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Normative architecture and applied international humanitarian law

Michael N. Schmitt
Michael N. Schmitt is a member of the Review's Editorial Board, as well as Professor of International Law at the University of Reading and Lieber Distinguished Scholar at West Point.

Abstract

Military strategists have begun pivoting from a focus on counterterrorism, counter-insurgency and stability operations to potential peer and near-peer conflict. This shift has profound operational and tactical implications for how future wars will be fought, but equally, it will have a significant impact on how international humanitarian law (IHL) is understood and applied. This article considers the process by which the normative evolution of IHL will occur in response to a battlespace that looks different than it has for decades. To do so, the article introduces two concepts: "normative architecture" and "applied IHL". It argues that only by understanding the difference between these two concepts, and their relationship to each other, can States and others concerned with how IHL is developing in the face of future conflict positively affect that process.

Keywords: international humanitarian law, customary law, development, State practice.

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This issue of the *International Review of the Red Cross* is dedicated to examining the development of international humanitarian law (IHL). It is an especially timely topic, for, over the past few years, many military strategists have begun pivoting from a focus on counterterrorism, counter-insurgency and stability operations to potential peer and near-peer conflict. That shift, should it occur, has profound operational and tactical implications for how future wars will be fought, but

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equally, it would have a significant legal impact. This has motivated two senior US judge advocates to argue that nations must maintain "legal maneuver space" to meet the evolving threat environment.[1] They are correct in the sense that the law with which one goes to war must be fit for purpose. This requires sensitivity to how IHL develops, as well as its vector.

To develop and leverage that sensitivity, it is first necessary to address the question, "which IHL?". In this thought piece, I suggest that two forms of IHL merit attention when assessing IHL's development: the "normative architecture" and "applied IHL". Only by understanding the difference between these two concepts, and their relationship to each other, can States and others concerned with how IHL is developing in the face of future conflict positively affect that process.

The normative architecture

The term "normative architecture" refers to IHL as found in treaties and customary law. In the abstract, it comprises the content of IHL – but there are two problems with stopping there. First, treaties and customary law are insufficiently granular to govern conduct in the battlespace effectively. Treaties are the product of compromise among States that often results in the lowest common denominator of acceptability. The limited content of Additional Protocol II to the 1949 Geneva Conventions, with its sparse eighteen substantive articles to govern non-international armed conflicts, is illustrative. The requirement that State practice and *opinio juris* be widespread has an analogous effect on the breadth and depth of customary law.

To achieve this consensus, it is often necessary to imbue treaty provisions with imprecision, thereby allowing States to read into them what they wish, at least so long as their interpretation is reasonable. The rule of proportionality is paradigmatic.[2] It is so vague that it is only possible to draw definite conclusions about a strike's proportionality at the rule's two extremes. A survey of the International Committee of the Red Cross (ICRC) Customary Law Study's rules demonstrates that similar vagueness pervades customary law in the field.[3]

The second problem relates to the first: treaties and customary rules lack contextuality, but their eventual application may demand it. For instance, the requirement to take precautions in attack will operate much differently for an advanced military than for an insurgent group, or in a dense urban fight compared to a confrontation in a remote, unpopulated area. As these examples

1 Charles Pede and Peter Hayden, "The Eighteenth Gap: Preserving the Commander's Legal Maneuver Space on 'Battlefield Next'", *Military Review*, March–April 2021.

2 The rule requires comparing two dissimilar values – harm to civilians and civilian objects and military advantage – that are themselves difficult to evaluate.

3 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 August 2022).

illustrate, even if the rules are clear-cut and detailed, those in the field are still left with the difficult task of figuring out how they apply in any given circumstance.

