

The 'Informal Law of War'

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Abstract

Recent developments in areas of international humanitarian law as varied as cyber-warfare, private security, the use of automated weapons system, and the handling of detainees, all point to a nascent trend in the regulation of war. Once regulated by multi-lateral treaties, today the laws of war are increasingly the product of instruments, with little, if any, binding force. Though these instruments may not necessarily fit within the traditional understanding of "law", they affect the fabric of IHL in important and long-lasting ways. This Article seeks not only to expose the breadth of the shift towards an "informal law of war", but also to reflect upon what it means for the future of war regulation and for the meaning of war itself. What are the political costs of engaging non-state actors in law-making? How does such involvement translate in terms of compliance and norm legitimacy? By "softening" IHL, private actors turn into agents of regulation with many governance mechanisms at their disposal. The expanded body of "law" produced by these mechanisms, though fragmented and non-binding, can enhance the compliance pull of IHL – particularly vis-à-vis non-state actors. The challenge lies in understanding how the "informal law of war" can be properly channeled to bolster the integrity of the law, further states' strategic goals, and, ultimately, make war regulation more humane and effective.

Key words: International legal theory, international humanitarian law, global governance, public authority.

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Introduction

For the past ten years, legal scholarship has focused on the *content* of the law, namely on whether the law should be reinterpreted, amended or re-written in light of the changing realities of modern warfare. Discussing these issues is certainly important. But an important related question – which has not been at the forefront of the debate – is the question of *how* war is regulated. The traditional view regards war regulation as consisting of binding norms elaborated by states to constrain state behavior in time of war. Today, this view seems increasingly anachronistic, as a growing set of actors takes part in war, and diverse and disorderly regulatory frameworks seek to shape the law. From decisions made by new international tribunals, domestic courts and non-judicial UN bodies, to guidelines and self-regulatory instruments, the contemporary laws of war take many forms.

What I coin the ‘informal law of war’ relates to the emergence of non-traditional law-making processes involving a variety of private, institutional and state actors, and producing voluntary but non-binding instruments governing war. While the move towards ‘softer’ modes of governance has been analyzed and debated in other contexts, experts have not yet taken full measure of similar regulatory changes affecting war and security.¹ This Article seeks not only to expose the breadth of the shift towards an ‘informal law of war’, but also to reflect upon what the change means for the future of war regulation and for the meaning of war itself.

The roots of the emergence of an ‘informal’ law of war can be found in three related, yet distinct, trends. First, the role of non-state actors in war has grown significantly in the past two decades. Having become major protagonists on and near the battlefield, these actors have also assumed a great role in shaping the regulation applicable to their activities. In a sense, participation in war has elicited the need for a broader array of actors to become involved in the regulation of war. The second reason, closely related,

¹ See for example, *INFORMAL INTERNATIONAL LAWMAKING* (Joost Pauwelyn, Ramses Wessel, and Jan Wouters, eds.) (OUP, 2012) (discussing numerous examples of informal law-making, but not in the context of human rights and humanitarian law).

lies in the inability of the laws of war to account for the increasingly active part played by these actors in war and security. Alternate modes of war regulation and governance have emerged in recent years in an attempt to contend with various aspects of modern warfare, including the role played by non-state actors and the rising importance of technology.² Finally, a multiplicity of new courts, UN bodies, self-mandated organizations, and non-state actors has become involved in interpreting and applying the laws of war – thereby contributing to the law's (informal) development.

As a result of this evolution, today's 'laws of war' (also known as international humanitarian law or the laws of armed conflict) consist of a wider variety of instruments, generated by a broader range of 'regulators'. Globalization and modern warfare have turned IHL into a process involving an array of actors, both public and private, on a global scale. While this fragmentation makes it difficult at times to ascertain with precision the content of the law, it has the potential of generating a long-lost compliance pull.

The challenge therefore lies in understanding how the emergence of an informal law of war can be channeled to bolster the integrity of the law, further states' strategic goals, and enhance compliance. May all war protagonists become involved in war regulation? How would this involvement affect the law's moral and strategic impact? How do we feel about the diminishing role of the state in humanitarian law-making? The Article explores these and other questions that arise out of the increasingly informal nature of war regulation.

² See, for example, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Addendum, *Study on Targeted Killings*, A/HRC/14/24/Add.6 (28 May 2010) (seeking to clarify the legal framework applicable to drones and targeted killings); United Nations Working Group on Mercenaries, *Methods of Work*, <http://www2.ohchr.org/english/issues/mercenaries/work.htm>, at (C) (1), para. 16 (establishing a procedure allowing individual communications to be submitted to the UN body in connection with the activities of private security and military companies); and United Nations Press Release, *UN Envoy Proposes Special Courts to Try Suspected Pirates* (25 January 2011), available at <http://www.un.org/apps/news/story.asp?NewsID=37378&Cr=piracy&Cr1=> (proposing the establishment of two special tribunals to try those accused of committing piracy):

