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Contestation before Compliance: History, Politics, and Power in International Humanitarian Law

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Despite the common reference to international humanitarian law (IHL) in the discourse and practice of international politics, international relations (IR) scholarship has yet to consistently engage in an analysis of IHL that extends beyond the relatively narrow specifications of its regulative and strategic effects. In this theory note, we argue that this prevailing focus leaves the discipline with an impoverished understanding of IHL and its operation in international politics. We propose that the study of IHL should be expanded through a deeper engagement with the law's historical development, the politics informing its codification and interpretation, and its multiple potential effects beyond compliance. This accomplishes three things. First, it corrects for IR's predominantly ahistorical approach to evaluating both IHL and compliance, revealing the complicated, contested, and productive construction of some of IHL's core legal concepts and rules. Second, our approach illuminates how IR's privileging of civilian targeting requires analytical connection to other rules such as proportionality and military necessity, none of which can be individually assessed and each of which remain open to debate. Third, we provide new resources for analyzing and understanding IHL and its contribution to "world making and world ordering."

Introduction

On August 1, 2019, the United Nations (UN) Secretary General Antonio Guterres established a Board of Inquiry to investigate attacks on medical facilities and other civilian objects in Northwestern Syria from September 2018. A pattern of systematic and deliberate attacks began early in the war despite all parties being responsible to undertake additional protective measures under international humanitarian law (IHL). Rather than using the UN deconfliction list to avoid striking legally protected targets, Assad and his allies used the list to intentionally do so. Former UN Secretary General Ban Ki-Moon decried the conduct of the war as "an affront to our shared humanity," admonishing all parties to the conflict to respect their obligations under IHL (United Nations 2016). The ICRC's head of the Syrian delegation fruitlessly implored: "this is madness and it has to stop" (ICRC 2018). In response, the Syrian ambassador insisted the hospitals were taken over by "terrorists" and no longer qualified as "civilian objects" (Nichols 2019).

Separately, on March 17, 2017, a United States airstrike killed approximately 200 civilians in a neighborhood in the western part of Mosul, Iraq. This attack occurred notwithstanding prior credible information that ISIL forces in the area were refusing to allow civilians to leave their homes, or were confining them to booby-trapped buildings, thus forcing them to act as human shields (Gordon and Perugini 2016). Responding to international outcry, the US Central Command opened an investigation to determine the facts surrounding the Mosul strike (CENTCOM 2017). It controversially concluded that civilian deaths were attributable to ISIL's "deliberate" staging of explosives to harm civilians (Gordon 2017).

The interpretation and assessment of these events, and the corresponding debates over appropriate responses, are informed by the terms set by IHL. States, international organizations, and non-state actors all invoke IHL not only to evaluate the legality of such actions, and measures for holding the parties to conflict accountable, but also to frame normative and political judgments about the conduct and character of actors and their warring methods. Yet, despite the common normative and juridical reference to IHL in the discourse and practice of contemporary international politics, International Relations (IR) scholarship has yet to consistently engage in an analysis of IHL that extends beyond its regulative and strategic effects.

IR scholars have most systematically focused on evaluating IHL in terms of its efficacy and compliance in interstate war (Morrow 2014). In so doing, they have adhered to a so-called "mantra" of assessing the effect or meaning of

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IHL solely by measures of wartime practice (Watkin 2016, 146).[1] Even as IR scholarship has recently expanded to consider civil wars or rebel group behavior, the focus remains on measuring compliance through the metrics of civilian deaths and targeting.[2]

Yet, the power of IHL and its influence on behavior are not reducible to regulative constraint or calculations of reciprocity, as demonstrated by important recent work informed by more substantive conceptions of legitimacy, morality, social construction, and contestation (Crawford 2013; Dill 2014; Hurd 2017). In what follows, we undertake to more fully articulate a theoretical and methodological sensibility that we believe crucial for expanding our understanding of the evolution and the effects of IHL. In turn, we identify potential implications for and challenges to IR posed by the empirics and practice of such sensibility.

