Concluding Observations: how International Humanitarian Law is Shaped to Meet the Challenges Arising from Areas of Limited Statehood – Theoretical Problems in Practice

Björnstjern Baade, Linus Mührel and Anton O. Petrov

A. Introduction

The vast majority of armed conflicts since World War II have been non-international in character.[1] In addition to the traditional civil war between a territorial State and a rebel faction, many of these recent conflicts have been and are being fought between a State and various actors, or indeed between non-State actors themselves.[2] Often, outside involvement internationalises and therefore further complicates the situation. These conflicts take place in, contribute to, and indeed create areas of limited statehood in which the territorial State can no longer ensure the implementation of its own law.

---

1 Michael Clodfelter, *Warfare and Armed Conflicts: A Statistical Reference to Casualty and Other Figures, 1500-2000* (2nd edn, McFarlan & Co. 2002) 593-94; see also the contribution by Vincent Widdig, 'Detention by Organised Armed Groups in Non-International Armed Conflicts – The Role of Non-State Actors in a State-Centred International Legal System' in this volume 124 (hereafter Widdig, 'Detention by Organised Armed Groups'). For an explanation of the decline in inter-State warfare, see recently: Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (Simon & Schuster 2017).

2 In fact, most conflicts in recent years were fought between non-State actors, and the number of fatalities in these conflicts was only slightly lower than in conflicts with State-involvement according to the available statistical data: Marie Allanson, Erik Melander and Lotta Themnér, 'Organized violence, 1989–2016' (2017) 54 JPR 574, 575-79, for all data of the Uppsala Conflict Data Program see <http://ucdp.uu.se/> accessed 20 November 2017; see also: Heike Krieger, 'Where States Fail, Non-State Actors Rise? Inducing Compliance with International Humanitarian Law in Areas of Limited Statehood' in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (CUP 2014) 504 (hereafter Krieger, 'Where States Fail, Non-State Actors Rise?').

https://doi.org/10.5771/9783845289557-217 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

As exemplified by the contributions to this volume, the challenges posed to IHL and its subsequent implementation by such conflicts are manifold. The increase in armed activities by non-State actors is widely, and rightly so, regarded as a dangerous phenomenon, which might require adaptations to IHL.[3] This volume endeavoured to examine if and how such a development in the law has taken or could take place. Can the rules and principles of IHL be adapted to the challenges of modern armed conflict in a legitimate manner, or are they too rigid, frozen in a state that seems unreasonable under contemporary conditions?

B. The Research so far

This volume sought to expand upon the insights that the research of Collaborative Research Centre 700 'Governance in areas of limited statehood' (*Sonderforschungsbereich* – SFB) generated, in particular the groundwork laid by Project C8 on 'Security Governance' and 'Legitimacy and Law-Making' in IHL.[4]

Ensuring compliance with IHL has always been challenging. The need for international criminal tribunals, the International Criminal Court, and potentially a regional African court,[5] which prosecute at least the main perpetrators of grave international crimes, is testament to this. In areas in which a State's actual power to enforce its law and provide security for the population is fragile or even non-existent, ensuring compliance with IHL by all actors involved becomes even more of a challenge.[6]

---

3 See eg Antonio Cassese, 'States: Rise and Decline of the Primary Subjects of the International Community' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2014) 49, 69.

4 This research took place in the first funding period from 2010 to 2013 on 'Security Governance and International Law: Humanitarian Governance in Areas of Limited Statehood' and in the second period from 2014 to 2017 on 'Legitimacy and Law-Making in International Humanitarian Law'.

5 See Balingene Kahombo, *Africa within the Justice System of the International Criminal Court: the Need for a Reform* (KFG Working Paper Series No. 2, 2016).

6 Cf also Robert Kolb, *Ius in Bello: Le droit international des conflits armés*, (2nd edn, Helbing Lichtenhahn 2009) 494-96 (hereafter Kolb, *Ius in Bello*).

https://doi.org/10.5771/9783845289557-217 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Traditionally, States considered armed non-State actors within their borders an entirely domestic affair, i.e. rebels to be dealt with as traitors.[7] While States' internal law still regards them as such, their number, persistence and influence has risen starkly,[8] which indicates that responses beyond repressive (military) action by States and beyond (international) criminal prosecution for breaches of IHL[9] may be necessary from an IHL point of view.[10] Project C8 focused in particular on the Great Lakes Region of Africa, which in part exhibits the traits of an area of limited statehood, in order to explore whether IHL is effective in such areas and how its implementation could be enhanced.[11] A central result of this project and the SFB's research more generally was that a rule's prospects for compliance improve significantly if the rule is regarded as legitimate.[12] Even non-State actors who seemingly engage in casual violence against civilians can usually be understood as rational actors.[13] To remain legitimate, and thus effective, the law might therefore have to develop to meet new challenges.[14]

---

7 Lassa F. L. Oppenheim, *International Law: A Treatise*, vol. II: *War and Neutrality* (3rd edn, Longmans, Green and co. 1921) 76, para 59; for the caution exercised by States when drafting CA 3 and AP II see Raphael Schäfer, 'A History of Division(s): A Critical Assessment of the Law of Non-International Armed Conflict' in this volume 43.

8 Cf Sven Chojnacki and Zeljko Branovic, 'New Modes of Security: The Violent Making and Unmaking of Governance in War-Torn Areas of Limited Statehood' in Thomas Risse (ed), *Governance Without a State? Policies and Politics in Areas of Limited Statehood* (Columbia University Press 2011) 89.

9 Reed M. Wood, 'Understanding strategic motives for violence against civilians during civil conflict' in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (CUP 2014) 13, 41 (hereafter Wood, 'Understanding strategic motives for violence'); Krieger, 'Where States Fail, Non-State Actors Rise?' (n 2) 535-40.

10 This is not to say that the threat of repressive action, such as criminal prosecution, serves no purpose. It may be one of the reasons that induces a party to an armed conflict to comply: Krieger, 'Where States Fail, Non-State Actors Rise?' (n 2) 550-51: non-coercive instruments may work best under a 'shadow of hierarchy'.

11 Heike Krieger, 'Introduction' in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (CUP 2014) 1.

12 Krieger, 'Where States Fail, Non-State Actors Rise?' (n 2) 504.

13 Ibid, 518-20; Wood, 'Understanding strategic motives for violence' (n 9) 43.

14 Concerning the challenges posed by asymmetrical warfare, cf: Heike Krieger, 'Deutschland im asymmetrischen Konflikt: Grenzen der Anwendung militärischer Gewalt gegen Talibankämpfer in Afghanistan' in Dieter

https://doi.org/10.5771/9783845289557-217 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

C. The Development of Law in Theory and Practice

In order to scrutinise the need for and the possibilities of a development of IHL with regard to areas of limited statehood, in particular two topical subjects were discussed in this volume. First, it was debated whether IHL provides for a legal basis for detention in NIACs,[15] and, secondly, it was discussed how IIL reacts to risks to investments emanating from armed conflicts. The contributions strove to shed light on these practical legal issues in a manner that is also historically and theoretically informed.

