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Steven R. Ratner

University of Michigan Law School, sratner@umich.edu

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The Oxford Handbook of the Sources of International Law

Samantha Besson (ed.), Jean d'Aspremont (ed.)

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CHAPTER

42 Sources of International Humanitarian Law and International Criminal Law: War/Crimes and the Limits of the Doctrine of Sources

Steven R. Ratner

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Abstract

This chapter contends that international humanitarian law (IHL) and criminal law (ICL) cast serious doubt on the traditional doctrine and understanding of sources. Article 38 of the International Court of Justice (ICJ) Statute inadequately describes key modes for prescribing law in these areas. International courts are particularly important for both areas, perhaps because of their unprincipled approach to the indicia of custom. More fundamentally, IHL and ICL suggest that sources scholarship should see itself not as determining necessary and sufficient methods for the making of law, but rather as a search for relevant inputs that become indicators of law. Under this view, certain processes are more authoritative than others, but all deserve scrutiny. Moreover, a theory of sources must take account of the purpose of understanding sources, which is to promote compliance with rules. IHL and ICL also shed light on the importance of morality and ethics to the law-making process.

Keywords: [Human rights remedies](#), [General principles of international law](#), [International criminal courts and tribunals](#), [Sources of international law](#), [International Court of Justice \(ICJ\)](#)

Subject: [Human Rights and Immigration](#), [Criminal Law](#), [International Law](#), [Law](#)

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I. Introduction

International humanitarian law (IHL) and international criminal law (ICL) represent two extremes in the making of international law. IHL is at its core the product of States' calculations of what has been, and will be, possible on the battlefield to mitigate the horrors of armed conflict. ICL develops in the arena metaphorically furthest from the battlefield—the courtroom and judicial chambers, where judges, with the advantage of hindsight, interpret and apply rules in a hushed and calm setting. Though both may eventually be codified in treaties, IHL starts in a world of madness and emotion; ICL emerges in a world of order and reason. Yet international law, and particularly the doctrine of sources, aims to minimize these differences—to emphasize the commonalities in the making of IHL and ICL, not only with each other, but with the other regimes of international law. The doctrine's key claim is that all areas of law share the same processes of law-making, and that without such a common starting point—a single rule of recognition—international law will fragment, and even lack the core attributes of law itself.

This chapter focuses on the making of IHL and ICL. I am to demonstrate that, despite the efforts by certain institutional players and scholars to place these two areas squarely within traditional sources doctrine, both remain distinct in terms of how actors determine whether a purported rule is in fact a legal rule. These distinctions cannot be discounted as variations permitted within the doctrine, but constitute a challenge to the idea of a unified doctrine. More important, IHL and ICL demonstrate not merely the futility, but the hazards, of a unified sources doctrine, for the purpose of a concept of sources is to ground the legitimacy of international law and, consequently, create the conditions for respect for and compliance with it. In that case, we need to treat any doctrine of sources as a tool, and not as an end in itself. Such a move requires that we do precisely what traditional doctrine seems to reject—to link the identification of a rule as law not only with the context in which it is formed (including its subject area), but with the context in which the norm is invoked.

The chapter consists of four main parts. In section II: The Scope of Inquiry, I clarify my terms regarding sources and my overall approach to identifying them and lay groundwork for the discussion that follows. In section III: Of Special Regimes: Identifying IHL's and ICL's Distinctive Approaches to Law-Making, I elaborate upon five distinct features of IHL and ICL that make those areas of law resistant to falling within a uniform doctrine of sources. In section IV: The Myopia of Traditional Sources Doctrine, I consider the costs of a single rule of recognition when it comes to these two areas of law. Finally, in section V: IHL and ICL as a Window onto Moral Sources, I briefly examine the role of ethical justifications for the rules of IHL and ICL in our understanding of sources.

II. The Scope of Inquiry

1. Of Sources and Law-Making

My starting point for understanding sources is two-fold (one might even say Janus-faced). First, I adopt Samantha Besson's broad conception of sources—'all the facts, or events that provide the ways for the creation, modification, and annulment of valid legal norms'—as well as her categorization of sources into formal, material, and probatory.¹ My principal focus is on formal sources, i.e., identification of the processes of law-making insofar as norms become legal rules, sometimes referred to as the prescriptive processes.

At the same time, I view the notion of 'formal' sources in decidedly non-formalist terms, i.e., as not yielding a fixed, closed list of modes that invariably and predictably does and should produce international law. My approach contrasts with what I will call the traditional doctrine of sources (or black-letter doctrine): the

identification of a fixed list of outputs of certain processes such that any norm (regardless of subject area) is a rule of international law if and only if it is generated by that process—with that list corresponding, perhaps with small emendations, to Article 38 of the Statute of the International Court of Justice (ICJ).² I have no normative attachment to any such list on the grounds that those categories are mentioned in the ICJ Statute.

Instead, I adopt a dynamic, sociologically grounded model that sees law-making as ‘a process of communication which creates, in a target audience, a complex set of expectations . . . about a policy content . . . , authority, . . . and control’.³ A social process thus generates a legal norm if (a) that norm has a specific content (e.g., a right, duty, permission, etc., regarding a subject, stated at a certain degree of generality or specificity); (b) that process is accepted by relevant decision-makers as producing law; and (c) the norm is accompanied by a signal that those prescribing it are prepared to secure compliance. The law-making process entails multiple arenas and participants.⁴ Moreover, it is in tension with a binary conception of law—a sort of ‘relative normativity’ before its time. It need not be inconsistent with a doctrine of sources in the abstract, although a non-formalist doctrine might be a contradiction in terms.

p. 915 2. The Norms at Issue

For purposes of this chapter, IHL encompasses the full range of norms regulating the conduct of armed conflict—the law of armed conflict or the *jus in bello*. I include both the Hague Law focusing on battlefield conduct and the Geneva Law addressing persons *hors de combat*, and include rules governing conflicts between States, between States and non-State actors, and among non-State actors.