Applied IHL

This is the crux of the notion of "applied" IHL. As Michael Reisman has observed, "law … is about making decisions".[4] Building on this point, applied IHL refers to how the normative architecture operates during armed conflict. It completes the normative architecture based on decisions by States, armed forces and individuals participating in the conflict. In that sense, applied IHL is the "real" IHL. This does not mean the normative architecture is inconsequential, but it is only a framework upon which applied IHL is erected. If we hope to understand how the IHL that resides in the battlespace develops, identify its extant content or assess its developmental vector, we need to grasp how it is applied in practice.

Interpretation drives the transition from normative architecture to applied IHL. Formally, international law contains rules of interpretation, such as those captured in the Vienna Convention on the Law of Treaties[5] or the Draft Conclusions on Identification of Customary International Law by the International Law Commission.[6] These rules occupy a place of prominence in international tribunals, scholarly writing and, at times, inter-State relations.

In practice, though, the rules of interpretation seldom influence how legal advisers and military forces interpret IHL and apply it in the field. This is especially the case at the operational and tactical levels of warfare. Instead, applied IHL is the product of the same dynamic that undergirds the initial development of IHL's normative architecture – a balancing of military with humanitarian concerns.[7] Those who apply the broadly crafted normative architecture need to understand that the rules were designed to permit States to effectively use military force to preserve vital national interests while minimizing the harm, to the extent feasible, that military operations present to protected persons and objects – and act accordingly.

Of course, it is not uncommon for the sought-after equilibrium to be skewed by those considering how the rules should play out in actual military operations. After all, what one sees depends on where one stands. For example, academics and members of the non-governmental community tend to criticize

4 W. Michael Reisman, "Covert Action", *Yale Journal of International Law*, Vol. 20, 1995, p. 420. This leads Reisman to famously distinguish between what he calls the "myth system" and the "operational code": W. Michael Reisman, *Jurisprudence: Understanding and Shaping Law*, New Haven Press, New Haven, CT, 1987, pp. 23–35. For Reisman, the myth system is the law that purportedly applies, in a sense, the law on paper. By contrast, while the operational code refers to the norms that govern in practice, it may depart, sometimes significantly, from the myth system.

5 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969, Arts 31–32.

6 International Law Commission, *Draft Conclusions on Identification of Customary International Law*, 2018, available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_13_2018.pdf.

7 Michael N. Schmitt, "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance", *Virginia Journal of International Law*, Vol. 50, No. 4, 2010.

battlespace operations by skewing the balance (often subconsciously) in favour of humanitarian considerations. At the same time, governments and their militaries have a propensity to assert their freedom of action and defend their actions by skewing the balance in the other direction. This is a positive dynamic at times, because the adversarial process can serve to calibrate the equilibrium. Indeed, the interplay between the two perspectives results in applied IHL, as militaries refrain from conducting operations that offer a military advantage because they either conclude that the operations pay insufficient heed to humanitarian concerns or worry that if they push the envelope too far, costly condemnation will follow.

This is only the case, however, with normatively mature militaries – that is, those that pay attention to IHL. Only the actions of States that endeavour to comply with IHL should affect the development and evolution of applied IHL. To do so, their contextual application of a rule in accordance with their interpretation must reflect a good-faith effort to achieve equilibrium. Of course, the lack of depth and ambiguity of some rules means that such States enjoy a fair margin of appreciation when interpreting and applying the normative architecture. Still, over time, consensus interpretation and application of rules begin to mature among these States.

Importantly, applied IHL sometimes deviates from the formal normative architecture. In other words, applied law can take the form of *de facto*, even if not *de jure*, application of the normative architecture's rules. The normative architecture set forth in Additional Protocol I (AP I) is illustrative. The United States is not a party to the instrument and therefore is only bound by its rules to the extent that they reflect customary international law. For instance, the United States accepts AP I's definition of a military objective and its prohibition on attacking civilians and civilian objects as restating customary law, but it does not consider itself bound by such rules as those prohibiting certain reprisals or safeguarding the environment and installations containing dangerous forces.[8]