I. Detention in Non-International Armed Conflicts

IHL does not provide for an express authorisation for detention in NIACs. Seemingly unimpressed by this state of affairs, in practice, detention in NIACs is commonplace.[16] How IHL deals with that phenomenon is therefore of considerable importance and was the subject of various contributions. Must and can existing rules and principles be legitimately developed through interpretation? Do new rules have to be created *de lege ferenda* or is the law as it stands adequate? Does international law authorise detention or do States have to enact domestic legislation for that purpose in order to comply with the requirement for a legal basis imposed by IHRL? Do non-State actors enjoy the authority to detain?

What is to be done if a legal rule seems normatively necessary, but, at first glance at least, no relevant legal material can be located, is a general question of legal theory that is of particular importance for IHL. Often, such a situation is framed as the existence of a normative gap and it is suggested

---

Weingärtner (ed), *Die Bundeswehr als Armee im Einsatz: Entwicklungen im nationalen und internationalen Recht* (Nomos 2010) 39, 59.

15 For an overview of the issue, see: Marco Sassòli, 'Internment' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force* (OUP 2017) 568, 574-75, paras 25-30.

16 Geneva Academy (ed), *Reactions to Norms: Armed Groups and the Protection of Civilians, Policy Briefing No. 1* (2014) 63-68 <https://www.geneva-academy.ch/joom-latools-files/docman-files/Publications/Policy%20Briefing/Geneva%20Academy%20Policy%20Briefing%201_Amed%20Groups%20and%20the%20Protection%20of%20Civilians_April%202014.pdf> accessed 20 November 2017.

https://doi.org/10.5771/9783845289557-217 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

that there is a need to fill it.[17] In addition to explicit analogies,[18] highly indeterminate treaty provisions like the Martens Clause in Art. 1 (2) AP I,[19] and general concepts or principles such as military necessity[20] may play a role in addressing such situations.[21]

Constructing a legal basis for detention in NIACs through existing treaty law, customary law or general principles appears to be far from easy. The existence of such a legal basis has been debated intensively in recent times.

17 Jörg Kammerhofer, 'Gaps, the *Nuclear Weapons* Advisory Opinion and the Structure of International Legal Argument between Theory and Practice, (2009) 80 BYIL 333, 354 et seq; Ulrich Fastenrath, *Lücken im Völkerrecht* (Duncker Humblot 1991) 15 et seq.

18 See Kevin J. Heller, 'The Use and Abuse of Analogy in IHL' in Jens D. Ohlin, *Theoretical Boundaries of Armed Conflict and Human Rights* (CUP 2016) 232 (hereafter Heller, 'Use and Abuse of Analogy').

19 See Katja Schöberl and Linus Mührel, 'Sunken Vessel or Blooming Flower? Lotus, Permission and Restrictions within International Humanitarian Law' in this volume 59 (hereafter Schöberl and Mührel, 'Sunken Vessel or Blooming Flowe?').

20 Arguing in favour of the principle as an independent constraint on military activities: ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009), 78-82 (hereafter ICRC, *Direct Participation*); Etienne Henry, *Le Principe de nécessité militaire: Histoire et actualité d'une norme fondamentale du droit international humanitaire* (Pedone 2016), 623-80 (hereafter Henry, *Nécessité militaire*); for critique, see: W. Hays Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect' (2010) 42 JILP 769, 829 (hereafter Parks, 'No Mandate'); in turn, for a defence see: Nils Melzer, 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities', (2010) 42 JILP 831, 892 et seq (hereinafter Melzer, 'Keeping the Balance').

21 See Schöberl and Mührel, 'Sunken Vessel or Blooming Flower' (n 19), who find insufficient support for military necessity as an independent principle, but consider the Martens Clause to provide that something which is not explicitly prohibited by IHL is not *ipso facto* permitted.

https://doi.org/10.5771/9783845289557-217 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

In contrast to some scholars,[22] but also States[23] and the ICRC,[24] *Manuel Brunner, Vincent Widdig,* and *Matthias Lippold*[25] – whose contribution unfortunately is not a part of this volume –[26], found that the most persuasive arguments speak in favour of the conclusion that IHL currently does not authorise detention in NIACs.[27] *Katja Schöberl* and *Linus Mührel* found this to be the currently prevailing view in international legal discourse.

For States and international organisations that are bound to human rights requiring a legal basis, this finding (only) leads to the need for them to create a legal basis. This basis can either be found in their domestic law, or – as *Matthias Lippold* considered,[28] in accordance with the UK Supreme

22 See most recently: Daragh Murray, 'Non-State Armed Groups, Detention Authority in Non-International Armed Conflict, and the Coherence of International Law: Searching for a Way Forward' (2017) 30 LJIL 435, 446-49 (hereafter Murray, 'Detention in NIAC').

23 For the Obama Administration's position, which derives authority to detain, *inter alia*, from CA 3, see: Naz K. Modirzadeh, 'Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance' in Jens D. Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (CUP 2016) 193, 217, fn 53 (hereafter Modirzadeh, 'Folk International Law'); but cf Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict* (OUP 2016) 72 considering US practice to be ambiguous (hereafter Hill-Cawthorne, *Detention in NIAC*).

24 ICRC, *Internment in Armed Conflict: Basic Rules and Challenges* (Opinion Paper 2014) 7-8 <https://www.icrc.org/en/download/file/3223/security-detention-position-paper-icrc-11-2014.pdf> accessed 20 November 2017 (hereafter ICRC, *Internment in Armed Conflict*).

25 LLM (NYU), Doctoral Researcher at the Institute for Public International and European Law of the Georg-August-University Göttingen.

26 See Matthias Lippold, 'Between Humanization and Humanitarization? Detention in Armed Conflicts and the European Convention on Human Rights' (2016) 76 ZaöRV 53, 92-93 (hereafter Lippold, 'Between Humanization and Humanitarization?').

27 See in the same vein: Hill-Cawthorne, *Detention in NIAC* (n 23) 71 et seq, while taking into account the UK Government's recent expression of opinio juris in the case of *Serdar Mohammed*.