I. The Emergence of an "Informal Law of War"

Modern conflicts involve a range of actors, activities, weapons, and moral considerations that differ significantly from those of only a few decades ago. In stark contrast to the state-on-state affairs that characterized war for the past several centuries, today's wars often feature non-state actors – terrorist groups, private military contractors, international organizations, regional bodies – as key battlefield protagonists alongside states. The instruments of war have been similarly transformed. If war was once characterized by small arms, mechanized armor, artillery, and fighter-bombers, technological advances over the past several decades have given rise to guided missiles, 'smart bombs', and unmanned drones that can be controlled far from the theater of battle (and at little risk to those wielding them). At the same time, war-making and its effects are now recorded – by satellite imagery, video-enabled weapons systems, and embedded reporters, as well as civilian observers capable of posting still-photos and video clips in real time to YouTube and the Internet. War has also become more legalized, with legal advisers involved at the operational level and legal rhetoric pervading the political discourse.

Though traditional paradigms of armed conflict have given way to the reality of modern battle, war remains regulated, broadly speaking, by multi-lateral treaties designed to mitigate the excesses and destruction of the state-on-state conflicts that dominated the international system from the Peace of Westphalia through the Second World War.

Because these instruments, for the most part, do not contemplate the new realities of war, the question of their applicability in modern conflicts has arisen. But today the consensus is that the laws of war continue to apply even on the changing battlefield.³ Though its applicability is no longer in contention, the law does not provide straightforward answers to all the questions that arise. To facilitate the application of the law to new realities – such as military outsourcing, robots, and cyber warfare – a number of efforts have been undertaken by public and private actors alike to narrow the gap between the legal constructs and the reality on the modern battlefield.

³ Daphné Richemond-Barak, Florida Journal of International Law.

It is important to distinguish these efforts, which I describe below, from the now well-established role played by non-state actors *in an advisory capacity* in law-making processes. NGOs' involvement in the drafting of the Mine Ban Treaty⁴, the Convention on Cluster Munitions, Convention against Torture Convention, Convention on the Rights of the Child, and the Rome Statute of the International Criminal Court⁵ did not translate in their actually signing the final product. In contrast, what characterizes the "informal law of war" is the ability of non-state actors to adhere to it *in their own capacity*. To put it differently, non-state actors do not merely influence the content of norms which will later be adopted by states, but, rather, acquiesce to the newly-created standards of behavior on their own behalf.

Efforts undertaken to facilitate the application of the laws of war to modern warfare must also be distinguished from the role played by international and regional bodies in interpreting, applying, and developing international humanitarian law. Unlike NGOs and other non-state actors acting in an advisory capacity, international and regional bodies *do* contribute to what I have called the 'informal law of war'. When commissions of inquiry are established to investigate violations of humanitarian law, they play a law-making function.⁶ Consider, for example, the United Nations Fact-Finding Mission on the Gaza Conflict that investigated the conflict between Israel and Hamas at the end of 2008.⁷ Another example is the report drafted by Ben Emerson on the legality of the use of drones – also on behalf and at the request of the Human Rights Council.⁸ The trend has expanded well beyond the United Nations. The Council of Europe established the Independent International Fact-Finding Mission on the Conflict in Georgia to investigate the origins and the course of the conflict in Georgia, including with regard to

⁴ Officially known as the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.

⁵ See Jean d'Aspremont, *International Law-Making by Non-State Actors: Changing the Model or Putting the Phenomenon into Perspective?*, in NON-STATE ACTORS DYNAMICS IN INTERNATIONAL LAW (Ashgate, 2010).

⁶ See <http://www.ejiltalk.org/international-commissions-of-inquiry-a-new-form-of-adjudication/>.

⁷ <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>.

⁸ [cite]

humanitarian law and human rights law.⁹ And Hamad bin Isa Al Khalifa, the King of Bahrain, established the Bahrain Independent Commission of Inquiry to investigate the incidents that occurred during the period of unrest in Bahrain in early 2011 and the consequences of these events.¹⁰

In addition to UN bodies and self-mandated bodies, a multitude of international courts and tribunals have been interpreting and applying IHL for the past two decades – among them the International Criminal Tribunal for the Former Yugoslavia, the Special Court for Sierra Leone and of course the International Criminal Court. Though their contribution to humanitarian law and to international criminal law cannot be questioned, these courts have not always spoken in one voice. This, too, has complicated the identification of the material sources of IHL.

Finally, in line with its mandate, the International Committee of the Red Cross has continued to play a major role in developing IHL. The ICRC's Customary International Humanitarian Law Study¹¹ and its Interpretive Guidelines on Direct Participation in Hostilities¹² are the latest examples of its contribution to the field.

The list does not claim to be exhaustive. Yet, it shows how diverse IHL has become. The multiplication of processes through which IHL gets interpreted and applied creates confusion as to what actually constitutes IHL. Contrasted to the earlier days, where the laws of war were developed by states and enforcement mechanisms were much more limited – the fragmentation and the increasingly informal nature of the 'law' are apparent. Of course, there is nothing terribly novel about the contribution of international, regional, and non-governmental actors to the crystallization of a customary law of IHL, provided the final legal instruments are adopted and subscribed to by states. Though these non-state actors certainly play a role in the emergence of an 'informal law of war' – the phenomenon on its own does not embody any dramatic change in how IHL gets created.

