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International humanitarian law's old questions and new perspectives: On what law has got to do with armed conflict

Thomas Forster*
Thomas Forster holds a PhD in law from the University of Bern. He has worked as a Delegate for the International Committee of the Red Cross and is currently employed by the United Nations Office of the High Commissioner for Human Rights.

Abstract
The question of whether international humanitarian law (IHL) has an impact on how armed conflicts are conducted is a controversial one. Sceptics claim that the law is virtually irrelevant in determining State behaviour in armed conflict. Proponents point to its importance in mitigating the suffering caused by war. This paper looks at recent scholarship from historians, political scientists, economists and lawyers that challenges traditional narratives held dear by the law's sceptics and proponents alike. It then discusses implications of these approaches for a current understanding of the role of IHL in today's armed conflicts. The new perspectives allow for a broader understanding of IHL's central issues and permit us to ask more pertinent questions when looking at the law with the aim of putting it to use for the protection of civilians.

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Keywords: international humanitarian law, armed conflict, compliance, empirical studies, game theory, critical approaches.

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Introduction

Tina Turner's "What's Love Got to Do with It?" is playing. You turn up the volume and listen to the chorus. In your mind, Tina sings "law" instead of "love" and "heart".

> What's law got to do, got to do with it? What's law but a sweet old-fashioned notion? … Who needs a law when a law can be broken?

The questions that have been asked time and time again about international humanitarian law (IHL) never sounded so good.[1] Hence, you decide to look at the issue from another angle. The International Committee of the Red Cross (ICRC), as "Guardian of International Humanitarian Law",[2] should have something to say about it. Its YouTube channel has a lot to choose from. For instance, a video entitled "Rules of War (in a Nutshell)" seems like a good starting point. Here is what "Wes the Hunter" had to say about it in the comments section: "There is f***ing rules of war…. Stupidest s**t I have heard ever."[3]

Even when shown in touching animated film, the basic ideas of IHL are met with a certain scepticism by the broader public (granted, outside the anonymity of online comment sections, that scepticism will usually be expressed in more measured terms). This is nothing new.[4] War inevitably conjures up images of chaos and destruction, and the thought of those who wage war coming up with rules and then actually sticking to them goes against intuition. Doubts about the impact of IHL run deep and have been present since it was conceived in its modern form. To this day, the anxiety over essential issues is constitutive of the way people think about it.[5] There is a tendency for clearly demarcated positions

1 If you tend to look dazed, you've read it someplace, you've got cause to be: given the number of articles in legal journals that have featured the "What's law got to do with it?" pun in one form or another, there is a strong chance for déjà vu. A book-length example can be found in Charles Gardner Geyh (ed.), *What's Law Got to Do with It? What Judges Do, Why They Do It, and What's at Stake*, Stanford University Press, Stanford, CA, 2011.

2 See Yves Sandoz, "The International Committee of the Red Cross as a Guardian of International Humanitarian Law", December 1998, available at: www.icrc.org/eng/resources/documents/misc/about-the-icrc-311298.htm (all internet references were accessed in October 2017).

3 ICRC, "Rules of War (in a Nutshell)", August 2014, available at: www.youtube.com/watch?v=HwpzzAefx9M. Comment posted in January 2016.

4 See, for example, the references given in Benjamin Valentino, Paul Huth and Sarah Croco, "Covenants without the Sword: International Law and the Protection of Civilians in Times of War", *World Politics*, Vol. 58, No. 3, 2006, p. 342.

5 Helen Kinsella, *The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian*, Cornell University Press, Ithaca, NY, 2011, p. 198.

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that either completely share the scepticism or fully reject it on moral grounds. For every new armed conflict that engages public opinion, the basic questions are asked and answered again in a blanket way.

However, continued doubts have also lead to a critical review of long-held positions. Recent scholarship from historians, political scientists, economists and lawyers promises a more nuanced look at the role and effectiveness of IHL. It challenges well-established narratives held dear by sceptics and proponents alike.

This article aims to make accessible these points of view that have yet to become part of wider discussions in the legal field. It will first describe the perspectives that have traditionally shaped our understanding of the effects of legal norms applying to armed conflict. It will then give a cursory overview of new approaches to these issues. On the one hand, this includes efforts to empirically analyse the effect of IHL on States' behaviour. On the other, it involves scholarship that tries to make explicit the power relationships which shape IHL. Finally, the potential implications that these new approaches can have for current understandings of the role of IHL in today's armed conflicts will be discussed.

Realism versus idealism

The stated goal of IHL is to regulate the behaviour of armed forces and limit the effects of armed conflict.[6] Why would States which see themselves as potential actors in armed conflict come up with rules that limit their strategic options? Why would they choose to restrict themselves in their choice of weapons and in the decision of who to target with them? The usual answers to these questions can be placed on a spectrum between pragmatism and ethical necessity.[7]

On the pragmatist side, it is argued that States commit to these rules because they have a solid interest in doing so. When States face each other in armed conflict, the threat of reciprocal retaliation is the force that can limit certain excesses. The classic example concerns the treatment of prisoners of war, where the threat of retaliation is particularly tangible and can lead to mutual respect of prisoners' lives.[8] This can then translate into codified rules that States view as valuable on utilitarian grounds. From this perspective, though, compliance with the rules can be sustained only if each State credibly threatens to retaliate in response to violations.[9]

6 See in this regard the fundamental points made by Hans-Peter Gasser, former Senior Legal Adviser at the International Committee of the Red Cross, in "International Humanitarian Law and the Protection of War Victims", November 1998, available at: www.icrc.org/eng/resources/documents/misc/57jm93.htm.

7 This paragraph to a large extent paraphrases Benvenisti and Cohen's introduction in Eyal Benvenisti and Amichai Cohen, "War is Governance: Explaining the Logic of the Laws of War from a Principal-Agent Perspective", *Michigan Law Review*, Vol. 112, No. 8, 2014, p. 1365.

8 *Ibid.*, p. 1366.

9 Eric Posner, "Human Rights, the Laws of War, and Reciprocity", *The Law & Ethics of Human Rights*, Vol. 6, No. 2, 2013, p. 152.

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This view mirrors how one strand of political science has looked at international law in general and how it sees legal norms playing a role in influencing how States act. In this so-called realist view, law is virtually irrelevant in determining State behaviour. States are seen to act on a basis of rationally assessed and pursued self-interest. Since international law usually lacks strict enforcement, it is without independent pull towards compliance.[10] High rates of compliance with international law commitments are seen as no more than selection effects, meaning that States only sign treaties that codify norms by which they would abide even in the absence of treaties.[11] One hundred and fifty years ago, humanitarian icon Florence Nightingale already voiced what political scientists have put in more technical terms in recent days when describing international law as epiphenomenal, claiming that it solely follows the consequences of power and interests.[12] Considering the early efforts to codify IHL in 1864, Nightingale stated: "But it's like vows. People who keep a vow would do the thing without the vow. And if people will not do without the vow, they will not do with it."[13]

On the other side of the spectrum, the focus is put on ethical reasons behind the existence and normative force of IHL. Its rules are seen as a product of ethical necessity.[14] This is what the instruments of IHL sometimes explicitly state themselves. In the preamble of the Hague Convention of 1907, for example, it is claimed that the Convention is "animated by the desire to serve … the interests of humanity and the ever progressive needs of civilization".[15] This insistence on the moral grounding of the norms is part of how many humanitarian lawyers conceive the foundations of the field. After the atrocities of World War II, disillusionment with IHL was at its height.[16] Nevertheless, the eminent international lawyer Hersch Lauterpacht retained his conviction about the law's importance and what lies at its base:

> We shall utterly fail to understand the true character of the law of war unless we realize that its purpose is almost entirely humanitarian in the literal sense of the word, namely, to prevent or mitigate suffering and, in some cases, to rescue life from the savagery of battle and passion. This, and not the regulation and direction of hostilities, is its essential purpose.[17]

10 Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account*, Cambridge University Press, Cambridge, 2010, p. 11; James Morrow, *Order within Anarchy: The Laws of War as an International Institution*, Cambridge University Press, Cambridge, 2014, p. 10.