28 See on this: Lippold, 'Between Humanization and Humanitarization?' (n 26) 80, 91 et seq.

https://doi.org/10.5771/9783845289557-217 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Court's judgment in *Serdar Mohammed*[29] and the ICRC[30] – in Security Council resolutions explicitly or implicitly authorising detention. Further specifications concerning the conditions and limits of detention might then be supplied by applicable IHRL.[31] Non-State actors, who are not bound by human rights enshrined in treaties, are thereby either left unbound, or, if considered bound to a customary rule prohibiting arbitrary detention,[32] unable to comply with that rule's requirement to detain only when there is a legal basis.[33] But binding non-State actors in some manner would seem desirable to further IHL's aim of protecting the individual.[34]

II. The Protection of Investment in Times of Armed Conflict

Dorota Banaszewska – whose contribution unfortunately is not a part of this volume –[35] drew attention to the fact that not only the relationship between IHL and IHRL can pose a challenge, but also the one between IHL and IIL, which may seem strained by the need to apply in situations of armed conflict. Due diligence obligations, for example under a 'full protection and security' standard, may require a State to do everything feasible to protect investments. A pivotal question in that regard is which role IHL should play in determining the protection and security owed to the investor. IHL might seem better suited for supplying standards appropriate to the situation of armed conflict, but it should not allow States to discard their IIL obligations at will.

Ira Ryk-Lakhman Aharonovich complemented this analysis by shedding light on the categorisation of tangible investments as military objectives.

---

29 *Abd Ali Hameed Al-Waheed (Appellant) v Ministry of Defence (Respondent) and Serdar Mohammed (Respondent) v Ministry of Defence (Appellant)* [2017] UKSC 2, Lord Sumption (with whom Lady Hale agrees), paras 18-30 (hereafter *Serdar Mohammed*).

30 ICRC, *Internment in Armed Conflict* (n 24) 8.

31 Cf *Serdar Mohammed* (n 29), paras 90 et seq.

32 On this controversy, see: Andrew Clapham, 'Focusing on Armed Non-State Actors' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014) 766, 786 et seq (hereafter Clapham, 'Focusing on Armed NSAs'); as well as the contribution by Widdig, 'Detention by Organised Armed Groups' (n 1).

33 Hill-Cawthorne, *Detention in NIAC* (n 23) 217-22.

34 For a proposal, see: Hill-Cawthorne, *Detention in NIAC* (n 23) 225 et seq; see also Widdig, 'Detention by Organised Armed Groups' (n 1).

35 Legal advisor working for the Council of Europe in Paris.

https://doi.org/10.5771/9783845289557-217 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Dual-use and revenue-generating targets proved to be the most contentious. The due diligence duty imposed by IIL may at times be at odds with the requirements of IHL in this regard. Any norm conflict would have to be resolved by the *lex specialis* rule on a case-by-case basis.

Charlotte Lülf analysed the protection provided by IHL in situations of occupation, in particular with regard to the occupations of parts of Ukraine in 2014 and of Iraq in 2003. Art. 43 Hague Regulations and Art. 64 GC IV generally require the occupying power to respect the laws of the occupied territory, and BITs of the occupied State may be interpreted to constitute such laws. Under certain conditions, the occupying power may, however, make necessary changes to these laws, mainly in order to safeguard its own security and the well-being of the population in the occupied territory. While the impetus of IHL can insofar be understood to be 'conservationist' – protecting the status quo as far as possible –, the exception clauses have, in the past, been interpreted in a manner that may qualify as very liberal, for example when the US initiated major changes to Iraq's economy.

D. The 'Nature' of International Humanitarian Law

In the discussion of these practical issues, the more theoretical question concerning the permissive or restrictive 'nature' of IHL proved to be of considerable significance. The question whether the effect, or purpose, of IHL is to restrict States' options, or to permit them to make use of additional ones, is frequently termed as pertaining to the 'nature' of IHL. It is often understood to have an influence on how gaps may or may not be filled. *Pia Hesse* observed that the *Lotus* case – the classical starting point for a discussion of the 'nature' of international law in general – might be ill-suited for answering this question, since it rather coordinates States' exercise of jurisdiction, and has no direct impact on a characterisation or interpretation of IHL. Like *Anton O. Petrov*, *Katja Schöberl* and *Linus Mührel* found IHL to be generally restrictive, serving to restrict States' freedom in times of armed conflict.

The terms 'restrictive' and 'permissive' themselves are relative in nature. The categorisation of IHL may accordingly depend on the perspective taken, and might therefore offer more than one answer. IHL may in fact both enable and restrict States' conduct.[36]

---

36 Cf Jens D. Ohlin, 'Introduction: The Inescapble Collision' in Jens D. Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (CUP 2016) 1, 1.

https://doi.org/10.5771/9783845289557-217 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

IHL and the institutional practice surrounding it can be understood as governance. According to the definition developed in the SFB, governance denotes 'institutionalized modes of social coordination to produce and implement collectively binding rules, and/or to provide collective goods'.[37] The contributions of this volume have shown that IHL's governance function, the social coordination that IHL is meant to make possible and the collective good modern IHL is meant to provide, serves two purposes.

On the one hand, by producing and implementing binding rules, IHL seeks to provide security to individuals, combatants and civilians alike – but of course to different degrees. It aims to protect them from the consequences of armed conflict that are not militarily necessary.[38] This is the humanitarian aspect of IHL, which is clearly reflected in its historical origins.[39]

On the other hand, bearing in mind that IHL allows for encroaching on individuals' interests in ways otherwise inconceivable under IHRL,[40] its function can also be understood as enabling States' armed forces to conduct warfare in an effective manner.[41] The legal prohibition of Art. 2 (4) UN-Charter embodies the aspiration that inter-State war should not break out.

---

37 Tanja Börzel et al, 'Governance in Areas of Limited Statehood: Conceptual Clarifications and Major Contributions of the Handbook' in Tanja Börzel et al (eds), *The Oxford Handbook of Governance and Limited Statehood* (OUP 2018) 6.

38 For the shift of the purpose of the laws of war from honour and chivalry to humanitarian concerns, see: Robert Kolb, 'The Protection of the Individual in Times of War and Peace' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2014) 317 at 321 et seq (hereafter Kolb, 'Protection of the Individual'); compare Silja Vöneky, 'Francis Lieber (1798 – 1872)' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2014) 1137, 1139-40, who would already ascribe it to *Lieber*; for an even later date (after AP I and in the 1990s), see Amanda Alexander, 'A Short History of International Humanitarian Law' (2015) 26 EJIL 109 (hereafter Alexander, 'Short History of IHL').

39 See eg Frits Karlshoven, 'History of international humanitarian law treaty-making' in Rain Liivoja and Tim McCormack (eds), Routledge Handbook of the Law of Armed Conflict (Routledge 2016) 33, 34 et seq.

40 For example, collateral damage under Art. 57 (5) (b) AP I.

41 Cf *Raphael Schäfer's* contribution for the war-legitimising effect of IHL; also concerning the disciplinary effect of IHL: Eyal Benvenisti and Amichai Cohen, 'War is Governance: Explaining the Logic of the Laws of War From a Principal-Agent Perspective' (2014) 112 Michigan Law Review 1363, 1367 et seq.

https://doi.org/10.5771/9783845289557-217 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Likewise, the domestic law of States prohibits internal strife.[42] IHL embodies the realisation that peace may collapse despite our best efforts at preserving it.

