

The Role of Nonstate Entities in Developing and Promoting International Humanitarian Law

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ABSTRACT

In recent years, both states and nonstate entities, the number of which has increased, have found ways to stimulate debate about how to interpret, apply, and clarify international humanitarian law (IHL). The development, interpretation, and clarification of IHL have largely occurred not so much through treaty making, but through other, non-legally binding avenues. There is a spectrum of such activity, ranging from state-driven processes aimed at producing non-legally binding outcomes, to hybrid processes involving states, independent experts, and various bodies. The International Committee of the Red Cross (ICRC) serves as a prominent actor in this regard, initiating ICRC-specific initiatives, expert processes, and academic writing.

TABLE OF CONTENTS

I.	THE DEVELOPMENT OF IHL: THE RETICENCE OF STATES AND THE INCREASED ROLE OF NONSTATE ENTITIES	714
II.	THE ROLE OF THE ICRC IN THE DEVELOPMENT OF IHL TREATY LAW	716
III.	THE ICRC: CONTRIBUTING TO THE CLARIFICATION, INTERPRETATION, AND PROMOTION OF IHL	717
	A. <i>Multilateral Process with States</i>	717
	B. <i>Expert Meetings & Conferences</i>	720
	C. <i>Updated Commentaries to the 1949 Geneva Conventions and Their 1977 Additional Protocols</i>	721

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	D. Customary IHL Study.....	723
IV.	OTHER ACTIVITIES CONDUCTED BY NONSTATE ENTITIES THAT CONTRIBUTE TO IHL.....	724
V.	CONCLUDING THOUGHTS	726

I. THE DEVELOPMENT OF IHL: THE RETICENCE OF STATES AND THE INCREASED ROLE OF NONSTATE ENTITIES

Since the negotiation and adoption of the 1977 Additional Protocols to the Geneva Conventions, no major codification of general IHL has occurred. IHL has developed, however, in specific areas, in particular regulating the employment of weapons, the protection of cultural property, and the prosecution of war crimes. While during the period following the Cold War states made significant progress in developing IHL in these specific fields, the last decade or so has been nearly devoid of any major IHL treaty developments—the notable exceptions, however, being the Convention on Cluster Munitions (2010), the Arms Trade Treaty (2014), and, most recently, the Treaty on the Prohibition of Nuclear Weapons (2017).¹ In the current geopolitical environment, states struggle to come to agreement on developing new instruments of IHL, whether binding or nonbinding. This is, amongst other things, the result of a deeply divided international community, armed conflict pervading nearly all regions of the world, and seemingly a lack of interest of states in developing or clarifying IHL through collective multilateral processes.

In this geopolitical context, it has also proved difficult for states to agree on concrete interpretations of the law. This is surely due, in part, to the fact that there is no general venue or forum where states can come together regularly to discuss IHL and share their interpretations on particular issues, unlike in the case of treaties regulating the employment of weapons.

One must acknowledge, however, that contemporary armed conflicts pose new humanitarian problems and legal problems that need answers, with many questions arising about how such issues can be addressed within the existing IHL framework. States rarely take initiatives in this respect. Exceptions include, for example, the Copenhagen Process on the Handling of Detainees in International Military Operations (The Copenhagen Process: Principles and

1. See generally Treaty on the Prohibition of Nuclear Weapons, July 7, 2017, C.N.475.2017.TREATIES-XXVI.9 (comprehensively prohibiting nuclear weapons); Arms Trade Treaty, Apr. 2, 2013, C.N.266.2013.TREATIES-XXVI.8 (regulating international trade in conventional arms); Convention on Cluster Munitions, May 30, 2008, 2688 U.N.T.S. 39 (committing to never use, produce, stockpile, or transfer cluster munitions).

