Deciphering the Landscape of International Humanitarian Law in the Asia-Pacific

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ABSTRACT

The 70th anniversary of the adoption of the Geneva Conventions on 12 August 1949 provided an opportunity for reflection on international humanitarian law (IHL). This article continues that reflection and presents some fresh scholarship about and from the Asia-Pacific region. The region's plurality leads to a complex and diverse landscape where there is no single "Asia-Pacific perspective on IHL" but there are instead many approaches and trajectories. This fragmented reality is, however, not a mess of incoherence and contradiction. In the following pages, the author argues for and justifies the following assessments. The first is that the norm of humanity in armed conflict, which underpins IHL, has deep roots in the region. This, to some extent, explains why there is no conceptual resistance to IHL, in the way that exists with the human rights doctrine. The second is that there has been meaningful participation of certain States from the region in IHL law-making. Thirdly, some Asia-Pacific States are among those actively contributing to the development of new or emerging areas relevant to IHL, such as outer space, cyberspace and the protection of the environment in armed conflict. This leads to the unavoidable issue of contradiction. How is it that in a region where such findings can be made (i.e., where there is discernible positivity towards the norm of humanity in armed conflict), there are so many armed conflicts with very serious IHL violations emerging? Should we reflect in a more nuanced way on "norm internalization" and "root causes"? These issues will be considered in the second section of the article. This examination leads to a third and final section, a concluding reflection on what all of this reveals about IHL in the Asia-Pacific. The real challenge for progressive humanitarianism, the author contends, is to traverse disciplines and to build on work done in, on and from the region in order to develop more informed and nuanced approaches to understanding the countries and societies of the region, moving on to study the process of norm internalization, and then developing creative and meaningful strategies for strengthening the links between that internalization, actual conduct on the ground, and norm socialization in the wider community.

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On the face of it, the four Geneva Conventions of 1949 have a 100% success rate, with all 196 States having committed themselves to abide by their terms.[1] A generalist reader may be tempted to believe that all States have a common approach to international humanitarian law (IHL). The more discerning reader, however, knows that being party to the Geneva Conventions does not, unfortunately, equate with adherence to their provisions. States demonstrate vastly differing degrees of implementation and enforcement and have different understandings of certain concepts and terms. Self-identifying as democratic and human-rights-respecting is no guarantee against inhumanity, as the US-led "war on terror", in several of its manifestations including renditions and Abu Ghraib, confirmed. The docket of the European Court of Human Rights evidences that some European States engaged in armed activities are not living up to what should be a collective vision of humanity at all times, whether in peace or in war.[2]

What of the Asia-Pacific region?[3] Like the rest of the world, the nations of the region are now all party to the Geneva Conventions, but

[1] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1951); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1951).

[2] See European Court of Human Rights, "Armed Conflicts", Factsheet, September 2018, available at: www. echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf (all internet references were accessed in February 2020).

[3] Many a quarrel has been and continues to be had over what the geographical concept of "Asia" entails. The present work views the "Asia-Pacific" region as including the countries of South, Southeast and East Asia, which are indisputably part of "Asia", as well as the countries that are indisputably part of the Pacific Island nations. It does not include the countries of "Central Asia" (e.g. Turkmenistan) and those that are actually part of the "Middle East" (e.g. Iraq). This notion is obviously different from the United Nations' "Asia-Pacific" grouping, which includes countries that are geographically not part of Asia (e.g. Cyprus and Saudi Arabia) and locates two countries that are in the

while some States have long implemented these in domestic law,[4] others were late joiners,[5] and a number of them have maintained substantial reservations or entered declarations or understandings that colour their engagement.[6] Simon Chesterman has shown how Asia's ambivalence towards international law is manifested through under- participation and under-representation.[7] A plurality of perspectives from the region about wider international law is borne out in articles published in *the Indian Journal of International Law,*[8] the *Chinese Journal of International Law,*[9] the *Korean Journal of International and Comparative Law*[10] and the *Asian Journal of International Law*.[11] New works, such as The *Oxford Handbook of International Law in Asia and the Pacific* and Asia-*Pacific Perspectives on International Humanitarian Law*, present expert views on and from the Asia-Pacific region and reveal great diversity, with no all-encompassing single perspective.[12] These publications take a non-linear, non-mechanical approach based on discrete topics within broad clusters of issues, indicating that efforts to decipher the region's pluralism are not best facilitated by an intellectual straitjacket which diminishes the existence, meaning and value of diversity. They draw out two dominant features: firstly, conservatism and a tendency towards the centuries-old notion of the all-powerful State that rejects external scrutiny or controls, and

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Pacific region (Australia and New Zealand) in the "Western European and Others" grouping.

[4] Examples include Australia's Geneva Conventions Act of 1957, India's Geneva Conventions Act of 1960, Malaysia's Geneva Conventions Act of 1962 and Singapore's Geneva Conventions Act of 1973.

[5] For example, Brunei acceded in 1991 and Myanmar in 1992.

[6] For example, Australia, Pakistan, Vietnam, the Republic of Korea and China. Vietnam's reservations to the Geneva Conventions are extensive – see: https://tinyurl.com/r67wv3k.

[7] Simon Chesterman, "Asia's Ambivalence about International Law and Institutions: Past, Present and Futures", *European Journal of International Law*, Vol. 27, No. 4, 2016.

[8] Available at: www.springer.com/law/international/journal/40901.

[9] Available at: https://academic.oup.com/chinesejil.

[10] Available at: https://brill.com/view/journals/kjic/kjic-overview.xml.

[11] Available at: www.cambridge.org/core/journals/asian-journal-of-international-law.

[12] Simon Chesterman, Hisashi Owada and Ben Saul (eds), The *Oxford Handbook of International Law in Asia and the Pacific*, Oxford University Press, Oxford, 2019; Suzannah Linton, Timothy McCormack and Sandesh Sivakumaran (eds), *Asia-Pacific Perspectives on International Humanitarian Law*, Cambridge University Press, Cambridge and New York, 2019.

secondly, diversity and fragmentation in terms of normative approach and practice.

Acharya rightly asserts that Asia is not "one", and that there is no singular idea of Asia.[13] Why should there be a single perspective in a region that is not drawn together into a grouping such as the European Union, which has common approaches and even coordinates external action in certain areas? The groupings that do exist, such as the Association of Southeast Asian Nations (ASEAN), the South Asian Association for Regional Cooperation and the Pacific Islands Forum are sub-regional, decentralized and of a loose nature.[14] This reflects the reality that the countries of the region are diverse, in terms of ethnicity, religion, culture, history, legal systems, political structures, security situations, socio-economic development and roles in the international community. The accident of being neighbours or being located within a man-made geographical concept does not mean that they have, or should have, the same perspectives on or approaches to IHL. Take the degree of embedding of IHL in the armed forces. Australia and Indonesia may be direct neighbours, but their militaries' approaches to IHL are profoundly different.[15] The situation of nuclear weapons can also provide some insight. The nations of Oceania, Australasia and Southeast Asia have rejected nuclear weapons,[16] but four of the world's nuclear powers are from the Asia- Pacific: two from East Asia (China and North Korea) and two from South Asia (India and Pakistan). And Japan, the one and only country to have borne the brunt of nuclear weapons in armed conflict, has

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[13] Amitav Acharya, "Asia Is Not One", Journal of Asian Studies, Vol. 69, No. 4, 2010.

[14] See, generally, Nicholas Thomas (ed.), Governance and Regionalism in Asia, Routledge, London, 2009.

[15] Contrast Yvette Zegenhagen and Geoff Skillen, "Implementation of International Humanitarian Law Obligations in Australia: A Mixed Record", with Suzannah Linton, "International Humanitarian Law in Indonesia", both in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12.

[16] See Treaty on the Southeast Asia Nuclear Weapon-Free Zone, 15 December 1995 (entered into force 27 March 1997), International Legal Materials, Vol. 35, p. 635; South Pacific Nuclear Free Zone Treaty, 1445 UNTS 177, 6 August 1985 (entered into force 11 December 1986). For analysis, see Roger S. Clark, "Pacific Island States and International Humanitarian Law", and Satoshi Hirose, "Japan and Nuclear Weapons", both in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12.

a surprisingly nuanced approach to the prohibition of nuclear weapons.[17] IHL in the Asia-Pacific region is very much contextualized, depending on factors such as country, local and international politics, culture, religion, time frame, political doctrine, actors and situation of violence. These factors obviously mean that assertions about IHL in the Asia-Pacific are not absolutely or equally applicable to every single country in the entire region. Universality seems only to relate to regional participation in the Geneva Conventions and the Convention on the Rights of the Child.[18]

The uncovering and analysis of the complex and large-scale realities of IHL application in such a large swathe of the globe is not facilitated by applying rigid academic approaches such as tracking a single, narrow technical issue (e.g., the implementation of the duty to take precautions in attack) across every single country. The present author has, instead, drawn from close scrutiny of the literature, in particular the most recent and authoritative, and applied the experience of years of working in and on the region. In this way, it has been possible to extract convergence in perspectives and approaches. This method is not exceptional, but the endeavour is in itself an original contribution, and it facilitates an innovative entrée into deciphering the Asia-Pacific's complex IHL landscape. The result is that the author is able to argue the following. First, the norm of humanity in armed conflict, which underpins IHL, has deep roots in the region.[19] This, to some extent, explains why there is no conceptual resistance to IHL in the region, in the way that exists within the human rights doctrine. Second, there has been meaningful participation of States from the region in IHL law-making, both in terms of treaties and custom. Third, some Asia-Pacific States are

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[17] See further below for the Japanese submissions during the advisory proceedings on the *Legality of the Threat or Use of Nuclear Weapons* and the complex interplay between Japanese culture, martial practices and IHL.

[18] See above note 6. The participation of many Asia-Pacific States in the Convention on the Rights of the Child is heavily diluted by substantial reservations. See the United Nations Treaty Collection website, available at: https://tinyurl.com/rxksp5l.

[19] This paper adopts Axelrod's behavioural definition: "A norm exists in a given social setting to the extent that individuals usually act in a certain way and are often punished when seen not to be acting in this way." He argues that "[n]orms often precede laws, but are then supported, maintained, and extended by laws." Robert Axelrod, "An Evolutionary Approach to Norms", *American Political Science Review,* Vol. 80, No. 4, 1986, pp. 1097, 1106.

actively contributing to the development of emerging or evolving areas relevant to IHL, such as weapons, outer space, cyberspace and the protection of the environment in armed conflict. Given the fragmented reality of the region, this leads inexorably to the issue of contradiction. How is it that in a region where there is discernible positivity towards the norm of humanity in armed conflict, there are so many armed conflicts with very serious IHL violations emerging? What happened to norm internalization? These issues will be considered in the second section of the article. This examination leads to a third and final section, a concluding reflection on what all of this reveals about IHL in the Asia-Pacific.

The nature of IHL in the Asia-Pacific is such that the present author does make some cautious generalizations; the grounds for making them are presented for the reader's consideration in the first section, and the contradictions are addressed in the second. This paper is about the Asia-Pacific experience, and the author is not suggesting that such features are unique to this part of the world. It should also be obvious that the present work attempts to make sense of a complex situation. The approaches of many regional States, large and small, powerful and less so, are referenced in this paper. However, some States have practice that is more accessible, and the author has obviously had to exercise some selectivity for a publication of this nature. Readers should examine the cited sources for the details and reasoning that cannot be presented in this article.

Assertion 1: The norm of humanity in armed conflict has deep roots in the Asia-Pacific region

The countries of the Asia-Pacific region do not display conceptual or ideological animosity towards the norm that requires humanity in armed conflict, in contrast to their well-documented ambivalence about human rights.[20] There is also nothing to suggest that IHL, as a collection of specific rules arising from that one fundamental norm, is seen as a foreign project imposed on the region. Review of the submissions during the

[20] See Hurst Hannum, "Human Rights", and Suzannah Linton, "International Humanitarian Law and International Criminal Law", both in S. Chesterman, H. Owada and B. Saul (eds), above note 12.

International Court of Justice (ICJ) advisory proceedings on the *Legality of the Threat or Use of Nuclear Weapons*[21] and the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[22] reveals that Australia, Bangladesh, the Democratic People's Republic of Korea (DPRK), India, Indonesia, Japan, Malaysia, the Marshall Islands, Nauru, New Zealand, Pakistan, Palau, the Philippines, Samoa and the Solomon Islands presented themselves as great humanitarians and champions of the IHL regime. There were, however, some nuances. Japan, very interestingly, held that "the use of nuclear weapons is clearly contrary to the spirit of humanity that gives international law its philosophical foundation" and repeatedly emphasized the necessity of nuclear disarmament and a desire to promote nuclear disarmament, but studiously avoided discussing the legality of the use of nuclear weapons.[23] Hirose explains that Japan takes a "realistic approach" because under the Japan–US Security Pact, Japan benefits from the so-called "nuclear umbrella" of the United States, and this has become an indispensable component of Japan's security policy.[24] Taking these positions, along with others, into account, the ICJ's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* determined that the "fundamental rules [of IHL] are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."[25]

However, the rhetorical public embrace of humanitarianism illustrated above goes far back in time for some Asia-Pacific States. We

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[21] Written submissions: Democratic People's Republic of Korea (DPRK), India, Japan, Malaysia, Marshall Islands, Nauru, New Zealand, Palau, Samoa and Solomon Islands (responses to submissions by Nauru and Solomon Islands), available at: www.icj-cij.org/en/case/95/written-proceedings. Oral submissions: Indonesia, Japan, Malaysia, Marshall Islands, New Zealand, Philippines, Samoa and Solomon Islands, available at: www.icj-cij.org/en/case/95/oral-proceedings.