The *jus in bello* thus cannot become a *jus contra bellum* by rendering the conduct of hostilities impossible. Once an armed conflict exists, IHL allows States to fight it effectively to a degree that would not be possible under IHRL, but that is limited nonetheless. To speak in *Lotus* terms, restrictions on States' sovereign independence, which is in itself a principle of international law,[43] are not presumed, but based on the positive provisions of IHRL.[44] IHL in turn offers States greater freedom to wage war. Non-State actors have so far not been understood as beneficiaries of that function.

E. How to Approach Non-State Actors

Since the involvement of non-State actors forms a significant part of modern armed conflict, particularly in areas of limited statehood, IHL needs to respond and maybe adapt to this situation.[45] To this end, two aspects should be taken into account when considering (the need for) a development of IHL: military necessity and capacity from non-State actors' point of view (1.) as well as their self-interest in complying with IHL. The latter can be engaged by creating incentives for compliance by non-State actors as groups (2.) and by individual fighters (3.).

---

42 A *jus contra bellum internum* does not exist (yet) as a distinct rule of international law: Claus Kreß, 'Review Essay on Emily Crawford, The Treatment of Combatants and Insurgents under the Law of Armed Conflict/Anthony Cullen, The Concept of Non-International Armed Conflict in International Humanitarian Law/Noam Lubell, Extraterritorial Use of Force against Non-State Actors/Sandesh Sivakumaran, The Law of Non-International Armed Conflict' (2012) 83 BYIL 145, 159.

43 Samantha Besson, 'Sovereignty' in Rüdiger Wolfrum (ed), MPEPIL, vol. IX (OUP 2012) 366, 378 et seq, paras 85-89, 114-17.

44 Hill-Cawthorne, *Detention in NIAC* (n 23) 66-67; Heller, 'Use and Abuse of Analogy' (n 18) 285.

45 Murray, 'Detention in NIAC' (n 22) 456.

https://doi.org/10.5771/9783845289557-217 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

I. Take into Account their Situation, in Particular their Military Necessities

As with States' armed forces, rules that seek to attract compliance by non-State actors must also take into account the non-State actors' situation; in particular, their capacity to comply with certain rules.[46] This may mean taking into account the resources available to a specific non-State actor,[47] but also military necessity seen from the non-State actor's point of view. An example from the law of IAC may illustrate this: interpreting a rule like Article 4 A (2) GC III so as to require an irregular fighter (belonging to an IAC party) to be exceedingly easy to spot from afar will certainly not attract compliance, as it does not sufficiently take into account the operational pressures exerted on this specific aspect of warfare.[48] This was recognised in Art. 44 AP I, which, 'owing to the nature of the hostilities', adjusts the obligation and requires only to openly carry one's arms.[49] IHL likewise does not require non-State actors to wear a uniform.[50]

Similarly, as noted by *Vincent Widdig*, the lack of a basis for non-State actors to detain might have adverse consequences for individuals, combatants and civilians alike, who might not be captured, but killed or treated inhumanely.[51] By giving non-State actors no practical choice but to violate the law, IHL loses relevance to them.[52] This is mirrored by the emphasis IIL puts on due diligence obligations for States in armed conflict, which acknowledges that even the capacity of States to ensure certain results can be limited.

---

46 Anton Petrov, 'Non-State Actors and Law of Armed Conflict Revisited: Enforcing International Law through Domestic Engagement' (2014) 19 JCSL 279, 281, 293-94 (hereafter Petrov, 'NSAs and LOAC').

47 Cf Art. 5 AP II: 'within the limits of their capabilities'; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 295-96 (hereafter Sivakumaran, *Law of NIAC*).

48 For such an interpretation in the British Military Manual of 1958, see: Emily Crawford, 'From Inter-state and Symmetric to Intra-state and Asymmetric: Changing Methods of Warfare and the Law of Armed Conflict in the 100 Years Since World War One' (2014) 17 YbIHL 95, 104-6 (hereafter Crawford, 'LOAC since WWI').

49 Ibid.

50 Petrov, 'NSAs and LOAC' (n 46) 290, 292-93.

51 Cf Murray, 'Detention in NIAC' (n 22) 450-451; Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 38 Yale J. Int'l L. 107.

52 Cf Clapham, 'Focusing on Armed NSAs' (n 32) 769.

https://doi.org/10.5771/9783845289557-217 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Finally, in terms of capacity, it should not be forgotten that knowledge of the law is a precondition for compliance.[53] Providing training in IHL for non-State actors, as done by the ICRC and Geneva Call,[54] is therefore of considerable importance.

Taking into account such considerations, of course, does not mean that they will prevail in determining what the law provides for or ought to provide for.[55] Taking into account the military necessities of parties to the conflict must not lead to an unreflected race to the point where 'anything goes'. A case in point is the temptation to compensate military inferiority by actions violating IHL that exploit the other side's adherence to this body of law, which may at times be observed in some non-State actors.[56] Taking operational needs into account cannot mean a return to the doctrine of *Kriegsraison*, which allows for any and all action required by military necessity.

As many rules of modern IHL show, military necessity is and will remain an important aspect of the law of armed conflict, but so will humanitarian concerns. Being too 'responsive' to the needs of non-State actors in particular might dilute established standards without actually improving compliance,[57] and might thus also damage IHL's legitimacy. For example, a group's capacity to control the actions of its fighters might often be problematic in practice.[58] But this cannot absolve the group and its leaders from responsibility for crimes committed, or lower legal standards. After all, asymmetry has always been a hallmark of NIAC.[59]

Likewise, when considering taking into account non-State actor views and practices, it should not be forgotten that, especially in areas of limited statehood, non-State actors may thrive which endanger human rights. They

---

53 Petrov, 'NSAs and LOAC' (n 46) 281.

54 For the ICRC see: Steven R. Ratner, 'Law Promotion Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War' (2011) 22 EJIL 459.

55 Cf Sandesh Sivakumaran, 'How to Improve upon the Faulty Legal Regime of Internal Armed Conflict' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012) 525, 534.

56 Crawford, 'LOAC since WWI' (n 48) 108-9; Petrov, 'NSAs and LOAC' (n 46) 289-90; Robin Geiß, 'Asymmetric conflict structures' (2006) 88 IRRC 757, 758.

57 Cf James T. Johnson, 'The Ethics of Insurgency' (2017) 31 Ethics & International Affairs 367, 381-82 (hereafter Johnson, 'The Ethics of Insurgency'); Petrov, 'NSAs and LOAC' (n 46) 303.

