Solving the Conundrum between Military Training, Prevention and Compliance in International Humanitarian Law

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Abstract

International humanitarian law (IHL) must be disseminated as widely as possible, and integrated into programmes of military instruction or training. The obligation to train the military in IHL is a laconic norm of prevention: it offers scant guidance, in a branch of international law which lacks transparent oversight and monitoring. Once assumed, a causal relationship between IHL training, prevention and compliance is now in doubt. Deficient military training in IHL has been implicated in the wilful killing of civilians and the torture of detainees; but scholarship has gradually acknowledged the insufficiency of IHL training to prevent violations, while interdisciplinary research suggests that military culture, moral disengagement and discourse about law and enemy forces may be more powerful causal factors for IHL violations than ignorance of the law. There is a conundrum between IHL training, prevention and compliance, which this thesis seeks to solve.

There are four contributions. First, via a genealogy of the IHL training obligation and a synthesis of legal and interdisciplinary literature, the thesis builds standards for military training in IHL based on group and individual factors, soldiers' understanding and their willingness to comply. Second, by integrating the training obligation with IHL's other preventive norms, including command responsibility and the duty to disobey unlawful orders, the thesis crafts a theory of prevention in IHL. Third, it offers an adapted compliance theory, drawing on constructivist communities of practice, which acknowledges seven distinctive challenges for compliance in IHL. Fourth, a case study of the British Army's IHL training finds recurrent assertions that the training was taking place or reforms implemented; recurrent patterns of violations and limited transparency; plus a 'legal siege' discourse which resists accountability and risks alienating soldiers from IHL. The most recent, belated reforms provide for comprehensive instruction in IHL, just beginning to connect training, prevention and compliance.

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Throughout 2016, I was on leave from this research to foster a baby boy. He became our son through adoption shortly before the thesis was complete. This work is dedicated to my husband Justin and our little boy.

Chapter 1. Introduction

1.1 International Humanitarian Law at the 'Vanishing Point' of Compliance

> If the Convention is to be implemented, its spirit must be introduced into the customs of soldiers and of the population as a whole. Its principles must be popularised through extensive propaganda.[1]

> If the legal norm, enacted by the legislator, provides sanctions, and if such a "law" becomes the content of a man's consciousness, it can very well become a motive of his behaviour and hence a cause of his … abstaining from theft and murder.[2]

> …the lawyer must do his duty regardless of dialectical doubts, though with a feeling of humility springing from the knowledge that if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law.[3]

These quotations sketch three facets of a conundrum between military training in international humanitarian law (IHL), the prevention of violations and compliance (behavioural conformity) with the law in armed conflict. The first quotation, from Henri Dunant's colleague and rival Gustave Moynier, argues that dissemination of international humanitarian law (IHL) is a necessary condition for its implementation, and links IHL's ethos to repeated behaviour ('its spirit must be introduced into the customs of soldiers…'). It is the first iteration of the International Committee of the Red Cross (ICRC)'s historic approach to dissemination: the belief that increasing awareness of IHL rules among soldiers and civilians is a prerequisite for the implementation of those rules during armed conflict.

Gustave Moynier, *'Si l'on veut que la Convention soit efficace, il faut en faire pénétrer l'esprit dans les mœurs des militaires et dans celles des populations tout entières. Il faut en vulgariser les principes par une propagande active.'* Second International Conference of the Red Cross, Berlin, 1869, *Compte-rendu des travaux de la Conférence internationale tenue à Berlin du 22 au 27 avril 1869 par les délégués des gouvernements signataires de la Convention de Genève et des sociétés et associations de secours aux militaires blessés et malades* (J.F. Starcke 1869) 74

Hans Kelsen, *General Theory of Law and State* (Anders Wedberg trans, Lawbook Exchange 2007) 166

Hersch Lauterpacht, 'The Problem of the Revision of the Law of War' (1952) 29 British Yearbook of International Law 360, 382

The second quotation, from Hans Kelsen's *General Theory of Law and State,* acknowledges the possibility of legal rules shaping human thought, agency and action, in a critique of O.W. Holmes' view that domestic legal rules do not cause changes in behaviour.[4] This process is doubly contingent: on sanctions and on law being internalised into 'consciousness'; and it assumes the effectiveness of sanctions: '[i]f the legal norm… provides sanctions, and if such a "law" becomes the content of a man's consciousness…' It is clearly limited to the domestic law context ('enacted by the legislator') and sees individual 'sanctions' as one of two prerequisites for law motivating action. Yet Kelsen's critique is enigmatic. It does not express *how* law might enter into human agents' consciousness. In modern terminology from constructivist international relations (which considers that norms constitute and explain states' behaviour and identity within the international order, and studies the mechanisms by which this occurs),[5] this is how norms might be 'internalised', becoming 'taken-for-granted' by states and individual actors.[6] Nor does Kelsen address *how* a combination of sanctions and conscientious internalisation can motivate an individual's subsequent behaviour. There are explanatory gaps between promulgated or disseminated rules on the one hand and human consciousness and agency on the other. The relationship between IHL rules and subsequent individual or regimental conduct in armed conflict needs to be explored. The brief extract from Kelsen illustrates the need to disaggregate questions of compliance,[7] and at times to reorient questions of norm internalisation and behaviour from the state to the soldier and officer; or in non-international armed conflict, also to the member of an armed group.

The third extract acknowledges that the structure and content of IHL presents distinctive challenges for the military legal adviser. It concludes Hersch Lauterpacht's *problématique* on the Four Geneva Conventions of 1949. Having identified 'gaps,

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Kelsen (n 2)

Martha Finnemore and Kathryn Sikkink, 'Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics' (2001) 4 Annual Review of Political Science 391; Jutta Brunnée and Stephen J. Toope, 'Constructivism and International Law' in Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2012)

Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 Yale Law Journal 2599; Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 International Organization 887, 895

Michael P. Scharf, 'International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate' (2009) 31 Cardozo Law Review 45

compromises, obscurities…' in the treaty texts,[8] Lauterpacht lists at length the matters left unregulated or unsettled in the Four Geneva Conventions, and recommends evolving clarification of IHL as weapons develop and conflicts become more complex. The extract considers the role of military legal advisers some twenty-five years before states adopted Article 82 of Additional Protocol I to the Four Geneva Conventions, which requires states parties to make legal advisers available to commanders, to advise on the application of the Geneva Conventions and Additional Protocol I, and on 'appropriate instruction' to troops in IHL.[9] IHL's flaws do not require its 'mere exposition' in military manuals and textbooks, but 'a critical spirit' from the legal adviser.[10] In Lauterpacht's view, the progressive development of IHL is poorly served by presenting contested interpretations as settled law.[11] The 'humility' Lauterpacht suggests reflects IHL's indeterminacy and hints at caution in the relationship between legal adviser and commander, or between legal adviser and the officers or soldiers he or she trains.

Lauterpacht's 'vanishing point' is a nod to the Oxford legal theorist Thomas Holland.[12] Holland believed that international law could not be subject to the fiat of a sovereign, as John Austin had argued, without international law either becoming part of domestic law, or requiring an entity to arbitrate disputes and enforce its norms.[13] IHL's functioning as a legal system, and implicitly states' compliance with it, is at a 'vanishing point', although interdisciplinary compliance theory postdates Lauterpacht's observations by some decades.[14] His notional legal adviser has duties despite this, to clarify and disseminate the law to governments, the armed forces and 'others', 'with determination though without complacency and perhaps not always very hopefully…'[15] Training and advice in IHL involves communicating an imperfect, contested set of norms to an audience of soldiers

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Lauterpacht (n 3) 380; Hersch Lauterpacht, *The Function of Law in the International Community* (1933; reprint, Oxford University Press 2011) 412, n 2

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (AP I) art 82

Lauterpacht (n 3) 380

ibid., 379

Thomas E. Holland, *Elements of Jurisprudence* (9th edition Oxford University Press 1900) 369, cited in Richard Collins, 'No Longer at the Vanishing Point? International Law and the Analytic Tradition in Jurisprudence' (2014) 5 Jurisprudence 265, 268

ibid., *per* Collins

1.4 (henceforth, cross-references to other sections in the thesis appear in this form)

Lauterpacht (n 3) 382

and officers who may not fully understand these norms, or may express a contingent willingness to comply.

These three extracts begin to sketch a conundrum (an intricate and durable problem, but not an insoluble one) between military training in IHL, prevention and compliance: the relationship between these three concepts is neither fully theorised nor empirically proven. From Moynier, dissemination may be necessary, but can it be sufficient to prevent IHL violations and ensure compliance? This theme recurs in 1.2 below. Applying Kelsen, how do individual soldiers, officers and armed group fighters internalise IHL norms, and to what extent can the norms be said to cause subsequent behaviour? These questions return in 1.4 below. And prompted by Lauterpacht: how does IHL's indeterminacy affect IHL training? What else is distinctive about modern IHL that places it at the 'vanishing point' of international law compliance? The following paragraphs address these questions, finding seven distinctive challenges for compliance in IHL.

First, contested norms: just as Lauterpacht emphasised 'gaps, compromises, obscurities…', Dill finds 'structural indeterminacy' in IHL, so that its norms depend for their meaning on the 'interpreting agent's conception of utility and reasonableness'.[16] Diplomatic consensus to include 'excessive' or 'reasonable' in IHL treaty norms delegates considerable authority to individual soldiers' and officers' judgement. Dill finds it 'puzzling' that simultaneously, not much is expected of individual combatants' reasoning and application of IHL in the stress of battle, and that IHL leaves so much to individual agents' moral discretion.[17]

All branches of law include indeterminate or contested norms, where lawyers on either side of a dispute can expand or contract definitions to support an arguable case. The need to interpret legal texts is the rule, while clarity is the exception.[18] In IHL, however, the human stakes are higher and bloodier than in other areas of law. Although not all of IHL is contested (the protections granted to prisoners of war in the Third Geneva Convention are not the subject of dispute), many IHL norms are poised between rival interpretations, with military necessity on the one hand and humanity on the other. These norms have

Janina Dill, *Legitimate Targets? Social Construction, International Law and US Bombing* (Cambridge University Press 2014) 352

ibid., 306

Chaim Perelman and Lucie Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* (Wilkinson and Weaver trans, University of Notre Dame Press 1969) 126

been stretched or contracted for operational or judicial reasons, with force protection arguments weighing military necessity more strongly than civilian protection,[19] or the principle of humanity weighing civilian protection more strongly than military necessity.[20] Individual IHL concepts can be ambiguous or contested, from the breadth of the definition of a military advantage differing between states;[21] the open-textured principle of proportionality – a prospective comparison of two qualitatively distinct predicted outcomes;[22] and the complexity in the principle of distinction where civilians take a direct part in hostilities.[23] Ambiguity is a common result of treaty negotiation, as states 'find it easier to build consensus at a higher level of abstraction.'[24] As Gillon and Waldron both point out, there are different types of indeterminacy and norm contestation. Gillon proposes tests to distinguish ambiguity, generality and indeterminacy,[25] while Waldron differentiates between ambiguity, contestability and vagueness.[26] Waldron argues that ambiguous laws do not by themselves undermine law's capacity to guide conduct, as individuals can employ practical reasoning. However, Waldron believes that deliberate attempts to exploit ambiguity in the definition of 'severe …pain and suffering' which is part of the prohibition on torture have undermined international law's capacity to guide conduct.[27] It is the coexistence of indeterminacy within the law and irresponsible rhetoric about it that risks compliance. If multiple states engage in similar rhetoric, shrinking ambiguous prohibitions in international law to suit their policy preferences,

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Asa Kasher and Amos Yadlin, 'Military Ethics of Fighting Terror: An Israeli Perspective' (2005) 4 Journal of Military Ethics, 3, 11, 20. For a critique: Michael N. Schmitt, 'Fault Lines in the Law of Attack', in Susan C. Breau and Agnieszka Jachec-Neale (eds), *Testing the Boundaries of International Humanitarian Law* (British Institute of International and Comparative Law 2006) 277, 294, 296-8; Ruvi Ziegler and Shai Otzari, 'Do Soldiers' Lives Matter? A View from Proportionality' (2012) 45 Israel Law Review 1

Henry Shue, 'Civilian Protection and Force Protection', in David Whetham (ed.), *Ethics, Law and Military Operations* (Palgrave Macmillan 2011) 135

United Kingdom, Interpretive Statement on AP I, art 52(2), cited in Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict* (2nd edition, Oxford University Press 2004) 56; United States, Department of Defense Law of War Manual (2015) 5.7.7.2

AP I, art 51(5)(b); Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (ICRC, Cambridge University Press 2005) (ICRC Customary IHL Study) rule 14

AP I, arts 48, 51(2), 51(3); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (AP II), arts 13(2), 13(3); ICRC Customary IHL Study, rules 1, 6; ICRC (2009) Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (ICRC Interpretive Guidance DPH)

Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights through International Law* (Oxford University Press, USA 2013) 113

Brendan S. Gillon, 'Ambiguity, Generality, and Indeterminacy: Tests and Definitions' (1990) 85 Synthèse 391

Jeremy Waldron, 'Vagueness and the Guidance of Action' in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (Oxford University Press 2011) 58 n 9

ibid., citing the US anti-torture statute, 18 USC 2340 (1)

contested norms can cause, in Brunnée and Toope's words, 'non-compliance or, if the contestation is widespread and sustained, a shift in the norm itself.'[28]

Contested norms and rhetoric that undermines compliance can both affect IHL training. From the perspective of an individual soldier or armed group fighter, who may have limited education or literacy, the nuance of IHL's indeterminacy is likely to be lost. Complex terminology in training may confuse instead of instilling understanding of IHL norms. If a decision is taken to impart IHL norms with simplicity and clarity, there may be less confusion, but selective understanding; with a risk of international law violations when troops are deployed. Where IHL training is squeezed in the curriculum for basic or annual training, contested norms may be misunderstood. Instead of practical reasoning, as Waldron asserts, the soldier or armed group fighter will rely on the ethos of his unit and recollections from his training to decide how to implement the law. IHL training operates in particular social and organisational contexts. Contested norms and institutional responses to them exemplify the gap between norms and behaviour that is at the centre of the conundrum between IHL training, prevention and compliance. This is why Lauterpacht urges the military lawyer to impart IHL 'regardless of dialectical doubts' and acknowledges the inevitable 'humility' that results from IHL's problem of compliance.

The second distinctive challenge for compliance in IHL relates to the classification of conflicts.[29] Non-international armed conflicts (NIAC – between one or more States and one or more armed groups, or between armed groups) now outnumber international armed conflicts (IAC – conflicts between states, and under Article 1(4) of Additional Protocol I, wars of national liberation). There were 17 IAC and 38 NIAC in 2017.[30] Yet the treaty law for NIAC is less developed than that for IAC. Some NIAC are governed only by the minimum standards in Common Article 3 to the Four Geneva Conventions 1949. Others are regulated by Common Article 3 and Additional Protocol II: where the latter is ratified, and where the conflict meets the three-part threshold in Article 1(1) of Additional Protocol II,[31] and exceeds the lower threshold in Article 1(2) of 'internal disturbances and

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Jutta Brunnée and Stephen J. Toope. *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010) 124

Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford University Press 2012)

Annyssa Bellal, *The War Report: Armed Conflicts in 2017* (Geneva Academy, March 2018) 29

The NIAC must 'take place in the *territory* of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under *responsible command*, *exercise such*

tensions, such as riots, isolated and sporadic acts of violence…'. In response to this gap in regulation and protection, case law has begun to suggest that the distinction between IAC and NIAC is dissolving;[32] and both states and non-governmental organisations seek to apply treaty provisions alongside customary IHL to enable selected provisions of IAC IHL to protect non-combatants in NIAC. This is not without controversy. The 2005 Study on Customary IHL by the ICRC has encountered sharp criticism for including non-state actors and international organisations as sources of 'other practice' (but the Study itself acknowledges that the legal status of such practice is 'unclear'), and for apparently conflating the separate criteria of state practice and *opinio juris*.[33]

Third, despite a growing body of case law from the European Court of Human Rights (ECtHR) in particular, there is ongoing controversy on the co-applicability of and norm-by-norm interaction between IHL and international human rights law (IHRL), where a state has 'effective control' of territory outside the borders of its state,[34] or where its 'agents exercise control and authority over an individual'.[35] Military and political leaders in the UK persist in a strong interpretation of *lex specialis derogat legi generali,* as code for a rejection of the extraterritorial application of the European Convention on Human Rights (ECHR) and the remedies that result, and a preference for IHL as the sole applicable body of law in armed conflict.[36] Although there is still vivid debate on whether IHL and IHRL should be co-applicable,[37] this thesis adopts the view that a strong interpretation of *lex specialis* is naïve and uninformative: that a norm-by-norm inquiry into how IHL and IHRL might be more mutually influencing,[38] or a study of the situations

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control over part of its territory as to enable them to carry out sustained and concerted military operations and to implement [AP II]' (emphasis added)

Prosecutor v Tadić, IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (ICTY Appeals Chamber) 2 October 1995 para 70

Yoram Dinstein, 'The ICRC Customary International Humanitarian Law Study' (2006) 82 International Law Studies (Blue Book) 99; John B. Bellinger and William J. Haynes, 'A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law' (2007) International Review of the Red Cross 443; Jean-Marie Henckaerts, 'Customary International Humanitarian Law: A Response to US Comments' (2007) 89 International Review of the Red Cross 473;

Loizidou v. Turkey (Admissibility) (1995) ECHR 10; *Cyprus v. Turkey* (2001) ECHR 331; *Bankovic and ors v. Belgium and Ors* (Admissibility) (2001) ECHR 890; *Issa v. Turkey* (2004) ECHR 629

Al-Skeini and Others v. the United Kingdom (2011) ECHR 1093, para 137; *Jaloud v. Netherlands* (2014) ECHR App. no. 47708/08, 20 November 2014

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Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2nd edition, Cambridge University Press 2010) 24; Naz K. Modirzadeh, 'The Dark Sides of Convergence: A Pro-Civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict' (2010) 86 International Law Studies 349

Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press 2013) 232; *Hassan v The United Kingdom* (2014) ECHR 936

in which either IHL or IHRL might be the dominant interpretive tool are more productive.[39]

More importantly for IHL training, prevention and compliance, a state's rejection of the co-applicability of IHL and IHRL could entail a failure to consider the norms shared between the two branches of law.[40] For example, IHL prohibits torture and outrages upon personal dignity, cruel or humiliating and degrading treatment in international and non-international armed conflicts,[41] and these prohibitions must be included in military instruction in IHL. IHL's prohibitions on torture and inhuman treatment (as variously described) are mirrored by IHRL's prohibitions on torture and cruel, inhuman or degrading treatment or punishment.[42] The Convention against Torture (CAT) requires states parties to train 'military' law enforcement and anyone who might have custody of a detainee in these prohibitions.[43]

The fourth and fifth challenges for compliance in IHL are closely linked to the problems of contested norms, conflict classification and the co-applicability or convergence or IHL and IHRL. The fourth, interoperability, relates to the effect of these controversies when several states work together in multinational deployments. Where states hold differing interpretations of IHL norms and their interaction with IHRL; where states in a coalition have not all ratified the same IHL treaties, or have differing beliefs as to the status of customary IHL norms, soldiers will be trained in the interpretation preferred by their state, commanders and superiors. As Abbott notes, the jurisprudence of the ECtHR risks 'strain[ing]' or 'sever[ing]' cooperation between North American and European states

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Daragh Murray, *Practitioners' Guide to Human Rights Law in Armed Conflict* (Elizabeth Wilmshurst and others eds, Oxford University Press 2016)

Manfred Nowak, 'Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' in Andrew Clapham and Paola Gaeta (eds), *Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2013)

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (entered into force 21 October 1950) 75 UNTS 31 (GC I), art 12(2); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (entered into force 21 October 1950) 75 UNTS 85 (GC II), art 12(2); Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (entered into force October 1950) 75 UNTS 135 (GC III), art 17(4), art 87(3); Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (entered into force 21 October 1950) 75 UNTS 287 (GC IV), art 32; AP I, art 75(2); GC I-IV, common art 3(1) (a), (c), AP II, art 4(2)

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 10 December 1984 (entered into force 26 June 1987), 1465 UNTS 85 (CAT) art 1; International Covenant on Civil and Political Rights 16 December 1966 (entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 7; European Convention on Human Rights and Fundamental Freedoms 4 November 1950 (entered into force 3 September 1953) ETS 5 (ECHR), art 3; American Convention on Human Rights 22 November 1969 (entered into force 18 July 1978) OAS TS 36 (ACHR), art 5(2)

CAT, art 10

within the North Atlantic Treaty Organization (NATO), because different states apply distinct rules of engagement on the use of force: either a conduct of hostilities framework (governed by IHL) or a law enforcement framework (influenced by ECtHR case law).[44] Zwanenberg points to the crisis of confidence caused by a US directive to target opium producers in Afghanistan, owing to the US interpretation that it is lawful to target 'war-sustaining' objects as a military objective. After resistance from European states, this directive was withdrawn.[45] IHL's interoperability challenges also relate to compliance: Zwanenberg argues that where one state believes that an IHL norm applies and another coalition state does not, the first state is bound to urge the other to comply with the disputed norm, pursuant to the obligation in Common Article 1 of the Four Geneva Conventions 1949 to 'respect and ensure respect' for the Conventions 'in all circumstances'. Similarly, he believes that individual criminal responsibility for IHL violations is more likely in multinational operations where states disagree.[46] This could be because of IHL's contested norms, questions of conflict classification or IHL and IHRL co-applicability. Zwanenberg sees common training programmes, and the development of common rules of engagement (ROE) as potential but minimalist solutions to this problem of interoperability,[47] but IHL training and compliance could also be adversely affected by confusion and disagreement among states, especially if these common ROE (and the mission-specific training that results) uses ambiguous phrasing in order to gain consensus.

The fifth reason why IHL is at the 'vanishing point' of compliance is its strong disaggregation to soldiers, officers, civilian authorities with responsibility for ROE or a proportionality calculus; and in NIAC, armed group fighters. Strong disaggregation is the term used in this thesis to differentiate between the relevance of individual actors in international law in general,[48] and the extent of IHL's reliance on individual actors.[49] It is a version of the agent/structure problem in constructivist international relations

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Kirby Abbott, 'A Brief Overview of Legal Interoperability Challenges for NATO Arising from the Interrelationship between IHL and IHRL in Light of the European Convention on Human Rights' (2014) International Review of the Red Cross 107, 108

Marten Zwanenburg, 'International Humanitarian Law Interoperability in Multinational Operations' (2014) 95 International Review of the Red Cross 681, 693-4

ibid., 696-7

ibid., 703

Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge University Press 2011)

Dieter Fleck, 'The Role of Individuals in International Humanitarian Law and Challenges for States in Its Development' (1998) 71 International Law Studies (Blue Book) 119

theory;[50] Scharf's call to consider elite individual actors in studies of international law compliance;[51] and Besson's call to 'lift the state veil',[52] moving beyond the fiction of a single meta-state.

The problem of the 'strategic corporal' exemplifies the problem of IHL's strong disaggregation in modern, asymmetric conflicts. Where there may be multiple armed groups fighting a coalition of states and/or other armed groups across one or more states; and where the intensity of these conflicts may vary over time and within a small area, soldiers and officers must understand the IHL of IAC and of NIAC, and the relevant principles of IHRL that also apply, in peacekeeping or law enforcement situations. Krulak coined the concept of the 'three block war' to describe these rapidly-changing factual and legal circumstances of deployment; and the 'strategic corporal' who must react swiftly and lawfully, with legal and moral expertise intact.[53] Carswell applies these complexities to IHL training. He urges against simplistic approaches in IHL training, and training that excludes IHRL. Soldiers must 'grasp the legal nuances associated with the sliding scale of conflict', because if they do not, 'drastic consequences' can result.[54]

But soldiers, officers and fighters in armed groups need not only understand IHL's complexities, they must also accept that IHL binds them, even if enemy forces violate the law. The relics of reciprocity in IHL, and its many misunderstandings (where violations are perpetrated in revenge or as tit-for-tat punishment) constitute the sixth challenge for compliance in IHL. Reciprocity is said to underpin the treatment of prisoners of war in international armed conflicts. One state is encouraged to treat prisoners of war lawfully, as they would wish opposing forces to do if they or their comrades were detained.[55] In White's words, reciprocity works best in IAC, or symmetrical conflicts; while NIAC requires 'centralised enforcement'.[56] In the nineteenth and early twentieth centuries, parties to an international armed conflict could employ belligerent reprisals which

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Alexander Wendt, 'The Agent-Structure Problem in International Relations Theory' (1987) 41 International Organization 335

Scharf (n 10)

Samantha Besson, 'The Authority of International Law: Lifting the State Veil' (2009) 31 Sydney Law Review 343

Charles Krulak, 'The Strategic Corporal: Leadership in the Three Block War' [1999] Marines Magazine

Andrew J. Carswell, 'Classifying the Conflict: A Soldier's Dilemma' (2009) 91 International Review of the Red Cross 143, 144

Eyal Benvenisti and Amichai Cohen, 'War Is Governance: Explaining the Logic of the Laws of War from a Principal-Agent Perspective' (2014) 112 Michigan Law Review 1363, 1401

Nigel D. White, *Advanced Introduction to International Conflict and Security Law* (Edward Elgar 2014)

themselves violated IHL in response to an IHL violation by enemy forces. The purpose of these belligerent reprisals was to secure future compliance (and the cessation of ongoing violations) by the violating state. This doctrine fell out of favour following the Second World War, so that by the mid-1970s, some states believed it should be expressly prohibited in Additional Protocol I.[57]

The current position is that IHL's humanitarian provisions should not depend on reciprocity. In particular, the obligation to 'respect and ensure respect' for IHL 'in all circumstances' does not depend on reciprocity; and this also applies to NIAC governed by Common Article 3.[58] Provost disputes this trend to reject reciprocity out of hand. He believes that reciprocity can be a tool for IHL compliance in both symmetric IAC and asymmetric NIAC, if we recognise that individual agents and armed groups all have a role in promoting IHL compliance, through communities of practice.[59] This original viewpoint places compliance at the centre of the reciprocity *problématique,* but it confuses problems and solutions (where perceived reciprocity and the potential for reprisals are the problem and compliance is a solution). More persuasive is Aldrich's prediction that 'disrespect for the law breeds further disrespect'. Where IHL's monitoring tools are insufficient (as the next paragraph shows they are), 'notions of reciprocity … lead …into a downward spiral … of expanding noncompliance with the law.'[60] Benvenisti and Cohen offer a subtle explanation. They argue that in practice, armed forces rarely have 'ample information confirming the opponent's intention' in relation to IHL compliance, so they are apt to interpret the enemy's actions as deliberate IHL violations.[61] This leads to Aldrich's 'downward spiral' of violations perpetrated in revenge. Such violations are not only perpetrated by individual soldiers, they are also occasionally encouraged by commanders. Mackmin cites General Patton's speech to Allied troops in Sicily in 1943, that 'no mercy' should be shown to the enemy because he had 'killed thousands of your comrades'. Shortly afterwards, American soldiers murdered 70

ICRC Customary IHL Study, rule 140

GC I – GC IV, common art 1; ICRC Customary IHL Study, rule 140; ICRC Commentary (2016), common article 1, para 125; cf. (on 'ensure respect' only) *Daniel Turp v. Minister of Foreign Affairs*, (Federal Court of Canada) [2017] FC 84, paras 70-73

Réné Provost, 'Asymmetrical Reciprocity and Compliance with the Laws of War' in Benjamin Perrin (ed), *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organizations, and the Law*

George H. Aldrich, 'Compliance with International Humanitarian Law' (1991) 31 International Review of the Red Cross 294, 295

Benvenisti and Cohen (n 55) 1366

prisoners of war.[62] Misunderstood reciprocity and violations motivated by revenge are an important reason why IHL is at the 'vanishing point' of compliance.

IHL's absent or disused monitoring mechanisms are the seventh and final reason why IHL is at the 'vanishing point' of compliance. IHL lacks a system for independent or transparent oversight of state practice. The IHL of IAC has three distinctive mechanisms which might have been used to improve compliance, but all of these depend upon state consent during an armed conflict, and in practice they have been rarely, if ever, called upon. Under the Four Geneva Conventions and Additional Protocol I, there is a sharply limited role for 'Protecting Powers' (a neutral state or states) to cooperate and scrutinise the application of IHL in international armed conflicts.[63] However, Protecting Powers 'shall not in any case exceed their mission', and must 'take account of the imperative necessities of security' in the state in which they operate.[64] In practice, Protecting Powers are seldom used, with the last recorded instance being in the Falklands War.[65] An enquiry procedure might also take place into alleged violations of the Geneva Conventions, at the request of a party to an international armed conflict,[66] but none of the admittedly few attempts to launch this have succeeded.[67] The International Humanitarian Fact-Finding Commission (IHFFC) was established by Article 90 of Additional Protocol I to investigate grave breaches and other serious IHL violations in IAC. It continues to exist, but in practice has never been used. As Pejic points out, no other branch of international law relies on state consent to trigger monitoring mechanisms to this extent.[68] The Four Geneva Conventions and their Additional Protocols lack a reporting and monitoring process, in contrast to the mechanisms relating to conventional weapons,[69] landmines,

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Sara Mackmin, 'Why Do Professional Soldiers Commit Acts of Personal Violence That Contravene the Law of Armed Conflict?' (2007) 7 Defence Studies 65

GC I ,art 8; GC II, art 8; GC III, art 8; GC IV, art 9; AP I, art 5

GC I, art 8

Knut Dörmann, 'Dissemination and Monitoring Compliance of International Humanitarian Law' in Wolf Heintshell von Heinegg and Volker Epping (eds), *International Humanitarian Law: Facing New Challenges* (Springer 2007) 227, 236

GC I, art 52; GC II, art 53; GC III, art 132; GC IV, 149

Jelena Pejic, 'Strengthening Compliance with IHL: The ICRC-Swiss Initiative' (2016) 98 International Review of the Red Cross 315

ibid., 320

Decision on a Compliance Mechanism Applicable to the Convention on Prohibitions and Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW), as Adopted by the Third Review Conference, 17 November 2006

cultural property and children and armed conflict,[70] which exist, but do not necessarily yield comprehensive or informative state reports.[71]

The absence or disuse of compliance tools in Geneva law, the absence of monitoring tools for NIAC, and states' resistance to further treaty negotiations which might have established binding compliance mechanisms led the 31st International Conference of the Red Cross and Red Crescent (RCRC) to establish consultations with states to strengthen compliance with IHL.[72] This initiative, led by the ICRC and the Government of Switzerland, held nine meetings with states from 2012-2015,[73] and a variety of bilateral and regional outreach meetings.[74] The phrasing of Resolution 1 - '*invites', 'encourages'* illustrates the consensual and voluntary nature of the consultation process. There were no plans to revisit treaty texts. All views expressed in the publicly-released updates are unattributed to particular States.[75] Early meetings removed from the agenda discussions of legal opinions, country visits, urgent appeals and an early warning function.[76] Consultations did move forward on periodic reporting, although discussions on fact-finding were postponed until states might agree on an institutional structure.[77] Meetings of States, voluntary reports on the implementation of IHL, and thematic discussions resulted in some consensus.[78] Delegates were keen to avoid both politicisation[79] and excessive use of resources;[80] some states were especially keen to avoid establishing the IHL equivalent of the UN Human Rights Council. Delegates agreed that no legally binding mechanism would be established. It would be state-driven, voluntary and based on consensus. State delegates preferred a 'non-contextual and non-conflict specific basis' to the discussions.[81] Early consultations suggested a preference among some states for

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ICRC and Government of Switzerland, Second Meeting of States on Strengthening Compliance with International Humanitarian Law (IHL): Background Document' (ICRC and Government of Switzerland 2013) Annex 3

The UK reports to the CCW Compliance Mechanism offer no text on IHL training

Resolution 1, Strengthening Legal Protection for Victims of Armed Conflicts, 31st International Conference of the Red Cross and Red Crescent 2011

ICRC, 'Strengthening Compliance with International Humanitarian Law: The Work of the ICRC and the Swiss Government' <http://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-compliance.htm> all web resources last accessed 1 July 2018

Pejic (n 67) 320

ICRC and Government of Switzerland, Third Meeting of States on Strengthening Compliance with International Humanitarian Law (IHL), 30 June-1 July 2014, Chairs' Conclusions 13

Background Document, Fourth Meeting of States, 17-18

Third Meeting of States, Chairs' Conclusions, 2, 5

ICRC and Government of Switzerland, Preparatory Discussion in View of the Fourth Meeting of States (2015), December 2014

Third Meeting of States, Chairs' Conclusions, 8, 10, 13

ibid., 3

ibid., 4

thematic discussion, as a means to avoid potentially politicised state-specific evaluation. Views differed on whether or not civil society observers should be invited to the meetings of States, with some delegations opposing this as they feared the meetings might be 'politici[sed]'. Discussions on any involvement of non-state actors, as a means of improving compliance in non-international armed conflicts were postponed until the conclusion of the consultation phase. Prior to the 32nd meeting of the RCRC, a Meeting of States was supported as a 'central pillar' of compliance initiatives, and 'most States' agreed that voluntary reporting on national practice in IHL, and a separate process for thematic discussion 'should be established'. A fact-finding mechanism was a possibility, to be 'added over time if there is State agreement'.[82] If voluntary reporting had been accepted, states might have shared their practice *inter alia* on IHL training using a collaborative reporting rubric.[83]

Before the 32nd RCRC, the Strengthening Compliance Initiative had become a discussion not about IHL or compliance, but how a state-led, thematic and voluntary process might be constructed by consensus. Consensus-based negotiations are problematic because a few vocal resisters can stall progress, and this is what happened at the 32nd RCRC, when the resolution that stemmed from the Strengthening Compliance Initiative was rejected in the late stages of negotiation. The USA, UK, and France had supported it, but the Russian Federation drafted a resolution, supported by Syria and India, that proposed ongoing intergovermental dialogue, and confidential bilateral meetings between states and the ICRC.[84] Pakistan announced that it could not support the ICRC's resolution by consensus, so a shorter, compromise resolution was drafted by the Organisation of the Islamic Conference (OIC) and eventually agreed.[85] There had been concerns that the proposed reporting mechanism might be similar to the universal periodic review mechanism established by the UN Human Rights Council; and the Arab Group of states in particular was concerned that the process would become politicised.[86]

Background Document: Fourth Meeting of States, 6

Elizabeth Stubbins Bates, 'Towards Effective Military Training in International Humanitarian Law' (2014) 96 International Review of the Red Cross 795

Stephanie Nebehay, 'Red Cross Talks to Debate New Mechanism for Upholding Laws of War' *Reuters* (6 December 2015)

Emanuela-Chiara Gillard, 'Promoting Compliance with International Humanitarian Law' (Chatham House Briefing 2016); Resolution 2, Strengthening Compliance with International Humanitarian Law, 32IC/15/R2 (9 December 2016)

Heba Aly, 'No Deal to Strengthen Respect for Geneva Conventions' *IRIN Global* (10 December 2015)

Despite the demise of the ICRC-sponsored resolution, intergovernmental meetings continue under Resolution 2, at approximately six-monthly intervals, with the first Meeting of States held in November 2016.[87] No updates on these meetings are released to the public. The results of these meetings will be presented to the 33rd Meeting of the RCRC in 2019.[88] Also at the 33rd meeting, a range of states, the EU and NATO will report to the ICRC on pledges made at the 32nd Meeting,[89] which included specific commitments on IHL dissemination and training.[90] The usual approach is for the ICRC to send surveys to states and National Red Cross or Red Crescent Societies, requesting brief reports on pledges made at the previous Meeting. Effective monitoring of IHL training would depend upon the agreement of states to share more than platitudes and assertions of good practice in these brief reports. The best way to do this is the creation of a collaborative rubric of standards on IHL training.[91] There is some potential that state practice on IHL dissemination and training will be open to intergovernmental scrutiny at the 33rd Meeting of the RCRC. In contrast, states' unwillingness to agree to evaluation or transparent oversight of their record in IHL in general is a perennial problem, contrasted by their willingness to assert good practice in IHL's laconic norms of prevention, including dissemination and military training in IHL.

1.2 Dissemination and Military Instruction in International Humanitarian Law

States must disseminate IHL 'as widely as possible', 'including to the civilian population', and integrate it into programmes of military instruction,[92] or training.[93] The dissemination and training obligation applies in peace and war, unusual for IHL which generally applies only during armed conflict or belligerent occupation. In IAC where

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Pejic (n 67) 329-330

Gillard (n 85)

Elzbieta Mikos-Skuza, 'Dissemination of the Conventions, Including in Time of Armed Conflict' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press 2015) 597, 614

See the Pledges on IHL Dissemination or Training from Austria, Canada, Denmark, France, Japan, New Zealand, Norway, Spain, the EU and NATO (32nd International Conference of the Red Cross and the Red Crescent, December 2015)

3.5, 8.2

GC I, art 47; GC II, art 48; GC III, art 127; GC IV, art 144; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (adopted 10 October 1980, entered into force 2 December 1983) 1342 UNTS 137 (CCW) art 6; ICRC Customary IHL Study, rules 142-143

Hague Convention for the Protection of Cultural Property in the event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956, HCCP) 249 UNTS 240 art 25; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the event of Armed Conflict (adopted 26 March 1999, entered into force 9 March 2004) 2253 UNTS 212 art 30

Additional Protocol I is ratified, dissemination should encompass both military and civilian authorities, so that all of those with responsibility for applying IHL are 'fully acquainted' with treaty texts.[94] The obligation to disseminate 'the text' of the Four Geneva Conventions includes the dissemination of Common Article 3, so NIAC IHL is part of the dissemination and training obligation.[95] An obligation to disseminate IHL also appears in NIAC regulated by Additional Protocol II,[96] so that armed groups are also obliged to disseminate IHL once a NIAC begins. Archival research suggests that the reference only to dissemination and not to military instruction was a hurried diplomatic compromise to agree the text of the Protocol rather than a substantive intention to restrict the obligation to that of dissemination instead of military instruction.[97]

The obligation to instruct military personnel in IHL is laconic (simply stated); with only recent treaties and soft law adding detail on how it should be implemented.[98] It is, in the words of a recent commentary, a 'due diligence' obligation, 'not one of result.'[99] This is not an asset. It means that IHL does not provide 'criteria, indicators or standards' to test state practice in dissemination and military instruction.[100] With the absence of transparent monitoring of state practice in IHL, the extent of states' compliance with their dissemination and military instruction obligations is lost to scrutiny, but so is the scope for sharing best practice. It also means that scholarly interpretations of the dissemination and instruction obligation are apt to be dismissed as *lex ferenda*, losing their scope to improve state practice in this respect.

The simplicity of the treaty norm and its emphasis on 'dissemination' continues to reflect Moynier's assumption that dissemination was a prerequisite for compliance with IHL. The Pictet Commentaries saw dissemination and military instruction in IHL as logically

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API art 83(2); ICRC Customary IHL Study, rule 143

Iris Muller, 'Article 47: Dissemination of the Convention', *ICRC Commentary of 2016: First Geneva Convention 1949* (ICRC 2016) at:
https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=E925A7160C083CC9C1257F15004A58D9

AP II art 19; Yves Sandoz, Christopher Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987) 1489, para 4912; ICRC Customary IHL Study, rule 142; Second Protocol to the HCCP 1999 art. 30 2.3

CCW art 6; Amended Protocol II, art 14(3); Second Protocol to the HCCP 1954, art 30; ICRC and Swiss Federal Department of Foreign Affairs, Montreux Document on Pertinent Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict, 2008 (Montreux Document) Good Practices 3(a), 10, 14 (e), 35, 63

Mikos-Skuza (n 89) 612

ibid.

prior to the duty to 'respect and ensure respect' for the Geneva Conventions of 1949 'in all circumstances';[101] while the 2016 ICRC Commentary still sees it as a 'corollary' of the duty to 'respect and ensure respect'.[102] At the Diplomatic Conference of Geneva 1974-1977, ICRC and state representatives spoke of dissemination and military training's contribution to compliance for IHL,[103] an idealism which grounded the diplomatic debates. There is a fallacy in this idealism: while ignorance of IHL is plausibly a contributing cause of some violations,[104] and IHL dissemination and training are mentioned every time IHL's implementation is on the diplomatic agenda,[105] it does not follow that civilian dissemination and military instruction will prevent future IHL violations. Relying on civilian dissemination as a preventive tool is a dated form of magical thinking for those states which no longer rely on mass conscription and national service. There is evidence that the civilian dissemination obligation is implemented intermittently, with warped understandings of IHL prevalent and not adequately countered in the media. More specifically, while more than two-thirds of a large and diverse sample of civilians thought the Geneva Conventions were still useful, 44% of those surveyed who were aware of the IHL prohibition on torture thought that torture was still sometimes acceptable.[106] This was a higher proportion than those the ICRC surveyed in 1999, proving a shift in a contested norm.

Causal uncertainty is therefore one aspect of the conundrum between military training in IHL, the prevention of violations, and promotion of compliance. Deficient military training in IHL has been implicated in the wilful killing of civilians and the torture of detainees;[107] but scholarship has gradually acknowledged the insufficiency of IHL

GC I - GC IV, common art 1; Jean Pictet (ed.), *Commentary to the Four Geneva Conventions of 12 August 1949*, vol I (1952), 347-349, vol II (1960) 257-259, vol III (1960) 613-615, vol IV (1958) 580-582

Muller (n 95)

Official Records of the Diplomatic Conference of Geneva (ORDCG) 1974-1977, vol VIII, Summary Record, 37th Meeting, 2 April 1975 (CDDH/I/SR.37), 383, draft art 72 of AP I – Dissemination, paragraph 55; vol IX, Summary Record, Third Session of Committee I, 59th Meeting, 17 May 1976 (CDDH/I/SR.59) 241-244, draft art 37 of AP II – Dissemination, CDDH/1, CDDH/226.Corr.2

Sylvie-Stoyanka Junod, 'La Diffusion Du Droit International Humanitaire' in Christophe Swinarski (ed), *Etudes et Essais sur le Droit International Humanitaire et sur les Principles de la Croix-Rouge en l'honneur de Jean Pictet* (Martinus Nijhoff 1984) 359

ibid., 360

ICRC, 'People on War' (2016)

Peers Inquiry, 'Report of the Department of the Army Review of the Preliminary Investigations into the My Lai Incident (1970); Commission of Inquiry into the Deployment of Canadian Forces to Somalia, 'Dishonoured Legacy: The Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia' (1997); Major-General Antonio M. Taguba, 'US Army Report of Abuse of Prisoners in Iraq' (MacMay 2008); Sir William Gage, 'The Baha Mousa Public Inquiry Report' (The Stationery Office 2011); US Senate Select Committee on Intelligence, Committee Study of the Central

training to prevent violations,[108] while interdisciplinary research suggests that moral disengagement and discourse about law and enemy forces may be more powerful causal factors for IHL violations than ignorance of the law.[109] A further aspect of the conundrum is this gulf between understanding, knowledge and recall of IHL on the one hand, and willingness to comply or 'a favourable attitude' towards IHL on the other.[110] If a communicated norm does not cause subsequent compliance, then what else is needed?