⁹ http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/30_09_09_iiffingc_report.pdf.

¹⁰ <http://www.bici.org.bh/>.

¹¹ <http://www.icrc.org/eng/resources/documents/publication/pcustom.htm>

¹² <http://www.icrc.org/eng/resources/documents/article/review/review-872-p991.htm>

What is novel here is the acknowledgement that the practice and *opinio juris* of non-state actors may create customary law – and not just *state* behavior.

Another important component of the ‘informal law of war’ is the involvement of non-state actors in law-making processes not only in an advisory capacity (as in the past) but also, and more remarkably, as actual decision-makers. A number of private entities – inter-governmental organizations, NGOs, companies, armed groups – have undertaken the task of elaborating their own standards of behavior. Often, but not always, they do so in cooperation with other actors. An ‘informal law of war’ emerges from the concerted efforts of public and private actors to jointly develop under-explored areas of the law. The instruments produced generally have no binding legal force.¹³ Early examples of this form of law-making include the elaboration of the Voluntary Principles on Security and Human Rights¹⁴ and the UN Global Compact¹⁵ initiative – both dating from 2000. More recently, states and private security companies came together with the International Committee for the Red Cross in an attempt to clarify the normative framework applicable to the provision of security and military services.

By way of these processes, a variety of non-state actors commit to a set of principles or guidelines in a specific area of IHL. I would argue that this commitment demonstrates the actors’ law-making intent. It is true that they do not always intend to be bound, in a legal sense, by the norms of behavior they create. Nevertheless, from an international scholar’s perspective, a non-state’s commitment to rules of behavior translates into something akin to law-making. Though the precise nature of the *outcome* remains open to discussion, the nature of the *process* justifies an examination of its law-making

¹³ *Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict*, 17 September 2008, reprinted in 13 J. Conflict Security L. 451 (2008); and *International Code of Conduct for Private Security Service Providers* (2010), available at <http://www.icoc-psp.org/>.

¹⁴ Voluntary Principles on Security and Human Rights (adopted in December 2000, available at http://www.voluntaryprinciples.org/files/voluntary_principles.pdf). Initiated by the British Foreign & Commonwealth Office and the U.S. Department of State, today the initiative counts 38 participants – including notably Canada, Colombia, Total, Amnesty International, and Human Rights First. The Voluntary Principles have been used by extractive companies to ensure the safety and security of their operations in volatile environments – while respecting human rights and humanitarian law.

¹⁵ See <http://www.unglobalcompact.org> (establishing ten principles in the area of human rights, labor, environment and anti-corruption to which public and private actors voluntarily submit).

potential effect. Regardless of whether the emerging non-binding frameworks create new legal obligations, they affect the fabric of both international humanitarian law and human rights law – and they affect it differently than customary international law does.

How different is the 'informal law of war' from customary international law? Customary international law derives from state behavior – and, under a broad and controversial interpretation, non-state actor behavior. The 'informal law of war', for its part, includes law-making processes in which non-state actors commit themselves *in their own capacity*. This is unlike non-states' contribution to customary law, which is by nature indirect. The 'informal law of war' is much more straightforward. Here, non-state actors elaborate, create and commit to standards directly, in their own name, and for their own benefit (not that of states). In regulatory terms, this amounts to 'decisional participation'.

A controversial example of how non-state actors have become involved in law-making was brought to light by Sandy Sivakumaran and Anthea Roberts in their ground-breaking article on law-making by armed groups.¹⁶ The authors demonstrated that armed groups (like the Liberation Tigers of Tamil Eelam of Sri Lanka, the Sudan People's Liberation Movement, and the Taliban) enter into ad hoc agreements with states and international organizations, issue statements or draw up codes of conduct, and make unilateral declarations – all on issues of international humanitarian law. This trend will likely intensify as a consequence of the realities of modern conflict, evidenced by President Obama's recommendation to engage diplomatically with non-state armed groups.¹⁷

Finally, a third mechanism having contributed to the emergence of an 'informal law of war' can be found in the growing tendency of *states* to opt for non-binding frameworks in the realm of law and security. States' tendency to favor non-binding agreements has been commented upon heavily in fields as diverse as environmental law and financial regulation. Yet, when it comes to IHL, the evolution has gone largely unnoticed.

¹⁶ Anthea Roberts and Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 *Yale Journal of International Law* 107 (2012).

¹⁷ Council on Foreign Relations, Working Paper, *Enhancing U.S. Diplomatic Engagement with Nonstate Armed Groups*, Payton L. Knopf (2011).

Significant areas of IHL are being developed by like-minded states that opt for non-binding frameworks.