58 Johnson, 'The Ethics of Insurgency' (n 57) 372; Krieger, 'Where States Fail, Non-State Actors Rise?' (n 2) 509.

59 Petrov, 'NSAs and LOAC' (n 46) 290.

https://doi.org/10.5771/9783845289557-217 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

may fill a governance gap left by the territorial State and disregard well-established human rights standards or turn against other States and their populations – effective governance by actors willing and able is a vital precondition for human rights protection after all.[60]

II. Create Incentives for the Non-State Actor as a Group

Historically and in addition to general humanitarian motives, a principal reason for the development of and compliance with IHL has been self-interest.[61] Reciprocity, the mutual abstention from violations which benefits both sides' protected persons, has long been recognised as one of the driving forces behind compliance.[62] Not alienating the enemy more than necessary to ensure a more sustainable peace, better operational effectiveness, or simply an interest in not destroying more than necessary the spoils of war, have proven to be other factors of self-interest of warring parties which lead to better protection for the individual.[63] In addition to such self-interest, which still serves as a meaningful rationale to justify IHL,[64] IHL may by

60 Cf John C. Dehn, 'Whither International Martial Law? Human Rights as Sword and Shield in Ineffectively Governed Territory' in Jens D. Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (CUP 2016) 315, 315, 340-42, 347.

61 However, it should be noted that self-interest can only be one factor in explaining States' and other entities' decision-making processes, cf: Andrea Bianchi, 'Law, Time, and Change: The Self-Regulatory Function of Subsequent Practice' in Georg Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 133, 137; Thomas Forster, 'International humanitarian law's old questions and new perspectives: On what law has got to do with armed conflict' (2017) 98 IRRC 995 (hereafter: Forster, 'IHL's old questions and new perspectives').

62 For this, as well as the separate legal question of belligerent reprisals, see: Shane Darcy, 'Reciprocity and reprisals' in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016) 492, 492 et seq; Petrov, 'NSAs and LOAC' (n 46) 285-86, 304-5; see generally: Bruno Simma, 'Reciprocity' in Rüdiger Wolfrum (ed), MPEPIL, vol. XIII (OUP 2012) 651.

63 Kolb, 'Protection of the Individual' (n 38) 322.

64 Morten Bergsmo and Tianying Song, 'Ensuring Accountability for Core International Crimes in Armed Forces: Obligations and Self-Interest' in Morten Bergsmo and Tianying Song (eds), *Military Self-Interest in Accountability for Core International Crimes* (Torkel Opsahl 2015) 1, 14 et seq, enumerating in a non-exhaustive manner *inter alia* domestic legitimacy, accomplishment of

https://doi.org/10.5771/9783845289557-217 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

now be so entrenched in States' militaries as to be effective qua internalisation.[65] For many non-State actors, compliance cannot be expected in that manner.

As *Lars Müller* and *Vincent Widdig* emphasised, improving IHL's input legitimacy for non-State actors by involving them in the law-making process in some form could be a method to encourage compliance.[66] This has been actively pursued by the NGO Geneva Call, which has successfully been engaging with non-State actors, encouraging them to sign 'Deeds of Commitment' to IHL, providing support to comply with them, and monitoring compliance.[67] Here, just like with States, self-interest can further compliance with IHL.[68] Recently, the Brussels Court of Appeal took note of the Deed of Commitment signed by the PKK and their intent to abide by IHL; this happened in the context of determining whether the group had the necessary degree of organisation to be a party to a NIAC in the sense of the *Tadic* test, and, thus, not count as 'terrorists' under Belgian domestic law.[69] Shared self-interest might also be used to conclude 'special agreements' in the sense of CA 3 between States and non-State actors that clarify and reinforce the applicable legal framework.[70]

By committing to the observance of IHL in one form or another, non-State actors may seek to benefit from others' reciprocal commitments – for example, if connected to a certain population that is in its interest to protect – or, just like States, they might seek political legitimacy and

---

counter-insurgency and peace-building, internal morale, order and discipline, i.e. operational effectiveness. See the other contributions in that volume, too.

65 Cf eg Harold H. Koh, 'Internalization Through Socialization' (2004-2005) 54 Duke Law Journal 975; Forster, 'IHL's old questions and new perspectives' (n 61).

66 Krieger, 'Where States Fail, Non-State Actors Rise?' (n 2) 531-34; Crawford, 'LOAC since WWI' (n 48) 114; Petrov, 'NSAs and LOAC' (n 46) 298 et seq; cf Jean d'Aspremont, 'Non-State Actors and the Formation of International Customary Law: Unlearning Some Common Tropes' in Iain Scobbie and Sufyan Droubi (eds), *Non-State Actors and the Formation of Customary International Law* (Manchester University Press 2018, forthcoming) (hereafter d'Aspremont, 'Non-State Actors and the Formation of International Customary Law').

67 Clapham, 'Focusing on Armed NSAs' (n 32) 802-5; Sivakumaran, *Law of NIAC* (n 47) 107 et seq (on their legal nature) and 538-41 (on Geneva Call in particular); see also the contribution by *Vincent Widdig* in this volume 124.

68 Krieger, 'Where States Fail, Non-State Actors Rise?' (n 2) 520-31.

69 Cour d'appel de Bruxelles, Arrêt à charge de X et al, No. 2017/2911 (14 September 2017).

70 Petrov, 'NSAs and LOAC' (n 46) 298, 312.

https://doi.org/10.5771/9783845289557-217 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

operational effectiveness by complying with IHL.[71] In this context, symbolic validation is an important feature. Deeds of Commitment, signed in Geneva City Hall's Alabama Hall (where the First GC was signed in 1864), and with the Government of the Republic and Canton of Geneva acting as custodian of the Deeds, might do more to improve a group's compliance with IHL than a direct change in the law-making process, which States are bound to vigorously oppose in any case.[72]

Nonetheless, exploring the practice of non-State actors in armed conflict, to a certain extent mirroring the ICRC customary law study, might be a worthwhile endeavour.[73] Besides the already mentioned risk of hereby diluting IHL standards,[74] it remains to be seen if one non-State actor would feel bound to the practice of another.[75]

III. Create Incentives for Individual Fighters

Another important idea to improve compliance by non-State actors is to grant their fighters some form of immunity for their participation in the hostilities equivalent to combatant immunity.[76] However, the gains in compliance that may be achieved from this might be more than offset by

71 Krieger, 'Where States Fail, Non-State Actors Rise?' (n 2); Clapham, 'Focusing on Armed NSAs' (n 32) 803-4; see also: David Kennedy, 'Lawfare and warfare' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 158, 162-64, 179-80.

72 See for this process established by Geneva Call: Geneva Call, *Engaging Armed Non-State Actors in a Landmine Ban: The Geneva Call Progress Report (2000-2007)* (Geneva Call 2007) <https://www.files.ethz.ch/isn/100311/gc-progress-report-07.pdf> accessed 20 November 2017.