The literature on IHL training has been built interstitially, with some historic insights about individual and social psychology forgotten by modern scholars.[111] Early authors did recognise that the aim of IHL training was not mere dissemination, but the development of 'psychological resistance' to 'contemplated' IHL violations;[112] while others thought less plausibly that dissemination alone might build a 'reflex of solidarity', overcoming brutal instincts.[113] Recent works by military trainers, academic researchers and civil society groups recommend that IHL training promote attitudinal change[114] and the 'internalisation' of norms so that they become second nature.[115] These authors recognise that IHL training needs to take place in a context which facilitates both understanding and a willingness to comply. They believe that IHL training needs interdisciplinary insights from education theory,[116] organisational theory,[117] and ethics;[118]

Intelligence Agency's Detention and Interrogation Program, Findings and Conclusions (released December 2014)

Françoise Hampson, 'Fighting by the Rules: Instructing the Armed Forces in Humanitarian Law' (1989) International Review of the Red Cross 111,116; Marco Sassòli, 'The Implementation of International Humanitarian Law: Current and Inherent Challenges' (2007) 10 Yearbook of International Humanitarian Law 45

Daniel Muñoz-Rojas and Jean-Jacques Frésard, 'The Roots of Behaviour in War: Understanding and Preventing IHL Violations' (2004) 86 International Review of the Red Cross 189

ibid., cited in Muller (n 95)

3.2

G.I.A.D. Draper, in Michael A. Meyer and Hilaire McCoubrey (eds), *Reflections on Law and Armed Conflicts: The Selected Works on the Laws of War by the Late Professor Colonel G.I.A.D. Draper, OBE* (Kluwer Law International 1998), 100

Junod (n 104)

Save the Children Sweden, 'Behind the Uniform: Training the military in child rights and child protection in Africa' (2009)

ICRC Customary IHL Study (n 22), rule 142, 503, note 45 (citing the military manual of the Republic of South Africa)

Jenny Kuper, *Military Training and Children in Armed Conflict: Law, Policy and Practice* (Martinus Nijhoff 2005) 173-4

Laura Dickinson, 'Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance' (2010) 104 American Journal of International Law 1, 3

Sassòli (n 108) 73; David W. Lovell, 'Educating for Ethical Behaviour? Preparing Military Leaders for Ethical Challenges' in David W. Lovell and Igor Primoratz (eds), *Protecting Civilians During Violent Conflict: Theoretical and Practical Issues for the 21st Century* (Military and Defence Ethics series, Ashgate 2012) 141

and that 'barracks culture' and competing priorities can jeopardise training.[119] More applied accounts encourage an approach where soldiers encounter moral dilemmas in practical exercises, so that these dilemmas can be lawfully addressed 'in the chaos of conflict.'[120] Potential modalities for IHL training in the twenty-first century include battle inoculation training at distributed simulation sites,[121] integrating IHL in computer games as a tool of IHL dissemination to civilians, and to future and current soldiers,[122] and moral competence training.[123] Notwithstanding the ICRC's recent emphasis on 'integrating' IHL in all aspects of military 'doctrine, education, training and equipment, and/or sanctions',[124] the IHL training obligation is still without a complete blueprint to guide state practice. The literature hints at but does not define an interdisciplinary component to good practice in IHL training.

A careful synthesis of interdisciplinary insights is needed to address the conundrum between military training in IHL, prevention and compliance. The conundrum is characterised by a laconic norm of prevention in a branch of international law that lacks transparent oversight and monitoring. It is influenced by assumptions first that ignorance of IHL causes violations, and that mere dissemination will help prevent them. The historic assumption that dissemination and training are themselves preventive is now in doubt. Military training in IHL is thought necessary but insufficient for prevention and compliance. Further aspects of the conundrum are the explanatory gaps between communicated norm and subsequent behaviour, and between understanding and willingness to comply. Where, as in IHL, norms are contested and indeterminate, and responsibility for compliance is delegated to soldiers, officers and armed group fighters, the conundrum between training, prevention and compliance is also about interpretation,

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David Lloyd Roberts, 'Teaching the Law of Armed Conflict to Armed Forces: Personal Reflections' in Anthony M. Helm (ed), *The Law of War in the 21st Century: Weaponry and the Use of Force* (2006) 82 International Law Studies (Naval War College) 121; Kuper (n 116) 173-4

Françoise Hampson, 'Fighting by the Rules: Instructing the Armed Forces in Humanitarian Law' (1989) International Review of the Red Cross 111,116

Jon Saltmarsh and Sheena MacKenzie, 'The Future of Collective Training: Mission Training through Distributed Simulation' (RUSI Defence Systems, Royal United Services Institute, October 2008) 107; Heather M. McIntyre, Ebb Smith and Mary Goode, 'United Kingdom Mission Training Through Distributed Simulation' (2013) 25 Military Psychology 280. There is a greater emphasis on the skills to be gained in distributed simulation than in the potential to integrate IHL through distributed simulation training

Ben Clarke, Christian Rouffaer and François Sénéchaud, 'Beyond the Call of Duty: Why Shouldn't Video Game Players Face the Same Dilemmas as Real Soldiers?' (2013) 94 International Review of the Red Cross 711

Stefan Seiler, Andreas Fischer and Sybille A. Voegtli, 'Developing Moral Decision-Making Competence: A Quasi-Experimental Intervention Study in the Swiss Armed Forces (2011) 21 Ethics and Behavior 452

ICRC, 'Integrating the Law' Publication Ref 0900 June 2007; ICRC, 'Decision-making Process in Military Combat Operations' Publication Ref 4120 December 2013

the clear but not oversimplified communication of complex norms, and strong disaggregation.[125]

1.3 Definitions and Choice of Terminology

International Humanitarian Law vs. Law of Armed Conflict

The choice of 'international humanitarian law (IHL)' instead of 'the law of armed conflict (LOAC)' positions the thesis in the civilian scholarly mainstream. While Fleck sees the two terms as interchangeable, 'like fraternal twins'; in his view, 'international humanitarian law' 'better conveys' that some obligations persist in time of peace, including dissemination, instruction and training; and the obligation in Common Article 1 of the Four Geneva Conventions to 'respect and ensure respect' for their provisions 'in all circumstances.[126] It follows that 'IHL' is a better terminological choice than 'LOAC' for this research project.

However, it is still very much a choice. Benvenisti sees the terminological preference between IHL and LOAC as 'camps',[127] where labels are clues for interpretive preferences. The ICRC and the UN choose 'IHL'.[128] Military interlocutors tend to prefer 'LOAC' over 'IHL', usually because not all of this body of law is humanitarian in ethos (although a NATO document on military training posits that 'LOAC …regulates only those aspects of the conflict which are of humanitarian concern').[129] For Dinstein, the adjective 'humanitarian' is misleading, as it ignores the centrality of military necessity in many LOAC/IHL rules.[130] Roberts acknowledges the omission of the laws of neutrality and arguably the principle of military necessity from the term 'humanitarian'. Dill shares this scepticism, noting that targeting rules do not have humanitarianism as their object and Some commentators go further in their rejection of the term 'international purpose.[131]

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Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (3rd edition Oxford University Press 2013) xv

Eyal Benvenisti, 'The Legal Battle to Define the Law on Transnational Asymmetric Warfare' 20 (2009) Duke Journal of International and Comparative Law 339

ibid.

NATO STANAG 2449 Training in the Law of Armed Conflict Edition A Version 1, F-15; cited in Ministry of Defence, Joint Service Publication (JSP) 898: Defence Direction and Guidance on Education , Training and Skills 48

Dinstein (2010) (n 37) 19

Adam Roberts, Introductory Remarks (From Suez to Syria: Modern Armed Conflicts and the Evolution of International Humanitarian Law, Foreign and Commonwealth Office, London, 6 June 2017); Dill (n 16)

humanitarian law'. In a somewhat overblown account, Wilson considers that 'IHL' was a conscious rebranding of 'LOAC' by the ICRC and then human rights organisations, to justify what she identifies as their intrusion into the actions of the armed forces. Wilson claims unpersuasively that 'IHL' is a 'myth': not 'a body of law at all' but 'a political project'[132] by these human rights organisations.

There are better approaches to this semantic issue. One is to acknowledge that 'IHL' is of recent coinage, dating approximately from the Additional Protocols I and II of 1977, and that a variety of actors were involved in the development of the term and its ethos.[133] Another is to acknowledge that not all of IHL is 'humanitarian' in orientation; nor is all of 'LOAC' about the conduct of hostilities. Military necessity and humanity are in frequent tension throughout the rules on targeting, while humanitarian goals are more apparent in the treatment of civilians, or former fighters who are *hors de combat* through detention or wounds. Moreover, some IHL norms contain rival interpretations,[134] with military advantage on the one hand and the principle of humanity on the other.[135] As well as presenting a marked challenge for compliance, as 1.1 explored, this indeterminacy shows IHL's moral compromise, which has been starkly criticised. Weizman sees all of IHL as a 'lesser evil', where treaty norms authorise what would otherwise be morally unacceptable.[136] On this view, the adjective '*humanitarian*' hides IHL's contestation and moral compromise. Af Jochnick and Normand offer a stronger critique, arguing that states deliberately constructed IHL to favour military necessity over humanitarian considerations: the widespread perception that IHL is a humanitarian triumph therefore allows states to conceal civilian suffering under a 'façade of legitimacy'.[137] This echoes

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Page Wilson, 'The Myth of International Humanitarian Law' (2017) 93 International Affairs 563

Amanda Alexander, 'A Short History of International Humanitarian Law' (2015) 26 European Journal of International Law 109

Michael N. Schmitt, 'Fault Lines in the Law of Attack', in Susan C. Breau and Agnieszka Jachec-Neale (eds), *Testing the Boundaries of International Humanitarian Law* (British Institute of International and Comparative Law 2006) 277, 294, 296-8; Dale Stephens, 'Blurring the Lines: the Interpretation, Discourse and Application of the Law of Armed Conflict' (2009) 12 Yearbook of International Humanitarian Law, 85; Janina Dill, 'Applying the Principle of Proportionality in Combat Operations' (Oxford Centre on Ethics,
Law and Armed Conflict (ELAC) Policy Briefing, December 2010)

Prosecutor v *Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić* (Case No. IT-95-16-T, Judgment of 14 January 2000) cited in Stephens (n 134) 106

Eyal Weizman, *The Least of All Possible Evils: Humanitarian Violence from Arendt to Gaza* (Verso 2012)

Chris af Jochnick and Roger Normand, 'The Legitimation of Violence: A Critical History of the Laws of War' (1994) 35 Harvard International Law Journal 49, 51; Chris af Jochnick and Roger Normand, 'The Legitimation of Violence: A Critical Analysis of the Gulf War' (1994) 35 Harvard International Law
Journal 387

Kennedy's seminar feedback on an early version of this work. Research on military training in IHL is, he asserted, 'a wildly dehumanising project';[138] on the premise that the armed forces cannot be partners in IHL compliance, and to acknowledge this possibility (or the idea that IHL scholars should work with military interlocutors for improved compliance)[139] is to be part of humanitarianism's 'dark side'.[140] Kennedy argues that international humanitarian lawyers should recognise the power they wield when embedded as advisers to military or political authorities, just as military officials should add a personal, subjective sense of moral responsibility to the law-talk that pervades military discourse. [141] Kennedy's latter point is a wise reminder to individual professionals, but his initial critique is unproven, failing to acknowledge the scope for variation between individual armed forces personnel and scholars in terms of the depth of their commitment to humanitarian goals. Kennedy's critiques of the language of IHL are more developed: he argues that law discourse only occasionally leads to accountability for violations, and does not encourage political and military actors to take responsibility for the suffering their decisions cause. Simply labelling a violation of IHL or a particular military target detracts (for Kennedy) from the experience of responsibility.[142] In a related point, Scarry points to the 'active redescription' of the act of injuring during battle, and the reconfiguration of language, including legal language, to elide the bodily harms caused by both armed conflict and torture.[143] This is a counterpoint to Cover's account of law's violence, the personal harm done by (domestic) legal language and procedures.[144] Weizman, Scarry and Cover remind those of us who prefer 'international humanitarian law' over the 'law of armed conflict' that the law itself sanitises and legitimises what would otherwise be prohibited, through the combatant's dubious 'privilege' lawfully to kill and to be killed.

What of variant terms? The term 'laws of war' is considered archaic,[145] as are the Latin *jus in bello*, and a distinction between 'humanitarian' 'Geneva law' (the Geneva

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David Kennedy, SOAS School of Law PhD Colloquium 2014

David Kennedy, *Of War and Law* (Princeton University Press 2006) 10, 169, 170

David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism,* (Princeton University Press 2005)

Kennedy 2006 (n 139) 170

ibid., 167-169

Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (Oxford University Press 1985)

Robert M. Cover, *Narrative, Violence, and the Law: The Essays of Robert Cover* (University of Michigan Press 1992)

Fleck (n 126) xv

Conventions and their Additional Protocols) and 'Hague law' on the conduct of hostilities, as Geneva law also regulates the conduct of hostilities,[146] while 'Hague law' includes provisions which intend to limit, for example, superfluous injury and unnecessary suffering.[147] 'Conflict law',[148] and the 'international law in armed conflict'[149] are new coinages, intended to demonstrate the complexity of IHL and IHRL applying together, which need more time to embed in practice and scholarship before they become mainstream terms of art. In Part III, the terms LOAC and 'operational law' appear in analysis of the British Army's own training materials. 'LOAC' is the MoD's preferred term, while the Army's current 'operational law' training includes the law of armed conflict (in international and non-international armed conflict), the use of force (with standards from IHL, IHRL and domestic criminal law), and on the treatment of prisoners of war and other detainees or internees (which also combines IHL with selected prohibitions from IHRL).

Dissemination, Instruction and Training

'Dissemination' is defined as spreading awareness of IHL, a thin measure which aims at general knowledge rather than in-depth scholarly attention or practical skills. This draws on the OED definition of the same term: 'The act of spreading …information, widely; circulation.'[150] Treaty provisions require that IHL is disseminated 'as widely as possible':[151] this term suggests breadth and superficiality rather than depth and reflection on dissemination's purpose and modalities. The Commentary to Article 83 of Additional Protocol I refers to dissemination as an obligation of result, that of 'sowing the seeds' of IHL compliance.[152] This speaks to the conundrum between mere dissemination of IHL and the prevention of violations or future compliance with IHL, because it leaves

AP I, arts 51-55 (as a single example)

Hague Convention II with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899 (entered into force 4 September 1990) art 23(e); Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907 (entered into force 26 January 1910) art 23(e); CCW 1980, preamble

William Boothby, *Conflict Law: The Influence of New Weapons Technology, Human Rights and Emerging Actors* (TMC Asser Press 2014)

Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict.* (Oxford University Press 2013)

OED, 'dissemination'

GC I, art 47, GC II, art 48, GC III, art 127, GC IV, art 144; AP I, art 83

Sandoz et al (n 96) 962, para 3372

unexplained the processes that might lead from awareness of IHL norms to subsequent behaviour.

Both military 'instruction' and 'training' in IHL are *lex lata* obligations, but 'instruction' appears more frequently. 'Training' appears in treaties on the protection of cultural property,[153] and in weapons treaties.[154] 'Instruction' implies passive learning, with classroom-style teaching. Classroom teaching is experientially distanced from the kinetic realities of deployment, and passive learning does not encourage the practical application of IHL norms. The shorthand adopted in this thesis of an 'IHL training obligation' reflects a reasoned preference for 'training' instead of 'instruction'. Military personnel undergo initial and continuation training in a range of skills and subject-matter. Moreover, unlike the classroom-based, top-down 'instruction', IHL 'training' is the preferred term, as training is pragmatic and focused on future action. It can include classroom instruction, discussion, simulations or practical exercises, debriefing and crucially, repetition or drills, so that IHL norms are internalised; compliance as a behavioural reflex. Educational theory defines 'training' as the correct term where a specific performance is the goal, and where repetition is the method.[155] Intellectual understanding matters less than correct performance in the theory on 'training', but 'the trainee's underlying knowledge and understanding' is developed through practice.[156] 'Training' is therefore compatible with a repeated exposure to IHL norms in practical or simulation-based training.

Prevention and Compliance

Traditionally, scholars and practitioners refer to IHL's 'implementation' and 'enforcement'. Draper sees a variety of measures open to states as part of IHL's 'implementation' (including legislation to provide for penal sanctions for grave breaches of the Four Geneva Conventions, and IHL dissemination and training); while 'enforcement' (which can include prosecution for grave breaches) is relevant only if implementation fails.[157] For the ICRC, the domestic implementation of IHL includes participating in treaties, translating and disseminating their texts, and legislating *inter alia*

HCCP, art 25; Second Protocol to the HCCP, art 30

CCW Protocol V, art 11

Malcolm Tight, *Key Concepts in Adult Education and Training* (2nd edition Routledge, 2002) 20-22, 18

ibid., 21

G.I.A.D. Draper, 'The Implementation and Enforcement of the Geneva Conventions of 1949 and the Additional Protocols of 1978 [*sic.*]' (1979) 164 Recueil des Cours 9

for the protection of the Red Cross, Red Crescent and Red Crystal emblems, for the repression of war crimes, and the protection of children. Domestic implementation also includes positioning military installations away from civilians.[158]

While implementation and enforcement are valid descriptors and an established terminology in IHL, IHL lacks 'prevention' as a term of art, and it also lacks a theory of prevention. One exception is the ICRC's recent use of 'prevention' in its interdisciplinary Prevention Policy. This is a broad interdisciplinary toolkit, that aims to 'foster an environment conducive to respect for the life and dignity of persons affected by armed conflict and other situations of violence' and to ensure that armed actors respect the ICRC's role.[159] It includes bilateral dialogue with states and armed groups, support for domestic legislation, and attempts to reduce public rhetoric that encourages the violation of IHL.[160] These largely hidden processes do aim to prevent violations. The latter may not encompass the anti-IHRL 'legal siege' rhetoric that has emerged in the UK.[161] However, the ICRC's approach to prevention is practical, not theoretical; and is distinct from IHL's norms of prevention. It does not itself explain the conundrum between military training, prevention and compliance. This thesis takes a more doctrinal, theoretical approach to prevention and compliance in IHL. As chapter 4 argues, IHL's norms of prevention (including the duty to 'respect and ensure respect',[162] command responsibility,[163] the provision of legal advisers,[164] dissemination and training,[165] and the duty to disobey manifestly unlawful orders)[166] are often treated as discrete duties, and the lack of attention to prevention as a term of art is a potential cause of this.

In this thesis, 'prevention' is defined as the treaty norms and actions of states and armed groups which aim to reduce the incidence of future IHL violations. 'Compliance' with IHL is behavioural conformity with IHL norms. While 'prevention' refers to prospective norms and actions, 'compliance' occurs in the present or past tense. As IHL is strongly

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ICRC, The Domestic Implementation of International Humanitarian Law: A Manual, Publication Ref 4028, 2011

ICRC, Prevention Policy, Geneva, Publication Ref. 4019, 11 June 2010, 5-6
ibid.
HL Deb 14 July 2005, vol 672, col 1236; 7.5
GC I-GC IV, CA1; AP I, art 1
AP I, art 86
AP I, arts 6, 82
(n 92-93, 96, 98)
ICRC, Customary IHL Study, rule 154

disaggregated to individuals and small units of fighters, the behavioural conformity is that of agents (individuals) as well as structures (armed forces, states and armed groups).

Effectiveness

A central aspect of the conundrum is the gap between (disseminated) norm and subsequent behaviour. This is not 'compliance', but 'effectiveness'. 'Effectiveness' has always hinted at the consistent or expansive application of law, but the term has undergone considerable evolution that still does not capture fully this explanatory gap between norm and subsequent conduct. Kelsen defined an effective legal system as one whose norms are applied in practice.[167] A legal system's validity depends on its norms having been made 'in a constitutional way', and on its norms being applied: 'Every single norm loses its validity when the total legal order to which it belongs loses its efficacy as a whole.'[168] A system can be effective if some of its individual norms are not applied, but a rule will become ineffective if it is never applied (*desuetudo).*[169] In contrast, Lauterpacht's principle of effectiveness is a function of judicial interpretation which aims at ample readings of states' treaty obligations; unless there is evidence that the obligation should be read restrictively.[170] Lauterpacht's principle of effectiveness favours international norms over state discretion: he sees restrictively-phrased obligations, 'artful devices' in domestic legislation, and 'deliberate inconclusiveness' in treaty texts as 'dangers' for international law.[171] The principle of effectiveness allows international judges to emphasise international law over these risks to its implementation.

'Effectiveness' still relates to the application of international law norms and the (perceived) policies behind them, but its modern usage is built from interdisciplinary scholarship in international relations and international law. Raustiala recognises a continuum of effectiveness, defined as 'the degree to which a legal rule or standard induces desired change in behavior.'[172] In their review of an emerging literature, Raustiala and Slaughter define effectiveness as: 'the degree to which a rule induces changes in

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Kelsen (n 2) 119
ibid.
ibid.
Hersch Lauterpacht, *The Development of International Law by the International Court* (revised edition, Oxford University Press 1982)
ibid., 227
Kal Raustiala, 'Compliance and Effectiveness in International Regulatory Cooperation' (2000) 32 Case Western Journal of International Law 387

behaviour that further the rule's goals; improves the state of the underlying problem; or achieves its policy objective'.[173] This definition hides an epistemological objection, that individual scholars will define the 'goals', 'problem' and 'policy objective' of a particular branch of international law, assessing effectiveness in accordance with their own bias. In the IHL context, where norms are sharply contested, prevention, compliance and effectiveness might be identified differently by scholars who favour the principle of humanity over that of military necessity and vice versa, meaning that assertions of IHL's effectiveness become unstable. This epistemological distinction is subtly distinct from Koskenniemi's critique of 'effectiveness' scholarship, explored in 1.5 below.

Dill also focuses on the enigma between international law and state or military behaviour, but her definitions do not refer to policy objectives.[174] She distinguishes, as do Raustiala and Slaughter,[175] and Meyer, [176] between effectiveness as a causal inquiry whether IHL norms change agents' behaviour (and if they do, what normative effect results),[177] and compliance, where behaviour matches a legal norm. In Dill's work, compliance refers only to the 'initial act of drawing on a legal rule when faced with the task of making a decision'[178] (a narrower and more formal definition than the one in this thesis); convergence means behaviour that happens to be consistent with a norm 'for reasons other than recourse to law';[179] and effectiveness refers to whether IHL makes a difference for behaviour. Dill's concept of convergence can be used to address an objection from logic that the presence of military instruction in IHL and broad compliance by a state could be correlation rather than causation. This causal effect of military training in IHL on the prevention of violations and compliance in armed conflict is the behavioural problématique where inquiries into training or instruction in IHL begin.

Understanding and Willingness to comply

Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance' in Walter Carlsneas, Thomas Risse and Beth A. Simmons (eds) *Handbook of International Relations* (Sage 2002) 538, 539

Dill (n 16) 8

Raustiala and Slaughter (n 173) 539

Timothy Meyer, 'How Compliance Understates Effectiveness' (2014) 108 Proceedings of the Annual Meeting of the American Society of International Law 168, 169

Dill (n 16) 10, 12

ibid., 12

ibid., 10

In this thesis, 'understanding' and 'willingness to comply' are easy-to-communicate shorthand for two aims of IHL training built in chapter 3: the cognitive and volitional internalisation of IHL norms. 'Understanding' is under-inclusive because IHL training should aim at understanding, knowledge and recall; while 'willingness to comply' appears out of place in a military chain of command, where soldiers must comply with lawful orders: they do not have discretion to assert their individual willingness or unwillingness to comply. However, soldiers are not automata, and IHL compliance depends upon volition as well as upon understanding, knowledge and recall of IHL. If we acknowledge (as we must) that some IHL violations are the result of individuals' or groups' deliberate actions while others stem from a rejection or resentment of the law, then individual willingness to comply with IHL instead of violating it is a relevant goal of IHL training.

1.4 Scholarly Context

To explain the conundrum between IHL training, prevention and compliance, this thesis builds insights from four interdisciplinary sub-fields: constructivist compliance theory from international relations, political science research on IHL compliance, the social psychology of violations of IHRL and IHL, and historical works on military training and on the UK's record in IHL. This section outlines and begins to synthesise relevant concepts from these fields. Four more are marginally relevant, arising to explain specific points on military training or emergent findings from the case study. These are military ethics, organisational learning, epistemic injustice, and the barely cohesive field of states' rhetorical responses to calls for accountability for IHL and IHRL violations. These marginal fields are defined briefly in what follows.

Compliance Theory

Compliance theory seeks to explain why and to what extent states adhere to international law. It began with a range of meta-state conceptions, viewing the state as a unitary, rational actor, for which international law was epiphenomenal, or only a coincidental restraint on preferences and power.[180] Influenced by Austinian positivism, and the

[180] Richard H. Steinberg and Jonathan M. Zasloff, 'Power and International Law' (2006) 100 American Journal of International Law 64, 74, citing Stephen D. Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', in Krasner (ed.), *International Regimes* (Cornell University Press 1983)

absence of a sovereign or sanction in the international legal system, Cold War realists argued that power, not international law, would determine if states might comply with international law.[181] Among the modern exponents of realism are Goldsmith and Posner,[182] whose rejection of international law's power to bind states coincided with the George W. Bush administration's attempted redefinition of the prohibition on torture.[183] Realism has now ceded to rational choice approaches, which apply game theoretical perspectives to states' choices to comply with international law. Guzman's schema of reciprocity, retaliation and reputation exemplifies sophisticated rational choice approaches to inter-state cooperation.[184] From the 1960s onwards, the New Haven school of McDougal and Lasswell argued that international law is characterised not by rules, but by authoritative decision-making.[185] In effect, law was subordinate to policy.[186] In contrast, the international legal process school, whose proponents included Abram Chayes and Louis Henkin, argued that international legal rules have a modest effect, but it is states' participation in an international legal and organisational process that assists compliance, by operating as a constraint on states' decision-making.[187] Henkin believed that realism was a 'cynic's formula'; and that:

> it is probably the case that *almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time*.[188]

Subsequently, liberal compliance theorists focused on differences in states' domestic regime type (democracies versus non-democracies) to explain state practice in international law.[189] Slaughter argued from the premise that international law compliance is more likely in liberal democratic states:[190] a premise countered by Alvarez for its US-

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Hans J. Morgenthau, *Politics among Nations: The Struggle for Politics and Peace* (Knopf 1948)

Jack Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford University Press 2005)

Michael P. Scharf, 'International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate' (2009) 31 Cardozo Law Review 45

Andrew T. Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press 2008)

Myres S. McDougal and Harold D. Lasswell, 'The Identification and Appraisal of Diverse Systems of Public Order' (1959) 53 American Journal of International Law 1, 9, cited in Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 Yale Law Journal 2599, 2618

Koh (n 185) 2623, citing remarks of New Haven scholar Oscar Schachter in 'Symposium, McDougal's Jurisprudence: Utility, Influence, Controversy' (1985) 79 Proceedings of the American Society of International Law Annual Meeting 266, 271

Koh (n 185) 2623

Louis Henkin, *How Nations Behave: Law and Foreign Policy* (2nd revised edition, Columbia University Press 1979) 49, 47 (emphasis in original)

Kal Raustiala, 'Compliance and Effectiveness in International Regulatory Cooperation' 32 (2000) Case Western Journal of International Law 387, 399

Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 European Journal of International Law 503

centricity.[191] The same criticism has been applied to realist, rational choice, international legal process and New Haven schools; but not to the constructivist approach explained below.[192] Slaughter's contention has been nuanced by subsequent research, including Hillebrecht's identification of 'begrudging' compliance with human rights judgments by some established democracies;[193] and by Simmons' correlation between recent democratisation and improved human rights compliance.[194] Slaughter was the first liberal institutionalist to call for a 'disaggregated' state,[195] recognising the role of transnational 'networks' of compliance between 'parts of states' (e.g. judges cooperating internationally in horizontal networks),[196] and supranational compliance mechanisms such as the EU and ICC (vertical networks).[197] This elite disaggregation is too remote from a soldier or officer's understanding of IHL, but it begins a useful inquiry into the principal/agent problem in international law compliance.

From this broad and varied field, constructivist approaches are the most relevant to the relationship between military training, prevention and compliance in IHL, because of constructivism's emphasis on the relationship between norm and state behaviour.[198] For constructivists, norms help to constitute states' identities in the international order, so constructivism might be said to reverse the compliance inquiry from whether states adhere to norms to how states' behaviour is constructed by norms. It is the norm-to-behaviour inquiry that begins to address Kelsen's *problématique* of individuals internalising municipal law,[199] although the norm internalisation in constructivist compliance theory is that of states and not individuals, and the norms are those of international rather than domestic (criminal) law. Unlike realists, rationalists and the New Haven and international legal process schools, constructivists argue that rules and norms have a causal impact on behaviour, and see norms as intrinsic to states' shifting preferences. Norms, learning, ideology and culture interact on constructivist accounts;[200]

José Alvarez, 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory' (2001) 21 European Journal of International Law 183

Brunée and Toope (n 5)

Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (Cambridge University Press 2014)

Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009)

Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2005) 12

ibid., 6

ibid., 24

Finnemore and Sikkink; Brunnée and Toope (n 5)

Kelsen (n 2)

Koh (n 185) 2650

and ‘norms’ are left undefined, with an uncertain relationship to binding rules, principles and standards. This has led to the criticism that with the exception of Finnemore, constructivists fail to account for how international law is binding.[201] Where the term ‘norms’ appears in this thesis, it refers to binding IHL rules (whether from treaty or custom), not to binding law and nonbinding standards together.

Specifically, the thesis focuses on constructivist norm internalisation and communities of practice to articulate standards for military training in IHL. It is sensible to note that constructivists have co-opted both these ideas. Constructivism is a broad and eclectic field in itself, making constructivist compliance theory a new sophisticated mainstream.[202] Norm internalisation appears both in Koh’s transnational legal process and in constructivist compliance theory;[203] and communities of practice appear first in social theories of learning,[204] and then in constructivist international relations by Adler and Pouilot.[205] Sikkink’s nascent concept of ‘agentic constructivism’ is relevant to IHL’s strong disaggregation to individual soldiers, officers and fighters in armed groups.[206]

In Koh’s transnational legal process, norm internalisation follows states’ interaction and prior interpretation of a norm. As the norm is internalised, it is incorporated into a domestic legal system:[207] a process that assumes dualist legal systems and may not be generalised to monist or civilian systems, where ratified treaties and customary international law are considered integral to municipal law without the need to incorporate these norms by statute. More useful is Finnemore and Sikkink’s constructivist approach to norm internalisation. They posit a two-stage process of ‘norm emergence’ and ‘norm cascade’, whereby state leaders and other ‘norm entrepreneurs’ persuade other states to accept a norm, which is then diffused through (or increasingly accepted) by other states until it becomes ‘taken-for-granted’.[208] Finnemore and Sikkink acknowledge that this

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Brunnée and Toope (2010) (n 28) 88-89

Elizabeth Stubbins Bates, ‘Sophisticated Constructivism in Human Rights Compliance Theory’ (2014) European Journal of International Law 1169

Koh (n 185) 2634, 2646; Finnemore and Sikkink (n 5)

Etienne Wenger, ‘Communities of Practice and Social Learning Systems: The Career of a Concept’ in Chris Blackmore (ed), *Social Learning Systems and Communities of Practice* (Springer London 2010)

Emmanuel Adler and Vincent Pouilot, ‘International Practices’ (2011) 3 International Theory 1

Kathryn Sikkink, ‘Beyond the Justice Cascade: How Agentic Constructivism Could Help Explain Change in International Politics’ (Princeton University International Relations Colloquium, 21 November 2011)

Koh (n 185)

Finnemore and Sikkink (n 5) 895

progress narrative does not always occur, and the linear model can be interrupted.[209] This state-based model is only a starting-point. An account of individual soldiers' and officers' internalisation of IHL norms in military training requires a less stylised account, which takes account of individual agents' understanding and their willingness to comply.

This thesis applies norm internalisation to individual soldiers and officers, and the military culture in which they undergo training and deployment. The thesis argues that in this context, the process by which norms become 'taken-for-granted' is not merely cognitive (involving the understanding, knowledge and recall of IHL). If it were merely cognitive, then the dissemination model of military training in IHL, or one that depends solely on classroom instruction would be sufficient to ensure the prevention of violations and compliance with IHL norms. It must also have a volitional aspect, that takes account of the risks to IHL compliance revealed by the social psychology of military training and armed conflict (see below). In differentiating between cognitive and volitional aspects of IHL norm internalisation (in layman's terms, understanding and willingness to comply with IHL), the thesis nods to the legal theory on normativity, thus beginning to close the gap between constructivism and accounts of international law's bindingness. It does this via H.L.A. Hart's 'internal aspect of rules': which he defines as 'a critical reflective attitude to certain patterns of behaviour as a common standard', evidenced by 'criticism (including self-criticism), demands for conformity', and a recognition that certain conduct is binding.[210] MacCormick argues that Hart's 'internal aspect of rules' hides an implicit distinction between the cognitive and the volitional,[211] and it is his argument that provides the theoretical justification for the distinction between understanding and willingness to comply developed in this thesis. Of course, Hart doubted (but did not dismiss)[212] whether international law was a legal system, so it is unorthodox to apply Hart to any account of international law compliance. However, Hart's doubts on international law have been critiqued, not least by Waldron, who believes that Hart merely 'ran out of steam or inclination' to address international law substantively.[213] Hart did not consider his

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ibid.

H.L.A. Hart, *The Concept of Law* (Leslie Green, Joseph Raz and Penelope A. Bulloch eds, 3rd edition, Oxford University Press 2012) 57

Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1994) 288

Jeremy Waldron, 'International Law: "A Relatively Small and Unimportant" Part of Jurisprudence?' in Luis Duarte d'Almeida, James Edwards and Andrea Dolcetti (eds), *Reading HLA Hart's The Concept of Law* (Hart Publishing 2013)

ibid., 223

'internal aspect of rules' in relation to international law, so there is scope for an account of military training in IHL that does so.[214]

Returning to constructivism, Adler and Pouilot's work on communities of practice provides the justification for an inquiry into individual and group norm internalisation. They argue that international action is both agential and structural, and that agents' actions are constituted by their communities of practice; with communities of practice mediating the relationship between the agential and the structural. [215] Wenger had defined communities of practice in three dimensions, comprising shared knowledge, a 'social fabric of learning', and shared practice that embodies that knowledge.[216] Again, this is a stylised account without a clear empirical basis, but it opens an inquiry into the interaction between shared knowledge, groups of individuals engaged in learning, and their practices that promote that knowledge, all of which can assist our understanding of military training, prevention and compliance in IHL. Over time, the definition of communities of practice has sharpened, and the differentiation of communities of practice from related concepts of epistemic communities and interpretive communities has become clearer. Briefly, epistemic communities tend to relate to elite knowledge;[217] while interpretive communities (a concept originally from literary criticism) decide upon relevant and irrelevant, valid or invalid views of a treaty;[218] while communities of practice can encompass both senior and junior ranks, structured militaries and less structured armed groups, because their focus is on shared practice.

Brunnée and Toope apply communities of practice to international law in their interactional account of compliance. They believe that the focus on shared practice in communities of practice can be distinguished from shared 'values or goals'.[219] This distinction may not fit an IHL context, given the high degree of unit cohesion which is the aim of military training, and the shared values imparted as a result. Nonetheless, Brunnée and Toope attempt a theory of obligation and not merely compliance in their constructivist, interactional account: the absence of a theory of normativity is one of the

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3.3, 3.5

Adler and Pouilot (n 205) 16

Etienne Wenger, *Communities of Practice: Learning, Meaning, and Identity* (Cambridge University Press 2002) cited in Adler and Pouilot (n 205) 18

Emmanuel Adler and Peter M. Haas, 'Conclusion: Epistemic Communities, World Order, and the Creation of a Reflective Research Program' (1992) 46 International Organization 367

Michael Waibel, 'Interpretive Communities in International Law' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (Oxford University Press 2015)

Brunnée and Toope (2010) (n 28)

critiques they apply to existing constructivist accounts of international law. Extending Fuller's *Morality of Law* to international law,[220] they hold that reciprocity and interaction between participants in a 'continuous practice of legality' helps to build compliance. For Brunnée and Toope, compliance results from 'broad participation', 'shared understanding' by communities of practice; a 'congruence' between social practice and legal norms,[221] and the frequent reassertion of norms; not their imposition,[222] or a simple 'teaching' of norms.[223] Theirs is a horizontal, not a top-down approach; constructivist because the 'practice of legality' builds state action, in contrast to realist or rational choice approaches, where state preferences are set prior to encountering norms and other actors. This horizontal approach is consistent with what chapter 5 calls the 'strong disaggregation' or delegation of authority in IHL to multiple individual sub-state actors and the units in which they serve.

There is a recent but growing body of work on compliance with IHL, including Dill's constructivist theory of US air targeting and IHL compliance in international armed conflict;[224] and significant studies by Krieger and Jo and Bryant on compliance with IHL in 'areas of limited statehood', which find that many state-based rationalist compliance theories need finessing when applied to armed groups and areas where state control is absent or undermined. Dill finds that IHL's contested or indeterminate norms make it harder to predict law's behavioural effect, and that IHL cannot be viewed separately from actors' prior interests and beliefs about norms. Krieger concludes that international criminal law, or the possibility of UN sanctions for IHL violations help constructivist persuasion and rational choice incentives to work better.[225] Jo and Bryant find the relative centralisation of an armed group and the extent to which it seeks legitimacy predict compliance with IHL and IHRL norms, and that a range of coercive or incentive-based behaviours work together with constructivist 'persuasion' to encourage compliance.[226]

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ibid., 6-7
ibid.
ibid., 55
ibid., 62
Dill (n 16)
Heike Krieger, 'A Turn to Non-State Actors: Inducing Compliance with International Humanitarian Law in War-Torn Areas of Limited Statehood' (2013) No. 62 SFB-Governance Working Paper Series, DFG Collaborative Research Center (SFB) 700 Governance in Areas of Limited Statehood - New Modes of Governance?
Hyeran Jo and Katherine Bryant, 'Taming of the Warlords: Commitment and Compliance by Armed Opposition Groups in Civil Wars' in Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press 2013)

Yet these works on compliance do not systematically address preventing violations in armed conflict: the stage logically and chronologically prior to deployment when much peacetime dissemination and/or pre-deployment training takes place.

Political Science

There is a larger body of work from political science on states' and armed groups' compliance with IHL.[227] Most relevant to this thesis is Andrew Bell's qualitative, constructivist research on IHL training, principally in the US armed forces. He finds that a military culture that emphasises civilian immunity norms shapes soldiers' and officers' preferences, steering them towards compliance with IHL.[228] The work of quantitative scholars is less central to this thesis, but still relevant to building a compliance theory for IHL. Using different quantitative datasets, Valentino *et al* and Downes sought to explain 'civilian victimization' in international armed conflicts. Valentino and co-authors found that neither joint ratification of IHL treaties nor regime type (democracies versus non-democracies) promote compliance with civilian protection norms.[229] Nor did these factors combined offer a statistically significant protection for civilians. Downes found that democracies and non-democracies were equally likely to target civilians, but he found that democracies target civilians in conditions of 'desperation' to end a 'war… of attrition'.[230] There was a possible selection bias: a number of asymmetric, lengthy conflicts were included in his dataset of 'interstate war' from 1816 to 2003. Downes also found that 'the intention to annex conquered territory significantly increase[d] the likelihood of civilian victimization.' A quantitative scholar's significant increase might be a qualitative scholar's marginal increase, as the threshold for statistical significance is usually set at 5%.

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[227] Benjamin Valentino, 'Why We Kill: The Political Science of Political Violence against Civilians' (2014) 17 Annual Review of Political Science 89; Alyssa K. Prorok and Benjamin J Appel, 'Compliance with International Humanitarian Law: Democratic Third Parties and Civilian Targeting in Interstate War' (2014) 58 The Journal of Conflict Resolution 713; Hyeran Jo and Catarina P. Thomson, 'Legitimacy and Compliance with International Law: Access to Detainees in Civil Conflicts, 1991–2006' (2014) 44 British Journal of Political Science 323

Andrew M. Bell, '"Leashing the Dogs of War": Law of War Norms, Military Culture, and Restraint toward Civilians in War', PhD thesis, Duke University 2016

Benjamin Valentino, Paul Huth, and Sarah Croco, 'Covenants Without the Sword: International Law and the Protection of Civilians in Times of War' (2006) 58 World Politics 339,368

Alexander B. Downes, 'Desperate Times, Desperate Measures: The Causes of Civilian Victimization in War' (2006) 30 International Security 152, 154

The scholars' conceptual definitions vary, both as between Downes and Valentino et al, and between the two political science outputs and IHL. Downes' definition of civilian victimization is significantly broader than violations of the principle of distinction: it includes 'aerial, naval and artillery bombardment of civilians; sieges, naval blockades and economic sanctions that deprive non-combatants of food; massacres; and forced movements or concentrations of populations.'[231] Downes also adds a third category of quasi-combatants (e.g. munitions workers), which risks confusion on the principle of distinction,[232] while not considering the contested notion of direct participation in hostilities (DPH).[233] Valentino's definition of 'intentional civilian fatalities' includes deliberate targeting of civilians but also deaths from thirst, hunger or disease as a result of policies aiming to 'undermine civilian morale or otherwise coerce civilian populations'.[234] Valentino's definition echoes without acknowledging the prohibition on 'spread[ing] terror among a civilian population',[235] or a teleological reading of economic and social rights combined with occupation law. Just as international lawyers reading Downes' and Valentino et al's work should not conflate 'significant' with 'strongly likely', readers also should not confuse this quantitative work with a study of the causes of wilful killing of civilians in international armed conflict.

Morrow's early work presents some conceptual problems from an international lawyer's perspective, where the definition of 'compliance' depends on his *ex post facto* four-point scale from full compliance to noncompliance (denoting 'major and frequent' violations).[236] International law tends towards binary measures of compliance and violation, but interpretive controversies make any quantitative analysis reductive at best. In 2007, Morrow found that ratification of IHL treaties by both parties to a conflict did reduce the likelihood of violations; and that ratification is particularly important for democracies, which commit more violations if they do not ratify treaties.[237] Early twentieth century prohibitions on chemical and biological weapons in the Geneva Gas Protocol of 1925 were generally implemented in Morrow's dataset, while compliance was

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ibid., 156

ibid., 157, n 21; Downes, *Targeting Civilians in War* (Cornell University Press 2011) chapter 1, n 7

AP I, art 51(3); AP II, art 13(3); ICRC Interpretive Guidance on DPH

Valentino et al, (n 229) 359

AP I, art 51(2); AP II, art 13(2); ICRC Customary IHL Study, rule 2

James D. Morrow, 'When Do States Follow the Laws of War?' (2007) 101 American Political Science Review 559, 571

ibid., 570

lower for the protection of civilians.[238] While Morrow does focus on ratification in his dataset, he seems not to take account of cumulative normativity: as the twentieth century continued concepts of IHL and definitions of compliance or violation grew as new norms were promulgated and new treaties ratified. Morrow's omission of customary IHL is understandable, given its contested methodology and content,[239] and the impossibility of parsing that controversy in quantitative analysis, but it too limits the validity of his dataset.

With all these methodological critiques, how is political science research useful for a study on IHL training, prevention and compliance? Morrow's more recent work offers some subtle distinctions and policy suggestions. There is a stronger dichotomy in his monograph than in his earlier article between violations directed by a state and violations committed by individual soldiers.[240] Joint ratification of treaties, he argues, works best to deter the former, while military training in IHL is one modality to address the latter. This helps to explain his earlier finding that the norms against chemical and biological weapons were largely complied with, while prohibitions on targeting civilians were not. The former would involve a state-directed violation, where 'military authorities have the greatest control',[241] while the latter would combine planned targeting (where civilian leaders or military commanders might direct an unlawful airstrike) and opportunistic targeting (where a soldier or officer's understanding of IHL matters for compliance). Soldiers, he argues, are more likely to violate IHL in retaliation where opposing forces commit perfidy, as an expectation of reciprocity is undermined. Training can help address this: 'A limited battlefield is created through training and sustained through discipline against those who break the rules.'[242] For Morrow, IHL compliance depends on reciprocity, training, punishment by courts-martial, and states' 'self-restraint'.[243] Morrow's work, to a greater extent than Downes', or Valentino et al's, offers insight into the necessity but insufficiency of military IHL training for compliance. Morrow does not,

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ibid., 559

W. Hays Parks, 'The ICRC Customary Law Study: A Preliminary Assessment', (2005) 99 Proceedings of the Annual Meeting of the American Society of International Law 208; Dinstein (2006) (n 33); Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press 2007)

James D. Morrow, *Order within Anarchy* (Cambridge University Press 2014)

ibid., 300

ibid.

ibid., 309

however, inquire into the dangers of misunderstood reciprocity, or violations committed in revenge.

Social Psychology

The social psychology of military training, and of violations of IHL forms a third relevant field. Unlike much literature from international relations and political science, social psychologists do consider the cognitive and social perspective of the individual soldier, officer or armed group fighter, but in relation to others. Social psychology offers valuable context to the learning that occurs in groups or military units, and the culture that is imparted through training. Other social psychological works approach the conundrum between training, prevention and compliance from the opposite perspective to compliance theorists, offering an anatomy of atrocity and its causal mechanisms; a theory of non-compliance in all but name. Social psychological insights can help build standards for effective military IHL training. Oft-quoted findings on obedience to authority,[244] and conformity to an in-group[245] are relevant starting points, but they are givens in a structured, centralised military force, so less illuminating for a study on military IHL training than for research into torture by law enforcement officials or criminal assault by gangs.

