

REPORTS AND DOCUMENTS

Generating respect for the law: An appraisal

13–14 October 2016, ICRC,
University of Tasmania Faculty
of Law and Institute for the
Study of Social Change

IHL symposium report*

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Executive summary

The symposium on “Generating Respect for the Law: An Appraisal” brought together experts from various disciplines, including law, political science, government, philosophy, history, humanitarian action, the military and academia, from across Australia. Over the course of two days, these experts considered several questions: How have perceptions of international humanitarian law (IHL) evolved over time, and where do we now stand? What are the challenges raised by transnational asymmetric armed conflict? How should armed groups who do not accept the constraints of IHL be approached? What roles should States, academics and civil society play in generating respect for the law? And lastly, how does new technology change the face of contemporary warfare?

Several conclusions can be drawn from the resulting discussion. Most importantly, the law alone is not enough to change behaviour on the battlefield.

* This report is a summary of an IHL symposium and does not necessarily represent the views of the ICRC or the University of Tasmania.

The challenge of improving respect for IHL is not new, but it has been made sharper by the barbarity we witness in contemporary conflicts. For those who voice strong support for IHL, the task is not to strengthen their own observance of IHL norms, but to find means to nurture respect in more restrictive environments. The drivers are both moral and legal, stemming from States' obligations to respect and ensure respect for IHL. The International Committee of the Red Cross itself has acknowledged that it must do more to engender respect for the law.

It may be useful to take a step back and determine what we mean when we use the word "respect". Is refraining from behaviours that violate the law sufficient? Is it important that refraining from such behaviours be based on an understanding that they are incompatible with morality or ethics? Does the motivation for refraining from these behaviours matter? Relatedly, does a blind reliance on the letter of the law lead to a sort of "moral de-skilling" that may ultimately undermine respect for the principle of humanity underlying IHL norms?

Determining the type of respect we are seeking to engender will allow the international community to seek out ways of influencing the behaviour of States and non-State armed groups. The most challenging of these to engage will be those that are not interested in applying IHL at all. Here we should note that given the apparent lack of appetite for the development of new norms, the future of IHL may lie in soft law.

The international community can look to the past for insights into how to approach new technologies on the battlefield. Each generation has struggled with new developments, and parallels can be drawn between how technology was dealt with when first encountered in the past, and how we are dealing with it today.

It is also vital that we highlight successes in the law as well as violations. IHL violations are ever-present in the international media, but respect is rarely reported, as good news is no news. This may lead to the perception that the law does not work. As such perceptions undermine the law's influence, it is important to show that IHL does have an impact.

Lastly, acknowledging that the mere existence of the law alone is not sufficient to generate respect for the law, future initiatives aimed at generating greater respect for IHL norms will need to include an open dialogue that is not limited to military lawyers, but reaches across disciplines.

The event also raised a number of interesting questions, which can inspire further discussion on these topics.

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Introduction

The IHL symposium on "Generating Respect for the Law: An Appraisal", co-organized by the International Committee of the Red Cross (ICRC), the University of Tasmania's Faculty of Law and the Institute for the Study of Social Change, was held in Hobart on 13 and 14 October 2016. The symposium, which

took place in the context of the ICRC's 2016 cycle of conferences on "Generating Respect for the Law", gathered experts from disciplinary backgrounds including law, political science, government, philosophy, history, humanitarian action, the military and academia to discuss how to create an environment conducive to respect for international law, particularly international humanitarian law (IHL), from a multidisciplinary perspective. Participants included: Vincent Bernard, ICRC; Leonard Blazeby, ICRC; Dr Gavin Daly, University of Tasmania; Fabio Forgione, Médecins Sans Frontières; Dr Jai Gaillot, University of New South Wales; Dr Rosemary Grey, Melbourne Law School; Fred Grimm, ICRC; Dr Matt Killingsworth, University of Tasmania; Dr Rain Liivoja, Melbourne Law School; Marnie Lloyd, University of Melbourne; Professor Tim McCormack, University of Tasmania Faculty of Law; Dr Rebecca Shaw, University of Queensland; Professor Dale Stephens, Adelaide Law School; Dr Phoebe Wynn-Pope, Australian Red Cross; and Australian government representatives.¹