We argue that IR's predominant treatment of IHL through a focus on compliance, and civilian targeting, leaves the discipline with an impoverished understanding of the law and its operation in international politics, especially its productive effects. We contend that the study of IHL should more fundamentally engage with the law's historical development, the politics informing its codification and interpretation, and its multiple potential influences beyond compliance. This approach makes three key contributions. First, it corrects for IR's erroneous tendency to hold constant across time and place basic features of the law, including the core definitions and classifications of armed conflict, participants, victims, and the rules governing restraint and protection. Second, it illuminates how IR's privileged element of IHL—civilian targeting—requires analytical connection to the "broader mosaic of rules" that compose IHL, such as proportionality and military necessity, none of which can be individually assessed and each of which remain open to debate (Corn 2019). Third, our approach provides new resources for analyzing and understanding the "productive power" (Barnett and Duvall 2005) of IHL and its contribution to "world-making and world-ordering" (Ansorge and Barkawi 2014, 3) through the creation and application of IHL rules, and more broadly by generating and sustaining notions of rightful conduct, identity, and order in international politics.[3]

Methodologically, our approach is reflective of a broader "historicizing moment" in international law, taking place primarily but not exclusively in the cognate field of human rights and producing a series of critical historical assessments (Pitts 2015, 541). It is also situated in the "third generation" of IR historical research which is marked by "an increased emphasis on primary sources" and analysis of the "ambiguities of secondary historical scholarship" (Reus-Smit 2008, 414, 401).[4] Finally, our approach also responds to calls for research based on conflict archives, focusing specifically on the archives of the development of IHL (Balcells and Sullivan 2018).

We expand on and illustrate the benefits of our proposed approach in two main sections. First, we make the case that a careful history of IHL establishes that political contestation and ambiguities consistently characterize the development of its essential legal categories, making a straightforward compliance focus problematic and overtly narrow.[5] Second, we discuss the notion of and controversy over determining civilians' "direct participation in hostilities" to illustrate the importance of a critical historical examination of IHL for assessing the contemporary debates regarding civilian protection, as illuminated in the opening vignettes about human shielding in Mosul and the targeting of "terrorists" in Syria. We demonstrate that grappling with imperialism, non-interstate wars, and non-Western actors is necessary to understanding the development, scope, and application of IHL, while also bringing to the fore its world-ordering and world-making effects.[6]

Historical Contestations in IHL

IR scholars often treat IHL as if it existed for the primary purpose of protecting civilians through absolute prohibitions. Within this framework, the ability to minimize intentional harm (e.g., the commission or avoidance of direct attacks) to civilians serves as the key yardstick of legal compliance and by extension, of the law's efficacy and value. Yet, as international lawyers and legal historians well know, this is not an accurate depiction of the purpose or development of IHL, nor of the elements of civilian protection. Arguably, IHL's purpose with regards to civilians is to strike some *balance* between military necessity and proportionality, informed by a historically contextual and contested notion of humanitarian concern: between civilian protection and "force protection," or between varying notions of military "advantage" (Dill 2014). As one military lawyer succinctly stated, "I have approved targets that could have caused 3,000 civilian causalities and I've raised questions about targets predicted to risk fewer than 200 civilian lives. The issue is about the importance of the target" (Carr Center 2002).[7] IHL does not prohibit the deaths of all civilians but rather seeks to balance proportionality and military necessity in the *calculation* of potential harm to civilians from attacks. Civilian deaths are thus not absolutely indicative of whether IHL "works" or not, nor are they evidence of its failure.

In fact, despite IR scholars' focus on civilian protection under IHL, historically the law's ostensive focus has

[1] Martin argues we "cannot possibly assess the depth (or shallowness) of international cooperation if we rely on compliance as a valid measure of outcomes" (2013, 593). See also Chilton, who writes that the study of compliance with the laws of war suffers from three specific problems; namely, "lack of variation, limited sample size, and endogeneity" (2015, 184).

[2] Wallace's (2015) work is on prisoners of war, Fazal's (2018) and Jo's (2015) work expands to the role of non-state armed groups, and Stanton (2016) focuses on civil wars. Yet, all still rely on either interstate wars and/or targeting of civilians. Narang and Stanton (2017) expand their focus to the targeting of humanitarian workers, but do not actually refer to such codification in IHL under Article 71(2) of Additional Protocol I. Morrow and Jo's collaborative data set (2006) and Morrow's book (2014) expand the scope of analysis but they include declarations and draft treaties which are arguably not reflective of the law, while the logic of what is included or excluded is unclear (e.g., the 1977 Additional Protocols are not included). Moreover, like Valentino et al. (2006), Morrow and Jo's dataset begins in 1900 and extends to the 1990s or early 2000s, as if the rules were consistent and similarly conceptualized during this time. In fact, the development and ratification of IHL rules on the protection of civilians from targeting only crystallized in the late twentieth century, *just as* the number of interstate wars declined.

[3] Finnemore (1999), Whyte (2018), Kinsella (2011), Alexander (2016), Kalmanovitz (2015), Evangelista and Tannenwald (eds.) (2017), and Mantilla (2020b).

