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How International Humanitarian Law Develops
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How international humanitarian law develops

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Abstract

This article takes a critical look at the development of international humanitarian law (IHL), from its early codification in the Hague and Geneva Conventions to the present day. It examines why and how IHL develops – through treaty, custom, interpretation and soft-law instruments, as well as the influence of jurisprudence and other branches of law. In doing so, it highlights some of the distinctive elements of IHL that set it apart from other bodies of law and explains how these elements influence IHL development. Turning to the present, it addresses some of the key arguments commonly heard against attempting any further development of IHL, by answering the following three key questions: Does IHL need to develop further? If so, how can this be achieved? And what are the prospects for such development in the near future? In answering these questions, the article argues that IHL will continue to develop in many ways, and that while the current environment does not appear propitious for new legally binding norms of IHL, they continue to be both necessary and possible.

Keywords: International humanitarian law, development of law, treaties, customs, soft law, interpretations.

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Introduction

Fifty years later, Jean Pictet would remember that at the beginning of 1945, he asked the then president of the International Committee of the Red Cross (ICRC), Max Huber, to revive the idea of reinforcing the Geneva Conventions, to stop civilians being attacked: "'Yes, do,' he said, 'but I warn you it won't work.' I told him, 'thank you, I accept, but it will work.'"[1]

It is often said that to come to the agreement over the four Geneva Conventions in 1949, as the Cold War had already become entrenched, as Western allies dropped supplies over Berlin blockaded by the Soviet Union, was nothing short of a miracle.

How, and why, does international humanitarian law (IHL) develop? And why does it matter? These are not only matters for legal historians. Knowledge and understanding of the law require a good grasp of its historic development. Insight into how and why IHL develops can give valuable answers to contemporary problems, such as unclear interpretation of IHL provisions or ways to address pressing humanitarian concerns arising from the effects of armed conflict on civilians and other protected persons and objects.

The Oxford Language Dictionary defines development as "the process of developing or being developed" and as "an event constituting a new stage in a changing situation". It further defines developing as "growing or causing to grow and become more mature, advanced, or elaborate".[2]

IHL development thus refers to the creation of new treaty or customary norms as well as changes in the scope of existing norms, including by means of clarification and interpretation.

A methodological analysis of the historical evolution of IHL can provide useful tools for anticipating further developments in the short- and mid-term. It can also assist in answering the much-asked question about the need for new law that arises in light of the evolution of warfare.

As part of the body of international law, IHL aims to protect persons who are not or no longer taking part in hostilities, the sick and wounded, prisoners and civilians, and to define the rights and obligations of the parties to a conflict in the conduct of hostilities.[3] The object and purpose[4] of IHL are to protect those affected by armed conflict, including by imposing limits on how belligerents use force.

1 *The Guardian*, "The Man Who Wrote the Rules of War", 12 August 1999, available at: www.theguardian.com/theguardian/1999/aug/12/features11.g2 (all internet references were accessed in October 2022).

2 *Oxford Learner's Dictionaries*, Oxford University Press, Oxford, 2022, available at: www.oxfordlearnersdictionaries.com/.

3 ICRC, "War and International Humanitarian Law", 29 October 2010, available at: www.icrc.org/eng/war-and-law/overview-war-and-law.htm.

4 On the concept of "object and purpose", see, for example, ICRC, *Commentary of 2020 on Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, Introduction*, paras 87, 88 and 91, available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=1B9A4ABF10E7EAD2C1258585004E7F19.

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In order to achieve its object and purpose, IHL has to evolve in tandem with the reality of warfare, including the evolution of military technologies and tactics; changes in the environment, such as the world's ever-increasing urbanization; and developments in other bodies of law, for example, international human rights law. Developments in IHL are further triggered or influenced by an evolving understanding of cross-cutting principles and concepts, such as the importance and different facets of the notion of gender. Courts and tribunals, both international and domestic, have in turn shaped the interpretation and implementation of IHL, and have often played an important role in introducing or reflecting such external developments.

The first part of this article examines the process of evolution of IHL from its early stages of codification to the present day – a history that has by no means been smooth, and that has been shaped by a variety of stakeholders. It identifies some of the elements, dynamics and trends that characterize IHL's development. It outlines the interplay of its main sources – treaty and custom – and also looks at judicial decisions, interpretation and "soft law". "Soft law" consists of a plethora of non-binding instruments – from political declarations and guidelines to compilations of good practices and interpretive guidance – that contribute to clarify the meaning of the law or facilitate its implementation. The second part of the article then analyses the plurality of actors engaged in the making of IHL, including the unsettled role of non-State armed groups (NSAGs). It further outlines the challenges of contemporary treaty-making and addresses the issue of law *versus* policy, which occupies much of the contemporary debate in multilateral fora where potential developments of IHL are discussed. Lastly, it offers some thoughts on the prospects of future IHL development and on next steps in addressing a number of contemporary issues that remain open and are cause for humanitarian concern.

The complex interplay of sources in the development of IHL

Any reflection on the development of IHL is closely linked to the development of its sources. In line with Article 38 of the Statute of the International Court of Justice (ICJ), these are international conventions; international custom; the general principles of law recognized by civilized nations; and as subsidiary means for the determination of rules of law, judicial decisions and the teachings of the most highly qualified publicists of the various nations.[5] However, through the years, novel "sources" have played an increasingly significant role in the development of IHL, notably "soft-law" instruments that have taken many shapes and

5 For an overview of the sources of IHL, see Jean-Marie Henckaerts, "History and Sources", in Ben Saul and Dapo Akande (eds), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, Oxford, 2020, pp. 1–2; Emily Crawford, *Non-Binding Norms in International Humanitarian Law*, Oxford University Press, Oxford, 2022. While a primary source of IHL, general principles will not be addressed in this article.

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forms.[6] IHL as we know it today is a result of the interplay of many processes, actors and factors throughout time. Indeed,

> international lawmaking is interactional in nature. The sources of international law themselves illustrate this point. Treaties may become custom; custom may be codified in a treaty; and a judicial decision may identify a customary rule or interpret a treaty provision. The actors involved in the making and shaping of international law must also engage in a highly interactional collaboration.[7]

This interplay is examined in the following.

Development through treaties

A look at the development of IHL treaties through the years highlights several interesting features. First, with some exceptions, IHL treaties are perhaps the clearest illustration of how IHL has developed in response to the evolving nature of wars and weapons. As is often said, many of them respond to the last war and the horrors witnessed therein. Linked to that, while these treaties are always the result of a compromise between strong military and strategic State interests, beyond reflecting these interests, they are also characterized by elements of strong normative and humanitarian considerations, elements of "common good".

Chronology

A chronological review of key IHL instruments reveals much about how and why IHL develops through treaties. The brief historical overview provided below, albeit by no means exhaustive, allows us to identify a number of elements that are characteristic of this pathway of IHL development.

While elements of the "laws and customs of war" can be traced back to ancient times, their codification in the shape that we still know today only began in the 19th century.[8]

In 1864 the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field was adopted.[9] The Convention largely owes its existence to Henry Dunant and his book *A Memory of Solferino*, where he proposed the adoption of a treaty giving protection on the battlefield to the wounded and to anyone who endeavoured to come to their assistance. Despite

6 See Paul Tavernier, "L'évolution du droit international humanitaire au XXIème siècle : une nécessité?", in *The International Legal Order: Current Needs and Possible Responses. Essays in Honour of Djamchid Momtaz*, Brill Nijhoff, Leiden and Boston, MA, 2017, p. 734.

7 Sandesh Sivakumaran, "Beyond States and Non-State Actors: The Role of State-Empowered Entities in the Making and Shaping of International Law", *Columbia Journal of Transnational Law*, Vol. 55, No. 2, 2017, pp. 392–3.

8 For a historical overview of IHL's early stages, see Geoffrey Best, *War and Law Since 1945*, Clarendon, Oxford, 1994, pp. 14–34. See also John Fabian Witt, *Lincoln's Code: The Laws of War in American History*, Free Press, New York, 2012.

9 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864 (entered into force 22 June 1865).

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containing a mere ten articles, the Convention marked a turning point in the laws and customs of war.[10]

The Declaration of Saint Petersburg (1868) was the first formal agreement prohibiting the use of certain weapons in armed conflict. It prohibited the use of bullets which exploded on contact with soft substances such as human tissue, before these bullets were even used on the battlefield, on the basis of humanitarian considerations.[11] While formally a declaration, it has the force of law: it confirms the customary rule according to which the use of weapons of a nature to cause unnecessary suffering is prohibited, a rule subsequently laid down in Article 23(e) of the Hague Regulations on land warfare of 1899 and 1907. Despite its very limited membership (only nineteen States are party to it), the Declaration is considered to have laid the foundations of modern conduct of hostilities law, including the key concept of military necessity.[12] It is a characteristic example of the power of treaties to shape IHL beyond their contracting parties. Like the first Geneva Convention, it is also an example of how States' military interest and realpolitik on the one hand, and concerns for humanity on the other, both flow into the making of IHL treaties.[13]

The 1899 and 1907 Hague Conventions on War on Land and their annexed Regulations are considered further milestones in the development of norms on the conduct of hostilities.[14] In 1946, the Nüremberg International Military Tribunal stated with regard to the Hague Convention on land warfare of 1907:

> The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing International Law at the time of their adoption … but by 1939 these rules … were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war.[15]

10 François Bugnion, "The International Committee of the Red Cross and the Development of International Humanitarian Law", *Chicago Journal of International Law*, Vol. 5, No. 1, 2004, p. 193. The Convention of 1864 was replaced by the Geneva Conventions of 1906, 1929 and ultimately 1949 on the same subject; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 6 July 1906 (entered into force 9 August 1907); Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 27 July 1929.

11 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, 29 November/11 December 1868 (entered into force 11 December 1868); Robert Kolb and Momchil Milanov, "The 1868 St Petersburg Declaration on Explosive Projectiles: A Reappraisal", *Journal of the History of International Law*, Vol. 20, No. 4, 2018, p. 517. The declaration was based on reciprocity, so (intentionally) not applicable to "colonial warfare"; see R. Kolb and M. Milanov, *ibid.*, p. 520.

12 Hans-Peter Gasser, "A Look at the Declaration of St. Petersburg of 1868", *International Review of the Red Cross*, No. 297, 1993.

13 Michael Riepl, *Russian Contributions to International Humanitarian Law*, Nomos, Baden-Baden, 2022, pp. 33–41.

14 Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899 (entered into force 4 September 1900); Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land. The Hague, 18 October 1907 (entered into force 26 January 1910). See Geoffrey Best, "Peace Conferences and the Century of Total War: The 1899 Hague Conference and What Came After", *International Affairs*, Vol. 75, No. 3, 1999.

15 "International Military Tribunal (Nuremberg), Judgment and Sentences", *American Journal of International Law*, Vol. 41, No. 1, 1947, pp. 248–9. Many of the rules codified in this convention were

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The carnage of the First World War with its eight to nine million prisoners of war, chemical warfare and great suffering of civilian populations led the ICRC to demand additional protections through IHL: conventions to protect prisoners of war and civilians, and a ban on chemical weapons.[16] The First World War had shown clearly that the few provisions protecting civilians contained in the Hague Regulations were insufficient in view of the dangers originating from air warfare and of the problems relating to the treatment of civilians in enemy territory and in occupied territories, and that additional rules were needed.

The 1925 Geneva Protocol prohibiting the use of chemical and biological weapons in war[17] and the 1929 Convention relative to the Treatment of Prisoners of War[18] represented a significant step forward in the development of IHL. Both instruments are characteristic of how the international community reacts to past wars, but also of how the suffering of their own servicemen prompted States to seek better protection. The plight of civilians still remained secondary and was not addressed.

The International Conferences of the Red Cross of the 1920s took the first steps towards laying down supplementary rules in this respect; however, the political situation was not yet conducive to an outcome. The events of the Second World War showed the disastrous consequences of the absence of a convention stipulating obligations regarding the protection of civilians in wartime.

The ICRC's efforts finally came to fruition in 1949, when the four Geneva Conventions[19] were adopted, marking a pivotal moment in the development of IHL. As in 1929, the negotiation and adoption of the Geneva Conventions reveals important elements of IHL development, which will be examined in the following

later codified and expanded on in the two Additional Protocols to the Geneva Conventions of 1977: Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I); Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II).

16 Daniel Palmieri, "The International Committee of the Red Cross in the First World War", ICRC, 10 September 2014, available at: www.icrc.org/en/document/international-committee-red-cross-first-world-war-0.

17 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, 17 June 1925 (entered into force 8 February 1928). The protocol was adopted in the aftermath of the First World War, which saw the widespread use of poison gas despite a prohibition already included in the 1899 Hague Convention. As a result of its adoption, civilians and combatants were largely spared this horrific fate during the Second World War.

18 Convention relative to the Treatment of Prisoners of War, Geneva, 27 July 1929. The Convention was adopted to overcome lacunae and imprecisions in existent protections of prisoners of war contained in the Hague Regulations of 1899 and 1907.

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

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section.[20] In the decades that followed, the world witnessed an increase in the number of non-international armed conflicts (NIACs) and wars of national liberation. The 1949 Geneva Conventions undoubtedly marked significant progress in the development of IHL. However, important gaps remained, in particular as regards the protection of civilians against the effects of hostilities. The rules pertaining to the latter, largely stipulated or codified in the Hague Regulations, had not undergone any significant revision since 1907. The ICRC set about the task of filling this gap immediately, picking up from its first endeavours in the 1920s, submitting draft rules upon draft rules over the years.[21] In 1977, after many efforts by the ICRC but also other actors, States finally adopted two Additional Protocols,[22] which strengthen the protection of victims of international armed conflicts (IACs) (Additional Protocol I; AP I) and NIACs (Additional Protocol II; AP II) and place limits on the way that wars are fought.

The 1977 Additional Protocols introduced fairly bold innovations.[23] AP II, in particular, was the first-ever international treaty devoted exclusively to situations of NIACs. Despite its rather restricted field (from the forty-seven articles originally proposed by the ICRC, only twenty-eight were eventually adopted) and high threshold of application, it represents considerable progress. Quite remarkably, almost all the provisions of both Protocols were adopted by consensus. In fact, of the 150 articles on matters of substance contained in the two Protocols, only fourteen required a formal vote.

Weapons law has been a particularly prolific area of IHL. Following the early instruments mentioned above, a series of conventions prohibiting or restricting the use of certain means and methods of warfare was concluded

20 On the drafting history of the four Geneva Conventions, see, among others, G. Best, above note 8, pp. 80–179; Robert Heintsch, "The International Committee of the Red Cross and the Geneva Conventions of 1949", in Robin Geiß, Andreas Zimmermann and Stefanie Haumer (eds), *Humanizing the Laws of War: The Red Cross and the Development of International Humanitarian Law*, Cambridge University Press, Cambridge, 2017, p. 27; Jean S. Pictet, "The New Conventions for the Protection of War Victims", *American Journal of International Law*, Vol. 45, No. 3, 1951, pp. 464 ff; Giovanni Mantilla, "The Origins and Evolution of the 1945 Geneva Conventions and the 1977 Additional Protocols", in Matthew Evangelista and Nina Tannenwald (eds), *Do the Geneva Conventions Matter?*, Oxford University Press, Oxford, 2017, pp. 38–49.