Guidelines, 2012),² and the process conducted by Switzerland and the ICRC that led to the adoption of the Montreux Document on Private Military and Security Companies (2008).³ However, these processes have involved limited numbers of states in the elaboration: twenty-four in the case of the Copenhagen Process⁴ and seventeen in the case of the Montreux Document,⁵ the latter of which has been subsequently endorsed by fifty-four states and three international organizations.⁶

The general reticence of states to take action to address such issues by developing new binding law, or to reach consensus on interpretations of the law, has left more space for nonstate entities to take action and put forward their views. Indeed, in the words of Michael Schmitt and Sean Watts, nonstate entities have come to play increasing roles in “exert[ing] informal but real pressure on the shape of IHL.”⁷

In the face of concrete challenges, in recent years, both states and nonstate entities, the number of which has increased, have used various avenues to stimulate debate about how to interpret, apply, and clarify IHL. There is now a spectrum of such activity ranging from state-driven processes aiming at producing non-legally binding outcomes, through to hybrid processes involving states, independent experts and organizations such as the ICRC, ICRC-initiated processes, expert processes leading to the development of manuals for specific areas, and academic writings.

2. See generally THE COPENHAGEN PROCESS ON THE HANDLING OF DETAINEES IN INT'L MILITARY OPERATIONS, THE COPENHAGEN PROCESS: PRINCIPLES AND GUIDELINES (2012), https://erasmusmais.pt/uploads/files/references/copenhagen_process-590ccac4a79a8.pdf [<https://perma.cc/9L83-K5S5>] (archived Feb. 10, 2018) [hereinafter COPENHAGEN PROCESS].

3. See generally Int'l Comm. of the Red Cross, *The Montreux Document on Private Military and Security Companies* (May 2, 2011), <https://www.icrc.org/en/publication/0996-montreux-document-private-military-and-security-companies> [<https://perma.cc/D6ZW-AR2C>] (archived Feb. 10, 2018) [hereinafter *Montreux Document*].

4. See COPENHAGEN PROCESS, *supra* note 2, at 1.

5. *Participating States and International Organisations*, MONTREUX DOCUMENT FORUM, <http://www.mdforum.ch/en/participants> (last visited Feb. 21, 2018) [<https://perma.cc/8PXT-LTSP>] (archived Feb. 10, 2018) [hereinafter *Participating States*].

6. *Id.*

7. Michael N. Schmitt & Sean Watts, *State Opinio Juris and International Humanitarian Law Pluralism*, 91 INT'L L. STUD. 171, 175 (2015). “Our examination suggests that non-State actors are outpacing and, in some cases displacing, State action in both quantitative and qualitative terms. States seem reticent to offer expressions of *opinio juris*, often for good reasons. We argue that such reticence comes at a cost—diminished influence on the content and application of IHL.” *Id.* at 177; see also 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, 192 (2015) (arguing that non-state actors have been “emboldened” in their efforts to shape IHL).

II. THE ROLE OF THE ICRC IN THE DEVELOPMENT OF IHL TREATY LAW

The ICRC in its role of guardian of IHL has been particularly active over time in contributing to the development, clarification, interpretation, and reaffirmation of IHL. It does so on the basis of its mandate in the field of IHL as articulated in the Statutes of the International Red Cross and Red Crescent Movement.⁸ The Statutes were adopted by the International Conference of the Red Cross and Red Crescent, which brings together the components of the International Movement of the Red Cross and Red Crescent (i.e., the National Red Cross and Red Crescent Societies, the International Federation of the Red Cross and Red Crescent and the ICRC, as well as all High Contracting Parties to the 1949 Geneva Conventions). Among its roles listed in the Statutes, the ICRC is to “undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law.”⁹ It is “to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof.”¹⁰

Pursuant to this mandate, the ICRC has played a critical driving role behind the development of much of the IHL treaty law over the last century and a half.¹¹ It was the ICRC that took the initiative that led to the adoption of the original Geneva Convention of August 22, 1864,¹² and the ICRC played important roles leading up to the adoption of the 1949 Geneva Conventions¹³ and their Additional Protocols.¹⁴ The

8. See generally Int'l Conference of the Red Cross and Red Crescent, *Statutes of the International Red Cross and Red Crescent Movement* (June 22, 2006).

