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Course Material

**One Year Advanced Diploma in International
Humanitarian Law**

**1.1 Introduction to International Humanitarian
Law**

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Part I Introduction, Ch.1 Current Challenges to International Humanitarian Law

Antonio Cassese

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(p. 3) Chapter 1 Current Challenges to International Humanitarian Law

1 Henry Dunant and the Birth and Development of International Humanitarian Law

INTERNATIONAL humanitarian law (IHL) is one of the great achievements of mankind. It was born in the middle of the nineteenth century thanks to Henry Dunant, a Swiss banker.

Dunant was not known for his acumen as a banker. Perhaps our debt for the creation of the International Committee of the Red Cross (ICRC) and the elaboration of the first Geneva Conventions is owed to his professional mediocrity, besides of course his great humanitarian commitment. In 1857, Dunant launched a company for the construction of windmills in Mons-Djémila, in the north-east of Algeria (located between the towns of Sétif and Constantine): the '*Société Anonyme des Moulins de Mons-Djémila*'. He hoped to produce wheat to be sold to the French army. Under the circumstances, the idea of such a project was preposterous: it required the concession of many acres (p. 4) of land in Algeria by the colonial power; in addition, it involved the cultivation of grain in a place where there were no roads and no rail access needed to transport the harvested wheat. As it happened, Dunant only managed to secure 19 acres, whereas he needed around 1219. He also needed a waterfall to make the windmills work and to irrigate the fields. To obtain these resources, he conceived a bold idea: to ask Napoleon III directly for the necessary land and water. He thus wrote to the Emperor and printed, at his own cost, two pocket-size books. In one of these, Dunant made the case for the establishment of a grain cultivation company in Algeria; in the other he extolled the Emperor's magnificent deeds and even asserted that he was the sole and rightful heir to the ancient Roman crown, declaring that 'one word from his [Napoleon III's] lips terrifies Europe. A line from his pen reassures Europe'.¹

Armed with these two booklets, Dunant set out to find Napoleon III but learned that in fact the Emperor was in northern Italy leading the French army and preparing, with the support of the army of Vittorio Emanuele II, to attack the Austrian army, led by the Emperor Franz Joseph. Draped in an impeccable white suit, Dunant naively hastened to Brescia but Napoleon III had already left for the battlefield. Hurrying on to Castiglione delle Stiviere (in the province of Mantua), Dunant arrived on the evening of 24 June 1859, precisely when, in a nearby clearing in Solferino, one of the bloodiest battles since Waterloo had just been fought. In that clearing, 170,000 Austrian soldiers had clashed with a combined Franco-Italian force of 150,000. The battle had begun to rage before dawn, and it lasted until five o'clock in the afternoon with the defeat of the Austrians. Strewn about on the battlefield there remained more than 40,000 dead and thousands of wounded.

The next morning, Dunant, still in his snow-white outfit, made his way to Solferino and was horrified by the scene. In the following days the banker almost completely forgot about his Swiss-Algerian company and, working day and night, struggled to care for the wounded and the dying. Three years later, in 1862, and once again at his own expense, Dunant published a short book called *Un souvenir de Solferino* ('A Memory of Solferino'). Although only 1600 copies were printed, the book achieved an extraordinarily wide distribution. In his account, Dunant not only described the terrible suffering of the survivors at Solferino but also proposed a great idea: to promote the conclusion of an international convention that would create societies in every European state to care for the wounded in battle. In short, he

launched the idea of a permanent, voluntary, and international organization that would care for victims of war.²(p. 5)

From that moment Dunant's life split in two. As a promoter of humanitarian ideas, Dunant had great success (even though he soon exited from the stage): in 1864, agreement was reached on the first Geneva Convention, concerning the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. This first Convention set in motion an extraordinary mechanism that led to two notable developments. First, the conclusion of other Geneva Conventions: the Convention of 1929 concerning the Treatment of Prisoners of War, the 1929 Convention on the Wounded and Sick (amending and updating the previous agreement) as well as the four Geneva Conventions of 1949 and the two Additional Protocols of 1977. Secondly, the creation of the national Red Cross societies in 1863 and of the International Committee of the Red Cross (ICRC) in 1864. As for the banking side of his life, however, Dunant was destined to fail miserably.³

I have lingered on the origins of the first two Geneva Conventions in order to highlight the fact that, in essence, it was the idealism and the innovative, ingenious spirit of a single man which originated the idea to create an international institution with an exclusively humanitarian character aiming to mitigate as far as possible the suffering caused by war. That exclusively humanitarian spirit—the wounded and the sick had to be cared for, regardless of whether they were friends or foes—also inspired, albeit in attenuated form, the drafting of the famous Hague Conventions, concluded in 1899 and in 1907 in The Hague, at the behest of the Russian Tsar Nicolas II. Among these was a Convention of the utmost importance containing, as an annex, the Regulation concerning the Laws and Customs of War on Land. The Hague Conventions also limit and channel the powers of belligerents and therefore are, in significant measure, of a humanitarian character: they protect individual persons. They address questions such as who may be considered a legitimate combatant and what rights are held by such a combatant when captured. In other words, these Conventions address the issue of the treatment of prisoners of war, as well as the powers and duties of an occupying state and those of the population of the occupied country. Above all, they determine the way in which hostilities may be conducted. (p. 6)

However, the states convening in The Hague were animated not only by a humanitarian spirit. They also sought to safeguard politico-military interests, agreeing a series of 'rules of the game' aimed in particular at satisfying the requirements of the Great Powers and, to some degree, also those of lesser states. In The Hague, as had previously been the case at the Conference of 1874 in Brussels,⁴ the large and powerful states were pitted against the small states, each with specific interests not altogether humanitarian. The large states, assured of victory in case of war, sought to secure as far as possible the interests of belligerents, while the small states—certain to be vanquished and occupied in the case of war—sought to protect civilian populations and their territory. Even the famous 'Martens clause', that is, the clause proposed by the Russian Delegate Martens according to which, in all cases not subject to the Regulation concerning the Laws and Customs of War on Land, civilian populations 'remain under the protection and empire of the principles of international law, as they result from the uses established between civilized nations, from the laws of humanity and the requirements of the public conscience'—even this clause in reality was conceived not as a humanitarian provision but as a clever diplomatic expedient to cut short a dispute between the large and small powers.⁵ In brief, at the Conferences in The Hague an effort was made to protect *persons*, but also and above all to safeguard the *interests of the states*.

The indisputable fact remains that all of these rules of the law of war (or international humanitarian law, as it is called today, conceptually merging the two components inspiring this body of law, namely the humanitarian and the politico-military components) have constituted, in the last hundred years, a formidable protective net which to some extent seeks to attenuate the devastation of war. No one can deny that the four Geneva Conventions of 1949 have shielded the 'victims of war', that is, those who do not take (or no longer take) part in hostilities, limiting the harm they suffer from the violence wrought by conflict. In short, there is no doubt that the more strictly humanitarian rules of the law of armed conflict represent significant progress for our civilization.(p. 7)

2 The Principal Failings of Current IHL

What are the principal weaknesses of contemporary IHL, and what challenges must it face?

I will not dwell too much on certain inadequacies of the law today, such as the fact that the regime governing military occupation (*occupatio bellica*) conceived for occupations of enemy territory limited in time (a few months or a few years) is today subject to strong tensions because certain occupations persist for decades. (The Israeli occupation of Palestinian territory has lasted 40 years, and Morocco's occupation of the Western Sahara dates back 32 years.) Other acts originally had another purpose and a different temporal dimension. For example, the *armistice*, which was originally intended to be of short duration—just long enough to reach agreement on a peace treaty—has in fact been stretched out to as long as 54 years in the case of the two Koreas (whose armistice was signed in 1953). Another example is the *cease-fire agreement*, which was supposed to be followed rapidly by an armistice and then by a peace treaty, whereas in reality such an agreement may crystallize for years, as we saw, for example, when a cease-fire agreement was concluded between Israel and Syria in 1973.

These inadequacies of humanitarian law are, to some degree, physiological: it is illusory to think that the law can keep pace with evolving reality, which becomes more and more complex and tends to slip past the constraints of legal rules. Yet even if states fail to fulfil their moral obligation to ensure that the law is appropriately adapted to reality, legal rules nevertheless contain at least the general principles capable of 'taming' new phenomena, principles that it falls to judges and jurists to distil from those rules.

In my view the real weakness of humanitarian law lies elsewhere: nowadays, in the numerous wars that plague the planet, *civilians are no longer protected*. All wars, internal or international, result in massacres. Why? The reason is very simple: the segment of IHL that governs the conduct of hostilities, namely the use of the means of war (arms) and the methods of war (attacks against the enemy), is loose and flawed by lacunae. It thus fails to restrain the violence of war, which in the end always causes more harm to civilians than to the clashing forces themselves.

A. The total and asymmetric nature of modern armed conflicts

The entire body of law which we have at our disposal today—the so-called law of Geneva (aimed at protecting persons that do not, or no longer, take part in hostilities, such as civilians, sick or shipwrecked persons, or prisoners of war) and the (p. 8) so-called law of The Hague (aiming above all at regulating the conduct of hostilities)—is modelled on a *Rousseauian* conception of war. According to this philosopher from Geneva, war is fought between *two armies*, from which civilians must be sheltered at all costs. War, he wrote in the *Social Contract* (1762),⁶ is a relation, not between man and man, but between state and state, and individuals are enemies only accidentally, not as men nor even as citizens, but as soldiers.

Yet today nearly all armed conflicts are *total wars*. They belong to the category of wars theorized by von Clausewitz in 1832 and practised by Napoleon a few decades before: bloody conflicts not between two armies but between *entire nations in arms*. These wars are merciless, and invariably they involve not just soldiers but the entire civilian populations of each side, or at least of the weaker one. In the midst of these hostilities, the distinction between military and civilian personnel, if not cancelled altogether, becomes, *de facto*, very hazy indeed.

Moreover, with certain exceptions, such as the wars between Iran and Iraq (1980–88) and between Eritrea and Ethiopia (1998–2000), almost all modern armed conflicts are *asymmetric*. On one side there is a state or government well supplied with a regular army and modern armaments (jets, helicopters, tanks, missiles and so on), while on the other side there are non-state entities (insurgents, guerrillas, or armed terrorist groups) without any proper army, air power, or heavy weaponry. The recent war in southern Lebanon between the Israeli army and Hezbollah, and the wars being fought in Iraq and Afghanistan, are typical manifestations of such modern conflicts. The likelihood that future conflicts will increasingly be *unconventional* wars was recently affirmed by Robert M. Gates, then US Secretary of Defense, in a speech of 10 October 2007. He noted that ‘we expect that asymmetric warfare will remain the mainstay of the contemporary battlefield for some time’.⁷

Given these two fundamental characteristics of modern armed conflicts, that is, their totality and their asymmetry, how do belligerents behave?

The short answer is that, by and large, states and governments involved in armed conflicts tend to be guided by the conception of war set forth by Rousseau. Broadly speaking, they insist on respect for IHL, a body of law that—as mentioned above—is itself patterned after the Rousseauian model. They therefore make an effort to distinguish between civilians and soldiers; they respect private dwellings, schools, places of worship, hospitals, ambulances and so on. But states and governments are not always on their best behaviour. They frequently avail themselves of the ambiguities and the lacunae of the international rules on the conduct of hostilities, ambiguities, and lacunae whose repercussions are all the more serious when war is not just between two armies but is total and asymmetric.(p. 9)

As for rebels, guerrillas, and terrorists, who do not have an extensive war-making apparatus comparable to that of a state, they normally conduct their hostilities in accordance with a different conception: that proffered by von Clausewitz. They do not wear military uniforms, they do not openly bear arms, and they do not refrain from blending in with the civilian population. Indeed, by camouflaging themselves among civilians, they may more effectively attack the enemy. Not only is this prohibited by IHL, it also confronts the adversary with a grave dilemma: attack the guerrillas and risk causing enormous civilian casualties, or abstain from attacks that could decisively contribute to defeating them? In 2007, US Rear Admiral Greg Smith, as US military spokesman in Iraq, in commenting on a US air strike on a stronghold of senior insurgent leaders in Baghdad which also killed nine children and six women, called those killings ‘absolutely regrettable’. However, Smith placed the blame for them on the enemy fighters: ‘We do not target civilians. But when our forces are fired upon, as they are routinely, then they have no option but to return fire’.⁸

B. Other specific deficiencies of IHL

The foregoing remarks have laid out a general context. Let us now look more closely at some *specific* gaps or deficiencies in modern IHL.

(i) Guerrillas and terrorists are discouraged from respecting IHL

Irregular combatants usually do not comply with the prescriptions of IHL and make no effort to distinguish themselves from civilians. On the contrary: they hide among civilians so as not to be attacked; they launch rockets or fire arms from private houses, or even from city streets (as Hezbollah did, launching rockets against Israel from trucks situated in the city centre or in a square before hastening to other locations); they camp in civilian dwellings or other civilian places, rather than in military quarters; they use civilians as human shields or hostages.

Unfortunately, IHL does not provide irregular combatants with any advantages that could induce them to respect the law of war. The only 'bonus' the current law offers such combatants is this: if they are captured by an enemy belligerent, they are not punished simply for making war, provided that 'they openly bear arms immediately prior to and during each military attack'. However, this advantage is somewhat limited by the fact that the military powers may use the means at their disposal to identify and strike a combatant that openly bears arms, even before a military encounter is initiated. For example, the great military powers have spy satellites, infrared vision equipment, deadly robot aircraft (so-called 'Predators', pilotless (p. 10) planes capable of electronic surveillance and search for targets) and laser weaponry. With these types of modern arms and equipment, a belligerent power can easily identify and strike an irregular enemy combatant.

I would add that an irregular combatant has little incentive to abide by IHL, considering that the military powers assert that it is legitimate to strike him not only in the theatre of war but anywhere they find him, even at home or when he takes his wife and children to the cinema. Furthermore, the military powers no longer distinguish between political adversaries (who should be treated as equivalent to civilians) and men in arms.⁹ For this reason, the irregular combatant, knowing that he is at a tremendous military disadvantage, may be inclined to conceal his weapons and to produce them only at the moment of attack, and may further seek to hide among the population while he prepares his next attack.

The obvious consequence of this state of affairs is that the irregular combatant puts the civilian population at great risk.

(ii) IHL Fails to place limits on the military might of the Great Powers

A second serious deficiency of modern IHL lies in the fact that it does not sufficiently limit the exorbitant military might of belligerent powers.

The rules of IHL prohibit attacks on civilians, but they do not specify the *precautions* that a belligerent must take when it risks striking them. As a consequence, for instance, in Kosovo the bombardment of the television station in Belgrade was not preceded by any precautionary measure. Or to cite another example, Russian armed forces, when they attack Chechen 'terrorists', consider it sufficient to warn the local population by means of loudspeakers they bring with them in helicopters.¹⁰ And in the case of Lebanon, the Israelis considered it adequate to distribute leaflets, or to use loudspeakers or radio transmissions, or recorded messages sent via Lebanese cellular phones.¹¹

Furthermore, IHL rules fail to delimit with sufficient precision the notion of *military objective*. In some of the latest conflicts, for example NATO's attack in Kosovo in 1999 and Israel's attack in Lebanon in 2006, belligerent powers substantially extend the notion of 'military objective' to the point of including, among other things, television stations. In addition, IHL rules prohibit attacks that cause so-called (p. 11) disproportionate *collateral damage* to civilians and civilian objects, ie harm that is 'disproportionate' with respect to the military advantage sought to be achieved. Yet no concrete standard is provided for the purpose of gauging the proportionality of the actions taken. Is the killing of 20 civilians in order to destroy a bridge used by the enemy 'proportionate'? Is it 'proportionate' to destroy

dozens of civilian homes and the occupants inside them in order to blow up an electric power plant used exclusively for military ends?

IHL also fails clearly to provide whether certain weapons (for example, cluster bombs) capable of inflicting damage indiscriminately and thus also harming civilians are banned or whether they may be used in specific exceptional circumstances.

Nor do we find rules—in scenarios where the soldiers of a belligerent have violated on a massive scale the obligation to respect civilians—which effectively ensure that the soldiers in question will be tried in *court martial* proceedings. Even when there is a competent international tribunal, political circumstances often scuttle attempts to establish liability. For example, the ‘collateral damage’ caused by NATO air forces in Kosovo in 1999 demonstrates clearly how the forces of great and medium-size military powers can cause serious harm to civilians without any negative consequences for the belligerents. Not only was there never a trial, there was never even an investigation into what Belgrade characterized as war crimes. Likewise, with regard to war crimes committed in Afghanistan, the International Criminal Court would be empowered to intervene, but remains silent.

(iii) IHL fails to control the actions of ‘private contractors’

One increasingly widespread and serious phenomenon is the so-called ‘privatization of war’. Today, belligerents tend to entrust to private parties tasks that are normally discharged by military units. These tasks are various and sundry: security services, including above all bodyguard services, logistical support, construction, and maintenance of logistical apparatus such as housing or cafeteria services, the maintenance of arsenal, the management of defence and intelligence systems, prison management (including interrogation of detainees), the training of armed forces or of local police, and psychological warfare. In other words, private parties are enlisted for practically all kinds of war-related activities short of actual participation in armed combat.

May we designate such ‘private contractors’—which, for example, the United States has used on a massive scale in Afghanistan and Iraq—as mercenaries, and hence criminals? No, they are not mercenaries. In the first place, these private parties are nearly always citizens of the state that employs them. Moreover, in the American case they are formally charged by the US Government with the missions they perform. And they take no direct part in armed hostilities. Why, then, have the authorities in Washington decided to rely so heavily on them? (According to several sources, the Pentagon has employed between 10,000 and 20,000 ‘private (p. 12) contractors’ in Iraq alone.) And how should they be characterized? Are they equivalent to armed forces or police forces? Or are they akin to vigilantes, unrecognized by the laws of states and the international community? The question is not an academic one: the answer will determine (i) whether they may be considered by the adversary as legitimate targets in warfare, as well as (ii) whether and by whom such private persons will be charged and prosecuted for the crimes they may commit against civilian populations.¹²

The ‘privatization of war’ confronts us with a very serious problem. For decades, if not centuries, the effort has been made to establish rules to regulate war—rules to decide who is a legitimate combatant, how hostilities are to be conducted, and how to punish those who flout the rules. But now a new trend has emerged for which these rules are ill-equipped, a trend that could produce disastrous consequences.

(iv) IHL fails to detect violations

A fourth deficiency of modern IHL—and hardly a minor one—is that there are not effective mechanisms for determining when a belligerent has violated that very law. The Geneva Conventions of 1949 and the First Additional Protocol of 1977 assign monitoring functions to both the Protecting Powers and the ICRC. The First Additional Protocol further establishes, in Article 90, an ‘International Fact-Finding Commission’, which may be charged by the belligerents with the task of ascertaining relevant facts.

Yet these organs are not functioning. The Protecting Powers must be accepted by both parties to a conflict; in addition, third states are always hesitant to become involved in conflicts, as these entail complex and politically risky actions. The ICRC, which substitutes regularly for the Protecting Powers because of their absence, is authoritative and competent, but is limited by the fact that its reports and interventions are always confidential: it therefore cannot avail itself of resort to (p. 13) world public opinion. The International Fact-Finding Commission provided for by Article 90 has been called the ‘Sleeping Beauty of the Forest’,¹³ considering that so far it has never been activated, partly because it is complex and cumbersome and also because substantially it is a quasi-judicial mechanism designed to intervene only on an *ex post* basis.

It is distressing to note that in the conflicts of the last 20 years, no international supervisory organ has been able to verify, on the ground, the numerous violations committed by the belligerents. Instead, it has been necessary to resort, in certain cases of massive and repeated violations, to the creation of ad hoc international criminal courts and tribunals (eg the ad hoc Tribunal for the former Yugoslavia, established in 1993, the ad hoc Tribunal for Rwanda, established in 1994, and the ad hoc Special Court for Sierra Leone, created in 2002), or to the use of inter-state tribunals, such as the Eritrea-Ethiopia Claims Commission, established in 2000, or human rights courts, such as the European Court of Human Rights, in the case of the Chechen conflict.¹⁴ In other cases, it has been necessary to rely on independent and authoritative non-governmental organizations, such as Human Rights Watch¹⁵ or commissions of inquiry set up by UN bodies (such as the commissions established by the Human Rights Council or by the Security Council).¹⁶

(v) IHL fails to secure compensation to victims

A further and equally important shortcoming of modern IHL is that it does not adequately protect the victims of violent conflict or their families, even after the violations have occurred, by providing an appropriate mechanism by which the offending belligerent can at least compensate the victim for damage suffered. Of course, international customary law (in accordance with Article 3 of the Fourth Hague Convention of 1907) as well as the four Geneva Conventions of 1949 (Articles 51/52/131/148) and the First Additional Protocol of 1977 (Article 91) all oblige a belligerent which has violated the rules of the law of war to indemnify the victim. Nevertheless, this obligation only has legal force between states, or at least this is the way it has thus far been interpreted. It follows that, if the party to the conflict to which the victim belongs does not demand compensation for the harm suffered (or if it obtains compensation in a lump sum to be distributed with discretion among (p. 14) the victims), there is no compensation to the victim by the state or other party that committed the violation. If the victims or their families are faced with inertia on the part of the party to the conflict to which they belong, and if they endeavour to seek redress through the courts of the offending party, in most cases they are doomed to fail. Indeed, they may find that the offending party has no courts, or at any rate courts capable of granting effective remedies (as is the case with rebels or other non-state organizations, let alone terrorist organizations); or they may discover that the belligerent in question, if it is a state, enjoys a powerful defence which for centuries has protected sovereign states: the

'doctrine' of sovereign immunity, in civil actions where the state has acted in its sovereign capacity.¹⁷

3 How Can Armed Conflicts Be Made Less Inhumane?

Given these gaps and difficulties in the law today, what can be done to mitigate the devastation of armed conflicts?

To my mind, we must first of all exclude two options, even though in the abstract they would seem relevant. These options consist of, on the one hand, *changing international rules* to adjust them to the reality of modern conflicts; and on the other, establishing *new criminal mechanisms* for the punishment of violators.

Regarding the first option, it is unthinkable to *modernize IHL rules*. These rules have been fashioned above all by the Great Powers, and these Powers do not have an interest in tying their own hands with more precise legal standards. On the other hand, states linked politically or ideologically to guerrillas or terrorists would also oppose modifications that could end up penalizing those under their protection.

Nor is it realistic to consider *extending and strengthening the application of criminal law* to individuals that carry out attacks against civilians. Guerrillas normally do not have courts martial in which either their own combatants, or those of the enemy, may be tried for serious violations of IHL. In any case, such groups tend to flout prohibitions laid down by IHL. On the other hand, belligerent states and governments often do not prosecute captured enemy combatants but tend rather to detain them in gloomy places without giving them any rights, least of all the right to a fair and speedy trial. In addition, belligerent states and governments tend not to prosecute their own military personnel, either because their conduct often conforms to widespread practices tolerated or indeed inspired or authorized by the authorities (p. 15) (consider the American attack in Falluja), or because any trials could damage the morale of other troops exposed to grave danger and exhausted by fighting.

In short, the world is beset by a vicious circle that is difficult to break out of: barbarity is met with barbarity, and no sanction is meted out. The exceptions are rare: soldiers are prosecuted only for egregious rapes or for 'gratuitous' killings of civilians (for example, where motivated by racial or ethnic hatred or by 'private' ends); no soldiers are tried when their crimes are in some way part of a common strategy or policy, required or tolerated by the chain of command.

A. A modest tripartite proposal

I would therefore suggest that we set aside those abstract possibilities; we need to venture out on more promising roads. As I see it, what is required is action on three levels.

(i) *The drawing up of non-binding guidelines*

On one level, authoritative 'general directives' could be worked out to delimit and specify what is permissible as regards the conduct of belligerents. When I say 'general directives' I am referring to parameters and standards that are not binding. Indeed, as I have just explained, the reluctance of the Great Powers to limit their own margin for manoeuvre makes it highly difficult if not impossible to secure the adoption of binding rules that circumscribe the enormous discretionary power states have at their disposal. Since, for that reason, international 'law-makers' keep silent, the elaboration of general parameters or directives providing greater precision, and hence limiting the power of belligerents, could indeed be a useful step forward. These standards or guidelines should be prepared by (military and legal) experts and should thereafter be approved by humanitarian bodies including Red Cross societies and the ICRC, or at least by authoritative non-governmental

organizations. Such instruments would thus have no legally binding character, but they could acquire an important moral, psychological, and political force.

One may ask: 'Is it realistic to think that legal and military experts could act as a kind of international "quasi-legislator"? On the strength of what authority will they be able to agree upon directives or standards of conduct, thus acting in the stead of states?' My answer is that those legal and military experts should assign a limited task to themselves. They should follow the case-by-case method adopted by the then-President of the Supreme Court of Israel, Aharon Barak, in the Court's judgment on the legitimacy, from the standpoint of international law, of 'targeted killings'.¹⁸ In other words, on the basis of a careful study of international practice, (p. 16) and drawing illumination and clues from the *general principles* of IHL, these experts could elaborate a sort of *casuistry*,¹⁹ indicating for each case the most appropriate and rational solution available under the relevant legal principles and in light of the particular circumstances of the case. In this way, belligerents could find, in that casuistry, the proper guidance for their behaviour in the course of armed conflict.

As for the subjects which should be covered by such guidelines, there are two that I think deserve priority: (i) the position of irregular combatants and 'private contractors'; and (ii) the limits that should apply to attacks by military powers carried out to target military objectives but leading to collateral damage to civilians.

On the first point, it is necessary to *incentivize irregular combatants* to spare the civilian populations in which they live and operate. In that regard, action could be taken on two fronts.

On the one hand, those combatants who treat civilians as human shields or who attack civilian dwellings or hide arms in civilian property should subsequently be 'penalized'—not with new procedural mechanisms, but with those that already exist. This 'penalization' should commence immediately where such a combatant is captured: he or she should immediately be court-martialled and, if found guilty, face serious penalties. Possible abuses on the part of the military power that has captured the irregular combatant may be avoided by recourse to certain monitoring mechanisms about which I will speak in a few moments.

On the other hand, it is also necessary to *incentivize* the civilian population to exclude, as far as possible, such combatants, or in any case to differentiate themselves from them. That could be achieved by providing, as I will explain, that where an attack against irregular combatants causes harm to civilians, compensation will only be obtained if the combatants have not 'utilized' or instrumentalized civilians in pursuit of their objectives (this, of course, within possible limits: for example, it may prove very difficult for a Palestinian living in the occupied territories to prevent an armed member of Hamas from taking refuge in his cellar or from leaving weapons there for later use).

It is furthermore necessary to propose legal regimes applying to the actions of '*private contractors*'. Such regimes would enumerate their obligations or treat them as equivalent to members of the armed forces. Provision should then be made for submitting them to the criminal jurisdiction of the state in which violations have been committed and to that of the state to which the offender belongs.(p. 17)

Turning to the *delimitation of the power* of belligerents to take precautions when launching an attack that could claim numerous civilian lives, and to the question of how to ascertain whether 'collateral damage' to civilians is 'proportional', a detailed casuistry should be elaborated, as I mentioned earlier. To that end, the method adopted by President Barak in the judgment of the Israeli Supreme Court, to which I have already referred, should be taken as a guidepost. To begin with, two extreme cases should be identified: one in which collateral damage is clearly legitimate; and then the opposite case, in which such damage is manifestly excessive. That would leave an intermediate or 'grey' zone. It is with respect to this grey zone that a casuistry should be elaborated, with indications, for each hypothetical case, of the most reasonable and appropriate solution that may be drawn from general

principles and from state practice. Furthermore, each solution should be fully reasoned. If such an approach were to yield reasonable and convincing solutions, and if these solutions were also supported by authoritative humanitarian organizations, we could offer states a set of standards by which states would hopefully comply when engaged in hostilities.

(ii) Setting up flexible and effective monitoring mechanisms

A second level for action could lead to proposals concerning the creation of monitoring mechanisms aimed at establishing the relevant facts in cases of grave violations of the principles and rules of IHL.

In general terms, the legal perspective—in particular the criminal law perspective—that some favour, should be abandoned. It is also time to abandon the mechanism adopted in Geneva in 1977, when Article 90 of the First Additional Protocol was approved. As I have said, this provision follows an outdated, quasi-judicial logic and lays down a quite cumbersome procedure. In contrast to this approach, what is needed are flexible bodies, not quasi-judicial ones but rather organs adapted for the minute and daily monitoring of the conduct of combatants. These supervisory mechanisms should obviously be impartial beyond any doubt and should be composed of military experts and specialists in humanitarian law who do not come from countries involved in the armed conflict in question. They should, moreover, be able to operate *right from the start* of the conflict: their intervention in the conflict should indeed be *automatic*. For example, as soon as armed conflict breaks out, the ICRC, or another authoritative humanitarian organization, could ask the belligerents to ensure that small monitoring organs can operate in their respective territories. Presumably, refusal of access to such an organ would be an embarrassment for a state. These organs would then be responsible for monitoring the conduct of the belligerents and for preparing factual reports. Initially these reports would be confidential and would be disclosed only to the parties to the conflict. However, they could be made public in cases of repeated violations of international humanitarian law. At the conclusion of the conflict all reports should automatically be published.(p. 18)

It could also be useful to provide for the creation of *ex post* verification mechanisms at the national level for the purpose of ascertaining whether the killing of civilians has been, under the circumstances, disproportionate.

(iii) Compensating victims

The third level of action, which in my view would be needed to help rectify the deficiencies of IHL, would be the adoption of mechanisms to indemnify victims of serious violations. I am thinking above all of cases of excessive ‘collateral damage’ and, all the more so, of cases of indiscriminate attacks. To my mind, in cases of excessive collateral damage caused by a belligerent party (not including damage resulting from civilian involvement in the activities of irregular combatants), it is necessary to compensate the *victims* or, more generally, the *community* concerned.

The idea of compensation can be an important incentive for civilians to avoid letting themselves be manipulated by guerrillas, particularly since they would realize that any excessive harm they suffer would only be indemnified if they have neither collaborated with guerrillas, nor allowed themselves to be the guerrillas’ ‘instruments’ by permitting them to hide among the population in violation of international rules.

Whose responsibility should it be to compensate the victims of serious violations, and when is intervention necessary? In this regard, a range of solutions could be offered to belligerents, it being understood that, if they fail to accept a particular mechanism, there is the possibility that one of the mechanisms in question would be triggered automatically. As a first step a special international mechanism could be created, either within the organization of the ICRC or at least linked to it, which could be activated by victims upon the termination of the conflict. Only if this international mechanism turns into a bottleneck

could victims bring their cases before the courts of the parties to the conflict. The courts would be competent to try cases following the conclusion of hostilities, but only in the capacity of 'surrogate' where international action is unavailing.

The financial resources necessary to compensate victims could be made available by the party to the conflict which has committed violations that have been verified by one of the organs that I have mentioned. But it would also be possible to set up a trust fund financed by contributions from international organizations and states, the primary function of which would be to compensate victims of violations committed by non-state organizations or rebels.

B. Who can we count on?

Now that I have proposed this tripartite action plan, let us ask ourselves who we could count on to carry such an enterprise forward.(p. 19)

Let us first consider whether we can rely on states or intergovernmental organizations. In my view, we cannot. Even the states that are the most sensitive to humanitarian needs, such as Switzerland, the Netherlands, or the Nordic European countries, cannot by themselves make changes to international law, let alone establish international monitoring mechanisms. In this domain more than in others in international law, it is the Great Powers that have the final word. And as I have already said, it is hardly in the Great Powers' own interest to tie their own hands.

It is therefore necessary to turn, above all, to non-governmental organizations such as the ICRC or other entities whose moral authority places them on higher ground than that of states, including for example the Holy See. There are other non-governmental organizations of high prestige as well that could be involved in the effort, such as the US-based Human Rights Watch. These organizations have already achieved great accomplishments in their quest to 'humanize' war. One of these bodies or organizations might invite a group of military and legal experts to study these themes carefully and formulate proposals along the lines I have just indicated.

I realize that it will not be easy to travel down these roads. It will take courage and imagination. But I am hopeful that some authoritative humanitarian body of great moral prestige will take affirmative steps, whether it be now or later, to drive forward or otherwise support this humanitarian enterprise.

Footnotes:

¹ C.Z. Rothkopf, *Jean Henri Dunant—Father of the Red Cross* (New York: Franklin Watts Inc, 1969), 39–40.

² The same idea had been advocated by the Italian physician Ferdinando Palasciano (1815–91), who had been a medical officer in the Bourbon army during the insurrectionist movements of the Risorgimento. Palasciano was arrested by the Bourbon troops for insubordination, and in particular for providing medical care to wounded enemies after having stated: 'The wounded, whatever army they belong to, are sacred to me and cannot be considered as enemies'. In 1861, at the International Congress at the Accademia Pontaniana of Naples, he famously declared that 'all the belligerent Powers, when declaring war, should reciprocally recognize the principle of neutrality of wounded combatants during the time in which they receive care. They should furthermore recognize the principle of unlimited increase of health care personnel during the entire period of the war.'

³ In 1867, the small private bank where Dunant worked as manager was obliged to close its doors. The bank's shareholders demanded compensation but Dunant was penniless. Regarded with contempt by the local Calvinist bankers, who had no tolerance for economic failure, and unable to live any longer in Geneva, he left and became a voluntary exile. At the age of 40 he thus began living in Paris, first doing odd jobs before gradually becoming a sort of *clochard* living on the street. In 1892 a journalist found him in the small Swiss village of Heiden, where he was living in a publicly funded shelter. At that stage Dunant was granted a new lease on life. In the end he was universally acclaimed for the actions he took to care for the sick and the wounded in war, and in 1901 he was awarded (together with Frédéric Passy, the French founder of the '*Société française pour l'arbitrage entre nations*') the first Nobel Peace Prize.

⁴ The 1874 Brussels Conference was convened at the initiative of Tsar Alexander II of Russia to adopt an international agreement on the laws and customs of war. The text of the agreement was adopted, but never entered into force. However, it constituted an important step towards the codification of the laws of warfare.

⁵ On the origin and meaning of the Martens clause, I take the liberty of referring to my earlier essay, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?', 11 *European Journal of International Law* (2000) 187-216.

⁶ See R.D. Masters and C. Kelly (eds), *The Collected Writings of Rousseau* (Hanover: University Press of New England, 1994), vol 4.

⁷ Robert M. Gates, Speech to the Association of the United States Army, 10 October 2007, available at <<http://www.defenselink.mil/speeches/speech.aspx?speechid=1181>>, 4.

⁸ *International Herald Tribune*, 13-14 October 2007, 3 ('15 Iraqi civilians die in American airstrike').

⁹ The Israeli Ambassador to the UN, Dan Gillerman, stated in 2006 that it makes no sense to distinguish between the political and military structures of Hezbollah, since '[the] Hizbollah member of parliament and the terrorist in the hills launching rockets at Israeli civilians both have the same strategy and goal. These labels cannot be allowed to give legitimacy to a gang of thugs' (UN Doc S/PV.5493, 11).

¹⁰ See European Court of Human Rights, *Isayeva v Russia*, 57950/00, Judgment of 24 February 2005, §§ 25, 52, 72, 77, 171, 192, 193.

¹¹ See Human Rights Watch, *Why They Died: Civilian Casualties in Lebanon During the 2006 War* (2007), 6-7 and 66-9.

¹² The reason why the US Government relies on private parties for such operations is clear: in scenarios such as that of Afghanistan (and previously in Iraq), hundreds of thousands of persons are needed to face the vast range of military and security issues. Military personnel are often poorly trained youth, and in the last few years they include many who in their native country have committed petty crimes. Due to the harshness of war, young officers are often tempted to quit the military, and in recent times the US Government has had to grant significant financial bonuses to retain them. It is therefore preferable to turn to specialized and better prepared personnel, even if this entails high cost, as this at least spares soldiers from having to perform so many specialized and onerous tasks and allows them to concentrate on combat operations. Another 'advantage' is that the killing of private contractors causes less of a stir in public opinion than that of young soldiers or marines. Furthermore, the use of such contractors can be a way to sidestep a lot of rules. In particular, such private parties are removed from the scope of the laws of the territories in which they operate, and likewise cannot be touched by American law or international law. On the basis of agreements the US has concluded with Afghanistan and Iraq, the latter may not exercise criminal jurisdiction in cases of crimes committed by 'private contractors'; only the US may prosecute them. But since in the US the legal

position of these persons is unclear, in practice they surreptitiously enjoy *de facto* immunity. It should be stressed that the use of private persons is increasingly expanding. See further Chapter 25 in this volume.

13 F. Kalshoven, 'The International Humanitarian Fact-Finding Commission: A Sleeping Beauty?', 4 *Humanitäres Völkerrecht* (2002) 213–16, reprinted in F. Kalshoven, *Reflections on the Law of War—Collected Essays* (Leiden: Koninklijke Brill, 2007), 835–41.

14 See *Isayeva v Russia*, 57950/00, Judgment of 24 February 2005, and *Isayeva, Yusupova and Bazayeva v Russia*, 7947/00; 57948/00; 57949/00, Judgment of 24 February 2005 (decided on the same day).

15 See eg Human Rights Watch, *Civilians under Assault—Hezbollah's Rocket Attacks on Israel in the 2006 War* (2007), as well as *Why They Died—Civilian Casualties in Lebanon During the 2006 War*.

16 On these commissions, see P. Alston, 'The Darfur Commission as a Model for Future Responses to Crisis Situations', 3 *Journal of International Criminal Justice* (2005) 600–7.