11 Adam Chilton, *The Laws of War and Public Opinion: An Experimental Study*, Coase-Sandor Institute for Law & Economics Working Papers, 2014, p. 3, available at: chicagounbound.uchicago.edu/law_and_economics/684/.

12 J. Morrow, above note 10, p. 14.

13 As cited in Caroline Moorehead, *Dunant's Dream: War, Switzerland, and the History of the Red Cross*, Carroll & Graf, New York, 1999, p. 47.

14 E. Benvenisti and A. Cohen, above note 7, p. 1365.

15 Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (entered into force 26 January 1910).

16 H. Kinsella, above note 5, p. 112.

17 Hersch Lauterpacht, "The Problem of the Revision of the Law of War", *British Yearbook of International Law*, Vol. 29, 1952, pp. 363–364.

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Idealist versus realist: those are the stereotypical points of reference when framing the debate about the role of IHL from the point of view of international lawyers and political scientists. Clearly there is a lot of potential for controversy between these positions, yet they are seldom brought into direct opposition. The critical views of political scientists and lawyers who analyze international law from an economic perspective rarely find their way into the discourse of IHL. Within this field, the main image drawn is that of a struggle between principled humanitarian lawyers pushing for maximum protection of the innocent and pragmatic military lawyers who argue for rules that take into account the tough choices faced by soldiers in armed conflict. Usually, neither of these sides enters into the debate about if and how IHL works.

New approaches to assess the purpose and effect of IHL

The questions surrounding the purpose and effect of IHL have existed since its inception. However, in their current form they are also part of a bigger trend of critical approaches to international law in general. Whether and why States comply with their international legal commitments has been an important topic of inquiry for scholars of international relations and international law over the last decade.[18] Some lawyers tend to think of international law as a separate entity, as something that resists outside perspective and is best understood from within. In the words of David Kennedy, "we lack the conceptual and social scientific tools to assess 'what happened' in a way which could disentangle the legal from everything else".[19] That has not stopped economists, political scientists, historians and legal scholars from applying different methods and drawing their conclusions. A selection of these efforts will be discussed in what follows. First, empirical analyses of the impact of IHL on States' behaviour will be looked at. The focus then turns to economic, game theoretical and constructivist perspectives on the same issue that provide a more nuanced picture of how IHL can influence decisions in armed conflict. Finally, recent scholarship that actively questions some of the most basic assumptions about IHL will be reviewed, turning the attention to the power relations that underlie the law and to the question of the purpose of IHL beyond its stated goals.

Empirical studies

Despite long-standing and intense debates over the effects of IHL, quantitative empirical analysis of States' compliance with its rules has long been absent. The first observational studies trying to examine the influence of IHL were those by

18 A. Chilton, above note 11, p. 3.

19 David Kennedy, "Lawfare and Warfare", in James Crawford, Martti Koskenniemi and Surabhi Ranganathan (eds.), *The Cambridge Companion to International Law*, Cambridge University Press, Cambridge, 2012, p. 173. At the same time, Kennedy notes: "To understand what law does in war we will not want to limit ourselves to what professionals in the discipline say that it does." *Ibid.*, p. 174.

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Valentino, Huth and Croco in 2006[20] and by Morrow in 2007.[21] Both studies examined compliance with international norms in international armed conflicts from the start of the twentieth century.

Valentino, Huth and Croco reached a harsh verdict. The study found "no evidence that signatories of international treaties on the laws of war are significantly less likely to kill civilians in war than are non-signatories".[22] The results of their empirical analyses "indicate that the laws of war do not provide strong protection for civilians in times of war. None of the variables representing international treaty commitments produced significant results in our equations."[23]

Morrow, on the other hand, found that States' compliance with IHL is influenced by the ratification of the relevant agreements, at least for democracies. According to his analysis, States at war have been more likely to comply when both sides have ratified the treaties in question. Moreover, he found that reciprocal enforcement has played an important role in ensuring compliance and that legal obligations favour but do not substitute such responses in kind.[24]

Apart from their conflicting results, these early efforts put a focus on the dynamic nature of States' compliance with IHL. Whether or not States abide by their legal commitments varies depending on the nature, duration and intensity of the armed conflicts they are involved in and is influenced by the nature of the States themselves.[25] Compliance equally varies across particular issues such as the use of chemical weapons, aerial bombardment or the treatment of civilians.[26] When the question was traditionally asked, it was simply "Does it work or not?" Now, however, the questions looked at are "What parts of it work and why?", or "Under which circumstances and in what way does IHL influence the behaviour of actors in armed conflict?"[27]

With the lessons these early studies provided, they acted as a stepping stone for more refined approaches. Morrow greatly enhanced his work on the topic and published a book-length study in 2014 that presents the most comprehensive empirical analysis of IHL so far.[28] In the study, he points out that IHL has an effect on States' behaviour by clarifying what acts are violations, thereby inducing restraint in actors that would otherwise engage in such behaviour.[29] Further,

20 B. Valentino, P. Huth and S. Croco, above note 4.
21 James Morrow, "When Do States Follow the Laws of War?", *American Political Science Review*, Vol. 101, No. 3, 2007.
22 B. Valentino, P. Huth and S. Croco, above note 4, p. 340.
23 *Ibid*., p. 368.
24 J. Morrow, above note 21, p. 570.
25 In this regard, empirical studies on armed conflict have paved the way. See, for example, Alexander Downes, *Targeting Civilians in War*, Cornell University Press, Ithaca, NY, 2008.
26 J. Morrow, above note 10, pp. 144–145.
27 The research undertaken for the updated ICRC study on "The Roots of Behaviour in War" gives a good example of such efforts; Francesco Gutierrez Sanin speaks of a "topology and typology" of compliance. See: www.icrc.org/en/event/roots-behaviour-war-revisited. For a broader view of empirical approaches to international law in general and IHL in particular, see Gregory Shaffer and Tom Ginsburg, "The Empirical Turn in International Legal Scholarship", *American Journal of International Law*, Vol. 106, No. 1, 2012.
28 J. Morrow, above note 10.
29 *Ibid*., pp. 144–145.

