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FOREWORD

The University of the Philippines Institute of International Legal Studies (UP IILS) of the UP Law Center is proud to announce the publication of the 2026 Edition of the Asia Pacific Journal of International Humanitarian Law (APJIHL). This year marks the Journal's seventh year of publishing volumes that cultivate scholarship and academic discourse on International Humanitarian Law (IHL) in the Asia-Pacific region.

With the release of the special issue edition centered on Artificial Intelligence and Warfare earlier this year, the journal has, for the first time in its history, released more than one edition in a single year.

Indeed, for the Journal, 2026 has proven to be a convergence of past and future. The emergence of Artificial Intelligence and other technological advancements in the digital space has led to new debates in IHL. Meanwhile, issues regarding freedom of religion and the Asia-Pacific region's role in IHL continue to carve out their space, of immense importance and long overdue, in academic discourse. It is in this spirit that we proudly present the articles in this volume:

- **International Humanitarian Law in the Asia-Pacific: History, State Practice, and Contemporary Challenges** by Dr. Bhavana Chandran & Dr. Udaya Simha, which outlines the evolution of international humanitarian law in the Asia-Pacific region to show how regional experiences are reflected in its development.

- **After the Algorithmic Battlefield: Artificial Intelligence in Post-Conflict Asia-Pacific Societies and the Fragmentation of International Humanitarian Protection** by Mx. Nandana Rajesh & Dr. Aneesh V. Pillai, which asks whether existing laws in the Asia-Pacific are enough to regulate AI systems in societies emerging from conflict.

- **On the Digitization of Distinctive Emblems in International Humanitarian Law** by Lei Zhang & Hui Chen, which discusses the advantages of digital emblems and the rules governing them.

- **Judicial Archives as Living Memory: Insights from the Extraordinary Chambers in the Courts of Cambodia** by Vikram Ramaswamy, which argues that judicial archives should be viewed as living memory that can contribute to transitional justice in post-conflict situations.

- **The Dragon's Human Face: Wartime Implications of Traditional Chinese Minben Thought for Contemporary Laws of War** by Kunyang Li & Zhuo Liang, which explores the ancient Chinese view of Minben and its intersection with the evolution of the laws of war.

- **Freedom of Religion and Belief Under Fire: Protection Theory and Practice in Jeopardy?** by Fadi Hachem, which, through case studies from the Levant, argues that protections for freedom of religion remain fragmented and insufficient.

- **The Dragon's Human Face: Wartime Implications of Traditional Chinese Minben Thought for Contemporary Laws of War** by Kunyang Li & Zhuo Liang, which explores the ancient Chinese view of Minben and its intersection with the evolution of the laws of war.

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This year has also seen an even greater increase in submissions from scholars across the region. This reinforces APJIHL's commitment to serve as a vehicle for scholars who are eager to contribute to the body of knowledge on IHL. We thank the scholars who keep the important discourses alive.

We extend our sincerest gratitude to the members of the Boards of Experts and the peer reviewers, without whose expertise, which is required for the facilitation of the rigorous editorial screening and double-blind peer review, the release of the 2026 edition would not be possible. This gratitude is likewise extended to the diligent administrative staff and dedicated research staff of the UP Law Center. Also, the 2026 edition would never be possible without the unwavering commitment of the editorial team, consisting of Atty. Joan Paula Deveraturda as Associate Editor, and

Ms. Aira Lynn Cunanan, Ms. Ma. Flordeliza Villar, Mr. Mackie Valenzula, Ms. Patricia Arago, and Mr. John Paolo Cabrera as Editorial Assistants.

As the world continues to advance technologically, and new technologies that may have been intended for the greater good of humankind are inevitably utilized for ends that multiply the destructive nature of human conflict, the scholars of IHL must continue their work so that the multiplying effects of these technologies on human suffering may at least be diminished.

ROMMEL J. CASIS
Managing Editor
2026

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International Humanitarian Law in the Asia-Pacific: History, State Practice, and Contemporary Challenges

Dr. Bhavana Chandran[*]
Dr. Udaya Simha .N.G[*]

ABSTRACT

IHL scholarship has progressively moved beyond Eurocentric narratives into the analysis of regional contributions and practices. This article builds on such scholarship by outlining history and evolution of international humanitarian law in the Asia-Pacific through treaties, customary law, and state practice. It takes an exploratory look at how colonial legacies, post-independence conflicts, and regional security realities shape the interpretation and application of IHL. While humanitarian norms are mostly sanctioned by states in the Asia-Pacific region, implementation gaps still persist due to political and operational realities of warfare. This study goes on to contend that the experience of the regions in the Asia-Pacific reflect how IHL develops from the interaction between normative ideals and practice by states in armed conflict.

Keywords: IHL, Asia-Pacific, State Practice, Customary International Law, Geneva Conventions, Non-International Armed Conflicts

Introduction

International humanitarian law or "IHL" refers to a body of rules which seek to limit the effects of armed conflict. However, as legal scholar Nils Melzer suggests, these rules are more precisely understood as addressing a particular category of effects: the humanitarian consequences—specifically the human suffering and the affronts to human dignity—that arise during hostilities.[1] By protecting persons who are not, or are no longer, participating in hostilities and by restricting the means and methods of warfare, IHL remains grounded fundamentally in the 'minimum standards of humanity.'[2] While the roots of IHL are often understood to be derived from developments in nineteenth and twentieth-century Europe and from the Geneva

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[1] Nils Melzer, International Humanitarian Law: A Comprehensive Introduction, ICRC, Geneva, 2019, p. 18.
[2] Nils Melzer, International Humanitarian Law: A Comprehensive Introduction, ICRC, Geneva, 2019, p. 17.

Conventions of 1949 (GCs), such a view neglects the existence of traditional humanitarianism and restraints in non-European societies, including the Asia-Pacific region.[3] Questioning the geographical or temporal narrowness of these accounts is not a recent phenomenon but builds on a long history of studies, notably by the ICRC, which emphasize that humanitarian considerations in warfare are neither geographically exclusive nor historically recent.[4] It is essential, however, to acknowledge the critiques of these studies, which argue that by attempting to universalize IHL, they may downplay cultural differences and appeal to a 'natural law' approach that inadvertently aligns with European worldviews.[5]

The Asia-Pacific region provides a particularly compelling context for this investigation into the history and evolution of IHL. From South Asia, across Southeast and East Asia to the Pacific Islands, the region encompasses vast religious, cultural, political, and social diversity from small island states and post-colonial societies to major military powers wielding substantial influence over global security affairs.[6] Despite this diversity, Asia-Pacific societies have extensive norms of restraint in warfare through religious texts, philosophical traditions, customary practices, and early legal codes.[7] Ancient Chinese military thought, for example, followed principles of proportionality, necessity, and moral conduct in war, while Southeast Asian polities like Siam demonstrated notions of righteous warfare and civilian protection within its customary and royal codes.[8] Such traditions demonstrate that the underlying values of humanity and restraint that animate modern IHL were not alien to the region.

Notwithstanding these historical foundations, states across the disparate sub-regions of Asia and the Pacific occupied a marginal position in the early formal development of IHL as a codified body of international law. The diplomatic processes that produced the Hague Regulations and the early Geneva Conventions

[3] ICRC, Under the Protection of the Palm: International Humanitarian Law and Islamic Law, ICRC, Geneva, 2009; Samuel White, The Laws of War in the Asia-Pacific, Cambridge University Press, Cambridge, 2021.

[4] ICRC, Under the Protection of the Palm: International Humanitarian Law and Islamic Law, ICRC, Geneva, 2009.

[5] This conceptual critique regarding the "natural law" approach and the universalization of IHL is a scholarly observation (often associated with TWAIL scholarship) that highlights the risk of homogenizing diverse traditions into a framework that remains fundamentally aligned with European worldviews.

[6] Sandesh Sivakumaran, "Asia-Pacific States and the Development of International Humanitarian Law", in Suzannah Linton, Timothy McCormack and Sandesh Sivakumaran (eds), *Asia-Pacific Perspectives on International Humanitarian Law*, Cambridge University Press, Cambridge, 2019.

[7] S. Linton, above note 2.

[8] Ibid.

took place during a period of colonial domination when much of Asia and the Pacific regions lacked sovereign representation.[9] Accordingly, the region's early treaty-determining influence was significantly curtailed. The formal legal shaping of IHL during this era is best understood as a jurisdictional encounter, where European legal views and strategic interests were propelled to dominance as a direct effect of the colonial endeavour.[10] This process facilitated what has been termed 'international legal reproduction,' ensuring that the local conceptual shaping of IHL emanated primarily from European state practice or legal inquiry rather than regional traditions.[11] This legacy of exclusion has spread the perception that IHL represents Western constructs imposed upon non-Western societies rather than shaped within non-Western societies themselves.[12]

Post-second world war period represents the first major discernible change regarding the involvement of the Asia-Pacific region with IHL. It is true that the negotiations regarding the Geneva Conventions of 1949 took place during the early stages of the decolonizing process.[13] This allowed some states within the Asia-Pacific region, like India, China and Pakistan to take part in the negotiations on the key rules, including the rules on the protection of prisoners of war and the regulation of non-international conflict.[14] Even though the number of states was relatively low, the introduction of voices from the periphery, such as the Asia-Pacific, reflects a diverse array of experiences ranging from the differing forms of colonial encounter and resistance in South and Southeast Asia to the distinct security realities of the Pacific Islands.[15] These variegated histories of colonial, internal, and conventional warfare fundamentally influenced how these states perceived the necessity of IHL, shifting the focus toward the mitigation of humanitarian consequences and the establishment of minimum standards of humanity during the 1949 negotiations.[16]

Following colonial independence, Asia-Pacific states demonstrated a tiered engagement with the IHL treaty regime. While ratification of the 1949 Geneva Conventions was nearly universal and relatively rapid for newly independent states such as India, Pakistan, and the Philippines in the early 1950s, consistency in treaty

[9] S. Sivakumaran, above note 4.
[10] Rose Parfitt, The International Court of Justice and the Reproduction of the International Legal Order, Cambridge University Press, Cambridge, 2019.
[11] Ibid.
[12] S. Sivakumaran, above note 4.
[13] Ibid
[14] Ibid.
[15] Supra p.2
[16] Ibid

adherence remained uneven.[17] This is particularly evident in the lower ratification rates for Additional Protocol II, reflecting regional sensitivities regarding the regulation of internal conflicts that had characterized many post-colonial transitions.[18] Nevertheless, the region's shift from peripheral beneficiary to active shaper is evidenced by its influential role during the 1949 and 1977 negotiations. For instance, India's representative chaired the committee addressing key protections for war victims, while states like Burma actively shaped the debates on Common Article 3.[19] This active engagement extended to the formation of customary IHL rather than merely existing as a subject of study, and regional practice, including domestic military manuals, national legislation, and judicial decisions, formed a critical part of the evidentiary matrix for the ICRC's landmark study on customary law.[20] Furthermore, the region's normative influence is observable in active legal diplomacy, such as the detailed submissions by Japan and India to the International Court of Justice regarding the legality of nuclear weapons.[21]

The Asia-Pacific region has borne witness to a diverse and violent range of modern conflicts, including the foundational Indonesian war for independence, the Korean War, and the complex, multi-decade struggle in Vietnam.[22] These have been accompanied by recurring low-scale hostilities between India and Pakistan and non-international armed conflicts (NIACs) in the Philippines and Myanmar. While the international commitment to IHL is formally anchored in the universal ratification of the 1949 Geneva Conventions across all states in the region, representing a consensus on the 'minimum standards of humanity', this commitment is not

[17] The 1949 Diplomatic Conference included seven Asia-Pacific countries, contributing 13.5% of the total state parties. Several of these, including India, Pakistan, China, Japan, and the Philippines, ratified the Conventions in the early 1950s, while others followed as they attained independence. IHL Treaties - Final Act of the Geneva Conference, 1949 Ratification

[18] While most regional governments have ratified Additional Protocol I, ratification of Additional Protocol II remains low, likely due to "sovereignty issues" and "sensitiveness regarding international regulation of internal conflicts" which are often viewed through the lens of post-colonial security realities. Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts:

[19] During the 1949 Conference, Australia served as Vice-President, and India's Sir Dhirer Mitra chaired Committee I. Pakistan, New Zealand, and China also contributed significantly to discussions on prisoners of war and non-international armed conflict. Two Conferences on Asian Matters in New Delhi

[20] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), Customary International Humanitarian Law, Vol. 1, Cambridge University Press, Cambridge, 2005.

[21] Japan and India provided detailed written and oral submissions to the ICJ in the *Nuclear Weapons* Advisory Opinion, applying principles of distinction and proportionality that were influenced by their specific historical and humanitarian perspectives. Legality of the Threat or Use of Nuclear Weapons

[22] RSIS and ICRC, International Humanitarian Law in Asia: Regional Conference on Generating Respect for the Law, Singapore, 2017.

consistently reflected in the ratification of the Additional Protocols. Specifically, while Additional Protocol I enjoys broad support, the ratification of Additional Protocol II remains low, as states continue to exhibit sensitivity regarding the international regulation of internal security and non-state armed groups. This gap between formal 'legal effects' and actual 'humanitarian consequences' is evidenced by documented breaches: in Myanmar, recent military operations have involved aerial bombardments and the targeting of civilian infrastructure, while in the Philippines, hostilities continue to result in civilian displacement, and protection concerns despite advanced domestic oversight mechanisms.

Research today reveals a fundamental tension within the Asia-Pacific environment. While there is little evidence of conceptual resistance to the humanitarian principles of international humanitarian law (IHL),[23] due in part to a cultural familiarity that makes IHL more 'legible' than international human rights law in regional discourse, actual implementation remains patchy. This gap highlights a critical distinction between the near-universal ratification of key treaties and their actual observance in conflict zones, reinforcing the need to measure engagement through state practice rather than mere legal formalisms. [24] Despite this implementation gap, a significant expansion in regional discourse is observable, particularly regarding emerging domains such as cyber-warfare, where states like China are active in defining the intersection of state sovereignty and information security. Similarly, regional friction in the South China Sea has revitalized debates on the law of naval warfare, while states with advanced technological capacities are increasingly influential in discussions regarding the militarization of outer space and the environmental impact of autonomous weapons. [25] This shift from marginalization to normative engagement is further evidenced by the 'pluralistic' inclusion of regional military manuals and judicial decisions in the ICRC's Customary IHL study, as well as the detailed legal submissions by Japan and India to the International Court of Justice.[26] This is due to an appreciation of the region's importance, not only in connection with situations of armed conflict, but also in its contribution to the development of IHL.

Guided by this perspective, this article takes a doctrinal approach in considering the elements of treaties, customary international law, and customary

[23] RSIS and ICRC, International Humanitarian Law in Asia: Regional Conference on Generating Respect for the Law, Singapore, 2017.
[24] S. Linton, above note 2.
[25] S. Sivakumaran, above note 4.
[26] Ibid

practice in the Asia pacific region with in their historic and political framework. It maintains that even though Asia-Pacific states have influenced the development of some of the main elements of IHL, the ongoing lacuna in their implementation points to the ongoing necessity of reconciling the ideal and the pragmatic in the conduct of hostilities.

Historical Origins of IHL in the Asia-Pacific

The historical origins of IHL in the Asia-Pacific date back well before the ratification of the Geneva Conventions of 1949. While the process of diplomacy leading to the codification of IHL emerged during the end of the nineteenth and the twentieth centuries within Europe, some of the Asia-Pacific founding cultures had already developed traditions of rules governing war, tied conceptually to moral restraints, military needs, and protecting civilians.[27] This complex history defies an entirely Western-based legal narrative and demonstrates a long-standing regional engagement with humanitarian concepts that were neither geographically exclusive nor historically recent.[28] This regional legacy, including ancient Chinese military thought regarding proportionality and Siamese royal codes on righteous warfare, proves that the underlying values of humanity and restraint that animate modern IHL were already deeply embedded in the region.[29]

The first instances of sovereign Asia-Pacific participation in the codification of warfare are found in the Hague Peace Conferences of 1899 and 1907.While Japan, China, and Siam (modern-day Thailand) were the first Asian countries, to enter this European led diplomatic space, that participated in the Hague peace meetings, thus contributing to some of the earliest attempts by Asian states to cooperate with the laws of war.[30] Japan's participation, in particular, was a deliberate strategic outcome of 1868 with the Meiji Restoration [31] during which the state systematically internalized and implemented Western understandings of international law to assert its status as a 'civilized' sovereign power equal to its European counterparts. [32] Similarly, China's decision to send a sizeable delegation despite internal political

[27] S. Linton, above note 2.
[28] Samuel White, The Laws of War in the Asia-Pacific, Cambridge University Press, Cambridge, 2021.
[29] ICRC, Under the Protection of the Palm: International Humanitarian Law and Islamic Law, ICRC, Geneva, 2009.
[30] S. Sivakumaran, above note 4
[31] S. Linton, above note 2.
[32] Oona Hathaway and Scott J. Shapiro, The Internationalists: How a Radical Plan to Outlaw War Remade the World, Simon & Schuster, New York, 2017

instability was motivated by a pragmatic need to navigate the harsher aspects of European law, specifically the 'unequal treaties' and foreign interference that had marginalized its sovereignty.[33] Siam's involvement was driven by an equally high stake: as one of the few remaining independent entities in Southeast Asia to avoid colonization, its engagement at The Hague was a critical attempt to utilize the burgeoning international legal framework to protect its independence from further colonial encroachment.[34]

Despite this early involvement, the input of Asia-Pacific countries in the early years of the construction of the body of international humanitarian law in the Hague era remained limited. These conferences had largely European input, and the material content of the Hague Regulations reflected this European military experience and strategic interests. Nonetheless, the involvement of Asian states provided a significant framework for later inputs, ensuring that regional players became acquainted with the terminology, content, and forms that international humanitarian law had taken in its early years.[35] The Second World War represents a definitive turning point in the history of IHL, marking a shift from the 'Hague era' to the modern humanitarian framework established in 1949. During this period, the region witnessed a catastrophic breakdown of restraint, characterized by what have been described as blatant breaches of the then-existing laws and customs of war.[36] Specific instances, most notably the treatment of prisoners of war during the Pacific War and the atomic bombings of Hiroshima and Nagasaki, demonstrated a dual crisis in the legal order.[37] On one hand, these events constituted clear violations of established customary and treaty-based protections for non-combatants and captives. On the other, the unprecedented scale of civilian infrastructure degradation and the use of weapons of mass destruction illuminated the profound shortcomings of a pre-war legal structure that was not designed for the exigencies of modern, total warfare. Consequently, the post-1945 period necessitated a 'juridical answer' to these atrocities, leading to a conceptual intensification of IHL that sought not merely to reaffirm existing rules, but to fundamentally expand the 'minimum standards of humanity' through the 1949 Geneva Conventions.

[33] Ibid.
[34] Ibid.
[35] S. Sivakumaran, above note 4.
[36] Ibid.
[37] K. Okimoto, above note 14

Furthermore, the end of the Second World War also marked the end of the growing decolonisation of the countries in Asia and the Pacific. As the newly formed states began to appear on the world scene, with them also appeared perceptions and points of view that arose out of the experience of foreign occupation, resistance, and internal conflict.[38] Unlike the interwar period (the years between the First and Second World Wars), the post-1945 international order provided greater opportunities even though uneven, for participation by non-European states in treaty-making processes.[39] The 1949 Diplomatic Conference in Geneva, which sought to revisit and expand the Geneva Conventions, marks an important point for Asia-Pacific involvement in IHL. The 59 state parties at this Diplomatic Conference included 7 countries from the Asia-Pacific region: Australia, Burma, China, India, New Zealand, Pakistan, and Thailand.[40] Although these numbers were relatively small, they were significant, especially if they are placed in an international context of colonialism, where some of these newly independent states were relatively recently freed from colonial rule. The Asia-Pacific region contributed 13.5% of all state parties, which, while small, is an important, albeit slight, measure of state representation.[41]

Asia-Pacific states were actively engaged during the proceedings at the Conference. Australia was a Vice-President in the Conference; hence, it was acknowledged as a seasoned participant in international legal diplomacy.[42] India also played a particularly prominent role, as the country's representative, Sir Dhirer Mitra, was the Chairman of Committee I, where key substantive matters concerning the protection of the victim of the wars would be addressed.[43] Pakistan, New Zealand, and China all contributed during discussions on the provisions that would become the final Convention, particularly concerning prisoners of war and non-international armed conflicts.[44] Of particular note is the objections raised by the Burmese delegation concerning what would become common Article 3[45], as the

[38] S. Linton, above note 2.
[39] Ibid.
[40] S. Sivakumaran, above note 4.
[41] Ibid.
[42] Final Record of the Diplomatic Conference of Geneva of 1949, Vol. I.
[43] Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II, Federal Political Department, Geneva, 1949.
[44] Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II-A, Federal Political Department, Geneva, 1949
[45] Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II-B, Federal Political Department, Geneva, 1949.

country was concerned that if there is control over internal conflicts, this would legitimize rebel movements, thereby undermining the sovereignty of the states.

The involvement of Thailand further highlighted the Asia-Pacific state's diversity at the Conference. With a pre-existing track record in navigating international law via the system established at The Hague, the involvement of Thailand at the conference served to bridge early involvement in Asia in the laws of war with the more modern framework in humanitarian law. The Asia-Pacific states' ideas were not universally adopted in the process, but they did inform the process in whatever fashion they were approved.[46] The adoption of the four Geneva Conventions of 1949 marked something of a watershed in the evolution of IHL. For Asia-Pacific states, the Conventions represented both a response to the atrocities of the Second World War and a legal framework through which newly independent states could assert their commitment to international norms. Ratification patterns reflect this engagement.[47] Several Asia-Pacific states ratified the Conventions in the early 1950s, including India, Pakistan, China, Japan, and the Philippines. Over time, universal ratification of the Geneva Conventions was achieved, making them the most widely accepted treaties in international law.[48]

Therefore, the post-1949 period marked the transition in the Asia-Pacific region from marginal participation to formal inclusion within the IHL treaty regime. Yet this represented little more than a starting point. Internal armed conflicts, post-colonial instability, and various forms of external intervention within many Asia-Pacific states further subjected the humanitarian norms to practical tests of applicability.[49] On the other hand, the regional engagement with the Geneva Conventions provided an important foundation for subsequent contributions to the development of customary international humanitarian law and subsequent treaty-making processes, such as the Additional Protocols of 1977. The region's history of decolonization directly influenced the drafting of Additional Protocol I (AP I). Specifically, the provisions concerning wars of national liberation and the criteria for revolutionary forces to attain combatant status were included to bring IHL into conformity with the independence struggles prevalent in the Asia-Pacific. During the 1977 negotiations, regional states were instrumental in formulating treaty rules that

[46] Final Record of the Diplomatic Conference of Geneva of 1949, Vol. IIB.
[47] S. Sivakumaran, above note 4.
[48] Ibid.
[49] Ibid.

governed combatant status and the control of anti-colonial conflicts, moving the law beyond its previous European-centric focus.[50]

In sum, the historical underpinnings of IHL in the Asia-Pacific show a more complex trajectory than the Western countries. Early involvement in the Hague system, the transformative encounter with World War II and active though confined participation in the 1949 Geneva Conference collectively indicate that certain actors within the region were neither absent from nor indifferent to the development of humanitarian law. Rather, Asia-Pacific states came into the post-war IHL framework shaped by distinct historical experiences that continue to inform their approach toward humanitarian norms. Understanding this history is crucial for appreciation of both the region's contributions toward IHL and the enduring challenges of its implementation that remain with us today.

Evolution of IHL post-World War II

The post-WWII period witnessed the expanded extension and conceptual intensification of IHL, primarily as a result of the dual phenomenon of decolonization and the juridical answer to the remarkably devastating scale of early-to-mid-twentieth-century conflicts.[51] With particular respect to the Asia-Pacific region, the post-1945 period may be highlighted to have been defined by the dual phenomenon of the increasing capabilities of regional countries to influence treaty-level international norm creation on the one hand, and state practice from the regions on the other a dual phenomenon that crystallized most prominently on the international negotiating path leading to the 1977 Protocols to the Geneva Conventions.[52] This process was significant as it was completed after the phenomenon of decolonization had altered the composition of regional contributions to such international normative creation.[53]

The Additional Protocols (AP I and AP II) marked a step forward in humanitarian doctrine by confirming and expanding existing protections for the victims of warfare and setting new and/or clarified rules on the waging of hostilities,

[50] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1, Cambridge University Press, 2005.
[51] S. Linton, above note 2.
[52] S. Sivakumaran, above note 4.
[53] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974–1977), Vol. I, Federal Political Department, Geneva, 1978.

the protection of civilians in these hostilities, and the protection of the natural environment in warfare.[54] Of particular relevance to the Asia-Pacific was the AP I's broadening conception of the combatant immunity, its broadening protection of civilians in international conflicts, and the innovative references to the right to self-determination of peoples and the wars of national liberation topics that had received direct relevance to the struggles for independence in the Asia-Pacific.[55] More specifically, the AP I provisions concerning wars of national liberation and the circumstances in which revolutionary forces would attain combatant status reflected the attempt to bring the international law on wars into conformity with the process of decolonisation itself.[56]

Asia-Pacific states' involvement in the negotiations and/or later interaction with the Protocols cannot be understood without the filter of the "process of decolonisation." Newly independent states aimed not only to establish themselves within the fledgling format of international law but also to secure instruments which could tackle the special nature of internal and international conflict, including conflict with colonial rulers and occupiers.[57] The interaction of Asia-Pacific states with the 1977 Additional Protocols must be viewed through the "filter of the process of decolonization". Unlike earlier "European-led" diplomatic efforts at the Hague or the 1949 Geneva Conventions where regional participation was often a strategic tool to assert sovereign status or was limited by colonial occupation, the 1977 negotiations allowed newly independent states to act as active shapers of international law. The notably higher "acceptability" of AP I in the region, compared to prior legal frameworks, is explained by its inclusion of provisions directly relevant to the region's history, such as the right to self-determination and the legal status of wars of national liberation. These innovations reflected a deliberate attempt to bring the international law of war into conformity with the process of decolonization itself.[58] Despite the development of customary international humanitarian law, the second pillar of doctrinal authority in IHL, depends on evidence of state practice coupled with *opinio juris*. The ICRC's landmark study on customary IHL deployed a

[54] 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, pp. 3–22.
[55] Protocol Additional (I) to the Geneva Conventions, above note 40, Art. 1(4).
[56] Kriangsak Kittichaisaree, "International Humanitarian Law and the Asia-Pacific Struggles for National Liberation", in Linton, McCormack and Sivakumaran (eds), *Asia-Pacific Perspectives on International Humanitarian Law*, above note 2, pp. 139–155.
[57] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), above note 37.
[58] Ibid, pp. 139-155.

rigorous methodology to identify rules and the practice that underpins them, and this study recognized that evidence from the Asia-Pacific region was both present and revealing, even when less visible in certain doctrinal inventories. The ICRC study's two volumes demonstrate how state practice including military manuals, national legislation, official statements, and judicial decisions contributes to the formation and clarification of customary rules, and how Asia-Pacific contributions form part of that evidentiary matrix.[59]

Doctrinally, the sources of evidence of *opinio juris* in the Asia-Pacific are multifaceted. First, national legislation and military manuals-for instance, the domestic incorporation of Geneva Conventions (GC) obligations and guidelines for armed forces-indicate that states regard some rules as legally binding.[60] Second, judicial pronouncements and executive submissions to international fora (including ICJ written statements and other government communications) afford concrete demonstrations of how states understand and accept IHL norms in concrete cases.[61]

National courts and tribunals, despite significant variability of both doctrine and ability across the region, offer material evidence of state practice relevant to customary IHL.[62] Domestic trials of war crimes, administrative application of IHL rules, and evaluation of the law of occupation or detention regimes offer material evidence of legal reasoning relevant and appropriate for review and guidance of both international and national theorists of customary law. National cases grounded upon treaty and customary rules demonstrate state practice, while detailed submissions to international bodies such as those by India and Japan to the ICJ, provide concrete evidence of *opinio juris* regarding the legality of specific methods of warfare.[63] It has been argued by long history of studies, notably by the ICRC that this cultural familiarity contributed toward a more 'legible' humanitarian element of IHL in regional discourse, even if there was underperformance in practical implementation.

Nevertheless, the formation of customary international law cannot be taken for granted, as the mere identification of rules cannot overcome the practical hurdles,

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[59] Ibid.
[60] Ibid.
[61] S. Linton, above note 2.
[62] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, paras. 78–95.
[63] Written Statement of Japan, *Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice, available at: www.icj-cij.org.

such as inconsistent implementation and sovereignty concerns, found along the Asia-Pacific's historical trajectory.[64] A large number of non-international armed conflicts, asymmetric warfare, and counter-insurgency activities in the region create difficulties in recognizing the consistency of state practice, as well as the legal belief that supports such practice. States that are involved in internal armed struggles may support rules on the international scene, while on the domestic scene, states may soften the observance of such rules.[65] Therefore, the validity of the evidence responsible for the establishment of specific rules related to the legalization of international armed conflict must be scrutinized.[66]

However, it is possible to identify some elements of the Asia-Pacific contribution to international humanitarian law through these challenges. First, regional states actively participated in multilateral processes, in particular in the negotiations that led to Additional Protocol I and Additional Protocol II, and thus contributed directly to the development of treaty rules governing combatant status and the regulation of anti-colonial conflicts.[67] Second, state practice from the region, as evidenced by military manuals, legislation and judicial decisions, has been referred to in prominent customary law studies and commentaries as providing support for rules safeguarding civilians' rights, humane treatment of detainees and restrictions on the means and methods of warfare.[68] Third, the ongoing and active positions of Asia-Pacific states toward emerging issues—including naval operations in contested maritime areas and protection of that environment from the effects of hostilities—show features—albeit not comprehensive—that are continuing to contribute to shaping doctrinal developments capable of refining and updating classical law of armed conflict.[69]

In brief, the post-Second World War evolution of international humanitarian law in the Asia-Pacific appears as a dynamic balance of the treaty

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[64] S. Linton, above note 2.

[65] M. Rafiqul Islam and Nakib Nasrullah, "The Application of International Humanitarian Law by the International Crimes Tribunal of Bangladesh", in Linton, McCormack and Sivakumaran (eds), *Asia-Pacific Perspectives on International Humanitarian Law*, above note 2, pp. 586–607.

[66] RSIS and International Committee of the Red Cross, International Humanitarian Law in Asia: Regional Conference on Generating Respect for the Law, Singapore, 27–28 April 2017.

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

[68] International Committee of the Red Cross, 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., ICRC, Geneva, 2016, Introduction, paras. 45–52.

[69] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), above note 37.

approach, as exemplified in the two 1977 Additional Protocols, and the slow accumulative process of the crystallisation of customary law through various forms of state practice and *opinio juris*. Decolonisation brought a proliferating number of participants in the negotiating process, as well as a specific body of claims in the realm of international humanitarian law, which had important implications for the law of armed conflicts generally, in the areas of self-determination and organized armed opposition.[70] A nuanced approach, attuned to the specific debates surrounding the evolution of international humanitarian law that privileges the evidence of practice and pronouncements in addition to treaty texts, is essential in attempting to understand the evolution of international humanitarian law in and through the Asia-Pacific region.

Ratification and Implementation of Treaties in the Asia Pacific Region

The ratification process of international humanitarian law treaties represents the utmost visible expression of states' consent to universally accepted humanitarian rules. With the states in the Asia-Pacific region displaying robust formal commitment to the leading treaties of international humanitarian law, in particular the 1949 Geneva Conventions, almost all Asia-Pacific states are party to the four Geneva Conventions. This represents a strong indication of the universally accepted nature of the treaties. The strong support in terms of treaty ratification represents a marked distinction from the varying acceptance of the Additional Protocols of 1977.[71]

The ratifications of AP I and AP II differ greatly among the Asia-Pacific nations. Though the state governments have ratified AP I, which deals with international wars and some of the rules of wars of national liberation, the ratification of AP II covering wars of non-international nature is low.[72] This point is especially noteworthy in light of the reality that non-international armed conflicts have historically been the dominant form of violence in the region. In this context, concerns surrounding sovereignty, internal security, and the control of opposition groups have been cited as significant obstacles to the ratification of Additional Protocol II.[73] There is a sense of sensitivity regarding international regulation of internal conflicts.

[70] S. Linton, above note 2.
[71] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), above note 37.
[72] S. Sivakumaran, above note 4.
[73] Ibid.

While there have been differing rates of treaty acceptance, Asia-Pacific states have begun emphasizing internal mechanisms of IHL treaty application. One of the more significant developments has been in the establishment of IHL national committees, acting as a coordination mechanism between treaty application, dissemination, and advisory activities, filling in the gaps between IHL treaty application and internal practices.[74] One of the more discussed regional examples comes in the form of the Philippine Inter-Agency Committee on International Humanitarian Law (IAC-IHL). Executed through an executive order, it enshrines interagency coordination between sixteen different state agencies, ranging from defense and law enforcement to foreign affairs and education.[75] Its mandate includes treaty implementation, legislative review, promotion of IHL, and working with international organizations, showing a holistic approach.[76]

The experience in the Philippines shows the role national IHL committees may play in ensuring coherence and continuity in implementation, particularly where there are long-running internal conflicts. The IAC-IHL has been key in helping to secure the adoption of national laws that incorporate war crimes, aiding IHL education within the military and civilian realm, and engaging with regional activities within ASEAN.[77] The way it was structured was even considered by several states in Southeast Asia that are working towards bolstering national implementation systems, showing the normative influence of the IAC-IHL even outside national boundaries.[78]

A pertinent precedent in the case of Australia can serve as an early exemplar of institutional engagement with the implementation of IHL rules and principles.[79] Australia, as one of the first Asia-Pacific states that enacted domestic legislation that incorporated the Geneva Conventions, enacted the Geneva Conventions Act in 1957, which provided for the incorporation of grave breaches provisions therein. Australia has also demonstrated continuous dedication to dissemination and training, especially in its own armed forces, using military manuals, operational law

[74] International Committee of the Red Cross, National Committees on International Humanitarian Law, ICRC, Geneva.
[75] RSIS and International Committee of the Red Cross, International Humanitarian Law in Asia: Regional Conference on Generating Respect for the Law, Singapore, 2017.
[76] Philippine Inter-Agency Committee on International Humanitarian Law (IAC-IHL), *Implementing Rules and Regulations of Republic Act No. 9851*, Government of the Philippines, Manila, 2010.
[77] Ibid.
[78] Ibid.
[79] S. Linton, above note 2.

courses, and participation in multinational military exercises.[80] These developments demonstrate a long-standing awareness of the importance of embedding IHL rules in military thought and operational conceptualization, rather than relying on post-conflict consequences.

Japan's approach to the implementation of IHL can again be characterized by its unique set of criteria and constitutional provisions. While Japan ratified the Geneva Conventions (GCs) rather quickly, its anti-war-oriented post-WWII Constitution and increasingly divergent viewpoint toward the scope of its Self-Defence Forces have influenced the methods of the dissemination and practice of IHL.[81] Specifically, Japan's focus on the educational and developmental roles of its Self-Defence Forces, coupled with its involvement in international humanitarian assistance, relief operations, and peacekeeping missions, underscores the central pillars of its commitment to international humanitarian law[82] Legislative enactment of its IHL responsibilities, in turn, has been marked by regional apprehensions.[83]

The experience of Indonesia provides an additional example of the variety of the application process found within the region. As a state that has undergone a range of internal conflict incidents, Indonesia has developed slowly but surely its application of IHL within military training and doctrine, and alongside its dialogue with international bodies and academic institutions with regard to humanitarian law.[84] The dissemination of IHL within the Indonesian military forces is enabled via its relationship with the ICRC and its integration within military training curricula.[85] The operational application, however, of IHL within internal conflict scenarios is seen as a challenge.[86]

As far as its application in the Pacific Island states of the Pacific Islands group is concerned, it has always been in an environment of scarce institutional

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[80] Ibid.
[81] Satoshi Hirose, "Japan and Nuclear Weapons", in Asia-Pacific Perspectives on International Humanitarian Law.
[82] Ibid.
[83] International Committee of the Red Cross, National Implementation of International Humanitarian Law: A Manual, ICRC, Geneva, 2013.
[84] Suzannah Linton, "International Humanitarian Law in Indonesia", in *Asia-Pacific Perspectives on International Humanitarian Law*.
[85] Ibid.
[86] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, 2012, pp. 1–5.

ability, and exposure to situations of warfare or armed conflict is rather rare.[87] However Pacific Island states have still ratified the conventions, and it is said that they have also ratified the protocols, which indicates that there is still a commitment to IHL, irrespective of scarce ability. However, it can still have regional support, and its application will always depend on its integration into its framework.[88]

Generally, within the context of the Asia-Pacific, a significant role of dissemination of IHL has come to be recognized as an essential part of IHL implementation strategy. Military training, the expression of IHL within national laws, educational campaigns, and working with academic institutions and civic society are examples of forms of dissemination of IHL followed across Asia-Pacific countries.[89] In military law, military manuals and rules of engagement are utilized as foundational tools for operationalization of IHL rules and regulations. In addition, dissemination of IHL helps raise awareness of IHL rules and regulations within the rest of the populace and influences the internalization of rules and regulations of IHL.

Nonetheless, gaps continue to exist between the formally ratified measures of IHL ratification, institutionalization, and actual implementation. Despite the presence of national IHL committees and legislative measures, success may continue to be dependent on political will and engagement in the process.[90] In states plagued by ongoing and/or repeated armed conflicts, the actual implementation of IHL may be hindered by the presence of non-state armed groups beyond state-centric compliance measures. When looking at the ratification and implementation of IHL in the Asia-Pacific region, a complex and multi-layered reality presents itself. The nearly complete ratification of the GCs exposes a high degree of acceptance of humanitarian law, but varying patterns in relation to the AP display sensitivities around sovereignty and internal conflict. Factors such as the military dissemination efforts, and legislative implementation expose a high degree of effort in relation to translating treaty commitment into practice. [91]

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[87] Suzannah Linton, "Pacific Island States and International Humanitarian Law", in *Asia-Pacific Perspectives on International Humanitarian Law.*
[88] Ibid.
[89] RSIS and ICRC, above note 66.
[90] S. Linton, above note 2.
[91] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, 2012, pp. 6–10.

Contemporary Challenges

The contemporary challenges facing IHL across the Asia-Pacific region require consideration against a broader appreciation of the region's historical engagement with humanitarian norms. Although the post-Second World War period ushered in a shift from marginal participation to formal engagement in IHL treaty regimes, the persistence of armed conflict and advancement of new methods of warfare have revealed continuing tensions between ideals set out in law and operational realities. These are modern expressions of issues that have followed the region's application of IHL since its original codification.

Persistent Violations in Contemporary Conflicts

Armed conflict in the Asia-Pacific continues to produce serious IHL concerns, most significantly in non-international armed conflict contexts. The hostilities between state forces and non-state armed groups in the Philippines have frequently produced issues surrounding the protection of civilians, conduct of hostilities, and displacement.[92] Despite the Philippines having developed some quite advanced institutional mechanisms for the implementation of IHL, such as a national IHL committee, violations continue and reflect the limits of institutionalization absent of effective enforcement.[93] This debate reflects the earlier historical debates around Common Article 3 and Additional Protocol II, in which states expressed similar concerns in relation to internal conflict regulation, but at the same time acknowledged the humanitarian imperative.

The situation in Myanmar provides a particularly stark illustration of these challenges. Since 2021, allegations of aerial bombardment, attacks on civilian infrastructure, and restrictions on humanitarian access have drawn widespread international condemnation and intensified debates concerning responsibility for violations of international humanitarian law, including in the context of the proceedings in The Gambia v Myanmar.[94] Myanmar also ratified some other humanitarian instruments prior to joining the Geneva Conventions (joining relatively late in 1992), including the Genocide Convention (1956). This mixed treaty

[92] RSIS and International Committee of the Red Cross, International Humanitarian Law in Asia: Regional Conference on Generating Respect for the Law, Singapore, 2017.
[93] Ibid.
[94] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures Order, International Court of Justice, 23 January 2020.

engagement makes for some difficult conclusions about its historical relationship to international humanitarian law. Myanmar was not a party to the Geneva Conventions until its ratification in 2013 but was still bound by applicable rules of customary international law. Nonetheless, the amount of state practice at this time constituted breaches of customary norms is not always so certain in the historical record. In a more general sense, the delay in Myanmar's joining treaties, coupled with relatively limited domestic incorporation of international legal obligations, reflects wider structural challenges in the universalization and implementation of international humanitarian law. Accordingly, allegations of breaches of international law must be situated within this broader legal and historical context rather than assessed in isolation.[95] The breach of international laws cannot be considered in isolation.

Maritime conflicts in the Asia-Pacific make it more challenging in the case of the observance of IH rules. Dispute in the South China Sea, which involves naval and air forces in close proximity, causes some worries regarding the law of naval warfare, the principles of attack, and the protection of civilians on the vessels.[96] Historically, the region's engagement with the Hague law of naval warfare was limited, and contemporary operational environments now test the adequacy of existing legal frameworks. The increasing militarisation of contested maritime spaces underscores how historical gaps in normative development can generate contemporary uncertainty.

Emerging Domains of Warfare

Evolution of warfare into new domains: Lessons can be drawn from historical patterns of adaptation concerning contemporary challenges emanating from the exploration of cyberspace, and outer space. Asia Pacific states demonstrate an emerging trend in cyberspace warfare, both in offense and defense. However, considerable variability exists in the perceptions of existing principles of IHL.[97] For example, China has proposed several positions based on the sovereignty of state and information security, while other states and actors in the Asia Pacific region proposed the extension of traditional principles of IHL, specifically the law of

[95] S. Linton, above note 2.

[96] Rob McLaughlin, "Anticipating Operational Naval Warfare Issues in International Humanitarian Law that May Arise in the Event of a Conflict in the South China Sea", in *Asia-Pacific Perspectives on International Humanitarian Law*, Cambridge University Press, 2019.

[97] Zhang Binxin, "Cyberspace and International Humanitarian Law: The Chinese Approach", in *Asia-Pacific Perspectives on International Humanitarian Law*,

distinction and proportionality, to cyberspace warfare.[98] Historical debates focused on the potential for regulation of emerging warfare, for example, through the lens of aerial bombardment or naval warfare. [99]

Similarly, the domain or space of outer space can be cited, with many states within the Asia-Pacific region possessing highly developed capacity within this sphere, having significantly contributed towards international debate on the militarisation of space.[100] While IHL has responded over time to the evolving environment within the conduct of warfare, the lack of conflict-specific treaty regimes applicable within the sphere of outer space results in legal uncertainty around the applicability of the principles. Increasing activity within this sphere positions the Asia-Pacific states at the centre continuing the trend that was established within the negotiations on the Additional Protocols.

Reviews of weapons with regard to Article 36 of AP I

Reviews of weapons with regard to Article 36 of AP I represent yet another area where past treaty commitments and present challenges coincide. Additionally, while AP I does mandate for states in the Asia Pacific region to consider and evaluate the legality of new weapons technology, only a few Asia-Pacific states have so far developed formal mechanisms in this regard.[101] With the development of autonomous weapons technology and missile systems, it is of utmost importance to effectively evaluate these arms in this region of intense military modernization.

The region's concern for the environment is not merely a modern trend but is rooted in a "juridical answer" to the "catastrophic breakdown of restraint" during the Second World War. The atomic bombings of Hiroshima and Nagasaki demonstrated the unprecedented scale of "civilian infrastructure degradation" and long-term harm, which illuminated the profound shortcomings of pre-war legal structures. This history informs the region's early engagement with the ENMOD Treaty and the environmental protections in AP I, which are now seen as the

[98] United Nations Group of Governmental Experts, Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, UN Doc A/70/174, 2015.
[99] Ibid.
[100] Steven Freeland and Elise Gruttner, "Critical Issues in the Regulation of Armed Conflict in Outer Space", in *Asia-Pacific Perspectives on International Humanitarian Law*.
[101] Yves Sandoz et al. (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, pp. 423–427.

foundational pillars for contemporary environmental discourse in regional IHL.[102] Military activities in the South China Sea have revitalized debates on the law of naval warfare and the "protection of the [maritime] environment against the impact of warfare". These military activities pose a risk of "enduring damage to the environment," which directly "impacts the lives of civilians" who depend on these ecosystems for their livelihoods. The militarization of new domains, such as outer space and the development of autonomous weapons, has created further uncertainty regarding environmental degradation, as there are few "conflict-specific treaty regimes" to regulate these high-tech military activities

Compliance Challenges and Structural Constraints

Another recurring theme within the Asia-Pacific is the position and role of non-state groups, and the historical resistance, especially regarding the regulation of internal conflict, is evident within the posturing of states during the drafting of common Article 3 and AP II. It is evident, especially within contemporary conflict, that the role of non-state groups inhibits compliance, and the attempt to work with such groups particularly regarding the dissemination of the laws, has had limited success within these frameworks.[103]

Another area which needs to be addressed is the prevalence of impunity. Though international criminal law has devised measures to impose accountability, national practice in the Asia-Pacific on the prosecution of IHL violations is inconsistent.[104] The historic lack of willingness to place military activities under the scanner of legal accountability continues to affect current practices. The issue of lack of accountability mechanisms has been highlighted in the lack of deterrence it provides, impacting the overall viability of IHL.

In addition, the restrictions on humanitarian access further exacerbate compliance challenges. In several contemporary conflicts, humanitarian actors face administrative, security, and political obstacles that impede the delivery of aid.[105] Such restrictions reflect longstanding tensions between sovereignty and

[102] Emily Crawford, "Accounting for the ENMOD Convention", in *International Law and the Cold War*, Cambridge University Press, 2020.
[103] Sandesh Sivakumaran, "Binding Armed Opposition Groups", *International and Comparative Law Quarterly*, Vol. 55, 2006.
[104] M. Rafiqul Islam and Nakib Nasrullah, "The Application of International Humanitarian Law by the International Crimes Tribunal of Bangladesh", in *Asia-Pacific Perspectives on International Humanitarian Law*, above note 5.
[105] International Committee of the Red Cross, *Challenges to Humanitarian Access*, ICRC, Geneva.

humanitarian intervention that have characterized the region's engagement with IHL since decolonisation. While states formally recognize obligations to allow humanitarian access, operational realities often diverge from legal commitments.

Comparative Perspective and Evolutionary Insights

In comparison, it is evident that present trends in Asia-Pacific face issues of continuity as well as transformation i.e., continuity in relation to IHL, owing to earlier involvement in treaty creation as well as custom development based on norms of humanity. Alongside this, there is transformation owing to issues like non-international armed conflicts, technologically advances, as well as geopolitical dynamics.[106] The low levels of regional resistance to IHL, based on its historical humanitarian traditions, again represent a paradox in relation to the actual levels of implementation. It confirms the key finding of the Asia-Pacific experience that the acceptance of humanitarian law in practice by itself, without the development of institutions, the political resolve, and the mechanisms of accountability, fails to translate into effective implementation. As the region enters discussions in the emerging sphere of Cyber War, Outer Space Law, and the Law of the Environment, its historical path suggests it again holds the key in the development of the evolving IHL.

From Peripheral Participation to Normative Influence

The Asia-Pacific region has gradually shifted from its position as a peripheral contributor to the development of international humanitarian law to an increasingly important player in its interpretation, explanation, and diffusion. This is occurring not only through treaty accession and national implementation but also in the engagement of the region with international processes of adjudication, doctrinal articulation, and education. Current regional contributions must therefore be seen as the result of a longer path shaped by iterative processes of norm internalization and institutional development.

Judicial and Doctrinal Contributions to International Humanitarian Law

One such example of the region's influence on the development of IHL lies in its engagement with the International Court of Justice. The written statements and oral pleadings submitted by the states of Asia-Pacific in advisory procedures have

[106] S. Linton, above note 2.

contributed to the clarification of the basic IHL principles, especially those referring to the conduct of hostilities and the protection of civilians. A good example is the Advisory Opinion of the ICJ on the Legality of the threat or use of nuclear weapons.[107] Other state parties such as Japan and India also made detailed written submissions providing an analysis of the applicability of principles of distinction, proportionality, and unnecessary suffering, primarily relying upon humanitarian elements of IHL developed and influenced historically.[108]

Regional State Practice, Authoritative IHL Commentaries, and Teaching Materials

Apart from the legal institutions themselves, Asia-Pacific state practice in IHL has emerged in the form of doctrinal texts emanating from international institutions. The newly revised Commentaries to the GCs and the Additional Protocols issued by the ICRC include state practice from the region, specifically examples from Asia-Pacific military manuals, legislation, and decisions.[109] This is evident "from a methodological position that the interpretation of IHL cannot be based exclusively or mainly upon a handful of states' practice." The interest in Asia-Pacific practice in IHL in authoritative doctrinal texts constitutes a significant move away from a fragmented approach in favor of a more holistic practice.

Academic and training texts produced within the region further attest to its imprint on the norm development of IHL as a whole. Universities and training centers within the region increasingly engage in the production and popularization of IHL scholarship relevant to regional realities.[110] This can be seen as another precursor of developments within the law of treaties and the creation of custom, again highlighting the importance of internalization both at the level of doctrine and its application.

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[107] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, International Court of Justice, 8 July 1996, para. 78.

[108] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, paras. 78–95; Written Statement of Japan and Written Statement of India, ICJ, available at: www.icj-cij.org (all internet references accessed 21 January 2026).

[109] International Committee of the Red Cross, 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., ICRC, Geneva, 2016, Introduction, paras. 45–52.

[110] S. Linton, above note 2.

Bridging Normative Influence and Compliance: Institutional and Regional Strategies

Despite the region's contributions, considerable challenges remain. These can arguably be overcome through forward-thinking strategies that build on existing structures while remaining responsive to the changing nature of conflict. The same trend is experienced throughout the region. There was early acquiescence within the region, yet inconsistent implementation. Thus, there has been a lag in the implementation.

Strengthening national IHL committees also marks a critical starting point. For although the Asia-Pacific region possesses several countries that have established national IHL committees, the scope of their mandates also varies considerably.[111] Strengthening the effectiveness of national IHL committees could likely produce greater synergies of implementation and dissemination. Intermeshed strategies could potentially be realized on a regional platform, too. This could be achieved either through the auspices of ASEAN or the Pacific Islands Forum, or on an ad-hoc basis.

Beyond Treaty Adherence: Internalisation of Humanitarian Norms

Regional dialogues also have an essential role to play, particularly in dealing with emerging threats that are not solely national security threats. Cyber operations, security in the maritime domain, protecting the environment in the course of war, are all key areas that need collective involvement, considering their non-national security connotations. The experience of the Asia-Pacific region is worth citing, showing that regional perspectives are capable of playing a role, even in setting global norms.

Education and training, not only for the armed forces, but also for civilian authorities, the legal system, and civil society, remain a key area for ensuring the internalization of norms. A level of conceptual resistance to the internalization of IHL remains relatively lower in the region due to its rich humanitarian legacy.[112] Building upon this can go a long way in promoting its observance.

[111] RSIS and ICRS, above note 66.
[112] S. Linton, above note 2.

Future Directions for Asia-Pacific Engagement with IHL

Under the outlook, the Asia-Pacific region is seen to be at a juncture in its relationship with IHL that has delineated its position both as a beneficiary and a shaper of humanitarian norms. The ongoing role in internationalized adjudications, doctrinal development, and innovation in institutions presents an opportunity to reinforce its compliance record, including its confrontation with myriad challenges, in pursuing this path. The development of IHL in the Asia-Pacific region therefore signifies its prospect in the years to come, not based on the development of any new legal instruments, but the entrenchment of existing commitments in the region.

Conclusion

This article has narrated the history and evolution of international humanitarian law (IHL) in relation to states within the Asia-Pacific region, from normative involvement through to the challenges, confirms that the Asia-Pacific region was never at the periphery of the putative humanitarian ethos upon which the law of warfare was constituted. From restraints upon warfare through to the involvement with the early Hague Conventions, the impact of the Second World War, and active involvement in the Geneva Conference of 1949, states within the Asia-Pacific region have been engaged with IHL from perspectives that are reflective of historical, political, and cultural circumstance. The post-1945 period, from the decolonisation, saw a change in character from limited involvement to more engaged involvement.

The acceptance of the Geneva Conventions of 1949 and their almost universal ratification in the region suggest the wide and sustained acceptance of humanitarian law. Engagement with the 1977 Additional Protocols suggests that the region continued to seek, in practical terms, to frame IHL to meet the needs of wars of national liberation and internal conflicts.

Significantly, Asia-Pacific state practice has contributed meaningfully to the development of customary international humanitarian law, and its recognition in International Committee of the Red Cross commentaries points to a more inclusive and pluralistic evolution of the field. Nevertheless, at the same time, this research points out some existing discrepancies between normative-perceived acceptance and practical implementation. For instance, recent conflicts in the Asia-Pacific region demonstrated an obvious gap in IHL compliance, particularly in NIAC situations, despite treaty ratification. This is not necessarily a deviation, as it is rather an

extension of underlying historical dynamics, particularly where issues of sovereignty, internal conflicts, and external interference are at play. The role of non-state armed groups, as well as limitations with accountability, have all contributed significantly.

These challenges are further complicated by emerging types of warfare. Cyberspace warfare, outer space activities, robotic weapons systems, and hybrid warfare create pressure on traditional legal systems, which have been shaped by traditional warfare. While there is a growing engagement of Asia-Pacific countries on various international and regional platforms regarding such challenges, the legal ambiguity and application thereof still persist.

Against this backdrop, the Asia-Pacific experience offers important lessons for the future development and effectiveness of IHL. One central insight is that low conceptual resistance to humanitarian norms rooted in historical and cultural traditions emphasising restraint and humanity in warfare does not automatically translate into compliance. Effective implementation requires sustained political will, institutional capacity, and operational integration. Accordingly, policy responses must move beyond reaffirming existing principles to strengthening mechanisms that enable their application in complex and evolving conflict environments.

First amongst the priorities is the encouragement of the universal ratification process of the Additional Protocols, particularly AP II. As the states in the concerned regions face the issue of non-international conflicts, ratifying AP II would strengthen the norm that guides non-interventional conflicts, thereby ensuring the standardization of the handling of internal violence in the region. During the ratification process, the domestic laws would also require the incorporation of the treaty provisions.

Secondly, states should build upon and empower national IHL committees as they are considered to be key coordinating entities in the implementation and dissemination of IHL. While several Asia-Pacific states have established such entities, their effectiveness differs from one country to another. The exchange of best practice at the regional level in the context of inter-state platforms of dialogue involving national IHL committees can facilitate greater conformity in the midst of legal diversity.

Thirdly, the military trainings undertaken and the planning involved in warfare need to be adjusted so that they are compatible with the changing nature of warfare. The hybrid warfare environments, cyber warfare, information warfare, and

warfare involving the use of advanced technologies have resulted in the need for special trainings in accordance with IHL. The Asia-Pacific states, being equipped with advanced technology, are better suited to develop special trainings for this region, adapting IHL to the changing risks. The Asia-Pacific states for decades have been very active in IHL.

Fourth, there is a need to enhance the mechanisms of accountability to overcome the problem of impunity ruling IHL breaches. Domestic prosecution, especially, is key in buttressing compliance and inhibiting future IHL violations. However, regional cooperation and international mechanisms may also be necessary, especially whenever there is weakness on the part of the national framework. Access to justice is evidently necessary and key to the legitimacy and acceptance of IHL rules.

Finally, the internalization of the norms over the long term calls for a continued investment in education and advocacy programs. Building on the strong humanitarian traditions of the Asia-Pacific region throughout history could provide the normative foundation on which to establish support for IHL at the societal level, thus building the culture of moderation even in the midst of war.

In conclusion, it is vital to note that the development of international humanitarian law in the Asia-Pacific has been characterized by an intricate relationship between engagement, contribution, and challenges in the region. The Asia-Pacific has contributed to, and continues to contribute to, the development of international humanitarian law, but it has continually encountered challenges in the implementation of international humanitarian obligations. Thus, in overcoming the challenges, it is vital to adopt an integrative approach to treaty compliance, capacity building, rendering, and internalization. Thus, Asia-Pacific states not only strengthen compliance in the region but contribute to the development of international humanitarian law in an ever-changing world of warfare.

After the Algorithmic Battlefield: Artificial Intelligence in Post-Conflict Asia-Pacific Societies and the Fragmentation of International Humanitarian Protection

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ABSTRACT

This article examines the growing role of artificial intelligence (AI) in post-conflict Asia-Pacific societies and evaluates whether existing international legal frameworks adequately regulate its long-term humanitarian consequences. It argues that AI systems deployed during armed conflict often persist into post-conflict governance, surveillance, and reconstruction, creating accountability gaps and civilian vulnerabilities. While international humanitarian law, human rights law, and emerging soft-law standards offer partial safeguards, their fragmented application leaves significant regulatory gaps. The article advocates a more coherent legal framework addressing the humanitarian implications of AI beyond active hostilities

Keywords: Artificial Intelligence, Post-Conflict Phase, International Humanitarian Law, Algorithmic Accountability, Civilian Protection

1. Introduction

Nowadays, it is hardly ever the case that armed conflicts end quickly with the silence of guns. However, even after the ceasefire or peace agreement, the territorial violence is lifted, the technological infrastructures that have been developed and used during the war times normally continue to exist long after the official declaration of the end of fighting. Artificial Intelligence systems play a very important role among these.[1] AI has been deeply intertwined with the structure of modern war, as it is being used in many different ways, such as decision support tools on the battlefield, biometric identification systems, data-driven surveillance, and risk assessment technologies. Most importantly, these systems don't disappear after the wars. They become a part of post-conflict governance structures, influencing security, reconstruction, and

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[1] Louise Arbour, *War Crimes and the Rule of Law*, University of Toronto Press, Toronto, 2003, pp. 215–217.

civilian-state relations; thus, the effects of war are carried to the seemingly peaceful spheres.[2]

The transformation of war consequences from physical destruction to what can be termed 'algorithmic aftermaths' is not just a change in the mode of devastation but also a change in the experience and regulation of war consequences. The classical approach to the understanding of post-conflict transitions had been limited to disarmament, demobilisation, reconciliation, and institutional restructuring.[3] Nonetheless, the continued existence of AI technologies presents a different story. The military surveillance tools are justified at the beginning and later used for the sake of internal security. The databases collected during the war are retained and utilized for police and border control purposes, and the algorithms aimed at counterinsurgency are now being used to govern post-conflict situations.[4]

International humanitarian law, which has historically been focused on regulating the conduct of hostilities, has found it difficult to cater for this technological continuity. Although IHL recognises that some obligations continue even after the end of hostilities, such as those related to detainees, missing persons and the wounded, it still mainly focuses on battlefield conduct.[5] Consequently, the post-conflict phase has been relatively neglected in IHL studies, especially when it comes to new technologies whose negative impacts are slow and indirect. AI reveals this hole sharply because its impacts are predominantly through less visible processes like administrative decision-making, data governance and security policies, rather than through direct acts of violence.[6]

The Asia-Pacific region illustrates this reality clearly, having experienced numerous long-standing non-international armed conflicts. In many cases, active violence has diminished without comprehensive peace settlements, leaving societies in fragile post-conflict conditions where unresolved political tensions, insecurity, and state surveillance continue to shape governance and everyday life. For example, in

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[2] Marco Sassòli, Antoine A. Bouvier and Anne Quintin, *How Does Law Protect in War*, 3rd ed., Vol. 1, ICRC, Geneva, 2011, pp. 45–47.

[3] William H. Boothby, *Weapons and the Law of Armed Conflict*, Oxford University Press, Oxford, 2009, pp. 356–358.

[4] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: Rules, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), pp. 3–5.

[5] Sarah Knuckey, "Surveillance, Counterterrorism and International Human Rights", *Human Rights Law Review*, Vol. 15, No. 1, 2015, pp. 51–53.

[6] Tristan Ferraro, "Determining the Beginning and End of an Occupation under International Humanitarian Law", *International Review of the Red Cross*, Vol. 94, No. 885, 2012, p. 133.

Sri Lanka, although the civil war ended in 2009, many Tamil-majority areas continue to experience heavy military presence, surveillance, and unresolved political grievances[7]. In Myanmar, decades of ethnic armed conflict and the persecution of the Rohingya have persisted alongside increasing digital surveillance and online misinformation[8]. In the Philippines, particularly in Mindanao, counter-insurgency operations against armed groups have continued even after peace initiatives, creating ongoing security tensions[9]. Similarly, in India's Jammu and Kashmir region, prolonged political conflict has been accompanied by extensive internet restrictions, biometric monitoring, and heightened state surveillance measures[10]. In some cases, there has been an end to hostilities without dismantling the security apparatus built during the conflicts. Such a post-conflict securitisation pattern is very conducive to the continual use of AI systems that were first introduced under the special requirements of armed conflict.[11]

Fragile peace processes in the Asia-Pacific region continue to worsen the situation with these challenges. In cases where peace agreements are partial, contested, or only weakly implemented, authorities in such areas usually prefer stability to accountability. Quite often in such societies, AI-based surveillance and predictive policing instruments are presented as impartial tools of governance while, in reality, they are mostly unfairly targeting populations affected by conflicts.[12] Continuation of emergency legal regimes and exceptional security measures well into the post-conflict phase serves to normalize the use of algorithmic technologies and, thus, erases the temporal and normative distinctions between the wartime need and peacetime governance.[13]

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[7] Ambika Satkunanathan, "Collaboration, Suspicion and Traitors: An Exploratory Study of Intra-Community Relations in Post-War Northern Sri Lanka", *Contemporary South Asia*, Vol. 24, No. 4, 2016, pp. 416–428.

[8] Matt Schissler, "Beyond Hate Speech and Misinformation: Facebook and the Rohingya Genocide in Myanmar", *Journal of Genocide Research*, Vol. 27, No. 3, 2025, pp. 445–470.

[9] Steven Rood, "A Tale of Two Towns: Patterns of Violent Conflict in Maguindanao since the Framework Agreement on the Bangsamoro", in Steven Rood and Veronica L. Taylor (eds.), *Contesting the Philippines*, ISEAS–Yusof Ishak Institute, Singapore, 2025, pp. 239–262.

[10] Raouf Ahmad Peerzada, Amrita Sharma and Samyuktha Kannan, "The Jurisprudence of Digital Blackouts: Law and Its Exceptions in Jammu and Kashmir", *Human Geography*, Vol. 19, No. 1, 2025, pp. 1–7.

[11] David Rodin and Fritz Allhoff (eds), *War and Ethics: A New Just War Theory*, Oxford University Press, Oxford, 2008, pp. 112–114.

[12] United Nations Office on Drugs and Crime, *Handbook on Police Accountability, Oversight and Integrity*, UNODC, Vienna, 2011, pp. 87–89.

[13] Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, Routledge, London, 2001, pp. 98–101.

In view of the preceding, the article assumes that artificial intelligence represents not only a weapon or a tool of war but also a lasting heritage of armed conflict. This heritage, in a way, opens deep legal, ethical, and moral issues that the existing framework has not yet been capable of settling.[14] International humanitarian law applies strictly during armed conflict and, to a very limited extent, also beyond it. International human rights law regulates the conduct of states in peacetime, and the increasing number of soft law instruments is aimed at laying down principles for the responsible use of AI. Nevertheless, these regimes quite frequently function alongside one another without coordination, thus resulting in a disjointed protection of individuals and communities who must cope with post-conflict environments being defined by algorithmic governance.[15]

This splitting gets increasingly obvious when considering the use of AI after conflict. IHL hardly deals with issues such as holding on to or changing the purpose of wartime data, holding accountable systems that make decisions based on algorithms, or the long-term monitoring of civilian populations after the end of hostilities. Human rights law at the international level is normatively relevant to some extent, but it encounters issues of enforcement, jurisdiction, and derogation in post-conflict situations.[16] The regional agreements in the Asia-Pacific area, which are based on the principles of non-interference and security-first governance, seldom offer binding safeguards. At the national level, domestic legal systems typically give priority to counter terrorism and internal security measures, thus hardly allowing for humanitarian or ethical control over AI systems that have been carried over from conflict.[17]

Hence, this paper tries to answer three interconnected issues. One, does IHL[18] regulate the use of and impacts of artificial intelligence in the post-conflict period, and if it does, to what extent? Two, what are the gaps and weaknesses of international, regional, and national legal systems in providing a logical and effective regulation of post-conflict AI deployment, especially in the societies of the Asia-Pacific? And three, what ethical and moral duties are still left unresolved when

[14] Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 4th ed., Cambridge University Press, Cambridge, 2019, pp. 22–24.
[15] International Committee of the Red Cross, Artificial Intelligence and Machine Learning in Armed Conflict: A Human-Centred Approach, ICRC, Geneva, 2019, pp. 4–6.
[16] United Nations Secretary-General, *Peacebuilding in the Aftermath of Conflict*, UN Doc. A/67/499–S/2012/746, 8 October 2012, paras. 14–16.
[17] Michael N. Schmitt, "Autonomous Weapon Systems and International Humanitarian Law: A Reply to the Critics", *Harvard National Security Journal*, Vol. 8, 2017, pp. 19–21.
[18] Hereinafter referred to as IHL

algorithmic systems keep determining the living conditions of the populations that are recovering from armed conflict?

Answering these questions, the article develops the main point that the international protection of humanitarian rights is becoming more and more fragmented in post-conflict situations, particularly where artificial intelligence erases the differences between war and peace. Tracing the flow of AI technologies from the battlefield to post-conflict government and locating this discussion within the actual experiences of the Asia-Pacific region, the article will argue that the legal frameworks in place are not enough to address the long-term humanitarian impacts of algorithmic warfare. It thus advocates for a reconsideration of post-conflict duties that would give due consideration to the ethical, legal, and social aspects of artificial intelligence long after the fighting has ceased.