The Copenhagen Process on the Handling of Detainees in International Military Operations is an example of this type of 'informal law of war'. Though often referred to as a multi-stakeholder process, it was initiated by the Danish government and agreed upon by additional states (with five international organizations participating as observers in the initiative). The process produced a number of non-binding guidelines on the treatment of detainees in the course of military operations in situations of non-international armed conflict.¹⁸

Similarly, in the realm of cyber, the NATO-led initiative which resulted in the elaboration of the Tallinn Manual on the International Law Applicable to Cyber Warfare suggests that international humanitarian law in this challenging area is developing by way of informal processes.¹⁹ Indeed, the adoption of a formal treaty restricting the use of cyber-weapons looks rather unlikely.²⁰

Nascent regulation in technology-dependent areas of IHL seems to reinforce the trend. Attempts to regulate the use of autonomous weapons systems are illustrative. The possibility of adoption a treaty banning autonomous weapons systems has been raised, but the criticism voiced against it makes it unlikely to move forward.²¹ With outright treaty law becoming increasingly unlikely, policy-makers, think tanks and academics seem to be moving toward the articulation of codes of conduct and guidelines.²² Similar trends could spill to the regulation of drones, a topic heavily debated at the moment in the

¹⁸ See http://um.dk/da/~media/UM/Danish-site/Documents/Politik-og-diplomati/Nyheder_udenrigspolitik/2012/Copenhagen%20Process%20Principles%20and%20Guidelines.pdf.

¹⁹ See <http://www.ccdcoe.org/249.html>.

²⁰ Michael Glennon, *The Dark Future of International Cyber Regulation*, 6 J. National Security L. & Pol'y 563 (2013).

²¹ See Human Rights Watch, *Losing Humanity: The Case against Killer Robots* (2012), available at <http://www.hrw.org/reports/2012/11/19/losing-humanity-0>.

²² Kenneth Anderson and Matthew Waxman, *Law and Ethics for Autonomous Weapon Systems: Why a Ban Won't Work and How the Laws of War Can*, available at <http://www.hoover.org/publications/monographs/144241> (expressing preference for codes of conduct based on traditional legal and ethical principles governing weapons and warfare.”)

United States. Recommendations have included the suggestion for the United States to “begin discussions with emerging drone powers *for a code of conduct* to develop common principles for how armed drones should be used.”²³ The 'informal law of war', therefore, is not just about non-state actors but also about the regulatory choices made by states.

To conclude, this section has shed light on the emergence of an 'informal law of war' governing more and more aspects of warfare, to which states and non-states actors contribute – sometimes together, sometimes independently of each other. The emergence of this 'informal law of war' was triggered by the increasingly active role played by non-state actors in the realm of war and security, the lack of an IHL-specific body within the international system, and the difficulty of contending with the ever-changing nature of the modern battlefield.

In what seems like a reaction to these challenges, an 'informal law of war' has come to life through three main channels: (1) when inter-governmental organizations, regional organizations, courts and tribunals and other non-state actors interpret and apply international humanitarian law, (2) when non-state actors commit, in their own capacity, to standards of behavior alone or in concert with other actors, and (3) when states opt for non-binding instruments to govern the conduct of war. Though this paper addresses (1), its focus is on (2) and (3) – as they embody a notable departure from the traditional regulation of war and the common understanding of customary international law.

²³ See <http://www.cfr.org/wars-and-warfare/reforming-us-drone-strike-policies/p29736>, at 27 (emphasis added).

II. A Welcome Development?

As the law 'softens', shall we rejoice? This section addresses the pros and cons of the emergence of an 'informal law of war'. It also examines the relevant considerations when contemplating the involvement of non-state actors in law-making.

1. Risks and Costs: Legitimacy and Fragmentation

Political and military decision-makers have become subject to a complex and diverse patchwork of regulatory and governance mechanisms that has greatly expanded over the past two decades. Today, the array of institutions involved in developing, enforcing, or opining upon matters of international humanitarian law includes the United Nations and a number of its committees and agencies, international courts and tribunals, regional bodies, self-regulatory bodies, and even domestic courts.

Unbridled proliferation of regulatory and governance mechanisms poses significant challenges to the legal coherence and institutional integrity of the law. Together with the multiplicity of UN-mandated mechanisms that have appeared in recent years – the creation of ad hoc courts such as the Special Tribunal for Lebanon and numerous commissions of inquiry into situations of conflict – a range of definitions of crimes, legal theories, and precedents has developed.

The body of law applicable to war has become more fragmented, and more difficult to identify. The United Nations Human Rights Council has become more vocal in pronouncing on matters of international humanitarian law (which is, strictly speaking, beyond its domestic human rights-focused mandate). Though to a lesser extent, regional and domestic courts, from the European Court of Human Rights to the high courts of the US, UK, Israel,²⁴ Spain and others, have also become more active in adjudicating matters of international humanitarian law.

²⁴ See, for example, *The Public Committee against Torture in Israel v. The Government of Israel*, HCJ 769/02, Supreme Court of Israel, para. 21 (December 11, 2006).

The first and perhaps most obvious disadvantage of the informal law of war is its disorderly nature, which leads to inconsistencies and makes it difficult to identify what IHL actually says about specific issues. When military commanders search for the answer to a specific question, where should they search? The IHL universe has gotten a lot larger, a reality which complicates the application of the law. This is further accentuated by the lack of a monitoring and/or enforcement mechanism specifically designated to implement IHL or oversee its development. The possible dilution, distortion, and/or misinterpretation of IHL should indeed be a concern – as "privatizing" law-making could affect the integrity and objectivity of the law. But at the same time, there is a legitimate argument to be made that the state cannot remain the sole 'regulator' of war when so many non-state actors (ranging from private armies to terror networks and non-governmental organizations) play a part in its conduct.

