

9 Governing Armed Conflicts

The ICRC between Hierarchy and Networks

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This chapter examines the governance of the regulation of armed conflict and the central role played by international humanitarian law (IHL) and the International Committee of the Red Cross (ICRC). Historically, states and non-state actors have tried to regulate armed conflict through various means, but with the adoption of the first Geneva Convention in 1864 law became a critical element. In brief, IHL is a “set of rules that seek to limit the effects of armed conflict[,] protect[ing] people who are not or are no longer participating in hostilities and restrict[ing] the means and methods of warfare.”¹ The modern governance of the regulation of armed conflicts begins in 1863 with the creation of what was to become the International Committee of the Red Cross (ICRC), a private Swiss initiative led by Henry Dunant who mobilized states to adopt the first Geneva Convention the following year. States endorsed Henry Dunant’s vision of an international binding legal framework accompanied with a network of neutral, impartial, and independent actors (originally the National Societies of the Red Cross) to assist the wounded on the battlefields. This led to a model with states as the law-makers and duty-bearers of IHL, the ICRC as a guardian and promoter of IHL, and a network of National Societies tasked to support their states in the implementation and promotion of IHL. As such the original mode of governance was a combination of hierarchy and network with several actors including the ICRC and National Societies supporting states and each other in the application and promotion of the existing rules. And this arrangement has largely stayed in place ever since.

This makes the ICRC quite unusual when situated against the other chapters. It indeed has a somewhat unusual status and is a different kind of creature in comparison to other actors in this volume. Although it

The views expressed in this chapter are those of the authors and do not necessarily reflect the views of the ICRC. The authors would like to thank Michael Barnett for his advice and Saman Rejali for her support in the drafting of this chapter.

¹ ICRC 2018b.

received a mandate from states under the 1949 Geneva Conventions, it is a private association under Swiss law. This combination makes it a unique, *sui generis* body in international relations. In addition, here is an organization and a mode of governance that seemingly withstood considerable shocks, wars, and trends in the global environment. In almost all the other cases there are various factors that cause a change in the mode of governance and the social relations between actors. But not here. The obvious question is: why? First, the resilience of the ICRC owes to several factors, including: the endorsement by states and Switzerland in particular; its cohesion, status in international affairs, expert authority; and its transformation into an operational actor in armed conflicts. Second, as states remain the main actors of governance the very nature of armed conflicts (power struggles, rivalries, emergence of non-state armed actors, etc.) hampers them from building a governance model where the main functions (i.e., rule-making, implementation, dissemination, application, enforcement) would be carried out by them or through international mechanisms in a predictable, systematic, and universal way. Hence the need for impartial, independent, and neutral actors has always remained.

This chapter is organized in the following way. The first section examines the modern origins of the global governance of the regulation of armed conflict. The second section looks more closely at the current landscape to consider whether and how new pressure points and opportunities may have forced a change in the mode of governance. First it examines how the expansion of contemporary IHL and the growth of other areas of international law have increased legal complexity. Second, it examines the growing diversity of the actors involved in the regulation of armed conflict. Although such trends suggest that the hierarchy is being worn down, we claim that it remains strong in place, even when it seems to be in the shadows. We conclude by considering the relationship between the resilience of this governance model and the effectiveness of protection during armed conflict.

Origins of the Governance of the Regulation of Armed Conflict

There is a long history of norms, rules, and customs regulating armed conflict, but it was not until the mid-nineteenth century that there developed a body of international law. There are various ways to narrate the background factors that contributed to its rise at this moment, but most impactful was the combination of the growing brutality of war, the rise of national armies, and new reporting and visual technologies that

brought the war into the public's gaze. There were also several prominent personalities. In the United States for instance, Florence Nightingale and Francis Lieber had been advocating for the development of rules during warfare through national codes, the former to include medical services within the armed forces, the latter to regulate the detention of captured prisoners and place some restraints in the conduct of hostilities.² Such initiatives did not reach permanence because they were drafted for specific events and relied on unilateral commitments from belligerents.

The breakthrough from voluntary national codes such as the Lieber Code to international binding law occurred at the instigation of Henry Dunant. A Swiss businessman who was traveling to obtain letters of support for a commercial venture, he witnessed the horrific aftermath of the Battle of Solferino in 1859. His experiences led him to write a memoir: one of the first unsanitized portraits of war, it ended with a plea for an international agreement by states to guarantee relief for both sides of the conflict, which was to be made possible through the support of neutral and impartial relief societies, independent from but recognized by states. His memoir became widely read and four fellow Genevois, Gustave Moynier, General Guillaume-Henri Dufour, Dr. Louis Appia, and Dr. Théodore Maunoir, took up the cause. The "Committee of the Five," operating under the name of the "International Committee for Relief to the Wounded," invited all the European states, several other states from the western hemisphere, and four philanthropic institutions to an international meeting to discuss wartime protections for soldiers in Geneva in 1863. The conference adopted several resolutions, including the creation of national committees, which soon became the National Societies of the Red Cross and Red Crescent.