9. *Id.* art. 5(2)(c).

10. *Id.* art. 5(2)(g).

11. See François Bugnion, *The International Committee of the Red Cross and the Development of International Humanitarian Law*, 5 CHI. J. INT'L L. 191, 191 (2004).

12. See generally The First Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940, T.S. No. 377.

13. See generally Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

14. See generally Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem, Dec. 8, 2005, 2404 U.N.T.S. 261; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

ICRC was strongly involved in developing the content of these treaties, while all decisions on negotiated outcomes of course remained with states. In these cases, over many years, the ICRC held consultations with groups of experts, prepared draft texts, consulted with the International Conference, presented revised drafts to Switzerland as depository to the Geneva Conventions, and participated actively in the Diplomatic Conferences.¹⁵ The ICRC also played important roles, albeit in comparison less prominently, in contributing to the development of other IHL treaties—including, for example, the Convention on Certain Conventional Weapons and its protocols and the Ottawa Convention on Anti-Personnel Mines.¹⁶

III. THE ICRC: CONTRIBUTING TO THE CLARIFICATION, INTERPRETATION, AND PROMOTION OF IHL

Given the current reluctance of states to develop new treaty rules, the activities of the ICRC, like several other nonstate entities, have come to focus more on alternative ways of contributing to the clarification, interpretation, and promotion of IHL; stimulating debate; and helping to influence states' views. It is in these diverse ways that, one can say, the ICRC contributes to the evolution of IHL over time—first and foremost, to find answers to contemporary pressing humanitarian problems of armed conflicts.

The following examples are illustrations of non-legally binding processes and outcomes—at times initiated by the ICRC, at times requested by the International Conference of the Red Cross and Red Crescent, mandating the ICRC to undertake such processes. Such processes were led either entirely by the ICRC, or together with one or several states, and involved legal experts or state representatives.

A. *Multilateral Process with States*

The ICRC has worked to facilitate a multilateral process with all states, aimed at producing one or more non-legally binding outcomes. It has done so based on resolutions adopted by the International Conference of the Red Cross and Red Crescent, as in the case of the following two examples, or on its own initiative as in the final example.

The first example is the ICRC's recent initiative on "Strengthening IHL Protecting Persons Deprived of their Liberty," a process of strengthening IHL through nonbinding clarification of existing law. The driving rationale for this initiative is the significant

15. See generally Bugnion, *supra* note 11.

16. See Knut Dörmann & Louis Maresca, *The International Committee of the Red Cross and Its Contribution to the Development of International Humanitarian Law in Specialized Instruments*, 5 CHI. J. INT'L L. 217, 220 (2004).

disparity between the robust and detailed provisions applicable to the deprivation of liberty in the context of international armed conflicts, and the very basic rules that have been codified for non-international armed conflicts (NIAC). There is general recognition that IHL in relation to detention in NIAC is insufficient. As a consequence, the 31st International Conference in 2011 gave the ICRC the mandate to facilitate a large consultation process aimed at identifying and proposing a range of options and ICRC recommendations regarding the strengthening of legal protection for persons deprived of their liberty in relation to NIAC.¹⁷ Since the 32nd International Conference in 2015, the process was intended to move into a new phase—the goal of which was to produce one or more concrete, non-legally binding outcome(s) that would strengthen IHL applicable to detention, in particular in NIAC. As an initial step, states were required first to reach agreement—by consensus on the modalities—for the new phase of the process.¹⁸

The second example is the intergovernmental process on strengthening respect for IHL, being co-facilitated by Switzerland and the ICRC. This process has been ongoing since 2011, based on a resolution of the 31st International Conference, and its current phase is mandated by a resolution of the 32nd International Conference in 2015.¹⁹ The 32nd International Conference did not agree to a draft resolution that proposed the creation of a regular Meeting of States with essentially two functions: thematic discussions and a reporting function, both conceived in a way to enable noncontextual and nonpoliticized discussions. Instead, the International Conference mandated a “State-driven intergovernmental process based on the principle of consensus,” aimed at finding agreement on “features and functions of a potential forum of States,” as well as “ways to enhance the implementation of IHL using the potential of the International Conference and IHL regional forums.”²⁰

