

# The view of the past in international humanitarian law (1860–2020)

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## Abstract

*This essay explores how the drafters of international humanitarian law (IHL) incorporated the past into their work between 1860 and 2020, and how they approached time, memory and history as indicators for this view of the past. Its sources consist of the complete series of general conventional and customary IHL instruments as well as the leading commentaries on them. For the IHL view of time, the impact of legal principles on the perception of time is scrutinized. Balancing nonretroactivity against customary international law and the humanity principle broadens the temporal scope towards the past, while balancing legal forgetting against imprescriptibility and State succession broadens it towards the future. For the IHL view of memory, dead persons and cultural heritage are seen as crucial vectors. Attention to the fate of the dead has been a constant hallmark of*

\* I am very grateful to Bruno Demeyere for providing encouragement and facilitating sources; to Daniel Palmieri, Meera Nayak, Ashley Stanley-Ryan and Jillian Rafferty for answering questions related to this research; to the two anonymous reviewers for their insightful comments; and to the copy editor, Kieran Macdonald.

*IHL, while care for cultural heritage has an even longer pedigree. For the IHL view of history, the essay highlights that the International Committee of the Red Cross has consistently advocated State duties to the war dead and has organized an archival infrastructure to satisfy the need—later converted into a right—of families and society to search for the historical truth about them.*

*Furthermore, the responses of IHL drafters to five major historical challenges are examined. First, while in the realm of war crimes impunity prevailed for most of history, after World War II a system of war crimes trials was mounted, culminating in the International Criminal Court. Second, soul-searching about the atrocities of World War II, including the Holocaust, helped create Geneva Convention IV of 1949, which protects civilians in wartime. Third, the human rights idea was not fully embraced by IHL treaty drafters until 1968. Fourth, the IHL approach to civil wars was slow and incomplete, but its appearance in 1949 and coming of age in 1977 were breakthroughs nevertheless. Fifth, colonial conflicts were not recognized as international wars in 1949, when this could have had considerable impact, but only in 1977, when decolonization was largely over. In all cases, the responses to these historical challenges came after long delays. Clearly, the IHL view of the past has to be assessed on a transgenerational scale.*

**Keywords:** amnesty, archives, civil war, colonialism, cultural heritage, customary international law, dead persons, history, Holocaust, human rights, IHL prehistory, imprescriptibility, impunity, intertemporal law, Martens Clause, memory, nonretroactivity, right to the truth, State succession, time.

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Even amidst fierce flames the Golden Lotus can be planted.

Wu Cheng'en, *The Journey to the West*, 1592 CE

## Introduction

In October 1870, during the Franco-Prussian War, French Republican statesman and historian Adolphe Thiers embarked on a diplomatic tour of European capitals to seek military allies. Barely one month earlier, the Second French Empire had been defeated in the Battle of Sedan. In Vienna, Thiers met the world-famous German historian Leopold von Ranke and asked him: “Who are you actually fighting against?” Ranke replied: “Against Louis XIV”, bringing to mind the multiple wars unleashed by the French king against the German lands two centuries previously.<sup>1</sup> Memories of past wars linger on. They constitute a major factor to reckon with for anyone engaged in conflict resolution.

1 Curt von Tresckow, *Geschichte des deutsch-französischen Krieges 1870 und 1871*, Vol. 1, Leuckart, Leipzig, 1871, p. 181. The anecdote can also be found in A. Pearce Higgins, *The Hague Peace Conferences and Other International Conferences Concerning the Laws and Usages of War: Texts of Conventions with*

For centuries, one of the most vexing challenges of humanity had been to limit the violence generated in theatres of war by alleviating the suffering of victims and forging acceptable rules for warring parties with diametrically opposing interests. International humanitarian law (IHL) was one solution to this conundrum. The idea of IHL germinated slowly in the early modern period, but in the formative years between roughly 1860 and 1910 the idea of protecting the victims of conflict (known as “Geneva law”) was gradually separated from the regulation of the means and methods of war (known as “Hague law”).<sup>2</sup> This process was foremost the work of States, with their regulatory system of conferences and conventions, but often, dedicated individuals and non-State actors involved in the “peace through law” movement played prominent roles in it. The development of IHL was not inevitable, however, and it was often the unintended consequence of opposing State interests that neutralized each other. Remarkably, the term IHL itself did not originate until 1953,<sup>3</sup> which in itself is a sign that peace brokers did not necessarily see themselves as operating under a monolithic IHL flag, and not necessarily for altruistic IHL purposes on top of their State’s interests (even if they often borrowed from IHL language to advance their point).

By and large, IHL history before the First Geneva Convention of 1864 is a black (or at least grey) hole. Pre-1864 history is replete with humanitarian initiatives, but many are not well known.<sup>4</sup> Even leaving aside those initiatives that did not focus on mitigating warfare – the slavery abolition movement, for example – the history of pre-1864 humanitarianism is often neglected apart from some occasional philosophical musings about the bellicose nature of human beings or the ritual nod to the 1648 Peace of Westphalia. The history of IHL is cut into two, as it were: before and after Henry Dunant, the inspirator of the First Geneva Convention. Pre-1864 humanitarianism does not play any substantial role in most of today’s IHL works. Even commentators writing around 1870, such as Gustave Moynier and Carl Lueder, when referring to remoter times, preferred to emphasize the great strides made since 1864. Therefore, although it takes the long view, this study may be biased in that it prioritizes post-1864 humanitarian

*Commentaries*, Cambridge University Press, Cambridge, 1909, p. xiii. The full story is in Ranke’s *Tagebücher*.

- 2 See also Wylie Neville, “Muddied Waters: The Influence of the First Hague Conference on the Evolution of the Geneva Conventions of 1864 and 1906”, in Maartje Abbenhuis, Christopher Barber and Annalise Higgins (eds), *War, Peace and International Order? The Legacies of the Hague Conferences of 1899 and 1907*, Routledge, London, 2018, for a good overview of the Geneva–Hague rivalry.
- 3 A first mention was found in International Committee of the Red Cross (ICRC), *Report on the Work of the International Committee of the Red Cross (January 1 to December 31, 1952)*, Geneva, 1953, p. 67.
- 4 For sketches, see Michael Barnett, *Empire of Humanity: A History of Humanitarianism*, Cornell University Press, Ithaca, NY, and London, 2011, pp. 47–94; David Kennedy, *Of War and Law*, Princeton University Press, Princeton, NJ, and Oxford, 2006, pp. 46–98; Antoon De Baets, “Does Inhumanity Breed Humanity? Investigation of a Paradox”, *History and Theory*, Vol. 51, No. 3, 2012, pp. 456–458; Randall Lesaffer, “Peace through Law: The Hague Peace Conferences and the Rise of the *Ius Contra Bellum*”, in M. Abbenhuis, C. Barber and A. Higgins (eds), above note 2.

achievements. Under any long-term view of IHL, however, the adoption of the First Geneva Convention in 1864 constitutes a landmark moment.<sup>5</sup>

At the time when Thiers met Ranke, in 1870, developments in the IHL field showed the rhythm of a dancing procession. After the initial successes of 1864, the Franco-Prussian War cast a shadow over IHL proposals made at a conference in Brussels in 1874.<sup>6</sup> Although these proposals were sensible, the Brussels conference failed. It would be another twenty-five years before the proposals were eventually integrated into new regulations at The Hague in 1899. The Hague Regulations – an integral part of the Hague Conventions – endure until today,<sup>7</sup> making Brussels, in retrospect, probably the most successful failed conference ever. An impressive series of IHL customs and conventions has been accumulated since 1899, and many perspicacious commentaries have been published on all their aspects. If, therefore, we understand the history of IHL either as the development of IHL-related events or as the development of IHL-related concepts, we can say that many of its post-1864 aspects are well studied.

One intriguing exception, though, is the IHL view of the past. How did the IHL treaty drafters incorporate the dimension of the past into their prescriptions? The dimension of the past can be broken down into three indicators: time, memory and history. By analyzing these indicators, we can find out how the IHL treaty drafters perceived time (the IHL view of time), memory (the IHL view of memory) and history (the IHL view of history); discern patterns, if any, in the process; and then collate the results to gain insights into how the IHL treaty drafters integrated the dimension of the past into their works. The present article is an attempt to do this.

The core sources for this analysis consist of the complete series of *general* conventional and customary IHL instruments: the Geneva Conventions of 1864, 1906, 1929 and 1949, and the Additional Protocols of 1977 and 2005; the Hague Conventions and Regulations of 1899 and 1907; the 1998 Rome Statute of the International Criminal Court (ICC); and the 2005 International Committee of the Red Cross (ICRC) Customary Law Study identifying 161 rules of customary IHL.<sup>8</sup> The leading commentaries on all these conventional and customary

5 For interesting discussions of IHL myths of origin, see Adam Roberts, “Foundational Myths in the Laws of War: The 1863 Lieber Code and the 1864 *Geneva Convention*”, *Melbourne Journal of International Law*, Vol. 20, No. 1, 2019; Randall Lesaffer, “The Temple of Peace: The Hague Peace Conferences, Andrew Carnegie and the Building of the Peace Palace (1898–1913)”, *Mededelingen van de Koninklijke Nederlandse Vereniging voor Internationaal Recht: Preadviezen*, Vol. 140, 2013. For an alternative view – locating the start of IHL in the 1970s, which in the present author’s view is profoundly ahistorical – see Amanda Alexander, “A Short History of International Humanitarian Law”, *European Journal of International Law*, Vol. 26, No. 1, 2015.

6 Carl Lueder, *La Convention de Genève au point de vue historique, critique et dogmatique*, Édouard Besold, Erlangen, 1876, p. 226; A. P. Higgins, above note 1, pp. 257–258.

7 Betsy Baker, “Hague Peace Conferences (1899 and 1907)”, *Max Planck Encyclopedia of Public International Law*, November 2009, para. 30.

8 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, and Vol. 2: *Practice*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), available at: [www.icrc.org/customary-ihl](http://www.icrc.org/customary-ihl) (all internet references were accessed in March 2022). Recording custom, as in the ICRC Customary Law Study, has undeniable parallels with

instruments, written at the time of their adoption or later, served as supplementary sources.<sup>9</sup>

## The IHL view of time

Time is the cornerstone of memory and history. In the IHL view of time, its scope can be contracted and expanded according to the diverging implications of fundamental legal principles, especially those applicable in criminal law.

### The nonretroactivity principle and custom

The most important time constraint on IHL is a principle older than IHL: nonretroactivity. First mentioned in the 1789 Constitution of the United States<sup>10</sup> and the 1789 Déclaration des Droits de l'Homme et du Citoyen,<sup>11</sup> it was conceptualized by Anselm von Feuerbach in 1801. Feuerbach coined the phrase under which the principle became famous: *nullum crimen, nulla poena sine praevia lege* (no crime, no penalty without previous law).<sup>12</sup> Nonretroactivity is a principle of general law, but from Feuerbach's formula we can infer that its most important application is in criminal law. That criminal aspect is probably the reason why we do not see any prominent appearance of the principle in IHL until 1945, when the punishment of war criminals was tackled in earnest with the establishment of the International Military Tribunal at Nuremberg. Indeed, this Tribunal was quickly accused of administering retroactive justice in trying the Nazi war criminals on the basis not only of existing crimes (war crimes) but also of new crimes (crimes against peace and crimes against humanity).<sup>13</sup> The Tribunal's response to this accusation was double: in its charter it stated that it would punish crimes against humanity "whether or not [committed] in violation of the domestic law of the country where perpetrated", and in its judgment it argued that its charter was "the expression of international law existing at the time of its creation" and that "individuals ha[d] international duties which

recording oral tradition. See Jan Vansina, *Oral Tradition as History*, James Currey, London, 1985, pp. 29–31, 56–67.

9 For an overview of the sources, see Appendix 1.

10 Constitution of the United States, 1789, Art. 1, Section 9(3).

11 Déclaration des Droits de l'Homme et du Citoyen, 1789, Art. 8.

12 Aly Mokhtar, "Nullum Crimen, Nulla Poena sine Lege: Aspects and Prospects", *Statute Law Review*, Vol. 26, No. 1, 2005, p. 46. See also European Court of Human Rights, *Guide on Article 7 of the European Convention on Human Rights*, Strasbourg, 2019.