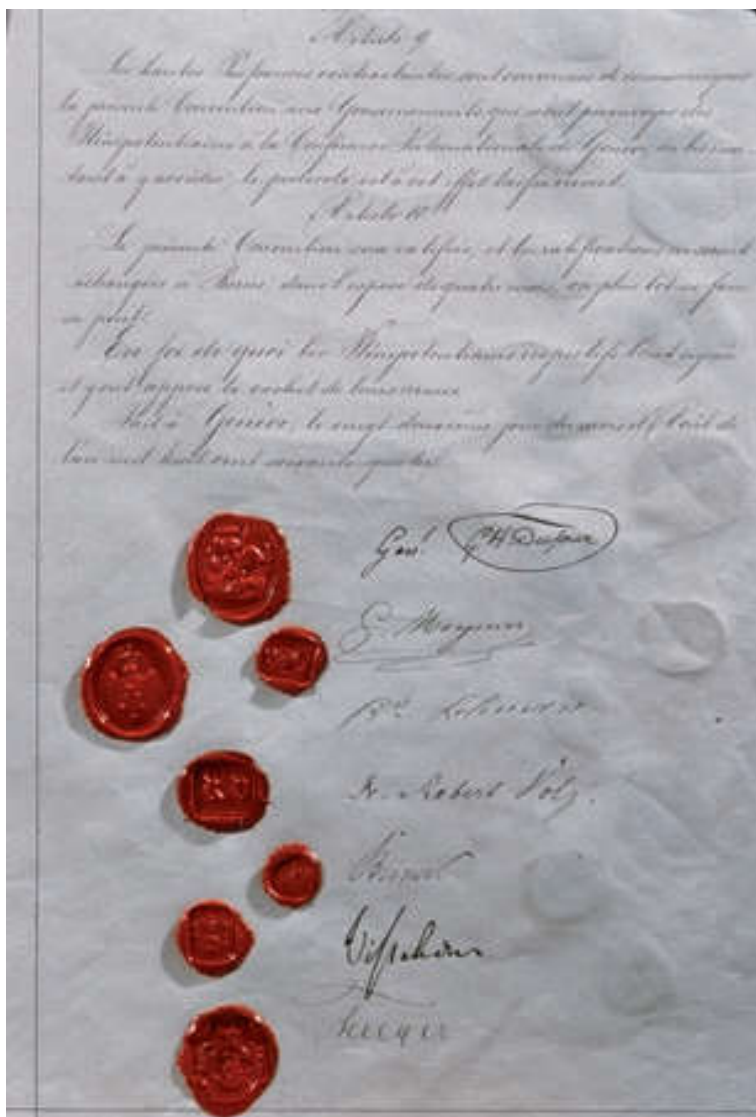
17 See the Chapter by C. Tomuschat in this volume.

18 Supreme Court of Israel sitting as the High Court of Justice, *The Public Committee against Torture in Israel and Others v The Government of Israel and Others*, HCJ 769/02, Judgment of 13 December 2006.

19 Like the word 'sophistry', it is probable that early usage of the word 'casuistry' was derogatory: see T.F. Hoad (ed), *The Concise Oxford Dictionary of Word Origins* (Oxford and New York: Oxford University Press, 1986) 65. In this Chapter, 'a casuistry' refers to an instance of casuistic reasoning, described in the *Oxford English Dictionary* as 'that part of Ethics which resolves cases of conscience, applying the general rules of religion and morality to particular instances in which "circumstances alter cases", or in which there appears to be a conflict of duties': see *Oxford English Dictionary* (2012), 'casuistry, *n.*'. For similar usage and further illumination, see T. Fowler, *The Principles of Morals, Part II (being the body of the work)* (Oxford: Clarendon Press, 1887), 246–8.

Chapter 1

Introduction to IHL



ICRC

Next-to-last page of the Geneva Convention of 22 August 1864.

Structure

- I. Definition and core principles of IHL
- II. Sources of IHL
- III. IHL in the international legal order
- IV. A brief history of and contemporary challenges for IHL

In a nutshell

- The purpose of IHL is to protect the victims of armed conflicts and regulate hostilities based on a balance between military necessity and humanity.
- IHL must be distinguished from legal frameworks that may apply in parallel but which have different objects and purposes, such as the UN Charter, the law of neutrality, human rights law and international criminal law.
- The belligerents must meet their humanitarian obligations in all circumstances, regardless of the enemy's conduct and of the nature or origin of the conflict.
- Although IHL is today one of the most densely codified and ratified branches of international law, its rules can also be derived from custom and general principles of law.
- Recent political, social, economic and technological developments pose fresh challenges to the fundamental achievements and faithful implementation of IHL.

I. DEFINITION AND CORE PRINCIPLES OF IHL

1. Definition of IHL

IHL is a set of rules that seek to limit the humanitarian consequences of armed conflicts. It is sometimes also referred to as the law of armed conflict or the law of war (*jus in bello*). The primary purpose of IHL is to restrict the means and methods of warfare that parties to a conflict may employ and to ensure the protection and humane treatment of persons who are not, or no longer, taking a direct part in the hostilities. In short, IHL comprises those rules of international law which establish minimum standards of humanity that must be respected in any situation of armed conflict.

→ On the distinction between the concepts of “war” and “armed conflict,” see Chapter 2.III.3.

2. Equality of belligerents and non-reciprocity

IHL is specifically designed to apply in situations of armed conflict. The belligerents therefore cannot justify failure to respect IHL by invoking the harsh nature of armed conflict; they must comply with their humanitarian obligations *in all circumstances*.¹ This also means that IHL is equally binding on all parties to an armed conflict, irrespective of their motivations or of the nature or origin of the conflict.² A State exercising its right to self-defence or rightfully trying to restore law and order within its territory must be as careful to comply with IHL as an aggressor State or a non-State armed group having resorted to force in violation of international or national law, respectively (*equality of belligerents*). Moreover, the belligerents must respect IHL even if it is violated by their adversary (*non-reciprocity of humanitarian obligations*).³ Belligerent reprisals are permitted only under extremely strict conditions and may never be directed against persons or objects entitled to humanitarian protection.

→ On belligerent reprisals, see Chapter 7.VII.5.

3. Balancing military necessity and humanity

IHL is based on a balance between considerations of military necessity and of humanity. On the one hand, it recognizes that, in order to overcome an adversary in wartime, it may be militarily necessary to cause death, injury and destruction, and to impose more severe security measures than would

¹ GC I–IV, common Art. 1; CIHL, Rule 139.

² AP I, Preamble, para. 5.

³ GC I–IV, common Art. 1; CIHL, Rule 140.

be permissible in peacetime. On the other hand, IHL also makes clear that military necessity does not give the belligerents *carte blanche* to wage unrestricted war.⁴ Rather, considerations of humanity impose certain limits on the means and methods of warfare, and require that those who have fallen into enemy hands be treated humanely at all times.⁵ The balance between military necessity and humanity finds more specific expression in a number of core principles briefly outlined below.⁶

4. Distinction

The cornerstone of IHL is the principle of distinction. It is based on the recognition that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy,”⁷ whereas “[t]he civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.”⁸ Therefore, the parties to an armed conflict must “at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”⁹

→ On the principle of distinction, see Chapter 3.

5. Precaution

The principle of distinction also entails a duty to avoid or, in any event, minimize the infliction of incidental death, injury and destruction on persons and objects protected against direct attack. Accordingly, IHL requires that, “[i]n the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.”¹⁰ This applies both to the attacking party, which must do everything feasible to avoid inflicting incidental harm as a result of its operations (*precautions*

4 AP I, Art. 35(1); Hague Regulations, Art. 22. For further information, see Françoise Hampson, “Military necessity,” in “Crimes of War,” webpage, 2011. Available at: <https://web.archive.org/web/20130809183729/http://www.crimesofwar.org/a-z-guide/military-necessity/>

5 See Chapter 1, II.3, which discusses “elementary considerations of humanity” as a general principle of law. For further information, see also Robin Coupland, “[Humanity: What is it and how does it influence international law?](#),” *IRRC*, Vol. 83, No. 844, December 2001, pp. 969–990.

6 See also Y. Sandoz, C. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff, Geneva/Dordrecht, 1987, paras 1389–1397.

7 St. Petersburg Declaration, Preamble.

8 AP I, Art. 51(1); CIHL, Rule 1.

9 AP I, Art. 48; CIHL, Rules 1 and 7.

10 AP I, Art. 57(1); CIHL, Rule 15.

in attack),¹¹ and to the party being attacked, which, to the maximum extent feasible, must take all necessary measures to protect the civilian population under its control from the effects of attacks carried out by the enemy (*precautions against the effects of attack*).¹²

→ On the principle of precaution, see Chapter 3.III.2–4.

6. Proportionality

Where the infliction of incidental harm on civilians or civilian objects cannot be avoided, it is subject to the principle of proportionality. Accordingly, those who plan or decide on an attack must refrain from launching, or must suspend, “any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”¹³

→ On the principle of proportionality, see Chapter 3.III.1.

7. Unnecessary suffering

IHL not only protects civilians from the effects of hostilities, it also prohibits or restricts means and methods of warfare that are considered to inflict unnecessary suffering or superfluous injury on combatants. As early as 1868, the St Petersburg Declaration recognized:

“That the only legitimate object [...] during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity.”

¹¹ *Ibid.*

¹² AP I, Art. 58; CIHL, Rule 22.

¹³ AP I, Arts 51(5)(b) and 57(2)(a)(iii) and (b); CIHL, Rules 14, 18 and 19.

Accordingly, in the conduct of hostilities, it is prohibited “to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”¹⁴

→ On the prohibition of unnecessary suffering, see Chapter 3.V.1.

8. Humane treatment

One of the most fundamental rules of IHL is that all persons who have fallen into the power of the enemy are entitled to humane treatment regardless of their status and previous function or activities. Accordingly, common Article 3, which is considered to reflect a customary “minimum yardstick” for protection that is binding in any armed conflict, states: “Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.”¹⁵ Although IHL expressly permits parties to the conflict to “take such measures of control and security in regard to [persons under their control] as may be necessary as a result of the war,”¹⁶ the entitlement to humane treatment is absolute and applies not only to persons deprived of their liberty but also, more generally, to the inhabitants of territories under enemy control.

→ On the duty of humane treatment, see Chapters 4–6.

To go further (Definition and core principles of IHL)¹⁷

- *Rules of war (in a nutshell)*, film, ICRC, 2014. Available at: <https://www.youtube.com/watch?v=HwpzzAefx9M>
- ICRC e-learning module, *What is international humanitarian law?* Available at: <http://www.icrcproject.org/elearning/en/ihl/M1/index.html>
- Jean Pictet, *Development and Principles of International Humanitarian Law*, Nijhoff Law Specials No. 2, Martinus Nijhoff Publishers, Dordrecht, 1985, 586 pp.

¹⁴ AP I, Art. 35(2); Hague Regulations, 23(e); CIHL, Rule 70.

¹⁵ GC I–IV, common Art. 3(1); CIHL, Rules 87 and 88.

¹⁶ GC IV, Art. 27(4).

¹⁷ All ICRC films, databases, documents and reports, readings and case studies from M. Sassòli, A. Bouvier and A. Quintin, *How Does Law Protect in War?*, ICRC, Geneva, 2011, and articles from the *IRRC*, are available on the ICRC website: www.icrc.org
All hyperlinks mentioned in this textbook were last visited on 28 January 2016.

II. SOURCES OF IHL

Just like any other body of international law, IHL can be found in three distinct sources: treaties, custom, and the general principles of law.¹⁸ In addition, case-law, doctrine and, in practice, “soft law” play an increasingly important role in the interpretation of individual rules of IHL.

1. Treaty law

Today, IHL is one of the most densely codified branches of international law. In practice, therefore, the most relevant sources of IHL are treaties applicable to the armed conflict in question. For example, in situations of international armed conflict, the most important sources of applicable IHL would be the four 1949 Geneva Conventions, their Additional Protocol I, and weapons treaties, such as the 1980 Convention on Certain Conventional Weapons or the 2008 Convention on Cluster Munitions. Treaty IHL applicable in non-international armed conflicts is significantly less developed, the most important sources being common Article 3 and, in certain circumstances, Additional Protocol II.¹⁹ Given that most contemporary armed conflicts are non-international, there is a growing perception that certain areas of treaty IHL governing these situations may require further strengthening, development or clarification.

→ See also Textbox 9: *Swiss/ICRC initiative on strengthening the implementation of IHL* (Chapter 7.III.4.b.).

The advantage of treaty IHL is that it is relatively unambiguous. The scope of applicability of the treaty is defined in the text itself, the respective rights and obligations are spelled out in carefully negotiated provisions, which may be supplemented with express reservations or understandings, and the States Parties are clearly identified through the act of ratification or accession. This does not preclude questions of interpretation from arising later, particularly as the political and military environment changes over time, but it provides a reliable basis for determining the rights and obligations of belligerents and for engaging in dialogue with them on their compliance with IHL.

2. Custom

While treaty law is the most tangible source of IHL, its rules and principles are often rooted in custom, namely general State practice (*usus*) accepted

¹⁸ ICJ Statute, Art. 38(1).

¹⁹ Other applicable treaties include the 1998 Rome Statute, the 1954 Hague Convention on Cultural Property and its Second Protocol of 1999, and a number of specific weapons treaties, namely the Convention on Certain Conventional Weapons of 10 October 1980 and its Article 1, as amended on 21 December 2001, the 1997 Anti-Personnel Mine Ban Convention, the 1993 Chemical Weapons Convention, and the 2008 Convention on Cluster Munitions.

as law (*opinio juris*).²⁰ Such practice has consolidated into customary law, which exists alongside treaty law and independently of it. Customary law does not necessarily predate treaty law; it may also develop after the conclusion of a treaty or crystallize at the moment of its conclusion. For example, a belligerent State may have ratified neither the 1980 Convention on Certain Conventional Weapons nor Additional Protocol I, which prohibits the use of “weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.” There is, however, a universally recognized customary prohibition against such means and methods of warfare.²¹ Thus, that State would be prohibited from using such munitions under customary IHL.

The advantage of customary IHL is that it is a dynamic body of law constantly evolving in tandem with State practice and legal opinion. Customary law can therefore adapt much more quickly to new challenges and developments than treaty law, any change or development of which requires international negotiations followed by the formal adoption and ratification of an agreed text. Also, while treaties apply only to those States that have ratified them, customary IHL is binding on all parties to an armed conflict irrespective of their treaty obligations. Customary law is relevant not only where an existing IHL treaty has not been ratified by a State party to an international armed conflict; it is particularly relevant in situations of non-international armed conflict, because these are regulated by far fewer treaty rules than international armed conflicts, as explained above. The disadvantage of customary law is that it is not based on a written agreement and, consequently, that it is not easy to determine to what extent a particular rule has attained customary status. In reality, State practice tends to be examined and customs identified by national and international courts and tribunals tasked with the interpretation and adjudication of international law. The ICRC’s extensive study on customary IHL is also a widely recognized source of reference in this respect (see Textbox 1, Chapter 1.II.2 below).

The fact that customary law is not written does not mean that it is less binding than treaty law. The difference lies in the nature of the source, not in the binding force of the resulting obligations. For example, the International Military Tribunal at Nuremberg, in the trials following World War II, held not only that the 1907 Hague Regulations themselves had attained customary nature and were binding on all States irrespective of ratification and reciprocity, but also that individuals could be held criminally responsible and punished for violating their provisions as a matter of customary

20 ICJ Statute, Art. 38(1)(b).

21 CIHL, Rule 70.

international law. Similarly, the ICTY has based many of its judgments on rules and principles of IHL not spelled out in the treaty law applicable to the case at hand but considered to be binding as a matter of customary law.

Textbox 1: The ICRC study on customary international humanitarian law

In December 1995, the 26th International Conference of the Red Cross and Red Crescent formally mandated the ICRC to prepare a report on customary rules of IHL applicable in international and non-international armed conflicts.²² In 2005, after extensive research and consultations with experts throughout the world, the ICRC published its report, now referred to as “the study on customary IHL”.²³ In essence, the study provides a snapshot of what the ICRC considered to be customary IHL at the time of publication. While customary IHL, as a source of international law like treaty IHL, is binding on States and other parties to armed conflict, the ICRC’s study as such is not binding. However, it carries the authority of an organization specifically mandated by the international community “to work for the understanding and dissemination of knowledge of international humanitarian law”.

The study does not attempt to examine each rule of treaty IHL as to its customary nature; rather, it aims to establish whether and, if so, to what extent certain issues of practical relevance are regulated in customary IHL. Volume I of the study lists 161 rules that the ICRC considers to be binding as a matter of customary IHL and explains the rationale behind that assessment; Volume II catalogues the practice on which the conclusions in Volume I are based. The study found that most (135 rules) of the customary IHL rules identified are equally applicable in both international armed conflict (IAC) and non-international armed conflict (NIAC). Since there is considerably less treaty IHL governing NIAC than there is for IAC, this was an important result of the study. Finally, the study discusses areas where IHL is not clear and points to issues that require further clarification. Overall, as important as its findings are, the ICRC’s study on customary IHL should not be seen as the end of a process but as a beginning. It reveals what has been accomplished but also what remains unclear and what remains to be done.

- For the rules identified as being customary by the ICRC, the practice underlying those rules, and regular updates of this practice, see the online *ICRC customary IHL database*, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>

22 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Resolution 1, “[International humanitarian law: From law to action; Report on the follow-up to the International Conference for the Protection of War Victims](#),” *IRRC*, No. 311, 1996, p. 58.

23 J.-M. Henckaerts and L. Doswald-Beck, [Customary International Humanitarian Law, Vol. I: Rules and Vol. II: Practice](#), Cambridge University Press, Cambridge, 2005.

3. General principles of law

The third source of international law, next to treaties and custom, consists of “the general principles of law recognized by civilized nations.”²⁴ There is no agreed definition or list of general principles of law. In essence, the term refers to legal principles that are recognized in all developed national legal systems, such as the duty to act in good faith, the right of self-preservation and the non-retroactivity of criminal law. General principles of law are difficult to identify with sufficient accuracy and therefore do not play a prominent role in the implementation of IHL. Once authoritatively identified, however, general principles of law can be of decisive importance because they give rise to independent international obligations.

Most notably, the ICJ has on several occasions derived IHL obligations directly from a general principle of law, namely “elementary considerations of humanity,” which it held to be “even more exacting in peace than in war.” Based on this principle, the ICJ has argued that the IHL obligation of States to give notice of maritime minefields in wartime applies in peacetime as well,²⁵ and that the humanitarian principles expressed in common Article 3 are binding in any armed conflict, irrespective of its legal classification and of the treaty obligations of the parties to the conflict.²⁶ Moreover, the ICTY has argued that “elementary considerations of humanity” are “illustrative of a general principle of international law” and “should be fully used when interpreting and applying loose international rules” of treaty law.²⁷

In this context, it would be remiss not to refer to the Martens Clause, which provides that, in cases not regulated by treaty law, “populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.”²⁸ The Martens Clause was first adopted at the First Hague Peace Conference of 1899 and has since been reformulated and incorporated in numerous international instruments.²⁹ While the extent to which specific

24 ICJ Statute, Art. 38.

25 ICJ, *Corfu Channel Case (United Kingdom v. Albania)*, Judgment (Merits), 9 April 1949, *ICJ Reports* 1949, p. 22.

26 ICJ, *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Nicaragua case)*, Judgment (Merits), 27 June 1986, para. 218.

27 ICTY, *The Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-T-14, Judgment (Trial Chamber), January 2000, para. 524.

28 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 (Hague Convention No. II), Preamble.

29 Hague Regulations, Preamble; GC I, Art. 63; GC II, Art. 62; GC III, Art. 142; GC IV, Art. 158; AP I, Art. 1(2); AP II, Preamble; Convention on Certain Conventional Weapons, Preamble.

legal obligations can be derived directly from the Martens Clause remains a matter of controversy, the Clause certainly disproves assumptions suggesting that anything not expressly prohibited by IHL must necessarily be permitted.

4. The role of “soft law,” case-law and doctrine

While treaties, custom and general principles of law are the only sources of international law, the rules and principles derived from these sources often require more detailed interpretation before they can be applied in practice.³⁰ For example, while the law makes clear that IHL applies only in situations of “armed conflict,” the precise meaning of that term must be determined through legal interpretation. Similarly, IHL provides that civilians are entitled to protection from direct attack “unless and for such time as they take a direct part in hostilities.” Again, a decision as to whether a particular civilian has lost his or her protection depends on the meaning of the term “direct participation in hostilities.”

Of course, guidance on the interpretation of IHL can be given by the States themselves as the legislators of international law. This may take the form of unilateral reservations or declarations, or resolutions of multilateral organizations, but also of support for non-binding instruments. Examples of such “soft law” instruments relevant for the interpretation of IHL include the United Nations Guiding Principles on Internal Displacement (1998) and the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005).³¹

Absent such State-driven guidance, the task of interpreting IHL falls, first and foremost, to international courts and tribunals mandated to adjudicate cases governed by IHL, such as the ad hoc international criminal tribunals established for specific conflicts, the ICC and, of course, the ICJ. In addition, the teachings of the most highly qualified publicists are also recognized as a subsidiary means of determining the law.³² Also, in view of the special mandate of the ICRC, its *Commentaries* on the 1949 Geneva Conventions

30 For the general rule for treaty interpretation, see Vienna Convention on the Law of Treaties, 23 May 1969, (Vienna Convention on the Law of Treaties), Art. 31.

31 For an overview of the ICRC's contribution to those instruments, see J.-P. Lavoyer, “[Comments on the guiding Principles on Internal Displacement](#),” *IRRC*, No. 324, September 1998; J. Kellenberger, “Relations of the ICRC with the humanitarian system of the UN,” Statement, San Remo, 8 September 2005.

32 ICJ Statute, Art. 38.

and their Additional Protocols are regarded as a particularly authoritative interpretation of these treaties.

→ On the special role of the ICRC with regard to IHL, see Chapter 8.

To go further (Sources of IHL)³³

- ICRC e-learning module, *What are the sources of international humanitarian law?* Available at: <http://www.icrcproject.org/elearning/en/ihl/M3/index.html>
- For a chronological list of all IHL treaties and their States Parties, see the on-line ICRC treaty database, available at: <https://www.icrc.org/ihl>
- For a complete list of rules identified by the ICRC as being part of customary IHL, see the online customary IHL database, available at: <https://www.icrc.org/customary-ihl/eng/docs/home>
- Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, ICRC, Geneva, 2011, Vol. I, [Chapter 4: Sources of contemporary international humanitarian law](#), pp. 149–162.
- Jean-Marie Henckaerts, “[Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict](#),” *IRRC*, Vol. 87, No. 857, March 2005, pp. 175–212.

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- Case No. 43, [ICRC, Customary International Humanitarian Law](#)
- Case No. 211, [ICTY, The Prosecutor v. Tadić, Doc. A, paras 94–134](#)
- Case No. 215, [ICTY, The Prosecutor v. Kupreškić et al., paras 525–540](#)

III. IHL IN THE INTERNATIONAL LEGAL ORDER

IHL is that body of international law which governs situations of armed conflict. As such, it must be distinguished from other bodies of international law, particularly those that may apply at the same time as IHL, but which have a different object and purpose. The most important frameworks to be discussed in this context are: (1) the UN Charter and the prohibition against the use of inter-State force; (2) international human rights law; (3) international criminal law; and (4) the law of neutrality. It should be noted that, depending on the situation, other branches of international law, while not specifically discussed here, may be relevant as well. They include the law of

³³ ICRC documents available at: www.icrc.org

the sea, the law governing diplomatic and consular relations, environmental law and refugee law, to name but a few.

1. IHL and the prohibition against the use of inter-State force

IHL governs situations of armed conflict once they arise. It does not regulate whether the use of force by one State against another is lawful in the first place. This function falls to the law governing the use of inter-State force, also referred to as *jus ad bellum* (or, perhaps more accurately, *jus contra bellum*), the basic premises of which are set out in the UN Charter and corresponding customary law. Article 2(4) of the UN Charter provides that States “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” In essence, this amounts to a general prohibition on the use of force, or on the threat thereof, in international relations between States. Although irrelevant under IHL, the question of whether the prohibition against the use of inter-State force has been violated is an important part of the legal and political context of any armed conflict involving cross-border operations on the territory of another State.

The UN Charter stipulates only two exceptions to the prohibition against the use of inter-State force. First, Article 51 states that the prohibition does not impair a State’s “inherent right of individual or collective self-defence if an armed attack occurs.” In essence, this means that a State may lawfully resort to inter-State force in self-defence to the extent that this is necessary and proportionate to repel an armed attack. Second, Article 42 states that the Security Council may use, or authorize the use of, inter-State force “as may be necessary to maintain or restore international peace and security.” It must be emphasized, however, that both exceptions derogate only from the Charter prohibition on the use of inter-State force, but cannot terminate, diminish or otherwise modify the absolute obligation of belligerents to comply with IHL (*equality of belligerents*).³⁴

2. IHL and human rights law

While IHL regulates the conduct of hostilities and the protection of persons in situations of armed conflict, international human rights law protects the individual from abusive or arbitrary exercise of power by State authorities. While there is considerable overlap between these bodies of law, there are also significant differences.

³⁴ On the equality of belligerents, see Section I.2.

Scope of application: While the personal, material and territorial applicability of IHL essentially depends on the existence of a nexus with an armed conflict, the applicability of human rights protections depends on whether the individual concerned is within the “jurisdiction” of the State involved. For example, during an international armed conflict, IHL applies not only in the territories of the belligerent States, but essentially wherever their armed forces meet, including the territory of third States, international airspace, the high seas, and even cyberspace. According to the prevailing interpretation, human rights law applies only where individuals find themselves within territory controlled by a State, including occupied territories (*territorial jurisdiction*), or where a State exercises effective control, most commonly physical custody, over individuals outside its territorial jurisdiction (*personal jurisdiction*).³⁵ More extensive interpretations of jurisdiction have been put forward that would extend human rights protections to any individual adversely affected by a State, but they remain controversial.

Scopes of protection and obligation: IHL is sometimes inaccurately described as the “human rights law of armed conflicts.” Contrary to human rights law, IHL generally does not provide persons with rights they could enforce through individual complaints procedures. Also, human rights law focuses specifically on human beings, whereas IHL also directly protects, for example, livestock, civilian objects, cultural property, the environment and the political order of occupied territories. Finally, human rights law is binding only on States, whereas IHL is binding on all parties to an armed conflict, including non-State armed groups.

Derogability: Most notably, IHL applies only in armed conflicts and is specifically designed for such situations. Therefore, unless expressly foreseen in the relevant treaty provisions, the rules and principles of IHL cannot be derogated from. For example, it would not be permissible to disregard the prohibition on attacks against the civilian population based on arguments such as military necessity, self-defence or distress. Human rights law, on the other hand, applies irrespective of whether there is an armed conflict. In times of public emergency, however, human rights law allows for derogations from protected rights to the extent actually required by the exigencies of the situation. For example, during an armed conflict or a natural disaster, a government may lawfully restrict freedom of movement in order to protect the population in the affected areas

35 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (*The Wall Opinion*), 9 July 2004, *ICJ Reports 2004*, para. 109. See also ECHR, *Loizidou v. Turkey* (Preliminary Objections), App. No. 15318/89, 23 February 1995, Series A no. 310, paras 62-63; ECHR, *Öcalan v. Turkey*, App. No. 46221/99, Judgment of 12 March 2003 (Chamber), para. 93 and ECHR, *Öcalan v. Turkey*, App. No. 46221/99, Judgment of 12 May 2005 (Grand Chamber), para. 91.

and to facilitate governmental action aimed at restoring public security and law and order. Only a number of core human rights, such as the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, and the prohibition of slavery remain non-derogable even in times of public emergency.

Interrelation: Despite these fundamental differences, IHL and human rights law have rightly been said to share a “common nucleus of non-derogable rights and a common purpose of protecting human life and dignity.”³⁶ As a general rule, where IHL and human rights law apply simultaneously to the same situation, their respective provisions do not contradict, rather they mutually reinforce each other. Thus, both IHL and human rights law prohibit torture or inhuman and degrading treatment and afford fair-trial guarantees to anyone accused of a crime.

In some areas, the interrelation between IHL and human rights law may be less straightforward. For example, with respect to persons who do not, or no longer, directly participate in hostilities, IHL prohibits violence to life and person, in particular murder in all circumstances. For obvious reasons, however, it does not provide such protection to combatants and civilians directly participating in hostilities. Universal human rights law, on the other hand, protects all persons against “arbitrary” deprivation of life, thus suggesting that the same standards apply to everyone, irrespective of their status under IHL. In such cases, the respective provisions are generally reconciled through the *lex specialis* principle, which states that the law more specifically crafted to address the situation at hand (*lex specialis*) overrides a competing, more general law (*lex generalis*). Accordingly, the ICJ has held that, while the human rights prohibition on arbitrary deprivation of life also applies in hostilities, the test of what constitutes arbitrary deprivation of life in the context of hostilities is determined by IHL, which is the *lex specialis* specifically designed to regulate such situations.³⁷ Similarly, the question of whether the internment of a civilian or a prisoner of war by a State party to an international armed conflict amounts to arbitrary detention prohibited under human rights law must be determined based on the Third and Fourth Geneva Conventions, which constitute the *lex specialis* specifically designed to regulate internment in such situations.

In other areas, the question of the interrelation between IHL and human rights may be even more complicated. For example, while treaty IHL confirms the existence of security internment in non-international armed

36 IACHR, *Juan Carlos Abella v. Argentina (La Tablada case)*, Case No. 11.137, Report No. 55/97, 18 November 1997, para. 158. See also ICTY, *Prosecutor v. Anto Furundzija* (Trial Judgment), IT-95-17/1-T, 10 December 1998, para. 183.

37 ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), 8 July 1996, *ICJ Reports* 1996, para. 25.

conflicts as well, it does not contain any procedural guarantees for internees, thus raising the question as to how the human rights prohibition of arbitrary detention is to be interpreted in such situations.

Finally, even though, in armed conflicts, IHL and human rights law generally apply in parallel, some issues may also be exclusively governed by one or the other body of law. For example, the fair-trial guarantees of a person who has committed a common bank robbery in an area affected by an armed conflict, but for reasons unrelated to that conflict, will not be governed by IHL but exclusively by human rights law and national criminal procedures. On the other hand, the aerial bombardment of an area outside the territorial control of the attacking State, or any belligerent acts committed by organized armed groups not belonging to a State, will not be governed by human rights law but exclusively by IHL.

Textbox 2: ICRC expert meeting on IHL and the use of force in armed conflicts

Scope and practical relevance of the problem

In a situation of armed conflict, the use of force by armed forces and law enforcement officials is governed by two different paradigms: the conduct of hostilities paradigm, derived from IHL, and the law enforcement paradigm, mainly derived from human rights law. Increasingly, in many contemporary armed conflicts – particularly in occupied territories and in non-international armed conflicts – armed forces are expected to conduct not only combat operations against the adversary but also law enforcement operations in order to maintain or restore public security and law and order. The two paradigms may also coexist in conflicts involving foreign intervention with the agreement of the territorial State (i.e. the State on whose territory the conflict is taking place), or under the mandate of the international community. In practice, it may be difficult to determine which situations are governed by which paradigm. For example, a State engaged in a non-international armed conflict will regard armed opposition fighters not only as legitimate military targets under IHL but also as criminals under domestic law. Thus, the armed forces of that State using force against those fighters may be considered as simultaneously conducting hostilities and maintaining law and order. Difficult situations may also arise when civil unrest coincides with combat operations, or when persons engaged in combat intermingle with civilian rioters or demonstrators. The choice of the applicable paradigm may have significant legal and humanitarian consequences, given that the conduct of hostilities paradigm is generally more permissive than the law enforcement paradigm, most notably in terms of the deliberate use of lethal force and of incidental harm to the civilian population.

ICRC expert meeting and report

In view of the practical importance of clarifying these questions, the ICRC convened an expert meeting in Geneva on 26 and 27 January 2012 with a view to identifying the dividing line between the conduct of hostilities and law enforcement paradigms in situations of armed conflict. The meeting brought together 22 prominent legal personnel and academics from 16 different countries under the Chatham House Rule, each participating in his or her personal capacity. In November 2013, the ICRC published a report on the issues discussed at the meeting with a few of its concluding observations.

- For further details, see Gloria Gaggioli (ed.), *The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms – Expert Meeting*, Report, ICRC, Geneva, November 2013, 92 pp.
- See also Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms, ICRC webinar recording, November 2014. Available at: <https://www.icrc.org/eng/resources/documents/event/2014/webinar-use-of-force.htm>

3. IHL and international criminal law

In regulating the conduct of hostilities and protecting the victims of armed conflict, IHL imposes certain duties on those involved in the conflict and prohibits them from engaging in certain acts. In order to enforce these duties and prohibitions, IHL obliges all parties to a conflict to take the measures necessary to prevent and repress violations of IHL, including criminal prosecution and sanctions. The 1949 Geneva Conventions and Additional Protocol I also identify a series of particularly serious violations, referred to as “grave breaches” and, in Additional Protocol I, as “war crimes,” which give rise to universal jurisdiction. This means that any State, irrespective of its involvement in a conflict or its relation to the suspects or victims in an alleged crime, has an international obligation to conduct an investigation and to either prosecute the suspects or to extradite them to another State willing to prosecute them.³⁸

In short, IHL obliges States to prevent and prosecute serious violations of IHL, but it does not attach sanctions to these violations, does not describe them in sufficient detail to make them prosecutable in court, and does not establish any procedures for the exercise of jurisdiction over individual suspects. This is the role of criminal law, whether on the domestic or the international level. In other words, criminal law, in contrast to IHL, does

³⁸ See also Chapter 7.V.

not define the duties of the belligerents, but creates the legal basis needed to prosecute individuals for serious violations of these duties.

Traditionally, the enforcement of IHL at the level of the individual was largely ensured by the belligerent States themselves, through disciplinary sanctions and criminal prosecution under their national laws and regulations. It was at the end of World War II that serious violations of IHL were first considered to give rise to individual criminal responsibility as a matter of international law and were prosecuted as war crimes by the International Military Tribunals in Nuremberg and Tokyo. These trials remained tied to specific contexts, however, and prosecuted only crimes committed by the defeated parties to the conflict. When the UN Security Council established the ICTY and the ICTR in 1993 and 1994, respectively, their jurisdiction was still confined to particular contexts. It was only with the adoption of the Rome Statute, in 1998, that the international community finally created a permanent International Criminal Court with jurisdiction over international crimes committed by nationals, or on the territory, of a State party to the Statute, or referred to it by the UN Security Council. Today, the Rome Statute has been ratified by more than 120 States; however, a number of militarily important States have yet to do so.

→ On the enforcement of IHL through international criminal law, see Chapter 7.V.–VI.

4. IHL and the law of neutrality

The law of neutrality is traditionally regarded as part of the law of war (*jus in bello*) alongside IHL. It is rooted in customary law and codified in the Hague Conventions, Nos V and XIII, of 1907. In essence, the law of neutrality has three aims: (a) to protect neutral States (i.e. all States that are not party to an international armed conflict) from belligerent action; (b) to ensure neutral States do not militarily support belligerent States; and (c) to maintain normal relations between neutral and belligerent States. Most notably, the law of neutrality obliges neutral States to prevent their territory, including airspace and waters subject to their territorial sovereignty, from being used by belligerent States. If combatants belonging to either party cross into neutral territory, they must be interned by the neutral State; the Third Geneva Convention also requires that they be treated as prisoners of war.³⁹ The belligerents, in turn, must respect the inviolability of neutral territory and may not move troops or convoys of ammunition or supplies across the territory of a neutral State.

³⁹ Hague Regulations, Art. 11; GC III, Art. 4(B)(2).

Strictly speaking, the law of neutrality applies only in international armed conflicts. Over the course of time, however, its rationale has gradually found its way into the practice of non-international armed conflicts as well. For example, with regard to the standards of internment to be applied by neutral States to combatants on their territory, the ICRC has formally stated that Hague Convention No. V “can also be applied by analogy in situations of non-international conflict, in which fighters either from the government side or from armed opposition groups have fled into a neutral State.”⁴⁰

By the same token, in political reality, the consequences of non-State armed groups using the territory of a neutral State to conduct attacks against a belligerent State are similar to those foreseen in the traditional law of neutrality and include, most notably, the loss of the neutral territory’s inviolability. For example, when attacks were launched by al-Qaeda against the United States from within Afghanistan (2001), by Hezbollah against Israel (2006) from within Lebanon, and by the FARC against Colombia from within Ecuador (2008), all the States that had been attacked conducted cross-border incursions against the groups in question, because their neutral host States were unable or unwilling to protect the attacked States’ interests within their territory. The international lawfulness of such cross-border incursions remains widely controversial, particularly in view of the UN Charter’s prohibition on the use of inter-State force. However, the basic obligation of States to prevent non-State armed groups within their territory from engaging in hostile activities against other States is generally recognized.⁴¹

To go further (IHL in the international legal order)⁴²

- Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, ICRC, Geneva, 2011, Vol. I, [Chapter 2: International humanitarian law as a branch of public international law](#), pp. 101–138.
- Louise Doswald-Beck and Sylvain Vité, “[International Humanitarian Law and Human Rights Law](#),” *IRRC*, No. 293, March–April 1993, pp. 94–119.

40 ICRC, The Civilian Character of Asylum: Separating Armed Elements from Refugees, Official Statement to the UNHCR Global Consultations on International Protection, 8–9 March 2001.

41 See, for example, the Annex to UN General Assembly Resolution 36/103 of 9 December 1981, Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, paras 2(II)(b) and 2(II)(f).

42 ICRC documents available at: www.icrc.org

- Françoise Hampson and Ibrahim Salama, *The Relationship between Human Rights Law and International Humanitarian Law*, Working Paper submitted to the UN Commission on Human Rights, document E/CN.4/Sub.2/2005/14, 21 June 2005.
- ICRC Advisory Services on International Humanitarian Law, *International Humanitarian Law and International Human Rights Law: Similarities and Differences*. Available at: http://www.icrc.org/eng/assets/files/other/ihl_and_ihrl.pdf

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- Case No. 23, [The International Criminal Court](#)
- Case No. 93, [United States Military Tribunal at Nuremberg, The Justice Trial](#)
- Document No. 98, [The Tokyo War Crimes Trial](#)
- Case, ECHR, [Al-Jedda v. UK](#) (only available online)
- Case, ECHR, [Hassan v. UK](#) (only available online)
- Case, [UK, Serdar Mohammed v. Ministry of Defence](#) (only available online)

IV. A BRIEF HISTORY OF IHL AND SOME CONTEMPORARY CHALLENGES

1. From ancient battlefields to industrialized war

War is as old as mankind, and all civilizations and religions have tried to limit its devastating effects by subjecting warriors to customary practices, codes of honour and local or temporary agreements with the adversary. These traditional forms of regulating warfare became largely ineffective with the rise of conscripted mass armies and the industrialized production of powerful weapons in the course of the nineteenth century – with tragic consequences on the battlefield. Military medical services were not equipped to cope with the massive number of casualties caused by modern weaponry; as a result, tens of thousands of wounded, sick and dying soldiers were left unattended after battle. This trend, which began with the Napoleonic Wars in Europe (1803–1815) and culminated in the American Civil War (1861–1865), set the stage for a number of influential humanitarian initiatives, both in Europe and in North America, aimed at alleviating the suffering of war victims and driving the systematic codification of modern IHL.