Bandura's social learning theory departs from an individual, experiential model of learning, and argues that 'virtually all learning phenomena … can occur on a vicarious basis through observation' of others.[246] It is this observation, Bandura argues, that enables individuals to perceive actions and their consequences; so, in the IHL context, if officers treat IHL training as a mere bureaucratic requirement, or if new recruits observe the chain of command speaking against accountability for IHL violations, then IHL compliance will be perceived as peripheral or antagonistic to military culture. Social learning theory is one of the mechanisms by which the rhetoric that the UK armed forces are 'under legal siege' from human rights litigation (often on the IHRL norms that are shared with IHL) risks undermining soldiers' willingness to comply with IHL.[247]

Stanley Milgram, *Obedience to Authority: An Experimental View* (Harper and Row 1974)

Philip G. Zimbardo, 'Revisiting the Stanford Prison Experiment: A Lesson in the Power of Situation' (2007) 53 Chronicle of Higher Education B6

Albert Bandura, *Social Learning Theory* (General Learning Press 1971) 2

7.5

Bandura's 'moral disengagement' also helps to develop a concept of soldiers' and officers' willingness to comply with IHL. 'Moral disengagement' is:

> …the cognitive restructuring of inhumane conduct into a benign or worthy one by moral justification, sanitizing language, and advantageous comparison; disavowal of a sense of personal agency by diffusion or displacement of responsibility; disregarding or minimizing the injurious effects of one's actions; and attribution of blame to, and dehumanization of, those who are victimized.[248]

A specific dimension of this 'cognitive restructuring' can be seen when instances of IHL violations are dismissed as the work of 'a few bad apples'. Bandura argues that 'foggy nonresponsibility' results when a few subordinates are blamed for publicised harm, and when the cause is attributed to 'isolated incidents arising from misunderstandings of what has been authorized'.[249] These rhetorical tendencies are found in the UK's institutional response to the Camp Breadbasket incident and the death of Baha Mousa and torture of other Iraqi civilians in British military custody in Iraq.[250] Moral disengagement has been applied in studies of former fighters' attitudes to IHL. In the first ICRC study into the Roots of Behaviour in War, moral disengagement has two dimensions: a) the justification of violations by a fighter's own group (which in turn correlates with group cohesion), and the dehumanising of the enemy.[251] The study found that knowledge of the law and attitudes consistent with a risk of violations can occur together,[252] offering evidence of dissemination or training's insufficiency to ensure respect for IHL. In this thesis, the case of Alexander Blackman (Marine A) is the clearest evidence that 'moral disengagement' can coexist with knowledge of IHL and creates a risk of violations.[253]

The Roots of Behaviour in War study has been subject to critique, including by Stephens, who argues that it neglected 'social and moral inquiry' as mechanisms to improve compliance with IHL, and was overly positivist in relation to IHL, perceiving it as value-neutral.[254] The present author disagrees with Stephens in part. The Roots of Behaviour in War study wisely identified that military and armed group values shift with ideology and

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Albert Bandura, 'Moral Disengagement in the Perpetration of Inhumanities' (1999) 3 Personality and Social Psychology Review 193

ibid., 197

6.4.1, 6.4.2

Muñoz-Rojas and Frésard (n 110)

ibid.

6.4.4

Dale Stephens, 'Behaviour in War: The Place of Law, Moral Inquiry and Self-Identity' (2014) 96 International Review of the Red Cross 751

circumstance, and that an emphasis on the 'values' underpinning IHL might undermine IHL's normativity. It was published too early to benefit from political science findings on military culture and legitimacy-seeking behaviour, as distinct from shifting values. A second study, on the Roots of Restraint in War, is due to be published in 2018.[255] It will address both 'formal' and 'informal norms', including values held by fighters' peer group, and will evaluate the impact of IHL training and dissemination, and the ICRC's integration model.[256] The changed focus of the new ICRC study does not invalidate moral disengagement's relevance to IHL violations.

In 1958, Kelman developed notions of 'compliance', 'identification' and 'internalization' that are distinct social psychological contributions to this research problem. The 'z' spelling will be retained to differentiate Kelman's 'internalization' from norm internalisation in constructivist compliance theory. For Kelman, these three concepts are three stages of 'attitude change'.[257] In 'compliance', an individual accepts influence from another individual or group on a reward or sanction basis; then in 'identification', an individual accepts influence so that he or she can gain 'a satisfying self-defining relationship' with another individual or group; and finally, in 'internalization', conduct is 'integrated with the individual's existing values' and is 'intrinsically rewarding'.[258] These insights can be applied to the motivations of individual recruits to armed forces or armed groups, and to the social psychology of military training in general.

Subsequently, Kelman and Hamilton conducted survey research on US citizens' views of the trial of Lt William Calley for the My Lai massacre in Vietnam.[259] Calley was convicted of 22 counts of murder under the US Code of Military Justice, having been charged with 102 counts; his co-defendants were acquitted.[260] Noting conflicting evidence as to whether the killings and rape of civilians was expressly ordered by Calley's superiors, Kelman and Hamilton class the killings as a 'sanctioned massacre', in which civilians were 'viewed as expendable', and their deaths 'strategic necessities'.[261] Kelman and Hamilton argue that implicit or explicit 'authorization', the 'routinization' of killing,

~~Brian McQuinn, Fiona Terry and~~ Benjamin Eckstein, 'The Roots of Restraint in War' (ICRC 2017)

ibid., ICRC, 'Integrating the Law' (n 124)

Herbert C. Kelman, 'Compliance, Identification and Internalization: Three Processes of Attitude Change' (1958) II Conflict Resolution 51

ibid., 53

Herbert C. Kelman and V. Lee Hamilton, *Crimes of Obedience: Toward a Social Psychology of Authority and Responsibility* (2nd edition, Yale University Press 1990)

ibid., 5

ibid., 2-3, 12-13

and 'dehumanization' of victims as a category are the combined causes for sanctioned massacres, from the Holocaust to My Lai.[262] Their survey research, whose participants showed considerable deference to authority and sympathy for Lt Calley, led Kelman and Hamilton to reason that 'rule and role orientations … foster a tendency to obey without question' while 'value orientation' encourages 'personal responsibility for actions taken under superior orders.'[263] Similar concepts might be used in armed forces recruitment screening, where outlier responses reflecting a very strong role orientation, but very little value orientation might be flagged on a soldier's personnel file, for future discussion and careful checks on that soldier's perceptions of international law. A tendency to 'dehumanize' enemy forces or enemy civilians could be flagged as a more serious risk for compliance on operations. Kelman's later work reveals 'authorization', 'routinization' and 'dehumanization' as causes of torture at Abu Ghraib. For Kelman, torture is another 'crime of obedience', triggered by the perception that the State's security is under threat, and that an extensive State 'apparatus' must be created to counter this threat.[264]

Shalit, an Israeli military psychologist, writes that the Lebanon War of 1982 led to internal critique and a reduced concern for the dead and wounded. Veterans wrote that they felt compelled to adopt 'little head': a low-profile reneging of responsibility which Shalit sees as caused by failures of leadership.[265] In addition, the soldiers believed the IDF doctrine of 'purity of arms' (that all weapons must be discharged in the spirit of the Geneva Conventions) had changed into a sarcastically-termed 'purity of the finger' (in which a soldier must fire continuously and without discrimination).[266] Shalit's research, like Kelman and Hamilton's, shows that deference can govern operations, which might involve soldiers and officers implementing unlawful orders without challenging them. His reflections point to the potential antagonism between military training in general and training on IHL. He argues that military 'drills' can create quick decision-making, but not moral courage, or the ability to apply that moral courage to novel situations.[267] Similarly, casting the enemy as cruel rather than clever 'creates a critical characteristic that cannot

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ibid., 12, 16-20
ibid., 21
Herbert C. Kelman, 'The Policy Context of Torture: A Social-Psychological Analysis' (2005) 87 International Review of the Red Cross 123, 123
Ben Shalit, *The Psychology of Conflict and Combat* (Praeger 1988) 172-175
ibid.
ibid., 117-119

be handled'.[268] A link might be drawn between Kelman and Hamilton's 'dehumaniz[ation]' and this tendency to stereotype the enemy.

Historical Research

In a similar way, historical research indicates that the aims of basic training (desensitisation, breaking down a soldier's inculcated reluctance to kill, unit cohesion and obedience to the command chain) are antagonistic to those IHL norms that emphasise restraint and the principle of humanity.[269] Holmes observes that '[t]here is a direct link between the harshness of basic training and the cohesiveness of the group which emerges from it',[270] showing unit cohesion as an explicit aim of basic training. The drill-sergeant's insults to new recruits were a model for subsequent behaviour.[271] Bourke's archival research of twentieth century military training reveals three purposes to demoralising verbal abuse: i) to break down troops so they would take orders, ii) to undermine soldiers' self-esteem so they would hope to improve the esteem their commanders held for them, and finally iii) to instil hatred as a reaction to the fear that might make service personnel 'freeze' on deployment, thus reducing casualties.[272] Battle inoculation (realistic practical training intended to prepare troops for the sensory realities of battle) was adopted in part because ideological training could not defeat troops' fear.[273] Holmes cites the British Army's abandoned approach to battle inoculation training in 1941-1942, which used animal carcasses and exercises 'designed to inoculate hatred and aggression'.[274] Bayonet training was retained during the First World War, Second World War and Vietnam War, with hard wood placed in sacks to mimic the feeling of bones against the bayonet.[275] Archives from a documentary on My Lai reveal a military trainer who favoured the 'spirit of the bayonet', identifying the purpose of military training to break down an individual human being's willingness to kill.[276]

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ibid., 95

Richard Holmes, *Acts of War: The Behaviour of Men in Battle* (2nd edition Cassell 2003)

ibid., 47

ibid., 41

Joanna Bourke, *An Intimate History of Killing: Face-to-Face Killing in Twentieth Century Warfare* (Granta 1999) 81-82

ibid., 84-85

Holmes (n 269) 53-54

Bourke (n 272) 90-93

Yorkshire Television, *Four Hours in My Lai*, transcribed interview with an ex-Sergeant 2nd Platoon, 1988 (The Liddell Hart Archive (LHArch), King's College London)

This approach prizes efficiency in killing and swift compliance with orders; treating recruits to be broken and remoulded, with hatred supposedly masking or eradicating inevitable fear. Instilling hatred as a means to overcome hesitation might also override the hesitation needed to recall and implement IHL training. Hatred of the enemy is in tension with the humane treatment of detainees and wounded enemy forces. Finally, subjecting soldiers to brutality through their training can imply that the armed forces authorise prohibited acts on prisoners of war, internees or detainees in NIAC. The Baha Mousa Public Inquiry found that personnel subjected to ill-treatment as part of conduct-after-capture training were not always aware that the treatment to which they were subjected is prohibited in IHL.[277] Brutal training dehumanises recruits and risks a cognitive and empathic 'distancing' from those they encounter in armed conflict. A distinct mechanism of cognitive 'distancing' has been shown to result from equipment which masks the humanity of the enemy. Anecdotally, soldiers who wore helmets in the Second World War were more likely to be attacked in face-to-face combat than those without, or with a 'humble cap', suggesting that equipment can 'distance' the soldier from the humanity of enemy personnel.[278]

There is a small but growing subfield of work on UK state practice in relation to IHL, and the UK's relations with the ICRC.[279] These historical works, and one contemporaneous account,[280] bolster the findings of recurrent patterns of IHL and IHRL violations against detainees, and of institutional denial and resistance to accountability when these violations come to light. Historical works offer limited detail on military training in IHL, with Bennett in particular noting gaps in the archive on this point.[281]

Marginally Relevant Fields

6.4.2

Holmes (n 269) 380

Victoria Nolan, *Military Leadership and Counterinsurgency: The British Army and Small War Strategy Since World War II* (I.B. Tauris 2011); Aoife Duffy, 'Legacies of British Colonial Violence: Viewing Kenyan Detention Camps through the Hanslope Disclosure' (2015) 33 Law and History Review 489; Huw Bennett, '"Detainees Are Always One's Achilles Heel": The Struggle over the Scrutiny of Detention and Interrogation in Aden, 1963–1967' (2016) 23 War in History 457; James Crossland, *Britain and the International Committee of the Red Cross, 1939-1945* (Palgrave Macmillan 2014)

Michael O'Boyle, 'Torture and Emergency Powers under the European Convention on Human Rights: Ireland v. the United Kingdom' (1977) 71 American Journal of International Law 674

Huw Bennett, *Fighting the Mau Mau: The British Army and Counter-Insurgency in the Kenya Emergency* (Cambridge University Press 2012) 63, 74

Military Ethics

At an early stage of literature review, works on military ethics training were sought to provide comparative context on military training in IHL. This was a false lead. A close reading of the Baha Mousa Public Inquiry report reveals the dangers in relying on education in military ethics to teach IHL compliance.[282] The literature on military ethics training has at least two principal debates with some relevance to this thesis: [283] first, whether training is capable of instilling ethical conduct, and second, whether military ethics training should train soldiers in independent reflection, given the importance of group cohesion and the command chain. As to the first, Lovell is sceptical: ethics and empathy are 'partly a function of cognitive development and not simply of education';[284] and education itself is too distanced from the 'stress, grief and rage' of the battlefield to be sufficient to instil compliance.[285] Van Baarda agrees: 'moral competence' cannot be trained formally in a discrete session of classroom instruction, but instead it is an ongoing personal chronology of learning, or an *éducation permanente*.[286] The British armed forces opt for what Robinson, de Lee and Carrick term a 'pragmatic' approach, in which an 'ethos', not ethics, is 'caught', not taught.[287] This approach leaves too much to chance. It is problematic to assume that training in military ethics reinforces IHL training. If military ethics training does not include a duty to disobey manifestly unlawful orders, or to report upon violations of IHL, it fails to reinforce IHL compliance as an ethical goal. This scepticism contrasts with the empirical findings of Wortel and Bosch, showing a beneficial impact of ethics in a 'train the trainers' scheme in the Netherlands armed forces.[288]

As to the second debate, Moseley suggests that the command chain is not always in favour of instruction programmes that might encourage independent thought.[289] He argues that

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6.4.2

David W. Lovell, 'Educating for Ethical Behaviour? Preparing Military Leaders for Ethical Challenges' in David W. Lovell and Igor Primoratz (eds), *Protecting Civilians During Violent Conflict: Theoretical and Practical Issues for the 21st Century* (Ashgate 2012) 141

ibid., 142

ibid., 146

Th A van Baarda, 'Moral Ambiguities Underlying the Laws of Armed Conflict: A Perspective from Military Ethics' (2010) 11 Yearbook of International Humanitarian Law 3, 39

Robinson et al (eds), (n 288), Introduction; Patrick Mileham, 'Teaching Military Ethics in the British Armed Forces' in Robinson et al, (eds), 43

Eva Wortel and Jolanda Bosch, 'Strengthening Moral Competence: A "Train the Trainer" Course in Military Ethics' (2011) 10 Journal of Military Ethics 17

Alexander Moseley, 'The Ethical Warrior: A Classical Liberal Approach' in Paul Robinson, Nigel de Lee and Don Carrick (eds) *Ethics Education in the Military* (Ashgate 2008) 175

commanding officers should accept that military ethics instruction encourages 'unlimited criticality.'[290] According to some US scholars, training in military ethics should not encourage 'knee-jerk moral certainty'[291] but instead should support a degree of moral autonomy;[292] a concept disfavoured by traditional military training and deference to the chain of command. This debate offers little of value on the relationship between IHL training, prevention and compliance, except to highlight a possible resistance in the command chain to independent thinking by subordinates. Independence of thought is arguably a prerequisite for reporting violations a soldier has witnessed; and for seeking clarification as the lawfulness of an order.

Organisational Learning

Literature on organisational learning in the British Army provides limited context in chapter 6's historical review of UK state practice in IHL. Foley points to the limited centralisation of doctrine in the British Army during the First World War, and the tendency to rely on individual commanders' initiative.[293] Nolan found failures in organisational learning on counterinsurgency in Kenya, Malaysia and Cyprus. The British Army preferred flexibility and ad hoc doctrinal developments, meaning that strategic approaches to counterinsurgencies were absent from institutional memory.[294] Applying social learning theory, Catignani finds similar failings in organisational learning on counterinsurgency in Afghanistan.[295] He employs a distinction between 'formal learning systems' (centralised doctrine, adversely affected by many classified documents and the limitations of the Defence Intranet)[296] and 'informal learning systems' (learning from colleagues or from social networks; a form of learning adversely affected by unit turnover),[297] which might be applied to the evaluation of military IHL training programmes.

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[290] *ibid.*

[291] *J. Joseph Miller, 'Squaring the Circle: Teaching Philosophical Ethics in the Military' (2004) 3 Journal of Military Ethics 199*

[292] *Susan Martinelli-Fernandez, 'Educating Honorable Warriors' (2006) 5 Journal of Military Ethics 55*

[293] *Robert T. Foley, 'Organizational Culture and Learning during the First World War' <http://defenceindepth.co/2015/07/08/organizational-culture-and-learning-during-the-first-world-war/>*

[294] *Nolan (n 279) 217-218, 223-224*

[295] *Sergio Catignani, 'Coping with Knowledge: Organizational Learning in the British Army?' (2014) 37 Journal of Strategic Studies 30-64*

[296] *ibid., 55*

[297] *ibid., 56, 58*

Epistemic Injustice

Fricker's concept of epistemic injustice is cited in relation to the Al-Sweady Public Inquiry.[298] In the course of reading the Inquiry Report, it became clear that Iraqi witnesses as a group were considered untrustworthy in relation to all their allegations, when only some had been proven to have lied about their membership of an armed group and their presence at the Battle of Danny Boy. In contrast, soldiers were (with few exceptions) considered honest witnesses, and their actions were cast in an honourable light, with inconsistencies in their evidence largely dismissed. The report's findings of 'ill-treatment' of detainees appear marginalised, and the extra-legal term 'ill-treatment' is used throughout, explicitly without reference to IHL and IHRL prohibitions, and with adjectives such as 'trivial' applied to this extra-legal analysis. Fricker's epistemic injustice is 'a wrong done to someone specifically in their capacity as knower.'[299] It has two components: 1) 'testimonial injustice' (where a speaker is given less credibility than he or she deserves) and 2) 'hermeneutic injustice' (where a concept is not shared by the speaker and hearer; in Fricker's book, often because the concept has not yet been developed).[300] The Al-Sweady Public Inquiry Report reveals more evidence of testimonial injustice than of hermeneutic injustice, but the use of extra-legal terminology and minimising language in relation to 'ill-treatment' reveals a concerning attitude in relation to IHL compliance.

States' Rhetorical Responses to Violations of International Law

This is a disparate field, not yet cohesive in its terms of art. Vennesson and Rajkovic assert that a 'coercive language game' results when transnational human rights organisations challenge states on their compliance with international law, resulting in duelling framings of facts and legal argumentation.[301] Such a framing is found in the assertions that armed groups sue Western militaries, or otherwise invoke international legal institutions to achieve strategic goals;[302] and that in the UK context, the extraterritorial effect of the European Convention on Human Rights (ECHR), the co-

Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford University Press, 2009); 4.3

ibid.

ibid.

Pascal Vennesson and Nikolas M. Rajkovic 'The Transnational Politics of Warfare Accountability: Human Rights Watch versus the Israel Defense Forces' (2012) 26 International Relations 409

Charles Dunlap Jr, 'Lawfare Today: A Perspective' (2008) 3 Yale Journal of International Affairs 146

applicability of IHL and IHRL, and the availability of domestic jurisdiction in relation to the ECHR has placed the armed forces 'under legal siege'.[303] A variant of this is the concept of the 'juridification' of the armed forces.[304] These concepts support Vennesson and Rajkovic's assertion, but more is needed to explain the conundrum; in particular, how states' responses to alleged or proven violations of IHL affect their policy choices on IHL training, and the future prevention of violations. In the British context, reforms to IHL training have been asserted as a panacea for future violations, while Parliamentary and media rhetoric has pitted litigation as an ongoing harm to the armed forces. This composite rhetoric avoids genuine questions about the limits of IHL training to prevent violations; reveals an institutional resistance to transparency and civil accountability; and risks undermining the legitimacy of the IHL norms trained to armed forces personnel.

1.5 Ethics, Methodology and Sources

This thesis was to have been a qualitative study, focused on British Army's IHL training in the present tense; and comprising structured surveys to soldiers and officers on their understanding of IHL norms, and semi-structured interviews to members of Army Legal Services (ALS) and others involved in the design and implementation of IHL training. That proposed qualitative study would have been part of a growing interdisciplinary trend in international law scholarship; one that builds 'midrange theorizing' by synthesising empirical (in this case qualitative) findings with abstract theory.[305] This proposed qualitative research was ethically approved by SOAS, University of London, but was blocked by the Ministry of Defence (MoD) after two years of training, research, preparation, and informal meetings with military lawyers who had welcomed the study. It was decided that the surveys and interviews could not take place because the Operational Law Training Directive had not been implemented by the summer of 2014, contrary to more sweeping assertions in Parliament that all reforms to IHL training following the Baha Mousa Public Inquiry had been 'addressed' or 'implemented'.[306] Following this decision, the thesis became a partly archival study, using genealogical method to study the evolution of the IHL training obligation; more abstract theorising on

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HL Deb 14 July 2005, vol 672, col 1236; 7.5

Anthony Forster, 'British Judicial Engagement and the Juridification of the Armed Forces' (2012) 88 International Affairs 283

Gregory Shaffer and Tom Ginsburg, 'The Empirical Turn in International Legal Scholarship' (2012) The American Journal of International Law 1

7.3

the relationship between the IHL training obligation and other norms of prevention in IHL, and on the relationship between IHL training and compliance; and a mix of archival and present-day analysis of the British Army's training in IHL. This represents a transition from qualitative to partly historical methods, taking account of an historicist trend in international law scholarship,[307] but the interdisciplinary work which inspired the original qualitative research design remains part of the thesis' scholarly context.[308] Nonetheless, this thesis is a work on international humanitarian law. It uses archival analysis to add historical depth, and relevant insights from international relations, political science and social psychology to explain the relationship between IHL training, prevention and compliance.

The following paragraphs reflect on research ethics and military gatekeepers, academic freedom and a methodology constructed and reworked; and on the ethics of using an archival and public inquiry dataset. Under the subheading 'Methodology' below, there is a *précis* of the literature on international law's many methods, and on the interdisciplinary trend in international law research; followed by definitions of genealogical and archival research, and of critical case study method as used in this project. The thesis' interpretivist stance is explained, alongside the mixed inductive and deductive approach which emerged from the case study. The final paragraphs reflect on the potential and limits of the available sources, acknowledging the gaps and availability biases that might result from training documents gained through Freedom of Information (FOI) requests, and from the few cases that have generated public inquiry testimony; and the value of a detailed single case study which may have limited generalisability. Themes emerge of limited institutional transparency and a resistance to scrutiny by military gatekeepers. These ethical and methodological reflections are findings in themselves, consistent with many of the findings in chapters 6 and 7.

Ethics

Following ethics approval of the proposed surveys and interviews by SOAS, University of London, a research protocol was submitted under the Ministry of Defence Research Ethics Committees (MoDREC) process,[309] and was successful at a first stage review by

Matthew Craven, 'Theorising the Turn to History in International Law', in A. Orford and F. Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016)

[309] 1.4 MoDREC, <https://www.gov.uk/government/groups/ministry-of-defence-research-ethics-committees>

the Army Scientific Assessment Committee (ASAC) in the summer of 2014. Minor amendments were made to the research protocol which was scheduled to be presented at a meeting of MoDREC in Whitehall in autumn 2014. At first stage review, ASAC noted that it was necessary for all research on the armed forces to have a Ministry of Defence (MoD) sponsor, who would be responsible for facilitating access, supervising consent and confidentiality protocols, for ensuring that the research offered 'organisational benefit' to the MoD, and (in a task not openly stated in the MoDREC guidance) for 'authoris[ing] publications' from the research in accordance with 'guidelines'.[310] These 'guidelines' were sought but not provided.

The latter two criteria gave pause in terms of research ethics. It was not clear how 'organisational benefit' might be construed, as distinct from the ever-applicable requirements to avoid harm to participants, to ensure their understanding and informed consent to the study, and the confidentiality of their data. Academic research is subject to peer review before publication, but publication does not, and must not, depend on the authorisation of a public official. Conditional publication presents risks for the objectivity and independence of a scholar's analysis, as research ethics are pitted against the need to publish as a precondition for an academic career. The supervisory committee and the Associate Dean for Research provided advice. The second version of the MoDREC research protocol and a letter written by the Faculty's Associate Dean for Research made clear that SOAS's ethics approval, and the implicit conditions on which Arts and Humanities Research Council (AHRC) funding was granted required no embargo or restriction on publication and the substance of the analysis.[311]

The need to seek permission from powerful institutional gatekeepers presents closely related ethical and methodological concerns. Research ethics codes are premised on the researcher being relatively more powerful than a potentially vulnerable participant whose informed consent and welfare must be carefully assessed prior to the research taking place.[312] While every research project requires that potential harm to research participants is assessed, individual informed consent secured, and data anonymised, encrypted and

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Email communication from ASAC, 17 July 2014 (on file with the author)

Email communication from the author to ASAC; Letter from Associate Dean to ASAC, 8 August 2014 (on file with the author)

Economic and Social Research Council (ESRC) Framework for Research Ethics (updated January 2015) <http://www.esrc.ac.uk/_images/framework-for-research-ethics_tcm8-33470.pdf>; SOAS Research Ethics Policy 2015 <http://www.soas.ac.uk/researchoffice/ethics/>

securely stored, the power imbalance is counter-intuitive where gatekeepers are involved. These gatekeepers can prevent or impose conditions on empirical research. Goodhand signals the intersubjectivities of research on violence and conflict, arguing that researchers are rarely seen as 'neutral or altruistic'. He argues that conflict leads to an 'information economy', where the powerful control the information which is disseminated.[313] Although service personnel's individual informed consent to invasive medical research is strongly emphasised in the MoDREC guidance, in other contexts and perhaps in other armed forces, it would raise concern in relation to research ethics if a commanding officer were to endorse or direct subordinates' participation in a research project. The pressure (implicit or otherwise) exerted by the chain of command on individual informed consent must be kept in mind in any research project involving military gatekeepers.

It became difficult to find an MoD sponsor who was willing to fulfil the tasks stipulated by ASAC. An MoD expert in IHL welcomed the substance of the study, and later provided collegial assistance with Freedom of Information requests, and with contextual information to aid interpretation of documents on the Army's IHL training. In the summer of 2014 however, this official decided that the research could not offer 'organisational benefit' for the MoD, as the Operational Law Training Directive of February 2014 was not yet implemented. This decision meant that the research protocol was rejected, although ASAC had formed a positive view of the quality of the research.

The reason given - that the Directive was then-unimplemented - was factually correct but partially contradicted Ministerial statements to Parliament, and arguments in litigation that all but one of the recommendations of the Baha Mousa Public Inquiry, including those relating to IHL training, had been 'implemented'.[314] There is slippage between the term 'implemented', which implies that policies have already been put into practice, and 'addressed', which might refer to ongoing or future implementation.[315] As the Operational Law Training Directive has been implemented from 1 April 2015,[316] a

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[313] Jonathan Goodhand, 'Research in Conflict Zones: Ethics and Accountability', (2000) 8 Forced Migration Review 1, cited in Julie M. Norman, 'Got Trust? The challenge of gaining access in conflict zones' in Chandra Lekha Sriram et al (eds), *Surviving Field Research: Working in Violent and Difficult Situations* (Routledge 2009) 77

R (Ali Zaki Mousa and Others) v Secretary of State for Defence [2013] EWHC 1412 (Admin) para 208; HC 27 March 2014, col32WS; Ben Sanders, Jeremy Johnson QC and Melanie Cumberland, The Al-Sweady Inquiry: Closing Submissions on Behalf of the Ministry of Defence, 2014, para 1096

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ibid.

reworked research protocol will be resubmitted to ASAC/MoDREC for a postdoctoral project, ideally with a small research team which is able to conduct comparative research.[317] In view of deadlines set by SOAS and the AHRC, it was infeasible to conduct the qualitative research during the PhD, so a critical case study method was chosen instead (see 'Methodology' below). The critical case study includes data from archives, public inquiry materials, Parliamentary reports and debates, and IHL training materials obtained through FOI requests.

Ethics remain relevant to archival and documentary research. Care must be taken with the attribution of intent or culpability to any named official in resources that are often scraps of paper lacking context, or opinionated letters lacking replies. Trouillot notes that archives are pre-selected and sifted.[318] The archives consulted, at the Imperial War Museum, the British Red Cross, and the Liddell Hart archive at King's College London, were catalogued to varying degrees, depending on the availability of archivists and a backlog of work. Truth is partially constructed by the availability of materials before the researcher begins his or her interpretation. Where the subjects of archives are deceased, Alcoff's 'problem of speaking for others' is even more acute,[319] as the context they might have offered if asked is forever lost to the public record. The dataset includes public inquiry testimony, where witnesses are not always anonymised as participants in social science research must be, and where a researcher might infer individual culpability without rules of evidence and criminal burdens of proof.

Methodology

MoDREC's decision conceals the perspectives of soldiers and officers on their understanding of IHL, and those involved in the design and implementation of IHL training reforms in the British Army. The surveys aimed at 'thin', easily comparable data on the consistency and frequency of IHL training, while semi-structured interviews aimed to give 'thick' (more detailed or nuanced)[320] data on UK perspectives on the priority norms included in training, on the training techniques used, and on any difficulties with implementation and evaluation of training policies. Semi-structured interviews have a

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Michel-Rolph Trouillot, *Silencing the Past: Power and the Production of History* (Beacon Press 1997)

Linda Alcoff, 'The Problem of Speaking for Others' (1991) Cultural Critique 5

Clifford Geertz, 'Thick Description: Towards an Interpretive Theory of Culture' in C. Geertz, *The Interpretation of Cultures* (Basic Books 1973)

pre-determined list of questions with some flexibility in the conversation, so that the interview participant can add information which he or she considers relevant. The survey and interview questions were checked for reliability (consistency or replicability between each survey and interview) and validity (to ensure for example that survey questions were measuring soldiers' understanding of IHL).[321] Surveys and interview data might have shed light on whether soldiers' varied educational backgrounds and potential struggles with literacy are amply planned for in the context of IHL training, or if dry, classroom instruction is predominant instead. Surveys might have assessed how much soldiers and officers learn and remember about lawful targeting and civilian protection; whether they internalise simple norms such as the principle of distinction more successfully than the more 'open-texture[d]'[322] principle of proportionality; whether they perceive some IHL norms as more binding than others; and whether and how their learning is affected by interpretive controversies in IHL, changes in Rules of Engagement, military ethics and barracks culture. Qualitative social science method might have filled the gaps left by the legal and scholarly sources, offering nuanced answers on interpretation and normativity in IHL, and testing interdisciplinary hypotheses. The case study method chosen asks similar questions,[323] but the perspective of individual soldiers and officers is missing as a result of the MoDREC decision to block the qualitative research.

The original research design would have contributed to the current epistemological shift towards interdisciplinary collaboration and the use of empirical method in international law scholarship.[324] The Chicago School of quantitative political science methods dominates more qualitative approaches, and it might appear that empiricism has become the new evidence in international legal thought. The dominance of quantitative approaches, especially in US scholarship, is open to question not only because quantitative method's claim to objectivity might be in doubt,[325] but also because of qualitative research's natural concordance with legal method. Dobinson and Johns argue that all legal 'doctrinal research is qualitative', because of its focus on 'selecting and

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Alan Bryman, *Social Research Methods*, (4th edition, Oxford University Press 2012) Chapters 3 and 7
Hart (n 210) 123, 128-136

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Gregory Shaffer and Tom Ginsburg, 'The Empirical Turn in International Legal Scholarship' (2012) 106:1 American Journal of International Law 1; Emilie M. Hafner-Burton, David G. Victor, Yonatan Lupu, 'Political Science Research on International Law: the State of the Field' (2012) 106:1 American Journal of International Law 47; Gregory Shaffer, 'The New Legal Realist Approach to International Law' (2015) 28:2 Leiden Journal of International Law 189

Wing Hong Chui, 'Quantitative Legal Research' in Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press 2007) 46-68, 48

weighing materials… [acknowledging] hierarchy and authority… social context and interpretation.'[326] Numerical accounts, which rely on statistical regression, correlation but not causation, lack a 'thick' or rich account needed to explain how international law might influence individual actors' behaviour.[327] Richness is needed in research on military IHL training, prevention and compliance. Behaviour cannot be explained by numerical datasets.

Yet some scholars criticise any interdisciplinary approach to international law.[328] These critics argue that interdisciplinary approaches to international law, especially those focused on international law's effectiveness (defined in 1.3 as norms' effect on behaviour) conceal two exercises of power. First, this scholarship allows legal scholars to claim 'definitional power…without much formal accountability but reputational';[329] and second, interdisciplinarity risks 'reproducing, or even strengthening, existing power relations', while failing to provide the best explanatory account of international law.[330] In Koskenniemi's words, effectiveness is 'an apology for the interests of the powerful',[331] and compliance is a 'new natural law': undermining 'responsibility',[332] and encouraging managerialist "balancing",[333] such as arguments undermining the absolute prohibition on torture with reference to a ticking bomb.[334]

This critique is over-generalised, from what Roth-Isigkeit sees as a few historical antecedents (Carl Schmitt, Morgenthau, Lasswell and McDougal) identified by Koskenniemi as scholars seeking to use law as a tool of repressive power or geopolitical influence.[335] It is an assertion too far that diverse interdisciplinary scholarship (which might come from any school of international relations, political science, or social

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Ian Dobinson and Francis Johns, 'Qualitative Legal Research' in Mike McConville and Hong Chui Wing (eds), *Research Methods for Law* (Edinburgh University Press 2007) 40

Geertz (n 320)

Martii Koskenniemi, *The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press 2001) 483; Jean d'Aspremont, '"Effectivity" in International Law: Self-Empowerment against Epistemological Claustrophobia' (2014) 108 Proceedings of the 108th Annual Meeting of the American Society of International Law 165

Jean d'Aspremont, *Epistemic Forces in International Law: Foundational Doctrines and Techniques of International Legal Argumentation*, (Edward Elgar 2015) 184

Jan Klabbers, 'The Relative Autonomy of International Law or the Forgotten Politics of Interdisciplinary' (2004) 1 Journal of International Law and International Relations 35, 38

Martii Koskenniemi, *The Politics of International Law* (Hart 2011) 371

ibid.,323

ibid., 325

ibid., 318

David Roth-Isigkeit, 'The Blinkered Discipline?: Martti Koskenniemi and Interdisciplinary Approaches to International Law' (2017) 9 International Theory 410, 412-414, citing Koskenniemi (n 328)

psychology) has a single effect in reinforcing the status quo, and that all this work fails to provide a sufficient intellectual account. However, there is debate about the extent to which modern constructivist compliance theory is different from managerial instrumentalism: Koskenniemi asserts that it remains instrumentalist, both departing from formal legal sources and risking apologism, while Brunnée and Toope disagree.[336] Koskenniemi's critique does useful work in reminding international legal scholars that states might misuse their conclusions, but he does not prove that i) 'compliance' is any more apologist than 'responsibility', and ii) all scholars seeking to improve international law compliance favour 'balancing' arguments.

This thesis does not employ empirical methods, but it supports interdisciplinary scholarship in international law, and argues that IHL scholarship in particular needs to engage further with the pragmatic, compliance-focused 'new legal realism' that d'Aspremont and Klabbers dislike. The arguments that interdisciplinary scholarship deprives international law of its normativity,[337] or that it reifies existing power relations, are unpersuasive, especially when research is directed at uncovering the 'internal point of view'[338] of sub-state actors being trained in IHL.

The change in research design marks a shift from a partly positivist, partly interpretivist epistemology to a stronger interpretivism; and from a deductive approach (building 'criteria' for 'effective' military training in IHL, and testing pre-formed hypotheses) to one that blends inductive and deductive approaches. Positivism implies that research findings are value-neutral and objective, while interpretivism accepts that actors' concepts and perspectives are relevant and contestable. The case study builds theory inductively from documentary sources: on recurrent themes of limited transparency, a tendency to conceptualise the prohibition on torture and other ill-treatment as 'human rights' rather than both IHL and international human rights law, and on a prevalent MoD discourse that human rights litigation has placed the armed forces under 'legal siege'.[339] It also tests some hypotheses from the literature, such as the distinction between understanding and willingness to comply; and the roles of moral disengagement,

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ibid., 419, citing Brunée and Toope (n 5) 125

Daniel Bodansky, 'Legal Realism and Its Discontents' (2015) 28 Leiden Journal of International Law

Hart (n 210)

7.5; HL Deb 14 July 2005, vol 672, col 1236

discourse about law, social learning theory and communities of practice on IHL training, prevention and compliance.[340]

The methodology is partly genealogical and partly archival, with other case study methods rooted in the present. The genealogy of the IHL training obligation in chapter 2 was chosen as an aspect of international law's interpretive method, studying the diplomatic debates and successive drafts of treaty texts on the IHL training obligation to uncover its laconic, discretionary nature, and the historic assumptions that IHL dissemination and training would prevent violations and promote compliance. Similarly, the archival methods in chapter 6 give context to the UK's delayed implementation of the IHL training obligation, and to its resistance, both to the application of IHL to non-international armed conflicts in the decolonisation era, and to external scrutiny of UK state practice in military detention. When combined with modern documentation, these historical methods offer depth and 'thickness' similar to Geertz's account of qualitative methods. The case study shows recurring patterns of IHL violation where norms converge between IHL and IHRL, delay in implementing military training, and recurrent assertions that that training was taking place. The genealogy in chapter 2 and the archival methods in chapter 6 are logically consistent with one another; and consistent again with the critical case study method in chapters 6 and 7.

Neither genealogy nor archival research is used as a standalone historical approach, but both are used to deepen an explanation of current practice. The genealogy of the IHL training obligation explores historic assumptions,[341] and historic insights on training, prevention and compliance that were lost in subsequent scholarship;[342] while the partly archival methods in chapter 6 explore the historical themes still resonant in the present.[343] According to Delacroix, in genealogy, 'history is at the service of an *interpretation*…[344] But genealogy is not intentionally critical: it 'seeks to trigger or renew reflections on the phenomenon to be explained'.[345] This more neutral account of genealogy, as adopted in this thesis, differs from Foucault's more stringently critical genealogy of current

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Sylvie Delacroix, *Legal Norms and Normativity: An Essay in Genealogy* (Bloomsbury Publishing 2006)

ibid., 102-103

assumptions and power structures.[346] This is not the first use of genealogical method in IHL scholarship: previous works include Kinsella's genealogy of the IHL principle of distinction,[347] and LeClerc-Gagné's unpublished work on IHL protections of humanitarian actors.[348] Both these works trace contingencies in the development of a norm, and the meanings actors imposed upon them, as well as (in Kinsella's case) the hidden gendered assumptions in the principle of distinction. A similar archaeology of the IHL training norm is at work in this thesis.

A critical case study method similarly uncovers hidden assumptions and offers depth or Geertzian 'thick[ness]' to the scholarly account. 'Critical' case study does not imply an intention to confront an institution's practice, but instead implies that the researcher has a well-developed theory, and has selected a single case which illustrates that theory with explanatory depth.[349] Critical case studies are predominantly deductive (hypothesis- or theory-led); similar to genealogical method.[350] Critical case studies are descriptive: they do not seek to compare or to make causal statements.[351] As the case study findings continued, the number of insights and the complexity of investigatory and training materials obtained made it infeasible to add another state for comparison of its military training in IHL; and illogical to draw causal inferences from the correlations identified. As a result, analytic induction, which seeks to increase rigour by comparing findings across cases;[352] and process tracing, which examines necessary and sufficient causes,[353] were both rejected as methods. The richness of the study justifies the choice of a single

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Michel Foucault, *The Archaeology of Knowledge* (1969; Routledge 2nd edition 2002); *Discipline and Punish*: *The Birth of the Prison* (1978; 2nd edition Penguin 1991)

Helen Kinsella, *The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (Cornell University Press 2011)

Elise Leclerc-Gagné, 'The Construction of the Humanitarian Worker as Inviolate Actor' (PhD thesis, University of British Columbia 2014)

Bryman (n 321) 70

Delacroix (n 344) 98

Ruthanne Tobin, 'Descriptive Case Study', *Encyclopedia of Case Study Research* (SAGE 2010)

Jack Katz et al, 'Analytic Induction' in Smelser (ed), *International Encyclopedia of the Social and Behavioral Sciences* (2001); Martin Hammersley, 'Aristotelian or Galileian? On a Puzzle about the Philosophical Sources of Analytic Induction' (2010) 40 Journal for the Theory of Social Behaviour 393 Graham Gibbs, *Analytic Induction* (video lecture, 2010); Patricia Bazeley, *Qualitative Data Analysis: Practical Strategies* (SAGE 2013)

Andrew Bennett, 'Process Tracing and Causal Inference' in Henry Brady and David Collier (eds), *Rethinking Social Inquiry: Diverse Tools Shared Standards* (2nd edition, Rowman and Littlefield Publishers 2010); Derek Beach and Rasmus Brun Pedersen, *Process-Tracing Methods: Foundations and Guidelines* (University of Michigan Press 2013); Andrew Bennett and Jeffrey T. Checkel, *Process Tracing: From Metaphor to Analytic Tool* (Cambridge University Press 2014); Courtney Hillebrecht, *Domestic Politics And International Human Rights Tribunals: The Problem of Compliance* (Cambridge University Press 2014); Andrew Bennett, 'Using Process Tracing to Improve Policy Making: The (Negative) Case of the 2003 Intervention in Iraq' (2015) 24 Security Studies 228

case (and critical case study method, which assumes a single case), which would otherwise limit the external validity or generalisability of the research. Subsequent comparative research is suggested to test the generalisability of the findings in this thesis.[354]

Sources

The sources for the project are wide-ranging, but the available materials are incomplete, leading to findings on limited transparency, questions about unavailable materials, and practical challenges for the researcher. Archives are pre-sifted and incomplete, especially in the UK context, where there is a history of concealed archives;[355] while an analysis of FOI documents depends on the gulf between materials obtained and those in existence but not released to the public. Delay in releasing FOI documents has also been a feature of this study, with 4-6 months being typical between an initial request and the material being authorised for release. FOI requests have yielded Directives setting consecutive policy on IHL training; dated pamphlets and past papers, and several years of training materials for individual annual training in the law of armed conflict. Pre-deployment training remains classified unless it is disclosed some years after the fact to a court or public inquiry. ROE and the Targeting Directive remain inaccessible to researchers, the latter causing a partial redaction to the Military Annual Training Test documentation released in 2015.[356] Materials from case law and public inquiries are radically incomplete, representing only those cases which have been heard, and allegations which have reached the public domain.[357] Public inquiry documentation is similarly limited by the terms of reference of each individual inquiry; and by the expertise of the Chair, counsel and those making submissions. Facts may be missing, and valid arguments left unmade or swiftly disregarded. The information released by the Iraq Historic Allegations Team (IHAT) and the Systemic Issues Working Group (SIWG) is radically incomplete for another reason, the lack of transparency and qualitative detail that the MoD has *chosen* for these investigations.[358] Both these mechanisms employ numbered ciphers for allegations, making it difficult to trace a case between earlier litigation and these MoD investigations.

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Aoife Duffy, 'Legacies of British Colonial Violence: Viewing Kenyan Detention Camps through the Hanslope Disclosure' (2015) 33 Law and History Review 489

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In addition, much MoD documentation exists in protected PDF format, ruling out the use of computer-assisted qualitative data analysis (through text searches, for example). These limitations on the dataset risk availability bias, but they are also consistent with the case study's findings on limited transparency, and on the MoD's resistance to civilian (judicial or academic) scrutiny of the armed forces.[359]

1.6 Scope, Research Questions and Structure

Scope

With such varied methods and sources, the thesis' scope must be closely defined. The focus is on military instruction or training in IHL (the rules relating to international and non-international armed conflicts), with literature on dissemination to armed groups part of the scholarly context and not the primary inquiry. Dissemination to the civilian population in general (as distinct from civilian authorities with responsibilities to apply IHL) fades into the background after chapter 2's inquiry into the evolution and phrasing of the IHL training obligation in treaty law. The scope broadens with chapter 3. As the scholarship on the IHL training obligation is found wanting, insights from the archives, from the social psychology of the battlefield, and from constructivist compliance theory help to build standards on the internalisation of IHL norms. This norm internalisation has cognitive and volitional aspects; and takes account of individual learning and social pressures. Dissemination of and compliance with IHL in non-international armed conflicts is considered in both chapters 2 and 3.