As for ICL, practitioners and scholars use the term to cover two overlapping fields—(1) the rules regulating law enforcement cooperation between States (e.g., extradition treaties and international arrests); and (2) the rules identifying certain acts of international concern as engendering individual criminal responsibility and prescribing the modes for their suppression. Indeed, some have narrowed their understanding of ICL to a subset of the second group, such as offences within the jurisdiction of international criminal tribunals (ICTs) (war crimes, crimes against humanity, genocide, and aggression) or offences concerning affronts to human dignity (e.g., the first three plus torture, disappearance, and slavery). I will adopt the second definition, but without the limits to courts’ jurisdiction or human rights abuses. In that sense, international norms on corruption and drug trafficking are included because they provide in some form for individual accountability. Finally, IHL and ICL overlap in important ways, in that one of the methods for the enforcement of IHL is through ICL. The law identifies certain IHL violations as war crimes—a *substantive* overlap; imposes duties and rights on States to prevent and punish them—an *enforcement* overlap; and includes certain mechanisms for that purpose—an *institutional* overlap.

IHL and ICL also merit a few other characterizations. First, both are special regimes in at least one sense—as ‘whole fields of functional specialization, of diplomatic and academic expertise . . . [where] special rules and techniques of interpretation and administration are thought to apply’.⁵ Decision-makers apply them with other rules, notably human rights law, but they require a particular expertise. Whether they entail separate secondary rules is the subject of much debate. I will use the term ‘special’ rather than ‘self-contained’ because, as the ILC stated, ‘no regime is self-contained’.⁶

Secondly, I endorse Antonio Cassese’s description of ICL as a ‘hybrid branch of law’, in that its substantive rules depend upon, indeed derive from, other branches of law. Those other branches of law include IHL and human rights law, but also anti-corruption law, anti-drug-trafficking law, and other fields (the ‘special part’ of ICL); and domestic law notions of *actus reus*, *mens rea*, and defences (the ‘general part’ of ICL).

p. 916 Lastly, in its identification of international crimes and the elements thereof (taken from both international and domestic law), ICL is unique because it offers a *distinct set of secondary rules for individual responsibility*.

This attribute makes ICL in certain ways akin to the law of State responsibility.

III. Of Special Regimes: Identifying IHL's and ICL's Distinctive Approaches to Law-Making

Both IHL and ICL are characterized by, as Hilary Charlesworth notes, differences from the traditional sources doctrine in 'the priority they accord to different sources and the approaches they take to them';⁷ I identify five major distinctions, although these two regimes are not unique in all these respects.

1. The Development of Law through Key Processes beyond the Four Usual (Article 38) Suspects

The States and other actors creating IHL and ICL have certainly relied upon treaties and customary international law to prescribe, and justify the validity of, key norms. Generally, treaties remain the most important process of IHL and ICL law-making—even as IHL is more comprehensively codified than ICL, customary international law fills gaps in and supplements IHL treaties, and, as discussed below, courts have played a key role in respect of ICL. Yet, when asked to identify a specific norm of either IHL or ICL, we would be remiss to ignore several other prescriptive processes that do not mesh easily with the Article 38-centred doctrine.

a. Security Council Resolutions

Since the early 1990s, the Council's members have been prolific in clarifying, shaping, and creating norms of IHL and ICL. The statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) help clarify IHL rules in non-international armed conflicts (NIACs) and violations thereof that engender criminal responsibility.⁸ Though the Secretary-General had suggested in his report on a proposed ICTY statute that only the rules and crimes governing international armed conflict were customary international law, the Council's decision to criminalize violations in NIACs in both statutes changed the legal landscape for IHL and ICL in NIACs.⁹ Resolution 1674, on the protection of civilians in armed conflict, condemned various atrocities, some of which, such as gender-based violence, and recruitment and use of child soldiers, were not outlawed as such in IHL treaties.¹⁰ Its paragraph 'emphasiz[ing] . . . the responsibility of States to comply with their relevant obligations to end impunity and to prosecute those responsible for war crimes, genocide, [and] crimes against humanity' went beyond existing treaty obligations and added normative weight to a (in some ways inchoate or limited) duty of prosecution by States under ICL.¹¹ Separate resolutions on women and children in armed conflict have sent a strong signal to States regarding illegality of certain acts and accountability of perpetrators.¹²

In addition, the Council has invoked Chapter VII to urge accountability in specific cases and impose economic sanctions against suspected war criminals,¹³ and it has referred two situations to the International Criminal Court (ICC)—Sudan and Libya.¹⁴ The Council's authority under Article 25 and its ability to take some measures to induce compliance—sanctions and the ICC referral—renders it a critical arena for law-making. For those conflicts where it has passed resolutions, those resolutions become, for the relevant parties, the critical governing law. And the General Assembly makes its own contribution with resolutions adopted by consensus, as with its 2006 resolution offering principles on the right to a remedy for IHL and human rights violations.¹⁵

Council resolutions need not challenge the traditional doctrine if we see them as simply the output of a body authorized by a treaty, the UN Charter. Yet, for situation-specific resolutions, their normative effect extends far beyond the conflict they are meant to influence. And some of these resolutions (e.g., Resolution 1373) resemble a form of instant global legislation that is harder to fit within the idea of a mere delegation from a treaty.

p. 918 **b. Reports of UN Expert Bodies**

The reports of UN expert bodies can prove highly significant for shaping expectations regarding illegal and criminal conduct under IHL and ICL, as well as duties to act against perpetrators. Their normative influence depends on the body that created them, the expertise of their members, their mandate, and the care with which they state legal conclusions.¹⁶ Although the Human Rights Council has created most fact-finding bodies recently, those created by the Security Council or the Secretary-General carry significant weight among some international actors—those who actually fight wars—because they maintain a distance from the human rights focus of the Human Rights Council. Thus, the reports of the Security Council's commissions of inquiry for the former Yugoslavia, Rwanda, and Darfur remain part of the canon of ICL. And the reports of the Secretary-General's panels on the Gaza flotilla incident and the Sri Lankan war (the latter on which I served) have helped to solidify, clarify, or change expectations of States' duties under IHL.