Most recently, during the formal meeting in April 2017 on the ICRC initiative on “Strengthening IHL Protecting Persons Deprived of their Liberty,” states were unable to reach an agreement on modalities of work and a work-plan, despite several months of discussions. One important point of contention was whether the ICRC should facilitate the state-led process alone or with states as co-facilitators. While one

17. 31st Int’l Conference of the Red Cross and Red Crescent Movement, Res. 1, *Strengthening Legal Protection for Victims of Armed Conflicts*, ¶ 6 (Dec. 1, 2011) [hereinafter 31st International Conference].

18. 32nd Int’l Conference of the Red Cross and Red Crescent Movement, Res. 1, *Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty*, ¶ 9 (Dec. 10, 2015) [hereinafter 32nd International Conference].

19. 31st International Conference, *supra* note 17; 32nd International Conference, *supra* note 18, ¶ 5.

20. Jelena Pejic, *Strengthening Compliance with IHL: The ICRC-Swiss Initiative*, 98 INT’L REV. RED CROSS 315, 329 (2016).

group of states felt it important for a state-led process that states would be co-facilitators with the ICRC, another group of states regarded the ICRC as the only actor they could trust to take up the role of facilitator because of its credibility as an impartial and independent actor, as well as its IHL expertise. A subsequent written consultation did not lead to identifying avenues to overcome the divergence of views.

While there seems to be widespread agreement that regular dialogue and exchanges among states on IHL would be useful and necessary, in the Second Formal Meeting of States in the intergovernmental process on “Strengthening Respect for IHL” in April 2017, no common vision on a possible outcome of the process emerged. Discussions thus far have demonstrated that a group of states strongly supports the idea of establishing a forum of states on IHL, based on the fact that the Geneva Conventions are rare treaties that do not institutionalize a periodic meeting of states, and that a potential forum would be intended to operate in a nonpoliticized and noncontextual, and consensual manner. Other states do not, however, support the establishment of a forum, but prefer to examine strengthening IHL implementation through existing mechanisms. Both of these experiences demonstrate that achieving substantive progress in relation to IHL matters via multilateral diplomatic processes—in particular, if process and content require consensus—is particularly challenging in the current geopolitical environment.

Another kind of initiative that was not based on an invitation from the International Conference of the Red Cross and Red Crescent and where the ICRC has worked closely with a smaller number of states to achieve a non-legally binding IHL outcome was the process that led to The Montreux Document on Private Military and Security Companies.²¹ It was the result of a joint initiative launched by Switzerland and the ICRC in 2006, and concluded in 2008. It reaffirms existing obligations of states under international law regarding the activities of private military and security companies during armed conflict, and also lists good practices to assist states in implementing their obligations.²² The document, as indicated before, was agreed to by consensus of the seventeen states involved in the initiative, but has come over time to gain support by fifty-four states and three international organizations.²³ The expectation is that the number of supporters will further increase.

21. *Montreux Document*, *supra* note 3, at 9.

22. Marie-Louise Tougas, *Commentary on Part I of the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*, 96 INT'L REV. RED CROSS 305, 306 (2014).

23. *Participating States*, *supra* note 5.

B. Expert Meetings & Conferences

The ICRC has convened numerous expert meetings and conferences on particular IHL topics, leading to published reports. Here the approach has been to bring together various IHL experts—government and independent—to discuss topical and challenging issues in IHL, and thereafter to share the results of those discussions via reports in order to help inform and shape international debate. One example is the 2012 expert meeting and subsequent report on the “Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms.”²⁴ More recently, in 2016, the ICRC convened an expert meeting on the principle of proportionality within the rules governing the conduct of hostilities under IHL, with a report to be published in 2018. In all these cases the ambition was not to have agreed outcomes, but more to reflect the state of the debate, to inform, and thus to stimulate further debate.