21 Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War, 19th Conference of the Red Cross, 1957; in 1965, the 20th and 21st International Conferences of the Red Cross urged the ICRC to pursue the development of IHL in this regard; the ICRC prepared drafts of two Protocols which served as a basis for discussion in the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, which met in Geneva in four sessions, between 1974 and 1977, with the participation of over 120 States, as well as national liberation movements, international organizations and civil society.

22 For an account of the period between 1949 and the 1977 Additional Protocols, the efforts by the ICRC, and also the role played by other actors that finally triggered the political will to negotiate the Protocols, see G. Mantilla, above note 20, pp. 52 ff; Michael Bothe, "The International Committee of the Red Cross and the Additional Protocols of 1977", in R. Geiß, A. Zimmermann and S. Haumer (eds), above note 20, p. 57; George H. Aldrich, "Some Reflections on the Origins of the 1977 Geneva Protocols", in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC, Geneva, 1984; François Bugnion, "Adoption of the Additional Protocols of 8 June 1977: A Milestone in the Development of International Humanitarian Law", *International Review of the Red Cross*, Vol. 99, No. 2, 2017, pp. 787–90.

23 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, p. xxxiv.

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throughout the 20th and in the early 21st centuries. The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction[24] was adopted in 1972, followed by the framework Convention Prohibiting Certain Conventional Weapons (CCW) (1980)[25] and its five protocols,[26] the Convention prohibiting Chemical Weapons (1993),[27] the Anti-Personnel Mine Ban Convention (APMBC) (1997),[28] the Convention on Cluster Munitions (CCM) (2008)[29] and the Treaty on the Prohibition of Nuclear Weapons (TPNW) (2017).[30]

What these instruments have, for the most part, in common is that they were developed as a response to the suffering caused by different means and methods of warfare, with the aim of preventing such suffering from occurring again.[31] It is worth examining some of them in more detail. The Geneva Conventions, their Additional Protocols and the CCW are addressed below. The APMBC, the CCM and the TPNW, which constitute a newer "generation" of disarmament instruments, characteristic of the dynamics of the modern era of IHL development, are examined later on in the article.

How treaties develop

Like many international law treaties, but perhaps more so with the core IHL treaties, i.e. the Geneva Conventions of 1949 and the Additional Protocols of 1977, their adoption can appear almost miraculous given the time when they were negotiated and the prevailing tensions in international relations, their subject matter (regulating war) and the detail of their provisions.

There are several explanations for this. One of them highlights the social pressure derived from the moral force of the argument in favour of protecting victims of war, and the opprobrium attached to opposing it. While certain States

24 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction. Opened for Signature at London, Moscow and Washington 10 April 1972 (entered into force 26 March 1975).
25 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980 (entered into force 2 December 1983).
26 Protocol on Non-Detectable Fragments (Protocol I), Geneva, 10 October 1980 (entered into force 2 December 1983); Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II as amended on 3 May 1996) (entered into force 3 December 1998); Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Geneva, 10 October 1980 (entered into force 2 December 1983); Protocol on Blinding Laser Weapons (Protocol IV), 13 October 1995 (entered into force 30 July 1998); Protocol on Explosive Remnants of War (Protocol V), 28 November 2003 (entered into force 12 November 2006).
27 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. Paris, 13 January 1993 (entered into force 29 April 1997).
28 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997 (entered into force 1 March 1999).
29 Convention on Cluster Munitions, 30 May 2008 (entered into force 1 August 2010).
30 Treaty on the Prohibition of Nuclear Weapons, 7 July 2017 (entered into force 22 January 2021).
31 Emily Crawford, "Non-Binding Norms in the Law of Armed Conflict", *Articles of War*, 3 February 2022, available at: https://lieber.westpoint.edu/non-binding-norms-law-of-armed-conflict/.

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might have preferred not to have these treaties, or to absolutely avoid certain obligations in the treaties, they nonetheless felt compelled to take part in the negotiations and not to be seen as opposing them.[32] As a consequence, while not "blocking" the treaties, they negotiated the texts down in order to weaken obligations. Similarly, IHL treaties contain a number of indeterminate and imprecise notions that reflect choices by States on the types of conflicts that will be regulated, which types of combatants will be protected and privileged or not, which type or amount of violence is legitimate or not[33] – and these choices evolved and changed over time, especially between 1949 and 1977. Despite these compromises, each of these instruments strengthened, beyond any doubt, the protection of people affected by armed conflict.[34]

For instance, a factor noted to have contributed to the adoption of the Additional Protocols was social pressure exerted by "Developing World" and Socialist States, spearheaded by the then USSR.[35] Against the backdrop of the Cold War and the wars of decolonization, which saw grave atrocities against civilians, a coalition formed by such States systematically pushed for revisions in IHL, generating pressure that significantly impacted the drafting and negotiation of the Additional Protocols. This pressure led previously conservative States such as the United States and United Kingdom, who were opposed to any development of IHL as regards the protection of civilians, to gradually adopt a more flexible and compromising approach and ultimately agree on moving IHL significantly forward.[36]

Beyond the social pressure, it is fair to say that more than most other branches of law (and similarly to international human rights law), IHL and its development through negotiation are characterized not only by a transactional or tit-for-tat element – though that plays an important part – but also by common normative positions. One might even say that they are largely guided by shared interests, the achievement of a "common good". It has often been described how strong this element was after the Second World War in the negotiation of the 1949 Geneva Conventions:[37] "Something of the world's disgust at the violence and cruelty of the war that had just ended was reflected in the fact that by 31

32 Giovanni Mantilla, "Forum Isolation: Social Opprobrium and the Origins of the International Law of Internal Conflict", *International Organization*, Vol. 72, No. 2, 2018, pp. 319 and 323; Boyd van Dijk, *Preparing for War, The Making of the Geneva Conventions*, Oxford University Press, Oxford, 2022, describes the watering down of provisions and exclusion of certain war-time acts, such as the protection of political prisoners, starvation or the use of nuclear weapons.

33 Helen M. Kinsella and Giovanni Mantilla, "Contestation before Compliance: History, Politics, and Power in International Humanitarian Law", *International Studies Quarterly*, Vol. 64, No. 3, 2020.

34 On a historical account of the making of the four Geneva Conventions from a UK perspective, see also Geoffrey Best, "Making the Geneva Conventions of 1949: The View From Whitehall", in C. Swinarski (ed.), above note 22, pp. 67–77.

35 For a detailed analysis, see Giovanni Mantilla, "Social Pressure and the Making of Wartime Civilian Protection Rules", *European Journal of International Relations*, Vol. 26, No. 2, 2020; as well as Henry Lovat, *Negotiating Civil War. The Politics of International Regime Design*, Cambridge University Press, Cambridge, 2020.

36 H. Lovat, *ibid*., p. 20.

37 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, p. 38.

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December 1949, fifty-five states had signed the four Geneva Conventions."[38] Thus, IHL treaties come about as a result of a humanitarian imperative: a need to protect specific categories of people or to restrict certain means and methods of warfare, and the perception of a gap in international law. The moral imperative to regulate the behaviour of belligerents or the weapons used has always played an important role, and acted as a convincing factor for adopting new rules, or at least as a factor for not opposing them openly.

This belief in a common good, the achievement of which is in the interest of all negotiating States, is essential in the development of norms whose enforcement relies largely on the good faith of contracting parties. Indeed, the very object and purpose of IHL and its humanitarian character mean that putting limits to the violence of armed conflict is a common interest shared by negotiating States, and that the normative component is stronger in IHL than in many other branches of law. Trust generally follows the perception of shared understandings, in particular on what is considered right or wrong. In negotiations, such common understandings of right and wrong are built, not least among individuals involved in the negotiations whose agency and role cannot be overstated.[39] In other words, while diplomatic negotiations of IHL norms among States are always influenced by national interest, military and security considerations, and many other "non-humanitarian" considerations, elements of "common good" and trust in the power of norms also play a role.[40]

Another crucial factor which contributed to successful negotiations in the case of the 1949 Geneva Conventions and their Additional Protocols, and ultimately to the acceptance of the norms developed or codified therein, was the role of the ICRC, and the broader Red Cross and Red Crescent Movement, as a driving force behind these instruments. Despite the occasional concerns about the perceived increasingly political role of the ICRC and the National Red Cross and Red Crescent Societies,[41] both enjoyed a high level of trust among many States as impartial actors motivated only by humanitarian considerations.

Beyond States, the ICRC and National Red Cross and Red Crescent Societies have been instrumental in the development of IHL. The ICRC proposed the draft for the first Geneva Convention of 1864 and all subsequent Geneva Conventions and their Protocols. It has also contributed significantly to the development of weapons law. This role is recognized in the Geneva Conventions and in the Statutes of the International Red Cross and Red Crescent Movement, which entrust it, among others, with the task of preparing the development of

38 Caroline Moorehead, *Dunant's Dream, War Switzerland and the History of the Red Cross*, Caroll & Graf, New York, 1998, p. 557.

39 Elvira Rosert, presentation in "Negotiation as a Means of Building Trust: The Example of IHL Development", session organized by the ICRC in the context of the Centre of Competence on Humanitarian Negotiation World Summit, 1 July 2021.

40 *Ibid*. For a more detailed analysis of theories on why States adhere to international law in general, and IHL in particular, see Giovanni Mantilla, "Conforming Instrumentalists: Why the USA and the United Kingdom Joined the 1949 Geneva Conventions", *European Journal of International Law*, Vol. 28, No. 2, 2017.

41 G. Best, above note 34, pp. 68–71.

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IHL.[42] Furthermore, the resolutions of the International Conference of the Red Cross and Red Crescent have traditionally triggered IHL development.

The willingness to come to an agreement among negotiators is, to a certain degree, a function of the frequency and intensity of interaction among them. Treaty negotiations, usually taking place in several rounds over several years, provide both. This is even more so when negotiations take place in an institutionalized setting where participants meet regularly to discuss different issues. In such cases, the trust gained in previous processes may spill over to others.[43] Unlike weapons treaties, however, the Geneva Conventions and their Additional Protocols are characterized by the absence of a permanent forum where States can review the implementation of these instruments, identify the existence of gaps and decide on the development of the law.

The CCW, a framework (or "umbrella") convention complemented by – so far – five protocols, provides for an institutionalized setting for States Parties to meet regularly. As its preamble mentions, it provides the general framework in order "to continue the codification and progressive development of the rules of international law applicable in armed conflict" through protocols. It contains three original protocols of 1980, on the use of any weapons the primary effect of which is to injure by fragments that in the human body escape detection by X-ray; restricting the use of mines, booby-traps and similar devices; and restricting the use of incendiary weapons, i.e. weapons that use fire as their means of injury or destruction. A 1995 protocol prohibits blinding laser weapons, and a 2003 protocol seeks to minimize the risks and effects of explosive remnants of war after the end of hostilities.

The example of the CCW is illustrative of two interesting aspects of IHL development through treaties: the pre-emptive development of norms, in anticipation of humanitarian consequences likely to occur in the future, and protocols to existing instruments as a means for further development of the law.

42 Article (2)(g) of the Statutes of the International Red Cross and Red Crescent Movement adopted by the 25th International Conference in 1986. For the role of the ICRC and the Movement in the development of IHL, see in particular R. Geiß, A. Zimmermann and S. Haumer (eds), above note 20; F. Bugnion, above note 10, pp. 193 ff; Knut Dörmann, "The Role of Nonstate Entities in Developing and Promoting International Humanitarian Law", *Vanderbilt Journal of Transnational Law*, Vol. 51, 2018; Knut Dörmann and Louis Maresca, "The International Committee of the Red Cross and its Contribution to the Development of International Humanitarian Law in Specialized Instruments", *Chicago Journal of International Law*, Vol. 5, No. 1, 2004, pp. 221–4; Jean-Philippe Lavoyer and Louis Maresca, "The Role of the ICRC in the Development of International Humanitarian Law", *International Negotiation*, Vol. 4, No. 3, 1999, pp. 503–4; Gabriel Pablo Valladares, "El Comité internacional de la Cruz Roja (CICR) y su contribución a los últimos desarrollos del derecho internacional humanitario", *Anuário brasileiro de direito internacional*, Vol. 2, No. 13, 2012; Yves Sandoz, "The International Committee of the Red Cross as Guardian of International Humanitarian Law", *Yugoslav Review of International Law*, 1996, available at: www.icrc.org/en/doc/resources/documents/misc/about-the-icrc-311298.htm; Hans-Peter Gasser, "International Committee of the Red Cross (ICRC)", *Max Planck Encyclopedia of Public International Law*, June 2016, para. 28, available at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e310?rskey=1RM8pW&result=1&prd=MPIL; David P. Forsythe and Barbara Ann J. Rieffer-Flanagan, *The International Committee of the Red Cross: A Neutral Humanitarian Actor*, 2nd ed., Routledge, London and New York, 2016, pp. 38–53.

43 E. Rosert, above note 39.

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CCW Protocol IV is an example of an IHL treaty aimed at preventing humanitarian consequences before they occur. It prohibits the use in armed conflict of blinding laser weapons. The protocol was negotiated and adopted before such weapons were ever employed in armed conflict, as a response to technological developments that raised concerns and posed a real risk that such weapons would be used. At the time of writing this article (2022), ongoing discussions on prohibiting and regulating autonomous weapon systems turn around similar issues. In both cases, the central question is whether existing IHL rules and principles are sufficient to effectively protect those affected by such weapons. A negative answer prompted States to negotiate new legally binding rules to address the grave humanitarian concerns associated with blinding laser weapons. Similarly, many States, as well as the ICRC,[44] are calling for new law to prohibit or regulate autonomous weapon systems.

IHL development does not stop with the adoption of a treaty. When the need for further developments arose, in order not to jeopardize the *acquis* of existing law, States often used the technique of adding protocols to existing treaties. The CCW is of course not the only example of this technique. The same was done with the Geneva Conventions of 1949 and their Additional Protocols of 1977 and 2005,[45] and with the Hague Convention for the Protection of Cultural Property of 1954, which was supplemented by two protocols: the First Protocol of 1954[46] which aims to prevent the exportation of cultural property from occupied territory and to provide for restitution of illegally exported objects, and the Second Protocol of 1999[47] which seeks to strengthen the Convention through preparatory and precautionary measures, establishes a regime of enhanced protection, and outlines criminal responsibility.

The technique of adding protocols to an existing instrument offers an additional avenue for developing the law, as well as some flexibility to States, which remain bound by the original convention while considering whether or not to join the protocols. At the same time, it can lead to an imbalance within a treaty regime, whenever there is a significant difference in membership between the framework convention and its protocols, or between different protocols.

Moreover, with each negotiation of an additional protocol that builds upon a principal treaty, there is a certain risk of regression, in particular as regards transposing agreed language from the principal instrument into the subsequent one. Once such language is placed on the negotiation table, the risk of it being

44 ICRC, "Peter Maurer: 'We Must Decide What Role we Want Human Beings to Play in Life-and-Death Decisions During Armed Conflicts'", 12 May 2021, available at: www.icrc.org/en/document/peter-maurer-role-autonomous-weapons-armed-conflict.