The following year, sixteen states held another conference that adopted the Geneva Convention for the Amelioration of the Condition of Wounded in Armies in the Field. The draft of the 1864 Geneva Convention had been prepared by the committee – renamed in 1875 the International Committee of the Red Cross (ICRC). The ICRC draft was then adopted by the conference without major alterations.³ Neutrality, which was a core concept in international relations at

² In a letter to Dunant, Florence Nightingale even dismissed his idea of creating independent relief societies: "Miss Nightingale ... entertains no doubt with regard to Mr Dunant's proposal. She says it is objectionable because first, such a Society would take upon itself duties which ought to be performed by the Government of each country and so would relieve them of responsibilities which really belong to them and which they can only properly discharge and being relieved would make war more easy" (Moorehead 1999, 30).

³ Bugnion 2009.

the time, was cleverly used by the drafters of the 1864 Geneva Convention: as attested by several of its articles, the protection of medical services, operating under the Red Cross flag – the reverse of the colors of Switzerland – is intrinsically linked to their neutrality.⁴

The governance of the regulation of armed conflict was a cross between a hierarchical and a networked mode. There were hierarchical elements, starting with states agreeing on an international treaty and being in the driving seat to regulate the conduct of armed conflict. Yet the Red Cross Movement, with its association of National Red Cross Societies, had the qualities of a network. The National Societies created a powerful group of like-minded actors, often well connected with military and political circles, capable of efficiently mobilizing resources and good will to advocate toward governments. These National Societies were created as “auxiliaries to government” but were to be recognized as part of the Movement, and granted a special independent status protected under the domestic law of each state.

Great Challenges without Change

The ICRC, IHL and this governance arrangement marched through its first half century without any major test, but that would change in its second half with two world wars, decolonization, and a growing concern with mass atrocities. The succession of these earth-shaking events posed severe questions for IHL and the ICRC, whose scope of concerns were simultaneously expanding and falling short of expectations. The surprise is not that the mode of governance changed, but rather that it remained largely the same. Below we identify three major challenges and how the ICRC responded to them and how IHL adapted in a way that preserved a mode of governance that had elements of both networks and hierarchies.

The first challenge occurred after the First World War and represented a direct assault on the ICRC’s place in a growing humanitarian system. During its first fifty years, with the exception of the Franco-Prussian War (1870–1871), the ICRC’s “main activity consisted of ‘literary’ work, exchanging correspondence with the Red Cross societies, and theoretical considerations on the relief in time of war.”⁵ In response to the First World War though, it grew from a “small philanthropic organisation” of a dozen of people to 1,200 staff in a few months and expanded its scope of activities into operations and monitoring compliance with IHL by the belligerents.⁶ These and other activities not only promoted IHL but also

⁴ Segesser 2013. ⁵ Palmieri 2013, 1277. ⁶ Palmieri 2013, 7.

elevated the authority of the ICRC.⁷ Just as the ICRC was embracing its expanded, operational role, it had to confront a new rival in the form of the League of the Red Cross Societies (now the International Federation of the Red Cross and Red Crescent Societies). Henry P. Davison, then chairman of the American Red Cross's "War Committee" – who had considerable support from US president Woodrow Wilson – pushed the idea of replacing the loose network of Red Cross societies and the ICRC with a more hierarchical mode modeled on the newly created League of Nations (even if only composed of the National Societies on the winning side of the war).

With the support of the Entente (with Britain and the US at its head) and the League of Nations, which wanted to be its humanitarian counterpart, and riding the wave of universal pacifism following "the war to end all wars," the League intended to expedite and modernize the work of the Red Cross by addressing social activities and preventive health care in peacetime. Given these new aims, the ICRC no longer had an active role because the League intended to take over many of its skills and responsibilities. The ICRC was therefore destined to become a "museum piece."⁸

In this context, the focus of this emerging system of governance could not be IHL, which was promised to also become a "museum piece" as there would be no more war.

The ICRC managed to survive this first major existential crisis due to several factors. First, its *raison d'être* remained highly relevant. At a time when pacifist movements wanted to banish war, the ICRC could have been seen as being out of step by continuing to implement its mandate to protect victims of armed conflict. But these visions of world peace quickly vanished and the need for regulating war remained. In parallel, the very homogenous Swiss, Geneva-based composition of the ICRC's governing entity presented a unified front in favor of the status quo, while the American-driven proposal for a new model did not receive the expected support.

Also, the ICRC did not seek to establish a "monopoly," and offered various ideas for the creation of new treaties and the expansion of the network operating on the regulation of armed conflict. For instance, Gustave Moynier was the first one to suggest the creation of an international court to judge suspects of war crimes in 1872.⁹ The ICRC gave its patronage to the Geneva-based International Save the Children Union in 1920. In 1921, Gustave Ador, then president of the ICRC, addressed members of the League of Nations and "urged the Council to appoint a

⁷ Cameron 2015.

⁸ Palmieri 2013, 1280.

⁹ Hall 1998.

commissioner to deal with the thousands of Russian refugees then spread out across Europe. He called the League the ‘only supranational political authority capable of solving a problem which is beyond the power of purely humanitarian organisations’.¹⁰ This call was heard, and the Council of the League eventually created a high commissioner for refugees, appointing the Norwegian explorer Fridtjof Nansen to that position.

