

How will international humanitarian law develop in the future?

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Abstract

This article tries to imagine how the development of international humanitarian law (IHL) could continue despite current difficulties, increasing the ownership and contribution of States and armed groups in this process. After suggesting that some traditional assumptions about IHL may need to be abandoned, it tries to suggest a new way in which IHL rules could be developed, through States adopting together core obligations and principles and each State and armed group then specifying the details internally, but publicly. Finally, it stresses the importance and difficulties of involving non-State armed groups in this process.

Keywords: international humanitarian law, development, law-making, sources, future, States, armed groups.

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Preliminary remark

This article has been written and submitted – and the ideas expressed in it were developed – before the international armed conflict (IAC) between Russia and Ukraine became on 24 February 2022 a reality that may influence fundamentally how international humanitarian law (IHL) develops in the future. There are both new fears and new hopes. The separation between *jus ad bellum* and *jus in bello* is challenged in many circles. IACs, for which IHL is already best developed, may

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become again a more important phenomenon. Many States have shown in their discourse an unprecedented commitment to IHL. It is too early to judge whether this will change IHL and how it develops. However, in particular if the IAC in Ukraine remains an exceptional phenomenon and if many central IHL issues, in particular on non-international armed conflicts (NIACs), continue to profoundly divide States, the ideas expressed in this contribution remain relevant.

Introduction

The Nobel Prize in physics winner Niels Bohr is reported to have said: “Prediction is very difficult, especially if it is about the future!” The future of IHL raises questions of substance (which rules will we need and which rules will we be able to get?) and of process (how can future rules of IHL be developed?). In both respects many other branches of international law are currently equally under fire. States are unable to find a consensus on many issues on which the international community has pressing normative needs. They are even unable to agree to start a process that might lead to rules responding to those needs. What is particular about IHL is that ideally it would not need to develop at all, because human societies would no longer engage in organized armed violence and the object that IHL regulates – armed conflicts – would therefore disappear. IHL will thus always remain a pragmatic endeavour.

On the substance we can expect that the development of IHL rules will continue to confront dilemmas along different parameters. First, the need to make a compromise between humanitarian aspirations and realism will continue to exist. Second, a good balance will have to be found between rules meeting new, in particular, technological, challenges and rules on the existing, traditional forms of armed violence, which still affect the greatest number of victims. Third, the tension will persist between stating timeless general principles (which will only protect if belligerents act in good faith) and detailed regulations, which will be quickly outdated and will inevitably turn out to be unrealistic in certain armed conflicts. NIACs will probably also continue to have the greatest humanitarian impact. Mankind must even hope so, because an IAC between great powers may mean its end. The rules regulating NIACs will continue to be limited by States’ reluctance to treat rebels – regularly labelled as “terrorists” – as equals under IHL and the legal, and in many armed conflicts real, inequality between the parties.

This contribution, however, aims to focus on the procedural challenge of how IHL rules can be developed in the future. As all of IHL, the possible processes we explore are either unrealistic or unsatisfactory; they also bear the risk of giving ill-intentioned States an opportunity to weaken the existing law – at least the law as it appears in the treaties and the International Committee of the Red Cross (ICRC) Customary Law Study.¹ Both unfortunately do not correspond

1 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1> (all internet references were accessed in May 2022).

to the real conduct of most belligerents. At the same time, to adapt the law to the actual conduct of belligerents may be satisfactory from a normative point of view, but not for those affected by armed conflicts.

Even in this framework, a disclaimer is necessary. It may be that the existing processes of (hopefully) adopting new treaties, or, if this is not possible, at least “non-binding” “best practices”, “manuals” in “expert processes”, or “interpretive guidance”, all claimed not to aim at new rules, and hoping that “official” State practice develops new rules of customary law are the best we can get. However, even the methods not aiming at new treaty rules have recently encountered considerable resistance by States. Some assumptions underlying recent attempts that failed or were criticized will be challenged hereafter. The war victims deserve such a reality check and some thinking outside the box in this respect, although such assumptions, which are traditionally also those of the author of these lines, may unfortunately be correct. It may also be that the international atmosphere changes again and States will be ready to adopt new rules as they did after the First and Second World Wars but this time hopefully not after a major war. Some have suggested that the time of unilateral IHL making by States has come.² However, this is incompatible with the very nature of international law consisting of common rules. It would privilege unduly some powerful Western States and will not influence the conduct of their enemies, including armed groups. Alternatively, if all States can and must be involved in such “unilateral IHL making”, this is another description of the traditional, cumbersome and mysterious process of creating customary rules.

I will therefore start this article by challenging some assumptions about the contemporary development of IHL. Next, an additional, new way of how IHL rules could be developed, drawn from experience made in other branches of international law, will be described. Finally, the importance and difficulties of involving armed non-State actors (hereafter: armed groups) in the development of rules addressed to them will be stressed.

Challenging some current assumptions

States do not want to adopt new IHL rules

The current wisdom is that States are no longer ready to adopt new IHL rules,³ in the contemporary political environment, advised by lawyers imagining future

2 Yahli Shereshevsky, “Back in the Game: International Humanitarian Lawmaking by States”, *Berkeley Journal of International Law*, Vol. 37, No. 1.

3 See, e.g., William H. Boothby, *Conflict Law*, Springer, New York, 2014, p. 72; John B. Bellinger III and Vijay M. Padmanabhan, “Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law”, *American Journal of International Law*, Vol. 105, No. 2, 2011, p. 205; Emily Crawford, “From Inter-state and Symmetric to Intrastate and Asymmetric: Changing Methods of Warfare and the Law of Armed Conflict in the 100 Years Since World War One”, *Yearbook of International Humanitarian Law*, Vol. 17, 2014, p. 112.

circumstances in which they cannot respect a given rule or in which their adversaries, non-governmental organizations (NGOs) or lawyers before domestic courts can exploit those rules for “lawfare” purposes. Like other traditional wisdoms, this is based upon plenty of evidence. Since 1949, the Geneva Conventions could not be replaced, as they had been in the previous eighty-five years, every twenty-five years by an updated series of treaties. Since 1977, outside the case of weapons treaties mentioned below, there has been no more major update of the rules. This is also due to the increase in the number of States and diversity among them, but equally to the fact that there is today a near consensus that the substantive rules are largely adequate and that what is missing is better implementation mechanisms – a field in which IHL has never been strong.

Nevertheless, to mention only progress in the form of treaty rules, and precisely in the field of enforcement, the Rome Statute of the International Criminal Court (ICC) was adopted in 1998 and now has 123 States parties.⁴ True, the Court has many weaknesses, impunity for war crimes is still the rule, and States became much more reluctant towards the ICC when they realized that it may also go after their own leaders. Nevertheless, from a conceptual point of view it nears a miracle for international law, which never accepted compulsory jurisdiction of an ordinary court over its subjects – States – that States parties accepted in the Rome Statute compulsory jurisdiction by a court over non-subjects – individuals, thus piercing the corporate veil of States and their sovereignty in criminal matters, of which they are so jealous. Moreover, the ICC Statute is not alone. States have accepted new treaty rules on such a delicate matter as the arms trade or banning anti-personnel landmines and cluster munitions. Those treaties are still, just as the Rome Statute, far from being universally binding but this does not mean that they do not influence the conduct of States non-parties.

On the other hand, we must remember that even the last major success in updating IHL, the 1977 Additional Protocols, had to be achieved in a profoundly divided international environment, marked by the cold war and the end of decolonization.

Therefore, whenever a window of opportunity arises in world politics, pushed by like-minded States forming coalitions of the willing on a certain subject and Western public opinion sensitive on one subject, the adoption of new treaty rules is still an option, which should not be discarded by cynicism and defeatism. States are cold monsters,⁵ but the State is also us.⁶ It may be that our times and the attitude of most States require “guerrilla tactics with cluster bombs” (that is, hoping that in the spur of the moment one piece of shrapnel will hit and obtain the necessary consent of States to achieve some progress), rather

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

5 (“Staat heisst das kälteste aller kalten Ungeheuer”): Friedrich Nietzsche, *Also sprach Zarathustra, Ein Buch für Alle und Keinen*, Naumann, Leipzig, 1903, p. 64.

