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## War is Governance: Explaining the Logic of the Laws of War From a Principal-Agent Perspective

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## WAR IS GOVERNANCE: EXPLAINING THE LOGIC OF THE LAWS OF WAR FROM A PRINCIPAL–AGENT PERSPECTIVE

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*What is the purpose of the international law on armed conflict, and why would opponents bent on destroying each other's capabilities commit to and obey rules designed to limit their choice of targets, weapons, and tactics? Traditionally, answers to this question have been offered on the one hand by moralists who regard the law as being inspired by morality and on the other by realists who explain this branch of law on the basis of reciprocity. Neither side's answers withstand close scrutiny. In this Article, we develop an alternative explanation that is based on the principal–agent model of domestic governance. We pry open the black box of “the state” and examine the complex interaction between the civilian and military apparatuses seething beneath the veil of sovereignty. Our point of departure is that military conflicts raise significant intrastate conflicts of interest that result from the delegation of authority to engage in combat: between civil society and elected officials, between elected officials and military commanders, and within the military chain of command. We submit that the most effective way to reduce domestic agency costs prevalent in war is by relying on external resources to monitor and discipline the agents. Even though it may be costly, and reciprocity is not assured, principals who worry that agency slack may harm them or their nation's interests are likely to prefer that international norms regulate warfare. The Article expounds the theory and uses it to explain the evolution of the law and its specific doctrines, and it outlines the normative implications of this new understanding of the purpose of the law. Ultimately, our analysis suggests that as a practical matter, international law enhances the ability of states to amass huge armies because it lowers the costs of controlling them. Therefore, although at times compliance with the law may prove costly in the short run, in the long run states with massive armies are its greatest beneficiaries.*

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## INTRODUCTION

Intuitively, the laws of international armed conflict (hereinafter “IHL”) are meant to regulate interstate action. As such, their very existence is puzzling: Why would opponents bent on destroying each other’s capabilities commit to and obey rules designed to limit their choice of targets, weapons, and tactics?

Traditionally, two kinds of answers have been provided to this question. On the one hand, moralists regard IHL as being inspired by morality.<sup>1</sup> On the other, realists explain the evolution of the law on utilitarian grounds and view compliance with it as a product of the threat of reciprocal retaliation.<sup>2</sup> We contend that both answers address only part of the dynamics of warfare and are therefore only partially convincing. Morality was obviously an important factor in the promotion of IHL, especially by nonstate actors. But it is difficult to reconcile morality with a law that strictly relies on state consent and is based on state practice, often reflecting not the aspiration to strive for just war during battle but rather the primacy of military necessity.<sup>3</sup> Nor can morality explain the codification process of IHL, which was dominated by military experts and governmental officials keen on promoting national interests.<sup>4</sup>

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1. The question of the morality of the laws of war is most intimately connected with the “just war” theory, see MICHAEL WALZER, *JUST AND UNJUST WARS* 127–33 (4th ed. 2006), and LARRY MAY, *WAR CRIMES AND JUST WAR* 3–8 (2007). On the moral approaches to law, see Gabriella Blum, *The Laws of War and the “Lesser Evil”*, 35 *YALE J. INT’L L.* 1, 39 (2010) (“From a deontological stance, the actions proscribed by strict IHL rules . . . are inherently repugnant, a violation of a moral imperative in the Kantian sense, independent of any cost-benefit calculation in any particular instance.”).

2. ERIC A. POSNER & ALAN O. SYKES, *ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW* 190–95 (2013) (suggesting that laws of war are possible in the first place and would be respected only under conditions of *symmetry* (namely, when the rules give advantage to neither side) and *reciprocity* (namely, the ability of the opponent to retaliate for prior violations)); ERIC A. POSNER, *Human Rights, the Laws of War, and Reciprocity*, 6 *L. & ETHICS HUM. RTS.* 147, 150, 170–71 (2012); ERIC A. POSNER, Centennial Tribute Essay, *A Theory of the Laws of War*, 70 *U. CHI. L. REV.* 297, 297 (2003).

3. Until very recently, and some argue even now, morality was subject to military necessity. On this tension between morality and international legal doctrine, see David Luban, *Military Necessity and the Cultures of Military Law*, 26 *LEIDEN J. INT’L L.* 315, 315–17 (2013), and discussion *infra* Section I.D.

4. In his speech at the Hague Peace Conference of 1899, Fedor Martens observed that “[t]hose who have caused the idea of humanity to progress in the practice of war are not so much the philanthropists and publicists as the great captains . . . who have seen war with their own eyes.” 1899 *PROCEEDINGS OF THE HAGUE PEACE CONFERENCES* 506 (James Brown Scott ed., Div. of Int’l Law, Carnegie Endowment for Int’l Peace trans., Oxford Univ. Press 1920) (1907) [hereinafter *PROCEEDINGS*], available at <https://archive.org/stream/proceedingshagu02scotgoog#page/n8/mode/2up>; see also GEOFFREY BEST, *HUMANITY IN WARFARE* 147 (1980) (“The law of war could not be developed at all without the assent of the generals and the admirals, and these were years . . . when their power and influence were very great.”). Professor Best describes the Hague Peace Conferences as “conferences supposedly about peace, but much more obviously concerned with war.” *Id.* at 140; see also PERCY BORDWELL, *THE LAW OF WAR BETWEEN BELLIGERENTS* 112 (1908) (“[I]t is fortunate that the [Brussels Declaration of 1874] was so largely the work of military men.”). The military also initiated the Instructions

The prevailing “retaliatory” explanation of IHL makes more intuitive sense at first blush. The tit-for-tat scenario can be modeled as an indefinitely iterated prisoner’s dilemma and illustrated by real-life examples, such as the trench warfare of World War I<sup>5</sup> or specific stories concerning the treatment of prisoners of war (“POWs”) during the two World Wars.<sup>6</sup> But this explanation, too, does not withstand close scrutiny as the main explanation for IHL’s continued efficacy. To be effective, reciprocity requires that each side have ample information confirming the opponent’s intention and ability to comply with the law indefinitely. This condition is rarely met during combat. The noise of the battlefield typically induces adversaries to interpret their enemy’s mistakes as intentional violations of the law and prompts them to retaliate in kind. More seriously, the shadow of the future is often quite narrow. For combatants actually involved in combat, each battle may well be their last; for their commanders, it may be crucial to eventual victory. This is especially true during the closing phase of a war: the losing side, with its back to the wall, cannot be expected to obey laws that guarantee its defeat; and the winning side, on the cusp of victory, is unlikely to worry about reprisals for its own breaches of the law.<sup>7</sup> With such an anticipated endgame, cooperation based on an iterated prisoner’s dilemma situation will quickly unravel.

Moreover, the retaliatory tit-for-tat explanation misses many aspects of the dynamics of war that reflect coordination games such as chicken or battle of the sexes rather than prisoner’s dilemma. The prisoner’s dilemma story cannot explain the codification process of IHL during the second half of the nineteenth century, which was characterized by pressure emanating from the *stronger* European nations to clarify the law, in particular the law of occupation.<sup>8</sup> As in the classic battle of the sexes game, the weaker countries were far less eager to accept a law that would benefit their more powerful

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for the Government of Armies of the United States in the Field [hereinafter the Lieber Code], published on April 24, 1863. See JOHN FABIAN WITT, *LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* 193 (2012). For further criticism of the moralist explanation, see POSNER & SYKES, *supra* note 2, at 191–92.

5. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 82–85 (1984) (explaining how a powerful ethic of revenge was evoked when mandatory raids on enemy trenches caused mutual cooperation to deteriorate).

6. One famous example began when British commandos tied up numerous German soldiers for the duration of an operation after the commandos surprised the soldiers. ALFRED M. DE ZAYAS, *THE WEHRMACHT WAR CRIMES BUREAU, 1939–1945*, at 108 (Univ. of Neb. Press 1989) (1979). “In retaliation, Hitler ordered that all British prisoners of war in Germany . . . be . . . tied up,” upon which “the British government ordered German prisoners of war to be shackled.” *Id.*; see also 1 ALEXANDER GILLESPIE, *A HISTORY OF THE LAWS OF WAR* 146, 173 (2011) (detailing other instances of reciprocal violations of the laws of war).

7. Obviously, if there are no incentives to comply with IHL during the last round of fighting, the indefinitely iterated game will unravel at earlier stages, leading both sides to disregard the law. See AVINASH K. DIXIT & BARRY J. NALEBUFF, *THINKING STRATEGICALLY* 100 (1991).

8. See EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 45–46 (2d ed. 2012).

enemies, but they preferred *some law* that would constrain any future invader or occupier rather than *no law*.<sup>9</sup> As this Article will explain, other wartime situations reflect the chicken game, where some parties have a dominant preference to abide by IHL regardless of their opponent's choice.<sup>10</sup> In these scenarios, IHL serves as an effective tool to promote parties' self-interest. In the Article, we argue that this self-interest, which is independent of the opponent's attitude toward compliance, is what explains the evolution and nature of IHL. This self-interest was met by the weaker states' gratitude for being granted *some protection* against evil rather than *no protection*.

While we do not reject the two traditional explanations for IHL as additional layers of explanation for *some* IHL rules and for the observance of IHL in *some* armed conflicts, we think that neither of them can account for the drive to codify, modify, and further develop IHL since the mid-nineteenth century, nor can they explain its continued viability. We submit that these two explanations fail to grasp a crucial factor in the dynamics of modern warfare: the need for each side to control its own forces. The leaderships of contending armies may indeed be motivated by moral concerns or locked in a reciprocal relationship, but this is not why they rely on IHL; for this they need no formal law, just as the princes and kings in earlier times could rely on their shared understandings about the law. Modern militaries and their civilian leaderships need IHL—indeed, a kind of IHL that is specifically tailored to control the agents—because they collectively face a daunting challenge of controlling their respective troops, whose interests may diverge from their own. During war each decisionmaker has a different future to consider: the state's president will have a long-term vision, contemplating the transition to peace, while the army commander will focus more concretely on the grand picture of the war. But the foot soldier at the service of them both has a rather concrete future to consider—how to be effective and survive the current assault on enemy positions. The need for law to maintain discipline within the fighting forces rises in direct relation to the growing disparity between the different “futures” that shape each actor's preferences.

In the Article, we explain why a codified, specifically designed IHL is necessary for resolving hierarchical governance challenges more than horizontal relations between armies. We believe that this intricate internal dimension of warfare, which traditional accounts of IHL largely miss and scholars of international law often disregard, provides an important key to

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9. Indeed, it was the latter group's reluctance that delayed the adoption of a comprehensive treaty on IHL between 1874 and 1899. See *id.* at 39–41, 45–46. Note that the law on occupation violates Posner and Sykes's symmetry condition, see *id.*; POSNER & SYKES, *supra* note 2, yet it was endorsed because the parties to the convention were engaged in a battle of the sexes game rather than in a prisoner's dilemma. Similarly, the symmetry condition cannot explain initiatives of the *more powerful* armies to ban harmful weapons or types of ammunition that they alone possessed, such as the exploding bullets banned in 1868. See *infra* note 79 and accompanying text.

10. See *infra* Part IV, on asymmetric warfare.

an understanding of IHL's development and resilience since the mid-nineteenth century. This Article looks beyond the veil of sovereignty and examines the interplay between the various domestic actors whose interests are implicated by war. Our rationale is informed by the observation that states engaged in armed conflict are not unitary actors but rather complex institutions that include internal chains of command within the echelons of power, accountable to a civilian government and ultimately to the public.

To explain this counterintuitive hypothesis, we must begin by prying open the black box of "the state" and examining the complex interaction between the civilian and military apparatuses seething beneath the veil of sovereignty.<sup>11</sup> Such an examination will reveal that the prevalent assumption that IHL is designed only to regulate interstate relations is too simplistic. The map of the battlefield may show one state fighting another, but there are other less visible and more complex intrastate battles raging simultaneously between different domestic actors, each seeking to control the conduct of the army and shape the war's outcome. As scholars of political science have long observed, controlling the armed forces, especially during war, is one of the most acute challenges for any government. In democracies, one of the "most basic of political questions" is how "to . . . reconcile a military strong enough to do anything the civilians ask, with a military subordinate enough to do only what civilians authorize."<sup>12</sup> This question leads to the following:

[A]n ineluctable and potentially dangerous tension between military force and constitutional government [which] makes for a vexing dilemma. Although raising and deploying armed forces may be indispensable for sustaining a secure environment for constitutionalist politics, creating a safe place . . . for military institutions [is] among the most troublesome challenges of a constitutionalist order.<sup>13</sup>

There is conflict not only between the high command of the armed forces and the civilian government that seeks to control it. Resorting to force creates conflicts between civil society and elected officials, between elected officials and military commanders, and between those commanders and combat

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11. This is true not only in the IHL context. Like any complex organization, states promote policies preferred by those domestic actors who are more politically effective than their competitors. Hence, theories that are based on the assumption that somehow "the state" can have unitary preferences risk being unrealistic. Compare Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167 (1999) (focusing on the influence of interest groups on the shaping of international norms), with JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 4–5, 7 (2005) ("[W]e give the state the starring role in our drama. . . . Our theory of international law assumes that states act rationally to maximize their interests."), and ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS* 121 (2008) ("Our basic rational choice assumptions imply that states will only enter into agreements when doing so makes them (or, at least, their policymakers) better off.")

12. PETER D. FEAVER, *ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS* 1–2 (2003).

13. Mark E. Brandon, *War and the American Constitutional Order*, in *THE CONSTITUTION IN WARTIME* 11, 13 (Mark Tushnet ed., 2005).

soldiers. IHL is an external tool designed to address many of these internal conflicts.

These diverse conflicts can all be framed as principal–agent (“P–A”) conflicts, situations in which each “principal” (the public, elected officials, high command) necessarily employs an “agent” (elected officials, high command, combat soldiers, respectively) to further its goals and secure its interests. The delegation of authority to engage in combat exposes the principal to the risk that the agent might act in its own interest rather than in that of its principal.<sup>14</sup> Agency costs tend to be high during wartime.<sup>15</sup> The principals want to win the war, but they are also aware that it will be necessary to reestablish peace afterward. The principals therefore fear that their agents might act too aggressively, undermining the principals’ long-term goals. Conversely, the military may have similar concerns when it is the civilian government that weighs only short-term interests at the expense of long-term ones, while soldiers are primarily concerned about their own survival during each engagement. Agency slack is high due to the opportunities for the agents to shirk their duties with impunity during combat.

The principal can employ several measures to reduce such agency costs by, for example, monitoring the agent or imposing penalties for violations. But incomplete information limits the high command’s ability to control low-ranking combatants. The civilian government suffers not only from incomplete information but also from inadequate expertise to assess it and a limited ability to restrain the military, if necessary.<sup>16</sup> When we carefully observe the multilevel dynamics of the battlefield, we notice that societies and commanders invest considerable effort in managing the delicate interface within the echelons of military power. Soldiers should be motivated to risk their lives when fighting the enemy but to maintain discipline at the same time.<sup>17</sup> Soldiers determined to confront the enemy yet fearing for their lives might be tempted to protect themselves at the cost of unnecessary harm to

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14. In this context, the military is no different from any other bureaucracy that may be framed as an agent of political principals. See generally KENNETH A. SHEPBLE & MARK S. BONCHEK, *ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS* 360–70 (1997) (discussing how bureaucratic policies drift toward an agency’s ideal); Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 433–35 (1989) (discussing problems in limiting the discretion of agencies).

15. See FEAVER, *supra* note 12, at 4, 68; Brandon, *supra* note 13, at 20–21, 22.

16. One famous example is Israel’s first Lebanon War in 1982, during the course of which the Israeli prime minister was surprised to learn from an American envoy that the Israel Defense Forces (“IDF”) had just invaded Beirut. It turned out that the IDF chief of staff and the minister of defense had decided to defy the prime minister’s clear orders. Shlomo Nakdimon, *Begin’s Legacy / ‘Yehiel, it ends today’*, HAARETZ (Feb. 22, 2012, 4:51 PM), <http://www.haaretz.com/weekend/magazine/begin-s-legacy-yehiel-it-ends-today-1.414173> (last visited Feb. 7, 2014).

17. In the trench warfare of World War I, soldiers on both sides tacitly cooperated to lower their respective risks and defy their respective commanding officers who tried to force them to fight. As Axelrod notes, “The soldiers became expert at defeating the monitoring system.” AXELROD, *supra* note 5, at 81–82. In the post–World War II era, several Western armies coached their soldiers to fear and hate the enemy, believing that portraying adversaries

enemy combatants and civilians. Some military manuals reflect this concern by suggesting that breaches of IHL “have almost invariably been shown to have been the deeds of subordinates who have acted through ignorance or excessive zeal; they have increasingly rarely been deliberate acts.”<sup>18</sup> Similarly, some manuals note that law is needed “to place a curb on the inflamed passions of [the] . . . soldiers.”<sup>19</sup> Empirical evidence collected from international armed conflicts around the world between 1900 and 1991 corroborates those statements. The data show that most violations are perpetrated by low-ranking soldiers facing enemy combatants or foreign civilians.<sup>20</sup> Indirectly, then, improving control of the military agent is the key to reducing the risk of unnecessary harm to civilians and combatants.<sup>21</sup> Small wonder that army commanders have been promulgating military manuals to discipline their soldiers since well before the rules became legally binding under international law. As Martens, the Russian architect of the laws of war, notes: “The great captains . . . [b]eing obliged to place a curb on the inflamed passions of their soldiers . . . inaugurated a discipline in their armies, which was the source of the regulation of the usages of war.”<sup>22</sup>

Famously, Helmuth von Moltke, the chief of staff of the Prussian Army, plays down the value of international law for the regulation of warfare, although he emphasizes that internal law, as well as “religious and moral education,” is the key to ensuring that “the gradual progress in morality [is] reflected in the waging of war.”<sup>23</sup>

Not all armed forces, however, enjoyed the discipline of the Prussian Army of 1880. Many of them soon discovered that during armed conflicts,

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as evil and malicious created feelings that made killing easier. See DAVE GROSSMAN, *ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY* 4, 9–15, 28–29 (1995); RICHARD HOLMES, *ACTS OF WAR: THE BEHAVIOR OF MEN IN BATTLE* 365–75 (1986). This approach sought to prevent the recurrence of the behavior of Allied soldiers during the two World Wars, most of whom balked at firing at the enemy even when attacked. See JOANNA BOURKE, *AN INTIMATE HISTORY OF KILLING: FACE-TO-FACE KILLING IN TWENTIETH-CENTURY WARFARE* 61–62 (1999); GROSSMAN, *supra*, at 4.