[22] Written submissions: Australia, DPRK, Indonesia, Japan, Malaysia, Micronesia, Marshall Islands, Pakistan and Palau, available at: www.icj-cij.org/en/case/131/written-proceedings. Oral submissions: Bangladesh, Indonesia and Malaysia, available at: www.icj-cij.org/en/case/131/oral-proceedings.

[23] S. Hirose, above note 16, p. 446.

[24] *Ibid.*

[25] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, p. 257, available at: www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf.

can see something more sophisticated than a simplistic belief in a moral duty "to be kind to the needy." Some of the earliest participants in IHL treaties and arrangements have been from the region. Three of the twenty-six participating nations in the Hague Peace Conference in 1899 were from the Asia-Pacific region: Siam, China and Japan.[26] Siam, one of Southeast Asia's great Buddhist warrior kingdoms, began to engage in IHL treaty participation as long ago as 1899, becoming party to Hague Convention II on the Laws and Customs of War on Land (1899), Hague Declaration IV (2) concerning Asphyxiating Gases (1899) and Hague Declaration IV (3) concerning Expanding Bullets (1899).[27] The Thai Red Cross Society was founded in April 1893 as the Red Unalom Society, before the nation became a party to the then Geneva Convention.[28] In fact, Yeophanthong explains that King Vajiravudh of Siam was open to merging both Western legal and political ideas with Buddhist values: he published a volume on international law in 1914, which included a substantial section devoted to explaining the laws of war.[29] That engagement has continued to the present Thailand, which is a signatory to the Arms Trade Treaty (2013)[30] and was one of the first States to sign and ratify the Treaty on the Prohibition of Nuclear Weapons (TPNW) on 20 September 2017, the first day it was open for signature.[31]

Humanitarian ideas do indeed have "deep roots in most Asian societies, being the products of complex social and religious systems."[32]

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[26] Betsy Baker, "Hague Peace Conferences (1899 and 1907)", Max Planck Encyclopaedia of Public International Law, available at: https://tinyurl.com/vrb9run.

[27] For Thailand's treaty participation, see the International Committee of the Red Cross (ICRC) database, available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vw TreatiesByCountrySelected.xsp?xp_country Selected=TH.

[28] Pichamon Yeophantong, "The Origins and Evolution of Humanitarian Action in Southeast Asia", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12, p. 83.

[29] *Ibid.*

[30] Arms Trade Treaty, 2 April 2013 (entered into force 24 December 2014), available at: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002803628c4&clang=_en.

[31] Treaty on the Prohibition of Nuclear Weapons, opened for signature 20 September 2017 (not in force).

[32] Pichamon Yeophantong, "Understanding Humanitarian Action in East and Southeast Asia: A Historical Perspective", Humanitarian Practice Group Working Paper, Overseas Development Institute, February 2014, p. 1. See also the Dissenting Opinion of Judge Weeramantry in the ICJ's Advisory Opinion on the Legality of the Threat or Use of

Yeophantong argues that key influences on the evolution of humanitarian thought and practice, at least in the Southeast Asian region, are (1) communitarianism, meaning a shared existence with resulting common social obligations; (2) religion, faith and non-religious belief systems; (3) political theories on statecraft and just war; and (4) identity and security politics.[33] Humanity in warfare in many cultures of the region predates the positivist IHL framework that emerged in Europe in the nineteenth century, and even the Western European chivalric culture in which too many scholars situate the roots of humanitarianism in armed conflict.[34] India, China and Japan will be considered in the following paragraphs, but they do not stand alone. The many ethnic groups of the Indonesian archipelago[35]and the Pacific islands[36] had their own laws of war. Humanitarian concerns in war can be identified in Hinduism,[37] Buddhism[38] and Sikhism.[39] For years, experts have been writing about an Islamic international law, with areas such as Islamic humanitarian law,

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Nuclear Weapons, above note 25, pp. 443–444. For a closer analysis, see P. Yeophantong, above note 28.

[33] P. Yeophantong, above note 28, p. 76.

[34] For a study that focuses on the global roots of humane treatment of captured enemy fighters, see Suzannah Linton, "Towards a Global Understanding of the Humane Treatment of Captured Enemy Fighters", *Frontiers of Law in China*, Vol. 12, No. 2, 2016.

[35] Fadilah Agus et al., *Hukum Perang Tradisional di Indonesia*, Universitas Trisakti, Jakarta, 1999.

[36] ICRC Regional Delegation in the Pacific, Under the Protection of the Palm: Wars of Dignity in the Pacific, ICRC, Geneva, 2009.

[37] For more, see Manoj Sinha, "Ancient Military Practices of the Indian Subcontinent", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12; B. C. Nirmal, "International Humanitarian law in Ancient India", in Venkateshwara Subramaniam Mani (ed.), *Handbook of International Humanitarian Law in South Asia*, Oxford University Press India, New Delhi and New York, 2007.

[38] For more, see Christopher G. Weeramantry, "Buddhism and Humanitarian Law", in V. S. Mani (ed.), above note 37; Mahinda Deegalle, "Norms of War in Theravada Buddhism", in Vesselin Popovski et al. (eds), World Religions and Norms of War, United Nations University Press, Tokyo and New York, 2009.

[39] For more, see Gurpreet Singh, "Sikh Religion and Just War Theory: An Analytical Study", Institute of Sikh Studies, available at: www.sikhinstitute.org/jan_2014/3-gurpreetsingh.html; Gurtej Singh, "The Sikh War Code, Its Spiritual Inspiration and Impact on History", Sikh24, 8 February 2019, available at: www.sikh24.com/2019/02/08/the-sikh-war-code-its-spiritual-inspiration-and-impact-on-history/#.Xl4qqEqnzIU.

the Islamic jus ad bellum and the Islamic jus in bello.[40] Islam has played a major role in some conflicts in the region, such as in Indonesia's Aceh.[41] From the work done in the Philippines by Santos Jr and others, we can see that the common points between the Islamic law of war and IHL have provided a basis for dialogue with some Islamist fighters, notably the Moro National Liberation Front and the Moro Islamic Liberation Front, although not the more hard-line Abu Sayyaf group.[42]

A closer examination of India, China and Japan explains further why, at an intellectual and cultural level, the concept of humanity in war has traction in the region. The use of force in ancient India was highly regulated. Sinha explains that "[i]n ancient times ... the laws of war were designed to bring out the best and not the worst of human traits."[43] Largely based on *Manu's Code of Law* (*Manava Dharmashastra or Manu Smriti*), which started to be compiled around 200 BC from earlier sources, these rules included the following:

1. "a warrior (*Kshatriya*) in armour must not fight one who is not so clad";
2. "one should fight only one enemy and cease fighting if the opponent is disabled";
3. "aged men, women and children, the retreating, or one who held a straw in his lips as a sign of unconditional surrender should not be killed";
4. it was prohibited to attack "the fruit and flower gardens, temples and other places of public worship";

[40] Notable examples include Mohamed Cherif Bassiouni, *The Shari'a and Islamic Criminal Justice in Time of War and Peace*, Cambridge University Press, New York, 2015; Ahmed Al-Dawoody, *The Islamic Law of War,* Palgrave Series in Islamic Theology, 2011; Mashood A. Baderin (ed.), *International Law and Islamic Law*, Ashgate, Aldershot, 2008.

[41] See, generally, Edward Aspinall, *Islam and Nation: Separatist Rebellion in Aceh, Indonesia*, Stanford University Press, Stanford, CA, 2009; Human Rights Watch, *Indonesia: The War in Aceh*, Vol. 13, No. 4(C), 2001.

[42] Soliman M. Santos Jr, "*Jihad* and International Humanitarian Law: Three Moro Rebel Groups in the Philippines", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12. For a theoretical framework on how to engage with jihadist groups, see Matthias Vanhullebusch, "Dialoguing with Islamic Fighters about International Humanitarian Law: Towards a Relational Normativity", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12.

[43] M. Sinha, above note 37, p. 110.

5. "poisonous weapons should not be used, inasmuch as they involve treachery"; and
6. it was prohibited to use weapons that cause unnecessary suffering, such as poisoned or barbed arrows.[44]

China is another country with an ancient tradition of humanitarianism in philosophy and the military sciences that predates Henry Dunant and even medieval European knights, so the advent of modern IHL was conceptually acceptable there.[45] Some of these rules have been identified as far back as the Spring and Autumn Period (770–476 BC) and the Period of the Warring Kingdoms (475-221 BC).[46] These were eventually recorded, and two sources are particularly well known: Sun Tzu's *The Art of War* and Sima Rangju's *The Precepts of War*. *The Art of War* counselled a strategic approach reconciling fighting, a necessary evil, with Taoist principles. It recommended that (1) captured soldiers should be kindly treated and kept alive; (2) it is better to recapture an entire army than to destroy it, and to capture an entire regiment, a detachment or a company than to destroy them; and (3) the skilful leader subdues the enemy's troops without any fighting.[47] *The Art of War* described the noble commander as one who obtained victory with minimal violence, including to the enemy fighters; "a commander should not seek the total annihilation of the enemy."[48] Rangju's work is "considered by all as a code of war which

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[44] *Ibid.*, pp. 108–109, direct sources omitted. For more, see V. S. Mani, above note 37; Lakshmikanth R. Penna, "Traditional Asian Approaches: An Indian View", *Australian Year Book of International Law*, Vol. 9, 1980.

[45] For more on China, see Ru Xue, "Humanitarianism in Chinese Traditional Military Ethics and International Humanitarian Law Training in the People's Liberation Army", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12; Ping-Cheung Lo and Sumner B. Twiss (eds), *Chinese Just War Ethics: Origin, Development, and Dissent*, Routledge, London, 2015; Ralph D. Sawyer, *Ancient Chinese Warfare*, Basic Books, New York, 2011.

[46] Li-Sun Zhu, "Traditional Asian Approaches: A Chinese View", *Australian Year Book of International Law*, Vol. 9, 1980.

[47] Sun Tzu, *The Art of War*, trans. Lionel Giles, available at: http://classics.mit.edu/Tzu/artwar.html.

[48] Sumio Adachi, "The Asian Concept", in *International Dimensions of Humanitarian Law*, Henri Dunant Institute & United Nations Educational, Scientific and Cultural Organization, Geneva and Paris, 1988, p. 13.

codified rules of law on warfare in Ancient China."[49] Scholars have also documented other ancient rules and practices concerning humane treatment of the disabled, the wounded, the sick and the dead in war.[50] The Russo-Japanese War of 1904–05 saw the establishment of the Shanghai International Red Cross Committee (which became the Red Cross Society of China in 1912).[51] 1904 was also the year that China became a party to the Geneva Convention of 1864.[52] Of the other early treaties, China is party to Hague Convention III on Maritime Warfare (1899), Hague Declaration IV (1) prohibiting Projectiles from Balloons (1899), the Hague Convention on Hospital Ships (1904), the Geneva Convention on the Wounded and Sick (1906), and Hague Convention XI on Restrictions of the Right of Capture (1907).[53] Today, China is also party to Additional Protocols I and II to the Geneva Conventions (AP I and AP II),[54] and hosts the East Asia Delegation of the International Committee of the Red Cross (ICRC). Since November 2007, China has had a national committee on IHL as well as academic institutions dedicated to the study of IHL (for example, at Wuhan and Peking universities). As for practice, Ru Xue argues that the People's Liberation Army (PLA) has long embraced humanitarianism in war, and has an active programme of IHL instruction.[55]

Japan's notorious inability to reconcile traditional practices with the international protection regime for prisoners of war (PoWs) in World War II has obscured a far more complex picture.[56] Sun Tzu's *Art of War*, with its Taoist principles balanced with shrewd pragmatism, was first introduced to Japan in the eighth century by the monk Kibino Makibi; "Since then, 'Art of War' has received the devoted attention of political

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[49] *Ibid.*

[50] L.S. Zhu, above note 46, pp. 144–145.

[51] P. Yeophantong, above note 32, pp. 4–6, also analyzing Chinese literature on humanitarianism in China.

[52] See China's treaty participation at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties HistoricalBCountrySelectedxsp?xp_countrySelected=CN.