73 Annyssa Bellal, *From Words to Deeds: Exploring the Practice of Armed Non-State Actors and its Impact on the Implementation of International Law*, Geneva Academy Project in partnership with Geneva Call, <https://www.geneva-academy.ch/our-projects/our-projects/detail/55-from-words-to-deeds-exploring-the-practice-of-armed-non-state-actors-and-its-impact-on-the-implementation-of-international-law> accessed 20 November 2017.

74 Petrov, 'NSAs and LOAC' (n 46) 305-6.

75 Ibid, 303, 308. In favour of customary law created by and for non-State actors, see d'Aspremont, 'Non-State Actors and the Formation of International Customary Law' (n 66).

76 Cf Sivakumaran, *Law of NIAC* (n 47) 514-20; Emily Crawford, *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict* (OUP 2010) 153 et seq.

https://doi.org/10.5771/9783845289557-217 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

the loss in incentive not to take up arms in the first place.[77] In any case, a customary rule granting combatant immunity to fighters of well-organised armed groups complying with IHL certainly does not exist yet.[78] When considering granting non-State actors' fighters such immunity to improve compliance with IHL, it may be a separate issue whether this immunity should be extended to the leadership. Similar to a prosecution for the crime of aggression for a serious violation of the prohibition of using inter-State force,[79] it could – depending on the particular circumstances – be advisable to retain the possibility to sanction the persons primarily responsible for breaking the internal peace of a State.[80] Under the law as it stands, amnesties are a policy choice that States can and should consider.[81] Art. 6 (5) AP II encourages States to grant amnesties, as should the toll the civilian population is likely to bear if the conflict continues, because there is no incentive for non-State actors to stop it[82]. Considering compliance with IHL as a mitigating factor in treason charges might be another option.[83]

The peace process in Columbia, which at the time of writing is still ongoing, is an example of amnesties being part of a settlement.[84] But, it also highlights that many details need to be worked out for such amnesties to be

77 Petrov, 'NSAs and LOAC' (n 46) 310 et seq; Claus Kress, 'Der Bürgerkrieg und das Völkerrecht: Zwei Entwicklungslinien und eine Zukunftsfrage' (2014) 69 JZ 365, 370 (hereafter Kress, 'Bürgerkrieg und Völkerrecht').

78 Considering it to be *in statu nascendi*: Antonio Cassese, 'Should Rebels be Treated as Criminals? Some Modest Proposals for Rendering Internal Armed Conflicts Less Inhumane' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012) 519, 523-24 (hereafter Cassese, 'Rebels as Criminals?').

79 Art. 8 bis ICC-Statute.

80 For the discussion of a very restricted right to resistance in the case of the worst human rights violations, see: Kress, 'Bürgerkrieg und Völkerrecht' (n 77) 371.

81 See in detail, including doubts regarding the effectiveness of amnesties as an incentive for compliance with IHL, Petrov, 'NSAs and LOAC' (n 46) 305; Frédéric Mégret, 'Should Rebels Be Amnestied?' in Carsten Stahn et al (eds), *Jus Post Bellum: Mapping the Normative Foundations* (OUP 2014) 519, 539-40.

82 See Wood, 'Understanding strategic motives for violence' (n 9) 41-43.

83 Kolb, *Ius in Bello* (n 6) 495.

84 'Columbia: President Santos grants Farc members amnesty' *BBC* (11 July 2017) <http://www.bbc.com/news/world-latin-america-40564577> accessed 30 November 2017.

https://doi.org/10.5771/9783845289557-217 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

perceived as legitimate.[85] Grave breaches of IHL certainly constitute a legal red line.

F. States, Courts, Scholars and the Development of International Humanitarian Law

Both, detention and the protection of investment in armed conflicts, are far from being abstract academic subjects. *Dorota Banaszewska's*, *Charlotte Lülf's* and *Ira Ryk-Lakhman Aharonovitch's* contributions showed this concerning the topic of investment protection. *Hannah Dönges'*[86] contribution, which unfortunately could not become a part of this volume, exemplified this most clearly for the subject of detention: even peacekeeping operations detain persons who can be directly affected by the legal constraints, or a lack thereof. The reality on the ground tends to spawn challenges that had not been conceived of when the rules were initially devised. The attempt to establish a detention regime that conforms to rule-of-law standards can meet severe difficulties in practice. However, such challenges may also exert pressure on the law and relevant actors to step up to the occasion and develop a framework which allows for reasonable solutions to the practical problems that arise.

As *Raphael Schäfer* found in his contribution, legal development, in particular changes in the laws of armed conflict, has generally been gradual and evolutionary in the past, not abrupt and revolutionary. While in some instances, States have proactively regulated warfare – the treaty prohibitions of asphyxiating or deleterious gases[87] and the prohibition of laser weapons[88] seem to be the only examples so far –, most changes in IHL

---

85 Alexandra V. Huneeus and Rene Uruena, 'Introduction to Symposium on the Columbian Peace Talks and International Law (November 3, 2016)' (2016) 110 AJIL Unbound 161.

86 Doctoral Researcher at the Centre on Conflict, Development & Peacebuilding (Graduate Institute Geneva) and a PhD Candidate in International Relations/Political Science at the Graduate Institute of International and Development Studies.

87 Declaration concerning the prohibition of the use of projectiles with the sole object to spread asphyxiating poisonous gases 1899 and Art. 23 lit. a HR, which of course were woefully ineffective in WWI and also fraught with some interpretative uncertainty: Thilo Marauhn, 'The Prohibition to Use Chemical Weapons' (2014) 17 YbIHL 25, 28 et seq.

88 See Kolb, *Ius in Bello* (n 6) 298.

https://doi.org/10.5771/9783845289557-217 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

have been reactive, attempting to adapt the law to 'the new realities of warfare'.[89]

Since 9/11, many proposed adaptations to the restrictions imposed on States by IHL as well as IHRL, have aimed at granting States greater freedom to meet new challenges.[90] As noted above, legitimate interpretations need to take into account all legally relevant reasons, including the will and practice of States. Overemphasising deference to States, though, may in certain situations lead to the creation of mere 'folk international humanitarian law', i.e. 'a set of concepts spoken and interpreted by a broad range of actors to provide a loose moral restraint on the organized use of lethal force'.[91] The approach of US administrations to IHL since 9/11 at least in part seems to resemble such a categorisation. As *Charlotte Lülf* notes in her contribution, in addition to international courts and tribunals, as far as they have jurisdiction, the responsibility to effectively hold States to reasonable interpretations of their competences and obligations under IHL falls first and foremost to other States in the international community, which should choose not to recognise excessive claims. The work of scholars may likewise play a role in this discourse.

