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## Back in the Game: International Humanitarian Lawmaking by States

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# Back in the Game: International Humanitarian Lawmaking by States

Yahli Shereshevsky\*

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*This Article is the first to identify and analyze the recent tendency of States to use unilateral, non-binding lawmaking initiatives in the context of international humanitarian law (IHL), also known as the law of armed conflict. While there was minimal direct State involvement in IHL-making initiatives in the first decade of the twenty-first century, in recent years States have taken an active part in IHL making. This Article analyzes the policies of two States that stand in the middle of this debate—the United States and Israel—to provide a detailed account of contemporary State-led IHL making. This Article argues that these new initiatives are an attempt by States to regain their influence over IHL from non-State actors. This suggests three broad implications for international lawmaking by States. First, unilateral lawmaking documents might be adopted more often as an alternative to traditional lawmaking and soft law initiatives when contracting costs are high. Second, the new lawmaking initiatives tend to adopt non-State actors' strategies to influence the debate, as an expression of States' internalization of the horizontal nature of contemporary international lawmaking. Third, States often cooperate with non-State actors that share their interpretive positions in the international lawmaking process.*

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## INTRODUCTION

Contemporary asymmetric armed conflicts have created constant pressure to reshape international humanitarian law (IHL), also referred to as the law of armed conflict (LOAC).<sup>1</sup> This Article discusses the role of States in the debate over the regulation of contemporary armed conflicts, exploring their recent attempts to regain influence in the creation and interpretation of IHL.

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<sup>1</sup> For brevity, I use IHL throughout this Article rather than “the law of armed conflict.”

The significant role of non-State actors in international lawmaking, and specifically in IHL making, has been widely recognized. The International Committee of the Red Cross' (ICRC) Customary International Law Study is one example of significant non-State contributions to contemporary IHL.<sup>2</sup> In contrast to the increasing participation of non-State actors, Michael Schmitt and Sean Watts argue that States are currently reluctant to directly participate in the process—that “the guns of State IHL *opinio juris* have fallen silent.”<sup>3</sup> This reluctance does not mean that States are failing to assume legal positions on contemporary issues. Instead, it suggests a reluctance by their executive branches to offer an official, elaborate, and comprehensive legal analysis of these positions, and to actively participate in the debate over IHL. While States were indeed reluctant to directly engage in the making of IHL in the first few years of the twenty-first century, States have recently begun to directly (re)engage in the making of IHL.

There are several ways to view this story. One explanation suggests that the Obama administration engaged with IHL more deeply than its predecessor.<sup>4</sup> Another sees it as an attempt by IHL and international human rights lawyers to maintain relevance in the executive decision-making process.<sup>5</sup> This Article offers a broader insight into international lawmaking. It explains the ability of non-binding non-State actors' initiatives to influence international law and argues that States have internalized the ways in which the lawmaking efforts of non-State actors are effective. The new direct engagement in the lawmaking process is of a different nature than previous efforts. First, it is based on unilateral lawmaking initiatives rather than on multilateral lawmaking efforts. Second, it manifests through active conversations over the interpretation of IHL norms in asymmetric conflicts. States realized that without direct engagement they would lose the battle over contemporary IHL. They understood that they are only one player, although a prominent one, in the battle of persuasion, and decided to play the game rather than try to disqualify other actors. By following these non-traditional lawmaking initiatives—by acting like non-State actors—the gap between State and non-State lawmaking has narrowed dramatically.

The Article suggests that, under the following conditions, States are incentivized to engage in significant unilateral lawmaking initiatives. First, States acknowledge that there are (or expect that there will be) lawmaking initiatives by non-State actors. Second, the State has a significant interest in the issue. Third, the substance of these non-State actors' initiatives contrasts with the State's

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<sup>2</sup> JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, ICRC: CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005) [hereinafter ICRC CUSTOMARY STUDY].

<sup>3</sup> Michael N. Schmitt & Sean Watts, *The Decline of International Humanitarian Law Opinio Juris and the Law of Cyber Warfare*, 50 TEX. INT'L L. J. 189, 191 (2015).

<sup>4</sup> See generally Ashley S. Deeks, *The Obama Administration, International Law, and Executive Minimalism*, 110 AM. J. INT'L L. 646 (2017).

<sup>5</sup> See generally Naz K. Modirzadeh, *Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance*, 5 HARV. NAT'L SEC. J. 225 (2014).

position on the issue. Fourth, there are no competing influential legal accounts by non-State actors that exist or are expected to be created. Fifth, the costs of traditional lawmaking methods or soft law initiatives are high and as a result the creation of unilateral outputs is more efficient. If these conditions are met, it is reasonable to expect that individual States will invest in unilateral lawmaking initiatives.

It is yet to be seen whether States will successfully regain their influence over the direction of contemporary IHL. Nevertheless, this novel form of engagement tells an important story about the relationship between State and non-State international lawmaking and its potential transformation from a hierarchical to a more horizontal model.

This Article proceeds as follows: Part I describes the influence of non-State actors' lawmaking initiatives on IHL, addressing the main non-traditional methods that are used and the different actors that take part in the lawmaking effort. Part II discusses the reluctance of States to directly engage in active IHL-making initiatives in the first decade of the twenty-first century and demonstrates the recent direct engagement of States in the making of IHL. In doing so, it focuses on two key States in this area: the United States and Israel. This Part first describes the indirect involvement of States in IHL making prior to the new lawmaking initiatives and then discusses the unique nature of the new initiatives. Finally, it offers rational and psychological explanations for the influence of non-State actors' initiatives despite their non-binding nature, suggesting that contemporary State engagement in IHL making is a result of States' internalization of the ability of non-State actors to significantly influence the law.

Part III offers three insights into international lawmaking based on recent State IHL-making initiatives. The first applies the soft law theory regarding the costs of unilateral lawmaking initiatives. This theory suggests that while the impact of non-binding sources might be less than that of hard law, such initiatives are attractive when the contracting costs of passing binding laws are higher than the expected difference in the ability to influence the behavior of relevant actors. This Article argues that unilateral outputs reduce the costs of international lawmaking even more than joint soft law initiatives. As a result, when contracting costs are high, unilateral outputs become an increasingly attractive avenue for international lawmaking.

The second insight addresses the growing similarities between State and non-State lawmaking projects, suggesting that the gap between State and non-State lawmaking initiatives has dramatically narrowed. This Article discusses various examples of such similarities, including features such as heavy footnoting, reliance on significant (and sometimes continuous) review by external experts, publishing the initiatives as online open access documents, and conducting and participating in workshops and conferences that relate to the documents.

The third insight relates to the role of interpretive communities in the new lawmaking process. This Article demonstrates how States and the community of

lawyers that this Article refers to as “LOAC lawyers”<sup>6</sup> cooperate to promote their preferred interpretation of IHL. The Article suggests that when a non-State actor publishes an initiative, it is seen as more impartial than when a State does. Therefore, the State would rather disseminate its preferences through non-State actors because of the facade of impartiality that a non-State actor is assumed to provide. In any case, when the initiative of a non-State actor does not pose a significant threat to the State’s preferences, there is no strong incentive for the State to actively engage in these initiatives—although non-State actors that share the interpretive positions of States wish for States to actively engage in lawmaking to increase the impact of such positions. In this regard, the Article focuses on IHL-making initiatives in the context of cyber operations. This third insight provides a discussion beyond lawmaking as State versus non-State actors, and considers the battle over IHL in which State and non-State actors cooperate on both sides of the debate.

## I.

### NON-STATE ACTORS IN INTERNATIONAL HUMANITARIAN LAWMAKING

The idea that international lawmaking is a State-centric endeavor has long been the subject of debate.<sup>7</sup> Even authors who continue to stress the key role of States in international lawmaking also recognize the growing influence of non-State actors.<sup>8</sup> This Section focuses on the increasingly acknowledged influence of non-State actors’ lawmaking initiatives on IHL during the past two decades.<sup>9</sup> This Article adopts a broad definition of non-State actors that includes all international actors that are not States. This includes international governmental organizations, which are often distinguished from non-State actors.<sup>10</sup>

Not all non-State actors are the same. They include international tribunals, international organizations, NGOs, expert groups, and individual academics. These actors differ in their international legal status and relative influence on international lawmaking. In some contexts, there are good reasons to analyze them separately. For example, Sandesh Sivakumaran has recently argued that there

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<sup>6</sup> See *infra* Part III.C.1; see also David Luban, *Military Necessity and the Cultures of Military Law*, 26 LEIDEN J. INT’L L. 315, 316 (2013) (referring to this community as “military lawyers,” although there are also civilians who share a similar vision).

<sup>7</sup> See, e.g., ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 62–77 (2007); Duncan B. Hollis, *Why State Consent Still Matters – Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT’L L. 137, 145 (2005); Jose E. Alvarez, *The New Treaty Makers*, 25 B. C. INT’L COMP. L. REV. 213 (2002).

<sup>8</sup> See, e.g., Jean d’Aspremont, *International Lawmaking by Non-State Actors: Changing the Model or Putting the Phenomenon into Perspective?*, in NON-STATE ACTOR DYNAMICS IN INTERNATIONAL LAW: FROM LAW-TAKERS TO LAW-MAKERS 171, 176 (Math Noortmann & Cedric Ryngaert eds., 2010) [hereinafter FROM LAW-TAKERS TO LAW-MAKERS].

<sup>9</sup> See Math Noortmann & Cedric Ryngaert, *Introduction: Non-State Actors: International Law’s Problematic Case*, in FROM LAW-TAKERS TO LAW-MAKERS, *supra* note 8, at 1, 2.

<sup>10</sup> For a discussion that refers to international organizations as non-state actors in the context of international lawmaking, see generally Hollis, *supra* note 7.

should be three categories of actors: States, State-empowered entities, and non-State actors.<sup>11</sup> State-empowered entities are defined as “entities that States empowered to carry out particular functions,” such as the International Court of Justice (ICJ), the International Law Commission (ILC), the ICRC, and the UN Human Rights Committee (HRC).<sup>12</sup> There are important differences between such entities and other non-State actors in the sense that usually State-empowered entities’ participation in international lawmaking is both more justified and influential than other non-State actors’ participation.<sup>13</sup> Nonetheless, this Article maintains the binary distinction between States and non-State actors. Being a State-empowered entity is merely one of the many factors that affects the level of influence of the entity on international law. Indeed, Sivakumaran recognized the potential influence of specific “pure” non-State actors such as the International Law Association (ILA).<sup>14</sup> Such pure non-State actors and State-empowered entities often share the same methods of treaty interpretation, identification of customary law, and the creation of soft law.<sup>15</sup> Specifically, as Part I.C demonstrates, in the context of IHL making, all types of non-State actors can usually be associated with the “humanitarian” side of the tension between military restraint and military necessity. Thus, the direct engagement of States in IHL making is to a large extent a response to the aggregated effort of this diverse group of non-State actors.

Despite its broad discussion of non-State actors, this Article will not address non-State armed groups. Even though armed groups are clearly relevant to the discussion of contemporary IHL, and a growing body of literature addresses a potential increased role for armed groups in IHL making,<sup>16</sup> this discussion lies outside the scope of the Article for two reasons. First, armed groups have led very few significant lawmaking initiatives. Second, State lawmaking initiatives have focused to a large extent on State conduct rather than on non-State armed groups’ conduct. For example, the debate over detention and targeting has focused mainly on detention and targeting by States. As a result, the States’ initiatives that this Article discusses are not a reaction to armed groups’ lawmaking efforts, but rather a reaction to other non-State actors’ lawmaking initiatives.

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<sup>11</sup> See Sandesh Sivakumaran, *Beyond States and Non-State Actors: The Role of State Empowered Entities in the Making and Shaping of International Law*, 55 COLUM. J. TRANSNAT’L L. 343 (2017).

<sup>12</sup> *Id.* at 346.

<sup>13</sup> See *infra* Section I.A.

<sup>14</sup> Sandesh Sivakumaran, *The Influence of Teachings of Publicists on the Development of International Law*, 66 INT’L & COMP. L. Q. 1, 7–8 (2017).

<sup>15</sup> See Sivakumaran, *supra* note 11, at 358–62.

<sup>16</sup> See, e.g., Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 YALE J. INT’L L. 107 (2012); Sophie Rondeau, *Participation of Armed Groups in the Development of the Law Applicable to Armed Conflicts*, 91 INT’L REV. RED CROSS 649 (2011).

A. *State and Non-State IHL and the Rise and Decline of Traditional IHL Making*

The tension between State and non-State IHL dates back to the emergence of modern IHL in the mid-nineteenth century. Two competing narratives can be traced regarding the birth of the modern regulation of war.<sup>17</sup> One narrative starts with Henry Dunant, then a Swiss businessman, as the main protagonist. The formative event of this narrative is Dunant's experience witnessing the aftermath of the battle of Solferino in 1859, which inspired him to write *A Memory of Solferino* and to establish the International Committee for Relief to the Wounded in the Event of War in 1863.<sup>18</sup> This later became the ICRC.<sup>19</sup> The basic legal document emerging from this narrative is the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.<sup>20</sup> In the second narrative, Francis Lieber, a professor at Columbia University, is the main protagonist. The formative event of this narrative is the American Civil War, and its basic legal document is Army General Order 100, more famously known as the Lieber Code.<sup>21</sup>

These two different narratives not only represent a battle between Eurocentric and American visions of the regulation of warfare,<sup>22</sup> but also the battle over the role of State and non-State actors in such regulation. The first narrative celebrates the role of non-State actors in the regulation of warfare. The story of

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<sup>17</sup> See Rotem Giladi, *Rites of Affirmation: Progress and Immanence in International Law Historiography* (unpublished manuscript) (on file with author). These narratives, naturally, are not the only possible description of the emergence of the modern regulation of warfare, nor do they present the only two founding documents of the codification of warfare. See, e.g., Eyal Benvenisti & Doreen Lustig, *Taming Democracy: Codifying the Laws of War to Restore the European Order, 1856–1874* (2017) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2985781](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2985781) (suggesting that the codification of the laws of war was mainly an effort by European governments to maintain their authority and pointing to the Paris Declaration of 1856 as the “first important initiative in the codification of the laws of war”).

<sup>18</sup> See HENRY DUNANT, *A MEMORY OF SOLFERINO* 116–17 (American Red Cross trans., International Committee of the Red Cross 1959) (1862), [www.icrc.org/en/doc/assets/files/publications/icrc-002-0361.pdf](http://www.icrc.org/en/doc/assets/files/publications/icrc-002-0361.pdf).

<sup>19</sup> See, e.g., MARCO SASSÒLI, ANTOINE A. BOUVIER & ANNE QUINTIN, *1 HOW DOES LAW PROTECT IN WAR* chs. 1, 3 (3d ed. 2011) (“It is commonly agreed that modern, codified international humanitarian law (IHL) was born in 1864, when the initial Geneva Convention was adopted.”). The book then describes Henry Dunant's experience in Solferino and the creation of the 1864 Geneva Convention.

<sup>20</sup> Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 75 U.N.T.S. 31.

<sup>21</sup> WAR DEP'T, *GENERAL ORDERS 100: INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD* (1863); see, e.g., GARY D. SOLIS, *THE LAW OF ARMED CONFLICT* 50 (2d ed. 2016) (“Much of LOAC that has followed—the Hague Regulations of 1899, the first Geneva Convention of 1864, even the 1949 Geneva Conventions—owes a substantial debt to Francis Lieber and his 1863 code.”). The book starts with a discussion of the Lieber Code and only then discusses the first Geneva Convention. *Id.* at 44–52. See also JOHN FABIAN WITT, *LINCOLN'S CODE – THE LAWS OF WAR IN AMERICAN HISTORY* 2–3 (2012) (describing the Lieber Code as “the foundation of the modern laws of war”).

<sup>22</sup> Giladi, *supra* note 17, at 8–9, 15.

the battle of Solferino emphasizes the prominent role of neutral voices who visit the battlefield as impartial actors who aim to decrease the calamities of war. The second narrative emphasizes the prominence of States in this process. The story of the Lieber Code highlights State-made laws of war as being key to the effective regulation of State conduct. Indeed, arguably more than any other branch of international law, IHL involves continuing engagement and interaction between State and non-State actors. These narratives also represent competing views on the balance between military necessity and humanitarian considerations in the regulation of armed conflicts.

In both histories, the modern regulation of warfare was achieved primarily through treaty law.<sup>23</sup> The Geneva Conventions are one of the main symbols of international law as a whole, and the existence of a Hague Law and a Geneva Law, named after the relevant conventions, is another indication of the prominence of treaty law in modern IHL. The story of modern IHL is to a large extent a story of its main treaties, from the 1864 Geneva Convention, to The Hague Regulations and the Four Geneva Conventions, to the two Additional Protocols. The prominence of IHL treaty law led to significant cooperation between non-State actors (especially the ICRC) and States. The lawmaking efforts of non-State actors focused on influencing the processes that led to the creation of the main IHL treaties and to some extent on the work that analyzes these treaties, such as the commentaries to the Geneva Conventions and the Additional Protocols.<sup>24</sup> Since only States can create such treaties, this focus on treaty law also maintained the perception of States as the main—and perhaps the only—actors that create IHL.

However, in recent decades, there has been a significant decline in the role of treaty law in the regulation of armed conflicts. Except for several treaties that focus on narrow subjects or the amendment of existing treaties,<sup>25</sup> there has been

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<sup>23</sup> Monica Hakimi, *Custom's Method and Process: Lessons from International Humanitarian Law*, in *CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD* 148, 153 (Curtis A. Bradley ed., 2016); Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare*, 20 *DUKE J. COMP. & INT'L L.* 339, 340 (2010).

<sup>24</sup> INT'L COMM. RED CROSS, COMMENTARY ON THE GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD (Jean S. Pictet ed., 1952); INT'L COMM. RED CROSS, COMMENTARY ON THE GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA (Jean S. Pictet ed., A.P. de Heney trans., 1960); INT'L COMM. RED CROSS, COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (Jean S. Pictet ed., 1960); INT'L COMM. RED CROSS, COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIANS PERSONS IN TIME OF WAR (Jean S. Pictet ed., 1958); INT'L COMM. RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz, Christophe Swinarski, & Bruno Zimmermann eds., 1987).

<sup>25</sup> See, e.g., Convention on Cluster Munitions, Dec. 3, 2008, 48 I.L.M. 357; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S. 172.

no significant treaty-making effort since the creation of the two Additional Protocols in 1977. And the prospects for new IHL treaties are minimal. The main IHL treaties are mostly focused on international armed conflicts, while contemporary conflicts mostly involve States and non-State armed groups.<sup>26</sup> The ability to create treaties to regulate such conflicts has proven time and again extremely difficult due to the clear differences in interests among actors. As a reflection of this difficulty, Common Article 3 to the Geneva Conventions and the Second Additional Protocol are the only IHL treaty protections in non-international armed conflicts.<sup>27</sup> The prominence of conflicts between State and non-State actors, and specifically the emergence of transnational armed conflicts between State and non-State armed groups at the beginning of the twenty-first century, initiated a widespread debate over the ability of IHL norms to account for this new reality.<sup>28</sup> Despite different positions regarding the need for a new treaty, there was a near consensus on the practical impossibility of creating a new IHL treaty to regulate such conflicts.<sup>29</sup>

The absence of a specific treaty to address the new reality of conflicts and the vagueness regarding the applicable norms in such conflicts opened the door to alternative lawmaking efforts. As further explained in the next Section, interpretation of existing treaty norms, identification of customary law, and soft law became central to the discussion regarding the regulation of contemporary conflicts. A variety of actors played a significant role in the battle over the desirable interpretation and application of IHL norms in this challenging context. While the role of States in making treaty law is clear and prominent, their role in interpreting existing law and in identifying customary IHL is more ambiguous. Indeed, as Schmitt and Watts argue, in contrast to the creation of IHL treaty law, the vast majority of the actors who took part in the contemporary debate were non-State actors.<sup>30</sup> The contribution of these actors to the development of the law

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<sup>26</sup> See, e.g., CHRISTINE CHINKIN & MARY KALDOR, *INTERNATIONAL LAW AND NEW WARS* 242 (2017); Marco Sassoli, *Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law*, 1 J. INT'L HUMANITARIAN L. STUD. 5, 5 (2010).

<sup>27</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 3518–20; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

<sup>28</sup> See generally Harold Hongju Koh, *The Emerging Law of 21<sup>st</sup> Century War*, 66 EMORY L. J. 487, 489 (2017); Charles J. Dunlap Jr., *Do We Need New Regulations in International Humanitarian Law? One American's Perspective*, 25 J. OF INT'L L. OF PEACE AND ARMED CONFLICT 121 (2012) and Anna Di Lellio & Emanuele Castano, *The Danger of "New Norms" and the Continuing Relevance of IHL in the Post-9/11 Era*, 97 INT'L REV. RED CROSS 1277 (2016); see also Benvenisti, *supra* note 23, at 344.

<sup>29</sup> See, e.g., W. H. BOOTHBY, *CONFLICT LAW* 72 (2014); John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT'L L. 201, 205 (2011); Emily Crawford, *From Inter-state and Symmetric to Intrastate and Asymmetric: Changing Methods of Warfare and the Law of Armed Conflict in the 100 Years Since World War One*, 17 Y.B. INT'L HUMANITARIAN L. 95, 112 (2014).

<sup>30</sup> Schmitt & Watts, *supra* note 3, at 191–92.

of transnational conflict was dramatic, well recognized, and widely discussed.<sup>31</sup> It is one of the clearest symbols of the rise of non-State actors in the international lawmaking process. The next Section briefly describes how these alternative lawmaking methods enable a greater role for non-State lawmaking efforts.

### B. *The Main Methods of Non-State IHL Making*

This Section focuses on three main lawmaking methods that non-State actors use to influence IHL making. It addresses the actual effect of non-State actors on IHL making, regardless of their formal ability to create international law,<sup>32</sup> since non-State actors' influence on IHL discourse lies at the heart of the recent direct State engagement in IHL making.