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Prorok and Appel recently published a paper that empirically examines compliance with IHL, specifically focusing on the role of third-party States in enforcement.[30] Using the same data set as Valentino, Huth and Croco, they come to the conclusion that, with regard to the targeting of civilians, ratification of the relevant treaties does matter under particular circumstances.[31]

Recent observational studies have brought to light the methodological problems and limitations of analyzing the impact of IHL empirically.[32] So far, studies have focused on compliance with IHL in international armed conflict.[33] A main limitation in this respect is the small sample size of conflicts to study since the specific rules of IHL were developed.[34] Another shortcoming is that there is no longer meaningful variation in the applicability – through treaty or customary law – of the central rules that govern international armed conflict.[35] Further, the data sets analyzed are not beyond dispute.[36] Crucially, Chilton points out that "even using sophisticated statistical techniques, it is extremely hard to tell whether States change their behaviour as a result of ratifying IHL treaties, or whether States ratify IHL treaties because they are likely to already comply with the norms the treaties codify".[37]

These problems have prompted different approaches. On the one hand, there has been a turn to more qualitative empirical analyses.[38] On the other, experimental methods have been chosen. Chilton has conducted a survey experiment that tested whether changes in public opinion create pressure on States to comply with IHL. His results suggest that democracies are likelier to comply with the laws of war when there is an expectation of reciprocity.[39] The idea behind this experimental approach is to look at mechanisms hypothesized to drive compliance with international law – changes in public opinion, in Chilton's

30 Alyssa Prorok and Benjamin Appel, "Compliance with International Humanitarian Law: Democratic Third Parties and Civilian Targeting in Interstate War", *Journal of Conflict Resolution*, Vol. 58, No. 4, 2014.
31 *Ibid*., p. 715.
32 See A. Chilton, above note 11, pp. 4–5; J. Morrow, above note 10, p. 272.
33 An exception in this regard is the work of Hyeran Jo and Catarina Thompson, "Legitimacy and Compliance with International Law: Access to Detainees in Civil Conflicts, 1991–2006", *British Journal of Political Science*, Vol. 44, No. 2, 2013.
34 See A. Chilton, above note 11, p. 5; J. Morrow, above note 10, pp. 248, 251. Efforts to increase the precision of IHL and achieve a more specific prohibition against civilian targeting only took off in the second half of the twentieth century. Regarding the absence of specific rules in respect to the targeting of civilians, see, for example, Anthony Grayling, *Among the Dead Cities: Was the Allied Bombing of Civilians in WWII a Necessity or a Crime?*, Bloomsbury, London, 2006, pp. 221 ff.
35 A. Chilton, above note 11, p. 4.
36 The study by Valentino, Huth and Croco, above note 4, operates under the assumption that the rules of IHL regarding the targeting of civilians have been clearly set out and straightforward to apply since 1907. How to unambiguously identify to a legal standard applicable at the time of the events the exact number of civilians intentionally targeted seems more difficult than the authors suggest, to say the very least.
37 A. Chilton, above note 11, p. 5.
38 See, in this regard, Laura Dickinson, "Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance", *American Journal of International Law*, Vol. 104, No. 1, 2010, with further references on p. 2.
39 *Ibid.*, p. 1. In this regard, see also Downes' results, suggesting that democracies are not likelier to comply with regard to targeting civilians: A. Downes, above note 25, pp. 246, 257.

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example – using methods developed in behavioural studies. This approach comes with its own limitations and is in its infancy in this field,[40] but the hope is that it could help to explore the question of why States are more or less likely to comply with their international obligations, adding another facet to the broader discussion of the role and impact of IHL.[41]

Moving beyond a rational choice approach to IHL: Questioning rationality assumptions and examining interests

The discussions regarding the role of law in armed conflict from the political science perspective have been triggered largely by the apparent divide between the extensive IHL normative framework and the perceived lack of compliance with it in actual armed conflict. Consequently, IHL first became an easy target for voices critical of international law's effects in general. The issue was looked at mainly using the tools of economic analysis, relying on standard assumptions of perfect rationality of States and decision-makers.[42] This rational choice approach to international law has found wide acceptance in legal scholarship and international relations theory of international law.[43] It strongly supported the traditional doubts about the effects of international law in general and those about IHL in particular.

While the rational choice paradigm as used in economics has been thoroughly challenged in its own field and in international relations since the 1970s, it has taken longer for the economic analysis of the law to react to the impulses described by behavioural economics.[44] Rational choice approaches to international law usually assume that the State is a unitary actor and that it acts rationally.[45] Drawing on the findings of cognitive psychology, behavioural economics complements and corrects these views. It points out that human rationality is bounded, characterized by systematic failures, shortcuts, and susceptibility to seemingly irrational traits such as fairness.[46] Recent efforts to operationalize these insights for the analysis of international law in general have come from van Aaken and Broude.[47] As van Aaken puts it: "Law, including

40 A. Chilton, above note 11, p. 19. See also Andrew Bell, "Leashing the 'Dogs of War': Examining the Effects of LOAC Training at the U.S. Military Academy and in Army ROTC", *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 108, 2014.

41 A. Chilton, above note 11, p. 19. See also the specific experiment described in Tomer Broude, "Behavioral International Law", *University of Pennsylvania Law Review*, Vol. 163, 2015, p. 1153.

42 See A. van Aaken, "Behavioral International Law and Economics", *Harvard International Law Journal*, Vol. 55, No. 2, 2014, p. 422; T. Broude, above note 41, p. 1153.

43 See Anne van Aaken, above note 42, p. 424, for an account of the influence of rational choice approaches to international law.

44 *Ibid.*, p. 423.

45 *Ibid.*, p. 441.

46 T. Broude, above note 41, p. 1103. The work of Daniel Kahneman has been fundamental in this respect: see Daniel Kahneman, *Thinking, Fast and Slow*, Farrar, Straus & Giroux, New York, 2011.

47 See A. van Aaken, above note 42; T. Broude, above note 41. Broude and van Aaken are currently working jointly on a book project on behavioural economics and international law, to be published at the end of 2017. An early call for the analysis of violations of IHL from the angle of law and economics came from Jeffrey Dunoff and Joel Trachtman, "The Law and Economics of Humanitarian Law Violations in Internal Conflict", *American Journal of International Law*, Vol. 93, No. 2, 1999.

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international law, is never neutral: it sets reference points, produces endowments … and sets points for perceived fairness. How, exactly, the law achieves those ends is a promising research field."[48] IHL, with its rules regarding decisions on matters of life and death, seems particularly ripe for research into collective decision-making, the cognitive psychology of individuals and the influence of legal standards.[49]

In the political science debate on the effects of international law on the behaviour of States in general, the so-called constructivists have also tried to expand on the rigid rational choice argument. They acknowledge that international law lacks enforcement by a higher authority. The constructivists then take a closer look at how the interests that are said to dominate States' calculations in such an environment are formed. Brunnée and Toope note:

> The key claim is that interests are not simply given and then rationally pursued, but that social construction of actors' identities is a major factor in interest formation. … Constructivists show how, through interaction and communication, actors generate shared knowledge and shared understandings that become the background for subsequent interactions. In the process, social norms may emerge that help shape how actors see themselves, their world and, most importantly for us, their interests.[50]

Constructivist views have played an important role in the discussion of international law in general from a political science point of view all along. The application of constructivist concepts to IHL in particular is more recent. International relations scholar Janina Dill has provided a comprehensive effort in her study on the legitimacy of targeting under IHL.[51] She argues that there is no contradiction between tangible interests and normative beliefs that are usually brought in opposition when analyzing the law's effects.[52] Taking the constructivist perspective, Dill sees interests as being constructed in the same way as normative beliefs – i.e., subject to perceptions.[53] The factors that influence the behaviour of actors are located on a continuum between immediate interests and more abstract normative considerations. Actors tend to be motivated by multiple considerations along that continuum at the same time, taking into account both immediate utility and normative appropriateness.[54]

Dill then argues that IHL can be behaviourally relevant by mediating between actors' immediate interests and more general normative beliefs. The law provides a "ready compromise between instrumental and principled courses of action",[55] and in doing so, it has an influence in two main ways. First, it provides

48 A. van Aaken, above note 42, p. 441.
49 T. Broude, above note 41, p. 1150.
50 J. Brunnée and S. Toope, above note 10, p. 12.
51 Janina Dill, *Legitimate Targets? Social Construction, International Law and US Bombing*, Cambridge University Press, Cambridge, 2015, pp. 44–63.
52 *Ibid.*, p. 47.
53 *Ibid.*, p. 47.
54 *Ibid.*, p. 48.
55 *Ibid.*, p. 52.