But reports commissioned by the Human Rights Council, or even authored by UN officials, carry weight as well. Two notable examples of the former are the 2005 Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, authored by experts mandated by the Human Rights Commission,¹⁷ and the 2010 follow-up report on Gaza regarding domestic accountability mechanisms.¹⁸ Among the latter are the Office of the United Nations High Commissioner for Human Rights (OHCHR) toolkit for post-conflict States addressing trials, amnesties, and truth commissions.¹⁹

Calling these merely soft law, or not law, obscures their influence on those evaluating the conduct of combatants for its illegality or criminality. Conflict-specific reports seem especially influential for IHL and ICL because they apply the law to facts or allegations. Actors are put on notice as to what acts will merit condemnation—or even risk indictment—and thus the reports clearly shape expectations. The focus of the UN on matters of war and peace lends them a weight in these two fields, just as a UN Environment Programme report might be key in international environmental law.

p. 919 **c. Reports of Expert Bodies not Commissioned by the UN**

Finally, IHL has benefitted from expert work without a UN connection. Both the International Committee of the Red Cross (ICRC) 2005 customary law study and its 2009 Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law go beyond restating existing IHL.²⁰ They extend existing law to cover NIACs, and the latter melds ideas of necessity into the rules on direct participation in hostilities (DPH) as well.²¹ The citation of the latter by US authorities as a justification for their detention policies—however much of a stretch it may have been—suggests it is endowed with some authority.²² Expert processes outside the ICRC produced the 2009 Manual on International Law Applicable to Air and Missile Warfare,²³ and the 2013 Tallinn Manual on the International Law Applicable to Cyber Warfare.²⁴

The authority of these non-UN documents lies in the choice by the entities producing them to include experts from military and academic backgrounds, even if they might be criticized for omitting human rights perspectives or strong critics of the status quo. Each document also followed multiple research projects, meetings of experts, and drafting. The result of this care is that they gain respect not merely where they restate well-settled law, but also where they go further, by filling in gaps in treaty or custom or by staking

out a new norm (even as they may deny doing so). The frequency with which such documents are invoked by key decision-makers, particularly in the military, suggests they have significantly influenced our expectations of legality. The areas in which they fill in or push the existing law are precisely those where these documents change expectations the most.

p. 920 **2. The Inescapable Thicket of Customary Law's Elements**

It is conventional wisdom that, whatever IHL or ICL treaties may say, the identification of customary law in these two fields is plagued by the difficulty of determining both State practice and *opinio juris*, a fate shared by international human rights law.²⁵ Certainly, it is not impossible to squeeze certain evidence into the two standard elements; both case law and scholarship include claims that: (1) legislation, regulations, and military manuals, or even widespread treaty ratification replace the actual conduct of States in conducting wars or prosecuting offenders as indicia of State practice; (2) that same evidence counts as *opinio juris* as well; (3) we need only look at the practice of some States but not all; (4) denials of violations generate *opinio juris* that overshadows the violations themselves (the ICJ's key interpretive move in the *Nicaragua* case); or (5) customary law involves a sliding scale of State practice and *opinio juris*, depending on the norm.²⁶

Thus, in the case of IHL, military manuals assume an importance reflecting these stretched and conflated notions of State practice and *opinio juris*.²⁷ For ICL, the absence of protest to the relatively rare invocation of universal jurisdiction by States supports the existence of a norm permitting States to exercise such jurisdiction.²⁸ Robert Kolb correctly observes that, as a general matter, *opinio juris* counts more than State practice when it comes to IHL and human rights law.²⁹ Some of this catholic approach to indicia of custom would seem to stem from the paucity of classic State practice and some from the prevalence of violations. Not all is controversial; for instance, the Martens Clause is well accepted as a core customary rule.³⁰

p. 921 Observers will differ on whether these doctrinal moves succeed in terms of their fidelity to the essence of customary international law—law made by the practice of States out of a sense of legal obligation. But at a minimum, with respect to discerning a rule of IHL or ICL, the evidence accepted as showing State practice or *opinio juris*, and how those two criteria should relate to one another, are quite different from what we might use for the rules of State immunity or the exercise of extraterritorial prescriptive jurisdiction.

3. The Peculiar Law-Making Function of Courts

ICL and IHL also challenge the traditional sources doctrine insofar as court rulings play a large role in States' and others' assessment of the state of the law. In theory, this reliance need not challenge the traditional sources doctrine—after all, Article 38 is itself a direction to a court, and we would not say that the influence of the ICJ's rulings interpreting treaties or discerning custom undermines that very doctrine. However, in the case of ICL, it is impossible to understand international crimes without digesting the output of courts (even if other bodies, like the Security Council, may play a role in sanctioning war criminals). Although we can gain a basic grasp of the crimes by reading the relevant treaties, we cannot have a more profound and nuanced appreciation of their elements until a tribunal has interpreted them. Courts thus play a function not captured by Article 38.

Courts are also important as venues *at the intersection of ICL and IHL*. The ICTs that have gained the most attention—the ICTY, ICTR, and ICC—are spending most of their efforts interpreting IHL through war crimes charges. Their most influential supporter both on and off the bench, Cassese, defended what he called the 'conspicuously crucial' role of domestic and international courts because they represent the best mechanism to offer 'detailed, clear, and unambiguous' elaborations of treaties and custom.³¹ But that very case law has received relentless criticism for its approaches to the elements of custom.³² The ICTY's views on the elements of State practice in the *Tadić* Interlocutory Appeal and on IHL in NIAC in the *Kupreškić* case,

p. 922 the Sierra Leone tribunal's views on child soldiers in the *Norman* case, and the ICTY's views on duress in the *Erdemović* Sentencing Appeal (later rejected in the ICC Statute) are cited as examples of judicial flouting—or, more generously in Jean d'Aspremont and Jérôme de Hemptinne's view, 'activisme normatif'³³—of the sources doctrine. As crystallized by Shane Darcy, '[i]nternational courts have regularly failed to provide any or sufficient evidence to support claims as to customary international law, yet the decisions are cited as authoritative statements by other courts and bodies'.³⁴ The creative interpretation of the elements of custom, leading to a law-making function, seems to be an occupational hazard of courts interpreting IHL rules.³⁵

It might be argued that this failure of ICTs to identify IHL rules according to the black-letter doctrine of sources does not mean that IHL has any different rule(s) of recognition, but only that courts are not doing their job competently. But this is a distinction without a difference. When decision-makers as important as ICTs apply their own version of sources doctrine and those rulings are then regarded as authoritative, then IHL is indeed identified by reference to a set of sources not shared with other areas of law.