18. WAR OFFICE, *MANUAL OF MILITARY LAW* 244 (1914) (Gr. Brit.).

19. PROCEEDINGS, *supra* note 4, at 506.

20. James D. Morrow, *When Do States Follow the Laws of War?*, 101 *AM. POL. SCI. REV.* 559, 571 (2007); see also James D. Morrow & Hyeran Jo, *Compliance with the Laws of War: Dataset and Coding Rules*, 23 *CONFLICT MGMT. & PEACE SCI.* 91, 106–09 (2006) (concluding that the treatment of civilians is the issue with the lowest level of compliance, whereas the rules concerning chemical and biological weapons have the best record of compliance), available at [http://sitemaker.umich.edu/jdmorrow/data\\_sets](http://sitemaker.umich.edu/jdmorrow/data_sets).

21. Morrow, *supra* note 20, at 571; see also Morrow & Jo, *supra* note 20, at 106–09.

22. PROCEEDINGS, *supra* note 4, at 506.

23. Helmuth von Moltke, the Elder, *On the Nature of War*, in *DIE ZERSTORUNG DER DEUTSCHEN POLITIK: DOKUMENTE 1871–1933*, at 29–31 (Harry Pross ed., Richard S. Levy trans., 1959) available at <http://www.h-net.org/~german/gtext/kaiserreich/moltke.html> (“I wholly agree with the principle . . . that the gradual progress in morality must also be reflected in the waging of war. But . . . [e]very law requires an authority to oversee and administer its execution, and just this force is lacking for the observation of international agreements. What third state would take up arms because one or both of two warring powers had violated the law of war [*loi de guerre*]? An earthly judge is lacking. In this matter success is to be expected

domestic mechanisms of control tend to fail. In this Article, we submit that the most effective way for principals to overcome these constraints and secure their interests, especially in times of war, is to outsource part of their regulatory function to foreign and international actors, including even the enemy. This outsourcing operates to rein in the agents by invoking shared norms. Even though it may be costly and reciprocity is not assured, principals who are worried about agency slack that could prove disastrous to long-term national interests are likely to prefer that international norms regulate the military conflict. Hence, our basic argument is that IHL reflects domestic principals' attempts to create an effective means of monitoring and disciplining their agents.

Reliance on IHL and IHL-based institutions can reduce the agency costs prevalent in war. IHL provides several benefits over purely domestic rules, such as military manuals and domestic prescriptions. First, by committing to international norms, domestic principals can tie their own hands in domestic bargaining and thereby preempt domestic opposition, such as a politically powerful military. Second, IHL can overcome monitoring and enforcement difficulties because the law can be interpreted and enforced by actors other than national principals. If the military agent breaches IHL, the victims (civilians and combatants on the enemy side), as well as neutral third countries and actors, such as the International Committee of the Red Cross ("ICRC"), can invoke the shared system of norms and bring the information about violations to the attention of the principals.<sup>24</sup> The principals can then use this "fire alarm" mechanism to restrain their agents.<sup>25</sup> Finally, third-party enforcement can prove an effective and credible threat to agents who might otherwise disregard their principals' commands.

Hence, we hypothesize that *ex ante* demand for IHL (before actual fighting) will be strong under the following cumulative conditions: (1) there is a likelihood that the principals' goals may differ from those of their military agents; (2) the costs to the respective principals of unilaterally monitoring their agents and enforcing compliance are relatively high; and (3) the agency costs are likely to be offset by relying on information or enforcement provided by the opponent or by third parties using tools provided by international law.<sup>26</sup> The costs of externalizing the monitoring functions to the

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only from the religious and moral education, the sense of honor and respect for law, of individual leaders who make the law and act according to it, so far as this is generally possible to do in the abnormal conditions of war.").

24. Indeed, one of the ICRC's major tasks is codifying and creating a shared interpretation of IHL, as evidenced in INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz et al. eds., 1987), as well as the restatement of customary law in JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005).

25. See Mathew D. McCubbins et al., *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 198–99 (1999) (discussing the role of administrative law as providing a fire alarm to the legislature when the executive deviates from its mandate).

26. Of course, there are significant costs involved in forming international law. Such costs may be negligible when several principals share the agency problem.

enemy (or to third parties, like the ICRC) could be substantial, and so the principals will rely on IHL whenever they expect the P–A costs to be higher than the costs of complying with IHL. If risk-averse principals anticipate that those conditions will eventually materialize, they have a strong incentive to invest in defining IHL.

At the same time, however, the principals will seek to retain sufficient discretionary space to enable them to violate the law with impunity should any of the three conditions not materialize during actual battle. Hence, the norms they prefer will be “optimally imperfect,”<sup>27</sup> namely, fairly detailed primary norms coupled with escape clauses and weaker, more ambiguous secondary norms that address the consequences for violation of the primary norms.

Our analysis provides not only an explanation for the design of IHL but also a hypothesis about the conditions under which principals would wish to comply with the law or use its escape clauses. When principals do not need third parties to control their agents (when there is no P–A conflict, when the principal has alternative means of controlling its agents, or when the third party becomes unreliable), the temptation to violate IHL will increase. This does not necessarily suggest that the principal will then violate IHL. There may still be good reasons to use IHL as a public relations tool to deflect criticism, but then the principal will tend to interpret IHL in a self-serving way rather than strictly impose it on its agents.

The same rationale can explain modern armies’ diminishing interest in further developing IHL to address technological advancements and the challenges of asymmetric warfare. Technological improvements in recent decades that enable modern armies to monitor their soldiers effectively, along with growing dependence on reliable elite soldiers to operate sophisticated weaponry and perform delicate tasks, reduce the threat of shirking. On the other hand, the recourse to public shaming for IHL violations by civil society NGOs, often seen by the principals as unreliable, reduces the latter’s appetite for international regulation of warfare.

In Part I, we elaborate on the three conditions mentioned above for the emergence of IHL and present the full hypotheses of the Article. The three subsequent Parts test the hypotheses: Part II outlines the evolution of IHL, particularly during the second half of the nineteenth century; Part III examines specific rules and institutions and asks why (some) strong armies try to comply with IHL during contemporary asymmetric conflicts; and Part IV examines the role of IHL in governing asymmetric warfare against nonstate actors. Part V then offers an initial exploration of the normative implications of the P–A rationale for IHL. We end the Article with a discussion of our conclusions.

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27. On the concept of optimally imperfect international norms that provide room for decisionmakers and informed interest groups to escape the obligation to comply with those norms, see GEORGE W. DOWNS & DAVID M. ROCKE, *OPTIMAL IMPERFECTION? DOMESTIC UNCERTAINTY AND INSTITUTIONS IN INTERNATIONAL RELATIONS* 59–72 (1995).

While in this Article we focus on the use of IHL to control military agents, we suggest that other fields of international law serve the same purpose. For example, the *jus ad bellum* of the nineteenth century, which required states to issue formal declaration of war before commencing hostilities, can only be explained as the sovereign's tool to control its military agent. In our future work, we will address this and other uses of international law to resolve domestic control issues within the military.

### I. A PRINCIPAL–AGENT THEORY OF IHL

The theory of the P–A relationship is well known and requires only succinct reiteration: agency costs arise whenever one party to any social interaction (the principal) delegates authority to another party to that interaction (the agent) to act on the principal's behalf, and the principal is unable to ensure that the agent is acting in the principal's best interest.<sup>28</sup> There may be several reasons why principals cannot control their agents effectively. The agent may have more information about the issue at hand (such as in an attorney–client relationship); the agent may be operating in a location where the principal cannot monitor its actions; or the principal may be barred from intervening in the agent's actions or disciplining it by some external constraint like a law or regulation. P–A relationships are also extant in governmental activity at various levels: between the voters and elected officials, between the legislature and the executive,<sup>29</sup> between the executive and the bureaucracy, and so forth.<sup>30</sup> In all of these relationships, the principals worry that various agents might defy the principals' wishes and instead promote their own.

Because of the armed forces' unique character as perhaps the strongest and most specialized of all bureaucracies, the political branches have even

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28. For a general description of P–A theory, see Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308–09 (1976); Steven Shavell, *Risk Sharing and Incentives in the Principal and Agent Relationship*, 10 BELL J. ECON. 55, 66 (1979); Eric Posner, *Agency Models in Law and Economics* 1–3 (Univ. of Chi. Law Sch., John M. Olin Law & Econ. Working Paper No. 92, 2000), available at <http://dx.doi.org/10.2139/ssrn.204872>.

29. Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making*, 12 J.L. ECON. & ORG. 119, 163 (1996) (arguing that the interactions between the president and Congress can create more or less autonomy for agencies); Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 249 (1987); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 768 (1983); Barry R. Weingast, *The Congressional-Bureaucratic System: A Principal Agent Perspective (with Applications to the SEC)*, 44 PUB. CHOICE 147, 155–57 (1984).

30. See, e.g., Tracey E. George & Albert H. Yoon, *The Federal Court System: A Principal-Agent Perspective*, 47 ST. LOUIS U. L.J. 819, 820–22 (2003) (analyzing the federal courts system as a P–A model).

more reason to suspect that the military agent will deviate from the commands it receives.<sup>31</sup> Like any bureaucracy, the military agent seeks to maintain its discretion vis-à-vis its principals. As Feaver puts it, “Regardless of what the military agent is asked to do, he would like to do it with the minimum of civilian interference and oversight.”<sup>32</sup> The challenge of controlling the military agent is particularly acute during armed conflicts, where the traditional domestic modes of controlling agents are inadequate. This Part outlines the theory for the function of IHL from a P–A perspective. It elaborates on the three conditions that create the demand for IHL: (1) the potential conflict of interest between the principals and their agents; (2) the high costs of unilateral monitoring and constraint of agents; and (3) the promise of reliance on third parties, including enemies, when invoking IHL. This Part concludes with an assessment of the relationships between the different motivations for IHL: morality, reciprocity, and governance.

A. *A Potential Conflict of Interest Between Principals and Agents During Warfare*

War gives rise to clashes between the divergent interests and goals of the relevant actors—civil society, the political branches (hereinafter referred to collectively as “government,” although obviously there are also internal tensions within the legislative and executive branches), and the army (and, of course, tensions throughout the army’s echelons).<sup>33</sup>

There may be several sources of such clashes: the government may have longer-term or broader concerns than the army, which is focused on winning the battle at minimal expense in terms of personnel and equipment. The government may be interested, for example, in its future relations with foreign civilians whom it will govern when the fighting is over or in its long-term relations with other governments, while the army may play down such concerns. By contrast, governments—particularly democratic governments that may fear losing the forthcoming elections—might adopt short-term goals, whereas the army, which is a repeat player in different arenas, might wish to maintain its own reputation in anticipation of future conflicts. There may also be clashes between the high command of the army and the lower ranks: in the past, both governments and armies have shown little respect

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31. Some political scientists have used the P–A framework to analyze civil–military relations. See, e.g., DEBORAH D. AVANT, *POLITICAL INSTITUTIONS AND MILITARY CHANGE: LESSONS FROM PERIPHERAL WARS* (1994); RISA A. BROOKS, *SHAPING STRATEGY: THE CIVIL MILITARY POLITICS OF STRATEGIC ASSESSMENT* (2008). Feaver has produced the major work in this field. See FEAVER, *supra* note 12. In law, there have been almost no attempts to use the P–A paradigm to analyze civil–military relations. One exception is Ziv Bohrer’s work in which he examines the defense of superior-order doctrine in criminal law from the perspective of P–A relations. As he demonstrates, the inherent conflict of interest between the principals and the army manifests itself in several types of situations that call for a set of responses. Ziv Bohrer, *The Superior Orders Defense: A Principal-Agent Analysis*, 41 GA. J. INT’L & COMP. L. 1 (2012).

32. FEAVER, *supra* note 12, at 64.

33. *Id.* at 57.

for their own soldiers, exposing them to unnecessary risks,<sup>34</sup> while soldiers have sought ways to reduce their own exposure to risk in battle at the expense of the other side’s civilians and soldiers, thereby potentially harming their own national interests. All of these are potential sources of conflicts of interest between principals and agents.

Conflicts can also arise due to different assessments of the consequences of certain strategies.<sup>35</sup> For example, during both World Wars, the conduct of submarine warfare proved a bone of contention among the German government, foreign office, and navy. The government was concerned about the United States’ possible entry into the war, whereas the navy played down this worry and pressed for indiscriminate attacks on British merchant ships.<sup>36</sup> Below we describe in general terms the features of the most common conflict of interest—that between the elected government as the principal and the armed forces as the agent. We describe other more specific P–A conflicts later in this Article.

Not all states and armies face the same P–A problems. Much depends on the relative strength of the army and its prospective role in future battles. Generally, we can expect higher agency costs to be associated with stronger armies, which may be expected to invade foreign territories and engage foreign populations. As Martens observes, “[D]iscipline was all the more necessary in case of invasion of a hostile territory.”<sup>37</sup>

By contrast, relatively weaker armed forces are not expected to invade other countries; conflicts of interest with their principals over the management of foreign occupied territories are therefore less likely, limiting the effectiveness of foreign civilians as a fire alarm.<sup>38</sup> Moreover, in the case of a weaker state fighting for its survival, the interests of the government and the army become equally short-termed and thus aligned. This leads to the counterintuitive hypothesis—tested and proved below—that states with stronger armies have a greater interest in IHL and are more committed to complying with it, whereas states with weaker armies evince less interest in IHL and display less commitment to its observance.<sup>39</sup>

When states are engaged in life-or-death battles, seeking “victory by all means” in a “total war,” as was the case during several stages of World War II, the goals of the principals and their agents become aligned. Their mutual

34. Among the notable examples are the Napoleonic wars, see CHARLES ESDAILE, *NAPOLEON’S WARS: AN INTERNATIONAL HISTORY, 1803–1815*, at 472–85 (2007), and the trench warfare of World War I, see ADAM HOCHSCHILD, *TO END ALL WARS: A STORY OF LOYALTY AND REBELLION, 1914–1918* (2011).

35. Armed forces are known to inflate the extent of national security threats. See FEAVER, *supra* note 12, at 63; see also GRAHAM T. ALLISON, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* (1971).

36. D.P. O’CONNELL, *THE INFLUENCE OF LAW ON SEA POWER* 45–49 (1975).

37. *PROCEEDINGS*, *supra* note 4, at 506.

38. Until recently, weaker armies could perhaps engage in battle with enemy combatants but could not harm the enemy’s civilians in the rear.

39. IHL itself is a result of a battle of the sexes game of draftsmanship: the weaker states opt for some law rather than none. See *supra* note 9 and accompanying text.

interests should lead to a limited demand for norms regulating the P–A relationship. Such an alignment of interests may explain the pervasive disregard of IHL during the greater portion of the two World Wars.<sup>40</sup> For this reason, as we argue below,<sup>41</sup> state executives seek optimally imperfect norms that enable them to dodge the law with impunity when they deem it necessary.

B. *Inadequate Domestic Mechanisms for Controlling the Agents*

Most cases of P–A problems are resolved through legal and institutional tools that provide information to the principal or enable it to punish the agent. Such mechanisms are problematic in the context of warfare. The information asymmetry between principals and agents within the military during the military conflict is acute, as commanders ordinarily rely on their subordinates to learn about the battlefield picture. This asymmetry is even more acute for the civilian leadership (and for their own principals, the voters), which, besides lacking information, has a limited capacity to interpret and assess the military situation. In addition to the information gap, it is difficult to elicit and enforce compliance from a recalcitrant army.

Theoretically, principals can try to overcome these two problems by relying on three domestic mechanisms, which we term here “the market response,” “the bureaucratic response,” and “the domestic law response.” The market response relies on the gathering and dissemination of information by private actors—such as the news media, civil society activists, or even the victims themselves—who upload their smartphone pictures to the internet.<sup>42</sup> The freedoms of speech and of the media usually yield at least some information to constrain the army.<sup>43</sup> Granted, to the extent that these actors have the means to monitor the army and report on its activities, the market response may serve as an effective fire alarm by providing timely and reliable information to the uninformed government (for example, the information

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40. See 1 GILLESPIE, *supra* note 6, at 169 (chronicling the widespread killing of prisoners in World War I); JAMES OWEN, NUREMBERG: EVIL ON TRIAL 55 (2006); M.W. ROYSE, AERIAL BOMBARDMENT AND THE INTERNATIONAL REGULATION OF WARFARE 131–32 (1928) (explaining how a weapon’s restriction will be inversely proportional to its effectiveness); Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT’L L.J. 49, 80–82 (1994) (explaining how nations permitted indiscriminate bombing of civilians during World War I).