2. Humanitarian initiatives and first codifications

In Europe, the move towards codification of IHL was initiated by a businessman from Geneva, Henry Dunant. On a journey through northern Italy in 1859, Dunant witnessed a fierce battle between French and Austrian troops and, appalled at the lack of assistance and protection for more than 40,000 wounded soldiers, improvised medical assistance with the aid of the local population. After returning to Geneva, Dunant wrote *Un souvenir de Solferino* (*A Memory of Solferino*), in which he made essentially two proposals. First, independent relief organizations should be established to provide care to wounded soldiers on the battlefield and, second, an international agreement should be reached to grant such organizations the protection of neutrality. His ideas were well received in the capitals of Europe and led to the founding of the International Committee of the Red Cross (1863) and to the adoption by 12 States of the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (1864). The Convention adopted the emblem of the red cross on a white background – the colours of the Swiss national flag inverted – as a neutral protective sign for hospitals and those assisting the wounded and sick on the battlefield. A parallel development was triggered by the atrocities of the American Civil War and led to the adoption by the government of the United States of the so-called Lieber Code or, more accurately, the Instructions for the Government of Armies of the United States in the Field (1863). Although the Lieber Code was a domestic instrument and not an international treaty, it has influenced the development and codification of modern IHL well beyond the borders of the United States.

3. Towards universal codification

Since the adoption of these first instruments, the body of treaty IHL has grown in tandem with developments in warfare to become one of the most densely codified branches of international law today.

In 1906, the original Geneva Convention was extended to further improve the condition of sick and wounded soldiers and, in 1907, the Hague Regulations concerning the Laws and Customs of War on Land formulated the basic rules governing the entitlement to combatant privilege and prisoner-of-war status, the use of means and methods of warfare in the conduct of hostilities, and the protection of inhabitants of occupied territories from inhumane treatment. After the horrors of chemical warfare and the tragic experience of millions of captured soldiers during the Great War (World War I), these instruments were supplemented by the Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925) and, a few years later, a separate Geneva Convention relative to the Treatment of Prisoners of War (1929).

After the cataclysm of World War II, which saw massive atrocities committed not only against wounded, captured and surrendering combatants but also against millions of civilians in occupied territories, the 1949 Diplomatic Conference adopted a revised and completed set of four Geneva Conventions: the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), the Convention relative to the Treatment of Prisoners of War (Third Geneva Convention) and the Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention). The four Geneva Conventions of 1949 are still in force today and, with 196 States Parties, have become the most widely ratified treaties.⁴³

With the establishment of the United Nations and the consolidation of the bipolar world order of the Cold War, war no longer took place mainly between sovereign States (international armed conflicts), but between governments and organized armed groups (non-international armed conflicts). On the one hand, former colonial powers were increasingly confronted with popular demands for independence and self-determination, resulting in wars of national liberation – from the Malay Peninsula through the Middle East to the Maghreb and sub-Saharan Africa. On the other hand, policies of mutual nuclear deterrence entailed a military stalemate between the United States and the Soviet Union, which in turn resulted in a proliferation of non-international proxy wars between governments and organized armed groups, in which each side was supported by one of the superpowers.

So far, the only provision of treaty law applicable to non-international armed conflicts had been common Article 3, which essentially requires the protection and humane treatment of all persons who are not, or no longer, taking an active part in hostilities. It was only in 1977 that two protocols additional to the Geneva Conventions were adopted to further develop treaty IHL. Additional Protocol I, “relating to the Protection of Victims of International Armed Conflicts,” not only improves and clarifies the protections already provided by the Geneva Conventions, it also contains the first systematic codification of IHL governing the conduct of hostilities. It also assimilates certain wars of national liberation against colonial domination, alien occupation and racist regimes to international armed conflicts, thus providing members of the insurgent forces the same rights and privileges as are enjoyed by combatants representing a sovereign State.

43 See States party to the main treaties, ICRC reference document, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountry.xsp>

Additional Protocol II, “relating to the Protection of Victims of Non-International Armed Conflicts,” strengthens and further develops the fundamental guarantees established by common Article 3 for situations of civil war.

At the same time, efforts to avoid unnecessary suffering among combatants and to minimize incidental harm to civilians have resulted in a range of international conventions and protocols prohibiting or restricting the development, stockpiling or use of various weapons, including chemical and biological weapons,⁴⁴ incendiary weapons,⁴⁵ blinding laser weapons,⁴⁶ landmines and cluster munitions.⁴⁷ Moreover, States are now obliged to conduct a review of the compatibility of any newly developed weapon with the rules and principles of IHL.⁴⁸

Concurrently, State practice has resulted in a considerable body of customary IHL applicable in all armed conflicts,⁴⁹ and the case-law of the Nuremberg and Tokyo Tribunals, the ICJ, the ad hoc Tribunals for the former Yugoslavia, Rwanda and Sierra Leone, and, most recently, the ICC has significantly contributed to the clarification and harmonious interpretation of both customary and treaty IHL.

Today, after 150 years of development, refinement and codification, the once fragmented and amorphous codes and practices of the past have emerged as a consolidated, universally binding body of international law regulating the conduct of hostilities and providing humanitarian protection to the victims of all armed conflicts. It is precisely at this point of relative maturity that the advent of the new millennium has posed fresh challenges to the fundamental achievements of IHL.

4. Current and emerging challenges

4.1 The “war on terror” and the rise of organized crime

No event embodies the global security challenges of the twenty-first century more than the dramatic terrorist attacks of 11 September 2001 in New York City and Washington, DC. Although, fortunately, these attacks have remained exceptional in terms of scale and magnitude, they triggered a veritable

44 Biological Weapons Convention; Chemical Weapons Convention.

45 Protocol III to the Convention on Certain Conventional Weapons.

46 Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), 13 October 1995.

47 Anti-Personnel Mine Ban Convention; Convention on Cluster Munitions.

48 AP I, Art. 36. On the regulation of weapons in IHL, see Chapter 3.V.4–5 and VI.4.

49 See Textbox 1, Chapter 1.II.2.

paradigm shift in national and international security policy. Within days of the attacks, the United States had declared a global “war on terror,” the UN Security Council had affirmed the right of self-defence against what appeared to be an attack by a transnational terrorist group, and NATO had for the first time in its history declared a case of collective self-defence based on Article 5 of the North Atlantic Treaty. The decade-long nuclear stalemate between superpowers was no longer perceived as the world’s foremost security concern, and the focus shifted to the vulnerability of modern, globalized society to the harm caused by sophisticated terrorist groups and other forms of transnational organized crime. The emergence of “war on terror” rhetoric, followed by military operations against suspected terrorist groups and individuals in Afghanistan, Yemen, Somalia and elsewhere, and the capture and transfer of hundreds of suspects to detention centres like the US internment facility at Guantanamo Bay Naval Station in Cuba raised a series of questions as to the nature and consequences of these operations under international law. Can all or part of the global “war on terror” be regarded as an armed conflict governed by IHL? If so, what are the geographic delimitations of this conflict and how does IHL interrelate with human rights law? What is the legal status of suspected terrorists, including those deprived of their liberty? Are they “unprivileged” combatants subject to direct attack? Or are they civilian criminals subject to arrest and prosecution under the rules of law enforcement? Once captured, are they entitled to combatant and prisoner-of-war status, or are they to be treated as civilian internees? What are the judicial guarantees and procedural rights of persons interned or prosecuted for their alleged involvement in transnational terrorism? What limits does the prohibition of torture and inhumane treatment impose on interrogation methods used to avert a perceived imminent terrorist threat? As will be shown, some of these questions have been largely resolved, while others remain controversial to this day. It is important to note, however, that the legal challenges related to transnational terrorism are not an isolated phenomenon, but are part and parcel of a broader trend towards transnational organized crime becoming a primary international security concern. Thus, similar questions with regard to the applicability and interpretation of IHL may also arise in other contexts where States resort to military means and methods in order to protect their internal and external security, whether in large-scale counter-narcotics campaigns, in multinational counter-piracy operations at sea, or even in particularly dramatic cases of urban gang warfare or mass hostage-taking. As a result of this trend, the distinction between peace and armed conflict, and between policing and military hostilities, is becoming increasingly blurred, and there is growing confusion as to the legal standards governing such situations.

- On the scope of application of IHL, see Chapter 2.
- On the legal status, treatment and procedural guarantees of persons deprived of their liberty, including “unprivileged” combatants, see Chapter 5.

4.2 Asymmetric conflicts and the challenge to non-reciprocity

Since the end of the Cold War, armed conflicts have become increasingly asymmetric, typically pitting overwhelmingly powerful States against often poorly organized and equipped armed groups. Prime examples of such conflicts are the multinational campaign against the Taliban in Afghanistan and recurrent Israeli operations against Hamas in the Gaza Strip. The enormous technological and military superiority of the States involved has led opposition groups to avoid identification and defeat by moving underground, intermingling with the civilian population and engaging in various forms of guerrilla warfare. As a result, military confrontations often take place in the midst of densely populated areas, which not only exposes the civilian population to increased risks of incidental harm, but also facilitates the direct participation of civilians in hostilities. Moreover, unable to prevail in direct confrontations with the enemy, armed groups are increasingly tempted to resort to means and methods prohibited by IHL, such as misusing civilian clothing to perfidiously kill, wound or capture an adversary, conducting indiscriminate attacks, or even directly targeting civilians, humanitarian or medical personnel and their infrastructure (so-called “soft targets”). State armed forces, in turn, are often unable to properly identify the adversary and bear an increased risk of being attacked by persons they cannot distinguish from the civilian population. Overall, this trend has put considerable strain on the concepts of non-reciprocity and the equality of belligerents and, unfortunately, on the willingness of both State armed forces and non-State armed groups to accept their obligations under IHL.

4.3 Privatization and civilianization of military and security activities

The armed forces have always been supported by civilians, including contractors and employees of civilian government services. Indeed, except in a few very specific cases,⁵⁰ IHL does not prohibit the outsourcing of military and security functions but even stipulates that civilians formally authorized to accompany the armed forces in an international armed conflict be

50 Most notably, the 1949 Geneva Conventions require that “[e]very prisoner of war camp shall be put under the immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power” (GC III, Art. 39), and that “[e]very place of internment shall be put under the authority of a responsible officer, chosen from the regular military forces or the regular civil administration of the Detaining Power” (GC IV, Art. 99).

entitled to prisoner-of-war status upon capture.⁵¹ The past decade, however, has seen an unprecedented trend towards the outsourcing of functions traditionally assumed by State armed forces to private military and security companies. In the recent wars in Iraq and Afghanistan, for example, tens of thousands of private contractors were deployed, and there were even periods when they clearly outnumbered the multinational forces on the ground. Depending on the context, such companies may assume a wide variety of functions, ranging from reconstruction, logistics, training and administrative services to the provision of security for civilian and military personnel and infrastructure, and from the maintenance and operation of complex weapon systems to guarding and interrogating detainees. Some of their activities are so closely related to combat operations that their personnel risk being regarded as directly participating in the hostilities and, depending on the circumstances, even as mercenaries.⁵² The privatization of military functions also raises a number of serious humanitarian concerns. First, it must be emphasized that States cannot, through the practice of outsourcing, absolve themselves of their legal responsibilities under IHL. Thus, they remain responsible for ensuring that the private military and security companies that are contracted by them, or that operate or are incorporated in their territory, respect all applicable laws and regulations, including IHL. Moreover, whatever their functions or activities may be, private contractors never fall outside the protection of IHL. In short, contrary to popular perception, private military and security contractors do not operate in a legal void.

→ On civilian participation in hostilities, see Chapter 3.I.4.

51 GC III, Art. 4(4) and (5).

52 For the definition of mercenaries under IHL, see AP I, Art. 47 and CIHL, Rule 108.

Textbox 3: The Montreux Document

The Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict (Montreux Document) is the product of a joint initiative launched in 2006 by the Swiss government and the ICRC. It aims to clarify existing international obligations relevant to the operations of private military and security companies in situations of armed conflict and to provide support and guidance for the implementation of those obligations. It focuses on practical issues of humanitarian concern and does not take a stance on the important, but separate, question of the legitimacy of using such companies in armed conflicts.

The Montreux Document consists of two parts. Part I restates the obligations of States, private military and security companies and their personnel under existing international law, including both IHL and human rights law, with regard to the operations of such companies in situations of armed conflict. In addressing the obligations of States, the Montreux Document differentiates between States using the services of such companies (contracting States), States in whose territory the companies operate (territorial States) and States in whose territory they are headquartered or incorporated (home States). Part I also addresses the obligations of “all other States,” the duties of private military and security companies and their personnel, and questions of superior responsibility and of State responsibility for the companies’ conduct. Part II provides a compilation of good practices designed to assist contracting, territorial and home States in complying with these legal obligations. The good practices are based largely on existing State practice in related areas and include measures such as introducing transparent licensing regimes, requiring adequate training and ensuring civil and criminal accountability.

The Montreux Document was developed between January 2006 and September 2008 with the support of governmental experts from 17 States and in consultation with representatives of civil society and of the private military and security industry. The Montreux Document does not create any new legal obligations, nor does it legitimize or provide a legal basis for the use of private military and security companies.

- For further details, see [*Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict*](#), ICRC and Federal Department of Foreign Affairs, Switzerland, August 2009, 44 pp.
- An updated list of supporting States and organizations can be found at: <https://www.eda.admin.ch/eda/en/home/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html>



S. Robertson/Crown

Unmanned aerial systems: a Predator aircraft ready for take-off, 2004.

4.4 New weapons technologies

In many contemporary armed conflicts, military operations and weapon systems have attained an unprecedented level of complexity, involving the coordination of a great variety of interdependent human and technological resources in different locations spread across the globe. In conjunction with the advent of new technologies, such as remote-controlled weapons, means of cyber-warfare, nanotechnology and increasingly autonomous weapons, this development poses a significant challenge to the interpretation and application of IHL.

(a) Remote-controlled drones

For example, the systematic use of remote-controlled drones for counter-terrorist operations in countries such as Afghanistan, Pakistan and Yemen raises questions as to the applicability of IHL to these operations and, consequently, as to the rules governing the use of lethal force against the persons targeted. Where IHL is applicable, the systematic use of drones raises concerns with regard to the reliability of the targeting information used, the exposure of the civilian population to incidental harm, and the inability of the attacker to care for the wounded, or to capture rather than kill.

(b) Cyber-warfare

Another relatively recent development is the expansion of military operations into cyberspace, the so-called “fifth domain of warfare” next to land, sea, air and space. While it is generally uncontested that IHL would also apply to cyber operations conducted in relation to an existing armed

conflict, it is unclear whether cyber operations, in and of themselves, could give rise to an armed conflict and, thus, trigger the applicability of IHL. Also, once cyber operations are governed by IHL, questions arise as to what exactly amounts to “attacks” – defined in IHL as “acts of violence”⁵³ – in cyberspace, and how the proportionality of “collateral damage” to civilian infrastructure should be assessed, particularly in view of the fact that military and civilian computer networks are generally interconnected. Also, what precautions can and must be taken to avoid the risk of excessive incidental damage to civilian objects whose functioning depends on computer systems (hydro-electric and nuclear plants, hospitals, etc.)? How can it be ensured that this damage does not ultimately cause erroneous or excessive harm to persons and objects protected against direct attack? What does the duty of combatants to distinguish themselves from the civilian population mean in cyberspace? Cyber-warfare also raises legal questions of fundamental importance in other areas of international law, such as *jus ad bellum* and the law of neutrality. These questions must be resolved through careful interpretation of existing IHL treaties and customary rules. The current discussion on the interpretation and application of international law in cyberspace involves a growing number of academic, national and international fora, and it will certainly take time for a consensus to emerge in that regard. This ongoing process, however, should not lead to the misperception of a legal void in this “fifth domain,” but must build on the premise that existing international law fully applies in cyberspace. In situations of armed conflict, that includes all relevant rules and principles of IHL.



Reuters

Personnel at the Air Force Space Command Network Operations & Security Center at Peterson Air Force Base in Colorado Springs, Colorado, 2014.

53 API, Art. 49(1).

Textbox 4: Tallinn Manual on the International Law Applicable to Cyber Warfare

In 2009, the NATO-affiliated Cooperative Cyber Defence Centre of Excellence launched a multi-year project aimed at producing the *Tallinn Manual on the International Law Applicable to Cyber Warfare* (*Tallinn Manual*).⁵⁴ The project brought together experts in international law, professional and academic, predominantly from NATO and NATO-allied military circles, with observers from the ICRC, the United States Cyber Command and the Centre of Excellence, in an effort to examine how existing rules and principles of international law can be applied to cyber-warfare.

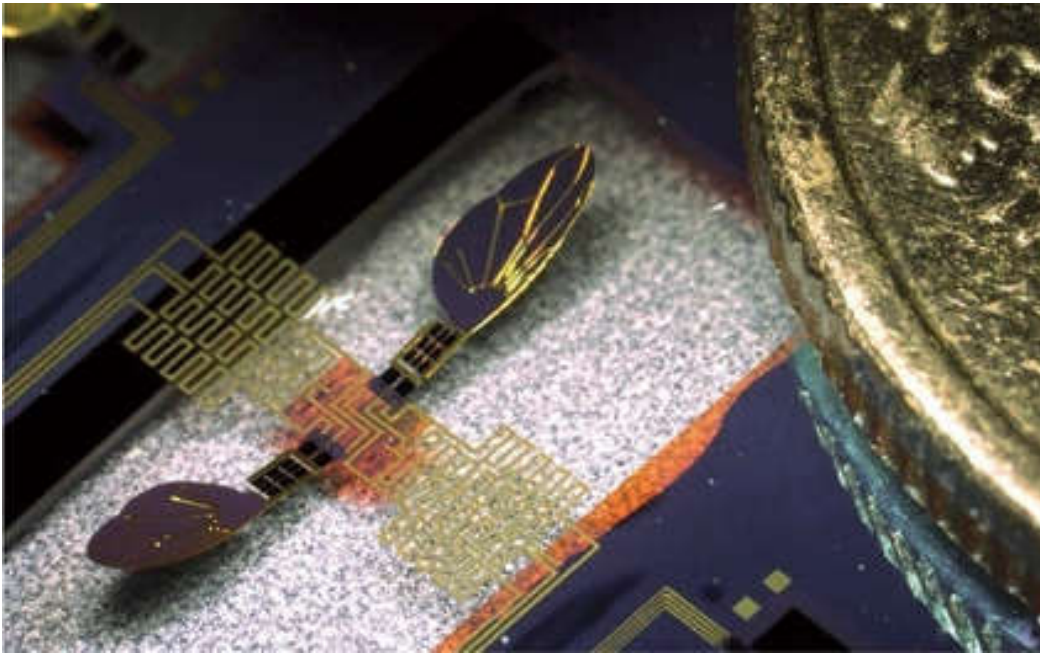
The *Tallinn Manual* is intended to restate and clarify international law governing cyber-warfare, including both the law governing the use of inter-State force (*jus ad bellum*), and the law governing the conduct of international and non-international armed conflicts (*jus in bello*). It does not address cyber activities occurring below the threshold of “use of force” (*jus ad bellum*) or of an armed conflict (*jus in bello*),⁵⁵ nor does it examine human rights law, international criminal law or international telecommunications law. It is divided into ninety-five “blackletter” rules, each accompanied by a commentary. The “blackletter” rules constitute a restatement of the international law of cyber conflict. The commentary accompanying each rule identifies the legal basis on which the rule was developed, expands on its application in practice and sets forth differing positions as to its scope or application.

The *Tallinn Manual* process is currently the most significant initiative to restate and clarify international law as it applies to cyber-warfare. It should be noted, however, that the *Manual* is not legally binding and does not necessarily represent the views of NATO or any other organization, or of any State. Instead, it reflects solely the opinions of the participating experts, all acting in their individual capacity. Moreover, it does not make any recommendations with regard to how the law should be clarified and developed; it simply restates and comments on the law as the participating experts see it. It was published in 2013 by Cambridge University Press.

- See Michael Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, Cambridge, 2013, 300 pp.

⁵⁴ The full text of the *Tallinn Manual* is available at: http://issuu.com/nato_ccd_coe/docs/tallinnmanual

⁵⁵ To determine what situations qualify as armed conflicts under IHL, see Chapter 2.III–V.



US Army/RDECOM

The United States Army works with industry and universities to study micro-robotics and develop technologies allowing soldiers to see threats lurking just beyond their range of vision using autonomous robots the size of bats and hummingbirds and even as small as fruit flies, 2012.

(c) Ongoing developments: Nanotechnology and autonomous weapons

Other technological developments of potential concern to IHL are the introduction of nanotechnology and increasingly autonomous weapons on contemporary battlefields. While nanotechnology is already being used in current military operations, most notably to enhance the performance of certain ammunitions and armour plating, the development of fully autonomous robots capable of taking targeting decisions independently of human involvement may still be decades away. However, this prospect clearly raises questions as to the operational control of such weapon systems and the legal and criminal responsibility for the harm done by them in case of actions violating IHL. The most important observation to be made here is that the responsibility to ensure that all means and methods used in an armed conflict comply with IHL will always remain with the parties to that conflict. Moreover, any individual act or omission amounting to criminal involvement in violations of IHL will remain subject to prosecution and punishment, even if the ultimate “decision” to commit the crime in question was taken by a machine based on programs and algorithms rather than on real-time commands by a human operator.

- On the duty of States to conduct a legal review of new weapons technologies, see Chapter 3.V.5.



J. Nicolas/Sipa Press

Keysaney Hospital in Mogadishu, Somalia, 1991. Note the red cross and red crescent emblems and the instructions prohibiting entry with weapons.

4.5 Respect for IHL

The legal and practical difficulties arising as a result of changes in the contemporary security environment have caused confusion and uncertainty not only about the distinction between armed conflict and law enforcement, but also about the traditional categorization of persons as civilians and combatants and the temporal and geographic delimitation of the “battlefield.” As most poignantly evidenced by the controversies surrounding the legal framework governing the various aspects of the United States’s “war on terror,” that confusion and uncertainty have also provoked doubt about the adequacy of existing IHL to cope with the emerging security challenges of the twenty-first century. In response, various key stakeholders have launched important processes aimed at analysing, reaffirming and clarifying IHL in areas of particular humanitarian concern, including, most recently, the ICRC’s initiative on strengthening legal protection for victims of armed conflicts and the joint initiative of Switzerland and the ICRC on strengthening mechanisms for the implementation of IHL (see Textbox 9, Chapter 7.III.4.b). These processes remain ongoing, but two preliminary observations can already be drawn from the preparatory work and initial discussions. First, there may indeed be certain areas of IHL that require further strengthening in order to better protect individuals exposed to contemporary armed conflicts. The most urgent humanitarian need, however, is not to adopt new rules but rather to ensure actual compliance with the existing legal framework.

- On the implementation and enforcement of IHL, see Chapter 7.
- On the special role of the ICRC with regard to the implementation and enforcement of IHL, see Chapter 8.

To go further (A Brief History of IHL and Contemporary Challenges for IHL)⁵⁶

- *The Story of an Idea*, film, ICRC, 2008. Available at: <https://www.youtube.com/watch?v=I9bsmnuJU-o>
- Henry Dunant, *A Memory of Solferino*, ICRC, Geneva, 1986, 147 pp.
- Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?*, ICRC, Geneva, 2011, Vol. I, [Chapter 3: Historical development of international humanitarian law](#), pp. 139–148.
- Mary Ellen O’Connell, “Historical development and legal basis,” in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, Oxford, 2013, pp. 1–42.
- Gabor Rona, “Interesting times for international humanitarian law: Challenges from the ‘war on terror’,” *The Fletcher Forum of World Affairs*, Vol. 27(2), Summer/Fall 2003, pp. 55–74.
- Robin Geiss, “[Asymmetric conflict structures](#),” *IRRC*, Vol. 88, No. 864, December 2006, pp. 757–777.
- “[Private military companies](#),” *IRRC*, Vol. 88, No. 863, September 2006.
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- ICRC Advisory Services on International Humanitarian Law, [What Is International Humanitarian Law?](#), 2004.
- “Current debates on IHL,” webpage, ICRC. Available at: <https://www.icrc.org/en/war-and-law/contemporary-challenges-for-ihl>

How Does Law Protect in War?

- Case No. 85, United States, [The Prize Cases](#)
- Case No. 263, [United States, Status and Treatment of Detainees held in Guantánamo Naval Base](#)
- Case No. 286, [The Conflict in Western Sahara](#)
- Case No. 288, [United States, The September 11 2001 Attacks](#)

⁵⁶ All ICRC documents available at: www.icrc.org

Oxford Public International Law



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A. *Ius ad bellum* and *ius in bello*: International Law and Armed Conflict

1 Modern international law includes two chapters that respond to the threat and conduct of war or, as the phenomenon is now regularly called, of armed conflict: *ius ad bellum* and *ius in bello*. The aim of the first set of rules is to prohibit war as a means to settle disputes between States (→ *Use of Force, Prohibition of*). The main source of this prohibition is the UN Charter, which outlaws the threat or use of force in international relations (→ *Use of Force, Prohibition of Threat*), with the exception of those circumstances that may justify such use of force, in particular individual and collective → *self-defence* and resort to collective measures based on Chapter VII of the UN Charter. The rules of *ius in bello*, on the other hand, for humanitarian reasons impose constraints on the conduct of hostilities in the course of all types of armed conflict, with a view to limit suffering and destruction once an armed conflict breaks out: international humanitarian law.

2 Although covering the same phenomenon—collective resort to force in the international context—the two bodies of international law respond to different policies and have different purposes. The UN Charter prohibits the resort to force with the exception of clearly defined situations, while international humanitarian law becomes applicable to all armed conflicts and under all circumstances, whether the use of force is lawful or not, whether it is legitimate or not. Its applicability does not depend on the legal qualification of the armed hostilities. That means that both States fighting what they consider to be a ‘just war’—a notion that has no place in present-day international humanitarian law—and States that are the victim of an unlawful attack must respect its provisions. The fate of those who are affected by armed hostilities, ie the victims of armed conflict, in particular the civilian population and detained persons, cannot depend on the motive of States for resorting to armed force against another State. Moreover, international humanitarian law is also applicable to situations that remain outside the scope of the UN Charter’s prohibition of the use of force among States, in particular armed conflict within the territory of a State, or non-international armed conflict, commonly called ‘civil wars’ (→ *Armed Conflict, Non-International*).

3 International humanitarian law, also called ‘the law of armed conflict’, intends to solve humanitarian problems arising in the context of an armed conflict, whether of an international or a non-international character. In particular, its rules limit the right of parties to a conflict to use methods and means of warfare and enjoin belligerents to protect persons or goods that may be affected by such conflict (→ *Warfare, Methods and Means*; → *Protected Persons*). The notion ‘international humanitarian law’ has been in use for a rather short period. As an expression in official use it appears for the first time in the title and documents of the various conferences that led to the adoption, on 8 June 1977, of the two Additional Protocols to the Geneva Conventions of 12 August 1949 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict (1974–77). While the Conference’s Final Act used as its title ‘International Humanitarian Law Applicable in Armed Conflict’, the expression—even abbreviated—does not appear in the text of the two Protocols. Yet the notion ‘international humanitarian law’ is now generally accepted, be it in United Nations language, in the political dialogue, or in academic writing.

4 International humanitarian law is applicable in situations characterized by the resort to armed force, whether that conflict is an armed confrontation between States, between governmental forces and armed groups within the territory of that State, or among armed groups in a domestic context. With the → *Geneva Conventions I–IV (1949)* and → *Geneva Conventions Additional Protocol I (1977)* as its core treaties, the well-developed written law is the main source of international humanitarian law applicable in international armed

conflicts. Written law on non-international armed conflicts is much less developed. Besides codified treaty law (common Art. 3 of the 1949 Geneva Conventions and → *Geneva Conventions Additional Protocol II* [1977]), rules of → *customary international law* play a decisive role in a domain that is influenced by age-old ways of behaviour (Henckaerts and Doswald-Beck). Taken together, these various sources develop an impressive body of provisions applicable in armed conflict. By building upon and at the same time developing the principle of humanity—to be respected not only under normal circumstances but also, and in particular, during armed conflict—international humanitarian law decisively contributes to achieving a peaceful world order (→ *Humanity, Principle of*).

5 The provisions of the international humanitarian law treaties apply in situations of armed conflict. The notion of armed conflict is therefore fundamental for understanding that chapter of international law. With a by now classic formula the → *International Criminal Tribunal for the Former Yugoslavia (ICTY)* defined armed conflict as follows: ‘[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’ (*Prosecutor v Tadić* para. 70; → *Tadić Case*). This definition distinguishes between two cases of armed conflict: ‘resort to armed force between States’, ie international armed conflict, and ‘protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’, ie non-international armed conflict. In both situations, neither a formal declaration of war nor the recognition of a state of war by any party to the conflict—or by both—is required to make international humanitarian law applicable.

6 The provisions of international humanitarian law must also be respected under circumstances that are not considered to be armed conflicts in the sense of the law of armed conflict although they may be characterized by the use of force: UN operations, in particular operations under Chapter VII UN Charter: peacekeeping operations (→ *Peacekeeping Forces*). A special treaty, the 1994 UN Convention on the Safety of United Nations and Associated Personnel, protects members of a UN contingent against the use of violence, ensures their safety, and requires their immediate release if captured. Furthermore, the UN Secretary-General’s Bulletin ‘Observance by United Nations Forces of International Humanitarian Law’ (1999) makes it clear that rules on the conduct of hostilities as codified by the international agreements are also binding on UN forces engaged in peace enforcement operations if they have to use force to accomplish their mandate (→ *United Nations and International Humanitarian Law*).

B. International Humanitarian Law: Origins, Development, and Sources

1. The Law up to the 1949 Geneva Conventions

7 The rules limiting violence and destruction in hostilities are much older than formal treaty law. Religion, ancient traditions and customs, codes of honour, and ad hoc agreements between belligerents have in different ways imposed restrictions on warfare. As a rule, the legitimacy of limiting resort to force as such has only exceptionally been put in doubt. Indeed, the goal of resorting to war usually is to gain an advantage—such as establishing one’s superiority over the other or occupying foreign territory—and not just to kill and destroy. Moreover, the fear of retaliation has always been an obstacle to violence without any limits, in other words total war. Thus, rules with the aim of limiting warfare for ethical reasons have been—and still are—part of the unwritten human cultural heritage, and religious books such as, among others, the Bible, the Koran, or Buddhist and Hindu scriptures give expression to its substance. In the Europe of the Enlightenment, Hugo

Grotius and Jean-Jacques Rousseau developed the conceptual basis for a modern approach to limiting the effects of warfare.

8 The modern history of organized humanitarian concern for the fate of war victims goes back to the second half of the 19th century. Henry Dunant's outcry after witnessing the useless suffering and anguish of wounded and dying soldiers the evening of the Battle of Solferino in 1859 awakened awareness in Europe. He was not so much scandalized by the cruel behaviour of the → *armed forces* during the battle as by the absence of organized care for the wounded soldiers. In his best-selling book *A Memory of Solferino*, published in 1862, Dunant called for two measures to be taken to alleviate the fate of the wounded on the battlefield, both of them practice-oriented indeed.

9 The first of Dunant's proposals led to the formation in Geneva of the Committee of the Five—which later became the → *International Committee of the Red Cross (ICRC)*. On the national level, Red Cross Societies and later also Red Crescent Societies were founded, as subsidiaries to the—then almost non-existent—medical services of the States' armed forces, at first in European countries and the United States, and later on all over the world (→ *International Federation of Red Cross and Red Crescent Societies*). The second proposal resulted in the adoption, on 22 August 1864, of the original Geneva Convention for the protection of war victims: the Convention for the Amelioration of the Condition of the Wounded in Armies of the Field, the first international and multilateral treaty on a humanitarian issue. The treaty calls for the protection of the wounded on the battlefield, declares medical personnel to be neutral, ie protected against all hostilities, and introduces the red cross on a white background as the protective emblem (→ *Emblems, Internationally Protected*). Thus the various initiatives taken as a response to Dunant's outcry bore fruit in an incredibly short time. The treaty of 1864 was adopted within months by all European States, the United States, the Holy See, and independent States on other continents. It entered into force on 22 June 1865.

10 At about the same time, in 1863, Francis Lieber wrote his famous 'Instructions for the Government of Armies of the United States in the Field' (→ *Lieber Code*), upon request by United States President Abraham Lincoln. A few years later, in 1868, the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight was adopted in Saint Petersburg ('Saint Petersburg Declaration'), developing for the first time the idea that there are limits to the use of weapons in the course of military operations, and that the use of weapons that cause unnecessary suffering is prohibited (→ *Weapons, Prohibited*).

11 With the beginning of the 20th century, international humanitarian law developed further through many stages and various codification processes, both within and outside the context of the Geneva Conventions. In 1906, the law covered by the 1864 Geneva Convention was rewritten, and the 1864 treaty was replaced by the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (signed 6 July 1906 and entered into force 9 August 1907). The two → *Hague Peace Conferences (1899 and 1907)* drafted and subsequently accepted on 18 October 1907 what came to be known as the Hague Conventions, in particular Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land ('Hague Regulations'). The Hague Regulations codified the rights of → *prisoners of war* ('POWs'), some rules on the conduct of hostilities, and provisions to be respected in the case of belligerent occupation (→ *Occupation, Belligerent*). The Hague Convention's most precious contribution to international humanitarian law is arguably the so-called → *Martens Clause*, which was redrafted in 1977 by Additional Protocol I Art. 1 (2): 'In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived

from established custom, from the principles of humanity and from the dictates of public conscience'. The 1907 Hague Peace Conference also adopted seven treaties relative to → *naval warfare*.

12 Based on the experiences of World War I, States adopted in 1925 the Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare ('Gas Protocol'), the first major treaty prohibiting resort to a specific weapon (→ *Chemical Weapons and Warfare*). The year 1929 brought about a revision of the 1906 Geneva Convention through the adoption of the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (signed 29 July 1929 and entered into force 19 June 1931), and also a first comprehensive codification of the law on the protection of prisoners of war, the Convention relative to the Treatment of Prisoners of War (signed 27 July 1929 and entered into force 19 June 1931). At the request of the Turkish government, a second protective emblem was also accepted: the red crescent on a white background. The two 1929 Conventions were in force during World War II and bound the major belligerent States, with the exception of the Union of Soviet Socialist Republics ('USSR') and Japan, which had failed to ratify Hague Convention IV before the outbreak of the war. Germany then refused to apply the POW Convention in its conflict with the USSR, invoking the → *general participation clause* (*clausula si omnes*), with dramatic consequences, in particular for the fate of the POWs on both sides. The most serious gap, however, was the highly unsatisfactory state of the law protecting the civilian population against the effects of hostilities (→ *Civilian Population in Armed Conflict*) and, in particular, civilian persons detained by the enemy. In the 1930s, the ICRC had taken several initiatives to fill the gap and had even submitted a draft for a convention protecting the civilian population in times of armed conflict (Draft International Convention on the Condition and Protection of Civilians of Enemy Nationality who are on Territory Belonging to or Occupied by a Belligerent, the so-called 'Tokyo Draft' of 1934). Yet the initiative failed to win the international community's interest before the outbreak of World War II—with tragic consequences. The civilian population had to pay the price, in particular in concentration camps and in the bombarded cities.

2. The 1949 Geneva Conventions and their 1977 Additional Protocols

13 In a major exercise of international law-making, international humanitarian law was rewritten in 1949 by a diplomatic conference convened in Geneva by the Swiss government, the → *depositary* of the Geneva Conventions. Taking into account the lessons learned during and immediately following World War II, the government representatives discussed the drafts prepared by the ICRC, with the support of experts, and finally accepted, on 12 August 1949, the four Geneva Conventions for the Protection of War Victims. The Conventions entered into force on 21 October 1950 and consequently have been adopted by all States that are members of the international community.

14 The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field ('Geneva Convention I') protects members of the armed forces who, owing to their physical condition, are *hors de combat* from unjustified acts of violence by the enemy's armed forces. Medical personnel must be respected and always allowed to perform their duties if captured, and medical facilities and means of transport may not be attacked (→ *Medical Transportation*). A protective emblem identifies medical personnel and facilities: the red cross or the red crescent on a white background. In 2005, an additional emblem was adopted: the red crystal on a white background (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem ['Additional Protocol III']). The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea

(‘Geneva Convention II’) adapts and codifies the law developed by Geneva Convention I for the conditions of warfare at sea (→ *Wounded, Sick, and Shipwrecked*).

15 The Geneva Convention relative to the Treatment of Prisoners of War (‘Geneva Convention III’) deals with the fate of POWs, ie members of the armed forces who fall into the hands of enemy forces and remain detained. Based on ample experience gained up to and, in particular, during World War II, the new POW Convention addresses every aspect of the POW’s fate, from the moment of capture through the period of → *detention* and up to the prisoner’s final release. A POW must be released and repatriated ‘without delay after the cessation of active hostilities’ (Art. 118 Geneva Convention III), while seriously sick or wounded POWs are to be repatriated as soon as circumstances so permit (→ *Repatriation*).

16 The most important contribution to traditional international humanitarian law is no doubt the Geneva Convention relative to the Protection of Civilian Persons in Time of War (‘Geneva Convention IV’). That Convention brings to a successful end what the international community failed to do before World War II: to protect through international law civilians, or the civilian population at large, the most vulnerable category of persons affected by warfare. The treaty protects the basic rights of civilians in the hands of the adverse party, thereby distinguishing between two situations: first, civilians who find themselves on the enemy’s territory during the conflict, and, second, civilians in occupied territory. The first set of provisions ensures humane treatment of civilians under all circumstances, particularly in detention, and guarantees their right to leave the enemy State (→ *Enemies and Enemy Subjects*). The new legal regime on occupied territories builds upon the Hague Law of 1907, provisions that were not able to prevent the tragedy of concentration camps in World War II, and develops them based on extensive experience gained in particular in Eastern Europe and in the Far East. Geneva Convention IV underlines the provisional character of occupation of foreign territory and attempts to ensure that people living in occupied territory may continue ordinary life as much as possible.

17 The four 1949 Geneva Conventions have a common part that codifies in particular rules on the implementation of the treaties, such as the role of → *Protecting Power* and the activities of the ICRC in the course of an armed conflict. Yet the most innovative contribution to the development of international humanitarian law is the adoption of common Art. 3, whose aim is to protect victims of non-international armed conflicts. A growing number of internal armed conflicts, and in particular the → *Spanish Civil War (1936–39)*, had underlined the urgent need for rules to be respected in non-international armed conflicts as well.