[4] Leira and de Carvalho (2016), Buzan and Lawson (2016), Bell (2009), and Reus-Smit (2016).

[5] For example, Ryan Goodman (2013) has insisted that IHL contains substantial restraints on the use of force *among combatants*, which under certain conditions compel capturing rather than killing. This, however, is vociferously contested by other prominent legal scholars, including Michael N. Schmitt (2013), who identify no such requirement in the law. Crawford (2013), among others, has argued that as regards the use of force *against civilians*, IHL is highly permissive, a view challenged by Adil Haque who claims that "that IHL does not authorize conduct which it fails to prohibit: comportment with IHL is a necessary, but not sufficient, condition of lawful killing in armed conflict" (2016).

[6] See, for instance, Anghie (2006), and Bartelson (2017).

[7] To take another example, "the administration of President George W. Bush sanctioned up to 30 civilian deaths for each attack on a high-value target in the Iraq war" (Koelbl 2009).

been on protecting certain *combatants*. The First Geneva Convention of 1864 and the St. Petersburg Declaration of 1868 respectively codified the provision of humanitarian aid to wounded soldiers and prohibited the use of a specific weapon (*dum–dum* bullets) among only certain combatants in warfare. As critical legal scholars have demonstrated, and government delegates at the time insisted, "in the St. Petersburg Declaration of 1868, the contracting Powers decided not to employ these bullets in wars *among* themselves. It is evident that there is a gap in the St. Petersburg Declaration, a gap which enables not only *dum–dum* bullets but even explosive bullets to be used against savages" (Russian delegate quoted in Kinsella 2017, 211).[8] Although rarely acknowledged in IR, the positive law of war emerged in the imperialist context of the mid-nineteenth century (Benvenisti and Lustig 2020). Humanitarian impulses aside, the states producing international protections focused on those they cared for most—combatants—and, as we note further below, they carefully instantiated within the law distinctions of difference (e.g., savage vs. civilized; occupiers vs. occupied or "occupiable" states; international vs. internal conflict) and hierarchies of acceptable harm. At the Hague Conferences of 1899/1907, states extended humanitarian protections for wounded and shipwrecked combatants at sea, and in 1929 crafted rules to protect captured soldiers, Prisoners of War (POWs) through the Third Geneva Convention (Wylie and Cameron 2018).

IHL's specific legal focus on civilians came nearly a century after its formal creation. States' first sustained engagement with the issue produced the Fourth Geneva Convention in 1949 (and was then revisited in 1974–1977 through the two Additional Protocols, which we address below).[9] Even so, civilian protection was not absolute. The Fourth Convention was specifically delimited to cover only two types of civilians: "enemy" civilians and civilians living in territory occupied by enemy forces. Substantively, it focused mainly on preventing "arbitrary action on the part of the enemy and not on minimizing the dangers of military operations themselves" (Uhler et al. 1958, 10). Thus, the Fourth Convention did *not* restrict states' combat practices to avoid harm to civilians, but rather focused on the humanitarian treatment of captured or enemy civilians through the creation of safety and internment zones, and the protection of hospitals. Select categories of civilians were to be protected not through prohibitions in the conduct of warfare per se, but upon the location of such civilians and the restriction of their movement (Kinsella 2016).

Unfamiliarity with this important legal history impedes compliance-focused IR scholarship. For example, when Valentino et al. use sieges and starvation as examples of intentional civilian harm, assessing them through the ratification of the 1949 Conventions (2006, 359), they overlook that sieges were not yet explicitly prohibited by IHL as a method of warfare. Rather, the correct empirical expectation would be that the parties should have taken steps to remove all persons *hors de combat* from "besieged or encircled areas." And since starvation was not formally prohibited until 1977 through Additional Protocol I (API; van Dijk 2018), attempting to measure the use of starvation in wars prior to 1977 using the ratification of the 1949 Conventions is inaccurate.[10] By not attending to these historical and legal distinctions, IR scholarship frames combatants' decisions for compliance as straightforwardly assessable and universal over time. Conversely, acknowledging and engaging these debates about the meaning of these concepts, and their specific historical articulation, provides greater understanding of the complex effects of IHL and sharper insights into decisions and debates over compliance which are not reducible to measures of civilian death. We further demonstrate this below, when we address the notion of direct participation in hostilities.

Moreover, it is typically overlooked in IR that IHL specifies its legal protections strictly *depending upon the type of armed conflict*, meaning that it was only in *particular wars* that IHL protections were made to apply at the time of their negotiation and ratification. Conflict definition and classification, crucially, long reflected imperial interests and legislated specific sorts of war as falling outside of IHL's purview. Indeed, IHL was long "a law of (European) statehood" (Koskenniemi 2011) designed to further and secure European interests, especially those of the major imperial powers. And absent an authoritative arbiter to definitely settle controversies over classification, contention over whether and how the IHL framework applies has been a persistent feature.