41. See *infra* text accompanying note 65.

42. Feaver thinks that “[t]he most prominent fire alarm on defense policy is the news media,” but he acknowledges the weakness of the media, noting that it is silent during war so as not to play into the hands of the enemy. FEAVER, *supra* note 12, at 80, 83.

43. See YORAM PERI, *The Media and the Military: From Collusion to Collision*, in DEMOCRATIC SOCIETIES AND THEIR ARMED FORCES: ISRAEL IN COMPARATIVE CONTEXT 184, 190–93 (Stuart A. Cohen ed., 2000) (claiming that the Israeli media has moved from cooperating with the government to criticizing it).

about Abu Ghraib).<sup>44</sup> But the combatants can easily restrict media access, and the information provided may be of low quality or distorted by the lack of clear markers distinguishing between lawful and unlawful action. The media provides useful fire alarms only in egregious cases. Most importantly, media coverage has only an *ex post* effect—when it is already too late—whereas principals seeking to control their military agents require a set of *ex ante* restraints. Lastly, as Feaver notes, governments dread media reports that expose their own shortcomings and inability to tame the army, and hence they prefer to obtain private information about their agents’ performance,<sup>45</sup> which is exactly the kind of information the ICRC provides.<sup>46</sup>

Alternatively, the bureaucratic response may consist of setting up competing military agencies that have a vested interest in checking and balancing each other. In Feaver’s study of the relationship between civilians and the armed forces in the United States, he describes the various bureaucratic ways in which the civilian principal controls its military agents by dividing the structure of the U.S. armed forces, which creates interagency rivalries that give civilians more control.<sup>47</sup> An informal bureaucratic response can be found in Israel, a country where army generals retire relatively early to go into political life, and, as a result, the army is almost always overseen by civilian leaders with a strong military background.<sup>48</sup> The weaknesses of this response are the potential collusion of the various agents<sup>49</sup> or the opposite worry that the different agents may hobble each other and undermine the collective effort.<sup>50</sup> Lastly, while bureaucratic responses may be efficient in reducing the gaps between the government and the army, they do not necessarily mitigate the agency costs incurred by the citizens.

Finally, the domestic law response consists of domestic statutes and military codes (“military manuals”). These codes regulate the behavior of the agents, impose checks on them, and otherwise enforce compliance with the

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44. Seymour M. Hersh, *Torture at Abu Ghraib*, *THE NEW YORKER*, May 10, 2004, at 42, available at [http://www.newyorker.com/archive/2004/05/10/040510fa\\_fact](http://www.newyorker.com/archive/2004/05/10/040510fa_fact) (last visited Feb. 7, 2014).

45. FEAVER, *supra* note 12, at 83.

46. See *infra* note 199 and accompanying text.

47. FEAVER, *supra* note 12, at 81.

48. On this phenomenon and its effects, see MOSHE LISSAK, *Paradoxes of Israeli Civil-Military Relations: An Introduction*, in *ISRAELI SOCIETY AND ITS DEFENSE ESTABLISHMENT* 1, 1–12 (Moshe Lissak ed., 1984), and YORAM PERI, *Generals in the Cabinet Room: How the Military Shapes Israeli Policy* (2006).

49. Especially when the head of the executive has no military background, as happened in the case of the IDF’s invasion of Beirut. See Esti Ahronovitz, *Begin’s Legacy / The man who transformed Israel*, *HAARETZ* (Feb. 22, 2012, 5:08 PM) <http://www.haaretz.com/weekend/magazine/begin-s-legacy-the-man-who-transformed-israel-1.414180> (last visited Feb. 7, 2014); Nakdimon, *supra* note 16.

50. On “inter-service rivalry,” see, for example, FRANK LEDWIDGE, *Punching Below Our Weight: How Inter-Service Rivalry Has Damaged the British Armed Forces* (Yale Univ. Press e-book, 2012).

principal's goals through domestic legal institutions (such as courts and disciplinary tribunals), which expound and enforce such obligations.<sup>51</sup> In the context of armed conflicts, this response suffers from serious deficiencies relative to norms that are based on international law. First, experience suggests—as evidenced most recently in the aftermath of 9/11—that in times of actual or perceived threat, domestic measures fail to accomplish their anticipated functions.<sup>52</sup> Second, domestic norms are not shared across nations, and therefore victims and third parties may not be aware of them, which limits their opportunities to invoke them against the agent. By contrast, universal norms and global institutions are more accessible to victims and third parties and are therefore more likely to trigger their responses. Third, domestic law does not impose similar constraints on the enemy. Other things being equal, even powerful armies would prefer universal restraints that also burden their opponents to unilateral ones. Fourth, recourse to international law may be preferable to state executives because they enjoy a greater degree of freedom from their respective legislatures when they represent their state in international bargaining over the contents of the law.<sup>53</sup> They can more effectively tie their own (and their military's) hands through an international treaty, which cannot be repealed unilaterally.<sup>54</sup> Moreover, international treaties leave room for discretion where the executive deems fit.<sup>55</sup> In vibrant democracies whose political branches have different preferences, or when majorities are cyclical or unstable, the ability to converge on norms to

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51. The first known military manuals date to the Salian Dynasty in the fifth century AD. WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 17–18 (2d ed. 1920). By the early twentieth century, many European powers had manuals addressing military tactics and behavior in battle. See *infra* note 103 and accompanying text. An early example of such a statute is the Mutiny Act of 1689, which protected the British Parliament from the king. See NORMAN DAVIES, *THE ISLES: A HISTORY* 730 (1999).

52. See, e.g., JACK L. GOLDSMITH, *THE TERROR PRESIDENCY* 183 (2009) (“The President’s control over the military and intelligence agencies, his ability to act in secret, and his power to self-interpret legal limits on his authority create extraordinary opportunities for abuse. Presidents throughout American history have used the threat of war or emergency to expand presidential powers in ways that later seemed unrelated or unnecessary to the crisis.”); see also JACK L. GOLDSMITH, *POWER AND CONSTRAINT* 3–18 (2012) (describing how U.S. presidential power was enhanced dramatically, and possibly unconstitutionally, in the post-9/11 phase).

53. Benvenisti, *supra* note 11, at 185–86; Anne-Marie Slaughter, *Agencies on the Loose? Holding Government Networks Accountable*, in *TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS* 521 (George A. Bermann et. al. eds., 2000); Anne-Marie Slaughter, *Government Networks: The Heart of the Liberal Democratic Order*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 199, 218 (Gregory H. Fox & Brad R. Roth eds., 2000); see also Amichai Cohen, *Terrorism-Related Adjudication*, in *RETHINKING THE LAW OF ARMED CONFLICT IN AN AGE OF TERRORISM* 167 (Christopher A. Ford & Amichai Cohen eds., 2012) (domestic norms empower domestic enforcement institutions (courts, commissions of inquiry), which might narrow the executive’s discretion beyond a level that it deems optimal).

54. Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 *INT’L ORG.* 217 (2000); Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 *INT’L ORG.* 427 (1988).

55. DOWNS & ROCKE, *supra* note 27, at 130–32.

control the state's executive and military agents may be limited. The executive may then prevail by invoking authority based on international law.<sup>56</sup>

The domestic law response may also be problematic from the perspective of the military—the agent in this story. In wartime, this agent needs to protect itself from the principal, who might expose the army to shortsighted, uncalculated risks. IHL, which constrains the army, shields it at the same time from more aggressive policies that the civilian government might be tempted to pursue. This factor is particularly important in contemporary asymmetric warfare against nonstate actors, for reasons elaborated in Part IV below.

Obviously, IHL norms cannot check all the possibilities for agency drift by the military and therefore do not mitigate all agency costs involved in the specific P–A relationship between the government and armed forces. But the main rules constraining the military during armed conflict and occupation pertain to areas where agency drift typically occurs. The rules are designed to curb the temptation to use force beyond what is necessary and thereby alienate the enemy's civilian population or even induce neutral third parties to assist the enemy. Moreover, information about IHL violations can be a good proxy for identifying pervasive disciplinary problems within the military command structure and may prompt the government to react. These factors offer tools for principals that can prove more effective than any alternatives for controlling their agents.

### C. *IHL as an Optimal Response to Principal–Agent Problems*

Thus far, we have argued that for governments as principals, the costs of creating domestic control mechanisms over their agents are high: the private market cannot be relied upon; bureaucratic mechanisms may break down under the stress of law; and domestic legal institutions may not be as effective as international ones. IHL, in contrast, can at times be an effective—in fact, the most effective—tool for parties in a military conflict to mitigate the costs associated with the P–A problems identified above. We explain the effectiveness of IHL as a tool for reducing agency costs from the perspective of the different principals along the chain of command and also discuss why the same norms can benefit agents vis-à-vis their principals. Domestic actors often use international law to stabilize their relationships and remove areas of regulation from domestic contestation.<sup>57</sup> The international regulation of

56. John Fabian Witt describes an early example where Alexander Hamilton invoked IHL as a source of federal authority over the member states of the union. See John Fabian Witt, *The Dismal History of the Laws of War*, 1 U.C. IRVINE L. REV. 895, 905–06 (2011).

57. Examples include regional human rights regimes, such as the European Convention on Human Rights, see Moravcsik, *supra* note 54, and international trade agreements, such as the General Agreement on Tariffs and Trade, see Robert O. Keohane et al., *Democracy-Enhancing Multilateralism*, 63 INT'L ORG. 1, 9–13 (2009) (claiming that “[m]ultilateral institutions such as the General Agreement on Tariffs and Trade (GATT), WTO, and North American Free Trade Agreement (NAFTA) provide mechanisms by which democratic publics can limit the influence of minority factions by committing in advance to a set of multilateral rules and practices that reflect broad public interests”).

armed conflict is yet another example of this practice, perhaps the most counterintuitive of them all.

To principals, the use of international norms offers three advantages: first, it provides an effective and reliable system of fire alarms by sufficiently informed actors (victims and third parties); second, it allows the principal to direct a credible threat against the agent, in the form of an international norm whose enforcement is outsourced to foreign actors; and third, it enables the principal, who is worried about the breakdown of discipline during battle and the mounting pressure to seek short-term goals, to tie its own hands in advance.

### 1. Third Parties as Fire Alarms

The use of third parties as fire alarms is an effective solution to the information asymmetry between the principal and agent. The victims of IHL violations are, by definition, the actors best informed to report on violations committed against them. Naturally, the victims may not always be trusted, as they have an interest in exaggerating their damages. But victims also have an interest in providing accurate information about violations because baseless accusations will deprive them of credibility. Moreover, even false alarms may be preferable to none, as they require the military to provide information that otherwise would have remained secret in order to counter the accusation.<sup>58</sup> More important are neutral states and international organizations like the ICRC, which can credibly monitor compliance and inform the principal of violations committed by its agents during military operations. Because IHL rules are universal, an actor can make reference to them regardless of the actor's nationality. And because many of the IHL rules are clear, at least at their core,<sup>59</sup> they provide information that persons who possess no military expertise, and little legal expertise, can assess—for the complaint to be communicated from the victim to the principal, it is sufficient that the complainant believes that the law was violated, regardless of whether there was, in fact, a violation. This is why the noise of war, which undermines reciprocity, does not diminish the value of fire alarms: the question of intentionality, which is crucial to reciprocity, is less

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58. For example, following accusations against Israel concerning its Operation Cast Lead in Gaza (2008–2009), the IDF provided detailed information about its actions. See *GAZA OPERATION INVESTIGATIONS: AN UPDATE (2010)* (Isr.), available at [http://mfa.gov.il/MFA\\_Graphics/MFA%20Gallery/Documents/GazaOperationInvestigationsUpdate.pdf](http://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/GazaOperationInvestigationsUpdate.pdf) (last visited Feb. 8, 2014).

59. See Amichai Cohen, *Rules and Standards in the Application of International Humanitarian Law*, 41 *ISR. L. REV.* 41, 49 (2008) (“The Hague Regulations of 1907 include many such legal norms that were drafted in a rule-like manner. They attempt to arrive at specific results, and leave little to doubt. Thus, expropriation of property is allowed only for the needs of the army of occupation; only soldiers who fulfill the four required conditions warrant POW status, and the trumpeter of the messenger carrying a flag of truce possesses immunity. All these are very specific *ex ante* agreements related to conduct during war. They are not hard to apply, especially if one considers that there are almost no obligations beyond those written down in the Hague Regulations.”).

relevant to a principal interested in whether its army is following the rules in practice.

The value of IHL as a fire alarm is reflected in its growing demand in areas where the affected population or third parties can sound the alarm bells for the principal to hear. If there were only a low likelihood that external actors would react to violations, IHL would not be an effective alarm, and the demand for it would decrease. Similarly, if information about what transpired in the fighting zone were unlikely to reach the principals directly or through third parties, this fire-alarm mechanism would be ineffective. Hence, principals whose armies may occupy foreign territories, where the local population is expected to react to violations and generate effective alarms, will have a greater demand for IHL norms than principals whose armies may only invade sparsely populated countries or regions where the population is deemed unreliable or lacks effective means of invoking the law as a reliable alarm.<sup>60</sup> For similar reasons, demand will differ with respect to different arenas of combat. IHL will be in high demand in land warfare (other than in desert or arctic areas) because the victims and witnesses can sound the alarm bells, but it will be in low demand in naval warfare, where those who are affected have a low probability of survival and few witnesses are likely to be found.

## 2. IHL as a Credible Threat Against Agents

International norms also provide for a credible threat by the principal against the agent.<sup>61</sup> Under the domestic law response outlined above, the agent might discount the threat of sanctions against violators. Furthermore, the principal might hesitate to prosecute its own combatants to avoid undermining morale and suffering associated political costs. But relying on third parties who can invoke IHL resolves these potential problems. One such third party could be the enemy, who is entitled to try POWs for war crimes committed during the fighting.<sup>62</sup> Another is the courts of third-party countries exercising universal jurisdiction—or international tribunals. The credibility of the threat depends, of course, on the availability of such courts and on the willingness of the respective prosecutors and those behind them actually to indict violators. The availability of such factors may, in turn,

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60. Where the enemy was regarded as barbaric, information originating from the enemy's side would have had little impact. See SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 168 (1996); John K. Fairbank, *A Preliminary Framework*, in *THE CHINESE WORLD ORDER: TRADITIONAL CHINA'S FOREIGN RELATIONS* 2–3 (John King Fairbank ed., 1968).

61. FEATHER, *supra* note 12, at 89–94 (claiming that threats of punishment are an important part of civilian control over the military).

62. For example, the British Manual of Military Law of 1914 mentions only this sanction for violating the provisions of the manual. See WAR OFFICE, *supra* note 18, at 302.

strengthen the resolve of domestic institutions—courts, for example—to enforce the law.<sup>63</sup>

There may be tensions, however, between the fire-alarm and credible-threat functions of IHL. The fire-alarm mechanism is focused on providing information to the principals but does not necessarily trigger enforcement action by third parties.<sup>64</sup> In this sense, the fire-alarm function of IHL is optimal in its imperfect qualities<sup>65</sup>: for state executives, it is optimal to have *ex ante* constraints on combatants who cannot predict whether their violations will be prosecuted or ignored. Unable to predict their principal's reaction to their IHL violations, these combatants are likely to balance their aversion toward assuming physical risk (which might prompt them to kill unnecessarily) against their aversion to the risk of sanctions. The principals, however, retain their discretion and may decide ultimately to forgo the sanctions against their agents. The credible-threat mechanism is different in this sense. The threat is credible because its exercise is in the hands of third parties who are beyond the principal's control. Hence, principals will opt for the credible-threat mechanism only if the fire-alarm function is not sufficiently effective to deter the agents and if deterring them is more important to the principal than losing its discretion over enforcement action. Obviously, the credible-threat function constrains the principals, too, and limits their ability to issue instructions to disobey IHL. This might prove too costly for some principals.<sup>66</sup> Such costs to principals associated with this credible-threat mechanism explain the stunted development of international criminal law over the years as compared with the significantly more elaborate development of IHL.<sup>67</sup>

### 3. IHL as Legal Handcuffs

War is a time when desperate actors are tempted to break the law. Whereas domestic law is relatively less resistant to pressures to modify it through exercising emergency powers or judicial deference, IHL may prove more resilient. For the same reason, IHL will also be useful to military and civilian agents who are worried that principals may, at the height of battle,

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63. Amichai Cohen, *Domestic Courts and Sovereignty*, in *THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY, AND SUBSIDIARITY* 265 (Tomer Broude & Yuval Shany eds., 2008).

64. Not all IHL violations trigger enforceable legal consequences, and enforceable violations must find prosecutors willing to prosecute and courts willing to adjudicate.

65. See DOWNS & ROCKE, *supra* note 27.

66. Interestingly, some armies have sought to overcome this tension by insisting that obedience to superiors' orders comes before obedience to the law and therefore that soldiers should be immune from prosecution by the enemy if they "commit . . . violations of the recognized rules of warfare as are ordered by their Government or by their commander." WAR OFFICE, *supra* note 18, at 302.