Yet, the United States is nearly as operationally constrained by those rules as are parties to AP I. There are two reasons for this. First, the likelihood of the United States engaging in an armed conflict without being in some form of coalition with a party to AP I is low, as most of its key partners are bound by the instrument. These include the so-called Five Eyes countries and most NATO allies.[9] It is difficult enough to engage effectively in "combined" operations without partners operating with different rules of the game.[10] For operational and legal reasons,[11] US commanders must respect the legal limits on partner forces and shape their operations accordingly. Admittedly, US assertions that specific AP I rules do not bind the United States because they do not reflect customary

8 US Department of Defense, *Law of War Manual*, revised ed., Office of the General Counsel, December 2016, Chap. V.

9 The Five Eyes countries are Australia, Canada, New Zealand, the United States and the United Kingdom.

10 "Combined operations" include the armed forces of multiple countries. The term "joint operations" refers to those that involve multiple services.

11 For instance, in a coalition operation, US operations could raise issues of coalition partner responsibility based on breach of obligations of the latter.

law are sometimes correct and, when so, can serve to prevent those rules from crystallizing into customary law, but making these assertions usually has little bearing on their *de facto* effect on operations.

Second, in most cases, the consequences for the United States of conducting operations that violate AP I would outweigh the benefits. First, the party/non-party nuance would likely be lost on domestic and international audiences; condemnation as having violated IHL would result. Moreover, such operations would open the door for the enemy and other adversaries and critics to exploit the situation for lawfare purposes. This is especially the case since the operations in question would be relatively unprecedented given that current US operations are *de facto* AP I-compliant. Indeed, failure to comply with the AP I rules might lead allies and partners to quit cooperating with the United States, as was the case with intelligence-sharing and other forms of military cooperation when reports of US prisoner mistreatment and torture surfaced in the aftermath of the 9/11 attacks.[12] Of course, an argument can be fashioned that these allies would have to do so as a matter of law,[13] but even if not, most States would not want to be seen as supporting actions that would have violated IHL had their own forces conducted them.

This reality bears on which rules find their way into applied IHL, but with so much leeway to interpret and apply the rules, what matters as much is how parties and non-parties interpret and use them in the battlespace. This process of interpretation and contextual application is highly practice-oriented. To take one example, in 2019, a Naval War College team, drawing on its members' personal experience in the field, attempted to capture how militaries deal with uncertainty during various phases of an attack.[14] Their analysis of qualification as a military objective is instructive vis-à-vis the translation of rules residing in the normative architecture into applied IHL.

Regarding the normative architecture, Article 52(2) of AP I defines military objectives as "objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military of advantage". Article 50(1) further provides that "[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian", while Article 52(3) states:

> In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

12 Douglas A. Johnson, Alberto Mora and Averell Schmidt, "The Strategic Costs of Torture: How 'Enhanced Interrogation' Hurt America", *Foreign Affairs*, Vol. 95, No. 5, 2016, pp. 125–129.

13 See discussion in Marko Milanovic, "Intelligence Sharing in Multinational Military Operations and Complicity under International Law", *International Law Studies*, Vol. 97, 2021.

14 Michael Schauss and Michael N. Schmitt, "Uncertainty in the Law of Targeting: Towards a Cognitive Framework", *Harvard National Security Journal*, Vol. 10, 2019, pp. 153–166.

The Naval War College team agreed that doubt as to the status of persons or objects could also sometimes prohibit an attack under customary law, but the doubt rules provide little practical guidance for those who must apply them.

The team concluded that applied IHL fills the void. In practice, for example, "the greater the value of a target, the more uncertainty may be countenanced in an attack, and vice versa".[15] Note that this is not the proportionality rule, which only kicks in once the attacker has determined that the target qualifies as a military objective; the calculation is more complex when deciding whether a target is a military objective in the first place. In combat, an attacker making the determination assesses not only the value of the target but also the probability of its correct identification (uncertainty) and the likelihood that even if correctly identified, the operation will successfully achieve the desired definite military advantage (for instance, considering the weapon used).