If the discourse on how to interpret and apply IHL were left solely to military institutions, the demands of military necessity would likely be given too much weight at times.[92] While auto-interpretation by States is sure to remain a decisive part of IHL in the near future, the contestation of their

89 Crawford, 'LOAC since WWI' (n 48) 106; Robin Geiß and Andreas Zimmermann, 'The International Committee of the Red Cross: A Unique Actor in the Field of International Humanitarian Law Creation and Progressive Development' in Robin Geiß et al (eds), *Humanizing the Laws of War: The Red Cross and the Development of International Humanitarian Law* (CUP 2017) 215, 226-27 (hereafter Geiß and Zimmermann, 'The ICRC: A Unique Actor').

90 Modirzadeh, 'Folk International Law' (n 23) 196 et seq.

91 Ibid, 224.

92 Cf Robert Cryer, 'The International Committee of the Red Cross' "Interpretive Guidance on the Notion of Direct Participation in Hostilities": See a Little Light' in Robin Geiß et al (eds), *Humanizing the Laws of War: The Red Cross and the Development of International Humanitarian Law* (CUP 2017) 113, 135-36 (hereafter Cryer, 'ICRC and Direct Participation'); Chris af Jochnick and Roger Normand, 'The Legitimation of Violence: A Critical History of the Laws of War' (1994) 35 Harv. Int'l L. J. 49, 74; Raphael Schäfer, 'Anwendung humanitärvölkerrechtlicher Normen in asymmetrischen Konflikten: Extensive Auslegung oder "Lawfare"-Methode?' (*Völkerrechtsblog*, 23 December 2015) <http://voelkerrechtsblog.org/anwendung-humanitarvolkerrechtlicher-normen-in-asymmetrischen-konflikten/> accessed 20 November 2017.

https://doi.org/10.5771/9783845289557-217 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

interpretations by other States and scholars is likewise an important feature of international law as a decentralised legal order.[93] Indeed, interpretations advanced by scholars can contribute to adapting established IHL rules to specific situations;[94] the issuance of expert manuals that seek to restate the *lex lata* for the contingencies of naval, air, cyber, and soon, space warfare,[95] or the ICRC's customary law study,[96] speak to the relevance attached to such an enterprise.

The exact requirements of the law will, of course, remain subject to controversial debate in many cases. But it is certainly advisable to adhere to the methodological standards established in international law; even though, their nature and requirements may in themselves be subject to controversy. One should avoid the urge to fill perceived *lacunae* in the law using a methodology that could be wielded too freely, since in different hands it might produce vastly diverging results.[97] For example, the use of analogy, a methodological device well-known to many domestic legal orders, is rarely advanced or accepted in international law as an argument. Most recently, its post-9/11 use to seek an expansion of the legal options of

93 Alexander, 'Short History of IHL' (n 38) 130 et seq, and in particular 136-37; cf Anton Petrov, 'Lawfare? We need the states to interpret international humanitarian law' (*Völkerrechtsblog*, 28 December 2015) <http://voelkerrechtsblog.org/lawfare-we-need-the-states-to-interpret-international-humanitarian-law/> accessed 20 November 2017.

94 Crawford, 'LOAC since WWI' (n 48) 113.

95 Louise Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflict at Sea* (CUP 1994); Humanitarian Policy and Conflict Research (HPCR), *Manual on International Law Applicable to Air and Missile Warfare* (CUP 2013); Michael N. Schmitt (ed), *Tallinn Manual on the International Law applicable to Cyber Warfare* (2013); Michael N. Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (CUP 2017); the forthcoming Manual on International Law Applicable to Military Uses of Outer Space (MILAMOS), for further information see: <https://www.mcgill.ca/milamos/> accessed 20 November 2017.

96 For its impact, and the function of custom to adapt to new challenges, see: Jean-Marie Henckaerts, 'The International Committee of the Red Cross and Customary International Law' in Robin Geiß et al (eds), *Humanizing the Laws of War: The Red Cross and the Development of International Humanitarian Law* (CUP 2017) 83, 92, 96 et seq (Henckaerts, 'ICRC and Custom').

97 Cf Cryer, 'ICRC and Direct Participation' (n 92) 136.

https://doi.org/10.5771/9783845289557-217 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

the US in its 'War on Terror', also as regards detention in NIACs, showed clearly the potential implications of such a development.[98]

Since questions of methodology are always questions of competence, anyone interpreting and applying IHL must take into account his or her position in the law-making process. An interpretation too detached from the interpretative constraints of State will and practice might be rejected in practice. The resistance to the Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law advanced by the ICRC in 2009[99] and even its customary law study[100] is a case in point. Regarding the latter, the theoretical question of what counts as State practice and *opinio juris*, and how such material should be evaluated formed a decisive part of the critique by States and scholars.[101]

It has also been noted that interpreters should be wary of too uncritically equating an expansion of the law with progress.[102] Scholarly attempts at

98 Heller, 'Use and Abuse of Analogy' (n 18) 234, 275 et seq, rejecting such analogies as unlawful under international law.

99 ICRC, *Direct Participation* (n 20); Kenneth Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance' (2010) 42 JILP 641, 693-94: '… certainly not a re-statement of existing law … does not reflect either the nature of warfare or the historical and contemporary scope of armed conflict … bias against State armed forces …'; Parks, 'No Mandate (n 20). For a defence, see: Melzer, 'Keeping the Balance' (n 20).

100 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law,* vol. I: Rules (CUP 2005).

101 See 'Letter from John Bellinger III, Legal Adviser, U.S. Dept of State, and William J. Haynes, General Counsel, U.S. Depart. of Defense, to Dr. Jacob Kellenberger, President, International Committee of the Red Cross, Regarding Customary International Law Study, November 3, 2006' reprinted in (2007) 46 ILM 514, 515-16, calling for a 'more rigorous' approach to the ascertainment of State practice and *opinio juris*; confirmed in Department of Defense, *Law of War Manual* (2015) 1075; likewise Daniel Bethlehem, 'The Methodological framework of the Study' in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP 2007) 3, 4 et seq; Iain Scobbie, 'The approach to customary international law in the Study' in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP 2007) 15, 27: 'less stringent [than the ICJ in the *North Sea Continental Shelf* case]'.