[53] *Ibid.*

[54] *Ibid.*

[55] R. Xue, above note 45, especially pp. 98–106.

[56] Sumio Adachi, "Traditional Asian Approaches: A Japanese View", *Australian Year Book of International Law*, Vol. 9, 1980, p. 159; Oleg Benesch, *Inventing the Way of the Samurai: Nationalism, Internationalism, and Bushidō in Modern Japan*, Oxford University Press, Oxford, 2014.

and military leaders of Japan."[57] Knutsen has shown how in the fourteenth and fifteenth centuries, Japanese masters of *Heiho* (the Art of War) were catalysts for the dissemination of Sun Tzu's teachings within the warrior community.[58] These teachings are said to have influenced Japanese military philosophy in World War II, including the surprise attack on Pearl Harbour in 1941.[59]

IHL is about humanitarianism, and Japan's earliest IHL treaty participation dates back to its participation in the 1864 Geneva Convention, in 1886.[60] The Japanese Red Cross Society was founded in 1877 as the Hakuaisha, or Philanthropic Society, to provide humanitarian assistance during a domestic armed rebellion.[61] It later changed its name to the Japanese Red Cross Society and joined the Red Cross family in 1887.[62] Japan indicated agreement with the principles of IHL by becoming party to almost all the IHL treaties between 1899 and 1907.[63] Furthermore, Japan was the first Asian country to participate in the International Conference of the Red Cross and Red Crescent (the fourth, held in Karlsruhe, Germany).[64] The Empress Shôken Fund, created in 1912 by the Empress of Japan, has since then been allocating grants to National Red Cross and Red Crescent Societies for projects involving disaster preparedness, health care, blood transfusion services, young

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[57] Yoichi Hirama, "Sun Tzu's Influence on the Japanese Imperial Navy", paper presented at the 2nd International Symposium on Sun Tzu's Art of War (16–19 October 1990), Beijing, 1990, available at: http://hiramayoihi.com/yh_ronbun_senryaku_sonshi.htm.

[58] Roald Knutsen, *Sun Tzu and the Art of Medieval Japanese Warfare*, Brill, Leiden, 2008.

[59] Y. Hirama, above at note 57.

[60] See the ICRC's ratification records at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties HistoricalByCountrySelected.xsp?xp_countrySelected=JP&nv=8.

[61] Several articles published in the ICRC Mission in Tokyo's Newsletter have addressed the historical relationship between Japan and the ICRC under the title "Historical Relationship between Japan and the ICRC." See *ICRC Newsletter,* No. 11, Autumn 2010, p. 6, available at: www.icrc.org/eng/assets/files/2010/icrc-bulletin-eng-vol11.pdf); *ICRC Newsletter*, No. 14, 2013, p. 6, available at: http://jp.icrc.org/wp-content/uploads/sites/92/2013/11/japan-newsletter-eng-vol14.pdf; *ICRC Newsletter*, No. 15, 2013, p. 3, available at: http://jp.icrc.org/wp-content/uploads/sites/92/2013/11/icrc-japan-newsletter-english-vol15.pdf.

[62] See above note 61.

[63] See ratification table at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties HistoricalBCountrySelectedxsp?xp_countrySelected=CN.

[64] See *ICRC Newsletter*, No. 11, above note 61, p. 6.

people and first aid.[65] Today, it is hard to deny that Japan's humanitarian credentials in East Asia continue to be tainted by the shadow of World War II, but even so, the country presents itself as a champion of IHL and actively urges States from the region to enter into the Additional Protocols.[66]

These three country illustrations – India, China and Japan – do not stand in isolation. In 1996, Judge Weeramantry from Sri Lanka reminded the world about Hinduism's two pivotal morality epics, the *Ramayana* (the story of Rama's journey) and *Mahabarata* (*The Great Chronicle of the Bharata Dynasty*); these are morality tales involving profound reflections on human nature, law and justice, including the norms and practices of fighting in accordance with Manu's Code.[67] Hinduism (and also Buddhism, which has not been discussed in the preceding section due to lack of space) spread beyond India.[68] Scenes from both epics are memorialized on stone inscriptions and adorn temples across Southeast Asia, from the oldest Hindu kingdom of the region (Funan, spanning parts of today's Vietnam, Cambodia and Thailand) to Pagan (Burma/Myanmar), Angkor Wat (Cambodia), the temples of Bali (Indonesia) and Ayodhya (Thailand). The *Ramayana* and *Mahabarata* have been adapted for local audiences in Burma/ Myanmar, Thailand, Cambodia, Laos, peninsular Malaysia, Java and Bali, "and the story continues to be told in dance-dramas, music, puppet and shadow theatre throughout Southeast Asia."[69] As for the dissemination of Sinic

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[65] See ICRC, "Legal and Financial Advisors", available at www.icrc.org/en/support-us/audience/legal-and-financial-advisors.

[66] Also see Hitomi Takemura, "The Post-War History of Japan: Renouncing War and Adopting International Humanitarian Law", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12.

[67] Dissenting Opinion of Judge Weeramantry, above note 32, pp. 478–480. Other insightful publications are Kaushik Roy, *Hinduism and the Ethics of Warfare in South Asia: From Antiquity to the Present*, Cambridge University Press, Cambridge, 2012; Michael Jerryson and Mark Juergensmeyer (eds), *Buddhist Warfare*, Oxford University Press, Oxford and New York, 2010; Venkateshwara Subramaniam Mani, "International Humanitarian Law: An Indo-Asian Perspective", *International Review of the Red Cross*, Vol. 83, No. 841, 2001.

[68] "The Indianisation of Southeast Asia: An Interactive Online Museum", available at: http://sea-indianisation-museum.weebly.com/.

[69] Jana Igunma, "The Ramayana in Southeast Asia", 21 April 2014, available athttps://blogs.bl.uk/asian-and-african/2014/04/the-ramayana-in-southeast-asia-1-cambodia-.html.

approaches to armed conflict, Sun Tzu's teachings influenced Chinese fighting for centuries and have been traced in Mao Tse Tung's own instructions; both inspired the operational approaches of modern Chinese, North Korean and Vietnamese armed forces.[70] The *Art of War*'s influence in Japan has previously been considered. The use of Sun Tzu's military strategies and tactics by the North Vietnamese general Vo Nguyen Giap, notably in the areas of knowledge of oneself and the foe, use of deception, and use of the strategic goal of breaking the enemy's will, has been well studied.[71]

Assertion 2: There has been meaningful participation in IHL law-making in the Asia-Pacific region[72]

Treaties

The historic engagement of Thailand, China and Japan in the early IHL treaties has already been considered above.

Scrutiny of the three volumes of the *Final Record of the Diplomatic Conference of Geneva of 1949* show that some Asia-Pacific States were active in the crafting of the Geneva Conventions.[73] The Conference took place at the start of the age of decolonization, and eight out of the fifty-nine participating States (13.5%) were from the Asia-Pacific: Australia, the

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[70] Manuel Poejo Torres, "Sun Tzu: The Art of War", *The Three Swords Magazine*, Vol. 33, 2018, p. 47, available at: www.jwc.nato.int/images/stories/threeswords/SUNTZU_2018.pdf.

[71] *The Art of War* apparently became an American military education staple after the Vietnam War (for example, the Marine Corps teaching on strategic warfighting is founded on ideas about manoeuvre warfare taken directly from *The Art of War*): see "The American Experience and Sun Tzu: Highlights of Ways Americans Have Felt the Impact of Sun Tzu's Philosophies", available at: www.artofwarsuntzu.com/america_experiences_sun_tzu.htm. See also Mark McNeilly, *Sun Tzu and the Art of Modern Warfare*, Oxford University Press, New York, 2014, pp. 11, 12, 21, 114; Mark Cartwright, "The Art of War", *Ancient History Encyclopedia*, available at: www.ancient.eu/The_Art_of_War/.

[72] The definitive study is Sandesh Sivakumaran, "Asia-Pacific States and the Development of International Humanitarian Law", in S. Linton, T. McCormack and S. Sivakumaran (eds.), above note 12.

[73] *Final Record of the Diplomatic Conference of Geneva of 1949*, 3 vols, Federal Political Department, Berne, 1949 (Diplomatic Conference Final Record). See the following footnotes for specific references.

Republic of the Union of Burma, China, India, New Zealand, Pakistan and Thailand.[74] The Philippines did not participate officially, but was present and signed all four Conventions.[75] Ceylon, later to be known as Sri Lanka, took the same approach, but it did not sign the fourth Convention on civilians.[76] The extent of the Asia-Pacific countries' participation ranged from light (Thailand) to active (Pakistan, Burma, China) to very active (Australia, New Zealand, India) engagement. Some delegations were one-person (e.g. Burma), while others were on the large side (e.g. China). Participation of the Asia-Pacific States took various forms. Several delegations were represented in leadership positions and on committees. Colonel W. R. Hodgson, head of the Australian Delegation, was appointed first vice-president of the whole Conference. India's Sir Dhiren Metra chaired Committee I on the Wounded and Sick and Maritime Warfare Conventions, and Pakistan was a member of this committee. Thailand and Burma were on the Coordination Committee. Delegations from India and Pakistan assisted in the work of the Medical Experts Committee.

Two of the many activities of Asia-Pacific States at the conference can be cited at some length to show that these States' participation in the making of the Geneva Conventions was genuine, and not ornamental. The first is the combined effort by India and Burma to seek to replace the Red Cross on a white background with a single new emblem that could be accepted by all as being neutral, thus avoiding the need for exceptions such as the Red Crescent, the Persian lion, and the Star of David that Israel was seeking. India's proposal had been voted down in Committee I. General Tun Hla Oung, the Burmese delegate, tabled its re- examination in the Plenary Assembly, alternatively suggesting an amendment to Article 31 to the effect that all red symbols on white grounds whose use had been duly notified should be given recognition as distinctive emblems. General Oung then addressed himself to "a vast majority of delegates of this

[74] *Ibid.,* Vol. 1, pp. 158–170.

[75] Official Ceremony for the Signature of the Geneva Conventions of 12 August 1949, for the Protection of War Victims, in Diplomatic Conference Final Record, above note 73, Vol. 2(B), p. 534.

[76] *Ibid.,* p. 533.

Conference who belong to one definite race and one definite religion."[77] He claimed that he, like everyone else (possibly not including the Israelis, who were apparently being contradictory), wanted to remove multiplicity of emblems. With the existing symbol being a reversal of the Swiss flag, General Oung cautioned against the use of "national emblems in the international field," and of religious signs. Speaking to "a religious feeling" and pressures from home about the "religious significance of the red cross," he explained: "I cannot now conscientiously go back to my country and to my men and tell them that it has no religious significance."[78] General Oung and India lost the battle of the emblem. Today, we still have the Red Cross on a white background as the visible sign of protection in IHL, the Red Crescent continues to be formally recognized as having the same function, and since 2005 the red crystal has been available for situations where the existing emblems are not acknowledged.

Despite being Burma's one and only representative, General Oung's voice is to be heard repeatedly across the records, bringing incision, directness, command of documents and real-life experiences of what it was like to be a soldier and a prisoner of war (PoW).[79] General Oung also provides the second example of the engagement of Asia-Pacific delegates in the 1949 process. He submitted a motion to reject the whole of common Article 2A (later to become common Article 3).[80] The motion was rejected and Article 2A was adopted by thirty-four votes to twelve, with one abstention. General Oung spoke forcefully and at unusually great length against the existing draft, describing it as an incitement and encouragement to insurgency.[81] It was "an Article which happens to be

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[77] Wounded and Sick, 9th Plenary Meeting, in Diplomatic Conference Final Record, above note 73, Vol. 2, p. 227.

[78] *Ibid.*

[79] General Oung was at that time the only Burman to have been educated at Sandhurst, and had been a prisoner of war held in Rangoon Jail by the Japanese. He was deputy inspector-general of police and chief of the Criminal Investigation Department at the time of the killing of Burma's independence leader, Aung San. In August 1949, he was appointed deputy supreme commander of the Burmese Armed Forces. Shelby Tucker, *Burma: Curse of Independence*, Pluto Press, London, 2001, p. 150.

[80] See S. Sivakumaran, above note 72, pp. 120–121.