There were a few underlying assumptions to the discussions that took place over the course of the two-day symposium. Firstly, in seeking to generate increased respect for IHL, the problem was not seen to be in the rules themselves – existing IHL norms are sufficient to govern armed conflict. Secondly, the problem is not ignorance of the rules; violations are caused by other factors, mainly a lack of political will to adhere to international norms. Lastly, the international community needs a multidisciplinary approach to address the lack of respect for IHL. The main objective of the discussion was to explore new ways to address violations of IHL and human rights and to get new perspectives from diverse disciplinary backgrounds on renewing the ICRC's approach.

How perceptions of IHL have evolved over time

Currently, there is a general feeling of pessimism in discussing respect for IHL. In an increasingly connected yet divided world, there are many challenges that must be addressed in order to ensure greater respect for IHL, including the lack of trust in international mechanisms, new technologies, the tendency of States to distance themselves from the battlefield, and the converse practice among non-State armed groups (NSAGs) to continue to resort to suicide bombings and other low-tech, up-close means of violence. Importantly, the main hurdle to be overcome is the striking lack of political will among States to ensure greater compliance with IHL or to negotiate new international norms. In light of all this, it is clear that there is a continued need to generate respect for IHL and other norms of restraint that can influence behaviour in armed conflict.

In starting this discussion, one important factor that should be determined is what we mean when we talk about respect for the law. Often we are talking about behavioural respect: refraining from behaviours that are in violation of the law,

1 Special thanks to Hannah Salisbury, for her note-taking, and to Netta Goussac and Ellen Policinski for their work in preparing this report.

regardless of the motives for doing so. There is also, at the other end of the spectrum, the philosopher's respect: refraining from such behaviours on the basis of realizing that they are incompatible with morality or ethics. In between these two is respect tied to an "honour culture" that is predicated on a contrast between civilization and barbarism, between "gentlemen" and "others". When talking about respect for IHL, where should the desired behaviour come from?

Due to the nature of IHL, it is difficult to identify instances of its respect. In contrast, violations are widely reported, which has led to the perception that the law is violated now more than ever, but in fact this is not necessarily the case. Paradoxically, while there is a perception that IHL is no longer respected, there is more of it than ever before in the form of a range of new treaties that have been ratified by States, the jurisprudence of international courts and tribunals, and the integration of IHL into States' domestic legal orders to an unprecedented extent.

One way to examine the evolution in perceptions of IHL is by looking at the specific example of the sacking of captured cities across the ages as a way of tracking continuity and compliance with international norms from the time of the Conference of Westphalia. Sacking cities fell out of fashion in the Napoleonic period, but there was a pre-existing custom of sacking cities during war. Therefore, despite the shift in what was considered acceptable, cities continued to be sacked and bombarded during the Napoleonic era, and a dichotomy arose between the ethical discourse of officers and the lack of restraint by common soldiers causing civilian suffering during sieges. At that time, respect for norms in armed conflict could be tied to the chivalric tradition, and thus there was an appeal to military honour and military shame. However, the sense among officers was that the sacking of cities by common soldiers was both unavoidable and at the same time unacceptable.

Sexual violence in armed conflict is another type of IHL violation that reveals much about perceptions of the law. Sexual violence is undoubtedly a violation of IHL, a war crime, and can also be an element in both the crime of genocide and in crimes against humanity, but it is still endemic in armed conflict. This is a stark reminder that the law alone is not enough to change behaviour. Sexual violence is linked to norms that are even older than IHL, such as ideas about men's entitlement to women's bodies and men's ideas of asserting dominance over others sexually, and these inform behaviour. IHL is an aspirational standard in this aspect, not a predictor of how people behave on the ground. There has been a rapid advancement on the topic of sexual violence in armed conflict, from the common acceptance of rape as part of the spoils of war to the recent *Bemba* case before the International Criminal Court (ICC),² but this may have led to perverse incentives for groups who commit sexual violence with the specific intention of gaining notoriety.