67. For the conditions that led to the growing impact of international criminal law in recent years, see *infra* note 227 and accompanying text.

adopt shortsighted goals that deviate from the long-term national interest.<sup>68</sup> IHL can therefore be seen as reflecting a pact between the civilian principals and the military agents that politicians cannot change on a whim. Following the same logic, IHL may constrain citizens who have lost their tempers and demand harsh responses against a ruthless enemy. Here, IHL serves as an outside constraint on civilian principals, which politicians and the army can invoke to deflect criticism. This phenomenon is particularly relevant to contemporary conflicts involving nonstate actors.<sup>69</sup>

D. *The Relationships Between Morality, Reciprocity, and Governance as Motivations for IHL*

The above analysis suggests that the demand for IHL by both principals and agents does not necessarily depend on the attitude of the enemy or on moral concerns. The principals may have an interest that is based on reciprocity or morality, or they may have other motivations (for example, invoking IHL to portray their violent acts as lawful). The point, however, is that without the challenges of governance presented during war, there would be little demand for devising IHL in the first place. Similarly, there would be little incentive to comply with IHL if not to protect oneself from governance failures.

Considerations of morality and reciprocity, to the extent that they exist, obviously could strengthen an actor's commitment to comply with IHL. Principals could more easily be able to convince their military agents to comply with IHL if they could show that it was widely regarded as a legitimate, shared body of norms. Soldiers might be convinced to comply with IHL if told that morality so demands; commanders could be convinced to respect IHL because this was what military ethics required. For that purpose, it sufficed to show that other similarly situated militaries (even if not the enemy) were committed to following the same rules. This likely motivated the introduction of the so-called *si-omnes* (conditionality) clause in treaties like the 1899 and 1907 Hague Conventions. That provision conditioned the applicability of the IHL treaty on the mutual commitment to it by all the parties engaged in the specific conflict.<sup>70</sup> The clause was not crucial in a

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68. On the tensions within the U.S. administration after 9/11 between the president who sought more discretion and the military that insisted on adherence to IHL constraints, see GOLDSMITH, *THE TERROR PRESIDENCY*, *supra* note 52; Charles J. Dunlap, Jr., *A Tale of Two Judges: A Judge Advocate's Reflections on Judge Gonzales's Apologia*, 42 *TEX. TECH L. REV.* 893 (2010); and David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 *STAN. L. REV.* 1981, 2001 (2008).

69. See discussion *infra* Part IV.

70. Convention (IV) with Respect to the Laws and Customs of War on Land, art. 2, Oct. 18, 1907, 36 Stat. 2277 [hereinafter 1907 Hague Convention], available at <http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=BEDFD1BDE5DB14CDC12563CD00516997>; Convention (II) with Respect to the Laws and Customs of War on Land, art. 2, July 29, 1899, 32 Stat. 1803 [hereinafter 1899 Hague Convention], available at <http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=D619BD15881DFC2FC12563CD00515C81>.

strictly legal sense because “the Rules basically codified principles that had long been widely recognised”<sup>71</sup> and hence were binding on all states as customary international law.<sup>72</sup> The Brussels Declaration of 1874, military manuals of that period, and contemporaneous treatises on military law completely ignored the requirement,<sup>73</sup> as did the military practice that crystallized between 1867 and 1874.<sup>74</sup> We therefore think that the conditionality clause was designed to appease agents who were worried about why they should restrict themselves during battle.<sup>75</sup>

Finally, as the more specific discussion below will demonstrate, many wartime dynamics do not reflect the prisoner’s dilemma game that raises reciprocity concerns. In those more prevalent game situations, such as battle of the sexes and chicken, IHL is required to ensure effective governance, which is in the actor’s best interests.

## II. TESTING THE HYPOTHESES: TRACING THE ORIGINS OF MODERN IHL

The above hypotheses can be tested through an analysis of the evolution of the collective efforts to codify and develop IHL. In this Part, we explore the timing of the rise of formal IHL, which we explain through the P–A prism. While almost all societies have sought to regulate the conduct of war, the emergence of a regime based on formal international law is a phenomenon of modern times.<sup>76</sup> The effort was designed not simply to codify the law but to modify it to ensure effective control of agents. The origins of contemporary IHL related to land warfare can be traced to the second half of the nineteenth century, in particular to the formative period of 1863–1874. It was then that the modern law on armed conflict was defined, although its formal codification had to wait until 1899. Following the introduction of the so-called Lieber Code of 1863 to the Union Army,<sup>77</sup> efforts to define international rules for land warfare started with the first Geneva Convention of

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71. STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS* 187 (2005).

72. See BORDWELL, *supra* note 4, at 112. See generally WINTHROP, *supra* note 51, at 41–42 (referring to the unwritten military rules and principles of law).

73. See, e.g., BORDWELL, *supra* note 4 (omitting any mention of the reciprocity or the *si-omnes* clause); WINTHROP, *supra* note 51 (also omitting mention of the *si-omnes* clause).

74. See TOMAS ERSKINE HOLLAND, *A LECTURE ON THE BRUSSELS CONFERENCE OF 1874*, at 8–9 (Oxford & London, James Parker & Co. 1876) (referring to the *modus vivendi* that was accepted in Europe at the time of the Franco–Prussian War of 1870–1871).

75. Martens explained at the time that a solemn, mutual undertaking was necessary to signify the existence of an international, or at least a European, society of states, which acts like a “mutual insurance association against the abuses of force in time of war.” *PROCEEDINGS*, *supra* note 4, at 518 (internal quotation marks omitted). On the reasons for the introduction of the *si-omnes* condition in the Saint Petersburg Declaration of 1868, see *infra* note 126.

76. Of course, the conduct during warfare has been subject to unilateral and bilateral norms since biblical times, but none had the form and contents of the law that developed since the second half of the nineteenth century.

77. WAR DEPT., ADJUTANT GEN. OFFICE, *GENERAL ORDERS NO. 100: INSTRUCTIONS FOR THE GOVERNMENT OF THE ARMIES OF THE UNITED STATES IN THE FIELD* (1863) [hereinafter *LIEBER CODE*], available at [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).

1864 concerning the treatment of dead and wounded soldiers.<sup>78</sup> Those efforts continued with the Saint Petersburg Declaration of 1868, the first international undertaking to prohibit the use of a certain type of ammunition (exploding bullets).<sup>79</sup> That sort of rulemaking culminated in the 1874 Brussels Declaration,<sup>80</sup> the first comprehensive document outlining the rules of occupation and of warfare on land.

Why was there this sudden burst of interest in the 1860s in regulating warfare on land in a collective manner through international instruments? What explains the formulation of elaborate rules concerning warfare on land as opposed to the scanty treatment of naval warfare? Several explanations for this development of the law have been offered, such as the demise of natural law and the emergence of voluntary law<sup>81</sup> or the realist explanation for the rise of reciprocal relationships among military powers.<sup>82</sup> All such explanations are unable to account for the specific contents of the laws of war; they can explain neither why these developments occurred at that historical juncture, nor why the process found its expression in international rather than domestic law (for example, military manuals for the respective armies).

By contrast, the P–A prism resolves both issues. This Part suggests that it was only during the 1860s that international law became an effective tool for regulating P–A relations. A more elaborate historical examination is beyond the scope of this Article, but we believe that the bird’s-eye view we provide here is sufficiently robust to support our contention that the evolution of IHL in the mid-nineteenth century is a story of principals seeking ways to enhance their control over their military agents and negotiating the contours of the law not only with foreign governments but also with their own armies and constituencies. Although we provide some proof below that actors within certain states consciously followed this train of thought, our theory does not require us to prove that the principals consciously sought IHL as a means of controlling their agents. For our purposes, it is sufficient to demonstrate that IHL suited their interest in controlling their respective agents.<sup>83</sup>

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78. Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter 1864 Geneva Convention], available at <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=477CEA122D7B7B3DC12563CD002D6603>.

79. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 CONSOL. T.S. 297 [hereinafter St. Petersburg Declaration], available at <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=3C02BAF088A50F61C12563CD002D663B>.

80. Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, 148 CONSOL. T.S. 133 [hereinafter Declaration of Brussels], available at <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=42F78058BA BF9C51C12563CD002D6659>.

81. See NEFF, *supra* note 71, at 167–69.

82. See sources cited *supra* note 2.

83. Cf. GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 7 (1976) (“[T]he economic approach does not assume that decisions units are necessarily conscious of

Recall the three conditions for the efficacy of IHL: (1) a conflict of interest between some principals and their agents; (2) the lack of effective alternatives to IHL for monitoring, assessing, and punishing the agent; and (3) the availability to the principal of information or enforcement measures by victims or third parties to close the agency gap. We argue that at this pivotal moment in the 1860s, three domestic governance challenges intensified. First, due to universal conscription, the army's high command faced an increasing need to discipline inexperienced soldiers. Second, the increasing size of the armies made governments aware of the need to control them more effectively, since chains of command had become longer, and larger armed forces potentially posed a serious threat to existing regimes. Third, citizens had become concerned about the way the government and the army treated their sons-turned-soldiers. Public opinion—not necessarily seeking world peace but certainly seeking more protection for the soldiers—had become a force for elites to reckon with.<sup>84</sup> These developments led to a complex and multidimensional interplay between principals and agents: the governments of powerful states and the armies' high command all sought ways to enhance their domination over their political and military agents. Such governance challenges could not be overcome in this period solely by traditional domestic mechanisms. At the same time, on the supply side, the communication revolution provided the principals with external sources of information from the battlefields and the occupied territories, sometimes through third parties, which the principals could use to satisfy their growing demand for restraints. In other words, it was only during the 1860s that governments could begin to rely on international law as an alternative tool for controlling their own militaries. The result was a turn to international law to solve these governance problems and to empower specific domestic actors in relation to others.

This Part will explore the three elements that prompted the evolution of IHL. The final Section of this Part addresses a few exceptions that also prove the rule: specific areas where international norms regulating hostilities did not fully develop or were not observed. In these instances, either no conflicts of interest emerged or third parties could offer neither fire alarms nor credible threats.

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their efforts to maximize or can verbalize or otherwise describe . . . reasons for the systematic patterns in their behavior.”).

84. Best summarizes the attitudes of key political leaders during the 1899 conference as follows: “Even if the great powers were not able or willing to do anything concretely to reduce the chances of armed conflict, their rulers felt it desirable to pretend otherwise.” BEST, *supra* note 4, at 140; see JAMES Q. WHITMAN, *THE VERDICT OF BATTLE* 235 (2012) (exploring the transformation of warfare from “pitched battle[s]” controlled by monarchs to wars involving republics that “degenerated into more chaotic violence”).

A. *An Intensifying Conflict of Interest Between Principals and Agents*

From the inception of the sovereign state, civilian governments have developed domestic mechanisms to control their armed forces and avert potential threats to their authority. The move away from using small professional armies toward relying on large numbers of conscripts and on officers not belonging to the aristocracy<sup>85</sup> required an elaborate and effective disciplinary system.<sup>86</sup> This became clear after the French Revolution, as both the French National Assembly and army generals sought to regulate the army's use of force.<sup>87</sup> The need for discipline in combat also intensified due to technological innovations that enabled swift maneuvers over great distances, in which commanders could no longer maintain direct eye contact with all their troops.<sup>88</sup> As a result, the supreme command had to delegate decision-making power to field commanders.<sup>89</sup>

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85. MICHAEL HOWARD, *WAR IN EUROPEAN HISTORY* 107 (updated ed. 2009).

86. JOHN KEEGAN, *A HISTORY OF WARFARE* 349–52 (1993). On the effect of mandatory conscription on war in general, see *id.* at 359–66. In the Battle of Nordlingen (1634), one of the major battles of the Thirty Years' War in Europe, the Swedish-led coalition numbered 16,000 infantry plus 9,700 cavalry. The Spanish-led coalition numbered 20,000 infantry plus 13,000 cavalry. WILLIAM P. GUTHRIE, *BATTLES OF THE THIRTY YEARS' WAR* 266, 268 (2002). In the Battle of Borodino (1812), the major battle of Napoleon's invasion of Russia, the French forces numbered approximately 126,000, while the Russian forces numbered approximately 134,000. ADAM ZAMOYSKI, *MOSCOW 1812: NAPOLEON'S FATAL MARCH* 258 (2004). More than 2.5 million soldiers participated in the seven-day Battle of the Marne (1914), in which the French and British forces managed to halt the German invasion of France at the beginning of World War I. MARTIN VAN CREVELD, *SUPPLYING WAR: LOGISTICS FROM WALLENSTEIN TO PATTON* (1977). See also Oleg Airapetov, *Miliutin Contra Moltke: Russia's Refusal to Adopt a Prussian-Style General Staff*, in *REFORMING THE TSAR'S ARMY: MILITARY INNOVATION IN IMPERIAL RUSSIA FROM PETER THE GREAT TO THE REVOLUTION* 292, 293–95 (David Schimmelpenninck van der Oye & Bruce W. Menning eds., 2004) (arguing that after the French revolution, armies over 100,000 became the rule among European powers, making their administration more complicated, and also arguing that the Prussian Army's success should be attributed to its creating an effective general staff). See also Samuel E. Finer, *State- and National-Building in Europe: The Role of the Military*, in *THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE* 84 (Charles Tilly ed., 1975).

87. In 1792, the French National Assembly declared that it would provide just and fair treatment for prisoners. Pillaging was prohibited, and compensation was awarded for requisitioned property. BEST, *supra* note 4, at 78, 80 (1980); see also Wolfgang Kruse, *Revolutionary France and the Meanings of Levée en Masse*, in *WAR IN AN AGE OF REVOLUTION, 1775–1815*, at 299, 300 (Roger Chickering & Stig Förster eds., 2010).

88. MARTIN VAN CREVELD, *COMMAND IN WAR* 104–09 (1985) (stressing that the greater size of armies made command much more difficult and gave local units far more independence). In this respect, the telegraph—although very important as a tool for mobilizing troops and keeping senior commanders in touch with each other—made little difference. The telegraph operated only where there were lines—and that was not at the front, where in any case they were easily cut and disrupted. Hence, “[t]he telegraph had an influence at the headquarters level, but corps and divisions, not to mention formations further down the ladder, still remained entirely dependent on messengers and optical and acoustic signals.” *Id.* at 108.

89. See ELIOT A. COHEN, *SUPREME COMMAND: SOLDIERS, STATESMEN, AND LEADERSHIP IN WARTIME* (2002) (describing how political leaders from Lincoln to Rumsfeld struggled with the correct amount of delegation to their armed forces).

In the mid-nineteenth century, European states moved toward universal conscription.<sup>90</sup> Once states introduced mandatory military service that covered all segments of society, producing a “citizens’ army” that encompassed more than the poor peasantry,<sup>91</sup> civil society became a significant political actor with an interest in the way the military treated its “cheap supply” of soldiers. Citizens became fearful that reckless executives would be all too ready to sacrifice the lives of soldiers.<sup>92</sup> Martens, a rising Russian international jurist and the self-proclaimed initiator of the Brussels Conference of 1874, explains the sudden urge to convene the European powers: “[A]t the very moment when obligatory military service is on the way of being introduced here[,] the need to settle, in [international] law, the rights and duties of troops has become an absolute imperative.”<sup>93</sup>

Not everyone was equally eager to confront this challenge. The British government “was not convinced of the practical necessity” of a multilateral convention on IHL and agreed to send a low-level military delegation to Brussels only when it received assurances from all participants that naval matters would not be discussed.<sup>94</sup> Britain, which had not introduced the draft, was engaged mainly in naval warfare and may have felt secure about the efficacy of its internal democratic mechanisms for controlling its army.<sup>95</sup> In contrast, Russia, with the largest standing army, enthusiastically promoted IHL.<sup>96</sup>

#### B. *The Need to Move Away from Unilateral Constraints*

Initially, governments and armies relied on internal codes to discipline their soldiers. President Lincoln issued the most famous military manual, the so-called Lieber Code, on April 24, 1863,<sup>97</sup> to resolve internal governance problems that he and Henry Halleck, the general in chief, had identified.<sup>98</sup>

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90. HOWARD, *supra* note 85, at 87; Jan Lucassen & Erik-Jan Zürcher, *Conscription and Resistance: The Historical Context*, 43 INT’L REV. SOC. HIST. 405 (1998).

91. In France, an unequal system of conscription continued until the Franco-Prussian War of 1870. LARRY H. ADDINGTON, *THE PATTERNS OF WAR SINCE THE EIGHTEENTH CENTURY* 44, 98 (2d ed. 1994). Russia introduced universal conscription on the modern pattern in 1874. Lucassen & Zürcher, *supra* note 90, at 408. Both the Confederate Congress and the U.S. Congress passed acts in 1862 requiring or authorizing universal conscription. ADDINGTON, *supra*, at 68. Britain introduced conscription for the first time in 1916. *Id.* at 149.

92. See *supra* note 84. Best’s account of this period focuses on the dialectic between the humanitarian sentiments of the peace movement and the nationalism and militarism of key political and army figures. BEST, *supra* note 4, at 128–47.