There is breadth too in chapter 4's linkage of IHL's norms of prevention, but the IHL training obligation remains the central focus, to which Common Article 1's obligation to 'respect and ensure respect' for the Four Geneva Conventions 'in all circumstances', the requirement in Additional Protocol I for qualified persons and legal advisers to the armed forces,[360] command responsibility to 'repress grave breaches… suppress other breaches', 'take all feasible measures within their power to prevent or repress the breach', and to ensure their subordinates know IHL; [361] and a duty to disobey manifestly unlawful orders[362] are related. Chapter 5's offering of a mature compliance theory for IHL is

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AP I, arts 6, 82
AP I, arts 86, 87(2)
ICRC, Customary IHL Study, Rule 154

nonetheless tightly defined. Motivated by seven distinctive challenges for compliance in IHL, chapter 5 seeks insights from existing compliance theory, argues that IHL does require an adapted compliance theory, and reflects upon the importance of norm internalisation and communities of practice (both constructivist compliance insights) to explain the conundrum.

The case study in chapters 6 and 7 is more sharply defined, with reference to IHL training in the British Army; just one land force in a single state. There is the lightest contextual detail on IHL training in the Royal Air Force, Royal Navy and Marines; and just one heavily redacted source available on the state of civilian dissemination in the UK. A case study in a different state where civilians directly participate in hostilities would entail greater inquiry on the state of civilian dissemination. However, the case study does note a few instances of ignorance of IHL shown by civilian authorities (Ministers at the MoD) who have responsibilities under IHL and should be 'fully acquainted' with the Four Geneva Conventions and Additional Protocol I.[363] Outside the scope of the study is the IHL training offered to intelligence personnel, special forces, and the training conducted by UK armed forces and private contractors for armed forces overseas. Some of the case study's findings will not be generalisable, but they do offer explanatory depth, testing insights from the literature in chapters 2-3, and building new theory specific to the UK context.

Research Questions and Structure

The thesis has three research questions:

> What is the conundrum between military training, prevention and compliance in IHL?
>
> How can it be solved? ('solved' entails 'explained', but also hints at practical solutions); and
>
> What is the potential and what are the limits of the proposed solution?

The first two sections of this chapter established the conundrum with their account of IHL's distinctive challenges for compliance, and of the challenges posed by the IHL training obligation's simple phrasing and causal assumptions. These sections answered in

[363] AP I, art 83(2)

the affirmative the question that is logically prior to research question 1), i.e. 'Is there a conundrum between military training, prevention and compliance?'

Part I (chapters 2 and 3) continues to address the first research question and begins to answer the second. Chapter 2 explores how the IHL training obligation offers scant guidance to states, while its drafting history shows early assumptions that the dissemination of IHL, including to the military, would prevent future violations and improve compliance. This causal assumption is now in doubt, and IHL training based on dissemination has been found insufficient for prevention and compliance. Deficient military training in IHL has been implicated in the wilful killing of civilians and the torture of detainees; but, as chapter 3 demonstrates, scholarship has gradually acknowledged the insufficiency of IHL training to prevent violations, while interdisciplinary research suggests that military culture, moral disengagement and discourse about law and enemy forces may be more powerful causal factors for IHL violations than ignorance of the law. Chapter 3 selects insights from historic works, social psychology and constructivist compliance theory, and shows the broadening of practice from the ICRC and Geneva Call. It suggests standards that build soldiers' and officers' understanding, knowledge and recall of IHL (norm internalisation from a cognitive perspective); and their adherence or willingness to comply, which has both individual and group aspects (norm internalisation from a volitional perspective).

Part II of the thesis (chapters 4 and 5) addresses all three research questions. The lack of synthesis between IHL's norms of prevention (of which the IHL training obligation is one) and the absence of prevention as a term of art in IHL scholarship (as opposed to the practice of the ICRC) is the subject of chapter 4. Chapter 4 defines the laconic phrasing of IHL's norms of prevention as one aspect of the conundrum between military training in IHL and the prevention of violations. There is too little guidance on how states should implement IHL's preventive norms, leading to the risk that they are implemented piecemeal or perfunctorily. Relating the IHL training obligation to the obligation to 'respect and ensure respect' for Geneva law; the availability of military legal advisers, command responsibility, and the duty to disobey an unlawful order adds strength and content to each of these obligations, and encourages states to see them as interlocking duties. This helps to solve the conundrum by encouraging more than lip service or a piecemeal approach to military IHL training. Chapter 5 addresses another distinctive challenge for compliance presented by IHL, that of its strong disaggregation to sub-state

actors (soldiers, officers and civilian authorities) and to non-state armed groups. This strong disaggregation requires that IHL norms be internalised by each of the actors responsible for IHL compliance, but traditional compliance theories, especially realist and rational choice accounts, are premised on the state as a single rational meta-actor. The complexity of modern conflicts also requires that soldiers and officers understand when rules on the conduct of hostilities apply, and when law enforcement standards govern the use of force. Chapter 5 considers arguments for and against a distinctive compliance theory for IHL, and finds seven strong arguments in favour, because of IHL's distinctive compliance challenges (which range from its strong disaggregation, to debates on the classification of conflicts and the co-applicability of IHL and IHRL, to states' resistance to transparency and external scrutiny of their practice in IHL). A constructivist account, focusing on norm internalisation and communities of practice, is the best available theoretical account of the relationship between IHL training and compliance, but it is not a complete solution to the conundrum.

Part III (chapters 6 and 7) addresses the second research question (by continuing to explain the conundrum, offering examples of flaws and recent improvements in military IHL training), and the third (by testing the theory built in earlier chapters and offering new, context-specific insights). These chapters begin to sketch an explanation for the conundrum in institutional responses to past violations. The British Army case study shows that IHL training (or reforms to IHL training) was often asserted to take place, but this training was either absent or perfunctory, and reforms delayed. In the UK context, historic patterns of torture and inhuman treatment in military detention recur in subsequent decades, with the cause of this torture attributed to gaps in doctrine and training. Reforms to training are offered as an assumed panacea, while accountability for violations is repeatedly and vocally resisted. As a result, IHL training is forced to do greater explanatory and exculpatory work than it can. The British case study shows little awareness of the influence of social psychology, specifically of moral disengagement and discourse about law and enemy forces, as causal factors for IHL violations. It also demonstrates violations motivated through revenge or false perceptions of reciprocity, including the wilful killing of an Afghan insurgent by former Marine Alexander Blackman.[364] There is little institutional awareness of the risks of a current discourse that the armed forces are under 'legal siege', or that civil litigation undermines operational

6.4.4

effectiveness for soldiers' and officers' future compliance with IHL. The case study offers another example of the conundrum between IHL training, prevention and compliance: where a resistance to independent investigations, and to civil litigation against the armed forces is justified by assurances that reforms to IHL training are in place, and such violations will not occur again. But chapter 7 also reveals belated but genuine, comprehensive reforms to the British Army's IHL training, on the treatment of prisoners of war and other detainees, on human rights standards applicable to the use of force in peacekeeping or law enforcement/occupation missions,[365] with the recent addition of a Module on investigations and accountability.[366] The case study does not solve the conundrum by itself, but it offers a rich explanation of flaws in IHL training, absence of institutional reflection on training's relationship with prevention and compliance, and a disconnect between political discourse against international law's legitimacy and genuine reforms to IHL training by Army lawyers.

The thesis conclusion, chapter 8, draws together insights from each chapter, and addresses each of the three research questions in turn. The thesis makes four contributions towards a solution to the conundrum between IHL training, prevention and compliance: i) the genealogy of the IHL training obligation and the synthesis from literature into standards for IHL training; ii) the sketched theory of prevention for IHL, which presents several preventive norms as interrelated obligations; iii) the adapted constructivist compliance theory for IHL; and iv) the insights built in the critical case study. Chapter 8 reflects on the limitations and possible impact of the study and calls for chapter 3's standards to be translated into a rubric for states to share their practice in IHL training at the next meeting of the Red Cross and Red Crescent movement in 2019. Finally, it suggests further research.

Operational Law Training Directive, 11 February 2014, D/ALS/OLB/4/3/7/1; Email communication with Army Legal Services (ALS), 8 April 2015 (both resources on file with the author)

Military Annual Training Tests (MATT) 7 Operational Law (2016) Module 2

Part I. The Conundrum between Military Training in International Humanitarian Law, Prevention and Compliance

Chapter 2. A Genealogy of the Obligation to Instruct the Armed Forces in International Humanitarian Law

2.1 Introduction

This chapter offers a genealogy of the IHL training obligation, dissecting treaty texts and diplomatic history to investigate: i) the extent of the assumption that dissemination and military instruction would prevent violations in future conflicts; ii) states' willingness to agree to a simply-stated obligation, which lacks criteria and a monitoring mechanism; and iii) the temporal and material scope of the obligation in IAC and NIAC - where *lex lata* ends and *lex ferenda* begins. It proceeds from the hypothesis that the simplicity of the treaty norm and its emphasis on 'dissemination' are evidence of an historic assumption that mere awareness of norms is necessary for compliance with IHL, without careful reflection on the modalities for training, prevention and compliance.

2.2 The Evolution of the Obligation in International Armed Conflicts

IHL's earliest documents refer to dissemination of a then-novel set of norms, and to the assumption that spreading awareness of IHL among all citizens would prevent unlawful conduct by citizen soldiers.[1] The Oxford Manual of War on Land 1880 is one such example,[2] reflecting the recommendation from the Second International Conference of the Red Cross in Berlin in 1869 that knowledge of the Geneva Convention of 1864 be publicised as much as possible, especially among soldiers.[3] '[N]ecessary steps' must be

[1] This section builds on material from published work, with the copyright of the ICRC gratefully acknowledged: Elizabeth Stubbins Bates, 'Towards Effective Military Training in International Humanitarian Law' (2014) 96 International Review of the Red Cross 795

The Oxford Manual on the Laws of War on Land, Preface (Institute of International Law, 1880), cited in François Sénéchaud, 'Instructing the Law of Armed Conflict: A Review of ICRC Practice' (2007) 3 Israel Defense Forces Law Review 49

IIème Conférence international des gouvernements signataires de la Convention de Genève et des Sociétés et associations de secours aux militaires blesses et malades, Imprimerie J.F. Starcke, Berlin, 22-27 April 1869, cited in Vincent Bernard, 'The ICRC's Evolving Experience in Prevention', 36th Round Table on Current Issues in International Humanitarian Law, San Remo, 3-5 September 2013

taken to instruct troops in IHL under Article 26 of the Geneva Convention of 1906,[4] while Article 1 of Hague Convention IV 1907 included an obligation to 'issue instructions' (meaning orders, rather than education in the law) to troops which were consistent with the Convention and its annexed regulations. Hague Convention X requires that 'necessary measures' be taken to bring its provisions 'to the knowledge of their naval forces', especially those who would be entitled to immunity.[5] Instruction appears again in a stronger formulation in the 1929 Geneva Convention on the Wounded and Sick:

> The High Contracting Parties shall take the necessary steps to instruct their troops, and in particular the personnel protected, in the provisions of the present Convention, and to bring them to the notice of the civil population.[6]

The 'necessary steps' suggests more than one administrative action to inculcate knowledge of IHL, and here (as in the earlier treaties), military instruction comes first, with civilian education a secondary issue.

The Four Geneva Conventions of 1949 require States to disseminate their texts 'as widely as possible' (an approach consistent with breadth but superficiality), and 'in particular' to include their 'study in programmes of military and, if possible, civil instruction'.[7] The text of the obligation 'varies lightly'[8] between each of the Conventions, to allow for greater specificity as to the individuals, e.g. 'civilian, military, police, or other authorities'[9] who assume responsibilities therein. Yet these dual dissemination and training duties are merely stated, with minimal guidance in the treaty text on how best to train military and civilian authorities in IHL.

In placing 'dissemination' first, the articles hint that the same policies and practices should inform both civic learning and military instruction. In the phrasing of each article, 'so that the principles thereof may become known' is stated as a result in itself. It may be true, as per the Pictet Commentary and the updated ICRC Commentary, that

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Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 6 July 1906 (entered into force 9 August 1907)

Hague Convention X for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention. October 1907 (entered into force 26 January 1910) art 20

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field July 1929 (entered into force 19 June 1931) art 27

GC I, art 47; GC II, art 48; GC III, art 127; GC IV, art 144

Final Record of the Diplomatic Conference of Geneva 1949, vol. II-B, 24, cited in Iris Muller, 'Article 47: Dissemination of the Convention', *ICRC Commentary of 2016: First Geneva Convention 1949* (ICRC 2016) n14

GC IV, art 144

dissemination and military instruction are closely related to the obligation in Common Article 1, to 'respect and ensure respect' for Geneva law 'in all circumstances';[10] but a simple norm, delegated to State discretion, without standards or a monitoring mechanism, is not ideally crafted for the prevention of violations. Nor is an emphasis on 'dissemination' sufficient for military instruction or training.[11]

The Pictet Commentary to Article 144 of the Fourth Geneva Convention offers some modalities to assist states, in an expansive reading of the treaty norm. It emphasises that the training obligation applies in peace and war, and that its purpose is to preclude the ignorance of those whose acts might lead to prosecutions and (implicitly) state responsibility. The Commentary recognises the importance of refresher training pre-deployment, of adapting training to soldiers' individual ranks, and of ensuring that civilian officials are also aware of IHL. It is emphasised that civilian dissemination should not be thought 'any the less imperative' than military instruction. The words 'if possible' do not imply that civilian instruction is less important, but reflect the concerns of federal states on education policy-making.[12] The Commentary then blends *jus in bello* with *jus ad bellum*: the aim of civilian dissemination is, apparently, to develop 'a pacific spirit among the peoples.'[13] The Commentary leaves unexplained the processes that might lead from awareness of IHL norms to subsequent behaviour.

Where ratified, Additional Protocol I adds substance to the obligation, providing a number of loosely-related norms of prevention. Article 6(1) of Additional Protocol I requires High Contracting Parties to 'train qualified personnel to facilitate the application of the Conventions and of this Protocol…' Article 82 specifies the role of legal advisers both in advising commanders on IHL compliance and in setting up military instruction programmes. Article 87 sets out the duties of commanders, which include an obligation to 'ensure that members of the armed forces under their command are aware of their obligations' under Geneva law.[14] Article 83 requires that '[a]ny military or civilian authorities who … assume responsibilities in respect of the application of the Conventions and this Protocol … shall be fully acquainted with [their] text.'[15] These are due diligence

GC I – GCIV, art 1; J. Pictet (ed.) *Commentary to the Four Geneva Conventions of 12 August 1949,* vol. I (1952) 384, vol. II (1960) 257, vol. III (1960) 613-4, vol. IV (1958) 580; Muller (n 8)

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Jean Pictet (ed), *Commentary* (n 10) vol. III, 614-615

ibid., vol 4, 580–582

AP I, art. 87(2)

AP I, art. 83(2)

obligations,[16] but this is not an asset, because the results to be attained, and the relationship between awareness of a text and subsequent behaviour, are left under-specified.

The obligation to disseminate IHL and include it in military instruction remains pithily-expressed and delegated to state discretion. The ICRC Commentary to Article 83 of Additional Protocol I defines dissemination as 'sowing the seeds' of IHL compliance (a brief expression of a process left undefined), and emphasises that the '…setting up the programme [of military instruction]… will probably require decisions at a ministerial level…'[17] In Resolution 21 of the Diplomatic Conference of Geneva 1974-1977, States are 'invite[d]' to 'encourag[e]…the authorities concerned to plan and to give effect' to IHL training, with ICRC assistance if necessary, 'in a manner suited to national circumstances'.[18] As might be expected in a nonbinding Resolution, the verbs here are permissive, not obligatory, reflecting some sharp criticism of Resolution 21. One delegate complained that it was 'excessively didactic' and 'unbecoming to the conference'.[19] But this sense of marginality and state discretion infuses treaty obligations too. Bothe and colleagues argue that the use of the words 'if possible', and 'as widely as possible' lend a contingency to the IHL training obligation, and (less plausibly) that the obligation for military and civilian authorities with relevant responsibilities to be 'fully acquainted' with the text of AP I is a dilution of the earlier obligation to possess the treaty texts.[20] On the contrary, 'fully acquainted' imposes a stronger obligation of result than merely possessing treaty texts, and the obligation in Article 83(2) of Additional Protocol I requires these authorities to have knowledge of the Four Geneva Conventions and AP I. Article 25 of the Hague Convention for the Protection of Cultural Property (HCCP) 1954, and Article 6 of the Convention on Certain Conventional Weapons (CCW) 1980 contain similarly drafted provisions.[21]

Elzbieta Mikos-Skuza, 'Dissemination of the Conventions, Including in Time of Armed Conflict' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press 2015) 612

Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols, of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 963, paras 3372, 3375

Diplomatic Conference of Geneva 1947-1977, resolution 21, Dissemination of Knowledge of International Humanitarian Law Applicable in Armed Conflicts, para 2(a)

Michael Bothe, Karl J. Partsch and Waldemar Solf, *New Rules for Victims of Armed Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (2nd edition, Brill 1982) 570

ibid., 569

HCCP, art. 25; CCW, art. 6

Discretion is not surprising. As Rowe notes, it is usual in international law for a state to 'decide for itself how its obligations may apply in the sphere of its own municipal law'.[22] This allows for treaty obligations to be adapted to states' particular circumstances, and to their constitutional structures; so, for example, a federal state cannot make decisions about education policy that is the domain of regional government. However, in IHL, states' resistance to standard-setting and to monitoring of treaty implementation is particularly acute, as noted in 1.1. Boothby acknowledges that 'light regulation' is the tendency in the laws of armed conflict 'because implementation depends on what states will accept.'[23]

Yet deference to state discretion is problematic in this context. States are willing to agree to laconic norms of prevention, including the IHL training obligation, in the context of assertions that it will prevent violations; but they are unwilling to agree to detailed guidance on how to implement the training, and to binding mechanisms to enable reporting and monitoring of these norms of prevention. A draft third paragraph in what became Article 83 of Additional Protocol I would have provided for the evaluation of States' IHL dissemination and training obligations through periodic reporting every four years. Following objections from the USSR and 16 other States in Committee I,[24] this provision was narrowly approved but later rejected in the plenary conference. Efforts to provide for a voluntary reporting mechanism on the national implementation of IHL in general (but including reports on IHL dissemination and training) have also failed, at the 1974-1977 Diplomatic Conference, [25] following the Intergovernmental Group of Experts for the Protection of War Victims 1995,[26] and the sudden demise of the proposed Meetings of States in the consultation phase of the Strengthening Compliance Initiative.[27]

A closer look at Resolution 21 and the ICRC Commentary to Article 83 of Additional Protocol I reveals a nuanced institutional response: to accept states' discretion in the implementation of IHL dissemination and training, while beginning to sketch best

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[22] Peter Rowe, 'The United Kingdom Position' in Hazel Fox and Michael Meyer (eds), *Effecting Compliance: Armed Conflict and the New Law,* vol. II (BIICL 1993)

William Boothby, *Weapons and the Law of Armed Conflict* (Oxford University Press 2009) 332-333

ORDCG 1974–1977, vol X, Second Session, Committee I, paras 133–135

Michael Bothe (ed.), 'Towards a Better Implementation of International Humanitarian Law: Proceedings of an Expert Meeting Organised by the Advisory Committee on International Humanitarian Law of the German Red Cross Frankfurt/Main, May 28-30, 1999' (German Red Cross 1999) 15

ibid., 15, 130

Jelena Pejic, 'Strengthening Compliance with IHL: The ICRC-Swiss Initiative' (2016) 98 International Review of the Red Cross 315; Heba Aly, 'No Deal to Strengthen Respect for Geneva Conventions' *IRIN Global* (10 December 2015)

practice in nonbinding documents.[28] This tendency is also found in the Plan of Action annexed to Resolution 1 of the 27th RCRC in 1999.[29] It provides detailed guidance on IHL education to a range of decision-makers;[30] and urges states to include IHL in field manuals and command procedures; making it a 'standard norm in command post and staff exercises as well as in military manoeuvres.'[31]

The timing of the 1999 Plan of Action is informative, as in the 1990s, there was a subtle increase in the specificity of IHL treaty norms relating to dissemination and military training. Protocol IV to the CCW from 1995 includes a brief IHL training obligation, specifying military training as part of 'all feasible measures' to avoid weapons which cause 'permanent blindness to unenhanced vision.'[32] Amended Protocol II 1996 (which applies the CCW and its Protocols to NIAC as well as IAC) requires 'training commensurate with [soldiers'] duties and responsibilities…';[33] while Article 30 of the 1999 Second Protocol to the Hague Convention of 1954 (also applicable, as is the Hague Convention 1954 to both IAC and NIAC) provides for co-operation between military and civilian authorities, UNESCO, and non-governmental authorities in dissemination and military instruction in peace and war. In particular, 'guidelines and instructions on the protection of cultural property' must form part of military regulations.[34]

Yet this subtle increase in detail is context-specific and does not last, suggesting an absence of attention to the modalities of IHL training when subsequent treaties were negotiated. Protocol V to the CCW on Explosive Remnants of War 2003 returns to a simply-stated norm;[35] keeping the phrasing of earlier Protocols that refer to 'instructions and operating procedures' as well as 'training'. Additional Protocol III to the Four Geneva Conventions 2005 on the protection of the Red Cross, Red Crescent and Red

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Sandoz et al (n 17) 963-6, paras 3375-3376

27th International Conference of the RCRC 1999, resolution 1, annex 2, Plan of Action, Final Goal 1.4

ibid., para 16

ibid., para 17

Protocol IV to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 13 October 1995 (entered into force 30 July 1998) UNTS 1342 art 2

Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 CCW Convention) (entered into force 3 December 1998) UNTS 1342 art 14(3)

Second Protocol to the HCCP 1999 art 30(3)(a)

Protocol on Explosive Remnants of War (Protocol V to the 1980 CCW Convention), 28 November 2003 (entered into force 12 November 2006) UNTS 2399, art 11

Crystal emblems uses the phrasing of Additional Protocol I.[36] The ICRC Commentary notes the importance of the emblem to the protection of 'medical personnel, units and transports', but does not offer modalities for dissemination and training that might assist with this.[37]

A genealogy of the obligation in IAC shows a durable and frequent assumption that IHL dissemination and military instruction would prevent violations, without critical consideration of the relationship between communicated norms and subsequent behaviour. States were willing to agree to simply-stated norms on dissemination and IHL training, but there was some resistance to detailed prescription (leaving guidance to states in the ICRC Commentaries and non-binding RCRC resolutions); and conclusive resistance at the 1974-1977 Diplomatic Conference to a proposed reporting mechanism on IHL training.

2.3 Dissemination and Training in Non-International Armed Conflicts

The extent of the obligation to disseminate the IHL of NIAC, and to train troops in these norms has been the subject of debate. Although there is no enumerated IHL training obligation in Common Article 3 to the Four Geneva Conventions (which regulates non-international armed conflicts where Additional Protocol II has not been ratified or does not apply),[38] Common Article 3 forms part of the whole of the Four Geneva Conventions text, and it is this text that is the subject of the almost-common articles on dissemination and training in the Four Geneva Conventions. It follows that dissemination and training should include the protections and prohibitions in Common Article 3, and not merely the distinction between IAC and NIAC.[39] This approach is supported by the newly-updated ICRC Commentary to the First and Second Geneva Conventions.[40] As the Four Geneva Conventions are universally ratified, all states must disseminate the content of Common Article 3 and include its text in programmes of military instruction.

Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005 (entered into force 14 January 2007) art 7

Jean-François Quéguiner, 'Article 7 - Dissemination', *Commentary: Additional Protocol III* (ICRC 2007)

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Muller (n 8)

Article 19 of Additional Protocol II, applicable to some NIAC when ratified,[41] provides simply that 'This Protocol shall be disseminated as widely as possible.'[42] There is nothing further: no specified obligation on states to instruct their armed forces, nor an obligation on other parties to a NIAC to train their fighters. However, delegates had previously agreed a detailed dissemination and military training provision for the Protocol. Article 19 was a casualty of the rush to simplify the text of the Protocol in order to ensure the final text would be passed; a process that took place late in the three-year diplomatic conference. The hurry to agree upon a consensus draft deprived the treaty text of an explicit obligation to include Additional Protocol II in programmes of military instruction. From April 1975 until May 1977, working groups and initial plenaries would have given Additional Protocol II a detailed dissemination and military instruction provision, the first paragraph dealing with dissemination and military instruction in time of peace, and the second with stronger training obligations once a NIAC had begun, for 'military and civilian authorities and all persons subject to their control'.[43] There was debate about the wisdom of insisting on civilian dissemination for Additional Protocol II, for educational reasons, and because of the structure of federal states, which could not set educational policy for their component parts. '[S]everal states' were worried that the dissemination of NIAC IHL in peacetime 'might encourage rebellion', but the ICRC emphasised that the causes of conflict were entirely different.[44]

Brazil successfully proposed the deletion of a peacetime obligation to include the Protocol in military instruction, so that 'military instruction' would appear only in the draft second paragraph, applicable once a conflict had begun.[45] The Brazilian delegation had referred to unspecified 'difficulties of application', and argued that it was undesirable for the text to be 'too definite,'[46] so there was nuance from some delegates about a detailed provision. The Philippines delegate believed the draft Article to be redundant, because it already instructed its military in the IHL of IAC and NIAC.[47] However, no delegates stated their outright opposition to military instruction in the provisions of Additional Protocol II, and there were emphatic statements by the USA and UK that dissemination and military

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AP II, art 19
ORDCG, vol IV, 203 (Canadian draft, 4 April 1975)
ibid., vol. IX, 242
ibid., 285-289
ibid., 243
ibid., 242

instruction were important preventive tools.[48] There is little evidence that the current, very brief formulation, focusing on dissemination only, reflects a substantive consensus.

In May 1977, in response to diplomatic rumours that the final draft of the whole treaty would not be agreed, Pakistan proposed a radically shorter version of the treaty, deleting the draft Art 37 and replacing it with its current brief text. [49] Multiple draft Articles that had received careful substantive consideration were similarly deleted. There was no substantive discussion on the dissemination provision, so the value of the earlier substantive debate and arguable consensus is lost in a hurried attempt to agree a draft of the entire Protocol by June 1977. Additional Protocol II's dissemination provision is genuinely ambiguous or obscure in its scope, justifying the use of the *travaux préparatoires* as an aid to interpretation.[50] It is far from settled that all delegates agreed that in NIAC, Additional Protocol II should be merely disseminated and not the subject of more stringent training. The ICRC Commentary explains that soldiers need to be taught 'exactly the same behaviour' for international and non-international armed conflicts alike.[51]

Article 19 of Additional Protocol II is not the last word on whether or not there is an obligation to integrate the IHL of non-international armed conflict into military instruction. The provision can be read with reference to the IHL training obligation in IAC. As it is both obligatory and possible for armed forces to be trained in IAC IHL, then 'disseminated as widely as possible' extends to training the armed forces in Additional Protocol II. If it is possible for armed groups to train their fighters, then 'as widely as possible' confers an obligation also to train them in the provisions of Additional Protocol

Other treaties applicable in NIAC contain a military instruction obligation. Amended Protocol II to the Convention on Certain Conventional Weapons includes an IHL training obligation, as does the Second Protocol to the Hague Convention on Cultural Property,[52] both of which clarify that their 'parent' Convention' and Protocols apply to IAC and NIAC.

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ibid., 244

ibid., vol. VII, 151

Vienna Convention on the Law of Treaties, adopted 23 May 1969 (entered into force 27 January 1980), UNTS 1155, art 32(a)

Sandoz et al (n 17) 1489, para 4912

Amended Protocol II to the CCW, article 14(3); Second Protocol to the Hague Convention, art 30

The ICRC Customary IHL Study reviewed multiple military manuals and found no evidence of divergent practice in training between international and non-international armed conflicts, suggesting there is an IHL training obligation applicable to international and non-international armed conflicts (although the negative conditional language used is not the strongest advocacy for a finding of an obligation).[53] As the IHL of NIAC binds both states and armed groups, then a putative customary IHL training obligation similarly applies to both armed forces and armed groups. There has been little scholarly attention on this aspect of the ICRC Customary IHL Study: most debate centres on states' objections to the Study's methodology.[54] The argument by Turns that Rule 142 is customary only in relation to the IHL of IAC is unpersuasive, however.[55] Turns infers a customary obligation in IAC from art 87 of Additional Protocol I, which is not universally ratified; and declines to find a customary IHL obligation on armed groups to train their members in the IHL of NIAC because he does not believe that armed groups show sufficient practice and recognise a legal obligation to train their members in IHL. This forgets that the practice of armed groups is not required to form evidence of a customary rule: the ICRC recognised this, classifying the practice of armed groups under 'Other Practice' in the CIHL Study, and not collecting any such practice in relation to Rule 142. A better approach would be to design a study on the extent of state practice and *opinio juris* available for military training on NIAC IHL, because such work is yet to be done. Authority for an obligation to train both armed forces and armed groups in IHL can also be found in Security Council Resolutions on the protection of civilians passed under Chapter VII.[56]

Case law provides only doubtful authority for a customary IHL obligation in relation to dissemination *and* military instruction. In its interlocutory decision in *Tadic,* the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) found that Common Article 3 and 'the core of Additional Protocol II' were 'declaratory of existing rules' or evidence that customary rules had 'crystallized'.[57] It is possible to interpret Article 19 of Additional Protocol II as 'declaratory' of an existing customary

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ICRC Customary IHL Study, rule 142, 505, 501

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David Turns, 'Implementation and Compliance', in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press 2007) 362

UN Security Council Resolution 1894 (2009), para 7(b)

Prosecutor v. Tadić, IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 117

rule that includes both dissemination and military instruction; but it is more difficult to argue that Art 19 is part of the 'core' of Additional Protocol II as interpreted by the Appeals Chamber. The Appeals Chamber reasoned that individual criminal responsibility exists for breaches of the IHL of NIAC, from Common Article 3 and customary IHL. Dissemination and military instruction were not the question before the court.

2.4 Narrow and Broad Readings of the Obligation

What is the temporal and material scope of the military instruction obligation? As to the temporal scope, it follows from the analysis above that states are obliged to provide military instruction, in peacetime and during armed conflict, in the IHL of IAC, and at a minimum the rules in Common Article 3. Where Additional Protocol II is ratified, it must be 'disseminated as widely as possible'. The frequency of civilian dissemination and military training is not set by the *lex lata.* Reading the IHL training obligation together with the duty in Common Article 1 to 'respect and ensure respect' for the Four Geneva Conventions 'in all circumstances', military instruction for deployable staff and for civilian officials with responsibilities in relation to IHL should take place sufficiently frequently in peacetime to enable a lasting knowledge of all relevant provisions; and to minimise gaps in institutional memory in case an armed conflict occurs. This is a broad reading of the temporal scope of the obligation, one that attempts to address the conundrum between military training in IHL and the prevention of violations.

The simply-stated military instruction norm gives few details on its material scope. This necessitates decisions about *who* should be trained, based on the treaty obligations; in *what* they should be trained; and *how* the instruction or training should be designed. These decisions are best made by interpreting the military instruction obligation to ensure its effectiveness in Lauterpacht's sense. Lauterpacht preferred to read treaty obligations broadly, unless there was evidence that a restrictive interpretation was required.[58] Lauterpacht's principle of effectiveness aimed to elide ambiguity or state discretion that might otherwise undermine the effectiveness of international law. Critics might assert that these readings of the military instruction obligation broaden beyond the *lex lata* into *lex ferenda.* To meet this criticism, the following paragraphs rely closely on treaty texts, linking them to the characteristics of modern conflicts; and rely on published compendia

Hersch Lauterpacht, *The Development of International Law by the International Court* (revised edition, Oxford University Press 1982); 1.3

of state practice: the ICRC Customary IHL Database, and a survey-based dataset of 53 states on their implementation of military instruction in IHL.[59]

Who should be trained?

In Albania, only '[o]fficers and trainers' are listed as training recipients,[60] leading to questions about basic training and IHL instruction to enlisted personnel. Egypt's entry raises similar questions, as only '[c]ommanders and officers' are listed as recipients of training.[61] It is possible that in these countries, IHL instruction is done entirely on a train-the-trainers basis, with unit commanders expected to distil the essence of IHL norms that they have learned in a classroom setting, but this is not made clear. If only 'commanders and officers' receive IHL training in a given country, then this is too narrow a reading of the obligation to integrate the study of the Four Geneva Conventions into military instruction. It runs the risk of violations through ignorance by enlisted personnel. Yet the formulation of the IHL training obligation allows for just such a narrow interpretation. India's entry suggests that training is only provided to '[o]fficers and JCOs [junior commissioned officers]', but law of armed conflict training also occurs at 'unit level', suggesting that a train-the-trainers approach is used.[62]

Where Additional Protocol I is ratified, 'any military or civilian authorities' who assume responsibilities under Geneva law during an armed conflict should be 'fully acquainted' with both the Four Geneva Conventions and Additional Protocol I.[63] The best interpretation is to require in-depth and regular professional training of government officials, including (at a minimum) the Prime Minister, President or equivalent, and office-holders at defence ministries and ministries of foreign affairs, and intelligence agencies. Mikos-Skuza calls for still broader instruction, to civil servants in Ministries of '…Justice, Health and Social Affairs, and Education,… politicians, diplomats and international officials', to 'medical and paramedical' professions and law enforcement.[64] Article 83(2) of Additional Protocol I places 'Any military or civilian authorities' with

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[59] ICRC, Customary International Humanitarian Law Database http://www.icrc.org/customary-ihl/eng/docs/v2; Laurie R. Blank and Gregory P. Noone, 'Law of War Training: Resources for Military and Civilian Leaders' (2nd edition United States Institute for Peace 2013)

Blank and Noone (n 59) 11

ibid., 18

ibid., 24

AP I, art 83(2)

Mikos-Skuza (n 16) 606

responsibilities to comply with Geneva law on an equal footing; in effect elevating those civilian authorities into recipients of instruction (equivalent to that received by the military) rather than the civilian dissemination that should take place 'as widely as possible.' In conflicts where unmanned aerial vehicles (UAV) or drones are used, civilian drone operators, and the developers of autonomous and semi-autonomous weapons should also receive training in IHL targeting rules, and applicable IHRL. There is no explicit treaty obligation to train these individuals in IHL.

Is there authority in customary IHL to provide instruction on a par with the armed forces to civilians with responsibilities in armed conflict? While several military manuals cited in the ICRC Customary IHL Study refer to the obligation from Article 83(2) Additional Protocol I to ensure that both military and civilian authorities with relevant responsibilities are 'fully acquainted' with treaty texts, these manuals do not provide information on the training of defence ministers, civilian drone operators, and members of private military and security companies. Arguably, military manuals are at best evidence of *opinio* juris, not of state practice on IHL training.[65] As a result, they can include statements of aspiration or intent on military instruction in IHL, but current training materials or a summary of the training undertaken are not included. Peru and Mexico are two examples of states attempting to bridge the divide between military and civilian authorities in IHL training. Peru's National Committee for IHL organises annual Miguel Grau IHL training course, for 'representatives of the public sector: the executive branch of government, judges and law professionals, and members of the military and police forces.'[66] It also conducts issue-specific training on the protection of cultural property in armed conflict.[67] Mexico's Interministerial Committee applies a similar approach, with a strong commitment to IHL dissemination to officials and citizens alike, supplementing the government and ICRC's role in IHL military instruction.[68] These are only two states with evidence of a sustained commitment to training civilian officials in IHL.

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cf. Charles Garraway, 'The Use and Abuse of Military Manuals' (2004) 7 Yearbook of International Humanitarian Law 425, 431; ICRC Customary IHL Study, xxxii both of which argue that military manuals are also evidence of state practice

Cristina Pellandini, 'Ensuring National Compliance with IHL: The Role and Impact of National IHL Committees' (2014) 96 International Review of the Red Cross 1043, 1047

ibid.

Mariana Salazar Albornoz, 'The Work of Mexico's Interministerial Committee on International Humanitarian Law' (2014) 96 International Review of the Red Cross 1049, 1055

It is easier to find evidence of flaws in IHL and IHRL training of intelligence agencies and of gaps in evidence on the training of civilian drone operators than any examples of state practice in this regard. The US Senate Intelligence Committee report into torture signalled that intelligence officers were trained in interrogation techniques but seemingly not trained in the prohibition of torture,[69] which is shared by IHL and IHRL. Open questions remain on the extent of IHL instruction (if any) received by civilian drone operators, and civilian contractors in the drone programme in the US. O'Connell believes that the CIA receives no training in IHL.[70] If this is correct, it is a concern, given the uncertain legal framework regulating drone strikes (some strikes take place in armed conflict when IHL applies, while others take place outside armed conflict, so that extraterritorial IHRL might apply if the drone strike constitutes state agent authority over an individual or the state operating the drones has effective control of an area).[71] It is also a concern because technical expertise in visual analysis and target identification prior to drone strikes is increasingly contracted-out to civilians.[72] The problem of civilian drone operators highlights the flaws in the IAC and NIAC treaty law that requires only 'disseminat[ion]' to civilians who might directly participate in hostilities. Where AP I applies, civilian drone operators can be read as 'civilian authorities' with responsibilities to upload Geneva law, so they should be 'fully acquainted' with the Geneva Conventions and AP I pursuant to Article 83(2) of Additional Protocol I. There is insufficient authority for a customary IHL obligation to train civilian drone operators, and no specific treaty norm requiring them to undertake instruction in IHL.

Private military and security companies (PMSC) often provide security, detention, technical and training services in armed conflicts or post-conflict environments.[73] Tonkin notes that where PMSC provide training, particularly if they advise armed forces or groups on the conduct of hostilities or are present at the front line, this can amount to

US Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, Findings and Conclusions (released December 2014)

Mary Ellen O'Connell, 'Rise of Drones II: Unmanned Systems and the Future of Warfare', Written Testimony, Hearing before the US House of Representatives Subcommittee on National Security and Foreign Affairs, 28 April 2010, 19

Christophe Heyns and others, 'The International Law Framework Regulating the Use of Armed Drones' (2016) 65 International and Comparative Law Quarterly 791, 823-824

Abigail Fielding-Smith and Crofton Black, '"When you mess up, people die": Civilians Who Are Drone Pilots' Extra Eyes' *The Guardian*, 30 July 2015 (citing Laura Dickinson and Charles Blanchard)

Montreux Five Years On: An Analysis of State Efforts to Implement Montreux Document Legal Obligations and Good Practices (The Center for Human Rights and Humanitarian Law, American University Washington College Of Law; International Coalition Control PMSC 2013)

DPH by the PMSC.[74] Is there an obligation to train PMSC personnel in IHL? There is neither a binding treaty obligation nor evidence of a customary IHL obligation, but there is a non-binding set of standards, the Montreux Document on Pertinent Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict (Montreux Document),[75] which strongly emphasises the wisdom of training PMSC in IHL. Five of the Good Practices call on States to train PMSC in IHL, often as a precondition for contracts to be concluded between States and those companies.[76] PMSC also provide training in IHL and IHRL to state armed forces or law enforcement officials, and governments have been known to contract out their IHL training (and their training on religious and cultural sensitivity for example) to PMSC. The quality of this training is beyond the scope of this thesis, but should be the subject of future studies.

What should they be trained?

2.3 above establishes that training in the prohibitions and protections of Common Article 3 should form part of the military instruction offered by all states, as the Four Geneva Conventions 1949 are universally ratified. The position under Additional Protocol II is more nuanced, but the final phrasing on dissemination only is evidence of the rush to agree a streamlined consensus draft of the Protocol, and does not fairly represent the substantive diplomatic debates. States parties to the CCW and its Protocols, and to the Hague Convention on Cultural Property and its Protocols should also train their armed forces in these norms, applicable in IAC and NIAC. The San Remo Manual on NIAC is also intended to be used in military instruction, despite its non-binding status.[77]

Is there an obligation to train the armed forces in IHRL norms? At a minimum, IHL training must include the norms shared between IHL and IHRL which apply during armed conflict,[78] or the instruction is left incomplete as regards binding IHL. IHL prohibits

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[74] Hannah Tonkin, *State Control over Private Military and Security Companies in Armed Conflict* (Cambridge University Press 2011) 171

Montreux Document on Pertinent Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict 2008

ibid., Good Practices 3(a), 10, 14(e), 35, 39

International Institute of Humanitarian Law, The Manual on the Law of Non-International Armed Conflict, San Remo 2006

Manfred Nowak, 'Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' in Andrew Clapham and Paola Gaeta (eds), *Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2013)

torture and outrages upon personal dignity, cruel or humiliating and degrading treatment in international and non-international armed conflicts,[79] and these prohibitions have analogues in IHRL.[80] There are binding treaty obligations requiring the training of 'law enforcement personnel, civil or military, medical personnel, public officials and other persons' who have responsibilities in relation to persons deprived of their liberty in a) the prohibition of torture and cruel, inhuman and degrading treatment or punishment;[81] and

the prohibition of, and the need to prevent, investigate and prosecute enforced disappearance.[82] Whether IHRL training in general should extend to the armed forces is a matter of *lex ferenda* (the only IHRL treaties requiring training are those on torture and enforced disappearance), but where troops will be faced by a rapidly changing legal context on deployment, akin to the 'three block war',[83] it is good policy to train them on the distinction between the use of force in the conduct of hostilities (governed by IHL) and the exceptional use of force in law enforcement situations (governed by IHRL).

Peacekeeping missions have ROE influenced by IHRL standards on the use of force. Blocq identifies 'moral uncertainty' and malleable ROE as part of a 'fog of peacekeeping',[84] given faltering authorisation to peacekeepers to use force to protect civilians under the provisional UN Standing ROE for peacekeepers. As the application of IHL to intergovernmental organisations' peacekeeping missions is uncertain (customary IHL could be binding, but treaty law is in doubt), Blocq suggests IHRL training should substitute for traditional military instruction in IHL[85]. Should IHL training be given to peacekeepers, or do they require bespoke training with a greater emphasis on IHRL? Both treaty and customary IHL on training are silent on the issue of peacekeepers. Only some states mentioned to the ICRC Customary IHL Study that they had a policy or existing practice on the training of peacekeepers or peace enforcement troops deployed from their state armed forces. Selected states in Blank and Noone's directory referred to training for peacekeepers specifically, but this was not a question asked to respondents. There is non-binding authority in the UN Secretary-General's Bulletin from 1999, where peacekeeping

GC I, art 12(2); GC II, art 12(2); GC III, art 17(4), art 87(3); GC IV, art 32; AP I, art 75(2); GC I-IV, common art 3(1) (a), (c), AP II, art 4(2)

CAT art 1; ICCPR, art 7; ECHR, art 3; ACHR, art 5(2)

CAT, art 10(1);

International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 Dec 2006, entered into force 23 Dec 2010, UNTS 2716, CED) art 23

Charles Krulak, 'The Strategic Corporal: Leadership in the Three Block War' (1999) Marines Magazine

Daniel S. Blocq, 'The Fog of UN Peacekeeping: Ethical Issues Regarding the Use of Force to Protect Civilians in UN Operations' (2006) 5 Journal of Military Ethics 201

ibid.

troops are required to be 'fully acquainted' with IHL rules, in terminology which matches Additional Protocol I.[86]

How should they be trained?