This case law of ICTs has also led to a more *systemic skewing of IHL sources*. The criminal tribunalization of IHL has led those discerning the rules of IHL to focus disproportionately on courts as the font of wisdom and to ignore equally important indicia in the practices and views of States. It is not merely that the tribunalization of IHL takes our focus off other methods for enforcement of IHL.³⁶ Rather, lawyers scour tribunal judgments as the last word about the very meaning of an IHL treaty or customary rule (an occupational hazard of lawyers). One need only read the reports of UN fact-finding bodies, the ICRC, or other influential voices on IHL to see the influence of courts.³⁷ Those writing such reports—including me—cite cases as the most authoritative meaning of a treaty or custom.

p. 923 Here we face a critical tension. On the one hand, to be authoritative and controlling—legitimate and effective—IHL rules must reflect the attitudes of States (and non-State actors) that fight the actual wars—not merely because they are specially affected in a doctrinal sense, but because otherwise those rules will be pretended law. Although the judicial venue has the appurtenances of an arena where the rules can be carefully identified and parsed by counsel and judges, we cannot assume it reflects expectations of relevant global actors (an issue distinct from whether the traditional doctrine should be used to identify those expectations). Where States have vastly different expectations, a court's ruling should not, then, be the last word on the law. On the other hand, the repeated invocations of these decisions over time affect, and can change, these State attitudes. The fate of the *Tadić* Interlocutory Appeal may be the greatest recent example of this law-making function, simultaneously selective in its inputs for custom and hugely influential in its output.³⁸

In their judgments about the state of the law, judges might err on the side of progressive development to find a rule even if it lacks State support; or they might err, with an awareness of the high stakes for the individual defendant, on the side of rejecting or narrowly interpreting a rule that would inculcate a defendant.³⁹ National courts might weave in domestic law sources into their IHL analysis, identifying a rule binding for domestic law but not accurately describing international law.⁴⁰ Or they might adopt odd interpretations of rules that, among international audiences, seem to have been clear.⁴¹ On the other hand, courts might ascertain State practice under a treaty or for purposes of custom in a methodologically sound manner. Or they might have the credibility to adopt broad views of treaty-based duties—even those without subsequent practice behind them—without risking a backlash from governments, as seems to be the case with the Inter-American Court's views on amnesties.⁴² But the reliance of many consumers of international law on those judgments means that they have become a critical source in themselves. So, whether courts are indispensable to modern IHL, or irresponsible in their approach to it, or both, their influence distinguishes IHL and ICL as a matter of sources.

Courts interpreting norms of ICL, including norms of IHL that are part of ICL, also must reckon with a unique norm front and centre to their elaboration of the law—*nullum crimen sine lege*. Although all courts have a duty to state—or at least make a good argument for—what the law is, rather than what they would like it to be, criminal courts must be particularly careful in that regard.⁴³ Doubts about the existence of a rule should be resolved in favour of the defendant, a position that does not apply to civil litigation. Readers of international criminal law judgments, from whatever court, must take account of a court's special methodology. This interweaving of *nullum crimen* with ICL has three implications for our purposes.

First, it should serve as a built-in constraint on the progressive development of international law through the options of criminal courts. However much other courts, particularly human rights courts, should be applauded for teleological interpretations of treaties or expansive interpretations of custom, criminal tribunals as a general matter should not be going far down that road. Yet some tribunals have done so with little negative reaction from States. Either because States lack sympathy for the defendants or agree with the endpoint, the law can evolve this way. From a starting point of avoiding of impunity, there is certainly a case to be made that *nullum crimen* should mean less in ICL than in domestic law at this early stage of the former. Yet respect for the defendant, which lies at the core of criminal law, exerts, in my view, a greater pull in the other direction.

Secondly, *nullum crimen* might even argue for precluding the use of customary law as a rule of decision, i.e., indictments or judgments based on customary law crimes. Customary law is often faced with particularly hard interpretive issues (e.g., have most States really adopted the norm with *opinio juris*?), though treaties are subject to interpretive disagreements as well. Dapo Akande dismisses this concern by noting that *nullum crimen* in international law has never required that a crime be written down before the relevant conduct takes place.⁴⁴ But that simply assumes that international law is in fact respecting defendants' rights with such a position.

Indeed, just as the *Nicaragua* judgment viewed custom as evidenced through denials of violations, courts seem to demonstrate the power of the principle of legality even when they are trying to find ways around it. The International Military Tribunal adopted a creative—and unconvincing—view of the principle in criminalizing violations of the Kellogg–Briand Pact; the Control Council to Tribunal did a better job in *US v Altschuler* in offering a series of grounds, which, at least in combination, come closer to justifying the charges against the Nazi defendants.⁴⁵ But both tribunals seemed to have felt a need to reckon with the principle and not simply assume that they could retroactively punish the defendants. So did the ICTY in *Tadić*.⁴⁶ With the ICC Statute in place, the determination of custom becomes less pressing in that venue, but domestic courts may still need to interpret *nullum crimen*.

Thirdly, the principle of legality represents a challenge to black-letter sources doctrine insofar as it constitutes an additional rule of recognition, one unique to ICL. *Nullum crimen* itself is a classic example of a general principle of law—for it is central to the domestic criminal law of all States⁴⁷—but does not assume the subsidiary position that general principles typically serve in identifying international legal rules.

5. Confronting the Practice and Views of Non-State Actors

Finally, IHL challenges our understanding of sources as it offers a strong case, more than any other area of law, to count the practice and *opinio* of non-State actors in determining the existence and meaning of a norm. Although non-State actors influence other areas of law, when they act as combatants, their connection to law and sources regarding IHL and ICL becomes quite special. Among key questions that arise: (1) Are agreements between States and armed groups on the conduct of hostilities or treatment of those *hors de combat* binding as treaties?; and (2) Are those agreements or the unilateral practices or legal views of those non-State actors evidence for determining customary IHL in NIACs or subsequent practice for interpreting Common Article 3 or Protocol II?