A second major development could have challenged the model of governance and the role of the ICRC: the creation of the United Nations after the Second World War. However, in the beginning the UN had a tricky relationship with IHL. As an organization created at the end of the Second World War with the view to ensuring international peace and security, the UN was confronted with a dilemma. States had agreed in the UN Charter to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”¹¹ Getting involved in substantive discussions on IHL, and in particular on the regulation of international armed conflict, could be seen as conflicting with its *raison d’être*. For the UN, working toward or even encouraging the development of IHL would have meant getting involved in the regulation of a situation that it was precisely meant to prevent – this would have been considered as an implicit recognition of the failure of the new world order.

While several articles of the UN Charter, including its first article, enjoins the UN “to promote and encourage respect for human rights and for fundamental freedoms for all,”¹² there is no mention of IHL. In return the 1949 Geneva Conventions do not mention the United Nations. Also, the distinction between *jus ad bellum* and *jus in bello* discouraged the UN from being initially involved in the development of IHL. Having said this, the UN later reconsidered its position and became more active because of the United Nations operations in Korea and in the Congo. The first historical mark of this change was Resolution XXIII of the International Conference on Human Rights (Tehran, 1968), which became General Assembly Resolution 2444 (XXIII) of December 19, 1968. Entitled “Respect for human rights in armed conflicts,” the resolution “codified basic humanitarian principles applicable in all forms of armed conflict, and at the same time gave decisive impetus to the process which eventually led to the adoption, in 1977, of the two

¹⁰ Skran 2018. ¹¹ UN Charter 1945, Art. 2(4).

¹² See Art. 1(3) UN Charter. See similar mentions in Preamble, and Arts. 13(1)(b), 55(c), 62(2), 68, and 76(c) UN Charter.

Protocols additional to the Geneva Conventions.”¹³ In parallel the UN became involved in the regulation of weapons, which it viewed as within its mandate of international peace and security.

The third challenge to the ICRC and IHL was their overall efficacy, which was questioned as a result of the numerous atrocities committed during the world wars. However, the ICRC responded by promoting the development of IHL to answer new contemporary challenges. The ICRC usually followed the same process over time: assemble the most complete documentation with a view to highlighting what specific legal issues – and in particular those directly linked to humanitarian challenges – needed to be added, confirmed, or changed; draft projects of conventions with the help of experts from governments, National Societies, and other aid organizations; and submit these projects to the International Conferences of the Red Cross and Red Crescent and then to a diplomatic conference for adoption. Following the First World War a diplomatic conference adopted the two Geneva Conventions of 1929. After the Second World War (and while the Movement had issued resolutions to address the legal gap in the protection of the civilian population already in 1921, 1923, and 1925) another diplomatic process led to the adoption of the four Geneva Conventions of 1949. Following the numerous examples of decolonization wars or guerrilla wars in the 1950s–1970s, yet another diplomatic process led to the adoption of the two Additional Protocols of 1977. In these and other moments the ICRC played a critical role in preparing the Diplomatic Conferences, through the drafting of texts to be discussed, organization of conferences of government experts, and being an active member during the diplomatic processes themselves.

The best illustration of the perpetuation of the original hybrid model of governance by states, the Movement, and non-state entities today is perhaps the periodic International Conferences of the Red Cross and Red Crescent. First held in 1867, the latest one took place in December 2019 with its 33rd edition. These conferences bring together institutions born out of private initiative – that is the components of the Movement – and the states party to the 1949 Geneva Conventions. Such a hybrid composition is virtually unique among international bodies (with the exception of the International Labour Conference, which brings together the member states of the International Labour Organization and the trade union federations and employers’ federations of those countries). Not only do governments take part in the International Conferences, but they do so “on an equal footing with other entities.”¹⁴

¹³ Gasser 1995. ¹⁴ Casalin and Lamb 2009. 91, Number 876, December 2009, p. 733.

It is generally accepted that the International Conference is a key moment of IHL governance. The conference serves as the “supreme deliberative body for the Movement.”¹⁵ In particular, François Bugnion highlights the role of the International Conferences for the following two critical functions of IHL governance.

- The development of international humanitarian law: there is no doubt that the Conference has contributed to every stage of the development of international humanitarian law, by virtue of the fact that it is a key place of dialogue between the Movement and the states;
- Respect for international humanitarian law: each conference enables a dialogue to take place between the Red Cross and Red Crescent institutions and the states on the subject of respect for humanitarian law.¹⁶

Indeed, while the resolutions adopted during these conferences are non-binding, they have often led to concrete developments. The Geneva Conventions of 1949 were developed at the International Conference in Stockholm in 1948, prior to their adoption the next year. In 1965, the conference adopted the Movement’s fundamental principles – which guide an immense array of humanitarian activities across the globe. In 1995, the 26th International Conference had a major impact in shaping the landscape of IHL for the following two decades. First, the ICRC was invited to prepare a report on customary rules of IHL. Thanks to this mandate the ICRC carried out an extensive study on customary law, which was published in 2005¹⁷ and later turned into a regularly updated online database.¹⁸ Second, the 1995 conference also requested the ICRC to strengthen its capacity to provide advisory services to states, in their efforts to implement and disseminate IHL. On that basis the ICRC’s Advisory Service on IHL was created to assist in the national implementation of IHL, and remains active today.¹⁹ Third, the 1995 International Conference contributed to create the momentum around the international campaign to ban landmines.