[81] 19th Plenary Meeting (Common Articles), in Diplomatic Conference Final Record, above note 73, Vol. 2 (B), p. 337.

one of the longest, vaguest and most dangerous to the security of the state in the Convention."[82] In addition to his opposition to the regulation of non- international armed conflicts (NIACs), General Oung also identified, with immense foresight, weaknesses in the draft that would come to haunt IHL for years to come and would only be clarified in the celebrated *Tadić* decision.[83] General Oung noted that "no attempt has been made to define the phrase 'armed conflicts not of an international character'."[84] He observed that, through the phrase "parties to the conflict", the insurgent party was being, "rightly or wrongly, given a place in international law,"[85] an issue that would re-emerge at the Diplomatic Conference of 1974–77 and which led to AP II being stripped of the language "parties to the conflict."[86] After referring to the words "each Party to the conflict shall be bound to apply," General Oung posed the question: "May I ask how it is proposed to bind the rebels?"[87] This is, of course, a question that is still giving the international community difficulty today.[88] He also opined that the simple fact of having such an article in an international convention "will automatically give the insurgents a status as high as the legal status which is denied to them."[89] It was a far-sighted intervention, but common Article 3 was adopted and did go on to become what is arguably the most important provision in all of IHL.[90]

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[82] 18th Plenary Meeting (Common Articles), in Diplomatic Conference Final Record, above note 73, Vol. 2 (B), p. 330.

[83] International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Duško Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70.

[84] 18th Plenary Meeting (Common Articles), in Diplomatic Conference Final Record, above note 73, Vol. 2 (B), p. 329.

[85] *Ibid.*

[86] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, p. 1344.

[87] 18th Plenary Meeting (Common Articles), in Diplomatic Conference Final Record, above note 73, Vol. 2 (B), p. 329.

[88] Also see Sandesh Sivakumaran, "Binding Armed Opposition Groups", *International and Comparative Law Quarterly*, Vol. 55, No. 2, 2006.

[89] 18th Plenary Meeting (Common Articles), in Diplomatic Conference Final Record, above note 73, Vol. 2(B), p. 330.

[90] See the commentary on common Article 3 in ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016.

There were many other interventions from Asia-Pacific countries. For example, in the Plenary Assembly on the wounded and sick convention, New Zealand revisited earlier concerns with Article 22.[91] There had been long discussions in Committee I about the status of medical personnel and chaplains after capture, and New Zealand delegate Mr Quentin-Baxter again suggested amendments to the Committee's text, but these were rejected.[92] Representing China in Committee III on civilians, Mr Wu considered that even after the conclusion of hostilities or the occupation, protected persons should not be transferred to a country where they had legitimate reasons to fear persecution. The granting of asylum to political refugees was in accordance with international usage.[93] Mr Wu, in the same committee, pointed out that placing "the offence of destruction of property under the title of reprisal would minimise the crime of wanton destruction and sheer vandalism," and sought for the provision's omission, or alternate formulation. He expressed his concern to alleviate the suffering of war victims, and in principle he supported a Soviet amendment that "provided for the prohibition of destruction of all categories of property except in the case of military necessity."[94]

The Asia-Pacific role increased in the 1974–77 discussions on revising the Geneva Conventions. The region's numbers had been significantly boosted by the decolonization process, and the Conference was famously able to expand the application of IHL in AP I to peoples engaged in armed conflicts in the exercise of their right to self-determination.[95] Several provisions of AP I are linked to this extension. One of them is Article 44, loosening the principle of distinction in certain situations. Kittichaisaree charts the evolution of greater protection for "freedom fighters" in international law, and notes how during the negotiations, North Vietnam, North Korea and Pakistan insisted that guerrilla fighters in national liberation situations need not distinguish

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[91] Diplomatic Conference Final Record, above note 73, Vol. 2(B), p. 214.

[92] *Ibid.*

[93] Committee III on Civilians, 15th Meeting, in Diplomatic Conference Final Record, above note 73, Vol. 2 (A), p. 662.

[94] Committee III on Civilians, 12th and 13th Meetings, in Diplomatic Conference Final Record, above note 73, Vol. 2(A), p. 651.

[95] Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1979).

themselves; "otherwise, they would be subjected to counterattacks and overwhelming repression by the latter's better equipped armed forces."[96]

Ironically, AP I, ratified globally by 174 States, has not been very popular in a region that has also had its fair share of post-liberation internal conflicts.[97] The dwindling number remaining outside the Protocol include Bhutan, Burma/ Myanmar, India, Indonesia, Malaysia, Marshall Islands, Nepal, Singapore, Sri Lanka, Thailand, Pakistan and Tuvalu. Of those that are party, there are reservations/declarations/understandings from Australia, China, Japan, Mongolia, the Philippines and the Republic of Korea.[98] New Zealand entered a substantial interpretative declaration.[99]

There is another noteworthy example of the region's contribution to IHL treaties. Sivakumaran observes how the delegate for Pakistan is often given credit for "saving" AP II.[100] As many know, this instrument had been through a difficult drafting process, and there was much disagreement about NIACs. During the Conference, a decision was taken to negotiate two protocols in committee, one for internal and one for international armed conflicts (IACs). However, "the day before the adoption of Protocol II by the Conference in plenary session, the draft submitted by the committees was considered to be too detailed and was unacceptable to certain delegations."[101] There was genuine concern about

[96] Kriangsak Kittichaisaree, "International Humanitarian Law and the Asia-Pacific Struggles for National Liberation", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12, p. 149.

[97] *Ibid.*

[98] For more, see Suzannah Linton, "International Humanitarian Law and International Criminal Law", in S. Chesterman, H. Owada and B. Saul (eds), above note 12.

[99] The declaration addressed the situations to which Article 44(1) could apply (only in occupied territory or in armed conflicts covered by Article 1(4)) and the meaning of "deployment" in para. 3(b); the responsibility of military commanders and others responsible for planning, deciding upon or executing attacks to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time in relation to Articles 51 to 58 inclusive; the meaning of "military advantage" in Articles 51(5)(b) and 57(2)(a)(iii); and the meaning of "total or partial destruction, capture or neutralisation in the circumstances ruling at the time offers a definite military advantage" in Article 52. See ratification table at: https://tinyurl.com/rxdvj4w.

[100] S. Sivakumaran, above note 72, p. 21.

[101] Frits Kalshoven, "The Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974–1977",

the possibility of not being able to agree a protocol for NIACs. The delegation from Pakistan then played an important role in facilitating the adoption of a "simplified draft".[102] The Pakistanis canvassed other delegations and submitted amendments to the Committee draft, and eventually submitted a compromise draft protocol. The last-minute intervention led to AP II being adopted. Even so, this protocol is even more warily regarded in the Asia-Pacific than AP I. There are 169 States Parties, but Asia-Pacific States comprise almost all of those remaining outside: Bhutan, Burma/ Myanmar, India, Indonesia, Kiribati, Malaysia, the Marshall Islands, Nepal, Papua New Guinea, Singapore, Sri Lanka, Thailand, Tuvalu and Vietnam.[103]

The Asia-Pacific contribution can also be seen in the matter of nuclear weapons, which have a particular resonance in the region. Not only were the world's first atomic bombs used in wartime against the cities of Hiroshima and Nagasaki, but nuclear weapons came to be tested by the United States, the United Kingdom and France in the Pacific and Australia, with devastating environmental and human consequences.[104] As a result, the affected and neighbouring nations have long been vocal in their opposition to nuclear weapons and testing. The Pacific Island nations have been instrumental in anti-nuclear treaty-making processes, notably the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty, NPT), the 1996 Comprehensive Nuclear Test

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Netherlands Yearbook of International Law, Vol. 8, 1977, pp. 107, 111, cited in Sivakumaran, above note 72, p. 265.

[102] *Final Record of the Diplomatic Conference of Geneva of 1977*, Federal Political Department, Berne, Vol. 7, 1977, p. 61, para. 11, and p. 311, para. 159.

[103] See ratification table at: https://tinyurl.com/y77xzvdf.

[104] Masao Tomonaga, "The Atomic Bombings of Hiroshima and Nagasaki: A Summary of the Human Consequences, 1945–2018, and Lessons for *Homo Sapiens* to End the Nuclear Weapon Age", *Journal for Peace and Nuclear Disarmament*, Vol. 2, No. 2, 2019; Ministry of Foreign Affairs of Japan, *Research Study on Impacts of the Use of Nuclear Weapons in Various Aspects*, 2013, available at: www.mofa.go.jp/files/000051562.pdf; Sue Rabbitt Roff, *Hotspots: The Legacy of Hiroshima and Nagasaki*, Cassell, London and New York, 1995. The testimony of Marshall Islander Lijong Eknilang to the ICJ on the devastation of the tests is unforgettable: see ICJ, *Legality of Threat or Use of Nuclear Weapons in Armed Conflict (Request for an Advisory Opinion)*, CR 1995/33 (Public Sitting), 14 November 1995, pp. 25–28, available at: www.icj-cij.org/files/case-related/95/095-19951114-ORA-01-00-BI.pdf.

Ban Treaty and the TPNW (not in force).[105] Litigation has ranged from New Zealand and Australia's challenge of French nuclear tests[106] to the most recent attempt, that of the Marshall Islands against India, Pakistan and the United Kingdom.[107] New Zealand, fuelled by an active civil society movement, played a pivotal role in the co-called "World Court Project" which led to the ICJ's 1986 Advisory Opinion on the threat or use of nuclear weapons.[108] The Pacific Island States and ASEAN have

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[105] Treaty on the Non-Proliferation of Nuclear Weapons, 729 UNTS 161, 1 July 1968 (entered into force 5 March 1970); Comprehensive Nuclear-Test-Ban Treaty, adopted at the 50th session of the UN General Assembly by UNGA Res. A/RES/50/245, as contained in UN Doc. A/50/1027, 26 August 1996 (not yet in force); Treaty on the Prohibition of Nuclear Weapons, opened for signature 20 September 2017 (not in force).

[106] ICJ, *Nuclear Tests (Australia v. France)*, Judgement, 20 December 1974, *ICJ Reports* 1974; ICJ, *Nuclear Tests (New Zealand v. France)*, Judgement, 20 December 1974, *ICJ Reports* 1974. Professor Clark notes, for the record, that in 1995, New Zealand endeavoured, unsuccessfully, to reopen its 1973 case considering new information about escape of underground radiation. See *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests Case (New Zealand v France)* (Order of 22 September 1995) [1995] ICJ Rep 288. Samoa, Solomon Islands, Marshall Islands and Micronesia tried, with even less success, to intervene in this effort. Since the Court ignored them, their materials do not appear on the Court's website. See "Applications Submitted by the Governments of Samoa, Solomon Islands, Marshall Islands and Federated States of Micronesia", in New Zealand Ministry of Foreign Affairs and Trade (Manatu Aorere), *New Zealand at the International Court of Justice: French Nuclear Testing in the Pacific* (1996) 115. R. Clark, above note 16, p. 201, fn. 10.

[107] ICJ, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Decision (Preliminary Objections), 5 October 2016, *ICJ Reports* 2016; ICJ, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India),* Decision (Jurisdiction of the Court and Admissibility of the Application), 5 October 2016, *ICJ Reports* 2016; ICJ, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan),* Decision (Jurisdiction of the Court and Admissibility of the Application), 5 October 2016, *ICJ Reports* 2016. The first-hand litigator's account – in R. Clark, above note 16, pp. 213–218 – is particularly insightful.

[108] ICJ, above note 25. Much insight into the role of the Pacific islands is contained in Roger S. Clark and Madeleine Sann (eds), *The Case against the Bomb: Marshall Islands, Samoa, and Solomon Islands before the International Court of Justice in Advisory Proceedings on the Legality of the Threat or Use of Nuclear Weapons,* Rutgers University School of Law, Camden, NJ, 1996. On the role of civil society in New Zealand, see Catherine Dewes, "The World Court Project: The Evolution and Impact of an Effective Citizens' Movement", PhD thesis, University of New England, 1998, on file with the author.

declared their regions to be nuclear-weapons-free zones.[109] However, as noted in this article's introduction, the situation is more complicated. The wider region is home to four nuclear powers, and Japan's approach as a victim State is notable. Japan is party to the NPT as a non-nuclear-weapon State, yet the Japanese government refused to participate in the negotiations for the TPNW and voted against it when it was adopted at the UN General Assembly in July 2017.[110] Singapore was the only participating country to abstain from the TPNW. However, Singapore is part of the ASEAN nuclear- free zone and stands against nuclear weapons; the abstention was because of unhappiness about the short time frame, and the failure to include Singaporean proposals.[111] And of course, the Asia-Pacific's nuclear-weaponized States, most notably North Korea, India and Pakistan, continue to pose acute threats to regional and global well-being.[112]

The Vietnam War provides a final example of a conflict in the region that played a major role in the development of IHL.[113] The legal issues that arose were many, including:

1. whether IHL was applicable in the first place (North Vietnam challenged IHL's applicability to what it called a war of aggression) and, if so, what kind of conflict it was (i.e., an IAC between North and South Vietnam, a NIAC, a national liberation struggle, or an internationalized or mixed conflict);
2. whether the IHL rules in force at the time were adequate in protecting civilians and civilian objects;

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[109] The treaty details are at note 16.

[110] S. Hirose, above note 16, p. 451. Hirose also emphasizes the testimony of the mayors of Hiroshima and Nagasaki at the ICJ in 1995, to show the disconnect between politicians and ordinary people on the matter of nuclear weapons. *Ibid.,* p. 448.