Domestic law may play an underappreciated role in influencing behaviour. International criminal law can also serve as a deterrent, but the likelihood of criminal prosecution at the international level is too low to generate the desired

2 ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, 21 March 2016.

respect for IHL. There is therefore a perception that IHL norms are more effective when translated into domestic law, perhaps also due to States' desire to exercise primacy of their national judicial systems, which is demonstrated where ICC Statute crimes are incorporated into domestic criminal legislation. In the military, the risk that troops will commit offences recognized in domestic criminal law can serve as a deterrent to commanders.

That said, it is possible to overstate how effective the law in and of itself can be at preventing behaviour. For example, targeting decisions do not necessarily turn solely on the legality of the attack, but also on policy considerations, which can sometimes be more protective than what is strictly required by the law. However, the discussion leading up to such decisions is about the law and in particular the principles of distinction, proportionality and precautions, so IHL is still an important part of the process even if it is not ultimately the determining factor.

In the present day, it can be argued that law has so saturated military thinking that it has had an anesthetizing effect on ideas of military honour or the "warrior's code", which formerly supplied norms of restraint. An over-reliance on the law risks giving rise to a mentality where legal compliance is the answer, and ethical or moral compliance are not relevant to the decisions being made. By virtue of IHL taking the reins in military decision-making, there is a danger of the "moral de-skilling" of military personnel. This could be seen as the success of IHL marginalizing other political and ethical commitments. However, military decisions do not necessarily turn on what lawyers say can be done; rather, they are based on a whole range of factors including law, expenditure of resources, whether a given operation is considered worth putting troops at risk, and so on. One theory is that it is actually the professionalism of an armed force that determines restraint, rather than the norms that it ascribes to.

Contemporary challenges raised by asymmetric, non-international armed conflict

Many of today's armed conflicts involve both States and NSAGs. Some NSAGs claim they must resort to measures that violate IHL due to the military superiority of the States they fight against. At the same time, asymmetric conflicts can create perverse incentives for States to violate their own IHL obligations when faced with a real or perceived existential threat. Under such circumstances, it becomes easier for NSAGs to violate IHL in turn, leading to a type of "erosion of humanity".

Neither States nor NSAGs are a monolithic group when it comes to respect for IHL. There is a spectrum of IHL compliance on which militaries and societies fall. Broadly speaking, States can be divided into three general categories vis-à-vis IHL: those that endeavour to respect IHL, those that are interested in IHL but with patchy application, and those that are not interested in applying IHL at all. The goal is to encourage those with patchy compliance towards greater compliance while at the same time moving recalcitrant societies towards more respect and ensuring that generally compliant parties do not lose their commitment to IHL.

Similarly, NSAGs should not all be painted with the same brush on their ability or their desire to comply with IHL. Some have proposed a sliding scale of obligation depending on the level of organization of the group in question, but this is not welcomed by all. Those suggesting this notion have in mind the fact that if the law is not realistic, it may be disregarded. The goal is not to lower the standard but to ensure that the law is realistic so that NSAGs are more inclined to respect it. The counter-argument is that IHL already includes an element of feasibility, for example the requirement to take “feasible precautions”.³