6 Political Report of the Central Committee of the Russian Communist Party for the 11th Party Congress, presented by Vladimir I. Lenin, 27 March 1922.

than pursuing ten-year-long processes aiming at consensus within a profoundly divided international community.

IHL rules must be developed by consensus

A second traditional wisdom, which does not always correspond to a legal requirement, is that IHL rules, and in particular IHL implementation mechanisms, must be adopted by consensus.⁷ The strife for consensus is based upon the idea that IHL rules must be the same for both parties to an armed conflict, because armed forces cannot be trained to respect different rules depending on who is their adversary and because IHL rules adopted by a majority of States never involved in armed conflicts would be meaningless if they were opposed by the few States most often involved in armed conflicts. Such desire for consensus made the recent initiative aimed at enhancing respect for IHL through the adoption of a new implementation mechanism, taken by the ICRC and Switzerland, fail.⁸ A large majority at the International Conference of the Red Cross and the Red Crescent was in favour of a voluntary reporting mechanism leading to non-confrontational, non-politicized and non-contextual discussions on the respect of IHL, but a few States were opposed.

However, the justification that the rules must be the same for both parties is, first, anyway only pertinent for the fortunately few IACs still existing. In such conflicts, the reciprocal applicability of IHL treaties only between their parties ensures that both parties are bound by the same rules. For the most frequent NIACs, the equality of States and armed groups before IHL does not depend on a consensus between States but constitutes a major challenge we have to discuss separately. Second, technically, armed forces even of States parties to all IHL treaties already now have to be trained to comply with at least four different sets of rules: the entirety of IHL treaty law if confronted with another State party to those treaties; the Geneva Conventions and customary rules if confronted with a State not party to Protocol I; Article 3 common to the four Geneva Conventions and customary law of NIACs for some NIACs; common Article 3, Protocol II and customary law of NIACs if confronted on their territory with an armed group which, under responsible

- 7 See the very accurate description of Swiss and ICRC efforts to get a new compliance mechanism for IHL: Emmanuela-Chiara Gillard, “Promoting Compliance with International Humanitarian Law”, *Chatham House Briefing*, October 2016, pp. 3 and 5, with references. Legally, the consensus ideal is only foreseen for the International Conference of the Red Cross and the Red Crescent in Article 11(7) of the Statutes of the International Red Cross and Red Crescent Movement, 1986, as amended in 2016, and in Rule 19 of the Rules of Procedure of the International Red Cross and Red Crescent Movement, 1986, as amended in 1995; the consensus requirement also exists in disarmament fora.
- 8 ICRC, “No Agreement by States on Mechanism to Strengthen Compliance with Rules of War”, 10 December 2015, available at: <https://www.icrc.org/en/document/no-agreement-states-mechanism-strengthen-compliance-rules-war>; Helen Durham, “Strengthening Compliance with IHL: Disappointment and Hope”, *Humanitarian Law & Policy Blog*, 14 December 2018, available at: <https://blogs.icrc.org/law-and-policy/2018/12/14/strengthening-compliance-with-ihl-disappointment-and-hope/>; and ICRC, *Strengthening Compliance with International Humanitarian Law: Concluding Report*, 32IC/15/19.2, Geneva, October 2015, available at: https://rcrcconference.org/app/uploads/2015/04/32IC-Concluding-report-on-Strengthening-Compliance-with-IHL_EN.pdf.

command, exercise such control over a part of that territory as to enable it to carry out sustained and concerted military operations and to implement Protocol II.⁹ When we take the treaty obligations concerning specific weapons into account, the picture gets even more varied. Third, the consensus approach confers a “triple victory” on those who have been described as “digging the grave of IHL” or, in other words, those who do not want better protection to exist in a given domain. “They slow the process down; they water down the text, and then do not even ratify the treaty once adopted.”¹⁰ They thus leave the States parties that wanted to increase protection with a text that falls short of their original wishes.

To avoid this unsatisfactory situation, some States that genuinely wanted improvement resorted to what is referred to as the “Ottawa process” because it was applied for the first time during the deliberations on the Ottawa Convention banning anti-personnel landmines.¹¹ In this process, only those States that wished to achieve a ban were involved in negotiating the standards that opponents were then free to agree to. This process was successfully repeated for the Oslo Convention banning cluster munitions.¹² This may be an avenue for future negotiations of treaty rules, soft law instruments and on new implementation mechanisms. Even those who act as “grave diggers” in the current processes may become more constructive if they know that their opposition, often justified by bad faith arguments, cannot always prevail. Obviously, the majority behind such new rules must nevertheless be large, representative, and genuine enough.

As States do not want any new development of IHL, normative needs must be met by claiming to interpret or determine existing law

Linked to the previous assumption is the prevailing option taken by all those who want to improve the protection of war victims to claim that they do not want to develop new rules – as if new rules were an obscene suggestion – but only interpret or clarify existing law.¹³ Thus, the ICRC stresses in its Interpretive Guidance on the Notion of Direct Participation in Hostilities that it does not “endeavour to change binding rules of customary or treaty IHL, but reflect the ICRC’s institutional position as to how existing IHL should be interpreted”.¹⁴ In

9 See 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), Art. 1(1).

10 Yves Sandoz, “Le demi-siècle des Conventions de Genève”, *Revue internationale de la Croix-Rouge*, Vol. 81, No. 834, 1999, p. 241 (my translation).

11 See Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 2056 UNTS 211, 18 September 1997 (entered into force 1 March 1998) (the “Ottawa Convention”). On the “Ottawa Process”, see, generally, Stuart Maslen and Peter Herby, “An International Ban on Anti-Personnel Mines: History and Negotiation of the ‘Ottawa Treaty’”, *International Review of the Red Cross*, Vol. 38, No. 325, 1998, pp. 693–8.

12 See Convention on Cluster Munitions, 2688 UNTS 39, 30 May 2008 (entered into force 1 August 2010).

13 See, generally, for a critical but detailed assessment of expert processes, Anton Orlinov Petrov, *Expert Laws of War: Restating and Making Law in Expert Processes*, Elgar, Cheltenham, 2020.

14 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009, p. 9.

a similar fashion, States themselves stress in the Montreux Document on Private Military and Security Companies that it should “not be interpreted as limiting, prejudicing or enhancing in any manner existing obligations under international law, or as creating or developing new obligations under international law”.¹⁵ This is also what they declared in the Safe Schools Declaration and the Guidelines for Protecting Schools and Universities from Military Use During Armed Conflict,¹⁶ although they changed the law in certain respects.¹⁷ The recent tendency not to separate in some cases law and policy recommendations or reasons¹⁸ similarly manifests this concern not to give the impression to change the existing law, as does the fact that in other cases the ICRC explicitly limits itself to policy recommendations.¹⁹

First, however, in a system without a centralized legislator as is international law the borderline between legislation and interpretation is much more fluid than in domestic law. Second, are States so stupid that they do not realize the trick? If they do, they become reluctant to any interpretation, claim that it – and not only legislation – must be reserved to States,²⁰ and no longer express their understanding of their IHL obligations, fearing that someone will deduce from it customary obligations or subsequent practice relevant for the interpretation of treaty rules.²¹ Some States had the impression that their arms were twisted in some past exercises determining customary law or interpreting rules. They are therefore now sceptical of any interpretation that is not authentic,