#### 1. *Treaty Interpretation*

Even with a conservative reading of the role of non-State actors in treaty making, their influence on international lawmaking through treaty interpretation should be taken into account. Although positivists will argue that treaty interpretation only discovers relevant law, and does not create law by itself,<sup>33</sup> scholars today generally agree that the interpretive process shapes the law.<sup>34</sup> For example, where there are several reasonable interpretations available, the decision to interpret a treaty in one way or another is similar to creating the treaty obligation. When the obligations in a treaty are vague, there is greater opportunity to influence the interpretative process. In many areas of international law, taking into account the lack of interpretive hierarchy and the absence of an authoritative interpretive institution, the interpretive process is open to many actors and not only to States.<sup>35</sup> It becomes an arena for a battle of persuasion. Sometimes, actors who are perceived as less invested in the specific question, or who possess significant legitimacy and prestige, enjoy an advantage in promoting their interpretations of the law. A paradigmatic example in this regard is the ICJ; its interpretations have gained much force in the international legal community and actively shape the understanding of specific treaty obligations even though it has no formal interpretive authority beyond binding the parties to the specific case.<sup>36</sup>

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<sup>31</sup> See, e.g., Hakimi, *supra* note 23, at 149; Schmitt & Watts, *supra* note 3, at 192–93 (discussing the various non-state actors that have a significant role in shaping IHL).

<sup>32</sup> For a normative discussion of the desirability of non-state actors' participation in the making of IHL, focusing specifically on the role of armed groups, see Sivakumaran, *supra* note 14 (arguing for a limited role of armed groups in the making of IHL).

<sup>33</sup> See INGO VENZKE, HOW INTERPRETATION MAKES INTERNATIONAL LAW 16 (2012); Gleider Hernandez, *Interpretive Authority and the International Judiciary*, in INTERPRETATION IN INTERNATIONAL LAW 166, 176 (Bianchi et al. eds., 2015).

<sup>34</sup> VENZKE, *supra* note 33, at 16; Hernandez, *supra* note 33, at 166.

<sup>35</sup> For an elaborated account of the different non-state interpretive actors, see, e.g., VENZKE, *supra* note 33, at 64–71; Michael Waibel, *Interpretive Communities in International Law*, in INTERPRETATION IN INTERNATIONAL LAW 146, 155 (Bianchi et al. eds., 2015).

<sup>36</sup> See, e.g., Christian J. Tams, *The ICJ as a 'Law-Formative Agency': Summary and Synthesis*, in THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE 377, 385–86

The role of the treaty bodies in the interpretation of international human rights law (IHRL) provides another notable example of such influence.<sup>37</sup>

## 2. Identifying Customary International Law

The international legal community is engaged in a continuous debate over the methods of identifying international customary law. It seeks to define and establish the appropriate balance between State practice and *opinio juris*. An abundance of recent scholarship on these questions suggests that this debate is here to stay.<sup>38</sup> As with treaty interpretation, even though it is accepted that the scope of customary law is restricted to State practice that is followed out of a sense of legal obligation, the identification of State practice and *opinio juris* in a non-hierarchical legal world enables different actors, including non-State actors, to shape the scope of international legal obligations.<sup>39</sup> Here again, the ICJ and other international tribunals serve as paradigmatic examples of non-State actors defining the scope of existing customary law.<sup>40</sup> The role of the ILC with respect to the identification and creation of customary law is also widely recognized.<sup>41</sup>

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(Christian J. Tams and James Sloan eds., 2013).

<sup>37</sup> See Kasey L. McCall-Smith, *Interpreting International Human Rights Standards - Treaty Body General Comments as a Chisel or a Hammer*, in TRACING THE ROLE OF SOFT LAW IN HUMAN RIGHTS 27 (Stéphanie Lagoutte et al. eds., 2017).

<sup>38</sup> A strong indication of the contemporary importance of the debate over customary law is the decision of the ILC to work on the subject of identification of customary international law. See U.N. GAOR, Rep. of the Int'l Law Comm'n, 63d Sess., Apr. 2–June 3, July 12–Aug. 12, 2011, Annex A, ¶ 3, U.N. Doc. A/66/10; U.N. GAOR, 66th Sess., Supp. No. 10 (2011). For a partial list of contemporary literature on customary law see, for example, CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD 34 (Curtis A. Bradley ed., 2016); Stefan Talmon, *Determining Customary International Law: The ICJ's Methodology Between Induction, Deduction and Assertion*, 26 EUR. J. INT'L L. 417 (2015); Piere-Hughes Verdier & Erik Voeten, *Precedent Compliance and Change in Customary International Law: An Explanatory Theory*, 108 AM. J. INT'L L. 389 (2014).

<sup>39</sup> See, e.g., Hakimi, *supra* note 23, at 163 (Curtis A. Bradley ed., 2016) (“Because CIL finding and CIL making are intertwined, non-state actors who are charged with finding CIL sometimes play a significant role in making CIL.”); Curtis A. Bradley, *Customary International Law Adjudication as Common Law Adjudication*, in CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD 34 (Curtis A. Bradley ed., 2016).

<sup>40</sup> See, e.g., Bradley, *supra* note 39, at 36; Stephen J. Choi & Mitu Gulati, *Customary International Law: How Do Courts Do It?*, in CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD 117, 135 (Curtis A. Bradley ed., 2016) (demonstrating that in a large number of cases, international courts refer to previous case law as evidence of the scope of customary international law); Tams, *supra* note 36, at 385–86; Roozbeh (Rudy) B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, 21 EUR. J. INT'L L. 173 (2010) (suggesting that the jurisprudence of the international criminal tribunals is perceived to represent customary international law).

<sup>41</sup> See, e.g., Laurence R. Helfer & Timothy Meyer, *The Evolution of Codification: A Principal-Agent Theory of the International Law Commission's Influence*, in CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD 305 (Curtis A. Bradley ed., 2016); HUGH THIRLWAY, *THE SOURCES OF INTERNATIONAL LAW* 19 (2014); Fernando Luca Bordin, *Reflections of Customary International Law: The Authority of Codification Conventions and the ILC Draft Articles in International Law*, 63 INT'L & COMP. L.Q. 535 (2014).

### 3. *Soft Law*

Soft law is a vague concept. Although it has been discussed in the international law literature for decades,<sup>42</sup> its exact scope and definition remain controversial.<sup>43</sup> Definitions of soft law range from binary distinctions between binding and non-binding sources<sup>44</sup> to a spectrum of softness and hardness along the lines of precision, obligation, and delegation.<sup>45</sup> Specifically, when it comes to the role of non-State actors in international lawmaking, it is not clear to what extent documents that are solely created by non-State actors are part of the common understanding of soft law.<sup>46</sup> Nonetheless, while significant segments of the literature focus on soft law that was directly created by States or intergovernmental institutions—for example, the 1992 Rio Declaration on Environment and Development<sup>47</sup>—there is also much discussion regarding the creation of soft law by non-State actors. This latter discussion addresses, *inter alia*, the role and influence of international organizations, treaty bodies,<sup>48</sup> industry groups, NGOs,<sup>49</sup> and decisions from international tribunals.<sup>50</sup>

In addition, the notion of soft law lessens the force of strict positive accounts of international lawmaking, blurring the scope of binding and non-binding norms. Indeed, it becomes more difficult to maintain a strict, formalist approach to the sources of international law, including the scope of actors that can take part in international lawmaking. As Christine Chinkin recognized, the “acceptance of normative standards articulated through soft forms of lawmaking entails recognition that the rigid control of States over the process is weakening.”<sup>51</sup> In

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<sup>42</sup> See, e.g., C. M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850 (1989); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413 (1983); R. R. Baxter, *International Law in "Her Infinite Variety"*, 29 INT'L & COMP. L.Q. 549 (1980).

<sup>43</sup> See Gregory Shaffer & Mark A. Pollack, *Hard and Soft Law*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 197, 198–202 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013) (describing the main approach to the definition of soft law).

<sup>44</sup> See Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 174 (2010).

<sup>45</sup> Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000).

<sup>46</sup> See Guzman & Meyer, *supra* note 44, at 201; Kenneth W. Abbott, *Commentary: Privately Generated Soft Law in International Governance*, in INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: BRIDGING THEORY AND PRACTICE 166, 175 n.8 (Thomas J. Biersteker et al. eds., 2007) (“Some definitions of ‘soft law’ encompass a role for privately generated norms, although few analyze the phenomenon in detail.”).

<sup>47</sup> United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, Aug. 12, 1992, U.N. Doc. A/CONF.151/26/Rev.1.

<sup>48</sup> BOYLE & CHINKIN, *supra* note 7, at 213.

<sup>49</sup> See, e.g., *id.*; JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WHIPPMAN, INTERNATIONAL LAW – NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 93 (2010).

<sup>50</sup> See, e.g., Guzman & Meyer, *supra* note 44.

<sup>51</sup> Christine Chinkin, *Normative Development in the International Legal System*, in COMMITMENT AND COMPLIANCE 21, 24 (Dinah Shelton ed., 2000).

this regard, it should be noted that it is not always possible to distinguish between expansive definitions of soft law, treaty interpretive projects, and customary law studies. The discussion of non-State IHL making that follows does not attempt to do so.

The following Section briefly describes the different non-State actors that take part in this debate. The discussion does not necessarily address the different non-State actors in order of their relative influence on IHL making.

### C. *The Role of Different Non-State Actors in Contemporary IHL*

The contemporary involvement and influence of non-State actors in IHL making has been extensively discussed in recent years.<sup>52</sup> The discussion primarily involves the three methods of lawmaking referenced in the previous Section: treaty interpretation,<sup>53</sup> the identification of customary international law,<sup>54</sup> and the creation of soft law.<sup>55</sup> In order to avoid merely rehashing that discussion, this Section briefly describes different non-State actors' initiatives, focusing mainly on aspects that have not received sufficient attention in the existing literature. As a result, the length of the discussion does not necessarily represent the relative importance of the specific non-State actor. For example, the role of IHL scholars is discussed in depth, while their actual influence on IHL is clearly less significant than other actors, such as the ICRC or international tribunals.

#### 1. *The ICRC*

The ICRC has always been a significant player in the creation of IHL norms. It has a unique role, different from all other non-State actors, and is often described as the guardian of IHL.<sup>56</sup> While its key contributions to IHL are mostly related to its role in facilitating the creation of the main IHL treaties, its own publications gained much influence, to the extent that the ICRC Commentary on

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<sup>52</sup> For general accounts on the role of non-State actors in international humanitarian lawmaking, see, for example, Bruce 'Ossie' Oswald, *The Copenhagen Process: Some Reflections Concerning Soft Law*, in TRACING THE ROLE OF SOFT LAW IN HUMAN RIGHTS 109, 112–118 (Stéphanie Lagoutte et al. eds., 2017) (discussing both state and non-state actor initiatives); Schmitt & Watts, *supra* note 3, at 195–209; Eyal Benvenisti, *The Legal Battle to Define the Law on Transnational Asymmetric Warfare*, 20 DUKE J. COMP. & INT'L L. 339, 345–48 (2010).

<sup>53</sup> See, e.g., NILS MELZER, INT'L COMM. RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009) [hereinafter INTERPRETIVE GUIDANCE].

<sup>54</sup> See, e.g., ICRC CUSTOMARY STUDY, *supra* note 2.

<sup>55</sup> See Peter Vedel Kessing, *The Use of Soft Law in Regulating Armed Conflict - From Jus in Bello to 'Soft Law in Bello'?*, in TRACING THE ROLE OF SOFT LAW IN HUMAN RIGHTS 129 (Stéphanie Lagoutte et al. eds., 2017) (describing the main soft law IHL initiatives of the last two decades).

<sup>56</sup> See, e.g., Ban Ki-moon, *The ICRC and the Changing Humanitarian Landscape*, 94 INT'L REV. RED CROSS 1251, 1251 (2012); Dieter Fleck, *International Accountability for Violations of the Jus in Bello: The Impact of the ICRC Study on Customary International Humanitarian Law*, 11 J. CONFLICT & SEC. L. 179, 191 (2006). *But see* W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 NYU J. INT'L L. & POL. 769, 795 (2010).

the Geneva Conventions was mistakenly referred to by the US Supreme Court as “The Official Commentaries” of the Geneva Conventions.<sup>57</sup>

However, it seems that there is something new about ICRC projects developed over the past two decades. Although using different methodologies, forms, and substances, these projects share a main characteristic: they are all unilateral ICRC documents that aim to provide a comprehensive (and maybe even authoritative) account of IHL. Each of the three main projects<sup>58</sup> has had, or will soon have, a significant influence on IHL and enhances the role of the ICRC as a key actor in the making of IHL.

The first of these projects, the ICRC Customary International Humanitarian Law Study,<sup>59</sup> is perhaps the most influential project by a non-State actor on contemporary IHL. In 2005, the ICRC published a two-volume study containing its analysis of existing customary IHL norms in international and non-international armed conflicts. While the study, as discussed below, was the subject of methodological and substantive criticism, it is widely recognized as having a significant influence on the accepted view of existing customary IHL norms.<sup>60</sup> In fact, it is one of the primary examples used in the literature on non-State actors’ influence on customary international law.<sup>61</sup>

The second project is the ICRC Interpretive Guidance on Direct Participation in Hostilities. Beginning as a project with active participation from a diverse group of experts and ending as a unilateral ICRC publication, the ICRC Interpretive Guidance is one of the most influential interpretive projects on one of the most debated areas of asymmetric conflicts: the targeting of non-State armed groups’ members. The contemporary debate over this subject started soon after the United States and Israel began to deploy a policy of targeted killings in 2002. In 2003, the ICRC began its work on the Interpretive Guidance. Since its publication in 2009, it has become the main reference point for any discussion of the subject.<sup>62</sup> Even prominent critics of the project recognize its significant influence over the debate, including the introduction of new concepts that govern

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<sup>57</sup> Hamdan v. Rumsfeld, 548 U.S. 557, 631 (2006).

<sup>58</sup> I focus here on the three main ICRC projects of recent years. There are other important projects that are of relevance to this paper, such as the series of reports entitled “International Humanitarian Law and the Challenges of Contemporary Armed Conflicts.” INT’L COMM. RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS (2015), <https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts>.

<sup>59</sup> ICRC CUSTOMARY STUDY, *supra* note 2.

<sup>60</sup> See, e.g., Hakimi, *supra* note 23, at 160 (describing the influence of the ICRC Customary Study on states and on international and national courts).

<sup>61</sup> See, e.g., Sivakumaran, *supra* note 11, at 358; Tullio Treves, *Customary International Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 62 (November 2006) (referring to the ICRC Customary Study as an example of a particularly authoritative codification).

<sup>62</sup> The Israeli Supreme Court’s *Targeted Killings* case was the main document in this regard until the creation of the Interpretive Guidance. See HCJ 769/02 Public Comm. against Torture in Isr. v. Gov’t of Isr. IsrSC 62(1) (2006) (Isr.) [hereinafter *Targeted Killings* case].

discussion of the subject. These include the notion of organized armed groups and the concept of continuous combat function (CCF).<sup>63</sup>

The new commentaries on the four Geneva Conventions of 1949 and the two Additional Protocols of 1977 are the third and most recent project. It is a huge project that is expected to be completed by 2021. The two commentaries that have already been published on the first two Geneva Conventions consist of thousands of pages. It is too soon to determine the future impact of the project, but the significant attention that the project is already receiving is a clear sign of the importance and potential effect of the commentaries.<sup>64</sup>

## 2. *International Tribunals*

International tribunals have contributed greatly to the development of IHL.<sup>65</sup> The decisions of international tribunals are formally a subsidiary source of international law, affirming existing laws and norms.<sup>66</sup> The lawmaking role of international tribunals in practice—through the interpretation of existing norms and the identification of customary international law—is almost a truism in contemporary international law scholarship.<sup>67</sup> It has been specifically recognized in the context of IHL.<sup>68</sup> While the ICJ is a key non-State player in international lawmaking and has contributed to the development of IHL, other international tribunals have greatly influenced this field as well. The international criminal tribunals have had an important effect on the development of the law of asymmetric warfare through decisions on non-international armed conflicts.<sup>69</sup> Of these, the most notable body is the International Criminal Tribunal for the Former Yugoslavia (ICTY). An example of the ICTY's influence comes from the seminal *Tadić* case. The Chamber determined that the majority of IHL norms that apply in international armed conflicts also apply in non-international armed conflicts as

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<sup>63</sup> Michael N. Schmitt & John J. Merriam, *The Tyranny of Context: Israeli Targeting Practices in Legal Perspective*, 37 U. PA. J. INT'L L. 53, 112–13 (2015) (suggesting that the notion of organized armed groups is now accepted as customary international law while the concept of continuous combat function was rejected by states).

<sup>64</sup> See *infra* Part III.B.

<sup>65</sup> See, e.g., SHANE DARCY, JUDGES, LAW AND WAR: THE JUDICIAL DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW (2014); APPLYING INTERNATIONAL HUMANITARIAN LAW IN JUDICIAL AND QUASI-JUDICIAL BODIES: INTERNATIONAL AND DOMESTIC ASPECTS (Derek Jinks, Jackson N. Maogoto & Solon Solomon eds., 2014) [hereinafter IHL IN JUDICIAL BODIES]; Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Law of War*, 59 VAND. L. REV. 1 (2006).

<sup>66</sup> Statute of the International Court of Justice, art. 38(1)(d), June 26, 1945; see also Gleider I. Hernández, *International Judicial Lawmaking*, in RESEARCH HANDBOOK ON INTERNATIONAL LAWMAKING 200, 202–03 (Catherine Brölmann & Yannick Radi eds., 2016).

<sup>67</sup> See Armin von Bogdandy & Ingo Venzke, *Beyond Dispute: International Judicial Institutions as Law Makers*, in INTERNATIONAL JUDICIAL LAWMAKING—ON PUBLIC AUTHORITY AND DEMOCRATIC LEGITIMATION IN GLOBAL GOVERNANCE 3 (Armin von Bogdandy & Ingo Venzke eds., 2012)

<sup>68</sup> See, e.g., Darcy, *supra* note 65, at 54–67.

<sup>69</sup> As discussed *infra*, the vast majority of international actors define transnational armed conflicts as non-international armed conflicts.

customary IHL.<sup>70</sup> This decision, which was made several years before the completion of the ICRC customary study, opened the door to the dramatic expansion of customary IHL. Another significant influence of the *Tadić* case is its elaborated definition of the threshold of non-international armed conflict, namely the requirement of “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>71</sup> This definition has become the focal point for any discussion about the existence of a non-international armed conflict. Finally, *Tadić* was influential in its use of the “overall control” test for the determination of the State control necessary for a conflict to be classified as an international armed conflict.<sup>72</sup>

Other tribunals, such as the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC) have also contributed to the development of IHL.<sup>73</sup> Additionally, of special importance is the case law of the European Court of Human Rights (ECHR), which has expanded the traditional understanding of the role of human rights law in the context of asymmetric conflicts.<sup>74</sup> In sum, international tribunals play a key role in what Theodor Meron, President of the Former ICTY, described as the “humanization of humanitarian law.”<sup>75</sup>

### 3. *Human Rights Treaty Bodies, Special Rapporteurs, and Commissions of Inquiry*

In recent years, different human rights actors have played significant roles in the debate over the regulation of armed conflicts. Human rights treaty bodies, most notably the Human Rights Committee, has taken an active role with regard to important issues such as the relationship between IHRL and IHL concerning detention in armed conflicts.<sup>76</sup> The different commissions of inquiry that the Human Rights Council appointed were controversial and triggered or widened the debate on several practices of contemporary conflicts, such as the issuance of early warnings, the use of artillery in urban warfare, and the investigations of

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<sup>70</sup> Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 126–37 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

<sup>71</sup> *Id.* ¶ 70.

<sup>72</sup> Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 162 (Int’l Crim. Trib. for the Former Yugoslavia Jul. 15, 1999).

<sup>73</sup> Danner, *supra* note 65.

<sup>74</sup> See, e.g., William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. INT’L L. 741, 746–51 (2005). The ECHR seems to hold a less expansive approach in cases of international armed conflicts, as the recent *Hassan* case suggests. See *Hassan v. The United Kingdom*, Eur. Ct. H.R. (2014), App. No. 29750/09.

<sup>75</sup> Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239 (2000).

<sup>76</sup> U.N. Human Rights Comm., General Comment No. 31, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.13, (2004) (promoting a complementary rather than a *lex specialis* approach to the relationship between IHL and IHRL); U.N. Human Rights Comm., General Comment No. 35: Article 9 (Liberty and Security of Person), ¶¶ 64–68, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014) (discussing detention during armed conflicts).

alleged war crimes.<sup>77</sup> Special Rapporteurs that were appointed by the Human Rights Council produced important studies on key issues that received much attention in the international law community, perhaps most notably on the issue of targeted killings and the use of drones.<sup>78</sup>

#### 4. Human Rights NGOs

Human rights NGOs play an active role in the contemporary debate over the regulation of warfare. They attempt to push the law towards a more humanitarian vision. They do so with a combination of reports on specific legal issues, such as the use of drones<sup>79</sup> or autonomous weapon systems,<sup>80</sup> as well as reports regarding alleged violations of IHL in specific conflicts.<sup>81</sup> Their effect on the public discourse is significant and it is reasonable to assume that they help to push the law in a more limiting direction.<sup>82</sup>

#### 5. International Law Scholars

Article 38(1)(d) of the ICJ Statute recognizes “the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”<sup>83</sup> In the literature that discusses IHL lawyering, it is not always clear if the term “humanitarian lawyers” clearly distinguishes between international scholars and more organized efforts such as ICRC publications.<sup>84</sup> The accepted interpretation of Article 38(1)(d) includes the work

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<sup>77</sup> See, e.g., U.N. Human Rights Council, *Report of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1*, A/HRC/29/52 (June 24, 2015) [hereinafter Gaza 2014 HRC Report]; U.N. Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict*, A/HRC/12/48, (Sept. 15, 2009) [hereinafter Goldstone Report].

<sup>78</sup> For example, Philip Alston’s Report on targeted killings is one of the most cited documents on this controversial issue. See U.N. Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston: Study on Targeted Killings*, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010).

<sup>79</sup> See, e.g., HUMAN RIGHTS WATCH, “BETWEEN A DRONE AND AL-QAEDA”: THE CIVILIAN COST OF US TARGETED KILLINGS IN YEMEN (2013), <https://www.hrw.org/report/2013/10/22/between-drone-and-al-qaeda/civilian-cost-us-targeted-killings-yemen>; AMNESTY INT’L, “WILL I BE NEXT?” US DRONE STRIKES IN PAKISTAN (2013), <https://www.amnestyusa.org/reports/will-i-be-next-us-drone-strikes-in-pakistan/>.

<sup>80</sup> HUMAN RIGHTS WATCH & HARVARD LAW SCHOOL’S INTERNATIONAL HUMAN RIGHTS CLINIC, MIND THE GAP: THE LACK OF ACCOUNTABILITY FOR KILLER ROBOTS (2015), <https://www.hrw.org/report/2015/04/09/mind-gap/lack-accountability-killer-robots>.