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action guidance by prescribing behaviour that already encompasses a compromise solution.[56] Second, it provides a tool that enables assessment of behaviour, be it by self-assessment, public scrutiny or institutionalized review. In this way it can change an actor's perception of potential courses of action and therefore their evaluation of strategic options.[57]

Traditionally, it has been argued that IHL does not provide a separate cause for compliance beyond prior interests or normative beliefs.[58] Dill moves beyond this position based on the way she sees IHL influencing behaviour as described above. She acknowledges that enforcement and sanctions, which are usually seen as law's independent pull towards compliance, are mostly lacking.[59] However, in her view IHL has an effect that is not reducible to calculations of interest and normative compliance that would take place in absence of legal guidelines. She describes this effect as being distinguishable from pure considerations of utility or appropriateness without being independent of them or possible on its own.[60]

Game theoretical approaches

Armed conflict is one of the main issues to which game theory has traditionally been applied.[61] It is not surprising, then, that the role of IHL in armed conflict has also been looked at from this point of view. This has usually happened in connection with rational choice approaches to support the conclusion that compliance with the law is solely based on calculations of interest.[62] The general argument is that States are best understood as mere participants in "prisoner's dilemma" settings, seeking to achieve self-interested outcomes. Compliance with international law can then be explained neatly within that framework. Most prominently, this view has been forwarded by Posner:

> States create international law for the sake of reciprocal gains, and they comply with international law so that those gains are not lost. The logic of reciprocity can be understood using simple game theory models, which show that it is the key to self-enforcement in the repeated bilateral prisoner's dilemma.[63]

While alluring in its simplicity, this view seems to put aside some of game theory's finer points. As Ohlin observes critically, "Recent accounts have harnessed game theory's alleged lessons in service of a new brand of 'realism' about international law. … Such claims are not just vastly exaggerated; they represent a profound

56 *Ibid*., p. 53.
57 *Ibid*., p. 54.
58 *Ibid*., p. 28.
59 *Ibid*., p. 55.
60 *Ibid*., p. 53.
61 See, for example, the work of Thomas Shelling, one of game theory's most famous exponents: Thomas Shelling, *The Strategy of Conflict*, Harvard University Press, Cambridge, MA, 1960; and *Arms and Influence*, Yale University Press, New Haven, CT, 1966.
62 A. van Aaken, above note 42, p. 438.
63 E. Posner, above note 9, p. 170.

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misunderstanding about the significance of game theory."[64] In his empirical study regarding States' compliance with IHL, Morrow develops a more differentiated game theoretical framework for analyzing IHL as an international institution. He goes further in analyzing reciprocity[65] and additionally focuses on the importance of shared understandings, echoing constructivist views.[66] "What the actors think one another will do is as central to their own calculations as their preferences over outcomes."[67] In games representing social settings, multiple equilibria exist – i.e., multiple sets of strategies can be stable. Which set of strategies is chosen depends on shared understandings of the situation.[68]

International law helps to create such shared understandings. Shared understandings alone, however, are insufficient to ensure that parties will comply.[69] Morrow uses game theory to expand on the traditional opposition between realist and idealist views:

> States have created international law to help them realize benefits from cooperation, but law helps to address some of the issues that make that cooperation difficult. … The realists correctly see that states select into legal agreements because they believe they will benefit from them, but fail to see that the resulting cooperation may require the mechanisms induced by those agreements. The idealists see that legal agreements structure international relations, but they fail to see the myriad problems that can impede cooperation …[70]

This game theoretical perspective highlights how IHL can help to restrain violence by fostering expectations that influence behaviour, but does not guarantee that everyone will follow its rules.[71] The effect that IHL can have cannot be separated from the strategic incentives that States face.[72] In Morrow's words: "The laws of war shape but do not determine how States fight."[73]

Thinking within and against the traditional narrative on IHL

Recent legal and historical scholarship has tried to actively question some of the basic assumptions about IHL and the manner in which it has commonly been

64 Jens Ohlin, "Nash Equilibrium and International Law", *Cornell Law Review*, Vol. 96, No. 4, 2010, p. 869. See also the comments made by Scott Gates in a discussion at the Peace Research Institute Oslo, 2012, available at: www.youtube.com/watch?v=BMC-FxqPDWU (starting at 54:00). Gates makes the point that armed conflict presents a game so loosely defined that you might not even know what game you are playing, let alone what the possible outcomes might be.
65 In this regard, see also the work by René Provost, "Asymmetrical Reciprocity and Compliance with the Laws of War", in Benjamin Perrin (ed.), *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organizations, and the Law*, University of British Columbia Press, Vancouver, 2012.
66 J. Morrow, above note 10, p. 23.
67 *Ibid*., p. 20.
68 *Ibid*., p. 23. See also A. van Aaken, above note 42, pp. 434–435, with references to behavioural game theory.
69 J. Morrow, above note 10, p. 7.
70 *Ibid*., p. 15.
71 *Ibid*., p. 5.
72 *Ibid*., p. 299.
73 *Ibid*., p. 299.

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analyzed. One of the assumptions questioned is the focus on States as the unique protagonists of IHL. The role and importance of non-State actors in armed conflict has become an important focus of recent legal and political science scholarship.[74] At the same time, the State as a homogenous unit of analysis has been put into question. Traditionally, States are seen as actors having interests and taking decisions according to these interests much in the way individual persons would decide and act. The metaphorical quality of personal characteristics attributed to States is easily put aside. This manner of looking at States and political and social outcomes has come under intense scrutiny in political science and history over the last half-century.[75] Discussions about IHL in legal circles, however, have rarely dealt with this issue explicitly.

The current interest of legal scholars in "prying open the black box of the state"[76] has drawn on methods of institutional analysis developed in political science and behavioural economics-based approaches.[77] As Benvenisti and Cohen put it, the basic observation is "that states engaged in armed conflict are not unitary actors but rather complex institutions that include internal chains of command within the echelons of power, accountable to a civilian government and ultimately to the public".[78] Recent game theoretical approaches draw attention to the same issue when they point out different levels of interrelated strategic problems within States and their armed forces.[79] Kennedy equally questions the concept of the State as a homogenous unit, both internally and in comparison to other States:

> States … differ dramatically in powers, resources, and independence. There is something audacious – and terribly misleading – about calling them all states …. Even in the most powerful and well-integrated states, moreover, power today lies in the capillaries of social and economic life.[80]

Looking closer at States' internal dynamics does not seem radical in light of the ideas that have been advanced in political science for some time. However, it breaks with a nation-State-based narrative that lies at the heart of the classic conception of IHL and still dominates a large part of discussions in this field today.[81] This shift in perspective permits a more nuanced look at the purposes and effects of IHL.

When the effectiveness of IHL is discussed, what is usually referred to is the impact the law can have in preventing violence against persons who do not participate in hostilities. IHL is measured against the goals that have been explicitly set by the States drawing up its main body of law: serving the interests

74 In this regard, see the section on "Disaggregation" below.
75 For a review of the literature, see, for example, Robert Oprisko and Kristopher Kaliher, "The State as a Person? Anthropomorphic Personification vs. Concrete Durational Being", *Journal of International and Global Studies*, Vol. 6, No. 1, 2014, pp. 31 ff.
76 E. Benvenisti and A. Cohen, above note 7, p. 1368.
77 A. van Aaken, above note 42, p. 441.
78 E. Benvenisti and A. Cohen, above note 7, p. 1368.
79 J. Morrow, above note 10, pp. 70–71.
80 David Kennedy, *Of War and Law*, Princeton University Press, Oxford, 2006, p. 14.
81 See D. Kennedy, above note 19, p. 170, who talks about the "remnants of discarded sensibilities that remain".