The IHL training obligation provides no detail on how the training should take place. The customary rule on IHL instruction does not require that all soldiers are 'totally familiar with every detail' of IHL: training should be suited to the personnel's 'actual functions'.[87] The authors of the ICRC Customary IHL Study noted that most IHL training was classroom-based, but were concerned that this would be insufficient for compliance. The South African military manual calls for training to instil a lawful response as 'second nature'.[88] The Customary IHL Study, like the Commentaries and non-binding Resolutions discussed in 2.2, add precision which the binding treaty norm lacks. 'War gaming' appears alongside classroom instruction in 30 of the 53 state entries in Blank and Noone's compendium of IHL training. The authors do not define this term, but they list it alongside field exercises in the introduction to the volume.[89] These thin data suggest a trend towards combining classroom and practical instruction in IHL, but 30 instances of suggested practice out of 53 states is insufficient to build a customary IHL rule. Of these, South Africa lists 10% of the training in the classroom, with 90% on 'training manuals, war gaming and field exercises'.[90] While there might be the beginnings of state practice that combines classroom-based and practical or scenario-based training in IHL, there is no binding obligation to do so. In treaty law, the words 'study' and 'instruction' suggest states assumed the usefulness of a classroom-based approach. This does not mean that classroom instruction alone is sufficient to prevent violations and ensure compliance on future deployments; only that the treaty obligation was phrased simply, and without careful consideration of how IHL training might be designed to improve prevention and compliance. Chapter 3 addresses this aspect of the conundrum in depth.

UN Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, ST/SGB/1999/13, 6 August 1999, section 3

ICRC Customary IHL Study, rule 142

Republic of South Africa, Law of Armed Conflict Manual, cited in ICRC Customary IHL Study, rule

Blank and Noone (n 59) 6

ibid., 35

2.5 Conclusion

A genealogy of the obligation to instruct the armed forces in IHL reveals a durable assumption that dissemination and military instruction were necessary to prevent violations in future conflicts; coupled with some states' resistance to detailed prescription on civilian dissemination and military instruction; and a nuanced institutional response: to leave treaty norms simply expressed, offering some guidance on best practice in non-binding resolutions and commentaries. The assumption that dissemination and training were necessary for compliance (if not a potential panacea for violations) lasted at least from Moynier's statement to the Second International Conference of the Red Cross in Berlin in 1869 until the Diplomatic Conference of Geneva in 1974-1977.[91] There was insufficient attention to the difference between necessary and sufficient causes in diplomatic debates up until the 1980s, and a subtle increase in the specificity of the dissemination and training obligation only in selected treaty texts from the 1990s. This idealistic assumption governed diplomatic debates, with the relationship between dissemination and training, prevention and compliance asserted but unexplored. Delegates saw ignorance of the law as a cause of violations and proffered awareness or knowledge of the law as a solution.

The assumption that knowledge of IHL will prevent violations is one explanation for the emphasis on dissemination as opposed to practical training in the Four Geneva Conventions of 1949 and the Additional Protocols of 1977 and 2005. Treaty formulations which mention 'dissemination' first imply that the same strategies should inform both civic learning and military training. Where resources are limited, an obligation to disseminate IHL 'as widely as possible' infuses an optional quality to the military training obligation. An emphasis on dissemination fails to acknowledge the distinctions between communicated norm and subsequent behaviour; and between understanding, knowledge and recall on the one hand, and adherence or willingness to comply on the other.

The same assumption is one explanation for the laconic or simply stated phrasing of the obligation in treaty texts, and the absence of binding standards and monitoring of states' implementation of the obligation. If awareness or knowledge actively prevents violations, and the dissemination and training obligation is an unqualified good, then (the assumption

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Moynier, 1.1 (n 1)

runs) there is no need to delineate standards nor to monitor state practice. Further explanations lie in international law's habitual resort to simple, discretionary norms for the domestic implementation of international law; and in states' particular resistance to transparent monitoring of their practice in armed conflict. A draft third paragraph in what became Article 83 of Additional Protocol I, to allow for regular reporting to the ICRC on states' implementation of dissemination and military instruction was rejected before the final text was agreed, and the reporting mechanism for the CCW and its Protocols yields only the thinnest data on military training.[92]

The laconic phrasing means that treaty law gives scant guidance to states on how to design their dissemination and training. If a simply-stated training obligation is a problem for compliance, how detailed and prescriptive should it be? First, the extent of the obligation in IAC and in NIAC should be clarified. The IHL training obligation binds states in peace and war, in IAC and to a considerable extent in NIAC. The obligation on armed groups to train their members in the IHL of NIAC begins when an armed conflict breaks out. The hurried simplification of Additional Protocol II meant that substantive debate on IHL training in non-international armed conflict is not reflected in the final treaty text, which on its face, requires only dissemination 'as widely as possible'. While Additional Protocol

is not the last word on IHL training in NIAC, and military instruction should take place in Common Article 3, weapons law and the protection of cultural property, the very brief formulation on dissemination in Article 19 of Additional Protocol II risks gaps in military knowledge of the applicable IHL in these more prevalent armed conflicts.

Second, the frequency of dissemination and training is not set by treaty law, but it is submitted that military instruction for deployable staff and civilian officials with responsibilities under IHL should take place with sufficient frequency in peacetime to minimise gaps in institutional memory.

Third, it is necessary to clarify who should be trained. Relying on the formal instruction only of officers risks gaps in IHL knowledge by enlisted personnel, but the phrasing of the IHL training obligation allows for such an interpretation. In addition, an evolving consensus is needed on the range of civilian authorities who should be 'fully acquainted' with the Four Geneva Conventions and Additional Protocol I. This should include heads

[92] United Nations Office for Disarmament Affairs, National Annual Reporting on Compliance, at: https://www.un.org/disarmament/geneva/ccw/compliance/national-annual-reporting/

of government, office-holders at Ministries of Defence and Foreign Affairs, intelligence agencies, private military and security companies, civilian drone operators and the developers of autonomous and semi-autonomous weapons. Thus far, there is no authority in treaty or customary IHL for requiring specific civilian authorities to be trained in IHL, and the risk is that they will receive *ad hoc* broad dissemination only.

Fourth, at a minimum, military instruction in IHL should include the prohibitions shared between IHL and IHRL, including the prohibition on torture and inhuman treatment (as variously defined). There are treaty obligations in IHRL to train military law enforcement officials in the obligations to prevent, investigate and prosecute torture and enforced disappearance. Peacekeepers, and troops likely to be deployed to rapidly-changing asymmetric conflicts, should be trained in IHL and in IHRL's distinctive standards on when to use force.

Fifth, while there might be the beginnings of state practice to combine classroom instruction in IHL with practical or scenario-based training, the treaty obligation continues to emphasise 'study' and 'instruction' (which might address at best soldiers' and officers' understanding of IHL) disfavouring practical approaches to training (which has the potential to build their understanding and willingness to comply).

Chapter 3. Towards Standards for Military Training in International Humanitarian Law

3.1 Introduction

Once assumed, a causal relationship between military training in IHL, the prevention of violations and future compliance is now in doubt. It is uncertain to what extent ignorance of IHL causes violations, and to what extent knowledge of IHL prevents them. Deficient military training has been implicated in the wilful killing of civilians and the torture of detainees, but in each case, there are causal threads from military culture, moral disengagement or unlawful orders operating alongside ignorance of IHL. For example, the soldiers involved in the My Lai massacre 'were not adequately trained' in 'the Geneva Conventions, the handling and treatment of prisoners of war, and the treatment and safeguarding of noncombatants.'[1] Their training had not prepared them to disobey 'palpably illegal' orders, nor to report IHL violations; and the directives on this matter were unclear.[2] However, 'a permissive attitude' within the task force's culture enabled the killing and rape of civilians, and the destruction of civilian objects. Orders were progressively 'embellished', in effect misleading troops that the civilian village was an enemy camp.[3]

The report into the shooting of intruders, and the torture and death of a Somali teenager by Canadian peacekeepers also found deficits in 'ongoing generic peacekeeping training', including IHL.[4] As for the My Lai massacre, these violations was multi-causal, and deficient military training was but one contextual factor. There were failings in command responsibility and the supervision of subordinates, poor approaches to transparency and 'public accountability', cover-ups or denial, and the failure to track concerns about disciplinary offences by candidates for promotion or retention.[5]

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1 Peers Inquiry, 'Report of the Department of the Army Review of the Preliminary Investigations into the My Lai Incident (1970) 12-8

2 ibid., 12-7-12-8

3 ibid., 12-1-12-2

4 Commission of Inquiry into the Deployment of Canadian Forces to Somalia, 'Dishonoured Legacy: The Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia' (1997), Executive Summary

5 ibid.

The Taguba report into the torture of Iraqi detainees by American soldiers at Abu Ghraib discovered that the relevant military police battalion had received 'very little' instruction on the Third Geneva Convention 1949, and 'few, if any copies' of the Convention were made available to military police or detainees.[6] There were unlawful orders to 'break' prisoners, and to subject them to torture and inhuman treatment, including sexually degrading acts and taunts.[7] The failure to implement the IHL training obligation was part of a context marked by poor leadership and the failure to report conduct that violates IHL.[8]

The Baha Mousa Public Inquiry, into the death following torture of an Iraqi civilian in British military custody in 2003, found a failure to 'instil… lasting knowledge'[9] in the British Army's annual, 40-minute instruction in IHL, most of which consisted of a dated Cold War-era video on the conduct of hostilities, [10] with instruction on the treatment of prisoners of war ending at the point of capture. Witnesses to the Inquiry understood that there was a requirement to treat detainees humanely, but they differed in their understanding of what this meant. There had been a doctrinal failure to communicate the prohibition on the 'five techniques' of hooding, wall-standing, stress positions, deprivation of food and sleep.[11] In this case, IHL training took place, but was found wanting. Arguably, the Baha Mousa Public Inquiry Report, and the political discourse that followed, emphasised IHL training too much as a cause of the violations, and reforms to IHL training as a panacea.[12] Williams' study of the court-martial reports that a deployed ALS officer and the chain of command may have authorised the prohibited treatment of detainees, with the euphemism that they were to be 'conditioned' for interrogation, although this was disputed by other witnesses.[13] Baha Mousa suffered multiple injuries consistent with severe, prolonged beatings; a sustained assault quite different from the prohibited 'five techniques'. It follows that deficiencies in legal training were at best a contextual factor, not a sufficient cause of these violations.

Major-General Antonio M. Taguba, 'US Army Report of Abuse of Prisoners in Iraq' (MacMay 2008) 19
ibid.
ibid., 48
Sir William Gage, 'The Baha Mousa Public Inquiry Report' (2011) Part XVIII, para 305
ibid., para 310
ibid., paras 292, 302, 318; *Ireland v. United Kingdom*, ECtHR (Application No. 5310/71), Judgment, 18 January 1978
6.4.2, 7.3
Andrew Williams, *A Very British Killing: The Death of Baha Mousa* (Jonathan Cape 2012) 246-249

This chapter gathers insights on IHL training from historic and modern, legal and interdisciplinary sources to build standards for military training in IHL, with a careful acknowledgement of the limits of training in the context of IHL's contested norms, its moral compromise, and the enigma between norms, instruction and subsequent behaviour. A synthesis is overdue, because (as 3.2 shows) the theory on IHL training is fragmented and incomplete. Historic works which related IHL training to the psychology of the battlefield were lost only to recur in a subsequent era of scholarship. An emphasis on supplementing classroom-based with practical training was similarly lost, recurring in modern scholarship without attribution. This scholarship has gradually acknowledged the insufficiency of military training in IHL to prevent violations, with individual scholars providing detailed reflection; but taken as a whole, the literature does not systematically integrate social processes and individual learning. In contrast, as explored in 3.3, interdisciplinary work has demonstrated that military culture, moral disengagement and discourse about law and enemy forces may be more powerful causal factors for IHL violations than ignorance of the law. 3.4 examines the evolution of practice at the ICRC in relation to military IHL training, and at Geneva Call, in relation to the practice of armed groups.

The analysis in this chapter proceeds on the basis that IHL training should aim at norm internalisation by soldiers, officers, and any civilian authorities or non-state armed groups to whom dissemination and training is directed. In this thesis, the constructivist notion of norm internalisation is applied to the level of the individual and group, in recognition of IHL's strong disaggregation to soldiers, officers and armed group fighters; and of the communities of practice through which military culture and attitudes to IHL are disseminated. The overall aim is that IHL norms should be 'taken-for-granted'[14] cognitively and volitionally. This requires insights from social psychological research on social learning theory and moral disengagement. The standards built in 3.5 are based on individuals' understanding, knowledge and recall of IHL, and both individuals' and groups' adherence or willingness to comply. They are suggested as a rubric for voluntary state reporting on the implementation of the IHL training obligation, by the next meeting of the RCRC in 2019.

Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 International Organization 887

3.2 A Chronology of Literature and Historic Insights Lost

From the 1950s until the 1970s, scholarly reflections on IHL dissemination and military instruction looked backwards to the atrocities of the Second World War. Gregoric sees ignorance of IHL as one causal factor for violations,[15] while Draper argues that 'the general ignorance on this subject, not excluding that of lawyers, contributed to the widespread and gross war criminality [of the Second World War].'[16] Neither author is simplistic in their analysis or prescription. Gregoric acknowledges the limitations in IHL's substantive and remedial norms, calling on instructors openly to acknowledge this, lest civilians believe that the Four Geneva Conventions of 1949 offer an 'absolute and facile protection'.[17] His prescription for civilian dissemination is detailed, representing the experience of the Yugoslav Red Cross in the post-Second World War era, and requiring course materials, public lectures and media dissemination of IHL. Writing on training the armed forces in IHL, Draper's writings show awareness of the need for interdisciplinary reflection (although he does not call it this). Draper recognises that training can build up 'a certain psychological resistance to criminal orders' (i.e. both understanding and willingness to comply sufficient to challenge a superior); yet 'States do not welcome the querying of the validity of orders given to military subordinates.'[18] Draper argues that during the Second World War, German and Japanese forces deliberately exploited soldiers' ignorance of IHL, in a system of military discipline so rigidly enforced that criminal orders were implemented without question.[19]

Siordet also recognises the social psychological dimension of armed conflict, and the challenges this presents to the prevention of violations. He is aware that '[t]he determination to survive or to win at all costs… blunts men's consciences, rendering them less particular [to restrictions on the means and methods of warfare].'[20] Des Cilleuls offers a different account of the interaction between ideology and dissemination. Dissemination, he argues is error-prone, 'superficial', and beset by arguments that the Geneva Conventions were outdated, and poorly suited to modern conflicts and military

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Pavle Gregoric, 'Campaign for the Dissemination of the Geneva Conventions' (1965) 5 International Review of the Red Cross 511

G.I.A.D. Draper, 'The Implementation and Enforcement of the Geneva Conventions of 1949 and of the Two Additional Protocols of 1978 [*sic.*]' (1979) *Recueil Des Cours* 20

Gregoric (n 15) 514

Draper (n 16) 22

ibid.,20-21

Frédéric Siordet, 'Dissemination of the Geneva Conventions' (1965) 5 International Review of the Red Cross 59, 60

necessity.[21] This phenomenon did not arise with twenty-first century debates on the classification of conflicts or DPH. Des Cilleuls recognises the challenges to IHL training of 'different ideological beliefs and … discordant interpretations',[22] suggesting a perennial challenge to IHL training from the influence of ideology on interpretation; or more precisely, the risks for compliance posed by discourse that undermines IHL.

Jean Pictet's working plan to disseminate the Geneva Conventions also emphasises the behavioural, echoing the norm internalisation in the Oxford Manual of 1880.[23] The Four Geneva Conventions' 'humanitarian provisions should be natural conduct and instinctive' for the armed forces and all individuals.[24] While vaguely expressed, the creation of 'natural … instinctive' compliance with IHL requires repeated instruction in IHL norms, the first inferred thread of guidance from this post-war literature. Pictet reiterates a similar idea two months later. He argues that 'continuing and co-ordinated action is required' in IHL dissemination, so that compliance becomes 'a natural reflex'.[25] Pictet begins a second and third thread of guidance: that IHL training differentiate between 'officers and men', where 'officers must have a precise knowledge' of the Conventions' scope and other service personnel must understand IHL rules on the treatment of the 'wounded, prisoners of war, partisans and civilians, ... and hospitals'; and 'must also rid the ordinary service-man of the erroneous notion that such rules are incompatible with the duties of a combatant.'[26] These ideas become, respectively, the obligation that IHL training be 'commensurate with their duties and responsibilities';[27] and the notion, echoed in interdisciplinary scholarship, that military culture and discourse about international law are often antagonistic to successful military instruction in IHL.[28] A fourth thread, and one that recurs in more recent scholarship, is the need to supplement classroom instruction with practical exercises that integrate IHL. [29] A fifth thread is that of empathy, or at least recognising the common humanity of the enemy. This is vaguely expressed wherever it

[21] Jean des Cilleuls, 'Plan of Action for the Dissemination of the Geneva Conventions' (1965) 47 International Review of the Red Cross 64, 68
ibid.
2.1 (n 2)
Jean Pictet, Working Plan, June 1959, cited in des Cilleuls (n 21) 65
Jean Pictet, 'Ratification and Dissemination of the Geneva Conventions' (ICRC Information Meeting, Athens, 30 September 1959; consulted in the British Red Cross Archive (BRCArch) 2014)
ibid.
Protocol II to the 1980 CCW Convention, art 14(3)
1.4, 3.3
Pictet (1959, BRCArch) (n 25)

appears;[30] an example of the literature on IHL training merely hinting at the importance of social psychological insights.

A recurring observation in the literature is states' failure to implement the military instruction obligation. Siordet noted extensive failures in state practice: 'apart from a few honourable exceptions, the majority of States parties … have not yet undertaken anything of a serious nature' in terms of dissemination and military instruction.[31] As noted in 6.2 below, Draper was sceptical about the UK's implementation of the IHL training obligations in the 1960s and beyond. McGowan, writing on the US Army's training in IHL in the aftermath of the My Lai massacre, documents the slow erosion of emphasis in Training Circulars of compulsory IHL training (although annual instruction was still supposed to run to three hours as early as 1955).[32] McGowan reports that practical exercises in IHL were included in unit training exercises as early as 1970, but recommends a much more individual approach, in which the unit commander assesses each individual soldier's knowledge of the Geneva Conventions:[33] an onerous obligation, but close to that in Additional Protocol I. Aldrich believes that by the early 1990s, Western countries had not 'even minimal success' in IHL dissemination and military instruction.[34] Aldrich was of the view that the ICRC 'finds inadequate dissemination of IHL to be nearly universal':[35] an overstatement given the descriptive accounts of military instruction and civilian dissemination collected in the early issues of the International Review of the Red Cross.[36]

Throughout the 1970s, the literature remains fragmented and incomplete, with simple assertions about state practice combined with brief insights on how training and dissemination should be designed. Among these brief insights is Fleck's, that 'continuous instruction' in IHL is 'essential for its enforcement', and that 'thorough and regular indoctrination' is necessary for officers to have the necessary awareness of IHL norms.[37]

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[30] ibid., citing Knackstedt; Jean de Preux, 'Dissemination of the Geneva Conventions' (1966) 6 International Review of the Red Cross 388

Siordet (n 20) 63

James J. McGowan Jr, 'Training in the Geneva and Hague Conventions: A Dead Issue?' (1975) XIV The Military Law and Law of War Review 51, 52

ibid., 55, 58

George H. Aldrich, 'Compliance with International Humanitarian Law' (1991) 31 International Review of the Red Cross 294, 297

ibid.

Gregoric (n 15); de Preux (n 30)

Dieter Fleck, 'The Employment of Legal Advisers and Teachers of Law in the Armed Forces' (1973) 13 International Review of the Red Cross 173, 177, 179

This interpretation, that repeated or 'continuous' IHL instruction is needed, substantially expands the treaty obligation simply to include treaty texts in military instruction. It emphasises the cognitive aspect of norm internalisation, and highlights that understanding, knowledge and recall can only be built with repeated training.

From the volitional side, De Mulinen echoes des Cilleuls and Pictet in his account of military culture and discourse about IHL. Many officers and soldiers suffer from what he considers a psychological block: IHL's merits might be recognised, but its applicability is questioned; while others think IHL presents dangerous or subversive risks to operational effectiveness.[38] Verri echoes this in his conclusion that once an armed conflict is under way, military culture favours Clausewitz, believing that IHL can be ignored.[39] So IHL training can face volitional obstacles, influenced by military culture. There are hints, but not more, that social psychological reflection is needed for effective IHL training.

Since the 1980s, scholarship on IHL training has evolved from the assumption that dissemination and training lead logically to compliance with the law. Writing in 1984, Junod still holds this assumption. She believes that the dissemination and training obligation is genuinely ambitious, not simple and discretionary; but neglected in practice.[40] Junod approaches dissemination as a form of conscientious internalisation, but her words lack precision. For Junod, IHL principles should create a 'reflex of solidarity' and replace humankind's primitive resort to violence.[41] These are larger aims than IHL itself, with its unwieldy balance between military necessity and humanity. Like Fleck, Surbeck emphasises repeated training in IHL, to create reflex or automatic behaviours consistent with IHL;[42] but like Junod (and like Kelsen, in the extract quoted in 1.1), he does not explain the gap between communicated norm and subsequent (automatic)

Frédéric de Mulinen, 'Diffusion Du Droit International Humanitaire Dans Les Forces Armées' (1978) 60 International Review of the Red Cross 58, 60

Pietro Verri, 'Institutions Militaires: Le Problème de L'Enseignement Du Droit Des Conflits Armés et de L'Adaptation Des Règlements a Ses Prescriptions Humanitaires' in Christophe Swinarski (ed), *Etudes et Essais sur le Droit International Humanitaire et sur les Principles de la Croix-Rouge en l'honneur de Jean Pictet (Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet)* (Martinus Nijhoff 1984) 608

Sylvie-Stoyanka Junod, 'La Diffusion Du Droit International Humanitaire' in Christophe Swinarski (ed), (n 39) 368

ibid.

Jean-Jacques Surbeck, 'La Diffusion Du Droit International Humanitaire: Condition de Son Application' in Christophe Swinarski (ed) (n 39) 544

behaviour. Surbeck recommends integrating IHL in military exercises, as the ICRC Commentary on Article 83 of Additional Protocol I was to do three years later.[43]

De Mulinen's work begins a more sophisticated approach. He argues that passive learning through lectures should be used as little as possible, and that 'integrated learning' (the first mention of integration by a scholar working on IHL training) should be preferred, to ensure that IHL is part of 'normal military activities'.[44] Integration requires no special resources, but does require trainees' active participation.[45] De Mulinen's approach also reflects on the challenges of translating IHL's prohibitions into clear and easily understood military orders.[46] This requires the prior interpretation of contested IHL norms, and is distinct from a related effort in IHL training, to simplify and reduce the number of IHL rules included in military instruction.[47] Hampson continues the focused output. Among her recommendations is a combined discursive-practical approach to officer instruction in IHL: with practical exercises that involve debriefing and evaluation, to demonstrate compliance 'in the chaos of conflict.'[48] Hampson is another scholar to hint at the need for psychological research into the causes of IHL violations, and she echoes Pictet and Cilleuls in pointing to the risk of soldiers' alienation from IHL, and the opportunity in psychologically preparing troops by showing them that IHL rules conform to their existing moral compass.[49] This is similar to Roberts' subsequent recommendation that IHL should not be presented as a gospel that merely needs to be disseminated and applied [from Geneva to] … the rest of the world.'[50] For Hampson, IHL training should aim at 'an informed conscience', so soldiers 'internalise their knowledge, *to make it part of themselves*';[51] but the relationship between communicated norm and the development of individual 'conscience' remains unexplained.

[43] Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff 1987) para 3376

Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces* (ICRC, 1987) 64

ibid.

ibid.

ICRC, 'Basic Rules of International Humanitarian Law in Armed Conflicts' (1988)

Françoise J. Hampson, 'Fighting by the Rules: Instructing the Armed Forces in Humanitarian Law' (1989) 29 International Review of the Red Cross, 111, 116-117

ibid., 115

Adam Roberts, 'The Laws of War: Problems of Implementation in Contemporary Conflicts' (1995) Duke Journal of International and Comparative Law 11, 70

Hampson (n 48) 115 (emphasis added)

From 2000 onwards, there is a gradual recognition that IHL training is necessary but not sufficient for compliance. [52] Authors make discrete recommendations for improving the training in three strands: i) on the educational aspects of IHL training and soldiers as learners, given their particular rank and role, and given technological opportunities for dissemination and training; ii) on the still-elusive problem of using IHL training to change behaviour; and iii) the role of military culture as an opportunity and obstacle for instruction in IHL. The literature hints at the need for interdisciplinary insights (e.g. norm internalisation and communities of practice) but these are not systematically explored.

In the first strand, scholars provide checklists for good teaching and instruction. The emphasis is the educational aspects of IHL training, and soldiers as learners, given their particular rank and role. *Per* Sénéchaud, the instructor should be 'convincing', while training should be 'integrated', 'selective', 'simple and continuous', 'practical and relevant'.[53] W. Hays Parks recommends trainers conduct a 'terrain appreciation' of the audience for their IHL training,[54] to ensure that the norms taught are tailored precisely to that audience, and are 'commensurate with their duties and responsibilities'.[55] Hays Parks emphasises the importance of the instructor and his/her knowledge of the law, but asserts that the individual soldier or officer receiving training is more important than the instructor and his/her training session. This approach is consistent with Sassòli's argument that the 'individual to be convinced' matters in IHL training,[56] and with Kuper's emphasis on tailoring IHL training to a soldier's rank and to the deployment situations they are likely to face.[57] There should be some selectivity, because working memory can only store 5-9 pieces of information; and 'schemas' (structured examples) can help with recall and knowledge application.[58] Kuper recommends a focus on principles, instead of black-letter law.[59] Klenner's work begins to emphasise 'integration' of IHL (see 3.4

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[52] Marco Sassòli 'The Implementation of International Humanitarian Law: Current and Inherent Challenges' (2007) 10 Yearbook of International Humanitarian Law 45

François Sénéchaud, 'Instructing the Law of Armed Conflict: A Review of ICRC Practice' (2007) 3 Israel Defense Forces Law Review 49

W. Hays Parks, 'Teaching the Law of War: A Reprise' (2007) 3 Israel Defense Forces Law Review 9,

Amended Protocol II to the CCW 1996, Article 14(3), cited by Hays Parks (n 54)

Marco Sassòli, 'The Implementation of International Humanitarian Law: Current and Inherent Challenges' (2007) 10 Yearbook of International Humanitarian Law 45

Jenny Kuper, *Military Training and Children in Armed Conflict: Law, Policy and Practice* (Martinus Nijhoff 2005) 173

ibid. 101

ibid., 104-105

below) into 'leadership, tactical, logistics, and combat training'.[60] Klenner endorses continuous IHL training of commanders, who then train those under their command in IHL.[61] Murphy identifies an educational challenge without a solution: that of how to translate 'obtuse and unintelligible' treaty norms into practical norms, without reducing them to a 'half-hearted, "touchy feely"' approach in the classroom.[62]

There has been recent interest in integrating IHL in computer games, both as a tool for civilian dissemination (to correct the frequent portrayal of IHL violations as a winning strategy in existing games) [63] and to help motivate new recruits in their IHL training. [64] These projects have given rise to new virtual reality training tools,[65,66] and remote learning opportunities, including projects established by the ICRC,[67] and a mobile application from Geneva Call.[68] These novel approaches to IHL instruction may help with the accessibility of IHL training, for remotely-located armed forces and groups, and those for whom literacy or formal classroom instruction is a challenge;[69] but technology can also lead to a distancing effect, undermining the gravity of armed conflict.[70]

In the second strand, scholars attempt to link IHL training and behavioural change. Kuper defines learning with reference to the behaviour required for compliance: 'a relatively permanent change in behaviour that occurs as a result of practice or experience.'[71] For this, military training in general should avoid brutal initiation, because this brutality may be normalised and repeated on deployment. Training should be 'disciplined [but]

Dietmar Klenner, 'Training in International Humanitarian Law' (2000) 82 International Review of the Red Cross 653, 660-661

ibid.

Ray Murphy, 'International Humanitarian Law Training for Multinational Peace Support Operations – Lessons from Experience' (2000) 82 International Review of the Red Cross 953

Frida Castillo, 'Playing by the Rules: Applying International Humanitarian Law to Video and Computer Games' (Pro Juventute, TRAIL – Track Impunity Always, 2009), 42

Ben Clarke, Christian Rouffaer and François Sénéchaud, 'Beyond the Call of Duty: Why Shouldn't Video Game Players Face the Same Dilemmas as Real Soldiers?' (2013) 94: 886 International Review of the Red Cross 711

Vincent Bernard, ' "Law of Warcraft": New Approaches to Generating Respect for the Law', (2014) 108 Proceedings of the 108th Annual Meeting of the American Society of International Law 276

ICRC, 'Video games get real' Video recording, 29 September 2013

Vincent Bernard and Mariya Nikolova, 'Generating Respect for the Law: The Need for Persistence and Imagination' in Julia Grignon (ed), *Hommage à Jean Pictet* (Editions Yvon Blais 2016) 575

Geneva Call, 'Fighter not Killer Campaign Launched by Geneva Call against Violations in Syria' 21 June 2015

Defence Committee, *The Armed Forces Covenant in Action? Part 4: Education of Service Personnel* (HC 2013-2014) 17

Law of Warcraft (n 65) Q&A

Kuper (n 57), 173-4

humane'.[72] Aside from Kuper's contribution, the literature does not address the elusive relationship between communicated norm and subsequent behaviour, but instead recommends repeated drills in IHL norms to create an automatic behavioural response. The South African military manual calls for the internalisation of IHL norms, so that they become second nature;[73] while Klenner (like Junod before him) thinks 'correct and disciplined behaviour' should become a 'reflex'.[74] This does not take account of Shalit's observation that repeated 'drills' address skills only and fail to build moral courage.[75] An emphasis on practical training continues, but in passing. There is a separate literature on the use of distributed simulation (training sites designed to emulate the geographic area where soldiers will be deployed),[76] for mission-specific or pre-deployment training, which does not consider IHL training.

The third strand examines the opportunities and threats presented by military culture. Dickinson uses organisational psychology to explain the influence of the US Judges Advocate General (JAG) in promoting compliance with IHL. She argues that the US JAG corps could promote compliance by influencing the cultural norms in the military community: 'fostering greater compliance' can be achieved not by new treaty norms, but instead by 'subtly influencing organizational structures and cultural norms'.[77] This 'subtl[e] influenc[e]' is achieved partly by the 'commingling' of the US Judges Advocate General corps with non-lawyers in the military. For Dickinson, this is consistent with organisational theory and promotes compliance, despite the violations at Haditha, where the JAG corps did not report violations.[78] Where military culture is strongly supportive of IHL compliance, it can facilitate soldiers' and officers' ability to identify and resist an unlawful order. This duty, explored in chapter 4 below, requires both understanding and willingness to comply. In her work on unlawful orders, Minow recommends the 'integration' of IHL into training programmes and military decision-making at all levels; and changes to military culture so subordinates see their commanding officers supporting

ibid., 103

Republic of South Africa, Military Manual, cited in ICRC Customary IHL Study, rule 142, 503, note 45

Klenner (n 60) 657

Ben Shalit, *The Psychology of Conflict and Combat* (Praeger 1988) 117-119

Jon Saltmarsh and Sheena MacKenzie, 'The Future of Collective Training: Mission Training through Distributed Simulation' (RUSI Defence Systems, Royal United Services Institute, 2008) 107; Heather M. McIntyre, Ebb Smith and Mary Goode, 'United Kingdom Mission Training Through Distributed Simulation' (2013) 25 Military Psychology 280

Laura Dickinson, 'Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance' (2010) 104 American Journal of International Law 1, 3

ibid., 26

IHL compliance.[79] Lloyd Roberts addresses 'barracks culture' as a risk to IHL training, causing an 'adjust[ment]' (reinterpretation) of the IHL communicated to soldiers:[80] a particular danger, in Lloyd Roberts' experience, in counter-terrorism detention.[81] In his experience as a military trainer, IHL is rarely perceived as a priority: 'It is a brave commandant who insists on maintaining a module on the law of war.'[82] Murphy and Kuper echo these concerns, acknowledging competing pressures on officers.[83] While the organisational culture of the Army as a whole is relevant to soldiers' adherence to IHL norms, regimental culture differs and each regiment has its own ethos. Barracks culture is not a monolith, to be generalised across a single state case study, and certainly not across states.

Scholarship has gradually acknowledged the insufficiency of IHL training to prevent violations. The literature is fragmented, with some historic insights on individual and social psychology lost. Yet an incremental consensus is building: first, that the repetition of IHL and its recurrence in military decision-making should result in norm internalisation (at least understanding and possibly willingness to comply), while discrete, marginal IHL training might not; second, that soldiers' understanding of IHL is necessary but insufficient for compliance, but that IHL training should aim somehow to translate communicated norm into lawful conduct; and third, that military culture can be an obstacle and an opportunity for IHL training. These works hint at interdisciplinary insights without thoroughly exploring them. A better explanation of the conundrum between IHL training, prevention and compliance is found by synthesising these fragmented insights with richer explanations from constructivist compliance theory and social psychology, as in 3.3 below. This review of the literature has focused on IHL instruction to armed forces. Scholarly works on dissemination and training of armed groups will be considered in 3.4 below.

[79] Martha Minow, 'Living Up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defence' (2007) 52 McGill Law Journal 1

David Lloyd Roberts, 'Teaching the Law of Armed Conflict to Armed Forces: Personal Reflections' (2006) 82 International Law Studies (Blue Book) 121, 126

ibid.

ibid., 125

Murphy (n 62) 957; Kuper (n 57) 173

3.3 Insights from Interdisciplinary Works

Norm Internalisation

Literature from IHL suggests that military training should inspire a taken-for-granted automatic practice in compliance with the law, but it lacks a complete account of how individuals and units can build this sense of normativity. It is as if the training is a form of physical conditioning, for which repetition and practice are sufficient; when the prevention of IHL violations requires attention to group and individual, cognitive and volitional aspects. It follows that interdisciplinary insights are needed for a mature synthesis of the literature. Norm internalisation from constructivist international relations is the first such insight. Finnemore and Sikkink propose that, after a norm emerges in the practice of a few entrepreneurial states, there is a 'tipping point' after which socialisation processes occur.[84] The norm might then be accepted into or 'cascade' into widespread state practice, and once multiple states accept it, the norm becomes 'taken-for-granted', no longer worthy of debate.[85] This stylised and linear account has been questioned,[86] but the aim of 'taken-for-granted' norms is a starting-point for IHL training. More is needed to explore how these norms might be taken-for-granted, and what that means in the IHL context.

Norm internalisation must also be explicitly adapted to the individual and group level. Sikkink's 'agentic constructivism' and Scharf's call to disaggregate the compliance inquiry from the state to that of individuals can help inform an individual soldier's perspective on IHL training.[87] Disaggregated norm internalisation can begin to build an account of understanding, knowledge and recall of IHL norms; and willingness to comply, which includes a willingness to question and disobey unlawful orders, and to report or intervene when IHL violations are witnessed.[88] Finnemore and Sikkink suggest that 'iterated behaviour and habit consolidate norms among the members of a

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Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 International Organization 887

ibid., 895

Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press 2013)

Kathryn Sikkink, 'Beyond the Justice Cascade: How Agentic Constructivism Could Help Explain Change in International Politics' (Princeton International Relations Colloquium 2011); Michael P. Scharf, 'International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate' (2009) 31 Cardozo Law Review 45

4.3

profession.'[89] Constructivist norm internalisation offers a theoretical basis for repeated exposure to IHL norms in military training. Finally, Finnemore and Sikkink observe that professional training does not only impart skills or knowledge, but that it 'actively socializes people to value certain things above others'.[90] Their work provides a glimpse into how military culture influences IHL training. So IHL norms are more likely to be 'taken-for-granted' in military units that not only provide instruction in IHL, but also 'value' IHL compliance more than competing pressures, such as resisting accountability or discouraging troops from reporting conduct that might violate IHL.

From social psychology, Kelman offers an alternative account of 'internalization', as the third of three cumulative processes of attitude change. In the first, 'compliance', an individual defers to their group (or to another individual) on the simple basis of rewards or sanctions. In the second, 'identification', an individual seeks to define him or herself in relation to another individual or group. In the third, 'internalization', the individual finds group values 'intrinsically rewarding' and integrates them with his or her own values.[91] When taken together with constructivist communities of practice, Kelman's work can help to explain how IHL training must be designed with awareness of the individual military recruit's self-identification with the values of his or her unit. This notion of 'internalization' also explains the risks of a military culture which seeks to marginalise the importance of IHL.

Communities of Practice

Constructivist communities of practice, applied to international relations by Adler and Pouilot,[92] and to international law compliance theory by Brunnée and Toope,[93] justify a focus on IHL training from individual and group perspectives. Adler and Pouilot differentiate between agential and structural mechanisms in international relations, and hold that communities of practice continually mediate the relationship between the individual and the group. Constructivist communities of practice can help explain the

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Finnemore and Sikkink (n 84) 904

ibid., 905

Herbert C. Kelman, 'Compliance, Identification and Internalization: Three Processes of Attitude Change' (1958) II Conflict Resolution 51

Emmanuel Adler and Vincent Pouilot, 'International Practices' (2011) 3 International Theory 1

Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010); for a more detailed exposition of their interactional theory, see 1.4

influence of military culture on individual soldiers' and officers' training in IHL and their subsequent compliance; and justify standards for IHL training which differentiate between the individual and group. Like Finnemore and Sikkink, Adler and Pouilot point to the shared norms communicated among professions or groups. Drawing on Bourdieu's *habitus,* which they define as an 'embodied stock of unspoken know-how',[94] Adler and Pouilot argue that knowledge and practice become enmeshed for experienced professions. In the literature on communities of practice, shared knowledge built through shared practice promotes compliance. This approach strengthens recommendations for practical and applied IHL instruction that recurs throughout the training cycle. Brunnée and Toope's 'practice of legality' promotes an 'attitude towards the law that is part of actors' identities'.[95] Their 'interactional' theory of international law compliance is further theoretical authority for frequent or recurrent IHL training (they emphasise the frequent reassertion, but not the imposition of norms), to promote a 'practice' of IHL compliance, and a willingness to comply (Brunnée and Toope's 'fidelity' to a law or legal system),[96] which constructivists would see as part of individual soldiers' and officers' identities. Neither Adler and Pouilot nor Brunnée and Toope apply their theoretical frameworks to armed forces or IHL.

Military Culture

Bell's study of military training in the US armed forces uses the related concept of 'military culture' instead of communities of practice to explain the causal mechanisms for IHL norm internalisation.[97] Bell's work is constructivist, but uses political science methodologies (quasi-experiments and comparative surveys). He finds that military training in IHL and ethics does influence cadets' norms, with the intensive four-year programme at the US Military Academy at West Point producing comparatively greater respect for civilian immunity norms than the less intensive US Army Reserve Officer Training Corps, where force protection norms were more evidently part of cadets' identity.[98] Bell's study is also evidence that immersive and practical IHL training provides stronger norm internalisation than less intensive, less practical instruction.[99] The

Adler and Pouilot (n 92) 18
Brunnée and Toope (n 93) 92
ibid.
Andrew M. Bell, '"Leashing the Dogs of War": Law of War Norms, Military Culture, and Restraint toward Civilians in War' (PhD thesis, Duke University 2016; 2015 draft summary on file with the author).
ibid.
ibid.

scholarly emphasis on practical training is consistent with works in the education field. In Kolb and Kolb's approach to higher education, competence to understand, analyse and apply material is gained through a progressively independent, 'experiential' cycle.[100]

Yet there are tensions between military culture, tasks and structures, and IHL. First, the aims of basic training (desensitisation, breaking down a soldier's inculcated reluctance to kill, unit cohesion and obedience to the command chain) run counter to many of the aims of IHL training.[101] Only if military culture is made explicitly consistent with IHL compliance, challenging unlawful orders, and accountability for violations is this tension overcome. Second, where the aims of basic training have been fulfilled but IHL norms are not 'central to the soldier's identity', violations may result if cohesive military units become isolated in armed conflict.[102] Third, Grassiani finds that the power and routine tasks of monitoring military checkpoints cause 'physical, emotional, and cognitive numbing' in combatants; and that this also numbs them morally;[103] thinking that can be linked to Kelman and Hamilton's 'routinization' (see 1.4 above) and (below) to Arendt's observation that Eichmann failed to think. Fourth, asymmetric conflicts with rapidly-shifting intensity and complexity as to applicable law delegate more authority than previously to the 'strategic corporal'.[104] Yet, as Johnson points out, these soldiers are often in their late teens and early twenties, drawing on their peer group for moral decision-making.[105] This keeps them at the midpoint of Kohlberg's six-stage theory of human moral development, which ranges from naïve moral realism to pragmatic morality, to perspectives shared within a social group, a 'social system morality' which anticipates a loss of honour when an individual defaults, and finally the synthesis of human rights, social welfare and universal ethics (Kohlberg does not consider IHL).[106] If Johnson's application of Kohlberg is correct, there are particular challenges for IHL norm

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[100] Alice Y. Kolb and David A. Kolb, 'Learning Styles and Learning Spaces: Enhancing Experiential Learning in Higher Education' (2005) 4 Academy of Management Learning and Education 193

1.4; Richard Holmes, *Acts of War: The Behaviour of Men in Battle* (Cassell, 2003; first published as *Firing Line* (Jonathan Cape 1983); Ben Shalit, *The Psychology of Conflict and Combat* (Praeger 1988); Joanna Bourke, *An Intimate History of Killing: Face-to-Face Killing in Twentieth Century Warfare* (Granta 1999)

Emanuele Castano, Bernhard Leidner and Patrycja Slawuta, 'Social Identification Processes, Group Dynamics and the Behaviour of Combatants' (2008) 90 International Review of the Red Cross 259; 6.4.4

Erella Grassiani, *Soldiering Under Occupation: Processes of Numbing among Israeli Soldiers in the Al-Aqsa Intifada* (Berghahn Books 2013)

1.1; Charles Krulak, 'The Strategic Corporal: Leadership in the Three Block War' [1999] Marines Magazine

Rebecca J. Johnson, 'Moral Formation of the Strategic Corporal' in Jessica Wolfendale and Paolo Tripodi (eds) *New Wars and New Soldiers* (Ashgate 2011) 239, 242

Lawrence Kohlberg, *Essays on Moral Development: Moral Stages and the Idea of Justice* vol 1 (Harper and Row 1981)

internalisation among military recruits and junior soldiers. Fifth and briefly, Bandura's social learning theory provides an account of individual learning through observation of their in-group.[107] If IHL training is squeezed in the curriculum, treated as a mere bureaucratic requirement or considered antagonistic to military advantage, then individual soldiers and officers will perceive it accordingly. Military culture is a powerful causal mechanism, more powerful than deficits in IHL training alone to explain violations where these occur. Yet, as Bell's research shows, military culture can also harness norm internalisation.

Moral Disengagement

Drawing on Bandura's reading of moral disengagement,[108] the 2004 Roots of Behaviour in War Study surveyed former fighters in Bosnia-Herzegovina, Colombia, the Republic of the Congo (Congo-Brazzaville) and Georgia for the ICRC, and found that attitudes associated with a risk of violations were held by some fighters who had a good knowledge of the law.[109] This provides additional grounds for a distinction between understanding and willingness to comply; and points to the limits of IHL training to prevent violations and ensure compliance. It seems that (taken together with military culture and discourse about law and enemy forces) moral disengagement is a more powerful causal factor for violations than deficits in IHL training.