Similarly, the attacker will consider the degree to which there is a risk of mistaken identification, the nature of the harm to protected persons or objects that could manifest if there is an erroneous identification, and the likelihood of that harm being caused. Failure to consider such issues renders the analysis mandated by the rules of doubt flawed. As is apparent, it is in this applied IHL that the equilibrium between military and humanitarian considerations is maintained.

Or consider the rule of proportionality that prohibits an "attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated". Found in Articles 52 and 57 of AP I and universally accepted as customary law in international armed conflicts, the rule is the paradigmatic reflection of the balancing of military and humanitarian considerations – yet, at the same time, it is one of the most difficult to apply definitively in the battlespace despite its relatively descriptive text.

The most obvious challenge is the inherent difference between the values to which this rule refers. How, for example, is a soldier or airman to compare a tank's value to a civilian's life or damage to a civilian structure? In practice, the application of the rule is always contextual, for no abstract value is assigned to any type or category of military objective.

Instead, military advantage is measured relative to the effect sought by the attack. To illustrate, the military advantage of destroying an enemy air defence asset is comparatively greater for a force that relies on air support than for one that does not; or, a tank that is having difficulty manoeuvring in an urban environment may pose less of a threat than one manoeuvring freely on open terrain, so destroying the same tank in those two circumstances would yield a significantly different military advantage in each case.

Further complicating matters is the issue of uncertainty. As the Naval War College team noted,

15 *Ibid*., p. 163.

> there is the matter of how uncertainty as to the occurrence and extent of incidental injury to civilians or collateral damage to civilian objects … should factor into the proportionality calculation …, and analogously, there is the matter of how doubt that the military advantage will be achieved (and, if it is, the degree to which it is achieved) should affect the proportionality determination.[16]

These highly contextual and practice-oriented examples illustrate that applied IHL matters most in achieving equilibrium between military and humanitarian considerations. The normative architecture sets out the framework, but to grasp the development of IHL, one must look to practice in the battlespace. It is the crucible within which the normative architecture takes on meaningful form.

The evolution of IHL

To maintain equilibrium between military and humanitarian considerations, IHL must evolve when those considerations change. This can occur through modifications to either the normative architecture or applied IHL. Timely adjustment is essential to the survivability of IHL, for if the law fails to track States' expectations (and those of other influential actors) as to the appropriate balance, it will lose the respect that undergirds its effectiveness. Therefore, evolution in IHL's content and understanding is usually a positive dynamic.

In this regard, the normative architecture tends to be reactive. It responds to changes in warfare and their consequences, usually following major conflicts. For instance, the 1906 Geneva Convention and 1907 Hague Conventions followed closely on the heels of the 1905 Russo-Japanese War, while the use of gas and maltreatment of prisoners during World War I served as the impetus for the 1925 Gas Protocol and 1929 Geneva Convention respectively. Suffering and destruction during World War II motivated the adoption of the four 1949 Geneva Conventions that protect the wounded, sick, shipwrecked, prisoners of war and civilians. Later, the prevalence of non-international armed conflicts, new methods and means of warfare, and shifting sensibilities about what the law should safeguard led, *inter alia*, to the 1954 Hague Cultural Property Convention, 1977 Additional Protocols I and II, 1972 Biological Weapons Convention, 1976 Environmental Modification Convention, 1980 Conventional Weapons Convention, 1993 Chemical Weapons Convention, 1997 Landmines Convention, 2008 Cluster Munitions Convention, 2017 Nuclear Weapons Treaty, and the establishment of international criminal tribunals to try war criminals from both international and non-international armed conflict, beginning with the conflicts in the Balkans.[17]

16 *Ibid*., p. 167.
17 These and other IHL treaties, as well as the statutes of international criminal tribunals, are available on the ICRC's comprehensive database at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByDate.xsp.