2. Artificial Intelligence Beyond Active Hostilities: Conceptualising the Post-Conflict Phase

2.1. Defining the Post-Conflict Phase in International Humanitarian Law

The post-conflict period is an ambiguous and often infrequently theorized phase within international humanitarian law. In contrast with the beginning of an armed conflict, whose occurrence is pinpointed by fairly clear legal criteria, the change from conflict to peace is hardly ever straightforward or announced officially. IHL separates the end of fighting from the point at which humanitarian law stops applying, thereby acknowledging that some responsibilities exist even outside the battlefield. These are, among others, the obligations to properly treat and release the detainees, to find the missing persons, and to compensate those who suffered during the conflict. Moreover, in the case of an occupation, IHL rules may still govern a situation long after what is generally understood as a post-conflict time.[19]

Nevertheless, this repertoire of regulations was mainly designed in reaction to classical warfare and does not sufficiently cover technologies whose effects reach far beyond moments of physical violence.[20] Although IHL admits that the humanitarian harm caused during the armed conflict may last after the cessation of hostilities, it is still generally silent on the regulation of tech systems that keep on

[19] United Nations Secretary-General, *Roadmap for Digital Cooperation*, UN, New York, June 2020, pp. 21–23.

[20] Christopher Kutz, *Complicity: Ethics and Law for a Collective Age*, Cambridge University Press, Cambridge, 2000, pp. 118–120.

functioning, developing, and impacting governance frameworks. By sticking wartime behaviours in post-conflict institutions, artificial intelligence unmasks this shortcoming, thus implying that conflict situations may result in peacetime administrations.[21]

2.2. Typologies of Artificial Intelligence Use in the Post-Conflict Phase

Artificial intelligence reveals itself in post-conflict environments through various interlinked typologies that collectively question the conventional notions of post-war governance. One dominant feature is that of surveillance and population monitoring.[22] AI-based surveillance systems that have been deployed during the armed conflict phase, mainly for intelligence and security purposes, are nowadays commonly seen being redirected for use in post-conflict environments to keep an eye on former conflict zones as well as marginalized communities.[23] Despite being justified most of the time as being necessary for stability and crime prevention, these systems unfortunately continue the wartime logics of suspicion and control, hence eroding trust and increasing the vulnerability of civilians.[24]

Another major typology of post-conflict AI applications is represented by biometric databases and facial recognition technologies. Biometric data, which is typically collected amidst conflict, often under coercive conditions or without acquiring proper consent, rarely gets discarded once the conflict is over.[25] On the contrary, these databases become a part of post-conflict law enforcement, border control, and civil administration. For those populations who have been affected by the conflict, ceaseless dependence on biometric identification has the potential of cementing existing patterns of exclusion and discrimination, thereby triggering issues that go beyond the traditional perimeter of IHL safeguards.[26]

Another segment refers to AI-based risk profiling for counter terrorism and law enforcement. Predictive algorithms utilized amid armed conflict for identifying

[21] Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. A/HRC/44/38, 29 June 2020, paras. 63–66.
[22] David Luban, "War as Punishment", *Philosophy & Public Affairs*, Vol. 39, No. 4, 2011, pp. 299–301.
[23] Hugo Slim, Humanitarian Ethics: A Guide to the Morality of Aid in War and Disaster, Oxford University Press, Oxford, 2015, pp. 184–186.
[24] International Committee of the Red Cross, *Ethical Challenges of Artificial Intelligence in Armed Conflict and Beyond*, ICRC, Geneva, 2020, pp. 7–9.
[25] International Committee of the Red Cross, Respecting and Protecting Health Care in Armed Conflicts and in Situations Not Covered by International Humanitarian Law, ICRC, Geneva, 2012, pp. 9–11.
[26] Heather Roff, "Lethal Autonomous Weapons and Jus ad Bellum Proportionality", *Case Western Reserve Journal of International Law*, Vol. 47, 2015, pp. 37–39.

potential threats are, in fact, the war strategies that are kept as part of post-conflict security measures. These programs depend on data derived from war intelligence activities, which, as a result, can have a bias, be mistaken, or have threat assessments that are overbroad.[27] The use of algorithmic risk profiling in post-conflict settings can facilitate the use of preventive detention, intensified surveillance, and disproportionate law enforcement by security forces, thus making it more difficult for the society to return to civilian administration.[28]

Moreover, artificial intelligence is being extensively used in rebuilding and humanitarian situations. AI-aided devices are utilized to evaluate the impact of the disaster, estimate the number of people who will be displaced, determine the priority of aid delivery, and decide on the distribution of reconstruction resources.[29] Although these types of uses are in most cases presented as neutral or efficiency-enhancing, they give rise to major concerns related to transparency, accountability, and participation. Algorithmic decisions can drastically influence the post-conflict recovery stage, but the communities concerned are generally deprived of the knowledge of or the power to regulate these mechanisms.[30]

2.3. Why Artificial Intelligence Disrupts Traditional Post-Conflict Assumptions

Artificial intelligence disrupts traditional ways of thinking about the post-conflict phase in at least three major aspects. The first concern is that the continuous operation of AI systems challenges legal frameworks traditionally founded on a clear temporal distinction between periods of war and peace. Unlike weapons or military equipment, AI systems keep on functioning, learning, and thus bringing about new effects over time, which makes the active hostilities cease an inadequate marker for the end of harm.[31]

Secondly, the opacity and partial autonomy of AI systems may well be game-changers for the post-conflict scenario because they may largely dismantle already

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[27] United Nations General Assembly, *Human Rights and Transitional Justice*, UN Doc. A/RES/60/147, 16 December 2005.

[28] United Nations General Assembly, Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/RES/74/147, 18 December 2019.

[29] Seth G. Jones, *Waging Insurgent Warfare*, Oxford University Press, Oxford, 2017, pp. 412–414.

[30] Karen Hao, "Training a Single AI Model Can Emit as Much Carbon as Five Cars in Their Lifetimes", *MIT Technology Review*, 6 June 2019, available at: https://www.technologyreview.com/2019/06/06/239031/training-a-single-ai-model-can-emit-as-much-carbon-as-five-cars-in-their-lifetimes (accessed in Jan. 2026)

[31] Human Rights Watch, Rights in Reverse: Surveillance and Security Laws in Post-Conflict States, Human Rights Watch, New York, 2022, pp. 14–18.

existing accountability systems.[32] A great number of the AI-based decisions are almost impossible to provide reasons for or challenge, especially in post-conflict societies where institutional structures are very weak, and people's trust in the government is extremely fragile. Responsibility attribution is more and more problematic in case harm results from the interaction between data, algorithms, and human oversight rather than from separate acts of violence.[33]

Thirdly, AI is speeding up the merging of the military and the civilian spheres. The technologies initially designed for war are being incorporated into post-conflict administration and security, which makes it really hard to tell the difference between extraordinary security measures and normal governance. The growing civil-military amalgamation is a real headache for international humanitarian law as well as international human rights law since post-conflict governance is still very much influenced by wartime logics of control and risk management.[34]

3. International Legal Frameworks: Applicability and Limits of IHL in Post-Conflict AI Governance

3.1. Continued Applicability of IHL Obligations after Hostilities

IHL is not a kind of law that just fades away once war has stopped. IHL's main rule is that quite a few obligations on both sides remain after the fighting has ceased. They have been underlining this feature since the social and humanitarian consequences that armed conflicts bring about do not just disappear when the guns stop firing.[35] Common Article 3 of the Geneva Conventions, which is binding on non-international armed conflicts, limits the treatment of persons who have ceased to take part in hostilities, such as those who have been captured or otherwise are under the control of a party to the conflict. The focus on humane treatment, prohibition of discrimination, and judicial guarantees, reminds us of how humanitarian protection is still very much needed in times of transition.[36]

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[32] Rosa Brooks, *How Everything Became War and the Military Became Everything*, Oxford University Press, Oxford, 2016, pp. 327–329.

[33] Abby Stoddard, Adele Harmer and Victoria DiDomenico, *Providing Aid in Insecure Environments: 2009 Update*, Humanitarian Policy Group Policy Brief No. 34, Overseas Development Institute, London, April 2009, p. 6.

[34] Nils Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford, 2008, pp. 287–289.

[35] United Nations Office of the High Commissioner for Human Rights, *Guidance on Lethal Autonomous Weapons Systems*, OHCHR, Geneva, 2023, pp. 5–7.

[36] United Nations Development Programme, *Digital Strategy 2022–2025*, UNDP, New York, 2022, pp. 10–12.

Besides that, customary IHL points to the same aspects. The obligations connected to the issue of missing persons, the treatment of detainees in a humane way and their release, the provision of compensation for damages, etc., are not matters that will be terminated just by the end of war.[37] These commitments recognise the fact that the damages inflicted as a result of the armed conflict bring about not only immediate but also long-standing humanitarian consequences that need to be legally remedied.[38] In the event of occupation, IHL may apply for a longer period. It will regulate the functions of administration, security, and welfare that an occupier carries out[39]. There is even a possibility that some lingering obligations in terms of restitution, accountability, and protection, which phase out slowly but surely, continue to govern the post-conflict situation even after the formal end of the occupation.[40]

However, IHL only provides a legal basis for certain obligations to continue after the conflict has ended, and this is only in the context of ensuring that there is no return to the infliction of physical violence and direct coercion. The post-conflict obligations were thought of in the scenarios of detention regimes, forced displacement, and physical abuse. With the help of AI, this continuum is broken as the resulting damages can be of a nature that is indirect, systemic, and often with a time lag.[41] AI systems that have been used during a conflict may still have an impact on decision-making in the post-conflict period but in fact, such situations may not fit those categories of humanitarian obligations. This means that while IHL, generally speaking, is still valid, after the hostilities are over, it possesses only a limited ability to regulate the use of post-conflict AI from a conceptual perspective.[42]

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[37] Hildebrandt Mireille, "Law as Computation in the Era of Artificial Legal Intelligence", *Osgoode Hall Law Journal*, Vol. 55, No. 1, 2017, pp. 107–109.

[38] Richard Goldstone and Adam M. Smith, *International Judicial Institutions*, Routledge, London, 2009, pp. 164–166.

[39] Vaios Koutroulis, "The Application of International Humanitarian Law and International Human Rights Law in Situations of Prolonged Occupation: Only a Matter of Time?", *International Review of the Red Cross*, Vol. 94, No. 885, 2012, pp. 205–231.

[40] Jelena Pejic, "The Protective Scope of Common Article 3: More than Meets the Eye", *International Review of the Red Cross*, Vol. 93, No. 881, 2011, p. 189.

[41] UN Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616, 23 August 2004, paras. 8–10.

[42] Philip Alston, "The Populist Challenge to Human Rights", *Journal of Human Rights Practice*, Vol. 9, No. 1, 2017, pp. 1–4.

3.2. The Silence of IHL on Post-Conflict Technological Governance

The limitations of IHL are significantly highlighted when we consider its silence on post-conflict technological governance. The normative framework of IHL is primarily and heavily focused on the regulation of the conduct of hostilities, including targeting, proportionality, distinction, and precaution.[43] Even when the obligations go beyond the battlefield, the text refers to the consequences of physical violence rather than the governance of technological systems. This emphasis is a leftover from the historical evolution of IHL as a tool to regulate kinetic warfare and creates huge regulatory voids in the case of artificial intelligence in post-conflict scenarios.[44]

One example is data retention. AI systems are dependent on huge volumes of data, a significant portion of which is obtained during armed conflict through surveillance, intelligence gathering, and biometric registration. IHL does not provide any guidance on whether, how, or for how long such data should be retained after the cessation of hostilities.[45] Neither does it cover issues of consent, purpose limitation, or secondary use of conflict-era data in post-conflict governance. The lack of rules governing data retention makes it possible for the wartime databases to be kept indefinitely, and information gathered under exceptional circumstances can remain the basis of civilian life long after the conflict is over.[46]

A second gap concerns algorithmic decision-making. IHL assumes human agency and accountability even when it comes to regulating warfare with the help of technology. It is not about the human decision-making level only, but about the processes of decision-making which are algorithmically oriented, especially when such processes are completely or partially operating in post-conflict administrative systems.[47] The issues of explainability, contestability, and responsibility for algorithmic results are not in the traditional domain of humanitarian regulation. Therefore, those people who are impacted by the AI decisions in post-conflict

[43] David Fisher, *Law and Ethics in War and Peace*, Oxford University Press, Oxford, 2011, pp. 198–200.
[44] International Committee of the Red Cross, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, ICRC, Geneva, 2019, pp. 34–36.
[45] United Nations Institute for Disarmament Research, *Increasing Transparency in the Development of Autonomous Weapon Systems*, UNIDIR, Geneva, 2022, pp. 14–16.
[46] United Nations High Commissioner for Human Rights, *The Right to Privacy in the Digital Age*, UN Doc. A/HRC/48/31, 13 September 2021, paras. 52–55.
[47] Mark Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, Cambridge, 2007, pp. 102–104.

situations do not have clear humanitarian protections or access to accountability mechanisms.[48]

Long-term civilian surveillance is another area where the norms are silent[49]. Surveillance technologies used during an armed conflict are often defensible with the argument of military necessity. However, the constant use of such technologies for monitoring the population after the end of the hostilities does not reconcile easily with IHL's protective rationale.[50] Still, IHL does not set out any standards by which to evaluate the appropriateness of the continuing surveillance once the legal context moves away from armed conflict. The upshot is a regulatory vacuum where practices that were developed during wartime become normalized features of post-conflict governance.[51]

3.3. Interface with International Human Rights Law

Because of the limitations of IHL, international human rights law (IHRL) is usually quoted as the default legal framework for regulating AI use in post-conflict situations. In principle, IHRL is applicable at all times, including during and after armed conflicts, and it provides protections that cover most of the negative effects of AI.[52] AI-enabled surveillance, profiling, and decision-making can directly infringe on the rights to privacy, equality, due process, and access to an effective remedy. The IHL-IHRL relationship is most often explained as being mutually supportive, with IHL being the *lex specialis* during armed conflict and IHRL remaining the general regulator of state behaviour.[53]

On the other hand, the practical interface between IHL and IHRL in post-conflict situations is more of a combination of fragmentation and complementarity. There are jurisdictional difficulties most of the time, especially in cases of

[48] Sandra Wachter, Brent Mittelstadt and Luciano Floridi, "Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation", *International Data Privacy Law*, Vol. 7, No. 2, 2017, pp. 76–78.

[49] Al-Haj, A., & Shany, Y. (2021). Automating occupation: International humanitarian and human rights law implications of the deployment of facial recognition technologies in the occupied Palestinian territory. International Review of the Red Cross, 103(918), 1-27.

[50] United Nations Peacekeeping Operations, *Technology and Innovation in Peacekeeping*, UN, New York, 2018, pp. 19–21.

[51] Frédéric Mégret, "The Dehumanization of International Humanitarian Law", *Goettingen Journal of International Law*, Vol. 8, No. 1, 2016, pp. 42–44.

[52] Doris Schroeder and Julie Cook Lucas, "The Ethics of Digital Surveillance in Post-Conflict Societies", *Ethics and International Affairs*, Vol. 33, No. 2, 2019, pp. 223–225.

[53] United Nations Security Council, UNSC Res. 1325, 31 October 2000.

extraterritorial control, multinational operations, or changing governance structures.[54] Governments may deny the extraterritorial application of human rights obligations, which in turn limits the scope of IHRL exactly in those contexts where post-conflict AI systems are being deployed most heavily. These jurisdictional conflicts undermine the human rights protections' practical effectiveness in post-conflict environments.[55]

Derogation adds to the confusion in the application of IHRL. States recovering from armed conflict typically continue to hold states of emergency or adopt exceptional security measures, and hence they derogate from the implementation of certain human rights obligations.[56] Despite the fact that derogations are within the limits of the law, their extensive use in a post-conflict setting might result in the protection standards lowering becoming the norm. AI security tools empowered by conflict might, therefore, still be running based on emergency regulations that make it difficult for them to be subject to human rights scrutiny.[57]

Enforcement gaps constitute a further problem. Even if human rights standards are technically applicable, societies after a conflict are often without functioning judicial and institutional mechanisms that can effectively deal with AI-related harm.[58] Those who are affected by the decisions of algorithms may find it difficult to discover who is responsible, obtain necessary data, or receive compensation.[59] The international human rights mechanisms, although significant in terms of norms, generally function slowly and do not have the capacity to deal with technologically systemic harms in a prompt way. Hence, the guarantee of IHRL protection for those who are under post-conflict AI governance is still more of a hope than a reality.[60]

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[54] International Committee of the Red Cross, When Rain Turns to Dust: Understanding and Responding to the Combined Impact of Armed Conflicts and the Climate and Environment Crisis on People's Lives, ICRC, Geneva, 2020, pp. 46–48.

[55] Mary Ellen O'Connell, *The Power and Purpose of International Law*, Oxford University Press, Oxford, 2008, pp. 251–253.

[56] Timothy L.H. McCormack, "Post-Conflict Justice and International Humanitarian Law", *International Review of the Red Cross*, Vol. 89, No. 867, 2007, pp. 497–499.

[57] International Criminal Tribunal for Rwanda, *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-I, Judgment (Appeals Chamber), 1 June 2001, paras. 37–45.

[58] United Nations Office for Disarmament Affairs, *Ethics and Emerging Military Technologies*, UNODA, New York, 2021, pp. 9–11.

[59] United Nations General Assembly, *Protection of Civilians in Armed Conflict*, UN Doc. A/RES/75/192, 28 December 2020.

[60] International Court of Justice, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, ICJ Reports 1986, paras. 172–179.

The weakness of remedies is particularly acute in cases of AI-driven harm. Traditional human rights remedies presuppose identifiable acts and decision-makers, whereas algorithmic systems diffuse responsibility across data sets, software developers, state agencies, and private actors. This diffusion undermines accountability and leaves victims without clear avenues for redress. In post-conflict contexts, where social trust and institutional legitimacy are already fragile, such accountability deficits risk exacerbating grievances and undermining peacebuilding efforts.[61]

Taken together, the interaction between IHL and IHRL shows that the law is very fragmented, and thus it is not very suitable for regulating artificial intelligence in the post-conflict phase. IHL still applies in some ways but is basically silent on technological governance. IHRL provides relevant norms but is limited by jurisdictional, derogation, and enforcement difficulties.[62] Consequently, there is a protection gap in which AI systems that were inherited from armed conflict have very limited legal constraints. Such fragmentation supports the main argument presented in this article, which is that international humanitarian law in its current form cannot effectively regulate technologies that cause most of their harm after the end of war.[63]

4. Regional and Soft-Law Approaches: Asia-Pacific Perspectives on Post-Conflict AI Regulation

4.1. Regional Security Practices in Post-Conflict Asia-Pacific Societies

Post-conflict governance in the Asia-Pacific region has been largely influenced by the security paradigms that focus on the primacy of stability, territorial integrity, and internal order. Several states in the region have been through prolonged non-international armed conflicts characterised by insurgency, counter-insurgency, and an extended state of emergency.[64] While they are the formal end of hostilities, these conflicts still result in institutional cultures that continue to securitise political dissent, mobility, and social organisation. Artificial intelligence technologies are

[61] United Nations Institute for Disarmament Research, *The Humanitarian Impact of Autonomous Weapons*, UNIDIR, Geneva, 2018, pp. 9–11.
[62] Carsten Stahn, *Justice as Message: Expressivism and Transitional Justice*, Intersentia, Cambridge, 2020, pp. 271–273.
[63] David Kaye, *Speech Police: The Global Struggle to Govern the Internet*, Columbia Global Reports, New York, 2019, pp. 163–165.
[64] United Nations Office for Disarmament Affairs, *Human Control and Emerging Technologies in Warfare*, UNODA, New York, 2022, pp. 11–13.

being used more and more in these post-conflict security practices that maintain, rather than challenge, the wartime logics of control.[65]

One of the hallmarks of post-conflict security practices in the region is the wide use of surveillance. AI-enabled monitoring systems introduced during armed conflict, often justified as necessary for intelligence-gathering or threat prevention, are retained and expanded in post-conflict contexts.[66] Former conflict zones, border regions, and communities associated with insurgent movements remain subject to heightened observation through facial recognition, data analytics, and predictive monitoring. This persistence of surveillance cultures reflects a broader reluctance to fully demilitarise governance after conflict, particularly where peace processes are fragile or incomplete.[67]

Counter-insurgency legacies continue to influence how the region implements post-conflict AI use. In many Asia-Pacific settings, counter-insurgency tactics have over time dangerously compromised the distinction between civilians and security threats. AI, in this case, intensifies the problem as it allows for mass risk profiling and pattern recognition based on datasets from wars.[68] People and groups get labelled as per algorithmic threat assessments that can be very much alive even when hostilities have ceased. Such behaviours nourish the condition of mutual distrust, thus making post-conflict reconciliation difficult as people still live under the wartime security securitizations rather than rights-based accountability.[69]

These regional security behaviours expose the essence of the dichotomy between post-conflict peacebuilding and the continuous use of AI-controlled means. On the one hand, states typically represent this kind of technology as mere instruments for upholding order; on the other hand, their use reveals the persistence of structural links between the mode of governing during the war and the one after the conflict. Here, AI is a means through which extraordinary measures are

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[65] International Committee of the Red Cross, *Digital Risks in Armed Conflicts*, ICRC, Geneva, 2021, pp. 15–17.
[66] Paul Ricœur, *Memory, History, Forgetting*, University of Chicago Press, Chicago, 2004, pp. 412–414.
[67] ASEAN Secretariat, ASEAN Political-Security Community Blueprint 2025, Jakarta, 2015, pp. 3–5.
[68] International Committee of the Red Cross, *Legal Reviews of New Weapons, Means and Methods of Warfare*, ICRC, Geneva, 2006, pp. 3–5.
[69] Ian Scobbie, "Operationalising the Law of Armed Conflict for Dissident Forces in Libya", *EJIL: Talk! – Blog of the European Journal of International Law*, 31 August 2011, available at: http://www.ejiltalk.org/operationalising-the-law-of-armed-conflict-for-dissident-forces-in-libya/ (accessed in Jan. 2026)

perpetuated; thus, it negatively impacts the division of humanitarian protection in the post-conflict phase.[70]

4.2. Role of Regional Organisations and Policy Instruments

Regional organisations in the Asia-Pacific region are not significantly involved in the post-conflict regulation of AI, especially from a humanitarian point of view. The Association of Southeast Asian Nations (ASEAN) is an example of a regional governance model that focuses on state sovereignty, consensus decision-making, and non-interference in the internal affairs of states.[71] While this approach has helped maintain regional stability, it has also limited the agreement of regional standards on human rights, humanitarian protection, and new technologies to be enforceable.[72]

ASEAN's focus on security is also visible in the way it deals with digital technologies. Regional talks about artificial intelligence usually highlight economic innovation, smart governance, and security cooperation, while humanitarian safeguards are rarely mentioned.[73] After a conflict, this attitude leads to very few checks on how AI systems that have been used in warfare can impact civilians. Since there are no regional binding instruments that address AI from a humanitarian or post-conflict perspective, regulation is left almost entirely to national governments, thus creating different levels of protection within the region.[74]

The absence of binding humanitarian AI standards at the regional level only contributes to the problem of fragmentation. While other regions have supranational courts or human rights mechanisms that provide oversight, the Asia-Pacific region has no such strong regional enforcement structures capable of dealing with technological harm in post-conflict situations.[75] Therefore, regional policy instruments are usually considered as platforms for dialogue rather than as sources of legal obligation. The inability of regional organisations to significantly limit the

[70] United Nations General Assembly, Report of the Group of Governmental Experts on Lethal Autonomous Weapons Systems, UN Doc. A/78/234, 28 July 2023.
[71] Thomas Franck, *The Power of Legitimacy among Nations*, Oxford University Press, Oxford, 1990, pp. 24–26.
[72] Heather Roff and Richard Moyes, "Meaningful Human Control, Artificial Intelligence and Autonomous Weapons", *Global Policy*, Vol. 7, No. 4, 2016, pp. 5–7.
[73] United Nations Institute for Disarmament Research, *Responsible Innovation in Military AI*, UNIDIR, Geneva, 2023, pp. 17–19
[74] Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 1, ICRC, Geneva, 1952, p. 45.
[75] Simon Chesterman, "Asia's Ambivalence about International Law and Institutions: Past, Present and Futures", *European Journal of International Law*, Vol. 27, No. 4, 2016, pp. 945–978.

use of post-conflict AI or to standardise the requirements among war-affected states is due to this fundamental flaw.[76]

Non-interference is the main reason why the region can hardly be regulated. It is legitimate for the technologies deployed in post-conflict situations to be seen as local issues, even if they have cross-border effects or involve transnational actors. Respect for state sovereignty has become the reason why governments can continue and even expand their AI-driven security practices without any meaningful regional oversight. Without binding standards, regional frameworks are more likely to accept post-conflict securitisation rather than challenge it, thus leaving humanitarian issues at the margin of broader governance concerns.[77]

4.3. Soft-Law Initiatives and Their Limits in Post-Conflict Settings

When no binding regional regulation exists, soft law initiatives have come to represent the main normative guidance on the use of artificial intelligence for humanitarian protection.[78] At the global level, various United Nations bodies have issued principles and guidelines for the responsible use of AI, highlighting transparency, accountability, non-discrimination, and human oversight as key elements. Such documents set out valuable ethical standards and attest to the growing understanding of the threats that algorithmic governance might bring, including in post-conflict situations.[79] In the same vein, the International Committee of the Red Cross (ICRC) has gradually taken up the question of how the digital and technological revolution impacts humanitarian protection.[80]

Based on its policy notes, expert meetings, and interpretative guidelines, the ICRC has indicated that the integration of technology in humanitarian work must be compatible with respect for fundamental humanitarian principles.[81] Working with AI, the ICRC has centered its efforts in the areas of ensuring human control over the

[76] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, pp. 35–36.
[77] United Nations Office for Disarmament Affairs, *Securing Our Common Future: An Agenda for Disarmament*, UN, New York, 2018, pp. 17–18.
[78] United Nations Secretary-General, *Our Agenda for Peace*, UN, New York, 1992, paras. 59–61.
[79] United Nations General Assembly, *Right to Remedy and Reparation*, UN Doc. A/RES/76/148, 16 December 2021.
[80] Rebecca Crootof, "The Killer Robots Are Here: Legal and Policy Implications", *Cardozo Law Review*, Vol. 36, 2015, pp. 1839–1842.
[81] International Committee of the Red Cross, The Principle of Proportionality in the Rules Governing the Conduct of Hostilities, ICRC, Geneva, 2018, pp. 21–23.

technology, minimizing the risk of harming civilians, and looking into a legal framework that could be adaptable to a fast-changing technological environment. These pieces of work bear great importance, especially considering that the ICRC is the authority responsible for safeguarding IHL.[82]

Despite their normative value, soft-law initiatives face inherent limitations in post-conflict settings. Non-binding standards lack enforceability and depend on voluntary compliance by states, many of which prioritise security and stability over humanitarian restraint in fragile post-conflict contexts.[83] Where AI systems are embedded within domestic security architectures, ethical guidelines alone are unlikely to constrain their use. Moreover, soft-law instruments often operate at a high level of abstraction, thus offering limited guidance on how principles should be applied to specific post-conflict practices such as data retention, biometric governance or predictive policing.[84]

The limitations of soft law in post-conflict societies run even deeper when power asymmetries come into the picture. People in the conflict-affected areas simply do not have the power to bring up ethical issues or control how the decision to use AI in these areas is made.[85] Without strong legal commitments or effective watch mechanisms, the norms based on soft law can be mere rhetorical commitments without real practical safeguards. In other words, depending on non-binding measures might give a false impression that there is regulation when actually the core practices remain unchanged.[86]

Bringing together both regional and soft law frameworks exposes the potential as well as the limitations in the regulation of AI in Asia-Pacific post-conflict societies. Regional organizations remain constrained by the principle of state sovereignty, which limits their ability to intervene in member states' internal governance practices. At the same time, soft law initiatives provide valuable ethical and normative guidance on AI governance, but they lack legally enforceable mechanisms to ensure compliance or accountability.[87] Thus, the regulatory

[82] International Committee of the Red Cross, *Human Control over Weapon Systems*, ICRC Position Paper, Geneva, 2021, pp. 2–4.
[83] Peter Asaro, "On Banning Autonomous Weapon Systems", *International Review of the Red Cross*, Vol. 94, No. 886, 2012, pp. 687–689.
[84] United Nations General Assembly, UNGA Res. 2857 (XXVI), 20 December 1971.
[85] Antonio Cassese, *International Law*, 2nd ed., Oxford University Press, Oxford, 2005, pp. 420–422.
[86] United Nations Security Council, UNSC Res. 181, 7 August 1963.
[87] United Nations University Centre for Policy Research, The Future of Conflict and AI, UNU-CPR, New York, 2020, pp. 8–10.

environment is such that while humanitarian concerns are raised, they are only very weakly institutionalised, thereby perpetuating the international humanitarian protection fragmentation in post-conflict settings where artificial intelligence plays a role.[88]

5. National Frameworks and Practices in Post-Conflict Asia-Pacific States

5.1. Artificial Intelligence and Post-Conflict Policing Practices

At the national level, regulation and deployment of artificial intelligence in post-conflict Asia-Pacific countries are largely influenced by domestic security concerns that are prioritized over humanitarian considerations. AI-assisted police work has become one of the main tools of post-conflict governance, especially in societies that are emerging from long-term internal armed conflicts.[89] Methods that were first used for intelligence gathering, counter insurgency operations, or battlefield surveillance often get utilized for ordinary law enforcement purposes. The different types of technology that aid in predicting crimes, such as facial recognition techniques and data analytics programs, are used as tools to keep the community safe and stop violence from happening again.[90]

Nevertheless, in a post-conflict setting, AI-assisted police work is more likely to reflect the negative aspects of wartime suspicion and control. Areas that used to be battlegrounds and neighbourhoods that were the base of insurgent movements are still being targeted for surveillance that is justified by the need to deal with lingering security threats.[91] Algorithmic systems that were developed based on data from the time of the conflict might accommodate biases formed by military intelligence methods, which in turn led to the disproportionate targeting of certain groups. Therefore, the application of AI in police work makes the distinction between exceptional security measures and normal law enforcement activities less clear, thereby weakening the switch to civilian rule based on rights and accountability.[92]

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[88] Philip Alston, *Report on the Use of Armed Drones for Targeted Killings*, UN Doc. A/HRC/14/24/Add.6, 28 May 2010, paras. 79–81.
[89] Helen Durham, "Women, Armed Conflict and International Law", *International Review of the Red Cross*, Vol. 84, No. 847, 2002, pp. 655–657.
[90] Shoshana Zuboff, *The Age of Surveillance Capitalism*, Profile Books, London, 2019, pp. 376–378.
[91] United Nations Economic and Social Council, *Science, Technology and Innovation for Sustaining Peace*, UN Doc. E/2021/58, 4 May 2021, paras. 19–21.
[92] David Lyon, *Surveillance Studies: An Overview*, Polity Press, Cambridge, 2007, pp. 91–93.

5.2. Expansion of Biometric Databases and Data Infrastructures

Another hallmark of post-conflict AI governance at the national level is the rise of biometric databases. In the course of hostilities, gathering biometric data is frequently defended as a necessary measure for identification purposes, controlling access, or delivering humanitarian aid.[93] Nonetheless, in the post-conflict stage, these databases are hardly ever dismantled. On the contrary, they get enlarged and connected with the greater state data systems, and thus they can be used for different purposes such as policing, migration control, welfare distribution, voter registration, etc.[94]

This continuation of biometric systems brings up grave humanitarian as well as legal issues. The data gathered in conflict situations, usually without meaningful consent or adequate safeguards, still determines the way individuals have to deal with the state, long after the conflict has ended.[95] For persons affected by conflict, especially those who are displaced and those who have been detained, the growth of biometric databases may foster their vulnerability instead of helping them reintegrate. The lack of appropriate legal frameworks that regulate data retention, access, and deletion is like adding fuel to the risk of misuse and abuse, thus stressing the gap between internal AI governance and humanitarian protection.[96]

5.3. Emergency Laws and the Normalisation of Exceptional Governance

A common occurrence in post-conflict governance across the Asia-Pacific region is the continuation of emergency legal frameworks that were initially set up during the period of armed conflict. Nations that have gone through internal conflicts tend to keep emergency powers, counter terrorism laws, and special security regimes not just during the war but for a considerable time after the conflict is over.[97] Artificial intelligence technologies are being incorporated into these legal frameworks, thus helping to further embed the practice of ruling through exceptional measures. Surveillance systems, risk, profiling algorithms, and intelligence databases can be

[93] International Committee of the Red Cross, *Operational Guidelines for Data Protection in Humanitarian Action*, ICRC, Geneva, 2015, pp. 10–12.
[94] UN Secretary-General, *Our Common Agenda*, UN, New York, 2021, pp. 89–90.
[95] Mary Kaldor, *New and Old Wars*, 3rd ed., Polity Press, Cambridge, 2012, pp. 187–189.
[96] International Committee of the Red Cross, *Data Protection and Humanitarian Action*, ICRC, Geneva, 2020, pp. 6–8.
[97] United Nations Human Rights Council, *Business, Human Rights and New Technologies*, UN Doc. A/HRC/50/56, 18 April 2022, paras. 29–32.

found functioning under legal authorities that were means of wartime exigencies rather than peacetime accountability.[98]

The embedding of AI technologies in such frameworks reinforces the fact that officers of the law operate within the legal framework, even in an emergency, they can use the AI of prediction systems to carry out profiling. Such legal frameworks may result in a reduction of civilian privacy and civil rights.[99] Allowing this machinery to run in a war zone context, you are giving that machinery war jurisdiction, and therefore the so-called application of the peace law to that is going to be difficult. Legal awareness campaigns may be part of the efforts to unravel the sophisticated suspense of the legal framework used to deploy AI under an emergency transition government.[100]

5.4. Domestic Security Laws and the Marginalisation of Humanitarian Considerations

Domestic security laws in post-conflict Asia-Pacific states frequently override humanitarian considerations in the regulation of artificial intelligence. National legal frameworks tend to prioritise counter-terrorism, internal security, and public order, often at the expense of protections for privacy, due process, and non-discrimination. While some states have adopted data protection or digital governance legislation, these laws are often framed narrowly and include broad exemptions for security agencies. As a result, AI-driven security practices operate with limited transparency and accountability.[101]

Judicial oversight of algorithmic systems remains weak across much of the region. Courts often lack the technical expertise, procedural tools, or institutional independence necessary to effectively review AI-driven decision-making. [102] Challenges to surveillance or predictive policing are further complicated by secrecy claims and national security exemptions. For individuals affected by algorithmic

[98] Jack Balkin, "The Constitution in the National Surveillance State", *Minnesota Law Review*, Vol. 93, 2008, pp. 3–5.
[99] Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, Oxford, 2014, pp. 682–684.
[100] Human Rights Council, *Impact of New Technologies on the Promotion and Protection of Human Rights*, UN Doc. A/HRC/47/23, 18 June 2021, paras. 40–43.
[101] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002).
[102] United Nations Development Programme, *Human Rights and AI Governance*, UNDP, New York, 2021, pp. 16–18.

governance, access to justice is thus constrained, reinforcing the protection gap identified at the international and regional levels.[103]

The marginalisation of conflict-affected populations is a particularly troubling consequence of these domestic practices. Communities that bore the brunt of armed conflict often remain subject to heightened surveillance and control in the post-conflict phase.[104] AI systems trained on conflict-era data perpetuate stereotypes and risk classifications that fail to reflect changed circumstances. Rather than facilitating reconciliation and reintegration, national AI governance frameworks risk entrenching exclusion and deepening post-conflict harm.[105]

5.5. Repurposing Wartime Technologies and Deepening Post-Conflict Harm

On the whole, the national frameworks of post-conflict states in the Asia-Pacific region show that they are following the example of major powers by modernizing and extending wartime AI technologies and capabilities.[106] Among the tools of war, those developed at the height of armed conflict become part of the normal functioning of the state without the redefinition of legal norms and the addition of protection measures for the affected population.[107] Such changes mirror the structural aspects of the continuance of the relationship between wartime and post-conflict governance, whereby security considerations continue to be at the forefront of legal and policy frameworks.[108]

The main impact of this continuity is, of course, the aggravation of post-conflict suffering. Advanced technologies for surveillance, profiling, and AI decision-making will, without a doubt, continue to be a source of trauma for civilians who, owing to the cycle of conflict, have become more vulnerable.[109] When there is neither independent legal oversight nor regulation with a humanitarian perspective, the use

[103] International Committee of the Red Cross, Autonomous Weapon Systems: Implications of Increasing Autonomy in the Critical Functions of Weapons, ICRC, Geneva, 2016, pp. 12–14.
[104] International Committee of the Red Cross, *Legal Reviews of New Weapons, Means and Methods of Warfare*, ICRC, Geneva, 2006, pp. 3–5.
[105] Stuart Casey-Maslen, *Weapons under International Human Rights Law*, Cambridge University Press, Cambridge, 2014, pp. 284–286.
[106] United Nations General Assembly, *Science, Technology and Innovation for Peace and Development*, UN Doc. A/RES/76/213, 24 December 2021.
[107] Paul Ricœur, *Memory, History, Forgetting*, University of Chicago Press, Chicago, 2004, pp. 412–414.
[108] Christof Heyns, "Autonomous Weapons Systems: Living a Dystopian Future", *Human Rights Quarterly*, Vol. 38, No. 4, 2016, pp. 803–805.
[109] United Nations Office for Disarmament Affairs, *Human Control and Emerging Technologies in Warfare*, UNODA, New York, 2022, pp. 11–13.

of AI at the national level may, through its direct and indirect effects, destabilize the very pillars of the post-conflict political and social order, such as reconciliation, trust-building, and sustainable peace.[110] The present discussion points to the need to conceptualize national AI governance in post-conflict settings not as a niche issue of domestic security, but essentially as a core humanitarian concern.[111]

6. Ethical and Moral Fault Lines in Post-Conflict AI Deployment

6.1. Accountability Gaps in Algorithmic Harm

The introduction of artificial intelligence to the peacebuilding process exposes significant gaps in accountability that pose challenges for the traditional ethical and legal frameworks.[112] These are very different from the usual atrocities in war, which can be linked to the culpability of specific actors and their particular decisions. Algorithmic harm, on the other hand, can be unheard of, being so widespread, indirect, and delayed.[113] AI technologies employed during hostilities, for example, in reconnaissance, target location or data analysis, can keep on functioning or subconsciously affecting human choices long after conflicts have finally ended. When harm occurs in the aftermath of war, it is very difficult to apportion responsibility.[114]

At the level of ethics, it is questioned whether the responsibility should be attributed to the government that keeps on using or adapting AI systems for different purposes, to the individuals who develop and maintain such technologies, or to the decision makers who consider the outputs coming from the algorithm. Critics of states are often reminded of the fact that they use national security or technical complexity as excuses to evade responsibility, while technology companies argue that they are only suppliers of neutral and impartial tools.[115] The creators of the

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[110] Carsten Stahn, *Justice as Message: Expressivism and Transitional Justice*, Intersentia, Cambridge, 2020, pp. 271–273.

[111] United Nations Institute for Training and Research, *Artificial Intelligence and Peacebuilding*, UNITAR, Geneva, 2020, pp. 11–13.

[112] International Committee of the Red Cross, When Rain Turns to Dust: Understanding and Responding to the Combined Impact of Armed Conflicts and the Climate and Environment Crisis on People's Lives, ICRC, Geneva, 2020, pp. 46–48.

[113] United Nations General Assembly, *Protection of Civilians in Armed Conflict*, UN Doc. A/RES/75/192, 28 December 2020.

[114] Antonia Chayes and Abram Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, Harvard University Press, Cambridge, MA, 1995, pp. 22–24.

[115] United Nations Office of the High Commissioner for Human Rights, *Artificial Intelligence and Human Rights*, OHCHR, Geneva, 2021, pp. 4–6.

systems may even say that post-conflict uses are beyond the scope of their initial intention. This scattering of responsibility leads to what is figuratively an accountability black hole, where no one actor takes the moral or legal blame for algorithmic harm.[116] In situations of post-conflict where governance and other systems are weak, such accountability gaps exist. Populations emerging from violence are often unable to identify who is responsible for continued surveillance, exclusion, or coercive decision-making driven by AI.[117]

6.2. Opacity, Explainability, and Human Dignity

Opacity is the main issue responsible for the ethical problems that arise after the deployment of AI in post-conflict situations. Most AI systems are black boxes that give results that are very hard or even impossible to explain in terms understandable by humans. Post-conflict societies, especially those whose members have suffered arbitrary detention, targeting, or displacement, are greatly affected by the further vulnerability of not being able to understand or challenge algorithmic decisions.[118] For instance, decisions about one's freedom of movement, access to services, or inclusion in security databases may become so puzzling that the person affected would essentially have no real power to act.[119]

Moreover, the ethical importance of the right to explanation goes far beyond just procedural fairness. It links strongly to the safeguarding of human dignity. People become mere 'data points' when their algorithmic categorization is done without their knowing the criteria or logic used, and thus, they are denied viewing themselves as rights holders.[120] Such dehumanisation is very marked in post-conflict situations since the populations there have already been seen as mere objects through the war's rationales. The persistent use of hidden AI will therefore continue to depersonalize these people who are the subjects of post-conflict recovery.[121]

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[116] Doris Schroeder and Julie Cook Lucas, "The Ethics of Digital Surveillance in Post-Conflict Societies", *Ethics and International Affairs*, Vol. 33, No. 2, 2019, pp. 223–225.

[117] Rebecca Hamilton, "Governing Data after Conflict", *Journal of International Humanitarian Legal Studies*, Vol. 12, No. 1, 2021, pp. 76–79.

[118] United Nations Peacekeeping Operations, *Technology and Innovation in Peacekeeping*, UN, New York, 2018, pp. 19–21.

[119] Paul Scharre, *Army of None: Autonomous Weapons and the Future of War*, W.W. Norton & Company, New York, 2018, pp. 362–365.

[120] Mark Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, Cambridge, 2007, pp. 102–104.

[121] Marko Milanovic, "The End of Application of International Humanitarian Law", *International Review of the Red Cross*, Vol. 96, No. 893, 2014, pp. 163–166.

Besides that, opacity also lessens the chance for ethical oversight. If there is no transparency, courts and oversight bodies are not going to be able to determine whether AI systems discriminate or cause harm. It is very hard to apply ethical principles like proportionality, necessity, and fairness if the decision-making processes are kept secret. Therefore, opacity is not only a technical limitation but also a moral failure that destroys accountability and dignity in post-conflict governance.[122]

6.3. Dehumanisation and the Algorithmic Framing of Post-Conflict Populations

Post-conflict AI systems often mirror narratives of threat and suspicion from wartime. Algorithms that have been trained on conflict-era data sets inherit assumptions derived from military intelligence practices, where entire communities were treated as potential threats.[123] By continuing their application during the post-conflict phase, these systems still carry out a threat-based characterisation of populations instead of one of vulnerability or rights.[124]

The ethical consequences resulting from this dehumanisation are quite profound. Post-conflict transitions mainly aim at restoring trust, bringing about inclusion, and reestablishing social cohesion. To use AI-driven governance that constantly arouses suspicion is really going against these goals because it basically mistrusts regularly.[125] People who have to live with the situation of being monitored all the time or checked by algorithms might start to think that they are under surveillance forever, which will not only discourage them from being active in the community but also segregate the society even more. In essence, ethically speaking, such results are very far from the moral intentions of post-conflict reconstruction.[126]

Also, dehumanisation is evident in the routinisation of harm, where algorithmic systems make big decisions with little human help, which means that

[122] United Nations Peacebuilding Support Office, *Technology and Sustaining Peace*, UN, New York, 2022, pp. 18–20.
[123] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge University Press, Cambridge, 2005, pp. 606–608.
[124] Gary Corn and Eric Talbot Jensen, "Transnational Armed Conflict and the Plight of Civilians", *Vanderbilt Journal of Transnational Law*, Vol. 47, 2014, pp. 1003–1006.
[125] Noelle Quénivet, *The Implementation of International Humanitarian Law*, Hart Publishing, Oxford, 2013, pp. 241–243.
[126] United Nations Development Programme, *Digital Public Infrastructure and Human Rights*, UNDP, New York, 2023, pp. 27–29.

there is hardly any room for human empathy or contextual judgment.[127] In post-conflict societies, the point of view of individuals is usually very complicated and heavily influenced by their past experiences. Hence, when human judgment is replaced by machine-automated decision-making processes, there is a very high chance of getting ethically deficient outcomes that do not take the lived experiences into consideration.[128]

6.4. Moral Injury and the Persistence of Surveillance after War

The post-conflict AI-enabled surveillance keeps on being deeply harmful to the victims of the war. The continuation of wartime surveillance for a long time after military conflicts tremendously adds to the violation of morally right conduct in war. The remainders of the war surveillance for long-suffering victims actually indicate that the war is not yet over.[129] Harming the victims, the physical stop of fighting is a mere pretence as the psychological state of being permanently observed, classified, and judged is put before the eyes of the victims. The constant observation situation is a strong blow to the victims' feeling of safety and peace, which are the immediate effects of the resumption of normal life.[130]

Morally, the perpetuation of surveillance is tantamount to denying the moral value of peace. Surveillance extent in war is only challenging in moral terms if it is a necessary evil. Post-conflict misuse of the surveillance technologies for purposes other than safety signals an unspoken probable continuation of the population's distrust and treatment as an enemy, thus, the continuation of the cycle of hatred. This violation of moral standards goes even further than the individual victims; it is the collective memory and social trust that get disturbed.[131]

The extent to which AI-assisted systems perpetuate suspicion is highly likely to result in the entrenchment of retaliatory cycles of exclusion. The tightly looped

[127] United Nations Office of the High Commissioner for Human Rights, *Human Rights Implications of the Use of New and Emerging Technologies in Military Contexts*, OHCHR, Geneva, 2020, pp. 9–11.
[128] Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights through International Law*, Oxford University Press, Oxford, 2013, pp. 89–91.

[129] Gabriella Blum, "The Individualization of War: From War to Policing in the Regulation of Armed Conflicts", *Georgetown Law Journal*, Vol. 107, 2019, pp. 1789–1792.
[130] Iain Scobbie, "Principle or Pragmatics? The Relationship between Human Rights Law and the Law of Armed Conflict", *Journal of Conflict and Security Law*, Vol. 14, No. 3, 2009, pp. 449–451.
[131] United Nations General Assembly, *Right to Privacy in the Digital Age*, UN Doc. A/RES/73/179, 17 December 2018.

self-reinforcing sequence of the continuously monitored communities[132] The state's response with detachment or confrontation, thereby further justifying the continuation of the monitoring, is the result. In terms of ethics, this state of things is diametrically opposite to the values of reconciliation and restorative justice, which form the basis of post-conflict peacebuilding.[133]

6.5. Ethical Responsibility Beyond the End of Hostilities

The ethical issues addressed here form part of a bigger normative argument that ethical responsibility should be continued even after the cessation of hostilities. It is agreed that while IHL and other related legal frameworks mainly focus on temporal aspects in setting limits on when moral responsibility arises or fades, morality is not so concerned with time. It is for this reason that the State, private actors, and artificial intelligence system designers need to have an attitude of moral responsibility throughout.[134] Such continuing ethical supports include familiarising oneself with the changing nature of conflict situations as influenced by the effects of AI, ensuring transparency and providing rationale for decisions, and prioritising conflict, with affected people being given their dignity and agency as the highest value.[135]

Accepting ethical responsibility after a conflict phase necessitates changing one's narrow concentration on lawfulness to a more thorough look at the notion of damage. AI deployment may be legally correct, but if in performing its function, it causes the perpetuation of dehumanisation, exclusion, or the infliction of psychological damage, it is also not acceptable on moral grounds. Hence, ethics intervene to provide support to the law in terms of clarifying which aspects of post-conflict harmful effects that the law is unable to identify by itself.[136]

In the end, dealing with the ethical and moral post-conflict dilemmas that arise due to AI use is crucial if we are to save peace from being ruined by war technology's legacy. The mere fact that if post-conflict governance relies on AI

[132] United Nations Peacebuilding Commission, *Harnessing Technology for Peacebuilding*, UN, New York, 2021, pp. 6–8.
[133] Laurie Blank and Gregory Noone, International Law and Armed Conflict: Fundamental Principles and Contemporary Challenges, Wolters Kluwer, New York, 2019, pp. 412–415.
[134] Jonathan Havercroft, "Beyond the Responsibility to Protect: Peacebuilding and Accountability", *Ethics & International Affairs*, Vol. 28, No. 4, 2014, pp. 415–417.
[135] Human Rights Council Advisory Committee, *New and Emerging Digital Technologies and Human Rights*, UN Doc. A/HRC/AC/28/2, 13 January 2022, paras. 21–24.
[136] UN Secretary-General, *Peacebuilding and Sustaining Peace*, UN Doc. A/72/707–S/2018/43, 18 January 2018, paras. 28–31.

systems that have been developed based on wartime logic, then the issue of transition holds no promise at all.[137]

7. Toward an Integrated Post-Conflict Regulatory Framework

The investigation to date has shown that AI not only magnifies the ill effects of war on people during hostilities but also long after the fighting has stopped. However, the current set of laws and regulations is still not up to the task of dealing with this situation.[138] The law of armed conflict internationally still relies on the categories and time-related assumptions of only physical warfare, whereas human rights law at the international level and regional mechanisms for governance present a patchy and sometimes weak protection in situations following conflicts.[139] This part outlines a reformist framework that aims to integrate legal, ethical, and institutional responses to post-conflict AI governance without proposing radical departures from established international law.[140]

7.1. Recognising Post-Conflict AI Governance as a Humanitarian Concern

One crucial first step involves a clear acknowledgment that post-conflict AI governance should be considered a humanitarian issue and not just a technical or security-related matter. Post-conflict AI systems may significantly impact the civilian population, influencing their rights, security, and availability of resources.[141] Thus, recognizing post-conflict AI deployment as a humanitarian issue would be in line with the goal of International Humanitarian Law, which, through its provisions, aims to alleviate the long-term suffering of civilians due to war. Such acknowledgment might serve as the normative basis for the application of the existing protective principles to AI governance in post-conflict environments.[142]

Furthermore, this change in viewpoint caters to the habit of states to interpret the issue of AI deployment solely from the perspective of their domestic security or

[137] Antoon De Baets, *Responsible History*, Berghahn Books, New York, 2009, pp. 194–196.
[138] Lisa Hajjar, "Lawfare and Armed Conflict", *Annual Review of Law and Social Science*, Vol. 13, 2017, pp. 529–531.
[139] David Kennedy, *Of War and Law*, Princeton University Press, Princeton, NJ, 2006, pp. 301–303.
[140] David Kretzmer, "Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?", *European Journal of International Law*, Vol. 16, No. 2, 2005, pp. 193–195.
[141] International Committee of the Red Cross, Avoiding Civilian Harm from the Use of Information and Communication Technologies in Armed Conflict, ICRC, Geneva, 2022, pp. 18–20.
[142] United Nations Office for Disarmament Affairs, *Lethal Autonomous Weapons Systems: A Primer*, UNODA, New York, 2020, pp. 6–8.

innovation. If we frame post-conflict AI governance within a humanitarian context, then the focal point will be on the protection, accountability, and dignity of civilians.[143] Such a change does not necessarily entail the establishment of completely new legal frameworks but rather the reinterpretation of the existing duties against the backdrop of the new technological circumstances.[144]

7.2. Extending IHL Interpretation to Technological Aftereffects

Although IHL was not meant to be a regulatory framework for artificial intelligence, its interpretive flexibility makes it possible to apply the core humanitarian principles to new situations. Such basic principles as humanity, necessity, proportionality, and precaution may be reinterpreted to deal with the technological consequences of war.[145] That is not to say that IHL's material scope is being extended to such an extent that it no longer recognises its main categories of regulation. On the contrary, it is now understood that the consequences of war include a myriad of algorithmic systems that perpetually influence the lives of civilians.[146]

Interpreting international humanitarian law in this manner would represent a significant step toward addressing the realities of contemporary conflict. The concept of harm should no longer be limited to visible physical injury or destruction alone, but it must also encompass the less visible but deeply consequential harms produced by AI-driven systems, including long-term surveillance, algorithmic exclusion, automated decision-making, and persistent data-based profiling. In modern conflict and post-conflict settings, these forms of technological harm can profoundly affect individual dignity, privacy, autonomy, and access to rights, even in the absence of direct physical violence[147]. With such an interpretive method, IHL would be able to readily deal with the employment of AI after a conflict without upsetting its internal logic or doing more than its original mission.[148] In fact, it is quite a simple matter that the extension be kept very closely to the existing treaty

[143] United Nations Economic and Social Commission for Asia and the Pacific, *Technology, Security and Human Rights in Asia and the Pacific*, UNESCAP, Bangkok, 2021, pp. 41–43.
[144] Eyal Benvenisti, *The International Law of Occupation*, 2nd ed., Oxford University Press, Oxford, 2012, pp. 303–305.
[145] Christian Schaller, "Private Security Companies and New Technologies in Post-Conflict Environments", *Journal of Conflict and Security Law*, Vol. 24, No. 2, 2019, pp. 213–215.
[146] International Committee of the Red Cross, *Professional Standards for Protection Work*, ICRC, Geneva, 2018, pp. 55–57.
[147] United Nations Secretary-General, *Counter-Terrorism and the Rule of Law*, UN Doc. A/70/371, 18 September 2015, paras. 22–24.
[148] Mark Duffield, *Global Governance and the New Wars*, Zed Books, London, 2001, pp. 155–157.

obligations and recognized customary principles, leaving aside the creation of strange or impractical standards.[149]

7.3. Strengthening Integration between IHL and International Human Rights Law

A more coherent post-conflict regulatory framework would require a greater level of integration between IHL and international human rights law. Instead of considering these legal systems as consecutive or hierarchically separate, post-conflict governance calls for a complementary approach that maximizes the strengths of both legal systems.[150] IHL conveys a humanitarian perspective based on the harshness of conflict, whereas IHRL provides substantive rights and procedural safeguards that are pertinent to AI-driven governance.[151]

Enhanced integration might provide clearer guidance on the simultaneous application of IHL and IHRL in post-conflict situations, especially regarding surveillance, data governance, and algorithmic decision-making. Furthermore, such clarity will lessen the controversy around issues of jurisdiction, derogation, and enforcement and ensure stronger protections for those impacted by post-conflict AI systems. Integration at this level does not necessarily require undergoing a treaty-making process; explanatory guidance and judicial practice can be quite efficacious in the unification of these regimes.[152]

7.4. Developing Context-Sensitive Regional Standards

Given the wide range of post-conflict situations, regional approaches are essential in reconciling global standards with local practices. In the context of the Asia-Pacific region, tailor-made standards could effectively reflect the diverse security cultures, governance models, and post-conflict characteristics that determine AI usage.[153] Although it might be politically challenging to have legally binding regional treaties,

[149] Thomas Burri, "The Politics of Robotic Warfare", *German Law Journal*, Vol. 19, No. 1, 2018, pp. 1–3.
[150] United Nations Research Institute for Social Development, *Digital Governance and Post-Conflict Inequality*, UNRISD, Geneva, 2021, pp. 19–21.
[151] United Nations Research Institute for Social Development, *Digital Technologies and Social Justice*, UNRISD, Geneva, 2020, pp. 14–16.
[152] Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006, pp. 271–273.
[153] Sarah E. Kreps and John R. Lindsay, "Where the Laws of War Come from", *Journal of Global Security Studies*, Vol. 3, No. 3, 2018, pp. 345–347.

creating regional guidelines or making principles a focus of post-conflict AI governance could help with the alignment of different norms.[154]

These standards should mainly focus on human rights while still taking regional governance models into account. Concentrating on such features as transparency, proportionality, and oversight may offer a common platform without compromising state sovereignty.[155] Regional dialogue and peer review mechanisms could also improve accountability by motivating states to consider the long-term humanitarian consequences of deploying AI in post-conflict settings.[156]

7.5. Humanitarian Oversight of AI in Post-Conflict Reconstruction

Finally, integrating humanitarian oversight into the use of AI in post-conflict situations should be considered without question. Efforts aimed at reconstruction and peacebuilding are getting more and more dependent on AI-based solutions for such things as planning, allocating resources, and delivering services.[157] Although these technologies bring about efficiency improvements, they also pose risks of exclusion and bias. Embedding humanitarian oversight features, such as independent review committees, impact evaluations, and public hearings, can provide a shared engagement framework and mitigate the risks of AI deployment advancing post-conflict goals of inclusion and trust.[158]

Humanitarian oversight is a misconception if it is viewed as an impediment to innovation; rather, it is a protection against the repetition of wartime atrocities. If AI systems' design and deployment are fused with ethical and humanitarian issues, post-conflict societies will be able to strike a better balance between technological progress and respect for human dignity.[159] This reformist attitude realizes the shortcomings of the present system and, at the same time, proposes practical

[154] Frederic Megret and Florian Hoffman, "The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities", *Human Rights Quarterly*, Vol. 25, No. 2, 2003, pp. 314–316.
[155] International Committee of the Red Cross, *Position on Autonomous Weapon Systems*, ICRC, Geneva, 2023, pp. 1–3.
[156] United Nations General Assembly, Impact of Rapid Technological Change on the Achievement of the Sustainable Development Goals, UN Doc. A/75/161, 21 July 2020, paras. 44–47.
[157] Neil Richards, *Why Privacy Matters*, Oxford University Press, Oxford, 2021, pp. 146–148.
[158] United Nations Economic and Social Commission for Asia and the Pacific, *Digital Transformation for Inclusive Development in Asia and the Pacific*, UNESCAP, Bangkok, 2022, pp. 33–35.
[159] Jeremy Waldron, *Dignity, Rank, and Rights*, Oxford University Press, Oxford, 2012, pp. 210–212.

solutions for augmenting protection in a post-conflict setting that is becoming more and more algorithmic.[160]

Conclusion

The paper has highlighted that AI significantly alters the experience of and the way the end of an armed conflict is governed. On top of that, IHL shores up the reality that wars have impacts that last beyond the cessation of hostilities; however, it has not caught up with technologies whose impacts are continuous, systemic, and integrated into post-conflict governance. AI technology, no matter whether it comes from autonomous weapons, intelligence infrastructure, or data-driven security practices, carries the logic of war into the post-conflict period, thus challenging the idea that peace is a clear legal and moral break from war.

This article reveals that international, regional, and national pieces of law are broken and inconsistent in protecting against harms caused by AI after a conflict. Humanitarian law is still very much focused on physical violence, and it does not offer much in the way of guidance on issues such as data retention, algorithmic decision-making, or long-term civilian surveillance. On the other hand, international human rights law provides relevant norms, albeit it is weakened in post-conflict situations due to different factors such as doubt over jurisdiction, emergency governance, and limited access to effective remedies. Furthermore, in the Asia-Pacific region, the focus on security-first regional approaches and non-binding standards only serves to further deepen the regulatory gaps.

At the domestic level, AI tools used in wartime are often reappropriated for use in peacetime controls under security laws and emergency powers, generally without being adjusted to post-conflict situations. In these cases, practices that do not serve reconciliation can lead to the marginalisation of conflict-affected populations and the continuation of wartime logics of surveillance and suspicion. Ethical analysis shows that the responsibility is not limited to the end of the war; accountability gaps, algorithmic opacity, and the continuation of surveillance cause moral injuries and weaken the trust of society.

The article suggests a reformist way out, which is based on recognising post-conflict AI governance as a humanitarian issue, reinforcing the IHL-IHRL

[160] Jelena Aparac, "Humanitarian Principles and New Technologies", *International Review of the Red Cross*, Vol. 102, No. 913, 2020, pp. 1017–1019.

relationship, creating context-sensitive regional standards, and including humanitarian supervision in reconstruction. If we do not face the technological aftermath of war, peace may remain only something that has been declared but will actually be fragile, as it will be influenced by the invisible technological continuities that make the difference between war and peace unclear.

On the Digitization of Distinctive Emblems in International Humanitarian Law

Lei Zhang[*]
Hui Chen[*]

ABSTRACT

Currently, medical institutions and humanitarian organizations (MIHO) face severe digital threats in both peacetime and armed conflicts. To strengthen the identification and protection of MIHO's digital assets, data, and services, the ICRC is actively promoting the digitization of distinctive emblems (i.e., "digital emblems"). Compared to traditional distinctive emblems, "digital emblems" have unique advantages in medium, operability, scalability, time, and geographical constraints. At the practical level, "digital emblems" also bring certain transformative and uncertain factors. In terms of the formulation of rules related to "digital emblems", emphasis should be placed on shaping the legal protection of MIHO in peacetime and clarifying the international responsibilities of cyber militias and civilian hackers during armed conflicts.

Keywords: Digital Emblem, Distinctive Emblem, International Humanitarian Law, International Law in Cyberspace, Digital Transformation

I. Introduction

In recent years, especially during the COVID-19 pandemic, medical institutions and humanitarian organizations (MIHO) have been subjected to frequent cyberattacks, and the proper performance of their functions has been severely challenged.[1] In January 2022, the database of the International Committee of the Red Cross (ICRC)

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[1] Ying He and Aliyu Aliyu et al., "Health Care Cybersecurity Challenges and Solutions Under the Climate of COVID-19: Scoping Review", *Journal of Medical Internet Research*, Vol. 23, No. 4, 2021, p. 1.

was hacked by an unknown source, stealing 515,000 pieces of personal information from at least 60 Red Cross and Red Crescent societies worldwide.[2] The incident accelerated the development and validation of the ICRC's "digital emblem" project to mitigate digital threats to MIHO from subsequent data theft, supply chain attacks and ransomware attacks.[3] In November 2022, the ICRC published the report Digitalizing the Red Cross, Red Crescent and Red Crystal Emblems: Benefits, Risks and Possible Resolutions (hereinafter referred to as "Digital Emblem" Report), which presents technical and legal options for the creation of "digital emblems" for the Red Cross, Red Crescent and Red Crystal.[4] The 34th International Conference of the Red Cross and Red Crescent in October 2024 adopted the resolution on "Protecting Civilians and other Protected Persons and Objects against the Potential Human Cost of ICT Activities during Armed Conflict", and a preliminary international consensus was reached on the creation of "digital emblems", thus laying the foundation for the subsequent promotion of the relevant legal procedures.[5]

The "digital emblem" is an extension and digital representation of the Red Cross, Red Crescent, and Red Crystal emblems in cyberspace, aimed at providing identification and legal protection for MIHO's digital assets, data, and services during armed conflicts and peacetime. After MIHO uses the "digital emblem", enemy cyber forces or malicious cyber actors can clearly identify MIHO's digital assets, data, and services, thereby avoiding accidental damage and effectively alleviating the practical difficulties faced by MIHO. At the same time, the "digital emblem" is a major initiative of the Red Cross Movement to address new problems and challenges of the digital era and to respond effectively to the theoretical needs of IHL that are in urgent need of digital transformation to promote the clarification and development of IHL in cyberspace.

At present, most of the existing studies focus on the risks and challenges of "digital emblems" and the feasibility of technical and legal solutions, etc.[6] However,

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[2] ICRC, Cyber Attack on ICRC: What We Know, 16 February 2022, available at: https://www.icrc.org/en/document/cyber-attack-icrc-what-we-know.

[3] ICRC, Digitalizing the Red Cross, Red Crescent and Red Crystal Emblems: Benefits, Risks and Possible Resolutions, 3 November 2022, available at: https://www.icrc.org/sites/default/files/topic/file_plus_list/icrc_digitalizing_the_rcrc_emblem_1.pdf.

[4] Ibid.

[5] ICRC, Protecting Civilians and other Protected Persons and Objects against the Potential Human Cost of ICT Activities during Armed Conflict, 28 October 2024, available at: https://rcrcconference.org/app/uploads/2024/09/34IC_9.2-Background-Doc-ICT-EN.pdf.

[6] For example, Tilman Rodenhäuser et al. pointed out the risks of "digital emblems" being vulnerable to misuse, of tagged entities being vulnerable to large-scale and rapid attacks, and of not providing

some scholars have prospectively explored how "digital emblems" can be applied to autonomous weapons.[7] There is still a lack of in-depth discussion about the potential practical changes that could be brought about by the "digital emblem" and how IHL could be refined and developed. To address this research gap in the field of international law, this paper aims to conduct an in-depth study from two perspectives: the transformative and uncertain nature of the "digital emblem" in practice and ways to improve international rules relating to it. This article seeks to provide doctrinal support for the process of establishing the "digital emblem".

II. Legal Basis and Legal Elements of the "Digital Emblem"

No international legal instrument on "digital emblems" has been adopted, and its legal basis is mainly derived from the existing rules on distinctive emblems in the Geneva Conventions and their Additional Protocols.[8] The legal assumptions expressed by the ICRC in its "Digital Emblem" Report, together with reference to the relevant rules on distinctive emblems, will help clarify the legal elements of the "digital emblem".

2.1 Legal Basis of the "Digital Emblem"

Chapter VII of the First Geneva Convention, Chapter VI of the Second Geneva Convention, Articles 18 to 22 of the Fourth Geneva Convention, Chapter II of Annex I to the First Additional Protocol and Article 12 of the Second Additional Protocol are the main legal bases for the deployment and application of distinctive emblems of IHL. The UN Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International

substantial cybersecurity. Tilman Rodenhäuser and Mauro Vignati, "How Can a 'Digital Emblem' Help Protect Medical Facilities Against Cyber Operations?" *Lawfare*, 2023, available at: https://www.lawfaremedia.org/article/how-can-a-digital-emblem-help-protect-medical-facilities-against-cyber-operations. Felix Linker et al. proposed a technical solution based on the Authentic Digital EMblem (ADEM), emphasizing its attributes of authentication, accountability and covert verification. Felix Linker and David Basin, "ADEM: An Authentic Digital Emblem", *CCS'23: Proceedings of the 2023 ACM SIGSAC Conference on Computer and Communications Security*, 2023, pp. 2815-2829, available at: https://dl.acm.org/doi/10.1145/3576915.3616578.

[7] Daniel C. Hinck et al. show that fully autonomous weapons may not be able to detect protective emblems due to long firing ranges, and point out that there are some advantages to "cross-frequency protective emblems". Daniel C. Hinck and Jonas J. Schottler et al, "A Next-generation Protective Emblem: Cross-frequency Protective Options for Non-combatants in the Context of (Fully) Autonomous Warfare", *International Review of the Red Cross*, Vol. 106, No. 926, 2023, pp. 1–29.

[8] As a digital extension of distinctive emblems in physical space, "digital emblems" can reasonably be expected to largely follow the established rules on distinctive emblems in IHL, but also to make some innovations in the rules in light of their unique attributes.