13 See in particular the Motion Adopted by All Defense Council (19 November 1945), *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*, Vol. 1, Secretariat of the Tribunal, Nuremberg, 1947, pp. 168–170. Accusations of retroactivity were also levelled against trying Kaiser Wilhelm in 1919 (the trial never took place). See William Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2020, p. 3; Kirsten Sellars, "Founding Nuremberg: Innovation and Orthodoxy at the 1945 London Conference", in Morten Bergsmo, Cheah Wui Ling and Yi Ping (eds), *Historical Origins of International Criminal Law*, Vol. 1, Torkel Opsahl, Brussels, 2014, p. 547.

transcend[ed] the national obligations of obedience imposed by the individual state”.<sup>14</sup> As to war crimes committed by the Nazi war criminals in particular, it further stipulated that “[t]he evidence relating to War Crimes has been overwhelming, in its volume and its detail. ... The truth remains that War Crimes were committed on a vast scale, never before seen in the history of war.”<sup>15</sup> In other words, the Tribunal argued that by 1939—the year in which its jurisdiction *ratione temporis* began<sup>16</sup>—the 1907 Hague Conventions and the 1929 Geneva Conventions had been recognized by all civilized nations,<sup>17</sup> meaning that they had acquired the status of customary international law applicable to all States, whether parties to the Hague and Geneva Conventions or not.<sup>18</sup> The Tribunal thus argued that the Nazi crimes had breached already existing customary international law and that, therefore, it did not violate the nonretroactivity principle in dealing with the Nazi crimes.<sup>19</sup> In other words, it appealed to “international custom”, one of the sources of international law recognized by the Permanent Court of International Justice (the world court from 1921 to 1946) and its successor, the International Court of Justice (ICJ).<sup>20</sup>

14 *Trial of the Major War Criminals*, above note 13, pp. 218, 223. For a discussion, see *Question of the Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity: Study Submitted by the Secretary-General*, UN Doc. E/CN.4/906, 15 February 1966, paras 122–126, stating in para. 125: “It is not very difficult to imagine how world public opinion would have reacted if after the Second World War, on the basis of the principle *nulla poena sine lege*, the serious crimes committed in connexion with the war or while it was in progress had been allowed to go unpunished.”

15 *Trial of the Major War Criminals*, above note 13, p. 226.

16 *Ibid.*, p. 254.

17 *Ibid.*, pp. 253–254. The Tribunal referred specifically to Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907 (1907 HC IV), Arts 46, 50, 52, 56; and to the Convention relative to the Treatment of Prisoners of War, Geneva, 27 July 1929 (1929 GC II), Arts 2–4, 46, 51.

18 Hans Kelsen, “The Rule against Ex Post Facto Laws and the Prosecution of the Axis War Criminals”, *Judge Advocate Journal*, Vol. 2, No. 3, 1945, p. 10; Hans Kelsen “Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?” *International Law Quarterly*, Vol. 1 No. 2, 1947, pp. 159–160; Karl Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, Cambridge, 2003, p. 82; ICRC Customary Law Study, above note 8, Vol. 1, pp. xxxvii–xxxviii, 1, 572, Vol. 2, p. 3872.

19 Most legal scholars agree with this conclusion as far as war crimes are concerned. In applying a principle of individual criminal responsibility, however, the Nuremberg Tribunal had in effect created new law and deviated, in this respect, from the nonretroactivity principle. As Hans Kelsen and Gustav Radbruch, among others, have argued, the nonretroactivity principle is not absolute: it has to be balanced against the higher principle of justice, namely that morally abject acts have to be punished even when under domestic law they had not been punishable at the material time.

20 Statute for the Permanent Court of International Justice, Provided for by Article 14 of the Covenant of the League of Nations, 1921, Art. 38(2); Statute of the International Court of Justice, San Francisco, 26 June 1945, Art. 38(1)(b). For the principles of identifying custom, see UNGA Res. 73/203, “Identification of Customary International Law”, 11 January 2019, commenting, in Conclusion 8.2, on the duration of custom: “Provided that the practice is general, no particular duration is required.” However, see also International Law Commission, *Draft Conclusions on Identification of Customary International Law, with Commentaries*, UN Doc. A/73/10, 2018, Conclusion 8, comment 9 and fn. 19, observing that there is no such thing as “instant custom.” The two-way traffic between custom and convention should be noted: customary law can become conventional law and vice versa. Also, customary international law should not be confused with customary domestic law based on traditional values: their relationship is complicated. See United Nations (UN) Human Rights Council, *Study of the Human Rights Council Advisory Committee on Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind*, UN Doc. A/HRC/22/71, 6 December 2012, para. 36.

The Tribunal's argument became known as the "Nuremberg clause". It was reaffirmed by the United Nations (UN) General Assembly in 1946<sup>21</sup> and repeated in the Universal Declaration of Human Rights in 1948.<sup>22</sup> In 1950, the International Law Commission reformulated the argument as a principle: "The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law."<sup>23</sup> The nonretroactivity and Nuremberg principles would later be integrated together into the 1966 International Covenant on Civil and Political Rights (with a non-derogable status),<sup>24</sup> the 1977 Additional Protocols,<sup>25</sup> and the 1998 Rome Statute of the ICC (Rome Statute).<sup>26</sup>

By definition, the nonretroactivity principle restricts the scope of time.<sup>27</sup> For the Nuremberg Tribunal, the jurisdiction *ratione temporis* stretched back to 1939 (six years before its establishment); for the ICC, the jurisdiction is prospective, not retrospective.<sup>28</sup> However, the reference to customary international law endowed the time-constraining nonretroactivity principle with unexpected breadth. The applicability of the Hague and Geneva Conventions as customary international law in 1939 meant a *de facto* temporal scope of at least

21 UNGA Res. 95(I), "Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal", 11 December 1946.

22 Universal Declaration of Human Rights, UNGA Res. 217(III) A, 10 December 1948, Art. 11(2). See also Johannes Morsink, *The Universal Declaration of Human Rights: Origin, Drafting and Intent*, University of Pennsylvania Press, Philadelphia, PA, 1999, pp. 52–58.

23 International Law Commission, "Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with Commentaries", *Yearbook of the International Law Commission*, Vol. 2, 1950, Principle 2, pp. 374–375.

24 International Covenant on Civil and Political Rights, UNGA Res. 2200 A (XXI), 16 December 1966, Arts 15, 4(2).

25 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 75; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 6. See also Michael Bothe, Karl Partsch and Waldemar Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff, The Hague, 2013, pp. 746–747. The 1949 Geneva Conventions III and IV also incorporated nonretroactivity into their sections on penal sanctions: see Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (1949 GC III), Art. 99; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (1949 GC IV), Arts 65, 67.

26 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (Rome Statute), Arts 11, 22–24. Article 11 is the *ratione temporis* provision of the ICC, an application of the nonretroactivity principle.

27 See, more generally, Harriet Moynihan, "Regulating the Past: The European Court of Human Rights' Approach to the Investigation of Historical Deaths under Article 2 ECHR", *British Yearbook of International Law*, Oxford University Press, Oxford, 2017; William Schabas, "Time, Justice, and Human Rights: Statutory Limitation on the Right to Truth?", in Nanci Adler (ed.), *Understanding the Age of Transitional Justice: Crimes, Courts, Commissions, and Chronicling*, Rutgers University Press, New Brunswick, NJ, 2018, pp. 37–55.

28 In addition, a State Party may declare, for a period of seven years after the entry into force of the Rome Statute, that it does not accept ICC jurisdiction for war crimes. See Rome Statute, above note 26, Art. 124.

four decades (namely from 1899 to 1939).<sup>29</sup> In this context, it is also noteworthy that after 1949, most provisions of the Geneva Conventions have gradually been considered as customary IHL themselves.<sup>30</sup> What custom does is shift the critical starting date of temporal jurisdiction backwards.

## The humanity principle and the Martens Clause

Another principle that helped expand the temporal scope of IHL towards the past was the principle of humanity. This principle was formulated most famously in the so-called Martens Clause, which in its original wording in the preamble of Hague Convention II on the Laws and Customs of War on Land of 1899 read:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.<sup>31</sup>

This residual clause – originally not an expression of lofty ideals but the solution to a pressing problem<sup>32</sup> – regulated all the problems that Hague Convention II did not

29 Forsythe’s thesis that the Nuremberg trials had little effect on IHL development is untenable. See David Forsythe, *The Humanitarians: The International Committee of the Red Cross*, Cambridge University Press, Cambridge, 2005, p. 243.

30 Among many sources, see ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (2016 Commentary on GC I), pp. 12, 17; ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020 (2020 Commentary on GC III), pp. 2–3.

31 Convention (II) with respect to the Laws and Customs of War on Land, The Hague, 29 July 1899 (1899 HC II), preamble recital 9. See also 2016 Commentary on GC I, above note 30, pp. 1186–1187. A prefiguration of the Martens Clause can be found in the preamble of the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, St Petersburg, 29 November–11 December 1868: “[A]n International Military Commission assembled at St. Petersburg ... having by common agreement fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity, ...”. The one-page declaration also mentions “the laws of humanity” twice. See A. P. Higgins, above note 1, pp. 5–7, for text and comment. See also Gustave Moynier, *Étude sur la convention de Genève pour l’amélioration du sort des militaires blessés dans les armées en campagne (1864 et 1868)*, Librairie Joël Cherbuliez, Paris, 1870, pp. 319, 333; Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva 1987, p. 400; ICRC Customary Law Study, above note 8, Vol. 1, p. 241. For a still earlier similar formulation, see *Tratado de Armisticio between Spain and Colombia*, 1820, Art. 14, as cited in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, pp. 180, 317 (“las prácticas más liberales, sabias y humanas de las naciones civilizadas”).

32 The clause was originally formulated to address the controversial right to massive armed popular resistance in (mostly small) countries that were invaded and occupied, and the status and treatment of civilians captured during such resistance. Actually, the Martens Clause should be renamed the Lambermont Clause, after its original author, the Belgian diplomat Auguste Lambermont. See Thomas Graditzky, “Bref retour sur l’origine de la clause de Martens: Une contribution belge méconnue (ou: ‘Ceci n’est pas la clause de Martens’)”, in Julia Grignon (ed.), *Hommage à Jean Pictet*, Schulthess and Yvon Blais, Zürich and Cowansville, 2016.

foresee. In metaphysical language reminiscent of natural law, it attempted to bridge morality and law by promoting the triad of custom (“usages”), humanity and conscience as a compass for all conduct in armed conflict not explicitly covered in the Convention. The clause was repeated with minor variations in scores of IHL instruments<sup>33</sup> and recognized as part of customary international law by the ICJ.<sup>34</sup> Vividly invoking custom, the Martens Clause became one itself.

## Reasoning by analogy and the principle of continuing breaches

Other tools with the potential to expand the temporal scope backwards – the method of analogy and the concept of continuing breaches – were not taken up in IHL. The Rome Statute stipulates that definitions of crimes must be strictly construed and prohibits extending them by analogy.<sup>35</sup> This prohibition, however, refers to analogy as a tool of law-making, not as a tool of interpretation. As tools of law-making – for example, by creatively widening the list of war crimes – analogies are detrimental to fair trial rights. As tools of interpretation, however, analogies between cases often endow investigations with a historical dimension that provides relevant context. Obviously, when analogies are invoked, the presumed precedents should be selected and used with methodological delicacy.<sup>36</sup>

The notion of continuing breaches – breaches of obligations enduring over time – was first introduced by Heinrich Triepel in 1899. A continuing breach is a breach which started before the critical moment that temporal jurisdiction comes into effect but continues after that critical moment. Phenomena such as enforced disappearances, confiscation of property, sexual slavery, conscription of children, forcible population transfer, unlawful occupation, and maintenance of colonial domination by force extend over time and are seen as continuing breaches.<sup>37</sup> This frequently discussed notion is underexplored in IHL, and it was not taken up in

33 1907 HC IV, above note 17, preamble recital 8; Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (1949 GC I), Art. 63; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (1949 GC II), Art. 62; 1949 GC III, above note 25, Art. 142; 1949 GC IV, above note 25, Art. 158; AP I, above note 25, Art. 1(2); AP II, above note 25, preamble recital 4. See also Rome Statute, above note 26, preamble recital 2.

34 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports 1996*, paras 78–79, 84, 87. See also Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, p. 625; 2016 Commentary on GC I, above note 30, p. 1186; K. Dörmann, above note 18, p. 168. The Statutes of the Permanent Court of International Justice and the ICJ echo the Martens Clause because in Article 38 both state that “the general principles of law recognized by civilized nations” are sources of international law.

35 Rome Statute, above note 26, Art. 22(2). See also Mark Klamburg (ed.), *Commentary on the Law of the International Criminal Court*, Torkel Opsahl, Brussels, 2017, pp. 255–256.

36 M. Klamburg, above note 35, p. 256; W. Schabas, above note 13, pp. 215–216. See also Cass Sunstein, *Legal Reasoning and Political Conflict*, Oxford University Press, Oxford, 2014, pp. 62–100 (“Analogical Reasoning”).