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of humanity and protecting the victims of armed conflict.[82] As discussed, the traditional counter-position has been to point out the raw State interests that lie below the thin veneer of humanitarian terminology. In this view, the soberer question to ask with regard to the impact of the law is if and how it affects inter-State relations. Looking closer at the dynamics within States, however, opens a different range of questions. What function and effect does IHL have within States? Beyond its stated goals and the interests of States taken as a whole, are there other purposes the law serves?

It has proven fruitful to look at the historical development of IHL and to take into account the different actors with competing interests that constitute the State. Recent work highlights functions of the law that are not made explicit by the law itself or by those who apply and shape it.[83] Benvenisti and Cohen argue that a main function and driver of IHL development is the control function it serves within State structures:

> [C]ontrolling the armed forces, especially during war, is one of the most acute challenges for any government. In democracies, one of the "most basic of political questions" is how "to … reconcile a military strong enough to do anything the civilians ask, with a military subordinate enough to do only what civilians authorize." … There is conflict not only between the high command of the armed forces and the civilian government that seeks to control it. Resorting to force creates conflicts between civil society and elected officials, between elected officials and military commanders, and between those commanders and combat soldiers. IHL is an external tool designed to address many of these internal conflicts.[84]

They conclude that IHL often reflects governments' or commanders' attempts to create an effective means of monitoring their troops rather than an international effort to regulate conduct between States.[85]

Kennedy makes a similar point when describing international law as an instrument through which force is disciplined and rendered effective.[86] He goes further, however, in describing law also "as a tactical ally, … a strategic asset, an instrument of war" that legitimizes and therefore enables military campaigns.[87] In a narrower sense, a legitimizing role of the law can be seen in the relationship between governments and their soldiers. It has been argued that Augustine's efforts in the fifth century to theorize the just war were made to absolve Christians from murder and allow them to participate in war.[88] IHL can be seen

82 See note 15 above. The first Additional Protocol to the Geneva Conventions of 1977 makes this explicit in its title: "relating to the Protection of Victims of International Armed Conflicts".
83 Whether or not certain aims are pursued consciously is a separate question. See E. Benvenisti and A. Cohen, above note 7, p. 1385, fn. 83.
84 *Ibid.*, pp. 1368–1369.
85 *Ibid.*, pp. 1367, 1371.
86 D. Kennedy, above note 19, p. 160.
87 *Ibid.*, p. 160.
88 H. Kinsella, above note 5, p. 193.

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to play a similar role today in absolving soldiers from moral responsibility for their participation in armed violence.[89]

Gaining awareness of the forces that shape IHL

Gender perspectives, third-world approaches, postcolonial looks: these are the headings for a range of recent scholarship that tries to make explicit the other power relationships that have shaped and continue to shape IHL.[90] They offer different lenses through which to analyze the law's content and the way it is thought and talked about. Looking at IHL in this way comes as part of a bigger trend of current critical approaches to international law[91] which have their roots in schools of thought such as critical legal studies and feminist legal theory that started in the 1970s. In this tradition, international law is taken not as a neutral body of law but rather as an institution inseparable from politics and power structures.

Early on, feminist critique pointed to the fact that IHL is based on a view of armed conflict which envisages men and women playing particular roles: men as fighters and women as victims of war.[92] Gender-conscious perspectives aimed at further unmasking such assumptions and exposing their inherently discriminatory dimension,[93] and have worked towards a better understanding of the different experiences of gendered actors in armed conflict.[94] A large part of these early efforts became focused on the pressing issue of sexual violence in armed conflict. In the emerging field of international criminal law, there was a concerted and successful push for the criminalization and punishment of sexual violence against women.[95] Broader debates about IHL's gendered assumptions, however, were somewhat sidelined by this focus on sexual violence.[96] Recent efforts in a range of fields give a more nuanced picture of women's experiences

89 J. Morrow, above note 10, p. 307. Kennedy goes further in arguing that IHL can work as a mechanism of absolution for soldiers and humanitarian actors alike: "In the face of the irrationality of war, modern law has built an elaborate discourse of evasion, offering at once the experience of safe ethical distance and careful pragmatic assessment. … The legal language has become capacious enough to give the impression that by using it, one will have 'taken everything into account' or 'balanced' all the relevant competing considerations." D. Kennedy, above note 80, pp. 143, 169.

90 See, for example, the work of H. Kinsella, above note 5; Frédéric Mégret, "From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Humanitarian Law's 'Other'", in Anne Orford (ed.), *International Law and Its Others*, Cambridge University Press, Cambridge, 2006; Orly Stern, "The Principle of Distinction and Women in African Conflict", doctoral thesis, London School of Economics and Political Science, 2015, available at http://etheses.lse.ac.uk/3291.

91 As represented by the work of Anne Orford, Marti Koskenniemi and Anthony Angie, for example.

92 O. Stern, above note 90, pp. 110 ff, provides an account of early feminist critiques in this regard. See also Judith Gardam, "A New Frontline for Feminism and International Humanitarian Law", in Margaret Davies and Vanessa E. Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory*, Routledge, London, 2013, p. 222, with further references.

93 Helen Durham and Katie O'Byrne, "The Dialogue of Difference: Gender Perspectives on International Humanitarian Law", *International Review of the Red Cross*, Vol. 92, No. 877, 2010, pp. 34, 45.

94 *Ibid.*, p. 42.

95 J. Gardam, above note 92, p. 217.

96 H. Durham and K. O'Byrne, above note 93, p. 51, observe the development of the discourse in this way. See also J. Gardam, above note 92, p. 218: "IHL as a whole has not been subjected to a broader scrutiny by feminists."

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in armed conflict and the question of how IHL in many ways fails to respond to this reality.[97] Beyond the attention to the role of women, a more comprehensive gender-conscious approach is in the making.[98]

Legal scholarship identifying as third-world and postcolonial approaches to international law is re-examining the historical foundations of international law.[99] These efforts place emphasis on legal history particularly in terms of imperial power dynamics, recognizing the colonial legacy as in some ways constitutive for international law.[100] In this way, they try to provide under-represented and alternative knowledge about the subject.[101] With regard to IHL in particular, important areas of re-evaluation are the dominance of European or Western points of view and the ensuing exclusions from the realm of IHL based on race, religion and purported levels of civilization.[102] These exclusions have taken the shape of a restrictive application of IHL to conflicts involving non-European people, namely the non-application of the norms to colonial wars.[103] But they have also manifested as practices of exclusion of alternative points of view from past and current debates. Further points of discussion in the postcolonial perspective on IHL concern the unacknowledged contributions to the law from non-Western backgrounds[104] and the effects of the structure of the law on postcolonial States today.[105] Additionally, recent scholarship has challenged the overwhelmingly progressist narrative of IHL, the complacency of the international law discourse in treating the colonial legacy as a dead letter that has been overcome by the process of decolonization.[106]

One subject that has received renewed scrutiny from legal scholars and political scientists alike is the principle of distinction between civilians and combatants, a concept central to IHL. These analyses provide an example of recent efforts that explicitly take into account power structures in terms of gender and the colonial and postcolonial background, as well as non-Western experiences.[107] How the Geneva Conventions and their Additional Protocols were elaborated with regard to the principle of distinction gives a good idea of why

97 *Ibid.*, p. 229. See, for example, the work of O. Stern, above note 90; Irène Herrmann and Daniel Palmieri, "Between Amazons and Sabines: A Historical Approach to Women and War", *International Review of the Red Cross*, Vol. 92, No. 877, 2010.