<sup>81</sup> See, e.g., HUMAN RIGHTS WATCH, TARGETING SAADA: UNLAWFUL COALITION STRIKES ON SAADA CITY IN YEMEN (2015), <https://www.hrw.org/report/2015/06/30/targeting-saada/unlawful-coalition-airstrikes-saada-city-yemen>.

<sup>82</sup> See, e.g., Benvenisti, *supra* note 52, at 45; ORDE F. KITTRIE, LAWFARE – LAW AS A WEAPON OF WAR 46–47 (2017).

<sup>83</sup> Statute of the International Court of Justice, *supra* note 66, at art. 38(1)(d).

<sup>84</sup> For example, David Luban, who wrote the most comprehensive article on the tension between the different actors in the regulation of warfare includes ICRC outputs in his analysis of humanitarian lawyers. See David Luban, *supra* note 6, at 324 (citing the ICRC Customary Study). Sivakumaran is

of groups of international law experts as “publicists.”<sup>85</sup> This, however, comes with the cost of not properly recognizing the influence of individual scholars.

An illuminating example of this role in the context of contemporary asymmetric conflicts is the discussion of the classification of transnational armed conflicts, one of the major debates concerning their regulation. Potential positions range from two extremes. On the one side of the spectrum it is suggested that these are not armed conflicts and they should be regulated fully by IHRL. On the other side of the spectrum it is suggested that there is a legal black hole since these are armed conflicts that are not regulated by IHL. In the middle are those who suggest that these conflicts are either international or non-international armed conflicts. This debate was led mainly by IHL scholars and resulted in a near consensus regarding the classification of such conflicts as non-international armed conflicts.<sup>86</sup> Thus, it was suggested that the classification of the United States’ “global war on terror” as a conflict governed by Common Article 3 of the Geneva Conventions in the *Hamdan* case<sup>87</sup> was significantly influenced by the work of humanitarian lawyers.<sup>88</sup> Moreover, it seems that this trend had some impact even on Israel. The Israeli Supreme Court’s *Targeted Killings* case is among the only cases on the classification of transnational armed conflicts as international armed conflicts.<sup>89</sup> Nonetheless, the Israeli report on the 2014 Gaza conflict did not commit to any specific classification. Instead, it referred both to the *Targeted Killings* case and international law scholarship on the issue. It placed both on a seemingly equal level, although the *Targeted Killings* case is a binding precedent.<sup>90</sup>

The *Hamdan* case and the potential deviation from the *Targeted Killings* case in the 2014 Gaza conflict report represent the influence of IHL scholarship. In

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a notable exception to this trend. See Sandesh Sivakumaran, *Who Makes International Law? The Case of the Law of Armed Conflict* (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3084238](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3084238).

<sup>85</sup> Michael Wood, *Teachings of the Most Highly Qualified Publicists (Art. 38 (1) ICJ Statute)*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 11 (October 2010), <http://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e1480?rskey=dNZKiv&result=1&prd=EPIL>.

<sup>86</sup> See Yahli Shereshevsky, *Politics by Other Means: The Battle over the Classification of Asymmetrical Conflicts*, 49 VAND. J. TRANS. L. 455 (2016) (describing the politics behind the decision of humanitarian actors to classify such conflicts as non-international armed conflicts).

<sup>87</sup> It is not clear whether the court classified the conflict as a non-international armed conflict or alternatively suggested that all conflicts regardless of classification are subject to the obligations under Common Article 3. See, e.g., Eran Shamir-Borer, *Revisiting Hamdan v. Rumsfeld’s Analysis of the Laws of Armed Conflict*, 21 EMORY INT’L L. REV. 601 (2007); Jack M. Beard, *The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterrorism Operations*, 101 AM. J. INT’L L. 56, 57 (2006).

<sup>88</sup> See Modirzadeh, *supra* note 5, at 258 (“The Court received numerous *amici* briefs from IHL and IHRL experts, and the Court’s decision can be read as being highly influenced by these submissions.”)

<sup>89</sup> *Targeted Killings* case, *supra* note 62, ¶ 18.

<sup>90</sup> STATE OF ISRAEL, THE 2014 GAZA CONFLICT: FACTUAL AND LEGAL ASPECTS ¶ 233 (2015) [hereinafter 2014 Gaza Conflict Report].

addition, they also might reflect governmental interest in less regulation.<sup>91</sup> As long as the United States continues to deny the extraterritorial application of IHRL,<sup>92</sup> classification of such conflicts as non-international armed conflicts will lead to less regulation. As for Israel, taking into account that the biggest contemporary threat from its perspective is potential criminal proceedings before the ICC, classification of the conflict as a non-international armed conflict might be a preferred option due to the lesser number of potential war crimes in such conflicts, as per the ICC Statute.<sup>93</sup>

The impact of IHL scholarship has grown in recent years through the development of international law blogs. These blogs are a lively arena for discussion and debate of contemporary practices and legal positions in a way that enables the authors to quickly react to recent events in short, focused posts without the burden of a long review and publication process. In addition to the increasing number of blog citations in more traditional international law publications (including this Article), the decision of the UK Court of Appeal in the much debated *Serdar Mohammed* case indicates the potential of quick reactions to international law developments through blog posts. The first decision in the *Serdar Mohammad* case, regarding the lack of authority to detain in non-international armed conflict,<sup>94</sup> attracted many reactions from international law scholars in leading international law blogs. The decision of the Court of Appeal was cited and addressed at length in a significant number of these blog posts.<sup>95</sup> The court referred to these blog posts over the objections of the UK government, and the court decision was acknowledged and celebrated in the blogosphere.<sup>96</sup>

Although international tribunals—specifically the ICJ—are still reluctant to directly cite scholarly articles (and blog posts),<sup>97</sup> the influence of the international scholarship on domestic courts might serve as an effective way to influence international law, as the *Serdar Mohammed* and the *Hamdan* cases indicate.

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<sup>91</sup> See Shereshevsky, *supra* note 86, at 494–95.

<sup>92</sup> Human Rights Committee Concluding Observations on the Fourth Periodic Report of the United States of America, ¶ 4, U.N. Doc. CPPR/C/USA/CO/4 (Apr. 23, 2014).

<sup>93</sup> Rome Statute of the International Criminal Court, art. 8, July 17, 1998, 2187

U.N.T.S. 3. The Rome Statute currently includes thirty-four crimes in international armed conflicts and nineteen crimes in non-international armed conflicts.

<sup>94</sup> *Mohammed v. Ministry of Defense*, [2014] EWHC 1369 (QB) (citing blog posts from Just Security and EJIL: Talk!).

<sup>95</sup> See *Rahmatullah v. Ministry of Def. & Foreign & Commonwealth Office* [2015] EWCA 843 (Civ).

<sup>96</sup> See Marko Milanovic, *Some Thoughts on the Serdar Mohammed Appeals Judgment*, EJIL TALK (August 10, 2015), <https://www.ejiltalk.org/some-thoughts-on-the-serdar-mohammed-appeals-judgment/>.

<sup>97</sup> Wood, *supra* note 85, ¶ 9.

## II.

## THE ROAD TO STATES' UNILATERAL IHL MAKING

This Section addresses the rise of States' direct and active involvement in IHL making by examining two specific States: the United States and Israel. The choice to focus on these specific States in the context of IHL making is due to the unparalleled attention that their policies receive from non-State actors. It is hard to find a discussion of the main controversies in contemporary conflicts that does not explicitly address either the United States or Israel or both. This is the case, for example, in discussions of drone strikes (or targeting more generally), detention, the relationship between IHRL and IHL, and the classification and scope of armed conflicts. As I suggest in Part III, in order to actively engage in unilateral lawmaking, States need to have sufficient incentives that outweigh the potential benefits of silence. The United States and Israel serve as a good example for such conditions in the context of IHL. Other States that share these positions but are less significantly invested in the issue, or receive less attention from the international community, can free ride on these lawmaking initiatives without exposing themselves to the costs.

A. *Reluctance of States to Actively Participate in IHL Making*

The following Section briefly describes the lack of direct engagement by the United States and Israeli governments in IHL making initiatives during much of the first decade of the twenty-first century.<sup>98</sup> It then addresses the unique role of domestic courts in IHL making.

1. *The United States*

While there were no significant IHL-making initiatives during much of the Bush administration, it is important to note that the US legal position regarding the “global war on terror” under the Bush administration was widely discussed and analyzed in the international law community almost immediately following the American response to the terror attacks of September 11, 2001.<sup>99</sup> Ashley

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<sup>98</sup> In their paper, Schmitt and Watts, present what they describe as the “void of State participation” in the making of IHL. They focus on State *opinio juris*. Schmitt & Watts, *supra* note 3, at 191. While I generally share this position with regard to much of the first decade of the twenty-first century, their analysis needs both more support and some qualifications. First, the analysis in their paper addresses the notion of States' *opinio juris*, while I believe that a more complete analysis should refer to international lawmaking more broadly. Second, the analysis in the paper focuses almost exclusively on US engagement with IHL. Analysis of the engagements of other States with IHL is needed to strengthen the argument. Third, some qualification of the argument should be made to address the engagements of different State organs with IHL. This could include the jurisprudence of domestic courts, leaked memos, and reports to international institutions. A more accurate description should refer to the decline in international lawmaking by the executive branch of States. Finally, at the time their paper was published, a new trend of State reengagement with IHL was already taking place, at least with respect to the United States and Israel.

<sup>99</sup> See, e.g., William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319 (2003); Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws*

Deeks recently argued that the Bush administration held a substantially and rhetorically maximalist approach to the law of asymmetric conflicts and that “it announced, clearly and plainly, its legal views on a wide variety of *jus ad bellum* and *jus in bello* topics.”<sup>100</sup> Indeed, from various US documents and practices in the first few years after 9/11, it is possible to have a strong understanding of the Bush administration’s position on a series of controversial legal issues. In addition, the administration’s positions on specific issues were adjudicated by US courts and discussed by international bodies, where the administration expressed its legal positions in official briefs and reports.<sup>101</sup> The administration’s positions can be summarized as a belief that States’ ability to use controversial practices in such asymmetric conflicts should be interpreted broadly.

Still, significant parts of these documents only became public as a result of leaks or were released several years after they were drafted.<sup>102</sup> Most of the official statements were a result of what Rebecca Ingber calls “external interpretive catalysts.” This includes court cases and treaty bodies’ reports.<sup>103</sup> The United States did not publish official detailed statements of its legal positions. As such, it is difficult to argue that the Bush administration clearly and plainly announced its international legal positions.<sup>104</sup> Thus, the more accurate characterization of the phenomenon that is described in this Article is not the lack of legal positions by States, but the reluctance of their executive branch to offer an official, elaborate, and comprehensive legal analysis of these positions; to actively participate in the debate over IHL.

One exception to this reluctance for direct involvement was the efforts of States to undermine the importance of non-State actors’ contributions to IHL making and to emphasize the traditional role of States in the international lawmaking process. For example, the Bush administration published a twenty-page response to the ICRC study on customary international law, mostly criticizing the study’s methodology.<sup>105</sup> The response noted, *inter alia*, that the study relies on the position of non-State actors to determine the scope of

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*of War*, 28 YALE J. INT’L L. 325 (2003); Steven R. Ratner, *Jus ad Bellum and Jus in Bello After September 11*, 96 AM. J. INT’L L. 905 (2002).

<sup>100</sup> Deeks, *supra* note 4, at 647.

<sup>101</sup> *See, e.g.*, Brief for Respondents, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184); U.N. Human Rights Comm., Comments by the Government of the United States of America on the Concluding Observations of the Human Rights Committee, U.N. Doc. CCPR/C/USA/CO/3/REV.1/ADD.1 (Feb. 12, 2008); Press Release, U.S. Dep’t of State, United States Written Response to Questions Asked by the Committee Against Torture (Apr. 28, 2006), [www.State.gov/j/drl/rls/68554.htm](http://www.State.gov/j/drl/rls/68554.htm).

<sup>102</sup> *See* Schmitt & Watts, *supra* note 3, at 213.

<sup>103</sup> Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 YALE J. INT’L L. 359 (2013).

<sup>104</sup> There were brief statements regarding the initial positions of the United States without much explanation. *See, e.g.*, White House Fact Sheet: Status of Detainees at Guantanamo, U.S. Department of State Archive (Feb. 7, 2002), <https://2001-2009.state.gov/p/sca/rls/fs/7910.htm>.

<sup>105</sup> John B. Bellinger, III & William J. Haynes II, *A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law*, 89 INT’L REV. RED CROSS 443 (2007).

customary law even though customary law is State-made law.<sup>106</sup> The inefficiency of such efforts by the Bush administration, which might be perceived as a step towards active involvement, is addressed in Part II.C.

## 2. *Israel*

The first decades of Israeli engagement with international law are outside the scope of this Article. Israel has been a party to several armed conflicts since 2000, which have received attention from the international law community. These conflicts include the Second Intifada which began in October 2000, the Second Lebanon War of 2006, and the Gaza armed conflicts of 2009 (Cast Lead), 2012 (Pillar of Defence) and 2014 (Protective Edge). The Israeli Government did not voluntarily or explicitly engage with the international law debate that concerned the regulation of these conflicts during the first decade of the twenty-first century. However, Israel did present its legal position—as did the US administration—within domestic proceedings that addressed some of its more controversial legal policies.<sup>107</sup> Further, Israel also filed reports to IHRL treaty bodies that addressed IHL topics.<sup>108</sup> In addition to the lack of any official elaborated legal position on the conflicts, Israel consistently refused to take part in international proceedings that addressed its conduct. For example, Israel refused to address the substantive legal question in the ICJ's proceedings in the Wall Advisory Opinion.<sup>109</sup> Israel did not present oral arguments before the ICJ and addressed only the question of jurisdiction of the court in its written statement.<sup>110</sup> In addition, Israel did not cooperate with the Human Rights Council's commissions of inquiry to the Second Lebanon War,<sup>111</sup> the 2009 Gaza conflict (the Goldstone Report),<sup>112</sup> the 2010 takeover of the flotilla to Gaza (the Hudson Philips Report),<sup>113</sup> or the 2014 Gaza conflict.<sup>114</sup>

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<sup>106</sup> *Id.* at 445.

<sup>107</sup> *See, e.g.*, HCJ 3799/02 Adalah – Legal Center for Arab Minority Rights in Israel and Others v. General Officer Commanding Central Command, Israeli Defense Force and Others [2005] IsrSC 60(3) (ordering the IDF to cease its practice of using civilians to give ‘early warnings’ during arrest operations); *Targeted Killings* case, *supra* note 62.

<sup>108</sup> *See, e.g.*, U.N. Human Rights Comm., Comments by the Government of Israel on the Concluding Observations, U.N. Doc. CCPR/CO/78/ISR/Add.1 (Jan. 24, 2007).

<sup>109</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9, 2004).

<sup>110</sup> Written Statement of the Government of Israel on Jurisdiction and Propriety 50 (Jan. 29, 2004).

<sup>111</sup> U.N. Human Rights Council, Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1, U.N. Doc. A/HRC/3/2 (Nov. 23, 2006).

<sup>112</sup> Abresch, *supra* note 74.

<sup>113</sup> U.N. Human Rights Council, Report of the International Fact-Finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance, U.N. Doc. A/HRC/15/21 (Sept. 27, 2010).

<sup>114</sup> Abresch, *supra* note 74.

### 3. *The Role of Domestic Courts*

Formally, domestic courts are State actors. In the process of identifying customary international law, their judgments are widely viewed as State practice and *opinio juris*.<sup>115</sup> Indeed, as State organs, domestic courts are sometimes described as a legitimizing actor with respect to IHL.<sup>116</sup> Nonetheless, it is not clear that when analyzing IHL making, the jurisprudence of domestic courts should be analyzed as State practice and *opinio juris*. Domestic courts are both national and international actors.<sup>117</sup> Domestic courts do not generate norms of their own initiative, but they adjudicate cases that are often brought against the executive. In the context of the rise of States' direct engagement with IHL making, domestic courts' IHL case law is better seen as part of the story of executive reluctance to engage in IHL making and the rise of non-State actors. Many of the seminal IHL cases heard by domestic courts were a response to controversial practices of the executive branch that were not accompanied by substantial and open legal justification. These judgements fill a gap in the legal analysis of contemporary warfare and fulfill the traditional executive role to some extent.

Non-State actors that are involved in international lawmaking often substantially support these cases. In the *Hamdan* case, for example, human rights and humanitarian lawyers filed numerous *amici* briefs. There are strong indications that these documents influenced the judgment.<sup>118</sup> Moreover, human rights and humanitarian actors often initiate proceedings. For example, the petitioners in the *Targeted Killings* case were human rights NGOs.<sup>119</sup> This is true for many other Israeli cases. Thus, it is not surprising that the judgments of national courts are not discussed as part of the lack of State *opinio juris* by Schmitt and Watts.<sup>120</sup>

Regardless of classification, domestic courts clearly constitute a significant arena for non-traditional international lawmaking in the context of asymmetric warfare. The contribution of domestic courts to international law has

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<sup>115</sup> See, e.g., Antonios Tzanakopoulos, *Domestic Judicial Lawmaking*, in RESEARCH HANDBOOK ON INTERNATIONAL LAWMAKING 222, 230 (Catherine Brölmann & Yannick Radi eds., 2016); Ingrid Wuerth, *International Law in Domestic Courts and the Jurisdictional Immunities of the State Case*, 13 MEL. J. INT'L L. 819, 821 (2012).

<sup>116</sup> See generally SHARON WEILL, *THE ROLE OF NATIONAL COURTS IN APPLYING INTERNATIONAL HUMANITARIAN LAW* (2014).

<sup>117</sup> See Tzanakopoulos, *supra* note 115, at 237–39.

<sup>118</sup> See, e.g., Modirzadeh, *supra* note 5, at 258 (“The Court received numerous *amici* briefs from IHL and IHRL experts, and the Court’s decision can be read as being highly influenced by these submissions.”); Marko Milanovic, *Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case*, 89 INT’L REV. RED CROSS 373, 380–81 (2007) (demonstrating that a citation error in the judgment repeat a similar error in an *amicus* brief that was submitted to the court).

<sup>119</sup> The petitioners in the *Targeted Killings* case were The Public Committee against Torture in Israel and the Palestinian Society for the Protection of Human Rights and the Environment.

<sup>120</sup> Schmitt and Watts emphasized State positions when litigating as a way to shape customary international law, but only at the end of a footnote do they recognize the role of domestic courts in this regard, through a quote from Oppenheim. See Schmitt & Watts, *supra* note 3, at 209.

received more recognition in recent years,<sup>121</sup> and specifically, their role in the interpretation and application of IHL has been widely acknowledged.<sup>122</sup> As mentioned, the Israeli Supreme Court was a key player in this respect, deciding on a series of important cases on the conduct of hostilities issues,<sup>123</sup> although it has been more reluctant to engage in such review.<sup>124</sup> US Courts have also rendered several important decisions in this regard.<sup>125</sup> Recently, the UK courts have taken a more active role in such cases.<sup>126</sup> Other domestic courts, including courts in Switzerland, Australia, Canada, India, and the Netherlands, have addressed asymmetric warfare.<sup>127</sup> Some of these decisions, such as the *Targeted Killings* case,<sup>128</sup> the *Hamdan Case*,<sup>129</sup> and *Serdar Mohammed case*,<sup>130</sup> played key roles in the debate over regulation of contemporary asymmetric conflicts.<sup>131</sup>

### B. The New Lawmaking Effort

States have become more willing to directly engage in the debate over the laws of asymmetric warfare in recent years. In contrast to the initial articulation of their legal positions—which were usually in non-voluntary or semi-voluntary contexts such as domestic court proceedings or engagements with international bodies—the new engagement of States with international lawmaking has been primarily through voluntary acts. The two dominant cases for this trend are the United States and Israel.

#### 1. The United States

In contrast to the United States' reluctance to directly engage in the debate over the regulation of asymmetric conflict in the beginning of the "global war on terror," in recent years, it has engaged in this debate in three types of ways: (a) Speeches of various US officials, (b) The Department of Defense Law of War Manual, and (c) government reports.

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<sup>121</sup> See, e.g., Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT'L & COMP. L. Q. 57 (2011); ANDRE NOLLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW (2011).

<sup>122</sup> See, e.g., Weill, *supra* note 116; IHL IN JUDICIAL BODIES, *supra* note 65.

<sup>123</sup> See, e.g., Adalah, *supra* note 107.

<sup>124</sup> Yahli Shereshevsky, *Targeting the Targeted Killings Case - International Lawmaking in Domestic Contexts*, 39 MICH. J. INT'L L. 241, 255-67 (2018).

<sup>125</sup> David Weissbrodt & Nathaniel H. Nesbitt, *The Role of the United States Supreme Court in Interpreting and Developing Humanitarian Law*, 95 MINN. L. REV. 1339 (2011).

<sup>126</sup> See, e.g., *Rahmatullah v. Ministry of Def.*, *supra* note 95.

<sup>127</sup> See IHL IN JUDICIAL BODIES, *supra* note 65.

<sup>128</sup> *Targeted Killings case*, *supra* note 62.

<sup>129</sup> *Hamdan v. Rumsfeld*, *supra* note 57.

<sup>130</sup> *Rahmatullah v. Ministry of Defense*, *supra* note 95. Recently the UK Supreme Court has issued its judgement in the case. *Al-Waheed v. Ministry of Defense* [2017] UKSC 2.

<sup>131</sup> Each of these decisions was the subject of intensive debate in the international law community.

*a. Speeches*

The first type of engagement with the regulation of asymmetric conflict is various speeches given by US officials. In a series of speeches, US officials addressed a significant number of controversial legal questions. The speeches began with John B. Bellinger III, the legal advisor for the US Department of State, at the London School of Economics in October 2006.<sup>132</sup> This speech addressed the most debated issue of the Bush administration in relation to contemporary conflicts—detention. An academic exchange with critics of the administration's position followed the speech. This bolsters the assertion that the administration was beginning to willingly present and publicly promote its legal positions.<sup>133</sup> Still, Bellinger's speech was a clear exception to the general tendency of the Bush administration to refrain from public legal justifications of their IHL position, making it hard to date the shift in practice to 2006.