The ICRC had a more ambitious goal when it embarked on its expert process to clarify the notion of Direct Participation in Hostilities. In the end it led to the ICRC Interpretative Guidance on Direct Participation in Hostilities, published in 2009.²⁵ While this topic was examined between 2003 and 2008 by a group of eminent legal experts, the positions enunciated in the Interpretative Guidance are the ICRC’s alone, as it was not possible to reach consensus at the end of the expert process. The Guidance provides the ICRC’s recommendations as to how the concept of “direct participation in hostilities” should be interpreted in contemporary armed conflicts.²⁶ The aim was to tackle one of the most difficult issues of IHL linked to the operational environment of contemporary armed conflict, which is characterized, among others, by a shift of military operations into civilian population centers, by ever more involvement of civilians in military action (both on the side of states and organized armed groups), and by increasing practical difficulties in distinguishing between fighters and civilians.²⁷ As no converging views were emerging on this issue by states, the ICRC felt it was important to try to address it through an expert process, to help provide some answers.

The ICRC is also involved in the field of weapons law, with the aim to further enrich state discussions and/or negotiations in

24. See generally Gloria Gaggioli, *The Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms*, INT’L COMM. OF THE RED CROSS (2013), <https://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf> [<https://perma.cc/7MMX-82R2>] (archived Feb. 10, 2018).

25. See generally Nils Melzer, *Interpretative Guidelines on the Notion of Direct Participation in Hostilities*, INT’L COMM. OF THE RED CROSS (2009), <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> [<https://perma.cc/STP3-DHBF>] (archived Feb. 10, 2018).

26. *Id.* at 9.

27. *Id.* at 5.

multilateral fora, to ensure IHL is taken into consideration. Most recent examples include expert meetings on technical, military, legal, and ethical aspects related to autonomous weapons systems,²⁸ with a view to, among others, support work conducted in the context of the Convention on Certain Conventional Weapons²⁹ and on Explosive Weapons in Populated Areas.³⁰

C. Updated Commentaries to the 1949 Geneva Conventions and Their 1977 Additional Protocols

Since their publication in the 1950s and the 1980s respectively, the Commentaries on the Geneva Conventions and their Additional Protocols³¹ have become a major reference for the application and interpretation of these treaties. Some interesting insights into the ICRC's rationale for producing the Commentaries can be found in the foreword to the Commentary to the Additional Protocols written by the then ICRC President Alexandre Hay. He stated that:

The ICRC decided to support this undertaking and publish the Commentary because it is conscious of its role as a guardian of international humanitarian law and is convinced of the importance of this work for those entrusted with implementing the Protocols or ensuring that they are widely disseminated, particularly among government and academic circles, and in Red Cross and Red Crescent circles³²

28. See, e.g., Int'l Comm. of the Red Cross, *Autonomous Weapon Systems: Implications of Increasing Autonomy in the Critical Functions of Weapons* (2016), <https://www.icrc.org/en/publication/4283-autonomous-weapons-systems> [<https://perma.cc/H7V9-2TWC>] (archived Feb. 10, 2018).

29. See Int'l Comm. of the Red Cross, *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects* 7 (June 2005), https://www.icrc.org/eng/assets/files/other/icrc_002_0811.pdf [<https://perma.cc/UXB6-Q3RL>] (archived Feb. 10, 2018).

30. See Int'l Comm. of the Red Cross, *Explosive Weapons in Populated Areas: Humanitarian, Legal, Technical and Military Aspects* (2015), <https://www.icrc.org/eng/assets/files/publications/icrc-002-4244.pdf> [<https://perma.cc/ZT6R-T3FL>] (archived Feb. 10, 2018).

31. INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS]; 3 INT'L COMM. OF THE RED CROSS, COMMENTARY ON GENEVA CONVENTION RELATIVE TO PRISONERS OF WAR (Jean S. Pictet et al. eds., 1960); 2 INT'L COMM. OF THE RED CROSS, COMMENTARY ON GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD (Jean S. Pictet et al. eds., 1960); 4 INT'L COMM. OF THE RED CROSS, COMMENTARY ON GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (Jean S. Pictet et al. eds., 1958); 1 INT'L COMM. OF THE RED CROSS, COMMENTARY ON GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD (Jean S. Pictet et al. eds., 1952).