As noted in 1.4 above, the Roots of Behaviour in War Study indicated that fighters' willingness to disregard IHL is linked to two dimensions of moral disengagement: a) the justification of violations by a fighter's own group (which in turn correlates with group cohesion), and b) dehumanising of the enemy.[110] Further, the authors found that 'What counts is esteem for their comrades, defence of their collective reputation and desire to contribute to the success of the group.'[111] This creates a tendency to 'abidicat[e] …responsibility…induced chiefly by group conformity and obedience to orders.'[112] This finding, that combatants lose autonomy as a result of the pressure to conform to the group,

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Albert Bandura, *Social Learning Theory* (General Learning Press 1971) 2

Albert Bandura, 'Moral Disengagement in the Perpetration of Inhumanities' (1999) 3 Personality and Social Psychology Review 193

Daniel Muñoz-Rojas and Jean-Jacques Frésard, 'The Roots of Behaviour in War: Understanding and Preventing IHL Violations' (2004) 86 International Review of the Red Cross 189

ibid., 197

ibid., 194

ibid..,190

echoes Milgram's observation that individual moral responsibility declines when an individual seeks to please authority figures within his or her own group.[113] This is not dissimilar to Bauman's finding that Nazi soldiers favoured self-preservation over moral duty, acting as unreflective automata; and his thesis that this would apply to any human beings living in circumstances where good moral choices were either absent or onerous.[114] Arendt's observation of Adolf Eichmann also revealed a failure to think, although *Eichmann in Jerusalem* was a reflection on moral and intellectual mediocrity in one defendant, expressly not (as Arendt clarified in her Postscript) a generalised study of evil or of totalitarianism.[115] Arendt did generalise 'non-thinking' as a potential cause of atrocities in her later work: in a society where individuals are 'shield[ed] from the dangers of examination', they become accustomed to following heinous rules if they are current in a particular society.[116]

The ICRC study also suggested a causal role for trauma in combat, finding a temporary risk of violations where combatants had experienced recent deployment. They called this the 'spiral of violence'.[117] Finally (in an argument criticised by Stephens and not by the present author), the Roots of Behaviour in War study calls on armed forces to emphasise the normativity of IHL, rather than conflating IHL training with training in military ethics, because combatants are 'not morally autonomous'.[118] Tripodi found a variant of moral disengagement in his study of documentary footage of those involved at abuses in Abu Ghraib that soldiers adapt to circumstances where violations occur. He found evidence that they fear the consequences of not obeying orders, and that they dissect or dissociate their own personalities as a coping mechanism.[119] This dissociation has a different cause, according to Lifton: the 'atrocity-producing situation[s]' of Nazi Germany and counterinsurgencies such as Vietnam encourage individual psyches to form a 'sub-self that behaves as if it is autonomous…'[120] Neither Lifton nor Tripodi considered the role

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Stanley Milgram, *Obedience to Authority: An Experimental View*, Harper and Row, New York, 1974, cited in Jean-Jacques Frésard, *The Roots of Behaviour in War: A Survey of the Literature* (ICRC 2004) 7

Zygmunt Bauman, *Modernity and the Holocaust* (Polity, 2nd ed, 2000)

Hannah Arendt, *Eichmann in Jerusalem* (Penguin Classics 2nd edition, 2006)

Hannah Arendt, *The Life of the Mind* (Harcourt, Inc 1971) 177

Frésard (n 113) 8

Muñoz-Rojas and Frésard (n 109); Dale Stephens, 'Behaviour in War: The Place of Law, Moral Inquiry and Self-Identity' (2014) 96 International Review of the Red Cross 751

Paolo Tripodi, 'Understanding Atrocities: What Commanders can do to Prevent them', in David Whetham (ed.), *Ethics, Law and Military Operations* (Palgrave Macmillan 2011) 173

Robert Jay Lifton, 'Haditha: In an "Atrocity-Producing Situation" — Who is to Blame?', Editor and Publisher, 4 June 2006, in Neta C. Crawford, 'Individual and Collective Moral Responsibility for Systemic Military Atrocity' (2007) 15 Journal of Political Philosophy 187, 193-194

of IHL, nor military training; but Lifton attributes moral blame both to the individual responsible for atrocity, and to political officials responsible for the policy of counterinsurgency war.[121]

Discourse about Law

Discourse about international law also influences IHL training, prevention and compliance, prospectively and retrospectively; and it is a powerful mechanism for IHL violations in its own right. During training, the indeterminacy of IHL norms might be stretched or contracted for political reasons, emphasising the lives of soldiers more than those of enemy civilians,[122] and weighing force protection strongly in a proportionality calculus.[123] This illustrates the limits of training in the context of IHL's contested norms and its moral compromise. Lauterpacht's legal adviser might be best served to avoid 'humility' in the face of a discourse about IHL that eviscerates its central principles.[124] More generally, if military trainers and the chain of command imply that IHL is an unwarranted restriction on military advantage or the flexibility of mission command, IHL training might be resented, and understanding and willingness to comply affected as a result. Following alleged or proven violations, a scornful approach to investigations, prosecutions or civil suits might undermine the legitimacy of the IHL in which soldiers are trained.[125] Where fighters seek to justify violations by their own group,[126] IHL's constraints are marginalised.

Discourse about Enemy Forces

Research suggests that dehumanising discourse about the enemy also causes IHL violations, independently from fighters' knowledge of IHL.[127] It can be found in the racist epithets commonly used by British armed forces in decolonisation conflicts and in

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ibid.

Gabriella Blum, 'The Dispensable Lives of Soldiers' (2010) 2 Journal of Legal Analysis 115; cf. Eitan Diamond, 'Before the Abyss: Reshaping International Humanitarian Law to Suit the Ends of Power' (2010) Israel Law Review 414

Asa Kasher and Amos Yadlin, 'Military Ethics of Fighting Terror: An Israeli Perspective' (2005) 4 Journal of Military Ethics 3

Hersch Lauterpacht, 'The Problem of the Revision of the Law of War' (1952) 29 British Yearbook of International Law 360, 382

7.5

Muñoz-Rojas and Frésard (n 109) 197

ibid.

Afghanistan and Iraq;[128] and the attempted justification of violations based on the enemy's perceived willingness to violate IHL.[129] Discourse that dehumanises the enemy or enemy civilians[130] can be seen as part of Bandura's moral disengagement, but preventing it requires its own policy responses, beyond IHL training. Attempting to justify violations on the basis that the enemy either has or would violate IHL if given the chance is linked to the problem of false reciprocity in IHL,[131] and violations committed in 'anger, revenge and rage'.[132]

Tripodi calls the latter 'situational atrocities', in contrast to violations ordered by the state and those influenced by the perpetrator's personality.[133] Yet a discursive approach to IHL training can and should begin to address the obligatory nature of IHL and the need for restraint even when the enemy has committed IHL violations. The affective dimension of close-knit military units should be explicitly acknowledged by policy-makers, as revenge and rage at the death of comrades are risk factors for IHL violations,[134] and these cannot be eradicated by military instruction in IHL. Mackmin cites psychological research that individuals predisposed to aggression use violent outbursts to re-establish their emotional equilibrium.[135] Where this factor is present alongside 'the "strangeness" of an opponent', a perception that the enemy has committed a crime,[136] or unlawful orders, the risk of IHL violations is magnified. Mackmin gives the example of General Patton's speech to Allied troops in Sicily in 1943, when troops were persuaded that, as the enemy did not respect IHL and had killed many of their comrades, they should take no prisoners.[137] Where 'dehumanization' is present alongside 'authorization' and 'routinization', all three conditions for a 'sanctioned massacre' pertain, implicated in the Holocaust and My Lai;[138] and in the torture at Abu Ghraib.[139]

6.2; Report of the Baha Mousa Inquiry (2011) Part XVIII, Summary, paragraph 317

6.4.4

3.1 (vignette on the My Lai massacre)

1.1

Tripodi (n 119) 175-6

ibid.

6.4.2

Sara Mackmin, 'Why Do Professional Soldiers Commit Acts of Personal Violence That Contravene the Law of Armed Conflict?' (2007) 7 Defence Studies 65, 71

ibid., 72

ibid., 77

Herbert C. Kelman and V. Lee Hamilton, *Crimes of Obedience: Toward a Social Psychology of Authority and Responsibility* (2nd edition, Yale University Press 1990)

Herbert C. Kelman, 'The Policy Context of Torture: A Social-Psychological Analysis' (2005) 87 International Review of the Red Cross 123, 123

Understanding and Willingness to Comply

A final insight from analytic jurisprudence addresses the enigma between IHL norms, military instruction and subsequent behaviour, while building a distinction between cognitive and volitional norm internalisation (or in shorthand, understanding and willingness to comply). Applying Hart's '"internal" aspect of rules' to IHL training does not only require instruction leading to understanding, knowledge and recall, but also calls for 'a critical reflective attitude to certain patterns of behaviour as a common standard',[140] and a recognition of IHL's obligatory nature through 'criticism (including self-criticism), [and] demands for conformity…' which are 'insistent'.[141] For Hart, this normativity is not a subjective 'feeling of pressure or compulsion',[142] and nor is volitional norm internalisation or willingness to comply. Hart's 'internal aspect of rules' begins to explain how social pressures and the availability of sanctions or accountability processes assist an individual's norm internalisation. Obligation follows, he argues:

> when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate and threaten to deviate is great.[143]

This is a richer account than Kelsen's notion of legislated rules with sanctions entering into an individual's conscience,[144] and is more consistent than Kelsen's with the social psychological works discussed in this chapter.

Synthesising Hart's 'internal aspect' with the research on military culture and communities of practice above, if the discourse within the armed forces insists upon compliance with IHL, then this will harness social pressure to internalise IHL norms. If moral disengagement and discourse that marginalises law or dehumanises the enemy is treated as a 'threat … to deviate' from IHL, then social pressure can be applied to improve compliance. Hidden in Hart's account is a distinction between the cognitive and volitional, as MacCormick points out.[145] On MacCormick's reading, Hart ignored this affective dimension, and did not consider that the cognitive 'internal aspect' was

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H.L.A. Hart, *The Concept of Law* (Leslie Green, Joseph Raz and Penelope A. Bulloch eds, 3rd edition, Oxford University Press 2012) 57

ibid., 86

ibid., 88

ibid., 86

Hans Kelsen, *General Theory of Law and State* (Anders Wedberg trans, Lawbook Exchange 2007) 166;

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Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1994) 288

contained within a volitional attitude,[146] which is summarised here as willingness to comply. This thesis uses MacCormick's reading of Hart to explain how IHL norms can be perceived as binding, closing the gap between communicated norm and subsequent behaviour. However, there is no reason to assume that cognitive norm internalisation of IHL norms 'presupposes' or is 'parasitic upon' the volitional, as MacCormick asserts, because social psychological research has shown that knowledge of IHL is independent from moral disengagement or an attempted justification of violations.[147] For this thesis, cognitive and volitional norm internalisation (understanding and willingness to comply) are distinct; and the design and delivery of IHL training need to take account of both.

3.4 An Evolution of Practice by the ICRC and Geneva Call

The ICRC: From Dissemination to Integration and Prevention

The ICRC's activities combine authority and self-censorship. It has crafted new IHL norms (Finnemore considers the ICRC's role more significant than that of states in the creation of the First Geneva Convention of 1864)[148] and interprets them,[149] often with an emphasis on the principle of humanity instead of military necessity. Yet the ICRC's role in protection and assistance to the victims of armed conflict depends upon states' agreement, e.g. to permit the ICRC to visit its detainees in a NIAC. This has led to tension between its role as norm-creator and IHL advocate on the one hand and its work with victims and their military gatekeepers on the other. As a result, the ICRC's efforts to persuade states to comply with IHL are usually confidential good offices, shielded from outside scrutiny. This enables the continued disuse of IHL's implementation mechanisms, and the intransigence of some states when monitoring of their practice is suggested.[150] Ratner concludes that the ICRC's protection mandate will often take precedence over strong advocacy for IHL compliance in the event of a conflict between the two.[151] The

ibid.

Muñoz-Rojas and Frésard (n 109)

Martha Finnemore, 'Rules of War and Wars of Rules: The International Red Cross and Restraint of State Violence' in John Boli and George M. Thomas (eds), *Constructing World Culture: International Nongovernmental Organizations Since 1875* (Stanford University Press 1999) 149, 153

Pictet (ed.) *Commentaries to the Four Geneva Conventions 1949;* Sandoz et al, *Commentaries to AP I and AP II;* ICRC Customary IHL Study 1.1

Steven R. Ratner, 'Law Promotion Beyond Law Talk: The Red Cross, Persuasion and the Laws of War' (2011) 22 European Journal of International Law 459

ICRC's role in IHL is pragmatic, which Ratner criticises as 'settl[ing]' for 'action merely in conformity' with IHL rather than its internalisation.[152]

The ICRC's expanding work on IHL training and the prevention of violations postdates and somewhat contradicts Ratner's critique. Over the past two decades, the ICRC has gradually shifted its IHL outreach activities from dissemination of the law to an emphasis on integration,[153] and subsequently to prevention (considered below). Integration has had two main outputs: first that IHL be interpreted and then recur in a 'continuous process' throughout a soldier's training and education cycle, being relevant to 'doctrine, training, education, equipment and sanctions';[154] and then, that IHL become continuously relevant to decision-making and communication within the military chain of command.[155]

In its first iteration, integration requires the prior interpretation of the law, an understanding of its operational consequences, and the adoption of 'concrete measures…to permit for compliance during operations.'[156] In recognising that IHL training alone is insufficient for compliance, the ICRC acknowledges that 'the mere teaching of legal norms will not result, in itself, in a change in attitude or behaviour'.[157] This position on the limits of a dissemination model of IHL training, or one based only in classroom instruction, reflects the consensus in the literature. The integration model emphasises IHL's continued relevance when soldiers and officers learn about a new weapons system ('equipment'), so that they can learn whether it can be used lawfully in civilian areas, or whether it can cause superfluous injury or unnecessary suffering.[158] Further, an integration of IHL training with an understanding of military discipline and international criminal law ('sanctions', read broadly) has the potential to reduce misconceptions about international law among service personnel.[159]

In integration's second iteration, IHL is continuously relevant to military decision-making, before and during armed conflict.[160] In this formulation, integration begins to

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ibid.
ICRC, 'Integrating the Law' (2007)
ibid; ICRC, 'Violence and the Use of Force' (2011) 58
ICRC, 'Decision-making Process in Military Combat Operations' (2013)
ICRC, 'Violence and the Use of Force' (2011) 58
ibid.
AP I, art 35(2)
W. G. L. Mackinlay, 'Perceptions and Misconceptions: How are International and UK Law Perceived to Affect Military Commanders and Their Subordinates on Operations?' (2007) 7 Defence Studies 111

ICRC, 'Decision-making Process in Military Combat Operations' (n 155)

close the gap between historic treaties' emphasis on giving 'instructions' (orders) consistent with IHL,[161] and the assumption from the Four Geneva Conventions and the Pictet Commentary that dissemination and military instruction in IHL would help 'ensure respect' for the law.[162] This approach emphasises ongoing communication about IHL throughout the command chain.[163] In relation to IHL training, it is the commander's responsibility to verify subordinates' knowledge of the law, moving away from the 'train the trainers' delegation of the IHL training obligation and towards a process of ongoing internal evaluation of IHL training.[164] If IHL is continually relevant to communication within and by the chain of command, IHL training will not be confined to a single, discrete classroom session. Integration should allow soldiers the opportunity to clarify the lawfulness of a mission or specific order, 'if time and situation permit'.[165] This disrupts concepts of conformity and unthinking obedience to the chain of command, and endorses the obligation only to carry out lawful orders. Integration also emphasises the continuous nature of IHL's duties, with reference to targeting, precautions and logistics. IHL sets the parameters of target selection; obliges commanders to settle uncertainty in intelligence which might affect IHL compliance,[166] and to desist from any attack from the moment that intelligence suggests it would be indiscriminate or disproportionate. The lawfulness of targeting must be kept under 'constant review'.[167]

The ICRC's emphasis on the continuous communication and relevance of IHL is consistent with Brunnée and Toope's interactional theory, where a continuous practice of legality grounds compliance and obligation.[168] It is also consistent with (but does not guarantee) both cognitive and volitional norm internalisation. Norms that are continuously relevant to military decision-making, with IHL recurring in 'doctrine, education, equipment', training and 'sanctions' are more likely to be 'taken for granted'[169] by soldiers and officers than norms introduced in a single classroom lecture. Recurrent

~~Hague Convention IV, art. 1~~

Jean Pictet (ed.) *Commentary to the Four Geneva Conventions of 12 August 1949,* vol. I (1952) 384, vol. II (1960) 257, vol. III (1960) 613-4, vol. IV (1958) 580;1.2, 2.2

ICRC, 'Decision-making Process in Military Combat Operations' (n 155) 22, 24

ibid., 22

ibid., 43

ibid.,18

ibid., 31

Brunnée and Toope (n 93) 16, 62

Finnemore and Sikkink (n 84)

mention of IHL will build Finnemore and Sikkink's 'iterated behaviour and habit [to] consolidate norms' within an armed force or armed group.[170]

Yet the integration model is not perfect: (i) there is no instrument to codify the approach, so for now, it remains an ICRC in-house approach with no power to bind states. At best, those armed forces and armed groups with in-depth knowledge of the ICRC's approach, or outreach by the ICRC in their military training, will be able to integrate IHL into their training and decision-making. (ii) It focuses on target selection and verification where commanding officers are involved; but does not address systematically the challenges of the 'strategic corporal' on patrol with a small group of colleagues,[171] or a soldier with responsibility for detainees. (iii) Evaluation is missing from the integration model, and this misses an opportunity.

The ICRC's 'prevention' strand is broader than its work on integration, and is more explicitly grounded in interdisciplinary research. Differentiated from 'protection', 'assistance', and 'cooperation', prevention 'aims to foster an environment conducive to the respect for the life and dignity of persons' affected by armed conflict and violence; and to ensure that armed actors respect the ICRC's role.[172] It recognises dissemination's insufficiency, includes integration, and creates an interdisciplinary toolkit for potential IHL compliance. Prevention includes the identification of appropriate stakeholders to create and maintain national legislation, sanctions and reparations to implement IHL; and dialogue with armed forces, armed groups, government officials, academia and civil society to promote IHL compliance and importantly, to reduce public discourse which might encourage violations of the law.[173] Prevention is also implicitly a process of norm internalisation: 'the shift from simply imparting knowledge and explaining IHL' and to the internalisation of IHL 'within specific systems of knowledge, values and norms of a particular group'.[174] Prevention builds on but goes further than the findings of the first Roots of Behaviour in War study. A follow-up study due for publication in 2018 critiques the emphasis on IHL's binding nature in the Roots of Behaviour in War study; and further critiques integration's emphasis on making IHL continually relevant to the command

ibid., 904
Krulak (n 104)
ICRC Prevention Policy (2010) 5
ibid., 9
Mariya Nikolova, 'Interview with Emanuele Castano' (2014) 96 International Review of the Red Cross 697, 704

chain, because of its premise that all armed groups will have the necessary hierarchical structure to make this possible.[175]

The Prevention policy is not yet the subject of scholarly work. Bussmann and Schneider's recent work purports to evaluate the ICRC's dissemination and advocacy efforts as a tool for IHL compliance; finding no evidence that the ICRC's dissemination efforts prevent violations.[176] However, their study does not take account of the latest version of Integration, nor of the ICRC's Prevention policy, so the materials cited are out of date. Bussmann and Schneider assert that IHL violations in Darfur and Bosnia show that IHL violations preceded 'naming and shaming' by the ICRC, and they cite this as evidence for the ineffectiveness of the ICRC's advocacy. Their conclusion is unpersuasive, as the ICRC makes public statements about IHL violations only in exceptional situations where serious violations have already occurred.

In contrast, Brassil creates goals for a dissemination and capacity-building programme based on the ICRC Prevention policy, and argues that dissemination can influence 'attitudes, knowledge and behaviours' if 'its objectives have been specifically defined.'[177] Brassil recommends a three-stage process to apply the Prevention policy more effectively: (i) to identify flaws or 'gaps' in the national implementation of IHL, e.g. absence of relevant domestic legislation; (ii) an assessment of whether these flaws are caused by 'a deficiency in …. knowledge, attitudes and behaviour'; and (iii) 'capacity building activities' specifically to change behaviour in relation to prevention and compliance.[178] This three-step process can guide state officials, but it is premised on dissemination's ability to change attitudes and behaviour; and on states' ability to identity the precise causal influence of gaps in knowledge or training. This does not fully take account of the Roots of Behaviour in War Study's own research, which Brassil cites, that:

> …behaviour is more effectively changed by modifying the environmental conditions that influence it than by directly trying to alter people's opinions, attitudes or outlooks.[179]

Brian McQuinn, Fiona Terry and Benjamin Eckstein, 'The Roots of Restraint in War' (ICRC 2017)

Margit Bussmann and Gerald Schneider, 'A Porous Humanitarian Shield: The Laws of War, the Red Cross, and the Killing of Civilians' (2016) 11 The Review of International Organizations 337

Denielle Brassil, 'Increasing Compliance with International Humanitarian Law through Dissemination' (2015) 39 University of Western Australia Law Review 83, 108

ibid., 95-96

Frésard (n 113) 8, cited by Brassil (n 177) 92

Sivakumaran points to the value of IHL instruction within armed groups, and the potential for compliance by one armed group constructively to influence the practice of others.[180] For Sivakumaran, the dissemination and training obligations in the Four Geneva Conventions extend to Common Article 3, and states which have ratified Additional Protocol II are obliged to disseminate its content during peacetime, with both states and armed groups obliged to do so once there is a NIAC.[181] Instruction, distinct from dissemination, must be supplemented by 'non-classroom' forms of training to be effective.[182] However, Sivakumaran sees dissemination as only part of the toolkit for compliance in NIAC. As the IHL of NIAC is underregulated, and its norms of prevention or, more traditionally, 'implementation and enforcement', are no exception.[183] So dissemination and military instruction enmeshes with legal advice, unilateral commitments by armed groups, the drafting of codes of conduct, and sanctions for violations; with extra-legal enforcement through non-governmental organisations, the UN, and even public opinion.[184]

Elsewhere, Sivakumaran has written on the variable detail in unilateral declarations, in which armed groups expressly commit themselves to respect provisions of IHL and/or IHRL.[185] For example, the Polisario Front of Western Sahara made a unilateral declaration to be bound by the Four Geneva Conventions and Additional Protocol I in its conflict with Morocco.[186] Usually, armed groups are bound only by the law of NIAC (Common Article 3 and Additional Protocol II where ratified), unless Article 1(4) of Additional Protocol I applies, and an armed group has made such a unilateral declaration. Other commitments might be reached through *ad hoc* bilateral agreements, perhaps as part of a ceasefire.[187] Yet, necessary engagement with armed groups is politically and

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Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 432, 436

ibid., 431-432

ibid., 434-5

ibid., 430

ibid.

Sandesh Sivakumaran, 'Implementing Humanitarian Norms through Non-State Armed Groups' in Heike Krieger (ed) *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (Cambridge University Press 2015) 126-127

AP I, art 96(3); Geneva Call, 'Geneva Conventions and Armed Movements: An Unprecedented Move' August 2015 <http://www.genevacall.org/geneva-conventions-armed-movements-unprecedented-move/>

Sivakumaran (n 185) 128-129

legally fraught. In the US, the Supreme Court considered IHL dissemination and outreach to be material support for terrorism,[188] not a potentially constructive contribution to IHL compliance. Building on compliance theory research on why armed groups might violate or choose to engage with IHL, Sivakumaran argues that these commitments and dissemination are less useful than sanctions (which can stop diaspora funding, for example) for groups whose reason for existence is the deliberate targeting of civilians, whereas those seeking legitimacy, statehood or a favourable peace deal might be persuaded to engage with IHL dissemination efforts or a Deed of Commitment,[189] whether its content relates to part of IHL or a selective range of binding law and standards.[190]

Geneva Call

Geneva Call conducts outreach to 61 non-state armed groups on the prohibition of anti-personnel mines, respect for humanitarian norms, child protection, gender in armed conflict, and since 2017, displacement.[191] Armed groups are invited to sign any of three Deeds of Commitment, prohibiting anti-personnel landmines, protecting children from the effects of armed conflict, and prohibiting sexual violence and eliminating gender-based discrimination in armed conflict.[192] The Deed of Commitment on anti-personnel landmines has its own dissemination obligation. When a Deed of Commitment is signed, Geneva Call and the armed group agree on steps for its implementation, including 'policy revision, dissemination, monitoring, sanctions and protective measures.'[193] Unlike the ICRC's outreach, confidential as a matter of operational policy,[194] and therefore outside academic or intergovernmental scrutiny, Geneva Call does monitor armed groups' compliance with its Deeds of Commitment,[195] and issues publicly available reports.

Holder v. Humanitarian Law Project (US Supreme Court) 130 S. Ct. 2705 (2010)

Sandesh Sivakumaran, 'From Suez to Syria: Modern Armed Conflicts and the Evolution of International Humanitarian Law' (panel discussion, Foreign and Commonwealth Office, 6 June 2017)

ibid., 242-243; Sandesh Sivakumaran, 'Lessons for the Law of Armed Conflict from Commitments of Armed Groups: Identification of Legitimate Targets and Prisoners of War' (2011) 93 International Review of the Red Cross 463

Geneva Call, 'Annual Report 2016: Protecting Civilians in Armed Conflict' (Geneva Call 2017)

Ben Saul, 'Enhancing Civilian Protection by Engaging Non-State Armed Groups under International Humanitarian Law' (2017) 22 Journal of Conflict and Security Law 39

Geneva Call, FAQ, <http://www.genevacall.org/who-we-are/faqs/#faq-4>

Steven Ratner, 'Behind the Flag of Dunant: Secrecy and the Compliance Mission of the International Committee of the Red Cross' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press 2013) 297

Pascal Bongard and Jonathan Somer, 'Monitoring Armed Non-State Actor Compliance with Humanitarian Norms: A Look at International Mechanisms and the Geneva Call Deed of Commitment' (2011) 93 International Review of the Red Cross 673

Décrey-Warner argues that no armed group approached by Geneva Call has ever refused a delegation, even when the group is alleged to have violated IHL.[196] It is also suggested that those armed groups which seek legitimacy are willing to engage with monitoring mechanisms, e.g. on children and armed conflict.[197]

Geneva Call has had success in disseminating a range of international norms within and beyond the limited IHL of NIAC. However, there are shortcomings in the Deeds of Commitment. The IHL principle of distinction, listed as Rule 1, in the ICRC Customary IHL Study, applicable in both IAC and NIAC, does not yet appear explicitly in the Deeds of Commitment, although institutional debate on this is ongoing.[198] Geneva Call's training module distils IHL and IHRL principles into only fifteen 'rules of behaviour' for armed group fighters'.[199] Does pragmatism or the logistics of training require such normative selectivity? Saul lists selective engagement by some armed groups as a further flaw in the process: some groups will not engage with Geneva Call at all, while others will omit 'strategically sensitive issues', such as improvised explosive devices or hostage-taking, from discussions with the group.[200] This is an important limitation on the value of this *ad hoc*, optional norm promotion. There are structural issues too: the fragmentation of armed groups means that Deeds of Commitment may not be transmitted to all fighters, and norm internalisation reduced.

What is the status of this practice by armed groups? Deeds of Commitment are not treaty texts, and an armed group's unilateral declaration to be bound by treaty norms does not have the status of a ratification. The practice of armed groups cannot be evidence of customary international law,[201] despite the proliferation of non-international armed conflicts and the factual relevance of such practice in the analysis of IHL compliance. The ICRC acknowledged that armed groups' practice had an 'unclear' legal status, and

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[196] Elisabeth Décrey-Warner, 'From Suez to Syria: Modern Armed Conflicts and the Evolution of International Humanitarian Law' (panel discussion, Foreign and Commonwealth Office, 6 June 2017)

UN Security Council Resolution 1612, Monitoring Mechanism on Children and Armed Conflict, cited by Virginia Gamba, 'From Suez to Syria' (FCO, 6 June 2017)

Décrey-Warner (n 196)

Geneva Call (n 191) 16

Saul (n 192)

ILC, Identification of Customary International Law, Commentary to Draft Conclusion 4, para. 9, Report of the International Law Commission, Sixty-Eighth Session (2 May-10 June and 4 July-12 August 2016), A/71/10, but cf. *Prosecutor v. Tadić,* IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras 102, 103, 107; cited in Sandesh Sivakumaran, Who Makes International Law? The Case of the Law of Armed Conflict' (2017) Current Legal Problems (forthcoming)

therefore classified it as 'other practice' in the Customary IHL Study.[202] Roberts and Sivakumaran argue that to give nonstate armed groups equivalent law-making powers to those of states would risk undermining humanitarian protection (through practice that undermines IHL) and would be politically unacceptable to many states, but 'unilateral declarations, hybrid treaties, and possibly hybrid custom' would allow for armed groups to acknowledge existing customary IHL norms and to accept new obligations.[203]

3.5 Standards to Build Understanding and Willingness to Comply

A synthesis of historic and modern, legal and interdisciplinary literature on IHL training yields standards to guide state practice. The standards below are based on individual and group factors, understanding and willingness to comply; and they attempt to bridge the gap between disseminated norm and subsequent behaviour that is at the centre of the conundrum between IHL training, prevention and compliance. The distinction between individual and group factors below is somewhat fluid, recognising Adler and Pouilot's distinction between agential and structural factors, mediated by communities of practice.[204] Given states' willingness to make pledges at the 32nd RCRC Meeting on IHL dissemination and training, there is scope for engagement between states, the ICRC and academic research on a collaborative rubric that might enable states to share their practice, subtly eroding the longstanding resistance to monitoring in IHL.[205]

Understanding

1. *Acknowledge literacy concerns before designing IHL training*

The individual soldier and armed group fighter matters to the design and delivery of IHL training.[206] His or her capacity to read and understand complex terminology is relevant to how the training is delivered.[207] Individual soldiers and armed group fighters might lack

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ICRC Customary IHL Study, p. xxxvi

Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37 Yale Journal of International Law 107, 151-

Adler and Pouilot (n 92)

1.1, 8.2

Hays Parks (n 54), Sassòli (n 56)

Defence Committee, *The Armed Forces Covenant in Action? Part 4: Education of Service Personnel* (HC 2013-2014) 17

the literacy or confidence in classroom settings to understand IHL's complex terminology when it is rendered in standard lecture format or in word-dense PowerPoint slides.

Consider education theory when balancing simple communication with IHL's complexity

Although the simplification of IHL to its core principles is highly problematic (Rowe argues that soldiers in charge of detainees must be given 'specific and detailed orders' and instruction),[208] IHL training which is over-inclusive can hinder understanding, knowledge and recall. Kuper's work reminds us that individuals can recall only 5-7 key items.[209] Brassil acknowledges that the IHL dissemination and training obligation does not only require that the text of the Conventions is shared widely, but also that its component 'principles' are 'translated' into education and training.[210] This persuasive reading suggests that IHL's complexity can be distilled through clear training materials without losing the normativity of the whole treaty text.

Use diverse learning strategies and reiterate IHL's relevance throughout training and military communication

To help an individual soldier internalise IHL norms, there should be explanation, clarity, repetition of core prohibitions,[211] and above all a blend of practical, discursive and classroom-based techniques. Reliance on only classroom teaching should be avoided, as this encourages passive learning and is distanced from the realities of deployment. As the ICRC's 'integration' insists, IHL is relevant throughout the training cycle, and to decision-making in the chain of command, but not merely in targeting decisions, as the second iteration of the 'integration' might imply. A diversity of dissemination tools can also assist norm internalisation within armed groups, but these would need to take account of the resources available and of how geographically diffuse the armed group is.

Peter Rowe, *Legal Accountability and Britain's Wars: 2000 - 2015* (Routledge 2016) Kindle ed., loc. 6898

Kuper (n 57) 101
Brassil (n 177) 86
de Mulinen (n 44)

Include practical examples to emphasise IHL's continual relevance to armed conflicts and belligerent occupation

Where IHL terminology is rushed in classroom-style instruction, this is dissemination of terms of art without translating them to deployment.[212] Unless this translation is carefully managed through explanation and repetition, it could increase soldiers' distance from the IHL being trained; training designed from a lawyer's perspective and not that of the soldier and officer being trained.

Review training materials to ensure their relevance to individual soldiers' ranks and responsibilities, and to complex, asymmetric conflicts

IHL training should be 'commensurate with [individuals'] duties and responsibilities'.[213] This involves intermittent review of training materials to ensure they cover the circumstances in which soldiers will be deployed; and in particular complex or asymmetric deployments, where the applicable legal framework can change rapidly from a conduct of hostilities paradigm to one based on IHRL law enforcement standards;[214] or where the classification of conflict is uncertain.

Ensure commanders' and superiors' understanding, knowledge and recall of IHL

The individual officer's understanding also matters. Without this, there is a 'fog of knowledge' communicated down the chain of command, which increases the risk of unlawful conduct by subordinates.[215] This risk is particularly acute where IHL norms are contested or indeterminate, such as the principle of proportionality; and where military culture encourages a discourse about law and about enemy forces that implies IHL is an unwanted restraint on behaviour, or that enemy forces will not honour IHL constraints. Failures to attend to officers' understanding of IHL also has an impact on command responsibility to 'repress… suppress … [and] prevent' violations of IHL, and puts at risk commanders' obligations to ensure IHL knowledge among their subordinates, especially if officers deliver IHL training.[216] A train-the-trainers model of IHL instruction has value

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Andrew J. Carswell, 'Converting Treaties into Tactics on Military Operations' (2014) 96 *International Review of the Red Cross* 919

Amended Protocol II to the CCW 1996, Article 14(3), cited by Hays Parks (n 54)

Krulak (n 104)

Rowe (n 205) loc.6864

AP I, arts 86, 87(2)

in social learning theory, as soldiers will be trained by one of their own, directly perceiving IHL's relevance to their unit or community of practice. This model has disadvantages, however, if officers have gaps in their knowledge or if they cannot answer soldiers' questions about IHL.

7. *Evaluate IHL training, tracking individuals' understanding norm-by-norm*

It is important to monitor and track each soldier or fighter's understanding, norm-by-norm. This can be done through individual discussion on deployment, spot checks in armed groups; and by thoughtfully-designed spreadsheets in armed forces. No need for millions to be spent on a new computer system: the systems should just be designed with IHL understanding in mind. Military and political officials can decide to track understanding of particular IHL norms following reforms to training, to evaluate the quality of these reforms. Norm-by-norm evaluation is particularly important where there have been recurrent violations by a particular state, or problems with IHL compliance in a particular regiment or group; or where some norms have been neglected in IHL training, with institutional memory limited. This is particularly true in the UK context, as the case study in chapters 6 and 7 reveals recurrent violations in the prohibitions shared between IHL and IHRL, and a tendency still to conceptualise the prohibition of torture (prohibited in both branches of law) as a matter of 'human rights' and not the law of armed conflict.[217] These evaluation tools can also be adopted by armed groups, for outreach and discussion with the ICRC and Geneva Call.

Willingness to Comply

Careful design and delivery of IHL training, and its repetition may instil understanding, knowledge and recall; but does not fully capture willingness to comply. Standards to improve willingness to comply are those that address the risks of violations from military culture, discourse about law and enemy forces, moral disengagement and revenge or misunderstood reciprocity. Particularly where soldiers or armed group fighters in their late teens and early twenties are making decisions in relation to their peer group,[218] it is a

6.3, 7.5
Johnson (n 105)

misnomer to consider an individual's willingness to comply as distinct from the military culture or community of practice of the unit in which they are trained.

Recognise that brutality within military training risks confusion about permissible action on deployment and consequent violations of IHL

Brutal training dehumanises recruits and implies that brutality to those in their power fighters who are *hors de combat* (through wounds or detention, for example) is authorised as part of the military norm. This risks a cognitive and empathic 'distancing', which affects willingness to comply with IHL, and confusion as to the binding status of IHL prohibitions based on the principles of humanity and restraint where military training is punitive or brutal. The Baha Mousa Public Inquiry found that personnel who had experienced brutality in conduct-after-capture training were mostly unaware that the treatment to which they were subjected is prohibited in IHL.[219] An officer who trained the soldiers involved in the My Lai massacre believed that the purpose of military training was 'the spirit of the bayonet': to break down an individual human being's willingness to kill.[220] He had scant knowledge of IHL.

Both IHL training and military culture should foster the ability to challenge unlawful orders

Individual soldiers must know enough IHL (in breadth and depth) to be able to recognise an unlawful order; but military culture must enable them to seek clarification and if necessary to disobey the order; and to intervene and report upon violations witnessed. This requires a commitment to IHL by the chain of command: (i) to recognise that IHL compliance requires occasional independence of action instead of the reflex obedience favoured by general military training; (ii) to facilitate IHL training, to recognise the parameters IHL imposes on mission command, and to be vigilant against discourse or organisational culture which casts law as the enemy.

10. Both IHL training and military culture must facilitate the reporting of violations

6.4.2

Yorkshire Television, *Four Hours in My Lai*, transcribed interview with an ex-Sergeant 2nd Platoon, 1988 (LHArch)

Where soldiers and officers who witness ongoing violations either do not understand them to be unlawful or believe that reporting them would be taboo, breaches of IHL will go unreported. The same result occurs where 'authorization', 'routinization' and 'dehumanization' are present;[221] where 'responsibility is diffused';[222] and where units are isolated from the broader military structure.[223] IHL training can respond by emphasising the duty on all soldiers to intervene to stop, or to report violations they witness. This would be in addition to command responsibility to 'repress' and 'suppress' violations by subordinates.[224]

Remedy discourse that dehumanises the enemy or attempts to justify IHL violations

The chain of command should address and correct any discourse that dehumanises the enemy or which attempts to justify IHL violations, recognising that these attitudes risk IHL violations and exist independently of soldiers' and armed group fighters' knowledge of IHL. Discourse that maligns enemy civilians or implies that their IHL protections are not deserved is a related and more complex problem, linked to specious arguments from recent just war theory. These theorists attempt to erode the principle of distinction by weighing force protection more strongly than the principle of humanity;[225] challenge civilians' immunity from attack if they have voted for a government pursuing an unlawful war,[226] or argue that soldiers fighting an unlawful war are not morally equivalent to soldiers fighting for a just cause.[227] Where these ideas are present, for example in military ethics training, soldiers might misunderstand IHL and be less willing to comply.

A related concern is how to remedy discourse that implies violations would be justified because enemy forces have themselves violated IHL, or as revenge for enemy IHL violations. This is a misunderstanding of reprisals in IHL and causes particular concern where it occurs alongside moral disengagement and a military culture that does not report violations. Rowe gives an example of this false reciprocity: soldiers involved in handling

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Kelman and Hamilton (n 138)

Stanley Cohen, *States of Denial: Knowing About Atrocities and Suffering* (Polity Press 2001) 16

Castano et al (n 102)

AP I, art 86

Kasher and Yadlin (n 123); Blum (n 122); cf. Eitan Diamond, 'Before the Abyss: Reshaping International Humanitarian Law to Suit the Ends of Power' (2010) 43 Israel Law Review 414

David Rodin, 'Morality and Law in War' in Hew Strachan and Sibylle Sheipers (eds) *The Changing Character of War* (Oxford University Press 2011) 446

Jeff McMahan, *Killing in War* (Clarendon Press 2009)

detainees may believe that if a detainee did not or would not have treated British Army detainees humanely, he should not be treated humanely.[228]

Rectify discourse that implies that investigations and prosecutions for IHL violations threaten operational effectiveness

Part III of the thesis reveals a 'legal siege' rhetoric which implies that investigations, prosecutions and civil suits for alleged violations of IHL by the British armed forces are a threat to operational effectiveness or troops' morale.[229] This rhetoric has some commonalities with the idea that IHL is a peripheral irritation to the business of waging war,[230] and like that related rhetoric, 'legal siege' risks undermining soldiers' and officers' willingness to comply. It also casts accountability as optional. Instead, political and military leaders should endorse investigations and disciplinary sanctions unequivocally where evidence suggests that IHL has been violated. Remedying this discourse helps to embed IHL in military culture, and to shield IHL instruction from politicisation and anti-law rhetoric. Where military leaders address and amend an anti-IHL rhetoric, they assist the social learning theory needed for IHL compliance. Bandura argues that 'moral actions are the products of the reciprocal interplay of personal and social influences' and that 'social systems' need 'safeguards' marked by compassion instead of cruelty.[231] In the IHL context, these 'safeguards' should include the legitimacy of investigations, prosecutions and civil suits where IHL is alleged to have been breached.

There is one predicted critique. Do standards based on willingness to comply expect IHL training to do too much? Moral disengagement can be tracked in another way, through personnel screening and careful monitoring of the effects of combat trauma on behaviour while a deployment is ongoing.[232] This is the role of recruiters and commanders and not of an IHL trainer. If soldiers grieving for killed colleagues or eager for revenge begin to express an intent to harm detainees or wounded enemy fighters, then the remedy for this is not more training but command responsibility to intervene in an attempt to prevent these predicted violations.

Rowe (n 205) loc. 6881

7.5

Verri (n 39)

Albert Bandura, 'Selective Moral Disengagement in the Exercise of Moral Agency' (2002) 31 *Journal of Moral Education* 101

Frésard (n 113)

3.6 Conclusion to Part I

Assumptions that mere dissemination of IHL prevents future violations rest on the premise that action or restraint on and after the battlefield is *caused by* awareness of IHL norms; and that ignorance of those norms (or the absence of IHL dissemination) *causes* IHL violations. These facile causal assumptions (present in the literature at least until the late 1980s) conflate necessary and sufficient causes. IHL dissemination (resulting in broad or superficial awareness of norms) is but one step which might prevent violations and ensure compliance. Military instruction in IHL is juridically necessary (required by treaties and custom), empirically necessary (barring a coincidental or morally-motivated convergence between soldiers' conduct and the content of IHL where soldiers have no knowledge of IHL) but empirically insufficient to prevent violations and ensure compliance.

Juridical necessity is demonstrated by the genealogy of the IHL training obligation, which shows a simply-phrased, discretionary norm, influenced by assumptions that dissemination and training would contribute to the prevention of violations. Empirical necessity can be *tentatively* demonstrated from cases where deficits in IHL training are implicated as one among several causes for violations, including the My Lai and Abu Ghraib inquiries in the US, the Commission of Inquiry into Canadian troops' actions in Somalia, and the Baha Mousa Public Inquiry in the UK. However, public inquiries are not designed to assess necessary and sufficient causal mechanisms, but to make findings of fact to satisfy particular terms of reference. There is no burden of proof for finding IHL training to be adequate or inadequate, and identifying flaws in training elides more complex, politically controversial questions of individual behaviour and social psychology. In contrast, each of these cases showed evidence that military culture, moral disengagement and unlawful orders are powerful causal factors for IHL violations, potentially more significant than ignorance of IHL. This finding is bolstered by interdisciplinary research that shows the antagonism between military culture and IHL compliance, and the role of discourse about law and enemy forces (or enemy civilians) in atrocity crimes. IHL training is empirically insufficient because of the gap between training and behaviour, understanding and willingness to comply. Social psychological research suggests that former combatants' knowledge of IHL does not necessarily

correlate with a moral adherence to IHL norms:[233] the moral disengagement which precedes atrocity could occur even in former fighters who had good knowledge of the law.

In addition to the explanatory gap between communicated norms and subsequent behaviour, the conundrum between IHL training, prevention and compliance is also characterised by a distinction between understanding and willingness to comply. It is an unproven assumption that mere 'study' or 'instruction' in IHL is capable of instilling understanding, knowledge and recall on the one hand, and individual soldiers' and units' willingness to comply with IHL and to prevent or respond to violations (by reporting them or urging comrades to desist) on the other. To assume that it can and does is to entrust IHL dissemination and classroom-based training with too much preventive power. It also risks cursory responses to violations, where improving IHL training is assumed to solve problems of prevention and compliance in the next conflict and the one after that. The conundrum is also how to build restraint in trained killers, and partly how to implement contested norms in complex deployments. Where IHL norms are poised between military necessity and humanity; they can be stretched or contracted by various actors. Genuine complexity in asymmetric warfare is a further complication: individual soldiers are expected to know if law enforcement or armed conflict rules apply, and to apply either branch of law in rapidly-changing deployments.[234] Trainers need to translate complex or contested IHL norms into relatively simple and clear military instruction, without losing the detail needed for compliance in practice.

3.2's chronology of the literature on IHL training shows that historic insights were lost on the psychology of armed conflict, and the importance of practical training in IHL, only to recur in much later works. Gradually, the literature began to articulate a range of educational and behavioural parameters for military IHL training, but it hinted (without more) that interdisciplinary insights were required. 3.3 offers a disaggregated account of constructivist norm internalisation, broadened to include both understanding and willingness to comply; and explores the role of communities of practice in IHL training. It cites recent work on the value and risk of military culture for norm internalisation in

1.2, 3.2; Muñoz-Rojas and Frésard (n 109)

Dieter Fleck, 'The Role of Individuals in International Humanitarian Law and Challenges for States in Its Development' (1998) 71 International Legal Studies (Blue Book) 119; Charles Krulak, 'The Strategic Corporal: Leadership in the Three Block War' [1999] Marines Magazine; Andrew J. Carswell, 'Classifying the Conflict: A Soldier's Dilemma' (2009) 91 International Review of the Red Cross 143

IHL and explores the causal role of moral disengagement and discourse about law and enemy forces in IHL violations. 3.4 argues in favour of the ICRC's work on integration of IHL and its wide-ranging prevention toolkit, while summarising the work of Geneva Call in IHL dissemination and outreach to armed groups. 3.5 yields standards that begin to close the causal gap between IHL training, compliance and the prevention of violations. In their focus on both understanding of and willingness to comply with IHL, these standards have relevance beyond the mere dissemination of IHL in classroom settings. They require reflection on the military culture in which IHL training takes place, and on the subtle interplay of individual and group factors present in military communities of practice. As such, the standards represent a broad reading of the IHL training obligation, grounded in the literature. Yet each of the behavioural standards detailed in this chapter relates to binding IHL, including the obligation to 'respect and ensure respect' for IHL 'in all circumstances',[235] command responsibility to 'repress … suppress … [and] prevent' IHL violations,[236] the provision of qualified persons and legal advisers to the armed forces,[237] and the duty to clarify, and if necessary to disobey, manifestly unlawful orders.[238] The next chapter studies these norms of prevention.