More recently, the ICRC has been seizing this periodic opportunity to share its report of activities, as well as recommendations or plans of action on the implementation of IHL, and its assessment of the evolving challenges to IHL.²⁰ In parallel, numerous pledges, including in relation to IHL, are traditionally adopted at each International Conference by all participating entities. Such endeavors provide concrete opportunities not only for the ICRC but also for each National Society to continue

¹⁵ Movement Statutes, Art. 8. ¹⁶ Bugnion 2009, 707.

¹⁷ Henckaerts and Doswald-Beck 2005. ¹⁸ ICRC, *Customary IHL*.

¹⁹ See [ICRC 2015b](#). ²⁰ See for instance: [IRRC 2015](#).

engaging in a constant dialogue with states on the application, promotion, and implementation of IHL. Finally, the International Conferences can pave the way for expert meetings and other types of conferences to interpret or clarify IHL.

What is remarkable is that despite the extraordinary challenges posed by the world wars and the lack of compliance with IHL, and even criticism of the ICRC's actions during the wars, there was little change in the mode of governance. Yet over the next several decades there occurred various developments that have continued to challenge this mode of governance, including changes in the conduct of war and the desirable responses and the expansion of actors involved in the regulation of armed conflict.

The Contemporary Challenges to the Mode of Governance

The mode of governance survived the strains and challenges posed by successive wars. This section addresses the evolution of the main tool of the governance model: IHL itself. While the most basic rules of IHL are frequently violated in modern armed conflicts and much work remains to be done to promote and enforce them, it is striking to note that there is a growing sophistication of the debates on IHL. Below we identify the impact of three important developments on international humanitarian law.

An Increasingly Complex Legal Environment

The evolution of armed conflict and the expansion of the range of issues to be governed have led to an increasingly complex legal regime. These and other factors triggered various efforts to clarify or expand IHL, including on themes such as direct participation in hostilities,²¹ the law applicable to detention during peace operations,²² and the regulation of autonomous weapons systems.²³ Additionally, human rights law has expanded in scope and become much more involved in the regulation of armed conflict. In this section we identify several important trends.

The first is the growing refrain regarding the “humanization of IHL.”²⁴ IHL initially developed through two parallel branches: the Law of Geneva and the Law of The Hague, in reference to the two cities where the main conventional instruments of IHL were adopted. Geneva

²¹ ICRC 2009. ²² Copenhagen Principles 2012. ²³ LAWS 2016.
²⁴ Meron 2000.

law is often presented as focusing on the principle of humanity, away from the battlefield and aimed at the protection of persons who do not or no longer participate in hostilities (the wounded and sick, shipwrecked, prisoners of war and internees, and civilians). The ICRC is often seen as the principal guardian of Geneva law. Hague law – from the two Hague Conferences of 1899 and 1907 – is usually presented as focusing on the principle of military necessity: the legitimate purpose of war is to weaken and defeat the opposing army, but with due considerations for humanity.²⁵

These two areas of IHL began to converge after the Second World War. The first important step came with the Fourth Geneva Convention (GC IV) as it expanded to include the protection of civilians, using the term “rights” in some instances, and complementing the regulation of occupation already dealt with in the Hague Regulations. But the merger truly began with the two Additional Protocols to the Geneva Conventions in 1977, which also introduced tensions. As Charles Garraway writes, “This convergence in itself has caused tension due to the differing philosophies that governed the two independent strands”.²⁶

The bringing together of “Hague” and “Geneva” law in 1977 was the start of a major upheaval in the laws of armed conflict. The ICRC now saw themselves as the guardians not only of traditional “Geneva law” but also of “Hague law.” Both were now incorporated in the new terminology “international humanitarian law” and this led to an increasing concentration on the humanity side of the balance. The United Nations, now perhaps somewhat more realistic than in the halcyon days immediately after the Second World War, moved into the “Hague law” field with a concentration on weaponry.²⁷

In his view, instead of conciliating “the necessities of war with the laws of humanity,” the concentration was now on fixing “the technical limits at which the necessities of war ought to yield to the requirements of humanity.” As Garraway concludes, “the principles that had always governed ‘Geneva law’ were now spilling over into ‘Hague law,’ which had always been much more concerned with maintaining the balance.”²⁸

This perceived “humanization” trend was reinforced by the parallel development of international human rights law after the Second World War. Human rights mechanisms have played a crucial role in developing and implementing IHL – and this involvement is not without opposition. In parallel, several scholars push for a merger between international human rights law (IHRL) and IHL.²⁹ This trend was, and still is,

²⁵ Meron 2000. ²⁶ Garraway 2013, 261 ²⁷ Garraway 2013, 268.