Private military and security companies (PMSCs), another type of non-State actor, are a contemporary manifestation of the mercenary industry that has evolved over centuries. While there are arguments which suggest that PMSCs fit into the existing legal framework, there have simultaneously been efforts to clarify the position of PMSCs and to regulate their behaviour, which may be instructive in how to affect behaviour in armed conflicts more broadly. Such efforts include a UN treaty proposal, the Montreux Document and the International Code of Conduct (ICoC) and its Association (ICoCA). The UN’s Draft Convention on Private Military and Security Companies⁴ opened the discourse on how to best regulate PMSCs, though without substantial progress. The non-binding Montreux Document,⁵ likewise, has not resulted in demonstrable changes in behaviour, though it has been effective in engaging State involvement. Lastly, the ICoC was well received by the PMSC industry, unsurprisingly as parts of the industry itself were involved in drafting the code of conduct. Adherence to the ICoC enhances the perceived reliability of member firms and therefore their ability to secure contracts. This makes adherence to accepted norms in the best interests of the PMSC. The lesson that can be taken away from this example is that financial interest, and a sense of ownership by the affected audience, is a way to ensure compliance. Self-interest and “soft law” mechanisms could potentially serve as a model for future development of norms should the current hostility to new treaties persist.

The Australian Defence Force (ADF) can be examined as an example of a State armed force that cares about respecting IHL in asymmetric armed conflict, knowing first-hand the challenges of transnational, asymmetric armed conflict. The ADF takes its IHL obligations very seriously and has designed and implemented processes that facilitate IHL compliance, even where it might be inconvenient to do so, irrespective of expectations of reciprocity or lack thereof.

3 See Marco Sassòli, “Introducing a Sliding-Scale of Obligations to Address the Fundamental Inequality between Armed Groups and States?”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011. Compare with Yuval Shany, “A Rebuttal to Marco Sassòli”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011. See also Rene Provost, “The Move to Substantive Equality in International Humanitarian Law: A Rejoinder to Marco Sassòli and Yuval Shany”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011.

4 Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Self-Determination, UN Doc. A/HRC/15/25, 2 July 2010, Annex.

5 Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, Montreux, 17 September 2008.

Reflecting on why Australia's experience differs from that of some other States, a number of factors come to light. The ADF is not involved in any existential armed conflicts or even any armed conflicts where the price of military failure would directly affect the State; it has not moved to "casual disregard" of the civilian population and, on the contrary, its mission is often to protect civilians; Australian society expects its military to comply with IHL; and lastly, the ADF has taken a number of essential measures when fighting in asymmetric conflict, including requiring investigation of all civilian casualty incidents, and there is a strong governance framework for detention and systemic integration of IHL into the targeting process.

Drivers of behaviour in armed conflict

There is a wealth of ongoing research into what drives the behaviour of NSAGs, the most notable being the ICRC's own study of restraints on behaviour in war, an update to its 2004 study.⁶ The goal of both this research and the present discussion is to identify means of affecting behaviour, including that of certain NSAGs who reject IHL on its face, which could provide guidance for those seeking to ensure respect for the law. We can look to what affects the behaviour of State armed forces for inspiration on what might affect the behaviour of NSAGs. Where NSAGs control populations or territory they may have similar incentives to States to comply with IHL, as predictability and respect for the rule of law contribute to stability and prosperity. Where NSAGs seek legitimacy, there is an obvious incentive to comply with IHL. For other NSAGs, this may be more difficult.

Compliance theory can provide useful insights into why States do or do not respect the law. By analogy, compliance theory might also be applied to NSAGs with a clear hierarchical structure. According to one view, it is the internalization of norms into domestic legal systems and the development of habitual compliance through repeated behaviour that leads to respect for international law.⁷ Debate on how a norm should be interpreted can encourage the legal, political and social internalization of that norm. The discussion about compliance is an opportunity for such a transnational legal discourse on IHL to take place.

Self-interest may also lead parties to armed conflict to respect IHL, with political scientists having postulated for many years that governments act out of self-interest. For most of the twentieth century, the understanding was that military self-interest was a main driver for governments. Since World War II this has expanded to include economic self-interest. Beyond this, however, States are also motivated by non-material self-interest, such as their reputation or identity.

For an example of the self-interest of armed forces leading to policies that reduce civilian casualties, one can look to the counter-insurgency doctrine

6 See "The Roots of Behavior in War Revisited", video, available at: www.icrc.org/en/event/roots-behaviour-war-revisited (accessed in January 2017).