[111] Statement by Ms Andrea Leong, Delegate to the 72nd Session of the UN General Assembly Thematic Discussion on Cluster One: Nuclear Weapons, 12 October 2017.

[112] See the collection of seventeen reflections in the Australian National University's 2017 publication on "Nuclear Asia", available at: https://asiapacific.anu.edu.au/sites/default/files/News/nuclear-asia-publication-web.pdf.

[113] Keiichiro Okimoto, "The Viet Nam War and the Development of International Humanitarian Law", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12.

3. whether the IHL rules of the time could adequately regulate means and methods of warfare that were employed during the conflict; and
4. how combatants captured while fighting clandestinely should be dealt with under IHL.

These questions would later feed into the development of IHL. Another important example is the environment. Sir Kenneth Keith, who took part in the negotiations at the 1974–77 Diplomatic Conference on behalf of New Zealand, has recalled how environmental issues had become a matter of international concern in the years leading up to the Conference:

> It is also true of course that the widespread use of Agent Orange and other defoliants in Viet Nam were having an impact as well. That haunting photograph of the young girl running down the road naked after she had been bombed with napalm is an iconic image of the Viet Nam War and had a huge impact on the international community. There was a sense that, in a general way, quite apart from armed conflict, the environment was being threatened and specifically in relation to some of the methods that were being used in Viet Nam and Laos at the time of the Diplomatic Conference.[114]

Some of the practices during the Vietnam War "directly prompted States to develop new rules of IHL."[115] Concretely, the American use of napalm "significantly influenced the subsequent development of IHL to regulate the use of incendiary weapons."[116] The most striking example in terms of treaty law is of course Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (on

[114] Tim McCormack, "Negotiating the Two Additional Protocols of 1977: Interview with the Right Honourable Sir Kenneth Keith", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12, p. 26.

[115] K. Okimoto, above note 113, p. 179.

[116] *Ibid.,* p. 179; see also pp. 167, 170–172, 174–175, 178.

incendiary weapons).[117] Also, the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, adopted a year before the Additional Protocols, "was an important development in preventing the use of environmental modification techniques, such as the cloud seeding operations during the Viet Nam War."[118] In AP I, Article 35's direct line to the use of defoliants in the Vietnam War is well known.[119] Some of the other rules adopted in AP I, such as the protection of civilians and civilian objects from direct as well as indiscriminate attacks, the principle of distinction, and the rules on attacking works or installations containing dangerous forces and the status of captured combatants, also link to experiences from this conflict.[120]

Custom: *Opinio Juris* and State Practice

There has been both invisibility and visibility in respect of custom in the Asia-Pacific region.

World War II notoriously played out in enormous swathes of the region, with countless atrocities. After the war was over, there were many war crimes trials. Readers of this journal will know about Nuremberg and that tribunal's poor relation, the underestimated International Military

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[117] Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (on Prohibitions or Restrictions on the Use of Incendiary Weapons), 1342 UNTS 171, 10 October 1980 (entered into force 2 December 1983).

[118] K. Okimoto, above note 113, p. 179; see also pp. 174–176. Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 1108 UNTS 151, 10 December 1976 (entered into force 5 October 1978).

[119] For example, as directly stated in the Dutch Military Manual, cited in Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: Rules, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 76, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule76. On the use of herbicides, see K. Okimoto, above note 113, pp. 167–168, 172–174.

[120] On the protection of civilians and civilian objects, see T. McCormack, above note 114 (interviewing Sir Kenneth Keith), pp. 17–18; K. Okimoto, above note 113, pp. 166–167. On carpet/aerial bombing, see T. McCormack, above note 114, pp. 34–35. On captured fighters, see T. McCormack, above note 114, p. 174. On captured combatants, see K. Okimoto, above note 113, pp. 175–177. On guerrilla warfare, see K. Okimoto, above note 113, pp. 177–178. On attacking works or installations containing dangerous forces, see K. Okimoto, above note 113, p. 168.

Tribunal at Tokyo, which tried on the leaders of Japan apart from the emperor. But until recently, few knew about the approximately 2,300 war crimes proceedings in more than fifty locations (not counting trials of collaborators) by ten different authorities including the returning colonial administrators, the Philippines and China, with trials spread out over a ten-year period: around 5,700 Japanese, Koreans and Formosans were prosecuted, with approximately 4,500 found guilty and just over 900 executed.[121] This was evidence of *opinio juris* and State practice from the Asia-Pacific region and could have been used for identifying the content of concrete rules of customary international law to be applied at the *ad hoc* international tribunals that began operating in the 1990s.[122] Some of these cases, had they been considered, could have resulted in different analysis and outcome. Sadly, it is only in the last ten years or so that this wealth of *opinio juris* and State practice from the World War II trials has been brought out of the dusty archives by scholars.[123]

To what extent was the practice and *opinio juris* of Asia-Pacific States considered in the ICRC's Customary Law Study?[124] Sivakumaran reports on a mixed picture.[125] The Study "made good use of the practice of Asia-Pacific States and there was representation of States generally,"[126] but the domestic case law of Asia-Pacific States on matters of IHL

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[121] Statistics from Sandra Wilson *et al., Japanese War Criminals: The Politics of Justice After the Second World War*, Columbia University Press, New York, 2017, pp. 1, 78–79 (Table 3.2).

[122] For recent scholarship, see for example, *ibid*.; Daqun Liu and Binxin Zhang (eds), *Historical War Crimes Trials in Asia*, Torkel Opsahl Publishers, Brussels, 2016; Kerstin von Lingen (ed.), *War Crimes Trials in the Wake of Decolonization and Cold War in Asia*, 1945–1956, Palgrave Macmillan, Basingstoke, 2016; Suzannah Linton, "Post Conflict Justice in Asia", in M. Cherif Bassiouni (ed.), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimisation and Post-Conflict Justice*, Vol. 2, Part III, Intersentia NV, Brussels, 2010, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2036245. Jurisdiction-specific studies include Fred L. Borch, *Military Trials of War Criminals in the Netherlands East Indies 1946–1949*, Oxford University Press, New York, 2017; Georgina Fitzpatrick, Tim McCormack and Narelle Morris (eds), *Australia's War Crimes Trials 1945–51*, Brill, Leiden 2016; Wui Ling Cheah, "An Overview of the Singapore War Crimes Trials (1946–1948): Prosecuting Lower-Level Accused", *Singapore Law Review*, Vol. 34, 2016; Suzannah Linton (ed.), *Hong Kong's War Crimes Trials*, Oxford University Press, Oxford, 2012.

[123] See above note 122.

[124] ICRC Customary Law Study, above note 119.

[125] S. Sivakumaran, above note 72, pp. 126, 137–138.

[126] *Ibid.,* p. 137.

"appears to be less prominent than the case law of other states."[127] An electronic search of the Study's citations of random Asia-Pacific countries reveals that Australia was cited 508 times, the Philippines 168 times, Indonesia 136 times, China 114 times, India ninety-eight times, Bangladesh seventy-nine times, Malaysia seventy-four times, Sri Lanka twenty- eight times, Thailand sixteen times and Myanmar nine times. By way of further comparison, the United States was cited 952 times, and the United Kingdom 626 times. This does not correlate to the depth of engagement with armed conflict. Sivakumaran provides one plausible explanation: readily available military manuals have a significant role in making national practice accessible for inclusion in such evaluations of customary IHL.[128]

The then newly adopted Geneva Conventions were tested in the Korean War of 1950–53, and practice in relation to repatriation of PoWs led to a softening of Geneva Convention III's Article 118 on repatriation of PoWs. Article 118 is based on the assumption that PoWs would be eager to return home and provides that PoWs "shall be released and repatriated without delay after the cessation of hostilities."[129]

None of the parties had ratified the Geneva Conventions at that stage, but they made unilateral declarations pledging to abide by the terms of the Conventions.[130] Kim argues:

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[127] *Ibid.,* p. 138. For fresh work on IHL in domestic legal systems, from which national practice and *opinio juris* on particular issues may be discerned, see the following chapters in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12: Sedfrey M. Candelaria, "International Humanitarian Law in the Philippines Supreme Court;" S.M. Santos Jr., above note 42; Sanoj Rajan, "International Humanitarian Law in the Indian Civilian and Military Justice Systems;" Tek Narayan Kunwar, "Application of the Geneva Conventions in Nepal: Domestication as a Way Forward;" Kristin Rosella, Göran Sluiter and Marc Tiernan, "Application of Grave Breaches at the Extraordinary Chambers in the Courts of Cambodia;" S. Linton, above note 15; M. Rafiqul Islam and Nakib M. Nasrullah, "The Application of International Humanitarian Law in War Crimes Cases by the International Crimes Tribunals of Bangladesh."

[128] S. Sivakumaran, above note 72, p. 138.

[129] Unjustifiable delay in the repatriation of PoWs became a grave breach under AP I's Article 85(4)(b).

[130] Hoedong Kim, "The Korean War (1950–1953) and the Treatment of Prisoners of War", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12, pp. 362–363.

> To some extent, and despite their pledges, all sides behaved as if the convention did not exist. ... [T]he soldiers of both sides seemed not to know what a POW was, the rights that a POW had, and the way that impacted on how the individual soldier could behave towards the POW.[131]

The practice was, in other words, abysmal. Against this backdrop, the issue of PoWs who do not wish to be returned or repatriated or wish to seek asylum arose, delaying the reaching of an armistice.[132] The problem was that Geneva Convention III does not contain a provision that is the equivalent of Article 45(4) of Geneva Convention IV protecting civilians; it has no protection against *refoulement*. What it does have is a provision that sick and wounded PoWs cannot be repatriated against their will, but this is obviously not the same thing as a prohibition against *refoulement*.

Thousands of North Korean and Chinese PoWs did not want to be returned home. The United States, negotiating for the United Nations (UN) force in its command role, argued that there should be freedom of choice for the individual PoW; the Communists took a literal reading of Article 118 and insisted that they had the right to have all their PoWs returned, regardless of the personal wishes of individuals.[133] As the negotiations were going on, the UN General Assembly adopted Resolution 610 (VIII) on 3 December 1952, affirming that unwilling PoWs should not be forced back to their home countries.[134] Rifts in the UN coalition led to South Korea's Prime Minister, Syngman Rhee, unilaterally liberating more than 27,000 North Korean PoWs who did not wish to be repatriated.[135] The compromise reached on PoWs was set out

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[131] *Ibid.,* p. 371.

[132] Howard S. Levie, "Prisoners of War in International Armed Conflict", International Law Studies, Vol. 59, 1978, p. 421, fn. 134.

[133] For consideration of the PoW issue from the US perspective, see Walter G. Hermes, *United States Army in the Korean War: Truce Tent and Fighting Front*, Center of Military History, US Army, 1992, Chaps VII, VIII, XVIII, XIX.

[134] Also see Richard Baxter, "Asylum to Prisoners of War", *British Year Book of International Law*, Vol. 30, 1950, p. 489.

[135] See the biography of Syngman Rhee at: http://www.koreanwar60.com/biographies-syngman-rhee; Man- ho Heo, "North Korea's Continued Detention of South Korean

in Article III of the Panmunjom Armistice Agreement of 27 July 1953.[136] All the sick and injured PoWs who insisted on repatriation were to be returned home with priority, and "each side shall, without offering any hindrance, directly repatriate and hand over in groups all those prisoners of war in its custody who insist on repatriation to the side to which they belonged at the time of capture."[137]

In international law, subsequent State practice can affect the way that treaty provisions are interpreted.[138] The practice on voluntary repatriation of PoWs that began in the Korean War does appear to have adapted the interpretation of Article 118 beyond its text. Sassòli asserts that State practice has continued to develop in the direction of respecting the PoW's wishes.[139] This confirms the ICRC's Customary Law Study, which reports that the ICRC's practice of requiring repatriation to be voluntary is accepted by States. The practice

> has developed to the effect that in every repatriation in which the ICRC has played the role of neutral intermediary, the parties to the conflict, whether international or non-international, have accepted the ICRC's conditions for participation, including that the ICRC be able to check prior to repatriation (or release in case of a non-international armed conflict), through an

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POWs since the Korean and Vietnam Wars", *Korean Journal of Defense Analysis*, Vol. 14, No. 2, 2002, p. 146.

[136] Military Armistice in Korea, 4 UST 234, TIAS 2782, signed at Panmunjom, 27 July 1953 (entered into force 27 July 1953), available at: http://peacemaker.un.org/sites/peacemaker.un.org/files/KP%2BKR_530727_AgreementConcerningMilitaryArmistice.pdf.

[137] *Ibid.,* Art. III, para. 51.

[138] Vienna Convention on the Law of Treaties, 1155 UNTS 182, 23 May 1969, Art. 31(3)(b) (on the use of subsequent practice for treaty interpretation) and Arts 39, 40 (on formal amendment). See the reports of the International Law Commission's Special Rapporteur on the treaties over time, and subsequent agreements and subsequent practice in relation to interpretation of treaties, available at: http://legal.un. org/ilc/guide/1_11.shtml

[139] Marco Sassòli, "Release, Accommodation in Neutral Countries, and Repatriation of Prisoners of War", in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 1055, para. 40.