Security (UN GGE) and the UN Open-ended Working Group on Security of and in the Use of Information and Communications Technologies (OEWG) have reached a basic consensus on the applicability of IHL to cyberspace,[9] which is a natural extension of the physical world, and the rules related to distinctive emblems should be applied to cyberspace by analogy.[10] However, due to the virtual and interconnected nature of cyberspace, there is an urgent need for a legal response on how distinctive emblems can be visualized in the virtual world, how existing rules can deal with the frequent remote attacks and attacks by non-State actors in cyberspace, and how to address the difficulty of traceability and attribution.

To ensure a legal basis for the protective role of "digital emblems", existing international legal instruments should be amended, or new international treaties should be developed. In its "Digital Emblem" Report, the ICRC mentions three legal options: the development of a new Additional Protocol to the Geneva Conventions, the amendment of Annex I to Additional Protocol I, and the conclusion of a special agreement (ad hoc agreement) on "digital emblems".[11] Ad hoc agreements are not currently considered as a priority option, as they may be divorced from the existing IHL framework or simply duplicate existing international rules and may contribute to the fragmentation of international law.

A new protocol or an amendment to Annex I is the mainstream option currently being discussed by the international community. Amending Annex I would require the ICRC to initiate a meeting of technical experts and propose amendments, which would then be considered for adoption by the Conference of the High Contracting Parties.[12] This option is quick and flexible, but its successful adoption and entry into force requires two rounds of large-scale consent by the Parties, which makes it more difficult to amend. The development of a new protocol, which consists of three steps (signature, incorporation into the Statutes and entry into force), requires more political will and diplomatic preparations before signature and is more difficult to initiate, but it is more in line with the ICRC's habit of creating new

[9] UNGA, Report of the Group of Governmental Experts on Advancing Responsible State Behavior in Cyberspace in the Context of International Security, A/76/135, 14 July 2021, available at: https://dig.watch/wp-content/uploads/2022/08/UN-GGE-Report-2021.pdf.
[10] Major Thomas R. Burks, "Cyberspace, Electronic Warfare, and a Better *Jus Ad Bellum* Analogy", *Air Force Law Review*, Vol. 82, No. 1, 2022, p. 1.
[11] ICRC, above note 3, p. 26.
[12] AP I, Art. 98.

content.[13] At the same time, a new protocol would be more formal than an amendment to Annex I, with greater visibility and diffusion of the text, which would be more conducive to the creation and practice of "digital emblems".

2.2 Legal Elements of the "Digital Emblem"

2.2.1 Functions and Scope of Application of the "Digital Emblem"

The "digital emblem" inherits the indicative and protective functions of the traditional distinctive emblems, but it also has its own peculiarities.[14] The first one is on the function for identification. The use of "digital emblems" implies that the cyber entity is one that is respected and protected from cyberattacks. The "digital emblem" facilitates the clear and intuitive discovery of the digital assets, data and services of the protected entity. In times of armed conflict, the "digital emblem" facilitates the identification of the digital assets, data and services of armed forces medical institutions, civilian medical institutions, and humanitarian organizations, preventing them from being the target of cyberattacks. In peacetime, the use of the "digital emblem" by armed forces medical services is a precautionary measure to indicate that they are in a position to provide medical care in the event of the outbreak of an armed conflict.[15] The use of the "digital emblem" by humanitarian organizations, such as members of the Red Cross Movement, demonstrates their neutrality, independence and impartiality in international humanitarian relief operations and identities. This type of use is also known as "indicative use".[16]

The difference between the identification function of "digital emblems" and that of traditional distinctive emblems is mainly reflected in four aspects. First, there is a difference between virtual and real carriers. The "digital emblems" identify virtual assets such as websites, databases, digital services, etc., while the traditional distinctive emblems identify physical assets such as hospital or clinic buildings, vehicles and medical equipment. However, "digital emblems" need to be visualized in the form of images on websites, databases and other carriers, which is also the

[13] In December 2005, the States Parties to the Geneva Conventions adopted the AP III, which established the "Red Crystal" emblem. In the following year, the International Conference of the Red Cross and Red Crescent incorporated the new emblem into the provisions of the Statutes. The Additional Protocol entered into force in January 2007.

[14] Anita Nwotite, "The Last Question: Do the Distinctive Emblems of the Geneva Conventions 1949, Really Protect?", *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 1, Vol. 13, No. 1, 2022, p. 2.

[15] ICRC, above note 3, p. 13.

[16] ICRC, above note 3, p. 13.

unity of the two in the dialectic. Second, the operability of using and withdrawing the emblems is different. The use and withdrawal of "digital emblems" not only require authorization from the competent military authorities but also require technical management authority, which makes it difficult to operate and, to a certain extent, prevents abuse by malicious actors. The use and withdrawal of traditional distinctive emblems, while also requiring authorization by the competent military authority, do not have a technical threshold in practice, are less difficult to operate, and are susceptible to abuse. Third, there is the issue of time and geographical limitations of recognizability. Once a protected entity has marked a "digital emblem", states or regions around the world with Internet access can identify and verify the "digital emblem" through digital channels at any time and in any place, whereas the identification of traditional distinctive emblems is usually limited to a specific time and place. This nature is rooted in the interconnectivity of the network, its trans-geographical nature, and the rapid mobility of data.[17] Fourth, there is a difference in the scalability of the identification function. The "digital emblem" has strong scalability, and the protected entity's first-level or second-level domain names, portals, etc., can usually be extended to the next level of domain names and websites after marking the "digital emblem", with the characteristics of "one to everything".[18] While traditional distinctive emblems do not have scalability, buildings, vehicles, equipment, etc., need to request authorization and mark distinctive emblems individually, which is a cumbersome procedure.

Second is the function of legal protection. In times of armed conflict, entities using "digital emblems" are explicitly protected by IHL, and violations of the relevant rules will be subject to accountability under international and domestic law.[19] Deliberate direct attacks on buildings, materials, medical units, means of transportation, and personnel using distinctive emblems of the Geneva Conventions in conformity with international law may constitute war crimes.[20] However, protected entities are not obliged to use "digital emblems", as such protection derives from IHL and does not depend on the use of "digital emblems".[21] In other words,

[17] Hakan Kayan and Matthew Nunes et al., "Cybersecurity of Industrial Cyber-Physical Systems: A Review", *ACM Computing Surveys,* Vol. 54, No. 11, 2022, p. 21.
[18] Shuai Hao and Haining Wang, "Exploring Domain Name Based Features on the Effectiveness of DNS Caching", *ACM SIGCOMM Computer Communication Review*, Vol. 47, No. 1, 2017, p. 37.
[19] For example, IHL prohibits acts such as improper use, perfidious use of distinctive emblems, etc. Art. 23, para.6 of the Hague Regulations, Art. 44 and 53 of the GC I, Art. 44 of the GC II, Art. 37, para.1 of AP I, Art. 12 of AP II, and Art. 2, para.3 of AP III.
[20] Art. 8(2)(xxiv) and 8(2)(vii) of the Rome Statute of the International Criminal Court.
[21] ICRC, above note 3, p. 13.

even if the protected entity does not display or withdraw the "digital emblems", it is still protected under IHL. This type of use is also known as "protective use".[22]

The scope of application of the identification function of the "digital emblem" covers both times of armed conflict and times of peace, while the scope of application of its legal protection function is limited to times of armed conflict. The functionalist division of the scope of application stems from the fact that IHL, as a lex specialis limited to times of armed conflict, can only legally regulate a specific period of time, specific objects, and specific behaviors.[23] In peacetime, there remains a lack of binding, specialized, and universally applicable international rules providing legal protection for MIHO. However, in peacetime, when cyberattacks occur more often than in times of armed conflict, the damage suffered by MIHO as a result of cyber activities can no longer be ignored. There is an urgent need to provide clear legal support for the respect and protection of MIHO in peacetime.[24]

2.2.2 Applicable Objects of the "Digital Emblem"

The "digital emblem" applies primarily to the digital assets, data and services of MIHO.[25] In times of armed conflict, digital assets, data and services of MIHO authorized by the competent military authorities may use the "digital emblem" and enjoy the legal protection provided by IHL. Beyond this, an increasing number of countries are advancing the digitization of historical sites and establishing "digital museums" to prevent these landmarks from being utterly destroyed by weather erosion, war damage, and other factors.[26] This effort holds profound significance for

[22] ICRC, above note 3, p. 13.

[23] Marko Milanovic, "The Lost Origins of Lex Specialis: Rethinking the Relationship between Human Rights and International Humanitarian Law", *Theoretical Boundaries of Armed Conflict and Human Rights*, in Jens David Ohlin (eds.), Cambridge University Press, 2014, pp. 1–10.

[24] Some scholars contend that the United Nations Charter, IHL, and ICL exhibit significant shortcomings in regulating military preparations during peacetime, particularly concerning military preparations involving disruptive emerging technologies such as cyber warfare and artificial intelligence. Consequently, a *Jus Ante Bellum* is required to provide a proactive legal framework for addressing the risks posed by the rapid advancement of such technologies. Asaf Lubin, "Technology and the Law of *Jus Ante Bellum*", *Chicago Journal of International Law*, Vol. 26, No. 1, 2025, p. 1.

[25] The digital assets, services, and data of protected entities can be specifically classified into four categories. The first category comprises digital assets, including servers, computers, smartphones, IoT devices, and so forth. The second category encompasses digital services, such as FTP servers for storing files and VPNs, as well as technical services for remotely managing electronic devices. The third category includes data stored in IT devices, servers, and clouds. The fourth category concerns communications and data transfers between protected devices and servers.

[26] Guohua Geng and Jian Gao et al., "Review of Research on Digital Protection and Application of Cultural Heritage", *Journal of Northwest University (Natural Science Edition)*, Vol. 55, No. 1, 2025, pp. 1–10.

human civilization. Consequently, the digital assets, data, and services associated with religious and historical sites should also be protected by law to shield them from the ravages of war.[27] However, such digital cultural heritage should bear the "blue shield" emblem rather than the red cross, red crescent, or red crystal emblems. Article 16 of the 1954 Hague Convention[28] stipulates that cultural property may be marked with the "blue shield" emblem to facilitate its protection, identification, and reduction of unnecessary risks of destruction. Crucially, the use of the "blue shield" emblem must comply with the form, function, and placement requirements stipulated in the 1954 Hague Convention and its two Additional Protocols.[29] From this perspective, the International Committee of the Blue Shield (ICBS) should also explore the possibility of developing a digital version of the "blue shield" emblem and of integrating it into the international legal framework.

While the use of distinctive emblems in IHL is mainly concentrated in times of armed conflict, MIHO still enjoys the right to use distinctive emblems in peacetime as an exceptional measure. Such use is subject to two limitations: that it is permitted by national law and that it is authorized by the Red Cross at the highest level in the country (or by a similar body under IHL). [30] In peacetime, humanitarian organizations (members of the Red Cross Movement) use the "digital emblem" to indicate their international humanitarian relief purposes and identity. [31] Medical institutions use the "digital emblem" before the outbreak of an armed conflict as a preparatory step to protect themselves from the effects of an armed conflict and to indicate that they are able to undertake rescue missions immediately.[32] In peacetime, the use of "digital emblems" by medical institutions also helps patients quickly locate the digital facilities and services. For example, it enables patients to locate the official website of the hospital among a large number of webpages and register for appointments. However, such identification functions are for the sole purpose of identifying the entity concerned and do not provide legal protection. Against the backdrop of increasingly frequent and severe peacetime cyberattacks on medical

[27] Presently, an increasing number of States are advocating for the digitization of historical sites and the construction of digital museums to prevent the complete destruction of historical sites due to natural disasters and the devastation caused by war. This is of paramount importance for the advancement of human civilization. The protection of places of cultural and religious significance is enshrined in Art.16 of AP II to the Geneva Conventions.

[28] Convention for the Protection of Cultural Property in the Event of Armed Conflict.

[29] Mokhamad Gisa Vitrana and Anna Anindita Nur Pustika, "The Existence of the Blue Shield Emblem on Cultural Heritage Property in Armed Conflict", *Dialogia Iuridica*, Vol. 15, No. 1, 2023, p. 6.

[30] GC I, Art. 44.

[31] ICRC, above note 3, p. 15.

[32] ICRC, above note 3, p. 15.

institutions, it is fully justified and necessary to provide MIHO with specific and clear legal protection.[33]

2.2.3 Autonomy in the Granting and Supervision of the "Digital Emblem"

The regulations pertaining to the distinctive emblems of the Geneva Conventions and the Additional Protocols thereto stipulate that the utilization of such emblems is contingent upon the direction, consent, or constraint of the competent military authority.[34] This serves to elucidate the autonomy of the military authorities in the granting and supervision of distinctive emblems. Furthermore, ICRC has reiterated in the "Digital Emblem" Report that civilian medical units and transports must be authorized by a competent authority (the State or, in times of armed conflict, possibly an "armed group").[35]

Military authorities must be guaranteed autonomy in the granting and supervision of "digital emblems", as this is a fundamental prerequisite for respecting cyber sovereignty. Cyber sovereignty represents the logical extension of state sovereignty in the digital domain.[36] It entails the internal supremacy and external independence of a State based on state sovereignty over network facilities, network subjects, network behaviors, and related network data and information within its own territory.[37] Competent military authorities thus enjoy legitimate autonomy over the establishment of their "digital emblem" infrastructure, the use and revocation of "digital emblems", and the granting and supervision of such emblems.[38] Developed countries and cyber powers should fully adhere to the Principles of Sovereignty and Non-interference, and should not interfere in the internal affairs of developing countries for any reason or through any means, such as acquiring and coordinating digital infrastructure resources, providing technical assistance, economic assistance, or coercion.[39] When providing cyber capacity building assistance (such as assistance in building "digital emblem" infrastructures) to some developing countries or least

[33] Priya Urs, "Cross-Border Cyber Operations: Targeting Medical as Unlawful Intervention in the Affairs of States", *Vanderbilt Journal of Transnational Law*, Vol. 57, No. 1, 2024, p. 1175.
[34] Chapter VII of GC I, Chapter VI of GC II, Chapter II of Annex I to AP I, and Art.12 of AP II.
[35] ICRC, above note 3, p. 13.
[36] Xu Wenhong, "Challenges to Cyber Sovereignty and Response Measures", *Mirovaya Ekonomika I Mezhdunarodnye Otnosheniya*, Vol. 64, No. 2, 2020, pp. 89–99.
[37] Cyber Sovereignty: Theory and Practice (Version 4.0), World Internet Conference, 2023, available at: https://cn.wicinternet.org/2023-11/09/content_36955448.htm.
[38] It can be reasonably inferred that the deployment and use of "digital emblems" will adhere to the existing rules for the deployment and use of distinctive emblems under IHL.
[39] Marko Milanovic, "Revisiting Coercion as an Element of Prohibited Intervention in International Law", *American Journal of International Law*, Vol. 117, No. 4, 2023, p. 604.

developed countries, the Principles of Fairness and Non-discrimination should be followed.[40] It should be noted that, according to the functional positioning of the ICRC, it is more likely to play a mediating and coordinating role in the development and operation of the "digital emblem", but it does not have the right to manage the "digital emblem", and it does not involve a situation in which a country cedes sovereignty to an international organization.[41]

III. The Transformative and Uncertain Nature of "Digital Emblem" in Practice

International law in the digital era has become more uncertain in terms of value orientation, normative system, attribution of behavior, identification of responsible subjects, etc., and the evolution of specific rules has accelerated.[42] How to deal with the risks and challenges in the digital transformation of international law has become a proposition of the times. As an exploratory attempt at how IHL can be applied to cyberspace, the creation and implementation of "digital emblems" have naturally given rise to some practical changes and uncertainties that are different from their physical counterparts. Specifically, these practical changes are reflected in the plurality of actors of "digital emblems", the perpetrator bias in identifying and attributing them, and the complexity of determining international responsibility.

3.1 Plurality of Actors of the "Digital Emblem"

International law is a set of principles, rules, and institutions that regulate relations between states. For a long time, the thesis that "the State is the subject of international law" prevailed.[43] Its proponents were convinced that the state was the end of the evolution of social systems. If international law existed, it could only be applied between states.[44] With the organization of international society and the complexity of international relations, international organizations, individuals, and

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[40] Francesca Bosco and Elise Vermeersch et al., "Non-discrimination and Protection of Fundamental Rights in Cybercrime and Cyberterrorism Research", *Combatting Cybercrime and Cyberterrorism*, in Babak Akhgar and Ben Brewster (eds.), Springer Press, 2016, pp. 97–115.

[41] If an international organization holds the right to administer "digital emblems" and is responsible for allocating, granting and withdrawing them, the internal supremacy and external independence of sovereign States may be undermined.

[42] 黄志雄，促进数字时代国际法的"良法善治"，中国社会科学报，2023 年 10 月 17 日 05 版(Zhixiong Huang, "Promoting Good Law and Good Governance in International Law in the Digital Era", *Chinese Journal of Social Sciences*, 17 October 2023, version 5, only available in Chinese).

[43] 王铁崖，国际法，北京：法律出版社，2005：105(Tieya Wang, *International Law*, Law Press, Beijing, 2005, p. 105).

[44] Astrid Kjeldgaard - Pedersen, "The International Legal Personality of the Individual", Oxford University Press, 2018, p. 17.

other non-State actors are gradually participating in the international legal order, providing a realistic basis for the openness of the subject of international law.[45] As far as IHL is concerned, it contains a set of international rules for the protection of wounded soldiers and civilians in times of armed conflict and for the restriction of the ways and means of combat, and the subject of its application is the State or armed groups. Thus, distinctive emblems in the physical domain are used to protect wounded soldiers, civilians, MIHO from military damage by states or armed groups. This reflects the functional state-centrism of distinctive emblems.

However, as the actors in cyberspace tend to diversify, the creation of "digital emblems" will inevitably accelerate the transformation of IHL from state-centrism to pluralism. With the rapid development of the internet, non-state actors, such as hackers, have increasingly gained influence by using information and communication technologies (ICTs) as tools.[46] In times of armed conflict, cyber militia[47] and civilian hackers[48] are deeply involved in cyber warfare between states. Such entities may find it difficult to comply with the rules on "digital emblems" to help their home countries or sympathetic countries win.[49] However, there are currently no clear, specific rules governing such entities, which can only be regulated

[45] 王立君，国际法基本范畴的再认识——基于系统论的反思，江西社会科学，2023，43(11) (Lijun Wang, "Re-conceptualization of the Basic Categories of International Law - A Reflection Based on Systematics", *Jiangxi Social Science*, Vol. 43, No. 11, 2023).

[46] Ashley Broin, "Cyber Mercenaries: The State, Hackers, and Power", *Journal of Information Technology & Politics*, Vol. 15, No. 4, 2018, pp. 400–401.

[47] A cyber militia can be defined as a group of volunteers engaged in defense-related activities in cyberspace on behalf of a State. These individuals are officially recognized by the States in question and receive a degree of coordination or guidance from the State, yet they remain distinct from the State's regular armed forces or national security structures. Jerker B. Svantesson, "Regulating a 'Cyber Militia' - Some Lessons from Ukraine, and Thoughts about the Future", *Scandinavian Journal of Military Studies*, Vol. 6, No. 7, 2023, p. 86.

[48] "Civilian hackers" include hacktivists, cybersecurity professionals, white-hat hackers, black-hat hackers, and patriotic hackers who help their home country or other countries to conduct a range of cyber operations against enemy countries. White-hat hackers are programmers who stand in for hackers attacking their own systems for security vulnerability troubleshooting. Black-hat hackers are often referred to as "hackers" who utilize their own skills to steal other people's resources or crack paid software on the network to make a profit. A patriotic hacker is a hacker who defends the interests of his country and does not use network technology to invade his country's computers but rather defends justice and fights for his country's honor. Tilman Rodenhäuser and Mauro Vignati, "8 Rules for 'Civilian Hackers' during War, and 4 Obligations for States to Restraint Them", *Humanitarian Law & Policy*, 2023, available at: https://blogs.icrc.org/law-and-policy/2023/10/04/8-rules-civilian-hackers-war-4-obligations-states-restrain-them/.

[49] Tilman Rodenhäuser, "Civilian Hackers in War: The Limits that International Humanitarian Law Imposes on Volunteer IT Armies, Hacktivists, and other Civilian Hackers", *International Review of the Red Cross*, Vol. 107, No. 935, 2025, pp. 1270–1272.

through general rules such as cybercrime conventions.[50] It remains to be seen whether the use of "digital emblems" can mitigate non-State-sponsored hacking attacks against MIHO in peacetime, where hackers frequently steal the private data of protected entities and launch ransom attacks. As such, given the large number and scale of non-State actors in cyberspace, their low willingness to comply with international law, and their much higher risk than that of sovereign states, "digital emblems" will be used primarily to protect the digital assets, data and services of MIHO from damage caused by a multiplicity of non-State actors.

3.2 Perpetrator Bias in the Identification and Attribution of the "Digital Emblem"

The distinctive emblems were created to protect the wounded and sick, the personnel, facilities, and means of transport of MIHO in times of armed conflict, and are essentially focused on protecting the rights and interests of victims.[51] However, owing to the characteristics of cyberspace, such as its virtual nature, interconnectedness and the multiplicity of actors,[52] "digital emblems" may in practice run counter to the original intent and appear to be biased in favor of the interests of the perpetrators, especially in terms of identification and attribution.

First, the core component of the "digital emblem" is the authentication mechanism, which is designed to facilitate potential cyber-attackers in verifying the true identity of the protected entity. In short, there is a state of "darkness" between the defender and the attacker.[53] "Digital emblems" are mainly used by attackers to verify the authenticity of the legal identity of a protected entity and are used more frequently by potential attackers; defenders do not know who has verified and who

[50] Danrui Luo, "Progress, Prospects, and Outlook of Global Convention on Combating Cybercrime from the Perspective of International Law", *International Journal of Cyber Criminology*, Vol. 16, No. 2, 2022, pp. 175–176.

[51] Francois Bugnion, "Adoption of the Additional Protocols of 8 June 1977: A milestone in the Development of International Humanitarian Law", *International Review of the Red Cross*, Vol. 99, No. 905, 2017, pp. 785–786.

[52] Sampath Kumar Venkatachary and Jagdish Prasad et al., "Cybersecurity Infrastructure Challenges in IoT-Based Virtual Power Plants", *Journal of Statistics & Management Systems*, Vol. 23, No. 2, 2020, pp. 263–264.

[53] The state of "darkness" between the defender and the attacker can also exist when traditional distinctive emblems are used, such as when armed groups hiding their identities attack hospitals marked with the "Red Cross, Red Crescent and Red Crystal" emblems. In the case of hospitals, the armed group is detectable, and the hospital can mount a timely and appropriate defense. This type of "darkness" is usually limited to the difficulty of identifying the attacker. However, protected entities using "digital emblems" face a very different situation: cyberattacks are transient, often unknown, and cannot be detected and defended against promptly; the traces of the attack are easily erased, making traceability and attribution after the fact more difficult. In the cyber environment, the characteristics of "darkness" are more complex.

has attempted to attack, and the frequency of defenders' risk response and maintenance is lower. As one of the members of the "digital emblem" project technology demonstration of the expert group - the University of Bonn, Germany-Professor Matthew Smith said, "'digital emblems' should be easy to use by the attacker to ensure that the attacker can easily find the emblem, but the defender cannot see it. So, in effect, the system is being built that is useful to the attacker rather than the defender, and that is what is unique."[54]

Second, intentional attacks against entities using "digital emblems" are difficult to technically trace and attribute to the state, and ultimately, perpetrators may not be held legally accountable.[55] In the physical world, deliberate attacks on entities wearing distinctive emblems are easier to identify (e.g., military or civilian, nationality, whether state-controlled or funded, etc.). In cyberspace, there has not yet been a fundamental breakthrough in the technology of tracing cyberattacks, which remains a threshold barrier to accountability. Even if the IP address and organizational affiliation of the perpetrator are found, it is difficult to determine whether the IP address and identity are suspected of being forged, or whether the perpetrator is funded or controlled by the state.[56] This has led to limitations on accountability to perpetrators, indirectly contributing to the expansion of malicious cyberattacks.

It is important to note that some states may be subject to false and unfounded accusations as a result. While the legal attribution of distinctive emblems usually exists in the state directly concerned, cyberattacks targeting "digital emblems" may still be subject to false accusations full of prejudice and arrogance, due to their invisibility, difficulty of traceability, and the disparity of traceability among states. This is especially so in view of the fact that some countries emphasize in their position statements on the application of international law to cyberspace that the political attribution of cyber operations is a matter within the sovereignty of each country, and that sufficient evidence of attribution is required only for the initiation

[54] Alexander Martin, "Could a 'Digital Red Cross Emblem' Protect Hospitals from Cyber Warfare?", *The Record*, 2022, available at: https://therecord.media/could-a-digital-red-cross-emblem-protect-hospitals-from-cyber-warfare.

[55] Marcus Schulzke, "The Politics of Attributing Blame for Cyberattacks and the Costs of Uncertainty", *Perspectives on Politics*, Vol.16, No. 4, 2018, pp. 954–955.

[56] Chaoqin Zhang and Guangwu Hu et al., "Towards a SDN-Based Integrated Architecture for Mitigating IP Spoofing Attack", *IEEE Access*, Vol. 6, 2018, p. 22764.

of legal proceedings.[57] If states make political attribution and so-called "legal attribution" of cyberattacks based on their political considerations alone, it may further expand the room for false accusations.[58] This is not conducive to the maintenance of the purposes of the Charter of the United Nations of international peace and security[59] and would constitute a serious interference in international humanitarian activities.

As a result, the perpetrator bias in the identification and attribution of "digital emblems" is twofold. On the one hand, it is beneficial for cyber attackers with certain legal awareness and moral bottom lines to verify and identify the true identity of the "digital emblem" user, thereby avoiding protected entities promptly and preventing accidental damage. At the same time, it also helps to reduce the network risk response and maintenance costs for defenders (i.e., users of "digital emblem"). On the other hand, the difficulty in tracing cyberattacks and accountability will also exacerbate the disregard (or even intentional challenge) by malicious actors of the international rules related to "digital emblems", making it difficult to bring into play the expected effect of legal protection.

3.3 The Uncertainty in Determining War Crimes Related to the "Digital Emblem"

There are two uncertainties regarding the determination of war crimes related to "digital emblems": one is whether it is necessary to examine the effects of cyberattacks, and the other is the structural contradiction between IHL and ICL. Article 8 (2) (xxiv) of the Rome Statute stipulates that intentionally attacking entities using distinctive emblems constitutes a war crime. This means that launching cyberattacks against entities using "digital emblems" constitutes a war crime. However, Article 8 (2) (vii) stipulates that the improper use of distinctive emblems resulting in the death or serious injury of personnel from another State constitutes a

[57] For example, Estonia states in its position paper that attribution is a national policy decision based on technical and legal considerations of a cyber incident or action. And the Netherlands states in its position paper that attribution of any cyber action is based on a government decision. Attribution of cyber actions does not require a state to disclose the underlying evidence. Evidence in the legal sense is only relevant when legal proceedings are initiated. UNGA, Official Compendium of Voluntary National Contributions on the Subject of How International Law Applies to the Use of Information and Communications Technologies by States Submitted by Participating Governmental Experts in the Group of Governmental Experts on Advancing Responsible State Behavior in Cyberspace in the Context of International Security Established Pursuant to General Assembly Resolution 73/266, A/76/136, 13 July 2021.

[58] Florian J. Egloff, "Contested Public Attributions of Cyber Incidents and the Role of Academia", *Contemporary Security Policy*, Vol. 41, No. 1, 2020, pp. 55–56.

[59] UN Charter, Art. 1.

war crime. This means that launching a cyberattack against a legitimate entity in country B using a "digital emblem" by an entity in country A that improperly uses it does not directly constitute a war crime but must result in death or serious injury to personnel.[60] There is a clear asymmetry between the two clauses, with the latter increasing the assessment of the effect of the cyberattack. In the determination of war crimes related to "digital emblems", there is still uncertainty about whether the effect of cyberattacks needs to be examined. If the effect of cyberattacks needs to be examined, considering the virtual nature of cyberspace and other characteristics, the determination of the effect of cyberattacks is also complex.[61]

In cyberspace, there is particular uncertainty in determining the scale and effect of damage and its forms, for example, what degree of damage can constitute a war crime, and whether non-physical damage (e.g., data leakage from medical institutions, economic loss, etc.) should be considered in addition to casualties and physical damage (e.g., computer system malfunction). National standards for determining the use of force and armed attack in cyberspace may provide an important reference for the determination of war crimes involving "digital emblems".

First, there is no doubt that an intentional attack on a medical institution using "digital emblems" that results in heavy casualties and damage to medical facilities constitutes a war crime. As most States have stated in their position statements on the application of international law to cyberspace, cyberattacks resulting in serious injury or death to persons or damage to or destruction of objects may be considered a use of force or an armed attack.[62]

Second, it is debatable whether the theft of large amounts of data from medical institutions or humanitarian organizations using "digital emblems" or the causing of significant financial damage to medical institutions meets the threshold for war crimes. A few States, such as France, the Netherlands, Norway, and Denmark, consider that cyberattacks causing serious economic or financial damage constitute the use of force or an armed attack. In addition, Italy considers that a cyberattack may be considered a use of force even if it does not cause physical

[60] Anita Nwotite, above note 14, p. 6.

[61] Kosmas Pipyros and Christos Thraskias et al., "A New Strategy for Improving Cyberattacks Evaluation in the Context of Tallinn Manual", *Computers & Security*, Vol. 74, 2018, pp. 371–372.

[62] Estonia, Australia, Poland, Germany, France, Finland, the Netherlands, the United States, Norway, Switzerland, Singapore, New Zealand, Iran, Israel, and Italy consider that cyberattacks resulting in serious injury or death to persons or damage to or destruction of objects may be regarded as a use of force or armed attacks. UNGA, above note 57.

damage but results in the disruption of essential network services.[63] Fewer States have taken a position on the characterization of non-physical damage caused by cyberattacks. Consensus on this issue is far from being reached. This is mainly because, at present, cyberattacks are frequent and most of them cause non-physical damage with minor consequences,[64] so that the formation of relevant rules will inevitably exacerbate political conflicts and public opinion disputes among States, which is not conducive to the maintenance of harmony and tranquility in the international community.

Furthermore, the structural tension between IHL and ICL exacerbates the uncertainty surrounding war crimes involving "digital emblems". This tension is an inherent contradiction stemming from the irrational or incomplete systemic structure formed by the two bodies of law. Unlike superficial or temporary conflicts, this tension is deep-seated and enduring, profoundly affecting the stability and development of the entire system. This is particularly evident in functional conflicts between the two systems, in tensions over the interpretation of rules, and in the paradoxes of enforcement mechanisms.[65] Regarding the creation of the "digital emblem", this structural contradiction manifests in the following way: as digital threats escalate daily, there is a need and impetus for IHL to undergo digital transformation and be interpreted expansively.[66] However, the principle of restraint

[63] UNGA, above note 9.

[64] Sorin Ducaru and Mihail Caradaica et al., "Can a Cyberattack Become an Act of War? European and Trans-Atlantic Perspectives", *Romanian Journal of European Affairs*, Vol. 24, No. 1, 2024, pp. 21–22.

[65] This structural tension manifests itself in three main ways: Firstly, functional conflict. IHL aims to minimize harm in armed conflicts by permitting violence under the Principles of Military Necessity and Proportionality. However, ICL aims to prosecute individual crimes, characterizing similar acts as war crimes through a strict interpretation of prohibitive rules. The same conduct in an armed conflict may be evaluated as either a legitimate tactic or a criminal offence, depending on the applicable framework. Secondly, there is tension in rule interpretation. Regarding proportionality, IHL allows for the balancing of military advantage against civilian harm in real time, whereas ICL employs "harsh *ex post facto* scrutiny", which makes it more likely to find it disproportionate. Regarding command responsibility, IHL requires superiors to exercise feasible control over the actions of their subordinates, whereas ICL holds commanders criminally liable under Article 28 of the Rome Statute for intentionally acquiescing in or failing to prevent violations, thereby holding them accountable for errors in battlefield decision-making. Thirdly, there is the paradox of enforcement mechanisms. In terms of sovereignty, IHL relies on state self-enforcement, whereas the ICC requires the overcoming of sovereign immunity to enforce accountability. Regarding evidentiary thresholds, IHL focuses on compliance with conduct standards, whereas the ICC requires proof of individual subjective intent. These structural contradictions fundamentally stem from the fragmentation of international law and the realities of power politics. While technological innovation and rule harmonization may mitigate some conflicts, the logic of tolerance in IHL and the logic of punishment in the ICC will coexist dynamically for the foreseeable future.

[66] The Russia-Ukraine conflict shows that cyber warfare is now a key part of hybrid armed conflicts. Given the rapid advancement of artificial intelligence (AI), particularly in the form of lethal

in criminal law limits the extent to which the Rome Statute can be interpreted expansively. According to Article 22 (2) of the Rome Statute, the constituent elements of war crimes are to be interpreted strictly, and expansive application by analogy is prohibited. The principle of nullum crimen sine lege, one of the fundamental principles of criminal law, strictly limits the specificity of war crimes and does not support an expansive interpretation.[67] This means that even if a new treaty on "digital emblems" is developed or Annex I of Additional Protocol I is amended, the International Criminal Court (ICC) may not necessarily be consistent with IHL when faced with a specific case.

IV. Improving International Rules Related to the "Digital Emblem"

Cyberspace is different from the physical world. There are certain incompatibilities or deficiencies in the application of the existing rules on distinctive emblems to cyberspace. As mentioned earlier, there are at least two major issues that need to be addressed in the implementation of "digital emblems": one is the lack of specialized international legal rules to protect MIHO during peacetime; another issue is that most of the cyberattacks against MIHO are carried out by cyber militias and civilian hackers, and these actors also lack specialized rules to regulate them. This article advocates the development of specialized international legal rules to address these two issues. For rules that are not suitable for inclusion in IHL (such as "Shaping the Obligation to Legally Protect MIHO in Peacetime"), the relevant soft law rules can be gradually developed through resolutions of the International Conference of the Red Cross and Red Crescent, etc., with a view to shaping universal opinio juris and

autonomous weapons (LAWS), AI is set to dominate future armed conflicts. IHL is actively adapting to the changes brought about by digitalization. In 2021, the UN GGE and OEWG reached a consensus on the applicability of IHL to cyberspace; however, further clarification on its implementation is required. In May 2023, some States respectively proposed draft Additional Protocols to the Convention on Certain Conventional Weapons to regulate LAWS. This marked significant progress in the Expert Group on LAWS' negotiation process. United Nations Office of Disarmament Affairs, *Draft Protocol on Autonomous Weapon Systems (Protocol VI)*, CCW/GGE.1/2023/WP.6, 11 May (2023); and United Nations Office of Disarmament Affairs, *Draft Articles on Autonomous Weapon Systems–Prohibitions and other Regulatory Measures on the Basis of International Humanitarian Law("IHL")*, CCW/GGE.1/2023/WP.4/Rev.2, 15 May 2023.

[67] The principle of *Nullum Crimen Sine Lege* is one of the fundamental principles of criminal law. No one can be held responsible for an unlawful act unless it has been established that, at the time of its commission, the act was subject to a clear rule making it a *de facto* crime. This principle applies both to the domestic legal order and to international law. *International Covenant on Civil and Political Rights*, Art. 14 and 15; and Luigi Condorelli, "La définition des infractions internationales, Présentation de la IIème Partie', in Hervé Ascensio, Emmanuel Decaux and Alain Pellet (eds.), *Droit International Pénal*, Paris Pedone, 2000, p. 241.

State practice, and ultimately forming rules of general customary international law.[68] IHL rules that should be supplemented (e.g., "Clarifying the International Responsibility of Cyber Militias and Civilian Hackers in Times of Armed Conflict") could be fully utilized to form legally binding rules of the law of treaties by means of a compact for a new additional protocol.

4.1 Shaping the Obligation to Legally Protect MIHO in Peacetime

The use of distinctive emblems in IHL is mainly concentrated in times of armed conflict. However, as an exceptional measure, MIHO still enjoys the right to use distinctive emblems in peacetime. It should be noted that distinctive emblems in peacetime can only provide an identification function for MIHO, but cannot provide legal protection. This is due to the inherent nature of IHL as a special law in times of armed conflict.

However, against the backdrop of the deepening information technology revolution and the accelerated digital transformation of various industries, MIHO has been subjected to frequent and severe cyberattacks in peacetime, and the cumulative damage has become too great to be ignored.[69] In contrast, protected entities in the physical world are less likely to be physically attacked by armed groups from other states, terrorist organizations, etc., which is inextricably linked to the simplicity, speed, anonymity, and low cost of cyberattacks. In light of this, there is an urgent need to provide MIHO using distinctive emblems with clear peacetime legal protection, especially in the cyber environment. The identification function does not deter potential attackers from launching cyber operations; clear and binding international legal protection is the only way to deter malicious actors. It should be noted, however, that it would be inappropriate to develop the rules in the context of IHL, as this would be inconsistent with its orientation and purpose of protecting the

[68] With regard to shaping the obligation to legally protect entities using "digital emblems" in peacetime, although it is closely related to IHL, it is inconsistent with its purpose and orientation, and it is therefore recommended that international humanitarian organizations or conferences be used as a platform, and that resolutions and other forms be used as a means of shaping international practice and forming rules of customary international law of a general nature. In emerging technological fields such as outer space, cyberspace, and AI, which are facing imminent threats, instant customary international law can be developed to make up for the long period of time and lag in the development of customary international law rules. Cheng Bin, "United Nations Resolutions on Outer Space: 'Instant' International Customary Law?", *Studies in International Space Law,* Oxford University Press, 1997, pp. 125–149.

[69] Niki O'Brien and Saira Ghafur et al., "Cybersecurity in Health is an Urgent Patient Safety Concern: We can Learn from Existing Patient Safety Improvement Strategies to Address it", *Journal of Patient Safety and Risk Management*, Vol.26, No. 1, 2021, pp. 5–10.

wounded, sick, and injured, civilians, and limiting the ways and means of warfare during armed conflict.

Consideration could be given to the development of new rules of general customary international law, such as the "Prohibition of Peacetime Cyberattacks on MIHO", to promote the formation of relevant international obligations. In the absence of a rule of international law directly regulating peacetime cyberattacks on MIHO, the international community often treats the digital assets, data, and services of medical institutions as critical civilian infrastructure[70] and invokes the general Principle of Sovereignty or the soft law "Norms for Responsible State Behavior in Cyberspace", which were adopted by UN GGE in 2015, to regulate such behavior.[71] The ICRC has also made it clear that medical facilities are part of the critical infrastructure protected by the Norms for Responsible State Behavior in Cyberspace.[72] The consensus that medical facilities should be considered "critical infrastructure" of sovereign states has already been reached in the reports of the UN GGE and the OEWG, and this is also an important reason why the ICRC, the Oxford Process and other processes have explored in recent years the development of a new international rule "Prohibiting Cyberattacks on Medical Institutions in Peacetime".[73]

However, it has yet to be determined whether humanitarian organizations can be regarded as "critical infrastructures", and there is no specific international legal basis for the protection of humanitarian organizations in peacetime. In view of the important value and irreplaceable role played by the Red Cross Movement in international humanitarian relief, relevant rules of protection should be formulated

[70] Priya Urs, above note 33, p. 1206.

[71] Most States have stated in their published position papers on the application of international law to cyberspace that attacks on critical infrastructure are considered a violation of sovereignty. The UN GGE "Norms for Responsible International Behavior in Cyberspace" 13(f) and 13(g) also address the protection of critical infrastructure. UNODA, The UN Norms of Responsible State Behavior in Cyberspace, March 2022, available at: https://documents.unoda.org/wp-content/uploads/2022/03/The-UN-norms-of-responsible-state-behaviour-in-cyberspace.pdf.

[72] ICRC, Norms for Responsible State Behavior on Cyber Operations Should Build on International Law, 2020, https://www.icrc.org/en/document/norms-responsible-state-behavior-cyber-operations-should-build-international-law.

[73] ICRC and the Oxford Process have published more research on the protection of the medical sector in peacetime. ICRC, Call by Global Leaders: Work Together now to Stop Cyberattacks on the Medical Sector, 2020, available at: https://blogs.icrc.org/law-and-policy/2020/05/26/call-global-leaders-stop-cyberattacks-medical/; The Oxford Process, The Oxford Statement on the international Law Protections Against Cyber Operations Targeting the Health Care Sector, 2020, available at: https://www.elac.ox.ac.uk/the-oxford-process/the-statements-overview/he-oxford-statement-on-cyber-operations-targeting-the-health-care-sector/.

to provide some legal support for the protection of humanitarian organizations in peacetime.

4.2 Clarifying the International Responsibility of Cyber Militias and Civilian Hackers in Times of Armed Conflict

In times of armed conflict, cyber militias under the command or control of states and independent civilian hackers have become increasingly involved in cyberwarfare between states, which, to a certain extent, affects the application of the Principle of Distinction in IHL in cyberspace, and consequently complicates the pursuit of the international responsibility of the relevant entities.[74] Such entities are closely related to the so-called "cyber combatants". Cyber combatants, by virtue of their direct participation in hostilities, lose the status of protected civilians. Some scholars also refer to them as "unlawful combatants".[75] The definition of a cyber-combatant is controversial. This concerns not only whether such entities can be lawfully targeted, but also whether they can enjoy prisoner-of-war status if captured and how they can be held internationally accountable.

Cyber combatants are different from physical-world combatants, and the criteria for their identification should be adjusted. Combatants are members of the armed forces of the opposing side, including regular and irregular forces, such as standing armies, reserve forces, paramilitary militias de facto integrated into the armed forces, and so on.[76] Articles 43 and 44 of Additional Protocol I to the Geneva Conventions regulate armed forces, combatants, and prisoners of war, but in contrast, article 4, paragraph 2, of the Third Geneva Convention (relating to militia and volunteer forces) is more clearly organized and complete in its provisions on combatants and prisoners of war. Article 4 (2) of the Third Geneva Convention contains four criteria:

(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;

[74] Nori Katagiri, "Between Cyber Retaliation and Escalation: Explaining the Variations in State Compliance with the Principle of Proportionality", *Politics & Policy*, Vol. 52, No. 4, 2024, pp. 712–727.
[75] Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict, Cambridge University Press, 2016, p. 44.
[76] Yoram Dinstein, above note 79, p. 41.

(d) that of conducting their operations in accordance with the laws and customs of war.

There is also an implicit criterion: (e) belonging to a party to the conflict. It has been argued that these five criteria are the conditions for lawful combatants.[77] However, (d) "conducting their operations in accordance with the laws and customs of war" is only an obligation attached to the status of combatant and is not a necessary condition for constituting combatant status. Moreover, article 44, paragraph 2, of Additional Protocol I to the Geneva Conventions emphasizes that all combatants must abide by the rules of international law applicable in armed conflict, and that violations of these rules shall not deprive combatants of their rights as combatants or as prisoners of war. Thus, the essential conditions for being a lawful combatant include the following four: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of belonging to a party to the conflict.

However, due to the virtual and hidden nature of cyberspace, the two formal elements of "displaying distinctive signs" and "openly carrying weapons" cannot be effectively adapted to the unique attributes of cyberspace and should be adjusted. In judging cyber combatants, only two criteria need to be recognized: (a) that of being commanded by a person responsible for his subordinates; (b) that of belonging to a party to the conflict. Accordingly, a cyber militia that has a clear commander-in-chief, is strongly organized and is under the command or control of a party to an armed conflict is a cyber combatant, and intentionally attacking an entity that uses "digital emblems" may constitute a war crime. Civilian hackers are not under the command of the armed forces and are more loosely organized. Even if they directly attack protected entities using "digital emblems", it is difficult for them to resort to IHL and the Rome Statute for malicious cyber operations, and they can only be regulated by global or regional rules in the field of cybercrime such as the United Nations Convention on Cybercrime, the Budapest Convention on Cybercrime, and domestic laws.

In recent years, the ICRC has been active in advocating for international rules against civilian hackers. In October 2023, against the backdrop of the intensifying Russian-Ukrainian cyberconflict, the ICRC proposed 8 rules against

[77] Zhixiong Huang and Yaohui Ying, "The Application of the Principle of Distinction in the Cyber Context: A Chinese Perspective", *International Review of the Red Cross*, Vol.102, No. 913, 2020, p. 347.

civilian hacking and reaffirmed the responsibility of governments to restrict such entities.[78] Rule 4, "Prohibition of Cyberattacks on Medical and Humanitarian Facilities", is consistent with the aims and objectives of the "digital emblem". However, these rules still face the dilemmas of low awareness, weak enforcement, and a lack of binding mechanisms in reality.[79] These rules should not remain at the initiative level but should be made legally binding through special agreements or new treaties to regulate the uncontrolled development of civilian hackers in cyberspace. Respect for distinctive emblems (including "digital emblems") must be more than just theoretical or superficial; it must be upheld in practice. Therefore, more proactive measures are needed to promote the protection and respect of MIHO and distinctive emblems in contemporary armed conflicts.[80]

V. Conclusion

The "digital emblem" is a significant initiative by the International Red Cross Movement in response to new issues and challenges emerging in the digital age. During the preparatory phase preceding its establishment, it is important to conduct in-depth research into its legal basis and elements, its transformative potential, and the practical uncertainties, as well as how to advance the refinement and development of related international rules. This research will contribute to the clarification and development of IHL in cyberspace, as well as the digital transformation of international law.

Governments should actively support the ICRC in researching and implementing the "digital emblem" project and participate in negotiations on relevant international legal instruments. At the same time, attention must be given

[78] Tilman Rodenhäuser & Mauro Vignati, above note 48.

[79] Many hacker communities are unaware of their legal obligations and even actively refuse to be bound by the rules. Even if they are aware of the relevant content (a few hacker organizations, such as KillNet, have stated that they comply with the rules), it is often difficult to enforce the consequences due to the ambiguity and anonymity of the responsibility. The most urgent task now is to enhance the hacker community's awareness and acceptance of the rules and to promote cooperation between the States and technology companies to strengthen ethical awareness of cyber warfare through education and incentives. The lack of effective legal constraints in the field of cyber warfare will make it difficult for IHL to adapt to the new form of warfare, and the ICRC's initiative, although not mandatory, is a necessary but insufficient first step to lay the moral and legal foundation for the future development of cyber warfare rules, which will need to be upgraded through inter-state cooperation and legal mechanisms to transform the soft guidance into substantive and binding rules in the future. Samuel White, "One Year On: Are the ICRC's Principles for Civilian Hackers Shaping the Laws of War?", *Lieber Institute*, 2025, https://lieber.westpoint.edu/one-year-are-icrcs-principles-civilian-hackers-shaping-laws-war/.

[80] See Anita Nwotite, above note 14, p. 3.

to safeguarding the collective interests of developing countries and those with underdeveloped cyber capabilities. In addition, governments should actively oppose the misuse of cyber weapons and LAWS and advocate capacity-building assistance from developed countries and cyber powers for developing countries. Guided by the Principles of Non-interference and Non-discrimination, they should assist these States in establishing the "digital emblem" infrastructure, bridging the digital divide and contributing to the sustainable development of the international community.

As a landmark humanitarian initiative that benefits the international community, non-State actors—including members of the International Red Cross and Red Crescent Movement, as well as relevant internet entities [81] —should collaborate to advance the implementation and practice of the "digital emblem", thereby jointly building a more inclusive, equitable and resilient community with a shared future in cyberspace.

[81] Relevant internet entities include internet technology standards organizations such as the Internet Engineering Task Force (IETF), cybersecurity companies, and laboratories. These entities played a significant role in the demonstration and testing of the "digital emblem" project. IETF, "Problem Statement for Digitized Emblems", May 2024, available at: https://datatracker.ietf.org/doc/draft-haberman-digital-emblem-ps/01/.

Judicial Archives as Living Memory: Insights from the Extraordinary Chambers in the Courts of Cambodia

Vikram Ramaswamy

ABSTRACT

International criminal law scholarship has long treated the judicial archive as passive evidentiary storage. This paper argues that judicial archives should be reframed from "storage memory" to "living memory," capable of contributing to post-conflict transitional justice. Focusing on the Extraordinary Chambers in the Courts of Cambodia during its residual phase, this paper provides the first systematic account of how a post-judicial tribunal has operationalized its archive. Through four representative case studies, the paper analyzes how the ECCC has curated and disseminated historical narratives under institutional constraints and distills design principles for future post-conflict tribunals to more effectively leverage judicial archives.

Keywords: Extraordinary Chambers in the Courts of Cambodia (ECCC), Khmer Rouge Tribunal, Residual Mechanism, Judicial Archive, Memory Studies, Transitional Justice, International Criminal Law (ICL)

1. Introduction

In 2022, the Extraordinary Chambers in the Courts of Cambodia (ECCC) concluded the trials of the last surviving leaders of the Khmer Rouge. Over seventeen years of trials, more than two million pages of evidence were submitted into the judicial record.[1] Within this "judicial archive" lies a detailed reconstruction of the Khmer Rouge period, assembled through witness testimonies, internal regime documents, academic and media reports, audiovisual materials, and an extensive body of judicial decisions and orders. Much has been written about the ECCC's legal outcomes; a large portion of this scholarship is critical of the duration,[2] financial cost,[3] or purported political bias of proceedings.[4] Similar patterns appear in scholarship on other post-conflict tribunals, which likewise tends to center retrospective analysis of

[1] ECCC, *The Court Report: 2023*, at 20 (Jan. 2024).

[2] *See, e.g.*, Sophie Ryan, *Delivering Justice: The ECCC's Verdict in Case 002/02*, 24 AUSTL. INT'L L.J. 229, 231–232 (2018).

[3] *See, e.g.*, Viviane E. Dittrich, *The Legacy of the ECCC*, *in* THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 123, 145 (Simon M. Meisenberg & Ignaz Stegmiller eds., 2016).

[4] *See, e.g.*, Seeta Scully, *Judging the Successes and Failures of the Extraordinary Chambers of the Courts of Cambodia*, 13 ASIA PAC. L. & POL'Y. J. 300, 325–332 (2011).

judicial outcomes.[5] Far less attention has been paid to the ECCC judicial archive in itself, independent of its role at trial.

This omission reflects the broader terrain of international criminal law. In most other tribunals, post-judicial maintenance of legal archives has been deprioritized. The Special Tribunal for Lebanon (STL) maintains no physical archive,[6] and the Special Panels for Serious Crimes in East Timor (SPSC) archive resides in a United Nations (UN) warehouse in New York that is closed to the public.[7] Even when judicial archives are more robust, their role remains limited to evidentiary preservation. The International Residual Mechanism for Criminal Trials (IRMCT) owns over nine kilometers of documentary evidence regarding the Rwandan and Yugoslav conflicts, and many of these documents are accessible to researchers.[8] But the Rwandan government's requests to relocate archival materials to Rwanda have been refused,[9] and amidst UN funding pressures, the IRMCT's mandate will soon terminate with little clarity on the archive's future.[10] So, across both academic scholarship and institutional practice, judicial archives are assigned little independent value beyond their custodial function.

But the ECCC's context is distinct. The UN and the Cambodian government have jointly expressed a desire to move beyond passive storage and to instead actively disseminate archival information, leading the UN General Assembly to explicitly recognize the value of the ECCC archive as an "important component of international humanitarian law."[11] This desire is codified in the residual mandate

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[5] *See, e.g.*, Alana Tiemessen, *The International Criminal Court and the Politics of Prosecutions*, 18 INT'L J. HUM. RTS. 444 (2014) (assessing prosecutorial selectivity at the ICC); Sara Kendall & Sarah Nouwen, *Speaking of Legacy: Toward an Ethos of Modesty at the International Criminal Tribunal for Rwanda*, UNIV. OF CAMBRIDGE FACULTY OF LAW RES. PAPER NO. 20/2016 (2021) (evaluating the success of the ICTR). *Cf. infra* Section 2.3 (discussing limited scholarship that does engage with judicial archives beyond their evidentiary role).

[6] *See Virtual Tribunals Debuts the Special Tribunal for Lebanon Collection,* STAN. CTR. FOR HUM. RTS. & INT'L JUST. (July 18, 2024), https://humanrights.stanford.edu/news/virtual-tribunals-debuts-special-tribunal-lebanon-collection.

[7] *An Overview: Justice Processes and Commissions for Timor-Leste*, ETAN/US (Apr. 2008), https://etan.org/news/2007/03justsumm.htm.

[8] Judge Graciela Gatti Santana (President of the IRMCT), *Address to the United Nations General Assembly*, at 5 (Oct. 16, 2024).

[9] Press Release, Security Council, *Mechanism Concluding Tasks of Criminal Tribunals for Rwanda, Former Yugoslavia 'Steadily Advancing on Path of Completion', President Tells Security Council*, U.N. PRESS RELEASE SC/15724 (June 11, 2024).

[10] Press Release, Security Council, *President of International Residual Mechanism Tells Security Council Justice 'Not a Finite Endeavour'*, U.N. PRESS RELEASE SC/16084 (June 11, 2025).

[11] U.N. General Assembly, *Report on the Use of the Commitment Authority and Request for a Subvention to the Extraordinary Chambers in the Courts of Cambodia*, para. 10, U.N. Doc. A/79/7/Add.23 (Nov. 14, 2024).

ratified in 2021, which governs the ECCC's ongoing functions.[12] As tethered to a hybrid tribunal, the ECCC archive is physically located within the post-conflict society it concerns, and Cambodian nationals play a direct role in its oversight. In light of these circumstances, since January 2023, the ECCC has functioned as a judicial body whose core activities center on the management, curation, and dissemination of its judicial archive. This residual-phase archival function is novel, and it makes the ECCC a unique case through which to explore the value of a judicial archive in itself.

In this paper, I argue that current academic discourse around archives of post-conflict international tribunals overlooks the transformative potential of these judicial archives. Rather than conceptualizing the ECCC's archival function as a passive memory of the Khmer Rouge period frozen in time, I propose that judicial archives can function as a form of "living memory" that, when curated and disseminated, actively shapes post-conflict transitional justice (TJ) processes.[13] Toward this end, I proceed in four parts. First, I review the existing literature surrounding judicial archives within transitional justice. Second, I explore the position of the ECCC within post-conflict Cambodian society. Third, I analyze how the ECCC's residual activities operationalize its judicial archive to curate and disseminate historical narratives. Finally, I distill broader design principles for future post-conflict tribunals to activate their judicial archives after legal proceedings conclude.

2. Theoretical Framework

In his foundational work on memory construction, Jan Assmann defines "cultural memory" as a collective representation of the past that exists "in disembodied form and requires institutions of preservation and reembodiment."[14] Cultural memory outlasts individual recollection because it is institutionalized: "cultivated by

[12] Addendum to the Agreement between the Royal Government of Cambodia and the United Nations concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea on the Transitional Arrangements and the Completion of Work of the Extraordinary Chambers ("ECCC Residual Mandate") (Aug. 11, 2021), art. 3(1).

[13] I borrow this term from the field of archival studies. For use in the judicial context, *see* Kirsten Campbell, *The Laws of Memory: The ICTY, the Archive, and Transitional Justice,* 22 SOC. & LEGAL STUD. 247, 249 (2012); Eric Keletaar, *A Living Archive, Shared by Communities of Records, in* COMMUNITY ARCHIVES: THE SHAPING OF MEMORY 109, 121–123 (Jeannette Allis Bastian & Ben Alexander, eds., 2009) (both in the context of the ICTY Archive).

[14] Jan Assmann, *Communicative and Cultural Memory*, *in* CULTURAL MEMORY STUDIES. AN INTERNATIONAL AND INTERDISCIPLINARY HANDBOOK 109, 111 (Astrid Erll & Ansgar Nünning, eds., 2008).

specialists," symbolized in tradition and monument, or memorialized in library and archive.[15] Aleida Assmann refines this framework by distinguishing between "storage memory" and "functional memory."[16] Storage memory is knowledge that has been stored for preservation in uncurated form; it has no inherent "vital ties to the present or bearing on identity formation."[17] In contrast, functional memory is knowledge that has been curated by a specific carrier, be they an individual or an institution.[18] Such information is value-laden and continues to shape the present and future; educational institutions, theaters, and concert halls all may serve as institutions that carry functional memory.[19]

These two forms of memory construction—storage and functional—are co-constitutive, not mutually exclusive. A. Assmann argues that "storage memory may be seen as an important reservoir for future functional memories."[20] And, while there are several ways to preserve the memories of historical events—"monuments, museums, parades, rituals, street names, graffiti," among other methods—textual archives are unique in their longevity and ability to precisely influence collective relationships with the past.[21] But archives only acquire this value when their stored memories are actively retrieved, curated, and disseminated as functional memory.

2.1. ICL Paradigm: Archive as Evidence

By treating the judicial archive primarily as evidence for a given legal proceeding, mainstream ICL scholarship conceptualizes post-judicial archives as largely untapped storage memory. William Schabas most directly lays out this paradigm in *Truth Commissions and Courts*. After Sierra Leone's civil war, both a non-judicial Truth and Reconciliation Commission (TRC) and a judicial tribunal (the SCSL) were established. In discussing the relationship between these two bodies, Schabas cites Amnesty International: "While the TRC may be able to make an important contribution to establishing the truth about human rights abuses … it should not be a substitute for prosecuting those responsible for serious crimes under international

[15] *Id.* at 111–112. In the Cambodian case, because most survivors are elderly, the institutionalization of these memories and narratives is particularly time sensitive.
[16] Aleida Assmann, *Cultural Memory and Western Civilization: Functions, Media, Archives,* at 123 (2011).
[17] *Id.* at 127.
[18] *Id.*
[19] Merike Lang, *Cultural Memory in the Museum and its Dialogue with Collective and Individual Memory*, 2 NORDISK MUSEOLOGI 62, 65 (2007).
[20] A. Assmann, *supra* note 16, at 130.
[21] Peter Meusburger et al., *Cultural Memories: An Introduction, in* CULTURAL MEMORIES: THE GEOGRAPHICAL POINT OF VIEW 1, 7 (Peter Meusburger et al. eds., 2011).

law."[22] This view reflects the dominant assumption, in which the function of a post-conflict tribunal is fundamentally prosecutorial: to "end impunity for the perpetrators,"[23] and to make judgments on individual guilt or innocence.

As such, the court's prosecutorial mandate underpins both the construction and the long-term function of the judicial archive. This archive-as-evidence framework becomes limiting once the judicial phase concludes. Because the ICL tribunal is primarily understood as a prosecutorial mechanism, rather than a vehicle for broader public engagement, external scholars and tribunals themselves have tended to frame judicial archives as proof of prosecutorial success: the number of exhibits and witnesses and convictions, the quality of judgments, and so on.[24] In the ICTY context, for example, archives were originally preserved for use in future legal appeals and for academic study of the legal process, as opposed to broader transitional justice purposes.[25] Accordingly, while survivors' groups sought to house the archives in the former Yugoslavia, the archives ultimately remained in The Hague.[26] Under this framing, the archive becomes a record of the judicial process for retrospective evaluation, rather than a resource to be repurposed for post-conflict purposes.

Scholarly engagement with judicial archives has reinforced this retrospective orientation. A growing emphasis on international transparency has expanded controlled access to tribunal records; for instance, the IRMCT has adopted the Universal Declaration on Archives, which calls for "the vital necessity of … accountability and transparency" in archival practices.[27] So, in some contexts, researchers do have the ability to scrutinize this record of the judicial process. But even where access exists, the archive remains a passive repository of uncurated information; it is the external researchers choosing which stories to tell and to whom

[22] *Sierra Leone: Renewed Commitment to End Impunity*, AMNESTY INT'L (2001), cited in William Schabas, *A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, *in* TRUTH COMMISSIONS AND COURTS 3, 26 (William Schabas ed., 2004).

[23] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 ("Rome Statute"), preamble. *See also* S.C. Res. 827, para. 2 (May 25, 1993) (the U.N. "decides hereby to establish an international tribunal for the *sole purpose* of prosecuting persons responsible for serious violations of international humanitarian law") (emphasis added).

[24] *See, e.g.*, Kendall & Nouwen, *supra* note 5, at 13–14.

[25] Rob van der Laarse et al., *Chapter Four: The ICTY Archives*, 5 HERITAGE, MEMORY, AND CONFLICT 139, 148–151 (2025).

[26] *Id.*

[27] Access Policy for the Records Held by the Mechanism for International Criminal Tribunals ("IRMCT Access Policy") (Aug. 12, 2016); Universal Declaration on Archives (Sept. 2010).

to tell those stories.[28] This academic analysis is often retrospective and narrow in scope—of court procedure, quality of legal reasoning, cost-effectiveness—and does not engage affected communities in the post-conflict zones themselves.

So, in the mainstream ICL framework, the judicial archive functions solely as Assmann's "storage memory." Judicial archives preserve evidentiary documents, but only as a record of what has already been concluded by the judicial process. In some cases, archival materials are publicly accessible, but with minimal curation or interpretive guidance, "the judicial archive is … excessive and overwhelming" to the post-conflict society itself.[29] As a result, little attention is placed on how archival materials might be activated to contribute to public education or support post-conflict collective healing. The archive is treated as a relic of the court's past work, rather than a mechanism to shape the future.

Of course, judicial archives *are* repositories of evidence for use in the legal process; this paper does not suggest that the archive should be divorced from evidentiary requirements or detached from legal functions. Rather, the question is what happens once the judicial function has been fulfilled. Post-conflict tribunals are valuable to the transitional justice process beyond solely their judicial outcomes: rebuilding trust in public institutions, reconstructing the truth for families of victims, and preventing the recurrence of violence.[30] In the archival context, this collection of evidence, which has been scrutinized and preserved for trial, has the potential to be repurposed for other transitional justice purposes.[31] Viewing judicial archives solely in terms of legal documentation obscures this potential. The following sections situate judicial archives in the context of Assmann's "functional memory," which contemplates the curation and dissemination of archives after the conclusion of the judicial phase.

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[28] Daniela Accatino & Cath Collins, *Truth, Evidence, Truth: The Deployment of Testimony, Archives and Technical Data in Domestic Human Rights Trials*, 8 J. HUM. RTS. PRACS. 81, 96 (2016).

[29] *Id.* ("The technicalities and jargon contained in voluminous full case files are as likely to confuse as to illuminate … pieces of the whole, if seized on in isolation, may confuse or mislead"); *see also* Arlette Farge, *The Allure of the Archive*s, at 4 (2013).

[30] Jessica Almqvist & Carlos Espósito, *Conclusion, in* THE ROLE OF COURTS IN TRANSITIONAL JUSTICE 290, 290–292 (Jessica Almqvist & Carlos Espósito, eds., 2012).

[31] For this idea of "repurposing" archival materials, *see* Anita Ferrara, *Archives and Transitional Justice in Chile: A Crucial Relationship*, 22 HUM. RTS. REV. 253, 273–274 (2021) (in the context of Chile's TJ process).

2.2. Archival Studies Paradigm: Archive as Living Memory

While scholarship around judicial archives has remained squarely in the "storage memory" paradigm, a growing branch of archival studies scholarship has begun to interrogate methods to operationalize non-judicial archives in line with Assmann's "functional memory." These methods are varied, including the exercise of active curatorial control,[32] the identification of narratives embedded in the archive,[33] and the dissemination of digitized archival materials.[34] Each of these practices is oriented toward shaping collective identity in the present and the future. For instance, in the context of post-socialist Hungarian society, Zsófia Réti argues that "the transmission of a clearly defined heritage to subsequent generations should be the duty of any functional memory project."[35] Unlike in the ICL paradigm, this goal positions the archive itself as serving a purpose independent of the institution that created it.

In the specific context of post-conflict transitional justice proceedings, scholars have adapted Assmann's "functional memory" into the concept of "living memory." This paper understands living memory as the active curation and dissemination of archival materials as sources of truth and healing in post-conflict societies. Terry Cook maps a shift in the role of the archivist from passive custodian to active curator, as transitional justice archives have increasingly become tools of justice in their own right. For example, South Africa's Truth and Reconciliation Commission was aimed at this end—a curated archive, detached from any judicial purpose, was itself intended to serve as a shared repository of truth and a mechanism for collective healing.[36] Accordingly, for communities grappling with collective traumas, greater access to intelligible archival information allows them to "put their trauma in context" and "transfor[m] their experiences into meaning."[37]

More recent scholarship reflects the argument that a TJ archive continues to shape collective memory even after its original institutional function has concluded.

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[32] Eilean Hooper-Greenhill, *Communication in Theory and Practice, in* THE EDUCATIONAL ROLE OF THE MUSEUM 28, 37 (Eilean Hooper-Greenhill ed., 1994).

[33] Anna Strowe, *Archive, Narrative, and Loss*, 66 META 178, 187 (2021).

[34] Dario Henri Haux et al., *A Cultural Memory of the Digital Age?*, 34 INT. J. SEMIOT. L. 769, 777 (2021).

[35] Zsófia Réti, *Past Traumas and Future Generations: Cultural Memory Transmission in Hungarian Sites of Memory*, 6 HUNGARIAN HIST. REV. 835, 838 (2016).

[36] Terry Cook, *Evidence, Memory, Identity, and Community: Four Shifting Archival Paradigms,* 13 ARCH. SCI. 95, 111 (2013). In particular, as with the ECCC in Cambodia, South Africa's TRC emphasized public acknowledgement of past abuses as a prerequisite to reconciliation and normalization of race relations. *See* Daniel L. Shapiro, *Reconciliation Systems Design: A Systematic Approach to Collective Healing in Post-Conflict Societies*, 26 HARV. NEGOT. L. REV. 193, 203–204 n.29 (2020).

[37] Ketelaar, *supra* note 13, at 120.

Julia Viebach posits that in the afterlife of an archive, its materials can be continually reinterpreted through public use.[38] In Pinochet's Chile, for instance, civil society's documentation of human rights abuses served multiple sequential functions. These archives established evidence of state abuses during the conflict period, were incorporated into two post-conflict truth commissions, supported subsequent criminal prosecutions, and were later "pluralized as collective memory in cultural representations," including exhibitions in Santiago's Museum of Memory and Human Rights.[39] So, scholars have recognized the potential for *extra-judicial* archives to be repurposed in this way, as a form of "living memory" that maps onto Assmann's conceptual framework.