While fragmentation of the law is indeed a concern, especially when clear-cut guidelines of conduct are sought by compliance-conscious parties – the crux of the problem is not legal proliferation per se. The problem is rather about *which* actors act in a law-making capacity and under what circumstances. Armed groups can hardly be compared to NGOs or multi-stakeholder coalitions involving intergovernmental organizations.

Is the risk that dramatic? After all, resort to 'soft' instruments to govern various aspects of international life is nothing new.²⁵ Jean d'Aspremont would certainly argue that the position that non-state actors have become "some sort of law-makers on the world stage" is exaggerated.²⁶ He is probably right that the emergence of an 'informal law of war' neither threatens the system nor call for a complete re-thinking of how the system works. Nevertheless, the 'softening' of IHL, including at the hands of states, deserves some reflection going forward.

²⁵ See, for example, INFORMAL INTERNATIONAL LAWMAKING, *supra* note 1.

²⁶ Jean d'Aspremont, *International Law-Making by Non-State Actors: Changing the Model or Putting the Phenomenon into Perspective?*, in NON-STATE ACTORS DYNAMICS IN INTERNATIONAL LAW (Ashgate, 2010), at 180.

As more actors get involved in the regulation of war, states' influence and control will likely diminish. This dilution of public authority might appear as objectionable, as the state is the bearer of the prerogative to regulate *par excellence*. The state is also the bearer of the prerogative to wage war, making its authority to regulate war seemingly inviolable. Those who find this reasoning attractive will take issue with the 'informal law of war' produced by non-state actors (such as the instruments governing the outsourcing of security services or the codes of conduct elaborated by armed groups). However, objections will not be raised in these quarters regarding the 'informal law of war' to the extent it is produced by states (such as guidelines governing cyber warfare or the use of autonomous weapons systems).

I would recommend setting aside positivist conceptions of international law, and looking at the 'informal law of war' in its entirety. Its emergence arises out of a certain need – the need for flexibility – and the realization that treaties no longer provide a realistic alternative. The sense that a more diverse and heterogeneous set of actors would become involved in law-making was felt decades ago. The change did not really catch us by surprise.²⁷ Though it has happened perhaps slower and more discretely in humanitarian law, it has arrived and must be contended with. There is no reason, a priori, to look down on the 'softening' of IHL. It certainly complicates the task of scholars and decision-makers, and calls for certain adjustments. But it should raise neither concern nor fear over the legitimacy and integrity of IHL.

2. Benefits: Flexibility and Compliance

The proliferation of IHL sources reflects the success of the international community in creating a consensus around the legitimacy and importance of the laws of war. It has also had the follow-on effect of bringing humanitarian law concepts the broader public – witness the breadth of public discussion of such topics as proportionality, necessity, human rights, and the Geneva Conventions. Well channeled, these developments can have other positive impact on the laws of war, particularly in terms of flexibility and compliance.

²⁷ See, generally, Anthony Clark Arend, *LEGAL RULES AND INTERNATIONAL SOCIETY* (OUP, 1999).

Flexibility is particularly important given the pace of change in the nature of warfare. In just over a decade, the private security and military industry has grown to unimaginable levels, piracy has re-emerged as a threat to global security, and terrorist organizations have achieved worldwide reach. While the adoption of new 'hard' regulation might address current manifestations of modern warfare, changes in warfare could soon render them inadequate. 'Soft law' may arguably have less teeth; but it has the capacity to adapt to future change.

This flexibility also makes it possible to envisage a more inclusive regulatory process – one which would enable the participation of certain non-state actors in law-making. Consider, for example, a treaty regulating the private security and military industry – negotiated, drafted, and adopted exclusively by states. Such a treaty would carry much less legitimacy than an instrument to which private security and military firms would have contributed, as is increasingly the case. The point is that certain regulatory mechanisms may be more successful than others in encouraging non-state actors to comply with the law. The type of mechanism selected, in other words, may significantly impact the way the law is perceived and followed. Involving non-state actors in law-making increases these actors' commitment to the final product – notwithstanding the latter's lack of legal force.

Enhancing compliance with the law is one of the declared objectives of the laws of armed conflict. Yet, compliance by non-state actors presents a fundamental challenge. Since, by definition, they cannot sign or ratify IHL's main instruments, a number of theories have been developed to justify their accountability to the law's most basic principles – even in the absence of unilateral undertakings on their part. The Pictet Commentary, for example, explains that the state's commitment to respect international humanitarian law is sufficient to bind non-state entities within the national territory of that state: "if the responsible authority at their head exercises effective sovereignty, it is bound by the very fact that it claims to represent the country, or part of the country."²⁸ Another relevant

²⁸ Pictet Commentary, at 37.