7 See Harold Koh, "Why Do Nations Obey International Law?", *Yale Law Journal*, Vol. 106, No. 1, 1996.

developed by coalition forces in Iraq. According to the this doctrine, members of the military assumed additional risk in order to avoid civilian casualties, as such casualties were believed to undermine the coalition forces' mission by alienating the local population that they, as well as the insurgents, were trying to win over. Killing civilians was therefore no longer seen as mere "collateral damage", but as tangibly undermining long-term counterterrorism goals. This framed avoidance of civilian casualties in terms of the coalition forces' self-interest, rather than in legal terms.

State armed forces have integrated the Geneva Conventions into their rules of engagement and often feel that the Conventions are part of the "warriors' code" by which they live. NSAGs do not participate in the drafting of international treaties, and may therefore feel less ownership of the Geneva Conventions and the norms they contain. Humanitarian actors often engage with NSAGs in order to get them to formally adopt the norms of IHL so that they feel ownership over them. The international community, including both States and humanitarian organizations, should consider where to involve NSAGs in drafting or developing international law (or whether or not to involve them at all). This is most clear when referring to the obligations contained in the Geneva Conventions, which even encourage the conclusion of special agreements by armed groups. Customary international law, on the other hand, is still determined by the practices of States, rather than armed groups. Providing an opportunity for NSAGs to participate in the development of the law in this way may increase their feeling of ownership of the law and their incentives to comply with it. Since not all NSAGs have equal capacity or resources to meet IHL standards, determining what practice contributes to a customary law norm may be a difficult task.

How much can be done to promote compliance with IHL depends on analysis of the organized armed group, level of contact and possible dialogue. Dialogue with armed groups is important as it has a noted link with their compliance with IHL – and despite the general assumption that dialogue with NSAGs is difficult, they are incredibly diverse in terms of structure, motivation, etc., and much work is being undertaken with armed groups that are more open to leverage.

Roles of States, academics and civil society in generating respect for the law

Generating respect for the law requires continuous interaction between governmental, military, academic and civil society actors.

In Australia, formal respect for the law is systematized: military lawyers work with government legal advisers to provide advice to decision-makers (the executive branch) who are ultimately accountable to Parliament, which has oversight of the ADF. Other actors – including the ICRC, Australian Red Cross and a broad range of civil society actors – can influence government processes.

Formally, however, the State remains at the centre of humanitarian law-making. Whether in response to a perceived "withdrawal" by States from the

development of IHL, or as a result of slow treaty-making or a desire by States to maintain “plausible deniability”, informal law-making (such as the development of manuals and guidances by academics, experts and the ICRC⁸) has emerged as a useful mechanism for advancing awareness of and respect for IHL. This is not necessarily an indication of “abdication” by States; rather, it may be an example of “forum shopping”, whereby States choose a forum of IHL development where they will achieve results. Informal law-making offers opportunities for clarification and development of the law, but also brings challenges, such as the absence of binding regulation.

When it comes to the clarification and understanding of IHL, the Australian military has followed others (such as the United States) by forming strategic ties with academia in order to enrich IHL training and debate. Academic military law centres can perform a vital role in generating respect for IHL by providing a platform for military lawyers to discuss their views on IHL issues and facilitating meaningful debate on IHL issues in view of the public. While engagement by government and military lawyers in academic debate is possible, the need to respect confidentiality and professional responsibility can sometimes limit the level of engagement (such limitations should not arbitrarily inhibit transparency). Academia can also play a role in educating humanitarian professionals about IHL.

While the academy can bring IHL “into the open”, building community knowledge and engagement can be very difficult, with some countries achieving more success than others. In this respect, a broad range of actors – from humanitarian actors to military industrial actors to the media – all have a role to play in “owning” IHL compliance.