45 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005 (entered into force 14 January 2007) (AP III). AP III designated the red crystal as a protective emblem equivalent to the red cross and the red crescent.

46 Protocol for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954 (entered into force 7 August 1956).

47 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 26 March 1999 (entered into force 9 March 2004).

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weakened or altogether rejected cannot fully be avoided. In other words, the "development" of IHL is not necessarily linear, and it contains a risk of moving backward.

As previously mentioned, treaty-making is typically a response to gaps in the existing legal framework. However, the question of whether existing rules are sufficient or not cannot always be answered simply, especially as the framework of IHL rules becomes denser. There might be very clear gaps, but there might also be disagreement on whether the rules are sufficient. In other cases, rules might be clearly sufficient, but States may nevertheless want to reaffirm or make them explicit for certain situations or for certain weapons. All these factors continue to influence discussions on the development of IHL, as we will see later.

Development through custom

Another pathway for the development of IHL, that has been alternating with treaties,[48] is customary international law:

> By nature, customary international law is unwritten. The "discovery" or "identification" of customary law happens usually through judicial decisions or legal writings. States may also declare which parts of IHL they consider customary, but such statements are not binding on other states.[49]

The establishment of a customary international law norm requires two elements: State practice and *opinio juris*. As these elements evolve, so, too, does IHL. Different developments can take place in this respect. For one, an IHL norm stipulated by treaty and binding upon States party to that treaty can, in time, acquire customary status. Indeed, while customary law can be established without the pre-existence of a treaty, treaties can constitute an element of *opinio juris*. And the other way around: a customary IHL rule can be codified in a treaty. There is a certain fluidity between crystallization and codification of customary international law.[50] Lastly, the content of a customary norm may change over time, provided State practice and *opinio juris* change accordingly.[51]

48 P. Tavernier, above note 6, p. 734.

49 J.-M. Henckaerts, above note 5, p. 17.

50 S. Sivakumaran, above note 7, p. 361.

51 International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision (Appeals Chamber), 2 October 1995, para. 83; ICTY, *Prosecutor v. Zdravko Mucić, Hazim Delić, Esad Landžo and Zejnil Delalić*, Case No. IT-96-21-T, Judgment (Trial Chamber), 16 November 1998 (*Čelebići* case), para. 202; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), "Introduction", in *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, pp. xliv and xlviii–li, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_in; Jean-Marie Henckaerts, "Study on Customary International Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict", *International Review of the Red Cross*, Vol. 87, No. 857, 2005, p. 180; Tullio Treves, "Customary International Law", in *Max Planck Encyclopedia of Public International Law*, November 2006, paras 3, 9, 38 and 85, available at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1393?rskey=IR8g8G&result=1&prd=OPIL; Robert Heinsch, "Methodological Challenges in Ascertaining Customary International Humanitarian Law: Can Customary International Law Respond to Changing Circumstances in Warfare?", in Heike Krieger and Jonas Püschmann (eds), *Law-Making and*

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While State practice is a prerequisite for the creation of customary norms, the identification of such norms is often done by other actors than States. As has been observed,

> it is relatively rare for a State to identify the existence of a customary norm outside its pleadings in a particular case. In contrast, it is far more common for an international court, tribunal, or the ILC [International Law Commission] to determine the existence of a customary norm.[52]

In 1995, the ICRC was mandated by States to carry out a Study on Customary IHL rules, which shall be discussed later.[53]

AP I to the Geneva Conventions is a good example of the interplay between treaty and customary law in IHL. As we saw earlier, the Protocol was the product of lengthy and difficult negotiations. Its sometimes vague and ambiguous language was the resulting compromise in strenuous attempts to reconcile diverging or conflicting understandings and interpretations of key concepts such as "military necessity" and "proportionality" and positions on a number of issues. Ultimately, some of the agreed provisions introduced new prohibitions and obligations, markedly changing the law in this respect, while others codified what was considered to be existing principles and rules of IHL under customary international law.

However, the question of what exactly constituted the codification of existing custom, and what were novel obligations, was an object of considerable controversy. Initially, some commentators, in particular, went as far as to question the force of AP I as a legally binding instrument, and these persistent objections provided an argument against the customary nature of some of its provisions.[54]

Yet, approaching the beginning of the 21st century, this situation had completely changed. Two factors played a major role in the growing acceptance of AP I as both codifying existing customary law and creating new law: the establishment of the International Tribunals for the former Yugoslavia and Rwanda, and the engagement of a new generation of practitioners and academics with a strong humanitarian background and interest.[55] As a result, by the

Legitimacy in International Humanitarian Law, Edward Elgar Publishing, Cheltenham and Northampton, MA, 2021.

52 S. Sivakumaran, above note 7, p. 360.

53 Recommendation II of the Intergovernmental Group of Experts for the Protection of War Victims, Geneva, 23–27 January 1995, endorsed by Resolution 1 of the 26th International Conference of the Red Cross and Red Crescent in 1995; see ICRC, "International Humanitarian Law: From Law to Action Report on the Follow-up to the International Conference for the Protection of War Victims", available at: www.icrc.org/en/doc/resources/documents/resolution/26-international-conference-resolution-1-1995.htm.

54 Amanda Alexander, "A Short History of International Humanitarian Law", *European Journal of International Law*, Vol. 26, No. 1, 2015, p. 128; Remarks of Lieutenant Professor William V. O'Brien in Martin P. Dupuis, John Q. Heywood and Michéle Y. F. Sarko, "The Sixth Annual American Red Cross–Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions", *American University International Law Review*, Vol. 2, No. 2, 1987, p. 511; Michael J. Matheson, "Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions", *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 422 (as cited by A. Alexander, *ibid.*).

55 A. Alexander, above note 54, pp. 130–1.

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beginning of the 21st century it was generally accepted that many of the provisions of AP I reflected customary international law.[56]

The law regulating NIAC is another example of the development of IHL beyond treaties. In this respect, the gap left in the treaty codification has been considerably reduced through other treaties and jurisprudence, much of which, though not all, is now accepted as customary law.

As is well known, there is only one article in the 400 or so articles contained in the Geneva Conventions that regulates NIACs, namely Article 3 common to the four Geneva Conventions. The ICRC sought to promote a much more comprehensive codification of the law of NIAC with a second additional protocol in 1977. However, during the negotiations this ambition met with resistance by States that had just experienced NIACs or were concerned that situations in their territory might be considered as NIAC. It was also resisted by colonial States, as well as by newly independent States seeking to protect their sovereignty against secession and rebellion and whose main aim was to ensure that fights against colonial domination, occupation and racist regimes were recognized as IAC.[57] The result was a mere twenty-eight articles in AP II (as opposed to 102 in AP I).

This wide gap between the regimes of IAC and NIAC has gradually been closed, even if not entirely.

First, a number of subsequent treaties cover both IAC and NIAC. While the CCW and its original three protocols were limited to IAC, Protocol II on mines, booby-traps and other devices was amended already in 1996 to apply to NIAC as well, and the Convention itself was subsequently revised and its scope of application, as well as that of its protocols, extended to NIAC. Its 2003 Protocol V on Explosive Remnants of War explicitly stipulates obligations on all parties to armed conflict, i.e. whether State or non-State.[58]

Newer IHL treaties apply equally to both types of conflict. This is the case with the 1997 APMBC, the 1998 Rome Statute of the International Criminal Court (ICC) (even if it differentiates between crimes committed in IAC and NIAC[59]), the 1999 Second Protocol to the Hague Convention for the protection of cultural property, and the 2008 CCM. The amendments to the ICC Statute of 2010,[60] 2017[61] and 2019[62] go in the same direction, as they gradually extended the list of war crimes to NIACs.

56 The fact that the majority of the Protocol's provisions have corresponding customary rules is demonstrated by the ICRC's Customary IHL Study. The Study was commissioned by the 26th International Conference of the Red Cross and Red Crescent, which mandated the ICRC to prepare a report on customary rules of IHL applicable in IACs and NIACs; see J.-M. Henckaerts, above note 5, p. 17.

57 Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff, The Hague, 1982, pp. 8–10; G. Mantilla, above note 20, pp. 64–5; Y. Sandoz, C. Swinarski and B. Zimmermann (eds), above note 23, pp. 1335–6; G. Best, above note 8, pp. 343–7; G. Mantilla, above note 32, pp. 321 ff; H. Lovat, above note 35, pp. 147–58.

58 Protocol on Explosive Remnants of War, above note 26, in particular, Arts 3, 4 and 6.

59 Rome Statute of the ICC, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002), Art. 8.

60 ICC-ASP/9/Res.5, 10 December 2010.

61 ICC-ASP/16/Res.4, 14 December 2017.

62 ICC-ASP/18/Res.5, 6 December 2019.

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Second, jurisprudence played a crucial role in the convergence of IAC and NIAC law as regards individual criminal responsibility, in particular the jurisprudence of the *ad hoc* International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR). More generally, international courts and tribunals have been instrumental in the development of IHL.[63]

A characteristic example is the jurisprudence of the ICTY and ICTR on war crimes in IAC and NIAC. In the *Tadić* case, the ICTY Appeals Chamber interpreted the ICTY statute as granting the tribunal jurisdiction not only on grave breaches committed in the context of IACs, but also on other violations of IHL, including potential war crimes committed in NIAC.[64] This interpretation allowed the ICTY to elaborate on the customary law principles applicable in NIAC as well as on individual criminal responsibility for violations of these principles.[65] The establishment of the applicability in customary international law of the principle of individual criminal responsibility for serious violations of IHL in NIAC was a crucial stepping stone in the evolution of IHL.[66] The ICTR in its very first judgment, *Akayesu*, confirmed the *Tadić* conclusion that the violation of IHL rules applicable in NIAC entails the individual criminal responsibility of the perpetrator.

The case law of the ICTY and ICTR is illustrative of the content of customary law in the area of war crimes in NIAC, and it largely influenced the positions of States during the negotiations of the Rome Statute of the ICC, as to

63 On the ICTY and ICTR, see Robert Heinsch, "Judicial 'Lawmaking' in the Jurisprudence of the ICTY and ICTR in Relation to Protecting Civilians From Mass Violence: How Can Judge-Made Law be Brought into Coherence with the Doctrine of the Formal Sources of International Law?, in Philipp Ambach, Frédéric Bostedt, Grant Dawson and Steve Kostas (eds), *The Protection of Non-Combatants During Armed Conflict and Safeguarding the Rights of Victims in Post-Conflict Society: Essays in Honour of the Life and Work of Joakim Dungel*, Brill Nijhoff, Leiden and Boston, MA, 2015. On other international and regional judicial bodies and IHL, see, e.g., Juana María Ibáñez Rivas, "El derecho internacional humanitario en la jurisprudencia de la Corte Interamericana de Derechos Humanos", *Revista Derecho del Estado*, Vol. 36, 2016; Linos-Alexandre Sicilianos, "L'articulation entre droit international humanitaire et droits de l'homme dans la jurisprudence de la Cour européenne des droits de l'homme", *Revue suisse de droit international et de droit européen*, Vol. 27, No. 1, 2017; Olivier de Frouville and Olivia Martelly, "La juridictionnalisation du droit des conflits armés : les tribunaux internationaux mixtes", in Vincent Chetail (ed.), *Permanence et mutation du droit des conflits armés*, Bruylant, Brussels, 2013; Vincent Chetail, "The Contribution of the International Court of Justice to International Humanitarian Law", *International Review of the Red Cross*, No. 850, 2003; Christopher Greenwood, "The International Court of Justice and International Humanitarian Law", in *Shielding Humanity: Essays in International Law in Honour of Judge Abdul G. Koroma*, Brill/Nijhoff, Leiden/Boston, 2015; Shane Darcy, "A Subtle yet Significant Influence: Judicial Decisions and the Development of International Humanitarian Law", in H. Krieger and J. Püschmann (eds), above note 51; Jérôme de Hemptinne, "L'évolution des fonctions du juge pénal international et le développement du droit international humanitaire", in Nico Krisch, Mario Prost and Anne van Aaken (eds), *European Society of International Law Conference Paper Series* No. 10/2013; Robert Cryer, "The Relationship of International Humanitarian Law and War Crimes: International Criminal Tribunals and their Statutes", in Caroline Harvey, James Summers and Nigel D. White (eds), *Contemporary Challenges to the Laws of War: Essays in Honour of Professor Peter Rowe*, Cambridge University Press, Cambridge, 2014.

64 ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision (Appeals Chamber), 2 October 1995, para. 142.

65 Eve La Haye, *War Crimes in Internal Armed Conflicts*, Cambridge University Press, Cambridge, 2008, p. 136.

66 *Ibid*.

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whether serious violations of IHL amount to war crimes in NIAC and as to which serious violations amount to war crimes in customary law and should therefore be included in the Statute.[67] As a result, there is today significant overlap between conduct criminalized in IAC and NIAC, even if some differences remain between the two.

At the same time, the case law of these tribunals and their interpretation of the rules of IHL influenced the understanding of the content of IHL rules, not only those protecting civilians and persons *hors de combat*, but also the rules on the conduct of hostilities. One example is the articulation between the prohibition against indiscriminate attacks and the prohibition against direct attacks against civilians. In this respect, the ICTY systematically inferred from the use of inherently (or otherwise) indiscriminate weapons the intent to target civilians, thus in practice equating attacks using a means or method which cannot be directed against a specific military objective with attacks directly targeting civilians.[68]

The ICRC Study on Customary IHL, published in 2005, took cognizance of these developments and of evolved State practice and showed the increasing convergence between the rules in IAC and NIAC. Of the 161 rules that the study identifies, twelve are identified as applying only to IAC, mainly relating to prisoners of war and to situations of occupation. Still, some differences and nuances continue to exist in the 146 remaining rules. First, eight were found to be only "arguably" customary in NIAC; second, some rules are slightly differently worded for NIAC; and third, some rules applicable in NIAC were only found to be binding on States. While the ICRC's Study is not without criticism,[69] it has also received praise for its contribution to the difficult task of determining customary IHL rules[70] and has been cited in several national and international courts and tribunals, as well as in military manuals.[71]

67 *Ibid*., p. 174.

68 See, characteristically, ICTY, *The Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Judgment on Appeal (Appeal Chamber), 12 November 2009, para. 53.

69 Daniel Bethlehem, "The Methodological Framework of the Study", in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2007, pp. 10–14; Marco Sassòli, "Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law", *Journal of International Humanitarian Legal Studies*, Vol. 1, 2010, pp. 17 and 21; John B. Bellinger, III and William J. Haynes II, "A US Government Response to the International Committee of the Red Cross Study *Customary International Humanitarian Law*", *International Review of the Red Cross*, Vol. 89, No. 866, 2007, pp. 444–8; Dieter Fleck, "Die IKRK-Gewohnheitsrechtsstudie: Polarisierend oder konsensbildend?", *Humanitäres Völkerrecht: Informationsschriften, Journal of International Law of Peace and Armed Conflict*, Vol. 22, No. 3, 2009.

70 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, p. 104; Aharon Barak, "International Humanitarian Law and the Israeli Supreme Court", *Israel Law Review*, Vol. 47, No. 2, 2014, p. 184; Marko Milanovic and Sandesh Sivakumaran, "Assessing the Authority of the ICRC Customary IHL Study", *International Review of the Red Cross*, Vol. 104, No. 2–3, 2022.