37 See also European Court of Human Rights, *Rohlena v. The Czech Republic*, Appl. No. 59552/08, Judgment (Grand Chamber), 27 January 2015, paras 28–37, 57–64; Mathias Neuner, “The Notion of Continuous or Continuing Crimes in International Criminal Law”, in Morten Bergsmo, Wolfgang Kaleck and Kyaw Yin

the Rome Statute, although it has been used by the UN Human Rights Committee<sup>38</sup> and the UN Working Group on Enforced or Involuntary Disappearances,<sup>39</sup> among others, and proposed in the 1991 Draft Articles on Responsibility of States for Internationally Wrongful Acts<sup>40</sup> and the 2005 UN Reparation Principles.<sup>41</sup> It could also become part of a future Convention on Responsibility of States for Internationally Wrongful Acts.<sup>42</sup>

## Imprescriptibility versus legal forgetting

In some circumstances, the temporal scope can also be expanded towards the future. In law, the finality principle reigns: *interest rei publicae ut finis litium sit* (it is in the public interest that lawsuits should end).<sup>43</sup> This principle imposes time limits (statutes of limitations) on the prosecution of crimes. After World War II it gradually dawned, however, that atrocity crimes (an umbrella term for genocide, crimes against humanity and war crimes) should be exempt from the principle – not only because these crimes complicated and thus extended the duration of investigations, but also because they constituted such an affront to humanity that taking responsibility for them was inescapable, however long after the fact.<sup>44</sup> Nevertheless, the history of the idea of imprescriptibility – the waiving of time bars – is long and twisted. This is partly due to a curious legal reasoning: the logic is that where international criminal law does *not* mention any time bars for prosecution, imprescriptibility applies; only explicit mention of time bars is interpreted as a rejection of imprescriptibility.<sup>45</sup> This oddity may partly explain why the Geneva Conventions of 1949 remained silent about the lifting of time

Hlaing (eds), *Colonial Wrongs and Access to International Law*, Torkel Opsahl, Brussels, 2020. See also M. Klamberg, above note 35, pp. 167, 173, 259; W. Schabas, above note 13, pp. 62–63.

- 38 Antoon De Baets, “The United Nations Human Rights Committee’s View of the Past”, in Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (eds), *Law and Memory: Towards Legal Governance of History*, Cambridge University Press, Cambridge, 2017, pp. 33, 46.
- 39 “General Comment on Enforced Disappearance as a Continuous Crime”, in *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/16/48, 26 January 2011.
- 40 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2001, Arts 14–15, pp. 59–64; UNGA Res. 56/83, “Responsibility of States for Internationally Wrongful Acts”, 28 January 2002.
- 41 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res. 60/147, 16 December 2005, Principle 22(a).
- 42 See UNGA Res. 74/180, “Responsibility of States for Internationally Wrongful Acts”, 27 December 2019, para. 9.
- 43 Rosalyn Higgins, “Time and the Law: International Perspectives on an Old Problem”, *International and Comparative Law Quarterly*, Vol. 46, No. 3, 1997, pp. 511–515.
- 44 *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, UN Doc. A/HRC/30/42, 7 September 2015, para. 48.
- 45 See Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, UNGA Res. 2391 (XXIII), 26 November 1968 (Convention on Non-Applicability), preamble recital 3: “Noting that none of the solemn declarations, instruments or conventions relating to the prosecution and punishment of war crimes and crimes against humanity made provision for a period of limitation.” The UN Secretary-General had defended this principle in 1966: see *Question of the Non-Applicability*, above note 14, paras 121–160, especially paras 129–140 (mentioning the silence in the Geneva Conventions of 1949 in para. 138). See also Natan Lerner, “The Convention on the

bars for war crimes, although by then it had become quite clear that the search for and prosecution of World War II criminals would continue for many years:<sup>46</sup> the silence about time bars in the Geneva Conventions was later interpreted as support for the imprescriptibility of war crimes. Nevertheless, the UN convention that explicitly blocked the pending prescription, after twenty-five years, of World War II crimes by declaring atrocity crimes imprescriptible in 1968 had less effect than expected.<sup>47</sup> In the end, resistance to the idea slowly waned and the imprescriptibility provision in the Rome Statute was adopted in 1998 without major problems.<sup>48</sup> The provision fits the ICC philosophy of working “for the sake of present and future generations” well.<sup>49</sup> Most legal scholars have since accepted imprescriptibility as a rule of customary international law.<sup>50</sup>

In tandem with the imprescriptibility discussion came the troubling problem of forgetting the past under international law: under which conditions could past crimes be legally forgotten through amnesties? It would be decades before this tough question was tentatively regulated in Additional Protocol II (AP II) of 1977, which requires authorities “to grant the broadest possible amnesty to persons who have participated in the armed conflict”.<sup>51</sup> It was logical to think that if atrocity crimes violated a *jus cogens* norm (a non-derogable and peremptory norm)—namely the humanity principle—the prosecution of these crimes was a *jus cogens* norm as well.<sup>52</sup> The practice, however, was different: the urge to reconcile and forget was often more powerful than the urge to prosecute, especially in situations where massive violence had left the hands of

Non-Applicability of Statutory Limitations to War Crimes”, *Israel Law Review*, Vol. 4, No. 4, 1969, pp. 520–522.

- 46 See also Christine Van den Wyngaert and John Dugard, “Non-Applicability of Statute[s] of Limitations”, in Antonio Cassese, Paola Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1, Oxford University Press, Oxford, 2002, p. 877; Y. Sandoz, C. Swinarski and B. Zimmerman (eds), above note 31, p. 981.
- 47 Convention on Non-Applicability, above note 45. The Convention was approved by fifty-eight votes against seven, with thirty-seven abstentions and twenty-five absentees. See also C. Van den Wyngaert, above note 46, pp. 875, 887. Another reason for the relative lack of success of the Convention lay in its Article 1, which stipulated that no time bars should apply for gross crimes “irrespective of the date of their commission”. Many thought that this violated the nonretroactivity principle. A final reason was the special mention of apartheid as a crime against humanity.
- 48 “List of Customary Rules of International Humanitarian Law”, *International Review of the Red Cross*, Vol. 87, No. 857, 2005, Rule 160; C. Van den Wyngaert, above note 46, p. 887; M. Klamberg, above note 35, p. 311.
- 49 Rome Statute, above note 26, preamble recital 9.
- 50 *Ibid.*, Art. 29. See also ICRC Customary Law Study, above note 8, Vol. 1, p. 616.
- 51 AP II, above note 25, Art. 6. The original proposal came from the United States; the article was adopted by consensus. In explaining its vote, the Soviet Union stated, however, that the provision could not be construed so as to enable perpetrators of atrocity crimes to evade punishment. See ICRC Customary Law Study, above note 8, Vol. 1, p. 612.
- 52 “List of Customary Rules”, above note 48, Rule 159. See also AP I, above note 25, Art. 75. For the definition of *jus cogens*, see Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, Art. 53 (“a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted”). For a list of extant or emerging *jus cogens* obligations, see “Jus Cogens”, in Francesco Forrest Martin *et al.*, *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis*, Cambridge University Press, Cambridge, 2006, pp. 34–36; for the notion of derivative *jus cogens* obligations (having *jus cogens* status because of their necessity in ensuring the protection of other *jus cogens* norms), see *ibid.*, pp. 36–39.

many dirty.<sup>53</sup> Behind this tension between principle and practice lay the deeper ambition to balance two basic values: peace and justice. After armed conflicts, the need for peace required broad amnesties but the need for justice made exemptions for atrocity crimes imperative. The Rome Statute, which is silent about amnesties,<sup>54</sup> did not tackle the issue, and this debate is still not settled. Amid ever stronger campaigns to combat impunity, legal forgetting remains a rock. The equilibrium is fragile.

## State succession

Another mechanism for enlarging the temporal scope is State succession. In the law of treaties, new States are not bound by treaties of their predecessors because they experience a fundamental change in circumstances (a doctrine known as *rebus sic stantibus*).<sup>55</sup> There is, however, near-consensus that when new States are established, the rule of continuity with the predecessor State still applies with respect to one particular type of obligations: the humanitarian and human rights of citizens.<sup>56</sup> The UN Human Rights Committee has explained the fundamental reason for this continuity:

[T]he rights enshrined in the [International Covenant on Civil and Political Rights] belong to the people living in the territory of the State party. ... [O]nce the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession.<sup>57</sup>

Like imprescriptibility, State succession stretches the temporal scope of IHL provisions into the future.

Looking at the entire panorama, then, we can conclude that the applicability of IHL is extended towards the past by means of the customary

53 Office of the UN High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Amnesties*, Geneva, 2009, p. 43; International Law Commission, *Third Report on Crimes against Humanity by Sean D. Murphy, Special Rapporteur*, UN Doc. A/CN.4/704, 23 January 2017, paras 285–297; Pierre Hazan, *Amnesty: A Blessing in Disguise? Making Good Use of an Important Mechanism in Peace Processes*, Centre for Humanitarian Dialogue, Geneva, 2020, pp. 8–10.

54 Article 16 of the Rome Statute is a provision to defer investigation or prosecution; Article 53(2) is a provision not to initiate prosecution when it is “not in the interests of justice”.

55 VCLT, above note 52, Art. 62.

56 *Ibid.*, Arts 38, 43, 73; Vienna Convention on Succession of States in respect of Treaties, 23 August 1978, preamble recital 6, Art. 5; Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary*, Oxford University Press, Oxford, 2011, pp. 1648–1649; Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, Oxford University Press, Oxford, 2013, pp. 908–909; Antônio Augusto Cançado Trindade, “Basic Considerations of Humanity in Relation to State Succession”, in *International Law for Humankind: Towards a New Jus Gentium*, Martinus Nijhoff, Leiden, 2013; A. Clapham, P. Gaeta and M. Sassòli (eds), above note 31, pp. 164–166.

57 Human Rights Committee, “General Comment No. 26 (61) on Issues Relating to the Continuity of Obligations to the International Covenant on Civil and Political Rights”, UN Doc. CCPR/C/21/Rev.1/Add.8/Rev.1, 8 December 1997, para. 4.

strand of nonretroactivity and the humanity principle as embodied in the Martens Clause. It is also extended towards the future by means of the State succession principle in IHL matters and the imprescriptibility principle in criminal matters, although a countertrend of legal forgetting under the guise of amnesties curbs this expansive tendency. On balance, IHL's time regime is an ingenious mixture of immediacy and *longue durée*. Its broad horizons constitute the background for discussing the IHL views of memory and history.

## The IHL view of memory

The painful absences created by death and destruction in war trigger the memories of survivors. Indeed, those fallen in war are located at the intersection of present and past: persons who have died continue to exist substantially (as remains), genetically (as offspring), materially (as legacy) and biographically (as life stories).<sup>58</sup> The destruction of their tangible and intangible creations – their heritage – reminds the living of their ancestors. In other words, dead persons and cultural heritage constitute important portals to memory and therefore inform the IHL view of memory.

A recent ICC policy paper clarified this intense connection between dead persons and cultural heritage as vehicles of memory. Many memorials for the dead are historical monuments in themselves, and many rituals for the dead are part of the intangible heritage of a community. The paper also explained that the impossibility of accessing sacred sites, performing traditional burial rituals or celebrating traditional holidays, and the elimination of persons who transmit culture (leaders, the elderly, women) or receive it (children), both undermine the mechanisms for coping with severe trauma and often constitute evidence of atrocity crimes.<sup>59</sup>

## Dead persons and gravesites as portals to memory

The Geneva Convention of 1864 did not pay attention to the war dead, but this would soon change. Deeply affected by the battlefield scenes of the 1866 Austro-Prussian war, the German physician Julius Naundorff wrote about “the hyenas of the battlefield” who pillaged dead bodies.<sup>60</sup> In 1867–68, conferences in Paris and Geneva studying the gaps in the 1864 Convention expressed wishes (*voeux*) to protect the dead against desecration and pillage, to bury them in conformity with sanitary prescriptions, to identify them and to notify other countries by

58 See Antoon De Baets, “The Posthumous Dignity of Dead Persons”, in Roberto Parra and Douglas Ubelaker (eds), *Anthropology of Violent Death: Theoretical Foundations for Forensic Humanitarian Action*, Wiley, Hoboken, NJ, 2022 (forthcoming), Chap. 1.

59 ICC, “Policy on Cultural Heritage”, The Hague, 2021, paras 70–74, 79, 87.

60 G. Moynier, above note 31, p. 273. See also C. Lueder, above note 6, pp. 267, 333.

exchanging death lists.<sup>61</sup> This early sensitivity to the dead was dominated by fear: fear of burying the living and fear that unattended corpses would endanger public health.<sup>62</sup>

The idea of codifying treatment of the war dead was taken up again in the Hague Conventions, which made compulsory some regulations about death certificates, last wills and burial of war prisoners.<sup>63</sup> The 1906 Geneva Convention translated the wishes of 1867–68, including the need to clarify the whereabouts of the dead, into binding provisions.<sup>64</sup> The duties flowing from these provisions were seen as duties of conduct, not of result.<sup>65</sup> The 1929 Conventions expanded upon them with a crucial new duty: the duty to search for the dead. At the same time, identification requirements and disposal practices were tightened and became duties to honourably bury the dead and to respect and mark their graves, including for exhumation purposes.<sup>66</sup> Thus, the notion of respect for the dead, itself stretching back into the mists of time, received solid codification in IHL in 1929.<sup>67</sup>

After World War II, IHL prescriptions about the dead would multiply and become more systematic. The 2005 ICRC Customary Law Study summed up this post-war system elaborated in the 1949 Geneva Conventions and perfected in their 1977 Additional Protocols: search for and collection of the dead, protection and respectful treatment of the dead, return of the remains and personal effects of the dead upon request, respectful individual disposal of the dead, respect for and maintenance of graves, and accounting for the dead through their identification prior to and after disposal and through marking and accessing graves.<sup>68</sup> These prescriptions now form an uncontested part of customary IHL.