In 2010, at the Annual Meeting of the American Society of International Law (ASIL), Harold H. Koh, then the Legal Adviser to the Department of State, gave an important speech in which he addressed the main legal positions of the Obama administration on transnational conflicts.<sup>134</sup> The speech included both legal and policy positions and discussed issues such as detention of armed group members, targeted killings, and the use of drones. Various officials in the Obama administration, including President Obama himself, then gave a series of speeches and statements that expanded the legal position of the United States.<sup>135</sup> These speeches included the public acknowledgment of specific legal commitments, including recognition of Article 75 of the First Additional Protocol to the Geneva Conventions as customary law in international armed conflicts,<sup>136</sup> and the extraterritorial application of the prohibition on torture.<sup>137</sup>

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<sup>132</sup> John B. Bellinger III, Legal Adviser, U.S. Department of State, Speech Before the London School of Economics: Legal Issues in the War on Terrorism (Oct. 31, 2006).

<sup>133</sup> John B. Bellinger III, *Legal Issues in the War on Terrorism*, 8 GERMAN L. J. 735 (2007); Silja N.U. Voenecky, *Response – The Fight against Terrorism and the Rules of International Law – Comment on Papers and Speeches of John B. Bellinger, Chief Legal Advisor to the United States State Department*, 8 GERMAN L. J. 747 (2007); John B. Bellinger III, *Legal Issues in the War on Terrorism – Reply to Silja N.U. Voenecky*, 8 GERMAN L. J. 871 (2007); Gabor Rona, *Legal Issues in the “War on Terrorism” – Reflecting on the Conversation Between Silja N.U. Voenecky and John Bellinger*, 9 GERMAN L. J. 711 (2008).

<sup>134</sup> Harold Hongju Koh, Legal Adviser, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010). Two speeches of President Obama preceded the Koh speech. Nonetheless, these speeches do not directly address international law issues and therefore are not part of the analysis in this article.

<sup>135</sup> For a list of the main speeches and other key documents, see THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS, Appendix (2016) [hereinafter FRAMEWORKS REPORT].

<sup>136</sup> Press Release, The White House, Office of the Press Secretary, Fact Sheet: New Actions on Guantanamo and Detainee Policy (Mar. 7, 2011). For a discussion of the limited scope of this acknowledgment and the refusal to apply it in non-international armed conflicts, see Goldsmith, *infra* note 215, at 3.

<sup>137</sup> Mary E. McLeod, Acting Legal Adviser, U.S. Dep't of State, Address to the Committee on Torture: U.S. Affirms Torture Is Prohibited at All Times in All Places (Nov. 12-13, 2014).

The importance of these speeches has been described in very different ways. While Schmitt and Watts suggest that the speeches are part of the unwillingness of the US administration to express its *opinio juris* on the most important contemporary legal controversies,<sup>138</sup> Kenneth Anderson and Benjamin Wittes suggest that the speeches represent the *opinio juris* of the United States and that they address "a surprisingly wide array of contested legal issues."<sup>139</sup> Schmitt and Watts thus downplay the importance of the speeches. For example, Schmitt and Watts suggest that the United States did not explicitly express its *opinio juris* regarding the ability to target members of a non-State armed group who do not hold a continuous combat function;<sup>140</sup> however, US officials have stated in a series of speeches that under IHL, States are permitted to target individuals based on their formal membership in an armed group.<sup>141</sup> Taking it one step forward, I want to suggest that these speeches, given over a period of several years and by different members of the administration, should be seen together with the two other types of engagements with international law. They are part of a new effort of the US administration to take an active part in the contemporary IHL discussion.

*b. The Department of Defense Law of War Manual*

In 2015, the Department of Defense (DoD) published its much-awaited Law of War Manual.<sup>142</sup> It is a 1,200-page document that was published after a long drafting process. Significant changes were made following 9/11 and the "global war on terror,"<sup>143</sup> which caused delays to its release.<sup>144</sup> The Manual was the result of a complex process which involved civil and military lawyers from the DoD, consultation with foreign experts and resources (mainly other States' military manuals and military lawyers), and the participation of experts from the State Department and the Department of Justice.<sup>145</sup> The DoD Manual addresses a wide range of issues, including asymmetric warfare and the relationship between IHL

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<sup>138</sup> Schmitt & Watts, *supra* note 3, at 215 ("...both administrations have resorted to periodic speeches by senior officials who provide only vague glimpses of the U.S. position").

<sup>139</sup> KENNETH ANDERSON & BENJAMIN WITTES, SPEAKING THE LAW: THE OBAMA ADMINISTRATION'S ADDRESSES ON NATIONAL SECURITY LAW 6–7 (2015).

<sup>140</sup> Schmitt & Watts, *supra* note 3, at 202.

<sup>141</sup> See, e.g., Brian Egan, *International Law, Legal Diplomacy and the Counter-ISIL Campaign: Some Observations*, 92 INT'L L. STUD. 235, 243 (2016); Koh, *supra* note 134.

<sup>142</sup> GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE, DEPARTMENT OF DEFENSE LAW OF WAR MANUAL (2015) [hereinafter DOD MANUAL].

<sup>143</sup> See AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LAW AND NATIONAL SECURITY, DOD LAW OF WAR MANUAL REVIEW WORKSHOP – WORKSHOP REPORT MARCH 2016 (2017) [hereinafter ABA LAW OF WAR MANUAL WORKSHOP REPORT] ("The manual sought to focus on novel LOW matters that had arisen in the aftermath of 9.11 and to offer clear U.S. positions on these issues.").

<sup>144</sup> Edwin Williamson & Hays Parks, *Where is the Law of War Manual?*, WEEKLY STANDARD, July 22, 2013, <http://www.weeklystandard.com/where-law-war-manual/article/739267> (stating that at the time the article was written, there was already a 30-month delay in the publication of the DoD Manual).

<sup>145</sup> DOD MANUAL, *supra* note 142, at V-VI.

and IHRL,<sup>146</sup> the geographical scope of a conflict,<sup>147</sup> the existence of a least harmful means rule for legitimate targets,<sup>148</sup> and the targeting of non-State armed groups members.<sup>149</sup> It also offers some controversial statements of the law regarding issues such as human shields, the targeting of journalists, target selection, and proportionality. The criticism of these issues has led the DoD to review and change the Manual twice. However, not all authors are convinced that the changes have solved the concerns.

The DoD Manual has been widely criticized for its limited goals, its size, and its substance.<sup>150</sup> Specifically, it is widely acknowledged that the DoD Manual is not an official statement of the US legal position on IHL norms. Thus, it cannot be regarded as an expression of US *opinio juris* on the relevant issues.<sup>151</sup> As the DoD Manual itself acknowledges in the preface, "...the views in this manual do not necessarily reflect the views of [the Department of State and the Department of Justice] or the US Government as a whole."<sup>152</sup> It was suggested that this comment indicates an actual disagreement between the different Departments over the DoD Manual's substance in addition to the lack of *opinio juris* of the manual.<sup>153</sup> Regardless of actual differences between the Departments, it seems that the DoD Manual followed the US criticism of the ICRC Customary IHL Study in its resistance to see domestic military manuals as reflections of *opinio juris*.<sup>154</sup>

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<sup>146</sup> *Id.* at §§ 1.3.2, 1.6.3.1 (adopting a strict *lex specialis* approach to this issue), § 1.6.3.3 (stating that the International Covenant on Civil and Political Rights does not apply extraterritorially). For criticism of the DoD MANUAL approach in this regard, see Aurel Sari, *Hybrid Law, Complex Battlespaces: What's the Use of a Law of War Manual?*, in THE UNITED STATES DEPARTMENT OF DEFENSE LAW OF WAR MANUAL: COMMENTARY & CRITIQUE (Michael A. Newton ed., forthcoming).

<sup>147</sup> *Id.* at § 5.5.5 (stating that attacks removed from the active theater of war are lawful).

<sup>148</sup> *Id.* at § 5.5.6 (suggesting that there is no obligation to use the least harmful means against legitimate targets).

<sup>149</sup> *Id.* at §§ 5.7.2, 5.8.1, 5.8.3, 5.9.2.1 (adopting a status-based approach to the targeting of armed groups members).

<sup>150</sup> See e.g., David W. Glazier et al., *Failing our Troops: A Critical Assessment of the New Department of Defense Law of War Manual*, 42 YALE J. INT'L L. 215 (2017); Jordan J. Paust, *Errors and Misconceptions in the 2015 DOD Law of War Manual*, 26 MINN. J. INT'L L. (forthcoming); Adil Ahmed Haque, *Off Target: Selection, Precaution, and Proportionality in the DoD Manual*, 92 INT'L L. STUD. 31 (2016); ABA LAW OF WAR MANUAL WORKSHOP REPORT, *supra* note 143. But see Charles J. Dunlap, Jr., *The DoD Law of War Manual and its Critics: Some Observations*, 92 INT'L L. STUD. 85 (2016). In addition to these articles, numerous blog posts address the DoD Manual. See, e.g., *A Reader's Guide to Our Mini-Forum on DoD's New Law of War Manual*, JUST SECURITY (Aug. 12, 2015), <https://www.justsecurity.org/25371/readers-guide-mini-forum-dods-law-war-Manual/>.

<sup>151</sup> See, e.g., Glazier et al., *supra* note 150, at 2; Eric Jensen, *Law of War Manual: Information or Authoritative Guidance*, JUST SECURITY (July 1, 2015), <https://www.justsecurity.org/24332/law-war-manual-information-authoritative-guidance/>. But see John Dehn, *The DoD Law of War Manual's Potential Contribution to International Law*, JUST SECURITY (July 16, 2015), <https://www.justsecurity.org/24675/dod-law-war-manuals-potential-contribution-international-law/>.

<sup>152</sup> DoD MANUAL, *supra* note 142, at VI.

<sup>153</sup> ABA LAW OF WAR MANUAL WORKSHOP REPORT, *supra* note 143, at 4.

<sup>154</sup> Bellinger Rostow, & Haynes, *supra* note 105, at 446. See also Nicholas Rostow, & Tom Bowman, *Policy by Other Means: A Review of DoD's Law of War Manual*, 4 Nat'l Sec. L. J. 259, 263 (2016) (making explicit reference to Matthew McCormack, the Associate General Counsel in the Office of General

Indeed, when considering the acknowledgement in the preface of the Manual and the statements of its drafters, it is difficult to consider the manual as an expression of the official US *opinio juris* on IHL norms. Nonetheless, as Part I suggests, traditional lawmaking, including official pronouncements of *opinio juris*, is no longer necessarily the only—or even the primary—way of international lawmaking, specifically in the context of IHL. The role of military manuals as expressions of the State positions on IHL norms has been widely acknowledged.<sup>155</sup> For example, it was suggested that the delay in the publication of the UK Manual on the Law of Armed Conflict was the result of a "concern over the appropriate timing for publication of such a Manual, which would inevitably be seen as an authoritative statement of the United Kingdom's position on international law."<sup>156</sup> This insight applies to the DoD Manual as well. The DoD Manual is likely to be commonly used because insights into soft law have shown that a document can be influential even if it is not binding.<sup>157</sup> Moreover, such documents are mostly effective where there are gaps in existing law.<sup>158</sup> In our case, in the absence of significant contradicting official US articulations of its legal position, the DoD Manual may become the primary reference point for the US IHL position. Moreover, the delay in the release date of the Manual was explicitly mentioned in the Schmitt and Watts paper as an indication of the United States' reluctance to express its *opinio juris* on core IHL issues, even while recognizing that manuals are not necessarily an official expression of *opinio juris*.<sup>159</sup>

This understanding did not escape those who emphasized the Manual's non-binding nature. Thus, in the opening paragraph of Chapter 6 in the Report of the ABA Standing Committee on Law and National Security Workshop on the DoD Manual, it States that "the Working Group observed that, given that the US military is the most technologically advanced in the world, this chapter on weapons will very likely be looked to by other States and international organizations as a definitive US statement on both the lawfulness of various weapons systems and the manner in which such systems might be employed."<sup>160</sup> This view seems to also be shared, at least to some extent, by the drafters of the Manual. As one of the DoD Manual's drafters, Matthew McCormack, stated regarding the envisioned use of the manual, "the practitioner would use the

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Counsel for the DoD, to this position in relation to the scope of the DoD Manual).

<sup>155</sup> See, e.g., Charles Garraway, *The Use and Abuse of Military Manuals*, 7 Y.B. INT'L HUMANITARIAN L. 425 (2004); W. Michael Reisman & William K. Leitzau, *Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict*, 64 INT'L L. STUD. 1, 8–9 (1991).

<sup>156</sup> Garraway, *supra* note 155, at 425.

<sup>157</sup> Gregory C. Shaffer & Mark Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 720 (2010).

<sup>158</sup> *Id.* at IIIC.

<sup>159</sup> Schmitt & Watts, *supra* note 3, at 219.

<sup>160</sup> ABA LAW OF WAR MANUAL WORKSHOP REPORT, *supra* note 143, at 47.

Manual [to] find the particular rule at issue, and the relevant US and DoD interpretations of that rule."<sup>161</sup>

A comparison between the DoD Manual and the UK Law of War Manual can illuminate the rise of State engagement in the international lawmaking of contemporary conflicts. In 2004, the UK published its long-awaited Law of War Manual.<sup>162</sup> Ostensibly, this Manual provided evidence of the active engagement of States in IHL lawmaking. Indeed, according to international law scholar David Luban, an eminent British lawyer suggested that the Manual had been published in light of the upcoming ICRC Customary Law Study, in order to "get in our retaliation in advance."<sup>163</sup> Moreover, the Manual itself states (with some qualifications) that it is "a clear articulation of the UK's approach to the Law of Armed Conflict."<sup>164</sup> Nonetheless, Charles Garraway, who took part in the drafting of the Manual, considered the lack of clear positions on State approaches to contemporary IHL to be reflective of their general reluctance in this arena. He states that the Manual deliberately does not include sections that deal with the most contentious issues of contemporary conflicts, such as the status of non-State armed groups members, and refrains from mentioning the "global war on terror" at all.<sup>165</sup> Garraway suggested that the reluctance to publish manuals is due to the fear that they will be used against the States.<sup>166</sup> In contrast to the UK Manual, the DoD Manual addresses the most controversial questions evoked by contemporary conflicts. This seems to represent the realization that the articulation of a State's positions better promotes its interests than silence.

### *c. Governmental Reports*

In recent years, the Obama administration published several documents on legal and policy issues in relation to contemporary conflicts. Some of them became publicly available several years after their creation.<sup>167</sup> The most important document was released in the last phase of the Obama administration. On December 2016, the White House released a 66-page report which addresses the United States' use of force in the context of contemporary asymmetric conflict.<sup>168</sup> The report received much attention in the international law blogosphere.<sup>169</sup> The

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<sup>161</sup> Rostow & Bowman, *supra* note 154, at 264.

<sup>162</sup> U.K. MINISTRY OF DEF., THE MANUAL OF THE LAW OF ARMED CONFLICT (2004) [hereinafter THE UK MANUAL].

<sup>163</sup> Luban, *supra* note 6, at n.9.

<sup>164</sup> THE UK MANUAL, *supra* note 162, at 5.

<sup>165</sup> Garraway, *supra* note 155, at 439.

<sup>166</sup> *Id.* at 440.

<sup>167</sup> See, e.g., THE WHITE HOUSE, PROCEDURES FOR APPROVING DIRECT ACTION AGAINST TERRORIST TARGETS LOCATED OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES (THE PRESIDENTIAL POLICY GUIDELINES PPG) (May 22, 2013); DEPARTMENT OF JUSTICE, DETENTION POLICY REPORT (April 12, 2012).

<sup>168</sup> FRAMEWORKS REPORT, *supra* note 135.

<sup>169</sup> See, e.g., Benjamin Wittes, *The White House Releases a "Report on the Legal and Policy Frameworks" on American Uses of Military Force*, LAWFARE. December 5, 2016,

report itself does not provide many new substantive legal positions that are not already included in the above-mentioned speeches.<sup>170</sup> Nonetheless, the mere fact that the White House published an official document summarizing its main legal positions on contemporary transnational armed conflict is significant. It gives much more weight to the substance of the speeches and clearly signals the willingness of the US administration to take part in an open debate over the law of contemporary asymmetric conflicts. Indeed, reactions to the report emphasized its contribution to greater transparency from the US administration with regard to its legal position and its direct contribution to the debate over the scope of customary international law.<sup>171</sup>

The report also significantly strengthens the role of the DoD Manual. It cites the Manual several times in relation to the US position on the conduct of hostilities, including controversial issues such as the definition of legitimate targets in conflicts with non-State armed groups.<sup>172</sup> While several authors have stressed the acknowledgement in the DoD Manual as an indication of a significant interagency disagreement on its content, the frequent reference to the DoD Manual, without any reservations or disclaimers, is notable evidence in the other direction. It should be noted in this regard that in contrast to the approach of the DoD Manual, the report scarcely cites external documents and only cites non-US commentary twice.<sup>173</sup>

## 2. Israel

Israel's reengagement with IHL making mainly occurred through a series of reports. The first sign of a change can be traced to the brief document that was published by the Israel Ministry of Foreign Affairs after the second Lebanon War in 2006.<sup>174</sup> The document analyzes Israel's conduct in the war generally without

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<https://lawfareblog.com/white-house-releases-report-legal-and-policy-frameworks-american-uses-military-force/>; Monica Hakimi, *Taking Stock of the Law on Targeting, Part I*, EJIL TALK, December 12, 2016, <https://www.ejiltalk.org/taking-stock-of-the-law-on-targeting-part-i/>; Marty Lederman, *President Obama's Report on the Legal and Policy Frameworks Guiding and Limiting the Use of Military Force*, JUST SECURITY, December 5, 2016, <https://www.justsecurity.org/35239/president-obamas-report-legal-policy-frameworks-guiding-united-states-military-force-related-national-security-operations/>; Deborah Pearlstein, *The President's Report on the Legal and Policy Frameworks*, OPINIO JURIS, December 15, 2016, <http://opiniojuris.org/2016/12/15/the-presidents-report-on-the-legal-and-policy-frameworks/>.

<sup>170</sup> See Wittes, *supra* note 169 (“[T]here is actually not all that much that's new in it. Most of it is restatement and collation of material presented in the speeches.”)

<sup>171</sup> *Id.* (“The basic idea is transparency.”); Lederman, *supra* note 169 (“Even so, today's Report undermines the idea that the United States has been especially or unusually secretive about its conduct of war, and the legal and policy frameworks that govern it, over the past eight years.”); Pearlstein, *supra* note 169.

<sup>172</sup> FRAMEWORKS REPORT, *supra* note 135, at 53 nn.90, 92 & 95; 54 nn.97-98 & 116-121; 55 nn.143 & 145; 56 n.176.

<sup>173</sup> *Id.* at 53 n.96 (referencing the The UK Manual), 56 n.162 (referencing the Pictet Commentary).

<sup>174</sup> *Preserving Humanitarian Principles While Combating Terrorism: Israel's Struggle with Hezbollah in the Lebanon War*, Isr. Ministry of Foreign Affairs, Apr. 1, 2007, <http://www.mfa.gov.il/mfa/foreignpolicy/terrorism/hizbullah/pages/preserving%20humanitarian%20>

providing an in-depth legal analysis. The most notable issue in the document is the justification that it provides for the use of cluster munitions in the conflict.<sup>175</sup>

A second, more significant, engagement is the Israeli decision to publish a report following the 2009 Gaza conflict.<sup>176</sup> This conflict had resulted in a high number of Palestinian casualties, including many civilians, and led to much criticism of Israel's conduct from the international community. While refusing to cooperate with the Human Rights Council's commission of inquiry that eventually issued the Goldstone Report, Israel decided to actively react to the upcoming report by issuing its own report on its conduct during the conflict. Much of the 164-page report discusses specific controversial incidents and presents the Israeli narrative of the conflict's development. Nonetheless, the report provides about a 20-page summary of the Israeli position on the application of IHL in contemporary conflicts. The report refers to issues such as the inclusion of force protection in the assessment of military advantage when applying the principle of proportionality,<sup>177</sup> and the obligation to take precautions before an attack.<sup>178</sup> Additionally, the report critically addresses specific publications of non-State actors. It suggests that reports by NGOs such as Amnesty International and Human Rights Watch "too often jump from reporting tragic incidents involving the death or injury of civilians during armed combat, to the assertion of sweeping conclusions within a matter of hours, days or weeks, that the reported casualties *ipso facto* demonstrate violations of international law, or even—war crimes."<sup>179</sup> The report also criticizes the methodology of the ICRC Customary Law Study and states that "[l]ike many other States, Israel does not agree that all of the rules stated in the ICRC CIL Study reflect customary international law."<sup>180</sup> Nonetheless, the report's commentary on the classification of armed conflict and the scope of customary IHL norms remains vague.<sup>181</sup> Overall, the report is an initial engagement in the debate over IHL norms, and it combines criticism of the output of non-State actors with a limited legal justification of Israel's conduct.

Unlike the DoD Manual which acknowledges that it may not represent the position of the US government, the Gaza 2009 Conflict Report is an official document of the Israeli government and unreservedly stipulates its legal position.

The two Turkel Commission Reports present a third notable engagement with IHL norms. On May 31, 2010, the Israeli Defense Forces (IDF) intercepted the Comoros-flagged *Mavi Marmara*, a maritime vessel on its way to the Gaza

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principles%20while%20combating%20terrorism%20-%20april%202007.aspx.

<sup>175</sup> *Id.* at III E. See also ALAN CRAIG, INTERNATIONAL LEGITIMACY AND THE POLITICS OF SECURITY: THE STRATEGIC DEPLOYMENT OF LAWYERS IN THE ISRAELI MILITARY 177 (2013) (suggesting that the legal response had a key role in the defense of Israel's conduct).

<sup>176</sup> STATE OF ISR., THE OPERATION IN GAZA 27 DECEMBER 2008-18 JANUARY 2009: FACTUAL AND LEGAL ASPECTS (2009).

<sup>177</sup> *Id.* ¶¶ 105, 122.

<sup>178</sup> *Id.* ¶¶ 132-38.

<sup>179</sup> *Id.* ¶ 34.

<sup>180</sup> *Id.* at n.70.

<sup>181</sup> *Id.* ¶¶ 29-31.