- 15 ICRC, *The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*, Montreux, 17 September 2008 (Montreux Document), p. 9, available at: <https://shop.icrc.org/the-montreux-document-on-private-military-and-security-companies-pdf-en.html>. See also International Institute of Humanitarian Law, *The Copenhagen Process on the Handling of Detainees in International Military Operations. The Copenhagen Process: Principles and Guidelines*, 2012, p. 1, para. II, available at: <https://ihl.org/wp-content/uploads/2018/04/Copenhagen-Process-Principles-and-Guidelines.pdf>.
- 16 Guidelines for Protecting Schools and Universities from Military Use During Armed Conflict, Global Coalition to Protect Education from Attack, 2014, available at: https://protectingeducation.org/wp-content/uploads/documents/documents_guidelines_en.pdf.
- 17 Marten 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 & Security Law*, Vol. 26, No. 2, pp. 257 and 282–3.
- 18 See, e.g., ICRC, *International Humanitarian Law and Challenges of Contemporary Armed Conflicts*, Geneva, October 2011, pp. 21–2 and 48–53, available at: <https://www.icrc.org/en/doc/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm>. See, also, “Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence”, as Annex 1 to ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Document No. 30IC/07/8.4, Geneva, October 2007, published in *International Review of the Red Cross*, Vol. 87, No. 858, 2005.
- 19 ICRC, “Explosive Weapons: Civilians in Populated Areas Must be Protected”, 26 January 2022, available at: <https://www.icrc.org/en/document/civilians-protected-against-explosive-weapons>.
- 20 Sean Watts, “Interpretation in the Updated GCIII Commentary”, *Articles of War*, 15 December 2020, available at: <https://lieber.westpoint.edu/interpretation-updated-gciii-commentary/>; Michael W. Meier, “The Updated GCIII Commentary: A Flawed Methodology”, *Articles of War*, 3 February 2021, available at: <https://lieber.westpoint.edu/updated-gciii-commentary-flawed-methodology/>; Ronald Alcalá, “*Opinio Juris* and the Essential Role of States”, *Articles of War*, 11 February 2021, available at: <https://lieber.westpoint.edu/opinio-juris-essential-role-states/>.
- 21 Michael N. Schmitt and Sean Watts, “State *Opinio Juris* and International Humanitarian Law Pluralism”, *International Law Studies*, Vol. 91, No. 1, 2015, p. 171.

even if it is made according to the ordinary rules of treaty interpretation of international law.

If IHL was reopened, States would weaken it

I have previously written:

States might take advantage of a new general revision of the IHL treaties 70 years after the Conventions to weaken rather than to improve protection of war victims, especially with regard to those they classify as “terrorists”. This concern was one of the main reasons why in 1977 no new generation of Geneva Conventions was drafted, but only “additional” Protocols that could not open up the existing law to negotiations. I think that Common Article 3 would today no longer be included into generally revised treaties on IHL.²²

Perhaps this assumption is too defeatist or even wrong. True, no consensus could recently be found for a very harmless ICRC initiative to specify the rules of detention in NIACs.²³ Most States, however, participated constructively in those discussions. True, States are reluctant towards any rules which give “terrorists” rights and virtually all armed groups are considered as such at least by the State they are fighting against. Nevertheless, States urged each other both in United Nations (UN) General Assembly (UNGA) and UN Security Council (UNSC) resolutions to ensure that counterterrorism legislation and measures do not impede humanitarian activities or engagement with all relevant actors foreseen by IHL.²⁴ More generally, in the field of international human rights law (IHRL) States have adopted new protective rules, although – contrary to IHL – every State is bound every time in all its activities by IHRL, and human rights interfere at least as much in “internal affairs” as IHL. Thus, States have in recent years been ready to adopt and widely ratify treaties on disappeared persons²⁵ or the rights of persons with disabilities,²⁶ which obliged many of them to change their domestic practices and to proceed to considerable investments. What is more, in 2002 States adopted an optional protocol to the UN Convention against torture that

22 Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019, p. 45. See also Michael Bothe, Karl Joseph 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*, 2nd ed., Martinus Nijhoff, Leiden, 2013, pp. xxii and 7; Nicolas Michel, “Propos introductif. Le droit international humanitaire, entre frustrations, réussites et interrogations”, in Jean-François Flauss (ed.), *Les nouvelles frontières du droit international humanitaire*, Bruylant, Brussels, 2003, p. 13.

23 ICRC, *Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty: Concluding Report*, Document No. 32IC/15/19.1, Geneva, October 2015, available at: https://rcrcconference.org/app/uploads/2015/04/32IC-Concluding-report-on-persons-deprived-of-their-liberty_EN.pdf.

24 UNGA Resolution 70/291, 15 June 2017; UNSC Resolution 2469, 28 March 2019, para. 24.

25 International Convention for the Protection of All Persons from Enforced Disappearance, 2716 UNTS 3, 20 December 2006 (entered into force 23 December 2010).

26 Convention on the Rights of Persons with Disabilities, 2515 UNTS 3, 13 December 2006 (entered into force 3 May 2008).

adds an innovative mechanism of scrutiny in a very sensitive field.²⁷ Perhaps, we have to admit that once a dynamic exists in favour of dealing with a serious human or humanitarian problem, only a few States want to lose face in front of other States as well as domestic and international public opinion, in particular if negotiations are not conducted in private. It may be that some of the States accepting such rules trust that they only constitute rhetoric and will never be enforced against them. They underestimate, however, the dynamics of public international law and civil society. Even States seriously violating women's rights do no longer dare to speak out to defend gender inequality. Hypocrisy is preferable to rejection because it offers an entry point to obtain improvements in practice.

On the other hand, if the worst-case scenario occurs and States openly declare that they are no longer prepared to accept many detailed protective rules, they could have anyway modified them through customary international law or new treaty rules. In addition, does a clear rejection by States not allow the finding of a new basis and starting new negotiations on rules States are prepared to respect? Are rules which remain in the books, but which are regularly and openly not implemented by States, useful from a protection point of view? Do they not undermine the credibility of IHL?

UN involvement would politicize IHL

The ICRC and Switzerland have fought until recently successfully to keep the development of IHL outside the UN system.²⁸ The 1977 Additional Protocols were among the last very few universal law-making treaties elaborated outside the UN system (if we neglect for a moment international trade law developed in the World Trade Organization context). There are good conceptual reasons for such separation, because under the UN Charter the priority of the UN should be strengthening and enforcing *jus contra bellum*, while IHL of IACs applies when this fails²⁹ and must treat both parties to an armed conflict equally, irrespective of the legitimacy of their cause. The UN has, however, become today the place where international law is developed. It has a mandate and practical experience in human rights and humanitarian matters. As for the fear that in the UN fora debates are politicized, is law-making not always a political exercise? Must it not result from genuine political debates if the results are to be respected by States? Apart from that, how can one expect that States, represented by the same diplomats in the same town, Geneva, keep debates less politicized, more

27 Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2375 UNTS 237, 18 December 2002 (entered into force 22 June 2006).

28 David P. Forsythe, *The Humanitarians: The International Committee of the Red Cross*, Cambridge University Press, Cambridge, 2005, pp. 251–2.

29 In 1949, the International Law Commission refused to codify IHL because “public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace”. See International Law Commission, *Yearbook of the International Law Commission*, 1949, p. 281.

constructive and conduct them in better faith in one forum than in another forum? The debates on IHL in the last two International Conferences of the Red Cross and the Red Crescent on IHL were very politicized and finally not successful in strengthening IHL. On the other hand, new serious sectoral human rights treaties have been elaborated under the aegis of the UN Human Rights Council³⁰ and even some treaties dealing with IHL matters are the result of deliberations within the UN fora. Since the year 2000, welcomed developments in treaty law in the fields of weapons³¹ and the protection of children³² have resulted from the work in the UN fora, while only one treaty has come out of a Red Cross/Red Crescent forum.³³

If the ICRC engaged in strong advocacy in favour of new IHL rules, it would jeopardize its operational dialogue with major powers

It is the main strength of the ICRC that it combines protection of people affected by armed conflicts through humanitarian activities in the conflict areas and normative action in Geneva and New York. Its priority is nevertheless understandably having access to the conflict victims, to protect and assist them. To get access and to conduct an operational dialogue that leads parties to armed conflicts to better respect persons affected by those conflicts, the ICRC keeps its working modalities neither confrontational nor public. Although normative action in favour of better IHL rules and mechanisms must equally be based on sound legal, technical and humanitarian expertise, one may wonder whether at a certain point it does not need public advocacy and confrontation with those who – in good faith or bad faith – oppose such developments. The problem is that both the humanitarian and the normative action are addressed to States (the former much more than the latter also to armed groups, but this is an aspect we will come back to).

It is therefore understandable that ICRC representatives are reluctant to confront in their normative action the same State whose consent, cooperation and funding they need for their humanitarian action to be successful. It is interesting to notice that in some fields, such as weapons, the ICRC is very

30 See International Convention for the Protection of All Persons from Enforced Disappearance, above note 25; Convention on the Rights of Persons with Disabilities, above note 26; Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, above note 27.

31 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 (and Protocols), 1342 UNTS 137, 10 October 1980 (entered into force 2 December 1983); Protocol on Explosive Remnants of War to the 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 (Protocol V), 2399 UNTS 100, 28 November 2003 (entered into force 12 November 2006).