18 The years following the creation of the United Nations in 1945 and the adoption of the → *Universal Declaration of Human Rights (1948)* were characterized by strong concern within the international community for the development of human rights protections. International humanitarian law was considered to be an object of limited interest (→ *Human Rights and Humanitarian Law*). On 9 December 1948, the Convention on the Prevention and Punishment of the Crime of Genocide was adopted, and it declared → *genocide* to be an international crime. It was only in 1968 that the UN General Assembly adopted Resolution 2444 (XXIII) entitled ‘Respect for Human Rights in Armed Conflicts’, which reaffirms a certain number of principles regarding ‘human rights in armed conflict’ and at the same time calls for international humanitarian law to be strengthened. Resolution 2444 thereby establishes the link between these two bodies of law. That process developed over the following years and brought about, on 8 June 1977, the adoption of two Additional Protocols to the 1949 Geneva Conventions, treaties that adapt international humanitarian law to conditions of modern warfare: Additional Protocol I applicable in international armed conflict and Additional Protocol II on non-international armed conflict. Both treaties were the result of lengthy and arduous negotiations, based on initial drafts prepared by the ICRC,

developed in governmental expert meetings, discussed during four sessions of the 1974–77 Diplomatic Conference by the representatives of the States Parties to the Geneva Conventions (1974–77), and finally adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict convened in Geneva by the Swiss government, the depositary of the Geneva Conventions. In 2005, a third Protocol was adopted by the States party to the Geneva Conventions: Additional Protocol III, which introduced another distinctive emblem: the red crystal on a white ground.

19 The 1977 Protocols not only develop the law applicable to traditional forms of warfare but also innovate with provisions that have to be respected in so-called asymmetric conflicts (→ *Asymmetric Warfare*), such as colonial wars (now called → *Wars of National Liberation*) and, in particular, non-international armed conflicts or civil wars, ie violence within the territory of a State. Additional Protocol I represents new law in a chapter that had been set aside in 1949: 1) limits on methods and means of warfare; and 2) protection of the civilian population from the direct effects of hostilities. It codifies an important number of specific rules commonly associated with Hague Law, ie rules to be respected by armed forces in the conduct of military operations of all types. And it introduces new concepts, such as the obligation to protect the natural environment in the conduct of military operations (Art. 55). With the adoption of Additional Protocol I, the dichotomy between Geneva Law and Hague Law became irrelevant. Additional Protocol II, on the other hand, develops the policy underlying common Art. 3 Geneva Conventions and codifies new rules to be respected in non-international armed conflict.

20 While the 1949 Geneva Conventions and their Additional Protocols represent the core of present-day international humanitarian law applicable in armed conflict, a considerable number of other treaties supplement these texts on various issues, among them the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 (→ *Cultural Property, Protection in Armed Conflict*), the Convention on the Rights of the Child of 20 November 1989 (→ *Children and Armed Conflict*), and the Convention on the Safety of United Nations and Associated Personnel of 9 December 1994. Another major international text to be mentioned in this context is the Rome Statute of the → *International Criminal Court (ICC)*, adopted on 17 July 1998. The idea of establishing an international criminal jurisdiction is almost as old as modern international law. It was in 1895 that the → *Institut de droit international*, taking up an idea expressed by Gustave Moynier, then president of the ICRC, proposed the establishment of an international criminal tribunal. The jurisdiction of the Nuremberg and Tokyo Military Tribunals over → *war crimes* committed during World War II (→ *International Military Tribunals*) developed the idea, taken over later by the tribunals established to judge war crimes committed in the conflicts in former Yugoslavia and in → *Rwanda*. With its universal jurisdiction over war crimes, the International Criminal Court is expected to make a major contribution to the implementation of and respect for international humanitarian law in time of armed conflict.

3. International Instruments Limiting Methods and Means of Warfare

21 The Saint Petersburg Declaration of 1868 is the first formal agreement among States that limits the right of belligerents to use a certain type of ammunition. The Declaration commits States ‘to renounce, in case of war among themselves, the employment by their military or naval troops of any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances’. Adopted by the 1907 Hague Peace Conference, Convention (IV) Respecting the Laws and Customs of War on Land with its annexed Hague Regulations then lays the foundations for an international regime regulating the conduct of warfare. Art. 22 Hague Regulations recalls the

fundamental rule that '[t]he right of belligerents to adopt means of injuring the enemy is not unlimited' (now codified in Art. 35 (1) Additional Protocol I). Several provisions set forth that basic rule. The Hague Regulations also commit an occupying power to respect the fundamental rights of the occupied territories' inhabitants. Finally, the text codifies a few rules on the status and treatment of POWs.

22 Based on lessons learned during World War I, the so-called Gas Protocol of 1925 continued the work begun by the Saint Petersburg Declaration and prohibited the use of lethal gas on the battlefield. Since the end of World War II, a considerable number of treaties have been adopted that prohibit specific weapons or ammunition or limit their use. Of particular importance are the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (10 April 1972) and the Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques (10 December 1976). Today, the framework established by the 1980 Convention Prohibiting Certain Conventional Weapons ('CCW') serves as a basis for elaborating and adopting individual protocols on specific and particularly cruel conventional weapons or ammunition types. Among the weapons and ammunition types covered by its protocols are: non-detectable fragments; → *land mines*, booby-traps, and similar devices; incendiary weapons; blinding laser weapons; and explosive → *remnants of war*. The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (13 January 1993) further developed the 1925 Gas Protocol. Of particular importance for the safeguarding of civilian lives are the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction of 18 September 1997, the so-called Ottawa Convention, and the Convention on Cluster Munitions of 30 May 2008 (→ *Cluster Munitions*). The 1977 Additional Protocol I for the first time in the history of international humanitarian law mentions the need 'to protect the natural environment against widespread, long-term and severe damage' during armed conflict. Its Art. 55 specifically prohibits 'the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population'.

23 According to a generally shared view, neither the Geneva Conventions nor international humanitarian law in general specifically prohibit the use of nuclear weapons (→ *Nuclear Weapons and Warfare*). It is, however, undisputed that the use of nuclear weapons in an armed conflict, like any other weapon, is subject to the existing provisions of international humanitarian law (ICJ *Legality of the Threat or Use of Nuclear Weapons [Advisory Opinion]* paras 85–87; → *Nuclear Weapons Advisory Opinions*). At the signing of Additional Protocol I, the delegations of the United Kingdom and the United States specifically expressed their views that the new provisions codified by this Protocol do not change the existing law relative to the use of nuclear weapons.

4. General Principles of Law and Customary International Law

24 General principles of international law are of particular relevance for the law governing such a complex phenomenon as armed conflict (→ *General International Law [Principles, Rules, and Standards]*).

25 The ICJ spoke of 'elementary considerations of humanity, even more exacting in peace than in war' (→ *Corfu Channel Case* 22). In its recent codification of the Martens Clause, Protocol I underlines that in cases not covered by a specific provision of international treaty law, 'civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience' (Art. 1 (2)). Referring to a statement made in the *Corfu Channel Case*, the ICJ held in its 1986 decision → *Military and Paramilitary Activities*

in and against Nicaragua Case (*Nicaragua v United States of America*) that common Art. 3 Geneva Conventions reflected 'elementary considerations of humanity' (para. 218). The Martens Clause may therefore be understood as a generally accepted expression of the principle of humanity as adapted to warfare.

26 The principle of → *proportionality* and the principle of distinction are particularly relevant for regulating the resort to force in armed conflict. According to the principle of proportionality, force used to achieve a certain legitimate goal must be proportionate to the military importance of that goal. In other words, attacks are prohibited when the expected losses or destruction 'would be excessive in relation to the concrete and direct military advantage anticipated' (Art. 57 (2) (a) (iii) Additional Protocol I). Furthermore, in the words of Art. 51 (5) (b) Additional Protocol I, any 'attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated' is prohibited. In other words, collateral damage among civilians or civilian objects—often unavoidable—must remain in a reasonable relation with the military advantage to be expected as a result of the operation (→ *Proportionality and Collateral Damage*). Accordingly, military commanders always have to weigh expected military gains against the interests of civilians affected by the planned military operation (→ *Military Necessity*). This is particularly important these days, when civilians are the primary victims of armed hostilities.

27 The principle of distinction enjoins belligerents to distinguish at all times between the civilian population and civilian objects, on the one hand, and combatants and military objects, on the other. Art. 48 Additional Protocol I codifies this rule, and the following articles elaborate this basic concept (Arts 49–60). Finally, its Art. 52 (2) for the first time in history gives a definition of the notion of → *military objectives*.

28 As early as 1868, the Saint Petersburg Declaration condemned the use of weapons 'which uselessly aggravate the suffering of disabled men'. Art. 35 (2) Protocol I gave this cardinal principle a new wording by prohibiting 'weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering'. The ICJ, in its *Nuclear Weapons Advisory Opinion* of 1996, counts this provision among the 'intransgressible principles of international customary law' (para. 79).

29 According to the ICJ, customary international law indeed plays a decisive role as an independent source of legal provisions applicable in the domain covered by international humanitarian law (*Nuclear Weapons Advisory Opinion* para. 75). A recently published study by the ICRC identifies the rules which in its view are to be considered as customary law, ie rules applicable in international armed conflicts as well as those applicable in non-international armed conflicts (see Henckaerts and Doswald-Beck). While the study does not purport to be a formal codification of international customary law rules, its list mirrors in detail established practice as covered by *opinio iuris*. One of its main conclusions is that an important body of the international rules on the conduct of hostilities are customary in character. Moreover, these customary rules apply in the same way to international and non-international armed conflict, thereby filling the gaps of the poorly codified written body of law on the conduct of hostilities applicable in intra-State warfare. The Study continues to be updated by the ICRC (see the ICRC Customary International Humanitarian Law database).

C. International Humanitarian Law: A Unique Regime

1. Absolute Character of the Legal Order

30 International humanitarian law, or the 'laws of war' as it was once known, is perhaps the oldest branch of international law. For a long time it was considered to be, in the words of Sir Hersch Lauterpacht, 'at the vanishing point of international law'. Cicero put it this way: 'During war laws are silent'. Yet today, in view of the great number of armed conflicts all over the world and the immense suffering and destruction brought about by resort to force by States and armed groups—in other words 'man-made violence'—a new perception of the value of human beings and their need to be protected has gained general acceptance. Today nobody would dare deny the relevance of international humanitarian law. The almost absolute prohibition of the use of force, at least in international relations, by the UN Charter is one of the cornerstones of the world order. Yet rules applying in warfare have not become obsolete. Guidance must be given on respect for humanitarian concerns in armed conflict in order to respond to human suffering resulting from violence, whether the resort to force is lawful or not, whether the conflict is 'just' or 'unjust', whether the cause is 'good' or 'bad'. It would indeed be absurd if the fate of individuals affected by warfare depended on the reasons advanced by a government or by individual groups for resorting to armed violence. The main provisions of international humanitarian law are generally recognized to be part of → *iuscogens*.

31 Because its provisions deal with extreme circumstances that arise during war, international humanitarian law must be observed under all conditions, without any exceptions. The applicability of these provisions does not require a formal declaration of war, and → *compliance* may not be made contingent upon the other party's behaviour (no excuse with → *reciprocity* nor defence of *tu quoque*). The Geneva Conventions specifically exclude resort to reprisal actions that would amount to a violation of their provisions (→ *Reprisals*). Common Art. 1 Geneva Conventions expresses the absolute character of its provisions with the simple words: 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances'.

2. Fundamental Rules of International Humanitarian Law

32 The fundamental rules that are the foundation of written and unwritten international humanitarian law may be summarized in the following way:

- The parties to an armed conflict must at all times distinguish between the civilian population and combatants in order to spare the civilian population and civilian property. Neither the civilian population as a whole nor individual civilians may be attacked. Attacks may be made solely against military objectives. A military operation which causes excessive damage to civilians or civil objects shall be cancelled. People who do not or can no longer take part in the hostilities are entitled to respect for their lives and for their physical and mental integrity. Such people must in all circumstances be protected and treated with humanity, without any unfavourable distinction whatsoever. It is forbidden to kill or wound an adversary who surrenders or who can no longer take part in the fighting (→ *Surrender*).
- Neither the parties to the conflict nor members of their armed forces have an unlimited right to choose methods and means of warfare. It is forbidden to

use weapons or methods of warfare that are likely to cause unnecessary losses or excessive suffering.

- The wounded and sick must be collected and cared for by the party to the conflict that has them under its control. Medical personnel and medical establishments, transports, and equipment must be spared. The red cross, red crescent, and red crystal on a white background are the distinctive emblems indicating that such persons and objects are *hors de combat* and must be respected.
- Captured combatants and civilians who find themselves under the authority of the adverse party are entitled to respect for their lives, their dignity, their personal rights, and their political, religious, and other convictions. They must be protected against all acts of violence or reprisal. They are entitled to exchange news with their families and receive aid. They must enjoy basic judicial guarantees.

33 And the following rules aim to ensure compliance with international humanitarian law:

- To ensure compliance with international humanitarian law, its provisions must be known by all those who participate in the war effort, in whatever capacity. Orders shall be given for strict observance of the law, its compliance must be supervised, and any serious violation must be investigated. Persons suspected of having committed a serious violation of international humanitarian law, ie a war crime, shall be prosecuted and tried by a regularly constituted court and, if found guilty, shall be punished.
- Delegates of the ICRC shall be granted all facilities required to carry out their humanitarian activities in conflict areas. They shall be allowed access to all persons affected by armed conflict, in particular to detained persons—military personnel or civilians—and to occupied territories and their inhabitants.

3. International Humanitarian Law and Human Rights Law

34 In the past, international humanitarian law and human rights law had separate places in the realm of international law. The history of modern humanitarian law goes back to periods when the general protection of human beings through international law was not yet an issue. It is interesting to note that general concern for the development of human rights law after World War II did not attempt to establish a link between the two chapters of international law. The 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions were drafted and adopted at the same time but in different contexts and in different forums, without any link between the two initiatives. Nor does an analysis of the language used by the treaties reveal any influence of one text on the other. While ‘promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion’ (Art. 1 (3) UN Charter) have always constituted one of the purposes of the UN, the state of international humanitarian law remained the concern of ‘Geneva’, with the ICRC as the main promoter of its content and the Swiss government as the depositary of the Geneva Conventions. This has changed

in recent times, in the sense that links between international human rights law and international humanitarian law have now been generally recognized.

35 The Diplomatic Conference of 1974–77 that developed and adopted the two Additional Protocols of 8 June 1977 confirmed this change in a distinctive way. In particular, Additional Protocol I, on international armed conflict, includes Art. 75 which, under the title of ‘Fundamental Guarantees’, reads as a résumé of fundamental human rights applicable in situations where humanitarian law treaties do not grant more favourable treatment. Furthermore, Protocol II now recalls in its preamble that ‘international instruments relating to human rights offer a basic protection to the human person’ in the course of a non-international armed conflict as well.

36 These two references show that in situations characterized by violence, be it in a confrontation among States or in a non-international armed conflict, both chapters of international law may be applicable simultaneously. In its 2004 → *Israeli Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory)*, the ICJ confirmed this conclusion. The Court distinguishes three situations and concludes as follows:

‘[S]ome rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law’ (para. 106).

37 With respect to occupied territories, the Court therefore concludes that human rights law and international humanitarian law apply in parallel, the latter as *lex specialis* (*Israeli Wall Advisory Opinion* para. 106, with reference to the *Nuclear Weapons Advisory Opinion* para. 25). Moreover, the obligation to protect economic, social, and cultural rights of human beings in general has a clear impact on the implementation of humanitarian law in occupied territories.

38 In a non-international armed conflict, the overlapping of the two bodies of law can no longer be challenged, in particular after the adoption in 1977 of Additional Protocol II. Commitments under international human rights law must be respected under all circumstances, including in situations of internal violence, unless the government may invoke a derogation clause which allows exemptions from certain commitments in a state of public emergency (eg Art. 4 → *International Covenant on Civil and Political Rights [1966];* → *Emergency, State of*). If violence reaches a certain level, humanitarian law becomes applicable, first of all common Art. 3 of the Geneva Conventions and, under specific conditions, Additional Protocol II. Thus both bodies of law are applicable, at least for government forces. In the special situation of a State intervening with its armed forces in foreign territory, such as in the context of a ‘war on terror’, human rights considerations have to provide a solution for issues where humanitarian law has no specific answer, such as, for example, the law applicable to the status and treatment of detainees (→ *Guantánamo, Detainees*).

39 Yet the scope of application of international humanitarian law in internal conflicts has its limits. If internal violence does not reach a certain intensity or, in the words of Art. 1 (2) Additional Protocol II, if the situation is characterized as ‘internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature’, in other words: a situation ‘short of war’, only international human rights law applies. Yet, several human rights codifications, on the universal and regional level alike, have no satisfactory answer for dealing with such situations. A possible response and step

forward is the so-called Turku Declaration, drafted by academics and published in 1990. That declaration codifies some basic rules, or minimum standards, to be respected under such circumstances. Unfortunately, this initiative did not find the expected support of governments. But the revised 'United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)', adopted by the UN General Assembly on 17 December 2015, may be a step in the right direction: to make it clear that detained persons under all circumstances have the right to be treated with dignity.

40 To conclude on this point it should be said that each of these two chapters of international law has its own legitimacy. While international human rights law embraces all situations in which human beings need either protection against the abuse of power or action to guarantee their economic, social, and cultural rights, international humanitarian law deals with the very specific problems arising out of armed conflict. Nothing calls for a merger of these two normative regimes—nor is mutual exclusion a reasonable response. Recent developments show that practice is moving towards a certain convergence, with a number of norms overlapping with each other while others remain separate.

4. Implementation of International Humanitarian Law: The Main Actors

41 Common Art. 1 Geneva Conventions reads: 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances'. States are, of course, the main actors who have to ensure respect for their commitments. While the obligation of States party to the treaty to take all measures necessary on the domestic level to guarantee respect for its commitments is obvious (→ *Pacta sunt servanda*), the obligation of third parties 'to ensure respect' for the Geneva Conventions by parties to an armed conflict is worth emphasizing. Thus an initiative by a State not party to a conflict to encourage a belligerent party to comply with international humanitarian law is an obligation and, therefore, cannot be disqualified as unlawful interference in internal affairs.

42 Humanitarian law treaties already put much emphasis on measures to be taken by States Parties in peacetime, with a view to being prepared to respect their commitments in time of war. In particular, they have to introduce into domestic criminal law the various grave breaches, ie serious violations of the Geneva Conventions and Additional Protocol I, and to take all measures necessary for the prosecution of persons suspected to have committed such breaches (→ *Individual Criminal Responsibility*). Parties to the Geneva Conventions have to codify the conditions under which the protective emblems may be used and provide for sanctions in case of abuse. The Conventions strongly underline the need to disseminate knowledge of international humanitarian law among those who must respect it. Commanders have to take all measures to ensure respect for the law by their subordinates (→ *Command Responsibility*). But civilian officials concerned with defence matters must also know the law, and even the civilian population at large should be familiar with the fundamentals of humanitarian obligations.

43 On the international level, several international institutions and procedures tend to assure compliance by the parties to an armed conflict with the rules of international humanitarian law. Traditionally, Protecting Powers (or their substitutes) were supposed to play an important role as a link between belligerents, yet practice shows that this institution has fallen into oblivion. In the event of a violation of the Geneva Conventions, an enquiry procedure may be instituted at the request of a belligerent party (see in particular Art. 52 Geneva Convention I, Art. 132 Geneva Convention III, and Art. 149 Geneva Convention IV). Moreover, States that are party to an international armed conflict are invited 'to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter' to find an end to serious violations (Art. 89 Additional Protocol I). Based on Art. 90 Protocol I, an → *International (Humanitarian) Fact-*

Finding Commission has been established for those parties to that treaty that specifically accepted its jurisdiction. In recent times, however, the UN has increasingly taken a stand on violations of international humanitarian law and appealed to belligerents to respect their commitments, be it through the General Assembly, the Security Council, or the Human Rights Council. The same holds true for regional governmental organizations.

44 The establishment of the International Criminal Court with its jurisdiction to try persons accused of war crimes is an important step to reinforce individual criminal responsibility for the failure to respect the Geneva Conventions and international humanitarian law in general. Art. 8 Rome Statute first lists grave breaches as codified by the Geneva Conventions and Additional Protocol I, ie crimes committed in the course of an international armed conflict. The list also includes, and this is a truly innovative step, serious violations of common Art. 3 Geneva Conventions and of customary law rules, ie crimes committed in the context of a non-international armed conflict, although neither common Art. 3 nor Additional Protocol II has established criminal responsibility for the failure to respect humanitarian commitments by individuals belonging to either side (Art. 8 (2) (c)–(f), (3) Rome Statute). At this point, reference should also be made to mechanisms and procedures established by human rights treaties that may allow reference to violation of international humanitarian law.

45 In practice it is the ICRC, a non-governmental organization with a special status within the international community, that has given itself a mandate to monitor compliance with the Geneva Conventions and with international humanitarian law in general. That mandate has been confirmed by the Geneva Conventions—and thus by the international community. Its main role is twofold. First, in an armed conflict, it has to monitor compliance with, in particular, Geneva Conventions III and IV (among others through visits to POW camps, civilian places of detention, and occupied territories at large); organize relief operations in favour of persons in need (→ *Humanitarian Assistance in Cases of Emergency*); search for missing persons (→ *Missing and Dead Persons*); reunite families; and, in case of breaches of humanitarian law, approach the responsible authorities with the intent of obtaining a change in behaviour. Second, the ICRC works for the development of international humanitarian law with a view to strengthening the protection of war victims. While the parties to an international armed conflict are under an obligation to accept the ICRC's presence at 'all places where protected persons are' (Art. 9 Geneva Conventions I–III, Art. 10 Geneva Convention IV, and Art. 81 Additional Protocol I), in a non-international armed conflict the ICRC 'may offer its services' to both sides, ie to government and insurgent groups alike (common Art. 3 (2) of the Geneva Conventions, Art. 18 Additional Protocol II). Practice has shown, at least since the end of the Cold War, that parties to armed conflicts, whether international or not, accept—even if not under an obligation to do so—and often also appreciate the role of the ICRC.

46 Yet any discussions on procedures to achieve respect for international humanitarian law by the parties to an armed conflict have to be supplemented by a reference to the power of public opinion—domestic or international—and, in particular, to the role of → *non-governmental organizations*.

D. Issues and Challenges

47 In recent decades new threats to peace and security have become manifest. Wars have changed in character. Direct confrontations between heavily armed regular forces, or classical warfare, may well be a thing of the past—although both the major powers and smaller States maintain their armed forces for that eventuality. From guerrilla warfare (→ *Guerrilla Forces*) to → *cyber warfare*, from the use of force by → *private military companies* or other non-State armed groups to war against the natural environment, from

classic conflicts to asymmetric confrontations, there are a number of new ways for parties to pursue political goals through the use of force. The 'war on terror', where forces of a State battle individuals beyond its borders, has also led to new forms of military operations. These facts and trends are challenges that efforts to further develop international humanitarian law must take into account, without, however, neglecting traditional resort to force by States with their armed forces.

48 It may be safely argued that the existing legal framework built up over almost two centuries has given ample proof not only of its relevance for solving humanitarian problems but also for its flexibility in adapting to new situations. As supplemented by customary rules and general principles, existing humanitarian law treaties seem in general to give satisfactory answers to the challenges of modern warfare. While no government is calling for a major overhaul of the international legal regime, the shared understanding of certain notions may, however, need a new approach. The definition of the direct participation of civilians in hostilities (→ *Civilian Participation in Armed Conflict*) and limits on → *targeted killing* are examples. Other chapters of the law may need to be strengthened. A case in point is the fate of civilians in non-international armed conflicts, in particular those people at a greater risk than others, such as women or children and persons deprived of their liberty. While international armed conflicts are governed by detailed rules, the law applicable to these groups in the context of non-international armed conflicts is much less specific. The provisions on the conditions under which persons may be deprived of their liberty, the rules guiding → *internment*, and procedural safeguards in general are insufficiently developed by the Geneva Conventions or Additional Protocol II. Another chapter of the law that could be further developed is the fate of persons displaced in the course of an armed conflict (→ *Internally Displaced Persons*; → *Refugees*). They too often live in unacceptable circumstances, and for too long a period. Other provisions may also merit more attention by governments and public opinion, such as the rules on the protection of the natural environment against the effects of military operations, in particular long-term effects. Finally, international rules limiting the use of particularly cruel weapons must be worked out alongside the development of new weapons.

49 On the other hand, the Geneva Conventions have clearly lost their singularity when humanitarian issues arising in armed conflict are at stake. Therefore, any discussion of issues related to international humanitarian law and, even more so, any development of its provisions have to take other chapters of international law into consideration, in particular human rights law, but also refugee law, criminal law, and the law on State responsibility. Taking into account the overlapping of different international legal regimes is a positive contribution to strengthening the protection of war victims by international law.

50 The goal of any legal commitment is its observance and respect. States bear the primary responsibility for ensuring compliance with international humanitarian law, not only on the domestic level but also internationally. They should consider that it is in their own national interest to observe and promote international humanitarian law, not only during an armed conflict but also in peacetime, by way of preventive action. Civil society has an important role to play in strengthening the political will to achieve that end. On the other hand, common Art. 1 Geneva Conventions asks States Parties not only to respect their own commitments but also 'to ensure respect' for humanitarian law by belligerent third parties, particularly in an ongoing armed conflict. Non-belligerent States should help to raise awareness of the relevance of respecting international humanitarian law in armed conflict in order to achieve a peaceful order.

51 By way of conclusion, it can be said that, in general, international humanitarian law as it stands today gives satisfactory answers to the problems raised by the use of force in modern armed conflicts. No doubt, the increasing complexity of today's armed conflicts, new technologies of warfare (such as cyber warfare and the use of robots), direct participation in hostilities by people other than members of the armed forces, the widespread availability of (conventional) weapons, extraterritorial military operations in the fight against → *terrorism* ('war on terror'), and the use of explosive weapons in populated areas among other issues require high-priority attention and may demand new responses from international humanitarian law or from other chapters of international law. The law of occupation asks for clarification, in particular the beginning and the end of its applicability to a specific situation. Yet the main issue that State actors and international bodies must work on is achieving greater respect for specific obligations of a humanitarian character and, in general, for the spirit of international humanitarian law. This is a contribution to achieving a peaceful order.

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how the term was created, then fought for and, finally, won in the 1970s through the propitious convergence of a range of different actors and interests. The new name represented, as its adherents fully understood, not just a shift in terminology but also a fresh approach to the *ius in bello*. It indicated a new field of law – an enlarged humanitarian law – endowed with an appropriate array of humanitarian principles. The 1977 Additional Protocols to the Geneva Conventions were the repository of these principles; they held the outline of the new field.² Yet, despite this accomplishment, ‘international humanitarian law’ and the humanitarian understanding of the *ius in bello* remained controversial for almost two decades, as states and legal commentators questioned the Protocols’ principles and authority. It was only at the very end of the 20th century that practitioners of international humanitarian law, following the example set by human rights organizations, suddenly accepted the authority of Additional Protocol I and, with it, a humanitarian vision of the *ius in bello*. This shift can be seen in both the newly confident use of the term ‘international humanitarian law’ to describe all of the laws of war³ and a renovated understanding of the content of this law – an understanding that is exemplified in the changing interpretation of the principle of proportionality.

The history that follows, of how this change in the language and understanding of the *ius in bello* came about, shows that it was a contested and contingent process. Moreover, it reveals that the contest for international humanitarian law was played out by a diffuse cast of actors, which included both the conventional contributors to international law and other less traditional, less acknowledged, participants. As such, this history provides an explanation of how one important aspect of the paradigm shift from sovereignty to humanitarianism in international affairs – a shift that has been observed by several scholars⁴ – was accomplished. At the same time, it also shows something about the nature of international humanitarian law itself, by illustrating international humanitarian law’s curious allocation of authority, its potential for change and its restrictions on variation.

2 International Humanitarian Law

The term ‘international humanitarian law’ refers to the current understanding of the *ius in bello* – the laws concerning the conduct of warfare. The ICRC, which is considered to have a special relationship with international humanitarian law as its guardian and promoter,⁵ describes it in the following manner:

² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) 1977, 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) 1977, 1125 UNTS 609.

³ Meron, ‘The Humanization of Humanitarian Law’, 94 *American Journal of International Law (AJIL)* (2000) 239, at 239.

⁴ See R. Teitel, *Humanity’s Law* (2011); D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2004); Meron, *supra* note 3, at 243, for accounts of this paradigm shift.

⁵ See, e.g., Dormann and Maresca, ‘The International Committee of the Red Cross and Its Contribution to the Development of International Humanitarian Law in Specialized Instruments’, 5 *Chinese Journal of International Law (Chinese J Int’l L)* (2004–2005) 217, at 217; Sandoz, ‘The International Committee of the Red Cross as Guardian of International Humanitarian Law’ (31 December 1998), available at www.icrc.org/eng/resources/documents/misc/about-the-icrc-311298.htm (last visited 8 January 2015).

International humanitarian law is part of the body of international law that governs relations between states. It aims to protect persons who are not or are no longer taking part in hostilities, the sick and wounded, prisoners and civilians, and to define the rights and obligations of the parties to a conflict in the conduct of hostilities.⁶

The ICRC's explanation is unexceptional; lawyers provide similar definitions.⁷ International humanitarian law is, broadly speaking, that branch of public international law that seeks to moderate the conduct of armed conflict and to mitigate the suffering that it causes.⁸

International lawyers tend to gloss this general statement with the comment that traditionally the term 'international humanitarian law' was applied to the 'Geneva' part of the *ius in bello*, which had a humanitarian focus, as opposed to the 'Hague' law, which was more concerned with the methods of warfare.⁹ They then state, however, that this division has 'long been highly artificial from a number of points of view'.¹⁰ Both parts of the law, it is argued, are based on humanitarian concerns and therefore overlap. Indeed, as Cherif Bassiouni says, '[t]hey are so intertwined and so overlapping that they can be said to be two sides of the same coin'.¹¹ Thus, it is reiterated, the term international humanitarian law can be used to refer to all of the rules of international law that concern armed conflict – whether customary, conventional, Hague or Geneva.¹²

3 Histories of International Humanitarian Law

International lawyers tend to attribute a long history to this current understanding of international humanitarian law. In their descriptions of international humanitarian law, whether their focus is on historical issues or contemporary concerns, they will often refer to an accepted narrative of international humanitarian law, which assumes its longevity and agrees on its important milestones. There are two common ways that international lawyers think about the history of international humanitarian law. One is the story of the humanization of war and law; the second is a story of imperialism and oppression.

The orthodox history of international humanitarian law tells the following story. Laws of war have always existed to limit the destruction of war.¹³ The ancients, the

⁶ International Committee of the Red Cross (ICRC), *War and International Humanitarian Law* (29 October 2010), available at www.icrc.org/eng/war-and-law/overview-war-and-law.htm (last visited 20 December 2014).

⁷ See, e.g., Bassiouni, 'The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities', 8 *Transnational Law and Contemporary Problems (Transnat'L & Contemp Probs)* (1998) 199, at 200; Greenwood, 'Historical Development and Legal Basis' in D. Fleck and M. Bothe (eds), *The Handbook of International Humanitarian Law* (2008) 1, at 11; H. McCoubrey, *International Humanitarian Law: Modern Developments in the Limitation of Warfare* (1998), at 1.

⁸ McCoubrey, *supra* note 7, at 1.

⁹ Bassiouni divides these sectors differently, as conventional law (Geneva) and customary law (Hague). Bassiouni, *supra* note 7, at 200.

¹⁰ McCoubrey, *supra* note 7, at 2.

¹¹ Bassiouni, *supra* note 7, at 199–200.

¹² Greenwood, *supra* note 7, at 11.

¹³ See, e.g., J.-M. Henckaerts and L. Doswald-Beck, for the International Committee of the Red Cross, *Customary International Humanitarian Law* (2005), at ix.

knights of the middle ages, the jurists of the early modern period all testify to the record of this concern.¹⁴ Nor is it just a Western concern. Other cultures, such as China, Japan, India and the Islamic world, have their own traditions of rules of warfare.¹⁵ Yet, despite this universal concern, the attempt to limit war has suffered various setbacks. It was not until the 19th century that a movement to codify the laws of war began and modern international humanitarian law was born.¹⁶

International lawyers refer to the Lieber Code, written to govern the conduct of Union forces during the American Civil War, as the first example of the codification of the laws of war,¹⁷ but they regard the Battle of Solferino in 1859 as the crucial moment in the history of modern humanitarian law.¹⁸ Henry Dunant, a Swiss citizen, happened to be present. Horrified by the suffering of injured soldiers, he was inspired to found the Red Cross movement,¹⁹ which was to become ‘a promoter and custodian of the humanitarian idea and the primary initiation for its transition into international humanitarian law’.²⁰ Dunant also instigated the adoption in 1864 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.²¹ This Convention marks the start of the Geneva tradition of humanitarian law. The orthodox history goes on to list the following inventory of humanitarian instruments: the 1907 Hague Convention,²² the 1949 Geneva Conventions and the 1977 Additional Protocols.²³

This orthodox narrative tends to conflate a long history of varied approaches to the laws of war with modern international humanitarian law. Although it is acknowledged that earlier approaches to the laws of war were not identical with modern international humanitarian law, their shared ‘humanitarian’ values are stressed and points of continuity are emphasized.²⁴ And while it is sometimes stated that the term international humanitarian law is new, it is not usual for a writer to state exactly how new it is or when and why the term started to be used.²⁵ This

¹⁴ See, e.g., McCoubrey, *supra* note 7, at 8; M. Sassòli and A.A. Bouvier, *How Does Law Protect in War?* (2006), at 124–125; T. Meron, *Bloody Constraint: War and Chivalry in Shakespeare* (1998), at 12.

¹⁵ See, e.g., McCoubrey, *supra* note 7, at 8; Sassòli and Bouvier, *supra* note 14, at 124–125.

¹⁶ See, e.g., Meron, *supra* note 14, at 12.

¹⁷ See, e.g., Greenwood, *supra* note 7, at 21; Schindler, ‘International Humanitarian Law: Its Remarkable Development and Its Persistent Violation’, 5 *Journal of the History of International Law* (J Hist Int’l L) (2003), 165 at 167. Lieber Code, General Order no. 100 (24 April 1863).

¹⁸ See, e.g., McCoubrey, *supra* note 7, at 16.

¹⁹ See, e.g., Greenwood, *supra* note 7, at 22.

²⁰ See, e.g., M.A. Meyer and H. McCoubrey (eds), *Reflections on Law and Armed Conflicts: The Selected Works on the Laws of War by the Late Professor Colonel G.I.A.D Draper* (1998), at 69.

²¹ See, e.g., Henckaerts and Doswald-Beck, *supra* note 13, at ix. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949, 75 UNTS 31.

²² See, e.g., W.A. Solf, ‘Protection of Civilians against the Effects of Hostilities under Customary International Law and under Protocol I’, 1 *American University Journal of International Law and Policy* (Am U J Int’l L & Policy) (1986) 117, at 123. Hague Convention for the Pacific Settlement of International Disputes 1907, 2 *AJIL* Supp. 43 (1908). The Hague Conventions are not technically part of this tradition, but as the Hague and Geneva Conventions are now merged, they tend to be listed as part of this history.

²³ See, e.g., Henckaerts and Doswald-Beck, *supra* note 13, at ix; Jaworski, ‘“Military Necessity” and “Civilian Immunity”: Where is the Balance?’, 2 *Chinese J Int’l L* (2003) 175 at 179–180.

²⁴ See, e.g., Greenwood, *supra* note 7, at 15.

²⁵ See, e.g., *ibid.*, at 11.

confusion is compounded as the two terms, 'international humanitarian law' and 'laws of war', are often used interchangeably in the historical account – thereby further obscuring any point of difference between them. In this way, the orthodox narrative is able to juxtapose the image of a long tradition of humanitarian law with the achievements of the modern age. The result is that the values of international humanitarian law appear universal and ahistorical, while their modern codification is laudable.

There is another story about international humanitarian law, which describes it not as a history of compassion and civilization but, rather, as a history of oppression and imperialism. Drawing on post-colonial and critical methodologies, lawyers describe a history in which military or Western needs have consistently trumped humane values, exposing civilians to the violence of war and legitimizing their suffering.²⁶ In these historical accounts, the catalogue of treaties is a litany of compromise and pragmatism. The 1868 Declaration of Saint Petersburg was a pointless failure.²⁷ The 1907 Hague Conventions left military necessity unchallenged as the dominant value of the laws of war and civilians more vulnerable than ever to the scourge of combat.²⁸ The Nuremberg Tribunal actually helped legitimate unrestrained conduct in war by refusing to convict, or even prosecute, based on violations of the laws of war.²⁹ Even the contemporary values of humanitarianism have been called into question, with David Kennedy identifying its ability to conceal problems and misdirect attention.³⁰

Both this negative account, and the more common orthodox history it reacts to, place the contemporary understanding of international humanitarian law in a long continuum with other codes of warfare. They extend international humanitarian law into the past. They elide its specificity and conceal its creation by placing it in a continuum with other codes of warfare. By deploying or relying on these histories, lawyers can suggest the longevity of international humanitarian law and bolster any claim they might wish to make about the law. For example, supporters of international humanitarian law will find it easier to claim that a principle of international humanitarian law is well established, unarguable or obvious if it is considered part of a long tradition. An established history also makes claims to the moral validity, authority and status of the field itself harder to refute. Alternatively, for those who wish to attack or change international humanitarian law, placing it in a long history makes it easier to draw connections with a tradition of oppression. In this way, histories of international humanitarian law not only reflect but also help to shape the current understanding of the field.

²⁶ See, e.g., J.G. Gardam and M.J. Jarvis, *Women, Armed Conflict and International Law* (2001), at 11; Gardam, 'Gender and Non-Combatant Immunity', 3 *Transnat'l L & Contemp Probs* (1993) 345, at 348–349; Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', 40 *Harvard International Law Journal* (Harv Int'l LJ) (1999) 1.

²⁷ See, e.g., Jochnick and Normand, 'The Legitimation of Violence: A Critical History of the Laws of War', 35 *Harv Int'l LJ* (1994) 49, at 66. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight (Declaration of St. Petersburg) 1868, 1 *AJIL* 95.

²⁸ See, e.g., *ibid.*, at 76.

²⁹ See, e.g., *ibid.*, at 94.

³⁰ Kennedy, *supra* note 4.