²⁸ Garraway 2013. ²⁹ Schabas, Doswald-Beck, Hampson and Lubell.

considered to be dangerous by most states and military lawyers, and many IHL scholars. Recent examples from military circles have shown increased concern regarding the role of the European Court of Human Rights for instance and the move toward a “human rights” understanding of IHL.³⁰

The second big development was the growth of international criminal justice. The creation of the two international criminal tribunals in the 1990s, respectively for the former Yugoslavia and for Rwanda, led to a number of cases that developed if not redefined IHL. One question to ask is whether international criminal justice, and more specifically international criminal judges, have played a role in the making of IHL, and whether such law-making competes with the will of the traditional makers of international law, namely states.³¹

A few cases have been considered groundbreaking for IHL. The case of *Tadić* in front of the International Criminal Tribunal for the former Yugoslavia (ICTY) is emblematic in this respect. Among various key achievements, the case of *Tadić* (1) proposed a refined definition of international and non-international armed conflict, which is still used today by most states and scholars,³² (2) defined both the geographical and the temporal scopes of both types of armed conflicts,³³ (3) proposed and applied an expansive interpretation of the notion of protected persons under GC IV,³⁴ (4) decided that war crimes could also be committed during non-international armed conflicts,³⁵ and (5) advocated in favor of a convergence between the law applicable in international armed conflict and the law applicable in non-international armed conflict, with the result that most protective rules applicable in the former were also applicable in the latter.³⁶

Such developments created a euphoric belief that international criminal justice could “fill in the gaps” of IHL. International jurisprudence indeed “has the potential to become a highly persuasive source of authority regarding future understanding and implementation of IHL.”³⁷

³⁰ The United Kingdom’s threats of quitting the European Convention on Human Rights exemplify this push-back for a merging between IHRL and IHL.

³¹ In this regard it is interesting to note that international criminal justice was influenced in its development by both common law and civil law traditions. In common law systems jurisprudence/case law and the judicial sector in general play important roles in interpreting and developing the law.

³² See in particular the following ICTY 1995, para. 70. ³³ ICTY 1995, para. 68–69.

³⁴ ICTY 1995, para. 76; ICTY 1997, paras. 163–169. ³⁵ ICTY 1997, paras. 86–136.

³⁶ ICTY 1995, paras. 73–76 and 96–98. See also: Cassese 1996, para. 11.

³⁷ IHL Clinic at Emory University 2011, 2.

However, precisely for that reason some cases were also heavily criticized for proposing an erroneous interpretation of IHL.³⁸ That said, the fact that military experts – who are the primary implementers of IHL – disagree with the interpretation of an international tribunal does not necessarily imply a competition between the actors. What is particularly interesting is that, although some case law is contested, the ICTY's mandate is widely accepted. The same experts who criticized the ICTY jurisprudence have also recognized that “one of the mandates of the tribunal is the progressive development of IHL.”³⁹ In other words, the mode of governance is a network. Disputes and differences of opinion are resolved through negotiation and persuasion, and the fact that international criminal justice can shape IHL shows that parallel means and mechanisms can be used to reach a common goal.

Growing Diversity

The purpose of IHL is to regulate the behavior of belligerents. While this seems quite obvious, the complexification of warfare has transformed the task of promoting respect for IHL. The diversification of the parties to armed conflict means that it is no longer sufficient to engage in a dialogue with state authorities: one now has to consider the high increase in the number of non-international armed conflicts (NIACs), and hence of non-state armed groups being party to them. Furthermore, there are new networks and coalitions formed at the national, regional, and international level by government and civil society experts.⁴⁰ Also, the main organizations active in the regulation of armed conflict, the ICRC and the UN, have evolved within this context of diversification of actors.

One area of growing diversity reflects the changing nature of war. Until roughly the end of the Second World War, regulating the behavior of belligerents mainly meant regulating the conduct of state armies during interstate conflicts. Yet, today most armed conflicts are not of an international character. In parallel, most of the rules of IHL apply to interstate conflicts. While IHL does contain many rules regulating NIACs, be they conventional (common Article 3, Additional Protocol II, or weapons conventions applicable in NIAC) or customary, it often remains difficult to further regulate noninternational armed conflicts, as this raises

³⁸ See e.g. ICTC, Gotovina case. See also IHL Clinic at Emory University 2011.

³⁹ IHL Clinic at Emory University 2011, 13.

⁴⁰ For instance, Slaughter (2005) contends that the new forms of global governance are fairer because they are less hierarchical and less state-centric.

questions of sovereignty and the perception of a risk of legitimizing “rebels,” “bandits,” or, nowadays, “terrorists.”