justification is provided by Christian Tomuschat, who argues that non-states are subject to international humanitarian law because elements of governmental authority have fallen into their hands.²⁹ The non-state entity essentially represents and exercises the state's authority. This might be relevant for non-state actors (like private security companies acting under contract with a governmental agency or ministry).³⁰ But it will not provide a suitable justification for others, which cannot be said to exercise elements of public authority. Marco Sassòli and Antoine Bouvier, for their part, explain that "when creating through agreement or custom the rules applicable to non-international armed conflicts...States implicitly confer on non-government forces involved in such conflicts the international legal personality necessary to have rights and obligations under those rules."³¹ Therefore, "[o]nce the State is bound by IHL, those rules either become part of its internal law or must be put into effect through implementing legislation."³² In short, there is a two-level imposition of rights and obligations by the state – first through the ratification of international legal instruments, and then through domestic law. Regardless of which theory one finds most convincing, in reality a consensus has now emerged that non-states are bound by international humanitarian law in all types of conflicts.³³

Both the theories and the consensus, however, derive from an artificial intellectual construct which is unsatisfactory. This artificial intellectual construct is sufficient to

²⁹ See Christian Tomuschat, *The Applicability of Human Rights Law to Insurgent Movements*, in (Horst Fischer, Ulrika Froissart, Wolff Heintschel von Heinegg, and Christian Raap, eds.) *CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION* 573, 586 (Berliner Wissenschafts-Verlag, 2004).

³⁰ This would be the case of Erinys, the US based contractor, when it acted pursuant to its \$40 million contract with the United States government for the protection and reconstruction of Iraqi oil pipelines.

³¹ Sassòli and Bouvier, at 266.

³² *Id.*

³³ This follows from a number of legal instruments which make no distinction between international and non-international armed conflicts when addressing the question of whether non-state actors are bound by humanitarian norms (see, for example, GA. Res. 2676 (XXV), *Respect for Human Rights in Armed Conflicts*, U.N. Doc A/2676, December 9, 1970; and Additional Protocol II, Articles 13-17 (Additional Protocol II provides that the civilian population is protected from the dangers arising from hostilities and cannot be the subject of attack. As in international armed conflict, such protection is suspended when civilians take part in hostilities. Additional Protocol II also provides for the protection of objects indispensable to the survival of the civilian population, for the protection of works and installations containing dangerous forces, and for the protection of cultural objects and of places of worship. The displacement of the civilian population is prohibited "unless the security of the civilians involved or imperative military reasons so demand."); S.C. Res. 1193, U.N. Doc. S/RES/1193, August 18, 1998, para. 12; Institute of International Law, Berlin Session Resolution, August 15, 1999, Article II; *Prosecutor v. Sam Hinga Norman*, Case SCSL-2004-14-AR72(E)) Decision on preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), May 31, 2004, para. 2; and Henckaerts and Doswald-Beck, at 6-7).

demand respect with basic IHL norms, but insufficient to provide incentives for non-state actors to comply with the law. In many situations, the ‘informal law of war’ can create the incentives these justifications have failed to provide.

III. The Challenge(s) Ahead

1. Defining IHL: What *is* IHL?

Those of us teaching IHL have defined international humanitarian law to students by explaining that, like most of international law, it consists of international treaties and customary law.³⁴ In light of the developments described in Part I, this dichotomy appears increasingly simplistic – and the need to adjust what we defined as “IHL” more palpable. International humanitarian law can no longer be defined as *the body of law governing the conduct of states in time of war*. It encompasses a growing number of instruments which regulate the conduct of non-states as well. And it may go beyond what was once understood as a body of 'law'.

So what *is* IHL today and what will the study of IHL look like in a few years? The change witnessed in the past decade will only intensify in the next few years – particularly as technology-enabled war-making capabilities like cyber and robots become governed by informal instruments. In the case of autonomous weapons systems or drones, for example, the rapid advances of technology might lead states to opt for more flexible instruments. In other cases, such as the regulation of the private security industry, private actors will continue to fill a vacuum where states had been reluctant to innovate.

Part of the problem, it seems, is that no single body is endowed with the prerogative to make IHL. This prerogative used to belong squarely to states. Today, a broad range of public and private bodies exercise IHL-making functions – often without having been formally endowed with the authority to do so. Public and private actors, and those in between, all exercise a residual law-making authority in the realm of IHL. Thus diluted, law-making authority in the realm of IHL must be carefully monitored, though not condemned outright.

³⁴ See, for example, Marco Sassoli, Antoine A. Bouvier and Anne Quintin, HOW DOES LAW PROTECT IN WAR (ICRC 2011), Chapter 4.

The prophecy of Anthony Arend seems to have come true. Back in 1999, he discussed the emergence of a "neomedieval" system, a system "defined by actors of increased *diversity* and *heterogeneity*, and characterized by overlapping international authority and conflicting loyalties"³⁵ and one witnessing the restoration of private international violence (i.e. "the growing presence of groups that use force against states and other international actors and claim the right to engage in such uses of force.")³⁶ In such a system, Arend notes, non-state actors would be "participating in law-creating processes in a more direct manner."³⁷ He believed the determination of the existence of international rules would become more complex, as it would no longer suffice to examine state practice, but rather the practice of a "panoply of actors" would have to be analyzed.³⁸ What he describes as the next big change in the international legal system rings very familiar to the observer of the 'informal law of war.'