61 See also First International Conference of the Red Cross, *Vœux de la Conférence Internationale*, Paris, 1867, Art. 8; *Protocole de la Conférence internationale réunie à Genève en octobre 1868*, Fick, Geneva, 1868, pp. 18–19, 26–27. Discussion in G. Moynier, above note 31, pp. 271–285; C. Lueder, above note 6, pp. 269–273.

62 G. Moynier, above note 31, p. 279; C. Lueder, above note 6, pp. 269, 272; Paul des Gouttes, *La Convention de Genève pour l'amélioration du sort des blessés et des malades dans les armées en campagne du 27 juillet 1929: Commentaire*, ICRC, Geneva, 1930, p. 33. ICRC forensic expert and present UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Morris Tidball-Binz has called the association of cadavers with epidemics a myth: see his “Managing the Dead in Catastrophes: Guiding Principles and Practical Recommendations for First Responders”, *International Review of the Red Cross*, Vol. 89, No. 866, 2007, pp. 426–427, 439–441.

63 1899 HC II, above note 31, Arts 14, 19; 1907 HC IV, above note 17, Arts 14, 19.

64 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 6 July 1906, Arts 3–4; see also Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, The Hague, 18 October 1907, Arts 16–17. See further A. P. Higgins, above note 1, pp. 37, 382; Louis Renault, “La Conférence de revision de la Convention de Genève”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 37, No. 148, 1906, pp. 234–235, 241–242.

65 See, for example, 2016 Commentary on GC I, above note 30, p. 572.

66 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 27 July 1929 (1929 GC I), Arts 3–4; 1929 GC II, above note 17, Arts 41, 76; 1949 GC IV, above note 25, Art. 16; AP I, above note 25, Arts 17, 19, 61. See also P. des Gouttes, above note 62, pp. 26–35.

67 Welmoet Wels, *Dead Body Management in Armed Conflict: Paradoxes in Trying to Do Justice to the Dead*, Jongbloed, The Hague and Leiden, 2016, pp. 5–6.

68 ICRC Customary Law Study, above note 8, Vol. 1, pp. 406–427, Vol. 2, 2655–2774 (Rules 112–117), based on 1949 GC I, above note 33, Arts 15–17; 1949 GC II, above note 33, Arts 18–21; 1949 GC III, above note

Mutilating dead bodies was seen as an offence from relatively early on. It was treated as a war crime at the US General Military Government Court in Dachau in 1947.<sup>69</sup> The idea that mutilating the war dead was a serious IHL breach which could be subsumed under the provision of “outrages upon personal dignity” prohibited under Article 3 common to the four 1949 Geneva Conventions matured slowly into treaty and custom. It was clearly expressed for the first time in the *Elements of Crimes* of the ICC in 2002.<sup>70</sup>

The influence of World War II, and particularly the Holocaust, can be noticed in two aspects. Whereas in the 1929 Conventions cremation was a disposal option equivalent to burial, this changed completely under the influence of the discovery of the Nazi death camps, with their crematoria. Although still permitted, cremation had to meet stricter conditions in the 1949 Conventions because it was irreversible, prevented identification and effaced traces of crimes: it could be carried out only for imperative reasons of hygiene, for a wish expressed in a will or for religious motives, and the reason had to be stated on the death certificate.<sup>71</sup> Similarly, mass disposal was rejected in 1949 unless absolutely unavoidable because it conflicted with the principle of respect for the dead and made identification, grave visits by families and exhumation for reasons of overriding public necessity (i.e., for public health, investigative, reburial or return purposes) exceedingly difficult.<sup>72</sup> We can conclude that sustained attention to the dead has been a constant hallmark of IHL since at least 1929.

## The principle of intertemporal law

It is unclear, however, how long IHL duties to the dead last. Searching for, identifying and protecting the war dead are open-ended tasks that continue to be performed in peacetime. Similarly, the maintenance of, and access to, gravesites may last quasi-indefinitely, and the duty to exhume and criminally investigate

25, Arts 120–121; 1949 GC IV, above note 25, Arts 129–131; AP I, above note 25, Arts 17, 32–34; AP II, above note 25, Art. 8; Rome Statute, above note 26, Art. 93.

69 “Case No. 82: Trial of Max Schmid—United States General Military Government Court at Dachau, Germany, 19th May, 1947”, in *Law Reports of Trials of War Criminals*, Vol. 13, United Nations War Crimes Commission, London, 1949, pp. 151–152. Not only is the Schmid trial briefly analyzed in this reference, but so are four similar cases of Japanese perpetrators.

70 Finalized draft text of the *Elements of Crimes*, adopted by the 23rd meeting of the Preparatory Commission for the International Criminal Court, New York, 30 June 2000, *Report of the Preparatory Commission for the International Criminal Court*, UN Doc. PCNICC/2000/INF/3/Add.2, Addendum, 6 July 2000, as adopted by the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, 3–10 September 2002, *Official Records*, UN Doc. ICC-ASP/1/3, 25 September 2002, and ICC-ASP/1/3/Corr.1, 31 October 2002 (*Elements of Crimes*), Arts 8(2)(b)(xxi), 8(2)(c)(iv), Element 1 (fn. 49 and 57 respectively). See also 2016 Commentary on GC I, above note 30, pp. 210, 227, 541.

71 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, pp. 178–179; 2016 Commentary on GC I, above note 30, pp. 583–584, 587, 589, 595–596.

72 J. Pictet, above note 71, p. 177; 2016 Commentary on GC I, above note 30, p. 587; A. Clapham, P. Gaeta and M. Sassòli (eds), above note 31, p. 286; Y. Sandoz, C. Swinarski and B. Zimmerman (eds), above note 31, pp. 370, 378. Sea burial is also discouraged: ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 2nd ed., Cambridge University Press, Cambridge, 2017, pp. 643–644.

deaths or return remains may come up decades after an armed conflict has ended.<sup>73</sup>

When the need arises to solve disputes about the exhumation of human remains, the removal of a war cemetery or the transfer of a war memorial, the question is which IHL norms must be followed: those in vigour at the time of the victim's interment, the cemetery's construction or the memorial's creation, or those at the time of the disputes. Anna Petrig has suggested invoking the principle of intertemporal law to solve this problem.<sup>74</sup> This principle was developed in 1928 by Swiss arbitrator (and later ICRC president) Max Huber at the Permanent Court of Arbitration. He wrote:

[A] juridical fact must be appreciated in the light of the law contemporary with it and not of the law in force at the time when a dispute in regard to it arises or falls to be settled. ... As regards the question of which different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.<sup>75</sup>

Bearing in mind the nonretroactivity requirement, this means that the law contemporaneous with the facts must prevail. But what are the facts? Applied to our problem, the principle has to factor in that remains, gravesites or memorials are “facts” that have not ceased to exist but persist over time. Their “continuing manifestation” imposes the use of IHL as evolved at the time of the dispute.<sup>76</sup> We notice that whereas the idea of continuity is not applied to IHL breaches (see above), it is quietly introduced here through the intertemporal principle as applied to “persistent facts”.

## Cultural heritage as a portal to memory

Sites of cultural heritage – including gravesites and memorials for the war dead<sup>77</sup> – are sites of memory. From this perspective, the Hague Conventions of 1899 and 1907 were the first

73 1949 GC I, above note 33, Art. 15; AP I, above note 25, Art. 34.

74 Anna Petrig, “The War Dead and Their Gravesites”, *International Review of the Red Cross*, Vol. 91, No. 874, 2009, pp. 365–368.

75 Permanent Court of Arbitration, *Island of Palmas Case (Netherlands, United States)*, 1928, in *Reports of International Arbitral Awards*, Vol. 2, UN, New York, 2006, p. 845. For an analysis of the delicate balance between stability and change required in applying the doctrine of intertemporal law, see T. O. Elias, “The Doctrine of Intertemporal Law”, *American Journal of International Law*, Vol. 74, No. 2, 1980. For a brilliant interpretation of the doctrine with the help of John McTaggart's philosophy of time, see Steven Wheatley, “Revisiting the Doctrine of Intertemporal Law”, *Oxford Journal of Legal Studies*, Vol. 41, No. 2, 2021. The case discussed was the 2019 ICJ Advisory Opinion on the Chagos Archipelago.

76 For possible complications, however, see M. Bothe, K. Partsch and W. Solf, above note 25, pp. 194–195; International Law Commission, above note 40, pp. 54, 57–59, 63–64.

77 See also UN Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, Principle 3: “A people's knowledge of the history of its oppression is part of its heritage”.

IHL instruments to tackle the problem of how to reconcile, in times of war, military necessity with respect for historical monuments and places of worship and works of art. They used a legal fiction and categorized all monuments as private property even when State-owned. The Hague Regulations then prohibited the confiscation of private property. Seizure of, destruction of, and intentional damage to historical monuments would be made the subject of proceedings unless the monuments were used for military purposes.<sup>78</sup> The 1949 Geneva Conventions did not refine these views, but the neglect was temporary as a specialized convention, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, was concluded in 1954. It aimed at shielding a subset of the objects protected by the Hague Conventions: cultural property. The new convention defined “cultural property” as “movable or immovable property of great importance to the cultural heritage of every people” and grouped monuments, archaeological sites, museums, archives and libraries under the concept. On top of this, the 1977 Additional Protocols aimed at protecting a subset of this subset – cultural property which “constitute[s] the cultural or spiritual heritage of peoples”. In this way, the provisions of 1907, 1954 and 1977 formed a pyramid of protective layers for heritage, with the latter two shielding unique and transcending categories of heritage of humanity by prohibiting acts of hostility against them as well as their use in support of military efforts or as objects of reprisal.<sup>79</sup>

The States that ratified the 1998 Rome Statute made it clear in its preamble that they were “conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time”.<sup>80</sup> The Statute criminalized IHL violations against cultural heritage in two ways: indirectly, by defining the persecution of groups on cultural grounds as a crime against humanity,<sup>81</sup> and directly, by labelling intentional attacks against historical monuments and other heritage during armed conflicts as war crimes unless imperatively required by military necessity and regardless of whether the attack results in actual damage.<sup>82</sup> The 2005 ICRC Customary Law Study maintained that the protection of historical monuments and broader classes of cultural heritage in wartime had been part of customary law since 1899 (and even decades earlier).<sup>83</sup> In short, we see that in

78 1899 HC II, above note 31, Art. 56; 1907 HC IV, above note 17, Art. 56.

79 1899 HC II, above note 31, Arts 27, 46, 56; 1907 HC IV, above note 17, Arts 27, 46, 56; Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War, The Hague, 18 October 1907, Art. 5; 1929 GC II, above note 17, Arts 34, 77; AP I, above note 25, Arts 38, 52–53, 85; AP II, above note 25, Art. 16; Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954, Art. 1. See also A. P. Higgins, above note 1, p. 270; J. Pictet, above note 34, p. 615; A. Clapham, P. Gaeta and M. Sassòli (eds), above note 31, p. 1528; Y. Sandoz, C. Swinarski and B. Zimmerman (eds), above note 31, pp. 639–649, 1465–1469; M. Bothe, K. Partsch and W. Solf, above note 25, pp. 371–376, 789–792.

80 Rome Statute, above note 26, preamble recital 1.

81 *Ibid.*, Arts 7(1)(h), 7(2)(g).

82 See *ibid.*, Arts 8(2)(b)(ix) and 8(2)(e)(iv), and the corresponding Elements in *Elements of Crimes*, above note 70.

83 “List of Customary Rules”, above note 48, Rules 38–41, 147. See also K. Dörmann, above note 18, pp. 215–218; M. Klamburg, above note 35, pp. 89–90, 130; ICRC Customary Law Study, above note 8, Vol. 1, pp. 127–138.

IHL, codification awareness of cultural heritage has an even longer pedigree than awareness of respect for the dead. The IHL view of memory is strongly embedded in the IHL provisions about dead persons and cultural heritage.

## The IHL view of history

The view that dead persons, including their resting places and legacies, are portals to memory has an epistemological complement that makes dead persons also portals to history. The IHL view of history deals with *facts* about dead persons – especially war victims – and with the right of families and society at large to know them. The reconstruction of life and family stories, often consisting of only the barest of these facts about the circumstances in which war victims died, is a crucial first step in the search for broader historical truth and understanding.

### The right to the truth, archives and families

From early on, the IHL treaty drafters tried to solve three problems that were preconditions for collecting facts about war victims in order to write their life stories: how to prevent war prisoners and war dead from going missing in the turmoil of war; how to repatriate last wills, money, articles of sentimental value and other possessions found on the dead; and how to address the need of families to obtain corroborated information about the whereabouts of the dead in their own as well as enemy countries. Dealing with these issues, which today are grouped together under a “right to the truth”, required the setting up of a documentary infrastructure in often chaotic circumstances. The ICRC quickly perceived this enormous need for collecting and exchanging data and objects while simultaneously protecting them against abuse.