The governance of IHL has always included dissemination of the law to weapons bearers. One way of doing so is to integrate IHL into military training and military manuals – an area that is actually a core obligation of states under IHL. The increasing involvement of non-state armed groups as parties to armed conflicts, however, also created the need to disseminate IHL to this category of belligerents. Activities aimed at integrating IHL into military practice only involve a small number of active actors (if we focus on non-military actors), which in the majority of cases cooperate well toward a common goal of ensuring awareness of the laws governing war among the primary actors involved in armed conflicts. This tends to demonstrate a network mode of governance. The ICRC is an obvious actor in this field, but not the only one. The International Institute of Humanitarian Law, based in San Remo, Italy, typically trains representatives of armed forces, and Geneva Call, a Geneva-based nongovernmental organization (NGO) created in 2000 is today generally dedicated to promoting respect for IHL and protections of civilians.

New networks and coalitions represent a second major change in the growing diversity in the regulation of armed conflict. Contemporary armed conflicts tend to present practical issues that the law does not always address with extreme clarity; hence a number of initiatives have been launched in the last decade or so with the purpose of identifying the law applicable to certain areas of armed conflicts. The goal was usually not to create new law (as mentioned, law-making is a state competence) but rather to try and clarify existing law, with the view to helping belligerents determine the applicable law and hence better respect it. The first of these attempts was the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea. The manual was developed by a group of legal and naval experts participating in their personal capacity, following a series of meetings convened by the San Remo Institute.⁴¹ The number of initiatives meant to “clarify” or “identify” existing law increased afterward: ICRC Study on Customary IHL, HPCR Manual on International Law Applicable to Air and Missile Warfare, Copenhagen Principles of Detention by Multinational Forces, Tallinn Manual on the International Law Applicable to Cyber Warfare, and similar initiatives are underway regarding the use of force in outer space.

⁴¹ San Remo Manual 1994.

Second, state structures created to ensure proper implementation of IHL may see a strong involvement of civil societies, and in particular of the National Societies. In this respect the national committees of IHL are the perfect example of how states and non-state actors can work together. IHL national committees are (optional) interministerial or interdepartmental entities that a state may decide to create within the executive branch to gather the various stakeholders on IHL-related matters. Such national committees are usually made up of representatives of the ministries or departments concerned with implementing IHL (e.g., depending on the state this may include defense, foreign affairs, internal affairs, justice, finance, education, and culture), representatives of legislative committees, as well as scholars, humanitarian organizations, the National Society of the Red Cross or Red Crescent, and the media. The national committees are traditionally tasked with a variety of activities, from advising and assisting the government in implementing and spreading knowledge of IHL, to making recommendations for new legislation, amendments, or administrative regulations. Although often unknown to the general public and ignored even by lawyers, the ICRC lists 115 national committees active as of December 31, 2020.⁴²

There is also a growing influence of local and transnational civil society in the governance of weapons regulation. The birth of IHL corresponded with the start of the industrial revolution in warfare, and hence IHL governance has always been interested in technologies. The rapid changes in warfare technologies have fueled several initiatives from the legal community and NGOs. The role of civil society in this area has significantly grown since the late 1990s, and particularly since the Coalition Against Landmines. The latter created a new way to draft treaties. Instead of following the traditional way of opening diplomatic conferences to all states (at the risk of having different states pursuing different objectives), the coalition gathered several NGOs, supported by some strong sponsor states, and set a different methodology: only states that accepted the end goal – the total ban of anti-personnel landmines – were allowed to take part in the drafting discussions. The approach by thematic campaigns developed afterward (e.g., Article 36, cluster munitions, autonomous weapons systems), with the latest example being that of the Treaty on the Ban of Nuclear Weapons. In general, notwithstanding, the growing diversity of actors, the mode of governance has largely remained static.

⁴² Advisory Service on IHL 2018.

The “Shadow of Hierarchy”

Based both on its legal expertise and on the legitimacy conferred by its field presence, the ICRC has developed its “humanitarian diplomacy” led from its headquarters and its network of missions in Addis, Brussels, New York, and the capitals of regional and global powers. Marion Harroff-Tavel defines this concept as follows: “The ICRC’s humanitarian diplomacy is a strategy for influencing the parties to armed conflicts and others - States, non-State actors and members of civil society. Its purpose is purely humanitarian and it is carried out through a network of sustained relationships – bilateral and multilateral, official and informal.”⁴³ Convincing states to apply or develop IHL is one of the main goals of these diplomatic efforts.

The UN has also evolved. Contrary to the early days of its existence the UN does not shy away from invoking IHL anymore. The UN Secretary-General and the president of the ICRC even issued a joint call for respect for IHL in 2015.⁴⁴ IHL is now referred to very often by UN specialized agencies and in United Nations meetings, reports, and resolutions. A good illustration is the annual Report of the Secretary-General on the protection of civilians in armed conflict,⁴⁵ which are emblematic of an “IHL diplomacy” by the UN.

The UN has expanded its diplomatic efforts in recent years, and some of its organs regularly invoke IHL, such as the Office of the High Commissioner for Human Rights. Similarly, some NGOs, local and international, refer to IHL on a more systematic basis.⁴⁶ But the humanitarian sector has not necessarily followed this trend, and the use of IHL in field or advocacy work remains occasional. While further research is needed, it appears that few NGOs use IHL systematically in their dialogue with parties to armed conflict in the field or in their public advocacy campaigns. For instance, Médecins Sans Frontières (MSF) – while a strong promoter of the humanitarian principles – hardly ever invokes IHL in its public communication or advocacy efforts,⁴⁷ with the notable example of its reaction after the attack against its hospital in Kunduz, Afghanistan.