4 Introducing International Humanitarian Law

Despite the widespread acceptance of these long histories of international humanitarian law, both the term ‘international humanitarian law’ and the particular conceptualization of the *ius in bello* that it evokes are fairly new. Prior to the 1960s, the term ‘international humanitarian law’ was not used to describe a field of law, and even when the term started to be used in the 1960s it still denoted quite a different understanding of the law to its current incarnation. Before this period, common and academic usage referred first to the ‘laws of war’ and later, in the 1960s, to the ‘laws of armed conflict’ in an attempt to comprehend *de facto* and internal conflicts.³¹

The ‘laws of war’ or ‘armed conflict’ was not just a different nomenclature for the same type of law. Rather, it was an appropriate title for a different concept of law and different rules. The laws of war were the ‘rules of the Law of Nations respecting warfare’.³² These rules, as various editions of Oppenheim’s *International Law* repeated throughout the first half of the 20th century,³³ contained, as their first principle, the idea that ‘a belligerent is justified in applying any amount and any kind of force which is necessary for the realisation of the purpose of war – namely, the overpowering of the opponent’.³⁴

The second principle of the law of war, Oppenheim’s *International Law* continues, is the principle of humanity, which holds that unnecessary forms of violence – violence that is not essential for the defeat of a belligerent – are not permitted. Other commentators corroborated this understanding of the rules of war. As Spaight stated in 1911:

[t]he general principle of war law is this – that no engine of war may be used which is (if one may use the term) supererogatory in its effect. The principle results from a compromise of humanitarian and military interests, the latter – for war is war – being the more powerful interest of the two.³⁵

The view that the rules of war must reconcile the ‘contradictory’ principles of humanity and military necessity persisted throughout the first part of the century.³⁶ Georg Schwarzenberger, writing in the 1960s, described the laws of war as an attempt to balance the needs of war with the standards of civilization.³⁷ He argued that, while some humanitarian rules protecting civilization did exist, they would generally only prevail where they did not interfere with military imperatives. Therefore, he acknowledged that there were rules that prevented truly sadistic or wanton acts – those that could not even claim to be part of a ‘scorched earth’ policy. There were also a few rules that formed a real compromise between civilization and military necessity, such as

³¹ See, e.g., Schwarzenberger, ‘From the Laws of War to the Law of Armed Conflict’, 17 *Journal of Public Law (J Pub L)* (1968) 61.

³² See, e.g., L. Oppenheim, *International Law: A Treatise*, edited by R.F. Roxburgh (3rd edn, 1921), at 84.

³³ *Ibid.*, at 85; L. Oppenheim, *International Law: A Treatise* (2nd edn, 1912), at 78; L. Oppenheim, *International Law: A Treatise*, edited by H. Lauterpacht (7th edn, 1952), at 227.

³⁴ Oppenheim, *supra* note 32, at 85–86; Oppenheim (1952), *supra* note 33, at 227.

³⁵ J.M. Spaight, *War Rights on Land* (1911), at 75. See also A.P. Higgins, *War and the Private Citizen* (1912), at 19.

³⁶ Kunz, ‘The Laws of War’, 50 *AJIL* (1956) 313, at 314.

³⁷ G. Schwarzenberger, *International Law and Order* (1971), at 172.

rules preventing poisoned weapons. The majority of rules, however, that referred to military necessity or contained 'as far as possible clauses' did not function to safeguard the minimum standard of civilization. Rather, they existed to cover up the inability or unwillingness to achieve this objective.³⁸

Thus, for the first part of the 20th century, legal commentators perceived the humanitarian principles of the rules of war as one thread, and often a weaker thread, of the law of war. This perception was underscored by international lawyers' understanding of, and categorization of, the existing humanitarian laws. After the second Hague Peace Conference in 1907, commentators listed the important developments in the limitation of war as the Declaration of Paris, the Declaration of St Petersburg, which prohibited certain weapons, the 1864 and 1906 Geneva Conventions, dealing with wounded and sick soldiers, and the 1899 and 1907 Hague Conventions.³⁹ All of these conventions were based, as they 'should be',⁴⁰ on 'an equilibrium between the cruel necessities of war and humanitarian ideals'.⁴¹ Out of this bundle of documents, the Geneva Conventions, as conventional law, provided particularly authoritative humanitarian provisions,⁴² but their purview was restricted to their subject matter. The Hague Peace Conferences had originally promised a more comprehensive attempt at the prevention or humanization of war,⁴³ but their outcome was also limited. Even an advocate such as James Brown Scott apologized for the results:

The result of a conference, therefore, is often strangely at variance with its program. The sweeping reforms of the enthusiast are brushed aside, and in their place tentative measures, timid measures perhaps, appear; but we must not forget that a step in advance is still a step in advance, and that the failure of today is the success of the morrow.⁴⁴

Despite this disappointment, Scott, and other observers, still remarked on the Conferences' important humanitarian advances.⁴⁵ They had produced provisions outlining the (limited) rights to combatancy,⁴⁶ the treatment of prisoners of war, and protection for non-combatants in Articles 25–28.⁴⁷ They had also denied the existence of an unlimited right to injure the enemy.⁴⁸ Yet, at the same time, the work of the Conferences also managed to 'adapt itself to the needs of warfare and to leave sufficient free play to military necessity'.⁴⁹ Indeed, the provisions only provided paltry humanitarian

³⁸ G. Schwarzenberger, *International Law As Applied by International Courts and Tribunals* (1968), at 10–11.

³⁹ Spaight, *supra* note 35, at 8–10; Oppenheim (1952), *supra* note 33, at 228–230; Higgins, *supra* note 35, at 15–17; J. Westlake, *International Law* (2nd edn, 1913), at 59–61.

⁴⁰ J.L. Kunz, 'The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision', 45 *AJIL* (1951) 37, at 59.

⁴¹ *Ibid.*, at 59.

⁴² Spaight, *supra* note 35, at 420.

⁴³ F.W. Holls, *The Peace Conference at the Hague, and Its Bearings on International Law and Policy* (1900), at 150.

⁴⁴ J.B. Scott, *The Hague Peace Conferences of 1899 and 1907* (1909), at 37–38. See also O. Nippold, *The Development of International Law after the World War* (1923), at 132 about the limits of humanitarianism in the Convention: the respect paid to military exigency.

⁴⁵ Holls, *supra* note 43, at ix–x.

⁴⁶ The restriction of combatants to an official, standing, army was considered a humanitarian development – see Oppenheim (1912), *supra* note 33, at 79.

⁴⁷ Scott, *supra* note 44, at 524–536.

⁴⁸ W.I. Hull, *The Two Hague Peace Conferences* (1908), at 469.

⁴⁹ Nippold, *supra* note 44, at 132.

protection for non-combatants, who remained exposed to bombardment, starvation and reprisals.⁵⁰ Moreover, in the eyes of some contemporaries, these provisions had a problematic status. The Hague Regulations, as they were described, were only an annex to a convention, and, as such, they did not have the same effect as an international convention.⁵¹ More importantly, they only applied when all parties to a conflict were bound, which proved to be a serious weakness during the World Wars.⁵²

The Nuremberg and Tokyo Trials confirmed the status of the Hague Regulations as customary law,⁵³ but by this point international lawyers had considered their provisions on the conduct of warfare to be outdated and not particularly useful for modern conditions and weaponry, such as aircraft.⁵⁴ Meanwhile, the 1929 and 1949 Geneva Conventions had adopted and expanded upon some of the humanitarian subjects of the Hague Conventions, in particular, the protection of prisoners of war and the management of occupied territories.

These developments encouraged legal commentators to start to separate the ‘Geneva’ and ‘Hague’ traditions of the laws of war in a manner that had not been apparent in earlier texts. Some lawyers now distinguished the traditions as the ‘customary’ Hague law and the ‘conventional’ Geneva law.⁵⁵ Others, following the ICRC, began to refer to Geneva law as ‘humanitarian’ law,⁵⁶ a move that Schwarzenberger described as a ‘fashionable’ attempt to describe law made on the fringes of the law of war.⁵⁷ According to this new distinction, Hague law governed the actual conduct of war, while Geneva law governed the humanitarian aspects of law. Jean Pictet, director general of the ICRC Directorate, argued that since the Geneva Conventions had updated the law on prisoners of war and civilian populations, these subjects should also now be understood to belong to the Geneva – humanitarian – part of the law. ‘Hague Law’, he suggested, would now just refer to the remainder, dealing with the means and methods of combat⁵⁸ or, as Pictet put it, the ‘law of war proper’.⁵⁹

⁵⁰ Alexander, ‘The Genesis of the Civilian’, 20 *Leiden Journal of International Law* (Leiden J Int’l L) (2007) 359, at 364; Higgins, *supra* note 35, at 132.

⁵¹ Spaight held this view. See Spaight, *supra* note 35, at 6–7. It was, however, a debatable question. See Renault, ‘War and the Law of Nations in the Twentieth Century’, 9 *AJIL* (1915) 1, at 7–8. Regulations to the Hague Convention 1907, 187 CTS 227 (1907).

⁵² See Oppenheim, *supra* note 32, at 88–89; Oppenheim (1952), *supra* note 33, at 234; Lauterpacht, ‘The Problem of the Revision of the Law of War’, 29 *British Yearbook of International Law* (British Y’book Int’l L) (1952) 360, at 367. See also J.W. Garner, *International Law and the World War* (1920), at 18–21, who argues that the 1907 Hague Conventions were not binding during the First World War.

⁵³ Oppenheim (1952), *supra* note 33, at 234; Schwarzenberger, *supra* note 38, at 20.

⁵⁴ Kunz, *supra* note 40, at 38.

⁵⁵ Oppenheim (1952), *supra* note 33, at 234; Schwarzenberger, *supra* note 38, at 20.

⁵⁶ Schindler, ‘Human Rights and Humanitarian Law: Interrelationship of the Laws’, 31 *American University Law Review* (Am U L Rev) (1981–1982) 935, at 935. Schindler states that the ICRC first started making this distinction in the 1950s before the Geneva Conventions were simply considered part of the law of war.

⁵⁷ Schwarzenberger, *supra* note 37, at 177.

⁵⁸ Pictet, ‘The Principles of International Humanitarian Law’, 6 *International Review of the Red Cross* (Int’l Rev Red Cross) (1966) 455, at 457; J. Pictet, *Humanitarian Law and the Protection of War Victims* (1975), at 16.

⁵⁹ Pictet, *supra* note 58, at 16.

Thus, while earlier texts had described the Hague Regulations and Geneva Conventions as part of a body of law that balanced humanitarian and military concerns,⁶⁰ legal writers now severed these principles, leaving the realm of military interests and military necessity to the Hague and bequeathing all of the humanitarian principles of the laws of war to Geneva⁶¹ and the administration of the ICRC. These humanitarian rules still made no claim to constitute the whole of the law. Indeed, they appeared even more circumscribed now that they were confined to the subject matter of the Geneva Conventions, enumerated in the titles of the conventions. Moreover, the repeated distinction between the Geneva rules and the 'law of war proper'⁶² had the effect of lending the humanitarian rules something of a secondary, peripheral appearance. As such, it was clear that the *ius in bello* continued to contain both humanitarian values and a strong appreciation of military considerations – they were just divided into separate traditions, instead of existing intertwined through all of the rules of warfare.

This severance meant that the Hague and Geneva division, now described as artificial, was, during this period, relevant and real. It had clear implications for the development and ownership of the law. The ICRC's promotion of the division may have strengthened its claim to the humanitarian laws, but it also limited the ICRC's ability to intervene in 'Hague' law. In the 1950s, Kunz argues, the ICRC ran afoul of this distinction, as it tried to draft a new code for the protection of the civilian population. The ICRC's 1955 Draft Rules caused some consternation among National Red Cross societies and private experts, who feared that it went beyond the bounds of ICRC concerns and interfered in government prerogatives.⁶³ The ICRC accepted this feedback and prepared a new draft, the 1956 Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War.⁶⁴ In this draft, Josef Kunz explained, the ICRC tried to adhere more closely to the accepted Geneva concerns.⁶⁵ Indeed, to better signal its limited ambitions, the ICRC named its commission at the New Delhi Conference the 'international humanitarian law commission'.⁶⁶ In this way, the ICRC made an early use of the term 'international humanitarian law', but it deployed the term in a very cautious manner that displayed its willingness to circumscribe its claims to the law. Nevertheless, despite the ICRC's restraint, governments could not agree on the draft, and the Conference was a failure.

After this first, abortive, use of the term 'international humanitarian law', Jean Pictet continued to use and publicize the term among a fairly small audience in the

⁶⁰ Lauterpacht, *supra* note 52, at 363–364.

⁶¹ See, e.g., K. Suter, *An International Law of Guerrilla Warfare* (1984), at 34, saying that the Geneva Conventions, not Hague, deal with prisoners of war; Erickson, 'Protocol I: A Merging of the Hague and Geneva Law of Armed Conflict', 19 *Virginia Journal of International Law* (Va J Int'l L) (1978–1979) 557, at 559; Kalshoven, 'Human Rights and Armed Conflict: Conflicting Views: Remarks', 67 *American Society of International Law Proceedings* (Am Soc Int'l L Proc) (1973) 141, at 159.

⁶² Pictet, *Humanitarian Law*, *supra* note 58, at 16.

⁶³ Kunz, 'The 1956 Draft Rules of the International Committee of the Red Cross at the New Delhi Conference', 53 *AJIL* (1959) 132, at 134–135.

⁶⁴ *Ibid.*, at 134–135.

⁶⁵ *Ibid.*, at 135.

⁶⁶ *Ibid.*

1960s. He published an article *The Development of International Humanitarian Law* in 1963,⁶⁷ a short study in 1967, entitled *Principles of International Humanitarian Law*,⁶⁸ and an expanded and clarified work *Humanitarian Law and the Protection of War Victims*.⁶⁹ In this work, Pictet explained that he used the term ‘international humanitarian law’ to comprise the humanitarian, Geneva, laws of war and human rights.⁷⁰ Thus, while Pictet propagated the use of the term international humanitarian law, he did not consider international humanitarian law synonymous with, or a replacement for, the laws of war. It was just an expression to describe a part of the laws of war, conjoined with human rights law.

The transition from Pictet’s esoteric discussion, which maintained the distinction between the ICRC’s humanitarian rules and the ‘real’ laws of warfare, to a field of ‘international humanitarian law’ that supplanted the ‘laws of armed conflict’ took place over a remarkably short period of time. It began in the late 1960s and was completed in 1974 with the assembly of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. The speed and decisiveness of this transition was due to the convergence of three distinct influences with quite different objectives: Seán MacBride, the UN General Assembly and the ICRC.

A Seán MacBride

At much the same time that Pictet was writing about international humanitarian law, Seán MacBride, Secretary-General of the International Commission of Jurists (ICJ), international and local politician, erstwhile chief of staff of the Irish Republican Army, and co-founder of Amnesty International,⁷¹ was busy lobbying non-governmental organizations (NGOs) and governments about an issue close to his heart. MacBride had a long-standing interest in prisoners, human rights abuses and the depredations of armed conflict that can be attributed to his own experiences, and that of his family, during the Irish rebellions against the British.⁷² As Secretary-General of the ICJ, he pursued this interest, advocating for the expansion of the human rights regime and greater regulation of armed conflicts. MacBride began speaking of the ‘massive but temporary wholesale violations of human rights in international armed conflicts’⁷³ in various human rights fora. In January 1968, he chaired a NGO Human Rights Conference, which concluded, in the following terms, that it was essential that the

⁶⁷ Pictet, ‘The Development of International Humanitarian Law’, in C. Jenks *et al.* (eds), *International Law in a Changing World* (1963), at 114–125.

⁶⁸ J. Pictet, *The Principles of International Humanitarian Law* (1967).

⁶⁹ Pictet, *Humanitarian Law*, *supra* note 58.

⁷⁰ *Ibid.*, at 13.

⁷¹ Cockburn, ‘In Memory of Sean MacBride: The Man Who Smelled a Rat’, 16 *Social Justice* (1989) 8, at 8.

⁷² E. Keane, *An Irish Statesman and Revolutionary: The Nationalist and Internationalist Politics of Seán Macbride* (2006), at 181. Seán MacBride was imprisoned several times by the British as was his mother, Maud Gonne. The poet Yeats lamented in *Prayer for My Daughter* that Maud Gonne had bartered ‘her loveliness’ for the ‘angry wind’ of conflict. MacBride’s father, John MacBride, was executed by the British after the 1916 Easter Uprising.

⁷³ Suter, *supra* note 61, at 26. This section is greatly indebted to Suter’s analysis of the Conference.

humanitarian principles of the 1949 Geneva Conventions protecting human rights prevail in all conflicts and that a new convention regarding modern weapons replace the outdated provisions of the 1907 Hague Conventions.⁷⁴ Then, in March, MacBride co-chaired an Assembly for Human Rights in Montreal that described 'human rights in armed conflicts' as a new area of concern.⁷⁵

The 1968 International Conference on Human Rights in Teheran provided MacBride with the opportunity to publicize his idea further. The Conference was held to mark the 20th anniversary of the UN Declaration of Human Rights; its aim was to improve the implementation of human rights.⁷⁶ MacBride's specific concern with 'human rights in armed conflict' was not on the agenda,⁷⁷ but MacBride, attending the Conference as an observer, privately lobbied delegates with his draft resolution. As MacBride explains:

I prepared a draft resolution which ultimately, with some minor amendments, was proposed by India and co-sponsored by Czechoslovakia, Jamaica, Uganda and the United Arab Republic. ... My task was greatly facilitated by reason of the fact that the leaders of the Indian, Czechoslovak, Jamaican and UAR government delegations were old friends of mine.⁷⁸

MacBride's preparatory work and lobbying at the 1968 International Conference on Human Rights in Teheran resulted in the conference passing the noteworthy Resolution XXIII concerning human rights in armed conflicts.⁷⁹ The Resolution called for the protection of humanitarian principles during armed conflict and suggested the creation of additional or revised conventions to achieve such protection.⁸⁰ Keith Suter suggests that the Resolution appealed to a broad range of governments, which, having had little time to consider its implications, thought it was benign and likely to be soon forgotten.⁸¹ Only the South Vietnamese delegation and the Swiss delegation, which had had notice of the Resolution, chose to abstain on the final vote – the Swiss being concerned that the Resolution 'forced the hand' of the ICRC.⁸² In this way, the Teheran Conference, while failing to achieve its stated aims,⁸³ made the first official connection between human rights and the laws of armed conflict.

B UN General Assembly

The Resolution, once passed, sparked a flurry of activity and discussion in the UN General Assembly. Draper argued that while the resolution passed because of

⁷⁴ *Ibid.*, at 27.

⁷⁵ Hewitt, 'Respect for Human Rights in Armed Conflicts', 4 *New York University Journal of International Law and Politics* (NYU J Int'l L & Politics) (1971) 41, at 43.

⁷⁶ Suter, *supra* note 61, at 23. UN Declaration of Human Rights 1948, UN Doc. A/810 (1948).

⁷⁷ *Ibid.*, at 34.

⁷⁸ Suter, *supra* note 61, at 28–29.

⁷⁹ Hewitt, *supra* note 75, at 43.

⁸⁰ Human Rights in Armed Conflicts, Resolution XXIII adopted by the International Conference on Human Rights, Teheran, Doc. A/Conf.32/41 (12 May 1968).

⁸¹ Suter, *supra* note 61, at 34.

⁸² *Ibid.*, at 31.

⁸³ *Ibid.*, at 21.

MacBride's interest, it was adopted with enthusiasm by nations who found it useful for their political ends. He explained:

In the period between 1968 and 1971 we witness in the organs of the UN a mounting endeavour to effect a fusion of the humanitarian law of war with human rights, which is not the outcome of accident. ...

The junction of human rights and the humanitarian law of war was timeous and profitable to the majority of states in the UN, i.e. Arab states in their perennial confrontation with Israel, the states supporting the disintegration of vestigial colonialism, and a large group of states supporting the racial confrontations in southern Africa and elsewhere. The Western states seem to have been slow to appreciate that humanitarian law-making might afford a useful opportunity to offset military reverses, and that human rights could be impressed for that purpose.⁸⁴

With this impetus, Resolution 2444 (XXIII) on Respect for Human Rights in Armed Conflicts was passed by the UN General Assembly on 19 December 1968, similarly talking of applying humanitarian principles in all armed conflicts and asking the Secretary-General to look into the need for additional humanitarian international conventions.⁸⁵ The topic continued to be canvassed in the 24th, 25th and 26th sessions of the UN General Assembly.

At the 24th session in 1969, the Secretary-General tabled his report on 'Respect for Human Rights in Armed Conflict'. It contained a 'historical survey of international instruments of a humanitarian character relating to armed conflict', looked at the relationship between the 1949 Geneva Conventions and UN instruments on human rights and considered steps to secure respect of humanitarian principles in all armed conflicts.⁸⁶ A resolution was passed, and it was decided to spend more time on the subject at the next session.

At the 25th session, the Secretary-General produced a more definitive report.⁸⁷ This report said it had given special attention, as Resolution 2597 (XXIV) had requested, to the need for protection of the rights of civilians and combatants in conflicts that arise from the struggles of peoples under colonial and foreign rule for liberation and self-determination and to the better application of existing humanitarian international conventions and rules to such conflicts.⁸⁸ The subject was discussed for four weeks in this session.⁸⁹ When it came to discussion in the UN General Assembly, many states had comments to make and agenda to push. The USA wanted to increase the protection of prisoners of war; the Soviet Union, with some Third World nations, wanted to condemn 'aggressive war' and protect freedom fighters; France wanted to protect journalists.⁹⁰

⁸⁴ Draper, 'Humanitarian Law and Human Rights', *Acta Juridica* (1979) 193, at 194–195. Suter, *supra* note 61, at 101, also makes this point.

⁸⁵ Respect for Human Rights in Armed Conflict, GA Res. 2444 (XXIII) (19 December 1968).

⁸⁶ *Respect for Human Rights in Armed Conflicts*, Report of the Secretary-General, Agenda Item 61, UN Doc. A/7720 (20 November 1969), at 70–104.

⁸⁷ *Respect for Human Rights in Armed Conflicts*, Report of the Secretary-General, Agenda Item 79, UN Doc. A/8052 (1970).

⁸⁸ *Ibid.*, at 8.

⁸⁹ Hewitt, *supra* note 75, at 59.

⁹⁰ *Ibid.*, at 60–62.

Four resolutions on the subject were passed at the 25th session. Resolution 2674 (XXV) said that extra instruments were needed to provide for the protection of the civilian population and freedom fighters against colonial and foreign domination as well as against racist regimes. Resolution 2675 (XXV) stated that fundamental human rights would still apply in armed conflicts and that civilians should not be the object of military operations or reprisals. Resolution 2677 welcomed the decision of the ICRC to convene a forthcoming 'conference on the reaffirmation and development of international humanitarian law.' Two more resolutions followed, in similar terms, at the 26th session.⁹¹

None of these instruments, with the notable exception of Resolution 2677, referred to 'international humanitarian law'. They either spoke of human rights, continuing the refrain from Teheran that human rights had to be protected in armed conflict, or they discussed humanitarian conventions or humanitarian rules as a part of the laws of armed conflict. As such, the emphasis of the UN General Assembly was very much focused on promoting the specific issue of human rights in armed conflict, an issue that suited the varying ends of the states involved. States did not yet think or talk in terms of 'international humanitarian law'.

C ICRC

The shift from human rights in armed conflict to 'international humanitarian law', as was shown by Resolution 2677, took place when the ICRC became involved in the UN General Assembly's discussion. The UN Secretary-General and the ICRC both emphasized the collaboration between the two institutions⁹² – presumably to bolster the claims of each to the material at issue. After having felt disregarded since the failure of the 1956 Draft Rules, the ICRC eagerly seized on the opportunity created by Teheran to fulfil its mission.⁹³ It convened the 1969 Conference in Istanbul under the title 'Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts'.⁹⁴ The Conference passed Resolution XIII, which underlined 'the necessity and urgency of reaffirming and developing humanitarian rules of international law applicable in armed conflicts of all kinds, in order to strengthen the affective protection of the fundamental rights of human beings, in keeping with the Geneva Conventions of 1949'.⁹⁵

It would be, the ICRC recognized, a sizeable and important task. The ICRC would, as it said, no longer be limited to its traditional role, concerned with those *hors de combat*. Instead, it said, it would be looking at all laws and customs of a humanitarian nature

⁹¹ Respect for Human Rights in Armed Conflicts, GA Res. 2853 (XXVI) (20 December 1971) and GA Res. 2852 (XXVI) (20 December 1971).

⁹² ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva, 24 May–12 June 1971, vol. 1 (1971), at 11.

⁹³ Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War 1957, ICRC, *XIXth International Conference of the Red Cross* (New Delhi, January 1957).

⁹⁴ ICRC, *XXIst International Conference of the Red Cross: Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts* (1969).

⁹⁵ ICRC, *supra* note 92, at 3.

– that is, ‘those concerning the protection of the human being or the essential assets of humanity’:⁹⁶

The subject matter of this report, of course, was far from new for the Red Cross. International wars or ‘blind weapons’, for example, have often been matters of concern, and of resolutions of the ICRC, alongside the protection of civilian populations. However, the terms employed here, ‘reaffirmation and development of the laws and customs applicable in armed conflicts’ definitely represented something new – a realization – they denoted that, in the ICRC’s opinion, the task devolving on the Red Cross in regard to the development of humanitarian law should in future be conceived and undertaken on a broader basis.⁹⁷

In this way, by a broad interpretation of the word ‘humanitarian’, the ICRC increased the ambit of Red Cross law to include issues concerning the means and methods of warfare – areas that it had previously attributed to the Hague tradition rather than to the ICRC. Yet it still had not yet begun to call its new domain ‘international humanitarian law’. The change only took place in 1971, when the ICRC called together its Conference of Government Experts. The title of its Conference was now the ‘Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts’.⁹⁸ The ICRC acknowledged the change and tried to explain it. International humanitarian law would mean those rules of the law of armed conflict that are clearly humanitarian in nature, namely those that protect human beings and their essential property.⁹⁹ Consequently, the term would cover not only the Geneva Conventions but also treaty or customary law rules that, for humanitarian reasons, lay down limits to be observed in the conduct of hostilities, the use of weapons, the behaviour of combatants, recourse to reprisals as well as norms intended to ensure the proper application of those rules.¹⁰⁰

The ICRC said that in its report it would sometimes abbreviate the term ‘international humanitarian law applicable in armed conflicts’ to international humanitarian law or just humanitarian law. It was concerned with dispelling any confusion this abbreviation might create. Sometimes, the ICRC said, the term international humanitarian law had been given a broader meaning, such as Pictet’s interpretation that encompassed human rights. It was not, the report stated, in that broad sense that the ICRC was now using it.¹⁰¹ Instead, it seems that the ICRC was using this new title to claim and justify its claim to an enlarged field of law. Although it explicitly said that human rights were outside its compass, it nevertheless inherited the broad range of concerns that the ‘human rights in armed conflicts’ discourse had raised. In fact, by claiming that it was not dealing with ‘human rights’, the ICRC, if anything, had strengthened its argument that what was left, what it was discussing, was international humanitarian law and its proper pursuit.

⁹⁶ ICRC, *supra* note 94, at 9–10.

⁹⁷ *Ibid.*, at 2.

⁹⁸ ICRC, *supra* note 92.

⁹⁹ *Ibid.*, at 25.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*, at 26.

This replacement was completed so quickly and thoroughly that the term international humanitarian law was used extensively during the Diplomatic Conference – and not as though it were an innovation but, rather, as an established term with a long history. The acting president, Pierre Graber, was able to introduce the Conference saying:

International humanitarian law had evolved slowly since 22 August 1864, when the plenipotentiaries of 13 States had met, also in Geneva, and adopted the ten articles of the first Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, prepared by Henry Dunant and Gustave Moynier.¹⁰²

Winspeare Guicciardi, Director-General of the United Nations Office at Geneva, made a similar historical claim:

Geneva had been the venue of the first diplomatic conference on international humanitarian law convened by the Swiss Federal Council in 1864, and of the subsequent conferences held in 1906, 1929 and 1949. The fact that the number of States participating in the present Conference was almost double that of the 64 States represented at the 1949 Conference was proof of the permanent and universal nature of the principles of a movement begun by Henry Dunant over a century ago.¹⁰³

Delegates also referred to ‘international humanitarian law’ in a manner that suggested it was a well-established field of long-standing principle.¹⁰⁴ Legal commentators also began to adopt the term, referring to ‘international humanitarian law’.¹⁰⁵ There did, however, continue to be inconsistency in the commentary. Some commentators maintained a link to the old regime, speaking of ‘the international humanitarian law of armed conflict’, while others continued to refer to the laws of armed conflict or laws of war¹⁰⁶ or to use the terms interchangeably.¹⁰⁷ Yet even this inconsistency was used by the ICRC to bolster the claim that ‘international humanitarian law’ now comprised the whole of the law of war. As Jean-Jacques Surbeck commented: ‘The view of the ICRC is that “international humanitarian law” is synonymous with “law of war”.’¹⁰⁸

Henceforth, this ‘humanitarian law’ would no longer be one strand of the ‘laws of war’. Nor would it mean the contained field of Geneva laws, standing opposed to the Hague ‘laws of war proper’. The new term brought the Hague and Geneva traditions together and made it all international humanitarian law, the rightful property of the ICRC. All that

¹⁰² *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)*, vol. 5 (1981), at 8.

¹⁰³ *Ibid.*, at 10.

¹⁰⁴ *Ibid.* See Mr. Boudjakdji (Algeria) at 17, Mr. Zafera (Madagascar) at 58, Mr. Dorochevitch (Byelorussian Soviet Socialist Republic) at 62.

¹⁰⁵ See, e.g., Starke, ‘Australia and the Development of International Humanitarian Law’, 8 *Federal Law Review (Fed L Rev)* (1976–1977) 1; M. Bothe, K.J. Partsch and W.A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (1982), at 293; Rubin, ‘Terrorism, Grave Breaches and the 1977 Geneva Protocols’, 74 *Am Soc Int’l L Proc* (1980) 192, at 192.

¹⁰⁶ See, e.g., Reed, ‘Laws of War: The Developing Law of Armed Conflict – Some Current Problems’, 9 *Case Western Reserve Journal of International Law* (1977) 17; Green, ‘The New Law of Armed Conflict’, 15 *Canadian Yearbook of International Law (CYIL)* (1977) 3.

¹⁰⁷ See, e.g., Aldrich, ‘Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I’, 26 *Va J Int’l L* (1985–1986) 693.

¹⁰⁸ Surbeck, ‘Dissemination of International Humanitarian Law’, 33 *Am U L Rev* (1983–1984) 125, at 126.

was left outside its ambit were the laws of the sea, the *ius ad bellum*, the rules of neutrality. In future, these would be known by their specific titles, rather than as part of the ‘laws of war’, and the rest of the law would be ‘international humanitarian law’. The laws of war had, for all useful purposes, been replaced by international humanitarian law.

5 Drafting International Humanitarian Law

The term international humanitarian law, its broad principles and its historical provenance may have been established by the beginning of the 1974 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, but its actual rules were contested throughout the Conference and continued to be questioned even after the Conference concluded. When the ICRC convened the Diplomatic Conference, it expected that the negotiations would take one year and that the delegates would follow the recommendations set by the ICRC and its government experts.¹⁰⁹ What actually took place was quite different.

Unlike previous conferences on humanitarian law, which had been attended by a discrete number of predominantly Western states, the Diplomatic Conference was an unwieldy gathering, consisting of around 700 delegates.¹¹⁰ These delegates separated into conflicting factions, which expressed different views about what international humanitarian law was and should be. The background of the Yom Kippur War, the Vietnam War and the decolonization struggles shaped these views and lent them urgency. The Third World and, nominally, the Eastern Bloc thought international humanitarian law should protect guerrilla fighters and obstruct imperialist forces.¹¹¹ The ICRC and most Western states hoped to recognize guerrillas and provide them with a modicum of protection in order to encourage guerrillas to follow the laws of war, while still maintaining a clear distinction between combatant and civilian.¹¹² Some states argued that the principle of discrimination should prohibit the use of certain modern weapons;¹¹³ others insisted that it could not do so.¹¹⁴ Many delegations, especially those from the Eastern Bloc and Third World, considered that international humanitarian law should not contain a principle of proportionality, claiming that it gave military commanders an unlimited right to decide to launch an attack if they thought there would be military advantage.¹¹⁵ In response, Australia,¹¹⁶ the United

¹⁰⁹ Baxter, ‘Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law’, 16 *Harv Int’l LJ* (1975) 1, at 9.

¹¹⁰ C. Pilloud et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), at xxxviii.

¹¹¹ See *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)*, vol. 14 (1981), at 342 (Mr Belousov (Ukrainian Soviet Socialist Republic) speaking).

¹¹² See Pilloud et al., *supra* note 110, at 520–521; Aldrich, ‘New Life for the Laws of War’, 75 *AJIL* (1981) 764, at 770.

¹¹³ See *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)*, vol. 6 (1981), at 167 (Democratic Republic of Germany), 192 (Mexico).

¹¹⁴ *Ibid.*, at 179 (Canada), 188 (Federal Republic of Germany).

¹¹⁵ *Official Records of the Diplomatic Conference*, vol. 14, *supra* note 111, at 61 (Poland and North Korea speaking).

¹¹⁶ *Ibid.*, at 62.

Kingdom¹¹⁷ and the USA¹¹⁸ argued that the principle of proportionality should be retained. States, they pointed out, were not going to abandon bombardment – all the law could reasonably hope to do was to govern it.¹¹⁹

These, and other, disagreements meant that the negotiations took four long years of difficult debates. The delegates eventually managed to resolve, or overlook, their differences by using vague, ambiguous language in the final draft. For example, the definition of guerrillas was resolved by prescribing that combatants must identify themselves from the time of ‘deployment’ – a word chosen because there was no agreement about what it meant.¹²⁰ The concerns about proportionality were ameliorated by removing the word proportionate from the relevant articles. The provisions on indiscriminate attacks remained imprecise.¹²¹ The many concerns regarding the effects of Additional Protocol II on state sovereignty were resolved by expurgating half of its provisions at the last minute.¹²²

By making these compromises, the delegates at the Diplomatic Conferences were able to complete Additional Protocol I, dealing with external armed conflicts, and Additional Protocol II, dealing with internal armed conflicts. And, despite the compromises, the new conventions made some important changes to the *ius in bello*. Guerrillas, who had previously been denied protection, could now qualify as combatants.¹²³ Civilians were defined for the first time in Article 50 and given a raft of unprecedented protection. In addition to the new codification of the principles of proportionality and discrimination, Protocol I demanded that precautions be taken to protect civilians, banned reprisals against civilians and civilian objects and prohibited the starvation of civilians,¹²⁴ which had previously been allowed under the laws of war.¹²⁵ Additional Protocol II introduced innovative, if limited, protection to civilians during internal armed conflicts.¹²⁶

International lawyers and governments understood that these new provisions shifted the existing balance of military necessity and the humanity in the law of armed conflict towards humanitarianism. Antonio Cassese stated:

The Protocol places primary emphasis on humanitarian demands and, indeed, in many respects subordinates military exigencies to such demands. On this score, the Protocol markedly departs from the customary law, which in general tends to put military necessity on the same footing as humanitarian demands.¹²⁷

¹¹⁷ *Ibid.*, at 64.

¹¹⁸ *Ibid.*, at 67.

¹¹⁹ *Ibid.*

¹²⁰ Aldrich, ‘Guerrilla Combatants and Prisoner of War Status’, 31 *Am U L Rev* (1981–1982) 871, at 878–879.

¹²¹ Pilloud *et al.*, *supra* note 110, at 625; Bothe, Partsch and Solf, *supra* note 105, at 307; *Official Records of the Diplomatic Conference*, vol. 6, *supra* note 113, at 182 (Colombia speaking).

¹²² Pilloud *et al.*, *supra* note 110, at 1334–1336; Greenwood, ‘A Critique of the Additional Protocols to the Geneva Conventions of 1949’ in T.L.H. McCormack and H. Durham (eds), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (1999) 3, at 7.

¹²³ *Ibid.*, at 521.

¹²⁴ Arts. 57, 51 and 54.

¹²⁵ Alexander, *supra* note 50, at 364.

¹²⁶ Pilloud *et al.*, *supra* note 110, at 1319.

¹²⁷ A. Cassese, ‘A Tentative Appraisal of the Old and the New Humanitarian Law of Armed Conflict’ in A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict* (1979) 461, at 481.

The Australian government described this shift as the importation of a human rights approach to the updating and revision of the laws of war, which it clarified as a ‘reaffirmation and development of these laws as a body of international humanitarian law’:¹²⁸

It goes without saying that Australia had neither opposed nor dissented from the process of events that led to the new appellation of international humanitarian law for the laws of war. This process, of itself, represented an extremely significant advance, for it involved nothing less than the importation of principles and standards of human rights into the laws of war.¹²⁹

Commentators and states, therefore, considered the Additional Protocols to be the framework and embodiment of a new approach to the *ius in bello* – international humanitarian law.

6 Querying International Humanitarian Law

Governments and delegates appeared fairly relieved when the Diplomatic Conference finally drew to a close. However, as their relief at the conclusion of the Conference faded away, commentators and states began to express concerns about Additional Protocol I. They feared that the new international humanitarian law was too humanitarian to be adopted.¹³⁰ This fear proved to be justified. Many states refused to sign or, having signed, did not ratify Additional Protocol I. The list included India, Indonesia, Iran, Iraq, Israel, Malaysia, Morocco, Pakistan, the Philippines, Singapore, Sri Lanka, Sudan, Thailand, the USA, and the Soviet Union.¹³¹ Despite the optimism of the US delegation,¹³² President Ronald Reagan announced in 1987 that the USA would not ratify Additional Protocol I, describing it as ‘fundamentally and irreconcilably flawed’.¹³³ Other states only ratified the treaties much later, such as France in 2001, Australia in 1991 and the United Kingdom in 1998. As the list shows, many of the states that were involved in the conflict following 1977 had not agreed to the provisions of the Additional Protocols.

Although the ICRC continued to try to promote Additional Protocol I, encouraging states to ratify the Protocol and apply its precepts, it encountered a great deal of opposition. Many legal and military commentators expressed doubts about the value and authority of Additional Protocol I.¹³⁴ These critics argued that Additional Protocol I was a problematic departure from the existing *ius in bello*.¹³⁵ The new provisions

¹²⁸ Starke, *supra* note 105, at 11.

¹²⁹ *Ibid.*, at 2.

¹³⁰ See, e.g., Green, ‘The New Law of Armed Conflict’, 15 *CYIL* (1977) 3, at 40.

¹³¹ ICRC, *State Parties to the Protocol I* (7 June 2005), available at www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P (last visited 28 January 2015).

¹³² Aldrich, *supra* note 112, at 778. Aldrich had reservations about the provisions on reprisals, which were controversial, but otherwise seemed positive about the outcome.

¹³³ Reagan, ‘Letter of Transmittal’, 81 *AJIL* (1987) 910, at 911.

¹³⁴ See, e.g., Carnahan, ‘Additional Protocol I: A Military View’, 19 *Akron Law Review (Akron L Rev)* (1986) 543, at 543; Parks, ‘Air War and the Law of War’, 1 *Air Force Law Review (Air Force L Rev)* (1990) 1, 111.