Strip, intending to break the maritime blockade imposed by Israel several months earlier. The Israeli soldiers faced resistance upon boarding the vessel, resulting in nine deaths among the passengers of the *Mavi Marmara* and several wounded Israeli soldiers. The incident received much international attention and led to several international commissions of inquiry, including a request by the Comoros Islands that the ICC open an investigation of the events.<sup>182</sup> As a response to the international coverage, and as a lesson from the Goldstone Report, Israel established its own commission of inquiry. In addition to Israeli members, the Turkel Commission of Inquiry was comprised of two foreign observers—Lord David Trimble and Brigadier General Kenneth Watkin—and two foreign special consultants—Wolff Heintschel von Heinegg and Michael Schmitt. The Turkel Commission provided a lengthy legal analysis that addressed several key IHL issues, including the classification of the conflict between Israel and Hamas,<sup>183</sup> the legality of naval blockades in non-international armed conflicts,<sup>184</sup> the occupation of Gaza,<sup>185</sup> the relationship between IHL and IHRL,<sup>186</sup> and the targeting of civilians who directly participate in hostilities.<sup>187</sup> In addition, the Commission addressed the ICRC Interpretive Guidance by stating that it should be used cautiously due to its controversial nature.<sup>188</sup>

Approximately two years after the first Turkel Report, the Commission of Inquiry published its second report.<sup>189</sup> The second report focused on the Israeli investigation of violations of IHL and its adherence to the international obligations. The report provides a detailed analysis of obligations that international law places on the investigations of alleged IHL violations, comparative analysis of the investigation systems of several other States, and detailed analysis of Israeli policy.

This second Turkel report is of even greater importance for this Article than the first report. While the first report focused on the legality of the specific *Mavi*

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<sup>182</sup> Union of the Comoros, *Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010, Gaza Freedom Flotilla situation*, ICC (May 14, 2013), <https://www.icc-cpi.int/iccdocs/otp/referral-from-comoros.pdf>; U.N. Secretary-General, *Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident*, (Sep. 2011) [hereinafter Palmer Report]; Human Rights Council, *Report of the International Fact-Finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance*, U.N. Doc. A/HRC/15/21 (Sep. 27, 2010) [hereinafter Hudson Phillips Report].

<sup>183</sup> THE PUBLIC COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010 (THE TURKEL COMMISSION), PART ONE, §§ 37-45 (Jan. 2010) [hereinafter TURKEL REPORT PART I].

<sup>184</sup> *Id.* §§ 37-38.

<sup>185</sup> *Id.* §§ 45-47.

<sup>186</sup> *Id.* §§ 98-100, 184-189.

<sup>187</sup> *Id.* §§ 193-199.

<sup>188</sup> *Id.* § 194.

<sup>189</sup> THE PUBLIC COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010 (THE TURKEL COMMISSION), SECOND REPORT – ISRAEL'S MECHANISMS FOR EXAMINING AND INVESTIGATING COMPLAINTS AND CLAIMS OF VIOLATIONS OF THE LAWS OF ARMED CONFLICT ACCORDING TO INTERNATIONAL LAW (Feb. 2013) [hereinafter TURKEL REPORT PART II].

*Marmara* incident, the second report examined much broader Israeli policy with regard to investigations of alleged IHL violations. It is a very hot topic in contemporary IHL and international criminal law (ICL), which occupied Israel in other instances, most notably in the Goldstone Report.<sup>190</sup> Beyond the importance of creating a key document on an issue of interest to States occupied with investigations of their military conduct in contemporary conflicts (such as the United States and the United Kingdom),<sup>191</sup> the focus on investigations is of particular importance in the context of the role of States in IHL making for two reasons. First, as ICL's prominence grows, investigations become a battle over the role of States and non-State actors in a specific conflict. The ICC operates under the principle of complementarity, which allows States to prevent a case from being adjudicated by the ICC if the State demonstrates that it is willing and able to investigate (and if required, prosecute) the case properly.<sup>192</sup> By establishing the standard for investigations of alleged IHL violations (and following those standards), the State may avoid adjudicating IHL cases in an international tribunal while also maintaining control of its own legal issues. Second, David Hughes recently suggested that the rise of ICL shifted in the battle over legitimacy from debates on IHL violations to debates over accountability for war crimes and investigations, defining this trend as a move towards informal complementarity.<sup>193</sup> Through a focus on investigations and perhaps the prosecution of individuals, States can maintain their legitimacy while reducing the need to justify policies of broader hostility. Israeli officials often use the Turkel Report to hail Israeli accountability mechanisms and to demonstrate Israel's willingness and ability to investigate alleged war crimes.<sup>194</sup> The second Turkel Report demonstrates Israel's recognition of the strategic importance of investigations of alleged IHL violations as Israel acted rather fast in producing one of the first outputs on this issue. Whether this decision was strategically correct—in light of the criticism of Israeli practice and its slow implementation of the Report's recommendations—remains

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<sup>190</sup> See Michelle Lesh, *A Critical Discussion of the Second Turkel Report and How It Engages with the Duty to Investigate Under International Law*, 16 Y.B. INT'L HUMANITARIAN. L. 119, 121-22 (2013).

<sup>191</sup> See, e.g., Ian Park, *Joint Series on International Law and Armed Conflict: The Obligation to Investigate Violations of IHL*, EJIL TALK, Sept. 30, 2016, <https://www.ejiltalk.org/joint-series-on-international-law-and-armed-conflict-the-obligation-to-investigate-violations-of-ihl/> (discussing the investigations of IHL violations in the UK while using the Turkel Second Report as a key reference); U.S. DEP'T OF DEFENSE, SUMMARY OF THE AIRSTRIKE ON THE MSF TRAUMA CENTER IN KUNDUZ, AFGHANISTAN ON OCTOBER 3, 2015: INVESTIGATION AND FOLLOW-ON ACTIONS (Nov. 21, 2015), [info.publicintellgence.net/CENTCOM-KunduzHospitalAttack.pdf](http://info.publicintellgence.net/CENTCOM-KunduzHospitalAttack.pdf) (U.S. Central Command's report on the Kunduz Hospital attack); Nathalie Weizmann, *When Do Countries Have to Investigate War Crimes?*, JUST SECURITY, Sept. 14, 2015, <https://www.justsecurity.org/26067/countries-investigate-war-crimes/> (discussing US investigation of alleged war crimes against Afghan civilians in 2012-2013).

<sup>192</sup> Rome Statute, *supra* note 93, at art. 17.

<sup>193</sup> David Hughes, *Investigation as Legitimization: The Development, Use, and Misuse of Informal Complementarity*, 19 MELB. J. INT'L L. 84 (2018).

<sup>194</sup> Emily Schaeffer Omer-Man, *Extrajudicial Killing with Near Impunity: Excessive Force by Israeli Law Enforcement Against Palestinians*, 35 B.U. INT'L L. J. 115, 154 (2017).

to be seen.<sup>195</sup> Nonetheless, the report is a clear indication of Israel's willingness to actively participate in IHL making.

Another notable decision in the context of the *Mavi Marmara* incident is Israel's willingness to cooperate with the Secretary General's report on the flotilla.<sup>196</sup> In contrast, Israel refused to cooperate with the Human Rights Council's report on the incident.<sup>197</sup> This cooperation may also indicate Israel's willingness to actively engage in the IHL debate over asymmetric lawfare.

Israel's fourth recent engagement with IHL is the Israeli Report on the 2014 Gaza conflict. This conflict led to a significant death toll and intense destruction.<sup>198</sup> Abundant legal criticism followed the results of this event, including a letter by a large number of international law experts,<sup>199</sup> a report by a commission of inquiry of the Human Rights Council,<sup>200</sup> and a preliminary examination of the situation by the ICC Prosecutor.<sup>201</sup> Just as it had following the conflict in 2009, Israel again issued its own official government report on the events in 2014 and refused to cooperate with the Human Rights Council commission of inquiry.<sup>202</sup> However, the 2014 report included three important changes when compared to the previous report. First, the report offered a more detailed legal analysis of relevant and controversial issues, including the deployment of artillery in urban warfare<sup>203</sup> and the targeting of armed group members, while explicitly rejecting the CCF requirement of the ICRC Guidance on Direct Participation in Hostilities.<sup>204</sup> Second, Israel offered international lawyers and experts unprecedented in-person access to its own military lawyers including an in-depth discussion of its views on IHL. This resulted in two articles by Michael Schmitt and John Merriam in which they describe the Israeli legal position on a wide variety of contemporary IHL norms including the customary status of different articles of the Additional Protocols.<sup>205</sup> Lastly, since the release

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<sup>195</sup> *Id.* (arguing that the Israeli investigation system is flawed, that the Turkel Report recommendations were only partially implemented, and that the recommendations that were implemented drew criticism as well).

<sup>196</sup> Palmer Report, *supra* note 182, at 3.

<sup>197</sup> Hudson Phillips Report, *supra* note 182, ¶ 16.

<sup>198</sup> The actual number of casualties is disputed but according to all sources the numbers for the 2014 Gaza conflict are much higher than previous conflicts. The HRC report states that the number of Palestinian casualties (2,251 total, including 1,462 civilians) was unprecedented. *See* Gaza 2014 HRC Report, *supra* note 77, ¶ 20. According to the Israeli Government's interim findings, 2,125 Palestinians were killed, including 936 militants, 761 civilians, and 428 "males between the ages of 16-50." *See* 2014 Gaza Conflict Report, *supra* note 90, at Annex – Palestinian Fatality Figures in the 2014 Gaza Conflict, ¶¶ 25-27.

<sup>199</sup> *Joint Declaration by International Law Experts on Israel's Gaza Offensive*, GLOBAL JUSTICE IN THE 21ST CENTURY (July 28, 2014).

<sup>200</sup> Gaza 2014 HRC Report, *supra* note 77.

<sup>201</sup> ICC, *Preliminary Examination: Palestine*, <https://www.icc-cpi.int/Palestine> (ongoing).

<sup>202</sup> 2014 Gaza Conflict Report, *supra* note 90.

<sup>203</sup> *Id.* ¶¶ 347-60.

<sup>204</sup> *Id.* ¶¶ 264-66.

<sup>205</sup> Major John J. Merriam & Michael N. Schmitt, *Israeli Targeting: A Legal Appraisal*, 68 NAVAL

of the report, Israel has shown a willingness to cooperate with the ICC preliminary examination of its conduct in the 2014 Gaza conflict.<sup>206</sup> These developments indicate another step in the increased willingness of Israel to take an active part in IHL lawmaking.

### C. *Explaining the Rise of States' Active Engagement in IHL Making*

#### 1. *Explaining the Lack of Active Engagement*

It is not surprising that States that do not actively take part in contemporary armed conflicts do not actively participate in the lawmaking process. States have a tendency to refrain from reacting to non-State actors' outputs<sup>207</sup> and from explicitly expressing their own legal positions.<sup>208</sup> In these cases, a State may not have sufficient legal resources to invest in a specific issue nor sufficient interest to express an official position and may prefer to maintain wide discretion.<sup>209</sup> However, the United States and Israel are two examples of States that are both significantly invested in the subject and seem to have the legal resources to actively engage in the debate. The rationale for a lack of engagement within this context is not obvious. Schmitt and Watts offer possible explanations for the lack of active involvement in the legal debate. They suggest that the reluctance to express an opinion can be the result of limited knowledge of the implications of an emerging area of warfare, a political impasse resulting from domestic political considerations, or a calculated decision to suggest that no IHL norms apply to the specific situation.<sup>210</sup>

I want to offer an alternative explanation that I believe had a significant influence on the decision of States to provide little legal justification for their conduct of hostilities policy. States acted under the traditional positivist model of international lawmaking, thereby discounting the role and power of non-State actors. They assumed that their own actions would be the most influential factor in shaping contemporary IHL. State actors did not expect non-State actors' outputs to have such a significant influence. Schmitt and Watts' suggestion that silence was intended to indicate a lack of IHL prohibition (or relevance) is included in this line of reasoning. Early attempts to address non-State initiatives by emphasizing the role of States in international lawmaking, such as the criticism of the ICRC customary study, might be an expression of the same notion. The

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WAR C. REV. 20 (2015); Schmitt & Merriam, *supra* note 63.

<sup>206</sup> Sharon Weill & Valentina Azarova, *The 2014 Gaza War: reflections on jus ad bellum, jus in bello, and accountability*, in THE WAR REPORT: ARMED CONFLICT IN 2014, 360, 386-387 (Annyssa Bellal ed., 2015).

<sup>207</sup> See Sivakumaran, *supra* note 14, at 181.

<sup>208</sup> See Marco Milanovic, *Accounting for the Complexity of the Law Applicable to Modern Armed Conflicts*, in COMPLEX BATTLESPACES: THE LAW OF ARMED CONFLICT AND THE DYNAMICS OF MODERN WARFARE (forthcoming 2019) (describing the silence of most States in the context of *jus ad bellum*).

<sup>209</sup> See Sivakumaran, *supra* note 14, at 182-83.

<sup>210</sup> Schmitt & Watts, *supra* note 3, at 211.

reluctance of the Bush administration to present a detailed legal justification can be explained by the administration's belief that US practice is significant enough to influence the vague law of such conflicts, especially as one of the "States whose interests are specially affected."<sup>211</sup> Moreover, the same belief may be strengthened by the notion of "hegemonic international law" that emerged in the international law scholarship of that time by Detlev F. Vagts.<sup>212</sup> Under this notion, there need not be any detailed analysis of the relevant legal situation for the hegemon to affect international law.<sup>213</sup> More importantly, no customary rule can emerge when a hegemon abstains from acting.<sup>214</sup> It is not surprising that the United States chose not to provide any detailed justifications for its actions, given its beliefs in its own ability to shape international law and skepticism of the role of non-State actors.

Another explanation may arise out of a negative perception of international law in the contemporary international law community. The Bush administration held a general suspicion towards international law which it viewed as "an obstacle to the exercise of American power."<sup>215</sup> This skepticism towards international law has been portrayed convincingly by Jens Ohlin.<sup>216</sup> As for Israel, its administration has expressed concerns not regarding international law in general but regarding the politicization of international legal institutions, as indicated in its continuing refusal to cooperate with various international law bodies. This sentiment relates to the growing use of the notion of lawfare. The term lawfare was reintroduced by Charles Dunlap Jr., as "a method of warfare where law is used as a means of realizing military objective."<sup>217</sup> This definition is rather neutral, as is the example Dunlap uses in another paper on the use of a contract to obtain exclusive rights to satellite imagery of strategic importance.<sup>218</sup> Nonetheless, the notion that is relevant in our context is the common use of the term to express the "imposition or manipulation of international legal standards to confine traditional military means and operations and to limit both State responses to terrorism and the use of force,"<sup>219</sup> that was widely discussed in the Israeli and American contexts.<sup>220</sup>

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<sup>211</sup> North Sea Continental Shelf Cases (F.R.G v. Den. & Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶¶ 73-74 (Feb. 20).

<sup>212</sup> Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843 (2001).

<sup>213</sup> See generally Jose E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873, 873 (2003).

<sup>214</sup> Vagts, *supra* note 212, at 847.

<sup>215</sup> Jack Goldsmith, *The Contributions of the Obama Administration to the Practice and Theory of International Law*, 57 HARV. INT'L L. J. 455, 455 (2016).

<sup>216</sup> See generally JENS DAVID OHLIN, *THE ASSAULT ON INTERNATIONAL LAW* (2014).

<sup>217</sup> Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* 4 (Carr Ctr. Human Rights Policy, John F. Kennedy Sch. Gov't, Harvard Univ., Working Paper, 2001).

<sup>218</sup> Charles J. Dunlap Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT'L AFF. 146, 147 (2008).

<sup>219</sup> David Hughes, *What Does Lawfare Mean?*, 40 FORDHAM INT'L L. J. 1, 4 (2016).

<sup>220</sup> See, e.g., *id.* (describing the term "lawfare" in the American and Israeli contexts); David Scheffer, *Whose Lawfare is It, Anyway?*, 43 CASE W. RES. J. INT'L L. 215 (2010) (critically discussing how the notion of lawfare in the United States and Israel affects the two nations' willingness to engage in the legal debate of their policies). From the other side, several authors have emphasized the political nature

I believe that the ‘skepticism towards international law’ explanation is important and can explain part of the difference between the Bush and Obama administrations’ attitudes. Nonetheless, the Israeli case demonstrates that this explanation does not capture the whole story. Since 2009, the Israeli government is by no means more receptive to international law. And, as the next Section demonstrates, Israel, just like the United States, changed its approach and began to directly engage with the lawmaking of contemporary IHL.

## 2. *Explaining the Recent Direct Engagement of States with IHL*

I suggest that greater State engagement with IHL largely resulted from the internalization by States of the impact of non-State actors’ initiatives on international law. The following Section explains the impact of such outputs and then addresses the reaction of States to such impact.

### a. *Explaining the Influence of Non-State Lawmaking Initiatives*

How do non-State actors’ outputs gain influence despite the lack of formal authority? The following Section suggests that where traditional actors are relatively silent, the mere existence of non-State actors’ outputs is sufficient to influence the law. This Section offers several rational and behavioral explanations for such influence.

In his article about the battle over the law of asymmetric warfare, Eyal Benvenisti captures an important insight about the way in which non-State actors influence international law. When referring to different lawmaking efforts by non-State actors, Benvenisti states that “these norms practically move the law beyond State consent and below the radar screens of governments in the hope that domestic and international courts will resort to them as reflecting evolving law.”<sup>221</sup> This insight captures two necessary components of the ability to influence the direction of IHL. First, the lawmaking initiatives should be made “below the radar screens” of governments. Second, they should fill a gap in legal regulation that other actors in the international legal community also need to address—to provide a thick enough legal analysis for these other actors to use.

Sandesh Sivakumaran’s recent article on international lawmaking by State-empowered entities discusses various factors that influence the impact of such lawmaking initiatives. While Sivakumaran focuses on State-empowered entities, his analysis could be applied broadly to any non-State actor lawmaking initiative. Sivakumaran’s main focus is on the way in which the community of international lawyers receives the lawmaking initiative. His argument is to a large extent a generalization of the argument that was made by Schmitt and Watts, stating that

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of the term “lawfare” itself. *See, e.g.,* Leila Nadya Sadat & Jing Geng, *On Legal Subterfuge and the So-Called “Lawfare” Debate*, 43 CASE W. RES. J. INT’L L. 153, 160 (2010); David Luban, *Carl Schmitt and the Critique of Lawfare*, 43 CASE W. RES. J. INT’L L. 457 (2010).

<sup>221</sup> Benvenisti, *supra* note 52, at 346. Eyal Benvenisti builds on the work of Kenneth Abbott on the effect of privately-generated soft law. *See* Abbott, *supra* note 46.

in practice States tend not to respond to non-State actors' lawmaking initiatives and the vast majority of the responses come from other non-State actors. As a result, non-State actors are gaining more influence in the making and shaping of international law while the role of States declines.<sup>222</sup>

Another step in the analysis is needed, however, to explain the endorsement of specific non-State lawmaking initiatives. Other factors that Sivakumaran discusses—such as the reputation of the non-State actor, its link to States, or the quality of its reasoning—significantly affect the impact of the output.<sup>223</sup> Another explanation is that actors who react positively to an initiative share the same substantive positions as the non-State actor who created the document.<sup>224</sup> This explanation captures part of the story. Nonetheless, ideology can only partially explain acceptance. If everything is already dependent on the political preferences of the different actors, there is no point in battling over norms, since all actors will hold on to their initial preferences. Indeed, political pressure from various actors who endorse the non-State actor's position can incentivize some States to accept this position as binding.<sup>225</sup> However, there are still limitations to the effect of such pressure, and there is limited explanation of how the norms are accepted by such actors.

I suggest that at least part of the reason that these initiatives are influential is the mere fact that they exist.<sup>226</sup> This explanation builds on two assumptions. First, many actors in the international law community have a genuine interest in applying the relevant legal norms to a specific situation. Second, many of these actors either do not have strong expertise in the particular subject matter or alternatively do not hold a strong preference on the matter. In such cases, actors rely on the most accessible, convenient, or detailed source on the relevant subject, especially when the actors need to provide an explanation for their position. This is often the case, for example, in international law cases adjudicated in domestic courts. In many cases, domestic courts lack specific IHL expertise. This is most notable when IHL cases are rare in a specific court or jurisdiction. For example, Naz Modirzadeh described the lack of IHL expertise in US courts and argued that this expands the influence of experts in the field through the filing of *amici* briefs.<sup>227</sup>

Steven Ratner's article on the effect of international law on the prevention of ethnic conflict provides a second example of the practical influence of non-

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<sup>222</sup> See generally Schmitt & Watts, *supra* note 3.

<sup>223</sup> Sivakumaran, *supra* note 14, at 365–70.

<sup>224</sup> See Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 898–99 (1998) (describing the life cycle of international norms including the role of non-State actors in the creation of such norms and the role of States in their dissemination).

<sup>225</sup> *Id.*

<sup>226</sup> See also Tomer Broude & Yahli Shereshevsky, *Explaining the Practical Purchase of Soft Law: Competing and Complementary Behavioral Hypotheses*, in INTERNATIONAL LAW AS BEHAVIOR (forthcoming 2018) (discussing similar explanations for the influence of soft law).

<sup>227</sup> See Modirzadeh, *supra* note 5, at 257–58 (discussing the lack of IHL expertise in US courts and their reliance on *amici* briefs).

binding norms.<sup>228</sup> Ratner suggests that soft norms had a strong influence as an argumentative tool when used by the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe (OSCE), especially when the actors to whom the communications were directed had little knowledge of the relevant international law norms.<sup>229</sup> One exception to the tendency to rely on soft norms was a small group of foreign ministry specialists who insisted on the relevance of the hard versus soft law distinction.<sup>230</sup> Ostensibly, the debate over contemporary IHL pertains to foreign ministry officials much more than to actors with no international law expertise. Nonetheless, there is reason to believe that in many cases, the debate over contemporary IHL is closer to the example of the influence of soft law on those actors with no expertise. Even the knowledge of international law experts is limited, especially in an era when it is increasingly common to have a specific, narrow expertise.

Think, for example, of a law clerk at the ICJ who faces a question regarding the customary status of a specific article in First Additional Protocol. Is it reasonable to assume that she is familiar with the relevant State practice and *opinio juris* needed to determine the status of the article? Can we assume that even an ICJ judge, or a military JAG is familiar with all the relevant materials? Often, within the most important cases in the debate over the regulation of contemporary warfare, there is more than a mere information gap. Instead, a real ambiguity surrounds the legal norm. Take for example the question of targeting non-State armed groups. Until the creation of the Interpretive Guidance (and to a much lesser extent the Israeli *Targeted Killings* case), the debate over this highly important issue was open-ended and vague.<sup>231</sup> Moreover, in contrast to many soft law instruments that clearly refer to themselves as non-binding, and thus enable international law experts to discern between binding and non-binding norms, most of the non-State initiatives discussed in this context intend to represent existing, binding norms.<sup>232</sup> This is true even if the legal propositions articulated in these initiatives are not authoritative. For example, the ICRC customary study aims to represent binding customary law and the ICRC new commentaries on the Geneva Conventions aims to offer an interpretation of binding treaty norms. Under these circumstances, it is likely that actors that need to hold a position on these questions will rely, at least to some extent, on such documents.

