towards the international community as a whole, and those arising vis-à-vis another State ... By their very nature, the former are the concern of all States. In view of the importance of the rights involved all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

*omnes* obligations under public international law.<sup>82</sup> As shown in previous sections – and as can be seen from a significant amount of verbal State practice as expressed in international organizations/fora and elsewhere – CA 1 goes beyond an entitlement for third States to take steps to ensure respect for IHL. It establishes not only a right to take action, but also an international legal obligation to do so. The words “ensure respect” imply an active duty and the term “undertake” suggests a genuine obligation,<sup>83</sup> and this applies to all aspects of CA 1 – both the internal and the external component. The Commentaries on the Geneva Conventions, when it comes to the imperative nature of the undertaking to ensure respect by others, assert that CA 1 is not a stylistic clause but a provision invested with imperative force.<sup>84</sup> A similar reading regarding the binding nature of the word “undertake” is made by the Commentaries on AP I,<sup>85</sup> as well as by the ICJ in the context of the Genocide Convention.<sup>86</sup> Furthermore, this is also what can be deduced from the language of the international rulings, resolutions and statements analysed in the previous section. Thus, the question at this point is not so much whether CA 1 imposes a binding obligation, but rather what type of obligation lies beneath it.

## A duty of diligent conduct

International obligations – as well as domestic ones – can be divided into two types.<sup>87</sup> On the one hand, there are obligations of result, which imply that a State must attain a

82 In the *Wall Case*, the ICJ made a clear distinction between the existence of *erga omnes* obligations within the body of IHL and the obligation imposed upon third States by CA 1 to ensure respect in all circumstances. See ICJ, *Wall Case*, above note 47, paras 155–159. For an in-depth analysis of the legal regime of *erga omnes* obligations, as well as of the diverging features of other treaty-based obligations in whose performance all contracting parties are said to have a legal interest (also referred to as *erga omnes partes* or *erga omnes contractantes* obligations), see Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge University Press, Cambridge, 2010, pp. 117–157.

83 ICJ, *Nicaragua v. United States of America*, above note 45, para. 220.

84 J. Pictet, above note 12, p. 17.

85 Y. Sandoz, C. Swinarski and B. Zimmermann, above note 14, para. 40. Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for the Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff Publishers, The Hague and Boston, 1982, p. 43:

Since para. 1 does not limit the obligations of the High Contracting Parties to territories involved in the conflict, the obligation to ensure respect for the Protocol falls also upon Parties not involved in the conflict. They have to use any lawful means at their disposal in their international relations to ensure that the High Contracting Parties involved respect the Protocol.

86 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, para. 162:

The ordinary meaning of the word “undertake” is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties ... It is not merely hortatory or purposive. The undertaking is unqualified ... and it is not to be read merely as an introduction to later express references to legislation, prosecution and extradition. Those features support the conclusion that Article I, in particular its undertaking to prevent, creates obligations distinct from those which appear in the subsequent Articles. That conclusion is also supported by the purely humanitarian and civilizing purpose of the Convention.

87 Riccardo Pisillo-Mazzeschi, “The Due Diligence Rule and the Nature of the International Responsibility of States”, *German Yearbook of International Law*, Vol. 35, 1992, pp. 47–48.

specific outcome. On the other hand, there exist obligations of means, also called obligations of due diligence, where States are only obliged to follow a certain conduct, regardless of whether they attain the desired result or not. In summary, “the obligation of result is an obligation to ‘succeed’, while the obligation of diligent conduct is an obligation to ‘make every effort’”.<sup>88</sup> Some authors have considered that High Contracting Parties might be held liable for failure to fulfil their CA 1 obligation until the desired result of ensuring respect for the Geneva Conventions in all circumstances is achieved.<sup>89</sup> However, this can hardly be the case. A State not party to a specific armed conflict cannot be said to be under an obligation to reach a particular outcome—for example, the cessation of all IHL violations by a belligerent—with regard to that conflict. On the contrary, third States can only be under an obligation to exercise due diligence in choosing appropriate measures to induce belligerents to comply with the law. This does not turn the duty to ensure respect into a vacuous norm, since States are under the obligation, depending on the influence they may exert, to take all possible steps, as well as any lawful means at their disposal, to safeguard respect for IHL rules by all other States.<sup>90</sup> If they fail to do so, they might incur international responsibility. In this sense, it should be highlighted that the intricateness of international relations, including the political dynamics to which a State might be subject, does not diminish the validity of this obligation.<sup>91</sup> In fact, the opposite is true: a State with close political, economic and/or military ties (for example, through equipping and training of armed forces or joint planning of operations) to one of the belligerents has a stronger obligation to ensure respect for IHL by its ally.<sup>92</sup> This is precisely the underlying logic of CA 1, as well as of other IHL rules in which close ties between two States lead to the reinforcement of their existing obligations.<sup>93</sup>

Further guidance for the purposes of CA 1 can be drawn from the ICJ in the case *Bosnia and Herzegovina v. Serbia and Montenegro*. Therein, the ICJ found that the legal obligation to prevent genocide enshrined in Article 1 of the Genocide Convention was also one of due diligence. With regard to the due diligence standard, it held that States are obliged to use “all means reasonably available to them” and that a State incurs responsibility only if it has “manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the

88 *Ibid.*, p. 48.

89 See e.g. F. Azzam, above note 12, pp. 73–74.

90 L. Condorelli and L. Boisson de Chazournes, above note 4, p. 39; Paolo Benvenuti, “Ensuring Observance of International Humanitarian Law: Function, Extent and Limits of the Obligation of Third States to Ensure Respect of IHL”, *International Institute of Humanitarian Law Yearbook*, 1989–1990, p. 29; M. Bothe, K. J. Partsch and W. A. Solf, above note 85, p. 43.

91 F. Azzam, above note 12, p. 74.

92 H-P. Gasser, above note 64, p. 28.

93 For an example of how burden and means can be correlated with regard to the principle of *non-refoulement*, see Laurent Colassis, “The Role of the International Committee of the Red Cross in Stability Operations”, in Raul A. “Pete” Pedrozo (ed.), *The War in Iraq: A Legal Analysis*, US Naval War College International Law Studies, 2010, pp. 467–468.

genocide”.<sup>94</sup> The ICJ further added that due diligence can only be assessed *in concreto*.<sup>95</sup> This is the case with any obligation of due diligence,<sup>96</sup> including the duty to ensure respect for IHL by others.<sup>97</sup> Thus, only a case-by-case analysis can reveal whether a State has actually violated CA 1. For that purpose, together with the capacity to influence the parties to the conflict, it is important to take into consideration the seriousness of the potential violation.<sup>98</sup> For instance, a non-belligerent State C could hardly justify its passiveness vis-à-vis grave breaches of the Geneva Conventions committed by State A against State B, in particular if State C has a “special relationship” with State A.<sup>99</sup> Such a special relationship is even more pronounced if third States provide support, directly or indirectly, to a party to an ongoing armed conflict.

## Possible measures to ensure respect

As for the possible measures for ensuring compliance with IHL available to States not party to an armed conflict, these can be classified into three broad categories.<sup>100</sup> First, measures aimed at exerting diplomatic pressure: these include, *inter alia*, protests lodged with the corresponding ambassador, public denunciations, pressure through intermediaries and/or referral to the International Fact Finding Commission<sup>101</sup> – in

94 See ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, above [note 86](#), para. 430:

It is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of “due diligence”, which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence.

95 *Ibid.*

96 See Robert P. Barnidge, “The Due Diligence Principle under International Law”, *International Community Law Review*, Vol. 8, 2006, p. 118 : “While general principles can, and should, be sketched in the abstract, here, as elsewhere, the assessment under the due diligence rule is necessarily specific to particular facts and circumstances.”

97 T. Pfanner, above [note 48](#), p. 305.

98 A. Devillard, above [note 9](#), p. 101; B. Kessler, above [note 68](#), p. 506, states: “The intensity of the treaties’ violations is another element that is important for obliging the States to take further steps to ‘ensure respect’ of the Conventions. This already follows from the *ratio legis* of the Geneva treaties.”

99 According to Kessler, this “special relationship” originates from different factors, such as “common history, common ethnic roots or even geographical proximity”. *Ibid.*, p. 506. As seen above, Gasser focuses on military and economic influence. See H.-P. Gasser, above [note 64](#), p. 28.

100 For a full analysis of this question, see Umesh Palwankar, “Measures Available to States for Fulfilling their Obligation to Ensure Respect for International Humanitarian Law”, *International Review of the Red Cross*, Vol. 33, No. 298, 1993, pp. 9–25. See also the possible actions that the EU has identified in its guidelines on the promotion of IHL (European Union, above [note 67](#)): political dialogue, general public statements, *démarches* and/or public statements about specific conflicts, restrictive measures/sanctions, cooperation with other international bodies, crisis management operations, individual responsibility, training, denying export of arms.

101 AP I, Art. 90.

the event that both States have accepted its competence – or the International Criminal Court. Second, coercive measures taken by the State itself, such as measures of retorsion: the above-mentioned expulsion of Syrian diplomats might fall under this category. Third are measures taken in cooperation with an international organization.<sup>102</sup>

Of course, States are free to choose among the different measures at their disposal. Nevertheless, CA 1 should not be used to justify a so-called “*droit d’ingérence humanitaire*”.<sup>103</sup> In principle, permitted measures must be limited to “protest, criticism, retorsions or even non-military reprisals”.<sup>104</sup> Armed intervention may only be decided within the context of the UN, and in full respect of the UN Charter.<sup>105</sup> The rules on the resort to armed force (*jus ad bellum*) govern the legality of any use of force, even if it is meant to end serious violations of IHL. The content of CA 1 is not part of *jus ad bellum* and thus cannot serve as a legal basis for the use of force.

Failing to take measures will give rise to the international responsibility of the third State only when its conduct cannot be deemed diligent. What needs to be proved is the inconsistency between the State’s actual conduct and the conduct demanded by the “due diligence standard”.<sup>106</sup> Needless to say, the burden of proof is higher than in the case of obligations of result, where it suffices to demonstrate that the outcome required by the norm has not been reached. An additional hurdle exists in the case of the obligation to ensure respect, since diplomatic *démarches* are often conducted bilaterally and discretely. Be that as it may, holding third States accountable for their failure to ensure compliance with IHL is more than a conjectural speculation – supposing, that is, that they do not meet the adequate “due diligence standard”. It remains to be seen what elements compose that standard.

## Specific content of the obligation to ensure respect

In the *Nicaragua* case, the ICJ considered that, by virtue of the duty to ensure respect, the United States was “under an obligation not to encourage persons or groups

<sup>102</sup> See e.g. *ibid.*, Art. 89.

<sup>103</sup> L. Condorelli and L. Boisson de Chazournes, above [note 4](#), pp. 76–78. See also H.-P. Gasser, above [note 64](#), p. 29: “The right to take action with a view to ensuring full respect for humanitarian law by belligerents does not include the right to derogate from the prohibition to use force against another State. This seems to be uncontroversial.”

<sup>104</sup> B. Kessler, above [note 68](#), p. 506.

<sup>105</sup> L. Condorelli and L. Boisson de Chazournes, above [note 4](#), pp. 76–78. See also ICRC, “The ICRC’s Position on ‘Humanitarian Intervention’”, *International Review of the Red Cross*, Vol. 83, No. 842, 2001, pp. 530–531:

The question of what measures are to be taken by the States and the United Nations in order to put an end to [breaches of IHL] is not dealt with by humanitarian law, but rather by the UN Charter (Chapters VII and VIII) ... If armed intervention is decided upon, the Security Council can decide whether it is to be carried out by the UN forces or delegated to a State or regional security body. However, Article 53 of the Charter specifies that “no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council”.

Article 89 of AP I stipulates in this regard that in cases of serious violations of the Geneva Conventions and AP I, the High Contracting Parties undertake to act, jointly or individually, in cooperation with the UN and in conformity with the UN Charter.

<sup>106</sup> R. Pisillo-Mazzeschi, above [note 87](#), p. 50.

engaged in the conflict in Nicaragua to act in violation of the provisions of [common Article 3 to the Geneva Conventions]”.<sup>107</sup> Since then, it has often been repeated that CA 1, as well as the general principles of humanitarian law to which it gives expression, prohibits third States from encouraging the parties to a conflict to violate IHL. As pointed out by Meron, the well-grounded principles of good faith and *pacta sunt servanda* impose upon States party to the Geneva Conventions not only a duty to abide by their own obligations, but also a duty not to encourage other parties to violate theirs.<sup>108</sup> Furthermore, according to the general regime of State responsibility, third States are under the obligation not to knowingly aid or assist in the commission of IHL violations.<sup>109</sup> They also must refrain from recognizing as lawful any situation created by a serious breach of peremptory norms of IHL.<sup>110</sup> All of these obligations can be considered negative duties, and even if CA 1 did not exist, they would flow from other norms of international law.<sup>111</sup> To give but one example, such negative duties could arise in multinational operations. High Contracting Parties would be prevented from carrying out joint operations with other States if there was an expectation that these States would act in violation of the Geneva Conventions or other relevant norms of IHL, unless they took active measures to ensure respect therewith. Such measures to ensure respect could include joint planning, training or mentoring programmes. This logic lies at the heart of UN Security Council Resolution 1906,<sup>112</sup> which reiterated that

the support of MONUC [United Nations Organization Stabilization Mission in the DRC] to FARDC-led [Armed Forces of the DRC] military operations against foreign and Congolese armed groups is strictly conditioned on FARDC's compliance with international humanitarian, human rights and refugee law and on an effective joint planning of these operations.<sup>113</sup>

However, the fact that these negative duties emanate from public international law, together with the above-mentioned practice, as well as the fact that CA 1 uses the term “ensure” in the active voice, indicates that the scope of the obligation to ensure respect is “undoubtedly larger than simply ‘not encouraging’”,<sup>114</sup> and also includes a series of positive obligations.

107 ICJ, *Nicaragua v. United States of America*, above note 45, para. 220.

108 T. Meron, above note 79, p. 31.

109 Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, Art. 16.

110 *Ibid.*, Art. 41(2). See also ICJ, *Wall Case*, above note 47, paras 158–159, recalling also CA 1.

111 A. Devillard, above note 9, p. 86: “L’interdiction de l’aide ou de l’assistance à la violation du droit international est une règle coutumière qui s’apparente au concept de complicité en droit interne.” See also B. Kessler, above note 68, p. 503; C. Focarelli, above note 7, pp. 169–170; F. Kalshoven, above note 9, pp. 503–504; Yves Sandoz, “Mise en œuvre du droit international humanitaire”, in UNESCO and Institut Henry-Dunant, *Les dimensions internationales du droit humanitaire*, Pedone, Paris, 1986, pp. 302–303.

112 Security Council, Resolution 1906 (2009), UN Doc. S/RES/1906, 23 December 2009.

113 The same logic could apply with a view to stopping and preventing violations, as shown in the following sections.

114 N. Levrat, above note 59, p. 268 (translation by the authors). The French original reads: “[L]’étendue de l’obligation de ‘faire respecter’ couvre un champ indubitablement plus large que simplement ‘ne pas encourager.’”



## Stopping IHL violations

To start with, High Contracting Parties have a duty to exert their influence/take appropriate measures to put an end to ongoing IHL violations. This aspect of CA 1 is the basis for Rule 144 identified in the ICRC Customary Law Study, which provides, *inter alia*, that States “must exert their influence, to the degree possible, to stop violations of international humanitarian law”.<sup>115</sup>

The above-mentioned abstract from the Commentaries to the Geneva Conventions already established that in the event of a belligerent failing to fulfil its obligations, third States have an obligation to “endeavour to bring it back to an attitude of respect for the Convention”.<sup>116</sup> *Prima facie*, the idea of bringing back one of the parties to the conflict to an attitude of respect implies that a violation of IHL has previously taken place. The Commentary to the First Additional Protocol equally echoed this aspect of the obligation.<sup>117</sup> According to expert participants in the five seminars organized by the ICRC in 2003 on the issue of improving compliance with IHL, States not involved in an armed conflict have a positive obligation to “take action ... against States who are violating international humanitarian law, in particular to intervene with States over which they might have some influence to stop the violations”.<sup>118</sup>

Such an obligation to stop IHL violations is evidenced specifically in Article 89 of AP I, which provides that “[i]n situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act jointly or individually, in cooperation with the United Nations and in conformity with the United Nations Charter”.

Many of the examples of State practice mentioned above were actually aimed at putting an end to situations that contravened basic humanitarian norms and, as shown by the ICRC Customary Law Study, they account for a well-grounded legal obligation. But going one step further, it is worthwhile pondering whether, in addition to requiring third States to exert their influence/take appropriate measures to bring ongoing violations to an end, the duty to ensure respect in its external dimension also includes a preventive component.

## Preventing IHL violations

If one looks at CA 1 against the backdrop of the atrocities committed during the Second World War, and in the light of its object and purpose, there are strong arguments that support an undertaking to prevent violations of the Conventions. An illustration of the eagerness of States at the time of negotiating the Geneva Conventions to avoid falling back into the scourges of the Second World War is manifest in Article 1 of the Genocide Convention, adopted only a few months

<sup>115</sup> ICRC Customary Law Study, above [note 11](#), p. 509.

<sup>116</sup> J. Pictet, above [note 12](#), p. 16.

<sup>117</sup> Y. Sandoz, C. Swinarski and B. Zimmermann, above [note 14](#), paras 42–43.

<sup>118</sup> ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, above [note 63](#), p. 49.



earlier than the Geneva Conventions. In that Article, the “Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish”. Looking at that provision, the ICJ held that the word “undertake”—the same used by CA 1—sets a legally binding obligation,<sup>119</sup> and asserted that the obligation of States was one of conduct, which could be breached if they failed to take all measures within their power to prevent genocide.<sup>120</sup> Interestingly, the ICJ further added that claiming, or even proving, that the means reasonably at the disposal of a State were insufficient was irrelevant for the purposes of breaching the obligation, since “the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result—averting the commission of genocide—which the efforts of only one State were insufficient to produce”.<sup>121</sup> It is submitted that this whole framework is indeed similar to the one underpinning CA 1, and which Pilloud described as an obligation for all High Contracting Parties to “do all in their power to see that the basic humanitarian principles of the Conventions were universally applied”.<sup>122</sup>

Several scholars have posited that the obligation to ensure respect includes a duty to take measures to prevent IHL violations. For instance, Devillard argues that although reacting to illicit conduct—that is, stopping ongoing breaches of a rule—constitutes the “heart” of CA 1, the role of prevention should not be neglected.<sup>123</sup> He adds that the consequences of IHL violations are often too serious to simply accept “*a posteriori* interventions”.<sup>124</sup> Although, according to Devillard, a general obligation of prevention incumbent on third States can be excluded, an obligation to prevent IHL violations would be triggered in situations where the risk of such violations can be reasonably foreseen.<sup>125</sup> In his analysis of the *erga omnes* obligation to ensure respect by others, Gasser refers not only to stopping violations, but also to “prevent[ing] further breaches from happening” and “act[ing] when parties to an armed conflict are likely to disregard the law or are about to violate their humanitarian obligations”.<sup>126</sup> Other authors seem to go even further when they frame CA 1 primarily as a duty to “avert the occurrence of violations”, instead of only acting at the stage at which the misbehaviour has already taken place.<sup>127</sup> It is not possible in abstract to elucidate the criteria under which non-belligerent States could incur international responsibility for their failure to prevent the violation of IHL rules. At any rate, it is clear that this obligation, being one of due diligence, only arises in cases in which the prospective

119 See ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, above [note 86](#), para. 162.

120 *Ibid.*, para. 430.

121 *Ibid.*

122 Final Record of the Diplomatic Conference of Geneva of 1949, above [note 5](#), p. 53.

123 A. Devillard, above [note 9](#), p. 96.

124 *Ibid.*

125 *Ibid.*, pp. 96 (where Devillard speaks of a specific risk) and 97 (“une obligation de prévention des violations du droit humanitaire dont on peut raisonnablement craindre la commission”).

126 H.-P. Gasser, above [note 64](#), pp. 31–32.

127 N. Levrat, above [note 59](#), p. 277 (translation by the authors): “La faute consisterait dans ce cas en la non-utilisation des moyens existants pour empêcher la survenance d’une violation des Conventions.”

inobservance of IHL is marked by a certain degree of predictability. That is why Gasser resorts to the idea of likelihood and Devillard to foreseeable risk. Indeed, under international law, due diligence obligations involving the need to prevent a particular event can only be triggered if the event in question is actually foreseeable.<sup>128</sup>

The High Contracting Parties themselves have also endorsed this interpretation of CA 1 during the 30th International Conference of the Red Cross and Red Crescent, where they stressed

the obligation of all States to refrain from encouraging violations of international humanitarian law by any party to an armed conflict and to exert their influence, to the degree possible, to prevent and end violations, either individually or through multilateral mechanisms, in accordance with international law.<sup>129</sup>

Moreover, UN pronouncements also point in this direction. For instance, a Security Council resolution from 1990 dealing *inter alia* with the intention of the government of Israel “to resume”<sup>130</sup> the deportation of Palestinian civilians in the occupied territories—that is, a potential IHL violation which had not yet occurred—called upon “the High Contracting Parties to [the Fourth Geneva Convention of 1949] to ensure respect by Israel, the occupying Power, for its obligations under the Convention in accordance with Article 1 thereof”.<sup>131</sup> In such instances, the obligation to ensure respect should clearly be seen through the prism of prevention.

As a matter of fact, the duty to ensure respect by others has been conceived of as a general principle informing the entire field of IHL implementation.<sup>132</sup> In this sense, it is interesting to note that measures to enforce IHL usually revolve around the concepts of repression and prevention,<sup>133</sup> and that in fact, according to Marco Sassòli, the focus between these two elements must always be placed on the latter.<sup>134</sup>

128 See e.g. International Law Commission, “Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries”, *Yearbook of the International Law Commission*, Vol. 2, Part 2, 2001, pp. 153–154:

In general, in the context of prevention, a State of origin does not bear the risk of unforeseeable consequences ... [D]ue diligence is manifested in reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures, in timely fashion, to address them. Thus, States are under an obligation to take unilateral measures to prevent significant transboundary harm or at any event to minimize the risk thereof.

Note that “the ILC’s description of the due diligence principle can be analogized to international law generally when the operative rule at issue imposes a due diligence obligation” (R. P. Barnidge, above note 96, p. 117).

129 30th International Conference of the Red Cross and Red Crescent, Resolution 3, 2007, para. 2.

130 UN SC Res. 681, above note 50, para. 3.

131 *Ibid.*, para. 5.

132 A. Devillard, above note 9, p. 113.

133 T. Pfanner, above note 48, p. 280.

134 Marco Sassòli, “State Responsibility for Violations of International Humanitarian Law”, *International Review of the Red Cross*, Vol. 84, No. 846, 2002, p. 401 : “For a branch of law that applies in a fundamentally anarchic, illegal and often lawless situation such as armed conflicts, the focus of implementing mechanisms is and must always be on prevention.”

Thus, considering this preventive component as part of the duty to ensure respect would be coherent not only with the means whereby IHL is usually implemented,<sup>135</sup> but also with the manner in which CA 1 itself has often been framed.<sup>136</sup>

All in all, and despite the need for further State practice and academic research elucidating the scope of this international legal obligation, it seems that prevention is inextricably intertwined with the duty to ensure respect. Failing to acknowledge this preventive aspect would probably be inconsistent with the *raison d'être* of the Conventions, one of their main goals being to forestall the transgression of their rules. In fact, CA 1 is only one of the mechanisms envisioned by the drafters of the Geneva Convention to attain this objective. Other examples include:

1. The supervisory role of the Protecting Powers.<sup>137</sup>
2. The obligation to disseminate the content of the Geneva Conventions as widely as possible, “in time of peace as in time of war”.<sup>138</sup>
3. The obligation to enact legislation to provide effective penal sanctions for and to repress grave breaches of the Geneva Conventions and AP I.<sup>139</sup>
4. The obligation to “take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than ... grave breaches”.<sup>140</sup> According to the Commentaries, the latter implies that States must do all they can to prevent the commission or repetition of acts contrary to the Conventions.<sup>141</sup>

Moreover, part of the reason why States must bring ongoing IHL abuses to an end – in conformity with CA 1 – is also to prevent them from occurring again in the future.<sup>142</sup>

Hence, it seems that CA 1 can and must be raised on its own whenever it helps to safeguard respect for the Geneva Conventions, and arguably for the whole body of

135 See e.g. Y. Sandoz, above [note 111](#), p. 299: “Il nous a paru que l’on pouvait distinguer trois types de moyens [pour la mise en œuvre du droit international humanitaire]: le moyens préventifs ... les moyens de contrôle ... [et] les moyens de répression.”

136 B. Kessler, above [note 68](#), p. 499, with further references:

Article 1 does not state anything about how the States shall ensure that the Conventions are respected ... Under the assumption that “ensuring respect” of a rule means making someone respect it, there are four means of enforcement: (1) repressive action against any violation of the Conventions, (2) help by one State to enable another State to fulfil its duties under the Conventions, (3) control, and (4) prevention.

137 Geneva Conventions, Arts 10/10/10/11.

138 Geneva Conventions, Arts 47/48/127/144.

139 Geneva Conventions, Arts 49/50/129/146; AP I, Arts 11, 85 and 86.

140 Geneva Conventions, Arts 49(3)/50(3)/129(3)/146(3).

141 Jean Pictet (ed.), *Commentary: I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 1952, p. 367: “The expression ‘faire cesser’, employed in the French text, is open to various interpretations. In our opinion it covers everything a State can do to prevent the commission, or the repetition, of acts contrary to the Convention.”

142 A. Devillard, above [note 9](#), p. 97. For a brief analysis on the importance of prevention and deterrence in the context of international criminal law, see ICTY, *The Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgment (Appeals Chamber), 29 July 2004, para. 678.

IHL, including when it comes to the obligation to prevent violations of its rules. A very clear example thereof can be found in the context of the Arms Trade Treaty (ATT).<sup>143</sup>

### *The ATT and the obligation ensure respect*

Modern efforts to control the humanitarian consequences of the arms trade can be traced back to the Brussels Conference Act of 1890. Therein, approximately twenty nations prohibited the introduction of firearms and ammunition to the Congo basin, with a view to curbing their “pernicious and prevailing role” in the slave trade and wars in Africa.<sup>144</sup> Since then, international law has struggled to find an adequate balance between the legality of arms and the need to rein in some of their more deleterious effects. This debate has been gaining momentum in the last fifteen years, culminating with the recent adoption of the ATT.

In 1998, over twenty like-minded States gathered in Oslo for the first time to specifically discuss the challenges raised by the spread of small arms.<sup>145</sup> They drew up a document wherein they recognized the humanitarian and security concerns linked to the arms trade and enumerated a series of existing norms that needed to be developed in order to address the problem. In particular, they referred to the obligation to respect and ensure respect for IHL.<sup>146</sup> A year later, in a study entitled *Arms Availability and the Situation of Civilians in Armed Conflict*, the ICRC, concerned about “the proliferation of weapons in the hands of new and often undisciplined actors”,<sup>147</sup> recommended that States “review their policies concerning the production, availability and transfer of arms and ammunition” in light of their responsibility under CA 1.<sup>148</sup> Since then, numerous codes of conduct on arms exports have incorporated compliance with IHL as part of their criteria for authorizing transfers. For instance, the Organization for Security and Cooperation (OSCE) *Document on Small Arms and Light Weapons* requires participating States to avoid issuing licenses for exports where they deem that there is a “clear risk” that the arms in question might “threaten compliance with international law governing the conduct of armed conflict”.<sup>149</sup> Instruments laying down similar criteria include the Organization of American States (OAS) Model Regulations for the Control of Brokers of Firearms,<sup>150</sup> the Economic Community of West African States (ECOWAS) Convention on Small Arms and

143 General Assembly, *Arms Trade Treaty*, UN Doc. A/Res/67/234 B, 2 April 2013.

144 General Act of the Brussels Conference Relative to the African Slave Trade, Brussels, 2 July 1890, Art. VIII.

145 For a comprehensive study of the norm-building process that preceded the ATT, see Denise García, *Small Arms and Security: New Emerging International Norms*, Routledge, London, 2006.

146 *An International Agenda on Small Arms and Light Weapons: Elements of a Common Understanding – Concerns and Challenges*, Oslo, 1998, cited in D. García, above note 145, pp. 46–58.

147 ICRC, *Arms Availability and the Situation of Civilians in Armed Conflict*, Geneva, 1999, p. 1.

148 *Ibid.*, p. 24.

149 308th Plenary Meeting of the OSCE, *Document on Small Arms and Light Weapons*, FSC.DOC/1/00/Rev.1, 24 November 2004, Section III(A)(2)(b)(v).

150 OAS, Model Regulations for the Control of Brokers of Firearms, Their Parts and Components and Ammunition, 2003, Art. 5: “The National Authority shall prohibit brokering activities and refuse to grant licenses if it has reason to believe that the brokering activities will, or seriously threaten to ... (c) lead to the perpetration of war crimes contrary to international law.”

Light Weapons<sup>151</sup> and the Best Practice Guidelines for the Implementation of the Nairobi Declaration.<sup>152</sup> All of these conventions and guidelines tend to focus on the likelihood of prospective IHL violations in order to establish whether weapons can be legitimately transferred. Thus, their main focus is to “avert the occurrence” of such abuses in the future – that is, to prevent them.<sup>153</sup>

During the 28th International Conference of the Red Cross and Red Crescent, the High Contracting Parties to the Geneva Conventions endorsed a similar interpretation of the role played by CA 1 vis-à-vis the prevention of IHL violations in this domain:

In recognition of States’ obligation to respect and ensure respect for international humanitarian law, controls on the availability of weapons are strengthened – in particular on small arms, light weapons and their ammunition – so that weapons do not end up in the hands of those who may be expected to use them to violate international humanitarian law.<sup>154</sup>

The UN General Assembly gave further impulse to these efforts by adopting Resolution 61/89 of 2006, where it requested the creation of a group of experts to examine the “feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms”.<sup>155</sup> However, even at that time, it was clear that – from an IHL perspective – if the ATT negotiations succeeded, the new legal instrument would only complement the already existing obligation to ensure respect by others.<sup>156</sup> That is precisely the reason why a solid majority of States supported from the outset the view that respect for IHL should become one of the main criteria in the assessment of arms transfers within the treaty.<sup>157</sup> As a

151 ECOWAS, Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials, 2006, Art. 6(2): “A transfer shall not be authorised if its authorisation violates obligations of the requesting States, as well as those of Member States, under international law, including ... universally accepted principles of international humanitarian law.”

152 Regional Centre on Small Arms and Light Weapons, *Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on Small Arms and Light Weapons*, 2005, p. 25:

State Parties shall not authorize transfers which are likely to be used ... (ii) for the commission of serious violations of international humanitarian law; (iii) in acts of aggression against another State or population, threatening the national security or territorial integrity of another State, or threatening compliance with international law governing the conduct of armed conflict.

153 N. Levrat, above note 59, p. 277.

154 28th International Conference of the Red Cross and Red Crescent, *Agenda for Humanitarian Action*, Geneva, 2003, final goal 2(3). In a report submitted to High Contracting Parties during the 31st International Conference of the Red Cross and Red Crescent, the ICRC reiterated that the obligation to ensure respect “entails a responsibility [for all States] to make every effort to ensure that the arms and ammunition they transfer do not end up in the hands of persons who are likely to use them in violation of IHL”; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflict*, report of the 31st International Conference of the Red Cross and Red Crescent, October 2011, p. 46.

155 UN GA Res. 61/89, UN Doc. A/Res/61/89, 18 December 2006, para. 2.

156 Daniel Thürer, *International Humanitarian Law: Theory, Practice, Context*, The Hague Academy of International Law, 2011, p. 223.

157 *Ibid.*, p. 224.

matter of fact, evaluating the level of respect for IHL before authorizing the export of arms has been considered an international legal obligation of a customary nature.<sup>158</sup>

The ATT was adopted by the UN General Assembly in April 2013.<sup>159</sup> It included a very explicit reference to CA 1. Indeed, the duty to “[r]espect[] and ensur[e] respect for international humanitarian law in accordance with, *inter alia*, the Geneva Conventions of 1949” was deemed one of the fundamental principles pervading the whole document.<sup>160</sup> Against the backdrop of this principle, Article 6(3) of the ATT established that a State Party must not authorize any transfers of conventional arms if it has knowledge that the weapons would be used in the commission of grave breaches to the Geneva Conventions of 1949, attacks against civilians or civilian objects, or other war crimes as defined by international agreements to which it is a party. Even if the export is not prohibited under Article 6, the following Article prohibits transfer if there is an “overriding risk” that the weapons might be used to commit or facilitate a serious violation of IHL.<sup>161</sup> As for the criteria States may use to assess the risk of transferring arms or military equipment, the ICRC has proposed a variety of indicators that include the recipient’s past and present IHL record, the recipient’s alleged intentions – as expressed through its own commitments – and the recipient’s capacity to ensure that the weapons in question are not used in a manner that is inconsistent with IHL.<sup>162</sup>

It should be noted that, as previously seen, the obligation to ensure respect cannot be circumscribed to the mere prohibition of aiding or assisting in the commission of IHL violations.<sup>163</sup> Therefore, in the context of arms transfers, CA 1 also prescribes a series of positive obligations that go beyond the wording of Article 16 of the Draft Articles on Responsibility of States. According to the International Law Commission, aid or assistance are only unlawful when the assisting State has knowledge of the circumstances that make the conduct illegal and decides to carry out such conduct with a view to facilitating the violation. In the case of arms exports, Draft Article 16 can be translated in the following manner: State C would only incur international responsibility if it sells weapons to State A in order to facilitate the infringement of IHL against State B, and with knowledge that the weapons will be used for such purpose. In contrast, CA 1 would require State C to assess whether State A is likely to use the weapons to violate IHL in an armed conflict with State B, and to refrain from transferring the arms if there is a substantial or clear risk that they could be used in that manner.<sup>164</sup>

158 Zeray Yihdego, *The Arms Trade and International Law*, Hart Publishing, Portland OR, 2007, pp. 226–232, with further references.

159 UN GA Res, 67/234, UN Doc. A/Res/67/234 B, 2 April 2013 (Armes Trade Treaty).

160 *Ibid.*, 5th principle of the preamble.

161 *Ibid.*, Arts 7(1)(b)(i) and 7(3).

162 ICRC, *Arms Transfer Decisions: Applying International Law Criteria*, Geneva, 2007, pp. 9–15.

163 M. Sassöli, above note 134, p. 413.

164 *Ibid.*, pp. 412–413; Maya Brehm, “The Arms Trade and States’ Duty to Ensure Respect for Humanitarian and Human Rights Law”, *Journal of Conflict and Security Law*, Vol. 12, No. 3, 2008, pp. 375–377 and 386; Alexandra Boivin, “Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons”, in *International Review of the Red Cross*, Vol. 87, No. 859, 2005, pp. 475–479.

At any rate, the legal debate that led to the adoption of the ATT is but one example of the ways in which CA 1 can contribute to endeavours to improve compliance with IHL. There can be no doubt as to the great potential of the duty to ensure respect by others when it comes to enforcing IHL rules in other domains – for instance, by clarifying the obligation of multinational forces during the transfer of detainees.<sup>165</sup>

## Conclusion

CA 1 epitomizes the commitment of States to avoid IHL violations taking place in the future. It does so by creating a framework whereby States not party to a particular armed conflict must use every means at their disposal to ensure that the belligerents comply with the Geneva Conventions and AP I, and probably with the whole body of IHL.<sup>166</sup> As shown by this article, CA 1 is not a mere entitlement to act. Instead, it imposes upon third States an international legal obligation to ensure respect in all circumstances. This obligation, which applies in international and non-international armed conflicts, is one of due diligence: to avoid breaching it, States must make every lawful effort in their power, regardless of whether they attain the desired result or not. For that purpose, they can choose among the different means at their disposal – with the exception of military intervention, which would only be lawful if undertaken in accordance with the UN Charter. That said, as in many other branches of international law, the larger the means, the greater the responsibility.

With regard to the content of the obligation to ensure respect in its external dimension, CA 1 clearly includes a duty of third States not to encourage persons or groups engaged in an armed conflict to act in violation of the Geneva Conventions, nor to knowingly aid or assist in the commission of such violations. Nonetheless, CA 1 goes well beyond this negative duty. Firstly, it includes an obligation to put an end to ongoing IHL violations. Secondly, the obligation to ensure respect encompasses the duty to prevent breaches of IHL from occurring.

In a world where compliance with existing rules seems to be the main hurdle to limiting the effects of armed conflict and to adequately protecting

165 See e.g. Cordula Droege, “Transfer of Detainees: Legal Framework, Non-Refoulement and Contemporary Challenges”, *International Review of the Red Cross*, Vol. 90, No. 871, 2008, p. 687. Droege makes the link between the transfer of detainees and the obligation to ensure respect, which – as already indicated – also applies to multinational forces:

Beyond the responsibility arising from direct attribution to them, international organizations are also bound by the obligation to ensure respect for international humanitarian law. Thus, if a multinational operation is carried out under the umbrella of an international organization, that organization is particularly well placed to take steps to prevent and terminate violations of international humanitarian law committed by the State. In such cases it should exert its influence as far as possible within the framework of its relations with the state concerned.

166 This is what can be deduced from current State practice, including the above-mentioned resolutions adopted by the High Contracting Parties during the International Conferences of the Red Cross and Red Crescent.

persons who are not or are no longer participating in hostilities, underscoring the preventive component of the legal obligation established by CA 1 is of paramount importance. Third States, thanks to their more neutral stance vis-à-vis the dynamics of the conflict, are in a privileged position to ensure that the “general principles of humanitarian law to which the Conventions merely give specific expression”<sup>167</sup> are respected universally. It can only be hoped that they will live up to the commitment they made when they subscribed to a body of law whose main purpose is precisely to prevent violations of the very same rules it enunciates.

167 ICJ, *Nicaragua v. United States of America*, above [note 45](#), para. 220.



## OPINION NOTE

# International law and armed conflict in dark times: A call for engagement

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### Abstract

*This Opinion Note highlights the international humanitarian law (IHL) provisions mandating dissemination of the Geneva Conventions and the Additional Protocols to the civilian population. In referencing three dilemmas concerning contemporary challenges to international law in armed conflict and how each of those dilemmas may result in a “breaking point” or a “turning point”, the author argues that it is vitally important not only for armed forces but also for the general public to learn – and actively engage with – IHL both during war and in (relative) peacetime.*

**Keywords:** IHL, dissemination, compliance, contemporary challenges.

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The world seems to be going through an especially grim period. Today, there are four “level 3” emergencies – defined as major sudden-onset humanitarian crises triggered by natural disasters or conflict that require system-wide mobilization around the world – spanning the Central African Republic, Iraq, South Sudan

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and Syria, not to mention the Ebola outbreak affecting West Africa.<sup>1</sup> According to some estimates, at the end of 2013, 33.3 million people were internally displaced due to conflict and violence – a record high number since such statistics have been maintained.<sup>2</sup> As the UN Secretary-General has recently said, “[t]he current state of the protection of civilians leaves little room for optimism”.<sup>3</sup>

There is, of course, always a tendency to think that one’s own era is the most challenging and presents the greatest threats to – take your pick – law, democracy, equality, and so on. To a certain extent, we all fall into this trap of thinking that our times are the most salient or the most meaningful. But the indicators noted above and others, particularly those focusing on armed conflict and humanitarian need, suggest that we are – today – living through a particularly complex and difficult period.<sup>4</sup> There is also a feeling amongst many that things are getting worse, not only in terms of actual events but also in the way that the law restrains those in power.

In this Opinion Note, I would like to discuss where there may be opportunities for real change in the legal fabric, and where all of us might play a role in what international law means to the future of armed conflict. I would like to highlight an aspect of international humanitarian law (IHL) that is rarely the focus of academic inquiry or much urgent attention: the dissemination of IHL to the civilian population. Jean de Preux foregrounded part of my argument when he wrote, in 1967, that:

Dissemination of knowledge of the Geneva Conventions is not merely a long-term task – it is a permanent one. One age group succeeds another; generation succeeds generation; the students become teachers and forgotten lessons of the past fade into the background of a past which is itself forgotten.<sup>5</sup>

The obligation to disseminate IHL is rooted in States Parties’ duty to respect and ensure respect for the Geneva Conventions in all circumstances.<sup>6</sup> In each of the

- 1 Kate Brannen, “Countries in Crisis at Record High”, *The Cable: Foreign Policy Blog*, 15 August 2014, available at: <http://foreignpolicy.com/2014/08/15/countries-in-crisis-at-record-high/>; Sayre Nyce and Patrick Duplat, “‘L3’ 101: The Basics of Level 3 Emergencies”, *International Rescue Committee Blog*, 22 September 2014, available at: [www.rescue.org/blog/l3-101-basics-level-3-emergencies](http://www.rescue.org/blog/l3-101-basics-level-3-emergencies) (all internet references were accessed in April 2015).
- 2 Sebastián Albuja et al., *Global Overview 2014: People Internally Displaced by Conflict and Violence*, report, Norwegian Refugee Council, Internal Displacement Monitoring Centre, Geneva, May 2014, p. 9.
- 3 Report of the Secretary-General on the Protection of Civilians in Armed Conflict, UN Doc. S/2013/689, 22 November 2013, para. 8.
- 4 See, e.g., Annie Kelly, “Humanitarian Workers Unprepared for Decades of Conflict, Warns UNHCR”, *The Guardian*, 30 April 2013, available at: [www.theguardian.com/global-development/2013/apr/30/humanitarian-workers-unprepared-decades-conflict](http://www.theguardian.com/global-development/2013/apr/30/humanitarian-workers-unprepared-decades-conflict).
- 5 Jean de Preux, “Progress in Dissemination of Knowledge of the Geneva Conventions”, *International Review of the Red Cross*, Vol. 7, No. 71, February 1967, p. 70.
- 6 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art. 1; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Art. 1; Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 1; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 1 (common Article 1).

four Geneva Conventions of 1949, “[t]he High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries”.<sup>7</sup> The International Committee of the Red Cross’s (ICRC) Commentary accompanying the Fourth Geneva Convention (which generally relates to the protection of civilians in international armed conflict) emphasizes – in the mode of political philosophy – that in addition to being disseminated to military personnel,

[t]he Convention must also be widely disseminated among the population so that its principles are known to all those who may benefit from it. *It is possible to go even further and to say that men must be trained from childhood in the great principles of humanity and civilization, so that those principles take deep root in their conscience.*<sup>8</sup>

Around a quarter of a century after the adoption of the 1949 Geneva Conventions, States further refined and expanded these obligations. In Additional Protocol I, States undertook to disseminate the law “to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population”.<sup>9</sup> These provisions were aimed, as stressed by an expert during the Final Plenary Meetings of government experts in 1972, at disseminating IHL at the national level “so as to reach all sections of the population and create a ‘collective state of mind’”.<sup>10</sup>

## Dilemmas

I will focus on three dilemmas currently facing international law in armed conflict. These dilemmas, in my view, raise complex questions: will the law serve as a predictable, straightforward and universally applicable set of rules that members of the armed forces and others can apply in situations of armed conflict? And will the law protect war victims? I see each of these dilemmas as potentially soon facing a “turning point” or a “breaking point”.

By “turning point”, I mean the potential moment when States and their publics recognize that the dilemma poses new challenges that were not

7 GC I, Art. 47; GC II, Art. 48; GC III, Art. 127(1); GC IV, Art. 144(1).

8 Jean Pictet (ed.), *Commentary on Geneva Convention IV relative to the Protection of Civilians in Times of War*, ICRC, Geneva, 1958, p. 581 (emphasis added).

9 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (AP I), Art. 83(1). Pursuant to Article 19 of AP II, the “Protocol shall be disseminated as widely as possible” (emphasis added). Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1987) (AP II), Art. 19.

10 ICRC, *Report on the Work of the Conference, Conference of Government Experts on the Reaffirmation and Development of International Law Applicable in Armed Conflicts* (Second Session), Vol. 1, Geneva, July 1972, p. 201, para. 527.

necessarily anticipated during the drafting of international humanitarian law. Then, based on that recognition, those constituencies will adapt, and potentially even transform, IHL in a way that addresses these new developments while retaining the core spirit and purpose of the law, including to protect those who are not or are no longer participating in the fight.

By “breaking point”, I mean the potential moment when, faced with these dilemmas and tempted by the notion that the old law can no longer adequately regulate new problems, States no longer agree on the elementary foundations of IHL. Flowing from that lack of agreement, the legal framework will lose its capacity to meaningfully constrain force. Armed actors will no longer share an understanding of the set of rules applicable in armed conflict. As a result, the protective regime as we know it will collapse – perhaps to make way for something new, or perhaps to usher in an era of fragmented and atomized norms applicable in armed conflict.

After discussing the dilemmas and the directions in which I think each of them could go, I will return to the notion of dissemination of IHL in these turbulent times. My main suggestion is that dissemination is imperative to leading us toward turning points and away from breaking points.

### First dilemma: The principle of distinction under IHL

The first dilemma is whether the blurring of the line between civilians and combatants on the contemporary battlefield will ultimately degrade the core rule of distinction in IHL, often thought of as the foundation of civilian protection in armed conflict.

Traditionally, IHL sees the battlefield as clearly divided between those things and people that can be lawfully targeted and those that cannot. It does so for a simple reason: it is militarily advantageous to defeat and destroy certain people and property in order to win the battle, but there are also people and property that have nothing to do with the fight, and the latter are protected from direct attack. In this way, in an international armed conflict members of the armed forces could not be held liable for conducting hostilities in conformity with the laws and customs of war – the so-called “combatant’s privilege”.<sup>11</sup> Combatants could be lawfully targeted based solely on their status as combatants. In the law, civilians are – purposefully – defined generally in the negative. They are those who are not combatants. The drafters were very careful to keep the rules simple and clear, stating that if there was any confusion regarding status, fighters should assume that people are civilians.<sup>12</sup>

11 See, e.g., AP I, Art. 43(2). For more on the debate on whether the “combatant’s privilege” should be extended to members of organized armed groups in non-international armed conflicts as a matter *de lege ferenda*, see Claus Kreß and Frédéric Mégret, “Debate: The Regulation of Non-International Armed Conflicts: Can a Privilege of Belligerency be Envisioned in the Law of Non-International Armed Conflicts?”, *International Review of the Red Cross*, Vol. 96, No. 893, 2014.

12 See, e.g., AP I, Art. 50(1).

This binary distinction in IHL was meant to create a predictable and clear regime for everyone – for those who fight and those who are affected by the fighting. The distinction also allowed armed forces to explain to their publics their actions and their approach to targeting, as well as the framework they shared with their enemies.

Today, there is a great deal of pressure on this clear distinction. In conflicts in Afghanistan, the Democratic Republic of Congo, the Gaza Strip, Libya and Syria, we increasingly see civilians taking a direct part in hostilities. States have argued that the law governing when these civilians can be targeted due to their behaviour is unclear, and that the current law creates a system where people can take advantage of their civilian status to target their enemies. This is sometimes referred to as the “farmer by day, fighter by night” dilemma, through which people will ostensibly be able to abuse the cloak of civilian protection. In many conflicts today, the understanding of when a civilian loses her immunity from direct attack by virtue of her behaviour, and when a member of an armed group becomes targetable in the same way as a traditional combatant, is subject to significant scrutiny and is under great strain. The ICRC’s efforts to explore the relevant legal issues – as elaborated in the 2009 *Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL* – succeeded in many respects but, in doing so, also cast a spotlight on a very wide spectrum of seemingly reasonable interpretations of this question.

### *Turning point*

In this dilemma, my conception of the turning point is that States, in consultation with their publics, would revisit the legal understanding of combatancy, exploring whether some members of armed groups should be granted formal status and seeking to achieve a shared – and legally binding – understanding of the specific behaviour that would cause a civilian to lose her immunity from direct attack for such time as she takes a direct part in hostilities. This definition would take account of the changing security risks posed by those who function as “full-time” fighters, allowing States to meaningfully protect themselves from threats, would provide clear and simple rules for soldiers to implement when identifying lawful targets, and would also provide civilians with a clear understanding of what they must do in order to ensure that they do not lose their immunity from direct attack. This turning point would take into consideration not only the changing demographics of the battlefield but also the fact that targeting decisions are subject to more intense scrutiny and monitoring than ever before, as civilian casualties are counted down to the person in an increasing (though still relatively small) number of contexts and as video and photographic evidence of attacks is increasingly often available to the world within hours of a strike.

### *Breaking point*

The breaking point here might be that the existing consensus (however flawed) on IHL’s core conception of the distinction between combatants and civilians, between

those who can be targeted and those who cannot be, will break down, where some States will define their targets in one way (and often in secret) and other States will do so according to a different set of criteria. Soldiers of various national armies will learn different and confusing definitions of status on the battlefield, definitions that may not be shared with their allies. In this outcome, civilians would be left to rely on their wits and whatever information they could piece together in order to try to keep themselves safe and separate from those being targeted by enemy forces.

## Second dilemma: Humanitarian access

The second dilemma focuses on whether humanitarian access and impartial assistance as understood in IHL should give way to contemporary security concerns and the desire to prevent resources from reaching terrorists. The dilemma highlights the question of whether it is practical to continue to allow independent humanitarian organizations to reach those in need across fighting lines and in dialogue with all parties to conflict.

In the Geneva Convention of 1864, the drafters laid down the rather radical idea that States at war with one another, States seeking to destroy each other's armed forces, must respect the roles not only of military medical personnel but also of the inhabitants of the territory who, on their own initiative, bring help to wounded or sick combatants irrespective of nationality.<sup>13</sup> In other words, in order to meaningfully protect wounded combatants, States agreed to allow a group of people who have no relationship to the fight (other than their proximity to it), a group of people whose only ambition is to help those in need, to *enter into the battlefield* in order to provide this assistance. It demanded of States (which were not necessarily inclined to allow such intervention) that they trust that there could be a space for life-saving assistance and medical care which would not threaten their military objectives and which would have to be respected by all sides. We sometimes take this idea for granted today, but it is crucial to remember that the notion of humanitarianism, of the efforts of volunteers and doctors and nurses to reach those harmed by armed conflict, was a new one as a matter of law between warring States a century and a half ago.

Today, this basic idea is under a tremendous amount of pressure and is being challenged in many quarters.<sup>14</sup> Some argue that the threat of terrorism has simply made the Geneva Conventions' notion of humanitarian action a luxury that can no longer be afforded. In this view, the risk that *some* of the benefits of humanitarian relief could possibly fall into the hands of terrorists controlling territory demands that humanitarian action be tightly controlled, monitored or

13 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva (signed 22 August 1864), Art. 5(1). Article 10 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (signed 6 July 1906) extended protections for duly recognized and authorized personnel of voluntary aid organizations, so long as they were assimilated into the military medical service and were subject to military laws and regulations.

14 ICRC, *International Humanitarian Law and Challenges of Contemporary Armed Conflict*, Doc. No. 311C/11/5.1.2, Geneva, October 2011, pp. 48–53.

even stopped.<sup>15</sup> Others argue that, given the challenges of contemporary conflicts and the need to ensure that populations living under terrorists' control are "de-radicalized", we must bring humanitarian action under the control and oversight of security actors, and ensure that humanitarian goals are in line with national security objectives. Others simply argue that humanitarian action is too beneficial to the enemy, that it provides succour to those unfortunate enough to live under the control of terrorists, and that this prolongs their rule. We see an example of this type of thinking in Syria, where President Assad has denied the entry of humanitarian actors and medical supplies into rebel-controlled areas, arguing that their services would benefit terrorists.<sup>16</sup> We may also see this in counterterrorism regulations that curtail the work of humanitarian organizations in territories controlled by designated terrorist groups, or in States that, it seems, increasingly paint humanitarian efforts as a threat to their sovereignty.<sup>17</sup>

### *Turning point*

Here, I imagine the turning point is that governments, humanitarian organizations, the ICRC and the public will engage in a conversation about what humanitarian assistance is and why it matters. There will be a renewed engagement with what is at stake if humanitarian space diminishes to the point that efforts to work with all parties to conflict in order to ensure that the wounded or sick, whether military or civilian, have access to life-saving relief are constantly weighed against a zero-sum understanding of security. Recalling that the drafters of IHL and the founder of the Red Cross understood that every State at war may be compelled to see all humanitarian efforts as a threat to its military goals unless specific legal protections are laid down, the turning point here may well be that, looking at situations like South Sudan and Syria, we demand that States reaffirm and respect a space for principled humanitarian assistance. The turning point here might involve a reassertion of these core principles, and a strengthening of the law that undergirds the provision of life-saving aid to those in need by impartial and, often, independent actors.

15 18 USC 2339B (prohibiting the provision of material support or resources—except medicine (but not the practice of medicine) and religious materials—to designated foreign terrorist organizations); *US v. Shah*, 474 F.Supp.2d 492, 2007, pp. 498–499, holding that para. 2339B is not unconstitutionally vague as applied to the conduct alleged against Dr Sabir in the indictment (namely, that Dr Sabir conspired to provide, attempted to provide, and provided “medical support to wounded jihadists” including in the form of personnel (himself) and expert advice and assistance) and reasoning in part that “Sabir is not charged merely for being a doctor or for performing medical services. Here, Sabir is alleged essentially to have volunteered as a medic for the al Qaeda military, offering to make himself available specifically to attend to the wounds of injured fighters. Much as a military force needs weapons, ammunition, trucks, food, and shelter, it needs medical personnel to tend to its wounded.”

16 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/28/69, 5 February 2015, Annex II, pp. 59–60, paras 261–264.

17 Jessica Burniske, Naz Modirzadeh and Dustin Lewis, *Counter-Terrorism Laws and Regulations: What Aid Agencies Need to Know*, Humanitarian Practice Network Paper No. 79, Overseas Development Institute, London, November 2014.



## Breaking point

The breaking point here would be that counterterrorism and security concerns overwhelm the notion of humanitarian access and assistance, and that neutral, independent humanitarian action is no longer possible in the armed conflicts of the future. In this vision, militaries or counterinsurgency experts would devise relief schemes based not on need but on political and security imperatives, and States experiencing armed conflict would reject humanitarians seeking to cross borders or front lines in order to reach civilians and wounded fighters. Humanitarianism here, and certainly the founding concept of the Red Cross/Red Crescent Movement, would be reshaped as subsidiary to security, measured constantly against risk and threat assessments, and increasingly shifted away from the core objective of providing life-saving assistance in the midst of conflict.

## Third dilemma: The notion of a boundary-less battlefield

The third dilemma is the question of whether the concept of so-called “global non-international armed conflict” will crystallize in international law such that it becomes a separate recognized category of armed conflict under IHL. This dilemma is informed by the threat posed by terrorist networks with cross-border capacities and highly classified counterterrorism operations. This dilemma asks whether the current legal framework regulating sovereign States and the limitations on the scope of armed conflict will remain effective and legitimate in light of this threat.

Today, there is an innovative concept of armed conflict that some argue is spreading in acceptance. This is the idea that non-international armed conflict is not limited to internal or civil war but rather also encompasses the idea that an armed conflict – including the law of war’s more permissive standards on the use of lethal force – follows a member of an organized armed group wherever she may travel around the world, even to territories where protracted and intense hostilities are not taking place between the State armed forces and an organized armed group, or between such groups. This expansive notion of global non-international armed conflict, seemingly crafted more by intelligence agencies than by militaries, puts pressure on the rules as we know them in at least three ways. First, this notion of global/boundary-less non-international armed conflict is often framed in a way that seems to conflate the rules that seek to limit the ability of States to resort to force (including war) – namely, the *jus ad bellum* – and the rules that bind States *in war*—namely, IHL. Second and relatedly, the use of extraterritorial lethal force is often framed neither as (solely) a policing measure nor as (solely) part of the hostilities in an ongoing armed conflict but rather, if implicitly, as both law enforcement *and* war under the label of “global counterterrorism operations”. Third and partly as a result, this expansive notion of global non-international armed conflict purportedly allows States – based on their internal assessments of threats and their (often classified) understanding of the ability of other States to



govern their own territories – to use lethal force against targets far outside of the territory of the State where the hostilities giving rise to the recognition of armed conflict are occurring.

We see this dilemma most vividly in the much-discussed US “targeted killing” programme, apparently devised by the Central Intelligence Agency. But the notion has far greater implications than the drone strikes in Yemen or Pakistan or Somalia that make it into the news.

The question of whether non-international armed conflict is geographically limited to the territory of a single State where protracted and intense hostilities are occurring, and whether States may expand some concept of armed conflict to new characterizations such as “areas beyond those of active hostilities” or “non-hot zones”, goes to the very heart of how international law regulates the use of force and war. A US legal scholar and former Defense Department official recently captured part of this sentiment when she wrote that

today it has become virtually impossible to draw a clear distinction between war and not-war – not just because of bad-faith legal and political arguments made by U.S. officials (though we’ve seen plenty of those), but because of genuine and significant changes to the global geopolitical landscape.<sup>18</sup>

The United States recently put forward a version of this argument in presenting its legal bases for attacking targets in Syria.<sup>19</sup> It was a clear moment for the international community – including other States – to weigh in on this innovative approach to determining the boundaries of armed conflict. Few States objected to the US legal understanding as such,<sup>20</sup> yet few appeared ready to vocally support such a broad conception of where armed conflict can go and how that conception can and should relate to sovereignty.<sup>21</sup>

Scholars, government officials and humanitarian actors alike understand that this dilemma is very real and raises exceptionally complicated questions about the purposes and legitimacy of international law to regulate the armed conflicts of the future, particularly in the effort to fight diffuse terrorist organizations operating across multiple countries.

18 Rosa Brooks, “There’s No Such Thing as Peacetime”, *Foreign Policy Online*, 13 February 2015, available at: <http://foreignpolicy.com/2015/03/13/theres-no-such-thing-as-peacetime-forever-war-terror-civil-liberties/>.

19 Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations, addressed to the Secretary-General, UN Doc. S/2014/695, 23 September 2014, stating, among other purported legal bases, that “ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States ... States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the [UN] Charter ... when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks.”

20 But see “Russia: Airstrikes Must Be Agreed with Syria or Will Fuel Tension”, *Reuters*, 23 September 2014, available at: [www.reuters.com/article/2014/09/23/us-syria-crisis-airstrikes-russia-idUSKCN0HI0OU20140923](http://www.reuters.com/article/2014/09/23/us-syria-crisis-airstrikes-russia-idUSKCN0HI0OU20140923).

21 See generally the sources cited in Louise Arimatsu and Michael N. Schmitt, “Attacking ‘Islamic State’ and the Khorasan Group: Surveying the International Law Landscape”, *Columbia Journal of Transnational Law Bulletin*, Vol. 53, No. 1, 2014, pp. 8–29.

### *Turning point*

Here, States would engage in an open, honest and transparent discussion – with their domestic constituents and with other States – regarding whether to recognize this new classification/category of armed conflict. A new treaty may emerge (or it may not), but States, through the process of this open discussion, would engage with their publics regarding the implications of this approach to armed conflict. In a democratic debate on these complex issues, they would need to justify an approach to armed conflict and targeting that may go far beyond the public's support for a particular war and that may leave a tremendous amount of authority in the hands of government leaders to decide when, where and according to what rules lethal force is used. Most importantly, perhaps, States would need to justify to their publics how such a legal concept, once unleashed to every State in the world (each presumably with its own understanding of terrorist threats and its own understanding of how broadly armed conflict ought to be defined), could – if at all – be limited through international law. States, pushed by their publics, would recognize their responsibility to articulate their positions on international law, not simply to remain silent. States would be compelled to be honest about how their developing conceptions may threaten IHL as we currently know it. I wonder if such a discussion would lead to a re-centering of international law and would de-legitimize the argument for global/boundary-less war by clarifying the longer-term stakes of such a transformation of existing rules.

### *Breaking point*

Alternatively, some States may continue to put forward this expansive conception of global non-international armed conflict, largely behind closed doors and only in limited discussion with the public or its representatives. Over time, as the notion of global counterterrorism operations takes hold and is embraced by many other States, those States might forsake shared conceptions of the application of IHL and instead pick and choose when to apply IHL targeting rules anywhere in the world at any time. In this future war invoked at any time and in any place, civilians would come to understand that they could be considered wartime “collateral damage” anywhere. It would become impossible to know if, relaxing in a café in the capital city of a country apparently at peace, one is sitting next to someone who has been identified by some State somewhere as a commander of a terrorist group that poses an imminent threat, a threat that such a State has determined the territorial government is unwilling to address. This breaking point, taken to its logical end, could undermine the foundations of the law governing the resort to force and of IHL. The notion of a boundary-less battlefield might thereby render our ability to regulate warfare effectively mute in the face of shifting and secretive “targeted operations” that we can only hope will spare those unfortunate enough to be in their path.

## Dissemination: A call for engagement

These are heady and difficult challenges, to be sure. They are not merely problems of enforcement of the law as it is written, but ask us what we wish the law to be in response to threats and battles that we have yet to face, wars and warriors that the drafters may not have anticipated or even imagined at the time of the law's creation. Some would argue that breaking points are necessary: that sometimes, the law simply cannot meet the realities of the day. I would like to suggest that we should not be intimidated into accepting this conclusion just yet, and to further suggest that this is where that often underappreciated role of dissemination of IHL to the civilian population becomes so important.

To reiterate the obligation to disseminate captured in the law, States “undertake, in times of peace as in times of war, to disseminate the text of the Convention ... so that the principles thereof may become known to the entire population”. As understood by the experts from Iraq during the Final Plenary Sessions of the 1972 Conference, “[i]nstruction should be adapted to the level of each person and should deal not only with the texts at present in force but with any shortcomings that may exist and the need for further development”.<sup>22</sup>

It appears to be a unique move in international law to explicitly require that those in power not only comply with the law themselves but that they *ensure that their broader publics understand and study the law*. I would like to suggest that this bold, even audacious obligation – and the crucial work of the ICRC and the National Red Cross and Red Crescent Societies – has three functions for how we will, as a global public, address these dilemmas, and whether we will move in the direction of turning points. The first is the creation of a public that, through the act of studying the law, becomes vested in IHL's interpretation; the second is the development of empathy; and the third is the fostering of an increasingly interconnected global citizenry.

First, dissemination and the study of IHL – the study not just of the *rules* but *why the rules were created* – foster a public that is not just more knowledgeable but is also engaged in a dynamic conversation about the law, about power, and about how States can live up to the spirit and purpose of IHL. Dissemination activities aimed at the civilian population, in seeking to encourage the understanding and study of IHL even amongst schoolchildren, develop publics which feel that they have a stake in the law, that they not only have a vital voice in its interpretation but that this interpretation does and should matter to them. My sense is that this requirement to encourage the *study* of the law protects us against the impulse – an impulse that we have seen so vividly in the past fourteen years – of those in power to make decisions about warfighting and about IHL in secret, behind closed doors, often providing only minimal information to the public. Publics who have knowledge about IHL, who are

22 ICRC, *Report on the Work of the Conference*, Conference of Government Experts on the Reaffirmation and Development of International Law Applicable in Armed Conflicts (Second Session), Vol. 2, CE/SPF/1 (Proposal by Iraq Experts), Geneva, July 1972, p. 191.

conversant with the law and, most importantly, who feel that they are *part* of the law will speak out against this, will demand access to legal decision-making, will demand to be part of the conversation. Publics who see the Conventions as *theirs* will demand that States have integrity in clarifying their approaches and will not accept silence or evasion. I do not claim to know what outcomes this will lead to. I do not know what the law of the future will or should look like. But I believe that this expansive understanding of who IHL belongs to, and what organizations like the ICRC have done with their dissemination mandate, may lie at the very centre of ensuring that IHL remains a force for protection in the twenty-first century.

Second, I would like to suggest that dissemination activities do not only develop a public that has a stake in the law. They also encourage the notion of empathy in armed conflict. When you first learn IHL, particularly as a young person, you do not only imagine yourself as a soldier driving a tank down the street, or as a pilot in an F-16 deciding when to release a bomb. You also, perhaps even more readily, imagine yourself as a civilian, or as a wounded combatant. Dissemination activities invite you, as an elementary student in Geneva or a banker in Zurich, to put yourself in the shoes of the child whose parents are rushing to gather their belongings as they flee a neighbourhood that is being shelled; they ask that you imagine yourself as the detainee, relying on your captors to provide you with life-sustaining food and medical care; they welcome you to think about why we demand that soldiers must treat their wounded enemies as though they were their own fellow warriors.

Empathy can be a powerful force. Empathy, coupled with knowledge, can ensure that societies – publics that must support their States in fighting wars – demand that their governments abide by the basic protections that IHL requires, even when they unleash lethal force against their enemies. Empathy ensures that societies see other, foreign civilians not as nameless enemies or huddled hordes of refugees, but as people just like them.

At this point, you might say that I am overly optimistic about what people are capable of when they are at war, or when they are attacked. Here is where I think the third element of dissemination becomes so crucial. The law does not only require that a nation at war must understand and study the law. In fact, it is quite explicit that the obligations of the Geneva Conventions are just as vital to understand and share in *peacetime*.<sup>23</sup> By doing so, the obligation of dissemination evokes the idea of a global citizenry that is invested in the principles of the law. When one society is tempted toward breaking points, when one nation or group of nations is drawn to declare that the threats are simply too great or too new to indulge in the protections offered by a law drafted in previous centuries, there are other societies, other publics that can call for fealty to internationally agreed legal frameworks applicable in war. Knowledge of IHL compels us to raise our voices across national boundaries, and to understand that the decisions of our

23 GC I, Art. 47; GC II, Art. 48; GC III, Art. 127(1); GC IV, Art. 144(1); AP I, Art. 83(1). Art. 19 of AP II does not make a distinction between dissemination during armed conflict and during peacetime.

governments may affect the decisions of other governments – and that the breaking down of our commitments may cause a breakdown of the system as a whole.

International humanitarian law, this limited but revolutionary set of rules that seeks to protect humanity even when we are at our most violent and destructive, is approaching a fascinating and challenging moment. In many ways, we are being asked what the law means in dark times. We are living through an age where many settled concepts are being reopened and where many rules are being questioned. And we are living in an age where we see and know more about faraway conflicts than ever before: we see YouTube videos captured by civilians, satellite and drone images of targets, images of tragic atrocities committed by governments and by armed groups.

None of us can fully and accurately predict the outcomes of the dilemmas I have discussed here, or the many others that the application of IHL in armed conflict may face in the future. Whether we are close to turning points or breaking points remains to be seen. As I think about the role of dissemination to civilians in fostering a public that is more knowledgeable, more engaged, more empathetic and more connected, I believe that each of us has a part to play in the vital conversations we must have about the future role of the law in protecting those who are caught up in war. Each of us has a stake in these debates, and each of us will be affected by their outcomes. A premise underlying the dissemination obligations of IHL is that we must all *know* more in order to *demand* more.

Hidden in this modest body of international law is an exhortation to knowledge, a call to study and understand, a demand that we take part in the rules. As de Preux recognized nearly half a century ago, the task – *our* task – of disseminating knowledge of IHL is a “permanent one”.<sup>24</sup> To ensure a role for international law even in times of great brutality, we – the *public* – must fulfil that responsibility.

24 J. de Preux, above note 5, p. 70.



# Behaviour in war: The place of law, moral inquiry and self-identity

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## Abstract

*Daniel Munoz-Rojas and Jean-Jacques Fresard's study "The Roots of Behaviour in War" (RBW Study), which came out in 2004, provided very useful insight into how compliance with international humanitarian law may be better ensured. In essence, it emphasized the role of "the law" and associated enforcement mechanisms in achieving optimal results. Emphasis on "persuasion" regarding the values underpinning the law was identified as having a possibly corrosive effect and was to be de-emphasized, if not avoided. Such conclusions raise serious questions. The study's reliance on neutral normativity of "the law" can be overstated. The issue may be less one of checking aberrant behaviour under the law and more one of ensuring that unnecessary harm is curtailed within the law. The assumptions made by the RBW Study concerning the efficacy of the law are too narrow in their avoidance of the moral and ethical questioning that can accompany legal interpretative approaches. The role of identity and professional culture offers an effective means of ensuring restraint under the law. This article argues that the RBW Study has not stood the test of time and that operational developments have transcended the conclusions made in the study.*

**Keywords:** IHL interpretation, military legal culture, legal theory, counter-insurgency, ethics and identity.

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## Introduction

In 2004, Daniel Munoz-Rojas and Jean-Jacques Fresard's study "The Roots of Behaviour in War" (RBW Study)<sup>1</sup> provided a profoundly important insight into the role of law and the assimilation of social and psychological factors that conditioned violence within the battlespace. The study was revealing in its interdisciplinary approach, relying upon both empirical and qualitative methods of analysis. It exposed much that had remained hidden in understanding the motivations that acted to propel violations of international humanitarian law (IHL). Despite the richness of its interdisciplinary methodology, it was surprisingly formal and narrow in its conclusions. The study concluded that compliance with IHL was best obtained through a combination of (1) ensuring that the normative role of law was emphasized over efforts to proselytize the underlying values of that law; (2) ensuring that "bearers of weapons" were properly trained in IHL and that compliance was underpinned by a strict regime of orders, with correlative disciplinary sanction; and (3) ensuring that the International Committee of the Red Cross (ICRC) was clear in its aims in undertaking instruction, by relying less upon strategies of persuasion regarding acceptance of the values underpinning IHL in favour of a more formalistic regime of orders, directions and policies that would direct the behaviour of such "bearers of weapons" on the basis of a hierarchical authority.

The conclusions made by the RBW Study might be perceived as uncontroversial and even predictable. They are also somewhat simple and unimaginative in their prosaic emphasis. The central message from this study is that strict compliance with the law, backed up by a regime of effective disciplinary action, is the critical focus necessary to ensure that soldiers and other "bearers of arms" act correctly. The implication from these conclusions is that soldiers cannot be trusted to exercise any kind of applied judgment regarding underlying values and that only a strong reliance on "the law", and a strict regime of enforcement, will ensure that behaviour is effectively conditioned. Given the time that has passed since the publication of this important work, it is opportune to ask whether the conclusions made by the authors are "durable" in the sense that they should remain the exclusive focus of compliance strategies relating to IHL instruction and practice. The purpose of this article is to provide that level of review and to take issue with aspects of the RBW Study's assessment.

It will be submitted that the emphasis on moral neutrality and the strong faith placed in the normative integrity of the law to promote compliance can be perilous. Moreover, a humanitarian strategy that asserts an emphasis on mechanical compliance with the normative quality of law assumes much about the nature of such normativity. In addition, such a perspective is deficient in expressly discounting the power and usefulness of a constructed identity that comes from internalizing the values underpinning IHL. It also seems to be

1 Daniel Munoz-Rojas and Jean-Jacques Fresard, "The Roots of Behaviour in War: Understanding and Preventing IHL Violations", *International Review of the Red Cross*, Vol. 86, No. 853, 2004 (RBW Study).



needlessly counterproductive to the general goal of promoting IHL compliance, by denying alternative strategies that can underpin meaningful application of IHL. The law does rightly condemn violations of its rules and standards, but it also allows much violence to be undertaken in its name. In essence, the central claim of this article is that too much faith can be placed in “the law” and its methods for ameliorating violence, and that a strategy which advocates such a singular focus is susceptible to rightful critique. There is a place for ethical and moral inquiry. Identification of the underlying values implicit in the corpus of IHL can have a more sustained impact on behaviour than merely relying upon “the law” and potential prosecutions for its violation.

## Law and moral/cultural disengagement

The RBW Study concludes that while cultural and moral factors influence perception about the universality of IHL, these do not translate to greater compliance. Indeed, the authors concluded that there is a process of moral relativism and disengagement that occurs. Hence, when participating in an armed conflict, participants can often subjectively consider themselves as victims<sup>2</sup> or view the opposing side as having committed violations of the law, thus allowing them to reconcile their own reciprocal violations as being justified.<sup>3</sup> Such disengagement is identified by the authors as cumulative, leading to greater levels of self-justification. Hence, the RBW Study authors’ note: “Each action taken by the individual exerts an influence on the next one and makes change of behaviour more difficult because the individual will have to admit that if he ceases to behave reprehensively, everything he has done hitherto will have been bad.”<sup>4</sup>

Given this phenomenon of self-justification identified in the RBW Study, the authors strongly contend that a solution is to emphasize the normative force of IHL and rely upon applied legal methodology to break down the potential subjectivity that underpins particular attitudes. Indeed, the authors decisively observe, “the perception that there are legal norms is more effective than the acknowledgement of moral requirements in keeping combatants out of the spiral of violence”.<sup>5</sup> The approach recommended in the RBW Study is a very recognizable one in the context of understanding the power of perceiving an objective and neutral set of standards that must be complied with. In the “rule-bound” culture of the military, such a strategy can have particular purchase. However, it comes with its own troubling consequences regarding the acceptance of legal neutrality.

2 *Ibid.*, p.198.

3 *Ibid.*

4 *Ibid.*, p. 200.

5 *Ibid.*, p. 203.

## Legal hegemony and its consequences

By any objective measure, IHL has been a wildly successful project within the international legal panoply. The four 1949 Geneva Conventions<sup>6</sup> still rank as the only treaty series to have obtained universal ratification by States throughout the entirety of the world. Similarly, the 1977 Additional Protocols<sup>7</sup> are widely subscribed to within the international community.<sup>8</sup> There is also an extensive body of customary international law that applies liberally to regulate all aspects of armed conflict.<sup>9</sup> Added to these is a comprehensive array of treaties dealing with specific weapons systems, including conventional weapons, chemical weapons, biological weapons, cluster munitions and anti-personnel landmines. All the rules that relate to land warfare also find generalized counterparts in both air and naval warfare. Furthermore, while existing rules are comprehensive in dealing with contemporary means and methods of warfare, there is a constant pressure to ensure that developing weapons and means are also covered. Hence, on the close horizon, nanotechnology, cyber-weapons and autonomous weapons systems represent emerging realities, and efforts are already under way to ensure that the law's reach is complete in these new arenas. The breadth and depth of legal regulation of armed conflict seems to know no limit. The legal colonization of land, sea, air and now cyberspace environments continues unabated, and the methodologies and techniques of the interpretative process are now well rehearsed within military and humanitarian groups. For most, this system fosters a confidence that violence is contained, controlled and regulated according to a strong regimen of legal proscription.

The fact is that current military operations take place in an environment saturated with law. The “juridification of the battlespace”<sup>10</sup> has seen a tremendous rise in the number and influence of military and other government (and non-government) lawyers that dispense advice on compliance. There exist

6 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II); Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV).

7 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (AP I); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (AP II); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem, 8 December 2005, 2404 UNTS 261 (entered into force 14 January 2007) (AP III).

8 As of March 2014, there were 173 States party to AP I, 167 to AP II and 66 to AP III.

9 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, and Vol. 2: *Practice*, Cambridge University Press, Cambridge, 2005, available at: [www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law/index.jsp](http://www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law/index.jsp).

10 This term was originally used by Gerry Simpson, *Law, War and Crime: War Crimes, Trials and the Reinvention of International Law*, Polity, Cambridge, 2007.

no gaps, no areas of battlefield practice, no moments of “free discretion” that are not subject to some level of legal control. Commanders and politicians and lawyers all speak in legal terms to justify and reinforce compliance. There is a natural relief felt by many that battlefield violence is conditioned and perhaps even tamed by the force of such overwhelming legal proscription.

It may be timely to ask whether too much is asked of the law. The enormous array of legal regulation brings with it a sense of misplaced hope that wartime violence is acceptably corralled. Indeed, so complete has been this sense of legal conquest that Professor David Kennedy of Harvard has observed: “The legal language has become capacious enough to give the impression that by using it, one will have ‘taken everything into account’ or ‘balanced’ all the relevant competing considerations.”<sup>11</sup> Such legal language finds strategic alliance with the tenets of political liberalism, which emphasizes the virtues of reasoned elaboration of the law. The Rawlsian sense of the strength of such political liberalism resides not in the content of any meta-narrative, but rather in the process of achieving outcomes on core political principles through mechanisms of rationalized reasoning and consensus. Rawls’ reliance upon the ideal of public reason<sup>12</sup> ensures that legitimate decision-making and law creation may be maintained on the basis of commonly shared public reasons and justifications. A consequence of this reliance is the emergence of an iterative proceduralism that is focused on fair process and “taking everything into account”, of a kind identified by Kennedy as highlighted above.

Within IHL, the discourse is heavily impacted by the alliance between political liberalism and legal positivism. The density of “black-letter law” rationality and reasoning that has been generated by this alliance has become its main product. Much rests on legal method; indeed, in this space enormous attention is paid to the nuances and tone of the words and phrases used in every asserted rule. Hence, one commentator has recently noted:

IHL lawyers, as a whole, are very fond of rules and rules-talk. For other international lawyers, IHL lawyers often seem remarkably positivist. They spend a great deal of time debating and discussing black-letter rules, their interpretation, their manifestation, and the consequences of their violation. They take such talk very seriously, and it has fueled, for many decades, the vast bulk of scholarship and debate within this relatively insular field.<sup>13</sup>

Such a tradition and adherence drives particular outcomes. “Rules-talk” dominates this discourse, defining both the methods of legal reasoning used and the vocabularies employed to channel reasoned argument. The point here is not to criticize legal positivism as an interpretative method, or political liberalism as a concept, but rather to reveal what is missed in the blind faith in “more law” as

11 David Kennedy, *Of War and Law*, Princeton University Press, Princeton, NJ, 2006, p. 143.

12 John Rawls, *Political Liberalism*, Columbia University Press, New York, 1993, pp. 7, 9 and Chap. 6.

13 Naz K. Modirzadeh, “Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance”, *Harvard National Security Journal*, Vol. 5, No. 1, 2014, p. 235.

always being the rightful solution to the current challenges faced in armed conflict. This is the key solution advanced in the RBW Study, but what does it mean to place total faith in the law and to minimize, or in fact marginalize, other factors such as the moral, ethical or even social commitment to temper decisions to kill in the battlespace?

The conduct of war necessarily animates deep passions, but contemporary legal method seeks to marginalize these very same forces from the decision-making process. This is something the RBW Study identifies as a necessarily optimal outcome; however, there is an inevitable loss in such a paradigm. As noted international legal theorist Martti Koskeniemi has observed, in “translating natural languages—the language of passions and fears that are involved in a dispute—into judicial language, something automatically gets lost, is *reduced*. This is perhaps the very point of law.”<sup>14</sup> Such a “reduction” and transformation of meaning in the context of IHL closes off broader considerations that might temper targeting decisions.

For the authors of the RBW Study this reduction is a positive outcome<sup>15</sup> because it represents a surer foundation for decision-making, one that is less amendable to self-justification. The prospect that decisions might be made not to target a particular person or objective, or to otherwise ameliorate violence through the application of applied social or moral inquiry, is outweighed by the relativism and subjectivity that such a moral application might generate, and which the authors condemn. All faith is placed in “the law” to ensure that the rightful, calibrated exercise of violence is undertaken legitimately.

### Legal neutrality: Is it real?

The dominant idiom of legal interpretation in the IHL field remains “soft positivism” of the H. L. A. Hart variety.<sup>16</sup> Hence, consistent with this approach, IHL, like all other law, is assumed to comprise a large core of settled meaning with a smaller penumbra of open language. On the whole, this approach holds that there is sufficient semantic certainty to ensure that legal rules are given their due and meaningful application in the battlespace. Allied to this formulation is the view that legal validity is not necessarily dependent on any kind of moral authority, but rather is generated through a process of accepted rules of external recognition. Given this paradigm, the IHL “rules-talk” process, observed from outside this field, reveals the moments of semantic precision that are being achieved. These assumptions about the law are what gives the RBW Study conclusions their force, a supposed process of neutral rules providing an objective standard of behaviour.

14 Martti Koskeniemi, “The Silence of Law/The Voice of Justice”, in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, The International Court of Justice and Nuclear Weapons*, Cambridge University Press, Cambridge, 1999, p. 501.

15 RBW Study, above note 1, p. 198.

16 H. L. A. Hart, *The Concept of Law*, 2nd ed., Oxford University Press, Oxford, 1994.

Such a conclusion is fraught with difficulties. The assumptions of legal positivism have been critiqued from many different sides and genres over the decades. Theorists as diverse as Carl Schmitt<sup>17</sup> and Ronald Dworkin<sup>18</sup> have taken to task the notion of semantic certainty and integrity of the assumed interpretative process. For both Schmitt and Dworkin there is enormous discretionary capacity inside and outside the law, and each has sought to identify the means to channel such discretion. For Schmitt the answer lay in the “jurispathic”<sup>19</sup> moment – the crystallization of will, and therefore legal decision, from an endless cascade of potential norms. For Dworkin it derived from a self-assessed moment of principled coherency that relies on a sense of political morality.<sup>20</sup> To each, though from radically different perspectives, the exercise of freedom arose from criteria quite outside the semantic “certainties” of the black-letter law advanced by the Hartian model. These are two theorists that sought to give conditioned meaning to the broad discretions they identified within the law, but there exist numerous other approaches<sup>21</sup> that have identified the same deficiencies. There has, in fact, been over a century of sustained critique regarding the integrity of the legal interpretative enterprise.<sup>22</sup> Such critique takes fundamental issue with the simplistic conclusion that “the law” is some kind of self-contained authority that compels neutrally predictable outcomes of the type assumed in the RBW Study.

The reality is that there is much that is unsettled in the law, and despite the assertions of certainty that underpin the dominant interpretative method, the process is often freewheeling and unpredictable. Moreover, marginalizing any kind of moral or social content that might underpin the interpretative enterprise surrenders enormous authority to lawyers and legal process.

Within the contemporary debates about legal meaning, the central concepts of IHL, including those of distinction, proportionality and precautions in attack, have all been the subject of considerable discussion and confrontation. Words like “excessive” and “extensive”, for example, which condition the number of civilians who may be killed or the amount of civilian property that may be destroyed “proportionately” to the military advantage resulting from an attack,

17 Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, George Schwab (ed), University of Chicago Press, Chicago, 2005 (originally published as *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität*, 1922).

18 Ronald Dworkin, *Law's Empire*, Belknap Press of Harvard University Press, Cambridge, MA, 1986.

19 Paul W. Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty*, Columbia University Press, New York, 2012, p. 78.

20 R. Dworkin, above note 18, pp. 247–248.

21 A useful outline of these methods is found in Steven Ratner and Anne-Marie Slaughter, “Appraising Methods of International Law: A Prospectus for Readers”, *American Journal of International Law*, Vol. 93, No. 2, April 1999, p. 291; a fictional IHL problem was used to reveal different modes of analysis and outcomes from, *inter alia*, the positivist school, the New Haven school, the international legal process school, critical legal studies, international relations/international law approaches, feminist jurisprudence and a law and economics perspective.

22 A famous example is Oliver Wendell Holmes, “The Path of the Law”, *Harvard Law Review*, Vol. 10, 1896–97, p. 457.

have been the subject of much disagreement over many years.<sup>23</sup> That words can have such significance is a natural result of the ascendancy of the legal method in the determination of questions of lawful violence. Unlike the resolution of almost all other legal questions, however, the resolution of the interpretative struggle in this field carries with it fatal consequences for many. The stakes could not be higher. Equally, newer concepts such as that of direct participation in hostilities (DPH) have brought forward significantly different views as to their correct interpretation.<sup>24</sup> DPH underpins the targeting decisions made in many contemporary conflicts, and remains a term that has significantly contended meaning. The ICRC Interpretive Guidance<sup>25</sup> on what DPH means has been subject to considerable academic riposte by a number of leading legal voices in this field; against such disagreement, States have necessarily determined their own calibration of meaning in their often-classified Rules of Engagement, which are undoubtedly informed by the power of legal argument advanced from both sides.

There seems something unsettling in the fact that life, death and the application of lawful violence are so dependent upon the cleverness, or technical proficiency, of a given legal argument. The process of reduction that Koskeniemi identifies often leads to a dispassionate list of binary choices. Standard checklist-type considerations are scrutinized and outcomes reached based on a cascade of ceaseless classification, where decisions are made according to the “lawful”/“unlawful”, “combatant”/“civilian”, “protected”/“not protected” dichotomy. Internalized moral or social commitment that might operate to further inform such decision-making is rendered legally irrelevant. The consequence of complying with the “law”, then, is the routine dispensation of violence to achieve political goals in a manner that is formally unresponsive to any type of introspective analysis. Enormous death and destruction are manifested through an entirely lawful application of force in which individuals are all neatly allocated into categories and the formulas and maxims of law operate to dispassionately permit the application of force. As will be outlined below, this can have a deleterious effect not just on preserving humanitarian priorities, but also on achieving effective military outcomes in particular circumstances. There is a limit to just how many people can be killed (lawfully) and how much property can be destroyed (lawfully) before the limits of “the law” are appreciated.

## Interpretive choice and policy preference

None of the above analysis is to suggest that there is any kind of malevolent force at play in the application of “the law”; it is intended merely to highlight the nature of

23 Yoram Dinstein, “The Principle of Distinction and Cyber War in International Armed Conflicts”, *Journal of Conflict and Security Law*, Vol. 17, No. 2, 2012, p. 272.

24 See “Forum: The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law”, *New York University Journal of International Law and Policy*, Vol. 42, No. 3, 2010.

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

the interpretative enterprise. Acting within the current interpretative framework, the law might be seen as seeking to reconcile two conflicting visions, namely military advantage/military necessity and humanitarian protection/human dignity. These are not easily reconciled and thus create two competing modes of understanding; such a conundrum leads to an inevitable practical indeterminacy. David Luban has interrogated this phenomenon in a classic liberalist manner.<sup>26</sup> He contextualizes his approach through deployment of similar but subtly differentiated descriptive terms, namely the “law of armed conflict” (LOAC) and “international humanitarian law”, to frame his perspective. In a very rough taxonomy, he advances the notion that military voices mostly adhere to the first view of the law (LOAC), whereas humanitarian voices principally adhere to the second (IHL). These are purely descriptive terms used by Luban to differentiate between the emphasis on military necessity (LOAC) and on humanitarian priority (IHL).<sup>27</sup>

Under this dichotomy, the particularized view of LOAC (preferred by the military) imagined by Luban draws upon classic legal methodological reasoning, giving great weight to the resonance of the *Lotus* case,<sup>28</sup> drawing on a close examination of State practice and the identification of the elusive *opinio juris* as well as judicious reading of hard sources of the law to locate normative effect. Such a perspective draws more heavily on what States actually do than on what they say.

In contrast, IHL devotees (pro-humanitarian under the Luban formula) are more willing to review soft-law instruments in their identification of relevant *opinio juris*, are less enamoured with the implications of *Lotus*, and focus on what States say rather than what that do to discern legally relevant State practice. Such an IHL methodology constructs a very respectable corpus of law that advantages humanitarian outcomes.

The clash, then, is one of competing visions of what the law requires. Luban notes that

the result is practical indeterminacy – not in the sense that anything goes, that any legal answer is as good as any other, but in the more significant sense that the law can be understood through either of two structured systems that stand in opposition to each other. Both have ample support within recognized sources of law; neither is frivolous or tendentious on its face, although, of course, both can be used tendentiously.<sup>29</sup>

Luban observes that the modes of argument used in developing a response to a legal problem under the law applicable to armed conflict will necessarily dictate the likely outcome. This includes identification of the premise used in the initial framing of the issue, the assessment of particular facts to underpin categorization, and the

26 David Luban, “Military Necessity and the Cultures of Military Law”, *Leiden Journal of International Law*, Vol. 26, No. 2, 2013, p. 1.

27 *Ibid.*

28 Permanent Court of International Justice, *The Case of the S. S. Lotus (France v. Turkey)*, Ser. A., No 10, 7 September 1927.

29 D. Luban, above note 26, p. 23.



values attributed to the inherent variables, all of which lead to an inevitable conclusion. Such inevitability may take the form of a “LOAC” (as defined by Luban) or an “IHL” (as defined by Luban)-based formula. The axioms and “unarticulated background assumptions”<sup>30</sup> that underpin the methodological moments of construction are incapable of rational reconciliation. Both military and humanitarian voices would undertake such analysis under the common framework but can, in good faith, arrive at dramatically different outcomes. In essence, the two are speaking the same language but have profoundly different ideas about what that language means, while employing interpretative techniques that may be at cross purposes.<sup>31</sup> This is manifested in numerous sites of agency and interpretative discretion.

The significance of the Luban analysis is in the counter-intuitive understanding that a good-faith application of “the law” can result in a myriad of outcomes on the battlefield. The outcomes achieved when applying “the law” turn on the methodological approach adopted. Within the command and control framework of modern military processes, there are usually policy directives from government that stipulate desired outcomes. These directions necessarily condition the interpretative trope applied, resulting in a more humanitarian or military-advantage emphasis in any given situation. In the absence of such direction, there is no governing driver that mandates one set of methodological criteria over the other—both are perfectly acceptable manifestations of “the law”. Given the possibility of a range of outcomes, it is curious that the RBW Study would place so much emphasis on “the law” as the singular means of ensuring compliance. To do so with an express avoidance of incorporating underpinning values, as emphasized by the RBW Study, seems a particularly risky approach.

Multiple rules and maxims can always be invoked to resolve any legal issue and can take on a particular hue depending on the context.<sup>32</sup> Such a perspective is not unique to international law, nor is it a contemporary phenomenon. Indeed, it found forceful expression within the American realist movement of the 1920s, when it was discovered that there was always a ready set, or cluster, of disparate rules that might apply to any ostensible legal problem.<sup>33</sup> The underlying ethos of the interpreter influenced the choice of characterization of the issue, which went a long way to determining the “correct” rule or standard that would apply to a given set of facts.

30 *Ibid.*, p. 22.

31 Allan C. Hutchinson, “A Postmodern’s Hart: Taking Rules Skeptically”, *Modern Law Review*, Vol. 58, No. 6, 1995, p. 803.

32 Rob McLaughlin, “‘Giving’ Operational Legal Advice: Context and Method”, *Military Law and Law of War Review*, Vol. 50, No. 1–2, 2011, p. 110.

33 Andrew Altman, “Legal Realism, Critical Legal Studies, and Dworkin”, *Philosophy and Public Affairs*, Vol. 15, 1986, p. 209.



## Moral and ethical contribution to legal analysis

The authors of the RBW Study are on reasonably solid ground in heralding the normative quality of the law over any kind of moral argument to ground choices made in the battlespace. That there are external moral or social obligations that should also condition decision-making is not readily evident within the law itself, or in its dominant interpretative method. Looking through the entire body of IHL instruments, it is difficult to identify any place where moral or ethical values may be directly incorporated into decision-making. There does exist the famous Martens Clause,<sup>34</sup> which speaks of using “laws of humanity” and the “dictates of public conscience” to guide decision-making, but its impact has been minimized through assertions by both States and academics that this clause offers no independent source of authority.<sup>35</sup> At best, the overwhelming sentiment is that it may assist as an aid to interpretation, something that might prompt a more humanitarian outcome in a particularly novel instance.

Hence, within the existing system and modes of interpretation, the challenge may be to find sound interpretative arguments for indirectly infusing decision-making with values that prompt a greater humanitarian emphasis. This requires redressing the structural framework of the black-letter legal foundation. Such an approach might be able to “smuggle” in the values about which the RBW Study seems so sceptical.

The International Criminal Tribunal for the former Yugoslavia (ICTY) *Kupreškić* case in 2000 offers an example of this kind of legal “engineering” being used to manifest such an outcome. In the *Kupreškić* case,<sup>36</sup> the ICTY dealt with individuals who were charged with carrying out an attack on a village in Bosnia, on 16 April 1993, in which over 100 inhabitants were killed. The accused raised defences of *tu quoque* and reprisal. The Tribunal dismissed both defences and in so doing based its reasoning on what might seem to be the Luban “IHL” (pro-humanitarian) vision.

The ICTY embarked upon an analysis of customary international law and observed that “the absolute nature of most obligations imposed by the rules of international humanitarian law reflects the progressive trend towards the so-called ‘humanisation’ of international legal obligations”.<sup>37</sup> The Tribunal expressly invoked elementary considerations of humanity<sup>38</sup> and the Martens

34 The Martens Clause first found expression in the Preamble to Convention (II) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning Laws and Customs of War on Land, 29 July 1899, 187 CTS 429, 1 Bevans 247 (entered into force 4 September 1900), as reproduced in the ICRC database, available at: [www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=9FE084CDAC63D10FC12563CD00515C4D](http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=9FE084CDAC63D10FC12563CD00515C4D).

35 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. 187.

36 ICTY, *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Šantić*, Case No. IT-95-16-T, Judgment, 14 January 2000, available at: [www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf](http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf).

37 *Ibid.*, para 518.

38 *Ibid.*, para. 524.

Clause<sup>39</sup> as exemplars of this humanitarian underpinning. It also invoked the rise of the separate regime of international human rights law to buttress its decision. The Tribunal further stated that the law ceased to be solely about State interests, but rather had decisively shifted away from its reliance upon reciprocity as the justification for its terms. The Tribunal expressly sought to minimize military discretion in favour of achieving greater humanitarian outcomes. The priority accorded to humanitarian considerations underpinned a structural renovation of interpretative method that self-consciously highlighted such goals to the detriment of military advantage and its attendant discretion. What is particularly illuminating in the ICTY's methodology was that after a lengthy examination of the humanitarian underpinnings of IHL, it waited until the final paragraph of its opinion before observing that all the parties to the proceeding had ratified Additional Protocol II and thus "indisputably the parties to the conflict were bound by the relevant treaty provisions prohibiting reprisals".<sup>40</sup> This last point was determinative from the beginning, and yet the Tribunal went to great lengths to expound upon its interpretative theory sustaining its view of legal coherence, plainly with a view to creating a sustainable foundation for future legal reference.

The *Kupreškić* case was subsequently subject to withering criticism for its departure from traditional interpretative techniques. The methodologies employed and conclusions reached in such critiques invoked established axioms and accepted canons of conventional interpretation. Typical was the classic response provided by Michael Schmitt.<sup>41</sup> He took issue with four aspects of the decision, each of which, he argued, undermined its efficacy, at least in relation to any broader reading on the structure and interpretative approach to the applicable law. He noted firstly that the decision made no attempt to analyze State practice, and that in this regard its findings were contrary to formal State declarations which sought to preserve the right of reprisal. Secondly, its reference to international human rights law was inappropriate due to the doctrine of *lex specialis*. Thirdly, its import was restricted only to its jurisdictional ambit, namely the territory of the former Yugoslavia, and the Tribunal could not so broadly re-engineer the whole corpus of IHL from the confines of this narrow jurisdictional authority. Fourthly, as outlined above, the matter could be determined on a plain reading of the treaty provisions, thus rendering all other observations otiose.

The response by Schmitt is compelling and persuasive—it was a classic riposte based on well-established grounds of hard law and interpretative convention. Within this framework, there are acceptable channels and frames of argument that produce outcomes which have an internal consistency. The *Kupreškić* case, on such grounds, overreached in its ambition and reasoning. Suffice to say, the approach favoured by the ICTY in the *Kupreškić* case found no

39 *Ibid.*, para. 525.

40 *Ibid.*, para. 536.

41 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, pp. 795, 820–822.

subsequent expression in hard references such as military manuals, Rules of Engagement or other open-source governmental publications.

## War and psychological distance

Participation in armed conflict generates intense emotion and a range of ethical and moral commitments that are unavoidable. Within the context of armed conflict, there is significant empirical evidence which confirms that killing is not an easy thing to do<sup>42</sup> and that most soldiers experience an aversion to the highly intimate task of killing another. In an effort to develop more effective fighting capacity, it is little wonder that governments are expending enormous efforts to optimize biotechnology and associated performance-enhancing drugs that render killing by soldiers a more effective and efficient process. The point is to maintain a level of psychological distance between the soldier and the act of killing. As Chris Coker observes:

Killing does not seem to come naturally in all situations to all soldiers, even the most highly trained. Natural born soldiers are not made; they are born – and there are very few of them. That is why the military has preferred the discipline of collective units such as gun crews, which are more easily controlled and which, being often distant from the battlefield, are also less emotionally involved – in a word, they are more ‘mechanical’. The greatest cruelties in war have been the impersonal ones of remote decision, system and routine.<sup>43</sup>

Within this desired condition of generating psychological distance, the law naturally acts to underpin a strong sense of moral disengagement. As previously outlined, the methodology of positivism is pointedly agnostic about the role of morality in its function. Despite this, the authors of the RBW Study place enormous faith in the normativity of the law. This is done in order to deliver outcomes that ensure better compliance with objective standards and avoid the relativism that can contribute towards violations of the law. There is, however, a price to be paid for such legal systematicity.<sup>44</sup> Ironically, because of the marginalization of social and moral inquiry, we are left with a world in which elaborated reason and unalloyed positivism lead to outcomes that permit the routine application of violence in a very generic manner. To this end, the issue isn't so much avoidance of the possibility of violations of IHL (i.e. “compliance”), but the consequences of a routine dispensation of legally articulate but morally agnostic decisions that mete out considerable violence. In a world saturated with law, where every social and political decision is rooted in a norm from some higher legal authority, we can

42 See, generally, Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society*, revised ed., Back Bay Books/Little, Brown & Co., New York, 2009.

43 Christopher Coker, “Biotechnology and War: The New Challenge”, *Australian Army Journal*, Vol. 11, No. 1, 2004, p. 134.

44 See generally Fleur Johns, “Guantanamo Bay and the Annihilation of the Exception”, *European Journal of International Law*, Vol. 16, No. 4, 2005, p. 613.

lose the capacity for authenticity; indeed, as one commentator has noted, “[l]awyers and not philosophers are kings”<sup>45</sup> in such a world.

The rise of unmanned aerial vehicle (UAV) warfare is sometimes heralded as an ideal method of ensuring legal compliance. Operating at a safe distance, UAV pilots are afforded time to assess the facts on the ground; to determine who is a combatant and who is not, who is taking a direct part in hostilities and who is not; and to calibrate what the right number of innocent civilian deaths shall be for the military advantage anticipated in any given attack. Yet such distance also ensures that the possibility of empathy and compassion is reduced, as are the qualities of mercy and forbearance. This distance, while probably ensuring better legal compliance, also has the effect of disorienting some operators. After a successful drone strike in Afghanistan, for example, one US-based drone pilot was congratulated, though it was reported that the soldier felt uneasy about his role:

[O]ne of the things that nagged at him, and that was still bugging him months later, was that he had delivered this deathblow without having been in any danger himself. The men he killed, and the marines on the ground, were at war. They were risking their hides. Whereas he was working his scheduled shift in a comfortable office building, on a sprawling base, in a peaceful country. ...

“[T]his was a weird feeling,” he said. “You feel bad. You don’t feel worthy. I’m sitting there safe and sound, and those guys down there are in the thick of it, and I can have more impact than they can. It’s almost like I don’t feel like I deserve to be safe.”<sup>46</sup>

The disquiet felt by the soldier draws upon a deeper well of understanding of the nature of war that is deflected under the legal method. The sense of honour that comes from lethal combat, the sense of mutuality of risk, has underpinned conceptions warfare from ancient Greek times.<sup>47</sup> Such risk acts to heighten the senses and validates the cognitive process. It also allows the underlying humanity of the exercise proper consideration.

While not explicit in the sources of IHL, there does seem to be an implicit recognition, and perhaps even reliance, that the exercise of judgment under the law will recognize such humanity—and hence, when making operational decisions under IHL, that civilians will be acknowledged as individuals with their own identities, anxieties, hopes and dreams, and that questions of military advantage will take into account the lives (and anticipated deaths) of people in a manner that is not reduced to a banal formula of cost–benefit analysis. It is a well-recognized phenomenon within neurology that good decision-making

45 Simon Critchley, *The Faith of the Faithless: Experiments in Political Theology*, Verso, London, 2012, p. 104.

46 Mark Bowden, “The Killing Machines: How to Think about Drones”, *The Atlantic*, September 2013, available at: [www.theatlantic.com/magazine/print/2013/09/the-killing-machines-how-to-think-about-drones/309434/](http://www.theatlantic.com/magazine/print/2013/09/the-killing-machines-how-to-think-about-drones/309434/).

47 Cian O’Driscoll, “A ‘Fighting Chance’ or Fighting Dirty? Irregular Warfare, Michael Gross and the Spartans”, *European Journal of Political Theory*, Vol. 11, No. 2, 2011, p. 112.

involves the exercise of both emotion and logic.<sup>48</sup> If emotions are the basis for moral reasoning, as contended by some,<sup>49</sup> then it follows that the legal requirement of marginalizing emotion runs counter to good decision-making.<sup>50</sup>

## Counter-insurgency, the law and military tactics

In addressing one of the key areas of IHL breach, the authors of the RBW Study observe that the basic rule of distinction between combatants and civilians is frequently one that is not respected. This is done partly through the blurring of the identity of so many actors within the contemporary battlespace, but is also “more often the result of a deliberate intention to attack the civilian population rather than any objective difficulty in distinguishing the one from the other”.<sup>51</sup> This alarming claim is apparently based upon reasoning that invokes reciprocity arguments which permit such recourse because of the failure of the opposing side to respect the tenets of IHL.

This assertion, which the RBW Study authors acknowledge requires further investigation, does seem to be another reason proffered by them as to why strict adherence to the normative expression of IHL is required. In this context, the study is perhaps showing its age and has decisively been overtaken by developments in contexts such as the counter-insurgency (COIN) and stability operations doctrines of many States. Such doctrines, contrary to the authors’ claims, consciously seek to avoid civilian loss and increased risk to one’s own military forces. The doctrines do seek expressly to deliver greater humanitarian outcomes and require an inversion of conventional interpretive approaches to the law, albeit for instrumental reasons, to achieve both military and humanitarian outcomes at the same time.

The COIN doctrine was (re)developed by US forces during the conflict in Iraq in order to address the phenomenon of insurgency warfare. Such warfare is a feature of the contemporary environment and requires a highly calibrated and somewhat counter-intuitive application of IHL to achieve desired outcomes. The US COIN Manual was developed during a tenuous time during the conflict in Iraq and painstakingly describes that an insurgency is fundamentally a political struggle, in which the centre of gravity is the population, who remain “the deciding factor in the struggle”.<sup>52</sup> Violence is the currency of an insurgency and

48 Antonio Damasio, *Descartes’ Error: Emotion, Reason and the Human Brain*, Vintage, New York, 2006, Introduction.

49 Joshua Greene, “The Secret Joke of Kant’s Moral Psychology”, *The Neuroscience of Morality, Emotion, Disease and Development*, Vol. 3, 2007, pp. 35, 48.

50 In light of this legal requirement, it seems supremely ironic that in the development of autonomous systems, including autonomous weapons systems, considerable attention is given to creating algorithms that include a component for emotion. Sandra Clara Gadanho and John Hallam, *Emotion Triggered Learning in Autonomous Robot Control*, University of Edinburgh, 2001, pp. 2–3, available at: [http://homepages.inf.ed.ac.uk/rbf/MY\\_DAI\\_OLD\\_FTP/rp947.pdf](http://homepages.inf.ed.ac.uk/rbf/MY_DAI_OLD_FTP/rp947.pdf).

51 RBW Study, above note 1, p. 202.

52 *The U.S Army/Marine Corps Counterinsurgency Field Manual*, University of Chicago, Chicago, IL, 2007 (COIN Manual), p. xxv.

destabilizing the legitimacy of the host nation government and the supporting counter-insurgent forces a strategic goal.<sup>53</sup>

A number of key points need to be made about this doctrine. Firstly, it will be repeated for the sake of clarity that it is an instrumental doctrine which serves to deliver successful military outcomes in the context of insurgency. It is not about being “nice”—it is about being effective.<sup>54</sup> It is also subverting normal assumptions about legal interpretation by excising the anonymity of potential targets and according them an accessible identity.

The military experience of coalition forces in Iraq and Afghanistan through the 2000s was one of continuous insurgency. This is actually the historical norm of most conflicts.<sup>55</sup> Hence, those taking a direct part in hostilities were targetable under IHL. While it is obviously the case that the law does not compel such targeting, the binary nature of the choice under the law and the operational imperative was to do just that. The law permits it, and it was done extensively.

Paradoxically, this was actually a means to an end for insurgent forces, for whom the key is to provoke violation of counter-insurgent ethics and values.<sup>56</sup> As already outlined, “the law” is agnostic about such values, which therefore lends itself to exploitation by insurgent forces. Where the strategic goal of an insurgent force is to generate considerable repeated (lawful) violence within a population base, the law and its dominant interpretative approach do not act to restrain such an outcome, at least where DPH and other lawful targeting criteria are manifested. Hence the COIN doctrine is revolutionary in demanding new skills and approaches. Qualities such as patience, self-reflection on ethical commitments and tolerance of military casualties from one’s own military force are all critical for success in a COIN environment.

The strategies and tactics for COIN operations are profoundly more nuanced than what IHL anticipates on face value. The COIN doctrine counsels greater restraint when confronting and targeting individuals who would otherwise come squarely within the DPH criteria as permissible targets. It has become clear that functional categorization of individuals and the validity of the norm are not the most effective answer for targeting. The success of the Iraqi surge in 2007 was dependent on an extremely nuanced and politically aware strategy of engagement, where efforts were made to reconcile with those who were otherwise targetable under the DPH formula. The COIN Guidance applicable to the Multi-National Force—Iraq (MNF-I) at the time made it clear that discretion is to be carefully exercised with respect to the application of force. The MNF-I commentary noted:

We cannot kill our way out of this endeavor. We and our Iraqi partners must identify and separate the “reconcilables” from the “irreconcilables” through

53 *Ibid.*, pp. 37–39, 42–43, 49–50; *The U.S. Army Stability Operations Field Manual*, 3-07, University of Michigan Press Edition, 2009 (Stability Operations Manual), pp. 1–29.

54 David Kilcullen, *The Accidental Guerrilla: Fighting Small Wars in the Midst of a Big One*, Oxford University Press, Oxford, 2009, p. 145.

55 Stability Operations Manual, above note 53, pp. 1–1, 1–2, 1–3.

56 D. Kilcullen, above note 54, pp. 30–34.

engagement, population control measures, information operations and political activities. We must strive to make reconcilables a part of the solution, even as we identify, pursue, and kill, capture or drive out the irreconcilables.<sup>57</sup>

Who may be “reconcilable” within the policy is not defined with any great clarity. The criteria nonetheless require greater consideration of individual identity and broader socio-political considerations relating to the individual and the sectarian/tribal/regional connections he/she may be entwined within. Kilcullen identifies such potentially “reconcilable” persons as “accidental guerrillas”,<sup>58</sup> individuals who find themselves manipulated into insurgent activity but without the hard ideological drive.

When the objective of a successful COIN/stability operations campaign is to “win the population”,<sup>59</sup> rather than “kill/capture” the insurgents, a different orientation to legal interpretation is required. Issues of legitimacy and recognition of moral and ethical orientation in the battlespace become critical. Significantly, one of the COIN premises is “Lose Moral Legitimacy, Lose the War”.<sup>60</sup> Rather than blurring the line between combatants and civilians, which the RBW Study observes as an apparent consequence of military operations, the COIN doctrine requires greater consideration of status. Hence, even when an individual civilian is ostensibly targetable under IHL, further consideration is required as to the social and political effect of such targeting. This requires consideration of variables of individual identity, affiliation and role, and socio-political context, and to a degree, self-examination of motive. It demands acceptance of responsibility, albeit in instrumental terms, but the imposition is unmistakable. Once these elements are put into the balance, the rule regarding distinction becomes less an empirical exercise and more an evaluative process. The rule begins to transform into a standard. On the one hand, there is the requirement to determine whether or not the person is in fact targetable under the general DPH formula, and the subsequent requirement to determine individually specific criteria, to decide whether or not the person is “reconcilable”. Broader regard to the social and political consequences of the (lawful) application of violence is required, as these condition the application of force in a manner that reduces civilian casualties. Hence, while “the law” permits continued targeting of all those taking a direct part in hostilities, “reconcilables” and “irreconcilables” alike, COIN adds extra layers of analysis that further reinforce ethical commitments, which in turn generate good decision-making. All of this is undertaken against an instrumentalist background—that of military success—but it also evidences a decisively new way to apply the law in a less formal or doctrinal manner. To be clear, COIN is itself often marginalized at military legal conferences as being

57 MNF-I Guidelines, in *MNF-I Commander's Counterinsurgency Guidance*, 21 June 2008, reproduced in Thomas E. Ricks, *The Gamble: General David Petraeus and the American Military Adventure in Iraq, 2006–2008*, Penguin Press, New York, 2009, Appendix D, pp. 369–371.

58 D. Kilcullen, above note 54, p. 38.

59 Ganesh Sitaraman, “Counterinsurgency, War on Terror, Laws of War”, *Virginia Law Review*, Vol. 95, No. 5, 2009, p. 1779.

60 COIN Manual, above note 52, p. 252.



epiphenomenal, but it was devised in a moment of urgency. It represents a counter to the assertions of the RBW Study concerning battlefield practice, and it challenges traditional approaches to “the law”. It serves to promote both military success and humanitarian priority. It also offers a glimpse of what is possible in this field.

## Identity, military legal ethics and compliance with IHL

### Constructivism

The question of compliance with IHL is one that generates a special sense of anxiety. The content of the law is unique in its character, simultaneously permitting and restricting the application of destructive violence. The authors of the RBW Study assert that the solution is to regard IHL “as a legal and political matter” and not as a moral one.<sup>61</sup> The emphasis is decisively upon the normative strength of the law, its effective enforcement and strategies which ensure that external validities are imposed upon actors to condition behaviour. Such an orthodox approach, while itself sound, nonetheless seems particularly self-limiting in its avoidance of alternative strategies of legitimation of IHL through the decision-making process.

In this regard, the concept of constructivism that comes from international relations (IR) theory provides a useful basis for examining behaviour and providing a powerful account of social agency. Constructivism is an ideational theory of IR which posits that national interests are shaped by international structures. Thus, a conception of self-identity emerges from identification with legal norms that are internalized through various processes of social agency. Importantly, what then follows is an attitude towards international legal concepts that is motivated by a “logic of appropriateness” which induces a particular legally compliant behaviour and set of choices in any given instance. This is in contrast to a “logic of consequence” that is attributable to a politically realist perspective.<sup>62</sup>

Constructivism is conceived in non-instrumental terms and seeks to “endogenize national interests”,<sup>63</sup> arguing that nations’ interests are constructed from the international structure in which they operate and that, accordingly, “realism and [liberal] institutionalism get it backwards in seeking to explain international behavior”.<sup>64</sup> Constructivism provides a useful bridge between IR theory and international law, partly because of the belief held by both fields that “international legal and other norms constitute the state’s identity”.<sup>65</sup>

Constructivism provides explanatory power for why politically advantageous actions in armed conflict are not taken, notwithstanding that the

61 RBW Study, above note 1, p. 202.

62 Jack Goldsmith, “Sovereignty, International Relations Theory, and International Law”, *Stanford Law Review*, Vol. 52, 1999–2000, p. 984.

63 Jack Goldsmith and Daryl Levinson, “Law for States: International Law, Constitutional Law, Public Law”, in *Harvard Law Review*, Vol. 122, No. 7, 2009, p. 35.

64 *Ibid.*

65 *Ibid.*



law may not prohibit such activity. The non-use of nuclear and particular chemical weapons<sup>66</sup> at a time when their legality was unclear is usually cited as an example of a constructivist mindset in action. If identity is indeed constructed through structural processes and conditioned by cognitive and social pressures, there is particular benefit in assessing its impact in relation to IHL. Studies of norm compliance have identified a tipping point for “norm cascade” that comes with treaty ratification.<sup>67</sup> Commentators point to the premise that once a treaty receives ratification by about 33% of States,<sup>68</sup> there is typically an exponential increase in further ratifications/accessions, with a concomitant accelerated norm internalization process. Given that the 1949 Geneva Conventions have received universal world ratification/accession, there is a greater likelihood that their underpinning norms have been internalized to a greater degree. While empirical evidence is difficult to gather, those external reports that are available point (in contrast to the views expressed in the RBW Study) to a high level of compliance with IHL norms in the field, particularly in relation to avoiding injury to non-combatants.<sup>69</sup>

The role of self-identity played out most graphically in the early years of the Bush administration, in relation to the question of law applicable to Afghanistan. During the debates as to whether the Geneva Conventions would actually be applied *de jure* to the war in Afghanistan, the Chairman of the Joint Chiefs of Staff, General Myers, resisted administration legal advice regarding their non-application, stating that “[t]he Geneva Conventions were a fundamental part of our military culture and every military member was trained on them ... Objectively applying the Conventions was important to our self image.”<sup>70</sup> This sentiment was echoed subsequently by other military members, who asked who “owned” the Geneva Conventions<sup>71</sup> – the civilian lawyers or the military? Such questioning suggests a strong sense of internalization of norms associated with the legal framework.

## Dispensation of military advice and the shaping of behaviour

It remains an enduring truism that law is “done” daily in the thousands upon thousands of transactions that take place between practitioners and clients across the globe. While review of judicial decisions forms the corpus of most external assessments of law’s social role, a truer sense of the sociology of law is resident within the dispensation of advice that occurs in the multiple venues and contexts

66 Richard Price, *The Chemical Weapons Taboo*, Cornell University Press, New York, 1997, p. 110.

67 Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change”, *International Organization*, Vol. 52, No. 4, 1998, p. 895.

68 *Ibid.*, p. 901.

69 Colin H. Kahl, “How We Fight”, *Foreign Affairs*, Vol. 85, No. 6, 2006, p. 103.

70 General Richard Myers, *Eyes on the Horizon: Serving on the Front Lines of National Security*, Threshold Editions, New York, 2009, p. 203.

71 Mark Osiel, *The End of Reciprocity: Terror, Torture and the Law of War*, Cambridge University Press, Cambridge, 2009, p. 335. (“In conversations among themselves, JAGs sometimes speak in candidly guild-like terms. ‘Who owns the law of war?’ rhetorically asks former My Lai prosecutor William Eckhardt at one such gathering. ‘We do: the profession of arms’, he immediately answers. ‘It’s time to take it back,’ he adds, alluding to the Office of Legal Counsel’s temporary, recent hijacking of the field.”)

of everyday life. This was a motivating intuition of legal realism,<sup>72</sup> and it finds enduring contemporary expression today. Luban notes, for example, that “legal advising is the most important thing lawyers do, and lawyer advice, rather than judicial decision, defines the law”.<sup>73</sup>

The rise of the influence of the military lawyer over the past thirty years has been unprecedented. Members of the respective US service Judge Advocate General’s (JAG) Corps, for example, serve in numerous operational roles, from the most tactically pedestrian to the most strategically significant, and their contributions have been generally welcomed and sought by planning and operational staffs;<sup>74</sup> hence, they are well positioned to dispense advice and to decisively shape military outcomes. The rise in influence of the US JAG officer has been replicated in other military forces across the globe.<sup>75</sup> This is partly attributable to the positive requirements of specific instruments such as Additional Protocol I,<sup>76</sup> and also to the recognition of the role that law plays in the broader framework of legitimacy which underpins evaluation of contemporary military operations. As a government lawyer, a JAG officer shares many of the same ethical and professional commitments as her or his counterparts in government service. This generates a set of possibilities concerning individual and professional attitudes to the role. Locating and understanding such attitudes is critical to anticipating the modes of advice subsequently dispensed,<sup>77</sup> which necessarily impact upon the nature and quality of compliance with IHL.

In recent years, many parties to armed conflict have proclaimed how legally compliant their military operations have been.<sup>78</sup> This emphasis reflects a contemporary realization of the connection between legal validity and legitimacy. It is also a product of the reactions by professional military forces to the loss of credibility that comes from a sense of social and professional rupture occasioned by too far a departure from values underpinning contemporary IHL. Following

72 Mauro Zamboni, *Law and Politics: A Dilemma for Contemporary Legal Theory*, Springer, Berlin, 2008, p. 90.

73 D. Luban, above note 26, p. 5.

74 Jack Goldsmith, *Power and Constraint: The Accountable Presidency after 9/11*, W. W. Norton & Co., New York, 2012, pp. 125–128.

75 In the Royal Australian Navy, for example, the number of permanent uniformed lawyers went from thirteen in 1989 to over fifty by 2012.

76 AP I, Art. 82 provides: “The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.”

77 Noting that the so-called “war on terror” has spawned a considerable literature on locating various models of ethic commitment within public legal roles: see, generally, Jesselyn Radack, “Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism”, *University Of Colorado Law Review*, Vol. 77, 2006, p. 1; W. Bradley Wendel, “Professionalism as Interpretation”, *Northwestern University Law Review*, Vol. 99, No. 3, 2005, p. 1167.

78 Chris Jochnick and Roger Normand, “The Legitimation of Violence: A Critical Analysis of the Gulf War”, *Harvard International Law Journal*, Vol. 35, No. 1, 1994, p. 395, citing, *inter alia*, General Colin Powell: “‘decisions were impacted by legal considerations at every level. Lawyers proved invaluable in the decision-making process’. At the war’s conclusion, the Pentagon boasted that Coalition forces had ‘scrupulously adhered to fundamental law of war proscriptions’ in conducting ‘the most discriminate military campaign in history’” (citations omitted).

the Vietnam War, and especially the My Lai incident, the US military undertook a profound revision of its law of war programme.<sup>79</sup> The JAG Corps in all branches of the US military assumed new responsibilities for providing training to the US military and refining US doctrine through numerous publications. Such programmes not only impacted US forces but also had a profound effect in galvanizing military allies to revise their own law of war programmes and enhancing their military lawyers with a sense of professional commitment beyond just technical application of “the law”.<sup>80</sup> The undertaking of these broader programmes of instruction did assist in realizing broader levels of commitment to notions of professional integrity and reputation.<sup>81</sup>

In the contemporary environment, JAG officers have assumed a key institutional role in training, advising and ensuring compliance with IHL. Recent reviews of organizational theory regarding the optimization of compliance with external standards provide a reassuring endorsement of the ability of military lawyers to achieve desired outcomes that reinforce compliance. Dickinson’s analysis<sup>82</sup> of this phenomenon in particular notes the capacity for JAG officers to create a positive culture for compliance that derives from a number of factors. These revolve around sociological stimuli relating to the internalization of norms from shared experiences in the battlespace,<sup>83</sup> a recognition of institutional reputation coming from the reinforcement of values underpinning the law, formal points of intersection and engagement within the decision-making process,<sup>84</sup> and externalized criteria relating to applicable disciplinary systems that can reinforce behaviour.<sup>85</sup> This last aspect is highlighted as a key feature that separates JAG officers from other in-house counsel, namely the capacity to formally enforce compliance within an established quasi-criminal (disciplinary) justice system. It also necessarily shares the same perspective as the authors of the RBW Study in that respect, but it is in addition to the many other features of professional military legal engagement that rely upon underpinning values and professional integrity.

While reviews such as Dickinson’s do provide a useful endorsement from the perspective of “best practice” organizational theory, there is still the lingering question of the optimal broader professional persona and/or role that a JAG

79 J. Goldsmith, above note 74, p. 126; see also W. Hays Parks, “The Gulf War: A Practitioner’s View”, *Dickinson Journal of International Law*, Vol. 10, No. 3, 1992, pp. 393, 394, 396–397. “Operational law is an area of the law born from the U.S. experience in the Vietnam War ... [A]s a result of the My Lai massacre and subsequent investigations of it, in 1974 the Department of Defense ... issued its first overall law of war directive. DoD Directive 5100.77 has set forth specific duties and responsibilities for law of war training for military personnel and the reporting of suspected violations of the law of war committed by or against U.S. personnel.”

80 Within the Australian Defence Force there exists a suite of operational law courses that are now mandatory as well as those that may be taken as an elective. See, generally, Australian Department of Defence, Military Law Centre, available at: [www.defence.gov.au/legal/mlc.html](http://www.defence.gov.au/legal/mlc.html); Asia Pacific Centre for Military Law, available at: <http://apcml.org>.

81 David Graham, “A Long, Hard Fall from the Pedestal”, *Joint Force Quarterly*, Vol. 54, 2009, p. 30.

82 Laura Dickinson, “Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance”, *American Journal of International Law*, Vol. 104, No. 1, 2010, p. 1.

83 *Ibid.*, pp. 6, 8, 16, 18.

84 *Ibid.*, pp. 10–11, 16.

85 *Ibid.*, p. 24.

officer should adopt. The nature and practice of IHL operations isn't the clinical technical process that seems to be idealized within the RBW Study. As Australian academic Hilary Charlesworth has observed in the wake of the debate surrounding the 2003 Iraq invasion, international lawyers should relinquish the illusion of an "impartial, objective, legal order" if there is to be effective engagement with statecraft.<sup>86</sup> Understanding such a sentiment and reorienting professional attitudes regarding the provision of legal advice thus becomes a critical exercise. Concepts such as constructivism, but also the role of virtue ethics and professional commitments to dispensing advice that do take into account moral and social consequences, must be recognized as having a key place in orienting legal advice and conditioning battlespace behaviour alongside positivist articulations (of chosen versions) of normative law.

The issue of conscience and ethical decision-making within the battlespace reveals a recognition of the lawyer's capacity to translate self-embraced martial qualities of honour, courage and chivalry into a modern framework. This translation has resulted in the replacement of an internalized "warrior's code" of social and moral behaviour in armed conflict from times past with a decisively legal one today. There is a sense that something has been lost in this bargain. The very term "warrior" carries with it a notion of commitment to deeper codes of conduct that are suppressed, or at least eroded, in the transition to "professional soldier".<sup>87</sup> It is striking that a recent suggestion by a European military force to reintroduce the term "warrior" into their public self-reference was met with a negative public reaction.<sup>88</sup> This is made all the more remarkable given that in history, a warrior's code was designed to preserve a "shield of humanity"<sup>89</sup> so as to avoid descent into unprincipled violence.

## Conclusion

The RBW Study is right to focus on strengthening law through numerous means of agency and correlatively ensuring that its violation meets with effective sanction. It would be an unusual ICRC-sponsored review that did not seek to bolster the law applicable in armed conflict. It does, however, assume much about the power of the normativity of law on the one hand, and the incapacity of bearers of arms to respond to anything but criminal sanction for breach on the other. There remains an attitude of enchantment associated with the law and a tendency to equate lawfulness with moral agency, but their correlation is not necessarily aligned.<sup>90</sup> Normative law can create an unlimited vocabulary of meaning that can generate

86 Hilary Charlesworth, "Saddam Hussein: My Part in His Downfall", *Wisconsin International Law Journal*, Vol. 23, No. 1, 2005, p. 143.

87 Hanne A. Kraugerud, "Shields of Humanity: The Ethical Constraints of Professional Combatants", *Journal of Military Ethics*, Vol. 10, No. 4, 2011, p. 266.

88 *Ibid.*, p. 271.

89 *Ibid.*, p. 268.

90 Gabriella Blum, "The Role of the Client: The President's Role in Government Lawyering", *Boston College International and Comparative Law Review*, Vol. 32, No. 2, 2009, p. 278.

its own kind of internal rationality, one that acts to anesthetize authentic experience. Hence, despite the recommendations made by the authors of the RBW Study, the resort to values and deeper registers of meaning can and should be applied to condition the application of force under the law. This is to be celebrated, not marginalized as the study suggests, despite the risk of moral relativism that might be occasioned. It is clear that the law itself can generate its own kind of moral relativism which pervades unnoticed. The point is not to undermine “the law”, which remains the ultimate limit on the application of force, but to condition its interpretative application and to allow for the incorporation of moral and ethical reasoning in decision-making.

The RBW Study asks rhetorically that the ICRC reflect on what it is seeking in its aims and methods of instruction. It advances the view that rather than seeking to persuade audiences or impart knowledge, the focus should be more utilitarian and should deal with the external modification of behaviour. The law provides the force for conditioning this behaviour. Whereas the RBW Study argues against efforts to persuade relevant audiences of the values underpinning the law, this article has argued that such mechanisms offer a greater chance for traction of the legal norms themselves. The law is not as normativity-neutral as presumed, nor are its interpretative mechanisms so benign that desired results will necessarily be realized through the strategies advanced in the RBW Study. Since the publication of the RBW Study, the rise of the COIN doctrine represents a key moment of insight into assimilating military outcomes with humanitarian outcomes. Although developed for plainly instrumental reasons, this doctrine represents a decisive moment at which traditional targeting criteria were modified in order to allow for a greater sense of individual identity, and hence humanity, to inform decision-making. The paradox of the conflation of humanitarian priority and military success may be ironic, but the experience should be grasped for the significance of its transformative power.

The RBW Study provides a profoundly important and useful analysis of the mechanisms of agency and is right to call upon the ICRC to focus on what strategies work best in fostering respect for IHL. However, the conclusions made and the arguments advanced in the RBW Study do seem quite insular and counter-productive in their very narrow focus. It is not surprising that the study invests greatly in “the law” as the means for ensuring compliance. Such investment carries with it great ambition that the law will provide the level of external objectivity and neutrality hoped for. As the author Arthur Allen Leff notes, however, “whenever we do set out to find ‘the law’ we are able to locate nothing more attractive, or more final than ourselves”.<sup>91</sup>

The underpinning values, sense of identity and power of legitimacy that are resident within the law, particularly the humanitarian provisions, are worthy of effective proselytization. These factors can decisively act to reinforce the ethical application of force in a manner that, despite the views of the RBW Study, should be more fully relied on by the ICRC and others in their training and dissemination programmes.

91 Arthur Allen Leff, “Unspeakable Ethics, Unnatural Law”, *Duke Law Journal*, Vol. 6, 1979, p. 1229.



## DEBATE

# Debate: The role of international criminal justice in fostering compliance with international humanitarian law

Chris Jenks and Guido Acquaviva

*Much has been written about the “deterrent” role of international courts and tribunals in preventing potential atrocities. Since the establishment of the ad hoc tribunals and the International Criminal Court, the international community has sought to anchor the legitimacy of international justice in the “fight against impunity”. Yet recent studies have suggested that an overly broad characterization of international courts and tribunals as “actors of deterrence” might misplace expectations and fail to adequately capture how deterrence works – namely, at different stages, within a net of institutions, and affecting different actors at different times.<sup>1</sup>*

*The Review invited two practitioners to share their perspectives on the concrete effects of international criminal justice on fostering compliance with international humanitarian law. Chris Jenks questions the “general deterrence” role of international criminal justice, contending that the influence of complicated and often prolonged judicial proceedings on the ultimate behaviour of military commanders and soldiers is limited. Guido Acquaviva agrees that “general deterrence”, if interpreted narrowly, is the wrong lens through which to be looking at international criminal justice. However, he disagrees that judicial decisions are not considered by military commanders, and argues that it is not the individual role of each court or tribunal that matters; rather, it is their overall contribution to an ever more comprehensive system of accountability that can ultimately foster better compliance with international humanitarian law.*

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# Moral touchstone, not general deterrence: The role of international criminal justice in fostering compliance with international humanitarian law

**Chris Jenks\***

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**Keywords:** deterrence, compliance, international criminal justice, international humanitarian law, prevention.

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This article contends that international criminal justice provides minimal general deterrence of future violations of international humanitarian law (IHL). Arguments that international courts and tribunals deter future violations – and that such deterrence is a primary objective – assume an internally inconsistent burden that the processes cannot bear, in essence setting international criminal justice up for failure. Moreover, the inherently limited number of proceedings, the length of time required, the dense opinions generated, the relatively light sentences<sup>2</sup> and the robust confinement conditions<sup>3</sup> all erode whatever limited

1 See e.g. Kate Cronin-Furman, “Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity”, *International Journal of Transitional Justice*, 2013, pp. 1–21; Michael Broache, “The International Criminal Court and Atrocities in DRC: A Case Study of the RCD-Goma (Nkunda Faction)/CNDP/M23 Rebel Group”, September 2014, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2434703](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2434703); Geoff Dancy, Bridget Marchesi, Florencia Montal and Kathryn Sikkink, “The ICC’s Deterrent Impact – What the Evidence Shows”, *Open Democracy*, 3 February 2015, available at: [www.opendemocracy.net/openglobalrights/geoff-dancy-bridget-marchesi-florencia-montal-kathryn-sikkink/icc%E2%80%99s-deterrent-impac](http://www.opendemocracy.net/openglobalrights/geoff-dancy-bridget-marchesi-florencia-montal-kathryn-sikkink/icc%E2%80%99s-deterrent-impac) (all internet references were accessed in June 2015).

\* Special thanks to two colleagues at SMU Dedman School of Law, Professor Jenia Turner and research librarian Cassie DuBay, as well as Mariya Nikolova and Ellen Policinski of the *Review* for their assistance. Additionally, I appreciate Dr. Guido Acquaviva’s suggestions and the manner in which he facilitated dialogue on this important topic.

2 Relative at least compared to the United States. See Jens David Ohlin, “Towards a Unique Theory of International Criminal Sentencing”, in Göran Sluiter and Sergey Vasiliev (eds), *International Criminal Procedure: Towards a Coherent Body of Law*, Cameron May, UK, 2009, p. 373: “When compared against sentences handed down in the United States for regular crimes, the sentences of international criminal tribunals are typically far lower, even though the crimes at these tribunals are far greater in both moral depravity and legal significance.”

3 See Doreen Carvajal, “Accused of War Crimes, and Living with Perks”, *New York Times*, 3 June 2010, available at: [www.nytimes.com/2010/06/04/world/europe/04iht-hague.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/06/04/world/europe/04iht-hague.html?pagewanted=all&_r=0), describing pre-trial confinement conditions at the International Criminal Court (ICC).



general deterrence international criminal justice might otherwise provide. Bluntly stated, thousands of pages of multiple *Tadić* decisions have not factored into any service member's decision-making on whether to comply with IHL.

International criminal justice can play many roles,<sup>4</sup> including fostering compliance with IHL, but not through general deterrence and the threat of punishment. Adherence to IHL is an indirect byproduct of international criminal justice as a moral statement, an explication of how the international community views certain actions in armed conflict. This statement, often translated by military legal advisers and conveyed to service members by military leaders through personal example, briefings, training exercises, and military manuals and regulations, reinforces behavioural norms of how to conduct oneself in the most immoral of circumstances: armed conflict. International criminal justice's moral statement aids service members in navigating the moral abyss which results from a State lawfully ordering them to intentionally direct lethal force against fellow human beings.<sup>5</sup> The result is service members who, in the aftermath of armed conflict, can live with themselves and the decisions they made during armed conflict. In the process, and in part as an indirect result of international criminal justice, the arc of service members' behaviour tends towards complying with IHL.<sup>6</sup>

This article first clarifies what is meant by "general deterrence" before reviewing how the claim that international criminal justice provides such deterrence is relatively new and stems from misunderstandings of what the International Criminal Court (ICC) can achieve. From there, the article explains how general deterrence is a challenging proposition for any criminal justice system and amounts to an unbearable burden at the international level. I then describe the indirect role that international criminal justice plays in providing if not moral clarity, then at a minimum, less moral ambiguity in defining by exception the bounds of permissible conduct during armed conflict.

## General deterrence?

The focus of this article is on general deterrence, understood as the theory that criminally punishing an offender for violating the law dissuades others from similar violations. I recognize that some commentators, to varying degrees, reject general deterrence in the context of international criminal justice.<sup>7</sup> Others claim

4 These roles include, but are certainly not limited to, contributing to peace and reconciliation and, as discussed in this note, derivatively and minimally providing general deterrence through active or positive complementarity.

5 On this point, see also Geoffrey S. Corn, "Contemplating the True Nature of the Notion of 'Responsibility' in Responsible Command", in this issue of the *Review*.

6 See American Public Media, "'Moral Injury': An Invisible Wound of War", available at: [www.wbur.org/series/moral-injury](http://www.wbur.org/series/moral-injury), detailing the moral challenges veterans face in returning home after having "been a part of something that betrays their sense of right and wrong" during combat.

7 See Jens David Ohlin's claim that deterrence is only partially relevant to international criminal justice and Mark Drumbl's argument that it is irrelevant. J. D. Ohlin, above note 2; Mark Drumbl, "Collective Violence and Individual Punishment: The Criminality of Mass Atrocity", *Northwestern Law Review*, Vol. 99, No. 2, 2005, p. 590.

that what is problematic is not general deterrence *per se*, but attempting to “ascribe deterrent aims to (or judge deterrence in the context of) single international criminal courts or tribunals”.<sup>8</sup> I don’t disagree. My point is that, as explained below, many influential figures began promoting international criminal justice’s general deterrent effects twenty years ago. They have not only retrospectively discovered general deterrent effects, but also claim these effects are the primary goal of international criminal law. Since this reconceptualization occurred in the mid-1990s, commentators – and international courts – have attempted to fit the square peg of general deterrence into the round hole of international criminal justice.<sup>9</sup>

Obviously, general deterrence is distinct from individual or specific deterrence – the theory that punishing an offender deters that particular offender from a future violation. Relatively speaking, the efficacy of a criminal justice system providing specific deterrence is easier to evaluate: it can be seen in the number of specific individuals who, having been punished for violating IHL, do or do not re-offend. Yet there is considerable debate on how well international criminal justice provides even specific deterrence.<sup>10</sup> That there is debate on the specific deterrence aspects of international criminal justice is (or should be) a harbinger of the system’s inability to provide the more abstract general deterrence.<sup>11</sup> If opponents of international criminal justice were behind the claims that the system provides general deterrence, the argument would be viewed as a straw man. Yet the unbearable burden of deterrent effect derives not from critics of international criminal justice but, as discussed below, from supporters.

8 See Guido Acquaviva’s response to this piece, “International Criminal Courts and Tribunals as Actors of General Deterrence? Perceptions and Misperceptions”, in this issue of the *Review*.

9 See Barbara Hola, “Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law”, *Amsterdam Law Forum*, Vol. 4, No. 4, 2012, explaining that at least in terms of the ICTY and ICTR, “judges clearly found inspiration in classic ‘domestic’ penal theories”, and that “[i]n general, deterrence and retribution are emphasized in the majority of cases”; Geoff Dancy and Florencia Montal, “Unintended Positive Complementarity: Why International Criminal Court Investigations Increase Domestic Human Rights Prosecutions”, paper presented to the American Society of International Law Research Forum, 20 January 2015, discussing how the ICC may be achieving positive complimentary but “of a sort initially unintended by the Court”; Hyeran Jo and Beth A. Simmons, “Can the International Criminal Court Deter Atrocity?”, Working Paper Series, 18 December 2014, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2552820](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2552820), describing how the ICC may indirectly bolster prosecutorial deterrence at the national level.

10 Nick Grono and Anna de Courcy Wheeler, “The Deterrent Effect of the ICC on the Commission of International Crimes by Government Leaders”, Presentation, *International Crisis Group*, 5 October 2012, available at: [www.crisisgroup.org/en/publication-type/speeches/2012/grono-the-deterrent-effect-of-the-icc.aspx](http://www.crisisgroup.org/en/publication-type/speeches/2012/grono-the-deterrent-effect-of-the-icc.aspx). Grono and Wheeler, while defending the idea that the ICC has deterred commission of crimes, concede that the ICC involves “the very situations where prosecutions are most unlikely to deter”.

11 Philipp Kastner, “Armed Conflicts and Referrals to the International Criminal Court: From Measuring Impact to Emerging Legal Obligations”, *Journal of International Criminal Justice*, Vol. 12, No. 3, 2014, p. 472. Helena Cobban called deterrence the “false hope of international justice”. See Helena Cobban, “Think Again: International Courts”, *Foreign Policy*, February 2006, available at: [www.foreignpolicy.com/articles/2006/02/17/think\\_again\\_international\\_courts](http://www.foreignpolicy.com/articles/2006/02/17/think_again_international_courts). Yet others claim that international criminal justice does provide a deterrent effect. See Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?”, *American Journal of International Law*, Vol. 95, No. 1, 2001, arguing that there is such a deterrent effect; Theodor Meron, “From Nuremberg to The Hague”, *Military Law Review*, Vol. 149, 1995, p. 110, arguing that if war crimes trials were “made a consistent reality, deterrence would be taken more seriously”.

Establishing that criminal prosecutions, at any level, generally deter others from committing the same or similar offences is challenging. It requires proving a negative: that the prosecution of person X for violating IHL deterred Y and Z in the future from similar violations. When Y and Z are not violating IHL, there is debate over the negative causation – proving why Y and Z are not committing violations. Rarely will individuals acknowledge general deterrence.<sup>12</sup> And when Y and Z do violate IHL in a manner similar to X, it would seem to present more straightforward evidence of the lack of general deterrence. Despite these challenges, or perhaps because of them, the idea that international criminal justice provides meaningful general deterrence is a relatively recent phenomenon.

## General deterrence and international criminal justice

Contemporary international criminal justice relies in large part on the International Military Tribunal (IMT) at Nuremberg following World War II. Yet the IMT's primary purpose was punitive – the “just and prompt trial and punishment of the major war criminals of the European Axis”.<sup>13</sup> The primary purpose of international criminal justice remained punitive up to and through the creation of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). As one commentator notes, the UN Security Council resolutions establishing the ICTY and ICTR were focused on

incapacitating specific offenders by removing them from the field of combat and preventing them from maintaining political power ... there is no clear language suggesting that the establishment of the ad hoc tribunals was intended to serve the purpose of preventing the commission of war crimes by potential offenders. *General deterrence does not seem to have been a primary goal of the architects of the ad hoc tribunals.*<sup>14</sup>

12 There are exceptions to that general proposition, however. For example, according to a UN official, the ICC convicting Thomas Lubanga for conscripting child soldiers has deterred others: “Let me that say that from my own experience the Prosecution and trials of the ICC are followed with great interest in the field. The deterrent effect of these proceedings is already being felt with regard to a large number of armed groups engaging with the United Nations to release children from their ranks and to cease all new recruitment.” ICC, *Prosecutor v. Thomas Lubanga Dyilo, Situation in the Democratic Republic of the Congo*, Transcript, ICC-01/04-01/06-T-223-ENG, 7 January 2010, paras 9–10. See also H. Jo and B. A. Simmons, above note 9, discussing the fear of ICC prosecution expressed by former Colombian president Andres Pastrana as well as by Colombian paramilitary leaders.

13 K. Cronin-Furman, above note 1.

14 *Ibid.*, p. 436 (emphasis added, internal citations omitted). Cronin-Furman contends that several years passed after the establishment of the ICTY and the ICTR before scholars began attributing to the tribunals the effect of general deterrence. This was around the same time that the international community created the Rome Statute and the ICC; *ibid.*, pp. 436 ff. See also Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal (IMT), 8 August 1945, UN Doc. A/CN.4/5, Art. 6, available at: <http://avalon.law.yale.edu/imt/imtconst.asp>, stating that the Allies established the IMT “for the trial and punishment of the major war criminals of the European Axis countries”.

Not until the “international epiphany”<sup>15</sup> of the 1998 Rome Statute did the international community formally embrace the idea that international criminal justice provided general deterrence. The Rome Statute itself reflects that the States Parties were “[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the *prevention* of such crimes”, as they “threaten the peace, security and the well-being of the world”.<sup>16</sup> Ending impunity for perpetrators is specific or individual deterrence, but preventing others from committing crimes in the future is general deterrence. Indeed, general deterrence is “the most important goal of the ICC”.<sup>17</sup> The former president of the ICC claimed that “[b]y putting potential perpetrators on notice that they may be tried before the Court, the ICC is intended to contribute to the deterrence of these crimes”.<sup>18</sup>

While the States Parties adopted the Rome Statute in 1998, preparatory work began in 1995.<sup>19</sup> The idea that the ICC would generally deter the commission of atrocity crimes in the future “became a major selling point among advocates for the ICC’s establishment and ratification”.<sup>20</sup> At the same time as the Preparatory Committee for the ICC was drafting early versions of what would become the Rome Statute, scholars began to reassess the *ad hoc* tribunals in terms of general deterrence despite that not having been a focus at their inception.<sup>21</sup> In 1996, Cherif Bassiouni outlined a view which was later adopted prospectively in terms of the ICC and retrospectively for the *ad hoc* tribunals. Bassiouni argued that “[t]he relevance of prosecution and other accountability measures to the pursuit of peace is that through their effective application they serve as deterrence, and thus prevent further victimization”.<sup>22</sup> General deterrence’s migration from the ICC to the *ad hoc* tribunals continued and expanded such that by 2004, prosecutors from the ICC, the ICTY, the ICTR and the Special Court for Sierra Leone had issued a joint statement expressing their commitment to general deterrence in preventing future atrocities.<sup>23</sup>

15 John Washburn, “The Negotiation of the Rome Statute for the International Criminal Court and International Law Making in the 21st Century”, *Pace International Law Review*, Vol. 11, No. 2, 1999.

16 Rome Statute of the International Criminal Court, 17 July 1998 (entered into force 1 July 2002), UN Doc. A/CONF.183/9, Preamble (emphasis added).

17 David Hoile, *Justice Denied: The Reality of the International Criminal Court*, Africa Research Centre, 2014, p. 228, quoting both the first Prosecutor of the ICC, Luis Moreno Ocampo, and Christine Chung, the first senior trial attorney in the ICC’s Office of the Prosecutor.

18 Howard Salter (ed.), “Mr. Philippe Kirsch: President and Chief Judge of the ICC”, *Global Solutions Quarterly: The Newsletter of Citizens for Global Solutions*, Fall 2005, p. 2, available at: [globalsolutions.org/files/public/documents/Newsletter-2005-fall.pdf](http://globalsolutions.org/files/public/documents/Newsletter-2005-fall.pdf).

