Under (Social) Pressure: The Historical Regulation of Internal Armed Conflicts through International Law

A DISSERTATION
SUBMITTED TO THE FACULTY OF THE GRADUATE SCHOOL
OF THE UNIVERSITY OF MINNESOTA
BY

Giovanni Fabrizio Mantilla Casas

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY

Kathryn A. Sikkink, Advisor

August 2013

Acknowledgements

Most people writing acknowledgements in books and dissertations speak of the many "debts" they have incurred in the process of completing them. Although this certainly resonates with me, here I want to resist using economistic metaphors to refer to the sincere gratitude I feel for the self-less care and attention that so many different individuals and institutions showed with regard to me and my work over the past six years.

Thanks must first go to my fantastic advisor, Kathryn Sikkink. In casual conversation with fellow students and others who have worked with her we always seemed to come to the same conclusion: we don't know how she does all she does. She's a real academic dynamo, who despite myriad commitments never once told me she could not meet to discuss my concerns or my project, and who always went out of her way to help me with whatever I needed. Best of all, she always did it gladly, with a big smile on her face. Six years after beginning this academic adventure, I am convinced I could not have had a better, more humane advisor and role-model (and wonder whether I ever will, moving forward!) Mil y mil gracias, querida Kathryn.

My other dissertation committee members were similarly available, thoughtful and kind. In particular, I wish to thank Fionnuala Ní Aoláin for believing so much in this project and for providing with *extremely* generous feedback and encouragement from beginning to end. She seems convinced that what I have written here has the potential to change the perception of some fairly important audiences about international law generally and the law of armed conflict in particular. I deeply appreciate such an astounding assessment, and truly hope that whatever becomes of this project in the future scratches the surface of "relevance." Thanks, Finn.

Ron Krebs read various (long!) draft chapters with impressive swiftness and always showed a kind disposition to discuss them in person. His careful eye and challenging comments were tremendously useful for clarifying my own thoughts. David Samuels has endured my musings about human rights and non-state actors for a few years now, and stayed happily on board even when the dissertation mutated from a Comparative Politics-tinged project to one that speaks mostly to International Relations/Law (IR/IL) folks. Thank you both, Ron and David.

My friends and family were essential in helping me get this far. Their emotional and personal support kept me afloat during the brighter and darker episodes of Ph.D. and dissertation life. Without Gabriela Sáenz, Dora Marujo-Dias and Esen Kirdis this journey would probably not have ended and certainly would not have been as enjoyable. I cannot express my gratitude in words to them—their company meant the world to me. Likewise, my mother Fabiola and my father Mario were consistently supportive from the distance, even if I never succeeded fully in explaining to them what I was studying. I promise to do better in the future. My siblings Mario Alberto and Maria Angélica also deserve a warm

mention. I hope the end product is interesting and understandable to them as well as to others uninitiated in IR/IL.

Beyond these specific individuals, my network of support, love and friendship extends widely. In Minnesota I was lucky to meet dozens of fabulous people who made my life at once fuller and lighter. They include, in no particular order: Elliot James, TJ Malaskee, Carlos Echeverría, Carlos Andrés Díaz, Ana Cuesta, Libby Sharrow, Bret Ryan, Dan Burke, Geoff Dancy, Bai Linh Hoang, Laura Thaut, EG Nelson, Jonas Bunte, Marcela Villarrazo, Verónica Michel, Menaka Phillips, Paul Snell, Robert Smith III, Azer Binnet, Chris Stone, Paul Scarth, Alex de Carvalho, Michelle Toppino, Michael Davidovich, Silvia Otero, Geoff Sheagley, John Briel, Angela Kaufmann, George Chew, Daniel Abate, Moira Lynch, Jesús Estrada-Pérez, Daniel Rosas, Adam Mielke, Juana Berrío, Tomás and Adriana Gutiérrez Meoz, Cally Ingebritson, Verónica Menaldi and Qais Munhazim. The participants of Kathryn's dissertation group, Darrah McCracken, Brooke Coe, Denis Kennedy, Ralitsa Donkova and Zhenqing "Rock" Zhang, as well as my friends Katharina Neureiter and Michelle Jurkovich, all read and provided helpful comments. Countless other friends and acquaintances that I cannot mention here, within and outside the University of Minnesota, also contributed to my sanity with their energy, good beer and yummy appetizers. They know who they are.

My friends and family in Colombia welcomed me every time I visited home with unique warmth. Their love helped me "recharge" at critical and difficult points of this process. I am especially grateful to Juan Guerra, Sergio Ruiz, Natalia Santiesteban, Maria Paula Godoy Casasbuenas, Cesar Rueda, Tatiana Acevedo, Karin Mantilla Osorio, Angel Camilo Peñaranda, Felipe Muñoz, Janice Gallagher, Angela María Restrepo, Diego Cantor, Pedro Felipe Hinestrosa Díaz del Castillo, Halim Badawi, Oscar Ortiz, Catalina Arreaza, Ángela Puentes, Jaime Landinez, Josué Rafael and Juan Diego Palacios Casas, Jorge Guillermo García, Lina Céspedez-Báez, Maria Paula Rueda and Juliana Cano Nieto, among many, many others.

Several institutions and individuals made my doctoral studies and/or this dissertation possible. The Department of Political Science at the University of Minnesota was extremely supportive and nurturing. Bud Duvall, Dara Strolovitch and Joan Tronto contributed directly or indirectly to my "success" through the years. The N. Marbury Efimenco Fellowship funded part of my coursework period, while my fieldwork and writing stages were respectively funded through a Compton International Fellowship granted by Minnesota's Interdisciplinary Center for the Study of Global Change (ICGC,) and the Robert T. Holt Distinguished Doctoral Dissertation Fellowship (DDF) in Political Science administered by the University of Minnesota Graduate School. Smaller grants such as the Andrew Dickinson and Hella Mears fellowships enabled me to make shorter but crucial trips, and an Upper Midwest Human Rights Fellowship granted through the University's Human Rights Center allowed me to spend a summer in New York City interning for Human Rights Watch in 2008. These were all indelible experiences. My thanks go to Karen Brown, Sara Braun, Catherine Guisan, Hella Mears, Sabine Engel,

David Weissbrodt and the members of various selection committees for supporting me, trusting my abilities, and for taking an interest in my research.

Beyond concrete funding sources, the hospitality of several people in Europe, the US and beyond was critical for executing this project. In particular, I have my brother Mario Alberto, my cousins Karin and Carlos Eduardo, and my friends Roberto Sierra, Julian Sánchez Berbesi, Kerstin Feurstein and Aaron Welo to thank. Paola Castaño hosted me several times in Chicago, sharing her space, her colors and her infectious joy with me every single time. Tatiana Acevedo, Nicolás Rodríguez Idarraga, Ingrid Bolivar and Tatiana Alfonso made a brief stay in Madison, Wisconsin unforgettable.

The staff of various institutions where I conducted archival and library research was also instrumental in helping me gather materials to write this work, especially the International Committee of the Red Cross (ICRC) and the International Commission of Jurists (ICJ) in Geneva, the Diplomatic Archives of France in Paris and Nantes, and the National Archives of the UK in London and of the US in College Park, MD. The ICRC also granted me permission to consult certain portions of their restricted archives. Dr. Jacques Moreillon, honorary member of the ICRC and former Director of Principles and Law at the same organization, read many chapters generously and critically, and connected me with many other important knowledgeable persons in or around Geneva. In practice he became an essential informal adviser, and for that my deep gratitude goes out to him. Drs. Yves Sandoz and François Bugnion, both members of the ICRC, likewise showed willingness to speak with me at length on the issues dealt with here. Dara Kay Cohen and Martha Finnemore kindly read my draft prospectus and provided useful advice. Frits Kalshoven, David Forsythe, Sylvie Junod, Michel Veuthey, Ben Ansell and Helen Kinsella all commented on one or a few draft chapters, helping me sharpen my approach and reconsider some views. The Political Science Department at the Universidad de los Andes in Bogotá, Colombia must be thanked for hosting a brief stint as a visiting scholar in January-February 2012. Finally, several individuals in Geneva, Colombia and elsewhere generously conceded interviews for a chapter that never made it onto the final version for reasons of focus, time and length. I thank them for their attention and in the future I promise to put their valuable insight to good use.

Other individuals who have made a profound impression in my career cannot go unnamed here. Notable amongst them is Alexandra Guáqueta, one of my brilliant early mentors. John Ruggie and Michael Barnett both also contributed in meaningful ways to my graduate development. I admire them all terribly and hope to follow in their footsteps moving forward.

A todos, muchas gracias. Hope you enjoy reading. All errors and omissions are my own.

This dissertation is dedicated to the International Committee of the Red Cross (ICRC,) for its restless efforts not only to set standards of acceptable conduct during armed conflict, but to alleviate the harms done to so many war victims, past and present.

Abstract

This dissertation investigates the political origins of the international rules for internal armed conflicts. It explores the following questions: Where do these norms and rules come from? Why have states negotiated and accepted them? How and why have international legal responsibilities been assigned to armed non-state actors waging civil wars? The two crucial international instruments of this type are Common Article 3 to the Geneva Conventions of 1949 and the Additional Protocols to those Conventions, from 1977. Through them states agreed to limit their means of action via binding treaty law while promising to extend humanitarian care to their challengers, at the risk of favoring them militarily or of legitimating their cause. States also extensively debated whether and how their armed contenders should bear responsibility. These are historically important and theoretically counterintuitive developments in international law and security, and this is the first work of political science to investigate them on the basis of extensive multi-archival research (amounting to over 35,000 declassified documents) and interviews conducted in four countries (the UK, the US, France and Switzerland.) I adopt the qualitative methods of process-tracing and focused case comparisons to answer the research questions.

The argument unveils in two phases. In a first stage, I show how international shocks, or domestic shocks of international proportions (typically, major civil wars) progressively opened windows of opportunity which 1) evinced the "need to do something" about internal conflicts; 2) motivated prominent non-state actors to take up the issue and press for change; and 3) facilitated states' acceptance to work out new international rules either by morally motivating some of them or by helping others relax their initial reluctance toward them.

Yet I argue also that socializing "the need to do something" was only half the work. Between the collapse of the old orthodoxies and the construction of new norms, much politics occurred. I theorize this second stage as one in which states waged struggles in international conferences to hammer out consensus formulae, with different groups trying to influence/coerce their opponents into accepting their vision. In 1949, for instance, while several Western democracies (including the United States, Scandinavian and Latin American countries) accepted the idea of the humanitarian regulation of civil wars, many others still fought hard to include high restrictions on its application. The Soviet Union fiercely supported the idea against all predictions, while the United Kingdom and France, already facing turmoil in their colonies, strongly opposed them and tried to warn their peers of the dangers posed by rules that might encourage or protect rebels. In the midst of these various pressures, I show how the pro-regulation majorities in the room managed to *socially coerce* (rather than persuade) skeptics into accepting the idea of making new rules. In the 1970s, under the powerful banner of self-determination, a majority coalition of newly-independent, Third World and socialist states forced the diplomatic hand of otherwise more powerful Western states into accepting polemical language that legally legitimated "armed conflicts in which peoples are fighting against colonial domination

and alien occupation and against racist regimes" as international conflicts. Simultaneously, this coalition fought hard to water down standards to regulate other types of internal conflicts, which many of them were experiencing in the aftermath of decolonization.

In a final step, having shown the effects of social coercion in diplomatic negotiations, I also detail how coerced states reacted or "pushed back" covertly by crafting counterproposals whose language seemed acceptable to them at the same time that it appeared to address the concerns of pro-regulation groups. In the case of Common Article 3 of 1949, I detail how the UK and France jointly re-shaped the resulting text to read simultaneously generous and vague, knowing this might allow them to "interpret their way out" of the commitment later on. In the 1970s, Western states swallowed the bitter pill of enshrining violent struggles for self-determination in international law while making sure the language applied only to specific and increasingly rare conflict situations. Far from representing a persuasive consensus, I argue that final regulatory outcomes in this issue-area are difficult compromises that strike an uneasy balance between various' states' concerns for status legitimacy, morality and military expediency, whose conflicted political origins partly explain their limited impact in practice.

Table of Contents

List of Tables

List of Figures

Chapter 1 – Introduction, Theory and Research Design

Historically, war has ranked perhaps highest among the interests of International Relations (IR) scholars. In addition to studying its causes, dynamics and consequences, IR as an academic subfield has long recognized war as one of the most heavily regulated of social phenomena, with webs of normative and legal injunctions attempting to govern both state recourse to armed force as well as combatant conduct during hostilities.[1]

Yet surprisingly --given this long-standing interest and recognition-- the norms and laws of war, now popularly known as "international humanitarian law" (IHL,) remain deeply understudied subjects in modern IR.[2] As I explain later, some important attention has gone into elucidating the emergence and evolution of some rules covering *inter*-state conflict or to explain why "taboos" have befallen certain weapons, among others.[3] Yet the origins, implementation and effectiveness of the international norms regulating the most prevalent type of armed contest in the world today --internal conflicts such as civil wars-- have only very recently begun to capture the imagination of the IR academe.[4] This

---

[1] Martha Finnemore, *National Interests in International Society* (Ithaca: Cornell University Press, 1996), 69.

[2] I use international humanitarian law or IHL throughout the dissertation, but recognize that the label is not undisputed. Some scholars and commentators prefer to speak of the "law of armed conflict," insisting that there is little that is humanitarian about armed conflict or war. There are also deeper historical reasons for this distinction, explained later.

[3] Martha Finnemore, "Norms and War : The International Red Cross and the Geneva Conventions," in *National Interests in International Society*, 1996; Richard Price, *The Chemical Weapons Taboo* (Ithaca: Cornell University Press, 1997); Christian Reus-Smit, *The Moral Purpose of the State: Culture, Social Identity, and Institutional Rationality in International Relations* (Princeton: Princeton University Press, 1999); Ward Thomas, *The Ethics of Destruction: Norms and Force in International Relations* (Cornell University Press, 2001); James D. Morrow, "The Institutional Features of the Prisoners of War Treaties," *International Organization* 55, no. 4 (October 01, 2001): 971–991; James D. Morrow, "When Do States Follow the Laws of War," *American Political Science Review* 101, no. 3 (2007): 559–572; Nina Tannenwald, *The Nuclear Taboo: The United States and the Non-Use of Nuclear Weapons Since 1945* (New York: Cambridge University Press, 2008).

[4] Two exceptions to this statement (with respect to the Additional Protocols) are: David P. Forsythe, "Legal Regulation of Internal Conflicts: The 1977 Protocol on Non-International Armed Conflicts," *American Journal of International Law* 72, no. 2 (1978): 272–295; Keith Suter, *An International Law of Guerilla Warfare: The Global Politics of Law-Making* (New York: St. Martin's Press, 1984). A notable recent addition is Helen M. Kinsella, *The Image*

is so despite the fact states have been formally discussing internationally-sanctioned protections and restraints applicable during civil conflict since at least 1912, and that the protagonists of many such conflicts, including the parties to the Spanish Civil War of 1936-1939, the Algerian civil war in 1956-1962, the Vietnam War in the 1960s and 70s, the Salvadorian conflict in the 1980s or the still-ongoing conflict in Colombia, have at one point or another vowed to respect some international standard, be it to refrain from attacking Red Cross workers or to respect captured combatants. More importantly, in 1949 and in the 1970s states negotiated actual international, binding humanitarian instruments to regulate internal conflicts, variously defined. These legal norms –Article 3 common to the four Geneva Conventions of 1949, and two Additional Protocols to those Conventions, from 1977,-- compel both state and non-state armed forces to, among others, respect and protect wounded, sick, surrendered and detained fighters and non-combatants, and prohibit gruesome war practices against such persons including torture, ill-treatment, hostage-taking and unlawful execution.[5] Civil society advocacy groups

---

Before the Weapon: A Critical History of the Distinction Between Combatant and Civilian (Ithaca: Cornell University Press, 2011).

[5] The full text of Common Article 3 to the Geneva Conventions (1949) reads: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict." The First Protocol governs international conflicts and wars of national liberation, while the Second Protocol complements the contents of Common Article 3 with respect to civil wars. Among others, it expands the protections for fighters put out of combat, for civilians and for objects indispensable for the survival of the civilian population. Later I elaborate on the content of these rules and instruments as needed.

have for decades drawn on these international rules to pressure for better combatant behavior during internal war, with some success.[6] More recently, these international rules provided the essential legal bases that enabled the international criminal tribunals created in the 1990s --including the permanent International Criminal Court (ICC,)-- to exert accountability for atrocities committed both by state and armed non-state actors in various internal conflicts, from the former Yugoslavia to Rwanda, Sierra Leone, Darfur, the Democratic Republic of Congo or Lebanon.

The relative academic silence vis-à-vis the origins and operation of international rules of acceptable behavior in internal conflict is thus notable. Theoretically, the sheer existence of international obligations for states countering rebellion or "national liberation" groups opens up fundamental puzzles for a discipline traditionally centered on the concept of sovereignty (and its correlate, international anarchy.) That states have agreed to enshrine international treaty limits on the violence they can inflict upon their armed challengers, even committing to showing them humane treatment, is surely a striking development.[7] Indeed, why would they create and accept such rules? The answer to this simple question is not obvious, yet until now IR scholars have not even posed it.[8] Historians and especially international lawyers have done much more to address this vacuum, but analytical efforts that go beyond description based on published records are extremely rare.[9] The puzzle extends further when one understands, as I just noted in

[6] David Weissbrodt, "The Role of International Organizations in the Implementation of Human Rights and Humanitarian Law in Situations of Armed Conflict," *Vanderbilt Journal of Transnational Law* 21 (1988): 313–365.

[7] As I explain later, human rights norms and laws represent a similar but distinct challenge.

[8] Kenneth Abbott came close, but did so obliquely by asking how the legal distinction between international and internal conflicts arose. Kenneth Abbott, "International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts," *American Journal of International Law* 93, no. 2 (1999): 368–371.

[9] Noteworthy but short treatments of the specific topic of internal conflicts are Best, *War and Law Since 1945*, 168–179; William I. Hitchcock, "Human Rights and the Laws of War: The Geneva Conventions of 1949," in *The Human Rights Revolution: An International History*, ed. Akira Iriye, Petra Goedde, and William I. Hitchcock (New York: Oxford University Press, USA, 2012), 368. Keith Suter analyzed only the process of the Additional Protocols, without reference to primary government sources; see Suter, *An International Law of Guerilla Warfare: The Global Politics of Law-Making*. David Forsythe wrote an excellent early analysis of the negotiation of

passing, that both Common Article 3 and the Additional Protocols to the Geneva Conventions purport to regulate the conduct of armed *non-state* actors, giving them not only protection but also, arguably, constituting them as legitimate bearers of international legal personality.

In this dissertation I seize squarely upon three puzzles: *How did the international rules for internal armed conflict emerge? Why did states agree to them? How can we explain regulatory outcomes and their change over time?* In so doing, I seek to contribute in particular to historical, legal and theoretical debates about the politics of international norm emergence and law-making.[10] I answer these questions on the basis of extensive primary and secondary research in the diplomatic archives of four countries (the United Kingdom, the United States, France and Switzerland) and various organizations (especially the International Committee of the Red Cross in Geneva,) as well as interviews with protagonists and experts.

Empirically, this dissertation offers one of the most exhaustive treatments to date of the historical and political process of emergence of these perhaps implausible international rules.[11] I begin in the mid-nineteenth century with the creation of the International Committee of the Red Cross (ICRC) in Geneva, a non-governmental organization that has ever since acted and been recognized as the "guardian" of humanitarian law. Step by step I identify crucial moments in the construction of

---

the Second Protocol cited earlier and on which I partly build here, see Forsythe, "Legal Regulation of Internal Conflicts: The 1977 Protocol on Non-International Armed Conflicts."

[10] I follow the now-standard definition of norms as collective standards of appropriate conduct within a given identity. Peter J Katzenstein, "Introduction: Alternative Perspectives on National Security," in *The Culture of National Security: Norms and Identity in World Politics*, ed. Peter J Katzenstein (New York: Columbia University Press, 1995); Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52, no. 4 (1998): 887–917. This dissertation investigates the origins of international legal rules, but for ease of readership I refer to "norms," "rules" and "laws" almost interchangeably. Granted, there are some important conceptual distinctions between these terms, and these are noted whenever relevant.

[11] Three comprehensive legal histories on the international rules for internal conflicts are Jean Siotis, *Le Droit de La Guerre et Les Conflits Armés D'un Caractère Non-international* (Paris: Librairie générale de droit et de jurisprudence, 1958); Rosemary Abi-Saab, *Droit Humanitaire et Conflits Internes: Origines et Évolution de La Réglementation Internationale* (Geneva: Editions A. Pedone, 1986); Lindsay Moir, *The Law of Internal Armed Conflict* (New York: Cambridge University Press, 2007).

international expectations about humanitarian protection and restraint in internal conflicts, from a time in which these were left to state discretion –and were believed to be plainly unsuited or undesirable for international treaty law,-- to a moment in which it goes without saying that internal atrocities can and should be prosecuted and punished through international legal means (the present.) In each of these stages I develop specific historically-appropriate "sub-puzzles" to frame the empirical and theoretical discussion. Along the way I also pay close attention to how debates about non-state armed actors have factored into the making of these international rules.

Theoretically, careful analysis of extensive historical evidence enables me to draw from, complicate and ultimately complement prominent rationalist and constructivist expectations about why and how international norms of this type arise. Following recent trends in IR research, my argument combines elements of the interest-based logics highlighted by rational institutionalists and the moral motives and social-relational dynamics and effects that are usually the turf of constructivists. In the process, I weld insights from both approaches to posit a causal mechanism –social coercion—which I argue helps us understand why crucial parts of these controversial rules were ultimately accepted by the Diplomatic Conferences that debated them, despite the caveats or outright opposition of powerful states. Moreover, a richer understanding of the tense politics behind the emergence of these rules allows me to suggest plausible reasons for why they may at times have been ignored in practice, contributing to current debates about rule effectiveness and compliance.

In this introductory chapter I expand on the above discussion. As a means to frame my research puzzle, I begin by presenting a general overview of the international relations and international law literatures as relevant to the concerns of this dissertation. I then develop various theoretical expectations on the basis of established IR traditions, specify ways to adjudicate between various expectations, present the dissertation's research design, and introduce my argument and its contributions at greater length. I close by laying out the chapter-by-chapter plan for the dissertation.

I. Situating the Issue

The study of international law and international relations has undergone profound rejuvenation over the past twenty years. A veritable explosion of research has emerged across a number of areas, including international trade, finance, human rights and the environment, to name a few. This transformation is noteworthy because until not too long ago prominent theoretical IR traditions (notably, realism) allowed little room or relevance for international law, despite the amount of resources and energy international political actors appeared to invest in it. The current outlook is quite another, with studies of international law capturing the pages of the most prestigious journals and presses publishing international relations scholarship. Many now speak –rightly-- of International Law/International Relations as a constituted subfield with its own acronym: IL/IR.[12]

International humanitarian law is often counted among the areas of law partaking in this surge of research. And indeed, as mentioned earlier, renowned IR scholars have considered a few of the core issues falling under the umbrella of humanitarian law or the laws of war. Martha Finnemore's study of the signing of the First Geneva Convention of 1864 provided a stepping-stone analysis along constructivist lines. Richard Price's genealogy of the chemical weapons "taboo," as well as his investigation of the swift signing and ratification of the Landmine Ban treaty in the late 1990s furthered Finnemore's efforts.[13] Helen Kinsella and Tuba Inal's explorations of the role of gender and civilization discourses in the history of the noncombatant immunity principle, and in the prohibition of rape and pillaging in war, recently entered that canon.[14] In a rationalist/game-theoretic vein, James Morrow has offered arguments about the institutional design of the regime protecting prisoners of war in international conflict, and

[12] Hafner-Burton, Victor, and Lupu 2012; Shaffer and Ginsburg 2012; Dunoff and Pollack 2013.
[13] Price, *The Chemical Weapons Taboo*. One might add here Nina Tannenwald's work on nuclear weapons. Tannenwald, *The Nuclear Taboo: The United States and the Non-Use of Nuclear Weapons Since 1945*. However, nuclear weapons are not formally banned under international law, and the "taboo" that Tannenwald investigates is not part of the humanitarian law tradition as such.
[14] Kinsella, *The Image Before the Weapon: A Critical History of the Distinction Between Combatant and Civilian*; Tuba Inal, *Looting and Rape in Wartime: Law and Change in International Relations* (University of Pennsylvania Press, 2013).

has researched the conditions under which states will abide (or not) by some of the laws of war, a conversation also joined by Benjamin Valentino and his co-authors.[15]

Beyond these efforts, however, IR has remained rather quiet about the history and implications of the plethora of agreements that constitute the modern body of international humanitarian law. The resurgence of international criminal law and courts dealing with atrocities committed in international and internal armed conflicts --no doubt an intimately related field-- has since the late 1990s injected some impetus into this agenda, but seminal questions and puzzles, especially about the older instruments, remain unaddressed.[16] Why have states historically created various intricate humanitarian conventions featuring few formal enforcement mechanisms? What explains the particular timing, design and change over time of the regulations governing the use of indiscriminate warfare?[17] Such questions, on which primary research materials are now widely available, call for fresh investigation. Even with regard to human rights, which have understandably elicited much attention and generated exciting research in recent years, theory-driven treatments of the origins and design of important treaty instruments and features is only now surfacing.[18]

---

[15] Morrow, "The Institutional Features of the Prisoners of War Treaties"; Benjamin Valentino, Paul Huth, and Sarah Croco, "Covenants Without the Sword: International Law and the Protection of Civilians in Times of War," *World Politics* 58, no. 3 (2006): 339–377; Morrow, "When Do States Follow the Laws of War."

[16] Gary J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press, 2000); Christopher Rudolph, "Constructing an Atrocities Regime: The Politics of War Crimes Tribunals," *International Organization* 55, no. 3 (September 01, 2001): 655–691; Nicole Deitelhoff, "The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case," *International Organization* 63, no. 1 (2009): 33–65; Beth A Simmons and Allison Danner, "Credible Commitments and the International Criminal Court," *International Organization* 64 (2010): 225–256.

[17] From their own vantage point, Valentino, Huth and Croco asked as recently as 2006: "If states generally do not comply with the laws of war, why do they bother to create and sign them?" Valentino, Huth, and Croco, "Covenants Without the Sword: International Law and the Protection of Civilians in Times of War," 374.

[18] On the rationalist side, see: Emilie M. Hafner-Burton, Laurence R. Helfer, and Christopher J. Fariss, "Emergency and Escape: Explaining Derogations from Human Rights Treaties," *International Organization* 65, no. 04 (October 07, 2011): 673–707; Barbara Koremenos and Mi Hwa Hong, "The Rational Design of Human Rights Agreements" (2010), http://papers.ssrn.com/abstract=1643809. In a sociological vein, see Christopher Roberts, "Exploring Fractures Within Human Rights: An Empirical Study of Resistance," Ph.D.

One crucial understudied area, as I have argued, concerns the international regulation of internal conflicts. Until now there has simply been *no* sustained theoretical examination of why states have created and accepted international rules to govern their response to rebellious armed violence within their borders, with the challenges that this may present to sovereignty. This is so despite the fact that civil wars are now widely acknowledged as the most prevalent form of armed conflict around the world, with images of civilians and combatants falling victim to violence in Syria, Libya, Iraq, Afghanistan or Colombia routinely populating media outlets. One legal tool mentioned earlier, Common Article 3 to the four Geneva Conventions of 1949 (CA3, hereafter,) entered recent public consciousness due to US misconduct with regard to captured Al Qaeda fighters in Abu Ghraib and Guantanamo, and is now more widely recognized as perhaps *the* crucial international standard of appropriate conduct in internal conflicts.[19] Yet discussion and acknowledgment have not sparked theory-driven investigations of its history, form and content. Why does CA3, for instance, refer to the violent struggles it purports to regulate obliquely as "non-international" conflicts? Why does this article not contain prisoner of war provisions? Why are civilians not mentioned explicitly? For their part, although the two other crucial legal instruments that exist to deal with conflicts occurring within states' borders, the Additional Protocols I and II to the Geneva Conventions (respectively regulating international conflicts including wars of national liberation, and civil wars) elicited some important theoretical analyses at the time of their making in 1974-1977, they have failed to re-ignite the imagination of IR scholars in a time of renewed interest on national liberation amid the so-called Arab Spring.[20] Non-state actors re-entered the canon of mainstream IR scholarship in the past decade or so, but only recently have IR scholars begun to ponder why and under what conditions armed rebel or paramilitary groups might respect or violate international standards placed upon

---

Dissertation (University of Michigan, 2010). Much more attention has been paid to the issue of *compliance* with human rights instruments than to their origins.

[19] See fn. 5 above.

[20] Again, important early analyses figure in Forsythe, "Legal Regulation of Internal Conflicts: The 1977 Protocol on Non-International Armed Conflicts"; Suter, *An International Law of Guerilla Warfare: The Global Politics of Law-Making*.

them.[21] Hence, as Kowert and Legro have pointed out, IR scholars, even those interested in the operation of humanitarian and human rights norms in international society, "tend to treat their own core concepts as exogenously given."[22]

We could briefly speculate about the reasons for this relative absence of research. It is possible that international relations stalwarts, long skeptical about the ability of international law to temper the conduct of embattled actors, have felt that the effects --let alone the origins-- of these instruments are ultimately negligible. Alternatively, they may have deemed that the study of the origins of these international norms could be left to historians and lawyers. It may also be that --as the recent turn to measuring compliance with international treaties suggests-- a certain policy urgency for ascertaining the circumstances that increase respect for the law has driven research interests, setting historical questions aside temporarily.[23] Whatever the cause, it is certain that the field is ripe for new and more inquiry, and not just on treaty but also on customary law, as recognized by freshly published books and articles on "the state of art" in IR/IL.[24]

Unsurprisingly, historians and legal scholars have been more attuned to the long trajectory of these international norms, and many treatises now exist that are exclusively dedicated to describing and interpreting the rules of internal armed conflict. The majority of these, however, provide only a summary description of the political dynamics shaping these instruments, and those that delve into their history at greater length typically stop short of providing theoretical explanations for the negotiating process and regulatory

---

[21] Hyeran Jo and Katherine Bryant, "Taming the Warlords: Commitment and Compliance by Armed Opposition Groups in Civil War," in *From Commitment to Compliance: The Persistent Power of Human Rights*, ed. Thomas Risse, Stephen C Ropp, and Kathryn Sikkink (New York: Cambridge University Press, 2013); Jessica Stanton, Ph.D. Dissertation in Political Science, "Strategies of Violence and Restraint in Civil War," (Columbia University, 2009).

[22] Paul Kowert and Jeffrey Legro, "Norms, Identity, and Their Limits: A Theoretical Reprise," in *The Culture of National Security: Norms and Identity in World Politics* (Columbia University Press, 1996). Ward Thomas later reinforced this point with specific reference to certain norms of war. Thomas, *The Ethics of Destruction: Norms and Force in International Relations*, 18.

[23] Martti Koskenniemi also critiques the scholarly tendency to focus on compliance as a gesture that "silently assumes that the political question – what the objectives *are* – has already been resolved." See Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge: Cambridge University Press, 2002), 485.

[24] Hafner-Burton, Victor, and Lupu 2012; Shaffer and Ginsburg 2012; Dunoff and Pollack 2013.

outcomes.[25] To be clear, I do not take this to be a flaw of this scholarship since, after all, historians and legal scholars do not usually see themselves in the business of providing political analysis driven by abstract social science theory. Yet the fact remains that there is much room to complement the descriptive historical and legal-interpretive work on these crucial humanitarian laws, most of which –it must be said—has been written almost entirely on the basis of the published proceedings of the international conferences that produced the rules, not on previously classified archival materials, especially governmental.

As the empirical chapters that follow will illustrate, the emergence of the international rules for internal conflicts has been an uphill battle. States have been notoriously sensitive to the idea of granting humanitarian concessions to rebel groups for both reasons of legitimacy, material protection and political empowerment. They have also been fearful of inviting outside concern or actual intervention impinging on their sovereign right to respond to "criminals" and "terrorists." "On no earthly account can I admit any thought or act hostile to the Old Government," pithily quipped a Russian General in 1912 while discussing a proposal for an international treaty legalizing humanitarian aid in internal conflicts, since "any offer of services, direct or indirect, of Red Cross Societies to insurgents or revolutionaries could not be conceived as more than a violation of friendly relations, as an "unfriendly act," likely to encourage and foster sedition or rebellion in another country."[26] These arguments recurred in the 1940s and 1970s, yet they did not hamper the creation of certain important limits to state action

[25] This is truer for Common Article 3 than for the Additional Protocols, but I believe holds as an overall claim for both. A non-exhaustive list is: Frédéric Siordet, "Les Conventions de Génève et La Guerre Civile," *Revue Internationale de La Croix-Rouge* 1, no. Feb-Mar (1950); Siotis, *Le Droit de La Guerre et Les Conflits Armés D'un Caractère Non-international*; James Edward Bond, *The Rules of Riot: Internal Conflict and the Law of War* (University Press, 1974); Michel Veuthey, *Guerrilla et Droit Humanitaire* (Geneva: Institut Henry Dunant, 1976); Abi-Saab, *Droit Humanitaire et Conflits Internes: Origines et Évolution de La Réglementation Internationale*; Laura Perna, *The Formation of the Treaty Rules Applicable in Non-international Armed Conflicts* (Martinus Nijhoff Publishers, 2006); Moir, *The Law of Internal Armed Conflict*; Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (New York: Cambridge University Press, 2010).

[26] *Neuvième Conférence Internationale de la Croix-Rouge tenue à Washington du 7 au 17 Mai 1912, Compte rendu,* Washington D.C., The American Red Cross, 45. ICRC Library, Geneva.

during internal armed conflicts, often against the preferences of powerful governments in the room. Fast-forwarding to the more recent past, at the 1998 Diplomatic Conference that established the International Criminal Court the possibility of *not* introducing criminal punishment for atrocities committed in internal conflicts was considered simply unacceptable by the great majority of the participating delegations. Thus, despite persistent anxieties and some stiff state opposition, international norms such as those legitimating humanitarian attention or prohibiting the mistreatment of captured fighters and civilians in internal conflicts and wars of national liberation, among others, have slowly surfaced to become both moral expectations of the "international community" and binding legal rules with "teeth." The purpose of this dissertation is to describe and theorize this phenomenon, one that to my mind can only be characterized as a change in the normative fabric of international politics.

Before moving on to the next section, a clarification is in order. While I frame the puzzle of norm emergence for internal armed conflicts around sovereignty (especially sovereignty "concessions,") I realize that this should not be overstated. As IR scholars have noted, the institution of sovereignty has always been relative in practice, such that the (Weberian) concept on which it is traditionally based should be seen not as an empirical claim but as an ideal-type.[27] Particularly in the twentieth century, certain political ideas have arisen as projects to forcefully challenge and modify how sovereignty is understood and practiced, notably self-determination and human rights. While, as this dissertation will show, these two projects and the construction of legal norms for internal armed conflicts have historically intertwined in interesting ways, I contend that they cannot be collapsed into one. Each has a distinct (though not mutually exclusive,) political genealogy with specific background conditions, protagonists and moral/social

[27] Kathryn Sikkink, "Human Rights, Principled Issue-Networks, and Sovereignty in Latin America," *International Organization* 47, no. 3 (1993): 411–441; John Gerard Ruggie, "Territoriality and Beyond: Problematizing Modernity in International Relations," *International Organization* 47, no. 1 (1993): 139–174; Thomas Biersteker and Cynthia Weber, "The Social Construction of State Sovereignty," in *State Sovereignty as a Social Construct*, ed. Thomas Biersteker and Cynthia Weber (New York: Cambridge University Press, 1996); Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999); Christian Reus-Smit, "Struggles for Individual Rights and the Expansion of the International System," *International Organization* 65 (2011): 207–242.

dynamics that may or may not overlap. Beyond their history, the challenges these three political constructions pose to sovereignty differ conceptually. Human rights norms and law, for instance, regulate the relationship between states and their presumably peaceful citizens. Even in the case of protesters or alleged criminals, the nature of the challenge they pose to state sovereignty, and the legitimate means through which the state is expected to respond to them, vary significantly vis-à-vis organized armed rebellion. Similarly, self-determination need not have violent manifestations. In contrast, by definition internal armed conflict presupposes an overt and potentially large-scale violent confrontation against the established government, making it an especially hard arena for the introduction of humanitarian duties and concessions. This aspect constitutes the uniqueness of the issue studied here.

II. Theoretical Possibilities

In this dissertation I raise three specific puzzles related to the international regulation of internal armed conflicts, which have so far gone unanswered: *How did these rules emerge? Why did states agree to them? How can we explain regulatory outcomes and their change over time?* A dearth of received and "competing" explanations on a specific research topic makes life both easier and more difficult. It makes it easier because the field is wide open for experimentation and there are few established accounts to "overturn." It makes it harder for precisely the same reasons: room for experimentation makes an intervention potentially riskier, or incomplete hence less engaging.

Luckily, IR thrives with general arguments amenable for "adjustment" to the specific empirical puzzles explored here. Although I aim to engage all the principal traditions of IR theory (realism, institutionalism, liberalism and constructivism,) I find it useful to regroup them in two (rationalism and constructivism) according the logics of action, concerns and actors that drive them.[28] Below I present what I take to be the field's crucial expectations and operative mechanisms possibly operative in the emergence of

[28] In so doing I follow Peter J. Katzenstein, Robert O. Keohane, and Stephen D. Krasner, "International Organization and the Study of World Politics," *International Organization* 52, no. 4 (1998): 645–685.

international rules for internal conflicts, setting the stage for my own intervention in the debate. I try to specify as much as possible the kinds of observable implications one might expect to find in practice as a way to both buttress my argument and to prime/prepare readers for the empirical chapters that follow.

a. Rationalism

Rationalists approach world politics as an arena of interaction between interest-driven (usually self-interested) and utility-maximizing actors. Upon this shared ground, diverse variants of rationalism co-exist, sometimes complementarily, sometimes competing against one another. In this section I introduce conjectures based on the versions of rationalism in IR that appear most relevant to this dissertation's substantive focus.

Most straightforwardly, some rationalist theories built upon an assumption of (sovereign) risk aversion would expect states to have actively resist the making of international rules that impinge on their ability to quell internal rebellion. For scholars subscribing to what can be termed *risk-averse rationalism*, the fact that self-protecting states would be willing to concede protections to armed rebels is quite confounding.[29] Yet at certain moments (1949 and 1977, notably) certain rules for internal conflicts have been accepted in Diplomatic Conferences, with many seeing government delegations seeing them as both desirable and necessary. Hence, arguments hinging on simple risk aversion are, on their face, unable to capture the entire empirical story as it unfolded. However, since until 1949 states had largely refused to entertain discussion of binding rules for internal conflicts, risk aversion may have historically acted as a barrier to law-making in this area, and therefore remains a theoretical possibility worthy of attention.[30] Risk-aversion is easily identified through evidence of state efforts to thwart the idea of regulating internal conflicts by sidelining it or pushing for its deletion.

---

[29] Note, however, that risk aversion is not a mechanism but an assumption underlying a variety of rationalist arguments. One well-known example of this type of scholarship is James Fearon, "Bargaining, Enforcement, and International Cooperation," *International Organization* 52, no. 2 (1998): 269–305.

[30] Prompting the following question: How and why was risk aversion "overcome" in this issue-area? I embed this aspect in my own theoretical argument, developed later.

But rationalist arguments exist that endorse, not reject, logics for creating international laws of war. The most prominent account of this type has been offered by James Morrow. Morrow's approach, representative of a school known as "rational institutionalism," views this branch of international law as the functional creation of states seeking to solve a "problem." A recent war, for instance, can spell either the need for a brand new rule (prisoner of war treatment after World War I) or of improvement upon a prior agreement or "equilibrium" later shown "inefficient" (most parts of the law after World War II.) In this approach, humanitarian treaties are the voluntary product of the strategic choice of states trying to better their lot in light of past failures or gaps, with a view to making future wars less brutal. Treaties do this essentially by providing clear "common conjectures" about how actors waging war should (or should not) behave in it, and what the consequences of failure to comply would be.[31] Morrow takes these laws to embody a mix of self-interest and shared (rational) purpose among states: "International law is the codification of the common conjecture underlying certain institutionalized behaviors in world politics," where "common conjecture" is a shared understanding "that one another will play according to the equilibrium," that is, follow a given agreed-upon rule.[32]

James Morrow's work does not focus on the international laws governing internal wars. So how *would* rational institutionalists à la Morrow theorize this phenomenon? Emulating the logic above, they could plausibly suggest that states might have --after much experience with internal wars-- realized that to regulate them was in their benefit, especially as a way of incentivizing reciprocity from rebel groups through the creation of shared (rational) understandings producing "common conjectures." This is a plausible candidate motivation and process-level mechanism for norm emergence in this area, to which, for ease of reference, I will refer to as *reciprocity-inducement*. In order to know

[31] James D. Morrow, "The Laws of War, Common Conjectures, and Legal Systems in International Politics," *The Journal of Legal Studies* (2002).

[32] James D. Morrow, "The Laws of War as an International Institution," 2009, 5. Typescript. Morrow sometimes claims that moral principles play a role sustaining respect for the laws of war, but his explanation of how they do so resort to a notion of rational, not humanitarian, "appropriateness." For this reason I disagree with his attempts to frame his theory as one attentive to constructivist concerns. For evidence to this, see Ibid., 27, 29.

whether this logic is operative empirically one ought to find persistent allusion to reciprocity by states, both as a *reason* to create rules for internal conflicts and later as a fundamental concern *during the drafting* or negotiation process.

Taking a similar tack, a cluster of rationalist scholarship known with the label of "rational design school" has emerged to study the design of international institutions, including aspects of legal agreements such as their precision or flexibility. This work, however, tends to remain agnostic about the question –crucial to this dissertation—of *why* and *how* international "designers" (usually states) come to care about an issue to conceptualize it as a cooperation problem to be addressed "rationally." In the words of Barbara Koremenos: "States (understood as the government actors negotiating the agreement) are assumed to have an interest in cooperation; why this is so is outside of the scope of rational design… Instead of asking why states cooperate, the relevant question… is why states cooperate the way they do."[33] This is a revealing admission that underscores the type of contribution the present study (and other historically-sensitive approaches that do not take state interests or international social problems as given) can make to the study of IL/IR, especially since, as I explain later, understanding the origins of international social concerns has important consequences *how* international legal rules are designed.

Yet despite their admitted disinterest in the question of why states would wish to regulate internal conflicts, the conjectures posited by the rational design school are worth taking into account. Scholars working from this perspective could potentially suggest that, given an interest in eliciting reciprocity from rebels, states may have wished to make rules for internal conflicts *precise* and *low in flexibility* (thus making reciprocal good conduct more likely.)[34] To know whether these motivations are at play one should be able to locate sufficient evidence of states' desire for precision and low flexibility in the

[33] Barbara Koremenos, "Institutionalism and International Law," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2013), 69.

[34] In this sense, I do not conceptualize precision and low-flexibility as separate explanatory mechanisms, but rather aspects related to rational reciprocity-seeking that may be empirically observed during the negotiating process.

drafting history of the rules, for instance in negotiators' insistence on stipulating the rules' terms explicitly, leaving little room for interpretive ambiguity or "wiggle room."

A third distinct type of rationalist expectation, following traditional realist zero-sum logic, could claim that states may have attempted to create prohibitions that would benefit *their* way of waging war to the detriment, for example, of guerrilla warfare. More cynically perhaps, states may have regarded adopting rules for internal conflict as a way to intervene in countries where they harbored some veiled economic or political interest. I will refer to this set of motivations simply as *offensive design*. Persuasive evidence of this motivation might be found less in public proceedings than in private position papers: to ascertain its operation one should locate statements reflecting states' desire to leave rebels worse off (perhaps by outlawing certain types of weapons or tactics explicitly recognized to be useful to rebels.) With regard to "interventionist" possibility, evidence suggestive of adopting rules that enable or legitimate external (non-humanitarian) incursions by third states would appear convincing.[35] In addition, since a common realist claim is that (materially) powerful states should tend to drive negotiation processes and manage to impose their will on others either through (threats of) material coercion or side-payments, considering the possibility of what might be termed *hegemonic design* is important for this project.[36]

Liberal theories share the key rationalist assumption of utility maximization on the global arena but bring to bear aspects from the domestic politics of the interacting states to explain the formation of state preferences. Most distinctively, liberal IR scholars point to the causal role of the varying institutional structures and mechanisms related to states' regime types (democratic, newly-democratic, authoritarian) and to the politics among domestic interest groups. Borrowing from Moravcsik's logic with regard to the origins of the European human rights regime, one might hypothesize that variation in regime type

[35] I exclude from the range of threatening interventions those of the ICRC or other National Red Crosses.

[36] For two examples (among many) of scholarship asserting that major powers should be expected to drive international regulation, see Lloyd Gruber, *Ruling the World: Power Politics and the Rise of Supranational Institutions* (Princeton University Press, 2000); Daniel W. Drezner, *All Politics Is Global: Explaining International Regulatory Regimes* (Princeton University Press, 2007). For a related, more complex realist position, see Krasner, *Sovereignty: Organized Hypocrisy*.

could have played a role for defining states' preferences toward the regulation of civil conflicts. Concretely, new democracies, wishing to "lock-in" liberal humanitarian norms to ensure good behavior and to protect democratic institutions in the face of future domestic turmoil, may have wished to lead the way in rule-promotion. Established democracies and autocracies, for their part, might have tended to oppose such a commitment.[37] I refer to this type of expectation as the *liberal "lock-in"* mechanism. Alternatively, others have recently suggested (drawing on the case of international human rights treaties) that long-time democracies may be more benevolent to these types of liberal commitments, a possibility worth bearing in mind.[38] Evidence for these mechanisms might be found by analyzing the breakdown of states' attitudes to the rules for internal conflicts during negotiations in Diplomatic Conferences. Private diplomatic papers indicating state preferences to have originated in domestic pressures to safeguard democratic institutions would constitute important evidence for this theory as well.

The above provides a brief sketch of how some of the most important rationalist IR traditions (institutionalism, realism and liberalism) might conceptualize rule emergence -- and design, partially-- in the area of internal armed conflict. The fact that I have presented them one by one as though they were "alternatives" does not mean that I see them necessarily as mutually exclusive. Institutionalist and regime-type mechanisms, for example, might be easily amalgamated to construct plausible causal stories of norm-emergence. Hegemonic and offensive design, as eminently self-interested impulses, may unproblematically go together (and many realists would expect them to.) This overview is thus merely analytical, and as I show later on, I find it useful to combine elements of different IR theoretical traditions to build my own explanation. Some of these are rationalist, others are constructivist. I turn to the latter next.

Table 1 summarizes this section:

---

[37] Andrew Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe," *International Organization* 54, no. 2 (2000): 217–252.

[38] Beth A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (New York: Cambridge University Press, 2009). Simmons theorizes ratification, not drafting, but the same logic can be expected to apply.

Mechanism/Assumption	Distinctive Type of Evidence for Rule-Acceptance
Risk aversion	Rejection of rule on the basis of sovereignty-inspired argument
Reciprocity-inducement	Express desire to include reciprocity so as to elicit good conduct by rebels, etc.
Offensive Design	Statements suggestive of adopting rules to enable or legitimate external (non-humanitarian) incursions by third states
Hegemonic Design	Same as offensive design but major powers drive process
Liberal "Lock-in"; Domestic Interest-Group Politics	Language indicating domestic-level interests to use international law to safeguard democratic institutions

Table 1.1. Rationalist Mechanisms and Types of Evidence

b. Constructivism

Constructivist scholars, as is widely recognized, take a very different vantage point to their study of world politics. In the most basic sense, they ask questions that precede and problematize the rationalist research agenda as laid out above: they investigate the historical sociopolitical sources of state identities and interests, take pains to show how these endure or transform over time, and demonstrate how states and other actors living in collectivity develop intersubjective ("social") facts, establish specific patterns of relating to one another (i.e. as friends, rivals or foes,) and even build broader forms of sociality (security or regional economic communities, for instance.) They also theorize the important causal role of factors usually overlooked in rationalist worldviews, particularly ideational, non-material, and sometimes even non-strategic, altruistic reasons for acting.

As with rationalism, various strands of constructivist theorizing exist, each taking their approach into the study of international society. Of particular relevance here are what has been termed "norm-centered constructivism" or, more recently, "agentic constructivism," which zoom in particularly on the political processes that certain actors

engage in with the purpose of creating new standards of appropriate behavior (that is, new norms) within and among states.[39]

Below I describe a wide variety of possible mechanisms within this branch of constructivism that may be relevant to this dissertation. At this point, however, there is an important clarification to make: beyond the question of *why* and *through what means* certain actors create new social standards of appropriateness, constructivists have been less concerned with the "design" aspects of the rule-making process, at least relative to their rationalist colleagues.[40] This is not anomalous: Although constructivists might agree that international trend-setters should want rules that are clear, monitoreable and enforceable, for them the crux of the matter usually lies in understanding how international norms and law are made legitimate and become accepted by their target actors, not necessarily in asking whether new rules come with stiff control levers.[41] In other words, the traditional task of the constructivist-oriented researcher has been to understand *the political struggles* permeating norm- and law-making processes that routinely feature actors with different identities and preferences, who command unequal material and social resources, and who may follow different ethical programs.[42] In addition, constructivists have studied the conditions and mechanisms through which new norms suffuse the international system over time, potentially leading states and other actors to internalize standards of appropriate conduct. As such, they see rule-compliance

[39] Three classic statements in this vein are Ann Florini, "The Evolution of International Norms," *International Studies Quarterly* 40 (1996): 363–389; Finnemore, "Norms and War : The International Red Cross and the Geneva Conventions"; Finnemore and Sikkink, "International Norm Dynamics and Political Change." Kathryn Sikkink has proposed the notion of "agentic constructivism" in her recent book. See Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (W. W. Norton & Company, 2011).

[40] This point was well made by Reus-Smit 2003. Constructivist interest in regime design seems to have increased in recent years. See Ryan Goodman and Derek Jinks, "How to Influence States: Socialization and International Human Rights Law," *Duke Law Journal* 54, no. 3 (2004): 612–703; Ryan Goodman, Derek Jinks, and Andrew K. Woods, eds., *Understanding Social Action, Promoting Human Rights* (Oxford University Press, 2012).

[41] Note, though, that human rights scholars have usefully incorporated insights from rational and sociological institutionalism to explain variation in compliance patterns.

[42] Christian Reus-Smit, "Politics and International Legal Obligation," *European Journal of International Relations* 9, no. 4 (December 2003): 591–625.

less as a result of institutional design aspects than of social processes of arguing, persuasion and habituation.

The implication of this is obviously not to fault constructivists for not "doing" institutional design as their rationalist colleagues do, but to remain attentive to the aspects and questions constructivists highlight, especially concerns over social processes, legitimacy and ethics which, as this project illustrates, can and often do relate to rational instrumental or strategic drives.

This clarification aside, we can now ask: What types of arguments have constructivists made to explain how international norms emerge? How do they relate more precisely to the question at hand?

One of constructivism's foremost figures, Martha Finnemore, conducted a seminal study precisely about the making of the 1864 Geneva Convention, the first-ever international humanitarian treaty in history, thus providing us with an archetypal constructivist account of humanitarian norm emergence. To summarize, the story goes like this: Swiss businessman Henry Dunant, having stumbled upon a battlefield in Solferino awash with sick, dying and dismembered soldiers in 1859, wrote a deeply moving book that shocked the conscience of elites across Europe and beyond.[43] Dunant's "Memory of Solferino" earned him the attention of a small group of prominent Swiss men with whom he created an institutional platform to further their cause (later known as the ICRC,) drafted a template treaty and lobbied several state leaders to gather and discuss it. In 1864, at a second international conference and with the help of a few very important governments, this group of principled entrepreneurs managed to persuade the majority of states of the cause's moral purpose, culminating with the signing of First Geneva Convention for the protection of wounded and sick soldiers on land.[44]

Extrapolating from the above, one might claim that constructivists expect international humanitarian rules to originate with principled actors (often acting in tandem with other individuals, organizations or state officials) who come to care deeply

[43] Henry Dunant, *A Memory of Solferino* (Geneva, 1986); Finnemore, *National Interests in International Society*, chap. 3.
[44] Reluctant states like the United Kingdom did exist, but "came around" a year later.

about an issue that they find problematic, perhaps due to recent traumatic events. Such *norm entrepreneurs*, as they are commonly known, operate as strategic agitators who seek allies, lobby decision-makers to convene meetings where they argue forcefully against detractors, and –importantly-- eventually *persuade* majorities to create new international rules.[45]

This bears repeating: "The characteristic mechanism" of norm emergence "is persuasion by norm entrepreneurs."[46] Most distinctively, the type of persuasion Martha Finnemore and Kathryn Sikkink outline has a *moral* quality, by virtue of whose power some actors convince others that a specific norm is right and that certain behaviors are wrong.

Translated to the research topic of interest to us, one might expect that international humanitarian rules for internal conflicts have emerged as the product of *moral, persuasive entrepreneurship.* Facing the moral agitation of principled entrepreneurs, previously skeptical states might have been convinced that internal conflicts should be regulated because it is the right, humanitarian thing to do. The observable implications of this expectation are clear. One should be able to identify the existence and operation of a moral entrepreneur attempting to convince states that it is necessary to institute a new international norm, thus addressing wrongful conduct. Further, private evidence of moral conviction produced by the actors targeted by moral campaigns is ultimately decisive to adjudicate the operation of this mechanism since states might be inclined to cite moral arguments insincerely in public as a reason for a change in policy.[47]

Although moral persuasion figures in most accounts of norm emergence in IR, other scholars of a constructivist stripe have developed arguments and mechanisms about why

---

[45] Among the documented cases of principled entrepreneurship explaining norm emergence are the landmine ban or the construction of the ICC. See Richard Price, "Reversing the Gun Sights: Transnational Civil Society Targets Land Mines," *International Organization* 52, no. 3 (1998): 613–644; Deitelhoff, "The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case." Price 1998 combines persuasion with social emulation but is unclear about whether the latter leads to preference change.

[46] Finnemore and Sikkink, "International Norm Dynamics and Political Change," 895.

[47] Ian Johnston uses this as a litmus test for real persuasion. See Alastair Iain Johnston, *Social States: China in International Institutions, 1980-2000* (Princeton: Princeton University Press, 2008).

states may accept international agreements or change their conduct and preferences with regard to various issues. These are worth considering because they may be fruitfully applied to the case under study. These are: *deliberative persuasion*, *epistemic communities, social influence* and *rhetorical coercion*. Let me address each one briefly.

Deliberative persuasion. Often presented in contradistinction to the self-interested interactions that we saw underpin rationalist accounts, this mechanism highlights the ability of actors using reasoned arguments to sway interlocutors and produce unexpected outcomes through public and usually institutionalized deliberation, rather than through coercive bargaining. Risse and Kleine explain that: "Arguing as a mode of action and interaction implies that actors challenge the validity claims inherent in any causal or normative statement and seek a communicative consensus about their understanding of a situation, as well as justifications for the principles and norms guiding their action. As a logic of action, arguing means that the participants in a discourse are open to be persuaded by the better argument."[48] The goal is thus to seek a reasoned consensus, not to pursue (and stubbornly stick) to one's fixed preferences: "Actors' interests, preferences and the perceptions of the situation are not fixed but subject to discursive challenges."[49]

Note that the means (discourse,) effect (persuasion) and observable outcome (changed attitude or behavior toward an idea or agreement) that this mechanism proposes are very similar to those captured by moral persuasion. The difference lies in the *nature* of the arguments proffered: deliberation emphasizes reasoned argumentation that convinces interlocutors through the power of their logic, often emphasizing procedural aspects (inclusiveness, publicity, equality, fairness) but without necessary reference to moral notions of "right" or "wrong."[50] In terms of the present project, one could suggest that certain actors, whether state or non-state, may have successfully convinced skeptics about the soundness of crafting type of norms because it makes sense that just as there are

[48] Thomas Risse and Mareike Kleine, "Deliberation in Negotiations," *Journal of European Public Policy* 17, no. 5 (August 2010): 4.
[49] Ibid.
[50] Deitelhoff, "The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case," 44.

rules for interstate war there should be some limits to violence in internal conflicts. Moderation in such contexts, so the story could go, is a sensible goal in and of itself in an increasingly legalized world, helping to equalize treatment of soldiers, prisoners and civilians across all forms of conflict. Statements (especially private documents) indicating changes in previous policy positions through exposure to such procedural or legal-rational logics would support the plausibility of the *deliberative persuasion* mechanism in the processes studied here.

Epistemic Communities. Adopting a different line but still following the constructivist emphasis on ideational influence, this mechanism captures the effects that groups with specialized technical knowledge can that play in creating and spreading ideas to guide policy. Because they possess independent professional credentials that certify their expertise and knowledge, these groups may attract the attention of governments or other powerful actors seeking solutions to problems they are uncertain about and, by advising them, might influence international policy-making.[51] In terms of this dissertation's topic, one could expect that a group of scholars –of humanitarian or human rights law, for instance—may have played a role in instigating attitudinal change in governments toward the regulation of internal conflicts through international legal means. If this is so, diplomatic governmental documents, especially during the preparatory and negotiation stages of the humanitarian agreements, should reveal an important influence of professional expert knowledge, for instance, through the hiring of international law experts to form part of states' diplomatic teams.

Social influence. Drawing from the insights of social psychology, an additional group of IR scholars have suggested that states may be amenable to pressures emanating from social-group dynamics.[52] The wager here is that, in addition to wealth and relative power,

---

[51] Peter Haas, "Introduction: Epistemic Communities and International Policy Coordination," *International Organization* 46, no. 1 (1992): 1–35.

[52] My discussion is inspired in Johnston, *Social States: China in International Institutions, 1980-2000*. For two authoritative statements from the social psychological literature see: Herbert C. Kelman, "Interests, Relationships, Identities: Three Central Issues for Individuals and Groups in

states also care about their *status*, especially with reference to certain groups with which they identify or feel they belong to, vis-à-vis others that lack such pull.[53] Emotional, cognitive and identity-related factors such as self-esteem, honor, empathy, a desire for social conformity or to increase one's positive status in a society all figure as possible reasons for state behavior. Crucial to this perspective is that actors worry about the effects of their actions on their reputation, not out of an instrumental concern for future gains or losses, but for reasons related to their image, standing or role within a particular group.

These varied motivations (cognitive, identity-related or emotional) suggest that "social influence" is better characterized as a family of mechanisms. As Iain Johnston explains, "Social influence refers to a class of microprocesses that elicit pro-normative behavior through the distribution of social rewards and punishments."[54] Importantly, social influence can be distinguished from persuasion (whether moral or deliberative) because its targets can be shown to have changed their public position without modifying their private preferences. "Public conformity without private acceptance" is a phrased often used to help differentiate this type of influence from otherwise similarly social mechanisms.[55]

For clarity purposes, given the multiplicity of factors that can fall under the label of social influence, it is useful to distill a few better-specified theoretical expectations with relation to the topic of interest here.

Negotiating Their Social Environment.," *Annual Review of Psychology* 57 (January 2006): 1–26; Robert B. Cialdini and Noah J. Goldstein, "Social Influence: Compliance and Conformity," *Annual Review of Psychology* 55, no. 1974 (January 2004): 591–621.

[53] This mechanism dovetails nicely with constructivist arguments about the importance of state identity to explain international outcomes, such as those of Alexander Wendt. However, I do not tease out separate expectations for the diverse arguments made by all scholars working in this direction, but select one (the social-psychological one) that I find easier to assess empirically.

[54] Johnston, *Social States: China in International Institutions, 1980-2000*, 79.

[55] Johnston, *Social States: China in International Institutions, 1980-2000*, 80.This definition of social influence coincides with the concept/mechanism of acculturation as defined by legal scholars Ryan Goodman and Derek Jinks. See: Goodman and Jinks, "How to Influence States: Socialization and International Human Rights Law." I use Johnston's work here only because it is more familiar to IR scholars.

One possibility is that states have decided to accept international rules for internal conflicts because some important group they look up to or identify with (because they share similar substantive values) has chosen to embrace them. This could be, for instance, a "club" of democratic or liberal states, some of which may have decided to adopt this type of rule. Initially skeptical liberal or democratic states, worrying about the prospect of being shamed and isolated by those with whom they identify, ultimately acquiesce to the in-group view. The operative engine here is a desire to avoid "internal costs such as anxiety or loss of self-esteem due to social opprobrium."[56] There are two possibilities here: one is that states foresee the possibility of group pressure and change their tune to prevent it (*self-inflicted conformity*,) another that they are *peer-pressured* into conforming.[57] Evidence of these social-psychological dynamics should be observable in states' private documents, either via statements denoting state insecurity and choice to conform to in-group's probable position, or actual pressure to accept their in-group's views.

Another potentially relevant mechanism in this vein is *emulation*, whereby actors that lack strong views for or against an idea or a policy simply follow their peers' cues.[58] In contrast to conformity-related factors, anxiety to weigh social costs and benefits is lacking here, such that decision-making may be less reflexive or contrived that in situations of actual or perceived pressure to follow others' example. A simple slogan ("Everybody else is doing it, so we will too") might best capture the logic at work under emulation, and private evidence resembling it would indicate its operation.

---

[56] Johnston, *Social States: China in International Institutions, 1980-2000*, 84.

[57] Social pressure might also hypothetically come in the form of *naming and shaming*, a mechanism usually used to explain diffusion and compliance with international agreements, not norm emergence. I do not list it here since, conceptually, naming and shaming is a resource utilized not by a state's own peers but by detractors. I find this dynamic useful, however, and will return to it when presenting my own argument about social coercion.

[58] World polity scholars refer to a similar dynamic of imitation with the terms *isomorphism* and *standardization.* John W. Meyer and Ronald Jepperson, "The 'Actors' of Modern Society: The Cultural Construction of Social Agency," *Sociological Theory* 18, no. 1 (2000).

The literature on social influence is incredibly rich and many more of its insights could be harnessed to draw up causal stories.[59] However, in my view, the mechanisms or "micro-processes" discussed above (*self-inflicted conformity*, *peer pressure* or *emulation*) present themselves as the most plausible candidate expectations with clear applicability to the case of the emergence of international humanitarian rules for internal conflicts.

Rhetorical coercion. Let me turn to a final relevant mechanism. Ronald Krebs and Patrick Thaddeus Jackson have proposed that rather than persuasive or "convincing" effects, the use of political rhetoric in public international forums may be seen to have *coercive* consequences. In their view, strategic, skillful language "can underpin a successful political campaign – not by persuading one's opponents of the rectitude of one's stance, but by denying them the rhetorical materials out of which to craft a socially sustainable rebuttal."[60] The backdrop of this rhetorical contest is a context-bound battery of legitimate and illegitimate discourses, tropes or commonplaces, from which a deft political negotiator might draw to "twist the tongue" or corner her adversary. Important to this story is the existence of a third party (a public) which sets limits to the policy stances contestants might take and to which a negotiator gestures in attempts to secure the legitimacy high-ground, hence denying her competitor of that luxury. As Krebs and Jackson note, "In sum, one argument 'wins' not because its grounds are 'valid' in the sense of satisfying the demands of universal reason or because it accords with the audience's prior normative commitments or material interests, but because its grounds are *socially* sustainable – because the audience deems certain rhetorical deployments acceptable and others impermissible."[61] Relative to the moral, deliberative and social-psychological mechanisms described earlier, rhetorical coercion seems to have a more

[59] There are, for instance, variants that emphasize actors' desire to "maximize" *social liking* by engaging in multiple acts that will heighten others' positive perceptions of them. I find this less plausible as a candidate explanation in this case, but bear it in mind when evaluating the empirical evidence.

[60] Ronald R Krebs and Patrick Thaddeus Jackson, "Twisting Tongues and Twisting Arms: The Power of Political Rhetoric," *European Journal of International Relations* 13, no. 1 (2007): 42.

[61] Krebs and Jackson, "Twisting Tongues and Twisting Arms: The Power of Political Rhetoric," 47.

contentious flavor, such that its nature and effects are produced less by virtue of moral appropriateness, reasoned logic, or feared/actual embarrassment, and more through public exchanges of heated wordplay.

Once more translating the above it into a causal story applicable to the emergence of humanitarian rules for internal armed conflict, one might suggest that certain states adopted them because, after engaging in public debate with others espousing different arguments, they lost the discursive "high-ground." Perhaps in the face of mounting humanitarian pressures to "do something" about civil war violence at a certain point in time, recalcitrant state concerns over sovereignty may have fallen out of favor as plausible arguments to repel the introduction of new rules. Particularly convincing evidence for the operation of this mechanism may come in private correspondence, for example via actors' recognition that certain logics will no longer carry weight in public given the dynamics of the debate.

Table 2 summarizes these constructivist mechanisms and the types of evidence one might find as supportive of their claims:

Table 1.2. Constructivist Mechanisms and Types of Evidence

Theoretical Mechanism	**Distinctive Type of Evidence for Acceptance**
Moral persuasion	Private acceptance of moral argument
Deliberative Persuasion	Reasoned argument cited as convincing
Epistemic Communities	Expert knowledge cited as convincing
Self-Inflicted or Peer Pressure Conformity	Mention of perceived or actual cognitive and social costs of isolation from esteemed reference group
Emulation	Unreflective "following"
Rhetorical Coercion	Loss of discursive struggle. Recognition that certain arguments are unavailable

c. Summary of the Theoretical Possibilities

This completes an overview of the major rationalist and constructivist expectations regarding the emergence of international rules for internal conflicts. Table 3

presents them all schematically for ease of reference. To reiterate: Although for analytic clarity I have presented them as distinct (alternative) possibilities, these mechanisms can and do intertwine in interesting ways empirically. Precisely the purpose of this dissertation (and, as will be seen, of my argument) is to show how they do in the case of the emergence of international rules for internal conflicts. Table 3 summarizes the entire range of posited mechanisms:

Table 1.3. Taxonomy of Social Mechanisms and Expectations (by approach)

A Tool-Box Taxonomy of Social Mechanisms and Expectations (by Theory)				
	Basic Approach	**Specific Theory**	**Mechanisms**	**Concrete Expectation**
1	Rationalism	Risk-Averse Rationalism	Risk-Aversion	States are in complete opposition or move for deletion of rules
2		Institutional Rationalism	Reciprocity-inducement	States want to create rules to elicit reciprocity through precise and strict rules
3		Realist Rationalism	Offensive Design	States want rules to leave rebels worse off **AND/OR** to legitimate and enable external intervention
4		Realist Rationalism	Hegemonic Design	Major powers drive process
5		Liberalism	Liberal Lock-in	States want to ensure good behavior in civil war in order to protect democratic institutions in the face of future domestic turmoil
6	Constructivism	Moral Entrepreneurship	Moral Persuasion	Entrepreneurs persuade states of the moral goodness of the rule
7		Deliberative Constructivism	Deliberative Persuasion	States believe it makes sense to have rules for internal conflicts
8		Epistemic Communities	Influence of Expert Technical Knowledge	States may be swayed to adopt these international rules due to the influential advise of independent expert groups

9		Social Influence #1	Self-Inflicted Conformity	Insecure states expect their peers to promote/accept rules and choose to support for fear of status loss
10		Social Influence #2	Peer-Pressure	States pressure their peers to promote/accept rules citing identity/group likeness factors
11		Social Influence #3	Emulation	States do not have clear views on this type of regulation so they simply follow their reference group
12		Coercive Constructivism	Rhetorical Coercion	States attempt to corner one another through skillful use of political rhetoric before an audience. A winner emerges when another makes unexpected concession.

III. Research Design: Stages, Method and Sources

This project comprises almost 150 years of political and legal history. As Chapter 2 shows, the earliest debates in the modern era regarding the possibility of introducing positive international rules for internal armed conflicts date from 1863, the year in which the International Committee of the Red Cross (ICRC) was formed by Henry Dunant and four like-minded individuals. The process continues today, with the ICRC facilitating international discussions among states and National Red Cross Societies on whether and how to revise or extend existing law.

Given such a historical span, I find it useful to break the *longue durée* of norm emergence in a series of "stages" that represent what I take to be the critical junctures of international rule-making for internal conflicts.[62] I identify these stages attending to an observed variation in normative outcomes: that is, each stage captures a time-bound process in which international debates about creating rules either "produce" a rule or not.

At each stage I pose the three motivating research questions: *How did rules emerge? Why did states agree to them? How can we explain regulatory outcomes and their change*

[62] For one explanation of the concept of critical junctures, see Paul Pierson, "Not Just What, but When: Timing and Sequence in Political Processes," *Studies in American Political Development* 14, no. Spring (2000): 72–92.

over time? The first two relate to the concrete processes and actors involved each episode of rule-making or negotiation. The third is attentive to global historical change and the dynamics of legalization, which operate often by setting initial precedents and building upon them at later moments. Put another way: Over 150 years, international social structures, and with them the nature of political and normative debates relevant to the topic of study, have changed considerably. Studying the way in political circumstances (say, the political nature of internal armed conflict) change both internationally and domestically, and the way in which such changes affect the nature of the regulation that obtains, is crucial to this dissertation. As a result I sometimes find it necessary to "recalibrate" the three broad questions above so as to make them appropriate to each historical period. I do this by introducing more specific "sub-puzzles" that get at what is going on at the time under study. This helps me avoid anachronism and allows me to present a more interesting and –I hope—persuasive story.

One example may suffice to clarify what I mean: whether or not to legitimize wars of national liberation and freedom fighters was central to the negotiation of the Additional Protocols in the 1970s, giving rise to a sharp division between wars for self-determination and "other" internal conflict between the two Protocols. Thirty years or sixty years earlier, however, "freedom fighters" were by comparison either the incipient concern of a few or a non-issue, and their imprint on the resolutions that emerged in 1921 or on Common Article 3 of 1949 was either non-existent or not determinant. I thus find it more interesting and relevant to frame the chapter on the Additional Protocols around the question of why and how it was possible for wars of national liberation to be "upgraded" to the status of international conflicts, while internal conflicts were given a far less preferential treatment, rather than by asking more generically: "Who did what and how did this affect the legal outcomes?" The choice for this is partly stylistic and partly substantive, but it does not lead to an obscuring of the central puzzles that drive the dissertation.

With regard to the changing dynamics of legalization, the point is made more simply: Rules created at a given moment often have an impact on rules created later, and vice-versa: rules created later may complement, supersede or restrict earlier norms.

Table 4 presents a summary of the different stages studied in this project, some relevant contextual factors, whether or not they saw the emergence of a rule for internal conflicts, and the types of questions asked.

Table 1.4. Stage Classification and Questions Considered

Timeline	Does a Rule Emerge?	Stage/Observation Classification	Specific Research Questions
Mid-19th Century onward	After mid-19th Century with creation of ICRC, initial ideas arise leading to practical concern but are not made into international law	Some normative concern exists but actors do not push for international treaty regulation	How did humanitarian concern for internal conflicts surface? What explains the approac taken by the ICRC/Red Cross?
1912, but especially 1918 to 1946	Resolutions are drafted and concerns are formally introduced into International Red Cross Conferences.	Proposals are initially dismissed but later pass in the context of Red Cross Conferences	Where did the impetus for discussing these resolutions come from? Why were they initially rejected but accepted later?
1946-1949 (Post WWII context)	Yes - Common Article 3 to the Geneva Conventions	Norm Emergence I	Where did the push to extend the Geneva Conventions to internal conflicts come from? What were states' views on this move? How was the rule made and what explains its design?
1954-1965	No. ICRC attempts to extend substantive protections of the Geneva Conventions but the Draft Norms are never adopted.	Failed Attempt	Where did the impetus for the Draft Rules come from? How did states view them? Why did the initiative fail?

1965-1970	Yes. Impetus for revision of the laws of war, including on internal conflicts, resurfaces and is enshrined in UN resolutions	(Pre) Norm Emergence II.	Where did the UN interest come from? What were states' positions with regard to internal conflicts?
1971-1977	Yes. Protocol I regulates international wars and struggles for self-determination; Protocol II regulates internal conflicts	Norm Emergence II	How were the rules negotiated? What were states' positions? Why were national liberation wars "separated" from other internal conflicts? What explains the final negotiated Protocols I and II?
1977-present	Yes; customary law and criminal law are recognized and later formally extended to internal conflicts. Human rights increasingly seen as complementary to IHL.	Norm Emergence/Extension III, mostly drawing from non-traditional sources and areas. Internal conflicts are enshrined in the statute of adhoc tribunals and later in the ICC.	What explains turn to other bodies of law? What were the politics of the emergence or extension of these rules?

Note that some "stages" explored involve non-outcomes, that is, processes that "failed" to produce the regulation envisioned by their proponents. I pay close attention to the actors, circumstances and arguments that drove the initial impetus but eventually led to their "fizzling." Studying positive and negative outcomes partially allows me to posit that some factors and mechanisms may be *necessary conditions* for successful norm emergence, and thus may be susceptible of being transposed from one specific historical moment to another. For instance, I can identify with confidence certain non-trivial necessary variables for norm emergence such as involvement by the ICRC in the rule-

making process as well as the support or at least the non-opposition of a core group of states (especially major powers) to the idea of revising or improving existing law. The strategy also allows me to evaluate the operation of causal mechanisms already posited in the IR/IL literature in each of the episodes, as well as to introduce a new mechanism (social coercion) that others can extrapolate and "apply" in other historical moments and issue-areas. In other words, this project both *probes existing theory* and *generates new arguments*.

Related to the above, it is important to recognize that each of the "stages" analyzed is not "independent" from one another, and in that sense I cannot sensibly "generalize" whole causal stories or combinations of variables across a "population" of cases of international norm emergence. Making "out of sample" predictions is also not among the goals of this project. Instead of a straightforward comparative cross-case strategy, this dissertation embraces a logic of inquiry that attempts to explain how various specific and largely interdependent outcomes *within the same issue-area* are produced *over time* by (sometimes similar, sometimes varying) specific configurations of factors. These are contingent combinations or "configurations" of actors and mechanisms operating in broader social contexts which constitute pathways of norm emergence in the case of the international rules for internal armed conflicts, but that have the potential of being extrapolated by other scholars to their issues of interest. This is akin to what Andrew Bennett has recently termed "typological theorizing," a theory that beyond specifying causal factors and effects produced provides "contingent generalizations on how and under what conditions they behave in specified conjunctions or configurations" to produce effects.[63]

The type of explanation pursued in this project is thus mechanistic. As Robert Keohane pithily noted, "Any coherent social science explanations requires a causal

[63] Alexander L George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge, MA: MIT Press, 2004), 235; Andrew Bennett, "Causal Mechanisms and Typological Theories in the Study of Civil Conflict," in *Transnational Dynamics of Civil War*, ed. Jeffrey T. Checkel (New York: Cambridge University Press, 2013), 216.

mechanism."[64] By social mechanism I mean "the pathway or process by which an effect is produced or a purpose is accomplished."[65] Mechanism-based explanations have also become increasingly valued in the study of IL/IR, constituting part of the subfield's theoretical frontier, as Kenneth Abbott and Duncan Snidal assert.[66]

What is the relation between this study and existing theory? In a previous section I framed the regulation of internal conflicts through international law not only as underanalyzed but as puzzling in view of prevalent IR arguments. I proceeded to offer an extensive list of mechanisms that belong to rationalist and constructivist traditions as possibly useful explanatory devices. My purpose here, however, is neither to "falsify" rationalism or constructivism, as this patently cannot be done. Rather, the goal is to complement studies of norm emergence by zooming deeply in on an unlikely case that, I argue, fits uneasily across these broad approaches and hence forces us to think harder (and ideally, to innovate) with regards to what the extant literature posits as the dominant mechanisms.

To accomplish this I pursue a methodological strategy called "abduction," increasingly endorsed by IR scholars.[67] This approach, inspired in the thought of

---

[64] Robert O. Keohane, "Rational Choice Theory and International Law: Insights and Limitations," *The Journal of Legal Studies* 31, no. 1 (2002): 311.

[65] John Gerring, "The Mechanismic Worldview: Thinking Inside the Box," *British Journal of Political Science* 38, no. 01 (December 07, 2007): 178. This is an increasingly accepted definition of the concept.

[66] Kenneth W Abbott and Duncan Snidal, "Law, Legalization, and Politics: An Agenda for the Next Generation of IL/IR Scholars," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey Dunoff and Mark A. Pollack (New York: Cambridge University Press, 2013), 51. I strongly disagree, however, with Abbott and Snidal's claim that young scholars would be wrong to focus on "specific treaties, regimes, or issue areas." This presumes, dubiously in my view, that there is sufficient accumulated knowledge about specific areas among interested social scientists. It also places emphasis on analyzing features that are "comparable" across legal regimes (adjudication or flexibility, to name two common ones,) occluding tremendously important specificities such as: Who counts as a subject of X international regime? Whose actions are regulated by it? Who is given license to do what? See Ibid, 50.

[67] John Gerard Ruggie, *Constructing the World Polity: Essays on International Institutionalization* (London: Routledge, 1998); Martha Finnemore, *The Purpose of Intervention: Changing Beliefs About the Use of Force* (Ithaca: Cornell University Press, 2003); Jörg Friedrichs and Friedrich Kratochwil, "On Acting and Knowing: How Pragmatism Can Advance International Relations Research and Methodology," *International Organization* 63 (2009): 701–

pragmatist philosopher Charles S. Peirce, is situated somewhere in the middle between deduction and induction, and "rests on the cultivation of anomalous and surprising empirical findings against a background of multiple existing… theories and through systematic methodological analysis."[68] With sufficient knowledge of existing theory, the analyst examines in depth the empirical material, organizes it as coherently as possible and, upon the location of evidence that confounds received theory, is prompted not to "falsify" or annul it but to formulate *new* theory, in this case, novel mechanisms and mid-range explanations. Adhering to Martha Finnemore's words: "I present deductively derived hypotheses that shape the initial design of the inquiry but quickly prove insufficient to explain events. Consequently, I supplement the deductive arguments with inductively derived insights, moving back and forth between the two to produce and account that will be 'verisimilar and believable to others looking over the same events'."[69]

In qualitative political scientific research, the method best suited to carry out this type of study is *process tracing*. According to George and Bennett, process tracing "attempts to identify the intervening causal process –the causal chain and causal mechanisms- between an independent variable (or variables) and the outcome of a dependent variable."[70] Though this phrasing privileges causal theorizing (and exhibits a positivist tone,) the process-tracing method is also suitable to unveil constitutive factors and mechanisms.[71]

---

731. Similarly, Andrew Bennett claims that typologizing "involves both deductive and inductive reasoning… The analyst can then iterate between what was theorized apriori, what is known empirically, and what is learned from additional empirical study…" Bennett, "Causal Mechanisms and Typological Theories in the Study of Civil Conflict," 221.

[68] Stefan Timmermans and Iddo Tavory, "Theory Construction in Qualitative Research: From Grounded Theory to Abductive Analysis," *Sociological Theory* 30, no. 3 (September 10, 2012): 169.

[69] Finnemore, *The Purpose of Intervention: Changing Beliefs About the Use of Force*, 13.

[70] George and Bennett, *Case Studies and Theory Development in the Social Sciences*, 206.

[71] Ibid.

Sources

The investigation of political origins I pursue in this dissertation requires an intensive empirical strategy. I have strived to be as thorough as possible in tracing the events and actors that have taken part in the construction of the international rules for internal armed conflicts. One organization –the ICRC— has historically centralized the great majority of initiatives dealing with the international humanitarian law, including debates on internal conflicts and civil war. In fact, from 1863 until the mid-1960s almost all debates of relevance to that body of law took place within ICRC-led forums, most of which I have been able to document exhaustively at the organization's archives in Geneva, Switzerland. The ICRC archives are only open to the public until 1965, however; after that year I have had to rely on published information, either by the ICRC itself, the Swiss government, or by scholars who participated in the rule-making processes of the 1970s and onward. I have interviewed some of the latter experts as well.

The other essential data source for this project has been the archives of select states. Prior to embarking on the fieldwork process I identified some of the crucial states that participated in the negotiation of the rules studied here: the United States, the United Kingdom and France. I found these states to be key not only due to their actual role during the negotiations, but also because they are theoretically interesting from the perspective of various IR approaches and global history more generally. In particular, various rationalist strands would expect them to be either risk-averse vis-à-vis binding their management of internal conflicts through international law, or to see "low rewards" from conceding their sovereignty in this way (especially in the case of the colonial powers, England and France.)

Fieldwork yielded the following types of material:

- Confidential correspondence between the ICRC and each of these states on the scope of the meetings and the contents of the agreements, as well as about scheduling/attendance by other states and actors;
- Confidential correspondence between the various relevant agencies within each state involved in the preparations for the negotiations;

- Confidential correspondence between these states and other states/actors to compare or coordinate positions and strategies prior to and during the negotiations;
- Confidential working drafts and final secret instructions/position papers for state delegations, not only for the main Diplomatic Conferences but also for several of the preparatory meetings (known as the *travaux préparatoires*);
- Most of the confidential telegraphic correspondence (cables) exchanged "in action" between the delegations in Geneva and their home governments *during* the negotiations and other relevant international conferences. These also include some "update memos" periodically sent back home by some delegations;
- The confidential final reports after each conference/negotiating session, with recommendations and discussions about whether/how to approach signing and ratification;
- Confidential memos and correspondence related to domestic inter-agency as well as inter-state debates about reservations, signing and ratification;
- Evidence about states' intent to apply (or their actual application of) these norms/laws in current or future internal conflicts;
- Considerable documentation (of all the types described above) about the ICRC's (failed) efforts during the 1950s to complement the 1949 Geneva Conventions, and about parallel debates in the UN in the late 1960s-1970s on "human rights in armed conflict," freedom fighters/decolonization, and international terrorism.

At the archives of the ICRC I collected material concerning:

- Internal ICRC policy debates in its early period, particularly between the creation of the organization and the death of its first President Gustave Moynier (1863-1910;)
- The private correspondence between the ICRC and certain important interlocutors with regard to internal conflicts and civil wars between 1863 and 1923;
- The confidential minutes of various ICRC bodies, including its Council of the Presidency (the second highest-level body of the ICRC) and its Juridical

Commission, focusing on any important discussion of internal conflicts/civil wars in 1937-1966, particularly in relation to the behavior of combatants from both sides, and the use and application (or lack thereof) of Common Article 3.

In total, this project is based on 7 months of archival research, approximately 40,000 original primary documents and interviews with the high-level ICRC staff and Swiss diplomats who participated directly in the negotiations of the 1970s, as well as experts on international humanitarian law and human rights**.**

IV. A Theory of Norm Emergence and Norm Construction

This dissertation advances a theory of international norm emergence and construction to explain the origins of the international humanitarian rules that govern internal conflicts. In its broadest formulation, I argue that these rules are the result of a slow historical process generated by *three factors*: exogenous shocks, moral entrepreneurship and international political contests waged at Diplomatic Conferences between various groups of states with different interests and identities, which themselves changed over time. The growing institutionalization and legitimacy of international humanitarian law as a normative framework, as well as the robust reputation of its relentless guardian, the International Committee of the Red Cross, have operated as crucial two *enabling pre-conditions* for the creation and development of this regulation.

That norm emergence and development in this issue-area have been slow is unsurprising. After all, these rules impinge upon the most sensitive area of all for states: their internal prerogative to react to organized violent challenges which, in the most dramatic cases, threaten their territorial integrity and their very survival. And yet, as this dissertation shows, in the last 150 years international society has gone from a moment in which most considered the idea of authorizing the provision of international humanitarian relief to civil war victims and combatants to be treasonous, to a time when legally punishing atrocities in internal wars is desirable and possible. This stark distinction enables me to characterize this as an important case of change in the normative fabric of international relations, even if, as the cruel cases of civil war in places like Syria or Libya

show, practice has not always kept apace. The expansion of these rules has naturally been embedded in broader transformations of social structures as the international level (the diffusion of international law, the spread of liberal democracy and the delegitimation of totalitarianism and formal empire, to name an important few) but, as I attempt to demonstrate, the causal chains of protagonists, actions and circumstances can be drawn much more precisely.

The theory of norm emergence I propose combines insights from constructivist and rationalist approaches outlined earlier, partially confirming but also qualifying some of their assumptions and expectations. Most importantly, it presents and illustrates the operation of a mechanism that I term *social coercion*, merging some of the mechanisms presented earlier, especially social influence and rhetorical coercion.

Let me present these findings at some length.

My theory proceeds in two steps. The first concerns the question of *where normative impetus comes from* to regulate internal conflicts and the combination of factors that operate to initiate an episode of rule-creation. The second focuses on *the political dynamics that permeate each norm-making episode* once it has been set in motion, and which shape its process and outcome. Both phases are marked by the specific historical contexts in which they unveil. Below I illustrate how the theory operates by focusing on the emergence of Common Article 3 to the Geneva Conventions in 1949, the first binding international rule for internal conflicts ever created.

a. STAGE 1: Triggering the Impetus for Normative Innovation

The first phase proceeds in a manner similar to established constructivist arguments. First, a shock, typically a major civil war, generates some level of moral concern that transcends states' borders. The first such conflict to cause important moral outrage (after the advent of treaty-based international law in the mid-nineteenth century) were the Balkan uprisings against the Ottomans in the 1870s. Although at the time no state appears to have surmised that there should be an international legal response to an eminently "internal" situation, the ICRC --still a young organization but already a respected legal and practical pioneer in humanitarianism,-- mused about what should be done. In 1875

Gustave Moynier, the organization's restless founding president suggested that states should apply the First Geneva Convention (designed to protect wounded and sick soldiers in inter-state conflict) to civil wars by analogy. The humanitarian "spirit" of the Conventions commanded such a course, Moynier claimed. Soon debates within the Conferences of the expanding Red Cross movement witnessed the suggestions of principles for the provision of humanitarian relief in civil wars— non-binding principles that, by depending on the consent of the embattled state, did not greatly disturb sovereignty norms.

The Red Cross principles were, however, never formally debated or adopted, and the issue remained unsettled for the time being. Curiously, during this period no actor (the ICRC included) proposed that there should be a binding legal covenant applicable to civil wars resembling what existed for inter-state conflict.[72] In Chapter 2 I suggest an explanation for this less-than-enthusiastic response by humanitarian law's key norm entrepreneur by locating the organizational reasoning of the ICRC within the sociopolitical context of the late nineteenth century. As we will see, more practical experience with civil war cruelty, a new leadership and accumulated outside pressure were needed for this morally committed actor to take up an issue that lay well within its mandate.

International discussion on the matter reopened in 1912. The political entrepreneur this time was not the Red Cross but a government. At the Ninth Conference of Red Cross Societies held that year in Washington D.C., the United States delegation, in tandem with its close partner the American Red Cross, introduced a draft treaty text that in essence proposed to enshrine the existing Red Cross principles into hard law. The US proposal was the idea of State Department lawyer, Joshua Reuben Clark Jr. who, while stationed

[72] When the idea was put to them, the eminent international lawyers that since 1876 had constituted the first ever scholarly international law association (the Belgian-based *Institut de Droit International*) dared only discuss the norms of neutrality to be followed by third states in times of internal conflict. In their meetings of 1898 and 1900, the majority of the experts present seemed to believe that the issue of humanitarian civil war provisions was "too politicized." Not surprisingly, many of these experts were or had recently been in government service.

in Mexico, had seen his Mormon co-religionists suffer the violence of the revolution of 1911 without the legal power to solicit humanitarian aid from outside.

The above roughly corresponds to the constructivist mechanism of *moral entrepreneurship*. But was entrepreneurship persuasive or effective in this case? Chapter 2 describes how, despite the moderate terms of the US initiative, in 1912 many representatives of important countries debating at the Red Cross Conference reacted quite harshly. "In no case or manner could the Imperial government become a contracting party to or even a discussant of any agreement or vow on this topic," virulently quipped General Yermolov of the Russian Empire. Rationalist expectations of risk aversion begin thus to reveal their importance in the story.

Such a response was unsurprising: Imperial powers, whose voice weighed especially heavily in these traditionally European forums, had good reason to fear this as an intrusion in their security affairs. Yet as I show in Chapter 2, the reasons for states' anxieties were more interesting than allowed by the rationalist worldview. Most states expressed fears not just about materially benefitting rebels via humanitarian relief, but especially about the possibility of *legitimating* them through their inclusion in international legal instruments. As noted earlier, one long-standing constructivist point about the nature of international norms is their ability not only *regulate* but also to *constitute* its subjects.[73] State reactions in 1912 (and consistently ever since,) give this theoretical insight strong empirical support. Throughout this dissertation I make efforts to trace just how persistent and powerful this constitutive concern was, *alongside but not reducible to* strategic and material state worries.

In 1912 we had a case of failed moral entrepreneurship due to overt state aversion toward the very idea of having legally binding rules for internal conflicts. But, importantly, a precedent was left (such that the Red Cross could say that the issue had already once been dismissed, making it harder to dismiss again later) and the story did not end there. In fact, the same combination of triggering factors (civil war-induced

[73] Martha Finnemore and Stephen J. Toope, "Alternatives to 'Legalization': Richer Views of Law and Politics," *International Organization* 55, no. 3 (2001): 743–758; Reus-Smit, "Politics and International Legal Obligation."

shocks and proliferating bottom-up pressures to "do something," coming especially from advocates on the ground and from National Red Cross Societies,) recurred in 1917-1920 with the Russian and Hungarian Revolutions, finally convincing the previously hesitant ICRC to pursue the issue forcefully, and leading to initial non-binding resolutions adopted at 1921 International Red Cross Conference.

Yet it was the horrors of the Spanish Civil War (1936-1939,) considered by many to have been a continent-wide conflict situated within the even larger trauma of World War II that finally drove home the point for the ICRC that soft principles had been exhausted as a response for the seriousness of the issue. Repeated major civil-war trauma and the existence of previously ineffective precedents thus seemed necessary to create a consensus on the form that an international response should take: binding treaty rules. Renewed atrocity also seemed to have a discernable impact on states' views on the subject, for when it was first put to them during the first preparatory meetings for the revision of the Geneva Conventions in 1947 and 1948 only a few expressed overt opposition to the idea. It seemed like the time for introducing international legal regulation in this area had finally arrived, and that it might have smooth passage.

b. STAGE 2: Negotiating International Humanitarian Rules: Social Coercion

This soon changed. In the second step, my theory posits that once the actual negotiation of these rule begin, international moral politics collide with the diversity of states' domestic interests in theoretically complex and unexpected ways. In sum, in this stage I show that diplomatic negotiations of humanitarian rules pit (mostly) external moral pressures against domestic interests and identities, and if anti-regulation states find themselves in a minority, they may be susceptible to *social coercion* out of fear of public embarrassment by others taking them to task for blocking humanitarian protections. In a final move, although international pressures may publicly force the hand of powerful recalcitrants and inhibit overt refusal to accept the norms that majorities desire, it may also trigger surreptitious or "covert pushback" on their part, through private attempts to make the terms of these humanitarian rules indeterminate or to shape them in ways that lowered the likelihood of their application in the future.

By 1949 many if not most states saw introducing humanitarian regulations for internal conflicts as important. But the devil --which we know is in the details-- remained at large. What counted as an "internal conflict"? What criteria would define the application of the law? Would obligations be conditioned by reciprocity? Did legal humanitarian imply political recognition? These questions did not come with preordained answers and proved excruciating to resolve due to states' varied interests. The breakdown of positions went something like this: Some states expressed an ardent belief in the humanitarian value of having generous rules: Scandinavian countries and Switzerland were key examples of this view, alongside Latin American states like Mexico or Uruguay. Others were more cautious and asked for important sovereignty safeguards (the United States, Canada, Greece or China, the last two facing civil wars of their own at the time). Only one state (England, a colonial power,) publicly dared go against the grain by suggesting that an alarming idea that struck so directly "at the root of national sovereignty" should be set aside altogether (France was more cautious in public but harbored similar thoughts privately.) In doing so, Britain expected empathy from its peers, by rehearsing an argument that it believed would easily resonate.

As this suggests, rationalist and constructivist expectations both have partial support in these findings, albeit in qualified form. Contra a strict rationalism, most importantly, across-the-board risk aversion was in the postwar world a thing of the past. States interests were now more varied, with some putting humanitarianism first, others agreeing with the humanitarian sentiment but showing a bit more caution, and finally a small minority pushing back. This suggests that the international moral shock of the recent wars, channeled especially by entrepreneurship of the Red Cross movement, had indeed exerted a effect, helping to shape how states defined their interests and perhaps their identities (the latter most clearly for the case of the Scandinavians and Switzerland.) That state interests change, and that state identities shape interests, as we saw, is a core constructivist insight.[74] Also heeding constructivist insights, the politics of recognition and legitimacy surfaced again in 1949 as they had in 1912, prompting the insertion of the

[74] Peter J Katzenstein, "The Culture of National Security: Norms and Identity in World Politics" (New York: Columbia University Press, 1995).

only clause all states could agree with: "The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."

But it was also the case that (as institutional rationalists would expect,) a sizable group of states had come to Geneva wearing their strategic lenses to press actively for precise safeguards that, in essence, ensured that the rules would only apply to high-level civil wars. Others similarly pressed hard for the eventual rule on internal conflicts to include an explicit condition of reciprocity, such that if rebels did not respect the provisions, states would be left off the hook.

As hinted above, the encounter of these actors' self-interested concerns and others' humanitarian views produced results not comfortably grasped by rationalists. To cite one crucial example: Despite the persistence of the important state representatives pushing for reciprocity, the opponents of the idea made it abundantly clear that they were not going to compromise on their view. The argument that conditional reciprocity might make the entire rule dead letter more or less automatically (since it would give states an easy way by claiming that rebel misconduct justified non-observance) seems to have been effective and skeptics in the room seemingly found it hard to counter because from then on *none of the alternative formulas* that came up for debate mentioned reciprocity as a condition-- a momentous outcome nicely captured by the logic of rhetorical coercion.

Since self-interest was clearly not out the window, were British wishes for complete deletion successful? Did other strategic-oriented states echo this desire, as one might expect they could have?

The answer, as I detail in Chapter 3, is a resounding no. Britain's proposal to set the idea aside entirely carried no force, even in a room featuring a number of important sovereignty-mindful peers. Flabbergasted by this response, and instead of choosing to leave the room, UK diplomats privately expressed profound anxiety of isolation, perceiving their image and reputation to be at such peril that they literally implored their colleagues in London for a change in instructions. Importantly from a social identity perspective, British delegates noted in their cables how their closest Commonwealth allies and "even the Soviets" were siding with the humanitarians. They also remarked how Swiss papers were deriding their legalistic attitude as that of a decaying, desperate

empire. Their situation had simply and quickly become *embarrassing*. London quickly acquiesced to the plea and gave a green light to a more flexible attitude.

Social pressures of a particularly coercive flavor appeared to play an important role in forcing the hand of a powerful stalwart. This is perhaps the moment to introduce this dissertation's central theoretical innovation: a mechanism I label *social coercion*.

c. What is Social Coercion?

By *social coercion* I refer to the mechanism that captures why and when states (individually or collectively) are cornered by an opposing group of actors and are forced to accommodate to a clearly unpalatable outcome for fear that publicly refusing to do so might carry important moral or social costs.[75] "Costs" here does not refer primarily to material losses, but rather to anxiety about perceived potential blows to aspects of one's social status or identity.[76] In this sense it can certainly be located within the family of "social influence" microprocesses outlined earlier. However, it differs from them in that the source of the pressure is not limited to an actor's "peers" or fellow in-group members but rather is expanded to encompass pressure from its opponents. To this extent social coercion resembles the "naming and shaming" dynamic identified in constructivist studies of compliance with human rights norms, whereby antagonistic pressure groups

[75] It is worth clarifying that social coercion is not necessarily a conscious or coordinated strategy by the "coercing" majority. Its effects may also be produced inadvertently, by coalitions that align only circumstantially in situ. What is important is the effect, that is, that the minority feels itself cornered and obligate to acquiesce, which will likely occur when the four conditions above are met.

[76] Identity may be defined as "the set of values, attributes, and practices that members believe characterize [their collectivity] and set it off from others. Identity is the (shared) answer to central if vague questions: Who are we? What are we like? Who are we similar to and different from?" See Robert Jervis, "Identity and the Cold War," in *The Cambridge History of the Cold War, II, Crisis and Détente*, ed. Melvyn P. Leffler and Odd Arne Westad, 2010. Material asymmetries, though broadly important in international politics, are not always crucial determinants of outcomes in international organizations or events organized on the principle of universality without weighted voting. Two examples are the United Nations' General Assembly (UNGA) or the International Conferences of the Red Cross. Another is the Plenipotentiary Diplomatic Conferences organized by the Swiss government in which international humanitarian laws have usually been negotiated. In this contexts the potential for social coercion increases since groups of smaller and weaker states can and often do band against otherwise more powerful states. I expand on this point later.

point to a target actors' weak spots by criticizing the recalcitrance, backwardness, or hypocrisy of its actions and positions.[77] Naming and shaming and social coercion differ, however, in that the former may be said to operate once a state has *already accepted* an international rule against which it is measured, whereas social coercion occurs in the absence of such a pre-existing commitment.

Expressions of social and moral costs include finding oneself isolated in public, perhaps out of step with a consensus (being in a minority of one,) associated to actors considered to be international pariahs (being seen voting with a "racist" state,) acting in disassociation from one's reference group (not being "in respectable company",) or being seen as overtly championing policies and actions that contradict a states' values or reminiscent of a shameful past (for example, disliking the glorification of national liberation wars but being unable to express it given a colonial history.)

Social coercion finds its distinctive theoretical edge by pointing to social identity costs, but in practice does not exclude the possibility that they may mix with instrumental goals. To give an example: states might wish to avoid exposing themselves publicly as responsible for an unfortunate outcome ("we cannot take responsibility for wrecking a humanitarian conference") or for allowing a valued institution be disgraced ("we must not let international humanitarian law be irresponsibly thrown by the board".) States may simply "value" an institution not only for moral or social reasons but also for instrumental ones: The former surely does not rule out the latter but *cannot be reduced* to it either. Fresh studies of compliance with human rights norms have come to a similar conclusion: In many cases it makes little sense to obsessively try to separate rational and social mechanisms or motivations for action.[78] Yet I believe one must be cautious not to let this "pluralist" insight slip into the obliteration of the analytical value of theorizing social dynamics and mechanisms.

How can we distinguish the operation of social coercion from other mechanisms such as persuasion, deliberation or rhetorical coercion? To name two crucial ones: There *must*

[77] See for example Margaret E Keck and Kathryn Sikkink, *Activists Beyond Borders* (Ithaca: Cornell University Press, 1998).
[78] Thomas Risse, Stephen C Ropp, and Kathryn Sikkink, *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press, 2013), 13.

be clear indication of the perceived *social* costs, and these should be moral, status- or identity-related. Second, the evidence must clearly suggest that the actors in the acquiescing minority are *not* privately swayed by the arguments of the majority, that is, that they have not been "convinced to change their minds" by either rational deliberative reason or the moral power of the idea. Instead it must be demonstrated that they are being pressured to change their positions to go along with the circumstances, against their express wishes. Yet unlike in cases of rhetorical coercion, the source of a changed position is not the discursive unavailability of an argument, but the awareness that using a line of reasoning or maintaining a conservative position will bring social or affective discomfort to an actor.

The specification of a theoretical mechanism should ideally come accompanied by mention of the conditions under which it becomes operative. In this dissertation I point to at least four factors that are necessary for the operation of social coercion. First, the state or states that are its target must believe themselves unable to effectively change the majority's opinion and/or block their vote. They must know they are isolated in a minority facing an obtuse majority unlikely to change its position through further debate or material inducement. Second, as stated earlier, target states must believe that there are serious moral or social opprobrium costs attached to their public refusal to acquiesce with the majority. Such costs may be more or less plausible in reality, but what matters is that the target state believes they exist and that they may be exacted by an international or a domestic audience. Inherent to this is target states' belief that the majority's public position carries such legitimacy that maintaining their recalcitrant minority stance will bring them shame and derision. Third, target states must believe that outright disengagement may lead to even *worse* outcomes, and so that it might make sense to remain at the table to contain further damage. Fourth, for social coercion to operate states must be interacting in a relatively institutionalized setting whose processes and outcomes are deemed important by participating states and are believed to carry some degree of scrutiny by a cherished audience or reference group.

d. Coerced States Strike Back: Covert Pushback

As I have shown, in this dissertation I argue that under certain conditions some states may be socially coerced to acquiesce to unpalatable outcomes. In the narration I had begun above this referred to colonial states, especially the United Kingdom (but also France, if more quietly.)

But does the story there? Does social coercion have foreseeable consequences? Did the British and French react submissively?

Again, the answer is no. Through public debate and private conversations the French and British Heads of Delegation had become aware of the similarity of their revised instructions: to accept a text that guaranteed the application of humanitarian principles in internal conflicts without explicitly calling for conditional reciprocity or delegating decisions to an external body *but* with the implicit understanding that lower-intensity rebellions were excluded, and that without saying as much, would leave the final decision of application to the concerned state. Their goal from then on would be to accomplish this through a formula acceptable to them but which could gain others' support while keeping more "extremist" versions at bay. In Chapter 3 I detail how, with some important additions, the France-UK "joint" text emerged as the adopted rule in the end. And in Chapter 5 I demonstrate how a similar effect was produced during the negotiations of the Additional Protocols with regard to the inclusion of wars of national liberation (and partially) prisoner of war protections for freedom fighters.

This is a type of strategic reaction I label *covert pushback,* which I argue has a direct impact on the implementation of the resulting rules. Following its negotiation, Common Article 3 from 1949 was disregarded in many occasions by states taking advantage of the vagueness of its scope. The First Additional Protocol not once became applicable in wars of national liberation because none of the liberation groups could rise to the high standards that the treaty, standards set high in deceptive ways. Yet the value or life of the produced rules with regard to internal conflicts was not always obliterated by covert pushback; in the case of Common Article 3, indeterminacy allowed for narrow *as well as* generous interpretation, and with the passage of time the vague scope CA3 became seen as useful by the actors pushing for better conduct in low-intensity conflicts.