32. Alexandre Hay, *Foreword to COMMENTARY ON THE ADDITIONAL PROTOCOLS*, *supra* note 31, at xiii.

He went on to state, “It is well known that without this work of implementation and dissemination, humanitarian law would remain a dead letter and would not be able to achieve its essential objective: the protection of the victims of armed conflicts.”³³

This is an ambition that has continued to guide the ICRC in its current project on updating the Commentaries to the Geneva Conventions. The ICRC has commissioned the updating of these Commentaries in order to document developments and provide up-to-date interpretations, taking account of the evolutions in interpretations, law, and practice since 1949 and 1977.³⁴ The updated Commentary on the First Geneva Convention was launched in March 2016,³⁵ and the one on the Second Geneva Convention in May 2017.³⁶

The updated Commentaries are the result of a collaborative process. The process relies significantly on external involvement and thus goes beyond the drafting process of the initial commentaries, which were drafted entirely within the ICRC. In addition to external contributors and external members of the editorial committee, a geographically representative group of practitioners and academics from all corners of the world are asked to review the draft commentaries, in their personal capacity, ahead of their publication.³⁷

The Commentaries, using methodology following the interpretive rules recognized as customary by states, are academic in nature. They

33. *Id.*

34. See Jean-Marie Henckaerts, *Bringing the Commentaries on the Geneva Conventions and their Additional Protocols into the Twenty-First Century*, 94 INT'L REV. RED CROSS 1551, 1552 (2012).

35. INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD (Cambridge Univ. Press 2016) [hereinafter 2016 COMMENTARY]. For an online version of the updated Commentary, see INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMERLIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD (2016), <https://ihl-databases.icrc.org/ihl/full/GCI-commentary> (last visited Feb. 21, 2018) [<https://perma.cc/LBA2-FW2F>] (archived Feb. 21, 2018); see also Lindsey Cameron et al., *The Updated Commentary on the First Geneva Convention—A New Tool for Generating Respect for International Humanitarian Law*, 97 INT'L REV. OF THE RED CROSS 1209 (2016) (detailing how and why the commentaries are updated); Int'l Comm. of the Red Cross, *Launch of the Updated Commentary on the First Geneva Convention* (Apr. 6, 2016), <https://www.icrc.org/en/document/launch-updated-commentary-first-geneva-convention> [<https://perma.cc/6JKF-U95H>] (archived Feb. 5, 2018).

36. Int'l Comm. of the Red Cross, *Launch of the Updated Commentary on the Second Geneva Convention* (May 4, 2017), <https://www.icrc.org/en/event/launch-updated-commentary-second-geneva-convention> [<https://perma.cc/EH7E-CGMZ>] (archived Feb. 5, 2018). For an online version of the updated Commentary, see Int'l Comm. of the Red Cross, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (2017), <https://ihl-databases.icrc.org/ihl/full/GCII-commentary> (last visited Feb. 15, 2018) [<https://perma.cc/74BE-244N>] (archived Feb. 5, 2018).

37. See, e.g., *Acknowledgements of 2016 COMMENTARY*, *supra* note 35 at xiii-xxiii (listing parties who contributed to the updated Commentary and their contributions).

are based on academic research and, as such, are not subject to “negotiation” among states. This was a conscious decision taken by the ICRC. Select state consultation would be perceived as preferential treatment for some states, and a consultation of all states would be neither feasible nor realistic.

In contrast to the previous Commentaries, the updated Commentaries present the ICRC’s interpretation of the law, where there is an official one, but also indicate clearly the “main diverging views and issues requiring further discussion and clarification.”³⁸ In that sense it is important to stress that the updated Commentaries aim to contribute to the debate on IHL and do not seek to provide the final word on any issue. They are designed to serve as an essential tool for a wide range of practitioners in the field of IHL.