Regardless of how one judges the merits of individual instruments, it is unquestionable that this is an impressive record of achievement. That said, codification can be slow and unwieldy, not least because of the baked-in tension between military and humanitarian considerations that makes negotiations so tricky. In particular, States will always be understandably nervous about tying their own hands with regard to new means and methods of warfare (like cyber, autonomous systems, artificial intelligence, machine learning and space operations) until they fully understand the consequences of doing so. Such hesitancy is not necessarily bad, for it ensures that both the military and humanitarian consequences of agreements are thoroughly vetted. Nevertheless, it does mean that the normative architecture, especially the *lex scripta*, will sometimes lag behind a shift in the equilibrium.

Applied IHL tends to be the more responsive tool for maintaining equilibrium. Consider cyber operations, for example. Adoption of a new treaty governing cyber operations during armed conflict is unlikely in the near term because of such quandaries as the meaning of the word "attack" in IHL, the condition precedent to applying the numerous rules governing attack, and whether data is an object such that civilian data is protected from attack and needs to be considered in proportionality and precautions in attack assessments.[18]

What is more likely is that practice, which includes battlespace practice and the verbal practice of States through mechanisms like military manuals, will over time begin to resolve how IHL should be interpreted and applied in these new contexts. It cannot avoid doing so, because once a weapons system or tactic makes its way into the battlespace, the armed forces involved in the conflict necessarily have to decide how to treat it, legally and operationally. In both its military and humanitarian guises, the reality of warfare will demand that the normative architecture take form as applied IHL.

For instance, I doubt that the term "attack" will be understood by military forces as being limited to cyber operations causing physical damage or injury, as States like Israel have argued.[19] Such an interpretation pays insufficient heed to the humanitarian considerations that result from the growing societal reliance on activities in cyberspace. When faced with hostile cyber operations against their own civilian cyber infrastructure, States will want to condemn at least some of such operations as unlawful direct attacks on civilian objects. And irrespective of their legal interpretation of attack, States will refrain from cyber operations against certain civilian cyber infrastructure and activities out of concern over condemnation of such operations as unlawful and enemy use of lawfare. I make this point not to disagree with Israel's position but rather to demonstrate that applied IHL will have to resolve such matters over time, even if the normative architecture remains unchanged.

18 Michael N. Schmitt, "Wired Warfare 3.0: Protecting the Civilian Population during Cyber Operations", *International Review of the Red Cross*, Vol. 101, No. 901, 2019.

19 Roy Schöndorf, "Israel's Perspective on Key Legal and Practical Issues Concerning the Application of International Law to Cyber Operations", *International Law Studies* Vol. 97, 2021, pp. 400–401.

Influences on applied IHL

Since the normative architecture finds meaning through the maturation and evolution of applied IHL, it is essential to identify influences on those processes. The most important is operational reality. A provision of the normative architecture that does not make sense on the battlefield as written will be interpreted in a manner that does, a point illustrated by the two provisions on doubt cited earlier. The plain text of the first requires treating an individual as a civilian in the case of doubt, whereas the second creates a presumption of civilian status for certain civilian objects should there be doubt as to status. In fact, individuals are often targeted when there is a degree of doubt, and forces in the field do not apply a presumption of civilian status as such. If these rules were strictly applied, there would be very few attacks because doubt is a pervasive feature of the fog of war; as written, the rules are unworkable operationally. Instead, and as explained earlier, doubt is handled contextually along a continuum so as to respond to both military and humanitarian considerations.