93. KARMA NABULSI, *TRADITIONS OF WAR: OCCUPATION, RESISTANCE, AND THE LAW* 7 (1999).

94. BORDWELL, *supra* note 4, at 102 (citing 1 PARL. PAPERS 28 (1874)).

95. See *id.* at 102, 104.

96. See Walter M. Pintner, *The Burden of Defense in Imperial Russia, 1725–1914*, 43 *RUSS. REV.* 231 (1984).

97. LIEBER CODE, *supra* note 77.

98. The Code was not intended to ensure ethical fighting. It was actually criticized for sanctioning excessively harmful practices. Jochnick & Normand, *supra* note 40, at 65–66. As

The troops were by and large unprofessional, and there was a danger that they might excessively harm and antagonize civilians.<sup>99</sup> In addition, the governance of the newly occupied Southern states proved quite problematic for commanders untrained in civilian affairs.<sup>100</sup> The Code addressed these concerns by restricting participation in combat to those subject to the commanders' control and discipline, defining the permitted conduct in warfare, and providing authority and guidance for the effective governance of newly captured localities. From the perspective of the executive and the military, the Code promised one additional benefit: because it was a military code based on the authority of international law, it restrained Congress from undesired intervention.<sup>101</sup>

Following the United States, several European nations adopted codes to regulate their armies' conduct during hostilities. Thomas Erskine Holland, whom the British government entrusted in 1904 with the task of compiling a "handbook" "for the information of H.M. land forces,"<sup>102</sup> referred to "the example set by the United States in 1863" and emphasized that those instructions were, "of course, authoritative only for the troops of the nation by which they are issued, and differ considerably one from another."<sup>103</sup>

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Burrus Carnahan explains, from the U.S. War Department's point of view, the Lieber Code was primarily a response to the U.S. Army's expansion during the Civil War. Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213, 214 (1998). Witt argues that the Code was also designed to legitimize the participation of freed slaves on the Union side and to protect them. WITT, *supra* note 4, at 240–44.

99. Brigadier-General Davis states as follows:

The need of a positive code of instructions was severely felt during the early part of the Civil War in the United States. During the first two years of that war the Federal Government had succeeded in placing in the field armies of unexampled size, composed, in great part, of men taken from civil pursuits, most of whom were unfamiliar with military affairs, and so utterly unacquainted with the usages of war. . . . [Q]uestions of considerable intricacy and difficulty were constantly arising . . . . Conflicting decisions and rulings were of frequent occurrence in different armies, and at times in different parts of the same field of operations; and great harm not infrequently resulted before these decisions could be reversed by competent authority.

GEORGE B. DAVIS, *THE ELEMENTS OF INTERNATIONAL LAW* 503 (3d ed. 1908); *see also* Witt, *supra* note 56, at 905 (explaining how the influence of "the militia and . . . volunteer tradition in U.S. history badly undercut the influence of professionals" in the occupation of Florida and during the Mexican War).

100. Robert J. Futrell, *Federal Military Government in the South, 1861–1865*, 15 MIL. AFF. 181 (1951).

101. Futrell cites a letter from General Halleck to Lieber where Halleck expresses the fear that Congress might circumscribe military power too narrowly. *Id.* at 187.

102. Holland explains that the British government, which "had long preferred in such matters to 'trust to the good sense of the British Officer,' was at last induced to alter its policy" and issue the handbook. THOMAS ERSKINE HOLLAND, *THE LAWS OF WAR ON LAND* 2 n.\* (1908).

103. *Id.* at 2. In Appendix I, Holland mentions French, Italian, and German codes; the confidential instructions to Prussian officers issued in 1870; and military manuals issued by The Netherlands (1871), France (1877), Serbia (1878), Argentina (1881), Spain (1893), Germany (1902), and Russia (1904). *Id.* at 71–73. Bordwell adds to the list the army regulations

But such unilateral codes failed to address the citizens' growing concerns. It was during the closing years of the eighteenth century and the first half of the nineteenth century that democracy began to take root on the European continent. A variety of regimes provided more avenues for the people to voice their concerns, even if they were not necessarily democratic in the modern sense. This stronger interest coincided with a communication revolution that had consequences no less dramatic than the "CNN effect" of a century later. The inventions of the telegraph, the popular press, and the railways "revolutionized the way Europeans . . . thought about war."<sup>104</sup> From the Crimean War (1853–1856) onward,<sup>105</sup> journalists brought home the harsh realities of the battlefields of Europe, and the public reacted with furor. Governments lost their exclusive hold on information about battles and casualties.<sup>106</sup>

As a result, citizens had both reason and opportunity to voice their opinions on the use of the military. Henry Dunant was certainly not the first civilian to witness atrocities. Yet in the mid-nineteenth century, he was able to raise the awareness of a receptive civil society.<sup>107</sup> Two other members of the Geneva precursor of the Red Cross, Gustave Moynier and Louis Appia, could in 1867 make the point that governments have a parental obligation to take care of soldiers they conscript.<sup>108</sup> This worry coincided with the introduction of a universal draft in key European armies and the growing peace movement in Europe that was opposed to wars and their harsh consequences.<sup>109</sup>

It was not only mounting civil society pressure that prompted European governments to explore more robust disciplinary measures beyond those provided by internal army restrictions. In many countries, the military posed a covert or overt threat of a coup d'état and overthrow of the civilian regime, especially if the regime embodied a weak form of democracy. This threat materialized in several instances in Central and South America<sup>110</sup> and

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issued in Spain (1882), Italy (1896), Switzerland (1904), Portugal (undated), and Columbia (undated). BORDWELL, *supra* note 4, at 116. The protocols of the Brussels Projects (1874) include references to the Austrian or Prussian military codes (session of 5 August) and the Italian code (session of 22 August). *Id.*

104. JOHN F. HUTCHINSON, *CHAMPIONS OF CHARITY* 26 (1996). On the growing effectiveness between approximately 1860 and 1914 of the widely circulated cheap popular press as a means of influencing and voicing public opinion, see BEST, *supra* note 4, at 138.

105. See WILLIAM HOWARD RUSSELL, WILLIAM RUSSELL, *SPECIAL CORRESPONDENT OF THE TIMES* (Roger Hudson ed., 1995).

106. HUTCHINSON, *supra* note 104, at 27.

107. *Id.* at 28.

108. See *id.* at 27–28 (citing G. MOYNIER & L. APPIA, *LA GUERRE ET LA CHARITÉ* 31–32 (1867) (Switz.)).

109. BEST, *supra* note 4, at 147; BARBARA W. TUCHMAN, *THE PROUD TOWER: A PORTRAIT OF THE WORLD BEFORE THE WAR, 1890–1914*, reprinted in *THE GUNS OF AUGUST & THE PROUD TOWER* 551, 832–34 (Margaret MacMillan ed., 2012).

110. ROBERT H. HOLDEN, *ARMIES WITHOUT NATIONS: PUBLIC VIOLENCE AND STATE FORMATION IN CENTRAL AMERICA, 1821–1960* (2004).

was apparent in French politics throughout the late nineteenth and early twentieth century, as evidenced by the events surrounding the Boulanger affair of 1889.<sup>111</sup>

Moreover, and more importantly, in the 1860s European powers started to worry about their relations with foreign populations. With the rise of nationalism in Europe, prospective occupiers were concerned about potentially rebellious communities who would actively resist their rule, like the Spanish guerrillas who fought Napoleon or the French *francs-tireurs* who refused to end the war against the Prussians in 1870–1871.<sup>112</sup> Such governments sought norms that would restrain their own soldiers in their interactions with those civilians, thereby hopefully reducing civilian opposition. For similar reasons, these governments worried that an unruly army's excesses might "make [ ] . . . the return to peace unnecessarily difficult."<sup>113</sup>

Governments were also concerned about neutral powers' reaction to military aggression. There is evidence suggesting that governments and their military high commands sought to avoid causing any harm to neutral powers lest they join the enemy and to forestall complaints that neutrals might raise.<sup>114</sup> Finally, the wrath of global civil society—informed by the media revolution of that time—was also something to be reckoned with. As the British military manual of 1914 observes, "it is in the interest of a belligerent to prevent his opponent having any justifiable occasion for complaint, because no Power, and especially no Power engaged in a national war, can afford to be wholly regardless of the public opinion of the world."<sup>115</sup>

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111. WILLIAM IRVINE, *THE BOULANGER AFFAIR RECONSIDERED* 73–124 (1989).

112. See BENVENISTI, *supra* note 8, at 38–41 (discussing the background for developing the law on occupation after the 1870–1871 war and noting that the smaller states of Europe were unhappy with the text adopted in the 1874 Brussels Declaration concerning the authority of the occupant and tried to resist it).

113. LIEBER CODE, *supra* note 77, art. 16. Article 16 of the Lieber Code captures the longer-term concerns that motivate moderation during combat:

Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. . . . [I]n general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

*Id.*

114. Demonstrating the importance of keeping neutral states appeased, Prussia communicated alleged French violations to neutral states during the Franco–Prussian War of 1870–1871. See WAR OFFICE, *supra* note 18, at 301. In 1818, the King of Prussia captured this concern most clearly in his instructions to his generals:

When war is carried on in a neutral country . . . the object of attention then is[ ] to rival the enemy in the confidence and friendship of the inhabitants. To attain this end, the most exact discipline must be observed, marauding and every kind of plunder strictly forbidden, and it's [*sic*] commission punished with exemplary severity.

MILITARY INSTRUCTIONS FROM THE LATE KING OF PRUSSIA TO HIS GENERALS 66 (Foster trans., 1818).

115. WAR OFFICE, *supra* note 18, at 301.

### C. *The Internationalization of Governance*

By resorting to international law to reduce domestic agency costs, governments obtained several benefits. As explained above, they were able to rely on victims and observers to act as effective fire alarms that would relay information about violations and might even independently prosecute violators.<sup>116</sup> At the same time, governments could assuage public concerns and demonstrate to their citizens and to foreign public opinion that they respected the lives of their soldiers by conferring with potential enemies. Moreover, IHL became a tool for bestowing legitimacy on practices that many would potentially regard as repugnant.<sup>117</sup> Specifically, the law of occupation, which required the occupier to protect the authority and resources of the ousted regime, functioned as a check against indigenous challenges to that regime.<sup>118</sup>

Civil society activists such as Dunant and his colleagues also realized that their best strategy was to seek clear universal norms that nonstate “informants” could invoke against violators. The universal rules cut across political boundaries and empowered civil society activists vis-à-vis their respective governments. Their first victory was the Geneva Convention of 1864, which delineated the law on the treatment of the dead, wounded, and POWs (without defining who was entitled to POW status).<sup>119</sup> The convention did not impose onerous duties on governments or armies. Quite the contrary: they were required merely to allow voluntary Red Cross associations access to the battlefield to treat wounded or captured soldiers and dispose of the dead.<sup>120</sup> The Prussian Army complied with the 1864 convention as early as its war with Austria in 1866 and also provided treatment to enemy combatants without demanding reciprocity.<sup>121</sup>

The success of that convention led to further efforts to develop the law, which included conferences in Paris (1867) and Geneva (1868).<sup>122</sup> These efforts, however, failed to produce binding texts.<sup>123</sup> They were stunted by the governments’ responses. In what may have been a reaction to the aroused interest of civil society in regulating warfare, several European principals met in 1868 in Saint Petersburg. The declaration they adopted loftily invokes

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116. See *supra* Section I.C.1–2.

117. Jochnick & Normand, *supra* note 40, at 80–82.

118. Because the occupier had to maintain local laws and assume responsibility over government property, the Hague Regulations of 1907 constituted “a pact between state elites, promising reciprocal guarantees of political continuity, and thus, at least to a certain extent, rendering the decision to resort to arms less profound.” BENVENISTI, *supra* note 8, at 70–71.

119. 1864 Geneva Convention, *supra* note 78.

120. *Id.*

121. Pierre Boissier, *Henry Dunant*, 14 INT’L REV. RED CROSS 395, 411–12 (1974); see HUTCHINSON, *supra* note 104, at 74–75.

122. See *Protocoles des Conférences tenues à Genève pour la révision de la Convention de Genève du 22 août 1864*, Oct. 20, 1868, 20 *Nouveau recueil général de traités* (ser. 3) 400; HOLLAND, *supra* note 74, at 8–9.

123. See HOLLAND, *supra* note 74, at 8–9.

the exalted goals shaped by “the progress of civilization” and stipulates that what “[s]tates should endeavor to accomplish during war is to weaken the military forces of the enemy [and for that] purpose it is sufficient to disable the greatest possible number of men” rather than “uselessly aggravate the sufferings of disabled men, or render their death inevitable.”<sup>124</sup> No doubt, the rhetoric was impressive and probably effective in disarming the grass-roots opposition, even if the operative paragraph was quite limited and prohibited the use of only one specific type of ammunition, which can be loaded to foot soldiers’ rifles (the same ammunition could be used by the artillery that was presumably under more reliable command).<sup>125</sup> Governments’ main practical advantage from this agreement was better control of their own armed forces’ use of ammunition.<sup>126</sup> Painful and unnecessary death was hard to justify at a time when reports from the bloody battlefields awaiting young conscripts stirred up public opinion.

The 1874 Brussels Declaration—the product of yet another conference that Russia initiated—can also be seen as a direct outcome of changing political realities resulting from universal conscription and governments’ growing attention to public opinion. One of Martens’s speeches reflected these concerns, associating the “absolute imperative” to set rules based on international law with the transition of many European powers to obligatory military service.<sup>127</sup>

#### D. *The Limits of IHL as a Mechanism of Governance*

The explanation of IHL’s evolution during the second half of the nineteenth century as a result of growing P–A conflicts is further bolstered by three counterexamples. They relate to the evolution of specific areas of warfare or neutrality: the stunted evolution of the law on naval warfare; the strict rules that developed with respect to neutrality at sea; and the late appearance of the law on internal armed conflicts.

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124. St. Petersburg Declaration, *supra* note 79.

125. These bullets, which weighed less than 400 grams, exploded or ignited fire on impact with human flesh and inflicted certain and painful death. *Id.*

126. The *travaux* of this declaration reveal that it sought to address a problem of governance *within* the respective armies rather than the need to regulate interstate relations: the prohibited bullets were effective when used against ammunition boxes, but the governments did not trust their soldiers simply to follow the orders that limited the use of these projectiles to nonhuman targets. Protocols of the Military Conference at St. Petersburg, Oct. 28–Nov. 9 1868, 18 *Nouveau recueil général de traités* (ser. 1) 458–64. (discussing the uncontrollable temptation of foot soldiers to use such projectiles against human targets as the motivation for the ban).

127. NABULSI, *supra* note 93, at 7 (“[A]t the very moment when obligatory military service is on the way to being introduced here the need to settle, in law, the rights and duties of troops has become an absolute imperative.”); *see also supra* note 94 and accompanying text; John Gooch, *The Weary Titan: Strategy and Policy in Great Britain, 1890–1918*, in *THE MAKING OF STRATEGY: RULES, STATES, AND WAR* 278, 285–87 (Williamson Murray et. al. eds., 1994).

## 1. IHL and Naval Warfare

The laws of war discussed thus far relate to war on land. The story of the laws of war at sea, with regard to both their evolution and content, is strikingly different. This contrast raises a puzzle: if IHL is based on some notion of morality, there should be little difference between the rules of each theater of war. If IHL is based on reciprocity, we would also anticipate similar rules to be applied on land and at sea. But that is not the case. Were it not for a group of committed scholars who pieced together, as late as 1994, the San Remo Manual on International Law Applicable to Armed Conflicts at Sea,<sup>128</sup> it would have been difficult to locate a coherent set of norms concerning naval warfare.<sup>129</sup> Most conspicuously, the law on naval warfare never developed sufficiently to offer strong protection for civilians at sea. As J. Ashley Roach points out, of the nine conventions adopted in The Hague in 1899 and 1907 concerning naval warfare, none addressed the question of which vessels were immune from attack.<sup>130</sup> During World War II, “enemy merchant vessels were widely regarded as legitimate military targets subject to destruction on sight.”<sup>131</sup> The process of overhauling IHL during the 1970s, which culminated in the Additional Protocols of 1977, omitted sea warfare altogether. Professor Ronzitti explains that the major powers had little interest in such regulation.<sup>132</sup> Consequently, “[c]urrent treaty law . . . does not

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128. INT’L INST. OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald-Beck ed., 1995), available at <http://www.icrc.org/ihl.nsf/full/560?opendocument>.

129. On the law of war at sea, see O’CONNELL, *supra* note 36; J. Ashley Roach, *The Law of Naval Warfare at the Turn of Two Centuries*, 94 AM. J. INT’L L. 64 (2000); and Howard S. Levie, *Means and Methods of Combat at Sea*, 14 SYRACUSE J. INT’L L. & COM. 727, 728–30 (1988), arguing that the additional Protocol I to the Geneva Conventions does not apply to naval warfare. Professor Lowe writes as follows:

There is, perhaps, no area of the public international law of war in such urgent need of revision as the law of war at sea. In no other area is there such a complex set of “classical” rules and so much uncertainty as to the extent to which those rules remain binding. Since the outlawing of war and of the use of force, there has been a marked reluctance to use the traditional terminology of the laws of war and neutrality. This has led to the abandonment in recent times of any clear conceptual framework, either in state practice or in academic writing, for the analysis of the rights and duties regulating hostilities at sea.

Vaughan Lowe, *Impact of the Law of the Sea on Naval Warfare*, 14 SYRACUSE J. INT’L L. & COM. 657 (1988).

130. Roach, *supra* note 129, at 69. The only treaty adopted at the first Hague Peace Conference of 1899 on naval warfare adapted to maritime warfare the principles of the 1864 Geneva Convention concerning the treatment of the dead and wounded, see Convention Relative to the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, July 29, 1899 [hereinafter Hague Peace Conference], available at <http://www.icrc.org/ihl.nsf/FULL/155?OpenDocument>.