19 See J. Washburn, above note 15.

20 K. Cronin-Furman, above note 1, p. 438, quoting Diane F. Orentlicher, “Judging Global Justice: Assessing the International Criminal Court”, *Wisconsin International Law Journal*, Vol. 21, No. 3, 2003, p. 498.

21 K. Cronin-Furman, above note 1, p. 436, note 13, referring to Payam Akhavan, “Justice in The Hague, Peace in the Former Yugoslavia”, *Human Rights Quarterly*, Vol. 20, No. 4, 1998, pp. 737–816, and David Wippman, “Atrocities, Deterrence, and the Limits of International Justice”, *Fordham International Law Journal*, Vol. 23, No. 2, 1999, pp. 473–478.

22 M. Cherif Bassiouni, “Searching for Peace and Achieving Justice: The Need for Accountability”, *Law and Contemporary Problems*, Vol. 59, No. 4, 1996, p. 18.

23 Louis Moreno Ocampo, Carla Del Ponte, Hassan Bubacar Jallow and David Crane, *Joint Statement of the Prosecutors of the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone*, 27 November 2004, available at: [www.iccnw.org/documents/JointDeclarationProsecutors26Nov04.pdf](http://www.iccnw.org/documents/JointDeclarationProsecutors26Nov04.pdf).

## General deterrence as an unbearable burden for international criminal justice

While providing (and proving) general deterrence is a challenge for any criminal justice system, the challenge is much greater in the international context given the limited jurisdiction of the ICC and the *ad hoc* tribunals. These fora have limited mandates and resources, which understandably results in their only prosecuting some of the most serious offenders. Yet current research indicates that it is the certainty of punishment which is most likely to produce general deterrence.<sup>24</sup> By definition, international criminal justice cannot offer anything close to certainty of punishment.<sup>25</sup>

Whatever vestige of general deterrence international criminal justice might claim dissipates along a spectrum of the inexorable time and length required. The greater the temporal gap between the offence and issuing the trial judgment, and the greater the length and opaqueness of that judgment, the less the deterrent effect. The case of Momčilo Perišić is, unfortunately, instructive on both points. Perišić allegedly violated IHL in 1995. The ICTY announced criminal charges against him in 2005. The ICTY then began the trial in 2008, yielding a trial judgment in 2011 requiring over 600 pages. In 2013, an appeals chamber granted Perišić's appeal, reversing the trial judgment and leaving the elements of aiding and abiding liability either in doubt or at least in confusion. Imagine a military legal adviser preparing to talk to senior military leaders and explain the "so what?" takeaway or lesson(s) learned from *Perišić*. What bright line, articulable rule or principle could the legal adviser say *Perišić* established or clarified? What actions does the *Perišić* judgment deter other senior leaders from taking?

I contend that military legal advisers would not even raise *Perišić* because they either (1) have not read the judgment, given its length and/or lack of clarity, (2) do not understand the judgment if they have read it (this barb is directed at the ICTY and not the military legal advisers), or (3) have read and understood the judgment but recognize that it cannot be meaningfully translated into anything resembling helpful legal advice. For the judgment to have even the potential of general deterrence, a military legal adviser would need to be able to finish the following sentence "Sir/Ma'am, in light of *Perišić*, you should avoid the following actions...". That a military legal adviser cannot do so means the judgment cannot possibly deter others. It is fine to speak of law in terms of expressive value and signalling effects, but at some point, to be of practical utility, the law must be able to be clearly articulated, distilled and conveyed to the category of individuals that the international community seeks to influence.

24 Valerie Wright, "Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment", Report, The Sentencing Project, Washington, DC, November 2010.

25 One study claims that the ICTR "might eventually prosecute approximately 0.005% of the pool of the likely humanitarian offenders" in the Rwandan genocide. Thus the ICTR would prosecute approximately half of one percent of offenders, or stated in the alternative, not prosecute 99.5% of the offenders. Julian Ku and Jide Nzebile, "Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?", *Washington University Law Review*, Vol. 84, No. 4, 2006, p. 808.

Thus, despite all the time, effort and resources that it entailed, *Perišić* confuses more than clarifies the law, precluding even *de minimus* general deterrence. Most international criminal justice cases do play a role in fostering compliance with IHL, but it's neither accurate nor helpful to think of that role in general deterrence terms.

For international criminal justice to generally deter IHL violations, there would need to be exponentially more cases and more easily understandable judgments issued closer in time to the underlying IHL violations. And that is fully at odds with the nature of international criminal justice. The idea of general deterrence is even more problematic at the ICC, as increasing the number of cases at the international level is at cross purposes from what should be the primary measure of the Court's effectiveness – domestic criminal justice capacity-building – rendering the Court if not unnecessary then seldom used.<sup>26</sup>

Arguing that international criminal justice provides general deterrence is akin to the tale of Sisyphus, who in Greek mythology was sentenced by the Gods to perpetually roll a boulder up a hill without ever being able to reach the top – only in this context it is worse, as proponents of general deterrence are seeking out the boulder.

## International criminal justice as a moral touchstone

Yet regardless of how long the process takes and how convoluted the judgments may be, international criminal justice constitutes a moral statement – the international community's expectations of how belligerents are to conduct themselves during armed conflict. Ultimately this leads to greater IHL compliance, but not because of the unbelievably remote prospect of being in the dock at an international criminal proceeding. Rather, international criminal justice fosters compliance because it aids leaders in their efforts to protect service members' morality, their ability to live with the emotional consequences of knowing they have killed other human beings. IHL, along with the international criminal justice institutions interpreting it, provides a moral touchstone, the significance of which should not be understated – or miscast as deterrence.

As Telford Taylor reminds us, “[w]ar is not a license at all, but *an obligation to kill* for reasons of state”.<sup>27</sup> We know that “most soldiers have a phobia-like resistance to using force and need to be specifically trained to kill”.<sup>28</sup> Thus a

26 See Election of the Prosecutor, Statement by Mr Moreno Ocampo, ICC-OTP-20030502-10 22, 22 April 2003, stating that “[t]he efficiency of the International Criminal Court should not be measured by the number of cases that reach the court or by the content of its decisions. Quite on the contrary, because of the exceptional character of this institution, the absence of trials led by this court as a consequence of the regular functioning of national institutions, would be its major success.”

27 Telford Taylor, *Nuremberg and Vietnam: An American Tragedy*, Quadrangle Books, Chicago, IL, 1970, pp. 40–41 (emphasis added).

28 Geoffrey S. Corn, Laurie L. Blank, Chris Jenks and Eric Talbot Jensen, “Belligerent Targeting and the Invalidity of a Least Harmful Means Rule”, *International Law Studies*, Vol. 89, p. 623, note 254, referencing Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society*, Little, Brown & Co., Boston, MA, 1995.

significant part of military training does just that – it breaks down the natural human instinct against killing a fellow human being. Overcoming the instinct against killing is but one half of the challenge, however; doing so within the bounds of IHL is the other.

## Conclusion

“War is, at its very core, the absence of order, and the absence of order leads very easily to the absence of morality...”<sup>29</sup> The absence of order is so profound that even delayed, long, and convoluted international criminal judgments are navigational lights, however dim, for service members traversing the moral abyss of armed conflict. The idea of international criminal law as a series of faint waypoints in a deep moral fog is distinct from its role (if it even has one) in providing general deterrence.

International criminal law in general deterrence terms essentially means that a soldier would avoid doing as, say, Tadić did because the punishment Tadić received had deterred the soldier. This simply doesn’t happen.<sup>30</sup> Instead, international criminal justice is a tether, an anchor in the good sense, which helps military leaders develop and preserve the good order and discipline necessary to be an effective fighting force. There is an exceedingly remote chance that a service member will face international criminal justice for violating IHL, but there is a 100% chance that a service member will have to live with the consequences of what they do in armed conflict.<sup>31</sup>

29 James R. McDonough, *Platoon Leader: A Memoir of Command in Combat*, Ballantine Publishing Group, New York, 1985, p. 78.

30 See J. D. Ohlin, above note 2, pp. 385–386, stating: “Those who kill and rape civilians are motivated by a variety of factors – genocidal hatred, war-induced rage, etc. – and most of these are not the types of motivations that can be altered by the knowledge that, possibly, just possibly, one might face criminal liability at an *ad hoc* or permanent international tribunal.”

31 For an example of the moral consequences of armed conflict, consider U.S. Army paratrooper Staff Sergeant Tom Blakely, who parachuted into France as part of Operation Overlord, the Allied forces’ invasion of Nazi-controlled Europe in World War II. Blakely’s unit was behind enemy lines and ordered to seize and hold a bridge to prevent the German military from reinforcing its positions at Normandy beach. While in defensive positions, Blakely’s platoon leader ordered each US soldier to identify not a direction to fire, but a specific German soldier. Blakely, now a docent at the World War II Museum in New Orleans, said: “I picked one out. I picked him out, got a site, hand on the trigger, and pulled it. I could see when the bullet hit him. He jumped up in the air, raised his arms above his head, and dropped his rifle and fell backwards.” This engagement was fully in compliance with IHL, but it nonetheless took a moral toll on Blakely. The German soldier he shot and killed haunted him: “He came to me from that day on every so often .... There was never any rhyme or reason when he came and when he left. Sometimes he would do that three or four times, sometimes he’d only do it once. But it was always somethin’. He was always there. And he came vividly in my mind often.” And this is a case where the service member followed IHL. The external validation and reinforcement that indirectly flows from international criminal justice that one’s actions in combat were permissible and legitimate is of significant utility. It is just not general deterrence. See CBS News, “A ‘Living Artifact’ of WWII Shares His Story”, 26 May 2013, available at: [www.cbsnews.com/news/a-living-artifact-of-wwii-shares-his-story/](http://www.cbsnews.com/news/a-living-artifact-of-wwii-shares-his-story/).



A US Army officer writing on his experience as a small-unit leader during the Vietnam war acknowledged that:

I had to do more than keep them alive. I had to preserve their human dignity. I was making them kill, forcing them to commit the most uncivilized of acts, but at the same time I had to keep them civilized. That was my duty as their leader. ... War gives the appearance of condoning almost everything, but men must live with their actions for a long time afterward. A leader has to help them understand that there are lines they must not cross. He is their link to normalcy, to order, to humanity.<sup>32</sup>

International criminal justice can help reinforce that link and, in so doing, indirectly fosters IHL compliance. It does so by disseminating societal norms by exception: from knowing how service members may not act, we indirectly reinforce how they should act in hostilities. This happens not necessarily because of the fear of a potential future international criminal prosecution that statistically speaking will almost never occur, but by helping to foster and maintain a moral sense of self with which the soldier can live, both during and in the years after armed conflict. However, we do international criminal justice a disservice by imposing the concept of general deterrence. International criminal justice cannot, and need not, bear the burden.

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## International criminal courts and tribunals as actors of general deterrence? Perceptions and misperceptions

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32 J. R. McDonough, above note 29, pp. 77–78.

\* Special thanks to the anonymous reviewers of the *Review* and to Professor Jenks for the interesting exchange of perspectives on this topic. The views expressed herein are those of the author and do not necessarily reflect those of the Special Tribunal or any other institution with which he is associated. The author can be reached at [guido\\_acquaviva@yahoo.com](mailto:guido_acquaviva@yahoo.com).



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Deterrence as an aim of criminal law means discouraging future crime by effectively punishing crimes already committed. Since at least Cesare Beccaria, criminal policy generally has assumed that punishment – if certain and prompt – can deter the general public, as well as specific criminals, from committing crimes.<sup>33</sup> It is, however, probably still too early to definitively state how much this assumption holds true in the case of international criminal courts and tribunals. In fact, to evaluate such courts and tribunals *per se* as actors of general deterrence might miss the point, and result in misperceptions about their purposes and impacts.

Some context is important. Since the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993, the international community has witnessed the establishment of numerous international courts and tribunals, as well as internationally assisted domestic institutions, to deal with specific situations. These include, most famously, the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the Special Tribunal for Lebanon (STL), as well as a number of other domestic and regional institutions such as the War Crimes Chamber in the State Court of Bosnia-Herzegovina, the Special Panels for War Crimes in East Timor, the Extraordinary African Chambers and the “specialist chambers” foreseen by Kosovo to deal with allegations of inhuman treatment of people and illicit trafficking in human organs in Kosovo.<sup>34</sup> The ICC, whose Statute is not universally ratified but nonetheless enjoys considerable support, is clearly meant to be the flagship institution of this international criminal justice “system”.

Over the past twenty years, as the discipline has rapidly yet tumultuously developed, the purposes of international criminal law, and the related question of its effectiveness, have been widely debated.<sup>35</sup> It is often argued that international criminal law does not actually assist in preventing criminal conduct (general

33 “Would you prevent crimes? Let the laws be clear and simple, let the entire force of the nation be united in their defence, let them be intended rather to favour every individual than any particular classes of men, let the laws be feared, and the laws only.” Cesare Beccaria, *Of Crimes and Punishment*, 1764, Ch. 41, trans. Edward D. Ingraham, 2nd American ed., A. Walker, Philadelphia, 1819.

34 See, in this respect, Annex 1 to Kosovo Law 04/L-274, promulgated on 7 May 2014, pp. 2–3 of the English version, available at: [www.kuvendikosoves.org/common/docs/ligjet/04-L-274%20a.pdf](http://www.kuvendikosoves.org/common/docs/ligjet/04-L-274%20a.pdf), related to Council of Europe Parliamentary Assembly Report, Doc 12462, 7 January 2011, and Kosovo Constitutional Court, Case No. KO26/15, Judgment, 15 April 2015, available at [www.gjk-ks.org/repository/docs/KO26-15\\_ANG.pdf](http://www.gjk-ks.org/repository/docs/KO26-15_ANG.pdf).

35 See, among others, Mirjan Damaška, “What Is the Point of International Criminal Justice?”, *Chicago-Kent Law Review*, Vol. 83, No. 1, 2008, pp. 329–365; Mark Drumbl, *Atrocity, Punishment and International Law*, Cambridge University Press, New York, 2007, pp. 149–180; Ralph Henham, “The Philosophical Foundations of International Sentencing”, *Journal of International Criminal Justice*, Vol. 1, No. 1, 2003, pp. 64–85; but also Jean Galbraith, “The Pace of International Criminal Justice”, *Michigan Journal of International Law*, Vol. 31, 2009, pp. 84 ff.

deterrence), with the implication that its institutions should be, if not disbanded, at least more focused on achieving other more attainable or “realistic” goals.<sup>36</sup> This proposition is, to a certain extent, and maybe paradoxically, both true and misleading.

Attempts to ascribe deterrent aims to (or judge deterrence in the context of) single international criminal courts and tribunals may rest on a fundamental misunderstanding. Each institution exercises jurisdiction over only a handful of cases, and these cases – though often well-publicized – likely do not have enough “strength” on their own to effectively function as deterrents. The same is true, to a degree, for the existing international criminal justice “system”. Instead, one should look at each of the international criminal institutions as parts of a *network* of intertwined, mutually reinforcing agencies dedicated to protecting and strengthening the rule of law and pursuing individual criminal responsibility for gross IHL and human rights violations. In this sense, they can increase awareness of the primary rules for the protection of human dignity among the general public and, together with other institutions, foster compliance with the law and therefore, indirectly, general deterrence. I will develop these considerations along two separate, though interconnected, lines of thought.

## **A preliminary caveat: The law applied by international criminal courts and tribunals**

Before discussing these lines of thought, it is useful to make a general remark. International criminal courts and tribunals are sometimes considered a sort of “branch” of the international community’s efforts to enforce IHL.<sup>37</sup> To be sure, we cannot (yet?) speak about a comprehensive international judiciary, at least if understood as a complete and hierarchical judicial system covering the globe. Nonetheless, over the past twenty years or so, in large part because of the proliferation of criminal institutions supported by the international community, the general public has to a certain extent come to expect enforcement of the laws of war at the international level. This expectation is based on a degree of awareness about international courts and tribunals and what they do, as well as an understanding that the most egregious IHL violations should entail serious punishment. International criminal institutions are therefore increasingly

36 See Chris Jenks, “Moral Touchstone, Not General Deterrence: The Role of International Criminal Justice in Fostering Compliance with International Humanitarian Law”, in this issue of the *Review*. See also European Council on Foreign Relations, *International Justice and Prevention of Atrocity*, Report, October 2014, especially pp. 34 ff., available at: [www.ecfr.eu/page/-/ECFR115\\_International\\_Justice\\_Report.pdf](http://www.ecfr.eu/page/-/ECFR115_International_Justice_Report.pdf). More generally on the history of the debate on deterrence in international justice, see Leslie Vinjamuri, “Deterrence, Democracy and the Pursuit of International Justice”, *Ethics and International Affairs*, Vol. 24, No. 2, 2010, pp. 191–211, available at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1747-7093.2010.00256.x/full>.

37 C. Jenks, above note 36. See also, in a more neutral way, Anne-Marie La Rosa, “Sanctions as a Means of Obtaining Greater Respect for Humanitarian Law: A Review of Their Effectiveness”, *International Review of the Red Cross*, Vol. 90, No. 870, 2008, pp. 221–247.

assessed, in practice, against this expectation; their effectiveness in countering criminal conduct during armed conflicts is measured, in the minds of most, by the degree of adherence by international actors to IHL. But this expectation is, in a sense, too restrictive. Thinking of international criminal institutions in this way can actually result in an under-appreciation of their work and in the application of inappropriate metrics.

International criminal courts and tribunals unquestionably often deal with IHL violations, but their jurisdiction and practice is by no means limited to these. The ICTY, the ICTR and the ICC undoubtedly have jurisdiction over serious IHL violations (not just those amounting to grave breaches). However, they also try individuals accused of other international crimes, such as crimes against humanity and genocide,<sup>38</sup> which have often been neglected by domestic legislators and prosecutors. It would therefore be reductive to consider international criminal justice as merely an enforcement mechanism for IHL.

Indeed, overall, IHL violations and war crimes are often well-regulated in domestic systems: national authorities have quite often prosecuted individuals for serious IHL violations since the end of World War II; this is much less the case for crimes against humanity and genocide. When discussing the deterrent effect of international criminal courts and tribunals, therefore, it is necessary to look at the general scope of their jurisdiction, and not limit the analysis to IHL violations.

Conceptually, while it might be true that IHL violations *stricto sensu* are not deterred by international courts and tribunals, one must at least contemplate the possibility that the activity of these *international* institutions in relation to crimes against humanity and genocide – where the import of domestic prosecutions is much more limited – justifies the resources expended on them.<sup>39</sup> This nuance is important, as the ICTR, for instance, has carried out most of its judicial activities in the areas of crimes against humanity and genocide, leading the way for other institutions (domestic or otherwise) working in this field – a field that is much wider than the prosecution of violations of the laws of war narrowly defined.

## General deterrence as an aim of international courts and tribunals?

### The role of general deterrence in sentencing

International criminal courts and tribunals must therefore be assessed for their relevance in fields beyond IHL *stricto sensu*. The issue remains, however, whether

38 The SCSL and the ECCC are further competent to try individuals for certain domestic crimes. The STL only applies domestic Lebanese law.

39 These institutions are certainly costly, but maybe not as much as generally thought. See, among others, David Wippmann, “The Costs of International Justice”, *American Journal of International Law*, Vol. 100, No. 4, 2006, pp. 861–880.

their aim is, or should be, to contribute to general deterrence in the areas in which they exercise their jurisdiction.

First, it should be recognized that it is far too simplistic to compare deterrence in domestic systems with that in international criminal law without properly taking into account the stages of evolution of the respective systems. The application of criminal law in domestic jurisdictions has a rich historical pedigree, and societies have internalized the law's tenets. Domestic legal systems and general deterrence itself are to a certain extent predicated upon the monopoly on the use of force by States. It is in an environment of constant repetition and enforcement that the deterrent value of criminal law in domestic systems has reached the point it is at today. The situation at the international level is, of course, very different. Considering that international criminal law, in the modern era, is just over two decades old, not to mention the various limitations placed upon its enforcement by the current system of international relations, it appears wholly unfair to test its general deterrence standard by reference to domestic systems.

Moreover, while it is true that there are pronouncements from these very courts and tribunals suggesting a role for general deterrence, most of these institutions were created not for the purpose of fostering general deterrence, but rather as a means to deal with threats to international peace and security,<sup>40</sup> as part of international efforts to support the rule of law in certain regions,<sup>41</sup> or more simply to ensure retribution for the crimes committed during specific historical periods.<sup>42</sup>

In practice, international criminal courts and tribunals – i.e., the judges issuing judgments of conviction or acquittal – do not appear to actively work towards the goal of general deterrence. Nowhere is this clearer than in the decisions on sentencing themselves. In fact, when the judges pen their written reasons for a specific sentence, they implicitly (and at times even explicitly) refuse to assign significant weight to general deterrence. Taking as an example the ICTY – the first of the contemporary international criminal tribunals, and the one that has issued the most decisions on guilt – two judgments elucidate the position in this respect. In *Jokić*, the judges acknowledged four main purposes of sentencing for international crimes: retribution, rehabilitation, special deterrence and general deterrence. In relation to the latter, they stated:

With regard to general deterrence, imposing a punishment serves to strengthen the legal order, in which the type of conduct involved is defined as criminal, and to reassure society of the effectiveness of its penal provisions. Nonetheless, it would be unfair, and would ultimately weaken the respect for the legal order as a whole, to increase the punishment imposed on a person merely for the

40 This is the case for the ICTY, ICTR and STL, established through UN Security Council resolutions adopted under Chapter VII of the UN Charter.

41 For instance, in the cases of internationally supported domestic prosecutions in Bosnia-Herzegovina and Kosovo.

42 Consider the ECCC, where the serious violations of Cambodian law and IHL were considered “matters of vitally important concern to the international community as a whole”, requiring prosecution.

purpose of deterring others. Therefore ... the Trial Chamber has taken care to ensure that, in determining the appropriate sentence, deterrence is not accorded undue prominence.<sup>43</sup>

In *Deronjić*, the judges added the important remark that, in modern criminal law, this approach to general deterrence is more accurately described as deterrence aiming at reintegrating potential perpetrators into global society.<sup>44</sup> The judges importantly noted:

One of the main purposes of a sentence imposed by an international tribunal is to influence the legal awareness of the accused, the surviving victims, their relatives, the witnesses and the general public in order to reassure them that the legal system is implemented and enforced. Additionally, the process of sentencing is intended to convey the message that globally accepted laws and rules have to be obeyed by everybody.<sup>45</sup>

These pronouncements stand for at least two principles. First, international criminal courts and tribunals (the examples above include decisions signed by judges from a diverse set of legal systems and cultures all agreeing on these principles) do consider general deterrence within the aims of their work,<sup>46</sup> but refrain from assigning undue importance to this principle. Retribution, special deterrence and the rehabilitative purposes of punishment are also given consideration, and arguably play bigger roles than general deterrence when sentencing is assessed. Judges do not consider general deterrence of paramount importance when sentencing.

Second, even when general deterrence is taken into account in sentencing, it is often considered in the broader sense of influencing legal awareness, of fostering the internalization of the relevant rules in the minds of the general public. This function might be particularly strong in cases of guilty pleas, especially in proceedings against a high-level politician or military official. In such cases, the accused accepts his or her responsibility for certain crimes and therefore “sets the record straight”, so to say, thus arguably assisting in establishing the illegitimate and reprehensible character of the conduct in question.<sup>47</sup> In this sense, general

43 ICTY, *Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-S, Sentencing Judgment (Trial Chamber), 18 March 2004, paras 30 ff. (extract from para. 34).

44 ICTY, *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-S, Sentencing Judgment (Trial Chamber), 30 March 2004, paras 142 ff., in particular para. 147, quoting with approval previous case law.

45 *Ibid.*, para. 149.

46 See, for example, SCSL, *Prosecutor v. Alex Tamba Brima, Ibrahim Bazy Kamara and Santigie Borbor Kanu*, Case No. SCSL-04-16-T, Sentencing Judgment (Trial Chamber), 19 July 2007, para. 16.

47 Strangely enough, however, international criminal tribunals do not explicitly consider general deterrence, even in this broader sense, to be relevant in sentencing judgments following guilty pleas; they rather seem to focus on the truth-seeking aspect and on the possibility that the process might lead to reconciliation. See, for instance, ICTY, *Prosecutor v. Biljana Plavšić*, Case No. IT-00-39&40/1-S, Sentencing Judgment (Trial Chamber), 27 February 2003, para. 80: “The Trial Chamber accepts that acknowledgement and full disclosure of serious crimes are very important when establishing the truth in relation to such crimes. This, together with acceptance of responsibility for the committed wrongs, will promote reconciliation. In this respect, the Trial Chamber concludes that the guilty plea of Mrs. Plavšić and her acknowledgement of responsibility, particularly in the light of her former position as President of Republika Srpska, should promote reconciliation in Bosnia and Herzegovina and the region as a whole.”

deterrence is understood by the judges as encompassing an expressive function of international criminal law, which gives effect to – and therefore develops – the normative value of the legal system as a whole among the general public. It is in this expressive context that the preamble of the ICC Statute refers to the determination “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”. In other words, there should be no illusion that the ICC on its own will achieve the aim of preventing future crimes – but the Court is meant to be one of the paramount instruments at the disposal of the international community to entrench the awareness that serious criminal conduct has consequences, and that military and political leaders should not expect impunity.

### The actual import of international jurisprudence in fostering compliance

Further, although the importance of international criminal courts and tribunals in fostering general compliance with IHL should certainly not be overestimated, we must be careful not to underplay the significant and, to a certain extent, decisive role that some of these institutions have in the development of the law of war writ large. It is probably unfair to say that, as Professor Jenks writes, thousands of pages of decisions by international criminal courts and tribunals have not factored into *any* service member’s decision-making on whether to comply with IHL.<sup>48</sup>

First, there is evidence that military commanders and lawyers take quite seriously legal and factual findings by international judges. To cite just one example, several military experts from various countries attempted to file an *amicus curiae* brief in the *Gotovina* appellate proceedings at the ICTY with the stated purpose of providing insights from military and civilian IHL experts who have studied, and in many cases undertaken, the process of targeting analysis in a populated area during hostilities. The experts in question submitted that it was “impossible to overstate the importance of the analysis and conclusions of any criminal adjudication of targeting decision-making in a context such as that reflected in the facts of this case”.<sup>49</sup> It seems hard to contend that the case and its legal significance have not given rise to keen interest among military experts. Similar attention has undoubtedly been paid to the judgments related to urban warfare during the siege of Sarajevo,<sup>50</sup> to the targeting of civilians in Zagreb<sup>51</sup> and to the shelling of Dubrovnik.<sup>52</sup>

48 C. Jenks, above note 36.

49 ICTY, *Prosecutor v. Ante Gotovina and Mladen Markač*, Case No. IT-06-90-A, Decision on Application and Proposed *Amicus Curiae* Brief (Appeals Chamber), 14 February 2012, para. 6.

50 ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29, Judgment (Appeals Chamber), 30 November 2006; ICTY, *Prosecutor v. Dragomir Milošević*, IT-98-29/1, Judgment (Appeals Chamber), 12 November 2009.

51 ICTY, *Prosecutor v. Milan Martić*, Case No. IT-95-11, Judgment (Appeals Chamber), 8 October 2008.

52 ICTY, *Prosecutor v. Pavle Strugar*, Case No. IT-01-42, Judgment (Trial Chamber), 31 January 2005.

Moreover, for the past twenty years, various military manuals have referred to international criminal tribunals' case law when discussing applicable law.<sup>53</sup> Needless to say, the seminal *Tadić* interlocutory appeal decision of 2 October 1995 is universally cited as a basis for the applicability of (certain) war crimes to non-international armed conflict. The same could be said for the test to establish the existence of an armed conflict.<sup>54</sup> The International Committee of the Red Cross (ICRC) itself based several of its findings on the customary status of IHL rules on ICTY and other tribunals' case law.<sup>55</sup> Even UNESCO, when addressing the implementation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, refers to ICTY case law.<sup>56</sup>

These are just a few examples of the import of international criminal case law on the elaboration and implementation of IHL rules for decision-makers at all levels, including military officials. Recent reports have highlighted that ICC investigations into possible crimes in Afghanistan made "U.S. military lawyers ... work ... to match up the incidents the court is interested in with the various internal investigations conducted by the U.S. military".<sup>57</sup> If true, these types of reports would signal a significant impact of the work of international criminal justice mechanisms on national compliance with international obligations. Although the ICC has been faulted for having little impact in practice on the "politics of impunity",<sup>58</sup> it appears too simplistic to deny *any* deterrent effect of international criminal courts and tribunals' judgments and decisions.

Of course, it should not be decisive whether the influence stems *directly* from a judicial decision, or, for instance, from a military manual that was amended following such a decision. Effectiveness can be defined as the ability to induce a change away from the *status quo* in a desired direction, even if the result

53 See, for instance, the UK Joint Service Manual of the Law of Armed Conflict, 2004, according to which "[c]ustomary international law is certainly not confined to 'wars' and applies to both international and internal armed conflicts" (p. 29) and "[h]eads of state and their ministers are not immune from prosecution and punishment for war crimes" (p. 440) (quoting *only* the ICTY case law for these propositions). Even more striking are the amount of references to international criminal case law in the recent US Department of Defence *Law of War Manual*, June 2015, available at [www.defense.gov/pubs/Law-of-War-Manual-June-2015.pdf](http://www.defense.gov/pubs/Law-of-War-Manual-June-2015.pdf).

54 See, among others, Louise Arbour, "The Laws of War: Under Siege or Gaining Ground?", speech of 23 June 2011, available at: [www.crisisgroup.org/en/publication-type/speeches/2011/the-laws-of-war-under-siege-or-gaining-ground.aspx](http://www.crisisgroup.org/en/publication-type/speeches/2011/the-laws-of-war-under-siege-or-gaining-ground.aspx), and references thereof.

55 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2005. See also, among others, Michael N. Schmitt, "Precision Attack and International Humanitarian Law", *International Review of the Red Cross*, Vol. 87, No. 859, 2005, pp. 445 ff.

56 UNESCO, Report on the Implementation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and Its Two 1954 and 1999 Protocols, Report on the Activities from 1995 to 2004, UNESCO Doc. CLT-2005/WS/6, paras 46–49, available at: <http://unesdoc.unesco.org/images/0014/001407/140792e.pdf>.

57 David Bosco, "The War Over U.S. War Crimes in Afghanistan Is Heating Up", *Foreign Policy*, 3 December 2014.

58 See, for instance recently, Sarah Nouwen, "The Politics of Impunity Little Impacted by the ICC", *Open Democracy*, 27 November 2014, available at: [www.opendemocracy.net/openglobalrights/sarah-nouwen/politics-of-impunity-little-impacted-by-icc](http://www.opendemocracy.net/openglobalrights/sarah-nouwen/politics-of-impunity-little-impacted-by-icc).



is less than full compliance:<sup>59</sup> the effectiveness of international criminal courts and tribunals in regard to general deterrence should therefore be assessed in a more holistic way, as the ability to foster behavioural changes and reinforce the legal ban on prohibited conduct, even when it is “mediated” by other legal and social instruments and does not directly flow from the text of an ICTY or ICC judgment. After all, even in domestic systems, it is doubtful that individuals consider trial and appellate judgments discussing the applicable legal standards for, say, murder or rape when deciding whether to proceed with the commission of these crimes: such standards find their ways into the conscience of individuals – and of society as a whole – through a myriad of avenues, *including* formal court pronouncements. One can start expecting the same trend in the international arena, although with the caveats mentioned above related to this area of law’s early stages.

## Courts and tribunals as participants in the international criminal justice system

Most importantly, complementarity must also be accounted for when evaluating the deterrent effect of international criminal courts and tribunals. It would be wrong to view the various international criminal justice institutions as isolated structures, for it is generally misleading to single out judicial institutions and assess their value in relation to general deterrence in a society on their own. Individual institutions, whether at the international or the domestic level, form part of a wider network of judicial actors – including law enforcement agencies – that, together, aim at addressing criminal conduct from a variety of angles and perspectives. It would be improper, for instance, to assess the general deterrence effectiveness of a single US federal appellate court, or of the military court in a single district. Similarly, it would be strange to state that, because people are still murdered throughout the world, domestic courts have not had any deterrent effect on potential offenders over the past millennia.

A holistic assessment should be undertaken with respect to the role of international criminal institutions within the global criminal justice structure, just as one would do in relation to the whole justice system within a country. In reality, the Preamble of the ICC Statute recalls “that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”. The ICC has thus been hailed as an institution that does not intend to try a large number of cases: its primary purpose should rather be that of ensuring effective complementarity in action, i.e., domestic prosecution.<sup>60</sup> The ICTY and

59 Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights*, Princeton University Press, Princeton, NJ, 2014, p. 6.

60 “[T]he absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success”, as stated by Prosecutor Moreno Ocampo on 13 July 2003, available at: [www.icc-cpi.int/NR/rdonlyres/D7572226-264A-4B6B-85E3-2673648B4896/143585/030616\\_moreno\\_ocampo\\_english.pdf](http://www.icc-cpi.int/NR/rdonlyres/D7572226-264A-4B6B-85E3-2673648B4896/143585/030616_moreno_ocampo_english.pdf).



ICTR have rightly been described as aiming at another type of complementarity, namely trying only the most serious cases, while assisting domestic courts that must deal with the significant caseload concerning accused individuals who were not political or military leaders.<sup>61</sup> The STL, when trying the cases within its jurisdiction, explicitly sees its task as assisting “the strenuous efforts of the Government and people of Lebanon to reinforce the rule of law through due process”.<sup>62</sup> In all of these examples, the institutions clearly shy away from claiming an ability to achieve, or even striving for, a goal as high (and lofty) as general deterrence: international criminal institutions instead clearly seek synergies amongst themselves and, more importantly, with domestic judiciaries to create a web of interrelated jurisdictions that together ensure an increase in the repression of serious violations of IHL and of human rights.<sup>63</sup>

This is why it is unrealistic to expect general deterrence from each one of these institutions by itself. Each of these courts and tribunals instead sees itself – and should be seen – as part of a developing system of international criminal justice, a system that is still clearly primitive and without “arms and legs”, but that has achieved much over the past couple of decades.<sup>64</sup> Even more relevant, these institutions, individually and collectively, appeal to policy-makers, NGOs and other actors such as the ICRC to share the burden of achieving legal compliance and of developing stricter standards for the protection of human rights, both in times of armed conflict and otherwise. They request funds, suggest new strategies and exchange expertise among themselves and with policy-makers, thus creating expectations and encouraging responses. They are actors in the international arena, which other actors, even those opposing them and their growing influence, must recognize and take into account. Over the past two decades, it is undeniable that these institutions, each in its own specific way, have contributed to fostering an environment where justice for mass atrocities is expected, and trials for serious violations of fundamental human rights have become part and parcel of the international discourse. The assumption at all levels is now that certain types of conduct demand effective prosecution, which

61 Fausto Pocar, “Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY”, *Journal of International Criminal Justice*, Vol. 6, No. 4, 2008, pp. 655–656. For the relevance of ICTY case law and practices, see also Diane F. Orentlicher, “Shrinking the Space for Denial: The Impact of the ICTY in Serbia”, Open Society Institute, New York, 2004, in particular pp. 15–16 and 38–39, available at: [www.opensocietyfoundations.org/sites/default/files/serbia\\_20080501.pdf](http://www.opensocietyfoundations.org/sites/default/files/serbia_20080501.pdf).

62 Special Tribunal for Lebanon, Fifth Annual Report, 2013–2014, p. 7, available at: [www.stl-tsl.org/en/documents/stl-documents/presidents-reports-and-memoranda/2984](http://www.stl-tsl.org/en/documents/stl-documents/presidents-reports-and-memoranda/2984).

63 In this respect, see also the findings of empirical research in G. Dancy, B. Marchesi, F. Montal and K. Sikkink, above note 1, as well as in Marlies Glasius, “‘It Sends a Message’: Liberian Opinion Leaders’ Responses to the Trial of Charles Taylor”, *Journal of International Criminal Justice*, Vol. 13, No. 3, forthcoming 2015, pp. 419–447.

64 This network, a growing justice system linking together international, hybrid, and domestic institutions, has also been described as part of a justice “cascade”. Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics*, W. W. Norton, New York, 2012. This description also shows the necessity of evaluating the ICC and other courts and tribunals as part of a wider concerted effort in which each part develops and feeds on the others.

was clearly not the case just twenty years ago.<sup>65</sup> This change of ethos must undoubtedly be seen as a first step on the path of general deterrence: it is only when individuals know that they may (or will) face justice for serious crimes that deterrence starts to meaningfully work.

## Concluding remarks

It is true that the international criminal law “project” as a whole – together with its most vivid incarnation, the ICC – is an exercise in what Antonio Cassese liked to describe as “realistic utopia”.<sup>66</sup> It is a complex attempt to implement in practice the grand and noble goal of achieving justice for the worst atrocities, amidst the huge practical challenges posed by a sovereign-centred world, a landscape in which legitimacy and control are largely in the hands of States. This means, for the purposes of this discussion, that international criminal law and institutions will only be able to achieve (more or less) what States and other subjects of international law allow them to achieve; while they can push ahead in certain areas, they must expect pushback. More importantly still, the resources at their disposal – and how they are prioritized – are determined by others.

Yet, as the ICTY has held, and as mentioned above, decisions of international courts and tribunals influence the legal awareness of the accused, the surviving victims, their relatives, the witnesses and the general public, reassuring them that international criminal justice is implemented and enforced. International courts and tribunals have also represented a potent incentive for national courts to exercise criminal jurisdiction over serious human rights violations, within or outside armed conflicts.<sup>67</sup> Their decisions are not just moral statements. All of this, and the encouragement that States and other local actors receive from the ICC and other institutions to improve their capacity to reduce, detect and prosecute war crimes domestically,<sup>68</sup> contributes to deterrence, properly understood. When evaluating the purposes and efficacy of international judicial institutions, they must be seen as part of a wider system, a system that is having a significant impact on international law as applied by military and civilian actors around the world, both at the policy level and “on the ground”.

65 On this point, see also Payam Akhavan, “Can International Criminal Justice Prevent Future Atrocities?”, *American Journal of International Law*, Vol. 95, No. 1, 2001, especially pp. 27 ff. and references therein.

66 Antonio Cassese, “Introduction”, in A. Cassese (ed.), *Realizing Utopia: The Future of International Law*, Oxford University Press, Oxford, 2012, p. xxi.

67 Antonio Cassese, *The Rationale for International Criminal Justice*, in A. Cassese et al. (eds), *Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, p. 130.

68 See, most recently, H. Jo and B. A. Simmons, above note 9.

# Towards effective military training in international humanitarian law

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## Abstract

*The obligation to train troops in international humanitarian law (IHL) is simply stated and its implementation delegated to State discretion. This reflects a past assumption that mere dissemination of IHL would be an effective contribution to the prevention of violations. Academic literature has evolved so that dissemination alone is now known to be insufficient for compliance, while the ICRC's integration model emphasizes the relevance of IHL to all aspects of military decision-making. A separate process, the ICRC/Government of Switzerland Initiative on Strengthening Compliance with IHL, is still in its consultative stages at the time of writing, but may result in voluntary State reporting and/or thematic discussions at meetings of States. This article synthesizes academic and practitioner insights on effective IHL training, and suggests a collaborative rubric for informative, standardized reporting on IHL training. Such a rubric could enable States and researchers to share best practice and future innovations on IHL training, using a streamlined, cost-effective tool.*

**Keywords:** compliance, dissemination, ICRC, integration, IHL, law of armed conflict, military training, social psychology.

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## Introduction

The treaty obligation to integrate international humanitarian law (IHL) into programmes of military instruction and training is a component of the broader duty to disseminate IHL “as widely as possible”, including to the civilian population.<sup>1</sup> Despite its applicability in peace and war, in treaties and customary international law, and (with some differences in specificity as between treaty and custom) to international and non-international armed conflict,<sup>2</sup> the IHL training obligation is simply stated and discretionary, with only recent treaties and soft law adding detail on how it should be implemented.<sup>3</sup> The simplicity of the treaty norm reflects a historic assumption that dissemination and training were necessary (though perhaps insufficient) to ensure compliance with IHL. The Pictet Commentaries to these training provisions saw them as logically prior to the duty to “respect and ensure respect” for the Geneva Conventions of 1949 “in all circumstances”.<sup>4</sup> At the Diplomatic Conference of Geneva of 1974–1977, ICRC and State representatives spoke of dissemination and training’s capacity to

- 1 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art. 47; Geneva Convention 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), Art. 48; Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 127; Geneva Convention 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. 144; Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 240 (entered into force 7 August 1956), Art. 25; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (AP I), Arts 83, 87(2); Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980, 1342 UNTS 137 (entered into force 2 December 1983) (CCW), Art. 6; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, 2253 UNTS 212 (entered into force 9 March 2004), Art. 30.
- 2 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (AP II), Art. 19; Yves Sandoz, Christopher 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, p. 1489, para. 4912; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 142; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the event of Armed Conflict 1999, above note 1, Art. 30.
- 3 CCW, above note 1, Art. 6, Amended Protocol II, Art. 14(3); Second Protocol to the Hague Convention 1954, above note 1, Art. 30; ICRC and Swiss Federal Department of Foreign Affairs, *Montreux Document on Pertinent Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict*, 2008 (Montreux Document), Good Practices 3(a), 10, 14(e), 35, 63.
- 4 GC I, Art. 1; GC II, Art. 1; GC III, Art. 1; GC IV, Art. 1 (common Article 1). Jean Pictet (ed.), *Commentary to the Four Geneva Conventions of 12 August 1949*, Vol. 1, 1952, pp. 347–349; Vol. 2, 1960, pp. 257–259; Vol. 3, 1960, pp. 613–615; Vol. 4, 1958, pp. 580–582. Editor’s note: Revised versions of the Commentaries on the Geneva Conventions and their Additional Protocols are currently forthcoming. The revised Commentary on GC I is expected to be published in 2015.

promote compliance with IHL<sup>5</sup> – an idealistic assumption which grounded the diplomatic debates, but which was not tested by research or empirical data.

Subsequently, the scholarly consensus has become pragmatic and cognisant of the limitations of IHL training for preventing violations: military IHL training should aim to internalize norms through attitudinal change, discourse and repetition, yet training is acknowledged to be insufficient to ensure compliance with the law.<sup>6</sup> In the past decade in particular, the literature has benefited from interdisciplinary insights. IHL training needs to take place in a context which facilitates the development of conscience, with input from education theory,<sup>7</sup> social and organizational psychology,<sup>8</sup> and perhaps military ethics.<sup>9</sup> A decade ago, the ICRC's first Roots of Behaviour in War Study showed that knowledge of the law and attitudes consistent with a risk of violations can occur together. This finding creates a conundrum between IHL training and compliance.<sup>10</sup> The Roots of Behaviour in War Study will be reviewed and updated in newly commissioned work.<sup>11</sup> Historical reflection and social psychology show that the aims of basic training (desensitization, breaking down a soldier's inculcated reluctance to kill, unit cohesion and obedience to the command chain) are antagonistic to many of the aims of IHL training.<sup>12</sup> There is a conundrum, possibly a paradox, between IHL training and compliance.

The ICRC's practice has evolved as the academic research has broadened. It has moved from an emphasis on dissemination of IHL norms to States and non-State armed groups, to integration – the idea expressed in 2007 that IHL

- 5 Official Records of the Diplomatic Conference of Geneva of 1974–1977, Vol. 9, Summary Records, Third Session of Committee I, 59th Meeting, 17 May 1976 (CDDH/I/SR.59), pp. 241–244, draft Art. 37 of AP II – Dissemination, CDDH/I, CDDH/226.Corr.2.
- 6 Françoise Hampson, “Fighting by the Rules: Instructing the Armed Forces in Humanitarian Law”, *International Review of the Red Cross*, Vol. 29, No. 269, 1989, pp. 111–124; Marco Sassòli, “The Implementation of International Humanitarian Law: Current and Inherent Challenges”, *Yearbook of International Humanitarian Law*, Vol. 10, 2007, pp. 45–73.
- 7 Jenny Kuper, *Military Training and Children in Armed Conflict: Law, Policy and Practice*, Martinus Nijhoff, The Hague, 2005, pp. 173–174.
- 8 Albert Bandura, “Moral Disengagement in the Perpetration of Inhumanities”, *Personality and Social Psychology Review*, Vol. 3, No. 3, 1999, pp. 193–209; Laura Dickinson, “Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance”, *American Journal of International Law*, Vol. 104, No. 1, 2010, pp. 1–29.
- 9 M. Sassòli, above note 6, p. 73; Paul Robinson, Nigel de Lee and Don Carrick (eds), *Ethics Education in the Military*, Ashgate, Aldershot, 2008; Martin L. Cook and Henrik Syse, “What Should We Mean by Military Ethics?”, *Journal of Military Ethics*, Vol. 9, No. 2, 2010, pp. 119–122; David W. Lovell, “Educating for Ethical Behaviour? Preparing Military Leaders for Ethical Challenges”, in David W. Lovell and Igor Primoratz (eds), *Protecting Civilians During Violent Conflict: Theoretical and Practical Issues for the 21st Century*, Military and Defence Ethics Series, Ashgate, Aldershot, 2012, p. 141.
- 10 Daniel Muñoz-Rojas and Jean-Jacques Frésard, “The Roots of Behaviour in War: Understanding and Preventing IHL Violations”, *International Review of the Red Cross*, Vol. 86, No. 853, 2004, pp. 189–206.
- 11 ICRC, “Roots of Behaviour in War: Revisited”, 3 November 2014, available at: [www.icrc.org/eng/war-and-law/law-and-policy/articles/rbw.htm](http://www.icrc.org/eng/war-and-law/law-and-policy/articles/rbw.htm) (all internet references were accessed in June 2015).
- 12 Daniel Holmes, *Acts of War: The Behaviour of Men in Battle*, Cassell, London, 2003 (first published 1983); Ben Shalit, *The Psychology of Conflict and Combat*, Praeger, New York, 1988; Joanna Bourke, *An Intimate History of Killing: Face-to-Face Killing in Twentieth Century Warfare*, Granta, London, 1999.

should be included in all aspects of “doctrine, training, education, equipment and sanctions”,<sup>13</sup> and more recently in 2011, that IHL is continuously relevant to decision-making and communication within the military command structure.<sup>14</sup> These principles remain a work in progress and have not to date been tested empirically.

In a separate development, the ICRC and the Government of Switzerland are leading a major consultative process on Strengthening Compliance with International Humanitarian Law, established *inter alia* “to enhance and ensure the effectiveness of mechanisms of compliance with international humanitarian law”.<sup>15</sup> This process is still in its consultative stages at the time of writing, but may lead to voluntary State reporting and/or thematic discussions at meetings of States.

This article charts the simply stated, discretionary obligation on States to train troops in IHL, and the conundrum between training and subsequent compliance, with reference to academic and practitioner literature and interdisciplinary work. It then explores the ICRC’s evolution from dissemination to integration, and the organization’s broader work on preventing violations of IHL. Synthesizing these separate, interstitial developments adds substantive depth to *effective* IHL training: in brief, training that contributes to compliance on operations and helps to prevent violations. If the Strengthening Compliance Initiative does support voluntary State reporting or separate thematic discussions on the domestic implementation of IHL in general, then the article recommends a collaborative rubric for reporting on IHL training specifically. Such a rubric could enable States and researchers to share best practice and future innovations on IHL training, using a streamlined, cost-effective tool. Finally, the article offers some next steps for interdisciplinary research on effective IHL training, and then concludes.

## The obligation to disseminate IHL and to integrate it into military instruction and training

IHL’s earliest documents refer to dissemination of a then-novel set of norms, and to the assumption that spreading awareness of IHL among all citizens would prevent unlawful conduct by citizen soldiers. The *Oxford Manual on the Laws of War on Land* of 1880 is one such example,<sup>16</sup> reflecting the recommendation from the Second International Conference of the Red Cross in Berlin in 1869 that knowledge of the First Geneva Convention be publicized as much as possible,

13 ICRC, “Integrating the Law”, Publication Ref. 0900, 8 June 2007, available at: [www.icrc.org/eng/resources/documents/publication/p0900.htm](http://www.icrc.org/eng/resources/documents/publication/p0900.htm); ICRC, “Violence and the Use of Force”, Publication Ref. 0943, 31 July 2011, 2011, p. 58, available at: [www.icrc.org/eng/resources/documents/publication/p0943.htm](http://www.icrc.org/eng/resources/documents/publication/p0943.htm).

14 ICRC, “Decision-Making Process in Military Combat Operations”, Publication Ref. 4120, December 2013.

15 Resolution 1, 31st International Conference of the Red Cross and Red Crescent, 2011, available at: <https://www.icrc.org/eng/resources/documents/publication/p4120.htm>.

16 *Oxford Manual on the Laws of War on Land*, Institute of International Law, Oxford, 1880, Preface, cited in François Sénéchaud, “Instructing the Law of Armed Conflict: A Review of ICRC Practice” *Israel Defense Forces Law Review*, Vol. 3, 2007, 49.

especially among soldiers.<sup>17</sup> “[N]ecessary steps” must be taken to instruct troops and disseminate IHL treaty law under Article 26 of the Geneva Convention of 1906,<sup>18</sup> while Article 1 of Hague Convention IV of 1907 included an obligation to “issue instructions” (orders, not education) to troops which were consistent with the Convention and its annexed regulations. The four Geneva Conventions of 1949 require States to disseminate IHL “as widely as possible”, and “in particular” to integrate IHL study into programmes of military instruction.<sup>19</sup> Yet these dual dissemination and training norms are merely stated, with minimal guidance to States on how best to train soldiers and officers in IHL. It may be true, as per the ICRC Commentary, that dissemination and military instruction are logically prior to the obligation in Article 1 common to the four Geneva Conventions to “respect and ensure respect” for Geneva law “in all circumstances”, but a simple norm, delegated to State discretion, is not ideally crafted for the prevention of violations.<sup>20</sup>

Where ratified, Additional Protocol I (AP I) adds substance to the IHL training obligation but still leaves it delegated to State discretion, and delegated again to those officers who, once trained in IHL, will themselves train the soldiers under their command (a “train the trainers” model which requires further testing as to its effectiveness). Article 6(1) of AP I requires High Contracting Parties to “train qualified personnel to facilitate the application of the Conventions and of this Protocol”. Article 82 specifies the role of legal advisers, while Article 87 sets out the duties of commanders, which include an obligation to “ensure that members of the armed forces under their command are aware of their obligations” under Geneva law.<sup>21</sup> Article 83 requires that “[a]ny military or civilian authorities who ... assume responsibilities in respect of the application of the Conventions and this Protocol ... shall be fully acquainted with [their] text”.<sup>22</sup> These are obligations of result: they do not give guidance to States on how to achieve that result.

The IHL training obligation is clearly delegated to State discretion: the ICRC Commentary to Article 83 of AP I emphasizes that “setting up the programme [of military instruction] ... will probably require decisions at a ministerial level”.<sup>23</sup> In Resolution 21 of the Diplomatic Conference of Geneva of 1974–1977, States are “invite [d]” to “encourag[e] ... the authorities concerned to plan and to give effect” to IHL training, with ICRC assistance if necessary, “in a manner suited to national

17 *IIème Conférence internationale 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, 22–27 April 1869, cited in Vincent Bernard, “The ICRC’s Evolving Experience in Prevention”, 36th Round Table on Current Issues in International Humanitarian Law, San Remo, 3–5 September 2013, available at: [www.ihl.org/Media/Default/Round%20Tables/XXXVI%20Round%20Table/Speakers%20contributions/Bernard\\_Final.pdf](http://www.ihl.org/Media/Default/Round%20Tables/XXXVI%20Round%20Table/Speakers%20contributions/Bernard_Final.pdf).

18 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 6 July 1906 (entered into force 9 August 1907).

19 GC I, Art. 47; GC II, Art. 48; GC III, Art. 127; GC IV, Art. 144.

20 Common Article 1; J. Pictet (ed.), above note 4, Vol. 1, p. 384; Vol. 2, p. 257; Vol. 3, pp. 613–614; Vol. 4, p. 580.

21 AP I, Art. 87(2).

22 AP I, Art. 83(2).

23 Y. Sandoz, C. Swinarski and B. Zimmermann (eds), above note 2, p. 963, para. 3375.



circumstances”.<sup>24</sup> Article 25 of the Hague Convention for the Protection of Cultural Property of 1954 and Article 6 of the Convention on Certain Conventional Weapons (CCW) contain similarly drafted provisions.<sup>25</sup> This discretion is not surprising. As Peter Rowe notes, “[i]t is in the very nature of international law that a state may decide for itself how its obligations may apply in the sphere of its own municipal law”.<sup>26</sup> It could be because of State sovereignty and because IHL dissemination and training obligations persist in peace and war that these provisions were drafted so simply and with such flexibility. Nonetheless, delegation and discretion raise questions as to the effectiveness of the IHL training obligation in promoting compliance with the law.

A draft third paragraph in what became Article 83 of AP I would have provided for the evaluation of States’ IHL dissemination and training obligations through periodic reporting every four years. Following objections from the USSR and sixteen other States in Committee I,<sup>27</sup> this provision was narrowly approved but later rejected in the plenary conference.

These simply stated, discretionary norms also show the durability of the assumption that dissemination would contribute to IHL compliance. At the Diplomatic Conference of Geneva in 1974–1977, ICRC and State representatives asserted a causal relationship between dissemination of IHL and prevention of violations. In detailed debate on the proposed dissemination and training obligation in what was then draft Article 37 of Additional Protocol II (AP II), Mrs Junod of the ICRC argued that dissemination is “one of the most important ... measures suitable for strengthening the existing law”;<sup>28</sup> while Mr Grandison, the delegate from the United States, believed dissemination and instruction are “[among] the most effective means of securing compliance with humanitarian law”. This assumption establishes a delegation’s commitment to IHL compliance and to obligations which might facilitate it, but it remains an assumption. Academic research and the ICRC’s integration theory show a more intricate approach to causation and compliance.

The lengthy debate on draft Article 37 of AP II was largely wasted, as the phrasing from the committee stage which would have provided for an obligation to instruct the armed forces in the IHL of non-international armed conflict was removed in the radically shortened compromise text proposed by Pakistan.<sup>29</sup>

24 Diplomatic Conference of Geneva of 1947–1977, Resolution 21, Dissemination of Knowledge of International Humanitarian Law Applicable in Armed Conflicts, para. 2(a).

25 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, above note 1, Art. 25; CCW, above note 1, Art. 6.

26 Peter Rowe, “The United Kingdom Position”, in Hazel Fox and Michael Meyer (eds), *Effecting Compliance: Armed Conflict and the New Law*, Vol. 2, BIICL, London, 1993, p. 203.

27 Official Records of the Diplomatic Conference of Geneva of 1974–1977, Vol. 10, Second Session, Committee I, paras 133–135.

28 Official Records of the Diplomatic Conference of Geneva of 1974–1977, Vol. 9, 59th Meeting, above note 5, para. 29.

29 Official Records of the Diplomatic Conference of Geneva of 1974–1977, 53rd Plenary Meeting, Fourth Session, 6 June 1977, p. 151, para. 62: “The President drew attention to the proposals by the delegation of Pakistan (CDDH/427 AND Corr.1) to delete Article 37, and replace it by the sentence ‘This Protocol shall be disseminated as widely as possible’ (CDDH/434). The numbering and positioning of the new simplified article would be dealt with at a later stage.” The simplified draft was adopted by consensus: Y. Sandoz, C. Swinarski and B. Zimmermann (eds), above note 2, p. 1488 and fn. 4.



Pakistan's simplified text for AP II was drafted to overcome an impasse, with some delegates having stated informally that they would vote against the lengthy draft Protocol if it came to a vote. There is no evidence of a deliberate choice to remove the obligation to train troops in IHL from the renumbered Article 19, which provides simply that States must "disseminate" its text. Nor is there evidence in the archives of a specific objection having been raised to military training in the IHL of non-international armed conflict, in contrast to the widespread objection to the comprehensive nature of the targeting norms in the draft text. The model of delegation continues, because Article 19's "choice of means is left to the Contracting Party or to the parties to the conflict".<sup>30</sup> Nonetheless, the ICRC Commentary to Article 19 goes some way towards mitigating the harm caused by the radically shortened text. It explains that soldiers need to be taught "exactly the same behaviour" for international and non-international armed conflicts alike.<sup>31</sup>

Article 19 of AP II is not the last word on whether or not there is an obligation to integrate the IHL of non-international armed conflict into military instruction. Although there is no enumerated IHL training obligation in common Article 3, which regulates non-international armed conflicts where AP II has not been ratified or does not apply, as common Article 3 forms part of the whole of the four Geneva Conventions' text, it can be assumed that dissemination and training should include common Article 3. Amended Protocol II to the CCW also includes an IHL training obligation, as does the Second Protocol to the Hague Convention on Cultural Property.<sup>32</sup> The ICRC Customary Law Study reviewed multiple military manuals and found evidence of an IHL training obligation applicable to international and non-international armed conflicts. In the latter, the training obligation binds both armed forces and non-State armed groups.<sup>33</sup> States including the UK have criticized the ICRC Customary Law Study for its reputed deductive method, and for the use of military manuals as a source of State practice, yet the argument that Rule 142 is customary only in international armed conflict<sup>34</sup> is too cautious, and arguably does not reflect current State practice. Leaving customary IHL aside, the outreach to non-State armed groups by non-governmental organizations such as Geneva Call shows that IHL dissemination and compliance activities are becoming more widespread in non-international armed conflicts.<sup>35</sup>

30 *Ibid.*, p. 1488, para. 4906.

31 *Ibid.*, p. 1489, para. 4912.

32 CCW, above note 1, Amended Protocol II, Art. 14(3); Second Protocol to the Hague Convention of 1954, above note 2, Art. 30.

33 ICRC Customary Law Study, above note 2, Rule 142, pp. 501, 505.

34 David Turns, "Implementation and Compliance", in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2007, p. 362.

35 Sandesh Sivakumaran, "Lessons for the Law of Armed Conflict from Commitments of Armed Groups: Identification of Legitimate Targets and Prisoners of War", *International Review of the Red Cross*, Vol. 93, No. 882, 2011, pp. 463–482; Pascale Bongard and Jonathan Somer, "Monitoring Armed Non-State Actor Compliance with Humanitarian Norms: A Look at International Mechanisms and the Geneva Call Deed of Commitment", *International Review of the Red Cross*, Vol. 93, No. 883, 2011, pp. 673–706.

More recent treaties and soft law gradually add specificity and guidance to States on how flexibly, or with what expertise, they should implement IHL training. This added specificity from the mid- to late 1990s onwards coincides with the gradual evolution by the ICRC from an approach based in dissemination to the early iterations of integration. Amended Protocol II to the CCW (1996) requires “training commensurate with [soldiers’] duties and responsibilities”,<sup>36</sup> while Article 30 of the 1999 Second Protocol to the Hague Convention of 1954 provides for cooperation between military and civilian authorities, UNESCO, and non-governmental authorities in dissemination and military instruction in peace and war. In particular, “guidelines and instructions on the protection of cultural property” must form part of military regulations, although not necessarily as part of annual or more frequent training of soldiers or officers.<sup>37</sup> This quite limited provision is context-specific, but it exemplifies dissemination through multiple actors, not simply as an obligation delegated to the State.

The Montreux Document on Pertinent Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict (Montreux Document) usefully expands IHL training and continues the multi-actor emphasis from the Second Protocol to the Hague Convention of 1954. Five of the Good Practices call on States to train private military and security companies in IHL, often as a precondition for contracts to be concluded between States and those companies.<sup>38</sup> The Montreux Document is non-binding, and refers only to private military and security companies, so again this detail is context-dependent.

The greater specificity on IHL training in soft law and the Second Protocol to the Hague Convention on Cultural Property is insufficient, given the simply stated, discretionary norm in Geneva law. Questions remain about the empirical effectiveness of States’ IHL training programmes: the simplicity of the IHL training obligation creates a conundrum between IHL training and compliance with the law. The next section explores the evolution of academic research on IHL training, and interdisciplinary insights from military ethics and social psychology.

## The Conundrum between IHL training and compliance

Modern scholarship on IHL training has evolved from the historic assumption found at the 1974–1977 Diplomatic Conference of Geneva that dissemination and training lead logically to compliance with the law. While the etymology of dissemination might refer to “sowing the seeds” of compliance,<sup>39</sup> a linguistic root does not equal causation. Academic work on IHL training now recognizes the conundrum between IHL training on the one hand and compliance with IHL on

36 CCW, above note 1, Art. 6, Amended Protocol II, Art. 14(3).

37 Second Protocol of the Hague Convention of 1954, above note 2, Art. 30(3)(a).

38 Montreux Document, above note 3, Good Practices 3(a), 10, 14(e), 35, 63.

39 Rogier Bartels, “National Red Cross/Red Crescent Societies and International Humanitarian Law”, *Israeli Defence Force Law Review*, Vol. 3, 2007, p. 58, fn. 5.

the other. While there is an unquestioned obligation on States (and in non-international armed conflict, on non-State armed groups) to disseminate IHL, research on social psychology in armed conflict questions the causal impact of IHL knowledge on compliance, suggesting that the presence or absence of moral disengagement is more informative.<sup>40</sup> This research will be re-evaluated one decade on,<sup>41</sup> and is supported by courts-martial and public inquiries, which suggest ignorance of IHL as one among several contextual factors where atrocities have taken place.<sup>42</sup> Historical reflection and social psychology show that the aims of basic training (desensitization, breaking down a soldier's inculcated reluctance to kill, unit cohesion and obedience to the command chain) are antagonistic to many of the aims of IHL training.<sup>43</sup> Transcripts of interviews conducted with soldiers involved in the My Lai massacre show the importance of repetition in bayonet drills, to break down soldiers' resistance to kill. The same interviewee reported that his training did not include the duty not to obey a manifestly unlawful order, and blamed the victims of the massacre for their own fate.<sup>44</sup> This historic and new evidence adds to the insight from Hampson and Sassòli, among others, that IHL training is necessary but insufficient to ensure respect for the law.<sup>45</sup>

## Literature on military training in IHL

Earlier literature on IHL training was a mix of academic, empirical and practitioner reflections, and case studies on dissemination in universities and individual States.<sup>46</sup> This body of work gives the impression of theory built pragmatically yet interstitially: it hints at but does not fully synthesize the insights from military ethics and social psychology. For example, best practice suggests that military training in IHL should promote attitudinal change<sup>47</sup> and the "internalisation" of norms so that they become second nature,<sup>48</sup> but that "barracks culture" and competing priorities can jeopardize effective training.<sup>49</sup> These sources suggest the

40 D. Muñoz-Rojas and J.-J. Frésard, above note 10.

41 ICRC, above note 11.

42 William R. Peers, *The My Lai Inquiry*, Norton, New York, 1979; J. Bourke, above note 12, p. 194, cited in Paolo Tripodi, "Understanding Atrocities: What Commanders Can Do to Prevent Them", in David Whetham (ed.), *Ethics, Law and Military Operations*, Palgrave Macmillan, Basingstoke, 2011, pp. 173–188; Report of the Baha Mousa Inquiry, Vol. 3, September 2011, Summary, Part XVIII, p. 1330, para. 294, but contrast p. 1333, para. 310.

43 R. Holmes, above note 12; B. Shalit, above note 12; J. Bourke, above note 12.

44 Yorkshire Television, *Four Hours in My Lai*, 23 May 1989, interview transcripts including interview with ex-sergeant, 2nd Platoon, 1988.

45 F. Hampson, above note 6; M. Sassòli, above note 6.

46 The "Dissemination: Spreading Knowledge of Humanitarian Rules" special issue of the *International Review of the Red Cross*, Vol. 37, No. 319, 1997, contains numerous case studies and reflections on IHL dissemination.

47 Save the Children Sweden, *Behind the Uniform: Training the Military in Child Rights and Child Protection in Africa*, 2009.

48 ICRC Customary Law Study, above note 2, Rule 142, p. 503, fn. 45 (citing the military manual of the Republic of South Africa).

49 David Lloyd Roberts, "Teaching the Law of Armed Conflict to Armed Forces: Personal Reflections", in Anthony M. Helm (ed.), *International Law Studies*, Vol. 82, Naval War College, Newport, Rhode Island, 2006, pp. 121–134; J. Kuper, above note 7.

importance of educational and behavioural insights, of norm internalization that echoes constructivist compliance theory, and of group culture and communities of practice.<sup>50</sup>

The educational and behavioural insights form two strands in the research. In the first strand, some works provide checklists for good teaching and instruction. *Per S  n  chaud*, the instructor should be “convincing”, while training should be “integrated”, “selective”, “simple and continuous”, “practical and relevant”.<sup>51</sup> Hays Parks recommends that trainers conduct a “terrain appreciation” of the audience for their IHL training<sup>52</sup> in order to ensure that the norms taught are tailored precisely to that audience and are “commensurate with their duties and responsibilities”.<sup>53</sup> Hays Parks emphasizes the importance of the instructor and his/her knowledge of the law, but asserts that the individual soldier or officer receiving training is more important than the instructor and his/her training session. This approach is consistent with Sass  li’s argument that the “individual to be convinced” matters in IHL training,<sup>54</sup> and with Kuper’s emphasis on tailoring IHL training to a soldier’s rank and to the deployment situations he or she is likely to face.<sup>55</sup> The “extreme circumstances” of armed conflict present challenges to effective training, as do the often indeterminate norms in which soldiers are trained.<sup>56</sup>

In the second strand, scholars draw a sophisticated link between IHL training and behavioural change. Kuper defines learning with reference to the behaviour required for compliance: “a relatively permanent change in behaviour that occurs as a result of practice or experience”.<sup>57</sup> This emphasis on practical learning is found in Fran  oise Hampson’s 1989 article in which she emphasized that IHL training should be partly discursive, and should involve moral dilemmas which soldiers encounter in practical exercises, so that these dilemmas can be lawfully addressed “in the chaos of conflict”.<sup>58</sup> It is also found in twenty-first-century works on battle inoculation training at distributed simulation sites (training sites designed to emulate the challenges of deployment),<sup>59</sup> on integrating IHL in computer games as a tool of IHL dissemination to civilians and to future and

50 Etienne Wenger, *Communities of Practice*, Cambridge University Press, Cambridge, 1998; Catherine Elgin, *Considered Judgment*, Princeton University Press, Princeton, NJ, 1999.

51 F. S  n  chaud, above note 16.

52 W. Hays Parks, “Teaching the Law of War: A Reprise”, *Israel Defense Forces Law Review*, Vol. 3, 2007, pp. 9, 23.

53 CCW, above note 1, Art. 6, Amended Protocol II, Art. 14(3), cited in W. H. Parks, above note 52.

54 M. Sass  li, above note 6.

55 J. Kuper, above note 7, p. 173.

56 *Ibid.*, p. 174.

57 *Ibid.*, pp. 173–174.

58 F. Hampson, above note 6, p. 116.

59 Jon Saltmarsh and Sheena MacKenzie, “The Future of Collective Training: Mission Training Through Distributed Simulation”, RUSI Defence Systems, Royal United Services Institute, October 2008, pp. 107–110; Heather M. McIntyre, Ebb Smith and Mary Goode, “United Kingdom Mission Training Through Distributed Simulation”, *Military Psychology*, Vol. 25, No. 3, 2013, pp. 280–293; Victoria Basham, *War, Identity and the Liberal State: Everyday Experiences of the Geopolitical in the Armed Forces*, Routledge, London, 2013, p. 30. There is a greater emphasis on the skills to be gained in distributed simulation than in the potential to integrate IHL through distributed simulation training.

current soldiers,<sup>60</sup> and in quasi-experimental studies on moral competence training in the Swiss armed forces.<sup>61</sup> This shows a cyclical relationship between some of the themes in the earlier literature and more recent innovations in approaches to compliance. Perhaps as a result of these innovations, Sassòli believes that prevention, dissemination and training “have made spectacular progress in recent years”.<sup>62</sup> If the current consultative stages of the Strengthening Compliance Initiative yield State reporting and/or separate thematic discussions on the domestic implementation of IHL, it might be possible to measure this progress, on IHL training specifically and on IHL compliance more generally, especially if reports and discussions are research-led.

Norm internalization is a third theme. The South African military manual calls for the internalization of IHL norms, so that they become second nature.<sup>63</sup> While there is an educational dimension, focusing on the repetition of IHL rules in training, this meaning of “internalization” echoes Finnemore and Sikkink’s sense of the term, where after norms have “cascade[d]” from a few States to become widespread, they then become “taken-for-granted norms”, no longer worthy of debate.<sup>64</sup> In the IHL training context, it is sub-State actors (soldiers and officers) or members of non-State armed groups who are internalizing norms until they are “taken-for-granted”.

A fourth theme is the relevance of group culture and communities of practice. Lloyd Roberts’ “barracks culture” refers to one of the risks to IHL training programmes: he hints at the importance of social psychology from his own experience as a trainer in the British armed forces. Barracks culture may cause an “adjust[ment]” of the IHL disseminated to soldiers in their training.<sup>65</sup> Lloyd Roberts reports that in his experience, this is a particular danger in detention in the so-called “war on terror”,<sup>66</sup> although there is no inkling as to why social psychology should be more important in this context than in other deployments. Lloyd Roberts also mentions that IHL training is rarely perceived as a priority: “It is a brave commandant who insists on maintaining a module on the law of war.”<sup>67</sup> Murphy and Kuper echo these concerns, with reference to competing pressures on officers.<sup>68</sup> These competing pressures might show

60 Ben Clarke, Christian Rouffaer and François Sénéchaud, “Beyond the Call of Duty: Why Shouldn’t Video Game Players Face the Same Dilemmas as Real Soldiers?”, *International Review of the Red Cross*, Vol. 94, No. 886, 2012, pp. 711–737.

61 Stefan Seiler, Andreas Fischer and Sybille A. Voegtli, “Developing Moral Decision-Making Competence: A Quasi-Experimental Intervention Study in the Swiss Armed Forces”, *Ethics & Behavior*, Vol. 21, No. 6, 2011, pp. 452–470.

62 Marco Sassòli, “IHL Mechanisms in Armed Conflict: Where Is the Problem?”, 36th Round Table on Current Issues in International Humanitarian Law, San Remo, 5–7 September 2013, p. 2.

63 Republic of South Africa, Military Manual, cited in ICRC Customary Law Study, above note 2, Rule 142, p. 503, fn. 45.

64 Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change”, *International Organization*, Vol. 52, No. 4, 1998, p. 895.

65 D. L. Roberts, above note 49, p. 126.

66 *Ibid.*

67 *Ibid.*, p. 125.

68 Ray Murphy, “International Humanitarian Law Training for Multinational Peace Support Operations – Lessons from Experience”, *International Review of the Red Cross*, Vol. 82, No. 840, 2000, pp. 953–968; J. Kuper, above note 7, p. 173.

something else: the influence of epistemic communities or communities of practice within the military, valuing IHL training to a greater or lesser extent.

Dickinson, in contrast, uses organizational psychology to explain the influence of the US Judge Advocate General's (JAG) Corps in promoting compliance with IHL. Dickinson argues that the US JAG Corps could promote compliance by influencing cultural norms in the military community: "fostering greater compliance" can be achieved not by new treaty norms, but instead by "subtly influencing organizational structures and cultural norms".<sup>69</sup> These structures and norms are neither IHL nor formal instruction in military ethics: they are closer to the "barracks culture" that Lloyd Roberts considers influential, or the epistemic communities or communities of practice in constructivist literature. Dickinson argues that the "commingling" of JAG officers and soldiers is consistent with organizational theory and promotes compliance. This is despite the massacre at Haditha, where twenty-four civilians were killed by US Marines, and JAG officers did not report violations.<sup>70</sup> Arguably, Dickinson's optimism about the potential of the JAG Corps as agents of compliance does not engage sufficiently with the institutional failings revealed by the Haditha massacre.

## Interdisciplinary work

There are hints in the literature that IHL training needs to take place in a context which facilitates the development of conscience: that ethics should be an integral part of IHL training, for example.<sup>71</sup> Yet the body of work on IHL training appears to have developed in parallel to the more copious material on military ethics and social psychology in armed conflict.<sup>72</sup> There is little systematic engagement with the advantages and disadvantages of integrating IHL and military ethics training in particular.

"Military ethics" does not have a settled international definition, and can be pliable. Some armed forces prefer an improvised definition of military ethics which reflects an army's broader cultural ethos while rejecting specific intellectual roots;<sup>73</sup> others see Aristotelian *phronesis* (or practical wisdom) as the root of military ethics.<sup>74</sup> A few ethicists seek to integrate a "critical understanding of the law of armed conflict" within their definition of military ethics, alongside the unquantifiable "courage and spirit".<sup>75</sup> If military ethics includes mandatory compliance with IHL,

69 L. Dickinson, above note 8, p. 3.

70 *Ibid.*, p. 26.

71 M. Sassòli, above note 6, p. 73; D. Lovell, above note 9.

72 A. Bandura, above note 8; J.-J. Frésard and D. Muñoz-Rojas, above note 10; P. Robinson, N. de Lee and D. Carrick (eds), above note 9.

73 Stephen Deakin, "Education in an Ethos at the Royal Military Academy Sandhurst", in P. Robinson, N. de Lee and D. Carrick (eds), above note 9, p. 15; Patrick Mileham, "Teaching Military Ethics in the British Armed Forces", in P. Robinson, N. de Lee and D. Carrick (eds), above note 9, p. 43.

74 Martin L. Cook, "Ethics Education, Ethics Training and Character Development: Who 'Owns' Ethics in the US Air Force Academy", in P. Robinson, N. de Lee and D. Carrick (eds), above note 9, p. 57.

75 M. L. Cook and H. Syse, above note 9, pp. 120, 121.

and reinforces the obligation to disobey an unlawful order, then it is useful to integrate training in ethics and law. However, the pliability of military ethics could present a threat to soldiers' internalization of IHL norms if they identify an anti-law ethos within their organizational culture.

The literature on military ethics training has at least two principal debates: first, whether training is capable of instilling ethical conduct, and second, whether military ethics training should train soldiers in independent reflection, given the importance of group cohesion and the command chain. As to the first question, while Socrates reasoned that education alone is insufficient to produce virtue,<sup>76</sup> modern literature shows the potential of military ethics training, provided that (as for the IHL training context) there is a practical, reflective component, instead of dry classroom instruction.<sup>77</sup> Lovell is more sceptical: ethics and empathy are "partly a function of cognitive development and not simply of education",<sup>78</sup> but education itself is too distanced from the "stress, grief and rage" of the battlefield to be sufficient to instil compliance.<sup>79</sup> Van Baarda agrees: "moral competence" cannot be trained formally in a discrete session of classroom instruction, but instead is an ongoing personal chronology of learning, or an *éducation permanente*.<sup>80</sup> This scepticism contrasts with the empirical findings of Wortel and Bosch, which show a beneficial impact of ethics in a "train the trainers" scheme in the Netherlands armed forces.<sup>81</sup> Their study shows the value of a mentoring or "train the trainers" approach (at least in military ethics), and could offer transferable insights for the design of IHL training.

A second debate on military ethics parallels the competing priorities which might squeeze out IHL training. Moseley suggests that the command chain is not always in favour of instruction programmes that might encourage independent thought.<sup>82</sup> He argues that commanding officers should accept that military ethics instruction encourages "unlimited criticality".<sup>83</sup> The British armed forces opt for what Robinson, de Lee and Carrick term a "pragmatic" approach, in which an "ethos", not ethics, is "caught", not taught.<sup>84</sup> If this is an accurate reflection of modern practice, it leaves too much to chance. The IHL training literature emphasizes attitudinal change and the internalization of norms, while considering that a barracks culture which is antagonistic to IHL compliance is a risk for that norm internalization. If military ethics training is improvised, or if the command

76 Plato, *Meno*, trans. Benjamin Jowett, Liberal Arts Press, New York, 1949.

77 John Keegan, *The Face of Battle*, Viking Press, New York, 1976, reprint Folio, London, 2007, cited in D. Lovell, above note 9, p. 146, fn. 14–17.

78 D. Lovell, above note 9, p. 142.

79 *Ibid.*, p. 146.

80 Th. A. van Baarda, "Moral Ambiguities Underlying the Laws of Armed Conflict: A Perspective from Military Ethics", *Yearbook of International Humanitarian Law*, Vol. 11, 2010, pp. 3, 39.

81 Eva Wortel and Jolanda Bosch, "Strengthening Moral Competence: A 'Train the Trainer' Course in Military Ethics", *Journal of Military Ethics*, Vol. 10, No. 1, 2011, pp. 17–35.

82 Alexander Moseley, "The Ethical Warrior: A Classical Liberal Approach", in P. Robinson, N. de Lee and D. Carrick (eds), above note 9, pp. 175–186.

83 *Ibid.*

84 P. Robinson, N. de Lee and D. Carrick (eds), above note 9, Introduction; Patrick Mileham, "Teaching Military Ethics in the British Armed Forces", in *ibid.*, pp. 43–56.



chain is opposed to the independent thought that military ethics training might encourage, as Moseley argues, the barracks culture is less likely to support the internalization of IHL norms. Those researching IHL training would benefit from a thorough synthesis of the literature on military ethics, while recognizing that flexible principles can never replace norm internalization in IHL.

While military ethics emphasizes the moral development of the individual soldier or officer, recent work in the social psychology of conflict shows the influence of the group. It is this research that adds depth to the concept of Lloyd Roberts' "barracks culture" and to communities of practice in the military. The 2004 *Roots of Behaviour in War Study* surveyed former fighters in Bosnia-Herzegovina, Colombia, the Republic of the Congo (Congo-Brazzaville) and Georgia for the ICRC, and found no positive correlation between moral disengagement and ignorance of the law: attitudes associated with a risk of violations were held by some fighters who had a good knowledge of the law.<sup>85</sup> The research indicated that fighters' willingness to disregard IHL is linked to moral disengagement, which has two dimensions: (i) the justification of violations by a fighter's own group (which in turn correlates with group cohesion), and (ii) the dehumanizing of the enemy.<sup>86</sup> The authors found that "[w]hat counts is esteem for their comrades, defence of their collective reputation and desire to contribute to the success of the group".<sup>87</sup> This creates a tendency to "abdicate[e] ... responsibility ... induced chiefly by group conformity and obedience to orders".<sup>88</sup>

The group cohesion that Muñoz-Rojas and Frésard implicated in moral disengagement by former fighters is an explicit aim of military training, so that soldiers fight for other members of their unit and respect the command chain. Training in IHL and training for conformity and group cohesion may work antagonistically, as Bourke and Shalit, among others, have noted. Harnessing group cohesion to IHL compliance by expressly relating IHL compliance to the honour of the regiment would be one way of taking account of these findings. Further synthesis could be achieved by acknowledging Muñoz-Rojas and Frésard's finding that IHL training is not merely insufficient to induce compliance but could even be "counter-productive where mechanisms of moral disengagement are present".<sup>89</sup> Addressing moral disengagement is logically prior to instruction in IHL on this reading. Yet the survey data were not resoundingly sceptical. Provided that there was no group influence seeking to justify violations of IHL, Muñoz-Rojas and Frésard found that IHL knowledge had "a moderating effect on the spiral of violence", apparently preventing a cycle of revenge.<sup>90</sup>

These nuanced, empirical findings were from samples of former fighters in four conflicts, and therefore have a degree of external validity or generalizability, but as the ICRC has noted, it is time to re-evaluate the findings of this decade-old study.

85 D. Muñoz-Rojas and J.-J. Frésard, above note 10.

86 *Ibid.*, p. 197.

87 *Ibid.*, p. 194.

88 *Ibid.*, p. 190.

89 *Ibid.*, p. 200.

90 *Ibid.*, p. 201.



The literature on IHL training merely hints at the importance of interdisciplinary reflections, and provides an array of tips on best practice.

This article has begun to synthesize the academic and practitioner reflections on IHL training, and the interdisciplinary works which explore the conundrum between IHL training and subsequent compliance. Academic and practitioner insights lend themselves to a rubric on State practice in IHL training which addresses the educational approach, how behavioural change is assessed, how States approach soldiers' and officers' norm internalization, and any risks to IHL compliance from military culture in their particular context. Interdisciplinary insights emphasize the necessity but insufficiency of IHL training for future compliance, and suggest that States might usefully share insights on how to prevent moral disengagement in the chaos of the battlefield, where IHL compliance is imperative. The next section considers the ICRC's progression from dissemination of the law to its integration in military decision-making, and to its broader work on the prevention of violations.

## **From dissemination to integration, and to prevention: The ICRC's approach**

Over the past two decades, the ICRC has gradually shifted its IHL activities to armed forces and non-State armed groups from simple dissemination of the law to an emphasis on integration.<sup>91</sup> Integration has had two main outputs: firstly, the idea that IHL should be integrated into all aspects of "doctrine, training, education, equipment and sanctions";<sup>92</sup> and secondly, and more recently, the idea that IHL is continuously relevant to decision-making and communication within the military command structure.<sup>93</sup> The first notion was a promising work in progress for increasing the effectiveness of IHL training; more recently, however, integration has become a comprehensive compliance tool which is operationally relevant, taking account of the real-time challenges of intelligence and targeting.

The first approach to integration involves a "continuous process" in which IHL becomes relevant to "doctrine, training, education, equipment and sanctions".<sup>94</sup> Importantly, integration includes training, but is not just training. Integration requires the prior interpretation of the law, an understanding of its operational consequences, and the adoption of "concrete measures ... to permit for compliance during operations".<sup>95</sup> In recognizing that IHL training alone is insufficient for compliance, the ICRC acknowledges that "the mere teaching of legal norms will not result, in itself, in a change in attitude or

91 ICRC, above note 13.

92 *Ibid.*; ICRC, "Violence and the Use of Force", above note 13, p. 58. An earlier hint of "integration" appears in Dietmar Klenner, "Training in International Humanitarian Law", *International Review of the Red Cross*, Vol. 82, No. 839, 2000, pp. 653–662, 656, 659, 660–661.

93 ICRC, above note 14.

94 ICRC, "Violence and the Use of Force", above note 13, p. 58.

95 *Ibid.*

behaviour”,<sup>96</sup> reflecting the interdisciplinary scholarship on IHL training. The integration model emphasizes IHL’s continued relevance when soldiers and officers learn about a new weapons system, so that they can learn whether it can be used lawfully in civilian areas, or whether it can cause superfluous injury or unnecessary suffering. Furthermore, an integration of IHL training with an understanding of military discipline and international criminal law should reduce misconceptions about international law,<sup>97</sup> which in turn could increase IHL compliance among service personnel.

The ICRC’s more recent document on integration addresses the continuous application of IHL: compliance-in-progress in the command chain and during armed conflict.<sup>98</sup> In this new formulation, integration is beginning to close the gap between historic treaties’ emphasis on giving “instructions” (orders) consistent with IHL<sup>99</sup> and the assumption from the four Geneva Conventions and the Pictet Commentaries (1952–1960) that dissemination and military instruction in IHL would help “ensure respect” for the law. This approach emphasizes ongoing communication about IHL throughout the command chain.<sup>100</sup> This author will read with interest the pending Updated Commentary to the four Geneva Conventions (due in consecutive years from 2015 to 2019), to see how integration and the Roots of Behaviour in War Study’s findings might be reflected in a more sophisticated understanding of the dissemination and training obligation.

In relation to IHL training, it is the commander’s responsibility to verify subordinates’ knowledge of the law, moving away from the “train the trainers” delegation of the IHL training obligation and towards a process of ongoing internal evaluation of IHL training.<sup>101</sup> In contrast to the group cohesion and risk of justification of unlawful orders which Muñoz-Rojas and Frésard found in their sample, integration should allow soldiers the opportunity to clarify the lawfulness of a mission or specific order, “if time and situation permit”.<sup>102</sup> This disrupts concepts of conformity and unthinking obedience to the chain of command, and strongly endorses the legal obligation only to carry out lawful orders. Integration also emphasizes the continuous nature of IHL obligations, with reference to targeting, precautions and logistics: IHL is relevant to decision-making throughout an attack, not merely when a target is first selected, so that commanding officers must clarify any information gaps which might affect IHL compliance,<sup>103</sup> and must desist from any attack from the moment that

96 *Ibid.*

97 W. G. L. Mackinlay, “Perceptions and Misconceptions: How are International and UK Law Perceived to Affect Military Commanders and Their Subordinates on Operations?”, *Defence Studies*, Vol. 7, 2007, pp. 111–160.

98 ICRC, above note 14.

99 Convention IV respecting the Laws and Customs of War on Land (Hague Convention IV), 18 October 1907 (entered into force 16 January 1910), Art. 1.

100 ICRC, above note 14, pp. 22, 24.

101 *Ibid.*, p. 22.

102 *Ibid.*, p. 43.

103 *Ibid.*, p. 18.

intelligence suggests it will be indiscriminate or disproportionate. The lawfulness of targeting must be kept under “constant review”.<sup>104</sup> While integration is thoroughly pragmatic and there is no explicit reference to theoretical work, the ICRC’s emphasis on continuous communication happens to be well-grounded in constructivist compliance theory, where theorists ranging from Lon Fuller to Brunée and Toope emphasize ongoing communication in expert communities as a means of improving compliance with the law.<sup>105</sup> The integration approach has in effect progressed from a way of improving the effectiveness of IHL training to a comprehensive, operationally relevant compliance mechanism.

The ICRC’s “prevention” strand is broader than its work on the integration of IHL, but it remains practical and grounded in interdisciplinary evidence. Differentiated from “protection”, “assistance” and “cooperation”, prevention aims to “foster an environment conducive to respect for the life and dignity of persons affected by armed conflict and other situations of violence” and to ensure that armed actors respect the ICRC’s role.<sup>106</sup> Since the publication of the *Roots of Behaviour in War Study*, the ICRC has broadened its prevention work, which now includes the identification of appropriate stakeholders to create and maintain national legislation, sanctions and reparations aimed at implementing IHL; and dialogue with armed forces, non-State armed groups, government officials, academia and civil society to promote IHL compliance and to reduce public discourse which might encourage violations of the law.<sup>107</sup> This varied interdisciplinary toolkit recognizes the insufficiency of mere dissemination of IHL, but includes integration of the law into military training and decision-making.

While the ICRC’s prevention toolkit is broad and the second iteration of integration qualitative and communicative, the integration of IHL training in doctrine, education, equipment and sanctions could be usefully added into a rubric for States to share their IHL dissemination and training activities. These criteria would be more informative than a simple “tick-box” approach, where States merely report that military training in IHL does take place. The next section considers the potential outcomes of the ICRC/Swiss initiative on Strengthening Compliance with IHL, which is in its consultation phase until December 2015.

## **The Initiative on Strengthening Compliance with IHL led by the ICRC and the Government of Switzerland**

At the time of writing, the ICRC and the Government of Switzerland are leading a major consultative process on Strengthening Compliance with IHL. This process

104 *Ibid.*, p. 31.

105 Jutta Brunée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account*, Cambridge University Press, Cambridge, 2010, pp. 16, 62.

106 ICRC, *ICRC Prevention Policy*, Geneva, Publication Ref. 4019, 11 June 2010, pp. 5–6, available at: [www.icrc.org/eng/resources/documents/publication/p4019.htm](http://www.icrc.org/eng/resources/documents/publication/p4019.htm).

107 *Ibid.*, p. 9.

was established in Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent in 2011, which

*invites* the ICRC to pursue further research, consultation and discussion in cooperation with States and, if appropriate, other relevant actors, including international and regional organizations, to identify and propose a range of options and its recommendations to: i) ensure that international humanitarian law remains practical and relevant in providing legal protection to all persons deprived of their liberty in relation to armed conflict; and ii) enhance and ensure the effectiveness of mechanisms of compliance with international humanitarian law, and *encourages* all members of the International Conference, including National Societies, to participate in this work while recognizing the primary role of States in the development of international humanitarian law.<sup>108</sup>

The Initiative proceeds from the basis that existing mechanisms in the Geneva Conventions and AP I (such as Protecting Powers and the International Humanitarian Fact-Finding Mission) are not used, and no compliance processes exist in the IHL of non-international armed conflict. The four Geneva Conventions and their Additional Protocols lack a reporting and monitoring mechanism, in contrast to the mechanisms relating to landmines, cultural property and children and armed conflict.<sup>109</sup> The phrasing of Resolution 1 – “*invites*”, “*encourages*” – illustrates the consensual and voluntary nature of any tools for compliance which might be agreed upon as part of the consultation process. There are no plans to revisit treaty texts: any mechanism that might be agreed will be non-binding. Meetings of States, voluntary reports on the implementation of IHL, and thematic discussions are among the mechanisms currently under discussion.<sup>110</sup> If any of these are agreed, the 32nd International Conference of the Red Cross and Red Crescent will be the beginning of these initiatives.

Although any process agreed will be voluntary and non-binding, the agenda of the Strengthening Compliance Initiative is ambitious. While early meetings seem to have removed from the agenda discussions of legal opinions, country visits, urgent appeals and an early-warning function,<sup>111</sup> consultations have moved

108 Resolution 1, 31st International Conference of the Red Cross and Red Crescent, 2011, available at: [www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-1-2011.htm](http://www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-1-2011.htm) (emphasis in original).

109 ICRC and Government of Switzerland, *Background Document: Working Group Meeting on Strengthening Compliance with IHL, 8–9 November 2012*, Geneva, October 2012. See also ICRC and Government of Switzerland, *Background Document: Fourth Meeting of States on Strengthening Compliance with IHL*, Geneva, March 2015. All documents on the Initiative are available at: [www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-compliance.htm](http://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-compliance.htm).

110 ICRC and Government of Switzerland, *Third Meeting of States on Strengthening Compliance with International Humanitarian Law (IHL), 30 June–1 July 2014, Chairs’ Conclusions*. See also ICRC and Government of Switzerland, *Preparatory Discussion in View of the Fourth Meeting of States (2015)*, December 2014.

111 ICRC and Government of Switzerland, *Background Document: Fourth Meeting of States*, above note 109, pp. 17–18.

forward on periodic reporting, although discussions on fact-finding have been postponed until an institutional structure can be established.<sup>112</sup> Delegates are keen to avoid both politicization<sup>113</sup> and excessive use of resources.<sup>114</sup> Discussions on any involvement of non-State actors as a means of improving compliance in non-international armed conflicts will await the conclusion of the consultation phase. A review of the documents available to date shows that politicization is an important concern: State delegates would prefer that the discussions “operate on a non-contextual and non-conflict specific basis”.<sup>115</sup>

On the one hand, the options available to the Strengthening Compliance Initiative emphasize discussion and the sharing of practices. In the author’s view, this is consistent with modern, sophisticated approaches to IHL compliance, which show that simply disseminating IHL is insufficient to ensure respect for the law. On the other hand, the consensus-building approach has favoured a broad, perhaps superficial approach to IHL compliance. The current consultation process has no decision-making power, but a meeting of States has been supported as a “central pillar” of compliance initiatives, and “most States” agree that voluntary reporting on national practice in IHL, and a separate process for thematic discussion, “should be established”. A fact-finding function might be “added over time if there is State agreement”.<sup>116</sup> Views differ on whether or not civil society observers should be invited to the meetings of States, with some delegations opposing this as they fear the meetings might be “politicized”.<sup>117</sup> All views expressed are unattributed to particular States.

## **Towards a rubric for State reporting on military training in IHL**

The pending Strengthening Compliance Initiative has not yet considered in depth the potential impact of academic research. The discussion in this article is advanced as a set of insights which States and the ICRC might bear in mind as discussions continue. In particular, if a State reporting mechanism is agreed, a rubric which synthesizes academic and practitioner research on IHL training and compliance could help States avoid a simple, superficial approach to reporting their practice in relation to military instruction in IHL – a flaw found in some State reports in the Compliance Mechanism established under the CCW.<sup>118</sup> Enriched, substantive discussion is appropriate for any voluntary mechanism which might be agreed by the Strengthening Compliance Initiative. Research-led

112 ICRC and Government of Switzerland, *Third Meeting of States*, above note 110, pp. 2, 5.

113 *Ibid.*, pp. 8, 10, 13.

114 *Ibid.*, p. 3.

115 *Ibid.*, p. 4.

116 ICRC and Government of Switzerland, *Background Document: Fourth Meeting of States*, above note 109, p. 6.

117 ICRC and Government of Switzerland, *Third Meeting of States*, above note 110, p. 13.

118 United Nations Office at Geneva, Convention on Certain Conventional Weapons, Compliance Annual Reports Database, available at: [www.onug.ch/80256EE600585943/\(httpPages\)/E0339F1FE92C35FBC12573E900351CD5?OpenDocument](http://www.onug.ch/80256EE600585943/(httpPages)/E0339F1FE92C35FBC12573E900351CD5?OpenDocument).

parameters could enable more fruitful sharing of best practice and new innovations as they evolve. An informative template for State reports could also address States' concerns about the costs and administrative burden of preparing State reports, as reports prepared under this rubric would be standardized and the process streamlined.

The analysis above suggests that a rubric for State reports on effective IHL training might include the following questions, each of which might be usefully discussed at a collaborative workshop of States, researchers and ICRC representatives prior to being agreed:

1. What are the educational approaches adopted to instruct members of the armed forces in IHL? Are these predominantly classroom-based, or a blend of classroom and practical instruction? How are these adapted to soldiers' rank and the range of situations they are likely to face? How is literacy taken into account?
2. How does IHL instruction address future behaviour on operations? Does IHL instruction for officers include the discussion of scenarios? Is IHL instruction supplemented by the use of technology, and/or by distributed simulation sites?
3. How is norm internalization addressed? What evaluation tools are used within the State to test soldiers' recall and understanding of IHL norms?
4. How does military culture and/or broader media discourse influence personnel's willingness to comply with the law?
5. To what extent is IHL integrated into "doctrine, education, equipment, training and sanctions" and into military decision-making throughout the command chain?

## **Next steps for qualitative and empirical research**

Interdisciplinary research is not currently included in this suggested rubric, but it can alert States to the risks of moral disengagement, false justifications of violations, and a misunderstanding of reciprocity undermining otherwise well-designed IHL training. As a next step, interdisciplinary researchers might find and test mechanisms which instil a good knowledge of IHL and a resistance to moral disengagement or justifications of unlawful conduct. At a later date, this author plans to conduct surveys and interviews of soldiers and officers in the British Army to ascertain their understanding of IHL and their attitudes towards compliance. Other researchers might test the impact of distributed simulation environments on soldiers' practical internalization of IHL norms, as compared to dry classroom instruction in IHL. More qualitative researchers might attempt to understand the impact of barracks culture and communities of practice on the design and implementation of IHL training, and to feed back their findings to military lawyers who organize IHL training programmes. There are ethical constraints on researchers who are "embedded" with the military or otherwise might be perceived as instruments of an armed force instead of independent

researchers. It is imperative that each of these studies be fully consistent with universities' and funding bodies' ethics review criteria, and that military interlocutors allow researchers to conduct their work without vetting the substance of their analysis prior to publication.

For different ethical reasons, quasi-experimental methods have a more limited role in testing the effectiveness of military IHL training.<sup>119</sup> Given the importance of IHL compliance, it would be unethical to divide soldiers between an experimental group which receives a form of IHL training thought to be effective, and another, control group that receives an incomplete or rudimentary form of IHL instruction. However, quasi-experimental studies which compare already-present differences in practice (e.g. between regiments or different training sites) would not present these ethical concerns. Quasi-experimental studies might show the influence of barracks discourse on IHL survey responses more clearly than interview data. These studies would form part of the burgeoning literature which applies empirical or political science methods to international law.<sup>120</sup> With appropriate ethical approval, these methods are ideally suited to studying the influence of IHL training on arms bearers' capacity and willingness to comply with the law, and the risks of barracks culture or discourses of "othering" that might undermine IHL training. A rigorous interdisciplinary approach will bring the body of literature on IHL training to maturity.

## Conclusion

The dissemination of international humanitarian law and its integration into programmes of military instruction and training were once assumed idealistically to promote compliance with and prevent violations of the law. While ignorance of IHL is one among several contextual factors found where violations lead to courts-martial or public inquiries, IHL training is necessary but insufficient to ensure respect for IHL. The treaty norm itself is simply stated and discretionary, giving little guidance to States on best practices in IHL training. Academic and practitioner reflections on IHL training built theory interstitially, with works emphasizing the importance of individual conscience, ethics and mission-specific flexibility, and of the need for repetition so that norms were internalized as second nature. These reflections were published in parallel to more numerous works on military ethics and social psychology in armed conflict, which showed *inter alia* that the aims of military training (to desensitize soldiers to killing, to create unquestioning obedience to the command chain, to consider enemy forces as "other") were antagonistic to the aims of training in IHL.<sup>121</sup> Only recently

119 Contrast the view of Adam S. Chilton and Dustin H. Tingley, "Why the Study of International Law Needs Experiments", *Columbia Journal of Transnational Law*, Vol. 52, No. 1, 2013, p. 173.

120 Gregory Shaffer and Tom Ginsburg, "The Empirical Turn in International Legal Scholarship", *American Journal of International Law*, Vol. 106, No. 1, 2012, p. 1.

121 R. Holmes, above note 12; B. Shalit, above note 12; J. Bourke, above note 12.



have interdisciplinary studies shown that knowledge of the law and attitudes consistent with a risk of violations can occur together.<sup>122</sup>

The ICRC has evolved a theory of integration that consists firstly of a notion that IHL be interpreted and then recur throughout a soldier's training and education cycle, being relevant to doctrine, equipment and sanctions;<sup>123</sup> and secondly of the idea that IHL should be integrated throughout the communicative structure of the military command chain.<sup>124</sup> The law requires that the stereotype of unthinking obedience to superior orders must be disrupted where there is doubt as to the lawfulness of an order; under the integration model, it must be possible for soldiers to clarify the lawfulness of an order with their commanding officer. Integration also emphasizes the continuous nature of IHL obligations, with reference to targeting, precautions and logistics: IHL is relevant to decision-making throughout an attack, not merely when a target is first selected. In integration, law is continuously relevant to operations and military decision-making, so IHL training cannot be a single, discrete classroom session on the Geneva Conventions. Integration shows real promise as a comprehensive compliance strategy for IHL, and fits within the ICRC's broader work on prevention.

The ongoing ICRC/Swiss Initiative on Strengthening Compliance with IHL is a separate development, and a range of possible voluntary processes is being discussed, including thematic reports, periodic State Party reports, and regular meetings of States.<sup>125</sup>

This article has synthesized academic and practitioner reflections on effective IHL training, and has argued that research can inform criteria for State reporting on IHL training, if voluntary reports are agreed as a mechanism for strengthening compliance with IHL. The article has suggested a rubric for State reports on effective military instruction in IHL, as a means of avoiding a "tick-box" exercise, while simultaneously addressing States' resource concerns. The suggested rubric would benefit from workshop discussion with representatives of States and the ICRC. To summarize, a rubric would bring State practice towards effective military training in IHL in two ways: first, the rubric would share research on IHL training with States, synthesizing insights which are currently scattered in the literature; and second, it would enable States to share best practice and future innovations on military training, using a streamlined, cost-effective tool.

Interdisciplinary research can inform policy-makers of the limits and potential of IHL training, and can add substantive depth to thematic discussions, if these are adopted by the Strengthening Compliance Initiative. Instead of simply acknowledging that IHL training is necessary (if insufficient) for compliance with the law, it is time to test its effectiveness, and to build mechanisms that facilitate best practice.

122 D. Muñoz-Rojas and J.-J. Frésard, above note 10.

123 ICRC, "Integrating the Law", above note 13.

124 ICRC, above note 14.

125 ICRC and Government of Switzerland, *Third Meeting of States*, above note 110.

# The International Committee of the Red Cross and the promotion of international humanitarian law: Looking back, looking forward

## **Marion Harroff-Tavel\***

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\* The opinions expressed in this article are those of the author and do not necessarily reflect those of the International Committee of the Red Cross. The author wishes to thank those people who contributed to this article by sharing their views, expertise and advice and by providing support in documentary research. She is particularly grateful to François Sénéchaud, who, when he was head of the Division for the Integration and Promotion of the Law at the ICRC, asked her to write this article; and François Bugnion, a member of the ICRC Assembly, for his support, critical feedback and insightful suggestions.

humanitarian law. She spent the last seven years of her career at the ICRC analyzing global trends in armed violence with the aid of a network of contacts in universities and strategic research centres. As political adviser responsible for analysing future trends in armed violence, she drew the attention of the ICRC's upper management and Assembly to emerging challenges.

## Abstract

*In a globalizing world marked by geopolitical upheaval, unprecedented threats to human security, new forms of violence and technological revolutions, particularly in the area of information technology, it is no simple task to raise awareness of international humanitarian law (IHL) applicable to armed conflict and ensure that warring parties comply with this body of law. This article traces the history of the International Committee of the Red Cross's (ICRC) work in promoting IHL from 1864 to the present, juxtaposing this history with important events in international relations and with the organization's (sometimes traumatizing) experiences that ultimately gave rise to innovative programmes. The article summarizes lively debates that took place at the ICRC around such topics as the place of ethics in the promotion of IHL, respect for cultural diversity in the various methods used to promote this body of law, and how much attention should be devoted to youth – as well as the most effective way to do so. The author concludes by sharing her personal views on the best way to promote IHL in the future by drawing on the lessons of the past.*

**Keywords:** international humanitarian law, history, dissemination, promotion, integration, implementation, education, prevention, culture, ethics.

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Throughout its history, the ICRC has demonstrated its utility and unique role in the context of armed conflict, even though this is not the only situation of violence that falls within its remit. The organization's real strength lies in the mirror effect on which it was founded:<sup>1</sup> its work in conflict situations to help people in distress derives from IHL, which it encourages belligerent parties to abide by; and this body of law in turn grows and develops by virtue of the observations made by the organization in the theatre of conflict. This mirror effect sets the ICRC apart in the humanitarian sphere.

The aim of this article is to describe the ICRC's unique experience in promoting IHL since the nineteenth century in the hope that it will be of use to others. Since the advent of international criminal justice, IHL has been invoked often in the media, in most cases in reference to serious violations of that body of

1 This image was borrowed from François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, 2nd ed., ICRC, Geneva, 2000, p. 301.

law. Governments, together with governmental and non-governmental organizations, refer to it to assess the behaviour of combatants, and they call on combatants to respect IHL. The military leaders of warring parties recognize the risks inherent in failing to train their troops in it; realizing that they may be called to account for their actions in a court of law, they put more of a priority on teaching IHL. Consequently, this body of law, which the ICRC has been promoting since its founding, is now more widely known and is defended by other entities. This is a positive development in a world in which IHL is often flouted and in which its very relevance is called into question.

To describe the ICRC's role in promoting IHL, it is first necessary to delineate the topic and then decide how to approach it.

This article only addresses the ICRC's work in the promotion of IHL,<sup>2</sup> its implementation<sup>3</sup> and its integration<sup>4</sup> into domestic law. It does not address dissemination of the Fundamental Principles of the International Red Cross and Red Crescent Movement,<sup>5</sup> nor does it describe efforts undertaken in this regard by the National Red Cross and Red Crescent Societies or the International Federation of Red Cross and Red Crescent Societies (IFRC).

Given the impossibility of summarizing more than 150 years of promoting IHL in a few dozen pages, this article discusses, in chronological order, the initiatives that the author, drawing on her knowledge and the experience she acquired during her professional career, deemed most important. The progression from one phase in the history of the promotion of IHL to the next is linked to events that affected the

- 2 In the past, the "promotion" of IHL referred to efforts undertaken to encourage States to ratify the treaties that they had signed or to adhere to them; the term has taken on a broader meaning over time. Some use it in place of the word "dissemination", which is now considered a little old-fashioned. In this document, the promotion of IHL covers any action aimed at encouraging familiarity with, understanding of and respect for these rules and their spirit. Marion Harroff-Tavel, "Promoting Norms to Limit Violence in Crisis Situations: Challenges, Strategies and Alliances", *International Review of the Red Cross*, No. 322, March 1998.
- 3 Implementation, a legal obligation of States, consists of transposing IHL into domestic law, for cases when international law is not directly applicable or to set out criminal sanctions in the event of violations. It may involve more than one government ministry.
- 4 The integration of IHL aims at creating mechanisms and proposing practical measures to ensure it is included in the training of armed forces and security forces and in the education of certain components of civil society, such as youth and academic circles. Because awareness of the law does not automatically lead to a change in behaviour and attitudes, practical guidelines must be given in order to put the law into practice. This terminology is no more than twenty years old. It is specific to the ICRC and, initially, was used mostly in the context of legal support provided to the army and police. Until recently, this type of work aimed at civil society was included in the meaning of the term "dissemination".
- 5 "Dissemination is the spreading of knowledge of IHL and of the Principles and ideals of the Movement so that they may be understood, accepted and respected; it is also intended to facilitate humanitarian work." The dissemination of IHL targets arms carriers as well as civil society. It is a legal obligation of States, which receive support from other entities, mainly the ICRC, the National Societies and the IFRC (the task of dissemination is included in their statutes to varying degrees). See ICRC and League of Red Cross and Red Crescent Societies, *Promotion of International Humanitarian Law and of the Principles and Ideals of the Movement: Dissemination – Guidelines for the '90s*, preparatory document for the 26th International Conference of the Red Cross and Red Crescent, reprinted in *International Review of the Red Cross*, Vol. 32, No. 287, 1992, p. 175. This conference was postponed *sine die* – see Yves Sandoz, "The 26<sup>th</sup> International Conference of the Red Cross and Red Crescent: Myth and Reality", *International Review of the Red Cross*, Vol. 35, No. 305, 1995.

ICRC and gave rise to new initiatives. The process of identifying the defining initiatives and contextualizing them is, of course, partly subjective. Still, this analysis could serve as a useful starting point for further academic research, as it draws on no more than a rapid and limited examination of source documents, interviews, books and articles.

The article concludes with the author's comments on the future of IHL promotion, informed by her missions to diverse conflict situations in such places as Colombia, Darfur, Rwanda, Uganda, Bosnia and Herzegovina, Kosovo, Chechnya, Abkhazia, Nagorno-Karabakh and Tajikistan.

## From 1863 to the First World War

The task of informing the public of the neutrality of both wounded soldiers and medical services can be traced to the first meeting, held on 17 February 1863, of the International Committee for Relief to the Wounded, the forerunner of the ICRC. Dr Théodore Maunoir put it this way: "It would be useful if the Committee 'kept agitating', if the expression might be allowed, for the adoption of our ideas by all, both high and low, by the rulers of Europe, no less than by the peoples."<sup>6</sup> The Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 22 August 1864 embodied Henry Dunant's idea that sick and wounded soldiers should be helped, regardless of their country of allegiance, but it contained no provision enjoining the States Parties to instruct their armies in the contents of the Convention. In 1869, the 2nd International Conference of the Red Cross, meeting in Berlin, rectified this oversight when it affirmed the need to "spread awareness of the articles of the Geneva Convention as much as possible, especially among soldiers."<sup>7</sup>

Also in 1869, Gustave Moynier, one of the founders of the ICRC and the main author of the Convention, began publication of the *International Bulletin of Red Cross Societies*; beginning in 1919 it was supplemented by the *International Review of the Red Cross*, which ended up replacing it. In addition to providing information and sharing new ideas, these publications served as a link among the

6 Original French text: "Il serait bon que le Comité entretînt une agitation, si l'on peut s'exprimer ainsi, pour faire adopter nos vues par tout le monde, en haut et en bas, chez les souverains de l'Europe, comme dans les populations." Transcript of the minutes of the first meeting of the International Committee for the Relief of Wounded Soldiers, 17 February 1863. English translation published in *International Review of the Red Cross*, No. 23, February 1963, pp. 63–65. The French original text can be found in "Comité international de Secours aux Blessés, Commission spéciale de la Société en faveur des Militaires blessés durant les guerres, Séance de la Commission du 17 février 1863", *Procès-verbaux des séances du Comité international de la Croix-Rouge, 1863–1914*, ed. Jean-François Pitteloud, with contributions from Caroline Barnes and Françoise Dubosson, Société Henry Dunant and ICRC, Geneva, 1999, p. 18.

7 ICRC translation. Original French text: "répandre autant que possible, spécialement parmi les soldats, la connaissance des articles de la Convention de Genève". "Relativement à la guerre sur terre", Resolution I, point 15, IIème Conférence internationale des gouvernements signataires de la Convention de Genève et des Sociétés et associations de secours aux militaires blessés et malades, Berlin, 22–27 April 1869, p. 248.

National Societies. Today, the *Review* remains an important vector for the promotion of IHL.

Despite Moynier's efforts to inform people of its existence,<sup>8</sup> the Geneva Convention had lost credibility by the end of the Franco-Prussian War of 1870–71. During that conflict, it was breached many times over, often due to the fact that soldiers and civilians alike were unaware of its content. Critics of the Convention claimed that an international treaty was not necessary to guarantee the neutrality of medical personnel, arguing that this could be accomplished through national regulations.

The International Committee refused to follow them down that path. In 1872, Moynier published a "Memo on the Creation of an International Judiciary Institution whose Purpose Would be to Prevent and Prosecute Violations of the Geneva Convention".<sup>9</sup> In it he argued that, since public opprobrium was not sufficient to prevent violations, sanctions were necessary for the Convention to be properly applied. This proposal was not followed up on immediately, but it did prefigure the Nuremberg trials of 1945 and the International Criminal Court.

The ICRC's efforts did eventually begin to pay off: in 1877, not only did Russia, in its war against the Ottoman Empire, instruct all its troops to comply with the Geneva Convention, but the Russian Red Cross Society printed a Commentary on the Convention that Pierre Boissier considered a "model of its kind".<sup>10</sup> The results, he said, were convincing: Turkish soldiers received the same care as Russian ones after being wounded.

A decisive step was taken in 1880. Moynier, aware of the paucity of military regulations in place at the time, came up with the idea of writing, under the auspices of the Institute of International Law that he had founded with other legal experts,<sup>11</sup> a manual on the laws of war on land meant for soldiers. In a forum where he held sway and could safeguard the Geneva Convention, he resurrected the idea of national regulations. The manual, which clearly and concisely lays out the principles that should guide the behaviour of soldiers, could be used as a model for the military manuals that States were called on to write and implement. It again addressed the issue of prosecuting violations, whose perpetrators were subject to criminal sanctions.<sup>12</sup> *The Laws of War on Land* or Oxford

8 To make the content more readily accessible, Gustave Moynier prepared a commentary on the Geneva Convention: *Droit des Gens—Étude sur la Convention de Genève pour l'amélioration du sort des militaires blessés dans les armées en campagne* (1864 et 1868), Librairie de Joël Cherbuliez, Paris, 1870.

9 ICRC translation. Original French text: 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.

10 Pierre Boissier, *History of the International Committee of the Red Cross: From Solferino to Tsushima*, Henry Dunant Institute, Geneva, 1985, p. 307. Established by the imperial family in 1867, the Russian Red Cross Society was originally named the Society for the Care of Wounded and Sick Soldiers.

11 The Institute of International Law, founded in 1873, plays a role both in the ongoing development of international law by establishing general principles applicable to that discipline, and in the progressive codification of those principles.

12 Before sanctions can be applied, the infractions have to be defined and identical provisions have to be incorporated in States' criminal codes so that soldiers understand the risk of violating the law; that was Gustave Moynier's reasoning. P. Boissier, above note 10, p. 480.

Manual<sup>13</sup> was sent to all the governments of Europe and America. Translated into several languages, including Chinese, it inspired a number of States to prepare their own military manuals and was the subject of commentaries published by legal experts and military officials in specialized journals. Still, the rules contained in the Oxford Manual had to be made known – and Moynier thought of this. The Preamble is clear in this regard, stating: “it is not sufficient for sovereigns to promulgate new laws. It is essential, too, that they make these laws known among all people.”<sup>14</sup>

In 1887, seven years after the Oxford Manual was published, during the 4th International Conference of the Red Cross held in Karlsruhe, the National Societies were encouraged to “spread awareness of the Geneva Convention internally”.<sup>15</sup>

The years around the turn of the century bore witness to the vitality of the Red Cross. This was a time of technological revolution – with innovations like the electric telegraph and the spread of railroads – that was arguably analogous to the dawn of the computer age. The ICRC played an active role at the Diplomatic Conference of 1906, which was convened to revise the Geneva Convention. At this conference, governments’ obligation to instruct their troops – especially protected personnel – in the provisions of the Convention and to inform the wider population of the Convention was codified for the first time in IHL.<sup>16</sup> The ICRC had overcome the headwinds impeding its work; it had been tested by several conflicts, which in the end demonstrated that the Geneva Convention did not interfere with military operations but did reduce loss of life.

The National Societies expanded their wartime and peacetime activities to a spectacular extent. The memo sent to the National Societies by Moynier on 15 March 1889 – entitled *Purpose and General Organization of the Red Cross (But et organisation générale de la Croix-Rouge)* – undoubtedly encouraged greater consistency in their flurry of initiatives without undermining their pioneering spirit or autonomy. In 1930 this work was renamed the *Handbook of the International Red Cross (Manuel de la Croix-Rouge internationale)* and became

13 *The Laws of War on Land* (Oxford Manual), adopted by the Institute of International Law at Oxford on 9 September 1880. See Dietrich Schindler and Jiri Toman (eds), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, Martinus Nijhoff, Boston, MA, and Leiden, 2004, pp. 35–48.

14 *Ibid.*, p. 35.

15 ICRC translation. Original French text: “répandre la connaissance de la Convention de Genève en leur sein”. 4th International Conference of the Red Cross, Point VIII, “*Mesures prises par les Sociétés pour répandre la connaissance de la Convention de Genève dans l’armée, dans les cercles particulièrement intéressés à son exécution et dans le grand public*”, Karlsruhe, September 1887.

16 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of 6 July 1906, Art. 26. Article 1 of Convention IV respecting the Laws and Customs of War on Land, signed at The Hague on 18 October 1907, only required the High Contracting Parties to give “instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention”. The Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, also signed at The Hague on 18 October 1907 and modelled on the 1906 Convention, was more restrictive in its Article 20: it called on the signing powers to take “the necessary measures for bringing the provisions of the present Convention to the knowledge of their naval forces, and especially of the members entitled thereunder to immunity, and for making them known to the public”.



the text that generations of delegates tasked with promoting IHL carried with them as they headed off into the field of combat and to foreign ministries.

From 1863 to the First World War, the foundations that continue to guide the promotion of IHL today were laid. These include governments' obligation to spread awareness of IHL among soldiers and the general populace; the need to make IHL accessible, to encourage States to enshrine the responsibility of promotion in domestic laws and regulations, and to put in place sanctions; and the responsibility of the National Societies to disseminate IHL's contents both internally and in public fora.

## From one World War to the next

The ICRC's main concern during this period was to inform as many people as possible of its work. In terms of IHL more specifically, the organization sought to ensure that it was properly applied during the war, and then to further strengthen it. On 21 September 1914, the ICRC called on all belligerents to give specific instructions to their army commanders in order to ensure that the "humane provisions" of the Geneva Convention of 1906 would be respected.<sup>17</sup>

At the end of the First World War, the organization was confronted with situations of violence within States. Indeed, the post-war years were marred by domestic insurrections: the Russian Civil War starting in 1917, the fall of the German Empire in 1918 and the Hungarian Revolution in 1919. It is therefore not surprising that the nagging question of Red Cross assistance for victims of civil wars was on the agenda of the 10th International Conference of the Red Cross, which took place in Geneva in 1921. Attendees at this conference, which set the stage for Red Cross involvement in cases of internal conflicts, expressed the desire that the National Societies and the ICRC "undertake intensive propaganda to create in all countries an enlightened public opinion, aware of the complete impartiality of the Red Cross".<sup>18</sup> This would be the "most effective safeguard possible against any violation of Red Cross principles in the event of civil war". The same International Conference encouraged the ICRC to "continue its supervision to ensure respect for the Geneva Convention and to intervene whenever necessary to ensure that its principles are applied".

Another important development during the post-war period was the ICRC's foray into university education. An international law school was founded in Paris, and Paul Des Gouttes was asked to teach a course on the Red Cross

17 André Durand, *History of the International Committee of the Red Cross: From Sarajevo to Hiroshima*, Henry Dunant Institute, Geneva, 1984, p. 49.

18 ICRC translation. Original French text: "s'engageant à faire une propagande intense pour créer dans tous les pays une opinion publique éclairée, connaissant la pleine impartialité de la Croix-Rouge". "Civil War" (Resolution XIV, Xth International Conference, Geneva, 1921), *Handbook of the International Red Cross and Red Crescent Movement*, 14th ed., ICRC, Geneva, 2008, pp. 1139–1141. Resolution IX of the 14th International Red Cross Conference, held in Brussels in 1930, also implored the National Societies to "intensify their propaganda" ("intensifier leur propagande"). At the 15th International Red Cross Conference in Tokyo in 1934, the role of the League in this matter was set out in Resolution VII.

there in 1922. It was the first time such an invitation had been made by a law school. Red Cross law was also taught at the Hague Academy in 1925 and 1927. It was not until the end of the Second World War, however, that the ICRC petitioned law schools to include such courses in their curricula.<sup>19</sup>

The ICRC's efforts in the academic realm are unsurprising. In the 1920s, after a years-long World War, the idea of updating the 1906 Convention garnered much enthusiasm. The specific question of promoting IHL was mentioned in Article 27 of the Geneva Convention of 27 July 1929, which reaffirmed the High Contracting Parties' obligation to take the "necessary steps to instruct their troops, and in particular the personnel protected, in the provisions of the present Convention, and to bring them to the notice of the civil population".<sup>20</sup>

The two Red Cross International Conferences that preceded the outbreak of the Second World War – held in Tokyo in 1934 and London in 1938 – were for the Movement an opportunity to assert three core beliefs against a backdrop of crisis and expectations of another global conflict.<sup>21</sup> The first belief was that young people should be familiar with the principles underpinning the Geneva Convention and the Red Cross.<sup>22</sup> The ICRC and the League of Red Cross Societies, which had been asked in Tokyo to prepare a manual for children between the ages of 10 and 14, were congratulated in London for the collection of readings for young people that they had written.<sup>23</sup> The second belief had to do with States' responsibility to incorporate IHL into domestic legislation on the basis of a collection put together by the ICRC. For this purpose, National Societies were expected to "study the laws of their country, compared with other countries' domestic laws, in order to draw the attention of their respective Governments to any gaps in their laws".<sup>24</sup> The third belief related to the Red Cross's teaching role – a task with both a practical and a moral component – which was included in a resolution.<sup>25</sup>

19 A. Durand, above note 17, pp. 132–133. Contacts with academia at this time were occasional and *ad hoc*. The first ICRC delegate assigned to work with academia was appointed in 1997.

20 Protected personnel are to be understood as "medical, administrative and transport staff and chaplains" ("sanitaires, personnel d'administration ou conducteur, aumôniers"), who must respect the Conventions in exchange for the privileges and immunity they enjoy. Paul Des Gouttes, *Commentaire de la Convention de Genève du 27 juillet 1929*, ICRC, Geneva, 1930, p. 193.

21 This backdrop included the economic depression of the early 1930s, the Chaco War (1932–35), the Second Italo-Ethiopian War (1935–36), the Spanish Civil War (1936–39), the Second Sino-Japanese War (1937–39) and the annexation of Austria by Hitler (1938). The ICRC had serious financial problems in 1938.

22 "Enseignement à la jeunesse des principes de la Convention de Genève et de la Croix-Rouge", Resolution IX, 15th International Conference of the Red Cross, Tokyo, 1934.

23 "Children's History of the Red Cross", Resolution XXIII, 16th International Conference of the Red Cross, London, 1938.

24 ICRC translation. Original French text: "à l'étude de la législation de leur pays, comparée avec les autres législations nationales, aux fins d'attirer l'attention de leurs Gouvernements respectifs sur les lacunes éventuelles de leur législation". "Recueil de textes relatifs à l'application de la Convention de Genève", Resolution XL, 15th International Conference of the Red Cross, Tokyo, 1934.

25 "La Croix-Rouge éducatrice", Resolution XXVI, 16th International Conference of the Red Cross, London, 1938.

What are the key points to take away from the interwar years? Apart from periods of major conflict, the ICRC was still modest in terms of size and financial wherewithal, and depended on the services of volunteers. Its main focus was on spreading awareness of its work, and with this in mind it expanded the scope of “target groups” for its dissemination efforts. On 17 April 1945, the Legal Division was created under the leadership of Jean Pictet.

## Aftermath of the Second World War

During the Second World War, the ICRC’s energies were focused on the Central Agency for Prisoners of War, visits to prisoner-of-war and civilian internment camps, and its relief work.<sup>26</sup> Still, the ICRC kept busy in the area of dissemination. It created an Information Division near the end of the war to produce films, pamphlets, press releases, exhibitions and radio broadcasts. This division’s staffing was reduced by 80% in 1946 owing to a shortage of resources, but the ICRC was still able, ten years after the London Conference, to publish a pamphlet called *Inter arma caritas* in five languages,<sup>27</sup> produce a film on this topic, and publish Jean-Georges Lossier’s book *Fellowship: The Moral Significance of the Red Cross*<sup>28</sup> and an English-language supplement to the *Review*. Together with the League, it incorporated the new Conventions into the *Handbook of the International Red Cross (Manuel de la Croix-Rouge internationale)*, which it reissued and published also in English and Spanish. These were substantial undertakings for an organization that, in 1948, had thirty-four delegations staffed by seventy-five delegates, over half of whom were volunteers (in comparison, the ICRC today has approximately 13,400 delegates in more than eighty countries).

We can now look at the immense task of revising and codifying IHL, which the ICRC had begun even before the Second World War ended, at a time when it was fighting “for its survival” and “on the verge of bankruptcy”.<sup>29</sup> The Geneva Conventions of 1949 clarified certain aspects of the 1906 and 1929 Conventions. They also added the obligation of the High Contracting Parties to disseminate the 1949 Conventions as widely as possible, in times of war and peace, in “programmes of military and, if possible, civil instruction”.<sup>30</sup> The Commentary

26 One activity of the ICRC should be mentioned here: the legal assistance that it provided to prisoners of war who were subject to criminal sanctions in an effort to ensure they were accorded at least the minimum rights provided by the 1929 Convention. When it came to prosecuting violations of the law, the ICRC wanted to ensure that this was not done in a spirit of vengeance or reprisal.

27 Frédéric Sordet, *Inter Arma Caritas: The Work of the International Committee of the Red Cross During the Second World War*, Geneva, ICRC, 1973.

28 Jean-Georges Lossier, *Fellowship: The Moral Significance of the Red Cross*, Geneva, 1948.

29 ICRC translation. Original French text: “pour sa survie” and “au bord de la banqueroute”. Catherine Rey-Schyr, *De Yalta à Dien Bien Phu: Histoire du Comité international de la Croix-Rouge, 1945–1955*, Georg, Geneva, 2007, Foreword by François Bugnion, pp. 7–9.

30 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art. 47; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Art. 48;

on these articles points out that this obligation was “general and absolute” and that the expression “if possible” did not make it optional.<sup>31</sup> It was included because, in some countries, civilian instruction is not under the authority of the central government.

States are also required to adopt the legislative, administrative and regulatory measures necessary to ensure that the Geneva Conventions are respected. They must establish “effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article”.<sup>32</sup> This was a major step forward.<sup>33</sup>

## The Cold War and decolonization

What did the ICRC do during the Cold War and the decolonization period to promote IHL, apart from the codification efforts mentioned above? It is necessary to place the discussion in context. When the First World War ended, the ICRC faced the challenge of civil wars; after the Second World War, the challenge was wars of independence. These included the Indochina War, the struggle for independence in the Dutch East Indies, fighting in the wake of the partition of British India, and the decolonization of the British and French mandate territories in the Middle East and North Africa. The ICRC’s theatre of operations had shifted from Europe to so-called “third world” States that had adhered to the Geneva Conventions by reaffirming their country’s treaty commitments. Human rights law came into play internationally with the adoption of the Universal Declaration of Human Rights in 1948, followed by the International Covenants in 1966.<sup>34</sup> In a bipolar world with an intensifying arms race, ideological enmity was near its peak. Communist bloc countries considered IHL to be a form of superstructure that expressed the will of the ruling class. It is not known what concrete initiatives the Soviet Union undertook to instruct its troops in the Geneva Conventions during that period. Marxist doctrine, based on class struggle, rejected the concepts of neutrality and impartiality. The trauma caused by the

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. 127; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 144. The wording in the four articles is nearly identical. Article 127 of GC III adds that any “military or other authorities, who in time of war assume responsibilities in respect of prisoners of war, must possess the text of the Convention and be specially instructed as to its provisions”. The commentary on this article mentions the groups to be targeted for civilian instruction: National Societies, the press and law faculties. Article 144 of GC IV also mentions dissemination to police forces “who in time of war assume responsibilities in respect of protected persons”. The Commentary on this article states that the Red Cross has a significant role to play in the area of dissemination.

31 Jean Pictet (ed.), *The Geneva Conventions of 12 August 1949: Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary*, with contributions by Frédéric Sordet (collab.) et al., ICRC, Geneva, 1952, pp. 348–349.

32 GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146.

33 F Bugnion, above note 1, pp. 1081–1083.

34 International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, adopted by the UN General Assembly on 16 December 1966.

atrocities committed in the Soviet Union during the Second World War was a sensitive topic, and the ICRC, which had been unable to protect Soviet prisoners held by the Germans, was widely mistrusted. Promoting IHL in this context was quite a challenge.

### The post-war period: Priorities other than the dissemination of IHL

At the start of the Cold War, the task of spreading awareness of IHL does not appear to have been a priority. In the first place, confrontations between the superpowers were played out in third-world conflicts, where the United States and the Soviet Union maintained a degree of influence over their satellite countries dependent on their support. The ICRC hoped that the United States would use this influence to keep an eye on the fighting. The Soviet Union and its allies justified their behaviour by invoking a reservation they had entered in regard to the Third Geneva Convention of 1949. This reservation stated that a prisoner of war who had been convicted of war crimes or crimes against humanity could be excluded from the protections afforded by the Convention.<sup>35</sup> Certain facets of the Convention had thus been stripped of their substance, but at least the reference to IHL remained. The ICRC then focused its attention more on strengthening this body of law and protecting civilians. The organization was still hampered by modest financial resources, and its legal staff were busy preparing commentaries on the Geneva Conventions.

### New Delhi, 1957: Growing interest in teaching young people

The 19th International Conference of the Red Cross, held in New Delhi in 1957, encouraged the ICRC to pay more attention to the youth of the day, perhaps in view of the demographic composition of the theatres of hostilities and the chilling of East–West relations caused by the Cold War. The Conference proposed several measures meant to “educate the young generation in the spirit of the Geneva Conventions”.<sup>36</sup> Among these were the inclusion in school curricula of the core principles of the Geneva Conventions; efforts by the League, with the ICRC’s support, to include the topic “The School and the Publicising of the Geneva Conventions” in an upcoming conference on public education being organized by the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the International Bureau of Education; and the production of films on the Geneva Conventions meant for young people. The Conference felt that it was necessary to instil in youth “the ideal of peace and respect for others” and that “the Geneva Conventions constitute a sound basis for social education”.<sup>37</sup>

35 F. Bugnion, above note 1, pp. 719–724; Claude Pilloud, “Reservations to the Geneva Conventions of 1949”, *International Review of the Red Cross*, Vol. 16, No. 180, 1976, p. 115.

36 “Young People and the Geneva Conventions”, Resolution XXIX, 19th International Conference of the Red Cross, New Delhi, 1957.

37 “Practical Means of Spreading Knowledge of the Geneva Conventions among Young People”, Resolution XXX, 19th International Conference of the Red Cross, New Delhi, 1957.

## Early 1960s: A dissemination plan, a new dynamic

In the 1960s, the ICRC adjusted its focus. It planned to fulfil its responsibility set forth in its statutes to work “for the continual improvement and diffusion of the Geneva Conventions”,<sup>38</sup> to which all countries in the world were party. Increasing awareness of the dangers that the Cold War and the arms race posed for humanity made people more amenable to the ICRC’s message. It was once again possible to talk about war. The ICRC had its work cut out for it, however, since according to Jean Pictet, only the Federal Republic of Germany had made a true effort to disseminate the Conventions.

The ICRC began by adopting a plan for disseminating the Geneva Conventions on 5 March 1959. It identified three target groups: the army, the medical corps and the public. This latter group was further divided into three categories: youth, college students and the general public (officials of National Societies and civil defence, police corps and all government officials who, in the event of an armed conflict, would have to apply the Conventions). Numerous activities were planned which, depending on the target group, ranged from standard activities (books, classes, instruction manuals, films, radio broadcasts, training courses) to more original ones (including cartoons, a fictional story of a family protected by the Geneva Conventions, and real-life stories of people protected by the Conventions). Professor Jacques Freymond pitched another idea: a four-lesson course on the Geneva Conventions, to be given at the Graduate Institute of International Studies in Geneva.<sup>39</sup> The ICRC also recognized the importance of improving its relationship with the press, which saw the organization as uncommunicative.

## Congo, Biafra, Yemen: Confronting ignorance of IHL

The ICRC was aware of its lack of familiarity with non-European countries despite having engaged in some limited work on other continents. It realized that “eight years after the end of the Second World War, it was still beholden to a mind-set and organization that had been imposed on it by the circumstances of the war”.<sup>40</sup> That had to change.

Between 1958 and 1962, decolonization in Africa and the ICRC’s work on that continent in conflict situations, including in Congo, made two things clear: the ICRC knew next to nothing about these countries, and IHL and the Red Cross were

38 Statutes of the International Red Cross, adopted by the 18th International Conference of the Red Cross, Toronto, July–August 1952, Art. VI, para. 7.

39 Responsibility for teaching this course has been taken over by the Geneva Academy of International Humanitarian Law and Human Rights, which is jointly managed by the Graduate Institute of International and Development Studies and the University of Geneva.

40 ICRC translation. Original French text: “huit ans après la fin du deuxième conflit mondial, il vivait encore selon une optique et avec une organisation qui lui avaient été imposés par les circonstances de la guerre”. ICRC, “Rapport du groupe de travail No. I présenté à l’assemblée plénière du CICR”, 11 March 1954, Archives du Comité International de la Croix-Rouge, Microfilms, procès-verbaux, C 03.

practically unknown quantities there.<sup>41</sup> So the ICRC undertook two initiatives. First, it created a general delegation for subequatorial Africa, one of whose tasks was to spread awareness of IHL. Second, it began to train African interns, established contact with African circles in Geneva, and reissued a culturally adapted booklet on the Geneva Conventions with the help of African artists. These decisions were driven by principles in vogue at the time: decentralization of its work, humanitarian diplomacy and sensitivity to cultural diversity.

The North Yemen Civil War (1962–70), the final years of which overlapped with the Nigeria–Biafra conflict, helped usher in this change in paradigm. Yemen had existed in total isolation, and the people were utterly unaware of the Geneva Conventions. Certain local traditions (such as punitive mutilations) were not permitted under IHL.<sup>42</sup> This conflict brought the ICRC face to face with the effects wrought by ignorance of existing norms, and it had a major emotional impact within the organization. The ICRC had to do something.

## The ICRC reorganizes in line with its ambitions

What did the ICRC do concretely in the following years? For one, it continued to publish for the purposes of disseminating IHL. It also modified its internal structure to support its ambitions: it strengthened its press division and, in 1970, created a department in charge of external growth, and a dissemination division. This reorganization at headquarters was accompanied by the setting up of regional delegations in Latin America, Africa and Asia in the early 1970s. The ICRC also involved the National Societies in its dissemination efforts,<sup>43</sup> while reminding governments of their responsibilities as well.<sup>44</sup>

All these efforts ran parallel to a growing interest at the United Nations (UN) in raising awareness among troops of the principles and spirit of the Geneva Conventions and to dissemination-related resolutions adopted by the International Conferences of the Red Cross held in Vienna (1965), Istanbul (1969) and Tehran (1973).<sup>45</sup> These efforts would be further supported by two training institutes: the International Institute of Humanitarian Law, founded in

41 Françoise Perret and François Bugnion, *De Budapest à Saigon: Histoire du Comité international de la Croix-Rouge, 1956–1965*, ICRC and Georg, Geneva, 2009, pp. 319–320.

42 *Ibid.*, p. 548.

43 On 26 August 1970, the first circular on dissemination was sent to the National Societies, suggesting that they take part in a global dissemination campaign and share their experiences with the ICRC. In January 1971, a first report on dissemination was sent to the National Societies, and on 30 March 1971 a questionnaire on university education in IHL was sent to the National Societies and universities. In 1972, a university curriculum on IHL and a dissemination action plan were sent to the National Societies, and the issue of dissemination was systematically included in the *International Review of the Red Cross*. In October 1976, the first IHL training course for National Society officials was given at the Henry Dunant Institute.

44 On 15 August 1972, the first memorandum on dissemination was sent to governments.

45 “Implementation and Dissemination of the Geneva Conventions”, Resolution XXI, 20th International Conference of the Red Cross, Vienna, 1965; “Dissemination of the Geneva Conventions”, Resolution IX, 21st International Conference of the Red Cross, Istanbul, 1969; “Implementation and Dissemination of the Geneva Conventions”, Resolution XII, 22nd International Conference of the Red Cross, Tehran, 1973.



San Remo in 1970, and the Interamerican Institute of International Humanitarian Law set up in Bogotá in 1976 under the auspices of the Santo Tomas de Aquino University and the Columbian Red Cross. The ICRC could also count on the support of the Henry Dunant Institute in Geneva, which it founded together with the League of Red Cross Societies and the Swiss Red Cross in 1965.

## The 1975 Tansley Report: Dissemination as a factor for protection

While the 1960s saw the ICRC putting the foundations of dissemination into place, the 1970s was a time for internal challenges that ran parallel to the expansion of its dissemination work. These challenges culminated in the Tansley Report of 1975. The ICRC had been deeply affected by the controversy surrounding the interruption of its work in the Nigeria–Biafra conflict;<sup>46</sup> while carrying out major relief operations, it became aware of the presence of hundreds of public and private humanitarian initiatives. The ICRC and the League, in conjunction with the National Societies, commissioned a study into the role of the Red Cross by a team of researchers headed by Donald Tansley.<sup>47</sup> The team visited forty-five countries and produced a series of reports. The dissemination aspect of the study was summarized as follows: “Dissemination of the Geneva Conventions is a difficult task, but even there, much more could be done.”<sup>48</sup> In a comment that is significant to anyone who knows the internal dynamics of the ICRC, Tansley considered dissemination to be a form of indirect protection: “Red Cross protection is interpreted by the ICRC not only in the minimum sense of deterring bodily harm but also at times in the maximum sense of developing an individual’s qualities as a human being. Thus the ICRC facilitates educational programmes.”<sup>49</sup> The Tansley Report concluded with a series of recommendations, some of which had to do with the promotion of IHL:

- strengthen the Red Cross’s international network, which, as a pressure group vis-à-vis governments, was one of its main assets;
- depend more on the League and the National Societies to help people understand the usefulness of the law and provide additional information on topics including patterns of violence, detention conditions and the use of weapons;
- “simplify the law, in information terms if not in legal terms”, since there are, “after all, a limited number of people in the world who are able to interpret it in its present form”;<sup>50</sup> and

46 Simone Delorenzi, *Contending with the Impasse in International Humanitarian Action: ICRC Policy Since the End of the Cold War*, ICRC, Geneva, 1999, pp. 22–23.

47 In 1968, Donald Tansley was appointed vice-president of the Canadian International Development Agency. From 1973 to 1975, he examined the role of the International Red Cross.

48 Donald D. Tansley, *Final Report: An Agenda for Red Cross – Re-appraisal of the Role of the Red Cross*, Henry Dunant Institute, Geneva, 1975, p. 23.

49 David P. Forsythe, *Re-appraisal of the Role of the Red Cross*, No. 1: *Present Role of the Red Cross in Protection*, ed. Joint Committee for the Reappraisal of the Role of the Red Cross, Henry Dunant Institute, Geneva, 1975, p. 49.

50 D. D. Tansley, above note 48, p. 69.

- adopt a regional approach to conveying information, which “could take into account cultural values and practices, as well as associating Red Cross values more directly with the values found in a particular culture”.<sup>51</sup>

That same year, Jacques Moreillon took over as head of the Department of Doctrine and Law. Drawing largely on the Tansley Report, to which the ICRC would eventually respond,<sup>52</sup> he devoted a dissemination policy and significant resources to the matter. He was also instrumental in further developing the organization’s official policies and historical research, and this helped strengthen the identity of the organization, whose responsibility was to promote IHL.

## 1977: From the Diplomatic Conference to the Warsaw Seminar

In many ways, 1977 was a pivotal year for the dissemination of IHL: the Additional Protocols to the Geneva Conventions, which reaffirm and extend the obligation of States to disseminate IHL, were adopted;<sup>53</sup> a draft action plan was set out in Resolution 21 of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts;<sup>54</sup> the first regional seminars, in Warsaw for Europe and Yaoundé for Africa, were organized; and the 23rd International Conference of the Red Cross (held in Bucharest) reaffirmed the importance of dissemination.

### The Diplomatic Conference: Widening obligations

The Additional Protocols expand the High Contracting Parties’ obligation to disseminate the Geneva Conventions and the Additional Protocols as widely as possible. This represents incontestable progress in the realm of non-international armed conflicts, since Article 3 common to the four Geneva Conventions does not mention this obligation. Additional Protocol I, applicable in international armed conflicts, calls for armed forces to be instructed in the Geneva Conventions and encourages the civilian population to study them (as in 1949, a flexible formulation was needed in view of the decentralized educational systems in federal states). It stipulates: “The High Contracting Parties and the Parties to

51 *Ibid.*, p. 69.

52 ICRC, *The ICRC, The League and the Report on the Reappraisal of the Role of the Red Cross*, Geneva, 1979, offprint regrouping content from several issues of the *International Review of the Red Cross* from No. 204, June 1978, to No. 208, February 1979.

53 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 83; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978), Art. 19.

54 *Draft Resolution CDDH/438 on the Dissemination of Knowledge of International Humanitarian Law Applicable in Armed Conflicts*, Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977), 55th plenary meeting, 7 June 1977, Vol. 7, p. 181.

the conflict shall without delay take all necessary measures for the execution of their obligations under the Conventions and this Protocol.”<sup>55</sup> Additional Protocol I also includes concrete measures: qualified personnel must be trained, in peacetime and with the support of the National Societies, to facilitate the implementation of the Conventions and the Protocol; legal advisers must be available to the armed forces to assist in the implementation of the law and in the training of those forces; commanders must ensure those under their control are aware of their obligations under the Conventions and the Protocol; and the High Contracting Parties must inform each other, as quickly as possible, of the laws and regulations they adopt to implement the Protocol.<sup>56</sup> Today, making legal advisers available to military commanders, training the armed forces and teaching this body of law to the civilian population are considered customary rules that also apply in non-international armed conflicts.<sup>57</sup>

The Diplomatic Conference also declared “a state of emergency” (“un état d’urgence”) in reference to dissemination<sup>58</sup> – a call heeded by Jacques Moreillon, then director of IHL at the ICRC. His initiatives would underpin new developments in the promotion of this body of law. Resolution 21 lays out an action plan that includes training qualified personnel, incorporating courses in university curricula and teaching the principles of humanitarian law in secondary schools. It encourages the ICRC to publish materials, circulate information and organize seminars and courses on IHL. The National Societies are called on to provide support in these matters to their respective governments.

## Poland: The promotion of IHL as a vector of East–West dialogue

The conferences of experts that met from 1969 to 1974 and the Diplomatic Conference held from 1974 to 1977 gave rise to an East–West dialogue that paved the way for the adoption of the Additional Protocols. The ICRC then had the idea of continuing this dialogue and cooperative effort on each side of the Iron Curtain and orienting them toward the dissemination of IHL. One country in particular – Poland – could serve as the framework for this dialogue. Poland had seen and was thankful for the ICRC’s involvement in the process of compensating victims of pseudo-medical experiments conducted in the concentration camps under the Nazi regime, and it was hungry for contacts beyond the Soviet orbit. The Polish Red Cross enjoyed relative independence. Friendships had developed over the course of eight years of negotiations between the ICRC’s legal experts and important figures in the Polish academic milieu. The first European seminar on the dissemination of the Geneva Conventions was

55 AP I, Art. 80, para. 1.

56 AP I, Arts 6, 82, 87, 84.

57 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, Rules 141–143, pp. 500–508.

58 Sylvie-Stoyanka Junod, “La diffusion du droit international humanitaire”, in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC and Martinus Nijhoff, Geneva, 1984, p. 365.

therefore held in Warsaw, in 1977. It produced three general conclusions: dissemination is primarily a duty of States; dissemination should not be limited to the Geneva Conventions but should also include the Fundamental Principles “in the general concept of the individual’s responsibilities towards others”; and dissemination cannot be dissociated from the encouragement of a spirit of peace.<sup>59</sup>

## Dissemination as a factor for peace?

The key debate at the time concerned the issue of peace. There were two schools of thought: one, supported by the Soviet bloc countries (which at the time held the advantage in terms of conventional weapons, while the West held the nuclear edge), felt that the Red Cross should weigh in on current issues such as disarmament and new weapons development and condemn aggressors, while the other sought to avoid using the issue of peace to politicize the Red Cross. The question of dissemination did not escape the controversy – does it contribute to peace? José Barroso, chairman of the League’s Board of Governors, noted at the International Conference of the Red Cross held in Tehran in 1973, “it strikes me as contradictory that the Geneva Conventions should be disseminated as a factor for peace when they deal solely with the protection of war victims”; to which Jean Pictet replied, “I think that whenever in wartime men agree not to kill each other, agree to care for each other and to protect each other, they accomplish an act of peace.”<sup>60</sup> At the same time, the Conference, in a unanimous resolution, said it was “convinced that, in a world torn by violence, there is a pressing need for a widespread dissemination of and instruction in the Geneva Conventions, as an expression of basic Red Cross principles, and hence a factor for peace.”<sup>61</sup> The Bucharest Conference confirmed this view, stressing that dissemination should never “make war appear ‘acceptable’”.<sup>62</sup> This was a welcome message in countries with authorities that refused to recognize being in a situation of conflict, and in societies that wished to put war behind them.