The following figure illustrates the operation of social coercion and covert pushback from the perspective of the "coerced" state:

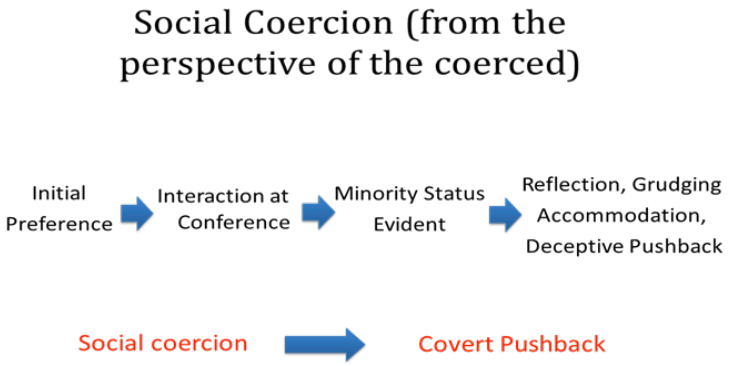

Figure 1. Social Coercion and Covert Pushback

Although the bulk of the dissertation is devoted to describing and explaining the process of formal rule-making in the area of internal conflicts in the context of international humanitarian conferences and diplomatic negotiations until the 1970s, the story of these norms has not ended there. Quite the contrary, over the past 35 years initiatives have proliferated that have extended the breadth and the means for accountability of the standards set earlier. This has occurred chiefly through the intersection or "cross-pollination" of humanitarian law with two bodies of law that had until then developed separately: international human rights and criminal law. The international architecture of these sets of standards has transformed radically over the last few decades, particularly with the creation of various regional and international commissions and courts, among which the International Criminal Court (ICC) is foremost.[79] Given the importance of these trends in historical terms and for their relevance to current debate I devote an entire final chapter to tracing them and explaining them. As I show, the pathway to norm-making adopted since the 1970s has taken "alternate" routes that department from conventional interstate negotiations of treaty law, forcing me in some ways to "break out" of the theoretical discussions that frame the norm emergence and development story until then. This chapter should thus be taken as preliminary but also as suggestive of the future of standard-setting in this area.

[79] Ruti G. Teitel, *Humanity's Law* (Oxford University Press, 2011); David Scheffer, *All the Missing Souls: Personal History of the War Crimes Tribunals* (Princeton University Press, 2013).

V. Plan of the Dissertation

The dissertation is organized as follows. Chapter 2 begins with the absence of codified international humanitarian rules, a process inaugurated by the Red Cross. Specifically, it explores why the ICRC, after initially vowing to focus on the humanization of inter-state war in 1863, soon decided to pursue relief action in civil conflicts but shied away from pushing for formal regulation. This chapter also analyzes the early debates about the international legalization of humanitarian relief in civil wars from the early twentieth century until 1921, the year that saw the emergence of the very first non-binding international humanitarian principles for internal armed conflicts. Chapter 3 resumes the trajectory and explains the circumstances leading to the idea of extending the Geneva Conventions to "non-international conflicts." This chapter zooms deeply into the disputed negotiation of Common Article 3. Chapters 4 and 5 continue the historical investigation by tracing the ICRC's and other organizations' efforts to develop the scope of Common Article 3 during the 1950s and 60s set against the backdrop of a new wave of armed conflict violence and atrocity, culminating with the inauguration of a new stage of norm creation. At the time Western states and the ICRC faced legitimate pressures to humanize wars of national liberation and to protect freedom fighters, a major moral crusade led by coalition of otherwise "weaker" states that ultimately prevailed. Given traditional power differentials, how was such success possible? To answer this question I descend again into the careful study of the preparation and negotiations of the two Additional Protocols over an intense period of almost seven years, and probe the operation of social coercion in this changed world-political context. Finally, Chapter 6 connects the process and outcomes of the 1970s to the (many) developments seen in the following three decades, highlighting in particular the rise of decentralized standard-setting through resort to international customary and human rights law by prominent international legal scholars and, crucially, by a new set of institutions and criminal tribunals. The concluding chapter reflects on the empirical and theoretical findings, and offers ideas for policy and future research.

Chapter 2 - The Early History of International Humanitarian Norms in Internal Armed Conflicts (1863-1921)

I. Introduction

Internal armed conflicts were first formally regulated via international treaty law in 1949 through Article 3, common to all of the Geneva Conventions, and later through the Additional Protocols to those conventions, negotiated in the 1970s. The origins of those instruments concern chapters 3 and 5 of this dissertation. Less well known is the much longer history of thought and practice on the treatment of civil conflict that preceded them. The first goal of this chapter is to describe the general contours of such precursor debates, focusing particularly on the discussions on humanitarian principles and practice in internal wars since the mid-nineteenth century, a period that witnessed a flurry of initiatives geared toward the "humanization" of war through international declarations and treaties. Despite a received lineage of ideas and doctrinal debates on the specific issue of internal armed conflicts, no international codes emerged at this time to bring humanity to bear on armed violence within states' borders. Instead, the prevailing legal frames remained tightly beholden to states' *ad hoc* decision to grant rebels recognition and/or good treatment, which happened only rarely. Moreover, although various actors gained an interest in regulating armed hostilities and protecting certain types of victims through international law, those standards were designed to apply strictly to conflicts between states, not within them.

This is perhaps not very surprising from the perspective of sovereign-minded states that wished to retain their security prerogatives internally. Some rationalist worldviews presented in the previous chapter have this expectation as their baseline. What is noteworthy, however, is the fact that the *non-governmental* organization that emerged in the early 1860s as the principled beacon for making war more humane --the International Committee of the Red Cross (ICRC)— for decades did not press especially hard for the formulation of binding legal rules for internal conflicts, despite the fact that soon after its creation it became deeply concerned and practically involved in alleviating their horrors. Why was this so? The second part of this chapter focuses on describing and explaining

the incremental, atrocity-punctuated process of change in the ICRC's thinking and practice with regard to conflicts within state's borders, what Gustave Moynier, ICRC President from 1864 until his death in 1910, colorfully termed "intestine" wars.

With regard to this question, I argue, in brief, that the ICRC was a creature both of and ahead of its time. A model trendsetter though it was, the Committee operated both on and through the prevailing norms of sovereignty at the time. And throughout the nineteenth century, but especially toward its end, sovereignty as a social institution was characterized by reinvigorated imperial colonialism and growing military nationalism. These elements of the broader structural context, I suggest, militated against projects seeking to place burdens on states vis-à-vis their internal prerogatives, particularly those that potentially emboldened domestic violent challengers. Thus, despite the ICRC's increasing involvement in the practical alleviation of the victims of internal wars, the organization ultimately seemed unwilling and/or unable to contradict the received international doctrine on such conflicts, which essentially left it up to states to decide whether to recognize rebels as belligerents worthy of humane treatment.

Beyond macro contextual factors, various organizational-level constraints emerged soon after the founding of the ICRC that may have inhibited it from challenging prevailing international norms and sovereign imperatives too radically. These institutional challenges ranged from petty organizational jealousy, to the discredit that arose when the rules enshrined in the 1864 Convention were egregiously violated in the major inter-state wars that followed its creation, notably in the Franco-Prussian War of 1870. In addition to lessening the organization's social resources to act a humanitarian broker, I contend that these setbacks may have "locked-in" a certain conservatism within its small group of leading figures, particularly in its restless President Gustave Moynier. This conservative stance likely further reduced incentives within the ICRC to support adventurous proposals for new binding rules or institutions.

Here I focus especially on the ICRC and the Red Cross movement because, until 1912, no government had suggested that there should be biding international humanitarian rules for internal armed conflicts. However, the third and final part of this chapter takes readers all the way through 1920-1, describing states' early proposals and

debates at international conferences on this issue. Importantly, I document and theorize the sources and processes through which the ICRC began to actively endorse the idea of formulating clear --if non-binding-- principles for humanitarian (mostly relief) action in internal conflicts, as well as the process through which states' risk aversion toward those international norms started to recede.

In sum, this chapter shows why, how and who placed the thorny issue of humanizing civil wars on the international agenda. Specific conditions and pressures generated incremental changes both in state and non-state concerns, spurring their combined moral entrepreneurship. And while during this time certain structural constraints blocked the emergence of "hard" humanitarian law in this issue-area, the seed idea became firmly planted and continued to grow over time due to similar, recurring auspicious conditions.

II. Strands of legal thought before the nineteenth century

Legal historians trace the origins of the debates among political theorists about the nature and participants of internal conflicts to Plato's *Republic*, written around 380 BC, and to Cicero's writings four and a half centuries later. According to Stephen Neff, political thought since this early period has consistently tried to differentiate between "true wars" against "worthy enemies" and conflicts with "bandits" or "brigands."[80] "Real" enemies were those with clear internal lines of authority, with some claim to territory, wealth, and popular legitimacy. With them, war was to be waged according to certain rules of good conduct, such as respect for prisoners of war. The latter and "lesser" type of conflicts, in contrast, could be dealt swiftly and violently, according to the local criminal laws that were in place. Notable legal publicists and political commentators of the sixteenth and seventeenth centuries, including figures such as Francisco de Vitoria and Hugo Grotius, agreed with this view, usually locating civil strife in the second, "criminal" category.[81]

---

[80] In this section I rely heavily on the work of Stephen Neff and Lindsay Moir, both international legal experts. Stephen C Neff, *War and the Law of Nations: A General History* (New York: Cambridge University Press, 2005); Moir, *The Law of Internal Armed Conflict*.

[81] Neff, *War and the Law of Nations: A General History*, 251–276.

In essence, this position did not seem to change until the mid-to-late eighteenth century when emerging liberal contractualist ideas began to ferment in Western Europe, slowly legitimating claims for representative government.[82] The notion that a revolt against a sovereign could potentially be justified if he did not perform his duty to protect his subjects seems to have provided a crucial conceptual change that enabled a more "sober" assessment of internal strife.[83]

This move is reflected in the thought of the deeply influential Swiss legal scholar Emerich de Vattel (1714-1767,) who in his treatise on the *Law of Nations* (1758) introduced a triad of distinction between types of internal strife: rebellion, insurrection, and civil war. This taxonomy would prove influential. According to Vattel, rebels were those (usually few in number and acting in a disorganized manner,) who waged an "unlawful" revolt against sovereign authority. They were to be treated as criminals. Insurrectionists, for their part, had some type of "just cause" that motivated them, including combating repression by their sovereign, but did not aim to overthrow the ruler altogether. Only when those in arms sought to bring down the central government could one speak of a civil war proper which, in Vattel's view, pitted two parties against one another as if they constituted distinct societies.[84] Importantly, it was also only this "higher" state of internal strife that according to Vattel activated the application of humanitarian principles: "It is very evident that the common laws of war, those maxims of humanity, moderation and probity… are in *civil wars* to be observed by both sides."[85] Historically then, entitlement to good treatment between combatants has been entwined with questions of status recognition and claim to legitimate authority, two issues that, as

[82] Some cite instances in which Islamic law during the Middle Ages sought to depart from this strict division and to create a space for "doctrine-based" struggles as different from sheer criminality. This seems to have been an isolated position, however. Neff, *War and the Law of Nations: A General History*, 251.
[83] Neff, *War and the Law of Nations: A General History*. Note that my discussion here has a narrow focus on the prevailing ideas and norms about civil war or internal conflicts, not on interstate war. For this reason I do not mention other crucial sources of the laws of war writ large, such as the Chivalric codes.
[84] Neff, *War and the Law of Nations: A General History*, 255.
[85] Cited in Moir 2007, 3. The emphasis is mine.

we will see, have persistently riddled debates on the regulation of internal armed conflicts through the present.

III. Legal thought in the nineteenth century

Vattel's proclamation about the application of humane rules in the context of civil war, however, was far from constituting a broader normative belief or an international rule shared by statesmen at the time. Instead it seems that his opinion was quite novel. International legal scholar Lindsay Moir notes, for example, that "toward the end of the eighteenth century there had been a distinct move toward the application of the laws of warfare to internal conflict, but this was based almost exclusively on the character of the conflicts and the fact that both [interstate and internal war] were often of a similar magnitude, *rather than any overriding humanitarian concern to treat the victims equally.*"[86]

To this one may add that the decision of whether to apply the customary laws of war was essentially at states' own discretion and, generally speaking, states seemed happy to continue treating internal uprisings as expressions of criminality.[87] Moreover, as I will note, it tended to be third states that seriously confronted the question of whether to afford recognition, not the states directly facing armed opposition, which usually preferred to avoid the issue altogether.

Nevertheless, Vattel's attention to the varied nature and intensity of armed challenge appeared to resonate among the legal publicists of the time, leading to the gradual carving out within traditional customary international law of three corresponding conflict categories: rebellion, insurgency, and belligerency. The importance of his opinions comes to light when we are reminded that, at the time, international law did not yet come in codified or "positive" written form, and that its key sources were state practice (custom) and the opinions of leading legal experts, of which Vattel was a shining example.

---

[86] Ibid. The emphasis is mine.

[87] A systematic assessment of this claim has not been conducted, perhaps due to reasons of data availability. For a longer discussion, however, see Hersch Lauterpacht, *Recognition in International Law* (Cambridge: Cambridge University Press, 1947); Moir, *The Law of Internal Armed Conflict*, chap. 1.

These three categories replicate almost verbatim the distinctions explained earlier. *Rebellion* was thought to cover small uprisings that could be dealt with through regular local measures— international rules had simply no import to quell it. *Insurgency*, for its part, involved a higher --and still undefined-- level of hostilities and organization, and its recognition triggered a few rights and responsibilities by parties to the conflict vis-à-vis each other, as well as to foreign countries. (The inability to set a clear "hostility threshold" would also plague rule-making in this area until the present.) International responsibilities to foreign third parties were chiefly related to economic matters at sea, such as the insurgents' duty not to blockade ports, or their right to search suspicious vessels in order to prevent supplies coming from abroad from reaching their opponents.[88] According to Stephen Neff, recognition of insurgency meant that captured opposition fighters could be given prisoner of war status by the government they opposed, instead of simply being treated as criminals. This, however, was not a *formal* or obligatory legal provision but a humanitarian one, granted by states on an *ad-hoc* basis.

State recognition of this second category –insurgency-- rarely came in explicit form. Despite this it appears that for the commentators at the time insurgency status could be triggered automatically (that is, without a declaration) once a few objective criteria were met: that the armed challengers occupied some concrete portion of territory over which they exercised sovereignty; and that they conducted hostilities under an organized corps with clear leadership, and in accordance with the customs of war. Neff clarifies that although "even to present day, there is no definite judicial authority on the point… there is little doubt that the automatic recognition of insurgency is the rule."[89] The extent to which this automatic activation of insurgency status was observed by governments has yet to be subjected to systematic scrutiny, however, and as such Neff's claims about the "automaticy" of recognition remain tentative.

The third and "highest" level violent non-state groups could "graduate to" was *belligerency*, which, when recognized, was taken to mean that a full-scale civil war was taking place, and hence that both parties should be treated in the same way as inter-state

[88] Moir, *The Law of Internal Armed Conflict*, 7–8.
[89] Neff, *War and the Law of Nations: A General History*, 273.

war in the eyes of international law. The benefits attached to belligerency went further than those of insurgency status because the former activated a fuller body of neutrality norms that had to be respected by the foreign state granting the recognition.[90] Simply, it constituted the most sophisticated legal mechanism that states could use, among others, to show humanitarian restraint toward their internal armed challengers. It legitimated the opposing party as "state-like," a status that afforded both wartime rights and duties to the belligerent party.

Some prominent occasions of belligerence recognition (by third states) exist. Britain exercised it in the case of the Greek independence struggle against the Ottomans in the 1820s, and vis-à-vis conflicts in Portugal in 1828, in Trieste in 1848, and perhaps more importantly, in the American Civil War in 1861.[91] Other major powers followed Britain's example, such as France and Russia toward the Greeks in the 1820s, and the Netherlands, Spain and France in the 1860s. The United States also employed it in regards to the South American states that sought independence from Spain in the 1810s, or in the case of the Texan independence struggle from Mexico in 1836.[92]

Notwithstanding these important cases, recognition of belligerence appears *not* to have been a predominant practice.[93] Although in theory certain "objective" criteria existed that triggered it, embattled states were not under any obligation to recognize belligerency, and rarely did so. When it was used, as suggested above, it was usually by third states that stood to enjoy some commercial or legal benefit, particularly if trade took place with insurgent-dominated ports. Thirds states also afforded recognition if they explicitly wanted to materially support and give political legitimacy to an internal struggle occurring in another state, sometimes citing a humanitarian motive.[94]

---

[90] Neff, *War and the Law of Nations: A General History*, 260.
[91] Neff, *War and the Law of Nations: A General History*, 262.
[92] Neff, *War and the Law of Nations: A General History*, 267; Moir, *The Law of Internal Armed Conflict*, 6; Lauterpacht, *Recognition in International Law*.
[93] Neff, *War and the Law of Nations: A General History*, 268.
[94] See generally Finnemore, *The Purpose of Intervention: Changing Beliefs About the Use of Force*, chap. 3; Gary J. Bass, *Freedom's Battle: The Origins of Humanitarian Intervention* (Knopf Doubleday Publishing Group, 2008).

Importantly, as Lindsay Moir asserts, "the laws of war were *not* automatically applicable to internal armed conflicts in the nineteenth and early twentieth centuries."[95] Only in few cases during the nineteenth century did the states directly concerned sign *ad hoc* accords with rebels to guarantee mutual respect for certain restraints in civil wars. Reciprocity was a key motivation in these bilateral agreements. Two prominent examples are the Swiss Civil War in the 1840s, and at least twice in Colombia (in 1820 during the War of Independence with Spain, and in 1860-1 during one of the many civil wars that country experienced at the time.)[96]

Yet without a doubt the most crucial precedent in the history of the written laws of war arose during the American Civil War, through an instrument now commonly known as "the Lieber Code." This domestic code took on such seminal importance that it bears some extended mention.

IV. Seminal Efforts at Codification

a. The Lieber Code

The Lieber Code is widely regarded as a significant landmark in the history of the laws of war because, quite simply, it constituted the first-ever formal written codification of such rules endorsed by a government in modern times.[97] Ironically, however, although originally conceived as a manual setting out standards for conduct in internal armed conflict, outside of the American Civil War the Lieber code became instead a model for the regulation of *inter*-state war.

Francis Lieber (1800-1872) was a Prussian-born academic who migrated to the United States, eventually becoming Professor of History, Political Science and International Law in South Carolina and later at Columbia College (now Columbia

---

[95] Moir, *The Law of Internal Armed Conflict*, 17.

[96] Alejandro Valencia Villa, *La Humanización de La Guerra: Derecho Internacional Humanitario y Conflicto Armado En Colombia* (Bogota: Tercer Mundo Editores, 1991); Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press, 2012).

[97] This is by now such a well-acknowledged fact that only one citation bears mention; Geoffrey Best, *Humanity in Warfare* (New York: Columbia University Press, 1980), 170. For a recent, extensive and celebrated account of the laws of war in the history of the United States, focusing on Lieber's influence, see John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (Free Press, 2012).

University.) Lieber, who had also had direct experience on the battlefield during his youth, became known for his teachings on the customs of war. In 1860, on the brink of the American Civil War (1861-1865,) Lieber wrote a document entitled "Guerrilla Parties considered with reference to the Law and Usages of the War" at the request of Mayor-General Henry W. Halleck, General-in-Chief of the Army of the United States, who led the Union's armed forces during the war.[98] General Halleck solicited Lieber's opinion on the grounds that:

> "the rebel authorities claim their right to send men, in the garb of peaceful citizens, to waylay and attack our troops, to burn bridges and houses, and to destroy property and persons within our lines. They demand that such persons be treated as ordinary belligerents, and that when captured they have extended to them the same rights as other prisoners of war; they also threaten that if such persons be punished as marauders or spies, they will retaliate by executing our prisoners of war in their possession."[99]

Lieber's twenty-two-page response paper occupied itself mostly with parsing out the constitutive differences between guerrillas and several other types of rebellious agents including: freebooters, marauders, brigands, partisans, free-corps, spies, rebels, conspirators, and robbers. Curiously, however, he conducted this survey in reference to the context of external *invasion* or *occupation*, but, explicitly, not of civil war. In the closing paragraphs, in fact, he declared that,

> "I do not enter upon a consideration to their application to the civil war in which we are engaged, nor of the remarkable claims recently set up by our enemies, demanding us to act according to certain rules which they have signally and officially disregarded toward us… The application of the laws and usages of war to wars of insurrection or rebellion, is always undefined, and depends upon relaxations of the municipal law, suggested by humanity or necessitated by the numbers engaged in the insurrection… Neither of these topics can occupy us here, nor does the letter prefixed to this tract contain the request that I should do so."[100]

President Lincoln and General Halleck were preoccupied with lack of knowledge of the laws of war by the thousands of new young volunteers that had swelled the army

---

[98] Francis Lieber, *Guerrilla Parties Considered with References to the Laws and Usages of War* (New York: D. Van Nostrand, 1862).
[99] Letter of Major-General H. W. Halleck to Francis Lieber, Washington, August 6, 1862, in Ibid.
[100] Ibid.

ranks in preparation for the Civil War.[101] Hence, a year after the publication of his original pamphlet Lieber requested to be appointed to write a broader code regulating the conduct of government forces during war. Halleck welcomed this request and Lieber was assigned, alongside three other military experts, to draft such a code.[102] The resulting 157-article work was soon thereafter adopted by President Abraham Lincoln as the official instruction manual for the Union's troops, and dubbed "General Orders 100 - Instructions for the Government of Armies of the United States in the Field."[103]

The Lieber Code crossed borders to become a model quickly emulated by several other states, including Great Britain, France, Prussia, Spain, Russia, Serbia, Argentina and the Netherlands, all of which issued military regulations of their own over the next four decades.[104] Legal historians have noted the irony contained in the fact that a domestic set of norms should become a template for international regulation, though this type of diffusion dynamic is consistent with much IR research on normative spread.[105] Lieber himself expressly hoped that his code would become the basis for similar documents in other countries.[106] Given how well connected he was to the budding society of European international law experts and practitioners, with whom he corresponded often on various topics, it is unsurprising that his ideas floated swiftly across the ocean.[107]

---

[101] Burrus Carnahan claims that in the pre-war period the US Army consisted of 13,000 professional fighters. These figures appeared to have risen to a million for the civil war, prompting Lincoln's concern. Burrus M Carnahan, "Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity," *American Journal of International Law* no. 92 (1998): 213–231.

[102] Lieber was the major author, with the rest of the Committee Members reportedly only briefly editing his draft. Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (New York: Cambridge University Press, 2010).

[103] Francis Lieber, *Instructions for the Government of Armies of the United States in the Field* (New York: D. Van Nostrand, 1863).

[104] Best, *Humanity in Warfare*, 155–156; Abi-Saab, *Droit Humanitaire et Conflits Internes: Origines et Évolution de La Réglementation Internationale*, 23; Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, 41.

[105] Florini, "The Evolution of International Norms"; Finnemore and Sikkink, "International Norm Dynamics and Political Change."

[106] Lieber, *Instructions for the Government of Armies of the United States in the Field*; Witt, *Lincoln's Code: The Laws of War in American History*.

[107] Romain Yakemtchouk, *Les Origines de L'institut de Droit International* (A. Pedone, 1973); Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960*. Another plausible reason for the positive international reception of Lieber's work was that

The success of the Lieber Code was not only international. It appears that, despite its initial rejection of these norms, the Confederate side eventually adopted it for the training of its troops.[108] This was surely a welcome outcome since it seems that part of the reasoning behind the drafting of a code about the regulated exercise of warfare by Lincoln was to elicit reciprocity from the opposite side.[109]

Importantly for our purposes, the Lieber Code also contained a full section (section X) on "insurgency, civil war, rebellion," which, as indicated, was missing in the paper he had written a year earlier. The Code's treatment of these matters was relatively modest (eleven articles out of a total of 157.) It provided definitions that mirrored the differences between insurgency and belligerency offered by Vattel.[110] Similar to the prevailing legal doctrine, Lieber proclaimed the possibility (but not the obligation) that humanitarian provisions such as prisoner of war status could be extended toward rebels, but beyond this no other concessions were specified. Lieber also seemed seriously preoccupied with clarifying that a government's gesture to give humanitarian concessions to rebels "neither proves nor establishes an acknowledgement of the rebellious people, or of the government which they may have erected, as a public of sovereign power."[111] This is worth noting, since it further confirms that state anxiety to avoid the legitimation of rebels through legal recognition has a long and sustained trajectory.

Without a doubt, the Lieber Code constituted a watershed in the codification of the laws of war. Its prominence at home and across the Atlantic notwithstanding, it did not constitute an international treaty. Moreover, as hinted earlier, the Lieber Code would

---

its language and provisions were not circumscribed to its direct geographical/political context (that is, the American Civil War,) but rather they were formulated in comprehensive terms, covered broad areas of warfare (including occupation,) defined crucial concepts in such as "military necessity" and, in general, crystallized in official form a rich tradition of legal reflection and custom on the waging of war. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*.

[108] Ibid.

[109] Moir, *The Law of Internal Armed Conflict*; Solis, *The Law of Armed Conflict: International Humanitarian Law in War*.

[110] Notably, it did not concern itself much with differentiating between these two, and brigands and other types of criminals—presumably the definitions he offered were clear enough to exclude them by fiat.

[111] Lieber, *Instructions for the Government of Armies of the United States in the Field*.

have a distinct influence on future efforts to humanize war *among* states but not *within* them.

b. The Birth of the International Law of War: the First Geneva Convention and the Law of The Hague

Discussions about humanizing war through international agreements were brewing in Europe at the same time that Lieber wrote his manual for Lincoln and Halleck. Various developments served as background conditions for this movement, among them a growing enthusiasm for international law in Europe, the introduction of compulsory military service by increasingly nationalistic states, and the rising visibility of war atrocities through public reporting on the subject.[112]

Actual international regulations of warfare among states began to crystallize in the 1860s through the efforts of non-state and state actors. The year 1863 saw the creation of the International Committee for the Red Cross (ICRC, originally under a different name) in Geneva.[113] Red Cross-inspired rules have since concerned principally the alleviation of harm to war victims, a category initially reserved for wounded and sick combatants.[114] A few years later, certain European states, especially the Russian Empire, began spearheading multilateral meetings to, among others, craft international instruments to

[112] Outside of the war regulations briefly reviewed here, the 1860s and 1870s saw the creation of the International Telegraph Union (1865) at the behest of France, and the International Postal Union in 1874 through the stewardship of the United States and Prussia. Alongside the ICRC, these are among the oldest, still-existing international organizations. On the enthusiasm for international law among liberal "internationalists" in Europe and the US around this time, see Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960*, chap. 1. On war reporting and its historical impact, see generally Paul L. Moorcraft, *Shooting the Messenger: The Political Impact of War Reporting* (Potomac Books, Inc., 2008). And on the eventual symbiosis between the Red Cross movement and growing war-prone nationalism in Europe, see John F Hutchinson, *Champions of Charity: War and the Rise of the Red Cross* (Boulder: Westview Press, 1996).

[113] The denomination of the International Committee varied during its early meetings. First it was named *Société Genevoise d'Utilité Publique* (Geneva Society for Public Welfare,) later *Comité International de Secours aux Blessés* (International Committee of Relief to the Wounded,) among other slight variations. Eventually, in 1875 the current name (with Red Cross in its title) was adopted.

[114] The respect and protection of wounded and sick combatants stemmed from the fact that they could no longer fight and therefore threaten the enemy.

regulate the use of weaponry and legitimate behavior between combatants, of which the 1899 and 1907 Hague Peace Conferences became the critical examples.

This "division of concern" between victim protection and warfare regulation over time gave rise to two relatively separate bodies of regulation: the "humanitarian" Geneva lineage shepherded by the ICRC, and the state-driven "military" Hague tradition mostly concerned with the conduct of hostilities and the legitimate methods of war. Although to the contemporary eye this may seem like an artificial and puzzling distinction, it was deeply felt and maintained by states for almost a century, only to be overcome after intense public pressure and fierce governmental resistance in the 1960s and 1970s. (Chapters 4 and 5 of this dissertation will explain at more length how this came to be.)

The credit of bringing about the first-ever international agreement for humanizing inter-state war (the First Geneva Convention of 1864) goes to the ICRC.[115] This organization was created by five notable Swiss men of Christian faith as a platform to champion a set of humanitarian ideals, whose essence may be simply captured by the statement: "War is a fact of human life, and while it is unlikely to disappear, its horrors can be mitigated."[116] Although its "ideator," the Genevan businessman Henry Dunant was not the first person to spouse this belief,[117] he became its most effective and dedicated "agitator" when, upon witnessing the horrors of the Battle of Solferino in 1859,

---

[115] Although a Declaration on war at sea had been signed in 1856 in Paris at the end of the Crimean War (which for almost three years pitted Russia against Great Britain, France, the Ottoman Empire and Sardinia,) its contents did not bear humanitarian traits but were limited to protecting neutral maritime trade. Dietrich Schindler and Jiri Toman, eds., *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents*, 4th Editio (Martinus Nijhoff Publishers, 2004), 1055.

[116] The story of the ICRC and the Red Cross Movement has been aptly documented elsewhere and thus needs only be briefly summarized here. The most balanced accounts are those of David Forsythe, especially David P. Forsythe, *The Humanitarians: The International Committee of the Red Cross* (Cambridge University Press, 2005). For an extensive account of this early period of the movement, see Pierre Boissier, *From Solferino to Tsushima* (Geneva: Henry Dunant Institute, 1985). More critical accounts are included provided by Hutchinson, *Champions of Charity: War and the Rise of the Red Cross*; Caroline Moorhead, *Dunant's Dream: War, Switzerland and the History of the Red Cross* (New York: Carroll and Graf Publishers, 1998). Finally, for a condensed version processed for IR scholars, see Finnemore, "Norms and War : The International Red Cross and the Geneva Conventions."

[117] The other towering figure was Florence Nightingale in the UK. Best, *Humanity in Warfare*, 148–149; Hutchinson, *Champions of Charity: War and the Rise of the Red Cross*, 19.

he wrote a moving manifesto (*A Memory of Solferino,*) and paid out of his own pocket to publish and circulate it among many of the key political and intellectual luminaries of the European world at the time, who received it with considerable interest.[118] His opus depicted war horrors (especially those related to the helpless fate of wounded soldiers) with impressive skill, and its prose made it a sensational success, turning him into a sort of instant celebrity. The book drew praise from most quarters throughout the continent, from notable French figures such as Victor Hugo and Ernest Renan, to Swiss military hero General Henri-Dufour, whose career included being Commander-in-Chief of the Swiss Army during the *Sonderbund* Civil War of 1847 and who had also trained a young Napoleon III (who became Emperor of France in 1852,) with whom he remained close friends.[119] Dufour went on to be part of the original "Committee of Five" that composed the original ICRC.

Another recipient of the book was Gustave Moynier, a respected and well-connected Genevan philanthropist and lawyer, who was similarly moved with Dunant's narrative and became enthusiastic about making it a reality. Moynier, like Dufour, had the moral and social standing to see the project through. At the time he presided the Geneva Society for Public Welfare, an organization founded in the 1820s that "brought together high-minded Genevan pietists, men of affairs who sought to improve both the moral and the material lives of the common people."[120] Other Genevan notables were invited by Moynier to form part of the Committee, possessing medical skills to further back team credibility: along came Dr. Théodore Maunoir, a "distinguished surgeon who had been twice president of the Geneva Medical Society, [and who] possessed both a lengthy experience in medical philanthropy and an awareness of developments in the English-speaking world that others lacked."[121] Maunoir enlisted Louis Appia, his "protégé" and

[118] Dunant, *A Memory of Solferino*. The Battle of Solferino was part of the wars of Italian reunification.
[119] Boissier, *From Solferino to Tsushima*, 49–53.
[120] Hutchinson, *Champions of Charity: War and the Rise of the Red Cross*, 21.
[121] Hutchinson, *Champions of Charity: War and the Rise of the Red Cross*, 22.

then-President of the Geneva Medical Society, who also held a respected record of publications on wartime medical care.[122]

Given their collective social resources, Dunant, Moynier, Dufour, Maunoir and Appia were quite well-placed to act as brokers of the nascent humanitarian spirit by tapping onto their links to high-level political figures.[123] It also helped that Dunant's oeuvre came equipped with concrete proposals, making the enterprise more amenable to realization. Dunant's specific ideas were: 1) To organize relief societies of principled volunteers who would succor the military wounded and sick during interstate war; 2) that these societies would be formally recognized by governments and armies as legitimate providers of aid on the field; 3) that their members would be identified and protected by a universally-accepted emblem;[124] 4) that this commitment could ideally be sanctioned as an international principle in the form of a Convention.[125]

Together, these ideas constituted the initial agenda of the ICRC. Dunant and his colleagues were able to organize two Conferences in 1863 and 1864, and from the latter emerged the already-mentioned First Geneva Convention protecting sick and wounded

---

[122] Hutchinson, *Champions of Charity: War and the Rise of the Red Cross*, 23.

[123] According to Stacie Goddard, in social network theory *brokers* are political entrepreneurs "who bridge structural holes in fragmented networks; they maintain ties with actors who would otherwise remain unconnected." And "by bridging structural holes, brokers occupy central positions in a network structure, acting as nodes through which the multiple transactions coalesce." Stacie E. Goddard, "Brokering Change: Networks and Entrepreneurs in International Politics," *International Theory* 1, no. 02 (2009): 257. To this basic definition I would add that brokers not only attack existing "structural holes" but can and often do *make them evident* by pursuing a number of different tactics. See Keck and Sikkink, *Activists Beyond Borders*, 16–25; Finnemore and Sikkink, "International Norm Dynamics and Political Change." These tactics are ultimately geared, among others, toward providing a common interpretive terrain and a focal point for action. Thus, the theoretical approach I adopt here pays substantive attention to brokers as *agents* of change, but maintains that the *conditions under which* entrepreneurs as agents succeed ultimately depend on the *structural* position they occupy. On transnational social mobilization more generally, see Sidney Tarrow, *The New Transnational Activism* (Cambridge University Press, 2005).

[124] The primary use of the Red Cross emblem was initially reserved for military medics, something that helps explain why initial governmental and army resistance to these new humanitarian standards soon subsided and transformed into a forceful embrace.

[125] A fourth one was added soon after: That the relief workers should be considered neutral by combatants and thus could not be targeted.

soldiers during inter-state war on land.[126] As will be seen later, this would become the standard procedure of humanitarian rule-making for the ICRC; First, calling for "unofficial" meetings of government experts (and Red Cross societies) that served to socialize ideas, gather feedback and produce working drafts that did not constitute formal commitments, and second, liaising with the Swiss government to summon Diplomatic Conferences where state delegations held treaty-making powers.

It is important to understand that, beyond humanitarian rules, the creation of the ICRC in 1863 propelled the emergence of the broader Red Cross movement that survives until today, which operates as a complex network of actors at the domestic and international levels. The ICRC sits in Geneva as an independent Swiss-registered non-governmental organization with the ability to regulate itself and to guide international legal humanitarian debate, in addition to many other activities of protection, and to the soft "enforcement" of the law through quiet diplomacy with warring parties during conflict. National Societies of the Red Cross, for their part, are locally-run organizations that gather volunteers and rely on state approval and some amount of state funding, and thus --to varying degrees-- remain beholden to governmental authority.[127] Since the early

---

[126] For the text of the First Geneva Convention see *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva, 22 August 1864* at http://www.icrc.org/applic/ihl/ihl.nsf/INTRO/120?opendocument or in Schindler and Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents*, 365. The political negotiation of the First Geneva Convention in 1863 and 1864 were arduous, however. Some governmental participants at the first (1863) conference, for example, initially balked at the idea of letting untrained amateurs "get in the way" of the battle, and it took spirited interventions by Moynier and others to tilt the adverse balance of opinion, eventually achieving most of what had been foreseen by the ICRC. Furthermore, only few state representatives seemed to have been morally committed (the Dutch medical expert Bastings, for example) to these ideas from the outset. Rather, most appear to have been convinced by ICRC and their peers' influence in the context of the Diplomatic Conferences. Although it is not a goal of this chapter to provide evidence for or against persuasion or peer-pressure dynamics among states in these meetings, there is historical material that suggests that this was the case with at least some of the representatives in attendance. For an argument supportive of the convincing-through-persuasion hypothesis, see Finnemore, "Norms and War : The International Red Cross and the Geneva Conventions." Also, John Hutchinson's more skeptical description of the 1863 and 1864 meetings, from which I draw heavily, is helpful to discern between the positions of different state officials. Hutchinson, *Champions of Charity: War and the Rise of the Red Cross*, 33–56.

[127] This is but a bare-bones description of the Red Cross movement in its early period. I do not bring in more detail yet so as not to confuse readers, especially as the movement's structure (and

years of the Red Cross movement the ICRC has balanced decentralized authority vis-à-vis National Societies, among others, by retaining and upholding the right to recognize new Societies, and by fostering continued dialogue among the various Red Cross entities through events known as the "International Conferences" of the Red Cross.[128] As we will shortly, these periodic gatherings have also constituted an essential forum for the development of IHL.

For over three decades, the 1864 Geneva Convention remained the only international binding war-related convention. Yet, as mentioned earlier, while the ICRC was the non-governmental precursor, there were other actors in its midst with similar goals. For reasons still subject to debate (historians cite a combination of military interest and perceived reputational benefits,) the Imperial Government of Russia became an active convener of inter-state meetings to discuss agreements about peace, disarmament and legal moderation in war in the second half of "the long nineteenth century."[129] At the

---

that of its component organizations) is utterly complex and has transformed historically. It is important to note, however, that National Red Cross and Red Crescent Societies have been since 1919 grouped by another organization, the League (now International Federation) of Red Cross and Red Crescent Societies, which arose out of organizational rivalries (and ambitions) instigated by the American Red Cross vis-à-vis the ICRC in the immediate post-World War I period. Historically, the League had a fairly difficult relationship with the ICRC regarding agenda-setting and claims to authority, but problems appear to have been ironed out in recent decades. In general it can be said that the League/Federation deals with natural disaster work and the ICRC is concerned with armed conflict. For more on the organizational history (among others) of the Red Cross, see especially Forsythe, *The Humanitarians: The International Committee of the Red Cross*, 316; François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims* (Macmillan Education, 2003). For a recent argument about how the decentralized network structure of the ICRC has been beneficial to its operations, see Wendy Wong, *Internal Affairs: How the Structure of NGOs Transforms Human Rights* (Ithaca: Cornell University Press, 2012).

[128] The First International Conference took place in Paris in 1867. The latest (XXXI) edition was held in 2011 in Geneva. Until 1892, the name of the event was officially "International Conference of Red Cross Societies." The switch to "International Conference of the Red Cross" provided greater accuracy in that the participants to these meetings included not just National Societies but also the ICRC, the states parties to the Geneva Convention, and after 1928, the League of Red Cross and Red Crescent Societies (now International Federation.) For an exhaustive history of these gatherings, the actors behind their organization, the resolutions they produce and their legal status, see Richard Perruchoud, *Les Resolutions Des Conferences Internationales de La Croix-Rouge* (Institut Henry-Dunant, 1979).

[129] Best, *Humanity in Warfare*, 163. See also Ian Clark, *International Legitimacy and World Society* (Oxford: Oxford University Press, 2007), chap. 3.

behest of the Russians, a conference met in St. Petersburg in 1868, which issued a Declaration to ban explosive and/or incendiary bullets, the first example of a formal international weapons ban and a source of future, more expansive commitments.[130] Later, in 1874, a Conference was organized in Brussels by Russian Czar Alexander II to examine a draft protocol on the laws and customs of war inspired in the Lieber Code and expanding the regulations of the means and methods of war initiated earlier in St. Petersburg. Although the participating states (all European plus Turkey) at the Brussels Conference were only willing to sign (but not ratify) the document, its standards soon made their way into a military manual issued in Oxford in 1880 at a meeting of the Institute of International Law (IIL,) an organization created in 1873 by a group of prestigious European and American international lawyers interested in the progressive development of international law.[131]

That code, however, was conceived as a model for voluntary domestic incorporation, not as a multilateral treaty.[132] It was not until 1899, in the context of an International Peace Conference organized in The Hague once more on the initiative of the Russian Imperial Government, that the non-binding precedents laid earlier, especially on the conduct of hostilities and the methods of war (i.e. weapons,) were extended and made

---

[130] Schindler and Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents*, 91.

[131] See the text of the Brussels Declaration in Schindler and Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents*, 21. For excellent accounts of the origins of the Institute of International Law, see Yakemtchouk, *Les Origines de L'institut de Droit International*; Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960*. It is worth noting that it was Francis Lieber who had sparked the idea behind the creation of an organization of prominent European and American experts to debate the development of international law more generally. Lieber died in 1872, months before the inaugural meeting of the IIL took place. That organization is still active, see its website at http://www.idi-iil.org/ (Consulted on August 13, 2013.)

[132] As noted earlier, in the 1870s and 1880s various states adopted domestic law-of-war codes inspired on the Geneva Convention, the Lieber Code, the Brussels Declaration or the Oxford Manual. See Abi-Saab, *Droit Humanitaire et Conflits Internes: Origines et Évolution de La Réglementation Internationale*, 23. Notably, ICRC President Gustave Moynier was entrusted by his fellow experts with authoring what became known as the "Oxford" Manual on the Laws of War on Land, in reference to the city where the IIL adopted it. See Schindler and Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents*, 29.

into international treaty law.[133] A Second Hague Conference, held in 1907 with American and Russian backing, revised and complemented the agreements from 1899. Although The Hague meetings failed to produce the intended disarmament accords, they are considered crucial in the history of war regulation and international institutions more generally for producing (among others) the seminal treaties referred to above, as well as for creating the Permanent Court of Arbitration to interpret and adjudicate international disputes.[134]

What About Civil Wars?

Internal armed conflicts were not considered at any of the diplomatic or Red Cross events described above, and as a result none of international instruments they produced dealt with the subject.[135] As said earlier, from a statist perspective this is not really puzzling, given that prevalent custom did not obligate sovereigns to grant combatant status or good treatment to rebels. State risk-aversion, per rationalist expectations, worked against disturbing the status-quo. From this one could plausibly conclude that, despite the Lieber Code, the humanization of civil war had seemingly not generated any concern among the actors involved in international rule-making. But was this so? In particular, looking beyond states, how did the ICRC (as the recognized principled non-

[133] The agreements obtained at The Hague Conferences are too extensive to detail here but can all be found in Schindler and Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents*. The website of the ICRC also features them at http://www.icrc.org/ihl. Note that at the Hague meetings states left the 1864 Geneva Convention untouched except for 1) adapting it to maritime warfare; 2) ensuring that The Hague Conventions included its standards. As I mention below, the ICRC fiercely reserved its position as the guardian of this "humanitarian" branch of the law, making sure that the original 1864 text was not revised without its direct stewardship. A Diplomatic Conference to that end was convened by Switzerland in 1906.

[134] This court was twice re-named, after the First and Second World Wars. It is now known as the International Court of Justice. For more on The Hague Conferences, see James Brown Scott, *The Hague Peace Conferences of 1899 and 1907 Volume 1* (Nabu Press, 2010); James Brown Scott, *The Hague Peace Conferences of 1899 and 1907 Volume 2* (Ulan Press, 2012). For three IR analyses highlighting the various important outcomes of these events, see Reus-Smit, *The Moral Purpose of the State: Culture, Social Identity, and Institutional Rationality in International Relations*, chap. 6; Clark, *International Legitimacy and World Society*, chap. 3.

[135] Although later I will cite two expert meetings of the International Law Institute in 1898 and 1900 that considered the subject but failed to produce humanitarian codes on it.

governmental organization devoted to the development of protections of war victims) see its own mission vis-à-vis that type of conflict?

Existing accounts suggest that from the very first founding meeting of the ICRC in 1863, questions were raised about the application of humanitarian provisions in civil conflicts.[136] Dunant's *Memoires* and the minutes of these seminal gatherings reveal that "after lengthy discussion, the Committee [thought] that it might be better and wiser to limit itself solely to thinking about the question of voluntary care in the context of the struggles *between* Great Powers, and only to European Wars."[137] Gustave Moynier is himself quoted as clarifying in 1864 that: "In case it needs to be said, we are not referring here to civil wars; international law is not applicable to them."[138] The reason for excluding civil wars was seemingly one of organizational (start-up) strategy: the Committee should have a clear and limited focus on which consensus by European rulers might be more or less easily attained. The extension to other types of war was *not* precluded on principle: rather, the ICRC founders felt that once the Red Cross idea had taken root and experience had accrued, it could grow in other directions.[139]

Thirteen years later, these relatively shy positions on civil war had seemingly undergone radical transformation. Moynier's own words are evidence of this. In 1876 he wrote: "That the wounded are insurgents…. Is that reason not to take them into account? Evidently not, since the motivations of the Red Cross are exclusively humanitarian, and detached from politics."[140] He added:

---

[136] Henry Dunant, *Mémoires* (Geneva: Institut Henry Dunant - Editions L'Âge d'Homme, 1971), 71; Abi-Saab, *Droit Humanitaire et Conflits Internes: Origines et Évolution de La Réglementation Internationale*, 30–31; Jean-François Pitteloud, ed., *Procès-verbaux Des Séances Du Comité International de La Croix-Rouge: 17 Février 1863-28 Août 1914* (Société Henry Dunant, 1999), 20.

[137] Dunant, *Mémoires*, 71; Abi-Saab, *Droit Humanitaire et Conflits Internes: Origines et Évolution de La Réglementation Internationale*, 30–31; Pitteloud, *Procès-verbaux Des Séances Du Comité International de La Croix-Rouge: 17 Février 1863-28 Août 1914*, 20. The translation is my own, as are the italics.

[138] Moynier, cited in Abi-Saab, *Droit Humanitaire et Conflits Internes: Origines et Évolution de La Réglementation Internationale*, 31.The translation is mine.

[139] Pitteloud, *Procès-verbaux Des Séances Du Comité International de La Croix-Rouge: 17 Février 1863-28 Août 1914*, 20.

[140] Abi-Saab, *Droit Humanitaire et Conflits Internes: Origines et Évolution de La Réglementation Internationale*, 31.

"The affirmative would not be in any doubt if the Convention was involved only with reciprocal agreements between the governments adhering to it, as would be the case of a commercial treaty or a postal convention. But the Geneva Convention is more than that. There is nothing to be found in its text that limits its effects to the contracting parties; on the contrary, all its articles are worded in general terms as if they were the expression of rules to be observed not only in relations between the signatories themselves, but in all circumstances. It is a kind of humanitarian profession of faith, a moral code which cannot be compulsory in certain cases and optional in others."[141]

What was the reason for this change of heart? Simply put, internal conflicts ravaged in the immediate years after the ICRC's creation. Table 5 presents a list of the internal wars in which the ICRC or National Red Cross Societies were involved during the first three decades of existence.

Table 2.1. Partial List of Internal Conflicts with Red Cross/ICRC Involvement, 1868-1949[142]

Country	Year	Civil war, internal troubles, or visits to political prisoners in internal tensions?
Turkey (Candie Revolt)	1868	Troubles (Insurrection)
Austria (Dalmatia)	1869-1870	Troubles (Insurrection)
Borneo	1870	Troubles (Insurrection)
France (Paris Commune)	1871	Troubles (Insurrection)
Spain (Carlist Insurrection)	1871	Civil war
Spain (Carlist Insurrection)	1874	Civil war
Turkey (Herzegovina)	1875	Civil war
Argentina	1880	?
Transvaal	1880	Troubles (Insurrection)
Turkey (Bosnia)	1881-2	Troubles (Insurrection)

[141] Moynier, cited in Ibid.

[142] Sources: Jacques Moreillon, *Le Comité International de La Croix-Rouge et La Protection Des Détenus Politiques* (Geneva: Institut Henry-Dunant-Editions L'Age d'Homme, 1973); Gustave Moynier, *La Croix Rouge: Son Passé et Son Avenir* (Paris: Sandoz et Thuillier, 1882); ICRC, *Manuel Chronologique Pour L'histoire Générale de La Croix-Rouge, 1863-1899* (Geneva: Imprimerie I. Soullier, 1900); André Durand, *From Sarajevo to Hiroshima: History of the International Committee of the Red Cross* (Geneva: Henry Dunant Institute, 1984); Catherine Rey-Schyrr, *De Yalta a Dien Bien Phu: Histoire Du Comité International de La Croix-Rouge, 1945-1955* (Geneve: Georg Editeur, 2007); Boissier, *From Solferino to Tsushima*.

Egypt (Arabi-Pacha)	1882	Troubles (Insurrection)
Peru	1885	?
Argentina	1890	Troubles (Insurrection)
Argentina	1893	Troubles (Insurrection)
Brazil	1894	Troubles (Insurrection)
Peru	1895	Civil war
Argentina	1895	?
Spain (Cuba)	1895	Civil war
England (Rhodesia)	1896	Troubles (Insurrection)
Cuba	1897	Troubles (Insurrection)
Uruguay	1897	?
Boer	1899	Civil war
Philippines	1901	Troubles (Insurrection)
Macedonia	1903	Troubles (Insurrection)
Uruguay	1903-1905	Civil war
Armenia	1909	?
Spain	1909	?
China	1911	Civil war
Cuba	1912	?
Russia (Soviet Revolution)	1918	Civil war
Hungary	1919	Troubles (Insurrection)
Upper Silesia	1921-1923	?
Soviet Russia	1921-	Troubles (Insurrection)
Ireland (Free State)	1922-1923	Troubles (Insurrection)
Poland	1924	Political Prisoners
Montenegro	1924	Political Prisoners
Italy	1931	Political Prisoners
Austria	1934	Political Prisoners
Germany	1933-1938	Political Prisoners
Spain	1936	Civil war
Lithuania	1937	Political Prisoners
Greece	1946	Civil war
China	1948	Civil war
Burma	1949	Troubles (Insurrection)

Thus, the ICRC was confronted with the cruelty of quickly erupting civil conflicts, which prompted certain policy changes to its relatively narrow initial mission. Note that this list of conflicts includes some minor uprisings and revolts short of insurrection and civil war. This confirms that since its early years ICRC practice did not conform to the distinctions between different levels of conflict set out by the customary international norms surveyed earlier in this chapter and thus, perhaps unwittingly, broke new

ground.[143] (The discussion on internal troubles and disturbances would surface again many decades later, as Chapters 3-5 will show.)

In its early years the International Committee refrained from directly attempting to operate on the ground unless it had been invited to do so by a legitimate local actor (the recognized National Society, or the conflict-ridden government.) Instead, respectful of sovereign non-intervention norms, it preferred to encourage the local Red Cross Society, if one existed, to take charge of relief provision.[144]

The first real instance of ICRC "indirect" influence occurred during the Third Carlist War in Spain (1872-1876.)[145] During that conflict and upon the request of the Spanish Red Cross Society, the ICRC extended its good offices, encouraged combatants to observe the Geneva Convention of 1864, and offered moral and intellectual support, particularly to the idea that relief workers should be granted neutrality from all sides and that they should not be treated as insurgents by the government merely for providing critical aid to the wounded and sick.[146] Eventually the Carlist insurgents decided to set up their own relief society, *La Caridad*, and jointly with the official Spanish National Red Cross, set up a liaison office in Paris.[147] Gustave Moynier himself managed most of these contacts directly from Geneva, as so many other International Red Cross affairs at the time.[148] Importantly, in this case the ICRC also sent appeals to the other National Red Cross societies for the channeling of aid to Spain, and agreed to publish constant updates

[143] On the long history of the ICRC's work on political prisoners in internal troubles, see Moreillon, *Le Comité International de La Croix-Rouge et La Protection Des Détenus Politiques*.
[144] Some National Societies acted out of their own volition. The earliest example of this was during the uprising on the Island of Candie (now Crete) in 1868, during the Italian reunification wars. Another example was the work of the French Society for the Relief of Wounded Soldiers during the uprising known as the Paris Commune in 1871. François Bugnion, "The International Conference of the Red Cross and Red Crescent: Challenges, Key Issues and Achievements," *International Review of the Red Cross* 91, no. 876 (May 07, 2010): 246.
[145] Moreillon, *Le Comité International de La Croix-Rouge et La Protection Des Détenus Politiques*, 25.
[146] Ibid.
[147] Ibid.
[148] Boissier, *From Solferino to Tsushima*, 297.

on all these developments in the organization's bi-monthly journal, the *Bulletin International des Sociétés de Secours aux Militaires Blessés.*[149]

The experience of the Carlist War is generally representative of ICRC operation in these initial cases, during which it acted largely by combining moral pressure, publicity and the mobilization of practical help. The outcome of this collaboration seems to have been a happy one, as eventually both parties to that conflict issued orders against executing prisoners and the wounded, and permitted the flow of aid from other Red Cross Societies.[150]

Yet "success" in Spain was soon dampened by dire news arriving in 1875 about the violence in Bosnia, Herzegovina and Bulgaria during their uprising against the Ottoman Empire. Indeed, the Balkan uprisings seem to have provided the crucial "moral shock" that led the ICRC to publicly change the position it held a decade earlier. According to Pierre Boissier, "in Bulgaria, particularly, the rising was put down by Turkish irregulars, known as Bashi-Bazouks, with appalling cruelty. A terrible tale of torture and massacre, claiming over 30,000 victims, soon reached a horrified and indignant Europe."[151] Such figures and messages seem to have helped the ICRC realize that the duty of the movement was "crystal clear: take action, regardless of the nature of the conflict."[152]

The "action" of the ICRC was careful and controlled, however. First, as in Spain, it saw itself as unable to enter internal conflicts without express invitation. In the case of the Balkan wars the Committee could not easily appeal to the Ottoman National Society, which, due to the recent passing of its founder, was moribund.[153] Second, the ICRC keenly understood the external politics of the conflict: it suspected that the uprisings had been fostered by Austria and Russia, and thus had to exercise caution since it risked upsetting two crucial Red Cross partners. (This danger also precluded asking the Red Cross Societies of the neighboring countries to intervene.) Eventually, the ICRC chose a

---

[149] Later renamed *Bulletin International des Sociétés de la Croix Rouge*.
[150] Moreillon, *Le Comité International de La Croix-Rouge et La Protection Des Détenus Politiques*, 26.
[151] Boissier, *From Solferino to Tsushima*, 298.
[152] Boissier, *From Solferino to Tsushima*, 298.
[153] Moreillon, *Le Comité International de La Croix-Rouge et La Protection Des Détenus Politiques*, 28.

partial, safer solution: upon receiving a plea for help from Montenegro (a neutral country during that war) to cope with the refugees that had reached its territory, the Committee was pleased to organize its very first delegation and to act in partnership with the newly-formed Montenegrin Society.[154] As Moreillon notes, this set a double precedent for the ICRC: it had for the first time decided to help the (civilian) *victims* of internal conflicts, which was not in its initial mandate of tending to wounded and sick *combatants.* The circumstances had evidently forced the Committee to devise creative, if limited, ways of dealing with an internationalized civil war without upsetting its key protagonists.[155]

Beyond political barriers to action, the performance of the Red Cross movement in the midst of internal armed conflict was marred by a long list of practical hurdles:[156] from poor means of transportation and communication, meager financial and medical resources held by local Red Crosses, to ignorance or denial of its existence by insurgents and sheer antagonism by governments that reneged on their prior commitment to the Geneva Convention. Civil wars and internal conflicts of lower intensity clearly presented the movement with extraordinary challenges. In all, however, it can be said that Committee definitely went beyond the initial expectations it had set for itself in 1863-4.[157]

Beyond practical help and moral influence, how did the Committee view the prospects of formulating rules for civil war? Writing in 1882, Moynier reflected: "In the absence of written precepts [for civil wars], which we agree are delicate and difficult to formulate *a priori*, the Red Cross did not always show felicitous inspiration, given the diversity of cases that it encountered. In our opinion, it sinned by abstaining too often,

---

[154] Moreillon, *Le Comité International de La Croix-Rouge et La Protection Des Détenus Politiques*, 28–29.

[155] Moreillon, *Le Comité International de La Croix-Rouge et La Protection Des Détenus Politiques*, 28–29. It appears that the ICRC also reminded the other National Societies of the countries receiving flows of refugees from the internal conflict their right and duty to aid such victims, irrespective of the side they supported. It reportedly scolded the Austrian Red Cross for refusing to provide such help to wounded refugees thought to be insurgents.

[156] Note that I do not necessarily claim that things worked much better in the context of international war, particularly during its early years. Moynier's language, however, seems to indicate his belief that that the situation of the Red Cross in civil wars was especially grim, so I take his declaration seriously.

[157] Moynier, *La Croix Rouge: Son Passé et Son Avenir*, 169–180.

and that was either because it did not feel protected enough by the laws of war, or because political considerations exert more influence over it than they should."[158]

In the passage above Moynier curiously found himself both underlining the importance of formulating legal rules *and* foreclosing the chance of attaining them. In the same book he almost solemnly declared that: "it is time to regularize the way in which the Red Cross conducts itself vis-à-vis intestine wars, just as we have done with international wars. One does not see why it would not extend its obligations in the former case as in the latter."[159] Did the ICRC heed Moynier's own advice and move in this direction?

Certainly, as I have shown, the organization did not either ignore the issue or remain aloof in practice. In the book just cited from 1882, Moynier formulated the practical ("National Red Cross first") approach it had followed until then as a potentially generalizable procedure for relief action in internal conflicts.[160] Yet these principles fell far short of the rules the organization had proposed years earlier for inter-state war.

There was also opportunity to debate the topic in the context of the periodic International Conferences of Red Cross Societies, which as mentioned earlier constituted an ideal forum for the socialization of new humanitarian principles. For reasons that are still unclear, sometime in the 1870s the Belgian Red Cross submitted to the ICRC the following question for consideration at the next meeting of National Societies: "In the case of insurrections, is there occasion to send relief to insurgents before they have been recognized as belligerents?"[161] At the time the customary procedure was for the ICRC to

---

[158] Moynier, *La Croix Rouge: Son Passé et Son Avenir*, 171. The translation is mine.
[159] Moynier, *La Croix Rouge: Son Passé et Son Avenir*, 178–179.
[160] Moynier, *La Croix Rouge: Son Passé et Son Avenir*, 178–179. His specific proposals were, first, that National Red Cross Societies should offer their services to *all* combatants (and even to fugitives "trapped in foreign engagements in foreign lands",) irrespective of the side they were on. Further, in his view, National Societies were called to cooperate with one another during civil war, but had better refrain from establishing any links with rebels. Third and final, foreign National Societies had to completely refrain from intervening in countries torn by civil conflict where the Red Cross had no presence at all.
[161] See "Annexe a la 52me Circulaire du Comité International de la Croix-Rouge, January 25, 1884, Liste de Sujets Proposés pour les Délibérations de la Conférence Internationale des Sociétés de la Croix-Rouge qui devait se tenir à Vienne," in *Bulletin International des Sociétés de Secours aux Militaires Blessés* 15 (57) : 9-27. ICRC Library, Geneva.

divide the various questions it had collected among the different member Red Cross Societies, which upon acceptance would prepare a brief report for presentation.[162]

The ICRC initially tasked the French Society with responding to the question on relief to insurgents. Such a request probably stirred controversy among the French since they had only a decade earlier dealt with the uprising of the Paris Commune of 1870, during which the rebels had not only denied recognition to the Red Cross but also attacked it. Unsurprisingly, the French Count of Beaufort, head of that country's Red Cross, responded politely but negatively to Moynier, declaring in a private letter that "given the diversity of circumstances in which this [voluntary assistance to insurgents] can become manifest, it does not seem to us to be amenable to a search for general rules or conclusions of principle which guide the practice of the Red Cross in the future."[163]

Given this reaction, Moynier appointed the Dutch Red Cross Society as a new rapporteur on it.[164] That Society came back with a set of proposed principles that in essence attempted to codify the practical experience the Red Cross had garnered up to that point, largely coinciding with Moynier's own thoughts on the matter. The Dutch report, however, was only submitted to the Third Conference to be held in Geneva in 1884 and (seemingly for reasons of time) did not actually come up for discussion.[165] The

---

[162] This procedure changed in 1884, when a special commission later known as the "Council of Delegates" was formed to prepare the organization of the International Conferences. The Council has since been composed of the ICRC, the National Societies, and after 1928, the League (now International Federation) of Red Cross and Red Crescent Societies. See Perruchoud, *Les Resolutions Des Conferences Internationales de La Croix-Rouge*.

[163] Letter from the Count de Beaufort, Secretary-General of the French Society of Wounded Military to Gustave Moynier, ICRC, April 17, 1884. ICRC Archives, A AF Carton 7, Document 1888, Geneva.

[164] Pitteloud, *Procès-verbaux Des Séances Du Comité International de La Croix-Rouge: 17 Février 1863-28 Août 1914*, 479.

[165] According to the Dutch Red Cross, differences should be made between relief originating from within the conflict-ridden state and that coming from abroad. In the former context, the concerned National Society *could but was not obliged* to provide relief to the insurgent wounded and sick. In the latter situation, they declared, "serious doubts should be raised" and more careful steps had to be taken. These steps were, first, that foreign relief had to be channeled through the concerned Red Cross. Direct flow of aid risked forfeiting the neutrality of the Red Cross cause as a whole. Second, aid had to be provided only to *military* wounded and sick. Finally, relief should in general follow a strict observance of the Geneva Convention, so as to preserve the neutrality of the Red Cross. See *Troisième Conférence Internationale de la Croix-Rouge tenue à Genève du 1 au 6 Septembre 1884, Compte rendu,* 239-240. ICRC Library, Geneva.

proposal carried over to the Fourth International Conference of the Red Cross in 1887, where it, however, died a strange death after being mysteriously "withdrawn" by its own authors before discussion, without further explanation offered on record or in private.[166]

Given these failed attempts by National Red Cross Societies, the question rears its head again: Why did the ICRC, despite singling out the lack of clear humanitarian rules as the most important blocking factor for the pursuit of its work in civil wars, stop short of mobilizing states around that cause? Why did it embrace practical action but not *legal* change?

The answer to this question is likely over-determined. That is, multiple factors probably worked to inhibit ICRC movement in that direction. Yet analytically and historically it may be interesting to ponder just what these factors were. I volunteer, first, that while the conditions under which the ICRC succeeded in eliciting regulations for inter-state war were salutary, during the same period there were powerful social and political circumstances that were utterly inhospitable to the idea of introducing international rules for internal armed conflict, notably the prevailing sovereignty norms and practices among European powers, characterized both by rising military nationalisms and the expansion of imperial colonialism.

Second, at a more agentic level, soon after the signing of the First Geneva Convention of 1864, the International Committee's initial social standing was tempered by a set of important setbacks that threatened its role and existence, likely removing incentives to put new issues on its regulative agenda. This attitude, I would argue, probably became "locked-in" into the practice of organization and the mindset of the individuals that led it, only to recede when a new generation of ICRC leaders came along. Let me briefly elaborate on each set of factors.

Inhibiting macro contextual factors and their influence on the Red Cross and the ICRC

As said in the introduction, the ICRC was a creature both of and ahead of its time. It acted (and continues to act) through and on the prevailing norms of sovereignty.[167]

[166] *Quatrième Conférence Internationale des Sociétés de la Croix-Rouge tenue à Calrsuhe du 22 au 27 Septembre 1887, Compte rendu,* 147. ICRC Library, Geneva.

Throughout the nineteenth century, but especially toward its end, sovereignty as a social institution was shaped by the impressive expansion of Western imperial colonialist practices in non-Western territories, particularly in Asia and Africa—at noticeably higher levels than in the past. As David Strang notes: "In the hundred years between 1780 and 1880, new colonies were formed at the rate of five a decade. Between 1880 and 1910, new colonies were formed at four times this rate, or twenty per decade. The pace of colonial formation slowed after 1910, as the number of candidates for colonial imperialism declined."[168]

Thomas Biersteker and Cynthia Weber have called our attention to "the constitutive relationship between state and sovereignty; the ways the meaning of sovereignty is negotiated out of interactions within intersubjective identifiable communities; and the variety of ways in which practices construct, reproduce, reconstruct, and deconstruct both state and sovereignty."[169] The colonial practices of Western states mentioned above, I wager, reflected and reinforced ("constituted") a world that was simply *not* a universal society of formally equal and sovereign states.[170] During this time, according to Strang, "Europeans resuscitated pre-Wesphalian forms of divided sovereignty like the protectorate, and compromised the internal authority of nominally sovereign states like China. Western powers received tribute as suzerain states in Asia and Africa, and paid it as well. Settler colonies like the British Dominions developed complete mixtures of formal dependence, internal self-government, and international personality."[171] Imperial control, thus, was "a system of interaction between two political entities, one of which,

---

[167] This is a well-recognized fact rather than a controversial claim. For critical analyses making a similar point, see Forsythe, *The Humanitarians: The International Committee of the Red Cross*; Hutchinson, *Champions of Charity: War and the Rise of the Red Cross*.

[168] David Strang, "Contested Sovereignty: The Social Construction of Colonial Imperialism," in *State Sovereignty as a Social Construct*, ed. Thomas Biersteker and Cynthia Weber (New York: Cambridge University Press, 1996), 27.

[169] Biersteker and Weber, "The Social Construction of State Sovereignty," 11.

[170] Christian Reus-Smit recently offered a persuasive argument to explain five great "waves" of systemic expansion in world politics, arguing that the current global system represents the first "universal, multicultural, and multiregional system of sovereign states." Reus-Smit, "Struggles for Individual Rights and the Expansion of the International System."

[171] Strang, "Contested Sovereignty: The Social Construction of Colonial Imperialism," 25.

the dominant metropole, exerts political control over the internal and external policy – effective sovereignty- of the other, the subordinate periphery."[172]

This larger context, I argue, was patently less than conducive to the type of legal regulation of the internal (and often but not only colonial) affairs of the Western European states that were the ICRC's main audience. Drafting, signing and ratifying a formal, binding treaty that would impinge upon the expansive interests of these powerful states in such a critical way, with language that could potentially empower these (mostly) non-Western subjects, simply does not seem like a viable route for the International Committee to have taken, or at least not one with any reasonable hope for success. Highlighting the Western/non-Western divide is crucial here because, as noted, it was precisely the countries in Asia and Africa that were the crucial target of Western imperialism during this period, and whose changes in sovereign control were at stake. Moreover, as Gerrit Gong has suggested, international law, including the laws of war drawn up in Geneva and The Hague, reflected the "standard of civilization" of the time, founded upon the imagined cleavages between civilized states from uncivilized peoples.[173]

How does this relate to the ICRC more directly? It has been widely documented that, visionary as Henry Dunant, Gustave Moynier and company were in the domain of humanitarianism, they bore shared traits with what one could call the social "episteme" of the time.[174] Prior to becoming a remarkable humanitarian, Henry Dunant was since his youth a convinced Bonapartist who believed that France, led by Napoleon III (whom he is quoted as having called "the successor to Romulus;" "the new Cyrus") had been tasked with "reconstituting" the Holy Roman Empire.[175] A few years before *A Memory of Solferino* appeared, Dunant's opera prima had been "an impressive in-quarto of 46

---

[172] Michael W. Doyle, *Empires* (Cornell University Press, 1986), 45. Cited in Reus-Smit, "Struggles for Individual Rights and the Expansion of the International System," 215.
[173] Gerrit W Gong, *The Standard of "Civilization" in International Society* (Oxford: Clarendon Press, 1984), 74.
[174] I borrow the term from John Ruggie, who in turn borrows it from Foucault. By social episteme, Ruggie means: "a dominant way of looking at social reality, a set of shared symbols and references, mutual expectations and a mutual predictability of intention." Ruggie, *Constructing the World Polity: Essays on International Institutionalization*, 55.
[175] Boissier, *From Solferino to Tsushima*, 12.

pages… decorated with the Imperial arms" titled *The Restoration of the Empire of Charlemagne* and dedicated to "His Majesty Emperor Napoleon III."[176] In fact, it was while he was literally chasing on the heels of Napoleon in order to deliver this book to him personally that Dunant found himself in Solferino and witnessed the impressive horrors of the battlefield.

For his part, Gustave Moynier, who has elsewhere been referred to as a "dedicated colonialist,"[177] was a supporter of the view that the Red Cross "should extend itself only to those parts of the world that were becoming westernized." Boissier further concedes that "while he did not relegate all colored men to the ranks of "the savages or barbarians"" Moynier remained convinced (in 1873) that ""the races which have a civilization, but a civilization different from ours" [did] not have the moral standards or philosophy that are compatible with the Red Cross."[178]

The mid-to-late nineteenth century was also the time in which military nationalism gained strong roots within Western European countries, something to which the Red Cross movement was not impervious.[179] John Hutchinson puts it quite bluntly when he claims that "between 1880 and 1906, the Red Cross was transformed from an institution that owed its first allegiance to the idea of civilization to one that, by its actions as well as its words, wholeheartedly supported the aggressive nationalism and militarism of the period."[180]

"The basic direction of this evolution was set at the Geneva Conference in 1884, when, at the behest of the Italian central committee, two fundamental propositions were discussed and approved: that 'the Red Cross owes the military sympathy and deference in

---

[176] Boissier, *From Solferino to Tsushima*, 8.

[177] Michael Barnett, *Empire of Humanity: A History of Humanitarianism* (Ithaca: Cornell University Press, 2011), 82.

[178] Boissier, *From Solferino to Tsushima*, 277. The quote continues with Moynier stating that "if we preach to them pity for the enemy wounded and respect for a symbol of charity on the battlefields, they would not understand what we were talking about because, for them, the law of war does not allow of such consideration; and as for associations for helping the victims, that would seem to them non-sense." Similar anecdotes/quotes exist that denote frank derision toward countries such as China, Japan, Persia, Turkey and India. Archival evidence gathered during my own research (that I do not include for lack of space) confirms these views.

[179] See again Hutchinson, *Champions of Charity: War and the Rise of the Red Cross*; Forsythe, *The Humanitarians: The International Committee of the Red Cross*, chap. 1.

[180] Hutchinson, *Champions of Charity: War and the Rise of the Red Cross*, 150.

peacetime, and absolute obedience in wartime; while the state owes the Red Cross protection, in the form of laws that will assure its special position as an institution recognized by the state."[181]

Hutchinson adds:

"It is fair to say that greater rapport between national Red Cross Societies and the military was an almost universal phenomenon in the period from the 1880s to 1914 and that the dominant feature of this closer relationship was the planned integration of the Red Cross into the wartime military-sanitary arrangements of each country."[182]

A respect for non-intervention at a time of both growing colonialist and nationalist practices thus likely exerted inhibiting effects on the decisions of the ICRC.[183] Even historian (and current ICRC member) François Bugnion has characterized the action of the Committee in internal armed conflicts during the late nineteenth century as having "narrow limits" and toeing a cautious line which the organization "considered necessary to ensure that any action it took was not seen either as unacceptable interference in the internal affairs of a country or a National Society, or as a bias toward one side or the other."[184]

Organizational Setbacks

In addition to sociopolitical factors, one may discern another set of reasons why the ICRC refrained from pushing the envelope too far.

In the early decades of its existences, the Red Cross idea and the ICRC itself suffered various challenges. On the one hand there were those who were unconvinced of the appropriateness of the Red Cross idea since, instead of supporting an all-out ban on war, its initiatives risked making it more palatable to states. Others believed that the notion of

[181] Hutchinson, *Champions of Charity: War and the Rise of the Red Cross*, 175.
[182] Hutchinson, *Champions of Charity: War and the Rise of the Red Cross*, 176.
[183] Michael Barnett, following others, has also highlighted the probably exclusionary role exerted by the ardent Christian faith held by the ICRC founders. Barnett, *Empire of Humanity: A History of Humanitarianism*, 81.
[184] Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, 248.

voluntary relief substituted what should really be a state's responsibility, lowering their war costs by picking up their slack.[185]

By the late 1860s, states started publicly raising the issue of regulating the structure of the ICRC, about the role of the National Societies during peacetime, and about the relationship between these and the International Committee. The Prussian government, for example, was enthusiastic about broadening the domain of action of the Red Cross by suggesting that National Societies could train nurses to care for the sick poor while "on break" from war. This vision was not shared by other states, as most feared it would amount to financial, technical and moral overstretch. The ICRC also appeared ambivalent to the idea of taking up peacetime responsibilities and remained allergic to external designs impinging on its own affairs.[186]

Important dissent also came from within the movement, as when the French National Committee suggested in 1867 that the headquarters of the Red Cross should move from Geneva to Paris. Although the "forced resettlement" of the ICRC did not gain traction, the French continued to be a thorn in the ICRC's side. It put a damper on a project to extend the 1864 Convention to war at sea, for example, threatening to withdraw its support. In response, Moynier became anxious that an attempt to embellish the original treaty would bring the whole edifice down. "Such a result, [he wrote,] would be disastrous, because it is of paramount importance to preserve the unity of this European understanding, so quickly and so auspiciously formed, even if it means sacrificing part of the hoped-for reforms."[187] And even though eventually four additional articles on sea warfare were drafted and circulated among states, they did not receive enough ratifications by states to enter into force.

Yet perhaps the biggest blow faced by the ICRC during its first decade went straight to the heart of its earlier success: the mediocre compliance (or the repeated violations) of governments with the provisions of the Geneva Convention during the Franco-Prussian War of 1870. While the Prussian army seemed to have been much better equipped to

[185] Florence Nightingale famously expressed the latter critique.
[186] See Hutchinson, *Champions of Charity: War and the Rise of the Red Cross*, chap. 2–3.
[187] Moynier, cited in Hutchinson, *Champions of Charity: War and the Rise of the Red Cross*, 90.

respect the rules they had signed, the French were reportedly in "disarray" in terms of medical preparedness, and unable to keep an eye out on abuses of the Red Cross emblem by alleged volunteers who were actually just using it deflect war levies and violence.[188]

The balance sheet after the Franco-Prussian war was at best unflattering. Moynier's earlier assumption --that no government would violate its commitments willingly for fear of looking bad-- proved naïve. Shortly thereafter he became convinced that "enlightened self-interest" to avoid being judged by the "court of public opinion" was not a strong mechanism to prevent abuses, and that legal punishment was needed.[189] Yet with the war being so recent, Moynier decided to take a public discussion of wartime violations off the agenda for the upcoming Third International Conference (originally scheduled for 1872 but delayed until 1884,) afraid of creating strains within the movement and between two crucial members, France and Prussia, which upset other European countries that wanted to see it discussed. Word of "plotting" against the Geneva Convention also surfaced around this time; France and Austria expressed their discontent with it and willingness to replace it with other measures, such as clauses within domestic military codes. Even a modest proposal Moynier drafted to loosely organize the Red Cross movement as a federation drew virulent reactions from states. In sum, as David Forsythe wryly notes: "the Red Cross idea almost perished during the Franco-Prussian war."[190]

Taken together, I suggest that this backlash likely caused great enough an impression on Moynier and company to force them to think about their own survival and to elicit a defensive attitude, hence discouraging them from taking the risk of formally expanding

---

[188] The ICRC itself wavered about its practical role, but eventually formed a temporary agency of information and assistance in order to keep track of their whereabouts as well as to gather and redistribute aid where it was most needed.

[189] Moynier in fact proposed in 1872 the creation of an international judicial institution, formed by notable and impartial figures appointed by states to judge individual cases of wartime atrocities. Such a plan, however, was either ignored or coolly dismissed by many of his fellow legal luminaries in Europe and the US at the time, including Francis Lieber and Gustave Rolin-Jaequemyns as either too radical, idealistic, or impracticable. Gustave Rolin-Jaequemyns, "Note Sur Le Projet de M. Moynier, Relatif a L'établissement D'une Institution Judiciaire Internationale Protectrice de La Convention," *Revue de Droit International et de Legislation Comparée* 2 (1872): 325–346; Katharina Neureiter, "'Too Radical for Its Time'? Gustave Moynier and His Proposal for an International Criminal Court Around 1872," Master's Thesis in International History (London School of Economics and Political Science, 2012).

[190] Forsythe, *The Humanitarians: The International Committee of the Red Cross*, 24.

their humanitarian mission. Indeed, as Hutchinson notes, by 1884, the ICRC had surely learned that "there were clear limits to what could be achieved and had decided not to risk further the displeasure of the powers, lest the gains of 1864 be lost in the process."[191]

Conservativeness and pragmatism were not entirely new factors that simply "came later" for the ICRC, however. Instead they are better understood as a birth defect that simply grew stronger over time. As Pierre Boissier's anthology suggests, since its very founding, the ICRC was well aware that if it hoped to pursue its agenda with some degree of success, it had to be strategic and "play with the players," that is, with states, and convince *them* to change the rules of the game.[192] The ICRC was thus a curious mix of principled creativity and shrewd pragmatism-- likely a product of the combustion of personalities at its head, particularly of Dunant and Moynier.

Admittedly, absent direct evidence on why the ICRC actually refrained from pursuing legal regulations for internal conflicts, the above analysis remains speculative.

Efforts toward regulation beyond the ICRC

Let me cite a final piece of evidence to reinforce the points I have just made with regard to the socio-legal environment of the late nineteenth century. Beyond ICRC thought and practice, it appears that the broader (though then still small) community of international legal scholars held a similarly conservative view regarding proposing international humanitarian rules for civil conflicts.

The Institute of International Law, mentioned earlier (and of which Moynier was a distinguished member,) took up the issue of internal armed conflict in their meetings in The Hague and in Neuchatel, in 1898 and 1900 respectively. Although there appears to have been debate on the issue, IIL members could not agree on more than formalizing the doctrine of belligerence from classic international law, discussed earlier, especially with

[191] Hutchinson, *Champions of Charity: War and the Rise of the Red Cross*, 157. The limits set by governments to humanitarian ideals at any given time, however, are never entirely clear nor fixed, and it is upon this unclear "frontier" that the ICRC has historically operated when trying to move the humanitarian agenda forward, one baby step at a time.

[192] For references to this aspect with regard to the First Geneva Convention, see Boissier, *From Solferino to Tsushima*, 119.

regard to the role and conduct of third states in internal wars occurring outside their territories in relation to military and economic neutrality. Humanitarian considerations during combat proved controversial. One IIL member is quoted as saying that:

> "The IIL is a scientific association which must rigorously stay outside of the realms in which the political passions of the day are aired… This proposal, to me, seems to have a character of political actuality that is too pronounced… I suggest that the project be momentarily set aside as inopportune…"[193]

This conservative view elicited opposing replies. A few members felt that, as a scholarly organization, the Institute should aspire to shed light precisely on this type of controversial legal issues.[194] Others insisted that distinctions should be made between "constitutional or dynastic insurrections, which we must condemn, and insurrections against a tyrannical or oppressive governments, which are legitimate."[195] Another group sought to exclude "non-civilized" countries from the purview of application of the eventual norms, echoing some of the arguments I outlined earlier.

In the end, the Rapporteur of the meeting opposed these contentious opinions, for fear that narrowing down the field of application and denying (certain types of) insurgents their rights "would discharge them from their attendant obligations. Instead of limiting the field of application, we should instead extend it."[196] The controversies were ultimately resolved by extricating to the extent possible the subjective political considerations from the official language, opting instead for technical/factual criteria. As such, the two ensuing non-binding declarations firmly strengthened the norms of non-intervention and said very little about humanitarian considerations.[197] Notably, like the customary law of the time and Lieber Code written a half-century earlier, they carefully

---

[193] Abi-Saab, *Droit Humanitaire et Conflits Internes: Origines et Évolution de La Réglementation Internationale*, 25.
[194] Ibid.
[195] Here I draw on Rosemary Abi-Saab's recounting of these IIL sessions.
[196] Ibid.
[197] See the texts of these declarations (« Règlement sur la responsabilité des Etats à raison des dommages soufferts par des étrangers en cas d'émeute, d'insurrection ou de guerre civile » and « Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectionnel, envers les gouvernements établis et reconnus qui sont aux prises avec l'insurrection ») available at the IIL website, respectively : http://www.idi-iil.org/idiF/resolutionsF/1900_neu_01_fr.pdf and http://www.idi-iil.org/idiF/resolutionsF/1900_neu_02_fr.pdf (Consulted on August 13, 2013.)

stressed that to show humane treatment to rebels did not amount to recognition of belligerent status. Such was the status of international legal regulation of internal armed conflicts at the turn of the century; seemingly very little had changed, even in the minds of --theoretically independent—scholarly associations.

How these debates related to the ICRC's own thinking is not entirely clear. Although Moynier was Honorary President of the IIL, at the International Committee he retained his independence. One instance, however, may serve to illustrate how Moynier, despite leading an organization that championed legal (not only practical) change, remained extremely sensitive toward questions that could might disturb state sovereignty and compromise the neutrality of the Red Cross in internal armed conflicts, emulating the IIL's own "prudence" on the matter.

In October 1895, years before the Cuban revolutionary uprising against colonial Spain transformed into the international conflict now remembered as the Spanish-American War (1898,) American Red Cross (ARC) President Clara Barton privately wrote to Moynier consulting him about an application she had received from a recent acquaintance, a medical doctor by the name of A. J. Díaz, who was reportedly very active in providing relief to victims of the uprising in Cuba as a member of the Spanish Red Cross. Díaz believed that acting as a member of the ARC (in addition to the Spanish Society) would enable him to carry out relief operations more effectively, prompting him to approach Barton for official admission.[198] Unable to decide on an issue that in her view touched indirectly on international law, Barton deferred to Moynier, hoping he would see no issue with this request and acquiesce to Díaz's idea. This was not the case, however. Instead, Moynier opined that Díaz should seek to work with his Spanish compatriots only. "If this does not suffice for him, and he wishes to accede to your [Red Cross] Society, this cannot be, it seems to me, but for a hidden political motive and in hopes that this new status will enable him to [treat] insurgents. From the humanitarian viewpoint this would certainly be a happy outcome, but I think it would be regrettable to set such a precedent, ie. to associate one person to two different Red Cross Societies… in a civil

[198] Clara Barton, President, American National Red Cross, Letter to Gustave Moynier, ICRC, October 17, 1895. ICRC Archives A AF Carton 5, Document 284. Geneva.

war during which susceptibilities are overexcited." For this reason, Moynier advised Barton to turn Díaz's request down, adding that: "… Mr. Díaz's zeal could be usefully employed to produce an *entente* between the Spanish government and the Cuban insurgents toward the reciprocal observation of the laws of war and especially of the Geneva Convention. This would be… the surest way of achieving his goals."[199]

This vignette illustrates the points made here about the ICRC's *modus operandi*. Moynier's simultaneously cautious and principled response to Barton served to guard his organization's interest and to show respect toward prevailing norms, while still displaying a commitment to the diffusion and application of humanitarian precepts in war. With regard to internal armed conflicts, specifically, Moynier appears to have seen the organization's role as that of an intermediary working within strict (sovereign, neutral) bounds, with a duty mostly limited to exerting moral influence that left the thorny politics to others.[200]

V. Into the Twentieth Century

Almost since its inception the ICRC opted to participate in internal armed conflict relief but refrained from forcefully advocating formal legal rules to be sanctioned by states. Broader structural dynamics in Europe at the time (the dramatic rise of imperialism, and budding nationalisms at home, particularly) as well as its diminished standing as a humanitarian broker roughly between 1870s and the mid-1890s, with the attendant conservative pragmatism it may have elicited among its core members, all probably prevented it from taking a decisive legal approach to a such politically charged issue. The similarly conservative opinion on this topic of other international legal experts (outside of, but in contact with the ICRC,) certainly did not help to move this agenda forward, instead working to reify the normative status-quo.

---

[199] Gustave Moynier, Letter to Clara Barton, October 31, 1895. ICRC Archives A AF Livre 14, Document 290. Geneva. The translation is mine.

[200] David Forsythe cites additional examples of this attitude in the case of the Spanish-American war in the Philippines, see Forsythe, *The Humanitarians: The International Committee of the Red Cross*, 30. I also collected others in my own fieldwork. ICRC historian and member François Bugnion concurs with this assessment. See Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, 247.

By the 1890s a tense international context, however, quickly propelled state and pacifist groups' interest in the prevention or moderation of interstate war.[201] Arms racing by European powers threatened the balance of power. Tensions were also brewing at home for many European countries, as the traditional political institutions coped with the social consequences of rapid industrial growth. Against this background and in a matter of years, Russian Tsar Nicholas II would champion the already-mentioned First International Hague Peace Conference in 1899, a gesture soon followed by the United States which, on the heels of two recent conflicts of its own (in Cuba against Spain, and while invading the Philippines,) proposed a second edition, eventually convened by the Russian Tsar in 1907. Although the governments that would gather at The Hague were largely concerned with codifying rules for the conduct of hostilities and the methods of combat (i.e. weapons, in addition to other matters of war-limitation and arbitration,) some among them had for some time also wished to revise the original Geneva Convention and to adapt it to maritime warfare (a task left pending decades prior when an ICRC proposal failed to garner enough backing.) These external pressures forced the ICRC to shake off its conservatism toward the idea of revisions to the existing law, and the organization had little choice but to adapt. Its plans were preempted, however, when on the verge of announcing a new Diplomatic Conference to revise and extend the original convention (under the sponsorship of the Swiss government,) Russia's Nicholas II circulated his proposal to meet at The Hague. [202]

Given the public prominence the upcoming Hague Peace gathering had attained, Swiss/ICRC plans were put on hold. There was uncertainty and nervousness as to how the 1899 Conference would approach the original Geneva Convention, perhaps lowering the standards attained before. Yet it seems that with the influence of the Swiss delegate, governments agreed that its revision should occur not at The Hague but at a separate "special" event be held to that purpose, under the aegis of Switzerland. The 1899 Hague went ahead with adaptation of the Geneva rules to maritime warfare, but the most

[201] Reus-Smit, *The Moral Purpose of the State: Culture, Social Identity, and Institutional Rationality in International Relations*, chap. 6; Clark, *International Legitimacy and World Society*, chap. 3.
[202] This episode is well told in Boissier, *From Solferino to Tsushima*, 365–384.

important issue –safeguarding the integrity of the original accord—was left in the hands of its zealous "guardian," the ICRC, which steered a revisions process that culminated in 1906.

In all these discussions, however, the issue of internal armed conflict remained conspicuously absent. Other less controversial and comparatively neglected issues had started to take precedence, notably increasing the legal protections for prisoners of war. The Hague Conferences had taken important steps toward regulation in this area, but there remained glaring gaps related to implementation that the ICRC, with some hesitation, declared it could endeavor to fill.[203]

The new century thus found the ICRC (if grudgingly) accepting new normative and operational tasks in less controversial subjects, reducing the odds that internal conflicts might take on greater relevance. Moreover, the ICRC's conservative organizational culture --depicted earlier-- remained largely unchanged. As official Red Cross historian André Durand noted: "At the beginning of the twentieth century, the ICRC was obviously in no hurry to change its composition, since no new members were appointed for sixteen years, from 1898 to March 1914."[204] The original generation led by the aging Moynier continued at the helm of the organization, and the passing of the torch to a younger generation would not be completed until the 1920s and 1930s with the retirement (or death) of Moynier successor Gustave Ador, Moynier's son Adolphe, and of Paul des Gouttes. Generational persistence (or lack of generational change) thus plausibly operated as a reproductive mechanism that furthered the received reluctance of the ICRC to tread on the waters of formally regulating humanitarianism in civil conflict.

Putting Civil Wars on the agenda: The US 1912 Proposal

Given the above, it is little wonder that the idea of formally regulating civil wars did not come from the ICRC. Yet it should surprise that it was a state (in conjunction with its National Red Cross) that eventually attempted to fill this void. In 1912 the United States,

---

[203] Boissier, *From Solferino to Tsushima*, 383–384.
[204] Durand, *From Sarajevo to Hiroshima: History of the International Committee of the Red Cross*, 10.

acting as host to the Ninth International Conference of the Red Cross in Washington D.C., came armed with a report and a proposal for creating the first-ever international agreement on the provision of humanitarian relief during civil war and internal disturbances.[205] Although it would fail to crystallize, this initiative triggered the first public discussion of the topic among statesmen, and as will be shown, constituted a crucial springboard for future efforts at regulation.

The US proposed to formally allow the extension of humanitarian relief to the sick and wounded victims from all sides (state forces, insurgents, and non-combatants,) expressly permitting a foreign Red Cross to offer its services to another country's government or local Red Cross when faced with internal conflict. Relief offers would be directed at the War Department of the recipient state, had to be approved by it, and would have to be tendered following the humanitarian precepts governing the Geneva Convention for interstate war.[206]

The origins of this curious initiative are not well known.[207] One may first ask, why would a rising power care about this controversial topic to begin with? At face value this idea is consistent with the expansionist (and to many sheer imperialist) impulse of US in the late nineteenth and early twentieth centuries, during the "Progressive Era" of the country's foreign policy. Indeed, historians and political scientists recognize this period, especially with the administrations of William McKinley, Theodore Roosevelt, William Taft and Woodrow Wilson, as the (first) heyday of US expansionism, including

---

[205] Various histories of the American Red Cross attest to the intricate relationship (amounting to sheer capture,) between the US government and the Red Cross during this time. See Foster Rhea Dulles, *The American Red Cross: A History* (New York: Harper & Brothers, 1950), 81–101; Gwendolyn C Shealy, *A Critical History of the American Red Cross, 1882-1945: The End of Noble Humanitarianism* (Lewiston, NY: The Edwin Mellen Press, 2003).

[206] Joshua R. Clark, Jr., American Central Committee, *Report of a Committee appointed by the International Relief Board of the American Red Cross, to be read as a part of the paper to be presented at the Ninth International Conference by Hon., Solicitor for the Department of State, Entitled "Functions of Red Cross when Civil War or State of Insurrection Exists,"* Washington D.C, April 1, 1912. ICRC Archives A AF-31 2. Clark Jr. signed the report as "Chairman."

[207] For an initial analysis, however, see Siotis, *Le Droit de La Guerre et Les Conflits Armés D'un Caractère Non-international*, 136–142.

international legalism.[208] Yet there was plainly nothing in the measured language of the draft agreement that lent itself overtly to interventionism. Rather it seemed to be carefully crafted to legalize the collaboration of relief provision by National Red Crosses which had to be approved and could be carefully monitored by the receiving state. As François Bugnion asserts: "The American Red Cross report was remarkable in that it managed to reconcile the interests of the victims, Red Cross freedom of action and the rights of the parties to the conflict. The sovereignty of the government was amply protected…"[209] Securing reciprocity at home as a possible motive also seems unpersuasive, since at the time there was no perceived risk of rebellion in the US.

What was the motivation of the American delegation then? Whose idea was it anyway? A look at the original invitation sent by the American Red Cross to member states, National Societies and the ICRC did not include civil war as a topic for discussion. No state had suggested adding it to the agenda, either. Rather, its inclusion on the Conference agenda seems to have come in April 1912, a short month before the conference started. The International Relief Board, a sub-agency of the American Red Cross, was requested to prepare a study on the conduct of National Red Crosses in foreign civil wars. This report was researched and later presented at the International Red Cross meeting by a solicitor within the US State Department, Joshua Reuben Clark, Jr. In time for the upcoming Conference, and seemingly in the spur of the moment, the American Red Cross thought it opportune to present the results of this research to other states, accompanied by concrete treaty language to materialize it.

It may be instructive to examine the personal story of Clark Jr. to gain insight into his project's intent. Clark Jr. had graduated from Columbia Law School and was appointed Assistant Solicitor of the US State Department in 1906.[210] According to his biographers,

---

[208] Dulles, *The American Red Cross: A History*; Shealy, *A Critical History of the American Red Cross, 1882-1945: The End of Noble Humanitarianism*; Benjamin Allen Coates, "Transatlantic Advocates: American International Law and U.S. Foreign Relations, 1898-1919" (Ph.D. Diss., Columbia University, 2010).

[209] Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, 249.

[210] For two biographies of Joshua Clark Jr., see Frank W. Fox, *J. Reuben Clark: The Public Years* (Utah: Brigham Young University Press, 1980); Stephen S. Davis, "J. Reuben Clark, Jr.,

when the Mexican Revolution erupted in 1911, Clark Jr. had acted as close counselor to the Secretary of State and to President William H. Taft. One of the areas promoted by Clark Jr. was humanitarian relief to victims of the revolution. A fervent Mormon, he appears to have been especially concerned with the seemingly important numbers of Mormon victims in Mexico. Beyond this, historians have noted that the problems caused by the "embittered rivalries of competing factions" over Red Cross aid after the overthrow of the Díaz regime in 1911 led the US State Department to make efforts to clarify the delicate issue.[211]

Clark Jr. does not appear to have been an avid interventionist. Rather, the American proposal can be more plausibly understood as produced by a humanitarian motive coupled by a newly-acquired interest in providing aid relief in civil conflicts taking place elsewhere. The US, and with it the American Red Cross, had been an active participant in a few civil wars and minor uprisings since the end of the nineteenth century, among them, as mentioned earlier, in Cuba and in the Philippines. In terms of relief provision, besides the Mexican Revolution of 1910, the American Red Cross had sent missions during uprisings the Dominican Republic (1903 and 1906,), Venezuela (1903,) Nicaragua (1909), Honduras (1911,) and China (1912.)[212] Thus, beyond altruism, the United States and the American Red Cross seemed to have developed an interest in securing clear legal rules in this field.

In any event, whatever its origins, this proposal came to naught. The representative from Imperial Russia, General Yermolov fired the opening shot by declaring that "in no case or manner could the Imperial government become a contracting party to or even a discussant of any agreement or vow on this topic," and "given its political gravity," in his opinion "it should not be opened to discussion in a Conference of exclusive humanitarian

---

Statesman and Counselor," in *Counselors to the Prophets*, ed. Michael K. Winder (Salt Lake City: Eborn Books, 2001).

[211] Dulles, *The American Red Cross: A History*, 127–130.

[212] Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, 247.

and pacifist nature."[213] In a shrewd rhetorical move, Yermolov cited the words of General Sherman during the American Civil War: "On no earthly account can I admit any thought or act hostile to the old Government." The Russian General went further, sentencing that "Any offer of services, direct or indirect, of Red Cross Societies to insurgents or revolutionaries could not be conceived as more than a violation of friendly relations, as an "unfriendly act," likely to encourage and foster sedition or rebellion in another country."[214] Italy and France agreed, with the latter sentencing that this was patently a "governmental question, and a government cannot see revolutionaries as belligerents." To this, and given that at the time Latin America showed a great concentration of internal conflicts, the Italian representative General Ferrero added that the topic was "too local" and "special," and as such unworthy of general discussion at an international conference.

Clark Jr. reacted with a humble but nevertheless passionate defense of his proposal, highlighting its eminently humanitarian character and the many safeguards it included, especially the fact that it allowed states to accept or decline offers for foreign relief. Importantly, he clarified that in no circumstance would relief provision indicate a recognition of belligerence upon insurgents. Indeed, most states sitting in Geneva seemed to be concerned with legally legitimizing potential revolutionaries—a recurrent worry.

Moreover, Clark Jr. scolded General Yermolov for his conservatism, reminding him that the Conference was primarily a meeting of Red Cross Societies, not of governments, and as such airing ideas and projects to advance the humanitarian mission was completely appropriate. (Clark's plea confirms the inevitably political character of these meetings and the prominent role states play in them, regardless of the claims by the ICRC or National Red Cross to the contrary. This politicization may vary over time but is never absent.) Clark Jr. also cited the American Red Cross' prior experience in relief provision to both sides of internal conflict. And in response to Yermolov's audacious reference to the American Civil War, Clark Jr. reminded the audience of the humanitarian work of the

---

[213] American Red Cross, *Neuvième Conférence Internationale de la Croix-Rouge tenue à Washington du 7 au 17 Mai 1912, Compte rendu,* Washington DC, 1912, 45. ICRC Library, Geneva.
[214] Ibid, 45.

US Sanitary Commission, which provided care to wounded and sick members of both the Union and the Confederate forces.[215]

It must be noted that not all states were as fiercely opposed to the idea as the Russians or the Italians. The British Representative warned against it apparently not on principle but due to the security difficulties it entailed, such as ensuring respect to the Red Cross corps by insurgents, which had been lacking, as noted earlier, during the Paris Commune uprising of 1871. Citing its own recent experience, China suggested that relief to insurgents could be domestic but not foreign, fearing an implicit recognition of belligerence. Greece supported the idea of principles for allowing relief *once* an internal conflict had reached civil war proportions, and once rebels had been implicitly or explicitly recognized as belligerents. Only three Latin American countries (Uruguay, Argentina and Cuba) and Switzerland agreed with the US proposal; Cuba had in fact come to Washington with its own proposal for legitimating domestic relief only to see it rhetorically lumped –and eventually dismissed-- with the American-born project.

Despite a measure of moderation, it is clear from the debates that most states in the room were either dubious or overtly against the idea of legitimizing humanitarian relief provision in civil conflicts. The motives behind rejection are not hard to ascertain: a mix between risk aversion among the imperiled European powers, and states' broadly shared fear of legitimizing rebels through international principles.

The ICRC played a notoriously demure role in the 1912 discussion. Gustave Moynier had died in 1910, so it was his successor, Gustave Ador, who now presided over the organization and over the Conference. Interestingly, in his interventions on this subject Ador appeared to actually side with the skeptics, for instance when he acquiesced to the idea that these were "personal matters relating to the particular situation of certain countries, but which could not give rise to a voted resolution by the Conference."[216] This seems like a disappointingly unenthusiastic attitude. Yet in the end, Ador recognized that

---

[215] William Quentin Maxwell, *Lincoln's Fifth Wheel: The Political History of the United States Sanitary Commission* (Longmans, Green & Company, 1956).

[216] American Red Cross, *Neuvième Conférence Internationale de la Croix-Rouge tenue à Washington du 7 au 17 Mai 1912, Compte rendu*, Washington DC, 1912, 203. ICRC Library, Geneva.

the topic remained on the agenda and that "it is very likely that in a few years this question will have been advanced and may be resolved in a different manner than it was today."[217]

Ador was right. "More than time" what was needed was "precedent."[218] One might add: more, and more spectacular precedents. Over the next few years, several Red Cross societies and the ICRC itself would garner additional fresh experience in war relief efforts. These experiences would prove to lead to advances at the following International Conference of the Red Cross Societies.

New Shocks: Russia and Hungary

First came the Soviet Revolution in 1917. The crumbling of the Russian Empire, and with it the Russian Red Cross Society, one of the most distinguished and able of those existing at the time, raised new challenges for the humanitarian mission of the ICRC. In January 1918, the Soviet Council of People's Commissars confiscated the property of the National Red Cross and announced a plan to reorganize it.[219] Alarmed, the ICRC appointed a Swiss delegate in Petrograd to deal with the rapidly changing situation, tasked with ensuring the continued presence of the Red Cross in such dire times. Much to the ICRC's surprise, however, the Soviet response was welcoming. A declaration signed by Lenin himself stated that Soviet Russia remained committed the Geneva Convention as well as to "all other Conventions and international agreements relating to the Red Cross," and that the Russian Red Cross would continue to be active in assisting and helping prisoners of war.[220] Action followed words, and a special committee for prisoners of war and refugees was set up in Moscow. A parallel committee had been formed by the ICRC representative there, Edouard Frick, and formed by Red Cross Societies from

---

[217] American Red Cross, *Neuvième Conférence Internationale de la Croix-Rouge tenue à Washington du 7 au 17 Mai 1912, Compte rendu*, Washington DC, 1912, 45. ICRC Library, Geneva.
[218] Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, 250. ICRC Library, Geneva.
[219] Durand, *From Sarajevo to Hiroshima: History of the International Committee of the Red Cross*, 99.
[220] Durand, *From Sarajevo to Hiroshima: History of the International Committee of the Red Cross*, 110.

neutral countries such as Denmark, Sweden, Norway, the Netherlands and Switzerland. The Red Crosses from Germany, Austria-Hungary, Turkey and Bulgaria also attended on an advisory capacity. These combined efforts reportedly provided considerable political, material, moral and medical help to political detainees, interned children, refugees and prisoners of war in need of repatriation.[221]

The situation in Hungary was equally perplexing. In March 1919, communist revolutionary Béla Kun unseated the government of President Mihály Károlyi, and though the coup d'état had been bloodless, the new government threatened to punish by death any contravention to it—a clear red flag against humanitarian values. In addition, Hungary represented a crucial point of passage for the repatriation of prisoners of war scattered through the region after World War I, and so securing its presence there was key for the ICRC.[222] Luckily, in Hungary the ICRC and the National Red Cross were again given all assurances by the communist government of their neutral status, and of respect for their humanitarian work. This allowed the ICRC representative in Budapest to conduct visits to many political detainees for some time, the first such visits for the ICRC.

Béla Kun, however, retracted his lofty promises when the head of the Italian Military Mission in Budapest offered protection to captured rebels. Italy, according to Kun, could not consider as combatants "armed gangs who, in the interests of the counter-revolution, massacre women and children and want to exterminate the Jews."[223] Kun's hardened position had little airtime, however, and his revolution ended with Romania's invasion in late July 1919. Concerned now with ensuring good treatment of the former Communist revolutionaries and other prisoners of war, along with offering some relief for the awful

---

[221] Moreillon, *Le Comité International de La Croix-Rouge et La Protection Des Détenus Politiques*, 44–47; Durand, *From Sarajevo to Hiroshima: History of the International Committee of the Red Cross*, 97–123; Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, 250–258.

[222] Durand, *From Sarajevo to Hiroshima: History of the International Committee of the Red Cross*, 138.

[223] Durand, *From Sarajevo to Hiroshima: History of the International Committee of the Red Cross*, 132–133.

conditions experienced by the broader population, the ICRC eventually stayed in the country until 1922.

According to the International Committee's report of activities between 1912-1920, the Russian and Hungarian efforts finally proved the value of the "indispensable role of the Red Cross in a civil war."[224] Indeed, as we will see in a moment, new non-binding norms were proposed and created in 1921 on the heels of these recent experiences.

Archival evidence suggests, however, that this change of mind was neither automatic nor necessarily a product of the ICRC's own reflection. In a letter from as late as January 1919, for example, the International Committee expressly refused to support the idea of organizing international relief for civil war victims not just in Europe but worldwide-- a project submitted to it by representatives of the Danish, Ukrainian, Polish, Russian and Italian Red Crosses. Instead of enthusiasm, the ICRC channeled the skeptics from the 1912 Conference by declaring that "one cannot conceive of organized action that applies to those types of wars, provoked by reasons in which a foreigner should not intervene." Moreover, in the ICRC's view "civil war is very different to ordinary war; it is not subject to the laws and customs of war. It comes in many forms in different localities and countries, following the character of the nation in which it reigns. One can hardly see how one could subject it to such an organization."[225] Following decades-old practice the ICRC reiterated that only the National Red Cross of the concerned country could provide relief to the combating sides. The letter ended by suggesting that the International Committee nevertheless found the idea "interesting" and that it would consider how to execute it. Hence, despite the practical efforts led by its representatives on the ground the ICRC back in Geneva remained seemingly cool toward the idea of regulating civil wars, even after the bloody Russian revolution had wound down. "Learning" from recent

[224] Durand, *From Sarajevo to Hiroshima: History of the International Committee of the Red Cross*, 138.