Arend's account should provide some solace to the skeptics. Though he truly believed that this "neomedieval system" would eventually come about,³⁹ he did not look down on the change. He simply warned of the difficult of the road ahead in international legal theory:

“With a change in the a priori assumption that state are the sole creators of general international law, the process for creating both customary international law and general principles of law would alter significantly. The task for the scholar or anyone else would become extremely complicated, if not unmanageable. As difficult as assessing state practice may be, the task of exploring the authoritative practice of a wide variety of international actors would be exceptionally daunting.”⁴⁰

No matter how we define IHL or how we call the new reality, a rethinking of the meaning of "law" is in order. Can informal, non-binding, instruments still properly be called "law"? Before a court of law, what normative weight would the Montreux Document, the Tallinn Manual or the Copenhagen Principles carry? As I noted earlier, the 'informal

³⁵Anthony Clark Arend, *LEGAL RULES AND INTERNATIONAL SOCIETY* 171 (OUP, 1999), citing Cronin and Leggold, (emphases in text).

³⁶ *Id.*, at 173.

³⁷ *Id.*, at 174.

³⁸ *Id.*, at 177.

³⁹ *Id.*, at 180, 185.

⁴⁰ *Id.*, at 178.

law of war' differs from customary international law in two main respects: first, when it is produced by non-state actors (customary law, in principle, derives from *state* conduct only), and, second, when it is produced by like-minded states who have voluntarily opted for a non-binding instrument governing certain aspects of warfare (i.e. not necessarily with the intention of creating customary law). Since the 'informal law of war' obviously does not qualify as treaty law, and since its unique features do not allow for a qualification as customary law either, it does not fit easily within the traditional theory of international legal sources.⁴¹ Yet, with time, the 'informal law of war' will become an increasingly important part of IHL. Our view of normativity, just like our view of compliance, must be re-examined in light of the significant transformations war has undergone in the last decade.

To help contend with these jurisprudential questions, I would suggest that the diverse and open-ended notion of "conceptions of law" is more adapted to the reality of modern warfare than the idea of "concept of law." [to be developed]

2. Regulatory Choices: 'Soft' or 'Hard' Law

Much of contemporary IHL scholarship focuses on the question of whether the laws of war ought to be modified or adapted to contend with new battlefield realities. The acknowledgement of the emergence of an 'informal law of war' brings us to reflect upon another, not less important, query. It forces us to look beyond an analysis of the substance of the norms (i.e. what should the law say about cyber-warfare), and ask what form of law is appropriate. Is 'hard' or 'soft' law preferable – for example, are international treaties like the Geneva Conventions preferable to voluntary codes of conduct?

The answer depends both on the type of behavior (cyber-warfare, robots, drones, etc.) and the type of actor (state v. non-state) considered. While some aspects of war remain well-suited for regulation through treaties and formal legal arrangements, other aspects

⁴¹ See Article 38 of the Statute of the International Court of Justice (listing as sources of international law treaties, customary international law, general principles of law, and (but to a lesser extent) academic writing and judicial decisions).

are better addressed through 'soft' law – non-binding instruments, self-regulatory mechanisms, or codes of conduct. Whether the address of the regulation is a state or a non-state matters, too. States and non-states may call for different types of regulation. These questions are questions of regulatory policy. We must identify which regulatory mechanisms guarantee the most effective and humane regulation of armed conflict.

Surprisingly, regulatory choices in war have hardly been discussed. No systematic and strategic analysis of the regulatory mechanism best suited to govern the use of cyber weapons or the treatment of detainees in non-international armed conflict has been conducted. It seems that regulatory choices – particularly the choice of ‘informal’ mechanisms – derive primarily from considerations of convenience. Most of the lawyers’ and decision-makers’ energy focuses on the content of the norm. Too little thinking takes place determining which regulatory instrument is best equipped to achieve regulatory objectives.

Consider cyber-warfare. The substance of the norm has attracted much attention (*ad bellum* – whether cyber-attacks give rise to the right of self-defense; *in bello* – whether the principle of proportionality continues to apply unchanged). In contrast, the question of the *types of instruments and mechanisms most appropriate to regulate the use of cyber-warfare* has not been addressed. Is this best done through “interpretive guidelines” of existing norms? Is this best done through the adoption of a new treaty regulating cyber-warfare? How does the involvement of non-state actors in cyber-attacks impact regulatory choices? What regulatory policy would enhance compliance with the law? The questions abound and yet they have been largely overlooked.

The emergence of an ‘informal law of war’ forces to reflect on *how* war should be regulated. Before states and other actors undertake to regulate under-developed areas of IHL, the question of what regulatory mechanism is best suited must be asked. Awareness must grow as to the implications of choosing one regulatory mechanism over another. And more research must be conducted on the factors underlying this choice – i.e. regulatory objectives. At the strategic level, the emergence of an ‘informal law of war’

triggers a reflection on the role of regulation in the realm of war and security. Factors such as influencing behavior of protagonists in a conflict or enhance compliance have already been identified. How important is it for the law to create incentives for non-state actors to comply with the law? Or to provide a framework within which states can win war, while protecting innocent civilians? Depending on how these goals are framed, regulatory strategy may vary. And different states may have different views on how the regulation of war best furthers their strategic goals.