## The practical scope of this normative work: The ICRC in Poland under martial law

The ICRC’s commitments and activities in the following years are too numerous to discuss in detail. For anyone wondering about the practical impact of these standards, resolutions, seminars and action plans, one particular success of the

59 ICRC translation. Original French text: “dans le concept général des responsabilités de l’individu vis-à-vis de ses semblables”. 23rd International Conference of the Red Cross, Bucharest, “European Seminar on Dissemination of Knowledge of Geneva Conventions, Warsaw, 21–30 March 1977”, report presented by the ICRC and the Polish Red Cross, June 1977, p. 6-V.

60 Report of the 22nd International Conference of the Red Cross, Tehran, 8–15 November 1973, p. 71.

61 “Implementation and Dissemination of the Geneva Conventions”, Resolution XII, 22nd International Conference of the Red Cross, Tehran, 1973.

62 “Dissemination of Knowledge of International Humanitarian Law Applicable in Armed Conflicts and of the Fundamental Principles of the Red Cross”, Resolution VII, 23rd International Conference of the Red Cross, Bucharest, 1977.

ICRC is worth mentioning. At the end of 1981, the Polish government decreed martial law and arrested the leaders of Solidarnosc. The country was totally cut off from the outside world, and dire rumours were circulating. In this tense situation, ICRC delegates were able to enter the country, cross the barricades and visit the “internees”. Furthermore, the government did not lay a finger on the officials of the National Society. This success was attributed to the dissemination efforts that had been conducted in the country in the preceding years. The ICRC’s interlocutors, well aware of the organization’s objectives and of the consequences of a constructive response, did not have to think twice.

## **1978 to 1990: The rise in dissemination after the Nyamaropa tragedy**

The Nyamaropa tragedy, in 1978, was the catalyst for a major dissemination effort that went well beyond the scope of Africa. Three ICRC delegates were brutally murdered in Rhodesia – the victims of ignorance – while they were driving a vehicle clearly displaying the Red Cross emblem. This sent the ICRC into a state of shock. The organization responded by putting into place several measures to encourage the warring parties to respect IHL and reduce the risk of such crimes recurring.

### **The information campaign in Rhodesia**

The Department of Operations and the Press and Information Division launched a massive information campaign in Rhodesia after consulting sociologists, professors, journalists and other members of civil society. They were advised to draw on the talents of African communication specialists in order to send a simple but meaningful message to the political leaders, guerrilla leaders and refugees in the camps and in rural areas, including children. Communication teams were set up in Rhodesia, Botswana and Zambia. Numerous channels and means of communication were employed, including television, radio, posters and cartoons. Afterwards, no faction displayed any hostility towards the ICRC. The success of this campaign led the ICRC to replicate it in the Philippines, Angola and El Salvador.<sup>63</sup> The principle of sending a specialized delegate to crisis situations became standard. On-the-spot dissemination (*la diffusion à chaud*) was born. It would quickly become an integral part of all the ICRC’s major operations and would be specifically mentioned in the fundraising appeals that the organization sent to the international community.

63 Jenny Griswold, “A Communication Campaign Designed to Solve a Critical Humanitarian Problem”, Case Study No. 1726, *PR News*, ISSN 0033-3697; ICRC, *Red Cross Information in Areas of Conflict: Analysis of the Information Campaign in Southern Africa 1978–1980, Recommendations for Similar Activities in Africa in the Future*, Geneva, 1981.

In 1982, the two approaches – on-the-spot dissemination and dissemination conducted away from the battlefield (*la diffusion à froid*) – were merged following a restructuring. This offered an advantage. Dissemination now had as much to do with the role of delegates and the nature of their work (some saw it as a “life insurance policy” for ICRC delegates) as with the essential principles of IHL and the protection of non-combatants. In the field, the task of delegates responsible for dissemination and communications was not always easy, however, and their work was often considered the poor child of the organization’s larger mission rather than as part of a comprehensive protection strategy.

### Dissemination seminars in the 1980s: The case of South America

Beginning in 1977 and throughout the 1980s, the ICRC ran numerous dissemination seminars in Eastern Europe, Africa, Asia and Latin America on Jacques Moreillon’s impetus and with his involvement.

The organization’s initiatives to raise awareness of IHL in South America are of particular interest. This continent represented a testing ground for the organization. This was a time when military dictatorships were highly wary of human rights and considered human rights defenders dangerous left-leaning activists. The ICRC was nevertheless able to convince members of the Argentine and Chilean militaries not only to participate in seminars on the theme of “Human Rights, International Humanitarian Law and National Security” (such as in Costa Rica and Colombia) but also to organize such events back home (in Argentina and Chile, for example).<sup>64</sup> While agreeing that the exigencies of national security (to use the military terminology) implied limitations on human rights, the ICRC insisted that these limitations could in no case infringe upon the baseline set forth in common Article 3, even in cases where humanitarian law did not apply.

### Action plans: Defining the “target groups”

More broadly, the ICRC decided on the need to clarify the strategic orientations of dissemination and translate them, with its partners in the Movement, into concrete objectives. Between 1978 and 1990,<sup>65</sup> the ICRC and the League came up with three action plans, in consultation with the National Societies. These plans had three main thrusts: encouraging States to accede to the Additional Protocols, conducting more in-depth research and publishing the results, and continuing to promote IHL and the Fundamental Principles.<sup>66</sup> These objectives were met: during this period the

64 It is worth mentioning the Inter-American Seminar on State Security, Human Rights and International Humanitarian Law, organized jointly by the ICRC and the Inter-American Institute of Human Rights, in San José, Costa Rica, in 1982. It was attended by representatives of the military and of National Societies and by researchers specializing in human rights, from across the continent. The ICRC also took part in seminars in Bolivia, Uruguay, Peru, Chile and Venezuela.

65 Action plans for the periods 1978–1981, 1982–1985 and 1986–1990.

66 Details on what was done in the 1980s are contained in the guidelines for the 1990s.

ICRC president issued five appeals to governments calling on them to adhere to the Protocols or to ratify them, and more than 170 missions for this same purpose took place. The main legal work was a Commentary on the Additional Protocols<sup>67</sup> – this was among 223 texts on IHL and/or the Fundamental Principles published by the ICRC, the League and the Henry Dunant Institute between 1975 and 1990. Dissemination projects targeted six specific groups: National Societies, armed forces, governments,<sup>68</sup> universities,<sup>69</sup> health-care personnel<sup>70</sup> and the mass media.

## Support for the National Societies enshrined in the 1986 Statutes

The ICRC allocated resources to its collaborative work with the National Societies. They were encouraged to appoint someone in charge of dissemination, and many of them received educational material, a financial contribution and training support. The ICRC also trained dissemination delegates of its own to provide support to the National Societies; at the end of 1983, four regional ICRC delegations were assigned one of these delegates. In 1987, in a first among National Societies, the Moroccan Red Crescent organized six seminars for the “target groups” identified in the Movement’s action plan.

The 1986 version of the Statutes of the International Red Cross and Red Crescent Movement, still in effect today, clarifies the roles of the respective entities:<sup>71</sup>

- the National Societies “disseminate and assist their governments in disseminating international humanitarian law; they take initiatives in this respect”;
- the ICRC’s role includes “to maintain and disseminate the Fundamental Principles of the Movement” and “to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflict”, a mission that was already set forth, in simpler form, in the 1952 Statutes;
- the League is to “assist the International Committee in the promotion and development of international humanitarian law and collaborate with it in the dissemination of this law and of the Fundamental Principles of the Movement among the National Societies.”

67 ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, 1987.

68 For this, the focus was on organizing training seminars for civil servants and diplomatic staff in different parts of the world, including in Geneva and New York for accredited UN diplomats.

69 The ICRC and the Polish Red Cross began the Warsaw summer course on IHL in 1981; the ICRC and the International Institute of Human Rights in Strasbourg started offering IHL seminars in 1982. The ICRC also ran conferences and produced publications.

70 Specialized publications were produced; the Medical Division, in cooperation with the University of Geneva and the World Health Organization, began the English-language course “Health Emergencies in Large Populations” in 1986; and in the field, training in first aid was provided to Afghan refugees on the border with Pakistan.

71 Article 9.3 of the Seville Agreement of 1997 on the Organization of the International Activities of the Components of the International Red Cross and Red Crescent Movement confirmed the ICRC’s “lead role” in this matter.



## Setting up integrated and decentralized training for the armed forces

At the start of the 1980s, the ICRC helped States, which were responsible for instructing their armed forces in IHL, by providing support to the courses given at San Remo in the form of a document known at the ICRC as the Mulinen Handbook.<sup>72</sup> The officers, once trained, were expected to introduce courses on IHL at the military schools and academies in their respective countries after adapting the course content to their needs and the national context. Most countries concerned requested financial aid from the ICRC (in the form of grants), which was quite costly.

The ICRC changed strategy in 1984. The courses at San Remo were being attended mainly by officers nearing the end of their careers, and the heads of delegation pressed hard to have the ICRC give courses in the military schools and academies of the countries in which they were assigned. The goal from that point forward was to train officers who were in direct contact with the military, in the upper command.<sup>73</sup> The students at these courses would eventually hold command posts themselves and be responsible for training their units. The first course of this type, modelled on the San Remo course, was given in Sudan in 1984. The three ICRC delegates to the armed forces then devised a shorter training course, more operational than legal in focus, which met the needs of officers in charge of training combat troops. The aim was to have an “integrated” course, not a theoretical discourse on the law. The end goal was to develop the soldiers’ instinct to use their weapons and carry out their missions within the constraints of the law; officers had to be able to incorporate IHL and its operational considerations into the tactical and strategic decision-making process, in accordance with their rank.<sup>74</sup> Initially, courses in the field were given by staff based in headquarters, who conducted temporary field missions.

## The diplomatic front

The many conflicts taking place between 1978 and 1990 spurred the international community to action. Who does not remember Vietnam’s intervention in Kampuchea, the Iran–Iraq War, the South Atlantic War (Falklands/Malvinas) and the fighting in Angola?<sup>75</sup> When conflicts are on the front pages of newspapers, interest in IHL increases. Here are some examples.

In 1980, States agreed to disseminate in both wartime and peacetime the Convention on Prohibitions or Restrictions on the Use of Certain Conventional

72 Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987.

73 This could be the minister of defence, the head of military training, the chief of staff, or commanders of major units (i.e., brigades or divisions).

74 Between 1975 and 1990, the ICRC organized eighty-eight national or regional seminars for the armed forces and participated in twenty courses of this type in San Remo; it also supported the production of teaching materials.

75 ICRC, *Quinze ans d’activités opérationnelles du CICR en faveur des victimes de la guerre et des conflits armés, 1970–1985*, internal document, 7 November 1985.

Weapons which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, along with its Protocols, and “in particular, to include the study thereof in their programmes of military instruction, so that those instruments may become known to their armed forces”.<sup>76</sup> The continuity in thought since the Berlin Conference of 1869 is remarkable.

Five resolutions on the promotion of IHL were adopted at just two International Conferences, those in Manila in 1981 and Geneva in 1986.<sup>77</sup> The Manila Conference called on governments to create joint committees that would bring together representatives of government ministries and National Societies, and the Geneva Conference encouraged the ICRC to regularly run international courses on the law applicable in conflict situations for the armed forces.

Finally, the ICRC and UNESCO agreed to include IHL in courses on human rights. In San Remo, the ICRC explained its view:

These two laws do not conflict .... The persons concerned are the same .... In academic circles the same people are likely to teach both laws ... [and] the sources of finance for the teaching of the two laws are very often also the same.<sup>78</sup>

Beginning in 1970, the ICRC contacted UNESCO, the Council of Europe, the Organization of American States and the Arab League to encourage them to help disseminate IHL. In 1979, during a visit by the ICRC president to UNESCO in Paris, the two organizations decided to establish regular contact. In July 1981, the United Nations Institute for Training and Research for the first time asked the ICRC to take part in the course on international law that it was giving at The Hague. By 1989, the historic year in which the Berlin Wall crumbled and the Iron Curtain fell, the ICRC had got into the habit of networking, without losing sight of the limits of cooperating with intergovernmental organizations that are sensitive to political considerations.

## The 1990s: Innovation, reflection and debates

The fall of the Berlin Wall kicked off a chaotic period, with no new world order replacing yesterday's bipolar world. While conflicts in Central America, Southeast Asia and southern Africa came to an end, violence was nevertheless breaking out

76 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980, Art. 6.

77 “Dissemination of Knowledge of International Humanitarian Law and of the Red Cross Principles and Ideals”, Resolution X, 24th International Conference of the Red Cross, Manila, 1981. “The Protocols Additional to the Geneva Conventions”, Resolution II; “Dissemination of International Humanitarian Law and the Principles and Ideals of the Movement in the Service of Peace”, Resolution IV; “National Measures to Implement International Humanitarian Law”, and Resolution V; “International Courses on Law Applicable in Armed Conflicts”, Resolution VI, 25th International Conference of the Red Cross, Geneva, 1986.

78 Jean-Jacques Surbeck, *Co-ordination Among Interested International Organisations in the Field of Promotion, Dissemination and Implementation of International Humanitarian Law*, 6th Round Table on Current Problems in International Humanitarian Law and Red Cross Symposium, San Remo, 5–8 September 1979, pp. 11–12.

in all four corners of the globe.<sup>79</sup> The disintegration of the Soviet Union also led to a fundamental change: a continent to which the ICRC did not have access for seventy years and where IHL and the Fundamental Principles had made no perceptible inroads was suddenly accessible at the same time that new conflicts were erupting in the Caucasus and Tajikistan. In Africa, people were worried about the breakdown of governmental structures in failed States, the growing number of uncontrolled militias and the spread of criminal, predatory violence driven by the need of the parties to the conflict to finance their struggle after losing the support of one of the superpowers. Terrorizing the civilian population in violation of IHL was becoming an objective of combatants, who often operated clandestinely. The safety of delegates was becoming increasingly uncertain.

Against this tumultuous backdrop, the ICRC continued its efforts to promote IHL with its partners in the Movement. It carried out pilot projects to determine how best to adapt its educational efforts to very different cultural contexts and how best to use art to communicate. It also took an interest in the mechanisms that influence human behaviour in combat situations. It was thoroughly rethinking the issue. Some high-level managers nevertheless expressed doubt about the utility of dissemination following the Rwanda genocide in 1994 and the murder of three delegates in Burundi and another six in Chechnya in 1996,<sup>80</sup> events that challenged the link between dissemination and security.

## Achievements of the International Red Cross and Red Crescent Movement

In 1989–90, the Movement engaged in a global campaign to protect war victims that involved 135 National Societies.<sup>81</sup> Following this effort, the ICRC and the League prepared dissemination guidelines for the 1990s.<sup>82</sup> The International Conferences of the Red Cross and Red Crescent held in Geneva in 1995 and 1999 concluded with some relatively standard dissemination-related pledges.<sup>83</sup>

79 Second Gulf War and second Intifada, internal conflicts in Afghanistan, Tajikistan and Nepal, Balkan and Caucasus conflicts, Rwanda genocide and conflicts in Somalia, the DRC and Guinea-Bissau, Chiapas revolt in Mexico, border conflict between Ecuador and Peru. The list, unfortunately, is long.

80 After the Nyamara murders in Rhodesia, the ICRC undertook a massive dissemination effort in Africa. Yet after the tragedies in Burundi and Chechnya, some ICRC officials wondered whether dissemination worked, as if it alone could be expected to safeguard delegates. Dissemination continued, however, to enjoy the full support of President Cornelio Sommaruga and interlocutors in government circles, who encouraged the ICRC to carry on its efforts.

81 ICRC and League of Red Cross and Red Crescent Societies, *Promotion of International Humanitarian Law and of the Principles and Ideals of the Movement: Results of the World Campaign for the Protection of Victims of War*, preparatory document for the 26th International Conference of the Red Cross and Red Crescent, CD 5/2, C.I/5.1/1, Geneva, 1991. This conference was postponed *sine die*.

82 ICRC and League of Red Cross and Red Crescent Societies, above note 5.

83 We would note, however, that the 1995 Conference adopted the Final Declaration of the International Conference for the Protection of War Victims of 1 September 1993, which encouraged the development of practical measures to promote the law in countries where government structures were falling apart. "International Humanitarian Law: From Law to Action. Report on the Follow-Up to the International Conference for the Protection of War Victims", Resolution I, 26th International Conference of the Red Cross and Red Crescent, Geneva, 1995.

It was in this auspicious context that, in October 1994, the ICRC adopted a plan to shore up its activities related to dissemination and cooperation with the National Societies based on:

- approaching guerrilla forces and other unstructured armed groups on an *ad hoc* basis, going beyond the traditional dissemination-related support provided to armed forces, supranational armed forces (NATO, ECOMOG) and UN troops;
- giving priority to youth, not just in schools but – for the first time – in the streets, in order to reach those who, having fallen through the cracks of the educational system, could come under the sway of paramilitary groups. Efforts would be focused on urban youth (reaching youth in the countryside was overly ambitious) and, in the educational sphere, on universities and on schools that train diplomats and senior civil servants. The strategy for the educational sphere and the National Societies was to train the trainers in three phases: raising awareness, encouraging involvement and fostering autonomy; and
- better informing the media of IHL in order to steer them away from war propaganda. The emotions stirred up by the hateful invective of the Mille Collines radio station in Rwanda were still raw.

## Respecting cultural diversity and using art to be more effective

*Woza Africa! Music Goes to War* is the title of a superb book – with a foreword by Nelson Mandela – that is the culmination of a dissemination initiative involving five major African musicians.<sup>84</sup> Following an epic trip to Liberia, Angola, the Sudanese border and KwaZulu-Natal, these individuals conveyed the spirit of IHL to African youth through their songs, some of which topped the charts. In Guatemala, in an effort to find effective dissemination tools and build links with a community severely tested by *la violencia*, representatives of Mayan society sought to establish parallels between Mayan mores and IHL.<sup>85</sup> In Burundi, in the wake of an outbreak of what was termed “interethnic violence” and in a society where the chains of command were in tatters, the ICRC established a dialogue both among Burundians and between Burundians and the ICRC around a “shared humanitarian standard”. The thought was that the preparation of a Declaration for Standards of Humanitarian Conduct as a result of this dialogue “was to be followed by a more educational phase undertaken by indigenous leaders, and finally adoption on an additional and more mandatory level”.<sup>86</sup> These are just a few examples demonstrating the belief among those responsible for dissemination in the need to innovate and use art to anchor the message of IHL in the native culture and draw on the expertise of sociologists, anthropologists and local

84 Kole Omotoso, with Foreword by Nelson Mandela, *Woza Africa! Music Goes to War*, J. Ball, Johannesburg, 1997.

85 Claudia F. Dary, *El derecho internacional humanitario y el orden jurídico maya: Una perspectiva historico-cultural*, FLACSO, Guatemala, 1997.

86 Édith Baeriswyl and Alain Aeschlimann, “Reflections on a Dissemination Operation in Burundi – Declaration for Standards of Humanitarian Conduct: Appeal for a Minimum of Humanity in a Situation of Internal Violence”, *International Review of the Red Cross*, Vol. 37, No. 319, 1997, p. 398.

communication specialists, in the same spirit that inspired the ICRC after the Nyamara tragedy.

Still, some dissenting voices were heard within the ICRC. Looking at the example of Youssou N'Dour singing "*Tears, my tears are falling! Africa, Africa will sing—So Why? The sun in your heart is your smile—So Why? Come on, let's call for peace—So Why?*" ("*Les larmes, les larmes m'en tombent! L'Afrique, l'Afrique va chanter—So Why? Le soleil dans ton coeur, c'est ton sourire—So Why? Allons, lançons un appel pour la paix—So Why?*"), some feared that the ICRC (although it was not doing the singing) would be associated with pacifism, not understanding that artists simply wished to round out a message on the limits of war with a personal appeal for peace. In the end, should parallels be sought between the law and local mores, accepting the risks inherent in this approach, or was it only necessary to inject cultural sensitivity in the means of communication? In departing from the traditional approach to dissemination of the law, was the ICRC not losing its way? An internal study on this topic was carried out.<sup>87</sup> The debate remains open.

## Reaching young people in the Caucasus and Central Asia

The conflicts in Abkhazia, Nagorno-Karabakh, Chechnya and Tajikistan gave rise to numerous breaches of IHL, an unknown body of law in these areas, and it was in these places that dissemination efforts aimed at young people really took off for the ICRC. They were the outcome of a series of questions. Was it enough to instruct the armed forces in IHL, in countries where the ideological nature of military training was generally predicated on total war? At a key juncture in history, with new States becoming independent, was it not necessary to also raise awareness among adolescents and students more broadly—tomorrow's citizens, soldiers and, in some cases, decision-makers? Though the people responsible for deciding whether or not to comply with the law in contemporary conflicts did not all attend university, would the same necessarily be true in the future? There was an opportunity to seize and partnerships to develop with the local and national educational systems, whose support was a critical success factor. The ICRC prepared courses of study for secondary schools, as part of literature classes, in the Russian Federation, Georgia and Azerbaijan in 1996, then in Armenia in 1997. The aim was to encourage young people, for several years in a row, to reflect upon the appropriate behaviour in conflict situations, whether in their immediate environment or in the middle of the fighting, while referring to the works of major writers from the region. The merit of this programme, called MINEDUC, was that the ICRC was not coming in like a missionary to spread the

87 G. Chaves, '*L'Approche interculturelle pour la promotion du droit international au CICR*', ICRC internal study, 1998–1999. See also M. Harroff-Tavel, above note 2, pp. 5–20; Marion Harroff-Tavel, "Cultural Diversity and the Challenges it Poses for Humanitarian Practitioners", *African Yearbook on International Humanitarian Law*, 2007; Marie-José Domestici-Met, "Cent ans après la Haye, cinquante ans après Genève: Le droit international humanitaire au temps de la guerre civile", *Revue Internationale de la Croix-Rouge*, No. 834, June 1999, pp. 277–302.

good word. Rather, in partnership with the country's educational system, the programme was designed around a facet of the national culture: literature. And it set its sights high. To give an idea of the ICRC's ambitions, in 2001 it shipped 2.5 million manuals to eighty-nine regions of the Russian Federation, for 65,000 schools. The programme was then rolled out to Tajikistan, Uzbekistan and Kyrgyzstan in novel ways (through dialogue with writers' collectives and inclusion in civic education curricula and in paramilitary courses inherited from the Soviet era).<sup>88</sup>

An internal evaluation of MINEDUC was carried out in 1998, and an independent external evaluation was done in 2001. Adolescents who went through the programme had greater knowledge of IHL and human rights than those who did not, although they spoke more readily of human values than of specific IHL topics. The evaluation also attributed changes in attitude to MINEDUC. Students spoke of the widespread and deep impact of this thought-provoking programme on their view of the world and the role that they would play in it. The sophistication and cost of these educational programmes was nevertheless controversial within the ICRC.

### Dissemination at universities: The MINUNI programme and its after-effects

In the early 1990s, the ICRC systematically pursued the promotion of IHL in universities. The programme it developed, called MINUNI, reached its fullest expression in the Commonwealth of Independent States (CIS). There, the ICRC sought to have IHL incorporated into university faculties of law, international relations and journalism; it prepared teaching aids in Russian, trained young assistants (some of whom would carry on the work) and promoted mechanisms of cooperation between Russian and Western universities. Thanks to the ICRC's efforts, IHL was made part of the Federal State Educational Standards in the Russian Federation.<sup>89</sup> At the same time, the ICRC held regional seminars on implementing IHL (called MEON) in Minsk, Tashkent and Riga in 1994 and 1995, and then in Baku, Yerevan and Tbilisi in 1996, with the support of UNESCO and the Organization for Security and Cooperation in Europe. These efforts led to the creation of interministerial committees in the fifteen countries of Eastern Europe and Central Asia. Subsequently, the MINUNI and MEON programmes, having been tested on a large scale in the CIS countries, would be introduced on other continents.

The principles underlying the ICRC's work with universities were clear: bolster local academic capacity, adapt to the procedures and systems of said universities, develop practical teaching methods (e.g. case studies, internet use

88 Marion Harroff-Tavel, "Les défis de l'action humanitaire du CICR dans les conflits du Caucase et d'Asie centrale (1993–1996)", *Relations Internationales*, No. 105, Spring 2001.

89 Stéphane Hankins, "Promoting International Humanitarian Law in Higher Education and Universities in the Countries of the Commonwealth of Independent States", *International Review of the Red Cross*, No. 319, July–August 1997, pp. 447–450.

and either running or supporting moot court competitions) and provide teaching material. It was in 1997 that the ICRC decided, in Geneva, to put together a collection of case studies that would contain all the teaching material needed to set up a practice-based course on IHL.<sup>90</sup> That same year, it created a delegate position at headquarters in charge of managing relations with the academic world.

Closer to home, in 1995 the ICRC took part in preparing the Multifaculty Programme for Humanitarian Action at the University of Geneva (later renamed the Centre for Education and Research in Humanitarian Action), and in 2002 it supported the creation of the University Centre for International Humanitarian Law (now called the Geneva Academy of International Humanitarian Law and Human Rights), also in Geneva.

### Dissemination among arms carriers: Decentralized positions and a pool of officer-instructors

Several important advances in dissemination targeting the armed forces took place in 1993 and 1994, taking account of nascent nationalisms and ethnic conflicts and drawing on experience acquired in complex situations (e.g. Somalia and the former Yugoslavia). First, the ICRC expanded its dissemination strategy to include “arms carriers” and decided to implement it in a decentralized way, basing its delegates initially in Nairobi and Bangkok.<sup>91</sup> The objective was not only to impart training but also to promote the ICRC among military authorities, so the organization could achieve its operational objectives. Next, the ICRC, while still maintaining a working relationship with the International Institute of Humanitarian Law in San Remo,<sup>92</sup> opted to create a pool of officer-instructors of various nationalities (who had retired from active duty and were from politically “neutral” countries), who would be available for temporary and occasional missions. It would base these instructors in its delegations, after having them take the integration course for delegates so that they would be better suited to the “ICRC culture” – quite different from that of the armed forces. Finally, the ICRC hired a special adviser, a major-general retired from the Swiss army, whose role was to organize high-level seminars with foreign generals who were likely to carry weight when it came to dissemination among the armed forces of their respective countries.

90 Marco Sassòli, Antoine A. Bouvier and Anne Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, 3rd ed., ICRC, Geneva, March 2011.

91 The network was then expanded to include New Delhi, Pretoria, Harare, New York and Brussels (posts at the latter two locations began in the early 2000s). The network is currently made up of thirty-five delegates working with armed and police forces and gendarmeries.

92 The ICRC delegates in charge of these decentralized courses have considerably expanded the network of the San Remo Institute, bringing in officers (and in some cases former rebel commanders) from Africa (Uganda, Angola, Ethiopia), Asia (Vietnam) and Latin America. Since 2008, the ICRC has been providing technical support to help modernize the Institute’s courses in terms of both content and methodology, with the help of other partners like the Swiss army.



## A new dissemination target: Police and security forces

Owing to changes in the nature of conflict as described above, the ICRC was working increasingly, especially in Latin America, in situations of domestic unrest that were subject not to IHL but to human rights law. The logic underpinning these two branches of law differs.<sup>93</sup> The ICRC saw both the armed forces and the police at work in domestic situations of violence. On the other hand, the police sometimes got involved in armed conflicts, without any training in this type of situation or knowledge of IHL. Was it necessary to include police in the ICRC's dissemination efforts and seek closer relations with that group in order to create a climate of trust? Just how far did the ICRC want to go in invoking human rights? Despite internal resistance, the Armed and Security Forces Unit was created, and subsequently became a division. It adopted a pragmatic approach to training the police and hired a police officer, Cees de Rover (former deputy head of the police academy in the Netherlands), to publish a practical instructional manual for training police forces.<sup>94</sup> Police officers would be assigned to a number of ICRC delegations (in Lima, for example).

## The ICRC Advisory Service on IHL

Throughout its history, the ICRC has concerned itself not only with the promotion of IHL treaties but with their implementation as well. Between 1988 and 1991, the ICRC surveyed States and their National Societies to learn about any national implementation measures that they had taken or planned to take to incorporate IHL into domestic law, for purposes ranging from protecting the emblem to prosecuting violations of IHL. In subsequent years, the international community, traumatized by the conflict in Yugoslavia, expressed a growing interest in criminally prosecuting IHL violations. The Conference for the Protection of War Victims (1993) led to the meeting in Geneva in 1995 of a group of intergovernmental experts to address the issue. The group asked the ICRC to prepare a report on the customary rules of international law applicable in international and non-international armed conflict (some of which, as we have seen, concern dissemination). It also recommended, first, that national committees be formed to help governments implement and promote IHL, and second, that information that could be useful for the States be shared.<sup>95</sup> The request that the ICRC share with States information it received from other States on advisory services rendered was particularly astute: since States did not want a

93 For example, the principle of distinction between military objectives and civilians (or civilian objects) does not exist in human rights law. The concept of "proportionality" does exist in both bodies of law, but differs fundamentally in each.

94 Cees de Rover, *To Serve and to Protect: Human Rights and Humanitarian Law for Police and Security Forces*, ICRC, Geneva, 1998. This practical training manual, which has been translated into several languages, was used by numerous countries as a model for the rules of engagement applicable to their police forces.

95 The 26th International Red Cross and Red Crescent Conference (Geneva, 1995) adopted these recommendations.

system that obliged them to periodically account for what they were doing to apply IHL, a less restrictive way to have them do this was through the ICRC. These annual reports were therefore not so much a means of dissemination as the sharing of best practices, encouragement to act and a form of “indirect” oversight.

To carry out the tasks it had been given, the ICRC set up, in the Legal Division, the Advisory Service on International Humanitarian Law, responsible for providing advice to governments. The Service began work in early 1996, having put in place a decentralized structure with legal experts based in delegations and supported by a team at headquarters. The Legal Division created a specialized documentation centre open to governments, National Societies, organizations and researchers,<sup>96</sup> which was then folded into the ICRC’s library.

## The People on War project

To commemorate the 50th anniversary of the Geneva Conventions, the ICRC conducted the People on War project, in which the organization interviewed more than 20,000 civilians and combatants from seventeen countries between October 1998 and September 1999.<sup>97</sup> The resulting report highlighted the fact that, while people believe that there should be limits in war, their belief is rooted most commonly in the notion of human dignity, in a religion, in traditions or in a personal code of ethics. 39% of people surveyed in conflict zones had heard of the Geneva Conventions, but only 60% of those could correctly describe the content. People unaware of the Conventions were more likely than others to deny even minimal rights to captured combatants; they were also less apt to help a combatant who was wounded or laying down arms if the combatant was responsible for the death of someone close to them.<sup>98</sup> In Muslim countries, people who mentioned the notion of law were probably referring to Islamic law. The results of this research set the stage for a collaborative effort with Harvard University (Jennifer Leaning) and the University of Geneva, along with a follow-up survey ten years later.<sup>99</sup> The People on War project, despite some of the

96 The Advisory Service on International Humanitarian Law engages in a number of activities in close collaboration with the National Red Cross and Red Crescent Societies. It encourages States to adopt laws, rules and administrative provisions that could help them fulfil their obligations, such as prosecuting infractions, protecting the red cross and red crescent emblems and marking protected sites. It organizes seminars that promote contacts among ministries, armed forces, National Societies, universities, civil protection entities, etc. Following these seminars, the Advisory Service provides more specialized assistance to States that request it. The Advisory Service also prepares an annual report to describe its progress. For a fuller description of these obligations and of the Advisory Service’s work, see Paul Berman, “The ICRC’s Advisory Service on International Humanitarian Law: The Challenge of National Implementation”, *International Review of the Red Cross*, Vol. 36, No. 312, 1996, pp. 338–347.

97 The results of this study were published in country reports and in a summary document, Greenberg Research, Inc., *The People on War Report: ICRC Worldwide Consultation on the Rules of War*, ICRC, Geneva, 1999.

98 *Ibid.*, p. 19.

99 Ipsos and ICRC, *Our World. Views from the Field. Summary Report: Afghanistan, Colombia, Democratic Republic of the Congo, Georgia, Haiti, Lebanon, Liberia and the Philippines*, Geneva, 2009.

methodological questions it raised, represented a major investment by the ICRC and was a rich source of feedback.

In the 1990s, some lively debates took place within the ICRC around dissemination. This was particularly true in the Directorate, certain members of which were reluctant to see the organization get more involved in “prevention” work and to allocate resources to it. Programmes focusing on youth or in the realm of education, along with the effort undertaken to infuse cultural diversity into the IHL message, faced real challenges – especially within the organization – for those who carried them out. Strong support from President Cornelio Sommaruga, Yves Sandoz and François Bugnion for IHL promotion work in the 1990s, along with the interest shown by a number of donors, therefore played a key role. The same can be said of Jean Marc Bornet, the general delegate for Eastern Europe and Central Asia, who was committed to the MINEDUC, MINUNI and MEON programmes in the regions under his responsibility. Bugnion’s numerous publications also contributed to the promotion of IHL, none more so than his authoritative work on the protection of war victims.<sup>100</sup> And the Geneva Academy of International Humanitarian Law and Human Rights owes its existence in large part to Yves Sandoz.

## **The year 2000 and onward: integration and implementation of IHL**

The attacks of 11 September 2001 in the United States had a profound impact on Western public opinion. The subsequent “war on terror”, the wars in Afghanistan and Iraq, and then the upheaval known commonly as the “Arab Spring” presented challenges that were made more complex by the instantaneous sharing of information around the globe enabled by the Internet. The ICRC met these developments head-on: it created the position of head of communications, trained specialists in operational communication,<sup>101</sup> began monitoring exposure in the media, made use of new technologies (e.g. social media and blogs) and expanded its networking efforts, especially in the Islamic world. Internal restructuring highlighted the growing importance accorded to press-related activities between 2001 and 2010.

As it laboured to promote IHL, the ICRC faced an increase in the number of people and organizations interested in teaching IHL, invoking IHL, and prosecuting violations of IHL either domestically or through international courts. The ICRC was no longer the only entity to dialogue on this topic with arms carriers. It was no longer sufficient to replicate study courses in different

100 F. Bugnion, above note 1. This work is both theoretical and practical and takes a multidisciplinary approach (bringing together history, legal and political science). It is full of lessons on the relationship between the ICRC’s work and IHL. The author’s conclusions remain very valid today.

101 The critical situation in Darfur in particular restored interest in on-the-spot dissemination, with four Arabic-speaking operational communications delegates permanently assigned to the field starting in 2005. In 2010, however, following an internal restructuring, support activities for operational communications were sharply scaled back in favour of press-related actions.

countries. The ICRC therefore redoubled its efforts to refocus its work on the integration of IHL in courses of study – at the secondary and university levels as well as in the training of armed and security forces – and on the implementation of this body of law. A study conducted by the University of Geneva on the roots of behaviour in war also spurred the ICRC to change its focus. The organization adopted guidelines for some of its activities, carried out evaluations and ran perception studies. Let us look at these more closely.

### Encouraging young people to explore IHL and focusing on children at risk

In 1997, drawing on the MINEDUC project (which would end in 2010) and the organization's experience in Guinea, Egypt, Somalia, Croatia, South Africa and Colombia, the ICRC commissioned the Education Development Center in Boston to develop a transnational educational programme for youth. The programme, called Exploring Humanitarian Law (EHL), would be less resource-intensive and, necessarily, less tailored to local cultures. The goal was for young people to become aware of the applicable rules (especially IHL) in situations of violence, as well as the similarities and differences between IHL and human rights law. They would also be encouraged to consider the human consequences of breaking the law and ways to prevent violations and reduce the resulting suffering.

The ICRC began the EHL programme in the early 2000s, with the aim of having it integrated into curricula and then continued by the educational authorities and/or National Societies. It added a virtual campus (a website for teachers) in 2006 and updated the programme in 2007–08. EHL was conceived as an interactive programme to develop critical thought and teach students the importance of maintaining a respectful dialogue with others. It had three positive outcomes: it developed operational communications with young people and their friends and family in a whole series of situations of violence, including in urban areas, such as certain favelas in Rio de Janeiro; it served as a springboard for access to communities, thanks to contacts established with families and teachers, such as Islamic intellectuals in Indonesia; and it helped spur an interest among young people for humanitarian work. Unfortunately the EHL programme struggled: the ICRC was not in a position to provide long-term support in terms of finances and human resources and, unfortunately, when it withdrew support the educational authorities in some countries did not continue the programme. The programme's demise was hastened by the opinion of some ICRC officials that, in conflict situations, human beings retain little of their free will as they become subjugated by a collective system of organized brutality. The resources allocated to this type of educational programme – considered an act of faith in human beings – were in their eyes put to better use elsewhere. Not everyone shared this opinion.

An important problem remained. Apart from child victims and child combatants (in the armed forces, militia groups or gangs), there was a new category of children at risk: street children, and children who had been

demobilized or had fled conflicts. The Children at Risk project,<sup>102</sup> an ICRC initiative arising out of observations made in the Democratic Republic of the Congo and Nepal, was designed to prevent the recruitment, whether voluntary or forced, of young people into armed groups. Despite the interest it aroused, this concept was unfortunately not seen through. Still, in Nigeria, the ICRC partnered with the National Society and a local NGO called AVP to develop an extracurricular programme aimed at preventing youth violence, based on a methodology developed by AVP. Local communities were also invited to take part in this initiative.

### “Influence research” into the origins of wartime behaviour<sup>103</sup>

Research into the origins of human behaviour in war, conducted with the support of the Faculty of Psychology and Educational Sciences at the University of Geneva, led to the following conclusion: “supervision of weapons-bearers, strict orders relating to proper conduct and effective penalties for failure to obey those orders are essential conditions which must all be met if there is to be any hope of securing better respect for IHL.”<sup>104</sup> According to the study’s authors, morals and values have little sway on the behaviour of arms bearers. Violations of IHL are common owing to a moral disengagement made possible by the justifications one gives to these violations and by dehumanization of the enemy. It is also by virtue of belonging to a group that arms bearers can be led to carry out acts that they would never have done alone. The question is therefore not one of influencing autonomous individuals who are capable of discernment, able to decide freely and sensitive to ethical considerations, but rather one of influencing groups, which always have a structure even if it is not readily apparent.

Challenging the utility and appropriateness of an ethics-based discourse was a real reversal of course. For over a century, the ICRC had been convinced of the importance of orders, the chain of command and sanctions. It knew that the group sometimes overrode the individual, but until this study, it considered itself the bearer of a universal humanistic ethic based on the Movement’s Fundamental Principles and the principles underpinning IHL—an ethic that could inspire humanitarian action and reaction and was thus necessary to make known.<sup>105</sup> Without conforming to any particular mould or believing it was invested with a

102 Michele Poretti, “Preventing Children from Joining Armed Groups”, *Refugee Survey Quarterly*, Vol. 27, No. 4, 2008, pp. 123–141.

103 This research project was based on the People on War study, a survey of combatants in four of the ICRC’s areas of operation, a questionnaire submitted to the majority of armed and security forces delegates and communications delegates, and a review of the literature. The study and the survey were carried out with researchers at the University of Geneva.

104 Jean-Jacques Frésard, *The Roots of Behaviour in War: A Survey of the Literature*, ICRC, Geneva, 2004, p. 110.

105 Jean-Luc Blondel, “The Meaning of the Word ‘Humanitarian’ in Relation to the Fundamental Principles of the Red Cross and Red Crescent”, *International Review of the Red Cross*, Vol. 29, No. 273, 1989. In the author’s view, humanitarian work is driven by an ethic of dialogue.

moralizing mission, it was not afraid to talk about human values, which IHL embodies in legal form. The results of influence research modified this approach.

This very interesting study unfortunately struck a serious blow to a number of programmes. It only addressed the behaviour of arms bearers, but in the prevailing discourse – not completely devoid of dogmatism – its conclusions were applied to other areas. The end result was that the ICRC would focus only on teaching the rules of positive law to combatants. Little interest remained in searching for bridges between IHL and the values, traditions and codes of conduct which encourage, in different cultural contexts, altruism, compassion and behaviour that is respectful of the dignity of other people.<sup>106</sup> Preventive, long-term activities aimed at other “target groups” besides armed forces and political elites – for example, adolescents in school – veered too far from the narrow path recommended by influence research to merit a real investment in terms of financial and human resources.

The content of influence research should be given a new reading and put to better use. With the passage of time, the ICRC should be able to critically analyze the conclusions that it drew at the time – an analysis that has already begun outside the organization.<sup>107</sup> Within the ICRC, the pendulum appears to be swinging back. A first step was taken several years after the results of influence research came out, when the ICRC adopted an official policy on its mission and work that includes prevention among its four programmes (the other three are protection, assistance and cooperation), and which recognizes that prevention must generally be undertaken in a medium- to long-term perspective in order to create an environment that favours respect for IHL.<sup>108</sup> The policy also underscores the organization’s interest in combining the activities linked to these different programmes in a multidisciplinary approach; in this way, it brings prevention out of isolation. More recently, the ICRC’s ambition to curb violence against health-care workers served as a reminder of the effectiveness of medical ethics as a powerful tool for influencing behaviour.<sup>109</sup>

## Implementation: More specific instructions

The three International Conferences of the Red Cross and Red Crescent of the past decade (2003, 2007 and 2011) highlighted the importance of the effective implementation of IHL. What is different about the pledges made at these International Conferences? In 2007, the Conference asked that States, when they incorporate IHL into national legislation and practice, emphasize the need to

106 However, according to a psychology book that appeared at that time, humanity and justice can be found in all traditions (most likely owing to their importance for the survival of the species). See Christopher Petersen and Martin E. P. Seligman, *Character Strengths and Virtues: A Handbook and Classification*, American Psychological Association and Oxford University Press, New York, 2004, pp. 33–52.

107 See Dale Stephens’ criticism of the conclusions of “influence research” in this issue of the *Review*.

108 ICRC, *The ICRC: Its Mission and Work*, Geneva, March 2009, pp. 16–17.

109 Vivienne Nathanson, “Medical Ethics in Peacetime and Wartime: The Case for a Better Understanding”, *International Review of the Red Cross*, Vol. 95, No. 889, 2013.

adopt measures not only for the use and protection of the distinctive emblems and for the prosecution of serious violations of IHL, but also for “the protection of cultural property, the regulation of means and methods of warfare and the protection of the rights of missing persons and their families, among others”.<sup>110</sup> The four-year action plan for the implementation of IHL resulting from the International Conference of 2011<sup>111</sup> highlights measures to be taken at the national level to protect women, children and journalists. States are encouraged to adopt legislation and make arrangements to allow families to participate in court proceedings. They must also redress violations of the law and put sanctions in place. The ICRC, for its part, will continue to “provide technical assistance for the incorporation of such crimes” into domestic law. Finally, the dissemination of IHL to “legal professionals, including prosecutors and judges”, calls for special attention.

### Armed and security forces and the police: Strategic orientations

The ICRC adopted directives guiding its dissemination work with the police and the gendarmerie (in 2007) and arms carriers (in 2009). Recognizing that it had an extensive network,<sup>112</sup> it wanted to adopt a single framework in which to orient its dialogue with all categories of arms bearers, including non-State armed groups, and link this dialogue to its protection activities by spreading awareness of two main principles underlying its work: impartiality and neutrality. The ICRC sought to avoid diluting its efforts and was concerned about the fact that in some cases, it had developed more extensive contacts with governmental armed forces than with non-State actors. It then defined the type of dialogue that was to be established with arms carriers, the situations in which this dialogue should take place and the extent of its involvement, as well as guidelines and respective responsibilities (since this would be a multidisciplinary approach). This same approach was applied to the dialogue with the police and the gendarmerie. Since their role was to maintain order without violating human rights, the ICRC had to clearly identify whether these forces of order create victims or are victims themselves; are able to assist and protect victims; have influence over those who hold the fate of victims in their hands; and/or play a role in the ICRC’s work or the safety of its workers. The guidelines demonstrate the special nature of the role of the police and gendarmerie, who can stop, detain and search people and use both force and firearms. These strategic orientations are both a safeguard and a teaching tool for the delegates.

110 “Reaffirmation and Implementation of International Humanitarian Law”, Resolution 3, 30th International Conference of the Red Cross and Red Crescent, Geneva, 26–30 November 2007.

111 “4-Year Action Plan for the Implementation of International Humanitarian Law”, Resolution 2, 31st International Conference of the Red Cross and Red Crescent, Geneva, 2011.

112 This network includes armed forces, police, armed groups, and private military and security companies, which can be further divided into those that develop policy, those that give orders and those that carry out orders.



## Networking: The Islamic world

The ICRC established close contacts with institutions and scholars in the Islamic world well before 11 September 2001. Three observations led it to expand these contacts several years later, making an extra effort to listen to and dialogue with a wide range of people and institutions. First, although IHL has been universally ratified by governments, the increasing number of armed groups and the growing power of civil society – thanks to new information technologies – have made working with these actors essential. Second, the importance of religion in people's value systems and systems of thought is on the rise. Islam has a very sophisticated body of law that addresses relations between nations and behaviour in war (e.g. safeguarding human dignity, respect for women and children and the protection of cultural property). Finally, the emergence of new powers and new conceptions of the world represents a challenge to IHL. Some see IHL, just as they see the UN Charter and human rights, as a product of the West – which itself is sometimes guilty of violating the laws that it sets forth. IHL, which is a human construct, is now competing with other reference systems, like *Shari'ah*, which is considered by its followers to be of divine origin.

The ICRC, whose contacts with *madrasas* (Islamic schools) in Pakistan began in 1998, then decided to systematically approach scholars, social activists, humanitarian groups, religious notables and researchers from all strains of Islam to discuss IHL and its parallels in Islamic law. This dialogue did not replace the organization's relationship with governments, but supplemented it and enhanced it, leading to an improved mutual understanding. In 2004, the ICRC put together, with the University of Islamabad, the first major conference on Islam and IHL, a meeting attended by *ulema* (scholars in Islamic law) from Pakistan and scholars from Afghanistan and other countries in the region and the Arab world. In 2005, the Yemen Red Crescent Society and the University of Aden held a seminar on the protection of war victims under Islamic law and IHL. In November 2006, the ICRC organized a conference in Qom, Iran, on the same topic, which was attended by around 100 experts from the main universities in Iran and other countries in the region. This dialogue then expanded to include partners in North Africa (Morocco, Tunisia), the Sahel (Mali) and East Africa (Uganda). In 2013, a first workshop was held in Mombasa on people deprived of their freedom in armed conflicts, with reference to IHL and Islamic perspectives. Some Middle Eastern countries – Jordan, Iraq and Egypt – took part in this dialogue. In June 2013, in Jeddah, Saudi Arabia, the ICRC engaged in a joint effort with the Organization of Islamic Cooperation and the International Islamic Relief Organization to carry on the dialogue begun some ten years earlier with the Islamic world. The ICRC was also active in Indonesia and Thailand, where it launched a pilot project in Islamic boarding schools, based on the EHL programme. These few examples demonstrate the path taken by the ICRC.

## Evaluations and perception studies

The effort to evaluate the ICRC's dissemination work has intensified since the start of the new century, but is in fact a long-standing concern. And it is a real dilemma: how can one know what atrocities were averted thanks to dissemination, since they were not committed? And how is it possible to measure the impact of efforts aimed at modifying attitudes and behaviour? The first guiding note titled "Planning and Evaluating Dissemination Activities at the ICRC", written in 1993, envisioned dissemination as a mainly operational tool. In the past fifteen years, the ICRC has systematically carried on this analytical effort by having external consultants evaluate several of its activities, including dissemination among the armed forces in Sri Lanka (1998), the MINEDUC programme (2001) and the domestic implementation of IHL (2008). In El Salvador, the ICRC and the country's armed forces carried out a joint evaluation of dissemination among the armed forces in 2009.

Initiatives were also taken in the area of communications. Between 2003 and 2010, the field-oriented communications unit conducted perception studies to better inform operational communication strategies, at the local and regional levels in particular, in the Democratic Republic of the Congo, Latin America and the Horn of Africa.<sup>113</sup>

## Harnessing the Internet

Another major change between 1990 and 2000 was the development of the Internet, which had a major impact on the ICRC's global positioning and whose potential for the dissemination of IHL, for instance through electronically available dissemination tools and IHL-related material (e-books and e-learning, for example), remains to be fully unlocked.

## **The challenges of tomorrow: Balancing short- and long-term objectives, and taking a holistic approach to prevention**

In view of the foregoing, three challenges merit reflection. The first is to strike the right balance between two aspects of the ICRC's interaction with its interlocutors. The first aspect of the ICRC's dealings with the outside world consists of promoting IHL, reminding interlocutors of their obligations, informing specific "target groups" of specific legal topics and helping change attitudes and behaviour. Promoting IHL is part of a long-term strategic and comprehensive vision but requires a judicious dose of contextualization (Paris is not Pretoria, and Damascus is not Tashkent). Those who promote IHL explain the ICRC's mandate and the tasks incumbent upon the organization under this body of law,

<sup>113</sup> At the time, the ICRC adopted a strategy (2006–2010) aimed at improving the hiring, training and professional development of both local and expatriate communications staff.

but they focus on the substance of the law. The second aspect of the ICRC's dealings consists of affirming and clarifying the organization's identity through "branding". This is important for gaining safe access to victims, defending the organization's reputation, positioning the organization on certain themes and conflict situations, influencing the humanitarian debate, responding to media inquiries on the current status of situations of violence in which the organization is working, and improving the organization's ability to generate the resources needed to fund its operations. In this role, the ICRC can refer to the core rules of IHL and its role in their implementation, but it is really the organization's work on the ground and its methods that it endeavours to highlight.

In the ICRC's efforts to address this challenge, two temptations must be resisted. The first is to focus on the short term at the expense of long-term objectives—the lack of resources that the organization currently devotes to promoting IHL among young people is, in our view, an unfortunate example of this. The second is to conflate all these dimensions of the ICRC's work without understanding or respecting their differences, which is easy to do given their overlap. Operational communication can indeed be used to spread awareness of the law, and the implementation of the law can certainly go some way towards building up networks likely to serve operational purposes, and that is good. However, these are fundamentally different roles that require distinct skill sets.

The second challenge, linked to the first, is structural. When different organizational units at headquarters are responsible for these two roles, which is not a problem in itself, three traps must be avoided: favouring only one of these organizational units rather than using all of them (depending on the environment and the humanitarian problem at hand); a lack of coordination among the units; and staff members identifying more with the organizational unit than with the overall mission. In the field, the situation varies across delegations. Most delegations have a limited amount of staff who must therefore be versatile in terms of communications and dissemination, while others employ both generalists and specialists as a function of the target groups (e.g. armed forces, police and universities). Orchestrating these disparate forces is not always easy and requires sufficient knowledge of the areas in which the specialists work, if only to ensure efficiency among everyone's efforts. Greater access by specialists to positions of operational oversight would be a step in the right direction.

The third challenge is more fundamental and should be reflected in the organization's 2015–18 Strategy. The ICRC must decide how to implement its prevention policy. The policy, in a shift away from a programmatic approach, is based on the idea that it is necessary to unite internal and external forces to create—in a multidimensional and contextualized way—an *environment* that favours both respect for human life and dignity and the organization's work. To accomplish this, the organization must focus its work on individuals and entities in a position to influence structures and systems (including legislation, military doctrine and sanctions) that can help resolve identified humanitarian problems. The prevention policy includes criteria for involvement and calls on the

organization to develop partnerships and combine its approaches,<sup>114</sup> including in particular *persuasion* and *mobilization*.

So what is the problem? In some conflict situations, the operational surface area is shrinking; in such cases it is not easy either to get the parties to the conflict to take responsibility and comply with IHL or to find influential people or entities that could help the ICRC do this. In other conflict situations, where the ICRC has long been active, the interlocutors it works with locally know IHL and even espouse it to a certain extent; the organization has carried out a confidential, bilateral dialogue to convince them to comply with the law, but the parties have decided to neglect or violate obligations with which they are very familiar. If the ICRC decides for strategic reasons to carry on its prevention work in this type of conflict situation, what services can it deliver? Given the fact that in such environments it may face constraints (it may, for example, be authorized to promote IHL in academic circles but not in the governmental sphere) and that other organizations refer to the Geneva Conventions as well, where is its added value? Engaging in a more technical dialogue on methods or tactics, such as in specialized areas like arrest? Providing training that the authorities should have provided—an approach the ICRC is not partial to? Reconciling the promotion of IHL with that of the Fundamental Principles of the Movement, together with the National Societies and/or the IFRC? There is no one answer to these questions.

## Conclusion: Looking ahead

The ICRC has done an enormous amount of work to ensure that States put in place the needed rules and laws and update them as the nature of armed conflict evolves. It has supported IHL awareness-raising by creating entities and training people; it has facilitated the incorporation of IHL into the law, the application of IHL and evaluations of its effectiveness by developing methods and tools; it has carried out research by teaming up with prestigious universities to assess the relevance of the chosen approaches; and it has contextualized its efforts in respect of cultural diversity. It has adapted its work in promoting the law to help achieve the organization's operational objectives, such as strengthening links with decision-makers and opinion leaders and with communities that give priority to traditional Islamic law.

Today the ICRC faces new challenges, three of which will be mentioned here. The first relates to changes in the nature of violence. When violence takes the form of an armed conflict between organized parties (States, armed groups) engaged in collective action, it is regulated by IHL. Today, however, many regions in the world are caught up in chronic, low-intensity violence that does not always amount to armed conflict. Other regions experience outbreaks of chaotic violence,

114 The ICRC's strategy is built around a combination of modes of action: raising awareness of responsibility (persuasion, mobilization and denunciation), support and substitution (or direct provision of service). ICRC, above note 108, pp. 19–20.

where crowds are ignited and fill the streets, sometimes taking their lead from social media. These crowds, unstructured, are spurred on by charismatic speakers. In such cases, human rights—especially inviolable ones—provide the legal framework. Does it always make sense to promote IHL in such situations? Yes, insofar as a situation of violence can evolve into a non-international armed conflict. And it is true that in some cases fighting in one part of a country will be considered an armed conflict while fighting in another part of the country will be considered domestic unrest. It would nevertheless be desirable to train all delegates in human rights law—particularly regarding the use of force and firearms—for just such situations, while recognizing the operational limits on the ICRC invoking this body of law.

The second challenge is related to the choice that the ICRC made, in view of the results of influence research, to direct its efforts at the military high command of States and of non-State armed groups so that instructions will reach arms carriers via the chain of command. For the ICRC, this implies the need for sanctions in the event of violations of IHL. In many contemporary situations of violence, however, a growing number of armed groups are led by individuals who prefer to remain hidden, especially if they have criminal connections. In addition, some groups do not have a chain of command—at least not one that is easily identifiable. Sometimes a group may even have leaders who have no authority over the group. In the worst-case scenario, the groups' strategy is to terrorize people and/or strip them of their belongings, in deliberate violation of IHL. In cases where courts apply sanctions, this can lead to reprisals against civilians. Does this mean the ICRC has erred in its choice of strategy? Certainly not. The strategy is very effective in those situations for which it was designed, but it is not enough: the ICRC needs to add a large dose of pragmatism, go back to its roots, and innovate.

Let us look at pragmatism first. It is important to work with the interest of the individual—that is, what that person stands to gain by behaving properly when the law and morals have little traction. In this case the individual is the arms carrier, whose interest is well understood. To this end, two initiatives could be useful: first, analyzing the factors contributing to violations of IHL in very specific conflict situations, drawing on influence research, in conjunction with specialists from academia and research centres. Such an analysis would allow the ICRC, together with its partners, to create strategies to prevent violence from spinning out of control and deteriorating into open conflict, with the tasks inherent in the strategies assigned to the partners in accordance with their respective mandates. Resources would need to be channelled into this area. Second, it would be useful to further explore practical arguments that could encourage respectful behaviour towards others (e.g. complying with IHL makes it possible to avoid penalties and prevent reprisals; violating IHL creates antagonism between coexisting communities and makes post-conflict reconstruction extremely difficult after the guns have fallen silent). Based on this, the ICRC could create the appropriate tools for its delegates, an initiative that was begun in the past but not followed through. Such tools could be adapted to each conflict situation, taking into

account the particularity of the conflict dynamic as well as the nature, objectives and organization of the belligerent parties.<sup>115</sup>

Next, going back to the organization's roots. After its experience with influence research, the ICRC became very reluctant to talk about ethics; only the law could be mentioned. But does that not overlook the fact that humanitarian action is universal and existed well before the ICRC and IHL? And the fact that in some societies, particularly in the Islamic world, law and morals cannot be separated? One option is to emphasize humanistic beliefs, which, in all cultures, are the soil in which the rules of positive law<sup>116</sup> take root. Of course, these beliefs are manifested differently from one society to the next, but it is in seeking the common core of human dignity – whether in the village, the region, the country or the world – that there may be a chance to restore in people a sense of responsibility towards others.

Finally, innovation. If the upper echelons of armed groups are hard to reach or their behaviour does not change, why not develop networks of women – whose influence, while not always obvious, is undeniable – to promote IHL? In regions where its access to women and girls is limited by cultural obstacles, the ICRC could work together with the National Red Cross or Red Crescent Society or women's associations to raise awareness among women and girls about IHL, a body of law that protects them, just as it protects male civilians, in conflicts that are mainly planned and carried out by men. Their help in encouraging respect for this body of law would be a highly valuable asset.

The final challenge is the connectedness created by the Internet, a space in which anyone can find and provide information instantaneously, without mediation, and in their own way learn about IHL via new tools (like video simulations) and create support platforms. The ICRC puts this connectedness to good use: it has accounts on Facebook and Twitter; the ICRC president, some high-level officials and its public relations officers send out tweets reminding people of the rules of law or seeking access (e.g. to Syria); and the organization is able to rally virtual communities. In the context of its Health Care in Danger campaign, the ICRC is interacting online with specific people and entities that share its concerns (e.g. legal experts, doctors, authorities, medical associations and military experts). It enters into dialogue with them on steps that could be taken to enhance respect for the rules protecting medical staff and infrastructure (e.g. hospitals and ambulances). These virtual communities of interest, drawing from numerous countries, are able to influence public opinion and, indirectly, the diplomatic community in multilateral fora. Nevertheless, while it benefits from connectedness, the ICRC must also remain aware of the vulnerability to which that connectedness leaves it exposed. This risk stems from rumours, propaganda,

115 Olivier Bangerter, "Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not", *International Review of the Red Cross*, Vol. 93, No. 882, 2011.

116 Beliefs such as respecting the dignity of others, accepting difference, compassion in the face of suffering, non-exclusion, solidarity in distress and impartiality in providing a helping hand to ease the most grievous wounds. The fact that these beliefs are not shared by all individuals or groups does not undermine their acceptance by the broader community in any way.

leaks and the manipulation of information, now that the battlefield of armed violence has spread from the physical to the virtual world.

Let us hope that the ICRC can meet these challenges with determination and single-mindedness. The objective is clear: “We need to encourage a humanitarian reading of events, instil a sense of responsibility towards others in distress, and support the setting of modest goals and reaching them rather than succumbing to a feeling of powerlessness. In the end, we need to give individuals the ability to make decisions on the basis less of economic criteria than of the inalienable dignity of human beings.”<sup>117</sup> Nothing more, nothing less.

117 ICRC translation. Original French text: “Il s’agit de susciter des réflexes humanitaires dans la lecture des événements, un sentiment de responsabilité par rapport à la détresse de l’autre, la capacité de viser des objectifs à sa portée et de les atteindre, plutôt que de céder à un sentiment d’impuissance. Il s’agit, en fin de compte, de donner aux individus l’aptitude de se déterminer moins en fonction de critères économiques que par rapport à l’inaliénable dignité de l’être humain.” Marie-José Domestici-Met, “Cent ans après la Haye, cinquante ans après Genève: Le droit international humanitaire au temps de la guerre civile”, *International Review of the Red Cross*, No. 834, June 1999, p. 300.





# Building respect for IHL through national courts

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## Abstract

*Respect for international humanitarian law (IHL) comes in many forms, one of which is through the practice of domestic courts in addressing IHL-related cases. This article takes a closer look at the structural conditions necessary for the effective enforcement of IHL by domestic courts, elaborates on the spectrum of options that are available to national judges when faced with IHL-related cases, and describes the functional roles of courts in adopting a particular posture. It is demonstrated that even if the structural conditions are fulfilled, this will not necessarily result in the normative application of the law. It appears that national judges are in the process of defining their own roles as independent organs for overseeing the State's acts during armed conflicts. In that regard, the article outlines a few suggestions for future research on the choices courts make and the conditions necessary for them to effectively handle IHL-related cases.*

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**Keywords:** domestic courts, IHL, national judges, enforcement, independence, impartiality, rule of law, application, interpretation.

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## Introduction

The enforcement of international law by domestic courts is essential. The tremendous powers allocated to the State, especially in times of war, have the potential to bear catastrophic consequences for the lives and security of many innocent people if not judicially supervised. Naturally, domestic courts cannot be the only institutions responsible for providing the necessary checks and balances on the State's exercise of its powers during armed conflicts. These institutions face particular political constraints related to security concerns and public opinion. Yet, the domestic courts of democratic States are in a good institutional position to enforce international humanitarian law (IHL) because evidence and testimony are easier to collect, the national investigation and judicial authorities are available and functioning, and therefore proceedings may be held relatively swiftly and in a cost-efficient manner. Moreover, national rulings have a strong impact on their respective societies because they are not seen as external pressures or interventions – and, as the trials are held inside the country, their outreach and positive effect in the long run are more likely to be guaranteed. Most importantly, national courts in democratic States are expected to conform to the rule of law requirements and thus enjoy an important degree of independence vis-à-vis the executive branch, which can be maintained even during armed conflicts.<sup>1</sup>

Currently, two main permanent international courts have jurisdiction over cases related to armed conflicts: the International Criminal Court (ICC), which is competent to determine individual criminal responsibility for war crimes,<sup>2</sup> and the International Court of Justice (ICJ), which has competence to determine State responsibility for IHL violations in disputes between States and to render advisory opinions on such issues. The jurisdiction of both the ICC and the ICJ is restricted by State sovereignty.<sup>3</sup> These limits on jurisdiction reflect the traditional

- 1 “[N]ational courts know that their executive is firmly tied to the national constitution from which it cannot exit and which the courts have the responsibility and sole authority to protect, for the benefit of the domestic population. Judges in national courts are relatively more independent than judges in international tribunals, and enjoy broader public support for their decisions”. Eyal Benvenisti and George W. Downs, “National Courts, Domestic Democracy, and the Evolution of International Law”, *European Journal of International Law*, Vol. 20, No. 1, 2009 p. 68. Yet, on their disadvantages, see Jose E. Alvarez, “Crimes of States/Crimes of Hate: Lessons from Rwanda”, *Yale Journal of International Law*, Vol. 24, 1999, p. 375. See also Antonio Cassese, “On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law”, *European Journal of International Law*, Vol. 9, 1998, pp. 5–7.
- 2 Rome Statute of the International Criminal Court, 17 July 1998 (entered into force 1 July 2002), UN Doc. A/CONF.183/9, Art. 8.
- 3 In the case of the ICC, this is due to two factors: first, the ICC Statute is a multilateral treaty and is thus only binding on States Parties, those that have accepted its jurisdiction (or when a case is referred to the

structure of the international legal order based on the principle of State sovereignty as laid down in Article 2(7) of the 1945 United Nations (UN) Charter.<sup>4</sup> Yet, the scope of “domestic jurisdiction” in Article 2(7) of the UN Charter is not an obstacle to the judicial enforcement of international law; rather, it shall be read as endowing national courts with a special role in enforcing international law.<sup>5</sup>

Indeed, the judicial enforcement of IHL relies primarily on domestic courts. This structure was foreseen by the Geneva Conventions in 1949, which imposed an explicit obligation on States Parties to incorporate the relevant rules into domestic legislation, with a view to enforcing international law governing armed conflict through national courts.<sup>6</sup> Today, one of the most extensive practices of this kind is taking place in the States of the former Yugoslavia following the end of the conflict there.<sup>7</sup> At the same time, the enforcement of IHL by the judiciary remains one of the most important challenges for guaranteeing respect for IHL (and for international law more generally). As observed more than a decade ago:

ICC by the Security Council); second, the principle of complementarity regulates relations between the ICC and national tribunals, and attributes primary jurisdiction to the national courts (see Article 17 of the ICC Statute). In the case of the ICJ, jurisdiction is limited by the non-compulsory nature of the proceedings and the necessity of having the States’ consent in order to hold the proceedings. See the ICJ website, available at: [www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1](http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1).

- 4 Article 2(7) of the UN Charter states: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.”
- 5 Richard Falk, *The Role of Domestic Courts in the International Legal Order*, Syracuse University Press, Syracuse, NY, 1964, p. 22: “To achieve international order, it is therefore necessary to rely upon horizontal distribution of authority and power among independent states ... [I]t is likely that progress towards a more rational delimitation of jurisdiction will result from efforts to improve the horizontal method of allocating legal competence rather than from efforts to centralize authority ... [F]rom this viewpoint, one grows more cautious about investing a high percentage of one’s enthusiasm in proposed expansions of the compulsory jurisdiction of the ICJ or in attempts to narrow the scope of ‘domestic jurisdiction’ in Article 2(7) of the UN Charter.” See also André Nollkaemper, *National Courts and the International Rule of Law*, Oxford University Press, Oxford, 2011, pp. 25–26: “Basing the primary role of national courts in the protection of the international rule of law on the principle of sovereignty presents something of a paradox. The principle of sovereignty has traditionally served as to give states control over the process of adjudication. In a Frankenstein-like reversal, it now provides a basis for courts to turn their dependent position into an independent power against the state.”
- 6 See, for example, the obligation to prosecute individuals who have committed war crimes regardless of their nationality and where the crimes were committed, in common paragraph 1 of Articles 49/50/129/146 respectively to the four Geneva Conventions of 1949, and Article 85(1) of Additional Protocol I to the Geneva Conventions of 12 August 1949. Other IHL provisions that impose an obligation to implement IHL clauses into domestic legislation include those relating to the use of the Red Cross emblem and the protection of cultural property, and conventions regulating the use of weapons.
- 7 For selected publications on the work of these national tribunals, see United Nations Interregional Crime and Justice Research Institute, “Reports and Publications on War Crimes Proceedings”, available at: <http://wcpj.unicri.it/proceedings/>. For ongoing war crimes cases prosecuted in Belgrade, see the Serbian Office of the War Crimes Prosecutor, available at: [www.tuzilastvorz.org.rs/html\\_trz/pocetna\\_eng.htm](http://www.tuzilastvorz.org.rs/html_trz/pocetna_eng.htm). For ongoing war crimes cases prosecuted in Bosnia and Herzegovina, see: [www.sudbih.gov.ba/?jezik=e](http://www.sudbih.gov.ba/?jezik=e). For prosecutions in Bosnia and Herzegovina, see the experience of the Bosnian War Crimes Chamber, documented in the Human Rights Watch report *Justice for Atrocity Crimes: Lessons of International Support for Trials before the State Court of Bosnia and Herzegovina*, available at: [www.hrw.org/report/2012/03/12/justice-atrocity-crimes/lessons-international-support-trials-state-court-bosnia](http://www.hrw.org/report/2012/03/12/justice-atrocity-crimes/lessons-international-support-trials-state-court-bosnia). Regarding Croatia’s efforts towards effective prosecution of war crimes, see Ivo Josipovic, “Responsibility for War Crimes Before National Courts in Croatia”, *International Review of the Red Cross*, Vol. 88, No. 861, 2006, available at: [www.icrc.org/eng/assets/files/other/irrc\\_861\\_josipovic.pdf](http://www.icrc.org/eng/assets/files/other/irrc_861_josipovic.pdf).

The international community has still to solve the problem of enforcement. Until it does so, the international rule of law is bound to be a less effective counterweight to international political power and the sovereign independence of states than it could, and should, be.<sup>8</sup>

The rule of law requires courts to be independent, impartial, accessible and able to provide effective and equal enforcement of the law.<sup>9</sup> In assessing whether national courts possess these features, two aspects – structural and functional – need to be examined. The structural conditions refer to the legal framework that empowers courts to enforce IHL, whereas the functional conditions refer to the courts' *de facto* enforcement of IHL.<sup>10</sup> This article takes a closer look at these conditions, while focusing mainly on the functional aspects. The first section outlines the structural conditions necessary for the effective enforcement of IHL by national courts. The second section elaborates on the spectrum of options that national judges have available to them while applying IHL, and describes the functional roles of courts in choosing any of these options. It is demonstrated that even if the structural conditions are fulfilled, it may well be that the *de facto* functioning of the court will not result in the normative application of the law. It appears that national judges are in the process of defining their own roles as independent organs for overseeing the State's acts during armed conflicts. Accordingly, the following section lists several conditions and factors aimed at strengthening their function, and the last section offers key questions to be looked at in future studies.

## Conditions necessary for the effective application of IHL by national courts: Structural aspects

The preliminary conditions necessary for the effective application of IHL by national courts depend on several structural factors. These include the existence of domestic legislation that allows for (1) the independence and impartiality of the judiciary, (2) the application and enforcement of IHL rules by national judges (either through a direct application of IHL rules into the national legal system or through their endorsement through national laws), (3) access to courts in cases of IHL violations, and (4) the equal and effective application of the law by the judiciary.

8 Arthur Watts, "The International Rule of Law", *German Yearbook of International Law*, Vol. 36, 1993, p. 44. See also A. Nollkaemper, above note 5, p. 50: "in states that in all other aspects have a reputable quality of the rule of law, the powers of judicial review against the political branches often do not cover international law to the full extent". And see A. Cassese, above note 1, p. 17.

9 Andrei Marmor, "The Ideal of the Rule of Law", in Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, 2nd ed., Wiley-Blackwell, Oxford, 2010), p. 666. One of the most inclusive definitions is probably the one formulated by Raz, who identified eight fundamental elements common to all legal systems: Joseph Raz, "The Rule of Law and Its Virtue", *Law Quarterly Review*, Vol. 93, No. 2, 1977, reproduced in Keith C. Culver (ed.), *Readings in the Philosophy of Law*, 2nd ed., Broadview Press, Ontario, 2008, p. 16.

10 The division between the structural and functional aspects is echoed in the ICC complementarity principle set forth in Article 17 of the ICC Statute: while the term "unable" indicates structural deficiencies of national courts, the term "unwilling" refers to functional deficiencies.

Within this ongoing process, each State has complied with the domestic implementation obligation to a varying degree.<sup>11</sup>

Structurally, the independence of the judiciary from political interference is realized mainly through the separation of powers principle, and through procedural guarantees prescribed by human rights law.<sup>12</sup> A threat to the independence of the judiciary may be understood as direct pressure from the political branch and as a way of imposing a limitation on the courts' competence. Thus, national legislation relating to immunities or amnesties, and rules that confer on the executive the exclusive binding interpretation of treaty law, actually limit the independence of courts. This would "amount just as much to interference by the political branches as direct political pressure".<sup>13</sup>

National courts will not be able to derive jurisdiction from international law beyond that vested in them by national legislation and their own constitutional framework.<sup>14</sup> They will only be competent to apply IHL if the international rules are applicable and the enforceable norms within their own national legal systems are sufficiently clear and detailed. In a number of States, the applicability of international law within the domestic national legal order is automatic. In other States, an explicit act of endorsement by the national legislator is required. In the latter case, States must adjust their own domestic legal system to be able to enforce international rules. They are required to incorporate these rules into domestic legislation or to empower courts constitutionally to directly apply international law. Yet, even in cases where courts may directly apply international law, in view of the fact that treaties are drafted in general terms as a result of their negotiation processes, in most cases further detailed and clear legislation is required in order to be enforced by a domestic court. Therefore, all States, whether dualist or monist, have to adjust their domestic legislation to be able to enforce those IHL rules that are not self-executing.<sup>15</sup> Also, the legislation should allow judges adjudicating international law cases to cite and rely upon international case law, academic writings by international lawyers, and other expert reports by the UN and the International Committee of the Red Cross (ICRC).

Given the central role of domestic courts in ensuring the rule of law, access to them is of paramount importance. For that purpose, it is not enough that a State

11 These structural demands were studied in a recent collective publication: Dinah Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion*, Oxford University Press, Oxford, 2011.

12 These include formal procedural requirements relating to the appointment of judges and their working conditions, the demand that judicial proceedings be conducted openly and fairly, and that the rights of the parties be respected. See International Covenant on Civil and Political Rights, Art. 14; and the UN Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by UNGA Res. 40/32, 29 November 1985, and UNGA Res. 40/146, 13 December 1985.

13 See A. Nollkaemper, above note 5, pp. 53–54; Resolution on the Activities of National Judges and the International Relations of their State, Institut de Droit International, Milan, 1993, Art. 1(1).

14 A. Nollkaemper, above note 5, pp. 44–45.

15 See Marco Sassòli, Antoine A. Bouvier and Anne Quintin, *How Does Law Protect in War?*, 3rd ed., Vol. 1, ICRC, Geneva, 2011, pp. 360–361.

endorses IHL rules in its domestic legislation. In order to make these laws enforceable, access to the courts and issues of standing must also be guaranteed by legislation. Furthermore, access to a court is only meaningful if the court can provide an effective remedy for violations.<sup>16</sup> Therefore, the structural aspect requires that judges are equipped with the necessary skills in order to apply IHL. This in turn relates to the legal education that is provided to judges; the curriculum at law faculties and special workshops, which can be provided to the judiciary in collaboration with international bodies such as the UN, ICRC or regional organizations; and other expertise required in the process of the qualification of judges and the creation of special international law benches.

Finally, all individuals must be equal before the law, meaning that no State organization or individual is above IHL. All belligerents are equally bound and protected by IHL, irrespective of the reasons that triggered the original conflict and of which side is deemed responsible for it.<sup>17</sup> The selective enforcement of IHL is usually not a problem related to the legislation itself – i.e., the structural aspect – as it is uncommon that the law explicitly provides for its uneven application. It is more of a functional issue, as discussed below.

While democratic States operating within a rule of law system increasingly comply with these structural requirements, which are necessary for the proper application of IHL, this is not a guarantee that national courts will enforce the law. The responsibility for applying international law through national courts depends largely on judges, who operate within a particular context and are bound by national political and institutional limits. Thus, even if structurally, judges are nominated through a procedure which seeks to guarantee their independence, and even if the relevant rules of IHL are endorsed by appropriate legislation and access to courts is provided for by the law, it may nonetheless well be that the actual functioning of the court will not result in the normative application of the law. This is so especially in IHL cases, which typically involve major political concerns.

## The function of courts: A spectrum of options

In a prior study, a spectrum of functional roles that judges may assume while applying IHL was identified.<sup>18</sup> Judges can variously serve as a legitimating agency of the State; avoid exercising jurisdiction due to extra-legal considerations; defer

16 Since the courts' judgments establish the law in the case before them, the litigants can only be guided by law if the judge applies the law correctly. Moreover, an open and fair hearing and absence of bias are essential for the correct application of the law. See J. Raz, above note 9, p. 18; A. Watts, above note 8, p. 39.

17 This principle was recognized in the Preamble of Additional Protocol I. See also M. Sassòli, A. Bouvier and A. Quintin, above note 15, pp. 114–115.

18 For a comprehensive analysis of the different roles of national courts, see Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law*, Oxford University Press, Oxford, 2014. This work presents a critical analysis of case law from different democratic jurisdictions, including criminal, civil and administrative cases. It has been largely based on the prior works of Eyal Benvenisti, André Nollkaemper, Marco Sassòli and critical legal scholars such as David Kennedy, Duncan Kennedy and Martti Koskeniemi.



the matter back to the other branches of government; enforce the law and impose limits on the State as required by the law; or develop the law and introduce ethical judgment beyond the positive application of the law. The following section elaborates on a number of these functional roles of courts. It is argued that although in IHL cases, the way national courts apply the law is not always consistent, it can be observed that national courts have gradually moved away from the traditional tendency to avoid jurisdiction in cases related to armed conflicts and towards a more assertive role.<sup>19</sup> As national courts are increasingly solicited to handle cases related to armed conflicts, and public demand for such scrutiny rises, it can be assumed that this tendency will keep expanding.

### Judges as legitimating State (illegal) acts

The apologist or legitimating role of courts can occur when courts legitimize States' illegal acts and policies even if this involves a misuse or distortion of the law. Obviously, legal choices are also motivated by political preferences. Indeed, IHL was drafted by States to regulate the conduct of hostilities during armed conflicts, and an important degree of discretion was left to accommodate for the needs of the armed forces and provide them with a margin of discretion based on necessity. Yet this is not to be confused with the view that positive limitations do not exist and that all positions can be endorsed due to the indeterminacy of the law.

The apologist application of IHL must remain outside the legitimate judicial choices available because such a function violates the founding principles of the rule of law that are essential for the proper functioning of the judiciary. It defies the fundamental requirement that the judiciary is independent and impartial. A court that serves as a legitimating agency for the State's illegal actions does not maintain a neutral position, and it becomes no more than the long arm of the executive. In addition, the right to access a court cannot be realized in an effective manner. If judges provide a distorted interpretation of the law to justify the State's actions, the law is not effective because it does not provide a reliable source upon which litigants can base their choice of action or provide legitimate expectations for remedies in case of violations. Moreover, the misuse of international law by national jurisdictions may have far-reaching and negative consequences beyond the specific facts of the case because it promotes the development of bad law, which runs the risk of being cited and adopted by other national jurisdictions.

19 See, for example, Lord Justice Richards: "It can be seen that the approach of the courts has been very far from insular or narrow. There has been a readiness to tackle issues arising across the world and involving complex and sensitive questions of public international law. ... [M]y chosen focus has been on foreign affairs and military conflict. In those fields there are, inevitably, certain forbidden areas – areas where the courts themselves have accepted that it is not appropriate for them to intervene. But that should not be allowed to obscure the fact that modern judicial review is operating in a way that exposes ministers and their officials to close and effective judicial scrutiny, to which the human rights legislation has given additional impetus." Lord Justice Richards, "The International Dimension of Judicial Review", The 2006 Gray's Inn Reading, 7 June 2006, p. 10.

## Avoiding the application of the law

Given that political objectives may, in certain situations, be unavoidable (like during ongoing hostilities, in which the legal system is not always able to function at full independence), national judges have developed avoidance doctrines.<sup>20</sup> These doctrines, such as the act of State doctrine, the principle of non-justiciability or the political question doctrine, permit judges to refrain from hearing cases despite having jurisdiction, thus shielding States from judicial scrutiny before national courts. By avoiding cases through the use of such doctrines, the legal question remains outside the realm of justice and is left to the political arena. Recourse to avoidance doctrines may be justified in light of the difficulty of assessing evidence in cases involving foreign affairs and of applying legal standards to policy questions, as well as the question of expertise of judges in these matters and the institutional fear of judges that the executive will ignore their decisions. However, these doctrines usually serve policy goals, which are not always made public.<sup>21</sup>

From the perspective of the rule of law, the use of avoidance doctrines by courts is problematic as it violates several requirements of the rule of law, most notably the right of access to a court and the requirement of a legal system to enforce the law in an impartial and effective manner. Avoidance doctrines have no definite boundaries; this is notwithstanding the judicial enumeration of “neutral” factors for their application.<sup>22</sup> While in one jurisdiction an issue may be not justiciable, in another the same issue would be. Thus, it appears that a policy choice (and not a legal one) motivates the decision of a court invoking the avoidance doctrine. This means that the law is often applied in a selective manner, in breach of the equality principle, which most often corresponds to the State’s position.<sup>23</sup> Having said that, the positive aspect of avoidance doctrines is that when avoiding cases, courts do not produce distorted jurisprudence which may be cited by other jurisdictions in order to legitimize States’ illegal acts. Thus, in cases in which the court is not sufficiently independent and is not in a strong

20 Louis Henkin, “Is There a ‘Political Question’ Doctrine?”, *Yale Law Journal*, Vol. 85, No. 5, 1976, p. 599; Eyal Benvenisti, “Judicial Misgivings Regarding the Application of International Norms: An Analysis of Attitudes of National Courts”, *European Journal of International Law*, Vol. 4, 1993, p. 183; Thomas M. Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?*, Princeton University Press, Princeton, NJ, 1992, pp. 45–60.

21 When a case is declared by the court as non-justiciable, it may appear that the judiciary is not only deferring to the political branch, but also implicitly condoning the action. Deeper examinations of cases in which these doctrines are not applied – through their rejection or by defining their exceptions – support this assumption. Studies have shown that a court is more likely to render a decision on the merits in cases involving foreign relations or military affairs when the case results in a finding in favour of the State. See Jeff Yates and Andrew Whitford, “Presidential Power and the US Supreme Court”, *Political Research Quarterly*, Vol. 51, No. 2, 1998, pp. 539–550.

22 US Supreme Court, *Banco Nacional de Cuba v. Sabbatino*, 376 US 398, 1964, p. 428. In this case, a number of factors were established, leaving a wide margin of appreciation for the court to decide on the matter.

23 For the selective application of avoidance doctrines in US Alien Tort Statute cases, which corresponds almost always to the State position see Jeffrey Davis, *Justice across Borders: The Struggle for Human Rights in U.S. Courts*, Cambridge University Press, Cambridge, 2008; S. Weill, above note 18, pp. 82–100. When the State directs courts as to when to exercise their competence (or not), the principle of independence and impartiality of the court is also compromised.

enough position to apply the laws governing armed conflicts, it may be preferable for the court to avoid exercising its competence. By doing so, it prevents a situation in which it would distort the law and confer a rubber stamp legitimizing the abuse and misuse of international law. In both situations, whether performing an apologetic or avoidance function, the political branches would be able to pursue the issue, even if the State's acts are in violation of IHL. In the latter case, however, the political branch would not enjoy the perception of legal legitimacy provided by a court in a democratic society. The issue would be left to be decided in the political sphere. NGOs could then advance the argument that the law has been violated and maybe gain public support, which is more difficult to achieve if a court has approved the illegal policy.

### From avoiding to deferring

While avoidance doctrines completely deny access to courts and leave the issue entirely outside the realm of the law, there are preferable solutions that could be enacted by courts in the process of defining and affirming the legitimate boundaries of their independent institutional position – for example, through the use of the deferral technique. In order to deal with the inherent political complexity of international law, courts have developed a nuanced and gradual way to do define the boundaries of their independent institutional position, in the form of an open dialogue with the other legislative and executive branches, through the deferral technique. Here, courts exercise their competence and do not avoid the issue. However, as they are still reluctant to overturn a decision by the executive on the merits, they defer to the executive. Thus, the court may make pronouncements on the legality of the act to a varying degree, yet it will choose to defer back to the executive or legislative branches the decision on implementation or interpretation. The deferral technique offers courts a range of options for applying the law while at the same time maintaining dialogue with other branches of the government, and not confronting them. Progressively, with the use of the deferral technique, courts have begun to exercise their judicial authority as an IHL enforcer.<sup>24</sup>

As case law shows, courts are increasingly willing to exercise their competence over questions of international law, especially cases dealing with the individual's protection of human rights. Thus, the deferral technique opens the gates to the normative application of international law by courts and enables courts to slowly abandon previous patterns of functions concerning the law applicable during armed conflicts. The deferral technique has allowed an important transition from the use of avoidance doctrines to judicial review. Cases that were previously seen as touching on “forbidden areas” have entered the

24 Eyal Benvenisti, “United We Stand: National Courts Reviewing Counterterrorism Measures”, in Andrea Bianchi and Alexis Keller (eds), *Counterterrorism: Democracy's Challenge*, Hart Publishing, Oxford, 2008, p. 257. The deferral role of courts is well apparent in a number of Guantanamo cases in different jurisdictions; see S. Weill, above note 18, pp. 121–134.

sphere of judicial review, and courts may well decide to be even more assertive in the future. Thus, while exercising judicial review, instead of deferring to the executive, courts may impose further limits on the executive. To turn back to the traditional path of avoidance is less expected. Yet, the risk with the deferral technique is that at the end of the day, if the State misuses the discretion allocated by the judiciary, the courts may facilitate a State's illegal policy instead of using their role to limit abuses of the law. Thus, courts need to instruct the State explicitly and unequivocally as to what the law says and the legal consequences of wrongdoing. Yet, as IHL cases involve sensitive and complex issues, national courts must also respect the institutional limits of the State within which they operate in order to maintain their authority and reputation.

### **Conditions necessary for the effective application of IHL by national courts: Functional aspects**

From a rule of law perspective it is desirable that the growing practice and proper function of national courts in their application of international law, along with the work of international courts, will guarantee the enforcement of the law by the judiciary also during armed conflicts. The section below identifies a number of factors necessary for the effective function of national courts in the application of IHL. It also proposes avenues for future studies aimed at strengthening the position of national courts and their capacity to enforce IHL.

#### **The independence of courts**

When the structural requirements related to the independence of the courts are fulfilled, the extent of the application of IHL by national courts is dependent on the domestic judicial tradition and the level of independence and strength of the courts vis-à-vis the political branches of government. Here, an analogy to the court's authority for judicial review of administrative acts of the State under domestic law can be useful.<sup>25</sup> The more a legal system is used to limiting the State through far-reaching constitutional review powers, the more it can be expected that the judiciary will enforce IHL, even to the extent of imposing limits on State acts or legislation. At the same time, because of the special nature of international law and more specifically the law applicable during armed conflict, an excess of judicial "activism" is not necessarily a guarantee that IHL will be better enforced; courts must take into account political concerns and the political

25 "If national constitutional courts are willing to strike down laws passed by the national legislature, then they should have the institutional clout to do the same thing when enforcing international law": Mattias Kumm, "International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model", *Virginia Journal of International Law*, Vol. 44, 2003, p. 24. Benvenisti proposes on the basis of that analogy to adjust the requirement of standing. Eyal Benvenisti, "Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on 'The Activities of National Courts and the International Relations of their State'", *European Journal of International Law*, Vol. 5, 1994, p. 438.

consequences of their rulings.<sup>26</sup> Courts are national institutions, and as such they have a defined role in the governmental structure of the State. In democratic systems, the judiciary is required to balance between two conflicting vectors: the institutional need of any government to rely on the court as a legitimizing agent, and the need for the courts to be seen as independent and capable of delivering justice according to the rule of law.<sup>27</sup> Scholars describe domestic courts' position in the national system as a pact with the political branch, which attributes to the courts the competence to carry out judicial review.<sup>28</sup> A court that exceeds the implicit limits of this pact risks a legislative counter-response that may impose limitations on the court's authority for judicial review in the future. Thus, courts must consider the consequences of their rulings because these may result in follow-up legislation that would invalidate the rulings or, more generally, limit their jurisdiction. Furthermore, as opposed to other fields of law, the State does not have the same interest in the law of armed conflict being independently and impartially applied.<sup>29</sup> This is because in cases of armed conflict, public opinion prevails over national interests and does not demand the same level of scrutiny with regard to compliance with the law in other fields. Courts cannot be expected to stand alone against the State and/or public opinion in the name of the law, particularly in relation to sensitive issues such as armed conflict. On the other hand, when public demand for judicial scrutiny over IHL grows, the independent position of the court is reinforced.

## The impartiality of courts

Koskenniemi observes a *structural bias* within the international legal order: "Out of any number of equally 'possible' choices, some choices – typically conservative or *status quo* oriented choices – are *methodologically privileged* in the relevant institutions."<sup>30</sup> This observation also seems to be valid for national courts that apply IHL.

The inherent impartiality of national judges is related to the combination of a number of factors that influence judges' willingness to serve their State's national interest while applying IHL. First, the subjective default orientation of the judge

26 Paradoxically, too much independence can limit the effectiveness of international law, as the judiciary may lose its ability to compel the executive to act. Nolkaemper argues that the political dimension of international law not only *de facto* limits the possibility of full independence of national courts but also questions the very desirability of such independence. See A. Nolkaemper, above note 5, p. 59.

27 Martin Shapiro, *Courts: A Comparative and Political Analysis*, University of Chicago Press, Chicago, IL, 1981; E. Benvenisti, above note 24, p. 275.

28 *Ibid.* See also Rofer Cotterrell, *The Sociology of Law*, Butterworths, London, 1984, pp. 232–236; T. M. Franck, above note 20, pp. 10–12.

29 E. Benvenisti, above note 25, pp. 425–427, holding the view that this pact did not include judicial review in foreign affairs, because of the absence of the State's interest in having legal legitimization for its acts abroad and because of a lack of public demand for scrutiny over those acts.

30 Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge University Press, New York, 2006, p. 607. See also Duncan Kennedy, *A Critique of Adjudication [fin du siècle]*, Harvard University Press, Cambridge, 1997, pp. 59–60. On the structural bias and the Israeli High Court of Justice, see S. Weill, above note 18, pp. 37–40.

herself tends to defend and favour her own national interest. This is especially true in times of armed conflict. Courts are State institutions – they consist of judges who are citizens of the State, and who therefore share the same sociological and psychological mindset.<sup>31</sup> Second, when two sides fall into a conflict that they cannot resolve between themselves, it is natural for them to resort to a third party to resolve the conflict. This is the prototype triadic structure of courts (i.e., two disputing parties and a third-party decision-maker). The condition for this structure to be legitimate is for the conflict-solver to be perceived as independent and impartial vis-à-vis the two parties to the conflict. As the judge is a State agent, in cases where the State is a party to the proceedings (and to the armed conflict), the triadic structure is necessarily weakened, as one of the parties may perceive the third party as an ally of its adversary.<sup>32</sup>

Presumptions, the burden of proof and other general rules may serve as legal tools to mask this structural bias through *factual* determination. In this respect, when the State is a party to IHL proceedings, and evidentiary or normative presumptions are made in its favour, the bias in favour of the State is only reinforced. In many legal systems, despite the complexity of establishing the facts in IHL cases (in which the State usually possesses exclusive information, already giving it an advantage over its adversary), additional presumptions are granted in favour of the State, further weakening the triadic structure. The authorities' version of the facts is given special weight. The general presumptions of honesty, good faith and integrity afforded to agency officials assume that the authority's factual claims are true. Moreover, it becomes extremely difficult to prove that the authority's decision was arbitrary. The factual presumption, taken together with the more general presumption that the judiciary does not have more expertise than the authorities on certain matters, prevents courts from intervening effectively in a decision that was taken according to a professional authority's assessment. This means that where State authorities claim they were guided by *reasonable* considerations, their rationale will generally be upheld by courts.

Finally, the complex political relations between the States involved in an IHL case often lead to a selective enforcement of the law that depends on the nationality of the victim and the identity of the responsible State or individual. In politically sensitive cases, courts may follow their government's stance and avoid exercising their competence, while in politically "easy" cases, they will exercise their competence (usually in accordance with their own executive).

31 See generally the critique of American legal realism, an intellectual movement in the United States during the 1930s: "How a judge responds to the facts of a particular case is determined by various psychological and sociological factors, both conscious and unconscious. The final decision, then, is the product not so much of 'law' (which generally permits more than one outcome to be justified) but of these various psychological factors, ranging from the political ideology to the institutional role to the personality of the judge." Brian Leiter, "American Legal Realism", in Dennis M. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, 2nd ed., Blackwell, Oxford, 2010, p. 249. See also José J. Toharia, "Judges", in James D. Wright (ed.), *International Encyclopedia of the Social & Behavioral Sciences*, 2nd ed., Elsevier, Amsterdam, 2015, pp. 879–884.

32 M. Shapiro, above note 27, p. 27.

## The duration of the conflict and public demand for judicial scrutiny

The duration of the conflict, the timing of the review and the length of time that has elapsed since the armed conflict took place are important factors for courts in determining their willingness to exercise their authority. An active and independent civil society and media, which could influence public opinion and increase the demand for judicial scrutiny during the period after the conflict, are equally important factors.

In the context of duration, we can distinguish between two types of situations: full-scale military operations involving active hostilities, and prolonged and low-intensity struggles, such as those waged by States against terrorist threats or insurgencies over a long period of time. Benvenisti argues that the need of the executive to rely on the courts as agents of legitimacy and the institutional need for the judiciary to be independent from the government must both take a “back seat” during short and intense crises. In contrast, when the conflict is prolonged – including a situation of enduring occupation – these factors become relevant again.

On the one hand, the State needs to rely on the courts as legitimating agencies in their exercise of judicial review; on the other hand, courts will be more willing than in other situations to review a State’s actions and safeguard their institutional independence and reputation.<sup>33</sup> The initial stages of armed conflicts are typically characterized by a strong sense of patriotism and unity of the State in support of the executive. As courts are State institutions, and judges are citizens of their States, they form an integral part of the State system. This may partially explain the fact that “State interests are attributed particular weight during wars.”<sup>34</sup> However, this is not necessarily the case when the review is carried out months or years after the facts (which frequently happens when a case is heard in a second or third instance). The time interval and the public opinion that has meanwhile crystallized due to media, NGO and academic reports concerning IHL violations may have an impact on the courts’ willingness to exercise their authority. Once the conflict becomes protracted, it becomes easier for a court to exercise its authority and to rule against the State – a situation that is barely imaginable during the initial stages of a full-scale military operation.<sup>35</sup>

There is another temporal aspect that is particular to serious violations of IHL. War crimes are not subject to statutory limitations.<sup>36</sup> Therefore, war crimes trials can be held a long time after the crimes occurred. When the courts of the

33 E. Benvenisti, above note 24, pp. 309–318.

34 *Ibid.*, p. 309. See more generally the critique of American legal realism.

35 For instance, the willingness of the US Supreme Court to exercise its authority and to rule against the US State position in the *Hamdan* case is likely related to the fact that the petitioner has been held for more than four years in detention without legal procedure, a situation which was strongly criticized by the international community, the ICRC and local NGOs. Similarly, in *Abbasi*, a decision which was rendered in the UK relatively close to the event had to allow complete deference, as politically, this was probably the farthest a court could go at that stage. See S. Weill, above note 18, pp. 124–130.

36 See the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: Rules, Cambridge University Press, Cambridge, 2005, Rule 106.



responsible State in a post-conflict setting deal with war crimes cases, courts may have an easier time in ruling against one of their own citizens. This is especially the case if there exists a consensual historical narrative that has identified individuals responsible for committing war crimes, and if enough time has passed to ensure that the people directly involved in the violations no longer belong to the circle of decision-makers.

During an ongoing armed conflict, when responsible individuals still hold key positions in government and in the military, it is hardly conceivable for such trials to take place at the national level. Until a national historical narrative becomes widely accepted, in which the nation's own responsibility has been acknowledged, the independence and impartiality of the judiciary, and thus its ability and willingness to apply IHL, remain at risk.<sup>37</sup> In this regard, the time that has elapsed since the crimes occurred and the political and historical narrative that has emerged are factors to take into account.

### National courts as a part of a global system

Another aspect to be taken in account is the fact that national courts are part of a global legal order, a development that domestic courts are increasingly becoming aware of when adjudicating IHL cases. Thus, if international tribunals or leading national courts have already reviewed the same issue, it may be legally and politically easier for other courts to take a more active or assertive role. For example, consider the US Supreme Court's rulings in *Rasul* (2004) and *Hamdan* (2006), before the Canadian Supreme Court found that the conditions under which Khadr was held in detention in the US military base at Guantanamo Bay were in violation of international law,<sup>38</sup> holding that the participation of Canadian officials in the "Guantanamo Bay process" constituted a "clear violation of Canada's international human rights obligations" and was "contrary to Canada's binding international obligations".<sup>39</sup> The US Supreme Court decisions had a decisive impact on the Canadian Supreme Court. These cases provided the legal authority to confirm that international law was violated during

37 In this context, the war crimes trials carried out in Serbia are among the rare examples of prosecution of war crimes just a few years after they were committed. See S. Weill, above note 18, pp. 46–67.

38 Supreme Court of Canada, *Canada (Justice) v. Khadr*, 2 SCR 125, 2008 SCC 28, 2008, available at: [www.canlii.org/en/ca/scc/doc/2008/2008scc28/2008scc28.pdf](http://www.canlii.org/en/ca/scc/doc/2008/2008scc28/2008scc28.pdf). Khadr, a Canadian citizen, was arrested by US forces in Afghanistan before his 16th birthday and had been detained since 2002 in Guantanamo Bay. His legal action involved a number of litigations, including two cases before the Canadian Supreme Court. The first Supreme Court ruling in 2008 addressed the involvement of Canadian officials in his illegal detention in Guantanamo, and the second case, from 2010, requested his repatriation to Canada.

39 *Ibid.*, paras 21, 25. Interestingly, the Court does not refer explicitly to IHL violations, but refers only to human rights or international obligations. "Given the holdings of the United States Supreme Court, the *Hape* comity concerns that would ordinarily justify deference to foreign law have no application here. The effect of the United States Supreme Court's holdings is that the conditions under which Mr. Khadr was held and was liable for prosecution were illegal under both U.S. and international law at the time Canadian officials interviewed Mr. Khadr and gave the information to U.S. authorities. Hence no question of deference to foreign law arises. The *Charter* bound Canada to the extent that the conduct of Canadian officials involved it in a process that violated Canada's international obligations": para. 26.

the detention process for Khadr, an assessment that is required for the application of the Canadian Charter extraterritorially. In fact, the US Supreme Court rulings in 2004 and 2006 enabled the Canadian Supreme Court in 2008 to apply the Canadian Charter extraterritorially to the acts of Canadian officials in Guantanamo Bay in 2003 – a decision that imposed a remarkable limitation on the executive’s authority. Another example can be found in the readiness of national courts to exercise universal jurisdiction over crimes that were committed in the Balkans or Rwanda, subsequent to the *ad hoc* international tribunals’ decisions. These universal jurisdiction cases were prosecuted more easily because of the establishment of the international *ad hoc* tribunals, which provided both an authoritative legal analysis of the situation (that serves as legal guidance for national courts) and political legitimacy for prosecutions.

### Types of violations: Individual rights versus conduct of hostilities cases

The growing trend of courts taking an active role in IHL cases is especially noticeable in cases dealing with the protection of individual rights, usually of the State’s own nationals, during protracted conflicts. Violations related to individual rights in specific cases are more readily adjudicated. Courts are less willing to exercise judicial review over policies and conduct of hostilities issues (weapons, combat tactics etc.). Courts usually refrain from pronouncing on means and methods of warfare, which are seen as being not only under the exclusive discretion of the State, but completely outside the realm of judicial review and law enforcement.

One factor that explains the tendency of courts to take a more assertive position with regard to human rights violations committed by the State’s own nationals is that human rights do not have an impact on future policies and practice. Another factor that comes to play is the national implementation of international human rights obligations, facilitating access to courts and the development of local political cultures in support of their legal enforcement. Following the human rights law movement of the last sixty years and its penetration into domestic law and international jurisprudence, national courts have developed their own important jurisprudence related to human rights, and have thus become the guardians of those rights.<sup>40</sup> This allows for judicial intervention from a practical and policy perspective, and indeed, the majority of courts in democratic States today are in a position to limit the State’s exercise of powers when it leads to human rights violations. Such human rights jurisprudence has also become gradually applicable in situations of armed conflict, as evidenced by the Guantanamo Bay-related cases. Thus, in addition to – or rather, instead of – IHL, courts increasingly tend to apply international human rights law during armed conflicts. One advantage of this approach is that human rights are often embedded in constitutional law and that litigants may have better access to courts.

40 E. Benvenisti, above note 24, fn. 52 and accompanying text.

As petitioners increasingly attempt to bring cases before national courts during ongoing conflicts because of domestic legislation that grants them access to the courts, the training of specialized lawyers and the public's demand for judicial scrutiny of such cases can reasonably be expected, given that the emerging trend of reviewing IHL cases will be expanded to also include conduct of hostilities cases. International human rights law may also influence this process, as the decision of the European Court of Human Rights in the *Al-Skeini* case suggests.<sup>41</sup>

## Access to the courts

Even when national constitutions explicitly provide for the incorporation of international law into domestic legal systems, access to courts can still be denied by the courts themselves on policy grounds. Courts have developed rules on standing, through which they define their own role in applying IHL. For example, the US Constitution establishes that international treaties are part of the supreme law of the land. At the same time, the enforcement of treaties in the US legal system has been restricted by judges through the development of self-executing and standing doctrines.<sup>42</sup> One of these is the demand for a “private cause of action”. Under this doctrine, private parties may only enforce a treaty provision if they possess a private right of action conferred by the treaty – a determination to be made by judges. Thus, in certain legal systems, the courts may still have the ability to decide, by using their interpretative tools, whether IHL is enforceable or not. Another example is the determination of whether or not a specific rule constitutes customary international law, which would then be directly enforced by courts in dualist States.

The rule of law requires not only access to a court, but also equal access for all. However, avoidance doctrines developed by judges impose *de facto* limitations upon the ability to access a court. These avoidance doctrines include doctrines of non-justiciability, such as the political question doctrine or the act of State doctrine, and questions of the convenient fora and subsidiarity rules – all

41 European Court of Human Rights, *Al-Skeini and others v. The United Kingdom*, Case No. 55721/07, Judgment, 7 July 2011. According to the British Act of State doctrine, English courts are prevented from considering a claim by an alien regarding the acts of the UK on foreign soil on behalf of the Crown (see F.A. Mann, *Foreign Affairs in English Courts*, Oxford University Press, Oxford, 1986, pp. 184–190). Yet, the European Court of Human Rights in *Al-Skeini* ruled that the European Convention of Human rights applied extraterritorially and bound the UK forces in Iraq (from the moment armed forces exercised effective control), resulting in access to the UK courts through the UK domestic Human Rights Act. *Al-Skeini*, para. 148.

42 The Supremacy Clause of the United States Constitution, Article 6, Clause 2, provides as follows: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” The distinction between self-executing and non-self-executing treaties was introduced into US jurisprudence by the Supreme Court for the first time in *Foster v. Neilson*, 27 US (2 Pet.) 253, 1829. See also Carlos M. Vazquez, “The Four Doctrines of Self-Executing Treaties”, *American Journal of International Law*, Vol. 89, No. 4, 1995, p. 699.

doctrines developed by judges. Through the use of avoidance techniques, the court can deny a party access to the courts, and consequently the law is not enforced. While courts have established various factors for the application of avoidance doctrines, it has not always been possible to predict when courts would render a judgment on its merits, as extra-legal considerations are often involved. The willingness to exercise competence varies therefore from one jurisdiction to another, and is not related to the legal question itself. Thus, in the United States, the policy of targeted killings was seen as a political question, while in Israel it was deemed to be a legal question and a justiciable case.<sup>43</sup> This means that the law and the use of avoidance doctrines are often applied in a “double standards” mode, in breach of the equality principle. In the same jurisdiction, similar cases may be decided differently depending on the nationality of the victim and the State responsible, in a way that most often corresponds to the State position. Such uneven application of the law has been clearly demonstrated through the application of the Alien Tort Statute by US courts.<sup>44</sup>

## Reinforcing national capacities to interpret IHL

Seeking a remedy in court means not only that the judgments will be given effect, but also that the law will be effectively applied by a competent court. Judges must apply the law correctly. In this regard, an outstanding question remains as to the level of the court’s knowledge of IHL and the objective capacities and skills of the judges with regard to this body of law. Functionally, in their interpretation and application of IHL, judges may rely (to the extent made possible by their own legal system, together with international case law) on domestic cases from other jurisdictions dealing with similar legal questions, academic writings, and other expert reports such as those produced by the ICRC or the UN.<sup>45</sup>

The first step in the correct application of IHL is to classify the conflict. An accurate classification of the conflict is of major importance, as the applicable law

43 See US District Court for the District of Columbia, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010), at p. 80: “Because decision-making in the realm of military and foreign affairs is textually committed to the political branches, and because courts are functionally ill-equipped to make the types of complex policy judgments that would be required to adjudicate the merits of plaintiff’s claims, the Court finds that the political question doctrine bars judicial resolution of this case.” On the other hand, the Israeli High Court of Justice found that “[w]hen the character of the disputed question is political or military, it is appropriate to prevent adjudication. However ... the questions disputed in the petition before us are not questions of policy. Nor are they military questions. The question is whether or not to employ a policy of preventative strikes, which cause the deaths of terrorists and at times of nearby innocent civilians. The question is – as indicated by the analysis of our judgment – legal.” Israeli High Court of Justice, *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.*, HCJ 769/02, 2006, para. 51.

44 See above note 23.

45 The author, along with judges, prosecutors and defence lawyers from around the world, was invited to participate in a workshop in Geneva organized by the ICRC Advisory Service in May 2015. The workshop addressed different topics including a discussion on how the judicial sector has contributed to the interpretation, enforcement and development of IHL, and the ICRC’s role in IHL training for judges. See: [www.icrc.org/en/document/icrc-consultation-brings-together-legal-professionals-discuss-ihl](http://www.icrc.org/en/document/icrc-consultation-brings-together-legal-professionals-discuss-ihl).

depends on this preliminary determination. Nonetheless, the task of classifying a conflict is not always carried out by national courts in their decisions.<sup>46</sup> A clear example is the adjudication of cases related to the “war on terror”. While a vast academic literature has attempted to define the scope of this “war”, its qualification and hence the applicable law,<sup>47</sup> different Western jurisdictions, such as Australia, Canada and the UK<sup>48</sup> (involved in reviewing legal questions related to detainees in Guantanamo), have completely ignored the applicability of IHL and the question of classification of conflicts.<sup>49</sup> National courts have also been less attentive to the distinction between international human rights law and IHL. National courts do not always address both branches of law, even if they are applicable. In most cases, courts only look at human rights law. Yet, for the correct application of international law, there are situations in which it is necessary to rely on both IHL and international human rights law. Useful examples include the rules on detention during international armed conflict and the right to life and liberty in armed conflicts of a non-international character.<sup>50</sup> The Israeli High Court of Justice in the 2006 *Targeted Killing* case is one of those rare cases in which a national court explicitly addressed the application of IHL and international human rights law and their interrelationship.<sup>51</sup>

46 In some legal systems, courts have to rely on a classification by the executive power and cannot do it independently. This is, as indicated above, a structural obstacle for the effective application of IHL.

47 To mention only a few: Marco Sassòli, “Use and Abuse of the Laws of War in the ‘War Against Terrorism’”, *Law and Inequality: A Journal of Theory and Practice*, Vol. 22, 2004; Luigi Condorelli and Yasmin Naqvi, “The War against Terrorism and Jus in Bello: Are the Geneva Conventions Out of Date?”, in Andrea Bianchi (ed.), *Enforcing International Law Norms against Terrorism*, Hart Publishing, Oxford, 2004; Christopher Greenwood, “International Law and the ‘War against Terrorism’”, *International Affairs*, Vol. 78, No. 2, 2002. For a resources list, see M. Sassòli, A. Bouvier and A. Quintin, above note 15, pp. 129, 131–132. Academic literature has examined at length the relations between IHL and international human rights law during armed conflict. See, for example, Cordula Droge, “The Interplay between IHL and International Human Rights Law in Situation of Armed Conflict”, *Israel Law Review*, Vol. 40, No. 2, 2007; Françoise J. Hampson, “The Relationship between IHL and Human Rights Law from the Perspective of a Human Rights Body”, *International Review of the Red Cross*, Vol. 90, No. 871, 2008.

48 See, for example, *Hicks v. Ruddock et al.*, FCA 299, 2007; *Canada (Prime Minister) v. Khadr*, SCC 3, 2010 1 SCR 44, 2010; *R (Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs*, EWCA Civ 1598, 2002, UKHRR 76 CA, 2003.

49 One of the rare cases that explicitly attempted to qualify the “war on terror” was the *Hamdan* case of the US Supreme Court, the outcome of which remains highly questionable: “The United States Supreme Court found in *Hamdan v. Rumsfeld* that the military commissions set up in Guantanamo violated precisely those judicial guarantees prescribed by common Article 3 to the Four Geneva Conventions of 1949. Yet the court left open the question whether *Hamdan*, arrested in Afghanistan when the country was still occupied by the United States and its allies, should rather be covered – as I would submit – by the law of international armed conflicts.” Marco Sassòli, “Transnational Armed Groups and IHL”, Harvard University, Program on Humanitarian Policy and Conflict Research, Occasional Paper Series, Winter 2006, p. 20.

50 Marco Sassòli and Laura M. Olson, “The Legal Relationship between IHL and Human Rights Law where It Matters: Admissible Killing and Internment of Fighters in Non International Armed Conflict”, *International Review of the Red Cross*, Vol. 90, No. 871, 2008, p. 599.

51 The official position of the State of Israel is that human rights treaties do not apply in the Occupied Palestinian Territories (OPT). See State of Israel, “International Covenant on Civil and Political Rights – Second Periodic Report”, UN Doc. CCPR/C/ISR/2001/2, 20 November 2001, para. 8. At first, when the question of the applicability of international human rights law in the OPT arose before the Israeli High Court of Justice, it was left open, and the Court was “willing without deciding the matter,

## Avenues for future enquiry

Some of the factors that may influence judges in reaching their optimal functional role in applying IHL from the standpoint of the rule of law have been discussed above. In order to better understand the function of national courts, it will be useful if future research in this area can investigate in-depth the following questions:

- (1) National courts will not be able to derive jurisdiction from international law beyond the competence accorded to them by the national constitutional framework. Therefore, the applicability of international law within the domestic legal system and the competence of courts to enforce it must be guaranteed at the national level. One of the more interesting questions to pursue further in this regard is the exact “rank” or “role” that international law plays in domestic courts, in particular in conflict-affected States. Does the national legislation correspond to the international rules? May courts repeal domestic legislation contradicting international law on the grounds that it is unconstitutional?
- (2) As observed by scholars, because of the special nature of international law, and more specifically the law applicable during armed conflict, an excess of court independence is not necessarily a guarantee that IHL will be better enforced. Courts have to take into account political concerns and the consequences of their rulings. In this regard, it may be useful to study whether it is possible to discern an evolution or a trend in the willingness of national courts to assert an independent position and strengthen their authority in IHL-related cases. Is this evolution linear? How successful have they been in limiting the State with regard to other branches of law?
- (3) To what extent are the judicial function and judicial interpretation by courts performed on an equal basis for all of their subjects? Does this depend on the identity of the subjects litigating before the court, and on factors such as their nationality, rank or position? Can a double standard be identified? Do members of the political and military branches allegedly responsible for IHL violations still hold key positions? Do courts establish the facts in the cases before them by using presumptions in favour of the State?
- (4) Would it be easier for courts to deliver a ruling against the State for past violations that do not have an impact on future policies? Have there been any political responses to court decisions that have imposed limits on the executive (for example, counter-legislation)?

to rely upon the international conventions”. *Mara’abe et al. v. Israel Prime Minister et al.*, HCJ 7957/04, 2005, para. 27. The doctrinal framework was articulated in 2006 in the *Targeted Killing* case, where the Israeli High Court of Justice declared that IHL is the *lex specialis* law applicable during armed conflict. When there is a lacuna in that law, it can be supplemented by human rights law. Israeli High Court of Justice, *Public Committee against Torture in Israel*, above note 43, para. 18. This position has since been cited as a matter of evidence. See, for example, Israeli High Court of Justice, *A and B v. The State of Israel*, HCJ 6659/06, 2008, para. 9: “where there is a lacuna in the laws of armed conflict ... it is possible to fill it by resorting to international human rights law”.

- (5) How much time has passed since the alleged violations? Is there an active and independent civil society and media that could influence public opinion and demand judicial scrutiny over international law issues? Have civil society and the media taken an active role in demanding judicial scrutiny over IHL violations? How influential can their demands be?
- (6) National courts are part of a global system. Have international tribunals/institutions or leading national courts already reviewed the same issue/context? Did they provide an authoritative legal analysis that could provide legal guidance for other national courts? Politically, has it been easier for national courts to address IHL issues when their decisions follow international courts' decisions? In this context, it might be useful to undertake further research in order to inquire to what degree national courts take into account the jurisprudence of international courts and third States' courts. Do they see them as guiding? Which are the courts most often cited by other courts? Do courts attempt to harmonize their decisions with transnational and international case law, or do they simply reject these as non-binding?
- (7) Regarding access to courts, it might be useful to further study whether standing before national courts is regulated by legislation, and to what extent. Do judges provide a restrictive interpretation limiting access? Is access allowed in an equal manner for all victims? In this regard, it might be useful to examine whether new tendencies can be observed, for instance if courts (a) attempt to extend the exceptions to the application of traditional avoidance doctrines in order to justify their exercise of jurisdiction over cases, or (b) explicitly reject their application altogether in light of the key principles of the rule of law, such as the right of access to a court.
- (8) Regarding the capacity of domestic courts to effectively handle IHL-related cases, it may be useful to document whether, beyond treaty law, judges are familiar with international law jurisprudence, customary international law and academic writings. In their interpretation, do judges rely on these sources? The existence of domestic international law expertise is also important: do private lawyers, State prosecution attorneys and legal advisers to NGOs use international law in their claims? Are they sufficiently familiar with international rules, and how do they procedurally rely on them within the particular circumstances of each domestic system? Is education in the domain of IHL available at universities or through professional training courses, international organizations' teaching projects and the like?

## Conclusion

These are only some of the many questions that can help enhance our understanding of how domestic courts position themselves with respect to international law cases, and specifically with respect to the law regulating armed



conflict. It is important that research tell us more about these tendencies and trends, as that can in turn help identify certain knowledge gaps and produce a better understanding of judicial enforcement of IHL domestically. This is crucial, as domestic courts remain the best, though likely also the most delicate, avenue for pursuing effective and lasting enforcement of IHL. The international community thus has an interest in not only better understanding the functioning of domestic courts, but also in ensuring that they are equipped and well placed to perform this role within the domestic legal order.



# Building respect for the rule of law in violent contexts: The Office of the High Commissioner for Human Rights' experience and approach

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## **Abstract**

*How does the Office of the High Commissioner for Human Rights (OHCHR) discharge its mandate of “promoting and protecting the effective enjoyment by all of all civil, cultural, economic, political and social rights”, especially in armed conflicts and other situations of violence? What are its concrete responsibilities, and how does it work to generate respect for the rule of law on the ground? This article aims to provide an overview of OHCHR’s activities, and point to some of the challenges associated with its work to generate respect for the rule of law, in particular in violent contexts. It begins with an overview of the unique mandate of OHCHR and situates it within the broader United Nations human rights machinery. It then gives an account of OHCHR’s experience and approach in building respect for the rule of law, including in armed conflicts and post-conflict situations, outlining how this informs OHCHR’s field setup. Finally, the article summarizes the main challenges that OHCHR faces in the discharge of its*

*mandate. It highlights the need for more concerted action on the part of human rights/humanitarian protection organizations on the ground, despite differences in mandates and constituencies.*

**Keywords:** OHCHR, human rights, prevention, rule of law, armed conflict, humanitarian law, High Commissioner for Human Rights.

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The creation of the Office of the High Commissioner for Human Rights (OHCHR) in 1993 ushered in a new era for the United Nations (UN), in which the human rights discourse was to be put gradually at the heart of the organization's mandate. As the UN Secretary-General famously declared several years later: "There is virtually no aspect of our work that does not have a human rights dimension. Whether we are talking about peace and security, development, humanitarian action, the struggle against terrorism, climate change, none of these challenges can be addressed in isolation from human rights."<sup>1</sup> In that sense, OHCHR today plays a key role in safeguarding not just one but all three pillars of the UN: peace and security, human rights and development.

But how does OHCHR discharge its mandate, especially in armed conflicts and other situations of violence? What are its concrete responsibilities, and how does it work to generate respect for the rule of law on the ground?

This article will aim to provide an overview of the range of OHCHR's activities and will point to some of the challenges associated with its work to generate respect for the rule of law, in particular in violent contexts. It is structured in three main parts. First, the article provides a brief overview of the unique mandate of OHCHR and situates it within the broader UN human rights machinery. Second, it gives an account of OHCHR's experience and approach in building respect for the rule of law, including in armed conflicts and post-conflict situations. Third, it focuses on the specific mandate of OHCHR with respect to violations taking place in armed conflict, and outlines how this informs OHCHR's field operations. This section also discusses some of the challenges that OHCHR faces in the discharge of its mandate, and highlights some innovative initiatives undertaken in the field.

## A brief overview of OHCHR's main role and mandate

OHCHR was created by UN General Assembly Resolution 48/141 of 20 December 1993, following the recommendations of the 1993 World Conference on Human Rights in Vienna.<sup>2</sup> Its general mandate consists of "promoting and protecting the

1 Ban Ki-Moon, UN Secretary-General, "Opening Remarks at News Conference", 23 January 2008, available at: [www.un.org/apps/news/infocus/speeches/search\\_full.asp?statID=176](http://www.un.org/apps/news/infocus/speeches/search_full.asp?statID=176) (all internet references were accessed in December 2014).

2 See paragraph 18 of the Vienna Declaration and Programme of Action: "The World Conference on Human Rights recommends to the General Assembly that when examining the report of the

effective enjoyment by all of all civil, cultural, economic, political and social rights”.<sup>3</sup> OHCHR is required to have as its head a High Commissioner: “a person of high moral standing and personal integrity”, who must “possess expertise, including in the field of human rights, and the general knowledge and understanding of diverse cultures necessary for impartial, objective, non-selective and effective performance of the duties of the High Commissioner”.<sup>4</sup> OHCHR is quite distinct from the Human Rights Council (HRC),<sup>5</sup> with which it is still often confused, and from the different committees established to monitor the implementation of the core human rights treaties,<sup>6</sup> as well as from the various independent experts (named “special procedures”) nominated by the HRC.<sup>7</sup> OHCHR supports the work of the committees and the Special Rapporteurs, but is independent from their mandate.

The work of OHCHR is organized in four substantive divisions: (1) the Research and Right to Development Division, which develops policy and provides guidance, tools, advice and capacity-strengthening support on thematic human rights issues; (2) the Human Rights Treaties Division, which supports the treaty bodies; (3) the Field Operations and Technical Cooperation Division, which is responsible for overseeing and implementing OHCHR’s work in the field; and (4) the Human Rights Council and Special Procedures Division, which provides substantive and technical support to the HRC, the HRC’s Universal Periodic Review mechanism and the HRC’s special procedures.<sup>8</sup>

Conference at its forty-eighth session, it begin, as a matter of priority, consideration of the question of the establishment of a High Commissioner for Human Rights for the promotion and protection of all human rights.”

3 UNGA Res. 48/141, 20 December 1993, para. 4(a).

4 *Ibid.* The resolution further states that the High Commissioner is appointed by the Secretary-General and approved by the General Assembly, with due regard to geographical rotation, and has a fixed term of four years with a possibility of one renewal for another fixed term of four years. She/he has the rank of Under-Secretary-General.

5 The HRC is an intergovernmental entity made up of forty-seven States, in charge of promoting and protecting human rights as required by the UN Charter (in particular, Article 55). The confusion was even greater at the time when the HRC was named the Commission of Human Rights: see Andrew Clapham, “The Office of the High Commissioner for Human Rights”, in Philip Alston and Frédéric Mégret (eds), *The UN and Human Rights*, 2nd ed., Oxford University Press, Oxford, forthcoming 2016, p. 3, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2190811](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2190811).

6 To date, ten such committees (or “treaty-based bodies”) are established: the Human Rights Committee; the Committee on Economic, Social and Cultural Rights; the Committee on the Elimination of Racial Discrimination; the Committee on the Elimination of Discrimination against Women (CEDAW); the Committee against Torture; the Subcommittee on Prevention of Torture; the Committee on the Rights of the Child; the Committee on Migrant Workers; the Committee on the Rights of Persons with Disabilities; and the Committee on Enforced Disappearances.

7 The special procedures report on country-specific human rights situations or particular thematic issues. There are to date thirty-seven thematic and fourteen country mandates; See OHCHR, “Special Procedures of the Human Rights Council”, available at: [www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx](http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx).

8 OHCHR, *OHCHR Report 2014*, Geneva, 2014. It is important to note that the OHCHR is currently undergoing changes in its internal structure. See High Commissioner’s Annual Report, Opening Statement, Item 2, available at: [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15642&LangID=E#sthash.2h61aLv3.dpuf](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15642&LangID=E#sthash.2h61aLv3.dpuf).

In addition, as of December 2014, OHCHR had thirteen country offices and thirteen regional offices or centres around the world.<sup>9</sup> It employed 1,189 staff, 474 of who were based in the field, 695 in Geneva and twenty in New York. OHCHR also supported close to 820 human rights officers serving in thirteen UN peace missions or political offices.<sup>10</sup> This combination of substantive research and legal development work, matched with active field presence as it relates to human rights monitoring, is precisely one of OHCHR's specificities.

## **OHCHR's experience and approach in building respect for the rule of law, including in armed conflicts and post-conflict situations**

The approach of OHCHR to protecting and promoting human rights is conceptualized in three different phases: (1) ensuring better *prevention* of human rights violations, (2) enabling *rapid reaction to a crisis and constant monitoring*, and (3) *addressing post-conflict situations*, notably through the support of transitional justice mechanisms. This part of the article addresses each of these phases, while providing some examples of recent tools aimed at generating better respect for the law – before, during and in the aftermath of armed conflicts or other violent situations.

### **Prevention**

These past years, the prevention of human rights and IHL violations has been a daunting but essential task for human rights and humanitarian organizations, including OHCHR.<sup>11</sup> Of course, there is no miracle recipe that could ensure the absolute prevention of human rights violations. Prevention will necessarily be about the implementation of different tools and mechanisms touching different sectors of a society, dealing with issues of development, education, health, rule of law or democratization.

To *prevent* human rights violations, OHCHR works mainly through its field offices, through the human rights component of peace missions, and through advisers in specific countries. The headquarters in Geneva support the field offices, and are also specifically in charge of some countries, such as China and India.

Across the board, OHCHR works closely with other UN agencies, notably to turn into reality the UN Secretary-General's Five-Year Action Agenda of 2012, which among other action points proposes to

9 See OHCHR, "Who We Are", available at: [www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx](http://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx).

10 OHCHR, above note 8.

11 See, on this topic, Christiane Bourloyannis-Vrailas and Linos-Alexander Sicilianos (eds), *The Prevention of Human Rights Violations*, Brill, The Netherlands, 2001.

[a]dvance a preventive approach to human rights by: [d]eveloping a policy framework that identifies basic elements needed to *prevent* human rights violations; [e]stablishing a *preventive matrix* that will chart progress and gaps in the use of a range of human rights instruments; [and] [a]dvancing the responsibility to protect agenda.<sup>12</sup>

### *Capacity-building and technical support*

Encouraging universal ratification of human rights treaties by States and enhancing their implementation is one of the facets of OHCHR's work on prevention. Examples of such work include capacity-building in helping governments to adopt human rights-compliant domestic legislation. For instance, following the Arab Spring in Tunisia, the adoption of the new Constitution was an essential step for the country's transitional process. OHCHR, through the UN country team, provided the National Constituent Assembly Speaker and Consensus Commission with extensive comments and recommendations throughout the drafting process.<sup>13</sup> The Constitution was adopted in January 2014,<sup>14</sup> and although it fell short of incorporating some important provisions,<sup>15</sup> it does include articles on national institutions and bodies related to elections, justice, human rights and the media, and guarantees their constitutional protection according to international standards.<sup>16</sup>

Another example is the support provided to Uganda, in cooperation with the Uganda Human Rights Commission and civil society organizations, which resulted in the adoption of the Prevention and Prohibition of Torture Act, consistent with the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>17</sup> Similar support was given to constitutional and legislative processes in Egypt, Fiji, Libya, Somalia and Paraguay.<sup>18</sup>

12 See "The Secretary-General's Five-Year Action Agenda", 25 January 2012, available at: [www.un.org/sg/priorities/sg\\_agenda\\_2012.pdf](http://www.un.org/sg/priorities/sg_agenda_2012.pdf) (emphasis added). Listed goals are: I. Sustainable development; II. Prevention; III. Building a safer and more secure world by innovating and building on our core business; 4. IV. Supporting nations in transition; V. Working with and for women and young people.

13 OHCHR, *OHCHR Report 2013*, Geneva, 2013, "Impunity and the Rule of Law" section, p. 33.

14 Hélène Sallon, "Libertés, droits des femmes: Les avancées de la Constitution tunisienne", *Le Monde Afrique*, 27 January 2014, available at: [www.lemonde.fr/tunisie/article/2014/01/27/des-avancees-majeures-dans-la-constitution-tunisienne\\_4354973\\_1466522.html](http://www.lemonde.fr/tunisie/article/2014/01/27/des-avancees-majeures-dans-la-constitution-tunisienne_4354973_1466522.html).

15 See the letter from Navi Pillay to the President of the Assemblée Nationale Constituante, Mustapha Ben Jaâfar, available in French at: <http://news.tunistribune.com/?q=node/3177#sthash.oNRqETQy.dpufhttp://news.tunistribune.com/?q=node/3177>; and also "Navi Pillay: La nouvelle constitution tunisienne répond aux normes internationales en matière de droits de l'Homme", 3 March 2014, available at: [www.aa.com.tr/fr/afrique/296157-navi-pillay-la-nouvelle-constitution-tunisienne-repond-aux-normes-internationales-en-matiere-de-droits-de-l-homme](http://www.aa.com.tr/fr/afrique/296157-navi-pillay-la-nouvelle-constitution-tunisienne-repond-aux-normes-internationales-en-matiere-de-droits-de-l-homme).

16 See also OHCHR's webpage on Tunisia, available at: [www.ohchr.org/EN/countries/MENARegion/Pages/TNIndex.aspx](http://www.ohchr.org/EN/countries/MENARegion/Pages/TNIndex.aspx).

17 OHCHR, above note 13, "Impunity and the Rule of Law" section, pp. 32–33.

18 *Ibid.*



## *Early warning and rapid response*

Prevention also presupposes the development of tools enabling the international community to detect early signs that a situation might degenerate into one leading to serious human rights violations. Early-warning mechanisms include looking at indicators such as hate speech, discrimination policies, recruitment of child soldiers, or the existence of dire economic and social conditions (starvation, extreme poverty, etc.). In this context, collaboration with other human rights mechanisms such as the special procedures plays a central role, because it enhances the development of country-specific or thematic strategies.<sup>19</sup>

In order to anticipate and respond to a deteriorating human rights situation, OHCHR's Rapid Response Unit tries to swiftly deploy personnel to the field.<sup>20</sup> As explained on OHCHR's website:

The Rapid Response Unit has, in recent times, conducted or coordinated the establishment of fact-finding missions or commissions of inquiry mandated by the Human Rights Council (HRC) on the Occupied Palestinian Territories, Democratic People's Republic of Korea and Syria (on-going since 2011). The Commission of Inquiry on Central African Republic, mandated by the Secretary General, and the OHCHR Investigations on Sri Lanka, mandated by the HRC are also ongoing. Commissions of Inquiry on Gaza and Eritrea are also being established, as is an OHCHR Mission to Iraq, all mandated by the HRC. Additionally, the Rapid Response Unit has established a human rights monitoring team based in Lebanon and sent fact-finding teams to Mali, Central African Republic and Ukraine. In response to humanitarian crises OHCHR staff have been deployed to the Philippines, Myanmar and Lebanon.<sup>21</sup>

The work of fact-finding missions and commissions of inquiry will be addressed later in this article.

In situations of armed conflicts and violence, OHCHR works closely with other UN entities, such as the Department of Peacekeeping Operations (DPKO), the Department of Political Affairs (DPA) and the Office for the Coordination of Humanitarian Affairs (OCHA), to ensure that all parts of field missions can better respond to the risk of human rights violations. In some instances, however,

19 See, for example, OHCHR, "Towards Developing Country Engagement Strategies on Minorities", available at: [www.ohchr.org/Documents/Publications/Strategies\\_on\\_minoritiesEN.pdf](http://www.ohchr.org/Documents/Publications/Strategies_on_minoritiesEN.pdf).

20 The UN Secretary-General can also trigger a "special circumstances" mechanism, in relation to a country where there is no UN peacekeeping mission or special political mission on the ground but where demands upon the UN are likely to rise due to a situation of armed conflict, heightened political instability or social unrest, or a significant natural disaster with potential political repercussions. Within forty-eight hours of the designation of special circumstances, an inter-agency task force co-chaired by the appropriate Department of Political Affairs senior official and the chair of the relevant regional UN Development Group team has to be established, see United Nations, *Special Political Missions Start Up Guide 2012*, New York, 2012, p. 8, available at: [http://peacemaker.un.org/sites/peacemaker.un.org/files/SPM\\_StartupGuide\\_UNDPA2012.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/SPM_StartupGuide_UNDPA2012.pdf).

21 See OHCHR, "OHCHR in the World: Making Human Rights a Reality on the Ground", available at: [www.ohchr.org/EN/Countries/Pages/WorkInField.aspx](http://www.ohchr.org/EN/Countries/Pages/WorkInField.aspx).

UN coordination and action on the field has been sharply criticized. In 2012, the Petrie Report, an independent report commissioned by the UN Secretary-General, assessed the UN's response to the final months of the war in Sri Lanka.<sup>22</sup> The report was very critical of the UN, characterizing its actions as a "systemic failure".<sup>23</sup> It recommended "a comprehensive review of action by the United Nations system during the war in Sri Lanka and the aftermath, regarding the implementation of its humanitarian and protection mandates". As a response to the report, the UN Secretary-General launched the Human Rights Up Front initiative.<sup>24</sup> The initiative was to be understood primarily as a coordination tool, outlining six actions that could help the UN system meet its responsibilities regarding human rights, namely:

**Action 1:** Integrating human rights into the lifeblood of the UN so all staff understand their own and the Organization's human rights obligations.

**Action 2:** Providing Member States with candid information with respect to peoples at risk of, or subject to, serious violations of human rights or humanitarian law.

**Action 3:** Ensuring coherent strategies of action on the ground and leveraging the UN System's capacities to respond in a concerted manner.

**Action 4:** Clarifying and streamlining procedures at Headquarters to enhance communication with the field and facilitate early, coordinated action.

**Action 5:** Strengthening the UN's human rights capacity, particularly through better coordination of its human rights entities.

**Action 6:** Developing a common UN system for information management on serious violations of human rights and humanitarian law.<sup>25</sup>

In the background paper prepared by OHCHR and the Office of the UN High Commissioner for Refugees (UNHCR) of 8 May 2013, further specific concerns relating to the protection of the rights of persons in humanitarian crises were identified. The paper noted that "at the field level, the humanitarian community faces multiple challenges in ensuring protection, such as for example, being confronted with restricted access and security concerns including direct military attack".<sup>26</sup> It went on to identify some common principles meant to "serve as the foundation for responding to the challenges to the effective protection of human rights in humanitarian crises, including by responding to international human

22 See *Report of the Secretary-General's Internal Review Panel on United Nations Action in Sri Lanka*, November 2012, available at: [www.un.org/News/dh/infocus/Sri\\_Lanka/The\\_Internal\\_Review\\_Panel\\_report\\_on\\_Sri\\_Lanka.pdf](http://www.un.org/News/dh/infocus/Sri_Lanka/The_Internal_Review_Panel_report_on_Sri_Lanka.pdf).

23 *Ibid.*, p. 28, para. 80.

24 More information about the initiative is available at: [www.un.org/sg/rightsupfront/](http://www.un.org/sg/rightsupfront/).

25 "Human Rights Up Front"; available at: [www.un.org/sg/rightsupfront/doc/RuFAP-summary-General-Assembly.shtml](http://www.un.org/sg/rightsupfront/doc/RuFAP-summary-General-Assembly.shtml).

26 "The Protection of Human Rights in Humanitarian Crises", Joint Background Paper by OHCHR and UNHCR IASC Principals, 8 May 2013, para. 4, available at: [www.refworld.org/cgi-bin/texis/vtx/rwmain?page=publisher&publisher=IASC](http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=publisher&publisher=IASC).

rights and humanitarian law violations”.<sup>27</sup> These principles, addressing substantive concerns, deserve to be reproduced here in full:

- **Primary responsibility of states:** The protection of the human rights of affected persons is the responsibility of States. Under international law, non-state armed groups also have certain responsibilities.
- **The role of humanitarian actors:** All humanitarian actors have a role to contribute to the protection of the human rights of affected persons either directly or as part of a broader strategy, which may include referring available information to relevant stakeholders, whether at the country or Headquarter level. Humanitarian activities must be aligned with protection priorities.
- **Protection activities** must focus on addressing the most serious violations of international human rights and humanitarian law and respond to the affected population’s needs in a manner that protects human rights as an outcome.
- **‘Protection’** should be centred on ensuring respect for international human rights, humanitarian and refugee law. The law is the principal basis and tool for undertaking effective humanitarian action, and provides advocacy arguments with an objective and impartial basis.
- **Humanitarian access and accountability:** Preserving humanitarian access and addressing accountability for international law violations are both grounded in international law. Both must be treated as human rights and humanitarian imperatives. Given the variety of actors, involved in humanitarian response including NGOs, concerted efforts should be made to ensure that methods and approaches are used complementarily to obtain optimal protection outcomes.
- **Monitoring, analysing and reporting** with respect to the protection of human rights of affected persons in humanitarian crises, including the root causes of violations, are critical in and of themselves and to inform and contextualise broader humanitarian strategies and responses. Human rights information must be analysed and assessed in terms of accuracy, credibility, compliance with international law and used for advocacy and to inform concrete action. Safe and confidential channels for sharing information must be established.
- **Sharing information:** Humanitarian actors should adopt and implement a strategy for regularly sharing information with relevant actors, while fully respecting principles of confidentiality. Risk mitigation measures should be put in place to preserve the safety and security of sources of information, particularly victims, witnesses and local civil society actors.
- In securing the protection of human rights, **humanitarian actors have different responsibilities** to undertake advocacy depending on their mandates and roles (e.g. [humanitarian coordinators] and [Protection Clusters] have a direct responsibility to undertake advocacy). For other

<sup>27</sup> *Ibid.*, para. 15.

humanitarian actors, advocacy can be indirect including through relaying relevant information with duty-bearers and other stakeholders with a view to preventing, putting an end to and seeking accountability for human rights violations, including effective remedies and access to justice for the affected population.

- **Public advocacy**, whether at the national, regional or global level, should take into account as a priority the protection of the human rights of the affected population. This should be based, inter alia, on an analysis of international human rights and humanitarian law violations, the potential role that an advocacy strategy will have in mitigating violations and the protection of humanitarian actors from possible retaliation.
- **Promoting access to justice**, including at the national level, and seeking accountability for violations of human rights law are essential elements of the [Inter-Agency Standing Committee's] commitment to ensuring accountability to affected populations.<sup>28</sup>

A final point to be made concerns the addressees of the preventing measures. OHCHR and the human rights community have traditionally focused very much on engaging State actors. However, since the majority of contemporary armed conflicts are of a non-international character – between States and non-State actors or between two or more non-State actors – OHCHR and the UN more broadly are increasingly required to strategically engage with armed non-State actors on human rights and humanitarian issues.<sup>29</sup> Thus, violations of international law obligations by non-State armed groups are regularly addressed by the reports of peacekeeping missions, such as in the 2014 report on Iraq.<sup>30</sup> OHCHR reports on country situations also mention human rights and IHL violations committed by non-State armed groups. For instance, in its latest report on Ukraine, OHCHR notes that, in the context of the conflict, “the armed groups continued to carry out abductions, physical and psychological torture, ill-treatment and other serious human rights violations”,<sup>31</sup> and further lists other violations committed by armed groups.

### *Reporting and monitoring, including during armed conflicts*

In addition to its work to anchor the protection of human rights at the core of UN peacekeeping missions, OHCHR reports on and monitors respect for human rights

<sup>28</sup> *Ibid.*

<sup>29</sup> These past years, the UN has elaborated many policy documents on engagement with armed non-State actors. See Brian McQuinn and Fabio Oliva, *Preliminary Scoping Report: Analysing and Engaging Non-State Armed Groups in the Field*, UN System Staff College, 26 June 2014, p. 6, available at: [www.unssc.org/home/news/analyzing-and-engaging-non-state-armed-groups-unssc-scoping-report](http://www.unssc.org/home/news/analyzing-and-engaging-non-state-armed-groups-unssc-scoping-report).

<sup>30</sup> See UN, *Report on the Protection of Civilians in the Non International Armed Conflict in Iraq: 5 June–5 July 2014*, available at: [www.ohchr.org/Documents/Countries/IQ/UNAMI\\_OHCHR\\_POC%20Report\\_FINAL\\_18July2014A.pdf](http://www.ohchr.org/Documents/Countries/IQ/UNAMI_OHCHR_POC%20Report_FINAL_18July2014A.pdf); see in particular the section on “Violations Committed by ISIL and Associated Armed Groups”, p. 9.

<sup>31</sup> Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Ukraine, UN Doc. A/HRC/27/75, 19 September 2014, paras 16–17.

in situations of armed conflict. The focus of OHCHR's action has been on the rights of those most affected by situations of violence and insecurity, in particular victims of sexual and gender-based violence and other segments of the population with heightened vulnerabilities, as well as people facing a risk of exclusion, marginalization or lack of protection. This may include women, internally displaced persons, children, refugees, migrants, the elderly, the urban and rural poor, persons with disabilities, persons living with HIV/AIDS, persons belonging to minorities and indigenous peoples.<sup>32</sup>

As will be further examined below, OHCHR has also been providing support to fact-finding missions and commissions of inquiry. Other tools include thematic papers on specific issues, such as torture and ill-treatment in Syria,<sup>33</sup> as well as "mapping" exercises that report on human rights violations in a given conflict. For instance, in 2005 OHCHR conducted a mapping of the human rights and IHL violations committed by all parties to the Afghan conflicts between 27 April 1978 and 22 December 2001.<sup>34</sup> Another well-known example of a mapping exercise concerns the conflict in the Democratic Republic of the Congo (DRC), which will be briefly addressed below.

### *The Mapping Report on the Democratic Republic of the Congo (2010)*

In late 2005, three mass graves were discovered in North Kivu by the UN Mission in the Democratic Republic of the Congo (MONUC). In consultation with different UN entities (DPKO, MONUC, OHCHR, DPA, and the Office of Legal Affairs, it was recommended that

a mapping exercise of the most serious violations of human rights and international humanitarian law committed within the territory of the DRC between March 1993 and June 2003 be conducted and, on the basis of the findings of the exercise, that an assessment be carried out of the existing capacities of the Congolese national justice system to address these violations and a series of options formulated for appropriate transitional justice mechanisms that would assist in combating the prevailing impunity in the DRC.<sup>35</sup>

32 OHCHR, above note 13.

33 OHCHR, "Open Wounds: Torture and Ill Treatment in the Syrian Arab Republic", 14 April 2014, available at: [www.ohchr.org/EN/NewsEvents/Pages/TortureInSyria.aspx](http://www.ohchr.org/EN/NewsEvents/Pages/TortureInSyria.aspx).

34 See OHCHR, "High Commissioner for Human Rights Urges Support for Afghan Efforts to Deal with Impunity", press release, 29 January 2005, available at: [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=7941&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=7941&LangID=E). See also the 2012 Nepal conflict mapping, which aimed to document and analyze "the major categories of conflict-related violations of international human rights law and international humanitarian law that allegedly took place in Nepal from February 1996 to 21 November 2006". OHCHR, "UN Releases Report Charting Ten Years of Violations during Nepal Conflict", press release, 8 October 2012, available at: [www.ohchr.org/RU/NewsEvents/Pages/DisplayNews.aspx?NewsID=12637&LangID=E](http://www.ohchr.org/RU/NewsEvents/Pages/DisplayNews.aspx?NewsID=12637&LangID=E).

35 OHCHR, *Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the Democratic Republic of the Congo between March 1993 and June 2003*, August 2010, p. 2, available at: [www.ohchr.org/en/countries/africaregion/Pages/rdcProjektmapping.aspx](http://www.ohchr.org/en/countries/africaregion/Pages/rdcProjektmapping.aspx).

On May 2007, the terms of reference of the mission were decided by the UN Secretary-General, and the mapping process, led by OHCHR, began in July 2008. Between October 2008 and May 2009, a total of thirty-three staff worked on the project in the DRC (including Congolese and international human rights experts). Twenty human rights officers were deployed in the country, operating out of five field offices. The mapping team's 550-page report contains descriptions of 617 alleged violent incidents occurring in the DRC between March 1993 and June 2003. Each of these incidents pointed to the possible commission of gross violations of human rights and/or IHL.<sup>36</sup> The methodology of the report was based on 1,280 interviews and analysis of over 1,500 documents; only events reaching a certain threshold of gravity were recorded, and incidents had to be backed up by two independent sources to be reported in the document.<sup>37</sup> The legal framework to which the report referred was international human rights law, IHL and international criminal law.<sup>38</sup>

While reactions to the report were generally very positive – both from human rights NGOs<sup>39</sup> and from States<sup>40</sup> – some of the States implicated in the report, notably Angola, Burundi, Rwanda and Uganda, strongly reacted to it and sent letters of protest to the High Commissioner.<sup>41</sup> The DRC itself criticized the report as being incomplete and biased, and as going outside its mandate.<sup>42</sup>

The Mapping Report was an exceptional exercise realized by OHCHR, in both magnitude and depth. Despite the few criticisms, mainly from implicated States, the report constitutes a thorough and meaningful account of one of the deadliest conflicts in contemporary international relations. It is nevertheless regrettable that there was no follow-up to the report, even though proposals were made in that direction.<sup>43</sup>

### *Fact-finding missions and commissions of inquiry*

Over the past twenty years, OHCHR has assisted almost forty commissions of inquiry and fact-finding missions.<sup>44</sup> Fact-finding missions and commissions of

36 *Ibid.*

37 *Ibid.*

38 *Ibid.*, pp. 369–393.