However, *judicial* archives remain comparatively absent from this strand of TJ literature. Some recent scholarship does analyze how international tribunals *produce* knowledge. Two works are particularly comprehensive in this regard. Kirsten Campbell analyzes the ICTY archive as a product of the external structures that constructed it, arguing that its process of evidence collection was shaped by its legal mandate, international pressures, and its role as an institution of post-conflict justice.[40] Henry Redwood's *The Archival Politics of International Courts* builds out this theory as it pertains to the ICTR archive: the materials in judicial archives can, in certain cases, exclude certain voices and reproduce colonial paradigms.[41] Less studied is what comes next. After archival knowledge has been produced and the legal proceedings have concluded, how can a judicial archive be further operationalized beyond its evidentiary role? The following sections of this paper aim to develop such a model.

2.3. Judicial Archives as Living Memory

Before proceeding, it is worth laying out the terrain of archival scholarship in the Cambodian context. In doing so, I aim to address the following question: why should *courts*, rather than civil society organizations (CSOs) or other stakeholders, be responsible for operationalizing their archives? In Cambodia, non-governmental organizations (NGOs) have long played central roles in documentation and memory work. By 2013, in the middle of the trial phase, Cambodia hosted around 3,500

[38] Julia Viebach, *Transitional Archives: Towards a Conceptualisation of Archives in Transitional Justice*, 25 INT'L J. HUM. RTS. 381, 398 (2021).
[39] *Id.* at 397; Ferrara, *supra* note 31, at 273.
[40] Campbell, *supra* note 13, at 251–252.
[41] Henry Redwood, *The Archival Politics of International Courts*, at 28 (2021).

registered NGOs.[42] Most notably, the Documentation Center of Cambodia (DC-Cam) was responsible for collecting a large portion of evidence later used by the ECCC.[43] The Tuol Sleng Genocide Museum preserves a public-facing repository of Khmer Rouge history,[44] and several other CSOs were responsible for administering court-approved reparations projects.[45] So, it's evident that—at least to some non-negligible degree—Cambodian NGOs and CSOs possess both the will and capacity to curate and disseminate archival information.

This question has been expressed in academic scholarship concerning the ECCC's trial phase. For instance, Michelle Caswell argues that "while the tribunal is concerned with administering legal justice, it is the [DC-Cam and Tuol Sleng] archives, not the tribunal, that is tasked with establishing truth."[46] Others have examined the "boundary" between the narrowly defined legal project of the ECCC and the broader process of writing the historical narrative,[47] arguing that DC-CAM and other CSOs are better suited for the latter.[48] The purported logic is that judicial archives are restricted in the scope of evidence they hold; the evidence and the narratives excluded from the court's narrow jurisdiction or deemed inadmissible in court might be important in reconstructing the full truth of the Khmer Rouge period.[49]

This paper takes a different view. CSOs indeed perform essential memory functions. Even so, legal tribunals are uniquely positioned to curate and disseminate archival narratives for three reasons. First is legal authority: the judicial process produces distinctive legal-historical narratives from which to engage post-conflict societies. Second is evidence credibility: the adversarial process, coupled with strict evidentiary standards, ultimately produces an archive that reflects rigorous methodological scrutiny. Third is political nexus: international tribunals are better

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[42] Helena Domashneva, *NGOs in Cambodia: It's Complicated*, THE DIPLOMAT (Dec. 3, 2013), https://thediplomat.com/2013/12/ngos-in-cambodia-its-complicated/.

[43] Kok-Thay ENG, *Documentation Center of Cambodia: 2013 Annual Report*, at 7 (James L. Black, ed., 2013).

[44] Timothy Williams, *Remembering and Silencing Complexity in Post-Genocide Memorialisation: Cambodia's Tuol Sleng Genocide Museum*, 15 MEM. STUD. 3 (2021).

[45] *Case 002/02 (Co-Prosecutor v. Khieu Samphân and Nuon Chea)*, Trial Judgment, E465, paras. 4420–4433 (Nov. 16, 2018).

[46] Michelle Caswell, *Khmer Rouge Archives: Accountability, Truth, and Memory in Cambodia*, 10 ARCH. SCI. 25, 36 (2010).

[47] Andrew Mamo, *History and the Boundaries of Legality: Historical Evidence at the ECCC*, 29 COLUM J. ASIAN L. 113 (2015).

[48] Peter Manning, *Complementary Knowledge, in* TRANSITIONAL JUSTICE AND MEMORY IN CAMBODIA, at 93 (Peter Manning, ed., 2017).

[49] Caswell, *supra* note 46, at 35–36.

able to engage the levers of power, which enables broader public engagement and norm diffusion. Here, I address each in turn.

Legal Authority: Legal narratives produced by international tribunals offer distinctive historical perspectives. Richard Wilson argues that criticisms of the court as an arbiter of history are only partially correct. Yes, non-judicial histories often take more comprehensive vantage points; however, at the same time, the process of legal analysis requires tribunals to generate highly directed historical findings that would not otherwise emerge.[50] The specific *mens rea* requirements of genocide and persecution, for instance, require courts to reconstruct events through a deliberate process that emphasizes individual motivations and causal connections otherwise overlooked by non-judicial narratives. Drawing on the work of Laurence Douglas, Wilson argues that "legal imperatives drive forward collective historical inquiry into mass crimes," meaning that tribunals generate specific historical findings that would not otherwise exist.[51] Given that these findings are tested through multiple levels of the international judiciary, they carry a unique form of institutional authority in post-conflict societies.

Evidence Credibility: Evidence admitted into the judicial archive is unique in both its procedural safeguards and its rigorous testing. Evidence that has not passed a threshold of reliability is rendered of low probative value or excluded entirely. For example, across courts, NGO reports have been afforded low probative value; because they often lack transparent methodology, they are rarely relied upon to shape judicial narratives.[52] At the same time, each piece of evidence is tested by dozens of lawyers and judicial officers at all levels.[53] In Case 002/01 at the ECCC, for instance, expert witness Phillip Short was heavily relied upon to establish various acts of violence, including the alleged mass execution of former Khmer Republic soldiers at Oudong.[54] While the Trial Chamber relied on this evidence to find that the mass execution occurred, the Supreme Court Chamber held that Short's statements were

[50] Richard A. Wilson, *Writing History in International Criminal Trials*, at 21–22 (2011).

[51] *Id.* at 22, citing Laurence Douglas, *The Legal Imagination and Traumatic History,* at 261–262 (2001) (arguing, in reference to the *Eichmann* trial, that the function of criminal prosecution to "represent and judge traumatic history" is an "imperative born of the scars left on an outraged collective consciousness").

[52] *See Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber Adjournment Decision, ICC-02/11-01/11, para. 29 (June 3, 2013); *Case 002/02* Trial Judgment, *supra* note 45, para. 130.

[53] Wilson, *supra* note 50, at 18.

[54] Yvonne McDermott, *The ECCC's Approach to Evidence and Proof*, 18 J. INT'L CRIM. JUST. 747, 755 (2020).

hearsay; the evidence did not rise to the standard needed to establish this event.[55] To be sure, NGO reports and hearsay expert statements both have their place in establishing a comprehensive historical narrative; these forms of evidence are not intrinsically inferior. Rather, the point is that the evidentiary rigor of court proceedings makes the resulting judicial archive particularly well-suited to producing precise, methodologically transparent historical narratives.

Political Nexus: Because of their legal mandates and institutional support, legal tribunals hold a unique position within the broader post-conflict political landscape. International courts are born from state consent.[56] Of course, some of these courts face direct opposition from the post-conflict state itself, but when this is not the case, this political nexus has its advantages. In Cambodia, for instance, the ECCC can leverage state-facing channels—coordination with government ministries, schools, local authorities—as well as international diplomatic channels, in ways that NGOs and CSOs often struggle to access.[57] Not only does this theoretically increase tribunals' abilities to disseminate an archival narrative, but it may also serve to spill over to other domestic institutions. Transitional justice scholarship has long centered the importance of rebuilding the integrity of post-conflict state institutions.[58] The Cambodian context demonstrates that when a tribunal employs transparent archival practices or preserves archival materials in compliance with international standards, it has the potential to diffuse these norms into other state institutions.[59] Section 5.4 of this paper will further examine this idea.

Of course, it's possible that a given tribunal does not possess these advantages. The final two sections of this paper discuss the ECCC's unique challenges, as well as a set of structural limitations that many tribunals must grapple with. In any case, when tribunals comply with their mandates and operate within a supportive or neutral political environment, they hold intrinsic advantages over non-

[55] *Case 002/01 (Co-Prosecutor v. Khieu Samphân and Nuon Chea)*, Appeal Judgment, F36, paras. 879–881 (Nov. 23, 2016).

[56] Karen Alter et al., *How Context Shapes the Authority of International Courts*, 79 L. & CONTEMP. PROB. 1, 6 (2016).

[57] *See, e.g.*, Ben Sokhean, *Cambodia Highlights Achievements, Legacy of ECCC at Seminar*, KHMER TIMES (Nov. 29, 2024), https://www.khmertimeskh.com/501599845/cambodia-highlights-achievements-legacy-of-eccc-at-seminar/.

[58] Paul van Zyl, *Promoting Transitional Justice in Post-Conflict Societies, in* SECURITY GOVERNANCE IN POST-CONFLICT PEACEBUILDING 209, 211–212 (Alan Bryden and Heiner Hänggi, eds., 2005).

[59] *See, e.g.*, ECCC, *ECCC Welcomes the "Records and Archives Management Program" Organized by the National Archives of Korea* (Aug. 29, 2024), https://www.eccc.gov.kh/en/resources/news-and-outreach/eccc-welcomes-the-records-and-archives-management-program-organized-by-the-national-archives-of-korea.

judicial bodies in curating and disseminating their archives as "living memory." With this background in mind, the next section turns from the theoretical to the practical context of the ECCC's judicial archive.

3. Context of the ECCC Archive

Three aspects of the ECCC make its judicial archive uniquely positioned for analysis. First, it is a hybrid court seated in Cambodia and operating in part within a framework of Cambodian law. Second, it was closely embedded within the Cambodian public during the trial phase, including unique forms of victim participation and public broadcasting of judicial proceedings. Third, the ECCC's 2023 residual mandate emphasizes both accessibility and dissemination of archival materials, centering the Court's post-judicial workings around its archive. Taken together, these factors establish the ECCC archive as capable of contributing to Cambodia's "living memory" and as a unique lens through which to study the potential of judicial archives in transitional justice. In this section, I consider each factor in turn.

3.1. Hybrid Structure

From its conception, the ECCC model was distinct from other international tribunals that had come before it. In 1997, the Government of Cambodia requested United Nations assistance in creating a new judicial body to try the surviving leaders of the Khmer Rouge.[60] From 1997 to 2003, a protracted series of negotiations ensued between the Cambodian government and the international community, each of whom sought control over the decisions of this new court.[61] As evidenced by a 1998 UN draft resolution, the international community initially imagined the creation of an International Criminal Tribunal for Cambodia (ICTC), much like the ICTR and ICTY—seated in The Hague and governed solely by international criminal law.[62]

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[60] First and Second Prime Ministers of Cambodia, *Letter dated June 21, 1997, from the First and Second Prime Ministers of Cambodia addressed to the Secretary General*, U.N. Doc. A/51/930 (June 24, 1997).

[61] Hans Correll, *Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea*, U.N. AUDIOVISUAL LIBR. OF INT'L. L. (2020).

[62] David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia*, CAMBODIAN TRIBUNAL MONITOR, at 3 (2013), (Abridgement of David Scheffer, *The Extraordinary Chambers in the Courts of Cambodia, in* INTERNATIONAL CRIMINAL LAW (Cherif Bassiouni, ed., 2008)), https://cambodiatribunal.org/wp-content/uploads/2013/08/history_history-analysis-scheffer_english.pdf.

However, by 2003, this idea was jettisoned in favor of a compromise with significantly greater Cambodian involvement; this is the ECCC of today.[63]

As such, the ECCC is among the few international tribunals that incorporated both national and international elements. Most notably, the ECCC anchored itself in Cambodian legal tradition. The ECCC Statute made clear that, along with international criminal law, Cambodia's domestic law was a source of statutory authority.[64] The ECCC Rules adopted the civil law practice of investigating judges, but it mandated two Co-Investigating Judges, one Cambodian and one international.[65] And every appointed judge, Cambodian or international, was confirmed by the King of Cambodia.[66] In sum, then, the ECCC was a fundamentally Cambodian project, borne of domestic legal tradition in a way distinct from other international tribunals.

The implication is that the ECCC archive, like its parent court, is uniquely embedded in Cambodia. Even in other hybrid courts located outside of The Hague, such as the EAC (East Africa) and the SCSL (Sierra Leone), official documentary languages were limited to English and French, while victims in Chad and Sierra Leone spoke a variety of indigenous languages.[67] In contrast, all documents filed in the ECCC were translated into three languages—English, French, and Khmer—and all three translations were formally entered into evidence.[68] And, while many scholars have fairly criticized the level of Cambodian government involvement in the workings of the Court,[69] by the same token, the state of Cambodia is intertwined with the future of the ECCC's archive. In the following sections, I will further consider the relationship between the state and the ECCC's archival activities. For now, it is sufficient to conclude that the legal framework of the ECCC embedded both the Court and its archive within Cambodia.

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[63] *Id*.

[64] Agreement between the Royal Government of Cambodia and the United Nations concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea ("ECCC Agreement") (June 6, 2003), art. 12(1).

[65] ECCC Agreement, *supra* note 64, art. 5(1).

[66] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004 ("ECCC Statute") (Oct. 27, 2004), art. 11 new.

[67] Statute of the Extraordinary African Chambers (unofficial translation by Human Rights Watch) (Sept. 2, 2013), art. 30, https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers; Statute of the Special Court for Sierra Leone (Jan. 16, 2002), art. 24.

[68] ECCC Statute, *supra* note 66, art. 45 new.

[69] *See, e.g.*, Shannon Maree Torrens, *Allegations of Political Interference, Bias and Corruption at the ECCC, in* THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 45, 72 (eds. Simon M. Meisenberg & Ignaz Stegmiller eds., 2016).

3.2. Social Embeddedness

International tribunals have consistently maintained some level of public involvement at trial. In the ICC, for instance, victims testify as witnesses and are afforded a legal representative to address matters that directly affect their interests, such as reparations.[70] The ECCC represented a step further, in terms of both breadth and depth of public involvement. For the first time, victims participated in the trial as full parties to the proceedings. Drawing from Cambodia's domestic legal system, these Civil Parties were, with few exceptions, afforded comparable rights to the prosecution and defense.[71] Accordingly, victims' representatives were able to directly cross-examine defendants and present legal submissions throughout each trial; these rights had never previously been afforded to victims of internationalized crimes. In total, across the two cases that went to trial, 3,959 victims were formally admitted as Civil Parties.[72]

And, indeed, the Cambodian public participated more broadly. Over 240,000 individuals attended these trials, which exceeds attendance over the lifespan of any other international or hybrid tribunal.[73] As the trials were broadcast through domestic media channels, access to the ECCC grew even in rural areas. A 2008 survey conducted by UC Berkeley's Human Rights Center, just before the start of the first trial, found that 61 percent of Cambodian respondents were aware of the ECCC's existence.[74] In 2010, a few months after the verdict in that trial, a follow-up survey found 75 percent awareness, while 47 percent of respondents had seen segments of the trial on television.[75] By the end of the proceedings, daily trial reports were broadcast across Khmer-language television, radio, and news outlets.[76]

This is not to say that the relationship between the ECCC and the Cambodian public has been entirely positive. Studies have found varying views of the Court's value to Cambodian society; for instance, Civil Parties were largely

[70] Rome Statute, *supra* note 23, art. 68(3).
[71] ECCC, *Internal Rules* (June 12, 2007) ("ECCC Internal Rules"), r. 23.
[72] ECCC, *Understanding the Extraordinary Chambers in the Courts of Cambodia* ("ECCC Public Guide"), at 10 (2023).
[73] *Id*.
[74] Christoph Sperfeldt, *Broadcasting Justice: Media Outreach at the Khmer Rouge Trials*, 115 ASIA PAC. ISSUES 1, 5 (2014).
[75] *Id.* at 8.
[76] *See, e.g.*, Ronit Arie, *Closing Argument Rebuttals Conclude in Case 002/02*, CAMBODIA TRIBUNAL MONITOR (June 22, 2017), https://cambodiatribunal.org/2017/06/22/closing-argument-rebuttals-conclude-in-case-00202/.

critical of the ECCC's inability to provide monetary compensation or funding for development projects.[77] Rather, more important for these purposes is the domestic legitimacy the ECCC has enjoyed. In Kosovo, for instance, lingering tensions mean that over 75 percent of ethnic Albanians believe the KSC's mandate is unfair and illegitimate.[78] In Cambodia, while the international community has largely criticized the failure to bring Cases 003 and 004 to trial as acts of political interference, there is little evidence of comparable domestic distrust in the Court or its mandate. Notably, there are no remaining organized pockets of Khmer Rouge supporters,[79] which distinguishes Cambodia from most post-conflict contexts in which perceptions of accountability mechanisms mirror ongoing divides.

Structurally, the ECCC's proximity to the Cambodian public means that its archive has been uniquely embedded within Cambodian society. Unlike with cases tried in The Hague, Cambodian victims and former perpetrators live in direct proximity to the ECCC; the Civil Party structure also allowed local communities to contribute en masse to the production of the judicial record. Unlike other hybrid tribunals, the ECCC operated via broad public awareness; the process of building the evidentiary archive unfolded within a public that was already following the trials.[80] And unlike many international tribunals, the ECCC did not face significant political hostility; the narratives captured by the archive have been largely accepted as legitimate.[81] In sum, because the ECCC's evidentiary archive was constructed from the start of proceedings as incorporated into public understanding, there is unique potential to study the archive as a tool of transitional justice.

3.3. Residual Mandate

In 2021, as the last remaining cases were concluding, the UN and the Cambodian government jointly conferred upon the ECCC a "residual mandate" to extend the

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[77] *See, e.g.*, James O'Toole, *Reparations Remain a Key Issue*, THE PHNOM PENH POST (July 27, 2010), https://www.phnompenhpost.com/national/reparations-remain-key-issue.

[78] Michael James Warren et al., *Public Perception of the Kosovo Specialist Court: Risks and Opportunities*, PAX: THE NETHERLANDS, at 13 (2017).

[79] Nichole Cochran & Andrew Wells-Dang, *Never Again? The Legacy of Cambodia's Khmer Rouge Trials*, U.S. INST. PEACE. (Oct. 3, 2022), https://www.usip.org/publications/2022/10/ never-again-legacy-cambodias-khmer-rouge-trials.

[80] *C.f. East Timor: Justice Past, Present and Future*, AMNESTY INT'L, at 35 (June 26, 2001) (lack of domestic engagement with the SPSC).

[81] *C.f., e.g.*, Harry Sekulich, *Three West African Countries to Quit International Criminal Court,* BBC (Sept. 23, 2025), https://www.bbc.com/news/articles/czjvp0pr3eko (hostility to the ICC); *Prosecutor for UN ex-Yugoslav Tribunal Warns of Negative Regional Political Situation*, U.N. NEWS (June 8, 2016), https://news.un.org/en/story/2016/06/531612 (hostility to the ICTY & IRMCT).

functions of the court from 2023–2025; this mandate was subsequently extended until 2027.[82] A small number of other tribunals, including the IRMCT and the SCSL, have similarly been endowed with residual mandates; these mandates each feature some custodial requirement. The IRMCT is required to "ensure the records' preservation and facilitate their accessibility;" in 2016, it adopted an access policy to share declassified records, housed in the Netherlands, with those who request access.[83] While the SCSL archive is physically located in the post-conflict state (Sierra Leone), its residual mandate is similar: to ensure "the public archives shall be available to the public."[84] These functions are largely reactive; the tribunals are tasked with granting controlled access to documents sought by researchers or other members of the public.

The text of the ECCC residual mandate goes further. Contained within this agreement is a mandate to "ensure that the archives of the Extraordinary Chambers are … as broadly accessible as possible,"[85] including a requirement to "*disseminate information* to the public regarding the Extraordinary Chambers."[86] This means that, by law, the ECCC—with both Cambodian and United Nations backing—is tasked with active dissemination of its archival materials across Cambodian society. Similar language does not appear in mandates of any other residual mechanism.

From 2006–2022, the ECCC's judicial proceedings helped embed the Court within the Cambodian public consciousness. The judicial archive was constructed with public access and input at multiple points throughout the trials. And, under its residual mandate, the ECCC is explicitly required to fashion its archive to engage actively with the public. Taken together, these circumstances position the ECCC archive not merely as a repository of judicial records, but as a vehicle through which this archival information can continue to influence the collective memory of the Khmer Rouge period. In the second half of this paper, I consider the ECCC's residual activities in this context.

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[82] U.N. Secretary General, *Extraordinary Chambers in the Courts of Cambodia –residual functions*, para. 40, U.N. Doc. A/79/827 (June 24, 1997); ECCC, *The Court Report: 2025*, at 5 (Jan. 2026).
[83] IRMCT Access Policy, *supra* note 27, art. 2.
[84] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Residual Special Court for Sierra Leone (Feb. 1, 2012), art. 7(2).
[85] ECCC Residual Mandate, *supra* note 12, art. 3(1).
[86] ECCC Residual Mandate, *supra* note 12, art. 2(1) (emphasis added).

4. Methods

In the following two sections, I qualitatively analyze materials produced during the ECCC's residual phase. The primary sources are official Court publications, including press releases, social media posts, judicial decisions, and annual reports. While such materials would be less appropriate in evaluating the efficacy of the ECCC's archival initiatives, they provide the most direct account of the Court's design choices and institutional priorities, which this paper aims to interpret. To contextualize these sources, I draw on Cambodian and international academic scholarship, media reporting, and my own professional experience while working at the ECCC during its residual function. I draw on my experiential knowledge only to clarify projects, rather than to make claims about the success of these initiatives.

This analysis provides a descriptive account of the ECCC's archival projects, focusing on objectives, design choices, and constraints. I examine four cases selected to provide a representative account of the ECCC's approach to developing a "living memory" archive: (1) the "CONSENT DENIED" exhibition, (2) the ECCC Guidebooks, (3) the Mobile Resource Centre, and (4) the partnership with Cambodia's National Archives. I do not evaluate the success or failure of these cases; rather, I analyze the intentional curatorial decisions underlying each program, and I consider what these choices reveal about the ECCC's approach to post-judicial archival knowledge production. I conclude by synthesizing the most generalizable aspects of the ECCC's archival approach and response to these constraints into a set of design principles relevant to future post-conflict tribunals seeking to activate their archives toward TJ goals.

5. Archival Engagement at the ECCC

While academic and media pieces have put forward a bird's-eye view of the residual mechanism,[87] close to zero attention has been paid to the specific design choices embedded in the ECCC's archival programming. Accordingly, the day-to-day practices of judicial archival work have largely gone unexamined. It is these operational decisions—how archival materials are curated and disseminated to

[87] *See* Andre Kwok, *On the Residual Functions of the Extraordinary Chambers in the Courts of Cambodia*, 166 TOAEP POLICY BRIEF SERIES (2025) (describing the Mobile Resource Center, digitalization, and victims' outreach); Choongman Lee, *The End of the Khmer Rouge Tribunal: Its Success and Legacy*, 34 MINN. J. INT'L L. 355, 377–378 (2025) (describing the elements of the ECCC's residual mandate); Maria Elander & Rachel Hughes, *Pressing Evidence: Activating Khmer Rouge Archives*, 33 SOC. & LEGAL STUD. 839, 855bird's-eye–856 (2024) (describing the ECCC's reclassification function).

specific audiences—that are core to understanding how a tribunal constructs a "living memory" archive after completion of its judicial mandate. The following case studies address this gap by examining four of the ECCC's major archival projects in detail to draw out specific considerations shaping each project. In broad strokes, Case Studies 1 and 2 address the challenge of curating an archival narrative while maintaining fidelity to judicial findings; Case Studies 3 and 4 address the challenge of effectively disseminating that narrative to local audiences, whether individuals or state institutions.

5.1. "CONSENT DENIED" Exhibition

Since the conclusion of judicial proceedings, the ECCC Resource Center has hosted a series of multimedia exhibitions, drawn from a large swath of archival materials. One such exhibition, titled "CONSENT DENIED," centers the ECCC's findings on sexual and gender-based violence (SGBV) inflicted by the Khmer Rouge.[88] The exhibition, developed in close partnership with multiple CSOs and institutional partners,[89] integrates survivor testimony, audiovisual materials, excerpts from judicial findings and court-approved reparations projects, and narrative text.[90] It was launched through an expert panel discussion and a subsequent public ceremony, each featuring a variety of stakeholders: Civil Parties, political figures, CSO partners, university students, and members of the general public.[91]

This case represents the most direct effort of the court to activate a discrete set of archival materials into a single curated narrative (here, of SGBV during the Khmer Rouge period). The "CONSENT DENIED" exhibition most squarely resembles Assmann's framework: it exemplifies the shift from storage memory, in the physical archive held in the basement of the ECCC Resource Centre, to functional memory, in the curated exhibition of archival documents on the floor

[88] ECCC, FACEBOOK (Oct. 22, 2025), https://www.facebook.com/reel/1593596381605584.

[89] These include the Cambodian Ministry of Women's Affairs, Tuol Sleng Genocide Museum, Bophana Center, Global Survivors Fund, HelpAge Cambodia, Kdei Karuna Organization, META HOUSE, TPO Cambodia, Youth for Peace-CAMBODIA, and Women Peace Makers. *See* GIZ Cambodia, FACEBOOK (Oct. 27, 2025), https://www.facebook.com/gizcambodia/posts/pfbid0pJGbi1QuQ4t8uGPZ2BXhoFUgCsyJmq6TbpzFFSMy8NjzL9nD BhZfvkAFBsscBMX6l.

[90] ECCC, FACEBOOK (Oct. 22, 2025), https://www.facebook.com/eccckh/posts/ pfbid02jWf1iNLYDBYmzYQkLsCTdVWMrms3PyhXX16p6EXvdTynzWLCXXQmkuAbhVgCVL7el.

[91] *ECCC Opens Exhibition on Forced Marriage and Sexual Violence Under Khmer Rouge Regime*, KHMER TIMES (Oct. 28, 2025), https://www.khmertimeskh.com/501780693/eccc-opens-exhibition-on-forced-marriage-and-sexual-violence-under-khmer-rouge-regime/ (opening ceremony); ECCC, FACEBOOK (Oct. 22, 2025), https://www.facebook.com/eccckh/posts/pfbid0toPdzaz38ZGjuFLZqfgt2ueMtJ6cXGnF12iZA22op6WfsdLhMnEhpGcWFGVrURRtl (panel).

above.[92] Unlike the Court's other forms of curation and dissemination, the exhibition is narrowly defined around a single subject area, and one that is particularly ripe for analysis. The Trial Chamber in Case 002/02 held that men *were* victims of forced marriage, but *were not* victims of the other inhumane act of sexual violence, as male sexual violence did not reach the severity threshold.[93] These findings were criticized on multiple fronts—both for failing to parse unique female harms under forced marriage,[94] and for excluding males as victims of sexual violence.[95] In the end, the Supreme Court Chamber (SCC) overturned the Trial Chamber's (TC) judgment, holding that both female and male victims were subject to the other inhumane act of sexual violence.[96]

With this context in mind, the most instructive curatorial decisions concern the exhibition's choices in engaging with male victims of sexual violence and forced marriage. Rather than presenting the TC and SCC judgments as competing narratives, the exhibition structures them as sequential components of a single unified narrative. A full panel dedicated to the judgments does not include any TC findings regarding male SGBV victims, but it highlights seven excerpts from the SCC judgment, all of which explicitly criticize the TC's reasoning on this question.[97] A panel presenting the timeline of the ECCC's SGBV jurisprudence is framed similarly: it first notes the TC's finding of "rape in the context of forced marriage committed against female victims," then the SCC's finding "with regard to male victims."[98] This framing, as an evolution rather than a dispute in the Court's jurisprudence, is careful not to place any sort of focus on the TC's findings that were subsequently overturned.

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[92] *See* Dagmar Brunow, *Curating Access to Audiovisual Heritage: Cultural Memory and Diversity in European Film Archives*, 18 IMAGE & NARRATIVE 97, 98 (2017) ("the process of selection, exhibition and recontextualization" is an "ac[t] of remembering," as framed through Assmann's distinction).

[93] *Case 002/02* Trial Judgment, *supra* note 45, para. 3701.

[94] Melanie O'Brien, *Gender Dimensions of Forced Marriage in International Criminal Law, in* GENDER AND INTERNATIONAL CRIMINAL LAW 207, 226–227 (Indira Rosenthal et al., eds., 2022).

[95] Valerie Oosterveld & Patricia Viseur Sellers, *Issues of Sexual and Gender-Based Violence at the ECCC, in* THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 321, 337–338 (eds. Simon M. Meisenberg & Ignaz Stegmiller eds., 2016); Myriam S. Denov & Mark A. Drumbl, *The Many Harms of Forced Marriage: Insights for Law from Ethnography in Northern Uganda*, 18 J. INT'L CRIM. JUST. 349, 366 (2020).

[96] *Case 002/02* (*Co-Prosecutor v. Khieu Samphân and Nuon Chea*), Appeal Judgment, F76, para. 1563 (Dec. 23, 2022).

[97] ECCC, "CONSENT DENIED" Exhibition, ECCC RESOURCE CENTRE, Phnom Penh ("ECCC SGBV Exhibition"), Panel #12 (Oct. 2025). For instance, it includes the following excerpt from the Case 002/02 Supreme Court judgment: "Similarly, the Trial Chamber neglected to consider, in its legal findings, the evidence of NAKAGAWA Kasumi that male victims were very seriously harmed by being forced to have sexual intercourse with their wives […]" *See Case 002/02* Appeal Judgment, *supra* note 96, para. 1583.

[98] ECCC SGBV Exhibition, *supra* note 97, Panel #3 (emphasis in original).

It's further worth noting that the full text of the exhibition is carefully positioned in alignment with the judgments. For instance, academic scholarship calls attention to the SCC's language framing sexual violence as committed by male victims "forced to victimise" female victims.[99] In the exhibition, expert witness Kasumi Nakagawa's account is framed along these same lines: Panel #10 of the exhibition does not refer to 'male rape victims,' but instead centers the fact that "men also suffered greatly when they had to force themselves to rape their wives."[100] This formulation is careful to track Case 001's narrow definition of rape, which requires sexual penetration, even though that definition excludes most male survivors.[101] While the exhibition could have highlighted male suffering more explicitly without emphasizing males as perpetrators—in alignment with the dominant ICL definition of rape, which considers males as rape victims—the Court instead prioritized strict fidelity to its jurisprudence.[102] So, in curating its narrative, the Court was careful to align with judicial findings while acknowledging some degree of gendered harms against both male and female victims.

As with any project of this nature, a primary limitation is the falloff in deep, genuine engagement after the exhibition's initial opening-week hype. The ECCC has adopted two primary strategies to mitigate this challenge. First is the prominent display of two questions for reflection, both backwards-looking and forwards-looking.[103] In particular, the second forward-looking question asks visitors to think directly about their own responsibilities and obligations in response to the exhibit. Second is the "Tree of Hope," which invites the predominantly university-student visitors to "leave messages of remembrance and solidarity" after interacting with the SGBV exhibition materials.[104] The design choice of incentivizing students to engage, both through self-reflection and through written messages, aligns with the ICTJ's best

[99] Juliette R. Tiedrez, *On the Rape of Men in the Context of Forced Marriages at the Extraordinary Chambers in the Courts of Cambodia*, EJIL: TALK! (Apr. 1, 2023), https://www.ejiltalk.org/on-the-rape-of-men-in-the-context-of-forced-marriages-at-the-extraordinary-chambers-in-the-courts-of-cambodia/.

[100] ECCC SGBV Exhibition, *supra* note 97, Panel #10.

[101] *Case 001 (Co-Prosecutors v. Kaing Guek Eav alias 'Duch')*, Trial Judgment, E188, para. 362 (July 26, 2010).

[102] Catherine A. MacKinnon, *The ICTR's Legacy on Sexual Violence*, 14 NEW ENG. J. OF INT'L & COMP. L. 101, 102 (2008). The prevailing standard was first established in *Akayesu*, which defines rape as any "physical invasion of a sexual nature, committed on a person under circumstances which are coercive." *See Prosecutor v. Jean-Paul Akayesu*, Trial Judgment, ICTR-96-4-T, para. 598 (Sept. 2, 1998).

[103] In English, these questions are: (1) "What did you learn from the survivors' stories about breaking the silence and healing?" (2) "What is my responsibility—and our collective responsibility—to support survivors and prevent such crimes and other forms of sexual violence from occurring in the future?" *See* ECCC SGBV Exhibition, *supra* note 97, Panel #25.

[104] Ben Sokhean, *Exhibition on Sexual Violence under KR Regime*, KHMER TIMES (Oct. 30, 2025), https://www.khmertimeskh.com/501781531/exhibition-on-sexual-violence-under-kr-regime/.

practices for transitional justice educational outreach, which stress the importance of open, age-appropriate youth dialogue.[105] And, the ECCC Resource Center's physical function, as a free public library centrally-located in Phnom Penh, is particularly valuable in this regard; each week, roughly one thousand visitors engage with the exhibition as soon as they enter the public lobby,[106] and hundreds of messages expressing "commitment and hope for a future free from [SGBV]" have been posted on the tree exhibit, which sits directly facing the entrance to the building.[107]

Taken together, then, this case is useful for two reasons. First, it demonstrates both the possibilities and the limitations of curating a complex, sometimes contradictory, set of individual historical experiences into one archival narrative. Second, it sheds light on the challenges and potential solutions of archival exhibitions in effectively engaging post-conflict communities.

5.2. ECCC Guidebooks

The ECCC's guidebooks demonstrate the Court's most direct effort to distill the totality of the ECCC's archives into a set of curated narratives. Since the beginning of the residual phase, the ECCC has produced several iterations of these materials, including a 66-page guide targeted toward the general public ("Public Guide"),[108] and two comprehensive technical guides totaling 645 pages ("Technical Guides"),[109] among others.[110] Together, these guides capture the ECCC's efforts to curate 2.4 million pages of evidentiary materials and the judicial decisions built atop that evidence into formats accessible to the Cambodian and international publics.

This case is especially useful in exploring the ECCC's efforts to construct archival narratives while avoiding undue political bias. In his work on the ICTY archive, David Kaye argues that judicial findings interpret the evidence in an

[105] Clara Ramírez-Barat, *Engaging Children and Youth in Transitional Justice Processes: Guidance for Outreach Programs*, INT'L CTR. FOR TRANSITIONAL JUST., at 12 (Nov. 2012).
[106] Phoeurng Phearak, *ECCC Resource Centre Transforms into a Popular Library*, CAMBODIANNESS (July 6, 2025), https://cambodianess.com/article/eccc-resource-centre-transforms-into-a-popular-library ("In the past two months, we've averaged around 220 users per day").
[107] ECCC (@krtribunal), INSTAGRAM (Nov. 21, 2025), https://www.instagram.com/p/DRTXoM9jelk/.
[108] ECCC Public Guide, *supra* note 72.
[109] ECCC, *Guide to the Extraordinary Chambers in the Courts of Cambodia, Volume 1: Establishment, Operations and Cases* (2024) ("ECCC Technical Guide"); ECCC, *Guide to the Extraordinary Chambers in the Courts of Cambodia, Volume 2: Jurisprudence* (2025).
[110] For example, a short pamphlet aimed at young children. *See* ECCC, *The ECCC Children's Guide* (2024).

"extraordinarily divisive and contested" manner.[111] The implication, Kaye argues, is that each state—Serbia, Bosnia, and Croatia, in the ICTY context—has an incentive to pressure tribunal archivists to "construct and narrate in such a way that is consistent with national or local narratives."[112] In the Cambodian context, the most pressing dispute played out in Cases 003 and 004, in which Cambodian judges opposed the indictments of five Khmer Rouge leaders while international judges favored the indictments.[113] Several scholars have argued that the sitting Cambodian government was politically opposed to the indictments because these defendants continued to hold leadership positions in the post-conflict regime.[114]

So, when the ECCC constructs archival narratives, an interesting question is raised—given that only three defendants were convicted, to what extent ought these narratives engage with the many non-convicted Khmer Rouge leaders,[115] including the five defendants purportedly protected by the government?[116] The Public Guide includes pages dedicated to each of the ten defendants; pages on the individual liability of Duch, Nuon Chea, and Khieu Samphan (the three convicted persons) include sections of "Key *Findings*," as opposed to the other seven charged persons, which include "Key *Allegations*."[117] This is contrasted with the non-defendants: Pol Pot, Ta Mok, and others are mentioned in a two-page spread describing Angkar, the CPK's leadership branch, but only as to their positions in Angkar—the guide

[111] David Kaye, *Archiving justice: conceptualizing the archives of the United Nations International Criminal Tribunal for the former Yugoslavia*, 14 ARCH. SCI. 381, 390 (2014).

[112] *Id.* at 392.

[113] ECCC, *Case 003*, https://www.eccc.gov.kh/en/cases/case-003 (last visited Dec. 5, 2025); ECCC, *Case 004*, https://www.eccc.gov.kh/en/cases/case-004 (last visited Dec. 5, 2025).

[114] *See, e.g.*, Torrens, *supra* note 69, at 72; Heather Ryan, *And then, finally, a judge wrote the shameful end of the Khmer Rouge Tribunal*, JUSTICEINFO (Feb. 4, 2022), https://www.justiceinfo.net/en/87248-finally-judge-wrote-shameful-end-khmer-rouge-tribunal.html.

[115] For further context: three Khmer Rouge leaders (Duch, Nuon Chea, and Khieu Samphan) were convicted. Two more (Ieng Sary and Ieng Thirith) were charged but died before the cases concluded. Five others (Meas Muth, Sou Met, Im Chaem, Ao An, and Yim Tith) were investigated but not charged. Two of the most senior leaders (Pol Pot and Ta Mok, among others) were not formally investigated at all, because they died before proceedings began.

[116] While most international scholarship criticizes Cases 003 and 004 as political suppression, this is not the only perspective. The ECCC's mandate covered "senior leaders of Democratic Kampuchea and those who were most responsible for the crimes" of the Khmer Rouge, aiming to achieve peaceful reconciliation instead of prosecuting rank and file cadres. Multiple judges interpreted this language to limit the Court's jurisdiction to the upper echelon of Khmer Rouge leaders, which excluded the defendants in Cases 003 and 004. This interpretation too has merit, and the domestic media's reaction to these outcomes was generally positive. *See* Rosemary Grey & Rachel Killean, *Communicating Justice: Cambodian Press Coverage of the ECCC's Final Judgment*, 23 INT'L CRIM. L. REV. 487, 498–501 (2023).

[117] ECCC Public Guide, *supra* note 72, at 29–38.

includes no explicit allegations as to their criminal responsibilities.[118] So, the general approach is this: the five charged persons in Cases 001 and 002 (including Ieng Sary and Ieng Thirith) are centered, the five investigated persons in Cases 003 and 004 are also highlighted, and other key players are placed on the periphery.

Across more than six hundred pages of the Technical Guides, the same pattern emerges: while being careful to frame trial judgments as solely pronounced against the five charged defendants,[119] the allegations against defendants in Cases 003 and 004 are also highlighted.[120] For instance, as pertains to Case 003, "according to the International Co-Prosecutor, Meas Muth … effectively control[ed] the town of Kompong Som, its surrounding area, and Cambodia's coastal islands;" along with Sou Met, Meas Muth "allegedly … participated in a criminal plan to purge the RAK of undesirable elements, resulting in at least thousands of deaths […]"[121] Of course, the guide is careful to note these are allegations, but they are still highlighted, with citations to Case 003 filings.[122] With respect to the defendants in Cases 003 and 004, then, even absent comprehensive trials, the existing judicial documents included enough evidentiary analysis through which to curate narratives about the alleged individual responsibility of each defendant.

However, here, too, these narratives of individual criminal responsibility are told without including Pol Pot, Ta Mok, or others who played key roles but were not charged. The challenge with this approach is the danger of leaving parts of the historical narrative on the table by largely framing the Khmer Rouge violence around only three of the many high-ranking officials. A mitigating factor, though, is that each of the three ECCC judgments did establish judicial findings regarding the broader context of Khmer Rouge history, including structure and hierarchy. For example, both the Public Guide and Technical Guides discuss the roles of Pol Pot and Ta Mok in planning the fall of Phnom Penh, citing explicitly the Historical Background section of the Case 002/02 judgment in which the Court found the same. Similarly, the ECCC's digital archive highlights each senior leader's responsibilities

[118] *Id.* at 25–26. Pol Pot is also mentioned when listing the Key Allegations against Ieng Sary and Ieng Thirith. *See, e.g.*, *id.* at 33–34 ("Along with Pol Pot, Nuon Chea, Khieu Samphan, and others, intended the commission of crimes at cooperatives …").

[119] *See, e.g.*, ECCC Technical Guide, *supra* note 109, at 181.

[120] *See, e.g., id.* at 167.

[121] *See, e.g.*, *id.* at 211–212.

[122] These passages cited the OCP's Second Introductory Submission in Case 003. *See Case 003 (Co-Prosecutor v. Meas Muth)*, Second Introductory Submission, D1, paras. 3–4 (Nov. 20, 2008).

within the Khmer Rouge hierarchy.[123] So, while ECCC archival narratives do not make claims about the individual crimes committed by Pol Pot or Ta Mok, they remain broadly able to tell a comprehensive story of the Khmer Rouge period.[124]

The ECCC's guidebooks, for the most part, have included a narrower set of claims about Pol Pot and other senior Khmer Rouge leaders than most Cambodian Genocide scholarship. Still, as outlined in the theoretical section of this paper, such an approach includes unique advantages in terms of the credibility and legitimacy of the historical narrative. Taken together, this case illustrates how tribunals may disseminate archival narratives that are as comprehensive as possible while still maintaining fidelity to judicial findings.

5.3. Mobile Resource Centre

The Mobile Resource Center is the ECCC's most extensive archival outreach program, implemented through a high-tech bus that has travelled to all twenty-five provinces across rural and urban Cambodia.[125] The project was implemented in 2024 to "bring the ECCC to meet the Cambodian people," with a particular focus on remedying the lack of Khmer Rouge history in school curricula.[126] The bus is equipped with technology not commonly used in rural schools, including touch-screen laptops, projectors, and audiovisual equipment.[127] At each school, programming is divided into three activities: discussions in the classroom focused on Khmer Rouge history, outdoor exhibitions focused on ECCC tribunal proceedings, and small-group visits inside the bus to interact with the ECCC's digital archives.[128]

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[123] ECCC, *Unmasking Angkar: Khmer Rouge Hierarchy*, https://kr-hierarchy.eccc.gov.kh/en/cpk (last visited Dec. 5, 2025).

[124] ECCC Technical Guide, *supra* note 109, at 5, citing *Case 002/02* Trial Judgment, *supra* note 45, paras. 227, 229–233.

[125] Rabia Rasul, *The ECCC Resource Bus' journey to Koh Kong to reframe Justice and Accountability through intergenerational dialogue*, ECCC (Feb. 13, 2025), https://www.eccc.gov.kh/en/resources/news-and-outreach/the-eccc-resource-bus-journey-to-koh-kong-to-reframe-justice-and-accountability-thro ugh-intergenerational-dialogue.

[126] Hang Punreay, *ECCC launches 'Mobile Resource Centre'*, KHMER TIMES (Feb. 1, 2024), https://www.khmertimeskh.com/501432478/eccc-launches-mobile-resource-centre/ (quoting ECCC Acting Director of Administration, Kranh Tony).

[127] Anton L. Delgado, *For Young Cambodians, a Mobile History Lesson from a Dark Time*, N.Y. TIMES (Aug. 24, 2024), https://www.nytimes.com/2024/08/24/world/asia/cambodia-khmer-rouge-museum-bus.html.

[128] Vikram Ramaswamy & Jehaan Sivasankar, *Bringing the ECCC to Takeo: A Snapshot of Our Journey with the Mobile Resource Centre*, ECCC (Aug. 13, 2025), https://eccc.gov.kh /en/resources/news-and-outreach/bringing-the-eccc-to-takeo-a-snapshot-of-our-journey-with-the-mobile-resource-centre.

In 2024, the bus visited 88 institutions, the majority of which were rural high schools, and engaged over 60,000 students in programming.[129]

This case is particularly helpful in illustrating the ECCC's engagement with Cambodia's cultural context in the process of operationalizing its archive. Existing work on post-conflict "living memory" emphasizes that education must be carried out with careful attention toward the local context.[130] In Cambodia, the Mobile Resource Center has encountered student dynamics deeply ingrained in rural classrooms. Students are often discouraged from speaking up and asking questions, both in the home and at school.[131] Teachers are expected to maintain a position of "distance, power, and status."[132] These dynamics also have a gendered dimension. Until 2007, the Cambodian high school curriculum included the Chbab Srey, a traditional poem reminding women to "show deference and subservience to their husbands;"[133] well after the poem was removed from the curriculum, surveys of Cambodian students and teachers have provided evidence that such values continue to be held in rural Cambodian schools.[134] Even the little details—boys and girls sitting in separate sections of the classroom, for instance—reinforce the academic norms that encourage Cambodian students to passively receive information[135] rather than to actively engage with the Khmer Rouge period.[136]

So, in analyzing this project, the most instructive design choices concern the modes of engagement between the ECCC Outreach Team and rural students. In this context, the challenge is not motivation—a 2019 empirical survey of Cambodian youth found 98.6 percent of respondents were interested in learning more about

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[129] ECCC, *Quarterly Progress Report: Q1 2025* 9 (Mar. 2025), https://www.eccc.gov.kh/sites/default/files/Quarterly%20Progress%20Report%20Q1%202025.final_website%20upload.pdf. *See also* ECCC, *Quarterly Progress Report: Q3 2024* (Sept. 2024), https://www.eccc.gov.kh/sites/default/files/Quarterly%20Progress%20Report%20Q3%202024%20data.pdf; ECCC, *Quarterly Progress Report: Q4 2024* (Dec. 2024), https://www.eccc.gov.kh/sites/default/files/Quarterly%20Progress%20Report%20Q4%202024_tables.pdf (both containing more detailed information).

[130] Campbell, *supra* note 13, at 262–263.

[131] Jenny Pearson, *Capacity Development in Cambodia: The Challenge of Changing an Educational Culture, in* EDUCATION IN CAMBODIA 175, 180–181 (Vincent McNamara & Martin Hayden, eds., 2022).

[132] *Id.*

[133] Emily Anderson & Kelly Grace, *From Schoolgirls to "Virtuous" Khmer Women: Interrogating Chbab Srey and Gender in Cambodian Education Policy*, 12 STUD. SOC. JUST. 215, 217 (2018).

[134] Rinna Bunry & Karen Walker, *Cambodian Women and Girls: Challenges to and Opportunities for Their Participation in Higher Education*, *in* EDUCATION IN CAMBODIA 275, 286 (Vincent McNamara & Martin Hayden, eds., 2022).

[135] Steven Prigent, *Concerning the education of children in contemporary rural Cambodia Filial debt, deference and "vagabondage" for boys and girls*, 276 LES CAHIERS D'OUTRE-MER 97, 115 (2017).

[136] The latter is necessary for successful TJ processes. *See* Ramírez-Barat, *ICTJ Guidance*, *supra* note 105, at 11.

Khmer Rouge history[137]—but norms around student outspokenness. As such, the ECCC has employed a concerted effort to cut through existing academic norms. From the moment students enter classrooms and sit down, ECCC outreach members ask those students to swap seats, so boys and girls are sitting interspersed. Students laugh, but the underlying aim is to signal that these activities are unlike traditional academic classes.[138] During the actual presentation of information, every effort possible is made to affirmatively encourage student engagement: encouraging students to stand up, read aloud off slides, answer questions in groups.[139] In particular, a deliberate emphasis has been placed on gender dynamics, which looks both like discomfort, in cold-calling female students to speak into a microphone, and supportiveness, in leading the class in clapping for each student who finishes speaking.[140] These decisions center an objective of framing classroom sessions away from traditional rural Cambodian schooling, and toward deeper, gender-aware forms of engagement with the memory of the Khmer Rouge.[141]

Through these efforts, the Court has grappled with the limitation of the lack of long-term interaction. Particularly given limited opportunities to reinforce these lessons both in school and out, a single day of programming might leave minimal lasting impact on rural students. The Mobile Resource Center has adopted two strategies to mitigate this challenge. First is curation of content intended to evoke deep student emotions, including the "My Story" survivor documentaries and the invitation of Civil Parties to speak on their experiences as survivors.[142] Second, students are provided with physical materials, including guide booklets and intergenerational dialogue kits, that explicitly encourage sustained conversations with family members and other survivors in their communities.[143] While the efficacy of such efforts over a longer time series remains to be studied, these design choices

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[137] Boravin Tann & Khuochsopheaktra Tim, *'Duty Not to Forget' the Past? Perceptions of Young Cambodians on the Memorialization of the Khmer Rouge Regime*, SWISSPEACE WORKING PAPER, at 22 (Mar. 2019).

[138] *See, e.g.*, Nathan Thomas & Patrick Thorne, *The Extraordinary Bus: Shifting Gears in International Criminal Law*, ECCC (Nov. 11, 2024), https://eccc.gov.kh/en/resources/news-and-outreach/driving-change-the-eccc-mobile-resource-centres-journey-to-connect-cambodias-past-and-present (photos of mixed-gender seating).

[139] Ramaswamy & Sivasankar, *supra* note 128.

[140] Note that the ECCC tracks gender statistics for each school visit. *See, e.g.*, ECCC, FACEBOOK (Nov. 26, 2025), https://www.facebook.com/eccckh/posts/pfbid06iFm5tLVRtZ8UhKwAQKSvYyzBCg5tD4t2dzgNsWXMRAF4HXCFUR5gy68KkgLg5cTl.

[141] Post-conflict TJ processes require gender-aware interventions. *See* Tine Destrooper and Stephan Parmentier, *Gender-Aware and Place-Based Transitional Justice in Guatemala: Altering the Opportunity Structures for Post-Conflict Women's Mobilization*, 27 SOC. & LEGAL STUD. 323, 325–326 (2018) (containing a literature review).

[142] Ramaswamy & Sivasankar, *supra* note 128.

[143] Rasul, *supra* note 125.

underscore a broader principle of the ECCC's outreach model: to build sustained engagement with archival materials in rural communities beyond the moment of dissemination.

Taken together, this case is useful for two reasons. First, it demonstrates an approach to archival dissemination that's responsive to the local context of the target audience. Second, it highlights both challenges and potential solutions to the lack of sustained student engagement endemic to any education project.

5.4. National Archives of Cambodia Partnership

Finally, the ECCC has working relationships with other domestic archival institutions, most notably including Cambodia's National Archives. The National Archives, attached to the Cambodian government, include a collection of records from the French colonial period, the post-colonial Cambodian government, and the Khmer Rouge period. [144] The archive contains antiquated record-keeping infrastructure, and the majority of documents have not been digitized, a task made more difficult by the challenges of digitally scanning Khmer script. [145] To help mitigate these challenges, the ECCC has partnered with the National Archives to both assist with scanning documents and to more broadly provide archival training and modernization assistance.[146]

This case is particularly illustrative in demonstrating how tribunals can utilize judicial archives to engage not only with individuals but also with institutional stakeholders, with the ultimate objective of strengthening institutional transparency in post-conflict societies. Nearly all of the academic scholarship surrounding the ECCC's political nexus is negative; such concerns are valid.[147] But far less has been written about the potential positive transitional justice implications of the ECCC's role as an internationalized tribunal with direct ties to the domestic government.[148]

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[144] Included within this collection are original documents regarding the 1979 People's Revolutionary Tribunal, organized by the Vietnamese occupying government, which convicted and sentenced Pol Pot and Ieng Sary to death. *See* Peter Arfanis, *Introduction to the National Archives of Cambodia*, CENTER FOR KHMER STUDIES, at 1–2 (June 8, 2013).

[145] Chea Sameang, *Cambodia Is Losing Its Memory – A Digital National Archive Can Save It*, CAMBODIANESS (Nov. 30, 2025), https://cambodianess.com/article/cambodia-is-losing-its-memory-a-digital-national-archive-can-save-it; National Archives of Cambodia, FACEBOOK (Feb. 21, 2022), https://www.facebook.com/photo.php?fbid=408823447679583&id=107336851161579&set=a.125060286055902 (describing a set of archival documents as "worryingly fragile").

[146] *See ECCC, Korea Records & Archives Program (Digital Website)*, supra note 59.

[147] *See, e.g.*, Torrens, *supra* note 69, at 72.

[148] van Zyl, *supra* note 58, at 211–212.

The ECCC archive is the first and only archival institution in Cambodia to receive international certification, on the basis of its open access to information and high-quality records management.[149] This makes sense: while the Khmer Rouge ripped apart Cambodia's domestic archival ecosystem,[150] the ECCC was built with international investment, and archival materials are stored according to international risk management standards.[151]

Given these circumstances, the most relevant design choices center on the details of the ECCC-National Archives relationship. It is immediately clear that this relationship features a very wide scope of capacity-building. The Court's Records and Archives Unit (RAU) has organized and facilitated a wide series of technical trainings for the National Archives and various other Cambodian institutions, spanning all aspects of archival management.[152] As the first international tribunal to digitize all of its archival evidence,[153] the ECCC has further engaged the National Archives in digitization training and the scanning of over 100,000 pages of physical Khmer Rouge commercial documents currently in the government's possession.[154] Particularly notable is how the ECCC has leveraged its international vantage point. RAU's 2022 facilitation of an International Council on Archives (ICA) training was the first time any ICA training had been administered in Cambodia, and it was the first instance in which the National Archives received ICA accreditation.[155] The ECCC's 2025 translation of the Universal Declaration on Archives to Khmer, too, serves as an attempt to anchor the domestic archival ecosystem in international

[149] *ECCC Archive Awarded ISO Certification, a First for Cambodia,* KHMER TIMES (Sept. 1, 2025), https://www.khmertimeskh.com/501749139/eccc-archive-awarded-iso-certification-a-first-for-cambodia/.

[150] Michelle Caswell, *Archiving the Unspeakable. Silence, Memory, and the Photographic Record in Cambodia*, at 83 (2014).

[151] ECCC, *Court Report 2023*, *supra* note 1, at 20–23.

[152] ECCC, *ECCC Conducts Records Management Training with Institutional Partners*, FACEBOOK (Feb. 28, 2022), https://www.facebook.com/eccckh/posts/pfbid0Gmz33cg5F8GYH5X5NpxtKe33trvGdK84gc1sTvhSz8VvH8ZQCvrXsaktm9fh17Xgl; National Archives of Cambodia, *The ICA online learning course "Introduction to Records Management"*, FACEBOOK (Feb. 23, 2022), https://www.facebook.com/nationalarchivesofcambodia/posts/pfbid02NrWjGc4QayKxUMfAPGq3gXUAnUikzzr8vCqTuzKDeqgXDiXrdCkc8DPNmD8VnQVtl.

[153] Nasa Dip, *After Khmer Rouge tribunal, Cambodian archivists preserve a brutal history*, SOUTHEAST ASIA GLOBE (Mar. 27, 2023), https://southeastasiaglobe.com/khmer-rouge-tribunal-archives/.

[154] ECCC, FACEBOOK (Aug. 28, 2024), https://www.facebook.com/eccckh/posts/pfbid08E4VjJRVWohn5GMwFx1zLGivgcw2x86GNMBnrvMPsrxs4KAeekfmk5dEeciiUuaYl; Arfanis, *supra* note 144, at 2.

[155] ECCC, *Records Management Training (Facebook)*, *supra* note 152.

standards for transparency and long-term public access, even after the tribunal itself concludes its residual mandate.[156]

Whether the ECCC's archival practices will spill over to other Cambodian institutions remains to be seen. Cambodia faces limited public access to information,[157] and recent crackdowns on journalists provide a potentially bleak outlook for the future of government transparency.[158] Even so, recent developments indicate that broader Cambodian archival practices are developing, both within and outside of the judiciary. For example, in late 2025, the Cambodian Supreme Court—which includes four former or sitting ECCC judges—digitally published judicial decisions for the first time; this judicial transparency is a novel development for the domestic legal system.[159] And, in November 2025, Cambodia's Permanent Deputy Prime Minister Vongsey Vissoth spoke about the initiation of a government project to modernize and digitize the National Archives; in doing so, he explicitly cited the ECCC archive's cooperation and ISO certification as foundational bases for the state archival project.[160]

This case is particularly useful because it explores the breadth of potential value that tribunal archives bring to domestic institutions. Even setting questions of historical narrative aside, the Cambodian case demonstrates how judicial archives are intrinsically positioned to influence broader practices of records upkeep and archival transparency in post-conflict states.

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[156] ECCC, FACEBOOK (Feb. 17, 2025), https://www.facebook.com/eccckh/posts/pfbid02LmWUZHTDo2gbsjLjLHg3gnD7AwaF6YQNGTArBnsxMChN74b3Zo7mZDUCAKJE52SNl.

[157] UNCAC, New Civil Society Report on Cambodia: Stronger enforcement efforts, more transparency and de-politicisation of key institutions needed to advance anti-corruption efforts, ASSOCIATION FOR THE IMPLEMENTATION OF THE UN CONVENTION AGAINST CORRUPTION (24 Nov. 2021), https://uncaccoalition.org/new-civil-society-report-on-cambodia-stronger-enforcement-efforts-more-transparency-and-de-politicisation-of-key-institutions-needed-to-advance-anti-corruption-efforts/.

[158] IFJ, *Cambodia: Two journalists charged with treason for border conflict reporting*, INT'L FED'N OF JOURNALISTS (Sept. 16, 2025), https://www.ifj.org/media-centre/news/detail/ category/press-releases/article/cambodia-two-journalists-charged-with-treason-for-border-conflict-reporting.

[159] *See* Supreme Court of Cambodia, *Civil Judgment*, https://supremecourt.gov.kh/en/ civil-judgement (last visited Dec. 5, 2025).

[160] Ben Sokhean, *National Archives to be modernised ahead of centennial*, KHMER TIMES (Nov. 13, 2025), https://www.khmertimeskh.com/501788602/national-archives-to-be-modernised-ahead-of-centennial/.

6. Looking Ahead

The preceding case studies demonstrate that the Court has articulated a novel approach to curating and disseminating a "living memory" archive. This paper aims to extract generalizable principles from how the ECCC has navigated its archival project. Case Studies 1 and 2 illustrate the Court's approach to curating archival narratives: oriented toward presenting a comprehensive account of the Khmer Rouge period, tethered to judicial findings, and facing real or perceived political influence. Case Studies 3 and 4 illustrate the Court's approach to disseminating archival narratives: aimed at engaging both local communities and national institutions, grappling with cultural context, and challenged by a lack of long-term engagement.

Here, I distill these observations into four design principles relevant to future post-conflict tribunals seeking to activate their archives. *First*, curating archival materials with close fidelity to judicial findings can mitigate risks of political capture and preserve the credibility advantage associated with legal judgments, even when those judgments are contested. *Second*, dissemination strategies can benefit from aligning outreach methods with local context, whether through active, personalized engagement in receptive environments or alternative digital strategies in areas of localized distrust.[161] *Third*, short-term archival projects can be strengthened when designed to enable sustainable, longer-term investment, including through prompting self-reflection and active community dialogue. *Fourth*, tribunals can take advantage of their institutional positions to collaborate with key stakeholders—both political and civil society—to support broader capacity-building efforts.

These considerations reflect the most generalizable patterns that emerge from the ECCC's experience navigating post-conflict archival work. Evaluative studies of the ECCC have largely failed to engage with the Court's archival programming. Yet, as the terrain of international criminal law swings back from large comprehensive courts to smaller, more targeted judicial mechanisms—in

[161] For example, it would be challenging to implement a ground-based dissemination strategy in Kosovo, where the KSC has been forced to limit or cancel in-person speaking engagements due to threats of violence. *See* Perparim Isufi, *Kosovo War Crime Court President Suggests KLA Leaders' Trial is Near*, PRISHTINA INSIGHT (Sept. 21, 2022), https://prishtinainsight.com/kosovo-war-crime-court-president-suggests-kla-leaders-trial-is-near/.

Kosovo,[162] Ukraine,[163] and the potential of Syria and beyond[164]—there is increasing value in descriptive study of the ECCC's participation in Cambodia's broader transitional justice project. This paper makes a case for the adoption of a "living memory" model of judicial archives, and it provides the basis for archival design choices as these tribunals grapple with their archival responsibilities.

[162] Maria S. Cataleta, *The Kosovo Specialist Chambers, an International Tribunal inside the National Judicial System*, 3 J. INT'L CRIM. L. 1 (2022).
[163] Milena Sterio, *The Ukraine Crisis and the Future of International Courts and Tribunals*, 55 CASE W. RES. J. INT'L L. 479, 499–501 (2023).
[164] *Promoting Criminal Accountability and Transitional Justice in Syria: The Role of the EU*, EUR. CTR. CONST. & HUM. RTS., at 4–5 (Oct. 2025).

The Dragon's Human Face: Wartime Implications of Traditional Chinese Minben Thought for Contemporary Laws of War

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ABSTRACT

Traditional Chinese Minben thought profoundly shaped the philosophy of warfare in ancient China. Diverging from the nation-state and ethnic consciousness that characterized early European history, the ancient Chinese worldview regarded the entire populace under Tianxia as an indivisible unity. Accordingly, the highest objectives of conflict were understood as bringing security to the people and benefiting the people, principles that permeated the entire spectrum of a just war. In the contemporary context, this people-as-root philosophy offers critical humanitarian insights for the evolution of the laws of war. Regarding jus ad bellum, it posits that the right to resort to force must be constrained by the imperative to protect civilian life and fundamental rights; regarding jus in bello, it offers a theoretical lens to rebalance military necessity with humanitarian obligations; and regarding jus post bellum, it advocates that the victor assumes a proactive responsibility to restore social governance, ensure public welfare, and preserve cultural continuity, thereby laying the social foundations for a durable peace.

Keywords: Minben Thought; Just War; Jus ad Bellum; Jus in Bello; Jus post Bellum

The efficacy of laws of war is increasingly understood to depend on their resonance with the diverse ethical traditions of individual states, as identifying humanitarian values embedded within local cultural contexts can foster greater compliance and more robust implementation.[1] In the Chinese context, Boris Kelecevic of the ICRC has noted that traditional ideals regarding dignity and social responsibility are fundamentally congruent with the overarching principles of international humanitarian law (IHL). Recognizing this alignment is a critical step

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[1] Fan Xueke, "China and Humanitarian Law: Evolution, Contemporary Influence and Prospects of Traditional Ethics in Modern-day Practice", *Asian Pacific Journal of International Humanitarian Law*, Vol. 5, 2024, p. 102.

toward strengthening the implementation of humanitarian norms through cross-cultural dialogue and institutional cooperation.[2]

At the same time, the universalism promoted by international law often encounters practical challenges. States, as the primary drafters and implementers of these norms, differ significantly in terms of economic systems, political ideologies, cultural traditions, religious beliefs, and legal frameworks.[3] Although all civilizations have developed norms and customs to restrain the conduct of war, the core rules of the laws of war as codified in modern legal instruments largely reflect the cultural values and intellectual traditions of Western civilization.[4] Yet warfare is not a challenge unique to Western civilization; both Eastern and Western societies have long developed concepts emphasizing humanity and benevolence in war. Judge Hanqin Xue has observed that "[n]otwithstanding its universal character, international law in practice is nonetheless not identically interpreted and applied among States."[5] Countries with diverse characteristics understand these concepts differently: "whilst a broad historical brush may depict all societies as having had some sort of notion of restraint in warfare, it is also clear that not all have emphasized the same ideas or adopted the same institutions."[6] This article therefore takes traditional Chinese *Minben* (people-as-root) thought as its point of departure to explore its implications for wartime conduct and its contemporary relevance for the laws of war. Not only did this school of thought profoundly shape Chinese concepts of warfare in antiquity,[7] but it also provides intellectual insights from Chinese civilization for the theory and practice of contemporary laws of war. Here, the term "laws of war" is used in a broad sense, encompassing *jus ad bellum*, *jus in bello*, and *jus post bellum*.

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[2] The International Academy of Red Cross & Red Crescent, *Boris stated that the ICRC is committed to engaging in in-depth dialogue and cooperation with China in the fields of culture and tradition*, 2025, available at: https://mp.weixin.qq.com/s/-nWNIuP43RGUg2CGpatXGg (all internet references were accessed in December 2025).

[3] Zhuo Liang, "Chinese Perspectives on the Ad Bellum/In Bello Relationship and a Cultural Critique of the Ad Bellum/In Bello Separation in International Humanitarian Law", *Leiden Journal of International Law*, Vol. 34, 2021, p. 292.

[4] M. Sassòli, A. A. Bouvier and A. Quintin (eds.), *How does Law Protect in War?: Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, International Committee of the Red Cross, Geneva, 2012, p. 5; Martti Koskenniemi, "The Case for Comparative International Law", *Finnish Yearbook of International Law*, Vol. 20, 2009, p. 4.

[5] Hanqin Xue, "Chinese Contemporary Perspectives on International Law: History, Culture and International Law", *Recueil des Cours*, vol. 355, 2012, p. 53.

[6] M. Sassòli, above note 4, p. 5.

[7] Fuchuan Yao, "War and Confucianism", *Asian Philosophy*, Vol. 21, No. 2, 2011, pp. 213–226.

To refine the scope of this study, the core research question is specifically defined as follows: How can traditional Chinese *Minben* thought provide a normative framework to address the structural imbalances in the contemporary laws of war? Rather than broadly surveying historical intersections of philosophy and conflict, this article explicitly aims to contribute to the critique, interpretation, and development of modern IHL and broader laws of war in three concrete ways. First, as a critique, it challenges the state-centric paradigm of jus ad bellum and the expansive application of military necessity, exposing how existing legal ambiguities are often exploited to rationalize civilian harm. Second, regarding interpretation, it introduces a people-centered lens to strictly construe ambiguous IHL concepts (such as proportionality and military advantage), ensuring that legal uncertainties are resolved in favor of civilian protection. Third, concerning legal development, it advocates for integrating fundamental human rights as substantive constraints on the resort to force and proposes transforming *jus post bellum* from a minimalist framework of order-maintenance into a system of positive obligations for post-war societal recovery.