71 ICTY, *The Prosecutor v. Ljube Boskoski and Johan Tarčulovski*, Case No. IT-04-82-T, Judgment (Trial Chamber II), 10 July 2008, para. 205; European Court of Human Rights, *Hannan v. Germany*, Application No. 4871/16, Judgment (Grand Chamber), paras 80, 81 and 83; US Court of Military Commission Review, *United States of America v. Ali Hamza Ahmad Suliman Al Bahlul*, Case No. 820

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In other words, despite some remaining fundamental differences, the considerable dichotomy between IAC and NIAC that existed in treaty law has been considerably reduced through the development of NIAC law. It is probably the most visible way in which IHL has developed through a combination of new sectorial treaties, jurisprudence, State practice and custom.

Development through interpretation

While treaty and custom are common pathways for the creation of new IHL norms, development can also take place in the context of existing rules, by means of interpretation. Indeed, as has been noted, "[t]he role of interpretation in the making and shaping of international law is significant, as the law develops incrementally through interpretation and the line between development through interpretation and creation of new law is a fine one."[72] A variety of actors perform interpretive functions. Some of these are in fact mandated by States to interpret the law.[73] The role of the ILC is well recognized is this respect.[74] The interpretation of customary and treaty norms of IHL by judiciary bodies, both international and domestic, in particular, has shaped the understanding of those norms remarkably, and at times also expanded their scope of application.[75]

The rules of treaty interpretation are set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Quite a bit of attention has recently been given to the role of subsequent practice in treaty interpretation.[76] The

F. Supp. 2d 1141 (M.C. 2011), No. CMCR 09-001, Judgment, 9 September 2011, available at: www.courtlistener.com/opinion/2143196/united-states-v-al-bahlul/; New Zealand Defence Force, *Manual of Armed Forces Law*, Vol. 4: *Law of Armed Conflict*, DM 69, 2nd ed., 2019, p. 3–16, para. 3.4.7 and subsequent references on various rules, available at: www.onlinelibrary.iihl.org/wp-content/uploads/2021/05/NZ-Manual-Law-of-Armed-Conflict.pdf; República de Colombia, Comando General de las Fuerzas Militares, *Operational Law Manual for the Armed Forces (Manual de derecho operacional paralas fuerzas militares)*, MM.FF. 3-41, 2nd ed., 2015, multiple references; German Federal Ministry of Defence, *Law of Armed Conflict: Manual*, Joint Service Regulation (ZDv) 15/2, May 2013, p. 19, available at: www.bmvg.de/resource/blob/93610/ae27428ce99dfa6bbd8897c269e7d214/b-02-02-10-download-manual-law-of-armed-conflict-data.pdf; Danish Ministry of Defence, *Military Manual on International Law Relevant to Danish Armed Forces in International Operations*, 2016, p. 118 and subsequent references, available at: www.forsvaret.dk/globalassets/fko---forsvaret/dokumenter/publikationer/-military-manual-updated-2020-2.pdf; Belgium, *Manuel de droit operationnel*, 2016, p. 107 and subsequent references.

72 S. Sivakumaran, above note 7, p. 347.

73 *Ibid*., p. 362.

74 Danae Azaria, "Codification by Interpretation: The International Law Commission as an Interpreter of International Law", *European Journal of International Law*, Vol. 31, 2020; for an illustration of the diverging views within the Commission over interpretation, codification and progressive development, see *Report of the International Law Commission on the Work of its Sixty-Ninth Session* (1 May–2 June and 3 July–4 August 2017), para. 134, available at: https://legal.un.org/ilc/reports/2017/english/chp7.pdf.

75 On the role of the judiciary in driving change in international law, see also Nico Krisch, "The Dynamics of International Law Redux", *Current Legal Problems*, Vol. 74, No. 1, 2021, pp. 20–21; "Interview with Ted Meron, Judge, International Residual Mechanism for Criminal Tribunals", *International Review of the Red Cross*, Vol. 104, No. 2–3, 2022.

76 ILC, reports of the Special Rapporteur (2013–2018): ILC, Report of the International Law Commission, UN Doc. A/68/10, 2013, Chapter IV, paras 29–39; ILC, Report of the International Law Commission, UN Doc. A/69/10, 2014, Chapter VII, paras 66–76; ILC, Report of the International Law Commission, UN Doc. A/70/10, 2015, Chapter VIII, paras 118–29; ILC, Report of the International Law Commission, UN Doc. A/

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purpose in the following paragraphs is not to give a comprehensive overview of the various methods of interpretation in the development of IHL, but rather to give a very brief outline, if somewhat impressionistic, on how interpretation has contributed to the development of IHL over time. The example of NIAC law above showed the influence of international courts on the development of IHL. The interplay between State practice, interpretation and custom[77] can also be particularly dynamic through the role of domestic courts and their judges in the development of IHL.[78] As has been noted, "domestic courts play a dual role. They are part of the State for the purposes of State practice but they are also neutral lawmakers in the sense that their judgments constitute a subsidiary means for determining the law."[79]

While the primary function of courts is to apply the law, in doing so they have a spectrum of options, some of which may result in normative development through interpretation.

In their interpretation and application of IHL, domestic judges may rely on the case law of international courts and tribunals, judgments from other jurisdictions dealing with similar legal questions, academic writings, and reports produced by international and non-governmental organizations, including the United Nations (UN) and the ICRC.[80] There is thus a strong interplay between national and international courts, academics, international organizations, civil society, and, of course, State practice itself which may or may not align with the views taken by domestic judges.

Overall, and especially on the law of NIAC, interpretation by domestic courts has over time contributed to extend the protection provided by treaty law. At times, courts have interpreted the law differently, or even in outright contradiction, to their State's national position. In doing so, they have assumed a role which has been called utopian, but which over time can influence the position of the government concerned.[81]

71/10, 2016, Chapter VI, paras 64–76; ILC, Fifth Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties by Georg Nolte, Special Rapporteur, UN Doc. A/CN.4/715, 28 February 2018; Emily Crawford, "Interpreting the Geneva Conventions: Subsequent Practice Instead of Treaty Amendments? A Case Study of 'Non-International Armed Conflicts' Under Common Article 3", in H. Krieger and J. Püschmann (eds), above note 51; Jean-Marie Henckaerts and Elvina Pothelet, "The Interpretation of IHL Treaties: Subsequent Practice and Other Salient Issues", in H. Krieger and J. Püschmann (eds), above note 51; Irina Buga, *Modification of Treaties by Subsequent Practice*, Oxford University Press, Oxford, 2018; Georg Nolte (ed.), *Treaties and Subsequent Practice*, Oxford University Press, Oxford, 2013; Benedict Abrahamson Chigara, "Treaty-Text Loyalists' Burden with Subsequent State Practice", *Netherlands International Law Review*, Vol. 68, 2021; Julian Arato, "Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences", *IILJ Emerging Scholars Papers*, 2011; Abassali Kadkhodaei and Ehsan Shahsavari, "The Role of Subsequent Practice in the Interpretation of Constituent Treaties of International Organizations", *Public Law Studies Quarterly*, Vol. 52, No. 1, 2022.

77 For further discussion on the interplay between treaty, interpretation and custom, see E. Crawford, above note 76.

78 Laurie R. Blank, "Understanding When and How Domestic Courts Apply IHL", *Case Western Reserve Journal of International Law,* Vol. 44, No. 1, 2011.

79 S. Sivakumaran, above note 7, p. 384.

80 Sharon Weill, "Building Respect for IHL Through National Courts", *International Review of the Red Cross*, Vol. 96, No. 895/896, 2014, p. 875.

81 Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law*, Oxford University Press, Oxford, 2014, pp. 157 ff.

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However, as with treaties, development through interpretation is not a linear process. There are also instances of courts providing a distorted interpretation of the law in order to justify unlawful State action;[82] or they can contribute to an interpretation of the law which over time renders acceptable practices which had previously not been considered lawful. There are several examples of national courts interpreting and applying IHL with an effect detrimental to the legal protection of persons affected by armed conflict. The Israeli Supreme Court, for instance, which has had numerous opportunities to contribute to the development of the law of belligerent occupation, has incurred much criticism for unduly limiting the protective scope of IHL.[83] Amongst its many cases, the 2006 *Targeted Killings* case is a much-discussed example, considered by many to have interpreted the concept of direct participation in hostilities in an overly expansive manner,[84] and to have had an influence far beyond national borders.[85]

The decisions by international and national courts are of course subject to debate and criticism,[86] and whether they influence the interpretation of IHL depends on uptake by the international community. However, through their influence on State positions and the "dialogue" between different national and international courts, they undeniably contribute to the shaping of IHL over time.

The development of IHL through interpretation by courts and other actors – and the influence of such interpretation on the understanding of treaties and custom – does not occur in a vacuum. IHL is not a self-contained regime. Developments in other branches of law can therefore have an important effect on the interpretation of IHL norms. Human rights law, in particular, has significantly influenced the interpretation of IHL, especially in more recent decades. This is well documented[87] and will not be the subject of detailed

82 Eyal Benvenisti, *The International Law of Occupation*, 2nd ed., Oxford University Press, Oxford, 2012, pp. 320–8.

83 David Kretzmer, "The Law of Belligerent Occupation in the Supreme Court of Israel", *International Review of the Red Cross*, Vol. 94, No. 885, 2012, p. 236; David Kretzmer and Yaël Ronen, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, Oxford University Press, Oxford, 2021, pp. 490–4.

84 Craig Jones, *The War Lawyers: The United States, Israel, and Juridical Warfare*, Oxford University Press, Oxford, 2020, p. 182; Hilly Moodrick-Even Khen, "Can We Now Tell What 'Direct Participation in Hostilities' Is?", *Israel Law Review*, Vol. 40, No. 1, 2007, pp. 233–6; Kristen E. Eichensehr, "On Target? The Israeli Supreme Court and the Expansion of Targeted Killings", *Yale Law Journal*, Vol. 116, No. 8, 2007. The various reactions to the judgment are also discussed in D. Kretzmer and Y. Ronen, above note 83, p. 476.

85 Ashley Deeks, "Domestic Humanitarian Law: Developing the Law of War in Domestic Courts", in Derek Jinks, Jackson N. Maogoto and Solon Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies: International and Domestic Aspects*, Asser Press, The Hague, 2014, p. 147; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, "Study on targeted killings", UN Doc. A/HRC/14/24/Add.6, 28 May 2010, paras 1, 7 and 12; C. Jones, above note 84, pp. 5–6 and 11.

86 See, e.g., A. Barak, above note 70, p. 187. For an example of misapplication of IHL, see Chintan Chandrachud, "International Humanitarian Law in Indian Courts: Application, Misapplication and Non-Application", in D. Jinks *et al.* (eds), above note 85, p. 405.

87 Gloria Gaggioli, *L'Influence mutuelle entre les droits de l'homme et le droit international humanitaire à la lumière du droit à la vie*, Editions A. Pedone, Paris, 2013, p. 529; Gerd Oberleitner, "The Development of

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description here. There are many examples of human rights law's influence on IHL. For instance, the way the duty to investigate IHL violations is understood today has been shaped to a large degree by human rights jurisprudence.[88]

Similarly, interpretation evolves in time with contemporary sensitivities, social norms and understandings, and this too contributes to the development of IHL. One example of this is the way that IHL rules concerning women are understood today.[89] In a nutshell, IHL rules prohibit discrimination in the treatment of women, including by requiring that due regard be given to their sex and their honour be protected.[90] These rules have been criticized for conceptualizing women in a reductive manner, focusing on their sexual and reproductive roles; for conceptualizing rape as an inevitable by-product of war, rather than a grave breach requiring criminal sanction; and for ignoring issues of structural discrimination or so-called "private sphere" harms that characterize much of the experiences of women and girls in armed conflict.[91]

IHL by Human Rights Bodies", in Ezequiel Heffes, Marcos D. Kotlik and Manuel J. Ventura (eds), *International Humanitarian Law and Non-State Actors: Debates, Law And Practice*, Asser Press, The Hague, 2020, pp. 298 ff; Lawrence Hill-Cawthorne, "Humanitarian Law, Human Rights Law and the Bifurcation of Armed Conflict", *International and Comparative Law Quarterly*, Vol. 64, No. 2, 2015, pp. 304 ff; David Weissbrodt, Joseph C. Hansen and Nathaniel H. Nesbitt, "The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law", *Harvard Human Rights Journal*, Vol. 24, No. 1, 2011, pp. 127 and 139–40; Edoardo Greppi, "Diritto internazionale umanitario dei conflitti armati e diritti umani: profili di una convergenza", *La Comunità Internazionale*, Vol. LI, No. 3, 1996; Robert Kolb, "'Condotta e utilità' e 'mantenimento dell'ordine': Due concetti chiave nella definizione dei rapporti tra diritto internazionale umanitario e diritti umani", in Adriana Di Stefano (ed.), *La tutela dei diritti umani e il diritto internazionale*, Editoriale Scientifica, Naples, 2012; D. Kretzmer and Y. Ronen, above note 83, pp. 86–9; Hans-Joachim Heintze, "Theorien zum Verhältnis von Menschenrechten und humanitärem Völkerrecht", *Humanitäres Völkerrecht: Informationsschriften, Journal of International Law of Peace and Armed Conflict*, Vol. 24, No. 1, 2011; Damien Scalia and Marie-Laurence Hebert-Dolbec, "The Intricate Relationship Between International Human Rights Law and International Humanitarian Law in the European Court for Human Rights Case Law: An Analysis of the Specific Case of Detention in Non-International Armed Conflicts", in Drazan Djukic and Niccolò Pons (eds), *The Companion to International Humanitarian Law*, Brill Nijhoff, Leiden, 2018, pp. 118–22.

88 Noam Lubell, Jelena Pejic and Claire Simmons, *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice*, ICRC and Geneva Academy, September 2019, paras 18 and 34, available at: www.icrc.org/en/document/guidelines-investigating-violations-ihl-law-policy-and-good-practice; Cordula Droege, "Elective Affinities? Human Rights and Humanitarian Law", *International Review of the Red Cross*, Vol. 90, No. 871, 2008, pp. 540 ff; Michelle Lesh, "A Critical Discussion of the Second Turkel Report and How it Engages with Duty To Investigate Under International Law", *Yearbook of International Humanitarian Law*, Vol. 16, 2013.

89 ICRC, *Commentary on the Third Geneva Convention: Convention (III) on Prisoners of War*, 2020, para. 1761.

90 See GC I, Art. 12 and GC II, Art. 12 ("Women shall be treated with all consideration due to their sex."); GC III, Art. 14 ("Women shall be treated with all the regard due to their sex."); GC IV, Art. 27 ("Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.").

91 Judith Gardam, "A Feminist Analysis of Certain Aspects of International Humanitarian Law", *Australian Year Book of International Law*, Vol. 12, 1992, pp. 266 and 277; Judith Gardam and Hilary Charlesworth. "Protection of Women in Armed Conflict", *Human Rights Quarterly*, Vol. 22, No. 1, 2000, pp. 149 ff; Catherine O'Rourke, *Women's Rights in Armed Conflict under International Law*, Cambridge University Press, Cambridge, 2020, pp. 36–43; Orly Maya Stern, *Gender, Conflict and International Humanitarian Law: A Critique of the "Principle of Distinction"*, Routledge Studies in Humanitarian Action, Routledge, Abingdon, 2019, pp. 100 and 103.