39 See for example Human Rights Watch, “DR Congo: UN Report Exposes Grave Crimes”, 1 October 2010, available at: [www.hrw.org/news/2010/10/01/dr-congo-un-report-exposes-grave-crimes](http://www.hrw.org/news/2010/10/01/dr-congo-un-report-exposes-grave-crimes).

40 See the press statement of the US Department of State, “UN Mapping Report on Violations of Human Rights in the Democratic Republic of the Congo”, 1 October 2010, available at: <http://www.state.gov/r/pa/prs/ps/2010/10/148549.htm>

41 All comments by States are available on the Mapping Report webpage, available at: [www.ohchr.org/en/countries/africaregion/Pages/rdcProjetmapping.aspx](http://www.ohchr.org/en/countries/africaregion/Pages/rdcProjetmapping.aspx).

42 See Ministry of Justice and Human Rights, DRC, “Observations du gouvernement (de la RDC) sur le Rapport du Projet Mapping concernant les violations les plus graves des droits de l’homme et du droit international humanitaire commises entre mars 1993 et juin 2003 sur le territoire de la République Démocratique du Congo”, 7 August 2010, available at: [www.ohchr.org/Documents/Countries/CD/DRC\\_Report\\_Comments\\_DRC.pdf](http://www.ohchr.org/Documents/Countries/CD/DRC_Report_Comments_DRC.pdf).

43 See Human Rights Watch, “Tackling Impunity in Congo: Meaningful Follow-Up to the UN Mapping Report”, 1 October 2010, available at: [www.hrw.org/fr/news/2010/09/22/dr-congo-meaningful-follow-un-mapping-report](http://www.hrw.org/fr/news/2010/09/22/dr-congo-meaningful-follow-un-mapping-report).

44 See OHCHR, *Manual on Human Rights Monitoring*, 2011, Chapter 3, available at: [www.ohchr.org/Documents/Publications/Chapter03-MHRM.pdf](http://www.ohchr.org/Documents/Publications/Chapter03-MHRM.pdf).

inquiry can be mandated either by the HRC<sup>45</sup>, by the UN Security Council or by the UN Secretary-General,<sup>46</sup> or can be initiated by OHCHR itself as part of its general mandate under UN General Assembly Resolution 48/141.<sup>47</sup> In the latter case, members of the fact-finding missions are usually OHCHR staff. The membership of commissions of inquiry is otherwise composed of independent experts, while OHCHR provides support in staff or secretarial matters. Whereas commissions of inquiry seem to be more focused on international criminal law, both types of investigative bodies aim at establishing the facts and recording the context of the events, identifying the alleged perpetrators, and providing recommendations to the State concerned as well as to the international community as to how to address violations.<sup>48</sup>

In its 2011 Annual Report, OHCHR underlined that, in the context of setting up commissions of inquiry/fact-finding missions, the office systematically conducted lessons learned exercises to ensure greater cohesive planning and enable future commissions to be established in the light of best practices.<sup>49</sup> Among the lessons learned identified in the report, it mentioned the need to develop a core secretariat team and a witness protection strategy, as well as the inclusion of specific expertise, such as forensics and military advisers.<sup>50</sup> Challenges to commissions of inquiry included:

tight reporting deadlines; parallel investigations occasionally established by other UN bodies; multiple commissions of inquiry established simultaneously; and the lack of a readily available source of regular budget funding for these urgent and time-sensitive mandates, leading to ad hoc

45 Recent commissions of inquiry mandated by the HRC include: the 2006 Commission of Inquiry on Lebanon (HRC Res. A/HRC/S-2/1, 11 August 2006); the 2009 United Nations Fact-finding Mission on the Gaza Conflict (HRC Res. A/HRC/RES/S-9/1, 12 January 2009); the 2010 International Fact-finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance (HRC Res. A/HRC/RES/14/1, 23 June 2010); the 2010 International Commission of Inquiry on Libya (HRC Res. A/HRC/RES/S-15/1, 25 February 2011); the 2011 International Commission of Inquiry on the Ivory Coast (HRC Res. A/HRC/RES/16/25, 25 March 2011); the 2011 Independent International Commission of Inquiry on the Syrian Arab Republic (HRC Res. A/HRC/RES/S-17/1, 18 October 2011); and the 2013 Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (UN Doc. A/HRC/22/13, 21 March 2013).

46 Recent examples include the 2004 International Commission of Inquiry on Darfur (UNSC Res. 1564 (2004)); the 2009 International Commission of Inquiry on Guinea (established by the UN Secretary-General on 16 October 2009, UN Doc. S/2009/556); the 2010 Secretary-General's Panel of Experts on Accountability in Sri Lanka (established by the UN Secretary-General on 22 June 2010, UN Doc. SG/SM/12967); and the 2013 International Commission of Inquiry on the Central African Republic (UNSC Res. 2127 (2013)).

47 See, for example, the OHCHR Mission to Kyrgyzstan to investigate serious violations of human rights in Andijan, Uzbekistan, in May 2005; the OHCHR Mission to Western Sahara and Refugee Camps in Tindouf (2006); the OHCHR Fact-Finding Mission to Kenya (2008); the OHCHR mission on the situation of human rights in Honduras since the coup d'état of 28 June 2009 (2009); and the OHCHR Mission in Mali (2013).

48 See also Philip Alston, "The Darfur Commission as a Model for Future Responses to Crisis Situations", *Journal of International Criminal Justice*, Vol. 3, No. 3, 2005, pp. 600–607.

49 OHCHR, *OHCHR Report 2011*, "Armed Conflict and Insecurity" section, Geneva, 2011.

50 *Ibid.*, p. 94.



arrangements that complicated administrative procedures and undermined transparency.<sup>51</sup>

One could add to this list the difficulty raised by the fact that commissions of inquiry might not have access to the country concerned (e.g. in Syria or North Korea). This underlines the importance of obtaining the State's consent, for access and cooperation purposes. Finally, the multiplication of fact-finding bodies in one particular situation can at times produce undesirable outcomes, such as contradictory narratives.<sup>52</sup>

In 2015, OHCHR published a guidance document for international commissions of inquiry and fact-finding missions.<sup>53</sup> The study contains methodological as well as practical recommendations. It should allow the UN to make decisions regarding the set-up of commissions of inquiry or fact-finding missions in a more coherent and systematic manner, as well as to avoid discrepancies and possible double standards.

## Implementing the rule of law in societies in transition

As noted by one commentator:

[W]hatever decisions are reached with respect to accountability for past crimes, it is doubtful that there can be stable or sustainable peace unless the immediate post-conflict period addresses protection of human rights in the present. While this issue is closely related to ensuring the rule of law, it is also tied to traditional human rights norms, such as rights to political participation, economic and social rights, freedom of expression, and non-discrimination.<sup>54</sup>

The work of OHCHR in post-conflict settings consists mainly of promoting access to justice for human rights violations. In 2013 and 2014, the focus has been on addressing sexual and gender-based violence. For instance, assessment missions to the Central African Republic, Colombia, the DRC and Somalia made recommendations to strengthen those countries' legal and institutional structures regarding sexual violence in conflict. In the DRC, the UN Joint Human Rights Office supported mobile courts to deal with cases of sexual violence, and provided military prosecutors with technical support to investigate sexual violence and other serious violations in remote areas of the country. OHCHR also supported efforts in Afghanistan, Guinea-Bissau and Sierra Leone to address sexual and gender-based violence. In addition, together with UN Women,

51 *Ibid.*

52 This could be an issue in the Central African Republic, for instance, where both a commission of inquiry and the International Criminal Court are present. See Annyssa Bellal, "Central African Republic: From Conflict to Chaos and Back Again?", in Stuart Casey-Maslen (ed.), *The War Report 2013*, Oxford University Press, Oxford, 2014.

53 Available at: [www.ohchr.org/Documents/Publications/CoI\\_Guidance\\_and\\_Practice.pdf](http://www.ohchr.org/Documents/Publications/CoI_Guidance_and_Practice.pdf).

54 Hurst Hannum, "Human Rights in Conflict Resolution: The Role of the Office of the High Commissioner for Human Rights in UN Peacemaking and Peacebuilding", *Human Rights Quarterly*, Vol. 28, No. 1, 2006, p. 40.

OHCHR finalized a guidance note on reparations for victims of sexual violence and launched a study on reparations for survivors of sexual violence in Kosovo.<sup>55</sup> Finally, OHCHR, “as the lead entity within the United Nations system in the area of transitional justice, has been assisting with developing standards and operational rule of law tools as well with the design and implementation of transitional justice mechanisms”.<sup>56</sup>

## OHCHR’s specific mandate in situations of armed conflict

Within the UN, several entities, offices and agencies have to deal with situations of emergency and armed conflict.<sup>57</sup>

Because respect for human rights also has to take place during armed conflicts,<sup>58</sup> OHCHR’s mandate covers violations of human rights committed in armed conflict, including when they constitute international crimes, as well as issues relating to the protection of civilians.<sup>59</sup> It is thus common for OHCHR reports to include legal assessments of situations under IHL and human rights law, as well as international criminal law and international refugee law.<sup>60</sup>

In working to promote respect for the rule of law in armed conflicts or other violent situations, OHCHR frequently works through its field presence, as well as through the human rights component of UN peacekeeping missions. In addition, the High Commissioner regularly reports to the UN Security Council on the human rights-related issues arising out of armed conflict situations.

## OHCHR’s standalone field presence

OHCHR is the only office which has an investigative mandate within the UN field presence. As such, it plays an essential role in monitoring and addressing human

55 OHCHR, above note 13, “Violence and Insecurity” section, pp. 82–95.

56 See: [www.ohchr.org/EN/Issues/RuleOfLaw/Pages/TransitionalJustice.aspx](http://www.ohchr.org/EN/Issues/RuleOfLaw/Pages/TransitionalJustice.aspx).

57 Among them, one could mention the DPA, DPKO, OCHA, UNHCR and UNICEF.

58 The application of human rights in situations of armed conflict, whether international or non-international, has been confirmed many times by the International Court of Justice in its 1996 *Nuclear Weapons Advisory Opinion* of 8 July 1996, *ICJ Reports* 1996, as well as in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 9 July 2004, *ICJ Reports* 2004. The applicability of international human rights law in situations of armed conflict was also confirmed in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 9 December 2005, *ICJ Reports* 2005.

59 See also Bertrand Ramcharan, “The United Nations High Commissioner for Human Rights and International Humanitarian Law”, *Program on Humanitarian Policy and Conflict Research Occasional Paper Series*, Spring 2005.

60 See, among the many different OHCHR reports on countries in situations of armed conflict, *Situation of Human Rights in the Central African Republic*, Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/24/59, 12 September 2013. In the High Commissioner’s 2008 report on the human rights violations resulting from Israeli military attacks and incursions in the Occupied Palestinian Territory, it was recalled that “both Israel and the Palestinian Authority, as well as Hamas in Gaza, carry obligations under international humanitarian law and international human rights law vis-à-vis the civilian populations in both Israel and the [Occupied Palestinian Territory]”: UN Doc. A/HRC/8/17, para. 4.

rights violations in armed conflict situations. The first OHCHR field presence in Rwanda and Burundi was established in 1994 by Ayala Lasso as an attempt by the then High Commissioner to respond directly to the Rwandan genocide.<sup>61</sup> As of December 2014, OHCHR had twelve country offices (Bolivia, Cambodia, Colombia, Guatemala, Guinea, Mauritania, Mexico, State of Palestine, Togo, Tunisia, Uganda and Yemen) and one standalone office in Kosovo. In addition, there were twelve regional presences which included ten regional offices in East Africa (Addis Ababa), Southern Africa (Pretoria), West Africa (Dakar), South-East Asia (Bangkok), the Pacific (Suva), the Middle East and North Africa (Beirut), Central Asia (Bishkek), Europe (Brussels), Central America (Panama City), South America (Santiago de Chile), a sub-regional centre for human rights and democracy for Central Africa (Yaoundé) and a Training and Documentation Centre for South-West Asia and the Arab Region (Doha).<sup>62</sup>

Field-based activities of OHCHR will often include issues related to obligations of both human rights law and IHL. For example, the agreement on the establishment of an office in Colombia, signed on 29 November 1996, states that OHCHR will receive “complaints on human rights violations and other abuses, including breaches of humanitarian law applicable in armed conflicts”.<sup>63</sup> In that respect, OHCHR monitors and reports on alleged violations committed by both States and non-State actors.<sup>64</sup>

There are several challenges faced by OHCHR in its action on the ground. Some of them are institutional, such as the perceived lack of communication between its field offices and headquarters, or different understandings in fieldwork approaches between different UN departments or agencies. Andrew Clapham has identified further challenges in relation to OHCHR's fieldwork in the context of the genocide in Rwanda. His observations remain very much valid for current conflicts. He mentions the following issues:

First, how to raise problems relating to the new government's human rights record when the country is still struggling to cope with a massive genocide which has also destroyed the infrastructure of the country? Second, how to carry out the investigative mandate without interfering with evidence that would be needed to issue the indictments in order to bring to justice those to be tried at the international level? Third, how to cooperate with humanitarian agencies who may only have access to certain camps and places of detention precisely because they will not be collecting information on human rights abuses? Fourth, how to work in close cooperation with the authorities on technical cooperation programmes involving the training of civilian police forces, the establishment of an independent judiciary,

61 H. Hannum, above note 54, p. 19; see also A. Clapham, above note 5, p. 31.

62 OHCHR, above note 8, “OHCHR's Approach to Field Work” section, p. 141.

63 UN Doc. E/CN.4/1997/11, Annex. See OHCHR, *International Legal Protection of Human Rights In Armed Conflicts*, New York and Geneva, 2011, pp. 104–106.

64 See OHCHR, *Training Manual on Human Rights Monitoring*, New York and Geneva, 2001, Chapter 16, pp. 327–362, available at: [www.ohchr.org/Documents/Publications/training7Introen.pdf](http://www.ohchr.org/Documents/Publications/training7Introen.pdf).

assistance in the preparation of dossiers for the prosecution – yet remain able to take a tough stand with these same authorities when there are allegations of serious human rights violations? Fifth, how to relieve the gross overcrowding in the prisons (at that time 70,000 in prisons designed for around 7,000) without simply encouraging new rounds of arrests?<sup>65</sup>

These challenges are regularly addressed internally by OHCHR, and lessons learned and methodologies are published in its *Manual on Human Rights Monitoring*, which is currently under revision.<sup>66</sup> One chapter in the *Manual* deals precisely with the delicate topic of the interaction with national authorities. The *Manual* recognizes that “[e]ngaging with national authorities and institutions is a challenging task. Field presences have to engage even with those that are not fully committed to promoting and protecting human rights.”<sup>67</sup> The *Manual* reminds human rights officers that they need “to establish smooth and transparent channels of communication with their governmental counterparts at all levels, in order to identify and support ‘allies’ in the implementation of human rights norms, while maintaining the integrity of the field presence”.<sup>68</sup>

The *Manual* also addresses the relationship between human rights law and IHL. In that regard, it advises field staff to adopt a pragmatic approach during monitoring, fact-finding and investigations and to

assess the situation or incident with reference to provisions of both international human rights law and international humanitarian law in order to determine the rules providing the most specific procedural and substantive guarantees. Since there are inconsistencies and gaps between the protection afforded by the various human rights and humanitarian law instruments, as well as national and local laws, the individual should be entitled to the most protective provisions of applicable international, national or local laws. Accordingly, if international humanitarian law affords better protection than human rights law, humanitarian law should be applied and vice versa.<sup>69</sup>

65 A. Clapham, above note 5, p. 33. Another difficulty in human rights fieldwork was highlighted by Todd Howland. Commenting on the work of the Human Rights Division (HRD) of the peacekeeping operation in Angola, he noted that: “The objective for human rights interventionists is to improve the situations they encounter, rather than simply denouncing them. Nonetheless, for most human rights activists, working with a government is heresy. Thus, it is not surprising that the HRD’s work was controversial. Some observers have lauded the HRD’s work with the Angolan government as a creative cooperation that opened opportunities for change previously unavailable in Angola. Others, however, worry that the support provided to the Angolan government by the HRD is nothing more than a costly legitimization of the present widespread violations.” Todd Howland, “UN Human Rights Field Presence as Proactive Instrument of Peace and Social Change: Lessons from Angola”, *Human Rights Quarterly*, Vol. 26, No. 1, 2004, p. 16.

66 See OHCHR, “Policy and Methodological Materials”, available at: [www.ohchr.org/EN/Publications/Resources/Pages/MethodologicalMaterials.aspx](http://www.ohchr.org/EN/Publications/Resources/Pages/MethodologicalMaterials.aspx).

67 OHCHR, above note 44, Chapter 17, p. 4, available at: [www.ohchr.org/Documents/Publications/Chapter17-28pp.pdf](http://www.ohchr.org/Documents/Publications/Chapter17-28pp.pdf).

68 *Ibid.*, p. 3.

69 *Ibid.*, Chapter 5, p. 15, available at: [www.ohchr.org/Documents/Publications/Chapter05-MHRM.pdf](http://www.ohchr.org/Documents/Publications/Chapter05-MHRM.pdf).

When fully revised, the *Manual* will further cover issues such as “Monitoring and Documenting Human Rights Violations”, “Engagement and Partnerships for Protection and Empowerment” (including a section on “Interaction with Non-State Actors”) and “Focus Areas for Human Rights Monitoring”.<sup>70</sup>

## The human rights component of peacekeeping missions

Several general institutional reforms within the UN, such as the UN Secretary-General's reports *An Agenda for Peace: Preventative Diplomacy, Peace-Making and Peace-Keeping*<sup>71</sup> and *Renewing the United Nations: A Programme for Reform*,<sup>72</sup> led to the inclusion of human rights components within UN peacekeeping missions.<sup>73</sup> In 2000, the Report of the Panel on United Nations Peace Operations submitted by Lakhdar Brahimi noted that:

OHCHR needs to be more closely involved in planning and executing the elements of peace operations that address human rights, especially complex operations .... If United Nations operations are to have effective human rights components, OHCHR should be able to coordinate and institutionalize human rights field work in peace operations; second personnel to Integrated Mission Task Forces in New York; recruit human rights field personnel; organize human rights training for all personnel in peace operations, including the law and order components; and create model databases for human rights field work.<sup>74</sup>

Addressing the cause of conflicts and ensuring that human rights are taken into account in peace negotiations and post-conflict settings are the rationales behind the human rights component of peacekeeping and political missions. This forms an important part of OHCHR's efforts to implement the rule of law in armed conflicts. Indeed, as noted by one commentator, “peace operations cannot solely be focused on military and, possibly, civilian police aspects. What these operations are addressing are but symptoms of the absence of a system under the rule of law, which ... pre-supposes a democratic system.”<sup>75</sup> Typical functions of human rights components in peacekeeping missions thus include:

70 The table of contents of the *Manual* is available at: [www.ohchr.org/Documents/Publications/OHCHRTableContents.pdf](http://www.ohchr.org/Documents/Publications/OHCHRTableContents.pdf).

71 *An Agenda for Peace: Preventative Diplomacy, Peace-Making and Peace-Keeping*, Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992, UN Doc. A/47/277-S/2411.

72 *Renewing the United Nations: A Programme for Reform*, UNGA Res. 51/950, UN GAOR, 51st Sess., UN Doc. A/51/950, 1997.

73 Todd Howland, above note 65, p. 4.

74 Report of the Panel on United Nations Peace Operations, UN Doc. A/55/305 S/2000/809, 21 August 2000, para. 244.

75 Hans Corell, UN Legal Counsel, “The Role of the United Nations in Peacekeeping: Recent Developments from a Legal Perspective”, keynote address delivered at “National Security Law in a Changing World: The Tenth Annual Review of the Field”, available at: [http://legal.un.org/ola/legal\\_counsel8.aspx](http://legal.un.org/ola/legal_counsel8.aspx).

- monitoring and reporting on the human rights situation and investigating human rights violations;
- advocating for peace processes to be inclusive, addressing past human rights violations and promoting and protecting human rights;
- integrating human rights in legislative and institutional reforms, including the rule of law and security sectors reforms;
- preventing and redressing violations of human rights and international humanitarian law, with a focus on the protection of civilians;
- building human rights capacities and institutions; and
- mainstreaming human rights into all UN programmes and activities.<sup>76</sup>

As of December 2014, there were fourteen UN peace missions, all of which incorporated human rights promotion and protection into their mandated work.<sup>77</sup>

Human rights divisions are an integral part of the peacekeeping missions. Administratively, human rights officers depend on the DPKO, but the selection of officers is done by OHCHR. In addition, human rights divisions have a dual reporting line: one to the Special Representative of the UN Secretary-General and one to the High Commissioner.

The integration of human rights and rule of law issues within peacekeeping missions has been met with some criticism. As underlined by an OHCHR staff member,

the humanitarian community (including actors outside the UN) is increasingly concerned about the “humanitarian identity” becoming blurred, advocating for further separation from political, military, and human rights actors. Some humanitarians feel that in many parts of the world, their acceptance and safety is endangered due to the perceived blurring of roles.<sup>78</sup>

## The High Commissioner’s briefings to the UN Security Council

One last interesting “tool” used by OHCHR to promote respect for human rights in armed conflicts is the regular briefings of the High Commissioner to the UN Security Council. This practice was initiated by High Commissioner Mary Robinson, and it illustrates the growing interest of the UN Security Council in human rights issues. By 2014, the High Commissioner had briefed the Security Council more than twenty times, attracting its attention to the most pressing

76 OHCHR, above note 8, “OHCHR’s Approach to Field Work” section, p. 143. The text of the memorandum of understanding between OHCHR and the DPKO can be found in Bertrand Ramcharan (ed.), *Human Rights Protection in the Field*, Martinus Nijhoff, Leiden and Boston, 2006, p. 269.

77 These are Afghanistan (UNAMA), Burundi (BNUB – closed in December 2014), the Central African Republic (MINUSCA), Côte d’Ivoire (UNOCI), the Democratic Republic of the Congo (MONUSCO), Guinea-Bissau (UNIOGBIS), Haiti (MINUSTAH), Iraq (UNAMI), Liberia (UNMIL), Libya (UNSMIL), Mali (MINUSMA), Somalia (UNSOM), South Sudan (UNMISS) and Sudan (Darfur) (UNAMID); see *ibid.* See also the DPKO website, available at: [www.un.org/en/peacekeeping/issues/humanrights.shtml](http://www.un.org/en/peacekeeping/issues/humanrights.shtml).

78 OHCHR staff, “Protection in the Field: Human Rights Perspectives”, in B. Ramcharan, above note 76, p. 120.

human rights issues in armed conflicts or other situations of violence.<sup>79</sup> Despite the fact that the Security Council does not necessarily act on these briefings, they nevertheless have the important effect of bringing to the attention of the Council the most serious human rights violations occurring in the year. As a consequence, they also deprive the Security Council of the possibility of arguing that it was not aware of those human rights crises.

## Conclusion

In his 2002 report *Strengthening of the United Nations: An Agenda for Further Change*, the UN Secretary-General stated that “as a worldwide organization, the United Nations provides a unique institutional framework to develop and promote human rights norms and practices, and to advance legal, monitoring and operational instruments to uphold the universality of human rights while respecting national and cultural diversity”.<sup>80</sup> As part of the UN, OHCHR operates within this “unique institutional framework”. In practice, this means that OHCHR has to work not only towards the promotion of respect for human rights by States, but also towards encouraging long-lasting and just solutions to the many challenges and threats to human rights in contemporary international relations. In her last statement to the HRC, High Commissioner Navi Pillay reminded member States:

OHCHR stands at your side, not in your way. It is a friend that is unafraid to speak the truth. This Office does not only seek to help States identify gaps in their human rights protection. It also assists States to repair them, and to pursue policies that promote equality, dignity, development and the resolution of conflict, thus helping to realise the full sense of its double mandate – to promote and to protect the rights of all.<sup>81</sup>

OHCHR has aimed at fulfilling its very large mandate to promote and protect “the effective enjoyment by all of all civil, cultural, economic, political and social rights”. The strategies and tools it has chosen, including in armed conflict situations, have not always been successful. Perhaps this can be explained by the very nature of the human rights protection discourse, embedded in complex ideological and political struggles, or by the fact that the UN is itself a huge institutional machinery, which necessarily causes discrepancies in coordination and approaches between different offices and entities, not to mention coordination with actors outside the UN.

Initiatives such as Human Rights Up Front might improve coordination within the UN system. The work of fact-finding missions and commissions of

79 The list of statements is available at: [www.ohchr.org/EN/NewYork/Pages/Statements.aspx](http://www.ohchr.org/EN/NewYork/Pages/Statements.aspx).

80 *Strengthening of the United Nations: An Agenda for Further Change*, Report of the Secretary-General, UN Doc. A/57/387, para. 47, available at: [www.un.org/events/action2/A.57.0387.pdf](http://www.un.org/events/action2/A.57.0387.pdf).

81 Statement of the High Commissioner at the 26th Session of the Human Rights Council, 10 June 2014, available at: [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14674&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14674&LangID=E).



inquiry supported by OHCHR, and efforts towards their systematization and methodological coherence, are also a step forward towards better documenting, preventing and repressing serious human rights violations. Similarly, analysis of the methodology and practice of human rights monitoring, such as that conducted in OHCHR's field manual, is an essential effort towards ensuring an efficient system that is capable of addressing human rights violations, including in armed conflicts.

It remains to be seen whether OHCHR and the tools it has elaborated will be able to respond effectively to the most pressing protection challenges in light of phenomena such as the engagement of armed groups with radical ideologies (Islamic State in Syria or Boko Haram in Nigeria) and the fragmentation and complexity of parties to armed conflicts (as in Syria, Libya and the DRC). It is fair to say that these challenges are not those of OHCHR alone, but of the broader human rights and humanitarian community. If these challenges are to be met, coordination, or at the very least concerted action between all actors working to strengthen and uphold the protection that human rights and IHL grant in armed conflict, seems warranted, despite the differences in mandates and constituencies.

## OPINION NOTE

# Contemplating the true nature of the notion of “responsibility” in responsible command

**Geoffrey S. Corn**

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### Abstract

*Operating under responsible command is an essential requirement to qualify as a lawful combatant, and is also central to the doctrine of command responsibility. This reveals the inextricable link between the role of the commander and the effective implementation of the international humanitarian law (IHL). Understanding this linkage is vital to ensuring that commanders and other military leaders fulfil their obligation to prepare subordinates to navigate the chaos of mortal combat within the legal and by implication moral framework that IHL provides. Few commanders would question the proposition that responsible commanders prepare their military units to effectively perform their combat missions. However, operational effectiveness is only one aspect of developing a “responsible” command. Because this term is grounded in the expectation of IHL compliance, a truly responsible command exists only when the unit is prepared to execute its operational mission in a manner that fully complies*

*with IHL obligations. This broader conception of a disciplined and effective military unit reflects the true nature of the concept of responsible command, as only military units built on this conception of discipline advance the complementary objectives of military effectiveness and humanitarian respect. Accordingly, the requirement that lawful combatants operate under responsible command is an admonition to all military leaders that truly effective military units are those capable of executing their missions with maximum operational effect within the framework of humanitarian constraint that defines the limits of justifiable violence during armed conflict.*

**Keywords:** responsible command, compliance with IHL, combatant, human dignity, armed forces, accountability, military discipline.

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## United States Army Operating Concept

The nature of the military profession is such that it requires Soldiers to discharge their professional duties in a moral and ethical manner. Army leaders in particular are obligated to the American people to maintain professional competence and personal character. As members of the profession of arms, leaders must exhibit the qualities which mark service in the military as a truly professional endeavor. These qualities include a code of professional conduct, a high degree of competence based on established and well regulated examinations of skill, education, and performance, and self-regulation to purge those members who fail to meet standards or demonstrate required professional knowledge. Like other professions such as medicine and law, the military also requires institutional training to develop a broad range of skills and a commitment to continuous education.<sup>1</sup>

The term “responsible command” is central to the treaty definition of “privileged belligerent” in the 1899 and 1907 Regulations Annexed to each respective Hague Convention,<sup>2</sup> and the related treaty definition of “prisoner of war” included in both the 1929 and 1949 prisoner-of-war conventions—definitions that are generally recognized as linking qualification as a prisoner of war with lawful combatant status.<sup>3</sup> This linkage was made explicit in 1977, when Additional

- 1 See US Department of the Army, *The United States Army Operating Concept, 2016–2018*, TRADOC Pamphlet 525-3-1, 19 August 2010, p. 36, available at: <https://fas.org/irp/doddir/army/opcon.pdf> (all internet references were accessed in December 2014).
- 2 See Hague Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, 29 July 1899 (entered into force 4 September 1900), Art. 43. See also 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, 18 October 1907 (entered into force 26 January 1910) (Hague Convention IV), Art. 43.
- 3 See Geneva Convention Relative to the Treatment of Prisoners of War, 27 July 1929, 118 LNTS 343 (entered into force 19 June 1931), Art. 1. See also 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 (defining the term “prisoner of war” and outlining categories into which prisoners of war fall, under this provision).

Protocol I (AP I) provided an explicit definition of combatant,<sup>4</sup> a status reserved for those individuals entitled by law to participate in hostilities. Consistent with the prior treaties on which this definition was based, it also made operating under responsible command a precondition for entitlement to the status of lawful combatant. Thus, lawful combatant status requires a “responsible” command/subordinate relationship. Responsible command is also the foundation for the doctrine of command responsibility, a theory of criminal liability central to ensuring military commanders (and by extension civilian leaders responsible for military decision-making) fulfil their “responsibilities” in a manner that mitigates the risk of subordinates violating international humanitarian law (IHL).<sup>5</sup>

But what exactly renders command “responsible”? Considering the centrality of this concept to both the legal authority to engage in mortal combat, and the accountability of those entrusted with leading the business of armed violence, the treatment of this question in scholarship and literature on IHL<sup>6</sup> is surprisingly sparse. What makes this even more perplexing is the importance of effective and responsible command as a genuine “force multiplier” for military units.<sup>7</sup> It is probably not an overstatement to assert that the quality of command is the *sine qua non* of successful military units. Commanders shape the character of the collective force that is the military unit, and influence every aspect of the unit’s operational competence. It is therefore no surprise that the study of leadership is a central component of the professional education and training of officers and non-commissioned officers, and that the concept of mission command is considered a core war-fighting function.<sup>8</sup>

4 See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (AP I), Art. 43. (“Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.”).

5 For an excellent summary of the history of this doctrine and recent developments, see Michael L. Smidt, “*Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*”, *Military Law Review*, Vol. 164, 2000; see also Yuval Shany and Keren R. Michaeli, “The Case Against Ariel Sharon: Revisiting the Doctrine of Command Responsibility”, *New York University Journal of International Law and Politics*, Vol. 34, No. 4, 2002; Victor Hansen, “What’s Good for the Goose Is Good for the Gander – Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards its Own”, *Gonzaga Law Review*, Vol. 42, No. 3, 2007.

6 “International humanitarian law”, also known as the “law of armed conflict”, refers to the body of international treaty and customary law regulating the methods and means of warfare and establishing protections for the victims of war.

7 See Joint Chiefs of Staff, *Joint Operations: Joint Publication 3-0*, 11 August 2011, A-2, available at: [www.dtic.mil/doctrine/new\\_pubs/jp3\\_0.pdf](http://www.dtic.mil/doctrine/new_pubs/jp3_0.pdf) (defining the term “unity of command” with a single responsible commander as a primary element).

8 US Department of the Army, *Army Leadership*, ADP 6-22, 1 August 2012, p. 1, para. 2, available at: [http://armypubs.army.mil/doctrine/DR\\_pubs/dr\\_a/pdf/adp6\\_22\\_new.pdf](http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/adp6_22_new.pdf). (“An Army leader is anyone who by virtue of assumed role or assigned responsibility inspires and influences people to accomplish organizational goals. Army leaders motivate people both inside and outside the chain of command to pursue actions, focus thinking, and shape decisions for the greater good of the organization.”)

## Leadership and battle command

Within a military organization there are many individuals who exercise leadership responsibility, ranging from low-level unit leaders such as infantry squad and team leaders to staff officers responsible for supervising the function of subordinates assigned to them. Unit command, however, involves a subtly different form of leadership, for a simple reason: it is the commander who is ultimately responsible for the effectiveness of the unit in executing whatever mission it may be assigned. While other leaders throughout the command play an important role in this process, their contributions will always be subordinate to the direction and priorities established by the commander. Ultimately, it is the commander who is responsible for providing the unit with the purpose, motivation and direction necessary to produce maximum operational and tactical effect.<sup>9</sup>

The IHL notion of responsible command is not synonymous with the manifold responsibilities inherent in the function of command. It is, however, inextricably linked to these responsibilities. This is because IHL is unquestionably and intuitively premised on the expectation that the proper exercise of command responsibility is essential to enhancing the probability of IHL compliance in the most physically and morally challenging martial situations.<sup>10</sup> Thus, “responsible command” in the IHL sense does not connote a distinct command function, such as the responsibility to train soldiers, or provide clear and effective orders, or ensure equipment is properly maintained, or manage the expenditure of finite unit resources. Instead, the IHL notion of “responsible command” inherently connotes an expectation that *all* command responsibilities will be conceived and executed in a manner that advances the core objectives of IHL. Preparing a military unit to execute its combat function within the bounds of IHL is therefore an inherent expectation of responsible command, and as such, IHL permeates the entire concept of command and every function performed in the execution of command responsibilities.

## Leader and subordinate expectations

Framing the meaning of command responsibility within the architecture of IHL – the law that it is intended to advance – illuminates the rationale of linking lawful combatant status with the requirement that the individual belligerent operatives

<sup>9</sup> See *ibid.*, p. 2, para. 8.

<sup>10</sup> See AP I, above note 4, Art. 87; Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of June 8 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, para. 1017.

function under responsible command.<sup>11</sup> This status qualification within the meaning of IHL requires much more than simply the capacity to engage in armed violence, or even the competence to do so in a tactically effective manner. IHL imposes a higher bar, reflected in the criteria incorporated into the prisoner-of-war definition found in the 1929 and 1949 Geneva prisoner-of-war conventions and the combatant definition found in AP I. Collectively, these “four qualification criteria” indicate an inherent expectation that lawful combatant status carries with it a level of confidence that:

1. the individual execution of tactical violence is subordinated to the will of the military organization—an inherent consequence of being a member of or incorporated into the armed forces of a party to the conflict;
2. the individual fighter is effectively incorporated into the military organization in a manner that clearly signals to the individual that he or she is an agent of a higher authority and not an autonomous actor—an inherent consequence of the requirement that members of militia or volunteer corps “belong” to a party to the conflict;<sup>12</sup>
3. most importantly, the higher authority exercises the function of command to ensure that subordinate conduct is consistent with core IHL principles—an inherent consequence of the requirement that lawful combatants operate under responsible command.

Fielding a force that only meets some but not all of these expectations is inconsistent with the IHL notion of responsible command. The essence of command unquestionably necessitates the development of subordinates whose obedience to orders, personal courage and tactical proficiency enables the commander to utilize the military unit to achieve defined outcomes. However, while it might produce a military unit that is *effective* in its ability to execute the orders of the commander, this is not sufficient to ensure that the unit will execute its mission in a manner that advances the overall objectives of the State or non-State group that it serves. In other words, being tactically effective is not, in and of itself, sufficient to ensure contribution to the strategic end-state driving the use of combat power.

## The link between discipline and operational effectiveness

Discipline is essential to create a tactically effective military unit; that is, a unit capable of efficiently executing its combat mission. But to transform a tactically effective military

11 See Hague Convention IV, above note 2, Arts. 1, 43. Article 1 indicates that a lawful belligerent is “[t]o be commanded by a person responsible for his subordinates”. Article 43 further indicates that to achieve compliance with the law of armed conflict, individuals must be subject to military command: “The 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, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.”

12 See Rachel VanLandingham, “Meaningful Membership: Making War a Bit More Criminal”, *Cardozo Law Review*, Vol. 35, No. 1, 2013.

unit into a unit that is considered “responsible” – at least within the implicit meaning of this term as it relates to lawful combatant qualification – involves more than instilling the discipline to obey orders. Instead, meaningful military discipline must produce a dual outcome. First, subordinates must be imbued with an unhesitating willingness to subject themselves to mortal danger in order to execute superior orders; second, they must also be fully committed to respecting the IHL-based legal limitations on their power. Only when a unit manifests this notion of discipline will orders be executed in a manner that advances the core objective of IHL: to bring the opponent into prompt submission in a manner that mitigates to the extent practicable the humanitarian suffering associated with hostilities.<sup>13</sup>

Responsible command is the *sine qua non* in the development of *this* type of discipline; the type of discipline that genuinely defines a professional military force. The term “responsible command” indicates an exercise of command authority that produces this broader notion of a disciplined and effective fighting force. Thus, an *effective* military unit is by implication a *responsible* military unit: a unit competent in tactically executing combat operations *in a manner* that manifests respect for and compliance with IHL.<sup>14</sup>

If unquestioning obedience to orders was the exclusive characteristic of a disciplined and tactically effective military unit, then the Japanese forces that captured Nanking<sup>15</sup> or the German units that murdered thousands of enemy prisoners of war or engaged in collective punishment of civilians<sup>16</sup> could be considered model military units. But this is not the case; instead, such units and the atrocities they committed provide iconic examples of the link between IHL compliance and strategic advantage, and the blunder of allowing subordinates to ignore IHL during the execution of military operations. Indeed, this inherent link between the notion of a responsible military unit—one committed to ensuring respect for IHL in the course of mission execution – and the overall effectiveness of a military unit reveals why these and other military units, all highly effective in a strictly tactical sense, so frequently produced long-term strategic failure.<sup>17</sup> These units obeyed orders, assumed mortal risk and leveraged their combat power to efficiently defeat their enemies. However, by doing so in a manner that consistently violated core humanitarian constraints applicable during armed conflict, they compromised the value of their tactical and operational successes, rendering strategic victory far less likely. The blatant abuses by these forces of the then-existing restraints imposed by the laws and customs of war produced profound negative strategic and moral consequences, including the corrosion of their moral integrity. Such negative effects are not unique to the foregoing examples. Even within an armed

13 Marco Sassòli, Antoine A. Bouvier and Anne Quintin, *How Does Law Protect in War?*, 3rd ed., Vol. 1, ICRC, Geneva, 2011, p. 1.

14 US Department of the Army, above note 1, para. 20.

15 “Scarred by History: The Rape of Nanjing”, *BBC News*, 11 April 2005, available at: <http://news.bbc.co.uk/2/hi/asia-pacific/223038.stm> (all internet references were accessed in July 2014).

16 Michael Reynolds, “Massacre at Malmédy During the Battle of the Bulge”, *World War II*, 12 June 2006, available at: [www.historynet.com/massacre-at-malmedy-during-the-battle-of-the-bulge.htm](http://www.historynet.com/massacre-at-malmedy-during-the-battle-of-the-bulge.htm).

17 For another example, see “My Lai Massacre”, available at: [www.history.com/topics/vietnam-war/my-lai-massacre](http://www.history.com/topics/vietnam-war/my-lai-massacre).



force whose overall commitment to IHL compliance is the norm, isolated incidents of deviation from this commitment poses immense strategic risks. Incidents such as the My Lai massacre and Abu Ghraib are powerful examples of this reality.<sup>18</sup>

The responsibility of command, therefore, should be understood as a responsibility to develop military units that are able to impose their will on opponents at the tactical level in a manner that contributes to strategic success. As such, a truly *effective* military unit is one that executes combat operations consistently with IHL regulatory norms, and truly *responsible* command creates a sense of discipline that produces this effect.

## Why and how responsible commanders ensure compliance with IHL

This conception of “command responsibility” – that a commander is responsible for preparing forces to engage in hostilities in accordance with IHL – may seem self-evident. However, what is not self-evident is exactly why this is so, or how individual commanders may best execute this responsibility. On the first point, it might be legitimate to question the assumption that a military unit cannot be truly effective if widespread IHL non-compliance is a common aspect of mission execution. Although it is not without exception, in general history validates this premise and demonstrates that IHL compliance almost inevitably produces strategic benefit, while widespread (and even isolated) non-compliance produces strategic disadvantage. Indeed, were this not the case, it is unlikely that so many States would agree to bind themselves (and by implication their military personnel) to the constraints inherent in IHL treaty obligations.

There is, of course, a purely humanitarian explanation for demanding that subordinates comply with IHL and for why such a demand is central to the notion of responsible command: it mitigates the human suffering produced by armed conflict. Many will likely consider this the ultimate justification for linking responsible command to IHL compliance. Indeed, the term “international humanitarian law” is a clear reflection of the belief that the central and principle purpose of this body of international law is to protect war victims, most notably civilians.<sup>19</sup> Others argue that humanitarian protection is not the primary purpose of the law, but is instead one component of a body of law that is intended to both *justify* and *regulate* armed violence; hence the assertion that the “law of armed conflict” is a more accurate characterization of this branch of international law than IHL.<sup>20</sup> Regardless of where one stands on this debate, there can be no dispute that a link between responsible

18 See Robert Rielly, “The Inclination for War Crimes”, *Military Review*, May–June 2009, available at: [http://usacac.army.mil/CAC2/MilitaryReview/Archives/English/MilitaryReview\\_20090630\\_art006.pdf](http://usacac.army.mil/CAC2/MilitaryReview/Archives/English/MilitaryReview_20090630_art006.pdf); see also Anthony R. Jones, *Army Regulation 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade*, 2004, available at: <http://library.uoregon.edu/ec/e-asia/reada/abugrab.pdf>.

19 See M. Sassòli, A. Bouvier and A. Quintin, above note 13, p. 139.

20 See 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.

command and subordinate commitment to IHL serves broader purposes than mitigating the suffering of civilians and other victims of war. The strategic benefit of limiting the brutality of armed conflict, as noted above, is clearly one of these purposes. Such commitment also contributes to the more subtle benefit of protecting the moral integrity of subordinates. This is because IHL provides them with a moral framework that allows them to reconcile their individual participation in the brutal endeavour that is “war” with the innate sense of morality that we hope all individuals will retain as they transition from civilian to soldier and back again.<sup>21</sup>

Protecting subordinates from the morally corrosive effects of combat is probably not commonly considered a benefit of IHL compliance or associated with the execution of command responsibility.<sup>22</sup> And yet, inherent in the responsibility of any military commander is the obligation to protect subordinate forces from the risks associated with combat operations, consistent with the dictates of the mission. Indeed, one of the first leadership principles taught to US Army personnel is the prioritization of effort: “mission, men, equipment”.<sup>23</sup> This prioritization includes an inherent obligation to prepare subordinates for the physical, mental and, as addressed in greater detail below, *moral* challenges inherent in combat. In other words, while mission accomplishment is always the first priority of a military leader, the second is protecting the members of the unit.

Executing this aspect of command responsibility is frequently characterized with concepts such as “force protection”.<sup>24</sup> But this characterization is somewhat misleading, for it suggests that the exclusive focus of this responsibility is protecting the force from external physical dangers. Such protection is, of course, a vital aspect of effective leadership and effective military command, but not an exclusive one. Commanders bear an equally important obligation to provide subordinates with the tools needed to navigate the moral hazards of military duty, most notably the challenges associated with engaging in lethal violence.<sup>25</sup>

21 See Telford Taylor, *Nuremberg and Vietnam: An American Tragedy*, Quadrangle, Chicago, IL, 1970, pp. 40–41; James R. McDonough, *Platoon Leader: A Memoir of Command in Combat*, Random House, New York, 1985.

22 See generally Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society*, Back Bay Books, New York, 2009.

23 This is a common catchphrase among US military leaders, used to emphasize the priority of leadership responsibility at all levels of command: first accomplish the mission, then take care of your personnel, then take care of your equipment.

24 See Joint Chiefs of Staff, above note 7, III-30–III-31. “**Force protection** includes preventive measures taken to prevent or mitigate hostile actions **against DOD** personnel (to include family members), resources, facilities, and critical information. These actions preserve the force’s fighting potential so it can be applied at the decisive time and place and incorporate integrated and synchronized offensive and defensive measures that enable the effective employment of the joint force while degrading opportunities for the adversary. Force protection does not include actions to defeat the enemy or protect against accidents, weather, or disease. Force health protection (FHP) complements force protection efforts by promoting, improving, preserving, or restoring the mental or physical well being of Service members. Force protection is achieved through the tailored selection and application of multilayered active and passive measures commensurate with the level of risk. Intelligence sources provide information regarding an adversary’s capabilities against personnel and resources, as well as information regarding force protection considerations. Foreign and domestic law enforcement agencies can contribute to force protection through the prevention, detection, response, and investigation of crime, and by sharing information on criminal and terrorist organizations” (emphasis in original).

25 See generally D. Grossman, above note 22.

## Moral consequences of a *duty* to kill

In this regard, it is probably unlikely that there are many military veterans who have genuinely contemplated the fundamental consequence of the military superior/subordinate relationship. It is relatively self-evident that this relationship results in an obligation that the subordinate obey the orders of the superior. What is not self-evident is the immense moral consequence this obligation encompasses. For the subordinate, this is ultimately manifested in a *duty* to take the life of another human being on demand.<sup>26</sup> This is a profound departure from the peacetime expectations of homicidal justification. In that context, the notion that some extreme situations justify the use of homicidal violence to protect oneself against an imminent threat to life is universally understood. However, it is the imminence of the actual and unlawful threat of extreme violence that permits an individual to engage in homicidal self-help. Such uses of force are exceptional in nature and restricted to those rare instances where an individual confronts a threat of imminent death or grievous bodily harm, triggering a necessity-based right of self-defence.<sup>27</sup> Thus, the individual acts pursuant to what is arguably a natural human instinct of self-preservation.

Justifiable homicidal action in obedience to military orders may at times also fall into this category, but is much broader in scope. The very nature of armed conflict involves two significant departures from this peacetime justification model. First, homicidal action in lawful combat is justified based on *status* determinations.<sup>28</sup> This means that deadly force is routinely ordered absent indicia of an actual imminent threat of death or grievous bodily harm.<sup>29</sup> This is because each combatant is presumed to be contributing presently or in the future to the collective effectiveness of the enemy force, the neutralization of which is a legitimate State aim. This presumption alone justifies the use of deadly force, which is therefore lawful as the result of the status of the object of attack.<sup>30</sup> In the simplest of terms, a commander points at another human being, who at that moment is not engaged in any aggressive conduct, and orders a subordinate to attack. Obedience to orders requires the subordinate to align his sights and pull the trigger of a weapon designed to create a high probability of death, and in many cases take the life of the status-based target. This also reveals the second significant departure from peacetime justification for engaging in homicidal self-help: the absence of any requirement to employ less-than-lethal means to

26 See T. Taylor, above note 21, pp. 40–41.

27 Wayne R. LaFare and Austin W. Scott, Jr., *Substantive Criminal Law*, West Publishing, St Paul, MN, 1986, p. 649.

28 See Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 2nd ed., Cambridge University Press, Cambridge, 2010.

29 See William A. Schabas, “Parallel Applicability of International Humanitarian Law and International Human Rights Law: Lex Specialis? Belt and Suspenders? The Parallel Operations of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum”, *Israel Law Review*, Vol. 40, No. 2, 2007, p. 604.

30 See Y. Dinstein, above note 28.

incapacitate the object of attack.<sup>31</sup> Hence, the subordinate need not, and indeed in many situations must not, exhaust lesser means to disable the status-based target.

This superior/subordinate influence on the employment of homicidal force is a constant feature of armed conflict: commanders issue orders to employ deadly combat power, and subordinates execute those orders. Both sides of this equation must, therefore, carry the mental and emotional weight of such action through the remainder of their lives. Even for the most hardened combatant, this weight should not be underestimated.<sup>32</sup> The vast majority of men and women who volunteer or are conscripted into wartime service come to their task with a solid moral foundation and aver the act of killing. So much has been established by empirical studies of the attitudes of front-line combatants in numerous conflicts.<sup>33</sup> Indeed, the challenge of overcoming this natural aversion to killing on demand significantly influences the nature of military training, which consistently seeks to prepare the individual to overcome this aversion by substituting a dehumanized conception of enemy for that of a fellow human being. While this is perhaps an unfortunate necessity of preparing men and women for the demands of combat, it is also a powerful confirmation that most soldiers are not “natural born killers”.

## **Preserving subordinates’ human dignity in the chaos of mortal combat**

Providing military personnel with a decisional framework that enables them to reconcile their innate sense of morality and humanity with the demands of employing lethal force on demand is therefore an essential responsibility of effective command. Leaders who understand this responsibility produce subordinates who are able to retain the recognition that there is a difference between moral and immoral killing, even in warfare. In other words, they will understand that war does not justify all violence, which is the central concept inherent to the principle of military necessity. This, in turn, produces two vital benefits. First, the commander’s unit is much more likely to respect IHL in the most demanding situations, because the distinction between justifiable and unjustifiable violence will have been embedded in the unit culture and the warrior ethos that the commander cultivates. Second, inculcating subordinates with an understanding of the nature and significance of IHL-based constraints on

31 See Leslie Green, *The Contemporary Law of Armed Conflict*, 2nd. ed., Melland Schill Studies in International Law, 2000, pp. 122–125.

32 See David Wood, “Moral Injury: A Warrior’s Moral Dilemma”, *Huffington Post*, 2014, available at: <http://projects.huffingtonpost.com/moral-injury> (covering a three-part series that investigates and analyzes the ethical uncertainties of war and the lasting effects of moral wounds).

33 See John Whiteclay Chambers II, “S.L.A. Marshall’s *Men Against Fire*: New Evidence Regarding Fire Ratios”, *Parameters*, 2003, available at: <http://strategicstudiesinstitute.army.mil/pubs/parameters/articles/03autumn/chambers.pdf>.

their permissible conduct renders them more capable of navigating the moral challenges associated with the execution of their violent duties.

Reinforcing the line between “right and wrong” in combat is no easy task, and will often require commanders to train subordinates to reject the temptation to adopt a “whatever it takes” mentality. Subordinates—and perhaps most importantly, the junior leaders who direct tactical operations—who realize that respect for the constraints inherent in the law contributes to broader mission accomplishment, even if it might increase tactical-level risk, are more likely to reject such temptation. Instead, they will demand that the combat power entrusted to them is utilized within the framework of the law, thereby advancing both military and humanitarian interests. And by preparing troops for this challenge, leaders increase the probability that the line between moral and immoral violence will be preserved as they transition back into civilian society. This is for the simple reason that *justification* will remain the central moral and practical consideration associated with the use of force, ideally enabling the individual to appreciate that different contexts justify different levels of violence.

Both legal and military operational experts have highlighted these benefits of responsible command and commitment to IHL compliance. Two of the most compelling articulations are found in Telford Taylor’s *Nuremberg and Vietnam: An American Tragedy* and James McDonough’s *Platoon Leader*. McDonough offered his perspective after serving as an infantry platoon leader in Vietnam, in a memoir that is considered essential reading for junior military leaders in the US Army. Explaining his role as a combat leader, he wrote:

I had to do more than keep them alive. I had to preserve their human dignity. I was making them kill, forcing them to commit the most uncivilized of acts, but at the same time I had to keep them civilized. That was my duty as their leader ... War gives the appearance of condoning almost everything, but men must live with their actions for a long time afterward. A leader has to help them understand that there are lines they must not cross. He is their link to normalcy, to order, to humanity. If the leader loses his own sense of propriety or shrinks from his duty, anything will be allowed.

... War is, at its very core, the absence of order; and the absence of order leads very easily to the absence of morality, unless the leader can preserve each of them in its place.<sup>34</sup>

McDonough’s perspective seems to be generally overlooked in contemporary IHL scholarly discourse, which focuses primarily on the law’s role in protecting civilians and other non-combatants—an important albeit non-exclusive objective. Little attention has been paid, however, to the role of the law in protecting the moral integrity of the soldier; or, as McDonough notes, in aiding the soldier to remain civilized in the context of the most uncivil of human endeavours. This is unfortunate, for it risks diluting a vital function of IHL, and in turn contributes

34 J. R. McDonough, above note 21, p. 77.

to an under-inclusive understanding of “responsible command”. As McDonough notes, commanders bear a responsibility for protecting subordinates from the moral corrosion inherent in the use of lethal force. IHL gives the commander a vital tool to accomplish this task, as it provides the framework to facilitate the distinction between legal and illegal violence, which will routinely translate to the distinction between moral and immoral individual conduct. Certainly, some may challenge the notion that participating in armed conflict can ever be characterized as a moral endeavour. However, it is undeniable that IHL reflects international consensus on the appropriate and legitimate balance between the necessities of war and humanitarian interest. As such, the law is used by commanders to indicate the line between moral and immoral conduct for those required to participate in armed conflict.<sup>35</sup>

Telford Taylor, the chief US prosecutor at the Nuremberg Tribunal, also recognized this critical morality-reinforcing function of the law. In his book he discussed the many benefits that flow from IHL compliance, including the following observation:

Another and, to my mind, even more important basis of the laws of war is that they are necessary to diminish the corrosive effect of mortal combat on the participants. War does not confer a license to kill for personal reasons—to gratify perverse impulses, or to put out of the way anyone who appears obnoxious, or to whose welfare the soldier is indifferent. War is not a license at all, but an obligation to kill for reasons of state; it does not countenance the infliction of suffering for its own sake or for revenge.<sup>36</sup>

These two insights—coming from both the tactical and legal ends of the military intellectual and experiential spectrum—provide a compelling explanation for the inherent command obligation to ensure that subordinates conduct operations in accordance with IHL.

Perhaps more importantly, these insights illustrate why IHL plays such a vital role in protecting the moral integrity of combatants. IHL provides a legal framework for the permissible use of violence—a framework that reflects the inherent international consensus on the moral limits of military action. By imposing limits on justifiable violence in war, and therefore by implication placing many acts of violence beyond the scope of lawful and moral conduct, the law establishes a profoundly important link between an individual’s violent combat actions and the interests of the State for which those actions are taken: violence and the attendant harm it produces are limited to what is necessary to

35 This equation of law with morality is controversial, of course, because as the long-standing natural law versus positivism debates reflect, simply because something is legal does not mean it is moral. Yet in the context of modern warfare, IHL is used by commanders as a substitute for personal morality in order to buffer their subordinates from the moral corrosiveness of killing. The question of whether this represents a “brainwashing” of individuals to do their government’s bidding, or a reinforcement of their individual moral codes that is necessary to translate individual self-defence concepts to an armed conflict setting, is inextricably linked to the morality of war itself.

36 T. Taylor, above note 21, pp. 40–41.

accomplish the collective objectives defined by the State, as implemented through the orders of *responsible* military commanders.

Accordingly, IHL provides the combatant with a rational framework to subjectively justify the infliction of human suffering. When understood as a duty, and not a right, it becomes easier to understand that this suffering is the consequence of the subordinate implementing the will of the command, and by implication the State. In short, moral beings are able to appreciate the link between their duties as subordinate members of a military unit and the necessity—perhaps an unfortunate necessity—of their violent actions. Of course, scepticism related to the moral foundation of the objectives that the State seeks to achieve may compromise individual confidence in the moral legitimacy of a commander’s orders. However, even when soldiers question the legitimacy of their State’s strategic objectives, both the risk to their moral integrity and the humanitarian consequences of their actions will almost certainly be mitigated when their military commanders demand respect for IHL when executing missions to achieve these objectives. Thus, even when executing an operation of dubious legitimacy at the *jus ad bellum* level, IHL provides moral “top cover” for the soldier, allowing her to reconcile her individual conduct with the accepted moral and legal standards applicable to the execution of military operations.

## Preserving the distinction between collective and individual necessity

When commanders encourage or even permit subordinates to transform the justification for inflicting suffering from serving the interests of the State to satisfying the individual impulse for revenge, for retribution or, as Taylor suggests, “to put out of the way anyone who appears obnoxious”,<sup>37</sup> this link to rationality dissipates. This is when the danger of humanitarian suffering and moral corrosion becomes most profound, because such conduct renders the infliction of suffering as a necessary act for achieving a State’s legitimate purpose (military necessity) indistinguishable from the infliction of suffering driven by personal motives. At that point there is little to distinguish the soldier from the murderer, a distinction that must be preserved in the interests of both the victims of violence and those asked to inflict harm.<sup>38</sup>

A commander, therefore, cannot be legitimately characterized as “responsible” unless these distinctions are established and reinforced through the exercise of command authority. Doing so mitigates the risk that the violence inherent in armed conflict will exceed that which is linked to the achievement of

<sup>37</sup> See *Id.*

<sup>38</sup> States do, of course, receive the ultimate benefit from characterizing their soldiers as morally and legally correct; it is the States’ ends that are being served by this IHL paradigm. Regardless of the important collateral effects of minimizing civilian and combatant suffering, IHL is a tool of states to ensure they can continue to effectively wage war in pursuit of state interests, regardless the legitimacy of those interests.



State purposes. This, in turn, reduces the suffering resulting from armed conflict, suffering which impacts both victims of war and the warriors themselves. Accordingly, this commitment to IHL compliance, and only this, justifies the permission granted by international law for individuals to employ lethal force in the context of armed conflict. This interrelationship between the role of the commander and the imposition of the legal framework within which subordinates are permitted to execute their tasks is bundled in the notion of responsible command, and the requirement that only those who operate under responsible command may qualify for lawful combatant status.

## Teaching versus training on IHL

Ensuring that subordinates understand and respect this legal framework and are prepared to execute their combat tasks within it is more complex than many might assume. Relying exclusively or even primarily on classroom education about IHL, perhaps accompanied by the admonishment that IHL violations will result in disciplinary and potentially criminal sanction, will rarely produce truly effective understanding and commitment to the law. Soldiers do not truly learn to effectively perform their battle tasks by classroom instruction; they learn by doing.<sup>39</sup> And because IHL obligations frame the performance of these tasks, IHL compliance must be integrated into the same training and development process used to produce proficiency in the battle task itself. The threat of a potential criminal sanction for violating IHL is not an adequate substitute for training integration, and will likely provide little or no deterrence when soldiers confront *in extremis* situations involving pressures to act in violation of the law. At that point, the soldier may be willing to prioritize immediate interests over the risk of future disciplinary sanction. In contrast, when IHL compliance has been integrated into all aspects of training battle tasks, that compliance will become increasingly instinctive and automatic, like the execution of the task itself.

This is not to say that education related to both IHL content and the individual disciplinary consequences for violations of the law are unimportant. Instead, responsible command requires a more nuanced appreciation for how the law implicates virtually every battle task assigned to subordinates and therefore must be integrated into soldier training so that the battle instincts of the soldier include respect for and compliance with the law.

Training is the essential component in preparing soldiers and military units for success in battle and other military operations. Training involves the complex process of building competence from the ground up, starting with individual soldier skills, progression to small unit capabilities, and finally integrating all of this into collective battle simulations. All of this contributes to developing almost instinctual reactions and responses to the myriad of situations that will confront

39 US Department of the Army, above note 1, p. 35 (placing emphasis on training programmes and experience as keys to learning the skills necessary to be an effective soldier).

the individual and collective military assets of an armed force. This is explained by US Army doctrine as follows:

Success in future Army operations depends in great measure upon effective, realistic training to build the necessary competence and confidence in soldiers, units, and leaders. ... Combat and collective training centers develop high-end collective proficiency to ensure unit readiness for deployment. Deployed forces continue to benefit from new sources of training support and reach back to sustain critical skills while away from home station regardless of the mission. Army schoolhouses and units at all levels access nested and operationally relevant scenarios that guide training and leader development across the force. Army training also incorporates increased levels of joint and interagency participation to broaden both Army and partner understanding and expertise. All of these efforts become part of a broad training enterprise that develops and sustains the tactical and technical competence that builds both confidence and agility.<sup>40</sup>

Leaders influence training at every step of this process. How leaders conceptualize their responsibilities in relation to training subordinates will in large measure define the nature, quality and focus of that training. Executing this command “responsibly” requires that challenges associated with IHL compliance be fully integrated into the training process. The value and importance of this is almost self-evident: the myriad of operational and tactical challenges likely to confront soldiers and units includes those related to IHL itself. Leaders who understand this will understand why just *teaching* IHL obligations is insufficient to fully execute their responsibilities, because they will understand that only by *training* compliance with this law will soldiers be genuinely prepared for their inevitable moments of decision.

The importance of this broader vision of executing the responsibilities of command as it relates to maximizing IHL compliance is perhaps more compelling today than at any time in recent memory. Indeed, as the complexities of the battle space increase as the result of the unconventional and rapidly evolving nature of the contemporary strategic environment, the importance of developing an *instinct* for IHL compliance also increases. This correlation is articulated by US Army doctrine:

The Army must clarify and reinforce standards of behavior for both leaders and Soldiers. To defeat enemies whose primary sources of strength are coercion, brutality, and the stoking of hatreds, the Army must provide its members a clear set of expectations. Ignorance, uncertainty, fear, and combat trauma can lead to breakdowns in discipline and conduct that often result in violations of the Uniform Code of Military Justice, the Law of War, and the Geneva Conventions. Against such challenges, leaders must strive to reduce uncertainty through tough, realistic training that builds cohesion, confidence,

40 *Ibid.*

and mutual trust. In addition, all Soldiers must understand and apply the essential tenets of *jus in bello*, discrimination (between combatants and noncombatants), and proportionality in the use of force, measured against the necessity of military operations. Finally, leaders and Soldiers must internalize and sustain a Warrior Ethos that insists upon commitment to core institutional values. Particularly important is the recognition that Soldiers are expected to take risks and make sacrifices that place them at increased risk of danger or death to accomplish the mission, protect their fellow Soldiers, and strive to safeguard innocents. The Army values of loyalty, duty, respect, selfless service, honor, integrity, and personal courage serve as a guide to all Soldiers about the covenant between them and the society they serve.<sup>41</sup>

As this doctrinal extract highlights, commanders at all levels must ensure their subordinates genuinely *understand* how IHL impacts their warrior functions. This understanding is absolutely essential to effective IHL implementation, because it links such implementation to two fundamental responsibilities of the commander: protect the subordinate from the risks inherent in armed conflict, and limit the harm caused by conflict to only that which serves the interests of the State. By developing this understanding, responsible commanders prepare subordinates to walk a proverbial tightrope between employing deadly force on demand and without hesitation, and at the same time respecting the limitations imposed by the law.

## Concluding remarks

Preparing subordinates to execute their deadly combat tasks often includes deliberate efforts to minimize the moral consequence of such action. This ranges from training to develop battle response instincts, to emphasis of the collective obligation of each member of the unit to perform effectively in order to accomplish the collective mission, to rewarding subordinates for their aggressiveness and personal courage in battle. It also often involves measures to enable the subordinate to view the opponent more as an object of tactical violence than a fellow human being. This is often done in quite subtle ways—for example, by using faceless silhouettes as targets during marksmanship training. It can also take the form of disparaging characterizations of the enemy writ large.

Whatever the method used to produce this moral minimization, IHL demands that these same subordinates be capable of shifting their attitude toward an enemy in the briefest of time. Once that enemy is captured or subdued—the point at which the captured enemy is at the total mercy of his captors—he is, as a matter of law, no longer allowed to be treated as an object of hostility, but must instead be treated like any other human being. When commanders weave IHL

41 *Ibid.*, pp. 35–36 (footnotes omitted).

compliance into their training, they prepare subordinates to execute this incredibly demanding mental shift in perspective in the briefest of moments between attack and submission.

Preparing subordinates to navigate this complex challenge is the essence of responsible command. It is also central to the international legal qualification of lawful combatant and the accordant legal privilege to participate in hostilities. That status and privilege is built on the assumption that commanders will discharge this duty “responsibly”. This inextricable link between responsible command, combatant status and humanitarian interests must constantly be emphasized in every aspect of leader training and development. Indeed, societies’ best hope for mitigating the detrimental impact of mortal combat is the responsible commander, a reality that has been and will continue to be central to balancing the interests inherent in IHL.



# Converting treaties into tactics on military operations

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## Abstract

*Despite widespread State acceptance of the international law governing military use of force across the spectrum of operations, the humanitarian reality in today's armed conflicts and other situations of violence worldwide is troubling. The structure and incentives of armed forces dictate the need to more systematically integrate that law into operational practice. However, treaty and customary international law is not easily translated into coherent operational guidance and rules of engagement (RoE), a problem that is exacerbated by differences of language and perspective between the armed forces and neutral humanitarian actors with a stake in the law's implementation. The author examines the operative language of RoE with a view to facilitating the work of accurately integrating relevant law of armed conflict and human rights law norms. The analysis highlights three crucial debates surrounding the use of military force and their practical consequences for operations: the dividing line between the conduct of hostilities and law enforcement frameworks, the definition of membership in an organized armed group for the purpose of lethal targeting, and the debate surrounding civilian direct participation in hostilities and the consequent loss of protection against direct attack.*

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The ineffectiveness of international law is an oft-heard accusation. The pessimism it induces is all the more potent when contrasted against the last century's claim to a new global order defined by the international rule of law. Indeed, the horrors of World War II led directly to the creation of the United Nations (UN), the Nuremburg and Tokyo international military tribunals, the modern corpus of international humanitarian law (IHL),<sup>1</sup> and the first treaties of international human rights law (IHRL). Today, every State is party to the four Geneva Conventions of 1949, the vast majority have ratified both of their 1977 Additional Protocols,<sup>2</sup> and the most important treaties limiting weapons that cause unnecessary suffering are broadly accepted. The customary law of armed conflict (LOAC) has expanded to fill in many of the gaps between the legal regimes governing international and non-international armed conflict. Furthermore, the pillar of human rights law, the International Covenant on Civil and Political Rights (ICCPR),<sup>3</sup> is backed by almost 90% of UN member States. The end of the century even witnessed the creation of the first permanent international criminal court with jurisdiction over war crimes, crimes against humanity and genocide.

Nevertheless, a quick glance at an international news service on any given morning reveals the obvious: the basic principles of humanity enshrined in international law are not consistently respected in inter- and intra-State violence today. In all too many cases, they appear to be blatantly disregarded by both States and non-State armed groups. What explains the chasm between the expressed political will of the international community and the frequent lack of compliance with the law on the ground? Evidently the media plays a role: it is only the perceived breach of humanitarian norms – a dead wedding party, a physically abused prisoner, a crushed protest – that generates headlines. The wartime infantry battalion commander who decides to issue a warning to the civilian population prior to launching an attack on a nearby enemy weapons cache receives no public accolades for his decision to maintain a degree of humanity in the fog of war. However, despite the great strides that international

1 The terms “international humanitarian law” and “law of armed conflict” are used interchangeably in this text since they convey precisely the same meaning – albeit with a different semantic emphasis.

2 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention (III) Relative to the Treatment of Prisoners of War; and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, all of which were adopted on 12 August 1949 and entered into force 21 October 1950. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I); and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (AP II), both adopted on 8 June 1977 and entered into force on 7 December 1978.

3 ICCPR, 16 December 1966 (entered into force 23 March 1976).



law has taken over the past century and a half, treaties and established legal custom are not adequately translating into consistent lawful behaviour on the ground.

The 31st International Conference of the Red Cross and Red Crescent in 2011 confirmed that

international humanitarian law, in its current state, provides a suitable legal framework for regulating the conduct of parties to armed conflicts. In almost all cases, what is required to improve the victims' situation is stricter compliance with that framework, rather than the adoption of new rules. If all the parties concerned showed perfect regard for international humanitarian law, most current humanitarian issues would not exist.<sup>4</sup>

The same can undoubtedly be said of the international law governing the use of force by armed forces below the threshold of armed conflict. Derived from the right to life in the ICCPR, the UN Basic Principles on the Use of Force and Firearms<sup>5</sup> are widely accepted as the standard not only for traditional law enforcement professionals, but also for militaries employing force that does not constitute part of the conduct of hostilities in an armed conflict. However, actions speak louder than words – the 2011 Arab Spring and its consequent conflicts prominently demonstrated the challenges posed by military involvement in traditional law enforcement activities.

The compliance of a State's armed forces with the international law governing military operations depends on the will and capacity of its government, as reflected in the following steps:

1. becoming a party to the principal LOAC and IHRL treaties;
2. taking domestic legislative measures to implement and give substance to its international obligations, both treaty and customary, including the repression of breaches;<sup>6</sup>
3. developing an independent mechanism within the executive branch of government for objectively determining the existence of an armed conflict (including whether it is international or non-international), identifying the opposing party or parties, and thereby triggering the application of the LOAC; and
4. taking measures to ensure that the applicable provisions of the LOAC and IHRL are integrated into the operational practice of the military, and backed by the authority of the chief of defence.<sup>7</sup>

4 International Committee of the Red Cross (ICRC), "Strengthening Legal Protection for Victims of Armed Conflict", 31st International Conference of the Red Cross and Red Crescent, Geneva, October 2011, p. 4.

5 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August–7 September 1990 (BPUFF).

6 There are several LOAC-specific obligations for States to respect and ensure respect of the law based on the Geneva Conventions (including common Article 1) and their Additional Protocols. There are similar obligations in IHRL, including Article 2 of the ICCPR. See ICRC, *The Domestic Implementation of Humanitarian Law: A Manual*, Geneva, April 2013.

7 See in particular AP I, Art. 87, as elaborated in ICRC, *Integrating the Law*, Geneva, May 2007, available at: [www.icrc.org/eng/resources/documents/publication/p0900.htm](http://www.icrc.org/eng/resources/documents/publication/p0900.htm) (all internet references were accessed in December 2014).

The first two steps provide the foundation for compliance, and are often facilitated by an inter-ministerial IHL committee.<sup>8</sup> The third step responds to an existential threat faced by the international law governing military operations: if for political reasons a State refuses to objectively classify the use of force employed by its armed forces in accordance with its treaty and customary legal obligations, then the intended beneficiaries of that law will bear the consequences, as will the humanitarian reputation of the State. Unfortunately, political manipulation of legal classification has become a more frequent manoeuvre in the exercise of an increasingly assertive notion of sovereignty. States have, for example, claimed that no armed conflict exists when the facts clearly reveal the contrary, or used lethal force in the first resort in situations that have not objectively crossed the threshold of armed conflict.<sup>9</sup>

The aim of this article is to examine the fourth step, which is derived from the success of the first three: how can LOAC and IHRL obligations be translated from raw treaty and customary provisions into operationally relevant, but legally accurate, rules that bind deployed armed forces? The inquiry begins with an overview of the psychological roots of military behaviour and the consequent need to integrate relevant legal norms into operational practice. It then addresses the International Committee of the Red Cross's (ICRC) dialogue with armed forces regarding the use of force both within and outside of armed conflict, and focuses on the problem of reconciling the language of international law with the language of operational orders and rules of engagement (RoE), with particular reference to the use of military force against persons. Throughout that analysis, it highlights those areas of legal disagreement on the law governing the use of force that are most likely to result in operational uncertainty – the dividing line between the law enforcement and conduct of hostilities frameworks, the LOAC definition of membership in an organized armed group for the purpose of lethal targeting, and the concept of civilian direct participation in hostilities – and suggests practical solutions aimed at balancing operational viability and force protection concerns with the diligent protection of the civilian population required by international law. This article does not directly address the specific challenge of improving compliance with non-State organized armed groups, but several of the core compliance issues remain the same.<sup>10</sup>

8 ICRC, above note 6, p. 127. For examples of the work of IHL committees, see Cristina Pellandini, "Ensuring national compliance with IHL: The role and impact of national IHL committees" and the accompanying section in this issue.

9 See, for example, 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, p. 94.

10 See Marco Sassòli, "Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law", *Journal of International Humanitarian Legal Studies*, Vol. 1, 2010, pp. 5–51.

## The roots of military legal compliance

In the context of armed conflicts and other situations of violence, military officers and soldiers are frequently called upon to make extraordinarily complex decisions involving the life and death of human beings. Even junior officers and non-commissioned members may take decisions with consequences that directly affect the strategic interests of the State, including its perceived legitimacy within the international order, its diplomatic clout, its liability to paying damages or being subject to reprisals, and the loss of support of its own electorate. The “strategic corporal”<sup>11</sup> may win an apparent tactical victory while simultaneously undermining national policy. Accordingly, operational commanders are painstakingly trained and given the tools to control the use of force by their subordinates. They are specifically required by the LOAC to “prevent and, where necessary, to suppress and report to competent authorities” breaches of the law, and to take disciplinary or penal action as appropriate.<sup>12</sup> Their obligation to prevent and suppress explicitly includes ensuring that their subordinates are aware of their LOAC obligations.<sup>13</sup> However, the concept of prevention is much broader than the requirement to instruct, and includes employing the means of command and control available to the commander. In modern armed forces, the most proximate directives on the use of force are rules of engagement. RoE are generally appended to an operational order that has been written and vetted by the operational commander and his military staff, including specialist planning, intelligence, operational and legal personnel. The commander and staff are first and foremost guided by the intent expressed by their operational and strategic-level superiors. They are also guided by their own field experience, the instruction they have received at military educational facilities such as command and staff college, and by doctrine. The RoE they request and authorize from more senior levels of command are ultimately reduced to a simplified and context-relevant pocket card carried by the soldier deployed on operations.

Accordingly, although the tactical decision of a soldier to apply lethal force might appear to be isolated, he or she is but the executive end of a chain of authority that reaches up to the commander-in-chief of the armed forces and the minister of defence. Indeed, soldiers go through vigorous training designed to ensure that their individuality is partially subsumed within the larger military structure that they support. Their creativity of action and leadership is only encouraged within defined limits. Almost every action they take on operations is determined or at least constrained by the orders they receive. Even the most innocuous breach of discipline – failure to adequately shine one’s shoes, for example – has had consequences throughout their military careers, ranging from losing individual weekend leave privileges to causing the collective punishment of their unit. One

11 This term was coined by General Charles Krulak in his article “The Strategic Corporal: Leadership in the Three Block War”, *Marines Magazine*, January 1999.

12 AP I, Art. 87.

13 *Ibid.*, Art. 87(2).

result of this combination of training, operations, incentives and disincentives is that a soldier and his or her fellow unit members have a bond of loyalty between them that is arguably closer than that of married couples.<sup>14</sup>

As an ICRC study entitled “The Roots of Behaviour in War” contends, the conduct of individual soldiers on operations may in large part be attributed to three criteria: conformity, which accounts for the dilution of individual responsibility; hierarchy, which shifts a degree of responsibility from subordinate to superior; and, consequently, a degree of moral disengagement.<sup>15</sup> Analyzing these observations, the study affirms that there is a gulf between personal attitudes and knowledge on the one hand, and actual behaviour on the other.<sup>16</sup> Accordingly, neither military nor civilian organizations that aim to ensure the compliance of armed forces with international standards may complacently assume that lecturing officers and soldiers on the law, however persuasively, actually influences behaviour on the battlefield. Indeed, stand-alone courses on the LOAC may be of marginal utility. Given a choice between following a direct order – with all of its personal and collective consequences – and following a course of action based on the loose recollection of a LOAC course given by someone outside of the soldier’s operational chain of command, there is no competition. If the execution of a given order would blatantly violate one of the cardinal LOAC principles, the decision of an officer or soldier to openly question it to his or her superior is more likely to depend on morality learned as a child than on a mandatory legal course, although the latter will be given greater weight if it has been delivered by a figure of authority from the soldier’s own chain of command.

## Integrating the law into operational practice

In order to modify the comportment of soldiers to better reflect international law, one must alter the very structures that guide military decision-making.<sup>17</sup> At the highest level, the law should be encouraged in macro terms through military strategic policy, and backed by an order from the chief of defence requiring that the planning and execution of operations reflect applicable international rules, setting out responsibilities for implementation.<sup>18</sup> The law must equally form an integral part of joint and service-specific doctrine, from which classroom education and field training curricula are derived. It must also be reflected in the acquisition and employment of military weapons and equipment.<sup>19</sup> The key to this process of integration is ensuring that the law forms a seamless part of existing operational guidance, and does not stand on its own. Indeed, the law

14 Daniel Munoz-Rojas and Jean-Jacques Frésard, “The Roots of Behaviour in War: Understanding and Preventing IHL Violations”, *International Review of the Red Cross*, Vol. 86, No. 853, 2004, p. 194.

15 *Ibid.*, p. 190.

16 *Ibid.*, p. 196.

17 ICRC, above note 7, pp. 17–35.

18 *Ibid.*

19 See AP I, Art. 36.

need not even be mentioned in the main body of guiding documents. For example, a tactical military manual governing the employment of artillery that already contains profession-specific terms accurately reflecting the principles of distinction, proportionality and precautions in attack<sup>20</sup> is far more likely to influence conformity with the law than a manual that sets out treaty provisions verbatim. Doctrine and training in turn serve as sources for operational orders and RoE that are directly applied at the tactical level.<sup>21</sup> Finally, the credibility of the orders that the soldier receives depends on the ability of the military disciplinary system to respond rapidly and effectively, maintaining an effective general deterrent against undisciplined conduct and creating an environment conducive to the respect of the law. The legal lessons learned from operations should then be captured and fed into policy and doctrine, thereby creating a continuous cycle of integration.

Even this cursory overview of the process of integrating international law into military operations demonstrates its complexity. In each domain – policy, doctrine, education, field training, operational orders and RoE – there is a procedure for determining the international law relevant to foreseen operations, formulating the operational implications of that law, and seamlessly integrating it into existing guidance, curricula and practice.<sup>22</sup> As such, there must be high-level commitment to the process, capacity to carry it out, and a senior hand guiding it forward. Military legal advisers must play a role throughout the process to ensure that operational guidance ultimately reflects the international law upon which it is based.<sup>23</sup> However, it is military operators – not their counsel – who should drive the process in order to ensure its central relevance to the military mission, and that legal vocabulary does not obfuscate guidance directed at the “pointy end” of military operations.

## Dialogue on use of force: Reconciling military necessity with humanity

As the internationally mandated guardian of IHL,<sup>24</sup> the ICRC works closely with State armed forces in peacetime to integrate the law into operational practice. However, its central priority is to maintain a confidential operational dialogue with those armed forces, militias and organized armed groups currently engaged in armed conflict and other situations of violence in order to address identified

20 These principles are reflected in the treaty and customary rules governing the conduct of hostilities in armed conflict, including AP I, Arts 48–58, and Rules 1–21 of Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study).

21 ICRC, *Decision-Making Process in Military Combat Operations*, Geneva, October 2013, available at: [www.icrc.org/eng/resources/documents/publication/p4120.htm](http://www.icrc.org/eng/resources/documents/publication/p4120.htm).

22 ICRC, above note 7, pp. 17–35.

23 See AP I, Art. 82.

24 Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross at Geneva in October 1986 and amended by the 26th International Conference of the Red Cross and Red Crescent at Geneva in December 1995 and by the 29th International Conference of the Red Cross and Red Crescent at Geneva in June 2006.

humanitarian problems. For example, the ICRC and the various State and non-State parties to the armed conflict in Afghanistan steadily increased the scope and intensity of their dialogue on the conduct of hostilities after 2001. The source of that dialogue remains the civilian population, who contact the ICRC in theatre with allegations of unlawful actions by the warring parties. Where credible, these allegations are presented bilaterally and confidentially to the responsible party, and framed in terms of their respective international legal obligations. The recipients of that information have tended to appreciate a neutral, confidential perspective on the humanitarian effect of their operations on the civilian population. However, the dialogue presents both legal and practical challenges.

## Two solitudes

When the ICRC interacts with armed forces and organized armed groups regarding the conduct of operations in armed conflict, their disparate perspectives inevitably come into sharp relief. Whereas disciplined armed forces are certainly preoccupied with civilian protection, they naturally interpret the law in a manner that is most conducive to protecting the security and ensuring the operational viability of the young men and women they put in harm's way. Although credible humanitarian organizations will certainly account for military necessity to the degree that is possible within their frame of reference, their main focus is invariably on the beneficiaries of IHL, and civilians in particular. In order to bridge that gap, the ICRC's civil-military dialogue is normally guided by former senior military officers. Nevertheless, whether at the level of public debate – such as the heated discussions between governments and civil society following the publication of the ICRC's *Interpretive Guidance on Direct Participation in Hostilities under International Law* (ICRC Interpretive Guidance)<sup>25</sup> – or at the level of confidential dialogue between the ICRC and armed forces regarding lawful conduct in detention and the conduct of hostilities, this difference of perspectives should be acknowledged at the outset.

To take one example, the legal debate following NATO's 1999 air campaign in Kosovo and Serbia touched on whether the decision to fly high-altitude sorties outside of the range of surface-to-air missiles potentially violated the LOAC principles of distinction, proportionality and precautions in attack.<sup>26</sup> From a military perspective, major factors in the decision to fly at higher altitude would have included the life of the aircrew, the expense that went into their training, the cost of the aircraft, and even the political and military fallout of a NATO ally losing an aircraft – combined with the fact that impressive new technology

25 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Law*, ICRC, Geneva, May 2009 (ICRC Interpretive Guidance).

26 See International Criminal Tribunal for the former Yugoslavia, Office of the Prosecutor, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, 13 June 2000, para. 56; Human Rights Watch, "The Crisis in Kosovo", *Civilian Deaths in the NATO Air Campaign*, Vol. 12, No. 1, 2000; A. P. V. Rogers, "Zero-Casualty Warfare", *International Review of the Red Cross*, No. 837, March 2000.

allowed them to direct attacks with precision-guided munitions which, for the most part, did not require naked-eye identification.<sup>27</sup> From a civil society perspective, the first consideration was whether the civilian population could be better protected if the air force took on more risk by flying at lower altitude.<sup>28</sup> Ultimately the armed forces' decision depended on a difficult judgement regarding the relative value of military assets, both personnel and equipment, on the one hand, and the lives of civilians, and the sanctity of their residences and essential objects, on the other. It also tested the boundaries of the LOAC principle of proportionality,<sup>29</sup> and whether anticipated concrete and direct military advantage as weighed against expected incidental loss of civilians and civilian infrastructure could include the safety of military assets.<sup>30</sup> Lastly, it tested the principle of precautions in attack, and the degree to which taking greater military risk is "feasible" in accordance with treaty and customary law.<sup>31</sup> It is therefore unsurprising to note that the two sides of the debate disagreed, and neither side had an irrefutable case. The difference is at its core one of perspective.

However, the discrete points of divergence between military and humanitarian actors should not overshadow the fact that there is general agreement on the vast majority of applicable international law. Take for example the IHL concepts of distinction in attack, humane treatment of detainees and caring without discrimination for the wounded on the battlefield: none of these are contentious for either disciplined armed forces or organized armed groups. The devil often lurks in the details, but true points of disagreement usually lie in the margins of legal interpretation, where new developments including widespread State confrontation with violent extremist organizations continue to test the boundaries of existing international law.

## Finding common ground

When ICRC delegates engage in a confidential dialogue with State armed forces regarding the use of force both within and outside of armed conflict, they are often confronted with a language barrier. Legal and protection delegates quote directly from the Geneva Conventions, the Additional Protocols, the customary LOAC, IHRL treaties such as the ICCPR, and soft-law instruments such as the UN's Basic Principles on the Use of Force and Firearms. They highlight the demarcation between the type of force available between the parties to an armed conflict (the conduct of hostilities framework) and force employed by armed forces in other situations of violence (the law enforcement framework). Where

27 There were however cases in which altitude became a factor for visual identification. See, for example, the NATO bombing of Djakovica-Decane, in which civilian vehicles forming part of a refugee convoy were mistaken for a military convoy. See Human Rights Watch, above note 26.

28 *Ibid.*

29 See AP I, Arts 51(5)(b) and 57(2)(b).

30 See Robin Geiss, "The Principle of Proportionality: 'Force Protection' as a Military Advantage", *Israel Law Review*, Vol. 45, No. 1, 2012, pp. 71–89; Michael Schmitt, "Fault Lines in the Law of Attack", in *Essays on Law and War at the Fault Lines*, TMC Asser Press, The Hague, 2012, pp. 296–297.

31 *Ibid.*



relevant, they draw a clear line between international and non-international armed conflict in order to ensure that the appropriate law is being applied. They also ensure that the humanitarian protections contained in the LOAC are considered without regard to the legal framework governing the sovereign resort to the use of force in international relations, the *jus ad bellum*.

Their counterparts in the uniformed legal services are familiar with the treaties underlying these frameworks, but as a general rule they view them as primary sources of law without direct operational implications. In the military construct, relevant treaties and customary law are taken into account at the strategic, operational and tactical levels through doctrine, operational orders and RoE. For professional armed forces, the law is considered the outer boundary of permissible conduct, and their own internal directives are in most cases restricted by national policy that they consider to fall well short of that boundary. On deployed operations, the legal officer's primary task is to interpret the operational order, and to develop an expertise on the RoE implemented by the commander, ensuring that they comply with the State's international obligations – but the focus is on the RoE themselves. In the case of multinational operations, the commander's plans will often be shaped by the RoE caveats expressed by various troop-contributing countries, which are subject not only to different treaty obligations and interpretations but also to different levels of political will to take risks on operations.<sup>32</sup> Despite these complications, both the operational commander and his legal adviser must ensure that the RoE are simple and do not place soldiers in a position of uncertainty. Accordingly, treaty and customary law primarily play a background role at the level of planning and executing operations – with certain exceptions such as the detailed treatment of prisoners of war under the Third Geneva Convention.<sup>33</sup> The following section therefore aims to bridge the terminology gap on military operations, while highlighting some of the most difficult points of legal contention.

## Reconciling rules of engagement with international law

Although relevant international law must permeate military policy, doctrine and training, rules of engagement entail the most direct consequences for the use of force on operations. RoE vary from State to State, but they are increasingly uniform and there are certain common precepts underlying them.<sup>34</sup> They are orders governing the type and amount of force that may be employed in military operations against persons and objects, and they are generally annexed to an operational order that encompasses the entirety of land, air or sea operations in a given area of responsibility. They are circumscribed by policy and international law,

32 See Martin Zwanenburg, "International Humanitarian Law Interoperability in Multinational Operations", *International Review of the Red Cross* Vol. 95, No. 891, 2013, pp. 681–705.

33 Above note 2.

34 See Alan Cole, Phillip Drew, Rob McLaughlin and Dennis Mandsager, *Rules of Engagement Handbook*, International Institute of Humanitarian Law, Sanremo, November 2009.

but are primarily driven by the operational requirements of the commander. As a general rule, they authorize the use of force against persons<sup>35</sup> on two bases: conduct and status.<sup>36</sup> Conduct-based RoE are premised on self-defence, applicable throughout the entire spectrum of military operations, and are generally reflective of IHRL “law enforcement” or “non-combat operations” use of force principles. Status-based RoE are applicable solely to the conduct of hostilities during an armed conflict. Translating relevant international law into these categories of force is a difficult task that fundamentally challenges the balance between operational prerogatives including force protection on the one hand and civilian protection on the other.

## Status-based RoE

### *Determining membership in an organized armed group*

Status-based RoE are drafted for the context of armed conflict, authorizing the use of lethal force in the first resort against members of the fighting forces of the opposing party to the conflict. Subject to the requirement of military necessity, this authority is not limited by the conduct of those fighting forces; indeed, like soldiers of regular armed forces, members of the armed wing of a non-State party to an armed conflict may be attacked even when they are outside of the immediate vicinity of active hostilities, and even when they are unarmed at the moment of attack.<sup>37</sup> There is no contradiction between this category of RoE and the LOAC governing the conduct of hostilities, which recognizes attacks against military objectives and subjects them to the principles of distinction, proportionality and precautions, as well as the prohibition on causing unnecessary suffering.<sup>38</sup>

In practice, the most controversial aspect of status-based RoE is the determination of membership in an organized armed group – or, in RoE terms, a declared hostile force. In the absence of formal membership criteria established by law, the decision as to who may be targeted by an opposing force has historically been governed by relatively loose standards and has been the subject of a wide latitude of interpretation for operational commanders. It is therefore unsurprising that the section of the ICRC Interpretive Guidance setting out functional membership criteria for organized armed groups was controversial, insofar as it recommended a more structured framework for decisions that had previously been the preserve of policy and command discretion.<sup>39</sup> Given the global prevalence of non-international armed conflicts, the increasing

35 RoE governing the use of force against objects are beyond the scope of this article.

36 These generic categories of force may be subdivided under several headings: use of force in defence of self and others, mission accomplishment, targeting in armed conflict, operations related to property, etc. See *ibid.*, Annex B.

37 See section “Restraints on the Use of Force against Otherwise Lawful Targets?”, below. Fighters may not be attacked if they are *hors de combat*. Medical and religious personnel remain protected against attack.

38 See AP I, Arts 48–58.

39 ICRC Interpretive Guidance, above note 25, pp. 32–36.

intermingling of civilians and fighting forces on the modern battlefield, and a paucity of guidance on the issue, rational criteria were fundamentally required in order to preserve the integrity of the principle of distinction under the law of armed conflict.<sup>40</sup>

The ICRC's proposed criterion for *de facto* membership in an organized armed group is an individual's continuous combat function (CCF), distinguishable from the merely temporary loss of protection associated with civilian direct participation in hostilities by his or her lasting integration into an organized armed group.<sup>41</sup> The permanency of such a function may be exhibited overtly, for example through a uniform or distinctive sign, or openly carrying weapons for the group; or through other conclusive actions, such as directly participating in hostilities in support of the group on a repeated basis in circumstances indicating that such conduct constitutes a continuous function.<sup>42</sup> Those cases in which membership is not readily apparent therefore require a difficult analysis of whether an individual's function on the part of the organized armed group is indeed continuous, and whether it meets the three cumulative elements of direct participation in hostilities: a minimum threshold of harm, direct causation of that harm, and a nexus to the hostilities.<sup>43</sup>

Critics of the ICRC's membership approach have argued that the CCF test creates complexity and uncertainty for the soldier on the ground, thereby undermining force protection.<sup>44</sup> However, the complexity inherent in determining membership certainly predates the ICRC Interpretive Guidance. Indeed, the absence of formal incorporation into organized armed groups is a factual reality of modern warfare. As recognized by Corn and Jenks, "this [CCF] test provides a logical and workable method to trigger status based targeting authority in [non-international armed conflict]".<sup>45</sup> Moreover, it is important not to lose sight of the fact that soldiers are always entitled to use lethal force in individual and unit self-defence against an imminent lethal threat.<sup>46</sup> The

40 See Dr. Jakob Kellenberger's Foreword to *ibid.*, pp. 4–7.

41 *Ibid.*, pp. 24, 31–32. From this perspective, it is important to note that the RoE term "declared hostile force" must be defined as the fighting forces of a party to the armed conflict, as opposed to its civilian component (which might include its political leadership, civilian employees and others), whether those forces belongs to a State or non-State party. This article uses the term "organized armed group" to represent only the armed wing of a non-State party to an armed conflict.

42 *Ibid.*, p. 35.

43 *Ibid.*, Chapter 2.

44 See, for example, Kenneth Watkin, "Opportunity Lost: Organized Armed Groups and the ICRC 'Direct Participation in Hostilities' Interpretive Guidance", *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010, pp. 662–664.

45 Geoff Corn and Chris Jenks, "The Two Sides of the Combatant Coin", *University of Pennsylvania Journal of International Law*, Vol. 33, 2011, p. 338. See also 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", *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010, p. 856: "the ICRC's Interpretive Guidance cannot, and does not purport to, replace the issuing of contextualized rules of engagement or the judgment of the operational commander. Instead, it aims to facilitate the task of those responsible for the planning and conduct of operations by providing useful and coherent concepts and principles based on which the required distinctions and determinations ought to be made."

46 See the following section, "Conduct-Based RoE".

complexity of deciding upon membership in an organized armed group only becomes manifest in those cases where the targeting force wishes to take the initiative to use lethal force against an individual whose membership is not readily apparent (which will certainly be a minority of cases), and such a decision will by definition only be necessary where there is no imminent threat to the life of friendly forces – i.e., where individual or unit self-defence is not applicable. Deliberate targeting of this nature is not based on a hasty decision, and will normally take place after a targeting board has been convened to discuss, amongst other operational issues, the legality of the proposed attack. It is also important to note that the presence of one or more civilians amongst members of an organized armed group, including civilians whose support to the group falls short of a CCF, does not necessarily render the members immune from attack. On the contrary, civilians who accompany those forces will constitute lawful incidental casualties in an attack against the members of the armed group if the expected incidental harm is not excessive in relation to the military advantage anticipated in the attack.<sup>47</sup>

Critics have also argued that the ICRC's membership criteria for organized armed groups<sup>48</sup> are narrower than those accepted for State armed forces – i.e., that the test does not capture a sufficient category of individuals who should be targetable.<sup>49</sup> One prominent commentator cites the example of a cook recruited into the regular armed forces who may be attacked at any time, whereas a cook for a non-State party to the conflict is a civilian who may only be attacked if and for such time as he directly participates in hostilities.<sup>50</sup> However, the cook recruited by the armed forces is still a rifleman, trained and equipped to engage in hostilities in the event that he is needed for that purpose.<sup>51</sup> In contrast, a contractor employed by the same armed forces for the exclusive purpose of cooking would remain protected from direct attack as a civilian, albeit one who is more likely than most civilians to become a lawful incidental casualty in an attack against a military objective. Likewise, a cook for the non-State party who additionally maintains a CCF for its armed wing would be targetable under RoE as a matter of status by virtue of this function.

On the other hand, that same CCF test has been criticized by the relevant UN Special Rapporteur because it allows *de facto* members of an organized armed group to be targeted “anywhere, at any time”, despite the fact that the treaty language of Additional Protocol I only limits civilian protection “for such time as” an individual directly participates – i.e., that the test potentially goes too far.<sup>52</sup>

47 This is the concept of proportionality in attack contained in AP I.

48 Importantly, these same criteria are applicable to irregular armed forces belonging to a State party to an armed conflict. See ICRC Interpretive Guidance, above note 25, pp. 25, 31.

49 See Michael Schmitt, “The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis”, *Harvard National Security Journal*, Vol. 1, 2010, pp. 21–24. See also K. Watkin, above note 44.

50 M. Schmitt, above note 49, p. 23.

51 N. Melzer, above note 45, p. 852.

52 Report of the Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions, Philip Alston, UN Doc. A/HRC/14/24/Add.6, 28 May 2010, pp. 20–21.

It is worth noting that the question of membership in an organized armed group has always been vexed. The ICRC Interpretive Guidance did not create the problem, but rather offered a practically oriented criterion for individual membership based on a balance between the principles of military necessity and humanity.<sup>53</sup>

The determination of membership in an organized armed group is heavily reliant upon the availability of accurate intelligence. Decisions regarding who may be deliberately targeted within the context of an armed conflict are normally carried out by a targeting board that creates a Joint Prioritized Effects List (JPEL) or similar tool. Inevitably the decision as to whether a given individual may be placed on that list is influenced by available information and is not based on 100% certainty. However, the LOAC does not require certainty – it requires that all feasible precautions be taken in planning and executing the attack to ensure that the proposed target is indeed lawful. In effect, the attacking force must overcome the presumption that the proposed target benefits from civilian protection.<sup>54</sup> What the ICRC Interpretive Guidance proposed in support of that difficult analysis are parameters defining the distinction between individuals who play an indirect, war-sustaining role for an organized armed group, and those who are legitimately characterized as members of its armed wing.

## Conduct-based RoE

### *Defining self-defence under international law*

In contrast to status-based RoE, conduct-based RoE reflect a soldier's inherent right of self-defence, which is generally framed as a use of force in response to a hostile act or demonstrated hostile intent.<sup>55</sup> The availability of force in individual or unit self-defence represents a protective shield applicable in any scenario, from peace to armed conflict, for which no more robust measure of force is available under international law. Stepping back from military parlance, the exercise of self-defence by armed forces is well articulated in IHRL, and the use of force authorized in response to either a hostile act or hostile intent must be reconciled with defined limitations. That law allows for the graduated use of necessary force only in proportion to the threat posed, and the use of lethal force only in the defence of oneself or other persons from an imminent threat of death or serious injury. This standard is derived from the right to life, the core of the ICCPR,<sup>56</sup> and is elaborated in a widely accepted soft-law instrument, the UN Basic Principles on the Use of Force and Firearms.<sup>57</sup> However, although the extraterritorial application of IHRL is accepted by the UN Human Rights Committee and international tribunals, a minority of States take the position that

<sup>53</sup> N. Melzer, above note 45, pp. 837–855.

<sup>54</sup> See AP I, Art. 50(1), note 2.

<sup>55</sup> For a discussion of the meaning of the concepts of hostile act and hostile intent, see A. Cole *et al.*, above note 34, Part II.

<sup>56</sup> ICCPR, above note 3, Art. 6.

<sup>57</sup> Above note 5.

the ICCPR was exclusively intended to regulate a government's relationship with individuals on its own territory.<sup>58</sup> In the case of expeditionary operations, these States therefore rely on the more nebulous general principles of law governing individual self-defence.<sup>59</sup> Differing sources of law potentially give rise to friction points in the dialogue between the ICRC and governments, such as the level of imminence of harm required before lethal force may be employed under the rubric of demonstrated hostile intent. This dialogue is rendered even more difficult by the fact that the RoE definition of imminence is normally classified information.

### *“Law enforcement” in armed conflict?*

It is a source of legal confusion that even within the context of an ongoing armed conflict, armed forces carry out tasks involving the use of force that do not form part of the conduct of hostilities. These are often referred to as law enforcement tasks,<sup>60</sup> even though they are not carried out by traditional law enforcement authorities, nor are they necessarily aimed at enforcing the domestic law of the host State (which is why they are perhaps more accurately referred to as “non-combat operations”). In fact, they may take place beyond the reach of the domestic law of the host State, in some cases as a result of a status-of-forces agreement. For example, deployed armed forces are today likely to set up checkpoints, carry out cordon and search operations, and use force to detain civilians who represent an imperative threat to their security. They may occasionally be called in for crowd or riot control duties near their own bases or elsewhere in the absence of the civil authorities normally given this assignment. These activities often have strong ties to the ongoing armed conflict, and have therefore perplexed those tasked with applying the relevant international legal framework: are such functions covered by the LOAC, and what is the relevance of IHRL?

Following the *Nuclear Weapons* Advisory Opinion of the International Court of Justice, governments have attempted to apply a *lex specialis* test in order to determine the applicable legal framework, but this has proven difficult in

58 UN Human Rights Committee, ICCPR General Comment 31, “The Nature of the General Obligation Imposed on States Parties to the Covenant”, UN Doc. CCPR/C/21/Rev. 1/Add.13, 29 March 2004, para. 10. For a summary of the contrary position held by the United States, and a critique of that position, see Beth Van Schaack, “The United States’ Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change”, *International Law Studies*, Vol. 20, No. 90, 2014.

59 UN Charter, Art. 38. See Terry Gill, Carl Marchand, Hans Boddens Hosang and Paul Ducheine, General Report for the 19th Congress of the International Society for Military Law and the Law of War, Quebec City, 1–4 May 2012, Parts 4, 5, 6. See also Gloria Gaggioli (ed.), *Expert Meeting: The Use of Force in Armed Conflicts – Interplay between the Conduct of Hostilities and Law Enforcement Paradigms*, Geneva, October 2013, pp. 11–12.

60 This is derived from the fact that the UN Code of Conduct for Law Enforcement Officials, adopted by UNGA Res. 34/169 of 17 December 1979, uses the term “law enforcement officials” to describe “all officers of the law ... who exercise police powers, especially the powers of arrest or detention”, inclusive of armed forces, in Art. 1(a). The same terminology is employed in the BPUFF, above note 5.

practice.<sup>61</sup> In deciding whether the ICCPR right to life is applicable to the use of force in armed conflict, the Court stated:

In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.<sup>62</sup>

However, the opinion did not specify what situations constitute “hostilities” for which the LOAC prevails over IHRL. Possible factors might include the location of the engagement, its proximity to the conflict zone, the actor using force and the degree of military control over that territory in order to determine whether the LOAC, IHRL or some combination thereof applies to a given use of force.<sup>63</sup>

In a meeting entitled “The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms”, the majority of a professionally diverse group of experts agreed that “the main (if not the only) legal criterion for determining whether a situation is covered by the conduct of hostilities or law enforcement paradigms is the status, function or conduct of the person against whom force may be used”.<sup>64</sup> If accepted, this is a very attractive test from a practitioner's perspective. When a soldier uses force against a member of an organized armed group who is not *hors de combat*, the situation is covered by the LOAC governing the conduct of hostilities; that is, lethal force in the first resort is permissible, except where there is a manifest lack of military necessity to employ it.<sup>65</sup> When that soldier uses force against a civilian who is directly participating in hostilities, the situation is covered by the same body of law. It is only when the soldier directs force against a civilian or a group of civilians not directly participating in hostilities that we must look to the law enforcement paradigm contained in human rights law: graduated use of force, and the use of lethal force only in response to an imminent threat to life.<sup>66</sup>

To take a hypothetical armed conflict example analyzed in the expert study, armed forces called in lieu of overwhelmed civil authorities to quell a violent demonstration must obviously be trained and equipped for the task in accordance

61 International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports* 1996, para. 25. See also ICJ, *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, *ICJ Reports* 2004, para. 106; and ICJ, *Case Concerning Armed Activity on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment, 19 December 2005, *ICJ Reports* 2005, paras 216–220.

62 ICJ, *Nuclear Weapons*, above note 61, para. 25.

63 See for example G. Gaggioli, above note 59, pp. 9–12.

64 *Ibid.*, p. 59.

65 ICRC Interpretive Guidance, above note 25, Recommendation IX. See section “Restraints on the Use of Force against Otherwise Lawful Targets?”, below.

66 See BPUFF, above note 5.



with use of force principles derived from the IHRL right to life standard<sup>67</sup> – that is, they may apply only necessary and graduated force that is proportionate to the threat using appropriate equipment such as shields, batons and pepper spray, and they must attempt to de-escalate the situation. However, should those armed forces discover that there is a member of the opposing organized armed group lurking amongst the protesters, then the LOAC governing the conduct of hostilities allows them to apply lethal force against that fighter in the first resort insofar as the concrete and direct military advantage anticipated in that attack outweighs the expected harm to civilians and civilian objects, and all feasible precautions including the choice of appropriate means and methods of warfare are taken to spare the civilian population. This could in some cases imply lawful incidental harm or death to surrounding protesters, as recognized by the LOAC, although these would ideally be avoided through the exercise of sufficient precautions.

### Adjusting RoE to a developing interpretation of civilian direct participation in hostilities

The heated debate that followed the publication of the ICRC Interpretive Guidance provided a wealth of perspective on the balance that must be struck between the principles of military necessity and humanity in the law of targeting. However, the academic and occasionally emotional nature of that debate has tended to overshadow the practical consequences of the Interpretive Guidance for the use of force on military operations. The following paragraphs highlight the most common misconceptions that have prevented a more productive dialogue with some armed forces on the integration of the Interpretive Guidance into operational practice: the oft-confused notion of the “revolving door” of civilian protection; the availability of the use of force against civilians not or no longer taking a direct part in hostilities; the status of civilians who work in close proximity to military objectives; and, most controversially, the ICRC’s assertion that the law may restrain the use of lethal force against otherwise lawful targets.

#### *Revolving door, spinning reality*

One of the fascinating, if bewildering, debates regarding the ICRC Interpretive Guidance concerns the so-called “revolving door” of civilian direct participation in hostilities. It is worth recalling Article 51(3) of Additional Protocol I, the genesis of the Interpretive Guidance, which is widely recognized as customary LOAC binding on all States in both international and non-international armed conflict.<sup>68</sup>

<sup>67</sup> *Ibid.* See also G. Gaggioli, above note 59.

<sup>68</sup> ICRC Customary Law Study, above note 20, Rule 6. See also AP II, Art. 13(3), note 2.

Civilians shall enjoy the protection afforded by this Section unless and *for such time as* they take a direct part in hostilities. [Emphasis added.]

As is clear from this language, the “revolving door” is not an ICRC creation, other than perhaps its nomenclature. It is a direct implication of this text. The phrase “for such time as” plainly implies that a civilian regains his/her protection following an act of direct participation in hostilities – as a simple matter of treaty construction, the inclusion of those four words imposes a finite window on loss of protection, following which it is regained. However, the Interpretive Guidance also acknowledges the military necessity of using lethal force in the first resort against *de facto* members of an organized armed group – i.e., those who have forfeited their civilian status and the protection that it grants. For such members, the “door” is not revolving but firmly locked, and it cannot be unlocked until they show conclusively that they have permanently disengaged from their combat function for the group, e.g. through desertion or through an enduring transfer to non-military functions.<sup>69</sup>

It is therefore inaccurate to argue, as some have, that the ICRC is suggesting that the “farmer by day and fighter by night” may only be lawfully targeted during periods of nocturnal military activity.<sup>70</sup> Indeed, by the ICRC’s reading, the farmer with a CCF on behalf of a party to the conflict is not a civilian, and may be targeted night or day, except for cases in which there is no manifest military necessity to do so.<sup>71</sup> Moreover, it does not matter whether he actually takes part in operations every night or once every week – he may be targeted night or day as a matter of status for the duration of his function, which might be months or years. It should be emphasized that an individual farmer who carries out an act of direct participation in hostilities but does so without taking on functional membership in a pre-existing organized group is not a status-based concern in the conduct of hostilities framework. To the extent that the farmer is not lastingly integrated, he cannot be considered a member of an organized armed group belonging to a non-State party to the conflict as contemplated by common Article 3 of the four Geneva Conventions and the widely accepted *Tadić* criteria defining non-international armed conflict.<sup>72</sup> His act of direct participation – as opposed to mere criminality – is by definition specifically designed to support one party to the conflict to the detriment of another, but insofar as he acts of his own accord and without the element of consent by the party necessary to establish functional membership, he remains a civilian.<sup>73</sup> A “civilian” is defined as any individual who is not a member of the organized fighting forces, and the farmer’s

69 ICRC Interpretive Guidance, above note 25, Recommendation VII.

70 See, for example, William Boothby, *Conflict Law: The Influence of New Weapons Technology, Human Rights and Emerging Actors*, TMC Asser Press, The Hague, 2013, p. 252.

71 See section “Restraints on the Use of Force against Otherwise Lawful Targets?”, below.

72 See International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Dusko Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70; and *Prosecutor v. Ramush Haradinaj*, Trial Chamber, Judgment, 29 November 2012, paras. 392–396, which elaborate on the *Tadić* intensity and organization requirements.

73 ICRC Interpretive Guidance, above note 25, pp. 58–64.

loss of protection under Article 51(3) is necessarily temporary.<sup>74</sup> That stated, the ICRC Interpretive Guidance recognizes as a matter of military necessity that he is targetable throughout the stages of preparation for, deployment to, execution of and return from an act of direct participation. Moreover, any collection of farmers and others who form a separate group that meets the organizational requirements and engages in nocturnal hostilities against government forces with a sufficient level of intensity to be considered an additional organized armed group party to the conflict will be targetable as a matter of status, regardless of their daytime vocation.<sup>75</sup>

### *Use of force against civilians who support an organized armed group*

To reiterate, members of an organized armed group are lethally targetable as a matter of status. Civilians who carry out acts of direct participation in hostilities may also be directly targeted, but only as a function of their conduct. There appears to be an underlying misperception amongst some critics of the ICRC Interpretive Guidance that it opens up two categories of civilians – indirect participants in hostilities and those who have previously directly participated – who represent a potentially deadly threat to friendly armed forces but must be left untouched. The category of indirect participants might include arms manufacturers and vendors, cooks, drivers, propagandists and others who are not otherwise directly participating in hostilities but whose actions have varying degrees of ancillary effect on the conduct of hostilities. Those critics appear to underplay two important facts: first, that a civilian who does not or no longer directly participates is protected against direct attack but may nevertheless be subject to robust measures under the law enforcement framework,<sup>76</sup> up to and including deadly force in self-defence against the imminent threat of death or serious injury posed by that individual; and second, that such an individual may nevertheless be detained and ultimately interned under the LOAC framework if he/she represents an imperative threat to State security.<sup>77</sup> Such an individual may also be prosecuted for a range of criminal offences under the domestic law of the host State or, in appropriate cases, the national law of the sending State applied extraterritorially. Should that civilian at some point become a member of an organized armed group,<sup>78</sup> he loses his civilian protection and is targetable as a matter of status under the LOAC. The legal restriction of force in situations that do not amount to the conduct of hostilities does in some cases impose upon armed forces greater risks, since rather than employing a weapon from a safe distance (e.g. a remotely piloted aircraft) to kill a civilian, they must carry out a tactical operation to detain. However, it is important to bear in mind that the use

74 *Ibid.*, Recommendation II.

75 See the LOAC definition of armed conflict found in the documents cited at note 72.

76 See section “Conduct-Based ROE”, above.

77 Subject of course to procedural safeguards. See Jelena Pejic, ‘Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence’, *International Review of the Red Cross*, Vol. 87, No. 858, 2005, pp. 375–391.

78 As defined by a CCF per the ICRC. See ICRC Interpretive Guidance, above note 25, pp. 32–36.

of lethal force remains permissible in cases where it is strictly unavoidable in order to protect life.<sup>79</sup>

### *Civilians who indirectly participate in hostilities: A legal challenge to zero-casualty warfare*

Another serious charge against the ICRC Interpretive Guidance is that it allows individuals who only indirectly participate in hostilities to remain protected against direct attack even though they are in direct contact with the means of warfare that will, in short order, be used to kill State armed forces.<sup>80</sup> For example, a civilian whose sole role is to manufacture, store and ultimately sell improvised explosive devices (IEDs) to an organized armed group does not, according to the ICRC's interpretive criteria, directly participate in hostilities, since his acts only indirectly cause harm. Nevertheless, the means of warfare themselves – in this scenario, the IEDs – remain valid military objectives.<sup>81</sup> The fact that the manufacturer works in close proximity to military objectives renders him more likely to become an incidental civilian casualty in an attack on those objectives, which will be lawful provided that the law governing the conduct of hostilities, including the principles of proportionality and precautions in attack, have been respected. Indeed, the Interpretive Guidance acknowledges that civilians who work in proximity to armed forces and other military objectives are more exposed than other civilians to the “dangers arising from military operations, including the risk of incidental death or injury”.<sup>82</sup> Accordingly, armed forces that as a matter of policy will not accept even a single incidental civilian casualty in attacks against military objectives place themselves in a precarious position with respect to the law of targeting as framed by the Interpretive Guidance. They effectively eliminate a significant legal avenue for the attack of legitimate military objectives that pose a direct threat to friendly forces.

### *Restraints on the use of force against otherwise lawful targets?*

The most genuinely controversial aspect of the ICRC Interpretive Guidance remains Recommendation IX, “Restraints on the Use of Force in Direct Attack”, which is stated as follows:

In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually

79 See BPUFF, above note 5.

80 Michael Schmitt, “Deconstructing Direct Participation in Hostilities: The Constitutive Elements”, *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010, p. 731.

81 See AP I, Art. 52.

82 ICRC Interpretive Guidance, above note 25, p. 38.

necessary to accomplish a legitimate military purpose in the prevailing circumstances.<sup>83</sup>

These words triggered a debate over whether the ICRC was proposing a least harmful means or “capture instead of kill” standard in relation to legitimate military objectives, effectively undermining the presumption that lethal force could be used in the first resort against enemy fighting forces and civilians who directly participate in hostilities during armed conflict.<sup>84</sup> As more than one commentator opined, the standard was raising a particular interpretation of the principles of humanity and military necessity into a black-letter legal restriction.<sup>85</sup> It has also been argued that the standard is difficult to apply in practice, injecting an undue element of uncertainty into targeting decisions made on the ground and thereby potentially endangering the targeting force.<sup>86</sup>

First and foremost, it must be stressed that Recommendation IX does not propose an unconditional obligation to “capture instead of kill” in all circumstances. The recommendation is best distilled in the following paragraph:

In sum, while operating forces can hardly be required to take additional risks for themselves or the civilian population in order to capture an armed adversary alive, it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there *manifestly is no necessity* for the use of lethal force.<sup>87</sup>

The presumption remains that lethal force may be used in the first resort against a lawful military objective. Recommendation IX evidently set out to place a limitation on the use of deadly force in situations where, *without endangering friendly forces*, it is possible to disable or remove a fighter from the battlefield using sub-lethal tactics. Such cases are likely to be limited, given that even unknown factors, such as a firearm hidden on the person of the proposed target, potentially represent a danger. Only those rare cases for which there is no apparent risk inherent in capturing the target rather than killing him would be covered by this recommendation. As recently clarified, “In the ICRC’s view, a legitimate target may be killed at any time, unless it is clear that he/she may be captured without additional risk to the operating forces.”<sup>88</sup>

83 *Ibid.*, Recommendation IX.

84 Ryan Goodman, “The Power to Kill or Capture Enemy Combatants”, *European Journal of International Law*, Vol. 24, No. 3, 2013, pp. 818–853. See the responses by Geoff Corn, Laurie Blank, Chris Jenks and Eric Jensen, “Belligerent Targeting and the Invalidity of the Least Harmful Means Rule”, *International Legal Studies*, Vol. 89, 2013; and Michael Schmitt, “Wound, Capture or Kill: A Reply to Ryan Goodman’s ‘The Power to Kill or Capture Enemy Combatants’”, *European Journal of International Law*, Vol. 24, No. 3, 2013, pp. 855–861.

85 See, for example, M. Schmitt, above note 49. See also W. Hays Parks, “Part IX of the ICRC ‘Direct Participation in Hostilities’ Study: No Mandate, No Expertise, and Legally Incorrect”, *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010, pp. 769–830. See the reply to Parks in N. Melzer, above note 45, pp. 892–913.

86 W. Hays Parks, above note 85, p. 810.

87 ICRC Interpretive Guidance, above note 25, p. 82 (emphasis added).

88 G. Gaggioli, above note 59, p. 17.

To take an armed conflict example, an unarmed child who sits alone outside of a forward operating base and makes a discrete mobile telephone phone call every time a military convoy exits, notifying non-State armed forces far down the road to prepare improvised explosive devices, very likely meets the elements of direct participation in hostilities. Depending on the circumstances, facts might also lead the targeting forces to conclude that he is a member of that organized armed group with a CCF. In either case, the legal starting point for the State armed forces is that lethal force could be used in the first resort against that child in the relevant time frame of participation. However, in the absence of any tangible threat such as potential sniper fire from enemy forces, there is manifestly no military necessity to use lethal force in the first resort against the child. If he could be easily approached and detained, then no logical military commander would in practice order an attack. In addition to obvious humanitarian and strategic considerations, a live culprit represents a crucial source of tactical intelligence for the detaining force. Moreover, carrying out an attack where there is no military necessity to do so arguably represents a serious breach of discipline. Recommendation IX may from this perspective be viewed as a crystallization of the LOAC principle of military necessity already embedded in military doctrine worldwide. Whether it eventually evolves into a specific binding norm of the LOAC will depend on whether States are ultimately persuaded by its humanitarian and practical logic and will thereby convert it into customary law through their practice.

Setting the legal debate aside, if this standard is accepted, it can be taught in a manner that is readily grasped at the operational and tactical levels. Soldiers can be trained to use lethal force against lawful targets except in circumstances where there is manifestly no military necessity, at least from their unit's tactical vantage point, to do so.<sup>89</sup> It would not take a great deal of creativity to integrate this standard into operational practice – inclusive of policy, doctrine, operational planning and RoE – without undermining the element of certainty that is central to force protection and the effectiveness of operations.

## The use of force in defence of property under RoE

Under the rubric of self-defence or “operations related to property”, it is common for rules of engagement to allow for the use of force to protect property.<sup>90</sup> It is important to examine such RoE through the lens of international law. In armed conflict, a positively identified member of an organized armed group may be targeted by opposing forces as a matter of status, and regardless of whether that fighter represents an actual or current threat to military property. Furthermore, in cases where a civilian threatens military property in a manner that amounts to

89 The term “manifest” is currently used by most armed forces in the context of the duty to disobey a “manifestly unlawful order”. See for example the Queen’s Regulations and Orders for the Canadian Forces, Art. 19.015, “Lawful Commands and Orders”.

90 A. Cole *et al.*, above note 34, pp. 39–41.

direct participation in hostilities – for example, by sabotaging a compound of military vehicles in order to weaken the military capability of the armed forces – he too is subject to lethal force in the first resort.<sup>91</sup>

However, it is difficult to reconcile the IHRL use of force limits with RoE that allow for the use of lethal force against a civilian representing an imminent threat to property (whether “mission-essential” or otherwise) in two cases: where there is no armed conflict, and, if an armed conflict exists, where the civilian’s act does not amount to direct participation in hostilities. Where applicable, IHRL use of force standards are clear that resort to lethal use of firearms is limited to situations where it is strictly unavoidable in order to protect life, thereby excluding such use in the protection of objects the manipulation of which does not represent an imminent threat of death or serious injury.<sup>92</sup> Accordingly, civilians who, without attempting to support one party of an armed conflict over another, threaten military property (e.g. by attempting to steal supplies for material gain) remain a law enforcement concern. The use of lethal force against such civilians is therefore restricted to situations in which they pose an imminent threat to life – for example, to the soldiers who are attempting to capture and detain them.

## Summary: Reconciling RoE with international law

As the foregoing section demonstrates, the languages of RoE and international law are fundamentally different. It is nevertheless of vital importance that they are reconciled in order to ensure legally compliant behaviour on military operations. It is easy to assume that RoE have already taken all relevant international law into account, given the lawyering that goes into their creation. It is also easy to assume that new developments in the law, such as the most recent academic reflections on direct participation in hostilities, can fit seamlessly into the existing structure of RoE. However, RoE need to be parsed in order to define those aspects of status-, conduct- and defence of property-based rules that are directly implicated by the complex inter-relationship between the LOAC and IHRL. Moreover, it is clear that those aspects of the ICRC Interpretive Guidance accepted by States need to be re-examined by RoE drafters in order to grasp their implications for the law of targeting. It is today insufficient to draft RoE solely on the basis of precedent.

## Conclusion

It is surprising how little of the discourse on compliance with international law during armed conflict and other situations of violence actually addresses the roots of military behaviour. Encouraging compliance with international law is at its

91 Unless there is no manifest military necessity to use such lethal force. See ICRC Interpretive Guidance, above note 25, Recommendation IX.

92 See BPUFF, above note 5, para. 9.



core a question of examining the motivation of the soldier who pulls the trigger. Research reveals that the soldier has very little latitude regarding his vocation, no matter how many LOAC dissemination sessions he has attended or how successful civil society has been in altering his mindset about international law. On operations, he is ultimately a servant of the orders he receives, with latitude to question only the most egregious instructions, and that is precisely the situation that armed forces intend to create. Accordingly, governments and civil society seeking better military compliance with the law need to adjust their efforts so as to influence the source of those orders: strategic policy, doctrine, classroom education, field training, standard operating procedures, even the unwritten practical guidance passed from one officer to another – any instruments that feed into the operational decision-making of the soldier's chain of command, and ultimately into his conscious undertaking to pull the trigger. Given the difficulty of engaging armed forces with respect to their guarded world of operations, this is no easy task. However, armed forces define themselves in relation to discipline, and it is rarely difficult to persuade them that international legal compliance is at its heart a matter of discipline.

As this article has argued, the most proximate instruments of command and control over military use of force are the operational order and its appended rules of engagement, neither of which normally have a holistic and transparent connection to international law. When the ICRC and operational commanders engage in confidential dialogue regarding the humanitarian consequences of military operations on the civilian population, they therefore begin from very different vantage points. They must first agree upon or at least express their disagreements regarding the applicable international legal framework, and then work through differences of legal interpretation, bearing in mind the competing principles of military necessity and humanity that permeate the law governing military operations. Throughout that discussion, they should acknowledge that the languages of international law and RoE are fundamentally different. It is only once this reconciliation of perspectives and terminology has taken place that substantive discussions regarding the application of the relevant international law can begin.

The friction points between the principles of military necessity and humanity have most prominently been revealed during recent debates surrounding the definition of membership in an organized armed group, the notion of civilian direct participation in hostilities and the dividing line between the law enforcement and conduct of hostilities legal frameworks. Key legal developments in these areas have yet to be fully translated into mainstream rules of engagement, purportedly due to their complexity and the consequent uncertainty they create for soldiers. However, soldiers well trained on conduct-based rules of engagement will never be legally uncertain insofar as their immediate safety is concerned, and the uncertainty surrounding some situations in which lethal force might be available in the first resort was not created by recent legal developments. On the contrary, those legal developments provide a logical structure upon which RoE may be built in order to address the factual complexity that is inherent to modern warfare.

# Direct participation: Law school clinics and international humanitarian law

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## Abstract

*Law school clinics focused on international humanitarian law (IHL) enable students to participate directly in the development and application of IHL through concrete “real world” work – from training to research and fact-finding, litigation to high-level advocacy, and many spaces in between. These opportunities do far more than just contribute to these students’ development as effective, reflective lawyers, certainly a key goal of any clinical environment. Clinical IHL work also matches clinical pedagogy with cutting-edge issues in armed conflict to deepen students’ law school experiences and enables them to engage in the IHL goals of promotion, implementation and enforcement.*

**Keywords:** international humanitarian law, clinic, promotion, clinical education, law of armed conflict, Geneva Conventions.

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In recent years, just as international humanitarian law (IHL) has entered the mainstream of international legal education in the United States, students and faculty have moved beyond the classroom and have integrated IHL work into clinical learning. Consider some examples:

- Students work with military and civilian faculty at Marine Corps University and the Naval War College to design simulation exercises and ethical decision games that incorporate IHL. They research and draft comprehensive discussion guides for legal seminars during junior officer courses.<sup>1</sup>
- Students, collaborating with a California-based Cambodian-American non-governmental organization (NGO), work with survivors of the Khmer Rouge regime who now live in the United States, helping hundreds to complete victim participation forms that identify alleged violations of IHL under the jurisdiction of the Extraordinary Chamber in the Courts of Cambodia (ECCC), or Khmer Rouge Tribunal. They deliver over 200 such forms to the ECCC in Phnom Penh, and these serve as the basis for several victims to participate in judicial proceedings.<sup>2</sup>
- In light of the events of the uprisings in the Arab world, students work with a Berlin-based human rights NGO to analyze whether the violence accompanying protests in specific countries triggered the existence of non-international armed conflicts and constituted crimes against humanity in order to analyze options for accountability.<sup>3</sup>
- Students work with activists in a Washington, DC-based NGO to explore how civilians perceive their roles in conflict, focusing on the IHL doctrine of “direct participation in hostilities”. Students and faculty conduct on-the-ground fact-finding in a number of post-conflict situations and prepare reports for the NGO.<sup>4</sup>
- Perhaps most common of all IHL clinical engagements, students at numerous American law schools work with law firms and criminal defence lawyers to provide pro bono legal research for detainees at the Guantanamo Bay Naval Facility. They conduct research, draft legal arguments and monitor proceedings in military commissions and habeas corpus cases in the Court of Appeals for the DC Circuit.<sup>5</sup>

1 This work is carried out by the Emory International Humanitarian Law Clinic: <http://law.emory.edu/academics/clinics/international-humanitarian-law-clinic.html>.

2 See UCLA School of Law International Justice Clinic, *Victim Participation and the Extraordinary Chambers in the Courts of Cambodia: Involvement of the Cambodian-American Diaspora Community*, June 2010, available at: <http://cdn.law.ucla.edu/SiteCollectionDocuments/Clinical%20Program/ECCC%20Report.pdf>.

3 This work is carried out by the Emory IHL Clinic.

4 This work is carried out by the University of California, Irvine International Justice Clinic: [www.law.uci.edu/academics/real-life-learning/clinics/international-justice.html](http://www.law.uci.edu/academics/real-life-learning/clinics/international-justice.html).

5 The Emory IHL Clinic worked with four different law firms and one NGO representing detainees at Guantanamo Bay between 2007 and 2011. Other clinics have also worked on Guantanamo issues. See, e.g., Carol Rosenberg, “FOIA Suit Reveals Guantánamo’s ‘Indefinite Detainees’”, *Miami Herald*, 17 June 2013, available at: [www.miamiherald.com/2013/06/17/3456267/foia-suit-reveals-guantanamos.html](http://www.miamiherald.com/2013/06/17/3456267/foia-suit-reveals-guantanamos.html); Gautam Haithi, “Duke Law Students Work on Guantanamo Prisoner Defense”, *The Duke Chronicle*, 15 January 2014, available at: [www.dukechronicle.com/articles/2014/01/15/duke-law-students-work-guantanamo-prisoner-defense](http://www.dukechronicle.com/articles/2014/01/15/duke-law-students-work-guantanamo-prisoner-defense); Ami Dodson, “William & Mary Law School Students Assist the Pentagon in Prosecuting Guantanamo Detainees”, William & Mary Law School, 21 January 2010, available at: <http://law.wm.edu/news/stories/2010/malone-guantanamo-project.php>.

The turn to such clinical IHL work does not arise out of a vacuum. Before the 1990s, IHL rarely appeared in American law school curricula. It made its primary appearance, where it appeared at all, as a small component of a public international law, human rights or use of force class. The past two decades, in contrast, have seen a growth in the variety and reach of IHL courses in the United States, with over forty law schools in the country offering a dedicated course on IHL, sometimes presented as a stand-alone offering and sometimes packaged with courses on national security, human rights, international criminal law or related fields.<sup>6</sup> Academic, policy and military communities engage one another extensively on IHL and related issues, and law school faculty and students address contemporary problems in articles and symposia and other fora, contributing to the discourse about and development of the law. Just as much of the rest of the law school curriculum nationwide has grown beyond the classroom – with clinical work in community economic development, capital punishment, environmental law, immigrant rights, domestic violence, human rights, appellate advocacy, civil rights and much more – so too has the widespread engagement with the legal consequences of armed conflict.

This article argues that enabling students to participate directly in the development and application of IHL in concrete “real world” settings – from training to research and fact-finding, litigation to high-level advocacy, and many spaces in between – does far more than just contribute to these students’ development as effective, reflective lawyers, certainly a key goal of any clinical environment. Such work also provides students with insights into issues of professional responsibility, ethics and general lawyering skills that are naturally portable to other areas of a student’s future career. Beyond that, clinical IHL work prepares students for careers in IHL and broadens their exposure to alternative ways of seeing law in action. It thus expands student understanding of the complexity, institutions and enforcement of IHL in a way that library research and classroom discussion, as critical as they are, cannot fully achieve.

At the same time, IHL clinic assistance to entities working on issues related to international law and armed conflict, accountability and protection – whether NGOs, international tribunals, domestic courts, militaries, law firms or others – goes beyond contributions to the implementation and enforcement of IHL in the specific area of any particular project. Clinical work connects classroom learning to work in IHL in a way that builds the knowledge, networks and skills essential to effective dissemination and promotion of IHL, a Geneva Convention obligation that undergirds the entire framework of IHL.<sup>7</sup> And, as we argue here, clinical IHL work contributes directly to that obligation of promotion. Altogether, IHL clinical work matches clinical pedagogy with contemporary issues in armed

6 This number and information about IHL in US law schools past and present is based on data found in ICRC reports on teaching IHL in US law schools. See, e.g., American University Washington College of Law and International Committee of the Red Cross, *Teaching International Humanitarian Law at U.S. Law Schools*, available at: [www.wcl.american.edu/humright/center/documents/IHLSurveyReport.pdf](http://www.wcl.american.edu/humright/center/documents/IHLSurveyReport.pdf).

7 Geneva Conventions I–IV, Arts 47, 48, 127 and 144 respectively.

conflict to deepen students' law school experiences and enables them to engage in the IHL goals of promotion, implementation and enforcement.

The first part of this article describes the work of two clinics: the Emory International Humanitarian Law Clinic and the University of California, Irvine's International Justice Clinic. After a brief discussion situating these clinics in the context of clinical education's development over the past few decades, this part introduces the goals of clinical IHL work and highlights both IHL-specific and general lawyering skills that the clinics aim to impart to students. Finally, this part explores the role of the clinical seminar that accompanies the project-specific work and forms an essential component of the clinical experience. The second part examines several particular challenges of IHL clinical work that stem from the different constituencies involved in the application, implementation and enforcement of IHL; from IHL's balancing of military necessity and humanity and how that plays out in the work of different organizations and the protection of persons in conflict; and from the complicated mix of law and policy inherent in the current discourse on IHL.

## **The clinical experience and IHL**

### **The development of legal clinics in US legal education**

Clinical education in the United States has its roots in a movement designed not merely to provide students with experiences in the field, or to offer legal services to the disadvantaged, or to hone critical skills in areas such as deposition, interviewing and advocacy, although it often includes each of those components. Clinical models grew out of a basic recognition that rigorous academic work, as critical as it is to developing familiarity and ease with legal principles and theory, does not adequately introduce students to the complexity of legal practice. Traditional curricular work, drawn from the case method study of law, revolved around – and continues to revolve around – appellate cases, designed to focus attention on the core legal issues that might be at the centre of particular disputes. As a leading visionary for clinical education, Jerome Frank, put it in 1947 (years before the clinical movement truly launched in the United States), “with a very few notable exceptions, the kind of so-called ‘law’ taught by most professors in the schools consists of deductions from upper-court opinions”.<sup>8</sup> Thus, we have the casebook, the heavy tomes designed by law professors in every legal field and read by all law students in the United States. The casebook has long been a central tool for training students to identify substantive and procedural legal norms.

But there are certain critical tools that the case method cannot reach. In particular, the casebook presents disputes as a series of found facts with disputes over them and the law applicable to them already resolved by various levels of

<sup>8</sup> Jerome Frank, “A Plea for Lawyer-Schools”, *Yale Law Journal*, Vol. 56, 1947, p. 1306.

administrative and judicial systems. Consider, for instance, the various treatments of the Israeli fence or separation barrier by the International Court of Justice and the Israeli High Court of Justice.<sup>9</sup> An examination of the cases demonstrates different approaches to IHL interpretation and enforcement, a useful way to explore the substance of the law. But the opinions themselves, as presented in casebooks, do not give students the tools to understand how and why the policy-makers and lawyers collected (or neglected to collect) facts to support their positions, advocate or defend against claims, consider the long-term implications of their positions, strategize their case, and so forth. They do not impart insights about how advocates work with or against one another, particularly when they represent or defend opposite sides of an armed conflict, or how activist lawyers may work with or against governments. They do not help students understand the choices advocates sometimes have to make regarding when and how to challenge a decision, and how those choices might affect future options for advocacy and legal work. They do not impart a substantial amount of learning about the practice of IHL because casebooks very rarely, if at all, present law students with the extensive range of challenges that lawyers face in practice: how to gather the facts necessary to building a legal case, how to deploy those facts consistent with the legal norms at issue, how to work with clients and adversaries in advancing a case or counselling a course of action. The growth of clinical education has shown that the casebook is but one tool in developing well-rounded curricula and, ultimately, well-rounded practitioners in law and other related fields.

Early clinical work in US law schools grew out of the vision of Professor Frank and, beginning in the 1960s, a mix of social justice and community service goals, particularly in the context of low-income communities. By 1980, leading clinicians would “argue ... that clinical education was not merely a return to apprenticeship or a cure for third-year boredom, but a vehicle by which students could gain a ‘broader view’ of the legal problems and processes studied in the classroom and work for the reform of those processes”.<sup>10</sup> Within a decade, “clinical legal education experienced a shift away from a justice mission and towards an emphasis on lawyering skills such as interviewing, negotiation, oral advocacy, and brief writing”.<sup>11</sup> Today, although the social justice vision of clinical education may still predominate, students at most American law schools have the opportunity to take clinical courses that focus on substantive legal problems as well as lawyering skills through simulations, intensive brief and motion-writing, and other exercises.

9 See Supreme Court of Israel, *Beit Sourik Village Council v. The Government of Israel*, HCJ 2056/04, 30 June 2004; International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, *ICJ Reports 2004*, p. 136.

10 Laura G. Holland, “Invading the Ivory Tower: The History of Clinical Education at Yale Law School”, *Journal of Legal Education*, Vol. 49, 1999, p. 525 (referring to the work of Dennis Curtis and Stephen Wizner, pioneering clinicians at Yale Law School).

11 Deena R. Hurwitz, “Lawyering for Justice and the Inevitability of International Human Rights Clinics”, *Yale Journal of International Law*, Vol. 28, 2003, p. 524.

Given the social justice and law reform objectives that became a central part of American clinical legal education, along with the expansion of international human rights law beginning in the 1960s, it was natural that human rights clinics would eventually enter the field. Dozens of law schools across the country have some form of human rights clinic today, alongside the traditional clinical offerings. Human rights clinics give students the opportunity to partner with leading NGOs, engage with human rights institutions of the United Nations (UN) and treaty monitoring bodies in a variety of fields, conduct fact-finding at home and abroad, and write reports, lobby governments and pursue other forms of advocacy. But while students in human rights clinics “learn many of the same skills ... as they would in traditional clinics”, the different “instrumental particularities of human rights lawyering” lead many human rights clinics to develop a “norm-centered pedagogy”.<sup>12</sup> In other words, much like the IHL clinical work described below, human rights clinics often prioritize a mission of promoting particular human rights regimes and rules, while they less often pursue the traditional clinical commitment to particular clients, whether individual or organizational.<sup>13</sup>

## Introduction to Emory’s IHL Clinic and UC Irvine’s International Justice Clinic

It is partly against this background that clinical work in IHL developed, often in the context of existing human rights clinics. One strand of clinical engagement began with the emergence of international criminal law in the 1990s and the establishment of the tribunals in The Hague, triggering a broad focus on accountability.<sup>14</sup> As new institutions applying IHL entered the scene in full force in the 1990s, IHL jurisprudence followed suit: the *ad hoc* UN war crimes tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR); the conclusion and subsequent entry into force of the Rome Statute for the International Criminal Court (ICC); hybrid national-international tribunals for Sierra Leone and Cambodia; and other specialized war crimes chambers, panels or commissions in places like Sarajevo, Belgrade and Dili, East Timor. UN and treaty-based human rights bodies and regional human rights courts began addressing (or avoiding) IHL issues as well.<sup>15</sup> Leading NGOs, enjoying significant momentum stemming from their influence over the development of the Ottawa

12 *Ibid.*, pp. 532–533.

13 This fact led Deena Hurwitz to suggest that “[h]uman rights norms or principles can even be the underlying ‘client’”. *Ibid.*, p. 533 (emphasis in original).

14 The war crimes projects at Case Western University Law School ([http://law.case.edu/centers/cox/war-crimes/content.asp?content\\_id=128](http://law.case.edu/centers/cox/war-crimes/content.asp?content_id=128)) and American University Washington College of Law’s War Crimes Research Office ([www.wcl.american.edu/warcrimes/](http://www.wcl.american.edu/warcrimes/)) were early entrants into the field.

15 See, e.g., *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, 25 January 2005, available at: [www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf); *Inter-American Court of Human Rights, Juan Carlos Abella v. Argentina (La Tablada Case)*, Case No. 11137, 18 November 1997; *European Court of Human Rights, Al-Skeini and Others v. The United Kingdom*, Application No. 55721/07, 7 July 2011.



Landmine Ban Convention in 1997 and the Rome Statute in 1998, developed programmes dedicated to State and individual accountability for IHL violations, such as Human Rights Watch's International Justice division, the Open Society Justice Initiative, and Amnesty International's Campaign for International Justice. Over the course of two decades, IHL entered the mainstream of public international law and human rights advocacy, building on the long-standing work of the International Committee of the Red Cross (ICRC) and national Red Cross and Red Crescent societies, and law schools followed close behind.

A second strand of clinical engagement first accompanied litigation over the status of detainees held at Guantanamo Bay Naval Facility and expanded with the enormous set of legal issues that followed the September 11 attacks and the wars in Afghanistan and Iraq. Critical issues of IHL became central points of dispute, advocacy and litigation, lead among them the status and treatment of detainees, the length of detention, the prosecution of detainees, the categorization of armed conflicts, and the use of unmanned aerial vehicles (UAVs, or drones) to combat terrorism.<sup>16</sup> Scholarship in IHL expanded exponentially alongside a vast array of legal disputes. The US Supreme Court entered the fray repeatedly, guaranteeing attention by American legal academics, even those without a background in international law. As with human rights, then, the focus on IHL in a clinical setting became a natural result of the legal activity among governments, international organizations, courts and other actors.

With terrorism and US military engagements putting IHL on the front page, the Emory IHL Clinic, founded in January 2007, took classical clinical goals – giving students opportunities to engage in hands-on, “real world” work and providing assistance to organizations – and put them into practice specifically in a comprehensive spectrum of IHL activities: dissemination, training, implementation and enforcement. Under direct clinical faculty supervision, each student in the Emory IHL Clinic provides assistance to one of many organizations with which the clinic collaborates. Students research complex contemporary issues, draft memoranda, briefing papers, reports and other written products, and communicate directly by phone and email with an attorney or supervisor at the relevant organization to report on and discuss their work. During the regular clinical classroom meeting, students learn the fundamentals of IHL, discuss application of IHL's core principles to contemporary conflicts and challenges, and present their work to their fellow students, describing their assignments and highlighting the key legal issues and challenges.

Unlike most human rights or international law-oriented clinics, which use a team approach in which most or all of the clinic students work together on one or two major clinic projects, the Emory IHL Clinic takes an alternative approach aimed at maximizing the diversity of student experience and the number of entities the

16 The US Supreme Court has rendered numerous opinions on detainee status and prosecution since 2004. In addition, two federal district courts have dismissed cases related to the killing of Anwar al-Aulaqi: *Al-Aulaqi v. Obama*, 727 F.Supp.2d (D.D.C. 2010); *Al-Aulaqi v. Panetta*, DC District Court, 7 April 2014. For a synopsis of the status and results of all habeas cases, see Center for Constitutional Rights, *Guantanamo Bay Habeas Decision Scorecard*, available at: <http://ccrjustice.org/GTMOscorecard>.

clinic can assist. International law is an area in which many students are keenly interested, but few can anticipate or understand what it means to “work in international law” after graduation from law school. This limited perspective is even more pronounced in the area of IHL and other legal issues during armed conflict. With each student in the Emory IHL Clinic working for a different entity (for example, an NGO, an international tribunal, the military, or an expert project or working group), students get an in-depth experience with regard to their own projects and gain a window into the other opportunities and venues through which one can practice international law.

The Emory IHL Clinic focuses on three main substantive priorities: training and education for militaries and organizations involved in armed conflict; the implementation of IHL in US military operations and national security strategy; and accountability for violations of IHL. For example, the Emory IHL Clinic has a long-standing project on military training programmes in the law of war that collects and analyzes information about how countries around the world train their forces in the law of war.<sup>17</sup> Providing training in IHL is an obligation for all countries as parties to the Geneva Conventions. Understanding how countries do so and the differences in their approaches to this foundational component of military training offers useful insights into the nature, capabilities and operations of the vastly different military organizations around the world.

Second, effective implementation of IHL and international law is essential to lawful and effective military operations and to the protection of civilians and all persons in zones of conflict. To this end, Emory IHL Clinic support for the ICRC customary IHL database of State practice<sup>18</sup> helps to advance understanding of how States execute their obligations under IHL. As another example, clinic students provide assistance to experts on the UN Committee against Torture, researching and drafting extensive preparatory memoranda for use at the Committee hearings each year. These students have an opportunity to see international law in action by working directly at the intersection of State practice, the international legal regime and the institutions that support it.

Finally, law also depends on enforcement and accountability as key components of ensuring that States and individuals adhere to the law and face appropriate legal consequences for failure to do so. Emory IHL Clinic assistance to international tribunals, military commissions and NGOs focused on accountability and advocacy for accountability contributes to this goal.

The International Justice Clinic at UC Irvine School of Law, established in 2012 and building on the work of its prior incarnation at UCLA School of Law, provides a platform for training law students in the tools of accountability for IHL and other significant international law violations, including violations of

17 This project produced the volume Laurie R. Blank and Gregory P. Noone, *Law of War Training: Resources for Military and Civilian Leaders*, 2nd ed., US Institute of Peace, Washington, DC, 2013.

18 The ICRC customary IHL database is available at [www.icrc.org/customary-ihl/eng/docs/home](http://www.icrc.org/customary-ihl/eng/docs/home). The database provides updated information based on and in support of the ICRC Customary Law Study: see Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2005.

human rights law.<sup>19</sup> The International Justice Clinic approaches IHL clinical education with a particular kind of advocacy in mind: that of the human rights fact-finder who engages with individuals directly affected by IHL and human rights violations and yet also seeks to influence policy change. The International Justice Clinic benefits from partnerships with international and domestic organizations, but it leaves room for independent projects and advocacy-oriented research. The International Justice Clinic also aims to introduce students to the possibility of pursuing IHL and human rights careers in contexts outside of the human rights NGO field where it does most of its work, including government (such as the human rights bureau or legal adviser's office at the US State Department), international organizations such as the UN and its many affiliated agencies, and the private sector, with its increasing focus on corporate social responsibility at an international level.