[225] Letter from Mr. Benson, Representative of the Danish Red Cross in Kiev, Ukraine, to the International Committee of the Red Cross in Geneva. January 15, 1919. ICRC Archives, B CR-22; Letter from Unidentified member of the ICRC to Mr. Benson, February 4, 1919. ICRC Archives, B CR-22. Geneva.

traumas had thus not been as automatic as official histories seem to imply. What happened then?

Archival research points, in particular, to the dedicated correspondence directed to the International Committee by a former member of the (old) Russian Red Cross, Georges Lodygensky, who after the fall of the Tsarist Empire had taken refuge in Geneva but continued to be in communication with different Red Cross organizations on the ground in Revolutionary Russia. Clearly anxious to facilitate concrete aid provision to victims, Lodygensky authored two reports detailing the profound need for coordinated Red Cross in civil wars, given the deep humanitarian challenges present all over his country. The ICRC, seemingly impressed by his work, accepted to publish these reports in its quarterly journal.[226] Importantly for us, Lodygensky was convinced that the ICRC had to take the issue of internal conflicts more seriously, by creating its own permanent special unit devoted to civil war relief and coordination, and by promoting legal studies to achieve the formalization of international Red Cross collaboration in such conflicts. He submitted these ideas directly to Gustave Ador, ICRC President, and to others in his staff in personal meetings in May 1920.

This time, and faced with extensive and dedicated research, the International Committee finally acquiesced. Ador himself replied to Lodygensky, recognized his brave perseverance, and among others, promised to "hasten the juridical and diplomatic examination of the questions raised by the intervention of the International Red Cross in civil wars."[227] Ecstatic, Lodygensky replied within three days, and over the next two months he sent to the ICRC his thorough vision of both the theoretical and practical aspects of project, built upon the multiple recent experiences of various National Red Crosses, in conflicts in Russia, Hungary, Mexico, Portugal, Estonia and Turkey.[228]

---

[226] Letter from Georges Lodygensky, Délégué du Comité Central de la Croix-Rouge Rousse pour le Secours aux Victimes de la Guerre Civile to ICRC, May 8, 1920. ICRC Archives A AF CR 21/1. Geneva.

[227] Letter from Gustave Ador, ICRC President to Georges Lodygensky, May 21, 1920. ICRC Archives A AF CR 21/1. Geneva.

[228] Letter from Georges Lodygensky, Délégué du Comité Central de la Croix-Rouge Rousse pour le Secours aux Victimes de la Guerre Civile to Gustave Ador, ICRC, May 24, 1920. ICRC Archives A AF CR 21/1. Geneva. Lodygensky's reports from July 1920 were his effort to prevent

Lodygensky's writings became key for the debate on the topic in the upcoming Conference, and he was directly invited to participate as representative of the "old" Russian Red Cross.

These vignettes are worth reconstructing because they extend the empirical and theoretical argument made earlier regarding the persistent reluctance of the fundamental moral entrepreneur in the area of humanitarianism to promote formal international mechanisms of civil war relief. In particular, they illustrate the point that atrocity trauma requires activate and persistent (in this case bottom-up) mobilization to lead to prompt a rethinking of old attitudes and policies.

A Concrete First Step: Legitimating International Red Cross Access to Civil Wars

Recent civil wars experience, embedded within the broader collective horrors due to the abuses committed in World War I, did make an impression on several National Red Crosses. In preparation for the next International Conference of the Red Cross, and likely in response to Lodygensky's missives, the ICRC asked National Societies to submit reports with their views on the topic. Eight of them responded positively: Germany, Finland, Italy, Poland, Portugal, Turkey, Ukraine and, through the person of Lodygensky, the "old" Russian Red Cross. As Kimberly Lowe notes, "The dissolution of the Russian, Austro-Hungarian, and Ottoman Empires catapulted numerous societies from a state of wartime mobilization into the throes of civil war and revolutionary troubles. These first-hand experiences of civil violence infused the 1921 debate with a new urgency."[229]

These reports were unequivocal in affirming the need of applying the Geneva Convention to internal conflicts, and the crucial role the ICRC should play in them.[230] Although priority of action continued to be given to *domestic* Red Crosses, these reports

---

the issue from stalling within the ICRC, after a special fact-finding mission sent by the International Committee could not enter Russia. See the rest of the correspondence in: ICRC Archives A AF CR 21/1. Geneva.

[229] Kimberly A. Lowe, "Humanitarianism and National Sovereignty: Red Cross Intervention on Behalf of Political Prisoners in Soviet Russia, 1921-23," 2012, 6. Draft article typescript on file with author.

[230] Moreillon, *Le Comité International de La Croix-Rouge et La Protection Des Détenus Politiques*, 52–63.

recognized that whenever these were unable to operate, the ICRC or foreign Red Cross Societies should have a right to help. Exact proposals varied, with the Turkish Red Crescent suggesting that foreign Societies and the ICRC should enjoy a type of "extraterritoriality" and neutral status in the context of civil wars. Others emphasized that the neutrality and independence of a National Red Cross operating in a country experiencing regime change should be guaranteed. Finally, these reports all suggested that states should observe the laws of war toward rebels, even if these were not formally recognized as belligerents. This included giving humane treatment to captured combatants, similar to that of prisoners of war.

Fifty Red Crosses, some of them accompanied by government delegates, attended the Tenth International Conference of the Red Cross, taking place in Geneva in 1921. Underlying its urgency, the topic of civil war was given its own (III) Commission of ten members. In 1921, however, the speakers reporting directly on this subject were National Red Cross representatives (not government delegates,) a factor that very likely colored the debates and help explain why they stood in such stark contrast to those of 1912.[231] This time most Red Cross Societies agreed that there should be some sort of agreement to authorize Red Cross relief in civil wars. "As conceived by the conference, the right to humanitarian assistance ascribed to all men by virtue of their suffering and was granted by a moral authority superior to the state. The last three years had made it clear that 'today, after the fall of the three empires the most strict in their defense of autocracy, there is no longer any government that could refuse the Red Cross the right to help the rebels as well'."[232] Beyond insurgents, participants insisted that *all* victims of internal conflicts should be entitled to humanitarian aid.

Consistent with these pleas, a resolution was eventually approved making Red Cross operations in internal conflicts legitimate. Codifying past practice, the National Red Crosses of countries facing internal conflicts were assigned a primary role, and were

---

[231] *Dixième Conférence Internationale de la Croix-Rouge tenue à Genève du 30 Mars au 7 Avril 1921, Compte Rendu*. ICRC Library, Geneva.

[232] Lowe, "Humanitarianism and National Sovereignty: Red Cross Intervention on Behalf of Political Prisoners in Soviet Russia, 1921-23," 8. Lowe is citing the report of the Italian Red Cross.

encouraged to remain neutral and independent. More importantly, the resolution also authorized the National Societies to request outside Red Cross assistance, to be channeled via the ICRC. The ICRC, however, had to make sure the receiving government agreed with such help and, in case of state refusal, it was entitled to make this reluctant attitude public. The ICRC was also called to take over the task of humanitarian assistance if a government or a Red Cross was dissolved during a civil war.[233]

An additional step was taken in 1921.[234] Through the insistence of Georges Lodygensky the Conference added a statement in the resolution condemning the practice of hostage-taking, and suggesting that political detainees captured during civil war should be treated humanely.[235] Yet, with regard to this addition, the German Red Cross representative succeeded in amending textual references to rebels as "belligerents" and "prisoners of war," arguing that such language might prematurely legitimate an uprising in its early stages and deprive a government of its legal ability to quell it. ICRC President Ador empathized with this concern, noting that "if a revolution breaks out… for example if communist parties declare themselves against the government and seek to overthrow it, it is difficult to consider these revolutionaries, these rebels, as prisoners of war and to treat them with all the benefits of The Hague Convention offers to prisoners."[236] This exchange reveals two crucial points. First, it reinforces the theme developed throughout this chapter (and this entire dissertation) about the felt anxieties, not only by states but also even by the Red Cross, regarding the risks of legitimizing insurgent parties through the use of legal categories that enhance both their status and their prerogatives. Second, with regard to the specific political context of the time, it brings to light a (mostly latent) concern among many of the participating National Red Cross Societies in 1921 vis-à-vis the risk of potential communist revolutions. The idea of humanizing internal conflicts through the provision of aid to all victims may well have been uncontroversial by then,

---

[233] *Dixième Conférence Internationale de la Croix-Rouge tenue à Genève du 30 Mars au 7 Avril 1921, Compte Rendu*, 217-218. ICRC Library, Geneva.
[234] In addition to the analysis of this Conference presented here, see Siotis, *Le Droit de La Guerre et Les Conflits Armés D'un Caractère Non-international*, 142–145.
[235] Lodygensky was invited to the Conference as a member of the Old Russian Red Cross.
[236] *Dixième Conférence Internationale de la Croix-Rouge tenue à Genève du 30 Mars au 7 Avril 1921, Compte Rendu*, 66-67. ICRC Library, Geneva.

yet since many of the possible beneficiaries in future uprisings might be of communist stripe, those debating in Geneva wished to exert caution so as *not* to legitimate them by inadvertently granting them the legal character of belligerents.[237]

As a result, one can conclude that even though in 1921 recent civil war atrocities may have done away with the until-then persistent risk-aversion toward the provision of humanitarian during internal armed conflict, evincing a critical measure of morally-driven change in attitudes, political fears brought on by the uncertain application of the principles (to the benefit of "undesirable" rebels) remained and worked to limit the range of humanitarian privileges that participants were willing to offer, as seen here in the area of the treatment of captured fighters. That the German Red Cross representative felt at liberty to express this concern publicly, with the acquiescence of the ICRC and the approval of other National Societies debating in the Third Commission, suggests that this was a concern shared more broadly, perhaps by the majority of them.[238] This dynamic of modifying the language of the sanctioned rules to avoid their application in undesirable circumstances would repeat itself in subsequent debates about rules for internal conflicts in 1949 and the 1970s. However, in contrast to 1921, in those moments risk-aversion was most strongly felt by powerful minorities who found themselves unable to express them openly in public for fear of embarrassment and isolation, enabling the operation of social coercion and prompting "covert pushback" on the part of the coerced.

The 1921 resolution was doubtlessly important. In practice it served to legitimize the work that the ICRC as well as a few National Red Cross Societies would perform in a variety of civil conflicts between 1921-1949, as detailed later. Moreover, as we will see, it laid a crucial precedent, opening the door to eventual legal developments. That said, the resolution's relevance was also limited. It constituted a non-binding statement obtained not at a "plenipotentiary" Diplomatic Conference of state delegations with treaty-making

---

[237] Jacques Moreillon hints at this underlying concern and the political dilemma it created in Moreillon, *Le Comité International de La Croix-Rouge et La Protection Des Détenus Politiques*, 59.

[238] The ten Red Cross Societies participating in the Third Commission hailed from Germany, USA, Finland, British Indies, Italy, Mexico, Poland, Portugal, Russia (old Red Cross) and the Ukraine.

power, but at a meeting of the International Red Cross movement. It may well have been seen as "quasi-law" by the ICRC and National Societies but it did not constitute binding law upon states. Second, while it legitimated humanitarian relief in internal conflicts, it also stopped short of expressly banning the resort to inhumane acts (except for the Lodygensky proposal, which condemned them.) In other words, even if its spirit pointed toward legitimating the idea that extant rules for interstate war should also apply in internal conflicts, it did not effectively regulate combatant behavior during internal war, which would take decades to occur. As such, it appears that even if the Red Cross was now convinced of its right to humanitarian action internal armed conflict, it still wavered on the idea that international law should regulate internal conflicts.[239]

As a result, the most important effect of the 1921 resolution was to empower and legitimate the Red Cross movement, especially the ICRC, to play a humanitarian role in the midst of civil war and other forms of violence within states' borders, rather than to set formal, binding limits to civil war violence.

Conclusion

This chapter provides an (admittedly dizzying) portrait of legal doctrine and history. Yet telling this early story is important because it allows us to trace the slow process of emergence *both* of the issue of humanizing internal conflicts through international principles *and* the conditions under which that concern could be placed on the international agenda.

As shown, over several decades various facilitating as well as inhibiting conditions surfaced. In particular, civil war-related shocks were fundamental for eliciting moral concern on this issue. Only through accumulated "shocks" did (a few) states and National Red Crosses begin to show a marked concern and adopt a more forceful, pro-active attitude toward clear standard-setting. Despite this, in the early decades twentieth century most governments remained notoriously risk-averse citing the twin concerns of sovereignty and legitimacy vis-à-vis internal armed challengers. Even National Red

[239] Moreillon, *Le Comité International de La Croix-Rouge et La Protection Des Détenus Politiques*, 59.

Crosses, after showing themselves morally motivated to legitimate a bolder right to humanitarian action in civil wars, proved fearful of "going too far" by granting rebels the status of belligerent and prisoners of war, suspecting that communists might asymmetrically reap those benefits. In the end, non-binding (if still seminal) statements were adopted in the context of the International Conferences of the Red Cross, laying a bedrock of principles that would prove crucial in the future.

Multiple shocks were also necessary to move a morally committed entrepreneur like the ICRC into the terrain of internal conflicts, first in practice and eventually in principle. Even a non-governmental humanitarian entrepreneur required a changed social environment, new dramatic episodes and pressure coming "from below," (as illustrated here through the figure of Georges Lodygensky and the pleas of several other Red Cross actors operating from the ground,) to forcefully assume the leadership of a cause it had considered important for decades.

These findings point to powerful general theoretical points. First, risk-averse actors, including states, are not impermeable to a changing atrocity-ridden environment. For their part, moral (non-state) entrepreneurs may be principled and moved to practical action in the aftermath of horrific violence, but changes in their interests and practices are incremental, not automatic or radical. Moreover, moral entrepreneurs, as organizations operating in a difficult political and material context, weigh their actions and decisions rationally and cautiously. In the end, formal policy change within them can take more time and be more circumspect than expected, and only occur when specific conditions combine and cumulate.

Chapter 3 – The Road to and Making of Common Article 3 to the Geneva Conventions of 1949 (1921-1949)

"It is a veritable squaring of the circle."
Jean Pictet of the ICRC (referring to one of the many formulas considered for the regulation of internal conflicts through the Geneva Conventions,) 1948[240]

I. Introduction

The previous chapter reconstructed the long and winding process through which the ICRC (and the Red Cross Movement more broadly) embraced the task of pushing for international principles to humanize internal armed conflicts in 1920. A year later, the International Conference of the Red Cross, thanks in no small part to various crucial reports submitted by the National Societies of states recently affected by internal atrocities, issued a path-breaking non-binding resolution that from then on provided a key basis for Red Cross action in domestic contexts.

This chapter resumes the story from that moment until the emergence of what to this day remains perhaps the most important legal humanitarian rule governing internal armed conflict, an Article (3) included in the four Geneva Conventions negotiated in 1949 to protect sick and wounded soldiers on land and at sea, prisoners of war, and certain types of civilians. The fact that it was "common" to all four Conventions gives this article its usual name, Common Article 3 (CA3 hereafter.) Among others, CA3 compels both state and non-state armed forces to respect and protect fighters who have fallen wounded or sick, those who have surrendered or who have been detained, as well as the non-combatant population. It also prohibits gruesome practices against such persons including torture, ill-treatment, hostage-taking and unlawful execution, provides for judicial guarantees to captured persons and enshrines the ability of the ICRC to offer its services to the parties to conflict.[241]

The innovations CA3 introduced at the time were profound in form and substance. This article constituted, simply, the first binding rule of international treaty law to protect the victims of armed conflicts occurring within states' borders. The magnitude of this

[240] *XVII Conférence de la Croix-Rouge, Stockholm, Août 1948, Commission juridique, Sténogramme des séances*, 44. ICRC Library, Geneva.
[241] See the full text in Chapter 1, fn. 5.

achievement comes to the fore when taking into account that the Universal Declaration of Human Rights (UDHR,) another seminal document dealing with states' treatment of their citizens adopted just months prior (December 1948) by the United Nations General Assembly was a *non-binding* document, or "soft law." It was not until the entry into force of the two Human Rights Covenants (on Civil and Political Rights, and on Economic, Social and Cultural Rights) in 1976 that binding human rights law could be said to exist.[242] Content-wise, CA3 featured a list of principles that tackled the most frequent abuses inflicted upon captured persons in internal armed conflicts, including death, torture and other forms of cruel and degrading treatment. This was a startling early development since an international convention prohibiting torture and similar mistreatment applicable within states' borders would still take decades to emerge, in 1984.[243] Moreover, CA3 added crucial fair trial safeguards that offset the traditional (criminal) treatment given to rebels under domestic treason laws. And although a more comprehensive set of protections for civilians in contexts of internal hostilities would not be introduced until later, CA3 laid a bedrock of humanitarian guarantees for them. Finally, CA3 encouraged the parties to conflict to come to special agreements and expand their mutual commitments as they saw fit, implicitly recognizing that states and rebels could negotiate accords on equal legal footing. The expansiveness of Common Article 3 quickly led to its popular characterization as a "convention in miniature," an expression initially used by a Soviet delegate in 1949 to (derisively) compare it to the broader

---

[242] Together, the UDHR and the two covenants comprise the so-called International Bill of Human Rights. See *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. See: http://www1.umn.edu/humanrts/instree/b3ccpr.htm. *International Covenant on Economic, Social and Cultural Rights*, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976. See: http://www1.umn.edu/humanrts/instree/b2esc.htm

[243] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987. See http://www1.umn.edu/humanrts/instree/h2catoc.htm

protections states had built for inter-state conflicts, but later re-signified positively by the Red Cross to highlight the broad coverage it actually permitted in practice.[244]

CA3 was as puzzling for what it said as for what it did not say. The article's opening line declared its contents would bind participants in a "conflict not of an international character," yet a clear definition of what this meant was not explicitly provided in the text. Moreover, considering that in 1949 the customary norms of belligerence with their stringent requirements for application (state recognition, control of territory, etc.) represented the normative status-quo for internal conflicts, CA3 surprisingly said nothing about conditions, whether about states' discretion to recognize the rebels as belligerents or about the characteristics insurgents had to display in order to trigger the application of international law. Even more puzzlingly, as this chapter will show, tense debate about the inclusion of these and other requirements *did* occur during the negotiations in 1949, reportedly making the deliberations on CA3 the longest and bitterest of those held in the four-month long Diplomatic Conference. Yet despite certain states' fierce struggle for their inclusion, the various proposed conditions were ultimately dropped from the approved text. The final product in fact seems to constitute the exact opposite of what its strongest government detractors originally wanted; yet they saw it through to its adoption. How could this be? How can we explain these positions, changes and outcomes?

This chapter argues that the adoption of CA3 was the product of a two-step process, characterized by the mechanisms of *moral entrepreneurship* and *social coercion*. First, I illustrate how despite the normative inroads made in 1921, ICRC action in practice was often hindered by government refusal to admit its services or to show humanitarian restraint in civil strife. These setbacks had an important effect since, in demonstrating the inadequacy of extant non-binding instruments, they allowed the International Committee to press harder for binding rules, thus delegitimizing the resort to further "soft law" resolutions. Second, confirming the combination of factors seen previous episodes of

[244] Jean S. Pictet, ed., *Commentary on the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the FIeld, August 12, 1949* (Geneva: ICRC, 1952), 48; Gerald Irving A. Dare Draper, *The Red Cross Conventions* (Praeger, 1958).

norm emergence, this chapter shows how a "new wave" of civil war atrocity was key for slowly generating a shared interest among a majority of states to include humanitarian protections for internal conflicts in the Geneva Conventions. The most crucial of these shocks came with the bloodshed of the Spanish Civil War, itself embedded in the broader trauma of World War II, which together prompted the ICRC and various National Red Cross Societies to push for revising the existing Geneva Conventions. By the time the initial conversations about a revamp began in 1946-7, most of the participating actors seemed to agree that conflicts occurring within states' borders had to be "humanized" through international legal means. Red Cross-driven moral entrepreneurship against a background of recent atrocity captures this stage of the process well.

Yet to say that most states were willing to entertain the idea does not mean that *actually producing* a legal rule for internal armed conflicts was a foregone conclusion or that its scope and contents were preordained. There remained barriers to overcome, the most important of which was the attitude of some powerful states that had a particularly grave stake in the outcome, especially colonial powers such as the United Kingdom and France who feared the application of the rule in their dependent territories. The final and more extensive part of this chapter makes the case that *social coercion* helps explain the contours of the normative construction process, particularly how these powerful recalcitrants were forced to accommodate to the majority view.

The analysis offered here demonstrates how intense public and private pressures grounded on concerns about social status and moral standing served to block calls for the dismissal of the idea of humanizing internal conflicts, and to "tame" others pushing for high conditions to the application of international law. With regard to the former, in particular, the political context proved crucial: by 1949 colonial powers were beginning to lose their legitimacy and authority in Africa and Asia as an international moral crusade in support of the principle of self-determination quickly gained ground. The early Cold War dispute between competing liberal and socialist ideologies accentuated these global political struggles over legitimacy, and anti-colonialism in particular gave the Soviet Union a powerful public argument --if for propaganda reasons-- against liberal-democratic but imperialist Western countries. As seen later, the Soviets put humanitarian

arguments against colonialism to good use during the negotiation of the Geneva Conventions, as in other international forums at the time. In addition, the openness of most other participant delegations (some of them hailing from conflict-ridden states) to accept the idea of humanizing civil wars combined with Soviet rhetoric and pushed colonial and other less radical Western skeptics against the political wall. In the end, although privately unpersuaded about the virtues of the idea, the UK and France realized that continuing to oppose a project embraced by the majority would bring them continued public derision and isolation. Citing direct diplomatic evidence of these felt social pressures, I argue that these states were "coerced" to modify their position and accommodate.

Yet social coercion did not exert unilateral effects. Instead, in a move that I label *covert pushback*, the UK and France decided to take the reins of the drafting process so as to craft a version that simultaneously pleased them and "the humanitarians" in the room while also neutralizing more "extremist" alternatives, especially an overtly-generous Soviet proposal introduced late in the process. To do so the colonial powers shaped a key portion of the text to read vaguely –the very "definition" of the internal conflicts to which the rule would apply,-- hoping that such vagueness would allow later them to avoid its implementation in practice. These initially recalcitrant actors took pains to see their version of text adopted, even letting a "golden opportunity" to delete the provision go by the wayside. This counterintuitive attitude can only be explained through attention to the social aspects of the negotiations. Indeed, in 1949 the UK and France understood that the balance of opinion was tipped against the absence of a humanitarian rule for internal conflicts, and preempting the adoption of a different (unpalatable) text, they stood by their draft. Ultimately, despite some very important insertions of protective content, theirs was the version that emerged as Common Article 3 to the four Geneva Conventions.

Theoretically, the analysis reveals how the historical process leading to the adoption of CA3 was characterized both by state interest as well as by their attention to social and moral pressures. Contra assumptions of invariable state risk-aversion or selfishness, however, "interest" is shown here to be a rather plastic category: Among the participating

delegations some appeared to be morally-committed humanitarians, others espoused public humanitarianism but did so likely for strategic reasons, others accepted the idea of having a humanitarian rule for internal conflicts but combined this position with traditional sovereignty concerns for safeguards, and finally others in the "sovereigntist" extreme vouched for the utter dismissal of the idea. (That the extreme sovereigntists were in the absolute minority, moreover, is noteworthy.) I argue that to explain such variation one needs not only look at domestic-level factors or calculations of material risk and benefit, but needs to factor in moral beliefs (in turn explained and sustained by the recent war-induced shocks.) Moreover, as hinted above, the most interesting findings of this chapter emerge once one investigates *the interaction* of different state delegations during negotiations. Social pressures (situated in a specific historical milieu) proved determinant for shaping the rule-making process and its outcome. This reinforces enduring constructivist arguments about the importance of sociality and intersubjectivity for understanding international politics.

These findings militate strongly against approaches that insist on applying a single set of explanatory tools to understand international outcomes, often ignoring social and historical processes along the way. Indeed, there is a current in recent IL/IR that insists on framing many central questions of institutional or legal design as the product of rational state choice, such as the use of precise or imprecise language in international law.[245] The assumption in this work is that states "realize" that they will face cooperation problems during negotiations, and as such they come to the table ready to rationally "solve" such issues by adopting imprecise language that they can accept and "sell to their publics." The close study of the origins of CA3 reveals these assumptions to be misleading. Many states' first option was undoubtedly to craft a precise text containing several clear conditions to safeguard their sovereignty. *Given* the social pressure in the room *against* precise sovereign safeguards, imprecision *became* a rational tactic for the "coerced" states. On balance, opting for imprecision here can only be said to have been

[245] Barbara Koremenos, Charles Lipson, and Duncan Snidal, "The Rational Design of International Institutions," *International Organization* 55, no. 4 (2001): 761–799; Koremenos and Hong, "The Rational Design of Human Rights Agreements"; Koremenos, "Institutionalism and International Law."

"rational under strong social pressure," not the product of conscious state choice prior to interaction with others. This pattern will resurface in Chapter 5 during the making of the Additional Protocols to the Geneva Conventions in 1974-1977.

ICRC and Red Cross Intervention in Internal Conflicts, 1921-1938

As seen in the preceding chapter, the Tenth International Conference of the Red Cross of 1921 produced an important resolution that for the first time legitimized the operation of the Red Cross and the ICRC in internal conflicts.

That document was, however, not an internationally binding rule.[246] Nevertheless, it allowed ICRC to lend its services in a number of internal conflicts and other cases of domestic instability, including in Upper Silesia (1921-1923,) Poland (1924,) Montenegro (1924,) Italy (in 1931, through the National Red Cross,) Austria (1934,) and Spain (1936-1939.)[247]

On the whole, however, the resolution performed less well than its drafters and the ICRC had hoped. A few countries declined Red Cross intervention, arguing that an internal conflict was either not occurring or had ended, and that those being held were being treated in accordance with domestic laws. This was the case in the Soviet Union in 1921-22 (and in 1926-27;) the Irish Free State in 1922-23; Lithuania in 1937, and Nazi Germany (1933-1945.) A failed ICRC attempt to offer help during the Rif War (1920-1926,) in which a group of Riffian rebels (from Northern Morocco) rose up against Spanish and Moroccan authorities and set up a short-lived Republic, also suggested that colonial powers thought their protectorates were outside of the scope of application of the

[246] For a discussion of the importance for international law of the resolutions adopted by the International Conferences of the Red Cross, see Perruchoud, *Les Resolutions Des Conferences Internationales de La Croix-Rouge*, 321–344.

[247] All these cases contain interesting elements. The Upper Silesia conflict, for instance, was peculiar in that it occurred in an area whose formal status had not been decided. The Polish and Montenegro cases were pursued after private individuals or groups made public denunciations about state persecution for political reasons but not in the context of overt armed conflict. For reasons of space I opt not to offer more detail, but please refer to Moreillon, *Le Comité International de La Croix-Rouge et La Protection Des Détenus Politiques*, 65–96; Durand, *From Sarajevo to Hiroshima: History of the International Committee of the Red Cross*, chap. 5–7; Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, 263–266.

1921 Resolution.[248] In all cases, historical evidence confirms that the ICRC seems have been greatly frustrated by these failures of access. It was particularly well aware of the dire situation in which political detainees found themselves in many of these countries. [249]

None of these internal conflicts, however, seems to have had more impact on the ICRC and the Red Cross movement than the Spanish Civil War, which for three years confronted the incumbent Republican side against the Nationalist insurrectionaries led by General Francisco Franco. Although, as detailed below, ICRC involvement in Spain was heavy and saw some important successes, the atrocity balance sheet was in the end seriously distressing.[250]

At the outset of the war, the Republican government forcibly reorganized the Spanish Red Cross.[251] The Nationalist rebels, for their part, created their own Red Cross Committee based in Burgos, and thus it was unclear what this "duality" would mean for their relations with the International Committee. The ICRC decided to communicate with both Red Crosses on the basis of the 1921 Resolution. Luckily, both of them recognized the ICRC's moral authority, and replied positively to a request to allow its channeling of foreign Red Cross assistance. Further, they committed to supporting ICRC delegates on the ground in the creation of information agencies for civilian prisoners and POWs. Finally, each accepted the fact that the ICRC would be working with the other.

These commitments allowed the ICRC to extend its operations in Spain widely. By the end of 1936, it had reportedly sent nine delegations to various regions of the country, coordinated by Dr. Marcel Junod. According to Durand, "in the Spanish War the International Committee did its utmost to extend its operations as much as it would have done in an international war, since the conflict increasingly took on an international

---

[248] Spain and France, in this case. See Durand, *From Sarajevo to Hiroshima: History of the International Committee of the Red Cross*, 239.

[249] Cfr. Moreillon, *Le Comité International de La Croix-Rouge et La Protection Des Détenus Politiques*, 65–96.

[250] Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, 282–3.

[251] For this portrayal I draw mainly on Durand, *From Sarajevo to Hiroshima: History of the International Committee of the Red Cross*, 317–368. See also Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, 266–283.

character."[252] ICRC operations comprised a variety of important areas: basic relief (medical supplies and food,) aid to the National Societies, protection of the Red Cross sign, prison visits, assistance to prisoners, establishment of lists, news provision, exchange and evacuation of persons, and aid to civilians. Humanitarian need was staggering. By the end of the war, the News and Tracing Service set up by the ICRC had reportedly sent 5,025,843 family messages, including incoming and outgoing notes.[253] The ICRC also endeavored to remind both combating sides of existing international humanitarian law, and strived to have them sign limited humanitarian agreements on the basis of reciprocity, chiefly for prisoner exchange, as well as for the evacuation of elderly and sick population, women, and children.

Extensive and crucial though this Red Cross help was, the situation during the war remained utterly precarious. Both sides engaged in gruesome practices (reprisals and aerial bombardment of civilian areas, most infamously,) and many prisoners, civilians or combatants, were either executed or held captive.[254] A state of belligerence was never recognized between the parties and hence the laws and customs of (inter-state) war did not become applicable. Republicans and Nationalists also failed to reach ad-hoc agreements for restraints on specific acts of violence, such that, "generally speaking, the conflict was characterized by a callous disregard for the laws and customs of war and humanitarian principles."[255]

Given the extent of the ICRC's involvement and the cruelty of the war practices, the Spanish conflict constituted a watershed for the eventual development of the rules for internal conflicts. As ICRC historian François Bugnion notes, "The [Spanish Civil War] highlighted the serious problems resulting from the absence of legal rules applicable to civil wars and showed how difficult it was, during actual hostilities, to reach agreements

---

[252] Durand, *From Sarajevo to Hiroshima: History of the International Committee of the Red Cross*, 322.
[253] For more detail see Durand, *From Sarajevo to Hiroshima: History of the International Committee of the Red Cross*, 317–368; Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, 266–283.
[254] Durand, *From Sarajevo to Hiroshima: History of the International Committee of the Red Cross*, 323.
[255] Ibid, 268.

between belligerents to limit the violence and protect the victims… In the final analysis, the Spanish Civil War underscored the need to draw up, in peacetime, legal rules applicable to civil wars."[256]

By the mid-to-late 1930s the International Committee realized that commitments bearing force of international law had to be put in place for internal conflicts. It knew, however, that this could only be done by summoning a Diplomatic Conference of states, which seemed like a distant thought given the brittle political context of the time. Political tension included not only the war in Spain but also the winds of international conflict in Europe. In the meantime, as a way of framing its own aspirations, the ICRC decided to prepare a study on the topic in preparation for the upcoming International Red Cross Conference, scheduled to take place in 1938 in London.

The Yung Report and the Sixteenth International Conference of the Red Cross, 1938

Dr. Walter Yung, a member of the International Committee and of its recently created Legal Commission, was in charge of the study. Explicitly on the basis of recent Red Cross experience, the report sought to elaborate upon and clarify the Resolutions approved in 1921, particularly in areas that had previously gone unidentified, such as prohibiting reprisals against civilians or facilitating their evacuation from war zones. Interestingly, the Yung report distinguished between three different types of internal conflict (minor troubles, grave troubles, and civil war) and proposed diverse types of protection for each.[257] Although this categorization is reminiscent of the different "levels" of internal conflict considered under existing customary law (discussed in the previous chapter,) Yung's report made no meaningful reference to received doctrines of belligerence. Rather, his typology responded to the humanitarian difficulties the ICRC had faced in the 1920s and 1930s, particularly to states' refusal of foreign Red Cross aid because a civil war allegedly did not exist. A prior tendency to "lump" together different forms of internal violence under the composite notion of "civil war" in hope that states would not discriminate among situations (and thus allow equal protections across varying

[256] Ibid, 282–3.
[257] Walter Yung, "Le Role et l'Action de La Croix-Rouge En Temps de Guerre Civile," *Revue Internationale de La Croix-Rouge* 20, February (1938): 97–113.

levels of violence) had proved unhelpful and required a fresh look. Indeed, from then on, those differences would become essential in debates about creating and applying of humanitarian rules in internal conflicts.

Predictably, Yung's report argued that Red Cross action was legitimate in all three situations. As before, initial relief would be the responsibility of the National Red Cross, including during "minor" troubles, while foreign assistance by the ICRC or another National Red Cross would be justified amid major troubles or a civil war. The only real difference for Yung was that outside intervention favoring captured rebels during minor troubles seemed unrealistic, hence the domestic criminal code should be expected to apply. Yung also drafted specific guidelines for Red Cross and ICRC action, restating and expanding their ability to provide aid to victims.

In addition, the Yung report explicitly recognized the fact that until then the basis for ICRC intervention in internal conflict was not rooted in formal international law, but rather stemmed from resolutions adopted by the International Conference of the Red Cross. This confirms, as argued earlier, that the ICRC was by then well aware of this "hard law" gap, which proved crucial moving forward. To begin addressing it, the Yung report enclosed a detailed draft resolution with detailed humanitarian safeguards for wounded and sick fighters, prisoners of war and political prisoners, and non-combatants. The 1921 resolution had included some language to this effect, but Yung now went much further by including several provisions drawn from the legal instruments that until then only applied to inter-state wars. Finally, the draft resolution clarified that none of the humanitarian provisions it contained should be taken as explicit recognition of a state of war or belligerence. Disclaimers of this type designed to neutralize the legitimization of rebels continued to be essential for securing governmental acceptance of any humanitarian rules for internal conflicts both in the context of the International Conferences of the Red Cross or at Diplomatic "plenipotentiary" Conferences, and they represented the only intersection between older doctrines of recognition and newer "non-political" humanitarian norms.

The ICRC sent the report and the draft resolution in advance to all National Societies of the Red Cross. As François Bugnion explains, "This prompted the Spanish Red Cross

to produce a document on the same subject. In it, the Spanish Red Cross unreservedly endorsed the Committee's conclusions, and emphasized the need for close co-operation between the ICRC and the National Society of a country engaged in civil war."[258] Yung's work and the Spanish Red Cross response were finally debated in the Sixteenth International Conference of the Red Cross, which took place in London in 1938. Held within a smaller Legal Commission, the discussion quickly collapsed an American delegate asked to clarify whether the ICRC resolution was to apply only to the Spanish case or to all future civil conflicts.[259] A Portuguese representative responded that it may not be appropriate to discuss generalized standards at exalted times (read: during wartime,) and that the ICRC should continue to "study" the topic for later consideration.

Delegates from France, Germany and Italy agreed with this sentiment, perhaps unsurprisingly given the domestic politics in their countries prior to the outbreak of the world war. Now fully at the forefront of the cause, the ICRC defended its proposal by reiterating that it needed a solid basis upon which to operate in this type of conflicts. A Greek delegate agreed, but clarified that any norms set at this point could only be of moral, not legal, character. For their part, Belgian and Chinese representatives decried this attitude and highlighted the eminently humanitarian nature of the initiative, as did their Egyptian colleague. In the end, the French delegate admitted that it was not really against debating the issue and that the ICRC should indeed have a moral basis for its action (something that by then seemed unquestionable,) but noted that given the possibility of different interpretations, the topic should be left to expert international jurists.[260]

Given these pressures to delay, the ICRC had little choice but to acquiesce. Ultimately, a short resolution emerged from the Sixteenth Conference recalling the terms of the 1921 resolution, commending the ICRC and other Red Cross societies for their "spontaneous" actions during recent civil wars, and requesting the ICRC and the National Societies "to endeavor to obtain" respect for the humane treatment of the wounded and

---

[258] Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, 285.
[259] *Compte-rendu de la 2ème commission Londres 1938*, ICRC Archives B CRI-19. Geneva.
[260] *Compte-rendu de la 2ème commission Londres 1938*, ICRC Archives B CRI-19. Geneva.

the sick, prisoners of war, medical personnel and stores, political prisoners, non-combatants and children, among others. The resolution also encouraged the ICRC to continue studying the issue of Red Cross protection during civil war, and to report its work at the next International Conference of the Red Cross.[261]

This outcome, though modest given the ICRC's original aspirations, was useful for once more highlighting the urgency of the issue. Moreover, even if the delegates present at this International Conference had wished to lay down more robust humanitarian rules for internal conflicts, it was difficult for them in any event to reach conclusions "before the matter had been studied in detail by the governments."[262] As seen below, this necessary step would take until the end of World War II to occur.

II. The Long Road to Making Common Article 3

Between 1939 and 1945, the world witnessed one of its darkest periods. The astonishing cruelties committed during World War II, particularly those directed against the civilian population (of which the Holocaust was the gravest example) and prisoners of war, made evident the need to strengthen the existing legal norms regulating international armed conflict. The Spanish Civil War, as seen, had a similar demonstration effect with regard to internal conflicts.

The first one to notice the legal gaps was the ICRC, which had its hands full during both wars. The organization's performance during WWII would later become subject to much controversy, particularly its actions (and omissions) against the Nazi Holocaust and its aftermath.[263] At this time, however, the Committee enjoyed broad international admiration, even earning the Nobel Peace Prize in 1944-45 for its wartime work. Back in Geneva, the Committee's Juridical Commission and its Director-Delegate Jean Pictet were concerned with quickly mobilizing states around the revision of the existing Geneva Conventions.

---

[261] *Sixteenth International Red Cross Conference, London, 1938,* 82-83. ICRC Library, Geneva.
[262] *Sixteenth International Red Cross Conference, London, 1938,* 83, 104. ICRC Library, Geneva.
[263] Favez 1999.

Four different treaties eventually emerged from the Diplomatic Conference in 1949. The first three were "updated" versions of older conventions protecting respectively, 1) wounded and sick soldiers on land; 2) wounded, sick and shipwrecked marines at sea; 3) prisoners of war; the fourth was a brand-new agreement with safeguards for civilians living in occupied territory or as "enemy" civilians in belligerent countries, particularly internees.[264] This last treaty was a major innovation; in contemporary debates about humanitarian law it is often forgotten than until 1949 no specific covenant existed that offered detailed safeguards to protect the non-combatant population. And although as seen later the text of that convention ignored some crucial areas (such as restrictions on the use of force,) the step taken in 1949 laid an important foundation. For clarity purposes I refer to the first two conventions collectively as the Wounded and Sick Conventions, and to the third and fourth as the Prisoners of War (or POW) and Civilians Conventions, respectively.

In February 1945, even prior to the end of WWII, the ICRC issued a first memorandum to the ¨Big Five" (France, the US, the UK, China and the Soviet Union,) laying out an agenda to revamp the Conventions.[265] At this time the Swiss organization wished especially to ascertain whether the major powers shared an interest in revising the law, postponing a broader consultation momentarily. This was a general communication; civil war was not explicitly mentioned.

In the meantime, the ICRC organized a new gathering of the Red Cross Movement, the first since the pre-war 1938 London Conference. Sparking conversation among National Societies before engaging governments was a common practice of the ICRC, one seen as useful for both receiving feedback from humanitarian actors operating on the ground as well as for socializing the Committee's own ideas regarding how to develop

[264] The Wounded and Sick Conventions had been updated in 1929 and the Prisoners of War treaty was created that same year. A key precedent to the Civilians Convention had been an earlier draft treaty known as the "Tokyo project" of 1934. For more on that instrument, see *Draft International Convention on the Condition and Protection of Civilians of enemy nationality who are on territory belonging to or occupied by a belligerent. Tokyo, 1934* at http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=85EE9A58C871B072C12563CD002D6A15&action=openDocument (Consulted on September 5, 2013.)

[265] Rey-Schyrr, *De Yalta a Dien Bien Phu: Histoire Du Comité International de La Croix-Rouge, 1945-1955*, 242–244.

humanitarian norms. Although the outcomes of these preliminary debates were not to be taken as binding on any of its participants, they helped to shape expectations about what could and should be considered in the revised Conventions, and what could or should not.

The Red Cross Movement, it bears noting, had been expanding since the early decades of the twentieth century to look less Western/European. In 1900 there were 37 recognized National Societies, mostly from the Old Continent.[266] By 1926, with the breakup of the Russian, Ottoman and Austro-Hungarian empires and the associated entry of various new states into the system, the number of Societies had risen to 52, thus beginning to change the face of the movement.[267] In addition, between 1900 and 1945 various former colonies had attained full or partial independence, as in the cases of Ireland, Iraq, Egypt, India, Canada, Australia or New Zealand. For their part, Latin American National Societies had multiplied over time and become more active participants at the International Conferences of the Red Cross. Hence by the end of World War II the movement counted 64 member Societies.[268] The attendance of National Societies to the International Conferences of the Red Cross had also popularized: at the 1912 International Conference 35 National Societies were present, 51 came in 1921 and 59 in 1938. (See Appendix 1 for a comparison of attendance at key meetings between 1912 and 1949.)

Progressive growth meant that new opinions beyond Europe and the US were being expressed within the movement. On balance, however, changing Red Cross membership during this period (1900-1946) did not prove as radical as during the 1950-1970s with the decolonization of the almost the entire continents of Africa and Asia, which brought much more numerical strength to their transformative ideas of self-determination. As illustration of this: In 1945, out of 64 National Societies of the Red Cross and Red Crescent nearly half (31) remained Western European, trailed by those located in the

---

[266] ICRC, *Manuel Chronologique Pour L'histoire Générale de La Croix-Rouge, 1863-1899*, 3.
[267] Durand, *From Sarajevo to Hiroshima: History of the International Committee of the Red Cross*, 187.
[268] Hans Haug et al., *Humanity for All: The International Red Cross and Red Crescent Movement* (Henry Dunant Institute, Paul Haupt Publishers, 1993), 165; Rey-Schyrr, *De Yalta a Dien Bien Phu: Histoire Du Comité International de La Croix-Rouge, 1945-1955*, 27.

Americas (22,) Asia and Oceania (8,) the Middle East (2.) and Africa (1.)[269] In contrast, by 1963 the total number would rise to 103 and to 122 in 1975, of which the great majority hailed from the "non-Western" world.[270]

That said, and as seen in some of the Conferences discussed above, already by the 1940s a plurality of smaller European, Latin American and "other" (Asian, Middle Eastern and African) states offered important counterpoints to major Western powers in humanitarian discussions. In the context of actually revising the Conventions in the second half of the 1940s, however, the most powerful of contrarian would be the Soviet Union, which remained officially disengaged from the revisions process until the Diplomatic Conference of 1949.

Forty-nine National Societies were represented at a July 26-August 3, 1946 Conference in Geneva specially convened to discuss possible updates to the Conventions, among other Red Cross matters.[271] The ICRC's Jean Pictet[272] put the issue of civil war on the table from the outset during debates about the Wounded and Sick Convention.[273] In addition, two National Red Cross Societies (from Norway and Yugoslavia) had mentioned it as a necessary reform in their reports to the Conference.

Interestingly, the initial ICRC proposal was cautious. It suggested that only the general humanitarian principles (as opposed to every single treaty provision) of the Convention should apply in civil wars, and under the condition that the "adverse" (i.e. rebel) party respected them in return—what one might term "conditional reciprocity." This type of reciprocity, whereby one party can declare itself unbound by a commitment *if* the other party is shown to not comply, is fairly uncommon in international law

---

[269] Ibid., 27.
[270] Haug et al., *Humanity for All: The International Red Cross and Red Crescent Movement*, 165.
[271] ICRC, *Report on the Work of the Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of Various Problems Relative to the Red Cross, Geneva, July 26 - August 3, 1946.* ICRC Library, Geneva.
[272] Jean Pictet is a towering figure in the history of international humanitarian law and the ICRC. It should suffice to note here that he was the main architect of the Geneva Conventions of 1949, and remained central to the evolution of the law and the principles of the Red Cross moving forward.
[273] *Conférence Préliminaire des Sociétés de la Croix-Rouge pour l'Étude des Conventions et des Divers Problèmes Ayant Trait à la Croix-Rouge, Genève, 26 juillet-3 Août 1946, Procès-Verbaux, Vol. II,* 3, ICRC Library, Geneva.

nowadays and had at least since the first POW Convention (from 1929) been limited in the framework of humanitarian law, yet in 1946 the ICRC felt its inclusion might make the idea of civil war protections more palatable to states.

Although conditional reciprocity for internal conflicts would later become a hot-button issue, records show that in 1946 the National Societies felt more adventurous than the ICRC. Representatives of the Belgian Red Cross and Iranian Red Crescent in fact suggested inverting the conditional reciprocity clause, so that parties to conflict would automatically be expected to apply the principles of the Convention *unless* they explicitly announced otherwise. (See Appendix 2 for the main textual formulas considered between 1946-1949.) The rationale here was that most "civilized" states (and insurgents aspiring to "civilized" statehood) would feel compelled to respect the law and find themselves unable to publicly oppose noble humanitarian norms. Also importantly, participants at this Conference of National Societies did not see the benefit of defining with precision the types of internal conflicts to which eventual rules would apply. The Iranian and Egyptian Red Crescent Societies were of the opinion that simply referring to "armed conflict" would suffice since it allowed for broad coverage across violent situations, whether internal or between states. Other Societies in attendance were in tacit or explicit agreement. Finally, participants suggested that the *entire* text of the Wounded and Sick Convention, not just its underlying principles, should apply to internal armed conflicts.[274] Another commission debating revisions to the POW Convention came to similar conclusions.[275] [276]

These initial debates were decidedly encouraging for the project of humanizing internal armed conflicts. The ICRC had achieved more than it had bargained for both in terms of the scope and substance of the provisions, and *none* of the participating National

---

[274] *Conférence Préliminaire des Sociétés de la Croix-Rouge pour l'Étude des Conventions et des Divers Problèmes Ayant Trait à la Croix-Rouge, Genève, 26 juillet-3 Août 1946, Procès-Verbaux, Vol. VII,* 4-7, 1946. ICRC Library, Geneva.

[275] *Conférence Préliminaire des Sociétés de la Croix-Rouge pour l'Étude des Conventions et des Divers Problèmes Ayant Trait à la Croix-Rouge, Genève, 26 juillet-3 Août 1946, Procès-Verbaux, Vol. VII,* 7-15, 1946. ICRC Library, Geneva.

[276] ICRC, *Report on the Work of the Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of Various Problems Relative to the Red Cross*, July 26 - August 3, 1946, 70. ICRC Library. Geneva.

Red Crosses rejected the measure; quite the opposite. (States were not present at this meeting, helping to explain this "generosity.") And as noted, National Societies were entertaining the *full extension* of the Wounded and Sick and POW Conventions to internal armed conflicts, not a specific "tailor-made" article (like the eventual CA3) to be devoted to them. That idea would emerge later.

States' Reactions to the Revisions Process in General

By the fall of 1946 the UK, the US and France had all begun debating internally how to react to the ICRC proposals and whether to participate in preparatory meetings. Whereas France and the US soon welcomed the idea of revisions, the UK hesitated. The US military had tried to follow the Conventions during the World War and while it had generally found them useful, it had faced a number of challenges that it wished to catalogue and resolve, particularly in relation to POW treatment.[277] France, for its part, having borne the heavy brunt of Nazi occupation, enthusiastically embraced the idea of a revamp, especially the project of a new convention to protect civilians. The UK, as said, was less excited initially: some British officials were unsure about the timing, while others felt that drafting a new Civilians Convention might involve undesirable commitments and distract from what should be the central task: updating the Wounded and Sick, and the Prisoner of War Conventions. The UK eventually accepted the ICRC's invitation, as did the Chinese. For their part, as noted earlier, the Soviets remained silent and kept everyone guessing until almost a week before the Diplomatic Conference started in 1949, when they finally announced their participation.

The US, UK and France all formed interdepartmental committees (IC) to tackle the revisions. The US had laid important groundwork through a War Department study of "gaps" in the POW Convention.[278] On the heels of this work and at the ICRC prompt, the

[277] Apparently unaware of the ICRC's invitation (which had gone to the State Department,) the US War Department in fact decided in August 1945 to write a report of the gaps faced in the application of the Conventions during the war. When the War Department staff learned of the ICRC's plans, it was willing and able to participate in the discussions.

[278] See generally the files of Colonel R. McDonald Gray relating to the US Interdepartmental Committee on Prisoners of War, Gray's Reports, Administrative Division, Mail and Records

US State Department called in January 1946 for the appointment of a formal US Interdepartmental Committee (US IC) devoted specifically to this subject, to be formed by representatives of the Justice, Navy, Interior, State and War Departments, alongside the American Red Cross and the Postal Office. The French created a similar Interdepartmental Committee (French IC) in May 1946 with a similar mix of military, civilian and technical Ministries. In addition, organizations like the French Red Cross, the National Federation of Mutual Aid for Political Internees and Deportees, the POW Federation, National Federation of Deported Workers, the Camps Secretariat, National Council for the Resistance participated.[279] The fact that many former members of the resistance were now sitting in the government surely marked French vision and priorities, and explains their interest in the protection of civilians and of "internal combatants," i.e. armed partisan groups that, like the French Resistance, had valiantly opposed German occupation.

The UK prepared for the revisions since early 1946, chiefly through the work of its War Office (WO) and the Foreign Office (FO), in occasional consultation with the Home, Colonial and Dominions Offices.[280] Two UK Interdepartmental Committees were eventually formed in July 1947, with the War Office and Foreign Office (WO/FO IC) devoting their efforts to studying revisions to the Wounded and Sick, and POW Conventions, and the Home Office (HO IC) to the new Civilians Convention.[281] This division responded to responsibility held over subject matter: while the WO and FO had direct experience dealing with local and foreign wounded, sick, shipwrecked, or captured soldiers, the treatment of civilians was considered a province of the Home Office (for civilians living in the colonies the HO also consulted the Colonial and Dominions Offices.) Overall, however, the WO, FO and HO maintained contact with one another

---

Branch, Geneva Convention 1946-1949, Box 670, Entry A1 437, Record Group 389, National Archives at College Park, College Park, MD (hereonafter Entry A1 437, RG 389, NACP.)

[279] Unions Internationales 1944-1964, Art. 160, Cote 4-17. Diplomatic Archives, La Courneuve, France (hereonafter U-I, Art. 160, Cote 4-17, French Archives.)

[280] The National Archives of the UK (TNA): Public Record Office (PRO) FO 369/3592.

[281] TNA: PRO FO 369/3796, K11724.

through point persons, so decision-making on the revisions to the Conventions was known to all involved.

Reactions to the idea of regulating internal conflicts

To be clear, including protections for internal conflicts in the Conventions was *not* in the original plans of France, the UK or the US. Most states were probably first exposed to the idea through the official ICRC preparatory documentation, sent to them just before an ICRC-organized April 1947 Conference of Government Experts, discussed below.[282] Until that point, states had been working on their own draft revisions to the Conventions.

Beyond the major powers (and in consultation with them,) the ICRC extended invitations not to all states in the world but to those that had suffered most during the recent world war and whose input for this reason was thought to be most valuable. This was usual practice for the ICRC: to liaise initially with those it deemed more important/relevant to the revisions of the law, ascertain their support for the project, and slowly expand the circle as it came up with draft agreements. This implied a marked Western bias, yet it was something the International Committee could freely do due to its private (not inter-governmental) nature. (The International Conferences of the Red Cross were handled differently, and since all states parties to the Geneva Conventions and all National Societies were invited.)

Fifteen government experts came to the preparatory meeting that took place in April 14-26, 1947 in Geneva.[283] Unsurprisingly, government delegates were less generous than National Red Crosses and the formula on internal conflicts obtained a year before proved frail. The Dutch representative, for example, suggested this time that only the humanitarian principles of the Conventions should apply, not their every provision. His explicit reasoning was that in contexts of internal strife it was often hard to know who was responsible for what, making an article-by-article application of the full treaties

[282] This documentation was based on the ICRC draft Conventions, produced partly on the conclusions of the 1946 meeting of National Red Crosses. Its late arrival annoyed some governments since it gave them less time to think through the ICRC proposals.

[283] ICRC, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims, Geneva, April 14-26, 1947* (Geneva, 1947).

difficult. From then on the two options for "humanizing" internal armed conflicts were: 1) either extending the *entire text* of the Conventions to internal violence without "translation," or 2) to find a formula that included only (some, yet to be defined) principles underlying them. In the end, the latter would win out, in the form of one especially-designed article common to all the Conventions.

Other interesting changes to the working formula emerged in 1947. France, for its part, fought to insert the disclaimer that any civil war regulations should not impact the legal status of the combatants and or involve the recognition of the rebels' belligerence, highlighting once more the persistence of this concern.[284] Government experts also opted for a more precise definition of the conflicts to cover, changing the previously vague text from 1946 ("armed conflict within the borders of a state") to read "civil wars on any part of the metropolitan or colonial territory of the contracting parties."[285] They, however, failed to define "civil war" or to set a clear threshold of violence, thus undercutting the precision advocated earlier. Further, they reversed the changes that the National Societies had made in 1946, going back to the formula of conditional reciprocity that allowed states to only apply the rules *if* the opposite party did so in practice.[286]

The resulting text was disquieting in the eyes of the ICRC. It now believed that the clause of conditional reciprocity threatened to annul the application of the rule, since governments could easily use it as a way to avoid the law. Yet the International Committee knew that the 1947 meeting was preliminary and the language provisional. Government delegates were also cognizant of this; in fact, when accepting the ICRC's invitation the participating states had taken great pains to clarify that these prior encounters were only "exchanges of views" from which no binding commitments could emerge.

---

[284] *Conférence d'Experts Gouvernementaux pour l'étude des Conventions protégeant les victimes de la guerre, Genève, 14-16 avril 1947, Procès-Verbaux, Assemblées Plénières, Vol. I,* 32. ICRC Library, Geneva.

[285] ICRC, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims, Geneva, April 14-26, 1947*, 8.

[286] *Conférence d'Experts Gouvernementaux pour l'étude des Conventions protégeant les victimes de la guerre, Genève, 14-16 avril 1947, Procès-Verbaux, Assemblées Plénières, Vol. I,* 32. ICRC Library, Geneva.

Once the 1947 Conference of Government Experts closed, the French, American and British delegations reported back to their superiors and raised red flags about the idea of including civil war in the Conventions. Delegate Albert Lamarle of France noted that "the prevalent trend is to extend the scope of application as far as possible. This poses, however, a delicate issue for its juridical aspects and the foreseeable discussions on the legality or illegality of this or that authority."[287] Various members of UK delegation listed treatment of civil war in the Conventions among the "bigger points of policy to be settled" by the British team.[288] And the US meeting reports, like those of the French, noted the "unanimity of opinion" regarding the proposed extension to internal conflicts.[289]

States continued to work out their views in preparation for the next meeting dealing with revisions. Concerns over the inclusion of internal conflicts, however, did not seem to be central to the preparatory work of the US and France. This was puzzling in the case of France given its reported distaste for the clause, but it may be partly explained by the fact that, as said earlier, the French had other very controversial issues they cared deeply about, including securing protections for partisans, one of its flagship proposals and one that stirred the most controversy during the 1947 Conference.[290]

The inclusion of internal conflicts also did not occupy the US IC in any great length. Importantly, the US IC never rejected the idea on principle. It opted rather for tightening the terms of its application: rather than accepting the Red Cross-proposed expression ("armed conflict not of an international character,") it suggested going back to "civil war" (presumably implying a high level of violence) and to insert conditional reciprocity in the POW and Civilians convention, though not in the Wounded and Sick Conventions. The reasoning behind this difference was that since the latter dealt with the wounded and sick combatants on land and at sea, humanitarian concerns should prevail over military

[287] U-I, Art. 159, Cote 4-17, French Archives.
[288] TNA: PRO FO 369/3794, K8146.
[289] *Report of Proceeding of the US Delegation to the Meeting of Gov. Experts Re the Revision of the Geneva Conv. (1947,)* Records Relating to the International Committee of the Red Cross (ICRC); 1900-2005, Container 75, Entry P 108, RG 200, NACP.
[290] It may also be that the documents registering explicit French preparatory debates on this were not kept complete by archivists.

ones.[291] These modifications were included in the draft Conventions that the US team would later bring to the following gathering of governments and Red Cross Societies in 1948, to take place in Stockholm.

Civil war, however, figured centrally on the (long) list of UK concerns. Given the importance the British assumed later on, I now zoom into their internal revisions process more deeply.

Initial UK Attitudes

As noted earlier, the British had appointed two interdepartmental committees (ICs) devoted to the revision of the Conventions: One combining War Office and the Foreign Office staff (studying the Wounded and Sick, and POW Conventions) and another led by the Home Office debating the Civilians Convention.

The initial reaction of the WO/FO team after the 1947 meeting was to *accept* the civil war extension for the Wounded and Sick, and POW Conventions under the condition that "the adverse party accept (sic) the obligations."[292] In 1947 William Gardner, a military officer and Chair of the UK WO/FO team reasoned that the ICRC's desire to cover civil war "probably… springs … from the experiences of the IRCC (sic) in the Spanish Civil War reinforced by the treatment of the Resistance Forces in the European countries occupied by the Germans."[293] This reinforces the argument made earlier about the importance of the Spanish Civil War on states' reception of the ICRC proposal. Despite this, Gardner worried about the application of protections to "such situations as the present difficulties in Palestine or the "resistance" movement in Germany."[294] Others, including the legal adviser of the FO, Joyce Gutteridge, shared this concern about the lack of a precise definition of civil war to avoid protections amid such "undesirable" situations. In addition, Gutteridge disliked the expression "adverse party" because of its

[291] Prisoners of War Committee Minutes, January 10, 1949, POWC M104, Minutes, Box 673, Entry A1 437, RG 389, NACP.
[292] TNA: PRO FO 369/3796, K11724.
[293] TNA: PRO FO 369/3796, K12857.
[294] Gardner also referenced the Nazi "resistance" movement after the fall of the Reich, known as the "Werewolves." TNA: PRO FO 369/3796, K12857.

possible legitimating effect, and worried about who would be responsible for establishing whether the insurgents actually respected to the Conventions.[295] So thorny was the idea of internal conflicts for this UK team that it was one of the last issues to be worked out in preparation for the upcoming Stockholm meeting.[296]

By 1948 the working position of the WO/FO team was that some of the humanitarian principles of the Wounded and Sick, and POW Conventions *could* apply to civil war (per the text adopted in 1947) with one crucial condition: that it should be up to the sovereign power to decide *when* the law should become operative. [297] That decision, moreover, could only be granted after states' discretionarily accepted that the rebels had met other objective conditions: they controlled territory; they had issued a formal declaration of independence and a renunciation of allegiance to the government; they had formed an organized rebel army and were engaged in ongoing hostilities against their "former sovereign."[298]

Although the WO/FO IC felt that with all these safeguards the application of humanitarian principles would not prove a great burden, it decided to include conditional reciprocity as an additional guarantee that British soldiers fallen in rebel hands would receive good treatment. These tall requirements simultaneously worked to reduce the likelihood that international humanitarian law would apply, but made it more probable that *if it did*, rebels would have a clear incentive to show good conduct. The WO/FO IC recommended that any tightening of this language was undesirable.[299] Finally, for this UK team it was important to avoid the recognition the formal belligerency of rebels <u>even if</u> a state decided to apply the Conventions. The reason for this was twofold: As explained in the previous chapter, according to the prevalent legal doctrine, granting belligerence would mean recognizing (and thus constituting) the opposing party as a "state," attributing an internal conflict the character and status of an international war. Second, belligerency recognition allowed the insurgent party to trade and forge alliances with

[295] TNA: PRO FO 369/3796, K12857.
[296] TNA: PRO FO 369/3967, K4200.
[297] TNA: PRO FO 369/3968, K5862.
[298] TNA: PRO FO 369/3968, K5862.
[299] TNA: PRO FO 369/3968, K5862.

third states, something that obviously threatened to escalate the war and strengthen the insurgents.

The Home Office team's position on including civil war in the Civilians Convention was slowly shaping and would not be finalized until later.

The Seventeenth International Conference of the Red Cross in Stockholm, 1948

The "working" text that had emerged from the 1947 Conference of Government Experts, which included conditional reciprocity, limited humanitarian protection to "principles" (i.e. not the full Conventions,) and the use of the term "civil war" to imply a high level of violence, displeased the ICRC. The organization thus used its position (and power) as drafter to selectively reconcile and incorporate states' suggestions, and decided to eliminate conditional reciprocity from the version it presented the following year at the Seventeenth International Red Cross Conference in Stockholm.[300] (States were well aware of and very annoyed by this practice of the ICRC.)

The ICRC's "tinkered" draft also expanded the scope of application to internal conflicts by making "civil war" one among other types of violent situations (to read: "armed conflicts not of an international character, especially cases of civil war, colonial conflicts, or wars of religion,") Finally, the ICRC embraced states' suggestion to clarify that acceding to this rule would not have legal consequences in regard to the status of insurgents (without which it probably knew it had no chance of moving forward.)[301]

Delegations from fifty-six countries (National Societies and government representatives, see Appendix 1 for details) came to what would be the final preparatory meeting. The political context (in terms of active or latent internal conflicts) at the time was particularly tense as the Cold War started to take shape, the Israel-Palestine conflict intensified, civil war raged in China and Greece, and colonial tensions in French

[300] ICRC, *Draft Revised or New Conventions for the Protection of War Victims* (Geneva, 1948), 6.

[301] The revised texts were sent to states only very shortly (a month or so) before the Seventeenth International Red Cross Conference in Stockholm, which upset some delegations that felt they were constantly working with outdated language and thus came ill-prepared to the following meeting.

Indochina and British Malaya (later Malaysia) intensified. Emotions ran high, but the ICRC, with the help of the highly-esteemed Swedish hosts, was able to successfully steer the Conference.

The 1948 debates on internal conflicts varied slightly across three subcommissions discussing the draft Conventions, but general patterns emerged. This time many delegations, including those from France, Greece and the US acquiesced to the idea of an imprecise definition of conflict so as to avoid the inevitable definitional quarrels, thus accepting a return to the language of "armed conflict not of an international character."[302] The reference to specific types of internal conflicts (civil war, or religious and colonial conflicts) however, was dropped after the ICRC, with American and French support, argued that adding this level of precision might weaken or narrow the scope of application.[303] The majority of delegations also agreed that *all* the provisions of the Conventions should apply, instead of only their humanitarian principles.[304]

Conditional reciprocity, however, remained a key bone of contention. The American delegates tried to persuade others that unless this requirement was explicitly inserted, states would only be binding themselves, not their opponents. Rebels, after all, could *not* sign on to international conventions and become "contracting parties;" this was a privilege of states. Hence, if a mechanism for securing rebel commitment (such as conditional reciprocity) did not figure into the rule, only governments would be responsible for complying with the law, a situation that rebels might exploit in their benefit.

By 1948 the ICRC worriedly warned against conditional reciprocity, arguing that instead of giving rebels a free pass it was more likely to give cynical governments an easy escape clause. Despite US insistence, most of the participants were *not* convinced that the lack of conditional reciprocity was too risky, at least with respect to the Wounded

---

[302] The Greek delegate represented both his country's National Society and its government. The French delegate spoke for the National Red Cross, while the American Red Cross and US government delegates shared views and worked together.

[303] *XVII Conférence de la Croix-Rouge, Stockholm, Août 1948, Commission juridique, Sténogramme des séances*, 39-45. ICRC Library, Geneva.

[304] *XVII Conférence de la Croix-Rouge, Stockholm, Août 1948, Commission juridique, Sténogramme des séances*, 46. ICRC Library, Geneva.

and Sick Conventions, which were by then the oldest and most uncontroversial of the humanitarian agreements. For this reason, conditional reciprocity was dropped for the Wounded and Sick Conventions.[305]

Faced with this loss, the US rejected the idea that this formula should be included in all four treaties. Their concrete concern arose specifically with regard to the POW Convention, which would grant both parties to conflict the right to a foreign "Protecting Power" that would care for them. This idea, tantamount to legitimating outside intervention by a state in another's internal conflict, seemed plainly unacceptable to the American and Greek delegates.[306] Although some states worried about approving different terms for each convention, US warnings about opening the door to the intervention of foreign states resonated with other participants and the majority accepted conditional reciprocity for the POW and Civilians Conventions.[307]

What emerged from the 1948 was not entirely discouraging to the ICRC. Eliminating conditional reciprocity from the oldest and "most humanitarian" agreements (those dealing with the Wounded and Sick) but including it in the more controversial or recent ones (POW and Civilians Conventions) seemed to strike some balance between humanitarianism and sovereignty concerns. In addition, as clarified earlier, these drafts did not formally commit anyone. The resulting texts were but temporary compromises waiting to pass their final test: the Diplomatic Convention with full treaty-making capacity.

The Final Stretch: States Prepare for the 1949 Diplomatic Conference

In 1948 France and the US had scored some victories with regards to the rule on internal armed conflicts (i.e. the inclusion of conditional reciprocity in the POW and Civilians Conventions,) so their representatives were not greatly disturbed by the ensuing

---

[305] *XVII Conférence de la Croix-Rouge, Stockholm, Août 1948, Commission juridique, Sténogramme des séances*, 46. ICRC Library, Geneva.

[306] *XVII Conférence de la Croix-Rouge, Stockholm, Août 1948, Commission juridique, Sténogramme des séances*, 49, 52-53. ICRC Library, Geneva. See also the Conference report, ICRC, *Draft Revised or New Conventions for the Protection of War Victims*, 71–72.

[307] *XVII Conférence de la Croix-Rouge, Stockholm, Août 1948, Commission juridique, Sténogramme des séances*, 57, 64. ICRC Library, Geneva. Swedish government representatives were publicly opposed to inserting conditional reciprocity in the POW Convention.

formula upon their return home. However, probably at the behest of the UK, the US decided it would push for supplementing the definition of "armed conflict not of an international character" with additional requirements for application similar to those entertained by the British, described in more detail below.[308]

Back to London

The UK's Gardner had attended the 1948 Stockholm Conference mostly with the intention of "observing" other states' attitudes rather than revealing his country's cards. Once the meeting ended he returned to London and wrote up a confidential report with his impressions. His opinion, revealed in private soon after Stockholm to the US Head of Delegation, was that "the draft Conventions as they now stand were not such as any government could sign if it was concerned with their workability." Despite this Gardner thought that "with the exception of two or three major issues, the Prisoners of War, Wounded and Sick… Conventions would probably not present serious obstacles to our acceptance; but there may be very hard battles to get those two or three major issues settled in a form which we could accept."[309] One of these "hard battles" was the application of the Conventions to internal conflicts.

The months prior to the Diplomatic Conference were intense for the UK teams as they worked to produce three documents: a brief for the UK delegation to the Conference; an internal paper for approval by the Cabinet with a detailed description of their preparations, with suggested instructions for the delegation; and a public memorandum for circulation to participants in the Diplomatic Conference. The WO/FO team devoted to the Wounded and Sick, and POW Conventions was particularly anxious to get a green light on its views from the highest level possible, realizing the seriousness of the issues. The WO/FO eventually submitted a long report to the Cabinet on its work, while the Home Office, responsible for the Civilians Convention, wrote smaller documents on issues where the teams differed, *especially* on internal conflicts.

---

[308] United States Draft for the Revision of the Geneva Convention Relative to the Treatment of Prisoners of War, POWC D-43, March 4, 1949, Box 673, Entry A1 437, RG 389, NACP.
[309] TNA: PRO FO 369/3969, K10003.

"A Step in the Dark": The UK and the Treatment of Internal Conflicts

Broadly speaking, there was no major difference *of principle* with the treatment of internal conflicts between the teams studying the different Conventions: both teams disliked it and found it generally dangerous.[310] The WO/FO IC's option was to propose a formula including precise conditions for application. And as said before, the WO/FO IC saw *some* potential (if marginal) humanitarian advantage from securing reciprocal humane conduct in a full-scale civil war.

To this end, the WO/FO team proposed that the application of the Wounded and Sick, and POW Conventions to internal conflicts could only become possible if a violent situation occurring within states' boundaries resembled a war between states (with both sides controlling territory, acting with organized armies,) if rebels respected the laws of war, and if they were willing and able to respect the Geneva Conventions.[311] The last requirement was this British team's way of including conditional reciprocity without stating it explicitly; a gesture that they knew was opposed by the majority.[312]

The HO IC team, on the other hand, fiercely rejected *any* possibility of applying the protections of the Civilians Convention to internal conflicts. The issue was one "bristling with difficulties," the risks it posed so high and its implications so "fantastic" that it should not "become obscured by theorizing."[313] In particular, they worried that the Conventions might protect and even give special treatment to the *civilian population* supportive of a rebel group, which had all sorts of dangerous military and political implications and hampered state's ability to apply domestic law of treason. In short, for the HO the civil war idea was "at best *a step in the dark*… and at worst an encouragement to rebellion."[314] They stressed the risk of legitimating rebels and considered the formal clause inserted to avoid this as mere "lip service" which in practice

[310] TNA: PRO FO 369/3970, K11941.
[311] TNA: PRO FO 369/3970, K11941.
[312] TNA: PRO FO 369/3970, K11941.
[313] TNA: PRO FO 369/3970, K13445.
[314] TNA: PRO FO 369/4142, K406.

would do nothing to safeguard the position of a UK government.[315] For these reasons, and despite their expectation to find great pressure against their view in Geneva, the HO team essentially recommended the UK should risk pushing for the rejection of the clause by convincing other states of the perils involved through the debates.[316]

Cabinet approval for these positions remained uncertain until less than a month before the 1949 Conference opened. On March 28, a high-level meeting took place to make final decisions; in attendance were: the Prime Minister C. R. Attlee, the Lord Chancellor Viscount Jowitt, the Secretary of State for the Home Department J. Chuter Ede, the Secretary of State for War, E. Shinwell, the Attorney General Sir Hartley Shawcross, the Parliamentary Under-Secretary of State for Foreign Affairs, C. P. Mayhew, alongside the UK Head of Delegation Sir Robert Craigie, and the War Office's William Gardner. In a nutshell: Attendees sided with the HO team and scolded the WO/FO team for being dangerously flexible. The summary of the confidential discussion is worth quoting at length: "It would be a matter of great practical difficulty to say at what point a riot or rebellion reached the stage at which it should be regarded as a civil war for the purposes of the Convention. In law, it was by no means clear that, as the proposal stood, the decision would lie within the discretion of the Sovereign Power… This country could not rule out the possibility of insurrection by anti-partition elements in Northern Ireland and there was always the danger of Communist uprisings in various European countries… The only practicable course was to apply civil war at the instigation of the Sovereign Power… the British Government should decline to sign the Convention, or sign it subject to reservation, if it views were not met on this matter."[317]

If the UK Delegation (through the WO) had internally shown a small modicum of ambivalence, these instructions made no bones about how to proceed: kill the provision,

[315] TNA: PRO FO 369/3970, K11941. The only possible way out of this impasse for the HO team was to accept the possibility for states to strike *ad hoc* agreements with the armed opposition based on reciprocity and facilitated by the ICRC. Eventually, however, even this was found unacceptable. Alternatively, the UK HO team suggested the proper place for this genre of clauses was "the Human Rights Charter," not humanitarian law. TNA: PRO FO 369/3970, K12091.
[316] TNA: PRO FO 369/3970, K13445.
[317] TNA: PRO CAB 130/46/281.

and failing that, in the words of Attorney General Hartley Shawcross, "resist it to the 'the bitter end' for the Civilians Convention."[318]

III. The Diplomatic Conference of 1949

Officially convened by the Swiss government, the Diplomatic Conference that revised the Geneva Conventions opened on April 21, 1949 and lasted four months. Sixty-four states participated in total (59 with voting power, 5 as observers; see Appendices 1 and 3.) The ICRC was also invited officially as an observer, as was the League of Red Cross Societies (LRCS) and a few other non-governmental organizations.

The issue that most marked the political dynamics prior to the Conference was the question of Soviet attendance, which was announced --to everyone's surprise-- a week and a half before proceedings began. The news that the Soviets were coming in the company of seven "satellites" sent Western channels abuzz with uncertainty. Very quickly they revealed to behave in exactly the opposite way most expected them to: Instead of sabotaging the Conference, they appeared thoughtful, well prepared and more "humanitarian" (if rhetorically) than any Western liberal state present. This would prove to have important effects on the process and outcomes, as demonstrated below.

The second aspect that marked the Conference soon after its start was the extremely conservative attitude of the British, who came with the explicit mission of tearing apart the 1948 Stockholm texts, which they saw as an expression of the most extreme humanitarianism.[319] Although other states disagreed with portions of that draft texts the ICRC put before them, the Brits' reported long list of amendments quickly made them come off as obtrusive and obnoxious to most other participants.[320]

The first debate on the application of the Conventions to internal conflicts happened over two meetings held late April in a Joint Committee. The ICRC introduced the text approved in Stockholm, reminding that states had decided in 1948 to delete conditional reciprocity in two of the Conventions (POW and Civilians) and to include it in the other

[318] TNA: PRO CAB 130/46/281.
[319] TNA: PRO FO 369/3969, K10003.
[320] This is confirmed by French, American and British private government documents.

two (Wounded and Sick on Land and on Sea.) "The two texts should be brought into conformity,"[321] noted the ICRC's Claude Pilloud, wisely framing the debate to be about the *how* and not the *whether*. At this stage the idea was still to *extend the full* Conventions to internal conflicts, not to create a tailored article.

France and the UK reacted swiftly. Setting the tone right from the start French Delegate Albert Lamarle stated that "it was impossible to carry the protection of individuals to the point of sacrificing the rights of States. In order to protect the rights of the State the French delegation would propose an amendment making it impossible for forms of disorder, anarchy or brigandage to claim the protection of the Convention under a mask of politics or on any other pretext."[322] Lamarle suggested that only well-organized military forces with a responsible authority capable of enforcing and respecting the Convention in a given territory should become eligible to any protections.

The UK Head Delegate, Sir Robert Craigie, plainly declared that the Conventions could only apply to wars as defined in international law, that is, wars between sovereign states. Covering other forms of conflict, he said, was a source of "great difficulties" because it "would appear to give the status of belligerents to insurgents, whose right to wage war could not be recognized." This, as Craigie put it "would strike at the root of national sovereignty and endanger national security."[323] This was a lightly veiled public admission of the private British desire to kill the extension.

Greece, Spain, the US, Canada, China and Australia, each with slight different emphases, sided with the French sentiment and vouched for having clearer, stricter terms to avoid over-inclusion. The conditions cited in 1949 were basically the same as those raised in previous meetings: the level of violence; clearly establishing *who* would decide if a civil war was taking place; excluding Protective Powers from internal conflicts; requiring that rebels have an organizational structure, control of territory and population, and that they are willing and able to respect the Conventions; and decoupling the application of the Conventions from the legal recognition of belligerence.

---

[321] ICRC, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol II-B (Bern: Federal Political Department, 1963), 11.
[322] Ibid.
[323] Ibid.

Not all other states agreed, however. Mexico, Norway, Monaco, Hungary, Denmark, and Romania voiced their discontent with such heavy doses of control. Mexico alerted that "in civil wars there might also be movements for emancipation of a morally creditable character," praising the "courage" states had shown in Stockholm to subject the rights of states to humanitarian considerations. Even if certain precautions were valid "the Conference should not be deaf to the voice of those who are suffering."[324] Hungary and Rumania reminded others that the point of Conference should be to extend humanitarian protections as widely as possible, without undercutting them through conditional reciprocity.[325]

However, the most forceful rebuttal of the position shown by Western states came from the Soviets. This was remarkable and created a major impression upon other states, which found themselves both puzzling over the Soviet intentions and flummoxed to be shown recalcitrant by the premier Communist country in the early Cold War contest for "hearts and minds." General Slavin took the British, the French, the Greeks and the Americans to task, noting that their proposals all tended to undermine the humanitarianism of the Conventions.[326] His arguments are worth quoting at some length:

> "The United Kingdom Delegation had alluded to the fact that colonial and civil wars were not regulated by international law, and therefore that decisions in this respect would be out of place in the text of the Conventions. This theory was not convincing, since although the jurists themselves were divided in opinion on this point, some were of the view that civil war was regulated by international law. Since the creation of the Organization of the United Nations, this question seemed settled. Article 2 of the Charter provided that Member States must ensure peace and world security. They could therefore not be indifferent to the cessation of hostilities, no matter the character or localization of the conflict. Colonial and civil wars therefore came within the purview of international law."[327]

---

[324] Ibid. Beyond the fact that Mexico had a revolution of its own decades earlier in 1910 (a moment regarded in a positive light and as foundational,) Mexico's position may be explained by the fact that in the immediate post-war moment it, as most of Latin America, was enjoying an unfortunately fleeting pro-democratic moment. See Leslie Bethell and Ian Roxborough, eds., *Latin America Between the Second World War and the Cold War: Crisis and Containment, 1944-1948* (Cambridge University Press, 1997), 1–32.

[325] ICRC, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol II-B:12–13.

[326] ICRC, *Final Record of the Diplomatic Conference of Geneva of 1949,* Vol II-B:13–14.

[327] ICRC, *Final Record of the Diplomatic Conference of Geneva of 1949,* Vol II-B:13–14.

This clever view seemed to reflect what soon became one of the most crucial political battles waged within the United Nations and without: the collective legitimation of self-determination and the associated delegitimation of colonialism. (The next two chapters will delve more deeply into these important dynamics.)

The Soviet delegate also chastised the French for pushing the idea of conditional reciprocity, arguing that that "if [it] were followed, there would be a danger of one party declaring, without proof, that the other party was not in a position to ensure order, and thus of justifying any violation of the basic humanitarian principles of the Conventions."[328] This reasoning was exactly identical to that of the ICRC.

About a Greek proposal to subject the application of humanitarian principles to formal recognition of belligerence in civil war, Slavin said that it was "unacceptable… This amendment restricted the scope of the text of the Draft which was approved at Stockholm and sapped its humanitarian bases." Similarly, "the proposal of the United States Delegation, by subordinating the application of the Convention to the decision of one Party, was no longer in harmony with the humanitarian principles governing these Conventions." In conclusion, Slavin:

> "…pointed out that civil and colonial wars were often accompanied by violations of international law and were characterized by cruelty of all kinds. The suffering of the population in the instance of civil and colonial wars was as distressing as that which led Henry Dunant to realize the need for regulating the laws of warfare."

This spirited Soviet defense surprised all others. Although there are reasons to explain genuine Soviet sympathy for the prevention of civil war atrocities --having itself emerged from a bloody revolution,-- it is hard to be gullible and accept that the Soviets were simply acting out of sheer humanitarianism.[329] Rather, their position in 1949, as it soon became clear in various other international forums and rule-making processes occurring at the time, was strategically crafted in large degree to shame Western countries, highlighting the inconsistency of their concrete legal proposals with their professed liberal-democratic worldview. Moreover, it is imaginable that by pushing for broad

[328] *Final Record of the Diplomatic Conference of Geneva of 1949*, 13–14.
[329] Soviet POWs also suffered harshly in the hands of the German captors during WWII, but the connection between this specific concern and the issue of civil war is at best tenuous.

protections in internal conflicts, the Soviet Union wished not only to "facilitate" communist uprisings in various parts of the world but also to influence the political direction of the postcolonial world. These suspicions with regard to the Geneva Conventions require careful weighing on the basis of research in Russian archives, yet historians and political scientists studying other processes and organizations have noted just how important the "scramble" for political allegiance was for both sides of the Cold War, especially in its early decades. Robert McMahon claims that for both the US-led West and the Soviets the stakes at play in the so-called "Third World" were unusually high. The newly decolonized world was not only instrumental to keep the overall military, political and economic balance around the globe, but also a "litmus test of their core ideas about the nature and direction of historical change."[330] As Robert Jervis has suggested, "What was at stake [at the time] was nothing less than each side's view of the rightness of its cause, the universalism of its values, and the answer to the question of whose side history was on."[331] In terms of concrete Soviet conduct at international podiums, Ilya Gaiduk explains how "in various UN organs, the Soviet delegates put forward the most extreme proposals, which had a demonstrably inflationary effect on the actions of the anticolonial forces."[332] The Soviets' initial words on the issue of internal conflicts in 1949 were suggestive of this behavior, but their actions a few weeks later would definitely confirm it.

Soviet intentions aside, in light of all these stark discrepancies, the Swiss representative suggested forming a subcommittee to work out a compromise formula. The British acquiesced, and asked for a few days' postponement "to enable delegations to

---

[330] Robert J. McMahon, ed., *The Cold War in the Third World* (Oxford University Press, USA, 2013), 3.
[331] Robert Jervis cited in Ibid. The original quote is from: Jervis, "Identity and the Cold War," 33.
[332] Ilya Gaiduk, *Divided Together: The United States and the Soviet Union in the United Nations, 1945-1965* (Stanford University Press, 2013), 248. Gaiduk suggests that beyond these public overtures the Soviets were insincere toward the post-colonial world, dismissing their nationalist sentiments as a distraction from international socialism. He also claims that the Soviet Union held a private desire to control colonies along the Mediterranean through the UN Trusteeship system.

consider this problem in informal talks before the Committee suggested by the Swiss representative was set up."[333]

London, Paris: We Have a Problem!

The confidential correspondence exchanged between the French and British delegates sitting in Geneva and their governments back home shows that alarms went off after these initial debates. French Delegate Lamarle, wrote various memoranda to Paris in late April and early May describing the diversity of arguments, particularly the polarization between the Soviets and the Brits. His reports confirmed that while France supported some kind of formula extending some of the protections of the Conventions to civil war, yet to be defined, they also found the 1948 Stockholm text dangerous. In response, Lamarle introduced an initial French draft that more closely resembled his country's preferences, specially looking to avoid granting protections to "any violent movement or even mere banditry."[334]

British correspondence, however, revealed extreme anxiety. A day after these discussions took place (April 28,) *three* members of the UK delegation wrote to London depicting the tensions and requesting more flexible instructions. Their letters are worth quoting at length. One wrote:

> "As… anticipated the Delegation has run into very heavy weather already on the subject of civil war… The whole of the fire of this subject is being concentrated on our attitude to civilians and the Soviet Union is allying itself very strongly with the humanitarian school in pressing for the widest possible application of the Conventions to civil and <u>colonial</u> wars. Those who have ventured to suggest that the application to civil war should be restricted are being labeled legalistic … The whole delegation is, I think, now convinced that if we maintain our attitude we shall probably find ourselves in a minority of one."[335]

This British delegate referenced elements of the social environment which added to the pressure evinced in the debates, including bad press at home and abroad, the fact that the Swiss had "picked out this as one of the necessary extensions to the Convention

[333] *Final Record of the Diplomatic Conference of Geneva of 1949*, 16.
[334] U-I, Art. 161, Cote 4-17, French Archives.
[335] TNA: PRO FO 369/4149, K4555. Underlining in the original.

which recent hostile events had demonstrated as essential," and more crucially, the fact that "nearly every nation of any importance, (including those who are in, or have recently experienced civil war,) have gone to the rostrum to adhere to this principle, the United Kingdom being the solitary voice raised in favour of not applying the Conventions to civil war."[336] He even feared a spill-over might occur across issues: "I anticipate a similar situation may emerge presently when we come to talk about war crimes and sanctions for them but sufficient unto the day is the evil thereof. I thought I ought to let you know that this situation which may call for consideration by Ministers at an early date, was developing."[337]

Another UK delegate wrote home essentially repeating his colleague's concerns, adding interesting social elements. "There have been some very critical articles in the Swiss papers. One of them even goes as far as to suggest, in effect, that the disintegration of the British Empire is proceeding at so fast a pace that we are determined to keep every possible power we can in order to preserve some of the empire. We here are quite satisfied that we shall never get what our instructions require." Not even the support of friendly New Zealand was assured: "The international background here is against us. Our authority and influence as reasonable people will be seriously undermined if we acquire a reputation for intransigence on an issue in which the overwhelming body of opinion is against us."[338]

Clearly, the UK delegation felt anxious and socially isolated. Other states had suggested limiting the inclusion of internal conflicts in the Civilians Convention, but none wanted it nixed. This evidence, I argue, thus strongly supports the operation of *social coercion* between delegations in Geneva.

Yet these and subsequent communications also revealed that the British were not prepared to support just any text that emerged. Rightly noting the divergences of opinion

---

[336] TNA: PRO FO 369/4149, K4555.
[337] TNA: PRO FO 369/4149, K4555.
[338] TNA: PRO FO 369/4149, K4590. Craigie acknowledged this himself. He wrote directly to the British Secretary of State, Ernest Bevin, MP, lamenting that "our attitude has aroused suspicions in the minds of the majority of the Delegates." He added: "There seems to be no prospect at all of keeping civil war out of the Conventions." TNA: PRO FO 369/4149, K4720.

and concerns about how "broad" the Stockholm proposal was, they reasoned: "If we adopt an intransigent attitude we will lose everything. If we are accommodating and prepared to compromise, we may well be able to get not all what we want but very much that we want (sic.)"[339] This was the logic according to which they would act from then on, one that can be characterized as "rational" but under heavy social constraints.

Devising an "Acceptable Compromise"

The situation in Geneva did not improve for the detractors of the idea of humanizing internal conflicts. By May 9, after three weeks of debate, the Joint Committee voted on the general question of whether the topic should be included in the Conventions, with an overwhelming positive vote of 10 to 1 (and 1 abstention.)[340] The verdict on the *whether* had at last come; the struggle would now be over the *how.*

And indeed the *how* continued to stir much controversy. A few options were already on the table, already described: the 1948 Stockholm text; an initial French proposal that allowed for the application of the Conventions given formal conditions had been met; and a proposal by the American Delegation including conditional reciprocity as well as a mix of subjective and objective requirements for application.

Disagreement prevailed between the partisans of inserting conditions and those against. In search for a solution, the Chairman of the Special Commission suggested forming a smaller Working Party to hash out a compromise text between the different proposals. The resulting text, however, retained several of the requirements aired previously (state recognition, rebel control of territory, high level of internal organization, conditional reciprocity,) again drawing strong critiques from Italy, Switzerland, the USSR and the ICRC.[341] This last one was emphatic: "the text drawn up by the Working could never have been applied in any recent case of civil war. It therefore did not

[339] TNA: PRO FO 369/4149, K4555.
[340] *Final Record of the Diplomatic Conference of Geneva of 1949*, 45.
[341] The First Working Party was formed by the US, UK, France, Australia, Norway and Switzerland.

represent a progress with regard to the present situation."[342] Given these harsh reactions, the First Working Party went back to the drawing board.

Although frustrating for the participating delegates, these debates were useful for states to collectively shape the parameters of acceptability of the eventual rule, that is, they progressively clarified which elements might be too controversial to make it on to the final text, namely the requirements of conditional reciprocity, state discretion and the conditions of territorial control and organization by rebels. This attests undoubtedly to the rhetorical power of the ICRC, Switzerland, Latin American countries like Mexico and Uruguay, and most crucially (though for different reasons,) of the Soviet bloc. Without their sustained pressure and persistent refrain that inserting formal conditions would work to invalidate the application of humanitarian law in internal conflicts by providing unscrupulous states with excuses not to apply it, any legal outcome of these negotiations would have probably included at least some of them. In the end, further confirming the persistent and widely-shared concern among states of avoiding the legitimization of rebels, the only explicit condition that remained in the adopted text of CA3 was one *all participants* could agree on: The legal application of the Conventions to rebels would not change the legal status of rebels.

Covert Pushback: The "Not Dotting the i's" Strategy

The British delegates in Geneva had cried for help. But were they heard? The response from London showed sympathy with their compatriots' anxiety. One official wryly noted: "Our Delegations worst forebodings… have come true… Other countries will oppose us for the sake of opposition or of showing us up in a bad light in the eyes of all the humanitarians; the Commonwealth delegates have been told to take a less restrictive stance than ours and the Americans, I gather, are sitting on the fence. I think it is important to consider the use the Communist and 'fellow-traveler' press will make of our legalistic attitude."[343] He later concluded: "If we stick to our guns, we shall not change the views held by the majority of other delegations and we shall earn more

[342] Ibid, Vol II:-B:46–47.
[343] TNA: PRO FO 369/4149, K4555.

unpopularity than if we had refused the invitation of the Swiss to attend the Conference."[344] Note the very clear references to social identity concerns in these communications.

Another London-based official shared this sentiment: "Now, surely there is something very surprising if you find the UK taking up a negative attitude to this proposal when it is supported by lots of other countries which have recently experienced civil wars and are likely to do so frequently… is not there probably some modicum of truth in what Sir R. Craigie describes as the 'reaction of the conference to our attitude' that the UK is influenced by conservative legalism and is indifferent to, and indeed opposing, the efforts of others to effect amendments and extensions to international law…?"[345] He sentenced: "It is quite clear, I think, that the Attorney General and Lord Chancellor will have to agree in the change of instructions."[346]

Showing recalcitrance when so many others, friends, neutrals and rivals alike, were showing openness, was for the British quite embarrassing. But did such embarrassment translate into a change of heart? What follows suggests that it did not. Instead of being rationally convinced or morally persuaded, the British seem to have been coerced into recalibrating their tactics with a view to the humanitarian pressures in the room.

Alongside his plea for flexibility, UK Head Delegate Craigie drafted the terms of a possible accommodation and shared them with London. He reasoned that the original Cabinet concerns "can be overcome. We all feel that it will be necessary to abandon any formula <u>specifically</u> leaving the decision in this matter to the Sovereign Power, and to seek rather some formula which, *while not dotting the I's,* would in fact leave the last word to the Sovereign Power."[347] This entailed decoupling the application of humanitarian law in civil war from the recognition of belligerency or the legal status of the rebels, and restricting the idea of extending the full Conventions to internal armed conflicts to a more limited and "tailored" formula featuring selected humanitarian provisions. Craigie mused: "If we make the relevant provisions relatively innocuous,

[344] TNA: PRO FO 369/4149, K4590.
[345] TNA: PRO FO 369/4149, K4555.
[346] TNA: PRO FO 369/4149, K4720.
[347] TNA: PRO FO 369/4149, K4720. Italics are mine.

would there really be an objection to this? On the contrary, might it not have the effect of side-tracking outside pressure for recognition of belligerency if it could be shown that these humanitarian provisions were being applied in a satisfactory way?" Craigie also intimated that the French were "tracking along the same lines as we are, though we had not disclosed this particular point with them and we had arrived at our conclusions independently." Indeed, it was only a matter of time before the Brits and the French joined forces.

In closing his note, Craigie commented on the social cost the UK might pay if instructions were not loosened: "I should be glad to know whether, if the United Kingdom, alone [among the] nations represented here, were to make a reservation on civil war, this would be likely to have unfortunate repercussions on our foreign relations. Must we not expect, in such a case, to be strongly criticized in the United States, where the humanitarian tide seems to be running strong? And can we… afford to lose any friends there just at present?... I am afraid the question is rather urgent because our position here is becoming increasingly embarrassing. A member of the very friendly New Zealand Delegation privately expressed the hope that some change in our attitude on civil war would soon be possible because we were tending to lose much of our influence by ploughing this lonely furrow. I know this view is shared by other Commonwealth Delegations."[348]

As this shows, the Delegations' cries were indeed heard. A group of representatives from the HO, the WO, the FO, the CO, the Treasury Solicitor's Office, the Lord Chancellor's Office and the Attorney General's Office met on May 20th to discuss the civil war issue and decided that the UK should no longer press for its deletion.[349] In a subsequent high-level meeting, the Cabinet of Ministers essentially approved this recommendation.[350]

---

[348] TNA: PRO FO 369/4149, K4720.
[349] TNA: PRO CAB 130/46/281.
[350] Present were the Prime Minister C. R. Attlee, the Secretary of State for the Home Department J. Chuter Ede, the Secretary of State for War, E. Shinwell, the Attorney General Sir Hartley Shawcross, the Parliamentary Under-Secretary of State for Foreign Affairs, C. P. Mayhew, alongside Frank Newsam from the Home Office, Eric Beckett from the Foreign Office and Mr. M.V.S. Sinclair from the Treasury Solicitor's Office. TNA: PRO CAB 130/46/281.

Coerced Empires Strike Back

On May 9 the French Delegate received orders from Paris to continue pressing for a restrictive text with formal requirements for application and conditional reciprocity. Lamarle knew this flew in the face of what most states in Geneva wanted. In effect, days later he wrote back confirming that despite his efforts, a great number of delegations were feeling more charitable. His strategy –he clarified—had been to continue participating in the debates so as to ensure that the terms of the civil war inclusion were "as attenuated as possible." Adopting a wholly negative attitude, Lamarle warned, would risk tipping the balance in favor of the most humanitarian versions of the text and very far from their own preferences.[351] This was essentially equivalent to the British position and strategy.

By mid-May the French and British Heads of Delegation started working closely. Through public debate and private conversations they had become aware of their instructions' similarity: to accept a text that guaranteed the application of some (selected) humanitarian principles that were not overtly threatening to an undefined class of internal conflicts ("armed conflicts not of an international character") without explicitly calling for conditional reciprocity but with the implicit understanding that lower-intensity rebellions were excluded.[352] Their goal from then on would be to craft a formula acceptable to them but with the potential of gaining others' support while keeping the more extremist humanitarian versions at bay. It is this type of deceptive, reactive attitude of the British and French that I label *covert pushback.*

Hammering out the desired magic formula would no doubt be difficult, given the range of critiques. France's Lamarle went back to Paris seeking new instructions to see how far he could *really* go. In the meantime, the Working Party established in Geneva to prepare a compromise formula for internal conflicts had circulated a revised draft. The UK's Craigie expressed his satisfaction with it, since it resembled his initial idea to craft different language for the Wounded and Sick, POW and Civilians Conventions, without

[351] U-I, Art. 161, Cote 4-17, French Archives.
[352] TNA: PRO FO 369/4152, K5437.

conditional reciprocity but with several other requirements. Yet Craigie also recognized the importance of supporting France, "not only because their position is closest to ours, but because the problem of civil war is, at the moment, a more serious one for France than for any other of our Allies."[353]

The French delegation returned with fresh instructions in early June. Paris was now in support of an article that would figure in all four Conventions but that only included the "general humanitarian principles" originally listed in an (eventually deleted) draft preamble to the Civilians Convention, and which contained neither explicit requirements for application nor conditional reciprocity. French instructions, surprisingly, claimed that the debates in Geneva had "convinced" the French government "that, on a matter such as civil war, which by its nature gives rise to such deeply divergent opinions, one thing is important: to apply as broadly as possible the humanitarian principles which lay at the basis of the Universal Declaration of Human Rights and the Genocide Convention recently approved by the United Nations. These principles are precisely the same as those that appear on the Preamble of the Convention on Civilians and which, it is desired, should be extended to the other Conventions." Surprisingly, the French no longer worried about formal conditions of application.[354]

It is hard to know exactly whether the "convincing" that had taken place in Paris was the result of moral persuasion. The instructions to Lamarle justified this change in part by saying that "in taking this position, the French government is consciously staying faithful to the ideal of humanity that has constantly inspired its policy." The rest of Lamarle's letter, however, revealed that the changed French attitude was not self-less through and through: "At the same time, this position presents the advantage for states which like France, the UK, Belgium, the Netherlands, etc. have overseas possessions and which, in these dominions, can face conflicts bearing traits of a civil war, to avoid having to apply the precise text of the Conventions."[355] The letter also confirmed that the French were

[353] TNA: PRO FO 369/4152, K5437.
[354] U-I, Art. 161, Cote 4-17, French Archives.
[355] U-I, Art. 161, Cote 4-17, French Archives. Curiously, the UK actually perceived the new French instructions as a "hardening" of their previous position, since it no longer allowed for the

ready to make a formal reservation if its views as depicted were not met. It can be said with certainty then that the French had accommodated through the *social* pressures evinced in debates, and that the "convincing" in this case combined both moral and rational elements.

The next step was to see how the Special Committee debating the issue of internal conflicts reacted to the new options, including a redraft of the (still very restrictive) Working Party text and the new French proposal, just described. This debate took place on June 15. With the support of the UK, Burma, Monaco, Uruguay and the ICRC, the French text gained some momentum. Still, the US, Australia and Norway continued to say they preferred the Working Party text, which offered greater humanitarian protection but stipulated stringent conditions for application. In response, the Soviet, Greek and Norwegian Delegates (who were allegedly sitting on the fence) encouraged forming a second Working Party to redraft the French text.

The French delegation seized the opportunity and took the drafting lead within this new Working Party. In the meantime the British sought and received clearance from London about the French formula.[356] Having finally found a palatable text, the UK Delegation set out to lobby other diplomats for support, particularly the Commonwealth states and the US, even using the implausible argument that supporting proposals from Western allies was militarily beneficial, without clarifying exactly what these might be.[357] (Indeed, the military argument, however, was neither clear nor convincing because when Craigie pitched it privately to US Delegate Leland Harrison, the latter admitted he did not see where the benefit lay. Still, Harrison accepted not to oppose the French text.)[358]

The reworked French proposal (which with some modifications, became the final CA3) was debated in the Special Committee on June 24th. As Lamarle said whilst introducing it "The text… contained no clause of a political character which could

---

application of the majority of the provisions of the Conventions, just general principles. TNA: PRO FO 369/4152, K5437.

[356] TNA: PRO FO 369/4154, K5812; K5936; K5974.

[357] TNA: PRO FO 369/4155, K6172.

[358] TNA: PRO: 1949 - FO 369/4156, K6348.

possibly lead to contestation."[359] During discussions the US admitted that while they preferred the binding application of a wider set of protections (but with more conditions,) they would accept the French text with improvements, including language allowing the ICRC to offer its services and a clarification on judicial guarantees.[360] Norway also proposed the constructive addition of considering humanitarian safeguards for captured combatants. At this stage, the only two states that did not support the French text were Australia, which supported a stricter alternative and the USSR (which had remained silent and reportedly awaited instructions from Moscow.)

After this debate, the French-tailored text from the second Working Party clearly stood out as the likeliest one to constitute an acceptable compromise. It would still have to face some hurdles, however. On July 8th the Soviets finally received the orders they had been expecting from Moscow and presented for their first time their own text on internal conflicts to the Committee. As the French and British had anticipated, an "extremely humanitarian" Soviet proposal had emerged which essentially supported the application of the Conventions *in toto* to conflicts not of an international character. French and British joint action to work out an acceptable text and lobby for support had been "proved right" and stood to ward off the Soviet formula. But not all was yet said and done.

A Golden Opportunity, Missed

On July 8 and July 11, after over a dozen meetings on the subject and plenty of bickering, the Special Committee put to a vote the options on the table. Shockingly, *all the formulas were rejected*, even the French-tailored second Working Party version which failed narrowly (5-5.)[361] Two contingencies led to this outcome: First, the Burmese delegate General Oung received instructions from his government to completely oppose inclusion of internal conflicts in the Conventions, probably responding to an aggravating

[359] ICRC, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol II-B:84.
[360] ICRC, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol II-B:84, 95.
[361] ICRC, *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol II-B:103.

insurrection at home.[362] Oung would, from then on and until the final vote, be the only public proponent of deleting the clause. Second, the Uruguayan representative, who was acting as Chair of the Second Working Party and who reportedly supported the French text did not vote because he was unsure that as Chair he could still cast a ballot. Regardless of these serendipitous events, the Swiss Chairman logically concluded that perhaps the idea of internal conflicts clause should be deleted altogether.

After the long struggle to negotiate a formula, these results left most diplomats apparently deflated. Only Burma's Oung celebrated the outcome openly, noting that the "Eastern countries he represented" could not at all agree on the coverage of civil war through the Conventions.

This surprising turn of events provides us with an exceptional chance to gauge whether the starting preferences of the opposing states, particularly the UK, had in fact been radically altered through social pressure. The UK Delegation had at the start been instructed to press for deletion: Would they now capitalize and seize this ideal happenstance to do so?

They did not. Instead, the UK, Australia and the USSR quickly rebutted the Chairman's dire conclusion, urging him to submit the various options to the upper (Joint) Committee for the final settlement of the issue.[363]

Why did this occur? The UK could have predictably recalibrated back to their default interest of excluding internal conflicts from the Conventions, period. This was the perfect moment for it, yet they did not seize it.

Were British diplomats in the end genuinely convinced of the appropriateness of humanizing civil wars? Did they suddenly see some other sort of benefit prompting them to fight for it? The evidence below demonstrates that the latter is correct: the British strategically reasoned that they stood to gain more from supporting the French text, palatable to the majority of the participants, than from supporting alternatives they knew

[362] Rey-Schyrr, *De Yalta a Dien Bien Phu: Histoire Du Comité International de La Croix-Rouge, 1945-1955*, 648–657.
[363] ICRC, *Final Record of the Diplomatic Conference of Geneva of 1949,* Vol II-B:103.

were unpopular and thus unlikely to win out: total deletion, a very restrictive text, or an extremely humanitarian (Soviet) one.

After the rejection of the French text the UK Delegation in Geneva reconvened to strategize, and explicitly decided *against* throwing their weight behind the other proposals. UK Delegate John Alexander suggested they should accept the momentary failure "with good grace," and that the best tactic would be to try to reopen debate in the Joint Committee "when it might be possible to gather Latin American support for the French proposal."[364]

The UK's Craigie, for his part, reported back to London admitting that they had "reached a strange position on our negotiations and votes." Craigie recalled "that our original hope had been to exclude the application of the Conventions to any form of civil war," and described the process by which they had come to support the French text. Yet given recent developments, Craigie wrote: "We are therefore now faced with the possibility of being landed with one of the three texts or of having no reference to Civil War in the Conventions at all, i.e.: (i) No text at all; (ii) Stockholm text; (iii) First Working Party Text; (iv) Second Working Party text."[365]

He then spelled out a strategy which, though intricate, boiled down to lending their support to the alternative most likely to win acceptance, i.e. the French-tailored text. Although the UK delegation continued to prefer the complete rejection of internal conflicts in the Conventions, it recognized that this outcome was, under the circumstances, improbable. The best option was to try to block the "undesirable" (overtly humanitarian) texts or "unlikely" (overtly conditional) drafts by throwing their weight being their own text, which had after all emerged as a sort of compromise.[366]

In addition to strategy, Craigie expressed regard for the work his and the French delegations had put into designing a workable solution. In a private conversation Lamarle had told Alexander "that after all their efforts on the subject, the French Delegation could

---

[364] TNA: PRO FO 369/4157, K6841. This seemed to them a more effective option than protesting the vote in the Special Committee, since as Alexander explained voting rules required a 2/3 majority to approve a re-opened topic.
[365] This is the French-steered version. TNA: PRO FO 369/4158, K6948.
[366] TNA: PRO FO 369/4158, K6948.

not accept any proposal to omit entirely any reference to Civil War in the Conventions. The French were anxious that the second Working Party's text should be adopted." The UK Delegates thus also felt that they should support the French out of loyalty, a social motive.[367] Further proof of this is that when the Burmese delegate approached Craigie to rally support for total deletion, Craigie responded "that this was far more acceptable to the United Kingdom but that we could not break with the French, who had said that they would not now go back on the decision to have a reference to Civil War in the Convention." The Burmese then prodded the UK diplomats, saying that the French did not want a reference to internal conflicts either. Ultimately, Craigie clarified that "if he could support the Burmese amendment without breaking faith with the French, that would be the best line to take."[368] Yet there again he knew that the current state of the debate might make that impossible.