> interview in private with the persons involved, whether they wish to be repatriated (or released).[140]

The Vietnam War, discussed in the previous section in relation to treaties, also features strongly in the ICRC's Customary Law Study. It has been considered in relation to the identification of rules such as Rule 44 ("Due Regard for the Natural Environment in Military Operations"), Rule 75 ("Riot Control Agents"), Rule 45 ("Causing Serious Damage to the Natural Environment"), Rule 54 ("Attacks against Objects Indispensable to the Survival of the Civilian Population"), and Rule 23 ("Location of Military Objectives outside Densely Populated Areas").

Assertion 3: Some Asia-Pacific States are contributing to emerging or evolving areas relevant to IHL: The examples of weapons, outer space, cyberspace and the protection of the environment in armed conflict

The Geneva Conventions were agreed years before the majority of Asia-Pacific States gained their independence. As many know, the lack of global participation in the making of older treaties has for some time been the subject of criticism from this part of the world.[141] Doctrinally, new States are bound by international law that exists at State creation; in relation to multilateral treaties such as in the area of IHL, they may either

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[140] ICRC Customary Law Study, above note 119, Rule 128, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule128#refFn_E202C038_00020.

[141] This is strongly tied to the movement known as TWAIL (Third World Approaches to International Law). The voluminous literature associated with this movement includes Bhupinder S. Chimni, International Law and World Order, 2nd ed., Cambridge University Press, Cambridge, 2017; Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality*, Cambridge University Press, Cambridge, 2011; Anthony Anghie, Imperialism, Sovereignty and the Making of International Law, Cambridge University Press, Cambridge, 2004; David P. Fidler, "The Asian Century: Implications for International Law", *Singapore Year Book of International Law*, Vol. 9, 2005; Antony Anghie et al. (eds), The Third World and International Order, Brill, Leiden, 2003; David P. Fidler, "Revolt Against or from Within the West? TWAIL, the Developing World, and the Future Direction of International Law", *Chinese Journal of International Law*, Vol. 2, No. 1, 2003; Muthucumaraswamy Sornarajah, "The Asian Perspective to International Law in the Age of Globalization", *Singapore Journal of International and Comparative Law*, Vol. 5, 2001; Ram P. Anand, *New Nations and the Law of Nations, Vikas Publications*, New Delhi, 1978.

join without reservation, join with lawful reservations, or not become party.[142]

The 1970s provided the first opportunity for many emerging nations to shape new treaties governing armed conflict, including in the area of weapons control. We have already seen how the Additional Protocols bear the imprint of the Asia-Pacific region. Another example is the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Chemical Weapons Convention, CWC), which was negotiated through several decades in the Conference on Disarmament.[143] Chemical weapons are of course not a new challenge, but this treaty was a radical revision of outdated treaties. During its war against China in the 1930s and 1940s, Japan employed chemical weapons against enemy combatants and civilians, including riot control agents, phosgene, hydrogen cyanide, lewisite and mustard agents.[144] It also launched biological attacks where plague-infested fleas were released on Chinese cities such as Ningbo; it released plague-infested rats into other urban areas, and deliberately spread diseases through "field tests" and by handing out contaminated food items.[145] There were also the notorious human experiments carried out by Unit 731 outside Harbin in Manchuria.[146] Despite Chinese efforts, these crimes were not prosecuted at Tokyo, and were later addressed by the USSR and China in domestic proceedings.[147] Ironically, when the

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[142] Ram P. Anand, "New States and International Law", *Max Planck Encyclopaedia of Public International Law*, available at: https://tinyurl.com/umr5jpu.

[143] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1975 UNTS 45, 13 January 1993 (entered into force 29 April 1997). This discussion draws from Treasa Dunworth, "The Chemical Weapons Convention in the Asia-Pacific Region", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12.

[144] Walter E. Grunden, "No Retaliation in Kind: Japanese Chemical Warfare Policy in World War II", in Bretislav Friedrich et al. (eds), *One Hundred Years of Chemical Warfare: Research, Deployment, Consequences*, Springer, 2017.

[145] Sheldon Harris, *Factories of Death: Japanese Biological Warfare, 1932–1945, and the American Cover-up*, revised ed., Routledge, London and New York, 2002, pp. 69, 88–90, 99, 101–104, 126–133, 142–143.

[146] Boris G. Yudin, "Research on Humans at the Khabarovsk War Crimes Trial: A Historical and Ethical Examination", in Jing-Bao Nie et al. (eds), *Japan's Wartime Medical Atrocities: Comparative Inquiries in Science, History, and Ethics*, Routledge, London, 2010.

[147] Barak Kushner, Men to Devils, Devils to Men: Japanese War Crimes and Chinese Justice, Harvard University Press, Cambridge, MA, 2015, Chap. 7; Jeanne Guillemin,

negotiations for the Conference on Disarmament started, Japan was one of the four Asia-Pacific States participating, but not China. During the decades of the negotiations, chemical weapons were allegedly used in several Asia-Pacific armed conflicts.[148] Dunworth argues that Australia played an important role in the negotiations for the CWC. She cites Australia's 1988 Chemical Weapons Regional Initiative, which attempted to promote "broader regional support for the future Convention" and to assist the ASEAN and Pacific Island countries in their preparations for implementation, as well as its hosting of the 1989 Canberra Conference aimed at engaging with the chemical industry about the treaty, and in March 1992, its proposal of a compromise text that facilitated the adoption of the treaty text.[149]

Today, evolving technologies are leading to emerging issues that provide fresh opportunities for Asia-Pacific States to shape the direction and content of the law, and IHL is relevant to some of these areas. Outer space is an example. The advances in both civilian and military-related space technology over the years since Sputnik was launched have been astounding. Investment into developing capabilities in outer space has become a priority across the Asia- Pacific region, particularly in China, India and Japan. Freeland and Gruttner observe that "the shift towards small satellite technology has drawn the interest of other Asia-Pacific nations such as South Korea, Pakistan, Singapore and Viet Nam."[150] Running alongside these developments are fears that outer space will be used to facilitate armed conflict and may become a theatre of war. This obviously raises the issue of IHL's applicability in outer space.

It is well known that the law of outer space is thin, vague and subject to different interpretations, and that the laws of war are inherently, although not exclusively, territorial in their application. Can they be calibrated for space, in the way that they have been for naval warfare? In light of all the activity in space, it is astounding that there is not even an agreed notion of where space begins. Freeland and Gruttner argue that the

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"The 1925 Geneva Protocol: China's CBW Charges against Japan at the Tokyo War Crimes Tribunal", in B. Friedrich et al. (eds), above note 144.

[148] T. Dunworth, above note 143, pp. 269–270.

[149] *Ibid.,* p. 269.

[150] Steven Freeland and Elise Gruttner, "Critical Issues in the Regulation of Armed Conflict in Outer Space", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12.

definitional ambiguities urgently need to be clarified, ideally in the form of treaty norms: clear definitions are needed for concepts such as "space weapons", "military uses" and "peaceful purposes".[151] They also identify "a divergence of views as to the interplay between the relevant principles that might apply to an armed conflict in space, as between the international laws of space and the existing *jus in bello* principles."[152] Given the increase in strategic and militarized use of outer space (this is not the same as the weaponization of outer space, although the linkage is obvious), "the lack of clarity gives rise to a heightened sense of uncertainty and (perceived) threats to security."[153] Freeland and Gruttner argue that existing treaties are not sufficiently robust in laying down "absolutely specific rules or incentives to prevent an arms race in outer space, let alone a conflict involving (and perhaps "in") space although the object and purpose of the space law regime is directed towards peaceful activities."[154]

Some Asia-Pacific States have been supporting a new treaty. China, Vietnam and Indonesia were among the six States that joined with Russia in submitting a working paper to the Conference on Disarmament in 2002 on *Possible Elements for a Future International Legal Agreement on the Prevention of the Deployment of Weapons in Outer Space, the Threat or Use of Force Against Outer Space Objects*.[155] In 2008, this was developed by China and Russia into a draft Treaty on the Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force against Outer Space Objects.[156] This emphasizes outer space as a weapons- free zone, defines terms such as "weapons in outer space" and proposes a mechanism to establish measures of verification of compliance with the Treaty. This, of

[151] *Ibid.,* p. 195.
[152] *Ibid.,* p. 189.
[153] *Ibid.*
[154] *Ibid.,* p. 195. There are efforts under way to improve the legal situation. The leading endeavour is the Woomera Manual project, named after a village in south Australia that has long been associated with Australian and multinational military space operations. The project is spearheaded by the universities of Adelaide, Exeter, Nebraska and New South Wales – Canberra. The experts involved are working on developing a manual that objectively gathers, articulates, clarifies and streamlines existing international law applicable to space exploration, development and militarization. The project website is available at: https://law.adelaide.edu.au/woomera/.
[155] UN Doc. CD/1645, 6 June 2001, available at: https://tinyurl.com/u3ugygu.
[156] The draft treaty was updated in 2014 and can be viewed at the website of the Chinese Ministry of Foreign Affairs, available at: https://tinyurl.com/w7kubqx.

course, sits rather interestingly alongside China's remarkable investment into developing military capabilities in space in recent decades. In 2007, China caused international concern when it was able to destroy one of its own satellites by using the SC-19 direct-ascent anti-satellite system.[157] It has a specialized structure within the PLA, the Strategic Support Force, which is responsible for the development and execution of the PLA's space capabilities and also its cyber- and electronic warfare capabilities.[158] By contrast, the remaining two of the 2002 trio, Indonesia and Vietnam, are newcomers to outer space. However, Indonesia has since 2013 had a National Space Law which makes a direct link between its space ambitions and the defence of the nation, and authorizes the Ministry of Defence to utilize all of the nation's space assets in the event of a national emergency or for the sake of national defence and security.[159] As for Vietnam, it supports the policy of "no first placement of weapons in outer space" in the absence of a legally binding international agreement aimed at eliminating the weaponization of outer space, the predictable arms race that will follow, and the transformation of outer space into a venue of armed confrontation.[160]

Another area attracting attention from certain parts of the region is cyberspace, meaning an "environment composed of physical and non-physical components, characterized by the use of computer units and electromagnetic spectrum to store, modify and exchange data through a computer network."[161] The invention and development of the Internet, relying on cyberspace, has opened a new vista for hostile and harmful activity in the private, public and mixed spheres. Hacking into computers for the purposes of spying may be done by individuals for private

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[157] Center for Strategic and International Studies, "Space Threat 2018: China Assessment", 12 April 2018, available at: https://aerospace.csis.org/space-threat-2018-china/.

[158] *Ibid.*

[159] Space Act of the Republic of Indonesia, Law No. 21/2013, 2013, available at: http://ditjenpp.kemenkumham.go.id/arsip/terjemahan/11.pdf.

[160] Letter dated 9 August 2017 from the Permanent Representative of the Russian Federation, Addressed to the Secretary General of the Conference on Disarmament, Transmitting the Joint Statement by President of the Russian Federation Vladimir Putin and President of the Socialist Republic of Viet Nam Tran Dai Quang of 29 June 2017, with Regard to the No First Placement of Weapons of Any Kind in Outer Space, UN Doc. CD/2098, available at: https://undocs.org/cd/2098.

[161] Michael N. Schmitt (ed.), *Tallinn Manual on the International Law applicable to Cyber Warfare*, Cambridge University Press, Cambridge, 2013, p. 258.

purposes, and it may be done by individuals on behalf of a State. Viruses and worms may be planted in computers, and when activated these may or may not result in physical damage. The WannaCry ransom attack in 2017 affected computers around the world and has been tied to North Korea,[162] and there was also the NotPetya malware attack, blamed on Russia.[163] "Cyber-war" is a term used to describe the computer-based attacks that have happened against national institutions in Estonia, Georgia and Ukraine, all alleged to have been conducted by Russia.[164] There is at present no global agreement that regulates cyberspace, although there are some regional-level agreements such as the Convention on Cybercrime, also known as the Budapest Convention on Cybercrime.[165] Not surprisingly, as is the case with outer space, the question of whether and how IHL can apply to cyberspace is controversial on multiple levels. The laws of war have traditionally been territorial, tied to land, water and air space, but have been extended to conflict on the high seas. Cyberspace, like outer space, is a new frontier.

China is regularly mentioned in discussions about international hacking, malware and cyber-attacks, and their global regulation. The Chinese academic Binxin Zhang identifies "a dividing line between the 'East' (arguing that IHL does not apply to cyberspace) and the 'West' (arguing that IHL applies to cyberspace)," with China and Russia often taking the same position on the Eastern side of the line.[166] The Chinese

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[162] Deirdre Shesgreen and Bill Theobald, "Alleged North Korean Spy Charged with 2014 Hacking of Sony, Bank Theft, WannaCry Cyberattack", *USA Today*, 6 September 2018, available at: www.usatoday.com/story/news/world/2018/09/06/report-u-s-officials-charge-north-korean-spy-cyberattack-case/1210204002/.