The International Justice Clinic operates on three levels: first, it provides students with specific projects, encouraging them to take ownership of them and use their initiative to solve problems and design solutions in a teamwork environment. They work in teams of two to four students, conducting fact-finding, legal analysis or drafting, depending on the project, under the supervision of faculty and often practitioners in the field. The International Justice Clinic aims to allow students to practise as if they were early associates at a firm or project managers in an NGO. Second, the International Justice Clinic provides space for students to reflect on their work and develop presentation skills, whether in the context of twice-weekly seminar meetings, weekly team supervision sessions or regular interactions with partner organizations. Reflection is, in fact, one of the hallmarks of clinical education. Students are encouraged to develop habits of reflection such that, when they move to a professional practice in the field, they take the time to consider their work product and relationships, analyze strengths and weaknesses, and improve. Third, the seminars enable students to deepen their substantive understanding of IHL and other legal areas and to explore the particular tools that are necessary for human rights and IHL advocacy.

This brief introduction to the two clinics provides the background for the discussion of the clinics' pedagogical goals and methodologies in the next part of this paper, and the presentation of key conceptions and challenges in the third part.

## **Pedagogical goals**

Clinical programmes typically seek to maximize student ownership of projects and encourage student initiative in the formulation, implementation and presentation of projects. A founding premise of clinical education is that students will learn legal skills best when they deploy those skills in real situations of advocacy, enhanced

<sup>19</sup> A prior version of the International Justice Clinic existed at UCLA School of Law from 2008 to 2012. Where applicable, we specify whether the clinical work took place at UCLA or UC Irvine.

by reflection and by the supervision, instruction and feedback of faculty. Two elements are distinctive for both clinics: first, IHL education through direct participation in its development and enforcement; and second, although both clinics conduct work outside of IHL in related areas such as human rights law, they both consider a critical focus to be the implementation and enforcement of IHL through understanding of and fluency with the many institutions that promote IHL and carry out its core purposes.

## Promotion of IHL's core purposes and principles

IHL regulates the conduct of hostilities and seeks to protect persons and objects affected by armed conflicts. The most obvious goal, perhaps, and the one most often cited by students motivated to work on IHL issues, is its humanitarian purpose: protecting persons who are caught up in the hazards of war. Equally important, however, is the goal of regulating the means and methods of warfare to protect those who are fighting – soldiers and other belligerents – from unnecessary suffering during conflict. Of course, IHL does not seek to inhibit legitimate military operations or prevent the unlawful resort to war (the goal and function of the *jus ad bellum*); rather, its goal is to ensure that military operations are conducted within the parameters of the aforementioned two protective purposes.

The application and implementation of IHL is often understood to rest on four core principles: military necessity, humanity, distinction and proportionality. This entire issue of the *Review* is dedicated to understanding and enhancing the obligation of all States to “respect and ... ensure respect for [IHL] in all circumstances”.<sup>20</sup> Although IHL applies only during armed conflict, respecting and ensuring respect for the Geneva Conventions and IHL more broadly is not an activity or an obligation limited to times of armed conflict. It rests in the training and education of military forces; in the dissemination of IHL beyond the military to “civil instruction” programmes, which include government, advocacy, policy circles, and academia; and in the culture of the rule of law that enables advocacy for better implementation of IHL and effective enforcement and accountability for violations of IHL during and after conflict. In the same manner, the two clinics discussed here work to ensure respect for IHL. Working with advocacy organizations and international or hybrid tribunals supports efforts to protect civilians during armed conflict and hold accountable those who violate IHL's central tenets. Developing teaching materials for the incorporation of IHL into other courses at law schools and graduate programmes contributes to wider dissemination of IHL, while projects to enhance and analyze training and education in IHL for militaries go to the heart of the obligation to respect IHL. At the same time, a diverse clinical approach contributing to all of these efforts concurrently creates an environment that mirrors the real world: advocacy must

20 Article 1 common to the four Geneva Conventions of 1949.

coexist with implementation, and accountability must coexist with training and education.

Traditional clinics often pursue a live-client representation model, usually serving specific needs in the local community for individuals and groups. IHL clinical projects may adopt the same representational approach, as in the case of work with detainees at Guantanamo Bay or support for Alien Tort Statute plaintiffs.<sup>21</sup> Generally speaking, however, the clinics discussed here tend to partner with other organizations on matters of fact-finding, research, training, advocacy and so forth. They adopt a broad view of the structure of the IHL arena and the needs of its key constituents as part of the promotion of IHL. One might say that IHL itself is the “client”,<sup>22</sup> but it may be just as accurate simply to note that the clinics discussed here pursue a mandate of IHL promotion.

The International Justice Clinic, for instance, developed a number of projects designed to promote the application of IHL and the expansion of accountability for violations. In one case, several students spent a year conducting research, including interviews with lawyers, diplomats and activists at the Assembly of States Parties of the Rome Statute in The Hague, to develop recommendations for US participation in the first Review Conference of the Rome Statute in Kampala, Uganda, in 2010.<sup>23</sup> The report ultimately aimed to enhance US participation in ICC activities, if not advocate for ratification of the Rome Statute. In another example, International Justice Clinic students worked with lawyers and scholars from the Open Society Justice Initiative who were developing an approach to hold accountable multinational corporations involved in illicit mining in conflicts in the Democratic Republic of the Congo.<sup>24</sup> They conducted research but also worked closely with lawyers thinking through legal strategies to hold such actors accountable under IHL, creatively using the model of the war crime of pillage to apply to such behaviour. In a similar example of projects involving broad thinking about the application and implementation of IHL writ large, Emory IHL Clinic students have worked with experts on the UN High Commissioner for Human Rights (UNHCHR) Working Group on the Use of Mercenaries to identify existing legal frameworks and accountability mechanisms for the use of mercenaries and private military and security companies during conflict, and to strategize how such frameworks and mechanisms can be strengthened to ensure better adherence to IHL and better protection for individuals.

21 See Rex Bossert, “UCI Law Students Help Attorney Argue First Case of New U.S. Supreme Court Term”, UC Irvine, 4 October 2012, available at: [www.law.uci.edu/news/features/2012/1004-ihrc.html](http://www.law.uci.edu/news/features/2012/1004-ihrc.html).

22 D. R. Hurwitz, above note 11, p. 533.

23 See UCLA School of Law International Justice Clinic, *The Road to Kampala: U.S. Participation in the Review Conference of the International Criminal Court*, April 2010, available at: <http://cdn.law.ucla.edu/SiteCollectionDocuments/Clinical%20Program/Road%20to%20Kampala%20FINAL.pdf>.

24 See James G. Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources*, Open Society Foundations, September 2011, available at: [www.opensocietyfoundations.org/sites/default/files/pillage-manual-2nd-edition-2011.pdf](http://www.opensocietyfoundations.org/sites/default/files/pillage-manual-2nd-edition-2011.pdf).

## Engagement with the institutions of IHL

The Emory IHL Clinic and the International Justice Clinic both seek to introduce students to IHL in all of the institutions where it is practiced and engaged, especially in governments, militaries, the ICRC, international courts and tribunals, international organizations and human rights NGOs. Partnering with institutions can take different forms. The International Justice Clinic, for instance, may assign students to work on a project co-led by a partner NGO. Clinic students may then conduct on-the-ground fact-finding for a portion of a larger project, feeding their reporting and research into litigation, reporting or other forms of advocacy. In a different approach, each student in the Emory IHL Clinic works with an attorney or other supervisor at one of the entities with which the clinic partners. Using either approach, both clinics provide assistance to and collaborate with the primary organization, rarely taking on client representation themselves. One of the primary pedagogical results of a partnering or assistance-based approach is that students learn about the different institutions and organizations that apply, advocate for and enforce IHL, identify the organizations' goals and agendas, and assess how to provide the most effective assistance possible.

In this environment, students in both clinics must first learn about and understand the organization with which they are working. The organization's goals and priorities serve as an essential basis for all of the students' work, just as they do for the full-time lawyers, policy analysts and others engaged in the comprehensive task of promoting, executing and enforcing IHL. For example, an Emory IHL Clinic student is asked by an NGO to research and analyze the viability of Colombia's prosecutions of sexual violence crimes. Although the facts and the law remain the same from any perspective, it is essential for the student to understand the NGO's perspective – accountability and remedies for victims of atrocities – and how the information will be used – in a communication to the ICC to encourage the prosecutor to investigate those crimes – so as to give the best analysis possible. The very same law and facts might well be presented, analyzed and used differently by an NGO advocating for better accountability from the Colombian government, or by a military training programme using the information as a case study, or by any number of other institutions.

In addition to working with and within institutions, IHL clinical education may introduce students to the critical elements of collaboration and networking in order to build support for IHL-sensitive projects. The International Justice Clinic, for example, conducted a year-long research project looking at a variety of areas related to transitional justice and the conflict in Syria in 2011 and 2012. Working with Syrian activists, the International Center for Transitional Justice and the Open Society Justice Initiative, UCLA Law School students participating in the Clinic helped to organize a workshop in Istanbul, Turkey, to discuss the spectrum of transitional justice options. The workshop aimed not to build a strategy for accountability, but rather to give Syrian activists the space to discuss the range of

choices they might have available to them in a post-conflict Syria. The project enabled students to collaborate with activists who were thinking specifically about enforcement of IHL, giving them insights into not only the range of enforcement opportunities but also the types of resistance typical in post-conflict situations.

## Public international law research and analysis

The ability to work effectively in the field of IHL depends on a thorough knowledge of public international law and IHL's foundational components: the threshold for triggering application of IHL, core IHL principles, the status of persons, rules for the conduct of hostilities, detention regimes, and accountability for grave breaches and other violations of IHL, to name a few. It also requires an understanding of customary international law and the ways in which general IHL principles, such as the Martens Clause, may be deployed to frame IHL arguments. Different projects require students to apply different aspects of this knowledge, depending on the particular legal issues at the forefront.

Broadly speaking, however, several additional competencies are essential to student and clinical success in this area. First, students need to understand how IHL relates to other international and domestic legal regimes and to recognize when IHL is not applicable. Using IHL when inappropriate can have significant negative consequences, both for people involved in and subject to military operations and for the development of the law. For example, although multinational counter-piracy operations can involve extensive naval capabilities and firepower, the operations are in most cases not governed by IHL because the situation is not an armed conflict.<sup>25</sup> Applying IHL in such a circumstance would mean that the militaries could use lethal force as a first resort and detain captured pirates without charge, authorities that IHL provides but that are not present in legal regimes applicable in the absence of armed conflict. Second, students need to learn the boundaries between law and policy, boundaries that often can be particularly blurry in the arena of conflict, national security and international law. Drawing these lines is essential for the provision of sound legal advice and analysis and also for the development of an effective advocacy strategy where relevant. Research in the area of targeted killing and UAV strikes, for example, has proved to be particularly challenging and demanding of careful law and policy delineation in this regard. Third, students must understand the roles that different institutions play before, during and after conflict, and learn how those roles may drive an institution's perspective on the application of IHL, effectiveness in using IHL, receptiveness to different types of IHL-based arguments and information, and success in fulfilling its designated mission.

25 See, e.g., Laurie R. Blank, "Rules of Engagement and Legal Frameworks for Multinational Counter-Piracy Operations", *Case Western Reserve Journal of International Law*, Vol. 46, 2013, pp. 397–409. In addition, as part of the Emory IHL Clinic's work with the Public International Law and Policy Group's (PILPG) High Level Working Group on Piracy, students analyzed the law applicable to piracy and counter-piracy operations, among other topics.



Beyond these thematic concepts, several of the projects of the Emory IHL Clinic and International Justice Clinic highlight specific IHL and international law competencies.<sup>26</sup> International law research requires a thorough knowledge of the sources of international law, how they interact, how courts and governments weigh those sources, and where to look for case law and other jurisprudence on issues from IHL to international investment arbitration. Academic courses on international law and related research emphasize these skills. The IHL clinical setting, however, focuses on another set of research skills as well: the gathering and analysis of facts and information about ongoing or recently concluded conflicts, State compliance with international obligations, and the different types of actors in a given situation of conflict. Depending on the nature of the project assignment and the goals of the partner organization, clinic students need to assess what information is needed, the validity of different factual sources, and why certain information is more or less useful.

The International Justice Clinic's work with the NGO AIDS-Free World, examining the international standards for witness protection in cases of sexual violence during armed conflict, highlights these skills. Teams of students explored the problem of witness protection in international criminal justice and the scourge of gender violence in situations of armed conflict through desk research, interviews with officials responsible for witness protection, prosecutors, counsellors and psychologists, investigators and others at the ICTY, ICC and Special Tribunal for Lebanon, and fieldwork in the justice systems of Colombia, Liberia and Sierra Leone. Throughout, the students analyzed whether international legal norms had developed in the context of witness protection or whether they would be better characterized as best practices, and they examined whether the standards developed at The Hague's institutions could be – and were being – applied in the other post-conflict settings.

In a similar manner, students in the Emory IHL Clinic work with the UN Committee against Torture to research conditions in countries appearing at hearings before the Committee and prepare background memoranda for one or more rapporteurs on the Committee. The research is fact-intensive and demands creativity and persistence to track down information about issues of concern to the Committee, such as prison conditions, violence against women, treatment of detainees, or migrant workers. In some cases, the country being researched is embroiled in low-level violence or a more extensive armed conflict, adding to the complexity. Most important, however, is that the clinic student must be able to assess which facts are important and why. This requires an understanding of the Committee's goals and methodology, as well as a broader grasp of what is happening in the country under review. Clinic students also prepare, and include in the background memoranda, extensive questions for the Committee rapporteur to pose directly to the country's representatives at the hearing. Doing so requires that the student analyze and understand what information is needed to assess a

26 A number of projects that highlight the skills discussed in this section involve confidentiality concerns and therefore are not described here.

country's compliance with international obligations and how to gather, analyze and use that information. This final component of these research competencies lies at the heart of effective international lawyering, whether in the advisory, advocacy or accountability arenas.

With regard to specific IHL questions, the first question, of course, is whether IHL applies at all. Clinic projects require students to delve deeply into multiple layers of analysis following from this question, including, for example: if there is an armed conflict, is it an international or non-international armed conflict; if, how and to what extent does human rights law apply during the conflict; what is the status of persons involved in or harmed by any alleged crimes; and what options are there for jurisdiction over potential IHL violations? Each of these questions – and other IHL legal issues – is complex, and students must focus on sophisticated relationships among these issues in conducting their legal analysis.

Selected projects at the Emory IHL Clinic engage all of these levels of IHL legal analysis and demand careful attention to the precise nature of the question posed by the partner or client organization. For example, clinic students working with the European Center for Constitutional and Human Rights have analyzed the protests in several Arab Spring countries to determine whether the level of violence rose to the threshold of a non-international armed conflict (a determination that then, of course, could frame options for seeking accountability). Doing so not only requires that students be able to present and explain the definition of non-international armed conflict, along with the appropriate jurisprudential analysis and reasoning, but also demands an understanding of what facts and information support or undermine a conclusion regarding the existence of a conflict. Here, of course, is the essence of legal analysis: knowing both the law and its application to the facts in the chaotic and complex reality of the situation on the ground.

Further examples of comprehensive legal analysis are the memoranda that IHL Clinic students have drafted for the Public International Law and Policy Group (PILPG) High Level Working Group on Piracy<sup>27</sup> and the analyses of domestic and international law governing the activities of private military and security companies (PMSCs) produced for the UNHCHR Working Group on Mercenaries. Research memoranda prepared by Emory IHL Clinic students on numerous topics, including the law governing counter-piracy operations and the use of force against pirates, the recruitment and use of child pirates as a crime against humanity, and the consequences of excessive use of force in the apprehension of pirates, are provided to judicial and government officials in countries prosecuting pirates, such as the Seychelles and Kenya, as part of a toolbox of resources for effective and lawful counter-piracy operations and prosecution of pirates. With regard to PMSCs, IHL Clinic students analyzed the domestic legislation

27 The PILPG Piracy Working Group provides legal and policy advice to domestic, regional and international counter-piracy mechanisms, with the goal of helping to create effective responses to the growing piracy threat.

pertaining to PMSCs in many countries and how that legislation comports with international treaty obligations and international soft-law commitments. This type of legal analysis, involving the layering of international and domestic law and different types of legal sources, is common in the IHL and international law arenas and is highly complex. Students engaging in this type of analysis learn how to look at an issue from multiple angles and how to assess the weight and value of vastly different sources of law.

Similarly, the International Justice Clinic provided direct support to prosecutors in the War Crimes Chamber in the Courts of Bosnia and Herzegovina in Sarajevo. Following extensive desk research, Clinic students travelled to Sarajevo for discussions with prosecutors and judges at the Chamber as well as journalists, activists, international civil servants, and local leaders in Bosnia. The Clinic produced a series of memoranda for court officials on topics ranging from prosecutorial discretion in international criminal law to lessons from domestic war crimes prosecutions in post-war Germany, Rwanda and Argentina. For instance, one team developed a prosecutors' manual for Bosnian lawyers new to war crimes prosecutions. Another team worked with the lead international prosecutor and others in Sarajevo to develop components of a prosecutorial strategy.

### Problem-solving, strategic and tactical thinking

Academic coursework can bring out the dynamism of IHL. Students doing traditional coursework, whether in lecture courses or seminars, are given the opportunity to explore key cases, problems, rules and theories. They may work through such problems in the context of domestic and international case law or hypotheticals in casebooks or generated by professors. In practice, however, lawyers are not provided with a straightforward question and a stipulated set of facts. They may have to determine what the factual situation involves, identifying in advance what IHL-relevant questions should drive the fact-finding. Once they have a set of facts, they may have to determine which ones are legally relevant and what law applies to the set of facts, and subsequently what course of action might be optimal to ensure enforcement of the law. They may have to choose among domestic and international legal approaches, or between legally binding mechanisms and political bodies under treaties or the UN. They may ultimately determine that the law is insufficient to address their client's needs, if they have a client, or their perception of sound policy. In that case, they will need to think through whether an alternative lawmaking approach – as opposed to law-enforcing – would advance client interests or sound policy.

Clinical work attempts to model as closely as possible the ways in which practicing IHL lawyers address legal problems. Clinical students must think both strategically and tactically in the context of real problems. For instance, in 2011, the International Justice Clinic was presented with an opportunity to develop policy proposals to improve multilateral support of the International Criminal Court. Students and faculty developed a project that would focus on improving

the support of the key multilateral institution – the UN Security Council – for the work of the ICC. The project required clinic students to think through the nature of the legal relationship between the Security Council and the ICC and identify steps that might improve the likelihood of Security Council support for international justice. Students and faculty conducted dozens of interviews with current and former diplomats, activists in leading NGOs, Court officials, academics and others, and they designed a workshop that brought together thirty thinkers in the field of international politics and justice. The project required students to think strategically about the end goal – a stronger Council–Court relationship – and tactically about the kinds of realistic steps which might achieve that strategic goal. Students also needed to think about enforcement mechanisms and advocacy beyond traditional institutions in IHL such as the military services or domestic and international courts or tribunals. In particular, they not only examined the increased role of IHL enforcement (or international criminal justice) at the UN, but they saw that the tools of such enforcement extend beyond exhortations and rhetoric to sanctions, ICC referrals, logistical and military support for fugitive apprehensions, and much more that falls outside the traditional framework of prosecutions and judicial opinions. The project ultimately resulted in a widely distributed report and a follow-on workshop in Beijing.<sup>28</sup>

## Training and education support

IHL depends for its effectiveness on pre-conflict, pre-mission training and education for militaries in the fundamental principles of IHL and how those principles must be applied during conflict. Every government has an obligation to provide training to ensure that its military personnel understand and can adhere to the law of armed conflict. Under the Geneva Conventions, States are explicitly required to “include the study [of the law of armed conflict] in their programmes of military ... instruction, so that the principles thereof may become known to all their armed forces”.<sup>29</sup> Participating in the promotion of IHL at this stage is a unique experience for law students. So much of law school is about analyzing when the law has been violated, how it can be enforced, where it can be enforced and similar questions, but little if any time is spent on the notion of the lawyer as an adviser. And yet, a significant component of lawyering is giving advice in advance – which certainly encompasses training and education in areas like IHL, where operators have to execute the law without a lawyer’s on-the-spot advice – to help a client comply with the law and choose the best course of action given the law’s parameters. This aspect of lawyering is particularly true in the government and national security arena.

28 See David Kaye *et al.*, *The Council and the Court: Improving Security Council Support of the International Criminal Court*, May 2013, available at: <http://councilandcourt.org>.

29 Geneva Conventions I–IV, Arts 47, 48, 127 and 144 respectively.

The Emory IHL Clinic has a long-term project, in partnership with the United States Institute of Peace, to study military training programmes in IHL around the world.<sup>30</sup> Clinic students also engage directly in finding ways to incorporate IHL and international law into military education in the United States, working with military and civilian faculty at Marine Corps University's Command and Staff College and the Naval War College's Joint Military Operations course. These experiences require extensive thinking about how to present IHL to a non-law audience, albeit one that is the key implementer of IHL's core principles and rules. Students draft IHL-based ethical decision games that challenge military officers at Marine Corps University to think about how IHL can help guide their leadership decision-making process. Students have provided briefing papers and course materials, including discussion questions and answers, on topics such as cyber-operations and the role of transitional justice mechanisms in war termination and the transition to peace, and have developed media questions for use in simulation exercises to challenge the officers to address IHL-related issues in new ways in the course of the exercises. Throughout all of these and other projects, clinic students need to rethink how they conceptualize the law; no longer an analytical framework for the courtroom or the client memorandum, here the law is a tool for helping to enhance the training and education of the very individuals who are tasked with implementing it, who are protected by it, and who can be held accountable for violating it.

## Lawyering skills

Students in the two IHL clinics described here are so immersed in the IHL and international law aspects of their work that they often do not realize that they are gaining and honing valuable lawyering skills that translate to any aspect of legal practice. Such skills are, of course, a hallmark of clinical education, but the varied and non-traditional nature of legal engagement in an IHL clinic can obscure this educational aspect of these clinics. For example, students in the Emory IHL Clinic have the real-world experience of talking with a supervising attorney and getting an assignment for a project. This, of course, is the bread and butter of junior lawyers at law firms and other legal offices, but is not an experience law students encounter often, if at all. Students learn to ask clarifying questions, take notes for future reference, and restate the assignment to ensure that they have the correct information and question before proceeding. Another important legal practice skill is to understand the client, its goals and agenda, and what it needs and wants in the final product. In some ways, this aspect of lawyering is a fundamental shift from the law student experience, in which students pick topics for papers and choose their classes. A student working with a partner or client organization must understand that organization and its role in the broader legal arena; the student who takes an assignment and instead turns it into his or her own project is doing the organization and the clinical experience a disservice. The

30 See above note 17 and accompanying text.

next step in this linear process of going from assignment to finished work product is to strategize for the most effective research approach.

As the descriptions of clinic projects throughout this article demonstrate, writing is a significant component of the clinical work, reflecting our view of its importance in legal practice. Because of the diverse nature of organizations engaged in IHL and receiving clinic assistance, students must learn to write for many different audiences. The traditional legal memorandum or brief simply does not meet the needs of every situation. Reports, advocacy documents, briefing papers, ethical decision games, strategy memoranda, and case studies all require a range of writing skills beyond those traditionally taught in law school. Students learn to write for non-law audiences, for advocacy purposes and for US and foreign lawyers, and, in particular, to write concisely and effectively about complex legal issues. Finally, students gain valuable experience in presenting information orally. Student presentations and discussions in class are one component of this experience in both clinics, but students in both clinics also engage with a wide range of actors to research, analyze, discuss and strategize about their research and projects.

### The clinical seminar and faculty supervision

Although the clinical projects described here aim to provide the kind of engagement with IHL that closely models the work of practicing lawyers in the field, it remains critical pedagogically for the clinical faculty to provide students with regular, ongoing space to reflect upon their work from academic, ethical, practical and other perspectives. For these purposes, both the Emory IHL Clinic and the International Justice Clinic involve seminars that meet weekly or biweekly. The seminar may focus on a wide range of IHL topics, depending on whether the students have had a previous opportunity to study IHL, human rights, international criminal law and public international law. While each programme may vary its focus according to the clinical work involved, they generally share the following elements.

Both clinics combine elements of a traditional law school seminar with the needs of a clinical meeting. For instance, the clinics meet regularly during the first half of the semester for in-depth classes on IHL, using readings drawn from casebooks<sup>31</sup> or primary documents to generate discussion about theories, strategies and implications of justice-oriented policies. Lectures and class discussions reinforce the necessary foundations in IHL and human rights law. Current events also provide an excellent lens through which to apply and explore these foundational IHL concepts and to link them to ongoing clinical work. At the same time, students present their current work, sometimes simply to update classmates but also to provide the opportunity to discuss specific problems or

31 Laurie R. Blank and Gregory P. Noone, *International Law and Armed Conflict: Fundamental Principles and Contemporary Challenges in the Law of War*, Wolters Kluwer, New York, 2013, is the assigned reading for the Emory IHL Clinic.

lessons that may have arisen in the course of the project work. Presentation not only focuses on speaking and oral advocacy skills but also advances the idea of reflection, giving students the tools to think critically about the work they are doing in the projects. Ideally, the faculty will press the students to think hard about the strategic and tactical choices they are making. Is a particular research approach likely to be successful? Why? Would one policy choice be more consistent with a rule of IHL than another? Is it possible that the law inadequately addresses the particular problem that a client faces? If so, how should we think about the capacity of the law to meet its object and purposes (e.g., civilian protection), and if the law is inadequate, what other kinds of approaches might address client or partner organization needs? These kinds of questions should sit comfortably at the centre of a clinic that addresses IHL, just as similar ones should in other clinical settings.

## **Conceptions and challenges of IHL clinical work**

Clinical programmes vary across (and within) American law schools, but each clinic commonly presents a particular model of lawyering, depending on the field, the kind of projects pursued or the experience of the professor. For instance, an economic development clinic may focus on transactional lawyering, building deals that advance certain social and legal goals in a particular community. An immigration clinic may focus on asylum claims by those fleeing persecution, which could involve litigation before immigration courts, or such a clinic could focus on long-term detention of immigration claimants, which could put the students in a federal court litigation context. An environmental law clinic may focus on challenging State or local regulations or new development projects with negative environmental impact, which could also involve litigation in State and federal courts. It is easy to go through fields of law and identify the range of professional options that one would want to emphasize for students.

In the context of the variety of work conducted by clinical students working in the field of IHL, one can imagine a number of conceptions of the IHL lawyer that an educator would want to advance. The military lawyer, the NGO activist and the international prosecutor all present very different models that may be difficult to imagine integrating into one clinic. The roles lawyers undertake in the field vary significantly, even when all are using the same vocabulary and arguably working toward the goals of IHL compliance.<sup>32</sup> A question for the clinical professor is whether to adopt one or more of these models as a dominant one for her or his clinic, and if adopting more than one, determining whether and how they fit together to present a coherent picture for students. What follows are some possible conceptions of the IHL lawyer that might be pursued, and some challenges they pose.

32 See David Kennedy, *Of War and Law*, Princeton University Press, Princeton, NJ, 2006.



## Promoters of IHL

The obligation of promotion, which includes dissemination, integration into domestic law and measures to ensure respect, exists in IHL – and in the Geneva Conventions in particular – as an obligation of States to ensure that those carrying out State policy do so within the constraints imposed by the law. One clinical model, therefore, is to assist governments and others in the objective of promotion. But what can this mean in the context of clinical work? How can “promotion” projects be designed so as to benefit student legal education and understanding of the law?

The concept of promotion, more than other concepts, shapes the agenda of the Emory IHL Clinic. Projects vary widely in both the nature of the partner organization (such as the US military versus NGOs engaged directly in criticizing US policy) and the goals of the student’s work (such as assisting the defence counsel at the US Military Commissions or at the Special Tribunal for Lebanon versus working with NGOs to advocate for accountability for sexual violence, crimes against humanity and torture). Indeed, in such a setting, it is the effective use and implementation of the law that forms the common thread. But highlighting that thread requires a direct and purposive engagement with that conception of IHL and of law in general to ensure that students continually see the big picture beyond the all-consuming specifics of their individual projects.

Furthermore, since the clinics discussed here – not to mention many human rights clinics – are not client-driven, or at least not principally client-driven, IHL clinicians need to balance the students’ promotional roles with the need to give them space to be critical of the law itself. One of the challenges that a clinic might face could be thought of as the challenge of legal change. IHL, like all bodies of law, is not perfect. Some of its standards are vague and subject to competing interpretations. Some may find the balance between military and humanitarian considerations to be weighted too much in favour of the former over the latter. Others may see the law as, despite its objectives, undermining civilian protection. A question faced by any clinic engaging in IHL work is whether its work can both promote and critique the law. A clinic should be able to do both: to promote the rules and values of IHL while also critiquing its application, scope and even specific rules in order to maximize the student educational experience. It may promote IHL by advocating new norms of IHL; this is something that, putting aside the merits of such weapons, the Harvard Human Rights Clinic is doing in the context of autonomous weapons, as it conducts research and advocates for a new instrument in that specific field.<sup>33</sup> In those situations, how does a clinic both promote IHL and seek to go beyond it? Does “promotion of IHL” allow room for efforts to challenge existing law and offer possibilities for changing it?

33 See Human Rights Watch, *UN: Start International Talks on “Killer Robots”*, 13 November 2013, available at: [www.hrw.org/news/2013/11/13/un-start-international-talks-killer-robots](http://www.hrw.org/news/2013/11/13/un-start-international-talks-killer-robots).

## Promoters of civilian protection

Many would argue that one of the great challenges of contemporary conflict and the law governing it is the protection of civilians. IHL results from negotiations among governments that approach armed conflict from a variety of perspectives, with a great diversity of capabilities, and based on a spectrum of experiences with armed conflict itself. The result is a balance, as it is often said that IHL involves weighing military necessity and humanitarian requirements.<sup>34</sup> Take, for instance, the rule of proportionality, according to which attacks causing civilian harm “which would be excessive in relation to the concrete and direct military advantage anticipated”<sup>35</sup> are forbidden. This is a challenging standard of IHL, for its breadth and scope are subject to a dizzying array of alternative interpretations. On the one hand, an IHL clinic should aim to promote civilian protection. On the other, one of the fundamental truths about IHL is that it does not proscribe all killing and all harm; it recognizes that non-combatant death, injury and damage may fall within lawful boundaries.

The clinical educator needs to remind students that the legal qualification of a killing under IHL, for example, may diverge from sound policy or moral choice, and is fundamentally different than the legal qualification of a killing outside of an armed conflict in a law enforcement paradigm in which IHL does not apply. This is an important lesson for a student who must choose whether to make legal arguments, policy arguments or moral ones, and must learn that existing law does not always produce what may be the most desirable outcome. In addition, this is an area where the tensions between advocacy and law, between an organization’s goal and its legal options, may be most evident. For example, when an Emory IHL Clinic student provided assistance to an NGO exploring accountability options for victims of US drone strikes in Pakistan, research demonstrating that civilians are the victims of many such strikes was not sufficient. Rather, because IHL forbids excessive civilian harm (in relation to the military advantage of an attack) – not all civilian harm – the student had to provide careful legal advice to the NGO to ensure that its advocacy would be based on law, not mere first impressions, which thus framed the types of legal and policy advocacy available to the partner NGO.

## Promoters of combatant protection

Is there room for clinical work that focuses on the protection of combatants? Could this apply not only in the context of people *hors de combat* and prisoners of war but also to the prevention and prohibition of unnecessary suffering? To the extent that

34 See, e.g., Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2004, p. 17, explaining that IHL “takes a middle road, allowing belligerent States much leeway (in keeping with the demands of military necessity) and yet circumscribing their freedom of action (in the name of humanitarianism)”.

35 Protocol Additional I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (AP I), Art. 51(5)(b).

we are not doing this now, why not, and is there room for change? In the past, work on weapons and prohibitions or restrictions of certain weapons would have fallen within this category; the prohibitions on certain weapons grow directly from IHL's prohibition against unnecessary suffering or superfluous injury.<sup>36</sup> Today, however, many efforts to ban or restrict weapons stem from and focus on the need to protect civilians from the effects of those weapons, whether cluster munitions, landmines, incendiary weapons or other means of warfare.

Another aspect of protecting combatants, however, lies squarely in the training and education aspect of IHL clinical work. IHL plays a fundamental role in protecting belligerents not only physically, but morally as well. As Telford Taylor, the US Chief Prosecutor at Nuremberg, eloquently explained:

War does not confer a license to kill for personal reasons – to gratify perverse impulses, or to put out of the way anyone who appears obnoxious, or to whose welfare the soldier is indifferent. War is not a license at all, but an obligation to kill for reasons of state; it does not countenance the infliction of suffering for its own sake or for revenge.

Unless troops are trained and required to draw the distinction between military and nonmilitary killings, and to retain such respect for the value of life that unnecessary death and destruction will continue to repel them, they may lose the sense for that distinction for the rest of their lives. The consequence would be that many returning soldiers would be potential murderers.<sup>37</sup>

The role of IHL in protecting soldiers and enabling them to segregate their role and actions as soldiers from their broader roles and obligations as members of society is critically important and enables service men and women to return from combat and reintegrate into society effectively. Clinical work that enhances IHL engagement in military education and training contributes to this essential and often overlooked goal.

## Promoters of specific clients

As described above, much of the work pursued by the Emory and UC Irvine clinics focuses on policy or legal advocacy without individual clients. But an entirely different model might focus on the representation of specific IHL clients: victims of grave breaches, defendants in war crimes trials, or organizations seeking the assistance of legal advocates in political or treaty bodies. An IHL clinic should leave room for this kind of client representation – but it does present a variety of challenges. For instance, can a clinic represent both civilian victims and militaries

36 See, e.g., AP I, Art. 35(2): "It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."

37 Telford Taylor, "War Crimes", in Malham M. Wakin (ed.), *War, Morality, and the Military Profession*, Westview Press, Boulder, CO, 1979, p. 429.

or military officers, even when neither have any relationship to one another and the projects or representations pose no formal conflicts of interest in the sense of professional responsibility? What kinds of conflicts might arise, if any, and how might such concurrent representations adversely affect each other? What criteria should govern those choices? Clinical faculty need to ensure that the clients, partners and issues chosen for projects present students with a coherent understanding of the role that IHL plays in contemporary conflict, which may enable the creation of a diverse docket of projects. However, a faculty member who wants to focus on one particular aspect of IHL enforcement – such as war crimes defence work, fact-finding and reporting in conflicts, prosecutorial support or policy advocacy – will avoid knotty conflicts within the docket and will merely need to identify other ways to bring into the classroom the full set of IHL work.

Another component of the choice of partner organizations and clients involves how broadly to extend the work of an IHL clinic. The Emory IHL Clinic provides assistance to a number of organizations whose primary work is not directly IHL but is rather more tangentially related, such as the UN Committee against Torture, the Special Tribunal for Lebanon or the PILPG High Level Working Group on Piracy. Determining how and when that relationship with IHL is an appropriate one for an IHL-centred clinic can be a challenging process. The Emory IHL Clinic's work with these organizations fits directly into the pedagogical goal of giving students an opportunity to do real-world international lawyering. In many ways, therefore, the Clinic's overall parameters are to work with organizations that are engaged directly with issues related to international law and armed conflict. These parameters naturally encompass many issues of human rights, *jus ad bellum*, national security law, criminal law and other topics. These "expanded" relationships or projects give students an opportunity to learn how IHL or similarly focused bodies also have to incorporate other legal regimes into their work and address a host of "mundane" legal issues. For example, the Emory IHL Clinic's work for the Special Tribunal for Lebanon has involved fair trial rights and evidentiary issues, which may not be issues that students first think of when they envision working in an IHL clinic. However, these projects enable students to see the many layers of law involved in enforcing international law, and how they interrelate; indeed, foundational rule of law and criminal law issues are central to the practice of all of the international criminal tribunals. Similarly, as noted above, one important aspect of IHL lawyering is being able to identify when IHL does not apply or is not the appropriate legal framework; projects that operate on the "fringe" of IHL provide exactly that opportunity.

## Promoters of human rights

For many years, scholars and lawyers in and out of government have been discussing the extent to which IHL is a *lex specialis* and displaces, or otherwise offers different norms than, human rights law. Some clinics may seek to apply IHL norms in human rights contexts (regional courts and commissions, for instance). For example, issues related to Guantanamo have arisen in the context

of the Human Rights Council, the Human Rights Committee of the International Covenant on Civil and Political Rights, the Committee against Torture, the Inter-American Commission for Human Rights and other human rights-oriented institutions. The location of such claims forces students and faculty to think through how a body of law that developed outside the human rights framework can be interpreted and applied by human rights institutions. One challenge for a clinic is to consider whether to help advance the development of IHL in human rights bodies or to resist that trend. In practical terms, it is probably an unstoppable trend, so the question for the committed IHL clinician may not be whether but rather how to engage with it.

### Promoters of accountability

A final conception of the IHL lawyer here may be as a promoter of accountability. The accountability model would put grave breaches and the enforcement of IHL norms at the centre of a clinical agenda. Without a doubt, accountability is essential to an effective body of law, and a clinical agenda that focuses on accountability offers students many ways to explore how IHL can be enforced, the challenges to effective enforcement and the limits of accountability mechanisms. At the same time, however, IHL is about far more than accountability – so the accountability-focused clinician should think about how to ensure that students gain access to the broader picture of IHL dissemination and implementation.

An accountability-focused clinic triggers valuable conversations around the notions of legal and political or moral responsibility. Presently, for instance, there is considerable debate over a series of acquittals in the ICTY.<sup>38</sup> It may be that these officials deserved acquittals – that is for a separate debate – but the legal notion of acquittal does not equate with a lack of other forms of responsibility. It may be that the officials committed acts or omitted to take action that led to (or were themselves) violations of IHL, but not subject to prosecution or simply difficult to investigate or prosecute. Or officials may create governmental systems that fail to restrain violations of IHL, and yet such systems may not present individuals amenable to prosecution. The trouble with a clinical programme focused solely on investigations and prosecutions in domestic or international courts is that it may inadvertently neglect these broader questions about the structure of IHL compliance.<sup>39</sup> In that case, faculty should ensure that students see the broader picture of compliance beyond prosecution.

38 ICTY, *Prosecutor v. Ante Gotovina and Mladen Markač*, Case No. IT-06-90-A, 16 November 2012, and *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-A, 28 February 2013.

39 As an example of the challenges posed by bringing the operational realities of armed conflict into the courtroom, see the report published by the Emory IHL Clinic on the discussions at an experts' roundtable on the *Prosecutor v. Ante Gotovina* case before the ICTY: Emory IHL Clinic, *Operational Law Experts Roundtable on the Gotovina Judgment: Military Operations, Battlefield Reality and the Judgment's Impact on Effective Implementation and Enforcement of International Humanitarian Law*, 2012, available at: [www.law.emory.edu/fileadmin/NEWWEBSITE/Centers\\_Clinics/IHLC/Gotovina\\_Meeting\\_Report.pdf](http://www.law.emory.edu/fileadmin/NEWWEBSITE/Centers_Clinics/IHLC/Gotovina_Meeting_Report.pdf).

## Conclusion

IHL is a well-established field, with its roots in nineteenth-century lawmaking. But it is also a dynamic field, expanded by the addition of international and domestic fora for accountability and advocacy. With the pace of technological development, it will remain that way going forward. Its central legal norms are found in the 1949 Geneva Conventions and their 1977 Additional Protocols, and a series of other codifications in areas such as cultural property, conventional weapons and torture, for example, have expanded the reach of the law since the 1970s. International criminal law itself, with roots in Nuremberg and Geneva, nonetheless has only become a major field of practice since the middle of the 1990s. All of this simply highlights a basic fact about IHL: it continues to develop by virtue of court interpretations, customary international law, advocacy and even negotiations in related areas. A steadily growing list of actors is deeply engaged in enforcement, advocacy, education, policy-making, training, implementation and legal interpretation of IHL. A mere glance at the major newspapers on any given day points to an array of issues that invoke or touch on IHL in some way.

It is this very dynamism and vulnerability that makes IHL such a worthwhile choice for clinicians, giving students the opportunity to see first-hand that law is malleable, constantly interpreted, and subject to debate and controversy – and perhaps most importantly, to see that they can engage with its norms and institutions and play a part, if only a small one, in helping to promote and even shape it. The two clinics discussed here offer robust mechanisms for IHL clinical work and for the students engaged in such work to participate directly in pursuit of the goal in Article 1 common to the four Geneva Conventions of 1949: “to respect and to ensure respect [for IHL] in all circumstances”.

## OPINION NOTE

# Australian Red Cross leadership in the promotion of international humanitarian law

**Tim McCormack\***

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*Editor's note: In this Opinion Note, Tim McCormack highlights the Australian experience of setting up and developing an IHL programme domestically as an*

\* The author gratefully acknowledges the insightful comments of Madeleine Summers and Natalia Jevglevskaja on an earlier draft of this article and thanks Vincent Bernard and Mariya Nikolova for their gentle but persuasive urging both to reflect on and to articulate lessons learned from the Australian Red Cross experience. Helen Durham was inextricably linked to so much described here, and the author was privileged to work with her so closely for so many years.



*example of how IHL can be disseminated and promoted at the national level. The Australian experience is a great success story and can serve as an example for others seeking to do the same.*

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## **An intriguing set of numbers**

For many years, the Australian Red Cross has enjoyed a reputation throughout the Red Cross and Red Crescent world as a leading National Society in the promotion of understanding of and respect for international humanitarian law (IHL). That reputation has not previously been tested in any scientific or objectively quantifiable way. Anyone so minded could perhaps have devised objective assessment criteria – such as *per capita* (or even overall amount) dollar value of resources allocated to salaries of National Society IHL officers and programmes, numbers of participants in training programmes or at public conferences and seminars, or local media coverage of IHL issues in reportage from conflict situations – and subsequently undertaken empirical research to confirm the assertions. Instead, representatives of other National Societies and International Committee of the Red Cross (ICRC) and International Federation of Red Cross and Red Crescent Societies (IFRC) officials and delegates have made their own observations, and the reputation has grown accordingly.

More recently, the *International Review of the Red Cross* has happened upon data prompting intrigue and concomitant enquiry.<sup>1</sup> Ever since Cambridge University Press (CUP) took over publication of the *Review* in 2011, statistics have been compiled on the number and location of hits to the *Review* website and of downloads of *Review* articles. A staggering picture emerges. By far the overwhelming number of hits and downloads emanate from “Down Under”. It might be assumed that this refers to *per capita* views, but no – the figures reveal that there are many more total views of articles from within Australia than from within any other country.<sup>2</sup>

This is a remarkable fact because despite the vast size of *terra australis* – at 7,682,300 square kilometres, the sixth-largest country on earth – the population of Australia is estimated at just over 23,700,000, meaning that there are forty-nine more populous countries on earth.<sup>3</sup> Australia has a total of thirty-six law schools – some would say more than the country needs – but that number is

1 Information provided by the editorial team of the *International Review of the Red Cross*.

2 Out of the top twenty institutional users of the site, between 2011 and the end of July 2014, over 23% of full-text views (ie., views of the articles in full) came from Australian universities. From January to July 2014, over 24% of abstract views came from Australian universities, while over 20% of full-text views by frequent institutional users during that period came from Australian universities.

3 Statistics available at: [www.worldatlas.com/aatlas/populations/ctypopls.htm](http://www.worldatlas.com/aatlas/populations/ctypopls.htm) (all internet references were accessed in April 2015).

dwarfed by the United States, for example, which has 203 law schools accredited by the American Bar Association to deliver and confer the first degree in law (JD) and many additional US law schools accredited by their respective State jurisdictions and/or offering distance learning courses online.

CUP's statistics beg the obvious question: what on earth is going on Down Under to generate such interest in IHL? The following observations may offer some lessons to be learned from the Australian national experience for different national contexts.

CUP statistics are, of course, most readily explicable by reference to a formidable Australian Red Cross IHL programme which is truly national and involves actively engaged audiences from Darwin in the far north to Hobart in the deep south and from Perth in the west to Melbourne, Sydney and Brisbane on the eastern seaboard. But there is a deeper story here about the receptivity of Australian audiences to the notion of legal constraints in war. Any failure to identify and acknowledge the sources of that national intrigue misses a crucial part of the story. The argument here is that the spectacular achievements of recent Australian Red Cross IHL initiatives have been possible because of a strong cultural commitment to humanity in war in Australia.

## **Australia's strong foundation of humanity in war**

The German invasion of Belgium and the massing of German troops on the French border on 4 August 1914 provoked the United Kingdom to formally declare war. Instantly, that declaration ensured that Australia and the other British Dominions (principally Canada, New Zealand and South Africa) were also at war. There was an overwhelming outpouring of loyalty and support for the British Empire in Australia as literally tens of thousands of young men rushed to enlist. Far from resenting being dragged into someone else's war on the other side of the world, Australians' enthusiasm for Empire obviated the need for conscription. Altogether 416,809 young men from a total population of just over 4.5 million volunteered to fight, and of those, 324,000 were deployed to serve overseas. That remarkable figure represented just under 40% of all eligible males between the ages of 16 and 45 in the nation.<sup>4</sup>

This enthusiasm for Empire is not part of the experience of recent Australian generations. Despite retention of the British monarch as Australia's constitutional Head of State, Australia's economic and strategic interests now lie very much in Asia – its geographic region of the world – just as the United Kingdom's lie in Europe. In 1914, however, Australia was just a fledgling nation, by then still only 13 years old. For 113 years (1788–1901) following the arrival of the First Fleet into Port Jackson (now Sydney Harbour), the establishment of the penal colony of New South Wales and the dispossession of Australia's indigenous peoples of the land they had nurtured for millennia, the states and territories

4 Australian War Memorial statistics are available at: [www.awm.gov.au/atwar/ww1/](http://www.awm.gov.au/atwar/ww1/).

which now constitute the federal nation of Australia were independent colonies of the British Empire.

World War I was unique for Australia because it was the first war following independent nationhood in which Australian servicemen fought as a distinct Australian force. Australia's most significant national day of commemoration for its war dead is 25 April, the anniversary of the landing of the Australian and New Zealand Army Corps (ANZAC) at Gaba Tepe (now known as Anzac Cove) at Gallipoli in the Dardanelles.

The military campaign at Gallipoli was a disaster, resulting in thousands of deaths and a humiliating withdrawal of all Allied forces. Despite this dubious basis for commemoration, Australians flock to dawn services around our own nation and also, in growing numbers annually, at Anzac Cove in Turkey to remember the dead. Concurrently with our collective commemoration, we also celebrate not the military defeat but the coming of age of our fledgling nation expressed through our very own (with New Zealand) fighting force.

War is prominent in the Australian national consciousness, and the Australian Defence Force (ADF) enjoys strong societal support. Australia's military has operated at a relatively high tempo of overseas deployment for many years, and the country venerates its war veterans. During Australia's military engagement in Afghanistan, for example, the Victoria Cross, Australia's highest award for military valour, has been awarded four times to ADF personnel, and all four recipients have been lauded by Australian society.<sup>5</sup> But here is an intriguing reality: neither these modern-day warriors nor their predecessors are Australia's iconic national military heroes.

The truly iconic Australian military heroes are all humanitarians: from World War I, a stretcher bearer from the Gallipoli Campaign who, wearing a Red Cross armband, carried wounded combatants down off the escarpments, often under fire, on a donkey;<sup>6</sup> from World War II, a military surgeon whose leadership inspired many Allied prisoners of war to cling to life during the brutality of forced labour on the construction of the Thailand–Burma Railway;<sup>7</sup> from the more recent 1999 intervention to stop atrocities in East Timor, the then two-star Australian commander of the International Force East Timor (INTERFET) coalition of forces who attained cult-hero status in Australia for the humanitarian effort and was promoted to the positions of chief of the Army and then chief of the Defence Force, and who is currently the governor-general of Australia.<sup>8</sup>

As this demonstrates, Australians are admiring of humanity in war, and an accompanying expectation that their own armed forces fight hard but fairly has

5 Australian Army, "Victoria Cross", available at: [www.army.gov.au/Our-history/Traditions/Victoria-Cross](http://www.army.gov.au/Our-history/Traditions/Victoria-Cross).

6 See Australian War Memorial, "Private John Simpson Kirkpatrick", available at: [www.awm.gov.au/people/P10675912/](http://www.awm.gov.au/people/P10675912/).

7 See Australian War Memorial, "Biographical Note: Sir (Ernest) Edward 'Weary' Dunlap", available at: [www.awm.gov.au/encyclopedia/dunlop/bio/](http://www.awm.gov.au/encyclopedia/dunlop/bio/).

8 See Australian War Memorial, "Major General Peter John Cosgrove", available at: [www.awm.gov.au/people/P10676762/#biography](http://www.awm.gov.au/people/P10676762/#biography).

made it much easier for the Australian Red Cross to develop a highly successful IHL programme.

## The foundation of the Australian Red Cross

The outbreak of World War I provided the catalyst for the establishment of the Australian Red Cross. The entire population was committed to the war effort, and although only young men were eligible to enlist to fight, there were many other ways to contribute to the war effort. The spouse of Australia's sixth governor-general, Lady Helen Munro-Ferguson,<sup>9</sup> was perfectly suited for the task. She had been a founding committee member of the Scottish Red Cross (established in 1905) and founding president of the Fife Branch<sup>10</sup> – the biggest Red Cross branch in Scotland. She was also intelligent, industrious, efficient and enthusiastic. Cometh the hour, cometh the woman.

Lady Helen published a letter in all major Australian newspapers on 8 August 1914 calling for the establishment of an Australian branch of the British Red Cross and urging her vice-regal spousal colleagues around the country to establish local chapters in each state and territory. On 13 August 1914, Lady Helen hosted the first meeting of the new entity at Government House in Melbourne, and other meetings around the country occurred in the following days. The response was immediate and overwhelming. Literally thousands of women around the nation formed local chapters of the Australian Red Cross, raised funds and made essential items for shipment to Australian forces on the front lines – in Palestine, in the Dardanelles and on the Western Front. Melanie Oppenheimer's excellent centenary history of the Australian Red Cross reveals a prodigious cottage industry as the women of the 108 local chapters across northern Tasmania alone hand-produced in excess of 40,000 items of clothing, blankets and bandages in the ten months to July 1915.<sup>11</sup> Lady Helen transformed the Grand Ballroom of Government House in Melbourne into a gargantuan Red Cross warehouse as hand-made goods flooded in from around the nation. And it was not just hand-made items. During the more than four years of the Great War, Australians donated a staggering £14 million – the equivalent amount in real terms in 2014 of more than AU\$1.5 billion.<sup>12</sup>

9 Lady Helen Hermione Blackwood was the eldest daughter and second child of Lord Dufferin (later the first Marquis of Dufferin and Ava), a professional diplomat who served in a number of senior posts including as Viceroy of India (1884–1888). Lady Helen married Sir Ronald Munro-Ferguson, who was appointed sixth governor general of Australia in 1914. For more detailed information, see Melanie Oppenheimer, "Lady Helen Munro-Ferguson and the Australian Red Cross: Vice-Regal Leader and Internationalist in the early Twentieth Century", *Founders, Firsts and Feminists: Women Leaders in Twentieth Century Australia*, eScholarship Research Centre, University of Melbourne, 2011, available at: [www.womenaustralia.info/leaders/fff/pdfs/ferguson.pdf](http://www.womenaustralia.info/leaders/fff/pdfs/ferguson.pdf).

10 Sir Ronald and Lady Helen Munro-Ferguson's home was in Kircaldy, Fife, Scotland.

11 Melanie Oppenheimer, *The Power of Humanity: 100 Years of Australian Red Cross*, HarperCollins Australia, Sydney, 2014, p. 44, Table 21.

12 Using the Reserve Bank of Australia's Pre-Decimal Inflation Calculator, available at: [www.rba.gov.au/calculator/annualPreDecimal.html](http://www.rba.gov.au/calculator/annualPreDecimal.html). On an equivalent *per capita* basis, today's Australian population of just under 24 million would need to donate almost AU\$8 billion to match the generosity of the

The Australian Red Cross, like earlier entities within the emerging global Red Cross and Red Crescent Movement, was born in war and had a ubiquitous presence throughout that first global conflagration. But this, for Australia, was no ordinary war. The human toll was staggering, wiping out a substantial proportion of an entire generation of Australian men. Every town, village and hamlet across the nation has a cenotaph or a memorial board bearing the names of young men who paid with their lives. Of the 324,000 who deployed overseas, over 60,000 were killed and another 156,000 returned home injured.<sup>13</sup> The chance of returning to Australia whole-bodied was less than three in ten, and those figures do not include post-traumatic stress or other mental suffering.

### Australian Red Cross leadership in IHL

In the lead-up to the Diplomatic Conference in Geneva from 1974 to 1977, the government invited the Australian Red Cross to send a representative as a member of the Australian Delegation to the Conference. The then deputy secretary general of the Australian Red Cross, Noreen Minogue, subsequently a recipient of the Henry Dunant Medal,<sup>14</sup> attended every session of the Conference on behalf of the National Society. The Australian Red Cross Archives have custody of all Minogue's correspondence with the National Society during the Diplomatic Conference.<sup>15</sup> She understood the significance of her involvement in the Conference on behalf of the Australian Red Cross and, every evening following proceedings, she audio-recorded her reflections on the day's developments, a remarkable personal record of participation.

Minogue understood perfectly that IHL was a distinguishing feature of the Red Cross and Red Crescent Movement and saw clearly that the relationship between the Australian Red Cross and the Australian government on IHL set the National Society apart from other Australian humanitarian organizations. Consequently, she pushed hard on multiple fronts to ensure that Australian Red Cross took its duty to disseminate IHL seriously.

Following the conference, Minogue wasted no time transferring momentum from Geneva back to the Australian Red Cross National Headquarters in Melbourne. The contrast with Canberra, where the intended ratification of Australian signature of both Additional Protocols stalled and was not finally executed until 1991, could hardly have been more stark. Minogue's first initiative in 1978 was the establishment of a National Advisory Committee on International Humanitarian Law with relevant Commonwealth government agencies, principally the Foreign Ministry and the Attorney General's

Australian people during the Great War of 1914–1918. (Australia's population today is 5.33 times the 1914 population of 4.5 million; AU\$1.5 billion  $\times$  5.33 = AU\$7.995 billion.)

13 Australian War Memorial statistics available at: [www.awm.gov.au/atwar/ww1/](http://www.awm.gov.au/atwar/ww1/).

14 See ICRC, "Henry Dunant medals awarded", News Release, 30 November 2003, available at: [www.icrc.org/eng/resources/documents/misc/5ttb2c.htm](http://www.icrc.org/eng/resources/documents/misc/5ttb2c.htm).

15 For more information on the Australian Red Cross Heritage Collection, see its website at: [www.redcross.org.au/heritage-collection.aspx](http://www.redcross.org.au/heritage-collection.aspx).

Department. The Australian Red Cross claims to have been the first National Society to establish such a committee and, thirty-seven years later, that Committee continues to function. Protracted continuous existence is no guarantee of productivity or efficacy, but the Committee has been profoundly influential on Australian government policy-making on IHL-related issues.

## Establishment of the Australian IHL Committee

The structure of the Australian Red Cross reflected the political arrangements of the Australian nation – a Division in each of the eight states and territories, with a single National Office. Those original eight Divisions continue to this day, but one key difference between the structure of the Australian government and that of the Australian Red Cross for the first ninety years was that revenue raising and control of finances lay with the Red Cross Divisions rather than with the National Office – and so ultimate decision-making authority lay with the Divisions. Noreen Minogue oversaw the establishment of IHL advisory committees in every state and territory, in addition to the National IHL Committee – the latter to liaise with the Commonwealth government while the Divisional Committees had responsibility of disseminating IHL within their own jurisdictions. That structure hardly made for the smooth development of a coherent national strategy for dissemination, as Divisions had their own priorities for target audiences, but it was a great foundation on which to subsequently build.

Divisional IHL committees all had uniformed ADF legal officers as members, as well as a mix of academics, teachers, medical professionals and legal practitioners. All Divisions employed IHL officers to assist their committees and to run IHL programmes and activities.

This author first served as a volunteer member of the National Advisory Committee on IHL in 1991. The Committee, working with both the secretary general and the deputy secretary general, had just successfully convinced the Australian government to ratify the two Additional Protocols – the first of a succession of concerted efforts to ensure our government committed itself to new IHL treaties as and when they were concluded and opened for signature. It was a great time to become involved in the IHL work of the Australian Red Cross.

## **The Australian Red Cross Chair of International Humanitarian Law at the University of Melbourne**

### Establishment

In 1995, the Victorian Division of the Australian Red Cross engaged external consultants to review the work of the Division and to make recommendations for greater efficacy. In relation to the IHL programme, the consultants identified IHL as a distinguishing feature of the Australian Red Cross – setting it apart from other humanitarian organizations – but the popular view of the Red Cross was of

the blood service, first-aid training, disaster relief and restoring family links. The consultants recommended that the Victorian divisional executive consider strategies for raising the public profile of the centrality of IHL to the work of the Division.

Although the consultants made no specific suggestions, the executive of the Victorian Division resolved to approach a university within the state of Victoria to discuss the possibility of either establishing a new “Chair of IHL” or an academic centre for the study of IHL. The executive reviewed the subject offerings of the various Victorian law schools and determined that Melbourne Law School had the strongest range of offerings in international law.

In the Australian tertiary education sector, not-for-profit organizations such as the Australian Red Cross do not walk into deans’ offices offering to establish new chairs on a regular basis. In 1995, Melbourne Law School had two other externally funded chairs – one in taxation law and the other in company law. The opportunity to develop a teaching and research programme to promote understanding of and respect for IHL was thoroughly appealing. So it happened that the Chair was established, applications were invited, and short-listed candidates were identified and interviewed. This author had the enormous privilege of being appointed the foundation Australian Red Cross professor of international humanitarian law, and occupied this position until appointed special adviser on international humanitarian law to the prosecutor of the International Criminal Court (ICC) in The Hague in March 2010.

The timing of the establishment of the Chair was highly propitious. The decisions of the UN Security Council to establish the International Criminal Tribunals for the former Yugoslavia (ICTY) in 1993 and Rwanda (ICTR) in 1994 acted as a major catalyst for the “mainstreaming” of IHL. For decades prior, IHL tended to be seen as a somewhat esoteric stream of public international law – the exclusive preserve of the global Red Cross and Red Crescent Movement, uniformed military lawyers and just a handful of interested academics. The prevalent popular view of IHL had been that it was honoured more in the breach than in the observance – that violations of the law were commonplace in armed conflict and impunity reigned supreme. The creation of the *ad hoc* international criminal tribunals challenged the prevailing orthodoxy. Individuals, at least from the Balkans and from Rwanda, faced the possibility of being held accountable for alleged violations of the law.<sup>16</sup> In Australia, as elsewhere in the world, there was an increasing appetite for knowledge of IHL.

In addition to global developments, other Australian-domestic factors were at play at the time of the creation of the Chair. Following the Australian government’s ratification in 1991 of the Additional Protocols of 1977,<sup>17</sup> the ADF was tasked with implementation of the obligation in Article 82 of Additional

16 For more on the flow-on effect of this changing reality, see, for example, Tim McCormack, “The Contribution of the International Criminal Court to Increasing Respect for International Humanitarian Law”, *University of Tasmania Law Review*, Vol. 27, No. 1, 2009, pp. 22–46.

17 See Australia in ICRC, “Treaties and States Parties to Such Treaties”, Database, available at: [www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp\\_countrySelected=AU](http://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=AU).



Protocol I (AP I) that legal advisers be available to advise military commanders, and so the policy decision was taken to deploy a uniformed legal officer to advise the commanding officer of every ADF contingent – those deployed overseas as well as those based in Australia. The ADF Legal Service (ADFLS) found it essential to significantly increase training of its officers in military operations law, which includes IHL.<sup>18</sup> In an era of ADF commitment to increasing competence in IHL, the Australian Red Cross could not hope to maintain its subject matter expertise in the field without also up-skilling its own IHL officers.

It was agreed explicitly between the parties that the new professor would establish an IHL teaching and research programme as an employee of the University of Melbourne, with academic freedom to pursue research interests without the Australian Red Cross dictating the work agenda. That agreement was important in principle, but in reality the work of the Chair was very much linked to advancing Australian Red Cross IHL-related interests.

## Achievements since the establishment of the Chair

### *Developing a specialist teaching programme in IHL*

One of the first initiatives following the creation of the Chair was the development of a graduate coursework specialization in IHL, first taught in the Melbourne Law master's programme in 1997. The subject was oversubscribed on that first offering and has continued to attract excellent numbers in each successive year since; it was taught for the eighteenth consecutive year in 2014. More than 450 graduate students have now completed the subject at Melbourne Law School, and that, in and of itself, is a significant development in terms of the resultant increase in the sophistication of understanding and awareness of IHL in Australia (and in several other countries from which graduate students have come). Prior to the introduction of IHL into the Melbourne Law master's, only two other Australian law schools offered an IHL course. Now, at least eighteen Australian law schools teach the subject as an optional course in either undergraduate or graduate programs.<sup>19</sup> The tertiary education sector in Australia, as with many other countries, is competitive, and the success of the IHL programme at Melbourne Law School did not go unnoticed.

After the initial success of the coursework subject, several stand-alone complementary subjects in the master's programme were gradually introduced: international criminal law; international human rights law; law of the sea and national security; law of peace operations; weapons, health and law; women and war; international law and the use of force; arms control and disarmament; maritime security law; and prosecuting the war on terror. As a consequence of

18 The ADF Military Law Centre was established in 2000 to oversee the specialist graduate training of ADF legal officers in core subject areas including military operations law, and training has continued since then. More information is available at: [www.defence.gov.au/legal/mlc.html#jolt](http://www.defence.gov.au/legal/mlc.html#jolt).

19 This author teaches IHL every second year at the University of Tasmania Law School's summer school in Hobart, for example.

this growth in the range of subject offerings, it is now possible for graduate students to undertake a graduate diploma or a master's degree exclusively in the general area of IHL at Melbourne Law School. That level of specialization is rare, in Australia and elsewhere in the world.

Without the initiative to establish the Chair, the IHL programme at Melbourne would certainly not have developed to quite the same extent. Here there are clear examples of synergistic benefits – students are attracted to the course in the first place because the faculty is seen to be taking the area of law seriously by establishing a Chair in the field. Student numbers have increased, and it has become feasible to increase the range of subjects to the level of a full specialization. Were it not for the establishment of the Chair, IHL would likely not be taught in as many Australian law schools as is currently the case.

In the late 1990s, as a consequence of the large number of ADF officers enrolled in IHL and related subjects, the ADFLS entered into discussions with the law school to develop a tailor-made graduate coursework programme in military law for the professional development of ADF legal officers. ADFLS staff were impressed with the relevance of the existing subjects on offer at Melbourne, the positive feedback from their own officers enrolled in the existing programme and the flexibility inherent in the intensive mode of delivery. From 2000 to 2006, all ADF legal officers – regular and reserve – were required to enrol in either a graduate diploma or a master's of military law at Melbourne. That specialist programme continues to this day through the Australian National University College of Law in Canberra.<sup>20</sup> IHL is an integral component of military operations law, and through this programme ADF legal officer training in IHL is now undertaken more systematically than at any earlier stage in the history of the ADF. This historic development emerged from a unique confluence of events – the establishment of the Chair of IHL (and the subsequent development of specialist master's courses in IHL and related subjects) coinciding with the implementation of Article 82 of AP I through the assignment of ADF uniformed legal officers on all military bases in Australia and also on all ADF deployments overseas. Increasing ADF operational tempo – in Somalia and Rwanda in the early 1990s, through the lead role in INTERFET in 1999 and in Iraq and Afghanistan in the early 2000s – only emphasized the importance of specialist training of ADF legal officers.

### *Establishment of a research programme in IHL*

Early in the tenure of the Chair, it was considered important to develop a critical mass of research higher degree (RHD) work in IHL and related fields of study. The level of interest in RHD work in IHL was commensurate with the enthusiasm for specialist graduate coursework in the field, and that level of interest has never abated. As recently as 2007, the IHL professor was supervising fifteen RHD students (PhD, SJD and LLM by thesis), almost all working in the

20 More information available at: <http://law.anu.edu.au/masters-program/military-law-program>.

field of IHL. That number of RHD supervisions was wholly unsustainable and will never be repeated – in part because those fifteen RHD students included Melbourne Law School colleagues (particularly Alison Duxbury, Bruce Oswald and Rain Liivoja) who, having completed their own PhDs, are now in a position to supervise students in their own right.

Since 1996, the Chair has supervised twenty-three RHD students to successful completion of their degrees, and it is currently supervising an additional nine PhD students. This group of enthusiastic and productive students undoubtedly constitutes the largest concentration of RHD work in IHL in Australia and, possibly, one of the largest groups in the world. There is no diminution of interest in RHD work in the field of IHL. The decision to establish the Australian Red Cross Chair of IHL sent a clear message that IHL was considered a serious field of academic study at Melbourne Law School, and the sheer number of RHD students engaged in IHL confirms just how enthusiastically that message was received.

The motivation to develop an IHL research programme was never only about attracting RHD students to Melbourne Law School. Another goal was to attract a core group of scholars and for our collective research efforts to have a positive impact in Australia and abroad. One initiative was to establish the world's first English-language IHL book series (jointly with His Excellency Judge Sir Christopher Greenwood), published by Kluwer Law International in The Hague in 1999 and, subsequent to the sale of Kluwer Law International to Brill, under the Martinus Nijhoff imprint in Leiden.<sup>21</sup> At the time of writing, the series has published forty-six volumes and has several others in press. This author was also appointed an inaugural advisory board member of the Asser Instituut's *Yearbook of International Humanitarian Law* in The Hague and served as editor-in-chief from 2003 to 2009. Other Australian IHL scholars also rose to prominence. Dr Helen Durham was appointed to the international editorial advisory board of the *International Review of the Red Cross* in 2011 and remained in that position until her appointment as ICRC director of international law and policy. Associate Professor Alison Duxbury, Associate Professor Bruce Oswald and Dr Rain Liivoja have also developed their own international reputations for scholarship in the field of IHL and have each enhanced the intellectual environment at Melbourne Law School.

In Australia, the development of IHL research capability at Melbourne Law School under the imprimatur of the Australian Red Cross rendered it a straightforward choice for the commissioning of ICRC research projects. For example, this author managed the Australian national report for the ICRC Customary IHL Study and Helen Durham managed an ICRC project in the South Pacific on culturally relevant constraints on the waging of war. A number of ground-breaking IHL publications have emerged from Melbourne on topics including women and war, the law of peace operations, the law of targeting,

21 Details of the volumes in the IHL Series are available at: [www.brill.com/publications/international-humanitarian-law-series](http://www.brill.com/publications/international-humanitarian-law-series).

military justice and the Tokyo War Crimes Trial.<sup>22</sup> There is currently a research team finalizing publication of a comprehensive and systematic law reports series for all 300 of Australia's war crimes trials of Japanese nationals, conducted in eight separate trial locations between 1945 and 1951.<sup>23</sup>

### *Influencing Australian government policy on IHL-related matters*

The appointment of a professor of IHL working closely with the Australian Red Cross IHL department exerted greater influence over Australian government IHL-related policy than may otherwise have been the case. Two examples substantiate this assertion: the decision to ratify the Rome Statute of the ICC, and the decision to ratify the Ottawa Convention on Anti-Personnel Landmines.

In May 1998, on the eve of the Rome Diplomatic Conference for the negotiation of the Statute for the ICC, the Australian Red Cross, in conjunction with the ICRC and the Australian government, organized a regional inter-governmental meeting to discuss both the concept and the desirability of a permanent international criminal court. Representatives from twenty-three Asia-Pacific States attended the meeting, and the then prosecutor of the ICTY and ICTR, Louise Arbour, travelled from The Hague to speak in support of the new court. At the time, the ICRC indicated that this was the first occasion on which it had organized an inter-governmental meeting jointly with the Australian government, and it proved to be an important initiative. Both the then foreign minister Alexander Downer and the then attorney general Daryl Williams participated in the meeting and became more aware of the proposal for a permanent international criminal court as a consequence.

In July 1998, at the conclusion of the Rome Diplomatic Conference and the opening for signature of the Rome Statute of the ICC, Downer and Williams issued a joint press release indicating their commitment to Australian participation in the Rome Statute<sup>24</sup> – a position applauded by the Australian Red Cross at the time. The two ministers never wavered from this original position, and Australia would

22 See Helen Durham and Tracey Gurd (eds), *Listening to the Silences: Women and War*, Martinus Nijhoff, Leiden and Boston, MA, 2005; Bruce Oswald, Helen Durham and Adrian Bates (eds), *Documents on the Law of UN Peace Operations*, Oxford University Press, Oxford, 2010; Ian Henderson, *The Contemporary Law of Targeting*, Martinus Nijhoff, Leiden and Boston, MA, 2009; Alison Duxbury and Mathew Groves (eds), *Military Justice in the Modern Age*, Cambridge University Press, Cambridge, forthcoming 2015; Yuki Tanaka, Tim McCormack and Gerry Simpson (eds), *Beyond Victor's Justice? The Tokyo Trial Revisited*, Martinus Nijhoff, Leiden and Boston, MA, 2011 (also translated and published in Japanese by Otsuki Shoten, 2013, and currently in translation for publication in Chinese).

23 Very little has been published about these trials and they remain virtually unknown in Australia, let alone elsewhere, despite the fact that the trial transcripts are accessible through the National Archives of Australia. This project has been undertaken with Australian Research Council funding in collaboration with the Australian War Memorial and with the Legal Division of the Department of Defence. The publication of the report series will render the primary Australian trial material much more accessible and may also inspire colleagues in other Allied nations to undertake similarly comprehensive and systematic studies of their own national post-World War II trials. See <http://apcml.org/post-wwii-war-crimes-trials> for more information.

24 Minister for Foreign Affairs, Attorney General, "Australia Votes for International Criminal Court", Joint Media Release, 18 July 1998, available at: [http://foreignminister.gov.au/releases/1998/fa096a\\_98.html](http://foreignminister.gov.au/releases/1998/fa096a_98.html).

certainly not have become an original State party to the Statute without their joint commitment.

The Report of the Joint Parliamentary Standing Committee on Treaties (JSCOT) on the Rome Statute for the ICC, released in May 2002, unanimously recommended Australian ratification of the Statute. It is well known that under the previous chair of the JSCOT, Andrew Thompson MP, it would not have recommended Australian ratification – at least not unanimously.<sup>25</sup> Suffice it to say that the Australian Red Cross had a profoundly significant role to play in influencing the recommendations to Parliament of the JSCOT,<sup>26</sup> as well as through public advocacy and a concerted media campaign to counter the often heated and regularly misinformed public debate on whether or not Australia should ratify the Statute.

This particular experience still constitutes the most effective example to date of public advocacy by the Australian Red Cross to influence Australian government decision-making on an issue of fundamental importance to IHL. The Australian Red Cross did not engage in public criticism of government policy because the Cabinet had already supported Australian ratification, and the main contribution of this was to shore up support for the government's position – including within the ranks of the government's back bench. The Australian Red Cross remains rightly proud of what was achieved. Importantly, the title of Australian Red Cross professor of IHL lent greater credibility both to submissions before JSCOT and to media representations.

It was relatively well known in the aftermath of the opening for signature of the Ottawa Treaty prohibiting anti-personnel landmines that Washington would have preferred Australia not to ratify the treaty. Consequently, the Federal Cabinet was split on the issue, with support against Australian participation as well as for it. The Australian Red Cross decided not to take a public stand in favour of Australian participation in the light of the Cabinet debate. Instead, it publicly supported the Ottawa Treaty and the comprehensive prohibition on anti-personnel landmines without taking a position on Australian government participation in the treaty and privately campaigned very firmly for Australian

25 The story of how Australia only deposited its instrument of ratification to the Rome Statute at the UN Treaties Secretariat on the morning of 1 July 2002 – the last opportunity for Australia to be counted amongst the original States party to the Statute – is too long and too complicated to be told here. For a detailed account, see The Hon. David Harper, "Australia's Road to Ratification of the International Criminal Court", *International Humanitarian Law Magazine*, Vol. 1, 2014, pp. 26–27.

26 See Joint Standing Committee on Treaties, Parliament of the Commonwealth of Australia, "Report 45: The Statute of the International Criminal Court", May 2002, available at: [www.iccnw.org/documents/AustraliaCCReport45.pdf](http://www.iccnw.org/documents/AustraliaCCReport45.pdf). The JSCOT Report is replete with references to Australian Red Cross submissions to the Committee, both written and oral. Of the eleven recommendations in the JSCOT Report, six are direct adoptions from the wording of Australian Red Cross submissions and an additional two are based on Australian Red Cross submissions. It is impossible to read the Report objectively and miss the significance of Australian Red Cross influence on the JSCOT process. This view was confirmed to me in person by the new chair of the Committee, Julie Bishop (now the Australian foreign minister). After Australian ratification of the Statute was announced, Ms Bishop thanked the author profusely for the contribution that the Australian Red Cross had made to her committee's deliberations.

ratification. This private advocacy involved successive meetings between the then secretary general of the Australian Red Cross and the relevant government ministers. The Australian Red Cross also worked very closely with departmental representatives on the National IHL Advisory Committee to present Australian Red Cross views on the importance of Australia's participation in the Ottawa Treaty.

Ultimately, the Australian government chose to disagree with the US government and to ratify the Ottawa Treaty.<sup>27</sup> The Australian Red Cross was informed by several senior government officials that its position and the manner in which it had conducted its campaign in favour of Australian ratification were highly influential in the government decision-making process.

## Beyond domestic IHL outreach

There were lofty ambitions in the establishment of the Chair to influence increased awareness of and respect for IHL beyond Australia in neighbouring geographic regions. No specific strategies were identified in 1996 to achieve this ambition, but several years later an intriguing model emerged. In 2001 Melbourne Law School and the ADFLS jointly established the Asia-Pacific Centre for Military Law.<sup>28</sup> This was a first for both partners – the first time the Law School had established a collaborative centre with a partner external to the University, and the first time Defence Legal had entered into a formal collaborative relationship with an Australian Law School. In this author's view, the establishment of the Centre was the single most significant outcome of the creation of the Australian Red Cross Chair of International Humanitarian Law. The establishment of the Centre created an institutional structure with the potential to open up opportunities for the promotion of IHL in Australia and throughout the Asia-Pacific Region – a structure that the Australian Red Cross could not have created bilaterally with the Department of Defence, but which was facilitated by the establishment of the Chair and the Australian Red Cross's relationship with Melbourne Law School.

The purpose of the Centre is to promote respect for the rule of law in military affairs throughout the South-East Asia and South Pacific regions. This primary purpose has been pursued through various activities in Australia and in-country in the region. The core activity in Australia has involved regional military officers coming to Australia for one- and two-week training courses in, for example, military operations law (with a strong IHL component), the law of peace operations, maritime security law or civil–military cooperation. The Centre has also run conferences and seminars in various locations around the country, sometimes at universities and other times at military bases. Outside of Australia, the Centre has conducted several in-country training programmes (e.g. the Law of Peace Operations in India, Military Law and Ethics in Thailand and the Law of

27 ICRC, above note 17.

28 For more information on the work of the Centre, see its website at: [www.apcml.org](http://www.apcml.org).

Military Operations in the Philippines) and conferences and seminars (e.g. a regional conference on national implementation of the Biological Weapons Convention).

Courses commenced in October 2002 with a two-week training course on military operations law for commanders and planning staff. Throughout that course, uniformed military officers from Indonesia, Malaysia, Singapore, Thailand, the Philippines, Papua New Guinea and Fiji interacted with ADF officers; these individuals encapsulated the realization of the rationale for the establishment of the Centre. Courses continue to this day, and the Centre provides a vehicle for promoting IHL regionally with the cooperation of the ICRC and other organizations. Although the Australian Red Cross and the ADF share a close working relationship already, the Australian Red Cross would be precluded from entering into a formal collaborative arrangement of this kind with the ADF because of the need to maintain neutrality and independence from government. However, the establishment of the Chair at the University of Melbourne enabled the law school to join the ADF legal service in a formal collaboration and to provide a role for the Australian Red Cross in the promotion of IHL among the militaries in the Asia-Pacific region which the Australian Red Cross would otherwise be unable to provide. This particular example exemplifies the facilitative role that the Chair was able to play.

### Melbourne Law School's institutional commitment to IHL

Following the establishment of the Chair, Melbourne Law School prioritized the development of an IHL programme and, consequently, I had the freedom to develop a graduate coursework specialization in IHL and to supervise RHD students in the area of IHL. As already explained, in the course of the development of the IHL programme and the steady increase in the number of students enrolling in IHL and related courses, the law school actively recruited academic personnel with expertise in this area. The appointment of these colleagues has enabled the law school to extend the teaching of IHL into the undergraduate programme, to significantly increase coursework offerings in IHL and related subjects – including, for example, international criminal law; international human rights law; law of the sea and national security; law of peace operations; weapons, health and law; women and war; international law and the use of force; arms control and disarmament; maritime security law; and prosecuting the war on terror – in the graduate teaching programme, and to supervise a greater number of IHL-related PhDs. These colleagues have also dramatically increased the published research output of Melbourne Law School in IHL and have significantly enhanced the national and international reputation of the school in the field.

An institutional commitment of this nature takes years to develop and is a precious asset when it exists. The decision to establish the Australian Red Cross Chair of IHL provided Melbourne Law School with the motivation to take this field of study seriously and to honour the funding commitment of the Australian



Red Cross. It was suggested at one point that the Australian Red Cross Chair of IHL should rotate around various Australian law schools; in this author's opinion, however, any such rotational model would have provided no incentive to a law school to make an institutional commitment to the field and to allocate human and financial resources over a sustained period of time to build up a critical mass of academic colleagues and RHD students.

## Australian Red Cross intellectual leadership in IHL

One additional, albeit unforeseen outcome from the establishment of the Chair has been a demonstrable increase in the Australian Red Cross's intellectual rigour and substantive expertise in IHL. The development of a tertiary specialization in IHL helped expose many of the complexities of the law in this field and set new benchmarks for Australian Red Cross personnel in IHL. It is no coincidence, for example, that since the establishment of the Chair, Helen Durham (then Australian Red Cross national IHL manager) completed her doctorate in IHL, and that when she left the Australian Red Cross to take up her appointment as director of international law and policy at the ICRC, the advertisement for her Australian Red Cross position specified a PhD in IHL as one of the selection criteria. Dr Phoebe Wynn-Pope, the successful applicant for Durham's position, is herself a highly regarded expert on IHL.

This level of expertise is not limited to the most senior IHL position at the Australian Red Cross. At least two Australian Red Cross IHL officers are currently undertaking PhDs in IHL, a number of volunteer members of IHL advisory committees around the nation are either currently undertaking or hold PhDs in IHL, and multiple IHL officers from various Australian Red Cross Divisions have completed their master's degrees in IHL. I am not suggesting here that it is mandatory for all IHL officers to have graduate qualifications in IHL: on the contrary, the Australian Red Cross has some outstanding IHL officers who are not lawyers at all. Much of the dissemination effort calls for effective communication skills rather than academic expertise in the law. However, the key point here is that the Australian Red Cross has been developing a pool of increasing IHL expertise, in part driven by the increasing level of subject matter expertise within the ADF. As a consequence of growing Australian Red Cross expertise, there is increased respect for the organization within the ADF as well as other relevant Australian government agencies, including the Department of Foreign Affairs and Trade and the Attorney General's Department.

By any measure, the development of the Australian Red Cross IHL programme has been a success. The National Society manages a robust and effective national IHL programme and boasts significant subject matter expertise in IHL amongst its staff and volunteer membership. The National Society is also actively engaged with the ADF and all other relevant government agencies and runs a series of high-profile public IHL-related events around the nation on a regular basis. Through the establishment of the Australian Red Cross Chair of IHL, the National Society has also facilitated outreach to the militaries of the

South-East Asia and South Pacific region to an extent and in ways that National Societies could not ordinarily hope to achieve.

In addition to the national and regional contributions of the IHL programme, the Australian Red Cross is also making a globally significant contribution to the development of IHL. In 2014 Dr Durham was appointed ICRC director of international law and policy – the first woman, the first Australian and the first National Society employee to be appointed to that position in the 150 years of the organization’s history. In her new position, Durham will profoundly contribute to the ICRC’s institutional contributions to the development of IHL and the policy decisions the organization takes on key future IHL challenges. In 2010 this author was appointed special adviser on IHL to the prosecutor of the ICC in The Hague to advise on every situation involving questions of the existence or not of an armed conflict, of the legal character of the armed conflict and of alleged war crimes. That these two positions are currently held by incumbents from the same Red Cross National Society, literally on the opposite side of the globe to Geneva and The Hague, is a remarkable contribution.

Helen Durham and this former chair both proudly identify themselves as products of the Australian Red Cross IHL programme. Both of us have enjoyed the privilege of contributing to the development of that programme, and to have done so collaboratively over much of the past twenty years. But the programme itself is bigger than any of the individuals mentioned in this opinion note, however significant their own respective contributions to its development. There is a new generation of Australian Red Cross IHL officers, of Australian IHL scholars and of Australian-based IHL RHD students, and the Australian Red Cross IHL programme continues to develop as a consequence of their respective contributions. Some of those individuals will undoubtedly also constitute part of the Australian Red Cross’s contribution to worldwide IHL expertise in the future.

## Concluding remarks

On a visit to Australia in July 2007, the then prosecutor of the ICC, Luis Moreno Ocampo, spent a day at Melbourne Law School. The school held a roundtable with academic colleagues, RHD students, ADF legal officers, Australian Red Cross IHL officers and representatives of the ICRC. Mr Ocampo repeatedly claimed that he had never witnessed the interaction of all these groups around the subject matter of IHL and enforcement of violations of the law before, and he kept pressing for answers on how this could happen so easily at Melbourne Law School. The prosecutor’s intrigue sparked multiple conversations about the efficacy of the Australian Red Cross IHL programme and the beneficial effects of the establishment of the Chair.

One clear lesson from the Australian experience for other National Societies keen to develop a vibrant IHL programme is the fundamental importance of effective working relationships with those academics specializing in

IHL. Academics with IHL subject matter expertise working closely with National Societies will expose their students to the substantive law as well as to the global Red Cross and Red Crescent Movement. Those same subject matter experts are also likely to raise the intellectual credibility of the National Society and so render interaction with national armed and security forces much more likely. The establishment of a university professorship in IHL by a National Society is not necessarily a prerequisite to enhancing an existing IHL programme.

In Australia's case, however, the establishment of the Chair facilitated an unprecedented level of interest in, and promotion of, the study of IHL. The Australian Red Cross has greater depth in its in-house IHL subject matter expertise than at any previous stage in its 100-year history. More Australian law schools teach IHL, more tertiary students study IHL, more RHD work is undertaken on IHL, and more academics in Australia teach and research in the field of IHL, than at any previous stage in the history of the nation. ADF legal officers are better trained in IHL, and there is more basic training for ADF recruits and more pre-deployment training in IHL for ADF contingents, than at any previous stage in the Australian military's history. Australia is also more actively engaged in IHL outreach – particularly through the militaries of those countries in closest physical proximity – than at any previous stage of its history. Perhaps this experience will provide encouragement and motivation to other National Societies contemplating the development of their own IHL strategies.

# Prevention in practice: Teaching IHL in US legal academia

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## Abstract

*This paper assesses the evolution of teaching international humanitarian law (IHL) in law schools in the United States since 2007, analyzes progress made in overcoming challenges to more effective integration of IHL content in law school curricula, and provides a measure of the contribution of promotional initiatives and strategies undertaken by the International Committee of the Red Cross (ICRC) to this effort. The findings and recommendations should serve to support law faculty and law schools in the US and elsewhere, as well as the ICRC, in expanding opportunities for teaching and scholarship, and in encouraging law students and professors to pursue their interest in this field.*

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**Keywords:** IHL education, IHL teaching, prevention, law school, United States.

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## Introduction

International humanitarian law (IHL), also known as the law of armed conflict (LOAC), the law of war and the *jus in bello*, is a vital source of guidance in shaping US national security policies and practices. Although active US military involvement has ended in Iraq and is coming to a close in Afghanistan, new issues have come to the forefront of public attention in recent years, including targeted killings, the use of unmanned aerial vehicles, and cyber-security. Knowledge of this body of law is an essential element in understanding, and even more in contributing to, the vigorous debates on these topics. Given the pre-eminence of the US as a military power, one would expect that familiarity with the rules of war would be a basic requirement for good citizenship, particularly for lawyers. Although most international law and national security law professors, as well as military lawyers, would strongly agree with this statement, there is no comprehensive study detailing the state of IHL integration in US legal academia. Without such a resource, it is difficult to assess the need for, and challenges facing, the expansion of IHL teaching and scholarship. This is the gap that the current study proposes to fill.

This article updates and complements the 2007 report *Teaching IHL at U.S. Law Schools* (2007 Report),<sup>1</sup> which surveyed law school professors and deans to assess the extent to which IHL was then taught at US law schools and the level of interest in that body of law, and made recommendations to expand such teaching. The 2007 Report found that the faculty who participated in the survey expressed a strong interest in IHL, and were confident that their students shared this feeling, especially with regard to legal issues related to the “global war on terror”. However, administrative constraints often prevented an effective and appropriate integration of IHL within the curriculum. In addition, the 2007 Report showed that IHL was most often taught as a small portion of another course and not as a stand-alone course, indicating that the lack of casebooks, teaching modules and issue-specific resources on IHL at the time was even more detrimental than general administrative constraints to efforts to expand teaching. Finally, the 2007 Report revealed that faculty interest drove the teaching of IHL: law schools offering multiple IHL options were clearly driven by a community of professors able to effectively channel student interest and negotiate administrative barriers. Based on these findings, the 2007 Report made three key recommendations: that IHL teaching resources be developed, that training opportunities be created, and that a faculty network be cultivated. As the present article shows, these recommendations have largely been implemented.

1 ICRC and American University Washington College of Law, *Report: Teaching International Humanitarian Law at U.S. Law Schools*, Washington, DC, 2007, available at: [www.wcl.american.edu/humright/center/ihl\\_report.cfm](http://www.wcl.american.edu/humright/center/ihl_report.cfm).

Seven years later, with new and much more comprehensive data, it is possible to draw solid conclusions on the progress of IHL integration in US legal academia and to chart a course for the future. This article documents tremendous growth in legal scholarship and increased opportunities for student engagement and professional development. It concludes with recommendations for further expanding the community of professors, students and practitioners devoted to exploring this vital area of the law.

The paper presents both quantitative and qualitative data gathered from a variety of sources, compares it to the baseline 2007 Report and analyzes its meaning in the context of today's changing law school environment. The research tools included a lengthy online survey completed by eighty-seven law school professors from eighty-two different law schools, extensive follow-up interviews by phone with twelve of the professors, a database of law school courses and professors, a numerical compilation of journal articles and books published in each of the last seven years, a presentation of new textbooks, teaching modules and other resources, and the International Committee of the Red Cross's (ICRC) own reflections on its prevention policy in the United States.<sup>2</sup> Together, these sources provide the most comprehensive review and resource to date on the state of IHL teaching and scholarship in US legal academia.

The first part of the paper addresses the continuing importance of teaching IHL, both in the United States and globally, as a matter of treaty adherence and as a precondition for effective implementation of international legal obligations. The second part then explains the methodology used for this research, and the relationship between the 2007 Report and the 2012 ICRC–Berkeley *Survey on Teaching IHL at US Law Schools*. The core of the article is found in the third part, which presents and analyzes the major survey findings. It identifies trends over the past seven years, and highlights current opportunities and challenges for what the ICRC calls a “prevention” policy, by comparing the research's results with some of the key external factors that might have served to promote or to discourage teaching of IHL in the United States during this period. The paper then presents findings on the growth of scholarship over the past seven years, and introduces the new textbooks and other resources devoted to teaching IHL. This part concludes with findings regarding student opportunities. Finally, the article ends with some recommendations for action on the part of law schools, legal scholars and the ICRC.

## Why teach international humanitarian law?

Before delving into the details of this study, it is essential that readers first understand – and, hopefully, agree with – the premise that IHL should indeed be

2 For a detailed overview of the ICRC's Prevention Policy, see ICRC, *ICRC Prevention Policy*, Geneva, April 2010, available at: [www.icrc.org/eng/resources/documents/publication/p4019.htm](http://www.icrc.org/eng/resources/documents/publication/p4019.htm). Prevention is discussed in more depth below.

known by the general population. The primary reason – although a legalistic one – is that IHL dissemination is an international obligation. Like every single State in the world, the United States has ratified the four Geneva Conventions of 1949,<sup>3</sup> which encourage them to promote IHL widely:

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population ...<sup>4</sup>

While the obligation to train armed forces in the laws of war is easily understandable,<sup>5</sup> one may wonder why the drafters of the Conventions also insisted on civil instruction. It should be noted that this provision is linked to Article 1 common to the four Geneva Conventions, according to which States have agreed to “respect and ensure respect” for the Conventions. The drafters were convinced of the positive relationship between knowledge and compliance, and would have agreed with Jean Pictet’s statement in the Commentaries that “knowledge of law is an essential condition for its effective application ... man should be made familiar from childhood with the great principles of humanity and civilization, so that they may become deeply rooted in his consciousness”.<sup>6</sup> While one may want to start with general principles of humanity and dignity, which are easier for the layperson to grasp than detailed legal provisions, lawyers are precisely the category of persons who should be familiar with the laws of war. The latter are indeed in a privileged position – and in fact are expected – to apply in good faith and ensure respect for the law.

3 The 1949 Geneva Conventions are indeed universally ratified. The latest State to adhere to them was South Sudan on 23 January 2013. For additional information, see ICRC, *Treaties and States Parties to Such Treaties*, available at: [www.icrc.org/IHL](http://www.icrc.org/IHL).

4 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950), Art. 47; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950), Art. 48; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Art. 127; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Art. 144; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978), Art. 83; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1987), Art. 19.

5 On this particular point, see for instance Daniel Muñoz-Rojas and Jean-Jacques Frésard, “The Roots of Behaviour in War: Understanding and Preventing IHL Violations”, *International Review of the Red Cross*, Vol. 86, No. 853, 2004; Elizabeth Stubbins Bates, “Emerging Voices: Is Dissemination Sufficient to Promote Compliance with International Humanitarian Law?”, *Opinio Juris*, 13 August 2013, available at: <http://opiniojuris.org/2013/08/13/emerging-voices-is-dissemination-sufficient-to-promote-compliance-with-international-humanitarian-law/>. See also ICRC, “Armed Forces: Integration of IHL”, 31 May 2003, available at: <https://www.icrc.org/eng/resources/documents/misc/armed-forces-ihl-integration-310503.htm>.

6 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, pp. 348–349.



It may seem at first glance that IHL is a highly specialized field of knowledge that will matter for only a very limited number of law students. However, many lawyers choose careers that touch on national security and armed conflict, whether in the executive, the judicial or the legislative branches of government, or in non-governmental organizations, academia, think tanks or international organizations. Understanding the practical relevance of IHL and its basic principles is essential for these professionals and should motivate the integration of IHL within law schools' curricula. This becomes even more compelling considering the growing number of law students who aspire to join the military as members of the Judge Advocate General's Corps. That said, the purpose is obviously not to create entire generations of IHL specialists – there is certainly no need and no room for that. But as young lawyers move through their careers, the mere knowledge that an entire body of law exists which governs the most extreme situations – where many still think that no law applies<sup>7</sup> – would already be a huge achievement and would increase the chances of compliance with the law. And if young lawyers also have some understanding of the content of this body of law, the likelihood will be even higher.<sup>8</sup>

Such familiarity with IHL is even more important in a country like the United States, as the last decade and a half has proven. Beyond a mere treaty recommendation, IHL instruction for civilians should indeed be an integral part of the policy strategy of a country that has been fighting on numerous fronts since late 2001. In other words, IHL instruction should be conceived not merely as an additional discipline for already-overburdened law students, but as an integral part of a national prevention strategy, where “prevention” stands for the creation and maintenance of an environment conducive to respect for the law and for human dignity during armed conflict.<sup>9</sup>

Following 9/11, the United States engaged in several armed conflicts, requiring lawyers, decision-makers in all three branches of government, and scholars to struggle with a large number of IHL issues, including its applicability to a given situation; the classification of the conflict; the definition of “non-international armed conflict”; the designation of “combatant”, and by extension, the question of the existence and legality of the category of so-called unlawful combatants; the right to detain; and the legality of certain interrogation techniques. The post-9/11 armed conflicts and continuing terrorist threats have

7 A 2011 American Red Cross survey on IHL showed that 48% of US youth from 12 to 18 years old (and 17% of the adult US population) had never heard of the Geneva Conventions. American Red Cross, *Survey on International Humanitarian Law*, research conducted by ORC International, March 2011, available at: [www.redcross.org/images/MEDIA\\_CustomProductCatalog/m12940087\\_Survey\\_on\\_International\\_Humanitarian\\_Law.pdf](http://www.redcross.org/images/MEDIA_CustomProductCatalog/m12940087_Survey_on_International_Humanitarian_Law.pdf).

8 As noted in an article about the American Red Cross Survey, *ibid.*, “[w]hile people may have become more aware of the Conventions’ existence, they have not necessarily become better versed in the Conventions’ content and the significance of that content. For example, [the ARC Survey shows that] 55% of adults surveyed felt that they were somewhat or very familiar with the Geneva Conventions, but 51% also stated that they believed it was acceptable to torture enemy soldiers.” See Brad A. Gutierrez, Sarah DeChristofaro and Michael Woods, “What Do Americans Think of International Humanitarian Law?”, *International Review of the Red Cross*, Vol. 93, No. 884, 2011.

9 See ICRC, above note 2.

also led to a redefinition of what national security means, making it all the more difficult to practice national security law without understanding public international law, in particular IHL.

Lawyers in the United States are constantly involved in decision-making; indeed, no foreign policy decision can be made by any administration without extensive preliminary consultations with lawyers from an array of federal agencies and without the ramifications of any such decision being discussed at length by scholars<sup>10</sup> and practitioners.<sup>11</sup> This would not be possible if lawyers did not receive a thorough training in international law. The consequence (or cause) of this is that today's law students cannot avoid studying the Supreme Court opinions in *Hamdi*, *Hamdan* and *Boumediene*,<sup>12</sup> or discussing the geographical scope of the battlefield and the legality of extraterritorial uses of force. In addition, with the United States being at the forefront of new technologies and ranking as one of the very few leading countries when it comes to the development of drones, robots and cyber-warfare, new realms of knowledge and sophisticated analysis are required from national security lawyers. Current and future generations of lawmakers and opinion-leaders must indeed be familiar with the legal nuances of new means and methods of warfare, and one can already sense a strong interest among law students in such fields of research.<sup>13</sup>

Beyond the impact on US national security interests, one should also consider the consequences of legally informed decisions on other countries. Current and future decision-makers are not only responsible for legal decisions that have an impact on US politics; they are also citizens of a State whose actions, policies, and interpretations influence the way international law is applied. One salient example is that of the law governing internment during non-international armed conflict. As the law of non-international armed conflict is currently silent on the length of detention, among other aspects of internment, several propositions aiming to fill the gap have emerged. One – supported by the United States – argues that norms from the law of international armed conflict (IAC) regulating internment of prisoners of war should be used by analogy, while the second argues in favour of an analogy with IAC law regulating the internment of

10 The increase over the last decade in the number of blogs dedicated to national security law and the laws of war is a good example of how the two legal bodies are now understood as deeply intertwined. See below.

11 For instance, non-governmental organizations traditionally specializing in human rights now also have experts in IHL and rigorously examine that body of law as well. See, for example, Human Rights First, which has a number of advocacy campaigns aimed at IHL issues. For more information, see the organization's website, available at: [www.humanrightsfirst.org/campaigns](http://www.humanrightsfirst.org/campaigns).

12 All three cases deal with certain aspects, including the legality, of the US detention regime at Guantanamo and are considered major legal developments following 9/11. See *Hamdi v. Rumsfeld*, 542 US 507, 2004; *Hamdan v. Rumsfeld*, 548 US 557, 2006; and *Boumediene v. Bush*, 553 US 723, 2008.

13 Reflecting this interest, "IHL and Emerging Technologies" is the theme of the 2014 Student IHL Writing Competition sponsored by the American Society of International Law and American University Washington College of Law, available at: [www.wcl.american.edu/humright/center/2014internationalhumanitarianlawihlstudentwritingcompetition.cfm](http://www.wcl.american.edu/humright/center/2014internationalhumanitarianlawihlstudentwritingcompetition.cfm).

civilians.<sup>14</sup> The first proposal implies that detainees may be kept until the end of active hostilities (in the context of the war against Al Qaeda, this has led many to speak about indefinite detention, as the end of hostilities is far from foreseeable at this stage) without the need for the detention authority to regularly review the reasons for detention. The US government may be comfortable with such proposals when it comes to the persons it detains, in particular because as a matter of US constitutional law it is committed to granting *habeas corpus* to all Guantanamo detainees and is working on implementing the Periodic Review Boards.<sup>15</sup> Nevertheless, the question arises of whether such a precedent should be created for other countries, which may not necessarily have effective or sufficiently developed legal systems to ensure that detainees receive due process.

To close these introductory comments on the importance of integrating IHL within law schools' curricula, it should be remarked that the United States provides one of the best contexts for a successful strategy on IHL integration: its unique status in global affairs and its involvement in several armed conflicts, combined with its deeply rooted belief in the importance of the law, create the perfect preconditions for effective implementation of international legal obligations. This paper documents progress made in that regard since the 2007 Report and analyzes how challenges to IHL integration can be overcome by a successful prevention strategy.

## Background and methodology

The present article is based on multi-pronged research carried out in the United States in 2012–2013. The authors conducted an online survey which was completed by eighty-seven US law professors, and subsequently complemented with in-depth follow-up interviews with twelve of these professors.<sup>16</sup> In parallel, an exhaustive review of scholarship and legal resource materials published in English since 2007 was also produced. To the extent possible, the findings were compared with those of the 2007 Report.<sup>17</sup> The aim was not only to update the 2007 Report, but also to expand the scope of inquiry with a number of new questions.

14 See, for instance, ICRC, "Internment in Armed Conflict: Basic Rules and Challenges", Opinion Paper, November 2014, pp. 1, 3–6, available at: [www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges#](http://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges#). VJGwnsAB; ICRC, *Strengthening International Humanitarian Law Protecting Persons Deprived of their Liberty. Synthesis Report from Regional Consultations of Government Experts*, ICRC, Geneva, November 2013; ICRC, "Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict. Chatham House and International Committee of the Red Cross, London, 22–23 September 2008", *International Review of the Red Cross*, Vol. 91, No. 276, 2009; Jelena Pejic, "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence", *International Review of the Red Cross*, Vol. 87, No. 858, 2005.

15 See Executive Order 13567, "Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force", 7 March 2011, available at: [www.gpo.gov/fdsys/pkg/FR-2011-03-10/pdf/2011-5728.pdf](http://www.gpo.gov/fdsys/pkg/FR-2011-03-10/pdf/2011-5728.pdf). The first Periodic Review Board hearing took place in November 2013, and the process is currently under way. For more information, see the website of the Department of Defense Periodic Review Secretariat, available at: [www.prs.mil/ReviewInformation.aspx](http://www.prs.mil/ReviewInformation.aspx).

16 The term "professor" indicates any law school instructor, without distinguishing between tenure/tenure-track and contingent faculty unless specifically noted.

17 See above note 1.

The 2012 survey was available online at [www.surveymonkey.com](http://www.surveymonkey.com) in August and September of that year.<sup>18</sup> It was publicized by posting announcements on various blogs and listservs, as well as by direct email invitations to a list of 332 US law professors compiled by the ICRC. The direct emails also invited the recipient to forward the survey link to others. There were ninety-six respondents from at least eighty-two US law schools in 2012, compared to 2007, when there were 101 respondents from at least seventy-three law schools.<sup>19</sup> The focus on civilian legal IHL instruction in 2012 led to a narrowing of the ninety-six responses received down to eighty-seven. Although in theory someone could have taken the survey more than once, thus skewing the results, there would have been no benefit in doing so, as there was no incentive offered for participation. To the contrary, the survey's length and degree of detail would have required an unusual degree of motivation to fill out more than once, with different answers each time.

Survey respondents in both years had the option of anonymity, and some schools had more than one respondent. Anonymous responses, representing 10% of the total in 2007 and 33% in 2012, prevent precise determination of overrepresentation of schools in both years. However, for questions that sought to elicit school characteristics, the study minimized known bias by merging the 2012 responses from non-anonymous professors teaching at the same university and integrating them as one response. Unfortunately, the authors' lack of access to raw 2007 data prevented a similar correction of that year's results, and no insight could be obtained into whether the known double-counting of approximately twenty 2007 schools biases those results upward or downward. Finally, where the available description of 2007 results was ambiguous regarding the counting of responses, comparisons between 2007 and 2012 are not reported.

To conduct the in-depth interviews, twelve out of the thirty-one survey respondents who responded affirmatively to a survey question asking permission to contact the respondent for further detail were selected. These twelve respondents, all of whom were reached and interviewed successfully, were selected with the hope of obtaining a diverse range of viewpoints: the interviewees included both women and men; tenure/tenure-track and contingent faculty; geographic representation from the East Coast and other regions of the country; pure and hybrid backgrounds in academia, the US military, and government or other civilian entities; and a range of primary expertise in international law, national security law and criminal law. The interviews were conducted via phone by one research assistant over a five-week period in March and April 2013 using a set of questions that were provided to respondents in advance. The interviewees were assured of confidentiality.<sup>20</sup>

Finally, as the next sections demonstrate, the findings of the survey and interviews were then used to reflect on the ICRC's legal outreach activities with

18 The survey questions can be found in the Appendices to this essay.

19 However, the response rate in 2012 may have been higher, as the 2007 survey was mailed in hard copy directly to more than 1,000 US law professors and deans of law schools.

20 Detailed interview notes are on file with the authors.

US academia, as a means to understanding the challenges and opportunities for increased integration of IHL into law school curricula. The rest of this article hence presents the results of the research merged into three main aspects: first, it highlights the main findings with regards to generating the interest of the academic community in the US and compares them with the ICRC's strategy on working with university professors; second, as a complement to the first aspect, the article details the growth in academic materials available to professors willing to teach IHL, one component that was deemed essential in ensuring IHL integration into university curricula; and third, opportunities available for students and recommendations on how to stimulate their interest in the subject matter are also included.

## The ICRC's approach

### Working with academia: Challenges and opportunities for generating interest in and adherence to IHL in the United States

The ICRC is known mainly for providing humanitarian assistance to and legal protection for victims of armed conflicts and other situations of violence around the world. But the organization also invests in averting (or preventing) human suffering "by fostering an environment conducive to: (1) respect for the life and dignity of persons affected by armed conflict and other situations of violence; and (2) respect for the ICRC's work".<sup>21</sup> Prevention in this sense is thus one of the four approaches that guide the ICRC's work, alongside Protection, Assistance and Cooperation. Building an environment of legal compliance is an essential component of the ICRC's prevention approach, and it necessarily means working towards understanding "the complex environmental factors influencing the likelihood that life and dignity or [the ICRC's] own work may be affected, [and] determin[ing] how best to act upon them".<sup>22</sup>

As far as the United States is concerned, the ICRC is interested *inter alia* in ensuring adherence to and compliance with international law and in particular with IHL. Working towards creating or strengthening an environment conducive to respect for IHL also means working with "those actors that have a significant capacity to influence the structures or systems" associated with the application of US legal obligations. It is obvious that several categories of actors can be identified in this respect;<sup>23</sup> however, this article is focused specifically on academic circles and law faculties.

21 See ICRC, above note 2, p. 5.

22 *Ibid.*, p. 7.

23 For instance, one of the main components of the ICRC's strategy is its bilateral and confidential dialogue with US government agencies and combatant commands, mainly on the protection of civilians, the conduct of hostilities, detention and other concerns in current theatres of US military operation worldwide. See ICRC, *ICRC Annual Report 2012 (Washington Regional Delegation)*, Geneva, May 2013, available at: [www.icrc.org/eng/assets/files/annual-report/icrc-annual-report-2012.pdf](http://www.icrc.org/eng/assets/files/annual-report/icrc-annual-report-2012.pdf).

The latter are indeed one of the categories of actors that can influence, even indirectly, decision-making. Law schools are highly regarded in the United States and train a large portion of the next generations of decision-makers, and lawyers generally represent an influential group in US society. However, the last few years have been marked by many changes within the legal profession and legal academia which have to a certain extent rendered integration of IHL more challenging.

### *The economic downturn and its consequences for law schools*

Law schools reflect the society in which they operate. Most notably, the shock waves of the economic downturn since the time of the 2007 Report are still reverberating throughout US legal academia. There is growing criticism of legal education as being too expensive and out of touch with the needs of the profession, which is itself undergoing severe market pressure.<sup>24</sup> Even President Obama, a former law school professor, has suggested that law school should last for only two years instead of three.<sup>25</sup> The overall picture of future IHL integration in law schools is discouraging in a number of ways, reinforced by the great sense of uncertainty and insecurity that exists concerning the changes to come in the years ahead. As summarized by the *New York Times*, “Law school applications are headed for a 30-year low, reflecting increased concern over soaring tuition, crushing student debt and diminishing prospects of lucrative employment upon graduation.”<sup>26</sup>

This sobering view was reflected in the in-depth interviews conducted with professors teaching in the field. Several confirmed that the economy was already having an impact on their schools and that applications for admission were down.<sup>27</sup> One professor summarized the impact on legal education generally as

24 American Bar Association Task Force on the Future of Legal Education, *Report and Recommendations*, 23 January 2014, available at: [www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/report\\_and\\_recommendations\\_of\\_aba\\_task\\_force.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf). The *Journal of Legal Education*, published by the American Association of Law Schools, regularly features articles such as “Symposium: Is Law School Worth It?,” *Journal of Legal Education*, Vol. 63, November 2013, p. 173; and Ronald G. Ehrenberg, “American Law Schools in a Time of Transition,” *Journal of Legal Education*, Vol. 63, August 2013, p. 98.

25 Peter Lattman, “Obama Says Law School Should be Two, not Three Years,” *New York Times*, 23 August 2013, available at: [http://dealbook.nytimes.com/2013/08/23/obama-says-law-school-should-be-two-years-not-three/?\\_php=true&\\_type=blogs&\\_r=0](http://dealbook.nytimes.com/2013/08/23/obama-says-law-school-should-be-two-years-not-three/?_php=true&_type=blogs&_r=0). For a rebuttal to this notion, see Erwin Chemerinsky and Carrie Menkel-Meadow, “Don’t Skimp on Legal Training,” *New York Times*, 14 April 2014, available at: [www.nytimes.com/2014/04/15/opinion/dont-skimp-on-legal-training.html?\\_r=0](http://www.nytimes.com/2014/04/15/opinion/dont-skimp-on-legal-training.html?_r=0). In this opinion piece, the authors argue that “[l]aw school faculties, in their teaching and their scholarship, must deal with the emerging problems of the 21st century. Law schools need to develop new courses to provide students with the expertise to deal with the crucial problems of our time in fields like ... national security, [and] conflict resolution .... There should be ‘problem-based’ seminars in fields such as ... world peace.”

26 Ethan Bronner, “Law Schools’ Applications Fall as Costs Rise and Jobs are Cut,” *New York Times*, 30 January 2013, available at: [www.nytimes.com/2013/01/31/education/law-schools-applications-fall-as-costs-rise-and-jobs-are-cut.html?\\_r=0](http://www.nytimes.com/2013/01/31/education/law-schools-applications-fall-as-costs-rise-and-jobs-are-cut.html?_r=0).

27 Due to the small sample size (12) of the in-depth interviews conducted with professors, and the authors’ choice to provide confidentiality in order to encourage interviewees to speak frankly, no information that could help identify the interviewees is supplied when citing specific comments. All interview notes are on file with the authors.

follows: some law schools will not survive; smaller law schools may have fewer professors and offer fewer courses; lower-ranking schools will cut electives. In this environment of academic retrenchment, one obvious obstacle to greater coverage of IHL is the resource constraints faced by many schools in expanding their curricula. One professor felt that it will be increasingly difficult to have stand-alone IHL courses, and advised that the focus should be on promoting IHL coverage in public international law courses. As will be explained later, IHL integration strategy in general has gradually moved away from promoting stand-alone courses, focusing efforts instead on integrating IHL into other law courses.

### *Prioritizing practical education*

Responding to the economic developments outlined above, today's law students understandably place a greater emphasis on practical, career-related courses, particularly in light of their growing debt burden. One professor pointed out that students are looking for career courses that will help them get jobs. IHL is unfortunately not such a class; only a few positions open every year where IHL is at the centre of the job description. In addition, another professor noted that the general trend is toward skills-based classes, and that law schools will put more emphasis on experiential learning and skills development. However, this professor also observed that IHL is more practical than some other international law courses, and that there are many ways to teach skills development in an IHL course, as will be discussed in more detail in this article.

### *The place of international law in legal education*

Based on the interviews conducted, a third and related factor affecting the teaching of IHL is the place of international law in legal academia. One professor commented on the larger disjunction of US legal education from international law, noting that the subject is not even tested on most professional licensing or "bar" exams, which are administered by the individual States. In that professor's view, international law itself, and certainly an area of public international law such as IHL, is perceived as a narrow specialty. In some quarters, there is even outright hostility toward international law. However, others noted that international law is one of only five subject areas surveyed and separately ranked in the influential *U.S. News & World Report* annual rankings of law schools,<sup>28</sup> an indication of its importance to mainstream legal education as well as to prospective students. One professor felt that law schools will not cut their existing international law courses but will refocus them on international business, a reorientation that might easily place a lower priority on coverage of IHL.

This trend may be reinforced by the withdrawal of US forces from military operations in Iraq and Afghanistan. Many professors nevertheless noted that

28 See "Best Grad Schools: Law: International Law", *U.S. News & World Report*, available at: <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/international-law-rankings>.



students' interest in armed conflict will always be present: the debates surrounding situations like Syria, Mali and the Central African Republic, the development and use of new technologies and the evolving response to the threat of terrorism show that there will always be an interest in and a need to understand IHL. Several professors confirmed that many students are drawn to learning about IHL precisely because it deals with contemporary situations.

### *The IHL academic community in the United States*

As another obstacle to the expansion of teaching IHL, one of the professors interviewed called attention to the lack of instructors who have expertise both in IHL and in teaching, and noted the difficulty of convincing professors to teach a subject matter in which they may not necessarily have much background. This observation dovetails with another comment made by several professors, who explained that they were not hired to teach IHL but were able to offer it as their own choice in addition to fulfilling obligations to teach more mainstream courses taken by larger numbers of students. The 2007 Report found that faculty interest was a major factor driving the teaching of IHL, and this appears still to be the case.

From this perspective, it is encouraging to note that most schools represented in the online survey which offer a stand-alone IHL course employ tenured or tenure-track professors to teach that course, suggesting that IHL faculty at those schools may be able to pursue their interest more freely than those at schools employing contingent faculty to teach IHL.<sup>29</sup> As shown in Figure 1, 67% of those teaching stand-alone IHL courses in 2012 were tenured or tenure track, 22% were adjunct or visiting faculty, and 12% fell into other categories, mostly clinical faculty.<sup>30</sup>

Standing in contrast to a number of the discouraging trends outlined above is the growth of a community of scholars and practitioners. Members of this community can serve as a resource for teaching and scholarship, for mentoring and for showing students the range of professional opportunities available. The existence of a developed academic IHL community in the United States is undeniable. This is felt by IHL professors in general: as shown in Figure 2, the online survey found that 65% of respondents think there is such a community, and also feel that they are part of it.

In addition, the online survey asked respondents if there was an IHL expert in their professional circle: 91% said yes, an encouraging finding that suggests a degree of cohesion in the academic community and indicates that the possibilities for mentoring and partnership are very real. A reflection of the maturation of such an IHL network – or a contributor to such development – is the number of professional associations that have committees or interest groups devoted to teaching and/or practicing IHL, such as the American Society of International Law (ASIL), the American Association of Law Schools (AALS) and the American

29 Information on the methodology for the online survey is presented below.

30 The 2007 Report did not include the clinical faculty category, but the results are otherwise similar.

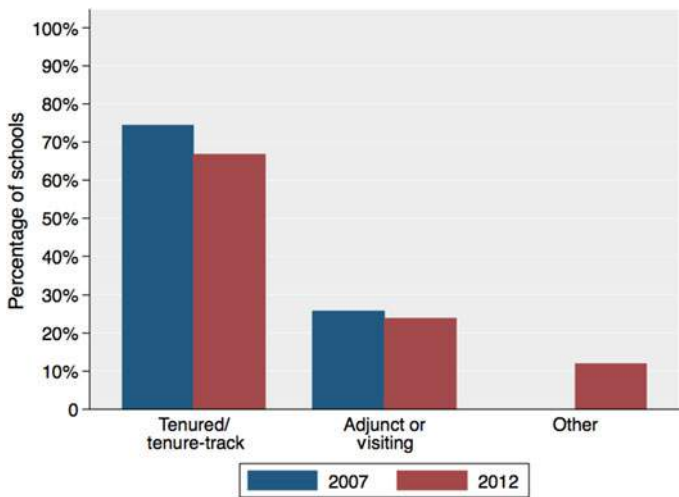


Figure 1. Status of faculty teaching a stand-alone IHL course, 2007 and 2012. n = 35 (2007), 42 (2012).

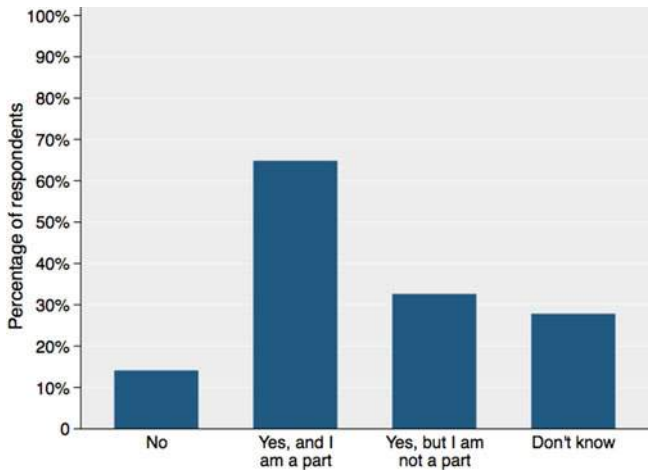


Figure 2. Perception of a community: Faculty responses to “Is there an academic IHL community”, 2012. n = 65.

Bar Association (ABA).<sup>31</sup> These organizations, along with the American Red Cross, are important partners with the ICRC in promoting IHL instruction.

Another particularity of the United States is the high degree of porosity that exists between policy-making and academic circles. There is indeed a two-way flow

31 ASIL’s interest group is the Lieber Society on the Law of Armed Conflict; AALS has a Section on National Security Law; and the ABA Section of International Law has Committees on International Criminal Law and on National Security.

and continuous interaction between governmental and military circles on the one hand and law faculties on the other, with university professors joining the State Department and other executive agencies, and former policy-makers or military lawyers joining well-respected law schools at the end of their government service.<sup>32</sup> Not only do many academic experts in the country write, teach and speak on IHL, but some of them also have direct access to the legislative level; a primary example of this influence is the regular invitations to academic experts to testify before congressional committees on a broad range of issues, including detention, the scope of the battlefield, and targeting.

This degree of connection offers a unique opportunity for a successful prevention strategy, and leads to the inference that those interested in IHL should work towards integrating this community of experts, who have a certain degree of leverage over governmental decisions and/or can assist in ensuring compliance with international legal standards. Being a part of this community may serve two purposes: having a degree of influence over policy-making, but also learning about emerging questions and debates in IHL, and hence being able to react quickly to new legal trends.

## The ICRC's experience of working on IHL with academia in the United States

Taking into consideration both the findings of the 2007 Report and the challenges and opportunities mentioned above, the ICRC's integration strategy has gradually evolved. When the ICRC's academic outreach in the United States started in the 1990s, it specifically aimed at encouraging the teaching of IHL at the law school level. Promoting a sound teaching and research tradition was then considered a long-term investment towards a unique goal: the next generation of leaders would be trained in IHL.<sup>33</sup> The 2007 Report was extremely useful in order to refine such outreach and ensure a more strategic approach. One of the main findings showed that student and faculty interest in IHL was already strong and that IHL was somewhat integrated into the law school curriculum. It also indicated that the interest was increasingly shifting towards new opportunities to learn how to teach IHL and to develop resources to support such teaching.

Combined with limited resources and the fact that the ICRC's final objective was never to achieve an exhaustive coverage of US law schools, this led to a strategic change. In general, the ICRC's academic work moved away from pure dissemination of IHL to concentrate efforts on the development of actionable

32 One of the most obvious examples is that of Harold H. Koh, who was Dean of Yale Law School before joining the State Department as Legal Adviser for President Obama's first term, and who returned to Yale Law School afterwards. There are of course dozens of additional examples, which also explains why academia is often referred to in the United States as the "government in the making". See also the section on "Challenges to and Opportunities for a Successful Prevention Strategy", above.

33 Katie Sams and Antoine Bouvier, "Teaching International Humanitarian Law in Universities: The Contribution of the International Committee of the Red Cross", *Yearbook of International Humanitarian Law*, Vol. 5, 2002, p. 382.

teaching strategies, tools and networks that could support those who teach IHL. In addition, while the ICRC initially promoted semester-long stand-alone courses, it then realized that these were not necessarily the most appropriate format for achieving prevention objectives. As a consequence, a dual approach was favoured, mixing support for semester-long courses with integration of IHL in other law courses. That aspect also evolved over time: while the ICRC traditionally works with professors and students interested in public international law (which is often seen as a natural path, especially in civil law countries), it quickly realized that scholars working in other areas of the law also manifested a strong interest in IHL. This was especially the case with national security law and US constitutional law, where professors themselves realized after 9/11 that they could no longer separate domestic and international law. In addition, the ICRC's prevention approach also heavily relies on developing external partnerships; in that respect, its academic strategy is largely based on collaboration with key institutions and scholars.

Putting this analysis into practice, the ICRC delegation in the United States currently organizes several academic events every year for students, often in partnership with the American Red Cross,<sup>34</sup> and for faculty. For instance, one of the first results of the 2007 Report was the creation of a Teaching IHL Roundtable for faculty members, in an attempt not only to train faculty on IHL but also to foster discussions and proposals on the teaching and support tools that may need to be developed. This started a tradition of annual Teaching IHL Workshops, where junior and senior professors discuss emerging topics and exchange ideas on methodology and pedagogy as well as on teaching materials.<sup>35</sup>

Nevertheless, because many professors do not have the time or resources to attend such trainings, the ICRC is also developing regional events dedicated to specific themes. Such regional events offer the advantage of reaching out to a higher number of professors and scholars interested in teaching IHL, as well as to professors who may not be IHL experts but are active in IHL-related areas of the law such as national security, public international law, human rights and international criminal law.<sup>36</sup>

To gauge the extent of this outreach, the 2012 online survey queried respondents on whether they had attended an ICRC or an American Red Cross event, or had received funding from the ICRC or the American Red Cross. As shown in the Figure 3, a large majority of respondents had attended either an ICRC event (58%) or an American Red Cross event (22%). Twenty-eight percent of the respondents indicated that they had received support from the ICRC, while 8% had received support from the American Red Cross. The roughly even (60/40)

34 One example is the ICRC–Berkeley Law Student IHL Workshop held annually at the University of California, Berkeley, most recently in January 2015.

35 At the time of writing, the most recent Teaching IHL Workshop was held in February 2014 in collaboration with Brigham Young University J. Reuben Clark Law School.

36 A first one-day thematic seminar was organized in November 2011 at the University of California, Berkeley Law School on “The Internet in Bello”. See Kate Jastram and Anne Quintin, “The Internet in Bello: Cyber War Law, Ethics & Policy”, summary paper of seminar held on 18 November 2011, Berkeley Law, available at: [www.law.berkeley.edu/files/cyberwarfare\\_seminar-summary\\_032612.pdf](http://www.law.berkeley.edu/files/cyberwarfare_seminar-summary_032612.pdf).

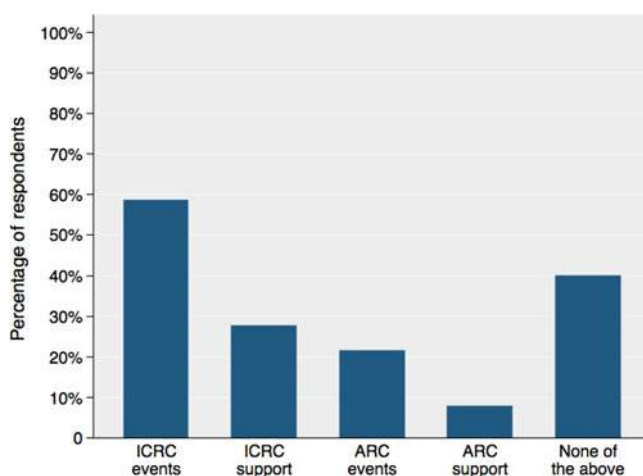


Figure 3. Responses to “Have you attended ICRC/American Red Cross events or received ICRC/American Red Cross funding”, 2012. n = 65.

balance of contact/no contact with the ICRC revealed by this question suggests both that the ICRC’s collaborative prevention strategy is succeeding in developing external partnerships and that there is a self-sustaining nature to the legal academic community.

Another finding of the 2007 Report was the increasing interest in receiving more substantive materials and a greater number of tools to support teaching. As explained in greater detail below, the ICRC partnered with Emory Law School to create a series of *IHL Teaching Supplements* meant to help law professors integrate IHL into their own courses. Furthermore, in September 2011 the ICRC delegation in Washington launched a blog that focuses on the ICRC’s operational activities and its work on IHL that are relevant in the US context; this online resource has already generated in-depth legal discussions on topical issues such as the scope of application of IHL, the legal regime applicable to terrorism, new technologies, and multinational forces.<sup>37</sup>

Also following the 2007 Report, the ICRC increased its support for new scholarship, for instance through collaborating with the increasingly well-known National Security Law Workshop, now in its eighth year, organized annually by South Texas College of Law and the School of Law at the University of Texas at Austin.<sup>38</sup> At present, the ICRC is also trying to encourage scholarship across borders through transnational workshops aimed at reinforcing academic networks and/or ensuring progress on specific legal issues. For instance, two Workshops on International Law and Armed Conflict were organized at Oxford University in July 2013 and July 2014, bringing US, Canadian and British

37 See *Intercross*, blog of the ICRC in Washington, DC, available at: <http://intercrossblog.icrc.org>.

38 The call for participants for the 2015 Workshop is available at: <https://jnslp.wordpress.com/>.

scholars together to discuss contemporary legal issues. A similar transnational workshop at Duke University in October 2013 and a Teaching IHL Workshop at Laval University in Quebec City in May 2015 were organized with a view to bringing together former participants from two prior Teaching IHL Workshops, hosted respectively in the United States and Canada, and hence capitalizing on and sharing the experiences of teaching IHL gathered by law professors at the national level.<sup>39</sup>

Finally, it is worth noting that the ICRC also believes in the importance of practical learning. IHL is a body of law that cannot remain theoretical or separated from practical considerations; its application is necessarily linked to domestic and international politics, and – even more importantly – to military strategy. For that reason, it is essential that law students interested in IHL, as well as professors who teach it, have a certain degree of understanding of the complexity of military operations. Pursuant to that idea, the ICRC has worked for many years with the US Army Judge Advocate General’s Legal Center and School based in Charlottesville, Virginia. This collaboration has resulted in many joint teaching events, where participants – benefiting from the operational and legal experience of both institutions – can truly understand and discuss the practical application of the law and its challenges.

## The ICRC’s experiences elsewhere

The ICRC’s academic strategy is not limited to the United States. The organization is active in academic outreach in at least sixty-six countries around the world today; it has worked towards ensuring global coverage and hence now offers training and organizes IHL-oriented regional training seminars for academics in most regions of the world. To cite just a few examples, in Africa, the Francophone Pan African Course on IHL<sup>40</sup> and the All Africa Course on IHL in South Africa<sup>41</sup> respectively offer French- and English-speaking university teachers and law practitioners, as well as lecturers, government and military officials, international organization staff, national society staff and graduate students, an introduction to IHL. In Asia, delegations organize a South Asian Teaching Session in South Asian countries (and beyond) and a Southeast and East Asian Teaching Session on IHL in Malaysia.<sup>42</sup> In the Balkans, the Regional IHL Course in Serbia encourages senior-year students of law, political science and the military and police academies to learn and carry out research on IHL. In the Middle East, the delegation in Lebanon offers a Regional Arab Course on IHL in Lebanon, designed for deans and professors of law. And the ICRC Headquarters in Geneva welcomes senior

39 Duke Law Events, “International Humanitarian Law and US–Canada Relations”, 4 October 2013, available at: <http://law.duke.edu/events/international-humanitarian-law-and-us-canada-relations/>.

40 “Cours panafricain francophone de droit international humanitaire pour les pays francophones d’Afrique”, held every two years, each time in a different West African country.

41 Every five years, South Africa also holds the Advanced Seminar on IHL.

42 There are also national courses available, such as the Annual Summer Course on IHL in China, held in Beijing.

professors from all around the world for a biannual Advanced Training Course in IHL for University Teachers. Many more trainings, courses and competitions are organized by delegations at the national level, all eventually working towards the creation and strengthening of a global network of IHL experts and practitioners.

The authors of this essay are convinced that the web of opportunities related to IHL teaching developed by the ICRC and partner institutions has contributed to maintaining and strengthening the high level of interest in that body of law. One specific sign of this trend that the survey has highlighted is the tremendous growth in scholarship in the last few years.

## Growth in scholarship and legal resource materials since 2007

Despite the potential difficulties in expanding IHL instruction discussed earlier in this article, there is no doubt that IHL scholarship has grown dramatically since 2007. The 2007 Report identified the dearth of IHL teaching materials for the US law school market as a significant obstacle to more widespread adoption of IHL courses. Among other problems, it reported that the lack of a textbook was one factor in the challenge faced by some professors in gaining law school approval for offering a new course. That situation has been remedied in a remarkably efficient fashion by the publication of at least five major new textbooks or new editions in the five years from 2009 to 2013.<sup>43</sup> These volumes have attracted a number of reviews in the literature.<sup>44</sup> The diversity in focus and perspective among the new textbooks and editions provides ample material for professors designing a course for the first time or revamping an existing course.

In the online survey, professors were asked if they used an IHL textbook. As shown in Figure 4, 44% do not, while 41% do. The 15% who answered “not applicable” presumably do not teach a stand-alone course and would not need a full-length IHL textbook. The percentage of professors who use a textbook may

43 In chronological order, they are: Mary Ellen O’Connell, *International Law and the Use of Force, Cases and Materials*, 2nd ed., Foundation Press, New York, 2009; Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press, New York, 2010; Marco Sassòli, Antoine A. Bouvier and Anne Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, 3rd ed., ICRC, Geneva, 2011; Geoffrey S. Corn, Victor Hansen, M. Christopher Jenks, Richard Jackson, Eric Talbot Jensen and James A. Schoettler, Jr., *The Law of Armed Conflict: An Operational Approach*, Wolters Kluwer Law & Business, New York, 2012; and Laurie R. Blank and Gregory P. Noone, *International Law and Armed Conflict: Fundamental Principles and Contemporary Challenges in the Law of War*, Wolters Kluwer Law & Business, New York, 2013.

44 For reviews of the Solis book, above note 43, see Ben Clarke, “Gary D. Solis, *Law of Armed Conflict: International Humanitarian Law in War* (2010)”, *Australian International Law Journal*, Vol. 17, 2010, p. 287; Jacques Hartmann, “*The Law of Armed Conflict: International Humanitarian Law in War* (Book Review)”, *Dordic Journal of International Law*, Vol. 80, No. 1, 2011, p. 121; and Alexander Orakhelashvili, “Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*”, *Journal of Conflict & Security Law*, Vol. 16, No. 3, 2011, p. 555. For reviews of Corn *et al.*, above note 43, see Dan E. Stigall, “*The Law of Armed Conflict: An Operational Approach*”, *The Army Lawyer*, September 2012, p. 46; Jamie A. Williamson, *International Review of the Red Cross*, Vol. 94, No. 886, 2012, p. 859. A review of Blank and Noone, above note 43, by Anne Quintin is forthcoming in the *Review*.



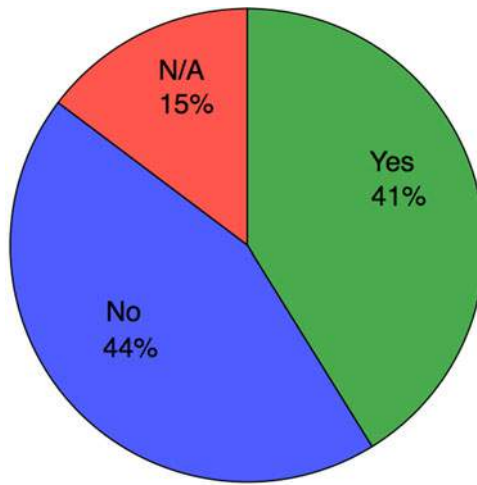


Figure 4. Responses to “Do you use an IHL textbook”, 2012. n = 68.

increase now that more choices are available; it should be noted that the survey was administered in the early autumn of 2012, when these five books were either not yet published or were only newly released. Alternatively, the preponderance of professors who do not use a textbook may indicate that given the nature of the subject matter – with many possible topics to cover in a semester, coupled with a fast-changing legal environment – some professors find it preferable to work with their own materials. This possibility is consistent with the choices of several of the professors interviewed to develop their course syllabus on their own, rather than borrowing from the syllabi of other professors.

The 2007 Report also noted a related need for supplementary course modules on IHL to facilitate the inclusion of IHL topics in the syllabi of existing courses. There has been impressive progress in this regard as well, with the appearance in the past few years of three *IHL Teaching Supplements* designed to be integrated, respectively, into courses in national security law, international criminal law and constitutional law.<sup>45</sup> These courses were among the most frequently cited by respondents in the 2007 Report and the 2012 survey as having an IHL component. Because the supplements are available free of charge and are not linked to any particular textbook, they represent an important resource for both experienced and new professors teaching these courses.

45 *International Humanitarian Law Teaching Supplements* are produced by the International Humanitarian Law Clinic at Emory University School of Law with the support of the ICRC Regional Delegation for the United States and Canada. Geoffrey S. Corn and Eric T. Jensen, *Volume 1: National Security Law and IHL*, ed. Laurie Blank, Jamie Williamson and Gary Solis, International Humanitarian Law Clinic at Emory University School of Law, 2011; Beth Van Shaack, *Volume 2: International Criminal Law and IHL*, ed. Laurie Blank, Anne Quintin and Cécile Aptel, International Humanitarian Law Clinic at Emory Law School, 2013; Sean Watts, *Volume 3: Constitutional Law and IHL*, ed. Laurie Blank, Anne Quintin and Julian Mortenson, International Humanitarian Law Clinic at Emory University School of Law, 2014. The *Supplements* are available at: <http://law.emory.edu/academics/clinics/international-humanitarian-law-clinic.html>.

In addition to assessing legal materials aimed specifically at law student instruction within the online survey and in our interviews, trends in scholarship in this area of the law since the time of the 2007 Report were also examined by conducting a structured online database search. To this end, a literature search on IHL topics from 2007 through 2013 was carried out.<sup>46</sup> As set forth in greater detail below, the number of articles, books and working papers published has increased dramatically over the past seven years.

The number of articles published annually in law reviews increased from 199 in 2007 to 233 in 2013, reflecting a growth of 17% in the past seven years.<sup>47</sup> While this is a significant increase, it actually represents a very conservative assessment of scholarly interest, focused specifically on IHL topics. For instance, articles on international criminal law, aggression, piracy, transitional justice, trafficking or universal jurisdiction were not examined, unless they were otherwise tied to IHL. In addition to including IHL-specific content, law review articles were classified as search results meeting the following characteristics: comprising more than five pages in length, not being described as a book or publication review, and not being described as an editorial.

Similarly to IHL law review articles, the number of books on IHL issues published annually rose from thirty-six in 2007 to eighty-eight in 2013, a striking increase of 144% over the seven-year period.<sup>48</sup> The criteria used for including books in the data were similarly restrictive, so this number is again a conservative gauge of scholarship in this field. Furthermore, this figure does not include journals, intergovernmental and non-governmental reports and documents, or government documents.

While the number of working papers made available online on the Legal Scholarship Network (LSN) may contain greater measurement error than publication tallies, this measure is reported here in order to illustrate the direction of developments rather than to establish exact numbers. Even with that caveat, the trend is unmistakable: the number of working papers posted on LSN grew from forty-nine in 2007 to 163 in 2013, an astonishing increase of approximately 232%.<sup>49</sup>

46 The 2007 Report did not include data on the legal literature, so 2007 was selected as the baseline year.

47 Berkeley Law librarians Marci Hoffman and Edna Lewis searched US legal journal literature published between 2007 and 2013 using the *Index to Legal Periodicals and Books* (ILP). It should be noted that the 2013 number may be under-inclusive, as ILP may still be indexing articles from 2013. The number of articles in 2012 was somewhat higher, at 260. ILP is available by subscription through the EBSCOHOST platform at: [www.ebscohost.com/academic/index-to-legal-periodicals-and-books-full-text](http://www.ebscohost.com/academic/index-to-legal-periodicals-and-books-full-text). ILP provides coverage of the most important English-language legal information. It includes indexing of over 1,025 legal journals, law reviews, yearbooks, institutes, statutes, and bar association, university and government publications. This index is a basic research tool used by many US law libraries. Other periodical indexes are available, but ILP is generally considered to cover the largest number of academic and scholarly publications. Search terms used are on file with the authors.

48 LawCat, Berkeley Law Library's catalogue, available at: <http://lawcat.berkeley.edu/search/X>. LawCat was used to represent what a US law school library with a strong international collection would acquire. The searches were limited to materials published between 2007 and 2013 and in English only. Search terms used are on file with the authors.

49 Since there are many collections of working papers available online, the Legal Scholarship Network (available at: <http://ssrn.com/en/index.cfm/lsn/>) was chosen to provide a representation of the number of working papers made available from 2007 to 2013. However, the search mechanism available

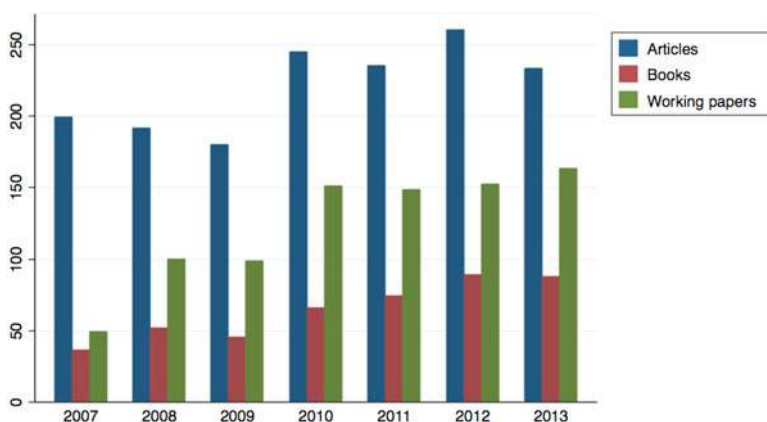


Figure 5. IHL literature, 2007–2012.

As shown in Figure 5, the findings on law review articles, books and working papers document a flourishing scholarly enterprise and indicate a promising future for IHL in US academia.

As in other fields of the law, newer formats for legal scholarship and commentary are gaining in importance in IHL. The online survey asked professors for the sources of their information on news and events in the field of IHL. As shown in Figure 6, 90% of the respondents cited blogs,<sup>50</sup> 68% mentioned the ICRC's website and 60% cited listservs.<sup>51</sup>

The impressive growth in legal scholarship and dialogue in all its forms is a sign of the strength of the discipline, and is a positive indication that the field of IHL is still growing and attracting professors and students. These are encouraging findings for the ICRC's prevention work in the United States.

## Meeting the demand for student engagement inside and outside the classroom

### *Student interest*

Professors perceive a tremendous interest in current IHL issues on the part of students. Ninety-seven percent of faculty in the survey reported that students in their law school are interested in legal issues related to armed conflict; 97%

through this database is very basic and does not allow for date limitations. The numbers represented for this question are provided to show the growth in this type of literature and should not be considered exact. Also, the numbers include not just scholarly working papers, but also some forthcoming journal articles. Therefore, some of the paper/articles included in this data may also have been counted when searching ILP (see above note 47 and accompanying text). Search terms used are on file with the authors.

50 The blogs most often cited were *Opinio Juris*, available at: <http://opiniojuris.org/>; *Lawfare*, available at: [www.lawfareblog.com](http://www.lawfareblog.com).

51 The most commonly mentioned was Robert Chesney's [NationalSecurityLaw] Listserv Archive, archived at: <http://jnslp.wordpress.com/>.

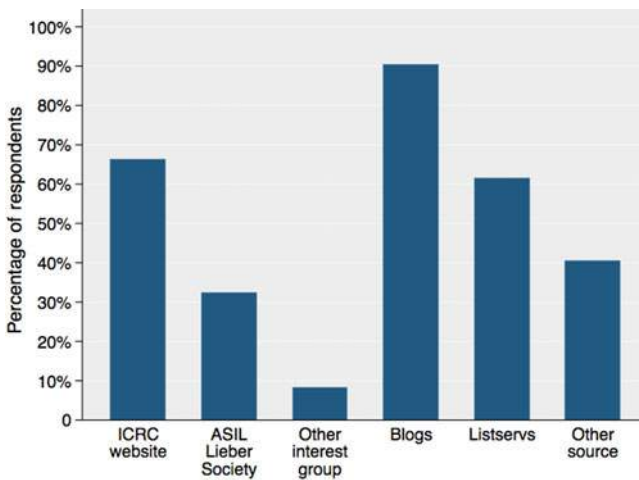


Figure 6. Faculty sources of IHL news and events, 2012. n = 62 (2012).

reported student interest in issues of detention and torture; 97% reported student interest in drones and war-fighting technology; 94% reported student interest in the “global war on terror”; and 67% noted interest in humanitarian assistance. These results, while possibly influenced by the professors’ own enthusiasm, are nevertheless remarkably consistent with the findings from 2007. Three of the same topic areas of student interest were asked about in the 2007 Report, with strikingly similar results: faculty perceived that 99% of students were interested in armed conflict, 99% in the “global war on terror” and 88% in relief assistance and humanitarian action.<sup>52</sup> While student interest does not necessarily translate into student enrolment in a course, these findings suggest that there is great scope for law schools to begin, or expand, instruction and opportunities in IHL. It also provides an encouraging contrast to some of the obstacles noted above.

### *Availability of course offerings*

Bearing in mind the potential for great student interest, a primary goal of the research was to identify whether and how law schools were responding to this demand. It appears that at least seventy-five US law schools offered some instruction in IHL in 2012; this comprises 94% of law schools in the sample analyzed, and approximately 40% of all US law schools. Ninety-four percent of 2007 respondents indicated that IHL was taught at their schools, but this percentage is possibly slightly biased by double-counting professors who self-reported from the same

52 In the interest of full disclosure, it should be noted that the 2007 survey allowed for multiple levels of interest, while the 2012 survey asked for a simple “Yes” or “No.” However, combining several 2007 categories indicating positive expressions of interest would approximate the 2012 “Yes” response.

school.<sup>53</sup> In both surveys, the high percentage of IHL coverage reported is not surprising, given the self-selecting nature of survey respondents.

However, this survey finding is consistent with another element of the research, an examination of the websites of all 199 of the law schools listed on the member and non-member fee-paid page of the American Association of Law Schools.<sup>54</sup> This analysis revealed seventy-nine law schools that offered IHL either as a stand-alone course or as part of another course, based on course names and descriptions. This count likely underestimates the true number of law schools offering IHL, as course schedules and course catalogues are not available online for all law schools. Additional measurement error could exist for schools whose course schedules were not available, but whose course catalogues contain IHL-related courses that have not been taught in recent years.

Although the authors did not see a significant increase in US law schools offering instruction in IHL between 2007 and 2012, it does appear that the percentage of schools offering stand-alone IHL courses increased significantly. The authors identified stand-alone courses as having names such as IHL, Law of Armed Conflict, Law of War, and Use of Force. In 2007, only 37% of survey respondents' schools where IHL was taught in any form (separately or as part of another course) offered a stand-alone IHL course. This percentage rose to 52%, or forty-two analogous schools, in 2012. This finding is more than double the number – only twenty – found in the examination of AALS law school websites. However, as mentioned above, this latter measure is probably under-inclusive since law school website lists of class names and course descriptions may be incomplete.

In addition to stand-alone IHL courses, law schools may offer non-IHL courses that include some coverage of IHL issues. The IHL content might be quite minimal in broad survey courses such as those on international law or human rights, or it could be a major component in more specialized courses on national security or international criminal law. Despite the inability to measure precisely the coverage of IHL in such courses, it was deemed worthwhile to try to assess the number of schools where students could have at least some exposure to IHL.

Here, the data in 2007 and in 2012 display similar patterns. In 2007, 65% of those schools where IHL was taught in any form (separately or as part of another course) reported that IHL was taught as part of another course. This percentage rose somewhat to 76% of similar schools in 2012, but the difference is statistically negligible. The 2012 survey data thus suggest that, in response to a simple yes/no question as to whether IHL is taught as part of another course, fifty-eight law schools offer at least some coverage of IHL in other courses. In contrast, the examination of AALS law school websites found course descriptions in sixty-nine schools which indicated that coverage of IHL material was included. The disparity in numbers between the survey and the web search is likely due to a

53 Again, anonymous respondents may contribute to schools being represented two or more times, but all known double-counting has been eliminated in the 2012 results.