The behind the scenes alliance between the French and the UK seems to have worked, because once presented again to the Joint Committee, all the versions of the text were rejected *except for the French-UK draft*, (which was approved by 21 votes against 6, with 14 abstentions.)[369]

The Moment of Decision

Yet the decisive moment would come at the final Plenary voting, when the approved draft would face-off against the Soviet proposal (USSR delegates had also resisted defeat and insisted in submitting their version to the upper body) and the Burmese motion to delete.

Spirited interventions preceded the final vote before the Plenary. The words of the Soviet delegate are worth citing as a testament of the road that had been traveled: "No other issue has given rise to such a long discussion and to such a detailed and exhaustive study as the question of the extension of the Convention to war victims of conflicts not of

[367] TNA: PRO FO 369/4158, K7107.
[368] TNA: PRO FO 369/4160, K7627.
[369] ICRC, *Final Record of the Diplomatic Conference of Geneva of 1949,* Vol II-B:129.

an international character."[370] Surely to the annoyance of the British, the Soviet diplomat further noted that from the long, tough debates it had clearly ensued that "the provision for the application of the four Convention to colonial and civil wars is supported by the overwhelming majority of the delegations at this Conference."[371] The Soviet speech aggressively continued to vouch for their proposal; singling out a variety of provisions which would be left out if the French draft were approved, including the prohibition of reprisals against the civilian population, and specific protections for women and children.[372]

Following the Soviets was the Burmese delegate Oung, who had at this stage become the only public recalcitrant. His speech, equally remarkable, systematically recounted the many options that had been considered throughout the preceding months, and shrewdly highlighted the many different dangers they presented for national sovereignty. Taking other states to task for supporting amply humanitarian language, he said pointedly: "Some of you, especially the delegations of Colonial Powers, have really been remarkably broadminded to support the Article, though it is going to encourage Colonial wars... So the only help that the Article will give, if you adopt it, will be to those who desire to loot, pillage, political power by undemocratic means, or those foreign ideologies seeking their own advancement by inciting the population of another country." The Burmese diplomat made a stellar case for the deletion of the idea of including internal conflicts in the Conventions, pushing as many "sovereignty" buttons as he could.[373] But his arguments fell on deaf ears.

The reactions from other states varied in tone and content. Eastern European countries such as Romania, Hungary and Czechoslovakia unsurprisingly preferred the Soviet draft, while others asked for clarifications on the meaning of the approved version or voiced support for the received Stockholm draft. Yet in the words of Swiss Delegate Mr. Plinio Bolla, a stark defender of the French formula: "Half a loaf is better than no

[370] ICRC, *Final Record of the Diplomatic Conference of Geneva of 1949,* Vol II-B:325.
[371] ICRC, *Final Record of the Diplomatic Conference of Geneva of 1949,* Vol II-B:326.
[372] ICRC, *Final Record of the Diplomatic Conference of Geneva of 1949,* Vol II-B:326.
[373] ICRC, *Final Record of the Diplomatic Conference of Geneva of 1949,* Vol II-B:328–329.

bread."[374] In the end no other delegation except for Burma risked saying they wanted the language on internal conflicts deleted. So isolated was Burma's Oung that he declared himself an outcast on record and requested that the vote be made secret so he would not be placing his "friends" in an embarrassing situation.[375]

The final Plenary vote confirmed that the majority of those present were simply not willing to do away with the idea of protections for internal conflicts. The Soviet proposal was beaten 20 to 11 (with 7 abstentions,) the recommendation of the Joint Committee was accepted for vote of 34 for, 0 against (1 abstention), and finally approved as Common Article 3 to all four Conventions by a secret vote of 34 for, 12 against, 1 abstention.

Conclusion

The international regulation of internal armed conflicts through a legal humanitarian innovation like Common Article 3 to the Geneva Conventions was not a preordained outcome. Indeed, if anything this chapter illustrates what a complex configuration of political circumstance, actors, forces and contingency had to concur to produce it.

Despite such complexity, this chapter has once more identified the importance of a specific combination of historical conditions and agency. With regard to question of where the impetus for regulation originated, the first section depicted how the shock brought on by additional conflict situations, compounded by the "underperformance" of the initial Red Cross resolutions from 1921, soon prompted the strong belief inside the ICRC that international binding regulation was necessary. The International Committee's difficult experience during the Spanish Civil war operated as a crucial driver. The traumas that conflict brought on, embedded within the broader revulsion toward the atrocities of World War II, motivated a majority of states to welcome the revision of the existing body of humanitarian law, including the introduction of regulations for internal conflicts.

[374] ICRC, *Final Record of the Diplomatic Conference of Geneva of 1949,* Vol II-B:335.
[375] ICRC, *Final Record of the Diplomatic Conference of Geneva of 1949,* Vol II-B:337.

Going beyond impetus, this chapter spends considerable time explaining the process through which Common Article 3 to the 1949 Geneva Conventions was actually made. In particular, it seeks to demonstrate the construction of this legal rule as the product of *social coercion* between diplomatic delegations forcefully debating in Geneva. As said, by the mid-1940s the majority of states admitted that an international humanitarian rule for internal conflicts was desirable. Yet not all of them shared an enthusiasm for the idea, and attitudes toward its contents certainly varied. As I showed, while moral (humanitarian) concerns colored the position of most states, national security interests retained their pull. Many states wanted to insert high requirements for the application of the law to internal conflicts, while colonial empires, especially the British, acted as the most skeptical in the room. Yet remarkably, as I illustrated, various very persistent voices effectively blocked off the formal insertion of conditional reciprocity and other requirements into the text. The pro-regulation majority also effectively cajoled the British into acquiescing to accepting that a rule would emerge, setting off various types of social anxieties for status and reputation. Notably, the Soviets' fierce public prodding, whether sincere or not, seems to have pushed the political identity "buttons" inside a British delegation that was especially sensitive to come off as backward, decaying and legalistic, particularly vis-à-vis the premier Communist state in the world. The emerging Cold War ideological competition evidently served as a crucial contextual factor that heightened the urgency and political poignancy of Soviet-induced pressures. In addition to the Soviets, the unwillingness of fellow Commonwealth allies (or the US) to toe the British line had a discernible social-psychological effect on the UK delegation. Swiss newspapers' derision of their retrograde stance rounded the circle of social pressure.

Yet, as described, the process did not end there. Embarrassment did not persuade UK diplomats to change their position. Rather, the Brits bounced back by strategically planning to insert language that "without dotting the I's," might safeguard their sovereignty woes. Along the way they realized they were not trekking a lonely path and liaised with the French to craft a joint text that pleased them as well as the humanitarian voices in the room. The fact that the Soviets came forward with an "ultra-humanitarian" version of the article only reinforced the British and French beliefs that pushing for their

"moderate" text was the best bet given the circumstances, a reaction I referred to as *covert pushback*. Even when given the opportunity to support the demise of the idea (as was their original intention,) both preferred to see their chosen version through the end, fully aware that the conference would not accept the absence of a rule. Sustained British and French efforts translated into the eventual acceptance of a vague scope of application ("armed conflicts not of an international character") for Common Article 3.

On balance, the analysis suggests that the process and outcomes seen in the making of Common Article 3 seen here cannot be explained by simple assumptions of rationality vs. sociality and morality working independently. The conduct shown by the British and French during negotiations studied here can only be conceptualized as "rational action under strong social pressure."

Beyond this, the origins story offered here helps explain why, as seen in the next chapter, CA3 as adopted in 1949 soon also "underperformed" in practice: while humanitarian law promoters celebrated the rule's "openness" and argued for its application in X or Y case, states facing internal conflicts often interpreted the same openness as *vagueness* and refused to argue or accept that it should apply in their specific situation. The British case would continue to be a crucial: once the 1949 negotiations were over and delegates wrote up their reports, one of them indicated that "it would certainly embarrass us if the situation now existent in Malaya were to be regarded by anyone as covered by Article 3 (and it is certainly 'an armed conflict'.)"[376] The French refused the rule's application for years in Algeria, and so did a few other conflict-ridden in the decades that followed. Hence the analysis provided in this chapter can contribute not only to debates about where international norms come from and how they are produced, but to whether and why they are implemented/complied with on the ground.

Importantly for this dissertation, a critical aspect also left ambivalent in the making of CA3 was whether and how its application by violent non-state actors could be secured: The legal argument made in 1949 (by the delegates of Monaco and Greece) that rebels would be bound by virtue of being citizens of a signatory state's may have allayed fears among negotiating diplomats and satisfied the ICRC but would prove to have little

[376] TNA: PRO FO 369/4163, K10223.

traction with actual insurgents waging war, whose very reason for being is precisely to *oppose* their "home" state and its legal regimes. A provision in CA3 allowing for special direct *ad hoc* agreements between combatants --of which there are various examples in practice—helped to party make up for this weakness but did not fully resolve it. Those debates would continue to arise in the later history of the humanitarian rules for internal conflicts, as the following chapters will show.

Finally, it should be said that the fact that a text –any text—emerged at the end of such a deeply contested negotiation process was a clear testament to the power of the Red Cross Movement, particularly the ICRC, and of the pro-extension states involved. (The International Committee's records in fact suggest that even its own representatives at the 1949 Conference privately doubted the extension to civil wars could survive the political turmoil.)[377] Unfortunately for the ICRC and for the victims of internal conflicts, however, getting states to apply CA3 would, perhaps predictably, prove very difficult. This frustration partly set the wheels of further debates about norm development in motion, a discussion to which I now turn.

[377] The confidential minutes of the ICRC Presidency, as well as private government documents, confirm this. ICRC Archives A PV Conseil de la Présidence 1949-1950, 05/19/1949. Geneva.

Chapter 4 – The Road to the Additional Protocols (1950-1968)

I. Introduction

The signing of the revised Geneva Conventions in 1949, Common Article 3 included, was collectively hailed as a landmark achievement by the ICRC and participating states. The path to ratification began swiftly in December of that year, and while the major governmental players who contributed to its design found certain articles disagreeable, Common Article 3 was not among them. None entered a formal reservation or interpretation of the final negotiated article.[378]

Yet some within the ICRC suspected that CA3's strengths, particularly its generous but vague threshold of application, might prove a weakness in practice. Claude Pilloud, ICRC Subdirector of General Affairs at the time, recognized in an internal report (dated March 10, 1952) that "Article 3 will almost always give rise to discussions between the interested parties and an organization that, like the ICRC, will come and demand its application in an armed conflict."[379] Indeed, ICRC experience prior to 1949 provided enough evidence of states' readiness to argue that the violence they faced within their borders did not constitute an armed conflict but mere "troubles," "tensions," or simple common crime and terrorism. This suspicion with regards to CA3 would soon become a reality, as internal armed violence of diverse degrees was either ongoing or would soon erupt in Southeast Asia, North and East Africa, and Latin America. The rising tide of decolonization at the turn of the decade arguably posed the greatest challenge for the Swiss organization, occurring in areas that, like Africa, had long remained largely unknown to it.

To make matters graver, conflicts for self-determination were compounded by repression within the Eastern Bloc and a perceived threat of communist revolutions elsewhere. Since most of these internal and decolonization struggles in the 1950s did not, at least in the beginning, reach an indisputably "high" level of violence, the ICRC faced tremendous obstacles in effectively persuading states to abide by international

---

[378] France ratified the Conventions in 1951, the US in 1955 and the UK in 1957.

[379] *Procès-Verbaux de la Commission Juridique et documentation y relative, Nos 36 à 60, Vol. II*, minutes of the 03/20/1952 session, ICRC Archives A PV (ICRC-A A PV CJ hereonafter,) Geneva.

humanitarian standards they had just signed.[380] Its hopes were dashed, at least initially, in places like Kenya, Cyprus, Tunisia, Morocco or Algeria, where the British and French colonial authorities fought off the operation of the ICRC or the application of CA3 during much or all the hostilities.

This chapter traces the events that followed the adoption of Common Article 3 in 1949 until 1968 when formal debates resurfaced –this time within the United Nations— about revising and developing the international legal rules for armed conflicts, both between and within states, eventually leading to the negotiation of two protocols complementing the 1949 Geneva Conventions. At first glance, this eighteen-year gap might suggest the ICRC sat in its laurels with regard to extending the protections of CA3 where they seemed lacking in practice, especially in situations of internal violence that could not be convincingly characterized as "non-international armed conflict." A detailed look at ICRC activities between 1950 and the mid-1960s reveals otherwise, evincing persistent efforts, doctrinal and practical, to make up for the operation of CA3 in the "grey" zones euphemistically referred to as "troubles" or "tensions." In this period, as before, ICRC reflection is shown to have been punctuated by episodes of frustration and abuse on the ground, notably involving concerns about detained persons in internal violent contexts of varying intensity.

Table 4.1. Partial List of Internal Conflicts with ICRC Involvement, 1949-1970

Country	Year
Korea	1950
Indonesia	1950
Indonesia (Moluques du Sud)	1950
French Indochina	1945-1954
India (Cachemire)	1947
India (Hyderabad)	1948

[380] Unlike in social science, where scholars have agreed on some numerical thresholds to characterize a situation as armed conflict –25 battle-related deaths, for example,-- in international law there is no such clear, accepted equivalent. As explained throughout this dissertation, the determination of "conflict status" has important legal and political implications that make it a tortured affair for states, particularly in the context of international rule-making. For one well-accepted definition in social science, see the Uppsala Conflict Data Program at: http://www.pcr.uu.se/research/ucdp/faq/#What_is_a_conflict__ (Consulted July 12, 2013.)

Israel-Palestine	1948
India (Bengal)	1950
Tunisia	1952-1954
Paraguay	1947
Venezuela	1952
Guatemala	1954
Costa Rica	1955
Argentina	1955
Hungary	1956
Morocco	1955
Nicaragua	1958
Lebanon	1958
Algeria	1955-1962
Tunisia (Bizerte Base)	1961
Cyprus	1955-1965
Kenya	1952-1955;1956-1958
Malaysia	1955-1956
Goa	1955-1957
Ireland and Northern Ireland	1959-1964
East Germany	1957-1958
Rhodesia (and Nyasaland)	1960-1965
Congo	1960-1966
Rwanda and Burundi	1961-1965
Goa	1958-1962
Cuba	1960-1962
Laos	1958
Lebanon	1959
Iraq	1959
Vietnam	1957-1975
Indonesia	1957-1961; 1965-1981
Ireland	1962-1970
South Africa	1963-1986
Yemen	1965
Dominican Republic	1965
Guinea (Portugal)	1965
Mozambique	1966, 1968
Angola	1966, 1970
Cape Verde	1969

Nigeria	1967-1970
Greece	1967-1971
Bolivia	1971
Northern Ireland	1971-1983
Guinea Bissau	1971-1974
Mozambique	1971-1974
Burundi	1972
Philippines	1972-
Uruguay	1972-1975
Chile	1973-1978
Angola	1973-1976
Thailand	1973-1975
Iraq	1974-1975
Ethiopia	1974-
Lebanon	1975-
Iran	1977-1981
Philippines	1977-1986
Poland	1981-1984

Sources[381]

To fully understand the seeming "norm emergence gap" elapsed between 1950 and 1968, and the subsidiary role the ICRC seemed to play initially once discussions were re-ignited among states within the United Nations, attention must be given to a second (unsuccessful) legal initiative led by the Swiss organization during this time. The Diplomatic Conference of 1949 had given birth to a brand-new Civilians Convention, but it was one that said little about the precautions and limits belligerents had to observe toward non-combatants while planning and deploying armed attacks or using certain weapons with "uncontrollable effects." In the 1950s these normative problems remained valid for *both* international and internal war, and the ICRC attempted to address them in

[381] Moreillon, *Le Comité International de La Croix-Rouge et La Protection Des Détenus Politiques*; Rey-Schyrr, *De Yalta a Dien Bien Phu: Histoire Du Comité International de La Croix-Rouge, 1945-1955*; Françoise Perret and François Bugnion, *De Budapest a Saigon: Histoire Du Comité International de La Crox-Rouge 1956-1965* (Geneva: Georg Editeur, Editions m+h, CICR, 2009); Forsythe, "Legal Regulation of Internal Conflicts: The 1977 Protocol on Non-International Armed Conflicts"; Haug et al., *Humanity for All: The International Red Cross and Red Crescent Movement*; ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts Geneva, 24 May - 12 June 1971, Vol. V - Protection of Victims of Non-International Conflicts* (Geneva: ICRC, 1971).

both contexts through a set of draft humanitarian rules that it hoped states would embrace, first as soft guidance and later as treaty law. Yet the tense politics of the early Cold War, especially a growing belief that recourse to nuclear weapons helped to keep global peace, compounded by the fact that many powerful Western states perceived the Red Cross to be the wrong forum for addressing weaponry issues, led this particular humanitarian project to founder. Since the so-called "Draft Rules for the Limitation of Dangers Incurred by the Civilian Population in Time of War" (Draft Rules, hereonafter) sought to cover both armed conflict *between* and *within* states at once, using their failure as a "negative" case to draw firm conclusions on norm emergence specific to internal conflicts becomes difficult.[382] Yet its consideration in this chapter is crucial for understanding the historical process of norm entrepreneurship by the ICRC leading up to the next "stage" of legal construction in the 1970s. Concretely, the Draft Rules episode will be shown to have caused a momentary "recoiling" within the organization vis-à-vis pushing for formal legal revisions in general. Although the Swiss organization did not stay put in terms of conducting private policy discussions and consultations with experts, having been "burnt" publicly its approach to pressing states to change the rules became more cautious and circumspect. In addition, analyzing the case of the Draft Rules may also have some potential theoretical payoff, notably that of highlighting a third important condition (beyond the by-now well-established combination of atrocity-related shock and the existence of moral entrepreneurship) for initiating new phases of international humanitarian norm emergence: breaking past the recalcitrance of powerful state gatekeepers. This is a condition that, on its face, seems applicable equally to humanitarian treaty-making initiatives dealing with either international or internal conflict, at least during this time-period.

By 1971, however, states were again engaged in formal debate about revisions to the Geneva Conventions. If not the ICRC, what and who sparked the process of updating the law? What actors and circumstances operated to mobilize the idea that new and better law

[382] I will describe the contents of the Draft Rules later in this chapter. For the complete text, see *Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War. ICRC, 1956* at http://www.icrc.org/applic/ihl/ihl.nsf/INTRO/420?OpenDocument (Consulted on July 12, 2013.)

was necessary? The second section of this chapter describes and theorizes the role of new moral entrepreneurs and the changing (actor-specific, as well as world-structural) historical conditions that by the mid-to-late 1960s had begun to facilitate a new stage of humanitarian norm development, particularly toward conflicts occurring within states' borders, including wars for self-determination and civil war. (Whether the former could and should be considered internal conflicts or not was a global battle *in crescendo* at the time, as discussed later.) Specifically, the persistence of atrocity episodes motivated another actor, the International Commission of Jurists (ICJ,) to advocate for the expansion of humanitarian protections across all types of conflicts. Thanks to the networking skills and political clout of its Executive Director, Sean MácBride, ICJ advocacy reinvigorated the path laid by the Red Cross. More importantly, it inserted the process (momentarily) within the United Nations General Assembly (UNGA,) at a time when that organization's shifting membership had changed the internal balance of influence against the West, thus potentially multiplying the number of supporters of normative revision and expansion. Indeed, the global politics of the epoch, marked by an emboldened process of decolonization and the growing legitimacy of "freedom fighters" elicited an interest among the proliferating new states from Africa and Asia to alter the received body of humanitarian laws to protect (hence facilitate) conflicts of self-determination. Coinciding with these developments but acting upon a distinct set of concerns, a previously skeptical actor –the United States— quickly developed a strong interest in extending protections for its own prisoners of war suffering abuse in Vietnam, with a crucial impact for the revisions process moving forward.

In the end, I demonstrate how this combination of factors in the 1960s (a mirror image of the conditions seen in the 1950s) successfully triggered a new episode of rule emergence that culminated in the negotiation of two Additional Protocols to the Geneva Conventions in 1977. The same developments also set the stage for political collision between very different humanitarian concerns and interests during that negotiation, which constitutes the topic of the next chapter.

II. Problems of Law and Practice in Situations of Internal Violence

Common Article 3 to the Geneva Conventions declared to protect "persons taking no active part in the hostilities" during "armed conflicts not of an international character." Most, however, found it difficult to figure exactly what this meant. The ICRC read it as saying that in addition to *bona fide* civil wars (fought in the image of the Spanish Civil War, for example, with clear territorial dividing lines and battle-fronts) lower-scale conflicts --excluding riots, protests and short-lived insurrections-- were also susceptible of coverage. Jean Pictet, Director-Delegate of the ICRC at the time and now amply recognized as the "principal architect" of the revised Conventions, claimed in 1952 that despite the various conditions or requirements states had insisted upon at the 1949 Diplomatic Conference during the making of CA3, "no Government can object to respecting, in its dealings with internal enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact respects daily, under its own laws, even when dealing with common criminals."[383] In Pictet's mind CA3 represented a condensed version of those "essential rules."

Yet, unfortunately, states facing internal violence often rebuffed that optimistic reading by claiming such instability was nothing more than isolated "troubles" or terrorism. Notably, the United Kingdom and France, the two colonial powers that, as I claimed in the last chapter, were socially coerced to accept the humanization of internal conflicts in 1949 and who had fashioned the scope of CA3 in a way that might allow them to escape its application, lived up to their duplicitous intent. The British faced the armed rebellion of the Mau-Mau tribes in Kenya since 1952, yet for years turned down

[383] Pictet 1952, 50. However, note that in the Commentary to the Civilians Convention, published six years later, in 1958, Pictet added: "Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities-conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country. In many cases, each of the Parties is in possession of a portion of the national territory, and there is often some sort of front." Despite a seeming if slight change in tone, Pictet still viewed territorial control and the existence of front-lines as optional, not obligatory elements. Jean S. Pictet, ed., *Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in War, August 12, 1949* (Geneva, 1958), 36.

ICRC requests to visit detained persons.[384] When the organization was finally granted access in 1957, the British government still declared that CA3 was not legally applicable to the situation, despite the fact that the violence and means of repression against rebels very likely rose to the level of non-international armed conflict.[385] Similar instances of British "conflict status" denial were seen in the cases of violence in Cyprus (1955-1958,) Aden (or South Yemen, in 1966-1967) and Northern Ireland.[386] France, for its part, admitted ICRC visits to prisons in Algeria on the basis of CA3 only in 1956, after three years of escalating violence and much ICRC insistence for humanitarian access.[387]

But colonial powers were not the only ones at fault for fending off the full application of CA3: during the Korean war (1950-1954) the United States Department of Defense and the United Nations Command operating there allowed the ICRC to visit only combatant detention camps on the basis of CA3 and the Prisoners of War Convention, refusing similar access to refugees and other affected civilians, despite being cognizant of the deep humanitarian crisis and of forceful protestations from both the Swiss organization and the US' own State Department.[388] During the Hungarian insurrection of

---

[384] Moreillon, *Le Comité International de La Croix-Rouge et La Protection Des Détenus Politiques*, 130–135; Perret and Bugnion, *De Budapest a Saigon: Histoire Du Comité International de La Crox-Rouge 1956-1965*, 259–268.

[385] Perret and Bugnion, *De Budapest a Saigon: Histoire Du Comité International de La Crox-Rouge 1956-1965*, 264; Fabian Klose, "The Colonial Testing Ground : The International Committee of the Red Cross and the Violent End of Empire," *Humanity* (2011): 107–126. Perret and Bugnion usefully cite the words of British international lawyer Gerald "G.I.A.D." Draper, a respected voice close to the UK Foreign Office, who asserted that Britain's decision against recognizing that violence in Kenya or in other British territories like Malaya or Cyprus fell under the scope of CA3 was political, not one "determined by an objective assessment of the facts." Draper's words are important because he was not particularly progressive with regard to advancing IHL for internal conflicts, as we will see later during his official actions as expert delegate for the UK.

[386] Haug et al., *Humanity for All: The International Red Cross and Red Crescent Movement*; Perret and Bugnion, *De Budapest a Saigon: Histoire Du Comité International de La Crox-Rouge 1956-1965*.

[387] Moreillon, *Le Comité International de La Croix-Rouge et La Protection Des Détenus Politiques*, 126–130; Rey-Schyrr, *De Yalta a Dien Bien Phu: Histoire Du Comité International de La Croix-Rouge, 1945-1955*, 687–698. Some ICRC prison visits were possible in Morocco but were facilitated through personal contacts, not on the basis of legal instruments.

[388] Sahr Conway-Lanz, *Collateral Damage: Americans Noncombatant Immunity and Atrocity After World War II* (Routledge, 2006), 168–170.

1956, the Soviet Union and the Hungarian government also refused ICRC requests for visits to detained persons as offered in CA3.[389]

A systematic assessment of patterns and causes of CA3's implementation and "effectiveness" across areas or recipients of protection (for captured persons, wounded and sick fighters, or civilians, example) has not been carried out.[390] To retain the focus of the dissertation on norm emergence, I cannot take fully take on this important issue here. Yet it seems fair to say, provisionally, that despite some interesting examples of acceptance, (whether complete, partial, explicit or implicit,) in practice CA3 disappointed the humanitarian expectations of the ICRC and other enthusiastic audiences.[391] Doubtless, the biggest blocking factor was state refusal to admit its application for fear that it might increase the legal and political standing of the rebels.

As hinted above, beyond the situations of internal violence that could plausibly have led to the application of CA3, in contexts euphemistically referred to as "troubles" or "tensions" states proved even less willing to grant the ICRC legal authorization to access prisons and camps, at best saying that any visits were only allowed on moral-humanitarian grounds, at worst completely refusing or ignoring the organization's requests. For example, in French North African territories such as Tunisia and Morocco experiencing lower but still considerable violence during the early 1950s, colonial authorities largely refused ICRC action, arguing essentially that the situation was not the business of international actors. Importantly, during this time even the ICRC itself hesitated to request access on some occasions, unsure of the appropriateness of acting in contexts of political tension and low-intensity violence.[392] The problematic threshold and

---

[389] Perret and Bugnion, *De Budapest a Saigon: Histoire Du Comité International de La Crox-Rouge 1956-1965*, 51–83.

[390] Writing in 1978 David Forsythe took an important first step in this direction, yet systematic research on this important topic still does not exist. See Forsythe, "Legal Regulation of Internal Conflicts: The 1977 Protocol on Non-International Armed Conflicts."

[391] Bond, *The Rules of Riot: Internal Conflict and the Law of War*, 60; Moir, *The Law of Internal Armed Conflict*, 67–88.

[392] ICRC historians and members have recognized the organization's ambivalence and hesitation vis-à-vis internal troubles and tensions before and after WWII. See Moreillon, *Le Comité International de La Croix-Rouge et La Protection Des Détenus Politiques*; Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*; Rey-Schyrr, *De*

applicability of CA3 was thus compounded by the question of whether the organization could and should rely on it to justify its requests to governments for access in times of internal troubles or tensions. Although by the 1950s the ICRC had amassed practical (if mixed) experience in these murky contexts, as explained later, this issue would continue to elicit much doctrinal reflection in the 1950s and 1960s.

An additional major worry hovered on the agenda of the Swiss organization, namely whether the Geneva Conventions sufficiently protected the civilian population, in both international and internal conflicts.[393] The new Civilians Convention, designed largely with the experience of the Second World War in mind, set out safeguards for civilians who had fallen in the hands of the enemy, and although it professed their general immunity as non-combatants and the procurement of their safety (for example through the establishment of neutralized zones or humane treatment while interned,) it did not touch on matters related to the precautions warring parties should follow while attacking one another so as to spare civilians. In particular, the Civilians Convention lacked precise guidelines for the "appropriate" use of weaponry and deployment of attacks during conflict, international and internal.

There are at least two reasons why the Diplomatic Conference of 1949 had failed to touch upon this subject. First, historically (as explained in Chapter 2,) rules placing limits on the conduct of hostilities had belonged to the "Hague" branch of the laws-of-war, not to the "Geneva" lineage of conventions focusing on the humane treatment of war victims, especially wounded and sick, shipwrecked combatants, and prisoners of war. In an annex, one of the Hague Conventions (IV) of 1907 contained general principles regarding civilians but these were not phrased to induce restraint in the use of "imprecise" or

---

Yalta a Dien Bien Phu: Histoire Du Comité International de La Croix-Rouge, 1945-1955; Perret and Bugnion, *De Budapest a Saigon: Histoire Du Comité International de La Crox-Rouge 1956-1965*.

[393] This concern was not new for the ICRC. Among others, its interest about the effects of warfare on civilians had previously been recorded in the form of a Resolution (V) issued during the XIV International Red Cross Conference of 1930, from which a series of expert consultations followed. ICRC, *Final Record Concerning the Draft Rules for the Limitation of Dangers Incurred by the Civilian Population in Time of War, XIXth International Conference of the Red Cross* (Geneva: ICRC, 1958), 8; Rey-Schyrr, *De Yalta a Dien Bien Phu: Histoire Du Comité International de La Croix-Rouge, 1945-1955*, 290.

"indiscriminate" weapons and methods of war (as the ICRC referred to them) such as bombing from the air or launching nuclear warheads. Although the dividing line between the "Geneva" and "Hague" law would eventually be blurred in the 1970s and now seems like a curious historical artifact to contemporary readers, in the 1950 it was still firmly ingrained in the minds of military lawyers the world over. States respected the role of the ICRC as the guardian of the Geneva Conventions, yet the Hague Conventions lacked such a patron. (The Dutch government nominally bore this responsibility but in practice exerted little if any leadership on the matter.) For this reason, since the early twentieth century, the law of The Hague had seen few additions to its canon, or updates.[394]

A second, more powerful reason existed to explain why governmental circles might later show allergy to the idea of new restrictions on their war practices: the principal forms of "indiscriminate warfare" cited above, aerial bombing and nuclear weapons, were two tools of war put to effective if grossly inhumane use by the victors of the recent world war. More importantly, NATO states, with the US at the helm, believed that nuclear weapons were essential for keeping world peace by deterring the Soviet Union and containing communism. This belief was compounded, much to the chagrin of the humanitarians, by the fact that the Soviet Union and its satellites had adopted calls for an all-out ban on such weapons as a fighting cry of their own since the 1949 Diplomatic Conference, which nuclear Western states like the US and UK perceived as nothing more than hypocritical propaganda. Thus, an issue of legitimate humanitarian concern (widespread harm done to civilians through bombing and weapons of mass destruction with indiscriminate effects) had already in the early to mid-1950s become entangled with power politics and the East-West ideological struggle.

The ICRC was aware of these complications but they did not deter it from at least *trying* to address such a serious regulative gap. While proposing a complete prohibition

---

[394] The only treaty signed since 1907 dealing with weapons was a protocol prohibiting gas and bacteriological warfare, negotiated in 1925 and recently revised, in 1993. See *Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Geneva, 17 June 1925* http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=921B4414B13E58B8C12563CD002D693B&action=openDocument (Consulted on July 12, 2013.)

on nuclear warfare was out of its purview, the organization understood it as part of its mission to facilitate the setting of limits on the use of pernicious war methods that in its view produced unnecessary and avoidable harm to combatants and non-combatants of all stripes across all forms of conflict.

As explained below, the ICRC could not foresee how elusive and contentious it would be to address these two issues, the protection of victims in internal troubles or tensions and from indiscriminate warfare.

a. Political detainees in situations of internal violence

As noted earlier, the lackluster application of CA3 to internal conflicts was certainly worrisome for the ICRC. Yet at a minimum that article constituted a hard-law instrument enabling it to "knock on the door" of states ridden by higher levels of internal violence. In addition to procuring aid for civilians, the organization usually drew on CA3 in order to request visits to captured persons, whose treatment and fate were often at profound peril in the hands of governmental authorities. Red Cross (1921 and 1938) resolutions aside, however, no such authoritative tool existed for internal violent situations of lower intensity, leaving detainees in such contexts at a special risk of abuse or disappearance. For this reason in the years immediately following the Diplomatic Conference of 1949 the ICRC became particularly concerned with situations of internal troubles and tensions, feeling it necessary to study and discuss, privately at the beginning, whether it might have competence to take action in them.[395]

Internal reflection began in July 1951, when the organization's commission charged with reviewing the organization's statuses debated whether the ICRC should intervene in cases of flagrant violation of human rights. This proposal was considered too risky and impracticable, as some thought it might enlarge the "vulnerable surface" of the Committee while potentially endangering its more traditional, limited role.[396] But others

[395] As Chapter 2 illustrated, practical concern for the victims of internal violence, especially for detained persons, had older roots for the ICRC. In this sense, debates in the 1950s were resuming conversations that had begun earlier. See Moreillon, *Le Comité International de La Croix-Rouge et La Protection Des Détenus Politiques*, 94–95.
[396] Moreillon 1973, 118.

felt it was equally grave to ignore the fate of political detainees in internal violence, hence potentially tarnishing the ICRC's moral stature.[397]

The matter thus did not end there. According to ICRC historian Catherine Rey-Schyrr, the refusal of the French government to allow the Swiss organization to visit detainees in Tunisia in 1952, compounded by the inaction (if not hostility) of the French National Red Cross toward them, triggered efforts within the ICRC to set a policy for operations in internal troubles.[398] A report presented in January 1953 to the International Committee's Legal Commission proposed that while National Societies had the primary right to act in situations of internal troubles or tensions, the ICRC should also act if the situation met one or more specific conditions: 1) a certain degree of intensity or seriousness of violence; 2) a certain duration (i.e. at the exclusion of one-off episodes of uprising); 3) a certain level of organization of the warring parties; 4) the violence had produced victims.[399] The Legal Commission accepted these rough guidelines but suggested more study was necessary. Thorny questions remained: Would the ICRC *actually* be able to help political detainees in an unforeseen number of states around the world or might it spread itself thin? What exactly was a "political detainee": a person in administrative detention, or one (dubiously) deemed guilty of treason after trial?

---

[397] As a product of these efforts a first step was taken in 1952 at the Eighteenth International Red Cross Conference in Toronto. Its participants, including not only National Societies but also the ICRC, the LRCS and delegates of government parties to the Geneva Conventions adopted the revised Statutes of the International Red Cross, which recognized the ICRC as a "neutral institution whose humanitarian activity is exerted especially in cases of civil war and internal troubles [where] it strives at all times to ensure protection and assistance to military and civilian victims of said conflicts and their direct results." The translation is mine. See the entire text of the revised 1952 Statutes in Perruchoud, *Les Resolutions Des Conferences Internationales de La Croix-Rouge*, 451. This recognition was important given governmental acquiescence at the International Red Cross Conference that approved the Statutes, but did not rise to the level of binding international law and was often ignored by states. This language was strengthened later on in 1986 and 1995, adding reference to what is known as the ICRC's "right of humanitarian initiative" in any situation or question it may deem to come within its purview (Art. 5, 3.) For their latest version, see *Statutes of the International Red Cross and Red Crescent Movement* at http://www.icrc.org/eng/resources/documents/misc/statutes-movement-220506.htm (Consulted on September 5, 2013.)

[398] Rey-Schyrr, *De Yalta a Dien Bien Phu: Histoire Du Comité International de La Croix-Rouge, 1945-1955*, 317.

[399] Also see report written on this issue by R.J. Wilhelm, Legal Expert at the ICRC, dated December 22, 1952. ICRC-A A PV CJ 12/22/1952 and the related document D. 252. Geneva.

The organization understood that these puzzles would prove very difficult to resolve. Hence at this time the ICRC seemed to oscillate between two positions: whether to wait for the revised Geneva Conventions to take root while attempting to create practical precedents in new areas, or to move forward with addressing novel concerns formally.[400] This dilemma, as we saw in previous chapters, has pervaded the activities of the ICRC since its inception.

The idea of attaching a protocol on political detainees to the Fourth Geneva Convention was entertained but dismissed as too rash given the novelty of the Conventions, in addition to the growing politization of the International Red Cross Conferences along ideological lines.[401] Yet despite being skeptical about the pursuit of a new legal instrument right away, ICRC jurists believed the organization should seek to create practical precedents to foreground later interventions, which in turn might also help to give credence to future treaty-law initiatives.[402] ICRC directives also recognized the importance of protecting political detainees for the humanitarian mission of the organization. Beyond an awareness of the gravity of the issue beyond the Iron Curtain and North Africa, ICRC President, Paul Ruegger had recently visited South and Central America and privately admitted being struck by its extended incidence there, citing the cases of Venezuela, Colombia, Bolivia and Argentina.[403]

The path ultimately chosen was to generate further reflection with outside input. This tactic was selected after concluding that to convene government representatives from the get-go might only lead to very limited protections. The ICRC thus summoned a series of private meetings of international legal experts from various regions acting in their

---

[400] Moreillon, *Le Comité International de La Croix-Rouge et La Protection Des Détenus Politiques*, 120–121.

[401] The Eighteenth International Red Cross Conference of 1952, like the one that followed in 1957 in New Delhi, featured bitter debates over the participation of the two Chinas as the legitimate representatives of the "Republic of China." Both meetings ended with the abrupt walk-out of various delegations.

[402] Rey-Schyrr, *De Yalta a Dien Bien Phu: Histoire Du Comité International de La Croix-Rouge, 1945-1955*, 320.

[403] Ibid., 318, 666–683. Also see ICRC-A A PV CJ 01/12/1953; 01/22/1953 and the related document D. 250. Geneva.

individual capacity. The first of these experts meetings took place in June 9-11, 1953.[404] The specific focus of this commission was to discuss the treatment and assistance to be given to political detainees in internal conflicts and to help formulate some doctrinal basis as guide for ICRC action.[405]

In a nutshell, the experts opined that the ICRC should strive to trespass the legal limits set by Common Article 3 and seek to protect "all categories of political detainees," a role that they considered appropriate for a neutral organization concerned not with the motivations behind prisoner arrest but rather with the conditions of their captivity. Like ICRC jurists months prior, these experts declined to recommend the drafting of a new protocol or convention, believing that CA3 was as much as was politically possible at that time, but considered nonetheless that the article, the general principles of the Conventions and the newly formulated Universal Declaration of Human Rights (UDHR,) offered enough basis for attempted ICRC action in internal troubles.[406]

It appears that although lacking in binding legal force, the conclusions of this first expert consultation facilitated the work of the ICRC during the escalating situation of violence lived in Guatemala in 1954.[407] Exactly around this time, however, the ICRC experienced frustration dealing with British and French authorities regarding Kenya, Tunisia, Algeria and Morocco, who refused it access.

---

[404] ICRC, *Commission of Experts for the Examination of the Question of Assistance to Political Detainees, Geneva, June 9-11, 1953*. ICRC Library, Geneva. The invited experts were: Maurice Bourquin, a Professor in Geneva; Roberto Córdova, Mexican Ambassador to Switzerland; Nihat Erim, a Professor and former Turkish minister; Gilbert Gidel, a French professor; Jean Graven, a Professor in Geneva; Max Huber, then-honorary ICRC president and former Judge of the Permanent International Court of Justice; Caracciolo Parra-Pérez, a Venezuelan diplomate; Emil Sandstroem, the Swedish President of the Governing Council of the League of National Red Cross Societies; Giuseppe Saragat, an Italian politician; and Carlo Schmid, a West German parliamentarian.

[405] Moreillon, *Le Comité International de La Croix-Rouge et La Protection Des Détenus Politiques*, 124.

[406] Moreillon, *Le Comité International de La Croix-Rouge et La Protection Des Détenus Politiques*, 125; Rey-Schyrr, *De Yalta a Dien Bien Phu: Histoire Du Comité International de La Croix-Rouge, 1945-1955*, 320–323.

[407] The Guatemalan government also eventually accepted the application of CA3 to the conflict in 1954.

The organization thus wondered whether it should make public its internal reflections so as to cajole reluctant governments. Before doing so, the Committee decided that further consultation with influential experts was warranted in order to strengthen its emergent doctrine. To this end, a second meeting convened in October 3-8, 1955, seeking to clarify more precisely the application of humanitarian principles to internal troubles, particularly CA3.[408] The experts' conclusion was that in the absence of two "parties to conflict" with some level of organization, CA3 did *not* apply. Yet they added that, even absent a legal basis, all actors engaged in violence should still observe the principles of the Geneva Conventions. As a result, while the ICRC should not seek to rely on a legal argument or directly object to a government's response in internal troubles, it may nonetheless insist that the humanitarian guarantees of the Conventions be followed, in particular the provisions of the Civilians Convention relating to a fair trial, care for the wounded and sick, or to the prohibition of mistreatment, torture, reprisals and collective responsibility. Moreover, the experts cited the UDHR, the European Convention of Human Rights, and the then-emerging work of the UN on the prevention of crime and the treatment of delinquents as normative basis for action.[409] Finally, they considered that the ICRC had by then a well-earned and justified right to offer its services to parties to conflicts (usually known as its "right of initiative,") which enabled it to at least try to act in times of troubles and tensions. Importantly, they clarified that its operation in internal troubles did not bear implications for the juridical status of detainees. The general message was clear: minimum humanitarian principles should apply in situations short of

---

[408] ICRC, *Commission of Experts for the Study of the Question of the Application of Humanitarian Principles in the Event of Internal Disturbances, Geneva, October 3-8, 1955*. ICRC Library, Geneva. In attendance were: Paul Cornil, President of the International Criminal Law Association; Gilbert Gidel, France; Max Huber, Switzerland; Julio López-Olivan, Spanish Ambassador; Mohan Sinha Mehta, Indian ambassador in Bern; Abbas-Naficy, former vicepresident of the Council of Iran and vicepresident of the Red Crescent and Lion; Nihat Erim, Turkey; Caracciolo Parra-Perez, Venezuela; M. Pilotti, president of the European Coal and Steel Community Court of Justice; Alejandro Quijano and M. de Rueda, Mexican Red Cross; W.E. Rappard, Professor in Geneva; Emil Sandstroem, Sweden; Carlo Schmid, West Germany. See also Moreillon, *Le Comité International de La Croix-Rouge et La Protection Des Détenus Politiques*, 137.

[409] Moreillon, *Le Comité International de La Croix-Rouge et La Protection Des Détenus Politiques*, 138.

high-level civil wars and the ICRC stood ready to offer its help to captured, wounded and sick fighters, and victims of all sides.

b. The protection of civilian populations against the dangers of indiscriminate warfare in international and internal conflicts

As with the issue of internal troubles, the ICRC resumed its plans to work on limiting the effects of warfare on civilians shortly after 1949. In 1950 it issued a circular to all states urging states to consider the grave consequences of nuclear and "blind" weapons on civilian population, whose use, it justifiably thought, threatened the very essence of the Geneva Conventions and of the Red Cross itself.[410]

Internal ICRC preparation for the development of rules for such forms of warfare began in 1952 through private conversations with American, British and Swiss legal and military experts, including pre-eminent names in international law as Cambridge Professor Sir Hersch Lauterpacht. These conversations were far from encouraging, however. Lauterpacht bluntly recognized that recent belligerent practice had tended to eliminate the distinction between combatants and non-combatants, and that states were unlikely to agree on limits to nuclear weapons and aerial bombardment.[411] Beyond the experience of WWII, an international conflict, it is worth noting that in the Spanish Civil War aerial bombardment was used to cruel effects in cities like Malaga, Durango and Guernica.[412] The method would also be used in Algeria and Cuba in the 1950s, to mention only two other examples of internal conflicts. Concern with imprecise weaponry must thus be understood as not only circumscribed to wars between states, even if the global context of the time prompted a special focus on East-West tensions.

ICRC lawyers were not discouraged by initial skeptical soundings, believing that the organization was indisputably responsible for setting the normative wheels in motion on this issue while greater consensus among states obtained. A first meeting of experts to

---

[410] Rey-Schyrr, *De Yalta a Dien Bien Phu: Histoire Du Comité International de La Croix-Rouge, 1945-1955*, 294–296.
[411] As we will see shortly, other government legal advisors shared this pessimistic view. See R.J. Wilhelm's mention of his encounter with Lauterpacht in ICRC-A A PV CJ 01/22/1953. Geneva.
[412] Veuthey, *Guerrilla et Droit Humanitaire*, 97–102.

treat this subject was convened for April 6-13, 1954.[413] Like the meetings on internal troubles and political detainees, the experts in attendance were invited in their personal capacity but this time clearly with a view both to wider regional variation and to their home states' political importance.[414] According to the ICRC, at this initial meeting the experts reached a consensus on a few important law-of-war principles, including the prohibition of attacking non-combatants directly and of causing superfluous harm. They also seemed to agree that aerial warfare should be regulated, and that military exigencies should not always prevail over the precepts of humanity. (Later events suggest the ICRC probably overestimated the level of agreement.) At the same time, however, experts seemed to acknowledge the difficulty in translating these aspirations into precise dispositions for aerial bombardment and considered the risks of proposing inefficacious rules on nuclear warfare, especially if governments were not willing to completely rule out their use.[415]

On the basis of the 1954 debates in Geneva, the ICRC decided to formulate a draft set of guidelines that it hoped would eventually become an international convention.[416] This

---

[413] ICRC, *Commission of Experts for the Legal Protection of Civilian Populations and Victims of War from the Danger of Aerial Warfare and Blind Weapons, Geneva, April 6-13, 1954, documents and summary records*. ICRC Library, Geneva. The full list of experts attending is: Major Richard Baxter, JAG Office, State Department, USA; Maurice Bourquin, Belgium; Georges Cahen-Salvador, Council of State, France; Erik Castren, Law Professor, Finland; Surgeon General André Costedoat, France; Juji Enomoto, former Law Professor, Japan; Capt. Cyril Betham Palls, Former Oxford History of War Professor, UK; MY.D. Gundevia, Indian Ambassador to Switzerland, India; Surgeon General Radmilc Jovanovic, Yugoslavia; Giorgio La Pira, Former Senator, Italy; Dr. M.W. Mouton, Dutch Royal Navy, Netherlands; Hans Rumpf, West Germany; Major General E.D. Tobiessen, Chief of Civilian Protection, Norway; Dr. Masao Tsuzuki, Professor Emeritus in Medicine, Japan; Raymond Yingling, Legal Advisor, US State Department; R.J.E.M. van Zinnicq-Bergman, Royal Court Marshall, Dutch Airforce, Netherlands.

[414] The ICRC's initial desired mix consisted of the US, UK, France, USSR, China, two South American countries, India, an Arab country and two neutral states: Sweden and Finland. See ICRC-A A PV CJ 04/16/1953 and the related document D. 273. Geneva.

[415] ICRC-A A PV CJ 04/29/1955 and the related documents D. 384, D. 385 and D. 386. For more on the Draft Rules, see not only the minutes of the official sessions (1954 and 1956) kept in the ICRC Library but the related documents housed in the ICRC Archives: ICRC B AG 051/Pj. I also consulted the minutes of the Council of the ICRC Presidency for this entire period (1952-1965,) ICRC-A A PV Conseil de la Présidence. Geneva.

[416] Their full name was *Draft Rules for the Protection of Civilian Population Against the Dangers of Indiscriminate Warfare*. The decision to urge the ICRC to complete these gaps in the 1949 Geneva Conventions came from a meeting of the Board of Governors of the League of National

initiative, for shorthand simply known as "Draft Rules," quickly became the subject of one of the most acrimonious and simultaneously less-known disputes in the history of humanitarian law. As said earlier, it is important to delve into the history of the Draft Rules here in some detail, not only because they purported to apply to *all* types of conflicts, but also because their fate helps explain the attitude of the ICRC in subsequent years and foregrounds changes and continuities in certain states' attitudes toward the development of humanitarian law.

The Draft Rules consisted of twenty articles regulating the conduct of combatants during hostilities in both international and internal conflicts. Article 1 provided their essential bedrock and summarized their intent well: the right of parties to conflict to adopt means of injuring the enemy was not unlimited, and as a result, parties should confine their operations to the destruction of the enemy's military resources, leaving the civilian population outside the sphere of armed attacks.[417] To the contemporary eye, this principle seems unquestionable. And indeed at the time the ICRC took the view that Draft Rules were not an innovation in international law; rather, they constituted no more than a re-statement of deep-seated and already accepted notions. (ICRC lawyers had good grounds to argue this, since these principles could be said to stem from customary norms as well as older and widely respected instruments such as The Hague Regulations.) The rest of the document fleshed out in greater detail this principle by, among others, prohibiting attacks expressly directed at the civilian population, setting out a list of objects that could be legitimately considered as military objects susceptible of attack, or insisting that attacks should be proportional to the target they intended to neutralize. Most controversial would prove to be Article 14, prohibiting weapons whose harmful effects "could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population."[418]

Red Cross Societies, which took place in Oslo in May 1954. Rey-Schyrr, *De Yalta a Dien Bien Phu: Histoire Du Comité International de La Croix-Rouge, 1945-1955*, 301–303.

[417] See the complete Draft Rules text at: http://www.icrc.org/applic/ihl/ihl.nsf/INTRO/420?OpenDocument (Consulted on July 12, 2013.)

[418] See text of Article 14 of the Draft Rules at the link above.

The Swiss organization's hopes for state support of the Draft Rules were high. It circulated them in 1955 to National Red Cross Societies and to the experts who had attended the first meeting, with the purpose of gathering comments in preparation for submission to the upcoming International Conference of the Red Cross Movement, to take place in New Delhi sometime in 1956-7.

The initial feedback from certain powerful states comments arrived like a bad omen. The United States, in a detailed legal analysis addressed to Claude Pilloud, now Deputy Director of the ICRC, and written by Raymond Yingling and Richard Baxter, two legal advisors working for the State Department, quickly took issue with the Draft Rules' underlying principles.[419] Their memorandum noted the "general unwisdom" of the Rules and offered two main critiques: In attempting to regulate the conduct of warfare, the ICRC was overstretching its traditional role, which was to alleviate the horrors of war through humanitarian protections.[420] Revising the laws of war (by which they meant the Hague line of regulation,) was not a matter for the ICRC or the Swiss government. Second, the US response claimed that the Draft Rules rested on a fallacy, namely the assumption that in times of total war it was possible to differentiate between the members of the armed forces and the civilian population. Rules of war needed to be realistic, the authors said, and at the time the realities of war made such distinction impossible; indeed, they had "wiped [it] out." Therefore, in their view, to presume that civilians could be rendered immune from the direct effects of modern warfare was "fanciful."

This did not mean, however, that governments were necessarily indifferent to the destruction of civilian life and property; some efforts might perhaps be taken in that direction and certain counterproductive terror tactics avoided, but in Yingling's and Baxter's opinion, moral principles could only be effective if they were militarily sound.

---

[419] Raymond Yingling was a well-published Legal Advisor to the State Department who had attended the 1949 Diplomatic Conference a part of the American delegation, as well as the prior April 1954 meeting on the issue of warfare regulations. Richard Baxter was a Judge Advocate at the time and later became a celebrated international lawyer and military expert, holding a faculty position at Harvard Law School and eventually representing the US at the Diplomatic Conference on humanitarian law of the 1970s.

[420] Material Relating to the Geneva Conventions and the Yingling-Baxter Comments on the Draft Rules (1952 & 1957,) Container 56, Entry P 108, RG 200, NACP.

Ominously, they declared that "it may be far more effective in winning the war to destroy a city like Pittsburgh or Essen than to destroy a battleship or a division, and in the destruction of such cities the civilian population cannot remain untouched. This is true, unfortunately, of cities in general…" Further, they noted that a revision of the laws of war in the absence of inter-state agreement on the ban or restriction of use of nuclear weapons was premature, and that "unless the nations principally concerned" reached an agreement, "paper prohibitions emanating from any other source" would be unsuccessful.[421] The US lawyers were doubtless referring to the ongoing efforts for arms control within the UN at the time.[422]

As we will see, these striking words, coming from key legal advisors to one of the two global superpowers (the self-appointed "leader of the Free World,") effectively marked the fate of the Draft Rules. The Soviet Union did not respond to the ICRC and thus one may only guess what position it took. As the only other nuclear nation at the time, the UK seems to either have agreed with the US stance or to have found additional reasons to dislike them.[423]

Despite the pushback, the ICRC was still not completely discouraged. By March 1956 President Leopold Boissier privately counted thirty responses to the Draft Rules project from National Societies and states, noting that only three of them, those from the US, the UK and Australia, showed a marked opposition to the project. The ICRC hoped that a wider diffusion of the Draft Rules and more work of persuasion among the Anglo-saxon Red Crosses might get the humanitarian point across.[424] To this end, they convened a new

---

[421] Material Relating to the Geneva Conventions and the Yingling-Baxter Comments on the Draft Rules (1952 & 1957,) Container 56, Entry P 108, RG 200, NACP.

[422] Documenting the rich history of international cooperative efforts on nuclear weapons would take me too far afield from the focus of the dissertation. I refer readers to Hisakazu Fujita, *International Regulation of the Use of Nuclear Weapons* (Kansai University Press, 1988); Tannenwald, *The Nuclear Taboo: The United States and the Non-Use of Nuclear Weapons Since 1945*.

[423] For this appreciation I draw on ICRC exchanges with one of the co-authors of a UK FCO memorandum on the Draft Rules, Gerald Draper. ICRC Archives B AG 051/Pj-021.04. Geneva. It is clear from these documents that the UK opposed the project, but their specific reasons may have well differed from those of the US.

[424] ICRC-A A PV Conseil de la Présidence, 03/22/1956. Geneva.

meeting of experts in May 14-19, 1956.[425] Some critical voices aside, most of the participating experts supported the project and after incorporating their feedback the ICRC decided to submit the revised Draft Rules for discussion at the upcoming International Red Cross Conference in New Delhi, to take place in October-November 1957. In the meantime the Committee worked to influence the opinion of several Red Cross Societies and of experts neutral or sympathetic to the project, believing that they could form a majority.[426]

American revulsion to the Draft Rules, however, intensified. While the ICRC carried out consultations in 1957 in preparation for New Delhi, NATO states led by the US began to anxiously coordinate their position vis-à-vis the project. The US government admitted in private correspondence with its allies that it was "most desirable if the rules did not exist or if they could be conveniently forgotten," and studied ways to pressure the ICRC to drop the Draft Rules from the agenda.[427] Yet consultations with the UK and the ICRC itself alerted it to the fact that this was unlikely to happen, not only because the project was near and dear to the Swiss organization, but also because giving it up might put the ICRC in an awkward position in the eyes of Socialist states, which could then reason it had given into the wishes of "war-loving" Western countries.[428] The US debated, as did France, whether to attend the New Delhi meeting at all, wondering their absence might take the air out of the initiative. Opinions between the US State and Defense departments on this issue were divided, and an initial decision to send an observer mission was made but soon upgraded to a full delegation with voting abilities.[429]

---

[425] Twelve National Societies were represented, from West Germany, East Germany, Belgium, France, Japan, India, Mexico, Norway, Netherlands, Switzerland, Poland, Switzerland and Yugoslavia. Rey-Schyrr, *De Yalta a Dien Bien Phu: Histoire Du Comité International de La Croix-Rouge, 1945-1955*, 304.

[426] ICRC Archives B AG 051/Pj. The precise document I refer to is identified as "SP 146."

[427] See contents of folder entitled "ICRC – Draft Rules of Warfare for the Protection of the Civilian Population, RTY," Rev of U.S. Policy on Treatment of P.O.W.s to XXth Int'l Conf of the Red Cross, Box 1, RG 59, NACP.

[428] Folder entitled "ICRC – Draft Rules of Warfare for the Protection of the Civilian Population, RTY," Rev of U.S. Policy on Treatment of P.O.W.s to XXth Int'l Conf of the Red Cross, Box 1, RG 59, NACP.

[429] The US drafted careful projected attendance and voting charts to make its decision, and to figure out whom it had to influence prior to the Conference.

(France eventually chose the same course.) The main preoccupation of the US was to secure a consensus position among its allies about the undesirability of the Draft Rules, and to get other moderate countries to support it. Realizing that *some* debate was unavoidable, NATO countries sought two outcomes: First, and most importantly, the Conference should not give formal endorsement to the Rules or summon a Diplomatic Conference to sanction them. Instead they were to insist that effective decisions about nuclear limitations rested solely with the United Nations Disarmament Subcommittee sitting in London, *not* with the Red Cross movement. Second, they had to find ways to avoid a detailed article-by-article debate that would provide Socialist countries with room for propaganda and opportunities to embarrass them publicly. Overall, absent the possibility of a complete dismissal, the best tactic in their view was to press for a general resolution expressing vague support for the principles embodied by the Draft Rules, urging the ICRC to send them back to governments for their consideration. Such a resolution, the US and allies reasoned, would have the virtue of pleasing everyone at the meeting while at the same time putting the ball in states' courts, where it could later be ignored and "buried" as desired.[430] After much bilateral and multilateral diplomatic coordination and various meetings prior to the International Red Cross Conference in New Delhi, NATO states agreed on this common stance.

The Nineteenth International Red Cross Conference finally took place in October 1957 in New Delhi. As colorfully expressed by François Bugnion, member and historian of the ICRC, this meeting featured political fireworks and ended in "psychodrama," though for reasons unrelated to the Draft Rules: the issue of whether to allow the "two Chinas", Nationalist Taiwan or the delegates from Communist mainland to seat as the legitimate representatives of "the Republic of China" wrought havoc and led the meeting to end with several delegations, including the Indian hosts, walking out abruptly.[431] More relevant to our purposes, after extended debate during the Conference and much political

[430] Folder entitled "ICRC – Draft Rules of Warfare for the Protection of the Civilian Population, RTY," Rev of U.S. Policy on Treatment of P.O.W.s to XXth Int'l Conf of the Red Cross, Box 1, RG 59, NACP.
[431] For an account of this event, see Bugnion, "The International Conference of the Red Cross and Red Crescent: Challenges, Key Issues and Achievements."

maneuvering behind the scenes, Western delegations succeeded in having their preferred resolution text on the Draft Rules passed, declaring that the next phase of the project should consist of governmental study and decision.

The ICRC abided by this mandate and circulated the Draft Rules to states in May 1958. NATO plans were then carried out faithfully: no Great Power replied, and the majority of the replies the ICRC received were merely ceremonial.[432] By 1961 only five replies (from India, Ireland, Japan, Pakistan and Switzerland) out of approximately forty dealt with the substance of the norms. Given such weak results, the ICRC discarded plans to summon a further meeting of government experts, and although it continued to consider the issue as one of the highest importance, it eventually decided against further promoting Draft Rules in the form in which they stood.[433]

III. Effects of and Follow-up to the Doctrinal Debates in 1950s

The failure of the Draft Rules was a major blow to the ICRC. The project represented several years invested in research, reflection and consultation. Existing histories of humanitarian law claim that this loss pushed the ICRC into conservative mode with regard to the progressive development of humanitarian rules.[434] This appreciation is accurate to an extent: states' private dismissal of the project convinced the ICRC that the moment was not ripe for the swift introduction of a new international legal commitment,

---

[432] The ICRC organized initial conversations with high-level interlocutors from the US (General Alfred Gruenther, then President of the American Red Cross and former Supreme Allied Commander in Europe/Commander-in-Chief of the US-European Command until 1956, and the already mentioned British lawyer Colonel Gerald Draper, then Lecturer of Law at the University of London, advisor to the UK government and former Military Prosecutor at the war crimes tribunals in Germany. These contacts revealed once again the utter distaste of the US and UK governments for the Draft Rules and the unlikelihood of their approval. Conversations also took place with West German and Japanese officials, and though less disappointing, they did not give confidence to ICRC jurists that the project had legs to stand on. Finally, a meeting organization National Red Cross Societies in Athens in November 1959, where the Draft Rules received only lukewarm support from few Red Crosses, confirmed the lack of enthusiasm by a majority of states. See ICRC Archives B AG 051/Pj-021.07 for the exchanges with Gruenther specifically, and all others can be found in the series ICRC Archives B AG 051/Pj. Geneva.

[433] ICRC Archives B AG 051/Pj-024. See especially the minutes of the Legal Commission sessions (Commission Juridique) held in 11/30/1959 and in 02/29/1960. Geneva.

[434] Suter, *An International Law of Guerilla Warfare: The Global Politics of Law-Making*, 96.

especially dealing with weapons. Yet archival evidence from the highest bodies of the Swiss organization suggests that the impact was rather one of momentary delay. That is, instead of leading the organization to give up the goal of altering international law entirely, the foundering of the Draft Rules forced it to "recoil" and turn inwards and to resume the tactic of internal reflection and of engaging in discreet consultation with experts. This inward re-turn, in lieu of a flat-out rejection of the ideas underlying the Draft Rules, can be explained by two facts: ICRC experts were frustrated by the politicization of the debate, but their belief in the need for better protections for the civilian population was not diminished.[435] Simultaneously, the practical challenges the organization faced on the ground continued to remind its members that further normative discussion was necessary, if at a slower pace and in low-key settings.[436]

Also toward the late 1950s and early 1960s the Committee revisited the topic of operating in contexts of internal violence. By then the ICRC felt its policy and practice during internal troubles was well founded. Clear ICRC policies, however, were not yet in place to deal with situations of political "tensions" or instability that, although lacking in armed confrontation, still led governments to engage in arbitrary arrests and detention without sufficient judicial guarantees. Some voices within the Committee felt the humanitarian mission of the organization justified action to aid detainees in such scenarios, while others warned that this surpassed its mandate to act during armed conflict.[437]

Hoping to attain sharper direction on two issues of such importance, in the period from 1960 to 1965 the ICRC resorted again to private expert roundtables, one on the provision of aid to and protection of victims of non-international conflicts broadly

---

[435] ICRC Archives B AG 051/Pj-024, 11/30/1959; 02/29/1960. In addition, the New Delhi Conference had issued a general "invitation" to the ICRC to continue making efforts toward the protection of the civilian population against the evils of war. ICRC lawyers took this as a basis for their continued work.

[436] ICRC Archives B AG 051/Pj-024, 11/30/1959; 02/29/1960.

[437] Moreillon, *Le Comité International de La Croix-Rouge et La Protection Des Détenus Politiques*, 151–156; Perret and Bugnion, *De Budapest a Saigon: Histoire Du Comité International de La Crox-Rouge 1956-1965*, 443–444.

conceived, and another on the legal protection of war victims in all types of conflict, against the dangers of warfare.[438]

The former, which took place in October 25-30, 1962, reaffirmed the findings of previous consultations in regard to the application of Common Article 3, summarized as follows: CA3 was legally applicable to conflicts that gave rise to hostilities and where the opposing party had a minimum degree of organization.[439] Yet even absent these conditions, CA3 should still cover internal troubles, albeit not on a legal (treaty) basis but rather on its recognized humanitarian practice and right of initiative. Rebels were also obliged to observe CA3, but reciprocity was not a condition for states' own compliance. For their part, detained persons should be treated according to the standards set in CA3, and be likened to prisoners of war in international conflicts whenever possible.[440] And although, curiously, experts did not fully zoom into the case of internal *tensions*, they nevertheless concluded that the ICRC could request to aid victims and detainees in the post-conflict period (that is, after armed hostilities had ceased,) providing a humanitarian entry-point in unstable contexts lacking actual confrontation. Finally, beyond humanitarian norms, experts cited recourse to the UDHR and the UN Charter as a basis for aiding political detainees in all contexts.

The roundtable organized to follow-up on the work on the dangers of warfare and the victims of conflict met in April 11-14, 1962, gathering an interesting mix of public

---

[438] In 1961 during a session of the Board of Governors, the Yugoslavian Red Cross proposed a resolution urging the ICRC to focus on improving the legal protection and relief for victims of internal conflicts. The resolution was approved and served as the basis for the continued work of the ICRC on this subject. See ICRC, *Protection of Victims of Non-International Conflict (Item 6 of the provisional agenda of the International Humanitarian Law Commission,) report submitted by the International Committee of the Red Cross, XXth International Conference of the Red Cross, Vienna, October 1965*, Geneva, February 1965, 5. ICRC Library.

[439] ICRC, *Commission of experts for the study of the question of aid to the victims of internal conflicts, Geneva, October 25-30, 1962,* ICRC Library. Geneva. The experts in attendance were: Professor Robert Argo, Italy; Professor Frede Castberg, Norway; Paul Cornil, Belgium; Jean Graven, Switzerland; Professor Nihat Erim, Ankara; Professor Roger Pinto, France; Professor Georges Tenekides, Athens; Professor Erik Husfeldt, Danish Red Cross; J.J.G. de Rueda, Mexican Red Cross; Bosco Jakovljevic, Yugoslavia. Gerald Draper, UK and Carlo Schmid, West Germany, could not attend but approved the final report.

[440] ICRC, *Commission of experts for the study of the question of aid to the victims of internal conflicts, Geneva, October 25-30, 1962,* ICRC Library, Geneva.

opinion leaders, military and legal experts, and prominent scholars on military strategy.[441] All participating experts agreed that the ICRC should continue to pursue its traditional work in spite of the threat of total war. They also recommended, however, that the ICRC refrain from trying to bind states through international law at that time, considering instead that narrower arrangements might be more attainable, for example, on the evacuation of civilian populations. They also reaffirmed, in general, the principle of distinguishing between combatants and non-combatants, the prohibition of attacking civilian populations as such, and the obligation to take every precaution not to harm the civilian population.[442] Finally, they argued that while a new treaty was inconvenient, the ICRC or the Red Cross Movement could draw up a resolution stating these basic principles and circulate it among states, which would then be free to make public announcements of their willingness to respect them in spite of their non-binding character.[443]

Although in the eyes of the ICRC the conclusions from this roundtable had been useful to gauge the state of expert opinion on the matter, the overall conclusion was nevertheless bleak: in 1965 the organization publicly recognized that "the problem of the respect of the civilian population in the event of armed conflict does not yet seem

---

[441] Nine experts came to this meeting. Three public opinion leaders: Beuve-Mery, Director of French Newspaper *Le Monde*, Major Adalbert Weinstein, Military Journalist for the West German newspaper *Frankfurter Allgemeine Zeitung*, and Urs Schwarz of the Swiss newspaper *Neue Zurcher Zeitung*; Four military strategists: Professor Thomas Schelling, Harvard University; Colonel F. C. Miksche, French military; Colonel Gerald Draper, UK; Professor François, Netherlands. The ICRC also attempted to consult with Soviet, Asian and Arab experts, to no avail. See ICRC, *Protection Juridique des Populations Civiles, Rapport sur le consultations menées par le CICR depuis 1962 sur le thème « Opportunité et Possibilité de Limiter les Maux de la Guerre dans le Monde Actuel*, » *rapport réservé à l'usage interne, Genève, Janvier 1965, SP 488*. A microfilmed version of this internal ICRC report can be found in ICRC-A A PV Conseil de la Présidence 1965, session of 01/21/1965. Geneva.

[442] There were interesting exceptions in this regard. Thomas Schelling was a steadily skeptical voice during the meeting, doubting that belligerents waging total war could actually respect the principle of distinction. Regardless, Schelling reportedly recognized the humanitarian value in reaffirming the principle.

[443] ICRC, *The Legal Protection of Civilian Populations against the Dangers of Indiscriminate Warfare (Item 5a of the provisional agenda of the International Humanitarian Law Commission,) report submitted by the International Committee of the Red Cross, XXth International Conference of the Red Cross, Vienna, October 1965,* Geneva, March 1965, 7. ICRC Library, Geneva.

anywhere near a prompt solution."[444] Moreover, it acknowledged that "in the field of humanitarian law, the Red Cross can but propose agreement and endeavor to persuade Governments to conclude them; it has no power over them to do so. The final responsibility remains solely with the Governments."

Theoretical assessment

Before moving forward it is appropriate to briefly assess, from a theoretical standpoint, the events and actions examined so far in this chapter. First, it is clear that despite the legal inroads made 1949 through the adoption of Common Article 3, most states facing internal violence during the 1950s showed important levels of risk aversion to the *implementation* of the rule. This evidence, however, relates at best indirectly to the question of norm emergence, the subject of this dissertation. Inferring from the observed widespread (though not absolute) aversion to the application of CA3, one might speculate that states would have very likely resisted formal efforts at norm expansion during this time. The ICRC reasoned in this way then and there is no evidence to suggest it was mistaken. (How a hypothetical Diplomatic Conference to discuss a protocol on internal troubles or political detainees might have turned out is a different question, but it is doubtful that many states would have supported its summoning in the first place.)

The dynamics and fate of the Draft Rules serve to further support this impression. Even if the major roadblock leading to their demise was the prohibition of nuclear weapons, it is evident that states, especially the Western powers grouped under NATO, were at this time extremely reluctant to engage in meaningful dialogue about filling the gaps left in the Geneva Conventions of 1949. This leads to the suggestion that, at least during the period studied here, securing the assent of the gatekeeping major Western powers was probably a necessary condition for the initiation of new episodes of norm emergence, whether for international or internal conflicts. Finally, it is also likely that the very recent adoption of the Geneva Conventions militated against the idea that states

[444] ICRC, *The Legal Protection of Civilian Populations against the Dangers of Indiscriminate Warfare (Item 5a of the provisional agenda of the International Humanitarian Law Commission,) report submitted by the International Committee of the Red Cross, XXth International Conference of the Red Cross, Vienna, October 1965,* Geneva, March 1965, 8. ICRC Library, Geneva.

would once more be willing to invest extensive efforts to make onerous additions or revisions to a just-reformed body of law.

Beyond states, some observations are warranted about the role of the ICRC as a moral entrepreneur on the issue of internal conflicts in 1950-1965. First, it is clear that the organization maintained its concern alive and pursued modest ways, from a doctrinal perspective, to build and propagate expansive interpretations of CA3. Given its expectation that formal extension of the law to cover internal troubles and political detainees were unlikely to prosper, it pursued a tactic of fostering an *epistemic community* via the convocation of expert roundtables. These consultations became a useful mechanism for legitimating generous readings of CA3 validated by the authority of influential international legal experts with varied backgrounds, many of whom also operated in or hailed from governmental circles. Although only generative of "soft" guidance, the conclusions emerging from these meetings seemed helpful to justify requests for access in some cases of troubles (as the case of Guatemala in 1954 suggests) and to clarify and systematize the Committee's field experience. On the other hand, these encounters and documents fell short of paving the road to broader state acceptance via triggering an impulse for more treaty law, at least in the near term.

On balance, it seems fair to say that, in the face of governmental animosity (actual or perceived risk aversion) to norm emergence or expansion during this time, expert consultations became a "safe" though productive route for the ICRC to take. This being said, that an organization traditionally marked by a certain conservativeness (as described in Chapter 2) would decide to press on with the task of normative development --if through more subdued/limited methods-- after important episodes of frustration, should be worthy of credit and seen as an important measure of change.

Hitting a Wall

On the basis of the new round of expert consultations the ICRC drew up summary reports for consideration by National Red Cross Societies and governments at the Twentieth International Red Cross Conference to take place in 1965 in Vienna, Austria.

Plenary debates on the legal protection of civilians against the dangers of hostilities at this Conference were not particularly acrimonious.[445] The ICRC report contained a suggestion for a "solemn declaration" (as suggested by experts) that National Societies and governments could make to reaffirm the following principles: 1) That the right of the parties to a conflict to adopt means of injuring the enemy was not unlimited; 2) That it was prohibited to launch attacks against the civilian populations as such; 3) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.[446] (The Swiss delegation drafted a resolution on the basis of the ICRC report.) These ideas constituted the core of the Draft Rules, yet in this version they represented only a declaratory suggestion for states to embrace, not a binding commitment.

Given the modest conclusions presented in the ICRC reports and the Swiss resolution, a lack of controversy was perhaps not surprising. However, evidence from other portions of the Conference proceedings and confidential US cables confirm sharp divisions between neutral and Socialist countries, on the one hand, and Western (particularly NATO) states on the other: While the former supported further work on this issue, at least publicly, most Western Alliance powers continued to dislike the idea that new rules could be imposed. In fact during debates at the Commission level in 1965 various (probably Socialist) countries had managed to add a fourth principle to the Swiss draft regarding the application of the general principles of laws of war to nuclear and similar weapons. On the opposite side, and further confirming the link between issue of warfare regulations and internal conflicts, the US delegation had been instructed to oppose any further

[445] The ICRC considered directly submitting a draft resolution reaffirming the basic principles on the protection of civilian populations supported by the experts. However, fearing backlash, it was content to simply include the passing of such a resolution as a recommendation of the experts that National Red Crosses could then either adopt or set aside. Various National Red Cross Societies from neutral and Socialist countries (Austria, Switzerland, East Germany, USSR, Czechoslovakia, and Vietnam,) however, introduced their own resolutions reaffirming the basic principles. These were eventually merged into one resolution, which received almost unanimous approval (128-0-3.) The votes were not recorded but the abstainers probably included the US and the UK. See *XX International Conference of the Red Cross, Report, Vienna, October 2-9, 1965,* 86-87. ICRC Library (hereonafter *1965 Vienna Red Cross Conference Report*.) Geneva.

[446] See the resulting Resolution (XXVIII) in *1965 Vienna Red Cross Conference Report,* 108-109. ICRC Library, Geneva.

resolutions on the regulation of hostilities because "the nature of much modern warfare, as exemplified by guerilla tactics and wars of national liberation, has blurred the distinction – already difficult—between the 'military' and 'civilian'." As a result, so the US position paper went, "a declaration along the lines now suggested by the ICRC could easily become the propaganda vehicle for precisely those regimes and forces who themselves demonstrate utter contempt for civilized rules of warfare and humane treatment of civilian populations."[447] In last resort, if the adoption of a resolution on this issue was imminent, US delegates were instructed to try to make it "as innocuous as possible."[448]

At the same time, however, the US team was told to "strongly support" a resolution calling on parties to the Geneva Conventions to strictly abide by Common Article 3 and to accept offers of services from the ICRC.[449] In addition, the US introduced a resolution of its own, drafted in conjunction with the American Red Cross, to call upon all authorities involved in an armed conflict to ensure that prisoners of war were accorded the treatment prescribed by the Geneva Convention on Prisoners of War.[450] US views of humanitarian law were thus not uniformly conservative, but rather selective and strategic: while it considered certain topics essentially taboo (new rules for weapons use,) the US saw a certain value in supporting other motions, particularly respect for *existing* law such

[447] Correspondence between the State and Defense departments on this position paper was interesting. Both agreed on the conclusion, that this type of regulative work was not desirable, the reasoning differed: while State Department Legal Advisor Raymond Yingling argued, as he had a few years before, that the rules of warfare were not the province of the ICRC, Defense Department Assistant General Counsel Benjamin Forman pointed out that this was "debatable" and suggested instead using the argument about the impossibility of actually respecting the principle of distinction. See folder entitled: XXth Int'l Conference of the Red Cross, "The Legal Protection of Civilian Populations Against the Dangers of Indiscriminate Warfare, L/SFP," Rev of U.S. Policy on Treatment of P.O.W.s to XXth Int'l Conf of the Red Cross, Box 1, RG 59, NACP. Note that instead of new rules, the only alternative acceptable for the US to ameliorate the fate of civilians was the introduction of neutralized zones, as contemplated by the Fourth Geneva Convention.

[448] See folder entitled: XXth Int'l Conference of the Red Cross, "The Legal Protection of Civilian Populations Against the Dangers of Indiscriminate Warfare, L/SFP," Rev of U.S. Policy on Treatment of P.O.W.s to XXth Int'l Conf of the Red Cross, Box 1, RG 59, NACP.

[449] United States Position Paper, Protection of Victims of Non-International Conflict, September 25, 1965, in Briefing Book for the XXth International Conference of the Red Cross, Rev of U.S. Policy on Treatment of P.O.W.s to XXth Int'l Conf of the Red Cross, Box 1, RG 59, NACP.

[450] *1965 Vienna Red Cross Conference Report,* 80-81. ICRC Library, Geneva.

as the minimum humanitarian provisions for non-international conflict contained in CA3, as well as the informal extension of guarantees to detained combatants in all armed conflicts, not surprisingly at a time when American soldiers were reportedly being badly mistreated by their captors in North Vietnam. (More on this below.)

In general, correspondence between the US and its NATO allies reveal that American reticence toward the regulation of warfare was still widely shared by its military allies in 1965. And although certain European countries such as Denmark, West Germany and Belgium felt they could support a declaration of basic principles on the conduct of hostilities, they would only do so because it was "the lesser of two evils," in implicit reference to the 1957 Draft Rules, which were meant to eventually becoming binding, not simply declaratory.[451]

The US was not the only force behind the scenes working to boycott the regulation of warfare. During the actual Plenary debates in Vienna, UK delegate Colonel Gerald "GIAD" Draper, already a very well-respected British legal scholar and constant protagonist of the international debates on the laws of war since the 1950s, attempted to shape the text of the draft resolution so as to refer to international conflicts *only,* arguing that the inclusion of non-international conflicts worked only to confuse matters. This reaction was consistent with the British government's past (and as we will see in the next chapter, persistent) worry about humanitarian intromission in internal conflicts. The ICRC rejected this reasoning, alongside delegates from Poland, East Germany, Iraq, Turkey and Yugoslavia, and the British amendment was struck down.[452]

The British delegation also attempted to water down an ICRC draft resolution on the protection of victims in non-international conflicts, which following recommendations of the 1962 expert commission, included language about protections being accorded during internal troubles. Draper argued (again) that to include this expression was to confuse the

[451] See folder entitled: XXth Int'l Conference of the Red Cross, "The Legal Protection of Civilian Populations Against the Dangers of Indiscriminate Warfare, L/SFP," Rev of U.S. Policy on Treatment of P.O.W.s to XXth Int'l Conf of the Red Cross, Box 1, RG 59, NACP.
[452] 115 votes against, 7 in favor, 6 abstentions. *1965 Vienna Red Cross Conference Report,* 87. ICRC Library, Geneva.

legal tenor of the text, but his amendment was once more rejected.[453] The resolution itself, which encouraged the ICRC to continue its work in strengthening the protection of victims of these types of conflicts and recommended that governments and National Red Crosses support it, was approved unanimously.[454]

As the above shows, by the end of 1965 the ICRC had a mandate to "continue" facilitating work on the legal protection of victims against the dangers of warfare across all forms of conflict, but faced the clear opposition of Western powers. In contrast, the UK notwithstanding, it also appeared to have wide support to continue providing aid and working to protect the victims of non-international conflicts, including in internal troubles, and to urge the application of Common Article 3 by combatants in such conflicts.

Yet neither situation warranted a swift move toward new binding rules. The resolution on the dangers of warfare included mentioned the creation of (yet another) committee of experts "with a view to obtaining a rapid and practical solution of this problem."[455] Instead of a new roundtable, the ICRC conducted a new round of private consultations with 15 experts during 1966 and early 1967.[456]

According to the ICRC, on the basis of this "broad survey of opinions," in Spring 1967 it decided on taking two measures: 1) endeavoring in the short-term to obtain rapid official confirmation by governments of the principles of protection against warfare

---

[453] 123 against, 73 in favor, 24 abstentions. *1965 Vienna Red Cross Conference Report,* 90. ICRC Library, Geneva.
[454] 124 vote in favor, none against, 5 abstentions. *1965 Vienna Red Cross Conference Report,* 90. ICRC Library, Geneva.
[455] *1965 Vienna Red Cross Conference Report,* 108-109. ICRC Library. Geneva.
[456] These experts were President Bargatzy, West Germany; Richard Baxter, USA; Mr. A. Buchan, UK; Professor Castren, Finland; Mrs. Chakhravarty, India; Mr. Choudhury, Pakistan; Professor Gerald Draper, UK; Ambassador El Erian, United Arab Republic; Professor Graefrath, East Germany; Ambassador Hambro, Norway; Judge Lachs, Poland; Senator Matine-Daftary, Iran; Professor Meray, Turkey; Professor Sahovic, Yugoslavia; Ambassador Tsuruoka, Japan; and Professor Wolfers, USA. Professor Arechaga, Uruguay and Professor Tunkin, USSR, were also reportedly approached but the ICRC but it was impossible to arrange a consultation. See ICRC, *Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts, report submitted by the International Commission of the Red Cross, XXI International Conference of the Red Cross, Istanbul, September 1969,* 16-17 (*Reaffirmation and Development* 1969 hereonafter,) ICRC Library, Geneva.

contained in the 1965 Resolution, and; 2) as a longer-term measure, to extend the work on revising the entire body of humanitarian law applicable in armed conflicts.[457] To this effect, the ICRC circulated a memorandum to governments, recalling and requesting them to sanction the four basic principles of protection during armed conflict, and "if need be develop these general rules in an adequate instrument of international law." In addition, the ICRC invited governments "to reaffirm… through any appropriate official manifestations, such as a Resolution of the United Nations General Assembly the value they attach" to the principles contained in the 1965 Vienna resolution.[458]

Much to the ICRC's disappointment, this memorandum seems to have fallen on deaf ears. The organization blamed this outcome on the fact that a week after the note was sent to governments war had broken out in the Middle East between Israel, Egypt (then called United Arab Republic,) Syria and Jordan (a conflict known as "the Six Day War.") Undeterred and encouraged by the responses of a dozen states, a representative of the ICRC traveled to New York to promote the idea of a submitting a resolution during the UN General Assembly in 1967. Yet, in the ICRC's own words, "there it became evident that the Middle East crisis and concentration of efforts on the non-proliferation treaty made it impossible to submit such a draft resolution."[459]

The development of the law (for both international and internal conflicts) in the hands of the ICRC had thus hit a major roadblock. Beyond the war-related impasse of 1967, it was far from evident that a major revamping of existing rules would become possible any time soon. Major Western states were skeptical about this course of action, and without acquiescence of a substantive number of states, particularly of the usual powerful gatekeepers (the US, UK and other European states) consulted formally and informally by the ICRC, the project had weak legs and slim hopes for success.

Yet a short four years later, in 1971, governmental experts were convening to discuss just such a revision of the humanitarian rules for international and internal conflicts. What happened between 1967 and 1971 to trigger such a change in the course of events?

---

[457] ICRC, *Reaffirmation and Development* 1969, 17. ICRC Library, Geneva.
[458] ICRC, *Reaffirmation and Development* 1969, 17. ICRC Library, Geneva.
[459] ICRC, *Reaffirmation and Development* 1969, 18. ICRC Library, Geneva.

The next section presents an explanation grounded on three major factors, some tied to the agency of specific actors and others to changes in the structure of the world polity: 1) the emergence of new political entrepreneurs which mobilized concern international for this issue, albeit outside the purview of the ICRC and under the alternative banner of human rights; 2) major conflict-related shocks of international proportions, which directly or indirectly motivated previously unbelieving governmental gatekeepers to take up the issue or made it harder for others to publicly deny the urgency of the issue; 3) the entry into the international scene of a great number of newly-independent states with their strong aspirations for political legitimacy and with the ability to find allies and wield decision-making majorities in international organizations, especially the UN. I argue that these factors, in addition to the road travelled by the International Committee of Red Cross, constituted once again the crucial mechanisms behind the renewed impetus toward the revision and development of humanitarian law in the late 1960s and in the early 1970s. The next section will flesh each of these out in more detail, while the following chapter will concern itself with the formal process of preparation and negotiation of the new set of agreements, the First and Second Protocols Additional to the Geneva Conventions.

IV. Re-setting the Scene: the Mechanisms behind the New Episode of Norm Emergence

a. A New Political Entrepreneur: The International Commission of Jurists and "Human Rights in Armed Conflict"

Until now, the overwhelming majority of efforts made internationally to revise the body of humanitarian law had been made by the ICRC.[460] In the immediate postwar

[460] This was the case until the late 1950s and mid-1960s. In a 1969 report, the ICRC for the first time recognized that there existed "several private national and international institutions showing active concern with this problem, holding meetings on the subject," adding that it was "only too pleased to witness the interest appearing in numerous circles on a subject too long left aside." Among the organizations showcased by the ICRC in this report was the Institute of International Law, which since 1956 had reportedly been working on the question of the reconsideration of the

period, with a revamped architecture of international organization, this task could have logically been assigned to the United Nations' International Law Commission. At the time, however, exhaustion with war and correlated hopes for peace were so high that thinking about rules for future wars was (in hindsight naively) seen as a political faux-pas. Moreover, the United Nations quickly became seen as a deeply politicized scenario for the prescription of international public policy, particularly for Western states that over a short number of years lost the majorities they had once held. In addition, and perhaps most importantly, after nearly a century of conscientious and judicious work in the fields of practical and legal humanitarianism, the ICRC had secured pride of place in international debates about them. The ICRC was after all both the pioneer and the guardian of international humanitarian law, and few governments now dared question these prerogatives, which the Committee protected fiercely through seemingly indefatigable pro-activity. As a result, the Swiss organization had little issue retaining control of this branch of the law (not so, as we have seen, with the "Hague" line of the rules of warfare.) UN bodies had their hands full regardless, with agendas that included the development of human rights law alongside other many other thorny areas of international law to resolve, including defining aggression, securing agreements on nuclear weapons limitation and drafting principles against war crimes.

Thus, two branches of global standard-setting that in practice are quite related --the laws protecting victims of conflict-related (particularly internal) violence, and those regulating governmental conduct toward its own citizens (human rights,)-- for years developed almost independently.[461] The historical separation of these two sibling bodies of law came to a momentary halt in the mid-1960s when a relatively new non-governmental organization, the International Commission of Jurists (ICJ,) began to

---

principles of the laws of war. ICRC, *Reaffirmation and Development* 1969, 15. ICRC Library, Geneva.

[461] I say "almost" because, as we have seen, the ICRC was mindful of the progress made on the human rights front, but still did not dare to publicly or officially "mix" the two, under the belief that humanitarian law applied to times of armed conflict (and perhaps even low levels of violence,) while human rights law applied chiefly during peacetime. Note that this is not to fault the ICRC. Only until decades later did international jurists become comfortable with referring to the "overlap" or the "merging" of humanitarian and human rights law. I take up this debate in Chapter 6.

campaign in the policy circles of Geneva and New York, among others, to bring to fore the issue of "human rights in armed conflict." The ICJ's intervention as political entrepreneur in this area injected renewed impetus to the cause of revising the laws of war by sparking a formal political process within the UN that the ICRC itself had been unable to ignite.

The ICJ was founded in 1952 as "a small offshoot of a comprehensive US policy to contain Soviet expansion." According to Howard Tolley Jr., the initial purpose of the organization was to recruit intellectuals to oppose communist political influence, for which it relied on funds from the Central Intelligence Agency (CIA.)[462] By the early 1960s, however, the organization had reportedly turned away from anti-communism, transformed itself internally by recruiting professional staff and distinguished jurists, established its home in Geneva, opened international offices, and gathered experience campaigning worldwide for the respect of the rule of law in countries on both sides of the Iron Curtain.[463]

In 1963 the Executive Committee of the ICJ appointed Séan MacBride as Secretary-General of the organization. MacBride was a multifaceted Irish figure with a distinguished background. MacBride "was first a journalist. He then rose to become the Chief of Staff of the Irish Republican Army during the early 1930s, which was then in combat against the Irish government."[464] He later gave up violence and opted for a career as a lawyer, making a career defending IRA members.[465] He went on to become a member of Ireland's Parliament and Minister for External Affairs, and in the latter capacity he worked as Vice-President of the Organization for European Economic Cooperation (OEEC,) helped found the Council of Europe, served as president of Council of its Council of Foreign Ministers, and jointly sponsored and signed the 1949 Geneva Conventions and the European Convention of Human Rights. After leaving the Irish

[462] This summary draws heavily from Howard Tolley Jr.'s work, as well as from Keith Suter. Suter, *An International Law of Guerilla Warfare: The Global Politics of Law-Making*; Howard B. Tolley, *The International Commission of Jurists: Global Advocates for Human Rights* (University of Pennsylvania Press, 1994).
[463] Tolley 1994, 92.
[464] Suter, *An International Law of Guerilla Warfare: The Global Politics of Law-Making*, 24.
[465] Ibid.

government, MacBride helped found Amnesty International and chaired its International Executive Committee through 1975. To this illustrious synopsis one ought to add that a decade later, in 1974, MacBride was awarded the Nobel Peace Prize (three years before Amnesty International received the same accolade in 1977,) along with the Soviet Union's Lenin Peace Prize in 1976. This was clearly a testament to his credibility in the Western and Socialist worlds.[466]

The appointment of MacBride in 1963 reinvigorated the ICJ's work on international law and institutions, which he made a top priority.[467] Among many other activities in the international human rights realm, MacBride led an (unsuccessful) *ad hoc* coalition to establish a UN High Commissioner for Human Rights and founded a permanent human rights NGO committee in Geneva.[468] Substantively, around this time MacBride became concerned with the allegations of conflict-related atrocity committed against civilians in places like Vietnam, the Congo and South Africa, and concluded that the Hague and the Geneva Conventions did not provide enough protections for victims of internal conflicts. He saw an opportunity to campaign for change when in 1965 the UN General Assembly decided to convene the very first International Conference on Human Rights, to take place in 1968 as part of the celebrations of the twentieth anniversary of the UDHR.[469] One of the stated goals of the Conference was to "formulate and prepare a program of further measures to be taken subsequent to the celebrations of the International Years of Human Rights," so the occasion was ripe for inserting new ideas.[470] Starting in 1965 MacBride spoke at various high-level international public events and worked to build coalitions of NGOs and sympathizers around the issue of increasing the legal protections for victims of violence in international *and* internal conflicts, as well as improved international oversight over them. He decried not only how outdated existing law was,

---

[466] See MacBride's biographical note on the Nobel Peace Prize website: http://www.nobelprize.org/nobel_prizes/peace/laureates/1974/macbride.html (Consulted on July 15, 2013.)

[467] Tolley, *The International Commission of Jurists: Global Advocates for Human Rights*, 100.

[468] Tolley, *The International Commission of Jurists: Global Advocates for Human Rights*, 100.

[469] In 1963 the UN General Assembly had declared 1968 the first International Year of Human Rights.

[470] United Nations, *Final Act of the International Conference on Human Rights*, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 at 3.

particularly the Hague regulations of 1907, but also the separate and disparate growth of international humanitarian, human rights and criminal law (the Nuremberg Principles, chiefly,) a phenomenon that in his view led to lacunae, confusing overlaps and a problematic lack of co-ordination between the three bodies of law. Although he was a lawyer, MacBride was not encumbered by the legal subtleties and doctrinal differences between them, since in his view all three formed part of the broader law of nations and ought to operate in tandem. Yet he also seemed aware of the difficulties for realizing this objective. In his interventions MacBride recognized the "marvelous work" of the Red Cross in trying to update existing regulations, quickly noting that the Swiss organization was "often powerless" in the face of governmental stubbornness.[471]

Through his capacity in the ICJ and his prominence among international NGOs, MacBride decided to help push the process forward. In January and March 1968, prior to the Tehran International Conference on Human Rights, he co-chaired respectively a meeting of 76 NGO experts in Geneva, and another in Montreal (the "Montreal Assembly on Human Rights,) gathering 50 experts. The conclusions to the January NGO meeting included explicit references to the need to revise the 1907 Hague Conventions to address the dangers posed by weapons of mass destruction, particularly for civilian populations, as well increasing efforts to ensure compliance with the 1949 Geneva Conventions "by all involved in a conflict, whether international or internal."[472] With this NGO mandate, MacBride flew to Tehran with one of his ICJ associates and set out to lobby governments for support to these initiatives. There his ideas for improving implementation and compliance mechanisms of the Conventions seem to have been quickly frustrated, however.[473]

In a private letter to another member of Amnesty International, MacBride explained he had instead "decided to concentrate on trying to get proposed a concrete resolution on the protection of human rights in armed conflict… which ultimately, with some minor amendments, was proposed by India and co-sponsored by Czechoslovakia, Jamaica,

[471] Suter, *An International Law of Guerilla Warfare: The Global Politics of Law-Making*, 25.
[472] Suter, *An International Law of Guerilla Warfare: The Global Politics of Law-Making*, 27.
[473] Suter, *An International Law of Guerilla Warfare: The Global Politics of Law-Making*, 28.

Uganda and the United Arab Republic." MacBride explained that "it was essential in the prevailing atmosphere to secure an 'uncommitted' sponsorship and one which was representative of the various geographical groupings. My task was greatly facilitated by reason of the fact that the leaders of the Indian, Czechoslovak, Jamaican and UAR [United Arab Republic, now Egypt] government delegations were old friends of mine. This sponsorship in the prevailing situation at Tehran was nearly ideal and probably the only political and geographical combination that could have secured a quasi-unanimous support for the resolution. The major powers—East and West—were far from happy about the resolution, but they could not afford to oppose."[474]

MacBride also confided that his work on the resolution had produced some friction with the Swiss delegation and indirectly, with the ICRC. The Swiss, along with the South Vietnamese, were in fact the only ones to publicly abstain on the resolution; a curious pairing to be sure. Swiss Ambassador explained that his opposition was due to the alleged fact that the ICRC had not participated in the drafting of the resolution at Tehran, a claim MacBride rejected since he claimed to have personally met with the organization, raising awareness of his work prior to the Conference and even suggesting joint action. MacBride had reportedly also facilitated meetings between UN Secretary-General U Thant and the ICRC. In addition, while at Tehran MacBride also claimed to have cooperated with the Swiss Ambassador August Lindt in the drafting of the Resolution, and that although "he was most helpful in this respect… he was unhappy because he felt that resolution was to a certain extent forcing the hand of the ICRC."[475]

A cursory reading of the resolution that ultimately passed easily explains why the ICRC (and with them, Switzerland,) felt uncomfortable. It touched on many controversial topics which by 1967 the ICRC had, as we saw, learned to steer clear from: it denounced the use of specific means of warfare such as chemical and biological weapons (including napalm bombing, then being used in Vietnam;) it included language, habitual for the UN but inflammatory for the ICRC, about "minority racist or colonial regimes'" refusal to

[474] Cited in Suter, *An International Law of Guerilla Warfare: The Global Politics of Law-Making*, 29.
[475] Cited in Suter, *An International Law of Guerilla Warfare: The Global Politics of Law-Making*, 29.

comply with the decisions of the UN and to respect the UDHR, while decrying the inhumane treatment given to "those who struggle against such regimes" who, the text asserted, should not only be protected but also treated as prisoners of war or political prisoners under international law; and in its operative paragraphs assigned priority to the UN General Assembly, through the office of the Secretary General, to work on the better application and the development of humanitarian law in all armed conflicts. With this, the 1968 resolution relegated the ICRC to a consultative role in the process of drawing states' attention to existing regulation, and pending the adoption of new rules of international law relating to armed conflicts, to ensure that in all armed conflicts the inhabitants and belligerents were protected.[476] Despite these contentious aspects, it is clear that the resolution went in a direction not inimical to ICRC aspirations, though perhaps too aggressively for its taste and without sufficient clarity about the all-important question of who would steer the process.

The document is said not to have provoked much public debate during the Tehran Conference. However, the few proposed amendments and their origins merit mention. The US delegation disliked an initial version of the text which requested the UNGA to set up a committee of experts charged with drawing up revised conventions in consultation with the ICRC "in order to secure the better protection of civilians or combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare," an unpalatable motion that removed states' authority from the revisions process, dealt with weapons, and appeared rash. The Indian delegate achieved the deletion of a proposed reference to a committee of experts that would consult with the ICRC and report back to the UNGA, and managed to insert the word "possible" before "revisions," introducing some flexibility regarding the fate of the recommendations made by the Secretary General's study. This was a change that likely appealed to most states, which probably preferred to be non-committal vis-à-vis the uncertain contents of a future expert report. Beyond these changes and the Swiss abstention due to the alleged lack of

[476] Cited in Suter, *An International Law of Guerilla Warfare: The Global Politics of Law-Making*, 31.

consultation with the ICRC, the resolution had a swift passage through the second committee where it was discussed, and debate on it was reportedly over in ten minutes.[477]

The resolution on "Human Rights in Armed Conflict" was one of the few clear accomplishments of the 1968 UN Tehran International Conference on Human Rights. General commentary on the proceedings and outcomes of this event is usually quite dour, as the Conference appeared to be high on aspirational and denunciatory rhetoric but low on concrete ideas on how to push the global human rights program forward.[478] Against this background, and considering the topic of improving protections during armed conflict was not on the original Conference agenda, MacBride's successful efforts to have a Resolution "quasi-unanimously" approved are notorious. Most importantly for our discussion, the work of the ICJ had managed to achieve something the ICRC, despite tireless action, had not: to mandate the premier intergovernmental organization (the UN) to steer a process likely to lead to a revision of the regulation of armed conflicts which states could not as easily ignore as they had the ICRC. It created a focal point and suggested a way forward. In addition, and although the text slighted the ICRC somewhat, the lack of overt state opposition to the Resolution allowed the ICRC to claim that there was a renewed interest among governments to develop existing law, and as we will see, encouraged it to re-claim its leading role in realizing that project.

b. A Shock: Vietnam and a changed US attitude

The 1960s were tragically violent decades in many corners of the world, with gruesome bloodshed in Algeria, Morocco, Laos, Rhodesia, Rwanda-Burundi, the Congo and Nigeria (Biafra,) among others. By 1968 it is not necessarily surprising that the some states' reluctance to revising existing humanitarian rules should have subsided in varying degrees as conflict-related brutality continued to produce victims in the thousands, many of them civilian. The growing recognition around this time of the right to be free from

[477] MacBride reasoned that the South Vietnamese had opposed the resolution in protest for an ICJ-sponsored text on the atrocities committed The drafting history of the Tehran resolution is narrated by Suter, *An International Law of Guerilla Warfare: The Global Politics of Law-Making*, 33.
[478] Ibid., chap. 2; Burke 2010, chap. 4; Moyn 2010.

colonial and racist rule became a decisive force in propelling the legitimacy and means for protecting "freedom fighters," particularly among newly independent nations that now populated the UN. I later devote a subsection to explaining these events and dynamics more fully as they relate to the process of updating the laws of war.

But beyond (and quite distinct from) enthusiasm for national liberation, changes in the attitude of certain powerful Western states regarding revisions of the Geneva and Hague Conventions should come as a surprise and are worthy of examination. Indeed, the evidence presented earlier in this chapter demonstrated that the US, alongside many of its European allies, opposed the development of new rules and had acted collectively as effective gatekeepers by blocking ICRC efforts in that direction, at least until 1965. The most an optimistic assessment could claim is that in 1965 the US supported work on improving the *implementation* of existing humanitarian rules, not their reconstruction or extension, as seen in American insistence that all combatants in internal conflicts should observe Common Article 3, and that prisoners of war in all armed conflicts should be granted the full benefits of the Third Geneva Convention regardless of the type of conflict.[479]

Yet by 1968 US skepticism over revisions seems to have diminished notably. As we saw, the US did not vote against the "Human Rights in Armed Conflict" Resolution at Tehran. US diplomatic telegrams claimed it had done so because it had a "strong policy interest in humane treatment for all persons involved in armed conflict."[480] More explicit evidence of a changed attitude, though, can be gleaned from a statement made by Jean Picker, US Representative at the Third UN Committee while discussing the Tehran resolution in December of that year: There, after expressing a broadly positive attitude toward the Tehran text, Picker declared:

---

[479] The US proposed, successfully, a resolution on respect for prisoner of war protections at the 1965 ICRC Vienna Conference. The US delegation admitted in its report to Secretary of State Dean Rusk that "from a purely political viewpoint" this was the most important international legal issue for the US. Report of the United States Delegation to the XXth International Conference of the Red Conference, Vienna, Austria, October 2-9, in Rev of U.S. Policy on Treatment of P.O.W.s to XXth Int'l Conf of the Red Cross, Box 1, RG 59, NACP.

[480] State Department Telegram, subject "Tehran HR Conference," 511-04.10, in folder "ICRC Conferences on Humanitarian Law (1972,)" POW/Civilian Internee Information Center, Confidential Records, Box 11, P 2, RG 389, NACP.

"Mr. Chairman, my Government voted for Resolution XXIII at Tehran and we will vote in favor of the present draft resolution… In giving its support to this resolution, my Government recognizes that it is not an easy task which we are asking the Secretary-General to undertake. But we are confident that he will make every effort to produce a thorough and objective study in consultation with qualified non-governmental organizations such as the ICRC… Perhaps it is not premature to give some preliminary consideration at this time to an important procedural question in the event there is a recommendation for new or revised international agreements in this field. The question is, of course, what body should undertake this most important work. Without discussing all possible answers to this question, we would like to call attention to the satisfactory procedure followed in 1949. The efforts of the ICRC and the Government of Switzerland contributed in large measure to the success of that last major effort to revise international law in this field. We would hope that whatever procedure is adopted would have at least a good chance to succeed in drafting sound instruments to which a great many, if not all, states will quickly adhere. Finally, Mr. Chairman, my Delegation would like to recognize the important contributions of concerned individuals, private groups and non-governmental organizations in calling the attention of governments to the humanitarian need for better application and respect for these international rules and to the possibility that new or revised international agreements are needed…"[481]

As is obvious from the above, by late 1968 the US envisioned the clear possibility of revisions, even suggesting that the ICRC (not the UN) should take the reins of the process. The question emerges: What brought about this change in US attitude?

In one word: Vietnam. More precisely, US involvement in the conflict between South and North Vietnam, which became an essential part of its containment strategy against Communism, had markedly increased since the early 1960s, and by 1965, with the adoption of the Gulf of Tonkin Resolution by the US Congress, American aerial bombing campaigns and land combat units were being deployed to weaken the National Liberation Front (NLF, or Vietcong) and their North Vietnamese supporters.[482] With increased US participation came allegations of American atrocities against civilians, either through indiscriminate or imprecise bombing, or through manhandling by army personnel on the

[481] Statement by Mrs. Jean Picker, United States Representative in Committee III on Human Rights in Armed Conflicts, December 10, 1968 in folder "Human Rights in Armed Conflicts (1968,)" POW/Civilian Internee Information Center, Confidential Records, Box 9, P 2, RG 389, NACP.