Operational concerns, therefore, can cause applied IHL to shy away from the sometimes bright-line rules that appear in the normative architecture for operational reasons. Consider harm to the environment. Beyond the special rules regarding the environment found in Articles 35 and 55 of AP I for States Parties, there is relative consensus that the environment is a civilian object. For instance, an International Law Association study group that brought together leading experts in the field concluded that since "the environment does not fulfill the definition of a military objective, it must be considered a civilian object (or rather many civilian objects)".[20]

However, treating the environment as a civilian object is operationally problematic. Attacks often cause some damage to the environment, as in the case of artillery or aerial attacks against an enemy hiding in a forested area. In practice, armed forces seldom factor such harm into their proportionality or precautions in attack analyses. Instead, environmental damage usually enters their calculations only when particularly severe harm results. From an operational perspective, treating harm to the environment in the same manner as harm to other civilian objects appears, at least in the current operational context, unworkable.

The reality of how IHL operates in the battlespace might lead to criticism on the basis that it allows attackers too much leeway at the expense of humanitarian considerations. This is sometimes a fair criticism, but it also must be acknowledged that indeterminacy infuses the normative architecture with flexibility. That flexibility allows it to remain responsive to either unanticipated circumstances or a broader shift in the military and humanitarian considerations balance. It tempers the risk of rules becoming viewed as unworkable, thereby

20 International Law Association Study Group on the Conduct of Hostilities in the 21st Century, "The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare", *International Law Studies*, Vol. 93, 2017. I was part of the group and agree with the conclusion.

undercutting IHL's credibility and, consequently, its ability to achieve its humanitarian ends.

Since operational reality is the most potent influence on the transformation from normative architecture to applied IHL, one would expect States to be the key players in IHL's interpretation and application. In a sense, they are, for the armed forces apply the law in the battlespace; yet, as has been observed,[21] there has been a paucity of verbal State practice and expressions of *opinio juris* regarding the interpretation and application of the normative architecture. States sometimes object when non-State actors like the ICRC opine on IHL, its content, and how it should be interpreted, but they have not engaged the issues aggressively.[22]

As a result, interpretation and expectations from beyond the battlespace can catch hold and affect how the normative architecture is ultimately applied. For instance, external expectations have significantly impacted how the rules regarding incidental injury to civilians and collateral damage to civilian objects are applied. Incidental injury and collateral damage that would have been seen as lawful only a few decades ago would not pass legal muster today.

Obviously, the increased accuracy of weaponry and improved transparency of the battlespace have heightened expectations as to the precision of attacks and the ability of attackers to avoid harm to civilians and civilian objects; thus, operational reality has forced an adjustment to the application of the rule. Beyond that influence, technology has made war globally observable, often in real time. In response, armed forces have become more cautious when conducting attacks, lest they turn public opinion against their cause or allow the enemy to engage in lawfare. Over time, such constrained practice motivated by such policy or operational concerns can transform mere sensitivity into applied IHL. This may prove a positive development because applied IHL should reflect the contemporary values underpinning the military and humanitarian considerations equilibrium.

Such external influences are varied; they include non-governmental organizations, academia and the media. Of particular note is the work of the ICRC. To take one well-known example, I agree with much of the ICRC's analysis in its project on direct participation in hostilities.[23] Still, like many others, including some States, I disagree with its restriction of the organized armed group concept to members with a continuous combat function. In my estimation, the limitation reflects neither the normative architecture nor applied IHL, and it makes little operational sense because an attacker will often have difficulty distinguishing those with such a function from those without, especially in groups where all members are uniformed or armed.

21 Michael N. Schmitt and Sean Watts, "State *Opinio Juris* and International Humanitarian Law Pluralism", *International Law Studies*, Vol. 91, 2015.

22 John B. Bellinger III and William J. Haynes, "A US Government Response to the International Committee of the Red Cross Study *Customary International Humanitarian Law*", *International Review of the Red Cross*, Vol. 89, No. 866, 2007.

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

Nevertheless, to its credit, the ICRC has effectively convinced many States and members of the broader IHL community to adopt this approach. Given the opposition to the notion by some key States and numerous prominent IHL experts, it has not become a full-fledged component of applied IHL – but neither can the approach by which all members of an organized armed group are targetable be considered to enjoy that status. And today, for better or worse, the continuous combat function, which appears nowhere in the normative architecture, is slowly becoming part of the *de facto* applied IHL described above. Rules of engagement in combined operations, for instance, have reflected a delicately crafted balancing of the two sides of the debate when coalition partners differ over the issue.