GC I-GC IV, art 1; AP I, art 1
AP I, art 86, 87
AP I, arts 6, 82
ICRC, Customary IHL Study, rule 154

Part II. Building Theories of Prevention and Compliance in International Humanitarian Law

Chapter 4. Laconic Norms of Prevention in International Humanitarian Law

4.1 Introduction

Unlike international environmental law and IHRL,[1] prevention is not a term of art in IHL, with the exception of the ICRC's interdisciplinary use of the term.[2] Instead, IHL scholars and practitioners focus on the 'implementation' and 'enforcement' of IHL;[3] addressing the ongoing present tense and violations in the past, without a sophisticated understanding of what is required to prevent future violations. The prevention of violations (especially those that impinge on the principle of humanity and non-combatant immunity) is implicit in IHL's substantive norms, including the obligation to 'take all feasible precautions in the choice of means and methods of attack' to avoid and minimise incidental civilian harm.[4] Yet there is no developed theory of prevention in IHL. The simple, laconic phrasing of IHL's norms of prevention, and the failure to delineate IHL's architecture of preventive norms are problematic for state practice. If each norm of prevention is pithily expressed, and subsequently viewed as a discrete obligation, the preventive potential of IHL's norms is reduced.

4.2 below sets out a three-part typology of IHL's norms of prevention, norms of monitoring, and norms of enforcement. Each of these sets of norms is treaty-based, so despite their procedural nature, they are equally binding on states parties as IHL's substantive norms. 4.3 then reads the IHL training obligation together with four other norms of prevention, explaining why they interrelate. 4.4 argues that this synthesis of

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[1] Jonathan Vessey, 'The Principle of Prevention in International Law' (1998) 3 Austrian Review of International and European Law Review 181; Edith Brown Weiss, *International Environmental Law and Policy* (Aspen Publishers 2006) 257; Ursula Kriebaum, 'Prevention of Human Rights Violations' (1997) 2 Austrian Review of International and European Law 155; Committee against Torture (CAT), General Comment No. 2: Implementation of Article 2 by States Parties, CAT/C/GC/2, 24 January 2008, para 3

3.4

1.3

AP I, art 57(2)(a) (ii)

preventive norms encourages states to view them as interlocking duties, instead of discrete, simply-phrased obligations. This helps to solve the conundrum by encouraging more than a superficial approach to military IHL training; but a full account of prevention in IHL requires more detailed engagement with norms of prevention in Hague law and in NIAC.

4.2 Norms of Prevention, Monitoring and Enforcement

IHL's implementation mechanisms are 'even less satisfactory and efficient' than those in other branches of law; in fact, their 'decentralized structure' is 'inherently insufficient and … even counter-productive.'[5] Sassòli, Bouvier and Quintin locate these inadequacies in the 'astonishing' proposition that the peaceful settlement of inter-state disputes (the foundation of the implementation of much of international law) can occur in armed conflicts.[6] Yet, there are cumulative weaknesses in IHL's procedural norms: they are for the most part simply expressed, delegated to state discretion without transparent oversight or monitoring of state practice, and there is no consensus on how they interrelate. Laconic phrasing does not doom the implementation of any international law obligation in the abstract, as subsequent practice, case law and scholarship can set the contours of a norm. It is in IHL's specific context of state discretion with minimal monitoring that simply-phrased procedural norms become problematic.

The terms 'secondary norms'[7] or 'secondary rules' are not used here, because this broad category includes rules which regulate the primary rules within a legal system,[8] e.g. their validity, how they can change and be adjudicated;[9] or how they can be 'enact[ed], modif[ied]… terminate[d]…interpret[ed and] appl[ied].'[10] IHL's procedural norms are much narrower. Secondary rules' relationship with the notion of a 'self-contained regime' also adds confusion which is not useful for the analysis in this chapter. Briefly, IHL's

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Marco Sassòli, Antoine Bouvier and Anne Quintin, *How Does Law Protect in War?* (3rd edition, ICRC 2011) Part I, Chapter 13, 2

ibid.

Hans Kelsen, *General Theory of Norms* (Oxford University Press 1990) 142; Anastasios Gourgourinis, 'General/Particular International Law and Primary/Secondary Rules: Unitary Terminology of a Fragmented System' (2011) 22 European Journal of International Law 993

Axel Marschik, 'Too Much Order? The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System' (1998) 9 European Journal of International Law 212

H.L.A. Hart, *The Concept of Law* (3rd edition, Oxford University Press 2012) 79, 98

Martii Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission' (ILC 2006) A/CN.4/L.682, para 27

procedural norms do not constitute a complete regime for handling breaches, so these 'secondary norms' do not make IHL a self-contained regime in the same sense as Article 55 of the ILC Articles on State Responsibility;[11] nor does IHL cover a specific '(territorial, functional) problem-area',[12] as it regulates multiple factual configurations of IAC and NIAC; but IHL's substantive norms can be *lex specialis* (and therefore the third sense of a self-contained regime)[13] in the jurisprudence of the International Court of Justice,[14] so that IHL's principles can either oust, or shape the interpretation of co-applicable IHRL (see 5.3 below).

IHL's procedural norms are usually classified as 'implementation' and 'enforcement'.[15] While implementation and enforcement are valid descriptors and an established terminology in IHL, they do not capture the range of purposes in these procedural norms. This section argues that IHL's procedural norms can be subdivided into norms of prevention, monitoring and enforcement. It begins a scholarly discussion about prevention as a term of art in IHL. It also permits a focus on IHL's neglected monitoring mechanisms.[16] This chapter aims to sketch a framework of IHL's procedural norms, to see how discrete obligations interrelate, and to problematise their weaknesses. All three categories of norms are 'primarily aimed at building legality',[17] but the framework distinguishes norms of prevention from norms of monitoring, and from norms of enforcement, to facilitate states' and scholars' focus on each set of norms.

The obligation to disseminate international humanitarian law and to integrate it into programmes of military instruction and training is one of IHL's laconic norms of prevention. Norms of prevention operate in the present and future tense, aiming to prevent violations of IHL and to suppress those in progress. Other norms of prevention include the obligation to 'respect and ensure respect' for IHL 'in all circumstances';[18] the requirement to 'train qualified persons' in the application of the Four Geneva Conventions and AP I, and to provide legal advisers to the chain of command, *inter alia*

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ibid., para 135 ; Sassòli, Bouvier and Quintin (n 5) 4, n 335
Koskenniemi (n 10) para 135
ibid., para 136
Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion 8 July 1996) [1996] ICJ Rep 226; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion July 2004) [2004] ICJ Rep 136; 5.3
1.3
1.1
Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010) 119
GC I-GC IV, art 1; AP I, art 1

to advise on 'appropriate instruction' in IHL to the armed forces;[19] command responsibility to 'repress … suppress … [and] prevent' IHL violations,[20] and to ensure subordinates' knowledge of IHL;[21] and the duty to clarify, and if necessary to disobey manifestly unlawful orders.[22]

The first of these is an open-textured *erga omnes* norm,[23] with intra- and inter-state dimensions. The second is obviously related to the IHL training obligation, while legal advice to the chain of command is a slim approach to 'integrating' IHL within military decision-making, as the ICRC suggests in the second iteration of its work on integration.[24] Article 6 AP I's simple phrasing means there is no definition of 'qualified persons', and Article 82 merely requires that the legal advisers are available to commanders, not that their advice be heeded. The third, command responsibility, is a detailed norm, with another clear link to military instruction in IHL, with patches of under-specificity. Article 86 is a mirror image of Article 87, with the former addressing the requirement on High Contracting Parties and other Parties to the conflict to 'repress grave breaches, and take measures necessary to suppress all other breaches' which would result if they were to fail to act,[25] and introducing the concept of command or superior responsibility for such failure to act.[26] The latter addresses the positive obligation on military commanders to 'prevent and, where necessary, to suppress and report to competent authorities breaches [not limited to grave breaches]' of the Geneva Conventions and AP I;[27] to ensure that 'members of the armed forces under their command are aware of their [IHL] obligations';[28] and, if a commander is aware that his subordinates will commit or have committed a violation, 'to initiate such steps as are necessary to prevent' them, 'and, where appropriate, to initiate disciplinary or penal action against violators.'[29] Art 87(1) and (3) set up a continuum between prevention and accountability: both the reporting of breaches, and 'disciplinary or penal action'. For states parties to AP I, therefore, an

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AP I, arts 6, 82
AP I, art 86, 87
AP I, art 87(2)
ICRC, Customary IHL Study, rule 154
Paolo Benvenuti and Giulio Bartolini, 'Is There a Need for New International Humanitarian Law Implementation Mechanisms' in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2013) 591
3.4
AP I, art 86(1)
AP I, art 86(2)
AP I, art 87(1)
AP I, art 87(2)
AP I, art 87(3)

emphasis on IHL training as a preventive norm is insufficient if obligations are not honoured to 'suppress and report', to prosecute or impose penalties for breaches.[30] It is necessary to allow for differing circumstances, and therefore not to specify the 'steps … necessary to prevent' violations, so the under-specificity is justified in Art 87(3). Finally, the fourth of these preventive norms, derives from international criminal law and customary IHL. The customary IHL rule is not so much laconically-expressed as sketched and constructed from cases that gradually eroded a defence of acting under superior orders, so that soldiers should be expected to identify and then disobey 'manifestly unlawful orders'.[31] Military instruction in IHL is a precondition for identifying unlawful orders, whether they are manifestly unlawful or less obviously so.

The variable detail in these norms prompts a question: are discretionary norms still legal norms? Vöneky sees 'flexibility' and 'decentralized implementation' as a 'structural' weakness in international law as a whole, as the norms to support the implementation of *erga omnes* and *jus cogens* are weak.[32] Lauterpacht offers a more forceful account, applicable to IHL's norms of prevention: 'an obligation whose scope is left to the free appreciation of the obligee', he argues, 'so that his will constitutes a legally recognised condition for the existence of a duty, does not constitute a legal bond.'[33] For Lauterpacht, influenced by Kelsen, a *legal* norm must not be discretionary.[34] In addition, Lauterpacht believed that states should not decide for themselves that they have implemented an obligation, while denying courts the opportunity to judge this impartially.[35] IHL is different, however, from a case before the ICJ. Its monitoring mechanisms are inadequate and discretionary preventive norms problematic in this context, but IHL's procedural norms remain binding on states parties as a result of their promulgation in treaties and subsequent ratification by states. They are no less binding than the norms in substantive IHL, including those in which prevention is implicit, such as the obligation to 'take all

7.2, 7.3, 7.5

ICRC Customary IHL Study, rule 154

Silja Vöneky, 'Implementation and Enforcement of International Humanitarian Law' in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (3rd edition, Oxford University Press 2013) 648

Hersch Lauterpacht, *The Function of Law in the International Community* (1933; reprint, Oxford University Press 2011) 197

ibid.,195

Separate Opinion of Judge Sir Hersch Lauterpacht, *France v. Norway (Case Concerning Certain Norwegian Loans)* ICJ Judgment of 6 July 1957, 48

feasible precautions in the choice of means and methods of attack' to avoid and minimise incidental civilian losses.[36]

Norms of prevention can be distinguished from norms of monitoring and of enforcement. Norms of monitoring include the enquiry procedure, by which an alleged violation of the Four Geneva Conventions may be investigated 'in a manner to be decided between the interested Parties' or an agreed 'umpire'.[37] Enquiries in IAC have as their aim the cessation of violations. The Third and Fourth Geneva Conventions also require the Parties to a conflict to allow ICRC delegates or the delegates of a Protecting Power full access to visit prisoners of war and internees, and to interview them without witnesses. These visits can only be prohibited by 'imperative military necessity'.[38] Additional Protocol I provides two more norms of monitoring, but neither are in active use: the International Humanitarian Fact-Finding Commission (tasked with enquiring into alleged grave breaches or other serious violations and restoring respect for Geneva law)[39] and inter-state communication about IHL implementation.[40] These norms of monitoring operate in the present tense, covering the recent past. However, they only apply to IAC where Additional Protocol I is ratified, and are largely in disuse. Without a regular meeting of states, such as that foreseen by the consultation phase in the Strengthening Compliance Initiative, these norms of monitoring cannot provide an account of state practice in IHL.[41]

Norms of prevention and monitoring are both distinct from retrospective norms of enforcement that set consequences for grave breaches and other serious violations of IHL. These include the obligations to criminalise, and to prosecute or extradite those suspected of being responsible for grave breaches of the Four Geneva Conventions and Additional Protocol I;[42] and not to absolve states of liability for grave breaches.[43] The latter is a neglected norm of enforcement, which entails not only inter-state compensation but also

AP I, art 57(2)(a) (ii)
GC I, art 52, GC II, art 53, GC III, art 132, GC IV, art 149
GC III, art 126, GC IV, art 143
AP I, art 90
AP I, art 84
1.1, 5.3
Hague Convention IV, art 3; GC I, arts 49-50; GC II, arts 50-51; GC III, arts 129-130; GC IV, arts 146-147; AP I, arts 11(4), 85(3); Amended Protocol II to the CCW, art 14; Second Protocol to the HCCP, arts 15, 22
GC I, art 51; GC II, art 52; GC III, art 131; GC IV, art 148

transparent investigation.[44] Norms of enforcement oblige states to provide consequences (intra- and inter-state) for grave breaches and other serious violations in IAC.

4.3 Integrating the Training Obligation with IHL's Other Norms of Prevention

This section reads the IHL training obligation together with four other norms of prevention, recognising the continuum between IHL training, the provision of legal advisers and command responsibility to ensure subordinates' knowledge of Geneva law; and articulating the less obvious connection between IHL training and the duty in Common Article 1 to 'respect and ensure respect' for IHL 'in all circumstances',[45] and command responsibility to prevent and suppress violations by subordinates. The logical thread between IHL training and a duty to disobey unlawful orders is obvious but incomplete: on the one hand, soldiers must understand enough IHL to be able to identify an unlawful order (it is suggested below that the duty is not merely to disobey *manifestly* unlawful orders, but all unlawful orders), but military culture and general training must permit sufficient independence of action to enable a soldier to disobey where necessary. Greater or lesser deference in the national culture may influence how easy this is to implement in the armed forces.

This is not the first attempt at a synthesis of IHL's norms of prevention, but it is a call for consensus, because existing accounts vary in the number of norms selected, arguably because IHL lacks 'prevention' as a term of art, and 'implementation' and 'enforcement' are terms of variable breadth. Writing just after the Additional Protocols were agreed, Draper connects Additional Protocol I's provisions on legal advisers, 'qualified persons' and dissemination and training.[46] The ICRC Commentary relates Article 83 of Additional Protocol I on dissemination and training to the requirement in Article 6 to train 'qualified personnel' to 'facilitate the application' of the Protocol; to Article 82's obligation to provide legal advisers, to offer advice 'where necessary' to military commanders on applying the Protocol and on IHL instruction; and to Article 87 on command

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Elizabeth Stubbins Bates, 'The Neglected Architecture of Justice in International Humanitarian Law' (ILA British Branch Spring Conference 2015)

Four Geneva Conventions 1949, common art 1; Jean Pictet (ed.), *Commentary to the Four Geneva Conventions of 12 August 1949*, vol I, 384; vol II, 257; vol III, 613–614; vol IV, 580

G.I.A.D. Draper, 'The Implementation and Enforcement of the Geneva Conventions of 1949 and of the Two Additional Protocols of 1978 [*sic.*]' (1979) *Recueil Des Cours* 24-25 (citing AP I, art 82, 6, 87(2))

responsibility.[47] The ICRC Customary IHL Study subdivides state practice between the norm as stated in Article 83 of Additional Protocol I, and commanders' responsibility to ensure subordinates' knowledge of IHL in Article 87(2).[48] Kuper also links Arts 83 and 87(2).[49]

Fleck takes a strategic approach, drawing on research by Sivakumaran and others on IHL compliance by armed groups in NIAC, and recognising the absence of these norms of prevention in NIAC. He recommends 'an extended spectrum of activities',[50] inspired by Common Article 1's obligation to 'respect and ensure respect [for IHL] … in all circumstances'. These include outreach by states to armed groups, a combination of pressure and administrative support; the development of incentives for compliance, and a facts-based investigation of what causes violations in NIAC, alongside war crimes prosecutions.[51] Durham and Massingham's approach is broader still.[52] Counter-intuitively classifying prospective norms of prevention as 'accountability mechanisms' (a term which suggests a retrospective approach), they begin to theorise IHL's architecture of prevention. They address dissemination, an obligation on commanders to *seek* legal advice (rather than a requirement on states parties to AP I to provide legal advisers),[53] the requirement to review new means and methods of warfare,[54] and an inferred obligation on urban planners and defence ministries to locate military targets away from populated areas.[55]

The Obligation to 'Respect and Ensure Respect'

The Pictet Commentary to the Four Geneva Conventions sees IHL dissemination and training as logically prior to the obligation to 'respect and ensure respect' for the

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Yves Sandoz, Christopher Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987) 962, para 3373

ICRC, Customary IHL Study, rule 142

Jenny Kuper, *Military Training and Children in Armed Conflict: Law, Policy and Practice* (Martinus Nijhoff 2005) 5

Dieter Fleck, 'The Law of Non-International Armed Conflict' in Fleck (ed.), *The Handbook of International Humanitarian Law* (3rd edition, Oxford University Press 2013) 608

ibid., 607-608

Helen Durham and Eve Massingham, 'Moving from the Mechanics of Accountability to a Culture of Accountability: What More Can Be Done in Addition to Prosecuting War Crimes?' in Jadranka Petrovic (ed.), *Accountability for Violations of International Humanitarian Law: Essays in Honour of Tim McCormack* (Routledge 2015) 267, 270-275

AP I, art 82

AP I, art 36

AP I, art 57

Conventions 'in all circumstances',[56] in Common Article 1 of the Four Geneva Conventions and in Article 1(1) of Additional Protocol I. Yet this logical link between IHL training and Common Article 1 needs to be carefully articulated. Both Pictet and Sandoz recognised the need for states to supervise 'details of the execution' of IHL dissemination and training;[57] prevention and compliance do not occur simply by ordering that training take place. In the updated ICRC Commentary to Common Article 1, Henckaerts makes subtle links between the two norms: explaining that states cannot abrogate their obligations under Common Article 1 when their armed forces participate in a multinational force and that adequate instruction and training are part of that duty.[58] Henckaerts emphasises that a state's duty to ensure respect of Geneva law and the related duty not to encourage, aid or assist violations also applies where it trains the troops of another state.[59] The updated Commentary argues that the duties in Common Article 1 apply to IAC and NIAC alike;[60] consistently with the ICRC Customary IHL Study's position on rule 139, and with practice on the obligation to 'respect' IHL in NIAC collected from the Netherlands, the Philippines, and Uganda.[61] The Federal Court of Canada recently ruled, following expert evidence from Michael Schmitt and others, that Common Article 1 does not apply to NIAC, and did not require Canada to prevent the export of military equipment to Saudi Arabia for use in Yemen. On a closer reading, however, this case might be confined to its facts, as the reasoning relates only to the outward-looking duty to 'ensure respect'; the judgment says nothing about the duty to 'respect' IHL in NIAC.[62]

Case law and scholarship distinguish between the intra-state duty to 'respect' Geneva law, and the inter-state duty to 'ensure respect'. It is the former that relates to a state's own military training in IHL, while the latter can include, as Henckaerts explains, a state's training of another state's troops.[63] Kalshoven believed that a state's obligation under Common Article 1 was to 'respect and ensure respect' for the Conventions and Additional Protocol I by their own armed forces, citizenry and any armed groups the state controls,

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Pictet (ed.) (n 45), vol I, 384; vol II, 257; vol III, 613–614; vol IV, 580
ibid., vol. I 26, Sandoz et al (n 47) para 41
Jean-Marie Henckaerts, 'Article 1: Respect for the Convention', *ICRC Commentary of 2016: First Geneva Convention 1949* (ICRC 2016) para 136
ibid., para 167
ibid., paras 125-126
ICRC Customary IHL Study, rule 139
Daniel Turp v. Minister of Foreign Affairs (Federal Court of Canada) [2017] FC 84 paras 70-73
Henckaerts (n 58), para 167

while there was only a moral obligation to speak out against violations by other states.[64] Palwankar holds a similar view, but recommends a range of measures of diplomatic pressure and non-violent retorsion to 'ensure respect' for IHL, and a data bank of national implementation measures.[65] The ICJ Advisory Opinion on the *Wall* differs, seeing Common Article 1 as an *erga omnes* obligation, binding states not to recognise the unlawful situation created by the Wall, nor to render aid or assistance.[66] Focarelli casts 'respect' as 'individual-compliance' and 'ensure respect' as 'state-compliance', where the latter includes third states' duties 'to do everything in their power' to prevent violations by parties to a conflict. [67] De Chazournes and Condorelli offer a maximalist interpretation, arguing (like Focarelli) that the obligation in Common Article 1 also applies to NIAC regulated by Common Article 3; that 'respect' refers to a state's obligation to 'do everything it can to ensure' that its own agents comply with IHL, while 'ensure respect' means both parties to a conflict and third states 'must take all possible steps to ensure that the rules are respected by all'.[68] Dörmann and Serralvo sketch a duty on all third parties (states, international organisations and non-state entities) not merely to discourage 'but also to take measures to put an end to on-going violations and to actively prevent their occurrence' as part of a 'due diligence' interpretation of the obligation to '…ensure respect' for the Four Geneva Conventions 'in all circumstances', both IAC and NIAC.[69] The unconditional nature of the obligation is recognised in the ICRC Customary IHL Study, where rule 140 provides that 'The obligation to respect and ensure respect… does not depend on reciprocity.'

Legal Advisers

The obligations in Articles 6 and 82 of Additional Protocol I to make 'qualified persons' and legal advisers available were both conceived as means to support IHL dissemination

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Frits Kalshoven 'The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit' (1999) 2 Yearbook of International Humanitarian Law 3, 60

Umesh Palwankar, 'Measures Available to States for Fulfilling Their Obligation to Ensure Respect for International Humanitarian Law' (1994) 34 International Review of the Red Cross 9

Advisory Opinion on the Legal Consequences of The Construction of A Wall In The Occupied Palestinian Territory [2004] ICJ Rep 136, paras 155–160. Similar phrasing appears in ILC, Articles on the Responsibility of States for Internationally Unlawful Acts 2001, art 41(2)

Carlo Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?' (2010) 21 European Journal of International Law 125, 127

Laurence Boisson de Chazournes and Luigi Condorelli, 'Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests' (2000) 82 International Review of the Red Cross 67

Knut Dörmann and José Serralvo, 'Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations' (2014) 96 International Review of the Red Cross 707

and military instruction. The text of Article 82 makes this clear (states parties must make legal advisers available to advise, 'where necessary' –a discretionary formulation - on the Protocol's application, and on military instruction in IHL), while the link between Article 6 and dissemination is revealed by the *travaux.*[70] The ICRC Commentary envisages that qualified persons might form consultative groups within government to facilitate the execution of the Convention.[71] Such experts could include the 'civilian authorities' who should (according to the argument built in 2.4) receive instruction equivalent to military instruction, and not mere dissemination. Article 82 also requires that legal advisers are available to commanders, facilitating command responsibility to prevent and suppress violations, but the treaty text does not specify that the advice be heeded. In negative conditional language, the ICRC Customary IHL Study indicates that there is no difference in state practice between the provision of legal advisers in IAC and in NIAC, although the obligation in Article 82 only exists in Additional Protocol I.[72] Literature suggests some complexity in the effects of legal advice. While legal advisers might help to prevent IHL violations by 'commingling' with an Army's organisational structure,[73] the opposite can also occur, with legal advisers being 'taken captive' by the agenda and retrogressive interpretations of a broader military culture.[74]

Command Responsibility

The obligations to 'repress grave breaches, and take measures necessary to suppress all other breaches'; to 'prevent, and, where necessary, to suppress and report' violations to 'competent authorities' and to ensure subordinates' awareness of IHL set up a continuum between prevention (including IHL instruction), and accountability: both the reporting of breaches, and 'disciplinary or penal action'.[75] The obligations are adjacent, suggesting different actions are required, but together, they establish a continuum between an officer's duty to prevent violations, to stop violations in progress, and to begin disciplinary or court-martial processes. The doctrine of command responsibility is recognised in Rule 153 of the ICRC Customary IHL Study (applicable in IAC and NIAC),

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Sandoz et al (n 47) 95, para 242
ibid., citing AP I, art 80
ICRC Customary IHL Study, rule 141
Laura Dickinson, 'Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance' (2010) 104 American Journal of International Law 1
Amichai Cohen, 'Legal Operational Advice in the Israeli Defense Forces: The International Law Department and the Changing Nature of International Humanitarian Law' (2011) 26 Connecticut Journal of International Law 367
AP I, arts 86(1), 87(1), 87(2), 87(3)

which holds commanders and other superiors criminally responsible for war crimes committed by their subordinates if the commander or superior knew, or had reason to know that the subordinate was about to commit, or in the process of committing the war crime, and if the commander or superior failed to prevent or punish the relevant act.[76] Williamson sees command responsibility as an 'affirmative duty to act', leading to 'liability by default or omission.'[77] This is persuasive, but the Article offers greater theoretical depth than this. If High Contacting Parties to Additional Protocol I emphasise IHL training but do not honour the obligation to 'suppress and report' breaches to 'competent authorities' then command responsibility (and state responsibility) has not been fulfilled.

Unlawful Orders

States' obligation to 'respect …' IHL 'in all circumstances' entails that soldiers understand sufficient IHL from their training to be able to recognise, seek clarification, and if necessary, disobey unlawful orders. Whether or not a soldier can identify an unlawful order depends on the quality of his IHL training, which can be facilitated by legal advisers' involvement in military instruction. Command responsibility to 'prevent' grave breaches and other violations of IHL requires that orders not be unlawful in the first place, and legal advice to commanders can assist with this. However, the duty to resist unlawful orders (and not merely the duty read from international criminal law to resist *manifestly* unlawful orders – see below) still needs to be articulated as a norm of prevention. It is in tension with much military culture and general training to obey superior orders without question.[78] The duty to disobey unlawful orders and the prevention of IHL violations requires that military culture allow soldiers sufficient independence of action to question and disobey unlawful orders.

Article 33 of the Rome Statute of the International Criminal Court 1998 establishes that a defendant will not be relieved of criminal responsibility as a result of following an order

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ICRC Customary IHL Study, rule 153; A similar problem is phrased as a 'due diligence' obligation to prevent in International Court of Justice, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 27 Feb. 2007, paras 430-431, cf. 429

Jamie Allan Williamson, 'Some Considerations on Command Responsibility and Criminal Liability' (2008) 90 International Review of the Red Cross 303, 304

3.3; Jacques Verhaegen, 'Refusal to Obey Orders of an Obviously Criminal Nature: Providing for a Procedure Available to Subordinates' (2002) 84 International Review of the Red Cross 35, 36

from a commander or superior, unless the defendant was under a legal obligation to follow the order, did not know the order was unlawful and the order was not manifestly unlawful.[79] A defendant would be expected to recognise an order to commit genocide or crimes against humanity, as such an order would be considered manifestly unlawful under Article 33(2) of the Rome Statute, but there is no explicit expectation that an order to commit any of the full gamut of war crimes in Article 8 of the Rome Statute would be 'manifestly unlawful'. Gaeta criticises this specific aspect of Article 33, as it implies that war crimes (and the then-unsettled crime of aggression) might be less seriously unlawful than genocide and crimes against humanity; and she further argues that Article 33 departs from customary international law, which supported the Nuremberg principle that obedience to superior orders should never be a defence.[80] The phrasing 'so manifestly unlawful' derives from the case of *R v. Smith*, in relation to breaches of the law of armed conflict in the Boer War;[81] but it was not until 1944 that British and US military manuals modified their prior requirement to obey all superior orders, so that unlawful orders did not have to be obeyed.[82] This approach is also found in the *Peleus* case,[83] where the Judge Advocate confirmed that 'There can be no duty to obey that which is not a lawful order.'[84] Yet, in that case, it should have been obvious to the defendants that an order to kill survivors of a sunken ship was unlawful. The Judge Advocate acknowledged that it might not have been 'fair' to prosecute subordinates for carrying out an order where a 'careful consideration' was required to determine unlawfulness. This suggests that prosecutorial fairness explains the adjective 'manifestly' in modern international criminal law. The London (Nuremberg) Charter denied the defence of superior orders, but allowed mitigation;[85] the approach Dinstein recognises as a current reflection of customary international law.[86]

Rome Statute of the International Criminal Court (adopted 1998, entered in force 1 July 2002) UNTS 2187 art 33

Paola Gaeta, 'The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law' (1999) 10 European Journal of International Law 172

R v Smith [1900] 17 Supreme Court (Cape of Good Hope) 561 (Solomon J) cited in Leslie C. Green, *The Contemporary Law of Armed Conflict* (3rd edition, Manchester University Press 2008) 337

ibid., 338

Peleus Trial (British Military Court for the Trial of War Criminals, held at the War Crimes Court, Hamburg) 1945

ibid.

Green (n 81), 338, n 134

Yoram Dinstein, 'International Criminal Courts and Tribunals, Defences', in Max Planck Encyclopedia of International Law (2009)

Minow prefers to restrict the defence of superior orders to enhance the 'symbolic ideal of individual responsibility';[87] recognising that IHL compliance will be attained only through 'changes to military incentives, culture, and practices', improved training and officers' good faith in applying IHL.[88] It is this contextual approach that justifies a different, prospective approach to unlawful orders in IHL. Nolte and Krieger infer a duty to disobey unlawful orders from IHL's object and purpose, and not from international criminal law.[89]

There is every reason for the defence of superior orders to be restricted in international criminal law, but no reason to restrict a soldier's duty to comply with IHL so that he must carry out all orders which are possibly or probably unlawful, only disobeying manifestly unlawful orders. As international criminal law and IHL have different purposes and operate at different times (retrospectively in the case of international criminal law and prospectively in the case of IHL's norms of prevention), there is no reason for the two branches of law to be coterminous. Simply transplanting international criminal law phrasing does not satisfy the demands of Common Article 1. Yet the ICRC Customary IHL Study does use the phrasing 'manifestly unlawful', when it finds in rule 154 'a duty to disobey a manifestly unlawful order' in IAC (no practice was found in relation to NIAC). The Study's authors draw on international criminal law and the obligation to respect IHL. They cite military law requiring obedience to 'lawful' or 'legitimate' orders; and practice from three states to support a right to disobey an unlawful order, but they conclude that 'practice is unclear' in relation to combatants who disobey an unlawful (but not a manifestly unlawful) order.[90]

The error here is in assuming that there is sufficient practice to support a prospective duty to disobey manifestly unlawful orders (where that practice derives in part from retrospective criminal trials) and then requiring evidence from state practice to displace the presumption that the adjective 'manifestly' circumscribes the obligation in IHL. In truth, the practice collected is mixed, with some references in military manuals to a duty to disobey orders to commit obvious crimes (US practice from 1995), other references to

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[87] Martha Minow, 'Living Up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defence' (2007) 52 McGill Law Journal 1

ibid.

Vöneky (n 32) 699, citing Georg Nolte and Heike Krieger, 'European Military Law Systems: Summary and Recommendations' in G. Nolte (ed.), *European Military Law* Systems (De Gruyter 2003) 10

ICRC, Customary IHL Study, rule 154, 564

'manifestly unlawful' (Canada), and others to 'unlawful order[s]' (US practice from 2007, UK practice from 1981). The Study fails definitively to prove that there is a customary IHL duty to disobey only those orders that are 'manifestly' unlawful. The Customary IHL Study cites the UK LOAC Pamphlet (1981): 'Military personnel … must not obey unlawful commands'; this phrasing is replicated in the Operational Law Training Directive 2014, suggesting a duty to disobey unlawful orders in general in the UK context.[91] A counterargument comes from the *Calley* case following the My Lai massacre, which is cited in the ICRC Customary IHL Study. The US Army Court of Military Appeals approved of military instructions which stated a soldier may only challenge and disobey an order if it is '*so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness*…'[92]

Several of the military manuals cited in the Customary IHL Study imply a duty first to clarify and then, if necessary, to disobey unlawful orders. This seems to be an accurate reading of the available practice, but query the extent to which soldiers will feel able to challenge a superior in strongly hierarchical military units. O'Connell takes a similar approach, but is too trusting, firstly in the superior who should initially decide if a dubious order is lawful; and secondly, in soldiers' willingness to comply with 'the principles of humanity and … follow their conscience.'[93] This presents difficulties where neither the superior nor the subordinate understand the unlawfulness of an order, or where one or both of them is motivated by revenge or moral disengagement.

4.4 Implications for Theory and Practice

What does this analysis bring to IHL theory and its implementation in practice? The typology of norms of prevention, monitoring and enforcement enables a more precise understanding of the purposes behind IHL's procedural norms than current approaches based on 'implementation' and 'enforcement' can allow. The typology sets up a temporal continuum between prevention (mostly prospective), monitoring (ongoing present tense) and enforcement (retrospective), but as 4.3 has shown, command responsibility is itself a

[91] ibid., 7.4.1 (OpLaw TD, Operational Performance Statements and Formal Training Statements, categories 13-14)

United States v William L Calley Jr (1973) 22 USCMA 534 (US Court of Military Appeals) 21 December 1973, cited in ICRC, Customary IHL Study Database, Practice relating to rule 155 (italics in original)

Mary Ellen O'Connell, 'Historical Development and Legal Basis', in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (3rd edition, Oxford University Press 2013) 1-42, 39

temporal continuum, with obligations relating to preventing violations and responding when they are predicted or have just taken place. In cases before the Inter-American Court of Human Rights and in soft law, training in IHRL and IHL can be a form of reparation,[94] specifically a guarantee of non-repetition;[95] a prospective, preventive form of reparation.

By linking the IHL dissemination and training obligation to other norms of prevention in IHL, the network of norms which aim to prevent violations of IHL becomes clearer. They are not discrete norms for which lip service in peacetime is sufficient. Prevention in IHL depends upon an understanding of where IHL training fits within this network of norms, and how related norms of prevention set the scope of the training obligation. This begins to address the problem of discretion caused by the laconic phrasing of the IHL training obligation, which is one aspect of the conundrum between training, prevention and compliance. IHL training and legal advice must be sufficient to the task of allowing soldiers to identify unlawful orders, and enabling commanders to honour their obligations to 'prevent', 'suppress' and 'report' grave breaches and other serious violations of IHL. Interlocking these obligations slightly reduces the discretion inherent in their mostly laconic formulation.

What is missing? This first sketch of interlocking norms of prevention in IHL is skewed towards IAC, and particularly Additional Protocol I, which is not universally ratified. While some of these norms are said to exist in customary IHL, practice does not always include NIAC. Norms of prevention in weapons treaties are also absent from this brief chapter. The next step in articulating a theory of prevention in IHL would be to address norms of prevention, monitoring and enforcement in Hague law, supplemented by an analysis of the obligation to review new means and methods of warfare in Article 36 of Additional Protocol I. An account of prevention in NIAC is also needed, but of necessity, this will not be treaty-focused and doctrinal, but will need to focus on the tools of prevention used by the ICRC and Geneva Call.

Caracazo v. Venezuela, 2002 Inter-Am. Ct. H.R. (ser. C) No. 95, Judgment 29 August 2002, cited in Thomas Antkowiak, 'Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond' (2008) 46 Columbia Journal of Transnational Law 353, n 181

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, Principle 23(e)

4.5 Conclusion

One facet of the conundrum between IHL training, prevention and compliance is states' willingness to agree to simple norms of prevention without attending to how these norms interact and how they should be implemented. A solution to the conundrum between IHL training and prevention requires an understanding of where IHL training fits with other laconic norms of prevention, including the obligation to 'respect and ensure respect… in all circumstances'; the provision of military legal advisers; commanders' duties to ensure that their subordinates know IHL; command responsibility *inter alia* to 'prevent', 'suppress' and 'report' IHL violations; and the duty at the very least to clarify and if necessary, to disobey unlawful orders. The IHL training obligation's pithy, discretionary formulation is not ideally suited to promoting compliance and preventing violations, but its potential is increased by explicitly linking IHL training to several other norms of prevention. This enables states to see IHL norms of prevention as interlocking or interdependent duties. It subtly reduces the scope for discretion or superficiality in the implementation of military instruction in IHL, as the related norms set the aims of training. For example, soldiers must know enough IHL to be able to detect a potentially unlawful order, to seek to clarify it; and they must have sufficient willingness to comply with IHL to disobey unlawful orders if necessary. Restricting the prospective duty to disobey orders that are manifestly unlawful only sets a low bar for IHL training and subordinates' understanding of IHL.

However, there is an important caveat. This sketched theory of prevention is biased towards the IHL of IAC, and two of the five norms of prevention are found in Additional Protocol I, which has 174 states parties, and applies to conflicts between states and armed groups only if the conditions in Article 1(4) of Additional Protocol I are made out. A fuller theory of prevention in IHL needs to depart from this narrow, doctrinal, IAC-focused approach; to take account of non-binding Deeds of Commitment and other tools of prevention among armed groups.[96] This chapter has begun a scholarly conversation, arguing that prevention should be a term of art in IHL scholarship (as distinct from the ICRC's interdisciplinary, pragmatic use of the term)[97] with norms of prevention, monitoring and enforcement distinguished.

3.4
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Chapter 5. Towards a Compliance Theory for International Humanitarian Law

5.1 Introduction

O'Donoghue has written that IHL exists in 'splendid isolation' from the remainder of international legal theory; that it is a technician's discipline, not a theorist's.[1] In the past five years, this statement has lost its resonance, with an increase in scholarly attention to compliance theory in IHL. With that in mind, 5.2 is a snapshot of the literature. It maps general compliance theories on a sliding scale from unitary (state-centric) to disaggregated (individual and group-focused) approaches; and charts their principal debates. 5.2 also distils the state of the literature on IHL compliance in both IAC and NIAC; works that are largely constructivist in orientation.

5.3 argues in favour of a distinctive compliance theory for IHL, because of IHL's seven compliance challenges (the high stakes for its indeterminate or contested norms; questions of conflict classification and applicable law; the co-applicability and convergence of IHL and IHRL; the challenges of interoperability where different states in a coalition have differing interpretations of IHL or rates of treaty ratification; IHL's strong disaggregation to soldiers, officers and armed group fighters; the relics of reciprocity and its misunderstandings, which can lead to violations committed in revenge; and IHL's disused or absent monitoring mechanisms, which leave much state practice hidden from scrutiny).[2] 5.3 evaluates which of these challenges are truly distinctive to IHL, and which exist to a matter of degree throughout international law; with a brief paragraph on the theoretical fragmentation that might result if IHL compliance theory is perceived as separate from broader work. 5.4 proposes a constructivist compliance theory, focusing on norm internalisation and communities of practice, as the best available theoretical account of the relationship between IHL training and compliance, but it is not a complete solution to the conundrum. 5.5 concludes Part II.

[1] Aoife O'Donoghue, 'Splendid Isolation: International Humanitarian Law, Legal Theory and the International Legal Order' (2011) 14 Yearbook of International Humanitarian Law 107

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5.2 General and IHL-Specific Compliance Theories

Traditional typologies of compliance theory are state-centric and chronological, moving from realist accounts to rational choice, liberal institutionalism, New Haven and international legal process schools, transnational legal process, managerialism, and constructivism. 1.4's compliance theory literature review began with such an account, but alternative framings are available. First, general compliance theories can be mapped on a sliding scale between state-centric, transnational, and disaggregated (individual or group-focused) theories. Second, they can be framed in relation to particular debates: such as the role of treaty ratification, regime type or norm precision and contestation. And third, compliance theories can be specific to a particular branch of international law.

A Sliding Scale: From State-Based to Disaggregated Theories of Compliance

This critical account of compliance theories sets up a sliding scale between unitary theories of state preference and pluralistic or disaggregated accounts. Realism doubts the normativity of international law given the absence of international enforcement, and considers any coincidence between treaties and state self-interest as a mere 'epiphenomenon'.[3] A realist starting-point places the state in the centre, fictionalising its preferences, often in opposition to international law;[4] and leading to the personification of the state. This continues in rational choice theory, which casts states as individual but rational actors, concerned with inter-state reciprocity, retaliation for breaches, and the reputational costs/benefits of compliance.[5] State-centricity only works if positivism (where states consent to be bound by treaties, and only state practice and *opinio juris* counts in the formation of customary international law)[6] is a sufficient framework. In IHL, it is not, because armed groups are outside the law-creation process:[7] they cannot ratify treaties, but are bound by the IHL on non-international armed conflict. There is normativity without consent, and a reliance on peremptory (*jus cogens)* and *erga omnes* obligations, which bind states and armed groups regardless of treaty ratification and

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Richard H. Steinberg and Jonathan M. Zasloff, 'Power and International Law' (2006) 100 American Journal of International Law 64, 74 (citing Krasner's re-reading of Morgenthau)

Jack Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford University Press 2005)

Andrew T. Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press 2008)

Statute of the International Court of Justice 1945 UNTS Chapter 3(1), Art 38(1)

Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37 Yale Journal of International Law 107

evidential thresholds for customary international law. In addition, IHL compliance is strongly disaggregated to individual soldiers and officers, and armed group fighters. State-centric accounts do not sufficiently 'lift the state veil',[8] disaggregating the state into individual units, regiments and armed forces personnel, and recognising that IHL violations are either ordered by political officials and the chain of command, or committed by sub-state actors and armed group fighters.[9] IHL demonstrates the need for disaggregated approaches to compliance theory.

Theories at the mid-point between unitary and disaggregated accounts address compliance in intergovernmental organisations and professional groupings. They include Slaughter's liberal institutionalist approach, which recognised the role of transborder relationships between 'parts of states'[10] (e.g. judges cooperating internationally in horizontal networks), and supranational compliance mechanisms such as the EU and ICC (vertical networks).[11] Goodman and Jinks' account of 'acculturation' (as distinct from 'material inducement' from rational choice theory and 'persuasion', a thin account of constructivism) is also at that mid-point. [12] Acculturation involves states assimilating their beliefs and practices about international law as a result of their membership in international organisations and networks. This can result in compliance, 'deleterious norms' or a 'race to the middle'.[13]

Constructivist insights are the most flexible, with relevance throughout the sliding scale. Finnemore and Sikkink assume multiple processes between states and between norms and states in their account of norm emergence and internalisation.[14] Their approach does not consider norm internalisation by individual actors within a state. Betts and Orchard argue that constructivists should instead focus on 'implementation' (the process by which a norm becomes part of domestic law or policy and compliance becomes 'routinize[d]').[15]

Samantha Besson, 'The Authority of International Law: Lifting the State Veil' (2009) 31 Sydney Law Review 343

James D. Morrow, *Order within Anarchy* (Cambridge University Press 2014)

Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2005) 6

ibid., 24

Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* (Oxford University Press 2013)

ibid., 42, 75-76, 188

Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 International Organization 887

887, 895

Alexander Betts and Phil Orchard (eds), *Implementation and World Politics: How International Norms Change Practice* (Oxford University Press 2014) 5, 269

This is an intra-state perspective, but not a fully disaggregated (individual-focused) account. Sikkink's 'agentic constructivism'[16] is more instructive for a study of individual actors' IHL training and compliance with IHL. Brunnée and Toope's interactional theory also focuses on individual actors and their communities of practice: 'the salient actors are individuals' and 'it is an abstraction to speak of compliance by "states"'.[17] Constructivists focus on the fluidity of norms,[18] and norms' constitutive role for states as they participate in intergovernmental organisations. While constructivists reject the idea of fixed state preferences, settled before international norms are formed,[19] their emphasis on inter-state deliberation,[20] argument,[21] and repetition,[22] helps to account for consensus in international law interpretation and practice. These approaches stand outside the state, looking at how norms, 'shared understandings',[23] and participation in normative discourse shape state behaviour.