On the first question, the legal bindingness of agreements concluded by non-State armed groups, we see a diversity of views, at least some key actors, on some occasions, are willing to see international agreements as extending beyond treaties by States and international organizations.⁴⁸ These include the Security Council itself.⁴⁹ The recognition of the bindingness of agreements signed by non-State actors extends beyond IHL to the range of peace treaties whose parties include opposition forces.⁵⁰ And the practice of the ICRC in encouraging armed groups to conclude agreements with governments and with each other, issue unilateral declarations of commitment to IHL rules, or include IHL commitments in peace agreements suggests that a doctrine denying a law-making role to such actors has reached its expiration date.⁵¹

With respect to the second issue, at least regarding non-State actors' ability to contribute to custom, the black letter remains dominant, denying the possibility of considering their actions and views as practice and *opinio juris*. Thus, the ILC's ongoing study of customary international law study reiterates that only State practice counts (including the practice of intergovernmental organizations), though it does add cryptically that non-State actor practice 'may be relevant' to assessing State practice.⁵²

On the other hand, scholars have been receptive to integrating non-State actor conduct into a doctrine of sources. Decades ago, Michael Reisman wrote about the prevalence of 'private armies' and their claims for participation in the legal process.⁵³ He acknowledged the need for their inclusion in venues if it would further the goals of minimum public order and protection of human dignity. With respect to IHL, the push to embrace the practice of non-State armed groups in a doctrine of sources or law-making, with respect to both treaty and custom, is gaining currency. Jan Klabbbers and Marco Sassoli have emphasized, respectively, the fairness of such a role (i.e., if armed groups can be bound by rules, then they ought to be able to express their consent to them more explicitly) and the effectiveness of such a role (i.e., involvement of those groups in law-making will increase the prospects for their compliance).⁵⁴ The involvement of some non-State actors in IHL law-making is thus (1) at a minimum normatively permissible because IHL treats them as legitimate actors and not outlaws—unlike, say, the involvement of criminal gangs in drafting money-laundering treaties; (2) at a maximum, normatively required, and (3) useful for fostering compliance with legal rules.

The most difficult question in developing a new sources doctrine for IHL will be which armed groups should have a law-making capacity, and what sort of capacity will it be. Will it be those that meet the criteria of Protocol II? What if they control territory but systematically carry out atrocities? Some States still want to treat all non-State armed groups as criminals, even though IHL does not do so for such groups in NIACs. Yet, this fear of legitimating unsavory non-State actors has not prevented States from signing peace agreements with them.

Finally, beyond armed groups, it is hard to deny the influence of one unusual non-State actor, the ICRC, on IHL, whether in its restatement of the rules of customary IHL or its views on direct participation in hostilities. And even as the ICRC formally states that only the practice of States is relevant,⁵⁵ it certainly examines the practices of organized armed groups. Moreover, its own practice regarding its competence

(e.g., visiting prisoners) creates either new customary IHL or defines the meaning of the Geneva Conventions' brief provisions about the institution.⁵⁶

The five patterns described above demonstrate that when decision-makers need to identify and apply norms of IHL and ICL, they tend to—or at a minimum are facing strong arguments to—make major interpretive moves regarding formal sources. Thus, they emphasize processes beyond those in Article 38; interpret the elements of custom in unconventional ways; rely heavily on court rulings; superimpose special values, notably *nullum crimen*; and take account of non-State actor conduct. The practice is inconsistent and diverse across institutions. It is thus very difficult, or at best premature, to identify with clarity a specific rule of recognition for either IHL or ICL, let alone one common to both.⁵⁷

Equally important is that the pattern shows that, whatever the rule(s) of recognition for IHL and ICL might now be, it is *not* that of Article 38. That is, the absence of a consensus on a new rule of recognition is proof of the erosion of the traditional doctrine, *not of its continued validity*. The latter view is reminiscent of the conclusion of René-Jean Dupuy, acting as arbitrator in the 1977 *Texaco/Calasiatic* arbitration—that the absence of a new consensus in the 1970s between North and South over compensation for expropriation meant that the old consensus (reflected in a 1962 General Assembly resolution favouring the Northern position) was still valid.⁵⁸

p. 928 Instead of seeking rules of recognition, the above inquiry points in an alternative direction—to identify *law-making inputs* that can constitute *indicators* of law. Thus, if we see a purported norm as the output of what we regard as the right combination of the various inputs, the indicators are strong that it is a legal norm. At least two indicators are generally dispositive, i.e., a treaty between States is binding on them as law, and a Chapter VII decision of the Security Council is binding law for all States (setting aside the possibility of *jus cogens* violations). But the other inputs come with a valence—strength combined with direction—that cannot be generalized by their origin alone, e.g., different court decisions, expert body reports, or forms of State practice. Over time, interpretive actors might evaluate the indicators so predictably and uniformly that they become true rules of recognition for a specific field. A concept of sources, then, requires identifying and evaluating indicators of law, including the transformation of those indicators into rules of recognition.

Seen this way, both IHL and ICL each have some indicators that generally seem accepted as strong, although, as explained below, we cannot avoid disagreements about them across institutional interpreters. Beyond the two dispositive indicators above, we could say, for instance, that a norm that purported to be one of customary IHL would have strong indicators if it were recognized as such by the Security Council or General Assembly (acting by consensus), military manuals of warfighting States, and the ICRC, and weak indicators if only other actors endorsed its customary status. For the scope of an international crime, the judgments of the ICTs are strong indicators, especially insofar as they take account of *nullum crimen sine lege* (an input that is simultaneously a legal principle).

But even if those indicators become rules, they cannot be incorporated in the traditional sources doctrine by simply adding items to Article 38. For as long as we have different indicators for ICL and IHL, compared to each other and compared to other areas, we will not have any list that would be a single rule of recognition of all international law. We might, then be able to establish a comprehensive list of indicators for the whole of international law. Whether we call this a doctrine or not is beside the point; what IHL and ICL suggest is that we need to accept that, for international law writ large, the best we can do is to devise such indicators.