As early as 1870, during the Franco-Prussian War, the ICRC established an information bureau for war prisoners (known since under various names, including the International Prisoners of War Agency from 1914 and the Central Tracing Agency from 1960). Over the years, and especially during the World Wars, data on many millions of war prisoners and war dead were collected and exchanged – an invaluable service, as war-torn countries always struggle with disorganized bureaucracies and scattered archives. Following the idea of establishing inquiry offices set out in the Hague Conventions of 1899 and 1907, the 1929 Geneva Conventions imposed the establishment of a Central Agency of Information regarding Prisoners of War and of official national information bureaus and grave registration services in conflict-ridden countries. From World War I, ICRC delegates also began tracing people in the field by visiting camps and prisons. The Central Agency of Information regarding Prisoners of War was also active in World War II and scores of post-war conflicts and disasters.<sup>84</sup>

84 1899 HC II, above note 31, Art. 14; 1907 HC IV, above note 19, Art. 14; 1929 GC I, above note 66, Art. 4; 1929 GC II, above note 17, Arts 77–80; 1949 GC I, above note 33, Arts 16–17; 1949 GC III, above note 25,

The unusual documentary awareness of the ICRC is also demonstrated by the archives that it has kept since its foundation in 1863, and by its journal, the *International Review of the Red Cross*, which still exists after more than 150 years.<sup>85</sup> All this time, the ICRC has had to carefully balance the transparency needed to research data with the privacy of the victims and the confidentiality of its missions.<sup>86</sup> The archives of the International Prisoners of War Agency from 1914 to 1923 became part of UNESCO's Memory of the World Register in 2007. Data collection on prisoners in World War II was started in 1943 under the aegis of the Allied authorities and from 1948 found a home in the International Tracing Service established in Bad Arolsen under the auspices of successively the International Refugee Organization (1948–51), the Allied High Commission for Occupied Germany (1951–55), the ICRC (1955–2012) and an International Commission (2013–present). This work became part of UNESCO's Memory of the World Register in 2013 and was renamed the Arolsen Archives – International Center on Nazi Persecution in 2019. This data collection on Nazi concentration and death camps between 1933 and 1945 is unparalleled. Between 1983 and 2006, however, the archive was criticized for its isolation and poor accessibility. It took time to restore the balance of competing interests.<sup>87</sup>

From this thumbnail sketch we can see that, although the right to the truth as a concept was only fully developed during the 1990s, its constituent elements – identification of victims, repatriation of objects, and recognition of the need of families to obtain information about victims – were prime IHL concerns from the beginning. In moving passages, commentators Gustave Moynier (in 1870), Carl Lueder (in 1876) and Paul des Gouttes (in 1930) conjured up an image of families torn for years or even decades by the moral anguish of ignorance and uncertainty, begging for crumbs of information, struggling to receive due benefits and estates, and, in the end, longing to start a mourning process.<sup>88</sup> Later commentators made similar remarks.<sup>89</sup> The need of families in particular was recognized in the Hague Regulations from 1899 and in the Geneva Conventions from 1929.<sup>90</sup>

Arts 77, 120, 122–123; 1949 GC IV, above note 25, Arts 113, 137, 140; AP I, above note 25, Arts 33, 78; “List of Customary Rules”, above note 48, Rule 123. See also A. P. Higgins, above note 1, p. 43; P. des Gouttes, above note 62, pp. 31, 35; J. Pictet, above note 71, pp. 167–168; 2016 Commentary on GC I, above note 30, p. 568; Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 3: *Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960, pp. 581–584; 2020 Commentary on GC III, above note 30, pp. 17, 19, 1744–1765, especially 1748 (para. 4812); Y. Sandoz, C. Swinarski and B. Zimmerman (eds), above note 31, p. 858.

85 A complete overview is available at: <https://international-review.icrc.org/latest-reviews>.

86 ICRC, *Rules Governing Access to the Archives of the International Committee of the Red Cross*, Geneva, 2017, Art. 5. See also 2020 Commentary on GC III, above note 30, pp. 21–22.

87 Available at: <https://arolsen-archives.org/en>. See also Henning Borggräfe, Christian Höschler and Isabel Panek (eds), *A Paper Monument: The History of the Arolsen Archives – Catalogue of the Permanent Exhibition*, Arolsen Archives, Bad Arolsen, 2019, pp. 8–18. For the role of the ICRC, see *ibid.*, pp. 17–19, 171–183, 203.

88 G. Moynier, above note 31, p. 280; C. Lueder, above note 6, p. 270; P. des Gouttes, above note 62, p. 31.

89 J. Pictet, above note 71, p. 164; 2016 Commentary on GC I, above note 30, pp. 552, 564, 579, 586; 2020 Commentary on GC III, above note 30, pp. 1658, 1668; J. Pictet, above note 34, p. 505.

90 1899 HC II, above note 31, Art. 46; 1907 HC IV, above note 17, Art. 46; 1929 GC II, above note 17, Arts 8, 36, 77. See also 1949 GC IV, above note 25, Arts 27, 116.

It is hard to explain why it took half a century – until the preparatory talks for Additional Protocol I (AP I) – before a discussion was started about whether this *need* of families was actually a *right*. This author’s thesis, which might be called the conceptual salience thesis, is that the common traits of three distinct phenomena – the dead, the missing and the disappeared – only became apparent in the mid-1970s. Whereas IHL had paid sustained attention to the dead from virtually the beginning and had begun codifying its principles from 1906, it long treated missing persons – who could be dead or alive – as a loose category. In 1870, Moynier touched upon the phenomenon of missing persons, but by linking them to the dead: some of these *disparus* of the battlefield, he wrote, were deserters, but most were soldiers, hastily buried without identification.<sup>91</sup> And in 1930, while evoking the image of the unknown soldier, des Gouttes also recalled the fate of missing persons.<sup>92</sup> But while the need to clarify the whereabouts of the dead had explicitly emerged in the 1906 Geneva Convention, as we saw, Geneva Convention IV of 1949 only stipulated the facilitation of enquiries made by members of dispersed families seeking to renew contact with each other.<sup>93</sup> A codification of missing persons similar to the 1906 one did not appear until 1977. Article 33 of AP I is devoted to “Missing Persons”. It was widely seen as filling a gap.<sup>94</sup>

In contrast to the dead and the missing, the disappeared refer to only one specific criminal subset of the missing: those who went missing after unacknowledged abduction. The practice of enforced disappearances was discussed at the Nuremberg Tribunal in 1945–46, under the counts of war crimes and crimes against humanity. This happened mainly in the context of the 1941 *Nacht und Nebel Erlass* (Night and Fog Decree), which had prescribed either the execution or the disappearance in complete secrecy of those who resisted Nazism, with the express intent to intimidate their families and others. The Nuremberg judges noted that this decree was a terror technique which violated the family rights protected in the Hague Regulations.<sup>95</sup> From 1966, disappearances also emerged as a large-scale practice in Guatemala, as they did shortly after elsewhere in Latin America.<sup>96</sup> However, we have to wait until a resolution of the UN General Assembly in 1978 for a conceptualization of the phenomenon. This resolution on disappearances – which, curiously, does not mention the broader category of the missing at all – refers to previous ICRC experience: the general provision on the missing in AP I may have spurred more specific thinking on disappearances eighteen months later.<sup>97</sup>

Whatever the validity of the conceptual salience thesis, AP I includes a section entitled “Missing and Dead Persons”, the opening article of which –

91 G. Moynier, above note 31, p. 280. See also C. Lueder, above note 6, p. 238.

92 P. des Gouttes, above note 62, pp. 28–31, also xvii–xviii (Max Huber).

93 1949 GC IV, above note 25, Art. 26.

94 M. Bothe, K. Partsch and W. Solf, above note 25, p. 194.

95 *Trial of the Major War Criminals*, above note 13, pp. 44, 232–233, 266, 290. See also Brian Finucane, “Enforced Disappearance as a Crime under International Law: A Neglected Origin in the Laws of War”, *Yale Journal of International Law*, Vol. 35, No. 1, 2010, pp. 175–186.

96 Amnesty International USA, “*Disappearances*”: A Workbook, New York, 1981, pp. 1–2, 21–23.

97 UNGA Res. 33/173, “Disappeared Persons”, 20 December 1978, para. 3.

Article 32 – formulates the “general principle” that activities for missing and dead persons should be “prompted mainly by the *right* of families to know the fate of their relatives”.<sup>98</sup> Although discussions about this principle went back to resolutions adopted by the International Conference of the Red Cross in 1973 and the UN General Assembly in 1974,<sup>99</sup> these early resolutions had not spoken about a “right” of families. Commentator Yves Sandoz recalled that the drafters of AP I adopted the term “right” “after careful reflection and ... in full consciousness”, emphasizing that it was not a right of governments, but a right of families.<sup>100</sup>

Therefore, Article 32 of AP I, with its *right* of families, was revolutionary for two reasons: it constituted the real birth of the right to know, or as it is now called, the right to the truth; and, by using a rights vocabulary, it connected IHL to human rights.<sup>101</sup> Once seen as a right, and not merely a need, and as a right of families and not of governments, the principle opened up three new perspectives: families could make claims regarding investigation and reparation, governments had duties to respond to these claims, and violations of the right of families to know the truth were forms of inhuman treatment separate from, and additional to, violations of the rights of the missing themselves.<sup>102</sup> Following this trend, the Rome Statute two decades later paid attention to the safety and psychological well-being of families of crime victims<sup>103</sup> and emphasized that enforced disappearances were crimes against humanity.<sup>104</sup>

Over time, it also became clear that the right to know, although a strong procedural right, was not absolute in two respects. First, while providing strong impetus to governments to investigate specific cases, individual families could not *force* governments to take particular actions.<sup>105</sup> Second, the right had to be balanced against all governmental duties, including duties to gather forensic evidence for criminal investigations into violent deaths, which could hinder rather than help communications with families.<sup>106</sup>

In sum, the ICRC has consistently advocated for State duties to the war dead from the beginning, organizing large-scale data collection and analysis in

98 AP I, above note 25, Arts 32, 90 (emphasis added). See also AP II, above note 25, Art. 8; “List of Customary Rules”, above note 48, Rules 105, 117, 125. See also Y. Sandoz, C. Swinarski and B. Zimmerman (eds), above note 31, pp. 343–347; A. Clapham, P. Gaeta and M. Sassòli (eds), above note 31, p. 276.

99 UNGA Res. 3220(XXIX), “Assistance and Co-operation in Accounting for Persons Who Are Missing or Dead in Armed Conflicts”, 6 November 1974.

100 Y. Sandoz, C. Swinarski and B. Zimmerman (eds), above note 31, p. 345. According to the *travaux préparatoires*, the date of birth is 1 June 1976.

101 See also Antoon De Baets, *Responsible History*, Berghahn, New York and Oxford, 2009, pp. 157–165; A. De Baets, above note 38, pp. 40–43.

102 On the other hand, the concept of “a family” was deliberately not defined. See Y. Sandoz, C. Swinarski and B. Zimmerman (eds), above note 31, pp. 346, 375.

103 Rome Statute, above note 26, Arts 68(5), 84(1), 87(4).

104 *Ibid.*, Arts 7(1)(i), 7(2)(i). See also “List of Customary Rules”, above note 48, Rule 98.

105 Y. Sandoz, C. Swinarski and B. Zimmerman (eds), above note 31, p. 346; M. Bothe, K. Partsch and W. Solf, above note 25, p. 196.

106 Rome Statute, above note 26, Art. 93(1)(g); “List of Customary Rules”, above note 48, Rules 158, 161; A. Clapham, P. Gaeta and M. Sassòli (eds), above note 31, pp. 278–284; Y. Sandoz, C. Swinarski and B. Zimmerman (eds), above note 31, pp. 346–347.

the process. This investigative work was a necessary, but not sufficient, condition for addressing the need of families to write the life stories of the war dead and for the broader right to search for the historical truth. Following the logic of its own thought, by converting this need to a right, the ICRC became a pioneer, from the mid-1970s, in developing the right to the truth. On a side note, the problem of the denial of war crimes – a pervasive abuse of history – and the powerful role of the right to the truth in countering it were never systematically raised within IHL.

## IHL breaches, impunity and repression

The IHL treaty drafters did not reason in the abstract – they reacted to the problems of their time. In order to see how they mobilized the past in these reactions, we must therefore also examine how they responded to major historical challenges. Five of these challenges are singled out here. These are, in chronological order: IHL breaches, the Holocaust, human rights, domestic conflicts and colonialism. The intention of these five exercises is not to write a complete history of IHL but rather to evaluate whether, how and how quickly the IHL community responded to these challenges and whether those reactions have resulted in continuity or change.

The first historical challenge was the problem of the paper tiger: how to respond credibly to breaches of IHL. Within the present analysis, this question will only be examined at the level of international accountability. An 1872 proposal by Red Cross co-founder Gustave Moynier to establish an international criminal court failed.<sup>107</sup> The Hague Conventions of 1899 and 1907 attempted to peacefully settle disputes, including disputes about breaches, through good offices, mediation, inquiries and arbitration, but not through prosecution. The drafters of these conventions reasoned in terms of State responsibility, not individual responsibility.<sup>108</sup> This changed after World War I, when the 1919 Versailles Treaty, in a section on penalties inspired by the Hague Regulations, stipulated that nationals of the defeated countries who had committed “acts in violation of the laws and customs of war” would be punished.<sup>109</sup> Although the term “war

107 See P. des Gouttes, above note 62, p. 212; Christopher Hall, “The First Proposal for a Permanent International Criminal Court”, *International Review of the Red Cross*, Vol. 38, No. 322, 1998. In 1870 Moynier had still pleaded against adjudication of IHL violations: see G. Moynier, above note 31, p. 299.