The law must be accessible to those actors who wish to champion its respect. NGOs in particular must overcome resource barriers and equip themselves with IHL knowledge in order to understand their own rights and obligations and effectively influence governments.⁹ In this respect, widespread dissemination of IHL is key. National Red Cross and Red Crescent Societies are central to dissemination efforts, acting in their role as auxiliaries to governments in the humanitarian field. Demonstrating a desire to translate knowledge into action, Australian Red Cross disseminates IHL among the key IHL actors in Australia and seeks to influence not just individuals but systems and rules as well. These endeavours, however, must remain distinct from government-led efforts, for example in areas such as the countering and prevention of violent extremism.

Examples of good practice on respect for IHL belie a pervasive gap between academia and public policy. Parliamentarians neither invite nor trust “outside” advice, academics remain wary of being “politicized”, and few NGOs have

8 See, for example, the San Remo Manual, Harvard Manual, Tallinn Manual, Manual on International Law Applicable to Military Uses of Outer Space, and Copenhagen Principles, as well as the ICRC’s *Interpretive Guidance on Direct Participation in Hostilities* and the Commentary to the Geneva Conventions.

9 See, for example, the Humanitarian Leadership Programme offered by Deakin University, Australia.

specialist knowledge of IHL. Contemporary examples from Australia – such as policies on indigenous people and migration – illustrate the importance of breaking down barriers between elected representatives, civil society and those with knowledge of the subject matter.

Technology and the changing face of warfare

The modern face of warfare prompts us to distinguish between rules that are “technology-neutral” (rules that are capable of being applied to new technologies) and rules that are “technology-specific” (rules that are developed for a particular type of technology). Technology-specific rules – such as those that can be found in the field of arms control – should nonetheless be informed by legal, humanitarian, strategic and technological considerations. Today, discussions of technology-specific rules often focus on four key fields: lethal autonomous weapon systems, human enhancement of military personnel, military uses of nano-technology, and cyber-warfare. Discussion has naturally focused on specific technical questions, such as whether there can be meaningful consent by military personnel for pharmaceutical enhancements.

However, the impact of technology on humanitarian law and military ethics goes beyond the technical. New technologies can challenge the underlying assumptions of IHL. For example, the ability to remotely conduct cyber-operations challenges the notion of “effective control” and thereby the rules for determining whether territory is occupied. New technologies can also give rise to complex ethical challenges and cause us to consider the moral antecedents of IHL itself, such as the sanctity of life and notions of mercy, empathy, pity and honour. Pharmaceutical enhancements or nano-technology in the body could reduce a soldier’s sense of personal vulnerability and give rise to asymmetry between individual combatants. This raises a number of questions. Does a reduced sense of personal vulnerability mean that soldiers will be less likely to show mercy to their enemy? If so, are we compelled to protect ideas such as mercy against the influence of new technology? Conversely, does autonomous warfare reduce the influence of hatred, fear and vengeance? Should we embrace or be concerned by the prospect of a “clinical” application of IHL?

Like the introduction of a new species of animal into an ecosystem, new technologies can alter the delicate balance that influences decisions to use lethal force. The lower cost and greater geographic range of new technologies also means that prospective parties to conflict need no longer be able to control large swathes of territory with firepower or human force, nor must they achieve broad democratic support. Small groups of trained professionals may be able to achieve comparable outcomes to large armies. Advances in technology may lead to “cleaner” wars, where fighting parties conduct hostilities at a distance and “smart” weapons minimize incidental damage or loss of life. Technology is already facilitating humanitarian interventions and revolutionizing how we communicate about war.

What will be the long-term impact of this change to the military ecosystem? Some argue that reducing the financial and political barriers to war may ultimately lead to greater suffering and loss of life in conflict. The growing asymmetry between fighting parties may also lead less-resourced parties to rely on more brutal methods. Yet reduction of human suffering is the aim of IHL. Laying bare the realities of war through communications technologies can support accountability measures. Should we embrace all opportunities to limit the suffering caused by war, including new war-fighting technologies? Or should the unknowable impacts of new technologies prompt us to refocus efforts on, for example, conflict prevention?