32 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2173 UNTS 222, 25 May 2000 (entered into force 12 February 2002).

33 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 2404 UNTS 261, 8 December 2005 (entered into force 14 January 2007).

outspoken and relatively confrontational.³⁴ It advocated strongly and publicly the adoption and ratification of a treaty banning nuclear weapons,³⁵ although its main funders, the most powerful States it is confronted with in its operational dialogue, and the permanent members of the UNSC, are opposed to that treaty. In other, more down-to-earth aspects, such as its failed efforts to strengthen IHL protecting persons deprived of their liberty in NIACs, it has proceeded much more cautiously and confidentially, avoiding access of civil society and even Red Cross and Red Crescent Societies' access to the debates.³⁶ The ICRC feared – fuelled by State representatives – that public advocacy or involvement of civil society would stall the process, which is now stalled even without those factors. True, the reports on the discussions held are publicly available³⁷ but they do not attribute any opinions to individual States – which makes any mobilization of domestic or international public opinion or parliaments impossible.

One may wonder whether the ICRC can convince States to accept again the difference between its operational role, on the one hand, and its general advocacy for the progressive development of IHL and new enforcement mechanisms, on the other hand. In its operational role, the ICRC has excellent reasons to pursue its confidential and cooperative approach. In its role as a guardian and promoter of IHL outside specific operational contexts, the ICRC should try to become consistently an advocacy organization it once was, by mobilizing public opinion against their reluctant governments and cooperating with civil society, as it already does concerning the ban on nuclear weapons³⁸ and lethal autonomous weapons systems.³⁹ It has successfully mobilized public opinion and civil society support in the past when it came to the banning of chemical weapons in the 1920s⁴⁰

34 See, generally, Ritu Mathur, *Red Cross Interventions in Weapons Control*, Lexington Books, New York, 2017.

35 ICRC, “Nuclear Weapons: Overdue Debate on Long-Term Impact Begins”, 13 February 2014, available at: <https://www.icrc.org/en/doc/resources/documents/news-release/2014/02-11-mexico-nayarit-impact-nuclear-weapon-conference.htm>; ICRC, “Why States Must Sign and Ratify the Treaty on the Prohibition of Nuclear Weapons: A Plea for Humanity”, Speech given by Mr. Peter Maurer, President of the ICRC, at the signing ceremony of the Treaty on the Prohibition of Nuclear Weapons, UN, New York, 26 September 2018, available at: <https://www.icrc.org/en/document/icrc-president-why-states-must-sign-ratify-treaty-prohibition-nuclear-weapons-plea-humanity>; ICRC, “Urgency to Rid the World of Most Destructive Weapon Ever Created”, 27 September 2018, available at: <https://www.icrc.org/en/document/icrc-statement-high-level-plenary-meeting-commemorate-international-day-total-elimination>; Robert Mardini, “Op Ed: Nuclear Weapons are Finally Outlawed; Next Step is Disarmament”, 22 January 2021, available at: <https://www.icrc.org/en/document/nuclear-weapons-are-finally-outlawed-next-step-disarmament>.

36 See ICRC, above note 23.

37 ICRC, “Strengthening IHL Protecting Persons Deprived of Their Liberty in Relation to Armed Conflict”, 1 April 2017, available at: <https://www.icrc.org/en/document/detention-non-international-armed-conflict-icrc-work-strengthening-legal-protection-0>.

38 ICRC, “A Date to Remember: The Banning of Nuclear Weapons in 2021”, 21 January 2021, available at: <https://www.icrc.org/en/document/date-remember-banning-nuclear-weapons-2021>.

39 ICRC, “Autonomous Weapons: The ICRC Recommends Adopting New Rules”, 3 August 2021, available at: <https://www.icrc.org/en/document/autonomous-weapons-icrc-recommends-new-rules>.

40 See ICRC, “The ICRC in WWI: Efforts to Ban Chemical Warfare”, 11 January 2005, available at: <https://www.icrc.org/en/document/icrc-wwi-efforts-ban-chemical-warfare>.

and anti-personal landmines in the 1990s.⁴¹ It may, however, be necessary to build up a coalition with others to be successful, which is obviously impossible when it proceeds confidentially.

More and more detailed rules offer better protection

Over the history of modern, codified IHL, the number of rules in IHL treaties has constantly increased. The Geneva Conventions and Additional Protocols alone comprise nearly 500 substantive articles, several of them with many paragraphs. The ICRC has found 161 rules of customary IHL, out of which 136, arguably even 141, apply in both IACs and NIACs. At least the treaty rules have become more and more detailed. The rules of the two UN Human Rights Covenants are much shorter and more general, although they cover a greater variety of circumstances. It is argued that IHL rules must be so detailed because they must be applied by practitioners, soldiers on the battlefield. However, few soldiers and even officers, but for that matter also ICRC delegates or war victims, often consult the Geneva Conventions. Hopefully, their legal advisors do, if they exist. More serious arguments are that unlike IHRL, IHL rules are more rarely specified by judicial decisions, recommendations, general comments or opinions of treaty bodies. In addition, IHL unlike IHRL consists mainly of objective rules of conduct rather than of subjective rights. There exists also the hope – some would label it an illusion – that the more detailed black-and-white rules are, the less controversies will arise concerning their meaning and interpretation. All this corresponds to a general tendency, that started in Anglo-Saxon legal systems (although it is not due to their common law tradition) and has now also contaminated civil law countries, towards more detailed legislation and contracts, trying to foresee and regulate every possible situation.⁴²

The flip side of this rush to the detail is obviously that rules are more quickly outdated. Furthermore, regulating fifteen situations instead of setting only one principle may be interpreted by parties to armed conflicts as implying that in the sixteenth situation falling under the principle they are free in their conduct. In addition, the more detailed rules are, the easier lawyers advising their State and military practitioners will imagine situations in which they cannot be respected – and therefore advise their State not to accept them or to suggest exceptions, which make the rules even more detailed.

IHL is mainly applied in the field, during armed conflicts, and not by courts

It is not only to explain why IHL rules must be detailed and precise that it is often noted that IHL – contrary for instance to IHRL – is most often applied in combat

41 See Peter Herby, “1997: The Year of a Treaty Banning Anti-Personnel Mines?”, *International Review of the Red Cross*, Vol. 37, No. 317, 1997, pp. 193–5.

42 See, generally, Julian Hermida, “Convergence of Civil Law and Common Law Contracts in the Space Field”, *Hong Kong Law Journal*, Vol. 34, No. 2, 2004. See, also, Joseph Dainow, The Civil Law and the Common Law: Some Points of Comparison, *American Journal of Comparative Law*, Vol. 15, No. 3, 1966–1967, pp. 424–6.

and by non-lawyers rather than by courts,⁴³ which also reduces the possibility of developing it through precedents, so dear to the common law tradition. This is certainly true for the immediate compliance with many rules, for example on the conduct of hostilities. However, this should not be seen as an axiom. An increasing number of judgments of international criminal tribunals have interpreted and, in many cases, clearly developed IHL – correctly or incorrectly. Astonishingly, States have reacted to them with much less criticism than to the developments suggested by the ICRC. Imagine the ICRC had suggested as the very first, in the commentaries of IHL treaties it publishes or in an interpretive guidance, that IHL of IACs is very similar to IHL of NIACs, that war crimes exist in NIACs, that States have to apply IHL of IACs when fighting an armed group that is under overall control of another State, and that persons in the power of their own State of nationality are protected persons under Geneva Convention IV based upon their allegiance. All this has been decided by the International Criminal Tribunal for the Former Yugoslavia in the Tadić case⁴⁴ and States have either not reacted or accepted such developments, although they are much more revolutionary than the interpretation of the notion of direct participation in hostilities suggested by the ICRC in its often-criticized Interpretive Guidance⁴⁵ – and some of them are unrealistic or even wrong.⁴⁶

It may be that we should build on this phenomenon to develop (and not only enforce) IHL in the future through court cases, adapting it to new developments in warfare. This is not only the case for decisions of international tribunals, but even more so of domestic courts, which develop precedents, a source of law in common law tradition, and which are binding in any State respecting the rule of law upon the executive branch, the administration and even the armed forces. Their judgments are viewed with less suspicion and tend to have a stronger impact on the public opinion of their respective societies.