108 Hague Convention (I) of 1899 and Hague Convention (I) of 1907 are conventions for the peaceful settlement of international disputes. See also 1907 HC IV, above note 17, Art. 3; A. P. Higgins, above note 1, pp. 44, 53. The 1906 Geneva Convention did contain a provision on repression of abuses (Art. 28), but it only addressed individual acts of robbery and ill-treatment of the sick and wounded in times of war and usurpations of military insignia. The first 1929 Geneva Convention (Arts 29–30) called upon States to introduce legislation for the repression in time of war of any act contrary to the Convention, to institute on request enquiries concerning violations, and, if corroborated, to repress those violations.

109 Treaty of Versailles, 28 June 1919, Arts 227–230. Article 227, though, charged Kaiser Wilhelm II with the “supreme offence against international morality and the sanctity of treaties”. In this, the Treaty of Versailles followed the recommendations of the *Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 29 March 1919, reproduced in *American Journal of International Law*, Vol. 14, No. 1–2, 1920, citing “the laws of humanity” on many occasions.

crime” did not literally appear in this treaty—and would not appear in any conventional IHL instrument until sixty years later<sup>110</sup>—the year 1919 can be considered the birth date of the notion of war crimes. However, the attempts to punish individual perpetrators largely failed at the time.<sup>111</sup>

Nuremberg, discussed above, changed this. Following Nuremberg, a system of individual criminal responsibility, with penal sanctions for abuses and breaches, was incorporated—albeit reluctantly—in the 1949 Geneva Conventions and their 1977 Additional Protocols.<sup>112</sup> War crimes for which individuals could be held liable regardless of their official capacity were codified in the statutes of a chain of international criminal tribunals, from Yugoslavia and Rwanda to the ICC in 1998.<sup>113</sup> Thus, while impunity prevailed for most of history, after World War II a system of war crimes trials was set up and then gradually perfected. As Horace said: “Raro antecedentem scelestum deseruit pede poena claudo” (Rarely does punishment, even at a slow pace, fail to overtake the criminal in his flight). But the pace was slow indeed, taking from 1872 to 1998—more than a century.

## IHL and the Holocaust

The Holocaust posed an unprecedented challenge to the IHL treaty drafters. This can be illustrated by the conduct of the ICRC between roughly 1942 and 1995. Notwithstanding—or perhaps because of—the fact that during World War II the German Red Cross operated under Nazi control and that its leadership even participated actively in crimes against the Jews,<sup>114</sup> the ICRC had become aware of the large-scale persecution inflicted on Jews by the summer of 1942. It considered launching a general public appeal to denounce these gross violations, among others, and it prepared a draft for such an appeal, with four central points of concern: aerial bombing raids; blockades; deportation, hostage-taking and massacres of civilians; and the fate of war prisoners not protected by the 1929 Geneva Convention.<sup>115</sup> On 14 October 1942, however, the ICRC decided against the launch of the appeal, believing that it would be unable to stop the atrocities.

110 A first literal mention of the expression “war crimes” was found in the First Draft Convention Adopted in Monaco (Sanitary Cities and Localities), 27 July 1934, Additional Art. The term is also mentioned in the Charter of the International Military Tribunal for Germany, Annexed to the London Agreement, London, 8 August 1945, Article 6(b), but not in the Geneva Conventions of 1929 or 1949. It appears in AP I, above note 25, Arts 75, 85; Rome Statute, above note 26, Art. 8; “List of Customary Rules”, above note 48, Rules 151–153, 156–161.

111 W. Schabas, above note 13, pp. 3–4, 117.

112 1949 GC I, above note 33, Arts 49–54; 1949 GC II, above note 33, Arts 50–53; 1949 GC III, above note 25, Arts 129–131; 1949 GC IV, above note 25, Arts 146–148; AP I, above note 25, Art. 85–91; AP II, above note 25, Art. 6. See also 1929 GC I, above note 66, Arts 28–30. For the reluctance, see M. Bothe, K. Partsch and W. Solf, above note 25, p. 577; A. Clapham, P. Gaeta and M. Sassòli (eds), above note 31, pp. 616–620.

113 Rome Statute, above note 26, Art. 8. See also “List of Customary Rules”, above note 48, Rules 158–161.

114 See website of the Dutch Red Cross, available at: [www.drk.de/das-drk/geschichte/das-drk-von-dena-faengen-bis-heute/?page=1940-2112](http://www.drk.de/das-drk/geschichte/das-drk-von-dena-faengen-bis-heute/?page=1940-2112). See also A. Clapham, P. Gaeta and M. Sassòli (eds), above note 31, p. 616; D. Forsythe, above note 29, pp. 44–50.

115 François Bugnion, “Dialogue with the Past: The ICRC and the Nazi Death Camps”, 5 November 2002, available at: [www.icrc.org/en/doc/resources/documents/misc/6ayg86.htm](http://www.icrc.org/en/doc/resources/documents/misc/6ayg86.htm).

Its subsequent confidential diplomatic approaches to Reich authorities and further activities in individual countries were still impressive – it was awarded the 1944 Nobel Peace Prize for such efforts – but on the whole the conduct of the ICRC was a *moral* failure. This general feeling led to a lingering crisis of conscience within the organization for the decades to come.

The first post-war reaction manifested itself in a determination to adapt the instruments of IHL. The large-scale suffering of civilians under foreign occupation in World War II – apart from atrocity crimes, this also included the other points of the 1942 appeal – spurred the drafters of IHL treaties to redouble their efforts. The missed opportunities of the past and the atrocities of World War II forced a revision of the two 1929 Geneva Conventions and haunted the drafters of the new Geneva Conventions in 1949.<sup>116</sup>

In order to understand this, we need to go back to 1919. If anything, World War I had shown that civilians lacked protection in wartime; provisions in the Hague Regulations to that effect had proved insufficient.<sup>117</sup> Therefore, as early as 1921, the ICRC proposed to prepare a convention for civilians. The initiative was rejected, however, because some government representatives feared that it could weaken the hard-won peace and general optimism following the Great War. The ICRC nevertheless continued studying the issues and prepared a draft, which was ready in 1934. In the end, a diplomatic conference, convened in 1939 to adopt this so-called “Tokyo draft” in early 1940, could not take place, as World War II had broken out. The belligerent States refused to bring the Tokyo draft into force but nevertheless agreed to apply the 1929 provisions for war prisoners to civilians at risk of internment for being in enemy territory when hostilities opened. This helped some 160,000 civilians in internment camps but left millions of others without protection against deportation and internment during the war. The frustration that efforts initiated in 1921 had had so few tangible results and the inability to stop the wartime atrocities, which prominently included the genocidal frenzy of the Holocaust, led to a vigorous drive “to bridge this tragic gap”<sup>118</sup> and extend IHL protection to civilians in a separate convention. This became Geneva Convention IV of 1949.<sup>119</sup>

This resounding success did not dissipate the awareness of failure or the silence about the Holocaust in the *International Review of the Red Cross*,<sup>120</sup> nor the criticism of third parties. In 1975, the ICRC reissued a 1946 report about its work for civilian detainees in German concentration camps, “by way of reply to the many questions from governments, National Red Cross Societies, associations

116 Édouard Chapuisat, “The Activity of the International Committee of the Red Cross during the War, 1939–1945”, Nobel Lecture, 1944, available at: [www.nobelprize.org/prizes/peace/1944/red-cross/lecture](http://www.nobelprize.org/prizes/peace/1944/red-cross/lecture); J. Pictet, above note 71, p. 14; 2020 Commentary on GC III, above note 30, p. 2.

117 1907 HC IV, above note 17, Arts 42–56.

118 Léopold Boissier, “Some Aspects of the Mission of the International Committee of the Red Cross”, Nobel Lecture, 1963, available at: [www.nobelprize.org/prizes/peace/1963/red-cross/lecture](http://www.nobelprize.org/prizes/peace/1963/red-cross/lecture).

119 For the whole story, see J. Pictet, above note 34, pp. 3–11.

120 “A Brief History of the International Review of the Red Cross”, *International Review of the Red Cross*, Vol. 100, No. 907–909, 2018, p. 30. The Jewish victims were briefly discussed in four reports about ICRC activities in World War II published in 1947 (one report) and 1948 (three reports).

and individual inquirers”.<sup>121</sup> A few years later, in 1979,<sup>122</sup> it eventually decided that more decisive action was needed: it opened its archives and commissioned an independent external study about its response to the Holocaust to historian Jean-Claude Favez, who published his book in 1988.<sup>123</sup> Although the initial reaction to this book by then ICRC president Cornelio Sommaruga was very defensive,<sup>124</sup> the silence was broken and a debate opened. It took another seven years until Sommaruga, on the fiftieth anniversary of the liberation of Auschwitz in 1995, declared in Krakow that “Auschwitz ... represents the greatest failure in the history of the ICRC, aggravated by its lack of decisiveness in taking steps to aid the victims of persecution”.<sup>125</sup> Since 1995, the ICRC has reiterated this view, including in statements by the incumbent ICRC president, historian Peter Maurer.<sup>126</sup> The history of the ICRC’s reaction to the Holocaust tragedy reveals that processes of dealing with a difficult war past affect not only States but also international organizations, that these processes can be postponed, and that when confronted at last, they take much time to address.

## IHL and human rights

Initially, IHL circles greeted the Universal Declaration of Human Rights of December 1948 with curiosity but without noticeable enthusiasm.<sup>127</sup> There were several reasons for this.<sup>128</sup> First, the genealogies of IHL and human rights differed: *sensu largo*, IHL went back to antiquity, human rights “only” to the Enlightenment; *sensu stricto*, IHL was born in 1864 and human rights in 1948. Second, their traditions diverged: IHL proceeded by discretion, human rights by

121 ICRC, *The Work of the ICRC for Civilian Detainees in German Concentration Camps from 1939 to 1945*, Geneva, 1975 (first published 1946).

122 Jacques Meurant, “Review and Analysis of Two Recent Works: The International Committee of the Red Cross – Nazi Persecutions and the Concentration Camps”, *International Review of the Red Cross*, Vol. 29, No. 271, 1989, pp. 375–376. It is unclear whether the ICRC Assembly of July 1979 had particular time-bound reasons to approve the Holocaust study, but the moment incidentally coincides with the trend of increasing Holocaust awareness following the 1978 television series *Holocaust*.

123 Jean-Claude Favez, with Geneviève Billeter, *Une Mission impossible? Le CICR, les déportations et les camps de concentration nazis*, Payot, Lausanne, 1988 (English translation 1999).

124 Cornelio Sommaruga, “Annex: The ICRC’s Point of View”, in J. Meurant, above note 122, pp. 394–397.

125 Quote in “Fiftieth Anniversary of the Liberation of Auschwitz Concentration Camp”, *International Review of the Red Cross*, Vol. 35, No. 304, 1995, pp. 109–110. Quote also in ICRC, “Commemorating the Liberation of Auschwitz”, statement, 27 January 2005, available at: [www.icrc.org/en/doc/resources/documents/statement/68zeb2.htm](http://www.icrc.org/en/doc/resources/documents/statement/68zeb2.htm). See also Cornelio Sommaruga, “Press Conference Given by the President of the ICRC (Geneva, 30 May 1995)”, *International Review of the Red Cross*, Vol. 35, No. 306, 1995.

126 Among others, see Peter Maurer, “Remembering the Shoah: The ICRC and the International Community’s Efforts in Responding to Genocide”, 28 April 2015, available at: [www.icrc.org/en/document/remembering-shoah-icrc-and-international-communitys-efforts-responding-genocide-and](http://www.icrc.org/en/document/remembering-shoah-icrc-and-international-communitys-efforts-responding-genocide-and).

127 For the first IHL reports about the Universal Declaration, see the contributions by Claude Pilloud and Jean-Georges Lossier in *International Review of the Red Cross*, Vol. 31, No. 364, 1949, pp. 252–264.

