

EDITORIAL

THE POWER OF ASKING “HOW” – A KEY TO UNDERSTANDING THE DEVELOPMENT OF IHL?

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Many enquiries and investigations begin with asking: Who? What? When? Where? and Why?: the “Five W’s”. However, failing to add “How?” to that list can neglect a powerful analytical tool – a door-opener for countless more technical and in-depth questions and queries.¹

Therefore, the questioning “how international humanitarian law (IHL) develops” sounds deceptively simple.

If asked to promptly answer, many readers of the *International Review of the Red Cross* would utter the following lines of thought: “it is developed by States as main actors, but there is also a role for the International Committee of the Red Cross as guardian of IHL”, followed by “one also needs to account for the fact that non-state armed groups are bound by rules they did not negotiate nor formally agree with, and for the fact that the international criminal tribunals have pushed certain interpretations of the law in a direction which has become authoritative”.

Some might say that IHL’s core rules are centuries old, reflective of various cultural and religious traditions before they were codified in their modern form. Others would evoke the well-known argument that “IHL is always one war behind reality”. In other words, most forms or causes of human suffering must first be experienced in real-world armed conflicts before States take regulatory action to prevent them from reproducing in the future.

Looking at the current political climate, assessing whether new IHL developments may be expected in the next few years, many will point to the difficulties within the traditional multilateral treaty-making system which may not be conducive to calls for new law. In particular, one often hears the fear expressed that, if one were to re-open IHL-treaties now, States would risk backtracking on their existing obligations.

In an attempt to make sense of these multi-layered answers, the *International Review of the Red Cross* is proud to present this foundational double-edition, which we hope will be of significant interest and of practical usefulness to each of our journal’s different audiences: practitioners, including decision-makers, analysts, academics, and students. Although, for analytical purposes, the edition’s twenty-six articles have been divided into “the past”, “the present” and “the future”, it is acknowledged that some articles may belong in more than one category.

Several articles looking at our era grapple with the diversification of instruments in which States include IHL rules. Virtually every textbook of public international law will have, among its opening chapters, one about the “sources” of international law, closely tied to the text of Article 38 of the Statute of the International Court of Justice.² IHL textbooks will duly follow this line by introducing the substance of the main IHL treaties, and by affirming the important complementary role of customary law for a broader understanding of this body of law.

And yet, anno 2022, anyone limiting their study of IHL to the rules of customary and treaty law would only be missing important parts of the overall landscape. Generally speaking, after the Second World War, there have been three distinct IHL treaty-making “waves”: (i) the four 1949 Geneva Conventions; (ii) the two 1977 Additional Protocols; and (iii) a number of treaties on specific topics, such as cultural property and treaties pertaining to the regulation or prohibition of certain weapons. Post-1977, it was particularly in the latter field that States maintained a healthy appetite for the negotiation of new treaties. Some of these enjoy near universal ratification, while others see a clear split between two distinct categories of States: the “have nots” of a particular type of weapon ratify *en masse*, whereas the few “haves” refuse to join.

In other areas of IHL, however, the negotiation of treaties in response to new and emerging humanitarian challenges has become the exception rather than the rule. Instead, IHL and its interpretation are increasingly developed in the form of informal standard-setting instruments, some of which could be described as “soft law”, such as political declarations, manuals, or documents. States themselves are often involved in these non-treaty efforts, sometimes even formally “signing” them – ironically, language straight from the Vienna Convention on the Law of Treaties.

In other instances, the lead in restating and interpreting customary and treaty IHL law is taken by mandated organizations such as the ICRC, or *de facto* even by informal groups of experts. While governments may task representatives with participating in such efforts in their personal capacity, or contribute to the drafting process through informal consultations (the “manual” approach, e.g. in the field of cyber warfare, among others), they almost always retain plausible deniability in terms of who said what, and who is bound by which rules.

In yet other instances States decide to go at it *solo* altogether, for example by issuing unilateral normative commitments on a particular IHL topic, for example as

- 1 G. J. Hart, “The Five W’s: An Old Tool for the New Task of Audience Analysis”, *Technical Communication*, Vol. 43, No. 2, 1996. The article is also available at: www.geoff-hart.com/resources/1995-1998/five-w.htm (internet references were accessed in October 2022).
- 2 “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; and (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.” Statute of the International Court of Justice, Art. 38, available at: www.icj-cij.org/en/statute.

formulate as a unilaterally declared “policy”, embedded in that State’s military manual. When doing so, they conveniently sideline the usual need to reach an agreement with those that they may not fully agree with, including potential future enemies during an armed conflict.

What these non-treaty regulatory initiatives of the last decades have in common is that they virtually always state that (i) they are not meant to modify IHL rules, as found in existing treaty and customary law; and (ii) they are by no means to be considered binding.

“Soft law” and other non-binding norms are not unique to IHL, public international law or law in general. However, the jury is still out on whether the proliferation of non-binding norms as the go-to formula to address new IHL challenges is either positive or worrisome, or somewhere in the middle of both. For sure, in the current geopolitical and multilateral climate, international standard-setting through non-binding norms may be the best we can wish for. Nevertheless, for all the time and effort it might take to negotiate treaties and have them entered into force, the enormous added value of a legally binding normative order based on a declared consensus among States should not be lightly underestimated.

In my view, the trends of the last few decades may well have pushed the pendulum too far, and we are now at a point where we should all be seriously worried: when nothing is binding, when all is mere guidance or just an “opinion”, when all is conveniently just a “view” expressed by experts which do not formally represent States, who actually knows what the *binding* law is? Who knows where are the *actual* faultlines separating lawful from unlawful conduct in warfare? The foregoing is not to devalue the appeal of policy documents, or of policy change reflected in new non-treaty commitments. In some instances and for some purposes, the latter may work perfectly fine. Yet there are moments in the multilateral legal order when *clarity* is called for in order to know which rules are *binding* versus optional as a matter of existing law.

In the worst case, therefore, the international community may well be “sleep-walking” into a situation increasingly undermining the normative coherence and clarity of IHL. On some topics of IHL, clear rules have existed for decades despite normative interpretational challenges with some States diverging in terms of their interpretation. Yet on others, particularly for new challenges such as new technologies, or new patterns of battlefield behaviour, only “guidance” exists. With the noted exception of the field of weapons regulation, at present, States seem quite content to continue along this path – a path which arguably risks turning into a slippery slope as the present morphs into the future.

Ultimately, the risk is not necessarily one of a *normative void* in IHL. After all, the creation of some normative content has been welcomed by States. The real risk is one of *normative indeterminacy*: a flurry of rules has been created with States “somehow”, yet not formally, involved. Informal processes cannot produce formally binding rules. The rules such processes generate float around anyone’s normative assessment of whether conduct by Parties to an armed conflict is or is not lawful, yet ultimately they fail to provide us with a clear and authoritative answer.

Thanks to the support and advice of countless individuals, the *Review* team carefully curated this selection of articles on the past, present and future of “how IHL develops”. All contributing authors deserve our ultimate words of gratitude – for agreeing to reflect, collectively, on the trends through which IHL has been developing during the last few decades, and what the roadmap for the next few years might look like.

Last, but not least, in addition to our usual “selected articles”, this edition of the *Review* also contains, and starts with, a unique interview with former International Committee of the Red Cross President, Mr Peter Maurer – reflecting on the changes observed throughout his decade (2012–2022) at the helm of the organization.