IV. The Myopia of Traditional Sources Doctrine

Yet attachment to the traditional sources doctrine as either reflecting actual practice or as theoretically capable of encompassing IHL and ICL remains.⁵⁹ Defenders of the need for a single rule of recognition across international law might regard the above characterization of IHL and ICL as a challenge, but a welcome one—to show that the existing doctrine of sources can accommodate all these variations. That approach is, as stated earlier, the essence of a legal formalist approach that views disruption to those categories as disruption to the law itself.⁶⁰

1. Special Regimes and the Fear of Fragmentation

Implicit in a defence of the doctrine of sources when it comes to IHL and ICL are several claims. One is that international law will lose its defining trait *as law* or as a *legal system* if it is to accept different criteria for law, or processes capable of producing law, or indicators of legal status, for different subject areas. Others in this volume will address this claim, but I offer a brief reply based on IHL and ICL. First, as for international law's status as law, H. L. A. Hart made clear that a rule of recognition was not required.⁶¹ And certainly the rules of IHL and ICL are considered binding. Secondly, if IHL and ICL have their own formal sources (whether we see them as indicators or rules), Hart's conclusion about international law—that its lack of a single rule of recognition means it is not a single *legal system*—does not make international law 'fragmented'.⁶² As the ILC's Fragmentation Study makes clear, much unites various special regimes of international law.⁶³ So the failure to meet Hart's criteria of a system, assuming he is right on that score, is not a threat to the unity or reality of international law.

p. 930 A second concern of those arguing for the unity of sources is that those who expound and defend international rules will lose their credibility and legitimacy without a single rule of recognition.⁶⁴ This claim may be correct as a diagnosis of the predilection of IHL lawyers and ICT judges to deny what they are doing. Particularly in the case of the former, if these professionals can argue that IHL is grounded in the same legal bases as other areas of law, all centred on State consent, they can enhance their own authority to say what the law is, to the exclusion of others. But for both IHL and ICL, if the relevant decision-makers of whatever kind—military lawyers counselling soldiers, international organizations invoking the law in resolutions, the ICRC explaining the law to parties—are aware of, and faithfully apply, the indicators (or whatever may turn out to be the accepted rules of recognition) for those regimes, then it is hard to see how they have lost their credibility or legitimacy.

2. The Purposes of the Concept of Sources

The attempt to reconcile highly diverse forms of law-making with traditional sources doctrine needs to be replaced by a focus on the purpose of such a doctrine. In the first instance, lawyers need to be able to identify modes of prescription able to produce law, to demonstrate to a particular audience that a purported obligation (or permission, or prohibition) has that special legitimacy that comes from being a legal rule. Those features of a legal rule (as opposed to a moral rule or mere practice) are critical because they increase the likelihood that the rule's policy content is followed by the relevant actors, including because of the possibility of sanctions for non-compliance. A rule's status as legal rule matters in the real world because many actors take that legal aspect seriously, even if some violate legal rules or act based on non-legal commands.⁶⁵ If legal rules were not treated differently by the general population from other rules, societies would not bother to create them at all.⁶⁶

The goal, then, of a concept of sources is to *promote compliance* with international legal rules. In making this assertion, I assume that many norms can be identified as law—that not all invocation of sources is mere

manipulation to advance one side's views. And claims by one actor that another actor should comply with a rule, face consequences for non-compliance, or enforce a rule against a third party arise in multiple settings. These range from bilateral diplomacy, to UN resolution-drafting, to NGO advocacy, to an international court proceeding. Across arenas, the actors making legal claims and the targets of those claims are likely to have different views about sources—including on whether sources should be seen in terms of rule(s) of recognition or indicators. Each institutional setting has its expectations, and some settings place more weight on certain modes of prescription than on others.

As a result, lawyers will and should tailor their arguments about sources to that context, or they risk irrelevance by arguing past those whom they are trying to convince. From that perspective of making international law work, it is far more important to identify modes of law-making regarded as legitimate *within institutional contexts* than to find a single rule of recognition for all international law, or a 'doctrine' of sources, or even a rule of recognition for IHL or ICL. The traditional doctrine is merely what Reisman calls a 'myth system', an idealized construct that projects lawyers' hope for an orderly, predictable rule of recognition.⁶⁷ In some institutional contexts, lawyers will need to respect and follow the myth system, but in others, they need to break free of it.

IHL and ICL confirm the importance of seeing sources in institutional terms. In front of the ICJ, or the Eritrea–Ethiopia Claims Commission, counsel would be well advised to rely on Article 38, interpreted conservatively (e.g., no non-State actor involvement), because those bodies give enormous weight to those sources (and Security Council resolutions). In that venue, the myth system is the operative rule. But in the ICJ, prosecutors and defence lawyers will need to look beyond a conservative interpretation of Article 38 to convince judges what the law is, even as they also need to be aware of the overlay of *nullum crimen sine lege*. When a military legal adviser is asked to restate the law to a commander, she might emphasize different law-making processes, e.g., the practice and *opinio juris* of States that have fought wars. And when the ICRC is explaining the law to an armed group suspicious of governments, it may invoke another set of law-making processes.

This diversity of approaches to identification of sources across venues does not equate with a complete dissensus on the secondary rules. Those invoking IHL across arenas will rely on some of the same modes of law-making to identify relevant rules. Treaties will still be *primus inter pares*: every international lawyer will look to the Geneva Conventions and Protocol I for IHL rules in IAC, or to the Torture Convention for the definition of torture. Nor does this diversity mean that the primary rules are indeterminate. One cannot argue with success, for instance, in any venue, that Common Article 3, or the principle of distinction, is not customary law, even as different lawyers might get there by slightly different means. The tension between an institutionally tailored concept of sources and a true doctrine can resolve itself at times.

3. The Scholarly Project of Identifying Sources

Thus, legal scholars who want to identify how the law works in practice will need to appraise the world we have, not some ideal system where all actors shed their institutional identity and adhere to a uniform sources doctrine. Can we expect a military lawyer and an international court judge to agree on a concrete rule of recognition that identifies precisely what counts for a rule of IHL or ICL? A purposive and institutional approach to sources is part of a broader, interdisciplinary agenda of understanding when a legal argument 'clicks' with a target audience, including the relevance of hard or soft law.⁶⁸

The shift in emphasis inherent in this view of sources does not represent an abandonment of a normative commitment about law-making in favour of a purely descriptive one (as political scientists might approach the problem). Lawyers should be able to appraise when institutional actors are acting competently or incompetently in their approach to prescriptive processes. Although advocates need to take account of

institutional settings as they argue why a norm is law, we can also demand that those institutions rely on indicators—or, if they exist, rule(s) of recognition—with some predictability and not just make up the law as it comes along. So, a descriptive agenda should work hand in hand with a normative one.