¹³⁵ Parks, *supra* note 134, at 112.

concerning reprisals, starvation, targeting, protected objects and combatant status could not be considered to be customary laws.¹³⁶ The military lawyer, William Hay Parks, in an influential 1990 article, 'Air War and Law', argued that Additional Protocol I's description of the principles of discrimination and proportionality also diverged from traditional, customary law.¹³⁷ Indeed, he stated, the principle of proportionality was expressed in such vague, tenuous terms as to lack any meaning.¹³⁸ Therefore, these sections of Additional Protocol I could not be considered a codification of customary law that would be binding on non-signatories.

Not only did these commentators agree that the Additional Protocol I did not represent customary law in these areas, but many felt that was as it should be. Parks, and those international lawyers who repeated his claims, described the Protocol as confusing, impracticable, inconsistent with the evolution of the laws of war and detrimental to the protection of civilians.¹³⁹ The Protocol's dual humanitarian aims of protecting civilians and non-traditional combatants, Parks claimed, were manifested in such an impractical way that it was unworkable and, ultimately, regressive. By blurring the distinction between civilian and combatant, the Protocol endangered civilians.¹⁴⁰ It was also dangerous, Parks argued, because it moved the traditional onus for the protection of civilians from the defender, who should have control over civilians, to the attacker, who would not.¹⁴¹

At the same time that Parks and other critics lamented the regressive effects of the Protocol, however, they also described the Protocol as being too humanitarian, such that it made military activity impossible.¹⁴² As Major Guy Roberts stated:

These proposed alternatives to customary law and practice pose fundamental operational and practical problems. Clearly, they represent an attempt to shift the balance established between military necessity and humanitarian principles in such a way as to hamper the ability of states to use military force to attain political objectives. Although perhaps laudable from a philosophical perspective, the changes are neither politically feasible nor operationally practical.¹⁴³

For some commentators, the distance between the innovations of the Protocol and the accepted rules of warfare, the requirements of the military and political reality meant

¹³⁶ Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989), at 64, 66; Matheson, 'Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions', 2 *Am U J Intl L & Policy* (1987) 416, at 426; Parkerson, 'United States Compliance with Humanitarian Law Respecting Civilians during Operation Just Cause', 133 *Military Law Review* (Military L Rev) (1991) 31, at 51.

¹³⁷ Parks, *supra* note 134, at 113, 141, 173.

¹³⁸ *Ibid.*, at 175.

¹³⁹ See, e.g., DeSaussure, 'The Role of the Law of Armed Conflict during the Persian Gulf War: An Overview', 37 *Air Force L Rev* (1994) 41, at 49; Infeld, 'Precision-Guided Munitions Demonstrated Their Pinpoint Accuracy in Desert Storm; But Is a Country Obligated to Use Precision Technology to Minimize Collateral Civilian Injury and Damage?', 26 *George Washington Journal of International Law and Economics* (George Washington J Intl L & Econ) (1992–1993) 109, at 122–123.

¹⁴⁰ Parks, *supra* note 134, at 66.

¹⁴¹ *Ibid.*, at 112.

¹⁴² See, e.g., *ibid.*, at 222.

¹⁴³ Roberts, 'The New Rules of Waging War: The Case against Ratification of Additional Protocol I', 26 *Va J Intl L* (1985–1986) 109, at 146.

that the Protocol would not have any force as a legal document. Michael Matheson suggested that the US rejection meant that the Protocol would not be seen as the next stage in the development of international humanitarian law.¹⁴⁴ Others described Additional Protocol I as a ‘pseudo code’,¹⁴⁵ something that looks like law but does not have the ‘control component’.¹⁴⁶

This critical attitude towards the status and usefulness of Additional Protocol I continued into the early 1990s, as the legal commentary on the First Gulf War demonstrates. When legal commentators assessed the conduct of the conflict, the first question they had to answer was the degree to which the Additional Protocol I was applicable. Although commentators came to slightly different conclusions, they agreed that this was a difficult question.¹⁴⁷ As neither the USA nor Iraq were parties, the problem was determining which parts of the Additional Protocol I could be considered customary law. Some parts of Additional Protocol I, it was agreed, were customary international law.¹⁴⁸ Other parts, many lawyers stated, repeating the objections of Parks and the US government, were not customary law and were not desirable as law.¹⁴⁹

The existence of such widespread opposition to Additional Protocol I meant that even commentators who were not ideologically opposed to the content of the Protocol, or sympathetic to the military perspective, accepted that these persistent objections prevented it from becoming customary law in its entirety.¹⁵⁰ Very few commentators were prepared to say that Additional Protocol I did codify customary international law.¹⁵¹ There was, however, one organization that stood against the consensus – Middle East Watch (MEW), a branch of Human Rights Watch (HRW). MEW wrote a report on the conflict: *Needless Deaths in the Gulf War*.¹⁵² It was the first time HRW had attempted to write about an international conflict. HRW was used to dealing with human rights issues but less familiar with the implementation of international humanitarian law. As Parks explained:

HRW, a human rights organisation, expressed an interest in law of war issues arising from the conflict but admitted its ignorance of that area of the law. A senior official of Middle East Watch met with lawyers in the Pentagon in order to gain an understanding of the law of war issues.¹⁵³

¹⁴⁴ Matheson, *supra* note 136, at 422.

¹⁴⁵ Remarks of Lieutenant Professor William v. O'Brien in Dupuis *et al.*, ‘The Sixth Annual American Red Cross–Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions’, 2 *Am U J Intl L & Policy* (1987) 415, at 511.

¹⁴⁶ Remarks of Professor Michael W. Reisman in Dupuis *et al.*, *supra* note 145, at 448.

¹⁴⁷ See, e.g., Gardam, *supra* note 26, at 815.

¹⁴⁸ Meron identifies these as Arts. 35(1), 35(2), and 40, the definition of perfidy in Arts. 37, 51(2), 52(2), 42, 59, 60, 57(2)(c), 73, 75, and 79. Meron, *supra* note 136, at 64.

¹⁴⁹ DeSaussure, *supra* note 139, at 49; Infeld, *supra* note 139, at 122–123; Carnahan, *supra* note 134, at 543; Parks, *supra* note 134, at 111.

¹⁵⁰ See, e.g., Gardam, *supra* note 26, at 160.

¹⁵¹ See, e.g., Barber, ‘Scuds, Shelters and Retreating Soldiers: The Laws of Aerial Bombardment in the Gulf War’, 31 *Alberta Law Review* (*Alberta L Rev*) (1993) 662, at 685.

¹⁵² Human Rights Watch (HRW), *Needless Deaths in the Gulf War: Civilian Casualties during the Air Campaign and Violations of the Laws of War* (1991), available at www.hrw.org/reports/1991/gulfwar/ (last visited 9 December 2014).

¹⁵³ Parks, ‘The Gulf War: A Practitioner’s View’, 10 *Dickinson Journal of International Law* (*Dickinson J Int’l L*) (1991–1992) 393, at 418–419.

Yet, clearly, MEW did not rely heavily on the advice given to it by US military, choosing instead to argue that, despite the US failure to ratify:

[t]his does not mean that the Protocol was irrelevant, since many of the Protocol's provisions reaffirm, clarify or otherwise codify preexisting customary law restraints on methods and means of combat and, thus, are binding on all nations regardless of ratification.¹⁵⁴

In this way, MEW departed from the more complex assessment made by contemporary international lawyers, which accepted some of Additional Protocol I as customary law, while rejecting other parts, certain interpretations and, in particular, the ideology underpinning it. Yet MEW's interpretation had little impact on the legal literature. Some commentators, such as Judith Gardam and Françoise Hampson, used the report as a source of facts about the conflict but paid no attention to its legal conclusions, preferring to construct their own legal analysis.¹⁵⁵ Those commentators who did note MEW's legal analysis argued that it was simply incorrect.¹⁵⁶ On the whole, when faced with an unorthodox reading of the law by MEW, lawyers would refer to Parks as a more authoritative source.¹⁵⁷

The general understanding that Additional Protocol I did not apply to the conflict was connected with a widespread perception that the legal regime governing the Gulf War was not really a humanitarian law. The central principle of the *ius in bello* was not humanity but, rather, the principle of military necessity. This was demonstrated when commentators applied the principle of proportionality to the conflict. With the notable exception of MEW, commentators did not use the Additional Protocol I's definition of proportionality.¹⁵⁸ Rather, they looked to the customary principle of proportionality, which, they stated, was one of the weakest principles of international law.¹⁵⁹ It was vague, subjective,¹⁶⁰ difficult to describe and harder to apply.¹⁶¹ What was clear to the commentators, as to many delegates at the Diplomatic Conference, was that it was a permissive principle that allowed almost any action if it could be justified by military necessity. It amounted to nothing more than a prohibition on the direct or negligent targeting of civilians.¹⁶² The US campaign, commentators agreed, satisfied this low threshold. Even the most distressing events, such as the destruction of the electricity

¹⁵⁴ HRW, *supra* note 152.

¹⁵⁵ See Hampson, 'Proportionality and Necessity in the Gulf Conflict', 86 *Am Soc Int'l L Proc* (1992) 45, at 48; Gardam, *supra* note 26, at 813.

¹⁵⁶ See, e.g., Shotwell, 'Economy and Humanity in the Use of Force: A Look at the Aerial Rules of Engagement in the 1991 Gulf War', 4 *United States Air Force Academy Journal of Legal Studies* (USAF Acad J Legal Studies) (1993) 15, at 32; Infeld, *supra* note 139, at 122–123.

¹⁵⁷ See, e.g., Shotwell, *supra* note 156, at 32; Infeld, *supra* note 139, at 122–123.

¹⁵⁸ See, e.g., Gardam, *supra* note 26, at 829. Gardam describes the principles regulating indiscriminate attack and proportionality as the most problematic in Additional Protocol I. See also Fenrick, 'Attacking the Enemy Civilian as a Punishable Offense', 7 *Duke Journal of Comparative and International Law* (Duke J Comp & Int'l L) (1997) 539, at 539.

¹⁵⁹ Kahn, 'Lessons for International Law from the Gulf War', 45 *Stanford Law Review* (Stanford L Rev) (1992–1993) 425, at 435.

¹⁶⁰ Fenrick, *supra* note 158, 546.

¹⁶¹ Parkerson, *supra* note 136, at 59; Kahn, *supra* note 159, at 435; Parks, *supra* note 134, at 173–175.

¹⁶² See, e.g., Crawford, 'The Law of Noncombatant Immunity and the Targeting of National Electrical Power Systems', 21 *Fletcher Forum of World Affairs* (1997) 101, at 106; Gardam, *supra* note 26, at 834.

system that resulted in hundreds of thousands of civilian deaths, were legal.¹⁶³ As Gardam stated:

The conduct of hostilities in the Gulf conflict indicates that the concept of ‘excessive casualties’ was restricted to that context. In other words, the military advantage always outweighed the civilian casualties as long as civilians were not directly targeted and care was taken in assessing the nature of the target and during the attack itself. The impact of the practice of states such as the United States and its coalition partners on the formation of custom is considerable and cannot be overlooked. It seems inevitable that the concept of proportionality as a customary norm is limited to the situations outlined above.¹⁶⁴

While some pragmatic military lawyers were comfortable with this outcome, others used it to fuel a pessimism and scepticism about the *ius in bello* that is apparent throughout the literature on the Gulf War.¹⁶⁵ Law, international lawyers felt in the early 1990s, could not prevent the horrors of war.¹⁶⁶ All it really did was to legalize them.

7 Recognizing International Humanitarian Law

Thus, at the beginning of the 1990s, the status of the Additional Protocol I was uncertain and, as a result, so was the appropriateness of ‘international humanitarian law’ as the description of a *ius in bello* that was dominated by military imperatives. Yet, by the end of the decade, this uncertainty had been replaced by the acceptance of Additional Protocol I as customary law and a general embrace of the humanitarian values of international humanitarian law. This change took place as quickly and unequivocally as the original emergence of the term ‘international humanitarian law’. After the Gulf War, questions about the value and status of Additional Protocol I dwindled in the legal literature. Cold War positions and attitudes had less relevance, and memories of the perceived hijacking of the Diplomatic Conference began to fade.¹⁶⁷ The attention of the international legal community was focused instead on the ethnic conflicts in Yugoslavia and Rwanda and the attempts of the newly functional UN Security Council to respond to these events – authorizing peacekeeping operations aimed at helping beleaguered civilians, setting up ad hoc tribunals for Rwanda and Yugoslavia and beginning work towards an International Criminal Court.

These conflicts and the new tribunals changed the focus, the constitution and the sensibility of international legal scholarship. Suddenly, there was an institutional environment established to enforce international humanitarian law. International humanitarian law was no longer just a ‘pseudo code’. Instead, it became seen as a

¹⁶³ See, e.g., DeSaussure, *supra* note 139, at 62; Crawford, *supra* note 162, at 101.

¹⁶⁴ Gardam, *supra* note 26, at 834.

¹⁶⁵ See, e.g., Jochenik and Normand, ‘The Legitimation of Violence: A Critical Analysis of the Gulf War’, 35 *Harv Int’l LJ* (1994) 387.

¹⁶⁶ Kahn, *supra* note 159, at 436; Myrow, ‘Waging War on the Advice of Counsel: The Role of Operational Law in the Gulf War’, 7 *USAF Acad J Legal Studies* (1996–1997) 131, at 138.

¹⁶⁷ Meron, ‘The Time Has Come for the United States to Ratify Geneva Protocol I’, 88 *AJIL* (1994) 678, at 684.

real option for study, research and work – an exciting and tangible pursuit.¹⁶⁸ A new cohort of academics entered international law and started producing a large body of literature. This literature was quite different to the sceptical and pessimist work of the early 1990s, which was dominated by military lawyers and a military perspective.¹⁶⁹ The literature that emerged over the 1990s was developed by a larger group of academics and practitioners, often drawn to the field by humanitarian concerns. Their work was concerned with the victims of warfare and the crimes committed against them – crimes against humanity, crimes of sexual violence and genocide. The victims of landmines were also a high profile issue during these years.¹⁷⁰ International lawyers, discussing these issues, employed a humanitarian vocabulary, which was appropriate in these contexts, and they were open to human rights values in a way that their predecessors were not.¹⁷¹ Moreover, they believed that international law could reflect these values; lawyers wrote of creating a kinder, more victim-focused form of law¹⁷² and they worked towards introducing change.¹⁷³ Even lawyers of a theoretical bent did not resign themselves to the kind of sceptical deconstruction that prevailed during the Gulf War.¹⁷⁴ Instead, international lawyers, writing from a feminist or post-colonial perspective, used these critical techniques as a precursor to discussions about the transformative possibilities of language and law.¹⁷⁵ Some of these hopes for change and a more humanitarian law were supported by the legal

¹⁶⁸ Otto suggests that there was significant surge of interest in international law at the undergraduate level between 1984 and 2000, with courses doubling. She attributes (and bemoans) this increase as an interest in private international law. Her figures, however, show a leap from 7 to 20 classes in international human rights law, 2 to 3 in international humanitarian law, 11 to 26 in public international law and 2 to 9 in advanced public international law. Otto, 'Handmaidens, Hierarchies and Crossing the Public-Private Divide in the Teaching of International Law', 1 *Melbourne Journal of International Law* (Melbourne J Int'l L) (2000) 35, at 65–67. John A.J.R. Barrett, 'International Legal Education in US Law Schools: Plenty of Offerings, But Too Few Students', 31 *International Lawyer* (Int'l Lawyer) (1997) 845, at 845.

¹⁶⁹ This dominance can be seen by looking at the references above for the literature on the Gulf War and, in particular, by the reliance on Parks' work.

¹⁷⁰ Koh, 'The 1998 Frankel Lecture: Bringing International Law Home', 35 *Houston Law Review* (Houston L Rev) (1998) 623, at 657.

¹⁷¹ Meron, *supra* note 3, at 244; Kennedy, *supra* note 4, at 267.

¹⁷² See, e.g., Knop, 'Re/Statements: Feminism and State Sovereignty in International Law', 3 *Transnat'l L & Contemp Probs* (1993) 293, at 311; Gunning, 'Modernizing Customary International Law: The Challenge of Human Rights', 31 *Va J Int'l L* (1990–1991) 211, at 220.

¹⁷³ Brooks, 'Feminism and International Law: An Opportunity for Transformation', 14 *Yale Journal of Law and Feminism* (Yale J L & Feminism) (2002) 345, at 352; Green *et al.*, 'Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique', 5 *Hastings Women's Law Journal* (Hastings Women's LJ) (1994) 171, at 175–176; Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law', 30 *Michigan Journal of International Law* (Michigan J Int'l L) (2008–2009) 1, at 4–6.

¹⁷⁴ See, e.g., Jochnick and Normand, *supra* note 165.

¹⁷⁵ Brooks, *supra* note 173, at 349. Charlesworth, 'Feminist Critiques of International Law and their Critics', 13 *Third World Legal Studies* (1995) 1, at 1; Chinkin, 'Feminist Interventions into International Law', 19 *Adelaide Law Review* (Adelaide L Rev) (1997) 13, at 13; Antony Anghie and B.S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflict', 36 *Studies in Transnational Legal Policy* (Stud Transnat'l Legal Policy) (2004) 185, at 186.

developments in the international tribunals¹⁷⁶ and the successes of the campaign against landmines.¹⁷⁷

Although the question of the status of Additional Protocol I lay dormant through these years, it was awakened when the North Atlantic Treaty Organization (NATO) intervened in Kosovo in 1999. Or, rather, it should have been. Considering all of the attention given to NATO's actions and its compliance with international humanitarian law, one would expect that international lawyers would have to face the old questions about the applicability of Protocol I and the extent to which it represented customary law. And, yet, this did not happen. Lawyers, almost without exception, would acknowledge that France, Turkey and the USA were not parties to the Protocol, but then they would simply state that the 'provisions of the Protocol are universally accepted as customary international law and are binding authorities on all nations'.¹⁷⁸

How did lawyers come to such a straightforward conclusion, which was so different to the debates that had taken place less than a decade earlier? A glance at their footnotes will reveal, almost without exception, a reference to HRW or Amnesty International.¹⁷⁹ HRW had stated:

Protocol I additional to the Geneva Conventions of 1949 provides the basis for the evaluation here of NATO's bombing. This Protocol has been ratified by most NATO members, and the US government has declared that it accepts all of the relevant standards. The basic principle of Protocol I, and of the laws of war generally, is that the civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. This turns in large part on the requirement that attackers must distinguish between civilians and combatants and between military objectives and civilian objects. They must take all feasible precautions to avoid or minimize harm to civilians, and to this end may not attack civilians exclusively, or combatants and civilians indiscriminately.¹⁸⁰

¹⁷⁶ In particular, the change to established legal categories such as rape and genocide, which put emphasis on the experiences of victims. See Amann, 'Prosecutor v. Akayesu', 93 *AJIL* (1999) 195, at 195; Askin, 'Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status', 93 *AJIL* (1999) 92, at 107.

¹⁷⁷ Wexler, 'The International Deployment of Shame, Second-Best Responses, and Norm Entrepreneurship: The Campaign to Ban Landmines and the Landmine Ban Treaty', 20 *Arizona Journal of International and Comparative Law (Arizona J Int'l Comparative L)* (2003) 561.

¹⁷⁸ See, e.g., Santopadre, 'Deterioration of Limits on the Use of Force and Its Perils: A Rejection of the Kosovo Precedent', 18 *St John's Journal of Legal Commentary (St John's J Legal Comment)* (2003–2004) 369, at 397.

¹⁷⁹ See, e.g., *ibid.* Santopadre quotes Amnesty International. See also McDonnell, 'Cluster Bombs over Kosovo: A Violation of International Law?', 44 *Arizona Law Review (Arizona L Rev)* (2002) 31, at 97; Stone, 'Protecting Civilians During Operation Allied Force: The Enduring Importance of the Proportional Response and NATO's Use of Armed Force in Kosovo', 50 *Catholic University Law Review (Catholic Univ L Rev)* (2001–2002) 501, at 523–530; Voon, 'Pointing the Finger: Civilian Casualties of NATO Bombing in the Kosovo Conflict', 16 *Am U L Rev* (2000–2001) 1083, at 1092, quotes Amnesty International and HRW. Colangelo is the only commentator to provide an alternative authority for Additional Protocol I in a footnote. Quoting J.L. Brierly, he writes: 'In order to constitute customary international law, the custom must have taken hold through (1) state practice and (2) *opinio juris*, or "because [the custom] is believed to be binding."' This statement does not, however, actually support the assertion that Protocol I is binding. See Colangelo, 'Manipulating International Criminal Procedure: The Decision of the ICTY Office of the Independent Prosecutor not to Investigate NATO Bombing in the Former Yugoslavia', 97 *Northwestern University Law Review (Northwestern Univ L Rev)* (2002–2003) 1393, at 1397.

¹⁸⁰ HRW, *Civilian Deaths in the NATO Air Campaign* (February 2000), available at www.hrw.org/reports/2000/nato/index.htm (last visited 10 January 2014).

And Amnesty International had agreed:

The fullest statement of the rules governing the conduct of hostilities in international armed conflict is in Protocol I Additional to the Geneva Conventions of 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I). This Protocol, which was adopted in 1977, has been ratified by over 150 states. Three of NATO's members are not parties to Protocol I: France (Amnesty International understands that it intends to ratify it in the near future); the United States (although key provisions of Protocol I are reflected in its military code); and Turkey. The fundamental provisions of this Protocol, including all the rules on the conduct of hostilities cited in this report, are considered part of customary international law and are therefore binding on all states.¹⁸¹

Amnesty International and HRW did not, in their reports, put in any reference or source for their claims. Nevertheless, their bland statements became the authority for confirming the status of Additional Protocol I and ushering in a new, stricter regime of international humanitarian law. Unlike the lawyers during the Gulf War, who were dubious about a human rights organization's ability to grasp the *ius in bello*,¹⁸² lawyers at the end of the century, familiar with a humanitarian approach and expectant that the law would protect victims, were ready to accept such legal reasoning as convincing and unproblematic.

The acceptance of Additional Protocol I as the applicable law, and the willingness to follow where Amnesty International and HRW led, meant that international lawyers writing about Kosovo demonstrated a starkly different understanding of the *ius in bello* than those writing about the First Gulf War. Lawyers interpreted the principle of discrimination much more strictly; they narrowed the class of acceptable targets and permissible weaponry.¹⁸³ As for proportionality, it was no longer considered a permissive principle. The NGO reports interpreted it strictly – more strictly even than the vague, pragmatic words of Article 51 would necessarily require. They stated that the principle of proportionality placed a duty on combatants to choose a means of attack that avoided or minimized damage to civilians.¹⁸⁴ They also insisted that no military benefit could justify high amounts of civilian casualties.¹⁸⁵ For lawyers adopting the NGOs' approach, this meant that much of the campaign was judged to fail the test of proportionality. Aerial bombardment was disproportionate,¹⁸⁶ any weaponry besides

¹⁸¹ Amnesty International, *NATO/Federal Republic of Yugoslavia: 'Collateral Damage' or Unlawful Killings?: Violations of the Laws of War by NATO During Operation Allied Force* (June 2000), available at www.amnesty.org/en/library/asset/EUR70/018/2000/en/e7037dbb-df56-11dd-89a6-e712e728ac9e/eur700182000en.pdf (last visited 10 January 2014) at 6.

¹⁸² See, e.g., Fenrick, 'Attacking the Enemy Civilian as a Punishable Offence', 7 *Duke J Comp & Int'l L* (1996–1997) 539, at 546.

¹⁸³ See, e.g., the condemnation of the bombing of the RTS communication station in Cohn, 'NATO Bombing of Kosovo: Humanitarian Intervention or Crime against Humanity?', 15 *International Journal for the Semiotics of Law (Int'l J Semiotics L)* (2002) 79, at 100; Schwabach, 'Report to the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia', 9 *Tulane Journal of International and Comparative Law (Tulane J Int'l Comparative L)* (2001) 167. See also attitudes towards weaponry in Santopadre, *supra* note 178, at 406; Medenica, 'Protocol I and Operation Allied Force: Did NATO Abide by Principles of Proportionality', 23 *Loyola of Los Angeles International and Comparative Law Review (Loyola of Los Angeles Int'l & Comparative L Rev)* (2001) 329, at 395–396.

¹⁸⁴ HRW, *supra* note 180.

¹⁸⁵ Amnesty International, *supra* note 181, at 6.

¹⁸⁶ Voon, *supra* note 179, at 1098.

precision-guided munitions was disproportionate¹⁸⁷ and the destruction of bridges or other infrastructure used by civilians was disproportionate.¹⁸⁸ To all intents and purposes, any attack that did not put the protection of civilians ahead of military objectives was disproportionate.¹⁸⁹

Once again, one institution disagreed with the widespread interpretation of international humanitarian law. In this case, it was the Office of the Prosecutor (OTP) at the International Criminal Tribunal for the Former Yugoslavia. The OTP had received several complaints against NATO by international lawyers¹⁹⁰ and had, in response, drafted a report that concluded that there were no grounds for prosecuting NATO. Legal commentators generally attacked this conclusion and the reasoning that had led the OTP to it.¹⁹¹ In particular, they pointed to what they described as the OTP's flawed interpretation of proportionality.¹⁹² The OTP report had taken a cautious approach to the principle of proportionality, which resembled that of the doubtful lawyers of the early 1990s:

The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects. For example, bombing a refugee camp is obviously prohibited if its only military significance is that people in the camp are knitting socks for soldiers. Conversely, an air strike on an ammunition dump should not be prohibited merely because a farmer is plowing a field in the area. Unfortunately, most applications of the principle of proportionality are not quite so clear cut. It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.¹⁹³

Lawyers argued that the OTP, in taking this approach, had given too little emphasis to civilian losses and excused too many military actions.¹⁹⁴ The committee had applied

¹⁸⁷ Medenica, *supra* note 183, at 396; Benvenuti, 'The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia', 12 *EJIL* (2001) 503, at 513.

¹⁸⁸ Belt, 'Missiles over Kosovo: Emergence, *Lex Lata*, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas', 47 *Naval Law Review* (*Naval L Rev*) (2000) 115, at 117; Santopadre, *supra* note 178, at 400; Stone, *supra* note 179, at 532; Benvenuti, *supra* note 187, at 508.

¹⁸⁹ Santopadre, *supra* note 178, at 398.

¹⁹⁰ Laursen, 'NATO, the War over Kosovo, and the ICTY Investigation', 17 *Am U L Rev* (2001–2002) 765, at 770.

¹⁹¹ See, e.g., Freeland, 'The Bombing of Kosovo and the Milosevic Trial: Reflections on Some Legal Issues', *Australian International Law Journal* (*Aust Int'l LJ*) (2002) 150; Mandel, 'NATO's Bombing of Kosovo under International Law', 25 *Fordham International Law Journal* (*Fordham Int'l LJ*) (2001–2002) 95; Schwabach, *supra* note 183.

¹⁹² See, e.g., Colangelo, *supra* note 179, at 1420; Benvenuti, *supra* note 187, at 517; Bothe, 'The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY', 12 *EJIL* (2001) 531, at 531; Massa, 'NATO's Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion', 24 *Berkeley Journal of International Law* (*Berkeley J Int'l L*) (2006) 610, at 637.

¹⁹³ International Criminal Tribunal for the Former Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (OTP Report) (2000), available at www.icty.org/x/file/Press/nato061300.pdf (last visited 25 July 2011), at para. 48.

¹⁹⁴ See, e.g., Stone, *supra* note 179, at 537. Freeland, *supra* note 144, at 168.

'its own interpretation of the relevant legal principles', which led it to fall into error.¹⁹⁵ It was suggested, by some lawyers that the OTP was biased¹⁹⁶ or even corrupt.¹⁹⁷ The report was 'incoherent';¹⁹⁸ perhaps its 'authors had spent too much time in The Hague's famous "coffee shops"'.¹⁹⁹ Thus, just as MEW's unorthodox humanitarian approach was seen as being out of step and incorrect at the beginning of the decade, so the OTP's different, less humanitarian, approach was also considered wrong at the end of the decade.

The correct approach, the correct understanding of the *ius in bello* by the end of the 20th century was that it was a truly international humanitarian law, a law in which considerations of humanity trumped military necessity. Indeed, military necessity was barely mentioned in the commentary on Kosovo. Unlike the commentators on the Gulf War, these lawyers displayed respect and optimism towards international humanitarian law. When civilians were killed, their deaths were not blamed on the inadequacy of the law but, rather, on the failure of NATO to apply the law properly. When lawyers sought better protection for civilians, they called for better adherence to the law – they did not suggest that better laws were required. In this way, international humanitarian law was cemented not only as the governing regime of *ius in bello* but also as a respected and prestigious regime.

Conclusion

I have concluded this short history of international humanitarian law at the end of the 20th century. I am aware that this is not the end of the story of international humanitarian law. International humanitarian law, in the 21st century, went on to develop new aspects, in particular, a more clearly enunciated association with human rights law.²⁰⁰ It also faced new challenges, brought by the war on terror.²⁰¹ Yet both the potential for these developments and the particular form of the new challenges depended on the specific understanding of the *ius in bello* as international humanitarian law, the humanitarian law articulated in Additional Protocol I. It is the

¹⁹⁵ See, e.g., Freeland, *supra* note 191, at 150; Schwabach, *supra* note 183, at 184–185.

¹⁹⁶ See, eg, Colangelo, *supra* note 179, at 1394; Benvenuti, *supra* note 187, at 505: 'The impression is given that the Prosecutor's intent has been, on the whole to prevent investigation against NATO officials.' See also: 'It is evident that this aspect of the Work Program of the Review Committee risks undermining the fundamental value of impartiality which must characterize all the activities of the Office of the Prosecutor' (at 507).

¹⁹⁷ Mandel, *supra* note 191, at 119, 127.

¹⁹⁸ Laursen, *supra* note 190, at 776.

¹⁹⁹ Mandel, *supra* note 191, at 119.

²⁰⁰ See, e.g., Kretzmer, Giladi and Shany, 'International Humanitarian Law and International Human Rights Law: Exploring Parallel Application', 40 *Israel Law Review* (*Israel L Rev*) (2007) 306; Cassimatis, 'International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law', 56 *International and Comparative Law Quarterly* (*Int'l Comparative L Quart*) (2007) 623; C. Byron, 'A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies', 47 *Va J Int'l L* (2006–2007) 839.

²⁰¹ See, e.g., Walen, 'Transcending, But Not Abandoning, the Combatant-Civilian Distinction: A Case Study', 63 *Rutgers Law Review* (2010–2011) 1149; Bellinger and Padmanabhan, 'Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law', 105 *AJIL* (2011) 201.

construction of this field of law that I have attempted to outline in this history, and I have therefore finished my account at the point where international humanitarian law won general acceptance.

As this short history of international humanitarian law demonstrates, international humanitarian law did not begin in the mists of time. Nor was it fashioned by Dunant when he created the ICRC. Rather, the history of international humanitarian law was forged in two rapid periods of change. It began in the 1970s when it was suddenly posited as a field of law whose precepts were outlined (in somewhat ambiguous terms) in the Additional Protocols to the Geneva Conventions. The idea of an international humanitarian law, together with the acceptance of the Additional Protocols, then faltered for almost two decades. It was only at the end of the 1990s that, suddenly and without any formal mechanisms, Additional Protocol I became accepted as the basis for a uniquely strict understanding of international humanitarian law as the *ius in bello*.

These moments of rapid change were not achieved by a straightforward process of codification. Nor were they the achievements of states alone. Rather, international humanitarian law was formed through the intersection of the work of a diverse group of actors, each focused on their own particular aims, strategies or tasks. Some of these actors were acknowledged participants in international law, such as the states involved in the Diplomatic Conference or the ICRC – but they played out their roles in a somewhat different manner to that which is usually envisaged. Other important actors, such as the human rights organizations and the individual Seán MacBride, had no acknowledged role in international humanitarian law. Nevertheless, it could be argued that Seán MacBride is as much a father of international humanitarian law as Dunant and that HRW and Amnesty International were as important in the dissemination and acceptance of international humanitarian law as the ICRC.

The acceptance of the human rights organizations' approach, and its translation into legal orthodoxy, relied on the work of another group of participants in international law: academic international lawyers. The fact that HRW's interpretation of international humanitarian law was considered authoritative at the end of the 1990s, but not at the beginning of the decade, was largely due to the willingness of international lawyers and academics to accept and repeat their pronouncements. It has long been noted that academics have an unusually important role in the determination of international law; Oppenheim made the point at the beginning of the last century²⁰² and Ian Brownlie at the end.²⁰³ Nevertheless, the involvement of academics in legal change is often obscured – not least by the historical narratives and language of continuity they deploy.

The varied cast of actors who have played a role in this history of international humanitarian law shows that international humanitarian law is not a code managed and shaped by states alone. It shows that it is a broader practice, which can comprehend contributions by conventional and unconventional participants. These

²⁰² Oppenheim, 'The Science of International Law: Its Task and Method', 1 *AJIL* (1908) 313, at 315.

²⁰³ I. Brownlie, *Principles of Public International Law* (2008), at 24–25.

participants do not even need to come from a traditional site of influence or power. The OTP could not garner support for its interpretation of the law. Yet, human rights organizations could inform the understanding of the law and academics could consolidate it. Harold Koh suggests that this kind of norm creation, which introduces the possibility of criticism of non-conformist states, has the potential to constrain state action as much as the rules that states have consciously chosen to accept.²⁰⁴ Certainly, any state, even if it is not a party to Additional Protocol I, which fails to apply its precepts, can expect international censure.²⁰⁵

It seems, therefore, that authority, the ability to discuss international humanitarian law and to be heard, can depend less on *who* speaks than on *how* they speak about the law. A sufficient grasp of legal language and conventions can allow a practitioner of international humanitarian law to intimate expertise and speak authoritatively about the field. Moreover, a proper grasp of these conventions can, as this history shows, include effective and acceptable methods for interpreting the law creatively and introducing change. These strategies include a restatement of the law,²⁰⁶ a reinterpretation of laws, a reference to custom and the construction of new histories. We have seen these strategies used when the law of armed conflict was suddenly relabelled international humanitarian law, when the principle of proportionality was reinterpreted and when Additional Protocol I was claimed to be binding as customary law. By deploying these strategies, practitioners are able to not only change the law but also to erase its former incarnations and the moment of change itself.

Yet, as this history has shown, not every statement about the law, however properly expressed, will be authoritative. At times, such as when the Additional Protocols were drafted, there is no, or little, consensus about the law, and many statements are provisional. At other times, however, the practitioners of international law form a disciplinary consensus that is strong enough to reject alternative arguments, such as those made by the OTP or MEW in the early 1990s. The problem with the OTP and MEW was not a failure to adhere to legal convention but, rather, their failure to display the dominant disciplinary sensibility, to work within the accepted paradigm and to reach an accepted position. MEW's humanitarian sensibility was, in the early 1990s, out of step with the prevailing pragmatic sensibility in international humanitarian law. Their conclusions, consequently, were wrong. By the end of the decade, the paradigm shift that was taking place in the international sphere towards humanitarianism made this sensibility more acceptable to international lawyers, and they were prepared to accept the statements made by the human rights reports as authoritative and obvious. They were willing to reinterpret the legacy of the Protocols, to forget the intervening years of doubt and to reshape the *ius in bello* as part of the humanitarian

²⁰⁴ Koh, *supra* note 170, at 654.

²⁰⁵ See, e.g., criticism of Israel in terms of the proportionality requirements of Additional Protocol I. Wells-Greco, 'Operation "Cast Lead: Jus in Bello Proportionality"', 57 *Netherlands International Law Review* (*Netherlands Int'l L Rev*) (2010) 397.

²⁰⁶ Halley argues that this is a feminist technique, whereby normative demands about what the law should be are presented as the existing law. It is, however, a practice that can be observed in many lawyers of different political and theoretical affiliations. Halley, *supra* note 173, at 42–43.

project.²⁰⁷ In this environment, the OTP's report on Kosovo, which was less humanitarian, less in line with the prevailing paradigm, was declared to be wrong. A scientist, Thomas Kuhn wrote, could not work outside a paradigm and do science.²⁰⁸ It seems that an international lawyer must, similarly, conform to a paradigm for their work to be considered legitimate.

As such, this history not only questions the orthodox account of the history of international humanitarian law but also the common understanding of the field itself. The history of international humanitarian law, both its actual development and the symbiotic narratives about its development, was shaped by a range of actors. Some of these actors were conventional practitioners of international law, others less so. Some were particularly interested in the development of the law, others had more complex goals. Their propositions about international humanitarian law were accepted or dismissed for a range of reasons, including both their compliance with clear legal forms and more nebulous disciplinary commitments. Through their work, they were able to introduce, define, change and confirm international humanitarian law.

²⁰⁷ Kennedy, *supra* note 4, at 261; Teitel, *supra* note 4, at 13.

²⁰⁸ T.S. Kuhn, *The Structure of Scientific Revolutions* (1970), at 79.

(p. 1) 1 History and Sources

1. Introduction

As its name indicates, international humanitarian law (IHL) is a branch of international law. It is also known as the international law of armed conflict, or simply the law of armed conflict (LOAC) or law of war. It must be distinguished from the law on the use of force which is regulated, for inter-state relations, by the UN Charter.¹ This distinction is often referred to by the Latin designations of both bodies of law: IHL is thus known as the *jus in bello* (law applicable in armed conflict) while the law on the use of force is known as the *jus ad bellum* (the law applicable to recourse to armed conflict).²

The rules and principles of IHL seek to limit the effects of armed conflict and at its core, IHL aims to preserve a sense of humanity in time of war.³ At the same time, IHL has been developed to regulate the social reality that is armed conflict. In order to provide a realistic, and hence useful, legal framework IHL must also take into account the military needs of parties to an armed conflict in their pursuit of defeating the adversary. The development of particular treaties and specific rules of IHL over time reflects what is at times the difficult exercise of finding the correct balance between these humanitarian and military considerations.⁴

As a branch of international law, IHL is subject to the general rules of international law, such as those related to sources, treaty interpretation, and state responsibility. The sources of international law are set out in article 38 of the Statute of the International Court of Justice. This provision lists international conventions, international custom, and general principles of law as the main sources of international law, in accordance with which the Court is to decide disputes submitted to it. It further stipulates that judicial decisions and the teachings of the most highly qualified publicists of the various nations are subsidiary means for the (p. 2) determination of rules of law. These are also the main sources of IHL, although in recent years a number of soft-law instruments have emerged with a view to providing guidance on the application and interpretation of IHL.

This chapter examines each of these sources of IHL, which in a particular way represent techniques of law-making or law clarification. Each source also interacts with the others in what is a constant dialogue leading to new treaties, customary rules, and principles, under the influence of case law, expert opinion, scholarship, and of course, world events.