The use of technology as a force multiplier can result in an increased focus on the individual combatant in modern conflict. Under this individualized approach – whereby a specific individual can be the target of a military operation which, in turn, was authorized by a single decision-maker – warfare seems more like policing. The societal implications of these consequences of new technologies go beyond IHL. How does the individualizing of conflict impact on the relationship between the individual and society as a whole?

New technologies can also offer opportunities for the development and strengthening of IHL. For example, the use of remotely controlled weapon systems can be seen as an opportunity to ensure greater compliance with IHL. This potential has been borne out by European jurisprudence on the right of members of armed forces to be properly trained and equipped.¹⁰ As the technology of war becomes accessible to a wider group of people, so too grows the number of people who must be made aware of humanitarian law. Weapon system developers may become a new audience for IHL dissemination.

The confusion and discomfort that often pervades the discussion of “technological warfare” illustrates that the law is saturated with morality (even legal positivists may come to the conclusion that the law must be broken because “it is the right thing to do”). But it is not clear whether human-designed technologies will perpetuate the same moral strictures that influence human behaviour in war. In this respect, the debate surrounding new technologies is a prism through which we can (re-)examine old assumptions about IHL.

Conclusions

It would be wrong to assume that all people, or all nations, consider international law (including IHL) to be relevant and important. Contrary to the perception that international law is only useful for small or middle powers, international law remains crucial to the most important decisions made by all States, including the decision to go to war and the conduct of hostilities.

The challenge of improving respect for IHL is not new, but it has been made sharper by the barbarity we witness on the battlefield. For those who voice strong support for IHL, the task is not to strengthen their own observance, but to find

10 UK Supreme Court, *Smith et al. (No. 2) v. Ministry of Defence*, UKSC 41, 19 June 2013.

means to nurture respect in more restrictive environments. There are both moral and legal elements, stemming from States' obligations to respect and ensure respect for IHL. The ICRC itself has acknowledged that it must do more to engender respect for the law.

Fulfilment of this goal requires honest self-reflection in order to understand the problem and implement workable solutions. We must recognize that IHL is not a panacea, and that we cannot continue to depend on traditional normative frameworks – new tools are required to create the humanitarian outcomes we desire. We must find new ways to speak to each other about IHL – a common language that acknowledges ideas from diverse fields such as science, history, ethics, military strategy and humanitarian action. And we must bring these conversations into the open, so that respect for IHL is integrated into the relationship between the public and the State.

What next?

It may be useful to take a step back and determine what we mean when we use the word “respect”. Is refraining from behaviours that violate the law sufficient? Is it important that refraining from such behaviours be based on an understanding that they are incompatible with morality or ethics? Does the motivation for refraining from these behaviours matter? Relatedly, does a blind reliance on the letter of the law lead to a sort of “moral de-skilling” that may ultimately undermine respect for the principle of humanity underlying IHL norms?

Determining the type of respect we are seeking to engender will allow the international community to seek out ways of influencing the behaviour of States and NSAGs. The most challenging of these will be those who are not interested in applying IHL at all. Here we should note that if the appetite for the development of new norms is low, the future of IHL may lie in soft law.

The international community should look to the past for insights into how to approach new technologies on the battlefield. Each generation has struggled with new developments, and parallels can be drawn between how new technologies were dealt with when they emerged in the past and how we deal with them today.

It is also vital that we highlight successes in the law as well as violations. IHL violations are ever-present in the international media, but respect is rarely reported, as good news is no news. This may lead to the perception that the law does not work; such perceptions undermine the law's influence, so is important to show that IHL does have an impact.

Lastly, acknowledging that the law alone is not sufficient to generate respect for the law, future initiatives aimed at generating greater respect for IHL norms will need to include an open dialogue that is not limited to military lawyers, but reaches across disciplines.