The ICRC is still seen as the main champion of IHL, the reference organization for promoting respect for and implementing IHL. One

⁴³ Harroff-Tavel 2006, 1. ⁴⁴ ICRC 2015a. ⁴⁵ UNSG Resolution 2018, 462.

⁴⁶ For instance, the NGOs ALMA in Israel and Al Haq in Palestine, or reports from Amnesty International or Human Rights Watch.

⁴⁷ Rony Brauman explains that MSF should not refer to IHL (Brauman 2018).

could wonder whether the diffuse authority of the ICRC over the governance of IHL could reflect the concept of “shadow of hierarchy.” For instance, this authority manifests itself when interpretations of the law by the ICRC are accepted by other actors, including courts, states, and their militaries, as the reference. *A contrario*, the “shadow of hierarchy” can also be demonstrated by the virulent objections raised by some states to certain ICRC initiatives to interpret or clarify existing law, for instance the ICRC study on customary IHL,⁴⁸ or the more recent initiative to update the Commentaries to the 1949 Geneva Conventions.⁴⁹ One could argue that states would not bother to raise objections if they did not consider the ICRC to be a key player in the governance of the regulation of conflicts. The ICRC’s source of authority lies within the Geneva Conventions and the Additional Protocols, which give it a clear mandate on many tasks to be carried in relation to armed conflict. On a more informal level the ICRC has managed to maintain its legitimacy over time through its long history and the enduring quality of its legal expertise, taking into account the reality of the field that the ICRC understands extremely well because of its presence in contexts torn apart by armed conflict.

Conclusion: Change, Legitimacy, and Efficacy

The governance of the regulation of armed conflict was born out of a private initiative to address the growing devastating impact of modern warfare, through the early collaboration of governments and civil society actors. States recognized that armed conflicts were by essence conducive to *inhumanity*, *partiality*, and *iniquity* and adhered to Dunant’s vision of an international network of independent entities acting as auxiliaries to states and basing their actions on *humanity*, *impartiality*, and *neutrality*. Combining hierarchical and network features, this model has proved particularly resilient.

Indeed, although one the oldest regimes of global governance, the governance of the regulation of armed conflict could have found its end following the wars and genocides of the twentieth century, fallen into obsolescence, been replaced by a new model, or been absorbed into the larger governance of peace and security under the aegis of the UN. The legitimacy of the very existence of IHL has been questioned regularly,

⁴⁸ Bellinger and Haynes 2007.

⁴⁹ ICRC 2020. Several scholars criticized the ICRC’s initiative, see e.g. Watts 2020.

with critiques coming from all sides: idealists blaming it for making wars easier to wage and cynics for exactly the opposite reason, with both agreeing it has anyway become obsolete. However, up to now no alternative model of regulation has been advanced.

Atrocities still happen in war, humanitarian access remains hampered, and there were countless victims of violations of the law over the course of the last 150 years with, all too often, impunity for the perpetrators. Nonetheless the persistence of actors of governance produced great progress for humankind such as the adoption of the four Geneva Conventions, the Ottawa treaty banning anti-personnel landmines, and the creation of a permanent international criminal court. They created the legal framework allowing impartial humanitarian organizations to operate in conflict situations. These achievements have saved countless lives over the same period.

Talking about respect, it is important to reiterate that IHL is a tool to an end: protect persons who are not or are no longer participating in the hostilities and restrict the means and methods of warfare. There are other norms (such as social norms, armed actors' own ethics, and codes or religious prescriptions) that may contribute to the same objectives.⁵⁰ Parties to armed conflict can even decide to implement more protective rules than what international law prescribes.

Even if the pace of progress has been irregular the governance model stood the test of time. It evolved over time and new actors joined in: in the past three decades international courts, NGOs, and academia have played an increasing role in the governance of the conduct of armed conflicts. In our view this diversification of actors and forums, beyond states and the Movement, did not dramatically change a preexisting "hybrid" model of governance. The latter was flexible enough to co-opt new actors. We can illustrate this evolution by looking at the main functions of governance: the development of new norms, the implementation of the rules and monitoring of their respect, and the repression of violations.

When it comes to the development of the law, states remain the central actor. As the sole entities with the authority to develop international law, states have brought forward new initiatives throughout the whole history of IHL. This includes states that are not necessarily the most powerful ones on the international scene. Switzerland played a crucial role in the creation and development of the 1864 Geneva Convention and its successor instruments, the Russian Empire initiated

⁵⁰ See for instance the ICRC 2018a.

the Saint Petersburg Declaration of 1868 as well as the diplomatic conferences that led to the adoption of the Hague Regulations, at a time where it was not as strong as it later became, and several states, including the Nordic states, have sponsored recent weapons-related conventions. Furthermore, the legitimacy of the model was strengthened after decolonization with the two Additional Protocols to the Geneva Conventions of 1977, adopted also by newly decolonized states.