During ongoing armed conflicts, national courts may be seized to review the compliance of certain State measures with IHL, for instance, relating to the

43 I myself still wrote so in Marco Sassòli, “International Humanitarian Law and International Human Rights Law”, in Ben Saul and Dapo Akande (eds), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, Oxford, 2020, p. 399.

44 See International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Tadić*, Case No. IT-94-1-A, Decision on Jurisdiction (Appeals Chamber), 2 October 1995, paras 96–126 and 128–36, and Judgment (Appeals Chamber), 15 July 1999, paras 115–45 and 163–9, respectively.

45 For criticism of the Interpretive Guidance, see Kenneth Watkin, “Opportunity Lost: Organized Armed Groups and the ICRC ‘Direct Participation in Hostilities’ Interpretive Guidance”, *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010; Michael N. Schmitt, “The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis”, *Harvard National Security Journal*, Vol. 1, 2010; W. Hays Parks, “Part IX of the ICRC ‘Direct Participation in Hostilities’ Study: No Mandate, No Expertise, and Legally Incorrect”, *New York University Journal of International Law and Politics*, Vol. 42, 2010.

46 For a detailed criticism of the Tadic decisions, see Marco Sassòli, “La première décision de la Chambre d’appel du Tribunal pénal international pour l’ex-Yougoslavie: Tadic (compétence)”, *Revue générale de droit international public*, Vol. 100, 1996, pp. 101–34; and Marco Sassòli and Laura M. Olson, “The Decision of the ICTY Appeals Chamber in the Tadic Case: New Horizons for International Humanitarian and Criminal Law?”, *International Review of the Red Cross*, Vol. 82, No. 839, 2000, pp. 733–69.

law of occupation⁴⁷ or the rules on detention.⁴⁸ In post-conflict situations, it is mainly domestic courts that try individuals and impose reparations for IHL violations.

Admittedly, this avenue meets some obstacles. First, for national courts to be able to enforce IHL rules, dualist States must adopt legislation of transformation, and even monist States must adopt domestic legislation for IHL rules that are not self-executing. Second, immunities under domestic law may bar a national court from exercising jurisdiction over acts committed by an individual during an armed conflict. Third, several doctrines prevent courts from adjudicating certain cases. These include the act of State doctrine, the political question doctrine and the doctrine of *forum non conveniens*.⁴⁹ In some unfortunate instances, national courts are openly apologetic or even legitimize the role of illegal State policies.⁵⁰ This may result in incorrect and harmful jurisprudence that may then be adopted and cited by other courts.⁵¹

To sum up, the role of international and domestic courts deserves to be strengthened. To achieve this, not only judges, but also attorneys, must be trained in IHL. Indeed, the best way to guarantee sound court decisions is making sure that the parties bring forward sound arguments. It is therefore correct that the ICRC prevention strategy puts emphasis on training lawyers and on ensuring that IHL is correctly implemented in domestic law.⁵²

Possible additional ways to develop IHL in the future

Overcoming some assumptions as suggested above, the traditional way to develop IHL may be tried again in the future, although with a slightly modified approach. In addition, when the assumptions mentioned above are overcome and based upon experiences made in other branches of international law described hereafter, a new, additional way of developing IHL may be tried out.

Experience made in other branches

International Labour Organization core labour standards

International Labour Law is a branch of international law codified in much more detail than IHL: in 190 Conventions and 206 Recommendations, some dating as

47 See, e.g., David Kretzmer and Yaël Ronen, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, 2nd ed., Oxford University Press, Oxford, 2021.

48 See, e.g., United States Supreme Court, *Salim Ahmed Hamdan v. Donald H. Rumsfeld et al.*, 548 U.S. 557 (2006), No. 05.184, 29 June 2006.

49 Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law*, Oxford University Press, Oxford, 2014, pp. 69–81.

50 *Ibid.*, pp. 13–67; D. Kretzmer and Y. Ronen, above note 47, p. 190.

51 S. Weill, above note 49, p. 67.

52 ICRC, *Prevention Policy*, Geneva, 2010, p. 7; ICRC, “Implementing International Humanitarian Law: From Law to Action”, *Legal Factsheet*, 2019.

far back as 1919, and six Protocols. On the initiative and in the framework of the International Labour Organization (ILO), States identified in the 1998 ILO Declaration on Fundamental Principles and Rights at Work four core principles, expressed in eight Conventions, which are binding upon member States independently of their ratification.⁵³ They made, however, a distinction between the existence of an obligation and its scope and specific content,⁵⁴ the latter not being binding upon all member States of the ILO. One of the objectives of the declaration was to encourage the governments, and other actors, such as corporations and financial institutions, to specifically focus on and enforce those standards.⁵⁵ The Declaration establishes a “soft monitoring system”. Member States that are not parties to one or several core Conventions are asked to report on the status of the relevant rights and principles in their country yearly. Such reports are then reviewed by the Committee of Independent Expert Advisers and in turn, their observations are considered by the ILO’s Governing Body. This mechanism does not replace but is additional to the existing ILO treaty monitoring mechanisms.

Interestingly, there is no evidence of a detrimental impact on the attention given to other rights.⁵⁶ The analysis of the ratification rates shows that the decline in ratifications of International Labour Law conventions did not start with the Declaration.⁵⁷ On the contrary, it seems that the Declaration and the “ratification campaign for fundamental conventions” have stimulated the ratifications of other conventions as well.⁵⁸ Apart from that, the general character of the Declaration and its reference to “principles”, that contrast the tradition of detailed prescriptions typical for conventions, do not seem to make protection “so decentralized and elastic as to be meaningless”.⁵⁹ On the opposite, it appears that the general character of commitments in the Declaration stimulated the progress to achieve “rights” going beyond and not limited to the provisions of the relevant instruments. This point can be illustrated by examples. Firstly, while the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) explicitly features only a rather limited number of grounds of discrimination, the Declaration and its follow-up address the range of constantly evolving grounds of discrimination in employment and occupation.⁶⁰ A second example is the new forms of forced labour, for instance, the forced labour dimensions of trafficking, which the Forced Labour Convention, 1930 (No. 29) could not possibly have foreseen and thus cover.⁶¹

53 ILO Declaration on Fundamental Principles and Rights at Work, 18 June 1998, para. 2.

54 Francis Maupain, “Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers’ Rights”, *European Journal of International Law*, Vol. 16, No. 3, 2005, p. 451.

55 Philip Alston, “‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime”, *European Journal of International Law*, Vol. 15, No. 3, 2004, p. 488.

56 F. Maupain, above note 54, pp. 458–63.

57 *Ibid.*

58 *Ibid.*, p. 460.

59 *Ibid.*, p. 452, citing P. Alston, above note 55, pp. 518–20.

60 *Ibid.*, pp. 453–4.

61 *Ibid.*

The Paris Agreement on Climate Change

As the 1992 Kyoto Protocol, a traditional instrument in the climate change regime, with detailed obligations and a rigorous monitoring system, failed to reach the goal set in terms of reduction of greenhouse gas emissions, States adopted in 2015, in the framework of the UN Framework Convention on Climate Change (UNFCCC), the Paris Agreement, which has to be read together with the detailed decision to adopt it (both are hereafter referred to as the Paris Agreement) and today has 196 States parties.⁶²

The legal techniques it uses are innovative in several respects.⁶³ It sets the common goal “to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty” and specifies it in three detailed goals (Article 2). The sub-goals are: to limit the temperature increase to 1.5°C above pre-industrial levels; increase the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development; and making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.

By 2020, States had to submit and most actually submitted their plans for climate action – Nationally Determined Contributions (NDCs), on the measures they will take to reduce their greenhouse gas emissions to reach the goals of the Paris Agreement as well as the actions they will take to build resilience to adapt to the impacts of rising temperatures. Every five years, every State party must submit more ambitious NDCs.⁶⁴ In addition, parties should submit – although an insufficient number of States actually did submit – long-term low greenhouse gas emission development strategies (LT-LEDS), which place the NDCs into the context of countries’ long-term planning and development priorities.