[482] This section relies heavily on the authoritative work of Howard Levie. See Howard S. Levie, "Maltreatment of Prisoners of War in Vietnam," in *The Vietnam War and International Law, Volume 2*, ed. Richard A. Falk, 1969, 361–397.

ground. Allegations of abuse extended to the US-backed South Vietnamese military. At the same time, the US denounced cruel treatment and lack of humanitarian guarantees by the North Vietnamese with regard to American pilots fallen in captivity, and although other US charges of communist atrocity would come later, I suggest that it was the concern for the fate of prisoners of war, both those held by its enemies as well as by its own forces, that initially moved the US to consider the need for updated humanitarian rules.[483]

Concerned with the escalation of hostilities, the ICRC wrote in June 1965 to the governments of the US, South Vietnam, North Vietnam, as well as to the National Liberation Front (NLF, or Vietcong,) to remind them of their responsibilities under the Geneva Conventions, particularly the Third Geneva Convention on the treatment of prisoners of war.[484] The ICRC's Vice-President Jacques Freymond explicitly referred Common Articles 1 and 2 to the Geneva Conventions as the formal legal basis for his appeal, thus implying that in Red Cross eyes the Vietnamese conflict was an *international* war, not an internal conflict. This notion was reinforced by Freymond's insistence that the NLF was "too bound by the undertakings signed by Vietnam" without an explicit mention of Common Article 3, which suggests that the ICRC was sufficiently convinced that the internationalization of the conflict, among others through foreign support to the Vietcong rebels, triggered the application of the entire set of Conventions, not only the humanitarian provisions of CA3.

---

[483] According to Howard Levie, North Vietnam "persists in refusing to provide the names of persons held as prisoners of war, refusing to permit correspondence between the prisoners of war and their families, and refusing to permit the neutral ICRC delegates to inspect the prisoner of war camps so as to be able to determine whether prisoners of war are, in fact, receiving the humane treatment to which they are entitled and which that regime long ago committed itself to provide. Similarly, the NLF refuses to consider itself bound in any way, even by the limited provisions of Article 3 of the [Third] Convention." Later in his chapter, Levie documents charges of reprisals committed by the NLF against captured US civilians, Levie, "Maltreatment of Prisoners of War in Vietnam," 364–365.

[484] All three states had ratified the 1949 Geneva Conventions and were thus "High Contracting Parties" to them. Common Article 3 arguably bound the Vietcong since it operated on the territory of states that were party to the Conventions, but this interpretation was not shared by the Vietcong itself. The ICRC letters to the US, South Vietnam, North Vietnam were published in *International Legal Materials* 4, 1965, 1171-1174. Responses from the US and the South Vietnamese were also included.

The US Secretary of State Dean Rusk replied to the ICRC in August 1965, declaring continued American respect for the Geneva Conventions, and announcing plans to aid South Vietnam in expanding and improving facilities and procedures to process and care for an increased number of captured combatants.[485] South Vietnamese Minister of Foreign Affairs Tran-Van-Do also replied, reassuring the ICRC that it was "fully prepared to respect the provisions" of the Conventions, that "Vietcong prisoners have always received the most humane treatment from our civilian and military authorities," and vowing to "contribute actively to the efforts of the International Committee of the Red Cross to ensure their application."[486] A few months later, North Vietnam announced it would regard any captured pilots as major war criminals for destroying property and massacring its civilian population, but would regardless treat them well. For its part, the NLF (or Vietcong) claimed it was not bound by the Geneva Conventions "to which others beside itself subscribed" but that, nevertheless, it would treat prisoners humanely and collect and care for the enemy wounded.[487]

These dissonant responses, as we will see in later, augured some of the principal challenges that would pervade the re-making of the law in the 1970s. From an American perspective, they highlighted the protective gaps that remained in the separation between international and non-international conflicts toward captured combatants (recall that Common Article 3 was far less comprehensive than the Third Geneva Convention for POWs,) particularly in struggles whose status was disputed by its participants. Although for the US the conflict in Vietnam was international, for the North Vietnamese it was both a civil war and a war of aggression, during which even the application of the minimal provisions of CA3 was in doubt. More alarmingly still, from the standpoint of North Vietnam and the Vietcong, wars of national liberation were to be given special recognition, particularly those also fought against external "aggressors" whose behavior --they thought-- was invariably criminal. To compound this divergence of views, there remained the thorny issue of whether non-state armed groups were or not bound by

[485] *International Legal Materials* 4, 1965, 1171-1174.
[486] *International Legal Materials* 5, 1966, 124.
[487] Cited in Levie, "Maltreatment of Prisoners of War in Vietnam," 362.

international humanitarian agreements that, as expressed by the Vietcong, had been signed not by them but precisely by the governments they targeted.

The Vietnam conflict and the violence committed in it by all parties have been amply documented and need not all be repeated here.[488] It is more important to show how in the years 1965-1968 the US grew increasingly dissatisfied with the protections contained in the law. Archival evidence from the US Army records confirms that around this time the US began to devote resources and studies to the consideration of both its opponents' conduct vis-à-vis- prisoners of war as well as its own. With regard to former, an internal memorandum of the Department of Defense dated March 7, 1968 reveals the hurdles faced by the US in trying to ascertain and improve the fate of American prisoners in the Vietnam conflict:

> "As of February 1968, 959 American military personnel were either prisoners of war or missing in action. Of these, 167 are believed held captive by North Vietnam and 450 are listed as missing in action over the North. The Viet Cong hold 24 known PWs and 165 are carried as missing in action in South Vietnam. The Pathet Lao are believed to be holding 5 in Laos and there are 71 others missing in that country. Red China holds 2 men whom we refer to officially as 'detainees' and there are 6 carried as missing in action in China… Exact figures on PWs held by Communist forces in Vietnam and Laos are not available because neither Hanoi, the Viet Cong, nor the Pathet Lao has provided lists of names or numbers of prisoners… "[489]

The same document, in a subsection entitled "Welfare of PWs" claimed that the Interdepartmental Committee formed to deal with prisoner of war issues had "concentrated its efforts in attempting to make the enemy aware of its responsibilities as outlined in the Geneva Conventions Relative to the Treatment of PWs. This is our

[488] For a variety of sources, see US National Archives, Military Resources: Vietnam War, http://www.archives.gov/research/alic/reference/military/vietnam-war.html (Consulted on August 15, 2013.)

[489] Assistant Secretary of Defense, Memorandum for the Deputy Secretary of Defense in folder "Report on the PW Problem (1968,)" Box 33, P 2, RG 389, NACP. Lack of information about prisoners of war and personnel missing in action was only one of the problems. As referenced earlier in fn. 72, the US was aware of a host of other abuses by its enemies during this conflict.

paramount interest. All avenues leading to this goal and to the eventual recovery of our captured servicemen are being explored."[490]

With respect to American policy and practice, a memorandum sent by the Office of the Deputy Chief of Staff for Personnel to the US Army Chief of Staff in December 1967 reveals that the US Army had since July 1966 decided to assign "a select group of knowledgeable military and civilian personnel" to conduct a comprehensive review process of this issue. The study suffered delays but was finally completed in November 1968.[491] Among the areas selected for review was a section on international law and the related US performance.[492]

In November 1967, even before the hired report had been executed, the Army's in-house researchers had already identified various problems with regard to the Geneva Conventions, thus summarized: "1. The Geneva Conventions are applicable but not appropriate to modern warfare. 2. The Geneva Conventions are 'fuzzy' in ruling on the

[490] Assistant Secretary of Defense, Memorandum for the Deputy Secretary of Defense in folder "Report on the PW Problem (1968,)" Box 33, P 2, RG 389, NACP.

[491] Perhaps tellingly, due to an avowed lack of internal capacity within the US Army, this report was contracted out to a consultancy firm. Moreover, the study was reportedly delayed for eleven months due to the Department of State's suggestion that the project be transformed into a joint operational study on Vietnam, which raised security clearance problems. Another delaying factor, according to the memorandum, was "the increased tempo of combat operations in Vietnam." This suggests that parts of the work actually began around May 1967. However, according to this memo, in response to the delays provoked by the State Department's suggestion, the US Army decided, "so as not to waste time, [to extract] from the study plan all material which had no foreign policy implications and proceeded with an in-house effort." Eventually the State Department withdrew its suggestion and reverted to the Army's original plans. See Department of the Army, Memorandum for Chief of Staff, Subject "Prisoner of War Study (U,)" December 31, 1967, in folder entitled "Prisoner of War Study (1967)," Box 33, P 2, RG 389, NACP.

[492] In regards to the international law section, the US Army confided that "the in-house expertise for a study of this kind is highly limited. The resources of the Judge Advocate General and to a lesser extent those of the Provost Marshal General which could be applied to the study effort are inadequate to undertake a study of the magnitude visualized and to continue to meet the day-to-day operational requirements." Although I could not find the final international law report, it appears it was completed *after* the in-house portion, that is, after November 1968. See Department of the Army, Memorandum for Chief of Staff, Subject "Prisoner of War Study (U,)" December 31, 1967, in folder entitled "Prisoner of War Study (1967)," Box 33, P 2, RG 389, NACP. See also enclosure F in folder entitled "Prisoner of War Study (1967)," Box 33, P 2, RG 389, NACP.

legality of certain policies. 3. The Geneva Conventions contain no enforcement mechanism."[493]

Importantly, the terms of reference for the international law portion of the study *assumed* from the outset that there were deficiencies across several aspects of an international legal regime which "is based in large measure on World War II experience and in certain areas may no longer be appropriate in the present state of technology."[494] Thus, the Army anticipated the study would offer "recommendations for remedying deficiencies in international law," particularly on the treatment of prisoners of war, and warned that if its results were ignored, the impact would be the "continuation of operations under a body of law which does not recognize the realities of modern warfare."[495]

The above makes it quite evident that at least since 1965, a clear sense of urgency emerged within the US military to diagnose perceived defects with the Geneva Conventions and to proceed with a revision of portions of the existing law. It is also clear

[493] Enclosure F in folder entitled "Prisoner of War Study (1967)," Box 33, P 2, RG 389, NACP. A fourth problem included in the Army review and worth reproducing at length stemmed from the fact that the Conventions: "are documents primarily in the Judeo/Christian tradition in their respect for human life and dignity. To the United States and other Western nations, good treatment of prisoners is part of their national character. It would take place whether this and other western countries were signatories to the Geneva Convention or not. To most other signatory countries, however, the spirit of the Conventions is miles apart from their ideology and national character. It should be possible to conduct cultural studies of each of these [potential enemy] nations with these objectives in mind: a. To determine to what extent can the nation be expected to deviate from the Geneva Conventions, considering its culture, character, ideology, and traditions. This information would be of immense value in the training programs of all services; conversely, it could be used in the training and indoctrination of prisoners from the nation under study. b. To identify the psychological Achilles heel of potential and actual enemy nations. The objective of this information is to secure correct treatment of captured US personnel. The traditional methods of persuading an enemy country to provide good treatment, such as appeals to world public opinion, publication of 'White Papers,' protests to various embassies and the International Committee of the Red Cross do not work too well with such Communist powers as Red China, North Korea and North Vietnam. On the other hand, psychological attacks aimed at losing face or otherwise wounding the national character may bring about the desired good treatment. We are now in our third war during which prisoners have suffered at the hands of oriental captors who were signatories to international agreements. More sophisticated methods than those traditionally employed must be used in obtaining better treatment for our people." See Enclosure E in folder entitled "Prisoner of War Study (1967)," Box 33, P 2, RG 389, NACP.

[494] Enclosure F in folder entitled "Prisoner of War Study (1967)," Box 33, P 2, RG 389, NACP.

[495] Enclosure F in folder entitled "Prisoner of War Study (1967)," Box 33, P 2, RG 389, NACP.

that the need for diagnosis and revision on the US side was elicited by the shocks and pressures to the deplorable conduct of its enemies during Vietnam, as well as by the lack of clarity left in portions of the Geneva Conventions.

Before moving forward it is important to clarify that I have thus far only highlighted one aspect of these "deficiencies" for the US (the treatment of prisoners of war,) which I believe was the initial trigger of change in American attitudes. However, as the Vietnam conflict dragged on, and with it more allegations of abuse, various other sensitive concerns surfaced, not least the protection of the civilian population brought to the fore when the March 1968 My Lai massacre became public in late 1969.[496] (On March 16, 1968 at least 300 civilians were brutally murdered in the Vietnamese hamlets of My Lai and My Khe by a company of US soldiers, despite being unarmed and unresisting.) I will reference these crucial added concerns in the next chapter since they will be shown to pervade the drafting and the negotiation of the Additional Protocols during the 1970s. For the moment, I claim simply that during the second half of the 1960s the US slowly let down its guard regarding the revision of the Geneva Conventions, and that although other parts of this process remained controversial for years, notably the regulation of weaponry, the American POW-related experience in Vietnam was the principal cause behind this internal transformation. This change is even more noteworthy because, as I demonstrate in the next chapter, the US went from acting as conservative gatekeeper to becoming a fierce "pro-revisions" broker among its Western peers.

A final and pivotal aspect of the question behind the move to the update the body of humanitarian law in the 1960s remains to be fleshed out: the swift arrival of newly decolonized states as a revolutionary political force and their ability to wield influence, particularly in the UN. It is to this issue that I turn before concluding.

[496] Problems with relation to South Vietnamese treatment of civilians and US action to ensure its ally's compliance with international law were to become crucial. Internal US reviews of the so-called "Phoenix Program," through which the US transferred captured civilians to South Vietnamese authorities, by whom they were mistreated, tortured or killed, found that the Americans bore certain co-responsibility in these violations of international humanitarian law.

c. A Global Structural Change: The Decolonized World Struggles for Legitimacy

Between 1945 and 1965 the formal structure of world politics changed. By this I refer to the massive official attainment of independent statehood by formerly "non-self-governing" or colonial territories --the majority of which were African and Asian-- which had fought or negotiated their way out of dependent status from their (mostly but not exclusively European,) masters.[497] While perhaps less significant in the arena of Great Power conflict, this revolution in sovereignty was fundamental in international organizations where statehood came with a voice and a vote, the paramount example being the United Nations. A numerical summary succinctly captures the scope of change within the UN: In 1950 the organization had 60 member states, 5 of which had become independent since 1945; in 1960, out of 99 states 33 were newcomers; by 1967, membership had exploded to 123 states, 56 of them novices. Put in percentage terms, in 1950 new states represented 8.33% of the UN make-up, in 1960 33.3% and in 1967 45.5%.[498]

As expected, these states brought their own common concerns to the international rostrum, foremost among which were decolonization and economic aid and development.[499] Their ability to wield voting majorities in the UN General Assembly and other UN Commissions, for which they could ally with Socialist or Arab states, enabled them to get multiple resolutions and declarations passed without much difficulty. This was the case notably of the Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960, or of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965. As David Kay asserts:

> "One must view as an outstanding achievement of the new nations their successful forging between 1960 and 1964 of an international moral consensus against the continuation of Western colonialism. By 1964 the impropriety of any defense of the continued existence of colonialism was apparent to all except the retrograde regimes of southern Africa. Within the United Nations itself the new nations succeeded during this

[497] Not all the new states were former colonies, i.e. Israel.
[498] Data taken from David A. Kay, *The New Nations in the United Nations, 1960-1967* (Columbia University Press, 1970).
[499] Kay, *The New Nations in the United Nations, 1960-1967*, 45.

period in making their own uppermost concern, colonialism, the uppermost concern of the Organization."[500]

The debate about the origins and causes of decolonization continues to be a lively one, with different authors expound conflicting views on whether the "international moral consensus" to which Kay refers above can be held causally responsible for the demise of colonialism.[501] What is indisputable, however, is that newly-independent nations excelled at using the United Nations, and its General Assembly in particular, as a site of *collective legitimization* in service of their ethical crusade.[502] This concern was sometimes conveyed in the language of human rights, in what current scholarly assessments deem an effective but controversial reappropriation of the term. Reflecting in 1965 on this instrumentalization of human rights within the UN, Louis Henkin claimed that:

"the struggle to end colonialism… swallowed up the original purpose of cooperation for promotion of human rights. The gradual elimination of dependent areas and their admission to the UN meant an ever-increasing Assembly majority with some agreed attitudes, particularly a determination to extirpate the remnants of white colonialism and white discrimination. These attitudes impinged on the human rights program as well. Of course, they assured the sharpest scrutiny of human rights in dependent areas…. But it was championship of anticolonialism, designed to accelerate "self-determination." It was not an assertion of general standards which other nations, including the champions, were prepared to accept in their own countries."[503]

The strategic re-appropriation of human rights by new states began to formally encompass the realm of humanitarian law in 1968. Recall that the MacBride-authored Resolution on "Human Rights in Armed Conflict" was co-sponsored by Uganda and Jamaica, two states whose avowed interest at the time lay in denouncing anti-colonialism

---

[500] Kay, *The New Nations in the United Nations, 1960-1967*, 85.

[501] This debate is addressed in, among others, Robert H. Jackson, "The Weight of Ideas in Decolonization: Normative Change in International Relations," in *Ideas and Foreign Policy: Beliefs, Institutions and Political Change*, ed. Judith Goldstein and Robert O. Keohane (Cornell University Press, 1993); Neta C Crawford, *Argument and Change in World Politics* (New York: Cambridge University Press, 2002); Reus-Smit, "Struggles for Individual Rights and the Expansion of the International System."

[502] Inis Claude, "Collective Legitimization as a Political Function of the United Nations," *International Organization* 20, no. 3 (1966): 369.

[503] Louis Henkin, "The United Nations and Human Rights," *International Organization* 19, no. 3 (1965): 512.

and endorsing self-determination.[504] The Resolution was also adopted unanimously, with only Switzerland and South Vietnam abstaining.

The question could be raised: Why was there not more overt opposition, especially from Western powers, to a text that in addition to calls for improvements on the humanitarian legal front also featured obviously incendiary language? One possibility that after years of seeing similar resolutions being "steamrolled" at the General Assembly, Western states had grown *blasé* about this practice. US opposition to other resolutions at Tehran, particularly those that appeared to legitimate the right to violent self-determination, casts some doubt on this hypothesis.

An alternative is that instead of indifference, US acceptance of this resolution was due to diplomatic negligence. Recent historical scholarship endorses this possibility. Roland Burke, for instance, decries the fact in the 1968 Tehran Human Rights Conference "few states were willing to challenge the assault on traditional human rights from the confident, and numerically superior, Afro-Asian bloc. This was especially true for the US delegation, who did little to defend the legacy of Eleanor Roosevelt and the Universal Declaration. They chose instead to flatter the prejudices of their audience with prophylactic doses of self-criticism."[505] This attitude leads Burke, in agreement with influential diplomatic figures like Daniel Patrick Mohniyan, to denounce the 1968 Tehran Conference as "a key moment in the collapse of US human rights diplomacy."[506] This argument overlooks other plausible sources of US conduct in this regard, however. Rather than negligence, it may well have been that sensitive American domestic and foreign policy considerations, namely its still-thorny racial issues at home and an (ever

---

[504] Direct evidence exists for the Ugandan case. In a letter addressed written by that state's Minister of Foreign Affairs in response to MacBride's request for continued Ugandan sponsorship of the 1968 Tehran Resolution, the diplomat revealed that although his country had found it easy to support the text "because we too believe that the present unrevised Laws of War are hopelessly inadequate. Our immediate concern in this subject, however, lay in the situation prevailing in South Africa where minority racist and colonial regimes refuse to comply with the principles of the Universal Declaration of Human Rights. We believe that freedom fighters who are victims of these regimes should be protected under international law, and when imprisoned they should be treated as prisoners of war." Quoted in Suter, *An International Law of Guerilla Warfare: The Global Politics of Law-Making*, 51.

[505] Burke, *Decolonization and the Evolution of International Human Rights*, 103.

[506] Ibid.

more) troubled experience in Vietnam, increasingly prompted rhetorical restraint on the part of the US delegates. The nature of the speeches US head delegate Roy Wilkins made at Tehran supports this view, as noted by Burke, insofar as Wilkins "emphasized the great progress made in racial equality, and the steps being taken to grant economic and social rights in the United States."[507] At Tehran in 1968 the US seemed therefore more interested in deflecting criticism than in raising controversy, which explains the acclamation that Wilkins's "defensive posture" elicited in Washington.[508] Moreover, the archival evidence presented earlier on the US worries about Vietnam supports this view with regarding the concrete issue of revising existing humanitarian rules to better protect prisoners of war and civilian populations.

US rhetorical restraint raises a crucial theoretical point with regard to the effects of the public re-appropriation of human rights (and with it, humanitarian law) by an increasingly dominant group of new states succeeding in morally and legally legitimating their cause in international forums against Western, especially colonial, powers. In the words of Burke:

> "The sheer preponderance of Asian, Arab, and African states also made still further collapse in the Western position more likely. Comfortable majorities could now be assembled on questions of *apartheid* and colonialism without consulting the so-called West and Others Group, let alone gaining assent. Negative votes or abstentions became increasingly embarrassing in such a context, even if the languages proposed bordered on that deemed unacceptable. As Ambassador Meyer noted on the Tehran Conference's *apartheid* text, the US was willing to capitulate on "extreme African demands" simply to avoid the humiliation of joining a friendless set of state absentees. The ambassador advised the secretary of state that he had in 'mind the unfortunate impression which would be created if we were one of the few absentees.'"[509]

David Kay's systematic analysis of the number of negative votes cast by the US, the UK and France on issues of self-determination before and after the influx of the newly independent nations to the UN provides additional strong support for the above hypothesis. Kay's data showed "a steady, though somewhat irregular, decline in the percentage of negative vote cast by these three states commencing with the eleventh

[507] Ibid.
[508] Burke, *Decolonization and the Evolution of International Human Rights*, 104.
[509] Burke, *Decolonization and the Evolution of International Human Rights*, 108.

session in 1956," coinciding with the entry of new nations into the organization and their fierce campaigning for colonialism.[510] Kay goes further to conclude that "the records are replete with… cases in which France, the United Kingdom, and the United States have since 1956 either acquiesced in or supported anti-colonial resolutions far stronger than these three states voted against in earlier years."[511]

Growing rhetorical restraint on the part of Western states, exemplified in their abstention or perhaps even in their voting for otherwise unpalatable texts, may thus have been an instance of social coercion similar to what occurred in 1949 with Common Article 3 and to the political dynamics seen during the negotiation of the Additional Protocols in the 1970s, analyzed in the next chapter.[512]

Conclusion

This chapter has once again demonstrated the operation of a recurrent "impetus-creating" path to normative development in the area of international humanitarian law, consisting of "demonstration" atrocity effects and persistent (or renewed/multiplied) moral entrepreneurship.

This was the case, first, of the ICRC and the issue of internal troubles in the 1950s and 1960s. Quickly after the adoption of Common Article 3 in 1949, events on the ground in various situations of internal violence triggered renewed debates within the ICRC on how to address state reluctance to admitting the existence of "non-international conflict" but also how to tackle situations that did not plausibly rise to that level ("troubles" or disturbances, and tensions.) Given an expectation that states were unlikely to take up new legal commitments on these issues so soon after the revision of the Geneva Conventions, the ICRC summoned various dialogues with influential

[510] Kay, *The New Nations in the United Nations, 1960-1967*, 83.
[511] Kay, *The New Nations in the United Nations, 1960-1967*, 83.
[512] Keith Suter suggests two additional plausible reasons for the unanimity obtained by the Tehran Human Rights Resolution: 1) That states were ostensibly unaware of what the approved text implied, or that 2) They saw it as yet another resolution they might be able to brush off in the future. Suter, *An International Law of Guerilla Warfare: The Global Politics of Law-Making*, 34. I find the former implausible with respect to Western states, but the latter may get something right, which underlines the importance of sustained attention by the ICJ and the ICRC to moving the project forward.

international legal experts the aim of arriving at more expansive interpretations of CA3. This tactic, I have argued, resembles an *epistemic community* as defined in Chapter 1.

Generating progressive interpretations of existing law through meetings of legal experts seems to have had some policy and practical benefits for the ICRC, but ultimately it did not seem legitimize a move among states to create new humanitarian treaty rules, whether for internal or international conflicts. This finding was confirmed through the documentation of an additional episode of frustrated rule emergence, also built on the basis of prior consultations with experts (the Draft Rules.) Further, the demise of the Draft Rules suggested what appears to have been, at least at the time, another fundamental condition for triggering formal conversations about treaty revisions and development: piercing through the skepticism of important Western state gatekeepers. Western states' (especially NATO powers) desire for international humanitarian regulations of their conduct during hostilities and their use of certain "means and methods" of war (especially nuclear weapons but also aerial bombardment) was low or non-existent. The attitude of those powerful states effectively shut down the initiative in the late 1950s, confirming that states' risk aversion toward humanitarian normative expansion/emergence was not only perceived (as with internal troubles) but also real (as with the Draft Rules.) Finally, I argued that as a result of this frustrating experience --and though its interest and efforts did not subside,-- the attitude of the ICRC toward the idea of formal legal developments in both international and internal conflicts became more circumspect.

The second half of the chapter addressed the puzzle of why, despite the grim prospects for the emergence of new international humanitarian rules around the mid-1960s, states were soon engaging in official meetings precisely to that end. In particular, three key conditions combined to change the fate of the story and led to this striking outcome. First, renewed atrocities motivated a new non-state moral/legal entrepreneur, the International Commission of Jurists (ICJ) to press for the revisions of the law and to insert the issue within the United Nations General Assembly. Second, the ICJ's actions occurred at an auspicious moment during which the international system was expanding radically due to decolonization, swelling up the numbers of "new" states with an interest

in promoting self-determination and protecting freedom fighters waging wars of national liberation. This "revolution in sovereignty" drastically reduced the influence of the West within the UN and enabled the newly-decolonized majorities to achieve and propagate an international moral consensus around self-determination as a central human right (and its corollary, colonialism as an international crime.) The idea of revising humanitarian law to incorporate these new concerns was soon folded into the UN's agenda, at once giving it the political impulse it had lacked in previous years and seemingly driving Western -- especially colonial—powers to the international moral "wall." Finally, unrelated to these developments, the interests of another crucial actor had also transformed: a United States mired in an abuse-riddled conflict in Vietnam now sought at all costs to protect its soldiers suffering abuse in the hands of their Communist captors in North Vietnam. This change in American attitudes toward debates about the revision of humanitarian law completed a "trifecta" of conditions facilitating a new step of humanitarian norm emergence for both internal and international conflicts.

To be fair, it may be said that by 1968 not all states were perhaps equally motivated to engage in a new process of revisions, but that a majority comprising a key major power as well as the enthusiastic group of new states was on board. As we will see, although effective for opening the door to a new stage of norm development, the distance between the interests of different groups of states constituted a highly explosive cocktail. The moral entrepreneurs of the story (the ICJ and the ICRC) could not have imagined just how protracted and tense negotiations would be in the coming years.

Chapter 5 – A Diplomatic Revolution: The Making of the Additional Protocols to the Geneva Conventions (1968-1977)

"The facts of life in the society of states are however not as sovereignty bravado portrays them. Its rhetoric does not fit their reality… Even Titans can find their range of options to be disagreeably restricted."
Geoffrey Best, *War and Law Since 1945,* 75.

I. Introduction

The previous chapter outlined, in chronological sequence, the most important conditions and actors that helped to re-ignite the process of developing international humanitarian law around 1968, nearly two decades after the adoption of the Geneva Conventions in 1949. This process, anchored in the ICRC's persistent push for better legal protection for the victims of armed conflict and ably catalyzed by Sean MacBride of the ICJ, ended with a collective sigh of relief nearly ten years later, in June 1977, with the adoption by consensus of two Additional Protocols to the Conventions of 1949 (hereafter referred to as First Protocol and Second Protocol.) The First Protocol regulates international conflicts and wars of national liberation, and makes substantive additions in areas where the Conventions were lacking, notably in the controversial field of the use of force and the respect owed to civilian persons and objects caught in the midst of armed attacks.[513] For its part, the Second Protocol is a much shorter treaty that, while complementing the principles included decades earlier in Common Article 3, for example with respect to the civilian population, civilian objects, or medical transports, omits the detailed guarantees of the First Protocol vis-à-vis prisoners of war and covers only internal conflicts bearing the characteristics of (high-level) civil wars.

The sigh of relief at the end of the Diplomatic Conference was not because it had "gone well" for all parties involved, but rather because it had ended at all. As this chapter details, the drafting and negotiation of the Additional Protocols, lasting over six years, were filled with acrimony, uncertainty and tension from beginning to end. This was true in particular for some very powerful states sitting at the table, including the United States,

[513] The First Protocol in fact enshrined many of the precautions and limits to warfare rejected by states twenty years earlier when the Draft Rules were abandoned following the Nineteenth International Conference of the Red Cross in 1957, as seen in the previous chapter.

Canada and most of Western Europe, which in addition to their own often frustrating efforts at private coordination, repeatedly fought and lost public battles against majority coalitions formed primarily by African, Asian, Socialist and Arab countries. The chief controversy during the CDDH (the French acronym for the "Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts," its official English name) was tied to the insertion of a peculiar provision in the most important Article of the First Protocol, which set out the treaty's scope of application. In addition to conflicts between states, paragraph 4 of the First Article proclaimed that the Protocol would cover "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."[514]

With this provision, signatory states admitted in politically quite charged (from the Western perspective quite offensive) terms, that a binding multilateral humanitarian agreement would treat as *international* certain conflict types that until then had been considered eminently internal. This "upgrading" of anti-colonial, anti-racist and anti-"alien occupation" conflicts was not merely nominal. In addition to Article 1, Article 44 of the same Protocol announced that even if combatants failed to meet the requirement of distinguishing themselves from the civilian population, they would nevertheless be given protections "equivalent in all respects to those accorded to prisoners of war" by the Prisoners of War Convention (from 1949) and by the First Protocol itself.[515]

These two provisions produced a veritable scandal when first raised during negotiations. From the perspective of newly-decolonized countries and Arab nations supporting Palestine against Israel, they represented legitimate aspirations, already enshrined in important legal documents negotiated under the aegis of the United Nations, including that organization's Charter, the Declaration on Principles of International Law

---

[514] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977,* available at http://www.icrc.org/ihl.nsf/full/470?opendocument (Consulted on August 15, 2013.)

[515] During the drafting of the First Protocol the Article on POWs was numbered 42. The final treaty reorganized the text and it thus became Article 44. In this chapter I refer to it as Article 42 in keeping with the drafting history.

concerning Friendly Relations and Co-operation among States (from 1970,) and the International Covenant on Civil and Political Rights (ICCPR, finalized in 1966 but not in force until 1976.) After waging ruthless wars of liberation against their Western colonial oppressors, some of these new states had mobilized effectively in international forums to highlight the moral bankruptcy of colonialism, the urgent right to self-determination, and the virtuousness of freedom fighters. The Socialist bloc, if for other reasons, echoed these sentiments. With few exceptions, however, Western states found the explicit inclusion of national liberation conflicts, and the privileging of the "irregular" combatants fighting them, to be dangerously regressive in a body of law long agnostic to political motivations. Some Western delegations considered these moves as no less than fatal affronts to the purported objectivity and universality of humanitarian law, reminiscent of outmoded "just war" doctrines. Accordingly, when the Committee discussing Article 1 in 1974 first took a vote on the controversial language, Western states voiced their horror and voted *en masse* against it. Unable to contain the majority, however, they lost the battle.[516] Yet, instead of walking out the Conference in disgust, Western states remained at the table and a few years later in 1977, when both Article 1 and 42 were put to a vote in Plenary for their final inclusion in First Protocol, only one state (Israel) voted against them. Western states either supported them or abstained. Why?

The Second Protocol on non-international conflicts also radically differed from initial aspirations, not only those of the ICRC but also of powerful states like United States and Canada. While in 1971-2 the ICRC proposed a draft treaty offering ample humanitarian treatment to combatants and non-combatants in internal conflicts, roughly defined as victim-producing, organized armed hostile actions against established authorities, the final negotiated Second Protocol was limited only to conflicts fulfilling a far more stringent set of conditions, namely those occurring "in the territory of a High Contracting

[516] The vote, studied later in detail, was 70-21-13. I use the term "Western" to refer to North America and Western Europe. This choice is guided by protagonist states' own use of the word. As we will see, at times the Western Group extended to Australia, New Zealand, and even Turkey and Japan. I identify those occasions whenever possible. Latin American states, though located in the Western Hemisphere, usually constituted a separate, semi-cohesive group during discussions about humanitarian law.

Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."[517] These requisites were more demanding than those set out in Common Article 3, signed nearly three decades prior. What happened?

These vignettes capture the two sets of empirical puzzles I take up in this chapter: 1) Why and how were provisions privileging wars of national liberation and their combatants inserted into the First Protocol? More to the point, if many powerful Western countries were so viscerally opposed to their inclusion in a binding humanitarian covenant, why did they not consistently vote against them? And when faced with failure, why did they not pull out of the Conference altogether? 2) Why and how did the Second Protocol transform from a broad instrument intended to develop CA3 to one only applicable to civil wars of a very high level? In addition to these central puzzles, this chapter also addresses the critical question of how and to what extent the status, rights and responsibilities of non-state armed groups (national liberation movements as well as "traditional" insurgents or rebels) under international humanitarian law were considered during the 1970s negotiations process—a topic of current scholarly relevance on which I expand in the next and final chapter.

Consistent with the argument presented in Chapter 3 regarding the making of Common Article 3, I argue that Western states' admission of wars of national liberation in the scope of the First Protocol was an effect of *social coercion*. In 1977, the states opposing this legal innovation, though powerful, were in the voting minority. They tried but were unable to persuade a mixed coalition of states that held the mightily legitimate trump cards of self-determination and the fight against racism and occupation. Numerically and politically disabled, Western states reasoned they could not walk out of

[517] The first definition paraphrases the earliest ICRC proposal from 1971 presented to governmental experts at the very first formal consultation that year. The second comes from the actual Second Protocol. See: *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977*. See online at: http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument (Consulted on August 15, 2013.)

a humanitarian negotiation, fearing not only public opprobrium at home and abroad but also the legal "damage" done to a cherished body of international law. Placed between a rock and a hard place, Western states opted for accommodating to the majority view while strategically seeking to "remedy" the situation in private by making the language of the rules indeterminate in certain key places, or by inserting additional articles that lowered the likelihood of the Protocol's application to such wars in the future. In other words: although forced to acquiesce to the opposing coalition's social pressure, Western states covertly "pushed back" in the 1970s (as the UK and France had in 1949,) hoping to make the most of a profoundly unfavorable situation. With respect to the provision granting generous prisoner of war treatment to captured freedom fighters in national liberation wars, I argue that social coercion between groups of states was strongly complemented by the American delegation's progressive interest in establishing humane treatment for *all* prisoners of war (a product of US experience in Vietnam, as outlined in the previous chapter,) and facilitated by the influence of the ICRC.

The story of the Second Protocol is also one of pressured compromise between clashing groups of entrepreneurs with asymmetric influence. In the 1970s, with the frailty of post-colonial states in Africa and Asia, the proliferation of repressive military governments in Latin America, the remains of Portuguese, French and British colonialism, as well as situations of political conflict and terrorism in parts of Western and Eastern Europe, the odds were strongly stacked against the emergence of generous humanitarian rules for internal conflicts. Although these states shared little in common in ideological terms, given the frailty of their domestic security situation they coalesced in their aggressive risk-aversion and in their general defense of national sovereignty and non-intervention. Committed to salvaging at least *some* humanitarian safeguards for the most prevalent type of violence around the world (internal conflict,) pragmatic delegates reached out to moderates in the opposing coalition and managed to strike a deal which, while less encompassing than wished by the most humanitarian in the room, nevertheless added substantive protections to those included in CA3.

Finally, in this chapter as in previous ones, I show that in the 1970s Western states' anxiety with the idea of assigning rights and responsibilities to armed non-state actors

(especially national liberation movements, but also "traditional" insurgents) had to do with the status and material consequences that might ensue from it, particularly the risk of granting them a veneer of legitimacy accompanied by humanitarian protections that strengthened their struggle. The opposing majority coalition made it clear that these were the goals they sought with regard to national liberation groups, feeding the fears of the West. Compounding Western states' political suspicion was an ingrained conviction that the will and the capacity of most armed non-state actors to apply international humanitarian norms were utterly weak, such that attempts to afford them responsibilities and entitlements would prove foolish and self-defeating. And although Western states -- very grudgingly-- admitted the presence of various liberation groups at the Diplomatic Conference, they did so more as a momentary, pressured concession than in the spirit of truly negotiating with them. Liberation groups' seeming disinterest in the actual proceedings of the Conference ultimately added to the distrust and sealed the fate of the First Protocol as an instrument only nominally equipped to either regulate or protect non-state groups waging national liberation wars.

As in previous chapters, these findings both contradict and complement existing theoretical arguments about the process of international rule-making and norm emergence. They reconfirm that international humanitarian negotiations are not instances of simple rational coordination between states, but social contests in which concerns both about national (security) interests, moral values and social reputation clash and interact in complex ways. In so doing, this chapter once more collapses facile or sharp distinctions between "rational" and "social" models of action, showing how these in fact intertwine to explain international outcomes. As stated earlier, this chapter further demonstrates the explanatory power of *social coercion* to account for some of the most important political dynamics and legal outcomes observed in these negotiations. Finally, this chapter also re-confirms the finding that legitimacy plays a crucial role for states participating in real-life international negotiations.

The chapter is organized as follows: The first section resumes where we had left off historically, describing how the reaffirmation and revision of humanitarian law became an active subject of debate within the UN and later in ICRC-facilitated forums toward the

late 1960s. It seeks to prime readers for the complex issues that would surface during the official pre-negotiation phase, commonly known in international law as the *travaux préparatoires*. The second section clarifies the core dilemmas states faced prior to the diplomatic negotiations, zooming into the multiple discussions held by Western states, (with the UK and the US at the helm) as they attempted to coordinate their preferences. The density of debates among Western states and their failure to arrive at common strategies in the pre-negotiation phase, even among long-standing ideological and military allies suggests that this process is far more fraught than rational institutionalist theories lead to believe.[518] This section also captures another recurring finding of this dissertation, namely how states' interests often combine moral and utilitarian elements, and how they are dynamically constituted by their domestic experiences and molded by international interaction. The next section continues this task but delves into the actual negotiation phase of the Protocols over a period of four years, featuring not only the proceedings and outcomes of the four sessions of Diplomatic Conference in Geneva but also the several additional coordination efforts within the Western Group in London, Washington and Bonn. It is this section where I demonstrate the operation of social coercion. The conclusion summarizes the findings and brings the conversation into the final chapter.

II. Resuming the Road to the Protocols

As seen in Chapter 4, in the spring of 1968 the ICJ successfully inserted within the UN an item contemplating the revision of humanitarian law and the laws of war under the umbrella of "human rights in armed conflict." The passing of a resolution at a special conference promised nothing, however. Sean MacBride knew that unless the United Nations General Assembly (UNGA) seized on the subject and instructed the United Nations Secretary-General (UNSG) to pursue the work outlined, the initiative might remain dead at birth. Thus, as Keith Suter explains, "for much of 1968 MacBride was at

[518] The assumption of some research on IL/IR along rationalist lines appears to be that preference-coordination among ideological/political allies is either relatively uncomplicated or that it can eventually be overcome. See Koremenos and Hong 2010; Koremenos 2013. The story told here demonstrates the opposite on both counts.

the centre of a network of frenetic correspondence, with him as the co-coordinator of the five governments [Uganda, Jamaica, India, Czechoslovakia, and Egypt, then United Arab Republic,] as well as trying to get U Thant and Marc Schreiber [Director of the UN Commission on Human Rights] more actively involved in this subject, trying to win the support of other governments, and trying to get NGOs to pressure their governments to support the Tehran resolution when it came before the 1968 General Assembly".[519] In April 1968, even before the Tehran Conference ended, UNSG U Thant replied positively, saying he had been in close touch with the ICRC on this issue and that he only wished governments would take an interest and support such difficult work.[520] MacBride responded with gratitude and made himself available to assist in accomplishing the operative portions of the resolution.[521] In the meantime, the ICRC seized on the opportunity created by the Tehran resolution and contacted U Thant in September 1968 to remind him that its work on the subject was "very similar" to the studies with which his office had been entrusted, and that it was prepared to help.[522]

With this note, the ICRC presented the UN with an offer it could not refuse, that is, with years of experience, research and reflection UN lawyers could hardly hope to attain on their own in a short period of time.[523] In October 1968, the ICRC Director Claude Pilloud traveled to New York to follow the UNGA discussions on the matter and managed to persuade the sponsoring governments to incorporate the principles proclaimed by the 1965 International Red Cross resolution in a text for presentation to states at that year's UNGA sessions. India introduced the draft resolution, which was co-

---

[519] Suter, *An International Law of Guerilla Warfare: The Global Politics of Law-Making*, 50.

[520] U Thant, Secretary-General, United Nations, Letter to Séan McBride, Secretary-General, International Commission of Jurists, April 25, 1968. On file with author.

[521] Séan McBride, Secretary-General, International Commission of Jurists, Letter to U Thant, Secretary-General, United Nations, May 17, 1968. On file with author.

[522] ICRC*, Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts, report submitted by the International Commission of the Red Cross, XXI International Conference of the Red Cross, Istanbul, September 1969,* 18, 23 (Reaffirmation and Development 1969 hereonafter.) ICRC Library, Geneva.

[523] Although the office of the UNSG eventually hired consultants for the preparation of the mandated reports, these exchanges signaled the beginning of the ICRC's "re-taking" over the project of revisions.

sponsored by a mix of newly independent, Socialist and Scandinavian states.[524] The text did not raise much controversy and was adopted unanimously both in Committee and in Plenary.[525] Unlike the original Tehran resolution (and likely at the prompting of the ICRC,) this one did not include mention of "minority and racist regimes," although it still referred to "the need for additional humanitarian international conventions or for other appropriate legal instruments to ensure the better protection of civilians, prisoners and combatants in all armed conflicts."[526] With regards to future action, this UNGA 1968 resolution was in keeping with the Tehran text.

---

[524] Afghanistan, Denmark, Finland, India, Indonesia, Iraq, Jamaica, Jordan, Morocco, Norway, Philippines, Sweden, Uganda, United Arab Republic (Egypt,) Yugoslavia and Zambia. The Indian delegate rightly presented this mix as "a cross-section of the membership of the United Nations" representing "the widespread concern felt throughout the world for the preservation of human rights in armed conflict." Suter, *An International Law of Guerilla Warfare: The Global Politics of Law-Making*, 53.

[525] The full text is as follows: "The General Assembly, recognizing the necessity of applying basic humanitarian principles in all armed conflicts; Taking note of resolution XXIII on human rights in armed conflicts, adopted on 12 May 1968 by the International Conference on Human Rights; affirming that the provisions of that resolution need to be implemented effectively as soon as possible 1. Affirms resolution XXVIII of the XXth International Conference of the Red Cross held at Vienna in 1965, which laid down, inter alia, the following principles for observance by all governmental and other authorities responsible for action in armed conflicts: (a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;(b) That it is prohibited to launch attacks against the civilian populations as such; (c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible; 2. Invites the Secretary-General, in consultation with the International Committee of the Red Cross and other appropriate international organizations, to study: (a) Steps which could be taken to secure the better application of existing humanitarian international conventions and rules in all armed conflicts; (b) The need for additional humanitarian international conventions or for other appropriate legal instruments to ensure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare; 3. Requests the Secretary-General to take all other necessary steps to give effect to the provisions of the present resolution and to report to the General Assembly at its twenty-fourth session on the steps he has taken; 4. Further requests Member States to extend all possible assistance to the Secretary-General in the preparation of the study requested in paragraph 2 above; 5. Calls upon all States which have not yet done so to become parties to the Hague Conventions of 1899 and 1907, the Geneva Protocol of 1925 and the Geneva Conventions of 1949.

[526] Suter, *An International Law of Guerilla Warfare: The Global Politics of Law-Making*, 54. Interestingly, this Resolution also dropped any direct reference to the limitation of nuclear weapons, since as the ICRC admitted it "raised difficulties" and "could be interpreted as not categorically forbidding all employment of nuclear weapons." This shows the ICRC had learned from past "mistakes" and internalized Western (NATO) distaste for this idea after the Draft Rules

The ICRC quickly convened the announced meeting of private experts in February 24-28, 1969.[527] The meeting touched on every substantive aspect of the law needing revision: the use of weapons and means of war; the protection of civilian populations against hostilities and their consequences; behavior between combatants with a view to limiting unnecessary suffering; and enforcement issues and mechanisms.[528] The ICRC also asked experts to review the types of armed conflicts to which these rules should apply, including not only international and non-international conflict but "hostilities conducted by the United Nations, guerrilla, and finally, by extension, situations of internal disturbance and tensions." Importantly, the ICRC framed the meeting to be exclusively about *revisions* to the law, setting aside questions about the application of existing rules, which it deemed so comprehensive to merit separate treatment.[529]

The outcome of the February 1969 experts meeting bears some importance because it formed the basis of the first substantive document to which states would react. The ICRC was straightforward about the need to pay special attention to non-international conflicts both due to their prevalence in recent decades and the few humanitarian rules devoted to them.[530] Two crucial gaps were singled out in Common Article 3 (CA3): a lack of clear definitions and general normative (substantive) underdevelopment. The ICRC urged that

---

fiasco. In addition, it suggests that talk about "limiting" (instead of fully banning) nuclear weapons was not acceptable to non-Western states. The wisest decision was probably to extirpate it from these discussions. The nuclear issue, however, would prove to be a recurrent specter with lasting consequences for the ratification of the 1977 Additional Protocols.

[527] In attendance was a combination of experts from Western, newly decolonized, Third World and Socialist states: General A. Beaufre, France; M. Belaouane, President of the Algerian Red Crescent; Mr. A Buchan, Director for the Institute of Strategic Studies, UK; General E.L.M. Burns, Canada; Prof. B. Graefrath, East Germany; Ambassador E. Hambro, Norway; Prof. R. Hingorani, India; Judge Keba M'Baye, Senegal; Ambassador L.E. Makonnen, Ethiopia; General A.E. Martola, Finland; Senator A. Matine-Daftary, Iran; Séan MacBride, Ireland; Prof. S. Meray, Turkey; Prof. J. Patrnogic, Yugoslavia; Prof. B. Roeling, Netherlands; Marc Schreiber, UN Commission of Human Rights; Prof. R. Taoka, Japan; Baron C.F. von Weizsaecker, West Germany. Three experts were consulted in writing: Judge Christopher Cole, Sierra Leone; Ambassador E. García-Sayan, Peru and Prof. Nagendra Singh, India. See ICRC, *Reaffirmation and Development* 1969, 25-26. ICRC Library, Geneva.

[528] ICRC, *Reaffirmation and Development* 1969, 32. ICRC Library, Geneva. In the end, due to time constraints, the experts focused on the specific issues of: weapons, protection of civilians, non-international conflicts, and guerrilla warfare.

[529] ICRC, *Reaffirmation and Development* 1969, 21. ICRC Library, Geneva.

[530] ICRC, *Reaffirmation and Development* 1969, 98. ICRC Library, Geneva.

it should not be up to states to decide when CA3 was triggered: rather, the article ought to apply whenever armed forces produced hostilities.[531] This definition echoed the "progressive" interpretation experts had honed through the various commissions and dialogues held during the 1950s and 1960s, as discussed in Chapter 4. The experts at this meeting agreed, claiming that "the conditions to be fulfilled by a non-international conflict to be considered as such should not be too restrictive."[532] They also concurred with the ICRC's idea that if a foreign party intervened to support any party to an internal conflict, the situation became international and the whole body of humanitarian law was applicable.[533] They were less certain, however, about whether international humanitarian law could regulate situations of "troubles" or "disturbances," where states might be particularly averse to external intromission.[534] Other solutions could perhaps be sought in those contexts via explicit agreements by governments allowing ICRC intervention, through resort to human rights law, or via UN resolutions requesting the ICRC to act which governments would accept. (A "complementarity" approach between humanitarian law and human rights is prescient of current debates on the interaction between the two legal regimes, as the next chapter will explain.)

The ICRC also argued that non-state groups should be bound by the text and seek to follow its considerations.[535] Controversy ensued on the issue of whether wars of national liberation constituted international conflicts or internal ones, but unable to agree, experts set it aside momentarily.[536] Although the ICRC report claimed the voices favoring

---

[531] The ICRC's own conclusions and proposals on the subject of non-international conflict were presented at the International Red Cross Conference at Istanbul in two separate documents, one on the general reaffirmation and development of the law and another on non-international conflicts specifically. This highlighted already the political challenges in legally splitting international and internal conflicts, at a time when categories were increasingly confused and resisted. See *XXI International Conference of the Red Cross, Report, Istanbul, September 6-13, 1969*. ICRC Library, Geneva. Besides the general Conference report, the associated ICRC submissions are also housed in the ICRC Library in Geneva.

[532] ICRC, *Reaffirmation and Development* 1969, 100. ICRC Library, Geneva.

[533] ICRC, *Reaffirmation and Development* 1969, 101. ICRC Library, Geneva.

[534] ICRC, *Reaffirmation and Development* 1969, 110. ICRC Library, Geneva..

[535] One idea that the ICRC circulated at the time was to draft a model agreement which parties to the conflict might sign on an *ad hoc* basis. CA3 encouraged this but provided no specific template, something that the ICRC thought should be remedied.

[536] ICRC, *Reaffirmation and Development* 1969, 102. ICRC Library, Geneva.

national liberation movements were in the minority, the document bristled with examples of the tension between the wish to extend humanitarian protections to these fighters and their stated inability (or the lack of military realism in asking them) to observe basic restraint. Some experts argued, for instance, that to compel rebels to respect the rules of war from the outset of their resistance "would sometimes deprive them of means of action." Others suggested that "no attempt at liberation had the slightest chance of success unless it were backed by the civilian population," making distinction between combatants and non-combatants particularly difficult.[537] These opinions offered a hint of the hurdles to be continuously faced in the coming years, as detailed below.

In the end, the ICRC dared to draw only three general conclusions from this debate: the conditions laid down in Article 4 of the Third Geneva Convention (created to protect partisans in the image of the anti-Nazi resistors during WWII) should be interpreted "as broadly as possible when the guerrillas respect fundamental humanitarian principles in combat." Second, prisoners on either side should be treated humanely. Third, terrorism should be clearly forbidden when inflicted indiscriminately against the civilian population.[538]

As the above illustrates, the meeting of experts in February 1969 did not resolve many of the thorniest issues; indeed, as seen previous chapters, experts attending these meetings acted on their private capacity and hence could not "make" positive law even if they managed to come to a consensus. That privilege remained restricted to government delegations in the context of "plenipotentiary" Diplomatic Conferences. This informal ICRC-convened meeting, however, offered a useful exercise for laying out the stakes of the upcoming debates. Procedurally, the report left it up to states to decide how the process would unveil and who would steer it, but by highlighting its long tradition and unique neutral character as well as its ideal position for facilitating the preparatory work, the ICRC diplomatically marked it its territory. On substance, the report claimed that while the ICRC would not lead the way on nuclear issues which were the providence of

[537] ICRC, *Reaffirmation and Development* 1969, 103. ICRC Library, Geneva.
[538] ICRC, *Reaffirmation and Development* 1969, 121. ICRC Library, Geneva. Tensions remained, since this phrasing implied that *some* acts of terrorism might still be valid.

the UN, "as regards the other subjects to be studied, in particular the conduct of hostilities or those applying to internal wars, these have been considered by the ICRC for a long time past."[539] (This was a thinly-veiled reference to the Draft Rules.) Therefore, a certain division of labor between the two organizations seems to have been worked out by 1969.

States had two opportunities to begin shaping and voicing their views more clearly that same year. The first and most important of these, already mentioned, was the XXI International Red Cross Conference that took place in Istanbul in September 6-13. This Conference, which gathered participants from nearly a hundred countries, unanimously approved the ICRC reports on the revisions of the law and urged the organization to continue studying and acting quickly toward the drafting of new instruments in dialogue with governmental experts and the UN. The Swiss delegation supported the idea that the ICRC should handle the revisions process and offered to convene a Diplomatic Conference when the time was appropriate. The Algerian Red Crescent, however, raised some hackles when it introduced a new resolution (XVIII) asking the Conference and the ICRC to pay special attention to combatants and members of resistance movements in non-international conflict, urging that they be given treatment similar to prisoners of war. The Danish and Swedish Red Crosses later amended the Algerian resolution, and a joint draft was approved in Commission and in Plenary, though with a vote of 97 in favor, 22 against, and 11 abstentions, its adoption was far from unanimous.[540]

The second forum for discussion was the 1969 UNGA Session in November. This meeting saw the very first UNSG report on "Human Rights in Armed Conflict," which consisted of a lengthy review of the existing law and the gaps within it, most of them

---

[539] ICRC, *Reaffirmation and Development* 1969, 28. ICRC Library, Geneva. On the nuclear issue, the ICRC warned that it "take into account the work proceeding on the subject in the United Nations" but reserved "the possibility of making its voice heard on these matters." The division was clear: it wished to leave the political work to the UN, but this would not mean giving up its moral/institutional authority.

[540] *XXI International Conference of the Red Cross, Report, Istanbul, September 6-13, 1969,* 77-79. ICRC Library. The initial vote in Commission was 50 in favor, 31 against, 19 abstentions. US archival documents suggest voices for were mainly Socialist, African and Asian votes, while those against came from Western delegations. See handwritten note, "Resolution No. 9, Protection of Victims of International Armed Conflicts," in folder entitled "ICRC Conference on Humanitarian Law (1972)," POW/Civilian Information Center, Confidential Records, Box 11, P 1, RG 389, NACP.

already made evident in the ICRC reports discussed earlier. Like those documents, the UNSG's report referenced the legal inadequacies and tensions regarding guerrilla warfare and national liberation movements, suggesting to increase the protection of captured freedom fighters by granting them prisoner of war-like treatment. The crosspollination between the ICRC and the UNSG reports was evident; the latter in fact referenced the former, confirming that for its preparation the UN remained in contact with the ICRC and with the experts it had consulted for its own meeting in February.[541] The UNSG report, however, was circulated only when the UNGA 1969 Session was far advanced and thus relatively few states had a chance to react. The UN Third Committee, where the topic was debated, prepared a draft resolution adopted at the UNGA on December 16 requesting the UNSG to continue working on this subject with particular attention the protection of civilians and wars of national liberation, and to submit another report a year later.[542] Importantly, two of the experts directly involved in the research and writing of the 1969 and 1970 UN reports on human rights in armed conflict, Hans Longva and Georges Abi-Saab, would become key protagonists as government delegates (for Norway and Egypt, respectively) during the preparatory process and the actual diplomatic negotiation of the Additional Protocols. Both Longva and Abi-Saab believed that national liberation struggles were international, (not internal,) conflicts, and that freedom fighters deserved enhanced protection as prisoners of war when captured. Not surprisingly, as seen here and later, the UN reports echoed these controversial concerns approvingly.

Public debate at Istanbul and the 1969 UNGA session was slim and as such it is difficult to infer the position of every state attending these early Conferences. It is clear that the bulk of work on drafting resolutions to move the item forward was taken up by a mix of newly decolonized and Socialist states, with neutral and Western states in the minority. The resolution approved at the XXI International Red Cross Conference in Istanbul, for instance, was coordinated by an *adhoc* Committee composed by Algeria,

---

[541] United Nations General Assembly, *Respect for Human Rights in Armed Conflicts, Report of the Secretary-General*, UN Doc. A/7720, 1969, 8.

[542] The unrecorded vote was 91 for and 21 against. Suter claims that the resolution "was adopted without debate or explanation of vote." Suter, *An International Law of Guerilla Warfare: The Global Politics of Law-Making*, 59.

Bulgaria, Upper Volta, Czechoslovakia, East Germany, Poland, Netherlands, Sweden, Switzerland, Canada and Yugoslavia. In addition, the Commission report noted that many (likely non-Western) delegations "warmly approved the ICRC's traditional mission of protecting war victims to include the safeguarding of the human person, these two questions being inseparable under the threat of the use of new weapons."[543] Moreover, the Yugoslavian and Romanian delegations explicitly supported the idea of drawing up new legal instruments related to the conduct of hostilities, while the Algerian Red Crescent, as said earlier, presented its own text on improved treatment for members of liberation movements.

It is not difficult to see why certain non-Western delegations wished to play such a prominent role in steering debate toward expanding the law to conflicts of self-determination. As shown, Algeria was noteworthy in this regard. Having waged (and won) a brutal war of liberation against the French a mere decade earlier explains why this country's representatives held such an ardent interest in securing protections for fellow, still active freedom fighters across Africa and Asia. The critical efforts the Algerians had made years prior to legitimize their own struggle, especially within the UN, have been much cited and recently well documented.[544] Algerians' sophisticated legal and political work has also been directly connected to the process of revising humanitarian law in the 1970s, though more focused archival research remains a task for the future.[545]

For their part and with few exceptions, until the turn of the decade major Western states seemed to be operating on the defensive, reacting with veiled disapproval (that is, abstaining, or voting against <u>when not on the record</u>) to others' initiatives. Government archives reveal this to be the case of waning colonial powers like France and the United Kingdom, both of which recognized the importance of the subject and the presence of

---

[543] *XXI International Conference of the Red Cross, Report, Istanbul, September 6-13, 1969*, 71. ICRC Library, Geneva.

[544] Mohammed Bedjaoui, *Law and the Algerian Revolution* (Publications of the International Associations of Democratic Lawyers, 1961); Matthew Connelly, *A Diplomatic Revolution: Algeria's Fight for Independence and the Origins of the Post-Cold War Era* (Oxford University Press, 2003).

[545] Kinsella, *The Image Before the Weapon: A Critical History of the Distinction Between Combatant and Civilian*, chap. 6.

gaps in the law (though frowning upon ideas favoring national liberation movements,) yet who had not yet really begun to craft specific proposals or views toward revision.[546] It was for example not until August 1970 that an officer of the British Foreign and Commonwealth Office (FCO) expressly recognized in an internal memo,

> "that the movement for a revision of the Laws of War is now very strong. We can no longer, therefore, rely on our former position, namely that, if existing law of War were properly observed, there would be no need for any revision… We are now trying to formulate specific proposals for changes in the Geneva Conventions."[547]

Archival evidence also reveals that although in 1969 the official American position continued to stress the better implementation of existing regulation, there was now a clear willingness to extend *some* of the rules, especially those improving the treatment of captured combatants and the protection of civilian populations to internal conflicts. As illustrated in the previous chapter and elaborated further below, the experience of atrocity in Vietnam had a transformative effect on US interests.[548] For instance, American instructions for the XXI International Red Cross Conference in Istanbul authorized the delegation to accept and strongly support the extension to internal conflicts of Article 23 of the Fourth Geneva Conventions limiting the blockade of essential goods to civilian population, a practice that had caused thousands of civilian victims in the Biafran secessionist conflict in Nigeria just two years prior.[549] The general attitude of the US at

---

[546] TNA: PRO DEFE 24/1748; Nations-Unies et Organisations Internationales (NUOI) 1970-1973, Carton 1296, Cote S. 50.3.8.4.6, Diplomatic Archives, La Courneuve, France (hereonafter NUOI 1970-1973, French Archives.)

[547] TNA: PRO DEFE 24/1748.

[548] As confirmed not only in private documents but also publicly by the US Head of Delegation during the revision of the Conventions, George Aldrich. See George H. Aldrich, "Some Reflections on the Origins of the 1977 Geneva Protocols," in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ed. Christopher Swinarski (Springer, 1984), 1143.

[549] See United States Position Paper, Application of Article 23 to Internal Conflicts, XXIst International Conference of the Red Cross, Istanbul, Turkey, September 6-13, 1969, in folder entitled "International Humanitarian Law Commission (1965,)" POW/Civilian Information Center, Confidential Records, Box 25, P1, RG 389, NACP.

this time was to seek an extension or interpretation the Conventions as applicable to *all* armed conflicts, not only international ones.[550]

Archival evidence also confirms, however, that sections of the US administration, particularly within Department of Defense (DoD,) continued to think in 1969 that the ICRC should not manage debates on the means and methods of warfare, considered separate "law-of-war" matters appropriate for governments or other forums like the UN to address.[551] This was an older concern, which as we saw in the last chapter successfully spelled the demise of the Draft Rules in the late 1950s. Yet within the responsible US bureaucracies (DoD and DoS, mainly,) weapons-related concerns now seemed to be slowly decoupling from other aspects of humanitarian law, preventing a possible new norm emergence "failure." Evidence of this comes in the fact that the Defense and State Departments agreed that efforts should be made to improve Common Article 3. A State Department memo instructed the US delegation to the ICRC Istanbul Conference in 1969 to

> "support a resolution calling for further consideration of strengthening the protection afforded to prisoners under Article 3 of the Convention. The [ICRC] proposals do not purport to change the legal status of such prisoners and as such should not really be objectionable to established governments. The intent is to substitute prisoner of war [POW] treatment for the minimum guarantees for POW treatment in international conflicts… while at the same time not extending prisoner of war treatment to, for example, individuals who carry isolated terrorist activities… In the present conflict in Vietnam, the [Government of Vietnam] GVN and its allies, have as a matter of policy, given prisoner of war status to many Vietcong soldiers who would not otherwise qualify for POW status under Article 4. The United States has found this to be in its national interest and, therefore, could support a proposal calling for further consideration of these issues."[552]

---

[550] Memorandum for Mr. Charles W. Havens III, Special Advisor (POW Affairs,) OASD/ISA, 22 August 1969 in folder entitled "Humanitarian Laws of War/Draft Position Paper US Delegation to ICRC Istanbul (1969)" Box 25, P1, RG 389, NACP.

[551] Memorandum for Mr. Charles W. Havens III, Special Advisor (POW Affairs,) OASD/ISA, 22 August 1969 in folder entitled "Humanitarian Laws of War/Draft Position Paper US Delegation to ICRC Istanbul (1969)" Box 25, P1, RG 389, NACP.

[552] United States Position Paper, Protection of Victims of Non-International Conflicts, XXIst International Conference of the Red Cross, Istanbul, Turkey, September 6-13, 1969, in folder entitled "Humanitarian Laws of War/Draft Position Paper US Delegation to ICRC Istanbul (1969)" Box 25, P1, RG 389, NACP. Although the Defense Department claimed to be generously applying POW protections to the captured Vietcong fighters in Vietnam, it insisted that a

The US had in fact since 1967 conceded prisoner of war status to all detainees in Vietnam, including Vietcong fighters, through the stewardship of the ICRC.[553] But beyond prisoner treatment, the Defense Department had additional concerns. Another internal memo pointed out that what the US had not applied "but probably should have… is a liberal interpretation of civilian internee status under the IV (Civilian) Convention, an action which might have resulted in avoiding GVN executions… Therefore it is recommended that the United States restrict itself to generic support of a liberal interpretation of the Geneva Conventions, with strong support for the proscription of guerrilla terrorism… A protocol which would modify article 3 toward these ends would be advantageous."[554] These documents reveal another important aspect: the US did not wish to "amend" the Geneva Conventions themselves for fear of a massive watering down at the behest of new states (this was a "Pandora's Box," in the words of the State

---

distinction should nevertheless be drawn between legitimate acts of guerrilla warfare and those of "pure terrorism" (i.e. those indiscriminately directed against the civilian population.)

[553] David P. Forsythe, *The Politics of Prisoner Abuse: The United States and Enemy Prisoners After 9/11* (Cambridge University Press, 2011), 19. This initiative was directly modeled a previous successful ICRC effort to get the French to accord prisoner of war *treatment* to captured guerilla fighters caught carrying arms openly during a military engagement in Algeria. See also Edwina Morgan, "The Protection of 'Irregular' Combatants: An Enduring Challenge for Humanitarian Action" (MAS Thesis, Geneva Center for Education and Research in Humanitarian Action, 2011), 76; Françoise Perret and François Bugnion, "Between Insurgents and Government: The International Committee of the Red Cross's Action in the Algerian War (1954–1962)," *International Review of the Red Cross* 93, no. 883 (June 08, 2012): 707–742.

[554] Memorandum for Mr. Charles W. Havens III, Special Advisor (POW Affairs,) OASD/ISA, 22 August 1969 in folder entitled "Humanitarian Laws of War/Draft Position Paper US Delegation to ICRC Istanbul (1969,)" POW/Civilian Internee Information Center, Confidential Records, Box 25, P1, RG 389, NACP. With regard to the issue of treatment of civilian internees and civilians transferred to another state, there is evidence that the US Department of the Army worried that due to poor US conduct during the Vietnam conflict, the State Department might choose to publicly oppose the idea that Article 45 of the Fourth Geneva Convention should apply to internal conflicts. In an interoffice memo, the DoD staff explained that DoS might adopt this attitude strategically, otherwise "there is no other course of action available other than to admit we have been remiss in our international legal responsibilities since 1965." Yet Colonel Baxter Bullock, Chief of the MP Plans and Operations Division, was concerned that such a strategic denial might increase "enemy propaganda relating to maltreatment of war prisoners held in civil jails and the ICRC message itself will cause a more critical look at the civil prison advisory system." See Interoffice Memorandum, OTPMG, October 31, 1969 in folder entitled "Humanitarian Treatment and Protection of Civilian Persons/Internees of War (1972,)" POW/Civilian Internee Information Center, Confidential Records, Box 9, P 1, RG 389, NACP.

Department,) instead endorsing the idea that any further developments of the law should come in *new* additional instruments, or protocols, for which further study was still needed.[555] The UK and France agreed.

The ICRC and the UN increased their liaison in 1970.[556] On April 13-17 of that year, the UN Human Rights Division organized a small meeting of government experts and various international organizations to address, for the first time, prospects for revising the entire body of humanitarian rules.[557] Also present, the ICRC offered to further collaborate in the preparations by conducting another survey of expert opinion, this time focusing specifically on non-international conflict and guerilla warfare.[558] The ICRC then wrote and circulated a preliminary report, in essence a summary of the factual, legal and procedural questions asked to the experts, without offering trends or conclusions.[559] In

---

[555] United States Position Paper, Protection of Victims of Non-International Conflicts, XXIst International Conference of the Red Cross, Istanbul, Turkey, September 6-13, 1969, in folder entitled "Humanitarian Laws of War/Draft Position Paper US Delegation to ICRC Istanbul (1969,)" POW/Civilian Internee Information Center, Confidential Records, Box 25, P1, RG 389, NACP.

[556] Beyond formal ICRC or UN meetings, experts meetings organized by international law institutes began to take place, gathering individuals who sometimes acted as government legal advisors, including the UK's Gerald Draper or the US' Richard Baxter.

[557] Among these experts were: Professor G. Abi-Saab, United Arab Republic; Graduate Institute of International Studies, Geneva; Professor R. Baxter, USA; Mr. M. Bianchi, Member of Inter-American Commission on Human Rights, Chile; Professor I. Blishchenko, USSR; Professor Gerald Draper, UK; Dr. F. Feliciano, Philippines; Professor B. Jakovljevic, Yugoslavia; Mr. B. Munyama, Zambia; Professor R, Pinto, France; Mr. L. G. Weeramantry, Ceylon. The UNSG was also helped by of Mr. H. Saba, Assistant Director-General of UNESCO; Mr. R. J. Uilhelm, Deputy Director of the International Committee of the Red Cross; Major-General Prem-Chand, Commander, United Nations Force in Cyprus; E. Schwelb, Former Deputy Director, Division of Human Rights, United Nations; Lt. Col. L. Koho, Military Liaison Officer, Executive Office of the Secretary-General; and other officers of the Secretariat. See United Nations General Assembly, *Respect for Human Rights in Armed Conflicts*, *Report of the Secretary-General,* UN Doc. A/8052, 1970, 8.

[558] This was only the first of several ICRC surveys with experts and state officials across the key areas of the law perceived as needing development or revision, including the protection of civilians against the dangers arising from hostilities, as well as enforcement and accountability-related topics such as the use of reprisals, supervision and sanctions. The ICRC wrote up summary reports and circulated them among states over the next few years.

[559] See ICRC, *Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Preliminary Report on the Consultation of Experts concerning Non-International Conflict and Guerrilla Warfare, July 1970,* Geneva, D 1153b, 1, ICRC Library,

general, this report re-emphasized the importance and the complications entailed in trying to define and distinguish among types of conflicts (international, mixed, non-international, or disturbances or tensions, etc.,) types of combatants (regular or irregular,) types of warfare, between combatants and civilians, and for setting out acceptable criteria for making decisions on these aspects and the protections to be afforded. At this stage, the ICRC was probably looking to convey complexity, raise awareness and begin sparking reflection among states.

It was at this April 1970 UN meeting that the ICRC announced it would convene a conference of government experts in the spring 1971, the first "official" intergovernmental encounter to consider the eventual development of the law. To pave the diplomatic road, high-ranking members of the ICRC also began to contact certain states informally (including the US, UK, Canada, the USSR and the Netherlands) hoping to gauge their interests with relation to the budding process. This resembled the pathway followed in Chapter 3 leading to the revision of the Geneva Conventions in the 1940s.

III. The *Travaux Préparatoires* Begin: An Analytic Frame

Having introduced the general contours of the early debates about revisions to the Geneva Conventions, it may be useful to provide a more precise analytical framing of the main stakes with regard to internal conflicts for the variety of actors involved. This section attempts to do so as it distils the essential from three-year long (1971-1973) preparatory phase of a process now officially entitled "reaffirmation and development of international humanitarian law applicable in armed conflict," leading up to the Diplomatic Conference that opened in February 1974.[560]

Geneva. The ICRC probably felt the UN was better placed to issue conclusions, and wanted to avoid the political costs of potential controversy while still gathering the feedback that emerged.

[560] This section is based on a veritable sea of (mostly public) documentation produced by the ICRC in preparation of or as the outcome of the various meetings it sponsored in 1971-1973 (prior to the opening of the start of the official Diplomatic Conference,) as well as from the XXII International Red Cross Conference of 1973 in Teheran. It also relies on a deep study of the similarly voluminous confidential internal government documents relating to the preparatory process found in the archives of the UK, the US and France. Some key ICRC documents, all of which may be found at the ICRC Library in Geneva, are: *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed*

Clarifying stakes and positions

Stripped to basics, in the 1970s the major dilemma once again facing states with regard to "humanizing" internal conflicts related to deep disagreements about the extension of *legal protection* to their armed non-state counterparts and its *symbolic* and *material* consequences. A lot hinged upon a deceivingly simple question: Who would be afforded what humanitarian protections in what contexts?

Unsurprisingly, most governments approached this puzzle through the lens of their own interests, a category that once more combined security and moral, as well as domestic and internationalist dimensions. The diversity of state interests at the turn of the decade was striking and the stakes seemed extremely high, as shown below. Different groups of states can be discerned, each with a "positive" (constructive) and a "negative" (destructive) agenda to push for various types of internal conflicts.

Foremost was the newly-decolonized world gathering most of Africa and Asia, keen on cementing the idea that national liberation, even if waged violently, was a legitimate international cause that ought to accrue special legal recognition and heightened humanitarian protection—a mix of symbolic and material benefits that they specifically wanted enshrined in international law. This was I term their "positive" agenda.

Traditionally, as seen in Chapter 4, conflicts pitting anti-colonial armed groups against colonial governments were considered internal conflicts.[561] This is so because they (largely) took place within the boundaries of territories officially belonging to imperial powers. The legal consequence of this factual-territorial ("objective")

Conflicts (Geneva, 24 May - 12 June 1971,) Report on the Work of the Conference as well as the eight volumes submitted to that Conference by the ICRC, dated January 1971; *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Second Session (Geneva, 3 May - 3 June 1971,) Report on the Work of the Conference, Vols. I and II, Geneva, July 1972; Draft Additional Protocols to the Geneva Conventions of August 12, 1949, Commentary, Geneva, October 1973; XXII International Conference of the Red Cross, Report, Teheran, 8-15, 1973.* This list is not exhaustive, however. The coordinates for locating the governmental documents is included in the bibliography. In later sections of this chapter relevant sources as regards precise statements are provided.

[561] Georges Abi-Saab, "Wars of National Liberation and the Laws of War," in *International Law: A Contemporary Perspective*, ed. Richard A. Falk, Friedrich V. Kratochwil, and Saul H. Mendlovitz (Boulder: Westview Press, 1985), 410–437.

assessment was that only the international rules applicable to *non*-international conflicts, namely CA3, regulated those struggles (unless the colonial power recognized the belligerence of the non-state armed group, an unlikely occurrence.) This was the accepted international view, but it was one that seemed inherently biased in favor of Western colonial powers, which in any event seldom permitted the application even of CA3, as seen in the previous chapter.

Starting in the 1940s (but only crystallizing from the mid-1950s onwards,) this traditional perspective became challenged by the increasingly larger numbers of post-colonial states, especially within the UN. The core of the argument was that self-determination had become an international human right and colonialism an international wrong. As asserted earlier, myriad instruments stood as evidence; from the UN Charter to the Human Rights Covenants and declarations and resolutions passed within the UN, all had (so the argument went) transformed national liberation from a domestic into an internationally sanctioned cause.[562] As a result, the decolonized world demanded that the *entire* body of international humanitarian law should become applicable to national liberation wars, not only CA3. As the previous chapter showed, since the mid-1960s this demand was part of the "international moral crusade" the newly independent world waged against colonialism through processes collectively legitimization, especially within the UN.

Characterizing national liberation conflicts as international wars had obviously crucial political dimensions, most notably pressuring colonial powers and their allies by discrediting imperial rule and precipitating their retreat from their occupied territories. But it also entailed more specific legal demands with symbolic and material consequences. Perhaps most importantly, decolonized states sought to proclaim the application of international safeguards for so-called "freedom fighters" that fell in the

[562] Two of the most prominent precedents were United Nations General Assembly, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res. 1514 / UN GAOR, 15th Sess., Supp. No. 16 / UN Doc. A/4684 (1960) 66, and; United Nations General Assembly, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. res. 2625, Annex, 25 UN GAOR, Supp. (No. 28), U.N. Doc. A/5217 at 121 (1970).

hands of their enemy. Since in this view such fighters were waging international (not internal) conflicts, they deserved both the *status* and the *treatment* granted to prisoners of war through the POW Geneva Convention of 1949 (plus those of whatever new instrument emerged from the ongoing revisions process to complement it.)

It is important to understand what being considered a prisoner of war (compared to a captured rebel, for example) entails. Put simply, the label carries with it sophisticated privileges under international humanitarian law. In terms of treatment, it activates a plethora of substantive protections contained in the 143-article POW Geneva Convention, including detailed guidelines on proper questioning, conditions of internment, work, food, clothes, and even recreation and right to canteens. The POW Geneva Convention also authorizes the verification by a third state of the treatment of prisoners (called a "Protective Power," in IHL legalese.) Symbolic benefits also accrue to POWs. First, governments and the general public usually afford them honorific, if not heroic, status that is denied to other fighters, especially to terrorists. In the framework of humanitarian law, additionally, the *legal* status of prisoner of war presupposes that, once detained, a combatant cannot be punished by their opponent solely for having participated in the conflict. They must also be released at the end of the hostilities. All of these symbolic and material benefits were absent in the rules for internal conflicts, in which governments had preferred to withhold rebels any legitimacy or entitlements beyond the important but basic guarantees of CA3. What is more: states had historically been extremely prickly to even allow the use of the terms "combatant" and "prisoner of war" in the context of internal conflict, fearing that to utilize such words might give not only legitimize the rebels but suggest that the conflict they waged was international, hence triggering more expansive regulations. In sum, until the 1970s, prisoner of war treatment *and* status (two separate but often inter-related dimensions) only figured in the international law regulating conflicts between states. Wherever states had decided to grant one or both to guerrilla fighters facing them (as the US had since 1967, or the French in Algeria in 1958,) this was done on an ad hoc "policy" basis, without necessarily recognizing that the conflict was an international war.

The above might already suggest why the proposal of legally transforming national liberation wars into international conflicts and giving detained freedom fighters the status and treatment of prisoners of war met with broad opposition, at once political and legal. The potentially disruptive consequences to the existing framework of IHL were prominent. Most importantly, it challenged three of its bedrock principles. First, the notion of conflicts "against colonial domination," "alien domination" or "racist régimes" appeared to bring back political motivation into a body of law that had long been agnostic to ideas of "just" or "unjust" war, and which had sought to decouple the question of *why* combatants go to war from that of *how* they fight once war erupts. (This is the essence of the oft-cited difference between the *jus ad bellum* and *jus in bellum*.) In other words, it appeared to single out a specific type of conflict (wars of liberation) and to attribute it privileged status alongside wars fought between states. This might seem like a general and legalistic concern, but it was one that carried enormous force amongst the learned audiences of IHL and the laws of war at the time (the bulk of whom, it should be said, were Western.) It also brought other thorny questions to the table: How might non-state actors devoid of international legal personality accede to international treaties? Can they be expected to *actually* apply the law in the same way that states are? Later I will demonstrate how these contentious puzzles were addressed during the official negotiation of the Additional Protocols.

Additionally, in order to qualify as prisoners of war the 1949 POW Geneva Convention required combatants to fulfill four requirements: 1) be commanded by person responsible for his subordinates; 2) bear a fixed distinctive recognizable at a distance; 3) carry arms openly; 4) conduct their operations in accordance with the laws and customs of war. Of these, the second and third requirements were geared to compel combatants to distinguish themselves from the civilian population, which per the customs of war, enjoyed general protection from attacks (this is known as the principle of non-combatant or civilian immunity.)

Yet, as expressed by some experts during the 1969 and 1970 ICRC/UN meetings, since in conflicts of national liberation the colonial power held the conventional military advantage over freedom fighters, to require the latter to distinguish themselves at all

times by wearing distinctive signs or carrying their weapons openly might easily translate into facilitating their annihilation, thus hampering the cause of national liberation.

As a result of this alleged military bias in the law, the decolonized world wanted these requirements to be relativized or eliminated. To do so, in their view, was both realistic and humane. However, from traditional legal and humanitarian perspectives, to do away with these requirements threatened both to increase the risk of violence to non-combatants, whom colonial armies might be more likely to find suspect --hence targetable-- as freedom fighters in civilian guise (violating the principle of distinction and harming civilians.) It might also put state militaries at a formal disadvantage, violating the idea that the law should apply to combatants equally, regardless of their motivation (often known as the "equality of belligerency" principle.)

These were all critical consequences in legal, symbolic and material terms, and it is not hard to understand why they were unpalatable to certain audiences, especially Western colonial powers. Moreover, they strongly suggest that in the 1970s the decolonized world was less interested in subjecting freedom fighters to regulations than in facilitating, even protecting their actions, to the obvious detriment of the colonial authorities and perhaps of civilians themselves. Theoretically speaking, one may characterize this "positive" side of the postcolonial world's agenda as a strategic (international) social construction combining moral and utilitarian elements.

Yet the newly independent countries also had a "negative" agenda relating to internal conflicts. At the same time that they supported wars of national liberation outside their borders, many decolonized states were extremely fragile internally and found themselves waging conflicts of their own against rebellious or secessionists groups. For this reason most of them proved intensely allergic to the idea of committing to humanitarian rules applicable to any conflicts happening within states' boundaries *other* than those of self-determination or against "foreign" occupiers. This was doubtless an expression of a "sovereignist" risk-averse impulse and domestic self-interest. To be clear, this distaste was not reserved for the idea of regulating "internal troubles" or "disturbances," but also included efforts to complement the principles of CA3 in key areas such as the use of

force. In fact, during the Diplomatic Conference a radical fringe even opposed the idea of a protocol applying to high-level civil wars.

The perspective of the decolonized group was one that found some total or partial sympathizers. Soviet bloc countries, for instance, supported it wholeheartedly. On the one hand, as seen during the 1949 Diplomatic Conference and other international forums, the Soviets and their satellites were bent on embarrassing the declining Western empires and their allies, and wasted no occasion to cheer the anti-colonial agenda at international forums. On the other hand, since internal repression was a backbone of their regimes' political viability, they held great revulsion for efforts to expand humanitarian law further into their domestic realm, whether for those that might considered to fall under CA3 or those better characterized as "internal troubles" or disturbances. The same may be said for much of the Arab world that, with few exceptions, rejected colonialism and external occupation (Israel being the main culprit in their case) but also disliked intromission into their internal violent affairs. These groups of states thus found themselves largely sharing the "positive" and "negative" agendas of the decolonized world vis-à-vis internal conflicts.

Partial support for the wishes of the decolonized world also surfaced from other geographic areas. Although they were not necessarily fierce anti-colonialists, Latin American states were in the 1970s similarly fragile (Argentina, Uruguay, Brazil, Chile, among others) or conflict-ridden (Colombia) internally, and in a period when authoritarianism was on the rise in the region, ideas for increasing humanitarian restraint in the fight against internal organized dissent were unwelcome. Latin Americans' approach to the revisions process thus proved mostly negative or reactive.

On the other side of the spectrum lay the Western world, which, interestingly, was fractured in its attitudes toward legal developments toward internal conflicts. Most Western states, but especially colonial powers like Portugal, the UK and France, fiercely opposed the classification of national liberation wars as international conflicts. To them this move irreparably disrupted the structure of humanitarian law, tarnished its credibility and further imperiled its practical application. Finding it hard to publicly espouse political arguments that would embarrass them as being morally retrograde, these

countries preferred to emphasize the *legal* dangers behind this innovation. The most important of these were described earlier—namely the violation of three core principles of the IHL, as well as the difficulties in crafting an instrument applicable both to states and non-state actors, especially the latter's unwillingness or inability to effectively implement the exigent rules and provisions essentially designed for states.

At the same time, however, Western powers (colonial states included) seemed to understand that better rules might be desirable for taming the atrocities committed against civilians in internal conflicts of a high level, as punctuated by the Biafran secessionist war in Nigeria, among others. Some areas, particularly the limitation of armed attacks on civilians remained at best implicit and at worst unaddressed in the extant legal framework (CA3.) The Western-colonial "solution," in this regard, was to continue to consider liberation conflicts as internal, and to create a protocol with stringent and precise conditions applicable simultaneously to Biafra-style wars *and* conflicts for self-determination. These conditions were similar to those discussed Chapter 3 during the 1940s: non-state groups would need to have an organized army under responsible command and exert sufficient territorial control enabling them to conduct their operations and to respect the body of humanitarian law. *Any other* "internal" conflicts failing to meet these requirements, according to the Western-colonial view, should remain outside of the scope of the new protocols and only be regulated by CA3, or for the case of troubles and disturbances, by domestic law or (perhaps) by other instruments of international law such as human rights. The UK, privately concerned with Northern Ireland, was especially hostile to the idea that the internal conflicts below a certain level (that of CA3) should be covered by a new legal instrument. Preventing the application of any new instruments of humanitarian law to Northern Ireland was, in fact, the Brits' most important goal throughout the revisions process in the 1970s.

Yet, as hinted, not all Western states clung to these beliefs. Most radically (and for reasons that remain unclear,) Norway came out strongly *in favor* of qualifying liberation wars as international, in fact arguing that there should be *no* distinction between international and internal conflicts, and that any new rules should apply to <u>all</u> types of conflict. The Norwegians' vocal support for the agenda of the decolonized proved to be a

persistent thorn on the side of the West, not least because Norway was a member of NATO. The position of Norway may be momentarily be characterized as essentially moral-idealist, at least until other motivations can be adduced. [563]

Although far less drastically, other countries besides Norway differed from the Western-colonial agenda. Canada and the US spoke strongly in favor of creating a protocol for non-international conflicts that expanded the principles of CA3 but that also would be more or less automatically applicable once a conflict broke out within a state, whether it was waged for self-determination or not. In this they squarely confronted the British and French. The reasons for the fierce Canadian position remain obscure, but with regard to the United States, it was the war in Vietnam that compelled them to press for the improvement of humanitarian regulation across types of conflicts, whether internal or international. And as noted earlier, specifically as concerned the treatment of captured irregular fighters in Vietnam, the US military had in 1966, with the guidance of the ICRC, changed its policy to allow for the application of the POW Geneva Convention to all persons who had been detained while carrying arms openly during a military engagement.[564] The US rationale during the 1970s process was that it was best to offer protections to most participants in the conflict than to leave loopholes that might enable communist regimes to mistreat American personnel, whom they invariably considered criminals.

Domestic politics at home buttressed the conduct of the American delegation in Geneva. Beside intense public opinion pressures, it was around this time (1971-4) that the US Congress became increasingly vocal on human rights and humanitarian legal issues. The Subcommittee hearings organized by House Representative Donald Fraser (a Democrat from Minnesota) constituted a landmark example of Congressional pressure in this regard. Fraser's office was aware of the humanitarian negotiations in Geneva, requested the DoS to inform him of the American views, and issued recommendations for

[563] The causes for Norway's peculiar interest in this issue are unclear, and a subject for future research.
[564] Forsythe, *The Politics of Prisoner Abuse: The United States and Enemy Prisoners After 9/11*, 18–19. Also see Aldrich, "Some Reflections on the Origins of the 1977 Geneva Protocols."

them in the ensuing report.[565] In addition to the Fraser hearings, Senator Ted Kennedy eventually traveled with the American delegation as Congressional advisor to the first session of the Diplomatic Conference in 1974, where he gave a progressive speech setting out the American line.

American concern with extending humanitarian protection to most detainees matched well the aspiration of the new African and Asian states to protect freedom fighters, but it clashed with those of other Western states who refused to protect those they considered terrorists. To be clear, both Canada and the US rejected the legal legitimization of national liberation as international conflicts, which they considered as unnecessarily political, polemical and indeed harmful in law and practice. But both delegations were keen on extending humanitarian law many victims of internal conflict lacking protection. Their position can thus be characterized as simultaneously self-interested and moral. The challenge lay in how this could be achieved given the diversity of opinions about what was politically desirable and militarily "practicable."

As described in the next section, due to the disparities over such crucial matters, the years (1971-1974) leading up to the Diplomatic Conference saw furious efforts at coordination among North American and Western European states to arrive at common positions, efforts that --perhaps surprisingly-- never fully succeeded. Given their interests, Canada and the US emerged as brokers on matters relating to internal conflicts and extended prisoner of war *treatment* (though not status) to all combatants. On the contrary, due to its legalistic conservative views on most aspects of the revisions process, the UK became a force for restraint among its peers, hoping in particular to avoid making changes that its experts in many cases saw as no more than unrealistic humanitarian niceties.

One belief appeared to be widely shared by all Western states (except for Norway,) however: an ingrained conviction in the inability and the will of national liberation movements or other insurgencies/guerilla groups to *actually apply* humanitarian rules.

---

[565] House Subcommittee on International Organizations and Movements, *Human Rights in the World Community: A Call for U.S. Leadership: Report*, 93rd Congress, 2nd session, March 27, 1974, Washington, D.C, GPO, 1974, 33-37.

Profound distrust regarding the ideological and institutional "inadequacies" of such groups supported this view. This was one additional reason why Western colonial powers were so reluctant to design a new protocol for international conflicts (or the Geneva Conventions, more broadly) applicable to national liberation struggles. NLMs, they held, could also not become official "high-contracting" parties to the conventions. As such, in this perspective, to accept the inclusion of national liberation wars in the draft protocols for inter-state conflicts, and to find ways to allow them to accede to the treaties, might only serve to legitimize and empower them without truly achieving the goal of binding them. It would constitute no more than a harmful unilateral commitment.

Aware that these complications were similarly present with regard to the Second Protocol on other (non-liberation) internal conflicts, which they favored, the US and Canada proposed that the instrument should contain fairly simple and "eminently humanitarian" principles that no state would find it hard to apply, whether or not rebels chose to embrace them in return. Conditional reciprocity, in the view of the US and Canada, should not derail the adoption of the Second Protocol. As expected, Western-colonial states and most of the non-Western world repealed these ideas, which to them still seemed like unilateral overtures in situations they considered to be no more than terrorism and organized crime.

Caught in the crosshairs of these complex manifold positions was the ICRC. From the perspective of the Swiss organization, it was desirable to extend humanitarian protections to as many types of internal conflicts as possible, including troubles and disturbances. This desire shaped its proposals for an instrument complementing CA3 without stringent conditions for application. But with regard to conflicts for self-determination and national liberation, despite the fact the ICRC publicly recognized the "strong movement" and moral force behind their re-consideration as international conflicts, it did not seem persuaded that the legal bases that enshrined these ideas (that is, UN declarations and other resolutions) provided a robust enough basis to do revise humanitarian law accordingly or that the legal extension might effectively improve conduct on the ground. This said, the organization was also aware that to fail to take into account the strongly-held beliefs of the non-Western states might jeopardize its relations with them and with

national liberation movements, possibly hampering its access to victims on the ground. Ultimately, the ICRC refrained from inserting language referring to liberation wars in its draft First Protocol, merely mentioning it as an "option" for states to sort among themselves. In doing so, they also heeded the formidable pressure Western states exerted against the revolutionary ideas of the decolonized world.

An Exhausting Road to 1974

The positions and stakes outlined above surfaced slowly in the late 1960s and early 1970s as a series of public and private encounters took place at the behest of the ICRC, the UN or states themselves. It is important to convey just how time- and energy-consuming the process of "dialogue about revisions" was between 1969 and the first months of 1974, lest one still believes that international law-making ranks as a low priority for governments. The focus here is placed on both inter-governmental debate in public forums and, to the extent that archival resources have allowed, of private meetings hosted by the ICRC, or by the UK, the US, or Western-NATO states.

Governmental experts and delegates participated in at least twelve official or semi-official group meetings *prior* to the start of the Diplomatic Conference (which itself lasted four years and had a multiplicity of break-out processes/parallel sessions.) See the following table for an (incomplete) summary:[566]

Table 5.1. Some State Encounters post-UN Human Rights Tehran Conference, 1968

Meeting #	Type of Meeting	Where/When
1	Expert Roundtable	Geneva, Feb. 28-29, 1969
2	XXI International Red Cross Conference	Istanbul, September 6-13, 1969
3	UNGA 1969	New York, November 1969

[566] This table is built on the basis of the plethora of documentation cited in fn. 560 above. Despite my efforts at exhaustiveness, the table is not complete. For example, it does not include the annual meetings of experts (including those acting as government delegates during the CDDH) at the San Remo International Institute of Humanitarian Law, which were crucial not only for academic debate but for the negotiation of various articles of the Protocols in the years 1974-1977.

4	Expert Roundtable	New York?, April 13-17, 1970
5	UK-ICRC	London, July 1970
6	UNGA 1970	New York, November 1970
7	National Red Cross and Red Crescent Societies Conference	The Hague, March 1-6, 1971
8	ICRC Conference of Government Experts, First Session	Geneva, May 24-June 12, 1971
9	Bilateral US-UK	Washington, September 9, 1971
10	Bilateral UK-ICRC	November 25, 1971
11	Bilateral US-UK	London, November 29, 1971
12	UNGA 1971	New York, November-December 1971
13	NATO Meeting	Brussels, April 6-7, 1972
14	ICRC - Conference of Government Experts, Second Session	May 3-June 3, 1972
15	UK-ICRC	August 1972
16	Bilateral US-UK	August 7, 1972
17	Western Group Meeting	London, September 11-14, 1972
18	ICRC Small Government Expert Consultation	Geneva, January 15-20, 1973
19	ICRC Small Government Expert Consultation	Geneva, March 5-9, 1973
20	Western Group Meeting	London, October 15-19, 1973
21	XXII International Red Cross Conference	Tehran 8-15, 1973
22	UNGA 1973	New York, November-December 1973

23	Western Group Meeting	January 1974
24	Western Group Meeting	September 2-3, 1974
25	Western Group Meeting	September 18-20, 1974
26	Western "Inner Core" Meeting	January 13-14, 1975
27	Western Group Meeting	January 27-30, 1975
28	Western "Inner Core" Meeting	Washington, November 17-19, 1975
29	Western Group Meeting	London, March 15-17, 1976
30	Western "Inner Core" Meeting	Bonn, November 1976
31	Western "Inner Core" Meeting	Brussels, January 1977
32	Western "Inner Core" Meeting	Geneva, March 14, 1977
33	Western Group Meeting	Geneva, March 15-16, 1977

Some of these preliminary were events devoted to issues beyond the development of humanitarian law (as the UNGA sessions and the International Conferences of the Red Cross,) but the topic was either important or central to many of them. In addition, although with three exceptions all events were public, not all states were invited in every occasion. Hence in the 1970s, as in previous episodes of legal revision or construction, the ICRC approached the process "cautiously" by inviting a smaller group of delegations to the initial preliminary meetings and then slowly expanding attendance. This tactic reportedly provoked some criticism against the ICRC, since in some of the early meetings the balance of opinion privileged Western voices and their views.

Although as said the ICRC's initial interest lay in generating debate among governments experts to arrive at semi-consensual drafts for submission to the Conference, given the deep divisions that surfaced and the risk they represented ("watering down" the proposals to low common denominator,) the organization decided against taking votes at preliminary meetings. Hence, the ensuing conference reports only hinted at trends of opinion and attached (but did not rank) experts' varied proposals. The ICRC used its "drafting power" whenever it could, however, trying to reconcile many governments' conservative views with its own "wish-list" of progressive changes. As in the 1940s, this practice generated discomfort (and sometimes serious tension) between the organization and certain groups of states.

In addition to public and private inter-governmental debate organized by the ICRC or within the UN, states (individually or collectively) held multiple private meetings with the Swiss organization. Most of these were regular exchanges of views, but some also took on unpleasant, even threatening, tones. For instance, Western governments in at least one occasion tried to pull their weight and "deliver a cold jolt" to the ICRC, hoping to force it to steer clear from controversial (to them polemical, unrealistic, or militarily "unworkable,") suggesting that unless it did so they "might not be in a position" to attend the treaty-making Conference. Not all efforts are influencing the Swiss organization were as forceful, however; a few involved sharing Western states' preferred textual versions for its consideration.

It should not be thought that only the West tried to force the hand of the ICRC, however. The newly-decolonized world did as much, not surprisingly with regard to the national liberation wars. Although a complete study of the "behind the scenes" process cannot be performed until the ICRC archives for the period are fully open to researchers, documents found in governmental archives provide sufficient evidence of the fact that since the early years of the *travaux préparatoires* the ICRC found itself between a rock and a hard place, trying to accommodate the deeply-held views of various groups of governments with its own humanitarian project. It can be generally asserted that most groups of states actively tried to privately influence the ICRC's views through multiple tactics and with varying degrees of success. The ICRC had to play its hand carefully and

acquiesce on some fronts, but in any event it reminded governments that that the last word was theirs in the context of the Diplomatic Conference. Reasserting this allowed the ICRC to stand its critical legal-humanitarian ground but also to give states a sense of ownership and responsibility over the process.

Domestically, it was in 1971 that states' bureaucratic machineries progressively began to ruminate their views on the plethora of issues on the table. There surely was much variation in the speed, mechanics and intensity with which different states approached legal revisions, depending their degree of capacity and salience of the topic on their agenda. Major Western powers seemed to rank high on both counts, as the US, UK and France had assembled interdepartmental teams to prepare for and exert influence during the slew of exploratory meetings laying ahead.[567] The teams formed in 1971 resembled those working on the revisions in 1946-1949, combining civilian and military staff from a variety of relevant ministries. In the US the State and Defense Departments (and within them, various subdivisions) bore most of the work. The UK team included mainly officials of the Foreign and Commonwealth Office (FCO,) the Home Office and the Defense Office. Staff from the Ministries of Justice, Defense, Interior and Public Health and Social Security, as well as from the National Red Cross formed the French team.[568]

As noted earlier, the UK and the US emerged as crucial brokers among their Western political and military allies around in 1971 and 1972. They constituted the heart of the Western group and jointly determined whom to invite and whom to exclude. Since the views of some NATO states proved so distant (Norway and Sweden, for their respective views on national liberation wars and weapons regulations,) their delegates earned colorful epithets and were only brought in when politically convenient. By 1973 Western coordination efforts broke the NATO "mold" to form larger and smaller groups of fluctuating membership: a Western Group composed more or less permanently by the

[567] See folder entitled "Proposed Agenda ICRC Conf on Humanitarian Law (1971,) POW/Civilian Internee Information Center, Confidential Records, Box 11, P1, RG 389, NACP.
[568] NUOI 1970-1973, Carton 1297, Cote S. 50.3.8.4.6., French Archives.

US, UK, Denmark, Belgium, Netherland, France, Canada, West Germany and Italy,[569] and a smaller "Inner Core" (UK, US, France and Canada, later expanded to West Germany as well.) Participants in the smaller group were asked to be tight-lipped regarding their meeting plans and in-group views, so as to avoid creating jealousy and embarrassment among the expanded circle of allies.

Interestingly, not even the closest "inner core" of Western allies saw eye to eye on key issues. Although France usually held more stringent views that the UK and the US, it often acquiesced to their ideas and threw tantrums in private. A concern for social reputation shone through the interaction between states holding progressive views (either for moral or alleged self-interested reasons,) prompting anxiety and sometimes policy change on skeptics. West Germany, for instance, shamed the Brits for their restrictive view on certain topics, including the protection the civilian population. In view of these reactions, the UK reasoned that it might have to moderate its position "to avoid a damaging isolation on positions which many people, including some of our friends, find over-rigid and inhumane."[570]

Relations *among* groups of states were also ripe with tension. The UK (and the Western group more broadly) was annoyed by the Soviet Bloc's posturing as "the champions of protection for the civilian population."[571] The British had some reason to suspect insincerity, since "certain of the delegates, e.g. those of Hungary and Yugoslavia [who] told us in private conversation that their aim was, quite simply, to make the rules so difficult that war would be virtually impossible."[572] This attitude in the 1970s resembles that taken by the Soviet delegation in the 1940s, as seen in Chapter 3.[573] That

[569] Turkey, Australia, New Zealand and Japan were sometimes invited.
[570] TNA: PRO FCO 66/422.
[571] TNA: PRO FCO 66/422.
[572] TNA: PRO FCO 66/422.
[573] Note, however, that it was again unclear the Soviets were being humanitarian singly out of strategic posturing. Implying that there may have been a measure of sincerity, David Forsythe, who was present during negotiations, claimed at the end of the negotiations that "in the last analysis the Soviet Union went out of its way to engage in public debate with Third World opponents of the [Second] Protocol, action indicating clear support for the Protocol especially when compared with the more general Soviet pattern of supporting the Third World on many issues related to Protocol I…" See Forsythe 1978, 280–281, fn. 38.

said, attitudes varied across issues and some within the Western group eventually found it convenient to coordinate with the Soviets. Inter-group relations were thus not monolithic, but rather issue-dependent and variable across time. The US attempted to exert influence over the Latin American delegations, as the UK did with Australia and New Zealand. And the nominally "Western" group, whenever convenient, expanded to include non-Western countries such as Turkey and Japan.

Yet it was the interaction (or lack thereof) between the Western group and the delegations from the so-called "Afro-Asian" nations that was perhaps most curious. As noted above, it should have been obvious to the West from the earliest debates at the UNGA or during ICRC-sponsored events that those states would constitute a majority with positions radically different from theirs in many (though not all) key areas. In spite of this, the Western group made *no* discernable efforts to spark joint dialogue with or influence the decolonized world prior to the start of negotiations. Once the first session of the Diplomatic Conference closed in the spring of 1974 (to very inconvenient results for the West, as shown shortly,) the British delegates concluded that the Western group had spent too much time talking to itself, not to others whose voices were decisive. (One potential explanation for this is that Western states found it hard to agree on a given position in their own camp, leading them to overlook the need to reach out to others. "Afro-Asian" states were sometimes referred to derisively in Western diplomatic documents, suggesting that there was also a certain arrogance underlying the lack of contact.)

In the end, after almost three years of intense coordination efforts, little Western consensus emerged on the quagmire of how to revise or develop the law vis-à-vis internal conflicts. Except for a shared understanding that national liberation wars should not qualify as international conflicts, Western states could not agree on exactly how to deal with captured fighters or with the threshold and protections to include in the Second Protocol to regulate (non-liberation) internal conflicts. Rational attempts at coordination had proved frustrating, time-consuming and ineffective, accommodation was uncertain, and legitimacy anxieties were foremost. Although rational strategizing had pervaded the *travaux preparatoires*, moral and social concerns were a fundamental part of the

confused picture. Western allies knew there were "problems" to solve, but they could not be "rationally" overcome in the face of deeply-held mixed (security *and* humanitarian) motives.

Unfortunately for Western allies, the situation during the actual Diplomatic Conference would get even more complicated.

The Politics of Procedure

Procedural politics became critical leading up to the treaty-making Conference, to open in February 1974. As described earlier, inter-governmental discussions about revisions in the late 1960s re-ignited within the UN, suggesting that organization might play some substantive role in the process. Over time, however, the ICRC regained the formal reins of the process, carefully conceding protagonism on the issue of weapons regulation to the UN.

The Western group participated actively in the efforts to put the ICRC back at the wheel of revisions due to the heavily politicized nature of the UN. Curiously, however, these Western states seemed to have been oblivious to the fact that the International Red Cross movement (alongside the Diplomatic Conference with universal attendance,) would be prone to *exactly the same* political dynamics within the General Assembly. In terms of rational "forum shopping," this was a surprisingly naïve attitude. An apparent belief that what was customary practice within the UN would *not* travel across organizations with similar members and voting rules only a short time later is indicative of the rootedness of IO-specific bureaucratic culture, as Erik Voeten has recently suggested.[574]

The West also faced frustration on another key procedural issue. In the summer of 1973 Norway began pressuring the Swiss government to invite national liberation movements (NLMs) to the Diplomatic Conference. UN practice at the time was that liberation movements recognized by regional organization could attend the General Assembly sessions as observers, without a voice or a vote. The thought of allowing

[574] Erik Voeten, "The Practice of Political Manipulation," in *International Practices*, ed. Emanuel Adler and Vincent Pouliot (Cambridge University Press, 2011).

NLMs to come and play an active role at a plenipotentiary Diplomatic Conference on humanitarian law horrified Western states, however. The British plainly believed their presence might kill the meeting altogether.[575] Given strong pressure and precedent, however the UK resigned itself that observer status for NLMs was the best they could expect, calculating to receive Portuguese, Israeli and South African protests as a result.[576]

On October 13 the Organization of African Unity (OAU,) however, announced African states' desire for NLMs to participate "fully in their own" right at the Diplomatic Conference.[577] Despite great efforts from the Swiss hosts to manage NLM participation *through* recognized international organizations (the OAU itself or the Arab League,) they learned that NLMs had dismissed that option, an outcome in which Norway's Longva claimed to have been instrumental.[578] The US delegation was so upset that it publicly announced it might reconsider its decision to participate in the Conference.[579]

In late 1973, alarmed Western states such as the US, UK, France, West Germany and the Netherlands set their diplomatic machinery in motion trying to get Norway to relent.[580] On balance, although the British saw some "educational value" in having NLMs at the Conference, they were adamant about not conferring them an inappropriate status.[581] A Kenyan resolution that the 1973 UNGA, however, "urged" the invitation of NLMs to the Diplomatic Conference.[582] Western states were again unable to oppose the

---

[575] TNA: PRO FCO 61/1090.