1. Core Concepts of Traditional Chinese *Minben* Thought

1.1. The Formation of Traditional Chinese Minben Thought

For many, the people-as-root thought represents an enduring tradition of Confucian political theory that conceives of the common people (民) as the root (本) of the state, implying that the state's priority lies in serving the best interests of the people—an idea often understood as the ruler's duty to govern for the people by promoting their welfare.[8] The formation of this thought underwent a long process of development.

As early as the Shang and Zhou periods, the concepts of "protecting the people" (保民) and "valuing the people" (重民) had already emerged. Although political authority at the time continued to be expressed through the language of the Mandate of Heaven, texts such as the *Guoyu* (《国语》)[9] and the *Zuo Zhuan* (《左传

[8] Ahyoung Lee, "For the People: A Philosophical Study of Min and Minben Thought in Early China", PhD dissertation, City University of Hong Kong, 2024, pp. 2–3.

[9] See Guoyu (Jin Yu, Part 4). Translation available at: https://ctext.org/guo-yu/ens?searchu=%E6%9F%94%E5%92%8C%E4%B8%87%E6%B0%91 (all internet references were accessed in December 2025).

》)[10] increasingly linked good governance with the well-being of the people, reflecting the early emergence of Minben-oriented political thought.[11] A decisive development occurred during the Western Zhou period, when the Mandate of Heaven came to be understood as operating through the people, a view reflected in the Book of Documents, which states that "Heaven hears as the people hear; Heaven sees as the people see," suggesting a conceptual unity between the will of Heaven and that of the people.[12]

As the intellectual landscape further diversified during the Spring and Autumn and Warring States periods, thinkers across the various philosophical schools continued to develop the notion of *Minben*, with the Confucian tradition offering the most systematic articulation of this idea. Building on historical experience, Confucian masters such as Confucius and Mencius placed "loving the people" (仁者爱人) and benevolent government (仁政) at the center of their political philosophy. They emphasized attending to the needs of the people in governance, promoting economic well-being for both the state and the populace, and grounding statecraft in policies oriented toward the people's livelihood. These ideas formed a distinct people-as-root thought, which was later institutionalized as part of the dominant ideological framework of subsequent dynasties.

1.2. The Shaping of Ancient Chinese Warfare Philosophy by Minben Thought

The *Minben* thought not only played a central role in political, economic, and social governance in ancient China, but its gradually developed theoretical framework also profoundly shaped Chinese conceptions of warfare. Within Confucian ethics, the moral regulation of warfare evolved under the rubric of the "just war" (义战) ideal.[13] Classical Chinese texts make clear that the purpose and ultimate end of a just war did not lie in a ruler's personal ambition or private gain; rather, its highest objective was to "bring security to the people" and "benefit the people." This people-as-root

[10] See Zuo Zhuan (Xi Gong, Year 5). Translation available at: https://ctext.org/guo-yu/ens?searchu=%E6%9F%94%E5%92%8C%E4%B8%87%E6%B0%91 (all internet references were accessed in December 2025).

[11] See Jin Yaoxi, *A History of the Minben Thought in China*, Law Press, Beijing, 2008, pp. 13, 17–22, 25, 28, 109.

[12] See Shang Shu (Great Declaration II). Translation available at: https://ctext.org/shangshu/ens?searchu=%E5%A4%A9%E8%A7%86%E8%87%AA%E6%88%91%E6%B0%91%E8%A7%86 (all internet references were accessed in December 2025).

[13] Zhuo Liang, "Culture, Ideology and Politics: The Shaping of China's Conception of International Humanitarian Law", *FICHL Policy Brief Series*, Vol. 112, 2020, p. 1.

orientation, which placed popular welfare at the heart of political judgment, constituted the very value standard by which the legitimacy of warfare was assessed in ancient China. As such, the ideal of "just war" not only served the broader purpose of upholding political legitimacy but also reflected the longstanding belief that even in times of conflict, governance must remain grounded in the welfare of the people.[14]

1.2.1 All Under Heaven: Treating Everyone as the Emperor's Subjects

The ancient Chinese referred to the mortal world as *Tianxia* (天下), literally "all under heaven,"[15] and their understanding of world order—most clearly embodied in this *Tianxia* worldview—shaped the very foundations of ancient Chinese conceptions of warfare.[16] China was understood as the "Central Kingdom," the sole true civilization, surrounded by so-called "barbarian" states.[17] Chinese emperors styled themselves as the "Son of Heaven" (天子), ruling by the Mandate of Heaven and recognized as the supreme sovereign over the *Tianxia* world, which encompassed both the Chinese cultural heartland (华夏) and surrounding non-Chinese peoples, with moral authority extending beyond territorial and national distinctions.[18] *The Book of Poetry* (《诗经》) expresses this sentiment thus: "Under the wide heaven, no land lies beyond the Emperor's domain, and within the bounds of the seas, no one falls outside the Emperor's rule."[19] This China-centered, universalist worldview rendered the notion of legally defined boundaries between China and non-Chinese states—so fundamental in contemporary international law—difficult for the ancient Chinese to conceive.

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[14] Wang Ying, "Why Are Chinese Peacekeepers So Disciplined? Towards a Research Agenda", *FICHL Policy Brief Series*, Vol. 24, 2014, p. 2.

[15] As William Callahan neatly elucidated, '[l]iterally speaking, tian is the heavens, the sky, and what is on top, while xia is an indexical term meaning below, lower, inferior. Tianxia thus refers to everything below the sky and is commonly used in classical texts to refer to "the earth" and "the (Chinese) world"'. See W. A. Callahan, "Chinese Visions of World Order: Post-Hegemonic or a New Hegemony?", *International Studies Review*, Vol. 10, No. 4, 2008, p. 751.

[16] See Xiong Mei, Ji Na and Feng Zhengzheng, *Study on Ancient Chinese Laws of War*, Shanghai People's Publishing House, Shanghai, 2023, pp.18-21.

[17] Zhaojie Li, "Traditional Chinese World Order," *Chinese Journal of International Law*, Vol. 1, No. 1, 2002, p. 25–26.

[18] Tieya Wang, "International Law in China: Historical and Contemporary Perspectives", *Recueil des Cours*, Vol. 221, 1990, p. 217.

[19] See Book of Poetry (Bei Shan). Translation available at: https://ctext.org/book-of-poetry/ens?searchu=%E8%8E%AB%E9%9D%9E%E7%8E%8B%E5%9C%9F (all internet references were accessed in December 2025).

This unique *Tianxia* conception not only shaped China's holistic understanding of internal and external relations but also provided a worldview foundation for the influence of *Minben* thought on ancient Chinese conceptions of warfare, endowing them with distinctive civilizational characteristics.[20] At a time when modern notions of interstate relations had yet to form, all inhabitants under heaven were nominally regarded as subjects of the Chinese emperor; even so-called "barbarians" were not considered truly foreign, but rather "people beyond civilization who have yet to be assimilated into Chinese culture."[21] Accordingly, in warfare, all people within enemy territory were seen as part of the *Tianxia* order under Chinese moral authority. Under this conception, the emperor was obliged not only to care for his own people but also to regard the enemy populace as his subjects, applying *Minben* thought universally. Ancient Chinese conceptions of warfare were thus deeply influenced by *Minben* thought; ethically conducted warfare aimed, at a macro level, to protect and promote the welfare of populations on both sides, and in practice emphasized the preservation and prioritization of human life.

In contrast, early European Christian kingdoms gradually established national boundaries and ethnic identities, considering themselves "civilized" states. They waged war to subjugate so-called uncivilized peoples and states under the pretext of spreading religion, but in reality, they employed violence and colonization to safeguard commercial interests. Europeans clearly distinguished between "us" and "them" in warfare; when a state was declared an enemy, all its subjects were treated as adversaries.[22] The early codification of legal boundaries between states in Western civilization thus treated enemy populations equivalently to rulers, contributing in part to a historical absence of moral constraints on conduct in war.[23]

1.2.2 Peace Without War: Ensuring the People's Security

The political order of ancient China was grounded primarily in moral authority rather than military force.[24] Peace was therefore regarded as the natural condition of

[20] Zhaojie Li, "Traditional Chinese World Order", *Chinese Journal of International Law*, Vol. 1, No. 1, 2002, p. 29.
[21] Immanuel C. Y. Hsü, *China's Entrance into the Family of Nations: The Diplomatic Phase 1858-1880*, Harvard University Press, Cambridge, 1960, p. 7.
[22] K. Hagen, "A Chinese Critique on Western Ways of Warfare", *Asian Philosophy*, Vol. 6, 1996, p. 214.
[23] Zhuo Liang, "Chinese Perspectives on the Ad Bellum/In Bello Relationship and a Cultural Critique of the Ad Bellum/In Bello Separation in International Humanitarian Law", *Leiden Journal of International Law*, Vol. 34, 2021, pp. 312–316.
[24] Samuel S. Kim, *China, the United Nations and World Order*, Princeton University Press, Princeton, 1979, p. 45.

tianxia and a defining attribute of its political order.[25] In an ideal state, war ought not to occur at all,[26] for ancient China perceived itself as the embodiment and center of civilization, emphasizing moral transformation rather than military coercion as the means to maintain its rule over *tianxia*. It thus assumed responsibility for preserving peace within this moralized world order and for guiding it toward the ideal of *datong* ("Great Harmony"). As the *Daodejing* (《道德经》) puts it, "Weapons are instruments of ill omen; they are not the tools of a gentleman."[27] Military force was generally regarded as inauspicious and permissible only when all other pathways to peace had failed. Out of respect for ritual propriety as the symbolic foundation of order, Confucius likewise approached warfare with caution. He famously praised Duke Huan of Qi for "uniting the feudal lords nine times without resorting to the chariot of war",[28] underscoring a preference for virtue-based governance and negotiation in securing peaceful coexistence among states.

From the perspective of practical governance, the belief that peace was the rightful condition of *tianxia* was closely tied to the traditional *Minben* thought. The "people," often mentioned alongside "agriculture" and "soldiers" in discussions of state interests, were viewed as vital political resources. As recorded in the *Analects* (《论语》), the essentials of statecraft lay in "the people, food, mourning rites, and sacrificial rituals."[29]

In ancient China, popular support was considered indispensable for political stability: only by winning the hearts of the people could a state or regime secure lasting peace, whereas the loss of popular support made it difficult for any ruler to maintain authority.[30] Warfare inflicted suffering and insecurity upon the populace, thereby undermining the foundations of political power. Xunzi observed: "If the people of another state become eager to fight us, while our own people become reluctant to do so, this is how the strong become weak. Territory may be gained, but

[25] S. C. Neff, *War and the Law of Nations: A General History*, Cambridge University Press, Cambridge, 2005, p. 31.

[26] Daniel A. Bell, "Justification of War in Ancient China", *Asian Philosophy*, Vol. 56, 1998, p. 32.

[27] See Dao De Jing. Translation available at: https://ctext.org/dao-de-jing/ens?searchu=%E4%B8%8D%E7%A5%A5%E4%B9%8B%E5%99%A8 (all internet references were accessed in December 2025).

[28] See The Analects (Xian Wen). Translation available at: https://ctext.org/analects/ens?searchu=%E4%B9%9D%E5%90%88%E8%AF%B8%E4%BE%AF (all internet references were accessed in December 2025).

[29] See The Analects (Yao Yue). Translation available at: https://ctext.org/analects/ens?searchu=%E6%89%80%E9%87%8D (all internet references were accessed in December 2025).

[30] Qian Hai, "Studies of People: Contemporary Transformation of Traditional People-oriented Thought", *Journal of Peking University (Philosophy and Social Sciences)*, Vol. 60, No. 3, 2023, p. 43.

the people will leave; burdens increase, but achievements diminish. Even those who defend themselves will only harm their position—thus do great states become reduced".[31] In other words, war depletes popular support and thereby weakens state capacity; its costs often outweigh its benefits. For this reason, rulers were expected to employ military force only with great caution, to safeguard the welfare of the people. Peace, therefore, was not merely a moral ideal but a practical necessity, for according to the *Minben* thought, the stability of political authority rests on the welfare of the people.

1.2.3 Victory or Defeat: Determined by the People's Support

Although ancient Chinese thought generally valued peace and refrained from advocating war lightly, armed conflict was nevertheless regarded as inevitable when moral education and legal governance failed. Even in times of war, however, ancient Chinese rulers profoundly recognized the centrality of the people: the outcome of war was never determined by rulers alone but was closely tied to the support of the common populace.[32]

The *Huainanzi* (《淮南子》) states, "to follow the desires of the people and to rely on their strength",[33] suggesting that a war may possess legitimacy insofar as it rescues the people from extreme suffering and thereby aligns with popular will. Such legitimacy, in turn, enables rulers to draw upon the people's material support and labor. The *Huainanzi* further observes that "the foundation of governance lies in securing the people, and the foundation of securing the people lies in ensuring sufficient means of livelihood".[34] This indicates that only when the welfare of the people continues to be safeguarded even in wartime—by ensuring that they are "kept alive without being killed, given to without being deprived, gladdened without being made to suffer, and pleased without being angered"—can a ruler truly win the hearts

[31] See Xunzi (Wangzhi). Translation available at: https://ctext.org/xunzi/ens?searchu=%E4%BA%BA%E4%B9%8B%E6%B0%91%E6%97%A5%E6%AC%B2%E4%B8%8E%E6%88%91%E6%96%97 (all internet references were accessed in December 2025).

[32] James A. Stroble, "Justification of War in Ancient China", *Asian Philosophy*, Vol. 8, 1998, p. 173.

[33] See Huainanzi (Binglüe Xun). Translation available at: https://ctext.org/huainanzi/ens?searchu=%E5%9B%A0%E6%B0%91%E4%B9%8B%E6%AC%B2%EF%BC%8C%E4%B9%98%E6%B0%91%E4%B9%8B%E5%8A%9B (all internet references were accessed in December 2025).

[34] See Huainanzi (Quan Yan Xun). Translation available at: https://ctext.org/huainanzi/ens?searchu=%E4%B8%BA%E6%94%BF%E4%B9%8B%E6%9C%AC (all internet references were accessed in December 2025).

of the people.[35] Only then can the people be willing "to guard the altars of state together with him, and even face death without deserting him."[36]

Accordingly, under the guidance of *Minben* thought, ancient Chinese war ethics sought to secure popular support through morally justified modes of warfare.[37] Military forces operating under such ethical constraints were praised as "armies of benevolence and righteousness" (仁义之师). Guided by ritual propriety and moral virtue, these armies were expected to uphold benevolence and humanitarian restraint in the conduct of war, thereby securing popular endorsement of their military actions. As Xunzi observed, "the army may kill, but must not deceive the people—this is what is called the utmost achievement";[38] when benevolence and righteousness are fully realized, warfare reaches its highest ideal: "the army of the benevolent preserves life with spiritual power; wherever it passes, transformation follows; like timely rain descending, none fail to rejoice."[39]

2. Elements of *Minben* Thought in China's Ancient "Just Wars"

In reflecting on war as an essentially unavoidable phenomenon, ancient Chinese thinkers came to reject the view that all wars were morally equivalent. Only those wars waged for the protection of the people and the vindication of justice were regarded as ethically legitimate—so-called "just wars."[40] On this basis, they developed a theory of just war centered on *Minben* principles, understood as a people-centred normative orientation of political legitimacy.

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[35] See Six Secret Teachings (Guo Wu). Translation available at: https://ctext.org/liutao/ens?searchu=%E7%94%9F%E8%80%8C%E5%8B%BF%E6%9D%80%EF%BC%8C%E4%B8%8E%E8%80%8C%E5%8B%BF%E5%A4%BA%EF%BC%8C%E4%B9%90%E8%80%8C%E5%8B%BF%E8%8B%A6%EF%BC%8C%E5%96%9C%E8%80%8C%E5%8B%BF%E6%80%92 (all internet references were accessed in December 2025).

[36] See Huainanzi (Quan Yan Xun). Translation available at: https://ctext.org/huainanzi/ens?searchu=%E4%B8%8E%E4%B9%8B%E5%AE%88%E7%A4%BE%E7%A8%B7%EF%BC%8C%E6%96%85%E6%AD%BB%E8%80%8C%E6%B0%91%E5%BC%97%E7%A6%BB (all internet references were accessed in December 2025).

[37] Ping Cheung Lo, "Chinese Traditions on Military Ethics", in J. T. Johnson and E. D. Patterson (eds.), *The Ashgate Research Companion to Military Ethics*, Routledge, London, 2015, p. 409.

[38] See Xunzi (Yi Bing). Translation available at: https://ctext.org/xunzi?searchu=%E5%8F%AF%E6%9D%80%E8%80%8C%E4%B8%8D%E5%8F%AF%E4%BD%BF%E6%AC%BA%E7%99%BE%E5%A7%93 (all internet references were accessed in December 2025).

[39] See Xunzi (Yi Bing). Translation available at: https://ctext.org/text.pl?node=12489&if=en&show=meta (all internet references were accessed in December 2025).

[40] Zhuo Liang, "Chinese Perspectives on the Ad Bellum/In Bello Relationship and a Cultural Critique of the Ad Bellum/In Bello Separation in International Humanitarian Law", *Leiden Journal of International Law*, Vol. 34, 2021, p. 297.

The Confucian tradition exerted the most sustained intellectual influence in this regard, particularly after the Han state adopted the policy of "elevating Confucianism and excluding the hundred schools" in 134 BCE, which entrenched Confucianism as the dominant orthodoxy of imperial governance. Yet Confucian primacy in doctrinal discourse did not eliminate the continued normative relevance of non-Confucian traditions in the articulation of military thought. Texts associated with the military tradition remained integral to statecraft and military education across successive dynasties, most notably the *Seven Military Classics* (《武经七书》)[41], which were systematised under the Northern Song dynasty (960–1127) and incorporated into the imperial military examination system.[42]

Against this backdrop, *Minben* is understood in this Article as a broad political ethic rather than a narrowly Confucian doctrine. It denotes a theory of political legitimacy in which the welfare of the people constitutes the foundational criterion of good governance and the primary standard by which political authority is assessed. Although the texts examined here—the *Shangshu*, *Analects*, *Mencius*, *Xunzi*, *Huainanzi*, *Six Secret Teachings*, *Sima Fa*, and *Lüshi Chunqiu*—emerged in different historical and intellectual contexts, they collectively articulate a continuous normative commitment to the primacy of popular welfare in political ordering.

This shared normative orientation was further reinforced by the institutional status of these works within imperial knowledge systems. Since the Han dynasty, Confucian classics have formed the core of the civil examination curriculum and imperial state education.[43] Military classics were likewise incorporated into official systems of learning and selection and were treated as authoritative references for military governance.[44] Despite their divergent intellectual genealogies, both traditions were progressively absorbed into imperial institutions and thereby stabilised as components of a shared canon of governance. It was this process of

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[41] The Seven Military Classics are *Six Secret Teachings* (《六韬》), *Sima Fa* (《司马法》), *The Art of War* (《孙子兵法》), *Wuzi* (《吴子》), *Weiliaozi* (《尉缭子》), *Three Strategies of Huang Shigong* (《黄石公三略》), and *Questions and Replies between Tang Taizong and Li Weigong* (《唐太宗与李卫公问对》).

[42] Ralph D. Sawyer, "General Introduction and Historical Background of the Classics", in *The Seven Military Classics of Ancient China*, Basic Books, New York, 1993, p. xii.

[43] Xu Chenggang, "The Imperial Examinations and Confucianism: The Institutional Genes for Imperial Personnel and Ideology", in *Institutional Genes: Origins of China's Institutions and Totalitarianism*, Cambridge University Press, Cambridge, 2025, pp. 163–201.

[44] Barry O'Sullivan and Liying Cheng, "Lessons from the Chinese Imperial Examination System", *Language Testing in Asia*, Vol. 12, 2022, p. 1.

institutionalisation that enabled texts of diverse intellectual origins to be received as components of a shared canon of governance and, consequently, as a common normative foundation for Minben-oriented political ethics.

This institutional convergence shaped not only theories of governance but also conceptions of legitimate warfare. Ancient Chinese thinkers consequently developed a normative framework for evaluating the legitimacy of war, one that extended beyond the identity of the belligerents, the causes invoked, and the timing of resort to force to encompass the protection of persons and objects during the conduct of hostilities. Accordingly, the following analysis examines the *Minben* elements reflected in ancient Chinese just war theory and practice along three dimensions: justice in the resort to war (*jus ad bellum*), justice in the conduct of war (*jus in bello*), and justice after war (*jus post bellum*).

2.1. Jus ad Bellum

Ancient Chinese thinkers generally regarded just war as an extension of criminal punishment against those who had lost virtue.[45] For instance, during the Spring and Autumn period, the statesman Zang Wenzhong stated, "The severest punishments employ armor and weapons; next come axes and battle-axes; then knives and saws; then drills and picks; and finally, whips and flails."[46] Guan Zhong also observed, "Weapons are used externally to punish the violent and internally to curb evil."[47] Accordingly, the purpose of just war was often expressed as "safeguarding the people and punishing the guilty" (吊民伐罪) or "curbing violence and eliminating harm" (禁暴除害), emphasizing that warfare aimed to relieve the suffering of the populace and restore social order, which aligns fundamentally with the objectives of criminal justice.[48] Because just war was conceived as an extension of penal sanction, it was understood not merely as an exercise of the right to wage war but also as a morally

[45] See Paschal Ting, Marian Gao and Bernard Li, *Philosophical Perspectives for the Third Millennium: Dialogue between Christian Philosophy and Chinese Culture*, Council for Research in Values and Philosophy, Washington, 2002, p. 244; Ji Na, "Tracing the Origins of Ancient Chinese Laws of War", *Military History*, No. 5, 2021, pp. 64–68.

[46] See Guoyu (The Discourses of Lu, Volume I). Translation available at: https://ctext.org/guo-yu/ens?searchu=%E5%A4%A7%E5%88%91%E7%94%A8%E7%94%B2%E5%85%B5 (all internet references were accessed in December 2025).

[47] See Guanzi (Canhuan). Translation available at: https://zh.wikisource.org/wiki/%E7%AE%A1%E5%AD%90/%E7%AC%AC28%E7%AF%87%E5%8F%83%E6%82%A3 (all internet references were accessed in December 2025).

[48] Torkel Brekke, *The Ethics of War in Asian Civilizations: A Comparative Perspective*, Routledge, London, 2006, p. 185; Chris Fraser, "The Mozi and Just War Theory in Pre-Han Thought", *Journal of Chinese Military History*, Vol. 5, 2016, pp. 154–155.

and legally regulated punitive measure. In other words, initiating a just war was not an arbitrary choice of the ruler or political faction; it had to satisfy conditions analogous to those governing criminal punishment—namely, deployment by a sage, a just cause, and the proper timing.

2.1.1 The Sage as the Sole Authority to Use Force

The principle that only the sage may legitimately resort to force refers to the requirement that war must be initiated by an authority or agent possessing legitimate moral authority, to ensure that the justifiability of warfare is grounded in genuine concern for the welfare of the people. Given that *Tianxia* denotes an understanding of a universal moral order, the authority entitled to wage a "just war" should be defined primarily in moral rather than purely political terms.[49] Here, "morality" does not signify abstract ethical principles, but rather a value orientation centered on *Minben*: whether the ruler truly cares for the people's survival and well-being, and whether he is capable of protecting and prioritizing their interests. Accordingly, only those who occupy a position of moral superiority grounded in commitment to the people are entitled to legitimate authority to initiate war.[50]

A just war, therefore, is conceived as resistance or opposition by a political actor possessing superior moral legitimacy against usurpers, tyrants, or aggressors.[51] The *Huainanzi* articulates this idea by emphasizing the sage's duty to "curb violence and suppress disorder," stating: "When the sage rises in righteous indignation, he punishes the violent and brings order to chaotic times, levels the dangerous and removes the corrupt, transforming the turbid into the pure and the perilous into peace; thus, decisive action cannot be avoided."[52] This passage suggests that only the "sage" is capable of genuinely assuming the political responsibility of protecting the people. Mencius similarly observes that "one who is invincible under *Tianxia* is an agent of Heaven,"[53] and that "as an agent of Heaven, one may legitimately punish

[49] Ping Cheung Lo, above note 37, p. 404.

[50] Chris Fraser, above note 48, p. 166; David Graff, "The Chinese Concept of Righteous War", in Howard M. Hensel (ed.), *The Prism of Just War: Asian and Western Perspectives on the Legitimate Use of Military Force*, Ashgate, Farnham, 2010, p. 200.

[51] Sumner B. Twiss and Jonathan Chan, "The Classical Confucian Position on the Legitimate Use of Military Force", *Journal of Religious Ethics*, Vol. 40, 2012, p. 452.

[52] See Huainanzi (Binglüe Xun). Translation available at: https://ctext.org/huainanzi?searchu=%E5%9C%A3%E4%BA%BA%E5%8B%83%E7%84%B6%E8%80%8C%E8%B5%B7 (all internet references were accessed in December 2025).

[53] See Mengzi (Gong Sun Chou I). Translation available at: https://ctext.org/mengzi?searchu=%E6%97%A0%E6%95%8C%E4%BA%8E%E5%A4%A9%E4%B8%8B%E8%80%85 (all internet references were accessed in December 2025).

[the wrongdoer]."[54] In Mencius's view, an "agent of Heaven" is a ruler who practices benevolent governance and acts in accordance with the will of the people. Such a ruler occupies the highest position of moral virtue within the *Tianxia* order and thus possesses supreme moral authority to wage a just war.[55]

Within the Chinese tradition, figures described as "sages" or "agents of Heaven" most often referred to emperors, who were ordinarily regarded as possessing legitimate authority to wage just wars.[56] Nevertheless, formal political status alone did not guarantee moral supremacy. When an emperor lost moral virtue, morally superior regional lords or even rebel leaders—provided that their actions were genuinely motivated by the protection of the people—could also claim legitimate authority to wage a just war.[57] A well-known exchange illustrates this point: when King Xuan of Qi asked Mencius whether it was permissible for a minister to kill his ruler, Mencius replied, "He who outrages the benevolence proper to his nature is called a robber; he who outrages righteousness is called a ruffian. Such robbers and ruffians are regarded as mere men."[58] Through this exchange, Mencius makes clear that a tyrant who has abandoned benevolence and righteousness becomes a legitimate target of punishment, and those who act to protect the lives and property of the people, in so doing, acquire the moral authority to wage a just war.

2.1.2 Just Cause

Just cause refers to the principle that a just war must be waged with the aim of preserving political order and protecting the interests of the people. Those who initiate a just war should act according to the principle of "using words to punish crime" (以辞伐罪).[59] The *Rites of Zhou* (《周礼》) records the "Nine Causes for

[54] See Mengzi (Gong Sun Chou II). Translation available at: https://ctext.org/mengzi?searchu=%E4%B8%BA%E5%A4%A9%E5%90%8F (all internet references were accessed in December 2025).

[55] Chris Fraser, above note 48, p. 166.

[56] Nadine Godehardt, "Between Harmonious World and 'War of Order': Chinese Meanings of Just War and Their Reemergence", in Brendan Howe and Boris Kondoch (eds.), *The Legality and Legitimacy of the Use of Force in Northeast Asia*, Brill, Leiden, 2013, pp. 80, 90.

[57] Cheng-Yun Chang, "Were Those Decisions Righteously Made? The Chinese Tradition of Righteous War and China's Decisions for War, 1950–1979", *Foreign Policy Analysis*, Vol. 13, 2017, p. 401.

[58] See Mengzi (Liang Hui Wang II). Translation available at: https://ctext.org/mengzi?searchu=%E8%B4%BC%E4%BB%81%E8%80%85%E8%B0%93%E4%B9%8B%E8%B4%BC (all. internet references were accessed in December 2025).

[59] See Zuo Zhuan (Ai Gong, Year 23). Translation available at: https://ctext.org/chun-qiu-zuo-zhuan/ens?searchu=%E4%BB%A5%E8%BE%9E%E4%BC%90%E7%BD%AA (all internet references were accessed in December 2025).

Military Action," which enumerate nine justifications for launching a campaign: "assisting the weak against the powerful" (冯弱犯寡), "punishing those who harm the virtuous or oppress the people" (贼贤害民), "suppressing internal violence and external aggression" (暴内陵外), "addressing wastelands and scattered populations" (野荒民散), "dealing with persistent disobedience" (负固不服), "punishing those who kill their relatives" (贼杀其亲), "acting against a minister who assassinates his ruler" (放弑其君), "responding to violations of decrees or disrespect of authority" (犯令陵政), and "intervening in internal and external disorder that allows chaos like wild animals to prevail" (外内乱，鸟兽行).[60] These behaviors were seen as blatant violations of the morally sanctioned order of *Tianxia* and a serious breach of the *Minben* principle. Punishing such crimes and restoring peace and order to *Tianxia* thus constituted a legitimate justification for war.

The objectives of a just war should be to "protect the people and punish wrongdoers" and "restrain violence and eliminate harm", with the key criterion being whether the war is grounded in the interests of the people rather than the private desires of the belligerents. As Zhuangzi observes, a war that manifests as "the strong oppressing the weak, the many bullying the few" (以强凌弱，以众暴寡), serving only the interests of a few while harming the common welfare of the populace, should be regarded as unjust.[61] The *Huainanzi* observes that "in later times, even when rulers lacked virtue, everyone fortified their cities with moats and walls; the attackers did not act to restrain violence or eliminate harm, but simply sought to seize more territory," suggesting that such wars, driven not by justice or the protection of the people but by mere territorial ambition, are inconsistent with the principles of a just war.[62] In Chinese history, tyrants such as Xia Jie, Yin Zhou, Jin Li, and Song Kang drained the realm's resources through their greed and imposed harsh laws that caused widespread suffering among the people, demonstrating that,

[60] See The Rites of Zhou (Xiaguan Sima). Translation available at: https://ctext.org/rites-of-zhou/ens?searchu=%E5%86%AF%E5%BC%B1%E7%8A%AF%E5%AF%A1 (all internet references were accessed in December 2025).

[61] See Zhuangzi (Dao Zhi). Translation available at: https://ctext.org/zhuangzi/zhs?searchu=%E4%BB%A5%E4%BC%97%E6%9A%B4%E5%AF%A1 (all internet references were accessed in December 2025).

[62] See Huainanzi (Binglüe Xun). Translation available at: https://ctext.org/huainanzi/zhs?searchu=%E6%99%9A%E4%B8%96%E4%B9%8B%E5%85%B5%EF%BC%8C%E5%90%9B%E8%99%BD%E6%97%A0%E9%81%93 (all internet references were accessed in December 2025).

without resistance justified as a just war grounded in the *Minben* principle, such oppression may lead to greater social harm and instability.

2.1.3 Proper Timing

The proper timing of a just war refers to the necessity of launching military action in accordance with favorable conditions, taking into account both the seasons and the welfare of the people, so as to avoid disrupting civilian life. In evaluating the justice of war in ancient China, consideration was given not only to the moral legitimacy of the cause but also to the potential impact of military campaigns on the livelihoods of the populace.[63] For example, in Confucian thought, an emperor who deprived the people of basic sustenance and withheld the food supply was considered a cruel and unvirtuous sovereign.[64]

Ancient Chinese military doctrine emphasized adherence to the way of war (战道), which required that campaigns be conducted without violating seasonal norms or harming civilians, demonstrating care for the people; without exploiting disasters or funerary occasions for aggression; and without mobilizing troops in extreme summer or winter, to safeguard civilian well-being.[65] This principle mandated that the initiation of war must consider the welfare of the people, avoiding disruption of agricultural cycles and civilian hardships, and refraining from opportunistic or excessive warfare. Such concern for civilian livelihoods reflects the *Minben* governance ideal, highlighting that the moral legitimacy of a just war rests on protecting and caring for the populace, rather than on pursuing unrestrained military ambition.

2.2. Jus in Bello

Given that the purpose of a just war is to punish those who disrupt political order and harm the populace, violence in war should be directed solely at the guilty.[66] Accordingly, in ancient Chinese just war theory, the justification of war consistently

[63] Daqun Liu, "International Law and International Humanitarian Law in Ancient China", in Morten Bergsmo, Cheah Wui Ling and Yi Ping (eds.), *Historical Origins of International Criminal Law*, Vol. I, Torkel Opsahl Academic EPublisher, Brussels, 2014, p. 103.

[64] Daniel A. Bell, *Confucian Political Ethics*, Princeton University Press, Princeton, 2008, pp. 241–242.

[65] See Sima Fa (Renben). Translation available at: https://ctext.org/si-ma-fa/ens?searchu=%E4%B8%8D%E8%BF%9D%E6%97%B6%EF%BC%8C%E4%B8%8D%E5%8E%86%E6%B0%91%E7%97%85 (all internet references were accessed in December 2025).

[66] Christopher C. Rand, *Military Thought in Early China*, State University of New York Press, Albany, 2017, p. 145.

adhered to a *Minben* value orientation, emphasizing the distinction between the guilty and the innocent. Violence in a just war ought to be proportionate to its punitive purpose, targeting only those who threaten social order and endanger the populace, while innocent civilians, who seek the restoration of harmony and peace under the tianxia order, must be spared to the greatest extent possible.[67] As Xunzi famously stated, "When carrying out punishment, one does not punish the common people themselves, but those who cause disorder among them."[68] Mencius further suggested that under a benevolent and righteous ruler, the ideal state is one in which no unjust acts are committed, and no innocent lives are taken.[69]

Based on this distinction, ancient Chinese just war theory developed a substantial and consistent set of humanitarian norms at the level of *jus in bello*, centered on the protection of civilians' lives and livelihoods. Although there also existed numerous norms regulating hostile actions solely in relation to enemy forces,[70] righteous armies (义兵) were required to adhere to the *Minben* principle. The *Six Secret Teachings* (《六韬》) instruct that a righteous army should "not burn granaries, not destroy houses, refrain from felling tomb trees or sacred groves, spare surrendering enemies, refrain from killing captives, demonstrate benevolence, and

[67] Karen Turner, "War, Punishment, and the Law of Nature in Early Chinese Concepts of the State", *Harvard Journal of Asiatic Studies*, Vol. 53, 1993, pp. 304–305.

[68] See Xunzi (Yibing). Translation available at: https://ctext.org/xunzi/zhs?searchu=%E5%87%A1%E8%AF%9B%EF%BC%8C%E9%9D%9E%E8%AF%9B%E5%85%B6%E7%99%BE%E5%A7%93%E4%B9%9F%EF%BC%8C%E8%AF%9B%E5%85%B6%E4%B9%B1%E7%99%BE%E5%A7%93%E8%80%85%E4%B9%9F (all internet references were accessed in December 2025).

[69] See Mencius (Gongsun Chou I). Translation available at: https://ctext.org/mengzi/ens?searchu=%E8%A1%8C%E4%B8%80%E4%B8%8D%E4%B9%89%E3%80%81%E6%9D%80%E4%B8%80%E4%B8%8D%E8%BE%9C%E8%80%8C%E5%BE%97%E5%A4%A9%E4%B8%8B%EF%BC%8C%E7%9A%86%E4%B8%8D%E4%B8%BA%E4%B9%9F (all internet references were accessed in December 2025).

[70] Xu Chuanbao summarized the rules of warfare in ancient China as follows: "engage in battle only when flags are raised and drums are sounded" (旗鼓而战), "show benevolence but punish the guilty" (怀仁杀故), "allow the fleeing to escape" (任逸奔者), "do not employ deceit" (勿事术诈), "handle traitors properly" (把通叛徒), "withdraw when mourning" (守哭退师), "cease attacks upon hearing of a death" (闻丧止攻), and "lift a siege as agreed" (解围如期). See Xu Chuanbao, *Relics of Pre-Qin International Law*, Shanghai Bookstore Publishing House, Shanghai, 1991, p. 275. However, these norms do not constitute rules aimed at protecting war victims; their ideological roots stem more from the "rites" (礼) developed from ancient sacrificial practices rather than from "people-centered" thought. See Xiong Mei, Ji Na and Feng Zhengzheng, *Study on Ancient Chinese Laws of War*, Shanghai People's Publishing House, Shanghai, 2023, pp. 114–115, 142–156.

exercise magnanimity".[71] *Huainanzi* emphasizes that a righteous army must observe the "Six Prohibitions" (六毋): "Do not cut down trees, do not dig up tombs, do not burn grain, do not set fire to stockpiles, do not capture civilians, do not seize livestock".[72] Similarly, the *Lüshi Chunqiu* (《吕氏春秋》) describes the people-centered conduct of a righteous army: "When troops enter enemy territory, the populace knows where to seek protection, and the common people know they will not be killed. On the outskirts of towns and cities, do not destroy grain, dig up tombs, fall trees, burn stockpiles, burn houses, or seize livestock. Accept surrendering civilians or captives and return them unharmed to distinguish good from evil; keep one's word with the people to deprive the enemy of resources".[73] The *Sima Fa* (《司马法》) provides even more detailed training requirements, prescribing the "Six Virtues" (六德)—benevolence, righteousness, ritual propriety, trustworthiness, courage, and wisdom—as wartime instruction, and it requires soldiers to "contend for righteousness rather than profit" and to "show compassion to the weak and to the sick and wounded."[74] It further mandates that, upon entering enemy territory, temples must not be violated; hunting and farming must be refrained from; fortifications, walls, and houses must not be destroyed; trees must not be felled; and livestock, grain, and tools must not be seized. The old and the young must be spared and returned unharmed; even able-bodied individuals must not be harassed or attacked; and wounded enemies must be provided with medical care.[75]

In the practice of warfare in ancient China, these humanitarian norms were, to a certain extent, voluntarily observed by belligerents who fought under the banner of righteousness. Historical records provide numerous illustrative examples. During the Eastern Han dynasty, the general Deng Yu, in suppressing the Red Eyebrow rebels, enforced strict military discipline and refrained from disturbing the civilian

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[71] See Liutao (Lue Di). Translation available at: https://ctext.org/liu-tao/ens?searchu=%E6%97%A0%E7%87%94%E4%BA%BA%E7%A7%AF%E8%81%9A (all internet references were accessed in December 2025).

[72] See Huainanzi (Binglüe Xun). Translation available at: https://ctext.org/huainanzi/zhs?searchu=%E6%AF%8B%E4%BC%90%E6%A0%91%E6%9C%A8 (all internet references were accessed in December 2025).

[73] See Lüshi Chunqiu (Mengqiu Ji). Translation available at: https://ctext.org/lv-shi-chun-qiu/zh?searchu=%E6%95%85%E5%85%B5%E5%85%A5%E6%96%BC%E6%95%B5%E4%B9%8B%E5%A2%83 (all internet references were accessed in December 2025).

[74] See Sima Fa (Ren Ben). Translation available at: https://ctext.org/si-ma-fa?searchu=%E5%85%AD%E5%BE%B7 (all internet references were accessed in December 2025).

[75] See Sima Fa (Ren Ben). Translation available at: https://ctext.org/si-ma-fa?searchu=%E5%85%A5%E7%BD%AA%E4%BA%BA%E4%B9%8B%E5%9C%B0 (all internet references were accessed in December 2025).

population, so that as a result of his repeated military successes and orderly conduct, large numbers of people in the Guanzhong region defected to his side, with surrenders reportedly numbering in the thousands each day.[76] Following this example, similar instances of disciplined and humane conduct can be found in later periods. A well-known episode from the Records of the Three Kingdoms recounts that Cao Cao, a prominent warlord of northern China during the Three Kingdoms period, ordered his army not to trample a field of ripened wheat, on pain of death. Consequently, the cavalry dismounted and carefully parted the wheat by hand to allow their horses to pass, and when Cao Cao's own horse was startled and ran into the field, he held that the author of the order must not be above it and symbolically cut off his own hair in place of the culprit's head, thereby reaffirming military discipline.[77]

Similarly, Zhu Yuanzhang, the founder of the Ming dynasty, adhered to the maxim of "taking cities by force but restoring order through benevolence," issuing strict prohibitions against indiscriminate killing and forbidding his troops from seizing children, women, or valuables. When dispatching generals Xu Da and Chang Yuchun on the northern expedition against the Yuan court, he instructed them that, unlike the wanton massacres of previous dynastic transitions, they were not to engage in arson, plunder, or arbitrary killing, and that even members of the former ruling house were to be preserved, to "respond to Heaven's will and fulfill the purpose of punishing wrongdoing while pacifying the people."[78] Hu Dahai, one of his subordinates, famously declared: "I am a man of arms and do not know books; I know only three things: not to kill people, not to plunder women, and not to burn houses."[79] Later, during the late Ming period, Li Zicheng, leader of the Dashun army, issued an explicit proclamation upon entering Beijing: "Whoever dares to harm the people or plunder property or women shall be executed without pardon."[80]

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[76] See Book of the Later Han (Deng Kou Lie Zhuan). Translation available at: https:// ctext.org/hou-han-shu/deng-kou-lie-zhuan/zhs?filter=425022 (all internet references were accessed in December 2025).

[77] Chen Shou, "*Annotated Records of the Three Kingdoms*", in Pei Songzhi (ed.), Dingwen Printing, Taipei, 1977, p. 429.

[78] See The Ming History (Annals II: Taizu II). Translation available at: https://ctext.org/wiki.pl?if=gb&chapter=390514&searchu=%E4%B8%8D%E6%81%AD%E5%91%BD%E8%80%85%E7%BD%9A%E6%97%A0%E8%B5%A6 (all internet references were accessed in December 2025).

[79] See The Ming History (Liezhuan Vol. XXI). Translation available at: https://ctext.org/wiki.pl?if=en&chapter=93772&searchu=%E5%90%BE%E6%AD%A6%E4%BA%BA&remap=gb (all internet references were accessed in December 2025).

[80] Liu Shangyou, *Dingsi Xiaoji*, Zhejiang Ancient Books Publishing House, Hangzhou, 1985, p. 69.

In summary, ancient Chinese humanitarian norms for the protection of war victims encompassed both human and material dimensions. In terms of human beings, they safeguarded civilians, especially the elderly, children, and women, as well as prisoners of war, the sick and wounded, and surrendering enemies, all of whom were not to be executed, harmed, or enslaved. At the material level, these norms protected houses, grain, livestock, tombs, and trees that were essential to civilian livelihoods and that were not, or were no longer, used for military purposes from plunder or destruction. These normative prescriptions were not merely abstract ideals but were, at least in part, reflected in wartime practice. Instances of compliance with such humanitarian norms appear throughout Chinese historical sources, spanning the entire trajectory of ancient Chinese warfare from the Xia, Shang, and Zhou periods to the Qing dynasty.

Nevertheless, it must be acknowledged that these norms, grounded in *Minben* thought, appear in modern terms more as ethical injunctions than as legally binding rules.[81] As a result, even when belligerents violated the principles of just war in practice, they were generally subject only to moral and public censure, rather than genuine legal sanction. This lack of enforceability is closely related to the moral-exhortative character and top-down structural limitations of *Minben* thought itself. So-called people-as-root thought was merely a limited modification of ruler-centered governance, functioning primarily as an admonition to the sovereign. Its implementation depended on the self-discipline of a virtuous ruler, while the populace occupied a largely passive position in relation to sovereign authority.[82]

For this reason, ancient Chinese humanitarian norms were ultimately unable to prevent all forms of wartime atrocities, particularly the notorious massacres following the capture of cities. Yet despite these limitations, the existence of these norms and the instances in which they were observed shine like a faint glimmer of light amid the darkness of war, preserving a measure of humanity on brutal battlefields and leaving a valuable legacy of ideas and cultural resources for the later development of the laws of war.

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[81] Stephen C. Neff, *War and the Law of Nations: A General History*, Cambridge University Press, Cambridge, 2005, p. 34; Daniel A. Bell, *Beyond Liberal Democracy: Political Thinking for an East Asian Context*, Princeton University Press, Princeton, 2006, p. 24.

[82] Viren Murthy, "The Democratic Potential of Confucian Minben Thought", *Asian Philosophy*, Vol. 10, No. 1, 2000, p. 34.

2.3 Jus post Bellum

In mainstream thought in ancient China, the ethical core of interstate relations lay in moral influence, whereby harmony and coexistence were promoted through moral authority and cultural attraction.[83] The "righteousness" of a righteous army thus extended to the postwar period. As Confucius advocated, "If neighbouring people do not submit to your ruler, then enhance your culture and virtue and draw them to you".[84] Guided by this principle, the victorious state should exhibit tolerance and magnanimity toward the defeated. After punishing a guilty state and completing the war's mission, the responsibility of the victor is not to annihilate the political, social, and cultural structures of the enemy, but rather to assist in restoring order and reestablishing normal governance.

From the perspective of civilian welfare, postwar law in ancient China emphasized the protection of noncombatants. The *Weiliaozi* (《尉繚子》) states, "Where the army advances, farmers should not abandon their fields, merchants should not leave their shops, and officials should not forsake their offices".[85] This provision may suggest that even during warfare, the basic livelihoods and social order of the people must not be disrupted, reflecting the central value of people-as-root governance.

From the perspective of political order, the victor bore the responsibility of helping the defeated state correct political deviations, restore administrative functions, and rebuild civil order. The *Sima Fa* prescribes: "The king and the feudal lords should rectify their states, appoint the capable and wise, and restore the proper exercise of official duties".[86] This demonstrates that the victor's duty extended beyond correcting political misrule to supporting capable individuals in resuming

[83] Zhaojie Li, "Traditional Chinese World Order", *Chinese Journal of International Law*, Vol. 1, No. 1 (2002), p. 34; Zhuo Liang, "Chinese Perspectives on the Ad Bellum/In Bello Relationship and a Cultural Critique of the Ad Bellum/In Bello Separation in International Humanitarian Law", *Leiden Journal of International Law*, Vol. 34, 2021, p. 292.

[84] See The Analects (Ji Shi). Translation available at: https://ctext.org/analects?searchu=%E6%95%85%E9%81%A0%E4%BA%BA%E4%B8%8D%E6%9C%8D%EF%BC%8C%E5%89%87%E4%BF%AE%E6%96%87%E5%BE%B7%E4%BB%A5%E4%BE%86%E4%B9%8B (all internet references were accessed in December 2025).

[85] See Weiliaozi (Wu Yi). Translation available at: https://ctext.org/wei-liao-zi?searchu=%E5%85%B5%E4%B9%8B%E6%89%80%E5%8A%A0%E8%80%85 (all internet references were accessed in December 2025).

[86] See Sima Fa (Ren Ben). Translation available at: https://ctext.org/si-ma-fa?searchu=%E7%8E%8B%E5%8F%8A%E8%AF%B8%E4%BE%AF (all internet references were accessed in December 2025).

governance, highlighting the importance of political and social continuity in ancient postwar law. The *Lüshi Chunqiu* provides even more detailed postwar practice norms: "When a state is conquered, do not harm its people; punish only the guilty. Appoint outstanding scholars and enfeoff them, select the virtuous and honor them, assist the widowed and orphans, show respect to elders. Increase their stipends and ranks. Rescue the imprisoned guilty where possible; distribute treasury funds and granary reserves to pacify the populace without misappropriating resources; inquire into local shrines and ancestral temples that people wish to preserve, and restore them according to ritual".[87] These measures define limits on postwar punishment, support for talent, relief for the populace, equitable resource allocation, and the preservation of ancestral rites, reflecting a comprehensive system that balanced civilian welfare, political reconstruction, and cultural continuity.

Finally, regarding the continuity of culture and social order, ancient Chinese thought emphasized the preservation of ancestral temples and lineage continuity.[88] The *Analects* records, "To rise or fall a state, to continue or end a lineage, when able people are elevated, the people of the world will be loyal".[89] Postwar measures such as appointing outstanding scholars, honoring the virtuous, assisting the widowed and orphans, respecting elders, rescuing prisoners where possible, distributing treasury funds and granary reserves to pacify the populace, and restoring ancestral shrines all exemplify the respect for social structures, cultural traditions, and public sentiment in ancient China. These measures not only ensured social stability but also laid the foundation for long-term harmony between states.

3. Insights from Traditional Chinese *Minben* Thought for the Contemporary Laws of War

The *Minben* philosophy, intrinsic to ancient Chinese just war theory, mandates that belligerents are expected to consistently uphold the humanitarian principles of protecting and benefiting the populace throughout the course of a conflict. Crucially,

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[87] See Lüshi Chunqiu (Huai Chong). Translation available at: https://ctext.org/lv-shi-chun - qiu/zh?searchu=%E6%95%85%E5%85%8B%E5%85%B6%E5%9B%BD (all internet references were accessed in December 2025).

[88] See Weicong Li *et al.*, "Cultural Rituality and Heritage Revitalization Values of Ancestral Temple Architecture Painting Art from the Perspective of Relational Sociology Theory", *Heritage Science*, Vol. 12, 2024, p. 341; Kathryn Coe, Ryan O. Begley, "Ancestor Worship and the Longevity of Chinese Civilization", *Review of Religion and Chinese Society*, Vol. 3, No. 1, 2016, pp. 3–24.

[89] See Analects (Yao Yue). Translation available at: https://ctext.org/analects?searchu=% E8%88%88%E6%BB%85%E5%9C%8B (all internet references were accessed in December 2025).

this obligation is generally understood to be universal, extending to all civilians regardless of whether they fall under the direct jurisdiction of the acting power.

Consequently, *Minben* thought offers profound insights into the contemporary evolution of the laws of war. Specifically, in the context of *jus ad bellum*, it emphasizes that the legitimacy of employing force should be grounded in the protection of civilian lives and fundamental rights; regarding *jus in bello*, it offers a theoretical framework for recalibrating the balance between military necessity and humanitarian considerations; and in the context of *jus post bellum*, it underscores the importance of institutional arrangements that ensure social stability and the smooth restoration of political order.

3.1. Reinforcing Human Rights Protection as a Constraint on the Use of Force

Since the emergence and rapid development of international human rights law after World War II, its relationship with *jus ad bellum* has become a prominent topic in international legal discourse. A central controversy in contemporary international law concerns whether and to what extent international human rights law—particularly the right to life—can impose substantive constraints on the legality of resort to force under the *jus ad bellum* framework, or whether it remains confined to regulating conduct during armed conflict under *jus in bello*.

In 1982, the UN Human Rights Committee, in its first General Comment on the right to life, emphasized that any measures taken by states "to prevent the dangers of war, particularly nuclear war, and to strengthen international peace and security, constitute the most important conditions and guarantees for the protection of the right to life".[90] Later resolutions adopted by the Sub-Commission on the Promotion and Protection of Human Rights in 1996 and 1997 similarly affirmed that "international peace and security are essential prerequisites for the enjoyment of human rights, especially the right to life".[91] A more significant milestone came in 2019, when the Human Rights Committee issued General Comment No. 36 on the right to life under Article 6 of the International Covenant on Civil and Political

[90] UN Human Rights Committee, "CCPR General Comment No. 6: Article 6 (Right to Life)", 30 April 1982.

[91] Economic and Social Council, "Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Its Forty-Eighth Session", UN Doc. E/CN.4/SUB.2/RES/1996/16, 25 November 1996, pp. 44-45; Economic and Social Council, "Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Its Forty-Ninth Session", UN Doc. E/CN.4/Sub.2/RES/1997/36, 28 August 1997, pp. 80-81.

Rights, reiterating that "efforts to avoid the risk of war and any other armed conflict, and to strengthen international peace and security, constitute the most important guarantees for the right to life".[92] The Committee further classified acts of aggression that result in loss of life as violations of the right to life and emphasized that states may fail to discharge their positive obligations if they do not take all reasonable measures to resolve international disputes by peaceful means.[93] Scholars increasingly support the view that aggression constitutes an infringement of the right to life, recognized as a fundamental human right.[94]

Despite these institutional and scholarly endorsements, state practice has historically shown a marked indifference to individual rights in the context of the exercise of the right to resort to force, revealing the immaturity of these claims.[95] Preparatory materials for the 2010 ICC Rome Statute amendments on the crime of aggression demonstrate that the possibility of individuals as victims of aggression was not considered in drafting and negotiations,[96] and some scholars[97] have noted that "historically, individuals were never regarded as victims of the crime of aggression".

Moreover, General Comment No. 36 has faced opposition from several states, with some recommending the deletion of relevant passages. France [98] cautioned against overly broad interpretations of Article 6, emphasizing that it was

[92] UN Human Rights Committee, "General comment No. 36 on article 6: right to life", UN Doc CCPR/C/GC/36, 3 September 2019, para. 69.

[93] *Ibid.*, para. 70.

[94] See e.g. Frédéric Mégret, "What Is the Specific Evil of Aggression?", in Claus Kreß and Stefan Barriga (eds.), *The Crime of Aggression: A Commentary*, Cambridge University Press, Cambridge, 2016, pp. 1441-1442; Hans-Peter Kaul, "Victims' Rights and Peace", in Christoph Safferling & Torsten Bonacker (eds.), *Victims of International Crimes: An Interdisciplinary Discourse*, T.M.C. Asser Press, The Hague, 2013, p. 227; Shane Darcy, "Accident and Design: Recognising Victims of Aggression in International Law", *International and Comparative Law Quarterly*, Vol. 70, 2021, p. 107.

[95] For example, under mechanisms such as the United Nations Compensation Commission (in relation to Iraq's invasion of Kuwait) or the Eritrea–Ethiopia Claims Commission, claims for individual losses could only be submitted by states on behalf of their nationals, and individuals have never been recognized as having independent legal standing in cases of violations of the *jus ad bellum*.

[96] See Stefan Barriga & Claus Kreß (eds.), *The Travaux Préparatoires of the Crime of Aggression*, Cambridge University Press, Cambridge, 2012.

[97] Erin Pobjie, "Victims of the Crime of Aggression", in Claus Kreß & Stefan Barriga (eds.), *The Crime of Aggression: A Commentary*, Cambridge University Press, Cambridge, 2017, p. 822.

[98] France, *Commentaires du Gouvernement Français*, para. 42, available at: https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/France.docx (all internet references were accessed in December 2025).

not intended to regulate the use of force between states; Germany[99] recognized that aggression affects human rights but insisted on maintaining a distinction between the right to resort to force and international human rights law; Canada[100] argued that IHL constitutes *lex specialis* in armed conflict, and thus should be the primary reference when assessing compliance with human rights law; and the United States[101] rejected the Committee's approach entirely, emphasizing that the ICCPR applies only within the territory of States Parties and to persons under their jurisdiction, meaning that aggressor states do not bear human rights obligations toward victims of aggression.

In this context, traditional Chinese *Minben* thought provides valuable insights for constraining the exercise of the right to resort to force through human rights considerations. From a *Minben* perspective, the decision to resort to war is not merely a political choice by state rulers based on military or strategic interests but must fundamentally aim at safeguarding the livelihoods and welfare of the civilian population. Accordingly, when assessing the legitimacy of resorting to war, key factors include whether the reasons for war adequately protect the interests of the people and whether the timing of hostilities takes their well-being into account; any warfare that exploits force recklessly and results in widespread suffering would be difficult to justify. Unlike the traditional state-centric conception of *jus ad bellum*, *Minben* thought places the welfare of the people at the centre of the legitimacy assessment. It therefore offers a normative framework in which human well-being is not merely a consequence of lawful resort to force but an essential criterion for determining whether the use of force is justified in the first place.

This conception aligns closely with contemporary efforts to limit the use of force through human rights law: if a state fails to assess the impact of armed conflict on civilians' lives and fundamental rights, the legality of its resort to force under *jus ad bellum* does not shield it from potential violations of international human rights obligations.

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[99] Germany, *Submission from Germany*, para. 24, available at: https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/Germany.docx (all internet references were accessed in December 2025)

[100] Canada, *Comments by the Government of Canada*, para. 5, available at: https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/Canada.docx (all internet references were accessed in December 2025)

[101] US, *Observations of the United States*, para. 20, available at: https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/UnitedStatesofAmerica.docx (all internet references were accessed in December 2025)

Rather than simply reinforcing existing human rights arguments, *Minben* thought contributes an alternative normative foundation by redefining the purpose of the law governing the use of force: the legitimacy of war derives not solely from compliance with inter-State legal rules, but also from its capacity to protect the lives and welfare of those affected by armed conflict. In this sense, *Minben* complement existing human rights-based approaches while offering a broader people-centred framework for evaluating the legality of resort to force.

Therefore, the traditional Chinese *Minben* criterion for evaluating the legitimacy of war provides a distinct philosophical and cultural foundation for current international initiatives advocating human rights–based constraints on the use of force, complementing other theoretical approaches[102] and contributing to the gradual maturation of this emerging international legal framework.

3.2. Expanding Humanitarian Considerations as a Constraint on Military Necessity

It is widely accepted today that modern IHL is predicated upon a delicate equilibrium between military necessity and humanitarian considerations. On the one hand, IHL acknowledges that the pursuit of military objectives may inevitably entail a certain degree of death, injury, destruction, and security measures more stringent than those applicable in peacetime; on the other hand, it makes clear that military necessity does not confer an unfettered right to use violence, but instead requires that wartime conduct be legally constrained to ensure the fundamental protection of civilians and non-combatants.[103] Since World War II, the "humanization" of international law has profoundly shaped the evolution of IHL, catalyzing a shift from a military paradigm to a human-centric one, as reflected most notably in the four Geneva Conventions, which place the principle of humanity and the status of protected persons at the core of the legal framework.[104] In essence, as its name suggests, IHL has moved toward a more pronounced emphasis on humanitarianism over military exigency.

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[102] For example, apart from the value of human rights protection as the main justification for this claim, some scholars invoke the evolution of the concept of sovereignty to explain its necessity: "The concept of sovereignty has changed… individual rights have become an indispensable aspect of sovereignty. Therefore, there is ample reason to argue that individuals can fall within the protective scope of the law on the use of force." See Friedrich Rosenfeld, "Individual Civil Responsibility for the Crime of Aggression", *Journal of International Criminal Justice*, Vol. 10, 2012, pp. 249–265.

[103] Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction*, International Committee of the Red Cross, Geneva, 2019, pp. 17–18.

[104] Robert Kolb, *Advanced Introduction to International Humanitarian Law*, Edward Elgar, Cheltenham, 2014, pp. 12–13.

Nevertheless, military necessity persists as a fundamental institutional arrangement within numerous provisions of modern IHL. Taking the 1977 Additional Protocol I as an example, Article 48 mandates that parties to a conflict shall direct operations only against military objectives, while Article 52 defines such objectives as those which "by their nature, location, purpose or use make an effective contribution to military action" and whose destruction offers a definite military advantage. Furthermore, Articles 51(5) and 57(2) prohibit attacks that violate the principle of proportionality—defined as those expected to cause incidental loss of civilian life or injury which would be excessive in relation to the concrete and direct military advantage anticipated. Article 57(2) further obligates belligerents to take "all feasible precautions" to avoid or minimize incidental civilian harm. While these provisions ostensibly balance necessity with humanity, the legal definitions of military advantage, excessive damage, and feasible precautions remain notoriously ambiguous.

This ambiguity provides a loophole for belligerents to circumvent IHL constraints under the guise of military necessity. The ICRC has noted that certain state interpretations of these core concepts are eroding their protective function.[105] By expanding the scope of military objectives and narrowing the definition of civilians, these interpretations render civilian casualties more acceptable in practice. Simultaneously, a loosening of the proportionality principle allows for a broad definition of military interest while excluding long-term or indirect incidental harm. The principle of precaution is likewise weakened, often treated as a mere policy choice rather than a binding legal obligation. Consequently, military necessity is increasingly viewed as an "insidious" doctrine, invoked to rationalize nearly any atrocity.[106] For instance, in the intensifying Israeli-Palestinian conflict, the concept of "collateral damage" within the principle of proportionality has been abused and alienated into a pretext for the mass killing of civilians—a total subversion of IHL's protective purpose.[107] Some scholars argue that IHL has yet to shed its warmongering roots.[108]

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[105] International Committee of the Red Cross, "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts", *International Review of the Red Cross*, Vol. 106, 2025, p. 1362.

[106] Burrus M. Carnahan, "Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity", *American Journal of International Law*, Vol. 92, 1998, p. 230.

[107] Luigi Daniele, "Incidentality of the Civilian Harm in International Humanitarian Law and Its Contra Legem Antonyms in Recent Discourses on the Laws of War", *Journal of Conflict & Security Law*, Vol. 29, 2024, pp. 23, 34.

[108] Alonso Gurmendi, "The Rabbit Hole, from Antwerp to Gaza", *Opinio Juris*, 19 May 2021, available at: https://opiniojuris.org/2021/05/19/the-rabbit-hole-from-antwerp-to-gaza/ (all internet references were accessed in December 2025).

These risks are likely to be further exacerbated by the deployment of emerging military technologies, particularly autonomous weapon systems and AI-assisted targeting. Where algorithms are trained on overly permissive interpretations of military objectives or proportionality, the existing ambiguities in IHL may be reproduced and amplified, enabling civilian deaths and destruction to occur on a far greater scale and at unprecedented speed.

In response to this crisis, traditional Chinese *Minben* thought offers significant insights for expanding humanitarian considerations and constraining the interpretation of military necessity. War-time philosophies rooted in *Minben* focus on the protection of those not actively participating in combat, emphasizing the minimization of disruption to civilian life, social governance, and production. In terms of value orientation, ancient Chinese theories of just war tend to prioritize humanity over military necessity, pursuing an ideal wherein no innocent are entangled and only the guilty are punished. This not only aligns with the modern IHL goal of limiting force and mitigating calamity,[109] but also suggests that a *Minben* idealistic lens would be highly critical of any expansive interpretation of military necessity that exploits legal vagueness.

3.3. Restoring Order as a Component of Post-War Justice

Jus post bellum is commonly understood as a body of legal norms aimed at regulating the transition from armed conflict to a just and sustainable peace,[110] and is increasingly regarded as an emerging branch of law associated with situations of armed conflict or the post-conflict phase.[111] Accordingly, *jus post bellum* is expected to articulate standards and principles governing the termination of hostilities, the post-conflict period, and the just reconstruction of communities devastated by war.[112]

Modern international humanitarian law imposes certain post-conflict obligations, particularly in situations of occupation. It is well established that an

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[109] Yu Zhengshan, "Ren as the Foundation of Warfare, Warfare According to Ren: A Brief Discussion on the Humanitarian Concepts and Rules in Pre-Qin Military Thought", *Journal of Xi'an Politics Institute*, Vol. 1, 2008, p. 102.

[110] Jens Iverson, *Jus post bellum: La redécouverte, les fondements et l'avenir du droit de transformer la guerre en paix*, Brill, Leiden, 2021, p. 145.

[111] Dan G. Cox, "The Unjustness of the Current Incantation of Jus post Bellum", *InterAgency Journal*, Vol. 7, No. 1, 2016, p. 25.

[112] Colleen Murphy, "Political Reconciliation, Jus post Bellum, and Asymmetric Conflict", *Theoria*, Vol. 62, No., 2015, p. 5.

occupying power bears responsibility for maintaining public order and ensuring the safety of the civilian population. Article 43 of the Hague Regulations provides that, where the authority of the legitimate government has in fact passed into the hands of the occupant, the latter must take all measures within its power to restore and ensure public order and civil life, while respecting, unless absolutely prevented, the laws in force in the occupied territory. However, apart from a limited number of provisions in the Hague Regulations, the Geneva Conventions, and their Additional Protocols addressing specific post-conflict situations, international law has not established a comprehensive framework governing the post-conflict phase as such. The existing rules are largely framed in abstract and principled terms—such as the duty to "maintain public order" or to "respect existing laws"—and offer little concrete guidance for implementation. Moreover, these obligations are predominantly negative or minimal in nature, requiring only the restoration of basic order and security to the extent possible.

As a result, international law lacks clearly articulated legal procedures for the restoration of durable peace and for the establishment of robust political, economic, social, and cultural institutions capable of fostering social cohesion.[113] Owing to this normative underdevelopment, *jus post bellum* remains a conceptually unsettled and evolving area of international law.[114]

By contrast, traditional Chinese post-war norms articulate a more affirmative and people-centered vision of post-conflict governance, in which the central objective is not merely the maintenance of public order, but the restoration of the social and material conditions necessary for civilian life and welfare. Normatively, this *Minben*-oriented approach provides a more demanding conception of post-conflict responsibility than that reflected in contemporary *jus post bellum*, which remains largely limited to minimal obligations of order maintenance. It implies that post-conflict duties should be understood as positive obligations to restore basic governance capacity and the conditions for social recovery, rather than as purely negative duties of non-disruption.

Accordingly, an occupying authority is not only required to reestablish administrative control, but also to restore essential public functions, ensure a fair

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[113] Noël Mfuranzima, "*Jus post bellum*: Scope and assessment of the applicable legal framework", *International Review of the Red Cross*, 2024, Vol. 106, No. 927, pp. 1252, 126.1

[114] Eric De Brabandere, "The Concept of *Jus post Bellum* in International Law: A Normative Critique", in Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (eds.), *Jus post Bellum: Mapping the Normative Foundations*, Oxford University Press, Oxford, pp. 124–126.

distribution of basic resources, and take reasonable measures to support social recovery and public trust, particularly for vulnerable groups. In this sense, *Minben* offers a normative perspective that shifts post-conflict governance from a minimalist order-preservation model toward a welfare-oriented understanding of post-conflict responsibility.

4. Conclusion

While historical warfare in ancient China frequently contravened humanitarian standards through unjust aggression, large-scale massacres, and the failure to protect civilians post-conflict, Chinese classical military thought nonetheless warrants a nuanced appraisal. Just as the dragon signifies malevolence in Western tradition yet represents auspiciousness in the East, Chinese intellectual traditions, particularly their focus on harmony and inclusiveness, remain worthy of critical engagement as a means to provide valuable perspectives for contemporary international legal discourse. This analytical approach suggests that such classical tenets may contribute significantly to the gradual development of a cross-cultural consensus on the rules of war.[115]

Within this intellectual tradition, *Minben* thought embodies the ideal of "all under heaven as one family," advocating that relations among peoples be grounded in mutual respect and peaceful coexistence. It is essential to recognize that *Minben* thought in ancient China did not function as an enforceable legal regime; rather, it served as a moral-political norm designed to maintain ruling legitimacy by addressing the welfare of the populace. In this sense, it can be conceptualized as a "tacit social contract" wherein the ruler provides benevolent governance and security in exchange for the people's obedience and recognition—a binding force sustained through moral scrutiny and public sentiment rather than formal legalism. This worldview demands that even in the unfortunate event of armed conflict, hostilities must be conducted in ways that facilitate the swift restoration of peace and protect the population as a whole. Its guiding principles of "bringing security to the people" and "benefiting the people" underscore that, from the initiation of war through its conduct, the protection of human rights and adherence to humanitarian considerations must remain paramount, while violence that does not serve the interests of the people should be minimized to the greatest possible extent

[115] Ping-cheung Lo, "The Art of War Corpus and Chinese Just War Ethics Past and Present", *Journal of Religious Ethics*, 2012, Vol. 40, No. 3, p. 436.