Perhaps most acutely contested are internal or "non-international" armed conflicts, which went unregulated until the adoption of Common Article 3 to the 1949 Geneva Conventions. Mantilla (2018) proves that the specific limitations of scope in Common Article 3 were the result of British and French maneuvering in the 1949 diplomatic negotiations during which these two declining empires postured as humanitarians while deliberately attempting to shield their colonial conflicts from international regulation. Even today, internal conflicts remain simultaneously under-defined (per Common Article 3's ambiguous definition) and over-defined (through the demanding terms set out in Additional Protocol II from 1977), complicating efforts to bring IHL to bear amid such violence (Vité 2009). A recognition of states' deliberate use of imprecision or indeterminacy in key parts of IHL frustrates expectations about the general function of the law as one of "clarifying" a common conjecture to create understanding of appropriate wartime conduct (Morrow 2014). Our point is not simply that IHL is imprecise and that this is a problem for assessing or enhancing compliance; indeed, recall that imprecision has functional uses (Chayes and Chayes 1993) and is itself a hallmark of much international law. Rather, our broader claim is that imprecision is revealing: it reflects and constitutes hierarchies of world order and legitimate violence, while signaling historical contestations over the meaning and application of IHL's fundamental precepts.

Indeed, in making and revising IHL, states have not only historically prioritized their ability to conduct military operations and to protect combatants, but also limited protections to *some victims* of *some wars* to a greater degree than over others.[11] Notably, it was not until API that wars of national liberation and decolonization, that is, wars of self-determination, achieved the status of international conflict—which arguably does not fit comfortably into any of the categories of interstate, colonial, or civil war as defined by the COW (Reid Sarkees 2010). The production of exclusionary legal categories is a primary world-ordering effect through which IHL constitutes, or "legally conditions"

[8] See also Mégret (2006).

[9] See also van Dijk (2018), Best (1994), Barsalou (2018), and Mantilla (2019).

[10] On the 1949 Conventions' failure to make wartime rape a grave breach of IHL, see Inal (2013).

[11] Recently, the General Counsel of the Department of Defense stated that "the law of war must be made, in particular, by states that conduct military operations." "Remarks by Defense Dept General Counsel Paul C. Ney Jr. on the Law of War" (Just Security 2019).

who is entitled to protection or not, how and why (Kennedy 2006, 8).

Consequently, IHL scholarship that ignores the debates over the classification of conflict cannot formulate accurate hypotheses or claims about which legal protections or prohibitions are in fact relevant to specific situations or to entire historical periods. The common IR focus on interstate wars, defined as dyadic violence between belligerents surpassing 1,000 battle deaths, entails two potential errors. First, in IHL, conflicts are not classified according to a set threshold of battle-related fatalities. Second, the possible range of conflicts covered by IHL has not remained static across the twentieth and twenty-first centuries. In particular, internal (including colonial) conflicts were excluded until 1949, and even after that year powerful states' unwillingness to adopt inclusive interpretations of IHL continued to inhibit its application to most internal violent situations. Thus, scholars of interstate IHL compliance who use these datasets uncritically replicate a particular historiography of war and the application and development of the laws of war which ignores their productive effects with regard to the definition of conflicts, shaped as it was by a defense of state sovereignty and imperial power.

As Kinsella wrote, an evaluation of IHL's "success or failure is predicated upon prior agreement as to its purpose or utility" (2011, 194). Thus, when IR scholarship deems IHL to have "failed" to apply or be observed in certain cases, it should grapple with the possibility that it may have done so specifically to protect a notion of civilization or a particular social order (see Kinsella 2011; Fazal and Greene 2015; Gregory 2015). Put otherwise, in failing to extend protections to certain combatants or those *hors de combat*, IHL might nonetheless succeed precisely by authorizing only particular forms of violence and protection, and these two world-making effects may be complementary. As Benvenisti and Lustig argue, in the late nineteenth century "European governments codified the laws of war *not* for the purpose of protecting civilians from combatants' fire, but rather to protect combatants from civilians eager to take up arms to defend their nation" (2020).