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While the treaty text of IHL is hard to change, developments since the adoption of the Geneva Conventions have been significant. International criminal tribunals have clarified gendered crimes, advocacy and scholarship have documented gendered experiences of armed conflict, and the ICRC is working to change sexist interpretations, including in the interpretations reflected in its updated Commentaries to the Geneva Conventions.[92] As a result of these developments, it is now unquestionable that the requirements of non-adverse distinction based on sex set down in IHL treaties require substantive – not formal – equality. It is further clear that sexual violence is prohibited not by requirements related to gendered notions of honour, but by prohibitions of violence to person, and that it is prohibited against everyone regardless of gender. Lastly, significant progress has been made in understanding the gendered implications of the application of IHL rules beyond those protecting pregnant women and mothers.[93]

Another example of evolutive interpretation combined with the interplay between IHL and human rights law is the contemporary understanding of the experiences and the rights of persons with disabilities.[94] This has considerably evolved since the drafting of the Geneva Conventions, and has been shaped by developments in human rights law, especially the 2006 Convention on the Rights of Persons with Disabilities (CRPD). In particular, the language of the Geneva Conventions and AP I still conceives of disability as a medical and charity issue, whereas today disability is understood based on the social and human rights models underlying the CRPD as the interaction between a person's impairment (including physical, mental, intellectual or sensory impairments) and a variety of barriers that prevent his/her full and effective participation in society on an equal basis with others.[95] The difference is not merely semantic. For instance, in cases where persons with disabilities are in the power of a party to a conflict, this conceptualization of disability permits an interpretation of the prohibition of non-adverse distinction that requires substantive equality and positive measures of accessibility and reasonable accommodation to achieve it. Thus, the interpretation of IHL has developed over time towards a more inclusive understanding of the rights and agency of persons with disability, and an obligation of non-adverse distinction that requires substantive equality and positive measures to achieve it.[96]

92 C. O'Rourke, above note 91.

93 ICRC, above note 89, paras 587, 613 and 1761.

94 For more on this topic, see Janet E. Lord, "Persons with Disabilities in International Humanitarian Law – Paternalism, Protectionism or Rights?", in Michael Gill and Cathy J. Schlund-Vials (eds), *Disability, Human Rights and the Limits of Humanitarianism*, Routledge, London and New York, 2016.

95 ICRC, 2016 Commentary on GC I, commentary on common Article 3, para. 553. Both the 2016 Commentary, as well as the original ICRC 1952 Commentary on GC I, are available at: https://ihl-databases.icrc.org/ihl/full/GCI-commentary. For a description of the concepts of "disability" and "persons with disabilities" in the CRPD, see Convention on the Rights of Persons with Disabilities, New York, 13 December 2006 (entered into force on 3 May 2008), Preambular para. (e) and Art. 1(2).

96 Alice Priddy, *Disability and Armed Conflict*, Academy Briefing No. 14, The Geneva Academy of International Humanitarian Law and Human Rights, Geneva, April 2019, available at: www.geneva-academy.ch/joomlatools-files/docman-files/Academy%20Briefing%2014-interactif.pdf; ICRC, *How Law*

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In sum, interpretation is undoubtedly an important way in which IHL develops. As all international law, it is a living instrument. Unlike national legislation, international treaties are not easily adopted or amended, and so their understanding – and that of customary law in parallel – is shaped over time by their application and interpretation in the practice of States, their armed forces, their courts, and other actors.

Development through soft-law instruments

Another interesting contribution to the development of IHL has been made through "soft-law instruments". Soft law is not mentioned among the sources cited in Article 38 of the ICJ Statute. It is not binding, yet it has a certain undefined normative role to play.

Next to the traditional sources of IHL – treaty and custom – the past few decades have seen a proliferation of such soft-law and interpretive instruments, both in IHL and in international law more broadly.[97] These soft-law instruments have various forms and objectives and can influence later developments of treaty or custom. They range from commitments contained in instruments such as political declarations, to principles, codes of conduct or manuals. Some soft-law instruments can be adopted by States in various forms, while others are stand-alone commitments or principles that do not ask States to sign on.[98]

In general, soft-law instruments are aimed at filling gaps in the law, providing solutions in the absence of clear law, strengthening its implementation, interpreting existing legal norms or extrapolating practical measures required to comply with existing obligations.[99] None of these instruments is legally binding *per se*, and the degree to which they impact the development of IHL differs depending on the level of endorsement by States and/or prominent academics and practitioners and the type and authority of stakeholders involved in their development.[100] State endorsement, in turn, can lead to State practice, for instance in military manuals or "on the battlefield".

The Oxford Manual on Laws of War on Land of 1880 is an early example of a soft-law instrument, drafted by Gustave Moynier and unanimously adopted by the

Protects Persons with Disabilities in Armed Conflict, 13 December 2017, available at: www.icrc.org/en/document/how-law-protects-persons-disabilities-armed-conflict; Report of the Special Rapporteur on the Rights of Persons with Disabilities, Gerard Quinn, UN Doc. A/76/146, 19 July 2021; Report of the Special Rapporteur on the Rights of Persons with Disabilities, Gerard Quinn, UN Doc. A/77/203, 20 July 2022.

97 José Luis Rodríguez-Villasante y Prieto, "Introducción a un 'soft law' humanitario: Principales aportaciones de los manuales doctrinales internacionales y otros documentos institucionales y académicos al derecho internacional humanitario", *Revista española de derecho militar*, Vol. 108, 2017; P. Tavernier, above note 6, pp. 738–41.

98 S. Sivakumaran, above note 7, pp. 358, 360–1 and 391. See also "Interview with Eirini Giorgou, Legal Adviser, ICRC Arms and Conduct of Hostilities Unit", *International Review of the Red Cross*, Vol. 104, No. 2–3, 2022.

99 See P. Tavernier, above note 6, p. 738; Wouter G. Werner, "The Law at Hand: Paratext in Manuals on International Humanitarian Law", in H. Krieger and J. Püschmann (eds), above note 51.

100 See S. Sivakumaran, above note 7, p. 366.

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International Law Institute.[101] The Manual was developed as a substitute for a treaty, an outcome considered by the Institute at the time as "premature or at least very difficult to obtain". Its aim was to codify "certain principles of justice which guide the public conscience, which are manifested even by general customs", to serve as a basis for national legislation.[102] Though itself non-legally binding, the Oxford Manual made a significant contribution to the development of IHL, reflected in subsequent key instruments such as the Hague Conventions of 1899 and 1907, the Geneva Convention of 1929, the four Geneva Conventions of 1949, as well as the 1954 Hague Convention on the Protection of Cultural Property in Armed Conflict.

Similarly, the 1923 Hague Rules on Air Warfare were adopted by an international committee of jurists from five States in the aftermath of the First World War, but never achieved the status of an actual treaty (in conformity with the commission's mandate, which was to clarify the questions raised and not to adopt an international treaty). Nevertheless, they did have some degree of influence on legal and military thinking, as well as – partly – on some orders issued by the armed forces of some of the military powers involved in the Second World War. It has been even submitted that the Hague Rules "played a decisive part in the emergence of binding customary international law", reflected today in AP I rules on indiscriminate attacks.[103]

An example of a soft-law instrument that came about as an expert product is the San Remo Manual on Naval Warfare.[104] Drafted by experts on naval warfare, including State experts, this manual has been widely relied upon and used as a reference in national legislation and military manuals. As a result, it is considered the "most recent restatement" of the law of naval warfare, with most of its rules being reflective of customary international law.[105]

Some soft-law instruments have been adopted by the UN General Assembly, such as the UN Principles on the Right to a Remedy and Reparation,[106] while others, like the Guiding Principles on Internal Displacement,[107] have not. The latter example shows that adoption is not a prerequisite for the relevance of such instruments. Despite not adopting them, the

101 *The Laws of War on Land*, Oxford, 9 September 1880 (Oxford Manual).

102 *Ibid.*, Preface. See also E. Crawford, above note 31.

103 Heinz Marcus Hanke, "The 1923 Hague Rules of Air Warfare: A Contribution to the Development of International Law Protecting Civilians From Air Attack", *International Review of the Red Cross*, Vol. 33, No. 292, 1993, pp. 36 and 39.

104 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 12 June 1994.

105 Wolff Heintschel von Heinegg, "Current State of the Law of Naval Warfare: A Fresh Look at the *San Remo Manual*", *International Law Studies*, Vol. 82, pp. 270 and 288; see also Louise Doswald-Beck, "The San Remo Manual on International Law Applicable to Armed Conflicts at Sea", *American Journal of International Law*, Vol. 89, No. 1, 1995, p. 193; William H. Boothby, *The Law of Targeting*, Oxford University Press, Oxford, 2012, p. 313.

106 UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution 60/147, UN Doc. A/RES/60/147, 16 December 2005.

107 UN Office for the Coordination of Humanitarian Affairs, *Guiding Principles on Internal Displacement*, 2nd ed., 2004, available at: www.internal-displacement.org/publications/ocha-guiding-principles-on-internal-displacement.

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UN General Assembly has recognized the Principles as an important international framework for the protection of internally displaced persons and encouraged all relevant actors to use them when confronted with situations of internal displacement. They were, in particular, an important source of inspiration for the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa.[108] Today, the Principles on Internal Displacement are used as a "universal" reference instrument.

More recently, just as with treaties, some States have come together to agree on principles or political declarations in the hope of universalizing them by gathering a wider number of supporting States in the future, as is the case for the Montreux Document on Private Military and Security Companies.[109] Other instruments have been limited to a certain number of States or experts from a geographic region, such as the Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations[110] and the Tallinn Manual on the International Law Applicable to Cyber Operations.[111] A number of these soft-law documents have been drafted through processes led by civil society, with or without the involvement of States.[112] These set out existing law and suggest good practices for implementing it, sometimes going beyond existing legal obligations.[113] An example of such a document is the Safe Schools Declaration and its 2014 Guidelines.[114] Such approaches based on policy and good practice constitute a pragmatic response to humanitarian concerns when faced with the reluctance of States to engage in lawmaking clarification processes, as well as where diverging views on the interpretation or application of the law block other pathways for IHL development (see the "How treaties develop" section). Similarly, a diplomatic process with the participation of over seventy States, international organizations and civil society recently concluded with the elaboration of a political declaration on explosive weapons in populated areas, aimed at committing States to take action to strengthen the protection of civilians

108 Global Protection Cluster, *Fact Sheet on the Guiding Principles on Internal Displacement*, available at: www.globalprotectioncluster.org/gp20/fact-sheet-on-the-guiding-principles-on-internal-displacement/; African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 23 October 2009 (entered into force 6 December 2012).

109 Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, UN Doc. A/63/467–S/2008/636, 17 September 2008.

110 See International Institute of Humanitarian Law, *The Copenhagen Process on The Handling of Detainees In International Military Operations: Principles And Guidelines*, available at: https://iihl.org/wp-content/uploads/2018/04/Copenhagen-Process-Principles-and-Guidelines.pdf.

111 Michael N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Cambridge University Press, Cambridge, 2017.

112 See P. Tavernier, above note 6, p. 740.

113 E. Crawford, above note 31. See also Martin Zwanenburg, "Keeping Camouflage out of the Classroom: The Safe Schools Declaration and the Guidelines for Protecting Schools and Universities from Military Use During Armed Conflict", *Journal of Conflict and Security Law*, Vol. 26, No. 2, 2021.

114 Global Coalition to Protect Education from Attack (GCPEA), *Safe Schools Declaration and Guidelines on Military Use*, available at: https://ssd.protectingeducation.org/safe-schools-declaration-and-guidelines-on-military-use/.

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from the use of explosive weapons in populated areas, and to facilitate respect for IHL.

The influence of such documents should not be underestimated. As has been noted,

> they can focus the attention of the armed forces on particular issues, and can provide clarity and guidance for refining military manuals or elaborating military doctrine and policies: to states when adopting legislation; and to courts, quasi-judicial bodies and intergovernmental organizations.[115]

Statements or reports by "recognized authorities in a private capacity without a clear affiliation to or mandate from states or international organizations" have also contributed to the development of IHL, "through the production of technical manuals, standards, and regulations – responding to new demands not (yet) addressed through other pathways – but in other cases such as the ICRC, private authority can also weigh heavily in lasting change of established rules".[116]

In a number of the soft-law instruments examined above, the influence of academics is prominent. The role of academics in IHL development comes as no surprise if one considers that international law has always been the subject of analysis and development by highly qualified publicists such as Grotius, Vattel, Oppenheim or Lauterpacht, and that such scholarship may even constitute a source of IHL according to Article 38 of the ICJ Statute. Even when falling short of being considered as a source of IHL, academics often have a significant influence over States' positions on and interpretations of the law, as well as on States' positions in the context of negotiations on new IHL norms.[117] Lastly, as part of the "community of international lawyers", they can play a role in shaping the development of IHL by either accepting or rejecting soft-law instruments or specific interpretations of the law, thus influencing their weight in normative development.[118]

Old challenges, new dynamics

The outline of the historical evolution of IHL through various sources, earlier in the paper, provides some insight into what lies ahead for this body of law. The sources, factors and trends that have shaped the development of IHL during the past 160 years or so are expected to keep playing an important role, as IHL continues

115 Emanuela-Chiara Gillard, "Seventy Years of the Geneva Conventions: What of the Future?", *Chatham House*, 24 March 2020, p. 12, available at: www.chathamhouse.org/2020/03/seventy-years-geneva-conventions. See also Robin Geiss and Anni Pues, "International Manuals in International Humanitarian Law: A Rejoinder to Wouter G. Werner", in H. Krieger and J. Püschmann (eds), above note 51.

116 N. Krisch, above note 75, p. 21.

117 A form of informal lawmaking in which governments closely rely on academics is described in David Hughes and Yahli Shereshevsky, "State–Academic Law Making", *Harvard International Law Journal*, Vol. 64, 2022, forthcoming.

118 S. Sivakumaran, above note 7, pp. 387–91.

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evolving. While some of the old challenges – inherent in lawmaking and international relations – will probably persist, the dynamics and interplay between the various actors involved appear to be shifting. Against this backdrop, questions, tensions and risks related to development *versus* no development will inevitably arise.

Plurality of actors and contestation over the development of IHL

As described above, the interaction and convergence of many sources has led to the development and densification of IHL. A multitude of actors, far beyond State governments, have contributed to this development. While this has overall strengthened IHL over time, development is not a uniform concept, nor is it always linear. At times, it is the result of more or less subtle changes taking place in different quarters and driven by different actors, which may or may not move in the same direction. It has been observed that particular areas of international law (whether thematic, regional or institutional) have developed their own, particular structures of change.[119] In addition, the perception of whether international law, and IHL more specifically, has developed or not, and the understanding of what such development consists of, may differ across a variety of actors – States, international organizations, civil society organizations and academics.