2. Treaties

While international conventions—or treaties—establish rules ‘expressly recognized by the contesting states’, international custom is defined in article 38 of the ICJ Statute as ‘evidence of a general practice accepted as law’. Even though article 38 lists ‘international conventions’ (treaties) as the first source, this does not reflect a hierarchy among the main sources of international law. Historically, customary international law has often preceded treaty law and provided a reservoir of principles and concepts on which much of the codification of IHL is based.⁵

The history of the codification of IHL, resulting in a long series of treaties with a global scope, started in 1864 with the adoption of the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.⁶ During the centuries leading up to this first codification, rules regulating warfare existed but were based mainly on tradition and custom. It is fair to say, therefore, that humanitarian law started as a body of customary

rules and remained so for centuries, and that its codification is a much more recent phenomenon.⁷

The codification and conventional development of IHL have often occurred against the background of particular battles that exposed weaknesses in the existing legal framework, and in response to developments in the means and methods of warfare.⁸

(p. 3) A. The General Framework: The Geneva Conventions and Their Additional Protocols

1. The Geneva Conventions

The battle of Solferino in northern Italy in 1859 acted as a catalyst for the adoption of the very first Geneva Convention in 1864.⁹ Henry Dunant, a businessman from Geneva, witnessed the horrific effects of the fighting during this battle and played a key role in the collection and caring for the wounded soldiers. In his book, *A Memory of Solferino*, Dunant proposed the peacetime creation of permanent aid societies in all countries to ensure that qualified volunteers would be available in the event of war to help the wounded of all parties. Dunant also suggested that states meet 'to formulate some international principle, sanctioned by a Convention inviolate in character' to regulate the functioning of such societies and to give legal protection to the wounded soldiers in the field. These proposals inspired the foundation of the Red Cross Movement and the convening by the Swiss Federal Council of a Diplomatic Conference in Geneva that, on 22 August 1864, adopted the 1864 Geneva Convention.¹⁰

The 1864 Convention, a mere ten articles, laid down several principles that have been maintained as core principles of IHL to this date: the protection of the wounded and sick without any distinction, whether friend or foe; the inviolability of medical personnel, establishments, and transports; and the use of a distinctive emblem of the red cross on a white ground (later supplemented by other emblems).

This Convention has been the subject of continuous update and adaptation. Thus, new versions were adopted in 1906, 1929, and 1949, and protocols were added in 1977 and 2005. Consideration of a possible revision of the 1864 Convention was, however, excluded from the agenda of the International Peace Conferences held at The Hague in 1899 and 1907.¹¹ This led to a split of the law of armed conflict into two branches, each with their own path of development.¹² Named after the respective cities in which their treaty rules were adopted, Geneva law was concerned mainly with the protection of the victims of armed conflict, while Hague law focused largely on limiting or prohibiting certain means and methods of warfare. With the adoption in 1977 of Additional Protocol I (AP I) to the Geneva Conventions of 1949, the two strands of law could be seen to merge.¹³ As is discussed below, that protocol reaffirms and develops the rules on methods and means of warfare embodied in the Hague Conventions and Regulations, as well as setting out rules on the wounded, sick, and shipwrecked, combatant, and prisoner-of-war status, and it contains a long section on the civilian population.

The first update of the 1864 Geneva Convention in 1906 more than tripled the size of the convention, from ten to thirty-three articles, adding more details and precisions, in addition to new provisions. For example, the 1906 Convention introduced provisions concerning the burial of the dead and the transmission of information concerning the wounded and (p. 4) sick and the dead.¹⁴ The protection of personnel of voluntary aid societies was also recognized for the first time.¹⁵

The third version of the Geneva Convention concerning the protection of the wounded and sick was adopted in 1929 in the wake of the First World War, taking into account the experience of that conflict.¹⁶ It contained new provisions on the protection of medical aircraft¹⁷ and the use of the distinctive emblem in time of peace.¹⁸ The emblems of the red

crescent and of the red lion and sun were moreover recognized for countries that already used them instead of the red cross.¹⁹

In addition, the Diplomatic Conference of 1929 adopted an entirely new Convention relative to the treatment of the prisoners of war.²⁰ This regime had previously been subject to the Hague Regulations of 1899 and 1907, which proved insufficient during World War I. Informed by the experiences of that war, the International Red Cross Conference held in Geneva in 1921 expressed the wish that a special Convention on the treatment of prisoners of war be developed. This new Convention did not replace the Hague Regulations, but complemented them. It is much more detailed, containing ninety-seven articles, compared to the previous seventeen articles found in the Hague Regulations (articles 4–20). Influenced by the practices during the First World War, the 1929 Convention on Prisoners of War moreover introduced new rules prohibiting reprisals against prisoners of war (POWs),²¹ regulating the work by POWs and their pay,²² and regulating the relations of POWs with the exterior²³ and with the authorities,²⁴ including the appointment of representatives.²⁵

The 1949 Geneva Conventions represent the third update of the 1864 Geneva Convention. While the initial diplomatic conference had been planned for the early 1940s, it could not take place due to the outbreak of the Second World War. As a result, the whole process was delayed for nine years, but with the consequence that the new Conventions could take into account the experience from the Second World War. The new Conventions include an update of the 1929 Geneva Conventions on Wounded and Sick (GCI of 1949),²⁶ as well as an update of the Hague Convention (X) of 1907 for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention.²⁷ The latter update expanded the Hague Convention from a mere twenty-eight articles to a more complete and self-standing convention of sixty-three articles (Second Geneva Convention of 1949). The 1929 Convention on Prisoners of War was updated and became the Third Geneva Convention of 1949, making the regime of the protection of prisoners of war more detailed, increasing from ninety-seven articles in (p. 5) 1929 to 143 articles in 1949.²⁸ This level of detail was meant to avoid certain misinterpretations and abuses that had occurred during the Second World War.

An important gap in the protection of victims of armed conflict had remained after 1929 and was sorely felt during the two World Wars, namely the protection of civilians. This protection has two aspects: the protection of civilians in the hands of a party to the conflict, and the protection of civilians against the dangers arising from warfare. The need to regulate the first aspect had become overwhelmingly clear during the Second World War and in response, states adopted the Fourth Geneva Convention in 1949.²⁹ The need to update the second aspect, already addressed in the Hague Regulations, was also clear during the Second World War, but would only be addressed in 1977 with the adoption of the Additional Protocols to the Geneva Conventions. With the increasing use of aerial warfare affecting populated areas, the rules on the conduct of hostilities were in dire need of updating. This was a long and difficult process for a variety of reasons, not least because of the thorny issue of nuclear weapons.

The Fourth Convention contains a short part concerning the general protection of populations against certain consequences of war, covering the whole of the populations of the countries to the conflict.³⁰ This includes an important provision on enquiries by members of families dispersed owing to the conflict, with a view to renewing contact and meeting.³¹ The bulk of the Convention deals with civilians in enemy territory and in occupied territory. The Hague Regulations already contained some provisions on occupied territory (articles 42–56) but these had proven inadequate already during the First World War. That is why the ICRC developed a new draft convention on the subject, approved by the International Red Cross Conference of 1934 in Tokyo. However, due to the outbreak of the Second World War the diplomatic conference planned for 1940 had to be cancelled. The consequences for populations in occupied territories would be dire. The 1949 Convention

expands and makes the protection of the civilian populations more detailed and complete. With a total of 159 articles, the Fourth Convention is the longest of the four Conventions.

One of the major innovations of the 1949 Conventions was the regulation of non-international armed conflicts (NIACs) in Common Article 3. This article was the outcome of protracted negotiations. Two options had become available: either to make the entire Geneva Conventions applicable to a limited number of NIACs, or to make a limited number of rules applicable to a wide range of NIACs broadly defined. The latter option was ultimately chosen. Common Article 3 has become one of the most important provisions of IHL, since most conflicts today are non-international in nature, and since all states are party to the Geneva Conventions, and thus bound by Common Article 3. In addition, the International Court of Justice (ICJ) has recognized the fundamental character of this provision as a reflection of 'elementary considerations of humanity' and as a 'minimum yardstick' binding in all armed conflicts.³² Common Article 3 has been supplemented by Additional (p. 6) Protocol II (APII, by other treaty rules applicable in NIACs) and by the continuous development of customary international law in this area (see below).

A. The additional protocols

As explained above, the Geneva Conventions were continuously updated through successive treaties replacing the previous ones. Updates since 1949, on the other hand, have taken place via a system of additional protocols. The advantage of this system is to preserve the *acquis* of the main Conventions, while states may adhere to the additional rules in the Protocols.³³

After 1949, the importance of the protection of the civilian population against the effects of hostilities or the conduct of hostilities, became clear. In 1956 the ICRC prepared Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War. These were approved a year later by the International Red Cross Conference in New Delhi and submitted to governments for examination. However, there was virtually no response from governments and no further action was taken to convert the Draft Rules into a treaty. It would not be until 1969 that the International Conference asked the ICRC to work out proposals to address these issues. As a result, the ICRC convened two expert meetings in 1971 and 1972 to prepare two draft protocols additional to the Geneva Conventions, one on international armed conflict (IAC) and the other on NIAC. The ICRC published the draft protocols in 1973 and Switzerland convened a diplomatic conference to adopt them which would meet during four sessions between 1974 and 1977. The outcome was the adoption of two Protocols Additional to the 1949 Geneva Conventions, updating the rules on the conduct of hostilities and on the protection of war victims and providing the first international convention specifically applicable in NIACs (APII).³⁴ The four years of negotiation show how the development of IHL had become more difficult, compared to the adoption in 1949 of four Geneva Conventions during a diplomatic conference that lasted less than four months.

The two Additional Protocols of 1977 were negotiated against the background of the decolonization process and the Vietnam/Second Indochina War (1955–1975), which had brought to the fore the issues of liberation wars and the status of guerrilla fighters.³⁵ One of the main objectives of countries of the South was to have fights against colonial domination, alien occupation, and racist regimes recognized as IACs. When this was achieved with the adoption of what is now article 1(4) of API, these countries lost interest in the regulation of NIACs. The result was a simplification of APII and its reduction to a mere twenty-eight articles, compared to 102 in API.

The most important developments in API relate to the rules on the conduct of hostilities (articles 35–60), which contain a much-needed update of the Hague Regulations of 1899 and 1907. The experience of the Vietnam War had demonstrated the importance of reaffirming and developing the rules on the conduct of hostilities in order to enhance the (p. 7) protection of the civilian population.³⁶ API thus elaborates on the principle of distinction between civilians and combatants and between civilian objects and military objectives and prohibits indiscriminate attacks. It contains a definition of military objectives,³⁷ and it spells out the obligations to take precautions in attack³⁸ and against the effects of attack.³⁹ The practices during the Vietnam War moreover focused the drafters' attention on topics such as starvation as a method of warfare, area bombardment, and the destruction of the natural environment.⁴⁰ For example, the prohibition in article 35(3) 'to employ methods of means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment' was inspired by the considerable environmental destruction brought about by that conflict.⁴¹ Another important aspect of API is the extension of the protection of the Conventions to civilian medical personnel, equipment, and supplies and to civilian medical units and transports.⁴²

As mentioned above, the draft APII was simplified in the last days of the Conference. The original drafts of both protocols submitted by the ICRC to the 1974–1977 diplomatic conference were very similar.⁴³ Even during the diplomatic conference, Committee III, which worked on the draft of APII, accepted a substantial number of the draft provisions submitted by the ICRC, often with consensus, although sometimes with minor changes. Yet in the last weeks of a four-year long negotiation, many parts of draft APII were simply deleted. The main reason was that a consensus could only be reached on a much-simplified text, not on the version elaborated by Committee III on the basis of the ICRC draft. This simplification process consisted, in particular, of removing or revising all articles that referred to the 'parties to the conflict'. A good example of this diplomatic manoeuvre is the provision on dissemination in the Additional Protocols. Whereas API imposes an obligation on all 'High Contracting Parties' to disseminate the Conventions and the Protocol as widely as possible,⁴⁴ APII summarily requires that '[t]his Protocol shall be disseminated as widely as possible'—without specifying to whom this obligation is addressed.⁴⁵ At the time, a number of states could not accept that armed groups as 'parties to the conflict' would have specific rights and obligations under international law, for example the obligation to disseminate humanitarian law.⁴⁶

This reticence was based on the reasoning of the then newly independent states that recognizing such rights and obligations and, in general, a detailed regulation of NIACs would encourage rebellion and secession, threatening their frail sovereignty.⁴⁷ However, (p. 8) this reasoning was misleading as recognition of rights and obligations of non-state armed groups (NSAGs) under international law predated the Protocol by at least thirty years. Indeed, Common Article 3 of the Geneva Conventions already imposed obligations on 'each Party to the conflict' not of an international character and even encouraged the parties to 'further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention' and so went further than APII. Common Article 3 specifies, on the other hand, that its application 'shall not affect the legal status of the Parties to the conflict', a provision that is repeated in a number of later treaties applicable to NIACs.⁴⁸

The simplification process of APII has, unfortunately, left the Protocol with an awkward structure. The basic rules on the distinction between military objectives, civilian objects, and their subsequent definitions are missing, though the Protocol retained mention of detailed rules on specific objects, namely objects indispensable to the survival of the civilian

population, works, and installations containing dangerous forces, and cultural objects and places of worship.⁴⁹

As a result, an important impediment in applying humanitarian treaty law is that it offers only a rudimentary framework for the regulation of NIACs, in particular with respect to the conduct of hostilities. Common Article 3 of the Geneva Conventions, the only provision of the Geneva Conventions that is formally applicable to NIACs, does not as such deal with the conduct of hostilities. APII failed to remedy this and does not deal with the conduct of hostilities and a number of other issues in sufficient detail. For example, unlike API, APII does not provide for the obligation to distinguish between military objectives and civilian objects. As a result, it does not contain any protection for civilian objects in general, nor does it define civilian objects and military objectives. This is problematic in practice because NIACs require armed forces (both state armed forces and NSAGs) to actually limit their military operations to military objectives. APII moreover lacks other key provisions on the conduct of hostilities, such as the prohibition and definition of indiscriminate attacks and the obligation to take precautions in attack and against the effects of attack.

These shortcomings in APII have somewhat been rectified in subsequent treaties applicable to NIACs.⁵⁰ But more importantly, these gaps have been filled by the development of customary rules of IHL (see below).

Finally, it should be mentioned that in 2005 a Third Additional Protocol to the Geneva Conventions was adopted. It recognizes an additional distinctive emblem: the 'Red Crystal', providing a further option to the Red Cross and Red Crescent.⁵¹

(p. 9) B. Specialized Conventions

In addition to the Geneva Conventions and their Protocols IHL is also characterized by different strands of substantive developments and specialization. Different areas of IHL are governed by different specialized treaties.⁵² Prominent examples are the protection of cultural property and the regulation of specific weapons.

With respect to the protection of cultural property, such property is, in principle, a civilian object and therefore protected under the general IHL rules on the conduct of hostilities. Nevertheless, cultural property has been protected by specific treaty rules since 1899.⁵³ The wanton destruction and forced exportation of cultural property during World War II reinforced the need for new treaty law on the subject. To that end, an intergovernmental conference convened by UNESCO in 1954 adopted the Convention for the Protection of Cultural Property in the Event of Armed Conflict.⁵⁴ Weapons law is another area where special treaty regulation has emerged, even though the use of any weapon in armed conflict must comply with the general rules of IHL on the conduct of hostilities. Among the numerous treaties that have been adopted to specifically regulate the use of certain weapons, the 1980 Convention on Conventional Weapons (CCW) deals with the use of certain conventional weapons that may be considered excessively injurious or to have indiscriminate effects.

In both these fields, the technique of adding protocols to the basic treaties have been used, similar to the Geneva Conventions which are supplemented by three additional protocols. The advantage of using additional protocols is to preserve the *acquis* of the original convention while allowing states flexibility in choosing which protocols to join. Thus, the 1954 Convention for the Protection of Cultural Property is supplemented by two Protocols, one of 1954, which aims to prevent the exportation of cultural property from occupied territory and to provide for restitution of illegally exported objects, and the second one of 1999 which updates the 1954 Convention in relation to the conduct of hostilities and individual criminal responsibility and established a new system of enhanced protection.⁵⁵ The CCW is different in that it is an 'umbrella' convention, providing the general framework but containing no regulation of specific weapons, which is the subject of its protocols. Three

original Protocols were adopted the same year as the CCW, prohibiting the use of any weapon which primary effect is to injure by fragments that in the human body escape detection by X-ray;⁵⁶ restricting the use of mines, booby-traps and similar devices;⁵⁷ and restricting (p. 10) the use of incendiary weapons, ie weapons that use fire as their means of injury or destruction.⁵⁸ In 1995 and 2003 respectively, two further protocols were adopted, prohibiting laser weapons specifically designed to cause permanent blindness to unenhanced vision (so-called 'blinding laser weapons'),⁵⁹ and seeking to minimize the risks and effects of explosive remnants of war (ERW) in post-conflict situations.⁶⁰ In addition, there are several 'stand alone' treaties prohibiting the development, production, stockpiling, transfer and/or use of certain types of weapons, in particular chemical and biological weapons, anti-personnel landmines, cluster munitions, and nuclear weapons.

For a discussion of the substantive protection of cultural property and regulation of specific weapons, see chapters 8 'Specifically Protected Persons and Objects' and 11 'Weapons', respectively.

C. IHL Mainstreaming in Human Rights Treaties

In addition to the adoption of specialized treaties on specific issues, another codification technique is to mainstream IHL by including it in human rights treaties. It is generally accepted that human rights law constitutes a relevant source of law in armed conflict, in addition to IHL.⁶¹ The ICJ has confirmed that international human rights law remains applicable during armed conflict, subject only to derogation.⁶² The relationship between IHL and human rights law is, however, complex and requires devoted separate consideration in chapter 17 'International Humanitarian Law and International Human Rights Law'.

The incorporation of IHL in human rights treaties has, for example, taken place in relation to the protection of children, women, and persons with disabilities. The first example is article 38(1) of the Convention on the Rights of the Child, which provides that 'States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child'. Through this referral, the Convention on the Rights of the Child incorporates all relevant IHL rules.⁶³ This is important because it means that the relevant IHL rules come within the mandate of the supervision system of the Convention, a system which does not (yet) exist under IHL. The Convention also contains a substantive rule aimed to prevent children under the age of fifteen being recruited and taking a direct part in hostilities. This age limit was increased to eighteen years in a 2000 Protocol to the Convention on the Involvement of Children in Armed Conflict.⁶⁴

(p. 11) The second example is a regional instrument, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.⁶⁵ Article 11(1) on protection of women in armed conflict stipulates: 'States Parties undertake to respect and ensure respect for the rules of international humanitarian law applicable in armed conflict situations, which affect the population, particularly women.' By the method of *renvoi*, this provision incorporates relevant provisions of IHL into the Protocol.⁶⁶

The third example is the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (CRPD).⁶⁷ Article 11 of this Convention provides:

States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with

disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.

This reference to IHL in this treaty is less direct than in the two previous examples.

D. Criminalization

The fact that serious violations of IHL are recognized as war crimes attracting individual criminal responsibility goes back at least to the First World War.⁶⁸ It was first recognized in the 1929 Convention. It was more firmly established in the grave breaches of regime of the 1949 Geneva Conventions, as complemented by API. This regime only applied to IACs; neither Common Article 3 nor APII contain such provisions.

However, over the past few decades, a level of convergence has been achieved in terms of the criminalization of conduct in IACs and NIACs.⁶⁹ The atrocities committed in the former Yugoslavia and in Rwanda in the 1990s led to the establishment of the ad hoc International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), both of which list war crimes committed in the context of NIACs.⁷⁰ This development paved the way for the adoption in 1998 of the Statute (p. 12) of the International Criminal Court (ICC) defining war crimes in IACs and NIACs,⁷¹ as amended in 2010.⁷²

While there is thus a growing tendency to consider serious violations of IHL applicable in NIACs under the broader concept of 'war crimes', liabilities are still less extensive in NIACs compared to IACs. This is demonstrated by the fact that the list of war crimes in relation to which the International Criminal Court has jurisdiction is more extensive for IACs compared to NIACs.⁷³

From a sources point of view, this field of law is moreover complicated by the existence of different liabilities, depending on the international instrument in question.⁷⁴ Notably, API extends the concept of 'grave breaches' laid down in the Geneva Conventions to cover various violations of the rules governing the conduct of hostilities.⁷⁵ While both the ICTY and the ICC have jurisdiction to take cognizance of grave breaches of the Geneva Conventions, neither Statute mentions grave breaches of API. On the other hand, the ICTY is competent to take cognizance of 'violations of the laws or customs of war'—a concept which the tribunal has interpreted broadly to include violations committed on the battlefield.⁷⁶ Moreover, the Statute of the ICC lists, in addition to grave breaches of the Geneva Conventions, 'other serious violations' of the law of IAC. These other 'serious violations' cover some, but not all, of the grave breaches set out in API.⁷⁷ For example, there is no reference in the ICC Statute to unjustified delays in repatriating prisoners of war and civilians.

E. General Observations on Codification

Based on this overview of the codification of IHL, a number of general observations can be made:

1. Universalization

The history of codification of IHL is marked by two strands of universalization. The first one is the increased participation of states in the development and codification of IHL. Whereas only sixteen states were present at the 1864 diplomatic conference that led to the adoption of the first Geneva Convention, by 1949 their number had increased to sixty-three states participating, and between 1974 and 1977 between 106 and 126 states took part in the four sessions of the diplomatic conference that adopted the Additional Protocols. This development reflects the general expansion of the community of states, mainly through (p. 13) decolonization and the breaking up of a number of states. The result is that today's IHL treaties have been developed with the cooperation of the global community of states and no

longer by a limited number of (mostly Western) states. This increases the legitimacy of the treaties and their acceptance as reflective of global traditions.

Related thereto, the second strand is the universalization in the participation of the main treaties of IHL. The most notable example is the Geneva Conventions themselves, which enjoy universal adherence.⁷⁸ After their adoption, the Geneva Conventions immediately had huge success. They entered into force as soon as 21 October 1950, after the first two ratifications. They were ratified by seventy-four states in the 1950s and obtained a further forty-eight ratifications in the 1960s. The ratification steadily increased in the 1970s (twenty ratifications) and 1980s (twenty ratifications). A wave of twenty-six new ratifications occurred in the early 1990s, resulting in particular from the break-up of the Soviet Union, Czechoslovakia, and the former Yugoslavia. With the last nine ratifications since the year 2000, the applicability of the Geneva Convention has today become universal, with 196 states party.

Other IHL treaties also enjoy increasing participation.⁷⁹ For example, API has 174 states parties and APII 168. While this is an impressive (and increasing) ratification record, an important number of states still remain outside the framework of this treaty regime.⁸⁰ This situation implies that in different conflicts, different treaty regimes apply, which is unsatisfactory from the perspective of the legal protection of war victims. The fact that different treaties have different levels of ratification also has an impact on coalition warfare when different coalition partners have not subscribed to the same treaties.⁸¹ In such cases, customary humanitarian law provides a common set of rules that is applicable to all coalition partners. Therefore, even if a state is a party to a particular treaty, it may still be relevant to know to what extent that treaty reflects customary law and is, as such, binding on coalition partners which have not ratified it.

Moreover, while IHL is marked by increased universalization in terms of state participation, it remains the case that NSAGs cannot be parties to IHL treaties.⁸² This fact poses a challenge to universalization understood in a broad sense. As mentioned in section 1.A.1 ('The Geneva Conventions') above, most contemporary armed conflicts are of a non-international nature. Armed groups thus constitute important actors in the social reality which IHL seeks to regulate.⁸³ Indeed, recent decades have witnessed an expansion of the (p. 14) IHL rules regulating the conduct of states and organized armed groups in NIACs. Yet, the traditional doctrine of sources remains largely intact: states are the primary law-makers of international law, with near-exclusive capacity to enter into treaties and create customary rules of international law.⁸⁴ Although NSAGs are bound by IHL applicable in NIACs to which they are party, their exclusion from the process of creation and formal ratification of the rules that bind them may have an adverse effect on their ability and/or willingness to comply with the applicable IHL rules.

There are, however, a limited number of ways in which organized armed groups can express their commitment to uphold IHL rules applicable in NIACs. One way is by means of unilateral declaration, through which the armed group expresses its intent to be bound by (certain) IHL treaties or rules.⁸⁵ API contains a specific provision that envisages unilateral declarations by national liberation movements. In view of article 1(4), which brings national liberation wars within the ambit of the Protocol and the category of IACs, article 96(3) opens up the possibility for the 'authority representing a people' fighting a liberation war to unilaterally 'undertake to apply the Conventions and this Protocol'. This construct remained a dead letter for many years, but was applied for the first time in 2015.⁸⁶

Another method in which armed groups party to a NIAC can formally make commitments under IHL is by means of special agreements. Article 3(3) of the Geneva Conventions encourages the parties to the conflict 'to bring into force, by means of special agreements, all or parts of the other provisions of the present Convention'. Such agreements could

implement IHL obligations already incumbent on the parties, or contain provisions 'drawn from humanitarian law'.⁸⁷

2. Regionalization

Unlike human rights law, IHL has not (yet) been subject to regionalization in the sense of the development of regional IHL instruments. Limited examples of regional IHL treaties or treaties that are related to IHL include the 1935 Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (the Roerich Pact);⁸⁸ the 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes;⁸⁹ the 1977 Organization of African Union (OAU) Convention for the Elimination of Mercenarism in Africa,⁹⁰ and the 1994 Inter-American Convention on the Forced Disappearance of Persons.⁹¹

(p. 15) The most recent, and perhaps most prominent, example is the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa ('the Kampala Convention'). This is the first binding instrument on the protection of and assistance of internally displaced persons.⁹² At the universal level, there is no specific treaty on this topic, only a soft-law instrument, the Guiding Principles on Internal Displacement.⁹³

3. Institutionalization

It also noteworthy that most IHL treaties foresee meetings of states parties to discuss the state of implementation of the treaty and any issue with respect to their application. Meetings of state parties are, for example, envisaged in the treaties on the ICC,⁹⁴ conventional weapons,⁹⁵ chemical weapons,⁹⁶ anti-personnel mines,⁹⁷ cluster munitions,⁹⁸ arms trade,⁹⁹ and cultural property.¹⁰⁰

The main and important exceptions are the Geneva Conventions and their Additional Protocols.¹⁰¹ An ICRC-Swiss government proposal to create a voluntary meeting of states, based on discussions among states that were held between 2011 and 2015, was not accepted at the 32nd International Conference of the Red Cross and Red Crescent in 2015.¹⁰² It was agreed instead that there should be a continuation of:

an inclusive, State-driven intergovernmental process based on the principle of consensus after the 32nd International Conference ... to find agreement on features and functions of a potential forum of States and to find ways to enhance the implementation of IHL using the potential of the International Conference and IHL regional forums in order to submit the outcome of this intergovernmental process to the 33rd International Conference.

The further years of work were unfortunately unsuccessful due to deep political divisions among States. The Swiss-ICRC facilitated process came to an end in 2019 with the submission of a purely procedural report to the 33rd International Conference on the (p. 16) exchanges that were held among States and on the documents that had been produced by the co-facilitators.¹⁰³

One of the aims of API was to add more teeth to the system of execution of the Conventions and the Protocol, ie measures aimed at ensuring respect for IHL.¹⁰⁴ One of the novelties of the Protocol was the provision for the establishment of an International Humanitarian Fact-Finding Commission.¹⁰⁵ Constituted in 1991, the Commission is a permanent body the primary purpose of which is to investigate allegations of grave breaches and other serious violations of IHL. While potentially a powerful mechanism to promote compliance with IHL, it has remained ineffective for a long time, but was activated for the first time in 2017.¹⁰⁶

Another way in which IHL is increasingly being institutionalized is through its application by human rights bodies and courts.¹⁰⁷ According to O'Donnell, this 'is perhaps the inevitable consequence of years promoting the idea that human rights and IHL are complementary and dedicated to the same objective'.¹⁰⁸ In addition, human rights mechanisms are increasingly called upon to deal with situations of armed conflict as their geographical and thematic coverage expand.¹⁰⁹

3. Customary International Law

International custom is defined in article 38 of the ICJ Statute as 'evidence of a general practice accepted as law'. It is thus generally agreed that the formation of custom requires two elements: general practice and an indication that this practice is followed as a matter of law (so-called *opinio juris*). The methodology to establish customary law has been clarified (p. 17) in several cases by the ICJ and is the subject of a recent study by the International Law Commission (ILC).¹¹⁰

Without being comprehensive, important material sources of customary rules of IHL include actual battlefield behaviour, the treatment of different categories of persons in armed conflict, and the use of certain weapons, in addition to certain verbal acts by states.¹¹¹ Military manuals, in particular, can constitute an important source for ascertaining both state practice and *opinio juris* with respect to customary rules of IHL.¹¹² An increasing number of states have sophisticated manuals that are publicly available for consultation. Domestic case law is another relevant source, as domestic courts are organs of the state and their decisions constitute practice of the state.¹¹³ This is independent of the fact that the decisions of national courts can also serve as a supplementary means for the determination of rules of law (see section 5 'Judicial Decisions' below). Other examples of relevant verbal acts include national legislation, diplomatic protests, comments by governments on draft treaties, executive decisions and regulations, pleadings before international tribunals, statements in international organizations and at international conferences, and government positions taken with respect to resolutions of international organizations.¹¹⁴

By nature, customary international law is unwritten. The 'discovery' or 'identification' of customary law happens usually through judicial decisions or legal writings. States may also declare which parts of IHL they consider customary, but such statements are not binding on other states.

Notwithstanding the high degree of codification of IHL, customary humanitarian law continues to be relevant, due to the impediments that affect the application of treaty law in practice today. These have been highlighted: the fact that not all IHL treaties are universally ratified and that treaty law governing NIACs is still rudimentary, in particular concerning the conduct of hostilities.

These impediments came to the forefront during the conflicts in the former Yugoslavia and Rwanda in the first half of the 1990s and explain why a study on customary IHL was commissioned at that time. The Intergovernmental Group of Experts for the Protection of War Victims met in Geneva in January 1995 and adopted a series of recommendations aimed at enhancing respect for humanitarian law, in particular by means of preventive measures that would ensure better knowledge and more effective implementation of the law. Recommendation II of the Intergovernmental Group of Experts proposed that:

[t]he ICRC be invited to prepare, with the assistance of experts in IHL [international humanitarian law] representing various geographical regions and different legal systems, and in consultation with experts from governments and international organizations, a report on customary rules of IHL applicable in international and

non-international armed conflicts, and to circulate the report to States and competent international bodies.¹¹⁵

(p. 18) In December 1995, the 26th International Conference of the Red Cross and Red Crescent endorsed this recommendation and officially mandated the ICRC to prepare a report on customary rules of IHL applicable in IACs and NIACs.¹¹⁶ Nearly ten years later, in 2005, after extensive research and widespread consultation of experts, this report was published.¹¹⁷

The Conference gave this mandate to the ICRC particularly in light of the rudimentary nature of treaty law governing NIACs. Indeed, both Yugoslavia and Rwanda had ratified APII when their armed conflicts broke out but, as explained above, the Protocol contains many gaps. Therefore, states wanted to know to what extent these gaps had been filled by customary international law.¹¹⁸

One of the main outcomes of the ICRC's customary law study was a confirmation of the gradual rapprochement of the law on IACs and the law of NIACs. This outcome should not come as a surprise, since it is part of a general evolution in IHL and practice.

The same evolution has taken place in the development of humanitarian treaty law. The dichotomy between the regulation of IACs and NIACs that had been the hallmark of humanitarian treaty law since its inception gradually came undone. After the adoption of two separate Additional Protocols in 1977, API on IACs and APII on NIACs, the CCW and its three protocols adopted in 1980 were limited to IACs.¹¹⁹ Protocol IV to the CCW, adopted on 13 October 1995, just two weeks after the decision of the ICTY Appeals Chamber in *Tadić*, was the last humanitarian law treaty so far to cover only IACs (and it was amended in the meantime to also cover NIACs). The shift in treaty law came with the adoption the next year of the Amended Mines Protocol on 3 May 1996.¹²⁰ The scope of application of the Amended Mines Protocol includes situations referred to in Common Article 3 of the Geneva Conventions.¹²¹ The Mine Ban Convention adopted a year later in 1997 does not explicitly define its scope of application in terms of international or NIAC, but prohibits the use, development, production, acquisition, stockpiling, retention, or transfer to anyone, directly or indirectly, of anti-personnel mines 'under any circumstances'.¹²² This means effectively that it applies equally in NIACs.

Next, in 1998, the adoption of the ICC Statute formally approved the extension of the concept of war crimes to NIACs in treaty law.¹²³ A year later, in 1999, the Second Protocol to the Hague Convention for the protection of cultural property was made applicable to NIACs.¹²⁴ In 2001, the CCW was amended to extend the scope of application of all then (p. 19) existing Protocols (I-IV) to NIACs, as defined in Common Article 3 of the Geneva Conventions.¹²⁵ Until then, only Amended Protocol II had applied in NIACs. The subsequent CCW Protocol V on explosive remnants of war adopted in 2003 applies to both IACs and NIACs.¹²⁶ The 2008 Convention on Cluster Munitions uses the same approach as the Mine Ban Convention. Under the Convention on Cluster Munitions, states undertake 'never under any circumstances' to engage in prohibited acts.¹²⁷ The Kampala Convention on Internally Displaced Persons adopted in 2009 equally extends to NIACs.¹²⁸ Finally, the amendments to the ICC Statute adopted at the in 2017, 2019 and 2010 go in the same direction, as they extend the list of war crimes in NIACs, bringing it more in line with the list of war crimes in IACs.¹²⁹

Similar developments took place in international fora, most notably the UN Security Council and General Assembly, as well as regional organizations and international conferences of states, which adopted numerous resolutions calling for respect for humanitarian law in general or for specific aspects of it. These resolutions dealt mostly with NIACs, being the most widespread form of armed conflicts in the recent decades.¹³⁰ Similarly, in national

practice, military manuals, and legislation, case law and official statements increasingly focus on the application of humanitarian law in NIACs.¹³¹

This is not to say that the law on IACs and NIACs is now exactly the same. In *Tadić*, the ICTY Appeals Chamber famously noted that:

only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.¹³²

Later in the *Hadzihasanović* appeal on command responsibility, the ICTY Appeals Chamber stated that ‘the rules applicable to international armed conflicts do not automatically apply to an internal armed conflict and what may constitute a war crime in the context (p. 20) of an international armed conflict does not necessarily constitute a war crime if committed in an internal conflict’.¹³³

Similarly, the ICRC study shows that a difference continues to exist in customary IHL between the regulation of IACs and NIACs. Of the 161 rules the study has identified, twelve apply to IACs only. These relate to what continues to be considered the ‘reserved domain’ of IACs, which are the definition of combatants and armed forces, conditions for POW-status, the regulation of occupied territory, and the regulation of belligerent reprisals.¹³⁴ On the other hand, two rules were found to apply to NIACs. These relate to the prohibition of belligerent reprisals and the granting of amnesty at the end of active hostilities.¹³⁵ With respect to the remaining 146 rules applicable in both IACs and NIACs, three important nuances exist. First, several rules were found to be only ‘arguably’ customary in NIACs, recognizing that practice was not as dense in certain areas.¹³⁶ Second, the wording of some rules of customary humanitarian law is different for IACs and NIACs.¹³⁷ Finally, some rules of customary international humanitarian law applicable in NIACs could only be identified as applicable to states.¹³⁸ Hence, important differences in substance and scope continue to exist.

However, the main rules on the conduct of hostilities, the use of means and methods of warfare, and the treatment of persons in the hands of a party to the conflict are now the same. The divide between the law on IACs and NIACs that existed in the past has been significantly narrowed down, but is not totally closed.

4. General Principles

Article 38(1) lists as one of the sources of international law ‘[g]eneral principles of law recognized by civilized nations’. This source is the least ‘developed’ or studied. It is also subject to controversy as to its exact place and content.

(p. 21) International courts and tribunals rarely discuss how general principles of law are generated or their existence ascertained. However, it is generally accepted that general principles of law can be based on a number of material sources.¹³⁹ Doctrine typically refers to general principles of law derived from those principles of domestic law that are common to all legal orders, as well as principles of legal logic.¹⁴⁰

Although listed as a source on a par with convention and custom in article 38, general principles of law primarily play a supplementary function, filling gaps left by treaty and customary law.¹⁴¹ General principles also assist in the interpretation of conventional and customary rules.¹⁴²

IHL contains its own general principles, specific to this body of law.¹⁴³ The principles most often referred to are the principles of humanity,¹⁴⁴ distinction, necessity, and the prohibition of causing unnecessary suffering. These principles have a triple legal basis: in addition to constituting general principles of law, they are also based on international conventional and customary law.¹⁴⁵ Albeit derived from existing rules, these principles also constitute an inspiration for the rules and a means of interpreting them.

The Martens Clause confirms the importance of general principles in IHL.¹⁴⁶ This clause, which first appeared in the preamble of the 1899 Hague Convention II, and which is contained in a number of IHL treaties, is phrased as follows in article 1(2) of API:

In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

In the *Krupp et al.* case, the Nuremberg Tribunal explained that:

The Preamble is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the (p. 22) Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare.¹⁴⁷

Although it has been pointed out that the ‘regulatory density’ of IHL means that exclusive reliance on general principles of law in any given case will be rare,¹⁴⁸ and while the exact meaning of ‘the laws of humanity and the dictates of public conscience’ is debated,¹⁴⁹ the ICJ has confirmed the continued relevance of the Martens Clause.¹⁵⁰ Its importance arguably lies in affirming that not everything that is not prohibited by a specific rule is necessarily lawful in war, recognizing ‘the existence of wider principles behind specific rules of IHL and point[ing] to the principles of IHL that fill the gaps left by customary and treaty rules’.¹⁵¹

5. Judicial Decisions

The subsidiary sources listed in the ICJ Statute are judicial decisions and publications by legal scholars. As subsidiary sources, they do not create legal rules but assist in their identification (eg their identification as customary law) or in their clarification (eg their interpretation). Although these sources are ‘subsidiary’, in practice they are extremely important because issues of rule identification and clarification almost always come up when rules have to be applied to concrete cases or in new situations.

The ICJ Statute mentions ‘judicial decisions’ as the first supplementary source of international law. In the realm of IHL, judicial decisions help to clarify and flesh out the content of the law. This is useful as many notions of IHL remain quite general or vague or their practical application to specific facts raises issues which judicial decisions can usefully clarify—and have done so on many occasions.