It is possible to think of different rational and psychological explanations for the widespread use of the lawmaking outputs of non-State actors by other actors. Think again of the example of the ICJ law clerk or government official who faces a question of the customary status of a specific IHL norm. With the ICRC

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<sup>228</sup> Steven R. Ratner, *Does International Law Matter in Preventing Ethnic Conflict?*, 32 N.Y.U. J. INT'L L. & POL. 591 (1999).

<sup>229</sup> *Id.* at 661.

<sup>230</sup> *Id.* at 664–65.

<sup>231</sup> Schmitt & Watts, *supra* note 3, at 199–200.

<sup>232</sup> See Broude & Shereshevsky, *supra* note 226 (discussing the difference between various types of soft law instruments).

Customary Law Study as the only significant account of customary IHL, she has to choose between two options: conducting independent research or using the ICRC study as a starting (and sometimes the only) point of reference. Indeed, there is much value in conducting independent research. Yet this has significant costs. Assuming that the relevant actor is not highly invested in a specific position, and given the workloads of the specific actor, relying on the ICRC study might be the most efficient path. Non-State actors' outputs can be focal points of coordination for the relevant actors.<sup>233</sup>

In addition, the ICRC study might gain influence through mechanisms that are recognized in behavioral law and economics and social psychology literature. The ICRC study can be difficult to ignore, since it often serves as an initial reference point (or meaningful anchor) that affects the position of the relevant actor.<sup>234</sup> If the ICRC study is perceived as the *status quo*, then the *status quo* bias might explain the tendency to rely on it as existing law.<sup>235</sup> Finally, if we accept the notion of a shared interpretive community, then insight from the literature on social influence, which addresses the effect of groups on individual decisions, can be invoked to assess the potential effect of existing documents on members of the relevant interpretive community. The reliance on these outputs might be the result of a tendency to conform to others' positions for informational or reputational reasons, especially when these outputs come from highly regarded experts or organizations.<sup>236</sup>

Regardless of the actual psychological or rational processes, the common feature of these explanations is the visibility and centrality of the stated norm as an explanation for its influence. The mere availability of the output might best explain why, despite extensive criticism of the methodology of the ICRC study (including by scholars that are not usually associated with the LOAC lawyers camp), it remained an extremely influential document.<sup>237</sup> Without a viable alternative, there is little incentive for international law actors to refrain from using the study as the main reference point in the context of customary IHL.

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<sup>233</sup> Tom Ginsburg & Richard H. McAdams, *Adjudication in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229 (2004).

<sup>234</sup> Anchoring is usually discussed in relation to the effect of exposure to random numbers on estimations, but the literature has recognized the potential anchoring effect of meaningful non-numerical standards or legal materials. See, e.g., Ozan O. Varol, *Constitutional Stickiness*, 49 U.C. DAVIS L. REV. 899, 947–48 (2016) (suggesting that existing constitutional norms might have an anchoring effect that contributes to the stickiness of constitutional norms); Yuval Feldman, Amos Schurr & Doron Teichman, *Anchoring Legal Standards*, 13 J. EMPIRICAL LEGAL STUD. 298, 320 (2016) (suggesting that future research should address the anchoring effect of default contract terms); Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 WASH. U. L. Q. 347, 363 (1996) (suggesting that standard contractual terms might have an anchoring effect).

<sup>235</sup> See Broude & Shereshevsky, *supra* note 226, at 23–24.

<sup>236</sup> See *id.*

<sup>237</sup> See Iain Scobbie, *The Approach to Customary International Law in the Study*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 15, 22 (Elizabeth Wilmshurst & Susan Breau eds., 2007).

*b. The New Engagement as a Reaction to the Influence of Non-State Actors*

When States internalized the potential significance of written legal reasoning in the battle over the law of asymmetric conflicts, they reacted to non-State actors' initiatives by producing their own legal counter-analyses. Even from the perspective of the notion of lawfare, or a negative sentiment towards international law, a State can decide that it is better to play the game rather than abandon it, and that it is better to adopt a positive strategy of forming counter-arguments on the applicable law rather than avoiding the subject altogether.<sup>238</sup> Building on Ingber's analysis, non-State actors' lawmaking initiatives might be seen as external interpretive catalysts once their potential influence is acknowledged by States. While Ingber discusses executive speeches as interpretive catalysts, we can look further at the causes that incentivize the decision to give a speech as an external interpretive catalyst.<sup>239</sup> As Schmitt and Watts have noted in the context of IHL and Sivakumaran has noted in the broader international law context, the result of the decision of States to refrain from significant involvement in lawmaking has increased, rather than decreased, the influence of non-State actors in shaping international law. This result was acknowledged by States and contributed to their decisions to reengage in international lawmaking.

Moreover, understanding the reasons for the influence of non-State actors' outputs, as explained in Part II.C, influences the form of the new State lawmaking initiatives. States realized that silence or mere criticism of the lawmaking initiatives are not enough to influence the law. For example, rejecting or criticizing non-State actors' outputs such as the ICRC customary study (by focusing on their methodology) is not sufficient to counter their influence. When States fail to put forward their own assessments of customary IHL, the ICRC initiative will remain the only significant account and will likely be used by the relevant actors due to the tendency to use such reference points, as described above. Thus, instead of mere criticism, States have decided to follow the path of non-State actors' nontraditional lawmaking methods to regain their influence. The form of these efforts is described in the Part III.B.

*D. Short Summary and Alternative Explanations*

Taken together, the speeches, reports, and the publication of the DoD Manual indicate a new approach by the United States and Israel towards IHL making. In the first few years of US and Israeli involvement in contemporary asymmetric conflicts, both nations showed little willingness to actively promote their legal positions, but in recent years they have taken a different path. This does not necessarily mean that the new approach is here to stay. For example, the Trump administration, which I address in the conclusion of the paper, is much less

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<sup>238</sup> See KITTRIE, *supra* note 82, at 298.

<sup>239</sup> Ingber, *supra* note 103, at 397.

engaged with international law than the Obama administration.<sup>240</sup> However, as this Section demonstrates, the Obama administration's approach was not unique, and Israel's current right-wing government has adopted a similar approach. Thus, the decision to engage in IHL making is not dependent on a favorable attitude towards international law and institutions.

Outputs from Israel and the United States have many differences, including the political environment in which they were created, the issues that they cover, their length, and their authors. Thus, while the speeches provide a brief insight into various US policies and do not always clearly differentiate between law and policy, the First Turkel Report provides a more robust analysis of specific legal questions that are related to the flotilla incident. While the DoD Manual is a DoD creation, the Israeli reports are joint projects. In addition, in each case it is possible to offer other explanations for the decision to actively participate in IHL making. With regard to the United States, it is possible to suggest that the internal pressure for transparency and accountability contributed to the creation of the new lawmaking initiatives. More specifically, the release date of the Framework Report was discussed in relation to the beginning of the Trump presidency.<sup>241</sup> As to Israel, the change can be explained as a result of the difference between the more intensive conflicts in Gaza from the Second Intifada,<sup>242</sup> or as part of a power struggle between the government and the Supreme Court in Israel.<sup>243</sup>

I do not intend to argue that the present explanation for the change is the only explanation. I do believe that other accounts of the change shed light on important aspects of the process. Nonetheless, this Article offers an important part of the story. First, regardless of the reasons for the recent use of unilateral lawmaking initiatives, this Article highlights the mere fact that there was such a change. While the reluctance of States to actively engage in international lawmaking was already acknowledged and discussed in the literature, States' recent active engagement in international lawmaking has not received sufficient recognition and analysis. Second, there are strong indications that these outputs were created as a response to non-State actors' involvement in international lawmaking. As mentioned, the Gaza conflict reports were published in light of the upcoming Human Rights Council commissions of inquiry, and the second Turkel Report was created in light of the increased international focus on investigations. In

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<sup>240</sup> See, e.g., Monica Hakimi, *International Law in the Age of Trump*, EJIL TALK, February 28, 2017, <https://www.ejiltalk.org/international-law-in-the-age-of-trump/>; Jack Goldsmith, *The Trump Onslaught on International Law and Institutions*, LAWFARE, March 17, 2017, <https://www.lawfareblog.com/trump-onslaught-international-law-and-institutions>. But see Ingrid Wuerth, *International Law and the Trump Administration*, LAWFARE, March 29, 2017, <https://www.lawfareblog.com/international-law-and-trump-administration> (suggesting that the Trump administration maintains at least formal compliance with international law).

<sup>241</sup> See Wittes, *supra* note 169 (discussing these questions and arguing that the release of the Framework Report should not be regarded as an attempt to pressure the Trump administration); Pearlstein, *supra* note 169 (discussing the potential effect of the report on the Trump administration while refraining from looking into the intentions of the drafters).

<sup>242</sup> The intensity of the Second Lebanon War in 2006 weakens the explanatory force of this argument.

<sup>243</sup> See Shereshevsky, *supra* note 124, at 255–67.

addition, several authors have already recognized Israel's deliberate decision to respond to non-State actors' legal criticism by producing its own legal outputs.<sup>244</sup> With respect to the United States, the DoD Manual was addressed as a lawmaking initiative and as a potential response to non-State actors' outputs, most notably the ICRC.<sup>245</sup> The next Section offers an analysis of the new engagement and what it can tell us about international lawmaking.

### III.

#### THE NATURE OF THE NEW ENGAGEMENT—STATES ACTING AS NON-STATE ACTORS: LESSONS FOR INTERNATIONAL LAWMAKING FROM THE RISE OF STATE INVOLVEMENT IN THE MAKING OF IHL

As mentioned, in traditional IHL making, States focused on treaty law. This constituted a coordinated effort of a group of States to create binding obligations. The contemporary engagement involves mainly non-traditional lawmaking efforts that result in non-binding documents. In few cases, these outputs take the form of a soft law joint project, such as the Denmark-initiated Copenhagen Process Principles on the Handling of Detainees in International Military Operations,<sup>246</sup> and, in the cases discussed in this Article, in unilateral outputs of specific States. The following Section addresses three aspects of the new lawmaking effort and the way that this lawmaking effort follows the way which non-State actors, mainly the ICRC, have attempted to influence contemporary IHL. This Section looks at the utility of unilateral outputs of specific States; the horizontal, communicative nature of the engagement; and the importance of cooperation between States and LOAC lawyers.

##### A. *Unilateral Outputs, Soft Law Theory, and Reducing the Costs of International Lawmaking*

The first lesson from the recent IHL initiatives is the potential importance of unilateral initiatives as a lawmaking tool. The research on unilateral lawmaking addressed the role of the unilateral *conduct* of States,<sup>247</sup> or domestic legislation,<sup>248</sup> as tools that can influence compliance with international law or shape customary

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<sup>244</sup> KITTRIE, *supra* note 82, at 270.

<sup>245</sup> See, e.g., Laura Burgess, *Event: The Department of Defense Law of War Manual: The Tension Between State and Non-State Expressions of Customary International Humanitarian Law*, ICRC INTERCROSS (Oct. 30, 2015), <http://intercrossblog.icrc.org/blog/whmkkm4vwwxkmd8q7xumo4ok886s21>.

<sup>246</sup> THE COPENHAGEN PROCESS ON THE HANDLING OF DETAINEES IN INTERNATIONAL MILITARY OPERATIONS: PRINCIPLES AND GUIDELINES (2012), <http://iihl.org/wp-content/uploads/2018/04/Copenhagen-Process-Principles-and-Guidelines.pdf>.

<sup>247</sup> See, e.g., Maggie Gardner, *Channeling Unilateralism*, 56 HARV. INT'L L.J. 297 (2015); Monica Hakimi, *Unfriendly Unilateralism*, 55 HARV. J. INT'L L. 105, 105 (2014).

<sup>248</sup> See, e.g., Peter-Tobias Stoll, *Compliance: Multilateral Achievements and Predominant Powers, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW* 456, 468-74 (Michael Byers & George Nolte eds., 2003).

international law as part of the international lawmaking process. Existing research did not pay sufficient attention, however, to the role of unilateral accounts of States' positions on existing international law as a lawmaking tool that can serve as an alternative to traditional lawmaking tools as well as to soft law initiatives.

An important insight from the soft law literature addresses the lower costs of soft law creation as one of the possible explanations for why States choose to create soft law over binding treaties. In their seminal article on soft law, Kenneth Abbot and Duncan Snidal claim that lower negotiating costs, or contracting costs, are a major advantage of soft law.<sup>249</sup> Even if binding norms are more effective than soft law, taking into account the lower costs of soft law creation, it might be more efficient to opt for soft law. Abbott and Snidal hypothesize that States will opt for soft law in cases where hard law contracting costs are higher, such as cases that involve intensely political costs.<sup>250</sup>

These insights could be taken one step further to address the benefits of unilateral lawmaking initiatives. Just like soft law versus hard law, unilateral outputs are less costly to produce than joint outputs. In the same way, even if joint projects are likely to be more effective, the costs of achieving such joint projects might be greater than the gain in effectiveness. Following from Abbot and Snidal, I hypothesize that actors will tend to use more unilateral outputs when the costs of joint projects are higher, for example, in cases involving highly controversial legal issues.

The regulation of contemporary armed conflict is an example of such a highly controversial legal issue and indeed different actors opted for unilateral initiatives. All three ICRC projects described in Part I.C are to a greater or a lesser extent unilateral ICRC projects. The Interpretive Guidance is the clearest example of this trend and illustrates the potential impact of such initiatives on international law. When the group of experts asked that their names be removed from the guidance, the ICRC had to decide how to proceed. The decision to publish the Interpretive Guidance as an institutional publication without the names of any expert who participated in the process is telling.<sup>251</sup> It suggests that even if it is more beneficial to produce an output that involves different participants, as was the initial intention, the institution can achieve its goals even with a unilateral publication.<sup>252</sup> The well-recognized influence of the Interpretive Guidance further supports the assumption that such outputs should be considered as useful

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<sup>249</sup> Abbott & Snidal, *supra* note 45, at 435–36. *See also* Shaffer & Pollack, *supra* note 157, at 719; Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 594 (2008) (discussing the lower costs of soft law creation as its big advantage in the domestic law context).

<sup>250</sup> Abbott & Snidal, *supra* note 45, at 436.

<sup>251</sup> *See* BOOTHBY, *supra* note 29, at 78 (presenting the decision as an ICRC initiative that was delivered to participants during the final meeting in 2008).

<sup>252</sup> *See id.* at 59 (suggesting that due to the reputation of the ICRC and the lack of knowledge of some government lawyers, the Interpretive Guidance is expected to be influential).

lawmaking initiatives, when facing high costs of reaching an agreement even through the use of soft law.<sup>253</sup>

States also opt for unilateral initiatives when contracting costs are high. The first option might be a joint soft law instrument. Reflecting on the debates over the contemporary law of detention, John Bellinger and Vijay Padmanabhan suggest that when the creation of a new international instrument is not feasible, like-minded States should act together to reach an agreement on common principles.<sup>254</sup> The Copenhagen Process is an example of such an effort.<sup>255</sup> Nonetheless, as the US and Israeli initiatives demonstrate, States can produce their own independent documents to promote their interpretations of the law in cases where other options are too costly.

The potential influence of unilateral outputs when the contracting costs are high is not unique to IHL and is relevant to international lawmaking in general. For example, Lawrence Helfer and Timothy Meyer recently described the tendency of the ILC to refrain from promoting its mandate with multilateral treaties as an end result, instead creating other outputs such as principles, conclusions, and draft articles.<sup>256</sup> They explain this tendency as a result of gridlock in the UN General Assembly. This makes the production of multilateral treaties much harder, while alternative outputs can still influence international law.<sup>257</sup> In other words, the ILC opts for unilateral outputs when contracting costs are high.<sup>258</sup>

This is not to say that engagement with other actors is not important for the effectiveness of the output. Cooperation with other actors is highly desirable in the creation stage and in the post publication stage of the output, as discussed *infra*. Nonetheless, the first lesson that contemporary IHL making teaches is about the potential importance of independent State and non-State actors' lawmaking initiatives.

### B. *The Form of the New Engagement—Horizontal v. Hierarchical International Lawmaking*

The new engagement in the IHL making process is of a different nature than traditional State international lawmaking. It features an active engagement in the

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<sup>253</sup> See Ka Lok Yip, *The ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities: Sociological and Democratic Legitimacy in Domestic Legal Orders*, 2 TRANSNAT'L LEGAL THEORY 224, 224 (2017) (describing the influence of the Interpretive Guidance).

<sup>254</sup> Bellinger & Padmanabhan, *supra* note 29, at 205.

<sup>255</sup> See THE COPENHAGEN PROCESS, *supra* note 246.

<sup>256</sup> Helfer & Meyer, *supra* note 41, at 305.

<sup>257</sup> *Id.* at 312–13.

<sup>258</sup> Helfer and Meyer analyze ILC behavior using a principal-agent theory. Nonetheless, while the principal-agent relations between the UN General Assembly and the ILC might, at least partially, explain the authoritativeness of the ILC outputs, such analysis is not necessary for their conclusion. See Sivakumaran, *supra* note 11, at 367. Even when the actor that seeks to engage in international lawmaking does not act within a framework of principal-agent relations, such as when it is an independent NGO or a State, it will similarly consider the contracting costs and the potential influence of the alternative outputs when deciding between lawmaking alternatives.

conversation or debate over the interpretation of IHL norms in asymmetric conflicts. States recognize that they are only one player, although a prominent one, among many involved in the battle of persuasion. States decide to play the game as it is actually played rather than trying to emphasize its formal rules. In order to gain influence, States must take an active part in the conversation and promote the visibility and accessibility of their lawmaking initiatives in order to incentivize other actors to engage with these initiatives, even in a critical way. The main goal of the participants is to make their output the focal point of reference in the conversation. There is not only one way to achieve this goal, and the different outputs use different methods to promote their influence. The important insight regarding the different ways that States communicate their positions to the international community is their resemblance to non-State actors' strategies. States do not rely only on the formal authoritativeness of the texts or their higher formal place in the State/non-State actor hierarchy, but play the game while sometimes using their status to increase the influence of the texts in a horizontal interpretive battle. The following Section describes some of the communication strategies that States use in their new engagement with the lawmaking process. This is not an exclusive list of potential strategies and not all strategies were used in all of the outputs. Nonetheless, these strategies demonstrate the unique features of the new engagement with IHL making.

*1. Engaging with the International Law Community: the Role of Conferences and Workshops*

The first communication strategy that States use is the promotion of State positions during international law conferences and workshops. This strategy was used in several of the Obama administration's international law speeches. The seminal example of this method is the location of the Harold Koh speech of 2010.<sup>259</sup> The Koh speech was the most cited speech and is perhaps the biggest symbol of the Obama administration's engagement with international law.<sup>260</sup> It was the keynote speech at the ASIL Annual Conference, an event that is considered by many to be the most important gathering of the international law community. Koh was a prominent international law scholar before joining the Obama administration, and his speech at ASIL can be seen as an attempt by the United States to become part of the international law conversation in a less confrontational way and be received as an actor that participates in the legal debate rather than challenging existing norms. The beginning of the speech, in which Koh reminds the audience of his past presentations at the annual conferences, is an indication of his attempt to frame the speech as part of a continuum and emphasize that government lawyers and academics are part of the same community. Koh's speech was not the only government speech to take place

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<sup>259</sup> Koh, *supra* note 134.

<sup>260</sup> According to a Google Scholar search, the speech was cited more than 130 times. See [https://scholar.google.co.il/scholar?cites=16656578638190814366&as\\_sdt=2005&sciodt=0,5&hl=iw](https://scholar.google.co.il/scholar?cites=16656578638190814366&as_sdt=2005&sciodt=0,5&hl=iw).

at ASIL's annual meetings. Stephen W. Preston, the General Counsel of the DoD was the keynote speaker at the 2015 conference,<sup>261</sup> and Brian Egan, the Legal Adviser to the Department of State, was the keynote speaker at the 2016 conference.<sup>262</sup>

The DoD Manual serves as a good example for the importance of conferences in promoting States' lawmaking initiatives. The drafters of the manual—most notably Charles A. Allen, Matthew McCormack, and Karl Chang—have shown a remarkable willingness to engage in discussions about the manual with domestic and international legal experts in symposiums, workshops, and conferences. In most cases these events were either exclusively dedicated to the DoD Manual or had a special panel or a keynote speech devoted to it.<sup>263</sup>

Following the 2014 Gaza conflict, Israel started a new initiative conducting international conferences on the law of armed conflict. The first conference took place in 2015 with more than seventy participants,<sup>264</sup> including "military lawyers, experts in the field of military law, and legal advisors to international organizations."<sup>265</sup> A second, even bigger conference was held in 2017, with more than one hundred participants,<sup>266</sup> including "past and present Military Advocates General, military judges, government and national security legal advisers, senior members of the ICRC, and leading 141 academics from Israel and other countries."<sup>267</sup> It seems that the goal of the conferences was to emphasize the legal challenges that Israel faces in contemporary warfare and its interpretation of the relevant norms. As the Military Advocate General at the time of the first conference, Maj. Gen. Dan Efroni, stated, "the objective of the conference [was] to shed light on the operational difficulties and legal challenges

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<sup>261</sup> Stephen W. Preston, Gen. Counsel, U.S. Dep't of Def., *The Legal Framework for the United States' Use of Military Force Since 9/11* (Apr. 10, 2015), <http://www.defense.gov/News/Speeches/Speech-View/Article/606662/the-legal-framework-for-the-united-states-use-of-military-force-since-911>.

<sup>262</sup> Egan, *supra* note 141.