54 Available at: [www.aals.org/member-schools/#nonmember](http://www.aals.org/member-schools/#nonmember). Because of the focus on civilian instruction, The Judge Advocate General's Legal Center and School was not included in the data collection.

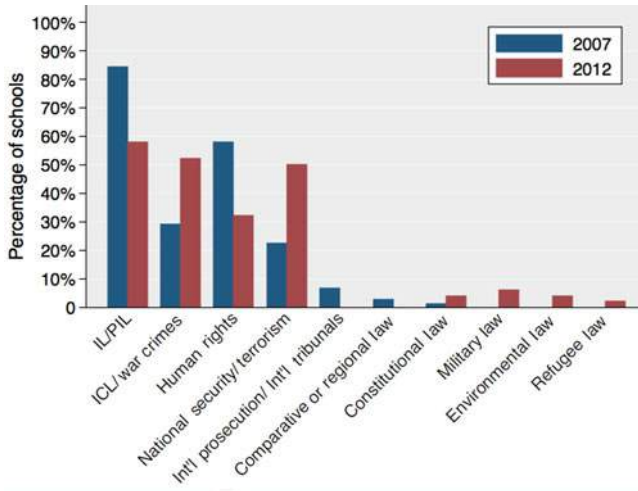


Figure 7. Other courses reported as containing IHL content, 2007 and 2012. n = 68 (2007), 50 (2012).

survey response rate below 100% for US law professors, but may also be affected by differing perceptions of what constitutes IHL coverage in another class.

Among those classes identified as having some IHL content, Figure 7 shows the most common course titles: International Law/Public International Law; International Criminal Law/War Crimes; Human Rights; and National Security/Terrorism.

### Enrolment

Another way to gauge the integration of IHL into law schools is to estimate the number of students enrolling in IHL courses each year. As demonstrated in Figure 8, in both 2007 and 2012, about 45% of the schools having a stand-alone IHL course had enrolment numbers in the range of twenty-one to forty. In 2012, about 18% of schools had twenty or fewer students in the course; in 15% of schools, the number of students on the course was sixty or more; and in about 12% of schools, the number of students taking a stand-alone course each year ranged from forty-one to sixty. Although the response rate for this question was lower in 2012, we interpret these results as illustrating a likely increase in average class sizes for stand-alone IHL courses.

Looking at student enrolment in other courses containing some coverage of IHL, Figure 9 indicates that in 24% of schools offering IHL content in other courses in 2012, the number of students taking such courses ranges from twenty-one to forty.<sup>55</sup> In 17% of schools, there are forty-one to sixty students exposed to IHL

<sup>55</sup> The available description of data from 2007 was too ambiguous for a definitive comparison.

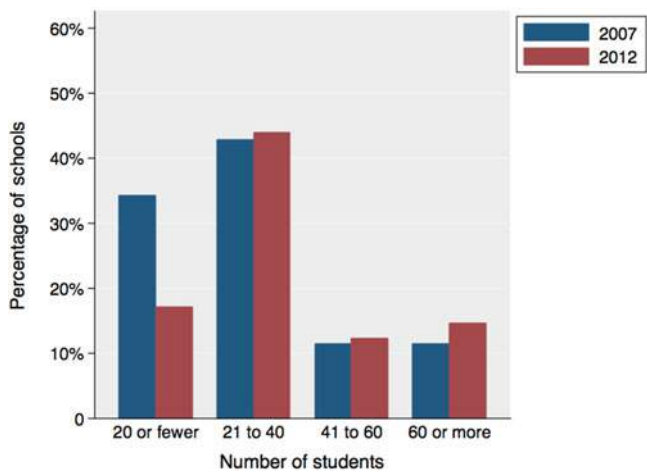


Figure 8. Annual student exposure to IHL in stand-alone courses, 2007 and 2012. n = 35 (2007), 41 (2012).

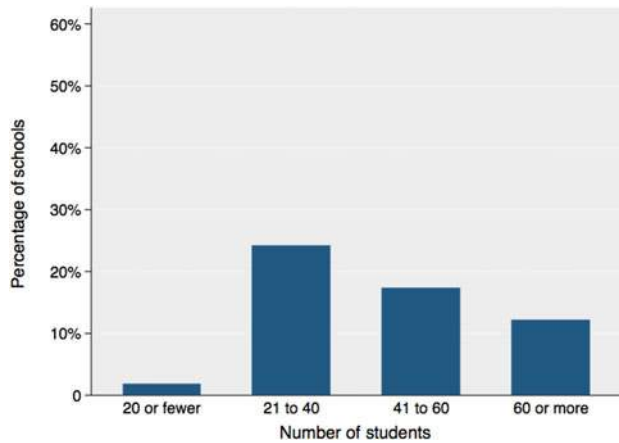


Figure 9. Annual student exposure to IHL in non-IHL law courses, 2012. n = 91 (2007), 58 (2012).

material each year, while in 12% of schools, there are more than sixty students each year who receive IHL instruction in a non-IHL course.

*Extracurricular opportunities*

In addition to quantifying IHL offerings in the curriculum, the survey examined IHL-related extracurricular opportunities available to students, as reported by professors. As illustrated in [Figure 10](#), 61% of schools represented in 2012 had a law review journal, 56% of schools hosted a student organization, and 44%



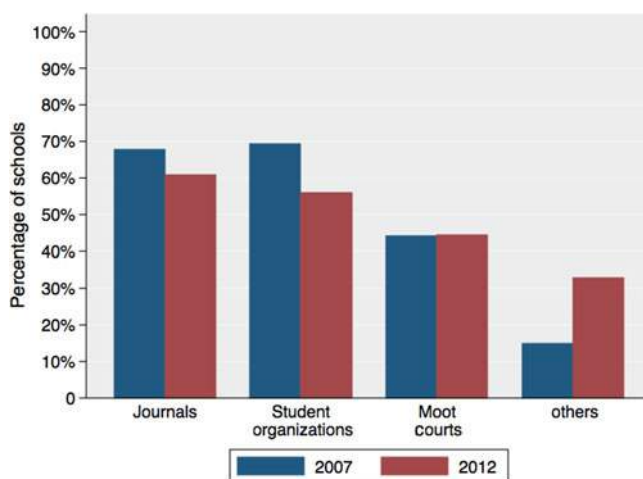


Figure 10. Extracurricular opportunities in IHL for students, 2007 and 2012.  $n = 68$  (2007), 61 (2012).

provided opportunities in moot court competitions.<sup>56</sup> There is a noticeable increase from 2007 to 2012 – from 15% to 33% – in schools offering extracurricular IHL opportunities. According to the 2012 online survey “comment” section for this question, such opportunities include internships, externships, clinical work, research assistance for faculty, outside speakers, the ICRC’s student workshops, and writing competitions. The growth in this category, and the wide scope of activities covered, is another indication that IHL is becoming increasingly well-established in legal academia.

### *Faculty perceptions of sufficiency of IHL offerings*

The survey asked faculty from schools where IHL is taught if they thought coverage should be expanded at their schools. Interestingly, opinion was almost evenly divided on the question, as shown in Figure 11.<sup>57</sup>

Of those professors who do not think IHL should be expanded at their schools, 96% indicated in response to a follow-up question that existing coverage is sufficient. As shown in Figure 12, a few also noted that IHL is not a priority and that there is low student interest.

<sup>56</sup> For most schools this would be the Jessup International Law Moot Court Competition, or Pace Law School’s ICC Trial Competition, as only a handful of US law schools have participated in the Jean-Pictet Competition and the online survey was conducted before the inaugural Clara Barton IHL Competition in 2014.

<sup>57</sup> Faculty from schools that did not have IHL instruction were also asked if it should be offered. For the very small number (four) of the 2012 survey respondents from such schools, three said yes, while one replied that he/she did not know. This finding was qualitatively similar to that in the 2007 Report, where four out of six respondents said their school should offer IHL, while two said it should not.

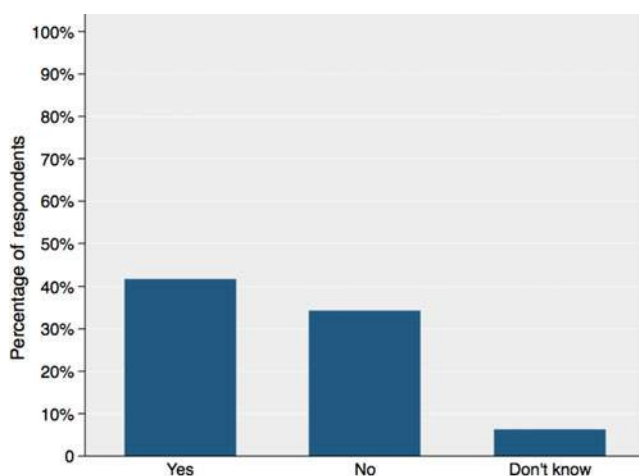


Figure 11. Faculty opinion on IHL expansion, 2012. n = 82.

The survey asked professors who think that IHL should be taught in their schools, or that its teaching should be expanded there, to rank the importance, ranging from extremely relevant to not very relevant, of five potential obstacles: lack of interest on the part of any faculty member in teaching IHL, lack of support from other faculty at the school for teaching IHL, lack of student interest, lack of teaching materials, and lack of teaching resources such as a model syllabus and mentors. As shown in [Figure 13](#), the clearest message on this point is that a lack of teaching materials is the least important obstacle. This finding is consistent with the appearance of several new casebooks and teaching supplements in the last few years, as described above. The only potential obstacle ranked as extremely relevant is lack of faculty teaching interest, which is consistent with the 2007 Report's finding that faculty interest drives teaching of this material.

## Conclusions and recommendations

IHL teaching and scholarship are strong and growing in US legal academia. While the shifting economics of legal education are a cause for concern, the ICRC and other organizations such as ASIL and the American Red Cross have helped to develop and support a dedicated network of professors and a motivated group of students.

The progress made can be assessed against the three main recommendations outlined in the 2007 Report. The first recommendation was that teaching resources should be made available. For the most part, this objective has been met. The 2007 Report called for a textbook, and there are now five available. It called for teaching modules, and there are now three that can be downloaded at no cost. It called for a syllabus bank, which the ICRC is in the process of developing on its website. Finally, it also called for greater dissemination of the ICRC's casebook *How Does*

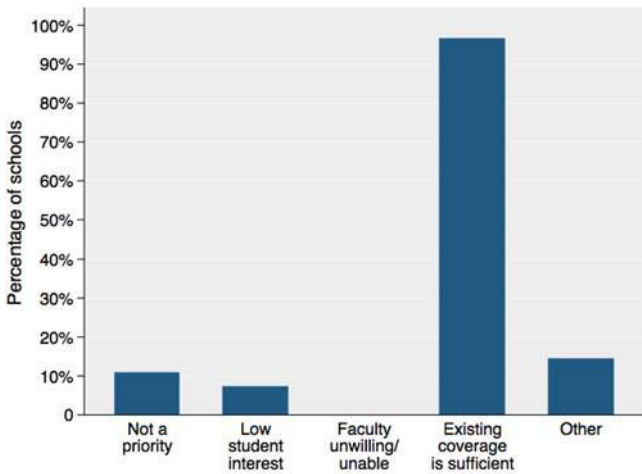


Figure 12. Reasons not to expand IHL, 2012. n = 28.

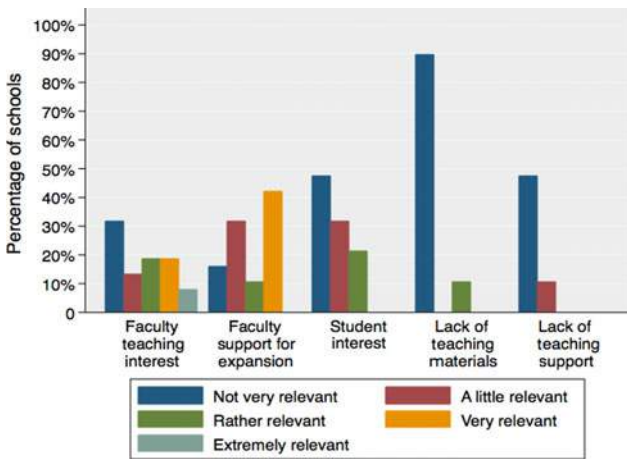


Figure 13. Faculty-identified obstacles to expanding IHL, 2012. n = 38.

*Law protect in War?* The third edition of this resource was published in 2011 and will soon be available online.<sup>58</sup>

The second recommendation in the 2007 Report was that IHL-specific training opportunities should be created for experienced faculty as well as first-time teachers. As detailed in this paper, the ICRC has partnered with a number of law schools and legal organizations, most notably ASIL's Lieber Society on the Law of Armed Conflict, to provide these opportunities, an initiative that continues.

58 Editor's note: Since the writing of this article, the online version of this casebook has become available at: [www.icrc.org/casebook/](http://www.icrc.org/casebook/).

The third and final recommendation in the 2007 Report was that a faculty network should be cultivated to share resources and ideas, support and encouragement. Such a network has been a natural outgrowth of the numerous training opportunities offered in particular by the ICRC and its partners, augmented by social media. The continued growth of the ASIL Lieber Society membership and the number of panels organized across the country in law schools, including the fact that many of the professors interviewed confirmed that they frequently receive invitations to speak at conferences, are other signs not only of the existence but also of the dynamism of such a network.

In addition to the recommendations proposed by the 2007 Report, professors were asked during the interviews whether they had suggestions for the ICRC in particular over the next five years. The following recommendations are informed by theirs, but taking into consideration those already made in the 2007 Report, the authors have chosen to focus on three.

First, it is important to continue efforts toward creating a series of regional thematic events on IHL. As mentioned above, many professors do not necessarily have the time, resources or need to attend multiple-days-long, specialized trainings on IHL. However, many would be interested in learning about specific aspects of IHL without having to travel too far. Such events present several advantages: on the one hand, they facilitate interaction between the current network and professors who may not be IHL experts but are active in IHL-related areas of the law, and on the other, they also allow the ICRC to reach out to regions that may not be considered as geographic IHL strongholds, but which may be home to mid- and top-ranking universities. Regional events also permit a reduction in costs by concentrating networking, awareness-raising and knowledge-generating efforts in one event.

Second, future efforts should also focus on looking beyond the borders: with a currently sustainable and dynamic network in the United States, it would be worth seeking to include other networks abroad in order to reinforce the domestic one or to ensure progress on specific legal issues. As mentioned above, the ICRC organized a number of transnational events in 2013 and 2014. Specific regions of interest should include Latin America, the Middle East and Asia, with events aimed at strengthening the interactions between the academic and legal networks in those regions. Moving forward, it is crucial that experts on IHL across the world are not only aware of legal positions held by other countries, but also know the legal communities abroad and are able to organize truly representative and diverse events. The existence of numerous blogs and listservs followed worldwide is already an essential tool in fostering such interaction; however, nothing can replace the efficiency and productivity of on-site and in-person discussions.

Third, although this study focuses exclusively on IHL integration with legal education, the authors would like to conclude on an expansive note. Now that the integration strategy has proven successful for law schools, it would be interesting to develop a similar but adapted framework for integration of IHL within international studies programmes and master's degree programmes. In particular,

faculty specialized in political science, international relations or conflict studies necessarily have to deal with questions related to IHL and could prove to be natural partners for legal scholars and law students working on IHL in the years to come.<sup>59</sup>

## Appendices

### Appendix 1: Survey questions used for the 2007 Report

1. Is international humanitarian law (IHL) taught at your law school? ☐ yes ☐ no  
(go to question 7)
2. Is a course entirely devoted to IHL? ☐ yes ☐ no (go to question 3)

How many IHL courses are in the curriculum? ☐ 1 ☐ 2 ☐ 3 ☐ over 4

What form does the course take? ☐ lecture ☐ seminar ☐ combination

Are there prerequisites for enrolling in IHL courses? ☐ yes ☐ no

How would you describe the staff teaching IHL courses? ☐ tenured ☐ adjunct  
☐ visiting

Please list the name(s), email address(es) and telephone number(s) of the staff:

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How many students take IHL courses during a year?

☐ under 20 ☐ 21–40 ☐ 41–60 ☐ over 61

3. Is IHL taught only within the framework of another course (e.g. public international law)?  
☐ yes ☐ no

How many students are exposed to IHL over the course of a year?

☐ under 20 ☐ 21–40 ☐ 41–60 ☐ over 61

4. Do you have on staff someone you would characterize as being an expert on IHL? ☐ yes ☐ no

59 See, for example, the number of IHL-related panels during a recent conference of the International Studies Association (ISA), “ISA’S 55th Annual Convention: Spaces and Places - Geopolitics in an Era of Globalization”, Toronto, 26–29 March 2014, available at: [www.isanet.org/Conferences/Toronto2014.aspx](http://www.isanet.org/Conferences/Toronto2014.aspx).

5. What extracurricular activities are available to your students related to IHL [check off all that apply]? ☐ law journals ☐ student organizations ☐ moot courts ☐ other \_\_\_\_\_
6. Do your students know about the Pictet International Humanitarian Law Moot Competition? ☐ yes ☐ no
7. Do you believe that students in your law school have an interest in the topics related to international humanitarian law?
 

|   |                          |     |                          |    |
|---|--------------------------|-----|--------------------------|----|
| relief assistance and humanitarian action | <input type="checkbox"/> | yes | <input type="checkbox"/> | no |
| armed conflict                            | <input type="checkbox"/> | yes | <input type="checkbox"/> | no |
| 'the global war on terror'                | <input type="checkbox"/> | yes | <input type="checkbox"/> | no |
| civil-military relations                  | <input type="checkbox"/> | yes | <input type="checkbox"/> | no |
| the security of humanitarian workers      | <input type="checkbox"/> | yes | <input type="checkbox"/> | no |
8. Should international humanitarian law be covered more thoroughly on your campus? ☐ yes ☐ no
9. Would you be willing to be contacted by phone for a short (maximum 30 minutes) follow-up conversation? ☐ yes ☐ no

If yes, please provide the following information:

Name: \_\_\_\_\_

University: \_\_\_\_\_

Title: \_\_\_\_\_

Telephone: \_\_\_\_\_

## Appendix 2: Survey questions used for the 2012 online survey

Thank you for agreeing to participate in this survey on the teaching of International Humanitarian Law (IHL, also known as the Law of War and the Law of Armed Conflict) in US law schools. The questionnaire only takes 10 minutes.

This survey was developed by the International Committee of the Red Cross (ICRC) Regional Delegation for the United States and Canada, and UC Berkeley's Miller Institute for Global Challenges and the Law. It is part of a five-year update to an initial survey on the teaching of IHL in US law schools.

This survey represents a critical component for assessing the evolution of IHL teaching in the last five years, as well as the impact of the ICRC's IHL promotional initiatives and strategies, and the remaining challenges to more effective integration in law school curricula.

More specifically, the results of this survey will help us to provide better support to legal scholars and law schools teaching IHL, as well as to identify how best to support a network of those interested in IHL in US law schools. These results will be published as an academic article in the *International Review of the Red Cross*, and publicly shared.

This questionnaire is organized in three (3) short sections:

1. Teaching IHL in US law schools
2. Challenges encountered
3. Expanding the teaching of IHL

Participation in this survey is strictly voluntary and without financial compensation. All feedback provided is anonymous and will be treated confidentially.

This questionnaire is intended for deans and professors/lecturers of law faculties. Please do not answer it if you are teaching IHL as part of non-legal course. If you would like to share comments and suggestions with us nevertheless, please contact us at [aquintin@icrc.org](mailto:aquintin@icrc.org).

\*\*\*

## Section 1: IHL in the curriculum

This section is intended to collect empirical data on the level of implementation of IHL within law schools' curricula.

\*\*\*

- 1.1. Is IHL taught, in any form, at your law school?
  - ☐ yes, as a stand-alone course (Please specify the name of the course)
  - ☐ yes, as part of a course on... (Please specify the name (e.g. national security law, public international law, human rights law, international criminal law, etc.)) (*go to question 1.2.2*)
  - ☐ no (*go to question 2.1.2*)
- 1.2.1. How many IHL courses are in the curriculum?
  - ☐ 1
  - ☐ 2 (Please specify the titles of the courses, if different from above)
  - ☐ 3 or more (Please specify the titles of the courses, if different from above)
- 1.3. How many students take IHL courses during a year?
  - ☐ under 20
  - ☐ 21–40
  - ☐ 41–60
  - ☐ over 61
- 1.4. What form does/do the course(s) take (you may select several answers)?
  - ☐ lecture
  - ☐ seminar
  - ☐ combination
  - ☐ clinic



## 1.5. How would you describe the faculty teaching IHL courses?

- ☐ tenured/tenure track
- ☐ adjunct/non-tenured
- ☐ visiting
- ☐ other (please specify)

\*\*\*

*(Track 2)*

## 1.2.2. In how many courses is IHL incorporated during a year?

- ☐ 1
- ☐ 2 (Please specify the titles of the courses, if different from above)
- ☐ 3 or more (Please specify the titles of the courses, if different from above)

## 1.2.3. How many students are exposed to IHL over the course of a year?

- ☐ under 20
- ☐ 21–40
- ☐ 41–60
- ☐ over 61

\*\*\*

*(For all)*

## 1.6. What extracurricular IHL-related activities are available to your students [check all that apply]?

- ☐ law journals (please specify)
- ☐ student organizations (please specify)
- ☐ moot courts (please specify)
- ☐ other (please specify)

\*\*\*

**Section 2: Challenges**

This section is intended to identify the factors that may impede the further integration of IHL into law schools' curricula, whether institutional, financial or otherwise.

\*\*\*

## 2.1.1. Do you think that IHL should be covered more thoroughly at your law school?

- ☐ yes (*go to question 2.2.1*)
- ☐ no (*go to question 2.2.2*)

## 2.1.2. Do you think that IHL should be covered in your law school?

- ☐ yes (*go to question 2.2.1*)
- ☐ no (*go to question 2.2.3*)

2.2.1. What obstacles have prevented IHL from being taught more thoroughly or at all (please list in order, with 1 being the greatest obstacle)?

- ☐ Lack of faculty interest/expertise for teaching a course
- ☐ Lack of faculty support for including an IHL course
- ☐ Lack of student interest
- ☐ Lack of IHL casebook/structured IHL course materials
- ☐ Lack of IHL teaching support network for syllabi, mentors, etc.
- ☐ Other (please specify):

2.2.2. Please explain why not (please list in order, with 1 being the most important reason)

- ☐ Not a priority given limited resources
- ☐ Students are not interested
- ☐ Faculty not able/willing to teach a course
- ☐ IHL is already being taught to a satisfactory level
- ☐ Other (please specify):

2.2.3. Please explain why not (please list in order, with 1 being the most important reason)

- ☐ Not a priority given limited resources
- ☐ Students are not interested
- ☐ Faculty not able/willing to teach a course
- ☐ Other (please specify):

2.3. Do you believe that students in your law school have an interest in topics related to IHL?

|   |                              |                             |
|---|------------------------------|-----------------------------|
| Armed conflict                            | <input type="checkbox"/> yes | <input type="checkbox"/> no |
| Detention and torture                     | <input type="checkbox"/> yes | <input type="checkbox"/> no |
| Drones and other warfighting technology   | <input type="checkbox"/> yes | <input type="checkbox"/> no |
| “The global war on terror”                | <input type="checkbox"/> yes | <input type="checkbox"/> no |
| Relief assistance and humanitarian action | <input type="checkbox"/> yes | <input type="checkbox"/> no |

Other:

2.4. Does your library provide any IHL materials in its collection, either print or electronic?

- ☐ yes
- ☐ no
- ☐ I don't know

\*\*\*

### Section 3: Expanding the teaching of IHL

This section seeks to identify means to capitalize on the existing interest in IHL to expand and support the teaching of IHL in law schools.

- 3.1. Do you use an IHL textbook?
- ☐ yes (please list the title and author)
  - ☐ no
  - ☐ not applicable (then jump to question 14)
- 3.2. Are you and your students satisfied with the IHL textbooks that you know?
- ☐ yes
  - ☐ no (please explain what type of textbook you would need)
  - ☐ no opinion/I don't know
- 3.3. Would you agree to share your syllabus?
- ☐ yes (then ask for email address in order to be contacted)
  - ☐ no
- 3.4. How do you keep informed of IHL-related news and events?
- ☐ ICRC website
  - ☐ I'm a member of the ASIL Lieber Society on the Law of Armed Conflict
  - ☐ Other interest groups (please specify):
  - ☐ Blogs (specify which blogs you follow):
  - ☐ Listservs (specify which listservs you receive):
  - ☐ Other (please specify):
  - ☐ I do not keep informed of IHL-related news and events
- 3.5. Is there someone in your professional network whom you consider an expert on IHL, i.e., if you had a question on IHL, is there someone you could contact either on your own faculty or elsewhere?
- ☐ yes (please give name)
  - ☐ no
- 3.6. Do you feel that
- ☐ There is a strong interest in IHL among academia but experts are not well connected with each other
  - ☐ There is an IHL community, but I am not part of it
  - ☐ There is an IHL community and I feel part of it
  - ☐ Other:
- 3.7. Have you: (please specify)
- ☐ participated in ICRC-led events in the past?
  - ☐ received support from the ICRC?
  - ☐ participated in American Red Cross-led events in the past?
  - ☐ received support from the American Red Cross?
  - ☐ none of the above
- 3.8. Are you aware that "Teaching IHL Workshops" designed for law faculty who teach or plan to teach IHL are offered periodically by the International Committee of the Red Cross and various law schools, including UC-Berkeley Law, Emory University Law, and American University Washington College of Law?

- ☐ yes  
☐ no

3.9. Have you attended such a workshop?

- ☐ yes (please specify the place and year)  
☐ no, but I have attended a similar workshop (please specify the name of the host institution, the place and year)  
☐ no

3.10. Would you be interested in receiving more information about these workshops?

- ☐ yes (please specify your email address)  
☐ no

3.11. Would you be interested in a regional IHL conference bringing together the persons interested in teaching IHL at your and neighbouring universities?

- ☐ yes  
☐ no

\*\*\*

## Conclusion

4.1. Are there any comments or suggestions that you would like to share that have not been covered in this questionnaire?

4.2. Please tell us a bit more about yourself.

Name of your law school:

Your position within the law school:

4.3. Would you be willing to be contacted by phone for a short (maximum 20 minutes) follow-up conversation? ☐ yes ☐ no

If yes, please provide the following information:

Name: \_\_\_\_\_

University: \_\_\_\_\_

Telephone: \_\_\_\_\_

## Appendix 3: Interview questions, April 2013

### I. Professor profile

Do you teach a stand-alone IHL/LOAC course? [hereinafter IHL]

Do you cover IHL topics in another course you teach?

For how many semesters or years have you taught/covered IHL?

How long have you been teaching law?

Do you also write on IHL?

How did you become interested in teaching IHL?

Have you ever been a member of the armed forces of any country?

Do you hold an advanced degree (other than a J.D.)? If so, in what subject?

## **II. Course coverage**

If a stand-alone course, is the main focus: conduct of hostilities/*jus in bello*; resort to force/*jus ad bellum*; international criminal law; or some other subject?

If you cover IHL in another course you teach, what topic(s) do you include?

If you do not teach a full semester on the conduct of hostilities/*jus in bello*, what reasons prompted a broader focus?

## **III. Course materials**

How much reading do you assign each week?

From which sources do you draw your IHL readings?

A textbook/casebook? If so, which one(s) have you used?

Your own reader/course materials? Online or in hard copy?

Do you assign, in addition to a published book or as part of your own course materials:

Treaties?

Government (Executive Branch or Congress) documents, speeches?

Judicial opinions from the US? From other national or international jurisdictions?

ICRC publications?

Academic books and articles?

NGO statements and publications?

Media articles and analysis on current events?

What other resources do you assign your students to read?

If you wrote your own textbook or created a course reader: what was the reason? Why did you feel the need to produce your own? What are the differences with other textbooks or available resources?

#### **IV. Course design and format**

What, if any, templates did you use to design the course? (E.g., did you have access to other syllabi?) If so, how did you obtain them (e.g., from a colleague at another school)? What other resources did you use?

How many hours per week/credit hours does your IHL class meet? Is it a standard 14-week semester course?

If you cover IHL in another course, how many class hours do you spend on it?

Do you discuss current events that unfold during the course? To what extent? If you use case studies in class, do you use historical or contemporary ones? What are the pluses/minuses of teaching from current events?

Have you used guest lecturers during class?

If so, what are their backgrounds? (E.g., a JAG, an ICRC attorney, someone who's worked at an international tribunal?) Are the students interested?

Do you show videos? On which topics?

Do you use participatory classroom activities, such as simulated treaty negotiations, mock trials, mock legislative debates, or small group breakout sessions?

#### **V. Feedback from students**

Does your law school provide students an opportunity to evaluate your IHL teaching? If you know, in teaching your most recent course or classes on IHL, which topics did the students find most engaging? Least engaging?

Have you changed your course structure, content, or materials as a result of student evaluations?

## **VI. Profile of students**

If you know, why are your students interested in IHL? Could you estimate how many of them are intending to go into international law versus domestic law? Public versus private law?

Can non-law students take your course?

If so, what percentage of students are law versus non-law students? What programs or departments do the non-law students come from?

How much familiarity with IHL do students come in with?

What is the typical gender balance in your IHL course? Is this consistent with the gender balance in your law school and/or in the other courses you teach?

Do you see any other demographic trends among your students as compared to your school's student population generally? (E.g., representation of current or former members of military, LL.M. students, or students with personal or family ties to conflict-affected countries.)

## **VII. IHL in the curriculum**

What is the title of the course?

How frequently is your course offered?

In which semester and year did you most recently teach an IHL course?

Since what year has IHL been taught at your school?

How have changes in the world (e.g., US involvement in Iraq, Afghanistan, Libya) changed the way IHL is taught at your school?

If you know, was there resistance on the part of faculty or the administration to offering a course dedicated to IHL? What were the concerns?

Are there any course prerequisites for your school's IHL course?



If your school offers more than one course in IHL, how do they differ? (E.g., a survey course and then a course focused on a more specific IHL topic?)

What other courses related or complementary to IHL are offered at your school? (E.g. International Human Rights Law, International Criminal Law, National Security Law, Military Law?)

Is IHL taught as a doctrinal course or a clinic or both?

Do you find that enrolment for your school's IHL course varies with current events?

If so, can you name specific incidents that contributed positively or negatively to enrolment?

Interest in IHL increased after 9/11 and many classes were added to the curricula in universities and law schools.

What, if any, impacts have you seen of this expansion at your law school, and on US policy and practice more generally?

Do you see that interest decreasing in the near future, especially after 2014 with the withdrawal of US forces from Afghanistan?

What do you think are the biggest obstacles to the growth of IHL courses/coverage of IHL issues in other courses at US law schools?

Do you think the recent criticism of and proposals for restructuring US law schools will have any impact on the IHL course at your school, or at US law schools more generally?

Why do you think it is important to teach IHL? What do you think are the main reasons why students should take an elective course on IHL?

## **VIII. Student opportunities outside the curriculum**

If you know, have any of your students had their IHL-related work published? Have any of your students entered ASIL's Lieber Society writing competition?

Are you aware of any students from your school who have attended the Jean Pictet moot court competition or any similar moot court competition?

If you know, does your law school have speakers (outside of your class) or events such as films or discussions on IHL topics? Are they well-attended?

## **IX. Wrap-up**

Do you have any other thoughts to share on the teaching of IHL in US law schools? What can the ICRC do over the next 5 years to promote and support teaching of IHL in US law schools?



# Promoting respect for IHL by NGOs: The case of ALMA – Association for the Promotion of IHL

**Ido Rosenzweig\***

Ido Rosenzweig is Chairman and Co-Founder of ALMA – Association for the Promotion of International Humanitarian Law, Director of Research on Terrorism, Belligerencies and Cyber at the Minerva Center for the Rule of Law under Extreme Conditions at the University of Haifa, and a PhD candidate at the Hebrew University of Jerusalem.

## Abstract

*ALMA – Association for the Promotion of International Humanitarian Law is an Israeli-originated non-governmental organization. ALMA was established with the prime objective of promoting knowledge, understanding and discussion of IHL. For that purpose, it has established several projects aimed at different audiences and with different goals. Since its establishment in March 2010, ALMA has managed to make its way to the front line through cooperation and dedication. This article provides an overview of ALMA's goals and projects, as well as its challenges and future aspirations in the quest to generate respect for international humanitarian law.*

**Keywords:** civil society, NGOs, workshops, IHL forum, association, education, IHL dissemination.

: : : : : :

This author has had the honour and pleasure to be among the founders of ALMA – Association for the Promotion of International Humanitarian Law,<sup>1</sup> together with

\* I would like to thank those who read earlier versions of this paper and offered valuable suggestions, and especially the editing team at the *Review*.

eight friends. Today ALMA has ten registered members, between twenty and thirty volunteers, and many projects, all tasked with one main objective: to promote international humanitarian law (IHL). This is the story of what a short conversation between two IHL-enthusiast friends can lead to.

ALMA is an apolitical non-profit association established on 24 March 2010 with the prime objective of promoting knowledge of IHL, mainly in Israeli society. ALMA members believe that knowledge of IHL should be accessible to the general public, and that the promotion of IHL will encourage fruitful discussions on its impact and application within Israeli society, as well as generate respect for IHL.

It all started with a Google Chat in December 2009 between Tom Gal<sup>2</sup> and myself. What began as a regular IHL discussion turned into a conversation on the need to establish a non-profit association for the promotion of IHL. This conversation, which continued in a meeting at a coffee house, was aimed at drafting the initial vision of ALMA in order to present that vision to potential co-founders. We then started seeking out our co-founders. We were looking for young scholars and practitioners from Israel with whom we could establish ALMA, and have fun doing so.

ALMA members include researchers at leading think tanks, legal advisers to ministries, current and past counsellors to international tribunals, PhD candidates, and scholars in leading academic institutions. All members of ALMA are involved in and contribute to the association's activities on a volunteer basis.<sup>3</sup>

The background to the establishment of ALMA lies in the situation in Israel in 2009, following Operation Cast Lead, the armed conflict between Israel and Hamas that took place between December 2008 and January 2009, and the publication of the Goldstone Report.<sup>4</sup> IHL issues were at the heart of the public discussion. Although there were some actors that took action mainly by writing reports about IHL topics, such actors were usually considered to be biased or driven by a political agenda. There was no organization with the sole purpose of promoting discussion and knowledge of IHL.

ALMA was established on the premise that any discussion or decision on IHL, its implications and consequences ought to be based on at least some basic IHL knowledge, especially with regard to the applicable legal framework. The acquisition of such knowledge allows for substantive positions and informed discussion rather than arguments based on empty and shallow rhetoric. Such uninformed arguments are often held on social media such as Facebook and

1 The name ALMA is a Hebrew acronym for Association for the Promotion of International Humanitarian Law.

2 Ms Tom Gal is a PhD candidate at the Geneva Academy of International Humanitarian Law and Human Rights, and Geneva UN Representative for the World Jewish Congress.

3 The other implicating members of ALMA are Ms Hila Adler, Ms Yfat Barak-Chaney, Ms Yael Rimer-Cohen, Ms Carmel Shenkar, Ms Yael Vias-Grisman, Ms Sigall Horovitz and Mr Ady Niv. Information about ALMA members is available at: [www.alma-ihl.org/who-we-are](http://www.alma-ihl.org/who-we-are) (all internet references were accessed in December 2014).

4 Report of the UN Fact-Finding Mission on the Gaza Conflict, UN Doc. A/HRC/12/48, 25 September 2009 (Goldstone Report), available at: [www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf).

Twitter, in blogs, in news media, and so on; empty slogans are also heard from politicians, diplomats and commentators. This is true in Israeli society as well as in other countries.

Armed conflicts tend to bring out strong emotions. Almost everyone has an opinion on the situation. Such opinions can be based on information found in traditional and non-traditional media, moral values and a personal evaluation of the situation. However, individuals usually lack the knowledge of IHL that would allow them to understand what is legally permissible during armed conflicts and what is prohibited.

It is with these goals and purposes that ALMA was established – to provide knowledge about IHL and enhance its discussion among the general public, scholars, practitioners (legal advisers, field delegates, etc.), politicians and diplomats, so as to clarify and inform public dialogue. While the main focus of ALMA is the Israeli context, it also has an interest in worldwide IHL developments and discussions.

## **ALMA's projects – activities generating and enhancing respect for IHL**

In order to fulfil ALMA's goals and vision, several projects have been established. Some of these projects are conducted in collaboration with like-minded partners, and others are managed solely by ALMA. One of the main concepts behind the projects is that there is no one way to promote knowledge and discussion of IHL. In order to be able to fulfil that mission and reach as many people as possible, ALMA has developed a spectrum of projects aimed at different audiences, each project having different goals. In order to evaluate ALMA's contribution to respect for IHL, therefore, one should examine the projects individually, but also consider the overall added value of the entire range of projects. In this section we will provide an overview of some of ALMA's main projects.<sup>5</sup>

### **Joint IHL Forum**

One of the very first projects established by ALMA was the Joint IHL Forum in collaboration with Interdisciplinary Center (IDC) Herzliya, Radzyner Law School.<sup>6</sup> The meetings of the Joint IHL Forum are open to the general public. The regular audience is diverse and includes undergraduate and graduate students, PhD candidates, scholars, and practitioners working at non-governmental organizations (NGOs), think-tanks and other organizations, as well as legal advisers from the Israel Defense Forces (IDF) and governmental offices. Speakers likewise come from the same professional circles as the audience.<sup>7</sup>

5 Information on other projects such as the ALMA newsletter and a national competition on international criminal law can be found on the ALMA website, available at: [www.alma-ihl.org](http://www.alma-ihl.org).

6 For more information, see the Joint IHL Forum website, available at: [www.alma-ihl.org/IHL-Forum](http://www.alma-ihl.org/IHL-Forum).

7 The list of past speakers who have appeared at the forum and the relevant topics can be found on the Joint IHL Forum website, *ibid*.

The Joint IHL Forum, also known as the ALMA Forum, conducts monthly meetings during the academic year (October–June). The forum provides a platform for roundtable discussions on issues related to IHL: current events in Israel and abroad, recent developments, new publications or draft articles and so on.<sup>8</sup> Most of the meetings have the same format—one or two presentations followed by a roundtable discussion. The discussions are held in an informal atmosphere, and the only rule is that everything said at the table is in a private capacity and nothing is to be inferred as an official position, in a modified version of the Chatham House rule or “ALMA rule”. Experience shows that these rules enable the discussion to be kept open and unrestrained among all of the participants. The lectures and discussions are not recorded, but various options for this, including live streaming of certain sessions and some forms of cooperation with the press, are being considered for the future.

The most considerable contribution of the Joint IHL Forum so far has been the establishment of a unique and dedicated platform for discussion in Israel, where students, scholars, practitioners and the general public can come to listen to expert IHL discussions on academic writing and recent developments.

### Young Researchers Project

In order to provide a platform and promote the academic writing of young researchers in Hebrew, ALMA has established the Young Researchers Project (YRP), aimed at undergraduate and graduate students and young IHL practitioners.<sup>9</sup>

The YRP is meant to provide an opportunity for young students to experience the process of academic writing and to present and discuss their research before the Joint IHL Forum. Following an open call for applications, a few students are selected to work on an IHL topic of their choice. The topic must be current and relevant. Each student is assigned an ALMA member for guidance in the process of research and writing. Once the draft papers are prepared, the students present their research in a special session of the Joint IHL Forum. Following each presentation, the speakers have their work commented on by an experienced local scholar or a researcher invited specifically for that purpose, and by the roundtable participants. The first YRP

8 For example, in the opening session of the 2014–2015 academic year, the forum hosted the distinguished Professor Malcolm Shaw, who discussed the topic of “Combatant Immunity for State Forces in Non-International Armed Conflicts”; see Shani Dann and Ido Rosenzweig, “Joint IHL Forum”, October 2014, available at: [www.alma-ihl.org/IHL-Forum/october2014](http://www.alma-ihl.org/IHL-Forum/october2014). In the May 2014 session, Professor Robbie Sabel and Advocate Keren Michaeli addressed “The Palestinian Accession to IHL Treaties”; see Ido Rosenzweig, “Joint IHL Forum”, May 2014, available at: [www.alma-ihl.org/IHL-Forum/ihlforum-may2014](http://www.alma-ihl.org/IHL-Forum/ihlforum-may2014). In April 2014, Professor Eugene Kontorovich, Dr Daphne Richemond-Barak and Dr Ziv Bohrer presented their views on “The Crimean Peninsula and IHL”; see Ido Rosenzweig, “Joint IHL Forum”, April 2014, available at: [www.alma-ihl.org/IHL-Forum/ihlforum-april2014](http://www.alma-ihl.org/IHL-Forum/ihlforum-april2014).

9 The Young Researchers Project is headed by Ms Yfat Barak-Chaney. For more information, see Yfat Barak-Chaney and Ido Rosenzweig, “The Young Researchers Forum”, March 2014, available at: [www.alma-ihl.org/IHL-Forum/ihlforum-march2014](http://www.alma-ihl.org/IHL-Forum/ihlforum-march2014).

presentations session took place in March 2014 and included the work of four young researchers.<sup>10</sup>

## Lectures and workshops

ALMA believes that IHL is not just a theoretical set of rules, but also a set of practical and moral standards aimed at guiding those who are involved in armed conflicts and those who are protected during such conflicts. In order to implement this vision, ALMA has developed two methods of relaying both the theory and practice of IHL and related issues: IHL lectures and IHL workshops.

IHL lectures and workshops are open to groups and are adapted to the level of knowledge and expertise of the group. Prior knowledge of IHL or public international law is not a prerequisite. ALMA provides a large and diverse selection of IHL lectures, starting with basic introductory lectures for people without any legal background, up to lectures that focus on a specific topic, region or development in the context of IHL and related fields, such as child soldiers, universal jurisdiction and contemporary challenges in the Israeli context (for example, targeted killings, occupation law and self-defence). The simulation-based workshops provided by ALMA give participants a chance to face “real-life challenges” related to the application of IHL and related norms in a virtual armed conflict.

The workshop begins by dividing the participants into small groups of about ten, each having a facilitator. Each group is given a scenario describing a part of the conflict that focuses on a certain legal and practical dilemma, such as self-defence, belligerent occupation or military targets. All the groups are required to identify the main issue at hand, with the help and guidance of the facilitator, and then either provide a decisive answer or understand why they have failed to provide such an answer. At the end of the workshop, the groups convene and representatives from each group present their part of the conflict scenario, explain the main issue and describe the solution they have reached (or explain why they did not manage to find a solution). The presentation of the various scenarios is followed by a concluding discussion about the workshop experience.

Lectures and workshops are ALMA’s “shelf products” that can be used at conferences or seminars for large or small groups. The workshops can be tailored to the unique needs of a specific group according to its size, knowledge, time

10 See *ibid.* The four papers presented were: Noa Bornstein-Ziv, “Extradition Laws in the Face of the Expanding World Terrorism” (respondent: Advocate Vadim Shuv, Deputy Public Defender in Jerusalem); Adi Swisa, “Disclosure in the Rome Statute and in Practice” (respondent: Advocate Yael Vias Gvirsman, ALMA member and International Criminal Court Defence Counsel); Advocate Adam Wolfson, “The Prohibition on the Exportation of Indiscriminate Weapons to Terrorist Organizations in International Law” (respondent: Advocate Liron Libman, former head of the IDF International Law Department); and Ilia Binyaminov, “Obama’s Drone Doctrine: International Lawyer or Legislator?” (respondent: Advocate Tal Mimran, a researcher from the Israel Democracy Institute). The forum session was successful and the comments that the researchers received from the respondents provided valuable input. Each completed article was submitted to a peer-reviewed Shaarei Mishpat College of Law journal. Currently, the YRP is being assessed following its first year in order to analyze the added value of the project and decide when the second YRP will take place.



constraints or any other factor. Most scenarios have been written in such a manner that almost no modifications are required to customize a workshop to a specific group, and it is the facilitator's role to ensure that the level of the discussion fits the level of the group. When a specific group has extensive knowledge, the details become more significant and the level of discussion goes to higher legal resolutions in comparison to a more "basic" group. One of the main challenges when guiding such a group is not necessarily to adjust the simulation to the level of the group, but rather to ensure that the group members understand the complexity of the topic and the legitimacy of different points of view on the one hand, and to lead the group members to a genuine and interesting discussion over that topic on the other hand. In cases where the group is very homogenous and it seems that the members tend to reach a consensus quickly, it is the role of the facilitator to "make some noise" and use his or her knowledge of the material to throw the participants off their basic or initial understanding of the situation.

ALMA has organized workshops under different variations such as for LLM students and PhD candidates from all over the world at an annual Student Conference on International Law held in Jerusalem, for various European students (most with no legal education) at the Geneva Seminar of the European Union of Jewish Students, for Israeli students participating in the Israel Model UN Club, and for students enlisted in a "Law and Terrorism" course at the IDC Herzliya, as well as for legal advisers at the Office of the Prime Minister.

ALMA workshops provide participants with a unique opportunity to get a better understanding of the principles of IHL and, more importantly, to understand the practical difficulties of their implementation in actual scenarios and situations. The main purpose of these simulations is to make participants experience the difficulties of taking decisions on the ground. The move from theory to practical application is extremely important. ALMA has so far conducted more than a dozen workshops, which have received enthusiastic responses and feedback from the participants.

## Op-eds and teaching articles

ALMA's website provides a platform for everyone interested in publishing articles on topics related to IHL. The articles can be published in Hebrew or in English. There are two types of articles that can be published on ALMA's website: "op-eds" and "teaching articles".

The articles published on the website are written for the general public. Most articles are written in a language suited for anyone, regardless of their background. Some of the op-eds are more complicated and are addressed to the professional IHL community. Over the years, several op-eds and articles have been published on different IHL-related topics such as the classification of the Syrian conflict,<sup>11</sup> urban

11 Noam Zamir, "Classification of the Syrian Conflict: A Question of Organization?", 27 September 2012, available at: [www.alma-ihl.org.il/opeds/zamir-syriaclassification092012](http://www.alma-ihl.org.il/opeds/zamir-syriaclassification092012) (Hebrew).

warfare,<sup>12</sup> Operation Pillar of Defence<sup>13</sup> and the location of military bases within major cities.<sup>14</sup> Authors include law students, IHL scholars and practitioners.<sup>15</sup> Some of the articles originally written in Hebrew have been translated to English as well. The purpose of the “Teaching Articles” section of the website is to provide a general explanation of current events, using them as case studies. These articles are published under the general authorship of ALMA, without any specific author being mentioned, and are currently published only in Hebrew. While the option of conducting the same project in English and perhaps translating some of these articles to English is always on the table, so far, due to other priorities and lack of relevant manpower, it has not yet been further developed.

All articles on the ALMA website are reviewed by the ALMA chairman, who also serves as the main editor of the website. After a first review, the work is reviewed by another ALMA member with relevant expertise in the field of the article.<sup>16</sup>

## National IHL Competition for Students

In 2007, the International Committee of the Red Cross (ICRC) Delegation in Israel and the occupied territories started an annual National IHL Competition for Students. The target audience of the competition is students from Israeli academic institutions. The basic requirement for participation in the competition is to have completed a course in IHL or public international law. The competition itself is a four-day-long, Jean Pictet-style simulation, based on role-play.<sup>17</sup> The competition awards two prizes – the winning team receives full funding for the international Jean-Pictet Competition (to which it must apply and gain admission separately), and the best speaker receives the Uriel Masad Award.<sup>18</sup>

The level of IHL knowledge in the national competition has been extremely high so far, and the proficiency of the coaches and judges has led to very well-respected performances by Israeli teams in the international Jean-Pictet Competition since the first team participated in 2008. In fact, in almost every year since 2008, there has been at least one Israeli team in the Jean-Pictet semi-finals, and in 2010 and 2011 the IDC Herzliya teams won the Jean-Pictet Competition.<sup>19</sup>

12 Eitan Diamond, “Lawful Conduct in Urban Warfare”, *Jerusalem Post*, 1 March 2012, available at: [www.alma-ihl.org/opeds/lawful-conduct-in-urban-warfare](http://www.alma-ihl.org/opeds/lawful-conduct-in-urban-warfare).

13 Ido Rosenzweig, “Pillar of Defense and IHL: Targeted Killings, Military Objectives, Proportionality etc.”, 10 February 2013, available at: [www.alma-ihl.org/opeds/jan2013forum-Rosenzweig](http://www.alma-ihl.org/opeds/jan2013forum-Rosenzweig).

14 Shavit Rissin, “HaKiria as a Ticking Bomb: Legal and Functional Aspects”, available at: [www.alma-ihl.org.il/opeds/rissin-proportionality-and-the-kirya0712](http://www.alma-ihl.org.il/opeds/rissin-proportionality-and-the-kirya0712) (Hebrew).

15 English op-eds available at: [www.alma-ihl.org/opeds](http://www.alma-ihl.org/opeds); Hebrew op-eds available at: [www.alma-ihl.org.il/opeds](http://www.alma-ihl.org.il/opeds).

16 Teaching articles available at: [www.alma-ihl.org.il/edu-eds](http://www.alma-ihl.org.il/edu-eds).

17 The 2014 National IHL Competition for Students project was headed by Ms Katja Knochelmann. For more information, see “National IHL Competition for Students”, available at: [www.alma-ihl.org/ihl-competition](http://www.alma-ihl.org/ihl-competition).

18 Named after the first head of communications of the ICRC in Israel, who contributed greatly to the promotion of IHL in Israel, particularly among the media and the military.

19 The IDC Herzliya teams were trained and coached by the author of this paper.

Since the fourth session of the National IHL Competition for Students in 2010, ALMA has joined the ICRC in the organization of the competition. The first added value of ALMA to the competition was the organization of an IHL summer course for the participants. This took the form of a series of sessions in which the participating teams received basic information about the competition and expert lectures about the core issues of IHL (such as the classification of conflicts, the conduct of hostilities and the relationship between IHL and other bodies of law, such as human rights law or international criminal law). The idea for the summer course emerged from the realization that there was a difference in the training that each team received in different institutions (*inter alia* due to time allocated to training and the different levels of experience of the coaches). Thus, it was important to ensure that all teams were provided with a solid and adequate starting point. A secondary but also important goal was to provide an opportunity for the teams to meet each other, which makes the competition more enjoyable and less stressful.

Another dimension ALMA added to the training for the competition was to introduce the option of “friendly matches” before the actual event. In the friendly matches, ALMA provides the opportunity for teams from different institutions to meet for a simulation. The purpose of these preparatory exercises is to practice the experience of going through a few full-length simulations against teams from other institutions. The teams are provided with (a) simulations written solely for the purpose of the friendly matches by ALMA, and (b) judges having the same level of IHL mastery as the judges in the competition to run the simulations and give the teams feedback. Since the option of ALMA-run friendly matches has been introduced, most teams have embraced it. It seems that going through such a “dress rehearsal” reduces the level of stress among students and improves their performance in the actual competition.

In contrast to the Jean-Pictet Competition, in the National IHL Competition, coaches are allowed to attend and are also allowed to provide substantial feedback to the teams.<sup>20</sup> The rationale behind this is twofold: firstly, coaches from within Israel can travel easily to attend the competition, unlike other events such as the Jean-Pictet and Clara Barton competitions; and secondly, enabling the coaches to provide substantial feedback allows the students to learn from their mistakes and improve in the next simulation. Due to the intensity of the competition, coaches are unable to give full-length explanations, and their feedback is therefore aimed merely at shifting the teams back on the right track. Throughout the years, it has become clear that teams whose coaches are unable to attend the competition or specific simulations do not receive such important feedback. Therefore, ALMA decided to provide teams whose coaches were unable to attend with experienced tutors who can replace the coaches and, with the approval of the team and the coaches, provide the necessary feedback.

20 In the Jean-Pictet Competition, coaches are not allowed to attend and the tutors provided on behalf of the competition are only allowed to comment on the performance of the teams, not on “substantive issues relating to the case study or on issues pertaining to law in general” (see the competition regulations, available at: [www.concourspictet.org/document/Regulations%202015%20EN.pdf](http://www.concourspictet.org/document/Regulations%202015%20EN.pdf)). On several previous occasions, the Israel National IHL Competition has also been conducted under similar limitations.

In the margins of the competition, there are different types of “side events” taking place. Such events include IHL lectures in the evenings by the judges or guests, and screenings of IHL-related movies and documentaries.<sup>21</sup> With the constant desire to take the experience of the competition one step further, for the 2014 competition ALMA has planned another side event, entitled the IHL Scavenger Hunt.<sup>22</sup>

## Engagement over social media: Facebook and Twitter

One of the most efficient ways of relaying information today is by using social media tools. ALMA uses its Facebook page<sup>23</sup> and Twitter account<sup>24</sup> for delivering information about IHL-related topics, updates, events and so on. The information published in ALMA’s social media tools is aimed both at the general public and at the professional IHL community. The Facebook page is also used to trigger discussions on different related topics and to explain certain norms and rules of IHL.

In order to make IHL more accessible to the general public, ALMA provides the opportunity to ask IHL and international law questions on its Facebook page and Twitter account. During periods of high-intensity warfare between the IDF and Palestinian armed groups in the Gaza Strip, such as Operation Pillar of Defence (November 2011) and Operation Protective Edge (July–August 2014), the amount of questions increases. The questions are usually received directly by ALMA via email, Facebook messages and so on, and published on ALMA’s Facebook page without the details of the person asking the question, allowing some anonymity in the process.

The questions received are diverse and relate to IHL issues such as combatant status, proportionality, legality of attacks against hospitals, and human shields. Due to the importance that ALMA places on conducting an open discussion, anyone can answer the questions. Moreover, since there is no such thing as an “official” ALMA opinion, ALMA members identify themselves as such and provide their own views and understanding of the question at hand and clarify the applicable legal rules and framework. The discussions are managed and moderated by a designated member. The main challenge is to enable an open and respectful discussion with different views, and at the same time ensure that no dramatically incorrect information on IHL is being conveyed by providing an

21 The 8th National IHL Competition took place on 17–20 November 2014. For more information, see “8th National Competition on IHL (November 2014)”, available at: [www.alma-ihl.org/ihl-competition/ihl-competition2014](http://www.alma-ihl.org/ihl-competition/ihl-competition2014).

22 The IHL Scavenger Hunt was composed of three daily riddles, an activity and a final riddle. During the first three days of the competition, the participants received a daily riddle (a word search, a maze and a crossword puzzle) related to IHL. The solution of each daily riddle led to a location and a code. With the right code at the right location, each team that had solved the daily riddle received a clue for the final riddle. On the fourth day, after the announcement of the finalists’ teams and the end of the preliminary rounds of the competition, the teams received their task sheets. Any team completing the relevant tasks received the fourth clue for the final riddle and was able to solve it and win the game.

23 Available at: [www.facebook.com/alma.ihl](https://www.facebook.com/alma.ihl).

24 Available at: [www.twitter.com/alma\\_ihl](https://www.twitter.com/alma_ihl).

explanation of the relevant norms. The main discussions and questions are also distributed via Twitter under the hashtag #AskIHL.

The ability to ask simple and complex questions about IHL and international law on social media enables the general public an opportunity to get a better understanding of existing rules. Due to the fact that many questions are related to high-profile incidents, the wording of the questions has great importance in ensuring that the discussion remains within the legal framework rather than a rhetorical or political framework.

## IHL events list

One of ALMA's contributions to the IHL community, not just in Israel but around the world, is the establishment of the "Upcoming IHL Events List" on ALMA's website.<sup>25</sup> This list provides detailed information about upcoming IHL events all over the world. It includes dozens of events organized by geographical region: Europe, North America, South America, Asia, Australia, Africa and the Middle East.

The list was created in November 2013 with the aim of providing a valuable service that did not exist at the time. It is kept up to date by a multilingual coordinating team. In order to keep the list updated with the most current information about IHL events, the coordinators conduct research about relevant events, proactively contacting organizers, universities and NGOs in order to update them about added events and to request to be notified about new events as well. In order to complete the service, added events and upcoming events are also published on ALMA's Twitter account and Facebook page. IHL events are tagged under the hashtag #IHLevent. The upcoming IHL events list is meant to serve members of the IHL community from all over the world.

## Translation of the Rome Statute of the International Criminal Court

The Rome Statute of the International Criminal Court provided an undeniable contribution to international criminal law and IHL. However, since Israel has not yet ratified the Rome Statute, it has not been officially translated into Hebrew. Recognizing the instrument's educational value, ALMA decided to take it upon itself to translate the Rome Statute into Hebrew.<sup>26</sup>

In order to ensure that every term is being translated carefully, specific research is being conducted, including an analysis of key terms, the *travaux préparatoires* and the commentaries to the Rome Statute. A translation team works under the guidance of the head of the project in order to ensure that the translation is consistent throughout.

25 See Anne Sapir and Moien Odeh, "Upcoming IHL Events", available at: [www.alma-ihl.org/upcoming-ihl-events](http://www.alma-ihl.org/upcoming-ihl-events).

26 The project is headed by Mr Ady Niv. For more information, see "Rome Statute Translation Project", available at: [www.alma-ihl.org/rome-statute-project](http://www.alma-ihl.org/rome-statute-project).

Once the translation process is completed, ALMA intends to publish the translation both in print, distributing copies to key individuals and entities in Israeli society (courts, scholars, legal advisers, NGOs, etc.), and in electronic form, freely available to download at ALMA's website. This translation project has two key target audiences. The first is the students and young practitioners working on the translation, while the second is the Israeli public: journalists, politicians, the judiciary, scholars, students, teachers and the general public. Although the translation is still under way, the expected value of the project is to make the Rome Statute more accessible to the Israeli population – the general public, professionals and the political, judicial and executive branches.

## IHL lexicon

The use of correct terminology in one's own language is very important for the proper understanding and implementation of IHL. Therefore, ALMA has established an IHL lexicon in Hebrew.<sup>27</sup> The lexicon is an ongoing project to explain IHL basic terms in two or three paragraphs. The project was established by ALMA members who contributed the first round of terms. Later the work took its intended form: research conducted by students and young practitioners who wish to volunteer their time, learn about IHL and help to promote knowledge of IHL.

## Results

ALMA's projects are meant to fulfil its agenda – promoting knowledge, understanding and discussion of IHL. Taking into account both the individual and overall contribution of its projects, and the highly positive response to them, it seems that ALMA's main goal is being achieved. One of the most important aspects of these projects is the way that each aims at a different target audience – the general public, scholars, students and so on.

For example, ALMA's involvement in the regular running of the National IHL Competition has been increased throughout the years, and today ALMA works in full collaboration with the local delegation of the ICRC; this also includes writing new and unique simulations for the competitions. Over the years, more than 200 students from nine major Israeli academic institutions have participated in this competition. Although it is very difficult to analyze the direct and indirect impact of this initiative over the years, and to keep track of the careers of all of the alumni, when looking at past participants it is clear that a significant number of them have maintained their interest in IHL and continued to pursue work in this field. In a recent non-official check with our alumni, we've found that among the ones who have already graduated from the degree taken during the time of the competition, at least five work for the Israeli Ministry of Foreign Affairs either as lawyers or diplomats, six are involved with IHL and human rights NGOs

27 Lexicon in Hebrew available at: [www.alma-ihl.org.il/ihlexicon](http://www.alma-ihl.org.il/ihlexicon).

(not including four ALMA members), four have started law school, three are currently pursuing LLM degrees and three are PhD candidates in high-ranked universities. Several alumni can be found serving as officers in the IDF Military Advocate-General's Corps or working in think tanks. Many others who have decided to follow other paths continue to acknowledge the competition as a milestone in their academic and professional journey.

## Challenges

Operating an NGO with a very specific agenda such as ALMA raises numerous challenges relative to income, cooperation, fundraising, staffing, and promoting discussion. These are the day-to-day challenges of running the NGO, ensuring the continuation of its existing projects and developing new ones.

Since its establishment, ALMA has been operating on a very modest budget. During the first years of the association, ALMA was funded entirely by its founders; all activity was solely conducted on a voluntary basis and no fee was charged for ALMA's services, such as lectures and workshops. However, due to financial realities, since 2013 ALMA has begun to charge a symbolic fee for its lectures and workshops, thus reaching financial independence and enabling the basic operations of the association.

The main tool for limiting expenses is relying on cooperation with different institutions. This enables the existence of such projects as the Joint IHL Forum and ALMA's participation in others such as the annual IHL competition. ALMA is always looking for new partnerships in Israel and abroad, with the purpose of expanding its current projects and engaging in new ones. Among ALMA's supporters and collaborators are the ICRC, the Swiss Embassy in Israel, IDC Herzliya and the Institute for National Security Studies.

Perhaps one of the biggest challenges for ALMA is improving its ability to reach out and find alternative sources of income. So far it has been unsuccessful in this due to a lack of budget and dedicated manpower. For the future of the association, this route must be further explored in order to enable the creation of new projects and expand the reach of the existing ones to broader and even more diverse audiences.

ALMA relies entirely on the work of its volunteers. ALMA members and activists contribute to the best of their ability and availability, but unfortunately the work of volunteers is always limited and due to its voluntary nature depends on their other commitments—naturally their primary consideration is their paying job or university obligations, thus making their highly appreciated ALMA activity secondary in nature.

Apart from spreading knowledge about IHL, the biggest challenge is to promote actual discussion on IHL-related topics. The understanding that certain aspects of IHL do not have an absolute and concrete nature and sometimes are also open to interpretation allows people to radicalize their points while referring to IHL norms. While ALMA aims to promote discussion among people with



different views, such behaviour (radicalization of points) undermines that purpose and may increase areas of divergence such as the question of proportionate collateral damage within the context of the recent military operations (Cast Lead, Pillar of Defence, and Protective Edge), the status of human shields, and when exactly individuals are taking direct part in hostilities in the context of these operations. In the Israeli political atmosphere, the opinions presented with regard to these notions are often agenda-based rather than knowledge-based. Therefore, it is important not only to provide IHL knowledge, but also to make the effort to lay the groundwork for a fertile and proactive discussion. ALMA's agenda is aimed at the promotion of the discussion of IHL, and since a real discussion is conducted between those with different opinions and not only between liked-minded individuals, it is important to enable such discussions and to ensure that all positions are welcomed and that the discussion is based on knowledge and understanding of the law and the arguments. ALMA is an independent non-political NGO with no affiliation and a very diverse membership base. ALMA members can rarely agree on one single interpretation of specific norms and rules, which leads to a twofold outcome: firstly, there is no such thing as "an ALMA position", and secondly, ALMA is accepted as a professional, impartial and independent organization. Therefore ALMA can implement its goal to promote discussion and understanding of IHL among the public, mainly in Israel.

## Going forward

Over the years, ALMA has been able to reach out to varied audiences including students, academics, legal practitioners in government, the armed forces and think tanks. This is not enough, however. More must be done to promote knowledge and discussion of IHL, in particular with key audiences such as politicians, diplomats and journalists, and to encourage international cooperation.

Although IHL is directly relevant primarily to military commanders and international lawyers, in many cases the important decisions that affect how it is applied in practice are taken by the legislative branch and the government. However, it is common to see decisions and statements being made without ensuring that the relevant persons understand the topics to which they refer. It is therefore important to strive for more IHL knowledge to be imparted to decision-makers, and to ensure that IHL considerations are also being taken into account among others. This is equally true with regard to diplomats, who must have sufficient understanding in order to convey their message using the right tools and without making crucial or sometimes embarrassing mistakes. Journalists serve as the main source of information to the general public during high-intensity conflicts. Since journalists are the ones who report about the different events and even provide interpretation and analysis, it is very important that they are provided with knowledge of IHL in order to convey more accurate information to the public on the one hand, and ensure more significant criticism on the other.



ALMA's activities are conducted mainly within Israel, but the importance of IHL dissemination is not limited to that country. Similar independent, local associations should be established in other States as well. Such associations should cooperate and collaborate with each other in order to provide better tools and develop joint projects and activities. According to the statistics provided with regard to visits to ALMA's website, it seems that about 50% of visits are from within Israel and the other 50% are from all over the world. This could serve as an indicator for ALMA's extended potential. ALMA will continue to run the existing projects and establish new ones in order to ensure that its main objectives are being achieved. It still has a lot of challenges ahead of it in order to reach a larger audience and promote knowledge, understanding and discussion of IHL. ALMA will continue to look for new partnerships in order to expand its audience and establish new projects. Such partnerships can enable the association to reach some of the potential groups with which it has not yet managed to successfully engage, such as politicians, diplomats and journalists.

The dedication of ALMA members and volunteers is inspiring and will enable the association to reach its goals and expand the circles of groups reached by its projects. It is important to note that this help is not overlooked and is highly appreciated.

Universities, NGOs, scholars, students, teachers, journalists, politicians, diplomats and others who wish to contribute to ALMA, take part in one or more of its projects, invite a lecture or a workshop or just support the association are welcome to do so, knowing that such activity can have a direct and real impact on the way people from different affiliations and backgrounds perceive IHL and gain respect for IHL.

## REPORTS AND DOCUMENTS

# Ensuring national compliance with IHL: The role and impact of national IHL committees

**Cristina Pellandini**

Cristina Pellandini is head of the ICRC Advisory Service on International Humanitarian Law, which supports efforts by States to implement international humanitarian law at the national level. Since joining the ICRC in 1984, she has carried out several field assignments for the organization in Latin America and Asia. She has also held various legal and diplomatic advisory positions, both in the field and at headquarters. In 1995–1996 she helped create the ICRC Advisory Service on IHL.

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Since the First Geneva Convention<sup>1</sup> was adopted in 1864, international humanitarian law (IHL) has become a complex and steadily developing body of international law. Its conventions, protocols and customary rules encompass a large range of subjects, from the protection of the sick and wounded, civilians, civilian objects, prisoners of war and cultural property to the restriction or prohibition of specific types of weapons and methods of warfare. All parties to a conflict are bound by applicable IHL, including armed groups involved in non-international armed conflicts.

The 1949 Geneva Conventions are universally accepted today, and the 1977 Additional Protocols enjoy increasingly widespread acceptance.<sup>2</sup> At the same time, other IHL instruments are not yet universally recognized. Furthermore, acceptance of international instruments is only the first – albeit vital – step towards effectively

implementing the legal protections contained in the instruments. States parties must then comply with their obligations under these instruments<sup>3</sup> and, for the rules of IHL to be effective in times of armed conflict, States must carry out a number of actions domestically in times of peace. These include creating a legal framework that will ensure that national authorities, international organizations, the armed forces and other weapons bearers understand and respect the rules; that the relevant legislative and practical measures are undertaken; that applicable IHL norms are complied with during armed conflicts; and that violations of this body of law are prevented – and when they occur, that the perpetrators are punished. Responsibility for ensuring full compliance with IHL rests with States. This responsibility is prominently set forth in Article 1 common to the four Geneva Conventions, which requires States Parties to “respect and to ensure respect for the present Convention in all circumstances.”<sup>4</sup>

Genuine political will is an essential precondition to the protections that IHL affords in situations of armed conflict. Political will alone, however, is insufficient. It must be translated into legislative and regulatory measures, policy directives and other mechanisms aimed at creating a system that will ensure the law is complied with and violations are dealt with appropriately. Coordination among State entities, government departments, armed forces and civil society is a *sine qua non* of an effective system.

The national authorities face a formidable task. The very relevance of IHL is being challenged by the nature of today’s armed conflicts. Added to this is the complexity faced by States – competing political agendas and legislative priorities, and limited financial and human resources – whether or not they are involved in or affected by an armed conflict. This situation has prompted an increasing number of States<sup>5</sup> to recognize the usefulness of creating a group of experts – often called a national IHL committee or a national commission for IHL – to coordinate activities in the area of IHL. In many cases this expert group acts as an interministerial and multi-disciplinary advisory body on IHL-related issues for

1 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864.

2 For the current status of ratifications of all IHL and related instruments, see: [www.icrc.org/ihl](http://www.icrc.org/ihl) (all internet references last visited in October 2014).

3 See Vienna Convention on the Law of Treaties.

4 See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950), Art. 1; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950), Art. 1; Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Art. 1; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Art. 1; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978), Art. 1(1). For an analysis of the obligation to “respect and to ensure respect”, see the contribution by Knut Dörmann and José Serralvo, “Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations”, in this issue of the *Review*.

5 Currently 108; see the table showing the existing National IHL Committees at: <https://www.icrc.org/en/document/table-national-committees-and-other-national-bodies-international-humanitarian-law>.

political and military authorities and decision-makers. The creation of such entities was encouraged twenty years ago by the 26th International Conference of the Red Cross and Red Crescent, echoing the recommendations of the Intergovernmental Group of Experts for the Protection of War Victims on the usefulness of such mechanisms.<sup>6</sup> The recent trend validates that initiative.

The International Committee of the Red Cross (ICRC), through its Advisory Service on IHL, assists States wishing to set up a national IHL committee and maintains regular contacts with existing committees. The ICRC supports them by providing expert legal advice, training their members, strengthening their capacity and delivering any needed technical assistance.<sup>7</sup> Drawing on the best practices of existing national committees, the ICRC Advisory Service has developed specific tools to facilitate and harmonize the work of the committees and relations between them.<sup>8</sup> It also organizes meetings of national-committee representatives from around the world to assess their achievements, discuss the challenges they face and facilitate the sharing of experience. The Advisory Service encourages peer exchanges and cooperation, especially among committees within the same region, which often have a common language and shared legal traditions and face similar situations and challenges.

The work and track record of the national IHL committees of Belgium, Peru and Mexico are discussed in detail in this section. Their success demonstrates that national committees can be effective if they are made up of the right people and given the necessary human and financial resources. They have a role to play in creating an environment that favours the implementation of IHL and other relevant international norms and increases respect for the law, and they help their respective States implement their IHL-related commitments and achieve policy objectives in this area. The chosen examples also show how the national committees' roles and tasks have evolved over time. National committees have gradually become part of their respective countries' governmental structures and have acquired a recognized advisory function when it comes to the implementation of *all* norms concerning the protection of people and objects affected by violence and *all issues* linked to IHL, i.e. beyond the mere adoption of domestic implementation measures.

Several factors underpin the success of these three national committees. Committee membership, including, in the case of Belgium, the role of the Red

6 "Commission I: War Victims and Respect for International Humanitarian Law," *International Review of the Red Cross*, Vol. 76, No. 310, 1996, p. 37; see also "Recommendations of the Intergovernmental Group of Experts for the Protection of War Victims," *International Review of the Red Cross*, Vol. 77, No. 304, 1995, pp. 33 ff.

7 For further information on national committees and commissions for IHL, see ICRC, *Preventing and Repressing International Crimes: Towards an "Integrated" Approach Based in Domestic Practice*, report of the 3rd Universal Meeting of National Committees for the Implementation of International Humanitarian Law, Publication Ref. 4138, 29 October 2013, pp. 89 ff, available at: [www.icrc.org/en/war-and-law/strengthening-ihl/national-committees](http://www.icrc.org/en/war-and-law/strengthening-ihl/national-committees).

8 See ICRC, *Guiding Principles Concerning the Status and Methods of Operation of National Bodies for the Implementation of International Humanitarian Law*, and ICRC, *Practical Advice to Facilitate the Work of National Committees on International Humanitarian Law*, which supplements the Guiding Principles, both available at: [www.icrc.org/en/war-and-law/strengthening-ihl/national-committees](http://www.icrc.org/en/war-and-law/strengthening-ihl/national-committees).

Cross National Society, is one. Another is the branch of government to which the committee is attached, as seen in the example of Peru. A third is the committee's terms of reference, working procedures – such as, in the case of Mexico, the annual work plan and reporting obligation to the President of the Republic – and concrete, theme-based activities.

**Belgium** was among the first States to appoint a specific body for the implementation of IHL, shortly after its adherence to the 1977 Additional Protocols. The initial purpose of the Belgian Interministerial Commission for Humanitarian Law was limited in scope: to identify and coordinate the development and adoption of the national measures required for Belgium to comply with its obligations under the Conventions and Protocols. Over the years, the Commission has developed into a technical IHL expert committee and permanent governmental advisory body that actively contributes to Belgium's IHL agenda and humanitarian diplomacy. Its structured and methodical approach to IHL implementation, consistent efforts over almost three decades and scope of activities have earned it recognition both domestically and worldwide and served as an inspiration for many other States.

Amongst the many activities undertaken by the Commission, two are particularly noteworthy, as they constitute pioneering work. The first was identifying 43 measures needed at the domestic level for the country to meet its obligations under the Geneva Conventions and their Additional Protocols. This effort, conducted with the support of working groups, clarified what type of action was required, which ministry was responsible, and what the financial implications were. It also resulted in a valuable collection of documents published in 1997 on the occasion of its tenth anniversary; this practical tool was widely circulated and consulted by many other national IHL committees and national experts.<sup>9</sup> In its role as advisory body to the federal government, the Commission itself refers to the list of needed measures when drafting proposals on specific IHL issues to be submitted to the ministry concerned.

Another example of the Commission's pioneering work relates to the repression of violations of IHL. The studies it conducted and laws it drafted were instrumental in the adoption of the 1993 law on the prosecution of grave breaches of the Geneva Conventions and their Additional Protocols – the first-ever comprehensive, stand-alone piece of legislation dedicated to this topic adopted by a country with a civil law system. This law served as a model for many other States. The Commission also played a unique role as the national advisory committee for the protection of cultural property linked to the 1954 Cultural Property Convention and the 1954 and 1999 Protocols. This may serve as inspiration for other States.

The most notable achievement of **Peru's** National Committee for the Study and Implementation of IHL concerns its place in the structure of government. Following its creation in 2001, it was gradually incorporated into the executive branch and, in 2013, it attained the status of formal advisory body to the

<sup>9</sup> See the Interministerial Commission for Humanitarian Law website, available at: [http://cidh.be/fr/activites%20de%20la%20CIDH#documents\\_travail](http://cidh.be/fr/activites%20de%20la%20CIDH#documents_travail).

executive branch in the development of public policies, programmes, projects, action plans and strategies on all matters pertaining to IHL. Furthermore, as the technical secretariat of the Committee is run by the Justice Ministry's Directorate-General for Human Rights, which is formally tasked with promoting and overseeing human rights and IHL in Peru, the Committee benefits from additional human and financial resources to conduct its activities. Peru's Committee has made a number of important achievements within its two strategic fields of activity. These include Peru's adherence to IHL instruments and their incorporation in domestic law; promoting the adoption of specific domestic implementation measures, including an analysis of domestic legislation to identify gaps (such as the protection of cultural heritage in the event of armed conflict or other emergencies); and the preparation of draft laws on such topics as the prohibition on recruiting children into the armed forces, the use of force in law enforcement operations, the repression of war crimes and other international crimes, and the development of IHL training programmes for the public sector.

Peru's Committee acquired visibility and recognition nationwide through the coordination of its professional training activities. Particularly important in this respect were the nine Miguel Grau IHL training courses conducted on an annual basis since 2006. These were designed mainly for representatives of the public sector: the executive branch of government, judges and law professionals, and members of the military and police forces. The Committee has also coordinated a series of more issue-specific training courses on such topics as the protection of cultural property in the event of armed conflict and the protection of children in the case law of the International Criminal Court. Finally, the Committee's role in the implementation of Peru's reporting obligations is worth highlighting. This body has, on various occasions, coordinated the drafting of official reports on issues linked to IHL and/or international human rights law, including reports requested by the United Nations General Assembly (e.g. on the Additional Protocols of 1977), the Organization of American States (e.g. on the missing and on the domestic implementation of IHL), the Committee on Enforced Disappearances and the Special Procedures of the UN Human Rights Council.

**Mexico's** Interministerial Committee on IHL, created in 2009, has already gained recognition as the government body responsible for IHL-related issues. It also successfully expanded the dialogue and discourse of IHL beyond the traditional sphere of foreign policy and into the realm of domestic policy and legislative debate. The Committee has proved its usefulness in broadening awareness of the relevance of IHL within the Mexican government and clarifying uncertainties and misunderstandings related to IHL amongst government authorities. It has demonstrated its added value as a platform for the discussion and coordination of IHL-related issues and topics; it has managed to gradually bring to the table issues considered sensitive in Mexico; and it has helped bridge the gap between the civilian and defence sectors. As a permanent technical advisory body of the federal executive branch of government, it has also proved its effectiveness in supporting the dissemination and implementation of IHL at

the domestic level and in shaping Mexico's positions and foreign policy on IHL-related subjects. Its chairmanship rotates annually among the four permanent member institutions, a system meant to ensure that each of the institutions assumes responsibility for reaching the Committee's objectives; continuity of the Committee's work is achieved through a permanent technical secretariat. The Committee's work is guided by its annual work programme and summarized in annual reports to the President of the Republic. Its concrete achievements, such as the adoption of the law concerning the use and protection of the Red Cross name and emblem in March 2014, have quickly made this Committee one of the most dynamic in the region.

These three national committees have undoubtedly had a positive impact on the domestic implementation of IHL, its integration in domestic law and procedure, and the concern for compliance in their respective countries, and the committees have supported their respective States in promoting and ensuring respect for IHL.

Looking beyond the specificities of each country, the three national committees discussed here share some features that appear to have contributed to their effectiveness. For example, in all three cases, the committees had the membership, resources and operating structure needed to perform their duties and ensure the continuity of their work. These include having a permanent secretariat (or appointed secretary) and addressing specific issues and topics through working groups. Each committee asserted its role as an expert advisory body through a variety of activities, such as analysing individual issues and drafting legislative proposals, hosting international conferences and representing their respective governments at such events, and carrying out reporting requirements on behalf of their governments. These activities often dovetailed with the three States' domestic or foreign policy agendas and met specific international commitments.

These three national committees have gained visibility and recognition by virtue of their IHL-related dissemination and training activities targeting key governmental sectors and groups within their respective societies. These committees have also managed to become an integral part of their States' governmental structures over time and acquire a recognized advisory function for their government.

The national committees described here are surely representative of many other equally successful national IHL committees. That said, they may also serve as case studies on what can work at the domestic level in the ongoing effort to build an effective system for improving compliance with IHL and repressing violations.

## REPORTS AND DOCUMENTS

# The work of Mexico's Interministerial Committee on International Humanitarian Law

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### Abstract

*In the six years since it was created, the Comisión Intersecretarial de Derecho Internacional Humanitario de México, Mexico's Interministerial Committee on International Humanitarian Law, has become one of the region's most active national bodies for the implementation of international humanitarian law (IHL). Its achievements are the result of the efforts of the federal executive branch agencies that form and participate in the Committee, as well as of the support that the International Committee of the Red Cross and the Mexican Red Cross have provided to facilitate its work. In this article, the author describes the structure and operation of the Committee, as well as the activities it has carried out in fulfilling its mandate to disseminate and promote respect for IHL rules, principles and institutions and further the national implementation of IHL.*

**Keywords:** CIDIH-Mexico, national IHL committees, international humanitarian law, Mexico.

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Mexico, as a peace-loving country, has historically supported the development and implementation of international humanitarian law (IHL). Mexico is a State party to the main IHL treaties: it ratified the four Geneva Conventions of 12 August 1949 on



29 October 1952, their Additional Protocol I of 1977 on 10 March 1983, and their Additional Protocol III of 2005 on 7 July 2008. Mexico is also a State party to the main international treaties on human rights, cultural property, the environment, disarmament, arms control and international criminal law that are related to IHL,<sup>1</sup> and has been a key player in promoting the negotiation and adoption of many of these, such as the Anti-Personnel Landmine Convention, the Convention on Cluster Munitions and, more recently, the Arms Trade Treaty. Consequent to these international obligations, Mexico is firmly committed to respecting and ensuring respect for IHL in all circumstances.

At the multilateral level, Mexico participates actively in the sessions of the International Conference of the Red Cross and the Red Crescent, as well as in the negotiations on follow-up of the resolutions adopted therein. It also promotes IHL in United Nations (UN) resolutions and debates – including the open debates of the Security Council on the protection of civilians in armed conflict,<sup>2</sup> women, peace and security<sup>3</sup> and children and armed conflict<sup>4</sup> – and it chaired the Security Council’s Working Group on Children and Armed Conflict during 2009 and 2010.<sup>5</sup> Mexico is also a regional promoter of the United Kingdom’s Preventing Sexual Violence Initiative.<sup>6</sup>

Additionally, since 1995 Mexico has presented a resolution entitled “Promotion and Respect for IHL”, which is adopted biennially by the General Assembly of the Organization of American States (OAS).<sup>7</sup> The resolution calls upon the States of the region to respect and disseminate IHL, ratify IHL-related

- 1 For a list of the IHL and related treaties to which Mexico is a party, see International Committee of the Red Cross (ICRC), *2012–2013 Report: Implementing IHL: Participation of the American States in International Humanitarian Law Treaties and their National Implementation*, December 2013, Part I, pp. 12–15, available at: [www.icrc.org/eng/assets/files/publications/t0276-2013.pdf](http://www.icrc.org/eng/assets/files/publications/t0276-2013.pdf).
- 2 For a list of UN Security Council meetings, resolutions and presidential statements on protection of civilians in armed conflict, see: [www.un.org/en/peacekeeping/documents/sc\\_poc\\_meetings.pdf](http://www.un.org/en/peacekeeping/documents/sc_poc_meetings.pdf). A complete description of the open debates can be found at: [www.securitycouncilreport.org/protection-of-civilians/](http://www.securitycouncilreport.org/protection-of-civilians/).
- 3 For a list of UN Security Council resolutions on women, peace and security, see: [www.un.org/en/peacekeeping/issues/women/wps.shtml](http://www.un.org/en/peacekeeping/issues/women/wps.shtml). A complete description of the open debates can be found at: [www.securitycouncilreport.org/women-peace-and-security/](http://www.securitycouncilreport.org/women-peace-and-security/).
- 4 For a list of UN Security Council resolutions on children and armed conflict, see: [www.un.org/en/peacekeeping/issues/children/index.shtml](http://www.un.org/en/peacekeeping/issues/children/index.shtml). A complete description of the open debates can be found at: [www.securitycouncilreport.org/children-and-armed-conflict/](http://www.securitycouncilreport.org/children-and-armed-conflict/).
- 5 Mexico chaired this working group during its non-permanent membership of the UN Security Council. For more information on the Security Council’s Working Group on Children and Armed Conflict, see: [www.un.org/sc/committees/WGCAAC/](http://www.un.org/sc/committees/WGCAAC/). The results of Mexico’s chairmanship can be consulted in Víctor Sánchez Colín and Ifigenia Argueta, “Contribuciones de México a la Protección de la Infancia Afectada por el Conflicto Armado”, in Roberto Dondisch (ed.), *México en el Consejo de Seguridad de la ONU: La historia tras bambalinas*, Debate, Mexico, 2012, pp. 127–148.
- 6 In its capacity as regional promoter of this initiative, Mexico organized an international seminar entitled “Time to Act: Voices of Latin America – The Eradication of Sexual Violence, Including that Committed during Conflict Situations”, held on 12–13 May 2014 in Mexico City. See: <http://saladeprensa.sre.gob.mx/index.php/es/comunicados/4116-195>.
- 7 The resolution was adopted yearly from 1995 to 2011. In 2011, following a policy of rationalization of resolutions within the OAS, it was decided that its adoption would be on a two-yearly basis. The resolution, adopted in 2013, can be consulted at: [www.oas.org/en/sla/dil/docs/AG-RES\\_2795\\_XLIII-O-13\\_eng.pdf](http://www.oas.org/en/sla/dil/docs/AG-RES_2795_XLIII-O-13_eng.pdf).

treaties and adopt legislative and other measures for their implementation. It also mandates that the OAS organize a course and a special session on IHL every two years to update State representatives and OAS officers on the latest developments in this branch of law.

Mexico collaborates closely with the International Committee of the Red Cross (ICRC), which has had a regional office in Mexico since 2001. Mexico is an important contributor to the ICRC's annual budget and maintains a regular dialogue with it on international and national issues. The activities carried out by the ICRC at the national level include training the armed forces on IHL and humanitarian principles regarding the use of force, as well as assistance to national authorities on forensic identification protocols.

Convinced of the advantages of establishing a national body to coordinate efforts in the area of IHL, in 2007 Mexico submitted a pledge for the 30th International Conference of the Red Cross and Red Crescent, in which it affirmed its commitment to strengthening, promoting and ensuring respect for IHL, calling on the Mexican Red Cross to contribute to this effort in the areas within its remit. One of the evaluation criteria proposed by Mexico for the implementation of the pledge was precisely the establishment and operation of an interministerial committee on IHL.<sup>8</sup>

As a result of more than a decade of hard work and coordination among the Federal Executive Branch agencies that deal with IHL, an executive order creating a permanent Interministerial Committee on International Humanitarian Law (Comisión Intersecretarial de Derecho Internacional Humanitario de México, CIDIH-Mexico) was issued by the president of the republic and published in Mexico's *Federal Official Gazette* on 19 August 2009.<sup>9</sup> Mexico thus became the nineteenth country in the Americas region to have a national IHL committee, and added its name to the list of 107 States in the world that currently have a body of this nature.<sup>10</sup>

## The structure and operation of CIDIH-Mexico

As established by the executive order, CIDIH-Mexico is a permanent, advisory and technical body of the Federal Executive Branch. Its mandate is to "disseminate and promote respect for international humanitarian law rules, principles and institutions and further the national implementation of Mexico's commitments in this respect under the international treaties to which it is a party".<sup>11</sup>

8 Pledges and follow-up to the 30th International Conference of the Red Cross and Red Crescent, Government of Mexico, Pledge P020, available at: [www.icrc.org/applic/P130e.nsf/va\\_PBGO/838436C15C1D6349C125739C003B9AD2?openDocument&section=PBGO](http://www.icrc.org/applic/P130e.nsf/va_PBGO/838436C15C1D6349C125739C003B9AD2?openDocument&section=PBGO).

9 The Executive Order that created CIDIH-Mexico, as published in Mexico's *Federal Official Gazette*, is available at: [http://dof.gob.mx/nota\\_detalle.php?codigo=5105965&fecha=19/08/2009](http://dof.gob.mx/nota_detalle.php?codigo=5105965&fecha=19/08/2009).

10 See ICRC, "Table of National Committees and other National Bodies on International Humanitarian Law", 31 August 2014, available at: [www.icrc.org/en/document/table-national-committees-and-other-national-bodies-international-humanitarian-law](http://www.icrc.org/en/document/table-national-committees-and-other-national-bodies-international-humanitarian-law).

11 Executive Order, above note 9, Art. 1. Author's translation.

The permanent members of CIDIH-Mexico are the Ministries of Foreign Affairs, National Defence, the Navy and the Interior, which form part of the Federal Executive Branch. These ministries appoint a deputy who must hold a senior position – at least director general or equivalent – so that decisions can be adopted at committee meetings.

In addition to these permanent members, CIDIH-Mexico can also invite any other Federal Public Administration body or institution to participate in its work on a permanent or temporary basis, when issues falling within its remit or mandate are being addressed. In such cases, these bodies have the right to speak and vote at Committee meetings. This has been the case, for example, for the Attorney-General's Office, the Ministry of Health, the National Institute for Anthropology and History and the National Institute for Statistics and Geography, which have each participated in some of CIDIH-Mexico's projects.

CIDIH-Mexico can furthermore invite representatives of the legislative and judicial branches, IHL experts and advisers, as well as representatives of the components of the International Red Cross and Red Crescent Movement, to participate in committee meetings in an informative capacity, with the right to speak. The ICRC and the Mexican Red Cross are therefore often invited to attend CIDIH-Mexico meetings and take part in its working groups, providing valuable input to assist the Committee in its work.

CIDIH-Mexico is chaired on a rotating basis by the four permanent member institutions, with each serving a one-year term. The Ministry of Foreign Affairs acts as Technical Secretariat of CIDIH-Mexico on a permanent basis, and this has proved effective in ensuring the continuity of the Committee's work.

The Committee's priorities are agreed each year by its four permanent member institutions and set forth in an annual work programme unanimously adopted by these four members. The Committee prepares an annual report on its activities, which is submitted by the chair to the Office of the President of the Republic.

CIDIH-Mexico meets in ordinary session once every four months, and in extraordinary session as required, at the request of one of the permanent members. Since it was created, CIDIH-Mexico has held a total of fourteen ordinary sessions and seven extraordinary sessions.

As a large part of CIDIH-Mexico's work is carried out through working groups, the frequency of plenary meetings has proven sufficient to enable it to adopt the decisions required to fulfil its mandate. Indeed, pursuant to Article 4 of the executive order that created it, CIDIH-Mexico can set up as many sub-committees and/or working groups as deemed necessary to fulfil its mission. The advantage is that such groups can meet more easily as participation in them is at the technical level. Since it was set up, CIDIH-Mexico has created working groups to implement seven individual projects. These working groups have a temporary mandate which ends when they submit their report and recommendations on the project to CIDIH-Mexico. The Committee then adopts final decisions in a plenary session.

The Rules of Procedure of CIDIH-Mexico, which were drawn up and agreed by its member institutions, were published in Mexico's *Federal Official Gazette* on 4 August 2011.<sup>12</sup> They contain provisions detailing the composition, responsibilities and functioning of CIDIH-Mexico and its sub-committees and working groups.

## The activities of CIDIH-Mexico

In spite of being one of the most recently created national bodies for the implementation of IHL in the region, CIDIH-Mexico has since its inception carried out vitally important activities to disseminate and promote respect for IHL, both at the national and international levels.

### Participation in international conferences

A few months after it was created, CIDIH-Mexico and the ICRC co-hosted the International Conference of National Committees on IHL of Latin America and the Caribbean, which took place from 30 June to 2 July 2010 in the premises of the Ministry of Foreign Affairs in Mexico City.<sup>13</sup> The conference, which brought together representatives of seventeen national committees on IHL and five National Red Cross Societies from the region, along with ICRC experts and academics, provided an opportunity for a fruitful exchange of best practices and lessons learned by the region's national IHL committees, which proved very useful to the recently created CIDIH-Mexico. The conference's recommendations on the role of national IHL committees in preparing international reports and drafting national laws were incorporated into CIDIH-Mexico's emerging activities and projects. Additionally, the recommendation to strengthen cooperation between national IHL committees and the OAS was included in the resolution presented by Mexico to the OAS. With the support of the ICRC, CIDIH-Mexico also took part in the Third Universal Meeting of National Committees for the Implementation of International Humanitarian Law held in Geneva on 27–29 October 2010, under the auspices of the ICRC.<sup>14</sup> Although Mexico had participated in previous meetings of this kind as an observer, this was the first time that the country had been represented by its Interministerial

12 The Rules of Procedure of CIDIH-Mexico, as published in Mexico's *Federal Official Gazette*, can be consulted at: [http://dof.gob.mx/nota\\_detalle.php?codigo=5203489&fecha=04/08/2011](http://dof.gob.mx/nota_detalle.php?codigo=5203489&fecha=04/08/2011).

13 The conclusions and recommendations of the 2010 International Conference can be consulted in ICRC, *2010–2011 Report: Implementing IHL: Participation of the American States in International Humanitarian Law Treaties and Their National Implementation*, December 2011, Annex A, pp. 39–40, available at: [www.icrc.org/eng/assets/files/publications/icrc-002-t0276.pdf](http://www.icrc.org/eng/assets/files/publications/icrc-002-t0276.pdf).

14 ICRC, *Preventing and Repressing International Crimes: Towards an "Integrated" Approach Based in Domestic Practice*, Report of the Third Universal Meeting of National Committees for the Implementation of International Humanitarian Law, 29 August 2013, available at: [www.icrc.org/eng/resources/documents/publication/p4138.htm](http://www.icrc.org/eng/resources/documents/publication/p4138.htm).

Committee. CIDIH-Mexico also assimilated the meeting's recommendations into its activities.

On the strength of the experience acquired and consistent with international recommendations, CIDIH-Mexico was commissioned to prepare Mexico's position for the 31st International Conference of the Red Cross and Red Crescent held in November 2011, including the drafting of the pledges submitted by Mexico. One of the evaluation criteria for the pledges submitted was to ensure the continuation of the active work of the Interministerial Committee.<sup>15</sup> CIDIH-Mexico also assumed responsibility for monitoring the implementation of the pledges and writing the compliance report that Mexico is required to submit to the next International Red Cross and Red Crescent Conference in 2015.

Additionally, with the support of the ICRC, CIDIH-Mexico participated in the Regional Seminar of National Committees on IHL Concerning the Protection of Cultural Property in Armed Conflict held in San Salvador, El Salvador, on 1–2 December 2011, under the auspices of the ICRC and El Salvador's Inter-institutional Committee on IHL.<sup>16</sup> As with previous conferences, CIDIH-Mexico incorporated the recommendations adopted in this seminar into its programme of work regarding protection of cultural property.

Thanks to the progress it had made, CIDIH-Mexico was also able to take an active part in the Conference of National Committees on IHL of the Americas held in San José, Costa Rica, on 10–12 September 2013, under the auspices of the ICRC and the government of Costa Rica.<sup>17</sup> The conference, which brought together representatives of seventeen national committees on IHL from the region and of six countries attending as observers, along with a number of experts, resulted in a valuable exchange of best practices and lessons learned by the region's national committees, including the already successfully consolidated CIDIH-Mexico. Additionally, due to Mexico's role as initiator and sponsor of the resolution on IHL adopted by the OAS, the technical secretary of CIDIH-Mexico was requested to report on the outcomes of the Americas Conference in the course of a "Dialogue Between the Committee on Juridical and Political Affairs of the OAS and the National Committees on IHL", which took place on 13 September 2013, following the Americas Conference.

Following the recommendations adopted by that conference, CIDIH-Mexico collaborates continuously with other national IHL committees of the region. Recently, CIDIH-Mexico participated, by invitation of the Colombian Committee on IHL, in the Third Augusto Ramírez Ocampo Course on IHL, which was held in Bogotá, Colombia, on 8–10 October 2014. On that occasion, CIDIH-Mexico and the corresponding national IHL committees of Colombia, Ecuador and Peru exchanged best practices and lessons learned. The structure of

15 The full text of the pledge can be consulted at: [www.icrc.org/pledges/pledge.xsp?documentId=0D0FD71ADD5002DCC12579580037A49C&action=openDocument](http://www.icrc.org/pledges/pledge.xsp?documentId=0D0FD71ADD5002DCC12579580037A49C&action=openDocument).

16 The conclusions and recommendations of the Regional Seminar can be consulted in ICRC, above note 13, Annex B, p. 40.

17 The conclusions and recommendations of the Americas Conference can be consulted in ICRC, above note 1, Annex A, p. 39.

CIDIH-Mexico has also served as a useful platform for other activities on topics related to IHL. That is the case for the Latin American Network for Genocide and Mass Atrocity Prevention, organized by the Auschwitz Institute for Peace and Reconciliation together with the governments of Argentina and Brazil.<sup>18</sup> Due to the relation of this topic with IHL, CIDIH-Mexico was commissioned to carry out the follow-up of Mexico's participation in the Network. Representatives of the four permanent members of CIDIH-Mexico, including the armed forces, have participated since 2012 in the training activities provided under the Network.

## Activities related to the dissemination and implementation of IHL at the national level

### *Promotion and dissemination of IHL*

One of the first achievements of CIDIH-Mexico at the national level was to establish the Annual National Specialized Course on International Humanitarian Law in 2010, in fulfilment of one of the pledges submitted by Mexico in 2007<sup>19</sup> and reaffirmed in 2011 at the International Conference of the Red Cross and Red Crescent.<sup>20</sup> The annual course is available free of charge and directed at participants from both governmental and non-governmental sectors, including officials of the executive, legislative and judicial branches, as well as representatives of academic institutions and civil society organizations at both the federal and state levels. Through this course, CIDIH-Mexico disseminates IHL among the country's population irrespective of their official, military or civilian character. This activity complements the various programmes that are organized on a regular basis by the federal government, in collaboration with the ICRC, to provide the armed forces with training in IHL.

Some 200 participants attend the specialized course each year. The fifth course, which was held on 29–30 September 2014 in the Ministry of Foreign Affairs, was attended by 260 participants, bringing the total number of people trained under this programme up to more than 1,000. CIDIH-Mexico prepares the course each year, which includes designing the training programme and making the logistical arrangements. This is done through a working group formed by the committee's four permanent member agencies, with advice and guidance from an academic expert in the field and the ICRC. The subjects featured in the course include the concept, definition and scope of IHL, persons and objects protected under this body of law, restrictions on methods and means of warfare, and tools for the prevention of and response to war crimes, including the responsibility of the State as well as individual criminal responsibility. The

18 A list of activities of the Latin American Network for Genocide and Mass Atrocity Prevention can be consulted at: <http://redlatinoamericana.org/>.

19 The full text of the pledge made in 2007 can be consulted at: [www.icrc.org/applic/P130e.nsf/va\\_PBGO/838436C15C1D6349C125739C003B9AD2?openDocument&section=PBGO](http://www.icrc.org/applic/P130e.nsf/va_PBGO/838436C15C1D6349C125739C003B9AD2?openDocument&section=PBGO).

20 The full text of the pledge made in 2011 can be consulted at: [www.icrc.org/pledges/pledge.xsp?&documentId=0D0FD71ADD5002DCC12579580037A49C&action=openDocument](http://www.icrc.org/pledges/pledge.xsp?&documentId=0D0FD71ADD5002DCC12579580037A49C&action=openDocument).

programme is updated and adjusted each year in light of the most recent developments in IHL. The lecturers are renowned national and international experts from academia, civil society, the ICRC and government. Year after year, the course has been positively evaluated by participants, and it is now recognized as a best practice and replicated in other countries.<sup>21</sup>

### *Protecting the Red Cross name and emblem*

Mexico passed the Law Concerning the Use and Protection of the Red Cross Name and Emblem<sup>22</sup> in 2007, incorporating into the national legal framework specifications relating to the use of the Red Cross name and emblem, eligibility requirements for its protective use in armed conflict, specifications for its indicative use by components of the International Red Cross and Red Crescent Movement and sanctions to be applied in the event of misuse or use of the emblem or name by persons or entities not authorized to do so. However, the law needed to be supplemented with regulations specifying the details of the process to authorize the protective use of the emblem, a control and enforcement mechanism and the procedure for imposing administrative sanctions on individuals or entities that misuse the emblem or Red Cross/Red Crescent name.

In the period 2011–2012, CIDIH-Mexico therefore undertook the task of drafting the relevant regulations to ensure the effective implementation of the above-mentioned law in Mexico. The work was carried out by a CIDIH-Mexico working group formed by the four permanent member institutions and the Ministry of Health, the ICRC and the Mexican Red Cross. The preliminary draft regulations were approved at a plenary session of CIDIH-Mexico in September 2012 and, after fulfilling the necessary legal requirements, the final regulations pursuant to the law were published in Mexico's *Federal Official Gazette* on 25 March 2014.<sup>23</sup> As per these regulations, the administrative sanctions for misuse of the Red Cross name and emblem are implemented by the Ministry of Interior, through its National Coordination for Civil Protection.

Through the relevant working group, CIDIH-Mexico monitors the dissemination and effective implementation of the control and enforcement mechanism established in the regulations. The Mexican Red Cross participates actively in this working group and plays a key role in providing information on specific incidents of misuse of the Red Cross name and emblem, for their

21 The results of the Annual National Specialized Course on IHL are available at the following press releases and links: 2010 course: <http://saladeprensa.sre.gob.mx/index.php/es/comunicados/588-324>; 2011 course: [www.sedena.gob.mx/derechos-humanos/actividades-coordinadas/comite-internacional-de-la-cruz-roja-\(cicr\)?movil=true](http://www.sedena.gob.mx/derechos-humanos/actividades-coordinadas/comite-internacional-de-la-cruz-roja-(cicr)?movil=true); 2012 course: <http://2006-2012.semar.gob.mx/component/content/article/39-dih/2228-tercer-curso-dih.html>; 2013 course: [www.gobernacion.gob.mx/es/SEGOB/Cuarto\\_curso\\_anual\\_DIH](http://www.gobernacion.gob.mx/es/SEGOB/Cuarto_curso_anual_DIH); 2014 course: <http://saladeprensa.sre.gob.mx/index.php/es/comunicados/4954-436>.

22 The Law Concerning the Use and Protection of the Red Cross Name and Emblem is available at: [www.dof.gob.mx/nota\\_detalle.php?codigo=4966327&fecha=23/03/2007](http://www.dof.gob.mx/nota_detalle.php?codigo=4966327&fecha=23/03/2007).

23 The regulations of the Law Concerning the Use and Protection of the Red Cross Name and Emblem can be consulted at: [www.dof.gob.mx/nota\\_detalle.php?codigo=5338043&fecha=25/03/2014](http://www.dof.gob.mx/nota_detalle.php?codigo=5338043&fecha=25/03/2014).



follow-up. Three public events were organized in 2014 for the dissemination of the mechanism contained in the regulations.<sup>24</sup>

### *Protection of cultural property in armed conflict*

Following its participation in the Regional Seminar of National Committees on IHL Concerning the Protection of Cultural Property in Armed Conflict held in San Salvador on 1–2 December 2011, CIDIH-Mexico began the task of identifying archaeological sites and centres containing monuments in Mexico to be entered in the International Register of Cultural Property under Special Protection of the United Nations Educational, Scientific and Cultural Organization (UNESCO), pursuant to the provisions of Article 8 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 and Article 13 of the Regulations for the Execution of the Convention.

CIDIH-Mexico carried out this work in the period 2012–2013 through a working group formed by the four permanent member institutions along with the National Institute for Anthropology and History and the ICRC, with guidance provided by the National Institute for Statistics and Geography. As a result, in August 2013 CIDIH-Mexico approved the inclusion of nine archaeological sites<sup>25</sup> in the relevant UNESCO register. Mexico submitted an application to UNESCO for the inclusion of these cultural heritage sites on 25 September 2013, and in February 2015, after a lengthy process, UNESCO confirmed that it had received all the required information to proceed with the registration. Through the above-mentioned working group, CIDIH-Mexico will provide follow-up to implement the national actions required as a result of the registration, including steps to disseminate relevant information and mark the archaeological sites.

### *Prosecution of war crimes*

As the issue of prosecution of war crimes is connected with its work, CIDIH-Mexico was commissioned to draft the pledges submitted by Mexico at the Review Conference of the Rome Statute of the International Criminal Court, held in 2010 in Kampala, Uganda. They included a pledge to prepare draft amendments to bring domestic criminal legislation into line with the provisions of the Rome

24 Representatives of CIDIH-Mexico presented the content of the regulations in events carried out in the following frameworks: (i) the Commemoration of the World Red Cross and Red Crescent Day organized by the Mexican Red Cross, held on 8 May 2014 in Mexico City and directed to the volunteers of the Red Cross; (ii) the National Convention on Civil Protection, held from 12 to 16 May 2014 in Acapulco, Guerrero, directed to the civil protection officers of each of the thirty-two local entities of Mexico; and (iii) the 47th Mexican Red Cross National Convention, held from 1 to 4 October 2014 in San Luis Potosí, directed to national and local Red Cross counsellors.

25 These sites are the Ancient Maya City of Calakmul, Campeche; the Pre-Hispanic City of Chichen-Itza; the Archaeological Site of Monte Albán; the Pre-Hispanic City and National Park of Palenque; the Archaeological Zone of Paquimé, Casas Grandes; the Pre-Hispanic City of El Tajín; the Pre-Hispanic City of Teotihuacán; the Pre-Hispanic Town of Uxmal (ceremonial sites of Uxmal, Kabah, Labna and Sayil); and the Archaeological Monuments Zone of Xochicalco.



Statute on crimes within the jurisdiction of the International Criminal Court, including war crimes listed in IHL. A similar pledge to encourage the adoption of legislation enabling Mexico to fulfil its outstanding commitments regarding IHL and the Rome Statute was drafted by CIDIH-Mexico and submitted by Mexico at the 31st International Conference of the Red Cross and Red Crescent in 2011.<sup>26</sup>

With a view to implementing these pledges, in 2010 and 2011 CIDIH-Mexico undertook the task of preparing a preliminary draft reform of federal criminal legislation with a view to harmonizing it with provisions concerning international crimes contained in the Rome Statute. In relation to war crimes, the “integrated approach” proposed by the ICRC at the Third Universal Meeting of National Committees for the Implementation of International Humanitarian Law<sup>27</sup> was taken into account. The task of preparing the preliminary draft reform was assigned to a working group formed by the four permanent member institutions of CIDIH-Mexico, along with the Attorney-General’s Office and the former Ministry of Public Security. The resulting text was approved at a plenary session of CIDIH-Mexico in October 2011.

### *Substantive review of international instruments concerning international humanitarian law issues*

Lastly, in the period 2010–2013, CIDIH-Mexico examined the contents of a number of international instruments concerning IHL which are not binding on Mexico in order to familiarize the different sectors of government with them, compare their scope with Mexico’s current international obligations and review their compatibility with domestic legislation. In some cases, CIDIH-Mexico has received assistance from ICRC international experts, who have explained the scope and contents of the provisions of some of the instruments.

## **Conclusions and way forward**

In the six years since it was created, CIDIH-Mexico has become one of the region’s most active national bodies for the implementation of IHL and has achieved significant results in fulfilling its mandate to disseminate and promote respect for IHL rules, principles and institutions and further the national implementation of IHL.

The achievements of CIDIH-Mexico are the result of the constant inter-institutional coordination and hard work of the Federal Executive Branch agencies that form and participate in the committee, as well as of the committed support that the ICRC and the Mexican Red Cross have provided to facilitate its work. Such achievements evidence the positive impact that this mechanism has had in the promotion of IHL in the country.

<sup>26</sup> See Mexico pledge P020, above note 8.

<sup>27</sup> ICRC, above note 14, Chapter 4.

Undoubtedly, CIDIH-Mexico's work has contributed to an increase in national awareness of IHL. The lessons learned by public officers related to CIDIH-Mexico in the international activities and exchanges of best practices have been successfully incorporated in the Committee's national projects. Also, CIDIH-Mexico's structure has proved to be a useful platform that has strengthened collaboration between civilian and military authorities, the ICRC and the Mexican Red Cross. Moreover, the increasing participation of civil society, including academia and non-governmental organizations, in the IHL courses offered by CIDIH-Mexico shows a growing interest in this branch of law and has resulted in better dissemination thereof throughout the country.

Building upon the lessons learned, CIDIH-Mexico continues its positive work in the dissemination and implementation of IHL. Among its future objectives, CIDIH-Mexico will seek to further enhance the dissemination of IHL in local entities, continue monitoring the implementation of the mechanism contained in the relevant regulations for the correct use of the Red Cross name and emblem throughout the country, and continue the process derived from the inclusion of nine archaeological sites under UNESCO's registry, including the dissemination thereof as well as promoting the marking of such sites by the competent authorities. It will also continue to be a key platform for the preparation of the reports on IHL that Mexico submits to the relevant international fora.

The work of CIDIH-Mexico is, without a doubt, a reaffirmation of Mexico's continued commitment to the common goal of respecting and ensuring respect for IHL in all circumstances.



## REPORTS AND DOCUMENTS

# Peru's National Committee for the Study and Implementation of International Humanitarian Law

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### Abstract

*Implementation of international humanitarian law (IHL) in national legislation is necessary to promote compliance with IHL in the event of an armed conflict. Owing to its consultative and interdepartmental nature, the National Committee for the Study and Implementation of International Humanitarian Law (CONADIH) plays a strategic role in promoting its implementation in Peru. To fulfil that role more effectively, CONADIH was strengthened during a structural internal reform of the Peruvian Ministry of Justice and Human Rights (MINJUS), where its presidency lies. Two of the crucial steps to that end were that the presidency fell under a higher authority within the Ministry and the creation of a governing body with decision-making powers regarding IHL and international human rights law, thus leading to the incorporation of IHL into a broad range of public policies.*

**Keywords:** national IHL committees, implementation of IHL, public policies.

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## Constitutional framework for IHL treaties in Peru

Peru is a party to most international humanitarian law (IHL) treaties, including the four Geneva Conventions of 1949<sup>1</sup> and their two Additional Protocols of 1977.<sup>2</sup> It has also ratified the International Convention for the Protection of All Persons from Enforced Disappearance<sup>3</sup> and the Convention on Cluster Munitions.<sup>4</sup>

In accordance with the Political Constitution of Peru, all treaties ratified by the State and in force are part of domestic law.<sup>5</sup> Although the Constitution does not specifically mention IHL treaties or the rights that derive therefrom, Article 55 stipulates that such treaties are part of domestic law provided they have been ratified by Peru and are in force.<sup>6</sup> Moreover, in accordance with the “open rights clause” set out in Article 3,<sup>7</sup> the Constitution does not exclude rights deriving from Peru’s IHL obligations, on the grounds that they are based on the principle of human dignity. It can therefore be affirmed that IHL and human rights treaties ratified by Peru are part of the country’s domestic legislation and that the rights set forth in those treaties are recognized by the Constitution.<sup>8</sup>

1 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950). Approved by Peru through Legislative Resolution No. 12412 of 31 October 1955, promulgated on 5 November 1955, and in force since 15 August 1956.

2 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1987). Approved by Peru through Legislative Resolution No. 25029 of 31 May 1989, promulgated on 1 June 1989 and in force since 14 January 1990.

3 Congress of the Republic, Legislative Resolution No. 29894 approving the International Convention for the Protection of All Persons from Enforced Disappearance, *El Peruano* (Official Gazette), 6 February 2012. Supreme Decree No. 040-2012-RE ratifying the International Convention for the Protection of All Persons from Enforced Disappearance, *El Peruano* (Official Gazette), 16 August 2012. In force since 26 October 2012.

4 Congress of the Republic, Legislative Resolution No. 29843 approving the Convention on Cluster Munitions, *El Peruano* (Official Gazette), 16 March 2012. Supreme Decree No. 021-2012-RE ratifying the Convention on Cluster Munitions, *El Peruano* (Official Gazette), 26 April 2012. In force since 1 March 2013.

5 Political Constitution of Peru, *El Peruano* (Official Gazette), 30 December 1993, Art. 55: “Treaties ratified by the State and in force are part of domestic law”.

6 Political Constitution of Peru, above note 5.

7 *Genaro Villegas Namuche*, Constitutional Court, Exp. No. 2488-2002-HC/TC, para. 12, available at: [www.tc.gob.pe/jurisprudencia/2004/02488-2002-HC.html](http://www.tc.gob.pe/jurisprudencia/2004/02488-2002-HC.html) (all internet references were accessed on 21 June 2014). Political Constitution of Peru, above note 5, Art. 3: “The list of rights set out hereinafter does not exclude further rights guaranteed by the Constitution or other rights of a similar nature or those based on human dignity or on the principles of the sovereignty of the people, the democratic rule of law and the republican form of government.”

8 In one of its rulings, the Constitutional Court also states that international human rights law is part of domestic law. See *Bar Association of Arequipa et al.*, Constitutional Court, Exp. No. 0025-2005-PI/TC and Exp. No. 0026-2005-PI/TC, 24 April 2006, para. 25, available at: [www.tc.gob.pe/jurisprudencia/2006/00025-2005-AI%2000026-2005-AI.html](http://www.tc.gob.pe/jurisprudencia/2006/00025-2005-AI%2000026-2005-AI.html).

In its Fourth Final and Transitory Provision, the Constitution also stipulates that the rules governing the rights and liberties recognized therein should be interpreted in accordance with the Universal Declaration of Human Rights<sup>9</sup> and with the relevant international treaties and agreements ratified by Peru. Article V of the Preliminary Title of the Constitutional Procedural Code further supports this interpretation of the law.<sup>10</sup> It is precisely these considerations that underpin the rulings of the Constitutional Court, stressing the need to investigate and punish alleged perpetrators of grave breaches of IHL and international human rights law, which are defined as crimes under international law.<sup>11</sup>

The Constitution and Peruvian legislation thus consistently establish that the country's obligations under IHL and human rights law are part of domestic law. Similarly, the rights and liberties guaranteed by the Constitution and domestic legislation should be interpreted in light of the relevant instruments of international law, as recognized in various decisions handed down by the Constitutional Court.

Given that IHL treaties are part of national law, it is the country's duty to implement and apply the content of such treaties; this facilitates the fulfilment of the CONADIH's objectives in the sense that it has to provide advice to the Executive Power to adopt and develop public policies taking into consideration IHL, based on the legal obligation to do so.

## **Establishment of the National Committee for the Study and Implementation of IHL**

The National Committee for the Study and Implementation of International Humanitarian Law (Comisión Nacional de Estudio y Aplicación del Derecho Internacional Humanitario, CONADIH) was set up in 2001, pursuant to Supreme

9 Political Constitution of Peru, above note 5, Fourth Final and Transitory Provision.

10 Congress of the Republic, Constitutional Procedural Code, Act No. 28237, *El Peruano* (Official Gazette), 31 May 2004, Art. V of the Preliminary Title: "The nature and scope of the constitutional rights protected by the procedures set out in this Code should be interpreted in accordance with the Universal Declaration of Human Rights, with human rights treaties, and with the decisions handed down by the international human rights tribunals set up under the treaties to which Peru is a party."

11 Constitutional Court, Exp. No. 00002-2008-PI/TC, 9 September 2009, para. 70, available at: [www.tc.gob.pe/jurisprudencia/2009/00002-2008-AI.html](http://www.tc.gob.pe/jurisprudencia/2009/00002-2008-AI.html); Constitutional Court, legal proceedings on unconstitutionality, No. 00021-2009-PI/TC, 5 November 2009, para. 6, available at: [www.tc.gob.pe/jurisprudencia/2009/00021-2009-AI%20Resolucion.html](http://www.tc.gob.pe/jurisprudencia/2009/00021-2009-AI%20Resolucion.html); Constitutional Court, Exp. No. 679-2005-PA/TC, 2 March 2007, paras 30–31, available at: [www.tc.gob.pe/jurisprudencia/2007/00679-2005-AA.html](http://www.tc.gob.pe/jurisprudencia/2007/00679-2005-AA.html); Constitutional Court, Jurisdictional Plenary, No. 0022-2004-AI/TC, 12 August 2005, para. 52, available at: [www.tc.gob.pe/jurisprudencia/2005/00022-2004-AI.html](http://www.tc.gob.pe/jurisprudencia/2005/00022-2004-AI.html); Constitutional Court, Exp. No. 4677-2005-PHC/TC, 12 August 2005, paras 9–15, 18–22, available at: [www.tc.gob.pe/jurisprudencia/2006/04677-2005-HC.html](http://www.tc.gob.pe/jurisprudencia/2006/04677-2005-HC.html); Constitutional Court, Exp. No. 0275-2005-PHC/TC, 9 February 2005, paras 3–5, available at: [www.tc.gob.pe/jurisprudencia/2005/00275-2005-HC.html](http://www.tc.gob.pe/jurisprudencia/2005/00275-2005-HC.html); Constitutional Court, Exp. No. 2310-2004-HC/TC, 21 June 2004, para. 4, available at: [www.tc.gob.pe/jurisprudencia/2006/02310-2004-HC.html](http://www.tc.gob.pe/jurisprudencia/2006/02310-2004-HC.html); Constitutional Court, Exp. No. 2798-04-HC/TC, 9 December 2004, paras 6, 14–17, available at: [www.tc.gob.pe/jurisprudencia/2005/02798-2004-HC.html](http://www.tc.gob.pe/jurisprudencia/2005/02798-2004-HC.html).

Resolution No. 234-2001-JUS, in order to promote the implementation of IHL treaties in Peru. CONADIH is an interdepartmental consultative body within the executive branch of government.<sup>12</sup> Its role is to conduct studies on and make recommendations for compliance with and development of IHL, monitor compliance with the provisions of IHL, and spread knowledge of the rules and principles of IHL.<sup>13</sup>

The following were appointed as full members of CONADIH at its founding: the then Ministry of Justice, now the Ministry of Justice and Human Rights, which holds CONADIH's chairmanship and is in charge of its Technical Secretariat; the Ministry for Foreign Affairs, which holds its vice-chairmanship; the Ministry of Defence; and the Ministry of the Interior. The Office of the Ombudsman, the Office of the National Human Rights Coordinator, and the International Committee of the Red Cross (ICRC) were appointed as observers. Pursuant to Supreme Resolution No. 062-2008-JUS,<sup>14</sup> the Ministry of Education subsequently became a full member and the Congress of the Republic became an observer. The director for human rights, also the executive secretary of the National Human Rights Council,<sup>15</sup> serves as CONADIH's chairman and head of its Technical Secretariat. The Secretariat is tasked with providing assessment services and technical and operational support.

In 2012, as part of the Ministry of Justice's reorganization,<sup>16</sup> it was put in charge of all matters pertaining to human rights law.<sup>17</sup> In order to discharge this mandate, it set up a Vice-Ministry for Human Rights and Access to Justice in charge of formulating, coordinating, carrying out and monitoring policies.<sup>18</sup> In particular, the Vice-Ministry is in charge of approving guidelines for the dissemination and promotion of international humanitarian and human rights law at the national level.<sup>19</sup> The Vice-Ministry includes, among other bodies, the Directorate-General for Human Rights, which is tasked with drafting, proposing, directing, coordinating, evaluating and monitoring policies, plans and

12 Supreme Resolution No. 234-2001-JUS, Art. 1, establishing the National Committee for the Study and Implementation of International Humanitarian Law, *El Peruano* (Official Gazette), 2 June 2001. The regulations for the Committee were approved through Ministerial Resolution No. 240-2001-JUS.

13 Supreme Resolution No. 234-2001-JUS, Art. 3.

14 Supreme Resolution No. 062-2008-JUS modifying the composition of the National Committee for the Study and Implementation of International Humanitarian Law, *El Peruano* (Official Gazette), 24 April 2008, Art. 1.

15 The National Human Rights Council, set up in 1986, is an interdepartmental body whose purpose is to give opinions to and provide assessments for the executive branch of government on the development of public policies, programmes, projects, plans of action and strategies in the field of human rights, in particular under the National Human Rights Plan. Supreme Decree No. 011-2012-JUS, Art. 136.

16 The reorganization of the Ministry of Justice followed the approval of Act No. 29809 on the Organization and Role of the Ministry of Justice and Human Rights, *El Peruano* (Official Gazette), 8 November 2011, and Supreme Decree No. 011-2012-JUS establishing its related regulations, *El Peruano* (Official Gazette), 20 April 2012.

17 Act No. 29809, Art. 4(a).

18 Act No. 29809, Art. 12(a).

19 Supreme Decree No. 011-2012-JUS, Art. 16(h), which stipulates that the Vice-Ministry shall "approve guidelines for the dissemination and promotion of international humanitarian law and human rights law, at the national level".

programmes for the protection and promotion of these bodies of law that could even affect and/or influence other government ministries and sectors.<sup>20</sup>

During this reorganization, the Vice-Ministry was entrusted with the chairmanship of CONADIH (which previously fell under the director of human rights, who worked under the Vice-Ministry) and the Technical Secretariat was placed under the recently created Directorate-General for Human Rights. Since the Vice-Ministry has a broader scope of influence than the Directorates and a stronger political capacity to influence policy-making decisions within the Ministry, CONADIH was also asked to render opinions and advise the executive branch of government on the development of public policies, programmes, projects, plans of action and transversal strategies relating to IHL. Thus, CONADIH not only plays the role of advising the executive branch on IHL, but also has the power to intervene directly through the implementation of public policies. This reorganization provided CONADIH with a broader field of action than it had under the resolution through which it was first set up. The fact that its Technical Secretariat comes under the responsibility of the Directorate-General for Human Rights, which is the main body in charge of promoting and protecting IHL and human rights law, has also enabled CONADIH to obtain additional financial and human resources to support its work.

## CONADIH's main activities

CONADIH has been entrusted with three main tasks. These can be summarized as adoption and implementation of IHL obligations, IHL dissemination, and further developing the law.

### Adoption and implementation of IHL obligations

CONADIH focuses on two strategic aims. The first is to ensure that the provisions of IHL treaties become part of the Peruvian legal order; the second is to promote the implementation of those treaties through measures taken at the national level. In order to meet these objectives, CONADIH has listed the national measures related to IHL that should be adopted as a guide to contribute to the monitoring of the following topics. They are (not necessarily in order of importance): institutionalized protection for individuals; protection of property; means and methods of warfare; investigation and prosecution of IHL violations; and IHL training and dissemination.

With regard to its first aim, CONADIH is endeavouring to promote the ratification by Peru of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Protective Emblem (Protocol III), of 8 December 2005 (AP III).<sup>21</sup> To this end, it has endorsed a

20 Supreme Decree No. 011-2012-JUS, Arts 114, 115(a).

21 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005, 2404 UNTS 261 (entered into force 14 January 2007).



report drawn up by its Technical Secretariat detailing the conditions to be met for such ratification. It has also recommended that the report be submitted to Peru's Congress through appropriate channels, and has urged the government to take the necessary steps for such ratification.

As for the second aim – namely, to promote the implementation of IHL treaties – CONADIH has already (i) set up a working group to analyze and identify the provisions of international law protecting cultural property that should be incorporated into domestic law, prioritize those provisions, and develop and propose measures to that end; (ii) drafted legislation amending Peru's Criminal Code and its Code on Children and Adolescents in order to provide for punishment for the recruitment and enlistment of persons under the age of 18 by State armed forces, armed groups and private military or security companies; (iii) carried out a technical study on questionable legal aspects of Act No. 29166,<sup>22</sup> which lays down rules on the use of force by military personnel on Peruvian territory, and related regulations; and (iv) studied the possibility of incorporating specific provisions protecting cultural property during armed conflict into Act No. 28296, which lays down general rules on Peru's cultural heritage,<sup>23</sup> and its regulations approved through Supreme Decree No. 011-2006-ED.<sup>24</sup>

## IHL training and dissemination

Moreover, CONADIH has developed and promoted the teaching and dissemination of IHL. It has, for instance, organized an annual Miguel Grau IHL training course for the past nine years.<sup>25</sup> The course is designed by CONADIH's Technical Secretariat with support from the ICRC and has a duration of one week, with

22 Congress of the Republic, Act No. 29166, *El Peruano* (Official Gazette), 20 December 2007, Repealed. This Act lays down the rules governing the use of force by military personnel on Peruvian territory. Act No. 29166 was amended as a result of legal proceedings, detailed in Exp. No. 00002-2008-PI/TC, that led the Constitutional Court to rule that certain provisions of the Act were unconstitutional. See Constitutional Court, Jurisdictional Plenary, 9 September 2009, available at: [www.tc.gob.pe/jurisprudencia/2009/00002-2008-AI.html](http://www.tc.gob.pe/jurisprudencia/2009/00002-2008-AI.html).

23 Congress of the Republic, Act No. 28296, General Law on the Cultural Heritage of the Nation, *El Peruano* (Official Gazette), 22 July 2004, Title 1, Chapter 2, "Regime Governing Property Deemed to Be Part of the Nation's Cultural Heritage", Art. 26.

24 Ministry of Education, Supreme Decree No. 011-2006-ED, approving the Regulations for Act No. 28296, General Law on the Cultural Heritage of the Nation, *El Peruano* (Official Gazette), 1 June 2006, Chapter 1, "General Provisions", Art. 7; Chapter 8, "Protection for Cultural Property During Armed Conflict".

25 In memory of the actions taken by Admiral Miguel Grau Seminari, who was commander of the Peruvian warship *Huascár* during the War of the Pacific between Peru and Chile (1879–1883). The battle of Iquique pitted the *Huascár* against the Chilean warship *Esmeralda*, commanded by Arturo Prat. Although Admiral Grau sank the *Esmeralda*, he ordered the rescue of the surviving crew from the waters and wrote a letter of condolence to Captain Prat's widow, Carmela Carvajal, praising the conduct of her husband. He also sent her some of her husband's personal effects, including his sword. Soon thereafter, States adopted the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (22 August 1864), the Hague Convention with Respect to the Laws and Customs of War on Land (29 July 1899) and the Hague Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864 (29 July 1899). Miguel Grau applied the principles and rules of IHL before he had any knowledge of the existence of the latter convention.

national and international speakers tackling both general and specific IHL subjects; these are chosen in relation to the national context and humanitarian concerns that need to be addressed in an interdisciplinary manner.

The aim of this course is to promote and facilitate IHL training for public-sector employees such as government staff, legal experts, military personnel and members of the national police force, as well as representatives of the Office of the Ombudsman and members of civil society involved in implementing IHL.

In 2012, the first Miguel Grau IHL course outside of Lima was held in Ayacucho, and a roundtable was held on the jurisprudence of the International Criminal Court and the protection of children in armed conflict, using the *Lubanga* case as an example. The second and third courses took place during 2014 in the Ancash and Cusco regions.

The focus of the ninth Miguel Grau course, held in 2014, was protection for civilians during armed conflict. For the first time since the course was launched in 2006, participants were able to participate in an online course for three weeks before attending live classes. During the distance-learning phase of the training, teachers supervised their work online, provided them with reading material and assessed their work in order to select those who would be invited to attend classes in person. The distance-learning phase of the training enabled participants to better prepare for the on-site phase by improving their basic knowledge of IHL.<sup>26</sup>

Other activities recently undertaken on CONADIH's initiative include the international workshop "International Standards on the Use of Force", which took place in Lima in November 2014; the first "macro-regional" course on IHL, with the participation of the Peruvian northern regions of Piura, Tumbes, Lambayeque, Cajamarca and Trujillo, held in Piura in 2013; and a course on the protection of cultural property in armed conflict, which was held in Lima at the end of 2013.

CONADIH has also issued publications and prepared teaching materials, such as compilations of international IHL instruments and of national measures for the implementation of IHL in Peru, to be used in its training and dissemination activities.

The dissemination activities and preparation of teaching materials have allowed CONADIH to position itself as a reference organization on IHL-related issues and international standards on the use of force in other situations of violence before national authorities outside of the Ministry of Justice. It has also sensitized some decision-makers that have participated in one of the above-mentioned activities to take IHL into consideration when designing and promoting public policy.

One of the examples of this strengthened relationship between IHL, CONADIH and other national authorities has been the recently approved National Plan for Education in Fundamental Rights and Duties, which was approved on 12 December 2014 through Supreme Decree No. 010-2014-JUS and

26 The Miguel Grau Course on International Humanitarian Law was taught online during the first three weeks. See the website of the course, available at: [www.minjus.gob.pe/actividades-institucionales-y-eventos/curso-de-derecho-internacional-humanitario-miguel-grau-se-desarrollara-de-manera-virtual-en-su-primer-etapa/](http://www.minjus.gob.pe/actividades-institucionales-y-eventos/curso-de-derecho-internacional-humanitario-miguel-grau-se-desarrollara-de-manera-virtual-en-su-primer-etapa/).

will apply until 2021. It involves and obliges different sectors, such as the Ministries of Education, Defence and the Interior, and demands specific actions to be created for each of them so as to include training on IHL and international human rights law into all the existing levels and institutions of public education.

### Further developing the law

CONADIH and the Directorate-General for Human Rights have submitted various reports and other documents to the United Nations and the Organization of American States (OAS), including: (i) a report concerning the resolution adopted by the OAS General Assembly in 2013 on “Promotion of and Respect for International Humanitarian Law”;<sup>27</sup> (ii) a report responding to a request for follow-up on the work of the 31st International Conference of the Red Cross and Red Crescent; and (iii) a report concerning the resolution adopted by the OAS General Assembly in 2011 on “Persons Who Have Disappeared and Assistance to Members of Their Families”.<sup>28</sup>

Moreover, CONADIH took part in the Continental Conference of National Committees for the Implementation of International Humanitarian Law of the Americas held in San Jose, Costa Rica, from 10 to 12 August 2013. CONADIH also participated in the fourth and fifth Mariscal Antonio José de Sucre IHL course, organized by the National IHL Committee of Ecuador in Quito and in Guayaquil, respectively, on “Humanitarian Needs in Armed Conflict and in Situations of Violence Falling Below that Threshold” (14 to 16 November 2012) and “IHL Applicable in Armed conflict at Sea and on Waterways” (31 July to 3 August 2013). Most recently, CONADIH participated in the Augusto Ramírez Ocampo IHL course held in Bogota, Colombia, from 7 to 10 October 2014.

Both the elaboration of reports and the participation in international activities have served as a means for CONADIH to gain a broader picture of the level of compliance of the State with the dispositions contained in IHL treaties, and to create and strengthen its dialogue and exchange of experience with other actors working toward the implementation of IHL, both at the national and international levels.

## Identification of good practices conducive to strengthening CONADIH

The effort to strengthen CONADIH was motivated by the need to promote the development of its activities from within the Ministry of Justice and Human Rights, which had the competence to directly implement IHL, among other

27 OAS, General Assembly, AG/RES 2795 (XLIII-O/13), 5 June 2013, paras 8 and 11, available at: [www.oas.org/consejo/sp/AG/AG43ordinaria.asp](http://www.oas.org/consejo/sp/AG/AG43ordinaria.asp).

28 OAS, General Assembly, AG/RES 2651 (XLIII-O/11), 7 June 2011, available at: [www.oas.org/consejo/sp/AG/Documentos/AG05445S05.doc](http://www.oas.org/consejo/sp/AG/Documentos/AG05445S05.doc).

matters. This competence fell under the Directorate-General of Human Rights and includes the permanent provision of technical assistance, thus ensuring the continuity of the Committee. The building up and strengthening of CONADIH, which has been ongoing since 2001, is the responsibility of all its members. However, the lead role is played by the Ministry of Justice, which, as we have seen, holds the chairmanship and is in charge of the Technical Secretariat.

In that capacity, one of the first steps taken by the Ministry of Justice to strengthen CONADIH was to ascertain and then upgrade its legal status. In 2012, on the basis of Organic Law of the Executive Power No. 29158,<sup>29</sup> among other legislation in force, the Ministry of Justice defined CONADIH as a permanent interdepartmental committee whose tasks were to provide follow-up, monitoring and technical information, now with its presidency falling under the Vice-Ministry of Human Rights and Access to Justice. On the other hand, the Directorate-General for Human Rights – with decision-making powers regarding IHL – was entrusted with CONADIH's Technical Secretariat. This link reinforces the position of IHL not only within the Ministry but before other national organs.

The second step was to incorporate CONADIH into the internal management procedures of the Ministry of Justice so that human and financial resources could be earmarked for its work. From 2004 to 2011, CONADIH received international support pursuant to a cooperation agreement entered into with the German Development Service, now the German Agency for International Cooperation (Gesellschaft für Internationale Zusammenarbeit, GIZ), which operates in Peru. The GIZ had lines of action and interests which intersected at the time with the need to strengthen the implementation of IHL in Peru. This agreement brought in the human and financial resources needed to produce publications and undertake training and dissemination activities, since the two first persons hired to work as personnel dedicated solely to CONADIH's activities at the Ministry of Justice were financed by the GIZ.

Cooperation mechanisms established through inter-agency agreements have also provided CONADIH with considerable support for its activities. It has thus established ties with, among others, the Ministry of Defence, the Lima Bar Association and the German Red Cross.

CONADIH has three observer members: the Ombudsman's Office, the National Coordinator of Human Rights and the ICRC. As an observer member of CONADIH, the ICRC can render opinions on legislative initiatives promoted or commented on by CONADIH and offer technical advice for the design and implementation of CONADIH's activities; through its delegation for Bolivia, Ecuador and Peru, it has made an essential and lasting contribution to the process of organizing and strengthening CONADIH and to the development of its activities, not only helping technically but also financing diverse aspects of the

29 In accordance with Organic Law of the Executive Power No. 29158, *El Peruano* (Official Gazette), 20 December 2007, Art. 36(3), permanent interdepartmental committees are established by Supreme Decree and approved by the president of the Council of Ministers and the heads of the departments concerned, and their internal regulations are approved by ministerial resolution.

organization process, including the invitation of international experts. In that respect, the ICRC is considered a key partner for the promotion of IHL in Peru.

## Impact

CONADIH, which has received a broad mandate, has been encouraged by the growing number of measures taken to promote the implementation of IHL since it was set up fourteen years ago. One example of such measures is the National Human Rights Plan (2014–2016), approved by Supreme Decree No. 005-2014-JUS, which involved CONADIH and the Directorate-General for Human Rights and includes the following provisions: (i) promote the ratification of IHL treaties, (ii) implement IHL treaties through normative measures, (iii) consolidate comprehensive and decentralized IHL training programmes for members of the armed forces and the national police of Peru, and (iv) encourage the introduction of IHL training courses in the curricula of universities and other institutions of higher learning.<sup>30</sup> Another is the National Plan of Action for Children and Adolescents (2012–2021), approved by Supreme Decree No. 001-2012-MIMP, which includes the aim of ensuring that those concerned cooperate to eliminate the voluntary or forced enlistment of children and adolescents in internal conflict, a goal known as “outcome 23”.<sup>31</sup> This bill was presented by CONADIH and is now part of the broader National Penal Code bill which aims to replace said Code entirely. A third measure is the National Action Plan against Trafficking in Persons (2011–2016), approved through Supreme Decree No. 004-2011-IN, which covers, among other things, forced recruitment by armed groups.<sup>32</sup>

Ministerial protocols adopted on specific topics include a set of technical guidelines on psychosocial support for the families of missing persons, which were approved through Ministerial Resolution No. 299-2012/MINSA.<sup>33</sup> These guidelines offer methodological tools to help medical personnel assist individuals, families and communities affected by the disappearance of persons in connection with the violence that plagued the country from 1980 to 2000.

CONADIH's strategic partners include the National Commission against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives

30 Ministry of Justice and Human Rights, “Approved National Human Rights Plan (2014–2016)”, *El Peruano* (Official Gazette), 5 July 2014, available at: [www.minjus.gob.pe/wp-content/uploads/2014/07/DS-005-2014-JUS-Aprobacion\\_PNDH.pdf](http://www.minjus.gob.pe/wp-content/uploads/2014/07/DS-005-2014-JUS-Aprobacion_PNDH.pdf).

31 Ministry for Women and Vulnerable Populations, Supreme Decree approving the National Plan of Action for Children and Adolescents (PNAIA 2012–2021) and establishing an interdepartmental committee tasked with its implementation, Supreme Decree No. 001-2012-MIMP, *El Peruano* (Official Gazette), 14 April 2012, pp. 90–91, available at: [www.mimp.gob.pe/webs/mimp/pnaia/pdf/Documento\\_PNAIA.pdf](http://www.mimp.gob.pe/webs/mimp/pnaia/pdf/Documento_PNAIA.pdf).

32 Ministry of the Interior, Supreme Decree No. 004-2011-IN, approving the National Plan against Trafficking in Persons (2011–2016), *El Peruano* (Official Gazette), 19 October 2011, pp. 19, 25, available at: <http://spij.minjus.gob.pe/Graficos/Peru/2011/octubre/19/DS-004-2011-IN.pdf>. In accordance with this document: “Although Act No. 28950 makes no specific mention of forced recruitment, this practice is covered by the National Plan, which takes a broad approach to the defence of human rights and victims of trafficking.”

33 Ministry of Health, Report No. 121-2013-DSM/DGSP/MINSA, Official Communication No. 2156-2013-DGSP/MINSA, General Directorate of Health, 12 August 2013.

and Other Related Materials (CONATIAF),<sup>34</sup> the Peruvian Centre for Action against Anti-personnel Mines (CONTRAMINAS)<sup>35</sup> and the National Council for the Prohibition of Chemical Weapons (CONAPAQ).<sup>36</sup> Although these agencies do not have specific IHL expertise, their tasks are related to this field. CONADIH offers technical support to these institutions both through written opinions and through direct participation in meetings in which IHL related matters are discussed. Act No. 27741 lays down the obligation to systematically teach and disseminate the provisions of the Political Constitution, human rights law and IHL at all levels of the civil and military educational system and in all universities and other institutions of higher learning.<sup>37</sup> This obligation was reiterated by the Ministry of Defence,<sup>38</sup> the Joint Command of the Armed Forces<sup>39</sup> and the

34 CONATIAF was set up through Ministerial Resolution No. 134-2007-PCM, *El Peruano* (Official Gazette), 9 May 2007, and its regulations were approved through Ministerial Resolution No. 0186, 11 February 2009. It is made up of the Ministries of Foreign Affairs, Defence, the Interior, and Justice and Production, the Office of the Public Prosecutor, the National Directorate of Intelligence and the National Superintendency of Tax Administration. The purpose of CONATIAF is to coordinate interdepartmental action for the implementation of plans and programmes – whether adopted by the United Nations, the OAS, the Andean Community or other international forums, or through bilateral agendas – that are conducive to promoting cooperation and the exchange of information and experiences among States in order to prevent, hinder, combat, eradicate or eliminate the manufacturing of and trafficking in illicit firearms, ammunition, explosives and other related materials throughout the national territory.

35 CONTRAMINAS was set up through Supreme Decree No. 113-2002-RE, *El Peruano* (Official Gazette), 13 December 2002, and its regulations were approved through Supreme Decree No. 051-2005-RE, *El Peruano* (Official Gazette), 2 July 2005. It is made up of the Ministries of Foreign Affairs, Defence, the Interior, and Education and Health, and the National Council for the Integration of Persons with Disabilities. It draws up government policies for action against anti-personnel mines in Peru and monitors compliance with the Convention on the Prohibition of Anti-personnel Mines.

36 CONAPAQ was set up through Act No. 26672, *El Peruano* (Official Gazette), 13 December 2002. It has been accepted by the Ministries of Foreign Affairs (which chairs it), Production, the Interior, Defence, and Justice and Health, the Office of the Public Prosecutor, the National Superintendency of Tax Administration and the National Society of Industries. It acts as the “National Authority” referred to in Article VII(4) of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction.

37 Congress of the Republic, Act No. 27741 establishing an educational policy on human rights law and setting up a national plan for its teaching and dissemination, *El Peruano* (Official Gazette), 29 May 2002.

38 The Act on the Organization and Role of the Ministry of Defence stipulates that this ministry is specifically in charge of “ensuring that compulsory instruction in fundamental rights and constitutional procedures be provided in all training centres for its staff”. IHL and human rights law are taught in several training centres, including the Centre for National Studies and the Centre for IHL and Human Rights Law. These centres are in charge of organizing and implementing training programmes for the armed forces and for civil servants at the national and local levels. Article 14 of the above-mentioned Act stipulates that the planning, preparation, coordination and conduct of military operations and actions must take place in compliance with IHL and human rights law. Executive Power, Legislative Decree No. 1134 approving the Law on the Organization and Role of the Ministry of Defence, *El Peruano* (Official Gazette), 10 December 2012, Art. 6(19); Ministry of Defence, Regulations for the Organization and Role of the Ministry of Defence, Supreme Decree No. 001-2011-DE, *El Peruano* (Official Gazette), 3 March 2011, Arts 66, 67.

39 One of the tasks of the chief of staff of the Joint Command of the Armed Forces is to “see to the dissemination and implementation of the provisions of human rights law and international humanitarian law applicable at the national and international levels, including those set out in the treaties to which Peru is a party”. Executive Power, Legislative Decree of the Chief of Staff of the Armed Forces, Legislative Decree No. 1136, *El Peruano* (Official Gazette), 10 December 2012, Art. 7(28).

Ministry of the Interior.<sup>40</sup> Pursuant to the aforesaid Act, the Directorate-General for Human Rights and CONADIH are working on a national plan for providing instruction in human rights law and IHL.

Lastly, the mechanisms set up by the United Nations pursuant to Resolution A/RES/65/29 on the “Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts”<sup>41</sup> and those set up by the OAS pursuant to the resolutions taken by its General Assembly on “Promotion of and Respect for International Humanitarian Law”,<sup>42</sup> among others, have helped to assess the extent to which Peru has implemented the provisions of IHL and to identify what still remains to be done.

## Conclusions

Peru has adopted various measures for the implementation of IHL at the national level, most of which have been drafted and presented to legislative actors by CONADIH. Where this has not been the case, CONADIH has commented on proposed measures and adopted a position – which thus became that of its members as well – on IHL-related matters. These measures are designed not only to fulfil CONADIH’s international obligations under the IHL treaties to which it is a party but also to encourage government forces to ensure respect for IHL at the national level, including compliance with the obligation to protect persons who are not or are no longer taking part in armed conflict.

Thanks to its interdepartmental nature, CONADIH has been able to consolidate its role as a technical IHL resource within the executive branch of government by undertaking, in coordination with all its members, activities that have a direct impact on the implementation of IHL. CONADIH and its constituent parts have thus become the main channel for promoting the implementation of IHL in Peru. Even when its members are able to act independently of CONADIH for the promotion of IHL in matters related to their exclusive competences, the inter-sectoral body facilitates dialogue and the adoption of a common position in matters that concern more than one member. This process has benefited considerably from the support and advice provided by the ICRC.

40 Directive No. 02-2009-DIREDD-PNP-SUBDACA/SEC: “Rules for promoting the teaching and dissemination of international humanitarian law, as it applies to police duties, among the national police forces of Peru.” Ministry of the Interior, approved through Directorial Resolution No. 2105-2009-DIREDD PNP/SDACA, 30 December 2009.

41 UNGA Res. A/RES/65/29, 6 December 2010, available at: [www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/65/29&Lang=S](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/65/29&Lang=S).