Freedom of Religion and Belief Under Fire: Protection and Practice in Jeopardy?

*Fadi Hachem**

Abstract:
This article examines how freedom of religion or belief (FoRB) is protected during armed conflict through the interaction of international humanitarian law (IHL), international human rights law (IHRL), and international criminal law (ICL). It argues that, although FoRB is not explicitly recognized as a standalone category within IHL, several of its core elements—including protection of religious practice, places of worship, detainees, and religious groups—are indirectly safeguarded across different legal regimes. Through selected case studies from the Levant region, the article demonstrates that these protections remain fragmented and insufficient, particularly regarding the collective and community dimensions of religious life, thereby requiring a stronger and more integrated legal protection framework.

Introduction

Freedom of Religion and Belief (FoRB) is a core pillar of human rights, both for the human rights system and for all people around the world, as it embodies the respect for human dignity and is fundamental to plurality and equality.[1] To that end, there are robust international legal frameworks for the protection of FoRB, particularly within International Human Rights Law (IHRL). Yet in recent years, especially amid the numerous conflicts around the world in general and in the Levant region in particular, an important dimension of FoRB has remained underexplored, namely, how it is protected during armed conflict beyond IHRL, but rather in additional regimes that apply to conflict, especially International Humanitarian Law (IHL) and International Criminal Law (ICL), particularly the Genocide Convention and the Rome Statute, as well as relevant customary norms.

Indeed, the persistence of armed conflict and its impact on FoRB have underscored the importance of analyzing how international law, which primarily

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[1] General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art. 18), UN Doc. CCPR/C/21/Rev.1/Add. 4, 30 July 1993, available at: https://www.refworld.org/legal/general/hrc/1993/13375.

regulates conduct during armed conflict (IHL), may shape our analysis of the protection of FoRB during armed conflicts, and how it interacts with, and at times diverges from, IHRL in its conceptualization and protection of religion and belief. Existing scholarship has predominantly approached FoRB through IHRL, often overlooking both the cumulative effect of these parallel legal regimes and how armed hostilities reshape the ability of individuals and communities to exercise the external dimension of FoRB, particularly in regions such as the Levant, where religious identity is closely intertwined with social and political structures.[2] This indicates a growing gap in the literature and in international law regarding how FoRB may be protected, even when not explicitly mentioned under IHL, in international and non-international armed conflicts (IAC and NIAC). Indeed, existing scholarship has addressed religion in armed conflict from distinct perspectives, with Eric David examining the protection of cultural and religious property,[3] Marco Sassòli exploring the place of religion within detention regimes and the relationship between IHL and IHRL, and David Llewellyn focusing on operational and targeting frameworks. Yet no literature has yet developed a comprehensive analysis of freedom of religion or belief across these intersecting legal regimes.

For instance, the Levant region has witnessed targeted attacks on individuals during prayers and religious holidays, as well as the deliberate or indiscriminate striking of religious buildings, targeting groups because of their beliefs, and prohibiting the practice of certain rights, demonstrating the persistent pressure placed on FoRB. Numerous examples illustrate this pattern, including concrete and recent incidents that illustrate the vulnerability of religious practice and identity during armed conflict. In southern Syria, for example, the 2025 attacks in Suwayda targeting Druze communities were accompanied by violence that directly intersected with religious identity, highlighting how religious belonging can become a basis for targeting in conflict, especially non-international ones.[4] Similarly, in Palestine, restrictions imposed during the holy month of Ramadan, both in Gaza and at the Al-Aqsa Mosque, have limited access to religious observance, raising serious concerns regarding the protection of the external dimension of FoRB under conditions of occupation and hostilities, in addition to explicit targeting of Palestinians from the

[2] Dylan O'Driscoll and Bahar Baser, *Intersecting Identities and the Need for Reconciliation in the Levant and Iraq*, Report, Middle East Research Institute, Erbil, 22 May 2019, available at: https://www.meri-k.org/publication/intersecting-identities-and-the-need-for-reconciliation-in-the-levant-and-iraq/.

[3] Eric David, *Principes de Droit des Conflits Armés*, 4th ed., Bruylant, Bruxelles, 2008, p. 325.

[4] Human Rights Watch, *Syria: Abuses, Humanitarian Emergency amid Sweida Clashes*, New York, 22 July 2025, available at: https://www.hrw.org/news/2025/07/22/syria-abuses-humanitarian-emergency-amid-sweida-clashes.

Muslim community, labeling them as terrorists and extremists in public statements.[5] In Lebanon, the 2023–2024 escalation saw unprecedented damage and destruction inflicted upon mosques and other religious structures. Reports suggest that more than 25 mosques and churches were partially or fully destroyed in 2024.[6]

Taken together, these examples illustrate not only the physical destruction of religious sites, but also the disruption of religious life itself, whether through preventing access to places of worship, targeting communities along religious lines, or undermining the conditions necessary for collective religious practice. These practices, therefore, demonstrate why examining FoRB through the lens of IHL and related legal regimes that regulate times of war is both timely and necessary.

Therefore, the central question this research addresses is: how is FoRB protected under international law in situations of armed conflict, and what are the limits of such protection? This article argues that, although IHL does not articulate a comprehensive or standalone regime for the protection of FoRB, it nonetheless provides a set of partial and fragmented safeguards across different provisions. In addition to its interaction with IHRL, IHL explicitly guarantees FoRB for civilians affected by IACs and NIACs, for prisoners and detainees of war, and for their right to manifest or exercise their religion, including through the protection of religious buildings and spaces. However, this protection remains structurally limited. First, the application of IHL as *lex specialis*, combined with broad exceptions such as military necessity (when they are used for military purposes or fall within highly important military targets), constrains the scope of protection afforded to religious practice.[7] Second, IHL tends to reduce FoRB to derivative protections, namely dignity, property, and access, rather than recognizing it as a unified right encompassing belief, manifestation, and communal religious life. In contrast, international criminal law, particularly genocide law, more explicitly recognizes religion as a protected marker of group identity, thereby offering a more direct engagement with the collective dimension of FoRB. Moreover, the gap between normative protection and practical implementation is particularly visible in the Levant, where recurrent violations expose the limits of existing legal frameworks, compounded by non-respect for them by various stakeholders. This article, therefore,

[5] "Rights Group: Palestinian Prisoners Face Harshest Ramadan in over 40 Years", *Palestinian Information Center*, 18 March 2026, available at: https://english .palinfo.com/news/2026/03/18/359785/.

[6] F. Hachem and K. Al Mufti, *IHL and IHRL Violations in Lebanon: 2023–2024 War*, Unpublished report, ALEF – Act for Human Rights, Beirut, 2024.

[7] Marco Sassòli, Antoine A. Bouvier and Anne Quintin, "Military Necessity", in *How Does Law Protect in War?*, ICRC, Geneva, available at: https://casebook.icrc.org/a_to_z/glossary/military-necessity.

adopts a multi-regime approach, examining how IHL, alongside ICL and IHRL, and related norms, engage with FoRB during armed conflict. It also calls for IHL to become more receptive to the normative content developed under IHRL, particularly by using FoRB standards to inform the interpretation of humane treatment, non-discrimination, detention, occupation, and the protection of religious sites and communities. Finally, it analyzes both the scope and limitations of these protections and situates the discussion within a case study of the Levant, providing critical context for understanding the interaction among religion, identity, and conflict.

Defining Freedom of Religion and Belief under International Human Rights Law

IHRL continues to apply during armed conflict, subject to state jurisdiction, and therefore remains a primary legal framework for understanding the scope and content of freedom of religion or belief (FoRB) even in wartime contexts. Cross-national survey evidence indicates that FoRB is considered a core value across societies, as the majority of populations worldwide affirm that they value living in a society where religion can be freely practiced.[8] Under the Universal Declaration of Human Rights (UDHR) and in Article 18 of the International Covenant on Civil and Political Rights (ICCPR), FoRB is an internationally recognized human right which protects the freedom to hold, adopt, change, or reject a religion or belief, and the freedom to manifest a religion or belief at the level of the individual or the community, in public or in private.[9] Perhaps Article 18 of the ICCPR presents one of the most innovative legal protections of FoRB: its second clause prohibits coercion to change one's belief or religion, while clause number three addresses the limitation of manifesting one's religion to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.

Furthermore, regional human rights frameworks in the Levant region, such as the Arab Charter on Human Rights, provide similar protection of FoRB, subject to limits necessary to protect public safety, health, or morals, and prescribed exclusively by law, aligning with international legal traditions.[10] Similarly, the Cairo

[8] Richard Wike, *et al.*, *Global Support for Principle of Free Expression, but Opposition to Some Forms of Speech*, Pew Research Center, Washington, DC, 18 November 2015, p. 11.

[9] Universal Declaration of Human Rights, UNGA Res. 217A (III), 10 December 1948, Art. 18: "Everyone has the right to freedom of thought, conscience and religion."

[10] *Arab Charter on Human Rights*, 22 May 2004 (entered into force 15 March 2008), Art. 30, available at: https://hrlibrary.umn.edu/instree/loas2005.html. Art. 32(2) provides that the exercise of freedom to manifest one's religion hall be subject only to such limitations as are prescribed by law and are necessary in a tolerant society that respects human rights and freedoms for the protection of public

Declaration on Human Rights in Islam affirms principles such as dignity, equality, and the protection of religion, but situates all rights and freedoms within the framework of Islamic Shari'a. This reflects a distinct normative approach in which FoRB is recognized but interpreted through specific legal and cultural paradigms[11]. Taken together, these frameworks demonstrate that, despite variations in scope and interpretation, FoRB remains a central normative principle across different legal systems. Indeed, its consistent recognition, whether grounded in IHRL or regional normative orders, underscores its universal significance, including in contexts of armed conflict.

On one hand, FoRB encompasses two dimensions: internal and external. The internal dimension (*forum internum*) is the absolute right to hold, change, or reject a belief.[12] It includes elements that cannot be overridden or restricted, no matter the circumstances,[13] such as one's right to adopt or change a belief without any form of intervention or coercion. Even in situations of public emergency threatening the life of the nation, states may not interfere with the freedom of conscience itself. This protection reflects the understanding that freedom of belief is intimately connected to human dignity and moral agency.

More specifically, the external dimension (*forum externum*) is the freedom to manifest that right through practice, observance, worship, or teaching, which, contrary to the internal dimension, is a dimension of the right that could legally be subject to limitations, as it is not absolute. However, limitations are permitted only when prescribed by law and necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.[14] It follows that the public manifestation of one's faith can be restricted for reasons associated with the security and order of a country, provided that these restrictions are temporary, exceptional, and align with the emergency unfolding.[15] These limitations are interpreted narrowly, but they acknowledge that religious practice takes place within social and institutional contexts that may require regulation.

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safety, public order, public health or morals or the fundamental rights and freedoms of other, reflecting a broader normative framework within which freedom of religion or belief may be interpreted in the region.

[11] *Cairo Declaration on Human Rights in Islam*, 5 August 1990, Arts 10, 24–25, available at: https://hrlibrary.umn.edu/instree/cairodeclaration.html.

[12] *General Comment No. 22*, above note 1, para. 3.

[13] Heiner Bielefeldt, "How to Preserve the Substance of Religious Freedom in Times of Crisis", *Religion & Human Rights*, Vol. 15, 2020, pp. 3–6.

[14] International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (entered into force 23 March 1976), Art. 18(3).

[15] H. Bielefeldt, above note 13, p. 8.

Finally, an important conceptual framework of FoRB concerns its dual character as both an individual freedom and a collective communal practice. IHRL frames freedom of religion primarily as an individual entitlement. Individuals possess the right to believe, change religion, and express their faith. Yet, it recognizes that the practice of religion, especially in its external dimension, is rarely purely individual, as it often takes place through collective structures such as congregations, rituals, celebrations, institutions, and shared identities.

This means that FoRB operates simultaneously across several interconnected levels: First, it protects individual belief, ensuring that individuals may hold or change their religious convictions without coercion. Second, it protects collective worship, including communal prayers, rituals, religious gatherings, and observance of sacred holidays. Third, it encompasses religious institutions, such as churches, mosques, temples, religious schools, and clergy structures that sustain religious communities over time. Fourth, religion frequently functions as a group marker of identity, shaping how communities define themselves and how they are perceived by others, which becomes more relevant in conflict settings, as we will see in the following sections.

Conceptualizing Obligations of Parties Related to Religious Duties in Conflict Settings

After defining FoRB in IHRL and looking at the application, one must recognize that neither the legal formulation of Article 18 of the UDHR and the ICCPR, nor any other general comment or IHRL treaty adequately explains how FoRB is protected during armed conflict. This gap necessitates conceptual clarification of the right's core components (belief, manifestation, and religious community) to assess how each is affected in conflict settings. Such an approach allows for a more precise evaluation of both the impact of armed conflict on FoRB and the extent to which existing legal frameworks, including IHL and ICL, address these dimensions. It is therefore essential to build a theoretical framework for understanding FoRB in conflict settings. It starts by revisiting the two dimensions outlined above regarding the internal and external dimensions of the freedom and by examining its dual individual and collective nature. This analysis reveals a structural tension: while IHRL conceptualizes FoRB as a unified right, IHL and Customary International Law (CIL), and ICL protect only certain elements of that freedom, and even when they do so, they do it in an indirect way. However, during armed conflict, the

application of IHRL must be understood alongside IHL, which operates as the *lex specialis* governing the conduct of hostilities and may shape how certain rights, including the external manifestation of religion, are interpreted and applied in practice.[16]

First, revisiting the internal and external dimensions, while this distinction is well established within IHRL, especially in Article 18 of the UDHR and ICCPR, as well as the Human Rights Committee's General Comment No. 22, no other relevant legal regimes that apply to armed conflicts recognize this conceptual structure. Indeed, IHL does not systematically distinguish between internal belief and external manifestation. The Geneva Conventions and their Additional Protocols[17] and customary humanitarian law[18] rarely, if ever, refer explicitly to "freedom of religion or belief" as a comprehensive right. Instead, they address religion in fragmented ways, primarily through provisions on humane treatment, detention conditions, and protection of religious personnel or places of worship.[19] Even with indirect protection, dimensions must be deduced rather than explicitly cited, as we will develop in the following section. In IHL, the internal freedom of religion or belief is largely assumed rather than explicitly protected, while the external manifestation of religion is safeguarded only in specific contexts such as detention regimes or protection of cultural property. This difference reveals an important structural shift: IHL does not regulate FoRB as a holistic right but rather incorporates aspects of it within broader humanitarian protections related to dignity, humane treatment, and cultural heritage.

Second, in many conflicts, religious identity becomes intertwined with ethnicity, culture, or political affiliation, turning religion into a primary axis of group targeting and making the fragmentation between individual and collective identities more pronounced. While IHRL clearly recognizes these two dimensions, as previously stated, other legal regimes, especially those relevant to armed conflicts, engage with them in a more limited and differentiated way. Instead of protecting

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[16] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, 8 July 1996, p. 226, para. 25; General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004.

[17] Christian Walter, "Religion or Belief, Freedom of, International Protection", in Anne Peters and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2021, para. 3, available at: http://opil.ouplaw.com.

[18] *Ibid.*, para. 8.

[19] Heiner Bielefeldt, Thiago Alves Pinto and Marie Juul Petersen, "Introduction: Freedom of Religion or Belief as a Human Right", *The Review of Faith & International Affairs*, Vol. 20, No. 2, 2022, pp. 1–12, at p. 6, available at: https://doi.org/10.1080/15570274.2022.2065799.

FoRB as an integrated right encompassing these dimensions, IHL safeguards certain fragments of religious life through different legal regimes. For example:

- The protection of detainees' ability to practice religion is set out in rules governing humane treatment and respect for religious convictions.[20]
- The prohibition of discrimination on the basis of religion, grounded in IHRL, operates across conflict settings, prohibiting adverse distinction and targeting based on religious identity, including under both IHRL[21] and relevant principles of IHL[22].
- The humane treatment and protection of religious rights of persons deprived of their liberty.[23]
- The protection of places of worship arises through cultural property law[24] and rules governing attacks on civilian objects.
- The protection of religious groups as collective entities appears primarily within international criminal law, particularly in the prohibition of genocide and persecution against religious groups.[25]

These protections do not operate as a unified legal framework for FoRB. Rather, they protect discrete elements of religious existence: belief, ritual, property, or group survival. This fragmentation can be understood as reflecting different legal logics through which religion is engaged in armed conflict: a humanitarian logic focused on the protection of persons (humane treatment and dignity),[26] an object-

[20] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, 12 August 1949 (entered into force 21 October 1950), Art. 27; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Art. 75(1); Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978), Art. 4(1). International Committee of the Red Cross, *Customary International Humanitarian Law*, Vol. I: Rules (Cambridge University Press, 2005), Rule 87.

[21] ICCPR, above note 14, Arts 26 and 27.

[22] 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 88.

[23] Geneva Convention (III) relative to the Treatment of Prisoners of War, 75 UNTS 135, 12 August 1949 (entered into force 21 October 1950), Arts 13 and 34–37; Geneva Convention (IV), above note 20, Arts 58 and 96; Additional Protocol II, above note 20, Art. 5(1)(b).

[24] Geneva Convention (IV), above note 20, Art. 53; Protocol Additional (I), above note 22, Art. 53; J.-M. Henckaerts and L. Doswald-Beck (eds), above note 22, Rule 38.

[25] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002), Arts 6 and 7.

[26] Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar Publishing, Cheltenham, 2019.

based logic centered on the protection of cultural and religious property,[27] and a criminal law logic addressing identity-based violence against religious groups.[28]

Seen through this lens, the absence of a unified FoRB framework in IHL is not merely a gap, but the result of the way international law distributes the protection of religion across distinct regimes, each capturing only a partial dimension of the right. While IHRL recognizes FoRB as a comprehensive right encompassing belief, practice, and community life, IHL does not treat FoRB as a standalone legal category nor does it open. Instead, elements of FoRB are protected through other humanitarian protections concerned with dignity, humane treatment, and cultural heritage.

International Criminal Law and the Protection of Religious Groups

While IHL engages with religion indirectly and in a fragmented manner, ICL constitutes a distinct legal regime that more explicitly addresses religion as a protected ground, particularly where violations reach the threshold of international crimes, including genocide and crimes against humanity, within which persecution on religious grounds is recognized as a distinct form of discriminatory conduct targeting protected groups. By contrast to other regimes, ICL more directly engages with the collective and institutional dimension of religion, particularly through the prohibition of genocide against religious groups and the recognition of persecution on religious grounds as a crime against humanity.[29] Under instruments such as the Rome Statute of the International Criminal Court, religion is explicitly recognized as a protected group category, thereby acknowledging that religious identity can form the basis of collective targeting. In the context of genocide, this protection is triggered where acts are committed with the intent to destroy, in whole or in part, a religious group as such, thus elevating religion from an individual belief system to a legally protected collective identity. Similarly, the crime of persecution encompasses severe deprivations of fundamental rights[30] on discriminatory grounds, including religion, thereby capturing patterns of systematic targeting of religious communities.[31]

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[27]Theodor Meron, "The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the former Yugoslavia", *Harvard Human Rights Journal*, Vol. 14, 2001.

[28] Kai Ambos, "What Does 'Intent to Destroy' in Genocide Mean?", *International Review of the Red Cross*, Vol. 91, No. 876, 2009

[29] Rome Statute, above note 25, Arts 6 and 7.

[30] Lovell Fernandez, "Religious Persecution as a Crime against Humanity: Ending Impunity", *International Journal for Religious Freedom*, Vol. 6, No. 1/2, 2013, p. 158, para. 4.

[31] Rome Statute of the International Criminal Court, above note 25, Art. 7(1)(h).

Additionally, the Rome Statute explicitly addresses religious buildings, specifically their use for sheltering, highlighting that any targeting of such monuments constitutes a breach of international humanitarian law and customary law. [32]

However, this recognition is both conditional and limited in scope. ICL intervenes only in situations that meet high thresholds of gravity[33] and intent,[34] such as widespread or systematic attacks against civilian populations[35] or the specific intent required for genocide.[36] As a result, while ICL explicitly acknowledges the collective dimension of religion, it does so only in extreme circumstances of mass violence. As for the protection of religious buildings, ICL's provisions remain conditional and limited, solely covering the case of their use for sheltering, and omitting the aspect of religious services and practice during an armed conflict. This means that many forms of interference with religious life in conflict, particularly those affecting everyday practices, community cohesion, or non-lethal forms of discrimination, remain outside its reach. Consequently, ICL complements but does not fully bridge the gap left by the absence of comprehensive, continuous protection for FoRB as a unified right in armed conflict.

This insight is fundamental to the main argument that this article aims to present: while various aspects of international law in armed conflicts address religion, none fully mirror the structure of FoRB as outlined in IHRL, which is applicable in such conflicts. Additionally, the lack of protection under IHL represents a significant gap. As a result, the system offers religious protection based on function rather than conceptual clarity. Therefore, recognizing this difference is essential before analyzing how these legal frameworks function in real-world contexts, as discussed in the upcoming sections.

[32] *Ibid.*, Arts 8(2)(b)(ix) and 8(2)(e)(iv).
[33] *Ibid.*, Art. 17(1)(d).
[34] *Ibid.*, Art.30.
[35] International Criminal Tribunal for Rwanda, *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Joseph Ngeze*, Case No. ICTR-99-52-A, Judgment (Appeals Chamber), 28 November 2007, para. 920, available at: https://cld.irmct.org/notions/ show/1015/widespread-or-systematic-attack.
[36] K. Ambos, above note 30, para. 1.

The Architecture of Protection of FoRB Under IHL

Applicability and Interrelationship of IHRL and IHL in Armed Conflict

The first question, then, concerns the protection of human rights during armed conflicts: the applicability of IHRL in such situations. Indeed, human rights treaties generally continue to apply during armed conflicts, subject to the jurisdiction criterion, as reflected, for example, in Article 2(1) of the ICCPR:

> "1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

This jurisdictional requirement has been interpreted by international bodies to extend beyond a State's territorial boundaries in certain circumstances, particularly where a State exercises effective control over territory or authority over individuals abroad. For instance, the Human Rights Committee has affirmed in General Comment No. 31 that States must respect and ensure Covenant rights to anyone within their power or effective control, even if not situated within the territory of the State.[37] Similarly, regional jurisprudence has reinforced this interpretation: the European Court of Human Rights, in cases such as Al-Skeini v. United Kingdom,[38] recognized that jurisdiction may arise when a State exercises effective control over an area or authority over individuals in the context of military operations abroad.

Additionally, the interrelationship between IHL and IHRL is, in principle, shaped by a logic of harmonious interpretation rather than strict separation. This approach finds its legal basis in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), which requires that treaties be interpreted in light of "any relevant rules of international law applicable in the relations between the parties."[39]

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[37] General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, available at: https://www.refworld.org/docid/478b26ae2.html.

[38] European Court of Human Rights, *Al-Skeini and Others v. the United Kingdom*, Application No. 55721/07, Judgment, 7 July 2011, available at: https://hudoc.echr.coe.int.

[39] Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force 27 January 1980), available at: https://treaties.un.org.

Accordingly, IHL and IHRL are not to be applied in isolation, but rather as part of a coherent body of international law, where each regime informs and complements the interpretation of the other. In practice, this means that IHRL continues to provide interpretive guidance and normative standards in areas where IHL may be silent, ambiguous, or limited in scope, while IHL offers more specific rules governing the conduct of hostilities and the realities of armed conflict. This interpretive interaction has been affirmed in international jurisprudence, notably by the International Court of Justice in the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, where the Court confirmed that human rights law continues to apply in situations of armed conflict alongside IHL.[40] This is particularly relevant for rights such as FoRB, whose protection may not be explicitly articulated within IHL but can be derived and reinforced through an integrated reading of both legal regimes.[41]

In situations where norms of IHL and IHRL appear to conflict, the principle of *lex specialis* is often invoked to determine which rule takes precedence. In effect, academic theory[42] treats the relationship between IHL and IHRL as context-dependent, with IHL often providing the more specific rules on conduct and detention in armed conflict, while IHRL continues to supply broader normative guarantees and interpretive standards. This approach has been affirmed in international jurisprudence, particularly by the International Court of Justice (ICJ) in cases such as the Nuclear Weapons Advisory Opinion and the Wall Advisory Opinion,[43] where the ICJ recognized that the right to life continues to apply during armed conflict but must be interpreted in light of IHL as the *lex specialis* governing the use of force.

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[40] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 9 July 2004, paras 106–108, available at: https://www.icj-cij.org.

[41] Sassòli, M. (2019). *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*. Edward Elgar, pp. 578–586 (discussion of the complementary interpretation of IHL and IHRL).

[42] Cordula Droege, "The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict", *Israel Law Review*, Vol. 40, No. 2, 2007, pp. 310–355; Marco Sassòli and Laura M. Olson, "The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts", *International Review of the Red Cross*, Vol. 90, No. 871, 2008, pp. 599–627; Alexander Orakhelashvili, "The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?", *European Journal of International Law*, Vol. 19, No. 1, 2008, pp. 161–182.

[43] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, above note 16, Para.25.

Similarly, the Human Rights Committee (HRCttee) has clarified in General Comment No. 36 on the right to life that, in situations of armed conflict, the assessment of arbitrary deprivation of life must take into account the rules of IHL, thereby reinforcing the complementary and interpretive relationship between the two bodies of law rather than a strict hierarchy.[44] This suggests that *lex specialis* does not imply the displacement of IHRL by IHL, but rather a contextual determination of which rule is more specifically applicable to the situation at hand.

In practice, however, this interaction remains complex. The reliance on IHL as the governing framework in specific contexts—particularly through concepts such as military necessity and proportionality—may narrow the scope of protection otherwise afforded under IHRL. This creates a risk that exception mechanisms like derogations, while legally grounded, may be interpreted expansively, thereby weakening the effective protection of certain rights, including aspects of FoRB. Nevertheless, while not explicitly articulated as a standalone right within IHL, Customary IHL, the Geneva Conventions and their Additional Protocols contain a range of provisions that directly protect elements of FoRB, while not mentioning it explicitly, particularly through guarantees of humane treatment, non-discrimination, and the protection of religious practices and sites. Additionally, Article 85 of the First Additional Protocol to the Geneva Conventions highlights the punitive dimension of IHL, establishing a "grave breaches" reference that could be translated into enforcement of its provisions. [45]

Protection Through Humane Treatment

Customary IHL is often overlooked due to limited consolidation in multilateral treaties. However, CIHL served as a basis for jurisdiction in war crimes trials for both World Wars and several subsequent cases, thus providing a solid legal basis for analyzing FoRB during conflicts, even with partial codification.[46] Indeed, the ICRC has tried to identify the customary rules of IHL. These were set out in its customary law study, and much of it is accepted by others as reflecting Customary IHL. One of these customary standards is Rule 104, which mandates respect for the religious convictions of both civilians and soldiers out of combat (*hors de combat*).[47] This rule

[44] General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, UN Doc. CCPR/C/GC/36, 30 October 2018, Art. 7, available at: https://docs.un.org/en/CCPR/C/GC/36.

[45] AP I, above note 21, Art. 85.

[46] International Humanitarian Law Database, "International Humanitarian Law Databases", ICRC, Geneva, 2026, available at: https://ihl-databases.icrc.org/en/customary-ihl/v1/in.

[47] J.-M. Henckaerts and L. Doswald-Beck, ICRC Customary Law Study, above note 22, Rule 104.

reflects the broader principle that FoRB continues to apply during armed conflict, irrespective of the status of the subjects of belief, thereby supporting the fact that FoRB is a basic human right guaranteed to all protected persons, not only prisoners of war and persons taking part in war. Similarly, Rule 127 of CIHL extends respect for freedom of religion and belief to all detainees, irrespective of their role in armed conflict,[48] and to all those whose freedom is denied.[49]

One instance where these customary rules of IHL—especially the ones reflected in Rule 104 of the ICRC Customary Law Study—were used in a case without reference to treaty codification was the 'Eritrea–Ethiopia Claims Commission' (2004).[50] The conflict was considered an international armed conflict, and the articles of the four Geneva Conventions were considered CIHL even before Ethiopia became a party to the Conventions in 2000.[51] In this instance, Rule 104 was applied to affirm that civilians' religious rights must be respected during conflict, demonstrating that such protection forms part of customary international law applicable not only to international armed conflicts but also to non-international armed conflicts. The Claims Commission explicitly indicated that "the Geneva Conventions have largely become expressions of customary international humanitarian law," and the law applicable is "customary international humanitarian law as exemplified by the relevant parts of those Conventions."[52] In addition, the case demonstrates that "Protected persons are entitled, in all circumstances, to respect for their … religious convictions and practices, and their manners and customs."[53] This confirms that respect for FoRB is a minimum, non-derogable humanitarian guarantee according to IHL, which binds all parties to a conflict regardless of treaty ratification, the classification of the conflict, or the legal status of affected persons.

Protection Through Detention Regimes

The Third Geneva Convention grants protection for the enjoyment of religious rights of prisoners of war. Article 34 provides full latitude for the exercise of religious rights by prisoners of war, including not only the internal freedom of belief but also participation in religious services. Further, Article 35 of the Third Geneva

[48] Eritrea–Ethiopia Claims Commission (EECC), *Partial Award: Central Front – Ethiopia's Claim 2*, 28 April 2004, RIAA Vol. XXVI, p. 165, para. 14.
[49] J.-M Henckaerts and L. Doswald-Beck, above note 22, Rule 127.
[50] EECC, *Central Front*, above note 51, p. 165, para. 14.
[51] *Ibid.*, p. 166.
[52] *Ibid.,* p. 166, para. 15; pp. 192–193.
[53] *Ibid.,* p. 172, para. 35 (quoting Art. 27 GC IV).

Convention requires the detaining power to provide chaplains to provide religious services to prisoners, each according to their own faith. It also indicates that:

> They [chaplains] shall be allocated among the various camps and labor detachments containing prisoners of war belonging to the same forces, speaking the same language or practicing the same religion. They shall enjoy the necessary facilities, including the means of transport provided for in Article 33, for visiting the prisoners of war outside their camp.54

The text provides clear protection for the right to the enjoyment of religious rights during detention for prisoners of war. This is also reflected in State practice. For example, in United States v. Noriega (1992), the U.S. District Court for the Southern District of Florida held that Noriega is a prisoner of war55 and therefore recognized that he enjoys his right to religious practice in accordance with the provisions of these articles.

In a similar fashion, Article 86 of the Fourth Geneva Convention 56 stipulates that the detaining power must provide the necessary premises for the exercise of the freedom of religion and belief for the interned persons by way of enabling suitable religious services.57 The practical implementation of the article is measured through the ICRC's records of state practices in places of detention. The updated ICRC commentary on the Fourth Geneva Convention sets out the records of states' practice under the Convention.58 The commentary indicates that, for the most part, the article has been interpreted to encompass the provision of premises for the practice of religion, even if they were not used for that purpose, without discrimination.59

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[54] Geneva Convention (III) relative to the Treatment of Prisoners of War, 75 UNTS 135, 12 August 1949 (entered into force 21 October 1950), Art. 35.

[55] United States District Court for the Southern District of Florida, *United States v. Manuel Antonio Noriega*, 808 F. Supp. 791 (S.D. Fla.), 8 December 1992, available at: https://law.justia.com/cases/federal/district-courts/FSupp/808/791/1478219/.

[56] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, 12 August 1949 (entered into force 21 October 1950). This Convention is dedicated to the protection of civilians in armed conflict and applies in particular to situations of occupation, where it regulates the treatment of protected persons under the authority of a Detaining or Occupying Power, including guarantees related to religious practice.

[57] *Ibid.,* Art. 86.

[58] International Committee of the Red Cross (ICRC), *Commentary on the Fourth Geneva Convention: Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, 2nd ed., Cambridge University Press, Cambridge, 2020, commentary on Art. 86.

[59] *Ibid*.

In practice, the obligation that the detaining power must provide premises for religious practice is considered fulfilled where the premises were made available in a non-discriminatory manner, even if the premises are not used for that purpose. For instance, the Commentary suggests that a premise may not inherently be established for a unique use of religious service, but must be capable of making the necessary modifications to enable the provision of such service.60 This means that the premises can be used for several other functions, but should be sufficiently capable of accommodating all detained religious practitioners and provide a minimal basis for physical suitability, cleanliness, spaciousness, and ability to withstand weather, whether the premises be a room or a large tent.

Indeed, this article has often been interpreted to recognize the inherent constraints of detention settings and to emphasize the provision of opportunities for religious observance, rather than mandating its actual observance. For example, compromises on the lack of premises were found whereby detaining powers would supply captives with the essential materials to construct or modify existing sites for religious exercise or alternatively seek material or construction assistance from relief organizations. In this light, pursuing active preventive measures to allow detainees to practice FoRB is not a severe breach of the Fourth Convention. However, in combination with adverse effects on a detainee's spiritual, physical, or mental wellbeing, a violation of Article 86 may amount to an 'inhuman treatment' breach under Article 147, and relevant aspects of an internee's cultural background according to the 2002 ICC 'Elements of Crimes' may be used in assessing such failure to abide by Article 86 as a war crime.61

A parallel logic underlies other sources on detention under IHL: Article 93 of the Fourth Geneva Convention accords internees the right to exercise religious rites, including attendance at religious services, provided compliance with the disciplinary routine set by the detaining authorities is maintained.62 This, alongside the rules set out in the ICRC Customary Law Study Rules 104 and 127, which mandate respect for religious beliefs and practices and persons hors de combat and detainees,63 affirms that FoRB is protected under the premises of access, non-discrimination, and humane treatment, not the actual realization of the right. As a result, it can be said that the external dimension of FoRB—or alternatively, the

[60] ICRC, above note 61, Art. 93.
[61] *Ibid.*, Art. 86.
[62] Geneva Convention IV, above note 59, Art. 93.
[63] J.-M. Henckaerts and L. Doswald-Beck, above note 22, Rules 104 and 127.

manifestation of religion in places of internment—is inherently linked to several provisions of protection under IHL.

Protection Through Cultural and Religious Property Regulations

IHL not only provides protection for individuals but also for cultural and religious property, where protection is afforded in text, and religious property is defined as cultural property in practice. This protection has deep roots in the law of armed conflict, notably in Article 27 of the 1907 Hague Regulations, which requires parties during sieges and bombardments to take all necessary steps to spare buildings dedicated to religion, charity, education, the arts and sciences, as well as historic monuments and hospitals, provided they are not used for military purposes. This early provision establishes both a principle of distinction and a conditional immunity, whereby protection is contingent upon the civilian character of such sites. 64 Moreover, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict indicates that "cultural property" in Article 1 also includes property of a religious nature. In practice, this provision was clearly affirmed in the ICTY Prosecutor v. Miodrag Jokić and Prosecutor v. Pavle Strugar cases on the bombardment of Dubrovnik's Old Town, where religious monuments were recognized as "cultural property" under Article 1 and thus protected by Article 3(d) of the ICTY Statute, which stipulates that the International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include but not be limited to: […] (d) seizure or destruction, or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science. 65

Similarly, the Prosecutor v. Prlić et al. case affirms that the Old Bridge of Mostar, due to the value accorded to it by the Muslim community,66 along with other religious sites, is afforded the same protection.67 Moreover, the Additional Protocol to the Geneva Conventions provides substantial grounds to study the extent to which IHL protects FoRB. Article 53 addresses the protection of cultural objects

[64] Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907 (entered into force 26 January 1910), Art. 27.

[65] Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/RES/827, 25 May 1993 (as amended to 29 September 2008), Art. 3(d), available at: https://ihl-databases.icrc.org/en/ihl-treaties/icty-statute-1993/article-3.

[66] ICRC Casebook, *"ICTY, The Prosecutor v. Prlić et al."*, ICRC, Geneva, 2024, available at: https://casebook.icrc.org/case-study/icty-prosecutor-v-prlic-et-al.

[67] *Ibid.*

and places of worship.68 It prohibits all acts of hostility against historic monuments and places of worship that constitute cultural heritage, the use of such objects for military purposes, or their use as objects of reprisals.69 Article 3 of Additional Protocol I was used in the ICC – Prosecutor v. Al Mahdi for the destruction of mausoleums and mosques in Timbuktu. Indeed, the perpetrator was found guilty of intentionally attacking religious and cultural sites in Timbuktu.70 The sentence issued in the case aligns with the provisions of Rule 38 of the ICRC Customary Law Study71, as well as the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.72 Together, these cases serve as an effective institutionalization of the use of CIHL and the Hague Convention as a basis for legal action against the desecration of religious sites and, by extension, FoRB.[73]

Structural Limits of Protection of FoRB: Derogations and Military Use

Legality of Derogations on FoRB

Article 4 of the ICCPR stipulates that in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.74 Therefore, international law does provide grounds for suspending some human rights obligations during emergencies, such as health emergencies, security crises, or war.

It is also clear that the state's power to declare a state of emergency and adopt exceptional measures is not absolute but is restricted by several conditions and

[68] Geneva Convention IV, above note 59, Art. 53.
[69] *Ibid.*
[70] ICJ, *Prosecutor v Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15, Judgment and Sentence, 27 September 2016, paras 30–46, 99–109.
[71] J-M. Henckaerts and L. Doswald-Beck (eds), above note 22, Rule 38.
[72] Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 UNTS 240, 14 May 1954 (entered into force 7 August 1956), available at: https://www. unesco.org/en/legal-affairs/convention-protection-cultural-property-event-armed-conflict-regulations-execution-convention.
[73] J.-M. Henckaerts and L. Doswald-Beck, above note 22, Rule 38.
[74] ICCPR, above note 14, Art. 4.

standards. First, the standards of necessity and proportionality[75] are essential, as these restricting measures are limited to those necessary to face impending danger and cannot extend beyond this condition. Second, the covenant affirms that these measures are temporary and must end when the threat that warrants them ends, and that these measures cannot become a reality that consolidates the restriction of rights and freedoms.[76] Third, the covenant requires the state to publicly announce the state of emergency and inform the UN Secretary-General of the measures adopted, thereby providing grounds for establishing an international monitoring mechanism and enhancing transparency regarding government measures.[77] Hence, this practice remains highly limited and strictly exceptional, as the Human Rights Committee emphasizes that derogations are exceptional and temporary. They are measures strictly required by the prevailing situation and cannot be used to justify violations of peremptory norms or humanitarian law.[78]

More importantly, Article 4 explicitly defines the rights that cannot be restricted. This includes the right to life; the prohibition of torture or cruel, inhuman or degrading treatment or punishment; the principle of criminal legality (the non-retroactivity of criminal laws); in addition to freedom of thought, conscience and religion in its internal dimension, that is, the right to adopt or change one's belief without any external interference.[79] Several of these non-derogable guarantees correspond to jus cogens norms, or peremptory norms, whereby non-derogability and jus cogens have different implications.[80]

The Human Rights Committee has clarified that Article 18 is included among non-derogable rights partly because it can never be necessary to derogate from it, not because it is peremptory by necessity. Therefore, the internal dimension of FoRB is considered a non-derogable right under the ICCPR, though not identified as jus cogens.[81] These guarantees highlight that the covenant aims to strike a delicate

[75] Human Rights Committee, General Comment No. 29: States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 4, available at: https://digitallibrary.un.org/record/451555?v=pdf#files.

[76] ICCPR, above note 14, Art. 4 (1). Measures must be "strictly required by the exigencies of the situation" and temporary; *see also* UN Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 2 (derogations must not become permanent).

[77] *Ibid.,* Art. 4 (3). This provision specifies the obligation to proclaim an emergency and notify the UN Secretary-General; *see also* UN Human Rights Committee, *General Comment No. 29*, above note 78, para. 17 (noting that notification ensures international scrutiny).

[78] ICCPR, above note 14, Art. 4(2).

[79] General Comment No. 29, above note 78, para. 11.

[80] *Ibid.,* Art. 4 (3).

[81] General Comment No. 29, above note 78, para. 11.

balance between protecting the state and society from exceptional dangers and safeguarding fundamental freedoms, which are the essence of human dignity.

Therefore, FoRB, especially in its internal dimension, has an exceptional position that protects it from even the most threatening conditions. This principle reflects a much deeper legal understanding that freedom of conscience is the building block of one's identity and dignity and cannot be subject to state-imposed restrictions or pressures, even in exceptional circumstances.[82]

Legality of Targeting of Religious Buildings Used for Military Purposes

The legality of targeting religious buildings under IHL must be assessed through its core principles (distinction, proportionality, imperative military necessity, precautions in attack and humanity) which together structure how protection is afforded to objects of religious significance in armed conflict. The principle of distinction requires that places of worship, as civilian objects, be protected from attack unless and for such time as they are used for military purposes. 83 Proportionality further constrains attacks by prohibiting those expected to cause excessive incidental harm to civilian objects, including religious sites, in relation to the anticipated military advantage. 84 Imperative military necessity permits only those measures required to achieve a legitimate military objective but does not override the obligation to respect protected objects where feasible alternatives exist. 85 Finally, the principle of humanity imposes overarching limits aimed at

[82] General Comment No. 22, above note 1, para. 1.

[83] Additional Protocol I, above note 20, Arts 48, 52(1)–(2) and 53Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Arts 48, 52(1) –(– (2) and 53; J.-M. Henckaerts and L. Doswald-Beck, above note 22,Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. I: Rules, Cambridge University Press, Cambridge, 2005, Rules 8, 9 and 38.

[84] Additional Protocol I, above note 20, Art. 51(5)(b)Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Art. 51(5)(b); J.-M. Henckaerts and L. Doswald-Beck, above note 22,Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. I: Rules, Cambridge University Press, Cambridge, 2005, Rule 14.

[85] Convention for the Protection of Cultural Property, above note 75, Art. 4(2)Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 UNTS 240, 14 May 1954 (entered into force 7 August 1956), Art. 4(2); Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 2253 UNTS 172, 26 March 1999 (entered into force 9 March 2004), Art. 6(a); J.-M. Henckaerts and L. Doswald-Beck, above note 22, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. I: Rules, Cambridge University Press, Cambridge, 2005, Rule 38.

reducing suffering[86] and preserving cultural and religious life.[87] As noted in the literature, these principles do not create absolute protection for religious sites; rather, they condition their protection on their civilian character and use, thereby embedding religion within broader regulatory frameworks governing hostilities rather than recognizing it as a standalone protected interest.[88]

Along similar lines, there is a body of literature that goes a step further in defining cultural and religious property. The study of Abtahi, "The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia" (2001), emphasizes the tension among imperative military necessity, the targeting of a militarily important and effective site, and the duty to protect cultural property.[89] This is important as military commanders often justify targeting cultural property on the basis of mere military necessity or by justifying (most of the time without viable proof) that the buildings were used for military purposes, which is mostly hard to prove after the building itself has been targeted. Even if treaty law explicitly states that they should not be attacked except when it is an imperative of the army, which is clearly the exception, not the first choice when other routes are available.[90] This does not constitute a direct limitation on FoRB as a standalone right but rather reflects the conditional nature of protection afforded to religious sites under IHL, which depends on their civilian character. Once such sites are used for military purposes, they may lose their protected status and become lawful military objectives.

Indeed, the sole legal basis for a strike on a religious site is embedded in its justification under IHL as a legitimate military goal. According to Rule 38 (B) of CIHL, "imperative military necessity" is the only exception as to when cultural heritage (including religious heritage) may be subject to an attack, which was codified by the 'Hague Convention for the Protection of Cultural Property' ratified by 111 States.[91] Indeed, the Second Protocol to the Convention includes imperative military necessity as a legitimate basis for waiving the prohibition on using cultural

[86] Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, "Resolution 22: Follow-up Regarding Prohibition or Restriction of Use of Certain Conventional Weapons", 9 June 1977, in *Protocols Additional to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 2010, p. 108, available at: https://www.icrc.org/sites/default/files/external/doc/en/assets/files/ other/icrc_002_0321.pdf (accessed in May 2026).

[87] J-M. Henckaerts and L. Doswald-Beck (eds), above note 22, Rule 38.

[88] Marco Sassòli, above note 28; Hirad Abtahi, above note 29, pp. 1–32; J.-M. Henckaerts and L. Doswald-Beck (eds), above note 20, Rules 9 and 38.

[89] Hirad Abtahi, above note 29, pp. 1–32.

[90] *Ibid.*

[91] J.-M. Henckaerts and L. Doswald-Beck, above note 22, Rule 88.

property as a military objective, provided that no feasible alternatives to achieve an equivalent advantage are available and that advance warnings are provided when possible.92

Nonetheless, this language leaves room for interpretation regarding what constitutes military necessity, and places states and armed groups as the actors expected to exercise agency in assessing the necessary precautions and proportionality. Still, these obligations are often not prioritized in states' calculations when engaging in a full-scale armed conflict. However, the relevant standard is not ordinary or "mere" military necessity, understood broadly as the usefulness of a measure in advancing military operations. The requirement of imperative military necessity establishes a substantially higher threshold: the cultural property must, by its function, have become a military objective, the waiver may operate only for as long as that status persists, and no feasible alternative must exist for obtaining a similar military advantage. [93] Accordingly, the term "imperative" narrows commanders' discretion and makes attack an exceptional measure of last resort rather than one justified by general operational convenience.

Protection of Religious Sites by Parties and Occupying Powers

The protection of religious and cultural sites also imposes obligations on the party controlling them.[94] Such parties must take feasible measures to safeguard cultural property against the foreseeable effects of hostilities and must refrain from using the property or its immediate surroundings in ways likely to expose it to destruction or damage.[95] More specifically, the Second Protocol requires parties, to the maximum extent feasible, to remove movable cultural property from the vicinity of military objectives or provide adequate in situ protection, and to avoid locating military

[92] *Ibid., Rule 88*; Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 UNTS 240, 14 May 1954, Arts. 4 (Para.2), 6 (entered into force 7 August 1956).

[93] Convention for the Protection of Cultural Property, above note 75, Art. 4(2); Second Protocol to the Hague Convention, above note 88, Art. 6(a); Jean-Marie Henckaerts, "New Rules for the Protection of Cultural Property in Armed Conflict", *International Review of the Red Cross*, Vol. 81, No. 835, 1999, pp. 593–620; J.-M. Henckaerts and L. Doswald-Beck (eds), above note 22, Rule 38. Convention for the Protection of Cultural Property, above note 75, Art. 4(2),Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. I: Rules, Cambridge University Press, Cambridge, 2005, Rule 38.

[94] Convention for the Protection of Cultural Property, above note 75, Art. 3.

[95] Second Protocol to the Hague Convention, above note 88, Art. 5; Convention for the Protection of Cultural Property, above note 754, Art. 4(1). Second Protocol to the Hague Convention of 1954, above note 96, Art. 5 and Convention for the Protection of Cultural Property, above note 75, Art. 4(1).

objectives near cultural property.[96] These obligations clarify that the protective regime is not limited to restraining the attacker: the party controlling the site must also reduce the risk that religious property will become exposed to attack through the placement or continued presence of military objectives nearby.[97]

Additional obligations arise in occupied territory. The Occupying Power must support the competent national authorities in safeguarding and preserving cultural property and, where those authorities cannot act, take the necessary protective measures in close cooperation with them.[98] It must also prohibit, prevent and, where necessary, stop theft, pillage, misappropriation and vandalism directed against cultural property.[99] The applicable occupation regime further prohibits the seizure, destruction or willful damage of institutions dedicated to religion and requires the Occupying Power to prevent illicit export, removal, transfer of ownership, unauthorized archaeological excavation, and alterations intended to conceal or destroy cultural, historical or scientific evidence.[100] These rules therefore protect religious sites not only against military attack, but also against appropriation, looting, physical alteration and the erosion of their religious and cultural identity during occupation.[101] Nonetheless, the upcoming case study on the Levant region will illustrate how the destruction of cultural property often goes unchecked.

When Religion Becomes the Target: Genocide and Identity Destruction

While the targeting of religious buildings may be justified under IHL when they lose their civilian character, such acts may also fall within international criminal law when they form part of a broader pattern of targeting directed against a religious group. In such cases, the destruction of religious sites may contribute to the crime of

[96] Second Protocol to the Hague Convention, above note 88, Art. 5(a); Additional Protocol I, above note 20, Art. 58(a)–(b); J.-M. Henckaerts and L. Doswald-Beck (eds), above note 22, Rules 22–23.Second Protocol to the Hague Convention, above note 88, Art. 5(a) and Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Art. 58(a)–(b); J.-M. Henckaerts and L. Doswald-Beck, above note 22, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), above note 96, Rules 22–23.

[97] J.-M. Henckaerts and L. Doswald-Beck, above note 22, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), above note 96, Rule 38.

[98] Convention for the Protection of Cultural Property, above note 75, Art. 5; Second Protocol to the Hague Convention, above note 88, Art. 9.

[99] Convention for the Protection of Cultural Property, above note 75, Art. 5(1).

[100] Ibid, Art. 5(2) and 4(3);

[101] Convention for the Protection of Cultural, Arts 4(3) and 5; Second Protocol to the Hague Convention, above note 88, Art. 9.

persecution,[102] which encompasses severe deprivations of fundamental rights on discriminatory grounds, including religion, or, in more extreme circumstances, may be indicative of genocidal intent when aimed at the destruction of a religious group as such.[103] As Antonio Cassese explains, persecution "consists of a gross or blatant denial of fundamental rights reaching the same level of gravity as other crimes against humanity," thereby capturing patterns of identity-based violence that may not always involve direct physical destruction but nonetheless aim at the marginalization or exclusion of a protected group and their identity.[104] Identity-based persecution and crimes against humanity in general can also occur in a peaceful context, extending their criminality beyond the landscape of armed conflict.[105] This highlights that, beyond the legality of individual attacks under IHL, the broader context and intent behind such acts are central in determining their qualification under international criminal law.

The most extreme manifestation of violations against FoRB in armed conflict is the targeting of religious identity itself through genocide (while genocide can be committed in peaceful contexts) and identity destruction. While the preceding sections demonstrated how IHL provides fragmented and indirect protection for elements of FoRB through humane treatment, detention regimes, and protection of cultural property, this section shifts the focus to situations in which religion is not merely affected by conflict but becomes the very basis of violence. This reading starts by engaging with ICL, particularly the Genocide Convention and the Rome Statute, to illustrate how religion is explicitly recognized as a protected group marker, thereby addressing a dimension of FoRB that IHL alone does not fully capture. In doing so, it complements the broader argument of this article: that the protection of FoRB in armed conflict emerges from the interaction of multiple legal regimes, each addressing different facets of the right, with ICL playing a critical role in safeguarding its collective and identity-based dimensions.

The Religious Group as a Protected Category

[102] Rome Statute, above note 25, Arts. 6, 7. Persecution is defined as the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group, including on religious grounds.

[103] *Ibid.,* Art. 6; *see also* "They came to destroy": ISIS crimes against the Yazidis, UN Doc. A/HRC/32/CRP.2, 15 June 2016,

[104] Antonio Cassese, *International Criminal Law*, 2nd ed., Oxford University Press, Oxford, 2008.

[105] Elements of Crimes, UN Doc. PCNICC/2000/1/Add.2, 9 September 2002, para. 3, available at: https://www.un.org/fr/node/218413; and Rome Statute, above note 25, Art. 7.

The Genocide Convention does not mention FoRB, but it is possible to deduce provisions within the convention that could be applied to FoRB. The Genocide Convention established that the most extreme cases of the violation of religious freedom during armed conflict are manifest in the act of genocide, especially that which is perpetrated with the intention of destroying a religious group as such. Indeed, as mentioned by the special rapporteur on FoRB, targeting a religious group during conflict is also part of systematic discriminatory efforts to destroy that specific group, removing any individual feature specific to religion and belief, transforming belief into a stamp by which human rights are either granted or withheld.[106] In this regard, FoRB is not protected as an autonomous right, but rather through the protection of religious groups as collective entities whose existence is threatened. The protection of civilian religious groups and individuals includes access to medical assistance and attendance on the battlefield as postulated in Article 15 of the First Additional Protocol to the Geneva Conventions, extending the inclusion of religious groups to medical care.[107] Accordingly, international criminal law captures dimensions of religious destruction that extend beyond individual harm, addressing situations in which violence is directed against the continued existence of a religious group as a collective entity.

Another legal route is Article 6 of the Rome Statute, which defines genocide to include acts intended to destroy, in whole or in part, a religious group. This definition is also set out in Article 2 of the Genocide Convention.[108] For example, the ICTY Prosecutor v. Radislav Krstić (2004) case recognized the Bosnian Muslims of Srebrenica as a protected religious group targeted for partial destruction.[109] Another instance is that of the German conviction for the Yazidi genocide, a case that was brought before the Higher Regional Court in Frankfurt110 on the case of the ISIS campaign against the Yazidi population. Prosecution reiterated the position on destruction just as strongly, arguing that the intention was to eliminate the religious memory of these people. Similarly, the Human Rights Council's 2016

[106] Report of the Special Rapporteur on Freedom of Religion or Belief on the Relationship between Freedom of Religion or Belief and Discrimination, UN Doc. A/HRC/40/58, 2019, paras 9–14.
[107] AP I, above note 22, Art. 15(5).
[108] Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, 9 December 1948 (entered into force 12 January 1951), Art. 2, available at: https://ihl-databases.icrc.org/en/ihl-treaties/genocide-conv-1948/article-2.
[109] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Judgment (Appeals Chamber), 19 April 2004, paras 6–23.
[110] Amnesty International, "Germany/Iraq: World's first judgment on crime of genocide against the Yazidis", 30 November 2021, available at: https://www.amnesty.org/en/latest/news/2021/11/germany-iraq-worlds-first-judgment-on-crime-of-genocide-against-the-yazidis/.

report "They Came to Destroy" concluded that the campaign pursued by ISIS intended to destroy the Yazidi based on their religious identity.111

Indeed, in accordance with the analysis provided by Ambos (2009), and based on the Court's qualification of the case as one of genocide and crimes against humanity,112 ISIS intended to destroy the spiritual and religious existence of the Yazidis, and not only to destroy the people physically. 113 This broader understanding of genocidal intent (encompassing both physical, biological, and cultural destruction)114 reveals a direct intersection between genocide law and the protection of the collective dimension of FoRB. In this sense, these instances illustrate the ultimate violation of FoRB in armed conflict. While genocide law does not explicitly regulate FoRB as a standalone right, genocidal acts inherently entail the destruction of both the internal and external dimensions of belief, including the ability to hold, practice, and transmit religion across generations. Accordingly, FoRB emerges here as a protected interest embedded within the prohibition of genocide, rather than as an independently articulated norm under IHL. This demonstrates that, in the most extreme cases, the protection of FoRB is subsumed within broader prohibitions against the destruction of protected groups, making religion a central factor in both the targeting of victims and the legal characterization of the crime.

Destruction of Religious Memory

These instances show that religion is still a fundamental factor in identifying the groups targeted during armed conflicts in the region and that "religious othering" is still used as an umbrella to legitimize systemic violence. This dynamic reflects the transformation of religion from a protected belief system into a marker of vulnerability, where identity itself becomes the basis for targeting.[115] The danger of this pattern lies not only in the fact that it targets individuals but also in its aim to erase an entire group by destroying its religious institutions, scattering its members, and removing their historic legacy from their region. Religious genocide, therefore, becomes both a mass murder crime and a crime of erasing culture and religion at the

[111] Human Rights Council, *"They Came to Destroy": ISIS Crimes against the Yazidis*, above note 106, paras 202–209.
[112] Higher Regional Court of Frankfurt am Main (Germany), *Taha Al-J.*, Case No. 5-3 StE 1/20 - 4 - 1/20, 30 November 2021, available at: https://interlinkagesdatabase.icct.nl/case/taha-al-j-5-3-ste-1-20-4-1-20-3-str-230-22.
[113] Human Rights Council, above note 106.
[114] *The Prosecutor v. Radislav Krstić*, above note 112, paras. 3
[115] Report of the Special Rapporteur on freedom of religion or belief, above note 91, Section V. A.

same time. In this sense, the destruction of religious sites, symbols, and practices operates as a deliberate strategy of identity erasure, directly undermining the collective dimension of FoRB. Killing in this case is therefore a particularly important aspect when committed on the basis of religion, as it constitutes the most extreme violation of FoRB, representing the ultimate form of coercion against belief and identity. Article 18 of the ICCPR prohibits any form of coercion that impairs the freedom to have or adopt a religion or belief, a protection that the Human Rights Committee has indicated includes threats or acts of physical force intended to compel individuals to abandon, change, or conceal their beliefs.116

When religious groups are subject to such violence, international criminal law affords an additional layer of protection through the prohibition of genocide, defined as acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group.117 This legal framework captures not only physical destruction, but also patterns of persecution that aim to dismantle the social and spiritual fabric of the group. In this sense, religiously motivated killing functions simultaneously as a mass atrocity crime and as an instrument to erase religious identity and collective memory. Criminalizing persecution and genocide based on religious grounds protects individuals as well as religious communities, safeguarding FoRB in both its individual and communal dimensions.[118] Accordingly, the protection of FoRB in such contexts is realized not through the direct articulation of the right itself, but through the prohibition of acts that seek to annihilate the very conditions that make its exercise possible.

FoRB in Times of Conflict in Iraq, Lebanon, Syria, and Palestine: Case Study

This section situates the theoretical and legal analysis developed above within concrete conflict settings in the Levantine region to examine how, in practice, FoRB is affected and protected (or not) during armed conflict. While the preceding sections established that FoRB is only partially and indirectly protected under IHL and, more explicitly, under ICL in extreme cases, this section evaluates how these fragmented protections operate in practice when confronted with real patterns of violence. For that reason, the Levantine region provides a particularly revealing context for such an inquiry, as religious identity frequently operates not only as a matter of personal belief but also as a central marker of collective belonging, social organization, and

[116] General Comment No. 22, above note 1, Art. 18.
[117] Genocide Convention, above note 93, Art. II.
[118] Rome Statute, above note 25, Art. 7(1)(h); *see also* H. Bielefeldt, above note 13, pp. 262–266; Genocide Convention, above note 111, Art. II.

political positioning. In such contexts, religion is often intertwined with ethnicity, territory, and power structures, making it a recurring basis for both targeting and exclusion during armed conflict.

This section, therefore, does not aim to provide an exhaustive overview but rather to illustrate recurring patterns through selected case studies, including Iraq, Syria, Lebanon, and Palestine. In doing so, the section reinforces the central argument of this article: that while international law offers multiple entry points for the protection of FoRB during armed conflict, these protections remain fragmented, context-dependent, and often insufficient in the face of the realities of contemporary warfare.

Destruction of Religious Property and Cultural Heritage

Because of the religious diversity in the Levant region, it acts as an important area for studying violations against minorities during times of conflict, particularly because of the threat patterns posed by to religious groups who, in many cases, are minorities within a region of other minorities. One of the most common examples is the Yazidis, whose rites and social cohesion, for example, are often linked to their ability to express their religious freedom through practices associated with their shrines.[119] This means that the destruction of a religious site constitutes more than property destruction; it is a structural violation of the conditions that enable FoRB.

For instance, the 2014 Islamic State of Iraq and the Levant (ISIL) attacks on Yazidis in Northern Iraq constituted a systematic aggression, demolishing 68 shrines and several sacred tombs.[120] This constitutes a deliberate campaign not only to eradicate Yazidi religious property and limit the exercise of FoRB by use of means that cannot be justified under broader standards of military necessity and in complete opposition to IHL, war crimes, genocide, and crimes against humanity laws. Nonetheless, Iraq is not a party to the Rome Statute of the ICC, yet individuals responsible for such crimes may still be prosecuted, including through domestic proceedings or by third states exercising extraterritorial jurisdiction. Therefore, the universal jurisdiction aspect of IHL can still be applied to uphold FoRB in this

[119] Melissa Gronlund, "Ancient Yazidi Heritage Still Under Threat after ISIS Genocide", *The Art Newspaper*, 5 September 2023, available at: https://www.theartnewspaper.com/2023/09/05/ancient-yazidi-heritage-still-under-threat-after-isis-genocide.

[120] Global Centre for the Responsibility to Protect, *Cultural Heritage and Mass Atrocities: Crimes Against Yazidis and Uyghurs*, New York, 2021, https://www.globalr2p.org/ resources/cultural-heritage-and-mass-atrocities-crimes-against-yazidis-and-uyghurs/.

scenario, since other ICC member states may prosecute offenders who are nationals of those states for crimes committed.[121] In this sense, while legal routes still exist for upholding IHL in the interest of safeguarding FoRB in times of conflict, some constraints remain despite the case's inherent normative aspects.

More recent cases can also be found in the Syrian conflict. Effectively, the siege and indiscriminate bombing campaigns enforced by the pro-government forces and Syrian allies in 2026-2017, during the civil war, resulted in extensive damage to and destruction of several religious sites, including several Mosques and Churches, including the 'Great Umayyad Mosque'. According to the UNESCO preliminary assessment, around 60% of Aleppo had experienced severe damage, and 30% was completely destroyed.[122] As a result, an 'Independent International Commission of Inquiry' was tasked with investigating crimes under IHL and IHRL and submitted a report to the Human Rights Council.[123] While the Commission was established to investigate a broad range of violations committed during the conflict, its findings included extensive documentation of the destruction of religious sites by aerial bombardment. The report validated the destruction of religious sites by aerial bombardment and noted the complete destruction of the Salah al-Din district mosque,[124] while noting that no military presence existed in the majority of reviewed cases[125], which annuls claims of military necessity. Also, it concluded that the Syrian Arab Republic, not having ratified the Second Additional Protocol to the Geneva Conventions of 1977, which applies to armed conflicts in non-international settings, was still responsible for upholding Customary IHL, which applied in this case.[126] This means that, once again, while the Geneva Conventions and their Additional Protocols cannot be referred to, IHL can still be implicitly invoked to protect FoRB in internal conflict.

Another important example is the 2023–2024 Israeli war on Lebanon, which resulted in the severe damage or destruction of more than 30 religious buildings. A statement by the UN Human Rights Office stressed that military proportionality and special care to protect religious sites must be observed in the absence of a context of

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[121] Antonio Cassese, above note 107; *see also* Cedric Ryngaert, *Jurisdiction in International Law*, 2nd ed., Oxford University Press, Oxford, 2015, pp. 120–129.

[122] UNESCO World Heritage Centre, "UNESCO reports on extensive damage in first emergency assessment mission to Aleppo", UNESCO, Paris, 2017, available at: https://whc.unesco.org/en/news/1619.

[123] UNHRC Res. 36/20, 29 September 2017, p. 4.

[124] *Ibid.*, p. 11.

[125] *Ibid.*, p. 20.

[126] *Ibid.,* p. 25.

military necessity.[127] Yet, a report by Amnesty International found explicit Israeli bulldozing of Mosques following the end of combat, and in the absence of military targets or viable proof that these buildings were used for military purposes, even if they have been accused as such for the legitimization of their targeting. This would therefore constitute a violation of IHL rules against the destruction of cultural property, which could amount to a war crime if recklessly or intentionally performed. Yet this case illustrates that those religious protections and, by extension, FoRB can be overridden and diluted in light of state forces acting under ambiguous terms in the name of military objectives.

Violations of FoRB under Occupation: Access, Worship, and Control

Perhaps, more poignant cases at the intersection of IHL and FoRB have been recorded in Palestine, particularly in Gaza and East Jerusalem. In a 2025 Commission of Inquiry report on 'Occupied Palestinian Territory, including East Jerusalem, and Israel', it was found that more than 50% of all cultural and religious sites in Gaza were damaged through shelling and airstrikes, while Israel had targeted places of worship used to serve refugees, including women and children.[128] According to the report, the attacks extended over several buildings and heritage sites across Palestinian territories, including in the West Bank and East Jerusalem, whereby "The sheer number of attacked sites indicates a clear disregard for the Palestinian people's religious belief." The report also found that all 10 religious sites in the strip constituted civilian objects under IHL, more specifically the 'Convention for the Protection of Cultural Property in the Event of Armed Conflict', which Israel was a member of. It noted that the 'Great Omari Mosque,' the 'Church of Saint Porphyrius,' the 'Saad al-Ghafari Mosque,' and the 'Ihya al-Sunna Mosque' were unjustifiably destroyed due to the absence of a clear military use, with the last 3 strikes resulting in the killing of 200 internally displaced people who used the sites for shelter, thus constituting a war crime, and by extension a major attack on FoRB. Similarly, the commission relayed that in cases where bulldozers and explosive demolitions were undertaken by security forces, the state was liable for committing

[127] United Nations Lebanon, "Lebanon: UN Human Rights Office alarmed by damage and destruction of buildings dedicated to religion", Beirut, 2024, available at: https://lebanon.un.org/en/282565-lebanon-un-human-rights-office-alarmed-damage-and-destruction-buildings-dedicated-religion.

[128] UN Geneva, "Israeli actions in Palestinian territories constitute war crimes, human rights violations - UN commission", Geneva, 2025, available at: https://www.ungeneva.org/en/news-media/news/2025/06/107472/israeli-actions-palestinian-territories-constitute-war-crimes-human; Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, UN Doc. A/HRC/59/26, 6 May 2025, paras 42–60.

war crimes implicitly against FoRB due to the deliberate and intentional targeting of historical and religious buildings.[129]

Other forms of hostilities taken against FoRB were also recorded in East Jerusalem and the West Bank, where Palestinians were severely restricted or completely blocked from accessing religious and cultural sites, which the commission noted as a violation of both IHL and IHRL, and explicitly mentions "the right of the Palestinian people to enjoy their own culture and the freedom of religion and belief."[130] Additionally, it was documented that militarized incursions were often employed in 'Haram al-Sharif/Temple Mount' in East Jerusalem with the aim to harass both religious figures and worshippers, which "resulted in severe restrictions of freedom of religion". These instances were also identified by the commission as breaches of IHL and IHRL, given that the occupying power fell short in its obligations to respect religious sites and safeguard the religious beliefs, customs, and practices of protected persons.