[576] The British also pushed against giving non-governmental organizations such as Amnesty International (AI) or the ICJ (who were a "nuisance" in Gerald Draper's words) speaking rights, and even wished the ICRC's role were restricted to brief introductions, believing "they had already done enough." TNA: PRO FCO 61/1090.

[577] Press Release No. 473, the Organization of African Unity, Addis-Abba, 13, October, 1973, attached to Department of State Airgram, December 5, 1973, in Central Foreign Policy File, 1970-1973, SOC 3 Red Cross, Box 3013, Entry 1613, RG 59, NACP.

[578] It was unclear whether Longva was following government instructions or acting on his own initiative. Norwegian Head of Delegation Ofstad privately said that Longva was going further than instructed, which Longva denied.

[579] See folder entitled "ICRC Conferences on Humanitarian Law (1972,)" in POW/Civilian Internee Information Center, Confidential Records, Box 11, P1, RG 389, NACP.

[580] TNA: PRO FCO 61/1091.

[581] TNA: PRO FCO 61/1092.

[582] Kenya was supported by Indonesia and more annoyingly for the US and UK, by Australia.

outcome and the Americans once more threatened the Swiss with their absence.[583] As a last-ditch effort at a compromise, the worried Swiss hosts decided to attend an OAU seminar with NLMs taking place in Dar-Es-Salaam, Tanzania in January 21-23, from which a final African line might ensue.[584] Swiss efforts in Tanzania found no sympathizers, however, and NLMs requested to be invited in the own right reproaching the Western retrograde attitude.[585] Flummoxed and unwilling to make the call for themselves, the Swiss left the decision on NLM admission to the Diplomatic Conference itself.

A related but even more explosive issue worried the American delegation. The Provisional Revolutionary Government of the Republic of South Vietnam (PRG,) formed by members of the Vietcong and smaller groups and recognized by the 1973 Paris Peace Accords signed between the parties to the Vietnam conflict as the "other" government of South Vietnam, had just acceded to the Geneva Conventions of 1949 and was now requesting to be invited as a participating state at the Diplomatic Conference. (Guinea-Bissau, which had recently declared its unilateral independence from Portugal, had done likewise.) Unlike the Swiss, the US could not let the PRG affair run its course and began a separate private diplomatic campaign to rally support.[586] For the Americans the PRG was but a front for North Vietnam, without legitimacy or territorial control. Yet privately American delegates recognized that their recognition of the PRG under the Paris Accord

---

[583] TNA: PRO FCO 61/1091.
[584] TNA: PRO FCO 61/1091.
[585] The Norwegians, present at that meeting, reportedly slighted the Swiss and supported the NLMs instead. Only the Egyptian ambassador proved conciliatory, asserting that the divergence lay not on whether these groups could attend, but on the how. NLMs, for their part, desired to attain full (voting) participant rights, which the Swiss thought was only a bargaining position they would drop in exchange for a compromise to accept their autonomous presence, without the vote. The Swiss were resigned that NLMs would come at any rate, since the leaders of these groups held Algerian passports that enabled them to forgo Swiss visas. See "Rapport No 9," January 28, 1974, in the dossier entitled "Consultations Presidentielles," Conférence Diplomatique sur la Réaffirmation et le Développement du Droit International Humanitaire Applicable dans les Conflits Armés (1973-1979,) J2.111*, 1979/29, Swiss Federal Archives, Bern (hereonafter "Consultations Presidentielles," Swiss Federal Archives, Bern.)
[586] Electronic Telegram, 1974STATE022068, Secretary of State, Washington D.C. to US Embassy in Saigon, February 1, 1974, Central Foreign Policy File, 1973-1976, RG 59, NACP.

weakened their argument.[587] The Americans worried about the precedent set by PRG attendance, and threatened to pull out. Uncertainty was great and their projected vote counts seemed to constantly change prior to the start of the Conference.[588]

Powerful though they were, major Western states were until the very last minute scrambling to protect their status and retain control over the Conference from the materially far weaker but politically and numerically stronger Third World and the armed non-state groups it supported. The situation was fluid, with the real contest about to begin.

IV. A Revolution Unleashed: the Diplomatic Conference of 1974

Following two days of conversation by the heads of delegations, the 1974 Session of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (CDDH) officially opened on February 20, gathering 125 state delegations and 30 observer international organizations.[589] Quiet efforts at conciliation did not calm the waters. During the very first Plenary session the only head of state present at the meeting (from Mauritania,) inaugurated the political fireworks by arguing for the recognition of just wars, claiming that "it was quite obvious that it was the Zionists who wanted to throw all Arabs into the sea."[590] The Israeli delegation immediately walked out in protest.

Given this start, the Conference disbanded for a few days of intense negotiation between different regional groups to again see whether compromises could be struck on the issue of invitations. The records of these meetings are unavailable, but state

---

[587] Electronic Telegram, 1974STATE033357, US Embassy in Saigon to US Mission in Geneva, February 20, 1974, Central Foreign Policy File, 1973-1976, RG 59, NACP.
[588] Electronic Telegram, 1974GENEVA01256, US Mission in Geneva to Secretary of State, Washington D.C., February 26, 1974, Central Foreign Policy File, 1973-1976, RG 59, NACP.
[589] For the full public records of the Conference, see Federal Political Department, Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977, Volumes 1-17. (Bern, Switzerland.)
[590] Summary Record of First Plenary Meeting, paras. 28-33, in Federal Political Department, Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977, Volume 5. (Bern, Switzerland.)

correspondence suggests that these efforts were possible on two of the three knotty issues. First, most states accepted the admission of Guinea-Bissau to the Conference, which, despite pressure from Lisbon, proved problematic for others to deny. The question of NLMs was also resolved behind the scenes, with Western states being coerced to concede that movements recognized by regional organizations (the OAU and the Arab League, in this case) could participate directly in the deliberations with the ability to make statements and circulate amendments, but without the vote."[591] Resolutions on these two agreements were announced at second plenary meeting and eventually adopted by consensus on March 1st. With this, ten NLMs were admitted to the Diplomatic Conference: the African National Congress, African National Council of Zimbabwe, Mozambique Liberation Front, Angola National Liberation Front, People's Movement for the Liberation of Angola, Palestinian Liberation Organization, Panafricanist Congress, Seychelles' People's United Party, South West Africa's People's Organization, and the Zimbabwe African National Union.

The potential attendance of the PRG, however, remained open. In private negotiations US diplomats had managed to separate it from the decisions on NLMs or Guinea-Bissau, thus increasing their odds of securing a positive vote. In the end, and despite being unsure until the last minute of what the outcome would be, a vote of 37 for admission, 38 against, with 33 abstentions, formally denied a seat to that entity.[592] Additional battles were fought during the election of officers for the Conference and on the definition the rules of procedure, and by the time political-procedural quarrels had finally extinguished, nearly half of the first session of the Conference had been spent on issues other than the substance of the treaty revisions.

The Rest Against the West: National Liberation War as International Conflicts

Although the 1974 session of the Conference was not prolific in the number of provisions debated or adopted, from it emerged perhaps the most one crucial of all:

[591] Resolution No. 3, First Session in Federal Political Department, Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977, Volume 1 (Bern, Switzerland.)
[592] TNA: PRO FCO 61/1231.

Article 1 of the First Protocol, which defined the international armed conflicts to which it would apply.

The worst fears of the West were quickly realized. Various groups of states introduced different amendments (see options 1-5 in Table 11) all with a view to making national liberation wars international. These featured important variations in language, ranging from political-incendiary ("colonial and alien domination against racist regimes,") to more legal-technical ("armed struggles waged by peoples in the exercise of their right of self-determination," per the Egyptian phrasing.) Egyptian legal scholar and diplomat Georges Abi-Saab sharply reminded his colleagues in Committee that there was "abundant proof" providing juridical footing to notion that wars of national liberation should be considered international conflicts, which was a "social phenomenon affecting millions of human beings," not just an issue of semantics. "Participants were thus not being asked to accept anything new; it was merely proposed that they should affirm explicitly in the field of humanitarian law what they had already accepted as binding law within the United Nations and within general international law."[593]

Table 5.2. Proposed Amendments to Article 1, First Protocol, 1974

Option	Amendment Co-Sponsors	Proposed Language
1	Algeria, Bulgaria, Czechoslovakia, East Germany, Hungary, Morocco, Poland, USSR, Tanzania	"The international armed conflicts referred to in Article 2 common to the Conventions include also armed conflicts where peoples fight against colonial and alien domination and against racist regimes."
2	Algeria, Arab Republic of Egypt, Australia, Cuba, Democratic Yemen, Guinea Bissau, Ivory Coast, Kuwait, Libyan Arab Original: English Republic, Madagascar, Morocco, Nigeria, Norway, Pakistan, Senegal, Sudan, Syrian Arab Republic, Tunisia, United Arab Emirates, United Republic of Cameroon, Yugoslavia, Zaire	"The situations referred to in the preceding paragraph include armed struggles waged by peoples in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and defined by the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."

[593] Howard S. Levie, ed., *Protection of War Victims: Protocol 1 to the 1949 Geneva Conventions, Volume 1* (Dobbs Ferry, N.Y.: Oceana, 1979), 3.

3	Argentina, Austria, Belgium, Germany, Federal Republic of, Italy, Netherlands, Pakistan, United Kingdom of Great Britain and Northern Ireland	“In cases not included in this present Protocol or in other instruments of conventional law, civilians and combatants remain under the protection and the authority of the principles of international law, as they result from established custom, from the principles of humanity and the dictates of public conscience." (Martens Clause)
4	Romania	"... and in armed conflicts in which the people of a colony, a Non-Self-Governing Territory or a territory under foreign occupation are engaged, in the exercise of the right to self-determination and the right to self-defence against aggression, with a view to ensuring more effective protection for the victims of aggression and oppression."
5	Turkey	“The present Protocol shall also apply to armed conflicts waged by the national liberation movements recognized by the regional intergovernmental organizations concerned against colonial and foreign domination and racist regimes in the exercise of the principle of the self-determination of peoples as set out in the Charter of the United Nations."
6 (Merger)	Algeria, Arab Republic of Egypt, Bangladesh, Bulgaria, Burundi, Byelorussian Soviet Socialist Republic, Chad, Congo, Cuba, Czechoslovakia, German Democratic Republic, Ghana, Guinea-Bissau, Hungary, India, Indonesia, Iraq, Ivory Coast, Jordan, People's Democratic Republic of Korea, Kuwait, Lebanon, Liberia, Libyan Arab Republic, Madagascar, Mali, Mauritania, Mongolia, Morocco, Nigeria, Pakistan, Poland, Qatar, Romania, Saudi Arabia, Senegal, Sri Lanka, Sudan, Sultanate of Oman, Syrian Arab Republic, Togo, Tunisia, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Republic of Cameroon, United Republic of Tanzania, Yemen, Yugoslavia, Zaire, Zambia	"The situations referred to in the preceding paragraph include armed conflicts where peoples fight against colonial and alien domination and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and defined by the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".

Differences of language and tone aside, all these amendments fell like cold water on most Western delegations.[594] In their defense, they relied on legalistic and utilitarian arguments, claiming that it was entirely inappropriate to insert motivations into humanitarian law, and that since decolonization was on the wane, permanent consideration of these struggles in international law was even less necessary. Moreover, Western skeptics raised the inability of national liberation movements to apply the law, something that the representative of the Mozambique Liberation Front sharply countered, noting that "cases were known where States had departed from the established rules far more grossly than the liberation movements," a sentiment echoed by the Palestine Liberation Organization.[595]

The Western Group was publicly and privately stunned. UK representative Gerald Draper sentenced that these amendments amounted to "damaging the structure of The Hague and Geneva Conventions and would involve the need to reconstruct the whole of humanitarian law." Behind the scenes, the British delegation cabled London, alerting them that with this text there might be "nothing to prevent the IRA from addressing the requisite declaration to the depositary and the Northern Ireland situation would thereby become an international conflict."[596] The French representative agreed that "the goal of humanitarian law was to alleviate suffering, not to make statements on conflict motivations" and that "his Government was not prepared, under any circumstances, to sacrifice that basic principle."[597]

The US also found the move "disturbing," since "it would make the determination of the protections to be accorded to a combatant depend on a political judgment about the nature of the cause for which he was fighting… The result is totally inconsistent with the basic premise of the Geneva Conventions."[598] The Americans so disliked the amendment

---

[594] The two exceptions to this pattern were Norway and Australia.
[595] Levie, *Protection of War Victims: Protocol 1 to the 1949 Geneva Conventions, Volume 1*, 26–27.
[596] TNA: PRO FCO 61/1232.
[597] Levie, *Protection of War Victims: Protocol 1 to the 1949 Geneva Conventions, Volume 1*, 8.
[598] Electronic Telegram, 1974STATE047331, Secretary of State, Washington to US Embassy, Canberra, March 8, 1974, Central Foreign Policy File, 1973-1976, RG 59, NACP.

that they pressured the Australians (who were co-sponsoring one of them, see option 2,) to desist: "We believe that for [the Government of Australia] and other governments which are concerned about effective application of international humanitarian law to participate in undermining of basic foundations of that law for short-term political gain would be highly irresponsible."[599] Belgium reacted swiftly and with the support of a few others proposed an alternative amendment that hoped to allay the concerns of the opposing coalition by recurring to using the older but well-accepted legal formula known as the "Martens clause" used in the 1899 Hague Conventions to "deal" with thorny issues where consensus among states was elusive (see option 3.) Canada, Switzerland, Italy, Uruguay, Spain and the Netherlands and Monaco supported this view, while Denmark preferred the original ICRC text.[600]

After much debate without resolution, the ICRC proposed setting up a working group to find a compromise that "would be accepted by the greatest possible number of parties." Although that working group's verbatim records are unavailable, private government correspondence suggests this effort did not succeed. UK cables revealed that after long discussions, the coalition of African and Asian countries were unwilling to compromise on their "extreme" resolutions.[601]

The British considered three options, worth detailing. First, to hold their legalistic line that national liberation wars should not be included in the First Protocol. Second, to accommodate and modify some of the less offensive versions of the amendment on the table, or third, wait to see if any better options emerged through the work of other states interested in including self-determination but in neutral terms.[602] More importantly, the British recognized the political/social risk in showing themselves intransigent:

> "If we refuse to budge on the point of principle *we shall be in a fairly small minority* and efforts will be made to blame us for any failure of the Conference, but to concede the point will be the thick end of a pretty long wedge since a number of consequential amendments will be put forward for the rest of [the First and Second

---

[599] Electronic Telegram, 1974STATE047331, Secretary of State, Washington to US Embassy, Canberra, March 8, 1974, Central Foreign Policy File, 1973-1976, RG 59, NACP.
[600] Levie, *Protection of War Victims: Protocol 1 to the 1949 Geneva Conventions, Volume 1*, 26.
[601] TNA: PRO FCO 61/1232.
[602] TNA: PRO FCO 61/1232.

Protocols] will probably disappear. *The consequences for international law in general and the Geneva Conventions in particular would clearly be very serious*."[603]

British security concerns intermingled with social reputation as reasons for refusing the inclusion of national liberation in the First Protocol. They feared that the IRA might derive at least some propaganda (if not demand the protection) through the amended First Protocol, that remaining British colonies might get word and be empowered to pursue self-determination through violence, and even terrorist groups might "enjoy or at least claim" enhanced status.[604] Legal Advisors in London thus recommended seeking a compromise short of accepting the explicit inclusion of special conflict cases "until the last possible moment." However, if the undesired proposal came to vote, "they should vote against [it,] provided at least one [European Economic Community] partner is prepared to do likewise."[605] Avoiding legitimating armed groups and preventing a public loss of face via isolation were thus fundamental woes for the British.

Within the special Working Group the Canadian delegation introduced a motion to summon an Inter-sessional Group of thirty states from all regions of the world to consider the issue. The Western Group liked this idea but knew it was unlikely to be taken up by the opposing coalition, which really wanted their proposal put to a vote.[606] And indeed, as feared, a "railroaded" vote on the contentious amendment (Table 11, option 6,) happened a day later, leading to its adoption with 70 votes to 21, with 13 abstentions, as follows:[607]

In favor: India, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Liberia, Madagascar, Mali, Morocco, Mauritania, Mexico, Mongolia, Nigeria, Norway, Uganda, Pakistan, Panama, Peru, Poland, Qatar, Arab Republic of Egypt, Libyan Arab Republic, Syrian Arab Republic, Republic of Viet-Nam, Democratic People's Republic of Korea, German Democratic Republic, Khmer Republic, United Republic of Cameroon, United Republic of Tanzania, Romania, Senegal, Sudan, Sri Lanka, Sultanate of Oman, Chad, Czechoslovakia, Thailand, Trinidad and Tobago, Tunisia, Ukrainian Soviet Socialist Republic, USSR, Venezuela, Yemen, Democratic Yemen, Yugoslavia, Zaire, Zambia, Albania, Algeria, Saudi Arabia, Argentina, Bangladesh, Byelorussian Soviet Socialist

---

[603] TNA: PRO FCO 61/1232. Italics are mine.
[604] TNA: PRO FCO 61/1232. Italics are mine.
[605] TNA: PRO FCO 61/1232.
[606] TNA: PRO FCO 61/1232. The Canadian proposal was in the end never seriously considered, and the winning coalition even sought later to delete it from the record.
607 Levie, *Protection of War Victims: Protocol 1 to the 1949 Geneva Conventions, Volume 1*, 42.

Republic, Bulgaria, Burundi, China, Cyprus, Ivory Coast, Cuba, El Salvador, United Arab Emirates, Finland, Gabon, Ghana, Guinea-Bissau, Honduras, Hungary.

Against: Israel, Italy, Japan, Liechtenstein, Luxembourg, Monaco, New Zealand, Netherlands, Portugal, Republic of Korea, UK, Switzerland, Uruguay, South Africa, Federal Republic of Germany, Belgium, Canada, Denmark, Spain, United States of America, France.

Abstaining: Ireland, Philippines, Holy See, Sweden, Turkey, Australia, Austria, Burma, Brazil, Chile, Colombia, Greece, Guatemala.

Except for Australia, Sweden, Ireland, Greece and Turkey, the Western Gorup members voted against the text, and lost.

A single step remained to final approval but it was uncertain whether the sponsoring coalition would bring its text to a Plenary vote.[608] In the end this did not occur, and to Western relief, the coalition of "Afro-Asian" states decided to only to present a report on the proceedings in Commission "welcoming the adoption of Article 1" but postponing the ultimate fight until later.[609] Counting its losses, the Western Working Group agreed to join in the consensus acceptance of the Commission report, an outcome that though far from ideal was welcomed as the best temporary solution.

Living to Fight Another Day

The UK delegation's last cable from Geneva illustrated the Western mood at the end of the 1974 CDDH session perfectly: This was "an untidy and not very satisfactory conclusion but it could have been much worse. We have shown ourselves to be conciliatory; we avoided further confrontation and we live to fight another day though the chances of our seriously altering the amended text are pretty slight."[610] Post-Conference attitudes were generally gloomy. The French delegation was "depressed," the Americans noted that "the record of accomplishment… was not one of which the participants could be proud,"[611] and the British quipped that the results, "as far as there were any, they were

608 TNA: PRO FCO 61/1232.
609 Levie, *Protection of War Victims: Protocol 1 to the 1949 Geneva Conventions, Volume 1*, 60.
610 TNA: PRO FCO 61/1232.
611 TNA: PRO FCO 61/1234.

lamentable."[612] Even the Swiss, less prone to dramatic rhetoric, thought the session was "deplorable" and declared they were ready "to do what they can to pick up the pieces."[613]

A few weeks later, the British Interdeparmental Committee reconvened to consider the road ahead.[614] Despite being greatly exercised by what had taken place, the UK was determined to take leadership within the Western Group since, as Gerald Draper noted, "the limits of Western resourcefulness may not yet have been reached."[615] The West, it was said, had been well prepared legally but not politically. The burning question now was: What next?

Why Stay? Assessing Interest and Motivation

It is worth pondering why powerful Western countries, feeling mistreated and forced, decided to continue negotiating in hostile environment, particularly when the prospects were not exactly bright. The UK report noted that "a number of smaller countries (but who have the votes) show signs of wanting to impose such restrictions on the conduct of warfare that no military authority could possibly accept them, or if they did would break them the first day of hostilities. The results would be either protocols not accepted by any serious military power and/or agreements of no value. Either way they would tend to destroy the force of the Conventions of 1949 and we would be worse off than before."[616] Some rational theories of IR in fact posit that in the face of unfavorable outcomes, powerful states, enjoying an "exit option" (unlike their weaker counterparts,) can easily threaten or actually leave the negotiating table; they can choose to "bargain hard."[617] Given what emerged from first session of the CDDH, one could have reasonably expected Western states like the US or the UK to adopt such an attitude.

Contra these conjectures, the British had some revealing words on their motivation to remain involved:

---

[612] TNA: PRO FCO 61/1233.
[613] TNA: PRO FCO 61/1233.
[614] TNA: PRO FCO 61/1232.
[615] See Draper's comments to the UK draft report in TNA: PRO FCO 61/1232.
[616] TNA: PRO FCO 61/1233.
[617] Fearon, "Bargaining, Enforcement, and International Cooperation."

> "No state except the small has a material interest in the emergence of new protocols – certainly no Great Power. (For the Russians they can be positively tiresome.) But the political value for the Third World and vague humanitarian desiderata will probably keep up the momentum. *The real danger is that the basic fabric and assumptions of the Geneva Conventions will be threatened… it is important that the Geneva Conventions, which do after all provide the main safeguards, should not be endangered.*"[618]

The UK team recognized that encouraging signs for the future were few. Yet preserving "the fabric" of international humanitarian law had become part of their national interest, and they did not dare imperil it through brinkmanship or rash departure. In addition, the British explicitly cited the "great anxiety on all sides not to want to seem unsympathetic to the Africans or to appear racialist (sic)," as well as solidarity owed to the Western camp and to the Swiss.[619] This combination of motivations can only be described as "eclectic," both rational and social. Deciding to stay involved due to anxieties to avoid seeming racist in public, furthermore, resonates as an effect of social coercion as I have defined it.

Compounding the above, the British in fact acknowledged that their decision to stay on board and be proactive was a risky gamble, recognizing that "by [making] genuine attempts to negotiate" a compromise version of Article 1, "we might be making our position far more difficult" if an unacceptable Protocol emerged forcing them not to ratify.[620] Still, "if the Diplomatic Conference is a complete failure as far as the Western Group is concerned, the rebounding damage done to the Geneva Conventions could be considerable."[621]

Crucially, the US shared British concerns almost verbatim. To their mind, "it would be a tragedy if the divisiveness shown at the Conference should endanger the fragile fabric of the existing humanitarian law," that is, if "the fragile community of roughly 135 states that are now parties to the Geneva Conventions of 1949" were "shattered by the interjection of political considerations that could lead a number of states, including some

[618] TNA: PRO FCO 61/1233.
[619] TNA: PRO FCO 61/1233.
[620] TNA: PRO FCO 61/1234.
[621] TNA: PRO FCO 61/1234.

of the world's major military powers, not to become parties to the two Protocols."[622] Beyond this, the US continued to identify several specific interests, most related to improving the law regulating inter-state war but also extending to respect for basic human rights in internal armed conflicts.[623] Again, a mix of security and humanitarian concerns operated to keep the powerful American team involved in the process.

For the US it was important that in the interim opportunities were increased for participants to reflect on the desirability of adopting protocols that commanded broad, if not universal, acceptance. Despite the American delegates being dismayed by others' ability to "pin paper flower on the text" (as Richard Baxter creatively phrased it,) mustered enough motivation to return to Geneva for a second round in 1975.[624] Before the second CDDH session opened in February, however, additional Western Group preparations were needed to secure a unity of position on all or most issues, as well as bilateral efforts to "educate" a number of Latin American and other developing countries.[625]

The US, the UK and France all recognized there had been slight overtures to compromise by a few moderates in the "Afro-Asian" coalition, particularly Egypt, indicating that the text adopted in Commission was not set in stone and that there "may be a way of separating out the issue of wars of national liberation… without necessarily accepting that obligation."[626] Regardless, the Western Group had to assess the impact of accepting wars of national liberation into the First Protocol "to avoid any formulation which permits unequal application of the Protocols and the Convention to different parties to a conflict."[627] Finally, the US retained an interest in the Second Protocol, for

---

[622] TNA: PRO FCO 61/1234. This paraphrases the classified and unclassified US reports. Classified Report of the United States Delegation to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, Switzerland, February 20-March 29, 1974, 6. On file with author (hereonafter Classified US CDDH Report, 1974.)
[623] TNA: PRO FCO 61/1234.
[624] TNA: PRO FCO 61/1233.
[625] Classified US CDDH Report 1974, 7.
[626] Classified US CDDH Report 1974, 6.
[627] *Classified US CDDH Report 1974,* 6. The US, moreover, worried about the matter of individual criminal responsibility for violations of the Protocols, which many non-Western states

which a majority of delegations had shown disdain during the first session. The Chinese delegation, for example, upon the adoption of the "Afro-Asian" amendment, stated plainly that the Second Protocol was unnecessary and could now be considered an improper intrusion in internal matters.[628]

Continuing to play the role of brokers among Western states, in mid-June 1974 the British drew up and circulated a memo with four options: 1) Postponing the 1975 session of the Diplomatic Conference, slackening the momentum of the opposite coalition and allowing for some of the ongoing conflicts in Africa to end; 2) Negotiating an amendment acceptable to the West and liaising with the Third World coalition to compromise; 3) Discussing options for re-shaping the protocols (and the Geneva Conventions) to make them applicable to national liberation wars; 4) Accepting the amended Article 1 as a *fait accompli* and agreeing collectively on what amendments to make. The British also floated the idea of holding informal talks at an upcoming meeting of the San Remo International Institute of Humanitarian Law, planned for September 6-9, 1974. To British eyes, this forum provided an "ideal cover" since it was not highly monitored and allowed a semblance of informality as many of the same negotiators from all regional groups were likely to attend. An eventual negotiation at San Remo, however, had to be preceded by a further meeting of the Western Group and by diplomatic exchange. Besides San Remo, contacts could be established during a weapons conference in Lucerne or at the UNGA sessions in New York. They knew that if their tactic was to work, they needed "a great degree of ingenuity" and liaisons with friends.

From their list the British preferred the first option. Realizing postponement was implausible, they decided to support the second alternative, while the third and fourth were only to be tried at last resort.[629] Interestingly, although most others in the Western camp agreed with the UK on this, eventually *the opposite* occurred and the fourth option was chosen. I show how below.

---

threatened to insert without reference to "intent" or "fault," thus easily exposing troops to multiple charges of abuse and a correlated withdrawal of POW benefits.

[628] TNA: PRO FCO 61/1234.

[629] TNA: PRO FCO 61/1233. The fourth and initially most disliked tactic was the one applied, as I show later.

The Swiss were asked to take soundings on attendance to San Remo, hoping to secure attendance by representatives from the Third World coalition. ICRC officials also encouraged the Western Group to seek compromises prior to the 1975 session, and urged in particular contact with Algeria, Indonesia, Nigeria and India.[630] A new round of Western Group coordination meetings were scheduled in September.[631] These meetings allowed it to gauge how Third World delegates reacted to their initial outreach, and to decide how to move ahead.

A "Solution" Emerges

Western demarches to Third World delegates at San Remo failed. The session revealed that the majority of the "winning" coalition felt extremely sensitive about yielding the gains made during the first session of the Conference, and despite a few isolated signs to compromise, they were firmly opposed to making concessions.[632]

At the September Western Group meetings, however, surfaced another possible tactic to face Third World "intransigence." The American head delegate, George Aldrich, suggested that if the text were not modified, a so-called *cordon sanitaire* could be introduced in order to prevent its application to cases beyond the specific ones that interested the Afro-Asian coalition (i.e. African anti-colonial struggles and Palestine.) This might come in the form of additional articles negating the application of the First Protocol to just wars or via other juridical means that compensated for Article 1.

These American proposals were the seeds of the Western Group's strategy of inserting "antidotes" in the text of the Protocol so as to undo the "damage" done by the contentious amendment, as illustrated later. Following these September 1974 consultations the Western Group agreed to continue exploring this solution, and tasked the UK with a study on the consequences of the adopted Article 1 for the entire First

[630] TNA: PRO FCO 61/1234.
[631] Greece and Sweden received invitations to these meetings.
[632] See "Berich über die Meetings, des "Western-group" an der Diplomatischen Konferenz über das Humanitäre Kriegsvölkerrecht, (London 2-3 September und 17-19 September 1974)" in Consultations Presidentielles, Swiss Federal Archives, Bern. Also see the UK brief for the 1974 UNGA in TNA: PRO FCO 61/1235.

Protocol. It also occurred to Western countries that demonstrating an accommodating attitude toward the Third World regarding the First Protocol might increase the chances of the Second Protocol, provided that its threshold of application was increased and its contents abbreviated to ward of those states' fears. Canada was thus entrusted with drafting a new "minimalist" version of that instrument, which as we will see, resurfaced years later and played a critical role.[633]

The Swiss report summarizing both September Western Group consultations closed with the telling conclusion that, although heavy fights laid ahead, most within the Western Group were willing to "swallow the Article 1 pill."[634] A new round of Western consultations, first restricted to the "Inner Core" (US, UK, France and Canada) and another gathering the entire Western Group, were scheduled to take place in January in Washington D.C. prior to the second session of the Diplomatic Conference.

A Crucial Meeting

The four-state Western "Inner Core" consultation occurred in January 13-14, 1975.[635] These conversations evinced that the American strategy regarding the dreaded Article 1 had taken root.[636] In George Aldrich's own words: "If we questioned the principle of the amendment to Article 1 we would have to take responsibility for the break-up of the Conference. We could afford to be cynical about Article 1 which would never be applied in NLM conflicts."[637]

The contours of what I have labeled *covert pushback* were thus emerging. According to the American view, the Western Group should continue negotiating a militarily acceptable protocol applicable to <u>conventional</u> (i.e. inter-state) international conflicts, while also inserting a few crucial provisions that neutralized the just/unjust war

[633] See "Berich über die Meetings," Swiss Federal Archives, Bern.
[634] See "Berich über die Meetings," Swiss Federal Archives, Bern.
[635] For the US: George Aldrich. For France: Christian Girard and Col. Fricaud-Chanaud. For the UK: John Freeland and Martin Eaton, FCO, and James Makin, MOD. For Canada: David Miller, Gerry Olsen and Col. Jack Wolfe. See Electronic Telegram, 1975OTTAWA00045, US Embassy in Paris to US Embassies in Ottawa and London, January 7, 1975, Central Foreign Policy File, 1973-1976, RG 59, NACP.
[636] NUOI 1974-1979, Carton 1678, Cote F. 6.8.1.2., French Archives.
[637] TNA: PRO FCO 61/1374.

distinction and that made the First Protocol's application to wars of national liberation subject to *de jure* and *de facto* conditional reciprocity by the non-state armed groups waging them. The Norwegians had recently circulated a proposal allowing NLMs to commit themselves the instrument, and although Norway likely suggested this text to *enable* NLMs to become parties to the First Protocol (gaining in status and protection,) the US cleverly reasoned Western states might use this opportunity to exactly the opposite end.

Other delegates reacted with some reservation to the American proposal. The UK and Canada, though wishing to be cooperative, were unsure to simply accept Article 1 and act as if it did not matter, "sweeping so many problems under the carpet" and perhaps complicating ratification later on. Privately, France displayed discomfort about what it perceived as a "ruse" leading to impracticable treaties, but recognized that opposing the Americans would spell isolation from both the Third World and the Western group. Indeed, in the end the weight of the American presence within the Western group locked-in the approach suggested by Aldrich. The French could not but acquiesce while quietly trying to liaise with friendly Third World delegations to craft an improved text.

Yet the consequences of the Western Group's "pragmatic" decision not to make efforts to adapt the First Protocol to national liberation wars were serious in humanitarian terms, given the potential protection such an instrument might provide to the victims of those conflicts. In a chilling private memo, the West German exposed their utilitarian ethical calculus like this: modifying the First Protocol and the Geneva Conventions would produce such a large amount of work and elicit such resistance that it was unlikely to be achieved. In addition, a First Protocol adapted to wars of liberation would "<u>only</u>" benefit "about 25 million people of the total world population."[638] Moreover, since by the negotiations' end some of the ongoing liberation conflicts might have finished (with fewer people standing to enjoy the First Protocol's protections,) the Germans concluded it was "unjustifiable" to have delegations from more than 120 countries devote their energy to the task.[639] The UK and Canada, for their part, agreed that proposing a flurry of

[638] The emphasis is mine.
[639] TNA: PRO FCO 61/1374.

amendments in order to make the protocol suitable for wars of liberation was just not politically expedient.

As the above suggests, a key reason buttressing the West's "cynical" line was tied to world political changes unfolding at the time. Portugal's "Carnation Revolution" at home in April 1974 indicated that that country's colonial holdings would soon attain independence, thus "resolving" one of the major sources of impetus behind the African initiatives. Attentive to these developments, the majority of the Western coalition believed that the issue of national liberation was temporary and soon to end, thus limiting, if not completely foreclosing, the dangers of accepting Article 1 or the eventual ratification of the First Protocol.[640]

The entire Western coalition reunited as planned in January 27-30, 1975 and with some behind-the-scenes reticence from France and Japan, approved the American tactic the amendment to the First Protocol.[641] They also agreed, upon Canadian insistence, that the West should force the Conference to at least consider the Second Protocol, albeit in a "more attractive" version "to other groups… as well as to ourselves," with reduced content and conditions for application.[642]

A New Round

The Vietnam conflict had not yet come to ahead when the second session of the CDDH opened on February 3, 1975. Accordingly, the US remained worried that the PRG would again attempt to participate. The Western group had agreed to press the Swiss hosts to maintain the previous year's status quo, and that if the PRG requested to reopen the issue, they should demand a 2/3 majority vote as necessary. Behind the scenes the US campaigned again for adherents, and prepared a temporary withdrawal statement in case the PRG won the battle (so serious was the matter.) Luckily for the US delegation, and

[640] Although the struggles in South Africa, Rhodesia and the Israel-Palestine persisted, alongside remaining overseas territories held by various European states, the downfall of a disgraced imperial Portugal clearly worked to allay the concerns of the West.
[641] Austria, Australia, Belgium, Canada, Denmark, France, FRG, Ireland, Italy, Japan, Luxembourg, Netherlands, Portugal, Switzerland, Turkey, UK, US.
[642] TNA: PRO FCO 61/1374. Note that the West German memo referred above emphasized their interest in the Second Protocol.

despite much maneuvering over two days, the PRG failed to secure the majority it needed to reopen debate on its admission.[643]

Despite this initial alacrity, the rest of the Conference proceeded unaffected. To Western relief, in 1975 the coalition of African and Asian states seemed uninterested in polemics. Instead "the second session [was] a simple continuation of the first… and the Conference avoided all but the most passing tactful references" to the issue.[644] The UK mused that this denoted not just Third World awareness of a changing Western attitude, but also a marked loss of interest on the part of many countries that, having secured the political gain they sought, did not much wish to meddle into the technical/substantive improvements of the law.

Although some important provisions of the First Protocol were long debated and adopted at the second session of the CDDH, for our purposes the relevant development in the 1975 session dealt with Second Protocol. Negotiations on the scope of that instrument attracted extensive presence by Third World states and proved among the most heated of the Conference. A mixed coalition pushing for high barriers to application and few humanitarian protections came out in full force, including Latin American (Argentina, Honduras, Brazil and Mexico,) African (Nigeria,) Asian (Indonesia, Pakistan, Philippines) Arab (Egypt, Iraq) and Socialist states (USSR, Yugoslavia, Romania, East Germany.) France joined their ranks, while the UK, secretly pleased, did not need to expose its intentions. The most radical proposals came from India and Iraq, which questioned the entire *raison d'être* behind a protocol for (non-liberation) internal conflicts as an unhelpful attack on state sovereignty, while Brazil seemed to be the only state to openly propose what others had in mind, i.e. that "draft [Second Protocol] could not be applicable unless its applicability was recognized both by the High Contracting Party in whose territory the armed conflict was considered to exist, and by the adverse

[643] The British volunteered this had again been partly due to the multiple (coffee-break and otherwise related) absences by African delegates while votes were being cast.
[644] TNA: PRO FCO 61/1374.

party."[645] In addition, Socialist states proposing high conditions for application sought ways to undermine Common Article 3, either by declaring that the scope of the Second Protocol should supersede the "vague but generous" one of CA3, or by inserting clarifying language that prevented CA3 from applying to conflicts below a high civil war level.

Western states (among them Austria, the Netherlands, New Zealand, Australia and Belgium) tried to contain these adverse efforts, to no avail. Taking a pragmatic line, the US and Canada put forth the idea that the Second Protocol should only contain a few fundamental humanitarian provisions with low conditions for application so as to cover a broader range of internal conflicts. However, Norway, Finland and Sweden opposed both these perspectives, declining to water down the Second Protocol's contents, or to give into the demands of the "extreme sovereigntists."[646]

A working group comprising 28 delegations was set up to discuss the scope of the Second Protocol, and after six meetings arrived at a compromise formula, as follows:[647]

> "The present Protocol, which develops and supplements article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by article 1 of Protocol I and **which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which under responsible command exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement the present Protocol.**
>
> 2. The present Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."[648]

The working group proposal was presented to Commission II, where it was adopted by consensus.[649] With this, the debate on the scope of the Second Protocol was almost

---

[645] NUOI 1974-1979, Carton 1678, Cote F. 6.8.1.2., French Archives; Howard S. Levie, *The Law of Non International Armed Conflict: Protocol II to the 1949 Geneva Conventions* (Martinus Nijhoff Publishers, 1987), 57–58.

[646] Norway in fact continued to insist that both protocols contain equal provisions, and hence should be merged. The Philippines and Algeria supported the merging, though Western states suspected reasons contrary to altruism.

[647] The verbatim records of these sessions are unavailable.

[648] Ibid. The emphasis is mine.

sealed, completely transforming the original wishes of the ICRC by including a series of stringent formal conditions for application that would only apply to high-intensity civil wars. The open question now related to what substantive provisions it might include.

The Americans, British and French reacted variously to these outcomes. In the eyes of the US, the proceedings of the 1975 session had dealt the Second Protocol a serious blow, since it would no longer apply to the conflicts where it was needed most. In addition, the insistence of the Scandinavians to overburden the text with obligations unpalatable to the powerful opposing coalition threatened ultimately to bring the downfall of the entire instrument. For their part, the British were satisfied with a threshold high enough to meet their security concerns. Yet they too decried Scandinavian gestures, which were seen as reducing the chances for the Second Protocol's wide acceptance and application. It was now for the West to generate sympathy for as minimal a Second Protocol as possible, in order to salvage it. (Less altruistically, securing *this* version of the scope of application was fundamental to British eyes, fearing that its frustrated Western allies might prefer to negotiate a separate, more protective instrument, outside of the Diplomatic Conference.)

Lamenting once more the cynical Western approach to the scope of the First Protocol and the seemingly heavy-handed approach of the Americans to obtain compromises behind the scenes, the French offered a sharp analysis of the negotiations up to that point. In their view the Conference was an awkward encounter between two very different groups of self-interested states (the Western and the non-Western,) and the idealist humanitarianism of the Scandinavians. This clash of views had for France led to treaty texts riddled by safeguards, idealistic prohibitions, tautologies and otherwise "surprisingly pious vows" whose complexity and ambiguity would not facilitate practical application.[650] The frustrated French concluded their confidential report bitterly: "It is up to the supporters of adapting the law of 1949 to new forms of conflict to define their concepts, and to its authors, most of whom are Western, to help them without looking to ambiguity and non-applicability as a way-out, which would do a durable disservice to the

---

[649] Ibid.
[650] NUOI 1974-1979, Carton 1678, Cote F. 6.8.1.2., French Archives.

whole of international humanitarian law."[651] What the French analysis missed was that the "glue" keeping the West at the Conference was as much *social* or relational as it was self-interested. Yet it was clear that all the Third World's social pressure had not achieved a sincere (persuasive) change within the West, but that its coercive character had led to deceptive or covert form of reaction.

Following the 1975 Conference session, conversations on the Protocols themselves resumed at a meeting of the "Inner Core," which now included West Germany, in Washington, DC on November 17-18.[652]

After the developments at the 1975 Conference session, the US wondered whether the Second Protocol was becoming a "white elephant," demanding too much energy but unlikely to be applied in the end, given its high threshold.[653] Canada bemoaned the Scandinavian-induced over-elaboration of the clauses but worried that further pressing for its simplification might be misconstrued as ant-humanitarian in public. The idea to propose a separate instrument of like-minded states surfaced anew, with US support. Perturbed by this thought, the British replied that it was "too soon to totally give up hope." Rather, the Western line should remain to argue for a simplified text, waiting to see what emerged. The West Germans agreed but American delegate Aldrich remained unpersuaded, suggesting that they might want to leave the negotiation of the Second Protocol until after the First had been adopted. The Canadians, who reportedly saw the Second Protocol as tied to their prestige,[654] stood their ground noting that this would be the "kiss of death" for the instrument and shrewdly pointing out "how unfortunate it would be if the impression were created that the US had washed its hands of [the Second

[651] NUOI 1974-1979, Carton 1678, Cote F. 6.8.1.2., French Archives.
[652] West Germany had emerged as a helpful partner of the US, UK and Canada during the IHL revisions process and a leader on the military implications of the Protocols, which worried them in the European East-West security contest. The original "Inner Core" member states were careful not to raise suspicion among the Germans by pretending that this was the first of such restricted consultations.
[653] The exact quote is: "It was unlikely that there would be any conflicts where Governments would be unable to find plausible reasons for saying that the Protocol did not apply." TNA: PRO FCO 61/1374.
[654] NUOI 1974-1979, Carton 1678, Cote F. 6.8.1.2., French Archives.

Protocol.]"[655] (Notice the social-reputational threat/argument here.) The Germans remarked that this unfortunate situation was due to a "bad" Article 1 for the First Protocol, and the French, though sympathetic, decided to hold back comments "since it would have been in poor taste."[656]

The entire Western Working Group reunited again in London on March 15-17, 1976 to prepare for the upcoming Third Session of the Conference (CDDH3,) set to begin a month later.[657] The most contentious issues were reviewed, and despite some French venting, the Western compromise on Article 1 was maintained.

Resolving the POW issue

The third session of the CDDH opened on April 21, 1976. The end of the Vietnam conflict in 1975 meant that the PRG admission issue did not re-emerge (there was only one Vietnam from then on,) yet progress this year proved slow due to the complex nature of articles under consideration. One of these was the critical provision offering POW protection to irregular combatants in international conflicts (i.e. within the Draft First Protocol in Article 42, paragraph 3.) American Head of Delegation George Aldrich reportedly acted again as the essential Western broker, liaising behind the scenes with representatives of the opposing coalition (an interesting mix: possibly Norway, Algeria, Egypt, the Democratic Republic of Vietnam and the Palestine Liberation Organization.)

Continuing with its role as moral entrepreneur, the ICRC seemed to have helped these delegations to devise a solution. According to the ICRC Director of Principles and Law at the time, Jacques Moreillon, sometime between the 1975 and 1976 session officials of

---

[655] TNA: PRO FCO 61/1374. Other thorny issues started to loom large around this time, among them the prohibition of reprisals against the civilian population, the inclusion of reservations, the treatment of nuclear weapons, or the possibility that offenses committed during combat (against civilians, for instance) may be considered grave breaches of the protocol, or enshrined as war crimes. In relation to this last point, the American view (shared by others) was that a high dose of mental intent (*mens rea*) and reference to context (availability of information) needed to be inserted, that the list of grave breaches had to be specific only to the most serious offenses, and that the language of war crimes should not be used.

[656] Presumably toward the Canadians.

[657] NUOI 1974-1979, Carton 1678, Cote F. 6.8.1.2., French Archives. Present were: UK, Australia, Austria, Belgium, Canada, Denmark, Finland, FRG, France, Greece, Ireland, Italy, Japan, Netherlands, NZ, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, US.

that Swiss organization contacted Aldrich and provided him with the legal formulas through which US in Vietnam (and the French in Algeria before it) had allowed for the application of POW *treatment* (and in the American case, *status*,) to most detained "irregulars," so long as they had been carrying arms openly before and during military engagements. The US delegate then used this template as basis for a compromise text that set out the conditions under which combatants could receive POW status and offered "POW-like" treatment to anyone who was captured while carrying arms openly.[658] Importantly, in American eyes this text contained various ambiguities that allowed the West to believe it could ultimately deny *status* to national liberation fighters, thus facilitating their prosecution as criminals for their wartime offenses. (More on this below.) These ambiguities were probably not evident to Norway, Algeria, the Vietnamese, Egypt or the Palestinians, to whom the compromise text appeared satisfactory, but they would soon create controversy within the Western camp. (See Appendix 4 for the full text of the draft Article 42.)

The study of the Second Protocol was once again made difficult in 1976 by persistent criticisms coming from Latin American states alongside India, Pakistan, Indonesia, the Philippines and Iraq. Each of the 13 articles debated and adopted that year gave rise to contestation at the Committee level. Certain states were so allergic to the consequences of the Second Protocol for their sovereignty that even the legal ability of the ICRC to do its humanitarian work during internal conflict was imperiled. Two of the opposition's leaders (India and Iraq) believed that giving the ICRC a legal "right to intervene" opened the door to unacceptable outside meddling in their internal affairs, and might operate to benefit the rebel side.

---

[658] For first-hand corroboration the American delegation's role in the drafting of this article, see Aldrich, "Some Reflections on the Origins of the 1977 Geneva Protocols"; George H. Aldrich, "Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions," *American Journal of International Law* 85, no. 1 (1991): 1–20; George H. Aldrich, "The Laws of War on Land," *American Journal of International Law* 94, no. 1 (2000): 42–63. On the role of the ICRC in persuading the French and the US to treat and/or consider captured rebels as POWs in Algeria and Vietnam respectively, and the importance of these experiences for the drafting of Article 42/44 of the First Protocol, see Morgan, "The Protection of 'Irregular' Combatants: An Enduring Challenge for Humanitarian Action," 49–50, 76–77; Forsythe, *The Politics of Prisoner Abuse: The United States and Enemy Prisoners After 9/11*, 19.

The turmoil of the proceedings, the frail compromises and in general the uncertain future of the Second Protocol had not escaped the Swiss hosts. Just before the third session of the Conference closed on June 11, 1976 the Swiss Foreign Office organized a series of private interviews between the President of the Conference (Swiss Foreign Minister Pierre Graber) and select important delegations. Conversations with Iraq, France, Algeria, Mexico, India, North Vietnam, Pakistan, Egypt, the UK, US, Sweden, USSR, Brazil, Tanzania and Venezuela confirmed the fears of the West: the animosity toward the Second Protocol was pervasive and only a simplified, non-threatening text would be adopted; the compromise on Article 1 of the First Protocol was seen as a precious gain for the "Afro-Asian" states, and attempts to alter it were said to have dire consequences; and the article on POWs would be among the most difficult up for debate in 1977.[659]

The Swiss also maintained contact with the ICRC on the future of the Conference. Interestingly, a conversation between ICRC Vice-president Jean Pictet and Swiss diplomat Jean Humbert in mid-July 1976 revealed that the ICRC was aware there were efforts in motion to minimize the Second Protocol, yet the delegations in charge (Canada, Pakistan, mainly) had reportedly not invited it to participate in such work. The ICRC was concerned about the substantive outcome but, as seen earlier, also knew full well that the current draft stood little chance of adoption during Plenary. In general, the ICRC worried that the following year Third World delegations would come *en masse* to the closing session of the Diplomatic Conference and "impose their will." As the aide-memoire of the ICRC-Swiss conversation appropriately noted: "Next year is the moment of truth!"

Military Fears Surface

In late 1976 and early 1977 the Western Group zoomed in on the military implications of the Protocols for NATO. West Germany had grown increasingly worried about the restrictions and confusions that in its view were being introduced, and recent German-commissioned security analyses had suggested that the First Protocol's

[659] See various documents, beginning on June 7, 1976, in "Consultations Presidentielles," Swiss Federal Archives, Bern.

obligations might in fact make the alliance vulnerable to attacks from the East.[660] At German instigation, new "Inner Core" meetings were held in Bonn in November 1976 and in Brussels in mid-January 1977 to discuss these matters.

These encounters showed that West German security concerns had diffused to the UK. During the preparation of the official briefs for Ministers, the British Defense staff began to express sharp disagreements with the American view that by crafting indeterminate texts on NLMs and POWs, among others, they could *actually* safeguard their legal and military position.[661] The risk existed that opposing parties to conflict would interpret the text to their convenience. Further bilateral contacts confirmed that others in the Western camp shared British worries, encouraging them to challenge the American line shortly before the opening of the Conference.

These attempts came to naught, however. At February and March 1977 Western Group meetings, George Aldrich made it clear that the US would continue to support the current version of the article granting POW protection to irregular combatants. Suspecting that Aldrich's view might not be shared by the US DoS, UK officials privately inquired with DoD staff in the American delegation "whether the Pentagon was really prepared" to endorse the text. These officials responded that though "they were unhappy" about it, there was high-level agreement to accept it, on the condition that American interpretation of draft's two major ambiguities were inserted in the negotiating record.

The ambiguities specifically related to the meaning of two words within the text: "deployment" and "protection." The working text recognized that although "that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot… distinguish himself" from the civilian population, a combatant could retain his status as long as he carried his arms openly "during each military engagement"

---

[660] NUOI 1974-1979, Carton 1678, Cote F. 6.8.1.2., French Archives; TNA: PRO FCO 58/1127.
[661] TNA: PRO FCO 58/1127. Head Delegate Aldrich later recognized in print that given these ambiguities, "the protection accorded by this article to irregulars may be less than it seems because it is the captor Power and its tribunals that have to interpret them." See George H. Aldrich, "Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I," *Virginia Journal of International Law* 26, no. 3 (1986): 708.

and "during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate." The UK feared that this required liberation fighters only to distinguish themselves *immediately prior* to executing an attack, hampering a states' ability to neutralize them and leading to potential civilian deaths. The American team insisted, however, that "deployment" should be given a broader meaning, covering "all the period of time (and distance in space)" elapsed between a guerrilla member or group leaving their posts until that attack took place, thus permitting a state wide latitude to target them. In addition, the Americans believed that the legal protection for these combatants did not imply immunity from criminal trial.[662] Moreover, the US felt that although the risk to civilians existed, it was "likely exaggerated," and revealed again that their primary interest in this article lay in securing protection for all combatants, even those believed to have broken the rules of war.[663] Complicating things, at the February meeting Aldrich had announced that the Soviet Union would agree to support the draft text on POWs. This alarmed the British not only because they knew a consensus US-USSR view would be difficult to crack, but because Soviet acceptance of the text fed into their fear of an attack from the East. A recent secret military report confirmed these concerns, and added to them threats from "international extremist terrorists against targets in Europe."[664]

Frustrated, the British Defense staff believed Aldrich himself was responsible for this "incredibly naïve" line, stating that "Pentagon thinking seems to be in the same direction as our own, the main difference being that they have to operate within the constraints imposed by a draft proposal prepared by their own Head of Delegation."[665] In their view,

---

[662] TNA: PRO FCO 58/1127. This was Martin Eaton's (UK) paraphrasing of his conversation with US General Walter Reed on February 22, 1977.
[663] Ibid.
[664] TNA: PRO FCO 58/1125.
[665] TNA: PRO FCO 58/1127. American naiveté, according to the British Defence Ministry, lay in hoping that their draft would prevent Vietnam-style arbitrariness against POWs. "No matter how an Article of this sort is drafted, it is always open to State to twist the law, taking advantage of the drafting to reach a conclusion which is totally contrary to the intention behind the Treaty." FCO legal advisors agreed, claiming that although "Mr. Aldrich has sought to allay Western fears by saying that we can feel perfectly free to exploit the ambiguities against the guerrilla… two can play at this kind of game."

"the US has gone out on a limb and their military now wish to extricate themselves from an impossible position."[666] They also found that the Pentagon's interpretation of deployment gave the word "a totally different, artificial and inappropriate" meaning, and that as a whole, even if amended, "the result would not be a good article. The whole framework appears to be designed to encourage guerrillas and this would seem to be against our national interest." Yet given that any amendments were unlikely, and reopening discussion might make the text worse, the UK decided the best course in the short-term was to associate itself with the American interpretive statements, even if these were "quite contrary to the apparent meaning of the Article and thus unlikely to get any wide acceptance." The long-term solution for the UK was to consider making a reservation prior to ratification.

A final Western coordination round before the fourth session of the Diplomatic Conference took place with meetings of the "Inner Core" on March 14th, 1977, and of the extended Western Group on the 15-16. The "Inner Core" meeting served to air the recurrent grievances.[667] Americans led the meeting and expressed satisfaction by the fact that they knew of few (if any) countries opposed the text on POWs. The UK reacted immediately, voicing their many problems with exactly that text: "Guerrilla activity was seen as an increasingly serious threat in Europe by NATO; it was very important the text of Article 42 did nothing to encourage this activity."

Aldrich acknowledged the concerns about the exploitation of the wording's ambiguity but believed that a "clear, satisfactory and agreed" interpretive statement in the negotiating history would suffice to overcome the problem. It was foremost, in Aldrich's view, to find a compromise acceptable to the majority. The West Germans agreed that interpretive precisions were indeed necessary, but the French doubted their legal validity. Instead, they should strive to uphold the principle of distinction through clear means, preferably by the use of a distinctive sign. To this, the American replied that forcing distinction by such means would inhibit guerrilla activity completely and prove unacceptable to the Third World majority. In the end, the UK reminded the Americans

[666] TNA: PRO FCO 58/1127.
[667] TNA: PRO FCO 58/1127.

that no article would be able to ensure the protection of captured combatants, and although the US admitted that strict adherence was never guaranteed, "it would be useful to have a statement of law in the books which would be helpful to our personnel." The UK proposed a smaller "sub-Inner Core" group to work on possible changes to the text. The Americans acquiesced, but emphasized that it would be procedurally difficult and potentially dangerous to re-open discussion of this text at the Conference.[668] Despite intense quarrels on this point, Western states agreed on tightening the language or inserting interpretive statements on other areas of the protocol with potentially negative security implications for the alliance.[669]

These decisions were confirmed in the enlarged Western Group consultation a day later but behind the curtain the UK retained its unease. The British Interdepartmental team had met in early April with Parliamentary Under Secretary of State, Evan Luard, to receive final approval of their delegation brief.[670] At this meeting the British delegation made two telling decisions. First, although still maintaining a reserved position on the controversial Article 1 of the First Protocol, they vowed not to oppose it publicly, and if it were put to a vote: "On balance, abstention, at least in respectable Western company, appears preferable; a negative vote by us might have prejudicial consequences for developments in southern Africa as well as provide ammunition for the Third World and East European militants, and there seems to be no prospect of securing a blocking third… It is unlikely that a vote can be avoided. If it can be, the Delegation should not oppose a consensus."[671] With respect to the article on POW protections British tactics were less

[668] TNA: PRO FCO 58/1127. The British Defence Ministry instructed its defense staff in Washington to persuade the Pentagon to put pressure on Aldrich, hoping to secure amendments to the text or to at least to insert interpretive statements in the negotiating record. TNA: PRO FCO 58/1125.
[669] TNA: PRO FCO 58/1127.
[670] TNA: PRO FCO 58/1125.
[671] TNA: PRO FCO 58/1125. Interestingly, Luard displayed a far more humanitarian view than those under him toward the Second Protocol, arguing that a high threshold including territorial control was an illogical demand in view of the reality of guerrilla warfare. Notwithstanding fears about the Protocol's applicability to Northern Ireland, Luard thought the UK should support language that would apply to as many internal armed conflicts as possible. However, being reminded that at that stage of the negotiations the existing compromise was what seemed

clear, noting the stubbornness of the US and stating that the delegation should work to uphold the principles of equality of belligerence, of distinction between combatants and non-combatants, and of the loss of combatant status if these conditions were not observed.[672]

The conditions for social coercion thus seemed present: an acknowledgement of political isolation, the recognition of social costs and the inability to leave the negotiating room. What occurred?

The Moment of Truth

The fourth session of the Diplomatic Conference opened formally on March 17, 1977. The procedural matters that had stirred controversy in previous years no longer troubled the start of the CDDH4, yet with so much weighty legal matter to hash out, delegates set promptly out to debate and adopt the remaining articles in Committee, which then passed to review in Plenary. After the article-by-article adoption in Plenary, states would be presented with the finished Protocols and decide to finally adopt them either by roll-call vote or consensus vote.

Draft Articles 1 of the First Protocol and Second Protocols, setting out their general scope, had been respectively adopted in 1974 and 1975, and thus only awaited consideration in Plenary. Draft Article 42 (of the First Protocol, on POWs) still needed examination. On the morning of April 22 and without much ado, the Egyptian Chairman of Committee III framed the (American-brokered) compromise draft as the product of "two years of hard work, official and unofficial contacts and prolonged discussion and meditation," and although he explicitly voiced his wish to see the article adopted by consensus, the Israeli delegate disagreed and requested a roll-call.[673] The results were as follows:

---

attainable, the delegation ultimately decided not to depart from it. Luard also had far less stringent stances on other issues contained in the Protocols or regarding weapons regulations.

[672] TNA: PRO FCO 58/1125.

[673] Howard S. Levie, ed., *Protection of War Victims: Protocol 1 to the 1949 Geneva Conventions, Volume 2* (Dobbs Ferry, N.Y.: Oceana, 1980), 485–486.

In favor: Madagascar, Mali, Mauritania, Mexico, Mongolia, Morocco, Netherlands, Nigeria, Norway, Oman, Pakistan, Panama, Peru, Poland, Qatar, Republic of Korea, Romania, Saudi Arabia, Senegal, Socialist People's Libyan Arab Jamahiriya, Socialist Republic of Vietnam, Somalia, Sri Lanka, Sudan, Sweden, Syrian Arab Republic, Tunisia, Turkey, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Emirates, United Republic of Cameroon, United Republic of Tanzania, United States of America, Venezuela, Yugoslavia, Zaire, Afghanistan, Algeria, Austria, Belgium, Bulgaria, Byelorussian Soviet Socialist Republic, Costa Rica, Cuba, Cyprus, Czechoslovakia, Democratic People's Republic of Korea, Ecuador, Egypt, Finland,· France, German Democratic Republic, Germany (Federal Republic of), Ghana, Greece, Honduras, Hungary, India, Indonesia, Iran, Ivory Coast, Jordan, Kuwait, Lebanon.

Against: Brazil, Israel.

Abstaining: New Zealand, Nicaragua, Spain, Thailand, United Kingdom of Great Britain and Northern Ireland, Uruguay, Argentina, Australia, Bolivia, Canada, Chile, Colombia, Denmark, Guatemala, Holy See, Ireland, Italy, Japan.

With 66 votes to 2 and 18 abstentions, the controversial Article 42 of the First Protocol passed its first test. Many interesting questions emerge from the above vote, but in terms of the analysis pursued here the most striking aspect is that despite all the behind-the-scenes turf within the Western camp, no state opted for publicly opposing a text they all found suspect (with the exception of the Scandinavians and the US, which actively supported it.)

Given their consistent frustration with the legal muddle and military risk this article brought, it is surprising that France and West Germany voted for, not against. Why? French cables provide an answer. The Western Group had in fact held meetings on this question in Geneva. American Delegate Aldrich had reiterated his support for the text and circulated a text with an interpretive statement addressing other states' worries, to be submitted after the article had been adopted. Western states could then decide whether to openly support the Article or to abstain—a negative vote, crucially, was foreclosed. Some, including the UK, insisted in attempting to modify the text, against Aldrich's will. In the end, the American line persuaded only a few (West Germany, Austria, Belgium,) with West Germany reportedly finding it undesirable to oppose the US. France felt uneasy to oppose a near-consensus position, and received further instructions from Paris:

"Bearing in mind the political importance of Article 42 and given the protection it affords to combatants of resistance movements, it is convenient… to support it in despite of the textual imperfections and to join the consensus or, as the case may be, to cast a positive vote."[674]

A flurry of explanations followed the Committee vote, with most Western states, even those voting in favor, inserting the interpretation they had agreed to privately.[675]

On May 23 the Plenary sessions resumed to consider, first, the Articles of the First Protocol, followed by those of the Second. The contentious Article 1 of the First Protocol took center stage after three years of its original adoption.[676] Algeria suggested proceeding with adoption by consensus but Israel again demanded a roll-call vote. The outcome was as follows:

In favor: Lebanon, Liechtenstein, Luxembourg, Madagascar, Mali, Malta, Morocco, Mauritania, Mexico, Mongolia, Mozambique, Nicaragua, Nigeria, Norway, New Zealand, Oman, Uganda, Pakistan, Panama, Netherlands, Peru, Philippines, Poland, Portugal, Qatar, Syrian Arab Republic, Republic of Korea; German Democratic Republic, Democratic People's Republic of Korea, Socialist Republic of Viet Nam, Byelorussian Soviet Socialist Republic, Ukrainian Soviet Socialist Republic, United Republic of Tanzania; Romania, Holy See, Senegal, Somalia, Sudan, Sri Lanka, Sweden, Switzerland, Czechoslovakia, Thailand, Tunisia, Turkey, Union of Soviet Socialist Republics, Uruguay, Venezuela, Yemen, Democratic Yemen, Yugoslavia, Zaire, Afghanistan, Algeria, Saudi Arabia, Argentina, Australia, Austria, Bangladesh, Belgium, Brazil, Bulgaria, United Republic of Cameroon, Chile, Cyprus, Colombia, Costa Rica, Ivory Coast, Cuba, Denmark, Egypt, United Arab Emirates, Ecuador, Finland, Ghana, Greece, Honduras, Hungary, India, Indonesia, Iraq, Iran, Libyan Arab Republic, Jamaica, Jordan, Kenya, Kuwait.

Against: Israel

Abstaining: Monaco, United Kingdom of Great Britain and Northern Ireland, Federal Republic of Germany, Canada, Spain, United States of America, France, Guatemala, Ireland, Italy, Japan.

---

[674] NUOI 1974-1979, Carton 1678, Cote F. 6.8.1.2., French Archives. Telegram DELFRA GENEVE No 304/05.
[675] Levie, *Protection of War Victims: Protocol 1 to the 1949 Geneva Conventions, Volume 2*, 487–513.
[676] Levie, *Protection of War Victims: Protocol 1 to the 1949 Geneva Conventions, Volume 1*, 62–80.

An outcome similar to that of draft Article 42 emerged, and after a vote of 87 for, one against and 11 abstentions, no Western state had dared to publicly oppose the dreaded Article 1. As we have seen, among the Western skeptics only the US appeared to hold a firm line, and the UK and France felt particularly irritated to accept it. Regardless, a desire to avoid straying from the US-brokered Western consensus led them to abstain. The UK clarified that although "we found… and still find this to be a regrettable innovation… our understanding of the reasoning behind the amendment and our determination [were] not to see the protocol founder on this difference of opinion."[677] In private France was even clearer about its motivation:

> "Article 1… is of capital importance for Third World countries since their essential goal during the conference is to make humanitarian law applicable to national liberation wars. *It would thus be politically harmful for us to cast a negative vote on this subject which would be poorly received and would ruin the very favorable impression* produced by our positive vote on Article 42 relative to the new category of prisoners of war, f*or which we were warmly thanked by Vietnam, the Arab states and several African states.* The representatives of the United States, UK, West Germany and Canada, with whom I consulted, indicated they would abstain on Article 1."[678]

For France it was again a social reputational concern that ultimately dictated their decision to abstain. Following the vote, most Western skeptics again proceeded to issue explanations that clarified, in polite legal terms, their disagreement with the Article's underlying principle.

Article 42 of the First Protocol (on POWs) resurfaced in Plenary on May 26.[679] After another Israel-requested roll-call vote, results went as follows:

In favor: Czechoslovakia, Tunisia. Turkey, Union of Soviet Socialist Republics, Venezuela: Yemen, Democratic Yemen, Yugoslavia, Zaire, Afghanistan, Algeria, Saudi Arabia, Austria, Bangladesh, Belgium, Bulgaria, United Republic of Cameroon, Cyprus, Ivory Coast, Cuba, Denmark, Egypt, United Arab Emirates, Ecuador, United States of America, Finland; France, Ghana, Greece, Hungary, India, Indonesia, Iraq, Iran, Socialist People's Libyan Arab Jamahiriya: Jamaica; Jordan, Kenya, Kuwait, Lebanon, Luxembourg, Madagascar, Mali, Malta, Morocco, Mauritania, Mexico, Mongolia,

---

[677] TNA: PRO FCO 58/1124.
[678] NUOI 1974-1979, Carton 1678, Cote F. 6.8.1.2., French Archives. Telegram DELFRA-GENEVE No. 1604-10. My italics.
[679] Levie, *Protection of War Victims: Protocol 1 to the 1949 Geneva Conventions, Volume 2*, 514–545.

Mozambique, Nigeria, Norway, Oman, Uganda; Pakistan, Panama, Netherlands, Peru, Poland, Qatar; Syrian Arab Republic, Republic of Korea, German Democratic Republic) People's Democratic Republic of Korea, Socialist Republic of Viet Nam, Byelorussian Soviet Socialist Republic, Ukrainian Soviet Socialist Republic, United Republic of Tanzania, Romania, Holy See, Senegal, Sudan, Sri Lanka, Sweden.

Against: Israel.

Abstaining: Thailand, Uruguay, Federal Republic of Germany, Argentina, Australia, Brazil, Canada; Chile, Colombia, Spain, Guatemala, Honduras, Ireland, Italy, Japan, Nicaragua, New Zealand, Philippines, Portugal, United Kingdom of Great Britain and Northern Ireland, Switzerland.

With 73 votes to one and 21 abstentions, the controversial POW article passed its final test. There were no surprises this time, and the pattern of voting and explanations of vote corresponded to what we had seen in Committee.

The final decision on the entire First Protocol came in the afternoon of June 8, where it was swiftly adopted by consensus.[680] A day before, the UK delegation had requested instructions from London on how to proceed:

> "If a vote is requested, we recommend we should… vote in favour. We think it unlikely that any WEOG delegations other than France… might abstain on Protocol 1."[681]

But France did not request a vote or abstain, as the British expected. French cables show that this decision was not made until the last minute, however. Only few weeks earlier, on May 20, the delegation in Geneva had in effect received explicit instructions to abstain given the "confusions" introduced in the text and the fact that several provisions were incompatible with French national security policy.[682] As the debate approached, however, the French Head of Delegation wrote back to Paris with a plea:

> "Although the Department instructed the delegation to abstain… I feel I must call its attention about the fact that *we are risking to find ourselves distressingly isolated (eventually with Israel) if we adopt such an attitude.* Third World countries would give this vote a political meaning it does not have, that of a complete dismissal of the

[680] Summary Record of the Fifty-Sixth Plenary Meeting, in Federal Political Department, Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977, Volume 7. (Bern, Switzerland.)
[681] TNA: PRO FCO 58/1124.
[682] NUOI 1974-1979, Carton 1678, Cote F. 6.8.1.2., French Archives. Telegram DELFRA-GENEVE No. 450/54.

extension of humanitarian law to national liberation wars... *Moreover, we would be lynchpins of the opposition against the humanitarian progress* [in other parts of the First] Protocol… Finally, how could we continue to manifest so much reticence to a text that we have ourselves contributed to improve… Our positive vote – preceded by a general declaration expressing our reservations – would not at all prejudge the future attitude of the government as regards signature: In a comparable situation, I was authorized to vote for the International Covenants on Human Rights, which we have not yet signed… Bearing in mind the previous considerations, I would be grateful if the Department authorized the delegation not to disassociate itself from an eventual consensus on the First Protocol, and if a vote were requested, to cast a positive vote."[683]

The French government acquiesced, and the delegation avoided opposing the motion to adopt API by consensus, not without issuing a statement detailing its discomfort with various portions of the text.

(Un)binding Liberation Groups

A final key provision of the First Protocol remains to be considered here, namely the article offering the possibility for NLMs to "undertake to apply the Conventions and this Protocol", by means of a unilateral declaration addressed to the Swiss depositaries. This was now branded Article 96. While the article stated that by depositing a unilateral declaration "the said [NLM] authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol," it clarified that the "High Contracting Parties" (states) were "bound by this Protocol *if the latter accepts and applies the provisions thereof*."[684]

As explained earlier, the inclusion of the language providing for NLM "participation" in the First Protocol had been an initiative of a coalition of African, Socialist and Arab

[683] NUOI 1974-1979, Carton 1678, Cote F. 6.8.1.2., French Archives. Telegram DELFRA-GENEVE No. 1878-83.

[684] The italics are mine. My paraphrasing here is an amalgamation of the paragraphs 2 and 3 of the text. National liberation movements are not named as such, but rather referred to as an "authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4." For the original text see Article 96, "Treaty relations upon entry into force of this Protocol," *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977*. http://www.icrc.org/ihl.nsf/INTRO/470?OpenDocument (Consulted on August 15, 2013.)

countries (plus Norway, Finland and Australia) similar to that supporting the amended Article 1. From the perspective of the Western Group, however, a situation whereby states assumed unilateral humanitarian commitments without binding national liberation movements to the same obligations was unacceptable. At the same time, all along the perplexed West had agreed that such groups, not being states, should not be entitled to accede or become "High Contracting Parties" to the Protocol. For that reason, since 1975 (when it was first introduced by the opposing coalition) this article had become an attractive alternative for achieving the "commitment without legitimizing" goal. Some within the Western Group, however, were against the idea that liberation forces could be entitled to legal benefits simply by issuing a unilateral declaration.

After internal deliberations and without much public debate, the majority of the Western Group was pleased to see that the amendment clause on national liberation movements contained in Article 96 was taken to "complement" the rest of the text, which as indicated above, ensured that contracting states would *only* be bound to non-parties (including liberation groups) *if* the latter accepted *and* applied the provisions thereof. This made *de facto* as well as *de jure* conditional reciprocity a requisite for the application of the law to liberation groups-- a tall request that states believed only very few armed non-state movements could aspire to. Deceptively pleasing to most of the critical actors in the room, this Article was adopted by consensus in Committee, and again thanks to an Israel-requested roll-call vote, it was overwhelmingly adopted in Plenary by 93 votes for, 1 against (Israel) and 2 abstentions (Thailand and Spain.)[685]

What Fate for the Second Protocol?

Before ending, let me turn to the final negotiation of Second Protocol. A high threshold of application had been preliminary adopted in 1975. Under discussion in 1977 were multiple matters of substance, many of which were debated by working groups (and

[685] Various states issued explanations of vote. Some wished to emphasize that only declarations made in good faith by groups truly implementing the law in practice could be valid (Netherlands, Canada, UK, Israel,) while West Germany clarified that until this type declaration was made, Common Article 3 applied. Howard S. Levie, ed., *Protection of War Victims: Protocol 1 to the 1949 Geneva Conventions, Volume 3* (Dobbs Ferry, N.Y.: Oceana, 1981), 481–500.

sub groups) whose verbatim conversations went unrecorded. According to the available evidence, however, it appears that these discussions evinced Scandinavian efforts (plus the Holy See) to produce a Second Protocol for internal conflicts that was *as similar as possible* to the First, for international ones. That desire, however, was unacceptable to most states thus as it stood the Second Protocol appeared to stand little chance of adoption during Plenary review. A French telegram dated June 1 was straightforward on this point:

> "The outcome of this debate seems very uncertain. In effect, many Third World delegations are extremely reticent about draft [Second Protocol] which they resent, on the one hand, for placing governments and rebels on a level of juridical equality, considering both to be parties to conflict. This constitutes, in the eyes of many… an affront to state sovereignty… and involving overtly detailed provisions and thus too constraining, which can again constitute an affront to state sovereignty. African delegations confirmed to us… their concerns on this subject."[686]

Coordination among Western states, as we have seen, confirmed that they too were worried about the future of Second Protocol. Although the strict threshold had allayed the original fears of the UK and France such that they were no longer viscerally opposed to the project *per se*, they continued to believe that a demanding protocol, placing too many burdens on states and on rebels unable to respect them, would sink. Canada and the US, until now consistent supporters of the Second Protocol, agreed with this "realistic" argument (even if they preferred a lower threshold.) The Canadian delegation had in particular worked for years on a simpler, more widely acceptable version of that instrument, which the Conference, on Scandinavian impetus, had not embraced.

Such was the state of affairs on May 31, 1977, when the Second Protocol was sent to Plenary for review. A day later (and a week before the Diplomatic Conference was scheduled to close,) the Pakistani delegate, Mr. Hussain, tabled an amendment consisting of an entirely different, much shorter Second Protocol. During his public presentation of the project on June 2nd, he recognized that there was "considerable dissatisfaction" among developed and "under-privileged" countries with the length of the text as well as

[686] NUOI 1974-1979, Carton 1678, Cote F. 6.8.1.2., French Archives. Telegram DELFRA-GENEVE No. 1864-69.

with the fact that "it ventured into domains which they considered sacrosanct and inappropriate for inclusion in an international instrument." In this view, the Protocol entered, into "unnecessary details, rendering it not only cumbersome to understand and to apply in the peculiar circumstances of a non-international armed conflict."[687] Hussain noted that his project was "partly inspired" by previous Canadian drafts, and that it was based on the following theses:

> "Its provisions must be acceptable to all and, therefore, of obvious practical benefit; the provisions must be within the perceived capacity of those involved to apply them and, therefore, precise and simple; they should not appear to affect the sovereignty of any State Party or the responsibility of its Government to maintain law and order and defend national unity, nor be able to be invoked to justify any outside intervention; nothing in the [Second] Protocol should suggest that dissidents must be treated legally other than as rebels; and, lastly, there should be no automatic repetition of the more comprehensive provisions… found in [the First Protocol.]"[688]

Although the simplified draft was well received by many states including Canada, the Soviet Union, Nigeria and Egypt, the President of the Conference decided that the Plenary would examine the two projects side by side. Subsequent debates secured the retaining of the high threshold of application, despite last-minute demands by Colombia (with Brazilian and Saudi support) to make it even more stringent.[689]

After detailed discussions and much Scandinavian, Iraqi and Indian frustration (for different reasons,) what emerged was a Second Protocol that roughly corresponded to the Pakistani proposal. Gone was the language referring to the "parties to conflict," (which might legitimize rebels,) the assurance of quarter, the delay of the death penalty, the ability to sign special agreements, or the provisions allowing the ICRC and similar humanitarian organizations to offer their services.[690] After so many years of wrangling

---

[687] Levie, *The Law of Non International Armed Conflict: Protocol II to the 1949 Geneva Conventions*, 4.
[688] Levie, *The Law of Non International Armed Conflict: Protocol II to the 1949 Geneva Conventions*, 5.
[689] Levie, *The Law of Non International Armed Conflict: Protocol II to the 1949 Geneva Conventions*, 74.
[690] Notable articles retained (in modified form) due to pressure from the ICRC, Scandinavian states, Austria and the Holy See, were those related to the protection of the civilian population, the protection of objects indispensable to the survival of the civilian population and the protection of works and installations containing dangerous forces.

and final statements from a multitude of states, this version of the Second Protocol was at last adopted by consensus on June 8, 1977.[691]

The details on the behind-the-scenes negotiation of the simplified Second Protocol, to which some delegations referred as a "gentleman's agreement," are not known with precision and might be the subject of future research. But it is sufficiently clear that what emerged was the product of arduous Canadian and Pakistani efforts that, acting as moderates, liaised with their respective groups of influence and secured the adoption of a halfway compromise treaty they both saw as desirable and necessary.

The Diplomatic Conference, in keeping with its contentious proceedings over four years, ended with drama when the NLMs requested that they should be allowed to sign the Final Act of the CDDH. After much protest from the West, anxious about the legitimating consequences of such a gesture, it was decided NLMs would sign a different piece of paper attached to the Final Act, to include the following disclaimer: "It is understood that the signature by these movements is without prejudice to the positions of participating States on the question of a precedent."[692] This provides a final piece of evidence of the power of legitimacy-related struggles and anxieties to which I have referred throughout.

Conclusion

The description and analysis offered here, as in the previous chapter on Common Article 3, has sought to make several points of theoretical importance to this dissertation. Most importantly, I have demonstrated once more how the combination of anxieties over political isolation, an inability to force an outcome through the vote, and the perceived dangers to image, social reputation and to the institution of the Geneva Conventions, *socially coerced* skeptics to accept some of the principal demands of the opposing

[691] Summary Record of the Fifty-Sixth Plenary Meeting, in Federal Political Department, *Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977, Volume 7*. (Bern, Switzerland.)

[692] Federal Political Department, *Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977, Volume 1*. (Bern, Switzerland.)

coalition. The fact that the coalition of Third World states held the voting majority *and* the legitimacy "trump card" of the right to self-determination (a card that Western states found it hard to reject in public for fear of appearing racist) was fundamental in securing the ultimate acceptance of wars of national liberation in the First Protocol. These conditions also helped the inclusion of generous POW protections for liberation fighters, but they were compounded –crucially-- by the flexible American stance, itself a product of the Vietnam experience, and by ICRC advice.

The American example confirms a consistent finding: While in most cases "interests" (in this case domestic interests) *did* shape the initial public position of their delegations in Geneva, one cannot limit that conceptual category singly to *self*-interest. Moral and humanitarian concerns clearly mixed with security concerns and constant strategizing. The making of the Second Protocol provides further evidence of this. Despite the widely-shared strong pull of national security against introducing rules for (non-liberation) internal conflicts, which toward the end of the Conference made that Protocol implausible, various groups of states nevertheless found a way to produce an instrument containing important additions to Common Article 3, albeit one applicable only to high-level civil wars, through the sustained liaising of diplomats acting as strategic humanitarian brokers (Canada and Pakistan.) Exactly how and why those two strategic brokers operated behind the scenes to secure the acceptability of the Second Protocol remains unknown, but it is clear is that absent the humanitarian pressure to produce some set of rules applicable to the most prevalent type of armed conflict (a belief some held strongly during the Conference, even as they were in the minority,) this Protocol would not have seen the light of day. For this reason I also explain the negotiation of this instrument as the combined result of social pressure and mixed-motive strategic action.

Writing about other international norm-setting processes occurring in the 1970s Stephen Krasner sentenced summarily: "Decolonization eroded American influence."[693] This chapter supports but also qualifies this statement. To say that the Third World managed to socially coerce powerful Western states (the US included) does *not* mean that

[693] Stephen D. Krasner, *Structural Conflict: The Third World Against Global Liberalism* (University of California Press, 1985), 10.

these lost their strategic vision and their power. Rather, as illustrated here (and in Chapter 3 with regard to Common Article 3,) under circumstances of social pressure the "coerced" Western states found deceptive ways to insert "antidotes" within the First Protocol hoping to "undo" the damage done by the language of national liberation. This may be a defensive and reactive form of power, but it is still a form of influence. (The US also held a clear leading role among its allies.) In the end, covert Western efforts succeeded, since the adoption of an article (Art. 96) setting an extremely high standard for NLMs, effectively prevented the First Protocol from ever applying to any such groups.

Importantly, outcomes during the Diplomatic Conference with regard to the regulation of non-state armed actors proved disappointing and revealing. As shown, in the 1970s the majority coalition of African, Asian, Arab and Socialist states were more interested in *privileging* liberation movements than in placing restraints on their conduct. Western states' opposite concern for avoiding the legitimatization and correlated empowerment of freedom fighters (or of rebels acting in non-liberation conflicts) foreclosed any genuine efforts to engage the groups that forced their way into the conference. Political distrust and an engrained belief among diplomats about non-state actors' inability and unwillingness to respect the law did away with any opportunities for meaningful interaction. Western states also cynically/strategically discounted the humanitarian benefits that might come from adopting humanitarian law to liberation conflicts. National liberation movements' reported loss of interest and widespread absence during the actual proceedings only reinforced Western lack of interest in producing instruments fit for those actors, and in the end, the cycle of distrust provoked states to introduce veiled safeguard mechanisms or "antidotes" referenced above. This was surely a missed opportunity, with regrettable humanitarian and political consequences.

That said, the inclusion of these mechanisms enabled the West to set the liberation movements issue aside and continue negotiating a First Protocol with extremely important humanitarian contents (if only applicable to "traditional" inter-state conflicts,) notably for the protection of civilians against the dangers of hostilities. This is crucial to

note because it suggests that (some) states' deception strategies can and do mix with a serious interest in improving humanitarian rules, albeit in ways deemed expedient or at least marginally acceptable.

On theoretical balance, given the demonstrated presence of strategic and instrumental concerns alongside social pressures, rationalist tools for understanding international legal design will remain useful. Yet what should *not* be assumed, as some analyses do, is that rational states *acting collectively* will more or less unproblematically produce "rationally efficient" outcomes. In short, the plurality and mixed nature of "interests," as well as the types of social pressures described in this analysis, debunk simple behavioral assumptions and conclusions. The section on the tense, drawn-out, frustrating, and largely ineffective process of coordination among Western allies should --if anything-- serve to buttress this claim.

In addition, the expectation that before coming to the negotiating room states will have figured out which type of "problem-structure" they will be faced with and hence will come ready to rationally craft flexible or imprecise language, has in this case turned out to be flat-out wrong. "Imprecision" here was the veiled result of sustained frustration, not the starting position of states. It was certainly a rational choice in the end, but also one made under strenuous circumstances of social pressure. What this suggests is that IL/IR scholars should not focus solely on studying outcomes but need to carefully investigate the process through which those outcomes are arrived at. Otherwise the portrait, and thus our understanding, of international law-making will be greatly distorted.

Beyond these theoretical issues, it must be emphasized that the Additional Protocols were multidimensional conventions regulating state behavior across a number of areas. For reasons of space I left out of my discussion the plethora of other very contentious issues raised during negotiations: the protection of civilians; the regulation of combat practices; the design of various mechanisms of enforcement (reprisals, Protecting Powers, the optional Fact-Finding Commission for the First Protocol;) the definition of grave breaches and war crimes; reservations, etc. These are all matter for future research. Based on my preliminary analysis, however, I submit that many of these regulations emerged as compromise products of social coercion, that is, in a modified form that displeased

Western states but that, through a variety of textual techniques, ultimately safeguarded their interests. This suggests that the argument I have presented may have broader applicability.

In the end, pressured compromises aside, Western states found much to like in the resulting treaties, particularly with regard to more "technical" aspects such as the protection of medical aircraft. The US delegation was particularly jubilant at the end of the Diplomatic Conference.[694] The fact that among NATO states, at least in the immediate aftermath of the negotiations, the thorniest issues to hash out before ratification were *not* those relating to the scope of the First Protocol or prisoners of war, but rather to ensuring the exclusion of nuclear weapons and retaining the use of reprisals under limited circumstances, serve as additional evidence of this.[695]

Indeed, over time the First and the Second Protocols have become widely accepted treaties, with 194 and 166 ratifications respectively, and many of the principles they embody, though initially controversial, seem to have taken root, even in the initially hesitating West. Although compliance patterns may leave much to be desired, for instance with respect to protecting civilians, the principles themselves now seem publicly and privately unquestionable in a way that they were not a half century ago. This suggests that, in spite of the deception tactics and sheer hypocrisy observed during the negotiation of these rules, with the passage of time and through the operation of other mechanisms (i.e. rule institutionalization via military training materials, normative "grafting" to other international treaties, or rule mobilization via international and domestic courts and publics,) they have become subject to a certain "decoupling from their origins," with the

---

[694] George H. Aldrich, "New Life for the Laws of War," *American Journal of International Law* 75, no. 4 (1981): 764–783. The US government attitude toward ratification, eventually answered in the negative, is more complicated. Despite the fact that in 1977 the delegation at the Conference counted its results as a success, years later the Reagan administration decided to publicly decry Protocol I as "terrorist law" due to its treatment of national liberation wars and prisoners of war. This story is well (and bitterly) told by its principal protagonist, George Aldrich, in Aldrich, "Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions." Crucially, as noted earlier, Aldrich's depiction of the pressures and deals made by the Americans at the CDDH corroborates the analysis presented in this chapter.

[695] The French recalcitrant attitude during negotiations survived the end of the CDDH, and they continued to be the most skeptical among NATO states, delaying the ratification of the First Protocol until 2001.

potential of changing not only shared values but material practices, especially in and among liberal democracies.

The broadest and perhaps most obvious concluding point to make is that although understanding a rule's origins is interesting and crucial, the story does not end there. Indeed, since the 1970s, with the growth and development of previous unsuspected trends in criminal law, the diffusion of ideas about the human rights responsibilities of non-state actors, and the spread of transitional justice, the world has witnessed what Sean MacBride had envisioned back in 1967, a mutually-reinforcing cross-pollination between three bodies of law previously thought distinct: international humanitarian law, international criminal law, and human rights. This provides a bridge to the next and final chapter of this dissertation.

Chapter 6: Norm Emergence Multiplied: The Intertwining of International Humanitarian, Criminal and Human Rights Law (1977-The Present)

I. Introduction

Legal scholar Sandesh Sivakumaran recently claimed that "until the early 1990s, there was a minimum of international law rules applicable to internal armed conflict. Today, the situation has changed almost beyond recognition with a healthy body of international law applicable to internal armed conflict."[696] The hyperbole of this statement can hardly escape the reader of this long dissertation. Sivakumaran is correct to say, however, that by the time the "Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts" (CDDH) closed in 1977, the treaty rules governing internal conflicts were rather slim relative to those regulating international war. As shown in the previous chapter, the Second Additional Protocol to the Geneva Conventions complemented important aspects of Common Article 3, but stricter conditions of application ("threshold") formally undercut its potential. And although the First Protocol contemplated robust legal protections for wars of national liberation *qua* international conflicts, the Protocol never became applicable to any such situation, as cleverly anticipated by the Western delegations that privately rejected Article 1 and supported Article 96-- its so-called "antidote."[697]

By 2013 this legal landscape had certainly changed, and this chapter is an attempt to show how and why it has done so.[698] The most contrasting aspect of the recent normative

---

[696] S. Sivakumaran, "Re-envisaging the International Law of Internal Armed Conflict," *European Journal of International Law* 22, no. 1 (April 2011): 219–264.

[697] Although various national liberation movements issued declarations of commitment to the First Protocol and the Geneva Conventions, these never entered into force formally because they did not meet the strict requirements set out in Article 96. Sivakumaran, *The Law of Non-International Armed Conflict*, 221.

[698] Owing to the recent nature of these developments in this chapter I rely more heavily on secondary materials instead of primary documents. This limits the level of detail I was able to obtain in comparison to previous stages of norm emergence and development, particularly through confidential diplomatic documents. For this reason some of the claims I make here (for instance about the negotiations of the Rome Statute in the 1990s) remain tentative, and adjudicating on them with more precision will only be possible as archival documents become

transformation regarding internal conflicts with respect to the past is that it has come largely from several interpolating actors and sources operating more diffusely, *alongside* and *within* states, and not all strictly related to international humanitarian law. Whereas previous episodes of norm emergence usually originated through Red Cross initiatives (sometimes aided, as seen, by other non-governmental organizations like the International Commission of Jurists,) later re-shaped and codified by states in plenipotentiary diplomatic conferences, in the last three decades it is perhaps international (mostly criminal) tribunals drawing not only on treaty commitments but increasingly on arguments about customary law that have made most impact in developing the rules applicable to internal conflicts. The International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR) are two seminal examples.[699] As shown below, the importance of these *ad hoc* courts was not only soon felt but also reinforced at the most transcendent treaty-making diplomatic encounter to occur since 1977: the 1998 Rome Conference that established the International Criminal Court (ICC.)

These and other international tribunals exemplify the "revival" and development of international criminal law "from above."[700] Yet bottom-up domestic demands for justice, truth, memory and reconciliation, *inter alia*, coincided and interacted with international dynamics and precedents. Since the early 1980s truth commissions emerged in the global South and began to proliferate as a mechanism of "transitional justice" in the aftermath of authoritarianism and of internal conflict around the world.[701] Similarly, since the 1970s, in a somewhat quieter but persistent fashion, domestic human rights trials, propelled by victims' demands, with support from local and foreign lawyers and NGOs, emerged in

---

publicly available. I try to compensate for this lack whenever possible through the use of published participant memoirs and scholarly analyses.

[699] The International Court of Justice, existing since 1946, is another.

[700] Theodor Meron terms this the "criminalization" of international law. Theodor Meron, "International Criminalization of Internal Atrocities," *American Journal of International Law* 89, no. 3 (1995): 554–577.

[701] The seminal and most comprehensive account on the history and operation of truth commissions is Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Routledge, 2010).

Southern Europe and Latin America and swiftly diffused to most parts of the world. Foreign (sometimes civil) trials have accompanied this "justice cascade."[702]

Human rights (HR) doctrine and practice have also undergone important change, to become inter-connected with the law regulating internal conflicts. Regional human rights institutions in Latin America and Africa have in various reports and decisions increasingly relied on humanitarian law as normative source. United Nations bodies and UN-appointed "special rapporteurs" or representatives have left similar marks while working on various issues and country cases, simultaneously restating and (perhaps unwittingly) developing existing international law in ways that intertwine two normative bodies previously considered separate (HR and IHL.) For their part, following a period of learning and reflection, international human rights non-governmental organizations (NGOs) began in the late 1970s and early 1980s to draw on international humanitarian law to complement their advocacy work in conflict areas, also expanding their focus to include the conduct of non-state armed actors over time. Other types of organizations (what one could call "engagement" NGOs,) have tried with apparent success to approach armed non-state actors directly to elicit their commitment to international norms, sometimes going beyond the internationally sanctioned legal instruments studied so far.

The growing convergence and overlapping of the three normative regimes (humanitarian, human rights and criminal law,) originally envisioned in the 1960s by Séan MacBride, has increasingly led scholars to speak of a single body of norms: "atrocity" or "humanity" law.[703]

This multiplication of relevant sources and entrepreneurs makes the task of scholars analyzing norm emergence more difficult than before. "Pinning down" exactly *who* is responsible for observed developments, ascertaining why this is so and *how* they have

---

[702] Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*. For an account of the practice of international civil tribunals with regard to armed conflicts, see Michael J. Matheson, *International Civil Tribunals and Armed Conflict* (Martinus Nijhoff Publishers, 2012).

[703] David Scheffer, *All the Missing Souls: Personal History of the War Crimes Tribunals* (Princeton University Press, 2013); Ruti G. Teitel, *Humanity's Law* (Oxford University Press, 2011); Christopher Rudolph, "Constructing an Atrocities Regime: The Politics of War Crimes Tribunals," *International Organization* 55, no. 3 (2001): 655–691.

operated to diffuse their ideas certainly becomes more elusive than when one organization more or less centralizes the process. But difficult does not mean impossible, and this chapter attempts to provide a step in that direction. Kathryn Sikkink, for example, has identified the seminal Greek, Portuguese and Argentine cases, victims and allies that shaped the initial demand for trials against officials of repressive regimes, eventually "chipping away" in important ways at the norm of sovereign immunity, with the correlated rise of the norm of individual criminal accountability for human rights violations.[704] Priscilla Hayner has documented the rise and diffusion of truth commissions since the late 1970s and early 1980s.[705]

In this chapter, while staying mindful of the "bottom-up" trends just noted, the focus lies upon the major *international* norm-setting developments over the past thirty years, that is, on those described earlier as coming "from above."[706] I argue that a great majority of these has emerged as the combined result of the work of various legal entrepreneurs and epistemic communities. One set of legal experts, dissatisfied with the outcome of the 1974-1977 treaty-making experience with regard to internal conflicts and situations of troubles and disturbances, and after writing in some of the most influential international law journals and teaching at elite institutions, arrived at positions of international legal power that enabled them to propagate their ideas, particularly about the criminalization of abuses committed in internal conflicts. They did so by relying on at least four tactics of influence. First, they encouraged the *progressive interpretation* of existing black-letter treaties. Second, with the passage of time and the accumulation of legal precedents issued by various reputable international bodies, these lawyers argued for the attribution of "customary status" to various rules in internal conflicts, including parts of the much-embattled Second Protocol. These tactics may be termed *inter-institutional validation* and

---

[704] Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*.
[705] Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*.
[706] Given the excellent and extensive treatment some of these norm-setting trends have received, I do not attempt to rewrite their history. Rather, I acknowledge these trends' existence and impact, and direct readers to authoritative research on those subjects. In addition to Sikkink's and Hayner's work, see Hunjoon Kim, "Expansion of Transitional Justice Measures," Ph.D. Dissertation in Political Science (University of Minnesota, 2008).

customification.[707] Third, as said earlier, these scholars' academic accolades and influence enabled them to arrive at some of the highest echelons of a reinvigorated international legal system, where their ideas gained traction and became embroidered in authoritative jurisprudence through opinions and decisions of lasting impact. I term this tactic *normative re-inscription*.

The epistemic community of scholars-cum-judges was not operating alone. The ICRC itself appeared to share others' disillusionment with formal treaty-making processes attempting to develop the body of humanitarian law, preferring to advance the existing framework through research initiatives and expert working groups, or through accompaniment and support of others' law-making initiatives in related areas. The first of these methods resembles the ICRC tactic of convening experts commissions seen in Chapters 4 and 5, with a twist: through resort to arguments about *customary* law, the Swiss organization "side-stepped" larger interstate conferences as necessary end-points for norm emergence or revision processes. Although many reputed international audiences have embraced the revival of customary law and the circumventing of positive (treaty) law, some of these initiatives present a degree of uncertainty as to whether (and which/how many) actors effectively accept them as valid.

For their part, international NGOs, scholars and legal institutions at various levels have also recently become protagonists of their own academic and policy debates on more expansive understandings of human rights as obligations, for example with regard to armed non-state actors. Moreover, in the face of challenges brought about by the "war on terror" since 2001, they have staunchly opposed skeptics' charges about the inapplicability or inability of existing law, helping to maintain its legitimacy or engaging in processes of normative defense.

---

[707] I adopt the term "validation" from Theodor Meron, *The Making of International Criminal Justice: A View from the Bench: Selected Speeches* (Oxford University Press, 2011), 242. I am also not the first to use the word "customification." See for example a blog post by Kenneth Anderson, law professor at American University's Washington School of Law: http://kennethandersonlawofwar.blogspot.com/2005/11/my-initial-reactions-to-icrc-customary.html (Last consulted on July 29, 2013.)

Given the plethora of "alternative" pathways to norm emergence outlined above, some of which (at least initially) "skip" explicit state sanction, the focus and arguments of this chapter differ from preceding ones. This is not to say that states have not been part and parcel of the stories told below, either as supporters or as gatekeepers, and their role and attitude are examined whenever relevant. Yet the fact remains that, with the exception of a few weapons-related treaties and the negotiation of the Rome Statute establishing the International Criminal Court (ICC, analyzed here,) the importance of Diplomatic Conferences as traditional mechanisms for humanitarian law-making has diminished, and diffuse, transnational standard-setting has prevailed.[708]

This being said, in this chapter I make efforts to show how central points made earlier retain their applicability and "carry over." For instance, and since transnational norm-setters obviously have not operated in a contextual vacuum, I again highlight the demonstration or "shock" effects exerted by war atrocities in the spurring of norm expansion episodes. I also argue that social coercion may have plausibly operated in the negotiations that established the International Criminal Court in 1998. Finally, I continue to insist on the importance of states' fear of legal legitimization in this issue-area, which though somewhat effaced in recent years, continues to pervade the debate on the alleged human rights responsibilities of non-state actors, or human rights and terrorism. With the respect to the latter, and given prominent debates about the impact of transnational terrorism and counterterrorism policy on the robustness on "humanity law" since 2001, I close the chapter by discussing them.

[708] Arguably the only "core" such instance is the 1998 Rome Conference leading to the creation of the International Criminal Court. However, I do not wish to overstate the "separation" between different types of issues/instruments on human rights, weaponry, criminal or humanitarian law and the conferences that produced them in the post-1977 period since the central point of this chapter is precisely to demonstrate the "hybridization" or "cross-pollination" of all these fields. That said, I believe it is also correct to characterize the Rome Conference as the one most directly developing the "Geneva" line of regulations (the Conventions and its Additional Protocols) by finally introducing permanent international criminal accountability for the grave breaches and war crimes that long figured in those treaties.

II. The Aftermath of the CDDH

As shown in the last chapter, the Second Protocol that emerged in 1977 was a compromise text that disappointed the aspirations of many. Sympathetic readers, however, found that "in terms of rights stated" it constituted a "significant advance" over the contents of Common Article 3 and various human rights instruments.[709] The biggest letdown dealt with its high threshold, which made it inapplicable to proliferating low-intensity internal conflicts. Among concerned audiences there seemed to be a certain disillusionment with diplomatic conferences as mechanism to reaffirm and revise the law:

> "International lawmaking and various diplomatic conferences, for example, the conference that adopted the Additional Protocols to the Geneva Conventions in 1977, have, on the whole, been unsympathetic toward extending the protective rules applicable to international wars to civil wars- an attitude that has dampened prospects for redress through orderly treaty making. Because conferences often make decisions by consensus and try to fashion generally acceptable texts, even a few recalcitrant governments may prevent the adoption of more enlightened provisions."[710]

This aftertaste soon led to renewed interest in normative development, through other means. Two prominent scholars who had participated in some official capacity during the 1970s treaty-making episode, Antonio Cassese and Theodor Meron, offered two different alternatives for such development.[711] In a chapter of a book he edited in 1979 assessing the then-new law of armed conflict, Cassese offered the following words regarding the attitude of scholars in the future, worth quoting at length:

> "I submit that those who have the lot of humanitarian law at heart should not overemphasize the deficiencies and pitfalls of the Protocols. Stressing the (inevitable) demerits and loopholes of these international instruments can only lead to increased skepticism about international humanitarian law… I therefore believe that scholars… should do their utmost to strengthen the possible role of these momentous treaties… *Legal scholars can serve a useful purpose in their expert capacity as well, by*

---

[709] Charles Lysaght, "The Scope of Protocol II and Its Relation to Common Article 3 of the Geneva Conventions of 1949 and Other Human Rights Instruments," *American University Law Review* 9 (1983). Charles Lysaght had been part of the Irish Delegation to the CDDH, which had shown support for a Second Protocol with fewer conditions for application.

[710] Meron, "International Criminalization of Internal Atrocities," 555.

[711] Meron had acted as Legal Advisor for the Israeli Foreign Ministry at the initial ICRC preparatory meetings of experts. Cassese had formed part of the Italian delegation, which supported a strong Second Protocol with few conditions for application and substantive protective content, opposing the conservatism of Western-colonial powers like Britain and France.

propounding interpretations of the Protocols that aim at emphasizing the humanitarian purpose of their rules. As neither international law in general nor the Protocols themselves entrust anybody with the task of giving authoritative interpretations of their provisions, there is much room in this area for forward-looking jurists. The Protocols offer much space for interpretation… many rules… are therefore open to divergent interpretations."[712]

For his part, in a 1983 article tellingly entitled "On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument," Theodor Meron proposed formulating a single set of "minimum" fundamental guarantees to account for the gaps found in humanitarian and human rights instruments.[713] "It would… appear that the international community needs a short, simple, and modest instrument to state an irreducible and nonderogable core of human rights that must be applied at a minimum in situations of internal strife and violence (even of low intensity) that are akin to armed conflicts."[714] Meron envisioned, as a first step, a "solemn declaration, which would not require formal accession or ratification by states."[715]

This particular idea was not new, as the ICRC had itself proposed a similar declaratory alternative in 1971-2 after states made it clear they would not accept binding rules for internal "troubles" and disturbances.[716] But resubmitted a few years after the CDDH Meron's proposal was welcomed by scholars in other places and eventually crystallized in 1990 declaration approved by a group of distinguished experts meeting in

---

[712] Antonio Cassese, "A Tentative Appraisal of the Old and the New Humanitarian Law of Armed Conflict," in *The New Humanitarian Law of Armed Conflict*, ed. Antonio Cassese (Editoriale scientifica, 1979), 500–501. Italics are mine.

[713] In 1983 the ratification of the human rights covenants and of the Additional Protocols to the Geneva Conventions was still fledging, further punctuating the need for alternative sources of protection. In addition, states could file declarations, interpretations or reservations that limited the impact of these instruments, which worried norm proponents.

[714] Theodor Meron, "On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument," *The American Journal of International Law* 77, no. 3 (1983): 589–606; Theodor Meron, *Human Rights in International Strife: Their International Protection* (Grotius Publications, 1987).

[715] Meron, "On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument," 606.

[716] ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts Geneva, 24 May - 12 June 1971, Vol. V - Protection of Victims of Non-International Conflicts*.

Turku (Finland.) The "Turku/Abo Declaration of Minimum Humanitarian Standards" was inserted into the agenda of the UN Sub-commission and Commission of Human Rights in the 1990s, where it was kept alive until 2005 without successfully transcending elsewhere.[717]

Ultimately, the "Cassese" approach prevailed. Beyond proposing progressive scholarly interpretation, Cassese soon began taking steps through his own writing toward clarifying the aspects of international humanitarian law that could be said to represent *customary* law for internal conflicts despite being contained in treaty instruments not universally applied like Common Article 3, or not yet widely ratified like the Second Protocol.[718] This is what one may call a *customification* tactic.[719] The latter factor weighed particular heavily given the contentiousness of the Additional Protocols, which threatened to foreclose or delay their formal ratification. By the end of 1982, only 27 states had ratified the First Protocol, and 23 the Second.[720]

Some clarifications regarding contemporary international customary law are warranted before moving ahead. The first is that it has undergone important transformation since the nineteenth century. With regard to internal conflicts in particular, doctrines of belligerence fell out of use, and since its adoption in 1949, Common Article 3 has provided the basic treaty-based standard for non-international conflicts. (The question posed in the 1980s, as seen below, was whether CA3 also constituted *customary law*.) Second, contemporary customary law has a special status in international law, namely that states cannot "opt in" or "out" of it at will. Rules that attain customary status are considered fundamental ("peremptory") international principles

---

[717] Martin Scheinin, "Turku/Abo Declaration of Minimum Humanitarian Standards (1990,) Workshop 'Standard-setting: Lessons Learned for the Future,' Geneva, 13-14 February 2005" (International Council on Human Rights Policy and International Commission of Jurists, 2005).

[718] Antonio Cassese, "The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Humanitarian Law," *UCLA Pacific Basin Law Journal* 3 (1984): 55–118.

[719] Historian and ICRC member François Bugnion agrees that Antonio Cassese must be given credit as one of the earliest authoritative voices claiming the customary status of humanitarian law for internal conflicts. François Bugnion, "Customary International Humanitarian Law," *African Yearbook of International Law* (2008): n. 85.

[720] This ratification data comes from Meron, "On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument," 591.

from which derogation is not possible. This gives them a particularly important place in the family of international norms. Third, international lawyers usually look to two sources to ascertain whether a given rule has attained customary law status: the consistency and density of relevant state practice with respect to said rule, and the *opinio juris*, or the statements of highly-regarded or authoritative bodies that indicate general normative acceptance. In the area of humanitarian law, as seen below, many international lawyers and tribunals, at least initially, tended to emphasize *opinio juris* over patterns of practice, and they have generally held abusive conduct to be the exception, not the norm.[721]

Writing in 1984 with the goal of suggesting an initial list of customary rules for internal conflicts, Cassese opined that the "most innovative" provisions of the Second Protocol, as well as those that had elicited the most resistance during the CDDH, might not yet have attained that status. Among these figured the guarantees to be accorded to children; the protection of objects indispensable to the survival of the civilian population; the protection of works and installations containing dangerous forces; and the prohibition on the forced movement of civilians.[722]

These and other important exclusions aside, Cassese drew a list of customary rules for internal conflicts that was far from negligible: the contents of Common Article 3 had in his view clearly attained the status of peremptory norms, as well as the provisions of the Second Protocol that seemed to "improve" or develop the general principles of CA3, for instance the prohibition of denying quarter or the "indirect regulation of the conduct of hostilities" such as the ban on deliberate attacks on civilian populations. Cassese was

[721] There has been some resistance to this move to customary law among equally prominent legal scholars. Frits Kalshoven has for example expressed skepticism about whether customary law can bind non-state actors in internal conflicts, or whether their practices should or should not be considered customary law as well. Frits Kalshoven, "Development of Customary Law of Armed Conflict," in *Reflections on the Law of War: Collected Essays* (Leiden: Martinus Nijhoff Publishers, 2007), 321. Kalshoven, it should be noted, was a crucial figure during the CDDH as part of the Dutch delegation, and remains one of the foremost IHL experts alive. Likely for other (i.e. political) reasons, key states such as the United States and Israel have joined in the skepticism regarding the customary status of certain parts of IHL with regard to internal conflicts, especially the regulation of hostilities.

[722] Cassese, "The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Humanitarian Law," 57.

aware that states and rebels had at times failed to apply these rules in practice, but asserted that this did "not disprove the general character of the rule."[723] Furthermore, with regard to Common Article 3, he claimed that "even when it was disregarded in practice, no State admitted violating it" such that "it seems… it has become legally impossible for any State to deny the applicability of those fundamental safeguards to civil strife."[724] This argumentative strategy would recur later on.

Cassese's idea were soon echoed in 1986 in part by a landmark opinion of the International Court of Justice in the case of *Nicaragua vs. the United States*, which among others determined that Common Article 3 represented "elementary considerations of humanity."[725] Although the case did not specifically require the Court to rule on the application of the Geneva Conventions, the sitting judges considered it appropriate to bring in a brief discussion of CA3 as the "minimum yardstick" for armed conflicts, whether internal or international, deeming it a "fundamental general principle of international humanitarian law."[726]

Later jurisprudence time and time again referenced this opinion as a real watershed. In 1987, however, and at the time still preferring the "non-binding" standard-setting approach, Theodor Meron fiercely critiqued the Court's decision "for the virtual absence of discussion of the evidence and reasons supporting this conclusion," as well as the strategy of deeming certain rules to be customary law without judicious attention to counter-practices. In his view, "the teleological desire to solidify the humanizing content of the humanitarian norms clearly affects the judicial attitudes underlying the "legislative" character of the judicial process" such that courts "tribunals have been guided, and are likely to continue to be guided, by the degree of offensiveness of certain

---

[723] Cassese, "The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Humanitarian Law," 55.
[724] Cassese, "The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Humanitarian Law," 55.
[725] In 1984 Nicaragua sued the United States for aiding Salvadorean paramilitary groups (the "Contras") in their effort to overthrow the Nicaraguan socialist government. The court ruled against the United States, which withdrew from the Court and refused to pay the damages determined by the court. See I.C.J., *14 - Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua Vs. United States of America)*, 1986.
[726] See Ibid. Especially para. 216-220.

acts to human dignity; the more heinous the act, the more the tribunal will assume that it violates not only a moral principle of humanity but also a positive norm of customary law."[727]

Although critical of it, Meron acknowledged that this "method cannot but influence future consideration of customary law in various fields, including the Geneva Conventions." Moreover:

> "Despite perplexity over the reasoning and, at times, the conclusions of a tribunal, states and scholarly opinion in general will probably accept judicial decisions confirming the customary law character of some of the provisions of the Geneva Conventions as statements of the law. *Eventually, the focus of attention will shift from the inquiry into whether certain provisions reflect customary law to the judicial decisions establishing that status*."[728]

Meron was prescient: the *customification* tactic with regard to internal conflicts endured, and although he continued to urge other tribunals should pursue it in more rigorous fashion than the International Court of Justice in 1986, he embraced the tactic in short order through the study of the complementarity between human rights and humanitarian law.[729]

Until the late 1980s, however, the ideas of Cassese, Meron and others remained but prominent scholarly opinions published in academic journals and books. It was unclear whether and how they would actually make a dent in "actual" customary law. Meron continued attempting to persuade broader audiences of his project of a minimum declaration of standards. However, as shown below, it was only through the tragic events that occurred a few years later, and the impressive impetus they provided both normatively and institutionally, that these ideas definitely transformed the outlook of the international law of internal conflicts.[730]

---

[727] Theodor Meron, "The Geneva Conventions as Customary Law" 81, no. 2 (1987): 362.
[728] Ibid, 363. Italics are mine.
[729] Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press, 1989).
[730] Exactly *how* Meron and Cassese later came to occupy the positions of international legal power they did (described below) and *why* their ideas (and not others') resonated so strongly at the time, remains subject of future research.

III. Yugoslavia, Rwanda and the Criminalization of International Law

With end of the Cold War and the break-up of the Soviet Union, ethnic tensions in the Balkans heightened. Multiple conflicts erupted within a disintegrating Yugoslavia as different regions sought to secede; an emboldened Serbia attacked Slovenia and Croatia in 1991, and later nationalist Serbs engaged in ethnic cleansing of Muslims and Croats in Bosnia. By mid-July 1992 1.1 million people had been killed, and when the war ended in 1995, the figure had reached 200.000 victims.[731]

In 1992 as in the 1940s and 1960-70s, publicity of the atrocities committed prompted proposals for action. Western states hesitated and ultimately proved unwilling to intervene military to curb the violence. That year various international expert and NGO reports (Human Rights Watch, notably) coincided in calling for the creation of an international tribunal to punish war criminals and *genocidaires*. Soon the idea of such a court, which had a much longer history, regained traction.[732] In May 25, 1993 the UN Security Council, acting under the Chapter VII of the Charter, unanimously adopted Resolution 827 establishing an International Criminal for the former Yugoslavia (ICTY,) the first such tribunal since World War II. The Security Council tasked the ICTY with prosecuting four types of offenses: 1) Grave breaches of the 1949 Geneva Conventions; 2) violations of the laws and customs of war; 3) genocide; 4) crimes against humanity.

Two years later, after genocide in Rwanda had become painfully evident in the spring of 1994 and multilateral military intervention was (again) not forthcoming, the Security Council agreed to create a second tribunal to deal with the atrocities committed there.[733]

---

[731] Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, 210. In this section I draw from Bass' narration of these events.

[732] The story behind the emergence of the ICTY (and other ad hoc tribunals) is more complex and told at length elsewhere. See Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*; Michael J. Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency* (Palgrave Macmillan, 2008).

[733] That humanitarian intervention was not pursued and instead international *ad hoc* criminal measures were taken to address the atrocities in the former Yugoslavia and Rwanda suggests that there was a political "underbelly" in the turn to international justice in the early 1990s, at least by the states sitting in the UN Security Council. This is another crucial link of the story to which I cannot devote sufficient attention in this dissertation. See, however, Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*; Rudolph, "Constructing an Atrocities Regime: The Politics of War Crimes Tribunals." Various explanations for the unanimity of decision

Unlike with the ICTY, the 1994 resolution establishing the International Criminal Tribunal for Rwanda (ICTR) expressly determined that the court had jurisdiction over "serious violations" of Common Article 3 and the Second Protocol. This was another watershed moment in the history of international law, since this resolution became the first instance in which atrocities committed in internal wars were explicitly criminalized. The importance of this cannot be overstated: Only twenty years before, while negotiating the Additional Protocols, speaking of war crimes during in internal conflicts was thought incongruous and out of the question.[734]

And yet whether this Resolution could be deemed applicable to cases beyond Rwanda remained unclear— after all, one statement did not customary law make.

This uncertainty was soon mitigated. In October 1995 the ICTY, through the Appeals Chamber presided a now Judge Antonio Cassese, delivered another landmark decision in the context of a challenge brought by the defense of Dusko Tadic, a presumed Bosnian war criminal. Tadic's appeal questioned the tribunal's jurisdiction over acts committed in internal conflicts, arguing that its founding charter only authorized it to prosecute abuses perpetrated in international conflicts, and since violations of Common Article 3 were not technically "grave breaches" of the Geneva Conventions, the ICTY could not proceed.[735] The Appeals Chamber responded that while internal atrocities could not be deemed grave breaches, they could still constitute "violations of the law and customs of war," a distinct category of acts considered under a separate article of the Tribunal's charter. By resorting to an argument about the *customary* nature of Common Article 3, the tribunal set a clear legal precedent that would resonate in later decisions.

The touch of Antonio Cassese was evident here. Years later he told an interviewer that during discussions about the ICC:

---

behind these Security Council resolutions might be tentatively offered: 1) That there was a rush motif whereby the major powers, in a desire to avoid military intervention, created a "less" costly legal mechanism but not fully foresee what the consequences of the ICTY and ICTR might be; and/or that the tribunals' narrow geographical reach served to allay their political-sovereigntist risk-aversion. I thank Fionnuala Ní Aoláin for noting these points.

[734] Rudolph 2001.

[735] George H. Aldrich, "Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia," *American Journal of International Law* 90, no. 1 (1996): 64–69.

"I was told there was also this fear of the 'Cassese approach', namely judges overdoing it, becoming dangerous by, say, producing judgments that can be innovative. For example, at the ICTY, we said for the first time that war crimes could also be committed in internal armed conflicts. This was breaking new ground. You go beyond the black letter of the law because you look at the spirit of law."[736]

The entrepreneurial, "overactive" role of prominent legal scholars-cum-judges like Cassese had thus proved essential to the development of the regulation of internal conflict.

The *Tadic* decision brought with it another crucial innovation. As some noted at the time, in its response to Tadic's claims, instead of asserting its jurisdiction in internal conflicts with recourse to customary law, the ICTY Appeals Chamber could have simply determined that the conflict in the former Yugoslavia was international. This would have resolved the controversy in that particular case and allowed the tribunal to continue pursuing its work without entering the murky waters of determining conflict status. Yet a further response by Tadic's defense, claiming that in fact *no* armed conflict was taking place at the time in the former Yugoslavia, enabled the judges to take the daring step of providing a positive definition of armed conflict, as one occurring "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[737]

This phrasing, credited directly to Presiding ICTY Judge Antonio Cassese, became immediately noteworthy.[738] Recall that Common Article 3 famously featured a "vague but generous," negative notion of internal conflict (as "armed conflicts not of an international character,") while the Second Protocol came with several restrictions related to territorial control, organization, and actors' ability to carry out sustained attacks and to respect the law. In contrast, this ICTY definition offered some parameters ("protraction"

---

[736] Cassese as interviewed in Heikelina Verrijn Stuart and Marlise Simons, *The Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese - Interviews and Writings* (Amsterdam University Press, 2010), 52–53.

[737] ICTY, "The Prosecutor V. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995," 1995, para. 70.

[738] Colin Warbrick and Peter Rowe, "The International Criminal Tribunal for Yugoslavia: The Decision of the Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the Tadic Case," *International & Comparative Law Quarterly* 45, no. 03 (January 1996): 697.

and "organization") without an indication that these had to reach the high levels of the Protocol, and dropping territorial control. The ICTY definition also included, for the first time, violent conflicts between non-state armed groups within the same state, long considered a gap in the black letter law of treaties.

The most prominent international legal circles immediately seized upon the *Tadic* text, considering it, alongside the ICTR statute, to herald the new era of the criminalization of internal atrocities. Meron himself, a former critic, now agreed that this decision demonstrated "the renewed vitality of customary law in the development of the law of war." In his view, "the clarification of customary law on this subject is the most important normative contribution of the decision."[739] Providing support for the claim made here about how critical the move to prominent judicial settings has been in the field of humanitarian law, the *Tadic* opinion continued to make waves over the following years. Conversely, the ICTY definition of conflict, as will be immediately shown, would soon play a crucial role during the creation of the ICC, reflecting the *normative re-inscription* looping from international tribunals back to traditional inter-state negotiations.[740]

Before moving forward, and given the important norm-entrepreneurial roles Antonio Cassese and Theodor Meron played on the developments studied in this first section, some elaboration may be warranted as to their influence after the mid-1990s. Cassese was the President of the ICTY until 1997 and continued acting as a judge of the same tribunal until 2000. Later the UN Secretary General elected him as Chairperson of the UN Commission of Inquiry on Darfur, after whose report the Security Council referred the case to the International Criminal Court on charges of war crimes and crimes against humanity against both the government and various armed non-state actors. He was also the first President of the UN Special Tribunal for the Lebanon from 2009 until his death

[739] Theodor Meron, "The Continuing Role of Custom in the Formation of International Humanitarian Law," *American Journal of International Law* 90, no. 2 (1996): 238–9.

[740] There is some debate among international lawyers regarding the differential importance given to the statements and decisions of various international courts. The "hierarchy" of decisions among various judicial institutions is key, and still contested, at the international level. I cannot delve into this complex discussion here, but I thank Fionnuala Ní Aoláin for bringing it to my attention.

in 2011. He was extensively published in his academic career and taught at the University of Florence and the European University Institute, among others.

Theodor Meron has been especially prolific throughout his career in the leading academic journals and presses in international law. Since the 1990s he has likewise played important practitioner roles. He served a member of the US Delegation to the Rome Conference establishing the ICC in 1998, where he was involved in the drafting of provisions on war crimes and crimes against humanity. In 2000-2001 he was Counselor on International Law in the US State Department. In March 2001 the UN General Assembly appointed him as judge to the *ad hoc* criminal tribunals, serving in the Appeals Chamber to both the ICTY and ICTR. He has been twice President of the ICTY (2003-2005 and 2011-present.)

These credentials speak for themselves, and many of the decisions taken by these and other ad hoc tribunals after the seminal *Tadic* case have made contributions to the general development of humanitarian law through *progressive interpretation*, often building and drawing upon earlier precedents (*inter-institutional validation*.) The aim here is not to list all such contributions exhaustively, but rather to make the point that these international lawyers, naturally operating alongside many other colleagues in these and other judicial institutions, have played a crucial role in the emergence and extension of the international rules governing internal armed conflicts. Let me now turn to one particularly crucial instance of the tactic of *normative re-inscription*, inspired precisely on the ideas of Meron and Cassese: the inclusion of atrocities committed in internal conflicts in the Rome Statute establishing the ICC.

IV. The International Criminal Court

Throughout the first half decade of the 1990s the United Nations' International Law Commission (ILC) had discussed the establishment of an international criminal court. Though the idea of such a tribunal was over a century old, these immediate efforts were the result of a proposal by Trinidad and Tobago for addressing drug trafficking from

1989.[741] This request paralleled work within the UN on a "Draft Code of Crimes against the Peace and Security of Mankind." Together these initiatives evolved into a full-fledged draft statute for an international court by 1994.[742] The tragedies of Yugoslavia and Rwanda experiences, thus by the ICTY and ICTR, no doubt propelled and quickened the process.[743]

The 1994 ILC draft statute, however, did not include references crimes in non-international conflict. According to the chairman of the Working Group, Cambridge Professor James Crawford, the team of experts behind the draft "had set its sights low" due to fears of states' reactions to such a radical encroachment on sovereignty.[744] Some have noted that "the drafting of the Rome Statute was, in fact, 'contrary to the trend in many other negotiations in which the initial draft is often watered down to accommodate a variety of State positions, in this case, the Statute adopted in Rome is much stronger than the ILC Draft in many significant respects.'"[745]

One of these respects was the inclusion of internal atrocities. During the discussions of an *Ad Hoc* Committee of states established in 1994 by the UN General Assembly (UNGA) to further consider the idea of a court, participants disagreed about the inclusion of these crimes, opting temporarily to simply refer to the ambiguous category of "war crimes" without specifying what these were or where they were committed. This controversy arose again in the Preparatory Committee (PrepCom) set up by the UNGA in 1995. By then, however, and with the precedents set by the ICTR founding Resolution and the ICTY's *Tadic* decision, it became increasingly difficult to delay the conversation. Amnesty International, an international human rights NGO, had recently argued in a

[741] In this section I am drawing on William Schabas, *The International Criminal Court: a Commentary on the Rome Statute* (Oxford University Press, 2010).
[742] For a description of the background behind these efforts since the 1970s, and the crucial role of Cherif Bassiouni in them, see Sikkink 2011a, chap. 6.
[743] In the early 1990s The US and UK also entertained the idea of a criminal tribunal to deal with the Iraqi invasion of Kuwait, upon which European states seized later on. To that extent, the eventual ICC has roots in the interests of both powerful Western and less developed countries like Trinidad and Tobago. Schabas, *The International Criminal Court: a Commentary on the Rome Statute*, 12–13.
[744] Ibid, 18.
[745] Philippe Kirsch and Darryl Robinson cited in Ibid.

briefing paper on the ILC Draft (around its time of presentation before the UN General Assembly) that "it would be unthinkable for any permanent international court" to omit crimes against Common Article 3 or the Second Protocol, letting off the hook the perpetrators of atrocities in the most prevalent type of armed conflict.[746] NGO pressure mounted ever since 1994, transforming in a very short time into a broader network of actors bent on the establishment of a robust ICC, known as the Coalition for the International Criminal Court (CICC.)[747] The CICC worked insistently on influencing state delegations to improve (from their perspective) the design of the court, with noticeable impacts as scholars have suggested.[748]

In 1995 states sitting in the PrepCom held diverse views on the subject. The US proposed a three-part typology: category "one comprised of grave breaches of the Geneva Conventions (but not [the First Protocol,]) category two consisted of 'other serious violations' committed in international armed conflict, and category three covered serious breaches of Common Article 3 (but not of [the Second Protocol.])"[749] Others like Switzerland and Sweden suggested incorporating certain provisions drawn from the Second Protocol, without mentioning the treaty itself. The American proposal endured, but the third category (on internal atrocities) was nevertheless put in square brackets as optional. Later, the PrepCom further divided this third category on internal conflicts into two: one for violations of CA3, and another for "other serious violations," reserved for the texts inspired in the Second Protocol. Importantly, as William Schabas notes, this division "reflected to some extent, a substantive distinction between 'Geneva law' and 'Hague law,' the former concerning victims of armed conflict… the latter concerning means and methods of warfare."[750] It is noteworthy, however, that in the resulting draft statute *both* categories were put in square brackets, continuing with the "prudent"

[746] This comes from a 1994 memorandum/report from Amnesty International, cited in Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency*, 91.
[747] See Coalition for the International Criminal Court website, http://www.iccnow.org/
[748] See especially Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency*; Deitelhoff, "The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case."
[749] Schabas, *The International Criminal Court: a Commentary on the Rome Statute*, 197.
[750] Schabas, *The International Criminal Court: a Commentary on the Rome Statute*, 197.

approach of the ILC. By 1998 it was thus unclear whether the eventual ICC would actually address internal conflicts. NGO pressure on states through the CICC (with around 500 participating organizations) had risen dramatically by this point, however, which undoubtedly worked to counteract the caution shown by the ILC and the PrepCom.

The Diplomatic Conference opened in Rome on June 15 of that year. Three weeks into the month-long negotiations, the Chair of the "Committee of the Whole" and head of the Canadian delegation, Philippe Kirsch prompted his colleagues to express their countries' views, among others, on whether the sections on crimes within internal conflicts should be included and what the threshold would be set for them.

Nearly a hundred diplomats spoke in succession on this topic on July 8, 1998. The positions revealed in these statements certainly would have surprised the members of ILC and PrepCom years prior: the great majority (59) of the delegations expressed unqualified support for the inclusion of all the forms of internal atrocities under consideration, with several deeming this an "essential" decision for the credibility of the court. A non-negligible minority (25) expressed some doubts about this attribution, but of it roughly a third (9) declared itself *completely* opposed; the rest were either "open" to consider alternatives or seemed only truly allergic to the inclusion of crimes directly inspired on the Second Protocol, that is, violations of the means and methods of war.

The following table summarizes the opinions expressed during the initial debate in Rome:

Table 6.1. Opinions on Including Internal Atrocities in the ICC Statute, 1998[751]

First Debate, Rome Conference, July 1998 - Opinions Expressed (Not a Vote)	
	Should Internal Atrocities (drawn from CA3 and the Second Protocol) be included in the Rome Statute?
Yes	Andorra, Australia ,Austria, Belgium, Benin, Bosnia and Herzegovina, Botswana, Brazil, Burkina Faso, Cameroon, Chile, Colombia, Croatia, Czech Republic, Denmark, Ecuador, Ethiopia, Finland, France, Georgia, Germany, Greece, Guatemala, Guinea-Bissau, Hungary, Ireland, Israel, Italy, Japan, Jordan, Liechtenstein, Lithuania, Mali, Malta, Namibia, Netherlands, New Zealand, Nicaragua, Norway, Philippines, Poland, Portugal, Romania, Senegal, Sierra Leone, Slovakia, Slovenia, South Africa, South Korea, Spain, Sweden, Switzerland, Togo, Trinidad and Tobago, Uganda, UK, Uruguay, USA, Venezuela
Only partially, or with amendments	Afghanistan, Azerbaijan, Bahrain, Bangladesh, Brunei, Comoros, China, Egypt, Indonesia, Iran, Mexico, Nepal, Russia, Sudan, Syria, Yemen
Definitely Not	Algeria, Burundi, India, Iraq, Libya, Oman, Pakistan, Qatar, Saudi Arabia

Any analysis of these debates must begin by noting how striking an outcome this was. That by 1998 states overwhelmingly supported something they had found absurd just twenty years prior no doubt evinced a transformation of international society. This change of opinion owed much to the legal precedents set decades earlier, to the more recent creation of the ICTY and ICTR and to the tragic spectacle of internal violence that plagued the 1990s. Yet these changes themselves were embedded in broader, interrelated global transformations, among others: 1) the "third wave" of democratization and the attendant decline of authoritarianism; 2) the demise of formal empire; 3) the end of the Cold War and the ebb of "proxy warfare"; 4) the endurance of political, economic and security communities in Europe and elsewhere; 5) the rise of human rights in world

[751] *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June - 17 July 1998, Official Records, Volume II* (New York: United Nations, 2002).

politics, helped in no small measure by the striking proliferation and interlocking of domestic and international advocacy groups.[752]

These global and domestic changes, not surprisingly, had an effect on the balance of power and purpose within international negotiations. A more detailed study of states' positions bears this out. To begin, this time no Western country opposed the provision. In particular, former colonial powers France and Britain no longer played the conspicuous role of dismissing the regulation of internal conflicts as an intrusion in their sovereignty. The minority of staunch opponents was formed almost entirely of authoritarian states (including Iraq, Qatar, Saudi Arabia, Oman and Libya,) many of which were facing unrest at home. Formal but "conflicted" democracies such as India, Sri Lanka or Turkey, also facing long-standing armed turmoil, joined them.[753] Yet crucially, and in contrast with what had transpired during the CDDH, a few fragile African states also combating rebels, among them Sierra Leone and Guinea Bissau, pleaded emphatically *for* the inclusion of internal atrocities; the Bissau-Guinean delegate explicitly claimed that he attached "prime importance" to this issue "since his country continued to suffer from non-international conflicts."[754]

On balance, there seemed to be a split between weaker conflict-ridden states that had trouble countering rebellions militarily at home (which were ready to commit their internal affairs to the Court's jurisdiction,) and stronger authoritarian states better able to clamp down rebels (which rejected the idea.) Yet as noted earlier, voices for total deletion were the utter exception: even Syria, Sudan, Yemen and China showed a measure of

---

[752] See among many others, Samuel P. Huntington, *The Third Wave: Democratization in the Late 20th Century* (University of Oklahoma Press, 1991); Emanuel Adler and Michael Barnett, eds., *Security Communities* (Cambridge University Press, 1998); Keck and Sikkink, *Activists Beyond Borders*.

[753] On the concept of "conflicted democracies," see Fionnuala Ni Aoláin and Colm Campbell, "The Paradox of Transition in Conflicted Democracies," *Human Rights Quarterly* 27 (2005): 172–213; Moira K. Lynch, "Seeking Justice During War: Accountability in Conflicted Democracies," Ph.D. Dissertation in Political Science (University of Minnesota, 2012). Turkey and Sri Lanka did not speak in the July 8 debate but later revealed their staunch opposition to the proposal for inclusion.

[754] *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June - 17 July 1998, Official Records, Volume II, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, 312.

moderation by suggesting that the criterion of "total state collapse" could allow for the triggering of the clause, or that only certain crimes (inspired in Common Article 3) might be considered, but not those arising from Second Protocol. In sum, these positions revealed that the *real* discussion was truly about *how*, not *whether* to include these crimes in the statute.

Similar to the 1949 Diplomatic Conference then, in 1998 social pressures in Rome worked *for* and *not* against the regulation of internal conflicts (as they had in 1974-1977.) Subsequent developments in the debate allow for an assessment of this claim. Noticing the resistance of the minority with respect to the crimes inspired on the Second Protocol, the Bureau of the Conference proposed modifying the threshold of application, to read as follows:

> "Section D of this article applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in a territory of a State Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations."

The reader may notice that this text is lifted in its entirety from the (demanding) Article 1 of the Second Protocol. One might have expected that this phrasing, sticking so closely to the highly conditional scope of the treaty from which the controversial crimes were drawn, might have been welcomed in Rome as an expedient compromise. Yet upon its presentation in public, most delegates were unhappy: of the 39 who spoke, only 3 (China, Jordan, and Indonesia) dared express some support for it. For the great majority the new text was quite unsatisfactory: those endorsing a progressive approach (22) found it too limiting of the Court's scope, while the rest were divided between those advocating partial or total elimination of the proposal (the latter being the utter minority position.) There appeared to be little room for persuasion between supporters and detractors of inclusion, but deletion also seemed foreclosed.

A second compromise emerged during the debate. The Sierra Leonean delegate, Fode M. Dabor, noting how "very restrictive" the proposed threshold was (since it effectively

excluded his country's ongoing conflict,) suggested that the category of internal atrocities inspired in the Second Protocol apply to "armed conflicts that take place in a territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups."[755]

This formulation reproduces almost verbatim the *Tadic* definition of armed conflict issued by the ICTY, studied earlier.[756] This Sierra Leonean compromise drew public praise from a few delegations and was ultimately incorporated into the final text approved of the Rome Statute on July 17, the closing day of the Conference.

The available records do not yet allow for a detailed study of the behind-the-scenes politics at Rome as in the negotiations of the Geneva Conventions or the Additional Protocols decades prior. Assessing with empirical certainty which social mechanisms worked to produce the observed outcome thus becomes difficult at this time. However, one can with some plausibility suggest that *social coercion* produced by the persistent, overwhelming majority of states pressing for the inclusion of internal atrocities in the Rome Statute was operative on the skeptics. There is also the possibility, as some scholars studying other aspects of Rome negotiations have suggested, that *persuasion* (moral and/or deliberative) through the work of the powerful NGO/like-minded coalition, might have helped produce this less restrictive outcome.[757] (Both mechanisms, social coercion and persuasion, could certainly have operated together.)[758] The fact that the compromise language came from the representative of a war-torn country (Sierra Leone,) with the moral authority that this presupposed, may have also helped garner support.

---

[755] *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June - 17 July 1998, Official Records, Volume II*, 355.

[756] There is some debate among international experts about whether a slight change in wording ("armed violence" in *Tadic* and "armed conflict" in this text) introduced a meaningful difference. See Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*. The prevailing interpretation seems to be that it does not.

[757] Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency*; Deitelhoff, "The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case."

[758] Some state delegations included *bona fide* advocates of strong and encompassing international justice mechanisms such as Theodor Meron for the US or Andrew Clapham for the Solomon Islands; the latter's work is discussed later in this chapter.

There is some additional reason to suspect that social coercion might have been present, however. The final compromise language included two words that appeared to condition the consideration of the most controversial internal atrocities: the armed conflict in which they occur needs to be "protracted" and must feature "organized" armed groups fighting a government or one another. The precise meaning of these terms, however, was not fixed there and then, leaving some interpretive "wiggle" room (indeterminacy) to be dealt with later. Moreover, these two conditions (protraction and organization) appeared to raise the armed conflict "threshold" somewhat, *not quite* as much as the Second Protocol had but presumably somewhere *above* the Common Article 3 language.[759] They can thus still be read (without it being express) as a political balance between the humanitarian supporters of the idea and its detractors, detractors that were aware that total deletion was unlikely anyway. Put otherwise, as was the case during the making of the Geneva Conventions and the Additional Protocols (Chapters 3 and 5,) the inclusion of these conditional words could be plausibly be understood as a sort of "antidote" produced through behind-the-scenes "pushback."

As said, a robust empirical assessment of these claims is postponed until further archival and interview research can be conducted. Yet beyond the possible operation of social coercion in this instance, the ICC case also illustrates what I called earlier *normative re-inscription*, that is, how ideas can first emerge in one setting (the Appeals Chamber of the ICTY,) gain prominence and be "validated" in international legal venues, and eventually "circle back" to be incorporated in the black letter of a binding treaty. This connection of events and mechanisms constitutes an important alternative pathway deserving study by scholars of norm emergence in international relations.

V. Enduring Entrepreneurship: Recent ICRC Initiatives

In contrast to earlier periods during which the ICRC played the role of propelling revisions to humanitarian law almost exclusively, so far this chapter has emphasized the

[759] For a different interpretation of the threshold introduced in the Rome Statute relative to CA3 and the Second Protocol, see Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*.

proliferation of various other sources and actors producing normative developments over the last three decades. But it should not be assumed that the International Committee withdrew from pursuing an entrepreneurial role in this field. This section argues that the ICRC has preferred to lead lower-profile initiatives combining in-house research with expert consultations, jointly constituting another authoritative epistemic community.

Framed simply, the major goal of the ICRC in recent decades has been to craft consensus documents that become authoritative interpretations/elaboration of existing treaty law, usually by drawing on other respected sources like scholarly opinion or arguments about humanitarian norms' customary status. This suggests that, as some of the other entrepreneurial efforts studied in this chapter, these projects represent attempts at *progressive interpretation* and *customification*. It should by now be clear that resorting to meetings of experts is not at all a new practice for the ICRC: such events have in fact preceded most, if not all, episodes of norm emergence and development. Yet in recent times, contrasting with the past, the ICRC has shied away from forcefully spearheading new major inter-state conferences to develop or revise the substance of the law. The only exception one might cite was a Diplomatic Conference held in 2005 to adopt an additional emblem (the Red Crystal,) resolving some historical controversies regarding the use of the Red Cross in certain contexts.[760]

This relative "shying away," as claimed earlier, may have had to do with disillusionment in the ability of major conferences to develop the entire body of law. The embattled political context that followed the Al Qaeda attacks on US soil in September 2001, a moment in which the Geneva Conventions seemed to be "under assault" due to the aggressive onslaught of transnational terrorism and the US-led response to it, likely also fed into the ICRC's "risk aversion" toward formal inter-state revisions.[761] That said, the perceived or actual challenges to the existing law in the post-9/11 moment have

[760] The text of the instrument, known as *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005*, see http://www.icrc.org/ihl/INTRO/615 (Consulted on July 30, 2013.)

[761] David Wippman, "Introduction: Do New Wars Call for New Laws?," in *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*, ed. David Wippman and Matthew Evangelista (Transnational Publishers, 2005), 1–30; Sarah Perrigo and Jim Whitman, "The Geneva Conventions Under Assault" (New York: Pluto Press, 2010).

nonetheless clearly influenced ICRC research and expert consultations –and/or certain governments' reaction to their findings,-- as explained below.

To the above factors one should add the Swiss organization's awareness of and interaction with a growing international community of discourse and practice in the areas of humanitarian law and human rights, supported by a growing institutional architecture (UN as well as regional human rights commissions and courts,) with their own ability to push norms in related fields forward through traditional/formal treaty means. In fact, UN bodies, certain entrepreneur states (Canada or the Netherlands, for example) and various NGO networks have --often together-- starred in the great majority of recent such initiatives complementing IHL, such as the creation of ICC, but also in the regulation or prohibition of weapons (an area that since the Draft Rules experience of the 1950s had proven difficult for the ICRC to assume.) These recent initiatives include new treaties on chemical weapons (1993,) landmines (1997,) cluster munitions (2008) or the global arms trade (2013,) as well as revisions to older agreements like the Convention on Certain Conventional Weapons (1981, 1996,) or in related areas such as the protection of children in armed conflict (2000.)[762] In all of these varied processes the ICRC (and the Red Cross movement) has certainly laid critical groundwork and acted as force multiplier, but it has not protagonized them in quite the same way as before.

Much excellent research has been conducted on the origins of some of these various IHL-related treaty initiatives.[763] For that reason this section devotes its energy to two of the most important and less well-known projects (for IR audiences, at least) of norm development recently led by the ICRC with implications for internal conflicts: a major

---

[762] *Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, Paris 13 January, 1993*; *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September, 1997; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict, 2000; Convention on Cluster Munitions, 30 May, 2008; United Nations' Arms Trade Treaty, 2 April, 2013.* For greater background, see: http://www.icrc.org/eng/war-and-law/weapons/index.jsp

[763] Price, "Reversing the Gun Sights: Transnational Civil Society Targets Land Mines"; Maxwell A. Cameron, Robert J. Lawson, and Brian W. Tomlin, *To Walk Without Fear: The Global Movement to Ban Landmines* (Oxford University Press, 1998); John Borrie, *Unacceptable Harm: A History of How the Treaty to Ban Cluster Munitions Was Won* (United Nations Publications UNIDIR, 2009).

study on the clarification of customary law applicable to armed conflicts, and the elaboration of a guidance text intended to help parties to conflict understand the conditions under which civilians might "directly participate in hostilities" and thus become lawful targets. Both of these proved to be thorny, and the latter in particular garnered some heavy governmental backlash. After describing and analyzing the politics behind these, I close by laying the contours of the other two recent and still ongoing ICRC-led initiatives.

The Customary International Humanitarian Law Project

After a two-day International Conference on the Protection of War Victims convened in August 1993 by Switzerland (in response to the grave violations of humanitarian law experienced at the time,) participants called for the creation of an Intergovernmental Group of Experts which, among others, asked the ICRC to prepare a report on clarifying the entire body of customary norms applicable in both international and non-international conflicts.[764] This effort represented a mammoth endeavor for the ICRC, requiring over a decade and a multitude of international and in-country experts from all regions of the world.[765] Establishing the range of customary norms was especially important with regard to the Additional Protocols of 1977, parts of which remained controversial decades after their negotiation.

ICRC legal expert teams carried out their research drawing from the organizations' own archives as well as national sources of nearly 50 states (9 in Africa, 11 in the Americas, 15 in Asia, 1 in Australasia and 11 in Europe,) and international organization resolutions and reports.[766] States' physical as well as verbal acts were considered to

[764] This idea was proposed in a January 1995 meeting of the Intergovermental Expert Group and endorsed at the International Conference of the Red Cross and Red Crescent later that year.

[765] The rationale and process behind the report are well documented in Jean-Marie Henckaerts, "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict," *International Review of the Red Cross* 87, no. 857 (2005): 175–212.

[766] Henckaerts, "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict," 179. The ICRC researchers were careful to clarify, however that not every statement or resolution mattered, yet "the greater the support for the resolution, the more importance it is to be accorded."

establish whether a practice was "dense" enough to be "virtually uniform" as was required. Norm-confirming as well as contradictory practices were taken into account, yet the latter were not used as standard setting if it could be established that it had faced condemnation by other states or denied by the government itself. "Through such condemnation or denial," explained one of the report's authors, Jean-Marie Henckaerts, "the rule in question is actually confirmed."[767] Importantly, Henckaerts commented, "this is particularly relevant for a number of rules of international humanitarian law for which there is overwhelming evidence of State practice in support of a rule, alongside repeated evidence of violations of that rule." In effect,

> "Where violations have been accompanied by excuses or justifications by the party concerned and/or condemnation by other States, they are not of a nature to challenge the existence of the rule in question. States wishing to change an existing rule of customary international law have to do so through their official practice and claim to be acting as of right."[768]

According to the study, furthermore, state discourse and conduct did not have to be "universal" for establishing custom, only "extensive" and "representative." Of special attention for creating custom was the practice of "especially affected states" with regard to specific rules, although for such practice to count the majority of other states had to have "at least" acquiesced to it. Finally, the ICRC decided *not* to study the practice and "doctrine" of non-state armed actors, declaring that "while such practice may contain evidence of the acceptance of certain rules in non-international armed conflicts, its legal significance is unclear." (As I show later in this chapter, other non-governmental

[767] The authors noted that separating behavior and legal conviction had been "very difficult and largely theoretical" because the same act often reflected both. States' military manuals provided the best example of this according to the ICRC, since they were indicative of legal belief *and* state practice. In cases of ambiguous practice, *opinio juris* helped to adjudicate the formation of custom. Finally, since many rules of humanitarian law relied on states' *abstention* from a certain conduct, the challenge was to prove that abstention had not been coincidental but rule-driven.

[768] Henckaerts, "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict," 180. This language draws directly on the definitions of custom as provided in the Nicaragua vs. United States opinion of the International Court of Justice. See I.C.J., *14 - Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua Vs. United States of America)*. It also echoes the ideas of constructivist IR scholars writing on international norms around the same time. Friedrich Kratochwil and John Gerard Ruggie, "International Organization : A State of the Art on an Art of the State," *International Organization* 40 (1986): 753–775.

organizations have disagreed with this assessment and paid more attention to non-state armed actors' statements and documents.)

The results of the consultative process, published in 2005 as a 5000-page three-volume report, proved noteworthy and contested to a degree. This was because, of over 161 rules considered by the experts, nearly all (146) were deemed to be applicable as customary to both international and internal conflicts.[769] A few merited the "arguably applicable in non-international armed conflict" qualifier, and there were important differences on civilian protection and prisoner of war guarantees, but by and large the proposed lists were nearly identical.[770]

What reaction did the ICRC study elicit? How did states view its results? Legal scholars have widely praised the report's findings, empirical depth and comprehensiveness. Very few states made their opinion public, however. An American memorandum issued to the ICRC in late 2006 provides the best-known response so far. In it legal advisors John B. Bellinger III (DoS) and William Haynes (DoD) recognized the value of the project but partially critiqued its method and its conclusions. Among others, Bellinger and Haynes decried the ICRC's tendency to privilege military manuals as evidence of practice supportive of customary states, as well as the choice to include "non-binding resolutions" of the General Assembly and NGO statements.[771] Instructions contained in manuals, these US lawyers argued, often represented "policy" decisions that while going beyond formal international commitments, should not be taken as proof of

[769] Bugnion, "Customary International Humanitarian Law."

[770] For example, the ICRC found insufficient evidence to brand customary the rule that armed actors in internal conflict should, when in doubt during their military operations, assume that persons were civilians and thus refrain from attacking them. Conversely, the ICRC study did not find a sufficiently shared, thus customary, interpretation of what it means for a civilian to be "directly participating in hostilities," which according to Common Article 3 and Additional Protocol II is the sole legal reason through which a civilian forfeits his immunity and becomes a legitimate target. As noted, a separate project of ICRC-led clarification, explored below, was conducted on this crucial issue to intensely disputed results. Moreover, other provisions dealing with the thorny areas of combatant and prisoner of war status were also left untouched. Henckaerts, "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict."

[771] John B. Bellinger III and William J. Haynes II, "A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law," *International Review of the Red Cross* 89, no. 866 (2007): 443–471.

widely accepted, binding law. The US memo also claimed the experts had not paid counter-practice enough relevance, particularly that of states that were not party to certain treaties. The ICRC responded swiftly to these and other critiques, standing its ground.[772] Although Bellinger and Haynes' personal roles in the Bush government's legal decisions leading to the violations of humanitarian law in Abu Ghraib, Guantanamo and other places seems to have markedly differed (and receive excellent research treatment elsewhere,) on the whole the skeptical American response to the ICRC customary law findings is not surprising, given the IHL-undermining climate pervading that administration's legal counsel.[773]

Beyond the US, only Egypt and Finland have referred (approvingly) to the study.[774] Whether the quiet reaction of states may be interpreted as proof of acceptance or consensus is up for debate, but the opinion of prominent scholars suggests the ICRC report commands a measure of normative authority and seems likely to become a key interpretive source in this area.

The Direct Participation in Hostilities (DPH) Study

An additional ICRC initiative toward norm development with relevance to internal conflicts in recent years was a consultative process intended to offer interpretive parameters for determining when a civilian was directly participating in hostilities, thus forfeiting non-combatant immunity. Common Article 3, it may remembered, protects "persons taking no active part in hostilities," while the Additional Protocols prohibit attacks on civilians "unless and for such time as they take a direct part in hostilities." Both these provisions beg the obvious question (Under what conditions can civilians be seen as "directly participating in hostilities"?) prompting the ICRC's desire for greater

[772] See Jean-Marie Henckaerts, "Customary International Humanitarian Law : a Response to US Comments" 76, no. 866 (2007): 259–270.

[773] For reasons of focus and space I cannot delve in this issue further. For an excellent account, covering (among many others) the roles of Bellinger and Haynes, see Forsythe, *The Politics of Prisoner Abuse: The United States and Enemy Prisoners After 9/11*.

[774] In the context of the presentation of the report to the 30th International Conference of the Red Cross and Red Crescent Societies. ICRC, *Report of the XXX International Conference of the Red Cross and the Red Crescent, Geneva 23–30 November 2007* (Geneva: ICRC, 2007).

clarity. Distinguishing civilians from combatants is difficult in most wars, but it is a particularly acute problem in internal conflicts.

Yet conducting a major research project on the topic of lawful targeting likely went beyond the goal of clarifying thorny legal meanings in the abstract. The nature of the project, its findings and the responses they elicited should be understood in the post-9/11 context. The Bush administration had since 2001 argued that it was involved in a "global war on terror" toward which the Geneva Conventions were ill-fitting, and inapplicable in cases (more on this below.) These claims, along with the dubious legal justifications crafted by some within the State Department's Office of Legal Counsel led to many grave abuses, as is now recognized. The mistreatment of captured persons (alleged or actual terrorists) is the best-known case. Yet beside prisoners, at stake was also states' legal ability to target persons (including extra-territorially) that they presumed were "posing" as civilians while actually involved in combat (i.e. participating in hostilities.) Controversy about US drone attacks on alleged Al Qaeda operatives in Yemen brought this issue back to the fore in 2002, and it remains lively to this day.[775]

The "Interpretive Guidance on the Notion of Direct Participation in Hostilities" (hereafter DPH,) as the project became known, was once again drafted through the method of expert consultations. Five informal meetings were held in The Hague and Geneva between 2003 and 2008, bringing together 40 to 50 legal experts from military, governmental and academic circles.[776] The resulting document was issued in May 2009 and presented by the ICRC as a "balanced and practical solution that takes into account the wide variety of concerns involved and, at the same time, ensures a clear and coherent interpretation of the law."[777] Although the ICRC clarified that the end product was a non-binding guide, it hoped it would be "persuasive to States, non-State actors, practitioners

[775] Many other issues are involved in the legal discussions about targeting, including the treatment of private military contractors or civilian employees.
[776] See Overview of ICRC's Expert Process (2003-2008,) available at: http://www.icrc.org/eng/assets/files/other/overview-of-the-icrcs-expert-process-icrc.pdf (Consulted on August 2, 2013.)
[777] Ibid, 4.

and academics alike and that, ultimately, it will help better protect the civilian population from the dangers of warfare."[778]

The ICRC's hopes for a persuasive consensus document were sorely dashed, however. In a public academic symposium hosted in 2010 by New York University's Law School (eventually published as the Spring 2010 volume of NYU Law's *International Law and Politics* journal) four experts among those who participated in the DPH process (three of them as unofficial representatives of the US, Canada, the UK governmental opinion) exchanged some scathing comments with the ICRC's Nils Melzer, the principal author of the Interpretive Guidance.[779] The four experts, W. Hays Parks (US,) Kenneth Watkin (Canada,) William Boothby (UK,) and Michael N. Schmitt (UK) agreed that while the project's intent was important, various conceptual decisions taken by the ICRC doomed the resulting text to failure.[780]

These experts' critiques are complex and broad ranging, but all can summarized in the idea that, in attempting to strike a balance between humanitarian protection and military necessity, the ICRC had "erred" far too much on the side of the former, limiting the latter unacceptably and unrealistically. Through the insertion of notions allegedly not grounded in existing law, for instance the idea that to become lawful targets civilians have to perform a "continuous combat function" which they could enter and leave in the manner of a "revolving door" (Watkin,) the notion that there must be one causal step between a civilian's action and a harmful attack negatively affecting one side to the conflict for direct participation to occur (Schmitt and Boothby,) or that even as lawful targets civilians should be approached using law enforcement (and not necessarily law of

---

[778] Ibid, 4.

[779] The entire volume of the journal may be found online freely at: http://nyujilp.org/new-issue-forum-on-direct-participation-in-hostilities/ (Consulted on August 2, 2013.)

[780] W. Hays Parks, among others, is a retired Senior Associate Deputy General Counsel, International Affairs Division, Office of General Counsel, U.S. Department of Defense, 2003 to 2010; Special Assistant for Law of War Matters, Office of The Judge Advocate General of the Army, 1979-2003. Colonel Kenneth Watkin is retired Brigadier-General and a former Deputy Judge Advocate General/Operations for Canada. Bill Boothby is the retired Deputy Director of Legal Services, Royal Air Force, UK. Michael Schmitt is currently Chairman of the International Law Department at the United States Naval War College. Schmitt also served 20 years in the United States Air Force as a Judge Advocate specializing in operational and international law.

war) standards, the ICRC appeared to have unduly narrowed states' ability to respond to offending non-combatants, not only exposing soldiers but potentially putting *bona fide* civilians to risk. Comments of such nature, alongside claims of a "troubling ignorance of the realities of 21st century warfare," intimations of breaches of confidence and suggestions of ethical missteps by the ICRC, colored initial government reactions to this ICRC initiative. It remains to be seen to what extent these experts' views are more widely shared by other states.[781]

The ICRC engaged and confronted these experts in the same public manner. This bolder attitude contrasts with the private reaction seen in prior experiences, including the Draft Rules in the 1950s, or during the contentious drafting of the Additional Protocols in the 1970s.[782] Nils Melzer, author of the DPH guidance, did not hide his discomfort when he responded that "all four authors attempt to remedy practical difficulties in identifying and engaging the enemy through the flexibilization and expansion of the legal criteria permitting direct attacks against individuals under IHL… As has been shown, even when applied in good faith, these proposals result in an extremely permissive targeting regime prone to an unacceptable degree of error and arbitrariness."[783] In other words, Melzer's response was that while the experts criticized the ICRC for overemphasizing

---

[781] The list of participant experts was seemingly withdrawn from publication given the resistance from many to be associated with it. Moreover, although these authors highlighted the level of experts' dissent toward the ICRC's alleged overtly humanitarian stance, Nils Melzer quipped that "other participants advocated an opposite, almost exclusively humanity-driven perspective, which sometimes tends to disregard legitimate concerns of military necessity. The Interpretive Guidance, faithful to the ICRC's role as a neutral and impartial intermediary, does not give either consideration preference over the other, but proposes a balanced approach, which takes all legitimate concerns into account, while at the same time aiming to ensure a clear and coherent interpretation of IHL consistent with its underlying purposes and principles." 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," *New York University Journal of International Law and …* 42, no. 3 (2010): 914.

[782] The ICRC's more robust public defense of its approach may have had to do with a perceived slippage of respect for international humanitarian standards post 9/11. Consistent with this, the Swiss organization had been engaged in a protracted and more-public-than-usual dispute with the US regarding its treatment of detainees in Guantanamo and other places. I thank Fionnuala Ní Aoláin for highlighting this point.

[783] 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," 913.

humanitarianism, they appear to have done their share by privileging military necessity instead.

On balance, and since the stated purpose of the exercise was to draft a non-binding "guidance" on the basis of multistakeholder consultations but ultimately prepared by the ICRC, it should have surprised no one that the outcome sought to move the law "forward," subtly or not, in the humanitarian direction rather than in the "military necessity" sense. However, the public controversy during the NYU-Law Conference suggests that both the ICRC and states understand "the power of precedent" well, and that both realize that soft law can and often does turn into "hard law" over time. Differences in degrees of animosity regarding the Customary Law study and the DPH guidance may well mark each initiative in their separate future standard-setting "success."

Two additional and still ongoing ICRC projects bear briefer mention. The first is a new attempt at ascertaining the adequacy of the existing law (treaty as well as customary rules,) in view of the realities of contemporary armed conflict. After an in-house two-year study of over 36 legal subjects, in September 2010 the ICRC concluded that although existing humanitarian legal frameworks are indeed adequate and most problems stem from their faulty implementation, certain areas might require strengthening and elaboration. These were: 1) the protection of the natural environment during armed conflict; 2) the implementation of the law and reparations to victims of armed conflict; 3) the protection of internally displaced persons; and 4) the treatment of persons deprived of their liberty. (Note the relevance of the last one in the post 9/11 context.)

Having identified them, the ICRC submitted a report to states to determine to what extent they agreed with its conclusions and to gauge the possibilities for working toward normative strengthening, either in all four areas or some of them. States' responses have not been made public, but according to the ICRC's latest (November 2011) update on this initiative, states suggested that "it would not be realistic to work simultaneously on all four" areas, and that instead priorities should be set. The majority of governmental responses seem to have indicated that reparations as well as the protection of the environment and of displaced persons were not yet "ripe" for elaboration. The two topics

that according to the ICRC "most attracted attention" from states were 1) the protection for persons deprived of liberty and; 2) international mechanisms for monitoring compliance with international humanitarian law. The latest International Conference of the Red Cross and Red Crescent Societies, held in Geneva in late 2011, mandated the ICRC to continue pursuing "research, consultation and discussion in cooperation with States and, if appropriate, other relevant actors, including international and regional organizations, to identify and propose a range of options and its recommendations to: i) ensure that international humanitarian law remains practical and relevant in providing legal protection to all persons deprived of their liberty in relation to armed conflict; and ii) enhance and ensure the effectiveness of mechanisms of compliance with international humanitarian law."[784] The ICRC was tasked with reporting on its progress to the next International Conference, scheduled for 2015.

Finally, in 2012 the ICRC decided to embark on a revamping of the Official Commentaries to the 1949 Geneva Conventions and the 1977 Additional Protocols to account for the practice and interpretation accumulated since the treaties were signed. The Commentaries are essentially guidance documents, produced by the ICRC some years after the negotiations of these instruments (in 1952-1958 and 1987, respectively.) Although not legally binding, they are widely considered to be authoritative sources of interpretation for lawyers, scholars, judges, advocates and governments. Jean-Marie Henckaerts, ICRC legal adviser (and co-author of the 2005 Customary Law project) currently leads this initiative. Like the customary law study, the updating of the Commentaries will draw from a range of sources "including military manuals, legislation and case law, as well as academic commentary and the ICRC's own field experience. In addition, consultations with practitioners will take place. The project also uses the ICRC's customary law database, in particular for access to State practice with respect to the application and interpretation of humanitarian law."[785] Given this combination of

[784] Resolution 1 in ICRC, *XXXI International Conference of the Red Cross and Red Crescent Geneva, 28 November – 1 December 2011 Council of Delegates of the International Red Cross and Red Crescent Movement, Resolutions* (Geneva, 2011), 26.

[785] See an online interview with Jean-Marie Henckaerts titled "Bringing the Commentaries on the Geneva Conventions and their Additional Protocols to the 21st Century" at:

factors (the author and sources utilized) it can be expected that the new Commentaries, schedule to appear progressively after 2015, will seek to advance the black letter law by incorporating the wealth of practical and jurisprudential developments of the past half-century, most of which were identified through the prior research on customary law. This project is likely to once more stir controversy amid states, and it remains to be seen how far the ICRC will dare go with its progressive thrust when revising the Commentaries.

Before closing this section, it is worth reflecting once more on the changing tactics adopted by the ICRC during the last three decades and their normative effects. As noted, a move away from self-initiated Diplomatic Conferences in the vein of the 1949 and 1974-1977 negotiations has been accompanied by participation in processes held under the aegis of *other* organizations and actors. There is no indication at present that this attitude will change in the near future, given that the additional forms and pathways to standard-setting have proved at least partially successful. That said, the uncertainty produced by states' reluctance (or silence) to acquiesce to the ICRC-steered interpretative guidances and studies might dampen their crystallization as truly authoritative. Conversely, armed actors' conduct on the ground may not change, and both these outcomes *could* prompt a new wave of binding treaty-making on subjects of special concern.

Either way, it is apparent that states have been and continue to act as normative gatekeepers. The decision to "leave for later" three subjects of evident importance (reparations, environmental protection and IDPs) and to continue "studying" the topics that were chosen (particularly two as old and well-known as the problem of compliance/monitoring mechanisms and the thorny one of detainees treatment) suggests that the path toward new humanitarian treaties may be long and difficult, or that impetus may only arise through new shocks or episodes of trauma, as it has historically.

---

http://www.icrc.org/eng/resources/documents/interview/2012/geneva-conventions-commentaries-interview-2012-07-12.htm (Consulted on August 2, 2013.)

VI. Human Rights Revolutionizes Humanitarian Law

One theme of this chapter has been the surfacing of many new actors with an interest in improving legal protective regimes for rights violations occurring within a state's borders. Phrased this way, the lines separating the traditional domains of humanitarian and human rights law become blurred. As seen in Chapter 5, however, well into the 1970s conflict-ridden or repressive states were wary to blend the two, refusing to mix peacetime with wartime protections or to grant their rebellious citizens too many guarantees, especially in humanitarian instruments that did not allow for derogation.[786]

Yet a few international lawyers and activists, beginning with Séan Macbride in the 1960s, had proposed holistic approaches to the international regulation in the fields of humanitarian, criminal and human rights law. In the 1970s still these voices were isolated, however. Historical path-dependence supported by encroached state interests and the persistence of separate institutions, rules and principled/epistemic communities for each body of law, probably worked to secure the distinction between human rights and humanitarian law until around the 1980s. This state of affairs soon became transformed, such that it is now nearly impossible to speak of internal atrocities without reference to human rights (or international criminal law, as we have seen) standards and institutions.

This process of normative "crosspollination" has occurred in complex ways and comes from various sources, some of which I have discussed earlier. Some international and regional human rights courts and commissions have begun referencing humanitarian law in their reports on country rights situations and specific legal cases. UN human rights institutions and special rapporteurs appointed to study diverse issues have done their part, further legitimating the idea that human rights (and not just humanitarian law) *are* applicable in armed conflict. Human rights NGOs have also played a major role, progressively deciding to incorporate humanitarian law standards into their advocacy work on internal violence. The relationship has thus been bidirectional: humanitarian law

[786] The two human rights covenants (ICCPR and ICESCR) allow for broad derogation during times of public emergency, *except* for the few most fundamental among rights: the right to life, the right to be free from slavery, the right to be free from torture and the right to be free from retroactive application of penal laws.

has become part of the human rights repertoire, and human rights have been deployed to complement and expand protections during armed conflict, formerly the sole province of the laws of war.

As can by now be expected in this contentious issue-area, agreement on this cross-pollination has not been swift or uniform. Indeed, the interaction between the two regimes, and the adoption of the humanitarian law language by certain actors remains fraught and poses potentially challenges moving forward.[787] States, for instance, have at times criticized NGOs for not looking at the human rights abuses of non-state actors.[788] At other times, however, states have refused to use such language due to the perennial fear of legitimating rebels by affording them statist prerogatives.[789] Regional courts have at times opted *not* to use human rights law to deplore non-state actor conduct, shedding some uncertainty on earlier precedents.[790] Human rights NGOs did not always or automatically want to draw from humanitarian law, fearing that to do so might "distract" them from pressuring the perceived main culprits (states,) that it might place unfair blame on "legitimate" rebels, or that it could simply lead to institutional overstretch. But persistent war-related violations in the late 1970s and early 1980s continued to fuel internal debate, and after a few years the major human rights NGOs officially determined that they should take on internal armed conflict. Nowadays, even with the accumulated practice in the advocacy world, the discussion on non-state armed actors among respected academics remains lively, with some insisting that they can and do bear *legal* (not only moral or social) human rights responsibilities, and others asserting that this is not the case. This debate, as I show, represents thus one among other "normative frontiers" in

---

[787] Human rights NGOs' embrace of IHL is not necessarily an unalloyed good given the dangers that it might present for their ability to use HR standards to critique states' conduct. I thank Fionnuala Ní Aoláin for raising this point.

[788] Carrie Booth Walling and Susan Waltz, eds., *Human Rights : From Practice to Policy, Proceedings of a Research Workshop* (Ann Arbor: Gerald R. Ford School of Public Policy, University of Michigan, 2011), 39.

[789] Walling and Waltz, *Human Rights : From Practice to Policy, Proceedings of a Research Workshop*, 37.

[790] Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (New York: Cambridge University Press, 2002), 38–54; Sivakumaran, *The Law of Non-International Armed Conflict*, 503–505.

this issue-area. In the meantime, various initiatives and NGOs have emerged that directly attempt to persuade violent non-state actors to abide by international norms, whether drawn from humanitarian or human rights law.

Despite political and scholarly disagreements about the notions that human rights can protect during armed conflict, and that humanitarian rules can or should complement human rights, these ideas seem to have achieved a notable degree of legitimacy, if still fraught and contested in part. The following section presents a panoramic view of these developments and trends. As with the rest of the initiatives considered in this chapter, tracing the precise steps along a plethora of intermingling sources and actions can be difficult, especially when attributing causality to individual entrepreneurs or institutions at specific times. I thus only attempt to do so when possible and as such, the portrayal below should be read as comprehensive in scope but partial in its details, inviting further research and reference to other sources.

Regional and International Human Rights Institutions

The first trend worth tracing is the extension of human rights concerns to armed conflict situations. That such a move remained controversial by the late 1970s may strike readers as odd since, after all, the original 1968 UNGA resolution that triggered the comprehensive revision of humanitarian law in the several years was entitled precisely "Respect for Human Rights in Armed Conflict." Yet at the time many interpreted this as something of a misnomer rather than as a substantive claim. During the CDDH human rights language was avoided by many (especially governments) who found it politically dangerous, and became instead "translated" into discussions about "legal rules applicable to non-international conflicts."

It is also true that most international lawyers and military jurists were well accustomed to thinking about the laws of war or humanitarian law and found human rights less familiar.[791] For their part, international human rights lawyers, as acknowledged

[791] In an autobiographical essay Theodor Meron notes that in 1977 "human rights was not regularly taught" at important United States law schools such as that of New York University. Meron was appointed there that year, first as visiting faculty and later permanently, and chose to

in 1981 by the renowned American jurist Thomas Buergenthal (who would later become a judge in the Inter-American Court of Human Rights,) had long "avoided concerning themselves with humanitarian law" in part due to "the hope that wars would soon become obsolete" or on the assumption that "wars were dirty business, that it is difficult enough on the international plane to obtain compliance with human rights standards in peacetime, and that the enforcement of humanitarian law was an even more hopeless task." Yet, as Buergenthal added, "neither our wishful thinking nor our desire to shrug off our responsibilities has had a significant effect on the realities of contemporary international life… the realities are that we live in a period of history in which, in many parts of the world, we have neither peace nor war in the traditional sense." Thus, he concluded:

> "Here the demarcation between humanitarian law and international human rights law disappear for all practical purposes, and the only question of significance that remains is: what can be done to stop or ameliorate the vast human suffering that engulfs our globe today?" The answer given was that both humanitarian as well as human rights lawyers should "embark on a massive joint educational effort… we face an immense task."[792]

Seminal contributions to this task were already being made at the time Buergenthal was writing. Indeed, the late 1970s and first half of the 1980s proved to be particularly germane to this conversation, and not just in scholarly circles. The Inter-American Commission of Human Rights began reporting on the human rights situation of countries facing armed rebellion (Nicaragua in 1978 and 1981, Colombia in 1981) and by 1983 was explicitly cited the Geneva Conventions in its reports (on Guatemala, for instance.)[793] The United Nations Commission on Human Rights moved in a similar direction in 1981 by appointing a special representative on the human rights situation in El Salvador responsible for site visits, fact-gathering and producing reports. Increasingly, though still intermittently, Common Article 3 and the Second Protocol began being cited

---

teach human rights, still an "uncharted territory." See Meron, *The Making of International Criminal Justice: A View from the Bench: Selected Speeches*, 7.

[792] Thomas Buergenthal, "Introduction, The American Red Cross - Washington College of Law Conference: International Humanitarian Law," *American University Law Review* 34 (1981): 805–807.

[793] See these reports online at: http://www.wcl.american.edu/pub/humright/digest/inter-american/ (Consulted on August 2, 2013.)

as normative basis in appeals by human rights bodies. The same may be said of the UN General Assembly after the negotiation of the Additional Protocols in 1977.[794] Although there were cases where the UNGA could have but did not mention instruments of humanitarian law (Chad, Cyprus, East Timor, Grenada, Kampuchea and Nicaragua,) after 1981 it seems to have done so more consistently (with regard to Afghanistan, El Salvador, Guatemala, Israel-Palestine or Namibia.)[795] Beyond Latin America, the African Commission on Human and People's Rights have also applied and enforced humanitarian law.[796] Unlike its Latin American and African siblings, however, the European Court of Human Rights has not used humanitarian law, aside from occasional borrowing of IHL language.[797] One may conclude that since the mid-1980s there has been a growing trend in the use of humanitarian law by inter-governmental organizations as they report on human rights situations during armed conflict, but that there also appears to be important regional variation.

In terms of international precedent-settings, however, without a doubt the watershed moment came in 1986 with the International Court of Justice (ICJ) case *Nicaragua vs. United States*, already mentioned, which determined that Common Article 3 was a "minimum yardstick" reflecting "elementary considerations of humanity."[798] The reverberations of that statement, as seen, were later felt during the making of the various international criminal tribunals and their jurisprudence.

Non-governmental Organizations

Chapter 4 highlighted the important role of a particular international non-governmental legal organization, the International Commission of Jurists (ICJ,) in reigniting global interest on human rights in armed conflict. Besides the high-level

[794] Weissbrodt, "The Role of International Organizations in the Implementation of Human Rights and Humanitarian Law in Situations of Armed Conflict."
[795] Weissbrodt, "The Role of International Organizations in the Implementation of Human Rights and Humanitarian Law in Situations of Armed Conflict," 327–331.
[796] Sivakumaran, *The Law of Non-International Armed Conflict*, 503.
[797] Sivakumaran, *The Law of Non-International Armed Conflict*, 503.
[798] I.C.J., *14 - Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua Vs. United States of America)*.

diplomacy of Séan Macbride, the ICJ researched and published statements and reports on various conflict situations (Vietnam and Pakistan, for instance) drawing on humanitarian law. The ICJ was still an isolated case, however. By the mid-1970s the international human rights NGO movement as we know it today was still fledging, with the few major protagonists focusing on specific issue-areas (Amnesty International and political prisoners, for instance,) without making systematic connections to the laws of war.

This situation began to change in a matter of years. Amnesty International (AI) reports in 1977 and 1978 (on Ethiopia and Somalia) contained scattered mentions of Common Article 3, but it was not until 1981, through an open letter to the US Secretary of State in relation to the Salvadorian conflict, that AI seems to have started taking humanitarian law more seriously in its advocacy work in internal conflicts. This episode triggered process of internal reflection and debate within AI's highest organs on whether to expand its mandate to consider internal armed violence through the humanitarian legal lens, including the political question of documenting non-state actors' abuses and pressuring them as well as states.[799] These would eventually be answered in the affirmative, but the decision was not easy and would take a few years.

Amnesty's early steps coincided with a similar process inside another budding international human rights organization at the time: Americas Watch, which later merged with other "Watch" committees around the world to become Human Rights Watch. According to Aryeh Neier, founding member of Helsinki Watch, Americas Watch had in fact "led the way" in starting to monitor armed conflicts in accordance with humanitarian law "and, over time, others followed."[800] Americas Watch, like AI, had been studying the grave situation in El Salvador, and upon the US Congress passing of legislation in 1981 mandating the President to "certify" the human rights conduct of states receiving American foreign aid, made plans to pressure the Reagan administration. "Quickly

[799] David Weissbrodt, *Study of Amnesty International's Role in Situations of Armed Conflict and Internal Strife, AI Index: POL 03/04/84*, 1984; Weissbrodt, "The Role of International Organizations in the Implementation of Human Rights and Humanitarian Law in Situations of Armed Conflict."

[800] Aryeh Neier, *The International Human Rights Movement: A History* (Princeton University Press, 2012), 131.

pulling together information that had been gathered over a period of several months by a number of researchers, America's Watch published a book-length report on January 26, 1982 demonstrating that certification was not warranted… though less than a year old, Americas Watch had put itself on the map and, from that moment on, was a leading voice internationally on human rights in Latin America…"[801] The practice of reporting on abuses committed by all parties to armed conflict, according to Neier, became their staple: "As Americas Watch initiated reporting on violations of international humanitarian law, which applies to both sides in international armed conflicts, and to guerrilla forces as well as to government forces in internal armed conflicts, it soon began reporting on guerrilla abuses. This helped the organization make clear that it was not aligned with one side in such conflicts. It was a critic of abuses, regardless of who committed them."[802]

The process within AI, as mentioned, was less swift. In 1982, after a meeting of its International Council in Rimini, Italy, the organization decided to mandate its International Executive Committee to "initiate a study into the problem of AI's function in situations of armed conflict and internal strife."[803] Aware of Americas Watch's experience, AI wondered to what extent its mandate too covered such cases, what problems existed when trying to research them and what effectiveness they might expect to see from including them their reports. Another goal of the study was to help Amnesty "shed light" on its attitude "with regard to human rights abuses by non-governmental entities" and to identify the rules of humanitarian law that AI could use to complement its human rights approach. David Weissbrodt, then working in the legal office of AI while on leave from his professorship at the University of Minnesota Law School, was asked to conduct this research. The 101-page report, circulated internally in August 1984, was an exhaustive review of Amnesty's past work in armed conflict as well as its occasional use of humanitarian legal norms. The conclusions were clear: "More regular use of

[801] Neier, *The International Human Rights Movement: A History*, 210.
[802] Neier, *The International Human Rights Movement: A History*, 211.
[803] Weissbrodt, *Study of Amnesty International's Role in Situations of Armed Conflict and Internal Strife, AI Index: POL 03/04/84*, 2. AI's initial concerns about this issue are said to have arisen in 1979 during discussions of AI's Mandate Committee.

international humanitarian law could provide Amnesty International with additional legal foundation… in some cases [IHL] may even provide a stronger basis for Amnesty International's work."[804] This was so not only because at the time the Geneva Conventions were more widely ratified treaties, but also because they made "certain non-governmental entities the subject of regulation and AI may wish to review humanitarian law to determine if there are lessons for AI's work in this respect."[805] The report reasoned that the fact that humanitarian law was better known to the military (active or retired) than human rights might open up new possibilities for influence. Despite these opportunities, however, the report cautioned that "before embarking on this ambitious, difficult and relatively new topic… AI must continue to work within its mandate and not to expand that mandate in periods of armed conflict and internal strife. Just the discussion of humanitarian law and human rights in armed conflict may create inappropriate expectations that AI will broaden its mandate and pursue all sorts of humanitarian law issues. These expectations must be narrowed at the outset."[806]

The reason for caution was not inherent conservatism, but rather a desire to avoid sudden overstretch owing to the comprehensiveness of humanitarian norms vis-à-vis the relatively limited number of issues AI worked on at the time: 1) detention of prisoners of conscience; 2) failure to provide prompt and fair trials for political prisoners; 3) torture and cruel, inhuman or degrading treatment or punishment; 4) the death penalty; 5) extrajudicial executions and; 6) disappearances. The precise goal was to maximize normative influence in places where there was clear complementarity, either because both bodies of law offered similar protection but one was better known/more accepted than the other, or because one "filled in" grey or underdeveloped areas in another, such as in situations of low-intensity violence. In other places IHL was deemed less helpful, as on the issue of extrajudicial executions, where it was found that it could 'provide very

[804] Weissbrodt, *Study of Amnesty International's Role in Situations of Armed Conflict and Internal Strife, AI Index: POL 03/04/84*, 3.
[805] Weissbrodt, *Study of Amnesty International's Role in Situations of Armed Conflict and Internal Strife, AI Index: POL 03/04/84*, 3.
[806] Weissbrodt, *Study of Amnesty International's Role in Situations of Armed Conflict and Internal Strife, AI Index: POL 03/04/84*, 4.

limited guidance as to what killings fall within AI's mandate," particularly given the difficulty for AI researchers to establish indisputably that a population had been targeted deliberately, and that they were non-combatants.[807]

With regard to which humanitarian standards to use, the report drew from all the principal instruments of IHL, including the Additional Protocols. Anticipating the issue of controversy over different "thresholds" for different rules (CA3 and the Second Protocol, notably,) the author recommended to "avoid making explicit, public assessments about the kind of armed conflict" that was occurring, as well as citing specific provisions except when this seemed expressly useful.[808] Indeed, humanitarian law should be cited "not as a primary source… but as a point of reference" which would "obviate the need for characterizing" conflict situations.[809]

As a final area of interest, the report encouraged AI to reconsider its decision not to take action in regard to non-state actors.[810] Although Amnesty had declared that abuses by those entities fell under its concerns, had deplored them and documented them in cases, it had also consistently clarified that its focus would remain on government abuse. In AI's view at the time, and as set out in human rights law, governments bore primary responsibility for guaranteeing the protection of its citizens from abuse by third parties, among which were guerrillas and other non-state armed actors. The report recommended, however, that the organization should rethink this rationale, especially vis-à-vis "certain

---

[807] Weissbrodt, *Study of Amnesty International's Role in Situations of Armed Conflict and Internal Strife, AI Index: POL 03/04/84*, 14. The report also advised AI to avoid creating a semblance of likeness between itself and its work during armed conflict and the International Committee of the Red Cross (or National Red Cross/Red Crescent Societies,) which might compromise the latter's strict "apolitical" principles which enable its victim-protection and quiet diplomacy work. The two should coordinate to the extent possible, but AI should seek to refrain from acting as or seeking recognition as an impartial humanitarian organization.

[808] Weissbrodt, *Study of Amnesty International's Role in Situations of Armed Conflict and Internal Strife, AI Index: POL 03/04/84*, 99.

[809] Weissbrodt, *Study of Amnesty International's Role in Situations of Armed Conflict and Internal Strife, AI Index: POL 03/04/84*, 99.

[810] Weissbrodt, *Study of Amnesty International's Role in Situations of Armed Conflict and Internal Strife, AI Index: POL 03/04/84*, 85.

quasi-governmental entities… that... are sufficiently similar governments [such] that AI may have a reasonable expectation of obedience to human rights standards."[811]

AI's policies eventually changed in 1991 after a meeting of the International Council Meeting in Yokohama, Japan, where its mandate was formally extended to focus on non-state abuses, both under human rights and humanitarian law. It appears that "peer pressure" created by Americas Watch's reporting on internal conflicts drawing from humanitarian law was a key motivating factor for AI's change of policy. Even so, AI's changed policy came after almost a decade, a "lag" likely due to organizational reasons (Amnesty's global multi-tiered governance structure compared to HRW's less complex architecture.) The broader analytical point is that humanitarian/human rights normative "merging" within international human rights NGOs was neither automatic nor sweeping, but incremental. It represented a simultaneously strategic and principled move aimed at increasing advocacy leverage whenever possible/desirable. Over time this practice became well established within these and many other human rights NGOs.[812]

Human Rights Responsibilities for Non-State Actors?

As we saw, in the 1980s human rights NGO reports began referring to non-state armed groups' human rights abuses and violations, as though that body of norms applied *as a matter of law* to them, not merely as a moral or social expectation. Over the past two decades, other types of actors have begun to use this language. Regional and international human rights bodies, UN special rapporteurs and even the Security Council (on Afghanistan, Guinea Bissau, Liberia) have inserted such references in various statements, resolutions or reports.[813] Truth commissions, especially in places where non-state abuse

[811] Weissbrodt, *Study of Amnesty International's Role in Situations of Armed Conflict and Internal Strife, AI Index: POL 03/04/84*, 90.

[812] For more on the history of HRW and AI's approach to internal armed conflict and non-state armed groups, see Walling and Waltz, *Human Rights : From Practice to Policy, Proceedings of a Research Workshop*, 15–20; 36–39.

[813] For detailed examples, Zegveld, *Accountability of Armed Opposition Groups in International Law*; Andrew Clapham, "Human Rights Obligations of Non-state Actors in Conflict Situations," *International Review of the Red Cross* 88, no. 863 (2006): 491–523. Another prominent instance is the work of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, particularly his 2006 report on Sri Lanka.

has been especially egregious, have done likewise. It is hard to assess to what extent these varied institutions were consciously formulating new *legal* human rights obligations for non-state actors in their work (thus challenging the traditional state-centered view,) or simply assuming them. [814]

Their growing practice, however, eventually elicited lively academic debate among international legal scholars, with contending schools of thought soon emerging. Lindsay Moir and Liesbeth Zegveld, professors of law in the UK and the Netherlands respectively, are two prominent voices still unconvinced about the notion of affording human rights legal obligations to non-state actors. They have argued that this use of human rights "legal talk" has been occasional, loose and sometimes contradictory. Zegveld has claimed, for instance, that "the examples of international bodies imposing human rights obligations on armed opposition groups are limited in number and not very authoritative… Furthermore, the practice asserting the applicability of human rights law to armed opposition groups is confined to unsupported statements. The practice disclaiming this applicability, on the other hand, is validated with detailed reasoning."[815] More substantively, these authors doubt that non-state actors *should* be attributed responsibilities under human rights law since they often lack the capacity to guarantee them (Moir.)

Prominent legal scholars and law professors Christian Tomuschat and Andrew Clapham have argued in the opposite direction. In Tomuschat's view, for instance, one need not claim that a new obligation exists; rather, non-state armed actors must be seen as having such responsibilities by virtue of the fact that they are embryonic states who, in

---

[814] As an interesting counter-example, during the 1990s the UN General Assembly debated the issue of "human rights and terrorism" at the urging of the 1993 Vienna Conference on Human Rights. Though initially uncontroversial, as Romaniuk indicates this discussion stalled in 1994 within the Commission on Human Rights because "several Western states, along with others, voiced opposition to the view that terrorist groups could 'violate human rights' as such, arguing that human rights are impressed upon states, and that states and non-state actors should not be equated… By 2000 the Western bloc actively voted against the proposed resolution, arguing again for a clear distinction between state obligations to observer human rights and the criminal acts terrorists." Peter Romaniuk, *Multilateral Counter-Terrorism: The Global Politics of Cooperation and Contestation* (London: Routledge, 2010), 61–62. See also Walling and Waltz, *Human Rights : From Practice to Policy, Proceedings of a Research Workshop*, 37.

[815] Zegveld, *Accountability of Armed Opposition Groups in International Law*, 82.

aspiring to legitimate statehood, are subject to similar obligations that "every State must shoulder in the interest of a civilized state of affairs among nations."[816]

Clapham, recognizing the political challenges that such an argument might face, not least states' persistent reluctance to afford any legitimacy or recognition of "state-likeness" to rebel groups, has rejected Zegveld's claim that the accumulated practice of international actors is weak or inconclusive. Instead, he argues that the proliferation of human rights language on non-state actors signals an emerging trend in the direction of normative acceptance, albeit one that will continue to find political resistance. In his own words, "perhaps is time for a radical rethink… once we rid ourselves of the assumption that human rights only cover the relationship between individuals and governments there is no danger that accusing an armed group of human rights violations lends it automatic or quasi governmental status. If we fail to address our human rights concerns to these non-state actors we fail the victims of abuses. It is time to feel comfortable talking about the human rights obligations of non-state actors."[817] To these normative goals, Clapham has added that human rights law applies even in cases where states deny the existence of armed conflict (thus negating the application of IHL) and that human rights rely on better accountability mechanisms than humanitarian norms, including monitoring by Special Rapporteurs of the UN Commission of Human Rights and the field offices of the High Commissioner for Human Rights.[818]

Conversations among international lawyers are important since, as we have seen, they have sometimes paved the way for eventual changes in treaty and customary law. If the recurrent example of Séan MacBride does not suffice anymore, one could note that Andrew Clapham was also a member and active participant of the Solomon Islands

[816] Cited in Clapham, "Human Rights Obligations of Non-state Actors in Conflict Situations," 501.
[817] Clapham, "Human Rights Obligations of Non-state Actors in Conflict Situations," 511, 523.
[818] Clapham, "Human Rights Obligations of Non-state Actors in Conflict Situations," 505. These mechanisms would operate, of course, in addition to a plethora of other "hard" and "soft" measures, including trials, truth commissions, reparations, reconciliation programs, etc. Some of these, however, blur the distinction or combine human rights and humanitarian norms, so the alleged additional "leverage" provided by the human rights frame may not be as strong.

delegation at the Rome Conference that established the ICC in 1998.[819] Tomuschat served on the UN's International Law Commission in the early 1990s at the time when that body debated early drafts of the ICC statute. He was also rapporteur of the UN Human Rights Commission on the human rights situation in Guatemala between 1990-1993, and later coordinated that country's Commission for Historical Clarification. Liesbeth Zegveld, for her part, is the co-author (with revered IHL scholar Frits Kalshoven) of one of the most-used short introductions to international humanitarian law.[820] These academic debates, and the positions taken in them by renowned legal academics, should be included in any analysis of emergent rules; the oft-traveled "scholar-to-legislator" (and back) pathway suggests that they are sometimes central to norm emergence.

Furthermore, besides "legislating," scholars can also be practical protagonists. From his positions as Professor at the Graduate Institute of International and Development Studies and the Geneva Academy of International Humanitarian Law and Human Rights, Clapham has for a number of years led a research project on the "ownership of humanitarian norms by armed non-state actors." His research team, in addition to academic discussion, has drafted instruments (in the form of a code of conduct) containing an extensive mix of human rights and humanitarian standards and brought them to non-state armed groups to elicit their commitment.

The outcome of the Clapham-led initiative is not yet known, but it is only one among a host of other similar efforts, some of which can be documented. In fact, over the last decade and a half a different genre of NGO that may be branded "engagement NGOs" has surfaced in the humanitarian field, with the mandate of liaising directly with armed non-state groups in order to establish a dialogue about international norms, hoping to eventually persuade them to accept and abide by specific rules. Given their current

[819] Clapham is a student of Antonio Cassese, with whom he co-authored legal articles. As mentioned earlier, Philip Alston is another prominent legal academic who has played important policy roles on the issue of human rights and non-state actors within the UN and elsewhere. See among others Philip Alston, "Non-State Actors and Human Rights" (Oxford: Oxford University Press, 2005).

[820] Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War : an Introduction to International Humanitarian Law*, 2001.

importance, I devote some elaboration about their work before moving to the next and final section of this chapter.

The best example of an engagement NGO in this field is Geneva Call.[821] This organization was founded in 2000 by members of the Non-State Actors Working Group (NSAWG) of the International Campaign to Ban Landmines (ICBL, a coalition of over a thousand NGOs in over 60 countries in that proved essential to the drafting and adoption of the Landmine Ban Treaty in 1997,) in response to the treaty negotiators' failure to impute formal responsibility to non-state actors.[822] The members of the Working Group were convinced that non-state actors should be prohibited from using, producing, stockpiling and transferring landmines since, due to the relatively low cost and simplicity involved in producing this type of mines, such actors were known to be active users with a significant risks to civilians.

Geneva Call was specifically conceived to provide a mechanism through which these actors could directly express their commitment to various rules from international humanitarian law *and* human rights law. For this purpose, the organization devised a small code of conduct known as a "Deed of Commitment," (DoC) which it brings to the armed groups in conflict areas in Africa, Asia and the Middle East. The DoC explicitly recognizes that "international humanitarian law and human rights apply to and oblige all parties of armed conflict" and urges the signatory non-state group to adhere to a total ban on this weapon. Moreover, through the DoC armed groups are obliged to disseminate to cooperate with other organizations in the destruction of stockpiles, mine clearance and victim awareness, or to undertake these actions themselves. The "deed" also provides for monitoring and verification visits, and reserves Geneva Call's right to publicize a groups' compliance (or lack thereof) with the text. Finally, in addition to committing them to existing standards, the DoC contains language recognizing non-state actors as

[821] See http://www.genevacall.org/ Andrew Clapham, it should be noted, has been a member of the board of the Geneva Call.

[822] For a well-known treatments of the landmine ban campaign, see Price, "Reversing the Gun Sights: Transnational Civil Society Targets Land Mines"; Cameron, Lawson, and Tomlin, *To Walk Without Fear: The Global Movement to Ban Landmines*. Certain states (Colombia among them) raised the idea of including non-state armed groups in the treaty during the negotiations but this was ultimately rejected.

"participants in the practice and development of legal and normative standards for such conflicts," while also clarifying that signing the document shall not affect their status, pursuant to the clause contained in Common Article 3 to the Geneva Conventions.[823]

Once the armed group has verbally agreed to be bound, the DoC is signed between by the parties (Geneva Call, the armed group and the Canton and Republic of Geneva) in a public act held at the "Alabama" room where the First Geneva Convention of 1864 was established, casting a symbolic dimension to the commitment. The Canton and Republic of Geneva acts as the "custodian" of the deed.

The experience of Geneva Call, thirteen years after its creation, appears to have been quite positive. The organization's website claims to have elicited commitments from 42 non-state armed groups with reportedly high levels of compliance. In addition to official signatories, Geneva Call has also conducted sustained dialogue and partial mine clearance exercises with other groups that have stopped short of formally accepting the DoC.[824] Geneva Call's relative success so far has led it to develop new DoCs on the issue of child protection and sexual violence by armed groups, and to consider similar efforts in areas such as the protection of internally displaced persons.[825]

Outside of the Geneva Call example (and perhaps due to its success,) attention to mechanisms of commitment outside of the formal web of treaties has sharply risen in

---

[823] Soliman Santos Jr., "A Critical Reflection on the Geneva Call Instrument and Approach in Engaging Armed Groups on Humanitarian Norms: A Southern Perspective, Paper Presented at Conference 'Curbing Human Rights Violations by Armed Groups,' Vancouver, 14-15 November 2003," 2003.

[824] An example of the latter is the Colombian National Liberation Army (ELN.) Although this group has engaged quite extensively in conversations with Geneva Call and has collaborated in limited mine clearance, it ultimately decided against signing the DoC, not wishing to commit to an exacting standard it could not fully live up to. This suggests that armed groups can take these initiatives as more than "cheap talk" geared to increase their reputation, instead rationally calculating the costs and benefits of binding themselves publicly. See http://www.genevacall.org/ (Consulted on August 16, 2013.)

[825] Another example of engagement NGO is the Centre for Humanitarian Dialogue (HD Centre,) based in Geneva. This organization is the spin-off of the Henry Dunant Center, a now-disappeared ICRC entity devoted to pursuing and publishing research on humanitarian law and issues. The "new" HD Centre resorts to humanitarian persuasion with armed groups (on issues such as safe access and protection of civilians, the special needs of women and children, displaced populations and any affected minority groups,) but in addition, carries out mediation and peacemaking support in Asia and Africa. See http://www.hdcentre.org/en/home/ (Consulted on August 2, 2013.)

recent years. Increasingly, humanitarian scholars and practitioners are prone to cite the wealth of "voluntary" commitments by armed non-state actors, whose history in fact goes far back.[826] According to Sandesh Sivakumaran, "ad hoc commitments can be sub-divided into unilateral declarations; bilateral agreements between the parties or between one of the parties and a UN entity or non-governmental organization, or trilateral agreements between the parties and an outside entity; codes of conduct, instructions, or regulations that are internal to the group; and legislation."[827] Basic research on this plethora of mechanisms is only beginning, with scholars and organizations now devoting some effort to their collection and analysis of their emergence and effectiveness.

The evident excitement amid concerned academics and activists on the virtues of "soft" or non-traditional non-treaty forms of eliciting commitment from non-state armed groups seems to support a trend identified earlier toward pathways other than traditional treaty-making. The inability of Diplomatic Conferences to meaningfully engage non-state actors in the law-making process, the limited (and underutilized) formal mechanisms included for securing their commitment contrasts with this type of targeted, less formal but still encompassing approach.

In other words, the use of localized agreements such as Geneva Call's "Deed of Commitment" appears to avoid the political traps and legitimacy pitfalls that are the enduring trait of "Conference diplomacy," allowing non-state actors to become the protagonists of their own commitment and norm-design processes. These conditions -- supporters hope-- might lead to greater "ownership" of normative commitments by these groups, and thus to their increased compliance with international law. Some authors, including current academic and policy entrepreneurs Andrew Clapham, Marco Sassòli and Sandesh Sivakumaran, go as far as to suggest that the signing of these types of documents might give rise to international legal responsibility and thus be used by

[826] Early examples include ad hoc commitments between states and rebels in a variety of contexts, including during the Spanish *reconquista* of Colombia in the 1820s, the Swiss Civil War of 1847, the American Civil War, as well as multiple others. For an extensive, though still preliminary list see Sivakumaran, *The Law of Non-International Armed Conflict*.
[827] Sivakumaran, *The Law of Non-International Armed Conflict*, 107.

international tribunals during potential criminal cases against armed groups and their members, though it is unclear just how widely accepted that view is.[828]

This clever way of "skipping" global politicking without skewing international law (actually often going *beyond* existing law) resembles the intent and effects of the progressive interpretation and "customification" of international law studied earlier in this chapter. And although enthusiasm for securing traditional binding international treaties has not gone away (the Cluster Munitions and the Arms Trade treaty being the most recent examples) and is unlikely to do so, practitioners and other stakeholders seem to be turning increasingly to alternative forms of "governance" that circumvent rigid traditional structures. This trend can not only be observed in the field of humanitarian law, but rather appears to proliferate across issue-areas, from environmental protection and climate change to business and human rights, where the combination of diverse types of regulation has given over time rise to "regime complexes" rather than traditional international legal regimes *tout court*.[829]

VII. Terrorism, Humanitarian Law and Human Rights

A final major facet of the debate on humanitarian law over the past three decades has been mentioned but deserves separate treatment: the relationship between terrorism and humanitarian law, and the incorporation of human rights law and norms into that relationship. As said, the challenge of terrorism to international law was made evident most pointedly after the 9/11 Al Qaeda attacks on the US and the ensuing response of the Bush Administration. But this discussion requires some clarification on a few basic background issues relating to: 1) whether and how international humanitarian law regulates terrorism in internal conflicts, 2) what responsibilities accrue to violent non-state actors for terrorist acts, and 3) whether and how suspected terrorists in those

---

[828] For this debate, see generally Andrew Clapham, *The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape and Issues Surrounding Engagement* (Geneva, 2010); ICRC, ed., *Understanding Armed Groups and the Applicable Law*, *International Review of the Red Cross*, vol. 93 (Cambridge University Press, 2011); Sivakumaran, *The Law of Non-International Armed Conflict*.

[829] Robert O. Keohane and David G. Victor, "The Regime Complex for Climate Change," *Perspectives on Politics* 9 (2011): 7–23.

conflicts are protected or not by international humanitarian law. At the crux of the discussion lies what/who is labeled as terrorism/terrorist. I do not pretend to fix those meanings here, but only to present the most relevant debates and observable trends as clearly as possible.[830]

Until the 1970s terrorist activity remain largely unregulated internationally.[831] Previous protocols (from 1898 and 1904) had succeeded in triggering moves toward inter-state police and diplomatic cooperation, and a later treaty negotiated under the aegis of the League of Nations, finalized in 1937 foundered over sovereignty concerns related to forcible extradition and asylum. (An embattled political atmosphere in Europe, skepticism over the League in the US and the proximity of another war probably did not help to foster a cooperative environment over such delicate matters.)

Attempts at inter-state cooperation against terrorism re-emerged within the UN in the 1970s. That decade saw several prominent international terrorist acts in Europe and elsewhere, prompting debate about the creation of a comprehensive international regime anew. At that time, however, Western states seemed to understand the risk involved in negotiating a consensus definition of terrorism with non-Western majorities, supportive of freedom fighters and national liberation (even through violent means,) and interested in delegitimizing the remaining colonial powers and their allies. Absent pressure from an organization like the Red Cross in the field of humanitarian law, Western states avoided entering into a formal negotiation process about terrorism in general, and pushed instead for a piecemeal approach (which arguably still prevails,) prohibiting *specific* acts of terrorism such as the unlawful seizure of aircraft and safety of civil aviation, the prevention and punishment of crimes against protected persons or the taking of hostages.

In the field of (international) armed conflict proper (i.e. beyond isolated non-war related acts of terrorism,) the 1949 Geneva Conventions still remain pioneer agreements, being the first to explicitly prohibit "measures" of terrorism as set out in Article 33 of the

---

[830] For a comprehensive review of international law and terrorism, see Helen Duffy, *The "War on Terror" and the Framework of International Law* (Cambridge University Press, 2005).

[831] The history of multilateral counter-terrorism has been told at more length elsewhere. See Romaniuk, *Multilateral Counter-Terrorism: The Global Politics of Cooperation and Contestation*.

Fourth Convention protecting enemy civilians or civilians living in occupied territory. (The exact language was that "collective penalties and likewise all measures of intimidation or of terrorism are prohibited.") This language, however, referred only to certain types of civilians in international conflicts. Common Article 3 prohibited various violent acts against persons "taking no active part in hostilities" or rendered *hors de combat* in internal conflicts, which to the contemporary eye amount to terrorizing civilians in practice (mutilation, cruel treatment, torture, hostage-taking, among others.)[832] But terrorism as such was not explicitly mentioned. During the 1950s and 1960s, as we saw in Chapter 4, international concern quickly surfaced with respect to the effects on civilians of certain weapons and of armed hostilities more broadly, which after moments of failure (i.e. the Draft Rules) and very heated debates during the CDDH, finally led to the inclusion of a prohibition of terrorist acts against civilians in both Additional Protocols I and II of 1977.

The definition given in both Protocols was that "the civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited." This provision more or less clearly determined that terrorist acts intentionally perpetrated against civilians are prohibited both in international as well as in non-international conflicts (at least those that rose to the high level of the Second Protocol.)[833] Though far from uncontroversial, this general notion was accepted by the various state coalitions during the CDDH.

Yet vexing issues lay behind this surface. Were rebels terrorists? Could civilians become terrorists too? Could combatants who engaged in terrorist acts lose their protections and become "unlawful"? These three questions struck at the heart of internal conflicts (especially those featuring guerrilla warfare, which are most) and wars of national liberation. And recall that although in the 1970s both these situations presented

[832] I say "to the contemporary eye" because in 1949, strictly speaking, some of these acts were either only beginning to be outlawed internationally, while others would take years to be considered internationally accepted norms.

[833] For a more complex exegesis of this provision, see Frits Kalshoven, "'Guerrilla' and 'Terrorism' in Internal Armed Conflict," *American University Law Review* 33 (1983): 67–81.

grave humanitarian problems, only the latter relied on a high level of international legitimacy and political urgency.

In the end at the CDDH the first question was answered in the negative. That is, states agreed that in conflicts that fulfilled certain exigent characteristics, captured rebels were entitled to humane treatment. To this end, Article 4 of the Second Protocol set out a list of "Fundamental Guarantees" that applied to them among "all persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted," which also included acts of terrorism (and threats thereof.)[834]

Regarding the second question, as mentioned earlier, civilians were given the obligation not to take direct part in hostilities; if they do they may become lawful military targets (First Protocol, Art. 51; Second Protocol, Art 13.) The precise conditions under which they can be considered direct participants in hostilities are, as seen earlier in this chapter, still disputed. Yet it is clear that at the CDDH drafters negotiated a text allowing for the possibility that civilians might partake in the conflict, perhaps becoming terrorists themselves. However, and although civilian immunity was not deemed absolute, states also agreed that upon capture non-combatants in high-intensity civil wars had to be treated humanely, as per the "fundamental guarantees" laid out in Article 4 of the Second Protocol, mentioned above.

The third question was more controversial. As noted in the previous chapter, national liberation movements and the coalition supporting them argued that to force such groups to always distinguish themselves from civilians was to thwart one of their principal methods of war, to the benefit of the (colonial, racist, occupying) regimes they fought. As seen, the compromise formula inserted in the First Protocol (providing that even in cases where combatants failed to meet the requirement of distinction, they would be given protections equivalent in all respects to those accorded to prisoners of war) pleased the

[834] This crucial article is essentially an expansion of the basic protections originally listed in Common Article 3. Article 5 of the Second Protocol expands these guarantees further. Although apparently "generous," the fact that most states did not expect the Second Protocol to apply may have relieved their fear of accepting these articles. Moreover, rebels in civil wars could still not be considered either "combatants" or "prisoners of war" in the legal sense, given the prestige, legitimacy and the extensive protections that such statuses entailed.

non-Western coalition and the United States for different reasons, but utterly displeased others. This was one of the ways in which the CDDH managed to "deal" with the international political pressure to accommodate freedom fighters in Africa and the Middle East.[835] Nevertheless, those POW protections had little bearing on the prohibition of terrorism: intentional attacks on civilians were still banned, and there were other requirements that combatants had to abide by, such as avoiding perfidy. In short, in international conflicts, including national liberation struggles, "any combatant who chooses to engage in guerrilla warfare remains bound to respect all rules on the conduct of military operations and the protection of civilians. There will be no excuse if he combines (legitimate) guerrilla warfare with a (criminal) terrorist campaign."[836]

Summarily, this was the state of affairs with regard to the relationship between terrorism and humanitarian law in the late 1970s. In the 1980s and 1990s, continuing with the piecemeal approach to international rule-making on terrorism mentioned earlier (and not in direct connection to humanitarian norms,) states adopted various additional conventions in the context of the UN to deal with specific forms of terrorism, *inter alia*, on the physical protection of nuclear material (1980,) on the suppression of unlawful acts against the safety of maritime navigation (1988,) on the marking of plastic explosives for the purposes of detection (1991,) on the suppression of terrorist bombings (1997,) and on the suppression of the financing of terrorism (1999.)[837] A further crucial development

[835] Recall also that certain "safeguards" were inserted to make sure this clause applied in very specific circumstances, but these did not deter opponents, notably during the Reagan administration, from deeming Protocol I "terrorist law." Such critiques were misguided because they missed the contextual politics that had given rise to the text and the clever ways in which drafters (with the US at the helm) had shaped it.

[836] Hans-Peter Gasser, "Acts of Terror , 'Terrorism' and International Humanitarian Law," *International Review of the Red Cross* 84, no. September (2002): 563.

[837] During the 1990s, in fact, the UN General Assembly, especially through the Sixth Committee, discussed plans for a general convention on terrorism. These efforts foundered then as they did in the 1970s, due to states' sharply different views on the phenomenon, giving way to agreements on specific issues just mentioned. Note that the exclusion or inclusion of self-determination struggles in the definition of terrorism continued to be a divisive issue, chiefly between countries supporting Palestine and Israel. Notably, the 1999 Convention on the Suppression of Financing of Terrorism incorporates language clearly drawn from humanitarian law, defining terrorism as "any… act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of

was the international criminalization of grave breaches of the Geneva Conventions and war crimes through the 1998 Rome Statute, which, as we saw earlier, included acts committed in internal conflicts.

Overall, as Weissbrodt and de la Vega claim, "despite the seemingly piecemeal manner in which the conventions address terrorism, most legal scholars agree that virtually all forms of terrorism are prohibited by one of these conventions, in addition to the Geneva Conventions and the Rome Statute."[838]

With the attacks of September 11, 2001 on the United States, the application of existing law appeared to face enormous challenges. The George W. Bush administration argued that the attacks of Al Qaeda on US soil brought about a "global war on terror" in which the law of armed conflict seemed "quaint" or only (very) partially applicable. One principal claim of the US government was that established definitions of "international" and "non-international" allegedly did not sit well with the transnational and non-state nature of such a conflict. After the invasion of Afghanistan, importantly, Bush officials argued that neither captured Taliban nor Al Qaeda personnel were entitled to POW protections, but that they were nonetheless to be treated humanely. These positions were backed by legal memos drafted by the Office of the Legal Counsel (OLC,) which not only denied these persons POW protections but also willfully re-defined torture in order to avoid the application of international human rights law (especially the Torture Convention.) It is now known that the commitment to treat captured enemy personnel humanely was amply violated.[839]

What impact did these decisions and conduct have on established international humanitarian law? Eventually, and though much debate occurred among international

---

such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act." (Article 2.)

[838] David Weissbrodt and Connie de la Vega, *International Human Rights Law: An Introduction* (University of Pennsylvania Press, 2007), 235. Regional conventions were also signed in Europe (1977,) the Arab world (1998,) and the Americas (2002.)

[839] This story has been told well elsewhere. See Jane Mayer, *The Dark Side: The Inside Story of How The War on Terror Turned into a War on American Ideals* (Knopf Doubleday Publishing Group, 2009); Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*; Forsythe, *The Politics of Prisoner Abuse: The United States and Enemy Prisoners After 9/11*.

lawyers on the adequacy or potential irrelevance of international humanitarian law, Bush administration officials failed to persuade authoritative domestic or international institutions of their reasoning, and in particular the revelation of egregious acts of prisoner abuse generated a strong reaction of a plethora of domestic and international actors.

Domestically, in a series of crucial rulings, the US Supreme Court deemed that the Geneva Conventions did apply, and specifically with regard to Al Qaeda personnel, Common Article 3, including its protections of personal dignity and basic fair trial rights.[840] International authoritative bodies clarified that humanitarian law applied even with regard to presumed terrorists, as well as human rights law.[841] The UN, though Security Council 1456 (2003) urged states to comply with all their obligations under international law, and to adopt counter-terrorism measures in accordance with international law, in particular, with international human rights, refugee, and humanitarian law. That same resolution established a Counter-Terrorism Committee (CTC) tasked with considering human rights in its work.[842] Furthermore, in 2003 the UN Secretary-General initiated a High-Level Panel, which later offered a definition of terrorism that included various references to the provisions of Geneva Conventions, the

[840] Some of the crucial decisions were Hamdi v. Rumsfeld 542 U.S. 507 (2004,) Rasul v. Bush, 542 U.S. 466 (2004,) Hamdan v. Rumsfeld 548 U.S. 557 (2006.) See David Weissbrodt and Nathaniel H. Nesbitt, "The Role of the United States Supreme Court in Interpreting and Developing Humanitarian Law," *Minnesota Law Review* 95 (2010); Teitel, *Humanity's Law*, chap. 5.

[841] Another crucial domestic judicial precedent was set when in 2006 the Israeli Supreme Court determined that the Israeli targeted killings policy toward suspected Palestinian terrorists violated humanitarian law and human rights law. The Court opined that although civilians-cum-terrorists could be lawfully targeted under specific circumstances, state authorities should seek to arrest them instead whenever possible, following human rights standards. For a discussion of this case and a comparison with the decisions of the US Supreme Court, see: Marko Milanovic, "Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case," *International Review of the Red Cross* 89, no. 866 (November 14, 2007).

[842] Criticism exists regarding the level of marginalization of human rights issues within the CTC, however. I thank Fionnuala Ní Aoláin for pointing this out to me.

Additional Protocols, war crimes and crimes against humanity.[843] Regional precedents have likewise been set in the European and Inter-American Human Rights systems.

The thrust of these decisions suggests that the crucial legal debate now lies in determining *how* humanitarian law and human rights relate to one another to protect not only victims of terrorism but also alleged terrorists, whether one prevails or supersedes the other according to their special vocation (for instance, whether in times of armed conflict humanitarian rules are the only guide, as *lex specialis*) or whether they complement one another to provide "the most coverage" possible in any situation. This is a complex and prickly legal debate on which I cannot elaborate here, but suffice it to say that the consensus appears to have emerged pointing toward the latter conclusion (most protection that is legally possible.) As such, even in the case of suspected terrorists in non-international conflict, minimum standards apply, usually by virtue of Common Article 3, human rights and other rules of customary law.

Before closing it should be said that, notwithstanding greater international concern and regulation related to terrorism, states have historically tended to cope with it through domestic means. Put otherwise, and as scholars have noted, at the same time that states have taken on international humanitarian and human rights commitments, many have also introduced stringent *domestic* criminal or and anti-terror legislation for dealing with suspected terrorists in times of "troubles," disturbances, or "national emergency." Moreover, many governments have ably and consistently resisted or "relativized" the application of international standards and mechanisms, whether inspired in human rights or humanitarian norms, for treating those they label terrorists. The picture is thus much more fraught that portrayed above.[844] Yet even with this caveat it seems possible to

---

[843] Over time concern for human rights violations committed in the pursuit of counter-terrorism has sharpened, with various UNGA resolutions requesting the appointment of a special rapporteur to this issue. A 2004 report of the High Commissioner for Human Rights determined that there were significant gaps in the consideration of counter-terrorism measures by the UN human rights system. This normative strand, though important, is only of relative relevance to this dissertation's topic, so I set it aside here. However, see generally Romaniuk, *Multilateral Counter-Terrorism: The Global Politics of Cooperation and Contestation*, chap. 3.

[844] For a more detailed analytical discussion, see Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006).

conclude that there is now a much more encompassing web of international protection norms in the area of terrorism than ever before.

Conclusion

Legal scholar Ruti Teitel recently claimed that "what the waging of the 'war on terror' has made abundantly clear is that humanity law need not run out—that, indeed, there is no category of persons on the globe that is not covered and protected. And, by turning to the overlapping regimes, coverage can be ensured."[845] This chapter comes to a similar conclusion after analyzing several of the most important normative developments with regard to the regulation of internal conflicts through international law that have taken place in the last three decades. A variety of legal entrepreneurs, epistemic communities and institutions have in recent times utilized a host of non-traditional tactics and pathways to advance the legal regimes protecting persons against internal atrocities. I have referred to these tactics as *progressive interpretation, customification, inter-institutional validation*. Some of these ideas have "circled back" and --through social pressures among diverse actors- become re-inscribed into treaty law, as seen in the case of internal atrocities of the ICC.

Strikingly, none of the formal treaty-making processes that have occurred since the CDDH in the 1970s were meant to revamp the Geneva Conventions or the Additional Protocols. Rather, these have emerged from "adjacent" issues such as human rights, international criminal law and weapons regulations. This has elicited a growing and still-developing "cross-pollination" between humanitarian law and other bodies of law previously thought distinct. Finally, recent initiatives have surfaced to address the persistent failure of inter-state conferences to bring non-state actors meaningfully into the normative fold, through attempts to elicit their political "ownership" of various international norms directly. Early reported rates of patterns of success merit praise and invite further research.

---

[845] Teitel, *Humanity's Law*, 133. By "humanity law" Teitel means the framework that spans the law of war, international human rights law, and international criminal justice. This is akin to what David Sheffer calls "atrocity law" in Scheffer, *All the Missing Souls: Personal History of the War Crimes Tribunals*.

Yet to any informed observer international law and politics even vaguely aware of the live controversies, among others, about the treatment of detainees, the targeting of presumed terrorists or so-called ”unprivileged belligerents,” the use of drones, prolonged occupation of territory, or massive reprisals against the civilian population by state and non-state actors alike, an optimistic conclusion like the above cannot suffice by itself. Political disputes and deep institutional challenges related not only to interpretation but also *implementation/enforcement* have and continue to accompany the recent swift expansion and overlapping of international regimes to protect persons in the midst of internal armed conflict and related situations of “troubles,” disturbances or “emergency.” If claims about the coming of “humanity” or “atrocity” law are to be sustained and further legitimized, those challenges must be acknowledged and tackled.

With regard to the interpretative challenges, as noted in this chapter, the turn to customary law in the humanitarian legal field is a move with great promise but also one marred by uncertainty. Uncertainty of course is not absent when dealing with black letter treaty law (the previous chapters on Common Article 3 and the Additional Protocols have made just this point,) but in terms of normative expansion, the tactic of “customification” opens even larger questions. As Theodor Meron has noted, “customary law is… a major vehicle for alignment, adjustment and even reform of the law. In many other fields of international law, treaty making is faster than the evolution of customary law. In international humanitarian law, change through the formation of custom might be faster, but less precise in content, than the adjustment of law through treaty making. It is all the more necessary, in view of the critical role of customary law, that its currency not be devalued by facile assumptions and sweeping generalizations. The test for the advancement of humanitarian norms lies in their acceptability.”[846] It remains to be seen whether the many claims about customary law explored in this chapter meet this test, not only in the courts but also in the practice of the actors engaged in armed conflict.

Besides the turn to customary law, another major shift observed in the past two decades involves the growing means of international accountability for wrongs

[846] Meron, “The Continuing Role of Custom in the Formation of International Humanitarian Law,” 247.

committed during armed conflict. The biggest novelty deals perhaps with holding non-state actors responsible for their abuses, as reflected most prominently in the cases against various rebel group leaders and militias before the ICC. Four of the seven cases currently or recently considered by the court (Uganda, Democratic Republic of Congo, Central African Republic, Sudan) included leaders of violent non-state groups operating in such contexts, and some of these have already produced guilty verdicts.[847] With these ICC precedents, it may now be fair to say that the normative frontier with regard to these actors lies not in the broader question of *whether* they can be held responsible but in more complex legal questions, such as whether only individual leaders or members can be tried, or instead *group* responsibility can be imputed.

Indeed, it may now be concluded that the core underlying idea of non-state armed actors' responsibility under international law has become well established, despite disagreements about the precise contents and sources of those normative obligations. This is an important change relative to previous episodes in the history of the rules for internal armed conflicts, where non-state actors' responsibility was either assumed or discounted. Yet older questions and even bigger challenges endure with regard to how these international expectations will actually "travel" and become effective downward, helping to improve or restrain *future* non-state armed conduct and to redress victims for those actors' *past* wrongs, i.e. not only after conflict but during it, or in the midst of peace negotiations. As with the move to customary law, this is an area of political uncertainty and controversy.[848] For the moment, the leading scholarly research suggests that the most effective answers will (continue to) come "from below," *inter alia* via domestic justice

[847] For more on these cases, see the website of the International Criminal Court: http://icc-cpi.int/ (Consulted on August 16.)

[848] Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," *International Security* 28, no. 3 (2004): 5–44; Hunjoon Kim and Kathryn Sikkink, "Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries," *International Studies Quarterly* 54 (2010): 939–963; Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (United States Institute of Peace Press, 2010).

mechanisms, political negotiation and pressure from local advocates, with international means, including the ICC, operating as "back-up" complementary forces.[849]

[849]Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*; Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*; Hyeran Jo and Beth Simmons, "Peace, Justice, and the International Criminal Court: A Preliminary Assessment of the ICC's Impact," 2012.

Chapter 7 – Conclusions

This dissertation has examined the historical construction of international humanitarian rules for internal conflicts. It has demonstrated in great detail how this construction has unveiled through a drawn-out political process punctuated by periods of conflict-related atrocity. After nearly 140 years since Gustave Moynier's first words on the subject, this process of rule-making appears to have come full circle. The Council of Delegates of the most recent International Conference of the Red Cross itself concluded that the body of international humanitarian law applicable to non-international conflicts is so well developed that its formal revision is not pressing and only tailored elaboration in certain areas is necessary.[850] Intense ongoing debates about the use of unmanned weapons and extraterritorial targeting prevent us from taking this claim at face value, but the general point stands: most of the "core" legal regulations are reasonably well established and encompass a broad number of areas of concern (from protections for civilians or detained, sick or wounded fighters, as well for medical personnel,) and now rely on "hard" accountability mechanisms, including international judicial measures actively deployed in various conflict and post-conflict situations.

This outlook is reason for both admiration and concern. From one perspective, the story told in the preceding chapters if anything conveys just how difficult, protracted and contingent international norm emergence has been with regard to internal conflicts. The recurrence of the "shocks plus moral entrepreneurship" pathway to international norm emergence is notable, but the intensely contested political negotiation of the actual rules (both their scope and content) preclude the inference that any point an outcome was easy or assured.[851] Although enabling ("crisis") conditions for promoting international debate about making rules may have been present at different times, were it not for the indefatigable insistence of key organizations, especially the ICRC, or for the social

---

[850] ICRC, *XXXI International Conference of the Red Cross and Red Crescent Geneva, 28 November – 1 December 2011 Council of Delegates of the International Red Cross and Red Crescent Movement, Resolutions*.

[851] Except perhaps in 1998 during the Rome Conference that created the ICC, where as we saw the great majority vouched for the inclusion of internal atrocities in the statute, and Western powers were no longer in the opposition.

pressures exerted by groups of states on their sovereignty-obsessed colleagues, one would not be able to speak of much normativity. Experts working as epistemic communities have also contributed to fostering new understandings of appropriate conduct during internal conflict. And more recently, the turn of international lawyers and courts to customary, criminal and human rights laws has filled in important gaps even if some claims remain contested or and their broad acceptance is uncertain, as suggested in Chapter 6.

Theoretically, this confirms two simple points long made by constructivist IR scholars: "Crises do not come with instructions" and "ideas do not float freely."[852] Further, *even when* those factors (windows of opportunity, moral mobilization) have operated together, powerful gatekeepers had to be taken into account and multiple points of pressure operated to actually propel serious consideration of the issues among states. Given all these myriad moral pressures, sovereignty fears, and public and private political clashes, I have argued that it is ultimately through social coercive dynamics that much of the international treaty law dealing with internal armed conflict has managed to see the light of day. Humanitarian regulation in this field, then, cannot be understood as states' rational and efficient collective response to objective "problems,"[853] but rather as a deeply conflicted and imperfect process of social construction. Further, as I hope the dissertation demonstrates, it cannot be said that this process of social construction is easily explained by hegemonic or offensive drives, domestic group interest, emulation, persuasion or reasoned communication mechanisms.[854]

---

[852] Thomas Risse-Kappen, "Ideas Do Not Float Freely: Transnational Coalitions, Domestic Structures, and the End of the Cold War," *International Organization* 48 (1994): 185–214; Wesley W. Widmaier, Mark Blyth, and Leonard Seabrooke, "Exogenous Shocks or Endogenous Constructions?The Meanings of Wars and Crises," *International Studies Quarterly* 51 (2007): 747–759.

[853] As implied in Morrow, "The Institutional Features of the Prisoners of War Treaties"; Morrow, "The Laws of War, Common Conjectures, and Legal Systems in International Politics."

[854] Drezner, *All Politics Is Global: Explaining International Regulatory Regimes*; John W. Meyer, "World Society, Institutional Theories, and the Actor," *Annual Review of Sociology* 36, no. 1 (June 2010): 1–20; Finnemore and Sikkink, "International Norm Dynamics and Political Change"; Thomas Risse, "'Let's Argue!': Communicative Action in World Politics," *International Organization* 54, no. 1 (2000): 1–39; Johnston, *Social States: China in International Institutions, 1980-2000*.

From one perspective, the fact that the push for international humanitarian regulation of internal conflicts has overcome so many hurdles seems outstanding. This appreciation of the "road traveled," however, is unfortunately very quickly sobered by the dire reality of the many gruesome atrocities committed in internal conflicts active now around the world. The perceived or actual inability of the law to temper the conduct of combatants and protect civilians and detainees in Syria, Colombia, Afghanistan or Sudan, to name a few, strongly suggests that one critical direction for the scholarly and policy agendas is the study of enhancing implementation and enforcement to improve compliance with the web of treaty and customary rules that now exists.[855]

In these concluding pages I will expand on the above claims by reviewing the dissertation's main findings and reflecting on the various research "frontiers" that they offer both for scholars of international relations and law, as well as for those specifically interested in the history and application of international humanitarian norms to internal conflicts.

Reviewing the Core Argument and Key Findings

The central argument of the dissertation may be quickly summarized. I have proposed a two-stage explanation for the emergence of the norms under study. The first stage addresses the question of normative *impetus*. Where does the idea that internal conflicts should be regulated through international law come from? What actors mobilize for this idea, why and how? Under what conditions does the idea of international humanitarian regulation arise, and what discernable factors help "trigger" formal debates and negotiation of rules? Through a careful review of primary and secondary sources the dissertation identified three plausible necessary conditions: one or various persistent moral entrepreneurs with institutional leverage, a background of recent conflict-related atrocities motivating their concern (and helping them justify it to others,) and the

[855] Today, unlike in the 1970s, most interested stakeholders (including states) seem to share the belief that the problem lies not in more legal development but in the effectiveness of the existing rules. A theory-driven history of states' unwillingness to construct credible enforcement mechanisms for humanitarian law, however, remains to be written.

acquiescence (or at least lack of pro-active aversion) of the major powers to the idea of engaging in international humanitarian rule-making.

These "first stage" findings confirm a venerable tradition of international relations research of norms' origins and do not seriously depart from it, except in one major respect: by analytically separating out the issue of normative *impetus* from that of normative *negotiation*, they open up space for documenting and theorizing in great detail the contentious politics of norm construction through diplomatic intercourse.[856] These diplomatic politics comprise the "second stage" of the argument, offering perhaps the most interesting empirical and theoretical findings.

In particular, I have made a strong argument for the role of one particular causal mechanism, social coercion, in the emergence of international humanitarian rules such as Common Article 3 or the First Protocol Additional to the Geneva Conventions. Chapter 1 defined social coercion as the mechanism that captures why and when states (individually or collectively) are cornered by an opposing group of actors and are forced to accommodate to a clearly unpalatable outcome for fear that publicly refusing to do so might carry important moral or social-identity costs. Chapters 3 and 5 demonstrated its operation through recourse to a vast amount of primary material in multiple archives.

I submit that social coercion is a valuable addition to the battery of mechanisms IR scholars have used to explain norm emergence. Drawing on different traditions, as surveyed in Chapter 1 and mentioned earlier, studies of international norms' origins hedge their bets on various explanatory factors, including hegemonic power (realism,) interest in eliciting reciprocity (rational institutionalists,) emulation (world polity,) persuasion or deliberation-based arguments (constructivism.) Yet as the historical record evaluated here showed, none of these captures in isolation the complex political dynamics observed during the making of the international rules for internal conflicts. Specifically, these arguments cannot explain how and why powerful reluctant states with a high stake in the regulatory outcome acquiesced to norms and terms they perceived as unpleasant and risky. Rhetorical coercion provides a useful point of departure here, but

[856] Finnemore and Sikkink, "International Norm Dynamics and Political Change."

given its strong focus on public discursive relations and contests, it misses the felt identity-related social and affective anxieties so pervasive during the making of Common Article 3 or the Additional Protocols to the Geneva Conventions.[857]

This being said, it is important to clarify that the operation of social coercion does not exclude the role that other mechanisms can play in parts of the emergence story. I strived to highlight in the detailed empirical cases just how pervasive rational interest, either in its risk-averse or reciprocity-inducing modalities, was during most of the debates on this type of regulation since at least 1912. Conversely, the conduct of the Soviet Union in Chapter 3 during the making of the Geneva Conventions suggests that hegemonic or "offensive" drives may not be discounted from the equation entirely. (Others could characterize the *animus* of the Afro-Asian coalition in the 1970s as "offensive," but it was hardly "hegemonic" in the traditional sense of the word.) Further, as seen in Chapter 6 while analyzing the creation of the International Criminal Court, there is room to think that persuasion through the work of an NGO/like-minded state alliance may have weighed on the inclusion of internal atrocities in the Rome Statute. A number of states in 1949 and the 1970s (notably the Scandinavian and Swiss delegations) also came to the table already deeply persuaded of the appropriateness of creating rules for internal conflicts, and their collective belief certainly mattered. And finally, states could simultaneously hold pragmatic-instrumental and moral interests, as the United States did in the 1970s while in the thick of controversy about Vietnam. In the end, if anything, I hope the empirical research presented in this dissertation demonstrates that the creation of international humanitarian rules has historically been a complex mixed-motive enterprise combining moral and security, domestic and international concerns. Conversely, analytic accounts built to explain complicated outcomes such as these could hardly treat the operation of mechanisms as though it were a straightforward zero-sum affair.

In this sense, this dissertation is one among a growing number of works that insist on the benefits of "eclectic" theorizing for understanding international political outcomes.[858]

---

[857] Krebs and Jackson, "Twisting Tongues and Twisting Arms: The Power of Political Rhetoric."
[858] Rudra Sil and Peter J. Katzenstein, *Beyond Paradigms: Analytic Eclecticism in the Study of World Politics* (Palgrave Macmillan, 2010).

Seeing value in and combining insights from different theoretical traditions has arguably been a staple in the academic study of international human rights origins, diffusion and compliance for some time, but recently scholars have more consciously underlined the virtues of this approach relative to traditional attempts at pitting hypotheses derived from rationalist theories against those that stress social factors.[859]

Yet there are some who persist in applying seemingly uni-dimensional or mono-mechanistic explanations to questions about the origins and design of international law and institutions.[860] This line of work sidelines learning about how states come to have an interest in resorting to international law; its focus is on the design of the agreements that emerge.[861] In this perspective, with respect to human rights states are said to rationally choose to construct imprecise treaties in the face of strategic cooperation problems that feature distributive domestic consequences but lack motive for international coordination.[862] Imprecision is then conceptualized as a rational solution for large and heterogeneous groups of states with various cultures, ideologies and institutional differences facing the challenge of cooperating via international law to regulate their conduct vis-à-vis their citizens.[863]

As Chapters 3 and 5 explained, imprecision is indeed a characteristic of certain important humanitarian rules, particularly Common Article 3, but also the First Protocol as regards wars of national liberation.[864] Yet, given the extensive historical material evaluated, may it be persuasively claimed that the states participating in their negotiation (both for and against it) were from the outset prepared to settle for imprecise terms?

Contrary to this, it appears that most delegation initially sought to design the rules as clearly and precisely as possible, and that it was only *because* of the strong social pressures among negotiation groups that imprecision became an attractive option. Lest

---

[859] Risse, Ropp, and Sikkink, *The Persistent Power of Human Rights: From Commitment to Compliance*, 13, 289.
[860] Koremenos, Lipson, and Snidal, "The Rational Design of International Institutions."
[861] Koremenos, "Institutionalism and International Law," 69.
[862] Koremenos and Hong, "The Rational Design of Human Rights Agreements."
[863] Ibid.
[864] Not all treaties for internal conflicts are uniformly "imprecise." Recall the very precise and stringent scope of the Second Protocol.

one is willing to "flatten" the anxious politics and arduous arguments exchanged between participating delegations into a more or less simple case of rational choice, it is necessary to be attentive to social *inter*-action and pressures originating from identity and moral anxieties as crucial influences on strategic choice. This has been a consistent rallying cry of constructivist IR scholars, one to which I subscribe. Thoughtful scholars of international cooperation have also hinted in this direction before, but have rarely elaborated upon it or included in their explanatory models.[865] A deeper engagement with history, particularly through recourse to bounds of previously unavailable archival material, may serve to enrich our understanding of norm emergence and rule negotiation to complicate standard assumptions of rational state choice. This has been one of the wagers of this dissertation, and a challenge it hopes to have met.

The aftermath of social coercion

Proposing an explanatory mechanism immediately elicits interesting follow-up questions. What are its scope conditions? Is it domain-specific or can its logic resonate across diverse issue-areas? Is it historically-bound or can one conceive it as transcending a particular world-time context?

I have proposed four conditions for social coercion to operate: First, the state or states that are its target must believe themselves unable to effectively change the majority's opinion and/or block their vote. They must know they are isolated in a minority facing an obtuse majority unlikely to change its position through further debate or material inducement. Second, as stated earlier, target states must believe that there are serious moral or social opprobrium costs attached to their public refusal to acquiesce with the majority. Such costs may be more or less plausible in reality, but what matters is that the target state believes they exist and that they may be exacted by an international or a domestic audience. Inherent to this is target states' belief that the majority's public position carries such legitimacy that maintaining their recalcitrant minority stance will bring them shame and derision. Third, target states must believe that outright

[865] See for example Oran R. Young, *International Governance: Protecting the Environment in a Stateless Society* (Cornell University Press, 1994), 132.

disengagement may lead to even *worse* outcomes, and so that it might make sense to remain at the table to contain further damage. Fourth, for social coercion to operate states must be interacting in a relatively institutionalized setting whose processes and outcomes are deemed important by participating states and are believed to carry some degree of scrutiny by a cherished audience or reference group.

It may be appropriate at this stage to specify the above further and suggest avenues for future inquiry. One strong possibility is that social coercion is more likely to occur in one specific type of institutional setting: universal-membership international organizations that grant a voice and vote to all its participants, with equal formal weighing. It is probable that powerful (Western) states may ultimately not have been forced to "give into" social pressures in institutional contexts that attributed their vote or preferences more importance by virtue of their relative economic resources or political standing. This is why the United Nations General Assembly between the mid-1950s and until the late 1970s constituted a key forum for the airing of grievances by the so-called "Third World" in a plethora of issue-areas, especially decolonization and development.[866] Similarly, the International Conferences of International Red Cross and Red Crescent movement or the Swiss-convened treaty-making encounters where the Geneva Conventions and the Additional Protocols were negotiated, given their universality and the attribution of equally-weighted votes to all participants, facilitated the formation of majorities able to "corner" skeptics against a political wall. In more restricted or "club"-style international organizations, where members are allocated differential voting power or veto abilities, the operation of social coercion, while not impossible, is likely made much more difficult.[867]

In terms of *domain-specificity*, it is possible that the distinctly "moral" nature of the humanitarian issue-area may be especially prone to bring out social-identity anxieties among different groups of states. In this regard the sibling area of human rights is an excellent case to which to apply the insights of this dissertation. The operation of social

[866] Kay, *The New Nations in the United Nations, 1960-1967*.
[867] For a typology of international organizations according to their membership, see Drezner 2007, chap. 3.

coercion thus may be restricted to certain fields. This said, there are other fields unrelated to humanitarian law or human rights that may bring out similar anxieties, such as concerns about equality and justice in the international regulation of the environment and climate change. Comparative research to assess these possibilities seems desirable.

Can social coercion operate on all types of states, or will it only tend to exert effects on a select "kind"? Although the negotiations studied in this dissertation were not all simple or neat cases of "the West vs. the non-West," it is true that on the whole Western states, especially colonial powers, were consistently on the defensive due to the dissonance produced by the clash of their professed embrace of liberal democratic politics and values, and the increasingly illegitimate political practice of holding "dependent territories." Moreover, these Western states were particularly anxious because *they cared* about the consequences of public embarrassment to their self-image and external reputation—they were "socially vulnerable" because they wished to be seen as "good" standing members of the "international community."[868] Yet it is reasonable to think that this type of social-identity concern and vulnerability will vary across time and type of states. Authoritarian or semi-authoritarian states, for example, may be comfortable to ignore attempts at international public shaming, suggesting they are reconciled with their egregious conduct at home, that they are confident that information about their bad behavior will not easily emerge, and/or that they simply place little value on how such conduct reflects internationally. Besides appearing aloof or careless, other such states may simply choose to accept international norms insincerely, or "fight back" publicly by pointing the moral or social failures of their democratic counterparts at home and abroad.[869] Although assuming that authoritarian or non-democratic states will be uniformly impermeable to international social pressures is probably going too far, it is

[868] One implication of the dissertation is that a greater engagement between IR and social psychology, as Iain Johnston and others have recommended, is highly desirable. Norms scholars have long drawn from social psychology, but the inter-connection should be deepened. For new proposals in this regard, see Vaughn P. Shannon and Paul Kowert, eds., *Psychology and Constructivism in International Relations: An Ideational Alliance*, vol. 2011 (University of Michigan Press, 2011); Goodman, Jinks, and Woods, *Understanding Social Action, Promoting Human Rights*.

[869] Beth Simmons aptly refers to the former category as "false positives." See Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, 67, 88.

reasonable to expect that social coercion will not easily "work" on them. As illustration, human rights scholars have shown recently that even China has fought hard to avoid resolutions emerging from the UN Human Rights Commission that condemn it.[870]

The above are interesting questions that might illuminate the potential generalizability of social coercion and help refine its scope conditions. Others in the same vein might be proposed: Since East-West Cold War tensions have now evaporated and decolonization has largely finalized, might other global disputes over legitimacy and standing conduce to social coercion? A provisional answer with respect to this is yes – if international politics is rightly understood to be not only about the distribution of material capabilities but about the contested construction of legitimate social purpose, then it is likely that disputes involving identity and image-related arguments and pressures will resurface in international public debate.[871]

Returning to the humanitarian issue-area, it is entirely possible, and an evident next step, to probe the operation of social coercion to explain other counterintuitive outcomes beyond the emergence of Common Article 3 and the aspects of the Additional Protocols that were studied in Chapter 5. One could, for instance, ask why and how other highly controversial provisions were attained, including the regulation of hostilities, the inclusion of war crimes or the construction of enforcement mechanisms within the Conventions and the Protocols, some of which seemed unpleasant to Western states in their finished form. As suggested earlier, one could also adopt a comparative lens and assess how the political dynamics behind the Geneva Conventions and the Additional Protocol resemble the negotiation of human rights instruments signed almost at the same historical time and by the same protagonists, from the Universal Declaration of Human Rights (1948) to the two International Covenants (on Civil and Political Rights, and Economic, Social, and Cultural rights, in the 1950-60s. Such comparative research would

---

[870] Risse, Ropp, and Sikkink, *The Persistent Power of Human Rights: From Commitment to Compliance*, 289.

[871] For more on global politics as being about the construction of "legitimate social purpose" beyond material capabilities, see Ruggie, *Constructing the World Polity: Essays on International Institutionalization*; Martha Finnemore, "Legitimacy, Hypocrisy, and the Social Structure of Unipolarity: Why Being a Unipole Isn't All It's Cracked Up to Be," *World Politics* 61, no. 1 (2009): 58–85.

strengthen and complement the theoretical findings of this dissertation as well as the broader literature on norm emergence.

Another interesting avenue for future research is to study in more depth the manner in which "socially coerced" states behave after they (grudgingly and provisionally) sign off on unpalatable rules at international forums. As Chapters 3 and 5 show, just as skeptical states resign themselves to having to acquiesce to social pressures during diplomatic conferences, they also engage in a variety of "compensation" tactics or plans to help offset the consequences of pressured normative accommodation. One central tactic occurring as negotiations are still ongoing is what I referred to as *covert pushback*, that is, strategic efforts to shape the language of the resulting rules in ways that reduce the likelihood of their implementation in practice.

Beyond this, however, coerced states also seem to engage in interesting calculations for dealing with future costs in the post-negotiation moment. Most commonly, reluctant states can place doubts on their ability to ratify controversial international instruments, propose to insert interpretative statements or deposit reservations and declarations upon ratification, bet that the "trump card" of sovereignty will help them prevent the application of an unpalatable new norm, or simply hope that changed political conditions will lessen the relevance (and hence the costs) of their commitment. The range and dynamics of "compensation" mechanisms that states utilize humanitarian conferences disband is not well known and deserves attention.

Domestic political battles over ratification and implementation of the international treaty rules for internal conflicts offer particularly interesting research opportunities. Do social-identity arguments exert any weight in states' decision to ratify an instrument they were unable to oppose internationally? As said, although "coerced" states may be forced *not* oppose a rule or treaty during negotiations and may even sign it at the closing ceremony, they still retain the ability to ratify it or not. Yet to assume that "coerced" states will uniformly opt for *not* ratifying is unfounded: France and the UK ratified the Geneva Conventions in 1951 and 1957 respectively, and they did not deposit reservations or interpretations of Common Article 3. And although these same states did not ratify the First Protocol for decades, provisional archival evidence gathered for this dissertation

suggests that the concern about national liberation wars was *not* the principal reason for delaying that decision, but rather NATO-wide preoccupations with nuclear weapons and the prohibition of reprisals against civilians. One is thus well-advised to dig further into the historical record and question assumptions that often seem intuitive or self-evident. Studying the factors influencing states' decision to ratify is a popular enterprise among IL/IR scholars, yet it is one that they rarely if ever deploy with attention to the government archives.[872] Doing so wherever possible may, I believe, serve as a helpful contribution and a healthy corrective to simple models of under-socialized rational choice.

Sincerity and insincerity in international law-making

Another interesting finding of this dissertation is that sincerity is not necessary condition for the emergence of "progressive" (liberal) humanitarian norms. That hypocrisy may be pervasive in international politics is of course not a new claim.[873] Yet what is most striking about the empirical work presented here is the suggestion that the political pressure of illiberal (and quite likely insincere) states was critical and *productive* for norm construction; Soviet rhetoric weighed especially heavily on the British decision to accommodate, as their confidential cables during the 1949 negotiation suggest. In the 1970s, although Western states were convinced that the opposing coalition of African, Asian and Socialist states was deep down only interested in scoring political legitimacy "points" (with their proposal to make liberation wars international conflicts,) they were still unable to contain it for fear of appearing racist.

Although as a theoretical claim this is peculiar and worth noting, there appear to be obvious downsides to rules promoted or adopted insincerely. As suggested above, their effective acceptance and implementation in the post-negotiation stage may be

[872] The most nuanced and cutting-edge theoretical work on why states commit to human rights treaties (or not) is Beth Simmons', although without recourse to governmental archives. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, chap. 3. Archival research in this area, though time-consuming, is desirable and possible in many cases.

[873] Prominent statements are offered in Krasner, *Sovereignty: Organized Hypocrisy*; Finnemore, "Legitimacy, Hypocrisy, and the Social Structure of Unipolarity: Why Being a Unipole Isn't All It's Cracked Up to Be."

jeopardized, and even when the coerced states (and the insincere among the "coercers") have ratified them, they may still constitute instances of "cheap talk." Yet I submit that here again one should be careful not to jump to conclusions. As illustration, some scholars have found that even insincere commitments may have discernible behavioral effects, although these may only occur through sustained/combined top-bottom and bottom-up reputational and institutional pressures to comply.[874] In the field of conflict studies, scholars are beginning to reconsider "cheap talk," concluding that it may have some effects.[875]

Beyond this, as in the cases of Common Article 3 and the First Additional Protocol, it is important not to assume that pressured acquiescence will necessarily plant a "kiss of death" on controversial international rules. While it is reasonable (and realistic) to expect that in the short-run the implementation of these international rules may prove lackluster, the passage of time and normative uptake by other domestic and international actors and institutions may generate a "decoupling" from their contested origins. Inclusion of humanitarian rules in military manuals is one example of a mechanism through which rules may permeate conduct on the ground and bypass legal discussions about whether to comply at other higher levels of a states' bureaucracy. Legal and civil society mobilization of these international commitments are two other critical mechanisms through which initially reluctant states may be pushed to respect, even if partially, rules they initially committed to insincerely or under international social pressure.[876]

Just as it may be premature to conclude that insincere commitments may not lead to important changes on the ground, it also does not follow that imprecise or "indeterminate" rules are necessarily doomed to failure. While Britain and France were successful (the former more than the latter) in holding back the application of Common

---

[874]Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink, "The Power of Human Rights: International Norms and Domestic Change" (New York: Cambridge University Press, 1999); Heather Smith-Cannoy, *Insincere Commitments: Human Rights Treaties, Abusive States, and Citizen Activism* (Georgetown University Press, 2012); Risse, Ropp, and Sikkink, *The Persistent Power of Human Rights: From Commitment to Compliance*.

[875] Dustin Tingley and Barbara F. Walter, "Can Cheap Talk Deter?: An Experimental Analysis," *Journal of Conflict Resolution* 55, no. 6 (August 23, 2011): 996–1020.

[876] See fn. 23 above.

Article 3 in Kenya, Cyprus, Northern Ireland or Algeria, arguing that the violence there did not rise to "non-international" conflicts, CA3 nonetheless provided the ICRC and other audiences with a legal tool to knock on states' doors and contributing to producing at least partial effects, such as facilitating visits to and improved treatment for prisoners. Indeed, scholars have suggested that just as CA3's "vague and generous" threshold was a problem in some cases, in others that did not indisputably amount to "conflicts" it may have actually facilitated ICRC operations.[877] ICRC officials have for this reason sometimes referred to CA3's scope as a "blessing in disguise."[878] Imprecision can thus have both damaging and salutary effects, and it seems critical in the future to study the conditions that might explain this interesting variation.

Other Research Frontiers

Norm Implementation and effects

This dissertation has very deliberately kept its focus on international norm emergence and has thus only indirectly touched on the crucial aspect of norm effects. Yet as the previous pages suggest, moving forward certain questions will have to be addressed head-on: What is the pattern of application of the humanitarian rules for internal conflicts? How do we properly theorize implementation, effectiveness or compliance in internal conflicts? What concrete mechanisms exist for the implementation of the law? How have they fared? Which areas of legal protection enjoy greater respect than others and why?

Surprisingly, rigorous examination of these issues is still rare in the social sciences. Part of the problem is the understandable dearth of reliable data about acts committed in the fog of internal wars. Yet it appears that a lack of interest has also played a role in this silence. In recent years a booming research program (especially through comparative

[877] Forsythe, "Legal Regulation of Internal Conflicts: The 1977 Protocol on Non-International Armed Conflicts," 277.

[878] Jelena Pejic, adviser to the Legal Division of the ICRC, quoted in Elizabeth Wilmshurst and Susan Breau, eds., *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press, 2007), 85.

civil war studies,) has quickly begun to reverse this trend, but international norms have rarely figured into its analytical concerns.[879]

This provides an opening for IR and humanitarian law scholars. A focused mapping and assessment of the formal and informal mechanisms of implementation of the law is lacking and seems of profound urgency, from analyzing the effects of the ICRC's "quiet diplomacy," to systematizing its pattern of visits to detainees, studying the evolution and quality of legal and military training by armed groups of all stripes, compiling and explaining cases of domestic legal incorporation/accountability, or taking more seriously the work of National Red Crosses or of NGO actors drawing on humanitarian norms.

In terms of monitoring actual patterns of respect or abuse, it remains to be seen what emerges from an ongoing ICRC-led process of reflection among states. In the meantime new academic projects are striving to construct databases aiming to fill that important gap.[880] Various research sources, both secondary accounts of myriad civil conflicts and uprisings as well as untapped archives of various states, inter- and non-governmental organizations around the world, stand as invaluable means for evaluating these questions. This dissertation has made in particular a case for the importance of archives in the context of norm emergence and construction, but archives clearly also offer a goldmine of information for the study of diffusion, implementation, effectiveness or compliance puzzles.

International law, legitimacy and non-state armed actors

Traditionally, policy and scholarly concern in IL/IR has been placed on the behavior of states. Yet, as the Chapter 6 showed, the idea that international standards also apply to armed non-state actors has gained momentum and legitimacy. In contrast with this

---

[879] Stathis Kalyvas, *The Logic of Violence in Civil War* (New York: Cambridge University Press, 2006); Jeremy M Weinstein, *Inside Rebellion: The Politics of Insurgent Violence* (New York: Cambridge University Press, 2007). For new IR research on civil wars that does incorporate international humanitarian law into the equation, see Jo and Bryant, "Taming the Warlords: Commitment and Compliance by Armed Opposition Groups in Civil War."

[880] One example is the Rule of Law in Armed Conflict" (RULAC) project at the Geneva Academy of International Humanitarian Law and Human Rights. http://www.geneva-academy.ch/RULAC/index.php (Consulted on August 5, 2013.)

development, little systematic investigation exists of when, why, how and how often non-governmental armed groups actually decide to respect international standards or not.[881] Practices of respect or disrespect to international standards vary across areas of responsibility or protection, but few studies try to unpack such variation. Research conducted both on historical cases and on contemporary conflicts seems pertinent here; from the already mentioned decolonization wars in Algeria and Kenya through Cold War proxy conflicts in Vietnam, to civil wars in El Salvador, Peru, the Philippines or Colombia, academic and policy debate can only be enriched through a careful assessment of the mechanisms and conditions under which non-state actors decide to embrace and abide by international rules.

It may be apt to close the dissertation by discussing one of its most consistent findings, namely the persistence with which governments have *resisted* the regulation of armed non-state actors through international law. That such resistance has been fiercely driven by fears of politically legitimating rebels, coupled by the corollary assumption that legitimization will somehow translate into material empowerment, should give analysts pause. On the one hand, it is theoretically interesting given the belief among many scholars that states resort to international law-making to pursue instrumental ends. From this perspective, the fact that legitimacy appears to "get in the way" of goal-oriented rational action so often merits acknowledgment.

From a constructivist standpoint, however, arguing that legitimacy-induced fears "disturb" rationality does not go far enough and may actually misconstrue the phenomenon. At least in this issue-area, legitimacy is not simply an annoying "intervening variable." Rather, legitimacy concerns are part-and-parcel of international law-making because of its constitutive effects, that is, its ability to created the subjects it seeks to regulate. This insight helps to understand why most states have consistently

[881] For valuable recent contributions to this agenda, see volumes 882 and 883 of the International Review of the Red Cross, available at http://www.icrc.org/eng/resources/international-review/index.jsp (Consulted on August 5, 2013.) Also see in general the work of Geneva Call, and the collection of statements by non-state armed groups they have recently made available. "Their Words: the Directory of Armed Non-State Actor Humanitarian Commitments," theirwords.org (Consulted on August 5, 2013.)

refused to engage and commit rebels through international legal mechanisms, fearing the political recognition that might ensue.[882] To recognition one must naturally add concerns about the security and material consequences that derive from enshrining international rules that promise to "bind" rebels but may actually fail to deliver on that promise. Yet the prevalence and intensity of concern about recognition cannot be explained by material or security concerns alone and should lead scholars to take seriously the constitutive and casual role of legitimacy in studies of international law.[883]

On balance, however, state reluctance to regulate non-state armed actors via international law has not impeded the growth of a consensus about their responsibility. Yet whether, why and how normative "ownership" or a sense of legal obligation arises within insurgent or paramilitary organizations on the ground are still open debates. Efforts such as those of Geneva Call to commit armed groups directly through localized/tailored agreements, "involving" them in the norm-creation process while circumventing the controversial "legitimizing/constitutive" effect, may in fact prove more successful in practice than direct appeals to international legal tools. More research and policy resources should be devoted to investigating this phenomenon, since insurgents and paramilitaries are probably the non-state actors with the greatest negative impact on the humanitarian and human rights situation of civilian populations around the world.[884] More profoundly, however, what the above suggests is that as long as states continue to believe that by engaging non-stated armed actors through international mechanisms they will grant them political legitimacy, the international normative system will remain handicapped in tending to urgent humanitarian concerns on the ground. A mix of initiatives (a type of "regime complex") may in this case be the next best regulatory substitute.[885]

---

[882] For a persuasive critique of the "rational" school of international legal design, attentive to identity and legitimacy, see Reus-Smit, "Politics and International Legal Obligation."
[883] Finnemore and Toope, "Alternatives to 'Legalization': Richer Views of Law and Politics."
[884] The other are transnational and other types of business corporations. See Giovanni Mantilla, "Emerging International Human Rights Norms for Transnational Corporations," *Global Governance* 15, no. 2 (2009): 279–298; John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (W. W. Norton & Company, 2013).
[885] Keohane and Victor, "The Regime Complex for Climate Change."

Bibliography

Abbott, Kenneth. "International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts." *American Journal of International Law* 93, no. 2 (1999): 361–379.

Abbott, Kenneth W, and Duncan Snidal. "Law, Legalization, and Politics: An Agenda for the Next Generation of IL/IR Scholars." In *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, edited by Jeffrey Dunoff and Mark A. Pollack, 33–58. New York: Cambridge University Press, 2013.

Abi-Saab, Georges. "Wars of National Liberation and the Laws of War." In *International Law: A Contemporary Perspective*, edited by Richard A. Falk, Friedrich V. Kratochwil, and Saul H. Mendlovitz, 410–437. Boulder: Westview Press, 1985.

Abi-Saab, Rosemary. *Droit Humanitaire et Conflits Internes: Origines et Évolution de La Réglementation Internationale*. Geneva: Editions A. Pedone, 1986.

Adler, Emanuel, and Michael Barnett, eds. *Security Communities*. Cambridge University Press, 1998.

Aldrich, George H. "Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia." *American Journal of International Law* 90, no. 1 (1996): 64–69.

———. "New Life for the Laws of War." *American Journal of International Law* 75, no. 4 (1981): 764–783.

———. "Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I." *Virginia Journal of International Law* 26, no. 3 (1986): 693–720.

———. "Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions." *American Journal of International Law* 85, no. 1 (1991): 1–20.

———. "Some Reflections on the Origins of the 1977 Geneva Protocols." In *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, edited by Christopher Swinarski, 1143. Springer, 1984.

———. "The Laws of War on Land." *American Journal of International Law* 94, no. 1 (2000): 42–63.

Alston, Philip. "Non-State Actors and Human Rights." Oxford: Oxford University Press, 2005.

Barnett, Michael. *Empire of Humanity: A History of Humanitarianism*. Ithaca: Cornell University Press, 2011.

Bass, Gary J. *Freedom's Battle: The Origins of Humanitarian Intervention*. Knopf Doubleday Publishing Group, 2008.

———. *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*. Princeton University Press, 2000.

Bedjaoui, Mohammed. *Law and the Algerian Revolution*. Publications of the International Associations of Democratic Lawyers, 1961.

Bellinger III, John B., and William J. Haynes II. "A US Government Response to the International Committee of the Red Cross Study Customary International

Humanitarian Law." *International Review of the Red Cross* 89, no. 866 (2007): 443–471.
Bennett, Andrew. "Causal Mechanisms and Typological Theories in the Study of Civil Conflict." In *Transnational Dynamics of Civil War*, edited by Jeffrey T. Checkel, 205–230. New York: Cambridge University Press, 2013.
Best, Geoffrey. *Humanity in Warfare*. New York: Columbia University Press, 1980.
———. *War and Law Since 1945*. New York: Oxford University Press, 1994.
Bethell, Leslie, and Ian Roxborough, eds. *Latin America Between the Second World War and the Cold War: Crisis and Containment, 1944-1948*. Cambridge University Press, 1997.
Biersteker, Thomas, and Cynthia Weber. "The Social Construction of State Sovereignty." In *State Sovereignty as a Social Construct*, edited by Thomas Biersteker and Cynthia Weber. New York: Cambridge University Press, 1996.
Boissier, Pierre. *From Solferino to Tsushima*. Geneva: Henry Dunant Institute, 1985.
Bond, James Edward. *The Rules of Riot: Internal Conflict and the Law of War*. University Press, 1974.
Borrie, John. *Unacceptable Harm: A History of How the Treaty to Ban Cluster Munitions Was Won*. United Nations Publications UNIDIR, 2009.
Buergenthal, Thomas. "Introduction, The American Red Cross - Washington College of Law Conference: International Humanitarian Law." *American University Law Review* 34 (1981): 805–807.
Bugnion, François. "Customary International Humanitarian Law." *African Yearbook of International Law* (2008): 59–99.
———. *The International Committee of the Red Cross and the Protection of War Victims*. Macmillan Education, 2003.
———. "The International Conference of the Red Cross and Red Crescent: Challenges, Key Issues and Achievements." *International Review of the Red Cross* 91, no. 876 (May 07, 2010): 675–712.
Burke, Roland. *Decolonization and the Evolution of International Human Rights*. University of Pennsylvania Press, 2010.
Cameron, Maxwell A., Robert J. Lawson, and Brian W. Tomlin. *To Walk Without Fear: The Global Movement to Ban Landmines*. Oxford University Press, 1998.
Carnahan, Burrus M. "Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity." *American Journal of International Law* no. 92 (1998): 213–231.
Cassese, Antonio. "A Tentative Appraisal of the Old and the New Humanitarian Law of Armed Conflict." In *The New Humanitarian Law of Armed Conflict*, edited by Antonio Cassese. Editoriale scientifica, 1979.
———. "The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Humanitarian Law." *UCLA Pacific Basin Law Journal* 3 (1984): 55–118.
Christopher Roberts. "Exploring Fractures Within Human Rights: An Empirical Study of Resistance." Ph.D. Diss., University of Michigan, 2010.
Cialdini, Robert B., and Noah J. Goldstein. "Social Influence: Compliance and Conformity." *Annual Review of Psychology* 55, no. 1974 (January 2004): 591–621.

Clapham, Andrew. "Human Rights Obligations of Non-state Actors in Conflict Situations." *International Review of the Red Cross* 88, no. 863 (2006): 491–523.
———. *The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape and Issues Surrounding Engagement*. Geneva, 2010.
Clark, Ian. *International Legitimacy and World Society*. Oxford: Oxford University Press, 2007.
Claude, Inis. "Collective Legitimization as a Political Function of the United Nations." *International Organization* 20, no. 3 (1966): 367–379.
Coates, Benjamin Allen. "Transatlantic Advocates: American International Law and U.S. Foreign Relations, 1898-1919." Ph.D. Diss., Columbia University, 2010.
Connelly, Matthew. *A Diplomatic Revolution: Algeria's Fight for Independence and the Origins of the Post-Cold War Era*. Oxford University Press, 2003.
Conway-Lanz, Sahr. *Collateral Damage: Americans Noncombatant Immunity and Atrocity After World War II*. Routledge, 2006.
Crawford, Neta C. *Argument and Change in World Politics*. New York: Cambridge University Press, 2002.
Cullen, Anthony. *The Concept of Non-International Armed Conflict in International Humanitarian Law*. New York: Cambridge University Press, 2010.
Davis, Stephen S. "J. Reuben Clark, Jr., Statesman and Counselor." In *Counselors to the Prophets*, edited by Michael K. Winder. Salt Lake City: Eborn Books, 2001.
Deitelhoff, Nicole. "The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case." *International Organization* 63, no. 1 (2009): 33–65.
Doyle, Michael W. *Empires*. Cornell University Press, 1986.
Draper, G.I.A.D. *The Red Cross Conventions*. Praeger, 1958.
Drezner, Daniel W. *All Politics Is Global: Explaining International Regulatory Regimes*. Princeton University Press, 2007.
Duffy, Helen. *The "War on Terror" and the Framework of International Law*. Cambridge University Press, 2005.
Dulles, Foster Rhea. *The American Red Cross: A History*. New York: Harper & Brothers, 1950.
Dunant, Henry. *A Memory of Solferino*. Geneva, 1986.
———. *Mémoires*. Geneva: Institut Henry Dunant - Editions L'Âge d'Homme, 1971.
Dunoff, Jeffrey, and Mark A. Pollack, eds. *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*. New York: Cambridge University Press, 2013.
Durand, André. *From Sarajevo to Hiroshima: History of the International Committee of the Red Cross*. Geneva: Henry Dunant Institute, 1984.
Favez, Jean-Claude. "The Red Cross and the Holocaust." Cambridge University Press, 1999.
Fearon, James. "Bargaining, Enforcement, and International Cooperation." *International Organization* 52, no. 2 (1998): 269–305.
Final Record of the Diplomatic Conference of Geneva of 1949. Bern: Federal Political Department, 1963.

Finnemore, Martha. “Legitimacy, Hypocrisy, and the Social Structure of Unipolarity: Why Being a Unipole Isn’t All It’s Cracked Up to Be.” *World Politics* 61, no. 1 (2009): 58–85.
———. *National Interests in International Society*. Ithaca: Cornell University Press, 1996.
———. “Norms and War : The International Red Cross and the Geneva Conventions.” In *National Interests in International Society*, 1996.
———. *The Purpose of Intervention: Changing Beliefs About the Use of Force*. Ithaca: Cornell University Press, 2003.
Finnemore, Martha, and Kathryn Sikkink. “International Norm Dynamics and Political Change.” *International Organization* 52, no. 4 (1998): 887–917.
Finnemore, Martha, and Stephen J. Toope. “Alternatives to ‘Legalization’: Richer Views of Law and Politics.” *International Organization* 55, no. 3 (2001): 743–758.
Florini, Ann. “The Evolution of International Norms.” *International Studies Quarterly* 40 (1996): 363–389.
Forsythe, David P. “Legal Regulation of Internal Conflicts: The 1977 Protocol on Non-International Armed Conflicts.” *American Journal of International Law* 72, no. 2 (1978): 272–295.
———. *The Humanitarians: The International Committee of the Red Cross*. Cambridge University Press, 2005.
———. *The Politics of Prisoner Abuse: The United States and Enemy Prisoners After 9/11*. Cambridge University Press, 2011.
Fox, Frank W. *J. Reuben Clark: The Public Years*. Utah: Brigham Young University Press, 1980.
Friedrichs, Jörg, and Friedrich Kratochwil. “On Acting and Knowing: How Pragmatism Can Advance International Relations Research and Methodology.” *International Organization* 63 (2009): 701–731.
Fujita, Hisakazu. *International Regulation of the Use of Nuclear Weapons*. Kansai University Press, 1988.
Gaiduk, Ilya. *Divided Together: The United States and the Soviet Union in the United Nations, 1945-1965*. Stanford University Press, 2013.
Gasser, Hans-Peter. “Acts of Terror , ‘Terrorism’ and International Humanitarian Law.” *International Review of the Red Cross* 84, no. September (2002): 547–570.
George, Alexander L, and Andrew Bennett. *Case Studies and Theory Development in the Social Sciences*. Cambridge, MA: MIT Press, 2004.
Gerring, John. “The Mechanismic Worldview: Thinking Inside the Box.” *British Journal of Political Science* 38, no. 01 (December 07, 2007): 161–179.
Goddard, Stacie E. “Brokering Change: Networks and Entrepreneurs in International Politics.” *International Theory* 1, no. 02 (July 06, 2009): 249.
Gong, Gerrit W. *The Standard of “Civilization” in International Society*. Oxford: Clarendon Press, 1984.
Goodman, Ryan, and Derek Jinks. “How to Influence States: Socialization and International Human Rights Law.” *Duke Law Journal* 54, no. 3 (2004): 612–703.

Goodman, Ryan, Derek Jinks, and Andrew K. Woods, eds. *Understanding Social Action, Promoting Human Rights*. Oxford University Press, 2012.
Gross, Oren, and Fionnuala Ní Aoláin. *Law in Times of Crisis: Emergency Powers in Theory and Practice*. Cambridge University Press, 2006.
Gruber, Lloyd. *Ruling the World: Power Politics and the Rise of Supranational Institutions*. Princeton University Press, 2000.
Haas, Peter. "Introduction: Epistemic Communities and International Policy Coordination." *International Organization* 46, no. 1 (1992): 1–35.
Hafner-Burton, Emilie M., Laurence R. Helfer, and Christopher J. Fariss. "Emergency and Escape: Explaining Derogations from Human Rights Treaties." *International Organization* 65, no. 04 (October 07, 2011): 673–707.
Hafner-Burton, Emilie, David G. Victor, and Yonatan Lupu. "Political Science Research on International Law : The State of the Field." *American Journal of International Law* 106, no. 1 (2012): 47–97.
Haug, Hans, Hans-Peter Gasser, Françoise Perret, and Jean-Pierre Robert-Tissot. *Humanity for All: The International Red Cross and Red Crescent Movement*. Henry Dunant Institute, Paul Haupt Publishers, 1993.
Hayner, Priscilla B. *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*. Routledge, 2010.
Henckaerts, Jean-Marie. "Customary International Humanitarian Law : a Response to US Comments" 76, no. 866 (2007): 259–270.
———. "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict." *International Review of the Red Cross* 87, no. 857 (2005): 175–212.
Henkin, Louis. "The United Nations and Human Rights." *International Organization* 19, no. 3 (1965): 504–517.
Hitchcock, William I. "Human Rights and the Laws of War: The Geneva Conventions of 1949." In *The Human Rights Revolution: An International History*, edited by Akira Iriye, Petra Goedde, and William I. Hitchcock, 368. New York: Oxford University Press, USA, 2012.
Huntington, Samuel P. *The Third Wave: Democratization in the Late 20th Century*. University of Oklahoma Press, 1991.
Hutchinson, John F. *Champions of Charity: War and the Rise of the Red Cross*. Boulder: Westview Press, 1996.
I.C.J. *14 - Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua Vs. United States of America)*, 1986.
ICRC. *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts Geneva, 24 May - 12 June 1971, Vol. V - Protection of Victims of Non-International Conflicts*. Geneva: ICRC, 1971.
———. *Draft Revised or New Conventions for the Protection of War Victims*. Geneva, 1948.

———. *Final Record Concerning the Draft Rules for the Limitation of Dangers Incurred by the Civilian Population in Time of War, XIXth International Conference of the Red Cross*. Geneva: ICRC, 1958.
———. *Manuel Chronologique Pour L'histoire Générale de La Croix-Rouge, 1863-1899*. Geneva: Imprimerie I. Soullier, 1900.
———. *Report of the XXX International Conference of the Red Cross and the Red Crescent, Geneva 23–30 November 2007*. Geneva: ICRC, 2007.
———. *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims, Geneva, April 14-26, 1947*. Geneva, 1947.
———. , ed. *Understanding Armed Groups and the Applicable Law*. *International Review of the Red Cross*. Vol. 93. Cambridge University Press, 2011.
———. *XXXI International Conference of the Red Cross and Red Crescent Geneva, 28 November – 1 December 2011 Council of Delegates of the International Red Cross and Red Crescent Movement, Resolutions*. Geneva, 2011.
ICTY. "The Prosecutor V. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995," 1995.
Inal, Tuba. *Looting and Rape in Wartime: Law and Change in International Relations*. University of Pennsylvania Press, 2013.
Jackson, Robert H. "The Weight of Ideas in Decolonization: Normative Change in International Relations." In *Ideas and Foreign Policy: Beliefs, Institutions and Political Change*, edited by Judith Goldstein and Robert O. Keohane. Cornell University Press, 1993.
Jervis, Robert. "Identity and the Cold War." In *The Cambridge History of the Cold War, II, Crisis and Détente*, edited by Melvyn P. Leffler and Odd Arne Westad, 2010.
Jo, Hyeran, and Katherine Bryant. "Taming the Warlords: Commitment and Compliance by Armed Opposition Groups in Civil War." In *From Commitment to Compliance: The Persistent Power of Human Rights*, edited by Thomas Risse, Stephen C Ropp, and Kathryn Sikkink. New York: Cambridge University Press, 2013.
Jo, Hyeran, and Beth Simmons. "Peace, Justice, and the International Criminal Court: A Preliminary Assessment of the ICC's Impact," 2012.
Johnston, Alastair Iain. *Social States: China in International Institutions, 1980-2000*. Princeton: Princeton University Press, 2008.
Kalshoven, Frits. "Development of Customary Law of Armed Conflict." In *Reflections on the Law of War: Collected Essays*, 321–324. Leiden: Martinus Nijhoff Publishers, 2007.
———. "'Guerrilla' and 'Terrorism' in Internal Armed Conflict." *American University Law Review* 33 (1983): 67–81.
Kalshoven, Frits, and Liesbeth Zegveld. *Constraints on the Waging of War : an Introduction to International Humanitarian Law*. *English*, 2001.
Kalyvas, Stathis. *The Logic of Violence in Civil War*. New York: Cambridge University Press, 2006.

Katzenstein, Peter J. “Introduction: Alternative Perspectives on National Security.” In *The Culture of National Security: Norms and Identity in World Politics*, edited by Peter J Katzenstein. New York: Columbia University Press, 1995.
———. “The Culture of National Security: Norms and Identity in World Politics.” New York: Columbia University Press, 1995.
Katzenstein, Peter J., Robert O. Keohane, and Stephen D. Krasner. “International Organization and the Study of World Politics.” *International Organization* 52, no. 4 (1998): 645–685.
Kay, David A. *The New Nations in the United Nations, 1960-1967*. Columbia University Press, 1970.
Keck, Margaret E, and Kathryn Sikkink. *Activists Beyond Borders*. Ithaca: Cornell University Press, 1998.
Kelman, Herbert C. “Interests, Relationships, Identities: Three Central Issues for Individuals and Groups in Negotiating Their Social Environment.” *Annual Review of Psychology* 57 (January 2006): 1–26.
Keohane, Robert O. “Rational Choice Theory and International Law: Insights and Limitations.” *The Journal of Legal Studies* 31, no. 1 (2002): 307–319.
Keohane, Robert O., and David G. Victor. “The Regime Complex for Climate Change.” *Perspectives on Politics* 9 (2011): 7–23.
Kim, Hunjoon. “Expansion of Transitional Justice Measures.” Ph.D. Diss., University of Minnesota, 2008.
Kim, Hunjoon, and Kathryn Sikkink. “Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries.” *International Studies Quarterly* 54 (2010): 939–963.
Kinsella, Helen M. *The Image Before the Weapon: A Critical History of the Distinction Between Combatant and Civilian*. Ithaca: Cornell University Press, 2011.
Klose, Fabian. “The Colonial Testing Ground : The International Committee of the Red Cross and the Violent End of Empire.” *Humanity* (2011): 107–126.
Koremenos, Barbara. “Institutionalism and International Law.” In *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, edited by Jeffrey Dunoff and Mark A. Pollack, 59–82. New York: Cambridge University Press, 2013.
Koremenos, Barbara, and Mi Hwa Hong. “The Rational Design of Human Rights Agreements” (2010). http://papers.ssrn.com/abstract=1643809.
Koremenos, Barbara, Charles Lipson, and Duncan Snidal. “The Rational Design of International Institutions.” *International Organization* 55, no. 4 (2001): 761–799.
Koskenniemi, Martti. *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960*. Cambridge: Cambridge University Press, 2002.
Kowert, Paul, and Jeffrey Legro. “Norms, Identity, and Their Limits: A Theoretical Reprise.” In *The Culture of National Security: Norms and Identity in World Politics*. Columbia University Press, 1996.
Krasner, Stephen D. *Sovereignty: Organized Hypocrisy*. Princeton: Princeton University Press, 1999.

———. *Structural Conflict: The Third World Against Global Liberalism*. University of California Press, 1985.
Kratochwil, Friedrich, and John Gerard Ruggie. "International Organization : A State of the Art on an Art of the State." *International Organization* 40 (1986): 753–775.
Krebs, Ronald R, and Patrick Thaddeus Jackson. "Twisting Tongues and Twisting Arms: The Power of Political Rhetoric." *European Journal of International Relations* 13, no. 1 (2007): 35–66.
Lauterpacht, Hersch. *Recognition in International Law*. Cambridge: Cambridge University Press, 1947.
Levie, Howard S. "Maltreatment of Prisoners of War in Vietnam." In *The Vietnam War and International Law, Volume 2*, edited by Richard A. Falk, 361–397, 1969.
———. , ed. *Protection of War Victims: Protocol 1 to the 1949 Geneva Conventions, Volume 1*. Dobbs Ferry, N.Y.: Oceana, 1979.
———. , ed. *Protection of War Victims: Protocol 1 to the 1949 Geneva Conventions, Volume 2*. Dobbs Ferry, N.Y.: Oceana, 1980.
———. , ed. *Protection of War Victims: Protocol 1 to the 1949 Geneva Conventions, Volume 3*. Dobbs Ferry, N.Y.: Oceana, 1981.
———. *The Law of Non International Armed Conflict: Protocol II to the 1949 Geneva Conventions*. Martinus Nijhoff Publishers, 1987.
Lieber, Francis. *Guerrilla Parties Considered with References to the Laws and Usages of War*. New York: D. Van Nostrand, 1862.
———. *Instructions for the Government of Armies of the United States in the Field*. New York: D. Van Nostrand, 1863.
Lowe, Kimberly A. "Humanitarianism and National Sovereignty: Red Cross Intervention on Behalf of Political Prisoners in Soviet Russia, 1921-23," 2012.
Lynch, Moira K. "Seeking Justice During War: Accountability in Conflicted Democracies." Ph.D. Diss., University of Minnesota, 2012.
Lysaght, Charles. "The Scope of Protocol II and Its Relation to Common Article 3 of the Geneva Conventions of 1949 and Other Human Rights Instruments." *American University Law Review* 9 (1983).
Mantilla, Giovanni. "Emerging International Human Rights Norms for Transnational Corporations." *Global Governance* 15, no. 2 (2009): 279–298.
Matheson, Michael J. *International Civil Tribunals and Armed Conflict*. Martinus Nijhoff Publishers, 2012.
Maxwell, William Quentin. *Lincoln's Fifth Wheel: The Political History of the United States Sanitary Commission*. Longmans, Green & Company, 1956.
Mayer, Jane. *The Dark Side: The Inside Story of How The War on Terror Turned into a War on American Ideals*. Knopf Doubleday Publishing Group, 2009.
McMahon, Robert J., ed. *The Cold War in the Third World*. Oxford University Press, USA, 2013.
Melzer, Nils. "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." *New York University Journal of International Law and ...* 42, no. 3 (2010): 831–916.

Meron, Theodor. *Human Rights and Humanitarian Norms as Customary Law*. Clarendon Press, 1989.
———. *Human Rights in International Strife: Their International Protection*. Grotius Publications, 1987.
———. "International Criminalization of Internal Atrocities." *American Journal of International Law* 89, no. 3 (1995): 554–577.
———. "On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument." *The American Journal of International Law* 77, no. 3 (1983): 589–606.
———. "The Continuing Role of Custom in the Formation of International Humanitarian Law." *American Journal of International Law* 90, no. 2 (1996): 238–249.
———. "The Geneva Conventions as Customary Law" 81, no. 2 (1987): 348–370.
———. *The Making of International Criminal Justice: A View from the Bench: Selected Speeches*. Oxford University Press, 2011.
Meyer, John W. "World Society, Institutional Theories, and the Actor." *Annual Review of Sociology* 36, no. 1 (June 2010): 1–20.
Meyer, John W., and Ronald Jepperson. "The 'Actors' of Modern Society: The Cultural Construction of Social Agency." *Sociological Theory* 18, no. 1 (2000).
Milanovic, Marko. "Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case." *International Review of the Red Cross* 89, no. 866 (November 14, 2007).
Moir, Lindsay. *The Law of Internal Armed Conflict*. New York: Cambridge University Press, 2007.
Moorcraft, Paul L. *Shooting the Messenger: The Political Impact of War Reporting*. Potomac Books, Inc., 2008.
Moorhead, Caroline. *Dunant's Dream: War, Switzerland and the History of the Red Cross*. New York: Carroll and Graf Publishers, 1998.
Moravcsik, Andrew. "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe." *International Organization* 54, no. 2 (2000): 217–252.
Moreillon, Jacques. *Le Comité International de La Croix-Rouge et La Protection Des Détenus Politiques*. Geneva: Institut Henry-Dunant-Editions L'Age d'Homme, 1973.
Morgan, Edwina. "The Protection of 'Irregular' Combatants: An Enduring Challenge for Humanitarian Action." MAS Thesis, Geneva Center for Education and Research in Humanitarian Action, 2011.
Morrow, James D. "The Institutional Features of the Prisoners of War Treaties." *International Organization* 55, no. 4 (October 01, 2001): 971–991.
———. *The Laws of War as an International Institution*. Typescript, 2009.
———. "The Laws of War, Common Conjectures, and Legal Systems in International Politics." *The Journal of Legal Studies* (2002).
———. "When Do States Follow the Laws of War." *American Political Science Review* 101, no. 3 (2007): 559–572.
Moyn, Samuel. *The Last Utopia: Human Rights in History*. Harvard University Press, 2010.

Moynier, Gustave. *La Croix Rouge: Son Passé et Son Avenir*. Paris: Sandoz et Thuillier, 1882.
Neff, Stephen C. *War and the Law of Nations: A General History*. New York: Cambridge University Press, 2005.
Neier, Aryeh. *The International Human Rights Movement: A History*. Princeton University Press, 2012.
Neureiter, Katharina. "'Too Radical for Its Time'? Gustave Moynier and His Proposal for an International Criminal Court Around 1872." Master's Thesis, London School of Economics and Political Science, 2012.
Ni Aoláin, Fionnuala, and Colm Campbell. "The Paradox of Transition in Conflicted Democracies." *Human Rights Quarterly* 27 (2005): 172–213.
Olsen, Tricia D., Leigh A. Payne, and Andrew G. Reiter. *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*. United States Institute of Peace Press, 2010.
Perna, Laura. *The Formation of the Treaty Rules Applicable in Non-international Armed Conflicts*. Martinus Nijhoff Publishers, 2006.
Perret, Françoise, and François Bugnion. "Between Insurgents and Government: The International Committee of the Red Cross's Action in the Algerian War (1954–1962)." *International Review of the Red Cross* 93, no. 883 (June 08, 2012): 707–742.
———. *De Budapest a Saigon: Histoire Du Comité International de La Crox-Rouge 1956-1965*. Geneva: Georg Editeur, Editions m+h, CICR, 2009.
Perrigo, Sarah, and Jim Whitman. "The Geneva Conventions Under Assault." New York: Pluto Press, 2010.
Perruchoud, Richard. *Les Resolutions Des Conferences Internationales de La Croix-Rouge*. Institut Henry-Dunant, 1979.
Pictet, Jean S., ed. *Commentary on the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field, August 12, 1949*. Geneva: ICRC, 1952.
———. , ed. *Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in War, August 12, 1949*. Geneva, 1958.
Pierson, Paul. "Not Just What, but When: Timing and Sequence in Political Processes." *Studies in American Political Development* 14, no. Spring (2000): 72–92.
Pitteloud, Jean-François, ed. *Procès-verbaux Des Séances Du Comité International de La Croix-Rouge: 17 Février 1863-28 Août 1914*. Société Henry Dunant, 1999.
Price, Richard. "Reversing the Gun Sights: Transnational Civil Society Targets Land Mines." *International Organization* 52, no. 3 (1998): 613–644.
———. *The Chemical Weapons Taboo*. Ithaca: Cornell University Press, 1997.
Reus-Smit, Christian. "Politics and International Legal Obligation." *European Journal of International Relations* 9, no. 4 (December 01, 2003): 591–625.
———. "Struggles for Individual Rights and the Expansion of the International System." *International Organization* 65 (2011): 207–242.
———. *The Moral Purpose of the State: Culture, Social Identity, and Institutional Rationality in International Relations*. Princeton: Princeton University Press, 1999.

Rey-Schyrr, Catherine. *De Yalta a Dien Bien Phu: Histoire Du Comité International de La Croix-Rouge, 1945-1955*. Geneve: Georg Editeur, 2007.
Risse, Thomas. "'Let's Argue!': Communicative Action in World Politics." *International Organization* 54, no. 1 (2000): 1–39.
Risse, Thomas, and Mareike Kleine. "Deliberation in Negotiations." *Journal of European Public Policy* 17, no. 5 (August 2010): 708–726.
Risse, Thomas, Stephen C Ropp, and Kathryn Sikkink. *The Persistent Power of Human Rights: From Commitment to Compliance*. Cambridge University Press, 2013.
Risse, Thomas, Stephen C. Ropp, and Kathryn Sikkink. "The Power of Human Rights: International Norms and Domestic Change." New York: Cambridge University Press, 1999.
Risse-Kappen, Thomas. "Ideas Do Not Float Freely: Transnational Coalitions, Domestic Structures, and the End of the Cold War." *International Organization* 48 (1994): 185–214.
Rolin-Jaequemyns, Gustave. "Note Sur Le Projet de M. Moynier, Relatif a L'établissement D'une Institution Judiciaire Internationale Protectrice de La Convention." *Revue de Droit International et de Legislation Comparée* 2 (1872): 325–346.
Romaniuk, Peter. *Multilateral Counter-Terrorism: The Global Politics of Cooperation and Contestation*. London: Routledge, 2010.
Rudolph, Christopher. "Constructing an Atrocities Regime: The Politics of War Crimes Tribunals." *International Organization* 55, no. 3 (September 01, 2001): 655–691.
Ruggie, John Gerard. *Constructing the World Polity: Essays on International Institutionalization*. London: Routledge, 1998.
———. *Just Business: Multinational Corporations and Human Rights*. W. W. Norton & Company, 2013.
———. "Territoriality and Beyond: Problematizing Modernity in International Relations." *International Organization* 47, no. 1 (1993): 139–174.
Santos Jr., Soliman. "A Critical Reflection on the Geneva Call Instrument and Approach in Engaging Armed Groups on Humanitarian Norms: A Southern Perspective, Paper Presented at Conference 'Curbing Human Rights Violations by Armed Groups,' Vancouver, 14-15 November 2003," 2003.
Schabas, William. *The International Criminal Court: a Commentary on the Rome Statute*. Oxford University Press, 2010.
Scheffer, David. *All the Missing Souls: Personal History of the War Crimes Tribunals*. Princeton University Press, 2013.
Scheinin, Martin. "Turku/Abo Declaration of Minimum Humanitarian Standards (1990,) Workshop 'Standard-setting: Lessons Learned for the Future,' Geneva, 13-14 February 2005." International Council on Human Rights Policy and International Commission of Jurists, 2005.
Schindler, Dietrich, and Jiri Toman, eds. *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents*. 4th Editio. Martinus Nijhoff Publishers, 2004.

Scott, James Brown. *The Hague Peace Conferences of 1899 and 1907 Volume 1*. Nabu Press, 2010.
———. *The Hague Peace Conferences of 1899 and 1907 Volume 2*. Ulan Press, 2012.
Shaffer, Gregory, and Tom Ginsburg. "The Empirical Turn in International Legal Scholarship." *American Journal of International Law* 106, no. 1 (2012): 1–46.
Shannon, Vaughn P., and Paul Kowert, eds. *Psychology and Constructivism in International Relations: An Ideational Alliance*. Vol. 2011. University of Michigan Press, 2011.
Shealy, Gwendolyn C. *A Critical History of the American Red Cross, 1882-1945: The End of Noble Humanitarianism*. Lewiston, NY: The Edwin Mellen Press, 2003.
Sikkink, Kathryn. "Human Rights, Principled Issue-Networks, and Sovereignty in Latin America." *International Organization* 47, no. 3 (1993): 411–441.
———. *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*. W. W. Norton & Company, 2011.
Sil, Rudra, and Peter J. Katzenstein. *Beyond Paradigms: Analytic Eclecticism in the Study of World Politics*. Palgrave Macmillan, 2010.
Simmons, Beth A. *Mobilizing for Human Rights: International Law in Domestic Politics*. New York: Cambridge University Press, 2009.
Simmons, Beth A, and Allison Danner. "Credible Commitments and the International Criminal Court." *International Organization* 64 (2010): 225–256.
Siordet, Frédéric. "Les Conventions de Génève et La Guerre Civile." *Revue Internationale de La Croix-Rouge* 1, no. Feb-Mar (1950).
Siotis, Jean. *Le Droit de La Guerre et Les Conflits Armés D'un Caractère Non-international*. Paris: Librairie générale de droit et de jurisprudence, 1958.
Sivakumaran, Sandesh. "Re-envisaging the International Law of Internal Armed Conflict." *European Journal of International Law* 22, no. 1 (April 08, 2011): 219–264.
———. *The Law of Non-International Armed Conflict*. Oxford University Press, 2012.
Smith-Cannoy, Heather. *Insincere Commitments: Human Rights Treaties, Abusive States, and Citizen Activism*. Georgetown University Press, 2012.
Snyder, Jack, and Leslie Vinjamuri. "Trials and Errors: Principle and Pragmatism in Strategies of International Justice." *International Security* 28, no. 3 (2004): 5–44.
Solis, Gary D. *The Law of Armed Conflict: International Humanitarian Law in War*. New York: Cambridge University Press, 2010.
Stanton, Jessica. "Strategies of Violence and Restraint in Civil War." Ph.D. Diss., Columbia University, 2009.
Strang, David. "Contested Sovereignty: The Social Construction of Colonial Imperialism." In *State Sovereignty as a Social Construct*, edited by Thomas Biersteker and Cynthia Weber. New York: Cambridge University Press, 1996.
Struett, Michael J. *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency*. Palgrave Macmillan, 2008.
Stuart, Heikelina Verrijn, and Marlise Simons. *The Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese - Interviews and Writings*. Amsterdam University Press, 2010.

Suter, Keith. *An International Law of Guerilla Warfare: The Global Politics of Law-Making*. New York: St. Martin's Press, 1984.
Tannenwald, Nina. *The Nuclear Taboo: The United States and the Non-Use of Nuclear Weapons Since 1945*. New York: Cambridge University Press, 2008.
Tarrow, Sidney. *The New Transnational Activism*. Cambridge University Press, 2005.
Teitel, Ruti G. *Humanity's Law*. Oxford University Press, 2011.
Thomas, Ward. *The Ethics of Destruction: Norms and Force in International Relations*. Cornell University Press, 2001.
Timmermans, Stefan, and Iddo Tavory. "Theory Construction in Qualitative Research: From Grounded Theory to Abductive Analysis." *Sociological Theory* 30, no. 3 (September 10, 2012): 167–186.
Tingley, Dustin, and Barbara F. Walter. "Can Cheap Talk Deter?: An Experimental Analysis." *Journal of Conflict Resolution* 55, no. 6 (August 23, 2011): 996–1020.
Tolley, Howard B. *The International Commission of Jurists: Global Advocates for Human Rights*. University of Pennsylvania Press, 1994.
United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June - 17 July 1998, Official Records, Volume II. New York: United Nations, 2002.
Valencia Villa, Alejandro. *La Humanización de La Guerra: Derecho Internacional Humanitario y Conflicto Armado En Colombia*. Bogota: Tercer Mundo Editores, 1991.
Valentino, Benjamin, Paul Huth, and Sarah Croco. "Covenants Without the Sword: International Law and the Protection of Civilians in Times of War." *World Politics* 58, no. 3 (2006): 339–377.
Veuthey, Michel. *Guerrilla et Droit Humanitaire*. Geneva: Institut Henry Dunant, 1976.
Voeten, Erik. "The Practice of Political Manipulation." In *International Practices*, edited by Emanuel Adler and Vincent Pouliot. Cambridge University Press, 2011.
Walling, Carrie Booth, and Susan Waltz, eds. *Human Rights : From Practice to Policy, Proceedings of a Research Workshop*. Ann Arbor: Gerald R. Ford School of Public Policy, University of Michigan, 2011.
Warbrick, Colin, and Peter Rowe. "The International Criminal Tribunal for Yugoslavia: The Decision of the Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the Tadic Case." *International & Comparative Law Quarterly* 45, no. 03 (January 17, 1996).
Weinstein, Jeremy M. *Inside Rebellion: The Politics of Insurgent Violence*. New York: Cambridge University Press, 2007.
Weissbrodt, David. *Study of Amnesty International's Role in Situations of Armed Conflict and Internal Strife, AI Index: POL 03/04/84*, 1984.
———. "The Role of International Organizations in the Implementation of Human Rights and Humanitarian Law in Situations of Armed Conflict." *Vanderbilt Journal of Transnational Law* 21 (1988): 313–365.
Weissbrodt, David, and Nathaniel H. Nesbitt. "The Role of the United States Supreme Court in Interpreting and Developing Humanitarian Law." *Minnesota Law Review* 95 (2010).

Weissbrodt, David, and Connie de la Vega. *International Human Rights Law: An Introduction*. University of Pennsylvania Press, 2007.
Widmaier, Wesley W., Mark Blyth, and Leonard Seabrooke. "Exogenous Shocks or Endogenous Constructions?The Meanings of Wars and Crises." *International Studies Quarterly* 51 (2007): 747–759.
Wilmshurst, Elizabeth, and Susan Breau, eds. *Perspectives on the ICRC Study on Customary International Humanitarian Law*. Cambridge University Press, 2007.
Wippman, David. "Introduction: Do New Wars Call for New Laws?" In *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*, edited by David Wippman and Matthew Evangelista, 1–30. Transnational Publishers, 2005.
Witt, John Fabian. *Lincoln's Code: The Laws of War in American History*. Free Press, 2012.
Wong, Wendy. *Internal Affairs: How the Structure of NGOs Transforms Human Rights*. Ithaca: Cornell University Press, 2012.
Yakemtchouk, Romain. *Les Origines de L'institut de Droit International*. A. Pedone, 1973.
Young, Oran R. *International Governance: Protecting the Environment in a Stateless Society*. Cornell University Press, 1994.
Yung, Walter. "Le Role et l'Action de La Croix-Rouge En Temps de Guerre Civile." *Revue Internationale de La Croix-Rouge* 20, no. February (1938): 97–113.
Zegveld, Liesbeth. *Accountability of Armed Opposition Groups in International Law*. New York: Cambridge University Press, 2002.

Other Sources Cited

Archives du Comité International de la Croix-Rouge, Geneva, Switzerland (ICRC Archives, or ICRC-A)

Letter from the Count de Beaufort, Secretary-General of the French Society of Wounded Military to Gustave Moynier, ICRC, April 17, 1884. ICRC Archives, A AF Carton 7, Document 1888, Geneva.

Clara Barton, President, American National Red Cross, Letter to Gustave Moynier, ICRC, October 17, 1895. ICRC Archives A AF Carton 5, Document 284.

Gustave Moynier, Letter to Clara Barton, October 31, 1895. ICRC Archives A AF Livre 14, Document 290.

Joshua R. Clark, Jr., American Central Committee, *Report of a Committee appointed by the International Relief Board of the American Red Cross, to be read as a part of the paper to be presented at the Ninth International Conference by Hon., Solicitor for the Department of State, Entitled "Functions of Red Cross when Civil War or State of Insurrection Exists,"* Washington D.C, April 1, 1912. ICRC Archives A AF-31 2.

Letter from Mr. Benson, Representative of the Danish Red Cross in Kiev, Ukraine, to the International Committee of the Red Cross in Geneva. January 15, 1919. ICRC Archives, B CR-22.

Letter from Unidentified member of the ICRC to Mr. Benson, February 4, 1919. ICRC Archives, B CR-22.

Letter from Georges Lodygensky, Délégué du Comité Central de la Croix-Rouge Rousse pour le Secours aux Victimes de la Guerre Civile to ICRC, May 8, 1920. ICRC Archives A AF CR 21/1.

Letter from Gustave Ador, ICRC President to Georges Lodygensky, May 21, 1920. ICRC Archives A AF CR 21/1.

Letter from Georges Lodygensky, Délégué du Comité Central de la Croix-Rouge Rousse pour le Secours aux Victimes de la Guerre Civile to Gustave Ador, ICRC, May 24, 1920. ICRC Archives A AF CR 21/1.

Compte-rendu de la 2ème commission Londres 1938, ICRC Archives B CRI-19.

Procès-Verbaux de la Commission Juridique et documentation y relative, Nos 36 à 60, Vol. II, minutes of the 03/20/1952 session, ICRC Archives A PV (ICRC-A A PV CJ hereonafter,).

ICRC-A A PV CJ 12/22/1952 and the related document D. 252.

ICRC-A A PV CJ 01/12/1953; 01/22/1953 and the related document D. 250.

ICRC-A A PV CJ 04/16/1953 and the related document D. 273.

ICRC-A A PV CJ 04/29/1955 and the related documents D. 384, D. 385 and D. 386.

ICRC-A A PV Conseil de la Présidence 1949-1965. Geneva.

ICRC-A B AG 051/Pj – Protection juridique des populations civiles – 1952-1967.

ICRC, *Protection Juridique des Populations Civiles, Rapport sur les consultations menées par le CICR depuis 1962 sur le thème "Opportunité et Possibilité de Limiter les Maux de la Guerre dans le Monde Actuel*, *rapport réservé à l'usage interne, Genève, Janvier 1965, SP 488* in ICRC Archives A PV Conseil de la Présidence 1965, Session of 01/21/1965.

***Bibliothèque du Comité International de la Croix-Rouge, Geneva* (ICRC Library)**

"Annexe à la 52me Circulaire du Comité International de la Croix-Rouge, January 25, 1884, Liste de Sujets Proposés pour les Délibérations de la Conférence Internationale des Sociétés de la Croix-Rouge qui devait se tenir à Vienne," in *Bulletin International des Sociétés de Secours aux Militaires Blessés* 15 (57) : 9-27.

Troisième Conférence Internationale de la Croix-Rouge tenue à Genève du 1 au 6 Septembre 1884, Compte rendu.

Quatrième Conférence Internationale des Sociétés de la Croix-Rouge tenue à Calrsuhe du 22 au 27 Septembre 1887, Compte rendu.

Manuel Chronologique Pour L'histoire Générale de La Croix-Rouge, 1863-1899. Geneva: Imprimerie I. Soullier, 1900.

Neuvième Conférence Internationale de la Croix-Rouge tenue à Washington du 7 au 17 Mai 1912, Compte rendu.

Dixième Conférence Internationale de la Croix-Rouge tenue à Genève du 30 Mars au 7 Avril 1921, Compte Rendu.

Sixteenth International Red Cross Conference, *Report, London, 1938*.

ICRC, *Report on the Work of the Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of Various Problems Relative to the Red Cross, Geneva, July 26 - August 3, 1946.*

Conférence Préliminaire des Sociétés de la Croix-Rouge pour l'Étude des Conventions et des Divers Problèmes Ayant Trait à la Croix-Rouge, Genève, 26 juillet-3 Août 1946, Procès-Verbaux, Vols. II et VII.

Conférence d'Experts Gouvernementaux pour l'étude des Conventions protégeant les victimes de la guerre, Genève, 14-16 avril 1947, Procès-Verbaux, Assemblées Plénières, Vol. 1.

Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims, Geneva, April 14-26, 1947. Geneva, 1947.

XVII Conférence de la Croix-Rouge, Stockholm, Août 1948, Commission juridique, Sténogramme des séances.

XVII Conférence de la Croix-Rouge, Stockholm, Août 1948, Commission juridique, Sténogramme des séances.

ICRC, *Commission of Experts for the Examination of the Question of Assistance to Political Detainees, Geneva, June 9-11, 1953*.

ICRC, *Commission of Experts for the Legal Protection of Civilian Populations and Victims of War from the Danger of Aerial Warfare and Blind Weapons, Geneva, April 6-13, 1954, documents and summary records.*

ICRC, *Commission of Experts for the Study of the Question of the Application of Humanitarian Principles in the Event of Internal Disturbances, Geneva, October 3-8, 1955.*

ICRC, *Protection of Victims of Non-International Conflict (Item 6 of the provisional agenda of the International Humanitarian Law Commission,) report submitted by the International Committee of the Red Cross, XXth International Conference of the Red Cross, Vienna, October 1965*.

ICRC, *Commission of experts for the study of the question of aid to the victims of internal conflicts, Geneva, October 25-30, 1962.*

ICRC, *The Legal Protection of Civilian Populations against the Dangers of Indiscriminate Warfare (Item 5a of the provisional agenda of the International Humanitarian Law Commission,) report submitted by the International Committee of the Red Cross, XXth International Conference of the Red Cross, Vienna, October 1965*.

XX International Conference of the Red Cross, Report, Vienna, October 2-9, 1965.

XXI International Conference of the Red Cross, Report, Istanbul, September 6-13, 1969.

ICRC, *Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts, report submitted by the International Commission of the Red Cross, XXI International Conference of the Red Cross, Istanbul, September 1969*.

ICRC, *Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Preliminary Report on the Consultation of Experts concerning Non-International Conflict and Guerrilla Warfare, July 1970, Geneva*, D 1153b.

Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May - 12 June 1971,) Documents submitted by the International Committee of the Red Cross, Vols. I-VIII.

Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May - 12 June 1971,) Report on the Work of the Conference.

Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Second Session (Geneva, 3 May - 3 June 1971,) Report on the Work of the Conference, Vols. I and II, Geneva, July 1972;

Draft Additional Protocols to the Geneva Conventions of August 12, 1949, Commentary, Geneva, October 1973.

XXII International Conference of the Red Cross, Report, Teheran, 8-15, 1973.

Report of the XXX International Conference of the Red Cross and the Red Crescent, Geneva 23–30 November 2007. Geneva: ICRC, 2007.

XXXI International Conference of the Red Cross and Red Crescent Geneva, 28 November – 1 December 201,1 Council of Delegates of the International Red Cross and Red Crescent Movement, Resolutions.

Others ICRC-related Documents

ICRC, *Application of Geneva Conventions in Vietnam*, Letter to the governments of the US, the Republic of Vietnam, the Democratic Republic of Vietnam and the National Front of Liberation of South Vietnam, *International Legal Materials* 4, 1965, 1171-1174 (with responses from the US and South Vietnam.)

Democratic Republic of Vietnam, Letter to the International Committee of the Red Cross, *International Legal Materials* 5, 1966, 124.

ICRC, Overview of ICRC's Expert Process (2003-2008,) available at: http://www.icrc.org/eng/assets/files/other/overview-of-the-icrcs-expert-process-icrc.pdf (Consulted on September 11, 2013.)

<u>Governmental Archives</u>

France

Ministère des Affaires étrangères, Direction des Archives, La Courneuve, Cedex (French Archives)

- Unions Internationales 1944-1964, Arts. 159-163, Cotes 4-17, 4-18, 4-19.

- Nations-Unies et Organisations Internationales (NUOI) 1970-1973, Cartons 1296-1297, Cote S. 50.3.8.4.6.

- Nations-Unies et Organisations Internationales (NUOI) 1974-1979, Conférence Diplomatique sur la Réaffirmation et le Développement du Droit International Humanitaire Applicable dans les Conflits Armés, Carton 1678, Cote F. 6.8.1.2.

United Kingdom

- The National Archives of the UK (TNA): Public Record Office (PRO,) Kew Gardens, London.

    - FO 369: Foreign Office, Consular Department, general correspondence from 1906.

    - FCO 58: Foreign Office and Foreign and Commonwealth Office: United Nations (Political) Department: Registered Files (UP and UL Series,) 1967-1982.

    - FCO 61: Foreign Office and Foreign and Commonwealth Office: United Nations (Economic and Social) Department: Registered Files (US and UM Series,) 1967-1976.

    - FCO 66: Foreign and Commonwealth Office: Disarmament Department and Arms Control and Disarmament Department: Registered Files (DS Series,) 1968-1980.

    - DEFE 24: Ministry of Defence: Defence Secretariat Branches and their Predecessors: Registered Files, 1952-2009.

    - CAB 130/46: Records of the Cabinet Office, Records of Cabinet Committees, etc, 1945 onwards, Miscellaneous Committees: Minutes and Papers (GEN, MISC and REF Series,) Revision of Geneva Conventions: Meetings 1-3.

United States

National Archives at College Park, College Park, MD (NACP.)

- Record Group 59: General Records of the Department of State, 1763-2002.

    - Records Relating to the Red Cross and the Geneva Conventions, Textual Records from the Department of State, Office of the Legal Adviser. (07/01-/1931.) Boxes 1-18, Entry A1 5210.

- Central Foreign Policy File, 1970-1973, SOC 3 Red Cross, Boxes 3011-3013, Entry 1613.

- Electronic Telegrams, Central Foreign Policy Files, 1973-1976. (Accessible online at http://aad.archives.gov/aad/series-description.jsp?s=4073. Search Term: "Humanitarian Law.")

- Record Group 200: Records Relating to the International Committee of the Red Cross (ICRC); 1900-2005, Entry P 108, Boxes 1, 3, 4, 56.

- Record Group 389: Records of the Office of the Provost Marshal General, 1920-1975.

    - Subject Files Relating to the Preparation of the Geneva Conventions, compiled 1946-1949, documenting the period 1917-1949. Entry A1 437, Boxes 669-679.

    - POW/Civilian Information Center, Confidential Records, Entries P 1 (Boxes 1-44) and P 2 (Boxes 1-25.)

Other US Documents

- House Subcommittee on International Organizations and Movements, *Human Rights in the World Community: A Call for U.S. Leadership: Report*, 93rd Congress, 2nd session, March 27, 1974, Washington, D.C, GPO, 1974.

- *Classified Report of the United States Delegation to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, Switzerland, February 20-March 29, 1974,* 6. On file with author.

US Legal Cases

- Hamdi v. Rumsfeld 542 U.S. 507 (2004)
- Rasul v. Bush, 542 U.S. 466 (2004)
- Hamdan v. Rumsfeld 548 U.S. 557 (2006).

Switzerland

Swiss Federal Archives, Bern

- Conférence Diplomatique sur la Réaffirmation et le Développement du Droit International Humanitaire Applicable dans les Conflits Armés (1973-1979,) J2.111*, 1979/29.

Other Swiss Documents

Final Record of the Diplomatic Conference of Geneva of 1949, *Vols. I-III* (Bern: Federal Political Department, 1963)

Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977, Volumes 1-17 (Bern: Federal Political Department, 1978)

Other Organizations

Institut de Droit International

Règlement sur la responsabilité des Etats à raison des dommages soufferts par des étrangers en cas d'émeute, d'insurrection ou de guerre civile, Session de Neuchâtel, 1900. http://www.idi-iil.org/idiF/resolutionsF/1900_neu_01_fr.pdf (Consulted on August 13, 2013.)

Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectionnel, envers les gouvernements établis et reconnus qui sont aux prises avec l'insurrection, Session de Neuchâtel, 1900. http://www.idi-iil.org/idiF/resolutionsF/1900_neu_02_fr.pdf (Consulted on August 13, 2013.)

United Nations

Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 at 3 (1968).

U Thant, Secretary-General, United Nations, Letter to Séan McBride, Secretary-General, International Commission of Jurists, April 25, 1968. On file with author.

Séan McBride, Secretary-General, International Commission of Jurists, Letter to U Thant, Secretary-General, United Nations, May 17, 1968. On file with author.

United Nations General Assembly, *Respect for Human Rights in Armed Conflicts*, *Report of the Secretary-General,* UN Doc. A/7720, 1969.

United Nations General Assembly, *Respect for Human Rights in Armed Conflicts*, *Report of the Secretary-General,* UN Doc. A/8052, 1970.

United Nations General Assembly, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res. 1514 / UN GAOR, 15th Sess., Supp. No. 16 / UN Doc. A/4684 (1960) 66.

United Nations General Assembly, *International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.

United Nations General Assembly, *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, G.A. res. 2625, Annex, 25 UN GAOR, Supp. (No. 28), U.N. Doc. A/5217 at 121 (1970).

United Nations General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987.

United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June - 17 July 1998, Official Records. New York: United Nations, 2002.

Other Treaties and Legal Instruments Cited

Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva, 22 August 1864.

Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899.

Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Geneva, 17 June 1925.

Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.

Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949.

Geneva Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War. ICRC, 1956, available at http://www.icrc.org/applic/ihl/ihl.nsf/INTRO/420?OpenDocument (Consulted on July 12, 2013.)

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, Paris 13 January, 1993.

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September, 1997.

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict, 2000.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005.

Statutes of the International Red Cross and Red Crescent Movement (2006) at http://www.icrc.org/eng/resources/documents/misc/statutes-movement-220506.htm (Consulted on September 5, 2013.)

Convention on Cluster Munitions, 30 May 2008.

United Nations' Arms Trade Treaty, 2 April, 2013.

Websites

International Committee of the Red Cross (ICRC,) War and Law, http://www.icrc.org/ihl

Institut de Droit International – Institute of International Law, http://www.idi-iil.org/

Uppsala Conflict Data Program:
http://www.pcr.uu.se/research/ucdp/faq/#What_is_a_conflict__

Coalition for the International Criminal Court website, http://www.iccnow.org/

International Criminal Court: http://icc-cpi.int/

Geneva Call, http://www.genevacall.org/

Centre for Humanitarian Dialogue, http://www.hdcentre.org/en/home/

Rule of Law in Armed Conflict" (RULAC) project at the Geneva Academy of International Humanitarian Law and Human Rights. http://www.geneva-academy.ch/RULAC/index.php

"Their Words: the Directory of Armed Non-State Actor Humanitarian Commitments," http://theirwords.org

Appendix 1. Comparison of Attendance at Key Meetings, 1912-1949. ("RC" stands for National Society, "G" for government delegation.)

1912	1921	1938	1946 (National Societies only)	1947 (Government Experts Only)	1948	1949
Argentina (RC)	Argentina (RC)	Afghanistan (G)	Argentina	Australia	Afghanistan (G)	Afghanistan
Austria-Hungary (RC+G)	Armenia (RC)	Albania (RC+G)	Australia	Belgium	Argentina (G)	Albania
Belgium (RC+G)	Australia (RC)	Argentina (RC+G)	Austria	Brazil	Australia (RC+G)	Argentina
Bolivia (G)	Austria (RC)	Australia (RC+G)	Belgium	Canada	Austria (RC+G)	Australia
Brazil (RC+G)	Brazil (RC)	Belgium (RC+G)	Brazil	China	Belgium (RC+G)	Austria
Bulgaria (RC)	British India (RC)	Bolivia (RC+G)	Bulgaria	USA	Bolivia (RC)	Belgium
Canada (RC+G)	Bulgaria (RC+G)	Brazil (RC+G)	Canada	France	Brazil (RC+G)	Byelorussia
Chile (RC)	Canada (RC)	Bulgaria (RC+G)	Colombia	Greece	Burma (RC)	Bolivia
China (RC+G)	Checoslovakia (RC+G)	Canada (RC)	Chile	UK	Canada (RC+G)	Brazil
Cuba (RC)	Chile (RC)	Chile (RC+G)	China	India	Chile (RC+G)	Bulgaria
Denmark (RC)	China (RC)	China (RC+G)	Costa Rica	Norway	China (RC+G)	Burma
Dominican Republic (G)	Colombia (G)	Colombia (RC+G)	Cuba	New Zealand	Colombia (RC+G)	Canada
France (RC+G)	Denmark (RC+G)	Costa Rica (RC+G)	Denmark	Netherlands	Costa Rica (RC+G)	Chile
Germany (RC+G)	Dominican Republic (G)	Cuba (RC+G)	Ecuador	Poland	Cuba (RC)	China
Greece (RC+G)	Dutch Indies (RC)	Cezchoslovakia (RC+G)	Egypt	Tchecoslovakia	Denmark (RC+G)	Colombia
Italy (RC+G)	Ecuador (G)	Danzig (RC)	US	South Africa	Dominican Republic (RC+G)	Costa Rica
Japan (RC+G)	Esthonia (RC)	Denmark (RC+G)	Finland		Ecuador (RC)	Cuba
Mexico (RC+G)	Finland (RC)	Dominican Republic (RC+G)	France		Egypt (RC+G)	Czechoslovakia
Norway (G)	Georgia (RC)	Ecuador (RC)	UK		Ethiopia (RC+G)	Denmark
Persia (G)	Germany (RC+G)	Egypt (RC+G)	Greece		Finland (RC+G)	Ecuador
Peru (G)	Greece (RC+G)	Ireland-Eire (G)	Guatemala		France (RC+G)	Egypt
Portugal (RC+G)	Haiti (G)	Estonia (RC)	Haiti		Greece (RC+G)	El Salvador
Russia (RC+G)	Hungary (RC+G)	Finland (RC+G)	Hungary		Guatemala (RC+G)	Ethiopia
Salvador (G)	ICRC	France (RC+G)	India		Haiti (RC+G)	Finland
Serbia (RC)	Italy (RC+G)	Germany (RC+G)	Iraq		Iceland (RC+G)	France
Siam (G)	Japan (RC+G)	UK (RC+G)	Iran		India (RC+G)	Greece
Spain (RC+G)	Latvia (RC)	Greece (RC+G)	Ireland		Iran (RC)	Guatemala
Sweden (RC+G)	Letland	Guatemala (RC+G)	Italy		Ireland (RC+G)	Holy See
Switzerland (RC+G)	Lithuania (RC)	Haiti (RC+G)	Liechtenstein		Italy (RC+G)	Hungary
Turkey (RC+G)	Mexico (RC)	Hungary (RC+G)	Luxembourg		Japan (RC)	India
UK (RC+G)	Netherlands (RC)	India (RC+G)	Mexico		Lebanon (RC)	Iran
Uruguay (G)	New Zealand (RC)	Italy (RC+G)	Norway		Liechtenstein (RC+G)	Ireland
US (RC+G)	Norway (RC)	Japan (RC+G)	New Zealanda		Luxembourg (RC+G)	Israel
Venezuela (G)	Panama (G)	Latvia (RC)	Netherlands		Mexico (RC+G)	Italy
	Persia (G)	Lithuania (RC+G)	Panama		Monaco (RC+G)	Lebanon
	Poland (RC)	Luxembourg (RC+G)	Peru		Netherlands (RC+G)	Liechtenstein
	Portugal (RC+G)	Netherlands (RC+G)	Poland		New Zealand (RC+G)	Luxembourg
	Romania (RC+G)	New Zealand (RC+G)	Portugal		Nicaragua (RC)	Mexico
	Russia (RC-Old)	Nicaragua (RC+G)	Romania		Norway (RC+G)	Monaco
	Serbia (RC+G)	Norway (RC+G)	Siam		Pakistan (RC+G)	Netherlands
	Siam (RC+G)	Panama (RC+G)	Sweden		Papal States (G)	New Zealand
	South Africa (RC)	Papal State (G)	Switzerland		Paraguay (RC+G)	Nicaragua
	Spain (RC)	Paraguay (RC)	Tchecoslovakia		Peru (RC+G)	Norway
	Sweden (RC+G)	Peru (RC+G)	Turkey		Philippines (RC+G)	Pakistan
	Switzerland (RC+G)	Poland (RC+G)	South Africa		Portugal (G)	Peru
	Turkey (RC)	Portugal (RC+G)	Uruguay		Siam (RC)	Portugal
	UK (RC+G)	Rumania (RC+G)	Venezuela		Spain (RC+G)	Romania
	Ukraine (RC)	Siam (RC+G)	Yugoslavia		Sweden (RC+G)	Spain
	Uruguay (G)	South Africa (RC+G)			Switzerland (RC+G)	Sweden
	USA (RC)	Spain-Republican (RC)			Syria (RC+G)	Switzerland
	Venezuela (RC)	Spain-Nationalist (RC)			Turkey (RC+G)	Syria
		Sweden (RC+G)			South Africa (RC+G)	Thailand
		Switzerland (RC+G)			UK (RC+G)	Turkey
		Turkey (RC+G)			USA (RC+G)	Ukraine
		USSR (RC+G)			Uruguay (RC+G)	USSR
		USA (RC+G)			Venezuela (RC+G)	UK
		Uruguay (RC)				USA
		Venezuela (RC+G)				Uruguay
		Yugoslavia (RC+G)				Venezuela
34	51	59	48	16	56	59

Appendix 2. Various Formulas on the Inclusion of Internal Conflicts in the Geneva Conventions, 1946-1949

	Working Text on Internal Conflicts	Notes
1946 (Conference of National Societies)	"In the case of armed conflict within the borders of a State, the Convention shall also be applied by each of the adverse parties, unless one of them announces expressly its intention to the contrary."	This was the text produced at the meeting.
1947 (Government Experts)	"In case of civil war, in any part of the home or colonial territory of a Contracting Party, the principles of the Convention shall be equally applied by the said Party, subject to the adverse Party also conforming thereto."	This was the text produced at the meeting.
1948 ("Stockholm text")	*For the Wounded and Sick Conventions:* "In all cases of armed conflict not of an international character which may occur in the territory of one or more of the High Contracting Parties, each of the adversaries shall be bound to implement the provisions of the present Convention. The Convention shall be applicable in these circumstances, whatever the legal status of the Parties to the conflict and without prejudice thereto." *For the POW and Civilians Conventions*, the following phrase was inserted: "subject to the adverse party likewise acting in obedience thereto."	This was the text produced at the meeting.
1949 (Diplomatic Conference of 1949)	See Stockholm formula for Wounded and Sick Conventions above, but add: 1) government recognition of belligerence of rebels; 2) rebels should present characteristics of a state, i.e. An organized military force under the direction of a civil authority, control of territory, governmental functions over a population, explicit and actual compliance with the laws and customs of war, and the means of enforcing the Geneva Conventions. Protecting Powers were only authorized by special agreements.	First Working Party Text

	In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimurn, the following provisions: 1. Persons taking no active part in the hostilities, and those placed hors de combat by sickness, wounds, captivity or any other cause, shall be treated humanely in all circumstances and without any discrimination. To this end, the following acts are and shall remain prohibited with respect to the above-mentioned persons: a) violence to life, in particular murder of all kinds, mutilation, cruel treatment and torture; b) taking of hostages; c) outrages upon personal dignity, in particular, humiliating and degrading treatment; d) the passing of sentences and carrying-out of executions without a previous judgment pronounced by a regularly-constituted court, affording all guarantees which are recognized as indispensable by civilized peoples. 2. The wounded and sick shall be collected and cared for. 3. No adverse discrimination shall be practised on the basis of differences of race, colour, religion or faith, sex, birth or wealth. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the precedingprovisions shall not affect the legal status of the Parties to the conflict.	Second Working Party Text ("French Proposal")
	A. Wounded and Sick and Maritime Conventions."In the case of armed conflict not of an international character	Soviet Proposal (Similar text for the Prisoners of War

	occurring in the territory of one of the States, Parties to the present Convention, each Party to the conflict shall apply all the provisions of the present Convention guaranteeing:Humane treatment for the wounded and sick; prohibition of all discriminatory treatment of wounded and sick practised on the basis of differences of race, colour, religion, sex, birth or fortune." *B. Prisoners of War Convention.*"In the case of armed conflict not of an international character occurring in the territory of one of the States, Parties to the present Convention, each Party to the conflict shall apply all the provisions of the present Convention guaranteeing:Humane treatment for prisoners of war; compliance with all established rules connectedwith the prisoners of war regime; prohibition of all discriminatory treatment of prisoners of war practised on the basis of differences of race, colour, religion, sex, birth or fortune."*C. Civilians Convention.*"In the case of armed conflict not of an international character occurring in the territory of one of the States, Parties to the Convention, each Party to the conflict shall apply all the provisions of the present Convention guaranteeing:Humane treatment for the civilian population; prohibition on the territory occupied by the armed forces of either of the parties, of reprisals against the civilian population, the taking of hostages, the destruction and damaging of property which are not justified by the necessities of war, prohibition of any discriminatory treatment of the civilian population practised on the basis of differences of race, colour, religion, sex, birth or fortune."	and Civilians Conventions.)

Appendix 3. Summary of States' Public Positions on Common Article 3 at Start of the 1949 Conference and Changes Observed during It

Debating States' Public Position early in 1949 Conference	Regime Type (in 1949)	Perceived Risk/Benefit toward CA3, and possible reasons why	Did Early Position Change during Debates? How?
Delete			
United Kingdom	Democracy	High (Colonial power) - Low Benefit	Yes - Accepted extension of Conventions to internal conflicts, supported and lobbied for French proposal
Yes but with Conditions			
France	Democracy	High (Colonial power) - Low benefit	Yes - Accommodated, drafted proposal and lobbied others for support
United States	Democracy	Medium Ris (Fear of Communist Revolutions?)/Medium Benefit	Yes - Accomodated to fewer conditions
Greece	?	High Risk (Active civil war)/High Benefit -	Yes - Accomodated to fewer conditions
China	?	High Risk (Active civil war)/High Benefit -	Yes - Accomodated to fewer conditions
Canada	Democracy	? Likely to side with US	Yes - Accomodated to fewer conditions
Australia	Democracy	? Likely to side with UK	Yes - Accomodated to fewer conditions
Burma	New Democracy	High Risk (Fear of internal rebellion)//Low Benefit	Yes but changed to REJECT extension
Yes - Few or no conditions			
Norway	Democracy	Principled Approach	Always Pro-Extension
Denmark	Democracy	Principled Approach	Always Pro-Extension
Mexico	Democracy (Authoritarian?)	Low Risk, Principled Approach	Always Pro-Extension
Uruguay	Democracy	None	Always Pro-Extension
Monaco	Constitutional Monarchy	Principled Approach	Always Pro-Extension
USSR	Totalitarian	Low Risk/High Benefit?	Always Pro-Extension
Rumania	Totalitarian?	Likely to side with USSR	Always Pro-Extension
Hungary	Totalitarian?	Likely to side with USSR	Always Pro-Extension
Czechoslovakia	Totalitarian?	Likely to side with USSR	Always Pro-Extension
Switzerland	Democracy	None	Always Pro-Extension

Appendix 4. Draft Article 42, First Protocol[886]

Combatants and prisoners of war

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.

2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he
carries his arms openly:

(a) during each military engagement, and
(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.

6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.

---

[886] This is the final version of the text, reorganized as Article 44 in the negotiated treaty

7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.

8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.