The ICJ has on several occasions clarified the content of the Geneva Conventions, for example in the *Nicaragua* case, where it clarified the scope of Common Article 1 by recognizing the negative obligation ‘not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions’.¹⁵² IHL issues were also assessed by the ICJ in its Advisory Opinions on the *Legality of the Threat or Use of Nuclear Weapons*,¹⁵³ and on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.¹⁵⁴ The Court moreover examined IHL issues at depth in the *Armed Activities case (Congo v Uganda)*,¹⁵⁵ and in the *Arrest (p. 23) Warrant case (Democratic Republic of Congo v*

Belgium) the Court considered the scope of universal jurisdiction in the prosecution of war criminals.¹⁵⁶

There has been a significant growth in IHL litigation in both domestic and international courts and tribunals over the past decades. This is partly owing to the growth of international criminal law and the creation of tribunals tasked with the prosecution of war crimes. The role played by judicial decisions as a subsidiary source of IHL has come to the forefront since the establishment of the ICTY, followed by other ad hoc tribunals¹⁵⁷ and the establishment of the ICC.

These tribunals have clarified a number of notions and aspects of IHL. To give an example, the ICTY famously defined IAC and NIAC. In its decision on jurisdiction in *Tadić* in 1995, the ICTY Appeals Chamber stated that 'an [international] armed conflict exists whenever there is a resort to armed force between States'.¹⁵⁸ This definition has since been adopted by other international bodies and is generally considered as the contemporary reference for any interpretation of the notion of armed conflict under humanitarian law. In the same decision, the Chamber found that the threshold of a NIAC is crossed 'whenever there is ... protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.¹⁵⁹ In its trial judgment in the same case in 1997, the ICTY further developed this approach by holding that the 'test applied by the Appeals Chamber ... focuses on two aspects of a conflict ... the intensity of the conflict and the organization of the parties to the conflict'.¹⁶⁰ These conclusions were subsequently reaffirmed in the case law of the ICTY, the ICTR, and the ICC.¹⁶¹ Another example is the clarification by the ICTY of the concept of torture under IHL.¹⁶²

Arbitral proceedings have also played an important role in the clarification of IHL. One notable example is the work of the Ethiopia-Eritrea Claims Commission (EECC). This (p. 24) Commission was set up after the end of the armed conflict between Ethiopia and Eritrea in 2000 to:

decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.¹⁶³

The Claims Commission has clarified several aspects related to the treatment of prisoners of war. For example, with regard to the humane treatment of prisoners of war, the Claims Commission has held that the evacuation of prisoners of war from the battlefield after their footwear had been seized, forcing them to walk barefoot through harsh terrain, which 'unnecessarily compounded their misery', was in violation of article 20 of the Third Convention requiring evacuations to be 'effected humanely'.¹⁶⁴ And with respect to the level of medical care to be provided to the wounded and sick, the Commission found that:

Eritrea and Ethiopia cannot, at least at present, be required to have the same standards for medical treatment as developed countries. However, scarcity of finances and infrastructure cannot excuse a failure to grant *the minimum standard of medical care* required by international humanitarian law. The cost of such care is not, in any event, substantial in comparison with the other costs imposed by the armed conflict [emphasis added].¹⁶⁵

The Claims Commission thereby confirmed that a basic minimum of medical care can reasonably be expected whatever the circumstances, even when a state lacks significant resources.

The Commission also ruled on other issues, such as the definition of occupied territory, holding that the term 'occupation' covers cases in which a state occupies territories with a controversial international status.¹⁶⁶

Domestic courts can also play an important role in clarifying rules of IHL, independent of the potential value of national case law for the process of customary law formation. In other words, the decisions of domestic courts can constitute both a 'formal' source (a process that creates rules of law) and an 'evidential source' (evidence of an existing rule) of IHL.¹⁶⁷

The negotiation of the Geneva Conventions made it apparent that states considered national courts to be the most appropriate fora for judicial consideration of matters relating to conduct during armed conflict, and it remains the case that judicial enforcement of IHL (p. 25) 'relies primarily on domestic courts'.¹⁶⁸ A recent example of a domestic court ruling seeking to clarify a controversial issue of IHL is the decision by the Swedish District Court that a non-state party to a NIAC can establish courts in order to (i) maintain discipline in the actor's own armed units; and (ii) maintain law and order in a given territory which the actor is controlling.¹⁶⁹

6. Teachings of the Most Qualified Publicists

Today we would call this source 'legal writings'. In the area of IHL, writings abound and anyone deciding on IHL may find it difficult to select from among the large amount of recent writings. There are a number of handbooks and guides that stand out and have been referred to on many occasions.¹⁷⁰ As a subsidiary source, the writings of publicists may assist courts and lawyers to determine or clarify the law, but they are in no way binding as such.

One particular type of legal writings is commentaries. These are article-by-article commentaries on the provisions of a treaty that provide interpretations of the provisions, examples of their application, references to case law, state practice, and academic commentary. Such commentaries exist on the Geneva Conventions¹⁷¹ and their Additional Protocols,¹⁷² as well as a range of other IHL treaties.¹⁷³

Another type of legal writing is expert restatements. These are particularly popular today to update areas of law, address new areas of law, or to provide expert clarifications.¹⁷⁴ As a restatement, they may reflect existing treaty or customary law, but they may also contain suggested new rules as a kind of 'progressive development'. The first, recent restatement is the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*.¹⁷⁵ This manual was adopted to update the law applicable to naval warfare, and also includes some 'progressive development'. Another example is the 2009 *HPCR [Humanitarian Policy and Conflict (p. 26) Research] Manual on International Law Applicable to Air and Missile Warfare*.¹⁷⁶ Under the auspices of the International Society for Military Law and the Law of War, a similar manual has been developed for peace operations.¹⁷⁷ Expert restatements can also be used to address new areas of law where no specific treaties or custom may exist. The first example is the *Tallinn Manual on the International Law Applicable to Cyber Warfare*.¹⁷⁸ A similar manual is being developed for outer space (the *Manual on International Law Applicable to Military Uses of Outer Space*, MILAMOS for short).¹⁷⁹

An example of an expert clarification is the ICRC report on the notion of 'direct participation in hostilities'. The report reflects the ICRC's interpretation of this notion but was the outcome of a multi-year project where experts met and discussed the notion of direct participation.¹⁸⁰ Another example is the 2016 Oxford Guidance on the Law Relating

to Humanitarian Relief Operations in Situations of Armed Conflict commissioned by the UN Office for the Coordination of Humanitarian Affairs.¹⁸¹

7. Soft Law

With a few exceptions, for example in the area of weapons law, there seems today to be a reticence of states to adopt further IHL treaty law. The last comprehensive update of the Geneva Conventions dates from 1977 and no new treaties appear to be on the horizon. Instead, states have preferred to use the technique of soft-law developments. Soft law can be described as ‘principles, rules, and standards governing international relations which are not considered to stem from one of the sources of international law enumerated in article 38 of the ICJ Statute’.¹⁸²

Like treaties and custom, they can ‘create’ rules and standards, but unlike them they are not formally binding. That being said, soft-law instruments have a certain—undefined—normative value because they can be used as arguments in various fora (eg in negotiations in international organizations or in pleadings before courts) and violating them would have certain (political) consequences. Sometimes soft-law instruments can also resemble expert restatements and reflect existing treaty or customary rules but applied to new phenomena, although they may also contain ‘new’ rules.

Examples of soft-law instruments are the Montreux Document on Private Military and Security Companies,¹⁸³ and the *Copenhagen Process on the Handling of Detainees in (p. 27) International Military Operations*.¹⁸⁴ These soft-law instruments were adopted by groups of states at the initiative of one of them, in this case Switzerland and Denmark, respectively.

Soft-law instruments can also result from multilateral organizations, in particular the UN, such as the UN Guiding Principles on Internal Displacement,¹⁸⁵ and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.¹⁸⁶ Both of these are not only limited to IHL, but also draw upon international human rights law (and refugee law).

8. Conclusion

The ever-increasing codification of humanitarian law, starting in 1864 and continuing well on to this day, means that this part of international law is highly codified. Nevertheless, in the big picture of human history and of warfare, this codification is still a recent phenomenon. Customary rules have regulated warfare for centuries prior to the start of this wave of codification and continue to do so today. Impediments to the application of the wealth of existing humanitarian treaty law, as well as the predominance of NIACs today, have contributed to a ‘revival’ of customary humanitarian law.¹⁸⁷ Hence, any description or analysis of humanitarian law that does not include an important section on customary humanitarian law will be considered deficient and, in the end, of limited practical value in today’s world. Furthermore, today, general principles continue to act to fill gaps and as guidance for the interpretation of treaty or customary law. The subsidiary sources of judicial decisions have taken on an increasingly important role and international courts in particular have contributed greatly to the definition of IHL notions. Scholarly writings have flourished and key publications have a wide impact and some expert restatement are of significant importance. Finally, several soft law instruments have emerged as a preferred manner for States to fill gaps and develop the law without committing to new formally binding rules.(p. 28)

Footnotes:

* The author wishes to acknowledge the valuable assistance of Ellen Nohle in finalizing this chapter. The views expressed in this chapter are personal and do not necessarily reflect those of the ICRC.

1 See UN Charter 1945 articles 2(4) (prohibition of threat or use of force against another state) and 51 (right of individual or collective self-defence). For further analysis, see Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, CUP 2011). It should be noted that there is no equivalent body of international law regulating recourse to force by or against non-state armed groups.

2 For a detailed analysis, see Keiichiro Okimoto, *The Distinction and Relationship between Jus ad Bellum and Jus in Bello* (Hart 2011).

3 See Amanda Alexander, 'A Short History of International Humanitarian Law' (2015) 26 *EJIL* 111–12 and Jeroen C van den Boogaard, 'Fighting by the Principles: Principles as a Source of International Humanitarian Law', in Mariëlle Matthee et al (eds), *Armed Conflict and International Law: In Search of the Human Face* (Asser Press 2013) 4.

4 For a discussion of the principles of humanity and military necessity, see chapter 7, 'International Humanitarian Law and the Conduct of Hostilities'.

5 See eg Christopher G Weeramantry, 'The Revival of Customary International Humanitarian Law', in Larry Maybee and Benarji Chakka (eds), *Custom as a Source of International Humanitarian Law* (ICRC 2006) 25.

6 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 22 August 1864.

7 For a discussion, see Frits Kalshoven, 'The History of International Humanitarian Law Treaty-Making', in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016) 33.

8 In the codification of IHL, the ICRC has played an important role, in particular with respect to the Geneva Conventions. According to the Statutes of the Movement, the role of the ICRC includes in particular 'to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any developments thereof'. The ICRC has prepared the draft Conventions and Protocols and these have been considered at the International Conference of the Red Cross and Red Crescent, which 'contributes to the respect for and development of international humanitarian law'. See Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross (Geneva, 23–31 October 1986, as amended in 1995 and 2006) article 5(2)(g) and article 10(2), respectively. For example, the 1949 Geneva Conventions are based on drafts prepared by the ICRC and discussed at the 1948 Stockholm Conference. In addition, the ICRC has published commentaries on each of the Conventions and Protocols and a project is currently underway to update these Commentaries. See Lindsey Cameron, Bruno Demeyere, Jean-Marie Henckaerts, Eve La Haye, and Heike Niebergall-Lackner, 'The Updated Commentary on the First Geneva Convention—A New Tool for Generating Respect for International Humanitarian Law' (2015) 97 *IRRC* 1209.

9 The *Instructions for the Government of Armies of the United States in the Field*, General Orders No 100 (24 April 1863) (*Lieber Code*) also had an important influence on subsequent efforts at codifying IHL. The *Lieber Code* was written to regulate the conduct of Union

Forces during the American Civil War (1861–1865) and largely reflected existing laws and customs of war. For a discussion, see Kalshoven (above n 7) 35.

10 Kalshoven (above n 7) 34.

11 *ibid* 39.

12 See Alexander (above n 3) 111.

13 See Kalshoven (above n 7) 44.

14 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (6 July 1906) articles 3–4.

15 *ibid* articles 10–11.

16 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (27 July 1929) 118 LNTS 303.

17 *ibid* article 18.

18 *ibid* article 24.

19 *ibid* article 19.

20 Geneva Convention relative to the Treatment of Prisoners of War (27 July 1929) 118 LNTS 343.

21 *ibid* article 2.

22 *ibid* articles 27–34.

23 *ibid* articles 35–41.

24 *ibid* articles 42–67.

25 *ibid* articles 43–44.

26 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GCI).

27 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 12 August 1949) 75 UNTS 85 (GCII).

28 Geneva Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GCIII).

29 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GCIV).

30 *ibid* Part II articles 13–26.

31 *ibid* article 26.

32 See *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Advisory Opinion) [1986] ICJ Reports paras 218–219.

33 Other IHL treaties have also used this system of development, including treaties on the protection of cultural property and the regulation or prohibition of the use of certain weapons.

34 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (API); Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed

Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (APII).

35 See Kalshoven (above n 7) 48.

36 Michael Bothe, Karl Josef Partsch, and Waldemar A Solf, *New Rules for Victims of Armed Conflicts. Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff 1982) xix.

37 API article 52(2).

38 *ibid* article 57.

39 *ibid* article 58.

40 See Hans Blix, 'Arms Control Treaties Aimed at Reducing the Military Impact on the Environment', in Jerzy Makarczyk (ed), *Essays in International Law in Honour of Judge Manfred Lachs* (Martinus Nijhoff 1984) 710.

41 *ibid* 712 and Kalshoven (above n 7) 47.

42 API articles 8–31.

43 Draft Additional Protocols of June 1973 to the Geneva Conventions of 12 August 1949, Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 1974–1977), Federal Political Department, Bern, 1978, Vol I, Part III.

44 API article 83(1).

45 See APII article 19.

46 For more details, including references to the preparatory work, see Bothe et al (above n 36) 604–08 (general) and 701 (dissemination in particular) and Sylvie S Junod, 'General Introduction to the Commentary on Protocol II', in Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds), *Commentary on the Additional Protocols to the Geneva Conventions* (Martinus Nijhoff/ICRC 1987) paras 4405–4418.

47 See *ibid*.

48 See eg the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954 (Hague Convention 1954) and the Convention on Conventional Weapons (CCW). Article 19 of the 1954 Convention is modelled on Common Article 3: (i) it provides a minimum set of rules applicable to a broad range of armed conflicts not of an international character; (ii) it requires parties to the conflict to endeavour to bring into force, by means of special agreements, all or part of the other provisions of the Convention; (iii) it provides that UNESCO may offer its services to the parties to the conflict; and (iv) it provides that the application of this provision shall not affect the legal status of the parties to the conflict.

49 See APII article 14 (objects indispensable to the survival of the civilian population); APII article 15 (works and installations containing dangerous forces); AP II article 16 (cultural objects and places of worship).

50 For an overview of some of these treaties, see the section on customary humanitarian law.

51 Protocol additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (8 December 2005).

52 For a discussion, see Jann Kleffner, 'Sources of the Law of Armed Conflict', in Livoja and McCormack (eds) (above n 7) 71, 72–3.

- 53** Thus the 1899 and 1907 Hague Regulations first protected ‘buildings dedicated to religion, art, science, or charitable purposes, historic monuments, ... provided they are not being used at the time for military purposes’. The Regulations further specify that ‘the besieged must indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand’.
- 54** Hague Convention 1954. See Kalshoven (above n 7) 45.
- 55** First Protocol for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of 26 March 1999 (Hague Protocol II).
- 56** Protocol on Non-Detectable Fragments (Protocol I) (10 October 1980).
- 57** Protocol (II) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (10 October 1980). Protocol II to the CCW was replaced in 1996 by Amended Protocol II, which sets stricter limitations on the use of mines, booby-traps, and similar devices. A total ban on the use of anti-personnel land mines (as opposed to anti-vehicle land mines) was adopted just a year later by the Mine Ban Convention, which was adopted outside the framework of the CCW.
- 58** Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) (10 October 1980).
- 59** Protocol on Blinding Laser Weapons (Protocol IV to the 1980 CCW Convention) (13 October 1995).
- 60** Protocol on Explosive Remnants of War (Protocol V to the 1980 CCW Convention) (28 November 2003).
- 61** See eg Hans-Joachim Heintze, ‘On the Relationship between Human Rights Law Protection and International Humanitarian Law’ (2004) 86 *IRRC* 789.
- 62** See *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 266 (*Nuclear Weapons*) para 26 and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 paras 102–106.
- 63** See eg GCIV articles 16 and 49 and GCIII, articles 14, 16–18, 21–27, 38, 49–51, 68, 76, 81, 82, 85, 89, 91, 94, 119, 127, 132, 136–140; API articles 8, 52, 70, 74, 75–78; APII articles 4–6; as well as relevant rules of customary international humanitarian law, as expressed for example in Rules 120 and 135–137 of Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol 1: Rules* (ICRC 2005) (CIHL).
- 64** Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict of 25 May 2000.
- 65** Adopted at Maputo, 11 July 2003.
- 66** Relevant provisions include GCI article 12(4), GCII article 12(4), GCIII article 14(2), GCIV article 27(2), API article 76(1), and APII articles 4–5, as well as relevant rules of customary international humanitarian law, including CIHL Rules 119 and 134.
- 67** Adopted by UN General Assembly Resolution 61/106 (13 December 2006) Annex I.
- 68** See Treaty of Versailles 1919 articles 227–229.
- 69** See eg Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (adopted by UN Security Council Resolution 827 (25 May 1993), as amended by Resolutions 1166 (13 May 1998) and 1329 (30 November 2000) (ICTY Statute) article 3 (as interpreted by the Tribunal in *Prosecutor v Tadic* (Decision) [1995] IT-94-1-AR72, Appeals Chamber paras 71–93); Statute of the International Criminal

Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994 (adopted by UN Security Council Resolution 955 (8 November 1994), as amended by Resolutions 1165 (30 April 1998), 1329 (30 November 2000), 1411 (17 May 2002), and 1431 (14 August 2002)) (ICTR Statute) article 8(2)(c) and 8(2)(e). See also Eve La Haye, *War Crimes in Internal Armed Conflicts* (CUP 2008); Theodor Meron, 'International Criminalization of Internal Atrocities' (1995) 89 *AJIL* 554; and Lindsay Moir, 'Grave Breaches and Internal Armed Conflicts' (2009) 7 *JICJ* 763.

70 ICTY Statute, article 3; ICTR Statute, article 8(2)(c) and 8(2)(e).

71 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute).

72 An amendment to article 8 of the Rome Statute in Kampala on 10 June 2010 extended the criminalization of the use of three categories of weapons to situations of non-international armed conflict (employing poison or poisoned weapons; employing asphyxiating, poisonous or other gases, and all analogous liquids, materials, and devices, and employing bullets that expand or flatten easily in the human body). See 2868 UNTS 195.

73 See Rome Statute article 8(2)(b) on international armed conflict and article 8(2)(c) and (e) on non-international armed conflict.

74 See eg Philippe Xavier, 'Sanctions for Violations of International Humanitarian Law: The Problem of the Division of Competences between National Authorities and between National and International Authorities' (2008) 90 *IRRC* 359.

75 API articles 11 and 85.

76 See *Tadić* (Decision) (above n 69) paras 86–136.

77 See Rome Statute, article 8(2)(e).

78 South Sudan and Palestine were the most recent states to adhere to the Geneva Conventions, on 13 January 2013 and on 2 April 2014, respectively. As a result, the Conventions are binding on all states as a matter of treaty law, regardless of whether they are also part of customary international law.

79 To the knowledge of this author, as of December 2017, no state has denounced a current IHL treaty to which it adhered.

80 UN member states that are not yet party to Additional Protocol I as of December 2017 are Andorra, Azerbaijan, Bhutan, Eritrea, India, Indonesia, Iran, Israel, Kiribati, Malaysia, Marshall Islands, Myanmar, Nepal, Pakistan, Papua New Guinea, Singapore, Somalia, Sri Lanka, Thailand, Turkey, Tuvalu, and the United States of America. UN member states that are not yet party to Additional Protocol II are Andorra, Angola, Azerbaijan, Bhutan, Democratic People's Republic of Korea, Eritrea, India, Indonesia, Iran, Iraq, Israel, Kiribati, Malaysia, Marshall Islands, Mexico, Myanmar, Nepal, Pakistan, Papua New Guinea, Singapore, Somalia, Sri Lanka, Syrian Arab Republic, Thailand, Turkey, Tuvalu, United States of America, and Vietnam.

81 For discussion on the applicability and application of IHL to multinational operations, see 'Multinational Operations and the Law' (2013) 95 *IRRC* 472–742 (special issue).

82 Vienna Convention on the Law of Treaties 1969 article 2(a) defines a treaty as ‘an international agreement concluded between States in written form and governed by international law’.

83 See Jean-Marie Henckaerts, ‘Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law’ Spring 2003 27 *Proc Bruges Coll: Relevance of International Humanitarian Law to Non-State Actors* 128.

84 See eg Anthea Roberts and Sandesh Sivakumaran, ‘Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law’ (2012) 37 *Yale J Int’l L* 107 and Marco Sassòli, ‘Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law’ (2010) 1 *Int’l Hum Legal Stud* 7.

85 Such declarations can either be of a general nature, encompassing whole IHL treaties, or focus on particular rules or issues, such as in the form of ‘Deeds of Commitment’ made under the auspices of Geneva Call to ban anti-personnel mines. See Kleffner (above n 52) 83 and Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (CUP 2002) 25.

86 See the unilateral declaration by the POLISARIO Front of 23 June 2015 www.eda.admin.ch/content/dam/eda/fr/documents/aussenpolitik/voelkerrecht/geneve/150626-GENEVE_en.pdf.

87 For a discussion, see ICRC, *Commentary on the First Geneva Convention* (CUP 2016) paras 846–855.

88 The Treaty has ten American states parties, all of which have since joined the Hague Convention 1954 on the subject.

89 The Convention only has three European states parties (the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity 1968 has fifty-five states parties).

90 The Convention has thirty African states parties (the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (adopted by UN General Assembly Resolution 44/34) (4 December 1989) has thirty-four states parties).

91 Adopted by the 24th Regular Session of the OAS General Assembly Resolution 1256 (XXIV-O/94) at Belém do Pará, 9 June 1994. It has fifteen American states parties. (The International Convention for the Protection of all Persons from Enforced Disappearance (adopted by UN General Assembly Resolution 61/177 (20 December 2006), has fifty-two states parties, including all states parties to the Inter-American Convention on the Forced Disappearance of Persons 1994, with the exception of Guatemala and Venezuela).

92 The Kampala Convention has twenty-five states parties.

93 Presented to the UN Commission on Human Rights by the Special Representative of the UN Secretary General on Internally Displaced Persons (11 February 1998).

94 Rome Statute of the International Criminal Court 1998 (Assembly of States Parties).

95 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 as amended on 21 December 2001 (Review Conference).

96 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction 1993 (Conference of States Parties).

97 Anti-Personnel Mine Ban Convention 1997 (Meeting of States Parties).

98 Convention on Cluster Munitions 2008 (Meeting of States Parties).

99 Arms Trade Treaty 2013 (Conference of States Parties).

100 Hague Convention 1954 (Meeting of the High Contracting Parties).

101 Additional Protocol I, Article 7, foresees a possibility for the depositary to convene a meeting of states parties at the request of one or more and the approval of the majority of them. However, such a meeting has, to date, not taken place.

102 See Jelena Pejic, 'Strengthening Compliance with IHL: The ICRC-Swiss Initiative' (2017) 901 *IRRC* 315–330.

103 For further details, see <https://www.icrc.org/en/document/strengthening-compliance-international-humanitarian-law-ihl-work-icrc-and-swiss-government>.

104 See API articles 80–91.

105 *ibid* article 90.

106 An Independent Forensic Investigation (IFI) team was assembled and deployed by the International Humanitarian Fact-Finding Commission at the request of the OSCE to look into an incident whereby an OSCE armoured vehicle was struck by an explosion, resulting in the death of an OSCE paramedic and the injury of two other patrol members. This occurred on 23 April 2017 during a routine patrol of the OSCE Special Monitoring Mission to Ukraine in the non-government-controlled area of Ukraine near Pryshyb. The aim of the IFI was to establish the facts of the incident by conducting a post-blast scene forensic investigation and technical assessment against the background of international humanitarian law. It was not within the mandate of the IFI to establish criminal responsibility or accountability for the incident. For an executive summary of the report, see OSCE 'Executive Summary of the Report of the Independent Forensic Investigation in relation to the Incident affecting an OSCE Special Monitoring Mission to Ukraine (SMM) Patrol on 23 April 2017' (OSCE, 7 September 2017) www.osce.org/home/338361. For information about the Commission, see www.ihffc.org/index.asp?page=home.

The Commission's effective utilization has been impeded by a number of features. First, a state is not bound by the authority of the Commission simply by acceding to the Protocol; it must additionally make a declaration specifically accepting the Commission's competence (currently seventy-six states parties to Additional Protocol I have made such a declaration). Second, the Commission does not have the power to act on its own initiative, but is dependent on a state (that has recognized its competence) to make a request for an investigation. Third, the Commission is only competent to inquire into situations arising in an international armed conflict. It should be noted, however, that the Commission has expressed its willingness to inquire into alleged violations of IHL arising from non-international armed conflicts, provided that the parties involved consent. See eg Charles Garraway, 'The International Humanitarian Fact-Finding Commission' (2008) 34 *Commonwealth Law Bull* 813.

107 One example is the Human Rights Division of the UN Observer Mission in El Salvador (ONUSAL), which had an express mandate to monitor violations of IHL as well as violations of human rights law. Another example is the work of the Committee on the Rights of the Child, which has evaluated compliance with IHL in its examination of the reports submitted by states parties involved in armed conflict.

108 See Daniel O'Donnell, 'Trends in the Application of International Humanitarian Law by United Nations Human Rights Mechanisms' (1998) 324 *IRRC* 481.

109 *ibid*.

- 110** Draft Conclusions on Identification of Customary international Law, *Yearbook of the International Law Commission*, 2018, vol. II, Part Two, (A/73/10, para. 65).
- 111** See CIHL xxxvii and International Law Association Committee on Formation of Customary (General) International Law, Final Report of the Committee (London Conference 2000) 12–14.
- 112** See eg François Bugnion, ‘Customary International Humanitarian Law’ (2007) 7 *ISIL YB Int’l Hum Ref L* 10.
- 113** See Conclusion 6 (2), Draft Conclusions on the Identification of Customary International Law (above n 107).
- 114** CIHL (above n 63) xxxvii and Conclusion 6(1) and 6 (3) (above n 110) .
- 115** Meeting of the Intergovernmental Group of Experts for the Protection of War Victims (23–27 January 1995), Recommendation II, published in , 62(1996) 78 *IRRC* 198.
- 116** 26th International Conference of the Red Cross and Red Crescent (3–7 December 1995) Resolution 1, published in 60 (1996) 78 *IRRC*.
- 117** CIHL vols I (Rules) and II (Practice).
- 118** However, the development of customary law is an ongoing process and no doubt future practice will continue to influence and shape customary law. Therefore, the ICRC decided to keep the collection of practice up to date in the form of a database. See ICRC, ‘Customary IHL Database’ <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>.
- 119** CCW; CCW Protocol I; CCW Protocol II; CCW Protocol III.
- 120** CCW Protocol II (as amended, 3 May 1996).
- 121** *ibid* article 1(2). See also article 1(3) and 1(6).
- 122** Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (18 September 1997) article 1(1).
- 123** Rome Statute article 8(2)(c) and (e).
- 124** Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999, entered into force 9 March 2004) 2253 UNTS 212 article 7 (containing a list of detailed precautionary measures very similar to those listed in API article 57(2)). For an analysis, see Jean-Marie Henckaerts, ‘The Protection of Cultural Property in Non-International Armed Conflicts’, in Nout van Woudenberg and Liesbeth Lijnzaad (eds), *Protecting Cultural Property in Armed Conflict. An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict* (Martinus Nijhoff 2010) 81.
- 125** CCW (21 December 2001) Amendment of article 1.
- 126** Protocol on Explosive Remnants of War (Protocol V) (28 November 2003) article 1(3).
- 127** Convention on Cluster Munitions (30 May 2008) article 1(1).
- 128** African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (23 October 2009) articles 1(k), 3(1)(e), 4(1) and (4)(b), and 7.
- 129** For instance, the list of war crimes in the Rome Statute article 8, as adopted in 2002, was considerable shorter for non-international armed conflicts than for international armed conflict and did not include such customary prohibitions as intentionally causing starvation, launching an indiscriminate attack, making civilian objects the object of attack, using human shields, and using prohibited weapons. At the 2010 ICC Review Conference in Kampala, the use of poison and poisoned weapons, asphyxiating, poisonous, or other gases, and all analogous liquids, materials, and devices, and expanding bullets were added to the list of war crimes in article 8(2)(e). see https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/

RC-Res.5-ENG.pdf. Other war crimes in non-international armed conflicts were added to that list by the ICC Assembly of States Parties in 2017 and 2019, see https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res4-ENG.pdf.

130 See the numerous resolutions concerning the conflicts in, among others, Afghanistan, Angola, Bosnia-Herzegovina, Burundi, DRC, Liberia, Rwanda, Sierra Leone, Russia (Chechnya), Somalia, Sudan (Darfur), Tajikistan and Yemen, comprehensively catalogued in the ICRC's 'Customary International Humanitarian Law Database' www.icrc.org/customary-ihl.

131 For a comprehensive overview of national practice, see *ibid*.

132 *Prosecutor v Tadić* (Decision) (above n 69) para 126.

133 *Prosecutor v Hadžihasanović and Kubura* (Decision on Command Responsibility) para 12.

134 These are CIHL Rules 3 (definition of combatants), 4 (definition of armed forces), 41 (export and return of cultural property in occupied territory), 49 (war booty), 51 (public and private property in occupied territory), 106-108 (conditions for POW-status, spies, mercenaries), 130 (transfer of own civilian population in occupied territory), and 145-147 (reprisals). For an analysis of whether even these areas could be merged, see Emily Crawford, 'Blurring the Lines between International and Non-International Armed Conflicts: The Evolution of Customary International Law Applicable in Internal Armed Conflicts' (2008) 15 *AILJ* 29 and E Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (OUP 2010).

135 These are CIHL Rules 148 (reprisals in non-international armed conflicts) and 159 (amnesty).

136 The following rules were only 'arguably' customary in non-international armed conflicts: CIHL Rules 21 (target selection), 23-24 (specific precautions against the effects of attack), 44-45 (specific rules on the natural environment), 62-63 (improper use of flags, military or military emblems, insignia or uniforms), and 82 (recording of the placement of landmines). For Rule 114 (return of the remains and personal effects of the dead), the study argues that the rule should apply equally in both international and non-international armed conflicts. See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Vol II: Practice* (ICRC and CUP 2005) 412.

137 The following rules have different formulations for international and non-international armed conflicts: CIHL (above n 63) Rules 124 (ICRC access to persons deprived of their liberty), 126 (visits to persons deprived of their liberty), 128 (release and return of persons deprived of their liberty), and 129 (displacement).

138 The following rules were found to be customary applicable to states only: CIHL Rules 141 (legal advisers for armed forces), 143 (dissemination among the civilian population), 144 (ensuring respect *erga omnes*), 149-150 (responsibility and reparation), 157-158 (jurisdiction over and prosecution of war crimes), and 161 (international cooperation in criminal proceedings).

139 See eg van den Boogaard (above n 3) 7.

140 For instance, if it is prohibited to attack civilians, logic dictates that an attack directed at a military objective has to be cancelled if it becomes apparent that the target is civilian. In addition, Kleffner mentions general principles that emanate from international relations (such as the principle of good faith) and general principles that develop from a fundamental rule in one particular treaty into a principle of a more general scope through express invocation in case law and doctrine, and through reaffirmation in resolutions of

international organizations or statements of international conferences. See Kleffner (above n 52) 80–1.

141 Indeed, this was the main reason for including general principles as a source of law in the Statute of the Permanent Court of International Justice and later in the statute of the ICJ, ie to prevent the court from having to conclude a *non-liquet*. See van den Boogaard (above n 3) 8.

142 For instance, van den Boogaard writes that the principles of international law may be invoked to provide guidance in one direction or another in the event that there is already a rule of treaty or customary international law in place, but its interpretation in a given situation is not clear. See van den Boogaard (above n 3) 6–10.

143 For a more detailed discussion, see chapter 7 ‘International Humanitarian Law and the Conduct of Hostilities’.

144 See Kjetil Mujezinović Larsen, Camilla Guldahl Cooper, and Gro Nystuen (eds), *Searching for a Principle of Humanity in International Humanitarian Law* (CUP 2013).

145 Kleffner (above n 52) 82.

146 See van den Boogaard (above n 3) 19–21.

147 *Krupp et al* [1948] Case No 214, Judgment of 31 July 1948, United States Military Tribunals (reprinted *Annual Digests and Reports of Public International Cases*, 1948 (Lauterpacht, ed.) 620, 622.

148 Kleffner (above n 52) 81.

149 *ibid* 85–6.

150 *Nuclear Weapons* paras 78 and 87.

151 van den Boogaard (above n 3) 20.

152 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA) (Merits)* [1986] ICJ Rep 3 para 220. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 paras 158–159 and *Armed Activities on the Territory of the Congo (Judgment)* [2005] ICJ Rep 168 paras 211 and 345.

153 *Nuclear Weapons*.

154 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136.

155 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (Judgment)* [2005] ICJ Rep 168.

156 *Arrest Warrant (Democratic Republic of Congo v Belgium) (Judgment)* [2000] ICJ Rep 168, 3.

157 For a discussion, see Guénaél Mettraux, *International Crimes and the Ad Hoc Tribunals* (OUP 2005).

158 *Tadić* (Decision) (above n 69) para 70.

159 *ibid*.

160 See *Tadić* (Trial Judgment) [1997] ICTY para 562:

(a) *Protracted armed violence between governmental forces and organized armed groups*

562. The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; *the intensity of the conflict* and *the organization of the parties to the conflict*. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law. Factors relevant to this determination are addressed in the Commentary to Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Convention I, ('*Commentary, Geneva Convention I*') [emphasis added].

161 See eg *Limaj* (Trial Judgment) [2005] ICTY para 84, and *Boškoski and Tarčulovski* (Trial Judgment) [2008] para 175. See also eg *Akayesu* (Trial Judgment) [1998] ICTR paras 619–620 and *Rutaganda* (Trial Judgment) [1999] paras 91–92.

162 Departing from its earlier case law (see *The Prosecutor v Zejnal Delalić et al*, ICTY Trial Chamber Judgment, 16 November 1998, IT-96-21-T, para 549, and, *Prosecutor v Furundzija* ICTY AC Judgement, 21 July 2000, IT-95-17/1-A, para 111), the ICTY in the *Kunarac* case [*Prosecutor v Kunarac* ICTY Appeals Chamber Judgement, 12 June 2002, IT-96-23/1-A at para 147] concluded that 'the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law' and that 'the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law'. The tribunal defined torture as the intentional infliction, by act or omission, of severe pain or suffering, whether physical or mental, in order to obtain information or a confession, or to punish, intimidate or coerce the victim or a third person, or to discriminate on any ground, against the victim or a third person.

163 Agreement between the Governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia, Algiers of 12 December 2000, article 5(1).

164 Eritrea-Ethiopia Claims Commission (*Prisoners of War, Eritrea's Claim*) (Partial Award) [2003] para 68.

165 *ibid* paras 138 and 115–119; Eritrea-Ethiopia Claims Commission (*Prisoners of War, Ethiopia's Claim*) (Partial Award) [2003] paras 104–107.

166 Eritrea-Ethiopia Claims Commission (*Central Front, Ethiopia's Claim*) (Partial Award) [2004] para 29.

167 See eg Kleffner (above n 52) 84.

168 Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (OUP 2014) 7.

169 Stockholm District Court, Case No B 3787-16 (Judgment of 16 February 2017) para 31.

170 See eg D. Fleck (ed.) *The Handbook of International Humanitarian Law* (OUP, 3rd edn, 2013) and E. David, *Principes de droit des conflits armés* (Bruylant, 5th edn, 2012); on occupation see eg Dinstein (above n 1); on non-international armed conflicts, see eg S Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012); and on classification of conflicts, see E Wilmschurst (ed), *International Law and the Classification of Conflicts* (OUP, 2012).

171 See ICRC Commentaries available at Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015).

172 Sandoz et al (above n 46); Bothe et al (above n 36).

173 See eg Jiří Toman, *The Protection of Cultural Property in the Event of Armed Conflict: Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol*, (Dartmouth 1996) and Jiří Toman, *Commentary on the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict* (UNESCO 2009); Stuart Maslen (ed), *Commentaries on Arms Control Treaties, Volume I: The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction* (OUP 2004); William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010); Gro Nystuen and Stuart Casey-Maslen (eds), *The Convention on Cluster Munitions: A Commentary* (OUP 2010); Andrew Clapham, Stuart Casey-Maslen, Gilles Giacca, and Sarah Parker (eds), *The Arms Trade Treaty: A Commentary* (OUP 2016); and Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Hart 2016).

174 These are not new, as even in 1880 the Institute of International Law had adopted a manual *The Laws of War on Land*, which was a restatement of the law as it then existed.

175 Louise Doswald-Beck and international lawyers and naval experts convened by the International Institute of Humanitarian Law: Louise Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (CUP 1995).

176 *HPCR Manual on International Law Applicable to Air and Missile Warfare*, Program on Humanitarian Policy and Conflict Research (HPCR) at Harvard University, Bern, 15 May 2009 and HPCR, *HPCR Manual on International Law Applicable to Air and Missile Warfare: Commentary* (CUP 2013).

177 Terry Gill, Dieter Fleck, William H Boothby, and Alfons Vanheusden (eds), *Leuven Manual on the International Law Applicable to Peace Operations* (CUP 2017).

178 Michael N Schmitt (ed), *Tallinn Manual on International Law Applicable to Cyber Warfare* (CUP 2013).

179 *Manual on International Law Applicable to Military Uses of Outer Space* www.mcgill.ca/milamos/about.

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

181 See www.unocha.org/sites/dms/Documents/Oxford%20Guidance%20pdf.pdf.

182 Daniel Thürer, 'Soft Law', in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2009) www.mpepil.com.

183 The Montreux Document on pertinent international legal obligations and good practices for states related to operations of private military and security companies during armed conflict (adopted at Montreux 17 September 2008, ICRC/Swiss Federal Department of Foreign Affairs August 2009).

184 The Copenhagen Process, *Principles and Guidelines, The Copenhagen Process on the Handling of Detainees in International Military Operations* (Copenhagen Process 2012).

185 Guiding Principles on Internal Displacement, presented to the UN Commission on Human Rights by the Special Representative of the UN Secretary General on Internally Displaced Persons UN Doc E/CN.4/1998/53/Add.2 (11 February 1998).

186 Adopted by UN General Assembly Resolution 60/147 (16 December 2005).

187 The term is borrowed from Meron (above n 69).