Another example of how inattention to the historical development of IHL can lead to faulty understandings of its functions and influence concerns the scope and character of protections for POWs. As Geoffrey Wallace notes, in offering select protections from prisoner abuse, IHL actually produces the categories necessary for evaluating degrees and kinds of suffering (2015, 13; see also Witt 2014). Or, as was the case under former US President George W. Bush, POW protections might be violated at exactly the same time that protections for civilians are instituted, precisely because of the constitution of one as "barbaric" and the other as "innocent." Indeed, "discourses of barbarism and civilization enable the particular construction of categories of violence (detainee, combatant, or civilian), the treatment of which iterates the fundamental opposition of civilization and barbarism by which the war on terror proceeds" (Kinsella 2005, 163; Anghie 2006; Mégret 2006). As such, the constitutive interplay *among elements* of IHL cannot be assumed to be mutually enhancing and must also be assessed as potentially mutually undermining. As van Dijk (2018, 557) underscores, IHL "cannot be understood exclusively in terms of promoting humanitarianism, or in metaphoric terms of linearity, or teleology, like 'progress' and 'advancement.'"

The production of such discourses and social distinctions by and through IHL and its use has a long history. A particularly noteworthy example concerns the embodiment and formalization of international prejudices about the uncontrollable barbaric nature of the "troops from the colonies" in the initial codification of racial segregation of POWs after WWI (Schroer 2013). As Giladi (2017) observes, colonial troops stationed in German Rhineland post-WWI were vilified as "40,000 black savages roaming the Rhineland at will, raping the women, infecting the population, and polluting the blood," directly influencing the codification of segregation within the conventions (2017, 852). International legal scholars at the time expressed consistent concern over states' use of such "barbarous forces" and "colonial races" because they were believed to be characterologically unable to regulate themselves in a "lawful" manner. Indeed, this same concern was a thinly veiled argument against recognizing those fighting in national liberation wars as combatants during negotiations for the 1977 Additional Protocols. Accordingly, we underscore once more that law is a site of productive power and has productive effects. This means that IHL as a body of law does not neutrally or objectively describe armed conflict, conflict protagonists, or the subjects of legal protection. *Instead, it actively produces, protects, and privileges particular identities and agendas*, thereby producing and defending particular hierarchies of social order.

Thus, contrary, for example, to Clark et al. (2017), with whom we otherwise share a similar theoretical sensibility and a desire to overcome a singular focus on compliance and efficacy, we do not see a contemporary "crisis" in the laws of war. Instead, we see evidence of its ongoing negotiation and contestation. Whereas Clark et al.'s brief retrospective insists that IHL is currently in a moment of profound crisis, facing manifold challenges that threaten the "social bargain" on which the law rests, our approach and empirical research suggests that such moments are nothing new. To the contrary, IHL has *always* been composed of tense, plastic, and contested layers of "agreement" about how to balance humanitarianism and military necessity, the pursuit of war and the protection of its participants, ensuring both the destruction and the security of the population. Thus, to speak of the "fraying" of IHL, and the "eroding of the normative basis on which to critique" violations of IHL (Clark et al. 2017, 3) is overwrought, and reifies a fundamentally thin historical view of IHL and its purposes, potentially obscuring the multifarious ends facilitated by the very claim to normative agreement. After all, the social bargain of IHL is often summed up by the "Martens clause" which states that "populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between *civilized* nations, from the laws of humanity and the requirements of the public conscience."

Viewed more broadly, the identification and production of perceived "crises" for IHL are themselves historically generative—meaning, they have variously been exploited not only to prevent violence but to privilege and facilitate it; to transform understandings of violence as well as to transform the law itself. As we explain further below, despite IHL's imperialist foundations, sheer European dominance decreased after WWII—or at least became harder to exercise, as newly decolonized states and some national liberation movements collectively managed to make an imprint on some of its core aspects, such as the legitimation of national liberation conflict and so-called "freedom fighters." It is for this reason that Hakimi argues against understanding "crisis" in international law only negative terms, insofar as law "facilitates and structures—but does not necessarily diffuse—conflict" (2017, 327). Thus, it follows that neither IHL as a whole nor its elements can be accurately

used for explanatory or evaluative purposes without a historicized awareness of when, how, and at the behest of whom those rules have emerged and developed. As Anne Orford powerfully illuminates, "international law is inherently genealogical, depending as it does upon the transmission of concepts, languages, and norms across time and space. The past, far from being gone, is constantly being retrieved as a source or rationalization of present obligation" (2013, 175).