[163] Andy Greenberg, "The Untold Story of NotPetya, the Most Devastating Cyberattack in History", Wired, 22 August 2018, available at: www.wired.com/story/notpetya-cyberattack-ukraine-russia-code-crashed- the-world/.

[164] D. Shesgreen and B. Theobald, above note 162.

[165] Convention on Cybercrime, ETS No. 185, 23 November 2001 (entered into force 1 July 2004).

[166] Binxin Zhang, "Cyberspace and IHL: The Chinese Approach", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12, p. 337. More generally, see ICRC, *International Humanitarian Law and Cyber Operations during Armed Conflict*, 28 November 2019, available at: www.icrc.org/en/document/ international-humanitarian-law-and-cyber-operations-during-armed-conflicts; Eitan Diamond, "Applying International Humanitarian Law to Cyber Warfare", *Law and National Security: Selected Issues*, Vol. 67, No. 128, 2014; articles in the symposium on "Cyber War and International Law", *International Law Studies*, Vol. 89, 2013; Jabbar Aslani, "Study on

position, explains Zhang, is more concerned "with the resort to self-defence by more powerful States against cyber-attacks, and not to specific IHL issues *per se*," because recognizing the applicability of IHL "would be an acknowledgement of the possible existence of armed conflict in cyberspace."[167] China actually provides an interesting example of an Asia-Pacific State deliberately shaping the legal trajectory with practice: the government has been issuing regulations, declarations and statements, and making domestic laws setting out a clear position that cyberspace should be used only for peaceful purposes. China's opinio juris is being demonstrated through public emphasis on the need to prevent a "cyber arms race", expressions of reluctance to accept the applicability of IHL and other existing regimes in cyberspace, and advocating "that cyberspace should only be used for peaceful purposes, and that discussion about the use of force in cyberspace would give rise to the militarisation of cyberspace."[168]

Finally, we can see the imprint of the region in the evolving area of environmental protection in armed conflict. In July 2019, the International Law Commission (ILC) provisionally adopted on first reading twenty-eight legal principles aimed at enhancing protection before, during and after armed conflicts (that is, throughout the entire conflict cycle).[169] This is not going to be a binding document. Even so, the principles are a landmark in the journey towards enhanced protection of the environment and natural resources in armed conflict. Some of the principles have certainly been progressive and consequently contentious. The draft goes beyond environmental damage to include misuse of environmental resources, covers both IAC and NIAC, extends the Martens Clause to environmental protection, draws from IHL's concept of protected zones, and envisages designation of significant environmental

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the Legal Dimensions of the Cyber Attacks from IHL Perspective", *International Studies Journal*, Vol. 10, No. 4, 2013–14; Cordula Droege, "Get Off My Cloud: Cyber Warfare, International Humanitarian Law, and the Protection of Civilians", *International Review of the Red Cross*, Vol. 94 No. 886, 2012.

[167] B. Zhang, above note 166.

[168] *Ibid.*

[169] See "Analytical Guide to the Work of the International Law Commission: Protection of the Environment in Relation to Armed Conflicts", available at: http://legal.un.org/ilc/guide/8_7.shtml.

and cultural areas as protected zones. It addresses the particular situations of indigenous people and mass displacement, illegal exploitation of natural resources in armed conflict, the restoration of the environment after armed conflicts and the responsibility of States. The draft does not directly address the responsibility of non-State armed groups, or corporate responsibility as such ("due diligence" and "liability" are the preferred terms, and the relevant principle simply makes a recommendation to States).

Over the six years that the project has been on the ILC's programme of work, several Asia-Pacific States have consistently played an active role: Singapore,[170] Palau,[171] the Federated States of Micronesia,[172] Vietnam,[173] Malaysia,[174] the Republic of Korea[175] and New

[170] For example, Singapore, UN Doc. A/C.6/70/SR.23, para. 122, expressing concern about phrasing the principles in too absolute terms that went beyond what it considered to be a reflection of customary international law; UN Doc. A/C.6/70/SR.23, para. 121, urging that the ILC should concentrate on analyzing how IHL relates to the environment, cautioning about the implications of addressing human rights as part of the topic, and expressing concerns about including NIACs within the scope of the principles.

[171] For example, Palau, UN Doc.A/C.6/70/SR.25, para. 27, offering examples of national and regional practice in the form of legislation, case law, military manuals and cooperation through the SIDS Accelerated Modalities of Action (SAMOA) Pathway.

[172] For example, Federated States of Micronesia, UN Doc. A/C.6/73/SR.29, para. 147, expressing support for the then draft principle 19 (on the general obligations of an Occupying Power to respect and protect the environment of the occupied territory), and desiring specific reference to be made to the link between the protection of human rights and the protection of the environment.

[173] For example, Vietnam, UN Doc. A/C.6/70/SR.25, para. 41m expressing concern about the inclusion of NIACs; UN Doc. A/C.6/70/SR.25, para. 42, stressing the need to address rehabilitation efforts, toxic remnants of war and depleted uranium; UN Doc. A/C.6/70/SR.25, para. 40, suggesting that the draft principles should explore environmental impact assessments for deploying weaponry.

[174] For example, Malaysia, UN Doc. A/C.6/73/SR.30, para. 67, stressing that "environmental issues were not limited to the natural environment; they included human rights, sustainability and cultural heritage;" UN Doc. A/C.6/73/SR.30, para. 73, commenting in relation to the then draft principle 20 (on the use of natural resources), expressing support for the requirement to engage in sustainable use of natural resources, and underlining the importance of the principles of permanent sovereignty over natural resources and of self- determination, which provide the general framework for the administration and use of an occupied territory's natural resources by an Occupying Power.

[175] For example, Republic of Korea, UN Doc. A/C.6/73/SR.30, para. 29, stressing the importance of ensuring that the ILC's work in this area remains in line with the existing rules of IHL; UN Doc. A/C.6/73/SR.30, para. 31, welcoming the tackling of the

Zealand.[176] Some, such as Malaysia[177] and the Republic of Korea,[178] contributed to the discussions and shared their national and international experience – for example, national legislation, military practice, and international commitments through treaties and other legally binding documents. A particularly meaningful contribution was made by the Federated States of Micronesia, when it provided a thirty-one-page document with its views on the importance of protecting the marine environment in armed conflict.[179] Micronesia also explained its position on a number of international rules and principles, for instance:

- that the "no-harm principle" applies in armed conflict "including during the build-up to actual military hostilities and after those hostilities end";[180]
- that "'hazardous wastes' produced by military activities of Parties (e g, military vessels with intact and flammable fuel caches that are decommissioned and subject to scrapping) are subject to the conditions and obligations of the [Basel] Convention, whether such wastes are produced before, during, or after armed hostilities";[181] and
- that the obligations of the Stockholm Convention "persist for its Parties during all temporal phases of an armed conflict – i.e., during actual armed

protection of the environment in NIACs; UN Doc. A/C.6/69/SR.27, para. 73, emphasizing that the principles should address NIACs.

[176] For example, New Zealand, UN Doc. A/C.6/70/SR.25, para. 102, stressing that reparation and compensation for the post-conflict phase should be included, and expressing support for the then draft principle II-4 prohibiting reprisals against the environment.

[177] For example, Statement by Malaysia to the Sixth Committee, 69th Session, 5 November 2014, cited in *Second Report on the Protection of the Environment in Relation to Armed Conflicts*, submitted by Marie G. Jacobsson, Special Rapporteur, UN Doc.A/CN.4/685, 28 May 2015, para. 63.

[178] Note verbale from the Permanent Mission of the Republic of Korea to the United Nations addressed to the Secretariat, 19 February 2015, cited in *ibid.,* paras 54–56.

[179] Note verbale from the Permanent Mission of the Federated States of Micronesia to the United Nations Secretariat, 29 January 2016, available at: http://legal.un.org/docs/?path=../ilc/sessions/68/pdfs/english/poe_micronesia.pdf&lang=E.

[180] *Ibid.*, para. 12.

[181] *Ibid.*, para. 11.

> hostilities as well as in the build-up to and aftermath of those hostilities."[182]

Some of these States, such as Vietnam, Japan and the Federated States of Micronesia, have had experiences of severe environmental damage in armed conflict that gives their input particular resonance. Reflection on the selection of views expressed (see notes 170–179) confirms the plurality of perspectives from across the region. Some, such as Singapore, take a conservative approach, while others, like Vietnam, Malaysia and Micronesia, are willing to push the boundaries and develop the law that exists as well as to fill existing gaps with fresh rules. The engagement of the identified States has been sustained, indicating genuine commitment to shaping this matter, and we can expect that they will continue to try to influence the draft principles as they move to the General Assembly for debate, and will be active in the ILC's consultation process prior to the second reading.

What of the Contradictory IHL Practice?

The author has thus far argued and justified three assertions: (1) the norm of humanity in armed conflict, which underpins IHL, has deep roots in the region; (2) there has been meaningful participation by some States from the region in IHL law-making; and (3) several Asia-Pacific States are among those actively contributing to the development of new or emerging areas relevant to IHL, such as outer space, cyberspace and the protection of the environment in armed conflict. It is then obviously necessary to address the paradox of how this positivity can exist in conjunction with the region's many armed conflicts, and its problematic implementation of IHL. The list of barbarity is long and includes the horrors of World War II, decolonization-related atrocities such as the Indonesian war of independence, Pakistan's devastation of breakaway Bangladesh in 1971, the atrocities of the Khmer Rouge in Cambodia from 1975 to 1979, the crimes in occupied East Timor from 1975 to 1999, the perpetual ethnic conflicts and the persecution of the Rohingya in Burma/Myanmar, and the decades-long struggle in Northern Sri Lanka, culminating in the

[182] *Ibid.*, para. 13.

government's unrestrained military annihilation of the Tamil Tigers in 2009. Saul's work on terrorism adds another dimension in clearly showing how many regional States have been twisting the conceptualization of terrorism beyond recognition to allow draconian powers to be deployed against a much broader category of persons in armed conflict, while Lassée and Anketell show how one State, Sri Lanka, attempted to distort IHL in order to justify its conduct of hostilities against the Tamil Tigers and the Tamil civilian population.[183]

How can we reconcile this depressing picture with what has been demonstrated in the preceding parts of the present article? One way of theorizing the inconsistency is to see a hierarchy of accepted fundamental norms in the region, and due to incomplete internalization of the humanitarian norm, the sovereignty norm – as understood by those in power – is able to trump in armed conflict. As long ago as 1949, the representative to the Geneva Conference of the newly independent Republic of the Union of Burma articulated the approach that would come to reflect the views of many other States in the region, and in his own country, up to the present:

> I do not understand why foreign governments would like to come and protect our people. Internal matters cannot be ruled by international law or Conventions. We say that external interference in purely domestic insurgency will but aggravate the situation, and this aggravation may seriously endanger the security of the State established by the people. Each Government of an independent State can be reasonably expected to treat its own nationals with due humanity, and there is no reason to make special provisions for the treatment of persons who had taken part in risings against the national government as distinct

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[183] See Ben Saul, "Counter-Terrorism Law and Armed Conflict in Asia", and Isabelle Lassée and Niran Anketell, "Reinterpreting the Law to Justify the Facts: An Analysis of International Humanitarian Law Interpretation in Sri Lanka", both in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12.

> from the treatment of other offenders against the laws of the State.[184]

This captures the core aspect of the so-called "ASEAN way" that is now crystallized in the ASEAN Charter's Article 2(2).[185] The ten member States have pledged allegiance to the "fundamental importance" of "respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States," "non-interference in the internal affairs of ASEAN Member States" and "respect for the right of every Member State to lead its national existence free from external interference." Textually, the ASEAN Charter bears resemblance to the UN Charter (Preamble and Article 1)[186] and the Friendly Relations Declaration,[187] but the practice of ASEAN States and their regional organizations has always been to prioritize Westphalian notions of statehood above all else.

Sovereignty concerns are manifested in the tardy Southeast Asian ratification of the two Additional Protocols that has already been discussed. There continues to be a definite chill in respect of aspects that potentially encroach on independence, sovereignty or territorial integrity, or that smack to these States of Western neo-colonialism. These aspects are, of course, subjectively evaluated by each State.[188] In practical terms, this frostiness can be seen in responses to certain issues in other branches of international law that have an impact on IHL:

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[184] 18th Plenary Meeting (Common Articles), in Diplomatic Conference Final Record, above note 73, Vol. 2 (B), p. 330.