Additionally, reports provided in prisons in the OPT have shown that the captives have not been allowed to know the timing of *Fajr* and *Maghreb* during Ramadan, prohibiting them from proper fasting.[131] In addition, on his Twitter, a lawyer said that when he was attending a court session for a prisoner from inside the OPT, held in Gilboa Prison, before an Israeli court, he asked a detainee, "How's fasting going for you?"; he looked at him and said, "Today is Ramadan? No one told us it started!"[132]

Finally, for the first time in the history of Christianity, Israel has closed the Tomb of Christ indefinitely. They have prohibited Holy Week and Easter services and canceled Sunday services. [133]Such measures amount to a serious interference with the external and collective dimensions of FoRB, as they prevent Christians from

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[129] *Ibid.*

[130] *Ibid.*

[131] Commission of Detainees and Ex-Detainees Affairs, "Ofer Prison administration deprives Palestinian detainees of properly observing fasting during Ramadan", *Instagram*, 6 March 2026, available at: https://www.instagram.com/p/DVEtn7oD5Bu/; *see also* Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, UN Doc. A/HRC/59/26, 6 May 2025, paras 42–60.

[132] Khaled Mahajna, "[Post about restrictions on Palestinian detainees' religious practices during Ramadan]", *X*, March 2026, available at: https://x.com/KhaledMahajna/status/2024257055591174196.

[133] Stacy Liberatore, "Site of 'Jesus' crucifixion' forced to shut for Holy Week in unprecedented move tied to biblical prophecies of the Antichrist", *Daily Mail*, 18 March 2026, available at: https://www.dailymail.com/sciencetech/article-15657581/jesus-crucifixion-site-holy-sepulchre-closure.html.

accessing one of the holiest sites in Christianity during the most sacred period of the liturgical calendar. The closure is particularly significant for Christians worldwide who await the Holy Fire ceremony on Easter Saturday, not only as an act of worship, but as a ritual of deep communal and spiritual importance linked to the celebration of the Resurrection. In this sense, restricting access to the Church of the Holy Sepulcher during Holy Week affects not only local worshippers but also the broader global Christian community whose religious observance is symbolically and liturgically tied to that site.

Considering these violations, the investigation thus concluded that the conduct of Israeli authorities was indicative of intent to prevent Palestinian communities from practicing their freedom of religion.[134] This case thus supports this research paper's primary claim by identifying FoRB as a key element protected under IHL obligations. What this case further demonstrates is that, in situations of occupation, the regulation of movement and access becomes a central mechanism through which FoRB is effectively shaped or restricted. Rather than direct destruction alone, control over entry to religious sites and interference with worship practices operate as forms of indirect limitation on religious life, raising questions about how far security-based measures may extend without undermining the substance of the right. In this respect, the case highlights a tension not only between legal frameworks, but between formal protection and administrative practices on the ground, where restrictions justified under security or public order considerations may, in effect, result in sustained interference with religious practice.

Similar instances were reported in more recent 2026 media content, where reports show that Palestinians were blocked from accessing the Al-Aqsa Mosque during the holy month of Ramadan prayers by security forces[135], with internal and external checkpoints being set up. The Mosque, being considered the third-holiest site of Islam, was forcibly closed along with "All holy sites in the Old City of Jerusalem" on March 6th [136] in light of the exchange of fire between Iran, the United

[134] Written Statement Submitted by Al Mezan Centre for Human Rights, a Non-Governmental Organization in Special Consultative Status, UN Doc. A/HRC/59/NGO/286, May 2025, p. 17, available at: https://docs.un.org/en/A/HRC/59/NGO/286.

[135] Euro-Med Human Rights Monitor, *Israel exploits State of Emergency to Dismantle Jerusalem's Religious Status Quo, Imposing a Discriminatory Reality*, Press Release, Geneva, 5 April 2026, available at: https://euromedmonitor.org/en/article/7016/Israel-exploits-state-of-emergency-to-dismantle-Jerusalem%E2%80%99s-religious-status-quo,-imposing-a-discriminatory-reality.

[136] "Israel cancels Friday prayers at Al-Aqsa Mosque amid Iran conflict", *Al Jazeera*, 5 March 2026, available at: https://www.aljazeera.com/news/2026/3/5/israel-cancels-friday-pray ers-at-al-aqsa-mosque-amid-iran-conflict.

States, and Israel, effectively forcing believers to perform prayers on the streets. Moreover, several records indicated that Palestinian Muslim detainees in Israeli prisons were not allowed the freedom to practice their religious beliefs in observance of the holy Ramadan prayers, as they were not informed of the appropriate timings for fasting or fast-breaking meals, and were instead forced to eat "food scraps".[137] The intersection between FoRB and IHL in this instance becomes clear, as such an act directly contradicts Common Article 3 of the Geneva Conventions and Rules 104 and 127 of Customary IHL previously mentioned.

Targeting of Religious Groups and Identity-Based Killings

The targeting of religious groups during armed conflict represents one of the clearest points at which FoRB intersects with identity-based violence. In such cases, religion is not merely affected as a consequence of hostilities; rather, it becomes the very basis upon which civilians are selected, attacked, displaced, or killed. This is especially significant in the Levant region, where religious affiliation often overlaps with communal belonging, territorial presence, and political vulnerability. As a result, attacks directed at religious groups frequently affect both the individual and collective dimensions of FoRB, undermining not only the right to believe and worship, but also the continued existence of communities organized around shared religious identity.

One recent example is the violence against Druze communities in Suwayda, Syria, where armed clashes and abuses were accompanied by sectarian incitement and attacks specifically affecting Druze civilians. Human Rights Watch documented that the July 2025 violence triggered a humanitarian crisis and heightened the risk of reprisals against Druze communities, while UN experts later warned of attacks on Druze communities, including grave abuses against women and girls. 138 These patterns are relevant not only as violations of civilian protection, but also because they show how religious belonging may itself become a basis for targeting in conflict settings. In such circumstances, FoRB is affected not only through restrictions on

[137] Aysar Alais, "Israeli Prison Authorities Prevent Palestinian Prisoners from Ramadan Fasting at Right Time: Commission," *Anadolu Agency*, 12 March 2024, available at: https://www.aa.com.tr/en/middle-east/israeli-prison-authorities-prevent-palestinian-prisoners-from-ramadan-fasting-at-right-time-commission/3837079.

[138] Office of the United Nations High Commissioner for Human Rights, "Syria: UN experts Alarmed by Attacks on Druze Communities, Including Sexual Violence against Women and Girls", Geneva, 2025, available at: https://www.ohchr.org/en/press-releases/2025/08/ syria-un-experts-alarmed-attacks-druze-communities-including-sexual-violence.

worship, but through the use of religion as a marker of vulnerability and exposure to violence.139

A second illustration is the June 2025 bombing of Mar Elias Church in Damascus, in which at least 20 worshippers were killed and dozens more injured when a suicide attacker detonated explosives inside the church during prayer. Reuters reported that Syrian authorities attributed the attack to Islamic State, and that Christian leaders described it as a serious blow to minorities' sense of security.140 The significance of this incident lies not only in the attack on a place of worship, but in the direct targeting of worshippers assembled as a religious community. In legal terms, such violence implicates both the protection of civilians under international humanitarian law and the protection of religious communities from identity-based attacks more generally. It thus demonstrates how FoRB violations may arise through the intentional targeting of persons on account of the setting, symbolism, and communal character of their worship.141

A more recent example remains the Yazidi genocide in Iraq and Syria. The UN Commission of Inquiry concluded in 2016 that ISIS had committed genocide, crimes against humanity, and war crimes against the Yazidis, specifically because of their religious identity.142 The report made clear that ISIS sought not only to kill Yazidis, but to destroy them as a religious group.143 Similarly, later assessments have continued to stress that ISIS systematically targeted Yazidis, Christians, and other religious minorities through killing, forced conversion, enslavement, and the destruction of religious life.144 These examples show that where religion becomes the ground upon which a group is marked for destruction, FoRB is no longer only a matter of individual belief or access to worship, but of group survival itself. In such contexts, international criminal law becomes particularly significant because it

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139 Human Rights Watch, above note 4.

140 "Syrian Christian Leader Chides President over Deadly Church Bombing", *Reuters*, 24 June 2025, available at: https://www.reuters.com/world/europe/syrian-christian-leader-chides-president-over-deadly-church-bombing-2025-06-24/.

141 "Twenty Killed in Suicide Bombing at Damascus Church", *Reuters*, 22 June 2025, available at: https://www.reuters.com/world/middle-east/blast-rocks-church-syrias-dam ascus-witnesses-say-2025-06-22/.

142 Human Rights Watch, above note 106.

143 United States Commission on International Religious Freedom, *Religious Freedom Challenges in Iraq: 10 Years After ISIS's Genocide*, Issue Brief, Washington, DC, September 2024, available at: https://www.uscirf.gov/sites/default/files/2024-09/2024%20Iraq%20Genocide%20Issue%20Brief.pdf.

144 United Nations, "ISIL/Da'esh Committed Genocide of Yazidi, War Crimes against Unarmed Cadets, Military Personnel in Iraq, Investigative Team Head Tells Security Council", New York, 2021, available at: https://press.un.org/en/2021/sc14514.doc.htm.

recognizes religion as a protected group marker in the law of genocide and persecution.

Indeed, these cases demonstrate that identity-based killings in the region expose a dimension of FoRB that cannot be captured fully through rules on access, property, or humane treatment alone. They reveal that, in certain conflicts, religion operates as a basis for selection, stigmatization, and elimination. This is precisely where the relationship between FoRB and international criminal law becomes most visible: not because FoRB is expressly codified as a separate offense, but because the destruction of religious communities may amount to persecution, crimes against humanity, or genocide when belief is transformed into a ground for collective targeting.

Summary of Case Studies

Taken together, these cases demonstrate that the interaction between IHRL, IHL, and ICL is not merely cumulative, but structurally differentiated in how each regime engages with FoRB in practice. While IHRL conceptualizes FoRB as a unified right encompassing belief, manifestation, and community life, the case studies illustrate how IHL engages with religion in a fragmented and situational manner, protecting only specific aspects of religious existence through rules on humane treatment, cultural property, and detention. At the same time, ICL becomes relevant where violations reach the level of identity-based targeting, recognizing religion as a protected group marker in the context of genocide and persecution.

In this sense, the patterns observed are not simply parallel violations of multiple legal frameworks but reflect how each regime captures a different dimension of the same right when applied to concrete situations of conflict. IHRL provides the normative baseline against which restrictions are assessed; IHL governs the conduct of hostilities and imposes context-specific limits; and ICL addresses the most extreme manifestations of violence where religion becomes a basis for collective destruction. However, the case studies also reveal that these regimes do not operate as a fully integrated system in practice. Rather, their interaction produces gaps, particularly in the protection of everyday religious practice and communal life, which often fall below the thresholds of international criminal law while remaining insufficiently addressed under IHL.

Conclusion

This article has demonstrated that FoRB is protected during armed conflict not through a single coherent legal regime, but through a combination of IHRL, IHL, and ICL, each addressing different dimensions of the right, sometimes—if not most of the time—not concurrently. Sufficient evidence exists to suggest that the Geneva Conventions and their Additional Protocols, Customary International Law, the Rome Statute, and the broader body of international legal frameworks provide avenues for the protection of elements of the external dimension of FoRB during armed conflict. Legal protections, including normative rules and principles of CIHL, as well as robust legal frameworks such as those governing detainees and genocide, constitute partial but enforceable safeguards across different aspects of what it means to enjoy that freedom.

Moreover, Article 15 of the First Additional Protocol to the Geneva Conventions extends this protection to the field of battle, including religious personnel. This paper finds that the scope can then be widened to include sacred places and places of worship recognized as cultural heritage. Humans, ideas, beliefs, places of worship, and significant heritage have all been within the scope of IHL and its umbrella of protection. However, these protections do not operate as a unified system of FoRB protection, but rather as functionally distinct and scattered rules addressing specific manifestations of religion, such as access, dignity, or property.

The theoretical scope of protection is enforced in the ICC system, where instances of punishment have been duly recorded to highlight the extent of its protection. In this regard, ICL plays a complementary role by addressing the most extreme violations, particularly where religion becomes a basis for persecution or genocide, thereby engaging with the collective and identity-based dimension of FoRB that IHL does not fully capture. Punitive measures have been prescribed under the authority of Article 85 of Protocol I, where humanitarian protections are often subject to due ambiguities in the process of turning investigations into mechanisms for legal accountability. Indeed, while legal paths to protect FoRB under IHL during conflict are usually more implicit, they exist and can be made accessible. Yet, the full enforcement of FoRB also rests on deterrence rather than exclusive punishment in some cases, as the available mechanisms rest on overlooked grounds. As such, the protection of FoRB relies not only on the existence of legal norms, but on their interpretation, coordination, and effective implementation across different branches of international law.

In practice, experiences in the Levant region illustrate that FoRB remains one of the most vulnerable rights during wars and crises, as religious individuals and groups continue to be targeted due to their religious group and identity. Despite IHL and IHRL establishing an indirect system and provisions that protect FoRB elements, on-the-ground practices reveal a gap between the text and reality. From Iraq and Syria, where minority religions were targeted and religious sites destroyed, in addition to Lebanon, to Palestine, where basic principles of freedom of religion and belief, such as access to prayer both in detention and occupied areas, are constrained, religion remained at the heart of conflicts. These patterns confirm that the fragmentation identified at the normative level is reflected in practice, where different dimensions of FoRB, including belief, practice, and communal life, are unevenly protected and often left vulnerable.

Ultimately, this article argues that understanding the protection of FoRB in armed conflict requires moving beyond a single-regime perspective and instead recognizing the fragmented architecture through which international law engages with religion. While this architecture provides multiple entry points for protection, it also generates gaps, inconsistencies, and limitations that become particularly visible in contemporary conflict settings. This requires IHL to remain more receptive to the normative content developed under IHRL, particularly by using FoRB standards to inform the interpretation of humane treatment, non-discrimination, detention, occupation, and the protection of religious sites and communities. Such interpretive openness would not displace IHL's specialized rules but would allow them to protect religious life more coherently and comprehensively. Addressing these challenges requires not only strengthening legal enforcement mechanisms but also rethinking how FoRB is conceptualized and integrated across the different regimes of international law that govern situations of armed conflict. This requires all practitioners and states to recognize a broader principle: if religion is so often invoked as a resource for peace, reconciliation, and social cohesion, international law must be equally committed to protecting religious life when conflict places it most at risk.

War by Nature: Rethinking International Humanitarian Law in the Age of Climate-Driven Conflict

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ABSTRACT

The Asia-Pacific region is marked by climate vulnerability and conflict risk, exposing doctrinal and protection limits within International Humanitarian Law (IHL), particularly in relation to Pacific Island insecurity and displacement in South Asia. The study analyses how current legal frameworks struggle to address slow-onset crises, climate-linked violence below the armed-conflict threshold, environmental accountability, and the emerging debate on ecocide. It proposes a prudent and gradual interpretive shift of IHL and places ecocide within the wider context of international criminal law and calls for enhancing regional legal mechanisms for enhanced humanitarian protection.

Keywords: International Humanitarian Law, Asia Pacific, Climate-Induced Conflict, Environmental Protection, War Crimes, Ecocide

Introduction

In the twenty-first century, alongside politics and territorial ambition, environmental pressure is also shaping armed conflict. International humanitarian law (IHL) is not the sole response to every instance of climate-related harm, and not every such harm necessarily constitutes a cause of armed conflict. However, it can aggravate existing social, economic, and political vulnerabilities through droughts, resource depletion, sea-level rise, extreme climate events, and displacement. [1] The pressures are particularly apparent in the Asia-Pacific region, where livelihoods that are sensitive to climate change often co-exist with dense coastal populations and weak governance. Therefore, the question in this study is more specific and asks: How does climate change expose *lacunae* in the doctrine and protection of IHL in the Asia-Pacific context, particularly in armed conflicts where environmental stress precedes, follows, or occurs during such conflicts?

The study starts by clarifying that there are two relationships, though interconnected, between climate change as a cause and climate change as an

[1] United Nations General Assembly, *Climate Change, and Its Possible Security Implications,* UN Doc A/64/350 (11 September 2009).

accelerator or as a background condition of insecurity. Environmental pressures, in this context, can play a role in triggering instability, localised violence, and even competition over resources, provided that the situation is also one in which either an international or a non-international armed conflict exists under the provisions of IHL. The second relationship concerns environmental damage resulting from armed conflict, including pollution, deforestation, disruption of water resources, and damage to ecosystems from military operations. The second of these relationships is more directly linked to IHL, namely the rules of conduct of hostilities and protection of the natural environment. This distinction is significant because the legal regime, the evidentiary burdens, and the remedies will also differ in each context.[2]

This present study does not require IHL to apply to all kinds of climate-related disturbances, disaster displacement, or environmental degradation. This expansion would misunderstand the purpose of IHL, which is to regulate behaviour in armed conflict, not in climate governance. The study suggests that climate change reveals the boundaries of IHL in the context of environmental stress and armed conflict. The damage that arises from some of the above-mentioned is thus not IHL failures per se but rather a result of fragmentation between IHL, international environmental law, international human rights law (IHRL), refugee law, and international criminal law. The main question is how these regimes interact, and where impacted people and degraded ecosystems are not adequately safeguarded, where climate stress and conflict converge.[3] This also requires a conceptual separation between climate change and environmental degradation. The accepted scientific term for the long-term and systematic alteration of global or regional climate patterns due to anthropogenic, or human-caused, emissions of greenhouse gases are climate change, and it is regulated by agreements in the United Nations Framework Convention on Climate Change and the Paris Agreement. Environmental degradation is broader and can cover loss of forests, water pollution, soil erosion, loss of biodiversity, and destruction of ecosystems due to peacetime activities, military operations, or weak governance. IHL has generally only addressed the question of environmental harm when it has had a sufficiently close connection with armed conflict. It does not directly regulate global climate

[2] Stavros-Evdokimos Pantazopoulos, "Navigating Legal Frontiers: Climate Change, Environmental Protection and Armed Conflict", *International Review of the Red Cross*, Vol. 106, No. 925, 2024, pp. 366–392.

[3] *See* A. Opdyke and S. Banki,"A Review of the Climate Change-Disaster-Conflict Nexus and Humanitarian Framing of Complex Displacement Contexts", *Climate and Development*, Vol. 18, No. 3, 2026, pp. 240–253.

processes.[4] This is because environmental damage during conflict may be governed by IHL rules, while environmental damage as a result of climate change or slow-onset environmental damage may not be governed by IHL rules and may require other legal mechanisms to be addressed.[5]

In IHL, the real challenge is not the total absence of environmental protection, but the limited reach and demanding thresholds of existing rules, because at present these rules are not broadly applied and are difficult to meet. The protection of the environment in an armed conflict is addressed by Additional Protocol I and customary IHL, but some terms are difficult to apply, such as "widespread, long-term and severe." Likewise, in times of armed conflict, IHL safeguards civilians, but is less effective where civilians are displaced by a range of slow-onset climate processes, particularly where the violence does not amount to armed conflict or where the displacement is caused by a combination of factors.[6] However, the issue is not just one of the obsolescence of IHL but that the harm caused by climate change can span multiple legal regimes, and the impacts on affected communities can be one continuous humanitarian crisis.[7]

In the current study, the Asia-Pacific is not merely a collection of examples but also a regional context in which to explore these legal tensions. The study does not consider all situations vulnerable to climate change to be IHL issues, but rather two closely related themes of case studies. First, Bangladesh and the general situation in South Asia demonstrate how climate-related displacement, land pressure, border insecurity, and resource competition can lead to instability, which is frequently not within IHL unless there is a level of organised armed violence. Second, Pacific Island communities show the limits of IHL in addressing displacement by sea-level rise and existential environmental threats, rather than the direct result of armed conflict. These examples make the Asia-Pacific especially useful for examining the

[4] C. S. Ferreira Fernandes, F. Alves, and J. Loureiro, "Sustainable Futures: From Causes of Environmental Degradation to Solutions", *Discov Sustain*, Vol. 5, 2025, p. 63.

[5] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 1125 UNTS 3 (adopted 8 June 1977, entered into force 7 December 1978), Arts. 35(3), 55.

[6] Michael Bothe, Carl Bruch and Jordan Diamond, "International Law Protecting the Environment during Armed Conflict", *International Review of the Red Cross,* Vol. 82, *2012, p.* 569.

[7] Walter Kälin, *Guiding Principles on Internal Displacement* (UN Doc E/CN.4/1998/53/Add. 2, 11 February 1998); Asian Development Bank, *Climate Change, Migration and Adaptation in Asia and the Pacific* (Asian Development Bank 2012).

relationship between climate vulnerability, conflict risk, and humanitarian protection because of these examples.[8]

Therefore, the central discussion of the study is doctrinally narrow and limited. Climate change should be understood as a structural condition that changes the conditions under which armed conflict occurs and the humanitarian consequences that follow from it. Where armed conflict exists, IHL is relevant, particularly in regulating attacks, the protection of civilians, and the limitation of environmental damage in times of conflict. But IHL is not enough to properly respond to climate-related harms of insecurity, displacement, and environmental loss. The study thus calls for an even more holistic approach to interpretation, namely one that preserves the armed conflict threshold of IHL while enhancing its reach in times of armed conflict to environmental harm, and clarifying its connection with environmental, human rights, refugee, and international criminal law.[9]

The structure of the study reflects this narrow discussion. The first section explains the threshold-based operation of IHL and the challenges of applying it to cases of climate-related violence that are localised, intermittent, or of a non-armed-conflict nature. The second part examines environmental protection under IHL, including provisions in the treaties and customary law, as well as accountability issues under the Rome Statute. The third section explores how climate-driven displacement and civilian protection gaps can occur when affected people do not fit into the categories of IHL and refugee law or existing internal displacement frameworks. The final section considers reform possibilities such as regional cooperation and the new discourse on ecocide. Ecocide is not treated as an existing IHL rule; rather, it is considered a broader international criminal law proposal that demonstrates dissatisfaction with current accountability mechanisms for severe environmental destruction, including but not limited to wartime environmental harm.[10]

The Legal Limits of IHL in Climate-Induced Conflicts

[8] Cymie R Payne, "Climate Change, Armed Conflict and International Law", *Journal of International Humanitarian Legal Studies, Vol. 7,* 2021, p. 1.

[9] UN Environment Programme, *Protecting the Environment during Armed Conflict: An Inventory and Analysis of International Law* (UNEP 2009).

[10] Cordula Droege, "International Humanitarian Law and Peace: A Brief Overview", *International Review of the Red Cross*, Vol. 106, 2024, p. 989.

To study the boundaries of IHL in climate-induced conflict, however, it is important to first define the conceptual framework of IHL. IHL is threshold-based: that is, it applies when a situation is an armed conflict under international law. IHL does not apply to all types of instability, environmental stress, disaster, forced displacement, or social unrest. The importance of this point is that climate change causes many harms before, outside, or below the threshold of armed conflict. These harms could be covered under international environmental law, human rights law, refugee law, disaster law, or national law, but are not necessarily included in IHL. This section is not intended, therefore, to claim that IHL should be used to regulate every suffering related to climate change. Instead, it asks the more restricted question of how IHL responds to or reaches its limits in relation to environmental stress as a cause of violence, where violence is nearing, or exceeding, the armed-conflict threshold, or where environmental harm occurs during an armed conflict.[11] IHL is based on a relatively stable notion of armed conflict, which presupposes recognisable parties, particular hostilities, and a distinct line drawn between the violence of war and the suffering of peace.[12] The environment's deterioration, the lack of resources, and the pressure from the climate are often indirect or slow causes of violence, making it difficult to see where the conflict ends and the crisis begins.[13]

The current section investigates the difficulties that the traditional IHL has in coping with these matters, thus revealing considerable gaps in both doctrine and accountability.[14] The problem is not simply that IHL is outdated, but that climate-related harm can play out over a long period of time, in multiple ways and due to multiple causes, and does not fit neatly into its event-based and conduct-based framework of IHL. Traditional legal categories of armed conflict are often unable to provide a complete legal response to the humanitarian consequences that arise from slow-onset environmental harm.

Traditional Framework of IHL

[11] Taha Wiheba, "The International Law of Armed Conflict and the Natural Environment: An Analytical Resource for States", *HLS PILAC*, 2025, available at https://hls.harvard.edu/wp-content/uploads/2025/07/The-International-Law-of-Armed-Conflict-and-the-Natural-Environment.pdf.

[12] Carlos Frederico de Oliviera Pereira, "Non-International Armed Conflict – Current Conceptual Challenges: Confronting Organized Crime and Globalization of the Conflict", *Small Wars Journal*, 2025.

[13] United Nations Security Council, *Maintenance of International Peace and Security: Climate Change* UN Doc S/PV.8451 (25 January 2019).

[14] Cymie R Payne, "Climate Change, Armed Conflict and International Law", *Journal of International Humanitarian Legal Studies*, Vol. 7, 2021, p. 1.

IHL aims to reduce the impact of armed conflict by controlling the way hostilities are carried out and protecting people who are not taking, or no longer taking, part in hostilities. Among its important principles are distinction, proportionality, military necessity, and humanity. The latter are the core and are applied mainly through the four Geneva Conventions of 1949, their Additional Protocols, and customary IHL.[15] These principles operate once armed conflict exists; they do not attribute responsibility for all environmental or climate-related harms outside armed conflict. Distinction is the principle that mandates during war that the opposing parties differentiate between fighters and non-combatants, and between military and civilian targets, always to some degree. The principle of proportionality prohibits attacks that are likely to cause civilian casualties disproportionately high in relation to the expected military advantage.[16] Military necessity only allows measures that are necessary for achieving the legitimate military objective, whereas the humanity principle attempts to limit suffering to the minimum.[17] These principles are fundamental to IHL, but their application is limited where civilian harm results from climate stress, resource depletion, or environmental degradation not connected to military activity. In these situations, the damage can be extensive, but the damage might not be legally considered as having been caused by an attack or other activity that would otherwise be covered by IHL.

IHL applies when there is an armed conflict, whether it is international or non-international. International armed conflicts occur between states, while non-international armed conflicts (NIACs) require prolonged armed violence between government troops and non-state armed groups, or between such groups. The two prerequisites of organisation and intensity, developed in international jurisprudence, serve as gatekeeping criteria. If the violence continues locally, in a limited area, is criminal, communal, or riotous, it can have significant humanitarian impacts but not meet IHL criteria.[18] With this threshold-based model of applying IHL, several instances where humanitarian harm arises out of climate change do not receive the same level of protection under IHL as they would if they occurred in formally recognised armed conflict situations.

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[15] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31 (adopted 12 August 1949, entered into force 21 October 1950); Geneva Convention (II), 75 UNTS 85; Geneva Convention (III), 75 UNTS 135; Geneva Convention (IV), 75 UNTS 287.

[16] ICRC, "Rule 14. Proportionality in Attack", available at: https://ihl-databases.icrc.org/en/customary-ihl/v1/rule14.

[17] International Committee of the Red Cross, *The Fundamental Principles of International Humanitarian Law* (ICRC 1978).

[18] Prosecutor v. Tadić (Jurisdiction), ICTY-94-1-AR72, 2 October 1995 (70).

Climate-related violence makes this threshold difficult to apply.[19] Armed conflict is not always solely or directly caused by climate change. Instead, it exacerbates pre-existing vulnerabilities, undermines the capacity of the state, deepens land and water/resource conflict, and places greater strain on already fragile communities. The resulting violence can be intermittent, geographically limited, or even mixed with crime and social unrest. Such scenarios are often below the legal threshold for the application of IHL, allowing the affected people to be excluded from its protection. These hybrid and fragmented forms of violence may leave affected populations outside IHL's protection. This should not be conceived as a "failure" of IHL in every case. It often mirrors the separation of labour between IHL and other legal regimes. Protection gaps occur when those other protection regimes are also ineffective or do not offer effective protection or remedies that are enforceable.

Incompatibility with Climate Triggers of Conflict

One significant limitation of IHL in relation to climate-induced conflict is that it applies only after violence reaches the legal threshold of armed conflict. IHL is mainly a reactive measure that regulates violence only after it reaches a certain level and is perpetrated by a certain organisation. In contrast, climate change operates gradually, combining with other risk factors in ways that may increase the likelihood of violence without immediately producing hostilities.[20] The mismatch between the temporal nature of IHL and the cumulative nature of harm caused by climate change is therefore an issue.

The legal definition of armed conflict does not include non-violent environmental pressures, such as drought, rise in sea level, and desertification. These things can, however, destabilise populations, deteriorate their means of survival, and intensify disputes over land and water. However, IHL applies only if the resulting violence satisfies the intensity and organisation requirements for a NIAC, or if it occurs between states so as to constitute an international armed conflict.[21] This situation results in the legal invisibility of climate-linked violence from the IHL

[19] UN Environment Programme, *Climate Change and Security: Risks and Responses* (UNEP 2020).
[20] United Nations Development Programme, *Climate Change and Conflict: Understanding the Linkages* (UNDP 2018).
[21] *Ibid*.

viewpoint, even where its humanitarian consequences are serious.[22] Consequently, communities impacted by these matters do not benefit from the protections provided by IHL, although the conditions they live under are similar (in terms of the effects suffered) to those suffered by persons engaged in formally declared armed conflicts.

The Asia-Pacific region illustrates this problem analytically, not merely descriptively. South Asia, especially Bangladesh and its border regions, shows how climate-induced displacement, river erosion, flooding, land loss, and livelihood insecurity can amplify social tension and pressure on urban and border communities. They can lead to a certain degree of localised violence or insecurity but do not necessarily meet the threshold for IHL. Their legal importance is that they demonstrate the potential for conflict risk to arise from climate stress but are largely beyond the scope of IHL.[23] Urban and border regions may come under pressure from displaced populations, and competition for limited resources may contribute to localised violence.[24] The point is not to classify these situations artificially as armed conflict, but to show that they create humanitarian needs that IHL cannot address unless the armed conflict threshold is met.

Myanmar has a similar, although distinct, issue. There, the existing ethnic conflict, displacement, weak governance, and insecurity are compounded by climate vulnerability. If there is already a conflict with organized armed violence, IHL may regulate the conduct of parties to the conflict. Nevertheless, displacement and vulnerability to climate events may remain outside IHL if they are not connected to any specific conduct in conflict or to obligations during conflict. This is demonstrated by Myanmar, where, even if IHL is applicable, it does not capture all forms of climate-related civilian harm.[25]

Island countries in the Pacific will face even more serious problems because of climate change. Rising sea levels and severe weather conditions are threatening the sovereignty of numerous island nations as well as their ability to survive

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[22] International Committee of the Red Cross, W*hen Rain Turns to Dust: Understanding and Responding to the Combined Impact of Armed Conflicts and the Climate and Environment Crisis on People's Lives* (ICRC 2020).

[23] Asian Development Bank, *Climate Change, Migration and Adaptation in Asia and the Pacific* (Asian Development Bank 2012); Maria Camila Duque, "Climate Change in Bangladesh Shapes Internal Migration and Movement to India", *Migration Information Source*, 2024.

[24] United Nations Office for the Coordination of Humanitarian Affairs, *Bangladesh: Climate Change and Displacement* (UNOCHA 2019).

[25] Climate Diplomacy, "Myanmar Climate-Fragility Risk Brief", available at: https://climate-diplomacy.org/magazine/conflict/myanmar-climate-fragility-risk-brief.

economically.[26] However, the harm is typically not caused by armed conflict and thus falls well beyond the scope of IHL. The Pacific Islands example is significant because it illustrates the extent to which IHL can be regarded as the legal solution to climate-related displacement, loss of territory, and/or existential environmental injury. These are issues more directly related to international environmental law, human rights law, law of the sea, migration governance, and statehood debates.

Weaknesses of Accountability Mechanisms

Where climate stress intersects with armed conflict, accountability gaps remain for environmental harm and damage to natural resources.[27] But accountability needs to be analysed carefully. Some environmental harms in times of armed conflict can be dealt with under IHL and international criminal law, but they do not provide a general mechanism for assigning responsibility for climate change itself or all climate-related suffering. The accountability gap arises from narrow legal definitions, demanding evidentiary standards, and the difficulty of linking gradual environmental harm to specific military conduct.[28]

Article 8(2)(b)(iv) of the Rome Statute exemplifies these higher standards when dealing with (exclusively) positive acts taken in an armed conflict.[29] The provision criminalises intentionally launching an attack in the knowledge that it will cause widespread, long-term, and severe damage to the natural environment that would be clearly excessive in relation to the concrete and direct overall military advantage anticipated. There are several difficult components in this formulation: the conduct must be related to an attack, the environment must be so severely damaged as to meet a high threshold, the accused must have the necessary mental element, and the harm must be considered by conducting a proportionality test. The climate-related harm that will need to be proved is usually gradual, takes place over several years, and arises from actions taken as part of indirect military activities. Thus, while the Rome Statute may be one means for prosecuting the environmental harm

[26] United Nations Economic and Social Commission for Asia and the Pacific, *Climate Change and Migration in the Pacific* (UNESCAP 2020).
[27] Michael Bothe, Carl Bruch, and Jordan Diamond, "International Law Protecting the Environment during Armed Conflict", *International Review of the Red Cross*, Vol. 82, 2010, p. 569.
[28] Thomas Obel Hansen, "Gaps and Options for Accountability for Environmental Crimes in Armed Conflict", *SSRN* 2022.
[29] Rome Statute of the International Criminal Court, 2187 UNTS 90 (adopted 17 July 1998, entered into force 1 July 2002), Art. 8(2)(b)(iv).

caused by warfare, it still limits those prosecutions based on the thresholds, which are difficult to prove in practice.[30]

Another restriction is that international criminal law lends itself well to the prosecution of identifiable acts rather than diffuse omissions or structural failures. Climate-related harm can be caused by a state's inaction in controlling resource extraction, safeguarding vulnerable populations, avoiding environmental degradation, and mitigating risks that it can foresee. Whereas human rights law, environmental law, or domestic public law might offer a route to holding a party accountable for a failure to prevent a slow-onset climate crisis, IHL offers no clear way of doing so unless it is linked to other obligations that arise in the context of armed conflict.[31]

The situation is further complicated in the Asia Pacific, where access to international judicial mechanisms and domestic enforcement varies significantly to seek accountability from the actors responsible for the violations. Many states within the region lack the political will or institutional capacity to investigate and prosecute environmental crimes relating to conflict, and thus, regional mechanisms are still being developed.[32] Environmental damage is often treated as secondary to urgent security threats.[33] This reinforces the need for a multi-regime approach. IHL can regulate conduct during armed conflict, but there is a need for more robust domestic environmental enforcement, human rights protection, regional cooperation, and international criminal law involvement when severe environmental destruction during wartime is at stake.

Environmental Destruction as a Violation of IHL

In IHL, environmental destruction has traditionally been regarded as a marginal issue rather than a core component of the legal framework.[34] In the past, the natural environment was often treated as the backdrop for hostilities or as collateral damage

[30] Frédéric Mégret, "The Problem of an International Environmental Criminal Law", *European Journal of International Law, Vol. 20,* 2011, p. 307.

[31] Lavanya Rajamani, "Climate Change and International Law: A Gap Analysis", *European Journal of International Law, Vol. 27,* 2016, p. 159.

[32] United Nations Environment Programme, *Protecting the Environment during Armed Conflict (n x): An Inventory and Analysis of International Law* (UNEP 2009).

[33] Asian Development Bank, *Law and Policy Reform for Environmental Justice in Asia and the Pacific* (Asian Development Bank 2016).

[34] Saeed Bagheri and Gerhard Kemp, "Damage to and Destruction of the Natural Environment: Terraforming Warfare in Gaza and Accountability for Ecocentric Crimes", *Journal of International Criminal Justice*, Vol. 23, No. 3-4, 2025, pp. 427–448.

caused by military operations.[35] Contemporary conflicts, however, show that environmental degradation is not merely a side-effect of war. It has the potential to directly impact civilian lives, public health, food security, access to water, displacement, and post-conflict recovery. As climate-induced conflict becomes a more prevalent cause of violence through direct or indirect means, the role of environmental destruction in relation to armed conflicts is growing increasingly important.[36] Rather than examining environmental destruction generally, the present section focuses only on environmental harm with a sufficient nexus to armed conflict. It does not state that all forms of environmental degradation or climate damage are necessarily in breach of IHL. Instead, it is limited to the narrower issue of the regulation of environmental harm during armed conflict, why the rules for it are hard to implement, and how ongoing discussions on ecocide reflect gaps in existing rules for environmental accountability.

The growing recognition of the humanitarian consequences of environmental damage has increased scrutiny of whether existing IHL rules adequately address severe wartime environmental harm. This evaluation is particularly timely given recent climate-related conflicts, in which environmental destruction may operate both as a driver of instability and as a result of armed conflict.

Environmental Protections in IHL

Additional Protocol I to the Geneva Conventions contains specific provisions on environmental protection during armed conflict.[37] Article 35(3) prohibits methods or means of warfare that are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment.[38] Under Article 55, parties to an international armed conflict must take steps to ensure that their use of military force does not cause environmental harm and cannot retaliate by attacking the environment.[39] However, these treaty provisions need to be read with great care. Articles 35(3) and 55 apply in the context of international armed conflict and are based on a high cumulative threshold: widespread, long-term, and severe damage.

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[35] Iryna Rekrut, "Environmental Destruction in Conflict: Broadening Accountability in War", 2025, available at: https://blogs.icrc.org/law-and-policy/2025/03/20/environmental-destruction-in-conflict-broadening-accountability-in-war/.

[36] *Ibid.*

[37] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 1125 UNTS 3 (adopted 8 June 1977, entered into force 7 December 1978).

[38] Additional Protocol I, Art. 35(3).

[39] Additional Protocol I, Art. 55.

Many incidents of environmental damage that happen during conflict could be a humanitarian problem but not strictly covered by the wording of these provisions.

The ICRC's customary humanitarian law outlines several critical provisions with respect to environmental protection within the framework of IHL and recognises that the protection of the environment is an inherently positive feature of the protection of civilians. It is particularly important because customary IHL may be applicable beyond treaty ratification and may impact on both international and non-international armed conflicts, though the extent to which rules of the environment may be applicable remains to be debated. The customary law framework is significant because customary rules may bind parties independently of treaty ratification, where state practice and *opinio juris* are established.

Rule 43 applies the general principles on the conduct of hostilities to the natural environment[40], while Rule 44 requires due regard for the protection and preservation of the natural environment during military operations.[41] Additionally, Rule 45 prohibits the use of warfare methods intended or expected to cause widespread, long-term, and severe damage to the environment.[42] The potential practical impact is limited due to uncertainty about the significance of the relevant thresholds, proving foreseeability and causation, and inconsistent enforcement practices. These rules collectively demonstrate the recognition within IHL that the destruction of the environment has significant consequences beyond ecological harm; i.e., destruction of the environment can lead directly to consequences for civilian survival, public health, food security, and displacement from home.[43] The humanitarian significance of these rules is especially clear in the Asia-Pacific region where many communities are very reliant on the land, forests, rivers, fisheries, and coastal ecosystems. Wartime environmental degradation can exacerbate the climate vulnerability already present and can extend the hardship for civilians beyond the war.[44] In climate-vulnerable regions, environmental destruction may act as a force

[40] International Committee of the Red Cross, *Customary International Humanitarian Law Database*, Rule 43.
[41] International Committee of the Red Cross, *Customary International Humanitarian Law Database*, Rule 44.
[42] International Committee of the Red Cross, *Customary International Humanitarian Law Database*, Rule 45.
[43] Michael Bothe, Carl Bruch and Jordan Diamond, "International Law Protecting the Environment during Armed Conflict", *International Review of the Red Cross*, Vol. 82, 2010, p. 569.
[44] International Committee of the Red Cross, *The Protection of the Natural Environment in Armed Conflict* (ICRC 2020).

multiplier by increasing displacement, reducing food security, damaging livelihoods, and contributing to long-term instability even after hostilities have ceased.

Table 1: IHL Provisions in Environmental Protection and Their Practical Limitations

IHL Provision	Environmental Protection Offered	Key Limitation
AP I, Art. 35(3)[45]	Prohibits widespread, long-term, severe environmental damage	Extremely high threshold, vague terms
AP I, Art. 55[46]	Obligation to protect the natural environment	Weak enforcement
Customary IHL Rules 43-45	General duty to avoid environmental harm	No clear accountability mechanism

Source: Compiled by the authors from Additional Protocol I (1977) and ICRC Customary International Humanitarian Law Study (2005)

Limitations of Existing Norms

The effectiveness of these rules is limited by uncertainty over what constitutes "widespread, long-term and severe" damage.[47] Because the threshold under Additional Protocol I is cumulative, accountability is difficult because the damage must generally meet all three elements, rather than just one.[48] The lack of legally defined thresholds means that interpretation remains inconsistent, and courts rarely address environmental damage caused during armed conflict. This uncertainty about the application of IHL environmental protection laws creates considerable challenges to their implementation in situations involving climate-induced conflict. In many instances, environment-related harm occurs in an incremental, rather than

[45] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 1125 UNTS 3 (adopted 8 June 1977, entered into force 7 December 1978), Art. 35(3).
[46] Additional Protocol I (n 1) Art. 55; International Committee of the Red Cross, *Protection of the Natural Environment under International Humanitarian Law* (ICRC 2014).
[47] Protocol Additional to the Geneva Conventions (Additional Protocol I), Arts. 35(3), 55.
[48] *Ibid*.

a sudden, manner. Environmental damage can result from military activity, resource extraction, and poor governance practices during conflict, and these combinations can produce environmental impacts that cause great harm to the people affected by these actions. These impacts can be especially severe in terms of humanitarian consequences; however, the challenge remains in classifying such harm as "widespread" or "long-term."[49] The issue is not just one of evidence, but also one of doctrine. IHL is often better suited to assessing identifiable attacks or military operations than gradual, cumulative, or multi-causal environmental degradation.

Additionally, obstacles arise from the enforcement of the International Criminal Court (ICC). The ICC has the authority to prosecute war crimes related to environmental harm as defined by the Rome Statute but has not prosecuted any cases to date.[50] Article 8(2)(b)(iv) of the Rome Statute criminalises intentionally launching an attack knowing that the attack will cause widespread, long-term, and severe damage to the natural environment that is clearly excessive in relation to the concrete and direct overall military advantage expected. This formulation requires proof of an attack, knowledge of expected environmental damage, widespread, long-term, and severe harm, and excessiveness in relation to the anticipated military advantage.[51] Establishing a direct relationship between the military activity causing the harm and the environmental degradation is extremely difficult in the complicated conflict environments that result from the stressors of climate change. Causation and attribution requirements, as well as the *mens rea* and proportionality requirements, therefore, limit the ICC's ability to respond to environmental damage that is linked to climate-related conflict.

Examples of these limitations are highlighted by regional examples in the Asia-Pacific. It is in regions of conflict and abundance that environmental degradation can be caused by the combination of militarisation, extraction, a lack of regulation, and local insecurity. Papua New Guinea and other resource-dependent settings illustrate how deforestation, mining-related harm, and conflict pressures can overlap without necessarily producing clearly prosecutable IHL violations.[52] In South Asia, water resource disputes and environmentally destructive mining

[49] International Committee of the Red Cross, *The Protection of the Natural Environment in Armed Conflict* (ICRC 2020).
[50] Rome Statute of the International Criminal Court, 2187 UNTS 90 (adopted 17 July 1998, entered into force 1 July 2002), Art. 8(2)(b)(iv).
[51] Frédéric Mégret, "The Problem of an International Environmental Criminal Law", *European Journal of International Law, Vol. 20, 2011,* p. 307.
[52] United Nations Environment Programme, *Environmental Rule of Law: First Global Report* (UNEP 2019).

activities intersect with the dynamics of conflict and cause both deepening grievances and displacement.[53] These harms are, however, frequently outside clear IHL violations, as they can be very serious from environmental or human rights points of view, but they are not easily prosecutable violations of IHL in terms of attack, military necessity, proportionality, or protected objects. Regional examples therefore reveal the difficulty of translating complex ecological harm into enforceable IHL claims.[54]

Expanding Interpretation of "War Crimes"

Legal discussions have highlighted numerous gaps in the existing body of law with respect to the treatment of war crimes and environmental harm. The concept of 'ecocide' is relevant here but needs to be placed appropriately. Ecocide is not defined as a crime under IHL at present and is not recognised as an independent crime under the Rome Statute. It is more commonly recognised as a more comprehensive international criminal law reform proposal which expresses concerns about the current accountability for extreme environmental degradation. Recent ideas, such as those championed by independent expert commissions, envision ecocide as an international crime on its own, and it does not necessarily have to occur in the presence of an armed conflict to take place. This is unlike traditional war crimes under the IHL that are subject to a nexus to armed conflict. Although the damage to the environment due to armed conflict might be covered by the current provisions of the IHL, the more general concept of ecocide aims at curbing the devastating and extensive environmental degradation regardless of whether the conflict is present or not. Accordingly, the study will consider ecocide in three ways: firstly, as evidence of perceived inadequacies in the current environmental war-crimes framework; secondly, as a potential proposal for reform of international criminal law; and finally, as a reminder that not all environmental damage is or should be deemed to be a war crime that can be addressed through IHL.[55] Proponents of Ecocide argue that IHL is

[53] Xuanxuan Wang, Buli Cui, and Yaning Chen, et. al., "Dynamic Processes of Water Conflicts and Their Coupling with Water Crises in Asia's Transboundary River Basins", *Ecological Indicators,* Vol. 172, No. 113325, 2025.

[54] Iryna Rekrut, "Environmental Destruction in Conflict: Broadening Accountability in War", 2025, available at: https://blogs.icrc.org/law-and-policy/2025/03/20/environmental-destruction-in-conflict-broadening-accountability-in-war/.

[55] V. Elia, "Ecocide to Effectively Stimulate the Integration of International Environmental and Criminal Laws", *Asian Journal of International Law*, Vol. 16, No. 1, 2026, pp. 1–12; Stop Ecocide International, "Ghana: National Crime of Ecocide Proposed in State-mandated Constitutional Review", 2025, available at: https://www.stopecocide.earth/bn-2025/ghana-national-crime-of-ecocide-proposed-in-state-mandate d-constitutional-review; Austin Jenish, "Explainer: What Is Ecocide and How Is It Treated in International and Domestic Law?", 2025, available at: https://earth.org/explainer-what-is-ecocide-and-how-is-it-treated-in-international-and-domestic-law/.

inadequate to capture the scale and severity of environmental destruction occurring in contemporary armed conflict, especially as climate change contributes to environmental destruction.[56] The push for Ecocide recognition indicates heightened dissatisfaction with the existing war crimes framework's inability to address cumulative and climate-related environmental damage.[57] Generally, Ecocide is defined as "unlawful, wanton acts committed with knowledge of a high probability that such acts will result in serious and long-term damage to the environment on a widespread basis."[58] This proposed formulation is important since it moves away from the limited wartime proportionality framework and places responsibility for reckless or wanton environmental damage.[59]

Nevertheless, the growing attention given to ecocide in international legal and policy discussions suggests a major shift in how we view environmental destruction. In contrast to considering the environment as merely an object incidentally affected by war, the new conceptualisation positions the environment as a separately protected interest closely tied to both human security and human survival.[60] This shift links environmental protection more directly with civilian protection, public health, and long-term peace. This does not mean that ecocide should collapse into IHL. Instead, it is an example of how IHL can complement international environmental law and international criminal law to offer a more coherent response to environmental harm.

Jurisprudence on environmental war crimes remains limited, which indicates the need for doctrinal development. The lack of sustained judicial treatment of environmental harm by international courts and tribunals has contributed to this perception of marginalising environmental destruction, despite the devastating humanitarian implications.[61] Ecological damage has been given a less systematic focus —the focus has been on direct damage to human persons and on the killing or destruction of civilian objects in international criminal practice. The marginalisation of environmental destruction in climate-related conflicts will likely be compounded

[56] Cymie R Payne, "Defining Environmental Damage as a War Crime", *Transnational Environmental Law*, Vol. 7, 2018, p. 175.
[57] Danuta Palarczyk, "Ecocide Before the International Criminal Court: Simplicity is Better Than an Elaborate Embellishment", *Crim Law Forum*, Vol. 34, 2023, pp. 147–207.
[58] Stop Ecocide Foundation, *Proposed Definition of Ecocide* (2021).
[59] Rome Statute of the International Criminal Court, 2187 UNTS 90 (adopted 17 July 1998, entered into force 1 July 2002).
[60] United Nations Environment Programme, *Environmental Rule of Law: First Global Report* (UNEP 2019).
[61] Michael Bothe, Carl Bruch, and Jordan Diamond, "International Law Protecting the Environment during Armed Conflict", *International Review of the Red Cross, Vol. 82, 2010,* p. 569.

by the fact that environmental degradation exists before, during, and after armed violence.[62]

Strengthening accountability in the Asia-Pacific does not necessarily require immediate treaty reform. In the absence of political and institutional opportunities, more practical avenues may be: clearer domestic implementation of IHL obligations; strengthening environmental-crime legislation; soft-law instruments at the regional level; incorporating environmental protection into military manuals; and judicial reasoning that considers the harm to the environment as directly linked to civilian protection.[63] In the Asia-Pacific, where treaty reform may face political resistance, customary law development, regional soft-law instruments, domestic implementation, and military practice may offer more practical pathways for improving environmental accountability.

Climate Displacement and Civilian Protection Gaps in IHL

Climate-related displacement highlights one of IHL's most important structural limits. Unlike IHRL, which always applies, and refugee law, which protects persons fleeing persecution, IHL is only applicable in cases of armed conflict. Consequently, populations displaced mainly by environmental causes, including slow-onset climate processes, often fall outside IHL's protective framework. This is not necessarily a doctrinal failure of IHL; rather, climate-related displacement often occurs in a gray area between legal frameworks. The regulation of displacement in the context of armed conflict is a concern of IHL, whereas other forms of climate-induced displacement must be addressed through refugee law, human rights law, disaster law, migration governance, regional agreements, and domestic protection systems.[64] In conflict-prone areas, displacement may result from the interaction of climate change, violence, poor governance, and poverty. As a result, many affected persons may fall

[62] Michael Bothe, Carl Bruch, Jordan Diamond, et. al., "International Law Protecting the Environment during Armed Conflict: Gaps and Opportunities", *International Review of the Red Cross*, Vol. 92, No. 879, 2010, pp. 569–92.

[63] International Committee of the Red Cross, *The Protection of the Natural Environment in Armed Conflict* (ICRC 2020).

[64] Prince Kumar, "Bridging the Gap: The Critical Challenge of Implementing IHL", *The Law Institute*, 6 December 2025, available at: https://thelaw.institute/application-of-ihl/implementing-international-humanitarian-law-challenges/; United Nations High Commissioner for Refugees, *Climate Change and Disaster Displacement* (UNHCR 2020).

outside IHL unless their displacement is sufficiently connected to an armed conflict.[65]

The question then becomes: What protection does IHL offer when climate-related displacement is coupled with a conflict, and where are the protection gaps when climate-driven displacement is not caused by hostilities or when it does not take place in a legally recognised armed conflict? This section examines how IHL views protected persons, identifies structural civilian protection gaps under IHL, and considers these challenges through the lens of the Asia-Pacific region. Although climate-induced displacement is increasingly prevalent, humanitarian responses often remain organised around categories such as "conflict displacement," "disaster displacement," "refugee movement," and "irregular migration." But the reality of the communities affected may cut across these categories. The legal challenge is that IHL applies only during armed conflict and does not establish a general status for persons displaced by climate change.

Who Is a Protected Person?

Civilians affected by armed conflict are a central concern of IHL. According to the Geneva Conventions and Additional Protocols, civilians are generally defined negatively as persons who are not members of the armed forces.[66] IHL also protects certain specific classes of people, such as POWs, the injured and sick, and displaced persons within conflict zones.[67] However, these protections only apply when there is an armed conflict.[68] This threshold is central because a person may be highly vulnerable, displaced, or in need of humanitarian assistance, yet fall outside IHL unless the situation involves armed conflict and the person has a sufficient connection to it. IHL traditionally treats civilians as separate from combatants and regulates the conduct of parties to armed conflict. Climate-related displacement complicates this framework, in part because it does not alter the definition of a civilian, but in part because many climate-displaced persons are not displaced by actions that IHL regulates.

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[65] International Committee of the Red Cross, *When Rain Turns to Dust: Understanding and Responding to the Combined Impact of Armed Conflicts and the Climate and Environment Crisis on People's Lives* (ICRC 2020).

[66] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (adopted 12 August 1949, entered into force 21 October 1950), Art. 4.

[67] *Ibid*.

[68] *Ibid*.

Many people and communities displaced by rising sea levels, droughts, and extreme weather events do not fall within the traditional definitions used in IHL. Some climate migrants move gradually or in anticipation of future harm, and many cross international borders without moving into areas of armed conflict. Therefore, these individuals will generally not meet the legal definition of a civilian affected by armed conflict [69] Climate migration throws the event-based and conflict-based conceptualisation of IHL into relief, revealing its limitations in the gradual and anticipatory nature of this kind of movement.

The difference between refugees, IDPs, and climate change migrants demonstrates the existing gap between these groups. Refugees are defined and protected by international refugee law based on persecution or a well-founded fear of persecution.[70] Therefore, any harm caused by climate change would only fall into the refugee category if there is an element of persecution involved.[71] IDPs can receive some level of protection under IHL and some soft-law instruments, such as the UN Guiding Principles on internal displacement.[72] However, IHL protection applies only when displacement is sufficiently connected to armed conflict.[73] Climate migrants therefore occupy a difficult legal position: they may face serious harm but do not have a specific, legally binding international status equivalent to refugee status and are not automatically protected by IHL.

Table 2: Comparative Legal Protection of Civilians, IDPs, Refugees, and Climate Migrants

Category	Applicable Legal Framework	Nature of Protection	Key Protection Gap
Civilians affected	IHL (Geneva Conventions, Additional Protocols)	Protection against attack, Humane Treatment, Protection of Civilian Objects	Protection applies only when displacement is directly linked to armed conflict

[69] Romina Edith Pezzot, "IHL in the Era of Climate Change: The Application of the UN Climate Change Regime to Belligerent Occupations", *International Review of the Red Cross*, Vol. 105, No. 923, 2023, pp. 1071–1091.

[70] Convention Relating to the Status of Refugees, 189 UNTS 137 (adopted 28 July 1951, entered into force 22 April 1954), Art. 1A (2).

[71] UNHCR, *Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters* (2020).

[72] UN Commission on Human Rights, *Guiding Principles on Internal Displacement*, UN Doc E/CN.4/1998/53/Add. 2 (1998).

[73] International Committee of the Red Cross, *Commentary on the Geneva Conventions of 1949* (ICRC 2016).

by armed conflict[74]			
IDPs[75]	IHL (during conflict) and UN Guiding Principles on Internal Displacement	Protection from forced displacement, access to humanitarian assistance	Limited Enforceability; Weak Protection for climate-driven, slow-onset displacement
Refugees[76]	1951 Refugee Convention and 1967 Protocol	Protection from refoulement, legal status, basic rights	Climate harm does not qualify as persecution under the existing definition
Climate Migrants	No binding international legal framework	Case-specific humanitarian responses without legal status	Legal invisibility; no formal status or Enforcement Protection

Source: The Geneva Conventions (1949), the UN Guiding Principles on Internal Displacement (1998), the 1951 Refugee Convention, and Reports on Climate Displacement from the UNHCR and ICRC were compiled by the authors.

Structural Blind Spot

Climate-displaced populations experience structural protection gaps, not just definitional ones. While IHL assumes that harm results from actions during armed conflict, with responsibility resting with parties to the conflict, climate displacement

[74] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (adopted 12 August 1949, entered into force 21 October 1950); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) (adopted 8 June 1977, entered into force 7 December 1978), Arts. 48-52.

[75] UN General Assembly, *Guiding Principles on Internal Displacement,* UN Doc E/CN.4/1998/53/Add.2 (1998); International Committee of the Red Cross, *Internally Displaced Persons, and International Humanitarian Law* (ICRC 2016).

[76] Convention Relating to the Status of Refugees, 189 UNTS 137 (adopted 28 July 1951, entered into force 22 April 1954); Protocol Relating to the Status of Refugees, 606 UNTS 267 (adopted 31 January 1967, entered into force 4 October 1967).

results from a build-up of climate stressors, ongoing state inaction, and multiple cross-border impacts, which makes it hard under current IHL rules and standards to establish a direct line of legal responsibility. Because climate migration is multi-causal, it is not easily captured by IHL's model of attribution, obligations, and conduct connected to hostilities.

A particularly significant blind spot concerns a slow-onset climate event. Drought, agricultural salinisation, and sea-level rise gradually erode the ability of people to sustain their livelihoods and remain in their homes, leading to voluntary or forced movement over an extended period.[77] Populations affected by slow-onset climate events may have lived in areas previously or currently embroiled in conflicts or have suffered from political instability; however, the ultimate cause of their displacement may not be directly attributable to any military action. As such, IHL does not guide how to protect these populations or hold any responsible parties accountable where there has been displacement due to the interaction of climate stress and insecurity, as opposed to direct hostility.[78] The mismatch is twofold: IHL is triggered by armed conflict and governs behaviour during armed conflict, while climate displacement can build up over a period of time before, during, and after armed conflict.

The application of IHL becomes more complicated when population movement occurs across national boundaries. When a population moves across an international border due to climate stress, IHL protections diminish significantly because they are territory- or conflict-specific.[79] Additionally, for populations who have become stateless or lost their nationality due to their territory being rendered uninhabitable, the issues are heightened. Individuals experiencing these compounded vulnerabilities may receive little effective protection under IHL and may not clearly qualify for protection under international refugee law.[80] This indicates that refugee law, human rights law, migration law, statelessness law, and regional cooperation are more central to climate displacement than IHL itself.

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[77] Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation and Vulnerability*, AR6, Cambridge University Press, 2022.

[78] Cymie R Payne, "Climate Change, Armed Conflict and International Law", *Journal of International Humanitarian Legal Studies,* Vol. 7, 2021, p. 1.

[79] *Ibid*.

[80] Convention Relating to the Status of Refugees, 189 UNTS 137 (adopted 28 July 1951, entered into force 22 April 1954).

The Rohingya crisis is an example of this intersection of displacement, statelessness, and environmental vulnerability.[81] While the overwhelming reason for Rohingya displacement has been violence and persecution, many of the humanitarian risks and long-term protection solutions are now being exacerbated by climate stress in camps and surrounding regions.[82] It is used to demonstrate how conflict-induced displacement and statelessness can be exacerbated by the environmental and climate vulnerability of stateless people following the displacement event. This demonstrates the need for greater coordination between IHL, refugee law, IHRL, statelessness law, and disaster-risk frameworks.

Asia-Pacific Focus

The Asia-Pacific is particularly vulnerable to climate-induced displacement because of its geography, population density, and reliance on climate-sensitive livelihoods. The small island developing states in the Pacific are facing existential threats from rising sea levels and coastal erosion, as well as from severe weather events.[83] Whole communities are at risk of being uprooted permanently, and this situation poses an unprecedented array of legal issues regarding statehood, nationality, and civilian protection. Because IHL is focused on armed conflict, it offers little guidance for those who have been displaced by environmental harm caused by climate-related disasters as opposed to armed conflict.[84] The Pacific Islands therefore demonstrate the outer limits of IHL: the harms are severe, but they are not usually caused by armed conflict. Their legal issues are therefore addressed more directly through climate law, human rights law, the law of the sea, migration arrangements, and regional protection frameworks.

In South Asia, climate-related displacement can often intersect with the factors that cause conflict.[85] Large-scale internal population displacement in Bangladesh from floods, cyclones, and drought has resulted in increased migration to urban areas and to border areas. Competition over limited land, water, and jobs

[81] Rajbir Singh Dalal and Vinay Yadav, "The Rohingya Crisis: A Humanitarian Disaster and Its Impact on South Asia's Geopolitics", *Journal of Research in Humanities and Social Science*, Vol. 13, No. 1, 2025, pp. 140–143.
[82] United Nations High Commissioner for Refugees, *Rohingya Refugee Emergency* (UNHCR Situation Reports 2020).
[83] United Nations Economic and Social Commission for Asia and the Pacific, *Climate Change and Migration in the Pacific* (UNESCAP 2020).
[84] International Committee of the Red Cross, *When Rain Turns to Dust* (ICRC 2020).
[85] Asian Development Bank, *Climate Change, Migration and Adaptation in Asia and the Pacific* (Asian Development Bank 2012).

in those areas may contribute to social tension and localised violence, particularly in areas that are already considered fragile.[86] Such tension does not, however, automatically trigger IHL. Displaced populations do not fall within IHL protections unless the violence reaches the required level of intensity and organisation. This is why Bangladesh is analytically important: it shows how climate stress may generate insecurity and humanitarian need while remaining legally outside IHL.

The Bangladesh–India border areas are another example of the difficulties associated with climate change-related dislocation.[87] Climate-induced movement across national borders can create humanitarian needs without clear legal recourse, particularly where border responses are securitised.[88] Displaced persons may be treated primarily as "irregular" migrants rather than as persons requiring humanitarian protection, thus exposing them to potential detention, forced repatriation, and exploitation.[89] The problem is not only IHL's limited reach, but also the absence of a clear protection framework for people whose movement is triggered by climate stress, but who are neither refugees nor persons displaced by armed violence.

In general, the Asia-Pacific analysis highlights that climate displacement should not be artificially forced into IHL. Rather, IHL should be used judiciously where displacement has a strong linkage to armed conflict, and other legal regimes should be strengthened to deal with displacement arising from climate and environmental harm. This approach respects IHL's doctrinal limits while recognising the humanitarian consequences of climate-induced mobility.

Toward a Reformed IHL for the Anthropocene

Reform can only be undertaken with caution to avoid undermining the doctrinal coherence of IHL. Instead of proposing a wholesale expansion of IHL into areas it was not designed to cover, this article argues for a limited and complementary reform approach. IHL should be firmly grounded in the context of armed conflict, and more responsive to the environmental and climate conditions in which contemporary

[86] United Nations Office for the Coordination of Humanitarian Affairs, *Bangladesh: Climate Change and Displacement* (UNOCHA 2019).
[87] Devangana Gupta, Pankaj Kumar and Naoyuki Okano, "Climate-Induced Migration in India and Bangladesh: A Systematic Review of Drivers, Impacts, and Adaptation Mechanisms", *Climate,* Vol. 13, No. 81, 2025.
[88] UN High Commissioner for Refugees, *Protection Challenges in Mixed Migration Contexts in South Asia* (UNHCR 2021).
[89] International Organisation for Migration, *Climate Change and Migration in South Asia* (IOM 2020).

conflicts are fought. Against this background, climate-related conflict is better understood as requiring a coordinated framework drawing on IHL, IHRL, environmental law, refugee law, migration law, and international criminal law.[90] As the preceding sections have shown, while IHL is effective in regulating conduct during armed conflict, it does not adequately address the current effects of climate change, including climate-related violence, environmental degradation, and climate-related displacement. These do not all constitute doctrinal failures of IHL. Instead, they demonstrate that the boundaries of a conflict-specific legal regime become apparent when climate harm extends across peacetime, conflict, and post-conflict settings. These issues highlight a fundamental disconnect between IHL and an evolving world termed the Anthropocene, a period when human activity has significant effects on the Earth's environment and systems.[91] Instead, it outlines three narrower avenues for reform: interpretive development of IHL principles concerning proportionality, precautions, military necessity, and environmental protection; coordination between IHL and human rights, environmental, refugee, migration, and criminal law; and regional and domestic mechanisms that can translate existing obligations into practice in the Asia-Pacific and other climate-sensitive regions.

Emerging Norms and Proposals

Legal and advocacy groups increasingly support recognising "ecocide" as a new category of international crime to address severe environmental damage.[92] While definitions of ecocide vary, it can generally be interpreted to mean that there has been serious environmental damage that is widespread, long-term, or severe enough to threaten human life or ecosystem stability.[93] Advocacy by expert panels, civil society groups, and states has increased pressure to reconsider how international law responds to severe environmental harm. But ecocide needs to be carefully placed. Currently, it is neither a general principle of IHL nor an independent crime under the Rome Statute. It is more commonly known as a proposal in international criminal law, which could operate alongside IHL where environmental destruction occurs during armed conflict, but could also be used outside of armed conflict if it is adopted in the future. This distinction is important because traditional war crimes

[90] H. Duffy, et al., "Trials and Tribulations: Co-Applicability of IHL and Human Rights in an Age of Adjudication", in *Law Applicable to Armed Conflict*. Cambridge: Cambridge University Press (Max Planck Trialogues), 2020, pp. 15–105.
[91] Paul J. Crutzen, "Geology of Mankind", *Nature,* Vol. 415, 2002, p. 23.
[92] Rachel Killean and Damien Short, "A Critical Defence of the Crime of Ecocide", *Environmental Politics*, 2025.
[93] Stop Ecocide Foundation, *Proposed Definition of Ecocide* (Independent Expert Panel, 2021).

require a nexus to armed conflict, whereas proposed definitions of ecocide are generally designed to address severe environmental destruction whether hostilities exist.

Recognition of ecocide in international criminal law would mark a shift in how international law understands environmental harm.[94] Rather than focusing only on physical civilian suffering during armed conflict, this broader understanding of harm acknowledges that the environment is an integral part of both civilian protection and the maintenance of peace over a prolonged period. In many cases where conflict risks are shaped by climate change, there may have been significant environmental damage before the beginning of hostilities, as well as the continuation of significant environmental damage for many years after the armed conflict has ended.[95] Ecocide is therefore relevant to this article in three respects: First, it is a way of expressing a dissatisfaction with the existing environmental war crimes provisions in international law; second, it presents an alternative path for reform in international law (outside IHL); and third, it emphasises that environmental destruction is a humanitarian matter and not just an issue of environmental damage.[96] The practical implication is not that climate change should become a new trigger for IHL application. Rather, in situations of armed conflict, climate vulnerability should be taken into account when considering the foreseeable harm to civilians, proportionality, precautions in attack, military necessity, and the protection of objects indispensable to civilian survival.[97] This approach does not require rewriting existing treaties; rather, it requires interpretive practice that treats climate vulnerability as a legally relevant contextual factor where armed conflict already exists.[98]

Integrating Human Rights and Environmental Law

[94] Cymie R Payne, "Defining Environmental Damage as a War Crime", *Transnational Environmental Law, Vol. 7, 2018,* p. 175.