131. Roach, *supra* note 129, at 70.

132. See Natalino Ronzitti, *Naval Warfare*, in 7 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 557, 558, 566–67 (Rüdiger Wolfrum ed., 2012).

comprehensively identify which persons at sea should be entitled to protected status.”<sup>133</sup>

We submit that the only way to explain the different path taken with respect to naval warfare is either the low P–A costs of controlling the navy or the inability of IHL to reduce such costs. The P–A problem during fighting at sea was not as acute as it was on land, the commanders of the navy vessels effectively controlled sea warfare, and individual sailors had only limited ability to deviate from orders and inflict harm unilaterally. Governments were able to control the actions of their navy commanders by domestic means, such as prize courts<sup>134</sup> or criminal sanctions.<sup>135</sup> Moreover, at sea, the fire-alarm function of IHL would not work well since only a few survivors were expected to return to report violations.

During the nineteenth century, IHL concerning naval warfare only developed in two areas: (1) where P–A conflicts could arise and the law was easily enforceable; and (2) where civilian victims could serve as fire alarms. The first norm abolished “privateering,” namely, authorizing private ships to attack foreign shipping during wartime. During the seventeenth and eighteenth centuries, private looting of enemy ships had been the norm.<sup>136</sup> The British Navy, for example, had an elaborate system of dividing the loot between private sailors and navy officers.<sup>137</sup> This practice, which incentivized private sailors to raid enemy ships, created agency slack, as the private actors could abuse their mandate while seeking to increase their gains. Modern fleets no longer needed private assistance and could unilaterally enforce the prohibition. The practice was prohibited in the 1856 Paris Declaration Respecting Maritime Law.<sup>138</sup>

The other set of norms relates not to warfare at sea but to attacks against targets on land, which affect civilians who could function as a fire alarm as effectively as in the context of the law on land warfare. The law that developed restricted the use of the blockade.<sup>139</sup> In 1907, another convention was adopted relating to the protection of civilians on land from bombardment from the sea.<sup>140</sup>

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133. Roach, *supra* note 129, at 74.

134. C.D. Allin, *English and German Prize Courts and Prize Law*, 2 MINN. L. REV. 22, 23 (1918).

135. The British Navy in the eighteenth century applied strict discipline by criminally indicting any deviation from the manual listing the tactics to be used in sea warfare. BARBARA W. TUCHMAN, *THE FIRST SALUTE* 125 (1988).

136. PETER T. BRADLEY, *BRITISH MARITIME ENTERPRISE IN THE NEW WORLD: FROM THE LATE FIFTEENTH TO THE MID-EIGHTEENTH CENTURY* 26–27 (1999).

137. TUCHMAN, *supra* note 135, at 114.

138. Declaration Respecting Maritime Law, Apr. 16, 1856, 115 CONSOL. T.S. 1, available at <http://www.icrc.org/ihl.nsf/INTRO/105?OpenDocument>.

139. O’CONNELL, *supra* note 36, at 19–20.

140. Convention (IX) Concerning Bombardment by Naval Forces in Time of War art. 1, Oct. 18, 1907, 36 Stat. 2351, available at <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=F13F9FFC628FC33BC12563CD002D6819>.

## 2. The Law on Neutrality

Whereas the law concerning naval warfare is not very elaborate,<sup>141</sup> the opposite is true regarding the law on neutrality at sea. Carefully detailed rules determine the rights of belligerents to visit neutral ports.<sup>142</sup> This also contrasts with the law on neutrality on land, which is not nearly as intricate.<sup>143</sup> This double contrast demonstrates the drafters' preoccupation with the challenge of governance, which is different at sea than on land.

Principals of all warring sides shared a strong interest in respecting the interests of neutrals.<sup>144</sup> Once the allocation of territorial jurisdictions in Europe stabilized, the laws on neutrality prohibited the use of a neutral territory by any of the belligerents.<sup>145</sup> There was minimal likelihood that an army would violate this prohibition on its own initiative. Hence, governments did not require an elaborate code of neutrality on land.<sup>146</sup> Neutrality at sea was altogether a different matter, however. There, the worry was that military vessels might inadvertently violate or be wrongly accused of having violated a foreign state's neutrality while visiting its ports.<sup>147</sup> Vessels were expected to be on their own at sea, and they were sometimes unable to communicate with their principals. These principals left very little to the captains' discretion.<sup>148</sup> Extraordinarily detailed rules regulated the entry of warships into, their presence in, and their exit from neutral ports.<sup>149</sup>

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141. See Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, Oct. 18, 1907, 36 Stat. 2371, available at <http://www.icrc.org/ihl.nsf/73cb71d18dc4372741256739003e6372/e5397a0fb560d0a9c12563cd002d6832?OpenDocument>.

142. See *infra* note 149; Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415, available at <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=06A47A50FE7412AFC12563CD002D6877&action=openDocument>.

143. See Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, available at <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=4D47F92DF3966A7EC12563CD002D6788>.

144. See *supra* text accompanying note 114.

145. Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land art. 2, 5, Oct. 18, 1907, 36 Stat. 2310, available at <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=71929FBD2655E558C12563CD002D67AE>.

146. See *supra* note 143.

147. See, e.g., O'CONNELL, *supra* note 36, at 18–19, 31–38.

148. E.g., *id.* at 42–43 (detailing a politically challenging situation in 1940, during which Prime Minister Churchill himself drafted instructions for a naval captain).

149. Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, *supra* note 142. These rules were carefully observed. In 1939, Germany was willing to sacrifice the *Graf Spee* rather than flout Article 16 of that convention, which required the ship to wait at the neutral port at least twenty-four hours after a British ship left the port. In the meantime, the British battleships closed in on the German warship, waiting for it to leave the port: according to another rule, the German vessel was not entitled to stay in a neutral port for more than seventy-two hours. The German commander scuttled the ship to minimize casualties among the troops. See O'CONNELL, *supra* note 36, at 27, 31–38.

### 3. The Law on Internal Armed Conflict

Our explanation also serves to explain why the law on internal armed conflicts remained underdeveloped until the second half of the twentieth century. First, the P–A problem is less acute in the typical internal armed conflict because there are only marginal differences between principals' goals and those of their respective militaries. Both actors view the enemy as illegitimate rebels whose forces should be crushed, perhaps by ruthless tactics aimed at instilling awe and discouraging further opposition to the government.<sup>150</sup> The affected population is not regarded as a credible source of information (and any such information could only serve to tarnish the state's reputation abroad), and there is no external actor who could pose a credible threat to the violators. The relatively recent developments in the law of internal armed conflicts were not motivated by the principals seeking to improve their control of their agents. Rather, foreign actors have imposed these legal developments on governments, mainly through norms enunciated by international criminal tribunals.<sup>151</sup> In Part V below, we develop this issue in more detail.

### III. SPECIFIC NORMS AND INSTITUTIONS

We have explained several principals' motivations for using IHL to constrain their respective agents as well as how that function influenced the development of IHL. In this Part, we explain how specific IHL norms and institutions close the agency gap. The specific norms are designed to increase discipline within the fighting force by restricting access to the battlefield, to reduce the temptation of combatants to deviate from orders, and to limit the ability of low-level soldiers to implicate the principals in strategic blunders. The institutions generate information about violations and promote accountability within the military. Space limitations do not allow us to examine each and every IHL norm or institution. We therefore focus on the more salient of these norms.<sup>152</sup>

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150. DAVID A. BELL, *THE FIRST TOTAL WAR: NAPOLEON'S EUROPE AND THE BIRTH OF WARFARE AS WE KNOW IT* 156 (2007).

151. On the lawmaking functions of international criminal courts, see Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 *VAND. L. REV.* 1 (2006), and Milan Kuhli and Klaus Günther, *Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals*, 12 *GERMAN L.J.* 1261 (2011), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1360>.

152. On the defense of superior order in criminal law and IHL as a P–A device to suppress illegal orders, see Bohrer, *supra* note 31. A similar doctrine is command responsibility, which reinforces the commanders' obligation to maintain discipline among troops subject to their control. On the doctrine of command responsibility, see GUÉNAËL METTRAUX, *THE LAW OF COMMAND RESPONSIBILITY* (2009).

## A. Norms

The prevailing view of IHL asserts that the law's basic goals are distinguishing between combatants and noncombatants (exposing only combatants to direct attack) and avoiding the infliction of unnecessary suffering on combatants. But these two principles remained underdeveloped and lacked specificity at least during the formative stages of the codification of IHL.<sup>153</sup> In contrast, the norms that did receive close attention in the formative stages of codification were only tangentially related to the basic goals. Instead, as we argue in this Section, these norms sought to limit agency slack.

## 1. Regulating Access to the Battlefield: The Privilege to Participate in Hostilities

The Lieber Code states that the protections of POW status apply only to soldiers<sup>154</sup> or "Partisans."<sup>155</sup> These protections are not afforded to "[m]en, or squads of men, who commit hostilities, . . . without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war."<sup>156</sup> The prevailing distinction between combatants and noncombatants is commonly explained by the need to protect civilians: if combatants fail to distinguish themselves from their civilian population, the other party may be forced or tempted to target the civilian population for fear that it is harboring soldiers.<sup>157</sup>

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153. The targeting of civilians was not expressly forbidden before the Hague Peace Conference of 1899 and was actually quite common. See 2 ALEXANDER GILLESPIE, *A HISTORY OF THE LAWS OF WAR* 14–16 (2011). Even after World War I, the British Air Ministry objected to any legal actions against German pilots who used indiscriminate bombing during the war. *Id.* at 20. Starving civilians as part of legitimate siege warfare was actually expressly allowed in the Lieber Code and was not regarded as a war crime by the Nuremberg Tribunal, see the famous *United States v. von Leeb (High Command Case)*, in 10–11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS (1951), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_war-criminals\\_Vol-X.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-X.pdf). See also LIEBER CODE, *supra* note 77, arts. 17, 18.

154. LIEBER CODE, *supra* note 77, art. 49.

155. "Partisans," according to the Lieber Code, are "soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy. If captured, they are entitled to all the privileges of the prisoner of war." *Id.* art. 81. During and after World War II, privileged status was further restricted to include only those resistance fighters who are members of a party to the conflict. Convention (III) Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, available at <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=77CB9983BE01D004C12563CD002D6B3E>; see also ANTONIO CASSESE, *INTERNATIONAL LAW* 402 (2d ed. 2005).

156. LIEBER CODE, *supra* note 77, art. 82.

157. Article 44(3) of the first additional protocol to the Geneva Conventions states as follows: "In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 44, June 8, 1977, 1125 U.N.T.S. 3,

This explanation is both logically flawed and historically inaccurate. It would be strange to assume that the law was designed to force one party to protect its own civilians; IHL was not designed to interfere with the way a state treated its own population. Moreover, the rules requiring soldiers to wear uniforms and subject themselves to the commands of a belligerent date back to a relatively early stage in the evolution of IHL, when the protection of civilians—as a matter of positive law—was still relatively weak.<sup>158</sup> And nonuniformed individuals were entitled to take up arms to confront advancing troops, even if they did not distinguish themselves from noncombatants,<sup>159</sup> which obviously endangered their civilians in situations where civilians could easily find themselves in the line of fire. If not to protect civilians, why, then, were soldiers required to be identifiable? Most likely, the soldiers' mark of privileged status—like the prohibition on “privateering”<sup>160</sup>—was aimed at preventing the participation in combat of irregular, unruly fighters who could not properly be controlled by their commanders. Men fighting without commission were not subject to the army's chain of command, “wildcards” more dangerous than they were useful. Lieber was well aware of such dangers: at the start of the U.S. Civil War, the Confederates passed the Partisan Rangers Act (1862), which facilitated the involvement of soldiers without uniform fighting behind Union lines. As it turned out, however, those “partisan rangers” behaved like common criminals. In one recorded incident, a group “entered the town of Lawrence, Kansas, and

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available at <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=D9E6B6264D7723C3C12563CD002D6CE4>. The ICRC commentaries regarding this article state the following:

[T]he *ratio legis* of this provision is given by the clause which states that it is “in order to promote the protection of the civilian population from the effects of hostilities” that combatants are obliged to distinguish themselves. Since the adversary is obliged at all times to make a distinction between the civilian population and combatants, in order to ensure respect for and protection of the civilian population (Article 48—*Basic rule*), such a distinction must be made possible. If, for example, the invader is confronted during his advance (the problem of occupation will be examined in the second sentence) by a combined resistance of regular forces presenting identifiable military targets, and the harassment of guerrilla forces which are indistinguishable from the civilian population, it is more or less certain that the security of this population will end up by being seriously threatened.

INT'L COMM. OF THE RED CROSS, *supra* note 24, at 527.

158. See *supra* note 153 and accompanying text.

159. The *levée en masse* situation was described as follows:

The population of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 9, shall be regarded as belligerents if they respect the laws and customs of war.

See Declaration of Brussels, *supra* note 80, art. 10.

160. See *supra* text accompanying note 136.

killed 150 men and boys in an act of senseless violence.”<sup>161</sup> Jefferson Davis, the president of the Confederacy, quickly repealed the law.<sup>162</sup>

We can therefore conclude that the restriction on participating in hostilities was aimed at resolving a P–A problem rather than reducing harm to civilians. The principal could not control combatants who were not subject to its control and whom it could not even recognize because they were not in uniform. The obligation to wear a uniform enforced this restriction by exposing unauthorized fighters to the mercy of the enemy.

## 2. The Status of Prisoners of War

The law on POWs stipulates that those who possess combatant status and have fallen into the hands of the enemy<sup>163</sup> must be protected from violence and treated humanely at all times.<sup>164</sup> Today this rule is generally understood as designed to protect captured combatants from unnecessary suffering. We identify a different motive, however. In analyzing the institution of POWs, it is necessary to differentiate between the *status* of POWs as individuals who should be immune from harm once they have laid down their arms (*hors de combat*) and the way POWs should be treated by the detaining army (for example, where they should be detained and whether they should be permitted to communicate with their families). The P–A prism can explain why the regulation of these two issues developed separately and why these issues were not similarly respected. As it happens, whereas the norms concerning POW status developed early on and have been generally well respected, the situation is quite different regarding the treatment of POWs in custody.

The norms regarding the treatment of POWs took a long time to mature and were often abused.<sup>165</sup> Resisted by governments throughout the nineteenth century, they became part of the Geneva Law only in 1929, with the adoption of the Geneva Convention Relative to the Treatment of Prisoners of War.<sup>166</sup> In contrast, the law concerning the status of POWs as immune from violence once they laid down their arms was recognized at the Brussels Conference of 1874<sup>167</sup> and codified in the Hague Regulations of 1899 and 1907.<sup>168</sup> The norms regarding the status of POWs have been generally respected in many, although certainly not all, conflicts.

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161. 1 GILLESPIE, *supra* note 6, at 62.

162. *Id.*

163. Convention (III) Relative to the Treatment of Prisoners of War, *supra* note 155.

164. *Id.*, 6 U.S.T. at 3328, 75 U.N.T.S. at 146.

165. *E.g.*, 1 GILLESPIE, *supra* note 6, at 149.

166. Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343, available at <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=0BDEDDD046FDEBA9C12563CD002D69B1>.

167. See Declaration of Brussels, *supra* note 80.

168. 1907 Hague Convention, *supra* note 70, at 2296, 2301–02 annex; 1899 Hague Convention, *supra* note 70, at 1812, 1817 annex. For an economic study of this issue, see also Bruno S. Frey & Heinz Buhofer, *Prisoners and Property Rights*, 31 J.L. & ECON. 19 (1988).

We posit that the P–A analysis can account for the discrepancy between the two types of norms concerning POWs. The definition of POW as a status is designed to restrain the potential captor in the battlefield. In earlier times, captors were free to negotiate ransom with their captives on pain of death.<sup>169</sup> This gave combatants the perverse incentive of seeking private gain rather than following the commander’s orders. Such a tradeoff was both unnecessary and problematic in an army of conscripts. When war became a national enterprise, the need arose for a clear stipulation that all enemy soldiers who surrendered would be kept alive and transferred to the centralized control of the state. These are the origins of rules on POW status. This was reflected in the Paris conference in 1867, where the parties “agreed that wounded soldiers needed protection against robbery and gratuitous injury (for example, by looters).”<sup>170</sup> Traces of this rationale also appear in the texts that define POW status. Article 23 of the 1874 Brussels Declaration (as well as Article 4 of the 1899 Hague Convention) emphasizes what is now self-evident but was at the time an innovation:

[POWs] are in the power of the hostile Government, but not in that of the individuals or corps who captured them.

. . . .

. . . All their personal belongings except arms shall remain their property.<sup>171</sup>

The main interest of principals in establishing the institution of POWs was to control their own soldiers during combat, lest they deviate from orders and, instead of rushing forward, capture and ransom enemy combatants. But once POWs were removed from the battlefield, the principals’ interest in regulating POW treatment waned. Indeed, the treatment of POWs is one of the rare instances where the main incentive to comply with the law is reciprocity (although tempting the enemy to surrender was an effective incentive that could override reciprocity concerns). In fact, the many failures to observe these norms, such as ordering POWs killed on the battlefield or torturing them in captivity, may indicate that reciprocity on its own, absent an additional P–A motivation, is often insufficient to ensure compliance with IHL.

### 3. The Prohibition on Taking Booty

The same rationale that led to the creation of the POW regime—minimizing private incentives in combat rather than reducing harm to the enemy—also explains the evolution of norms first regulating, and later

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169. Like the concept of “privateering.” BRADLEY, *supra* note 136, at 26–27.