Developing institutionally sensitive criteria for sources represents a great challenge for international legal scholarship. We should be able to appraise, for each institution, its role within the implementation of international law and identify the law-making processes it can utilize in determining the law. Such a project will then help us distinguish among sources upon which States, international organizations, NGOs, and other actors can rely as they project their policies and legal interpretations.⁶⁹

V. IHL and ICL as a Window onto Moral Sources

Even as we expand our understanding of the sources of IHL and ICL to consider institutional arenas, those two areas of law invite another, equally important inquiry—into the moral sources of legal rules. For while the prospects for compliance with a rule increase if the rule is a product of accepted sources (as judged by the relevant institution), those prospects will also improve if the rule resonates with certain moral sensibilities. If a set of norms is morally defensible under a considered moral viewpoint, we have provided those actors additional reasons for respecting it beyond just an appeal to some inner respect for the law as law or the fear of adverse consequences for ignoring the rules. Although the project of identifying moral sources is methodologically distinct from that of identifying the formal sources of a rule, it is no less important.⁷⁰

With respect to IHL, the identification of its moral sources is the stuff of significant moral philosophy. Some, like Augustine's just war theory, predate IHL itself. In the modern era, Michael Walzer's *Just and Unjust Wars* remains the canonical defence of many principles of modern IHL and ICL, including the separation of *jus ad bellum* and *jus in bello*, the principle of distinction, and the rejection of the following orders defense.⁷¹ In reaction to Walzer's defence, more recent scholarship from Jeff McMahan and his followers sees significant moral shortcomings in IHL and extends ideas of individual responsibility from domestic criminal law into the international realm.⁷² With regard to ICL, scholars now reckon with the moral justification for international criminalization of certain atrocities.⁷³ However, the crimes recognized by ICL do not just correspond to grave violations of international law; some serious acts are not international crimes, and some international crimes are not particularly serious.

We cannot expect international law to simply map onto a philosophical ideal theory of ethical behaviour by States or individuals. It will remain the product of a political process, as studies of the material sources of international law make clear. Yet holding the rules up to ethical scrutiny remains a valuable project, for the moral justification of the rules may prove as important, if not more so, than the formal sources for them. Moreover, understanding the moral sources of rules can serve as a moral guide for the development of new rules.

VI. Conclusion

The identification of IHL and ICL, like that of other special regimes, requires the lawyer and scholar to account for processes and participants not captured in the traditional doctrine of sources. Article 38's list proves deceptive in its omission of key processes and actors, its simplicity regarding the elements of custom, and its failure to consider the influence of court rulings and those courts' need to respect *nullum crimen sine lege*. While I would not rule out that a single rule of recognition might encompass IHL and ICL, it is hard to see the real-world relevance of a doctrine that glosses over the unique features of law-making in these two regimes. More fundamentally, such a doctrine neglects the inevitability and, in some cases, the normative necessity that different institutional actors adopt distinct approaches to determining when a rule is law for their purposes.

It is tempting to think that if international actors could only agree upon a single rule of recognition, disagreements about whether a norm is indeed a legal rule, and what it means, would be greatly diminished. Though consensus-building on legal rules is a laudable goal, IHL and ICL suggest we are going about it the wrong way by searching for that single rule of recognition. We would still be making great progress towards that goal if we could agree on certain indicators of sources for each subject area. Yet some disagreements over secondary rules and primary rules will not be fixed by that solution because of institutional identities. The ICRC and the US Department of Defense will probably disagree for the foreseeable future about direct participation in hostilities; the ICC will find ways to chart its own interpretation of ICL rules distinct from that of the ad hoc tribunals. Scholars should give guidance to institutions on sources for discerning the law, but that guidance must take account of institutional identities and roles. In a system like international law, we should not consider the absence of a single rule of recognition or the continuation of disagreements over the acceptable ways to make IHL and ICL norms as a fatal condition.

Research Questions

- Do the processes for the prescription of international criminal law and international humanitarian law suggest that sources should be conceived as indicators of law, rather than as necessary and sufficient conditions for law? ↴
- Do you agree with the author that sources are institutionally sensitive and that sources research should focus on identifying how different institutions do and should treat different sources?

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Notes

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- 3 Myres S. McDougal and W. Michael Reisman, 'The Prescribing Function in the World Constitutive Process: How International Law is Made', in Myres S. McDougal and W. Michael Reisman, eds, *International Law Essays* (Mineola: Foundation Press, 1981), 355–80, 355–6.
- 4 See Hilary Charlesworth, 'Law-making and Sources', in James Crawford and Martti Koskenniemi, eds, *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012), 187–202, 189 (law is 'generated by a multi-layered process of interactions, instruments, pressures and principles').
- 5 Report of the Study Group of the International Law Commission on the Fragmentation of International Law, finalized by Martti Koskenniemi, 13 April 2006, UN Doc. A/CN.4/L.682, para. 129.
- 6 *ibid.*, para. 192.
- 7 Charlesworth, 'Law-Making', p. 189.
- 8 UNSC Res. 827 (25 May 1993); UNSC Res. 955 (8 November 1994).
- 9 See Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), 3 May 3 1993, UN