Of course, there are countless other influences on the development of normative architecture and applied IHL. For example, the judgments of tribunals can be influential, although probably less so on applied IHL than commonly thought. Consider the International Criminal Tribunal for the former Yugoslavia's (ICTY) characterization of non-international armed conflict as consisting of protected armed conflict of sufficient intensity between a State and an organized armed group or between armed groups.[24] Although necessary to find jurisdiction, it is unlikely that practitioners beyond the courtroom who would not have characterized a conflict as non-international would do so in light of the court's formula, or vice versa. I do not mean to criticize the tribunals, for their work is essential to IHL's viability. I only mean to point out that it is a long journey from a courtroom to a battlespace. Indeed, in my experience, judgments find their way into the hands of operational legal advisers only after having been parsed, summarized and filtered extensively; often, the operational lawyer is unaware of the guidance's judicial pedigree.

International criminal law's deterrent effect further influences the transformation of the normative architecture into applied IHL. The prospect of war crimes prosecution can slow the evolutionary development of applied IHL, lest it gets too far ahead of the normative architecture to which courts will look. Ethical and moral considerations also influence many militaries; indeed, more time tends to be spent on the subject in the US Army Command and General Staff College and War College than on IHL. There is no question that these factors have influenced targeting, as in the case of children tending to be assigned greater weight than adults in proportionality and precautions in attack analyses even though the normative architecture contains no such requirement. And ethics and morality are presently exerting influence on the normative architecture that is slowly being built for cyber, autonomy, artificial intelligence and related technologies. Such influence is perhaps best exemplified in the notion of "meaningful human control" that animates discussions and policies about lethal autonomous weapons systems.[25]

24 ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

Finally, it has been my experience that the influence of scholarship on applied IHL has been declining dramatically. There are two reasons why this is so. First, there is simply too much of such scholarship to manage. When I started in the field during the Cold War, a small, select group of serious scholars and practitioners occupied the field. The names and their works were familiar to most practitioners and the entire academic community – Baxter, Parks, Levie, Green, Sandoz, Gasser, Fleck, Bothe and Dinstein, to name some of the most eminent. These individuals significantly influenced those responsible for developing and applying the normative architecture and applied IHL. Some participated personally.

Today there are still bright lights in the field, but there are so many scholars writing so many pieces in so many journals that the volume renders much of the work practicably inaccessible. Search engines help, but even then, it is difficult for practitioners to separate the wheat from the chaff. As a result, contemporary practitioners tend to rely on military manuals, guides, and summaries produced by their armed forces;[26] ICRC publications; articles in a small group of practice-oriented journals, such as the *International Review of the Red Cross*, *International Law Studies*, the *Military Law Review*, and the *Review of Military Law and the Law of War*; and blogs like *Articles of War*. I do not wish to exaggerate this point, but the reality is that a great deal of scholarship is consumed primarily by scholars, if at all. This is unfortunate because tucked in among this unmanageable flood of academic pieces are incisive works that practitioners should be considering when taking actions that develop the normative architecture and applied IHL.

The second reason is related to the first. Although some scholarship evidences a deep understanding of warfare, the sheer number of individuals working in the field, and the lack of opportunity for all of them to acquire practical experience, means that posts, articles and books frequently lack operational contextuality or address issues in a manner that makes little operational sense. This has led some key practitioners to adopt a sceptical approach to scholarship. Of course, such scepticism is often unmerited; still, there is no denying that many practitioners look askance at the "ivory tower", especially those coming from States that engage in armed conflict and therefore wield the most significant influence on IHL.