170. HUTCHINSON, *supra* note 104, at 80 (describing the informal agreement reached in the 1867 Paris conference).

171. Declaration of Brussels, *supra* note 80, art. 23; *see also* Hague Peace Conference, *supra* note 130, art. 4.

prohibiting, pillaging.<sup>172</sup> Several ancient traditions did not prohibit looting but rather regarded it as a legitimate reward.<sup>173</sup> Obviously, the loot provided an incentive for fighters to join the fighting force and engage in combat with determination. But it was also a potential source of conflict, both within the fighting force and between soldier and principals, who wanted their share as well. Therefore, complex rules had to be developed to provide effective incentives while minimizing tensions.

With the turn to a conscripts-based army, there was no longer a need to provide private incentives to increase the force's size. But with huge armies now consisting of mostly poor and undisciplined soldiers, the regulation of looting became a formidable task. Moreover, the reliance of the large army on local resources grew dramatically. A large army of occupation was expected to feed its men and horses on the resources of the occupied population and thus had to secure their continued availability. As a result, looting and pillaging were strictly prohibited.<sup>174</sup> More accurately, *personal* looting was prohibited, whereas *organized* looting, otherwise known as the "requisitioning" of private property, was recognized as lawful.<sup>175</sup> As long as organized looting followed the rules, no P-A problems would arise.

#### 4. The Prohibition on the Use of Certain Weapons and Types of Ammunition

Intuitively, the prohibition on the use of certain weapons can have only one goal: to prevent unnecessary suffering of combatants. But beyond moral commands, to understand fully the armies' incentives, attention should be directed to the benefits accruing to armies from such prohibitions. The P-A perspective suggests that weapons prohibitions provide a measure of control: by prohibiting the use of weapons whose use may have adverse strategic implications, armies seek to reduce the likelihood of strategic blunders created by lower-ranking soldiers. In this Section, we discuss exploding bullets and poison, two types of forbidden ammunition that gained recognition early on under IHL.

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172. Gillespie explains the evolution of strict norms in several ancient traditions as "necessary for two reasons. First, so that equity could be achieved amongst the victors and each would get their 'just' reward. . . . Secondly, so that the troops would continue to fight through a conflict, and not stop to do private pillaging, allowing an enemy to regroup." 2 GILLESPIE, *supra* note 153, at 211.

173. As Napoleon advised his brother Joseph, when Joseph was made King of Naples, in 1806, "[t]he security of your dominion depends on how you behave in the conquered province. Burn down a dozen places which are not willing to submit themselves. Of course, not until you have first looted them; my soldiers must not be allowed to go away with their hands empty." *Id.* at 247.

174. 1907 Hague Convention, *supra* note 70, art. 28.

175. On the requisitioning of private property by the army of occupation, see *infra* notes 184–186 and accompanying text. Also, as part of the peace treaty, the losing side would pay reparations to the victor. Most famously, under the Versailles treaty of 1919, Germany was to pay reparations of 132 Billion Gold Marks. HENRY KISSINGER, *DIPLOMACY* 257 (1995).

The prohibition contained in the inaugural multilateral treaty on the conduct of hostilities—the Saint Petersburg Declaration of 1868—related to the use of bullets that explode or ignite fire on impact with human flesh, causing certain and painful death and disfiguring the corpse.<sup>176</sup> The declaration resolved a problem of internal governance within the stronger European armies, which sought to limit foot soldiers’ access to this type of ammunition. The prohibited bullets were quite effective when used against nonhuman targets, such as cases of ammunition, but there was little military advantage in using them against soldiers. It was hard to justify gruesome pictures of targeted soldiers to a concerned public.<sup>177</sup> Obviously, it was possible simply to order the troops to use such bullets against nonhuman targets only, but governments did not trust low-ranking soldiers.<sup>178</sup> At the same time, they felt that they could trust commanders of artillery units to use properly the projectiles. Hence, the declaration prohibits only projectiles weighing less than 400 grams, namely, those that could be loaded into rifles.

Poisoning can be an effective way to incapacitate an enemy combatant. Nonetheless, it was prohibited by IHL even before the Brussels Declaration of 1874.<sup>179</sup> At the time it was prohibited, the use of poison was perceived as dishonorable.<sup>180</sup> Immanuel Kant sheds light on the matter, suggesting that nations at war must refrain from “such acts of war as shall make mutual trust impossible during some future time of peace” and specifically referring to poisoning as one of the “dishonorable stratagems” that must be “absolutely prohibited.”<sup>181</sup> In other words, beyond moral condemnation of such a method of warfare, the more realist concern was the potentially long-term reputational effects of using such weapons. Poison was readily available to soldiers, and its use would not always be apparent to commanders. Soldiers might have been tempted to use poison to avoid confrontation or otherwise reduce their risks of injury or death. The prohibition on the use of poison therefore resolved a potential tension between governments and their soldiers. In our terminology, principals who were worried about the long-term implications of using poison sought to secure their military agents’ compliance through a clear IHL prohibition.

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176. St. Petersburg Declaration, *supra* note 79.

177. On the communication revolution of the time, see *supra* text accompanying notes 104–105.

178. See Protocols of the Military Conference at St. Petersburg, *supra* note 126. The protocols reflect a debate dominated by the powerful European states in which the relatively weaker state representatives rarely ventured to intervene.

179. Declaration of Brussels, *supra* note 80, art. 13(a).

180. 3 ALEXANDER GILLESPIE, *A HISTORY OF THE LAWS OF WAR* 88–90 (2011).

181. Immanuel Kant, *To Perpetual Peace: A Philosophical Sketch* (1795), reprinted in *PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS* 107, 109–10 (Ted Humphrey trans., 1983).

## 5. The Law of Occupation

The goal of controlling the military agent resonates in many, if not most, nineteenth-century norms governing the occupation of enemy territory. As Napoleon discovered in Spain, occupation poses complex governance challenges for the occupying forces. Not only do such forces need to control an adversarial population, but they must also make sure their own forces do not treat the communities under their control too harshly. The need for international law to govern occupation and minimize what we call agency costs was felt by the U.S. General Scott in the U.S.–Mexican War in 1848, by Lincoln in 1863, and by the Prussian Army in occupied France in 1870.<sup>182</sup> The law of occupation that developed during the nineteenth century is tailored to these very ends: it sets forth what an occupier is and is not permitted to do, regulating the treatment of locals who dare to challenge the occupier and thereby providing tools for the local population and third parties to assess compliance with these restraints.<sup>183</sup>

For example, whereas individual soldiers are prohibited from pillaging and destroying property,<sup>184</sup> the organized exploitation of private property is approved and regulated. The regime of organized exploitation of private property reflects not morality but the evolving needs of the army of occupation. The Brussels Declaration of 1874 permitted occupying armies to rely heavily on the occupied population's resources to sustain the war effort. When requisitioning private property, the occupant was expected to issue a receipt to enable dispossessed owners to claim a refund from their own government (at the time, the defeated government was expected to compensate the victor).<sup>185</sup> With the modernization of military logistics in the late nineteenth century allowing armies to rely more heavily on their own resources, nations agreed (in the 1899 Hague Regulations) to stipulate that the occupier would pay compensation "as far as possible" instead of issuing receipts.<sup>186</sup> Only in the 1907 Regulations did actual reimbursement become the norm.<sup>187</sup> The deliberations during the respective conferences on the limits of requisitioning reflect the strong interest of the potential occupying forces in

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182. See WITT, *supra* note 4, at 123–24 (discussing Scott's use of international law to resolve governance problems); see also *supra* note 114; *infra* text accompanying notes 215–216.

183. BENVENISTI, *supra* note 8, at 70–71.

184. 1899 Hague Convention, *supra* note 70, art. 47.

185. Declaration of Brussels, *supra* note 80, arts. 41, 42 ("For every contribution, a receipt shall be given to the person furnishing it.").

186. The 1899 Hague Regulations introduced actual payment of compensation as the primary substitute. 1899 Hague Convention, *supra* note 70, art. 52 ("The contributions in kind shall, as far as possible, be paid for in ready money; if not, their receipt shall be acknowledged.")

187. The 1907 version made sure actual compensation was the occupant's obligation. 1907 Hague Convention, *supra* note 70, art. 52. ("Contributions in kind shall as far as [*sic*] possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible").

norms that would facilitate their military rule without regard to morality or reciprocity.

Another key example is the norms that define the occupier’s authority to modify existing legislation. Occupiers were expected to maintain the institutional status quo and abide by existing legislation “unless absolutely prevented.”<sup>188</sup> This regime resolves three problems of governance. First, it reduces the discretion of occupying forces and ensures consistency in the way they treat the various areas under their control, thereby increasing the ability of their principal to control its agents’ actions.<sup>189</sup> Second, the norms assigning authority to the occupier seek to regularize life under occupation. Third, maintaining the status quo resolves a P–A problem for the ousted government, which may be worried that local elements will exploit the opportunity to seize power or otherwise make its resumption of authority difficult. In this latter sense, Article 43 of the Hague Regulations constituted a pact between state elites that had nothing to do with morality or reciprocity.<sup>190</sup> As with the other IHL norms that received detailed attention during the formative stage of codification in the second half of the nineteenth century, the law of occupation had little to do with protecting civilians or minimizing harm to combatants. It was all about controlling the military agents.

## B. *Institutions*

IHL’s fire-alarm mechanism has been considerably enhanced through the establishment of mechanisms that communicate information between the governments engaged in hostilities. The following material outlines the traditional institutions that developed in an era of interstate warfare. All of them reduce information gaps within the army. Additional institutions developed in recent years to address asymmetric warfare, and they will be discussed in Part IV.

### 1. Information-Generating Institutions

The first of such institutions is the “protecting power.” A protecting power is a neutral state that has agreed to look after the interests of another state engaged in hostilities with a third state.<sup>191</sup> One of the protecting power’s key tasks is to facilitate the exchange of information from the state it represents (and its population under occupation, to which it has the right of access<sup>192</sup>) to the government of the opposite side. This information is not

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188. 1907 Hague Convention, *supra* note 70, art. 43.

189. See *supra* note 101 and accompanying text.

190. BENVENISTI, *supra* note 8, at 70–71.

191. Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 9, Aug. 12, 1949, T.I.A.S. No. 3365, available at <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=AE2D398352C5B028C12563CD002D6B5C>.

192. *Id.*; see also BENVENISTI, *supra* note 8, at 341; Hans-Joachim Heintze, *Protecting Power*, in 8 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 545 (Rüdiger Wolfrum ed., 2012).

disseminated publicly. The opposite side's government can therefore rely on the protecting power to provide information from the battlefield or occupied territory that its own army may be hesitant to reveal.

The ICRC is the most effective information-generating institution. The ICRC's access to hostility zones and occupied areas, which is secured by IHL,<sup>193</sup> enables it to obtain information about the behavior of combatants and occupiers. Over the ICRC's many years in existence, it has developed a strategy for communicating this information in the most effective way. In a 2005 document, the ICRC explained this strategy, stressing that its principal mode of operation is "bilateral and confidential representations."<sup>194</sup> Its primary role is to communicate information about violations to the fighting party itself, obviously under the assumption that such violations betray a lack of discipline within the army rather than an intention to breach the law.<sup>195</sup> Only if the state does not respond to the communication will the ICRC start mobilizing other states or regional organizations to persuade the violator to observe the law.<sup>196</sup> These contacts are also confidential and extend only to states that provide assurances that they will honor the confidentiality of the communications.<sup>197</sup> It is only when these two methods fail that the ICRC might turn to public condemnation.<sup>198</sup> In his comprehensive analysis, Professor Ratner posits secrecy and confidentiality as the core modality of the ICRC's operations.<sup>199</sup>

The secretive mode of operation of both protecting powers and the ICRC fits nicely with our P-A analysis. The information they communicate enables a government to overcome information gaps and thereby constrain its army's autonomy. That the information remains private allows a government to conceal what it wants from the general public and thereby avert criticism for its inability to rein in the military.

## 2. "Military Necessity"

As Professor Luban recently clarified, the entrenched doctrine of military necessity has been accorded several interpretations.<sup>200</sup> Initially, some states (notably Germany) regarded the necessities of war (*Kriegsraison*) as enjoying precedence over the rules of war. IHL, therefore, applied only until

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193. *Id.* art. 11.

194. *Action by the International Committee of the Red Cross in the Event of Violations of International Humanitarian Law or Other Fundamental Rules Protecting Persons in Situations of Violence*, 87 INT'L REV. RED CROSS 393, 395 (2005).

195. *See id.*

196. *Id.* at 396.

197. *See id.* at 396–97.

198. *Id.* at 398.

199. Steven R. Ratner, *Law Promotion Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War*, 22 EUR. J. INT'L L. 459, 472 (2011).

200. Luban, *supra* note 3, at 322–36.

it became too dangerous to be complied with.<sup>201</sup> This extreme view was later rejected in favor of a meaning that endorses “military necessity” as part of the law.<sup>202</sup> In Luban’s words, according to this second meaning, whereas IHL “governs . . . war everywhere, by decreeing which rules will bend to military necessity and which will not,” it “remains overwhelmingly slanted in favour of militaries, and grants them enormous latitude.”<sup>203</sup> As Professor Dinstein emphasizes, in assessing the exercise of discretion in ex post proceedings, the “appraisal of the circumstances . . . must be based on the combat situation as it appeared to the commander at the time of action.”<sup>204</sup>

This “enormous latitude,” to be reviewed ex post and taking into account the information that the commander had at the time of action, provides a useful escape clause for agents (governments and commanders alike) who wish to avoid responsibility. But the principals are the main beneficiaries of this “optimally imperfect” doctrine.<sup>205</sup> They are the ones who enjoy enormous latitude in deciding how to react to information they receive about their agents’ breaches of the law. The doctrine also shields them to some extent from having sanctions imposed on them or their agents by third parties. If the main goal of IHL is to deter the agent without restricting the principal’s options too severely, the traditional doctrine on military necessity is eminently suitable for the purpose.

Indirectly, the doctrine on military necessity creates an incentive for armies to collect information and keep records so that their discretion does not betray recklessness toward compliance with IHL.<sup>206</sup> By forcing military commanders to gather as much information as possible regarding a specific incident, to record this information, and to make it available to the civilian authorities, the doctrine seeks to close the information gap and thereby reduce agency slack.<sup>207</sup>

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201. See Yoram Dinstein, *Military Necessity*, in 3 *THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 274 (Rüdiger Wolfrum ed., 2012); cf. Carnahan, *supra* note 98, at 217–18 (referring to the Lieber Code’s definition of military necessity as “a license for mischief”).

202. For example, the prohibition against indiscriminate attacks refers to attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *supra* note 157, art. 51(5)(B).

203. Luban, *supra* note 3, at 342.

204. Dinstein, *supra* note 201.

205. On the optimally imperfect nature of IHL, see *supra* text accompanying notes 26–27.

206. See Gregory S. McNeal, *Targeted Killing and Accountability*, 102 *GEO. L.J.* 681 (2014) (explaining the procedure used by U.S. armed forces in Afghanistan to limit collateral damage during targeted killings operations).

207. For a procedural interpretation of the norm of proportionality, see Amichai Cohen, *The Principle of Proportionality in the Context of Operation Cast Lead: Institutional Perspectives*, 35 *RUTGERS L. REC.* 23 (2009).

### 3. Reprisals

The doctrine of reprisal states that when one party to a conflict violates an IHL norm, the other party is allowed to respond in kind, subject to certain conditions.<sup>208</sup> In recent decades, the doctrine has fallen out of favor, and most commentators consider its use to be allowed only under very narrow circumstances.<sup>209</sup> Reprisals are usually described as an embodiment of the reciprocal nature of IHL, and their demise is attributed to the rise of morality in IHL. Neither of these explanations is entirely convincing. It has always been problematic to justify reprisals with moral arguments.<sup>210</sup> And although it is possible that the voice of morality has become louder in recent years, the need to find an answer to asymmetric conflicts has become more acute where nonstate actors systematically flout IHL. Indeed, if the reason for the doctrine is the reciprocal nature of IHL, we would have expected it to thrive under contemporary conditions when most wars are asymmetric and when regular armies are sorely tempted to react harshly to their opponents' violations. But regular armies rarely invoke reprisals as a justification for their reactions.

The doctrine of reprisal, we submit, is specifically designed to respond to P–A problems because of the procedures it sets forth: it allows retaliation only after an advance warning has been communicated to the enemy (that is, a fire-alarm mechanism) and only after retaliation has been approved by the highest echelons of the retaliating army.<sup>211</sup> As a result, P–A costs are minimized on both sides. That reprisals are governed by international norms also enables both the government and the army to deflect pressure from their respective principals (citizens and government) to respond too aggressively against an opponent. We find such reliance on the law already during the U.S. Civil War, where Halleck, in his role as general in chief, invoked the limits on reprisals to rebuff public calls for harsher retaliation measures against the Confederates.<sup>212</sup>

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208. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 253–55 (2d ed. 2010).

209. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *supra* note 157, art. 51(6); HENCKAERTS & DOSWALD-BECK, *supra* note 24, at 513–18.

210. Professor Walzer argues that there is some moral justification for reprisals against soldiers but not against civilians. WALZER, *supra* note 1, at 215. It is not clear, however, why reprisals were common practice in the nineteenth century and what exactly brought about the demise of the phenomenon in the twentieth century.