D. Customary IHL Study

The ICRC undertook its 2005 study on customary IHL (CIHL) based on a specific mandate given in 1995 at the 26th International Conference, where the ICRC was asked to prepare a “report on customary rules of IHL applicable in international and non-international armed conflicts.”³⁹ The study took some ten years of work, and in preparing it the ICRC had to address a wide array of methodological questions that the International Law Commission is grappling with as well in its work on the topic *Identification of customary international law*.⁴⁰ The adopted methodology has much in common with the methodology set out by the ILC in its draft conclusions.⁴¹

Since 2007, a joint British Red Cross–ICRC research team based at the Lauterpacht Centre for International Law in Cambridge, United Kingdom, has been working on the update of the practice section of the study. National practice is collected by ICRC delegations worldwide, often in cooperation with national partners and experts, and supported

38. Peter Maurer, *Commentary of 2016 Foreword by Peter Maurer, President of the International Committee of the Red Cross*, at xii, INT’L COMM. OF THE RED CROSS, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=B4058FA53A17EA47C1257FB20050C685> (last visited Mar. 27, 2018) [<https://perma.cc/9WDZ-P7RV>] (archived Mar. 27, 2017).

39. 26th International Conference of the Red Cross and Red Crescent Movement, Res. 1, *International Humanitarian Law: From Law to Action Report on the Follow-up to the International Conference for the Protection of War Victims*, Annex II, § II (July 12, 1995) [hereinafter 26th International Conference].

40. See, e.g., Int’l Law Comm’n, Rep. on the Work of Its Sixty-Fourth Session, U.N. Doc. A/67/10, at 133, ¶ 268 (2012).

41. See *Report of the International Law Commission: ICRC statement to the United Nations, 2016*, INT’L COMM. OF THE RED CROSS (Nov. 15, 2016), <https://www.icrc.org/en/document/report-international-law-commission-icrc-statement-United-nations-2016> [<https://perma.cc/D3XC-5MRS>] (archived Feb. 5, 2018) (noting that the ICRC’s IHL approach is “generally in line with the approach taken by the Commission”).

by a number of National Red Cross and Red Crescent Societies. Overall, the ICRC currently aims to collect the national practice of 106 countries.⁴² These countries have been chosen to ensure a geographical representation that is as wide as possible, to represent different types of legal systems, and to reflect various experiences with matters of IHL and situations of armed conflict. In addition to national practice (such as that set out in military manuals, national legislation, national case law, and other national practice such as official government reports or high-level statements), the updates to the customary IHL study's practice section have included international materials by analyzing, for example, decisions of international courts and tribunals.⁴³ A research team at the International Criminal and Humanitarian Law Clinic at Laval University in Canada has been contributing to the analysis of such materials since 2014.⁴⁴

IV. OTHER ACTIVITIES CONDUCTED BY NONSTATE ENTITIES THAT CONTRIBUTE TO IHL

The ICRC is one nonstate entity active in relation to IHL that has a unique voice, given its specific mandates and its particular roles as a reference institution and guardian of IHL. However, there are other very important actors as well that conduct a diverse range of other activities that make significant contributions to IHL. Two are worth mentioning as examples: expert-driven processes and a private-public initiative. There are various expert-driven processes that have led to the production of IHL-related manuals, which are all, of course, nonbinding documents.

The 2009 Manual on International Law Applicable to Air and Missile Warfare is the result of a six-year long endeavor led by an international group of experts, under the guidance of Professor Dinstein, to reflect on existing rules of international law applicable to air and missile warfare, drawing from various sources of international law.⁴⁵

The work on the 2013 Tallinn Manual on the International Law Applicable to Cyber Warfare and the 2017 Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations has brought together international law practitioners and scholars in an effort to examine how existing legal norms applied to cyber warfare and cyber

42. Council of Delegates of the Int'l Red Cross and Red Crescent Movement, *Background Report, Part II—Customary International Humanitarian Law*, at 4, CD/17/12.2 (Sept. 2017).