- Doc. S/25704, paras 35, 41.
- 10 UNSC Res. 1674 (28 April 2006), para. 5.
- 11 *ibid.*, para. 8.
- 12 UNSC Res. 1325 (31 October 2000), paras 9–11; UNSC Res 2068 (19 September 2012), paras 2–3.
- 13 UNSC Res. 2127 (5 December 2013), paras 17–18, 54; UNSC Res 2134 (28 January 2014), para. 30 (both concerning the Central African Republic).
- 14 UNSC Res. 1593 (31 March 2005); UNSC Res. 1970 (26 February 2011).
- 15 UNGA Res. 60/147 (21 March 2006). See also UNGA Res. 55/89 (22 February 2001), paras 2–3.
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- 21 Melzer, ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities’, Principle IX, pp. 77–82.
- 22 Harold Koh, ‘The Obama Administration and International Law’, Speech before the Annual Meeting of the American Society of International Law, US Department of State (25 March 2010), <<https://2009-2017.state.gov/s/l/releases/remarks/139119.htm>>, accessed 23 June 2017¹.
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- 26 Some of these moves are not unique to customary IHL or customary ICL. See e.g., Bruno Simma and Andreas Paulus, ‘Le rôle relatif des différentes sources du droit international pénal’, in Hervé Ascencio, Emmanuel Decaux, and Alain Pellet, eds, *Droit International Pénal*, 2nd edn (Paris: Pedone, 2012), 67–80, 72–3.
- 27 See e.g., Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, pp. xlv–xlvi; H. H. G. Post, ‘Some Curiosities in the Sources of the Law of Armed Conflict Conceived in a General International Legal Perspective’, in L. A. N. M. Barnhoorn and Karel C. Wellens, eds, *Diversity in Secondary Rules and the Unity of International Law* (The Hague: Martinus Nijhoff, 1995), 83–117, 99.
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- 30 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 259, 260 (paras 84, 87).
- 31 Antonio Cassese, *International Criminal Law*, 2nd edn (Oxford: Oxford University Press, 2008), p. 9.
- 32 See e.g., Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford: Oxford University Press, 2008), pp. 79–105; Ilias Bantekas, ‘Reflections on Some Sources and Methods of International Criminal and Humanitarian Law’, *International Criminal Law Review* 6 (2006): 121–36.
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- 34 Shane Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law* (Cambridge: Cambridge University Press, 2014), p. 80; see also Kenneth S. Gallant, ‘International Criminal Courts and the Making of Public International Law: New Roles for International Organizations and Individuals’, *The John Marshall Law Review* 43 (2010): 603–34, 612 (‘the value of a judicial act as norm-creating (lawmaking) is determined by whether it is followed or not’).
- 35 See Hersch Lauterpacht, *The Development of International Law by the International Court* (Cambridge: Grotius

- Publications, 1982 reprint), p. 380 (preferring that courts prove absence, rather than existence, of *opinio juris*).
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- 37 See e.g., Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka (31 March 2011), paras 194–203, <http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf>, accessed 21 July 2016.
- 38 See *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1-AR72, Appeals Chamber (2 October 1995).
- 39 For the latter, see *Prosecutor v Vasiljević* (Judgment) IT-98-32-T (29 November 2002), paras 193–204.
- 40 See e.g., *Public Committee against Torture v State of Israel*, HCJ 769/02 (11 December 2005).
- 41 See e.g., *Hamdan v Rumsfeld*, 548 US 557 (29 June 2006) (Common Article 3 not limited to civil wars); and Israeli cases discussed in David Kretzmer, 'The Law of Belligerent Occupation in the Supreme Court of Israel', *International Review of the Red Cross* 94, 885 (2012): 207–36.
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- 45 Compare *Trial of the Major War Criminals before the International Military Tribunal*, Part 22 (1 October 1946), p. 462, with *US v Altstoetter et al.*, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, Volume 3 (1951), pp. 954, 974–9; see also Van Schaack, 'Crimen sine Lege'.
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- 48 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: Oxford University Press, 2012), pp. 109–13.
- 49 *ibid.*, p. 109.
- 50 See Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford: Oxford University Press, 2008), pp. 127–38.
- 51 ICRC, 'Increasing Respect for International Humanitarian Law in Non-International Armed Conflict' (February 2008), pp. 16–27, <https://www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf>, accessed 21 July 2016⁴¹; see also Bell, *On The Law of Peace*, pp. 135–6 (circularity of much of the doctrine of legal subjects).
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- 53 W. Michael Reisman, 'Private Armies in a Global War System: Prologue to Decision', in McDougal and Reisman, eds, *International Law Essays*, 142–90.
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- 58 See *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Libya* (Arbitration Award) (1977) 53 ILR 389. See chapter 41 by Raphaël van Steenberghe in this volume, p. 910, 'Specificities characterizing [IHL and ICL] . . . must only be viewed as specific applications of [the] secondary norms [regulating the classical sources of international law] and not as derogating from them . . . '.
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- 61 H. L. A. Hart, *The Concept of Law*, ed. Paul Craig, 3rd edn (Oxford: Oxford University Press, 2012), pp. 233–5.
- 62 See Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1999), p. 150 (international law as a legal system, but not an 'institutionalized' one).

- 63 ILC, Report of the Study Group on the Fragmentation of International Law, paras 191–4.
- 64 See e.g., d’Aspremont, ‘Théorie des Sources’, p. 96 (‘fragmenter le régime général des sources du droit international . . . emporte un sérieux risque d’affaiblissement de l’autorité et de la légitimité . . . de toute . . . autorité à laquelle il revient d’appliquer le droit humanitaire’).
- 65 This observation does not mean that the validity of a legal rule depends on a certain mindset by individuals in their approach to legal rules. See e.g., Hart, *The Concept of Law*, pp. 115–16.
- 66 See Raz, *Practical Reason*, pp. 149–54 (on legal system as the embodiment of an institutionalized system of exclusionary reasons).
- 67 W. Michael Reisman, *Folded Lies: Bribery, Crusades, and Reforms* (New York: The Free Press, 1979), p. 16.
- 68 See e.g., Steven R. Ratner, ‘Persuading to Comply: On the Deployment and Avoidance of Legal Argumentation’, in Jeffrey L. Dunoff and Mark A. Pollack, eds, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013), 569–90.
- 69 See, e.g., Anthea Roberts and Sandesh Sivakumaran, ‘Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law’, *Yale Journal of International Law* 37 (2012): 107–52, 125 (‘needs of the international community as a whole’ should determine role of non-State actors in the making of IHL).
- 70 See generally Steven R. Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (Oxford: Oxford University Press, 2015).
- 71 Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 5th edn (New York: Basic Books, 2015).
- 72 See e.g., Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009).
- 73 See e.g., Andrew Altman and Christopher Heath Wellman, ‘A Defense of International Criminal Law’, *Ethics* 115 (2004): 35–67; Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (Oxford: Oxford University Press, 2010).