[95] Michael Bothe, Carl Bruch and Jordan Diamond, "International Law Protecting the Environment during Armed Conflict", *International Review of the Red Cross*, Vol. 82, 2010, p. 569.

[96] United Nations Security Council, *Maintenance of International Peace, and Security: Climate Change,* UN Doc S/PV.8451 (25 January 2019); Valerie Hase, Daniela Mahl and Mike S. Schäfer, et al., "Climate Change in News Media across the Globe: An Automated Analysis of Issue Attention and Themes in Climate Change Coverage in 10 Countries (2006–2018)", Global *Environmental Change,* Vol. 70, 2021.

[97] International Committee of the Red Cross, *The Protection of the Natural Environment in Armed Conflict* (ICRC 2020).

[98] Vienna Convention on the Law of Treaties, 1155 UNTS 331 (adopted 23 May 1969, entered into force 27 January 1980), Art. 31.

Greater collaboration between IHL and other bodies of law is necessary. The most effective reform will be enhanced coordination of the existing regimes rather than a single unified legal regime for different harms arising at different stages.[99] IHL, IHRL, and international environmental law have traditionally been treated as separate areas, but this separation is increasingly inadequate for complex humanitarian crises involving climate stress, displacement, environmental degradation, and armed conflict.

IHRL contributes principles of dignity, equality, non-discrimination, access to necessities, and state obligations to protect life, health, housing, water, food, and the environment. These principles can help bridge the protection gaps identified above, particularly where climate-related displacement or environmental harm falls outside the strict scope of IHL.[100] IHRL is not restricted to armed-conflict situations, but is applicable in peacetime and during armed conflict, albeit subject to derogations, limitations, and considerations about the relationship between *lex specialis* and *lex generalis*. This is particularly relevant when climate-induced damage has been felt before the start of armed conflict, or even after the armed conflict is over.

Recent developments in the UN human rights system recognise the relationship between climate change and the enjoyment of human rights.[101] Recognition of the human right to a clean, healthy, and sustainable environment reflects growing consensus that environmental harm directly affects life, health, water, and food.[102] Together with IHL, these principles can enhance the protection of civilians in conflict-affected and climate-vulnerable environments. They should not, however, be used to blur IHL's doctrinal boundaries. Instead, they can inform the interpretation and application of IHL where both regimes are relevant. Human rights principles, including non-discrimination and basic living standards, can inform the treatment of climate-displaced persons in conflict-affected regions, especially where IHL's application is uncertain.[103]

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[99] International Court of Justice, *Legality of the Threat, or Use of Nuclear Weapons* (Advisory Opinion) (1996) ICJ Rep 226 (25).

[100] Dinah Shelton, "Normative Hierarchy in International Law", *American Journal of International Law, Vol. 100, 2006,* p. 291.

[101] UN Human Rights Council, *Human Rights and Climate Change*, UN Doc A/HRC/41/21 (2019).

[102] UN General Assembly, *The Human Right to a Clean, Healthy and Sustainable Environment*, UN Doc A/RES/76/300 (28 July 2022).

[103] UN Office of the High Commissioner for Human Rights, *The Relationship between International Humanitarian Law and International Human Rights Law* (OHCHR Fact Sheet No 13).

In addition, environmental law also complements this integrated approach by providing a preventive, precautionary, and intergenerational basis for military decision-making in climate-vulnerable regions.[104] In situations where military operations could lead to irreversible environmental effects with substantial humanitarian consequences, the precautionary principle, environmental impact assessment, and responsibilities for prevention can be used to inform decisions. Together, these regimes provide a more coherent framework for addressing climate-related harms that intersect with armed conflict.

Regional Mechanisms and Soft Law

The region needs practical mechanisms to respond to the disproportionate impacts of climate change, including disaster risk, displacement, resource insecurity, and environmental degradation. Regional organisations and soft-law instruments cannot formally amend IHL, but can enhance its implementation, foster common standards, and adapt humanitarian and environmental protection principles to regional realities.[105] While there are very few binding regional treaties governing humanitarian law, regional forums increasingly recognise the relationship between climate change, security, and migration.[106]

ASEAN has adopted declarations and frameworks that support disaster response, humanitarian assistance, and regional cooperation.[107] Although none of these have directly reformed IHL, they do demonstrate an increasing acknowledgement of the human risks posed by climate-related disasters.[108] The ASEAN mechanisms may be further enhanced through the inclusion of principles on civilian protection, humanitarian access, protection of essential infrastructure, and environmental risk reduction, in conflict-affected and disaster-prone areas that are compatible with IHL. Embedding compatible principles of IHL within these regional mechanisms could better prepare states to protect civilians in climate-affected and conflict-affected settings.

Equally important, the Pacific Islands Forum has repeatedly identified climate change as a major threat to human security in its recent declarations, with particular concern for vulnerable populations.[109] But the Pacific Islands also illustrate

[104] Rio Declaration on Environment and Development (1992), principles 3 and 15.
[105] United Nations Economic and Social Commission for Asia and the Pacific, *Asia-Pacific Disaster Report* (UNESCAP 2021).
[106] UN Development Programme, *Climate Security in Asia and the Pacific* (UNDP 2019).
[107] ASEAN, *ASEAN Agreement on Disaster Management and Emergency Response* (AADMER) (2005).
[108] ASEAN, *ASEAN Declaration on Climate Change* (2007).
[109] Pacific Islands Forum, *Boe Declaration on Regional Security* (2018).

the limits of IHL. Sea-level rise, loss of habitable land, relocation, and potential for loss of statehood and nationality are among the most serious threats to Pacific communities, but not a result of armed conflict. These challenges require legal responses grounded primarily in climate law, human rights law, migration arrangements, the law of the sea, and regional cooperation, rather than IHL alone.[110]

Similarly, National Humanitarian Law Committees in Asia-Pacific states can support the integration of climate-related issues into domestic law. These committees can incorporate environmental protection and climate-risk awareness into domestic IHL laws, military manuals, rules of engagement, operational planning, and training programmes, without waiting for the amendment of the treaties. Because these committees promote and support IHL implementation, they provide an important opportunity to incorporate environmental protection and climate-risk awareness into domestic practice.[111]

Soft law serves a particularly important function, as it is non-binding but enables a process of normative development, regional experimentation, and gradual consensus-building. Soft-law mechanisms can offer a practical approach to enhancing environmental protection during armed conflict, where there is limited political willingness to amend formal treaties. This can encompass regional guidance on military operations in climate-sensitive areas, guidelines on wartime environmental damage, model legislation and guidance for armed forces, and regional protocols for humanitarian assistance for climate-affected IDPs.

A new approach to IHL for the Anthropocene should then be modest, plural, and implementation-based. It should continue to apply IHL's armed conflict threshold but should also give due consideration to the impact of climate vulnerability and environmental effects in the interpretation of existing IHL rules when IHL applies. Complementary legal regimes and regional mechanisms should be used to address harms not covered by IHL at the same time. This approach preserves doctrinal coherence while recognising the changing climate context in which humanitarian protection and military operations increasingly occur.

Conclusion and Recommendations

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[110] Pacific Islands Forum, *2050 Strategy for the Blue Pacific Continent* (2022); Jane McAdam, "Regional Approaches to Climate-Induced Displacement in the Pacific", *International Journal of Refugee Law, Vol. 29, 2017, p.* 1.

[111] International Committee of the Red Cross, *Integrating the Environment into Military Operations* (ICRC Guidelines 2019).

The discussion in the study has shown that shortcomings identified are not simply gaps in legal protection but also express internal structural aspects of international law. Though necessary in regulating armed conflict, the threshold-based application of IHL necessarily rules out a broad category of climate-related harms that do not amount to organised armed violence. Simultaneously, the division of international law into various regimes poses difficulties when it comes to solving problems that intersect established legal categories. This is not always an issue with IHL. Instead, it is an indicator that IHL is a specialised branch of law that governs armed conflicts, while many of the harms that stem from climate change occur before conflict has evolved, after conflict has concluded, or beyond the threshold of armed conflict. It is important to identify these structural dynamics to come up with responses that are not only legally sound but also practical.[112] This article has highlighted the increasing tension between IHL's threshold-based structure and the real-world complexity of climate-related violence. However, IHL developed around a more conventional paradigm of armed conflict; therefore, it continues to operate under that framework. Consequently, IHL is most effective in the regulation of the conduct of hostilities, and less so in the regulation of diffuse, cumulative, indirect, and slow-onset harms.

The analysis of IHL's traditional framework shows its limits in effectively addressing conflicts that involve or have been aggravated by climate stress and environmental issues. IHL is based upon very strict classifications of what a conflict is and subsequently has a very high threshold for what is appropriate for the application of the law to certain situations. Therefore, if a situation falls outside one of these classifications (the conflict is not officially recognised), IHL protection may not be triggered. This threshold should be maintained as a matter of doctrinal coherence, but this must be recognized, and its implications acknowledged: many communities facing humanitarian insecurity due to climate change could be outside IHL even if their humanitarian needs are extreme. Furthermore, despite the large potential humanitarian impact from environmental destruction, IHL contains environmental protections, but their enforcement remains limited. Where environmental harm is cumulative, indirect, or multi-causal, as opposed to immediate and obviously caused by a particular attack, accountability can be particularly difficult because of the high thresholds of certain provisions like Additional Protocol I Article 35(3) and 55, as well as the evidentiary and mental element requirements of international criminal law.

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[112] ICRC, "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts", *International Review of the Red Cross*, Vol. 106, 2024, p. 1357.

This study demonstrates that climate change displacement reveals deficiencies in the Civilian Protection Regime of IHL. People displaced by environmental harm are not automatically recognised as refugees or as victims of armed conflict, and these people will often experience the consequences of their 'invisibility' from existing legal definitions, especially in the Asia-Pacific region, where vulnerability to Climate Change is most pronounced. This invisibility manifests in the tangible form of people living in permanent displacement from low-lying Pacific Islands, or through the movement of people driven by Climate Change in regions such as the Borderlands of South Asia that are affected by armed conflict. However, the above examples should not be considered to be the same IHL issues. The displacement of Pacific Islanders gives rise to the major concerns of climate law, human rights law, migration law, statehood, nationality law, and regional protection arrangements. In contrast, South Asian Displacement illustrates the potential for the combination of climate stress with conflict risk, border securitisation, and localised violence not to trigger IHL conditions. These examples highlight that affected communities are living in a state of legal limbo, where they are not adequately protected by either humanitarian law or refugee law.

Climate Change must not be viewed as an external factor but as a key aspect of conflict in the modern world. The Anthropocene requires legal responses that can address diffuse, long-term, and interconnected harms to human security.

While this article seeks to demonstrate that comprehensive amendment of current IHL treaties is not required for reform and likely presents institutional and political obstacles, many of the principles and concepts already established within IHL can provide a mode of evolution. The principles of distinction, proportionality, precautions in attack, military necessity, and humanity can be given a more climate-sensitive interpretation, as can their need to consider foreseeable environmental consequences and civilian dependence on a fragile environment. This approach would enhance the protection of non-combatants while meeting the normative stability of existing IHL.

Greater coordination between IHL, human rights law, and environmental law is essential. Human rights law contributes principles of dignity, equality, non-discrimination, and access to necessities, which can help address protection gaps affecting climate-displaced persons. Environmental Law will continue to play a major role in assisting with Military Planning and Operations when operating in climate-sensitive locations. International criminal law, such as discussion on the

concept of ecocide, can also offer another avenue of accountability for high-level environmental devastation; ecocide is not an existing IHL rule, but a proposal for international criminal law reform. Taken together, these bodies of law offer a more comprehensive response to climate-related conflict and displacement without undermining the primary objectives of humanitarian law.

The Asia-Pacific region offers important opportunities for practical reform. Regional organisations, soft law instruments, and National Humanitarian Law Committees can significantly assist with incorporating climate-related considerations into IHL implementation. By revising military manuals, humanitarian processes, and establishing frameworks for regional collaboration, states can provide better protection for at-risk populations and additionally support the incremental development of global norms.

Specific frameworks of ASEAN disaster response and Pacific Islands Forum human-security initiatives, as well as domestic bodies for IHL implementation, can be given special attention in translating the general principles of humanitarian and environmental law into practice. Such mechanisms do not have the power to formally amend IHL, but they do have the potential to enhance compliance, ensure preparedness, and ensure regionally appropriate standards for climate-vulnerable and conflict-affected contexts.

On this basis, the study makes the following recommendations. Firstly, Environmental/Climate-risk assessment should be incorporated into military planning, targeting review, and operational training in times of armed conflict in climate-vulnerable areas, by states and military actors. Secondly, National Humanitarian Law Committees should revise their national implementation measures, military manuals, and training materials to incorporate protection of the natural environment and climate-sensitive civilian infrastructure. Thirdly, soft-law guidance should be created by regional organisations in Asia-Pacific in the context of humanitarian assistance, displacement, and environmental protection in the context of climate stress and conflict risk. Fourthly, policymakers must improve the linkages between IHL, human rights law, environmental law, refugee law, migration governance, and disaster-risk regimes—and avoid trying to shoehorn all climate-related harms into IHL. Fifthly, international criminal law debates on ecocide and environmental crimes should be worked out with due consideration to causation, attribution, *mens rea,* and the armed conflict connection. Lastly, there is a need to conduct more in-depth empirical case studies on Bangladesh, Myanmar, and other

communities in the Asia-Pacific region to better understand when climate-induced harm does not constitute IHL and when it does.

IHL is in a critical position today. It needs to be responsive to the humanitarian realities of climate change, environmental degradation, and displacement if it is to have meaning and effectiveness. Yet, adaptation should not become a rule of general climate governance, as IHL. It should indicate the need to use IHL more carefully and contextually, in the context of armed conflict, and the use of complementary legal regimes for harms outside of IHL. Therefore, environmental damage and climate-related displacement are both central humanitarian issues, but appropriate legal frameworks must be used to address them. This study considers several scholarly works that are calling for a climate-responsive approach to IHL, especially in the Asia-Pacific area. Further studies are needed that collect empirical data on the connection between climate stress and armed violence, build on detailed regional case studies, and explore new legal practice and jurisprudence concerning climate-related environmental damage in times of war. Such coordination enables IHL to preserve its humanitarian function while working alongside other legal regimes in a climate-changing world.

THE LIMITS OF COMPLICITY: STATE RESPONSIBILITY FOR AIDING IHL VIOLATIONS IN LIGHT OF THE COMMON ARTICLE 1 AND THE OBLIGATION TO ENSURE RESPECT

Sheikh Saaim Shahzad
Sadia Asif

ABSTRACT

The paper examines the obligation to respect and ensure respect under common article 1 of the Geneva Conventions, specifically addressing state responsibility for financial and military support to the violators of International Humanitarian Law. It analyses key jurisprudence from international courts and argues that the obligation should be extended to third-party states in both international and non-international armed conflicts across the globe.

Furthermore, the research highlights the legal implications of arms transfers and complicity using case studies. Lastly, the researchers advocate strengthening the 'ensure respect obligation' by mandating the cessation of support for actors violating the humanitarian principles.

1. Introduction

Since the start of human civilization, there has always been a fight for power and control between men. At first, it was on a small scale, tribal warfare, and city-states fighting amongst one another. However, with human evolution, this grew tenfold, with wars covering thousands of acres and affecting millions in their midst. While the paper does not aim to discuss the evolution of war over the course of human settlement on this planet, it aims to address an issue related to warfare that poses a serious threat to human existence in the contemporary world.

After the World Wars, the states vowed to reduce the conflicts and to try to resolve them through dialogue and diplomacy. The UN Charter effectively outlawed war between states unless forced to act in self-defence.[1] Although it was a great gesture to exemplify the unified goal of pacificism by the state parties to the UN Charter, it stood merely as a symbolic gesture, as it did not, in fact, rid the human

[1] Article 2(4), UN Charter.

race of the scourge of war. And currently, there are remnants of preceding and existing wars in almost all continental landmasses.[2]

However, modern warfare is quite complex and interlinked with not just two states or two groups engaged in combat, but multiple parties clashing at various levels. This ladder of support by various states is so twisted that the obligation to ensure respect for the Geneva Conventions by the Contracting Parties has been broken repeatedly. This raises numerous questions, most importantly, whether the states providing logistical and financial support for the actors or states violating the conventions should be held responsible for failing to fulfil their obligations under international law.

This paper will try to point out the fallibilities in the existing legal and diplomatic frameworks, while analysing the realities of various ongoing conflicts in the world to propose prospective developments in the field that will lead to holding responsible the states violating international law. However, the scope of the research has been limited to only financial support and arms trade to reach a more focused and feasible conclusion in light of the existing world order.

2. What are the Geneva Conventions?

The Geneva Conventions in their history predate the existing United Nations structure, although their focus initially was to merely protect civilians and the wounded soldiers from the scourge of war. Henry Dunant, known as the father of the International Humanitarian Law (IHL), advocated for the protection of wounded and medical personnel through his memoir of the Battle of Solferino.[3] And through his efforts, the First Convention was thus signed in 1864.[4]

Although the first convention was a significant step towards a regulated and humane war, it was far from a complete code for warfare. Over the next decades, the Conventions were expanded and revised to address the evolving realities of warfare since the world was rapidly developing following the Second Industrial Revolution (Technological Revolution). In 1906, a new convention was adopted to extend the existing legal framework to the conflicts at sea.[5] Subsequently, in 1929, inspired by

[2] War Watch, RULAC.
[3] Henry Dunant, A Memory of Solferino, ICRC 1959 (the French version was published in 1862 and was later translated into English).
[4] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, adopted 22 August 1864, entered into force 22 June 1865.
[5] Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, adopted 6 July 1906, entered into force 6 August 1907.

the effects of the First World War, or the Great War as it was called back then, the convention about the treatment of prisoners of war was introduced.

World War II drastically changed the global order and brought about an everlasting change for human civilization. Subsequently, the law of war was not immune to the change brought along with it. World War II not only forced the states to move to criminalize breaches of the existing laws of war but also laid the foundation for the modern International Criminal Law through the Nuremberg and Tokyo trials.[6]

Additionally, the atrocities and widespread suffering brought about by World War II emphasized the need for a more comprehensive and robust set of humanitarian laws. Thus, the 1949 Geneva Convention, built upon the existing treaties, was a monumental revision. There are four Conventions; the First Geneva Convention protects wounded and sick soldiers on land; the Second Geneva Convention extended the protection of wounded and sick soldiers to shipwrecked members of armed forces at sea; the Third Geneva Convention addresses the treatment of prisoners of war, whereas the Fourth Convention was a new introduction to the law of armed conflict. The convention protected civilians in times of war and those under occupation. This was a response to the devastating loss of civilian life sustained in World War II.

3. Respect and Ensure Respect: A Brief History

The core goal behind the conventions has always been to reduce the suffering during armed conflicts regardless of their status. One of the pivotal elements of the conventions has been the obligation of all the parties to always respect and ensure respect for the conventions.

There are certain provisions of the conventions referred to as the general provisions that remain largely common to all four conventions. The International Committee of the Red Cross (ICRC) placed these articles as principal provisions of a general nature that have been incorporated to enunciate the fundamental principles of the conventions.[7]

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[6] International Military Tribunal (Nuremberg); International Military Tribunal for the Far East (Tokyo).
[7] Report of the Conference of Government Experts of 1947, p. 332, and Draft Conventions submitted to the 1948 Stockholm Conference, p. 4.

Similarly, Article 1, being a part of the general provisions, remains common to all four conventions. The article imposes the duty on all Contracting Parties to respect and always ensure respect for the conventions. The initial conventions of 1864 and 1906 did not include such a provision. However, both these elements are deemed to be implicit in the 1864 Convention,[8] and that implicit obligation to respect and ensure respect was carried forward by reproducing the said provision in both the 1906 Geneva Convention[9] and the 1907 Hague Convention.[10]

The principle of pacta sunt servanda was expressly incorporated in the 1929 Conventions, which were complemented by the words 'in all circumstances.'[11] Subsequently, the said article was polished and moved to the prominent position of being the first article of all four Conventions. Moreover, the element to ensure respect was added to 'stress that if the system of protection of the Convention is to be effective, the High Contracting Parties cannot confine themselves to implementing the Convention' but 'must also do everything in their power to ensure that the humanitarian principles on which the Convention is founded shall be universally applied.'[12] Furthermore, this obligation is not restricted to the Geneva Conventions, but rather it qualifies as customary IHL as per the study by the ICRC.[13]

3.1. Scope of Application

> *The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.14*

It must be understood that the said provision is equally applicable in peacetime as it is in armed conflict. This is apparent by the obligation being addressed to the High Contracting Parties in a general manner rather than a specific address to the *parties to the conflict.* This stance is further strengthened by the discussions of the 1929 Diplomatic Conference.[15] The phrase "in all circumstances," also reflects the intention to extend the temporal scope of application for both peacetime and armed

[8] Article 8, Geneva Convention (1864).
[9] Article 25, Geneva Convention (1906).
[10] Article 19, Hague Convention (X) (1907).
[11] Article 25(1), Geneva Convention on the Wounded and Sick (1929); Article 82(1), Geneva Convention on Prisoners of War (1929).
[12] Draft Conventions submitted to the 1948 Stockholm Conference, pg. 5.
[13] Rule 139, Customary International Humanitarian Law, ICRC Study on Customary International Humanitarian Law (2005).
[14] Common Article 1, Geneva Conventions (1949).
[15] Proceedings of the Geneva Diplomatic Conference of 1929, pp. 329–330.

conflict. Additionally, Des Gouttes' French Commentary on the 1929 Convention indicates the desire of the treaty parties to extend the scope of such a provision to both wartime and peacetime.[16]

The phrase "in all circumstances" also serves to partially detach the application of the Conventions' rules from any principle of reciprocity. Put differently, a State's duty to comply with the Conventions is, as a general matter, not contingent upon an adversary or any other State's adherence to them. Although some scholars have questioned whether reciprocity has truly been eliminated from the law of armed conflict, there is broad consensus that most of the Conventions' obligations do not rely on reciprocal compliance.

Additionally, it is understood that the phrase 'in all circumstances' also points to the unconditional application of the Conventions. Thus, alluding that the obligations apply regardless of the casus belli (reason of war), whether the state fights as an aggressor or in self-defence.[17]

The doctrine of military necessity operates as a limited exception within IHL, permitted only where specific treaty provisions expressly allow it. For instance, Article 23(g) of the Hague Regulations authorizes the destruction or seizure of enemy property solely when **"imperatively demanded by the necessities of war."**[18] Read literally, the phrase "in all circumstances" in Common Article 1 might be taken to require compliance with the Geneva Conventions even where military necessity would otherwise be invoked to justify departure from certain rules. Such an interpretation reflects pre–Second World War theories that treated military necessity as a general principle capable of overriding legal obligations. That concept has since been rejected in modern IHL.

In the immediate post-war period, international and military tribunals consistently affirmed that military necessity or expediency cannot justify violations of positive rules of humanitarian law, including in the context of war crimes prosecutions. This jurisprudence has been reinforced in subsequent treaty law, which makes clear that military necessity may operate only where the applicable instrument explicitly recognizes its justificatory effect, and never as a general defence. Since

[16] Des Gouttes, Commentaire de la Convention de Genève de 1929 sur les blessés et malades, ICRC, 1930, p. 186.
[17] Lieber Institute, Articles of War, Common Article 1, Michael N. Schmitt and Sean Watts, April 12, 2024.
[18] www.icrc.org/ihl.nsf/FULL/195?OpenDocument.

1945, military necessity has accordingly been understood as legally relevant only in those limited situations where a treaty expressly provides for it[19]. The 1949 Geneva Conventions contain no general military necessity clause, and even if they did, a general obligation under Common Article 1 would not supersede a clear, specific provision authorizing such an exception.

The understanding of the phrase "the present Convention" extends to the nature of conflict. And the provision is not merely applicable to international armed conflict, which includes occupation under common Article 2, but the provision is also applicable to non-international armed conflict as per the common Article 3. Therefore, the obligation to respect and ensure respect extends to non-State groups as well, which has been affirmed by the International Court of Justice (ICJ) in the Merits Judgment of the Nicaragua Case.[20]

3.2. How to Ensure Respect?

The phrase 'respect' can be easily understood as directly imposing the obligations on a state to comply with the provisions and principles of IHL. This includes adherence to the cardinal principles of IHL and refraining from acts that might be in contravention of the said principles.

On the other hand, the 2016 ICRC Commentary on the First Convention points out that the expression 'ensure respect' has raised a variety of questions over the decades. It must be noted that the provision of ensuring respect goes beyond the State's own conduct and actually requires the State to act appropriately to ensure other States, armed groups or actors comply with and respect the Conventions. The late Professor Frits Kalshoven, in what is the most in-depth inquiry into the subject to date, concluded:

> The point remains that the primary legal obligation arising from common Article 1 is for States Parties to impose respect for the applicable rules of international humanitarian law, 'in all circumstances', on their armed forces, including armed groups under their control, and on their populations: for the

[19] US V List (Annual Digest, Vol XV, 647); Manstein (Annual Digest, Vol XVI, 511–513); The Peleus (Law Reports of Trials of War Criminals, Vol I); Additional Protocol I, Art 41(3).
[20] ICJ, Military and Paramilitary Activities in and against Nicaragua case, Merits, Judgment, 1986, para. 220.

> implementation of this obligation, they can be held legally responsible. No such legal liability attaches to their moral duty to endeavour to ensure respect by their peers. Since it is their right to do this under the law of treaties, they cannot be reproached for doing so either[21].

This position is also supported by the original commentaries to the 1949 Geneva Conventions prepared under the general editorship of Jean Pictet and published in the authors' private capacities between 1952 and 1960.[22] The position subsequently remains the currently prevailing view in the 2016 Commentary and is supported by the ICRC. This is quite broad compared to the preceding view on the phrase, which advocated for states to adopt all measures that are necessary to ensure respect only by their organs and private individuals within their own jurisdictions.[23]

The contemporary view is much more coherent and aligned with the goals of the legislators. Thus, the obligation to ensure respect encompasses significant obligations that directly address the state's support for violations. But to comprehend and to evaluate the obligations and their implications, the situations of direct state responsibility must be analysed.

4. Direct State Responsibility

A state is directly responsible under IHL for any violations of the Conventions that are attributed to it. The attribution to the state can be through multiple means.[24] Primarily, all acts committed by members of their armed forces would be directly attributable to the state, regardless of whether they operate domestically or overseas.[25]

Secondly, any violations by people or entities who are exercising government authority on behalf of the state are also attributable to the state that has authorized them.[26] Moreover, any violations by private actors that are acknowledged

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[21] Frits Kalshoven, The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit, 2 Yearbook of International Humanitarian Law 3, 7 (1999) at 60.
[22] Jean Pictet, Commentary on the First Geneva Convention, 1952, p. 26.
[23] ICRC, Commentary on the First Geneva Convention, Article 1, 2016, page 61.
[24] Jean-Marie, Louise Doswald-Beck, Carolin Alvermann, Knut Dörmann, and Baptiste Rolle. "Responsibility and Reparation (Rules 149–150)." Chapter. In Customary International Humanitarian Law, 530–50. Cambridge: Cambridge University Press, 2005.
[25] Diakonia International Humanitarian Law Centre, 'For whose actions is the state responsible?'.
[26] Ibid.

by the state as their own are attributable to the state. Under the Geneva Conventions, States are obligated to criminalise and prosecute grave breaches and be responsible themselves for any violations and crimes that might be committed by their agents.[27]

Additionally, any acts committed by people or groups acting under the state's instructions, direction or control are also attributable to the state. This is in line with the ICJ's stance established under the Nicaragua v. United States case, where the court stated that mere financing, training, equipping, and strategic guidance of armed groups is insufficient for full attribution of their acts to the supporting state.[28] It reiterated that the state providing support cannot be absolved of its responsibility for its own conduct in that regard.

The Court clarified that while "effective control" over specific operations is required for full attribution, supporting states remain responsible for their own unlawful assistance when they are aware of violations being committed by the groups they support.[29]

5. Jurisprudence on Aiding and Assisting: Analysis of ICJ Cases

The ICJ's jurisprudence provides insight into the established application of the common article in situations that involve the aiding or assisting of IHL violations.

5.1. Nicaragua v. United States (1986)

In this particular case, although the ICJ did not find the United States directly responsible for the IHL violations committed by the Contras, due to a lack of effective control over their specific operations. The court did hold the US responsible for its own conduct, particularly in encouraging violations by dissemination of a war manual on Psychological Operations in Guerrilla Warfare.[30] The ICJ held that the United States had obligations under Common Article 1 to ensure that the paramilitary forces it supported abided by Common Article 3 obligations, even when the United States was not itself a party to the conflict:

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[27] Practical Guide to Humanitarian Law, 'Responsibility' (Doctors Without Borders).
[28] Oona A Hathaway, Emily Chertoff, Lara Domínguez, Zachary Manfredi and Peter Tzeng, 'Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors' (2017) 95 Texas Law Review 539.
[29] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits) [1986], para. 392.
[30] Nicaragua v. United States of America (1986).

> The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to "respect" the Conventions and even "to ensure respect" for them "in all circumstances", since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions.[31]

The ruling by the international court established a precedent for the negative obligation under the common article 1 to refrain from encouraging violations. This further integrates the indirect support by states under the ambit of state responsibility.[32]

5.2. Wall Advisory Opinion (2004)[33]

The ICJ's Advisory Opinion on the Wall further clarified the external dimensions of the Common Article 1. The court reiterated that the states that are party to the Convention have a duty under Article 1 not only to respect the Convention but also 'to ensure that other parties also respect the Convention.'[34] The court further stated that this imposed a specific duty not to recognise the legal situation created by the Wall and not to provide aid or assistance for its construction. This stance by the court explicitly links the obligation to ensure respect with the obligations of non-recognition and non-assistance in maintaining illegal situations.[35]

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[31] Nicar. v. U.S, 1986 I.C.J. 14, para 220.

[32] Marko Milanovic, 'Common Article 1 Does Prohibit Complicity in IHL Violations, Through Arms Transfers or Otherwise' (EJIL: Talk! 15 April 2024).
https://www.ejiltalk.org/common-article-1-does-prohibit-complicity-in-ihl-violations-through-arms-transfers-or-otherwise/.

[33] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), (2004).

[34] Chatham House, The ICJ Advisory Opinion on the Wall: Summary of Discussion at the International Law Programme Discussion Group (26 November 2004).

[35] Amnesty International, 'Chapter 6: Settlements and Third State Responsibility' (30 January 2019) https://www.amnesty.org/en/latest/campaigns/2019/01/chapter-6-settlements-and-third-state-responsibility/.

The ICJ adopted an interpretation of Common Article 1 that points toward the existence of certain positive obligations for third States[36]. The Court held that Common Article 1 requires "every State party" to the Fourth Geneva Convention to take steps to "ensure that the requirements" of the Convention are respected:

> The Court would also emphasize that Article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.[37]

In applying this principle, the Court concluded that "all the States parties to the Geneva Convention … are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with IHL as embodied in that Convention."[38] The Court therefore expressly recognized that Common Article 1 imposes obligations on third States, namely, all High Contracting Parties, to take steps to halt Israel's violations of the Fourth Geneva Convention. This interpretation necessarily suggests the existence of a positive duty, particularly because many States Parties have no direct involvement in Israel's military operations in Palestine. Furthermore, the Court's qualification that such obligations must be fulfilled "while respecting the UN Charter" reinforces the ICRC's view that Article 2(4) of the Charter delineates the limits of permissible measures taken to ensure compliance with Common Article 1.

The Wall Advisory Opinion indicates that third states may be liable for their failure to take preventive action against foreseeable IHL violations by other states, but it must be stressed that advisory opinions are non-binding. Given the limited depth of the Court's analysis, the evident divergence among the judges, and the non-binding character of the findings as they relate to States not party to the proceedings, the judgment and the accompanying opinions provide only weak and unreliable support for the existence of an external dimension to the "ensure respect" obligation.[39]

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[36] Wall Advisory Opinion, 2004 I.C.J. 136, para 156–60.
[37] Wall Advisory Opinion, 2004 I.C.J. 136, para 158.
[38] Wall Advisory Opinion, 2004 I.C.J. 136, para 159.
[39] Wall Advisory Opinion, 2004 I.C.J. 136.

5.3. Bosnia v. Serbia (2007)[40]

Although the case particularly concerned the Srebrenica Massacre and whether the actions of the perpetrators could be attributed to Serbia. However, the Court discussed the element of ensuring respect under the Geneva Conventions. In this regard, the Court chose to include a due diligence obligation. The clause requires that states use all means reasonably available to prevent breaches by parties over which they have influence. The court set about a standard for this clause, which is that the state must prevent breaches by all means at its disposal, and this is dependent upon the capacity, relationship, and foreseeability of those violations to be committed.[41]

Specifically, about the issue of due diligence, the ICJ noted:

> A State cannot be under an obligation to succeed, whatever its circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide as far as possible.[42]

This reasoning yields two insights relevant to the interpretation of the obligation to ensure respect. First, compliance with the duty cannot be assessed solely by reference to the eventual outcome of a state's efforts. A State may employ "all means reasonably available" yet still fail to halt or prevent the violations in question. Accordingly, the obligation to ensure respect is one means of conduct, rather than a guarantee of results. Second, states seeking to ensure respect are required to take only those measures that are "reasonably" within their capacity in the circumstances and that are appropriate in light of the degree of influence they possess over the parties to the conflict.

A very useful summary of the principle of this case is provided by Tzevelekos.

> For the state to escape responsibility for lack of diligence, it needs to demonstrate that it did everything that was possible to fight wrongfulness. To comply with diligence, states need to suitably use

[40] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Judgment), (2007).
[41] ICJ, Bosnia v. Serbia, para 430.
[42] Case concerning application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgement) (2007) ICJ, para 430.

> the pertinent means at their disposal… due diligence generates obligations of means…[43]

6. Financial Support as a Potential Breach

Although the ICJ has previously absolved states of responsibility for any violations of IHL if they are merely financing the group or state that is actively committing such violations, this view would be in contravention of the opinion adopted by the ICRC with respect to the phrase 'ensure respect'. Moreover, this grey area in the law opened avenues for states to avoid any repercussions despite actively financing genocides and war crimes in other states.

The International Law Commission's Articles on State Responsibility (ARSIWA) have extended the responsibility by codifying the preceding view and diverging from the ICJ's stance in Nicaragua. Article 16 states that

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
> a. that State does so with knowledge of the circumstances of the internationally wrongful act; and
> b. the act would be internationally wrongful if committed by that State.[44]

While some elements of State responsibility under Article 16 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts are relatively straightforward, others are more complex. The concepts of aid and assistance are broad, encompassing the provision of weapons, logistical and technical support, financial assistance, and intelligence-sharing. Likewise, the requirement for a causal nexus is met whenever the aid or assistance makes a material contribution to the internationally wrongful act. The term "internationally wrongful" under Article 3 of ARSIWA encompasses acts such as the commission of war crimes. The most contentious element, however, is the knowledge requirement under Article 16.

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[43] Tzevelekos, V. (2013) Revisiting the Humanisation of International Law: Limits and Potential. Erasmus Law Review 1, para 73.

[44] Article 16, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83.

Part of the difficulty arises from inconsistencies in the ILC's treatment of the concept[45].

While Article 16 itself employs the term "knowledge," the ILC's commentary at times refers to intent rather than knowledge. Scholarly opinion and State practice are similarly divided. Under a knowledge-based interpretation, a state is complicit if it knowingly assists another state that will use it to commit internationally wrongful acts, including war crimes. By contrast, an intent-based interpretation requires that the assisting State act with the purpose of facilitating the wrongful conduct.

The obligations under Article 16 are further reinforced by Article 41, which prohibits a State from aiding or assisting in the maintenance of situations created by a serious breach of a peremptory norm (jus cogens) of international law. Such peremptory norms include, inter alia, the prohibition on acts of aggression, crimes against humanity, and genocide. This framework underscores that State assistance facilitating serious violations of fundamental international law can trigger both State responsibility and, in some cases, individual criminal accountability.

In practise, this means that any state that knowingly funds or arms a state to commit violations and breaches of the Geneva Conventions would make the state liable as well. The particular provision has a narrow scope and has been tailored to address state-to-state aid, but it reiterates the principles that States should not be intentionally facilitating violations of the Conventions.

Scholars argue that the difference between the obligations of Common Article 1 and Article 16 may not be so stark. The ARSIWA requires intent on the part of the state, but an oblique intent may suffice for imposing responsibility.[46]

In contrast, for Common Article 1-specific complicity, some arguments suggest that the subjective element of "intent" to facilitate the wrong is unnecessary. Instead, "knowingly contributing" or "conscious risk-taking akin to recklessness" is argued to be sufficient if the aid facilitates a serious IHL violation.[47]

[45] Intelligence Sharing in Multinational Military Operations and Complicity under International Law by Marko Milanovic 97 INT'L L. STUD. 1269 (2021).
[46] James Crawford, State Responsibility: The General Part (Cambridge University Press 2013).
[47] Milanovic (n 26).

7. Arms Trade as a Breach of IHL

Under International Law, arms trade deals are also a point of scrutiny if the trade deals are resulting in violations of the established law. The Arms Trade Treaty (ATT) of 2013 aimed to correct this issue in particular, as it imposed the obligation on states not to export arms that could, in turn, result in IHL violations, commission of genocide, war crimes, and crimes against humanity.[48] The treaty also imposes a duty upon the state parties to conduct a thorough risk assessment and deny any such arms transfer if there is an existence of an overriding risk that the arms could be used to commit IHL and human rights violations.[49]

Under customary international law reflected in the ARSIWA, a State incurs international responsibility when it aids or assists another State in committing an internationally wrongful act. Article 16 captures not only the transfer of weapons but also a wide spectrum of support that meaningfully contributes to wrongful conduct. Such support may include logistical, technical, or financial assistance, the sharing of intelligence, or the provision of equipment and other resources that enable or facilitate the commission of the unlawful act.

EU Member States are further constrained by the Council Common Position of 8 December 2008[50], which establishes uniform rules for the control of military technology and equipment exports. Under this framework, Member States are required, *inter alia*, to refuse an export license where there exists a clear risk that the military technology or equipment in question could be used to commit serious violations of IHL.

Members of the Organization for Security and Cooperation in Europe (OSCE), including the United States, are bound by the OSCE Principles Governing Conventional Arms Transfers (OSCE Principles) when making decisions regarding arms exports[51]. Principle 4 obliges States to "promote and, by means of an effective national control mechanism, exercise due restraint in the transfer of conventional arms and related technology." To implement this principle, States must consider a range of factors when assessing proposed arms exports and are required to refrain from any transfers that would contravene the criteria set out in the OSCE Principles. Failure by States to take preventive or corrective action may also amount to

[48] Article 6, Arms Trade Treaty, adopted 2 April 2013, entered into force 24 December 2014.
[49] Article 7, Arms Trade Treaty, adopted 2 April 2013, entered into force 24 December 2014.
[50] EUR-Lex - 02008E0944-20250415 - EN - EUR-Lex.
[51] https://www.osce.org/files/f/documents/3/6/42313.pdf.

complicity in internationally wrongful acts, including the aiding or abetting of international crimes. This, in turn, could expose senior officials of such States to individual criminal responsibility under Article 25(3)(c) of the Rome Statute of the International Criminal Court for aiding and abetting the commission of war crimes and crimes against humanity.[52]

The unfortunate truth about international law has always been the lack of uniform enforceability of the laws globally due to the absence of unanimity among states on different treaties. Similarly, the states that are involved in conflicts are not state parties to the treaties. Furthermore, the treaty does not provide any punishment for violation apart from international condemnation.

Although domestic judicial reviews were introduced in many countries as part of the integration of the treaty, the governments have rarely been forced to suspend their arms trade deals as a result. In the CAAT v. UK, the British government adopted a vague stance on arms deals, identifying the violations as isolated events and subsequently carrying on the trade deals.[53]

Although the EU regulations are much stricter in this regard, they are also not uniformly imposed on states, as national laws and state interests often override the protection of international law. A notable exception in this regard is the order by the District Court of The Hague, as well as the Hague Court of Appeal, for the Dutch government to suspend arms trade with Egypt due to its involvement in the violations of international law in Yemen.[54]

The Dutch government has also been stopped from selling F-35 parts to Israel by the Hague Court of Appeal due to the use of the aircraft in the bombing of Gaza. The court reversed a lower court's decision and held that the Minister of Foreign Trade had conducted an inadequate reassessment of an arms export permit. The HCA first focused on whether a "clear risk" of violations of IHL existed, as required under Article 2 of the EU Common Position on Arms Exports and Article 7 of the United Nations Arms Trade Treaty (ATT). Importantly, the court emphasized that judicial confirmation of actual violations is not required to establish

[52] Rome Statute of the International Criminal Court, July 17, 1998, United Nations Treaty Series, vol. 2187, no. 38544.
[53] R (Campaign Against Arms Trade) v Secretary of State for International Trade (2019) EWCA Civ 1020.
[54] PAX and Others v The State of the Netherlands, District Court of The Hague, 23 November 2021; PAX and Others v The State of the Netherlands, Hague Court of Appeal, 17 May 2022.

a clear risk; conditioning the assessment on past violations would render the standard meaningless.

According to the EU User's Guide, a determination of clear risk necessitates a thorough assessment of the recipient's past and present respect for IHL, their expressed intentions through formal commitments, and their capacity to ensure that the transferred equipment or technology is used consistently with IHL. In evaluating the risk, the court considered extensive evidence, including UN statistics on civilian casualties, destruction of infrastructure, hospitals, and water supplies, reports by UN Special Rapporteurs, and Amnesty International investigations concluding that attacks on civilian targets were indiscriminate.

The court also referenced statements by Israeli military officials regarding attacks on Gaza. Arguments by the Dutch government questioning the reliability of these sources were rejected. On this basis, the court concluded that the potential violations were grave, noting the scale of civilian casualties, destruction of residential areas, use of indiscriminate munitions, attacks on essential services, and the abandonment of prior limitations on collateral damage.

Following this finding, the court reaffirmed that the Dutch international commitments required the authorities to reassess the export permit in light of new circumstances arising after 7 October 2023. Although the EU Common Position and the ATT do not explicitly impose a general obligation to review permits, the court reasoned that failing to do so in the presence of a clear risk of grave IHL violations would defeat the purpose of these agreements. The court further held that such an obligation aligns with Common Article 1 of the Geneva Conventions, which requires States to ensure respect for IHL "in all circumstances," including by other States.

The court also found that the Minister had applied an improper assessment framework, giving undue weight to general foreign policy considerations, such as Israel's interest in preventing regional escalation and the Netherlands' desire to maintain relations with the United States and Israel. The court concluded that when a clear risk of IHL violations exists, the Minister must halt arms exports regardless of political considerations.

Finally, arguments by the Dutch government that plaintiffs lacked standing or that a cease order would breach contracts with the United States were rejected. The court emphasized that compliance with international obligations outweighs

contractual or political concerns, even in the context of complex multinational arms programs such as the F-35 fighter jet project.[55]

Apart from the Dutch courts, there is a lack of jurisprudence on such issues, and even in cases where the court orders either to halt sales or reconsider sales, they are seldom enforced due to policy reasons and the precedence of diplomatic relations over international relations.

8. Application of Common Article 1 in Non-International Armed Conflicts

It is important to address its potential application to non-international armed conflicts (NIACs), given their prevalence in contemporary conflicts. The text of Common Article 1 is broadly framed, obliging States to "respect and ensure respect for the present Convention in all circumstances," suggesting no inherent limitation on the types of conflicts or provisions to which the duty applies. Its placement at the beginning of the Conventions, preceding Common Articles 2 (international armed conflicts) and 3 (non-international armed conflicts), further supports a wide interpretation. Extending Common Article 1, including its external obligations, to NIACs aligns with the humanitarian purpose of the Conventions, as failing to do so would leave most contemporary conflicts without enforcement mechanisms[56].

Although there is substantial subsequent State practice supporting the existence of an external obligation under Common Article 1, the bulk of this practice has emerged in the context of international armed conflicts, most prominently in relation to the Israeli occupation of Palestinian territory. This has contributed to the perception that the obligation to "ensure respect" operates primarily, or even exclusively, within the inter-State paradigm. Nevertheless, more recent practice indicates a broader understanding of the obligation. In statements made before the UN Security Council and General Assembly, as well as in regional and multilateral instruments, several States have articulated the duty to ensure respect for IHL in terms that are not limited to international armed conflicts.[57] Instead, these

[55] Oxfam Novib and Others v The State of the Netherlands, Court of Appeal of The Hague, 12 February 2024.

[56] See, e.g., the latest analysis from the Uppsala Conflict Data Program comparing the number of interstate and intrastate conflicts (albeit defined non-legally) since 1946: S Davies, T Pettersson and MÖberg, 'Organized Violence 1989–2021 and Drone Warfare' (2022) 59 JPeaceRes 593, 597 (figure 3).

[57] Knut Dörmann and Jose Serralvo, "Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations," International Review of the Red Cross 96, no. 895/896 (2014): 707.

interventions frame Common Article 1 as applying to armed conflict as such, thereby encompassing non-international armed conflicts where serious violations occur.

While this practice remains less extensive and less consolidated than that relating to international armed conflicts, it nevertheless points towards an emerging acceptance of the external obligation's relevance beyond the traditional inter-State context.[58]. Explicit rejection of this position is also rare. The main instance often cited is the Canadian government and the Federal Court of Canada's suggestion, in the context of the non-international armed conflict in Yemen, that Common Article 1 does not apply to NIACs[59].

Yet this conclusion was reached without substantive reasoning. Both the government and the Federal Court of Canada relied on earlier Canadian jurisprudence, which stated that Common Article 1 does not impose obligations in the context of non-international armed conflicts where the State in question is not involved in the underlying hostilities. At the same time, this reasoning leaves open the possibility that Common Article 1 may still give rise to obligations in certain non-international conflicts where a State is sufficiently implicated.[60].

Overall, supporting practice for applying Common Article 1 to NIACs is less developed and less consistent than the practice relating to international conflicts. While few States have expressly opposed the broader interpretation, it is difficult to determine whether the silence of many States amounts to acquiescence. As a result, the level of "agreement" required under Article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT) appears weaker in this context.[61] Nonetheless, extending Common Article 1 to internal conflicts strongly advances the humanitarian object and purpose of the Geneva Conventions, which may compensate for the relatively limited supporting practice.

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[58] See, e.g., statements by States in UN fora and multilateral instruments extending Common Article 1 to all armed conflicts: UNSC S/PV.8953 (Scandinavian States); UNSC S/PV.8596 (Belgium); UNGA A/C.6/73/SR.16; Council of the European Union, User's Guide to Common Position 2008/944/CFSP (2015); ICRC, 30th International Conference (2007), Resolution 3.

[59] Daniel Turp v Minister of Foreign Affairs [2017], para 22 (on the government's submissions) and para 71 (on the Court's view).

[60] Turp (ibid) paras 22, 71–73, relying on Sinnappu v Canada (Minister of Citizenship and Immigration) [1997] 2 FC 791, where the Court rejected Common Article 1 claims without substantive analysis and emphasised Canada's lack of involvement in the Sri Lankan civil war.

[61] Vienna Convention on the Law of Treaties. May 23, 1969. United Nations Treaty Series, vol. 1155, no. 18232.

The *travaux preparatoires* of the 1949 Conventions provide little guidance on this issue. The preparatory works suggest that the drafters at the 1949 Diplomatic Conference did not envisage the application of Common Article 1 to non-international armed conflicts. The records indicate that the phrase "in all circumstances" was carried over from the 1929 Conventions chiefly to signal the abandonment of the *clausula si omnes*, a rule under earlier law whereby treaty obligations applied only if all belligerents were parties to the relevant convention.[62] and to reaffirm that the Geneva Conventions are applicable both in wartime and peacetime.[63] However, the ICRC also partly influenced Common Article 1 pre-1949 efforts to encourage States to promote respect for IHL among their populations, including in situations of civil war[64]. This indicates that there may be some historical foundation for extending Common Article 1 to non-international armed conflicts. Furthermore, the absence of a parallel provision in Additional Protocol II (as opposed to Additional Protocol I) does not undermine this interpretation. The draft of AP II was drastically narrowed in scope at the last minute during the 1974–77 Diplomatic Conference to prevent the negotiations from failing[65]. Consequently, the omission of certain provisions from AP II should not be given significant interpretive weight[66].

In conclusion, while State practice regarding NIACs is limited, the text, context, and humanitarian purpose of Common Article 1 support its applicability in such conflicts. This interpretation is also supported by the ICJ and other scholars[67]. Importantly, applying Common Article 1 to NIACs does not expand the substantive scope of the Conventions: third States must ensure respect only for provisions relevant to NIACs[68]. Moreover, the due diligence standard for positive obligations

[62] Hague Convention (IV) respecting the Laws and Customs of War on Land (1907) art 2, limiting the application of the Convention to conflicts between contracting powers where all belligerents were parties.

[63] F Kalshoven, 'The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit' (1999), 6–10.

[64] Kalshoven, Ibid., 13.

[65] S Sivakumaran, The Law of Non-International Armed Conflict (OUP 2012) 50–1.

[66] For the same point in a different context, see N Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (ICRC 2009) 29.

[67] See, e.g., Nicaragua para 220; HRC, Syria para 111; HRC, 'Situation of Human Rights in Yemen, including Violations and Abuses since September 2014' (9 August 2019), UNDoc A/HRC/42/17, para 11.

[68] GC I Commentary, 26, particularly given the absence of any actual discussion of the application of common art. 1 in non-international armed conflicts at the 1949 diplomatic conference, is a restatement of this point: that applying common art. 1 in internal conflicts cannot have the effect of extending every substantive provision to those situations, rather than that the provision itself cannot apply. Indeed, this was the ICJ's approach in Nicaragua, in which it held the US to be under an

means that third States with no involvement in an NIAC would generally discharge their duties without difficulty.

The ongoing Sudanese civil war provides a contemporary illustration of how States have failed to discharge their Common Article 1 obligations in the context of a non-international armed conflict. In late October 2025, the Rapid Support Forces (RSF) seized El Fasher, the last major Sudanese Armed Forces (SAF) stronghold in Darfur, triggering mass civilian displacement and reports of widespread killings and sexual violence. Although States have publicly condemned these atrocities and declined to recognize the RSF's self-proclaimed parallel government, such non-recognition has not prevented extensive indirect support that enables the RSF's continued operations.[69]

A complex regional network of complicity demonstrates the international dimension of the conflict. Despite formal denunciations, several States have allowed their territories, airspace, or commercial sectors to function as logistical corridors for the RSF's acquisition of arms, military equipment, and gold-smuggling revenue. This conduct directly engages the "duty to ensure respect" under Common Article 1, which, when interpreted in light of its drafting history and subsequent State practice, requires States not only to refrain from violating IHL themselves, but also to prevent their territory or resources from being used to facilitate violations by parties to the conflict.

Chad's role illustrates this tension. Early in the conflict, credible evidence emerged that airports in Amdjarass and Abéché were used for UAE-supported resupply flights to the RSF.[70] Although domestic pressure and SAF threats prompted Chad to scale back cooperation, illicit transfers through its northern regions continue, demonstrating a failure to adequately prevent support that contributes to ongoing IHL violations. Comparable patterns have emerged in Kenya, Uganda, South Sudan, and the Central African Republic (CAR). Kenyan- and South Sudanese-registered aircraft have delivered supplies to RSF-controlled Nyala; Ugandan-based operators have been linked to cargo flights carrying RSF material; and South Sudan has become a central conduit in the RSF's multi-billion-dollar gold-smuggling

obligation not to encourage others in the non-international armed conflict to violate common art. 3: Nicaragua, para 220.

[69] Eromo Egbejule, 'Dire warnings over aid and hunger following RSF's capture of Sudanese city' The Guardian (London, 12 November 2025) https://www.theguardian.com/world/2025/nov/12/sudan-north-darfur-aid-malnutrition-rsf-el-fasher-tawila.

[70] UNSC, 'Final report of the Panel of Experts on the Sudan' (15 January 2024) UN Doc S/2024/65 https://docs.un.org/S/2024/65

economy, which finances its military abuses. Even the CAR has been implicated as a potential emerging hub for external military assistance, facilitated in part by the Russia-aligned Wagner Group.

Collectively, these examples reveal a sustained failure of regional States to prevent their territory, infrastructure, and commercial networks from enabling RSF operations. Under an expanded reading of Common Article 1 applicable to NIACs, such omissions may constitute violations of the obligation to "ensure respect" for IHL. States cannot merely condemn atrocities; they must take proactive measures to disrupt support networks that materially contribute to war crimes and serious abuses. The Sudan case therefore demonstrates both the contemporary relevance of Common Article 1 in NIACs and the significant gap between its legal obligations and actual State practice.

9. The Current Global Scenario

In recent years, the world has changed dramatically, and armed conflict has become veiled and disguised under the pretext of diplomacy and trade. While states may posture themselves as the flagbearers of international law and human rights, their trade deals can easily be traced to be financing atrocities and violations of the Conventions in another state. Weapons deals are arming belligerent groups and states, further putting the international legal order under threat.

And while certain states are directly financing states or armed groups that are clearly violating the principles of the law of war with no repercussions whatsoever, they are evading responsibility merely on the argument that they do not exercise effective control over the actions of the perpetrators.

The hypocrisy of states has become more visible following the Israeli onslaught on the Palestinian population due to its conflict with Hamas. While there has been a gradual realisation by many states that their trade deals are financing the violations of international law, many of the global powers are still in denial of their complicity in the conflict, while also acknowledging the gravity of the situation.

The United Nations Special Rapporteur on the Occupied Palestinian Territories' 2025 report[71] provides one of the clearest contemporary illustrations of how extensive, multi-layered third-State involvement can sustain, enable, and legitimize atrocity crimes. The report characterizes the situation in Gaza as a "collective crime" perpetrated not only by Israel but also through the material, political, and economic participation of a range of third States whose support has been indispensable to the continuation of the assault and blockade. It documents that several States, including the United States, Germany, the United Kingdom, Italy, Canada, Australia, and others, continued to supply Israel with advanced weapons systems, precision-guided munitions, armoured platforms, surveillance infrastructure, and dual-use technologies, even after the ICJ's finding of a plausible risk of genocide established a legal duty of prevention and abstention under the Genocide Convention and Common Article 1 of the Geneva Conventions.

Some of these States simultaneously expanded intelligence-sharing agreements and military-industrial cooperation that directly reinforced Israel's operational capacity, facilitating aerial bombing campaigns and targeted operations in densely populated civilian areas.

Beyond arms transfers, the report highlights an entrenched ecosystem of foreign economic and technological support that has helped maintain the occupation's coercive architecture. International technology companies based in the U.S. and Europe continued supplying biometric, cyber-surveillance, and population-monitoring tools integrated into Israel's control of movement, biometric registries, and predictive policing systems across Gaza and the West Bank. These exports, including AI-enabled targeting platforms, have enabled the systematic identification, tracking, and mass detention of Palestinians, materially contributing to violations that the report describes as part of a broader system of domination.

Third States also maintained extensive trade relations, including in goods and components used in weapons production and border-control systems, thereby sustaining an economic environment that subsidizes and facilitates Israel's military capacity. Diplomatic shielding by powerful third States forms another pillar of complicity identified in the report. The United States, the United Kingdom, and others used their political influence in the UN Security Council and other multilateral

[71] A/80/492: "Gaza Genocide: a collective crime" – Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 by Francesca Albanese.

forums to block or dilute efforts seeking ceasefires, arms embargoes, accountability mechanisms, or international investigations, thereby prolonging the conditions under which violations occurred.

Several States also adopted domestic legal measures restricting or criminalizing criticism of Israeli policies, suppressing advocacy efforts by civil society and diaspora communities that sought to mobilize pressure and humanitarian relief.

The report further documented the deliberate sabotage of humanitarian mechanisms through restrictions on UNRWA and the humanitarian system. After unsubstantiated allegations against UNRWA staff, numerous States abruptly suspended or froze funding, despite being aware that such withdrawals would critically undermine the delivery of food, medical aid and shelter to a population experiencing famine and disease outbreaks, and despite subsequent investigations finding no evidence validating the allegations.

Some major donors replaced UN-mandated channels with parallel "humanitarian corridors" coordinated with Israel and foreign militaries, which the report finds were weaponized as tools of forced displacement, produced lethal crowd-control incidents, and repeatedly failed to deliver meaningful relief to starving civilians.

Taken together, the Special Rapporteur concludes that this constellation of military, economic, technological, diplomatic, and humanitarian involvement by third States has materially contributed to the continuation of mass atrocities in Gaza and the sustainability of Israel's occupation regime. This demonstrates a contemporary pattern in which third States do not merely fail to prevent violations but actively enable, shield, and sustain them, precisely the type of conduct that engages State responsibility under Articles 16 and 41 of the ILC Articles on State Responsibility and violates the negative obligation under Common Article 1 to refrain from providing assistance that contributes to serious IHL breaches.

Germany's support for Israel has become a focal point of this discourse. Although the historical and political basis of Germany's relationship with Israel is long-standing, the continuation of military cooperation during active hostilities has raised concerns about whether such assistance aligns with the duty to "ensure respect" for IHL. Germany has supplied defence equipment and dual-use items potentially deployable in Gaza, prompting allegations that it is facilitating the commission of serious violations. This debate took legal form in *Nicaragua v. Germany*

(2024)[72], where Nicaragua argued before the International Court of Justice (ICJ) that Germany's ongoing arms exports and diplomatic backing amounted to a failure to exercise due diligence under Common Article 1. Nicaragua contended that when a State knowingly supports a party engaged in conduct that poses a clear risk of serious IHL violations, it is no longer merely failing to influence its peer but may be actively contributing to internationally wrongful acts.

By contrast, Germany invoked the narrower interpretation of Article 1, one closely reflected in the analysis of the Lieber Institute[73], that the legal obligation under Common Article 1 pertains primarily to ensuring respect by a State's own organs and forces, whereas efforts to influence other States fall within a political or moral sphere rather than a legally enforceable one. Under this reading, Germany argued that it cannot be held legally responsible for not compelling another sovereign State, Israel, to alter its military strategy.

The ICJ did not grant provisional measures against Germany, but the Court's reasoning nonetheless reflected a degree of unease. While it refrained from finding Germany in violation, the Court noted the "plausibility" of serious violations occurring in Gaza. This acknowledgement, although limited, has significant implications: it suggests that where the risk of violations is patent and well-documented, States cannot rely exclusively on a narrow reading of Article 1 to justify continued support without scrutiny. In other words, even if the obligation to influence peers is not strictly enforceable as a matter of treaty law, the combination of customary developments, due diligence principles, and the broader objectives of IHL may collectively raise the standard of conduct expected from States.

States like Spain have cut off weapons trade deals with Israel on the grounds that they do not want to be complicit in the violations that it may be committing.[74] While others are pressing for sanctions and suspension of arms deals, some states are outright refusing to accept the existence of humanitarian law violations despite

[72] Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v Germany) (Provisional Measures, Order of 30 April 2024) https://www.icj-cij.org/case/193

[73] Michael N Schmitt and Sean Watts, 'Common Article 1 of the 1949 Geneva Conventions' (Articles of War, 12 April 2024) https://lieber.westpoint.edu/common-article-1-1949-geneva-conventions/

[74] Jerusalem Post Staff, 'Spain Halts Arms Sales to Israel as Pressure Mounts to Cancel Contracts' (The Jerusalem Post, 23 October 2024).

international lawyers and rapporteurs categorically taking the stance that the situation on the ground resembles genocide and must be prosecuted by the courts.[75]

Former State Department spokesman for the United States, Matthew Miller, is on record as stating that while Israel is not committing a genocide, it has 'without doubt' committed war crimes in Gaza. He also acknowledged that the USA could have done more to prevent deaths in Gaza. Miller was a public face for the Biden government's staunch support for Israel, while it flattened the Occupied Territories to rubble and killed tens of thousands of Palestinians. This raises a question on why the United States continued to arm Israel despite there being a realisation in the power circles of the fact that the military aid was being directly attributed to hostilities. The irony of this situation remains that the United States actually has laws that restrict military aid to countries in violation of human rights.[76]

Regarding Common Article 1 and NIAC, Sudan's recent proceedings before the International Court of Justice (ICJ) further illustrate the external dimension of Common Article 1 obligations in the context of the Sudanese civil war. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in Sudan (Sudan v. United Arab Emirates),*[77]Sudan alleges that the UAE has provided extensive financial, political and military support to the RSF, support which Khartoum claims has enabled mass killings, systematic rape and the forced displacement of the non-Arab Masalit community in West Darfur.

The conflict has produced one of the world's gravest humanitarian catastrophes, with tens of thousands killed, over 12.4 million displaced, and famine and disease overwhelming what remains of Sudan's basic services. Sudan argues that the UAE's alleged conduct amounts to complicity in genocide and has requested provisional measures requiring the UAE to take all steps within its power to prevent further atrocities by the RSF and allied militias. While the case proceeds under the Genocide Convention, its factual assertions underscore the broader principle that States must not, through action or omission, facilitate serious violations of IHL by parties to a non-international armed conflict.

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[75] Al Jazeera, 'Ex-Biden Official Says, "Without Doubt" Israel Committed War Crimes in Gaza' (3 June 2025).

[76] US Department of State, 'Export Controls and Human Rights Initiative Code of Conduct Released at the Summit for Democracy' (30 March 2023).

[77] Application of the Convention on the Prevention and Punishment of the Crime of Genocide in Sudan (Sudan v United Arab Emirates) (Provisional Measures, Order of 5 May 2025).

This aligns with the external limb of Common Article 1, reinforcing that States have a positive obligation to withhold support, restrict the use of their territory, and prevent material contributions to IHL violations committed by armed groups.[78]

10. The Way Forward

While Article 3(e) of the Genocide Convention[79] incriminates the complicity in genocide, there is little to no formal global legislation that incriminates the complicity through financing in armed conflicts. ARSIWA, despite addressing this, is merely a set of draft articles and lacks legal enforceability. The European Union has an existing framework under the Council Common Position 2008/944/CFSP,[80] which lays out eight binding criteria to be assessed before authorization of any arms exports. However, even European states escape the restrictions under this framework, as licensing of such arms deals remains a national subject.

Unfortunately, the global order is not poised in a manner that would encourage international treaty-making; however, the realization by states that to comply with the obligation to ensure respect under the Geneva Conventions could actually be a step forward in ensuring better enforcement of IHL.

Even though judicial decisions of the International Court of Justice are not binding upon the ICJ itself, they have immense importance in the development of international jurisprudence and act as a source of law under the ICJ Statute.[81] The mere fact that the court has recognised the applicability of the ensure respect clause to extend to states to ensure that no breaches of international law by all means at their disposal, should be enough to acknowledge that the scope of effective control goes beyond the restrictive definition of effective control in preceding decisions.

Although the scope and the applicability of the ensure respect clause of the Common Article 1 is not particularly codified, the actions of states do reiterate the fact that states are not to engage in such acts that may result in IHL violations by

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[78] Vibhu Mishra, 'World Court begins hearing Sudan's case accusing United Arab Emirates of "complicity in genocide"' (UN News, 10 April 2025) https://news.un.org/en/story/2025/04/1162066

[79] Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, entered into force 12 January 1951.

[80] Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, (2008).

[81] Article 38, Statute of the International Court of Justice, annexed to the Charter of the United Nations, adopted 26 June 1945, entered into force 24 October 1945.

third parties. Thus, recognising an *opinio juris* is required for making a particular law a customary international law. The current codified customary law rule[82] on ensuring respect only recognises the scope of the rule to the limit of those on whom there is a level of control by the state party in question, this rule can be developed in light of the current state practise by numerous states to cut off arms deals with the violators of international law and once it is codified it acquires a particular level of recognition internationally.

11. Conclusion

Although the Rome Statute of the International Criminal Court allows for individual criminal responsibility for aiding and abetting war crimes, there is a lack of effective legislation that restricts and incriminates states for aiding such acts. And even though the International Law Commission's Articles on State Responsibility (ARSIWA), particularly Article 16, and the Arms Trade Treaty aim to hold states accountable, their effectiveness is limited. ARSIWA, being merely a set of draft articles, lacks legal enforceability, whereas the Arms Trade Treaty has no provisions for punishment beyond international condemnation. Furthermore, many states involved in conflicts are not even parties to these treaties.

Despite the apparent weaknesses, the principle of 'respect and ensure respect' as enshrined in the Common Article 1 of the Geneva Conventions offers a promising avenue for strengthening IHL and its applicability to states. This obligation requires states to do everything in their power to ensure that humanitarian principles are universally applied and is not limited to the state's own conduct but rather extends to the actions of other states and armed groups.

Despite the ICJ not attributing complete responsibility for violations by armed groups they support in the absence of 'effective control', it has emphasized that states have a duty to prevent breaches by parties over which they may have influence, using all reasonable means. This evolving interpretation demonstrates that the scope of effective control may be expanding. The increasing practise of cutting off arms trade deals with states that are violating international law by states like Spain, Ireland, and the Netherlands demonstrates a developing legal custom or opinio juris.

[82] Rule 144, Customary International Humanitarian Law, ICRC Study on CIHL (2005).

To bridge the gap between legal theory and practical enforcement, it's crucial to solidify this emerging customary international law. This could be achieved by codifying the "ensure respect" clause to explicitly include the obligation of states not to engage in acts, such as financial and arms support, that may subsequently lead to IHL violations by third parties.

Although the current global order may not be conducive to a new international convention, there is an apparent trend of powerful states acknowledging the violations of international law and resultantly leading to cutting off ties with violators. Thus, leveraging the immense importance of ICJ jurisprudence and the actions of states can strengthen the legal precedent.

Ultimately, holding states responsible for their complicity in atrocities is essential to upholding the foundational goals of the Geneva Conventions, to reduce suffering and ensure respect for human life during armed conflicts.