98 A development outlined in H. Durham and K. O'Byrne, above note 93, pp. 39, 51.

99 James Thuo Gathii, "TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography", *Trade, Law and Development*, Vol. 3, No. 1, 2011, p. 30. In this regard, see also the seminal work of Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, Cambridge, 2007.

100 J. T. Gathii, above note 99, p. 40, F. Mégret, above note 90, p. 2.

101 J. T. Gathii, above note 99, p. 38.

102 H. Kinsella, above note 5, pp. 107 ff.; F. Mégret, above note 90, pp. 11, 17.

103 F. Mégret, above note 90, p. 15; H. Kinsella, above note 5, p. 11.

104 Corri Zoli, "Islamic Contributions to International Humanitarian Law: Recalibrating TWAIL Approaches for Existing Contributions and Legacies", AJIL Unbound, No. 109, 2016.

105 F. Mégret, above note 90, p. 34.

106 J. T. Gathii, above note 99, p. 30; H. Kinsella, above note 5, pp. 112, 152 ff.; F. Mégret, above note 90, pp. 4, 21 ff.

107 See the work of H. Kinsella, above note 5; O. Stern, above note 90; and F. Mégret, above note 90; see also Hugo Slim, *Killing Civilians: Method, Madness and Morality in War*, Hurst & Co, London, 2007, pp. 11 ff.

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IHL is also referred to as a "strategic expression of morals".[108] A closer look at the principle of distinction shows a blind spot, because the principle

> presumes that we know what a combatant is. Of course, combatants do not exist in nature, any more than war exists as a natural condition waiting to be "regulated" by the laws of war. What is and what is not a combatant is an elaborate normative and social construct.[109]

Kinsella shows from a historical perspective just how the terms "civilian" and "combatant" are neither neutral nor inevitable identities but have rather been defined and redefined, and continue to be adapted, with clear strategic goals in mind.[110]

The range of efforts discussed feeds into a growing awareness of the implicit and explicit biases of IHL. They provide a further dimension to the basic questions about IHL: in addition to asking where the law fails or succeeds, they put in question what it has excluded and obscured.[111] They lead to an increased consciousness of how the discourse on IHL is shaped by power relations and how that needs to be taken into account when envisaging future developments of the law and applying it for the benefit of those affected by armed conflict.

Discursive threads resulting from the new perspectives on IHL

The new perspectives on IHL look at the issues raised from different angles, making observations based on premises that vary greatly. In this way, they do not form a unified picture but in combination allow for more depth in our perception of certain questions. There are common discursive threads that emerge, some of which will be discussed below.

Disaggregation

Invariably, looking at the impact of IHL from a range of perspectives not only provides answers but also leads to new and more specific questions. In this respect, the analysis of the law follows in the footsteps of conflict research that has been going through a similar process. For this field, Kalyvas notes:

> Empirical and theoretical disaggregation has led us to a point where we are able to ask more clearly defined questions about the dynamics of conflict and to use more appropriate techniques to address them. For example, we have moved away from largely sterile debates about the primordial versus constructed

108 H. Kinsella, above note 5, p. 188.
109 F. Mégret, above note 90, p. 28.
110 H. Kinsella, above note 5, p. 196. Benvenisti and Cohen also analyze the concept of distinction, noting that while it is seen today as providing the framework for the protection of civilians, it was initially designed to prevent the participation of irregular fighters. See E. Benvenisti and A. Cohen, above note 7, pp. 1398–1399.
111 F. Mégret, above note 90, p. 34.

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> nature of ethnic identities, or the greedy versus aggrieved motivations of rebel actors. Instead, we are moving toward formulating research questions that investigate the precise ways in which ethnicity is configured as political action and explore how exactly motivations interact with context.[112]

Ways of further investigating the extremely complex phenomenon that is armed conflict are seen in disaggregating it with regards to space, sequencing, and actors involved in the process, and in questioning the dichotomy between violence and non-violence.[113] In looking closer at IHL and its effects, all of these forms of refined analysis equally promise to expand on our current understanding.[114]

As discussed, examining the actors of armed conflict is part of several current approaches. The game theoretical and institutional analysis of IHL point to the importance of different levels of strategic competition and differing strategic interests within States.[115] Recent discussions of the law also highlight the importance of actors other than States. Engaging non-State actors has been called "the new frontier for international humanitarian law".[116] There is a tendency to "conceptualize non-state political factions involved in armed conflict as monolithic actors akin to States writ small".[117] However, adopting a less State-centred view has made discussions more likely to take into account issues regarding the particular structure and dynamics of non-State groups, as pointed out by recent conflict research in this area.

Another important area of disaggregation lies in the dynamics of behaviour in armed conflict over time. Kalyvas calls war a transformative phenomenon and points out that "[c]ollective and individual preferences, strategies, values, and identities are continuously shaped and reshaped in the course of a war".[118] Recent empirical work confirms this with regard to the killing of civilians in international armed conflict.[119] Compliance with the law is not a static phenomenon. This insight is not new, but it is surprising how little it has informed discussions about the impact of IHL so far.

These considerations tie in with practical approaches to IHL. The ICRC is currently updating its study on "The Roots of Behaviour in War", which looks at what leads combatants to comply or not to comply with legal norms.[120] The study and its update highlight the importance of taking a differentiated look at

112 Stathis Kalyvas, "Internal Conflict and Political Violence: New Developments in Research", in Erica Chenoweth and Adria Lawrence (eds.), *Rethinking Violence: States and Non-State Actors in Conflict*, MIT Press, Cambridge, MA, 2010, p. xiii.
113 *Ibid.*, p. xii.
114 See also A. Bell, above note 40, pp. 371, 373.
115 See in this respect the remarks by Benvenisti and Cohen referred to in note 83 and Morrow's remarks referred to in note 79, above.
116 Marco Sassòli, "Engaging Non-State Actors: The New Frontier for International Humanitarian Law", in Geneva Call (ed.), *Exploring Criteria and Conditions for Engaging Armed Non-State Actors*, Conference Report, Geneva, 2007.
117 S. Kalyvas, above note 112, p. xii.
118 Stathis Kalyvas, *The Logic of Violence in Civil War*, Cambridge University Press, Cambridge, 2006, p. 389.
119 A. Downes, above note 25, p. 8.
120 See: www.icrc.org/en/event/roots-behaviour-war-revisited.

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the issue if the aim is to draw lessons for putting the norms of IHL to use. The wealth of experience that the ICRC has gathered in interacting with armed actors during conflict makes it hard to uphold blanket assumptions about their behaviour.[121] Instead, the current efforts towards more effective work with regard to compliance with IHL seem to focus on the law's impact on a local level, within different organizational structures and taking into account the transformative nature of armed conflict.[122]

Great expectations

What questions are asked about IHL, and the way in which they are asked, is influenced by what the law is expected to do. Given IHL's stated aim to "prevent or mitigate suffering and, in some cases, to rescue life from the savagery of battle",[123] these expectations tend to be considerable. Also, they tend to neglect the specific nature of international law and IHL in particular. In the middle of the last century, Hersch Lauterpacht famously described international law as being at the vanishing point of the law, and the law of war as being at the vanishing point of international law.[124] Notwithstanding the development of international law and its institutions since, this description is still relevant today.