<sup>263</sup> A partial list of these events includes: a special panel on the DoD Manual at the ASIL annual conference (Mar. 31, 2016), <https://www.asil.org/blogs/us-and-international-perspectives-new-us-department-defense-law-war-manual>; a panel at the International Law Weekend (Nov. 7, 2015), <https://www.ilsa.org/ILW/2015/ILW2015DraftProgram.pdf>; a keynote speech at the Minerva ICRC IHL Conference (Nov. 15, 2015), <http://blogs.icrc.org/ilot/2015/11/09/reassessing-developments-in-the-laws-of-armed-conflict/>; a panel on the Manual in an IHL conference at Harvard Law School (Mar. 31, 2017), <https://www.facebook.com/events/750248245140807/>; and a panel discussion at Georgetown Law School (Feb. 3, 2016), <http://www.law.georgetown.edu/academics/centers-institutes/national-security/events/past-events.cfm>.

<sup>264</sup> The Military Advocate General's Corps, *Conferences on the Law of Armed Conflict* (Feb. 23, 2015), <https://www.idf.il/en/minisites/military-advocate-generals-corps/conferences/>.

<sup>265</sup> IDF, *IDF Hosts Multinational Conference on Contemporary Armed Conflicts* (Feb. 23, 2015), <https://www.idf.il/en/minisites/military-cooperation/idf-hosts-multinational-conference-on-contemporary-armed-conflicts/>.

<sup>266</sup> Judah Ari Gross, *In Israel, International Law Grapples with 21st Century War*, TIMES ISRAEL (Apr. 25, 2017), <http://www.timesofisrael.com/in-israel-international-law-grapples-with-21st-century-war/>.

<sup>267</sup> Sharon Afek, *We're Not in Beersheba Anymore: Discussing Contemporary Challenges in the Law of Armed Conflict with 120 International Lawyers*, 51 VAND. J. TRANS. L. 691, 693 (2018).

posed by modern armed conflicts."<sup>268</sup> And the Contemporary Maj. Gen., Sharon Afek, stated with regard to the second conference that "the topics selected for the conference reflect some of the most pressing issues emerging from contemporary conflicts, and the way in which the theory of LOAC is to be applied in practice."<sup>269</sup> Key subjects in the conferences included areas of disagreement between the Israeli legal position and the ICRC, most notably the targeting of armed groups' members.<sup>270</sup> In addition, the conferences included field trips and meetings with field commanders. The 2015 conference included a field trip to demonstrate the challenges in the 2014 Gaza conflict,<sup>271</sup> and the second conference included a field trip to Israel's northern boundaries to demonstrate the challenges in the conflict with Hezbollah in Lebanon and the situation near the Syrian border.<sup>272</sup> Lastly, the proceedings of the second conference, including several presentations by Israeli LOAC lawyers, were published in a special issue of the Vanderbilt Journal of Transnational Law.<sup>273</sup> This enables Israel's positions to reach wider readership under a well-respected international law journal, as Maj. Gen. Afek recognized in his contribution to the special issue.<sup>274</sup>

Conducting conferences on the law of war is not a completely new phenomenon. The Stockton Center for the Study of International Law at the US Naval War College has been conducting annual workshops for years.<sup>275</sup> In addition, LOAC lawyers are regular participants in IHL conferences. Nonetheless, the Israeli conferences are much larger than common IHL conferences. Israel's willingness to invest such resources in conducting large scale international conferences reflects its efforts to become a more significant actor in IHL making through its own initiatives.

## 2. Footnotes and Elaborated Legal Analysis

If the only goal of this new form of legal engagement was to pronounce State *opinio juris*, this could have been done through short, clear, statements of the relevant legal rules. Nonetheless, many of the State outputs contain elaborate legal justifications as well as many footnotes. The Turkel Reports, Israeli Gaza Conflict Reports, and Frameworks Report all contain footnotes and legal justifications, although they differ in the amount of the footnotes and the depth of

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<sup>268</sup> IDF, *supra* note 265.

<sup>269</sup> Afek, *supra* note 267, at 693.

<sup>270</sup> *Id.* at 695.

<sup>271</sup> The Military Advocate General's Corps, *supra* note 264.

<sup>272</sup> Afek, *supra* note 267, at 694.

<sup>273</sup> See 51 VAND. J. TRANSNAT'L L. (2018). The table of contents of the special issue and links to the papers can be found at: <https://www.vanderbilt.edu/jotl/2018/06/volume-51-no-3-table-of-contents-on-website/>.

<sup>274</sup> Afek, *supra* note 267, at 695.

<sup>275</sup> Stockton Center for International Law, U.S. Naval War College, <https://usnwc.edu/Research-and-Wargaming/Research-Centers/Stockton-Center-for-International-Law> ("The Stockton Center annually hosts legal research workshops on emergent issues drawing many of the world's leading international law experts.").

the legal analysis. The DoD is the most extreme example of such use of footnotes with almost 7,000 footnotes in its initial 2015 version. The choice to use a quasi-academic style is another indication of the horizontal nature of the new engagement. The footnotes place the outputs within an existing conversation in contrast to a sole authoritative voice; they represent the participation in a battle of persuasion rather than mere expressions of *opinio juris*.

### 3. *Online Publication and Accessibility*

As mentioned above, in order to be effective, the outputs need to be as available as possible for the different relevant actors. The United States and Israel have taken steps to ensure that the outputs will be easily accessible. Once again, the DoD Manual is an illustrative example. The manual has free and open online access.<sup>276</sup> The decision to publish the manual online was, at least partially, aimed at enhancing its global reach. As Matthew McCormack, the Associate General Counsel in the Office of General Counsel for the DoD, put it, "an online Manual would be immediately accessible. You post it and it's not just accessible within DoD, but anybody in the world can hit [the website] and look at [the Manual]."<sup>277</sup>

In addition to the DoD Manual, US government speeches are available online and there are links to the various speeches and documents in the appendix of the Frameworks Report.<sup>278</sup> All of the Israeli documents appear in English and are available online. I recently suggested that the decision of the Israeli Supreme Court to stop the translation into English of its national security cases in recent years indicates a decline in Israel's role as an international actor.<sup>279</sup> The creation of the Israeli Gaza Reports only in English is a clear indication of a move in the other direction, suggesting that the primary goal of the drafters is to engage with the international community on the legality of Israel's policies.<sup>280</sup>

### 4. *Openness to Comments and Changes*

Perhaps most surprising and most important was the decision of the DoD Manual drafters to include in the DoD Manual an invitation for "[c]omments and suggestions from users of the DoD Law of War Manual" with a special email address included. Indeed, many comments were received in various mediums including a special ABA review workshop with the participation of DoD

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<sup>276</sup> GEN. COUNCIL OF THE U.S. DEP'T OF DEF., LAW OF WAR MANUAL (2016), <https://www.hsdl.org/?view&did=797480>.

<sup>277</sup> Rostow & Bowman, *supra* note 154, at 264.

<sup>278</sup> FRAMEWORKS REPORT, *supra* note 135, at 44.

<sup>279</sup> Shereshevsky, *supra* note 124, at 264–65.

<sup>280</sup> The 2014 Gaza report can be found here: <http://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf>, and the 2009 report can be found here: [http://www.mfa.gov.il/MFA\\_Graphics/MFA%20Gallery/Documents/GazaOperation%20w%20Links.pdf](http://www.mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/GazaOperation%20w%20Links.pdf).

personnel.<sup>281</sup> Thus far, this has resulted in two revisions of the original DoD Manual.<sup>282</sup> It is possible that the open nature of the document weakens its authority. However, the solicitation for comments comes with the advantage of increasing the legitimacy of the manual as a text, resulting from a thoughtful process of continual review. The willingness of the drafters to change minor parts of the manual—such as the section on journalists<sup>283</sup>—enhances the legitimacy of the project as a whole. An example of this process can be seen in a blog post by Kenneth Watkin that compares the DoD Manual and the ICRC's New Commentary on the First Geneva Convention. At the end of his second post on the subject, Watkin suggests that the ICRC should learn from the drafters of the DoD Manual and should be willing to change the commentaries if necessary.<sup>284</sup>

This last feature, the openness to criticism, is part of a wider phenomenon—the involvement of different actors in the creation of these outputs. This involvement is analyzed in the next Section in the context of the importance of interpretive communities.

All of these features, while unique for State publications, resemble in many ways the lawmaking efforts of non-State actors. Specifically, they resemble the new ICRC project of commentary to the Geneva Conventions, the first part of which was published a few months after the publication of the DoD Manual.<sup>285</sup> Both documents contain heavy footnoting,<sup>286</sup> involve significant review by external experts,<sup>287</sup> and are published free with open access online.<sup>288</sup> Their authors engaged in many public and private events discussing the documents,<sup>289</sup>

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<sup>281</sup> See ABA LAW OF WAR MANUAL WORKSHOP REPORT, *supra* note 143.

<sup>282</sup> The DoD Manual was revised in May and December 2016.

<sup>283</sup> U.S. Dept. of Def., *DoD Announces Update to the DoD Law of War Manual*, July 22, 2016, <https://dod.defense.gov/News/News-Releases/News-Release-View/Article/852738/dod-announces-update-to-the-dod-law-of-war-manual/>.

<sup>284</sup> Kenneth Watkin, *The ICRC Updated Commentaries: Reconciling Form and Substance, Part II*, JUST SECURITY, August 30, 2016, <https://www.justsecurity.org/32608/icrc-updated-commentaries-reconciling-form-substance-part-ii/>.

<sup>285</sup> See ICRC, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION(I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD (2016).

<sup>286</sup> Several blog posts have recognized the similarities between the DoD Manual and new Geneva Commentaries, although they mostly addressed the substantive legal controversies between the two documents. See, e.g., Sean Watts, *The Updated First Geneva Convention Commentary, DoD's Law of War Manual, and a More Perfect Law of War, Part I*, JUST SECURITY (July 5, 2016), <https://www.justsecurity.org/31749/updated-geneva-convention-commentary-dods-lowm-perfect-law-war/> (“That interpretive contest continues today in the recently released Updated Commentary on the First Geneva Convention of 1949 and U.S. Department of Defense Law of War Manual. Each publication deserves careful attention for its arguments — explicit and implicit — about how best to read and understand the law of war.”).

<sup>287</sup> DOD MANUAL, *supra* note 142, at IV-V; Lindsey Cameron et al., *The Updated Commentary on the First Geneva Convention – A New Tool for Generating Respect for International Humanitarian Law*, 93 INT'L L. STUD. 157, 161 (2017).

<sup>288</sup> *Treaties, States Parties and Commentaries*, ICRC, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>.

<sup>289</sup> A partial list of the events which feature discussions of the updated commentary on the First Geneva

which were already subject to much debate in the international law blogosphere.<sup>290</sup> These similarities represent the desire of the authors of both documents to have a significant influence over the interpretation and application of the relevant IHL norms. In some respects, the IHL community already addresses the contradicting positions between the documents as part of the current debate over the regulation of asymmetric warfare.<sup>291</sup> A more significant and intensive clash between the documents is expected when the next parts of the ICRC project are released, especially the commentary on the Additional Protocols.

### C. *The Power of Cooperation: The Interpretive Community of States and LOAC Lawyers*

#### 1. *LOAC Lawyers*

The usual discussion of non-State actors' influence on IHL refers to their role in the "humanization of humanitarian law," or emphasis on the humanitarian element of the balance between humanity and military necessity in the regulation of warfare. Indeed, most of the non-State actors discussed in Part I.C are usually associated with the humanitarian camp. There is one important exception to this trend, which is closely related to the discussion above regarding the influence of international law scholars: LOAC lawyers.

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Convention include: special events in Geneva, *Launch of the Updated Commentary on the First Geneva Convention*, ICRC (Mar. 22, 2016), <https://www.icrc.org/en/event/launch-updated-commentary-first-geneva-convention>; Melbourne, *ICRC Visits Melbourne to Mark the Launch of the First Geneva Convention Updated Commentary*, THE UNIV. OF MELBOURNE, Nov. 9, 2016, <http://law.unimelb.edu.au/news/MLS/icrc-visits-melbourne-to-mark-the-launch-of-the-first-geneva-convention-updated-commentary>; The Hague, *HILAC Lecture: The ICRC Updated Commentaries: Legal Developments and Novelities to Enhance Respect for IHL*, ASSER INST., July 6, 2016, <http://www.asser.nl/education-events/events/?id=2941>; and Israel, *ICRC in Israel Launches an Updated Commentary to the First Geneva Convention*, ICRC BLOG, May 31, 2016, <http://blogs.icrc.org/ilot/2016/05/31/icrc-israel-launches-updated-commentary-first-geneva-convention/>; as well as a conference at the University of Georgia School of Law, "*Humanity's Common Heritage*": *Georgia Law-ICRC Conference on Geneva Conventions Commentaries*, DEAN RUSK INT'L LAW CENTER, Sept. 20, 2016, <https://deanruskintlaw.com/2016/09/20/humanitys-common-heritage-georgia-law-icrc-conference-on-geneva-conventions-commentaries/>.

<sup>290</sup> For discussions of the ICRC's new commentaries, see, e.g., Kevin Jon Heller, *Multi-Blog Series: First Thoughts from Academia on the Updated GCI Commentary*, OPINIO JURIS, July 22, 2016, <http://opiniojuris.org/2016/07/22/multi-blog-series-first-thoughts-on-the-updated-gci-commentary-from-academia/>; Robert Chesney, *Joint Series on International Law and Armed Conflict: Hakimi on Fair Trial Guarantees in Armed Conflict*, LAWFARE, September 23, 2016, <https://www.lawfareblog.com/joint-series-international-law-and-armed-conflict-hakimi-fair-trial-guarantees-armed-conflict>; Sean D. Murphy, *Joint Series: The Role of the ICRC Commentaries in Understanding International Humanitarian Law*, INTERCROSS BLOG, July 6, 2016, <http://intercrossblog.icrc.org/blog/joint-series-the-role-of-the-icrc-commentaries-in-understanding-international-humanitarian-law>.

<sup>291</sup> See, e.g., Yael Ronen, *The DoD Manual: Occupation Chapter*, in INT'L LAW FORUM OF THE HEBREW UNIV. OF JERUSALEM L. FACULTY (2017); Geoffrey S. Corn & Andrew Culliver, *Wounded Combatants, Military Medical Personnel, and the Dilemma of Collateral Risk*, 45 GA. J. INT'L L. 445 (2017).

In the absence of direct State involvement in the IHL making process, discussed *supra* in Part II.A, the role of States in preserving military needs in the regulation of warfare fell almost exclusively to LOAC lawyers. I use the term LOAC lawyers to refer to the community of lawyers that share the military vision of the regulation of warfare. This follows David Luban's discussion of "military lawyers." According to Luban this vision "assigns military necessity and the imperatives of war-making primary, axiomatic status. In this vision, the legal regulation of warfare consists of adjustments around the margins of war to mitigate its horrors."<sup>292</sup> This concept of the LOAC lawyer, may be contrasted with the notion of "humanitarian lawyers." Humanitarian lawyers endorse the IHL vision that "begins with humanitarianism, and assigns human dignity and human rights primary status."<sup>293</sup> It is necessary to qualify that not all LOAC lawyers are active military lawyers. Although many in the community of LOAC lawyers are active military lawyers, many others have either served as military lawyers in the past or hold a teaching position in military academies. I refer here even to LOAC lawyers who still actively serve in the military as non-State actors, since I address only statements and academic writings made in their personal capacity.<sup>294</sup>

LOAC lawyers have engaged in academic writing on debatable subjects and explicitly stated their concerns about the increased involvement of humanitarian non-State actors in IHL making.<sup>295</sup> While taking part in non-traditional lawmaking efforts, including the seminal Interpretive Guidance, LOAC lawyers harshly criticized some of these efforts. They directed much of their criticism toward the ICRC initiatives. For example, several LOAC lawyers criticized the ICRC customary IHL study for its general methodology as well as the status of specific rules.<sup>296</sup>

The inability to reach an agreement in the context of the Interpretive Guidance serves as a symbol of the inability to bridge the gap between the two competing communities of international lawyers and was, perhaps, the source of the new engagement of States in IHL making. Facing criticism from LOAC lawyers, the ICRC decided to publish the Interpretive Guidance as its own publication without any individual reference to the experts that took part in the

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<sup>292</sup> Luban, *supra* note 6, at 316.

<sup>293</sup> *Id.*

<sup>294</sup> See, e.g., John J. Merriam, *Affirmative Target Identification: Operationalizing the Principle of Distinction for U.S. Warfighters*, 56 VA. J. INT'L L. 83, 83 (2016).

<sup>295</sup> The paradigmatic example of such explicit concerns is Yoram Dinstein's concerns over the increased involvement of "human rights-nicks" in IHL debates. See Yoram Dinstein, *Concluding Remarks: LOAC and Attempts to Abuse or Subvert It*, 87 INT'L L. STUD. 483, 488 (2011).

<sup>296</sup> See, e.g., James P. Benoit, *Mistreatment of the Wounded, Sick and Shipwrecked by the ICRC Study on Customary International Humanitarian Law*, 11 Y.B. OF INT'L HUMANITARIAN L. 175, 176 (2008); J. Jeremy Marsh, *Lex Lata or Lex Faranda? Rule 45 of the ICRC Study on Customary International Humanitarian Law*, 198 MIL. L. REV. 116, 117 (2008); Michael N. Schmitt, *The Law of Targeting*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 131 (Elizabeth Wilmshurst & Susan Breau eds., 2009); Yoram Dinstein, *The ICRC Customary International Humanitarian Law Study*, 82 INT'L L. STUD. 99, 100 (2006).

process.<sup>297</sup> In a much-cited symposium hosted by the NYU Journal of International Law and Politics, four prominent LOAC lawyers described their main criticisms of the study and the author of the study, Nils Meltzer, responded to these critiques.<sup>298</sup> The symposium highlighted some of the key controversies in the regulation of contemporary asymmetric conflicts.

As a minority in the field, facing a dominant group of humanitarian lawyers, it is not surprising that LOAC lawyers were the first to recognize the limited involvement of States in the IHL debate. In response, LOAC lawyers endeavored to change the situation. They first called for States to become more involved in the lawmaking process. In 2011, in a paper titled *Time for the United States to Directly Participate*, J. Jeremy March, a US Air Force JAG, and Scott L. Glabe, called on the United States to formally respond to the Interpretive Guidance, preferably in order to counter the influence of the ICRC study.<sup>299</sup> In 2013, a blog post in *Just Security* by Sean Watts (which later served as a basis for the 2015 article by Michael Schmitt and Sean Watts)<sup>300</sup> discussed the significant influence of humanitarian actors on IHL and called for States to reengage in international lawmaking.<sup>301</sup> As this Article demonstrates, the shift in States' willingness to engage in IHL making was already taking place in 2013, but the Schmitt and Watts paper illustrates how LOAC lawyers perceived the power balance in the IHL community at the time.

Furthermore, projects such as the Tallinn Manual on the Law Applicable to Cyber Warfare can be seen as a way to balance the prominence of humanitarian actors in the making of IHL.<sup>302</sup> If States do not engage in the lawmaking process, then non-traditional lawmaking projects governed by LOAC lawyers might enhance their influence in a way that they could not do under projects led by humanitarian actors such as the ICRC.

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<sup>297</sup> See INTERPRETIVE GUIDANCE, *supra* note 53, at 9-10; Hays Parks, *supra* note 56, at 783-85 (suggesting that the decision to refrain from mentioning individual names was the result of a request by at least one-third of the participants to remove their names from the publication).

<sup>298</sup> See *id.*, at 773; Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC Direct Participation in Hostilities Interpretive Guidance*, 42 NYU J. INT'L L. & POL. 641, 643 (2010); Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 NYU J. INT'L L. & POL. 697, 698 (2010); Bill Boothby, "And for Such Time As": *The Time Dimension to Direct Participation in Hostilities*, 42 NYU J. INT'L L. & POL. 741, 743 (2010); Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 NYU J. INT'L L. & POL. 831, 834 (2010).

<sup>299</sup> J. Jeremy Marsh & Scott L. Glabe, *Time for the United States to Directly Participate*, 1 VA. J. INT'L L. ONLINE 13, 14 (2011).

<sup>300</sup> Schmitt & Watts, *supra* note 3.

<sup>301</sup> Sean Watts, *Reviving Opinio Juris and Law of Armed Conflict Pluralism*, JUST SECURITY, Oct. 10, 2013, <https://www.justsecurity.org/1870/reviving-opinio-juris-law-armed-conflict-pluralism-2/>.

<sup>302</sup> TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael N. Schmitt ed., 2013) [hereinafter TALLINN MANUAL ]; TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS (Michael N. Schmitt & Liis Vihul eds., 2017) [hereinafter TALLINN MANUAL 2.0].

In addition to the call for States to explicitly reengage in IHL *opinio juris* and the initiation of non-traditional lawmaking projects such as the Tallinn Manual, LOAC lawyers tried to establish States' positions through their writings. Some of these accounts analyze open source documents regarding State positions. Thus, George Cadwalader, Jr. analyzes the US position on the customary status of different norms in the First Additional Protocol.<sup>303</sup> Other projects do not rely on open sources but on independent research. In a detailed article following a visit to Israel, in which the authors interviewed Israeli military lawyers and other officials in the government, Michael Schmitt and John Merriam explain the Israeli position regarding different conduct of hostilities issues, including the Israeli position on the customary status of several articles of the First Additional Protocol.<sup>304</sup> Another example is the response to the notion of CCF as a requirement for the targeting of non-State armed groups' members in the ICRC Interpretive Guidance. Schmitt and Merriam argue that it is clear from State practice and *opinio juris* that States have adopted a formal, status-based approach to the targeting of non-State armed groups members, while failing to reference explicit State positions in this regard.<sup>305</sup>

For several years, the written IHL debate was a debate between different non-State actors. The recent active engagement of States with IHL provides an opportunity to examine the relationship between LOAC lawyers' lawmaking efforts and States' lawmaking initiatives.

## 2. States, LOAC Lawyers, and IHL

While State outputs are often unilateral projects, a significant part of new engagement involves cooperation with other actors. Such cooperation is highly important for the legitimacy and effectiveness of such outputs. As Sivakumaran suggested with regard to the outputs of State-empowered entities, the reactions of other actors in the international law community significantly influence the lawmaking initiatives' ability to be effective.<sup>306</sup> Attempts to enhance the legitimacy and effectiveness of outputs through reactions in the post-publication period was partially discussed previously with regard to the DoD Manual review process. This Section focuses on the involvement of various actors in the pre-publication process.

External actors are involved in the pre-publication process of State outputs in various ways. For example, the DoD Manual went through a multi-tiered review process that included participation of officers from the UK and Australian militaries, review by governmental lawyers from the United Kingdom, Canada,

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<sup>303</sup> See George Cadwalader Jr., *The Rules Governing the Conduct of Hostilities in Additional Protocol I to the Geneva Conventions of 1949: A Review of Relevant United States References*, 14 Y.B. OF INT'L HUMANITARIAN L. 133, 133 (2011).