In that sense, agreement on development of IHL is the subject of every-day contestation and is in flux. As has been noted, "change may consist in a full shift of an accepted understanding of the law, but it may also consist in more subtle shifts in the burden of argument, or a greater scope of acceptable contestation within legal discourse".[120]

While States undoubtedly remain at the centre of international lawmaking, in particular as regards the traditional pathways of IHL development (treaty and custom), there is equally no doubt that IHL as we know it today is the result of the influence of many actors beyond States: the ICRC, international and regional organizations, civil society, judges, academics and practitioners, and, to some degree, also NSAGs.[121] Moreover, even States themselves are entities comprising various actors, including the judiciary and the military, including military lawyers in particular. Effective protection of civilians and other persons affected by armed conflict has benefitted greatly from the involvement of all of these actors and

119 N. Krisch, above note 75, p. 19.

120 *Ibid.*, p. 11.

121 See, e.g., S. Sivakumaran, above note 7, on the role of so-called "state-empowered entities" and of the "community of international lawyers" in the development of the law; María Teresa Comellas Aguirrezábal, "La contribución del Consejo de Seguridad de las Naciones Unidas a la aplicación y al desarrollo normativo del derecho internacional humanitario", *Revista española de derecho militar*, Vol. 85, 2005; Paul Tavernier, "La contribution du Conseil de Sécurité des Nations Unies à l'élaboration des normes du droit international humanitaire : quelques observations", in Stéphane Doumbé-Billé and Jean-Marc Thouvenin (eds), *Mélanges en l'honneur du Professeur Habib Slim : Ombres et lumières du droit international*, A. Pedone, Paris, 2016; Yahli Shereshevsky, "Back in the Game: International Humanitarian Lawmaking by States", *Berkeley Journal of International Law*, Vol. 37, No. 1, 2019.

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stakeholders in the development of the law. The role of two of them specifically – the military and NSAGs – is addressed briefly in the following.

The multitude of actors is a defining characteristic of contemporary lawmaking, but this does not mean it is entirely a modern phenomenon. Already in the 19th century, States were far from being the only influence on the development of the law. It has been argued that the flurry of codification of the laws and customs of war which took place in the late 19th and early 20th centuries can be explained not so much by the desire of States to strengthen the protection of victims of armed conflict, but rather by their interest in establishing a "monopoly" in this area, notably by the exclusion of "civil society" both from lawmaking and from war-fighting.[122] This monopoly was challenged by growing awareness and pressure from civil society, as evidenced by the impact of Henry Dunant's *A Memory of Solferino*.[123] As has been observed,

> pressure from civil society may have urged governments to participate in the codification of the laws of war, but the signing of the 1864 Geneva Convention would be the last occasion during the 19th century on which civil society activists would be permitted to set the agenda and initiate codification. From the St Petersburg Declaration onward, governments would pre-empt civil society initiatives and exclude their members from participation in the drafting processes.[124]

In subsequent years, in cooperation with States or in opposition to them, civil society actors – lawyers, academics and practitioners – consistently advocated an interpretation and application of IHL compatible with humanitarian values. In doing so, they continued to challenge the attempts of States to monopolize the development of IHL, both in terms of process and outcome.[125]

The contestation over the State monopoly, not only over treaty-making but also the interpretation of IHL, continues today.[126] It is reinforced by voices coming from some States and military experts strongly questioning the legitimacy of non-military experts to have a say on IHL.[127] Indeed, the role of the military in

122 Eyal Benvenisti and Doreen Lustig, "Monopolizing War: Codifying the Laws of War to Reassert Governmental Authority, 1856–1874", *European Journal of International Law*, Vol. 31, No. 1, 2020, p. 129.

123 *Ibid.*, pp. 139–40.

124 *Ibid.*, p. 141.

125 *Ibid.*, p. 169.

126 Heike Krieger and Jonas Püschmann, "A Legitimacy Crisis of International Humanitarian Law?", in H. Krieger and J. Püschmann (eds), above note 51; William H. Boothby, "Direct Participation in Hostilities – A Discussion of the ICRC Interpretive Guidance", *Journal of International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010, pp. 144–5; Anton O. Petrov, *Experts Laws of War: Restating and Making Law in Expert Processes*, Edward Elgar Publishing, Cheltenham and Northampton, MA, 2020, pp. 20–1; Iain Scobbie, "The Approach to Customary International Law in the Study", in E. Wilmshurst and S. Breau (eds), above note 69, pp. 16–21; D. Bethlehem, above note 69, p. 4; J. Bellinger and W. J. Haynes, above note 69; Charles Pede and Peter Hayden, "The Eighteenth Gap: Preserving the Commander's Legal Maneuver Space on 'Battlefield Next'", *Military Review*, March–April, 2021, pp. 7–8, available at: www.armyupress.army.mil/Portals/7/military-review/Archives/English/MA-21/Pede-The-18th-Gap-3.pdf.

127 C. Pede and P. Hayden, *ibid.*; Paul Ney, "Remarks at the Israel Defense Forces 3rd International Conference on the Law of Armed Conflict", *Just Security*, 28 May 2019, available at: www.justsecurity.

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the development of IHL is evident, if one considers its roots in the laws and customs of war. These were initially and to a large extent derived from the behaviour of belligerents on the battlefield or were developed precisely in response to such behaviour. Since its early stages of codification, military experts influenced the development of IHL norms as part of States' delegations to negotiating conferences. Subsequently, military lawyers and commanders produced prolific writings on the interpretation of treaty and customary rules, largely shaping the understanding and national positions of States in this respect. As the drafters of military manuals, rules of engagement and other instruments of military doctrine, they further influence the interpretation and very implementation of IHL, and as such can even contribute to the development, crystallization or identification of customary law (of which the content of military manuals is a prime indication).[128] The heavy footprint of the military is a characteristic element of IHL, distinguishing it from other branches of international law.

However, it is clear today that if IHL is to realistically address the experience and limit the suffering of all those affected by armed conflict, a wide range of expertise and experiences should contribute to its interpretation and development.[129] Evidence collated by scholars, civil society organizations and others on the human cost of armed conflict has an important role to play. The ICRC, international organizations and other bodies, and civil society have a – longer or shorter – history of contributing to, and indeed at times triggering or even spearheading, the development of IHL through the negotiation of treaties and other legally binding instruments.[130] Indeed, "international humanitarian law is not a code managed and shaped by states alone. It […] is a broader practice, which can comprehend contributions by conventional and unconventional participants."[131] Thus, while States continue to play a crucial role in the "making and shaping" of IHL,[132] the divide between treaty-making as a State-dominated domain and soft law as mostly driven by actors other than States appears to be closing.

org/64313/remarks-by-defense-dept-general-counsel-paul-c-ney-jr-on-the-law-of-war/; Thomas Ayres, "The Use of Explosives in Cities: A Grim but Lawful Reality of War", *Joint Force Quarterly*, Vol. 87, 2017, p. 26; Y. Shereshevsky, above note 121, describes the move by States to take back control over lawmaking in opposition to non-State actors, including through "unilateral" initiatives.

128 Michael N. Schmitt, "Normative Architecture and Applied International Humanitarian Law", *International Review of the Red Cross*, Vol. 104, No. 2–3, 2022.

129 O. M. Stern, above note 91, p. 86; E. Crawford, above note 31; Hilary Charlesworth, Christine Chinkin and Shelley Wright, "Feminist Approaches to International Law", *American Journal of International Law*, Vol. 85, No. 4, 1991, pp. 616 and 621 ff; Jasminka Kalajdic, "Rape, Representation, and Rights: Permeating International Law with the Voices of Women", *Queen's Law Journal*, Vol. 21, No. 2, 1996, pp. 474 and 491; A. Priddy, above note 96, pp. 11–17; J. E. Lord, above note 94; see also Bhupinder S. Chimni, "Third World Approaches to International Law: A Manifesto", *International Community Law Review*, Vol. 8, 2006, pp. 3 ff.

130 See F. Bugnion, above note 10; Claude Emanuelli, *International Humanitarian Law*, Bruylant, Brussels, 2009; A. Alexander, above note 54; K. Dörmann and L. Maresca, above note 42; and Kathleen Lawand and Isabel Robinson, "Development of Treaties Limiting or Prohibiting the Use of Certain Weapons: The Role of the International Committee of the Red Cross", in R. Geiß, A. Zimmermann and S. Haumer (eds), above note 20.

131 A. Alexander, above note 54, p. 136; see also Ezequiel Heffes and Marcos D. Kotlik, "How Focusing on Non-State Actors Can Change the IHL Narrative", *OpinioJuris*, 3 November 2020, available at: https://opiniojuris.org/2020/11/03/how-focusing-on-non-state-actors-can-change-the-ihl-narrative/.

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Despite the plurality of actors, there is still a long way to go to achieve diversity and inclusion in the development of IHL, more specifically as regards gender, disability and geographic representation.[133] When it comes to treaty-making, for one, IHL, and in particular the field of disarmament (as weapons treaties are called in diplomatic parlance), remains male-dominated.[134] Statistics in this regard are striking: a study analysing patterns of State participation at a selection of disarmament and non-proliferation fora in the period from 2015 to 2018 concluded that, while the participation of women in international disarmament diplomacy has steadily increased over the past decades, the share of women remains far from the 50% parity mark, which means there is still much ground to be covered to achieve gender balance.[135] The average share of women per delegation during the observed period was a mere 30%.[136] This shows that much more needs to be done to ensure equal representation of women in disarmament negotiations, and consequently in IHL development.

The participation of persons with disabilities in the negotiation and subsequent "life-cycle" of IHL or IHL-related instruments also lags far behind.[137] Despite the absence of consolidated quantitative data, a variety of sources confirms that the voices of people with disabilities and organizations of persons with disabilities are not sufficiently heard. For one, the Charter on Inclusion of Persons with Disabilities in Humanitarian Action adopted at the World Humanitarian Summit in 2016 explicitly recognizes that "persons with disabilities and their representative organizations have untapped capacity and are not sufficiently consulted nor actively involved in decision-making processes concerning their lives".[138] The International Red Cross and Red Crescent Movement itself has recognized the need to do more as regards the participation of persons with disabilities, including in the International Red Cross and Red Crescent Conferences.[139]

132 S. Sivakumaran, above note 7, p. 393.

133 See Louise Arimatsu, "Transformative Disarmament: Crafting a Roadmap for Peace", *International Law Studies*, Vol. 97, 2021; Federica du Pasquier, "Gender Diversity Dynamics in Humanitarian Negotiations: The International Committee of the Red Cross as a Case Study on the Frontlines of Armed Conflict", *Harvard Humanitarian Initiative*, Humanitarian Negotiation Working Paper Series No. 1, November 2016, available at: https://hhi.harvard.edu/files/humanitarianinitiative/files/atha_gender_diversity_dynamics_in_humanitarian_negotiations.pdf?m=1610041180.

134 See Renata Dalaqua, Kjølv Egeland and Torbjørn G. Hugo, *Still Behind the Curve: Gender Balance in Arms Control, Non-Proliferation and Disarmament Diplomacy*, UNIDIR, 2019, available at: https://unidir.org/sites/default/files/2019-10/Still%20behind%20the%20curve.pdf.

135 Norwegian People's Aid, *Patterns of Participation in Multilateral Disarmament Forums*, 2020, p. 8, available at: www.npaid.org/publications/patterns-of-participation-in-multilateral-disarmament-forums.

136 *Ibid.*, p. 9.

137 On international criminal law specifically, see William I. Pons, Janet E. Lord and Michael Ashley Stein, "Disability, Human Rights Violations, and Crimes Against Humanity", *American Journal of International Law*, Vol. 116, No. 1, 2022.

138 UN, Charter on Inclusion of Persons with Disabilities in Humanitarian Action, 2016, available at: http://humanitariandisabilitycharter.org/.

139 ICRC and International Federation of Red Cross and Red Crescent Societies, "Inclusion of Persons with Disabilities in Humanitarian and Development Action", pledge adopted at the 33rd International Conference, 2019, available at: https://rcrcconference.org/pledge/inclusion-of-persons-with-disabilities-in-humanitarian-and-development-action/; Council of Delegates of the International Red Cross and Red Crescent Movement, "Promoting Disability Inclusion in the International Red Cross and Red

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As regards soft law, concerns have been expressed that the relatively small number of experts involved in the processes leading to the elaboration of such instruments "might mean that only a limited number of perspectives are represented—especially if the experts represent only select legal, geographical, social–cultural, or political backgrounds".[140] Lack of inclusivity in this respect risks resulting in some form or degree of bias, with a negative impact on the acceptance of the soft-law instrument's legitimacy, authority or even value.

The role of non-State armed groups

The role of NSAGs is a characteristic element of contemporary armed conflicts, as the vast majority of conflicts around the world are non-international in character. It is today widely accepted that NSAGs are bound by IHL as applicable to NIAC, whether customary or treaty based. Some treaties, such as, for example, CCW Protocol V on Explosive Remnants of War, even expressly state that they apply to all parties to an armed conflict (i.e. both State and non-State). However, NSAGs are not involved in the development of IHL by means of treaty or custom: they do not participate in treaty negotiations or become party to such instruments, and their practice does not constitute "State practice" constituent of customary law.[141]

Nevertheless, some submit that, with their activities, such actors "have consistently and conspicuously affected the evolution of IHL for a long time",[142] in particular through the conclusion of special agreements among parties to the conflict on the application of IHL or through the adoption of action plans with the UN.[143] Similarly, there are signs that the practice of NSAGs is, if not accepted on a formal normative level by States, at least accepted for practical reasons in many respects.[144] In that way, the contribution of NSAGs to the interpretation of the rules through practice might be more substantial than meets the eye.

There are increasing voices and ideas for the participation of NSAGs in the development of IHL norms.[145] Such calls are not unprecedented, considering the

Crescent Movement", Resolution, Sydney, Australia, 17–18 November 2018, available at: www.icrc.org/en/doc/assets/files/red-cross-crescent-movement/council-delegates-2013/cod13-r9--people-with-disabilities-adopted-eng.pdf.

140 E. Crawford, above note 31; for similar criticism voiced with regard to expert manuals, see A. O. Petrov, above note 126, p. 227.

141 See E.-C. Gillard, above note 115, p. 14; for the ILC draft conclusions on the identification of customary international law, see ILC, Report of the International Law Commission on the Work of its Sixty-Eighth Session, UN Doc. A/71/10, 2016, Conclusion 4(3) and para. 8 commentary to Conclusion 4, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/184/25/PDF/G1618425.pdf?OpenElement.

142 E. Heffes and M. Kotlik, above note 131.

143 *Ibid*; Ezequiel Heffes, "Hacia un mayor respeto del derecho internacional humanitario: utilidad, contenido y regulación de los acuerdos especiales en conflictos armados no internacionales", *Anuario Iberoamericano de Derecho Internacional Humanitario*, Vol. 1, 2020.

144 See the recent study by René Provost, *Rebel Courts: The Administration of Justice by Armed Insurgents*, Oxford University Press, New York, 2021, pp. 433–44, which shows that States have pragmatically accepted the administration of justice by NSAGs to a greater degree than may appear at first sight.