102 See, maybe somewhat too critical in his appraisal of International Criminal Law: Jean d'Aspremont, 'The Two Cultures of International Criminal Law' in Kevin J. Heller et al (eds), *Oxford Handbook of International Criminal Law* (OUP 2018, forthcoming), Working Paper available <https://ssrn.com/abstract=2910295> accessed 20 November 2017.

https://doi.org/10.5771/9783845289557-217 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

'pushing' for certain rules to rapidly become accepted as custom despite clear resistance by States[103] seem unlikely to be successful. However, clinging to a very restrictive interpretation of States' will in spite of a glaring need to interpret the law in a manner that allows for resolving issues that arise in practice might similarly delegitimise the law. Legitimate interpretations that provide reasonable solutions to legal problems require taking into account all interpretative aspects provided for in the VCLT, such as a rule's object and purpose, its effectiveness and systematic considerations. However, legal practice shows that certain marks of authority may compensate for a lack of adherence to the rules of interpretation reflected in the VCLT. For example, the Pictet Commentaries to the four 1949 Geneva Conventions, written a decade prior to the adoption of the VCLT, emphasized subjective aspects of interpretation rather than objective ones, i.e. they relied heavily on the *travaux préparatoires* and the circumstances of the treaties' conclusion (the 'spirit of the time'). Nevertheless, the commentaries were widely taken into account in legal practice by reference to their authority[104] and established a basis for many concepts which are widely accepted today in IHL as well as in international criminal law.[105]

When reflecting on their profession, and in particular when attempting to apply indeterminate legal concepts to the challenges of contemporary times, lawyers should bear in mind not only their own role in the law-making process, but also the purpose and limits of the law they interpret. The increased input-legitimacy of being mandated to study State practice or

103 Explicitly so, envisioning to recruit the ICRC and the UN GA as 'midwives', Cassese, 'Rebels as Criminals?' (n 78) 524.

104 See eg *Prosecutor v Milutinovic et al* (Judgment Volume 4 of 4) IT-05-87-T (26 February 2009) Annex B; *Prosecutor v Stanisic and Zupljanin* (Judgment Volume 3 of 3) IT-08-91-T (27 March 2013) Annex III; *Prosecutor v Hadzihasanovic et al* (Decision on interlocutory appeal challenging jurisdiction in relation to command responsibility) IT-01-47-AR72 (16 July 2003) para 15; *Prosecutor v Tadic* (Judgment) IT-94-1-A (15 July 1999) para 93; Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*) [2002] ICJ Rep 3, 63, para 31.

105 For further reading, see Linus Mührel, 'Die Kommentare des Internationalen Komitees vom Roten Kreuz, ihre Autorität und ihr Einfluss auf die Entwicklung des humanitären Völkerrechts im Wandel der Zeit' in Sebastian Wuschka et al (eds), *Zeit und Internationales Recht* (Mohr Siebeck 2018, forthcoming).

https://doi.org/10.5771/9783845289557-217 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

interpret the law – enjoyed to some degree by the ICRC –[106] increases the significance that a contribution might have in legal discourse, but is certainly not determinative of it.[107] States may yet reject its interpretations.[108] While certainly not free to devise new solutions from scratch – unless labelled *de lege ferenda* –, interpreters cannot be restricted to only that which has already been thought. If that were the case, no development save by treaty amendment or compellingly clear State practice would be possible. It is also legal scholars' task to devise possible solutions to new challenges by employing legal methodology.[109] Maybe it is one of the enduring lessons of *Lotus* that, in doing so, the burden of argumentation rests on them. Yet, the existence of abstract terms and general clauses in IHL treaties, in particular the Martens Clause,[110] and the existence of diverse aspects relevant for interpretation in the VCLT, show that the law is meant to regulate even situations unthought-of before, as well as respond to new challenges.

Interpretive proposals *de lege lata* as well as proposals *de lege ferenda* which aim to adapt the law to new challenges, must take into account not only humanitarian concerns, but also the demands of effective warfare if they seek to make an impact.[111] This also includes the need for obtaining as

106 See in general: Geiß and Zimmermann, 'The ICRC: A Unique Actor' (n 89) 215; Kelisiana Thynne 'The role of the International Committee of the Red Cross' in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016) 477, 481, 486-90; for the customary law study: Henckaerts, 'ICRC and Custom' (n 96) 96 et seq.

107 For the critical reactions to the ICRC's Interpretive Guidance on Direct Participation, see: Cryer, 'ICRC and Direct Participation' (n 92) 132 et seq.

108 Geiß and Zimmermann, 'The ICRC: A Unique Actor' (n 89) 237.

109 See Anne Peters, 'The Rise and Decline of the International Rule of Law and the Job of Scholars' in Heike Krieger et al (eds), *The International Rule of Law: Rise or Decline?* (forthcoming), Working Paper available <https://ssrn.com/abstract=3029462> accessed 20 November 2017.

110 Cf Kolb, *Ius in* Bello (n 6) 122-26.

111 Most clearly: Geoffrey S. Corn et. al, 'Belligerent Targeting and the Invalidity of a Least Harmful Means Rule' (2013) 89 International Law Studies 536, 541: '… LOAC must, as it has historically, remain rationally grounded in the realities of warfare', and *in concreto* 610 et seq; see also on this Cryer, 'ICRC and Direct Participation' (n 92) 132 et seq; Jochnick and Normand, 'The Legitimation of Violence' (n 92) 83-84, although *in concreto* too critical of the practicality of the 1923 Hague Rules of Air Warfare, for whose (partly) customary law status see: Michael N. Schmitt, 'Air Warfare' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014) 118, 121-22.

https://doi.org/10.5771/9783845289557-217 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

much legal certainty as possible. Members of armed forces, who manage high levels of factual uncertainty in fulfilling their tasks,[112] have a keen interest in knowing precisely what the law requires from them so as not to become liable to disciplinary sanctions or criminal prosecution.[113] Considering the dynamic nature of warfare, military personnel applying the law will often, and legitimately so, enjoy discretion in making *bona fide* decisions on the ground.[114] These are structural cornerstones of IHL that cannot be spirited away: IHL is not only intended to protect the individual, but also to enable States to wage armed conflicts effectively. Any expectations that IHL will abolish suffering completely and at the same time attract perfect compliance will necessarily be disappointed. But attempts to interpret IHL in a manner that would unreasonably relax existing restrictions on warfare to the detriment of the protection of individuals should likewise be disappointed.

During the first conference of the SFB Project C8 in 2011, *Robert Cryer*[115] aptly described this state of affairs and the sometimes seemingly excessive expectations towards IHL in the following manner: 'International Law isn't Mommy. It's not going to make everything all right'. But the aspiration that the law can make a contribution, and lead to reasonable solutions legitimately adapted to new challenges, should not be abandoned.[116] It is our hope that this volume makes a small contribution to that endeavour.

112 See eg Barry R. Posen, 'Foreword: Military doctrine and the management of uncertainty', 39 (2016) Journal of Strategic Studies 159.

113 Amichai Cohen, 'Legal Operational Advice in the Israeli Defense Forces' (2011) 26 Connecticut Journal of International Law 367, 384; Jeremy J. Marsh and Scott L. Glabe, 'Time for the United States to Directly Participate' (2011) 1 VJIL 13.

114 Cf Henry, *Nécessité militaire* (n 20) 686.

115 Professor of International and Criminal Law, University of Birmingham (United Kingdom).

116 Cf Cryer, 'ICRC and Direct Participation' (n 92) 133-34.

https://doi.org/10.5771/9783845289557-217 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

https://doi.org/10.5771/9783845289557-217 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY