
A Short History of International Humanitarian Law

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Abstract

This article questions the conventional histories of international humanitarian law, which view international humanitarian law as the heir to a long continuum of codes of warfare. It demonstrates instead that the term international humanitarian law first appeared in the 1970s, as the product of work done by various actors pursuing different ends. The new idea of an international humanitarian law was codified in the 1977 Additional Protocols to the Geneva Conventions. Nevertheless, many of the provisions of the Protocols remained vague and contested, and their status, together with the humanitarian vision of the law they outlined, was uncertain for some time. It was only at the end of the 20th century that international lawyers, following the lead of human rights organizations, declared Additional Protocol I to be authoritative and the law of war to be truly humanitarian. As such, this article concludes that international humanitarian law is not simply an ahistorical code, managed by states and promoted by the International Committee of the Red Cross. Rather, it is a relatively new and historically contingent field that has been created, shaped and dramatically reinterpreted by a variety of actors, both traditional and unconventional.

1 Introduction

International humanitarian law, as the *ius in bello* is currently described, is imbued with a particular sense of its history. Sometimes, international lawyers locate international humanitarian law in a long history of codes of warfare that straddle different times and cultures. At other points, international lawyers might emphasize the contribution of Henry Dunant, who witnessed the Battle of Solferino and was inspired to create the International Committee of the Red Cross (ICRC) and instigate the tradition of the Geneva Conventions.¹ These histories help to inform the current understanding of the nature and purpose of international humanitarian law. In this article, I will relate a different – a shorter – history of international humanitarian law. I will describe

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¹ Geneva Conventions 1949, 1125 UNTS 3.

how the term was created, then fought for and, finally, won in the 1970s through the propitious convergence of a range of different actors and interests. The new name represented, as its adherents fully understood, not just a shift in terminology but also a fresh approach to the *ius in bello*. It indicated a new field of law – an enlarged humanitarian law – endowed with an appropriate array of humanitarian principles. The 1977 Additional Protocols to the Geneva Conventions were the repository of these principles; they held the outline of the new field.² Yet, despite this accomplishment, ‘international humanitarian law’ and the humanitarian understanding of the *ius in bello* remained controversial for almost two decades, as states and legal commentators questioned the Protocols’ principles and authority. It was only at the very end of the 20th century that practitioners of international humanitarian law, following the example set by human rights organizations, suddenly accepted the authority of Additional Protocol I and, with it, a humanitarian vision of the *ius in bello*. This shift can be seen in both the newly confident use of the term ‘international humanitarian law’ to describe all of the laws of war³ and a renovated understanding of the content of this law – an understanding that is exemplified in the changing interpretation of the principle of proportionality.

The history that follows, of how this change in the language and understanding of the *ius in bello* came about, shows that it was a contested and contingent process. Moreover, it reveals that the contest for international humanitarian law was played out by a diffuse cast of actors, which included both the conventional contributors to international law and other less traditional, less acknowledged, participants. As such, this history provides an explanation of how one important aspect of the paradigm shift from sovereignty to humanitarianism in international affairs – a shift that has been observed by several scholars⁴ – was accomplished. At the same time, it also shows something about the nature of international humanitarian law itself, by illustrating international humanitarian law’s curious allocation of authority, its potential for change and its restrictions on variation.

2 International Humanitarian Law

The term ‘international humanitarian law’ refers to the current understanding of the *ius in bello* – the laws concerning the conduct of warfare. The ICRC, which is considered to have a special relationship with international humanitarian law as its guardian and promoter,⁵ describes it in the following manner:

² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) 1977, 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) 1977, 1125 UNTS 609.

³ Meron, ‘The Humanization of Humanitarian Law’, 94 *American Journal of International Law (AJIL)* (2000) 239, at 239.

⁴ See R. Teitel, *Humanity’s Law* (2011); D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2004); Meron, *supra* note 3, at 243, for accounts of this paradigm shift.

⁵ See, e.g., Dormann and Maresca, ‘The International Committee of the Red Cross and Its Contribution to the Development of International Humanitarian Law in Specialized Instruments’, 5 *Chinese Journal of International Law (Chinese J Int’l L)* (2004–2005) 217, at 217; Sandoz, ‘The International Committee of the Red Cross as Guardian of International Humanitarian Law’ (31 December 1998), available at www.icrc.org/eng/resources/documents/misc/about-the-icrc-311298.htm (last visited 8 January 2015).

International humanitarian law is part of the body of international law that governs relations between states. It aims to protect persons who are not or are no longer taking part in hostilities, the sick and wounded, prisoners and civilians, and to define the rights and obligations of the parties to a conflict in the conduct of hostilities.⁶

The ICRC's explanation is unexceptional; lawyers provide similar definitions.⁷ International humanitarian law is, broadly speaking, that branch of public international law that seeks to moderate the conduct of armed conflict and to mitigate the suffering that it causes.⁸

International lawyers tend to gloss this general statement with the comment that traditionally the term 'international humanitarian law' was applied to the 'Geneva' part of the *ius in bello*, which had a humanitarian focus, as opposed to the 'Hague' law, which was more concerned with the methods of warfare.⁹ They then state, however, that this division has 'long been highly artificial from a number of points of view'.¹⁰ Both parts of the law, it is argued, are based on humanitarian concerns and therefore overlap. Indeed, as Cherif Bassiouni says, '[t]hey are so intertwined and so overlapping that they can be said to be two sides of the same coin'.¹¹ Thus, it is reiterated, the term international humanitarian law can be used to refer to all of the rules of international law that concern armed conflict – whether customary, conventional, Hague or Geneva.¹²

3 Histories of International Humanitarian Law

International lawyers tend to attribute a long history to this current understanding of international humanitarian law. In their descriptions of international humanitarian law, whether their focus is on historical issues or contemporary concerns, they will often refer to an accepted narrative of international humanitarian law, which assumes its longevity and agrees on its important milestones. There are two common ways that international lawyers think about the history of international humanitarian law. One is the story of the humanization of war and law; the second is a story of imperialism and oppression.

The orthodox history of international humanitarian law tells the following story. Laws of war have always existed to limit the destruction of war.¹³ The ancients, the

⁶ International Committee of the Red Cross (ICRC), *War and International Humanitarian Law* (29 October 2010), available at www.icrc.org/eng/war-and-law/overview-war-and-law.htm (last visited 20 December 2014).

⁷ See, e.g., Bassiouni, 'The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities', 8 *Transnational Law and Contemporary Problems (Transnat'l L & Contemp Probs)* (1998) 199, at 200; Greenwood, 'Historical Development and Legal Basis' in D. Fleck and M. Bothe (eds), *The Handbook of International Humanitarian Law* (2008) 1, at 11; H. McCoubrey, *International Humanitarian Law: Modern Developments in the Limitation of Warfare* (1998), at 1.

⁸ McCoubrey, *supra* note 7, at 1.

⁹ Bassiouni divides these sectors differently, as conventional law (Geneva) and customary law (Hague). Bassiouni, *supra* note 7, at 200.

¹⁰ McCoubrey, *supra* note 7, at 2.

¹¹ Bassiouni, *supra* note 7, at 199–200.

¹² Greenwood, *supra* note 7, at 11.

¹³ See, e.g., J.-M. Henckaerts and L. Doswald-Beck, for the International Committee of the Red Cross, *Customary International Humanitarian Law* (2005), at ix.

knights of the middle ages, the jurists of the early modern period all testify to the record of this concern.¹⁴ Nor is it just a Western concern. Other cultures, such as China, Japan, India and the Islamic world, have their own traditions of rules of warfare.¹⁵ Yet, despite this universal concern, the attempt to limit war has suffered various setbacks. It was not until the 19th century that a movement to codify the laws of war began and modern international humanitarian law was born.¹⁶

International lawyers refer to the Lieber Code, written to govern the conduct of Union forces during the American Civil War, as the first example of the codification of the laws of war,¹⁷ but they regard the Battle of Solferino in 1859 as the crucial moment in the history of modern humanitarian law.¹⁸ Henry Dunant, a Swiss citizen, happened to be present. Horrified by the suffering of injured soldiers, he was inspired to found the Red Cross movement,¹⁹ which was to become ‘a promoter and custodian of the humanitarian idea and the primary initiation for its transition into international humanitarian law’.²⁰ Dunant also instigated the adoption in 1864 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.²¹ This Convention marks the start of the Geneva tradition of humanitarian law. The orthodox history goes on to list the following inventory of humanitarian instruments: the 1907 Hague Convention,²² the 1949 Geneva Conventions and the 1977 Additional Protocols.²³

This orthodox narrative tends to conflate a long history of varied approaches to the laws of war with modern international humanitarian law. Although it is acknowledged that earlier approaches to the laws of war were not identical with modern international humanitarian law, their shared ‘humanitarian’ values are stressed and points of continuity are emphasized.²⁴ And while it is sometimes stated that the term international humanitarian law is new, it is not usual for a writer to state exactly how new it is or when and why the term started to be used.²⁵ This

¹⁴ See, e.g., McCoubrey, *supra* note 7, at 8; M. Sassòli and A.A. Bouvier, *How Does Law Protect in War?* (2006), at 124–125; T. Meron, *Bloody Constraint: War and Chivalry in Shakespeare* (1998), at 12.

¹⁵ See, e.g., McCoubrey, *supra* note 7, at 8; Sassòli and Bouvier, *supra* note 14, at 124–125.

¹⁶ See, e.g., Meron, *supra* note 14, at 12.

¹⁷ See, e.g., Greenwood, *supra* note 7, at 21; Schindler, ‘International Humanitarian Law: Its Remarkable Development and Its Persistent Violation’, 5 *Journal of the History of International Law (J Hist Int’l L)* (2003), 165 at 167. Lieber Code, General Order no. 100 (24 April 1863).

¹⁸ See, e.g., McCoubrey, *supra* note 7, at 16.

¹⁹ See, e.g., Greenwood, *supra* note 7, at 22.

²⁰ See, e.g., M.A. Meyer and H. McCoubrey (eds), *Reflections on Law and Armed Conflicts: The Selected Works on the Laws of War by the Late Professor Colonel G.I.A.D Draper* (1998), at 69.

²¹ See, e.g., Henckaerts and Doswald-Beck, *supra* note 13, at ix. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949, 75 UNTS 31.

²² See, e.g., W.A. Solf, ‘Protection of Civilians against the Effects of Hostilities under Customary International Law and under Protocol I’, 1 *American University Journal of International Law and Policy (Am U J Int’l L & Policy)* (1986) 117, at 123. Hague Convention for the Pacific Settlement of International Disputes 1907, 2 *AJIL Supp.* 43 (1908). The Hague Conventions are not technically part of this tradition, but as the Hague and Geneva Conventions are now merged, they tend to be listed as part of this history.

²³ See, e.g., Henckaerts and Doswald-Beck, *supra* note 13, at ix; Jaworski, ‘“Military Necessity” and “Civillian Immunity”: Where is the Balance?’, 2 *Chinese J Int’l L* (2003) 175 at 179–180.

²⁴ See, e.g., Greenwood, *supra* note 7, at 15.

²⁵ See, e.g., *ibid.*, at 11.

confusion is compounded as the two terms, 'international humanitarian law' and 'laws of war', are often used interchangeably in the historical account – thereby further obscuring any point of difference between them. In this way, the orthodox narrative is able to juxtapose the image of a long tradition of humanitarian law with the achievements of the modern age. The result is that the values of international humanitarian law appear universal and ahistorical, while their modern codification is laudable.

There is another story about international humanitarian law, which describes it not as a history of compassion and civilization but, rather, as a history of oppression and imperialism. Drawing on post-colonial and critical methodologies, lawyers describe a history in which military or Western needs have consistently trumped humane values, exposing civilians to the violence of war and legitimizing their suffering.²⁶ In these historical accounts, the catalogue of treaties is a litany of compromise and pragmatism. The 1868 Declaration of Saint Petersburg was a pointless failure.²⁷ The 1907 Hague Conventions left military necessity unchallenged as the dominant value of the laws of war and civilians more vulnerable than ever to the scourge of combat.²⁸ The Nuremberg Tribunal actually helped legitimate unrestrained conduct in war by refusing to convict, or even prosecute, based on violations of the laws of war.²⁹ Even the contemporary values of humanitarianism have been called into question, with David Kennedy identifying its ability to conceal problems and misdirect attention.³⁰

Both this negative account, and the more common orthodox history it reacts to, place the contemporary understanding of international humanitarian law in a long continuum with other codes of warfare. They extend international humanitarian law into the past. They elide its specificity and conceal its creation by placing it in a continuum with other codes of warfare. By deploying or relying on these histories, lawyers can suggest the longevity of international humanitarian law and bolster any claim they might wish to make about the law. For example, supporters of international humanitarian law will find it easier to claim that a principle of international humanitarian law is well established, unarguable or obvious if it is considered part of a long tradition. An established history also makes claims to the moral validity, authority and status of the field itself harder to refute. Alternatively, for those who wish to attack or change international humanitarian law, placing it in a long history makes it easier to draw connections with a tradition of oppression. In this way, histories of international humanitarian law not only reflect but also help to shape the current understanding of the field.

²⁶ See, e.g., J.G. Gardam and M.J. Jarvis, *Women, Armed Conflict and International Law* (2001), at 11; Gardam, 'Gender and Non-Combatant Immunity', 3 *Transnat'l L & Contemp Probs* (1993) 345, at 348–349; Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', 40 *Harvard International Law Journal* (Harv Int'l LJ) (1999) 1.

²⁷ See, e.g., Jochnick and Normand, 'The Legitimation of Violence: A Critical History of the Laws of War', 35 *Harv Int'l LJ* (1994) 49, at 66. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight (Declaration of St. Petersburg) 1868, 1 *AJIL* 95.

²⁸ See, e.g., *ibid.*, at 76.

²⁹ See, e.g., *ibid.*, at 94.

³⁰ Kennedy, *supra* note 4.

4 Introducing International Humanitarian Law

Despite the widespread acceptance of these long histories of international humanitarian law, both the term ‘international humanitarian law’ and the particular conceptualization of the *ius in bello* that it evokes are fairly new. Prior to the 1960s, the term ‘international humanitarian law’ was not used to describe a field of law, and even when the term started to be used in the 1960s it still denoted quite a different understanding of the law to its current incarnation. Before this period, common and academic usage referred first to the ‘laws of war’ and later, in the 1960s, to the ‘laws of armed conflict’ in an attempt to comprehend *de facto* and internal conflicts.³¹

The ‘laws of war’ or ‘armed conflict’ was not just a different nomenclature for the same type of law. Rather, it was an appropriate title for a different concept of law and different rules. The laws of war were the ‘rules of the Law of Nations respecting warfare’.³² These rules, as various editions of Oppenheim’s *International Law* repeated throughout the first half of the 20th century,³³ contained, as their first principle, the idea that ‘a belligerent is justified in applying any amount and any kind of force which is necessary for the realisation of the purpose of war – namely, the overpowering of the opponent’.³⁴

The second principle of the law of war, Oppenheim’s *International Law* continues, is the principle of humanity, which holds that unnecessary forms of violence – violence that is not essential for the defeat of a belligerent – are not permitted. Other commentators corroborated this understanding of the rules of war. As Spaight stated in 1911:

[t]he general principle of war law is this – that no engine of war may be used which is (if one may use the term) supererogatory in its effect. The principle results from a compromise of humanitarian and military interests, the latter – for war is war – being the more powerful interest of the two.³⁵

The view that the rules of war must reconcile the ‘contradictory’ principles of humanity and military necessity persisted throughout the first part of the century.³⁶ Georg Schwarzenberger, writing in the 1960s, described the laws of war as an attempt to balance the needs of war with the standards of civilization.³⁷ He argued that, while some humanitarian rules protecting civilization did exist, they would generally only prevail where they did not interfere with military imperatives. Therefore, he acknowledged that there were rules that prevented truly sadistic or wanton acts – those that could not even claim to be part of a ‘scorched earth’ policy. There were also a few rules that formed a real compromise between civilization and military necessity, such as

³¹ See, e.g., Schwarzenberger, ‘From the Laws of War to the Law of Armed Conflict’, 17 *Journal of Public Law (J Pub L)* (1968) 61.

³² See, e.g., L. Oppenheim, *International Law: A Treatise*, edited by R.F. Roxburgh (3rd edn, 1921), at 84.

³³ *Ibid.*, at 85; L. Oppenheim, *International Law: A Treatise* (2nd edn, 1912), at 78; L. Oppenheim, *International Law: A Treatise*, edited by H. Lauterpacht (7th edn, 1952), at 227.

³⁴ Oppenheim, *supra* note 32, at 85–86; Oppenheim (1952), *supra* note 33, at 227.

³⁵ J.M. Spaight, *War Rights on Land* (1911), at 75. See also A.P. Higgins, *War and the Private Citizen* (1912), at 19.

³⁶ Kunz, ‘The Laws of War’, 50 *AJIL* (1956) 313, at 314.

³⁷ G. Schwarzenberger, *International Law and Order* (1971), at 172.

rules preventing poisoned weapons. The majority of rules, however, that referred to military necessity or contained 'as far as possible clauses' did not function to safeguard the minimum standard of civilization. Rather, they existed to cover up the inability or unwillingness to achieve this objective.³⁸

Thus, for the first part of the 20th century, legal commentators perceived the humanitarian principles of the rules of war as one thread, and often a weaker thread, of the law of war. This perception was underscored by international lawyers' understanding of, and categorization of, the existing humanitarian laws. After the second Hague Peace Conference in 1907, commentators listed the important developments in the limitation of war as the Declaration of Paris, the Declaration of St Petersburg, which prohibited certain weapons, the 1864 and 1906 Geneva Conventions, dealing with wounded and sick soldiers, and the 1899 and 1907 Hague Conventions.³⁹ All of these conventions were based, as they 'should be',⁴⁰ on 'an equilibrium between the cruel necessities of war and humanitarian ideals'.⁴¹ Out of this bundle of documents, the Geneva Conventions, as conventional law, provided particularly authoritative humanitarian provisions,⁴² but their purview was restricted to their subject matter. The Hague Peace Conferences had originally promised a more comprehensive attempt at the prevention or humanization of war,⁴³ but their outcome was also limited. Even an advocate such as James Brown Scott apologized for the results:

The result of a conference, therefore, is often strangely at variance with its program. The sweeping reforms of the enthusiast are brushed aside, and in their place tentative measures, timid measures perhaps, appear; but we must not forget that a step in advance is still a step in advance, and that the failure of today is the success of the morrow.⁴⁴

Despite this disappointment, Scott, and other observers, still remarked on the Conferences' important humanitarian advances.⁴⁵ They had produced provisions outlining the (limited) rights to combatancy,⁴⁶ the treatment of prisoners of war, and protection for non-combatants in Articles 25–28.⁴⁷ They had also denied the existence of an unlimited right to injure the enemy.⁴⁸ Yet, at the same time, the work of the Conferences also managed to 'adapt itself to the needs of warfare and to leave sufficient free play to military necessity'.⁴⁹ Indeed, the provisions only provided paltry humanitarian

³⁸ G. Schwarzenberger, *International Law As Applied by International Courts and Tribunals* (1968), at 10–11.

³⁹ Spaight, *supra* note 35, at 8–10; Oppenheim (1952), *supra* note 33, at 228–230; Higgins, *supra* note 35, at 15–17; J. Westlake, *International Law* (2nd edn, 1913), at 59–61.

⁴⁰ J.L. Kunz, 'The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision', 45 *AJIL* (1951) 37, at 59.

⁴¹ *Ibid.*, at 59.

⁴² Spaight, *supra* note 35, at 420.

⁴³ E.W. Holls, *The Peace Conference at the Hague, and Its Bearings on International Law and Policy* (1900), at 150.

⁴⁴ J.B. Scott, *The Hague Peace Conferences of 1899 and 1907* (1909), at 37–38. See also O. Nippold, *The Development of International Law after the World War* (1923), at 132 about the limits of humanitarianism in the Convention: the respect paid to military exigency.

⁴⁵ Holls, *supra* note 43, at ix–x.

⁴⁶ The restriction of combatants to an official, standing, army was considered a humanitarian development – see Oppenheim (1912), *supra* note 33, at 79.

⁴⁷ Scott, *supra* note 44, at 524–536.

⁴⁸ W.I. Hull, *The Two Hague Peace Conferences* (1908), at 469.

⁴⁹ Nippold, *supra* note 44, at 132.

protection for non-combatants, who remained exposed to bombardment, starvation and reprisals.⁵⁰ Moreover, in the eyes of some contemporaries, these provisions had a problematic status. The Hague Regulations, as they were described, were only an annex to a convention, and, as such, they did not have the same effect as an international convention.⁵¹ More importantly, they only applied when all parties to a conflict were bound, which proved to be a serious weakness during the World Wars.⁵²

The Nuremberg and Tokyo Trials confirmed the status of the Hague Regulations as customary law,⁵³ but by this point international lawyers had considered their provisions on the conduct of warfare to be outdated and not particularly useful for modern conditions and weaponry, such as aircraft.⁵⁴ Meanwhile, the 1929 and 1949 Geneva Conventions had adopted and expanded upon some of the humanitarian subjects of the Hague Conventions, in particular, the protection of prisoners of war and the management of occupied territories.

These developments encouraged legal commentators to start to separate the ‘Geneva’ and ‘Hague’ traditions of the laws of war in a manner that had not been apparent in earlier texts. Some lawyers now distinguished the traditions as the ‘customary’ Hague law and the ‘conventional’ Geneva law.⁵⁵ Others, following the ICRC, began to refer to Geneva law as ‘humanitarian’ law,⁵⁶ a move that Schwarzenberger described as a ‘fashionable’ attempt to describe law made on the fringes of the law of war.⁵⁷ According to this new distinction, Hague law governed the actual conduct of war, while Geneva law governed the humanitarian aspects of law. Jean Pictet, director general of the ICRC Directorate, argued that since the Geneva Conventions had updated the law on prisoners of war and civilian populations, these subjects should also now be understood to belong to the Geneva – humanitarian – part of the law. ‘Hague Law’, he suggested, would now just refer to the remainder, dealing with the means and methods of combat⁵⁸ or, as Pictet put it, the ‘law of war proper’.⁵⁹

⁵⁰ Alexander, ‘The Genesis of the Civilian’, 20 *Leiden Journal of International Law (Leiden J Int’l L)* (2007) 359, at 364; Higgins, *supra* note 35, at 132.

⁵¹ Spaight held this view. See Spaight, *supra* note 35, at 6–7. It was, however, a debatable question. See Renault, ‘War and the Law of Nations in the Twentieth Century’, 9 *AJIL* (1915) 1, at 7–8. Regulations to the Hague Convention 1907, 187 CTS 227 (1907).

⁵² See Oppenheim, *supra* note 32, at 88–89; Oppenheim (1952), *supra* note 33, at 234; Lauterpacht, ‘The Problem of the Revision of the Law of War’, 29 *British Yearbook of International Law (British Y’book Int’l L)* (1952) 360, at 367. See also J.W. Garner, *International Law and the World War* (1920), at 18–21, who argues that the 1907 Hague Conventions were not binding during the First World War.

⁵³ Oppenheim (1952), *supra* note 33, at 234; Schwarzenberger, *supra* note 38, at 20.

⁵⁴ Kunz, *supra* note 40, at 38.

⁵⁵ Oppenheim (1952), *supra* note 33, at 234; Schwarzenberger, *supra* note 38, at 20.

⁵⁶ Schindler, ‘Human Rights and Humanitarian Law: Interrelationship of the Laws’, 31 *American University Law Review (Am U L Rev)* (1981–1982) 935, at 935. Schindler states that the ICRC first started making this distinction in the 1950s before the Geneva Conventions were simply considered part of the law of war.

⁵⁷ Schwarzenberger, *supra* note 37, at 177.

⁵⁸ Pictet, ‘The Principles of International Humanitarian Law’, 6 *International Review of the Red Cross (Int’l Rev Red Cross)* (1966) 455, at 457; J. Pictet, *Humanitarian Law and the Protection of War Victims* (1975), at 16.

⁵⁹ Pictet, *supra* note 58, at 16.

Thus, while earlier texts had described the Hague Regulations and Geneva Conventions as part of a body of law that balanced humanitarian and military concerns,⁶⁰ legal writers now severed these principles, leaving the realm of military interests and military necessity to the Hague and bequeathing all of the humanitarian principles of the laws of war to Geneva⁶¹ and the administration of the ICRC. These humanitarian rules still made no claim to constitute the whole of the law. Indeed, they appeared even more circumscribed now that they were confined to the subject matter of the Geneva Conventions, enumerated in the titles of the conventions. Moreover, the repeated distinction between the Geneva rules and the 'law of war proper'⁶² had the effect of lending the humanitarian rules something of a secondary, peripheral appearance. As such, it was clear that the *ius in bello* continued to contain both humanitarian values and a strong appreciation of military considerations – they were just divided into separate traditions, instead of existing intertwined through all of the rules of warfare.

This severance meant that the Hague and Geneva division, now described as artificial, was, during this period, relevant and real. It had clear implications for the development and ownership of the law. The ICRC's promotion of the division may have strengthened its claim to the humanitarian laws, but it also limited the ICRC's ability to intervene in 'Hague' law. In the 1950s, Kunz argues, the ICRC ran afoul of this distinction, as it tried to draft a new code for the protection of the civilian population. The ICRC's 1955 Draft Rules caused some consternation among National Red Cross societies and private experts, who feared that it went beyond the bounds of ICRC concerns and interfered in government prerogatives.⁶³ The ICRC accepted this feedback and prepared a new draft, the 1956 Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War.⁶⁴ In this draft, Josef Kunz explained, the ICRC tried to adhere more closely to the accepted Geneva concerns.⁶⁵ Indeed, to better signal its limited ambitions, the ICRC named its commission at the New Delhi Conference the 'international humanitarian law commission'.⁶⁶ In this way, the ICRC made an early use of the term 'international humanitarian law', but it deployed the term in a very cautious manner that displayed its willingness to circumscribe its claims to the law. Nevertheless, despite the ICRC's restraint, governments could not agree on the draft, and the Conference was a failure.

After this first, abortive, use of the term 'international humanitarian law', Jean Pictet continued to use and publicize the term among a fairly small audience in the

⁶⁰ Lauterpacht, *supra* note 52, at 363–364.

⁶¹ See, e.g., K. Suter, *An International Law of Guerrilla Warfare* (1984), at 34, saying that the Geneva Conventions, not Hague, deal with prisoners of war; Erickson, 'Protocol I: A Merging of the Hague and Geneva Law of Armed Conflict', 19 *Virginia Journal of International Law (Va J Int'l L)* (1978–1979) 557, at 559; Kalshoven, 'Human Rights and Armed Conflict: Conflicting Views: Remarks', 67 *American Society of International Law Proceedings (Am Soc Int'l L Proc)* (1973) 141, at 159.

⁶² Pictet, *Humanitarian Law*, *supra* note 58, at 16.

⁶³ Kunz, 'The 1956 Draft Rules of the International Committee of the Red Cross at the New Delhi Conference', 53 *AJIL* (1959) 132, at 134–135.

⁶⁴ *Ibid.*, at 134–135.

⁶⁵ *Ibid.*, at 135.

⁶⁶ *Ibid.*

1960s. He published an article *The Development of International Humanitarian Law* in 1963,⁶⁷ a short study in 1967, entitled *Principles of International Humanitarian Law*,⁶⁸ and an expanded and clarified work *Humanitarian Law and the Protection of War Victims*.⁶⁹ In this work, Pictet explained that he used the term ‘international humanitarian law’ to comprise the humanitarian, Geneva, laws of war and human rights.⁷⁰ Thus, while Pictet propagated the use of the term international humanitarian law, he did not consider international humanitarian law synonymous with, or a replacement for, the laws of war. It was just an expression to describe a part of the laws of war, conjoined with human rights law.

The transition from Pictet’s esoteric discussion, which maintained the distinction between the ICRC’s humanitarian rules and the ‘real’ laws of warfare, to a field of ‘international humanitarian law’ that supplanted the ‘laws of armed conflict’ took place over a remarkably short period of time. It began in the late 1960s and was completed in 1974 with the assembly of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. The speed and decisiveness of this transition was due to the convergence of three distinct influences with quite different objectives: Seán MacBride, the UN General Assembly and the ICRC.

A Seán MacBride

At much the same time that Pictet was writing about international humanitarian law, Seán MacBride, Secretary-General of the International Commission of Jurists (ICJ), international and local politician, erstwhile chief of staff of the Irish Republican Army, and co-founder of Amnesty International,⁷¹ was busy lobbying non-governmental organizations (NGOs) and governments about an issue close to his heart. MacBride had a long-standing interest in prisoners, human rights abuses and the depredations of armed conflict that can be attributed to his own experiences, and that of his family, during the Irish rebellions against the British.⁷² As Secretary-General of the ICJ, he pursued this interest, advocating for the expansion of the human rights regime and greater regulation of armed conflicts. MacBride began speaking of the ‘massive but temporary wholesale violations of human rights in international armed conflicts’⁷³ in various human rights fora. In January 1968, he chaired a NGO Human Rights Conference, which concluded, in the following terms, that it was essential that the

⁶⁷ Pictet, ‘The Development of International Humanitarian Law’, in C. Jenks *et al.* (eds), *International Law in a Changing World* (1963), at 114–125.

⁶⁸ J. Pictet, *The Principles of International Humanitarian Law* (1967).

⁶⁹ Pictet, *Humanitarian Law*, *supra* note 58.

⁷⁰ *Ibid.*, at 13.

⁷¹ Cockburn, ‘In Memory of Sean MacBride: The Man Who Smelled a Rat’, 16 *Social Justice* (1989) 8, at 8.

⁷² E. Keane, *An Irish Statesman and Revolutionary: The Nationalist and Internationalist Politics of Seán MacBride* (2006), at 181. Seán MacBride was imprisoned several times by the British as was his mother, Maud Gonne. The poet Yeats lamented in *Prayer for My Daughter* that Maud Gonne had bartered ‘her loveliness’ for the ‘angry wind’ of conflict. MacBride’s father, John MacBride, was executed by the British after the 1916 Easter Uprising.

⁷³ Suter, *supra* note 61, at 26. This section is greatly indebted to Suter’s analysis of the Conference.

humanitarian principles of the 1949 Geneva Conventions protecting human rights prevail in all conflicts and that a new convention regarding modern weapons replace the outdated provisions of the 1907 Hague Conventions.⁷⁴ Then, in March, MacBride co-chaired an Assembly for Human Rights in Montreal that described 'human rights in armed conflicts' as a new area of concern.⁷⁵

The 1968 International Conference on Human Rights in Teheran provided MacBride with the opportunity to publicize his idea further. The Conference was held to mark the 20th anniversary of the UN Declaration of Human Rights; its aim was to improve the implementation of human rights.⁷⁶ MacBride's specific concern with 'human rights in armed conflict' was not on the agenda,⁷⁷ but MacBride, attending the Conference as an observer, privately lobbied delegates with his draft resolution. As MacBride explains:

I prepared a draft resolution which ultimately, with some minor amendments, was proposed by India and co-sponsored by Czechoslovakia, Jamaica, Uganda and the United Arab Republic. ... My task was greatly facilitated by reason of the fact that the leaders of the Indian, Czechoslovak, Jamaican and UAR government delegations were old friends of mine.⁷⁸

MacBride's preparatory work and lobbying at the 1968 International Conference on Human Rights in Teheran resulted in the conference passing the noteworthy Resolution XXIII concerning human rights in armed conflicts.⁷⁹ The Resolution called for the protection of humanitarian principles during armed conflict and suggested the creation of additional or revised conventions to achieve such protection.⁸⁰ Keith Suter suggests that the Resolution appealed to a broad range of governments, which, having had little time to consider its implications, thought it was benign and likely to be soon forgotten.⁸¹ Only the South Vietnamese delegation and the Swiss delegation, which had had notice of the Resolution, chose to abstain on the final vote – the Swiss being concerned that the Resolution 'forced the hand' of the ICRC.⁸² In this way, the Teheran Conference, while failing to achieve its stated aims,⁸³ made the first official connection between human rights and the laws of armed conflict.

B UN General Assembly

The Resolution, once passed, sparked a flurry of activity and discussion in the UN General Assembly. Draper argued that while the resolution passed because of

⁷⁴ *Ibid.*, at 27.

⁷⁵ Hewitt, 'Respect for Human Rights in Armed Conflicts', 4 *New York University Journal of International Law and Politics (NYU J Int'l L & Politics)* (1971) 41, at 43.

⁷⁶ Suter, *supra* note 61, at 23. UN Declaration of Human Rights 1948, UN Doc. A/810 (1948).

⁷⁷ *Ibid.*, at 34.

⁷⁸ Suter, *supra* note 61, at 28–29.

⁷⁹ Hewitt, *supra* note 75, at 43.

⁸⁰ Human Rights in Armed Conflicts, Resolution XXIII adopted by the International Conference on Human Rights, Teheran, Doc. A/Conf.32/41 (12 May 1968).

⁸¹ Suter, *supra* note 61, at 34.

⁸² *Ibid.*, at 31.

⁸³ *Ibid.*, at 21.

MacBride's interest, it was adopted with enthusiasm by nations who found it useful for their political ends. He explained:

In the period between 1968 and 1971 we witness in the organs of the UN a mounting endeavour to effect a fusion of the humanitarian law of war with human rights, which is not the outcome of accident. ...

The junction of human rights and the humanitarian law of war was timeous and profitable to the majority of states in the UN, i.e. Arab states in their perennial confrontation with Israel, the states supporting the disintegration of vestigial colonialism, and a large group of states supporting the racial confrontations in southern Africa and elsewhere. The Western states seem to have been slow to appreciate that humanitarian law-making might afford a useful opportunity to offset military reverses, and that human rights could be impressed for that purpose.⁸⁴

With this impetus, Resolution 2444 (XXIII) on Respect for Human Rights in Armed Conflicts was passed by the UN General Assembly on 19 December 1968, similarly talking of applying humanitarian principles in all armed conflicts and asking the Secretary-General to look into the need for additional humanitarian international conventions.⁸⁵ The topic continued to be canvassed in the 24th, 25th and 26th sessions of the UN General Assembly.

At the 24th session in 1969, the Secretary-General tabled his report on 'Respect for Human Rights in Armed Conflict'. It contained a 'historical survey of international instruments of a humanitarian character relating to armed conflict', looked at the relationship between the 1949 Geneva Conventions and UN instruments on human rights and considered steps to secure respect of humanitarian principles in all armed conflicts.⁸⁶ A resolution was passed, and it was decided to spend more time on the subject at the next session.

At the 25th session, the Secretary-General produced a more definitive report.⁸⁷ This report said it had given special attention, as Resolution 2597 (XXIV) had requested, to the need for protection of the rights of civilians and combatants in conflicts that arise from the struggles of peoples under colonial and foreign rule for liberation and self-determination and to the better application of existing humanitarian international conventions and rules to such conflicts.⁸⁸ The subject was discussed for four weeks in this session.⁸⁹ When it came to discussion in the UN General Assembly, many states had comments to make and agenda to push. The USA wanted to increase the protection of prisoners of war; the Soviet Union, with some Third World nations, wanted to condemn 'aggressive war' and protect freedom fighters; France wanted to protect journalists.⁹⁰

⁸⁴ Draper, 'Humanitarian Law and Human Rights', *Acta Juridica* (1979) 193, at 194–195. Suter, *supra* note 61, at 101, also makes this point.

⁸⁵ Respect for Human Rights in Armed Conflict, GA Res. 2444 (XXIII) (19 December 1968).

⁸⁶ *Respect for Human Rights in Armed Conflicts*, Report of the Secretary-General, Agenda Item 61, UN Doc. A/7720 (20 November 1969), at 70–104.

⁸⁷ *Respect for Human Rights in Armed Conflicts*, Report of the Secretary-General, Agenda Item 79, UN Doc. A/8052 (1970).

⁸⁸ *Ibid.*, at 8.

⁸⁹ Hewitt, *supra* note 75, at 59.

⁹⁰ *Ibid.*, at 60–62.

Four resolutions on the subject were passed at the 25th session. Resolution 2674 (XXV) said that extra instruments were needed to provide for the protection of the civilian population and freedom fighters against colonial and foreign domination as well as against racist regimes. Resolution 2675 (XXV) stated that fundamental human rights would still apply in armed conflicts and that civilians should not be the object of military operations or reprisals. Resolution 2677 welcomed the decision of the ICRC to convene a forthcoming 'conference on the reaffirmation and development of international humanitarian law.' Two more resolutions followed, in similar terms, at the 26th session.⁹¹

None of these instruments, with the notable exception of Resolution 2677, referred to 'international humanitarian law'. They either spoke of human rights, continuing the refrain from Teheran that human rights had to be protected in armed conflict, or they discussed humanitarian conventions or humanitarian rules as a part of the laws of armed conflict. As such, the emphasis of the UN General Assembly was very much focused on promoting the specific issue of human rights in armed conflict, an issue that suited the varying ends of the states involved. States did not yet think or talk in terms of 'international humanitarian law'.

C ICRC

The shift from human rights in armed conflict to 'international humanitarian law', as was shown by Resolution 2677, took place when the ICRC became involved in the UN General Assembly's discussion. The UN Secretary-General and the ICRC both emphasized the collaboration between the two institutions⁹² – presumably to bolster the claims of each to the material at issue. After having felt disregarded since the failure of the 1956 Draft Rules, the ICRC eagerly seized on the opportunity created by Teheran to fulfil its mission.⁹³ It convened the 1969 Conference in Istanbul under the title 'Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts'.⁹⁴ The Conference passed Resolution XIII, which underlined 'the necessity and urgency of reaffirming and developing humanitarian rules of international law applicable in armed conflicts of all kinds, in order to strengthen the affective protection of the fundamental rights of human beings, in keeping with the Geneva Conventions of 1949.'⁹⁵

It would be, the ICRC recognized, a sizeable and important task. The ICRC would, as it said, no longer be limited to its traditional role, concerned with those *hors de combat*. Instead, it said, it would be looking at all laws and customs of a humanitarian nature

⁹¹ Respect for Human Rights in Armed Conflicts, GA Res. 2853 (XXVI) (20 December 1971) and GA Res. 2852 (XXVI) (20 December 1971).

⁹² 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. 1 (1971), at 11.

⁹³ Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War 1957, ICRC, *XIXth International Conference of the Red Cross* (New Delhi, January 1957).

⁹⁴ ICRC, *XXIst International Conference of the Red Cross: Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts* (1969).

⁹⁵ ICRC, *supra* note 92, at 3.

– that is, ‘those concerning the protection of the human being or the essential assets of humanity’:⁹⁶

The subject matter of this report, of course, was far from new for the Red Cross. International wars or ‘blind weapons’, for example, have often been matters of concern, and of resolutions of the ICRC, alongside the protection of civilian populations. However, the terms employed here, ‘reaffirmation and development of the laws and customs applicable in armed conflicts’ definitely represented something new – a realization – they denoted that, in the ICRC’s opinion, the task devolving on the Red Cross in regard to the development of humanitarian law should in future be conceived and undertaken on a broader basis.⁹⁷

In this way, by a broad interpretation of the word ‘humanitarian’, the ICRC increased the ambit of Red Cross law to include issues concerning the means and methods of warfare – areas that it had previously attributed to the Hague tradition rather than to the ICRC. Yet it still had not yet begun to call its new domain ‘international humanitarian law’. The change only took place in 1971, when the ICRC called together its Conference of Government Experts. The title of its Conference was now the ‘Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts’.⁹⁸ The ICRC acknowledged the change and tried to explain it. International humanitarian law would mean those rules of the law of armed conflict that are clearly humanitarian in nature, namely those that protect human beings and their essential property.⁹⁹ Consequently, the term would cover not only the Geneva Conventions but also treaty or customary law rules that, for humanitarian reasons, lay down limits to be observed in the conduct of hostilities, the use of weapons, the behaviour of combatants, recourse to reprisals as well as norms intended to ensure the proper application of those rules.¹⁰⁰

The ICRC said that in its report it would sometimes abbreviate the term ‘international humanitarian law applicable in armed conflicts’ to international humanitarian law or just humanitarian law. It was concerned with dispelling any confusion this abbreviation might create. Sometimes, the ICRC said, the term international humanitarian law had been given a broader meaning, such as Pictet’s interpretation that encompassed human rights. It was not, the report stated, in that broad sense that the ICRC was now using it.¹⁰¹ Instead, it seems that the ICRC was using this new title to claim and justify its claim to an enlarged field of law. Although it explicitly said that human rights were outside its compass, it nevertheless inherited the broad range of concerns that the ‘human rights in armed conflicts’ discourse had raised. In fact, by claiming that it was not dealing with ‘human rights’, the ICRC, if anything, had strengthened its argument that what was left, what it was discussing, was international humanitarian law and its proper pursuit.

⁹⁶ ICRC, *supra* note 94, at 9–10.

⁹⁷ *Ibid.*, at 2.

⁹⁸ ICRC, *supra* note 92.

⁹⁹ *Ibid.*, at 25.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*, at 26.

This replacement was completed so quickly and thoroughly that the term international humanitarian law was used extensively during the Diplomatic Conference – and not as though it were an innovation but, rather, as an established term with a long history. The acting president, Pierre Graber, was able to introduce the Conference saying:

International humanitarian law had evolved slowly since 22 August 1864, when the plenipotentiaries of 13 States had met, also in Geneva, and adopted the ten articles of the first Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, prepared by Henry Dunant and Gustave Moynier.¹⁰²

Winspeare Guicciardi, Director-General of the United Nations Office at Geneva, made a similar historical claim:

Geneva had been the venue of the first diplomatic conference on international humanitarian law convened by the Swiss Federal Council in 1864, and of the subsequent conferences held in 1906, 1929 and 1949. The fact that the number of States participating in the present Conference was almost double that of the 64 States represented at the 1949 Conference was proof of the permanent and universal nature of the principles of a movement begun by Henry Dunant over a century ago.¹⁰³

Delegates also referred to ‘international humanitarian law’ in a manner that suggested it was a well-established field of long-standing principle.¹⁰⁴ Legal commentators also began to adopt the term, referring to ‘international humanitarian law’.¹⁰⁵ There did, however, continue to be inconsistency in the commentary. Some commentators maintained a link to the old regime, speaking of ‘the international humanitarian law of armed conflict’, while others continued to refer to the laws of armed conflict or laws of war¹⁰⁶ or to use the terms interchangeably.¹⁰⁷ Yet even this inconsistency was used by the ICRC to bolster the claim that ‘international humanitarian law’ now comprised the whole of the law of war. As Jean-Jacques Surbeck commented: ‘The view of the ICRC is that “international humanitarian law” is synonymous with “law of war”.’¹⁰⁸

Henceforth, this ‘humanitarian law’ would no longer be one strand of the ‘laws of war’. Nor would it mean the contained field of Geneva laws, standing opposed to the Hague ‘laws of war proper’. The new term brought the Hague and Geneva traditions together and made it all international humanitarian law, the rightful property of the ICRC. All that

¹⁰² *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)*, vol. 5 (1981), at 8.

¹⁰³ *Ibid.*, at 10.

¹⁰⁴ *Ibid.* See Mr. Boudjakdji (Algeria) at 17, Mr. Zafera (Madagascar) at 58, Mr. Dorochevitch (Byelorussian Soviet Socialist Republic) at 62.

¹⁰⁵ See, e.g., Starke, ‘Australia and the Development of International Humanitarian Law’, 8 *Federal Law Review (Fed L Rev)* (1976–1977) 1; M. Bothe, K.J. Partsch and W.A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (1982), at 293; Rubin, ‘Terrorism, Grave Breaches and the 1977 Geneva Protocols’, 74 *Am Soc Int’l L Proc* (1980) 192, at 192.

¹⁰⁶ See, e.g., Reed, ‘Laws of War: The Developing Law of Armed Conflict – Some Current Problems’, 9 *Case Western Reserve Journal of International Law* (1977) 17; Green, ‘The New Law of Armed Conflict’, 15 *Canadian Yearbook of International Law (CYIL)* (1977) 3.

¹⁰⁷ See, e.g., Aldrich, ‘Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I’, 26 *Va J Int’l L* (1985–1986) 693.

¹⁰⁸ Surbeck, ‘Dissemination of International Humanitarian Law’, 33 *Am UL Rev* (1983–1984) 125, at 126.

was left outside its ambit were the laws of the sea, the *ius ad bellum*, the rules of neutrality. In future, these would be known by their specific titles, rather than as part of the ‘laws of war’, and the rest of the law would be ‘international humanitarian law’. The laws of war had, for all useful purposes, been replaced by international humanitarian law.

5 Drafting International Humanitarian Law

The term international humanitarian law, its broad principles and its historical provenance may have been established by the beginning of the 1974 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, but its actual rules were contested throughout the Conference and continued to be questioned even after the Conference concluded. When the ICRC convened the Diplomatic Conference, it expected that the negotiations would take one year and that the delegates would follow the recommendations set by the ICRC and its government experts.¹⁰⁹ What actually took place was quite different.

Unlike previous conferences on humanitarian law, which had been attended by a discrete number of predominantly Western states, the Diplomatic Conference was an unwieldy gathering, consisting of around 700 delegates.¹¹⁰ These delegates separated into conflicting factions, which expressed different views about what international humanitarian law was and should be. The background of the Yom Kippur War, the Vietnam War and the decolonization struggles shaped these views and lent them urgency. The Third World and, nominally, the Eastern Bloc thought international humanitarian law should protect guerrilla fighters and obstruct imperialist forces.¹¹¹ The ICRC and most Western states hoped to recognize guerrillas and provide them with a modicum of protection in order to encourage guerrillas to follow the laws of war, while still maintaining a clear distinction between combatant and civilian.¹¹² Some states argued that the principle of discrimination should prohibit the use of certain modern weapons;¹¹³ others insisted that it could not do so.¹¹⁴ Many delegations, especially those from the Eastern Bloc and Third World, considered that international humanitarian law should not contain a principle of proportionality, claiming that it gave military commanders an unlimited right to decide to launch an attack if they thought there would be military advantage.¹¹⁵ In response, Australia,¹¹⁶ the United

¹⁰⁹ Baxter, ‘Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law’, 16 *Harv Int’l LJ* (1975) 1, at 9.

¹¹⁰ C. Pilloud *et al.*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), at xxxviii.

¹¹¹ See *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)*, vol. 14 (1981), at 342 (Mr Belousov (Ukrainian Soviet Socialist Republic) speaking).

¹¹² See Pilloud *et al.*, *supra* note 110, at 520–521; Aldrich, ‘New Life for the Laws of War’, 75 *AJIL* (1981) 764, at 770.

¹¹³ See *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)*, vol. 6 (1981), at 167 (Democratic Republic of Germany), 192 (Mexico).

¹¹⁴ *Ibid.*, at 179 (Canada), 188 (Federal Republic of Germany).

¹¹⁵ *Official Records of the Diplomatic Conference*, vol. 14, *supra* note 111, at 61 (Poland and North Korea speaking).

¹¹⁶ *Ibid.*, at 62.

Kingdom¹¹⁷ and the USA¹¹⁸ argued that the principle of proportionality should be retained. States, they pointed out, were not going to abandon bombardment – all the law could reasonably hope to do was to govern it.¹¹⁹

These, and other, disagreements meant that the negotiations took four long years of difficult debates. The delegates eventually managed to resolve, or overlook, their differences by using vague, ambiguous language in the final draft. For example, the definition of guerrillas was resolved by prescribing that combatants must identify themselves from the time of ‘deployment’ – a word chosen because there was no agreement about what it meant.¹²⁰ The concerns about proportionality were ameliorated by removing the word proportionate from the relevant articles. The provisions on indiscriminate attacks remained imprecise.¹²¹ The many concerns regarding the effects of Additional Protocol II on state sovereignty were resolved by expurgating half of its provisions at the last minute.¹²²

By making these compromises, the delegates at the Diplomatic Conferences were able to complete Additional Protocol I, dealing with external armed conflicts, and Additional Protocol II, dealing with internal armed conflicts. And, despite the compromises, the new conventions made some important changes to the *ius in bello*. Guerrillas, who had previously been denied protection, could now qualify as combatants.¹²³ Civilians were defined for the first time in Article 50 and given a raft of unprecedented protection. In addition to the new codification of the principles of proportionality and discrimination, Protocol I demanded that precautions be taken to protect civilians, banned reprisals against civilians and civilian objects and prohibited the starvation of civilians,¹²⁴ which had previously been allowed under the laws of war.¹²⁵ Additional Protocol II introduced innovative, if limited, protection to civilians during internal armed conflicts.¹²⁶

International lawyers and governments understood that these new provisions shifted the existing balance of military necessity and the humanity in the law of armed conflict towards humanitarianism. Antonio Cassese stated:

The Protocol places primary emphasis on humanitarian demands and, indeed, in many respects subordinates military exigencies to such demands. On this score, the Protocol markedly departs from the customary law, which in general tends to put military necessity on the same footing as humanitarian demands.¹²⁷

¹¹⁷ *Ibid.*, at 64.

¹¹⁸ *Ibid.*, at 67.

¹¹⁹ *Ibid.*

¹²⁰ Aldrich, ‘Guerrilla Combatants and Prisoner of War Status’, 31 *Am UL Rev* (1981–1982) 871, at 878–879.

¹²¹ Pilloud *et al.*, *supra* note 110, at 625; Bothe, Partsch and Solf, *supra* note 105, at 307; *Official Records of the Diplomatic Conference*, vol. 6, *supra* note 113, at 182 (Colombia speaking).

¹²² Pilloud *et al.*, *supra* note 110, at 1334–1336; Greenwood, ‘A Critique of the Additional Protocols to the Geneva Conventions of 1949’ in T.L.H. McCormack and H. Durham (eds), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (1999) 3, at 7.

¹²³ *Ibid.*, at 521.

¹²⁴ Arts. 57, 51 and 54.

¹²⁵ Alexander, *supra* note 50, at 364.

¹²⁶ Pilloud *et al.*, *supra* note 110, at 1319.

¹²⁷ A. Cassese, ‘A Tentative Appraisal of the Old and the New Humanitarian Law of Armed Conflict’ in A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict* (1979) 461, at 481.

The Australian government described this shift as the importation of a human rights approach to the updating and revision of the laws of war, which it clarified as a ‘reaffirmation and development of these laws as a body of international humanitarian law’.¹²⁸

It goes without saying that Australia had neither opposed nor dissented from the process of events that led to the new appellation of international humanitarian law for the laws of war. This process, of itself, represented an extremely significant advance, for it involved nothing less than the importation of principles and standards of human rights into the laws of war.¹²⁹

Commentators and states, therefore, considered the Additional Protocols to be the framework and embodiment of a new approach to the *ius in bello* – international humanitarian law.

6 Querying International Humanitarian Law

Governments and delegates appeared fairly relieved when the Diplomatic Conference finally drew to a close. However, as their relief at the conclusion of the Conference faded away, commentators and states began to express concerns about Additional Protocol I. They feared that the new international humanitarian law was too humanitarian to be adopted.¹³⁰ This fear proved to be justified. Many states refused to sign or, having signed, did not ratify Additional Protocol I. The list included India, Indonesia, Iran, Iraq, Israel, Malaysia, Morocco, Pakistan, the Philippines, Singapore, Sri Lanka, Sudan, Thailand, the USA, and the Soviet Union.¹³¹ Despite the optimism of the US delegation,¹³² President Ronald Reagan announced in 1987 that the USA would not ratify Additional Protocol I, describing it as ‘fundamentally and irreconcilably flawed’.¹³³ Other states only ratified the treaties much later, such as France in 2001, Australia in 1991 and the United Kingdom in 1998. As the list shows, many of the states that were involved in the conflict following 1977 had not agreed to the provisions of the Additional Protocols.

Although the ICRC continued to try to promote Additional Protocol I, encouraging states to ratify the Protocol and apply its precepts, it encountered a great deal of opposition. Many legal and military commentators expressed doubts about the value and authority of Additional Protocol I.¹³⁴ These critics argued that Additional Protocol I was a problematic departure from the existing *ius in bello*.¹³⁵ The new provisions

¹²⁸ Starke, *supra* note 105, at 11.

¹²⁹ *Ibid.*, at 2.

¹³⁰ See, e.g., Green, ‘The New Law of Armed Conflict’, 15 *CYIL* (1977) 3, at 40.

¹³¹ ICRC, *State Parties to the Protocol I* (7 June 2005), available at www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P (last visited 28 January 2015).

¹³² Aldrich, *supra* note 112, at 778. Aldrich had reservations about the provisions on reprisals, which were controversial, but otherwise seemed positive about the outcome.

¹³³ Reagan, ‘Letter of Transmittal’, 81 *AJIL* (1987) 910, at 911.

¹³⁴ See, e.g., Carnahan, ‘Additional Protocol I: A Military View’, 19 *Akron Law Review (Akron L Rev)* (1986) 543, at 543; Parks, ‘Air War and the Law of War’, 1 *Air Force Law Review (Air Force L Rev)* (1990) 1, 111.

¹³⁵ Parks, *supra* note 134, at 112.

concerning reprisals, starvation, targeting, protected objects and combatant status could not be considered to be customary laws.¹³⁶ The military lawyer, William Hay Parks, in an influential 1990 article, 'Air War and Law', argued that Additional Protocol I's description of the principles of discrimination and proportionality also diverged from traditional, customary law.¹³⁷ Indeed, he stated, the principle of proportionality was expressed in such vague, tenuous terms as to lack any meaning.¹³⁸ Therefore, these sections of Additional Protocol I could not be considered a codification of customary law that would be binding on non-signatories.

Not only did these commentators agree that the Additional Protocol I did not represent customary law in these areas, but many felt that was as it should be. Parks, and those international lawyers who repeated his claims, described the Protocol as confusing, impracticable, inconsistent with the evolution of the laws of war and detrimental to the protection of civilians.¹³⁹ The Protocol's dual humanitarian aims of protecting civilians and non-traditional combatants, Parks claimed, were manifested in such an impractical way that it was unworkable and, ultimately, regressive. By blurring the distinction between civilian and combatant, the Protocol endangered civilians.¹⁴⁰ It was also dangerous, Parks argued, because it moved the traditional onus for the protection of civilians from the defender, who should have control over civilians, to the attacker, who would not.¹⁴¹

At the same time that Parks and other critics lamented the regressive effects of the Protocol, however, they also described the Protocol as being too humanitarian, such that it made military activity impossible.¹⁴² As Major Guy Roberts stated:

These proposed alternatives to customary law and practice pose fundamental operational and practical problems. Clearly, they represent an attempt to shift the balance established between military necessity and humanitarian principles in such a way as to hamper the ability of states to use military force to attain political objectives. Although perhaps laudable from a philosophical perspective, the changes are neither politically feasible nor operationally practical.¹⁴³

For some commentators, the distance between the innovations of the Protocol and the accepted rules of warfare, the requirements of the military and political reality meant

¹³⁶ Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989), at 64, 66; Matheson, 'Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions', 2 *Am U J Intl L & Policy* (1987) 416, at 426; Parkerson, 'United States Compliance with Humanitarian Law Respecting Civilians during Operation Just Cause', 133 *Military Law Review (Military L Rev)* (1991) 31, at 51.

¹³⁷ Parks, *supra* note 134, at 113, 141, 173.

¹³⁸ *Ibid.*, at 175.

¹³⁹ See, e.g., DeSaussure, 'The Role of the Law of Armed Conflict during the Persian Gulf War: An Overview', 37 *Air Force L Rev* (1994) 41, at 49; Infeld, 'Precision-Guided Munitions Demonstrated Their Pinpoint Accuracy in Desert Storm; But Is a Country Obligated to Use Precision Technology to Minimize Collateral Civilian Injury and Damage?', 26 *George Washington Journal of International Law and Economics (George Washington J Int'l L & Econ)* (1992–1993) 109, at 122–123.

¹⁴⁰ Parks, *supra* note 134, at 66.

¹⁴¹ *Ibid.*, at 112.

¹⁴² See, e.g., *ibid.*, at 222.

¹⁴³ Roberts, 'The New Rules of Waging War: The Case against Ratification of Additional Protocol I', 26 *Va J Int'l L* (1985–1986) 109, at 146.

that the Protocol would not have any force as a legal document. Michael Matheson suggested that the US rejection meant that the Protocol would not be seen as the next stage in the development of international humanitarian law.¹⁴⁴ Others described Additional Protocol I as a ‘pseudo code’,¹⁴⁵ something that looks like law but does not have the ‘control component’.¹⁴⁶

This critical attitude towards the status and usefulness of Additional Protocol I continued into the early 1990s, as the legal commentary on the First Gulf War demonstrates. When legal commentators assessed the conduct of the conflict, the first question they had to answer was the degree to which the Additional Protocol I was applicable. Although commentators came to slightly different conclusions, they agreed that this was a difficult question.¹⁴⁷ As neither the USA nor Iraq were parties, the problem was determining which parts of the Additional Protocol I could be considered customary law. Some parts of Additional Protocol I, it was agreed, were customary international law.¹⁴⁸ Other parts, many lawyers stated, repeating the objections of Parks and the US government, were not customary law and were not desirable as law.¹⁴⁹

The existence of such widespread opposition to Additional Protocol I meant that even commentators who were not ideologically opposed to the content of the Protocol, or sympathetic to the military perspective, accepted that these persistent objections prevented it from becoming customary law in its entirety.¹⁵⁰ Very few commentators were prepared to say that Additional Protocol I did codify customary international law.¹⁵¹ There was, however, one organization that stood against the consensus – Middle East Watch (MEW), a branch of Human Rights Watch (HRW). MEW wrote a report on the conflict: *Needless Deaths in the Gulf War*.¹⁵² It was the first time HRW had attempted to write about an international conflict. HRW was used to dealing with human rights issues but less familiar with the implementation of international humanitarian law. As Parks explained:

HRW, a human rights organisation, expressed an interest in law of war issues arising from the conflict but admitted its ignorance of that area of the law. A senior official of Middle East Watch met with lawyers in the Pentagon in order to gain an understanding of the law of war issues.¹⁵³

¹⁴⁴ Matheson, *supra* note 136, at 422.

¹⁴⁵ Remarks of Lieutenant Professor William v. O'Brien in Dupuis *et al.*, ‘The Sixth Annual American Red Cross–Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions’, 2 *Am U J Intl L & Policy* (1987) 415, at 511.

¹⁴⁶ Remarks of Professor Michael W. Reisman in Dupuis *et al.*, *supra* note 145, at 448.

¹⁴⁷ See, e.g., Gardam, *supra* note 26, at 815.

¹⁴⁸ Meron identifies these as Arts. 35(1), 35(2), and 40, the definition of perfidy in Arts. 37, 51(2), 52(2), 42, 59, 60, 57(2)(c), 73, 75, and 79. Meron, *supra* note 136, at 64.

¹⁴⁹ DeSaussure, *supra* note 139, at 49; Infeld, *supra* note 139, at 122–123; Carnahan, *supra* note 134, at 543; Parks, *supra* note 134, at 111.

¹⁵⁰ See, e.g., Gardam, *supra* note 26, at 160.

¹⁵¹ See, e.g., Barber, ‘Scuds, Shelters and Retreating Soldiers: The Laws of Aerial Bombardment in the Gulf War’, 31 *Alberta Law Review* (*Alberta L Rev*) (1993) 662, at 685.

¹⁵² Human Rights Watch (HRW), *Needless Deaths in the Gulf War: Civilian Casualties during the Air Campaign and Violations of the Laws of War* (1991), available at www.hrw.org/reports/1991/gulfwar/ (last visited 9 December 2014).

¹⁵³ Parks, ‘The Gulf War: A Practitioner’s View’, 10 *Dickinson Journal of International Law* (*Dickinson J Int’l L*) (1991–1992) 393, at 418–419.

Yet, clearly, MEW did not rely heavily on the advice given to it by US military, choosing instead to argue that, despite the US failure to ratify:

[t]his does not mean that the Protocol was irrelevant, since many of the Protocol's provisions reaffirm, clarify or otherwise codify preexisting customary law restraints on methods and means of combat and, thus, are binding on all nations regardless of ratification.¹⁵⁴

In this way, MEW departed from the more complex assessment made by contemporary international lawyers, which accepted some of Additional Protocol I as customary law, while rejecting other parts, certain interpretations and, in particular, the ideology underpinning it. Yet MEW's interpretation had little impact on the legal literature. Some commentators, such as Judith Gardam and Françoise Hampson, used the report as a source of facts about the conflict but paid no attention to its legal conclusions, preferring to construct their own legal analysis.¹⁵⁵ Those commentators who did note MEW's legal analysis argued that it was simply incorrect.¹⁵⁶ On the whole, when faced with an unorthodox reading of the law by MEW, lawyers would refer to Parks as a more authoritative source.¹⁵⁷

The general understanding that Additional Protocol I did not apply to the conflict was connected with a widespread perception that the legal regime governing the Gulf War was not really a humanitarian law. The central principle of the *ius in bello* was not humanity but, rather, the principle of military necessity. This was demonstrated when commentators applied the principle of proportionality to the conflict. With the notable exception of MEW, commentators did not use the Additional Protocol I's definition of proportionality.¹⁵⁸ Rather, they looked to the customary principle of proportionality, which, they stated, was one of the weakest principles of international law.¹⁵⁹ It was vague, subjective,¹⁶⁰ difficult to describe and harder to apply.¹⁶¹ What was clear to the commentators, as to many delegates at the Diplomatic Conference, was that it was a permissive principle that allowed almost any action if it could be justified by military necessity. It amounted to nothing more than a prohibition on the direct or negligent targeting of civilians.¹⁶² The US campaign, commentators agreed, satisfied this low threshold. Even the most distressing events, such as the destruction of the electricity

¹⁵⁴ HRW, *supra* note 152.

¹⁵⁵ See Hampson, 'Proportionality and Necessity in the Gulf Conflict', 86 *Am Soc Int'l L Proc* (1992) 45, at 48; Gardam, *supra* note 26, at 813.

¹⁵⁶ See, e.g., Shotwell, 'Economy and Humanity in the Use of Force: A Look at the Aerial Rules of Engagement in the 1991 Gulf War', 4 *United States Air Force Academy Journal of Legal Studies (USAF Acad J Legal Studies)* (1993) 15, at 32; Infeld, *supra* note 139, at 122–123.

¹⁵⁷ See, e.g., Shotwell, *supra* note 156, at 32; Infeld, *supra* note 139, at 122–123.

¹⁵⁸ See, e.g., Gardam, *supra* note 26, at 829. Gardam describes the principles regulating indiscriminate attack and proportionality as the most problematic in Additional Protocol I. See also Fenrick, 'Attacking the Enemy Civilian as a Punishable Offense', 7 *Duke Journal of Comparative and International Law (Duke J Comp & Int'l L)* (1997) 539, at 539.

¹⁵⁹ Kahn, 'Lessons for International Law from the Gulf War', 45 *Stanford Law Review (Stanford L Rev)* (1992–1993) 425, at 435.

¹⁶⁰ Fenrick, *supra* note 158, 546.

¹⁶¹ Parkerson, *supra* note 136, at 59; Kahn, *supra* note 159, at 435; Parks, *supra* note 134, at 173–175.

¹⁶² See, e.g., Crawford, 'The Law of Noncombatant Immunity and the Targeting of National Electrical Power Systems', 21 *Fletcher Forum of World Affairs* (1997) 101, at 106; Gardam, *supra* note 26, at 834.

system that resulted in hundreds of thousands of civilian deaths, were legal.¹⁶³ As Gardam stated:

The conduct of hostilities in the Gulf conflict indicates that the concept of ‘excessive casualties’ was restricted to that context. In other words, the military advantage always outweighed the civilian casualties as long as civilians were not directly targeted and care was taken in assessing the nature of the target and during the attack itself. The impact of the practice of states such as the United States and its coalition partners on the formation of custom is considerable and cannot be overlooked. It seems inevitable that the concept of proportionality as a customary norm is limited to the situations outlined above.¹⁶⁴

While some pragmatic military lawyers were comfortable with this outcome, others used it to fuel a pessimism and scepticism about the *ius in bello* that is apparent throughout the literature on the Gulf War.¹⁶⁵ Law, international lawyers felt in the early 1990s, could not prevent the horrors of war.¹⁶⁶ All it really did was to legalize them.

7 Recognizing International Humanitarian Law

Thus, at the beginning of the 1990s, the status of the Additional Protocol I was uncertain and, as a result, so was the appropriateness of ‘international humanitarian law’ as the description of a *ius in bello* that was dominated by military imperatives. Yet, by the end of the decade, this uncertainty had been replaced by the acceptance of Additional Protocol I as customary law and a general embrace of the humanitarian values of international humanitarian law. This change took place as quickly and unequivocally as the original emergence of the term ‘international humanitarian law’. After the Gulf War, questions about the value and status of Additional Protocol I dwindled in the legal literature. Cold War positions and attitudes had less relevance, and memories of the perceived hijacking of the Diplomatic Conference began to fade.¹⁶⁷ The attention of the international legal community was focused instead on the ethnic conflicts in Yugoslavia and Rwanda and the attempts of the newly functional UN Security Council to respond to these events – authorizing peacekeeping operations aimed at helping beleaguered civilians, setting up ad hoc tribunals for Rwanda and Yugoslavia and beginning work towards an International Criminal Court.

These conflicts and the new tribunals changed the focus, the constitution and the sensibility of international legal scholarship. Suddenly, there was an institutional environment established to enforce international humanitarian law. International humanitarian law was no longer just a ‘pseudo code’. Instead, it became seen as a

¹⁶³ See, e.g., DeSaussure, *supra* note 139, at 62; Crawford, *supra* note 162, at 101.

¹⁶⁴ Gardam, *supra* note 26, at 834.

¹⁶⁵ See, e.g., Jochnick and Normand, ‘The Legitimation of Violence: A Critical Analysis of the Gulf War’, 35 *Harv Int’l LJ* (1994) 387.

¹⁶⁶ Kahn, *supra* note 159, at 436; Myrow, ‘Waging War on the Advice of Counsel: The Role of Operational Law in the Gulf War’, 7 *USAF Acad J Legal Studies* (1996–1997) 131, at 138.

¹⁶⁷ Meron, ‘The Time Has Come for the United States to Ratify Geneva Protocol I’, 88 *AJIL* (1994) 678, at 684.

real option for study, research and work – an exciting and tangible pursuit.¹⁶⁸ A new cohort of academics entered international law and started producing a large body of literature. This literature was quite different to the sceptical and pessimist work of the early 1990s, which was dominated by military lawyers and a military perspective.¹⁶⁹ The literature that emerged over the 1990s was developed by a larger group of academics and practitioners, often drawn to the field by humanitarian concerns. Their work was concerned with the victims of warfare and the crimes committed against them – crimes against humanity, crimes of sexual violence and genocide. The victims of landmines were also a high profile issue during these years.¹⁷⁰ International lawyers, discussing these issues, employed a humanitarian vocabulary, which was appropriate in these contexts, and they were open to human rights values in a way that their predecessors were not.¹⁷¹ Moreover, they believed that international law could reflect these values; lawyers wrote of creating a kinder, more victim-focused form of law¹⁷² and they worked towards introducing change.¹⁷³ Even lawyers of a theoretical bent did not resign themselves to the kind of sceptical deconstruction that prevailed during the Gulf War.¹⁷⁴ Instead, international lawyers, writing from a feminist or post-colonial perspective, used these critical techniques as a precursor to discussions about the transformative possibilities of language and law.¹⁷⁵ Some of these hopes for change and a more humanitarian law were supported by the legal

¹⁶⁸ Otto suggests that there was significant surge of interest in international law at the undergraduate level between 1984 and 2000, with courses doubling. She attributes (and bemoans) this increase as an interest in private international law. Her figures, however, show a leap from 7 to 20 classes in international human rights law, 2 to 3 in international humanitarian law, 11 to 26 in public international law and 2 to 9 in advanced public international law. Otto, 'Handmaidens, Hierarchies and Crossing the Public-Private Divide in the Teaching of International Law', 1 *Melbourne Journal of International Law (Melbourne J Int'l L)* (2000) 35, at 65–67. John A.J.R. Barrett, 'International Legal Education in US Law Schools: Plenty of Offerings, But Too Few Students', 31 *International Lawyer (Int'l Lawyer)* (1997) 845, at 845.