There is still a general tendency "to look at international society through the prism of domestic legal systems and to find international law under-developed or wanting".[125] With specific regard to IHL, Kennedy notes:

> Discussions about international law and war usually unfold as if the participants were imagining an international law which would be able to substitute itself for sovereign power in a top-down fashion, first to distinguish legal from illegal violence and then, perhaps not today but eventually, or perhaps not directly but indirectly, to bring that distinction to bear in the life of sovereigns, extinguishing sovereign authority for war at the point it crosses a legal limit.[126]

The automatic association of national law enforcement mechanisms with the terms "law" and "crimes" can be problematic at the international level. While individuals can be prosecuted for violations of IHL domestically and in some cases internationally, the same does not go for States. To put it simply, one cannot call

121 Notwithstanding the tendencies towards cynical simplification sometimes displayed by humanitarian workers. With regard to this phenomenon, see, for example, Fiona Terry, *Condemned to Repeat? The Paradox of Humanitarian Action*, Cornell University Press, Ithaca, NY, 2002, pp. 224 ff.

122 See www.icrc.org/en/event/roots-behaviour-war-revisited, including a recording of the panel discussion held on 28 April 2016; compare the comments by Francesco Gutierrez Sanin regarding a "typology and topology" of compliance.

123 H. Lauterpacht, above note 17, pp. 363–364.

124 *Ibid.*, p. 382.

125 J. Brunnée and S. Toope, above note 10, p. 6.

126 D. Kennedy, above note 19, p. 158.

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the police on States that violate IHL rules. The expectation that this should be possible inevitably leads to frustration in the current environment.[127]

The hollowness of imagining a monopoly of force to create and enforce rules in relation to armed conflict has been widely discussed.[128] In theory, the differences from domestic law are well understood and acknowledged.[129] Practically, though, the thinking in domestic legal concepts and the expectations that go with it are commonplace.

On 3 October 2015, a US aircraft opened fire on the Médecins Sans Frontières (MSF) trauma hospital in Kunduz, Afghanistan. According to the US Department of Defense, the airplane mistook the hospital for the intended target and fired its heavy guns on the medical facility, despite frantic calls from MSF to military commanders.[130] The attack killed forty-two people, including patients and medical personnel, and wounded dozens more.[131] In the aftermath of the events, the United States launched an internal investigation that resulted in administrative sanctions for sixteen military personnel. MSF, understandably dissatisfied with this outcome, demanded a separate investigation by the International Humanitarian Fact Finding Commission. Given the Commission's jurisdiction, this demand will most likely remain unanswered.[132] However, it illustrates the yearning for an independent body that distinguishes legal from illegal behaviour and metes out justice accordingly.[133] It shows how much the expectations towards IHL and its effects are modelled on what is expected from a functioning domestic legal order.

Moving images

In the opening scene of *American Sniper*, a film directed by Clint Eastwood and based on a soldier's account of his experience in Iraq until 2009, a US

127 It is often assumed that international law can only be effective if it creates absolute obligations, the equivalent to State-backed sanctions in a domestic system. This puts aside the effect that IHL has in States through implementation and enforcement within their armed forces, and it neglects a whole range of mechanisms in which norms can be enforced in a decentralized system and which play an important role in the enforcement of international law. See, in this respect, A. van Aaken, above note 42, pp. 471 ff.

128 See, for example, R. Provost, above note 65, p. 37.

129 J. Morrow, above note 10, p. 317.

130 See Matthew Rosenberg, "Pentagon Details Chain of Errors in Strike on Afghan Hospital", *New York Times*, 29 April 2016, available at: www.nytimes.com/2016/04/30/world/asia/afghanistan-doctors-without-borders-hospital-strike.html?_r=0.

131 See MSF, "Kunduz: Initial Reaction to Public Release of U.S. Military Investigative Report on the Attack on MSF Trauma Hospital", 29 April 2016, available at: www.msf.org/en/article/kunduz-initial-reaction-public-release-us-military-investigative-report-attack-msf-trauma.

132 See, in this regard, the article by Catherine Harwood on the potential role of the International Humanitarian Fact-Finding Commission in the investigation of the attack. Catherine Harwood, "Will the 'Sleeping Beauty' Awaken? The Kunduz Hospital Attack and the International Humanitarian Fact-Finding Commission", *EJIL: Talk!*, 15 October 2015, available at: www.ejiltalk.org/will-the-sleeping-beauty-awaken-the-kunduz-hospital-attack-and-the-international-humanitarian-fact-finding-commission/.

133 The International Criminal Court – with all its imperfections – embodies the same impulse. The frustration about the lack of traction for the International Humanitarian Fact-Finding Commission is common among international lawyers; see, for example, Marco Sassòli's comments made at a panel discussion organized by the ICRC on 21 April 2016, available at: www.icrc.org/en/event/law-armed-conflict-crisis-and-how-recommit-its-respect.

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sharpshooter is faced with a difficult decision. Through the gunsight of his rifle he sees a woman and a child carrying explosives, approaching a US patrol. While he is considering firing at the woman and child, another soldier present at the scene bluntly tells him, "They'll fry you if you are wrong", referring to the US military prosecutors. Without mistaking the movie for the reality on the ground, it is telling that the potential for criminal prosecution for breaches of IHL[134] is portrayed in a Hollywood film as part of the heavy burden the hero has to bear.

For one, it points to the impact of the law through implementation in procedures and training. In a number of armed forces, "IHL has been transformed from an 'external' constraint on military action to an intrinsic facet of the military's own operational code".[135] Practitioners themselves have noted the substantial recent increase in the role of IHL in US target decision-making processes.[136] Legal advisers embedded in front-line units and who are involved in operational decisions are now common in the US, British, other NATO and Israeli armed forces.[137] More generally speaking, for armed forces of this type the "institutional pathways by which war is made have been carved in law".[138] Given the current technological possibilities, soldiers and commanders must reckon with the knowledge that their battlefield decisions are subject to painstaking re-evaluation by their chain of command, by their opponents, by their families and also by themselves.[139]

The *American Sniper* example also shows the enormous development IHL has gone through and the impact it has on how armed conflict is thought and talked about. "War is cruelty and you cannot refine it", wrote William T. Sherman, general for the Union Army during the American Civil War. With this statement he was justifying his decision to adopt scorched-earth tactics, to evict the inhabitants of Atlanta and burn a large part of the city after it was captured.[140] Imagine how Sherman would have to frame such a justification in today's context. Compare it to the language used by US generals after the recent incident in Kunduz.[141]

IHL not only stipulates a set of norms but also provides terminology with which to discuss armed conflict. The use of the concept of distinction between combatants and civilians by both the United States and the Taliban in recent years offers an example of how actors on opposite ends of the spectrum disagree in a shared jargon.[142] Kennedy notes that "even enemies who stigmatize one

134 This happens through the intermediary of US legislation in this case.
135 Amichai Cohen, "Legal Operational Advice in the Israeli Defense Forces: The International Law Department and the Changing Nature of International Humanitarian Law", *Connecticut Journal of International Law*, Volume 26, 2011, p. 389.
136 See, for example, Geoffrey Corn, "Legitimate Questions about Legitimate Targets", *EJIL: Talk!*, 23 September 2015, available at: www.ejiltalk.org/13613-2/.
137 E. Benvenisti and A. Cohen, above note 7, p. 1410.
138 D. Kennedy, above note 80, p. 33.
139 *Ibid.*, pp. 133–134.
140 A. Downes, above note 25, p. 1.
141 See Barbara Starr and Ryan Browne, "Pentagon: U.S. Bombing of Afghanistan Hospital not a 'War Crime'", *CNN*, 29 April 2016, at: http://edition.cnn.com/2016/04/29/politics/u-s-airstrike-hospital-afghanistan-investigation/.
142 See the revealing account by H. Kinsella, above note 5, pp. 1–3.