Settling the Civilian and the Combatant

To demonstrate the effects the politics and histories of concepts and categories of IHL have upon contemporary politics, we turn the notion of direct participation in hostilities (DPHs). IHL states that civilians are immune from deliberate targeting "unless and for such time as they take a direct part in hostilities."[12] Despite being crucial, the notion of DPH remains frustratingly unclear and contested. Depictions of "insurgents by night and farmers by day" or of a "revolving door" of combatancy haunt military advisers and frustrate humanitarian lawyers alike, influence the waging of irregular or counterinsurgency wars, and the war on terror itself. The ongoing and unresolved debate over DPH thus directly affects targeting decisions, complicates the emphasis on direct attacks, and illuminates the complexity of assessments of the legal use of force in armed conflict.

Colonial and Postcolonial Inheritances in Law

Against the bloody backdrop of wars in Algeria, Kenya, and Vietnam, among others, in the 1970s postcolonial states demanded that "national liberation" be considered a legitimate, protected category of armed conflict, equal to war between states, that "freedom fighters" be granted the status and protection of soldiers and prisoners of war, and that civilians should be absolutely protected in armed conflicts. Western powers, especially European empires, firmly rejected these ideas, holding steadfast that considerations for civilian protection were only aspirations, not binding commitments, and that since wars of national liberation and self-determination were internal conflicts, those who fought against the state were not legitimate combatants but traitors or criminals. In the late 1960s, Third World and socialist states mobilized within UN forums to formally revise existing IHL. As a consequence of their increasing numerical majority, the moral weight of anti-colonialism, and the ideological Cold War competition with the Soviet bloc, they were able to confront Western powers and, to a new degree, control the terms of debate (Mantilla 2020a). This charged political environment resulted in nearly 8 years of preparation for and formal negotiations of the two Additional Protocols of 1977.

During negotiations, the Third World-led supermajority pushed not only for the legal legitimation of national liberation wars and the recognition of freedom fighters as combatants, but also for the absolute prohibition of attacks of civilians and the banning of means and methods of war which, by their very nature, seemed unfit to respect civilian protection but were capable of destroying a people and a way of life (Kinsella 2017). The Chinese delegation spoke in the most politically charged terms: "In view of the cruel oppression and heavy casualties suffered by the civilian population in the aggressive wars launched by the imperialists, colonialists, racists and Zionists, Protocol I should provide for the maximum protection of civilians" (Levie 1980, 64). Syrian and Iraqi delegates fiercely rebuffed the insertion of the principle of proportionality. The Syrians asserted that they "could not accept the theory of some kind of "proportionality" between military advantages and losses and the destruction of the civilian population and civilian objects, or that the attacking force should pronounce on the matter" (Levie 1980, 127). The Iraqis opined that "it would be impossible to prove that the military advantage expected was in fact disproportionate," therefore "the idea [of proportionality] should be dropped" (Levie 1980, 133). Mongolia concurred that the principle of proportionality, and language balancing civilian immunity with expected military advantage, should be deleted as being anti-humanitarian and open to abuse due to its ambiguity (Levie 1980, 132).

These proposals for the definition of the protection of civilians during conflict appalled the delegates of many Western powers, yet they found themselves embroiled in a diplomatic process that they could not derail without—so they believed—triggering social opprobrium entailing political and legal consequences. Western states' orientation, particularly that of the US and the UK, eventually changed from a total opposition to the codification of legal protections for civilians, toward a *via media* "best efforts" approach: civilians should not be attacked deliberately or indiscriminately, and "feasible" measures should be taken to avoid civilian losses (Mantilla 2020a). As such, indirect attacks on civilians were not made impermissible, but rather subject to a *calculus of proportionality*, dependent on the relative value of a given attack's military advantage, and the forecast of civilian lives potentially lost. The final outcome of the long years of negotiation instructed combatants to "distinguish between the civilian population and combatants and between civilian objects and military objectives," directing their operations only against military objectives, and to take feasible precautions before attacking civilians, proffering standards by which justifiable damage to civilian persons and objects could be calculated.[13]

Importantly, it was only in the API of 1977 that a legal definition of civilian finally became enshrined in IHL: the civilian is that which a combatant is not. Like the notion of "non-international conflict" analyzed earlier, this "negative definition" of the civilian was intended to make the category as capacious as possible; precision was exactly *not* the goal. As the Chinese delegate claimed during negotiations: "attempts to confine the civilian population within narrower limits (i.e., to define it more strictly) … was tantamount to providing the imperialists and colonialists with a pretext for attacking the civilian population during their wars of aggression" (FPD 1978, 57).