43. *Id.*

44. *Id.*

45. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIV., *Foreward to MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE* at vii (2013).

operations.⁴⁶ Both Tallinn Manuals are the product of the group of experts acting solely in their personal capacity.⁴⁷ Again, the aim was to help clarify the existing law. Whatever views states may have on the manuals, the mere fact that the Tallinn discussions have taken place is an important contribution to the international debate, particularly if one considers that the interstate discussions on cyber matters through the UN Group of Government Experts on Developments in the Field of Information and Telecommunications in the Context of International Security have thus far only led to two modest statements concerning international law.⁴⁸ The 2013 and 2015 Reports confirmed that “[i]nternational law, and in particular the Charter of the United Nations, is applicable”⁴⁹ and noted “the established international legal principles, including, where applicable, the principles of humanity, necessity, proportionality and distinction.”⁵⁰

Finally, the International Code of Conduct for Private Security Providers’ Association (ICoCA) is an interesting public-private initiative comprised of states, intergovernmental organizations, private security service providers, and civil society organizations.⁵¹ The purpose of the ICoCA is to promote, govern, and oversee the implementation of the International Code of Conduct for Private Security Service Providers. The non-legally binding code is the fruit of a multistakeholder initiative launched by Switzerland. The ICoCA seeks to promote compliance amongst private security companies with the principles of IHL and international human rights law contained in the Code.⁵² These include rules on the use of force, the prohibition of torture or other cruel, inhuman, or degrading treatment or punishment, and sexual violence.⁵³

46. Michael N. Schmitt, *Introduction, in* TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 1 (Michael N. Schmitt ed., Cambridge Univ. Press 2013); *see also* Michael N. Schmitt, *Introduction in* TALLIN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 2 (Michael N. Schmitt ed., Cambridge Univ. Press 2017).

47. TALLIN MANUAL 2.0, *supra* note 46.

48. *See generally* U.N. Secretary-General, *Report of the Group of Government Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, U.N. Doc. A/70/174 (July 25, 2015) (hereinafter 2015 GGE Report); U.N. Secretary-General, *Report of the Group of Government Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, U.N. Doc. A/68/98 (June 24, 2013) (hereinafter 2013 GGE Report).

49. 2015 GGE Report, *supra* note 48, ¶ 24; 2013 GGE Report, *supra* note 48, ¶ 19.

50. 2015 GGE Report, *supra* note 48, ¶ 28(d).

51. *The ICoC Association, INT’L CODE OF CONDUCT ASSOC.*, <https://icoca.ch/en/icoc-association> (last visited Feb. 21, 2018) [<https://perma.cc/J5HD-KLRB>] (archived Feb. 5, 2017).

52. *See Frequently Asked Questions, INT’L CODE OF CONDUCT ASSOC.*, <https://icoca.ch/en/frequently-asked-questions> (last visited Feb. 21, 2018) [<https://perma.cc/3K6U-24S7>] (archived Feb. 15, 2018).

53. *Id.*

V. CONCLUDING THOUGHTS

The current geopolitical climate makes it very difficult for states to reach agreement on developing IHL through treaty law and through multilateral processes. While it would be ideal if this climate could ease, the current situation does create some positive spaces for nonstate entities to make useful contributions. This Article argues that these contributions are very important in their role as complementary to the work of states. It is in this positive, complementary spirit that the ICRC undertakes its work, pursuant to its mandate under the Geneva Conventions and the Statutes of the Red Cross and Red Crescent Movement. While the ICRC seeks to assume its role of guardian of IHL, it remains mindful and appreciative of the fact that it is working in a complex space alongside a range of other important actors, which have valuable contributions to make in promoting and stimulating the evolution of IHL.

Pressing IHL issues in contemporary armed conflicts need to be addressed. Absent a forum where states can meet regularly to discuss such issues, or specific state initiatives to address them, this Article submits that at a minimum, action by nonstate entities is important and useful, even if just to stimulate states to think about these issues, to help inform their thinking, and to encourage states eventually to articulate their own views.