It is for our purposes interesting to note that the decision to adopt the Paris Agreement is addressed to a variety of non-State actors with a very diverse legal status, called “non-party stakeholders”,⁶⁵ which include intergovernmental organizations, regions, cities, civil society organizations and the private sector.

As far as monitoring is concerned, the Paris Agreement establishes an enhanced transparency framework (ETF). Under the ETF, starting in 2024, countries will report transparently on actions taken and progress in climate change mitigation, adaptation measures and support provided or received. The information gathered through the ETF will feed into the Global Stocktake, which will assess the collective progress towards the long-term climate goals. This will

62 The text of the decision and the agreement as an annex may be found in UN, Adoption of the Paris Agreement, UN Doc. FCCC/CP/2015/L.9/Rev.1, 12 December 2015.

63 Laurence Poisson de Chazournes, “Regards sur l’Accord de Paris – un accord sur le futur”, in Marta Torre-Schaub (ed.), *Bilan et perspectives de l’Accord de Paris (COP 21) – Regards croisés*, Institut de la recherche juridique de la Sorbonne, Paris, 2017, p. 97.

64 Paris Agreement, 12 December 2015 (entered into force 4 November 2016), Art. 4.

65 See UN, Adoption of the Paris Agreement, above note 62, paras 134–7 of the Decision.

lead to recommendations for countries to set more ambitious plans in the next round.

While the actual success of the Paris Agreement in terms of climate change mitigation is still limited and controversial,⁶⁶ the mechanisms established are nevertheless an interesting avenue in cases in which States do not want to take precise binding obligations but agree on an aim.

Features of a possible new way of developing IHL

The branches, the developments of which are described above, are obviously very different from IHL in many respects and their solutions cannot be mechanically transposed into IHL. Nevertheless, some experiences made in those branches may serve as inspiration. They have to be adapted to the specificities of IHL. Following such inspiration, combined with overcoming the assumptions discussed above, and mindful of the necessity and sensitivity of involving armed groups, the following may be a way of how IHL can be developed in the future.

First, based upon the widest possible consensus, but without starting the negotiations announcing that consensus will be needed, States should adopt, in order of preference at an International Conference of the Red Cross and the Red Crescent (which also includes national Red Cross and Red Crescent Societies, the ICRC and the International Federation of Red Cross and Red Crescent Societies), the UNGA, or in the UNSC, a declaration on core obligations and principles of IHL. An adoption by an International Conference of the Red Cross and the Red Crescent has the advantage of keeping such a development in a Red Cross/Red Crescent forum, of taking the unique role of the ICRC into account, and of allowing an active involvement of parts of civil society, National Red Cross and Red Crescent Societies, which may then also have an important role in the national mechanisms discussed below. A UNGA resolution would not be legally binding but could ensure procedural legitimacy and a certain democratic character, in particular if it results from the work of the Human Rights Council, with the largest possible involvement of civil society. A UNSC Resolution would be binding but could meet a veto by permanent members of the Council. Like in the ILO context, the core obligations and principles would not need to be newly invented but could be based upon existing treaty rules,⁶⁷ to which they would refer.

Second, States could undertake, in the Declaration, to individually specify those core obligations and principles, in conformity with their interpretation of their existing IHL treaty and customary law obligations, resulting in detailed rules

66 See, e.g., Ezgi Ediboğlu, “The Paris Agreement: Effectiveness Analysis of the New UN Climate Change Regime”, *University College Dublin Law Review*, Vol. 17, 2017.

67 E.g., Article 48 of Protocol I, reading, “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”, which should be acceptable also for States not parties to Protocol I, or Article 27 of Convention IV, where the technical term “protected persons” could be replaced either by civilians or by all persons who are in the power of a party.

they undertake to comply with, and make those rules public. This would have important positive side-effects in terms of ownership and dissemination within a State. It would counter the – in my view erroneous – impression in some quarters of the Global South that IHL serves the interests of Western, Christian, rich, (technologically) developed countries, or more basically great power interests. Such national rules would also combat world-wide the erroneous impression that most States do not care about IHL, which is so detrimental to the credibility of IHL and the readiness of arms-bearers to respect it. The International Court of Justice (ICJ) has considered, although admittedly in the much less codified field of international environmental law, that domestic legislation instead of interpretation according to the standard methods of international law, is a normal way of specifying the scope and content of rules of international law.⁶⁸

The ICRC Advisory Services could certainly help States to formulate such rules and to avoid that they reinvent the wheel – the Geneva Conventions and Additional Protocols. However, States would not be barred from modifying existing IHL rules, if they consider that they are not realistic for them or do not provide for the best protection for victims of armed conflicts, as long as those changes are in line with the core obligations and principles. In addition, States would be encouraged to formulate rules on issues not yet covered by IHL that they are ready to comply with. The Declaration could also encourage non-State armed groups involved in NIACs to do the same, or – if such equal treatment between States and armed groups is unacceptable for States – armed groups could be encouraged by the ICRC and/or Geneva Call to do the same – and those organizations could provide armed groups the necessary advice in view of formulating such rules.

Third, each State could create a national mechanism commenting on the rules adopted, including on whether any deviation from existing IHL rules is based upon objective justifications, and their implementation.⁶⁹ Obviously, to fulfil its task meaningfully, such a mechanism should be sufficiently independent from the government services whose work it is commenting upon. Armed groups could do the same. It may be that this third aspect is not immediately acceptable to all States adopting the Declaration and can be implemented only at a later stage.

Fourth, in the future, one could foresee that each national mechanism makes an annual report public, which could then be discussed in a kind of periodic peer review by the body having adopted the Declaration, possibly based upon an evaluation by an expert body. One of the results of such a discussion could be that when the national rules and the reports of national mechanisms show a sufficient support for some new rules and for changing some existing rules, this can be translated into new treaty rules. It may be unacceptable, or even inappropriate, for such a review body composed of States to receive reports from

68 ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, 20 April 2010, p. 14, para. 205.

69 The Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, above note 27, foresees a similar obligation to create a national mechanism, mainly for the purpose of monitoring the treatment of persons deprived of their liberty (Art. 17), but also to “to submit proposals and observations concerning existing or draft legislation” (Art. 19(c)).

mechanisms created by armed groups. In this case, a non-State expert body, e.g. linked to Geneva Call, could receive and review the rules adopted by non-State armed groups and the reports by their mechanisms and condense them into one report to the States' review body, which, without attributing certain rules and practices to certain groups, would identify trends of convergence and divergence and possible new rules.

Such a new way of developing IHL implies admittedly some risks and disadvantages. We have already discussed above the fear that States would take advantage of such a process to diminish and undermine their existing treaty obligations. We have also argued that the disadvantages of general compared to detailed rules are limited. This is particularly so if, as suggested here, the general rules would be specified at the State and armed group levels.

A major question concerns the relationship between the results and existing IHL rules. Several answers are possible. The formal answer of public international law is that, except in the rare case of *desuetudo*, the existing treaty obligations continue to be binding, as do the customary rules, although the latter could much more easily and informally be developed and amended by the process suggested here. Each set, the existing treaty rules and the new implementation rules adopted by each State and armed group would be implemented by their own enforcement systems. The risks of contradictions should not be over-evaluated. The core obligations and principles will, by definition, be drawn from existing IHL. The new domestic rules will simply show what many tried up to now to ignore: major divergences in the interpretation of existing treaty rules and in the assessment of customary IHL. In States governed by the rule of law, the probability that the domestic rules they will adopt will contradict their previously existing understanding of their IHL obligations is small. At best, some additional rules will appear; at worst some treaty rules will not be mentioned or military interests will be strengthened. As for States and armed groups less concerned by the rule of law, the new domestic (or internal) rules will at least show what can be expected from them – without destroying the dream that one day the ICJ can find the State responsible for every violation of its IHL obligations and that (international) criminal tribunals will hold members of both State armed forces and of armed groups accountable for every violation of the existing treaty and customary rules classified as war crime.