3. Channeling the Informal Law of War

The third challenge facing the ‘informal law of war’ relates to oversight – or more accurately the lack thereof. Decentralized and somewhat disorganized in nature, the emerging regulatory framework is not subject to any review – except perhaps that of non-governmental organizations. The success and achievements of this ‘informal law of war’ will depend on its ability to uphold and promote the values cherished by international humanitarian law.

Maximizing flexibility and enhancing compliance cannot suffice. Certain safeguards must be put in place to ensure that the ‘informal law of war’ preserves and upholds the essential objectives of humanitarian law. IHL seeks to advance moral ideals in humanity’s darkest times. It has well-established roots in religion and morality, and extends protection from attack to as many actors as possible.⁴² All IHL-related instruments seek to balance these humanitarian considerations with considerations of military necessity.

Going back, one realizes that no institutional control was exercised over states to make sure that whatever treaty they adopted would uphold the essence of international humanitarian law. Even if institutionalizing some oversight over the creation of an ‘informal law of war’ were advisable, its modalities would raise many issues. For

⁴² On the objective of the laws of war to enhance the protection of as many actors, see generally, Commander Gregory Noone, *Prisoners of War in the 21st Century: Issues in Modern Warfare*, 50 *Naval L. Rev.* 1, 13 (2004); and Pictet Commentary, at 38.

example, the question would arise of the type of control that could realistically be exercised over codes of conduct adopted by armed groups.

The main issue here in my view lies in raising awareness for the potential pitfalls of the 'informal law of war' and making sure that all actors remain mindful of the need to preserve the law's roots in morality as the 'informal law of war' expands and develops.

The 'informal law of war' should also continue, like more traditional expressions of IHL, to provide states with a framework through which they can further their military and strategic goals.

Conclusion

The emergence of an 'informal law of war' deserves more attention than it has received. The meaning of IHL is changing, both in substance and in form. Non-state actors not only influence the content of the law but also, and more importantly, are now able to commit to it in their own capacity. Simultaneously, states increasingly opt for non-binding instruments to regulate the conduct of war.

I argued that the body of norms thus created, referred to in this Article as the 'informal law of war', forms an integral part of IHL. International humanitarian law, like the rest of international law, has expanded to include a range of 'softer' and more diverse instruments which would not meet the traditional meaning of 'law'. As I noted above, the IHL universe is much larger than it was a decade ago.

This change must be reflected in our conception of international humanitarian law. It certainly calls for an adjustment in how lawyers and military commanders conceive of IHL. It does not, however, call into question the entire system. That would exaggerate the positions taken in this paper. The paper, rather, sought to assess the desirability of the trend and suggest the type of adjustments needed to contend with it.

It began with a reflection on the desirability of the trend – because observing the trend and finding it agreeable are two very different things. Does the informal law of war bring good news to IHL? I believe it generally does. It provides an answer to the pressing need to create incentives for non-state actors to comply with the law. The past decade has seen numerous attempts – including some of my own – in trying to hold non-state actors accountable for IHL norms developed by states, and for states. It is time to develop more efficient and legally sound ways to achieve this. Involving non-state actors in law-making can help enhance the compliance pull of IHL norms vis-à-vis those actors.

This reflection on the risks and benefits of an informal law of war lead me to another, equally important, insight. IHL scholarship has focused the past few years on *what* we

regulate or, to put it differently, on the substance of IHL norms – the meaning of proportionality, the importance of reciprocity, the relationship between IHL and human rights law, or the contours of direct participation. The present Article forces us to consider *how* war is regulated. Determining the vehicle or regulatory mechanism most appropriate to govern a certain area of the law is no less important than asserting its content. At a time where the weaknesses of traditional regulation become more and more apparent, defining the goals of war regulation and identifying the normative tools best suited to achieve them has become indispensable. Regulatory choices made today will affect the way war is waged in the future, just as the Geneva Conventions changed the way war was perceived and fought in the wake of their adoption.

The remainder of the Article sought to offer suggestions on the type of adjustments needed to contend with the emergence of an informal law of war. While not threatening the system as such, the emergence of an informal law of war requires a re-conceptualization of the objectives of IHL, particularly, once again, as it applies to non-state actors. What mode of governance is most likely to impact non-states' compliance? What legal vehicle is likely to best uphold the underlying roots of IHL? What is the optimal level of state involvement and/or control over the emergence of an informal law of war? We thus need to adjust our understanding of what 'humanitarian law' stands for, broaden our view of compliance, and re-think the role of the state in IHL-making.

This paper has tried to raise awareness on the said adjustments and identify areas for future research – all in the hope of making war regulation more effective and humane. Ultimately, the challenge lies in ensuring that the informal law of war upholds the moral premises of humanitarian law, enables states to further their strategic goals, and creates incentives for non-state actors to comply with the law.