The definition of combatant was also altered in contentious debates over the extension of formal combatant status to those fighting in national liberation conflict. Once again, IHL struggled to come to terms with the status of irregular fighters. In the 1970s negotiations, representatives from African, Asian, and socialist states, and from national liberation movements, made skillful arguments analogizing their combatants as being no different from the resistance groups endorsed or utilized by the Allies in WWII. In their view, similar to anti-Nazi partisans during WWII, combatants in national liberation war were not mere rebels but

[12] Article 51, Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977 (API). https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=4BEBD9920AE0AEAEC12563CD0051DC9E. Accessed May 5, 2020.

[13] Articles 48 and 57(2), *API*, https://ihl-databases.icrc.org/ihl/INTRO/470. Accessed May 5, 2020.

freedom fighters struggling for justice; in the words of one delegate, "a struggle in line with the one waged in the Second World War by many peoples of the world … (against) … the menace of Hitler" (Kinsella 2011, 137). And they succeeded. API was made to apply to all armed conflicts "in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination," and afforded protection to all combatants participating in such conflicts.

The 1970s-era recognition of the exigencies of guerrilla and counterinsurgent war, in which the wearing of uniform in asymmetric warfare made little strategic sense, compelled delegates codifying API to "relax" the definition of the combatant, such that combatants no longer would have to distinguish themselves from the civilian population or carry arms openly *unless and only for such time* as militarily engaged. Such relaxation had correlated consequences for when and how civilians could be targeted in war. The chosen language (according to which civilians lose their immunity from attack *during and for such time* as they participate in hostilities)[14] reflected intense negotiations among newly-decolonized states, Socialist states, national liberation movements, and states who wished to limit the status and protections of those participating in decolonial struggle, collectively embedding a temporal and thus relatively indeterminate element into the distinction itself.

Although these changes to combatant status and to civilian participation were specific to national liberation wars, these controversies and tensions continue to pervade the application of IHL today. Particularly, in contemporary discussions over targeting via human shielding, which revolve around the question of DPH, we see the inheritance of the lingering ambiguities in the Additional Protocols, since neither "for such time" nor "participation in hostilities" were properly defined legal notions.[15] Overall, the principle that civilians are protected from direct attacks unless they take direct part in the hostilities is, as Dapo Akande writes, "undoubtedly accepted … but subject to much ambiguity," and therefore disagreement (2010, 180).

Untangling DPH?

Recognizing this, in 2009, the ICRC undertook to prepare a clarifying guide to DPH. This study concluded that "civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non-state party to an armed conflict cease to be civilians and lose protection against direct attack for as long as they assume their *continuous combat function*" (Melzer 2009, 21). While the former can be understood as derived from an activity, and is a temporary consideration, the latter definition is premised on status and, thus, understood as continuous. In either case, there must be a "belligerent nexus," in that the attacks are aimed at supporting one belligerent against others (Melzer 2010, 841). In both cases, their acts must be "likely to adversely affect the military operations." Once no longer directly participating in hostilities, both civilians and members of non-state forces may no longer be attacked.

According to the ICRC guidance, individuals, "who participate in hostilities on a recurrent basis regain protection from attack every time they return home and lose it again only upon launching the next attack" (Melzer 2010, 841) and reaffirms that in case of doubt that person must be presumed to be a civilian and protected against direct attack. There should be caution, however, in taking this doubt to be absolutely protective: "The object and purpose of attaching loss of protection to hostile activities is not to punish criminal conduct or to safeguard the civilian population against all forms of harm, *but to enable parties to an armed conflict to react militarily against all persons taking up arms against them as enemies*" (Melzer 2010, 841, emphasis added).

Understanding IHL through our broader theoretical sensibility—as productive, not merely regulative—we can see how the law facilitates distinct means of military response, and how it makes protection formally contingent on conduct, nationality, group membership, or through other qualifications, like those offered by former Secretary of Defense Donald Rumsfeld to justify the detention and torture of "the worst of the worst," or the targeting of hospitals "taken over by terrorists" (quoted in Ballen and Bergen 2008). The long history of these "qualifications" dates back to the imperial wars of the nineteenth century and the liberation movements of the twentieth century, in which categories of combatant and civilian exemplified disagreements over legitimate participation in violence, and the juridical and discursive legitimation or delegitimation of the enemy. Examining the role of IHL in an effort to ascertain the effects of the rules on targeting must confront these particular irresolvable or, at least highly fractious understandings of the categories of combatant and civilian, both the distinction between the two categories and the treatment of each in specific moments and places.