42 OAS, General Assembly, AG/RES 2795 (XLIH-O-13), AG/RES 2575 (XL-O/10), AG/RES 2507 (XXXIX-O/09), AG/RES 2293 (XXXVII-O/07), AG/RES 2226 (XXXVI-O/06), AG/RES 2127 (XXXV-O/05), AG/RES 2052 (XXXIV-O/04), AG/RES 1904 (XXXII-O/02), AG/RES 1771 (XXXI-O/01), AG/RES 1706 (XXX-O/00), AG/RES 16195 (XXIX-O/99), “Promotion and Respect for International Humanitarian Law”; AG/RES 1565 (XXVIII-O/98), AG/RES 1408 (XXVI-O/96), AG/RES 1335 (XXV-O/95), “Respect for International Humanitarian Law”.



Incorporating IHL into public policies in peacetime, and thus taking preventive action, is a major challenge. How well this challenge is met no doubt depends on the nature and structure of national IHL committees and on the degree to which they are provided with the means to achieve their aims. CONADIH has positioned itself as the technical body regarding IHL; its activities, such as the Miguel Grau course, now constitute a coveted introductory and interdisciplinary training space for public servants. However, there is still a need to further position the topics covered by CONADIH before political authorities in decision-making positions and to continue promoting the ratification of IHL treaties as well as implementing those to which Peru is already a party.





# Belgium's Interministerial Commission for Humanitarian Law: Playing a key role in the implementation and promotion of IHL\*

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## Abstract

*The Belgian Interministerial Commission for Humanitarian Law was created in 1987 for the purpose of identifying and coordinating national measures for implementing*

\* The Belgian Interdepartmental Commission for Humanitarian Law was the subject of an article published in the *Review* several years after the Commission was created: Marc Offermans, “The Belgian Interdepartmental Commission for Humanitarian Law”, *International Review of the Red Cross*, Vol. 31, No. 281, April 1991, pp. 154–166.

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*the Geneva Conventions of 1949 and their Additional Protocols of 1977, which Belgium had just ratified. In the first part of this article, the authors describe the Commission's background, composition, missions and structure. They then explain how, through its work, the Commission helps incorporate the rules of international humanitarian law into domestic law, disseminate these rules and promote compliance with them. In the final part of the article, the authors highlight the key factors underpinning the Commission's success in achieving its missions.*

**Keywords:** national committee, international humanitarian law, implementation, dissemination, promotion, development, national measures, Belgium.

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## Introduction

Belgium has always taken an active role in the implementation and further development of international humanitarian law (IHL). It ratified the four Geneva Conventions of 12 August 1949 on 3 September 1952,<sup>1</sup> followed by their two Additional Protocols of 8 June 1977 on 20 May 1986,<sup>2</sup> and has systematically supported their development and adoption. It also rapidly addressed the issue of prosecuting grave breaches of the Geneva Conventions. In 1952, for example, it created a permanent commission to examine, upon the government's request, questions of criminal law that arise in international relations.<sup>3</sup> More recently, the Belgian "Interdepartmental Commission for Humanitarian Law" was established

- 1 See the International Committee of the Red Cross (ICRC) treaty database, available at: [www.icrc.org/ihl](http://www.icrc.org/ihl) (all internet references were accessed in January 2015); and the law of 3 September 1952 approving the following international laws: (a) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, plus Annexes, signed in Geneva on 12 August 1949; (b) the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, plus Annex, signed in Geneva on 12 August 1949; (c) the Convention Relative to the Treatment of Prisoners of War, plus Annexes, signed in Geneva on 12 August 1949; and (d) the Convention Relative to the Protection of Civilian Persons in Time of War, plus Annexes, signed in Geneva on 12 August 1949. *Belgian Official Gazette*, 26 September 1952, p. 6822.
- 2 See the ICRC treaty database, above note 1, and the law of 16 April 1986 approving the following international laws: (a) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I); (b) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (AP II), both adopted in Geneva on 8 June 1977. *Moniteur belge*, 7 November 1986, p. 15196.
- 3 Royal Decree of 31 October 1952 creating a Permanent Commission to examine questions of criminal law in international relations, *Belgian Official Gazette*, 30 January 1953. This commission filed an opinion concerning the legislation needed to prosecute grave breaches of the Geneva Conventions together with a draft model law for this purpose that was submitted in 1956 to a committee of experts meeting under the auspices of the ICRC. However, owing to significant differences between national legal systems, this draft model law was subsequently abandoned. The Commission then analyzed the question from the angle of Belgian law, and the minister of justice filed a draft law with the Chamber of Representatives in 1963 (see *Parliamentary Documents*, Chamber, 577 (1962–1963)-1). This text served as the basis for the preparation of the law of 16 June 1993 on prosecuting grave breaches of the Geneva Conventions and the Additional Protocols (see below).

following the country's ratification of the Additional Protocols. Later renamed the Interministerial Commission for Humanitarian Law (ICHL or the Commission), its main mission was to identify and coordinate national measures to implement these new international legal instruments.<sup>4</sup> It is worth recalling that States Parties are required to respect and to ensure respect for the Geneva Conventions and the Additional Protocols in all circumstances.<sup>5</sup> For this purpose, national measures must be put into place in times of peace.

The ICHL was one of the first national committees set up to address the implementation of IHL. The International Committee of the Red Cross (ICRC) broadly encouraged other States and National Red Cross and Red Crescent Societies (National Societies) to follow Belgium's lead in undertaking this initiative in 1987. In 1988, the ICRC encouraged governments and their National Societies to work together "within the framework of an interministerial committee enlarged to include representatives of the National Societies" for the purpose of adopting national measures to implement the Geneva Conventions and their Additional Protocols.<sup>6</sup> Subsequently, Resolution I of the 26th International Conference of the Red Cross and Red Crescent, held in 1995, endorsed the recommendations of the Intergovernmental Group of Experts for the Protection of War Victims, including the creation of national committees on IHL.<sup>7</sup>

The ICHL has made a name for itself over the years. The purpose of this article is to show how the Commission became indispensable in the Belgian government's efforts to implement IHL. The article begins with a description of the Commission, including its founding, mission, composition and operating structure, together with changes that have taken place over time. It goes on to show how the various components of the Commission's work contribute to the process of incorporating the rules of IHL into national law, disseminating them and promoting compliance with them. Finally, it highlights the key factors underpinning the Commission's success in achieving its missions.

## Creation of the Commission and subsequent changes

After ratifying the Additional Protocols in 1986, Belgium quickly recognized the utility of creating a committee for IHL in order to coordinate national implementation measures in this field. The Commission was soon formed, but it was necessary to expand its size and scope of work several times to keep pace with the various

4 Visit the ICHL website, available at: [www.cidh-ichr.be](http://www.cidh-ichr.be).

5 See Article 1 common to the four Geneva Conventions of 12 August 1949 and Article 1(1) of AP I.

6 See "Letter to the States Party to the Geneva Conventions" and "Letter to the National Red Cross and Red Crescent Societies", dated 28 April 1988 and sent by the ICRC president. *International Review of the Red Cross*, Vol. 28, No. 263, 1988, pp. 122–124.

7 Resolution I, "International Humanitarian Law: From Law to Action. Report on the Follow-Up to the International Conference for the Protection of War Victims", adopted at the 26th International Conference of the Red Cross, Geneva, 7 December 1995, para. 4; report of the meeting of the Intergovernmental Group of Experts for the Protection of War Victims, Geneva, 23–27 January 1995, Recommendations, Point V.

institutional reforms taking place in the country and the significant advances in IHL in recent years. When its mandate was again expanded in 2000, the necessary operating structure had to be put into place to ensure that it could fulfil its missions. For this, the Belgian authorities were on their own: the Geneva Conventions and their Additional Protocols do not explicitly provide for national committees on humanitarian law, and there were very few others in existence in the late 1980s.

## Creation of the Commission: the National Society as the driving force

When Belgium ratified the Additional Protocols of 1977, the Belgian Red Cross analyzed these texts in detail. It recommended identifying, with the involvement of the government entities directly concerned, the measures that needed to be put into place in peacetime to ensure that the Protocols were effectively implemented. It was thus that Belgium's National Society organized a symposium on 27–28 November 1986 to study the question of implementing the two Additional Protocols.<sup>8</sup> This symposium came shortly after the Additional Protocols had entered into force in Belgium on 20 November 1986. Alexandre Hay, president of the ICRC at the time, was correct in saying that it was not enough to simply ratify the Protocols, but that appropriate measures had to be taken to ensure compliance with these treaties in the event that an armed conflict were to involve a State Party.<sup>9</sup> In his speech opening the symposium, the president of the Belgian Red Cross, His Majesty King Albert II (Prince of Liège at the time), focused on a major challenge that lay ahead: coordinating among the ministerial departments involved to ensure that these measures were adopted and properly followed up. To this end, he asserted the need for permanent committees to oversee and monitor measures aimed at implementing the Additional Protocols.<sup>10</sup>

This suggestion was acted on with the decision of the Council of Ministers of 20 February 1987 creating the Interdepartmental Commission for Humanitarian Law, which has since become the Interministerial Commission for Humanitarian Law.

## Evolving missions and composition

At the outset, the ICHL was tasked with examining the Additional Protocols and, where needed, the Geneva Conventions themselves;<sup>11</sup> identifying measures that

8 Belgian Red Cross, "Implementation of the Additional Protocols to the Geneva Conventions of 12 August 1949: Under the Co-presidency of Vaast Leysen and Jacques Delruelle, National Vice-Presidents of the Belgian Red Cross", Symposium, 27–28 November 1986, Brussels, *Military Law and the Law of War Review*, Vol. 27, No. 2, 1988, pp. 195–366.

9 *Ibid.*, pp. 205–209.

10 *Ibid.*, pp. 203–204.

11 As noted above, the ICHL was created following the 1986 symposium on the implementation of the Additional Protocols of 1977. Because this symposium was organized at the same time that Belgium was ratifying these Protocols, the ICHL's coordination mission focused particularly on measures to implement these laws without explicitly excluding the Geneva Conventions of 1949. But since the Additional Protocols supplement the Geneva Conventions, the ICHL would, at the same time, address implementation of them as well (it was made clear at the symposium that a number of provisions of the Conventions, including those relating to the prosecution of grave breaches, had not yet been incorporated into Belgian law).

should be taken at the national level for the purpose of implementing these laws; submitting proposals to the competent authorities on adopting these measures; and monitoring and coordinating the measures that would eventually be taken.<sup>12</sup>

In view of the various reforms undertaken by the Belgian government, further developments in IHL and the growing number of peacekeeping operations in which Belgium was participating on the request of the United Nations, the ICHL's missions – which had been growing in scope – were formally modified.<sup>13</sup> On 23 December 1994, the Council of Ministers expanded the ICHL's mandate. In addition to the tasks it had been attributed in 1987, the ICHL would act as a permanent advisory body to the federal government, providing studies, reports, opinions and proposals to help it implement and develop IHL. The Commission was given no decision-making or executive authority; its role would be to spur the political and administrative authorities to action.<sup>14</sup> Several years later, the Commission's existence and role were officially and publicly recognized by the Royal Decree of 6 December 2000 reorganizing the Interdepartmental Commission for Humanitarian Law,<sup>15</sup> which reaffirmed the 1994 revision of the ICHL's mandate. According to the royal decree, the ICHL's mission is thus to propose to the federal government national measures necessary for the implementation of the rules of IHL, to follow up on and coordinate these measures, and to prepare opinions and proposals concerning the application and further development of this body of law.<sup>16</sup>

It bears mentioning that for several years the ICHL has acted as the national advisory committee on the protection of cultural property under the terms of Resolution II of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict, adopted at The Hague on 14 May 1954. Cultural property is civilian by definition, which means it is automatically protected in the event of armed conflict. Because cultural property is intimately connected with the identity of a people, its protection is also, and specifically, reaffirmed by Articles 53 and 16 of Additional Protocols I and II to the Geneva

12 Marc Offermans, "The Belgian Interdepartmental Commission for Humanitarian Law", *International Review of the Red Cross*, Vol. 31, No. 281, 1991, p. 154.

13 Guido Van Gerven, Chairman of the ICHL, *Introduction to the ICHL's Working Documents*, 14 June 2005, p. 3.

14 M. Offermans, above note 12, p. 154. For more detailed information on how the ICHL spurs government action, see the discussion of the Commission's mandate in the second part of this article.

15 Royal Decree of 6 December 2000 reorganizing the Interdepartmental Commission for Humanitarian Law, *Belgian Official Gazette*, 12 December 2000, p. 41449.

16 Under the terms of Article 2 of the Royal Decree of 6 December 2000:

The mission of the Interministerial Commission for Humanitarian Law ... is to:

1. identify and examine the national enforcement measures necessary for the implementation of the rules of international humanitarian law, inform the federal ministers concerned of them and submit proposals to them in this regard;
2. monitor and coordinate the national enforcement measures addressed in point 1;
3. as a permanent advisory body, assist the federal government, on its own initiative or on the request of the latter, with studies, reports, opinions and proposals concerning the application and development of international humanitarian law;
4. ensure the work of the Interdepartmental Commission for Humanitarian Law is carried on and its archives preserved.

Conventions, respectively. Given its role as an expert in IHL, the ICHL incorporated the protection of cultural property into its priorities, and in 1997 it created an internal working group in charge of studying national implementation measures in this regard. One of the Commission's first actions in this area was to organize, in 2000, an information session on the protection of cultural property during armed conflict which was attended by the federal departments, the federal entities (the Communities and Regions) and the Belgian Red Cross. The ICHL took the opportunity to reassert its view that its core remit included studying national measures to implement legal instruments concerning the protection of cultural property in the event of armed conflict.<sup>17</sup> The Commission's commitment to this issue gradually deepened during the preparations for and follow-up to the 28th International Conference of the Red Cross and the Red Crescent in 2003. The "Protecting Human Dignity" declaration emanating from this conference stated that the cultural heritage of peoples must be protected and called on "all parties to an armed conflict to take all feasible measures to prevent pillage of cultural property and places of worship and acts of hostility against such property not used for military purposes."<sup>18</sup> In responding to this appeal, the Cairo Declaration on the protection of cultural property, which was adopted by consensus during a regional conference held in 2004, invited "national commissions for humanitarian law to devote the necessary effort for the protection of cultural property and to adopt the national measures for the implementation of the 1954 Convention and its two Protocols at the national level as being an integral part of international humanitarian law".<sup>19</sup> In this way, the ICHL's mission gained muscle over the years. At first, it consisted mainly of preparing a list of national measures that should be taken to protect cultural property and ensuring follow-up to the ratification of the Second Protocol to the Hague Convention of 26 March 1999. However, soon after the Second Protocol was ratified by Belgium and entered into force on 13 January 2011, the ICHL decided to expand the size of its working group on the protection of cultural property and the scope of that working group's mission. The aim was twofold: to ensure that the obligations under the Hague Convention and its two Protocols were implemented at the national level, and to provide input, on behalf of Belgium, to international meetings having to do with the promotion and implementation of these conventions.

17 Marc Offermans, "The Interdepartmental Commission on Humanitarian Law (ICHL) and the Testing of National Implementation Measures on the Protection of Cultural property in Armed Conflict", in *The Protection of Cultural Property in Times of Armed Conflict: Report of the Informational Meeting of 27 April 2000*, 2001, available at: [http://cidh-ichr.be/fr/activites%20de%20la%20CIDH#rapports\\_activites](http://cidh-ichr.be/fr/activites%20de%20la%20CIDH#rapports_activites).

18 "Protecting Human Dignity" declaration contained in the Annex to Resolution I, "Adoption of the Declaration and Agenda for Humanitarian Action", 28th International Conference of the Red Cross and Red Crescent, Geneva, 2–6 December 2003, *International Review of the Red Cross*, Vol. 85, No. 852, 2003, pp. 888 ff.

19 Cairo Declaration on the Protection of Cultural Property, adopted during a regional conference held on 14–16 February 2004 under the aegis of the Egyptian national IHL committee, in partnership with the ICRC, the Egyptian Red Crescent Society and UNESCO, para. 4, available at: [www.icrc.org/en/document/cairo-declaration-protection-cultural-property](http://www.icrc.org/en/document/cairo-declaration-protection-cultural-property).

The current composition of the ICHL was set forth in the Royal Decree of 6 December 2000 and is largely in line with the decisions taken by the Council of Ministers in 1987 and 1994. The Commission has the following permanent members: a representative of the prime minister and representatives of the ministers of foreign affairs, justice, defence, the interior, public health and development cooperation.<sup>20</sup> It also has a number of invited members: representatives of the Communities and Regions, and of the Belgian Red Cross.<sup>21</sup> It may, upon request by a minister represented on the Commission, appoint permanent experts to assist in its work.<sup>22</sup> The Commission appoints a vice chairperson and a secretary from among its members or the permanent experts to a renewable three-year term.<sup>23</sup> To ensure it has all the information it needs to carry out its work, the Commission can invite representatives from other government entities that are not represented and bring in other outside individuals whose input is deemed useful.<sup>24</sup>

The National Society's status within the Commission is unique in two ways. First, the Belgian Red Cross was invited to participate in the Commission's work starting with its first meeting on 12 May 1987. Initially, this was in response to Resolution V adopted by the 25th International Conference of the Red Cross and Red Crescent in 1986 concerning national measures to implement IHL, which "invites National Societies to assist and co-operate with their own governments in fulfilling their obligation" relative to the adoption of implementation measures.<sup>25</sup> The involvement of the National Societies derives mainly from their role, as auxiliaries to the public authorities, of supporting their government in disseminating IHL and ensuring respect for this body of law.<sup>26</sup> This practice was formalized by the Royal Decree of 2000.

Second, although the Belgian Red Cross is invited to take part in the Commission's work, and therefore in its meetings, it is not a permanent member

20 Royal Decree of 6 December 2000 reorganizing the Interdepartmental Commission for Humanitarian Law, *Belgian Official Gazette*, 12 December 2000, p. 41449, Art. 4(1)(1).

21 *Ibid.*, Art. 4(2).

22 *Ibid.*, Art. 6.

23 *Ibid.*, Art. 4(1)(2); Internal Regulations of the ICHL, adopted on 14 September 2001, Art. 3.

24 Royal Decree of 6 December 2000 reorganizing the Interdepartmental Commission for Humanitarian Law, *Belgian Official Gazette*, 12 December 2000, p. 41449, Art. 7.

25 Resolution V, "National Measures to Implement International Humanitarian Law", adopted by the 25th International Conference of the Red Cross and Red Crescent, Geneva, October 1986, *International Review of the Red Cross*, Vol. 28, No. 263, 1988, p. 127. See also General-Major René Bats, introduction to the proceedings of the symposium on "Implementation of the Protocols Additional to the Geneva Conventions of 12 August 1949", Brussels, 27 and 28 November 1986, *Military Law and the Law of War Review*, Vol. 27, No. 2, 1988, p. 197.

26 Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross and Red Crescent, Geneva, 8 November 1986, and amended in 1995 and 2006, Art. 3(2)(3). The mission of disseminating IHL is included in the statutes of the Belgian Red Cross, revised on 13 October 2003, Art. 4; approved by the decree of the government of the French Community on 4 December 2003, which approved the statutes of the Belgian Red Cross, *Belgian Official Gazette*, 22 April 2004, p. 23953; by the decree of the Flemish government on 2 April 2004, which approved the modified statutes of the Belgian Red Cross, *Belgian Official Gazette*, 1 July 2004, p. 53385; and by the decree of the German-speaking Community on 4 June 2004, which approved the new statutes of the Belgian Red Cross, *Belgian Official Gazette*, 20 August 2004, p. 62408.



and is not directly involved in decision-making. The National Society is thus invited as an expert in IHL to give an opinion on implementation-related issues at a strictly technical level. Under this arrangement, the National Society remains faithful to the principles of independence and neutrality, while the represented government entities assume full responsibility for the decisions adopted.

## Clearly defined operating structure and working procedures

When the Commission was reorganized in 1994, it was placed under the authority of the minister of foreign affairs,<sup>27</sup> whose remit includes ensuring respect for Belgium's obligations under both treaty-based and customary IHL.<sup>28</sup> Since then, the minister has been responsible for appointing the Commission chairperson.<sup>29</sup> The minister also approves the Commission's internal regulations<sup>30</sup> and provides it with administrative staff, offices and material resources.<sup>31</sup>

The Commission's operating structure is laid out in its Internal Regulations<sup>32</sup> and Working Procedures,<sup>33</sup> the latest versions of which were approved on 14 September 2001. A working procedure on updating the working documents that spell out the implementation measures which should be taken was adopted in 2006. The Commission holds a plenary meeting at least four times per year. A number of working groups,<sup>34</sup> comprising both members and experts, meet during the interim and can address urgent issues whenever necessary. These working groups are formed to carry out the Commission's mission as a permanent advisory body to the federal government. Their respective tasks can be modified as needed. The Internal Regulations do not define an end date for the working groups, which continue to operate as long as they help the Commission to carry out its mandate. The working groups currently focus on the following issues: bringing federal legislation in line with IHL, the dissemination of IHL (largely focused on training), the protection of cultural property in the event of armed conflict, the creation of a national information bureau, preparing and following up

27 Previously, by virtue of the decision of the Council of Ministers in 1987 creating the ICHL, the Commission was chaired by the chairman of the Commission for National Defence Problems (CPND), a body under the direct authority of the prime minister. The CPND's mission was to support the Ministerial Defence Committee, which was created by the Royal Decree of 3 August 1950. This law was abrogated by the Royal Decree of 24 April 2014, *Belgian Official Gazette*, 13 May 2014, p. 38600.

28 G. Van Gerven, above note 13, p. 3.

29 Royal Decree of 6 December 2000 reorganizing the Interdepartmental Commission for Humanitarian Law, *Belgian Official Gazette*, 12 December 2000, p. 41449, Art. 4(1)(1).

30 *Ibid.*, Art. 8.

31 *Ibid.*, Art. 9.

32 *Ibid.*, Art. 8, according to which, "[a]t the first meeting following the entry into force of this decree, the Commission defines internal regulations".

33 Pursuant to Article 15 of the ICHL's Internal Regulations, adopted on 14 September 2001: "The ICHL defines its working procedures for its mission of identifying and examining national enforcement measures needed for the implementation of the rules of international humanitarian law and for following up on and coordinating these national enforcement measures."

34 ICHL Internal Regulations, 14 September 2001, Art. 5; ICHL Working Procedures, 14 September 2001, Point I(C).

on decisions of International Conferences of the Red Cross and Red Crescent, and public outreach (this includes organizing colloquiums and workshops).<sup>35</sup>

The Commission can issue opinions upon the request of the federal government or on its own initiative.<sup>36</sup> It makes decisions by consensus among the permanent members (i.e., the representatives of the ministers whose work is somehow related to the implementation of IHL) who are in attendance, following consultations with the other Commission members who are in attendance (i.e., invited members, permanent experts and outside individuals who have been brought in).<sup>37</sup>

## Fulfilling its mandate through a variety of activities

Alongside the ICHL's evolving mandate, the volume of its work has significantly increased in recent years. Its main tasks include identifying implementation measures that should be adopted in view of existing domestic law, proposing texts for draft laws on the implementation of IHL as an advisory body to the federal government, and organizing academic events to promote and contribute to the development of IHL.

### Identifying national implementation measures

In 1997, the ICHL completed the first mission it had been given, which was to identify aspects of Belgian law that needed to be adapted and to prepare, for the ministers concerned, a list of enforcement measures that were needed to effectively implement the Geneva Conventions and their Additional Protocols at the national level.

For this purpose, the working groups analyzed forty-three essential obligations under treaty-based and customary IHL. These were drawn from an indicative list of national implementation measures prepared by the ICRC in 1986 in the run-up to the 25th International Conference of the Red Cross and Red Crescent,<sup>38</sup> international doctrine and the preparatory documents for the various diplomatic conferences.<sup>39</sup> For each obligation, a working document was prepared that described the legal basis for the provisions to be implemented, the national measures to be adopted, the ministerial departments concerned and the

35 An overview of the current working groups is available at: [www.cidh.be/fr/Composition%20et%20structure](http://www.cidh.be/fr/Composition%20et%20structure). There are currently six *ad hoc* working groups: Legislation, Protection of Cultural Property, Public Outreach, International Conferences, Promoting IHL, and National Information Bureau.

36 Royal Decree of 6 December 2000 reorganizing the Interdepartmental Commission for Humanitarian Law, *Belgian Official Gazette*, 12 December 2000, p. 41449, Art. 2(3).

37 ICHL Internal Regulations, 14 September 2001, Art. 16.

38 "Respect for International Humanitarian Law: National Measures to Implement the Geneva Conventions and their Additional Protocols in Peacetime", *International Review of the Red Cross*, Vol. 28, No. 263, 1988, pp. 130–140.

39 G. Van Gerven, above note 13, p. 3.

lead department.<sup>40</sup> The working document also addressed the budgetary implications and the status of the issue (i.e., work done and ongoing work), and it proposed decisions. Once the working document was approved by the Commission meeting in a plenary session, the proposals were then submitted to the respective authorities.<sup>41</sup> A number of key themes were among those studied: the appointment and training of qualified staff, legal advisers in the armed forces, prosecuting grave breaches, judicial cooperation and extradition, the protection of cultural property and civil defence.

All the ICHL's working documents were assembled and published in a collection in 1997, as the Commission marked its 10th anniversary. The working documents represent a regularly updated action plan for the ministerial departments regarding the national measures that should be implemented.<sup>42</sup> When last updated, in 2005, the documents were published in a new collection.<sup>43</sup> This collection was distributed to the departments concerned and was also provided to the ICRC, which then passed it along to other national committees around the world in an effort to encourage the sharing of best practices.

Thanks to its work developing the list of necessary national implementation measures, the Commission has helped spawn a number of important measures since its creation in 1987. These include:<sup>44</sup> the preparation and regular updating of a list of qualified staff made up of experts from the ministerial departments, the National Society and universities; the posting within the armed forces of advisers specializing in the law of armed conflict; incorporating the teaching of IHL into military instruction programmes; recognition of the authority of the International Humanitarian Fact-Finding Commission provided for in Article 90 of Additional Protocol I of 1977; incorporating grave breaches of IHL into Belgium's criminal code (i.e., the insertion of Title I *bis* "Grave Breaches of International Humanitarian Law" into Book II of this code); and the adoption of detailed legislation in the area of judicial cooperation with international criminal courts.

## Serving as advisory body to the federal government

As the advisory body to the federal government in the area of IHL, the ICHL commonly submits opinions on its own initiative or upon request by the government. These opinions are generally prepared by the working groups and then eventually reviewed and approved by the Commission meeting in a plenary session. At that point the opinions are sent to the minister of foreign affairs and other ministers concerned for the necessary follow-up.<sup>45</sup>

40 "It is responsible for preparing proposals for implementation measures of a legal or practical nature that should be taken at the national level", ICHL Working Procedures, 14 September 2001, Point I(B).

41 ICHL Working Procedures, 14 September 2001, Point I(E).

42 On 14 March 2006, the ICHL adopted a working procedure for updating these working documents.

43 ICHL, *Collected Working Documents*, June 2005. These updated documents and the Commission's archives of working documents are available at: [www.cidh.be/fr/inventaire\\_doc](http://www.cidh.be/fr/inventaire_doc).

44 *Ibid.*, Document 01, "National Measures to Implement the Geneva Conventions and the Additional Protocols."

45 More information is available at: [www.cidh.be](http://www.cidh.be).

The Commission is thus the entity that prepares the text of draft laws in the area of IHL and submits them to the government. For example, it was the Commission's work and proposals that led to the law of 16 June 1993 on prosecuting grave breaches of the Geneva Conventions and Additional Protocols<sup>46</sup> (modified on 10 February 1999 and 23 April 2003), which was abrogated and replaced by the law of 5 August 2003 on grave breaches of IHL.<sup>47</sup> More recently, the Commission prepared the text for two draft laws assenting to amendments to the Statute of the International Criminal Court – the amendment to Article 8 on war crimes, and amendments on the crime of aggression – agreed at the Review Conference of the Rome Statute in Kampala on 10 and 11 June 2010. These texts led to the adoption of two laws of assent in November 2013.<sup>48</sup>

The Commission also responds to follow-up surveys seeking to ascertain what actions the government has taken in view of its pledges and the resolutions resulting from International Conferences of the Red Cross and Red Crescent.<sup>49</sup> It prepares its answers in collaboration with all the departments concerned and submits them to the ICRC and the International Federation of Red Cross and Red Crescent Societies (IFRC), which produce the surveys. In June 2011, for example, the ICHL responded on behalf of Belgium to the follow-up survey on the 30th International Conference of the Red Cross and Red Crescent (2007). Its report was incorporated into the follow-up reports prepared by the ICRC and the IFRC for the 31st International Conference of the Red Cross and Red Crescent (2011).<sup>50</sup> The ICHL also responded to the follow-up survey (mid-term review) to the 31st Conference.<sup>51</sup>

It is again in its role as an advisory body that the ICHL prepares reports on the implementation of international legal instruments by Belgium and submits these reports to the appropriate international entities. We will mention two examples: Belgium's follow-up report on the biennial resolutions of the General Assembly of the United Nations addressing the "Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed

46 Law of 16 June 1993 on prosecuting grave breaches of international humanitarian law, *Belgian Official Gazette*, 5 August 1993, p. 17751.

47 Draft amendments abrogating the law of 16 June 1993 on prosecuting grave breaches of international humanitarian law and transferring its provisions to the Criminal Code and the Code of Criminal Procedure. These texts led to the law of 5 August 2003 on grave breaches of international humanitarian law, *Belgian Official Gazette*, 7 August 2003, p. 40506.

48 Law of 22 November 2013 assenting to the amendment to Article 8 of the Rome Statute of the International Criminal Court, adopted in Kampala on 10 June 2010 during the Review Conference of the Rome Statute, *Belgian Official Gazette*, 3 March 2014, p. 17672; Law of 22 November 2013 assenting to the amendments to the Rome Statute of the International Criminal Court on the crime of aggression, adopted in Kampala on 11 June 2010 during the Review Conference of the Rome Statute, *Belgian Official Gazette*, 3 March 2014, p. 17674.

49 More information is available at: [www.cidh.be](http://www.cidh.be). The resolutions of the 31st International Conference of the Red Cross and Red Crescent held in 2011 and the pledges made by Belgium on this occasion are available at: [www.rcrcconference.org](http://www.rcrcconference.org).

50 The various follow-up reports to the 30th International Conference of the Red Cross and Red Crescent are available at: [www.icrc.org/applic/p130e.nsf/va\\_navPage/POAI?openDocument&count=-1](http://www.icrc.org/applic/p130e.nsf/va_navPage/POAI?openDocument&count=-1).

51 "Survey (Mid-Term Review) on the Outcome of the 31st International Conference of the Red Cross and Red Crescent (2011)", available at: <http://rcrcconference.standcom.org/en/midtermreview.html>.

Conflict”, and the report submitted to the Committee on the Rights of the Child concerning the implementation of the Optional Protocol of 2000 to the Convention on the Rights of the Child on the involvement of children in armed conflict.<sup>52</sup> Another illustration is the four-year reports concerning the implementation by Belgium of the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols of 1954 and 1999, which are submitted to UNESCO.<sup>53</sup>

## Organizing and participating in academic events

ICHL delegations regularly take part in a broad range of events having to do with IHL as well as in regional or universal meetings of national committees on IHL.<sup>54</sup> The ICHL also organized, in conjunction with the Ministry of Foreign Affairs, the ICRC and the Belgian Red Cross, the first European meeting of commissions and other national bodies for the implementation of IHL from various European countries in 1999. Particular focus was placed on the importance of creating a national-level body tasked with overseeing the implementation of IHL.<sup>55</sup>

The Commission also organizes academic seminars, colloquiums and expert workshops, generally in conjunction with the ICRC or the Belgian Red Cross and other organizations concerned with the selected topics. These events are designed to promote and further develop IHL. They bring together a large number of participants from around the world, including experts in diverse disciplines, staff from embassies located in Brussels and representatives of international organizations.

Examples of such events are many: in June 2012 the ICHL organized a colloquium on the amendments made in 2010 to the Statute of the International Criminal Court;<sup>56</sup> in 2013, together with UNESCO, it organized an international colloquium on the implementation of the Second Protocol (of 1999) to the Hague

52 See, for example, the report of the Committee on the Rights of the Child, UN Doc. CRC/C/OPAC/BEL/1, 15 August 2005.

53 Report prepared by the ICHL on the implementation of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 1954) and its two Protocols of 1954 and 1999, for the 2004–2008 period, 2008; and Report on the national implementation of the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols (1954 and 1999), for the 2009–2012 period, 2012. Documents available at: [www.unesco.org/new/fr/culture/themes/armed-conflict-and-heritage/](http://www.unesco.org/new/fr/culture/themes/armed-conflict-and-heritage/).

54 European Regional Meetings of National Committees on International Humanitarian Law (Budapest, 2–3 February 2001; Athens, 25–28 January 2006) and Universal Meetings of National Committees on International Humanitarian Law (Geneva, 25–27 March 2002; Geneva, 27–29 March 2007; Geneva, 27–29 October 2010). At each of these meetings, an ICHL representative either made a presentation or ran a workshop. The Commission took advantage of these opportunities to share its experience in the implementation of IHL.

55 European Meeting of National Committees on the implementation of international humanitarian law, Brussels, 19–20 April 1999. See the meeting report in ICHL, above note 43, Document 01, “National Measures to Implement the Geneva Conventions and the Additional Protocols”, Annex A.

56 Colloquium entitled “From Rome to Kampala: The First Two Amendments to the Rome Statute”, held in Brussels on 5 June 2012. The colloquium proceedings were subsequently published: Gérard Dive, Benjamin Goes and Damien Vandermeersch (ed.), *From Rome to Kampala: The First 2 Amendments to the Rome Statute*, Bruylant, Brussels, November 2012.

Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict;<sup>57</sup> and in early 2014, as part of the ICRC's Health Care in Danger project,<sup>58</sup> it joined with the ICRC to organize the expert workshop in Brussels focusing on domestic regulatory frameworks for implementing international rules on safeguarding health care in armed conflict and other emergencies.<sup>59</sup>

## The main success factors of the Commission

Several factors have undeniably contributed to the ICHL's effectiveness and to the quality of its work. These include the highly diverse composition of the Commission and the expertise of its members, its working-group approach, its right of initiative, and the wide range of international academic events that it organizes.

### Expertise born of diversity

First, the ICHL has been able to develop its expertise over time thanks to the broad participation of all the representatives of the ministerial departments affected in one way or another by the implementation of IHL and to the close working relationship between its permanent members and the National Society.

### *Ministerial departments well represented*

The ICHL is present and has an impact at the various institutional levels in Belgium because of its composition: it brings together representatives of various federal ministers responsible for implementing international humanitarian law, representatives of the governments of the federated entities (Regions and Communities) and representatives of the Belgian Red Cross. Thanks to its membership, the Commission also benefits from the expertise and knowledge of the main actors involved in the application of IHL in Belgium.

The expanding involvement of the ministerial departments in the ICHL's work has led to a real sense of ownership by the country's authorities. The Belgian Red Cross may have come up with the idea of setting up the ICHL in 1987 and helped it along for a few years by providing office space and office staff,<sup>60</sup> but the national authorities wasted no time in assuming their responsibilities in the Commission's functioning and the management of its work.

57 Colloquium held in Brussels on 12–13 December 2013.

58 More information on the Health Care in Danger project is available at: [www.icrc.org/eng/what-we-do/safeguarding-health-care/solution/2013-04-26-hcid-health-care-in-danger-project.htm](http://www.icrc.org/eng/what-we-do/safeguarding-health-care/solution/2013-04-26-hcid-health-care-in-danger-project.htm).

59 Expert workshop on "Domestic Normative Frameworks for the Protection of Health Care", held in Brussels on 29–31 January 2014. The workshop report was published in January 2015 and is available at: [www.icrc.org/eng/assets/files/publications/icrc-002-4215.pdf](http://www.icrc.org/eng/assets/files/publications/icrc-002-4215.pdf). See also ICRC, "Protecting Health Services Requires Good National Laws", 31 January 2014, available at: [www.icrc.org/eng/resources/documents/news-release/2014/01-31-health-care-in-danger-brussels.htm](http://www.icrc.org/eng/resources/documents/news-release/2014/01-31-health-care-in-danger-brussels.htm).

60 For more on this, see M. Offermans, above note 12, p. 156.

## *Active participation of the National Society*

Today, the National Society's main role in support of the ICHL's work lies in providing expertise. It intervenes at several levels.

The National Society helps develop legislation aimed at implementing IHL. As part of the Commission's "Legislation" Working Group, which is chaired by the representative of the minister of justice, it is involved in writing the texts for draft bills. For example, the National Society helped prepare the draft law of assent to Additional Protocol III to the Geneva Conventions, adopted in 2005, which created an additional distinctive emblem called the "red crystal"; this law of assent paved the way for this treaty's ratification by Belgium. It was also involved in writing the law of 22 November 2013 that modified the law of 4 July 1956 protecting Red Cross names, signs and emblems in order to include the red crystal.<sup>61</sup>

The Belgian Red Cross supports the ICHL in its mission to promote IHL in Belgium. In 2007, for example, the National Society coordinated with the Chancellery of the Prime Minister to prepare a pamphlet explaining the legal regimes that protect cultural property in Belgium, including the Hague Convention of 1954 and its Protocols.<sup>62</sup> This pamphlet was published and distributed to the Belgian authorities. More broadly, the National Society also has a hand in preparing and organizing colloquiums involving the ICHL.

The ICHL counts on the support of the Belgian Red Cross in its task of overseeing the preparations for and follow-up to the International Conferences of the Red Cross and Red Crescent on behalf of the Belgian authorities. In this respect, the National Society chairs the Commission's "International Conferences of the Red Cross and Red Crescent" Working Group. The working group's mission includes following up on the pledges and resolutions adopted by Belgium at the previous International Conference and overseeing the report that Belgium is required to submit to the conference organizers. The working group also draws up proposals for new pledges for the following four years that the Belgian authorities will present during the subsequent International Conference. The pledges proposed by the working group and approved by the Belgian authorities in advance of the 31st International Conference include the following: supporting the international Arms Trade Treaty (including compliance with IHL), as well as ratifying this treaty and adopting national implementation measures;<sup>63</sup> ratifying

61 Law of 4 July 1956 on protecting Red Cross names, signs and emblems, *Belgian Official Gazette*, 11 July 1956, p. 4616; modified by the law of 22 November 2013, *Belgian Official Gazette*, 20 December 2013, p. 101271.

62 ICHL, *The Protection of Cultural Property in Belgium: Applicable Law*, Federal Public Service Foreign Affairs, Brussels, 2007.

63 The Arms Trade Treaty was adopted by the United Nations General Assembly through Resolution 67/234 B of 2 April 2013. Belgium ratified it on 3 June 2014. The text of the treaty and the status of ratifications are available at: <http://disarmament.un.org/treaties/t/att>. Since 2011, Belgium has adopted national measures aimed at taking into account the requirements of IHL in the context of arms transfers: Decree of the Flemish Region of 15 June 2012 concerning the importation, exportation, transit and transfer of defence-related products, other equipment for military use, equipment for maintaining order, civilian firearms, spare parts and ammunition, *Belgian Official Gazette*, 4 July 2012, p. 36557; Decree of the Walloon Region of 21 June 2012 concerning the importation, exportation, transit and transfer of



the amendments to the Statute of the International Criminal Court – the amendment to Article 8 concerning war crimes and amendments concerning the crime of aggression – adopted at the Review Conference of the Rome Statute in 2010 in Kampala;<sup>64</sup> and ratifying Additional Protocol III to the Geneva Conventions, adopted in 2005, and consequently adapting domestic legislation.<sup>65</sup> Pledges to be made jointly with the National Society were also proposed by the working group during preparations for the 31st International Conference, such as considering an agreement between the Ministry of Defence and the Belgian Red Cross aimed at enhancing cooperation in the area of training, particularly in the realm of IHL.<sup>66</sup>

The working group also represents an ideal opportunity for the National Society to keep the authorities informed of decisions made at Movement meetings that the Belgian authorities cannot attend. These include meetings of the Council of Delegates, where preparations for future International Conferences are often discussed.<sup>67</sup> Being aware of potential agenda items allows the Belgian authorities to begin preparing for the following International Conference as early as possible.

Finally, the Commission is a unique platform for the National Society and the national authorities to discuss and debate questions concerning the development of IHL which are addressed at the international level. One example of this is the follow-up to Resolution I on strengthening legal protection for victims of armed conflict adopted in 2011 at the 31st International Conference of the Red Cross and Red Crescent.<sup>68</sup> The representatives of the Belgian authorities who attend the international consultation meetings systematically share the outcome with the National Society and are open to any proposals that the latter makes.

## Working groups: The linchpin to the Commission's success

The second success factor has to do with the ICHL's actual operating structure, which is based on working groups. At first, the Commission only held monthly

civilian arms and defence-related products, *Belgian Official Gazette*, 5 July 2012, p. 36653; Ordinance of the Brussels-Capital Region of 20 June 2013 concerning the importation, exportation, transit and transfer of defence-related products, other equipment that may have a military use, equipment for maintaining order, civilian firearms, and their spare parts, accessories and ammunition, *Belgian Official Gazette*, 21 June 2013, p. 40076.

64 Belgium ratified these amendments on 26 November 2013. The status of ratifications of these amendments is available at: [www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/PR968.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/PR968.aspx). Two laws of assent were prepared by the ICHL before the ratification instrument was filed. See above note 48 for reference information on these two laws.

65 See the aforementioned information on the ICHL's work in this regard, and above note 61, for references to national legislation.

66 This agreement was signed on 23 November 2012.

67 According to Article 14(5) of the Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross and Red Crescent, Geneva, 8 November 1986 and amended in 1995 and 2006, "[t]he Council [of Delegates] may refer any matter to the International Conference".

68 Resolution 1 on "Strengthening Legal Protection for Victims of Armed Conflict", adopted by the 31st International Conference of the Red Cross and Red Crescent, Geneva, 1 December 2011.



plenary meetings. Because the meetings were long and each agenda item sometimes concerned only a small number of attendees, this approach translated into slow and cumbersome work. The Commission has since reorganized and now operates through six *ad hoc* working groups, each one responsible for what is deemed a priority policy area.<sup>69</sup> The working groups, which generally meet four or five times per year from September through June, examine the issues in depth and come up with proposals. The Commission subsequently modifies or approves these proposals during its plenary sessions, which are now held only four times per year.<sup>70</sup>

This procedure allows for more in-depth analyses because the working groups comprise only those people directly concerned with the topics addressed there and because they can more easily surround themselves with experts in certain sectors of IHL. For example, the working group tasked with the protection of cultural property in the event of armed conflict is unique in that it also oversees the Belgian delegation and its positions at international meetings that discuss the Hague Convention and its Protocols. It can do this thanks to the inclusion in the working group of experts in the protection of cultural heritage. This procedure also allows the ICHL to cover and study a broader terrain and to react more quickly and flexibly to developments in current affairs that the working groups follow very closely. The working-group approach has proven to be more efficient than the approach of addressing individual topics in monthly, plenary meetings – a fact which is, incidentally, reflected in the sheer volume of work that has been accomplished since the Commission's reorganization – and results in shorter plenary meetings in which more people participate and more decisions are made.<sup>71</sup>

## An effective advisory body to the federal government

Thirdly, as the permanent advisory body to the federal government, the ICHL has a right of initiative which it invokes more and more frequently. Its aim is to help the government by providing studies, reports, opinions and proposals concerning the application and further development of IHL. The Commission's success in using this right of initiative to encourage the federal government to act when it comes to implementing IHL is borne out by the many legislative proposals seen in recent years.

## Gaining renown thanks to its dissemination-related activities

The ICHL organizes a wide range of international academic events for the purpose of spreading awareness of IHL and encouraging its further development. While the

69 For more information on how long a working group exists and the topics currently covered, see the section on the Commission's operating structure and working procedures in the first part of this article.

70 G. Van Gerven, above note 13, pp. 4, 8.

71 *Ibid.*, p. 8.

seminars and workshops lead to greater knowledge of this body of law among relevant sectors of society, they also acquaint more and more people with the Commission itself.<sup>72</sup>

Each year the ICHL must also submit a report on the work accomplished during the previous year to the ministers represented on the Commission.<sup>73</sup> These reports, if forwarded by the minister of foreign affairs to the legislative assemblies upon the Commission's suggestion, can go some way towards expanding the Commission's visibility and highlighting the resources that it brings to bear in terms of expertise.

On several occasions, the ICRC and national committees for the implementation of IHL or other foreign entities with a similar mission to that of the ICHL have requested documents on the Commission's activities or resulting from its work.<sup>74</sup> The Royal Decree reorganizing the ICHL gives the Commission the authority to accede to these requests if this is deemed useful.<sup>75</sup> The Commission determines which documents to pass along through a consultation held among its members.

## Conclusion

Initially created to implement the provisions of the four Geneva Conventions and their Additional Protocols, the ICHL has seen both its role and renown grow over the years. It now represents a valuable tool for the Belgian government in its quest to keep pace with ongoing developments in the field of IHL.

The Commission has successfully fulfilled its missions owing to a number of factors: the knowledge and expertise of its members, who all play a key role in the implementation of IHL in Belgium; the Commission's internal operating structure, with specific priority policy areas assigned to working groups; its right of initiative as an advisory body to the government; and the variety of initiatives it undertakes to disseminate IHL.

While the Commission plays an essential role in the implementation of IHL in Belgium, it also responds to a growing number of requests from the ICRC's Advisory Services to help it support other States in this same area.

In all these ways, the ICHL is uniquely positioned to foster compliance with the obligations set forth under international humanitarian law.

72 *Ibid.*, p. 7.

73 Royal Decree of 6 December 2000 reorganizing the Interdepartmental Commission for Humanitarian Law, *Belgian Official Gazette*, 12 December 2000, p. 41449, Art. 3(1).

74 *Ibid.*, Report to the King.

75 *Ibid.*, Art. 3(2).



## 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 2014

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The biannual update on national legislation and case law is an important tool in 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 regional events organized by the International Committee of the Red Cross (ICRC), to the development of national committees for the implementation of IHL or similar bodies and to accession and ratification of IHL and other related international instruments.

### 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 the technical expertise required to incorporate IHL into their domestic legal frameworks;<sup>1</sup> (iii) to collect and facilitate the exchange of information on national implementation measures; 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 Lucie Boitard, legal intern in the ICRC Advisory Service on International Humanitarian Law, based on information provided by regional legal advisers.

## Relevant ICRC regional events

To further its work on implementation of IHL, the ICRC Advisory Service organized, in cooperation with host States, a number of national and regional events directed at engaging national authorities in the period under review.

Of particular interest was the 5th South Asia Regional Conference on IHL co-organized by the Ministry of Law, Justice, Constituent Assembly and Parliamentary Affairs of the Government of Nepal and the ICRC, which took place from 7 to 10 April 2014 in Kathmandu, Nepal. This was the first thematic regional conference organized in the South Asia region. It gathered senior government officials, members of Parliament, members of the armed forces and police, academics and ICRC experts from Afghanistan, Bangladesh, Bhutan, Iran, Nepal, the Maldives, Pakistan and Sri Lanka. The conference dealt with topics such as sexual violence in armed conflict, post-conflict situations, transitional justice and IHL. The conference resulted in an external report.<sup>2</sup>

Another event of interest was the 2nd Regional Seminar on National Implementation of IHL, co-organized by the ICRC Nairobi Regional Delegation, Kenya's State Law Office (Department of Justice) and the Kenyan national IHL committee, which took place from 16 to 19 June in Naivasha, Kenya. The seminar brought together governmental officials and members of national IHL committees from Djibouti, Ethiopia, Eritrea, Kenya, Somalia, South Africa, Tanzania and Uganda. The aim of the seminar was to discuss the work of the ICRC and IHL domestic implementation in East Africa, such as the challenges to the promotion of the Arms Trade Treaty (ATT) in Africa; domestic implementation of weapons treaties in East Africa and the Horn of Africa; contemporary issues and challenges with regards to multilateral forces and IHL; private military and security companies, counterterrorism operations and IHL; as well as national, regional and international perspectives on repression of violations of IHL and the ICRC's tools for facilitating national implementation of IHL. The seminar resulted in the adoption of new suggestions and recommendations to promote national implementation of IHL in the region. The event also proved to be a platform for engaging bilaterally on issues and topics of common concern with representatives from authorities of the respective countries.

## Update on national IHL committees

Another way in which the Advisory Service facilitates the domestic implementation of IHL is through direct support of the national IHL committees or similar bodies – interministerial or inter-institutional – which advise the governments of their

1 In order to assist States, the ICRC Advisory Service proposes a multiplicity of tools, including thematic fact sheets, ratification kits and model laws, all available on the unit's web page, at: [www.icrc.org/en/war-and-law/ihl-domestic-law](http://www.icrc.org/en/war-and-law/ihl-domestic-law) (all internet references were accessed in December 2014).

2 Fifth South Asia Conference on IHL, *Sexual Violence and Armed Conflict*, report, 8–10 April 2014.

respective countries on all matters related to 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. There were 107 national IHL committees across the world in June 2014, including four new committees in Bahrain, Bangladesh, Iraq and Slovenia.

## **Bahrain**

On 15 May 2014, the Bahrain IHL Committee was established as a result of Royal Decree No. 39.

The main function of the national committee is to implement and apply IHL and to develop the kingdom's policies, strategies and plans on IHL. One of its mandates is to conduct research and studies in IHL and issue publications relating to the principles of IHL and how to apply them. The committee has the task of exchanging expertise with national, regional and international IHL committees and enhancing cooperation with the ICRC.

The committee is composed of representatives of the Bahrain Defence Force's Military Judiciary, the Interior Ministry's General Directorate of Civil Defence, the Foreign Ministry, the Education Ministry, the Health Ministry, the Information Affairs Authority, the National Institution for Human Rights, the University of Bahrain and the Bahrain Red Crescent Society. It is chaired by the Ministry of Justice, Islamic Affairs and Endowments.

## **Bangladesh**

On 12 June 2014, the Prime Minister of Bangladesh approved the decision adopted in an interministerial meeting in October 2013 to establish a national committee for IHL.

The national committee's functions include the assessment of the sufficiency and implementation of IHL treaties to which Bangladesh is party, and recommendations on the drafting of legislation and administrative instructions. It also has a mandate to promote incorporation of IHL in academic circles and civil society and to advise on and encourage the organization of seminars, training sessions, research, etc. The committee is also entitled to recommend action in connection with Bangladeshis imprisoned abroad and foreigners detained in the country.

The committee is composed of representatives of the Cabinet Secretariat, the Prime Minister's Office, the Ministry of Defence, the Ministry of Home Affairs, the Ministry of Law, Justice and Parliamentary Affairs, the Ministry of Cultural Affairs, the Ministry of Education, the Ministry of Health and Family Welfare, the Ministry of Women and Children's Affairs, members of the Armed

Forces Division and the Bangladesh Red Crescent Society. It is chaired by the Foreign Secretary.

## **Iraq**

On 14 April 2014, the Permanent National Committee for IHL of Iraq was established as a result of Government Order No. 38.

The committee is considered the main reference organization for IHL. Its main function is to design plans and programmes for promoting and implementing IHL principles at the national level.

The committee is composed of representatives of the High Commission for Human Rights, the Ministry of Human Rights, the Ministry of Defence, the Ministry of Foreign Affairs, the Ministry of the Interior, the General Secretariat for the Council of Ministers and the Iraqi Red Crescent Society. It is chaired by the assistant director-general and head of the International Agreements Division, General Secretariat for the Council of Ministers.

## **Slovenia**

On 27 May 2014, the Permanent Coordination Group for IHL was established by the Government of the Republic of Slovenia as a result of Decision No. 02401-7/2014/4. This Coordination Group replaces the previously existing national body for IHL.

The Coordination Group has the task of monitoring, fostering, shaping, coordinating and overseeing activities concerning implementation of and respect for IHL by the Republic of Slovenia. It focuses on the implementation of Slovenia's commitments in the field of IHL, in particular the Geneva Conventions of 1949 and their Additional Protocols. The Coordination Group is also in charge of disseminating knowledge of IHL at the national level. One of its mandates is to propose to competent ministries the ratification and incorporation into national legislation of relevant IHL treaties to which Slovenia is not a State party.

The Coordination Group is composed of representatives of the Ministry of Foreign Affairs, the Ministry of Defence, the Ministry of the Interior, the Ministry of Culture, the Ministry of Education, Science and Sport, the Ministry of Labour, Family, Social Affairs and Equal Opportunities, the Ministry of Health, the Ministry of Justice, the Ministry of Agriculture and the Environment, the General Staff of the Slovenian Armed Forces, and the Slovenian Administration for Civil Protection and Disaster Relief. Representatives of the National Education Institute, the Faculty of Law of Ljubljana University and the Slovenian Red Cross are also invited to attend the sessions of the Coordination Group. It is chaired by a representative of the Ministry of Foreign Affairs.

## Update on the accession and ratification of IHL and other related international instruments

Universal participation in IHL treaties is a first vital step toward the respect for life and human dignity in situations of armed conflict and therefore is a priority for the ICRC. In the period under review, thirteen IHL and other related international conventions and protocols were ratified or acceded to by various States.<sup>3</sup> In particular, there has been notable adherence to the ATT. Indeed, as of June 2014 forty-one States had ratified the ATT. According to its Article 22, the treaty will enter into force ninety days following the date of the deposit of the fiftieth instrument of ratification, acceptance or approval with the Depositary.<sup>4</sup>

The Advisory Service also supports adherence to other international treaties that are considered to be of relevance for the protection of persons during armed conflicts, such as the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of all Persons from Enforced Disappearance, *inter alia*.

The following table outlines the total number, as of end June 2014, of ratifications of and accessions to IHL treaties and other relevant related international instruments.

### Ratifications and accessions, January–June 2014

| Conventions   | States    | Ratification/<br>accession<br>date | Number<br>of<br>parties |
|---|-----------|------------------------------------|-------------------------|
| 1949 Geneva Conventions I–IV  | Palestine | 2 April 2014                       | 196                     |
| 1972 Convention on the<br>Prohibition of the<br>Development, Production and<br>Stockpiling of Bacteriological<br>(Biological) and Toxic<br>Weapons and Their<br>Destruction | Myanmar   | 12 January<br>2014                 | 171                     |

3 To view the full list of IHL-related treaties, please visit the ICRC Treaty Database, *Treaties and States Parties to Such Treaties*, available at: [www.icrc.org/ihl](http://www.icrc.org/ihl).

4 Editor's note: The ATT entered into force on 24 December 2014.



(Cont.)

| Conventions  | States               | Ratification/<br>accession<br>date | Number<br>of<br>parties |
|--|----------------------|------------------------------------|-------------------------|
| 1977 Additional Protocol I to the Geneva Conventions   | Palestine            | 2 April 2014                       | 174                     |
| 1977 Additional Protocol I to the Geneva Conventions – Declaration Article 90                                    | Malawi               | 10 January 2014                    | 76                      |
|  | Saint-Kitts-et-Nevis | 17 April 2014                      |                         |
| 1989 Convention on the Rights of the Child   | Palestine            | 2 April 2014                       | 194                     |
| 2000 Optional Protocol to the Convention on the Rights of Child on the involvement of children in armed conflict | St. Lucia            | 15 January 2014                    | 156                     |
|  | Estonia              | 12 February 2014                   |                         |
|  | Palestine            | 2 April 2014                       |                         |
|  | Ethiopia             | 14 May 2014                        |                         |
| 2002 Optional Protocol to the Convention against Torture   | Lithuania            | 20 January 2014                    | 72                      |
|  | Greece               | 11 February 2014                   |                         |
| 2005 Additional Protocol III to the Geneva Conventions   | Portugal             | 22 April 2014                      | 67                      |
| 2006 Convention against Enforced Disappearances  | Portugal             | 27 January 2014                    | 42                      |
| 2011 Optional Protocol to the Convention on the Rights of the Child on communications procedure                  | Costa Rica           | 14 January 2014                    | 11                      |
|  | Belgium              | 30 May 2014                        |                         |
| 2013 Arms Trade Treaty   | Panama               | 11 February 2014                   | 41                      |
|  | Norway               | 12 February 2014                   |                         |

*(Cont.)*

| <b>Conventions</b> | <b>States</b>                             | <b>Ratification/<br/>accession<br/>date</b> | <b>Number<br/>of<br/>parties</b> |
|--------------------|---|---|----------------------------------|
|                    | The former Yugoslav Republic of Macedonia | 6 March 2014                                |                                  |
|                    | Albania                                   | 19 March 2014                               |                                  |
|                    | Bulgaria                                  | 2 April 2014                                |                                  |
|                    | Croatia                                   | 2 April 2014                                |                                  |
|                    | Denmark                                   | 2 April 2014                                |                                  |
|                    | El Salvador                               | 2 April 2014                                |                                  |
|                    | Estonia                                   | 2 April 2014                                |                                  |
|                    | Finland                                   | 2 April 2014                                |                                  |
|                    | France                                    | 2 April 2014                                |                                  |
|                    | Germany                                   | 2 April 2014                                |                                  |
|                    | Hungary                                   | 2 April 2014                                |                                  |
|                    | Ireland                                   | 2 April 2014                                |                                  |
|                    | Italy                                     | 2 April 2014                                |                                  |
|                    | Latvia                                    | 2 April 2014                                |                                  |
|                    | Malta                                     | 2 April 2014                                |                                  |
|                    | Romania                                   | 2 April 2014                                |                                  |
|                    | Slovakia                                  | 2 April 2014                                |                                  |
|                    | Slovenia                                  | 2 April 2014                                |                                  |
|                    | Spain                                     | 2 April 2014                                |                                  |
|                    | UK  | 2 April 2014                                |                                  |
|                    | Japan                                     | 9 May 2014                                  |                                  |
|                    | Austria                                   | 3 June 2014                                 |                                  |
|                    | Australia                                 | 3 June 2014                                 |                                  |
|                    | Belgium                                   | 3 June 2014                                 |                                  |
|                    | Burkina Faso                              | 3 June 2014                                 |                                  |
|                    | Jamaica                                   | 3 June 2014                                 |                                  |

(Cont.)

| Conventions                       | States                               | Ratification/<br>accession<br>date | Number<br>of<br>parties |
|-----------------------------------|--------------------------------------|------------------------------------|-------------------------|
| 2013 Arms Trade Treaty<br>(Cont.) | Luxembourg                           | 3 June 2014                        |                         |
|                                   | Samoa                                | 3 June 2014                        |                         |
|                                   | St. Vincent<br>and the<br>Grenadines | 3 June 2014                        |                         |
|                                   | Sweden                               | 16 June 2014                       |                         |

## 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 2014, or collected by the ICRC Advisory Service during that period. They cover a variety of topics linked to IHL, such as the repression of torture, the prevention of recruitment of child soldiers, the concept of universal jurisdiction, enforced disappearances, and criminal repression and disciplinary sanction of IHL violations.

This compilation is not meant to be exhaustive; it represents a selection of the most relevant developments relating to IHL implementation and related issues collected by the ICRC. The full texts of these laws and case law can be found in the ICRC's IHL National Implementation Database.<sup>5</sup>

### A. Legislation

The following section presents, in alphabetical order by country, the domestic legislation adopted during the period under review (January–June 2014). Countries covered are Burkina Faso, Chad, Colombia, the Democratic Republic of the Congo, Ecuador, Jordan, Mexico, Spain, Sweden and Switzerland.

#### Burkina Faso

*Law No. 022 on Prevention and Repression of Torture and Similar Practices*<sup>6</sup>

<sup>5</sup> ICRC, *IHL National Implementation Database*, available at: [www.icrc.org/ihl-nat](http://www.icrc.org/ihl-nat).

<sup>6</sup> Available at: [www.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=8F8FFA1E912703C3C1257E62004CDFCE&action=openDocument&xp\\_countrySelected=BF&xp\\_topicSelected=GVAL-992BU6&from=state](http://www.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=8F8FFA1E912703C3C1257E62004CDFCE&action=openDocument&xp_countrySelected=BF&xp_topicSelected=GVAL-992BU6&from=state).

On 27 May 2014, the National Assembly of Burkina Faso adopted a law on the prevention and repression of torture and similar practices.

The law provides for a definition of the crime of torture similar to the one in the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment and excludes the justifications of exceptional circumstances or orders from a superior officer or a public authority.

An independent national preventive mechanism is established by the law in order to visit places of detention and to regularly assess the treatment of persons deprived of their liberty. According to Article 23 of the law, the mechanism may make recommendations to the relevant authorities as well as submit proposals and observations concerning existing or draft legislation.

## **Chad**

### *Presidential Ordinance No. 001/PR/2014 on Child Soldiers*<sup>7</sup>

On 4 February 2014, the president of the Republic of Chad adopted an ordinance prohibiting and repressing the recruitment and use of children in armed conflicts.

This ordinance prohibits the participation and involvement of children in an armed conflict as well as their recruitment in any group or armed forces.

The ordinance further provides for imprisonment and fines for persons that have recruited or facilitated the recruitment or use of children in the armed forces or in armed groups.

## **Colombia**

### *Law No. 1719 on Access to Justice and Other Matters for Victims of Sexual Violence and Especially of Sexual Violence Related to the Armed Conflict*<sup>8</sup>

On 3 June 2014 the Parliament of Colombia adopted a law providing access to justice for victims of sexual violence, in particular in relation to the armed conflict. The law expands the definition of sexual violence against protected persons as defined by IHL by including crimes such as forced prostitution, sterilization, pregnancy, abortion and nudity.

According to Article 15 of the law, sexual violence can constitute a crime against humanity, and when this is the case, the judicial authorities have the obligation to qualify it as such. In its Article 16, the law also states that there is no statute of limitations for war crimes, crimes against humanity or genocide.

<sup>7</sup> Available at: [www.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=C681E1734CB2C779C1257E62004F283E&action=openDocument&xp\\_countrySelected=TD&xp\\_topicSelected=GVAL-992BU6&from=state](http://www.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=C681E1734CB2C779C1257E62004F283E&action=openDocument&xp_countrySelected=TD&xp_topicSelected=GVAL-992BU6&from=state).

<sup>8</sup> Available at: [www.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=574056545A066035C1257E620053D05C&action=openDocument&xp\\_countrySelected=CO&xp\\_topicSelected=GVAL-992BU6&from=state](http://www.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=574056545A066035C1257E620053D05C&action=openDocument&xp_countrySelected=CO&xp_topicSelected=GVAL-992BU6&from=state).

When sexual violence constitutes a crime against humanity, it is therefore not subject to any statute of limitations.

The law adopts a multifaceted approach to responding to the needs of victims of sexual violence. For example, Chapter 4 of the law provides for psychosocial support and for free medical attention for victims. In addition, pursuant to Article 20 of the law, military courts do not have jurisdiction over crimes of sexual violence.

## **Democratic Republic of the Congo**

*Law No. 14/006 on Amnesties for Insurrectional Acts, Acts of War and Political Offences*<sup>9</sup>

On 11 February 2014, the president of the Democratic Republic of the Congo signed a law granting amnesty for insurrectional acts, acts of war and political offences committed on the territory of the Democratic Republic of the Congo from 18 February 2008 to 20 December 2013. This law was adopted as a part of a peacebuilding process, in particular in the eastern part of the country, and for the purpose of supporting the Kampala peace process between the government and the M23 armed group.

The amnesty law applies to every Congolese national who perpetrated, co-perpetrated or was an accomplice to the perpetration of insurrectional acts, acts of war or political offences as defined in Article 3 of the law. It specifically excludes from its scope of application, *inter alia*, the crime of genocide, crimes against humanity, war crimes, terrorism, offences of torture, cruel, inhuman or degrading treatment, rape and other sexual violence, the use, conscription or recruitment of child soldiers and other grave, massive and egregious violations of human rights. Similarly, this law shall not affect civil compensation and other entitlements and expenses owed to victims.

In addition, applicants for amnesty must undertake in writing that they will not commit the acts for which they are granted amnesty again. If they do, the amnesty will be withdrawn and the author of the crime is barred from benefiting from any amnesty in the future.

## **Ecuador**

*Organic Integral Criminal Code*<sup>10</sup>

On 28 January 2014, the National Assembly of Ecuador adopted a new Criminal Code establishing the crimes, procedure and execution of sentences under the

9 Available at: [www.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=6FB98CB972E433EEC1257E6200547ACF&action=openDocument&xp\\_countrySelected=CD&xp\\_topicSelected=GVAL-992BU6&from=state](http://www.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=6FB98CB972E433EEC1257E6200547ACF&action=openDocument&xp_countrySelected=CD&xp_topicSelected=GVAL-992BU6&from=state).

10 Available at: [www.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=D6FE6928F486E375C1257E58004B3102&action=openDocument&xp\\_countrySelected=EC&xp\\_topicSelected=GVAL-992BU6&from=state](http://www.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=D6FE6928F486E375C1257E58004B3102&action=openDocument&xp_countrySelected=EC&xp_topicSelected=GVAL-992BU6&from=state).

Ecuadorian legal criminal system, including those related to violations of IHL, crimes against humanity, genocide and aggression.

In particular, in its Title 4, Chapter 1, the entirety of Section 4 (Articles 111 to 139) deals with crimes against persons and objects protected by IHL in both international and non-international armed conflicts.

In Article 88, the Criminal Code includes the crime of aggression as defined in Article 8 *bis* of the Rome Statute, which was added in 2010 following the Kampala revision conference.

## Jordan

*Law No. 20 of 2014 Amending Law No. 23 of 2006 on the Formation of Military Courts*

On 1 June 2014, Law No. 20 of 2014 Amending Law No. 23 of 2006 on the Formation of Military Courts was published in the *Official Gazette*.

Article 5 of the new law states that military courts are composed of military judges only, while according to the previous law they could be composed either of military judges or military officers. Article 13 adds that any matter related to the judicial system is addressed under a special regulation for military judges' service. A special fund to support these judges is created by Article 15 of the law.

In addition, Article 9 provides that military courts have jurisdiction over persons accused of committing genocide, crimes against humanity, war crimes and the crime of aggression in accordance with the provisions of the Rome Statute, whether these persons are military or "civilian fighters" (meaning any civilians who have participated in the hostilities). Furthermore, the Military Criminal Code of Jordan, in its Article 44, punishes war crimes committed by civilians.

## Mexico

*Regulation on the Use and Protection of the Red Cross Emblem*<sup>11</sup>

On 19 March 2014, the president of the United Mexican States approved this regulation pursuant to the Law on the Use and Protection of the Red Cross and Red Crescent Emblems of 2007.<sup>12</sup>

The regulation identifies the personnel, materials and facilities entitled to request the protective use of the emblem, the way the response will be delivered

11 Available at : [www.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=B4E4FCE34A4894FDC1257D740040FFAC&action=openDocument&xp\\_countrySelected=MX&xp\\_topicSelected=GVAL-992BU8&from=state&SessionID=E1KT115T5J](http://www.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=B4E4FCE34A4894FDC1257D740040FFAC&action=openDocument&xp_countrySelected=MX&xp_topicSelected=GVAL-992BU8&from=state&SessionID=E1KT115T5J).

12 For further information regarding this law, please consult "What's New in Law and Case Law Across the World: Biannual Update on National Legislation Implementing Humanitarian Law and Relevant Case Law, January–June 2007", *International Review of the Red Cross*, Vol. 89, No. 867, 2007, p. 760, available at: [www.icrc.org/eng/assets/files/other/irrc-867-nat-impl-ihl.pdf](http://www.icrc.org/eng/assets/files/other/irrc-867-nat-impl-ihl.pdf).

and the timeline of the response, verification of documents, and issuance and delivery of the identity card and armlet. It establishes the way that protected persons should be identified. It also provides for the procedure that has to be followed by these persons to benefit from the protection of the emblem in case of armed conflict.

In addition, chapter 4 develops the legal procedure for the competent authority to identify and impose sanctions for the misuse of the emblem both in time of peace and during armed conflict.

*Decree Approving the Withdrawal of the Express Reservation Made by the Government of the United Mexican States to the Inter-American Convention on Forced Disappearance of Persons of 9 June 1994*<sup>13</sup>

On 4 February 2014, the Congress of the United Mexican States adopted a decree approving the withdrawal of the reservation to the Inter-American Convention on Forced Disappearance of Persons of 9 June 1994.

Article IX of the Convention states that the alleged perpetrators of the acts constituting forced disappearance of persons may only be tried by the competent ordinary jurisdictions in each State, excluding any special tribunal, in particular military tribunals.

The withdrawal of this reservation is derived from the commitments adopted by Mexico following its second evaluation within the UN Universal Periodic Review mechanism and is one of the measures undertaken to comply with the decision adopted by the Inter-American Court of Human Rights in the *Radilla Pacheco v. Mexico* case, which specifically considered the reservation invalid.<sup>14</sup>

## Spain

*Organic Law 1/2014 Modifying Organic Law 6/1985, of the Judicial Power, on Universal Jurisdiction*<sup>15</sup>

On 13 March 2014, Organic Law 1/2014 Modifying Organic Law 6/1985 of 1 July 1985, of the Judicial Power, on Universal Jurisdiction was promulgated. This new law expands the list of crimes covered by universal jurisdiction but restricts the application of universal jurisdiction by Spanish courts.

On the one hand, the law extends the list of crimes over which Spanish courts have jurisdiction by including crimes against persons and property protected in the case of armed conflict (including war crimes, whether or not

13 Available at: [www.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=F093E01DC2CB7526C1257D6D0040C998&action=openDocument&xp\\_countrySelected=MX&xp\\_topicSelected=GVAL-992BUF&from=state](http://www.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=F093E01DC2CB7526C1257D6D0040C998&action=openDocument&xp_countrySelected=MX&xp_topicSelected=GVAL-992BUF&from=state).

14 Available at: [www.corteidh.or.cr/docs/casos/articulos/seriec\\_209\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_209_ing.pdf).

15 Available at: [www.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=26DF035F7A2CB224C1257E6C002D426C&action=openDocument&xp\\_countrySelected=ES&xp\\_topicSelected=GVAL-992BU6&from=state](http://www.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=26DF035F7A2CB224C1257E6C002D426C&action=openDocument&xp_countrySelected=ES&xp_topicSelected=GVAL-992BU6&from=state).

they are drawn from customary international law), crimes of torture and enforced disappearances. Crimes against humanity, crimes of genocide, terrorism, piracy and unlawful seizure of aircraft, remain under the Spanish courts' jurisdiction. As for the crime of trafficking or illegal immigration of people, it is replaced by the crime of human trafficking.

On the other hand, for each type of crime, the text introduces conditions restricting the jurisdiction of the Spanish courts. Pursuant to Article 23.4(a) of the law, for proceedings to be initiated in cases of genocide, crimes against humanity or war crimes, the text requires the alleged perpetrator to be a Spanish national, a foreigner who habitually resides in Spain or a foreigner who happens to be in Spain and whom the Spanish authorities have refused to extradite (in accordance with the principle of *aut judicare aut dedere*). According to Articles 23.4(b) and (c) of the law, the Spanish courts shall have jurisdiction for crimes of torture and enforced disappearance if the alleged perpetrator is a Spanish citizen or the victim is a Spanish citizen at the time the act was committed and the alleged perpetrator is on Spanish territory. However, Article 23.4(p) of the law states that for any other offences for which prosecution is imposed by a treaty to which Spain is a party, or other regulatory acts of an international organization of which Spain is a member, Spanish courts have jurisdiction in the conditions determined therein.

The new Section 6 introduces an additional restriction, eliminating the possibility of "*acusaciones populares*" (the ability under Spanish law for civil society in a third-party capacity to press charges) for all these crimes. Crimes under this law shall only be prosecuted if the prosecutor or the victim has lodged a complaint.

The transitory provision of the law also establishes that all cases pending at the time of its entry into force should be dismissed if they do not comply with the new requirements. The law entered into force on 15 March 2014.

## **Sweden**

*Act of 28 May 2014 on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes*<sup>16</sup>

On 28 May 2014, the Swedish Parliament issued an Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes.

This new law clearly defines these crimes. It incorporates crimes against humanity as offences in domestic law, whereas they were previously not a classification under Swedish law. For most war crimes, the law does not distinguish according to whether they were committed in situations of international or non-international armed conflicts. However, it does provide for

<sup>16</sup> Available at: [www.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=F0FED3FA6059C2E0C1257E6200491650&action=openDocument&xp\\_countrySelected=SE&xp\\_topicSelected=GVAL-992BU6&from=state](http://www.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=F0FED3FA6059C2E0C1257E6200491650&action=openDocument&xp_countrySelected=SE&xp_topicSelected=GVAL-992BU6&from=state).



certain specific war crimes committed in international armed conflict and provides Swedish courts with the possibility of exercising universal jurisdiction for these crimes. Sections 13–15 of the law provide for superior responsibility for acts of subordinates. In Sections 1 to 11, it harmonizes penalties and sentencing. Moreover, the law does not contain any statute of limitations for these international crimes.

## **Switzerland**

*Federal Law No. 520.3 on the Protection of Cultural Property in the Event of Armed Conflict, Natural Disaster or Emergency*<sup>17</sup>

On 20 June 2014, the Federal Assembly of the Swiss Confederation adopted a law on the protection of cultural property in the event of armed conflict, natural disaster or emergency, leading to a complete revision of the Federal Law of 6 October 1966 on the Protection of Cultural Property in the Event of Armed Conflict. This new law expands the scope of protection by including protection of cultural property in situations of natural disaster or emergency.

The federal law implements the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, notably by providing for a “safe haven” in its Section 6, for movable cultural property when such property is threatened on the territory of the State on which it is located.

Pursuant to Article 8 of the law, it will be possible to file applications to UNESCO to obtain “enhanced protection” for cultural property of national importance. Such protection implies that the “[p]arties to a conflict shall ensure the immunity of cultural property under enhanced protection by refraining from making such property the object of attack from any use of the property or its immediate surroundings in support of military action” (see Article 11 of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict).

## **C. Case law**

The following section lists, in alphabetical order by country, relevant domestic jurisprudence related to IHL and released during the period under review (January–June 2014). Countries covered are Bosnia and Herzegovina, Canada, the Democratic Republic of the Congo, France, Germany, Nepal, Spain, Switzerland and the United Kingdom.

<sup>17</sup> Available at: [www.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=E140B33CFB0E302AC1257E6C002F3696&action=openDocument&xp\\_countrySelected=CH&xp\\_topicSelected=GVAL-992BU7&from=state&SessionID=E1KT115T5J](http://www.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=E140B33CFB0E302AC1257E6C002F3696&action=openDocument&xp_countrySelected=CH&xp_topicSelected=GVAL-992BU7&from=state&SessionID=E1KT115T5J).

## **Bosnia and Herzegovina**

*Case No. S1 1 K 014267 13 Krž: Mirko Pekez; Case No. S1 1 K 014267 13 Kžk: Mirko (Špire) Pekez and Milorad Savić; Second Instance Verdicts, Court of Bosnia and Herzegovina, Section I for War Crimes, Appellate Division*<sup>18</sup>

**Keywords:** former Yugoslavia, war crimes, European Convention for the Protection of Human Rights and Fundamental Freedoms.

On 15 April 2008, the Court of Bosnia and Herzegovina concluded that Mirko (Špire) Pekez, Mirko (Mile) Pekez and Milorad Savić were guilty of war crimes against civilians under the Criminal Code of Bosnia and Herzegovina. The accused were found guilty of participation in the killing of twenty-three and wounding of four Bosniak civilians during the war in Bosnia and Herzegovina. Mirko (Mile) Pekez was sentenced to a long-term prison sentence of twenty-nine years, while Mirko (Špire) Pekez and Milorad Savić were sentenced to a long-term prison sentence of twenty-one years each.

On 29 September 2008, the Appellate Panel of Section I for War Crimes of the Court of Bosnia and Herzegovina upheld the first-instance verdict for the accused, Mirko (Mile) Pekez. Within the same judgement the Appellate Panel revoked the first-instance verdict for the second and the third accused, Mirko (Špire) Pekez and Milorad Savić, and ordered a retrial before the Appellate Panel.

On 5 May 2009, the Appellate Panel of Section I found Mirko (Špire) Pekez and Milorad Savić guilty of war crimes against civilians. Mirko (Špire) Pekez was sentenced to fourteen years' imprisonment while Milorad Savić was sentenced to a long-term prison sentence of twenty-one years.

On 22 October 2013, following the decision of the European Court of Human Rights in the *Maktouf-Damjanovic v. BiH* case of 13 July 2013, the Constitutional Court of Bosnia and Herzegovina upheld the appeal by Mirko (Mile) Pekez and established that there had been a violation of the appellant's right stemming from Article 7(1) of the European Convention for the Protection of Human Rights (ECHR), which provides that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed". The Court revoked the second-instance judgements of the Court of Bosnia and Herzegovina of 29 September 2008 and of 5 May 2009. The Constitutional Court ordered the Court of Bosnia and Herzegovina to render a new decision in accordance with Article 7(1) of the ECHR in expedited proceedings.

18 Available at: [www.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=7A4ED2FBD4722BFEC1257E6E0047EEDA&action=openDocument&xp\\_countrySelected=BA&xp\\_topicSelected=GVAL-992BU6&from=state](http://www.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=7A4ED2FBD4722BFEC1257E6E0047EEDA&action=openDocument&xp_countrySelected=BA&xp_topicSelected=GVAL-992BU6&from=state).

On 16 December 2013, the Appellate Panel partially granted the appeal of defence counsel for Mirko (Mile) Pekez and modified the trial verdict with regard to the legal qualification of the criminal offence and the sanction imposed. The accused was found guilty of war crimes against civilians in violation of Article 142(1) of the Criminal Code of the Socialist Federal Republic of Yugoslavia and was sentenced to twenty years' imprisonment. The judgement was sent down on 17 January 2014.

On 18 December 2013, the Appellate Panel found Mirko (Špire) Pekez and Milorad Savić guilty of war crimes against civilians in violation of Article 142(1) of the Criminal Code of the Socialist Federal Republic of Yugoslavia. Pekez received a prison sentence of ten years and Savić received a prison sentence of fifteen years. The judgement was sent down on 24 January 2014.

## Canada

*Case No. 500-10-004416-093: Désiré Munyaneza, Quebec Court of Appeals*<sup>19</sup>

**Keywords:** Rwanda, universal jurisdiction, customary international law.

On 7 May 2014, the Court of Appeal of Québec upheld the conviction of Désiré Munyaneza, for seven counts of genocide, crimes against humanity and war crimes committed during the 1994 Rwandan genocide, thereby affirming the universal jurisdiction of the Canadian Courts over these crimes.

On 22 May 2009, Désiré Munyaneza was convicted under the Crimes against Humanity and War Crimes Act 2000 of Canada and was sentenced to life imprisonment. An appeal was filed, alleging *inter alia* that the acts charged of intentional killing, acts of sexual violence and pillage did not constitute war crimes according to international law or, in the alternative, according to Canadian law, in force at the time of their commission.

The Court of Appeal of Québec stated that in 1994 war crimes comprised serious acts such as murder and rape, and acts of sexual violence constituting serious harm to the integrity and dignity of victims, that were committed during the non-international armed conflict in Rwanda, and that pillage was a war crime according to customary international law when committed in the context of a non-international armed conflict. The Court referred to common Article 3 of the four Geneva Conventions of 1949, Additional Protocol II of 1977, the Nuremburg Charter and the 1907 Hague Convention IV, as well as the case law of the International Criminal Tribunals, in reaching its conclusion.

The Court confirmed Canadian courts' jurisdiction over acts which constituted crimes under international law at the time and in the place of their

<sup>19</sup> Available at: [www.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=5E1064A2DC047A3BC1257E6C003377DA&action=openDocument&xp\\_countrySelected=CA&xp\\_topicSelected=GVAL-992BU6&from=state](http://www.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=5E1064A2DC047A3BC1257E6C003377DA&action=openDocument&xp_countrySelected=CA&xp_topicSelected=GVAL-992BU6&from=state).

commission (paragraphs 20–55). It considered that the Act, at most, is retrospective in effect but not retroactive.

## **Democratic Republic of the Congo**

*Case No. R.P 003/2013 and RMP 0372/BBM/2013: “Minova”, Operational Military Court in North Kivu*

**Keywords:** Uganda, amnesties.

On 5 May 2014, the Operational Military Court in North Kivu delivered its judgement regarding thirty-nine FARDC members.

In November 2012, during fights to control Goma, mass rapes and other violations of human rights committed in Minova and surrounding areas were reported. Thirty-nine members of the loyalist forces of the Democratic Republic of the Congo were tried.

In its judgement, in addition to the criminal military code, the Court applied directly the Rome Statute and specifically Articles 8, 25, 68 and 77, and found that war crimes of rape, pillage and murder had been committed in a non-international armed conflict.

Of the thirty-nine defendants, thirteen officers were acquitted because the Court could not establish their responsibility as commanders. Twenty-five of the defendants were found guilty of pillage and sentenced to three to twenty years in prison, one was found guilty of murder and sentenced to life imprisonment, and two were found guilty of rape and sentenced to twenty years in prison. One accused was not tried as the Court declared that he was not competent to stand trial. The Operational Military Court's rules of procedure do not provide for the possibility of an appeal.

## **France**

*Case No. 13/0033: Pascal Senyamuhara Safari (alias Pascal Simbikangwa), Criminal Court of Paris*

**Keywords:** Rwanda, genocide, crimes against humanity, universal jurisdiction.

On 14 March 2014, the Criminal Court of Paris convicted Pascal Simbikangwa of genocide and complicity in crimes against humanity committed in Rwanda between April and July 1994. The Court sentenced him to twenty-five years' imprisonment. Both parties appealed this decision.

Pascal Simbikangwa was the head of Central Intelligence in Rwanda during the 1994 genocide. After the conflict, he lived in Comoros before moving to Mayotte under a false identity. In 2008 he was arrested in Mayotte for producing and selling fake documents and his real identity was discovered. In 2009, the *collectif des parties civiles pour le Rwanda* filed a complaint against him for genocide and crimes against

humanity. He was transferred to Paris in 2009, after France rejected a request for his extradition submitted by the Rwandan government. This case was referred to the Paris Criminal Court by the special unit created by the tribunal in 2012 to investigate and prosecute crimes against humanity, as well as misdemeanours and crimes of war.

The law of 22 May 1996 on adapting French law to United Nations Security Resolution 955 gives jurisdiction to the French courts to adjudicate facts falling within the competence of the International Criminal Tribunal for Rwanda (ICTR) if the author of these facts is on French territory and if the ICTR decides not to exercise its jurisdiction.

In the present instance, the Criminal Court of Paris referred to the decision of the Appeals Chamber of the ICTR on Prosecutor's Appeal on Judicial Notice, dated 16 June 2006, in the case of *Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, to conclude that there was no reasonable doubt about the existence of a genocide and crimes against humanity in Rwanda.

This was the first time that a Rwandan genocide suspect has been tried before a French court. It was also the first time that, in France, a trial based on universal jurisdiction has been held in the presence of the accused.

## Germany

*Case No. 5-3 StE 4/10-4-3/10: For criminal liability of a former Rwandan mayor accused of involvement in a massacre that was committed in the course of the genocide that took place in Rwanda in 1994, Higher Regional Court of Frankfurt*

**Keywords:** Rwanda, genocide, universal jurisdiction.

On 18 February 2014, the Higher Regional Court of Frankfurt convicted a former Rwandan mayor for aiding and abetting genocide and sentenced him to fourteen years of detention. The mayor of the Muvumba commune in the north of Rwanda during the genocide of 1994 left Rwanda for Germany in 2002, where he was granted refugee status. An international arrest warrant was issued in 2007. He was arrested in 2008 and Germany declined an extradition request made by Rwandan authorities but started an investigation and opened his trial in 2011.

The mayor was accused of inciting Hutu residents to kill Tutsis and of actively participating in the killing of thousands of Tutsis. After a three-year trial, the Higher Regional Court found the accused guilty of aiding and abetting genocide. He was sentenced on the basis of Sections 220a and 6 No. 1 of the German Criminal Code allowing for universal jurisdiction of German courts (now Sections 1 and 6 of the German Code of Crimes against International Law). The accused has filed an appeal of the decision of the Higher Regional Court of Frankfurt.

## Nepal

*Writ Petition No. 069-WS-0057, Supreme Court of Nepal*

**Keywords:** enforced disappearances, truth and reconciliation commission, amnesties, domestic criminalization of IHRL violations.

On 2 January 2014, the Supreme Court of Nepal ruled that Ordinance 2069, establishing a Commission on Investigation of Disappeared Persons, Truth and Reconciliation, contravened previous Supreme Court judgements, the Interim Constitution of Nepal of 2007 and international law.

Two writ petitions challenged this Ordinance and the Supreme Court issued an order staying the implementation of the Ordinance and ordered the government to issue another Ordinance to ensure that two separate commissions are established, one for investigating enforced disappearances and one tasked with pursuing truth and reconciliation.

In addition, the Supreme Court ordered the amendment of Sections 23, 25 and 29 of the Ordinance, in consultation with a team of proscribed experts. These provisions of the Ordinance were deemed unlawful by the court as they provided the Commission with uncontrolled discretionary powers to grant amnesties, which would not be contingent on victim consent, and a thirty-five-day time-limit for filing criminal charges (following the recommendation of prosecution by the Commission) would be imposed.

The Supreme Court also directed the government to adopt practical and legal measures to criminalize serious human rights violations, promote the spirit of reconciliation, provide reparations to victims and their families, ensure the autonomy and impartiality of the Commission and implement a victim and witness protection programme.

Following this decision, on 25 April 2014, the Parliament of Nepal passed Act 2071 on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation to create the Truth and Reconciliation Commission and the Commission on Investigation into Enforced Disappearances. It is however to be noted that at the time of writing, the Supreme Court of Nepal has granted a petition submitted against some of the provisions of this Act, thereby limiting the discretionary powers accorded by the Act to the two commissions.

## Spain

*Case No. 27/2007, National Court (High Court), Spain*

**Keywords:** Iraq, universal jurisdiction.

On 17 March 2014, the Spanish National Court refused to apply certain sections of Organic Law 1/2014 modifying Organic Law 6/1985 of 1 July 1985, of the Judicial Power, on universal jurisdiction. It considered that these sections were inconsistent with Spain's obligations under Geneva Convention IV of 1949.

On 8 April 2003 in Iraq, US Army troops allegedly directed fire against the Palestine Hotel in Baghdad, killing two cameramen including Ezequiel, a Spanish national. Three US military personnel were under an international arrest warrant for crimes against persons and property protected in situations of armed conflict (war crimes), issued by Judge Santiago Pedraz. With the entry into force of Organic Law 1/2014, the question arose as to whether investigations and prosecutions should be pursued.

For proceedings to be initiated in respect to the crime of genocide, crimes against humanity or war crimes, Article 23.4(a) of Organic Law 1/2014 requires the alleged perpetrator to be a Spanish national, a foreigner who habitually resides in Spain or a foreigner who happens to be in Spain and whom the Spanish authorities have refused to extradite. Judge Pedraz ruled that this Article was in contradiction with Article 146 of Geneva Convention IV of 1949 that obliges Spain as a High Contracting Party to prosecute the crime regardless of the perpetrators' nationalities and wherever they may be. In addition, he found that this Article was in contradiction with Articles 26 and 27 of the Vienna Convention on the Law of Treaties. Judge Pedraz recalled that a domestic rule cannot amend or derogate from a provision of a treaty or an international convention. The Spanish Constitution makes an exception for amendments or derogations provided for in the treaties themselves or in accordance with the general rules of international law, but this does not apply to the present case.

Additionally, Article 23.5 of the Organic Law 1/2014 states that the Spanish courts are required to verify whether an international tribunal, the State where the crimes have been committed or the State of nationality of the suspected person has initiated investigations and prosecutions. Judge Pedraz considered that this Article was in contradiction with Article 146 of Geneva Convention IV of 1949, under which a State may also, "if it prefers, and in accordance with the provisions of its own legislation, hand [the person suspected] over for trial to another High Contracting Party concerned, provided such High Contracting Party concerned has made out a *prima facie* case". Judge Pedraz considered that the United States was not a High Contracting Party to Geneva Convention IV of 1949 and that Article 23.5 should not apply.<sup>20</sup>

As recalled earlier, the transitory provision of Organic Law 1/2014 establishes that all cases pending at the time of its entry into force should be dismissed if they do not comply with the new requirements.

Judge Pedraz considered that Articles 23.4(a), 23.5 and the transitory provision of Organic Law 1/2014 should not apply and that therefore, Spanish courts are competent to hear this case.

20 Editor's note: The United States is in fact a party to the Fourth Geneva Convention. For more information about States party to the Convention (IV) relative to the Protection of Civilian Persons in Time of War, see the ICRC database on treaties and States parties to such treaties, available at: [www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=380](http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=380).

## Switzerland

*Case No. 4A\_41/2014: A.\_\_\_\_\_ SA v. Swiss Red Cross, 1st Civil Court of the Federal Tribunal of Switzerland*<sup>21</sup>

**Keywords:** National Society, emblem protection.

On 20 May 2014, the Federal Tribunal of Switzerland confirmed the ruling of the Commercial Court of Bern ordering A.\_\_\_\_\_ SA to pay most of the Court's fees as well as the expenses of the parties. In addition, the Commercial Court of Bern ordered the invalidity of the trademark resembling the emblem of the Red Cross and its cancellation.

In 2008, the ICRC raised the attention of the Red Cross National Society of Switzerland, on the use by A.\_\_\_\_\_ SA, to represent its brand, of a sign resembling closely to the emblem of the Red Cross. The negotiations between the Swiss Red Cross and A.\_\_\_\_\_ SA about the use of this sign failed and the case was brought by the National Society to the Commercial Court of Bern.

In 2013, the Commercial Court of Bern rendered its decision, which was appealed by A.\_\_\_\_\_ SA.

In its decision confirming the ruling of the Commercial Court of Bern, the Federal Tribunal of Switzerland notably referred to Article 53 of Geneva Convention I of 1949 and to the Commentaries to the Geneva Conventions.

## United Kingdom

*Case No. 2014/00049/B5: Regina v. Sergeant Alexander Wayne Blackman and Secretary of State for Defence, Courts-Martial Appeal Court of the United Kingdom*<sup>22</sup>

**Keywords:** Afghanistan, murder.

On 22 May 2014, the Courts-Martial Appeal Court confirmed the ruling of the General Court Martial which found Sergeant Blackman guilty of murder.

The court recalled that on 15 September 2011, during an operation, an Apache helicopter opened fire on a Taliban insurgent. Sergeant Alexander Blackman was sent on patrol with other Royal Marines to undertake a battle damage assessment. They found the Taliban insurgent, who had been seriously wounded and was no longer a threat. After removing his AK47, magazines and a grenade, and putting him out of sight, Sergeant Blackman discharged a 9 mm round into his chest from close range. On 8 November 2013 the Court Martial found Sergeant Blackman guilty of murder and on 6 December 2013 he was

21 Available at: [www.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=C9FF57593F46A4E1C1257E6C0030D97F&action=openDocument&xp\\_countrySelected=CH&xp\\_topicSelected=GVAL-992BU8&from=state](http://www.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=C9FF57593F46A4E1C1257E6C0030D97F&action=openDocument&xp_countrySelected=CH&xp_topicSelected=GVAL-992BU8&from=state).

22 Available at: [www.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=1DCC74171EEE7186C1257E6C00331781&action=openDocument&xp\\_countrySelected=GB&xp\\_topicSelected=GVAL-992BU6&from=state](http://www.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=1DCC74171EEE7186C1257E6C00331781&action=openDocument&xp_countrySelected=GB&xp_topicSelected=GVAL-992BU6&from=state).



sentenced to life imprisonment with a minimum term of ten years in custody, a reduction to the ranks and dismissal with disgrace from the armed forces.

Sergeant Blackman appealed this decision but the Courts-Martial Appeal Court did not overturn it. It nonetheless reduced his sentence from life imprisonment with a minimum term of ten years to life imprisonment with a minimum term of eight years in prison, concluding that combat stress arising from the nature of the insurgency in Afghanistan and the particular matters affecting him should have been accorded greater weight as a mitigating factor.

## REPORTS AND DOCUMENTS

# The Conference of High Contracting Parties to the Fourth Geneva Convention of 17 December 2014 and the duty to ensure respect for international humanitarian law

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### Abstract

*While international humanitarian law envisages the possibility of holding formal thematic discussions, only United Nations General Assembly resolutions prompted the depositary of the Geneva Conventions to consult the High Contracting Parties*

\* While the authors were involved in the consultations and preparations related to the Conference of High Contracting Parties of 17 December 2014, they wrote this article in their personal capacity. The opinions expressed therein are not to be construed as the official position of Switzerland or the Federal Department of Foreign Affairs. This is not an official publication of the Department.

*on the opportuneness of conflict-specific conferences. Recalling the precedents of 1999 and 2001 – convened on the basis of the support expressed by the States Parties during related consultations – this article focuses on the Conference of High Contracting Parties to the Fourth Geneva Convention of 17 December 2014, which is likewise related to the Israeli–Palestinian conflict. The result of the conference consists of a declaration reflecting the willingness of the States Parties to further implement Article 1 common to the four Geneva Conventions.*

**Keywords:** common Article 1, depositary, Conference of High Contracting Parties, Israel, Palestine, Occupied Palestinian Territory, protection of civilians.

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[I]t is evident that Article 1 [common to the four Geneva Conventions] is no mere stylistic clause, but is deliberately invested with imperative force, and must be obeyed to the letter.<sup>1</sup>

In summer 2014, a new series of hostilities erupted in the context of Israel's Operation Protective Edge and attacks by Palestinian armed groups (hereafter referred to as the 2014 Gaza conflict). Against this background and violations of international humanitarian law (IHL) continuously affecting the civilian population in both the Occupied Palestinian Territory and Israel, High Contracting Parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949 (Fourth Geneva Convention) decided to convene a dedicated conference on 17 December 2014. Through its final declaration,<sup>2</sup> the Conference of High Contracting Parties to the Fourth Geneva Convention reaffirmed various fundamental rules of IHL in the hope of contributing to the alleviation of civilian suffering in the context of this protracted conflict. In addition, the declaration implements Article 1 common to the four Geneva Conventions, which requires the High Contracting Parties "to respect and ensure respect for the ... Convention[s] in all circumstances".

This contribution recounts the framework and the multilateral process that resulted in the conference of 17 December 2014. First, it shows that thematic discussions on general problems concerning the application of IHL are usually favoured by States. Only exceptionally and acting on the basis of recommendations by the United Nations (UN) General Assembly, the government of Switzerland, in its capacity as depositary of the Geneva Conventions,<sup>3</sup> consulted the High Contracting Parties on the opportuneness of conflict-specific conferences. It will be recalled that the support expressed by States in the consultations is the *conditio sine qua non* for the convening of such a conference.

1 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Times of War*, ICRC, Geneva, 1958, p. 17.

2 The text of the final declaration in English and French is available in the Annex to this piece.

3 The government of Switzerland is the depositary for seventy-nine international treaties, including the Geneva Conventions of 1949 and their Additional Protocols of 1977 and 2005. For more information, see: [www.eda.admin.ch/depositary](http://www.eda.admin.ch/depositary) (all internet references were accessed in August 2015).

This article will then briefly recall the Conferences of High Contracting Parties of 1999 and 2001 relating to the Israeli–Palestinian conflict, both of which reflected the approach taken by the depositary. The conference of 2014 follows in this line, concluding a multilateral process that began in 2009 after the publication of the Goldstone Report,<sup>4</sup> was suspended in 2011 and resumed in 2014 following the Gaza conflict in summer. This report will detail the subsequent rounds of multilateral consultations before finally providing some insight into the recent conference as well as into the related declaration.

## Thematic meetings on international humanitarian law

The Geneva Conventions and their Additional Protocols provide States with the possibility of holding formal thematic discussions on IHL. More specifically, Article 7 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and related to the Protection of Victims of International Armed Conflicts (AP I) foresees that the depositary “shall convene a meeting of the High Contracting Parties, at the request of one or more of the said Parties and upon the approval of the majority of the said Parties”. The article goes on to specify that such a meeting shall “consider *general problems* concerning the application of the Conventions and of the Protocol”.<sup>5</sup> Meetings related to a specific situation can therefore not be held under this provision.<sup>6</sup> In fact, since the depositary has never received a request satisfying the above-mentioned conditions, no meeting has ever been convened based on Article 7 of AP I.

In the same vein, the holding of a conflict-specific discussion amongst States is not foreseen in the framework of a so-called “periodical meeting”. Constituting a development of Article 7 of AP I, this type of meeting rests on Resolution 1 of the 26th International Conference of the International Red Cross and Red Crescent adopted in 1995. This resolution endorsed a recommendation that “the Depositary organize periodical meetings of the States parties to the 1949 Geneva Conventions to consider *general problems* regarding the application of IHL”.<sup>7</sup> The material scope of such meetings is broader than that of Article 7 of

4 Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN Doc. A/HRC/12/48, 25 September 2009.

5 Emphasis added.

6 See 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, p. 104.

7 “Resolution 1 of the 26th International Conference of the International Red Cross and Red Crescent (Geneva, Switzerland, 3–7 December 1995)”, *International Review of the Red Cross*, Vol. 36, No. 310, 1996, pp. 58–60 (emphasis added). The recommendation can be traced back to the International Conference for the Protection of War Victims that took place in Geneva from 30 August to 1 September 1993. In the final declaration, the participants in the conference called upon the Swiss government to convene an open-ended intergovernmental group of experts to study practical means of promoting full respect for and compliance with IHL: see “Final Declaration of the International Conference”, *International Review of the Red Cross*, Vol. 33, No. 296, 1993, pp. 377–381. Accordingly, the Group of Experts for the Protection of War Victims subsequently recommended the convening of “periodical meetings”: see “Meeting of the Intergovernmental Group of Experts for the Protection of

AP I, which only envisages the handling of general problems concerning the application of *the Conventions and of the Protocol*, while “periodical meetings” allow for discussions on the application of IHL in general.

Acting on the basis of the above-mentioned resolution and following consultations of the States Parties, the depositary convened the First Periodical Meeting on International Humanitarian Law. Taking place in Geneva from 19 to 23 January 1998, it discussed respect for and security of the personnel of humanitarian organizations and armed conflicts linked to the disintegration of State structures, thus complying with Resolution 1.<sup>8</sup> No further “periodical meeting” has taken place since.

Finally, most States also expressed a clear preference for thematic, as opposed to context-specific, discussions during the consultations facilitated by both Switzerland and the International Committee of the Red Cross (ICRC) between 2012 and 2015. On the basis of Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent in 2011,<sup>9</sup> the ICRC and Switzerland were jointly consulting States and, where appropriate, other relevant actors on possible means to strengthen the application of IHL and reinforce the dialogue among States and other interested entities.<sup>10</sup> In the consultations concluded in April 2015, most States expressed their support for the establishment of a regular meeting of States on IHL. As a result of many rounds of consultations, it was established that the functions of this potential new meeting of States should not involve the examination of specific situations, but should rather focus on general or common issues.<sup>11</sup> The way forward, in particular as regards the establishment of such a regular meeting, will be decided in Geneva at the 32nd International Conference of the Red Cross and Red Crescent from 8 to 10 December 2015.<sup>12</sup>

War Victims: Recommendations”, *International Review of the Red Cross*, Vol. 35, No. 304, 1995, pp. 37–38.

8 See Lucius Caflisch, “First Periodical Meeting on International Humanitarian Law”, *International Review of the Red Cross*, Vol. 38, No. 323, 1998, pp. 366–373; Federal Department of Foreign Affairs, “Première réunion périodique sur le droit international humanitaire”, 15 January 1998, available at: [www.admin.ch/cp/f/1998Jan15.162726.8806@idz.bfi.admin.ch.html](http://www.admin.ch/cp/f/1998Jan15.162726.8806@idz.bfi.admin.ch.html).

9 Res. 31IC/11/R1, 28 November–1 December 2011, op. paras 5–8, available at: [http://rcrcconference.org/wp-content/uploads/sites/3/2015/03/R1\\_Strengthening\\_IHL\\_EN.pdf](http://rcrcconference.org/wp-content/uploads/sites/3/2015/03/R1_Strengthening_IHL_EN.pdf).

10 For more details and the current state of the process, see: [www.eda.admin.ch/ihl-compliance](http://www.eda.admin.ch/ihl-compliance) and [www.icrc.org/en/document/strengthening-compliance-international-humanitarian-law-ihl-work-icrc-and-swiss-government](http://www.icrc.org/en/document/strengthening-compliance-international-humanitarian-law-ihl-work-icrc-and-swiss-government).

11 ICRC in conjunction with the Swiss Federal Department of Foreign Affairs, “Strengthening Compliance with International Humanitarian Law – Concluding Report”, advance unedited version, June 2015, pp. 20–22, available at: [www.eda.admin.ch/content/dam/eda/mehrsprachig/documents/topics/aussenpolitik/voelkerrecht/Concluding-Report-Strengthening-Compliance-IHL\\_June%20202015.pdf](http://www.eda.admin.ch/content/dam/eda/mehrsprachig/documents/topics/aussenpolitik/voelkerrecht/Concluding-Report-Strengthening-Compliance-IHL_June%20202015.pdf). The purpose of a new meeting of States on IHL would be to foster dialogue and cooperation among States on ways of strengthening respect for this body of law and to promote awareness of IHL at the international and domestic levels. It would allow States to examine practical experiences as well as challenges in the application of IHL, to exchange best practices, to flag capacity-building needs and to foster international cooperation in addressing such needs.

12 For more information on the 32nd International Conference of the Red Cross and Red Crescent, see: <http://rcrcconference.org>.

It can be seen from the above that States currently seem to favour a thematic approach when they can indicate, *in abstracto*, the preferred format of meetings on IHL. Article 7 of AP I, Resolution 1 of the 26th International Conference and the views of States expressed during the consultations initiated after the 31st International Conference equally reflect this preference for thematic rather than conflict-specific meetings.

## **Two conflict-specific conferences based on General Assembly resolutions and consultations of the High Contracting Parties (1997–2001)**

Starting from 1997, the UN General Assembly created exceptional circumstances as regards the convening of discussions of High Contracting Parties on IHL. It adopted several resolutions,<sup>13</sup> resulting in the initiation by the depositary of a multilateral process that essentially lasted until 2001.<sup>14</sup>

Against the background of insufficient improvement in respect for IHL in the aftermath of the Oslo process, the General Assembly resolutions<sup>15</sup> contained recommendations prompting the depositary to consult the High Contracting Parties on the opportuneness of a conference linked to the Israeli–Palestinian conflict. Following extensive informal consultations, two expert meetings and a last-minute compromise, it was clear that there was the necessary support of High Contracting Parties for holding a conference. Acting as impartial facilitator and on behalf of the High Contracting Parties, the depositary deemed such support the *conditio sine qua non*. As the *conditio* was fulfilled, a Conference of High Contracting Parties to the Fourth Geneva Convention took place on 15 July 1999. A total of 103 States participated and the conference consensually adopted a brief statement, which most notably contained the following paragraph:

The participating High Contracting Parties reaffirmed the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, including East Jerusalem. Furthermore, they reiterated the need for full respect for the provisions of the said Convention in that Territory.

Following growing tensions in the Middle East at the end of September 2000, member States of the Arab League and the Organisation of the Islamic Conference (OIC)<sup>16</sup> reminded the depositary of the final paragraph of the statement. It stated that “the Conference [of 15 July 1999] was adjourned on the

13 UNGA Res. ES-10/3, 15 July 1997, to ES-10/9, 20 December 2001.

14 For a detailed historical account of the multilateral process, on which the following overview is based, and the text of the declaration of 5 December 2001, see Pierre-Yves Fux and Mirko Zambelli, “Mise en oeuvre de la Quatrième Convention de Genève dans les territoires palestiniens occupés: Historique d’un processus multilatéral (1997–2001)”, *International Review of the Red Cross*, Vol. 84, No. 847, 2002, pp. 661 ff.

15 UNGA Res. ES-10/3, 15 July 1997, to ES-10/6, 9 February 1999.

16 Now, notably, renamed the Organisation of Islamic Cooperation.

understanding that it will convene again in the light of consultations on the development of the humanitarian situation in the field". It was only after a new recommendation by the General Assembly,<sup>17</sup> however, that the depositary initiated new consultations and the conference ultimately reconvened on 5 December 2001. This time, the 115 participating States adopted a detailed declaration which affirmed not only the *de jure* applicability of the Fourth Geneva Convention but also the obligations of all States based on common Article 1, the obligations of the parties to the conflict reflected in the Fourth Geneva Convention and the specific obligations of Israel as the Occupying Power.<sup>18</sup> It was a humanitarian declaration that highlighted the protection of victims, irrespective of their belonging to a party to the conflict.

### **A new General Assembly resolution and the initial consultations of the High Contracting Parties (2009–2011)**

On 5 November 2009, the UN General Assembly adopted Resolution A/RES/64/10, following up on the Goldstone Report inquiring into alleged violations of international law committed during the Gaza conflict, including in the context of Operation Cast Lead, at the end of 2008 and the beginning of 2009.<sup>19</sup> In operational paragraph 5 of the resolution, the General Assembly

*[r]ecommend[ed]* that the Government of Switzerland, in its capacity as depositary of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, undertake as soon as possible the steps necessary to reconvene a Conference of High Contracting Parties to the Fourth Geneva Convention on measures to enforce the Convention in the Occupied Palestinian Territory, including East Jerusalem, and to ensure its respect in accordance with article 1.<sup>20</sup>

Based on Resolution A/RES/64/10, the depositary undertook preliminary consultations with a limited number of parties in December 2009. It also engaged with the five UN Regional Groups<sup>21</sup> and informed all interested States and international organizations. Acting as an impartial facilitator in accordance with its previous practice, it sought to determine the opportuneness of a Conference of High Contracting Parties. The depositary carried out these consultations bearing in mind that such a conference should be inclusive, constructive, consensual and conducive to a concrete result. The various views expressed at the time did not

17 UNGA Res. ES-10/7, 20 October 2000.

18 For the text of the declaration in English and French, see P.-Y. Fux and M. Zambelli, above note 14, pp. 683 ff.

19 See Report of the United Nations Fact-Finding Mission on the Gaza Conflict, above note 4.

20 UNGA Res. 64/10, 5 November 2009, op. para. 5 (emphasis in original).

21 African Group, Asia-Pacific Group, Eastern European Group, Latin American and Caribbean Group (GRULAC) and Western European and Others Group (WEOG).

allow for the determination of a trend either in favour of or against the holding of a conference.

On 26 February 2010, the UN General Assembly reaffirmed its recommendation to the depositary in Resolution A/RES/64/254.<sup>22</sup> In order to follow up on this, the depositary conducted deliberations on possible topics for a conference. After originally envisaging the issue of access of humanitarian aid, goods, persons and services to Gaza, two alternative themes were identified: the operationalization of common Article 1, and legal issues related to situations of prolonged occupation. The depositary also organized talks from 25 June to 6 July 2010 with a view to sounding out the opinions of parties on those topics. The result of these consultations was inconclusive. On 1 February 2011, the depositary coordinated a final meeting that confirmed the impossibility of getting a critical mass of States Parties from across all regions to endorse a conference. In the face of such a lack of support, the depositary officially suspended the consultations but declared that it remained at the disposal of High Contracting Parties and other relevant actors.<sup>23</sup>

## **The resumption of the consultations of the High Contracting Parties (2014)**

At the beginning of summer 2014, mounting tensions and acts of violence by both Israel and Palestinian armed groups followed an unsuccessful US-led peace effort. On 8 July 2014, Israel initiated Operation Protective Edge. After the resumption of intense armed violence, the depositary received two letters from the State of Palestine – a High Contracting Party to the Geneva Conventions since 2 April 2014<sup>24</sup> – requesting it to lead further consultations with a view to convening a Conference of High Contracting Parties to the Fourth Geneva Convention. Equally considering the rapidly deteriorating humanitarian situation on the ground, the depositary decided to resume the consultations that had been suspended in 2011. On 22 July, it notified all 196 High Contracting Parties accordingly, underlining that it was proceeding on the basis of the original recommendation of the General Assembly contained in Resolution A/RES/64/10.<sup>25</sup> Seized with the situation in the Occupied Palestinian Territory, including

22 UNGA Res. 64/254, 26 February 2010, op. para. 4.

23 Switzerland regularly informed the Secretary-General throughout this original process, notably by sending him two letters in November 2009 and July 2010 respectively. See Report of the Secretary-General in follow-up to the report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN Doc. A/64/651, 4 February 2010, Annex III; Report of the Secretary-General in second follow-up to the report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN Doc. A/64/890, 11 August 2010, Annex III.

24 The State of Palestine had acceded to the Geneva Conventions and their Additional Protocol I on 2 April 2014. It subsequently adhered to Additional Protocols II and III on 4 January 2015. See: [www.eda.admin.ch/eda/fr/dfae/politique-exterieure/droit-international-public/traites-internationaux/depositaire/protection-des-victimes-de-la-guerre.html](http://www.eda.admin.ch/eda/fr/dfae/politique-exterieure/droit-international-public/traites-internationaux/depositaire/protection-des-victimes-de-la-guerre.html).

25 The notification is available at: [www.eda.admin.ch/content/dam/eda/fr/documents/topics/aussenpolitik/voelkerrecht/Geneve/140722-GENEVE\\_e.pdf](http://www.eda.admin.ch/content/dam/eda/fr/documents/topics/aussenpolitik/voelkerrecht/Geneve/140722-GENEVE_e.pdf).



East Jerusalem, the 21st Special Session of the Human Rights Council adopted Resolution S-21/1 on 21 July 2014.<sup>26</sup> Its operational paragraph 11 contained a recommendation similar to that made by the UN General Assembly. Following a formal request, the depositary informed the Office of the High Commissioner for Human Rights of the steps it had undertaken.<sup>27</sup>

On 28 July 2014, the depositary initiated extensive consultations with the parties to the conflict and a sample of sixty High Contracting Parties deemed representative of all geographic regions.<sup>28</sup> Simultaneously engaging with various international organizations,<sup>29</sup> it also expressed its readiness to discuss bilaterally with any other State Party upon request. From the beginning onwards, the depositary had envisaged the potential closure of the consultations if no positive consensus was to emerge in a limited time frame. The whole process would eventually consist of three rounds, lasting about six months.

## The consultation process in 2014

As in the past, the depositary began the consultations by emphasizing its role as an impartial facilitator; an inclusive and consensual conference could only be convened if High Contracting Parties so wished. The depositary also reiterated the opinion that such a conference should promote better respect for IHL on the ground, rather than serving as a platform for political accusations. Having done so, the depositary invited all High Contracting Parties to express their views on the opportuneness of a conference and to submit ideas regarding its possible content and format.

Since some High Contracting Parties had advised against the holding of any plenary or steering group meeting, the consultations were carried out bilaterally at the respective permanent missions and offices in Geneva. A significant number of approached States Parties favoured convening a conference.<sup>30</sup> Others, however, expressed their indecisiveness, scepticism or – as in the case of Israel<sup>31</sup> – opposition on the matter. Although views diverged regarding the ways to appropriately

26 UNHRC Res. S-21/1, 21 July 2014.

27 Report of the United Nations High Commissioner for Human Rights on the Implementation of Resolution S-21/1 on Ensuring Respect for International Law in the Occupied Palestinian Territory, including East Jerusalem, UN Doc. A/HRC/27/76, 29 September 2014, para. 3–6.

28 The remaining High Contracting Parties were informed of the consultation process through the respective presidencies of the UN Regional Groups.

29 The depositary consulted the ICRC, the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) and the Office of the High Commissioner for Human Rights.

30 Some publicly communicated their position. For example, the Non-Aligned Movement's Committee on Palestine issued a declaration through the Islamic Republic of Iran, on 4 August 2014, which "called on Switzerland, in its capacity as depositary, to undertake the necessary efforts for the timely convening of such an important conference". The full declaration is available at: <http://iranembassy.ch/en/496>.

31 For Israel's position towards the end of the process, see Israel Ministry of Foreign Affairs, "The Conference of Fourth Geneva Convention Signatories", 11 December 2014, available at: <http://mfa.gov.il/MFA/PressRoom/2014/Pages/The-Conference-of-Fourth-Geneva-Convention-Signatories-11-December-2014.aspx>; Israel Ministry of Foreign Affairs, "Conference of High Contracting Parties to the Geneva Conventions", 17 December 2014, available at: <http://mfa.gov.il/MFA/PressRoom/2014/Pages/Conference-of-high-contracting-parties-to-the-Geneva-Conventions-Israel-reaction-17-Dec-2014.aspx>.

address the humanitarian needs of civilians affected by the conflict, High Contracting Parties saw the imperative necessity to do so. The depositary was thus encouraged to seek to accommodate the various opinions, ideas and proposals in a timely manner.

States Parties certainly did not deem a continuation of the consultations after December 2014 desirable, notably due to the planned examination of the report by the Independent Commission of Inquiry on the Gaza conflict at the 28th Session of the Human Rights Council in March 2015.<sup>32</sup> In any case, a lengthy process seemed unlikely to increase the probability of a consensus amongst High Contracting Parties, as the consultations between 2009 and 2011 had shown.

The depositary thus immediately undertook a second round of consultations with the same States Parties. Discussions held in September 2014 suggested that the elaboration of a non-paper could contribute to clarifying the possible goal, format and content of a conference. Following extensive preparation, a text was circulated on 20 October 2014 that was very much inspired by the preparatory and concluding documents of the 2001 Conference of High Contracting Parties.

Based on the assessment that only strict procedural rules would allow for a non-politicized conference focused on the applicable IHL, the non-paper dealt with the envisaged modalities. It suggested adopting the 2001 modalities *mutatis mutandis*, thus foreseeing the participation of High Contracting Parties through their respective permanent representatives in Geneva and disallowing individual statements as well as points of order. Most notably, the non-paper suggested that the text of a potential declaration, to be adopted by consensus, would be finalized in advance. The depositary would facilitate its drafting and consult the High Contracting Parties in order to avoid controversial debates or a vote during a conference.

The non-paper also dealt with the potential content of a declaration, reflecting on comments and suggestions by High Contracting Parties and international organizations that had been consulted, rules of international humanitarian law and the 1999 statement and 2001 declaration. It was divided into three sections, as follows:

- First, a reaffirmation of the statement and declaration of 1999 and 2001, respectively, and of relevant legal principles. Many consulted States had emphasized the need to appropriately contextualize a conference, even though this risked hampering support by others that had opposed the previous conferences and were now opposing another one. Those sceptical High Contracting Parties had indeed argued that a conference focusing on the Occupied Palestinian Territory would inevitably be biased. However, Resolution A/RES/64/10 explicitly mentioned this particular geographic context. In order to accommodate all remarks, this section of the non-paper

32 On 16 March 2015, the Human Rights Council consensually decided to postpone the report by the Commission of Inquiry to June 2015. A short oral update was accordingly given on 23 March 2015.

included a restatement not only of general legal principles of IHL, including those related to occupation, but also of provisions particularly relevant to the 2014 Gaza conflict.

- Legal elements relevant to a factual update were also included, so as to reflect major developments that had happened since the Conference of High Contracting Parties in 2001. Among other events, the construction of a wall in the Occupied Palestinian Territory, the expansion of settlements, the disengagement from and the closure of the Gaza strip, the frequent occurrence of indiscriminate attacks and the use of civilians as human shields justified the recalling of existing significant rules of IHL. Given the concern of some High Contracting Parties, this section equally addressed the issue of non-State armed groups. It not only emphasized their legal obligations, but also explicitly referred to violations committed during attacks directed against or emanating from the Occupied Palestinian Territory. This was repeatedly done throughout the document.
- The non-paper finally proposed a two-fold follow-up mechanism, which consisted of both a voluntary self-evaluation by parties to the conflict and an additional follow-up process facilitated by the depositary.

High Contracting Parties reacted positively to the non-paper, generally supporting the envisaged modalities as well as the first two sections dealing with the content of a potential declaration. Contentious points nonetheless remained. Some wished to retain the ability to give individual statements during a conference, while others still feared the risk of politicization. The issue of joint statements was also of concern, since certain regional groups seemed unable to agree on a text. Finally, several States firmly opposed the inclusion of any follow-up mechanism.

Despite the lack of consensus at this stage, High Contracting Parties insisted that the depositary proceed with the consultations while maintaining transparency vis-à-vis all stakeholders. Additional discussions were thus held in Geneva and in several capitals throughout November 2014. They revealed that only the formulation of a draft declaration and of draft modalities would allow High Contracting Parties to take a final stand as to the opportuneness of a conference.

Based on the comments received, the depositary immediately drafted and submitted the required documents, which were examined during a third and final round of consultations in November and December 2014. The draft declaration contained specific amendments that had been suggested by High Contracting Parties on the basis of the non-paper and no longer mentioned any follow-up mechanism. The draft modalities allowed for either oral statements by predetermined groups<sup>33</sup> or written individual statements to be submitted before a conference for subsequent inclusion in its official records. Additional suggestions were also carefully evaluated in order to reflect as many views as possible. As

33 The draft modalities provided a non-exhaustive list of such pre-established groups.

envisaged, High Contracting Parties were then able to take a definitive stand regarding the convening of a conference.

On 3 December 2014, the depositary concluded that there was the necessary support to convene a conference of High Contracting Parties. Recalling the modalities and text of the final draft declaration, it invited all High Contracting Parties to confirm this assessment by pre-registering. On 10 December 2014, the depositary notified the High Contracting Parties that the conference would take place a week later given the existence of a cross-regional critical mass of support. Given that a small number of States Parties had already expressed their opposition to the principle of such a conference, the notification specified that “[t]he planned conference will be a ‘Conference of High Contracting Parties’ like the 1999 and 2001 conferences (not a ‘Conference of *the* High Contracting Parties’), on the basis of article 1 of the [Fourth Geneva] Convention”.<sup>34</sup> Likewise, the declaration adopted on 17 December 2014 referred to “participating” High Contracting Parties.

## The Conference of High Contracting Parties to the Fourth Geneva Convention of 17 December 2014

On 17 December 2014, 128 High Contracting Parties<sup>35</sup> participated in the Conference of High Contracting Parties to the Fourth Geneva Convention, held at the World Meteorological Organisation in Geneva. Israel,<sup>36</sup> Canada<sup>37</sup> and the United States<sup>38</sup> in particular were not represented and publicly criticized the existence of the conference. In accordance with the agreed modalities, eight observers attended,<sup>39</sup> while neither the public nor any media presence was allowed in the room.<sup>40</sup> After the opening speech by the depositary, representatives of the ICRC and the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) delivered statements. Both organizations underlined the challenges faced on the ground during and after the

34 “Notification to Governments of the States Parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War”, 10 December 2014, available at: [www.eda.admin.ch/content/dam/eda/fr/documents/topics/aussenpolitik/voelkerrecht/Geneve/141210-GENEVE-Mission\\_EN.pdf](http://www.eda.admin.ch/content/dam/eda/fr/documents/topics/aussenpolitik/voelkerrecht/Geneve/141210-GENEVE-Mission_EN.pdf) (emphasis in original).

35 The full list of participating States is available at: [www.eda.admin.ch/content/dam/EDA-Event/GVA%20Convention/CHCP-List%20of%20Participants.pdf](http://www.eda.admin.ch/content/dam/EDA-Event/GVA%20Convention/CHCP-List%20of%20Participants.pdf).

36 See above note 31.

37 Foreign Affairs, Trade and Development Canada, “Canada Strongly Opposes Decision to Convene Anti-Israel Conference in Geneva”, 16 December 2014, available at: [www.international.gc.ca/media/aff/news-communiques/2014/12/16b.aspx?lang=eng](http://www.international.gc.ca/media/aff/news-communiques/2014/12/16b.aspx?lang=eng).

38 Permanent Mission of the United States of America to the United Nations and Other International Organizations in Geneva, “U.S. Statement on the Conference of High Contracting Parties to the Fourth Geneva Convention”, 17 December 2014, available at: <https://geneva.usmission.gov/2014/12/17/u-s-statement-on-the-conference-of-high-contracting-parties-to-the-fourth-geneva-convention/>.

39 African Union, European Union, ICRC, International Federation of the Red Cross and the Red Crescent, League of Arab States, Office of the High Commissioner for Human Rights, OIC and UNRWA.

40 The depositary held a short press conference immediately afterwards and issued a press release: see Federal Department of Foreign Affairs, “Switzerland Hosts Conference of High Contracting Parties to the Fourth Geneva Convention”, 17 December 2014, available at: [www.eda.admin.ch/countries/blueprint/en/home/aktuell/news.html/content/eda/en/meta/news/2014/12/17/55724](http://www.eda.admin.ch/countries/blueprint/en/home/aktuell/news.html/content/eda/en/meta/news/2014/12/17/55724).

2014 Gaza conflict, calling on all States and non-State actors alike to ensure respect for IHL in the Occupied Palestinian Territory and in Israel. The depositary then read the ten-point declaration that was adopted by consensus. Several High Contracting Parties spoke on behalf of predefined established groups,<sup>41</sup> while thirty-three others had previously submitted written statements to be included in the conference's records. The conference ended after about two hours with a concluding speech by the depositary.

Available in six languages, the declaration was notified to all High Contracting Parties on 14 January 2015, together with the other official conference documents.<sup>42</sup> Accommodating the views expressed during the consultations, the declaration reflects a delicate balance between the restatement of basic principles of IHL and the emphasis on provisions particularly relevant to the 2014 Gaza conflict. Compared to the 2001 declaration, original elements include:

- the explicit reference to the three cardinal IHL principles of distinction, proportionality and precaution (para. 3, further specified in para. 9);
- the explicit reference, throughout the declaration, to non-State actors as parties to the conflict and to their specific obligations under IHL (para. 3, 5, 7 and 9);
- the emphasis on the principle of non-reciprocity (para. 3);
- the reference to recurring violations of IHL since 2001 by all parties to the conflict, and as such also by non-State actors, in the context of “military operations and attacks directed *against* and *emanating* from the Occupied Palestinian Territory” (para. 7, emphasis added);
- the expression of particular concern about civilian victims in densely populated areas (para. 7);
- the illegality, under IHL, of the construction of the wall in the Occupied Palestinian Territory, and its associated regime, according to the advisory opinion of the International Court of Justice of 9 July 2004 (para. 8);
- the “closure of the Gaza strip” by the Occupying Power (para. 8); and
- the prohibition under IHL of “indiscriminate attacks of any kind”, “the location of military objectives in the vicinity of civilians and civilian objects, when it would be avoidable”, and “the use of civilians as human shields” (para. 9).

Other elements, such as the essential nature of both respect for and implementation of IHL to the achievement of a just and lasting peace, the applicability of the Fourth Geneva Convention, the illegality of the settlements, the responsibilities in relation to humanitarian supplies and references to the need for accountability, were already reflected in the declaration of 2001.

41 Iran spoke on behalf of the Non-Aligned Movement, Italy on behalf of the European Union, Ecuador on behalf of the Bolivarian Alliance for the Peoples of Our America (ALBA), Saudi Arabia on behalf of the Organisation of Islamic Cooperation, the United Arab Emirates on behalf of the Arab Group, and Namibia on behalf of the African Group.

42 The conference's records are not publicly accessible, except for the list of participating High Contracting Parties, the declaration (in French, English, Spanish, Chinese, Arabic and Russian), the modalities, and the programme (available at: [www.eda.admin.ch/eda/en/fdfa/etc/fourth-geneva-convention.html](http://www.eda.admin.ch/eda/en/fdfa/etc/fourth-geneva-convention.html)). Some of the participating States and entities have published their statements on an individual basis.

The declaration of the Conference of High Contracting Parties of 2014 is important for IHL in the Israeli–Palestinian conflict and beyond. Neither the statement of 1999 (103 participants) nor the declaration of 2001 (115 participants) was adopted by as many participating High Contracting Parties as the declaration of 17 December 2014 (128 participants). As per its predecessor texts, the declaration affirmed the *de jure* applicability of the Fourth Geneva Convention in the Occupied Palestinian Territory, including East Jerusalem and the Gaza Strip. Compared to the 2001 declaration, it is more concise and more specific. Dealing in detail with the role of the Occupying Power, it also includes several elements that can be clearly linked to Palestinian actors, such as the repeated mention of non-State actors, the reference to attacks emanating from the Occupied Palestinian Territory and the reference to the use of human shields. The declaration also distinctively takes into account specific alleged violations that occurred during the 2014 Gaza conflict. Finally, the humanitarian character of the declaration is evident; it expresses concern about the great suffering that has been inflicted on the civilian population since 2001 and supports the work of impartial humanitarian organizations such as the ICRC and UNRWA.

By adopting the ten-point declaration, the 128 participating High Contracting Parties reaffirmed fundamental rules of IHL in the hope of effectively contributing to the alleviation of protracted civilian suffering in the Occupied Palestinian Territory. The two-fold – legal and humanitarian – purpose of the conference was therefore fulfilled. The depositary informed the UN Secretary-General by sending him a formal letter on 29 December 2014, specifying that “[t]his concludes the actions of the depositary in respect of the recommendation set out in paragraph 5 of General Assembly resolution 64/10”.<sup>43</sup> The multilateral process initiated in 2009 thus came to a close.

## Conclusion

The conference of 17 December 2014 confirmed that Article 1 common to all Geneva Conventions is no mere stylistic clause. When faced with disastrous humanitarian situations resulting from armed conflicts, High Contracting Parties are to ensure that the rules of international humanitarian law are respected equally by States and non-State actors. On the basis of resolution A/RES/64/10 of the United Nations General Assembly, the depositary carried out extensive consultations of High Contracting Parties that ultimately decided to underscore the continued relevance of this body of law by convening the Conference of High Contracting Parties to the Fourth Geneva Convention. The result consists in the ten-point declaration adopted by 128 High Contracting Parties from across regions which demonstrates that compliance with international humanitarian law remains crucial for alleviating the suffering of civilian populations.

<sup>43</sup> Letter dated 29 December 2014 from the Permanent Representative of Switzerland to the UN, addressed to the Secretary-General, UN Doc. A/69/711-S/2015/1, 9 January 2015.

## **Annex**

### **Conference of High Contracting Parties to the Fourth Geneva Convention**

Geneva, 17 December 2014

#### **Declaration**

1. This Declaration reflects the common understanding reached by the participating High Contracting Parties to the Conference of High Contracting Parties to the Fourth Geneva Convention on 17 December 2014, mindful of the recommendation by the United Nations General Assembly in resolution 64/10 of 1 December 2009.
2. The participating High Contracting Parties reaffirm the statement of the Conference of High Contracting Parties to the Fourth Geneva Convention of 15 July 1999 and the Declaration of 5 December 2001.
3. The participating High Contracting Parties reiterate the need to fully respect the fundamental principles of international humanitarian law, according to which all parties to the conflict, and as such also non-State actors, must respect, at all times, inter alia, (1) the obligation to distinguish between civilians and combatants and between civilian objects and military objectives, (2) the principle of proportionality, and (3) the obligation to take all feasible precautions to protect civilians and civilian objects. In addition, the participating High Contracting Parties emphasize that no violation of international humanitarian law by any party to a conflict can relieve the other party from its own obligations under international humanitarian law.
4. The participating High Contracting Parties emphasize the continued applicability and relevance of the Fourth Geneva Convention, which all High Contracting Parties have undertaken to respect and to ensure respect for in all circumstances. As such, they call on the Occupying Power to fully and effectively respect the Fourth Geneva Convention in the Occupied Palestinian Territory, including East Jerusalem. They also remind the Occupying Power of its obligation to administer the Occupied Palestinian Territory in a way which fully takes into account the needs of the civilian population while safeguarding its own security, and notably preserve its demographic characteristics.
5. The participating High Contracting Parties recall the primary obligation of the Occupying Power to ensure adequate supplies of the population of the occupied territory and that whenever it is not in a position to do so, it is under the obligation to allow and facilitate relief schemes. In that case, they further recall that all High Contracting Parties shall permit the free passage of humanitarian relief and shall guarantee its protection. In this regard, the participating High Contracting Parties reiterate their support to the activities of the ICRC, within its particular role conferred upon it by the Geneva Conventions, of UNRWA, and of



other impartial humanitarian organizations, to assess and alleviate the humanitarian situation in the field. Beyond, all parties to the conflict, and as such also non-state actors, should make all possible efforts to allow and facilitate rapid and unimpeded passage of humanitarian relief for the population of the occupied territory.

6. The participating High Contracting Parties emphasize that all serious violations of international humanitarian law must be investigated and that all those responsible should be brought to justice.

7. The participating High Contracting Parties express their deep concern about recurring violations of international humanitarian law by all parties to the conflict, and as such also by non-state actors, including in the context of military operations and attacks directed against and emanating from the Occupied Palestinian Territory since the Conference of High Contracting Parties on 5 December 2001 and the resulting great suffering of the civilian population. They are particularly concerned about the number of victims among the civilian population in densely populated areas.

8. The participating High Contracting Parties express their deep concern about the impact of the continued occupation of the Occupied Palestinian Territory. They recall that, according to the advisory opinion of the International Court of Justice of 9 July 2004, the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, at least insofar as it deviates from the Green Line, and its associated régime, are contrary to international humanitarian law. They equally express their deep concern, from an international humanitarian law standpoint, about certain measures taken by the Occupying Power in the Occupied Palestinian Territory, including the closure of the Gaza Strip. They reaffirm the illegality of the settlements in the said territory and of the expansion thereof and of related unlawful seizure of property as well as of the transfer of prisoners into the territory of the Occupying Power.

9. With regard to the conduct of hostilities, the participating High Contracting Parties underscore that the following acts are, among others, prohibited by international humanitarian law for all parties to the conflict, and as such also for non-state actors: (1) indiscriminate attacks of any kind, including attacks which are not directed at specific military objectives, and the employment of a method or means of combat which cannot be directed at a specific military objective or whose effects do not meet the requirements of the principles mentioned in paragraph 3 of this Declaration; (2) disproportionate attacks of any kind, including excessive destruction of civilian infrastructure; (3) destruction of property, carried out inconsistently with the principles mentioned in paragraph 3 of this Declaration; (4) attacks against protected persons and objects, including medical buildings, material, transports, units and personnel, as well as humanitarian personnel and objects, unless and for such time as they have lost their protection against direct attack; (5) attacks against civilian objects, including



schools, unless and for such time as they are military objectives; (6) the location of military objectives in the vicinity of civilians and civilian objects, when it would be avoidable and (7) the use of civilians as human shields.

10. The participating High Contracting Parties reiterate the need to find a peaceful solution to the conflict, and stress that respect for and implementation of the Fourth Geneva Convention and international humanitarian law in general is essential to achieve a just and lasting peace.

## **Conférence de Hautes Parties contractantes à la quatrième Convention de Genève**

Genève, 17 décembre 2014

### **Déclaration**

1. La présente déclaration reflète l'accord commun auquel sont parvenues les Hautes Parties contractantes qui ont participé à la Conférence de Hautes Parties contractantes à la quatrième Convention de Genève du 17 décembre 2014, ayant à l'esprit la recommandation de l'Assemblée générale des Nations Unies formulée dans la résolution 64/10 du 1er décembre 2009.

2. Les Hautes Parties contractantes participantes réaffirment la déclaration (*statement*) adoptée par la Conférence de Hautes Parties contractantes à la quatrième Convention de Genève du 15 juillet 1999, ainsi que la déclaration du 5 décembre 2001.

3. Les Hautes Parties contractantes participantes réitèrent la nécessité de respecter pleinement les principes fondamentaux du droit international humanitaire, selon lesquels toutes les parties au conflit, et donc également les acteurs non étatiques, doivent, en tout temps, respecter entre autres : 1) l'obligation de distinguer entre personnes civiles et combattants, ainsi qu'entre les biens de caractère civil et les objectifs militaires, 2) le principe de proportionnalité, et 3) l'obligation de prendre toutes les précautions pratiquement possibles pour protéger les personnes civiles et biens de caractère civil. En outre, les Hautes Parties contractantes participantes soulignent qu'aucune violation du droit international humanitaire par l'une des parties au conflit ne libère l'autre partie de ses propres obligations au regard du droit international humanitaire.

4. Les Hautes Parties contractantes participantes soulignent que la quatrième Convention de Genève, que toutes les Hautes Parties contractantes se sont engagées à respecter et à faire respecter en toutes circonstances, est toujours applicable et pertinente. A ce titre, elles appellent la Puissance occupante à respecter pleinement et effectivement la quatrième Convention de Genève dans le Territoire palestinien occupé, y compris Jérusalem-Est. Elles rappellent également à la Puissance occupante son obligation d'administrer le Territoire palestinien occupé de manière à tenir pleinement compte des besoins de la population civile, tout en assurant sa propre sécurité, et notamment à préserver les caractéristiques démographiques de celle-ci.

5. Les Hautes Parties contractantes participantes rappellent l'obligation première de la Puissance occupante d'assurer l'approvisionnement adéquat de la population du territoire occupé, et que lorsqu'elle n'est pas en mesure de le faire, elle a l'obligation d'autoriser et de faciliter les actions de secours. Elles rappellent également qu'en pareil cas, toutes les Hautes Parties contractantes doivent permettre le libre passage de secours humanitaires et garantir leur protection. A cet égard, les

Hautes Parties contractantes participantes réitèrent leur soutien aux activités du CICR, dans le cadre du rôle particulier qui lui a été conféré par les Conventions de Genève, de l'UNRWA et d'autres organisations humanitaires impartiales, pour évaluer et soulager la situation humanitaire sur le terrain. Par ailleurs, toutes les parties au conflit, et donc également les acteurs non étatiques, doivent entreprendre tous les efforts possibles pour permettre et faciliter le passage rapide et sans encombre des secours humanitaires destinés à la population du territoire occupé.

6. Les Hautes Parties contractantes participantes soulignent que toutes les violations graves du droit international humanitaire doivent donner lieu à une enquête, et que tous les responsables doivent être traduits en justice.

7. Les Hautes Parties contractantes participantes expriment leur profonde préoccupation quant aux violations récurrentes du droit international humanitaire commises depuis la Conférence de Hautes Parties contractantes du 5 décembre 2001 par toutes les parties au conflit, et donc également par des acteurs non étatiques, y compris dans le contexte d'opérations militaires et d'attaques dirigées contre ou émanant du Territoire palestinien occupé ainsi que par la grande souffrance de la population civile qui en résulte. Elles sont particulièrement préoccupées par le nombre de victimes civiles dans des zones densément peuplées.

8. Les Hautes Parties contractantes participantes expriment leur profonde préoccupation quant aux effets de l'occupation continue du Territoire palestinien occupé. Elles rappellent que, selon l'avis consultatif de la Cour Internationale de Justice du 9 juillet 2004, l'édification du mur dans le Territoire palestinien occupé, y compris à l'intérieur et sur le pourtour de Jérusalem-Est, du moins dans la mesure où son tracé s'écarte de la Ligne verte, ainsi que le régime qui lui est associé, sont contraires au droit international humanitaire. Elles expriment également leur profonde préoccupation, du point de vue du droit international humanitaire, quant à certaines mesures prises par la Puissance occupante dans le Territoire palestinien occupé, y compris le blocus de la bande de Gaza. Elles réaffirment le caractère illégal des colonies de peuplement dans ledit territoire, de leur expansion et des saisies illicites de biens correspondantes, ainsi que du transfert de prisonniers vers le territoire de la Puissance occupante.

9. Concernant la conduite des hostilités, les Hautes Parties contractantes participantes soulignent que les actes suivants sont, entre autres, proscrits par le droit international humanitaire pour l'ensemble des parties au conflit, et donc également pour les acteurs non étatiques: (1) les attaques indiscriminées de toute sorte, y compris les attaques qui ne sont pas dirigées contre un objectif militaire déterminé, et le recours à des méthodes ou à des moyens de combat ne pouvant être dirigés contre un objectif militaire déterminé, ou dont les effets ne respectent pas les principes mentionnés au paragraphe 3 de la présente déclaration; (2) les

attaques disproportionnées de toute sorte, parmi lesquelles les destructions excessives d'infrastructures civiles; (3) les destructions de biens, contrevenant aux principes mentionnés au paragraphe 3 de la présente déclaration; (4) les attaques visant des personnes et des objets protégés, y compris les bâtiments, le matériel, les transports, les unités et le personnel médicaux, ainsi que le personnel et les objets humanitaires, sauf si et pendant qu'ils ont perdu leur protection contre les attaques directes; (5) les attaques visant des biens de caractère civil, dont les écoles, sauf si et pendant qu'ils sont des objectifs militaires; (6) la localisation d'objectifs militaires à proximité de personnes civiles et de biens de caractère civil, lorsqu'elle peut être évitée; et (7) l'utilisation de personnes civiles comme boucliers humains.

10. Les Hautes Parties contractantes participantes réitèrent la nécessité de trouver une solution pacifique au conflit et soulignent que le respect et la mise en œuvre de la quatrième Convention de Genève et du droit international humanitaire dans son ensemble sont indispensables pour parvenir à une paix juste et durable.



## REPORTS AND DOCUMENTS

# Taking the law out of the books: The annual Jean-Pictet IHL Competition, 19–26 March 2016, Évian-les-Bains and Geneva

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The Committee for the Jean-Pictet Competition is pleased to announce that the 28th Jean-Pictet Competition will take place in Évian-les-Bains (France) and Geneva (Switzerland) from 19 to 26 March 2016.

The Jean-Pictet Competition is the leading international humanitarian law moot court competition, and one of the most innovative training programmes in public international law for law students. Every year, approximately 150 students representing forty-eight universities from around the world take part in this unique and world-renowned event. Since its inception in 1989, almost 3,000 students from approximately 220 universities and seventy-five countries have participated in the Competition.

The Competition is a week-long training event in international humanitarian law (IHL) intended for students (undergraduate or above) of law, political science, international relations, or other disciplines, as well as students from military academies. Its approach aims to “take the law out of the books” through simulations and role-plays, thus allowing the jury of the Competition to evaluate each team’s theoretical knowledge and practical understanding of IHL.

The simulations and role-plays are based on a fictional but realistic case study of an armed conflict. During the Competition, the simulations are set up so that the teams (each comprised of three students) engage with each other and the jury in different formats: some simulations take place between the jury and only

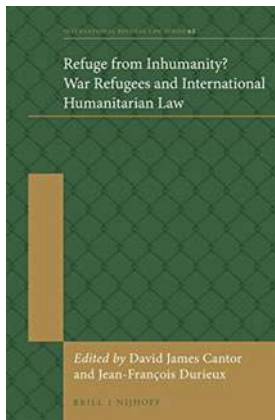


Participants and volunteers of the 27th edition of the Competition pose for the traditional group photo, in Charlottesville, VA, United States, April 2015. © CCJP

one team, some between the jury and several teams, some between two teams with a silent jury, and so on. Participants are also required to take on roles that constantly evolve. For example, they may be asked to play the role of representatives of the International Committee of the Red Cross in the morning and, later that same day, to play the role of armed carriers. This stimulates participants to consider the same conflict from different perspectives.

For more information on the 28th Jean-Pictet Competition, or on the Competition in general, please consult our website at [www.concourspictet.org](http://www.concourspictet.org), or follow us on Facebook (Concours Jean-Pictet Competition) and Twitter ([@ConcoursPictet](https://twitter.com/ConcoursPictet)).

## BOOK REVIEW



# Refuge from Inhumanity? War Refugees and International Humanitarian Law

**David James Cantor and Jean-François Durieux (eds)\***

**Book review by Sarah Barr**, Programme Partnership Arrangement Officer at the British Red Cross.

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David James Cantor and Jean-François Durieux's edited volume *Refuge from Inhumanity? War Refugees and International Humanitarian Law* explores the legal dimensions of the significant protection gap for those fleeing violent conflict. The authors of the eighteen chapters each assess different scenarios, and aspects of the existing international protection regime, in a bid to clarify and potentially expand the boundaries of legal protection currently available for war refugees. The analysis is underpinned by the omission of any explicit protection for those fleeing conflict in the 1951 Refugee Convention<sup>1</sup> and looks to international humanitarian law (IHL) for a potential solution.

The opening section by David Cantor sets the scene by outlining characteristics shared by IHL and international refugee law (IRL), and exploring the ways in which the two regimes interact, before assessing how IHL may assist in the interpretation of IRL. His purpose is to lay the conceptual groundwork for the detailed analysis of the interrelationships between the two bodies of law which follows.

\* Published by Brill/Martinus Nijhoff, 2014.



The remainder of the book is divided into five further sections which are grouped thematically. The second section builds on Cantor's argument in his opening chapter; that IRL and IHL, alongside international human rights law (IHRL), must be used in conjunction with one another rather than being treated as autonomous. Hugo Storey recalls his previous argument that international protection fails to address the needs of those fleeing conflict with reference to the correct body of law<sup>2</sup> and argues for the development of a comprehensive framework and guidance to address this. This is well supported by Stéphane Jaquemet's chapter, which argues that IRL, IHL and IHRL should be repositioned in relation to each other, to work towards a continuum of protection. Hélène Lambert's chapter in the same section focuses on how causation is analyzed by refugee decision-makers and posits prioritizing "constitutive causation". Lambert argues that assessing the material situation of war refugees and understanding the construction of threat in their social environment can enable us to better understand a refugee's reason for leaving, and therefore potentially lead to better-quality decision-making by those determining asylum cases.

The third section looks at different grounds for including or excluding individuals from a claim for asylum based on the Refugee Convention. Here Vanessa Holzer provides a timely assessment of how persecution can be identified in a non-international armed conflict (NIAC). Eric Fripp assesses the case of combatants and ex-combatants, while on a similar thread, Geoff Gilbert looks at those who are explicitly excluded from making claims under the Refugee Convention. Both leave the door open for some members of these groups to make claims for asylum based on the Refugee Convention, though Gilbert cautions that the level of variation and complexity in this area is too great to make a conclusive argument.