The other main disadvantage of the results of the process suggested is that both parties to an armed conflict are no longer necessarily bound by the same rules. Some powerful arguments have been made in favour of differential law for armed conflicts, although in the application of existing norms rather than when new norms are created.⁷⁰ This always risks ending up on a slippery slope, leading to a mixing up of *jus ad bellum* and *jus in bello*. Nevertheless, is equal application of IHL to all parties to a given conflict not an axiom, which does no longer correspond to contemporary reality? A differential IHL does not necessarily imply that *jus ad*

70 See Gabriella Blum, "On a Differential Law of War", *Harvard International Law Journal*, Vol. 52, No. 1, 2011; and Kevin Jon Heller, "On a Differential Law of War: A Response", *Harvard International Law Journal Online*, Vol. 52, 2011.

bellum considerations are taken into account. Even today, under the existing flexible IHL rules, the same conduct is not expected from a State with sophisticated technology at its disposal and its adversary. Even today, few soldiers of modern, well-trained and well-equipped State armed forces engaged in an asymmetric armed conflict against a non-State armed group, a proxy armed group under overall control of a foreign State (which should fight according to IHL of IACs) or even regular armed forces of a weak State really expect that their adversaries will fight according to the same rules they were trained to comply with. They will already consider themselves lucky not to be immediately executed if they fall into the hands of those adversaries. Even today, a State that considers that a war-sustaining function cannot render an object a military objective is supposed not to attack such an object. This is the case even if such object belongs to an adversary who added war-sustaining functions in its definition of military objectives and therefore considers that it may target such objects.

In sum, looking at today's reality, the axiom may be a fiction.⁷¹ Fictions, however, undermine IHL because this body of law deals with the humanitarian consequences of an (undesirable) reality, and it must take reality into account if it wants to have any real impact. Abandoning the fiction, admittedly, risks even further decreasing the willingness of States, armed groups, soldiers and fighters to comply with IHL and starting a race to the bottom under which everyone will argue that they are unable to comply with most rules. This risk should, however, be limited by the core principles and obligations that remain of general application.

Start with mechanisms enhancing the respect of some rules

It is to be hoped that the suggested way of developing IHL, apart from increasing States' and armed groups' ownership of IHL rules, avoiding the impression that IHL rules are imposed from the outside and ensuring that every party has only those obligations it is able to respect, will also enhance its respect. Beyond this, in view of the current stalemate, it may be advisable to (provisionally) abandon the ideal of a mechanism dealing with all IHL rules. It may be better to take advantage of a public outcry on the violation of some IHL rules, which States cannot see as affecting their ability to fight armed conflicts, to adopt, including in a UN framework, a new mechanism aimed at enhancing the respect of those specific rules. First attempts going in this direction have appeared in recent years concerning use of children in hostilities,⁷² sexual violence⁷³ and attacks on hospitals.⁷⁴ They were neither completely successful nor completely unsuccessful.

71 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.

72 See, for the monitoring and "reporting" mechanism to combat six grave violations committed against children in armed conflict established by the UNSC, the website of the Office of the Special Representative of the Secretary-General for Children and Armed Conflict, "Monitoring and Reporting on Grave Violations", available at: <https://childrenandarmedconflict.un.org/our-work/monitoring-and-reporting>.

73 See, e.g., the UK initiative and the follow-up debate, "Preventing Sexual Violence in Conflict Initiative", *Hansard*, Vol. 697, debated on 17 June 2021, available at: <https://hansard.parliament.uk/commons/2021-06-17/debates/55A96907-C7BC-4865-8E74-978F14A461F8/PreventingSexualViolenceInConflictInitiative>. See

From a conceptual point of view this avenue is obviously not ideal because it creates double standards between rules, leads to duplication, contradictions and turf battles. However, it may pave the way to progress based on opportunities, reassure States, and allow comparison of the efficiency and acceptability of different mechanisms by trial and error, and finally to select the best for a future new general mechanism.

The elephant in the room of development of IHL: armed groups

An important part of IHL, which covers the largest number of contemporary armed conflicts, and which is, at least as far as treaty rules are concerned, in the greatest need of new, more detailed and updated regulation, is IHL of NIACs. That part of IHL is not only addressed to States, but also to armed groups. Common Article 3 explicitly requires that “each Party to the conflict” must comply with certain minimum rules. The rules are simply not meaningful if they do not bind more than half of the parties to armed conflicts. From there it appears desirable to involve armed groups in the development of IHL of NIACs.⁷⁵

Involving armed groups in the development of IHL will increase their willingness to comply

Any role of armed groups in developing IHL would increase their sense of ownership of the rules and therefore their willingness to comply with them. Today it is growingly accepted that armed groups must be directly engaged to foster their sense of ownership of IHL rules. The ICRC has always cultivated a dialogue with both State and non-State parties to armed conflicts; it has a “Global Affairs and Non-State Armed Groups Unit” that develops and coordinates approaches to engage with armed groups. The unit conducts an annual global mapping of armed groups to gain a better understanding of them and their perception of the ICRC, with a view of identifying trends and opportunities for strengthening the ICRC’s engagement with them. In 2020 it found that more than 600 armed groups operate in the more than 100 countries where the ICRC works; the ICRC has contact with approximately 465 of them and “engages in protection dialogue” with 32% of them (which implies that it discusses with them their respect of IHL).⁷⁶ A report of key findings on the ICRC’s dialogue with non-State armed groups has recently been published.⁷⁷

also, European Commission, *Call to Action on Protection from Gender-Based Violence in Emergencies*, Brussels, 2019, available at: https://ec.europa.eu/echo/system/files/2019-05/booklet_eu_leadership_c2a.pdf.

74 UNSC Resolution 2286, 3 May 2016.

75 Sophie Rondeau, “Participation of Armed Groups in the Development of the Law Applicable to Armed Conflicts”, *International Review of the Red Cross*, Vol. 93, No. 883, 2011.

76 ICRC, *Annual Report 2020*, Vol. I, p. 69, available at: <https://library.icrc.org/library/docs/DOC/icrc-annual-report-2020-1.pdf>.

77 Irénée Herbet and Jérôme Drevon, “Engaging Armed Groups at the International Committee of the Red Cross: Challenges, Opportunities and COVID-19”, *International Review of the Red Cross*, Vol. 915, No. 102, 2022.

The NGO Geneva Call is an institution traditionally focused on armed groups only. Among other things, it tries to obtain concrete commitments from armed groups to respect humanitarian rules and tries to ensure their fulfilment through persuasion and dialogue.⁷⁸ It started its work with the ban on antipersonnel landmines because the Ottawa Convention on Landmines neither addresses armed groups nor allows them to undertake to respect it. Since then, Geneva Call has added the protection of children in armed conflict, the prohibition of sexual violence as well as gender discrimination, and the protection of healthcare to the issues on which it tries to obtain “deeds of commitment”. It has just launched a new one on the prevention of starvation and conflict-related food insecurity.

Involving armed groups in the development of IHL will ensure that the rules of IHL of NIACs are realistic

To involve armed groups in the development of rules of IHL of NIACs would ensure that those rules are realistic. Indeed, such groups are as central to IHL of NIACs as navies are to the law of naval warfare. No one would suggest revising the law of naval warfare without consulting the world’s navies. The success of IHL depends on its effective application by parties to conflicts. Therefore, it must be based on a solid understanding of the problems, dilemmas, and aspirations of all parties to armed conflicts. While States undertake this reality check for themselves as they are the legislators making the rules, they do not and cannot determine whether such rules are realistic for armed groups. Claiming that unrealistic rules apply will not only result in violations of such rules; it will also undermine the credibility and protective effect of *other* rules that an armed group can comply with.

There are several examples of current rules that may be unrealistic for armed groups. First, the tendency to apply rules which originated in IHL of IACs to NIACs either by analogy or as customary law (based upon the practice and *opinio juris* of States exclusively) may lead to certain rules that are not entirely realistic for non-State armed groups.⁷⁹ Second, the increasing integration of IHRL standards into IHL may lead to a similar result. Third, the combination of raising the minimum age to 18 years and an enlargement of the concept of (prohibited) involvement of children with armed groups results in requirements that make it impossible for members of armed groups to remain together with their families and to be supported by the whole population on whose behalf they (claim to) fight.⁸⁰ Fourth, the usual definition of pillage suggested by those who fight against businesses pillaging natural resources in conflict areas is discriminatory against armed groups.⁸¹

78 See Geneva Call’s website, available at: <http://www.genevacall.org>.

79 See Marco Sassòli, “The Convergence of the International Humanitarian Law of Non-International and of International Armed Conflicts: Dark Side of a Good Idea”, in Giovanni Biaggini, Oliver Diggelmann and Christine Kaufmann (eds), *Polis und Kosmopolis, Festschrift für Daniel Thürer, Dike/Nomos*, Zürich/Baden-Baden, 2015, pp. 683–4.