[185] Charter of the Association of Southeast Asian Nations, 20 November 2007, available at: http://www. aseansec.org/21069.pdf. Also see Simon S. C. Tay, "The ASEAN Charter: Between National Sovereignty and the Region's Constitutional Moment", *Singapore Year Book of International Law*, Vol. 12, 2008, p. 151.

[186] Charter of the United Nations, 1 UNTS XVI, 26 June 1945, as amended.

[187] UNGA Res. 2625 (XXV), "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations", UN Doc. A/RES/2625/XXV, 24 October 1970.

[188] For an examination of the region's two most populous countries' approach to the International Criminal Court, see Suzannah Linton, "India and China *Before, At* and *After* Rome", *Journal of International Criminal Justice*, Vol.16, No. 2, 2018, pp. 283–286, 291.

- external threats of accountability against political leaders, in particular the immunities of heads of State;[189]
- the exercise of extra-territorial jurisdiction;[190]
- Security Council referrals to the International Criminal Court[191] and the Court's exercise over non-States Parties;[192]
- Pillar Three of the "Responsibility to Protect" doctrine;[193] and

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[189] As an illustration, see Statement by Mr David Low, Delegate to the 71st Session of the United Nations General Assembly, on Agenda Item 78 on the Report of the International Law Commission on the Work of Its Sixty-Eighth Session (Cluster 3: Chapters X, XI and XII of A/71/10), Sixth Committee, 1 November 2016, para. 4.

[190] See, for example, UN General Assembly and UN Security Council, *13th Summit Conference of Heads of State or Government of the Non-Aligned Movement: Final Document*, UN Doc. A/57/759–S/2003/332, Kuala Lumpur, 18 March 2003, Annex I, para. 124. Written information and comments expressing reservations on the ILC's work on "The Scope and Application of the Principle of Universal Jurisdiction" were provided by several regional States: see UN Docs A/C.6/66/SR.12, 13, 17 and 29, and also UN Doc. A/65/181 and UN Doc. A/66/93 with Add.1. The cautious approach can also be seen in the Sixth Committee discussions on the scope and application of universal jurisdiction (64th to 72nd Sessions of the General Assembly): UN Doc. A/C.6/64/SR.12, 25 November 2009 (China, Thailand); UN Doc. A/C.6/65/SR.12, 10 November 2010 (India); UN Doc. A/C.6/65/SR.11, 14 January 2011 (Thailand, Republic of Korea, China, Vietnam); UN Doc. A/C.6/67/SR.12, 6 December 2012 (India); UN Doc. A/C.6/67/SR.13, 24 December 2012 (China, Sri Lanka, Bangladesh, Malaysia); UN Doc. A/ C.6/69/SR.12, 9 December 2014 (India, Vietnam); UN Doc. A/C.6/71/SR.14, 31 October 2016 (India, China, Vietnam, Bangladesh); UN Doc. A/C.6/71/SR.13, 21 December 2016 (Iran speaking for the Non-Aligned Movement, Singapore); UN Doc. A/C.6/72/SR.14, 13 November 2017 (Malaysia, Vietnam); UN Doc. A/C.6/72/SR.13, 6 December 2017 (Iran speaking for the Non-Aligned Movement, Singapore, Thailand, Bangladesh, China).

[191] See, for example, Statement by Mr Wang Guangya (China), 5,158th Meeting of the Security Council, UN Doc. S/PV.5158, 31 March 2005, p. 5.

[192] See, for example, Statement by Mr Nambiar (India), 4,568th Meeting of the Security Council, UN Doc. S/ PV.4568, 10 July 2002, p. 14; Statement by Mr Vinay Kumar (India), 6,778th Meeting of the Security Council, UN Doc. S/PV.6778, 5 June 2012, pp. 12–13; Statement by Mr Dilip Lahiri (India), UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 16 June 1998, para. 10; Statement by Mr Wang Guangya, above note 191. However, on 26 February 2011, China did not exercise the veto and India voted in favour of UNSC Res. 1970 referring the situation in Libya to the ICC. China also declined to veto the referral of Sudan to the ICC in UNSC Res. 1593 of 31 March 2005.

[193] Alex J. Bellamy and Catherine Drummond, "The Responsibility to Protect in Southeast Asia: Between Non- Interference and Sovereignty as Responsibility", *Pacific Review*, Vol. 24, No. 2, 2011. Twenty-two States, including India, Pakistan, Indonesia and Malaysia, are members of the Non-Aligned Movement, which has taken a strong position on

- certain formulations of international crimes (for example, war crimes in NIAC).[194]

The particular understanding of sovereignty that results from these patterns has been dubbed Eastphalian by scholars since Sung Won Kim first coined the phrase in 2009.[195] It is not as simple as the geopolitical ambitions of powerful States such as India and China or claims to be seeking to make international law more international. It is about encouraging Asian countries to look to themselves for solutions that cannot be found in the present framework, using the different approaches from the region, such as Confucian communitarianism. Eastphalia is not about dismantling the existing order, based as it is on established concepts, rules, principles and structures underpinned by international law. The emphasis on maintaining the State as a leviathan is, of course, not the only possible reason for the apparent disconnect with the implementation of humanitarianism in armed conflict. There are different reasons why norms that seem to be internalized are obeyed, violated or adapted, and they do not necessarily involve rejection of the norm itself. However, understanding what is going on is extremely important work that must be encouraged and tested in the contradictory landscape of the Asia-Pacific. For example, tapping into Axelrod's seminal games theorizing in relation to an evolutionary approach to norms, Villatorro and his co-authors have confirmed fluidity in the way that States relate to norms, and that this can

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sovereignty. The Movement's collective position on the right to protect is succinctly summarized in the European Parliament Factsheet on the Responsibility to Protect, available at: www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/factsheet_resptoprotect_6may/factsheet_ resptoprotect_6may05.pdf.

[194] During the Rome Statute negotiation, China, India and Pakistan were among those refuting the claim that war crimes can be committed in NIAC. See "Article 8: War Crimes", in William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd ed., Oxford University Press, Oxford and New York, 2016; Knut Dörmann, "War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes", *Max Planck Yearbook of United Nations Law*, Vol. 7, 2003, available at: www.mpil.de/files/pdf3/mpunyb_doermann_7.pdf.

[195] Sung Won Kim, "Eastphalia Revisited: The Potential Contribution of Eastphalia to Post-Westphalian Possibilities", *Inha Journal of International Studies*, Vol. 33, No. 3, 2018; David P. Fidler, "Eastphalia Emerging", *Indiana Journal of Global Legal Studies*, Vol. 17, 2010; Sung Won Kim, David P. Fidler and Sumit Ganguly, "Eastphalia Rising? Asian Influence and the Fate of Human Security", *World Policy Journal*, Vol. 26, No. 2, 2009.

be a process of ongoing change, even of mutation. The notions of process and movement are important, and this seems to match what we see in the Asia-Pacific region. Academics have argued that "norm internalization is not an all-or-none phenomenon, but a *multi-step* process which consists of degrees and levels characterized by different mental ingredients;" it is a "*flexible* phenomenon, allowing norms to be de-internalized, automatic compliance blocked, and deliberation restored in certain circumstances."[196] Importantly, Villatorro and his co-authors point out that even internalized norms "are not inexorably bound to remain as such" and that they can evolve over time, including under extreme conditions.[197] If this understanding of norm dynamics is indeed correct when applied to the IHL hotspots of the Asia-Pacific, it offers an important new approach to strengthening norm internalization and compliance, and for designing interventions that are more effective.

The norm internalization avenue should be considered along with other attempts to rationalize and understand some of the egregious behaviour that has arisen in a number of Asia-Pacific IHL situations. For example, the present author recently analyzed wartime military sexual enslavement in the region, focusing on three of the most ignominious manifestations of the phenomena: the so-called "comfort women" of World War II, the abuse of Bangladeshi girls and women during the break-up of Pakistan in 1971, and the criminal and inhumane treatment of sexually enslaved women and girls in occupied East Timor.[198] That study identifies commonalities between these geographically and temporally diverse phenomena, and these commonalities allow for a broader understanding that is important for control of behaviour and prevention of abuses. Notably, the three phenomena all share aspects of the root causes identified in modern scholarship, such as all illustrating symbolic or representative sexual violence that is meant to humiliate the wartime opponent through the victim, and sexual violence as a concrete

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[196] See, for example, Daniel Villatoro et al., "Self-Policing through Norm Internalization: A Cognitive Solution to the Tragedy of the Digital Commons in Social Networks", *Journal of Artificial Societies and Social Simulation*, Vol. 18, No. 2, 2015, available at: http://jasss.soc.surrey.ac.uk/18/2/2.html.

[197] *Ibid.,* para. 1.5.

[198] Suzannah Linton, "Wartime Military Sexual Enslavement in the Asia-Pacific", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12.

strategy of war, to reward fighters and boost morale. Three other features are clearly identifiable from this study: problematic institutional handling of sex and aggression in the armed forces; linkage to historical precedents and institutional cultures that socialize their members and influence their behaviour; and differing conceptions of what good leadership entails. In Burma/Myanmar,[199] Indonesia,[200] Sri Lanka,[201] the Korean Peninsula[202] and the Southern Philippines,[203] there are more than enough cases for a generation of multidisciplinary researchers to carry out work that facilitates our understanding of root causes and of why there has not been a complete internalization of the norm of humanity in armed conflict, and that helps us to develop insights and approaches which can really make a difference to limiting the man-made harms that occur in armed conflict.

Concluding Reflections

The region clearly has a roughly textured and multifaceted relationship with IHL, and its underlying norm of humanity in armed conflict. We have seen that there is no single Asia-Pacific perspective on IHL and that there are contradictions in approach and practice. However, we have also seen that this does not mean that the region does not have a significant and varied contribution to make. On the contrary, the broad acceptance, at an intellectual and cultural level, of the norm of humanity in armed conflict has facilitated a meaningful contribution to IHL law-making, and engagement in new areas of actual and potential application. In addition to the contributions pointed out in this paper, McCormack argues that the region can offer

> significant experience and expertise ... in relation to effective national implementation of IHL; engagement with non-state armed groups ... to increase awareness of

[199] Megumi Ochi and Saori Matsuyama, "Ethnic Conflicts in Myanmar: The Application of the Law of Non- International Armed Conflict", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12.
[200] S. Linton, above note 15.
[201] I. Lassée and N. Anketell, above note 183.
[202] H. Kim, above note 130.
[203] S. M. Santos Jr., above note 42; S. M. Candelaria, above note 127.

> and respect for IHL; and drawing on the experience, history, culture and values of other, non-Western societies to broaden IHL and help dilute some of the Western Judeo-Christian stigma associated with it.[204]

The present contribution suggests that the non-linear process of norm internalization may be one reason for the contradiction between conceptual or rhetorical acceptance and actual practice on the ground in many Asia-Pacific armed conflicts. This may explain how it is that sovereignty, another norm of great importance, is able to trump the norm that requires humanity in armed conflict. This enigma is not necessarily a "problem" but could be seen as simply a feature of social and political existence. The region actually presents diverse and complex situations that do require more "thinking outside of the box" and non- linear approaches. Linked to this is the reality that the wealth of regional practice in armed conflict should not be dismissed for being an IHL disaster zone. The dense practice with high levels of atrocity undeniably presents a schizophrenic picture, but it also provides case studies for deeper reflection on and understanding of human behaviour in armed conflict. This study discussed one example, military sexual enslavement, spanning three paradigmatic case studies spread out over some sixty years. From that, we have seen that there are more common than unique features. Broad and trans-disciplinary country-specific studies – for example, in the atrocity-rich conflicts of Burma/Myanmar, Sri Lanka and Indonesia – will surely yield exceptional insight, going well beyond the simplistic belief that dissemination and more enforcement are what is needed. Such studies can also be brought together for comparative purposes, and to identify shared features that warrant a common approach in the effort to facilitate norm acceptance and atrocity prevention.

The humanitarian community around the world has just commemorated and reflected on the 70th anniversary of the Geneva Conventions. The work that is emerging from the region shows that the challenge of the Asia-Pacific is not really that the region needs to be disseminated to about IHL or "capacity-developed" on humanitarianism

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[204] Tim McCormack, "International Humanitarian Law in the Asia-Pacific", in S. Linton, T. McCormack and S. Sivakumaran (eds), above note 12, p. 2.

in armed conflict. The countries of the region are not unaware of IHL, and it is misguided to approach their conduct in armed conflict as if it were all about ignorance. It may be hard for those who hold to a vision of the "civilizing" role of laws adopted in Geneva and The Hague to accept, but this part of the world has much to offer the world of IHL, such as humanitarianism from its countries' cultures and religions, and the demonstrable expertise of a growing community of practitioners and academics. The real challenge for progressive humanitarianism is to traverse disciplines and build on recent important scholarship in order to develop more informed and nuanced approaches to understanding the countries and societies of the region, moving on to study the process of norm internalization, and then to develop creative and meaningful strategies for strengthening the links between that internalization, actual conduct on the ground, and norm socialization in the wider community.