Regional systems and directives and the implications of applying IHL at the regional level come under scrutiny in the fourth section. The first two chapters in this section look at the expanded refugee definitions enshrined by the Organization of African Unity (OAU) and by Latin American countries in the Cartagena Declaration. Maja Janmyr provides a conceptual analysis of "civilian" and "humanitarian", comparing their ascribed meanings in IHL and by the United Nations High Commissioner for Refugees (UNHCR). The remaining three chapters in the section look at the European Union (EU). They are united in their hesitancy around using IHL as a primary reference point for asylum cases, and their belief that more must be done to improve the consistency of asylum decision-making within the EU.

Protection for war refugees against being returned to conflict zones is assessed in the fifth section. Here each of the three writers supports the view that IHL and the law of armed conflict (LOAC) more broadly provide some

1 Convention Relating to the Status of Refugees, 28 July 1951, UNTS 137 (entered into force 22 April 1954) (Refugee Convention).

2 See Hugo Storey, "Armed Conflict in Asylum Law: The 'War-Flaw'", *Refugee Survey Quarterly*, Vol. 31, No. 2, 2012, pp. 1–32.

protection against return to conflict zones, especially where individuals are at risk of suffering torture or inhumane treatment, though this optimism is not unreserved. David Cantor shows that certain forms of protection against return exist in universally ratified treaty law, but illuminates a protection gap for those in third-party States or those who become refugees after the outbreak of conflict. Reuven Ziegler argues that a protection lens can be applied to Article 3 common to the four Geneva Conventions to apply *non-refoulement* provisions to third States. Françoise Hampson, on the other hand, posits that IHRL can more usefully be drawn upon to provide clarity in this area, given that those resisting return are likely to be out of the conflict zone and IHL will therefore not hold.

The final section looks beyond legal provisions for protection of refugees, taking the view that law is only one mechanism in a broader set of international norms which can enhance protection available to those fleeing war. Jennifer Moore picks out protection-related commitments in the Millennium Development Goals and in the Responsibility to Protect, highlighting the seemingly high levels of international commitment to the protection of those fleeing conflict. Guy Goodwin-Gill develops the idea of “temporary refuge” as an alternative to full asylum or citizenship and shows the strong foothold it has gained in customary international law. These final chapters underwrite the pleas made earlier in the book to take a more open-minded and innovative approach to the protection of those fleeing conflict.

The detail and clarity provided by most of the authors ensure that the book is useful for practitioners hoping to advance protection afforded to those fleeing violent conflict. The specificity of the analysis with regard to particular scenarios or areas of law makes it easy to identify which section or chapter would be of use, and some authors conclude with very clear recommendations.

A common characteristic throughout the book is a sense of pragmatism and a desire to clarify rather than further mystify this complex legal area. For example, Vanessa Holzer walks the reader through different NIAC scenarios in which contraventions of IHL that violate the principles of distinction, proportionality and military necessity can be interpreted as persecution. This provides a number of ways in which those fleeing a NIAC can appeal for protection on the basis of the Refugee Convention, which if applied could potentially open up protection to a number of claimants. Equally, on the point of clarification, Maja Janmyr highlights a potential confusion, or misunderstanding, originating from the different meaning ascribed to the terms “civilian” and “humanitarian” and implores the UNHCR to clarify how it uses these terms. This could be straightforwardly implemented to make a tangible difference at the intersection of IHL and IRL in the refugee camp context.

The detailed enquiry into the potential use of IHL to further the protection of those fleeing conflict also raises a number of cautions worthy of note for those looking to use IHL to support IRL. Realism about the limitations of IHL provided weight to points that are optimistic about its utility. A number of the authors drew attention to the fact that the purpose of IHL is not to provide protection for those fleeing war and that there are some cases where its application may actually

reduce potential levels of protection. For example, Tamara Wood argues that applying IHL to the OAU's expanded refugee definition may reduce the numbers eligible for protection under situations of occupation and external aggression, and that the criteria for analyzing conflict offered in IHL is not designed for protection and may therefore not further its cause. Hélène Lambert also cautions about the types of evidence and criteria used in IHL, given its static and positivist nature, in contrast to the fluidity of conflict and the difficulty in finding conclusive evidence in conflict contexts.

In terms of applicability, the book comes into its own in the three chapters focusing on the EU. Céleste Bauloz and Evangelia Tsourdi both focus on aspects of Article 15(c) of the EU Qualification Directive that generate concrete recommendations. Bauloz in particular provides clear direction about how the confusing and perhaps contradictory terms within Article 15(c) could be defined and interpreted to have their best effects.

Moreno Lax's standout chapter looks at the interrelationships and impasses between public international law, EU law and IHL. She pushes for a systemic understanding of the EU legal order, seeking to contribute not only to the understanding of a particular Article or scenario, but to the "advancement of the 'constitutional *telos*' of the system as whole",<sup>3</sup> and reminding us of the Charter of Fundamental Rights as a primary reference point for understanding EU legal norms. The utility of this chapter is derived from the detailed description of how and in what order different norms and bodies of law should be considered in the determination of asylum cases in the EU, and from its systemic approach. Countering this, it is unfortunate that the complexity of the interpretive methodology she suggests may place it beyond easy operationalization by many decision-makers.

While the chapters focusing on the EU make a significant contribution towards understanding aspects of EU law and how IHL may be used in asylum cases, they are also the source of one of the books' major weaknesses. The EU neither produces nor receives a majority of refugees in terms of global numbers.<sup>4</sup> Reconciling this fact with the preoccupation with European law and jurisprudence that permeates the book has proven difficult. This is reflected in the fact that three of the six chapters from the section focusing on regional definitions focus on Europe, and also that the overwhelming majority of cases quoted throughout the book are European in origin.

It is true that a complex legal system and weighty body of jurisprudence make for interesting analysis, making the EU an understandable focal point. However, if the purpose of the book is to potentially expand the parameters for the protection of refugees fleeing conflict, a more direct approach would have been one grounded in legal responses in countries who are host to mass influxes of people fleeing conflict. A significant proportion of countries which host very

3 *Refuge from Inhumanity?*, p. 340.

4 See UNHCR, "Facts and Figures about Refugees", available at: [www.unhcr.org.uk/about-us/key-facts-and-figures.html](http://www.unhcr.org.uk/about-us/key-facts-and-figures.html) (accessed on 4 January 2015).

large numbers of people fleeing conflict are not signatories to the Refugee Convention – for example, Pakistan or Lebanon – but the idea that this would make them irrelevant is hard to swallow. In any case, there are signatories to the Refugee Convention who do host large numbers of war refugees, such as Kenya and Turkey, which also remain out of view in the book. Additionally, the assessment of the potential utility of IHL in furthering the protection of war refugees would have been particularly prescient in some of these cases, with reasonable cause to argue that some major host countries could themselves be classified as engaged in a NIAC while hosting groups from another country also engaged in a conflict; Kenya and Pakistan both spring to mind here. Tamara Wood's chapter and David Cantor and Diana Trimino Mora's chapter are both notable exceptions in that their focus is not overly centred on Europe.

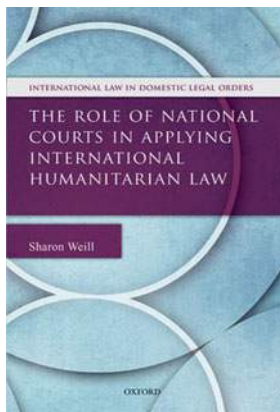
The effect of the heavy weighting towards Europe is that the book comes across as being somewhat detached from the lived experiences of those fleeing war, and this is compounded by the very limited discussion of the relationship between legal possibilities and operational realities. For example, Françoise Hampson's chapter on the obligation not to return combatants or ex-combatants provides a clear, cogent argument, but does so using a series of abstract scenarios through which the gravity and complexity of these types of situations are lost. A second point relating to the ill explored relationship between the legal and operational is the very limited cognisance of the political dimensions of the legal decision-making around those fleeing war. Reading Bauloz's chapter, it would have been easy to believe that the interpretation and application of the law takes place in a vacuum, free of subjectivity or external influences. This is not to say that her recommendations are not clear, but simply to draw attention to a possible naivety in the idea that decision-making depends only on a "correct" interpretation of certain terminology. After all, the imprecise and contradictory nature of Article 15(c) of the EU Qualification Directive with which she grapples is itself the outcome of a political negotiation. The apolitical approach to analysis, not just in this chapter but more broadly throughout the book, appears particularly peculiar given the focus on the EU and that the issue of asylum seekers has become intensely politicized in this context. Given this, Jennifer Moore's chapter, which demonstrates a consensus around "humanitarian *non-refoulement*", is refreshing in its acknowledgment that legal provisions around protection are only part of a bigger and more complex assemblage of forces which influence the protection of war refugees, and a desire to use this for the better.

The above weaknesses will no doubt be frustrating to the reader; nonetheless, the authors collectively do make a number of valid arguments and lay some important groundwork in the use of IHL to support IRL, to potentially expand the protection available for war refugees. As part of a broader conversation, the conclusions reached in the book provide a source of optimism for the advancement of legal protection for war refugees. However, the book opens up almost as many lines of enquiry as it resolves. An obvious starting point for further research would be a greater regional focus, especially on how the application of IRL is playing out in contemporary situations of mass influx,

including assessment of the role or potential role of IHL on a country or regional level. This could enable identification of specific individuals or groups at increased risk of falling through a protection gap, and help pull analysis from the abstract to reality. Improving the collective understanding of the political dimensions of EU decision-making may expose some uncomfortable truths, but could perhaps lay the ground for more consistent and transparent decision-making. Finally, one chapter which stands out as suggesting a solution that could benefit large groups of people is David Cantor and Diana Trimino Mora's, on the Cartegna Declaration. The interesting point is around affording groups fleeing conflict protection based on the geographic area that they come from, rather than on who they are; this appears to have the potential to overcome a number of evidential issues while being suitable for mass influx situations. It would be very interesting to explore this idea in greater depth and especially its potential for application outside Latin America, where provisions equivalent to the Cartegna Declaration do not exist.

Overall, the book clearly makes a timely and significant contribution to an important area of legal enquiry. It is encouraging that certain sections may genuinely extend protection to those who may not otherwise be seen as entitled to it. For example, if used, Eric Fripp's analysis could potentially extend protection to certain combatants or ex-combatants, and David Cantor's may do the same for those classified as refugees before the outbreak of a conflict. These concessions, and those put forward collectively throughout the book, appear somewhat piecemeal when faced with the current reality that the number of individuals fleeing conflict is unprecedented in recent times. The intention of the book is to broaden the parameters of the debate, and certainly it has succeeded in doing this, but only marginally. This is perhaps representative of the complexity of the area in focus: the absence of any "magic bullet" solution. It may also demonstrate a sense of realism and an acceptance of only incremental progress. However, enhancing protection for those fleeing war is among the most pressing contemporary issues, given the continuing and intensifying instability across the Middle East and parts of Africa. This demands a level of ambition and imagination beyond what is offered in *Refuge from Inhumanity? War Refugees and International Humanitarian Law*.

## BOOK REVIEW



# The Role of National Courts in Applying International Humanitarian Law

**Sharon Weill\***

**Book review by Shane Darcy**, Lecturer at the Irish Centre for Human Rights, National University of Ireland Galway.

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States have exhibited a perennial wariness towards allowing judicial oversight of conduct during situations of armed conflict, by either international or national judicial bodies. While the prosecution of war crimes by international courts and tribunals over the past two decades has marked an upsurge in the judicial application of international humanitarian law (IHL) and invigorated scholarly interest in the area,<sup>1</sup> the jurisdictional reach of these bodies has been tightly circumscribed. The *ad hoc* international criminal tribunals have been granted a temporary existence, and their jurisdiction has usually been tied to a specific time frame and geographical location. Even the exceptional International Criminal Court (ICC) only addresses war crimes reaching a certain threshold, when committed by nationals of a State party or on its territory, and where national authorities have been unwilling or unable to investigate or prosecute the offences.<sup>2</sup> The United Nations Security Council represents an unlikely route for triggering the universal reach of the ICC, given the dominance of the “Permanent Five” members and the less than enthusiastic support for the Court by several of those States.

That State sovereignty would be a barrier to any broad judicial role was evident during the drafting of the Geneva Conventions – States would not agree

\* Published by Oxford University Press, Oxford, 2014. The views expressed here are those of the book reviewer alone and not of the International Committee of the Red Cross.

to a proposal to grant compulsory jurisdiction to the ICC. The Plenary Assembly of the 1949 Diplomatic Conference heard that:

To deplore the inadequacy of the procedure for settling disputes under international law is almost a commonplace. Whereas national legislations generally provide for the repression of any infringement of their rules, and whereas all legal disputes are settled by the national courts of justice, the dogma of State sovereignty in international law has proved an insurmountable obstacle to any generalization of a system of compulsory international jurisdiction.<sup>3</sup>

The deliberately limited part played by international courts in this context, as Sharon Weill observes, “reinforces the important responsibility carried by national jurisdictions”.<sup>4</sup> Yet, as she discusses and analyzes at length in *The Role of National Courts in Applying International Humanitarian Law*, domestic judicial bodies are also subject to certain restrictions when addressing wartime conduct.

It was apparent during the preparation of the Geneva Conventions that States considered national courts the more appropriate venue for judicial consideration, if any, of matters relating to conduct during armed conflict. The judicial enforcement of IHL, Weill points out, “relies primarily on domestic courts”.<sup>5</sup> As the first detailed treatment of this subject, this book is a welcome and long overdue contribution to the existing literature on international law and IHL, which has not previously provided such a comparative analysis of the national application of IHL.<sup>6</sup> Against the backdrop of an increased number of national cases concerning IHL, Weill’s book provides “a theoretical framework for the analysis of national jurisprudence in the field of IHL”.<sup>7</sup> National courts do not enjoy the same degree of detachment that international tribunals have from domestic politics and pressures, and this invariably impacts on the national

- 1 See, for example, Derek Jinks, Jackson Nyamuya Maogoto and Solon Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies*, TMC Asser Press, The Hague and the Netherlands, 2014; Leslie C. Green, “The International Judicial Process and the Law of Armed Conflict”, *Military Law and the Law of War Review*, Vol. 38, No. 4, 1999; Allison Marston Danner, “When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War”, *Vanderbilt Law Review*, Vol. 59, No. 1, 2006; Shane Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law*, Cambridge University Press, Cambridge, 2014.
- 2 Rome Statute of the International Criminal Court, 17 July 1998 (entered into force 1 July 2002), UN Doc. A/CONF.183/9, Arts 12(2), 17(1).
- 3 Report drawn up by the Joint Committee and presented to the Plenary Assembly, *Final Record*, Vol. II, Section B, 1949, p. 131.
- 4 *The Role of National Courts in Applying International Humanitarian Law*, p. 7.
- 5 *Ibid.*, p. 7.
- 6 See generally Timothy L. H. McCormack and Gerry J. Simpson (eds), *The Law of War Crimes: National and International Approaches*, Kluwer Law International, Boston, MA, 1997; Igor P. Blishchenko, “Judicial Decisions as a Source of International Humanitarian Law”, in Antonio Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Editoriale Scientifica, Naples, 1979; Robert Y. Jennings, “The Judiciary, National and International, and the Development of International Law”, *International and Comparative Law Quarterly*, Vol. 45, No. 1, 1996; Vincent Chetail, “The Contribution of the International Court of Justice to International Humanitarian Law”, *International Review of the Red Cross*, Vol. 85, No. 850, 2003, pp. 235 ff.
- 7 *The Role of National Courts in Applying International Humanitarian Law*, p. 2.



application of IHL. It is these dynamics and influences which are at the heart of Weill's book. She focuses on the "functional role" of national courts, and the book has as one of its primary aims the deconstruction of the "contradictory and often incoherent positions in which national courts place themselves when applying IHL".<sup>8</sup> Weill proposes a methodology for understanding court decisions "in order to decipher properly their functional role".<sup>9</sup> According to the spectrum of roles she identifies, courts might:

serve as a legitimating agency of the state; avoid exercising jurisdiction for extra-legal considerations; defer the matter back to the other branches of government; enforce the law as required by the rule of law; or, develop the law and introduce ethical judgment beyond the positive application of the law.<sup>10</sup>

These various roles are analyzed in turn in the individual chapters of the book, which provide a thorough and critical demonstration as to why the domestic application of IHL is neither "predictable nor consistent".<sup>11</sup>

At the outset of the study, Weill observes how the unique context of armed conflict serves to place obstacles in the path of national courts that may seek to "oversee the state's exercise of its war time power".<sup>12</sup> She elaborates:

The conduct of wars has traditionally been left to the discretion of the executive and its professional agencies. Their information is generally kept out of the public domain. This concealment prevents the effective crystallization of public opinion, impairs public ability to influence decision-making, and weakens the demand for judicial scrutiny over armed conflict issues. These and other socio-psychological factors that favour unity and support for the state (all of which typically emerge in times of crisis and violence) lead to a weakening of the checks and balances of the democratic system, not least its oversight by the judiciary.<sup>13</sup>

Even where in a position to exercise such oversight, judges have shown a tendency to defer to military decisions taken on the battlefield, except perhaps in especially egregious cases. This judicial approach is apparent in a couple of cases which are not explicitly mentioned by the author, but which can be seen to confirm her analysis. In a 2013 case concerning British soldiers in Iraq, the UK Supreme Court expressed the view that a court should be "very slow indeed to question operational decisions made on the ground by commanders".<sup>14</sup> A UK-US Claims Arbitral Tribunal sitting over a century earlier, in 1910, also preferred to defer to those in the field on questions of military necessity:

8 *Ibid.*

9 *Ibid.*

10 *Ibid.*

11 *Ibid.*

12 *Ibid.*, p. 1.

13 *Ibid.*

14 *Smith et al. v. Ministry of Defence*, UKSC 41, 2013, paras 64–65.



The determination of these necessities ought to be left in a large measure to the very persons who are called upon to act in difficult situations, as well as to their military commanders. A non-military tribunal, and above all an international tribunal, could not intervene in the field save in case of manifest abuse of this freedom of judgment.<sup>15</sup>

Such deference is but one manifestation of the complex relationship between judicial bodies and State actions during situations of armed conflict. Weill's study helps the reader to make sense of these interactions, with its in-depth and thought-provoking analysis of national jurisprudence on IHL.

The book's structure is based on the spectrum of judicial roles put forward by the author, beginning with apologist in Chapter 1 and ending with utopian in Chapter 4. This schema obviously borrows from the work of Martti Koskenniemi in part,<sup>16</sup> and although the author does not explain the rationale for drawing on Koskenniemi in this way, the approach provides a useful means of characterizing the varying judicial approaches to the application of IHL. The reader is faced in Chapter 1 with the author's sternest criticism of the national application of the laws of armed conflict. Focusing on Israel and Serbia, Weill portrays the relevant courts as apologists for State wrongdoing. She shows that in certain instances judicial bodies are used to give legitimacy to governments and their policies by way of judicial review, given that such a process tends to lead to only the most serious of illegal acts being overruled.<sup>17</sup> Courts in this apologist category have tended to give a judicial imprimatur to wrongful activity, while demonstrating their independence "through the rare landmark cases in which they rule against the interests of the state".<sup>18</sup> In this chapter, Weill looks at the "hidden politics of the law", arguing that judicial interpretation allows for the making of policy choices, and that when making decisions, national courts "choose the most politically convenient option".<sup>19</sup>

In Weill's well-argued opinion, the Israel High Court of Justice, sitting in judicial review of the acts of military commanders, has largely acted as an apologist for Israeli military actions. Through its questionable treatment of the law of occupation, she starkly concludes, the Court has "not only legitimized the creation of a segregation regime in the [Occupied Palestinian Territories], but has actively contributed to its formation by providing the state with the necessary legal tools required to design and implement it".<sup>20</sup> Its approach has been one marked by selectivity, excessive deference to military opinion, and a failure to

15 Cited in *Affaire des Biens Britanniques au Maroc Espagnol (Spain v. United Kingdom)*, 1 May 1925, *Rapport III, Reports of International Arbitral Awards*, Vol. 2, 1949, p. 645, trans. in Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Stevens & Sons, London, 1953 (reprinted by Grotius Publications, 1987), p. 65. For further discussion, see S. Darcy, above note 1, p. 146.

16 Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge University Press, Cambridge, 2005.

17 *The Role of National Courts in Applying International Humanitarian Law*, pp. 13–14.

18 *Ibid.*, p. 14.

19 *Ibid.*, pp. 15–17.

20 *Ibid.*, p. 25.

look at policies in their broader context.<sup>21</sup> The chapter also provides a consideration of the record of the Belgrade War Crimes Chamber, which stands as a rare example of a domestic court which has prosecuted its own nationals for crimes associated with a recent conflict.<sup>22</sup> Although created under international pressure, the Chamber is a domestic judicial body without international staff or judges, and lacking in sufficient expertise on IHL. As examples of its apologist approach, Weill highlights how the prominent *Scorpions* ruling was “in line with the political interest of the state”, while similarly the prosecutor refused to apply command responsibility and prosecute high-ranking commanders.<sup>23</sup> The focus on lower-level accused, she finds, was the result of either “political pressures or self-imposed restraints”.<sup>24</sup> The chapter provides an important reminder of the undoubted propensity for a regressive application of IHL by national judicial bodies.

In Chapter 2, Weill turns to the avoiding role played by domestic courts, whereby doctrines such as act of State, political question, *forum non conveniens* and combat immunity result in States being “shielded” from judicial scrutiny.<sup>25</sup> The chapter focuses principally on the United States and United Kingdom, where higher courts have avoided “politically sensitive cases through the application of self developed doctrines”.<sup>26</sup> Alien Tort Statute decisions, for example, have tended to reflect the State Department’s position on whether to allow or deny jurisdiction, with courts mostly, but not always, seeking to avoid interfering in political questions and foreign affairs. Weill finds that US courts can “rely on convenient jurisprudence to decide on a *state by state* basis whether it is *appropriate* to adjudicate and apply IHL or whether it is *appropriate* to avoid rendering justice”.<sup>27</sup> She usefully contrasts the US and Israeli courts’ approach to justiciability in the context of targeted killings.<sup>28</sup> The chapter concludes by suggesting that an international court’s intervention may be desirable where the oversight provided by national courts proves unsatisfactory.<sup>29</sup>

The subsequent chapter addresses the normative role of national courts, and provides a more positive account of the part played by judicial bodies in limiting the conduct of States during armed conflicts. Weill finds that domestic courts are showing “a growing determination and willingness to exercise their role of ‘law enforcer’ for violations of IHL during armed conflict”.<sup>30</sup> The influence of human rights law is also addressed in Chapter 3, with courts more likely to tackle individual rights violations rather than matters pertaining to conduct of hostilities.<sup>31</sup> The same can be said for international courts applying

21 *Ibid.*, pp. 34–39.

22 *Ibid.*, p. 47.

23 *Ibid.*, pp. 60–63.

24 *Ibid.*, p. 65.

25 *Ibid.*, p. 65.

26 *Ibid.*, p. 82.

27 *Ibid.*, p. 100 (emphasis in original).

28 *Ibid.*, pp. 102–109.

29 *Ibid.*, p. 115.

30 *Ibid.*, p. 117.

31 *Ibid.*, pp. 153–154.

IHL, whereby “Geneva” law addressing the protection of civilians, detainees and prisoners of war has and continues to receive far more attention than “Hague” law applicable to the conduct of hostilities.

The final substantive chapter looks at the “utopian role” played by judges when they engage in activism and the development of the law. The latter occurs, Weill argues, where national courts interpret treaty rules beyond acceptable limits, perhaps “in the name of ethical values”, or where they identify a new rule of customary international law without sufficient evidence. Such occurrences are not unknown in the international jurisprudence on IHL,<sup>32</sup> and indeed judge-made law has been a feature of common-law legal systems. However, this is problematic for the international legal order:

When adjudicating between two parties, if the court chooses to develop the law rather than just applying the law appropriate to that particular case, unforeseen consequences may result. It is questionable whether a national court has the ability, or the willingness, to take into consideration the global consequences of its ruling, which may go beyond the particular interests of the litigating parties.<sup>33</sup>

The chapter reveals that in national jurisprudence applying the laws of armed conflict, such decisions are “extremely rare”, with the *Ferrini* case in Italy, involving the lifting of State immunity for *jus cogens* crimes, standing apart.<sup>34</sup> Weill notes that the case went against settled practice on the matter, as the International Court of Justice confirmed, and that the Italian courts were in fact guilty of double standards.<sup>35</sup> While accepting that judges have some discretion in choosing between claims of varying legal merits, she considers that when they enter “the twilight zone of utopia, that choice is no longer an implementation of a legal rule, but the execution of a moral value”.<sup>36</sup> It can be difficult, of course, to draw fine lines here, especially if unwritten customary international law is being applied by the courts.

The concluding chapter provides an assessment of the different roles accorded to national courts by the author over the preceding pages with regard to various rule of law principles. The rule of law requires that the judiciary be “independent, impartial [and] accessible” and that it provide “an effective and equal enforcement of the law”.<sup>37</sup> For Weill, the record of national courts in this regard has proven deficient; she considers there to be a demonstrable structural bias in favour of the State during adjudication, which at its worst reveals “judicial practice based on double standards, bias and impartiality”.<sup>38</sup> She provides a very

32 See, for example, S. Darcy, above note 1, pp. 216–221.

33 *The Role of National Courts in Applying International Humanitarian Law*, p. 158.

34 *Ferrini v. Germany*, Corte Suprema di Cassazione, sezioni unite civili, Appeal Decision No. 5044/4, 11 March 2004.

35 *The Role of National Courts in Applying International Humanitarian Law*, pp. 160–163.

36 *Ibid.*, p. 177.

37 *Ibid.*, p. 180.

38 *Ibid.*, p. 184.

valuable section at the end of the book entitled “Looking Forward” which usefully summarizes the factors that influence the performance of national judiciaries addressing the laws of armed conflict.

The book demonstrates a healthy scepticism towards judicial bodies and presents a strong critique at times of the record of national bodies, motivated by the author’s desire for “the optimal fulfilment of the international rule of law”.<sup>39</sup> The book is thoroughly researched and unquestionably timely, and will appeal to scholars of IHL and international law, as well as those with an interest in the judicial function and the interaction of different legal regimes. Military lawyers, international and domestic judges, and the legal advisers of non-governmental and inter-governmental organizations will also be richly rewarded by reading this book. The critique presented by Weill contributes significantly to our understanding of how judicial bodies apply IHL and the motivations and dynamics underlying such application. The book also acts as a counterpoint to an emerging discourse which claims that military activities are becoming increasingly and indeed overly restricted by the expansion of applicable legal rules and the growing reach of judicial bodies, particularly with regard to developments in international human rights law.<sup>40</sup> Weill’s analysis demonstrates that there remains considerable scope for enhancing judicial oversight of the activities of parties to armed conflict.

<sup>39</sup> *Ibid.*, p. 199.

<sup>40</sup> See, for example, Thomas Tugendhat and Laura Croft, “The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power”, Policy Exchange, 2013. See also Christopher P. M. Waters, “Is the Military Legally Encircled?”, *Defence Studies*, Vol. 8, No. 1, 2008.



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## OPINION NOTE

# From remote control to remote management, and onwards to remote encouragement? The evolution of MSF's operational models in Somalia and Afghanistan

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### Abstract

*This Opinion Note continues the discussion started in Antonio Donini and Daniel Maxwell's "From Face-to-Face to Face-to-Screen: Remote Management, Effectiveness and Accountability of Humanitarian Action in Insecure Environments", published previously in the Review, by exposing the realities of Médecins Sans Frontières' (MSF) struggle with the issue of remote management. By reviewing MSF's experience with remote management in Somalia and Afghanistan, the authors explore how operational compromise evolves over time, based on specific contextual factors, and highlight the challenges that this form of compromised action poses to MSF's identity and principles.*

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## Remote management as a form of compromise: What is at stake?

The strength of traditional humanitarian approaches resided in the proximity and empathy that were at the core of a relationship which, even if it was unequal, stressed the common humanity of those involved. ... Without a modicum of presence, empathy and solidarity, the humanitarian endeavour is at risk of losing its meaning.<sup>1</sup>

The statement above is among the conclusions drawn by Donini and Maxwell in their recent article for this publication exploring the implication and the impacts of “remote management” on the aid industry. As remote management becomes more commonplace in insecure environments, opinion on its validity is divided in the aid community, between aid organizations and within organizations themselves. While many of these aid actors consider that remotely managed programming is a logical evolution of the industry, Médecins Sans Frontières (MSF) struggles against this trend. Although MSF resists, reformulates and nuances this discussion in its own terms, it is not above the debate on remote management, and no consensus has been reached on how to handle the many issues surrounding it.

The parameters of the term “remote management” and its implications as established by Donini and Maxwell accurately reflect the way the concept is employed in the industry today, and MSF’s understanding of it does not differ in any consequential way from their proposed definition.<sup>2</sup> We have therefore chosen to focus our analysis on the questions of identity and principle that remote management raises for MSF, and we will illustrate the organization’s experiences through the case studies of Somalia and Afghanistan. We will argue that this debate is necessary and that this tension between identity, compromise and evolution in the sector is essential to maintaining principled action in the humanitarian endeavour.

MSF’s default mode of programming is a “direct action” model which involves mixed national and international teams in every project it runs. Core to our sense of humanitarian action is the notion of “being there” for reasons of principle, identity and quality, and most notably to safeguard impartiality in conflict settings. The organization generally operates with a ratio of around one to ten international to national employees, which is significantly higher than the 3% standard of some other major aid actors.<sup>3</sup> MSF’s charter offers a claim to “full and unhindered freedom in the exercise of its functions”, and invokes the principles of independence and of bearing witness, which embody MSF’s spirit in

1 Antonio Donini and Daniel Maxwell, “From Face-to-Face to Face-to-Screen: Remote Management, Effectiveness and Accountability of Humanitarian Action in Insecure Environments”, *International Review of the Red Cross*, Vol. 95, No. 890, 2014, pp. 383–413.

2 “The withdrawal of senior international or national humanitarian managers from the location of the provision of assistance or other humanitarian action which represents an adaptation to insecurity and a deviation from normal programming practice”: *ibid.*, p. 384.

3 Abby Stoddard, Adele Harmer and Katherine Haver, “Providing Aid in Insecure Environments: Trends in Policy and Operations”, HPG Report No. 23, September 2006, p. 39.

direct action.<sup>4</sup> Beyond its charter, MSF has revisited the theme of “direct” engagement in many pivotal documents and assemblies throughout its history. In both the Chantilly Agreement and the La Mancha Agreement – two key documents which formalize the evolution of the organization – MSF reaffirms its commitment to bearing witness with international staff on the ground as well as through “direct control over the use and surveillance of its resources”.<sup>5</sup>

With the proliferation of humanitarian crises where humanitarian access is denied or where aid workers and their assets are deliberately targeted, such as in Somalia, Afghanistan, Pakistan, Syria, Libya and Mali among others, the pressure on the organization to “adapt” or experiment with less direct operational models has increased. Following a widespread internal debate, MSF’s International General Assembly in 2013 ratified, by an overwhelming majority, a motion that introduced the following paragraph into MSF’s vision statement:

We value direct medical action, proximity and bearing witness by mixed teams of international as well as national staff. Therefore, remote management or the selection of staff based on gender, ethnicity, nationality or religion will only be accepted in exceptional cases, and even then only as a temporary measure.<sup>6</sup>

This statement addressed concerns that an unchecked tendency to compromise, in ways described above, would eventually erode the organisation’s identity and values. The organisation thus again reaffirmed a direct implementation model while reserving a margin for temporary adaptation in exceptional circumstances.

In settings of armed conflict, remote management and other compromised modes of intervention call into question an aid agency’s ability to conduct independent assessments and deliver aid impartially. It is generally understood that in armed conflict, belligerent parties seek to control, appropriate, divert or withhold aid for various obvious tactical and political reasons. It therefore follows that independent needs assessments and need-based programming can be, or rather tend to be, subversive to some degree as they challenge the agenda of one or more of the warring parties. Jean-Hervé Bradol explains:

Humanitarian action is necessarily subversive, since partisans of the established order rarely empathise with those whose elimination they tolerate or decree. In other words, the first condition for the success of humanitarian action is refusal to collaborate in this fatal selection process.<sup>7</sup>

Outsiders to a conflict, despite having a lesser understanding of the culture and institutions of a context, have the benefit of an external point of reference that

4 MSF Charter and Principles, available at: [www.msf.org/msf-charter-and-principles](http://www.msf.org/msf-charter-and-principles).

5 The Chantilly Principles, 1995, available at: [http://association.msf.org/sites/default/files/rst\\_library\\_item/Principles%20Chantilly%20EN.pdf](http://association.msf.org/sites/default/files/rst_library_item/Principles%20Chantilly%20EN.pdf); the La Mancha Agreement, 2006, available at: [http://association.msf.org/sites/default/files/rst\\_library\\_item/La%20Mancha%20Agreement%20EN.pdf](http://association.msf.org/sites/default/files/rst_library_item/La%20Mancha%20Agreement%20EN.pdf).

6 From Note 2: Compromises to our Modus Operandi, MSF International General Assembly, Brussels 27–29 June, 2013.

7 Jean-Hervé Bradol, “The Sacrificial International Order and Humanitarian Action”, in Fabrice Weissman (ed.), *In the Shadow of Just Wars*, C.: Hurst & Co, London, 2004, p. 9.

hasn't already been appropriated by the local political landscape. Additionally, a foreign agency's temporary engagement can somehow act as protection in that a foreign entity would be the culpable party in challenging the established order and thus can shield local engaged and willing personnel from the fallout of being controversial. This commonly occurs in scenarios where a manager is faced with pressure to hire certain personnel, or purchase from certain suppliers within networks of patronage that favour local strongmen; or, on a higher level, when challenging authorities to allow for assessments or provision of aid for those most in need, rather than those in their zone of control. The weight and reputation of an international agency can (but does not necessarily) shield local employees from the repercussions generated by dogged negotiations with potentially dangerous parties. The struggle with authority is touched upon by François Jean:

[An independent needs assessment] needs to be paired with a more comprehensive analysis of the causes of the target population's deteriorating situation, particularly to determine whether it is the result of any strategy on the part of political authorities ... [T]his obligation of fairness is very different from the notion of even-handedness between parties that can be dictated by a false conception of neutrality.<sup>8</sup>

While "direct" operational models can have a clear added value, in an increasing number of conflicts, there are warring parties who consider that certain Western nationalities are by default proxies in the conflict. The public decapitation of aid worker David Haines at the hands of his captors is a tragic and painful example of an armed group enacting vengeance against international armed forces by the simple association of nationality.<sup>9</sup> It is quite commonplace for MSF and other aid agencies to self-censor with regards to nationality in phase with the understanding of local perceptions when certain nationalities are not perceived as neutral (American and British being those commonly restricted by MSF).

In practice, operational managers will use nuanced language to describe the compromises they make, in accordance with the light in which they would like to cast their chosen model of intervention. But at what point do these compromises with the preferred direct intervention model begin to constitute a new norm, and at what point do we begin to feel that they are at irreconcilable odds with humanitarian principles? It is the gradual evolution of compromise and its impact on the aid environment and the organizations acting within it that we must seek to understand when addressing the question of remote management. When MSF's international president, Dr Unni Karunakara, announced the organization's decision to close all activities in Somalia, he likened the evolution of MSF's ever-increasing compromise to the anecdotal frog in boiling water: the

8 François Jean, *From Ethiopia to Chechnya: Reflections on Humanitarian Action, 1988–1999*, MSF, 2008, pp. 164–165.

9 See "David Haines – Obituary", *The Telegraph*, 14 September 2014, available at: [www.telegraph.co.uk/news/obituaries/11095290/David-Haines-obituary.html](http://www.telegraph.co.uk/news/obituaries/11095290/David-Haines-obituary.html).

organization realized it had been pushed too far only when it was too late.<sup>10</sup> While most decision-makers within MSF agreed with this decision, others viewed it as too categorical and believed that despite everything, the organization's operations were of too great a value to the local population to be given up.

## **The evolution of MSF remote control in Somalia between 2008 and 2011: From security necessity to political imposition**

On 28 January 2008, Victor, Damien and Billan were killed in Kismayo by a roadside bomb which hit their car close to the hospital where they were working for MSF.<sup>11</sup> Although the motivation for this attack was never conclusively established, it soon became apparent that it was deliberate and targeted. The three MSF workers were not victims of an unfortunate incident: they were murdered. MSF's immediate reaction was natural: all expatriate personnel were immediately evacuated from Somalia. What was surprising to most people not directly managing the operation was not the decision to evacuate, but the scale of the evacuation: more than 120 expatriate staff left the country the next day.

While it is common for MSF to have so many (or even more) international staff on the ground in a crisis, people were alarmed that this was also the case in Somalia, where it was notoriously difficult to work. Since 1997, the number of agencies working with expatriate staff based inside Somalia had steadily declined,<sup>12</sup> and Somalia gained the reputation of a "no-go" zone for foreigners. Many aid agencies in 2008 managed their operations by "remote control", later rebranded as "remote management", using Nairobi as the base for international staff for the Somalia projects, and "managing" operations inside the country by phone and Internet. Where possible, aid agencies would make unannounced and unpredictable "flash visits" to the project locations, so as not to become completely disconnected from the operational reality while minimizing the risk of targeted attacks.

Even though MSF had 120 international staff on the ground, its "direct action" model of operations was already converging with the "remote management" model adopted by most other aid agencies, even before the attack in Kismayo. There was a brief window of opportunity in 2006, when the Islamic Courts seized power in Mogadishu and large parts of Southern and Central Somalia and established brutal but effective control over the warlords, removing all checkpoints and guns from the streets. MSF and other agencies were able to expand rapidly in the six months during which the Islamic Courts ruled, including the project in Kismayo where three of its staff later died. This period of relative security and access was brief, however, as the country was plunged into

10 Andrew Gilligan, "Is Foreign Aid Just Money Down the Drain?", *The Telegraph*, 17 August 2013, available at: [www.telegraph.co.uk/news/politics/10248706/Is-foreign-aid-just-money-down-the-drain.html](http://www.telegraph.co.uk/news/politics/10248706/Is-foreign-aid-just-money-down-the-drain.html).

11 MSF, "Three MSF Aid Workers Killed in Fatal Incident in Kismayo", press statement, 28 January 2008, available at: [www.msf.org/article/three-msf-aid-workers-killed-fatal-incident-kismayo-somalia](http://www.msf.org/article/three-msf-aid-workers-killed-fatal-incident-kismayo-somalia).

12 Mark Bradbury, *State-building, Counterterrorism, and Licensing Humanitarianism in Somalia*, Feinstein International Center, Tufts University, Medford, MA, 2010, p. 8.

fragmented chaos after the intervention of Ethiopian troops. Although MSF had medical projects in sixteen locations throughout the territory by the end of 2007, security was so bad in many of them that the expatriate teams spent more time in Nairobi than on the ground due to repeated evacuations. In some locations this occurred so frequently that the actual time spent on the ground meant the operation differed very little from the “flash visits” used by other agencies. To the untrained eye, MSF expatriates were not flying “out” of their project for an evacuation; they were flying “in” for a visit. Consequently, MSF had already started to debate whether it should be more honest about the operational reality in these projects and formally switch to a remote management model.

These discussions came to a rapid conclusion following the Kismayo killings. The targeted nature of the attack, combined with the already tenuous presence prior to the incident, made the choice inevitable. MSF would join the rest of the humanitarian agencies and adopt a remote management approach to Somalia. This was the second time MSF had adopted this policy structurally – the first time was in Chechnya in 2001 – and in both cases it was triggered by a serious security incident and considered as a temporary measure.

However, in Chechnya, remote management was still firmly in place seven years later, and the teams immediately suspected that the situation would be the same in Somalia for the long haul. MSF was able to benefit from its long history in the country, where over the years it had created a large pool of experienced and well-trained Somali staff who could continue to provide medical services in much the same way, in the absence of the international managers. This pool included staff from the neighbouring countries – Kenyan and Ethiopian nationals with an ethnic Somali background who quickly made up a third category, wedged in between expatriate and national staff: the so-called “regionals”. It was thought that concerns regarding a loss of impartiality would be mitigated as these regionals did not have direct economic, political or family links to the project locations they supervised.<sup>13</sup> With the exception of Kismayo, which was formally closed, almost all projects resumed activities according to this new model within weeks. In a few locations in the north, expatriate presence was still judged possible and so MSF’s overall ability to manage its operations seemed strong.

For the first year, the remote management model did not change much on the ground. Flash visits by expatriates were still possible, and activities remained largely the same. Some suggested that, in retrospect, it actually made things easier and there was less friction as it signalled increased trust and commitment to the staff and community. There was, however, a tangible change in the decision-making process, most notably in decisions taken through direct negotiations with the armed groups.<sup>14</sup> As noted in the introduction to this piece, in a direct action approach one of the main tasks of the expatriate staff is to front negotiations with

13 Abby Stoddard, Adele Harmer and Jean S. Renouf, “Once Removed: Lessons and Challenges in Remote Management of Humanitarian Operations for Insecure Areas”, *Humanitarian Outcomes*, February 2010, p. 27.

14 A. Stoddard, A. Harmer and K. Haver, above note 3, p. 33.

armed actors; this cannot be maintained when operating on a remote model. As most of these negotiations concern small, daily issues, most of them go unnoticed by the nominal supervisors based in Nairobi. Slowly, however, the distance between the expat staff and the daily reality grows.

Over the course of the same year, the frequency and length of the flash visits diminished. This reduced presence on the ground was the result of a perceived increase in security risks, but this was hard to verify without independent risk assessment. The security risks on the ground were reported by national staff, who may have had an interest in minimizing the presence of expatriate staff as this brought complications and tensions. This implies that national staff had a natural tendency to err on the side of caution, and to recommend more often than not that expatriate staff could not travel to the project location, which further increased the distance between them and the operational reality on the ground.

MSF began to question the national staff's overly cautious approach, especially in project locations firmly controlled by Al Shebab. Al Shebab had evolved from the Islamic Courts, and its methods of control were similarly brutal and highly effective. Clans, warlords and criminal groups, which had brought so much insecurity to many regions of Somalia, could not operate freely under the Al Shebab administration. In a sense, Al Shebab-controlled locations tended to be some of the safest locations. Discussions regarding whether or not to engage again with expatriate staff on the ground were cut short when Al Shebab decided to ban all foreigners from its territory in mid-2009.<sup>15</sup> For a period, regional staff – Kenyans and Ethiopians with a Somali background – were still allowed to work, so there were still some, more impartial or independent international personnel on the ground, and the MSF projects were consequently branded “remote control – light”. By 2010, most of the local commanders had also banned these regionals from their territory. All MSF projects in Al Shebab-controlled areas were now under full remote control.

Major investments were made in this period to mitigate the expected negative aspects of this model. One of the main concerns was around the quality of the medical services, so a huge investment was made to improve the training of national staff: regular flights bringing senior staff to Nairobi were organized, and hardware was put in place to improve phone and internet connections in order to facilitate video links for “telemedicine” and remote medical consultations by doctors based in Nairobi. To mitigate the expected pressures on impartiality, a management model was developed to allow national staff to credibly defer sensitive decisions to the hierarchy in Nairobi. Finally, to counter concerns about accountability, remote monitoring tools were developed to reduce the risk of resources being diverted or misappropriated. There is no doubt that the investments in training have resulted in the continuation of high-standard medical services. The success of the other measures, however, is less clear, as impartiality is hard to quantify and accountability has been a problem in Somalia regardless of the intervention model.

15 A. Donini and D. Maxwell, above note 1, p. 399.

Over the same period, in locations that were outside Al Shebab control, such as Mogadishu and Galkayo, MSF slowly brought expatriate staff back in. Although never to the level of a formal permanent presence, flash visits increased and there were longer periods of expatriate presence. Ironically, this meant that MSF had no international staff in the safer locations controlled by Al Shebab, but had a resumed expatriate presence in the more insecure areas outside of Al Shebab's direct control. Not surprisingly, this triggered a fundamental and emotional debate inside MSF on the legitimacy of remotely managed humanitarian interventions. For some, remote management is as legitimate as any other operational model, as long as the final objective of delivering quality medical assistance is achieved. Proponents of this argument were backing up their position by showing the medical output, numbers of lives saved, people cured and medical data to prove that quality standards were met. Those that argued against this model said that MSF's identity and principles were at stake, and questioned the impartiality of the medical interventions, the reliability of the (near-perfect) data and the lack of proximity to the patients. They emphasized that even if one can measure the outcomes for patients in the hospital, there was no real understanding of the situation of people outside of the hospital and no data on those who may not have been able to access it in the first place.

The development of the humanitarian environment in Somalia in March 2011 posed the greatest challenge to proponents of the remote model. Reports of drought, displacement and malnourishment began to arrive from the rural heartland of Southern and Central Somalia,<sup>16</sup> a region that was primarily under the control of Al Shebab. MSF made some attempts in the spring of that year to launch an exploratory mission into the regions reported to be the worst affected, but access continued to be denied. Not only international and regional staff but also local personnel from nearby MSF projects were forbidden from entering these regions. In other words, all potential independent needs assessments were banned and MSF was unable to operate there. Although staff in some of the MSF projects were proactive and creative in their attempts to address this emergency, many other projects fell into a "trap" or "rut"<sup>17</sup> – i.e., they tended to maintain the status quo. While external reports on the drought and displacement became harder to ignore, many remotely managed MSF projects, although based around the same region, did not report anything at all and continued to churn out routine medical reports, again raising doubts about the impartiality of the response.

The upshot of this was that MSF did very little in terms of emergency response until large numbers of displaced people entered accessible areas like Dadaab refugee camp in Kenya and the outskirts of Mogadishu in July of that year. As the emergency response geared into action, international personnel were deployed *en masse* to these locations, complete with full charter cargo planes to support the rapid deployment of nutrition and measles treatment centres for

16 "Drought-Hit Somalia on Brink of Humanitarian Disaster, Warns UN Expert", UN News Centre, 2 March 2011, available at: [www.un.org/apps/news/story.asp?NewsID=37660#.VBq4Y\\_mSy9o](http://www.un.org/apps/news/story.asp?NewsID=37660#.VBq4Y_mSy9o).

17 A. Stoddard, A. Harmer and K. Haver, above note 3, p. 33.



hundreds of thousands of people. Operating under the paradigm that direct action works best in emergencies, MSF paid a heavy price for this massive scale-up in its activities. In October 2011, two expatriate members of staff were kidnapped in Dadaab refugee camp in Kenya, and two months later, in December, two others were shot dead inside MSF's compound in Mogadishu. The two hostages would be held captive for some twenty-one months. Shortly after their release in July 2013, recognizing that there was no longer any respect for aid workers among any of the parties to the conflict, MSF decided to close down all of its medical programmes in Somalia, including those in the autonomous regions of Somaliland and Puntland.<sup>18</sup> MSF made the announcement on 14 August, and within days, work was under way to organize the closure of all projects, including the management of remaining patients, outstanding payments and the donation of medical stocks. Although plans allowed one month for the projects to manage all these matters properly and safely, the process took less than twenty-four hours in most of the remotely managed projects in Al Shebab-controlled zones. Al Shebab officials arrived at the gates of the MSF compounds immediately after the announcement, confiscated the keys, expelled the MSF staff and all the patients, even those who were in mid-treatment, and took over the structures and all their assets. The speed and ease with which this transition took place begs the question: how much did MSF really "manage" in these remote management projects in the first place?

The Somalia case raises questions regarding impartiality and independence, and the progressive nature of MSF's compromise in its operations demonstrates how rational decision-making in the moment brought the organization to an untenable position over time. In turn, this evolution poses deeper questions about MSF's identity. The attacks conducted on its international personnel, the complicity of local authorities and the fundamental compromises required to continue to work remotely left MSF with no other option but to leave.<sup>19</sup>

## **MSF returns to Afghanistan, 2009–2011: Remote control rejected against the conventional wisdom of the aid community**

On 2 June 2004, Helene, Willem, Egil, Fasil and Besmillah, all working for MSF, died when the clearly marked MSF ambulance in which they were travelling to an MSF clinic in Badghis province, northern Afghanistan, came under gunfire.<sup>20</sup> As in Somalia, although the motivation for this attack was never conclusively established,

18 MSF, "MSF Forced to Close All Medical Programmes in Somalia", press statement, 14 August 2013, available at: [www.msf.org/article243/msf-forced-close-all-medical-programmes-somalia](http://www.msf.org/article243/msf-forced-close-all-medical-programmes-somalia).

19 *Ibid.* To the surprise of many, this closure also affected Somaliland (where no incidents took place) and not Dadaab in Kenya (where the two Spanish staff were abducted). The rationale behind this was that the authorities accused (Al Shebab, TFG) were allowed to freely circulate in Somaliland, and not in Kenya. In practice, of course, they freely circulate in both places, hence the controversial nature of this decision.

20 MSF, "Five MSF Workers Killed in Serious Incident in Afghanistan", press release, 2 June 2004, available at: [www.msf.org/article/five-msf-workers-killed-serious-incident-afghanistan](http://www.msf.org/article/five-msf-workers-killed-serious-incident-afghanistan).



it was soon evident that it was deliberate and targeted. MSF immediately evacuated its personnel from some project locations, reduced numbers in others and put many projects on hold. What followed, however, was unprecedented in the history of MSF. Less than a month after the incident, MSF announced that it would completely close all its projects in Afghanistan, and leave the country.<sup>21</sup> After previous incidents in other countries, MSF had usually closed the project where the incident occurred, and sometimes the MSF office responsible for the project would leave the country. For the entire MSF movement to withdraw, especially from a country where it had such a long history and so many projects – at the time of closure MSF was responsible for health care in thirteen of Afghanistan’s provinces – was exceptional. Publicly the justification for this decision was based on the collusion of all the parties in the Afghan conflict in the killing of the five staff members. On the government side, it quickly became clear that a local policeman was involved in the killing, but his bosses in Kabul were unwilling to hold him to account. Meanwhile, the Taliban claimed responsibility for the attack. Although it was unlikely that they were actually involved, some commanders were quite willing to claim responsibility to boost their image of influence and reach. Privately, there was also a significant emotional element to MSF’s decision. MSF had a long history of engagement with Afghanistan, and had remained present during some of the worst periods of its history. The brutal assassinations, followed by the government and opposition’s indifference towards punishing the perpetrators, triggered a strong feeling of betrayal, which fed into the decision to leave.

Our analysis of remote management in the Afghan context begins four years later, in mid-2008, when MSF was ready to re-engage in the country. Since its departure, the situation had deteriorated dramatically in terms of security, while humanitarian needs, in a country that had already been at the bottom of health, poverty and development tables even in peaceful times, predictably increased. In addition, the ICRC had started discussions with MSF to encourage a return to Afghanistan, as it was struggling to find health actors willing to work in the more insecure regions of the country. This had put pressure on the ICRC to engage in general health activities well beyond its mandate and capacities.

MSF deployed an exploratory team to Kabul to see if a return was feasible. The outcome of this visit was a clear yes, but with a recommendation to follow a model of operations which was “low profile” and “relying on senior national staff”. In other words: remote control. This was hardly surprising, as the conventional wisdom of the aid community in Kabul was “less is more” when it came to expatriate presence. The United Nations, in its Humanitarian Action Plan for 2009, observes that: “In areas where insecurity prevents access, there has been an increased reliance on programme delivery and monitoring through local partner organisations.”<sup>22</sup>

21 MSF, “MSF Pulls Out of Afghanistan”, press release, 28 June 2004, available at: [www.msf.org/article/msf-pulls-out-afghanistan](http://www.msf.org/article/msf-pulls-out-afghanistan).

22 UN Office for the Coordination of Humanitarian Affairs, *Humanitarian Action Plan for Afghanistan*, Geneva, 2009, p. 1.

The kidnapping of foreigners had grown into an industry, road travel was all but impossible except for Afghans with sufficiently long beards, and large parts of the south were controlled by the Taliban, who did not allow foreign staff into their regions. On the development side, where working through local partners is the preferred model, a similar assessment was made for monitoring health-care indicators. The Afghan Ministry of Health (MoH) channelled all health-related overseas development funding through NGOs for implementing the ambitious goals that were defined in the Basic Package of Health Services (BPHS). In its 2009 document, the Afghan MoH notes that:

Insecurity is still another challenge which reduces the population's access to the health care services. It also limits monitoring visits to the provinces where BPHS is being implemented. This may result in a compromise of the quality and possibly a lack of transparency in terms of quality services provision.<sup>23</sup>

This meant that even local health officials could no longer reach their structures, and had to rely on remote control. In this environment the recommendation to MSF to consider remote control was logical. Moreover, this model of operations would resemble MSF's projects over the border in Pakistan at the time, where security in the Pashtu areas had deteriorated.

MSF's team arrived in Afghanistan in January 2009 with a clear brief to restart medical activities, concentrating on the conflict regions outside Kabul, and with a firm recommendation to copy the Pakistan mission's "national staff-driven, low-profile model". At the time, the reality of the reigniting conflict was readily apparent within the aid community, who were beginning to adapt their intervention mode accordingly, yet the health sector remained entrenched in the development logic outlined in the BPHS, channelling all funds through the MoH in Kabul.

Upon arrival, the team was inundated with reams of reports and megabytes of data showing in detail health structures, population figures, prevalence tables, mortality and morbidity figures and treatment outcomes. Such forthcoming and positive data was suspect. The monitoring system deployed by the BPHS was outsourced to the John Hopkins University in the US, who employed the system known as "the balanced scorecard", which produced health data in colour-coded spreadsheets, with green indicating that targets were achieved or exceeded. On first glance, these sheets were a sea of green with an occasional yellow or red dot. This seemed improbable in a context where even the MoH admitted its own staff could hardly travel, newly displaced people were arriving in Kabul fleeing the intensive fighting, and very few qualified health staff dared to work in the countryside. As no expatriate and very few senior national staff could travel outside of Kabul, most of the data were collected by the local health workers whose continued financing depended on a positive outcome of the monitoring exercise. Faced with this quandary, MSF decided that any assessment had to be

23 Ministry of Public Health, Islamic Republic of Afghanistan, *A Basic Package of Health Services for Afghanistan*, Kabul, January 2009, p. 10.

conducted by an expatriate team to guarantee a disinterested and impartial overview, even if the organization still considered remote management to be the most feasible mode of running the project.

In May 2009, MSF sent an expatriate-led assessment team to Helmand province, which at the time was at the centre of the conflict between international forces and the Taliban. On paper in Kabul, the main hospital for the province in its capital Lashkar Gah was a successful 150-bed facility with general surgery capacity, sufficient medical staff and good to excellent health outcomes, according to the “balanced scorecard”. What the MSF team found on the ground was this:

The hospital is beautiful, spacious, well designed with an almost perfect infrastructure, but it has 53 doctors who run it like a butcher shop mostly aimed at marketing their own private clinics. The few patients that are admitted (the register showed 39 on the day of assessment) hang around on the ward a bit lost as most of the nurses seem to be continuously occupied drinking tea in their offices. Between 10 and 11 AM, all of the Doctors and a large part of the Nurses rush off to their jobs in the numerous private clinics in town, the biggest one of which is owned by the Provincial Health Director.<sup>24</sup>

The impact of this assessment on the decisions around operational models was profound, and the following operational discussions were animated by a simple logic: if numerous NGOs with similar expertise and capacity to MSF have not been able to provide a relevant outcome with the remote management approach, it would be irrational to assume this would be different for MSF. The idea of employing remote management was instantly taken off the table and a direct management model was considered essential for meaningful impact on the ground.

A direct model of intervention with mixed international and national teams in the heart of the conflict zone went completely against the grain of the conventional wisdom of the aid community in Afghanistan. Only a handful of organizations maintained an expatriate presence in the south, and they were able to do so because they were either protected by an armed force or by agreement with opposition forces active in the region. As military protection was not an option, such an agreement was therefore also required for MSF, and negotiations with the opposition forces started the same month. These discussions with the central leadership of the Taliban (the so-called “Quetta Shura”), had an unexpected outcome. Permission to start medical activities in Helmand was relatively easily obtained, in contrast with MSF’s failed access negotiations with Al Shebab in Somalia. MSF ascribed its quick success in Afghanistan to the good reputation it had built between 1996 and 2001, when the Taliban had been in power in Kabul. Many of the current members of the Shura had occupied ministerial posts in Kabul before, including the crucial (“shadow”<sup>25</sup>) minister of

24 MSF, “Helmand – Lashkar Gah Assessment”, internal report, 2 May 2009.

25 The official name of the Taliban is “Islamic Emirates of Afghanistan”, which is the old name used during their rule in Kabul. From their point of view, they are the legitimate government of Afghanistan, currently in exile, driven out by foreign invaders. Following that logic, their man is the legitimate, not the “shadow”,

health. When the details of the *modus operandi* were discussed, they had a final demand: the doctors MSF brought to run the hospitals had to be expatriate doctors, because they said they “didn’t trust any of the local doctors”. Moreover, these expatriate doctors, and their cars and compounds, had to be clearly marked with MSF logos. This last precondition was basically so that their fighters could recognize which foreigners not to kill.

This logic is in sharp contrast with that expressed by Al Shebab in Somalia, indicating that remote management is not the *de facto* future of the industry, even in a context where Western armed actors are engaged. The decision to reject remote control was at first a choice made by MSF, but later this approach was actually imposed as a condition and locked into the deal with the dominant armed group. Five years on, MSF is working in four locations, three of which are conflict zones in Helmand, Khost and Kunduz, each with a large, highly visible expatriate team. For now the deal is holding, but there are clear limitations. Safe travel by road remains unreliable and difficult for foreigners, so MSF locations are limited to where a plane can fly. Despite the Taliban’s request that MSF open projects in five remote locations in the heartlands of their constituency, the organization has only managed to travel to assess one of them. The others were never reached as local Taliban commanders were never able to overcome their fear of a Trojan horse. Although the leadership considered that humanitarian assistance was vital in these locations, when it came to negotiations on each checkpoint, the local commanders could not be convinced that not *all* foreigners attract drones. To some this may suggest that alternative operational models should be considered in order to reach these distant regions with no access to supplies or services, but so far this has not been explored.

## From remote management in Somalia to “remote encouragement” in Syria: A compromise too far?

Casting a broader focus beyond these two case studies, we must note that similar struggles exist in a proliferating number of contexts today. In Mali, MSF responded to the kidnap risk posed to Western expatriate staff by imposing restrictions not just on nationality, but even on the skin colour of its international staff, resulting in teams mostly staffed by regional nationalities. This recalls the early decrees by Al Shebab, which initially restricted access to staff with a Somali ethnic background from the region, but eventually deteriorated into the banning of all foreigners. In the case of Syria, MSF tried many avenues of intervention, but eventually concluded that most regions controlled by the opposition were too dangerous for international staff. Access to areas controlled by the government was outright denied to the agency. As the intensity of the conflict is extreme and the resulting needs immense, MSF has taken the unusual

minister of health. However, the term “shadow” was widely used to refer to members of their parallel administration.

measure of supporting local networks of medical actors who provide desperately needed medical care in areas which the international NGOs cannot reach. While this helped build the trust and confidence required for working directly on the ground in some parts of opposition-controlled northern Syria, the kidnapping of five of MSF's personnel in early 2014 led to the eventual withdrawal of its entire international staff, and there is no clear prospect of a meaningful return.

As the remaining programme is largely donations of medical supplies to third parties, what is left, at best, is a concept of "remote encouragement". The point of departure is the failure of the organization to be relevant if it sticks to a classic direct intervention model. This additional step, even farther from the field than in remote management, simply enables groups to do what they would do anyway without MSF's "encouragement". Any true pretence of control is absent in this model, as is the idea of "management", since these groups are not even employed by MSF. However valid, useful or life-saving, can we still consider that the aid is humanitarian – in the proper sense of the industry's definition of the term – or has it become more a form of philanthropy? "Without a modicum of presence, empathy and solidarity, the humanitarian endeavour is at risk of losing its meaning" is one of the conclusions of Donini and Maxwell. If this is considered valid, what does this mean about the organization's identity?

Beyond Syria, debates on replicating this third-party model are ongoing for other seemingly impenetrable contexts where needs are great and direct access is not possible. For a "Dunantist" organization like MSF, direct action remains the preferred model as the focus on immediate humanitarian needs requires a level of impartiality that is difficult to maintain in other operational models. Also, whilst concerns about quality and accountability can be largely mitigated by different management models, more principled issues like the dilemma of "outsourcing" the risk to national staff are less easy to fix.

Also, remote management, usually conceived as a temporary adjustment, tends to become a self-perpetuating situation. National staff have little incentive to reintroduce the risk associated with expatriate presence to their projects, and armed groups or other authorities have little reason to invite back nosy foreigners once the resources are secured. The case studies discussed in this paper show that there is no "one size fits all" model for managing operations in highly insecure contexts. What works well for one organization can be unacceptable to others in the same context. Each organization will adapt its intervention model to the local requirements and needs. For MSF, the evolution from remote control, to remote management, and finally to merely "encouraging" activities of third parties, may well be a step that pushes us to the limits of "humanitarianism" in the classical sense of the term. Yet it may also be the right thing to do considering the enormous needs and impossibility of intervening in a more direct manner in contexts like Syria.

While MSF may still decide what mode of operation is valid when the international system itself fails, organizations like MSF should never concede that

this evolution is inevitable unless we acknowledge that humanitarianism, as we have known it, is to some degree obsolete. While MSF's *modus operandi* will remain dynamic and will continue to evolve in accordance with the operational reality on the ground, debates around these issues will continue to shape and challenge the organization's identity in the coming years.



## CORRIGENDUM

# From remote control to remote management, and onwards to remote encouragement? The evolution of MSF's operational models in Somalia and Afghanistan – **CORRIGENDUM**

**Michiel Hofman and Andre Heller Pérache**

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The text of the above article by Michiel Hofman and Andre Heller Pérache has been amended since it was first published online.

The original version of this text represented the vote taken by MSF's International General Assembly as having been divided, rather than a resounding majority decision.

The article has now been corrected in order to assure historical accuracy.



## Reference

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# Special agreements as a means of enhancing compliance with IHL in non-international armed conflicts: An inquiry into the governing legal regime

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## Abstract

*Common Article 3 to the four Geneva Conventions encourages the parties to a non-international armed conflict to bring into force international humanitarian law provisions through the conclusion of special agreements. Since armed groups are ever more frequent participants in contemporary armed conflicts, the relevance of those agreements as means to enhance compliance with IHL has grown as well. The decision-making process of special agreements recognizes that all the parties to the conflict participate in the clarification and expansion of the applicable rights and obligations in a way that is consistent with the principle of equality of belligerents. This provides incentives for armed groups to respect the IHL rules they have themselves negotiated. However, even upon the conclusion of such agreements, it remains unclear which legal regime governs them. This paper will argue that special agreements are governed by international law instead of domestic law or a sui generis legal regime.*

**Keywords:** armed groups, special agreements, sources of international law, equality of belligerents, participants.

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When the Geneva Conventions (GCs)<sup>1</sup> were adopted on 12 August 1949, some general provisions were designed as articles common to the four treaties. Among them – and for the first time since the birth of international humanitarian law (IHL) – was a set of rules included in common Article 3 (CA3), which were intended to be applied by each party to a conflict “not of an international character occurring in the territory of one of the High Contracting Parties”.

One of the groundbreaking characteristics of CA3 is precisely that it creates equal obligations for States and armed groups (AGs).<sup>2</sup> This means that these non-State actors are, by virtue of this provision, directly addressed as subjects of IHL with

1 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); Geneva Convention (II) 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); Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); 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).

2 Jelena Pejić, “The Protective Scope of Common Article 3: More than Meets the Eye”, *International Review of the Red Cross*, Vol. 93, No. 881, 2011, pp. 197–198; Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, pp. 52–88; 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, p. 661. See also Anne-Marie La Rosa and Carolin Wuerzner, “Armed Groups, Sanctions and the Implementation of International Humanitarian Law”, *International Review of the Red Cross*, Vol. 90, No. 870, 2008, p. 328. Throughout this paper, the term “AG” will be used in a very general sense, including both armed groups fighting against each other and those fighting against governments. For a brief explanation on how these terms are being used in the international realm, see Ezequiel Heffes, Marcos D. Kotlik and Brian E. Frenkel, “Addressing Armed Opposition Groups through Security Council Resolutions: A New Paradigm?”, in Frauke Lachenmann, Tilman J. Röder and Rüdiger Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, Vol. 18, Brill Nijhoff, Leiden and Boston, MA, 2015, pp. 43–45.

specific obligations.<sup>3</sup> The importance of CA3 and its application to all armed conflicts has been recognized by a number of international tribunals.<sup>4</sup> Most notably, the International Court of Justice (ICJ) in its *Nicaragua* judgment asserted that its provisions “constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which in the Court’s opinion, reflect what the Court in 1949 called ‘elementary considerations of humanity’”.<sup>5</sup>

Despite its undisputed relevance, it has also been noted that certain aspects of IHL, such as the protection of civilians, the regulation of the means and methods of combat, and the respect for the Red Cross and Red Crescent emblems, are not included within the content of CA3.<sup>6</sup> However, the drafters of the GCs were certainly conscious of the many aspects of non-international armed conflicts (NIACs) that were being left without specific regulation. In fact, they envisaged and included an alternative solution within the text of CA3, by seeking that the parties expand their obligations through the conclusion of special agreements.<sup>7</sup>

Nowadays, as NIACs prevail in number over international armed conflicts (IACs),<sup>8</sup> AGs tend to play leading roles. Thus, if used wisely and taking into account their advantages and challenges, special agreements may prove to be of crucial

- 3 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, p. 1372, fn. 18; L. Moir, above note 2, pp. 65–67; Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, p. 152; Marco Sassòli, “Possible Legal Mechanisms to Improve Compliance by Armed Groups with International Humanitarian Law and International Human Rights Law”, paper submitted at the Armed Groups Conference, 2003, p. 6.
- 4 See, e.g., International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment (Trial Chamber), 2 September 1998, paras 608–609; Special Court for Sierra Leone (SCSL), *The Prosecutor v. Morris Kallon and Brima Bazzy Kamara*, Case No. SCSL-04-15-PT-060, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, paras 45–47. See also J. Pejić, above note 2, pp. 197–198; L. Moir, above note 2, p. 56; J. Somer, above note 2, p. 661.
- 5 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, *ICJ Reports* 1986, para. 218.
- 6 L. Moir, above note 2, p. 88. Of course, it cannot be ignored that many shortcomings of the GCs were dealt with to some extent within the framework of the 1977 Additional Protocols (AP I and AP II) – specifically, AP II develops and supplements CA3 and addresses important matters such as the protection of the civilian population. Additionally, many rules of customary IHL have also developed as applicable to non-international armed conflicts. See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), p. xxxiv.
- 7 Christopher Greenwood, “Scope of Application of Humanitarian Law”, in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict*, Oxford University Press, Oxford, 2008, p. 56. For an explanation on the existence of special agreements even before CA3, see Michel Veuthey, “Learning from History: Accession to the Conventions, Special Agreements and Unilateral Declarations”, *Collegium*, No. 27, 2003, pp. 140–143.
- 8 Recent surveys have concluded that the great majority of ongoing armed conflicts around the world are non-international. According to different sources, the total number of armed conflicts in recent years fluctuates between thirty and thirty-eight, and only two or three of them are considered to be international. See Stuart Casey-Maslen (ed.), *The War Report 2013*, Oxford University Press, Oxford, 2014, pp. 28–29; Stuart Casey-Maslen (ed.), *The War Report 2012*, Oxford University Press, Oxford, 2013, pp. 3–4. See also data available from the Uppsala Conflict Data Program, available at: [www.pcr.uu.se/research/ucdp/](http://www.pcr.uu.se/research/ucdp/).

importance for encouraging compliance with IHL by all parties to the conflict, and especially by AGs. This will be the main argument of the following section.

The second part of this article will deal with one of the main challenges regarding special agreements: the lack of a unified view on which legal framework regulates such agreements. Different alternatives will be explored, and it will be argued that the regulation of special agreements by international law is the most appropriate solution in order to deal effectively with IHL compliance issues.

## **What are special agreements, and why are they useful tools for enhancing IHL compliance in NIACs?**

Just like any other actor in the international realm, AGs make public statements on their ideological perspectives, their justification for the use of force, and other moral, political and historical aspects of their own existence. Some of these expressions are also intended to affirm their commitment to applying a set of international rules in the context of the armed conflicts in which they are involved.<sup>9</sup>

Unilateral declarations, codes of conduct and special agreements have been used by several AGs in order to express their views on the applicable international rules during armed conflicts.<sup>10</sup> They have even been encouraged or facilitated by third parties, such as States, international organizations, the International Committee of the Red Cross (ICRC) and non-governmental organizations.<sup>11</sup> Of these instruments, only special agreements are an expression of concurrent will. In particular, CA3 establishes that “[t]he Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention”.<sup>12</sup> In light of this wording, special agreements can be understood as explicit commitments between two or more parties to a NIAC to comply with certain rules of IHL, and they may be expressed in a signed document, a joint declaration or any other form. They are essentially public expressions of a concurrent will to abide by IHL.

9 See Olivier Bangerter, “Internal Control: Codes of Conduct within Insurgent Armed Groups”, in *Small Arms Survey*, Occasional Paper No. 31, November 2012, pp. 4 ff., available at: [www.smallarmssurvey.org/fileadmin/docs/B-Occasional-papers/SAS-OP31-internal-control.pdf](http://www.smallarmssurvey.org/fileadmin/docs/B-Occasional-papers/SAS-OP31-internal-control.pdf); Marcos Kotlik, “Reconocimiento de beligerancia y uso de la fuerza: La construcción de legitimidad en la Selva Lacandona”, in Emiliano Buis (dir.), *¿Justificar la guerra? Discursos y prácticas en torno a la legitimación del uso de la fuerza y su licitud en el Derecho Internacional*, Eudeba, Buenos Aires, 2014, pp. 241–242.

10 A.-M. La Rosa and C. Wuerzner, above note 2, pp. 332–333. See also Sandesh Sivakumaran, “Lessons for the Law of Armed Conflict from Commitments of Armed Groups: Identification of Legitimate Targets and Prisoners of War”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011, p. 463.

11 Marco Sassoli, “Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law”, *Journal of International Humanitarian Legal Studies*, No. 1, 2010, p. 30. See also Gérard Aïvo, “Le Rôle des Accords Spéciaux dans la Rationalisation des Conflits Armés Non Internationaux”, *Revue québécoise de droit international*, No. 27.1, 2014, pp. 23–30.

12 CA3. A similar provision can be found in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Article 19(2). Although our analysis is focused on CA3, we believe it would also be applicable to special agreements under the 1954 Hague Convention. However, even if Article 19(2) of the 1954 Hague Convention did not exist, the parties to NIACs could still reach agreements concerning the protection of cultural property based solely on the text of CA3.

The above definition makes no distinction between agreements concluded by States and AGs and those exclusively concluded between the latter.<sup>13</sup> For example, in recent NIACs, special agreements have been concluded between States and AGs in Indonesia and Sudan,<sup>14</sup> but also exclusively between non-State entities in Somalia and El Salvador.<sup>15</sup> Moreover, under the same definition, ceasefire agreements and peace agreements could also be included within this category inasmuch as they bring into force humanitarian provisions, since they are concluded by the parties to the conflict.<sup>16</sup> Examples of these agreements can be found in Angola and in Liberia.<sup>17</sup>

- 13 A special agreement exclusively between AGs can be envisaged taking into account that an armed conflict “exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed opposition groups or *between such groups within a State*” (emphasis added). International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70.
- 14 Cessation of Hostilities Framework Agreement between Government of the Republic of Indonesia and the Free Aceh Movement, 9 December 2002 (Indonesia Agreement), available at: [www.usip.org/sites/default/files/file/resources/collections/peace\\_agreements/aceh\\_12092002.pdf](http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/aceh_12092002.pdf); Humanitarian Ceasefire Agreement on the Conflict in Darfur, 2 April 2004, available at: [http://peacemaker.un.org/sites/peacemaker.un.org/files/SD\\_040408\\_Humanitarian%20Ceasefire%20Agreement%20on%20the%20Conflict%20in%20Darfur.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/SD_040408_Humanitarian%20Ceasefire%20Agreement%20on%20the%20Conflict%20in%20Darfur.pdf); Protocol on the Establishment of Humanitarian Assistance in Darfur, 8 April 2004, available at: [http://peacemaker.un.org/sites/peacemaker.un.org/files/SD\\_040408\\_Humanitarian%20Ceasefire%20Agreement%20on%20the%20Conflict%20in%20Darfur.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/SD_040408_Humanitarian%20Ceasefire%20Agreement%20on%20the%20Conflict%20in%20Darfur.pdf).
- 15 General Agreement Signed in Addis Ababa on 8 January 1993, available at: [www.usip.org/sites/default/files/file/resources/collections/peace\\_agreements/somalia\\_01081993\\_gen.pdf](http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/somalia_01081993_gen.pdf); Agreement on Implementing the Cease-Fire and on Modalities of Disarmament (Supplement to the General Agreement Signed in Addis Ababa on 8 January 1993), available at: [www.usip.org/sites/default/files/file/resources/collections/peace\\_agreements/somalia\\_01081993\\_sup.pdf](http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/somalia_01081993_sup.pdf); *Acuerdo político entre el FMLN y la Juventud Militar para la constitución del nuevo ejército*, 1981, available at: <http://www.cedema.org/ver.php?id=4788>. Sivakumaran mentions the 2008 *Acte d’engagement* concluded in the Democratic Republic of the Congo as an agreement between AGs. Although it is true that AGs undertake most of the commitments in the agreement and that the government is initially only referred to as a facilitator, Article 4 establishes specific obligations upon the Government. Hence, it is not clear to what extent the *Acte d’engagement* can be considered as exclusively concluded between armed groups. Sandesh Sivakumaran, *The Law of Non-International Armed Conflicts*, Oxford University Press, Oxford, 2012, p. 133; *Acte d’engagement*, 2008, available at: [www.essex.ac.uk/armedcon/story\\_id/000720.pdf](http://www.essex.ac.uk/armedcon/story_id/000720.pdf).
- 16 Of course, ceasefire agreements and peace agreements may also include provisions that do not deal with humanitarian concerns. However, this prevents neither their consideration as special agreements, nor their regulation under international law, as will be argued in the second part of this paper.
- 17 For example, in a ceasefire agreement concluded in 2002 between the government of Angola and UNITA, it was established that “[t]he task of re-establishing a cease-fire encompasses ... [t]he guarantee of protection for people and their possessions, of resources and public assets, as well as the free circulation of persons and goods”. Cease Fire Agreement between Angola Government and UNITA, 4 April 2002 (Angola Agreement), available at: [www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3e81949e4](http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3e81949e4). In the case of peace agreements, references to IHL “most commonly pertain to the provisions of the law that continue to apply, or that come into force, after the cessation of hostilities .... [S]uch commitments have included ... the release of ‘prisoners of war’ or detainees belonging to the respective parties (e.g. in Angola, Bosnia and Herzegovina, Cambodia, Côte d’Ivoire, Liberia, and Sierra Leone), the duties of the parties towards evacuated, displaced and interned civilians (e.g. in Cambodia), the respective duties of military and civilian authorities to account for missing and dead members of armed formations and civilians (e.g. Rwanda, Bosnia and Herzegovina), and the duty of the parties to report the location of landmines (e.g. Rwanda).” ICRC, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, Geneva, February 2008, p. 26, available at: [www.icrc.org/eng/assets/files/other/icrc\\_002\\_0923.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf). Another agreement containing

Other instruments, such as unilateral declarations or codes of conduct, might contain humanitarian provisions adopted between one of the parties to the conflict and other actors such as the ICRC or non-governmental organizations.<sup>18</sup> Although they can also serve the purpose of encouraging IHL compliance, they are not concluded between the parties to the conflict, as framed in CA3.<sup>19</sup> This differentiates them from special agreements, as the latter's key feature is the concurrent will of the parties.

This particular characteristic also helps to explain why special agreements can be very useful tools for enhancing IHL compliance by AGs, even though there is no obligation to actually conclude them.<sup>20</sup> On the one hand, special agreements involve AGs in the process of creation of the rules that will bind them. On the other hand, in this process, it is possible for the parties to the conflict to agree upon specific rules that might not otherwise apply. In general, this is a unique opportunity for AGs to actually have some input on what their concrete rights and obligations will be. They may express their views as to what commitments they are factually prepared to undertake, and they may find incentives to comply if the other parties to the negotiations also show good will. Moreover, in some cases the parties will be able to agree upon enforcement mechanisms, a possibility that they do not usually have. Overall, this type of process may influence the perspective of AGs' leadership and create a sense of ownership of the agreed-upon rules among them, also making it easier to disseminate the content of the agreements to the members of the group. These features will be explained below.

humanitarian provisions is the 1993 Cotonu Agreement between the Interim Government of National Unity of Liberia, the National Patriotic Front of Liberia and the United Liberation Movement of Liberia for Democracy, which deals, for example, with the release of prisoners of war and detainees (Article 10), humanitarian assistance (Article 17) and repatriation of refugees (Article 18). Cotonu Agreement, 25 July 1993, available at: [www.refworld.org/docid/3ae6b5796.html](http://www.refworld.org/docid/3ae6b5796.html).

- 18 For example, the Deed of Commitment signed between the non-governmental organization Geneva Call and the Puntland State of Somalia. Geneva Call, Deed of Commitment under Geneva Call of Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action, Puntland State of Somalia, reproduced in Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, Vol. 3, ICRC, Geneva, 2011, pp. 1706–1708, available at: [www.icrc.org/casebook/doc/case-study/geneva-somalia-mines-case-study.htm](http://www.icrc.org/casebook/doc/case-study/geneva-somalia-mines-case-study.htm).
- 19 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, pp. 59–60. The author refers to “bilateral agreements” which “will generally only be concluded because of an existing situation which neither of the parties can deny, no matter what the legal aspect of the situation may in their opinion be”. Nevertheless, in our opinion, the fact that agreements between a single party to the conflict and other entities are not framed by CA3 does not mean that they have no legal value within the international realm. Quite the contrary, they may serve the important purpose of reaffirming and/or enabling compliance with international obligations.
- 20 In the Commentary to GC I, Pictet affirms that the parties are “under an obligation to try to bring about a fuller application of the Convention by means of a bilateral agreement” (emphasis added): *ibid.*, p. 59. This means that they must make an effort to reach an agreement. If this were not the case, it would seem improbable to think that a State would feel itself obliged to negotiate a special agreement with an AG, especially since these groups are by definition in breach of domestic law.

## The principle of equality of belligerents: Engaging AGs in the creation of IHL rules

In a NIAC, the effectiveness of IHL can be linked to several circumstances – for example, the unwillingness of the parties to acknowledge that a situation of violence amounts to an armed conflict, the absence of an incentive for the parties to abide by IHL, or AGs’ lack of an appropriate structure or resources.<sup>21</sup> The particular features of these conflicts have shown the importance of implementing strategies specifically aimed at achieving IHL compliance by these non-State actors. Accordingly, it has been pointed out that the means that AGs use to express their will can be very useful tools to that end, and that they should be encouraged and further studied since “they provide an indication as to the views of armed groups on humanitarian norms and they comprise a useful entry point for engaging with armed groups on humanitarian issues”.<sup>22</sup>

In the case of special agreements, it can be argued that they are not only entry points, but also crucial tools for achieving greater levels of respect for IHL in NIACs. One factor behind this is that special agreements are concluded through a process that entails the application of the principle of equality of belligerents, thus directly engaging AGs in the creation of IHL rules, along with other parties to the conflict.

The sole fact of participating in such negotiations may already help enhance IHL compliance for at least two reasons. First, negotiations enable the involved actors to engage in a conversation about humanitarian issues, which might otherwise not take place. Second, an additional incentive may be found in the fact that all parties will have the same opportunities to express their views, regardless of their domestic law asymmetry. AGs may not want to risk missing such a chance by committing acts contrary to IHL.

However, in order to fully understand this process and its relevance, it is important to begin by highlighting that CA3 addresses “each Party to the conflict” and that Additional Protocol II (AP II) applies to “all armed conflicts which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups”. This is of particular relevance because it allows the identification of a direct relationship between IHL rules and the parties to a NIAC. This relationship is the same for all parties, and it does not vary if the conflict is between a State and AGs or exclusively between the latter. In sum, what is implied in the texts of CA3 and AP II is that all parties to a NIAC have the same rights and obligations

21 ICRC, *Improving Compliance with International Humanitarian Law – ICRC Expert Seminars*, Report, October 2003, pp. 20–21, available at: [www.icrc.org/eng/assets/files/other/improving\\_compliance\\_with\\_international\\_report\\_eng\\_2003.pdf](http://www.icrc.org/eng/assets/files/other/improving_compliance_with_international_report_eng_2003.pdf); Olivier Bangerter, “Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011, p. 357.

22 S. Sivakumaran, above note 10, p. 464.



irrespective of their status. This is precisely the expression of the principle of equality of belligerents.<sup>23</sup>

This paper argues that this principle provides not only that the same rights and obligations bind all parties, but also that the source of those rights and obligations should be the same for all parties. This entails that all parties to an armed conflict, including AGs, have a role in the process of creation of IHL rules. The contrary would lead to subordinating AGs' obligations to those of the State, which appears to be an unacceptable outcome for several reasons.

From a practical point of view, it seems unlikely that AGs will accept any set of rules merely by the fact that it has been previously agreed upon by States, be it customary or treaty law.<sup>24</sup> This seems obvious when AGs are actually fighting against a State, but it also holds true when AGs are fighting each other, to the extent that the recourse to violence by these groups is usually contrary to the State's domestic law to begin with. In this sense, if IHL rules were to be considered binding upon AGs only by virtue of State acceptance, the perception of legitimacy of such rules from the standpoint of AGs would be diminished. This, in turn, would probably reduce the incentives provided to AGs to comply with IHL.

But even if an argument based upon the State's acceptance of IHL obligations on behalf of AGs is acknowledged as useful to explain why AGs must also comply with IHL in some cases, it most certainly does not provide a legal approach that is capable of covering every possible scenario. It is not clear how this kind of explanation would work in some complex situations, such as armed conflicts fought across borders by AGs but without State involvement.<sup>25</sup>

Also, as explained above, the texts of CA3 and AP II directly address AGs. Hence, a theoretical perspective that subordinates their obligations to those of States would straightforwardly ignore the standing of AGs in international law and vis-à-vis other parties.<sup>26</sup>

These problems affect the arguments that hold that AGs are bound by IHL because of their territorial link to a State party to the GCs, or because they act under the domestic legislative jurisdiction of a State party to the GCs.<sup>27</sup> In short, to what

23 On the principle of equality of belligerents, see Christopher Greenwood, "The Relationship between *Ius ad Bellum* and *Ius in Bello*", *Review of International Studies*, No. 9, 1983, pp. 221–234. Interestingly, Somer argues that the term "equality" is a narrow concept and proposes to use instead "parity", which better represents a general equality of status. See J. Somer, above note 2, pp. 661–662.

24 See Jean-Marie Henckaerts, "Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law", *Collegium*, No. 27, 2003, pp. 126–127; and L. Moir, above note 2, pp. 54–55.

25 Other unsolved situations are mentioned by J. Somer, above note 2, p. 661; and L. Moir, above note 2, pp. 55–56.

26 Antonio Cassese, "The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts", *International and Comparative Law Quarterly*, Vol. 30, No. 2, 1981, pp. 429–430.

27 Such argumentation is presented in J. Pictet, above note 19, p. 51; and Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. II: *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, ICRC, Geneva, 1960, p. 34. Additional explanations and critiques can be found in Jean d'Aspremont and Jérôme de Hemptinne, *Droit international humanitaire*, Pedone, Paris, 2012, pp. 98–99; and historically in A. Cassese, above note 26, p. 416; and Erik Castrén, *Civil War*, Soumalainen Tiedeakatemia, Helsinki, 1966, p. 154.

extent is it possible to attain AGs' compliance with rules imposed by their "enemies"?

Of course, there is a limit to AGs' refusal of previously agreed provisions. As explained in the introduction to this article, CA3 constitutes the minimum humanitarian norms to be respected in any armed conflict. The fact that it lies at the very foundation of IHL means that no actor can deny its existence and applicability during hostilities. The only alternative for AGs would be to deny any link whatsoever with the international community in the first place – that is, not to recognize the validity of the international legal system as a whole. In such a case (that is, even if an AG refused to recognize the validity of the international system), IHL would continue to apply. And in any case, AGs' members could still face criminal charges at the domestic or international level.

By contrast, the interpretation of the principle of equality of belligerents proposed in this paper can be upheld by supporting a different approach, although this represents a minority opinion. The above-mentioned problems can be dealt with by submitting that AGs' practice is in fact taken into account in the creation of IHL, particularly in the form of customary rules.<sup>28</sup> This has been argued by Sassòli, who explains, for example, that

[a] first step for creating a sense of ownership among armed groups is to involve them into the development and reaffirmation of the law. In my view, as far as customary IHL of NIACS ... [is] concerned, this already is the case. Customary law is based on the behaviour of the subjects of a rule, in the form of acts and omissions or (whether qualified as practice *lato sensu* or evidence for *opinio juris*) in the form of statements, mutual accusations and justifications for their own behaviour ... IHL implicitly confers a limited international legal personality to armed groups involved in armed conflicts, i.e., by providing them the functional international legal personality necessary to have the rights and obligations foreseen by it.<sup>29</sup>

According to this argument, AGs participate in the elaboration of IHL and are therefore bound by its provisions. As Somer suggests, "the notion that armed opposition groups are bound by the customary nature of their Common Article 3 obligations makes one question the meaning of 'equality' if they have been unable to participate in its formation".<sup>30</sup>

In fact, this perspective also gives insight into the process of creation of special agreements. As mentioned above, CA3 addresses "[t]he Parties to the conflict", and not exclusively the "High Contracting Parties", when it encourages their conclusion. This means that both States and AGs – or exclusively AGs if no State is involved in the conflict – should endeavour to bring into force other provisions of the GCs.

28 J. Somer, above note 2, pp. 661–662. See also Jann Kleffner, "The applicability of international humanitarian law to organized armed groups", *International Review of the Red Cross*, Vol. 93, No. 882, 2011, pp. 443–461.

29 M. Sassòli, above note 11, p. 13.

30 J. Somer, above note 2, p. 662.

Yet, some scholars have claimed that the principle of equality of belligerents could not be applied in NIACs because AGs' members remain at all times subject to domestic criminal law and may be prosecuted for its breach.<sup>31</sup> However, despite the legal prohibition of participating in armed conflict against the State, under *jus in bello*, all parties to an armed conflict have the obligation to comply with the same set of rules under the equality of belligerents principle.<sup>32</sup> Hence, CA3 merely invites the parties to broaden that set of rules and accommodates their capacity to actually accomplish this.

Thus, this recognition of AGs' capacity to conclude special agreements can also be understood as an application of the principle of equality of belligerents, in the sense that the parties which conclude such an agreement will not only be accepting the same rights and obligations as binding, but will also be doing so by virtue of the same reason: their own participation in the adoption of IHL rules. This can have a direct impact on IHL compliance, as pointed out by Ryngaert, who notes:

[I]t can hardly be denied that willingness to comply on the part of an actor is crucially dependent on the perception of it having consented to, or at least of having participated in, the formation of the law by which one is bound.<sup>33</sup>

This perspective highlights the link between special agreements and the principle of equality of belligerents. In doing so, it recognizes that such agreements might enhance the chances of AGs actually applying IHL, since they (i) address the direct relationship between IHL and AGs and avoid the practical problems that would otherwise result from the arguments concerning the territorial link and domestic legislative jurisdiction; (ii) provide an incentive for AGs to comply with IHL, as the negotiation process may demonstrate a mutual will to that end; (iii) create a sense of ownership, as AGs participate in the decision-making process, which leads them to be bound by those rules in the first place; and (iv) give AGs the opportunity to assess the feasibility of accepting or rejecting specific commitments as well as their factual ability to comply with them.

## The importance of specific commitments agreed upon by the parties

The second reason that special agreements are appropriate tools for enhancing IHL compliance in NIACs is related to their potential content. As these agreements comprise and formalize the concurrent will of two or more entities involved in a specific NIAC, they undoubtedly imply a minimum degree of willingness of all parties to apply and abide by IHL. In fact, they represent an unparalleled

31 S. Sivakumaran, above note 15, p. 243.

32 Marco Sassoli, "Ius ad bellum and Ius In Bello – The Separation between the Legality of the Use of Force and Humanitarian Rules to be Respected in Warfare: Crucial or Outdated?", in Michael Schmitt and Jelena Pejić (eds.), *International law and Armed Conflict: Exploring the Faultlines*, Martinus Nijhoff, Leiden and Boston, MA, 2007, p. 246.

33 Cedric Ryngaert, "Non-State Actors in International Humanitarian Law", in Jean d'Aspremont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law*, Routledge, Oxon, 2011, p. 288.

opportunity for the parties to NIACs to address mutual concerns: they can emphasize some existing rules that the parties consider to be especially relevant and bring into force other rules that might otherwise not be applicable to a particular armed conflict, such as the rules applicable to IACs. In this regard, the ICRC has affirmed that

[a] special agreement might either create new legal obligations by going beyond the provisions of IHL already applicable in the specific circumstances (a “constitutive” agreement), or it might simply restate the law that is already binding on the parties, independent of the agreement (a “declaratory” agreement). It may also be limited to specific rules that are particularly relevant to an ongoing conflict.<sup>34</sup>

Moreover, special agreements often include both declaratory and constitutive clauses. The importance of declaratory clauses is due to the fact that the parties have an opportunity to demonstrate their concurrent will, publicly expressing their intention to comply with pre-existing IHL obligations. For instance, the 1992 Agreement on the application of IHL between the parties to the conflict in Bosnia-Herzegovina, concluded at the invitation of the ICRC,<sup>35</sup> contained a commitment to respect and to ensure respect for the provisions of CA3, which was quoted in full. Similarly, the 1985 Nairobi Agreement between the military government of Uganda and the National Resistance Movement affirmed in its Article 1(i) that CA3 was applicable, while reproducing the full text in its Appendix D.<sup>36</sup> Also, the 2008 *Acte d’engagement* negotiated by multiple actors involved in the armed conflict in the Democratic Republic of the Congo includes, in Article III, the commitment to comply with IHL principles.<sup>37</sup>

When special agreements refer to specific provisions, they can be extremely beneficial, as “all parties concerned have a clear understanding of the nature and content of a particular commitment”.<sup>38</sup> If the specific rule was already binding for the parties (for example, if it is a part of CA3), its inclusion in the agreement will highlight the parties’ concrete concerns and reinforce their commitment to dealing with them in accordance with IHL.<sup>39</sup> Such normative references are an important symbolic resource that may impact the attitudes of individuals and

34 See ICRC, above note 17, p. 16.

35 Bosnia and Herzegovina, Agreement No. 1, 22 May 1992 (1992 Agreement), reproduced in M. Sassòli, A. Bouvier and A. Quintin, above note 18, pp. 1717–1721, and available at: [www.icrc.org/casebook/doc/case-study/yugoslavia-agreements-case-study.htm](http://www.icrc.org/casebook/doc/case-study/yugoslavia-agreements-case-study.htm).

36 Nairobi Peace Agreement, 17 December 1985, available at: [http://theirwords.org/?country=UGA&ansa=109&document\\_type=1](http://theirwords.org/?country=UGA&ansa=109&document_type=1)

37 *Acte d’engagement*, above note 15.

38 S. Sivakumaran, above note 10, p. 471.

39 Interestingly, Bangerter explains that in order to get AGs to respect IHL “or to respect it better, we need to understand the factors that influence their choices”. Thus, “[r]espect for IHL can only be encouraged – and hence improved – if the reasons used by armed groups to justify respect or lack of it are understood and if the arguments in favour of respect take those reasons into account”. See O. Bangerter, above note 21, pp. 354, 383.

have a preventive effect, even more than the acknowledgment of moral requirements.<sup>40</sup>

However, in the context of NIACs regulated only by CA3, special agreements also provide the opportunity to bring into force obligations that stem from the entire GCs, Additional Protocol I (AP I) and AP II. In fact, the ICRC has submitted that the parties “should be encouraged to include both treaty and customary rules”.<sup>41</sup> Thus, if the agreement includes rules that were not previously binding, those provisions will have a “constitutive” nature, since the parties will have voluntarily extended their rights and obligations.<sup>42</sup> For example, agreements concluded in Afghanistan, Angola, Liberia, the Democratic Republic of the Congo, Tajikistan and Uganda include clauses concerning the release of prisoners or detainees, and in some cases they also provide for the ICRC or other organizations to assist or to verify compliance with those commitments.<sup>43</sup> More broadly, in 1991 a Memorandum of Understanding was concluded between the parties to the conflict in the former Yugoslavia, making multiple references to rules of the GCs, AP I and the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices annexed to the 1980 Weapons Convention.<sup>44</sup>

Constitutive clauses are a key feature of special agreements, inasmuch as the parties have the opportunity to specifically assess, within the process of negotiations, the extent to which they are factually able to comply with those “new” rules. Afterwards, it might be quite difficult to argue that they lacked the structure or resources to comply with them, as such clauses were agreed upon during the conflict.

As stated above, a special agreement can include both declaratory and constitutive clauses at the same time. In this regard, the 1992 Agreement on the application of IHL between the parties to the conflict in Bosnia-Herzegovina<sup>45</sup> is also a good example of the inclusion of additional IHL rules. As mentioned, its

40 See Daniel Muñoz-Rojas and Jean-Jacques Frésard, “The Roots of Behaviour in War: Understanding and Preventing IHL Violations”, *International Review of the Red Cross*, Vol. 86, No. 853, 2003, pp. 192, 203.

41 See ICRC, above note 17, p. 16.

42 In order to assess precisely what rules were previously binding, it should be taken into consideration whether AP II – with its more restricted scope of application – was already in force between the parties to the conflict, or if the conflict was only regulated by CA3.

43 Afghan Peace Accord (Islamabad Accord), 7 March 1993, available at: [www.incore.ulst.ac.uk/services/cds/agreements/pdf/afgan1.pdf](http://www.incore.ulst.ac.uk/services/cds/agreements/pdf/afgan1.pdf); Peace Accords for Angola, May 1991, available at [www.incore.ulst.ac.uk/services/cds/agreements/pdf/ang1.pdf](http://www.incore.ulst.ac.uk/services/cds/agreements/pdf/ang1.pdf); *Acte d'engagement*, above note 15; Agreement on Cessation of Hostilities and Peaceful Settlement of Conflict between the Armed Forces of Liberia and the National Patriotic Front of Liberia and the Independent National Patriotic Front of Liberia, 24 October 1990, available at: [www.ucdp.uu.se/gpdatabase/peace/Lib%2019901024.pdf](http://www.ucdp.uu.se/gpdatabase/peace/Lib%2019901024.pdf); Agreement between the President of the Republic of Tajikistan, E. S. Rakhmonov, and the Leader of the United Tajik Opposition, S. A. Nuri, on the Results of the Meeting Held in Moscow on 23 December 1996, available at: [http://theirwords.org/media/transfer/doc/1\\_tj\\_uto\\_1996\\_03-787be4c90d0af3748b7c4630429c01b7.pdf](http://theirwords.org/media/transfer/doc/1_tj_uto_1996_03-787be4c90d0af3748b7c4630429c01b7.pdf); Nairobi Peace Agreement, above note 36.

44 Memorandum of Understanding of 27 November 1991, reproduced in M. Sassòli, A. Bouvier and A. Quintin, above note 18, pp. 1713–1717, and available at: [www.icrc.org/casebook/doc/case-study/yugoslavia-agreements-case-study.htm](http://www.icrc.org/casebook/doc/case-study/yugoslavia-agreements-case-study.htm).

45 1992 Agreement, above note 35.

text quoted CA3 in full, but the parties also agreed to bring into force other provisions concerning the protection of the wounded, sick and shipwrecked, of hospitals and other medical units and of the civilian population, the treatment of captured fighters, the conduct of hostilities, assistance to the civilian population and respect for the Red Cross and Red Crescent emblems. Even though the 1992 Agreement did not have the expected effect of preventing violations,<sup>46</sup> the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) would later use it to demonstrate the existence of a prohibition on attacking civilians.<sup>47</sup>

Similar examples can be found in several ceasefire agreements.<sup>48</sup> Among them, the 2004 Humanitarian Ceasefire Agreement on the Conflict in Darfur<sup>49</sup> is of particular relevance, since it was supplemented by a specific Protocol on the Establishment of Humanitarian Assistance in Darfur, where the parties agreed to apply the international principles enshrined in the GCs, AP I, AP II and a series of international human rights law instruments. Consequently, the Protocol mentions six guiding principles (humanity, impartiality, neutrality, dignity, transparency and accountability) and lays out operational criteria for the setting up of humanitarian assistance programmes by humanitarian agencies.<sup>50</sup>

It must be noted, then, that the parties to a NIAC can also agree to other kinds of obligations: if the purpose of special agreements is to broaden protection for the victims of armed conflicts, it should not come as a surprise that they may also include international human rights law provisions.<sup>51</sup> Examples of such practice can be found in agreements concluded in the Philippines and Sierra Leone.<sup>52</sup>

46 L. Moir, above note 2, p. 127; François Bugnion, “*Jus ad Bellum, Jus in Bello* and Non-International Armed Conflicts”, *Yearbook of International Humanitarian Law*, Vol. 6, 2003, p. 193.

47 ICTY, *The Prosecutor v. Enver Hadzihasanovic and Amir Kubura*, Case No. IT-01-47-AR73.3, Decision on Joint Defence Interlocutory Appeal of Trial Chamber on Rule 98bis Motion for Acquittal (Appeals Chamber), 11 March 2005, para. 28, fn. 51. For how the ICTY has used special agreements, see Luisa Vierucci, “‘Special Agreements’ between Conflicting Parties in the Case-Law of the ICTY”, in Bert Swart, Alexander Zahar and Goran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, Oxford, 2011, pp. 401–433.

48 See, for example, Agreement on a Ceasefire between the Government of the Democratic Socialist Republic of Sri Lanka and the Liberation Tiers of Tamil Eelam, 22 February 2002 (Sri Lanka Agreement), available at: [www.regjeringen.no/nb/dokumentarkiv/Regjeringen-Bondevik-II/ud/Lover-og-regler/2002/agreement\\_on\\_a\\_ceasefire\\_between.html?id=260701](http://www.regjeringen.no/nb/dokumentarkiv/Regjeringen-Bondevik-II/ud/Lover-og-regler/2002/agreement_on_a_ceasefire_between.html?id=260701); Indonesia Agreement, above note 14; Angola Agreement, above note 17.

49 In this agreement, among other relevant provisions, the parties “decided to free all the prisoners of war and all other persons detained because of the armed conflict in Darfur” and undertook “to facilitate the delivery of humanitarian assistance and the creation of conditions favorable to supplying emergency relief to the displaced persons and other civilian victims of war and this, wherever they are in the Darfur region, in accordance with the appendix attached to the present Agreement”. Humanitarian Ceasefire Agreement on the Conflict in Darfur, above note 14.

50 Protocol on the Establishment of Humanitarian Assistance in Darfur, above note 14.

51 S. Sivakumaran, above note 15, p. 125. Still, the legal basis for the inclusion of human rights obligations in special agreements can be disputed. See different arguments in L. Zegveld, above note 3, p. 50; and L. Moir, above note 2, p. 64.

52 In the Philippines, the government and the National Democratic Front of the Philippines devoted an entire part of a special agreement, composed of thirteen articles, to “respect for human rights”, addressing such matters as the right to life, the prohibition of summary executions, and involuntary

In addition, both when special agreements restate rules that were already binding and when they include rules not previously applicable, they can also be considered as an expression of the parties' *opinio juris* concerning the content of such provisions and *praxis* regarding AGs' active role in the process of creation of international customary law. This is a very clear example of the role that AGs may have in the formation of customary IHL rules.

Of course, there is also the possibility that special agreements are too vague or limited in scope, whether this is because States are worried about the potential granting of legitimacy to AGs,<sup>53</sup> because the parties to the conflict do not wish to commit to these norms and risk the possibility of their members facing criminal charges, or because the parties do not sincerely wish to comply with IHL.<sup>54</sup> But these risks are not a downside to the agreements as a form of expression *per se*; rather, they are the result of numerous factors involved in determining the actual will of the parties to comply with certain humanitarian norms. Moreover, as pointed out by Moir, in many cases even statements that only refer to a set of humanitarian principles can still be advantageous.<sup>55</sup> This is true for two reasons: (i) CA3 provisions are applied regardless, as they embody the underlying principles of IHL; and (ii) such statements may include principles not included in CA3, such as proportionality, or only included to some extent, such as distinction.<sup>56</sup>

In sum, one of the main advantages of special agreements, understood as tools for enhancing compliance with IHL, stems from the fact that they serve the purpose of clarifying the obligations that the parties to the conflict undertake. Equally important is the opportunity that the parties have to extend their rights and obligations by mutual agreement, after assessing the possibility of actually complying with them.<sup>57</sup>

Yet, it is very important to bear in mind that special agreements are concluded within the framework of IHL, and thus it seems fairly clear that they could never be used to diminish the rights and obligations enshrined in CA3.<sup>58</sup> In

disappearances. Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines, 16 March 1998 (Philippines Agreement), available at: [http://theirwords.org/media/transfer/doc/ph\\_ndfp\\_1998\\_17-ef3249df335f48cd378d1c5082457be4.pdf](http://theirwords.org/media/transfer/doc/ph_ndfp_1998_17-ef3249df335f48cd378d1c5082457be4.pdf). In Sierra Leone, the parties addressed political and civil liberties, with reference to other international human rights law instruments, in Article 19 of the Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, 30 November 1996, available at: [http://theirwords.org/media/transfer/doc/1\\_sl\\_ruf\\_1996\\_03-e377977056bb4bc499dfaa593507511d.pdf](http://theirwords.org/media/transfer/doc/1_sl_ruf_1996_03-e377977056bb4bc499dfaa593507511d.pdf).

53 Churchill Ewumbue-Monono, "Respect for International Humanitarian Law by Armed Non-State Actors in Africa", *International Review of the Red Cross*, Vol. 88, No. 864, 2006.

54 A.-M. La Rosa and C. Wuerzner, above note 2, pp. 332–333. See also S. Sivakumaran, above note 10, p. 464.

55 For example, the Protocol on the Establishment of Humanitarian Assistance in Darfur, above note 14.

56 L. Moir, above note 2, pp. 86–87, 274.

57 This may counter the argument of reciprocity that is sometimes used to justify IHL violations. D. Muñoz-Rojas and J.-J. Frésard, above note 40, p. 202.

58 Arai-Takahashi deals with similar issues during IACs. Based on Article 47 of GC IV, he explains that "the rights of protected persons in an occupied territory must not be derogated from by ... an agreement entered into by parties to the conflict. This provision prohibits only negative derogation (*la derogation négative*). It does not prevent parties from entering into agreements to broaden the ambit of rights for



any case, if such an agreement were concluded, CA3 would still continue to apply, as its rules constitute the minimum standard that protects individuals against any attempt to implement a lower threshold of protection.<sup>59</sup> As for the agreement in itself, those provisions less protective than CA3 would be inapplicable, while other clauses could remain in force, as long as they are compatible with that article.

Another advantage of these agreements, as mentioned in the previous section, is that they can easily be publicized and AGs can also use them to transmit a unified message or instructions to all their membership and to promote respect for IHL within the group and outside of it. This is a crucial feature, taking into account the identification of individuals with the group to which they belong and the relevance they give to orders that stem from those whom they consider to be the legitimate authority.<sup>60</sup> As explained by Muñoz-Rojas and Frésard, in order to achieve respect for IHL,

the rules must be translated into specific mechanisms and care must be taken to ensure that practical means are set in place to make this respect effective. In other words, it is necessary, wherever possible, including with non-State bearers of weapons, to opt for an integrative approach. This means an approach which provides ... for the rules to be incorporated into the orders passed down through the chain of command, and that combatants are given the necessary means of ensuring that their behaviour can indeed comply with IHL.<sup>61</sup>

However, the potential contribution of special agreements to the effectiveness of IHL in NIACs may go beyond the above observations. As mentioned before, special agreements can also provide an opportunity for AGs to agree upon the creation or implementation of enforcement mechanisms.

On the one hand, in the absence of a more complex or institutionalized structure or resources, special agreements can serve as tools for AGs to demand greater compliance with IHL by the other parties to the conflict. Despite some discussions on AGs' capacity to try and convict those responsible for IHL breaches,<sup>62</sup> these non-State actors typically do not have direct access to any kind of institutional mechanism to that end. Special agreements will usually not

protected persons (*la dérogation positive*).” See Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, Martinus Nijhoff, Leiden and Boston, MA, 2009, p. 273.

59 See ICJ, above note 5, para. 218. The question remains, though, as to what extent special agreements can modify rules of other international treaties, such as AP II when applicable, or even customary rules. In the context of IACs, certain provisions attempt to address this matter: Article 6 of GCs I, II and III and Article 7 of GC IV all prohibit any special agreement that may adversely affect the situation of the wounded, sick, shipwrecked, prisoners of war, and medical and religious personnel. Article 10(5) of GCs I, II and III and Article 11(5) of GC IV also forbid certain derogations by special agreements. See also François Bugnion, *Le Comité International de la Croix-Rouge et la protection des victimes de la guerre*, ICRC, Geneva, 1994, pp. 502–504.

60 D. Muñoz-Rojas and J.-J. Frésard, above note 40, pp. 193–195, 203–204.

61 *Ibid.*, pp. 203–204.

62 J. Somer, above note 2.



change that reality, but the commitments made therein might enable AGs to publicly condemn any violation of the agreed rules.

On the other hand, the mechanisms available to ensure IHL compliance by AGs are usually those established by the domestic legislation of States and, in some cases, international criminal tribunals. From the standpoint of AGs, these mechanisms probably lack any legitimacy whatsoever, and therefore it seems unclear if they can actually contribute *ex ante facto* to enhanced IHL compliance.<sup>63</sup> Conversely, special agreements can help achieve that goal by creating a sense of ownership of IHL rules and a better understanding of the potential consequences of their violation. In addition, some special agreements might even include new enforcement mechanisms, aimed at achieving full compliance by all parties concerned. This has been the case, for example, in agreements in Darfur, Sri Lanka and Indonesia.<sup>64</sup>

Although the few experiences in this realm do not allow us to extract definitive conclusions, it should be stressed that from the perspective of equality of belligerents, this type of mechanism, if compared to domestic legislation or international tribunals, has a better chance of succeeding as far as its perceived legitimacy is concerned. This is mainly because special agreements are by definition inclusive rather than exclusive of both sides' views and willingness to commit.

63 Certainly, there have been some discussions on the possible deterrent effect of such mechanisms, especially considering that preambular para. 5 of the Statute of the International Criminal Court establishes that the parties are "[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes". This view has been supported, for example, by Cassese and Falk: see Antonio Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2008, p. 440; Richard Falk, *The Declining World Order: America's Imperial Geopolitics*, Routledge, New York and London, 2004, p. 120. However, this effect has been questioned in Theodore Meron, *The Humanization of International Law*, Martinus Nijhoff, The Hague, 2006, pp. 179–180. See also ICRC, *Ad Hoc Tribunals*, available at: [www.icrc.org/eng/war-and-law/international-criminal-jurisdiction/ad-hoc-tribunals/overview-ad-hoc-tribunals.htm](http://www.icrc.org/eng/war-and-law/international-criminal-jurisdiction/ad-hoc-tribunals/overview-ad-hoc-tribunals.htm). Crawford has explained that "[t]he deterrent effect of international prosecution is unclear, and probably always will be": James Crawford, *Brownlie's Principles of Public International Law*, Oxford University Press, Oxford, 2012, p. 690. For a continuation of the discussion on the deterrent effect of international criminal justice, see the debate between Chirs Jenks and Guido Acquaviva in this issue of the *Review*.

64 In Darfur, the government of Sudan, the Sudan Liberation Movement/Army and the Sudan Justice and Equality Movement created a commission in charge of "receiving, verifying, analyzing, and judging complaints related to the possible violations of the cease fire" and "developing adequate measures to guard against such incidents in the future". See Humanitarian Ceasefire Agreement on the Conflict in Darfur, above note 14. In Sri Lanka, the 2002 agreement between the government and the Liberation Tigers of Tamil Eelam included the creation of the Sri Lanka Monitoring Mission "to enquire into any instance of violation of the terms and conditions of this Agreement": Sri Lanka Agreement, above note 48. In Indonesia, the government and the Free Aceh Movement reactivated a previously created Joint Security Committee and established that part of its functions was "to undertake full investigation of any security violations" and "to take appropriate action to restore the security situation and to agree beforehand on the sanctions to be applied, should any party violate this Agreement". Indonesia Agreement, above note 14.

## The legal nature of special agreements

Despite the importance of special agreements in the context of NIACs, CA3 does not determine which legal regime governs them; neither does any other rule of international law. Are these agreements regulated by international law or by domestic law? What sorts of obligations do they create? What kinds of relations do they create between the parties to them? Any answer to these questions will inevitably have consequences for the way in which the effectiveness of IHL at large is approached.

Taking this into account, this section will analyse three alternatives: (i) special agreements are regulated by domestic law; (ii) special agreements are regulated as a *sui generis* legal regime; and (iii) special agreements are regulated by international law. Ultimately, it will be argued below that this last perspective is not only a more accurate description of the current dynamics of international law, but also more useful for engaging with AGs and ensuring their compliance with IHL.

### Special agreements as regulated by domestic law

The first alternative considers that AGs do not have a recognized ability to create international rules and therefore special agreements should be governed by domestic law.<sup>65</sup> According to this position, the creation of international law is exclusively reserved for States, or for those entities that States acknowledge to have the capacity to do so, such as some international organizations. Therefore, AGs are mere addressees of IHL rules. This State-centric view is based on the “subject–object” dichotomy,<sup>66</sup> entrapping AGs in the latter category. Furthermore, these non-State actors are envisaged not as part of the international community, but only as part of the State they are fighting against or within. Accordingly, IHL would only address AGs through the domestic legal systems of the States to which they are subject.<sup>67</sup>

This position is usually linked to the final phrase of CA3, which affirms that the content of the article “shall not affect the legal status of the Parties to the

65 Hersch Lauterpacht (ed.), *International Law: A Treatise*, Vol. 2: *Disputes, War and Neutrality*, Longmans, Green and Co., London, New York and Toronto, 1952, pp. 226–233; Fritz Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, ICRC and Cambridge University Press, Geneva, 2001, pp. 15–18.

66 “In international law, the problem of the subject appears in the designation of states as ‘subjects’ of the law while individuals and corporations are regarded as ‘objects’ of the law...whatever rights or duties individuals and corporations have are derivative of, and enforceable only by states who, as ‘subjects’, conferred these rights and duties upon them”: A. Claire Cutler, “Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy”, in Andrea Bianchi (ed.) *Non-State Actors and International Law*, Ashgate, Aldershot, 2009, p. 22. See also Rosalyn Higgins, “International Law and the Avoidance, Containment and Resolution of Disputes: General Course on Public International Law”, *Recueils des cours de l’Académie de droit international*, Vol. 230, 1991, pp. 79–81.

67 For a similar analysis on individuals, see *ibid.*; and Roland Portmann, *Legal Personality in International Law*, Cambridge University Press, New York, 2010, p. 42.

conflict”. This has been understood as an explicit refusal by States to recognize that an AG has “any new international status, whatever it may be and whatever title it may give itself or claim”.<sup>68</sup>

Such a perspective was put forward by the Constitutional Court of Colombia when it affirmed that the CA3 special agreements “are not, strictly speaking, treaties, as they are not established between entities subject to public international law but between the parties to an internal conflict, which are subject to international humanitarian law”.<sup>69</sup> The same view was affirmed by the Special Court for Sierra Leone, which held that the Lomé Agreement between the government of Sierra Leone and the Revolutionary United Front was not an international agreement, precisely because the parties to it were the government of Sierra Leone and an AG.<sup>70</sup> The underlying argument in both cases is that, by definition, NIACs involve non-State actors that have not previously been considered as subjects of international law with the capacity to create international rules. Hence, even if they were addressees of IHL rules, their capacity to conclude special agreements could only be understood from a domestic law perspective.

However, the practical consequences of considering special agreements as being regulated by domestic law have not been thoroughly envisaged.<sup>71</sup> There are at least three problems that this position cannot solve.

Firstly, it is difficult to imagine that any State will ever recognize an AG struggling against it as having some sort of legitimacy under its domestic legal system. Hence, States will hardly accept the regulation of some specific issues which their domestic law may treat quite differently than IHL. For example, if a special agreement, adopted under the regulation of domestic law, includes rules concerning the conduct of hostilities between the State’s armed and security forces and the AG’s members, it is likely that these rules will be in contradiction with other domestic rules that probably criminalize acts such as murder. The same would happen if AGs were to regulate the conduct of hostilities among two or more AGs, since under domestic law it would be unacceptable for entities other than the State to legalize the killing of any given individual. Therefore, it

68 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 3: *Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960, p. 44. According to Pictet in the Commentary to GC I, this provision was caused by States’ fear that its application may interfere with their right to lawfully suppress AGs. Furthermore, it was not intended to “constitute any recognition by the de jure Government that the adverse Party has authority of any kind” or “to give [that party] any right to special protection or any immunity, whatever it may be and whatever title it may give itself or claim”. See J. Pictet (ed.), above note 19, p. 60.

69 Constitutional Court of Colombia, Constitutional Conformity of Protocol II, Case No. C-225/95, 18 May 1995 (unofficial translation), partly reproduced in M. Sassòli, A. Bouvier and A. Quintin, above note 18, p. 2245, para. 17, and available in Spanish at: [www.corteconstitucional.gov.co/relatoria/1995/c-225-95.htm](http://www.corteconstitucional.gov.co/relatoria/1995/c-225-95.htm).

70 See SCSL, *Kallon and Kamara*, above note 4, paras 45–50.

71 The SCSL had the opportunity to do so in the *Kallon and Kamara* case, above note 4. However, it limited itself to stating that the agreement did not need to be considered as an international treaty in order to create rights and obligations under municipal law, while expressly deciding not to analyze the validity of the agreement under municipal law, as that was not questioned before the Court.

seems difficult for any government authority to admit the legality of actions that are already inherently illegal under domestic law.

Secondly, it is unclear how the domestic legislative jurisdiction might operate in complex scenarios, such as NIACs that take place in the territory of any given State between an AG and a third State. Could the national law of the third State be relied upon as a legal basis for the conclusion of special agreements in those cases? Or should the domestic law of the territorial State prevail? And what would happen in the case of armed conflicts where AGs fight across the borders of two States?

Finally, according to most national legislation, there is an asymmetrical relation between States and AGs, in which the former have the predominant position.<sup>72</sup> It is quite likely that States, after concluding these agreements, could legislate in such a way as to unilaterally alter, annul or effectively terminate them, without any consideration whatsoever of AGs' positions on the previously negotiated issues. In fact, even in the case of special agreements exclusively concluded between AGs, unless they are assimilated into some form of contract between private entities, there seems to be nothing to prevent States from unilaterally modifying their legal value.

Most importantly, by virtue of that asymmetrical relationship, States can easily deny the validity and effect of special agreements, since they would be automatically void in the majority of national regimes, given AGs' inherently unlawful domestic character. This could even be the case when AGs conclude agreements exclusively among themselves, irrespective of the content of said agreements. In sum, States can completely deny the *effet utile* of special agreements.

In general, this State-centric perspective undermines the equality of the belligerent parties to a NIAC by subordinating special agreements to domestic law. In addition, the enforcement of their provisions is also left exclusively within the domain of States. In fact, breaches of special agreements (either by a State or by an AG) would not have any consequences at the international level, and in the end, only national judges would be entitled to determine any kind of State or individual responsibility.<sup>73</sup>

This scenario is a huge disincentive for AGs to actually engage in the conclusion of special agreements, thus making it more difficult to use such agreements as a tool to achieve greater levels of compliance. In sum, this alternative seems to render IHL less effective.

72 J. Somer, above note 2, pp. 659–660.

73 This would raise a number of complex questions concerning the actors entitled to bring cases before national courts using special agreements as a legal basis and regarding the specific commitments that could entail State or individual responsibility. In any case, given the asymmetrical relationship described in this section, it does seem improbable that national judges would hold States accountable for violations of those agreements.

## Special agreements as regulated by a *sui generis* legal regime

A second view has been proposed by Sassòli, who argues:

By analogy to other fields of international reality dominated by non-State actors, one could imagine armed groups developing among themselves a new transnational law of armed groups, just as sports clubs and their organizations have developed international sports law, internet users and providers the cyber law and merchants the *lex mercatoria*. The relationship between such new *lex armatorum* and the IHL adopted by States would have to be clarified, but similar clarification was also necessary to establish the relationship between the *lex mercatoria* and the instruments of international trade law.<sup>74</sup>

This means that AGs would have the capacity to create a new legal regime, neither entirely domestic nor international, but something in between. Indeed, *lex mercatoria* is often described as a set of rules constantly developing without any reference to any particular national or international system of law.<sup>75</sup> Rondeau has suggested that this idea seeks “to address practical gaps that rendered existing law impractical and unrealistic for ... key non-state actors”.<sup>76</sup> Of course, this approach presents a new perspective, as AGs would be considered to be participating in the creation not only of new rules, but of an autonomous legal regime: *lex armatorum*. In fact, the mere concept of *lex armatorum* in the creation of IHL would fundamentally challenge the notion of international law as being exclusively dominated by States.

However, Sassòli does recognize that this position has certain inherent difficulties, mainly related to the nature of AGs and their interaction with each other. On the one hand, the duration of hostilities has an effect on the existence of an AG, because when the armed conflict ends, the group will either triumph in its struggle, eliminating the need to fight, or be defeated and disbanded. In fact, that seems to be the reason why the notion of AGs is intrinsically related to the notion of NIACs, since one cannot exist without the other.<sup>77</sup> On the other hand, although AGs have common interests, they usually have different structures or characteristics, and – unlike sports clubs, merchants and internet users, who interact with each other globally and create transnational law<sup>78</sup> to

74 M. Sassòli, above note 11, p. 23.

75 Antonio Cassese and Luigi Condorelli, “Is Leviathan Still Holding Sway over International Dealings?”, in Antonio Cassese, *Realizing Utopia: The Future of International Law*, Oxford University Press, Oxford, 2012, p. 21.

76 Sophie Rondeau, “Participation of Armed Groups in the Development of the Law Applicable to Armed Conflicts”, *International Review of the Red Cross*, Vol. 93, No. 883, 2011, p. 669.

77 On the link between the definition of NIACs and the elements that determine the existence of an AG, see generally Michael Schmitt, “The Status of Opposition Fighters in a Non-International Armed Conflict”, in Kenneth Watkin and Andrew Norris (eds), *Non-International Armed Conflict in the Twenty-First Century*, International Law Studies, Vol. 88, Naval War College, Newport, RI, 2012, pp. 119–144.

78 For the purposes of this paper, transnational law refers to the law which regulates actions that transcend national frontiers without being “purely domestic nor purely international, but rather, a hybrid of the two”. See Harold Hongju Koh, “Why Transnational Law Matters”, Keynote at AALS Workshop on

regulate such interactions – they fight against each other not on a worldwide scale, but rather in a restricted geographical vicinity, most frequently against governments “whom it would be difficult to subject to the new *lex armatorum*”.<sup>79</sup>

Cassese and Condorelli criticize this theory by affirming that a “law without a state” is only possible when international and national law leave room for it, “opening up more or less extensive spheres of action for private autonomy: [such a law] is, in other words, an ‘*interstitial*’ law, called upon to occupy the interstices left to it by domestic and international law”.<sup>80</sup> This, however, relies on the classic State-centric theory of international law, pushing aside the stronger reasons to reject Sassòli’s proposal without ignoring AGs’ role in the conclusion of special agreements. Mainly, it does not seem clear that this perspective accurately describes what the parties to special agreements are actually doing. Indeed, one of the most frequent reasons why AGs conclude them is to achieve some political recognition from States;<sup>81</sup> the creation of a new legal regime separate from the one in which they are trying to get some legitimacy would therefore be a contradiction. In fact, the notion of *lex armatorum* seems to severely reduce the importance of State involvement, since it focuses almost exclusively on AGs’ interactions between each other.

Moreover, given the content of special agreements, in particular their references to specific IHL rules,<sup>82</sup> it is difficult to believe that either States or AGs seek the creation of an entirely new legal regime – or at least, that does not appear to be the case from a black-letter reading of their content. In this sense, to consider that these agreements are part of a *lex armatorum* is conceptually problematic, since they usually bring into force (or expand the scope of) existing rules of international law rather than attempting to create a unique set of rules to govern conduct in an entirely new field of human activity.

Of course, this approach has the benefit of recognizing the role of AGs in the design and implementation of IHL rules, so it manages to avoid the problems mentioned in relation to a regulation exclusively by domestic law. However, by seemingly failing to properly consider the actual practice and intentions of the parties to NIACs, this framework also runs short of incentives for AGs to conclude special agreements and comply with IHL at large. To what extent would AGs be interested in creating agreements that do not provide them with the expected legitimacy?

Integrating Transnational Legal Perspectives into the First-Year Curriculum, 3–7 January 2006, *Penn State International Law Review*, No. 24, 2006, p. 745.

79 M. Sassòli, above note 11, p. 23.

80 A. Cassese and L. Condorelli, above note 75 (emphasis in original). The authors do not explain in great detail what exactly these spaces are, but they do suggest that “work is in progress on several fronts, with instruments of all types, both hard and soft, and within the framework of various international organizations (UN, International Labour Organization, Organization for Economic Co-Operation and Development, European Union, UNIDROIT, etc.). This is, for example, the case in the fields of development cooperation, the fight against corruption, corporate social responsibility, environment protection, promotion of virtuous human rights practices by multinational companies, identification of mandatory rules the *lex mercatoria* must respect, and so on.”

81 O. Bangerter, above note 21, pp. 360–361.

82 See, for example, Memorandum of Understanding, above note 42; 1992 Agreement, above note 35; Philippines Agreement, above note 52.

Once again, other problems may also arise concerning the enforcement of special agreements understood as a *lex armatorum*. In this realm, the main concern would be how to assure mutual compliance. Would States be willing to accept an entirely new legal regime that leaves them as actors in a supporting role? Would they accept the creation of new enforcement mechanisms not regulated by domestic or international law? These challenges seem quite difficult to address in the short term.

In sum, the notion that special agreements should be governed by an autonomous *lex armatorum* is neither reflective of the real intentions of the parties involved, nor is it suitable where the relevant obligations already exist.

### Special agreements as regulated by international law

Finally, it is suggested that special agreements are already regulated by international law. This interpretation most closely reflects the parties' roles and intentions when concluding special agreements and recognizes AGs' role in their design.

Generally speaking, this approach logically follows from the principle of equality of belligerents, thus enabling greater levels of IHL effectiveness in the context of NIACs. As explained, special agreements are consistent with that principle because they are a tool designed to establish similar rights and obligations for all parties involved in the conflict and, most importantly, because they are based on those parties' joint commitment to abide by certain norms. By adopting an international law perspective, it is possible to accurately explain the process through which special agreements are usually concluded, recognizing each party's equal capacity to negotiate content and to take every necessary step to achieve compliance with the terms.

However, some difficulties may arise when trying to explain the nature of special agreements in light of the commonly accepted theories concerning the traditional sources of international law.<sup>83</sup>

### *Are special agreements international treaties?*

In accordance with some drafts presented during the negotiation process of the 1969 Vienna Convention on the Law of Treaties (VCLT),<sup>84</sup> special agreements could be included in the category of international treaties, if treaties were to be defined very broadly. For example, a 1962 draft of Article 1 provided that the term "treaty" comprised international agreements between two or more States, or other subjects of international law such as international organizations and insurgents.<sup>85</sup> The

83 As expressed in Article 38 of the Statute of the ICJ, the undisputed sources of international law are international conventions, international customary law and general principles of law. See generally Malcolm M. Shaw, *International Law*, 6<sup>th</sup> ed., Cambridge University Press, Cambridge, 2008, pp. 113–122.

84 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

85 International Law Commission, *Yearbook of the International Law Commission: 1962*, Vol. 2, United Nations, New York, 1964, p. 162, Art. 1, Commentary 8.



same year, draft Article 3 acknowledged the capacity of those insurgents to which a measure of recognition had been accorded to conclude treaties.<sup>86</sup> Those articles were subsequently deleted, and the final text of the VCLT does not acknowledge that any actor other than States can conclude treaties under its scope.<sup>87</sup> However, Article 3 of the VCLT does admit the possibility that there might be other international agreements concluded outside of its scope.<sup>88</sup>

As broad as any definition of international treaty can be, it is still usually required that the agreement be concluded by subjects of international law. This can be a problem when special agreements are faced with the final sentence of CA3, which denies the possibility that the application of the Article itself “affect[s] the legal status of the Parties to the conflict”. Thus, there seem to be only two options: (i) special agreements cannot be considered international treaties because AGs do not have the capacity to conclude treaties and the contrary would inevitably modify their legal status; or (ii) AGs have a limited international legal personality which allows them, at least *a priori*, to conclude only the agreements referred to in CA3 and only to the extent that they refer to and concern IHL.

If one adopts the first perspective, there is no doubt that special agreements would fall outside the category of international treaties. If one prefers the second perspective, some practical problems arise. Within the limits of the final sentence of CA3, only those special agreements pertaining exclusively to IHL rules might be considered as “international treaties” (although, of course, falling outside of the VCLT’s scope). However, some special agreements may include both IHL rules and provisions which are traditionally identified as belonging to other legal regimes, such as international human rights law.<sup>89</sup> In these cases, it would not be clear whether the agreements are international treaties or not. And it seems rather illogical that the limited international legal personality conferred to AGs may render the IHL-related portion of an agreement an international treaty, while the rest of the agreement remains something else.

In sum, classifying special agreements as international treaties would entail a number of complexities related to the aforementioned limitations. Consequently, it is necessary to seek other alternatives.

### *Participation in the creation of international law through an authoritative decision-making process*

Even if the equality of belligerents perspective allows us to argue in favour of AGs participating in the creation of international law, may it also be claimed that they

<sup>86</sup> *Ibid.*, p. 164.

<sup>87</sup> When giving the definitions relevant to understanding its scope, Article 1.a of the VCLT affirms that “‘treaty’ means an international agreement concluded *between States* in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation” (emphasis added). Vienna Convention on the Law of Treaties, above note 84, Art. 1.

<sup>88</sup> *Ibid.*, Art. 3.

<sup>89</sup> See above note 52.



take part in this process through different means from those accepted as the traditional sources of law? Is it possible to accept such an atypical process?

Certainly, this can be argued. In fact, special agreements can be understood as creating international law through an authoritative decision made by relevant actors that interact within the realm of international relations and with the intention to bind themselves to a set of rules designed to regulate such interaction. Hence, in order to fully grasp this alternative approach, it is necessary to focus on the goal of special agreements and on the decision-making process that leads to their conclusion.

As explained above, the specific commitments undertaken by the parties to special agreements usually have the ultimate objective of bringing into force a higher level of rights and obligations. Most notably, they aim to enhance the protection of individuals affected by armed conflicts. Therefore, it is proposed here that the capacity of AGs cannot be over-constrained by the final part of CA3. A comprehensive and harmonic interpretation of this provision's protective goal should be fulfilled without entailing a modification of AGs' legal status. By understanding special agreements as authoritative decisions rather than through the lens of traditional international law sources, it is possible to avoid entering into the maze of CA3's last sentence.

It is necessary, then, to leave aside the notions of "subjects" and "objects" of international law and, instead, embrace the idea that international rights and obligations are created by participants in a continuing process of authoritative decisions. Within this framework, all players in the international arena can be relevant in the context of the legal decision-making process, depending on their acceptance by other established participants.<sup>90</sup> In this sense, Higgins explains that

[w]hen ... decisions are made by authorized persons or organs, in appropriate forums, within the framework of certain established practices and norms, then what occurs is *legal* decision-making. In other words, international law is a continuing process of authoritative decisions. This view rejects the notion of law merely as the impartial application of rules. International law is the entire decision-making process, and not just the reference to the trend of past decisions which are termed "rules". There inevitably flows from this definition a concern, especially where the trend of past decisions is not overwhelmingly clear, with policy alternatives for the future.<sup>91</sup>

In this kind of process, where policy alternatives are embraced, the distinction between typical and atypical sources of international law may become obsolete.<sup>92</sup> Instead of following the traditional rules for verifying the existence of an international treaty, a customary rule or a general principle of law, the creation of international law is rather based upon the effective actions and interactions of

90 R. Portmann, above note 67, pp. 212–213.

91 Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, Clarendon Press, Oxford, 1994, p. 2.

92 See above note 83 in reference to those sources that can be understood as typical.

multiple actors within organized arenas like diplomatic negotiations or unorganized scenarios such as public campaigns, academic events or side events.<sup>93</sup>

This theoretical approach allows us to understand special agreements as regulated by international law, avoiding the complexities that emerge if they are considered as international treaties. At the same time, this perspective remains consistent with the principle of equality of belligerents, by considering AGs' will in the context of their effective interactions with other actors in the international decision-making process. Consequently, it may serve the purpose of enhancing their compliance with IHL.

### *Challenges and consequences*

Some contemporary authors have expressed different concerns that must be addressed in order to further support the idea that special agreements can be understood as authoritative decisions.

A first set of critiques may undermine the idea that AGs are considered relevant actors in the international realm, although from different perspectives. In general terms, Portmann argues against the normative force of effective action in international law by analyzing the role of *opinio juris* in the creation of customary law. He explains that there is a

distinction in international law between what specific entities actually do, and what legal effect such action may have: action in itself clearly is not sufficient to draw a normative conclusion ... It therefore seems difficult to argue that in the field of personality or in any other field of international law there can be direct normative implications of effective behaviour or actual power: such conclusions require a principled justification in analogy to the role of *opinio iuris* in the formation of customary law.<sup>94</sup>

More specifically, although arguing in favour of the inclusion of non-State actors in the making of IHL, Ryngaert points out that to date, "only *state* practice, as opposed to non-state actor practice, appears to have been taken into account for the formation and identification of customary law".<sup>95</sup>

As previously pointed out, the idea that AGs already participate in the creation of customary IHL is still a minority opinion. However, in the case of special agreements, their conclusion is in itself sufficient proof of those non-State actors' participation. Nevertheless, according to Portmann's critique, such effective action could not be said to have any direct normative implications. What this author does not seem to consider is that under Higgins' theory,

93 As explained by Portmann, all these interactions "cumulate in decisions which themselves enjoy authority not because international rules exist to this effect, but because the relevant participants effectively accept, to varying degrees in different contexts, the decision as compulsory". R. Portmann, above note 67, pp. 211–212.

94 R. Portmann, above note 67, pp. 267–268, and in general, pp. 264–268.

95 C. Ryngaert, above note 33, pp. 288–289. See also ICRC Customary Law Study, above note 6, pp. xxxiv–lvii; and J.-M. Henckaerts, above note 24, p. 128.

normative implications are derived not from isolated actions of single actors but from their interactions, which may also serve as principled justification. In fact, the relevance of actors in the international realm is dependent upon their acceptance by other established actors, and the creation of international law occurs as a result of a continuing process of decision-making among them.

Certainly, the “authorized persons or organs” and the “appropriate forums” may vary, in accordance with the actions taken by international actors themselves. But in the case of special agreements, CA3 is in itself sufficient proof of AGs’ recognition as authorized entities by other established actors. When AGs interact among themselves and with States in such a way that they all commit to rules governing their respective conduct during armed conflict, they are in fact recognizing each other as authorized to do so, without affecting AGs’ legal status in the terms of CA3. They are also acknowledging the forum in which they meet as an appropriate one. And when this interaction is encouraged by international and non-governmental organizations, they too accept a new way of making authoritative decisions.

A second set of arguments may cast doubt as to the possibility of actually achieving protective outcomes through decision-making processes. Portmann affirms that there is a confirmed tendency today to support the idea of having rules of international law that transcend acquiescence by particular States, especially peremptory norms. He then submits that this renders it impossible to assume that international law is a decision-making process rather than a set of rules, since this would imply that *jus cogens* rules would depend on policy considerations.<sup>96</sup>

In the realm of IHL, Ryngaert explains that when arguing in favour of AGs’ participation in the norm creation process,

one should also be willing to accept the consequence that the content of the customary rules thus formed may not, as a matter of course, be a humanitarian’s dream. Armed opposition groups ... are not known for their respect of IHL. Indeed, quite the contrary is true. Accordingly, including non-state actors in the process of customary law formation may possibly lead to regression.<sup>97</sup>

As for peremptory norms, Higgins does explain that States cannot limit or derogate them because of the critical importance they are given by the community as a whole.<sup>98</sup> What probably troubles Portmann is Higgins’ acceptance that if the international community decided not to attribute *jus cogens* rules such importance any more, they would not retain their normative value. However, Higgins’ position can also be understood by acknowledging that an isolated

96 R. Portmann, above note 67, p. 264. This is a relevant critique, as “certain rules of international humanitarian law are considered almost unanimously to be peremptory norms of international law”. Rafael Nieto-Navia, “International Peremptory Norms (*Jus Cogens*) and International Humanitarian Law”, The Hague, 2001, p. 20, available at [www.iccnw.org/documents/WritingColombiaEng.pdf](http://www.iccnw.org/documents/WritingColombiaEng.pdf).

97 C. Ryngaert, above note 33, p. 289.

98 R. Higgins, above note 66, p. 47.

principled justification may not be enough to explain the hierarchy of international norms. Such a justification should also take into account the effective action – that is, how different actors interact concerning the normative value of those rules. In fact, she explains that

[t]he status of norms that we hold dear is to be protected by our efforts to invoke and apply them, in turn ensuring that they do not totally lose the support of the great majority of States. But they cannot be artificially protected through classifying them as rules with a “higher normativity” which will continue to exist even if we fail to make States see the value of giving such proscriptions a normative quality.<sup>99</sup>

However, dealing efficiently with the difficulty presented by Ryngaert may require further examination. To some extent, proving or disapproving the contention that AGs’ participation in the creation of binding rules may lead to a less protective outcome seems to actually require an *ex post facto* analysis of the specific instances of AGs’ participation.

Although it would exceed the scope of this paper to examine the full content of and compliance with all special agreements, some basic aspects should be examined. To begin with, it is well established that the provisions of CA3 are considered basic humanitarian rules applicable in any armed conflict. Therefore, it can be argued that the international community as a whole considers them to be of critical importance<sup>100</sup> and, consequently, that they are in fact a “minimum yardstick” which could not be in any way diminished by special agreements.

In this vein, as was explained in the above discussion on the specific commitments included in special agreements, even the mere reference to a vague set of humanitarian principles may actually broaden the rights and obligations of the parties to a NIAC. Moreover, there are good examples of agreements that actually reproduce the content of CA3, or include general references to other international treaties such as AP I, AP II and the GCs, or specific rules that may even belong to the realm of international human rights law.<sup>101</sup>

Yet, if special agreements are regulated by international law, some practical consequences must be addressed. In particular, it is important to consider two questions within this theoretical framework: what rules will guide the process of international law creation through special agreements as well as their interpretation, and how can special agreements be enforced?

As for the first question, it must be taken into account that decision-making processes, as explained above, are not subject to concrete procedural rules, since the participants are continuously recognizing and accepting other actors and means of decision making. However, it is submitted here that the VCLT – or at least, some of

99 *Ibid.*, p. 48.

100 See, among others, Jelena Pejić, “Non-Discrimination and Armed Conflict”, *International Review of the Red Cross*, Vol. 83, No. 841, 2001, available at: <https://www.icrc.org/eng/resources/documents/misc/57jqzq.htm>; R. Nieto-Navia, above note 96, pp. 25–26; ICTY, *The Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Judgment (Trial Chamber), 14 January 2000, para. 520.

101 See above notes 44 and 52.

its core provisions<sup>102</sup> – could be applied by analogy, both in terms of interpretation of special agreements and of the rules that may guide their conclusion.

While, strictly speaking, the VCLT rules are intended to apply only to international treaties, they have already been used with regards to other international instruments. For example, the ICTY, the ICTR and the Special Tribunal for Lebanon (STL) have applied VCLT rules in order to interpret their statutes.<sup>103</sup> The difficulties of considering special agreements as international treaties have already been dealt with. At the most, the analogical application of the VCLT rules of treaty-making and interpretation only provides a framework that the parties to special agreements are free to modify by expressing their concurrent will within the agreement or in separate instruments.

Concerning enforcement, special agreements will undoubtedly undergo the same difficulties that many other international rules must face in the context of a decentralized international system. However, building on the arguments presented throughout this paper, the regulation of special agreements under international law has the core advantage of equally taking into account the will of all parties. On the one hand, it provides the parties the opportunity to implement *ad hoc* enforcement mechanisms that are not subordinated to a State, but are not dependent on the creation of a wholly new legal and institutional framework. On the other hand, and much more importantly, the process of creation of special agreements as understood under the framework of international law serves to enhance the perceived legitimacy of the rules agreed upon, hence increasing the chances of voluntary compliance in the first place.

## Concluding remarks

Compliance with IHL by AGs presents many challenges. This article has focused on the possibility of addressing some of them through the conclusion of special agreements, understood as authoritative decisions to create and be bound by international law.

It was first argued that special agreements are useful tools for generating respect for IHL for several reasons. Firstly, special agreements are concluded through a decision-making process that engages AGs in the reaffirmation and creation of IHL obligations, which is consistent with the principle of equality of

102 We are referring here to some substantial rules such as the *pacta sunt servanda* clause (Art. 26), the general rules of interpretation (Art. 31) and the rules concerning conflicts with peremptory norms (Arts 53 and 64). VCLT, above note 84.

103 ICTR, *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-37-A, Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment against Théoneste Bagosora and 28 Others (Appeals Chamber), 8 June 1998, para. 28; ICTY, *The Prosecutor v. Erdemović*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah (Appeals Chamber), 7 October 1997, para. 3; ICTY, *The Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction (Trial Chamber), 12 November 2002, para. 63; STL, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Case No. STL-11-01/I/AC/R176 bis, 16 February 2011, para. 26.

belligerents. In this context, the parties have an equal opportunity to express their views and demonstrate their mutual will regarding humanitarian issues. This is already an incentive to comply with IHL. Secondly, given that AGs play an active role in determining the terms of the agreement, they are likely to develop a sense of ownership of the IHL rules they undertake to respect. This may have a positive impact on AGs' levels of compliance with such provisions.

Finally, through the conclusion of special agreements the parties may clarify the general legal framework applicable during a NIAC, and they can also undertake additional commitments concerning specific rules, thus extending the set of rights and obligations mentioned in CA3. This can help to generate respect for IHL because (i) the parties will have the opportunity to assess their factual ability to comply before accepting any commitment; (ii) the rules agreed upon may be easily publicized and transmitted in the form of instructions to AGs' membership (which may be expected to happen if there is a sense of ownership of those rules); (iii) the acceptance of normative references has a symbolic value that may impact the attitudes of individuals (members of AGs) and have a preventive effect; and (iv) special agreements may contain provisions which accept the legitimacy of already existent enforcement mechanisms or even create new ones.

The core part of this paper aimed at explaining why special agreements are best understood as regulated by international law, as opposed to by domestic law or a *sui generis* regime. While the proposition that domestic law would be the appropriate legal regime regulating special agreements is difficult to reconcile with the principle of equality of belligerents; the *sui generis* proposition presents a few practical challenges that might obstruct the effective implementation of IHL. Therefore, it is suggested that the regulation of special agreements by international law is the only approach that enables their conclusion to be understood consistently and in accordance with the principle of equality of belligerents. And while special agreements cannot be considered as international treaties, they can - and often do - contain international legal rules to which the parties to a NIAC can commit through the established legal framework of CA3, within the continuing legal decision-making process conducted by various stakeholders involved in a conflict.

The need to find solutions to IHL compliance issues has led to the exploration of new paradigms, which may require the revision of some basic notions of international law. For the purpose of better protection of the victims, certain limits set by IHL and public international law should be challenged in order to solve practical problems that arise in today's armed conflicts.<sup>104</sup>

104 On the challenges and stakes inherent in defining certain phenomena as legal or non-legal, see Andrea Bianchi, "Reflexive Butterfly Catching: Insights from a Situated Catcher", in Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking*, Oxford University Press, Oxford, 2012, p. 200. See also Ezequiel Heffes, "The Responsibility of Armed Opposition Groups for Violations of International Humanitarian Law: Challenging the State-Centric System of International Law", *Journal of International Humanitarian Legal Studies*, Vol. 4, No. 1, 2013, pp. 81–107. There, the author explores the possible application of the International Law Commission's Draft Articles on the

A first step is to begin thinking of special agreements in terms of the international rights and obligations they encompass and of the actors involved in their conclusion, without necessarily trying to fit them into the categories of traditional sources of international law. Inasmuch as this new perspective may create new incentives for AGs to comply with humanitarian rules, special agreements should continue to be encouraged as a means of generating respect for and enhancing the effectiveness of IHL.







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Credit: REUTERS/Siegfried Modola.

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