80 See M. Sassòli, above note 22, p. 285.

Practical and conceptual difficulties to overcome

There are serious obstacles in involving armed groups in the development of IHL. First, States are nearly unanimously opposed. They fear that this could confer legitimacy upon non-State actors they fight and label nearly always as “terrorists”. Second, there are serious conceptual and practical obstacles to such involvement. Some are common to all avenues of how IHL could be developed; others are specific to either deliberate law-making through treaties or soft law instruments or to the (mysterious) process of how customary law develops. Concerning the former, States will never allow armed groups to officially sit at the negotiation table.⁸² Thus, it is more realistic that an NGO, such as Geneva Call, represents their views and problems in the drafting process.⁸³ The process suggested above in which core obligations and principles confirmed by States are specified separately by each State and each armed group could also facilitate the involvement of armed groups in the development of IHL of NIACs without facing the difficulties of bringing States and armed groups together, while avoiding discrimination between States and armed groups, to which the latter are allergic.

As for customary IHL of NIACs, there is a large consensus that armed groups’ practice and *opinio juris* do not count.⁸⁴ The ICRC Customary Law Study considers the legal significance of such practice to be unclear.⁸⁵ The underlying doctrinal question is whether customary law rules are based upon the consent of States. I submit rather that customary law rules develop from the conduct and *opinio juris* of the rule’s addressees in the form of acts, omissions, declarations, accusations or justifications for their conduct.⁸⁶ From a purely practical point of view, it is useless to consider a rule to be “customary” law if half of the addressees (non-State armed groups) by hypothesis do not respect it out of a sense of conviction. To ensure that customary rules are realistic for all belligerents, it is important that the practice and statements of armed groups are considered when determining customary rules applicable in NIACs.⁸⁷

81 See *ibid.*, p. 294.

82 The counterexample often mentioned, the admission of national liberation movements to the diplomatic conference which elaborated between 1974 and 1977 the Additional Protocols, has been very controversial and can only be explained by the particular historical situation: see M. Bothe, K.-J. Partsch and W. Solf, above note 22, p. 8.

83 See, e.g., ICRC, *Safeguarding the Provision of Health Care: Operational Practices and Relevant International Humanitarian Law Concerning Armed Groups*, Geneva, 2015; Geneva Call, *In Their Words: Armed Non-State Actors Share Their Policies and Practice with Regards to Education in Armed Conflict*, Geneva, 2017.

84 Thus, categorically, the International Law Commission, Draft Conclusions on Identification of Customary International Law, see International Law Commission, Report of the International Law Commission on the Work of its 68th Session, UN Doc. A/71/10, 2006, pp. 87–9, Conclusion 4(3) and para. 9 commentary to Conclusion 4. However, the ILC admits that it may provoke State practice, which is obviously a different issue.

85 J.-M. Henckaerts and L. Doswald-Beck, above note 1, p. xxxvi.

86 For further details, see Marco Sassòli, *Bedeutung einer Kodifikation für das allgemeine Völkerrecht*, Helbing & Lichtenhahn, Basel, 1990, pp. 32–48.

Admittedly, there are several conceptual difficulties in considering the practice of non-State armed groups in the customary norm-creating process.⁸⁸

First, an armed group, contrary to a State, is not meant to be and does not even want to be permanent, but must inevitably disappear by either victory (becoming the government of a State) or by defeat.⁸⁹ A certain stability and continuity of States as well as the possibility for them to repeat practice and to become in the future both a beneficiary and addressee of a rule are all ingredients of the mysterious customary process that turns what is – practice – into what ought to be – the law. Some of these factors may not apply in the case of non-State armed groups.

Second, in most cases, a non-State armed group has an IHL practice only towards one State or one adverse armed group, and it considers itself less than States as a part of an international society made up of other States (and, in this case, armed groups).

Third, international law presupposes that States have uniform characteristics, and they are indeed much less diverse than armed groups. Should one deduce IHL of NIACs from the practice and *opinio juris* of all armed groups that are parties to NIACs, or should one create categories of groups (for example, according to whether they control territory or want to become the government of a State) and deduce different rules applicable to each category from the practice and *opinio juris* of groups belonging to that category? In the first case, only very rudimentary rules will result, while the second alternative would lead to a further fragmentation of IHL. The second alternative would also raise the question of whether States should also be bound by different rules depending on the category of non-State armed group they are fighting.

Fourth, the question arises of whether the law deduced from the practice and *opinio juris* of armed groups binds only them or whether customary IHL of NIACs for States and armed groups should be based upon the practice and *opinio juris* of both. The first alternative would mean the end of the equality of belligerents before IHL, which may anyway be a fiction. The second alternative would lead to very rudimentary rules even for States that can comply with additional and more complex rules. This consequence, however, is mitigated by the fact that States also remain bound by IHRL. Finally, one must avoid the risk

87 For this purpose, the Geneva Academy of International Humanitarian Law and Human Rights and Geneva Call have undertaken since 2017 a research project “From Words to Deeds: A Study of Armed Non-State Actors’ Practice and Interpretation of International Humanitarian and Human Rights Norms”. See research outcomes until now: Geneva Academy of International Humanitarian Law and Human Rights, “From Words to Deeds: A Study of Armed Non-State Actors’ Practice And Interpretation of International Humanitarian and Human Rights Norms”, available at: <https://www.geneva-academy.ch/research/our-clusters/non-state-actors/detail/55-from-words-to-deeds-a-study-of-armed-non-state-actors-practice-and-interpretation-of-international-humanitarian-and-human-rights-norms>.

88 See Lizaveta Tarasevich, “Participation of Non-State Armed Groups in the Formation of Customary International Humanitarian Law: Arising Challenges and Possible Solutions”, *Humanitäres Völkerrecht, Journal of International Law of Peace and Armed Conflict*, Vol. 3, No. 1–2, 2020.

89 Zakaria Daboné, *Le droit international public relatif aux groupes armés non étatiques*, Schulthess, Geneva, 2012, pp. 87–8.

that taking the practice of armed groups into account may result in rules that are no longer humanitarian.

Despite all these open questions, some scholars suggest that it is possible for armed groups to play a role in the development of new rules without “downgrading” current international protections by considering the result of their practice and *opinio juris* as “quasi-custom”.⁹⁰ This theory merits further reflection. While research on the actual practice of non-State armed groups is fortunately increasing,⁹¹ proposals on how such practice could contribute to customary IHL are still lacking.⁹²

Conclusion

Currently, the development of IHL seems to be largely stalled and pragmatic alternative ways of adapting the rules to new challenges and increasing the compliance with existing rules have come under criticism. States reclaim ownership of the rules and claim even that they are the sole interpreters. Armed groups, which represent the greatest number of participants in current armed conflicts, never had their say in the development of IHL. We may certainly try time and again to use the traditional methods, in particular if we overcome some assumptions, such as: that IHL rules must be developed by consensus; that States do not want to adopt new IHL rules; that one must therefore claim to interpret or determine existing law; that States would weaken IHL if a discussion on its norms were reopened; that UN involvement politicizes IHL; that the ICRC would jeopardize its operational dialogue with major powers if it engaged in strong advocacy in favour of new IHL rules; that more and more detailed rules offer better protection; and that IHL is mainly applied in the field, during armed conflicts, and not by courts. We have shown some evidence challenging those assumptions. In addition, new ways of developing IHL may be explored, such as the adoption by States of some core obligations and principles, based upon existing IHL, which would then be specified by every State – and armed group – by detailed internal but public rules. This process could be accompanied by a national committee and at a further stage by regular peer review between States. In any case, and although this is politically and conceptually difficult, armed groups must gain more voice in the development of IHL of NIACs. This does not only increase their sense of ownership but also ensures that its rules are realistic for them.

90 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, 2011, pp. 141–52.

91 See Geneva Academy of International Humanitarian Law and Human Rights above note 87.

92 See, however, the forthcoming PhD of Ms Lizaveta Tarasevich at the University of Geneva on non-State armed groups and the formation of customary international law and her preliminary thoughts, above note 88.