Concluding thoughts

I have suggested that understanding how IHL develops and evolves necessitates distinguishing between the normative architecture and applied IHL, and understanding their relationship. They each play an essential role in governing

25 See documents at United Nations Office of Disarmament Affairs, "Convention on Certain Conventional Weapons – Group of Governmental Experts on Lethal Autonomous Weapons Systems", available at: https://meetings.unoda.org/meeting/ccw-gge-2020/.

26 Ops law handbook.

armed conflict, and they should do so synergistically, given their common goal of achieving equilibrium between military and civilian considerations as IHL operates in the battlespace.

There are, of course, numerous challenges standing in the way of that objective. A major one highlighted above, which is widely recognized, is the need for those participating in the developmental process to recognize the balance between military and humanitarian perspectives objectively. As noted, what one sees depends on where one stands. Respectful tension between those who emphasize one or the other consideration can yield positive results, but States, non-governmental entities and academia need to do better at talking with, instead of at, each other; after all, equilibrium is about balancing differing perspectives.

A second challenge involves understanding the binary nature of IHL. The academic and non-governmental communities tend to focus on normative architecture, while their governmental and military counterparts devote greater attention to applied IHL. Those who straddle both camps, like faculty members at military educational institutions or civilian university faculty with extensive military experience, are often conflicted, with individuals leaning in one or the other direction. However, in that the normative architecture and applied IHL constitute a normative whole that governs armed conflict, each group must develop a greater understanding of IHL's other component.

Unfortunately, many in the academic and non-governmental IHL communities lack more than a wave-top grasp of warfare. Their expertise on how war is conducted tends to diminish as consideration moves from the strategic to the operational and tactical levels of warfare. Few understand combat tactics or weapons system capabilities and uses. They may have a deep understanding of IHL rules in the abstract, but too many lack sensitivity to how those rules work in diverse battlespace contexts. Since their views can have life-and-death implications, these individuals shoulder a responsibility to learn about war. Until they do, they will never grasp applied IHL. In my experience, the ICRC is an exemplar of an organization that understands this need; I don't always agree with its stances, but I always know they are contextually well reasoned.

That responsibility cuts the other way as well. Many in government and the armed forces must better understand the nuances of the normative architecture. This involves knowing not only the treaty text and broad customary rules but also the foundational purposes of IHL, the lineage of the rules and ongoing debates about their meaning. In short, government and military legal advisers who advise on IHL matters have to be experts. Unfortunately, many lack depth beyond that acquired during basic IHL training courses. Of particular concern is the unfortunate belief in some militaries that all legal advisers should be plug-and-play generalists, which means that those militaries never develop a cadre of officers with deep IHL expertise. This is a significant failing because IHL is a complex body of law requiring many years of experience and study to master. As a result, these militaries get out-lawyered time and again by their academic and non-governmental counterparts during negotiations, consultations and expert meetings, and in the public arena. More importantly, it means that their

commanders and operators sometimes get sub-optimal legal advice during hostilities – and advice about IHL is the most important advice that legal advisers can provide to an organization which exists for the primary purpose of engaging in armed conflict.

In this regard, the Israeli Defense Forces (IDF), particularly its International Law Department, is an exemplar of good practice.[27] The IDF allows some of its officers to spend years doing international and operational law, invests heavily in their education, ensures they understand combat and other military operations, and sends them out to engage with the broader IHL community. Whether one agrees with the IDF's positions or not, there is little denying that it has the best uniformed international and operational law attorneys in the world.

Thus, moving IHL in a positive direction requires well-developed multi-dimensional expertise among the individuals and entities that make up our diverse IHL community. These individuals and entities must first understand that *both* military and humanitarian considerations matter when crafting, interpreting and applying IHL, and they must equally recognize that this must be accomplished at two levels, thereby requiring sensitivity to *both* the normative architecture and applied IHL.

27 IDF, "International Law Department", available at: www.idf.il/en/minisites/military-advocate-generals-corps/ild/.