Through this brief discussion of the enduring controversy over the boundaries of civilian protection and targetability, we underline two central points: that *calculation* is always at the heart of IHL's distinction between combatant and civilian, and that the resources for making it—where and when to make it, how to assess it, what evidence to draw upon to make it sensible, meaningful, and correct—are never solely guided by black-letter, codified IHL. Rather, the resources upon which the law's practitioners draw on as they deploy IHL in concrete cases *inform* its implementation, and in a sense, *perform* the law. If we place the development of DPH in IHL's long history, including the legacies of its colonial and postcolonial past, our revised understanding of the law and its influence becomes not just a matter of measuring (or demanding) better compliance with and implementation of existing treaty rules, or of increasing the clarity of its core categories, but also a call to assessing its constitutive tensions, the generative effects of the law, and the legacies of its colonial histories.

Conclusion

As Clark et al. (2017) assert, IHL is a social bargain and a social construct. Yet, as we show, changing historical power dynamics and priorities of humanitarian protection over the course of the past 150 years have resulted in a series of contested, ambiguous, and unsettled rules of IHL. Even those treaties and customary norms that command both formal, near-universal agreement and public veneration conceal deep disagreements and indeterminacies. Scholarly assessments of IHL and its influence that ignore or discount the histories of legal rules and frameworks thus risk misconstruing their purposes and effects. Whereas reasonable scholars may disagree about whether IHL is indeed in a "crisis" at present, we have shown that it is beyond

[14] Article 50 (3), *API*, emphasis added.

[15] The additional protocols do not define what is meant by "hostilities" or "attacks," beyond referring to "acts of violence against the adversary" (Article 49). The Working Committee reluctantly decided to leave the terms undefined "as the interpretations of these terms may affect matters of life and death, it is indeed regrettable that the ambiguities are left" (Bothe et al. 1982, 302).

debate that the law has *always* been a site of intense political contestation.

To comprehend this, as Reus-Smit (2008, 414) puts it, "require[s] us to situate [IHL] within culturally and historically specific contexts," and to study history as a "process" composed of contingent forces and a plurality of possibilities—what Foucault (in Burchell et al. 1991, 76) describes as "a sort of multiplication or pluralization of causes." Importantly, focusing on the evolution and effects of IHL requires reckoning with an imperial past and identifying how disagreements over what constituted the proper world order (and its generative categories) parceled and shaped the precepts and practice of IHL.

This attention to empire and race, traditionally eschewed by IR, is in fact pivotal to the study of IHL, as is an attention to multiple forms of imperial, racialized, and gendered armed violence (Barkawi, 2016, 2018; Baron et al. 2019; Shilliam et al. 2014). We argue that such a recognition is particularly necessary to avoid a reductive focus on compliance, however "methodologically tractable" (Putnam 2020, 32) that might appear to be, because such a focus oversubscribes IHL to a form of liberal humanitarianism and promotes the privileging of the law's enforcement over its productive power.[16] This recognition is essential in IR scholarship not only vis-à-vis IHL, but toward international law more broadly.[17] Indeed, although our critique stems from analyzing IHL's complex history, nature, and operation, its insights extend to the ahistoricity and reductivity still prevalent in IR approaches to international law.

We demonstrated these claims by highlighting three concrete areas of contestation: the classification of armed conflict, the distinction between combatant and civilian, and the discernment of civilians' direct participation in conflict. For each of these issues, we first laid out the effects of contestation: the initial exclusion and resultant weakness of the application of IHL to national liberation and internal armed conflicts; the negative definition of the civilian, which at once provides a generous definition and creates difficulties in ascertaining a precise status; and the unsettled meaning of direct participation in hostilities, which results from the debates over, and imprecision of, the notions of internal conflict and the civilian. Second, we traced the reasons for these outcomes: to protect or contain challenges to imperial and, later, newly independent states' sovereignty; to expand the protection of civilians, and; in the case of civilians' direct participation in hostilities, as an inheritance from the unresolved contestation over who is a civilian and what counts as internal conflict. Third, recalling our introductory vignettes, we note the significance of these contestations for world politics today: how the bombing of Syrian hospitals depends on the construction of those inhabiting it as "terrorists," and how the legal adjudication of human shielding necessarily engages the complex and unsettled temporality debates around participation in hostilities. Grappling with how *imperialism, non-interstate wars and non-Western actors* have been conceptualized and reflected by the development of IHL demonstrates that singular or reductionist explanations of rulemaking and rule-following limit our understanding of the precepts and practice of IHL, and of its role in generating and defending world orders.

[16] See Traven and Holmes (2020) who, while similarly critiquing the focus on compliance and IHL, do so by focusing solely on the standard of appropriate behavior in a given context, thus ignoring the constitutive dimension of appropriateness which shapes identity itself.

[17] For a theory of "contestedness" and contestation, see Wiener (2014).

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