For some scholars the fact that non-state armed groups are bound by rules elaborated by states without having participated in their elaboration undermines the legitimacy of the governance, in an era when the vast majority of armed conflicts are of a non-international character. The same argument is used to explain why armed groups would be less incentivized to respect the law. However, it needs to be nuanced: armed groups are far from forming a homogeneous category and their motivations to respect the law largely depend on non-legal factors.⁵¹

Beyond states, other actors have played an important role in paving the way for the adoption of new conventions. First, the ICRC has regularly been involved in the preparatory work leading to development of the law. Its legitimacy to do so increased over time as it progressively developed its own operations from the First World War on. In parallel, a growing number of other actors from civil society have emerged that run advocacy campaigns promoting the development of specific norms, such as the coalition to ban landmines or the Campaign to Stop Killer Robots.

Finally, in areas where the development of binding instruments is unlikely, the governance model has allowed for the adoption of soft law instruments and specific studies aimed at clarifying how existing rules apply to new challenges posed by warfare. Those instruments are often developed by the same actors traditionally involved in the governance of the regulation of armed conflict: state representatives, ICRC, NGOs, scholars, and independent experts.

The ICRC remains the central actor when it comes to supporting the implementation of IHL by states (mainly through the ICRC's Advisory Services) and monitoring the application of IHL in modern conflicts. The ICRC now interacts with a growing number of experts, who play a critical role when it comes to the function of implementation of existing norms of IHL: governments, the military, National Societies, specialists

⁵¹ Bangerter 2011; ICRC 2018a.

in academia, and NGOs are working to ensure a better integration of the rules into national legislation, military instruction, military manuals, academic teaching, etc.⁵² This community of experts benefits from an ever-growing amount of academic literature, manuals, and training courses. They contribute discreetly but actively to the aim of building a stronger culture of respect among weapons bearers (developing sanctions, certifications, etc.).

Innovative strategies have been adopted to ensure that the law is implemented and ultimately respected by non-state actors. For instance, Geneva Call works to make armed groups implement the law through the signing of “deeds of commitment,” the adoption of codes of conduct or trainings on IHL. Another interesting innovation in the field of implementation of the law is the International Code of Conduct Association (ICoCA). Private military and security companies (PMSCs) can join the ICoCA.⁵³ By providing platforms of discussions, certifications of compliance, and codes of conduct, the ICoCA provides a “cluster of governance” specifically adapted to translate international norms to PMSCs, within the broader governance of the conduct of armed conflicts. However, this is not a self-contained regime of governance or a kind of self-regulation club as the ultimate responsibility to regulate the conduct of PMSCs lies with states. The ICoCA helps them to implement their obligations to make sure the law is respected by these non-state actors.

When it comes to the repression of violations of the law, the development of international criminal courts and tribunals has been a much-needed addition to the model. Their jurisprudence has also enriched the interpretation of IHL and clarified some gray areas. At the same time the legitimacy of the mechanisms, in particular the International Criminal Court (ICC), is periodically being questioned. The ICC has been criticized for its slow processes, for targeting only African states, or for infringing on the sovereignty of states not party to the Rome Statute. However, it should be recalled that the governance model places the primary responsibility to repress violations on states. On that front it should be noted that many states in the world have in the recent past updated their penal codes or adopted specific acts in order to allow for the repression of international crimes at the domestic level.⁵⁴

We could add a remark on the evolution of other areas of governance and the potential impact on the governance of the conduct of armed

⁵² Bernard and Nikolova 2016.

⁵³ For an analysis of the governance of PMSCs, see Chapter 1.

⁵⁴ ICRC, National Implementation of IHL Database.

conflict itself. Today the humanitarian field is witnessing the increasing involvement of actors not traditionally concerned with armed conflicts.⁵⁵ For instance, development actors are moving away from the optimistic paradigm of development ultimately putting an end to conflicts. They are instead realizing that the benefits brought by development work is threatened, if not destroyed, by armed conflicts.⁵⁶ However, at the moment, while these new actors are not active in the field of the regulation of armed conflicts. This could nonetheless be the case in the future: with the realization that the mitigation of violence could contribute to peace – itself a precondition for human development – the network could perhaps expand beyond the initial actors and the increasing layers added over time (which include to a certain extent human rights and humanitarian circles) but also include development, environment, or business actors in the years to come.

The undeniably frequent violations of IHL can lead one to despair on the efficacy of the law. Governance actors need to adopt a more nuanced narrative on IHL highlighting its successes and impact, both when violated and when respected.⁵⁷ Showing how respect for IHL can help the international community address other types of global challenges such as displacement, development, education, or public health could also contribute to opening up the field of IHL and creating bridges with other areas of global governance.

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⁵⁵ For an analysis of trends in humanitarian governance, see Chapter 5.

⁵⁶ As an example of development actors getting increasingly interested in armed conflicts, we can mention the strategic partnership established recently by the ICRC and the World Bank (World Bank 2018).

⁵⁷ Sassòli and Issar 2015; Bernard and Nikolova 2016.

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