128 See Robert Kolb, “The Relationship between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions”, *International Review of the Red Cross*, Vol. 38, No. 324, 1998; Sergey Sayapin, “The International Committee of the Red Cross and International Human Rights Law”, *Human Rights Law Review*, Vol. 9, No. 1, 2009.

revendication, and in addition, IHL regulators saw human rights as a political idea at odds with IHL's professed neutrality. Third, conventions (such as the Geneva Conventions) had more force than declarations (such as the Universal Declaration). Although many predicted the historic character of the Universal Declaration, nobody foresaw its future as an exceptional instrument with the status of customary international law.<sup>129</sup> Fourth, IHL and human rights spoke different languages. The Universal Declaration contained only one oblique reference to armed conflict when in its preamble it mentioned the “barbarous acts which have outraged the conscience of mankind” and “tyranny and oppression”.<sup>130</sup> Conversely, the 1949 Geneva Conventions – adopted eight months after the Universal Declaration – did not contain a single reference to human rights: proposals for a preamble which included such a reference did not reach unanimity and were dropped.<sup>131</sup> Finally, there was a basic antagonism between international human rights law, which prohibits the use of force, and IHL, which establishes rules for situations which according to human rights should not exist.<sup>132</sup>

Even the 1977 Additional Protocols still reflected the laborious relationship between IHL and human rights. AP I's preamble mentioned the UN, but the notion of human rights was conspicuously absent (although it was acknowledged at the beginning of the section on the treatment of persons in the power of belligerent States).<sup>133</sup> In contrast, AP II's preamble ceded a place of honour to the concept. The official appearance of human rights in the Additional Protocols was the first significant result of the slow rapprochement between IHL and international human rights law that had started in earnest in 1968, when the International Conference on Human Rights in Tehran instructed the UN Secretary-General to prepare reports about respect for human rights in armed conflicts. This initiative, though, came from the side of human rights, not from IHL.<sup>134</sup>

The relatively minor role of human rights in AP I, which is dedicated to international armed conflicts, and its prominent role in AP II, which is dedicated to domestic conflicts, was no coincidence. The Uppsala Conflict Data Program shows why. Its database of armed conflicts between 1946 and 2020 reveals that inter-State and intra-State conflicts were on a par until about 1955, but after that

129 See William Schabas (ed.), *The Universal Declaration of Human Rights: The Travaux Préparatoires*, Cambridge University Press, Cambridge, 2013, pp. cxix–cxxiii; and, particularly, Jaime Oraá Oraá, “The Universal Declaration of Human Rights”, in Felipe Gómez Isa and Koen De Feyter (eds.), *International Protection of Human Rights: Achievements and Challenges*, University of Deusto, Bilbao, 2006, pp. 117–132.

130 The 1929 Geneva Conventions were not mentioned during the *travaux préparatoires* of the Universal Declaration.

131 See J. Pictet, above note 71, pp. 20–22; 2016 Commentary on GC I, above note 30, pp. 29, 139; J. Pictet, above note 84, pp. 14–16; J. Pictet, above note 34, pp. 12–14.

132 M. Bothe, K. Partsch and W. Solf, above note 25, p. 30.

133 AP I, above note 25, Art. 72. See also M. Bothe, K. Partsch and W. Solf, above note 25, pp. 729–730. It is also recalled that Article 32 spoke about a right of families to know the fate of their relatives.

134 *Final Act of the International Conference on Human Rights (Tehran)*, UN Doc. A/CONF.32/41, 22 April–13 May 1968, Proclamation, para. 10, and Resolutions, Part 23; Y. Sandoz, C. Swinarski and B. Zimmermann (eds), above note 31, pp. 1326–1327; Theodor Meron, “The Humanization of Humanitarian Law”, *American Journal of International Law*, Vol. 94 No. 2, 2000.

date intra-State conflicts (including internationalized intra-State conflicts) massively outnumbered inter-State conflicts.<sup>135</sup> Despite this predominance, the only IHL norms governing intra-State conflicts were those found in common Article 3 and additionally, from 1977, those in the modest second Additional Protocol. To close any gaps left by the IHL drafters in AP II, therefore, an appeal to apply human rights guarantees in domestic conflicts was indispensable. Conversely, international human rights bodies increasingly admonished States to apply IHL in armed conflict in order to reduce human rights violations.<sup>136</sup> The rapprochement between the two types of law was crowned with success when both received pride of place in the 1998 Rome Statute. Together, they occupied the entire field.

An initiative launched in 1990 to draft Fundamental Standards of Humanity intended to fill any remaining gaps in IHL and human rights foundered in 2008.<sup>137</sup> The view of the ICRC, expressed during this debate, was against such new standards.<sup>138</sup> It is increasingly recognized that international human rights law applies in all circumstances, meaning that it operates simultaneously with IHL in armed conflicts and beyond these also provides protection during riots, rebellions and times of peace.<sup>139</sup> In sum, the relationship between IHL and human rights was a rather chilly one in the first twenty years – until 1968 – but from then onwards they were increasingly seen as complementary.

## IHL and civil war

In IHL's first decades, its norms regulated international wars, not internal armed conflicts. Before 1949, proposals to also monitor domestic conflicts failed because State-centred thinking dominated. The recognition of internal conflicts as being worthy of humanitarian codification was seen as a major attack on the Westphalian system that since 1648 had sanctioned State sovereignty as its prime principle. Proponents of the view that civil wars, despite the multiple difficulties in regulating them, also needed at least some IHL guarantees recalled in vain that one of the most influential early IHL instruments, the 1863 Lieber Code, had been drafted precisely to discipline the conduct of soldiers of the Union during the American Civil War (1860–65).<sup>140</sup> In a similar vein, early modest proposals

135 Uppsala Conflict Data Program, “UCDP Charts, Graphs and Maps”, available at: <https://ucdp.uu.se/downloads/charts>.

136 A. Clapham, P. Gaeta and M. Sassòli (eds), above note 31, p. 720.

137 T. Meron, above note 134, pp. 273–275. See also Declaration of Minimum Humanitarian Standards, UN Doc. E/CN.4/Sub.2/1991/55, 12 August 1991; *Fundamental Standards of Humanity: Report of the Secretary-General*, UN Doc. A/HRC/8/14, 3 June 2008, paras 38–39; “The Paris Minimum Standards of Human Rights Norms in a State of Emergency”, *American Journal of International Law*, Vol. 79, No. 4, 1985.

138 “Fundamental Standards of Humanity: 56th Annual Session of the UN Commission on Human Rights, Agenda Item 17: Statement by the International Committee of the Red Cross”, 14 April 2000, available at: [www.icrc.org/en/doc/resources/documents/statement/57jqcv.htm](http://www.icrc.org/en/doc/resources/documents/statement/57jqcv.htm).

139 ICJ, *Nuclear Weapons*, above note 34, para. 25. See also A. Clapham, P. Gaeta and M. Sassòli (eds), above note 31, pp. 728–735.

140 Y. Sandoz, C. Swinarski and B. Zimmerman (eds), above note 31, p. 1341. For more on the role of the Lieber Code, see A. Roberts, above note 5.

from the United States and Cuba to explore the role of the Red Cross during civil wars or insurrections, when submitted to a Red Cross Conference in 1912, were discussed only in a procedural sense but not put to the vote.<sup>141</sup> Resolutions adopted by Red Cross Conferences in 1921 and 1938, however, had some effect: they induced the parties in ongoing civil wars in Upper Silesia and Spain to respect IHL rules.<sup>142</sup> Over the decades, literally every term in the heated discussions addressing domestic conflicts proved explosive: the conflict's name (civil war, rebellion or riot), the conflict's motives (liberation or subversion), the conflict's combatants (belligerents, rebels or bandits) and the name of the breaches during the conflict (atrocities or disturbances of public order).

The diplomats preparing the 1949 Geneva Conventions rejected an ICRC proposal (written with the experiences of the Spanish and Greek civil wars in mind) to make the Conventions applicable to all types of armed conflict, whether international or internal.<sup>143</sup> After the dramatic events of World War II, however, they were open, although hesitantly, to incorporate a single provision to regulate the humane treatment of those involved in what they termed “conflicts not of an international character”. They refused, nevertheless, to accept a proposal to add to the term three examples between parentheses (“cases of civil war, colonial conflicts or wars of religion”) on the grounds that examples would weaken the provision.<sup>144</sup> Even stripped of examples, the approved text – which would become common Article 3 – was revolutionary. For the first time, domestic conflicts came within the purview of IHL norms.

In its turn, common Article 3 would become a launch pad for an IHL instrument on non-international armed conflicts, AP II, in 1977. Although the ambitions of AP II were dramatically downsized in the last stages of the preparatory conference on the initiative of Pakistan,<sup>145</sup> it signified a victory of sorts after sixty-five years of attempts. But as internal conflicts had become the dominant form of warfare since 1955, common Article 3 came just in time,<sup>146</sup> whereas AP II arrived late. In retrospect, the IHL approach to civil wars was slow, and its codification showed many lacunae. Even so, its breakthrough in 1949 and its modest coming of age in 1977 were more than worth the midwifery.

141 “Commission chargée de préciser les fonctions de la Croix Rouge en cas de guerre civile”, in *Neuvième conférence internationale de la Croix-Rouge tenue à Washington du 7 au 17 mai 1912: Compte-rendu*, American Red Cross, Washington, 1913, pp. 23, 39–40, 45–49, 60–61, 85, 197, 199–208. The Tenth Red Cross Conference of 1921 also discussed the issue.

142 J. Pictet, above note 71, pp. 39–40; 2016 Commentary on GC I, above note 30, pp. 134–135.

143 Y. Sandoz, C. Swinarski and B. Zimmerman (eds), above note 31, p. 41; M. Bothe, K. Partsch and W. Solf, above note 25, pp. 37–38.

144 J. Pictet, above note 71, p. 42; 2016 Commentary on GC I, above note 30, pp. 135–138, 163, 169; Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 2: *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, ICRC, Geneva, 1960, p. 23; J. Pictet, above note 84, p. 31; J. Pictet, above note 34, pp. 30–31; Y. Sandoz, C. Swinarski and B. Zimmerman (eds), above note 31, p. 46.

145 Y. Sandoz, C. Swinarski and B. Zimmerman (eds), above note 31, pp. 1335–1336; M. Bothe, K. Partsch and W. Solf, above note 25, pp. 7, 12, 695–696.

146 See also Peter Maurer, “Changing World, Unchanged Protection? Seventy Years of the Geneva Conventions”, *International Review of the Red Cross*, Vol. 100, No. 907–909, 2018, p. 399.

## IHL and colonialism

The belated recognition of colonial conflicts as IHL objects constitutes one of the tragic moments in the history of IHL (and of humanity at large). State sovereignty threw a veil of silence over these conflicts, despite the fact that the principle of self-determination had been proclaimed in the American and French Revolutions in the late eighteenth century, that it had almost been incorporated into the Covenant of the League of Nations at the instigation of American president (and historian) Woodrow Wilson,<sup>147</sup> and that the UN Charter eventually recognized the principle of (but not the right to) self-determination in 1945.<sup>148</sup> In this context, it is noteworthy that the Allies had agreed in 1945 to prosecute Nazi crimes committed against Germans within the borders of Germany as “crimes against humanity” on condition only that a nexus existed between these crimes and the other crimes of the Nuremberg statute – crimes against peace or war crimes. In so doing, they cleverly avoided any application of the notion of crimes against humanity to their own conduct against their minorities or in their colonies.<sup>149</sup> And when the diplomats drafted common Article 3 on non-international conflicts in 1949, they had successfully countered, as we saw, a proposal to insert “cases of civil war, colonial conflicts or wars of religion” into the provision on the pretext that examples would weaken it.

Portugal’s attitude was typical. This country entered a reservation to common Article 3 in 1949 (and stuck to it until 1961). In this reservation, it argued that there was no accepted definition of “conflicts not of an international character”; that when the term meant “civil wars”, there was no criterion to define the moment when an armed rebellion transformed into a civil war; and that it “reserve[d] the right not to apply the provisions of Article 3, in so far as they may be contrary to ... Portuguese law, *in all territories subject to her sovereignty in any part of the world*”.<sup>150</sup> Portugal’s arguments singled out “civil wars” in its reservation regarding non-international conflicts, but there was little risk of civil war in Salazar’s dictatorship. What it really wanted to exclude from the protection of common Article 3 were conflicts in its huge colonial empire. While other colonial powers did not make similar reservations, they reasoned in much the same way.<sup>151</sup>

The discussions of the 1949 Geneva Conventions among the 63 participating States, only three of them from Africa (Ethiopia, Liberia and Egypt),<sup>152</sup> revealed that colonial powers saw the inclusion of colonial wars into the class of non-international wars, let alone the class of international wars, as outright blasphemy. In retrospect – but only in retrospect – this view was

147 Y. Sandoz, C. Swinarski and B. Zimmerman (eds), above note 31, p. 42.

148 Charter of the United Nations, San Francisco, 26 June 1945, Arts 1(2), 55.

149 W. Schabas, above note 13, p. 102.

150 2016 Commentary on GC I, above note 30, p. 127 (emphasis added).

151 This colonial mode of thought is also visible in the 1948 Genocide Convention because its Article XII does not impose an extension of the Convention to non-self-governing territories.

152 A. Clapham, P. Gaeta and M. Sassòli (eds), above note 31, p. 679.

outdated. Indeed, the self-determination principle gained strength as it was incorporated into a spate of resolutions adopted by the UN General Assembly between 1952 and 1970, two of which were declarations—the 1960 Declaration on the Granting of Independence of Colonial Countries and Peoples and the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States. The right to self-determination was also incorporated into the two UN Human Rights Covenants of 1966 as their common Article 1. All this demonstrates that self-determination crystallized as a right and a norm of customary international law during the 1960s.<sup>153</sup>

The 1970 Declaration was decisive: it stated that “[t]he territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it”.<sup>154</sup> It meant that colonies and non-self-governing territories were in fact proto-States with a status distinct from the metropolis and that, therefore, the conflict between the principles of territorial integrity and self-determination could be solved. In the preparatory meetings for the 1977 Additional Protocols, then, a majority saw the struggles of peoples against colonial domination, alien occupation and racist regimes in the exercise of their right of self-determination as armed conflicts of an international, not an internal, character. Their views prevailed and became part of Article 1 of AP I.<sup>155</sup> This provision was largely the work of the new States from the South, which had increasingly cooperated since the 1955 Bandung Conference. They were supported by the socialist States.