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ICTY's consideration of the practice of armed groups in its *Tadić* decision.[146] Furthermore, organizations such as Geneva Call have since contributed to making the views and actions of many NSAGs more accessible.[147] According to some, this should lead the way to the practice and *opinio juris* of NSAGs being considered in the same way as that of States.[148] Others consider that NSAGs should be given a more limited role in the creation or modification of customary norms, with the contribution of States weighing more heavily.[149] Such participation would arguably give NSAGs a sense of ownership over the rules they are bound by, thereby hopefully improving their compliance with them. In light of persistent difficulties in formally acknowledging a role for NSAGs in the development of customary IHL,[150] several scholars concede that for the time being it is more realistic to consider their views and practices informally in the development and interpretation of customary IHL rules.[151] Still, as far as treaty-making is concerned, there is no sign that States are willing to give up their monopoly on the development of the law.[152]

Challenges of contemporary treaty-making

The progressive codification of IHL over the last century and a half, which continues to this day, means that this part of international law is highly codified. This codification has not been without its difficulties, and, at the time of writing, faces challenges.

145 M. Sassòli, above note 69, pp. 20–2; Annyssa Bellal and Ezequiel Heffes, "'Yes, I Do': Binding Armed Non-State Actors to IHL and Human Rights Norms Through Their Consent", *Human Rights and International Legal Discourse*, Vol. 12, No. 1, 2018, pp. 126–7; Katharine Fortin, *The Accountability of Armed Groups Under Human Rights Law*, Oxford University Press, Oxford, 2017, p. 327; S. Sivakumaran, above note 70, p. 565; O. M. Stern, above note 91, p. 226; Katharine Fortin, "How to Cope with Diversity While Preserving Unity in Customary International Law? Some Insights From International Humanitarian Law", *Journal of Conflict and Security Law*, Vol. 23, No. 3, 2018; Hyeran Jo, "Law-Making Participation by Non-State Armed Groups: The Prerequisite of Laws Legitimacy?, in H. Krieger and J. Püschmann (eds), above note 51; Lizaveta Tarasevich, "Participation of Non-State Armed Groups in the Formation of Customary International Humanitarian Law: Arising Challenges and Possible Solutions", *Humanitäres Völkerrecht: Informationsschriften*, *Journal of International Law of Peace and Armed Conflict*, Vol. 3, No. 1–2, 2020.

146 ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision (Appeals Chamber), 2 October 1995, paras 102–8.

147 K. Fortin, "How to Cope with Diversity", above note 145, p. 349; Ezequiel Heffes, "Non-State Actors Engaging Non-State Actors: The Experience of Geneva Call in NIACs", in E. Heffes, M. D. Kotlik and M. J. Ventura (eds), above note 87.

148 M. Sassòli, above note 69, p. 21; A. Bellal and E. Heffes, above note 145, p. 126; Marco Sassòli, "How Will International Humanitarian Law Develop in the Future?", *International Review of the Red Cross*, Vol. 104, No. 2–3, 2022.

149 Anthea Roberts and Sandesh Sivakumaran, "Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law", *Yale Journal of International Law*, Vol. 37, No. 1, 2012, pp. 141–51.

150 See, for instance, K. Fortin, "How to Cope with Diversity", above note 145, pp. 350–4.

151 M. Sassòli, above note 69, p. 21; A. Bellal and E. Heffes, above note 145, p. 126; K. Fortin, above note 145, pp. 356–7.

152 Though Sivakumaran, for instance, has called for a new type of instrument binding armed groups "in all situations", which could be drafted by States and NSAGs together; S. Sivakumaran, above note 70, p. 565.

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As is generally the case with every branch of law, be it domestic or international, questions of "how" and "why" IHL develops are closely intertwined. This means that the reasons that prompt legal developments determine, or at the very least influence, to a significant degree the manner – methodologically speaking – in which such developments take place. And the other way around: the pathways by which IHL develops (State practice and *opinio juris*, treaty negotiations, soft-law instruments) have a considerable impact on the outcome, i.e. the rules and principles themselves, and their object and purpose.

A typical example is the impact of consensus on the content of agreed norms. Consensus is meant to augment the chances of subsequent adherence to the instrument. However, when international instruments are negotiated and adopted by consensus, the need to reach general agreement often leads to multiple concessions and sometimes a "lowest common denominator" approach, inevitably limiting the scope or strength of the negotiated rules or impacting on their clarity (resulting in what is commonly known as "constructive ambiguity").

Garnering the support of a majority of States, let alone consensus, becomes more challenging as the number of States increases. Sixteen States were present at the 1864 diplomatic conference that led to the adoption of the first Geneva Convention; by 1949, their number had increased to sixty-three; between 106 and 126 States took part in the four-year diplomatic conference that led to the adoption – remarkably by consensus – of the 1977 Additional Protocols. The Rome Statute was adopted on 17 July 1998 by a vote of 120 to seven, with twenty-one countries abstaining.

The CCW, for example, though not bound to do so, operates by consensus. It currently has 125 States Parties and four signatories. While States have agreed to five protocols in the framework of the Convention, the last of these was adopted in 2003.

Where a rule or practice of consensus applies, the "protocol technique" can be used to stall, or control, the development of IHL. Such was the case of the failed negotiation of a protocol on cluster munitions in the context of the CCW. The negotiation of such a protocol was supported and promoted by a number of States that opposed a prohibition on cluster munitions. They endeavoured to prevent it by negotiating a protocol to the CCW, knowing that, due to the practice of consensus, the outcome would be a watered-down text imposing mild restrictions. The effort did not prove successful, however, and the CCM was eventually adopted outside of the CCW framework.

The past two decades saw the advent and consolidation of a new category of multilateral instruments regulating weapons, often referred to as "humanitarian disarmament". Humanitarian disarmament was largely the result of the influence of IHL and international human rights law, enhanced in part by the active involvement of civil society in the crafting and negotiation of those instruments.[153] In parallel, the continued "humanization" of international law led

153 K. Lawand and I. Robinson, above note 130, pp. 158 and 179–80.

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to increased attention on the individual (both as a victim and as a perpetrator) rather than the State (as carrier of rights and obligations). As a result, in recent disarmament instruments we find elaborate provisions on victim assistance, which are missing in older conventions such as those prohibiting biological or chemical weapons.

Characteristically, these modern IHL instruments (such as the CCM or the APMBC) are often called "hybrid" instruments. The term hints, notably, at their compound nature, which encompasses traditional disarmament elements (e.g. stockpile destruction) and IHL-derived aspects (prohibitions on use based on IHL principles, coupled with human-centric elements such as victim assistance obligations).

These new-generation IHL instruments have in common that they were concluded through processes that were launched in response to States' failure to achieve consensus in traditional, established negotiating fora, and outside of the latter.

Following the failure of the First CCW Review Conference to adopt far-reaching prohibitions or restrictions on anti-personnel mines, the so-called "Ottawa Process" was launched.[154] At the Oslo Diplomatic Conference on a Total Global Ban on Anti-Personnel Mines, eighty-nine States adopted the APMBC on 18 September 1997. The Convention has today 164 States Parties. Its effects have gone beyond the States Parties, however, and it can be attributed to the Convention that the development, production, sale and use of landmines have diminished substantially. Since its adoption, the Convention has helped to reduce annual civilian casualties by 90%, with a positive knock-on effect on development and human security. The new use of anti-personnel mines, even by States not party to the APMBC, is now a rare anomaly, the legal trade in and production of anti-personnel mines have virtually disappeared, and more than fifty-five million stockpiled mines have been destroyed.[155]

Similarly, after seeing that there would be no agreement in the framework of the CCW on cluster munitions, Norway launched the "Oslo Process" in February 2007. As a result, 107 States adopted the CCM on 30 May 2008 in Dublin. Today, 110 States are party to the Convention. Like the APMBC, the CCM has had a tangible effect on reducing the production, sale and use of cluster munitions beyond its States Parties.

The TPNW was adopted in 2017 and entered into force in 2021 despite strong objections and criticism by nuclear-armed States and those under the nuclear umbrella. The TPNW created a new legally binding rule of IHL prohibiting, among other things, the use and threat of use of nuclear weapons. Although this rule is only binding on the States party to the TPNW, the universal

154 For a comprehensive history, see Louis Maresca and Stuart Maslen, *The Banning of Anti-Personnel Landmines: The Legal Contribution of the International Committee of the Red Cross 1955–1956*, Cambridge University Press, Cambridge, 2000.

155 Helen Durham and Eirini Giorgou, "International Humanitarian Law and the Universality of the Geneva Conventions", in V. Buonomo, D. Fernandez Puyana, M. Levrak, C. M. Marenghi and S. Saldi (eds), *Enhancing Multilateralism and Peace*, Lateran University Press, Rome, 2022, forthcoming.

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applicability of a norm should not be confused with its legal validity and force. It remains to be seen whether this new treaty-based norm eventually contributes to the emergence of a customary rule prohibiting the use of nuclear weapons, despite persistent objection by some States.

Compliance *v.* development and law *v.* policy

Beyond weapons treaties and international criminal law, other areas of IHL have seen very little to no development by either treaty or custom since 1977.[156] The emergence of customary law norms takes time, making the slow pace of development by means of custom unsurprising. However, this scarcity of new IHL treaties in fields other than weapons and international criminal law is striking and merits closer examination.

IHL treaties are concluded through multilateral negotiations, and negotiations take trust, transparency and, in the case of IHL, belief in a "common good". These are to a large extent lacking in the current geopolitical environment, where dynamics and tensions between States, in particular major military powers, are not conducive to treaty-making that would lead to further restrictions in conduct during armed conflict. In addition, the proliferation of IHL soft law has triggered resistance on the part of some States, who tend to assert the lawmaking privilege and authority associated with statehood to the exclusion of all other actors. This resistance has, in turn, fuelled efforts to develop the law or strengthen protections for people and objects in armed conflict by means other than treaties, in the expectation that processes leading to non-legally binding outcomes would have higher chances of success.

States' reluctance to develop IHL by means of creating new norms or expanding the interpretation of existing ones – ranging from skepticism to downright vehement objection – is typically expressed through arguments asserting that no new law is needed, but rather better compliance with existing law suffices. On its face, this argument is a perfectly reasonable one. However, decoupling the law from its implementation is not as easy as it may first seem.

Where do shortcomings in the norms themselves stop, and gaps in implementation begin? If the law is deemed adequate in scope and content, but it is not complied with by parties to an armed conflict, there are several things that such non-compliance may hide. There is intentional non-compliance, of course, out of disregard for the law or other reasons. But non-compliance can also be the result of an erroneous interpretation of the law by a State – at least in the eyes of other States or observers – or an inability to comply with its obligations. These in turn raise further questions as to the adequacy of the law if it leaves a large

156 See, for instance, the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, above note 47; the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000 (entered into force 12 February 2002); and AP III to the Geneva Conventions.

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margin of discretion in interpretation; or its effectiveness if it simply cannot be complied with by some parties.

In many cases, more clarity on how States interpret and apply IHL rules is needed to determine whether the problem lies with compliance or with interpretation or, indeed, with the scope and content of the rules themselves.[157]

States' reluctance to develop IHL by means of interpretation is equally prominent. A number of States regularly reaffirm that the content of their military manuals constitutes policy and does not reflect or reiterate the law. While the difference between law and policy is clear as regards their legally binding nature, the boundaries between the two are not always as clear-cut. Indeed, militaries often implement the law by means of policy, and such policy, when integrated into military instruments and tools such as Directives or Rules of Engagement, is of course binding for its addressees.

At the same time, States are not always clear as regards what they consider to be legally binding obligations and what "mere" policy. The main problem in this respect arises when States formulate policy that essentially reiterates existing legal obligations, thereby "downgrading" them to a non-legally binding status. Policy can be a very effective tool to achieve the object and purpose of IHL; consider, for example, the moratorium on the use of anti-personnel landmines imposed by some States despite not being party to the APMBC. Thus, policy can serve as a substitute to norm development, provided that it is not used to deliberately or incidentally undermine existing law. Policy can also be a precursor to the development of legal rules, although this is not always necessarily the case.

Measures taken as a matter of policy have certain advantages, notably in that they can be put in place quickly and unilaterally, without the requirement of lengthy negotiations and broad agreement. On the downside, they can just as quickly and unilaterally be revoked, whereas withdrawal from treaty obligations is much lengthier, and withdrawal from customary or *jus cogens* norms is impossible (although States at times engage in contrary practice).

Ultimately, policy can facilitate compliance with IHL, provided it does not undermine it. How, then, to determine when there is a need for development of new IHL rules *versus* a need for strengthening compliance with existing ones? We submit that the two are not mutually exclusive alternatives.

Prospects for further IHL development

Does IHL need to develop further, and, if so, how? Considering IHL's main objective is to protect persons from the suffering caused by armed conflict, the question whether IHL will develop and indeed whether it should develop depends largely

157 See ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Report submitted to the 32nd International Conference of the Red Cross and Red Crescent, 8–10 December 2015, p. 53, available at: www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts.

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on whether important protection gaps remain or appear with new realities of conflict.

Gaps in IHL have been identified by many commentators, including on NIAC law, obligations of NSAGs, the protection of women, the protection of children, the protection of the environment, weapons issues, or regulation in the digital field.[158] In 2011, the ICRC submitted a report to the International Conference of the Red Cross and Red Crescent in which it suggested a number of areas in which IHL should be strengthened, such as reparations for victims of IHL violations, the protection of the environment, detention in NIAC and international compliance mechanisms.[159] After consultations with States, some of these were the subject of an intergovernmental process within the framework of

158 S. Sivakumaran, above note 70, pp. 513 ff; Laura Inigo Alvarez, *Towards a Regime of Responsibility of Armed Groups in International Law*, Intersentia, Cambridge, 2020, p. 158; Gordon Brown and Shaheed Fatima, "Need for Change to Protect Children in Armed Conflict", *Just Security*, 2 November 2018, available at: www.justsecurity.org/61335/gordon-brown-shaheed-fatima-change-protect-children-armed-conflict/; Ruth Abril Stoffels, "Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps", *International Review of the Red Cross*, Vol. 86, No. 855, 2004, p. 520; Michael Bothe, Carl Bruch, Jordan Diamond and David Jensen, "International Law Protecting the Environment During Armed Conflict: Gaps and Opportunities", *International Review of the Red Cross*, Vol. 92, No. 879, 2010, pp. 575 ff; Eric Prokosch, "The Development of the Convention on Conventional Weapons 1971–2003", Article 36, Guest Research Briefing, November 2021, pp. 8–9, available at: https://article36.org/wp-content/uploads/2021/12/The-Development-of-the-CCW.pdf?mc_phishing_protection_id=28048-c7anv7f0s0v91iu3cerg, on the unfinished agenda of the CCW; Brad Smith, "The Need for a Digital Geneva Convention", 14 February 2017, available at: https://blogs.microsoft.com/on-the-issues/2017/02/14/need-digital-geneva-convention/; O. M. Stern, above note 91. Robert Heinsch, "Der Wandel des Kriegsbegriffs: Brauchen wir eine Revision des humanitären Völkerrechts?", *Humanitäres Völkerrecht: Informationsschriften, Journal of International Law of Peace and Armed Conflict*, Vol. 23, No. 3, 2010; P. Tavernier, above note 6, pp. 741–7; Karine Bannelier-Christakis, "Is the Principle of Distinction Still Relevant in Cyberwarfare?", in Nicholas Tsagourias and Russell Buchan (eds), *Research Handbook on International Law and Cyberspace*, Edward Elgar Publishing, Cheltenham and Northampton, MA, 2015; Giacomo Biggio, "International Humanitarian Law and the Protection of the Civilian Population in Cyberspace: Towards a Human Dignity-Oriented Interpretation of the Notion of Cyber Attack Under Article 49 of Additional Protocol I", *Military Law and Law of War Review*, Vol. 59, No. 1, 2021; Matilda Arvidsson, "Targeting, Gender, and International Posthumanitarian Law and Practice: Framing the Question of the Human in International Humanitarian Law", *Australian Feminist Law Journal*, Vol. 44, No. 1, 2018; Judith Gardam, "The Silences in the Rules that Regulate Women During Times of Armed Conflict", in Fionnuala Ní Aoláin, Naomi Cahn, Dina Francesca Haynes and Nahla Valji (eds), *The Oxford Handbook of Gender and Conflict*, Oxford University Press, Oxford, 2018; Ezequiel Heffes, "The International Responsibility of Non-State Armed Groups: In Search of the Applicable Rules", *Goettingen Journal of International Law*, Vol. 8, No. 1, 2017; Kubo Macak, "A Needle in a Haystack? Locating the Legal Basis for Detention in Non-International Armed Conflict", *Israel Yearbook on Human Rights*, Vol. 45, 2015; Gregory Rose, "Management of Detention of Non-State Actors Engaged in Hostilities: Recommendations for Future Law", in Gregory Rose and Bruce Oswald, *Detention of Non-State Actors Engaged In Hostilities: The Future Law*, Brill Nijhoff, Leiden and Boston, 2016; Sandesh Sivakumaran, "Re-Envisaging the International Law of Internal Armed Conflict", *European Journal of International Law*, Vol. 22, No. 1, 2011.