211. For the “conditions for reprisal action,” see MINISTRY OF DEFENCE, JOINT SERVICE PUBLICATION 383, *THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT* 421 (2004) (U.K.), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/27874/JSP3832004Edition.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf) (“Reasonable notice must be given that reprisals will be taken . . . . It must be publicized. . . . [It] must only be authorized at the highest level of government.”); see also Christopher Greenwood, *Scope of Application of Humanitarian Law*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 201, 233 (Dieter Fleck ed., 2d ed. 2008) (“[R]eprisals shall be authorized by the highest political level.”).

212. BEST, *supra* note 4, at 169.

At the same time, the right to resort to reprisal offers a convenient escape clause for governments that seek to deviate from the rules by citing the opponent's violations. In this way, the doctrine also contributes to the optimal imperfection of IHL.

In asymmetric warfare conducted by and against nonstate actors, acts of reprisal against the nonstate actor, which in fact harm civilians, have little informational value because they are unlikely to reduce the information gap within the enemy army. The principals of the nonstate power have no qualms about flouting IHL. Nor will the nonstate enemy resort to the process of reprisals to warn its regular opponent of violations by its fighters. We submit that the ineffectiveness of reprisals as a means of communication probably explains their falling out of favor.<sup>213</sup>

#### IV. ASYMMETRIC WARFARE AND PRINCIPAL–AGENT RELATIONS: WHAT ROLE FOR IHL?

Asymmetric warfare poses acute governance challenges. Frustration with the inability to identify defined military targets and achieve clear “victory” against an enemy that abuses the law's protection often leads both principals and agents to break the law. Some principals realize sooner or later that such deterioration may be counterproductive, and they may adopt what has recently been called counterinsurgency strategies.<sup>214</sup> As we suggest in this Part, IHL can assist the principals in promoting this policy. At the same time, other principals fail to appreciate this concern out of the hope that extreme measures will break their opponents' backs. In these latter cases, while principals have little need for IHL, other forces—foreign states and global public opinion—resort to IHL for a variety of moral and utilitarian reasons. These actors hope to deter both principals and agents through external enforcement measures that are based on IHL, such as war crime adjudication. Through such indirect enforcement of IHL, third parties seek to strengthen agents' resolve to defy manifestly unlawful orders issued by their principals.

The first reported use of international law as part of a counterinsurgency operation took place during the U.S.–Mexican War in 1847 when General Scott issued General Order No. 20.<sup>215</sup> The order authorized him to

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213. It is not clear whether all reprisals against citizens are always prohibited. Article 51(6) of Additional Protocol I indeed prohibits such acts, but it is arguable whether it is customary, that is, obligatory, on states that did not join the first additional protocol (e.g., the United States and Israel) or that attached a specific reservation to this article (e.g., the United Kingdom). See HENCKAERTS & DOSWALD-BECK, *supra* note 24, at 514. It is almost unthinkable, however, that any state would actually use reprisals against civilians in the modern world.

214. E.g., U.S. DEP'T OF THE ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY (2006), available at <http://www.fas.org/irp/doddir/army/fm3-24.pdf>.

215. David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L. 5, 31–33 (2005); Erika Myers, *Conquering Peace: Military Commissions as a Lawfare Strategy in the Mexican War*, 35 AM. J. CRIM. L. 201, 205, 215–16 (2008); see also WITT, *supra* note 4, at 123–24.

try both American soldiers and Mexican fighters for violating his instructions in military commissions. The success of Scott's law-based strategy in effectively reducing strife in the area under his control can be compared to the experience of another general in another area who faced severe challenges to his authority until he adopted Scott's methods.<sup>216</sup>

The U.S. troops' massacre in the village of My Lai in 1968 served as the impetus for the U.S. Army's strict adoption of IHL.<sup>217</sup> Canada followed suit after Canadian forces were involved in atrocities during the short-term occupation of Somalia in 1992.<sup>218</sup> What is common to these measures is the adoption of institutions that provide a credible threat to military agents based on domestic institutions (rather than on external actors). Since the available external threats are limited for armies as strong as the U.S. military, the leadership must develop effective internal constraints. These constraints are also optimally imperfect because they offer the principals at least some opportunities to forgo sanctions when they do not need the cover of IHL. Reliance on *internal* institutions and procedures to ensure compliance with IHL is therefore the optimal solution for government and military agents engaged in asymmetric warfare. Here we mention rather briefly three of these enforcement institutions.

#### A. Operational Legal Advisers

Since the Gulf War in 1991, the presence of legal advisers embedded in front units and involved in operational decisions has become routine in the U.S., British, NATO, and Israeli armed forces.<sup>219</sup> Legal operational advice constitutes the most important internal monitoring device available to the government and the army's high command in controlling the behavior of

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216. Myers, *supra* note 215, at 226.

217. The Peers Report that investigated the events leading up to the My Lai Massacre in Vietnam cited the lack of proper training in the law of war as one of the factors that created an environment conducive to violations. See Stephen A. Myrow, *Waging War on the Advice of Counsel: The Role of Operational Law in the Gulf War*, 7 U.S. A.F. ACAD. J. LEGAL STUD. 131, 133 (1996–1997); see also Major Jeffrey F. Addicott & Major William A. Hudson, Jr., *The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons*, 139 MIL. L. REV. 153, 162–64 (1993) (discussing the findings of the Peers Report concerning lack of training in the law).

218. Following the recommendations of the Somalia Commission of Inquiry Report, see Colonel Kenneth W. Watkin, *The Operational Lawyer: An Essential Resource for the Modern Commander* (manuscript at 12–15) (on file with authors).

219. During the Gulf War in 1991, officers of the U.S. Judge Advocate General Corps constantly monitored and reviewed the selection of targets in the coalition's air campaign. See Michael W. Lewis, *The Law of Aerial Bombardment in the 1991 Gulf War*, 97 AM. J. INT'L L. 481 (2003); see also U.S. DEP'T OF DEF., REPORT TO CONGRESS ON THE CONDUCT OF THE PERSIAN GULF WAR, APPENDIX O: THE ROLE OF THE LAW OF WAR, 31 I.L.M. 615, 617 (1992). During the NATO attack on Serbia in 1999, lawyers examined every sortie, Michael F. Lohr & Steve Gallotta, *Legal Support in War: The Role of the Military Lawyer*, 4 CHI. J. INT'L L. 465, 476 (2003), and during the invasion of Iraq in 2003, American and British legal advisers accompanied the ground forces, Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AM. J. INT'L L. 1 (2010).

the armed forces. Operational legal advisers are not only required to approve activities but also to inculcate the relevant legal norms and incorporate international law into military practice. Observing the emergence of legal operational advice in the IDF, one of this Article’s authors points out that “[t]he presence of operational legal advisers has enabled the military to ‘internalize’ IHL, with all that the term implies with respect to the assimilation of that body of law into the *modus operandi* of the armed forces themselves.”<sup>220</sup> Thanks to them, “IHL has been transformed from an ‘external’ constraint on military action to an intrinsic facet of the military’s own operational code.”<sup>221</sup>

And yet there is no obligation under international law to embed operational legal advisers with the troops or have them approve individual missions. The only obligation is to “ensure that legal advisers are available, *when necessary*, to advise military commanders *at the appropriate level*” on IHL.<sup>222</sup> Nevertheless, as indicated above, after having experienced serious agency costs relating to violations of the law by their subordinates, several armies have voluntarily adopted even more stringent legal review than IHL actually demands.<sup>223</sup>

#### B. *Domestic Review by Independent Actors*

In many liberal democracies, domestic institutions responsible for investigating violations of IHL have undergone major reforms in recent years. Courts have started to exercise review over security measures and even over military practices;<sup>224</sup> commissions of inquiry have sprouted up in many jurisdictions; and an IHL-based obligation to review and investigate possible violations of IHL by independent agents has crystallized.<sup>225</sup> In other words,

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220. Amichai Cohen, *Legal Operational Advice in the Israeli Defense Forces: The International Law Department and the Changing Nature of International Humanitarian Law*, 26 *CONN. J. INT’L LAW* 367, 389 (2011).

221. *Id.*; see also Dickinson, *supra* note 219; Galia Rivlin, *Constitutions Beyond Borders: The Overlooked Practical Aspects of the Extraterritorial Question*, 30 *B.U. INT’L L.J.* 135 (2012) (interviewing Israeli military officials, state attorneys, and judges concerning Israeli policies in the Occupied Territories).

222. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *supra* note 157, art. 82 (emphasis added). Article 82 of the Additional Protocol declares the following:

The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.

*Id.*

223. On the evolution of operational legal advice, see Dickinson, *supra* note 219.

224. Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 *AM. J. INT’L L.* 241 (2008).

225. *E.g.*, THE COMM’N OF INQUIRY INTO THE EVENTS AT THE REFUGEE CAMPS IN BEIRUT, FINAL REPORT, in *THE BEIRUT MASSACRE: THE COMPLETE KAHAN COMMISSION REPORT*

domestic actors that are institutionally distinct from the echelons of military authority have become more involved with the monitoring and possible disciplining of military actions. The need to reduce agency costs provides a partial explanation of these developments.

### C. *The Rise of International Criminal Law*

What motivated the rise of international criminal law (“ICL”) was third parties’ realization that the *principals* were no longer reliable. The rise of genocidal regimes made it necessary to deter the principals and the agents that obey their orders. ICL constitutes a reminder to the military agents of their obligation to disobey their principals if they are given illegal commands.<sup>226</sup> Obviously, ICL can also be a way for governments to pre-commit themselves and their troops.<sup>227</sup> Furthermore, the principle of “complementarity,”<sup>228</sup> according to which states may avoid prosecution abroad if they themselves make genuine efforts to prosecute violators, provides an incentive to strengthen domestic reviewing institutions that can enforce domestic compliance with IHL.

## V. NORMATIVE IMPLICATIONS

In this Article, we have focused on what we suggest has been a main function of IHL: providing a system of norms designed to regulate the agency gaps in the governance of warfare. Before concluding, we would like to reflect briefly on the potential normative ramifications of this analysis.

Our main observation is that IHL does not necessarily reflect its drafters’ intention to promote morality in warfare and to protect civilians and

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(Karz-Cohl Publ’g, Inc. 1983) (Isr.); THE BLOODY SUNDAY INQUIRY, REPORT, 2010–11 H.C. 29-1 (U.K.), available at <http://webarchive.nationalarchives.gov.uk/20101103103903/http://bloody-sunday-inquiry.org>; ABOUT THE INQUIRY, IRAQ INQUIRY, available at <http://www.iraqinquiry.org.uk/about.aspx> (last visited Feb. 12, 2014); NETH. INST. FOR WAR DOCUMENTATION, SREBRENICA, A ‘SAFE’ AREA: RECONSTRUCTION, BACKGROUND, CONSEQUENCES AND ANALYSES OF THE FALL OF A SAFE AREA, <http://www.niod.knaw.nl/en/srebrenica-report/report> (last visited Feb. 12, 2014). For a description of these reforms and their implications, see Amichai Cohen & Yuval Shany, *Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts*, 14 Y.B. INT’L HUMANITARIAN L. 37 (2011); Michael N. Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 HARV. NAT’L SECURITY J. 31 (2011).

226. Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9\* (July 17, 1998). See generally Bohrer, *supra* note 31 (describing the inherent conflict of interest between the principals and the military).

227. Beth A. Simmons & Allison Danner, *Credible Commitments and the International Criminal Court*, 64 INT’L ORG. 225, 234 (2010) (claiming that governments tied their hands by joining the ICC in order to create credible commitments to their domestic constituencies).

228. The principle of complementarity appears in article 17 of the ICC Rome Statute. Rome Statute of the International Criminal Court, *supra* note 226. According to this principle, the court would only act if the relevant state is “unwilling or unable” to investigate the crime. *Id.*

combatants as much as possible against the scourge of war. Indeed, governments and armies have often tried, and sometimes succeeded in, convincing their citizens and global public opinion that the sole purpose of the law they have drafted and complied with is to promote a common morality. This public relations campaign began in 1868 with the first solemn declaration to the effect that war was meant solely to weaken, not kill, the enemy.<sup>229</sup> It has continued ever since. Our analysis demonstrates that although IHL has promoted moral concerns, these concerns came as an afterthought, when they comported with the interest of maintaining control throughout the echelons of authority.

As a tool for regulating P–A relations, IHL is indirectly protective of civilians’ interests and partially promotes morality in warfare. IHL directs governments or armies not to harm citizens excessively or expose their family members serving in the army to unnecessary suffering and death without the opportunity to surrender. As we saw above, the evidence suggests that low-level soldiers perpetrate most violations, and better controls could eliminate much harm.<sup>230</sup> Even when IHL’s function is reducing agency costs, it can indirectly contribute to mitigating human suffering because it seeks to restrain soldiers who might lose their tempers at the height of battle.

But IHL responds to citizens’ goals only partially (and indirectly) because the IHL-making process itself is also subject to the P–A problem. Agents of the citizens (governments and armies) usually dominate international bargaining over treaty drafting, while civil society has had considerable difficulty expressing its views.<sup>231</sup> Civil society has encountered difficulties in repeating the unique success of Dunant and his colleagues in 1864, after which governments and armies took the lead in regulating warfare.<sup>232</sup> In recent years, only a handful of civil society initiatives—for example, prohibitions on the use of certain types of weapons and ammunition, such as anti-personnel mines<sup>233</sup> and cluster bombs<sup>234</sup>—matured into treaties. The Rome Statute of the International Criminal Court was also achieved through heavy civil society involvement,<sup>235</sup> but the criminal law’s emphasis on strict *actus reus* and *mens rea* requirements leave out violations of IHL that do not amount to war crimes. It is therefore not surprising that the IHL to which governments and armies subscribe—and which is reflected in ICL—grants priority to military necessity over humanitarian concerns.<sup>236</sup> Their version of

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229. St. Petersburg Declaration, *supra* note 79.

230. See Morrow, *supra* note 20, at 569–70.

231. See *supra* note 4 and accompanying text.

232. *Supra* notes 119–121 and accompanying text.

233. 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.

234. Convention on Cluster Munitions, May 30, 2008, 48 I.L.M. 357.

235. Mahnouch H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT’L L. 22 (1999).

236. Luban, *supra* note 3.

the law is less than perfectly aligned with limited human suffering, as naked state interests often overshadow humanitarian concerns.

Our observation about the function of IHL therefore suggests that the law does not fully reflect the interests of all stakeholders, as the more diffuse citizenry has not had ample opportunity to weigh in on the drafting process of the law or its implementation. Our story adds weight to Luban's call for the "civilianization of the laws of war"<sup>237</sup> and supports the lawmaking function of international courts, which Theodor Meron has characterized as "the humanization of humanitarian law."<sup>238</sup> Our analysis authorizes, indeed requires, the judicious interpreter—a domestic or international judge applying IHL—to adopt a critical attitude toward the law and to take into account the interests of the underrepresented principals in the process of construing it.<sup>239</sup>

#### CONCLUSION

Many factors may explain the emergence of IHL: the influence of philosophical ideas, the self-interest of armies, or the heroic role played by social activists. All of these explanations have their merits, which we do not challenge. Rather, our goal in this Article has been to highlight an alternative explanation of the rationale for IHL, its evolution, and the shape of key IHL norms. Our approach resolves certain puzzles—such as why strong powers have an interest in IHL, why there is a difference between the laws of war on land and at sea, and why IHL is still viable in asymmetrical armed conflicts—because it addresses a crucial aspect that all other accounts have failed to discern: the grave challenge that governments face when their armies engage in battle and their concomitant need to ensure their control over them.

Due to the limited space and general claim of the Article, we have been able to provide only a bird's-eye view of IHL's evolution. We believe, however, that our account is sufficiently robust to support the contention that the evolution of IHL is a story of principals seeking ways to enhance their domination over their military agents and negotiating the contours of the law not only with foreign governments but also with their own armies. Our summary account leaves space for a much-needed, more elaborate historical examination of the motivations of the different actors who contributed to IHL's evolution. We believe that attention to the P–A dimension of warfare

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237. *Id.* at 338–39.

238. Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000).

239. For a domestic analogy to this method of interpretation, see, for example, William S. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988); William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001); William N. Eskridge, Jr. & John Ferejohn, Comment, *Structuring Lawmaking to Reduce Cognitive Bias: A Critical View*, 87 CORNELL L. REV. 616 (2002); William N. Eskridge, Jr. & Philip P. Frickey, Foreword, *Law as Equilibrium*, 108 HARV. L. REV. 26 (1994).

and the need to regulate it will provide more data that will further bolster our general claim.

By many accounts, IHL is presented as imposing restrictions on states engaged in combat. A state fighting an asymmetric war is regarded as having to “fight with one hand tied behind its back.”<sup>240</sup> But if our analysis is correct, the opposite is often true: as a practical matter, IHL *enhances* the ability of states to amass huge armies because it lowers the costs of controlling them. It thus renders the decision to go to war less risky than it would be otherwise.<sup>241</sup> Therefore, although at times compliance with the law may prove costly in the short run, in the long run states with massive armies are the greatest beneficiaries.

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240. HCJ 5100/94 *The Public Committee Against Torture v. Israel* 53(4) PD 1, 36–37 [1999] (Isr.).

241. A similar argument is raised with respect to the law of occupation, viewed as “a pact between state elites, promising reciprocal guarantees of political continuity, and thus, at least to a certain extent, rendering the decision to resort to arms less profound.” BENVENISTI, *supra* note 8, at 71.