The tragedy is that the 1977 provision on anti-colonial struggles would have made a substantial difference in 1949, when decolonization conflicts were in full swing, but meant little in 1977, when the decolonization process was largely over.<sup>156</sup> The opinion of legal scholar Frits Kalshoven that the 1977 provision was applicable only to the peoples of Southern Africa and Palestine was not far from the truth.<sup>157</sup> Two tragic paradoxes were at work here. The first is that even in 1977, the characterization of anti-colonial struggles as international armed conflicts would never have been adopted if the majority of colonies had not meanwhile become independent, largely between 1945 and 1965, and recognized as States in the first place. It took the voice of *former* colonies to force a change in the perception of colonial wars. The second paradox is that once they had won this cherished prize, many States of the South lost their interest in transforming common Article 3 into a strong second Additional Protocol, fearing in fact that it would undermine their stability.<sup>158</sup> This opened the way to the dramatic downsizing of AP II.

153 S. Wheatley, above note 75, pp. 499, 504–507.

154 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV), 24 October 1970, Annex, Principle 5.6.

155 AP I, above note 25, Art. 1. See also Y. Sandoz, C. Swinarski and B. Zimmermann (eds), above note 31, pp. 41–47, 54, 1319; M. Bothe, K. Partsch and W. Solf, above note 25, pp. 2, 8, 37–40, 47–49, especially p. 47.

156 A. Clapham, P. Gaeta and M. Sassòli (eds), above note 31, p. 43.

157 M. Bothe, K. Partsch and W. Solf, above note 25, p. 50.

158 *Ibid.*, pp. 7–8, 693–694.

## Conclusions

An analysis of the IHL view of the past can be undermined by bias. Knowledge of the outcome of events may warp judgement about what people knew at the material moment of their conduct (the hindsight bias).<sup>159</sup> The past can be interpreted as a series of events propelled by an abstract protagonist called IHL (the agency bias), or it can be presented as a development ineluctably leading to the present triumphant situation (the teleological bias), and recent concepts and values can be impermissibly transferred to the past (the anachronistic fallacy).<sup>160</sup> An additional danger of historical interpretation lies in the prevention paradox: if IHL is effective, it prevents suffering, but if suffering decreases, how can one prove that this was the result of IHL in the first place? Positive IHL results are often untraceable, with the risk of skewing the balance towards the negative. But absence of evidence is not evidence of absence.<sup>161</sup> With all these caveats in mind, a few defining trends in the IHL view of the past can be identified.

In order to reconstruct the IHL view of time, this essay scrutinized the impact of legal principles on time perception. Balancing nonretroactivity against customary international law and against the humanity principle broadened the temporal scope towards the past, while balancing legal forgetting against imprescriptibility and State succession broadened the scope towards the future. As a result, the IHL view of time was characterized as an amalgam of immediacy and *longue durée*. Above all, the breadth of IHL's temporal scope hinges on the interpretation of what constitutes customary international law.

In searching for the IHL view of memory, dead persons and cultural heritage were singled out as the two principal vectors of memory. Sustained attention to the dead has been a constant hallmark of IHL, while awareness of the value of cultural heritage has an even longer pedigree than awareness of respect for the dead. On the whole, the IHL view of memory greatly facilitates remembrance.

The IHL view of history deals with facts about dead persons. The ICRC's unusual archival awareness, its early and consistent development of a data infrastructure, its long-standing insistence on State duties to the dead and – later – the missing, and, finally, the conversion in 1977 of the *need* of families to write the life stories of their beloved war dead into a *right*, made the ICRC a pioneer in developing the right to the truth – a major key to the past and a powerful weapon in preventing the denial of past crimes.

159 There is, however, also the benefit of hindsight when it comes to determining which law is applicable at which time. See S. Wheatley, above note 75, pp. 486, 503, 505–506, 508–509.

160 Evidently, many concepts and values can legitimately be transferred to the past.

161 For overviews of what have been called “international law’s method wars”, see Andrew Fitzmaurice, “Context in the History of International Law”, *Journal of the History of International Law*, Vol. 20, No. 1, 2018; Ann Orford, *International Law and the Politics of History*, Cambridge University Press, Cambridge, 2021; Natasha Wheatley, “Law and the Time of Angels: International Law’s Method Wars and the Affective Life of Disciplines”, *History and Theory*, Vol. 60, No. 2, 2021.

Finally, the search for the responses by the IHL drafters to five historical challenges, and the mobilization of the past in formulating them, was revealing. First, while in the realm of war crimes impunity rather than accountability prevailed for most of history, after World War II a system of war crimes trials was mounted and then culminated, with a delay of four decades, in the ICC approach. Second, soul-searching about World War II atrocities, including the Holocaust, helped create a long-awaited convention, in 1949, to protect civilians in wartime. But the slow and painful recognition by the ICRC of its moral failure to respond to the Holocaust demonstrates how difficult the duty of responsibly handling a war past can be even for organizations that themselves constantly remind States to fulfil this very duty. Third, the human rights idea, revived in 1945 after a long period of subliminal existence, was only fully embraced by the IHL treaty drafters after two decades, when a rapprochement increasingly demonstrated the beneficial complementarity of IHL and international human rights law. Fourth, the IHL response to proliferating domestic conflicts was slow and full of lacunae; even so, its appearance in the 1949 Geneva Conventions as common Article 3 – rightly called a “convention in miniature” – was memorable. Its coming of age in 1977 as a modest second Additional Protocol constituted a breakthrough. In retrospect, the drastic downsizing of the 1977 draft into that modest Protocol was a missed opportunity, although it may have been the lesser evil at the time. Fifth, colonial conflicts were not recognized as international wars in 1949, when this could have had considerable potential and impact; this happened only in 1977, when the decolonization process was largely over. The 1949 Geneva Conventions missed the historic opportunity to intervene in the self-determination struggles that raged at the time. In this regard, the IHL drafters’ lack of initiative did not differ markedly from the views prevalent at the UN and elsewhere. Even in 1977 the recognition of colonial conflicts as international wars was mainly the paradoxical result of pressure by the new States themselves. In all five cases, the responses to these historical challenges came after long delays. Clearly, the IHL view of the past has to be assessed on a transgenerational scale.

Until 1945, if not until the 1960s, IHL treaties and customs bore the stamp of eurocentrism (although often posing as universalism).<sup>162</sup> When new States conquered the international stage after 1945, significant levels of universality were gradually reached. Every State in the world eventually ratified the four Geneva Conventions, and no State has ever denounced them. In addition, these Conventions are now recognized as customary international law.<sup>163</sup> This latent universalism – formal, recent and imperfect as it may be – is unprecedented, and

162 For examples of eurocentrism, see G. Moynier, above note 31, p. 335; L. Renault, above note 64, p. 231; 2016 Commentary on GC I, above note 30, p. 134; B. Baker, above note 7, para. 11; “A Brief History of the International Review of the Red Cross”, *International Review of the Red Cross*, Vol. 100, No. 907–909, 2018, p. 26. For an incisive critique, see Frédéric Mégret, “The Universality of the Geneva Conventions”, in A. Clapham, P. Gaeta and M. Sassöli (eds), above note 31.

163 2016 Commentary on GC I, above note 30, pp. 12, 17; 2020 Commentary on GC III, above note 30, pp. 2–3.

if globalization and its crises show that we are so often dancing on the edge of a volcano, it has come none too soon. What Lord Acton observed in 1910 about the 1789 Déclaration des Droits de l'Homme et du Citoyen may then perhaps also have some validity for the instruments of IHL: “And yet this single page of print, which outweighs libraries, ... is stronger than all the armies of Napoleon.”<sup>164</sup>

## Appendix 1: Sources

### Corpus of conventional and customary instruments

(Chronologically, abbreviated titles)

1. The 1864 Geneva Convention.
2. The 1899 second Hague Convention, including the Hague Regulations.
3. The 1906 Geneva Convention.
4. The 1907 fourth, ninth and tenth Hague Conventions, including the Hague Regulations in the fourth Convention.
5. The 1929 Geneva Conventions.
6. The 1949 Geneva Conventions.
7. The 1977 and 2015 Additional Protocols to the Geneva Conventions.
8. The 1998 Rome Statute of the International Criminal Court.
9. The 2002 *Elements of Crimes* of the International Criminal Court.
10. “List of Customary Rules of International Humanitarian Law”, *International Review of the Red Cross*, Vol. 87, No. 857, 2005.

### Commentaries on the conventional and customary instruments

(Same order as corpus)

- 1a. Gustave Moynier, *Étude sur la convention de Genève pour l'amélioration du sort des militaires blessés dans les armées en campagne (1864 et 1868)*, Librairie Joël Chérbuliez, Paris, 1870.
- 1b. Carl Lueder, *La Convention de Genève au point de vue historique, critique et dogmatique*, Édouard Besold, Erlangen, 1876.
2. A. Pearce Higgins, *The Hague Peace Conferences and Other International Conferences Concerning the Laws and Usages of War: Texts of Conventions with Commentaries*, Cambridge University Press, Cambridge, 1909.
3. Louis Renault, “La Conférence de revision de la Convention de Genève”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 37, No. 148, 1906.
4. See under 2.

164 John Dalberg (Lord Acton), *Lectures on the French Revolution*, ed. John Figgis and Reginald Laurence, Liberty Fund, Indianapolis, IN, 2000 (first published 1910), available at: <https://oll.libertyfund.org/titles/acton-lectures-on-the-french-revolution-lf-ed>.

- 5a. Paul des Gouttes, *La Convention de Genève pour l'amélioration du sort des blessés et des malades dans les armées en campagne du 27 juillet 1929: Commentaire*, ICRC, Geneva, 1930.
- 5b. Georges Werner, "Rapport présenté à la Conférence diplomatique au nom de la II<sup>e</sup>me Commission, chargée de l'élaboration du Code des Prisonniers de guerre", *Revue Internationale de la Croix-Rouge*, Vol. 11, No. 127, 1929.
- 6a. Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949, Vol. 1: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952.
- 6b. ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016.
- 6c. Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949, Vol. 2: Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, ICRC, Geneva, 1960.
- 6d. ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 2nd ed. Geneva, 2017.
- 6e. Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949, Vol. 3: Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960.
- 6f. ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020.
- 6g. Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949, Vol. 4: Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958.
- 6h. Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015.
- 7a. Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva 1987.
- 7b. Michael Bothe, Karl Partsch and Waldemar Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff, The Hague, 2013.
- 7c. Jean-François Quéguiner, "Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III)", *International Review of the Red Cross*, Vol. 89, No. 865, 2007.
- 8a. Karl Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, Cambridge, 2003.
- 8b. Mark Klamberg (ed.), *Commentary on the Law of the International Criminal Court*, Torkel Opsahl, Brussels, 2017.
- 8c. William Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2020.
9. See under 8.

10. Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, and Vol. 2: *Practice*, Cambridge University Press, Cambridge, 2005, available at: [www.icrc.org/customary-ihl](http://www.icrc.org/customary-ihl).

## Appendix 2: Methodology

For this study, the IHL view of the past, itself a *dimension* of IHL, was broken down into three *indicators* (time, memory, history). Indicator reconstruction occurred using the following keywords searches in the sources:

- For *time*: amnesty; anachronism; analogy; ancestor; century; continuing; custom; desuetude; duration; foresight; generation; hereditary; hindsight; immemorial; imprescriptibility; lapse of time; laws of humanity; Martens Clause; nonrecurrence; nonrepetition; nonretroactivity; Nuremberg; obsolescence; outdated; precedent; prescription; public conscience; *ratione temporis*; retrospective; statute of limitation; temporal; time bar; times; tradition; updated; usage.
- For *memory*: ashes; bereavement; burial; cemetery; commemoration; cremation; cultural property; the dead; death; deceased; decedent; dignity; exhumation; forgetting; funeral; grave; grief; heirs; heritage; human remains; last will; legacy; memorial; memory; monument; mourn; museum; outrage; remembrance; remember; remind; rites; statue; testament; testate; tribute.
- For *history*: archaeology; archive; civil war; colonialism, disappearance; forensic; Great War, historian; history; Holocaust; the missing; Nobel; search; transition; truth; Versailles; World War.

With these keywords (including their variants and French versions), relevant preamble parts, articles and rules were located in the conventional and customary instruments listed in Appendix 1. Some obvious but general keywords were excluded because they yielded too many hits (e.g., “past”, “time”) or had a double meaning (e.g., “will”). In a next step, the commentaries on these conventional and customary instruments (also listed in Appendix 1) were similarly searched. In addition, all general sections of the commentaries were consulted for context. The *travaux préparatoires* of conventional instruments were searched only sporadically. However, most commentaries provide summaries of key passages of these preparatory works.