¹⁶⁹ This dominance can be seen by looking at the references above for the literature on the Gulf War and, in particular, by the reliance on Parks' work.

¹⁷⁰ Koh, 'The 1998 Frankel Lecture: Bringing International Law Home', 35 *Houston Law Review (Houston L Rev)* (1998) 623, at 657.

¹⁷¹ Meron, *supra* note 3, at 244; Kennedy, *supra* note 4, at 267.

¹⁷² See, e.g., Knop, 'Re/Statements: Feminism and State Sovereignty in International Law', 3 *Transnat'l L & Contemp Probs* (1993) 293, at 311; Gunning, 'Modernizing Customary International Law: The Challenge of Human Rights', 31 *Va J Int'l L* (1990–1991) 211, at 220.

¹⁷³ Brooks, 'Feminism and International Law: An Opportunity for Transformation', 14 *Yale Journal of Law and Feminism (Yale J L & Feminism)* (2002) 345, at 352; Green *et al.*, 'Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique', 5 *Hastings Women's Law Journal (Hastings Women's LJ)* (1994) 171, at 175–176; Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law', 30 *Michigan Journal of International Law (Michigan J Int'l L)* (2008–2009) 1, at 4–6.

¹⁷⁴ See, e.g., Jochnick and Normand, *supra* note 165.

¹⁷⁵ Brooks, *supra* note 173, at 349. Charlesworth, 'Feminist Critiques of International Law and their Critics', 13 *Third World Legal Studies* (1995) 1, at 1; Chinkin, 'Feminist Interventions into International Law', 19 *Adelaide Law Review (Adelaide L Rev)* (1997) 13, at 13; Antony Anghie and B.S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflict', 36 *Studies in Transnational Legal Policy (Stud Transnat'l Legal Policy)* (2004) 185, at 186.

developments in the international tribunals¹⁷⁶ and the successes of the campaign against landmines.¹⁷⁷

Although the question of the status of Additional Protocol I lay dormant through these years, it was awakened when the North Atlantic Treaty Organization (NATO) intervened in Kosovo in 1999. Or, rather, it should have been. Considering all of the attention given to NATO's actions and its compliance with international humanitarian law, one would expect that international lawyers would have to face the old questions about the applicability of Protocol I and the extent to which it represented customary law. And, yet, this did not happen. Lawyers, almost without exception, would acknowledge that France, Turkey and the USA were not parties to the Protocol, but then they would simply state that the 'provisions of the Protocol are universally accepted as customary international law and are binding authorities on all nations'.¹⁷⁸

How did lawyers come to such a straightforward conclusion, which was so different to the debates that had taken place less than a decade earlier? A glance at their footnotes will reveal, almost without exception, a reference to HRW or Amnesty International.¹⁷⁹ HRW had stated:

Protocol I additional to the Geneva Conventions of 1949 provides the basis for the evaluation here of NATO's bombing. This Protocol has been ratified by most NATO members, and the US government has declared that it accepts all of the relevant standards. The basic principle of Protocol I, and of the laws of war generally, is that the civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. This turns in large part on the requirement that attackers must distinguish between civilians and combatants and between military objectives and civilian objects. They must take all feasible precautions to avoid or minimize harm to civilians, and to this end may not attack civilians exclusively, or combatants and civilians indiscriminately.¹⁸⁰

¹⁷⁶ In particular, the change to established legal categories such as rape and genocide, which put emphasis on the experiences of victims. See Amann, 'Prosecutor v. Akayesu', 93 *AJIL* (1999) 195, at 195; Askin, 'Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status', 93 *AJIL* (1999) 92, at 107.

¹⁷⁷ Wexler, 'The International Deployment of Shame, Second-Best Responses, and Norm Entrepreneurship: The Campaign to Ban Landmines and the Landmine Ban Treaty', 20 *Arizona Journal of International and Comparative Law (Arizona J Int'l Comparative L)* (2003) 561.

¹⁷⁸ See, e.g., Santopadre, 'Deterioration of Limits on the Use of Force and Its Perils: A Rejection of the Kosovo Precedent', 18 *St John's Journal of Legal Commentary (St John's J Legal Comment)* (2003–2004) 369, at 397.

¹⁷⁹ See, e.g., *ibid.* Santopadre quotes Amnesty International. See also McDonnell, 'Cluster Bombs over Kosovo: A Violation of International Law?', 44 *Arizona Law Review (Arizona L Rev)* (2002) 31, at 97; Stone, 'Protecting Civilians During Operation Allied Force: The Enduring Importance of the Proportional Response and NATO's Use of Armed Force in Kosovo', 50 *Catholic University Law Review (Catholic Univ L Rev)* (2001–2002) 501, at 523–530; Voon, 'Pointing the Finger: Civilian Casualties of NATO Bombing in the Kosovo Conflict', 16 *Am U L Rev* (2000–2001) 1083, at 1092, quotes Amnesty International and HRW. Colangelo is the only commentator to provide an alternative authority for Additional Protocol I in a footnote. Quoting J.L. Briery, he writes: 'In order to constitute customary international law, the custom must have taken hold through (1) state practice and (2) *opinio juris*, or "because [the custom] is believed to be binding."' This statement does not, however, actually support the assertion that Protocol I is binding. See Colangelo, 'Manipulating International Criminal Procedure: The Decision of the ICTY Office of the Independent Prosecutor not to Investigate NATO Bombing in the Former Yugoslavia', 97 *Northwestern University Law Review (Northwestern Univ L Rev)* (2002–2003) 1393, at 1397.

¹⁸⁰ HRW, *Civilian Deaths in the NATO Air Campaign* (February 2000), available at www.hrw.org/reports/2000/nato/index.htm (last visited 10 January 2014).

And Amnesty International had agreed:

The fullest statement of the rules governing the conduct of hostilities in international armed conflict is in Protocol I Additional to the Geneva Conventions of 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I). This Protocol, which was adopted in 1977, has been ratified by over 150 states. Three of NATO's members are not parties to Protocol I: France (Amnesty International understands that it intends to ratify it in the near future); the United States (although key provisions of Protocol I are reflected in its military code); and Turkey. The fundamental provisions of this Protocol, including all the rules on the conduct of hostilities cited in this report, are considered part of customary international law and are therefore binding on all states.¹⁸¹

Amnesty International and HRW did not, in their reports, put in any reference or source for their claims. Nevertheless, their bland statements became the authority for confirming the status of Additional Protocol I and ushering in a new, stricter regime of international humanitarian law. Unlike the lawyers during the Gulf War, who were dubious about a human rights organization's ability to grasp the *ius in bello*,¹⁸² lawyers at the end of the century, familiar with a humanitarian approach and expectant that the law would protect victims, were ready to accept such legal reasoning as convincing and unproblematic.

The acceptance of Additional Protocol I as the applicable law, and the willingness to follow where Amnesty International and HRW led, meant that international lawyers writing about Kosovo demonstrated a starkly different understanding of the *ius in bello* than those writing about the First Gulf War. Lawyers interpreted the principle of discrimination much more strictly; they narrowed the class of acceptable targets and permissible weaponry.¹⁸³ As for proportionality, it was no longer considered a permissive principle. The NGO reports interpreted it strictly – more strictly even than the vague, pragmatic words of Article 51 would necessarily require. They stated that the principle of proportionality placed a duty on combatants to choose a means of attack that avoided or minimized damage to civilians.¹⁸⁴ They also insisted that no military benefit could justify high amounts of civilian casualties.¹⁸⁵ For lawyers adopting the NGOs' approach, this meant that much of the campaign was judged to fail the test of proportionality. Aerial bombardment was disproportionate,¹⁸⁶ any weaponry besides

¹⁸¹ Amnesty International, *NATO/Federal Republic of Yugoslavia: 'Collateral Damage' or Unlawful Killings?: Violations of the Laws of War by NATO During Operation Allied Force* (June 2000), available at www.amnesty.org/en/library/asset/EUR70/018/2000/en/e7037dbb-df56-11dd-89a6-e712e728ac9e/eur700182000en.pdf (last visited 10 January 2014) at 6.

¹⁸² See, e.g., Fenrick, 'Attacking the Enemy Civilian as a Punishable Offence', 7 *Duke J Comp & Int'l L* (1996–1997) 539, at 546.

¹⁸³ See, e.g., the condemnation of the bombing of the RTS communication station in Cohn, 'NATO Bombing of Kosovo: Humanitarian Intervention or Crime against Humanity?', 15 *International Journal for the Semiotics of Law (Int'l J Semiotics L)* (2002) 79, at 100; Schwabach, 'Report to the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia', 9 *Tulane Journal of International and Comparative Law (Tulane J Int'l Comparative L)* (2001) 167. See also attitudes towards weaponry in Santopadre, *supra* note 178, at 406; Medenica, 'Protocol I and Operation Allied Force: Did NATO Abide by Principles of Proportionality', 23 *Loyola of Los Angeles International and Comparative Law Review (Loyola of Los Angeles Int'l & Comparative L Rev)* (2001) 329, at 395–396.

¹⁸⁴ HRW, *supra* note 180.

¹⁸⁵ Amnesty International, *supra* note 181, at 6.

¹⁸⁶ Voon, *supra* note 179, at 1098.

precision-guided munitions was disproportionate¹⁸⁷ and the destruction of bridges or other infrastructure used by civilians was disproportionate.¹⁸⁸ To all intents and purposes, any attack that did not put the protection of civilians ahead of military objectives was disproportionate.¹⁸⁹

Once again, one institution disagreed with the widespread interpretation of international humanitarian law. In this case, it was the Office of the Prosecutor (OTP) at the International Criminal Tribunal for the Former Yugoslavia. The OTP had received several complaints against NATO by international lawyers¹⁹⁰ and had, in response, drafted a report that concluded that there were no grounds for prosecuting NATO. Legal commentators generally attacked this conclusion and the reasoning that had led the OTP to it.¹⁹¹ In particular, they pointed to what they described as the OTP's flawed interpretation of proportionality.¹⁹² The OTP report had taken a cautious approach to the principle of proportionality, which resembled that of the doubtful lawyers of the early 1990s:

The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects. For example, bombing a refugee camp is obviously prohibited if its only military significance is that people in the camp are knitting socks for soldiers. Conversely, an air strike on an ammunition dump should not be prohibited merely because a farmer is plowing a field in the area. Unfortunately, most applications of the principle of proportionality are not quite so clear cut. It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.¹⁹³

Lawyers argued that the OTP, in taking this approach, had given too little emphasis to civilian losses and excused too many military actions.¹⁹⁴ The committee had applied

¹⁸⁷ Medenica, *supra* note 183, at 396; Benvenuti, 'The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia', 12 *EJIL* (2001) 503, at 513.