<sup>304</sup> Schmitt & Merriam, *supra* note 63, at 97-104.

<sup>305</sup> *Id.* at 113.

<sup>306</sup> Sivakumaran, *supra* note 11, at 371-90.

Australia, and New Zealand, and review by "distinguished scholars."<sup>307</sup> The First and Second Turkel reports involved foreign observers and special consultants.<sup>308</sup> Both reports start with letters from foreign observers praising the independence of the commission and the content of the reports. For example, Lord Trimble, who previously served as the First Minister of Northern Ireland, described them as "clearly balanced and fair reports;"<sup>309</sup> Brigadier General Watkin, who was the Judge Advocate General of the Canadian Forces, described the work of the commission as "an important reflection of the commitment to the Rule of Law;"<sup>310</sup> and Professor Timothy McCormack noted that the "study has identified the applicable international legal requirements for effective investigations into alleged violations of the Law of Armed Conflict."<sup>311</sup> In addition, the Second Report included a comparative study in which six foreign experts prepared reports on the investigation mechanisms of the United States, Canada, Australia, the United Kingdom, Germany, and the Netherlands.<sup>312</sup>

While the 2014 Gaza Conflict Report did not directly involve external actors, it did involve them indirectly. As described in Part II.B.2, Israel granted two LOAC lawyers, Michael Schmitt and John Merriam, unprecedented access to Israeli military lawyers. Schmidt and Merriam conducted in-depth discussions about Israel's legal positions concerning conduct of hostilities. These discussions resulted in academic papers, which were published a short time before the Israeli report and which favorably discussed the Israeli legal positions. While the authors emphasized their independence, their support of the Israeli positions helps strengthen the authority of the Israeli report. This stance was probably considered by the Israeli officials before the authors were granted such far-reaching access to Israeli military lawyers.

In addition to the involvement of foreign experts, States tend to emphasize the outputs of other States. The comparative study in the Second Turkel report is a clear example of this tendency. The comparative study enabled Lord Trimble to note that "taken as a whole, Israeli law and practice will stand comparison with the best in the world."<sup>313</sup> The DoD Manual states that it benefited from consulting foreign State resources, including manuals of the United Kingdom, Canada, Germany, and Australia.<sup>314</sup>

Such reliance on other actors strengthens the power and authority of State outputs as part of a shared understanding of international law rather than an

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<sup>307</sup> DOD MANUAL, *supra* note 142, at V.

<sup>308</sup> *See id.* section IIIB2. In 2011, Professor Timothy McCormack replaced Brigadier General Kenneth Watkin as an observer, and Professors Claus Kreß and Gabriella Blum replaced Michael Schmitt as special consultants of the second report.

<sup>309</sup> TURKEL REPORT PART II, *supra* note 189, at 21.

<sup>310</sup> *Id.* at 26.

<sup>311</sup> *Id.* at 28.

<sup>312</sup> *Id.* at 475.

<sup>313</sup> *Id.* at 22.

<sup>314</sup> DOD MANUAL, *supra* note 142, at V.

isolated position of one self-interested State. The new engagement of States should not only be seen as part of a battle over the ownership of international law between State and non-State actors.<sup>315</sup> This is definitely part of the story, but not the whole story. Rather, the new engagement should also be discussed in the context of the specific battle over IHL: the battle between military necessity and humanitarian considerations and, more generally, between competing interpretive communities in international lawmaking that include State and non-State actors.<sup>316</sup> When Schmitt and Watts discussed the decline of State *opinio juris*, they emphasized the role of non-State actors in pushing the humanitarian side of the equation and the important role of States in introducing the military necessity side of the debate.<sup>317</sup> Nonetheless, an important non-State actor is absent from their analysis: LOAC lawyers who push against non-State actors' humanitarian initiatives.

The identity of the drafters of the non-State actors' outputs might explain the tendency of States to engage or refrain from engaging in international lawmaking. The emerging debates over the international law of cyberspace serves as an illuminating example. In recent years, cyberspace has received a lot of attention from the international law community. Debates over the law of cyberspace resemble the debates over asymmetric conflicts. This is an area where the law is vague, and it is unlikely that States will create a new treaty to regulate cyberspace in the near future.<sup>318</sup> Similar to IHL making in general, States are reluctant to announce their positions on the law of cyber operations.<sup>319</sup> Schmitt and Watts' article was part of a symposium on the law of cyber warfare and its last part is dedicated to a specific call for States to express their positions on IHL in the context of cyber warfare.<sup>320</sup> Recently, Kubo Mačák has described the lack of State cyber lawmaking and called on States to change this tendency.<sup>321</sup> Finally, similar to the IHL making initiatives of non-State actors in the context of asymmetric warfare, the Tallinn Manual was created by an international group of experts in the context of cyberspace and is a key reference point in any significant discussion of the issue.

In light of the importance of cyberspace and the recent active engagement of States in IHL making, we would have expected to see such engagement in

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<sup>315</sup> See Sivakumaran, *supra* note 11, at 378.

<sup>316</sup> See Robert Cryer, *The International Committee of the Red Cross' Interpretive Guidance on the Notion of Direct Participation in Hostilities: See a Little Light*, in HUMANIZING THE LAWS OF WAR: THE RED CROSS AND THE DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW 113, 133 (Robin Geis et al. eds., 2017) (discussing the Interpretive Guidance and its critics in the context of the battle over the ownership of IHL between military experts and other international lawyers).

<sup>317</sup> Schmitt & Watts, *supra* note 3, at 191.

<sup>318</sup> *Id.* at 222; BOOTHBY, *supra* note 29, at 84.

<sup>319</sup> Dan Efrony & Yuval Shany, *A Rule Book on the Shelf? Tallinn Manual 2.0 on Cyberoperations and Subsequent State Practice*, 112 AM. J. INT'L L. 583, 584 (2018).

<sup>320</sup> Schmitt & Watts, *supra* note 3, at 222-224.

<sup>321</sup> Kubo Mačák, *From Cyber Norms to Cyber Rules: Re-engaging States as Law-makers*, 30 LEIDEN J. INT'L L. 877, 881 (2017).

cyberspace law as well. However, the expected level of engagement has not materialized. For example, the two States that are the focus of this paper have not produced extensive cyber law outputs. Israel did not produce any meaningful analysis on the subject, and most commentators regard the contribution of the Koh speech titled *International Law in Cyberspace*<sup>322</sup> and the DoD Manual cyber chapter as modest additions to the development of cyber law.<sup>323</sup> In his 2016 speech on international law and stability in cyberspace, Brian Egan recognized that States "rarely articulate their views on this subject publicly" and that in the case of the United States, "more work remains to be done."<sup>324</sup> The speech itself did not add much to the substantive US analysis of IHL in cyberspace, although it made some progress on other issues such as attribution of cyber operations.<sup>325</sup>

The literature has offered several explanations for the reluctance of States to express their positions in the context of cyber laws. For example, scholars point to the secrecy that surrounds cyber law and the suggestion that since it is a rather new area States will wait to determine their positions.<sup>326</sup> These explanations are useful and provide part of the answer. Nonetheless, scholars provided similar explanations in the general context of the reluctance of States to actively engage in IHL making,<sup>327</sup> and as this Article demonstrated, States nonetheless decided to directly engage in IHL making.

The creation of the Tallinn Manual, and more specifically the identity of its authors, might explain the continuous reluctance of States to engage in cyber lawmaking in the context of IHL. The literature, including the Tallinn Manual itself, suggests that the existence of the Manual should incentivize States to participate in the lawmaking process. In an article that builds on her notion of interpretive catalysts, Rebecca Ingber suggested that the Tallinn Manual is an interpretive catalyst that should lead to State responses.<sup>328</sup> Kubo Mačák believes that the Tallinn Manual serves a similar function to other soft law instruments as "an intermediate stage on the way towards the generation of cyber 'hard law'"<sup>329</sup> and suggested, as did Schmitt and Watts, that States should express their positions in order to reclaim their lawmaking role in light of the increased influence of non-

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<sup>322</sup> Harold Hongju Koh, *International Law in Cyberspace*, 54 HARV. J. INT'L L. ONLINE 1 (2012).

<sup>323</sup> See, e.g., ANDERSON & WITTES, *supra* note 139, at 72-75; Schmitt & Watts, *supra* note 3, at 223; Sean Watts, *Cyber Law Development and the United States Law of War Manual*, in INTERNATIONAL CYBER NORMS: LEGAL, POLICY & INDUSTRY PERSPECTIVES 49 (Anna-Maria Osula & Henry Rõigas eds., 2016); Mačák, *supra* note 321, at 882 ("Although it does contain a chapter on cyber operations, the Manual skirts virtually all of the unsettled issues, including standards of attribution, rules of targeting or the requirement to review cyber weapons.").

<sup>324</sup> Brian J. Egan, *International Law and Stability in Cyberspace*, 35 BERKELEY J. INT'L L. 169, 171 (2017).

<sup>325</sup> See Michael Schmitt, *U.S. Transparency Regarding International Law in Cyberspace*, JUST SECURITY, Nov. 15, 2016, <https://www.justsecurity.org/34465/transparency-international-law-cyberspace/>.

<sup>326</sup> See e.g., Mačák, *supra* note 321, at 881.

<sup>327</sup> See e.g., Schmitt & Watts, *supra* note 3, at 211.

<sup>328</sup> Rebecca Ingber, *Interpretation Catalysts in Cyberspace*, 95 TEX. L. REV. 1531, 1531 (2017).

<sup>329</sup> Mačák, *supra* note 321, at 881.

State actors in this area.<sup>330</sup> However, these authors do not take into account the identity of the leaders of the Tallinn Manual project and their potential effect on the substance of the Manual, and as a result on the interest of States to hold independent positions.

The Tallinn Manual, the only significant project on cyber warfare, was led by Michael Schmitt under the auspices of the NATO Cooperative Cyber Defence Centre of Excellence, with NATO, the US Cyber Command, and the ICRC serving as observers.<sup>331</sup> The important role of LOAC lawyers in the project enabled them to have substantial influence on this project, while still incorporating a significant number of humanitarian lawyers and thus strengthening the legitimacy of the project.

Two examples of the way in which the Tallinn Manual treats highly controversial issues demonstrate how it can promote the interests of States. First, as discussed *supra*, the targeting of armed group members, and especially the notion of CCF, is a key controversy that led the US and Israel to respond to the Interpretive Guidance. The Tallinn Manual addresses this issue in its discussion of Rule 96—Persons as lawful objects of attack. Rule 96(b) allows the targeting of "members of organized armed groups." In the discussion of the definition of membership, the authors of the Manual suggested that the positions of the international group of experts on this were mixed—referring first to the position that allows targeting that is based on mere membership in the organization, and then to those who hold to the Interpretive Guide requirement of CCF.<sup>332</sup> Thus, the Manual lends support to US and Israeli positions that targeting based on the mere membership in an organized armed group is a legitimate position. Referring first to this position strengthens it even more. Second, the extraterritorial application of human rights is one of the most important issues in recent years. While the Tallinn Manual ostensibly lends support to the position that human rights apply extraterritorially (in contrast to the minority position of the United States on this question),<sup>333</sup> it leaves room for conservative positions on the extraterritorial application of human rights in the context of cyber operations. The Manual States that the majority of experts believe IHRL does not apply extraterritorially without physical control over territory or persons.<sup>334</sup> In the context of cyber law, this means that human rights will not apply to the most controversial issues. For example, the Manual explicitly refers to the inapplicability of human rights, according to the majority of experts, in cases of extraterritorial signal intelligence programs which stand at the heart of contemporary debate over cyber and human rights.<sup>335</sup> Moreover, the Manual relies on the notion of *lex specialis* when it addresses relations between IHL and IHRL and thus enables restrictive positions

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<sup>330</sup> *Id.*; Schmitt & Watts, *supra* note 3, at 230.

<sup>331</sup> TALLINN MANUAL, *supra* note 302, at 16.

<sup>332</sup> TALLINN MANUAL 2.0, *supra* note 302, at 426.

<sup>333</sup> *Id.* at 184-85.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.* at 185.

on the application of IHRL in situations of armed conflicts.<sup>336</sup> Indeed, most commentators suggest that the Tallinn Manual majority position on signal intelligence is in line with the positions and actions of certain States in the limited areas that States have expressed their explicit positions.<sup>337</sup>

The Tallinn Manual demonstrates that when the outputs of a non-State actor are in line with State interests, the incentive of those States to independently engage in international lawmaking decreases. From the perspective of such States, the existence of an authoritative non-State actor output might even be more beneficial than their own outputs, since it has the appearance of a more neutral instrument, especially when actors with various backgrounds and institutional affiliations take part in the process.<sup>338</sup> This might explain the United States' unwillingness to explicitly rely on the Tallinn Manual in the DoD Manual, as well as the cautionary tone that Egan used when referring to the Manual in his speech.<sup>339</sup> Such an attitude towards the Manual achieves two goals. Because the Manual does not align with the US position, the Manual can be perceived as more neutral. In addition, by avoiding an explicit recognition of the value of non-State actor's outputs, the US does not harm its continuous battle with the lawmaking initiatives of the "humanitarian lawyers."

Dan Efrony and Yuval Shany recently analyzed eleven case studies of State practice regarding cyber operations. They argue that "there appears to be limited support in State practice for certain key rules of the Tallinn Manual, and that it is difficult to ascertain whether States accept the Tallinn Rules."<sup>340</sup> It is important to note in this regard that the case studies also demonstrate that States are reluctant to explicitly refer to international law in general and not only to the Tallinn Manual. In addition, the States in these case studies did not explicitly challenge or attack the rules in the Manual. Thus, it seems that this might strengthen the notion that there is a qualitative difference between the other non-State IHL making initiatives and the Tallinn Manual. While the reliance on the Tallinn Manual might be limited, it does not incentivize States to actively take adverse positions to those that appear in the Manual. This Article suggests that the lack of such incentive is based on the substance of the majority of the Manual's norms, especially when it comes to IHL, and that this substance is the result of the identity of the authors of the Manual.

The discussion above explains the lack of unilateral State IHL initiatives in the context of cyber operations. It does not suggest that alternative multilateral lawmaking paths are not attractive to States. As discussed earlier, if the contracting costs are lower than the expected gains, States will tend to use multilateral lawmaking tools. Indeed, the UN Group of Governmental Experts is an attempt to pursue such a path. Nonetheless, it does not seem likely that this

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<sup>336</sup> *Id.*

<sup>337</sup> *Id.* at 181; Frédéric Gilles Sourgens, *The Privacy Principle*, 42 YALE J. INT'L L. 345, 366 (2017).

<sup>338</sup> See BOOTHBY, *supra* note 29, at 89.

<sup>339</sup> Egan, *supra* note 324.

<sup>340</sup> Efrony & Shany, *supra* note 319, at 585.

path will be successful in the near future.<sup>341</sup> In addition, the discussion focuses mainly on IHL making (and some aspects of the application of human rights law), an area in which LOAC lawyers and States share a similar vision. When it comes to other areas, it is possible that the discussion in the Tallinn Manual might incentivize State reactions. One example is the question of sovereignty and cyber operations.<sup>342</sup>

The analysis here suggests that the new engagement of States in IHL making should be seen in light of the wider conflict between competing approaches to IHL, between the two interpretive communities of LOAC lawyers and humanitarian lawyers. States and LOAC lawyers rely on each other's outputs to strengthen and legitimize their positions. LOAC lawyers' outputs should be seen as an alternative for the lawmaking initiative of States, as complementing the efforts of States to reengage with IHL.

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The previous insights on the new forms of State engagement with IHL making shed light on the conditions for the willingness of States to engage in significant unilateral lawmaking initiatives. These conditions are: (1) there are (or are expected to be) non-State actors' lawmaking initiatives on the relevant issue; (2) the State has significant interests in the issue; (3) the substance of these non-State actors' initiatives contrasts with the State's positions on the issue; (4) there are no competing influential legal accounts by non-State actors that exist or are expected to be created; (5) the costs of traditional lawmaking methods or soft law initiatives are high and as a result the creation of unilateral outputs is more efficient. If these conditions are met, it is reasonable to expect that individual States will invest in unilateral lawmaking initiatives.

#### CONCLUSION

Facing the significant influence of independent lawmaking initiatives, especially the ICRC projects, States decided to change their position and reengage in international IHL making. This new engagement is built on the internalization of the ways in which non-State actors influence international law. It resembles their efforts and benefits from continuous cooperation with the community of LOAC lawyers.

This Article focuses on one example of the move in international lawmaking from joint efforts to unilateral initiatives, or cooperation between individual States and like-minded non-State actors. The change started with non-State actors'

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<sup>341</sup> See Michael Schmitt & Liis Vihul, *International Cyber Law Politicized: The UN GGE's Failure to Advance Cyber Norms*, JUST SECURITY, June 30, 2017, <https://www.justsecurity.org/42768/international-cyber-law-politicized-gges-failure-advance-cyber-norms/>.

<sup>342</sup> Efrony & Shany, *supra* note 319, at 591-92; Jeffrey Biller & Michael Schmitt, *Un-caging the Bear? A Case Study in Cyber Opinio Juris and Unintended Consequences*, EJIL TALK, Oct. 24, 2018, <https://www.ejiltalk.org/un-caging-the-bear-a-case-study-in-cyber-opinio-juris-and-unintended-consequences/>.

projects and was followed by State initiatives. The decision to produce such outputs was driven by the high contracting costs of developing IHL through traditional lawmaking processes and might represent a wider tendency in other areas in which traditional international lawmaking processes, or joint soft law initiatives, face similar problems.

One such possible case that involves cooperation between States and former State officials is the contemporary question of the right to self-defense against an imminent armed attack by non-State actors under *jus ad bellum*. In this context, the article of Sir Daniel Bethlehem, formerly the principal Legal Adviser of the UK Foreign and Commonwealth Office, in the *American Journal of International Law* served as a focal point of reference in the debate.<sup>343</sup> The author acknowledged that the principles in the paper "are not the settled view of any State" but stressed that they were "informed by detailed discussions" with legal advisers of several States.<sup>344</sup> While the article was criticized by scholars and former legal advisors,<sup>345</sup> several States seemed to endorse its principles to a large extent in speeches and lectures by officials.<sup>346</sup>

This Article is being published in the Trump era. It is possible to wonder about its relevance in such times when the US President seems to be involved in an "unprecedented assault on the institutions and regimes of the postwar legal order."<sup>347</sup> Indeed, it seems that much of the discussion today focuses on international law in challenging times often characterized by a rise of populism and resentment towards international law and institutions.<sup>348</sup> While it is highly important to discuss the current changes to international law, I strongly believe

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<sup>343</sup> Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Non-State Actors*, 106 AM. J. INT'L L. 770 (2012).

<sup>344</sup> *Id.* at 773.

<sup>345</sup> See, e.g., Elizabeth Wilmschurst & Michael Wood, *Self-Defense Against Non-State Actors: "Reflections on the Bethlehem Principles,"* 107 AM. J. INT'L L. 390, 390 (2013).

<sup>346</sup> See Milanovic, *supra* note 208, at 10 (suggesting that the principles are in an "ongoing mainstreaming process"); Egan, *supra* note 141, at 239 (suggesting that the US relies *inter alia* on the "Bethlehem Principles" when considering the issue of imminence of an attack); Jeremy Wright, *The Modern Law of Self-Defense*, EJIL: TALK, Jan. 11, 2017, <https://www.ejiltalk.org/the-modern-law-of-self-defence/> (stating that the UK endorses Bethlehem's definition of imminence); George Brandis QC, *The Right of Self-Defence Against Imminent Armed Attack In International Law*, EJIL: TALK, May 25, 2017, [https://www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law/#\\_ftn7](https://www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law/#_ftn7) (stating that the Australian government in broad terms agrees with Bethlehem's definition of imminence).

<sup>347</sup> Harold Hongju Koh, *Trump vs. International Law: He's Not Winning*, OPINIO JURIS, October 2, 2018, <http://opiniojuris.org/2018/10/02/trump-vs-international-law-hes-not-winning/>.

<sup>348</sup> For example, the 2018 European Society of International Law Research Forum focused on "International Law in Times of Disorder and Contestation." International Law in Times of Disorder and Contestation, Hebrew Univ. of Jerusalem, <https://en.law.huji.ac.il/european-society-international-law-research-forum>. See also, e.g., HAROLD HONGJU KOH, THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW (2018); Eric A. Posner, *Liberal Internationalism and the Populist Backlash*, 49 ARIZ. ST. L. J. 795 (2017); Karen J. Alter, *The Future of International Law, in A NEW GLOBAL AGENDA: PRIORITIES, PRACTICES, AND PATHWAYS OF THE INTERNATIONAL COMMUNITY* 25 (Diana Ayton-Shenker ed., 2018).

that it is equally important not to focus exclusively on such trends and to look backwards and forward toward other possibilities.

The paper discusses lawmaking tools that States can use and the conditions that might incentivize States to use such lawmaking tools. It does not suggest that these tools will be always be utilized under such conditions. The Trump administration provides a scenario in which these lawmaking tools are less likely to be employed. Nonetheless, unilateral lawmaking is not only part of the toolbox of States that are strong proponents of international law and institutions, as the use of unilateral lawmaking by Israel demonstrates. Finally, there is strong resistance to the current assault on international law and on institutions in the US and elsewhere. The current trend may not last for much longer, at least not in its strongest form. It is important to note in this regard that even in the case of the Bush administration there was a significant change in its approach towards international law between its first and second terms.<sup>349</sup>

We have yet to see whether these new efforts to influence IHL will be successful. These considerations are further complicated as the Trump administration seems to take a step back in this regard.<sup>350</sup> Taking into account the great influence of some of the non-State actors' initiatives and the importance of being the first elaborate account of the law, some of the State initiatives might not succeed in significantly changing the path of IHL. The ability of these projects to influence IHL might determine whether this tendency will expand, or whether we will see a reemergence of more traditional lawmaking initiatives.

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<sup>349</sup> See Koh, *supra* note 347.

<sup>350</sup> For example, significant parts of the Trump administration's update of the Frameworks Report were classified. See Allison Murphy & Scott R. Anderson, *We Read the New War Powers Report So You Don't Have To*, LAWFARE, March 14, 2018, <https://www.lawfareblog.com/we-read-new-war-powers-report-so-you-dont-have>.