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another as not sharing in civilization nevertheless find themselves using a common vocabulary to dispute the appropriateness of military ends and means".[143] In this sense, IHL plays a role as a communication tool.[144] Kennedy goes on to argue: "We should come to see law … not as the articulation of rights or restraints, but as a more subtle and dispersed practice through which people struggle with one another through articulation and action."[145]

More often than not, the law is referred to in quests for legitimacy rather than for legal measures.[146] This is not a new phenomenon. The tactic of complying with IHL and communicating this strategically to gain legitimacy was used by postcolonial movements, for example.[147] As early as 1914, the British military manual observed that "it is in the interest of a belligerent to prevent his opponent having any justifiable occasion for complaint, because no Power, and especially no Power engaged in a national war, can afford to be wholly regardless of the public opinion of the world".[148] The importance of IHL as a tool of strategic communication has become crucial, however, with the advent of today's communication technologies. They provide the stakeholders of armed conflict with the dramatic ability to reach global audiences in near real time and with minimal effort.[149]

Blind spots

The different perspectives on IHL allow for an awareness of blind spots, of biases in the way it is usually perceived. One of these blind spots concerns the selective public perception of violations of the law versus its preventive impact. As Helen Durham of the ICRC notes:

> The media and humanitarian agencies often only publicise breaches of the law, not the many instances in which it is respected and applied: every time a child is vaccinated in a conflict area, an army stops an attack because of the potential for civilian casualties, or a detainee is protected from torture.[150]

143 D. Kennedy, above note 80, p. 24. It can take on this role internationally but also among actors within States: see E. Benvenisti and A. Cohen, above note 7, p. 1371.
144 D. Kennedy, above note 19, p. 166.
145 *Ibid.*, p. 182.
146 Even though the format of legal measures and judicial review continues to be a means to gain or question legitimacy, of course. Kennedy speaks of a shift from validity to persuasiveness: see D. Kennedy, above note 80, p. 96. Dill makes a similar point when distinguishing behaviour in war permitted by law from behaviour that is perceived as legitimate: see J. Dill, above note 51. Going against this tendency, international criminal law lets people imagine a return to pure validity arguments and the clarity and sovereign-backed enforcement of national legal orders.
147 See H. Kinsella, above note 5, pp. 130–131, regarding the strategies adopted by the FLN during the French–Algerian War.
148 UK War Office, *Manual of Military Law*, 1914, p. 301, as quoted in E. Benvenisti and A. Cohen, above note 7, p. 1391.
149 D. Kennedy, above note 80, p. 25.
150 Helen Durham, "Atrocities in Conflict Mean We Need the Geneva Conventions More than Ever", *The Guardian*, 5 April 2016.

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Similarly, weapons treaties such as the Chemical Weapons Convention[151] and the Ottawa Treaty banning landmines[152] have had a significant impact on the use of these weapons. What draws attention, however, are instances in which these treaties are not respected. What drives this selective perception? As a start, the preventive impact of IHL is difficult to ascertain.[153] How do you go about determining what violations would have taken place in the absence of the law?[154] More importantly, compliance with the law lacks the shock value of videos showing wounded children after an indiscriminate attack. Someone stuck to the rules? That is not exactly front page material. Publicizing alleged violations is a powerful tool as part of political campaigns that serve strategic interests; again, communicating the absence of violations will be more difficult and likely less effective in achieving such goals. Additionally, even humanitarian actors will often have an interest in painting a sombre picture to attract attention and funding to their cause. The sheer flood of imagery of blood and gore with which we are confronted on all channels makes it tempting to dismiss the impact of IHL from the outset.

A blind spot of a different nature concerns those who deal with the law from an institutional point of view. The discourse on IHL is dominated by people who have the privilege of sophisticated university education and of living in contexts of relative peace and security. For the most part, those who publish texts like the present one live in societies in which armed violence is a rare exception. In this environment, a functioning monopoly of force provides levels of security that make people perceive armed violence as an anomaly. Baberowski argues that this "belief that violence is deviant behaviour helps people in peaceful societies to imagine their reality as a space in which the argument triumphs over the fist".[155] This is a comforting idea, especially for lawyers, but it makes it hard to imagine violence as the powerful resource, the viable option for pursuing one's goals, that it becomes under different circumstances.[156] It makes it hard to imagine situations in which armed violence is the dominating factor in people's lives – a force that affects everyone and that fundamentally alters all social relations.[157]

This divide affects how IHL is approached. Kennedy notes that it is easy to mistake our ability to articulate the law for an actual capability to restrain the power and violence of war.[158] To roughly paraphrase Saul Bellow's "Herzog": people who

151 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1974 UNTS 45, 13 January 1993 (entered into force 29 April 1997).
152 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 2056 UNTS 211, 18 September 1997 (entered into force 1 March 1999).
153 Kaul makes the same observation for international criminal law. See Hans-Peter Kaul, "Abstrafung der Täter – ein Instrument zur Prävention", in Hans-Joachim Heintze and Knut Ipsen (eds), *Heutige bewaffnete Konflikte als Herausforderungen an das humanitäre Völkerrecht*, Springer, Berlin, 2011, p. 158.
154 See in this regard the comments made regarding the update of the ICRC's "Roots of Behaviour in War" study, which aims to examine compliance with IHL's norms, available at: www.icrc.org/en/event/roots-behaviour-war-revisited.
155 Jörg Baberowski, *Räume der Gewalt*, S. Fischer, Frankfurt am Main, 2015, p. 20 (author's translation).
156 *Ibid.*, p. 27.
157 *Ibid.*, p. 11. See also Kalyvas' remarks referred to in note 112 above.
158 D. Kennedy, above note 19, p. 172.

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spend their lives in humane studies imagine that once cruelty is described in books, it is ended.[159] This is a caricature, of course, but it points towards the tendency to confound formal representation of law with successful law-making and effective engagement.[160]

Conclusion

In the end, what *has* law got to do with it? Given the complexity of the subject, it comes as no surprise that blanket answers do not satisfy those looking for more than simply to confirm their initial ideological leanings. The new approaches described in this article allow us to ask more pertinent questions that might allow for a wider and more detailed understanding of IHL's central issues. These questions are far from answered and will remain so along with the changing nature of armed conflict. Questions regarding the purpose, effects and limits of IHL need to be asked continuously, especially if we are looking at the law with the aim of putting it to use for the protection of civilians. Any answers that come in the form of simple declarations should be met with the suspicion they deserve.

Tina Turner's "What's Love Got to Do with It?" betrays the anger of someone whose heart has been broken, and likewise, some who ask the tough questions about IHL might be those who are in it with their heart. They might be the ones who feel strongly about the suffering of people affected by armed conflict and are frustrated by how little is achieved in trying to stop it. In this sense, dropping the rose-tinted glasses and acknowledging that IHL might at the same time be more and less than we want it to be is an important first step. Taking a good hard look at one's own imperfections would not hurt, either. Then the pain needs to be turned into forward movement instead of bitterness. That is the Tina Turner thing to do.

159 Saul Bellow, *Herzog*, Viking Press, New York, 1964, p. 238.
160 J. Brunnée and S. Toope, above note 10, p. 47. Kennedy goes further and speaks about an "elaborate discourse of evasion": D. Kennedy, above note 19, p. 169.

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