159 ICRC, *Strengthening Legal Protection for Victims of Armed Conflicts*, Report submitted to the 31st International Conference of the Red Cross and Red Crescent, 28 November–1 December 2011, available at: www.icrc.org/en/doc/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-5-1-1-report-strength-ihl-en.pdf. The areas identified were: the protection of persons deprived of liberty in NIAC; the protection of the natural environment; the protection of internally displaced persons; and international mechanisms to monitor compliance with international humanitarian law and reparation for victims of violations.

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the International Red Cross and Red Crescent Conference. However, there was eventually insufficient consensus to agree to further developments.[160]

To be sure, the main challenge to IHL is not its lacunae, but rather lack of compliance. As said above, it is a densely codified body of law in terms of treaties and customary law, and human rights law has brought additional protection.

Nonetheless, it is fair to say that the development of the law – national, international, or indeed IHL – can and will never stop. Old lacunae have never been filled, especially on the law of NIAC, and new ones will arise. Today, just as the world is facing a digital revolution, so will digital means and methods of warfare be deployed on the battlefield. Existing rules of IHL were drafted without any anticipation of these technologies. They will therefore evolve by interpretation, and application to new technologies, as indeed anticipated in Article 36 of AP I. However, controversies and incertitude over interpretations are already apparent, such as on IHL rules applicable to cyber operations in armed conflict or to autonomous weapons systems. The call by many States, civil society organizations and the scientific community for a new treaty on autonomous weapons systems is becoming more urgent.[161]

If IHL is to continue being a relevant body of law with an effective capacity to limit the choices of means and methods of warfare in order to protect combatants and civilians, there is no doubt that it needs to evolve to address and, if possible, anticipate developments in warfare (including advances in technology and its military applications) as well as in other branches of law. Therefore, IHL will inevitably continue to develop. How it will do so, however, is far from clear.

In light of the current international climate, some have recommended that "future endeavours should focus on clarifying existing law rather than attempt to develop it, and on promoting compliance".[162] Indeed, many commentators are

160 See ICRC, Strengthening International Humanitarian Law Project, available at: www.icrc.org/en/war-and-law/strengthening-ihl; Tilman Rodenhäuser, "Strengthening IHL Protecting Persons Deprived of Their Liberty: Main Aspects of the Consultations and Discussions Since 2011", *International Review of the Red Cross*, Vol. 98, No. 903, 2016; Jelena Pejic, "Strengthening Compliance with IHL: The ICRC–Swiss Initiative", *International Review of the Red Cross*, Vol. 98, No. 1, 2016.

161 Phil Twyford, "Government Commits to International Effort to Ban and Regulate Killer Robots", New Zealand Government Press Release, 30 November 2021, available at: www.beehive.govt.nz/release/government-commits-international-effort-ban-and-regulate-killer-robots; UN Secretary-General, "Secretary-General's Message to the Sixth Review Conference of High Contracting Parties to the Convention on Certain Conventional Weapons", 13 December 2021, available at: www.un.org/sg/en/content/sg/statement/2021-12-13/secretary-generals-message-the-sixth-review-conference-of-high-contracting-parties-the-convention-certain-conventional-weapons-scroll-down-for-french-version; Human Rights Watch, "Stopping Killer Robots: Country Positions on Banning Fully Autonomous Weapons and Retaining Human Control", 10 August 2020, available at: www.hrw.org/report/2020/08/10/stopping-killer-robots/country-positions-banning-fully-autonomous-weapons-and; Janos Kramar, "Autonomous Weapons Open Letter: AI & Robotics Researchers", Future of Life Institute, 9 February 2016, available at: https://futureoflife.org/2016/02/09/open-letter-autonomous-weapons-ai-robotics/?cn-reloaded=1, announced at the International Joint Conference on Artificial Intelligence on 28 July 2015; Frank Sauer, "Autonomy in Weapons Systems: Playing Catch Up with Technology", *Humanitarian Law & Policy*, 29 September 2021, available at: https://blogs.icrc.org/law-and-policy/2021/09/29/autonomous-weapons-systems-technology/; ICRC, "ICRC Position on Autonomous Weapon Systems", 12 May 2021, available at: www.icrc.org/en/document/icrc-position-autonomous-weapon-systems.

162 E.-C. Gillard, above note 115, p. 10.

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weary of embarking on formal development processes, for two main reasons, as they see it. One is simply that the law is broad enough to accommodate evolving interpretations, so that there is no substantial need to amend it. Another is that even if IHL is insufficient to deal with certain important issues arising in conflicts, the current political climate holds no promise to amend it formally or to amend it in a way that will be more progressive. The feminist debate on IHL illustrates this:

> Although most feminist scholars working in this area agree that there are problems with this body of law, not all agree that it merits amendment. A debate exists amongst feminist scholars about whether the provisions of IHL are inadequate – needing to be reconceptualised and revised (the "revisionist school") – or whether there are in fact sufficient protections for women in the law, with the main problems resulting from the lack of adherence and enforcement (the "enforcement school").[163]

Of course, embarking in a norm-creating exercise in the face of strong reluctance or even downright opposition by influential States is not always a wise course of action. In addition, as described above, the formal treaty route contains the risk of regression. The backlash and sometimes even roll-back against developments of IHL must be seen in the wider context of a backlash against international law more generally.[164]

> […] Even those [feminist scholars] who support the revisionist approach are aware of the dangers of reopening discussions on IHL's texts. Legal amendment brings the risk of new law that is worse from a gender and protection perspective, a danger feminist lawyers are acutely aware of.[165]

Nevertheless, recent developments, most notably the adoption and entry into force of the TPNW, have shown that successful outcomes even in such circumstances are possible.

As mentioned above, States' resistance to the development of IHL and the multiplication of soft-law and interpretive processes and outcomes are mutually

163 O. M. Stern, above note 91, p. 225.

164 Susan Marks, "Backlash: The Undeclared War against Human Rights", *European Human Rights Law Review*, Vol. 4, 2014; Martti Koskenniemi, "International Law and the Backlash Against Globalization", Lecture at IHEID (Graduate Institute of International and Development Studies), 3 March 2020; Human Rights Council, Report of the Working Group on the Issue of Discrimination against Women in Law and in Practice, UN Doc. A/HRC/38/46, 14 May 2018, para. 14; Australian National University, "Navigating the Backlash against Global Law and Institutions", available at: https://law.anu.edu.au/navigating-backlash-against-global-law-and-institutions; Jeremy Farrall, Jolyon Ford and Imogen Saunders, "The Backlash against International Law: Australian Perspectives", *Australian Year Book of International Law Online*, Vol. 38, No. 1, 2020; Mikael Rask Madsen, Pola Cebulak and Micha Wiebusch, "Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts", *International Journal of Law in Context*, Vol. 14, 2018; Karen J. Alter, "The Contested Authority and Legitimacy of International Law: The State Strikes Back", iCourts Working Paper Series No. 134, 2018, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3204382; Frederick V. Perry, "The Assault on International Law: Populism and Entropy on the March", *Syracuse Journal of International Law and Commerce*, Vol. 46, No. 1, 2018.

165 O. M. Stern, above note 91, p. 225.

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reinforcing trends. It is perhaps tempting for some States, and in particular civil society organizations, to opt for such more flexible processes in order to escape the deadlock in traditional negotiating fora, where chances of progress are admittedly weak. Soft-law instruments, such as political declarations or the Montreux Document, offer considerable benefits: a comparatively speedy conclusion, usually a more like-minded base of negotiators, and more room for progressive content, given their non-legally binding nature and the absence of the cumbersome consensus rule. Documents such as the Tallinn and San Remo Manuals have the added benefit of not going through any multilateral negotiating process among States, which arguably ensures substantive accuracy of an outcome not subject to concessions, trade-offs or constructive ambiguity. The same is true for interpretive guidance and various academic instruments.[166] These processes do not create law *per se*, but can significantly influence its interpretation and/or its implementation, and thereby contribute to its constant development.

At the same time, the continued importance and potential of treaty-making in IHL development should by no means be disregarded. For one, multilateral negotiations have benefits, irrespective of the outcome. Trust, confidence-building, transparency, inclusivity, mutual understanding of positions and ownership of the outcome are some of the "by-products" of negotiations, if properly conducted. The end result, namely the treaty or convention, has clear benefits as well. The rules stipulated by such instruments are unequivocally of a legally binding nature. What is more, treaties and conventions are characterized by durability: as said above, it is much more difficult for a State to "opt out" of a treaty, i.e. to withdraw from it, than to disengage from a political instrument. Lastly, while not the case for the Geneva Conventions and their Protocols, legally binding instruments, and in particular weapons treaties, are often accompanied by an international monitoring mechanism, including regular meetings of States Parties.

The issue is of course far more complex, but suffice it to say here that, despite the well-established trend of proliferation of soft-law and other non-binding IHL instruments, treaties should not be discarded as a "thing of the past". The success story of the TPNW shows that treaty-making is possible even in less than auspicious circumstances and that in some cases it is indeed the only effective pathway for IHL development.

Treaties and soft law both have their place and are valuable instruments for the development of IHL, with different benefits and shortcomings. The choice of one *versus* the other (insofar as it can be called a choice) will depend on a number of factors, including the urgency of addressing the humanitarian concern, the configuration of States' positions and their dynamics, the subject matter and history of relevant IHL development, and the perceived gaps in the existing legal framework.

At the time of writing (2022), consensus among States appears elusive on issues of IHL, leading to a dilemma. As a body of law that should be conceived as universal, embodying universal values and, importantly, applicable in armed

166 See E. Crawford, above note 31.

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conflicts whenever and between whomever they occur, consensus among all States should remain a desirable objective for its development. At the same time, some urgent issues of contemporary armed conflicts call for new agreements, and if the existing uncertainties in the treaty law cannot be filled by agreement on interpretation or custom, there is a risk of leaving these issues unaddressed.

When faced with the need to develop IHL, States and other "norm entrepreneurs"[167] must ask themselves how it can be achieved. Commentators have identified a number of factors that lead to negotiations, or to agreement among States. These include the preferences of great powers that shape the design of the legal regime; cost–benefit calculations, such as gaining reputation and legitimacy *versus* political and security costs or limitations on governments' freedom of action; moral authority and expertise of governments or non-State actors in eliciting support for regulation; the *Zeitgeist* of negotiations; the strength of strong and coherent arguments based on a premise of widely shared principles and values; the type of governmental regime such as democratic or liberal political regimes;[168] social pressure and avoidance of social opprobrium.[169]

However, while all these factors play a role, no clear pattern or one-size-fits-all formula can really be drawn from past negotiations,[170] and the question remains for practitioners and "norm entrepreneurs" to think about how best to convince States to agree to the development of IHL, and in fact how to create the conditions that will lead to consensus or the widest possible support for such development.

Conclusion

Formally, IHL, similar to all international law, relies on the consent of States. It is States that must agree to treaties and to custom. However, like all international law, IHL develops in more complex and subtle ways than its formal structure may lead to us believe. The influence of jurisprudence, political statements, State practice and soft-law instruments does converge towards norms that are widely recognized as customary. Even if they are not, in the absence of answers in the applicable legal framework, States will use certain norms "as a matter of policy" or gradually even as a matter of law.

It is only in this way that one can explain the phenomenal transformation that IHL has undergone over the past forty-five years since the adoption of the 1977 Protocols. The significant development of IHL from its inception to the present day has rendered it literally unrecognizable. Since the 1990s, the density and sophistication of research, writing, State engagement and international

167 A term coined by Cass Sunstein, "Social Norms and Social Roles", *Columbia Law Review*, Vol. 96, No. 4, 1996. See also Paul B. Stephan, "The Crisis in International Law and the Path Forward for International Humanitarian Law", *International Review of the Red Cross*, Vol. 104, No. 2–3, 2022.

168 H. Lovat, above note 35.

169 G. Mantilla, above note 32, p. 323.

170 See, e.g., E. Prokosch, above note 158, p. 7, on the varying role of evidence in treaty negotiations.

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jurisprudence on IHL have created a broad convergence of views among States on a much wider range of norms than those codified in the Geneva Conventions and their Additional Protocols. At the same time, the latter remain the core of IHL, despite its expansion and evolution.

It is also true, however, that the complex and intertwined manner in which IHL has evolved, and which in part has led to a certain loss of State control over its development, combined with a lack of international mechanisms with a mandate to take binding decisions on the law, has also led, as said above, to constant controversy, and therefore a certain amount of uncertainty and even backlash among States on what the law actually is. Looking ahead, a balance needs to be found between the urgency to address some developments in warfare, and the interest to see IHL develop as a body of law that still garners the widest possible support and respect.

Development of the law is not linear and there are risks of new treaties, in particular, proving regressive.[171] The question is, however, whether there is ever a good moment in time, or rather if such a moment is worth waiting for. Looking at the treaty-making described above, for instance the ICRC's efforts from the 1920s to 1977 to protect civilians from the effects of hostilities, and all other efforts to strengthen legal protection in armed conflict, is it not rather always time to start working on "realizing Utopia"?[172]

171 S. Sivakumaran, above note 70, p. 565.
172 Antonio Cassese (ed.), *Realizing Utopia, The Future of International Law*, Oxford University Press, Oxford, 2012, p. 525.

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