¹⁸⁸ Belt, 'Missiles over Kosovo: Emergence, *Lex Lata*, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas', 47 *Naval Law Review (Naval L Rev)* (2000) 115, at 117; Santopadre, *supra* note 178, at 400; Stone, *supra* note 179, at 532; Benvenuti, *supra* note 187, at 508.

¹⁸⁹ Santopadre, *supra* note 178, at 398.

¹⁹⁰ Laursen, 'NATO, the War over Kosovo, and the ICTY Investigation', 17 *Am U L Rev* (2001–2002) 765, at 770.

¹⁹¹ See, e.g., Freeland, 'The Bombing of Kosovo and the Milosevic Trial: Reflections on Some Legal Issues', *Australian International Law Journal (Aust Int'l LJ)* (2002) 150; Mandel, 'NATO's Bombing of Kosovo under International Law', 25 *Fordham International Law Journal (Fordham Int'l LJ)* (2001–2002) 95; Schwabach, *supra* note 183.

¹⁹² See, e.g., Colangelo, *supra* note 179, at 1420; Benvenuti, *supra* note 187, at 517; Bothe, 'The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY', 12 *EJIL* (2001) 531, at 531; Massa, 'NATO's Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion', 24 *Berkeley Journal of International Law (Berkeley J Int'l L)* (2006) 610, at 637.

¹⁹³ International Criminal Tribunal for the Former Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (OTP Report)* (2000), available at www.icty.org/x/file/Press/nato061300.pdf (last visited 25 July 2011), at para. 48.

¹⁹⁴ See, e.g., Stone, *supra* note 179, at 537. Freeland, *supra* note 144, at 168.

'its own interpretation of the relevant legal principles', which led it to fall into error.¹⁹⁵ It was suggested, by some lawyers that the OTP was biased¹⁹⁶ or even corrupt.¹⁹⁷ The report was 'incoherent';¹⁹⁸ perhaps its 'authors had spent too much time in The Hague's famous "coffee shops"'.¹⁹⁹ Thus, just as MEW's unorthodox humanitarian approach was seen as being out of step and incorrect at the beginning of the decade, so the OTP's different, less humanitarian, approach was also considered wrong at the end of the decade.

The correct approach, the correct understanding of the *ius in bello* by the end of the 20th century was that it was a truly international humanitarian law, a law in which considerations of humanity trumped military necessity. Indeed, military necessity was barely mentioned in the commentary on Kosovo. Unlike the commentators on the Gulf War, these lawyers displayed respect and optimism towards international humanitarian law. When civilians were killed, their deaths were not blamed on the inadequacy of the law but, rather, on the failure of NATO to apply the law properly. When lawyers sought better protection for civilians, they called for better adherence to the law – they did not suggest that better laws were required. In this way, international humanitarian law was cemented not only as the governing regime of *ius in bello* but also as a respected and prestigious regime.

Conclusion

I have concluded this short history of international humanitarian law at the end of the 20th century. I am aware that this is not the end of the story of international humanitarian law. International humanitarian law, in the 21st century, went on to develop new aspects, in particular, a more clearly enunciated association with human rights law.²⁰⁰ It also faced new challenges, brought by the war on terror.²⁰¹ Yet both the potential for these developments and the particular form of the new challenges depended on the specific understanding of the *ius in bello* as international humanitarian law, the humanitarian law articulated in Additional Protocol I. It is the

¹⁹⁵ See, e.g., Freeland, *supra* note 191, at 150; Schwabach, *supra* note 183, at 184–185.

¹⁹⁶ See, eg. Colangelo, *supra* note 179, at 1394; Benvenuti, *supra* note 187, at 505: 'The impression is given that the Prosecutor's intent has been, on the whole to prevent investigation against NATO officials.' See also: 'It is evident that this aspect of the Work Program of the Review Committee risks undermining the fundamental value of impartiality which must characterize all the activities of the Office of the Prosecutor' (at 507).

¹⁹⁷ Mandel, *supra* note 191, at 119, 127.

¹⁹⁸ Laursen, *supra* note 190, at 776.

¹⁹⁹ Mandel, *supra* note 191, at 119.

²⁰⁰ See, e.g., Kretzmer, Giladi and Shany, 'International Humanitarian Law and International Human Rights Law: Exploring Parallel Application', 40 *Israel Law Review (Israel L Rev)* (2007) 306; Cassimatis, 'International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law', 56 *International and Comparative Law Quarterly (Int'l Comparative L Quart)* (2007) 623; C. Byron, 'A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies', 47 *Va J Int'l L* (2006–2007) 839.

²⁰¹ See, e.g., Walen, 'Transcending, But Not Abandoning, the Combatant-Civilian Distinction: A Case Study', 63 *Rutgers Law Review* (2010–2011) 1149; Bellinger and Padmanabhan, 'Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law', 105 *AJIL* (2011) 201.

construction of this field of law that I have attempted to outline in this history, and I have therefore finished my account at the point where international humanitarian law won general acceptance.

As this short history of international humanitarian law demonstrates, international humanitarian law did not begin in the mists of time. Nor was it fashioned by Dunant when he created the ICRC. Rather, the history of international humanitarian law was forged in two rapid periods of change. It began in the 1970s when it was suddenly posited as a field of law whose precepts were outlined (in somewhat ambiguous terms) in the Additional Protocols to the Geneva Conventions. The idea of an international humanitarian law, together with the acceptance of the Additional Protocols, then faltered for almost two decades. It was only at the end of the 1990s that, suddenly and without any formal mechanisms, Additional Protocol I became accepted as the basis for a uniquely strict understanding of international humanitarian law as the *ius in bello*.

These moments of rapid change were not achieved by a straightforward process of codification. Nor were they the achievements of states alone. Rather, international humanitarian law was formed through the intersection of the work of a diverse group of actors, each focused on their own particular aims, strategies or tasks. Some of these actors were acknowledged participants in international law, such as the states involved in the Diplomatic Conference or the ICRC – but they played out their roles in a somewhat different manner to that which is usually envisaged. Other important actors, such as the human rights organizations and the individual Seán MacBride, had no acknowledged role in international humanitarian law. Nevertheless, it could be argued that Seán MacBride is as much a father of international humanitarian law as Dunant and that HRW and Amnesty International were as important in the dissemination and acceptance of international humanitarian law as the ICRC.

The acceptance of the human rights organizations' approach, and its translation into legal orthodoxy, relied on the work of another group of participants in international law: academic international lawyers. The fact that HRW's interpretation of international humanitarian law was considered authoritative at the end of the 1990s, but not at the beginning of the decade, was largely due to the willingness of international lawyers and academics to accept and repeat their pronouncements. It has long been noted that academics have an unusually important role in the determination of international law; Oppenheim made the point at the beginning of the last century²⁰² and Ian Brownlie at the end.²⁰³ Nevertheless, the involvement of academics in legal change is often obscured – not least by the historical narratives and language of continuity they deploy.

The varied cast of actors who have played a role in this history of international humanitarian law shows that international humanitarian law is not a code managed and shaped by states alone. It shows that it is a broader practice, which can comprehend contributions by conventional and unconventional participants. These

²⁰² Oppenheim, 'The Science of International Law: Its Task and Method', 1 *AJIL* (1908) 313, at 315.

²⁰³ I. Brownlie, *Principles of Public International Law* (2008), at 24–25.

participants do not even need to come from a traditional site of influence or power. The OTP could not garner support for its interpretation of the law. Yet, human rights organizations could inform the understanding of the law and academics could consolidate it. Harold Koh suggests that this kind of norm creation, which introduces the possibility of criticism of non-conformist states, has the potential to constrain state action as much as the rules that states have consciously chosen to accept.²⁰⁴ Certainly, any state, even if it is not a party to Additional Protocol I, which fails to apply its precepts, can expect international censure.²⁰⁵

It seems, therefore, that authority, the ability to discuss international humanitarian law and to be heard, can depend less on *who* speaks than on *how* they speak about the law. A sufficient grasp of legal language and conventions can allow a practitioner of international humanitarian law to intimate expertise and speak authoritatively about the field. Moreover, a proper grasp of these conventions can, as this history shows, include effective and acceptable methods for interpreting the law creatively and introducing change. These strategies include a restatement of the law,²⁰⁶ a reinterpretation of laws, a reference to custom and the construction of new histories. We have seen these strategies used when the law of armed conflict was suddenly relabelled international humanitarian law, when the principle of proportionality was reinterpreted and when Additional Protocol I was claimed to be binding as customary law. By deploying these strategies, practitioners are able to not only change the law but also to erase its former incarnations and the moment of change itself.

Yet, as this history has shown, not every statement about the law, however properly expressed, will be authoritative. At times, such as when the Additional Protocols were drafted, there is no, or little, consensus about the law, and many statements are provisional. At other times, however, the practitioners of international law form a disciplinary consensus that is strong enough to reject alternative arguments, such as those made by the OTP or MEW in the early 1990s. The problem with the OTP and MEW was not a failure to adhere to legal convention but, rather, their failure to display the dominant disciplinary sensibility, to work within the accepted paradigm and to reach an accepted position. MEW's humanitarian sensibility was, in the early 1990s, out of step with the prevailing pragmatic sensibility in international humanitarian law. Their conclusions, consequently, were wrong. By the end of the decade, the paradigm shift that was taking place in the international sphere towards humanitarianism made this sensibility more acceptable to international lawyers, and they were prepared to accept the statements made by the human rights reports as authoritative and obvious. They were willing to reinterpret the legacy of the Protocols, to forget the intervening years of doubt and to reshape the *ius in bello* as part of the humanitarian

²⁰⁴ Koh, *supra* note 170, at 654.

²⁰⁵ See, e.g., criticism of Israel in terms of the proportionality requirements of Additional Protocol I. Wells-Greco, 'Operation "Cast Lead: Jus in Bello Proportionality"', 57 *Netherlands International Law Review* (*Netherlands Int'l L Rev*) (2010) 397.

²⁰⁶ Halley argues that this is a feminist technique, whereby normative demands about what the law should be are presented as the existing law. It is, however, a practice that can be observed in many lawyers of different political and theoretical affiliations. Halley, *supra* note 173, at 42–43.

project.²⁰⁷ In this environment, the OTP's report on Kosovo, which was less humanitarian, less in line with the prevailing paradigm, was declared to be wrong. A scientist, Thomas Kuhn wrote, could not work outside a paradigm and do science.²⁰⁸ It seems that an international lawyer must, similarly, conform to a paradigm for their work to be considered legitimate.

As such, this history not only questions the orthodox account of the history of international humanitarian law but also the common understanding of the field itself. The history of international humanitarian law, both its actual development and the symbiotic narratives about its development, was shaped by a range of actors. Some of these actors were conventional practitioners of international law, others less so. Some were particularly interested in the development of the law, others had more complex goals. Their propositions about international humanitarian law were accepted or dismissed for a range of reasons, including both their compliance with clear legal forms and more nebulous disciplinary commitments. Through their work, they were able to introduce, define, change and confirm international humanitarian law.

²⁰⁷ Kennedy, *supra* note 4, at 261; Teitel, *supra* note 4, at 13.

²⁰⁸ T.S. Kuhn, *The Structure of Scientific Revolutions* (1970), at 79.