Debates in General Compliance Theory

Contrasting realism/rational choice approaches with constructivism is a simple binary, opposing 'instrumentalist' and 'normative' conceptions of state compliance,[24] but it does not take account of the range of sophisticated constructivist approaches in modern compliance theory.[25] The newest compliance theories are aggregates of the quantitative and qualitative,[26] and like Goodman and Jinks' study, combine rational choice,

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Kathryn Sikkink, 'Beyond the Justice Cascade: How Agentic Constructivism Could Help Explain Change in International Politics' (Princeton University International Relations Colloquium, 21 November 2011)

Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010) 115

Mona Lena Krook and Jacqui True, 'Rethinking the Life Cycles of International Norms: The United Nations and the Global Promotion of Gender Equality' (2012) 18 European Journal of International Relations 103

Jutta Brunnée and Stephen J. Toope, 'Constructivism and International Law' in Jeffrey L Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* 119

Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (Oxford University Press 2011)

Thomas Risse, '"Let's Argue!": Communicative Action in World Politics' (2000) 54 International Organization 1

Finnemore and Sikkink (n 14) 904

Brunnée and Toope (2010) (n 17) 105

Robert O. Keohane, 'International Relations and International Law: Two Optics' (1997) 38 Harvard Journal of International Law 487; Jana von Stein, 'The Engines of Compliance' in Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2013) 478

Elizabeth Stubbins Bates, 'Sophisticated Constructivism in Human Rights Compliance Theory' (2014) European Journal of International Law 1169

von Stein (n 24) 477

constructivism and sociological approaches.[27] Compliance theory in the aggregate justifies an alternative framing, based on its principal debates on the effect of treaty ratification, regime type, norm precision or its opposite. Hathaway presented the counterintuitive finding that human rights treaty ratification would 'offset pressure for change' in state practice instead of 'augment[ing] it'.[28] In the IHL context, it was political scientists who found first that joint treaty ratification (by both parties to an IAC) and regime type had no statistically significant effect on civilian protection;[29] and in contrast, that treaty ratification did improve IHL compliance, especially for democracies.[30] Yet both of these studies have conceptual problems, Valentino et al employ a *sui generis* definition of 'civilian', and Morrow considers conduct to be an IHL violation even when a state has not ratified a treaty, without confirming a norm's status in customary IHL.[31]

In general compliance theory, Slaughter argued that liberal democracies were more likely than non-democracies to comply with international law,[32] but liberal institutionalism's focus on regime type has been criticised for its US-centricity.[33] Weiss is sceptical, because in democracies, public opinion or particular interest groups can lobby against international law.[34] Hillebrecht found that some democracies, including the UK, would practise 'begrudging' compliance if particular issues were politically sensitive;[35] and Simmons found a pro-compliance effect in human rights law where states had recently democratised.[36] A beneficial effect of democracy on compliance is less likely where there is 'limited statehood', a term that includes central governments with limited control of

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Goodman and Jinks (n 12) 25-32

Oona A. Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 Yale Law Journal 1935, 2025

Benjamin Valentino, Paul Huth, and Sarah Croco, 'Covenants Without the Sword: International Law and the Protection of Civilians in Times of War' (2006) 58 World Politics 339,368

James D. Morrow, 'When Do States Follow the Laws of War?' (2007) 101 American Political Science Review 559, 570

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Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 European Journal of International Law 503

José Alvarez, 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory' (2001) 21 European Journal of International Law 183

Edith Brown Weiss, 'Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths' 32 (1998-1999) University of Richmond Law Review 1555, 1579; 7.5

Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (Cambridge University Press 2014)

Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009)

sub-state actors, and states where warlords, transnational corporations or organised crime operate.[37]

Norm precision or its opposite is another debate in general compliance theory. Textual determinacy (both clarity and specificity) was for Franck one dimension of a rule's 'compliance pull', and proportional to legitimacy: '…the more determinate a standard, the more difficult it is to justify non-compliance.'[38] Yet in very clear, 'idiot' rules, *per* Scobbie: 'rule determinacy can undermine legitimacy when it results in perceived injustice',[39] so clarity alone is not a guarantee of 'compliance pull'.[40] In contrast, sophist rules are interpretively complex, liable to be stretched or contracted at whim,[41] suggesting that norm complexity (a form of precision) would result in variable interpretations and variable practice, making compliance harder to identify and measure. In contrast, managerial accounts hold that precise norms facilitate state compliance and monitoring mechanisms.[42] Weiss differentiates these two effects, arguing that precise norms make it easier to determine compliance, but that 'it does not necessarily follow that states will comply with precise obligations' more than with simply stated norms.[43] Goodman and Jinks note that norm precision is preferred by both the realist/rational choice and constructivist/managerial approaches, but each of these approaches acknowledge that treaty negotiations are often easier when norms are simply phrased. In their acculturation model, however, norm precision does not always correlate with compliance.[44]

IHL-Specific Compliance Theories

Compliance theorists rarely considered IHL in depth until the current decade. One exception was Posner's model, influenced by his rational choice perception of states as self-interested actors, in which he reasoned that the laws of war (especially weapons law) were not designed to constrain state action in armed conflict; but instead to 'limit… states'

Tanya A. Börzel and Thomas Risse, 'Human Rights in Areas of Limited Statehood: The New Agenda', in Risse, Ropp and Sikkink (eds) *The Persistent Power of Human Rights: from Commitment to Compliance* (Cambridge University Press 2013) 64

Thomas M. Franck, *The Power of Legitimacy among Nations* (Oxford University Press 1990) 53-54

Iain Scobbie, 'Tom Franck's Fairness' (2002) 13 European Journal of International Law 909, 914

Franck (n 40) 68

ibid., 79, cited by Scobbie (n 39) 915

Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995), cf. 10-11

Weiss (n 34) 1572

Goodman and Jinks (n 12) 111-113

investment in military conflict.'[45] This is a teleological, economic theory of Hague law.

Prorok and Appel used quantitative methods to demonstrate that compliance with both Geneva and Hague law was more likely where a party to an IAC had strong ties to democratic states, trade partners and intergovernmental organisations. This approach acknowledges the role of 'third party coercion' in IHL compliance;[46] a quantitative test for the obligation to 'respect and ensure respect'.[47] From a constructivist perspective, Dill finds that international law does 'make a [counterfactual] difference for state behaviour' (it is 'behaviourally relevant'). She finds that a 'logic of efficiency' (where military advantage or the protection of combatants matters more than the principle of humanity) determines US practice in air targeting, but 'IHL is not normatively successful' because it does not satisfy public legitimacy, which is influenced by IHRL.[48]

Benvenisti and Cohen investigate IHL's 'principal-agent problem', or its strong disaggregation to soldiers, officers and armed group fighters, and the 'intra-state conflicts of interest' between different civilian and military authorities.[49] They find that most IHL violations are committed by subordinates, so states with large armies prefer to rely on IHL and on external bodies to enforce IHL; international criminal law in particular serves to remind troops of the need to comply with IHL. These external enforcement mechanisms counteract the problem of 'agency slack', so that IHL compliance has long-term advantages, including for the state's reputation.[50]

Most recently, Clark *et al* cast doubt on the viability of compliance and effectiveness terminology in IHL. They argue that states' and armed groups' legitimacy calculations have a greater causal impact; and IHL's problem of compliance is better addressed through a 'new social bargain' than through managerial (monitoring) or enforcement mechanisms.[51]

Jo and Bryant find that constructivist factors such as concerns for legitimacy and social pressures influence armed groups' incentives to comply with civilian protection norms,

Eric A. Posner, 'A Theory of the Laws of War' (2003) 70 University of Chicago Law Review 297

Alyssa K. Prorok and Benjamin J. Appel, 'Compliance with International Humanitarian Law: Democratic Third Parties and Civilian Targeting in Interstate War' (2014) 58 The Journal of Conflict Resolution 713

GC I-GC IV, art 1; 4.3

Janina Dill, *Legitimate Targets? Social Construction, International Law and US Bombing* (Cambridge University Press 2014) 14-15, 308-309, 349-352

Eyal Benvenisti and Amichai Cohen, 'War Is Governance: Explaining the Logic of the Laws of War from a Principal-Agent Perspective' (2014) 112 Michigan Law Review 1363

ibid.

Ian Clark and others, 'Crisis in the Laws of War? Beyond Compliance and Effectiveness' (2017) European Journal of International Relations (forthcoming)

while the extent of a group's centralisation into a hierarchical structure facilitates compliance.[52] Clark *et al*'s focus on legitimacy is supported by Jo's study of 'compliant rebels': armed groups that seek legitimacy are more likely to comply with IHL.[53] Jo and Thomson tested this theory in relation to states' and armed groups' willingness to accept ICRC visits to detainees. They found that legitimacy-seeking (expressed by a state's democratic regime, or an armed group which has a political wing, controls territory and receives international support) explains the choice to allow ICRC access to detainees, despite the absence of a binding obligation to do so in NIAC.[54] These findings cast doubt on Lamp's earlier contention that asymmetric 'new wars' present an intractable problem for IHL compliance.[55]

Wood investigates armed groups' motivations to violate IHL, finding that the intentional targeting of civilians 'is a short-term strategy' when a group's 'viability … is threatened or when it faces significant military setbacks.'[56] Krieger's study of IHL compliance in areas of 'limited statehood' concludes that persuasion (including IHL dissemination, where organisations such as the ICRC provide a 'shadow of (state/intergovernmental) hierarchy') and incentives (including sanctions or the possibility of criminal prosecution) can still work in NIAC, if humanitarian non-state actors step in where third states are unwilling to do so, and where hierarchy is imposed through possible sanctions and prosecution.[57] Hers is a combined account of rational choice and constructivist approaches, applicable where armed groups operate in states with a limited or non-existent law enforcement infrastructure. This is in line with Risse, Ropp and Sikkink's view that where there are 'degrees of statehood and of the centralization of compliance decisions', insights are needed on 'regime type and social or material vulnerability' alongside constructivism.[58]

Hyeran Jo and Katherine Bryant, 'Taming of the Warlords: Commitment and Compliance by Armed Opposition Groups in Civil Wars' in Risse et al (eds) (n 37) 239

Hyeran Jo, *Compliant Rebels: Rebel Groups and International Law in World Politics* (Cambridge University Press 2015)

Hyeran Jo and Catarina P. Thomson, 'Legitimacy and Compliance with International Law: Access to Detainees in Civil Conflicts, 1991–2006' (2014) 44 British Journal of Political Science 323

Nicolas Lamp, 'Conceptions of War and Paradigms of Compliance: The "New War" Challenge to International Humanitarian Law' (2011) 16 Journal of Conflict and Security Law 225

Reed M. Wood, 'Understanding Strategic Motives for Violence against Civilians during Civil Conflict' in Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (Cambridge University Press 2015) 13, 15

Heike Krieger, 'A Turn to Non-State Actors: Inducing Compliance with International Humanitarian Law in War-Torn Areas of Limited Statehood' (2013) No. 62 SFB-Governance Working Paper Series, DFG Collaborative Research Center

Risse and others (n 37) 25

5.3 Does International Humanitarian Law Need its Own Compliance Theory?

None of the works on compliance specific to IHL attempt to generalise their conclusions to other branches of international law, and IHL is thought to be a problem case for compliance theory.[59] Yet it does not automatically follow that IHL needs its own compliance theory. Krieger's and Dill's work both draw on existing rational choice and constructivist perspectives, while Clark *et al* see the flaws in compliance and effectiveness scholarship, seeking to add a causal inquiry based on legitimacy. In contrast, Wood, Jo, and Jo and Thomson present findings that appear to be confined to NIAC, while Benvenisti and Cohen's 'principal-agent problem' speaks to the strong disaggregation that is distinctive to IHL.

1.1 identified seven reasons why IHL was at Lauterpacht's 'vanishing point' of international law; seven distinctive reasons presenting problems of compliance for IHL. These were the high stakes for its contested norms; debates on conflict classification and applicable law; the co-applicability and convergence of IHL and IHRL; the challenges of interoperability where different states in a coalition have varied interpretations of IHL or rates of treaty ratification; IHL's strong disaggregation to soldiers, officers and armed group fighters; the traces of reciprocity and its misunderstandings, which can lead to violations committed in revenge; and IHL's disused or absent monitoring mechanisms, which leave much state practice hidden from scrutiny.

This section argues that existing frameworks from compliance theory are insufficient to explain these distinctive problems of compliance in IHL, and that traditional, state-based compliance theories need to be adapted as a result. While contested norms, co-applicable regimes and disaggregation exist to a matter of degree in general international law, all seven compliance challenges justify an adapted compliance theory for IHL, which can draw on general compliance theory or depart from it as needed. An adapted compliance theory does not create theoretical fragmentation, but broadens and enriches compliance debates with the addition of IHL's distinctive contexts.

Barbara Delcourt, 'Compliance, Theory of' (2011) Max Planck Encyclopedia of Public International Law (citing Guzman)

IHL's contested or indeterminate norms present a problem for compliance, especially where military necessity is expanded at the expense of the principle of humanity or civilian protection; but also where the discretion in IHL's procedural norms means legal advice to the command chain is deemed not 'necessary'.[60] Some controversies are intractable, such as the factual and temporal scope of the lawful targeting of a civilian who directly participates in hostilities;[61] while others, such as the treatment of the wounded and sick, are not subject to open debate. Dill argues that IHL's indeterminacy 'impose[s] a much higher cognitive burden on the conscientious individual', and makes it harder to predict IHL's effect on state behaviour.[62] Yet, all legal norms require interpretation, and contested norms are found in all branches of international law. General compliance theories have already provided the insight that unsettled, imprecise norms can cause problems for compliance;[63] and that sustained reinterpretation of norms can produce 'a shift in the norm itself'.[64] Constructivists have begun to study interpretive communities to explain why these norm contests occur,[65] while others argue that norm contests are inevitable because of law's 'semantic pragmatism' and 'structural indeterminacy'.[66] This is not a problem limited to IHL. As argued in 1.1 above, it is IHL's high stakes in human lives, and the scope for politicised, irresponsible rhetoric that renders its contested norms a problem for compliance. This aspect of IHL is a distinctive problem for compliance, but by itself, it does not justify IHL having its own compliance theory.

The classification of conflicts and consequent debates about applicable law are arguments in favour of an adapted compliance theory for IHL. NIAC outnumber IAC, but there is much greater normative regulation in IAC than NIAC. Case law and customary IHL points to an increasing convergence between IAC and NIAC,[67] but treaty IHL remains divergent. Increasingly, NIAC have a transborder element, or IAC and NIAC coincide

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AP I, art 51(5)(b), 1.1; AP I, art 82, 4.3

AP I, art 51(3); AP II, art 13(3), ICRC Customary IHL Study, rule 6; ICRC Interpretive Guidance

Dill (n 48) 306, 303

Chayes and Chayes (n 42) 10, 120; Franck (n 38) 53-54

Brunnée and Toope (n 17) 124

Michael Waibel, 'Interpretive Communities in International Law' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (Oxford University Press 2015)

Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press 2012) 47

Prosecutor v Tadić, IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (ICTY Appeals Chamber) 2 October 1995 paras 70, 127; ICRC Customary IHL Study

within the same territory or territories.[68] These facts were not anticipated when Common Article 3 of the Four Geneva Conventions and Article 1(1) of Additional Protocol I were agreed. Article 1(4) of Additional Protocol I is a creature of its time, intended to extend IAC protections to conflicts fought 'against colonial domination and alien occupation and against racist regimes'. These criteria do not cover the majority of modern NIAC. In NIAC, IHL binds armed groups despite their inability to ratify treaties (Kleffner explains that the standard reasons for this tend to be assumed rather than explored)[69] so there is normativity without consent. Conflict classification also bears on IHL's procedural norms: there is no obligation within the treaty law of NIAC to provide legal advisers to the chain of command, nor command responsibility to 'prevent', 'suppress' and 'report' violations.[70] Such obligations need to be crafted from customary IHL; while an obligation to provide instruction or training (as distinct from dissemination) in IHL is built from treaties other than Geneva law, and from the diplomatic history.[71] No other branch of international law leaves unregulated or underregulated the bulk of situations for which it is designed to apply.

Despite the increasing acceptance in case law that IHL and IHRL are co-applicable,[72] and can in defined circumstances be mutually influencing,[73] IHL is not 'a subset of human rights'.[74] Instead, there are continuing debates on the meaning of the principle *lex specialis derogat legi generali*:[75] whether this should mean that IHL is always *lex specialis* in armed conflict, and should therefore displace IHRL;[76] whether either IHL or

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Noam Lubell, 'Fragmented Wars: Multi-Territorial Military Operations against Armed Groups' (2017) International Law Studies 215

Jann K. Kleffner, 'The Applicability of International Humanitarian Law to Organized Armed Groups' (2011) 93 International Review of the Red Cross 443

AP I, arts 82, 86, 87; 4.3

2.3

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion 8 July 1996) [1996] ICJ Rep 226; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion July 2004) [2004] ICJ Rep 136; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* (Merits) (19 December 2005) [2005] ICJ Rep 116

Hassan v. The United Kingdom (2014) ECHR 936

Réné Provost, 'Asymmetrical Reciprocity and Compliance with the Laws of War' in Benjamin Perrin (ed), *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organizations, and the Law* (UBC Press 2012) 18

Anja Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis' (2005) 74 Nordic Journal of International Law 27; Nancie Prud'homme, 'Lex Specialis: Oversimplifying A More Complex and Multifaceted Relationship?' (2007) 40 Israel Law Review 356

Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2nd edition, Cambridge University Press 2010) 24, cited in William H. Boothby, *Conflict Law: The Influence of New Weapons Technology, Human Rights and Emerging Actors* (TMC Asser Press 2014) 341

IHRL can be the *lex specialis,* offering more specific regulation for particular norms and particular circumstances;[77] or if the *lex specialis* concept is outdated and unhelpful.[78] ECtHR jurisprudence establishes that the ECHR can apply extraterritorially where a state party has 'effective control of an area'[79] or exerts 'state agent authority' over an individual.[80] This has expanded the reach of the substantive and investigatory aspects of Articles 2, 3 and 5 of the ECHR to the use of force by troops, military detention, and checkpoints.[81] But these cases say nothing about theoretical debates on compliance with IHL. They provide individual remedies in IHRL where none exist in IHL. Of greater theoretical interest is states' varied responses to the co-applicability of IHL and IHRL, and state practice on prohibitions shared between IHL and IHRL.[82] Also significant for IHL compliance is the effect of legal uncertainty from flux in case law and rapidly changing circumstances in deployment, which means that the legal framework on the use of force can oscillate between the conduct of hostilities and a law enforcement (IHRL) paradigm.[83] These matters justify an adapted compliance theory for IHL that takes account of the variable state practice caused by IHL and IHRL co-applicability and convergence.

Contested norms, differential treaty ratification, and differing views on the co-applicability of IHL and IHRL will lead to strain within multinational deployments. This problem of interoperability is another distinctive compliance challenge in IHL. It means that 'compliance' varies according to coalition states' treaty ratifications and interpretation. The US has resisted the co-applicability of IHL and IHRL, so its ROE will differ from those of European states which must take account of ECtHR jurisprudence.[84] Similarly, the US has long held doctrines identifying dual-use (military and civilian) objects, and 'war-sustaining' objects (such as opium fields in Afghanistan) as legitimate

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ICJ, *Wall* (n 72)

Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press 2013) 232

Loizidou v. Turkey (Admissibility) (1995) ECHR 10; *Cyprus v. Turkey* (2001) ECHR 331; *Al-Saadoon and Mufdhi v United Kingdom* (2010) ECHR 282

Issa v. Turkey (2004) ECHR 629; *Al-Skeini and Others v. the United Kingdom* (2011) ECHR 1093

Jaloud v. Netherlands (2014) (App. No. 47708/08) 20 November 2014

1.1; 6.3, 7.5

Daragh Murray, *Practitioners' Guide to Human Rights Law in Armed Conflict* (Elizabeth Wilmshurst and others eds, Oxford University Press 2016)

Kirby Abbott, 'A Brief Overview of Legal Interoperability Challenges for NATO Arising from the Interrelationship between IHL and IHRL in Light of the European Convention on Human Rights' (2014) International Review of the Red Cross 107

military objectives; doctrines with which European coalition partners have disagreed.[85] Interoperability difficulties can yield research questions for qualitative semi-structured interviews with military leaders, to parse the extent of these interpretive difficulties, and how inter-state discussions in coalition have promoted or eroded IHL compliance from the perspective of each state. Such research would be specific to IHL compliance theory, and not generalisable to other branches of international law.

IHL has a particularly acute principal-agent problem,[86] with strong disaggregation of many of its norms. Sub-state actors including soldiers, officers and civilian authorities have responsibilities in relation to IHL, while non-state actors including armed groups, PMSC and civilians directly participating in hostilities are also relevant to IHL's implementation. The 'strategic corporal' must act swiftly and with a good understanding of IHL, even in deployment situations where the applicable legal framework often changes.[87] Arguably, more junior personnel have greater responsibilities in land forces than air or sea forces, given the likelihood that the latter are involved primarily in planned targeting operations, whereas land forces will engage in both planned and opportunistic targeting, with some arrest and detention. Principal-agent and structure-agent problems are not unique to IHL, as much of international law is implemented by individuals.[88] An 'agentic constructivism' has value in compliance theories within and beyond IHL,[89] but the extent of IHL's disaggregation is unusual. An adapted compliance theory for IHL would place individuals and communities of practice at the centre of the research inquiry; enabling a richer account of individual understanding and willingness to comply, and of the military culture in which IHL training, and the investigation and prosecution of grave breaches and other serious violations of IHL takes place. An adapted compliance theory for NIAC could also take account of the fragmentation or factionalisation of armed groups – a form of disaggregation which is more horizontal than vertical – and which presents problems for outreach and IHL dissemination.

Reciprocity is increasingly marginalised in IAC, and never established as a tool of IHL enforcement in NIAC. Historically, belligerent reprisals were employed to encourage

[85] Marten Zwanenburg, 'International Humanitarian Law Interoperability in Multinational Operations' (2013) 95 International Review of the Red Cross 681, 693-694
Benvenisti and Cohen (n 49)
Charles Krulak, 'The Strategic Corporal: Leadership in the Three Block War' [1999] Marines Magazine
James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press 2002) Commentary on Article 2, para 5
Sikkink (n 16)

opposing forces to cease violations of the laws of war, but following the Second World War, reprisals were prohibited against prisoners of war, and then against civilians and civilian objects. In customary IHL (applicable in IAC and NIAC), the obligation to 'respect and ensure respect' for IHL does not depend on reciprocity.[90] Yet, there are relics and misunderstandings of reciprocity, including soldiers' conviction that some violations may be justified because of the enemy's actual or asserted IHL violations.[91] These misunderstandings are a false justification of IHL violations, linked to moral disengagement and revenge. Inter-state enforcement through reprisals is not unique to IHL, but as for contested norms, the human stakes are higher in IHL where the relics of reciprocity are misunderstood or misused. An adapted compliance theory for IHL might evaluate the extent to which false reciprocity is present in discourse about law and enemy forces.[92]

There are three monitoring mechanisms in IAC (Protecting Powers, an enquiry procedure, and the IHFFC) but these have fallen into disuse. In NIAC, no monitoring mechanisms exist, and a *de minimis* proposal of a voluntary meeting of states was rejected at the 32nd RCRC. Pejic explains that no other branch of international law relies on state consent to trigger monitoring mechanisms to this extent.[93] This is perhaps the most distinctive aspect of IHL, and its greatest challenge to compliance, justifying an adapted compliance theory for IHL. If monitoring is either non-existent or (at best) consultative, consensus-based and *de minimis*, devoid of scrutiny on individual states' practice, then is acculturation inapplicable? Constructivist and managerial insights might be tested in relation to the indirect monitoring of practice in IHL by the UN Security Council, General Assembly, and Human Rights Council, but these mechanisms are *ad hoc* and do not encompass all state and armed group practice in IHL.

There are three nuances to the argument that IHL should have its own compliance theory. First, disaggregated approaches to compliance theory, and constructivist accounts of individuals and communities of practice already exist, and are relevant to a constructivist account of compliance in IHL. Constructivist and managerial work on norm precision or contestation is also of use, but existing compliance theories do not take account of

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ICRC, Customary IHL Study, rule 140
6.4.4
3.3
Jelena Pejic, 'Strengthening Compliance with IHL: The ICRC-Swiss Initiative' (2016) 98 International Review of the Red Cross 315, 320

interoperability, false reciprocity, and states' resistance to external monitoring; nor of the extent of IHL's disaggregation to non-state actors which cannot ratify treaties. Second, arguing that IHL is distinctive in several respects from other branches of international law does not entail ignoring the substantive norms which converge between IHL and IHRL. It also does not ignore the IHL norms which have influenced international criminal law. Transferable insights from IHRL (if they are relevant to norms applicable in armed conflict or belligerent occupation) are not excluded from an IHL compliance theory. Third, partly a result of norm convergence,[94] an adapted compliance theory for IHL does not exacerbate the problem of fragmentation in international law. It is a theoretical choice only, reflecting that armed conflicts are a distinctive yet variable social fact, presenting particular cognitive and behavioural challenges for compliance.

5.4 Theorising Training and Compliance in International Humanitarian Law

A constructivism of individuals and of their communities of practice provides the best account of IHL training from the perspective of the individual soldier and the barracks culture in which he is trained. It enables an account of normative interpretation and flux; of 'shared understandings' and IHL training as a 'practice of legality';[95] and outlines the cognitive and volitional aspects required for compliance with IHL. An account of individuals' and groups' understanding of IHL and their willingness to comply begins to close the gap between communicated norm and subsequent behaviour; explaining the conundrum between IHL training, prevention and compliance. Constructivism acknowledges the interaction of norms with a social context, so it is suited to explaining the intersection between IHL training and discourse about law and enemy forces; it is also suited to an explanation of misunderstood reciprocity. Further research on IHL compliance should investigate communities of practice among negotiating states, and among those civilian and military authorities which oppose investigations, prosecutions or civil suits into IHL violations.

Constructivism's breadth gives the flexibility needed to explore IHL compliance in NIAC, by diffuse armed groups with different ideologies and concepts of legitimacy, and

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Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015) 2

Brunnée and Toope (n 17)

in ‘areas of limited statehood’. Realism, rational choice, process-based and managerial accounts are too steeped in state and inter-state machinery to explore the motivations of armed groups in relation to IHL. Yet a constructivist account is not a complete solution: constructivism exists at the disciplinary boundary between international relations, international law and sociology, but it does not provide a thorough social psychological account for behaviour on the battlefield. Social psychological insights, on moral disengagement and social learning theory, are also needed to explain the difference between norm and behaviour, understanding and willingness to comply. Constructivist approaches in general should articulate where their insights end and where sociological contributions begin.

5.5 Conclusion to Part II

Part II has made two contributions to the literature: an initial theory of prevention and an adapted constructivist compliance theory for IHL. The first begins a scholarly endeavour in IHL; responding to the lack of a theory of prevention in IHL, and to the disparate ways in which the ‘implementation’ of IHL has been categorised; while the second contributes to an increasingly rich scholarly debate.

> The IHL training obligation is related to several other norms of prevention which are usually treated as discrete, unrelated norms. Understanding the relevance of IHL training to the duty to ‘respect and ensure respect’ for IHL, to provide legal advisers in armed forces; command responsibility and the duty to clarify and if necessary disobey unlawful orders makes the aims of IHL training subtly clearer. Soldiers and officers need to understand and be willing to comply with substantive IHL at least to the extent that they can also fufil these obligations, with the obligation to ‘respect’ IHL ‘in all circumstances’ being the broadest. However, two of these five linked norms of prevention apply *de jure* only in international armed conflicts where Additional Protocol I is ratified; the customary status of *all* of these norms is not beyond doubt in other IAC and NIAC.
>
> IHL requires an adapted compliance theory in part because of states’ resistance to external scrutiny and monitoring, and the factual and political contexts in which IHL applies (IAC and NIAC, where the latter might occur in ‘areas of limited statehood’). Meta-state, peacetime truisms about international law compliance are

not generalisable to IHL. A constructivist compliance theory, which takes account of the strong disaggregation to individual soldiers, officers and armed group fighters, is a first theoretical solution to the conundrum between training, prevention and compliance in IHL. A second step is to integrate social psychological findings on armed conflict and atrocity into a constructivist account of military training, and as a matter of policy, to instil it into military communities of practice. A third, related step (for future research) is to address constructivist communities of practice among negotiating states, and those civilian and military authorities who oppose scrutiny of or accountability for IHL violations.

Part III. A Case Study of the British Army's Training in International Humanitarian Law

Chapter 6. The Conundrum in Practice: The British Army and Deficits in Training, Prevention and Compliance

6.1 Introduction

The UK's Manual on the Law of Armed Conflict sees 'as wide a knowledge … as possible' being 'the first step to enforcement of the law of armed conflict'.[1] Dissemination (both military and civilian) is the dominant model,[2] facilitated by legal advisers in relation to military instruction in IHL.[3] The Manual acknowledges the obligation in Art 83(2) of Additional Protocol I that military or civilian authorities with responsibility for applying Geneva law 'must be fully acquainted' with it,[4] but gives no detail on how the UK fulfils this obligation. The Manual exemplifies the UK's approach to military training in IHL until very recently. It acknowledges the obligation to disseminate IHL and to instruct the armed forces in its provisions, but it shares very little detail on how the UK trains its forces in IHL.

A Freedom of Information request to the Foreign and Commonwealth Office (FCO) revealed a heavily-redacted set of minutes of the UK Inter-Departmental Committee on International Humanitarian Law.[5] This shows tentative, minimal provision for IHL dissemination for 'civilian authorities'. As at 2001, IHL featured in the FCO's International Law Course, but the Civil Service College believed IHL too specialised for its introductory curriculum. The minutes reflect that individual government departments should receive 'something imaginative to point out … that IHL was relevant to them', e.g. the potential for detention of prisoners of war within the UK involving the Home Office.[6] There is an elliptical reference to a 'top-down' review of IHL training within the

[1] Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict* (2nd edition, Oxford University Press 2004, last amended online May 2013), para 16.2.1
ibid., para 16.3.1
ibid., para 16.5
ibid., para 16.3.1
UK National Committee on International Humanitarian Law, Minutes, 2001-2016, FOI 0051-17
ibid., 16 October 2001, paras 5-7

armed forces during 2001. As all proper nouns are redacted from the document, the institutions responsible cannot be identified.[7] By 2015, there were two references to IHL in Key Stage 4 of the National Curriculum; the FCO had updated its publication on 'The UK and International Humanitarian Law', and by the end of 2016, a Handbook and Field Guide for Media Professionals in IHL was to have been published.[8] There are no further details as to how 'civilian authorities' will become 'fully acquainted' with the provisions of the Four Geneva Conventions 1949 and Additional Protocol I.[9]

A similar trend can be found throughout the archival and Hansard evidence explored in this chapter. The UK's implementation of the dissemination and training obligation is asserted but rarely described in detail. This chapter begins the retrospective part of a critical case study, asking how the UK's record on IHL training exemplifies the conundrum between training, prevention and compliance in IHL. The British Army's IHL training was selected because of significant flaws found in that training for troops deployed to Iraq in Operation Telic;[10] and because of much-mentioned reforms to that training following the publication of the Baha Mousa Public Inquiry in 2011.[11] As the research progressed, however, patterns emerged of assertion (that IHL training takes place or that reforms have already been implemented, without more detail about which reforms and when), of violation (especially in the prohibitions of torture and inhuman treatment shared between IHL and IHRL), and of institutional response (resistance to external scrutiny of the armed forces' activities, and to the application of IHL to non-international armed conflicts and decolonisation conflicts). 6.2 explores the history of the British Army's training in IHL, 6.3 identifies patterns of violations and institutional response, 6.4 examines court-martial prosecutions and public inquiries, and 6.5 explains how this retrospective part of the study illustrates the conundrum between IHL training, prevention and compliance, and the new insights it builds. 6.6 concludes.

ibid. para 13
ibid., 28 January 2015, 27 October 2016
AP I, art 83(2)
Sir William Gage, 'Report of the Baha Mousa Public Inquiry' (2011) Part VI
HC 10 December 2014, col 217077W; *UK Armed Forces Personnel and the Legal Framework for Future Operations: Government Response to the Committee's Twelfth Report of Session 2013–14* (Defence Select Committee HC 2014, 931) para 9

6.2 A History of the British Army's Training in International Humanitarian Law

The consensus used to be that IHL had little relevance to the First World War; to the conduct of hostilities and to military training. Isabel Hull's research broke this consensus, with evidence of the centrality of international law (both on the use of force and on the conduct of hostilities) to each of the Great Powers before and during the conflict.[12] On military training and the inclusion of law of armed conflict treaties in military manuals, Hull finds that Britain and France began to incorporate Geneva and Hague law into field manuals significantly earlier than Germany (1904, 1903 and 1911 respectively); and criticises Germany's delay in disseminating instructions consistent with the Hague Regulations until 1914 (for officers) and preparing instructions for mobilised troops only in December 1911. There are no archival findings in Hull's study on British military instruction in the law of armed conflict, but she finds that Oppenheim and Edmonds' 1914 Military Manual, included 'ready-made forms, and detailed instructions clearly designed for … use in the field.'[13] The Manual reflected Hague and Geneva law in some detail, plus prohibitions on asphyxiating gases, bombardment, and the St Petersburg Declaration 1868 on explosive projectiles. At the time, British military doctrine permitted reprisals and collective punishment of civilians (the destruction of civilian homes) with some limitations; but urged against hostage-taking and the killing of hostages.[14] The 1914 Manual is an early example of Britain's resistance to IHL's application to conflicts with colonised peoples:

> It must be emphasised that the rules of International Law apply only to warfare between civilised nations…They do not apply in wars with uncivilised States and tribes.[15]

As Mégret points out, Britain was the only state at the 1899 Hague Conference to argue that dum-dum bullets should be permissible in colonial warfare.[16] This implicit denial of the equal humanity of individuals in colonised states recurs in the Mau Mau emergency

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Isabel V. Hull, *A Scrap of Paper: Breaking and Making International Law during the Great War* (Cornell University Press 2014) 83-84

ibid., 83-84

ibid., 85

War Office, *Manual of Military Law* (1914), para 7, cited in Frédéric Mégret, 'From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Humanitarian Law's' Other'' in Anne Orford (ed), *International Law and its Others* (Cambridge University Press 2006) 279

ibid., 275

in Kenya and subsequently. The 1914 Manual is idealistic as to the causes of IHL violations, asserting that they are 'almost invariably' the result of 'ignorance or excess of zeal', and that deliberate violations occur 'increasingly rarely';[17] consistent with the assumption that ignorance causes violations and dissemination prevents them. The inclusion of IHL in the 1914 Military Manual is not proof of the comprehensive implementation of the IHL training obligation in Article 26 of the 1906 Geneva Convention.

Superior orders were still considered a defence to war crimes during the Second World War until the 1944 amendment to the Military Manual,[18] and its 1958 edition.[19] From 1944, soldiers were expected to question and if necessary to disobey 'obviously illegal' orders, despite the tension this created with military discipline.[20] Yet Britain was not a champion of IHL. Crossland believes that Britain cast itself 'as the enforcer of pragmatic restraint upon the ICRC's humanitarian ambitions' in the Second World War; a longstanding position as the organisation was perceived as pacifist and as unnecessarily intruding on military matters.[21]

By the Korean War in 1951, soldiers were reminded that they were bound by both domestic and international law. Bennett notes that 'traditional attitudes towards obedience' persisted, and the chain of command 'neglected to disseminate to either officers or men the duty to refuse illegal orders.'[22] Bennett found gaps in the archive, with Sandhurst's syllabus missing for 1945-1949,[23] but 'military law', including aspects of military justice, e.g. the rules of evidence, was taught at Sandhurst from 1950 onwards.[24] The Staff College also taught military law in the post-war era, but National Servicemen received only sixteen weeks of training. Bennett notes that their training

War Office, *Manual of Military Law* (1914), 244, cited in Eyal Benvenisti and Amichai Cohen, 'War is Governance: Explaining the Logic of the Laws of War from a Principal-Agent Perspective' (2014) 112 Michigan Law Review 1363, 1370

Huw Bennett, *Fighting the Mau Mau: The British Army and Counter-Insurgency in the Kenya Emergency* (Cambridge University Press 2012) 63

Leslie C. Green, *The Contemporary Law of Armed Conflict* (3rd edition, Manchester University Press 2008) 338

Bennett (n 18) 70

James Crossland, *Britain and the International Committee of the Red Cross, 1939-1945* (Palgrave Macmillan 2014) 6, 28

Bennett, (n 18) 63, 74

ibid., 82, n 92

ibid., 73

syllabus lacks detail, so he could not assess whether soldiers were taught the duty to disobey unlawful orders.[25]

A hypothesis emerges that, for reasons of colonial self-interest and nuclear security, Britain was at the periphery of IHL standard-setting and implementation, with IHL training no exception. Bennett's reading of the *travaux préparatoires* for the Four Geneva Conventions reveals the UK's 'open hostility' to Common Article 3, in case it might be said to apply to colonial conflicts.[26] This was the cause, according to Bennett, of the UK's delay in ratifying the Geneva Conventions until 1957; and the failure in the post-war era to instruct troops in the Conventions' prohibitions.[27] Archival findings for this thesis suggest in 1956, the Foreign Office was opposed to an ICRC resolution on internal conflicts, lest this mean that the ICRC could visit prisoners in the UK's colonial territories.[28] The Foreign Office wrote that such violence should be classed as an 'internal disturbance', neither IAC nor NIAC; and asked the British Red Cross Society (BRCS) delegation to oppose the ICRC resolution, recalling '[t]he circumstances in which … it has been found necessary to resort to collective punishment in Malaya and Kenya…'[29]

The incompatibility of the Geneva Conventions and a nuclear deterrent was a concern known to the BRCS.[30] It seems also to have delayed IHL training. Having concluded that Parliament may have been misled when Ministers asserted that IHL training was taking place, Draper reached the 'painful and reluctant conclusion' that the Service Departments knew IHL instruction could jeopardise acceptance of the legality of 'nuclear and thermo-nuclear weapons', and that that explained the delayed implementation of the IHL training obligation.[31] However, the relevant archive shows only Draper's letter to the BRCS on this point; no reply, nuance or disagreement. Draper's conclusion might have been correct, but it is not corroborated.

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ibid., 62
Bennett (n 18) 66
ibid.
Memo from the Foreign Office, sent to Miss Evelyn Bark of the BRCS, 5 June 1956 (BRCArch para 3
ibid., para 6
Letter from I.D.M. Reid Esq, Assistant Secretary-General of the BRCS, 3 August 1961, enclosing Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War (BRCArch)
Letter from Gerald Draper to Mr Reid of the BRCS, 15 July 1961 (received by Captain Liddell Hart on August 1961, LHArch)

Yet military culture could also explain the UK's tendency to place IHL at the periphery. For forty years after the Second World War, no Defence White Papers mentioned IHL.[32] Rogers and Risius attribute this to a 'widespread view that British soldiers instinctively knew how to behave properly on operations' and that IHL rules had been introduced 'primarily for the benefit of other states.'[33] Variants of this view appear to this day, in assertions that military ethics can be caught, not taught, by 'institutional osmosis';[34] or that a British Army officer or Sandhurst cadet already understands 'right and wrong' and would be 'embarrassed' to be taught it.[35] There is another view, that IHL is too complex, requiring too much deliberation[36] and expertise to be compatible with mission command,[37] a doctrine that favours clear expression of orders and intent from commanders to subordinates, and swift implementation of those orders, with flexibility to the subordinate's immediate context. On this view, IHL is presented as an encumbrance to military decision-making.

In December 1948, shortly after Emergency Regulations were declared by the colonial administration in Malaya, 24 unarmed civilians were killed by the members of the Scots Guards in the village of Batang Kali. As noted by the Court of Appeal and the Supreme Court,[38] there was 'limited training' for counterinsurgency operations, and a rapid of turnover of National Servicemen (evidence corroborated by Nolan's archival research),[39] but neither court comments on the IHL training, if any, they received. The majority of the Supreme Court held that the UK was not obliged under Article 2 ECHR to hold a public inquiry into the killings. Lord Neuberger for the majority reasoned that the killings

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[32] APV Rogers and Gordon Risius, 'Army Legal Services and Academia' in Caroline Harvey, James Summers and Nigel D White (eds), *Contemporary Challenges to the Laws of War: Essays in Honour of Professor Peter Rowe* (Cambridge University Press 2014) 40 (citing Adam Roberts)

ibid.

David Whetham, 'International Law and the Ethics of War at the UK Joint Services Command and Staff College' in James Connolly, Don Carrick and Paul Robinson (eds), *Ethics Education for Irregular Warfare* (Ashgate 2013), 133, 143 citing Paul Robinson, in Paul Robinson, Nigel de Lee and Don Carrick (eds), *Ethics Education in the Military* (Ashgate 2008)

Stephen Deakin, 'Counter-Insurgency Ethics at the Royal Military Academy Sandhurst' in Connolly et al (n 34) 120

Sir Charles Napier, cited by Christopher Greenwood, 'Command and the Laws of Armed Conflict (Lecture)' (1993) 4 Strategic and Combat Studies Institute Occasional Paper 40

British Army, Army Doctrine Publication: Operations, November 2010, Chapter 6, 9-15

Keyu and others (Appellants) v Secretary of State for Foreign and Commonwealth Affairs and another (Respondents) [2015] UKSC 69, para 7; *Keyu and Ors v. Secretary of State for Foreign and Commonwealth Affairs and Anr* [2014] EWCA Civ 312, paras 20-21

Victoria Nolan, *Military Leadership and Counterinsurgency: The British Army and Small War Strategy Since World War II* (IB Tauris 2011) 215

predated the 'critical date'[40] on which the Article 2 ECHR obligation might have applied (despite new evidence coming to light in 1969 and 1970, after that 'critical date');[41] that there was no investigatory obligation under customary international law; and that judicial review principles could not apply to determine whether the government's decision not to hold an inquiry under the Inquiries Act 2005 was lawful and rational, in part because of assertions that IHL training had been recently reformed.[42]

During the violence in Kenya from 1952-1960, torture and inhuman treatment were widespread in British military/colonial detention. Approximately 150,000 suspected Mau Mau insurgents were detained, suffering beatings, stress positions, rape and sexual degradation.[43] In June 2013, the UK government made a £14m settlement with five claimants from Kenya (four living, and the estate of a deceased claimant). The claimants alleged torts of assault, battery and negligence in relation to acts of torture, castration and other sexual violence committed in British military detention during the Mau Mau uprising from 1952-1960. The UK government had argued that its colonial administration had operated separately from the UK government at the time, and that the claims should be struck out and dismissed in a summary judgment. The High Court dismissed this application in June 2011, and in October 2012, the High Court applied section 33 of the Limitation Act 1980 to allow a trial on the facts.[44]

Archives had been systematically concealed. The Court heard from expert witnesses that six hundred new documents (the Hanslope Disclosure) revealed that the British military had been involved in widespread torture in detention camps; that the Colonial Office had tried to cover up investigations and that documents had been systematically destroyed, and removed from Kenya from 1958-1963.[45] Archival documents revealed in the Court's judgment point to the need for immediate deployment of 'European' and 'African'

Janowiec and Ors v. Russia ECtHR (Grand Chamber) Applications nos. 55508/07 and 29520/09, 21 October 2013

Keyu and others [2015] UKSC 69, para 89

ibid., para 311(2) per Lady Hale (dissenting); cf. 7.3

Caroline Elkins, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya* (reprint edition, Henry Holt 2005)

Ndiki Mutua and Ors v. Foreign and Commonwealth Office [2012] EWHC 2678 (QB), paras 95, 140. A further case, with approximately 40,000 claimants, is pending under a group litigation order, with testimony expected to finish in 2018.

Ndiki Mutua and Ors v. Foreign and Commonwealth Office, Witness Statement of Caroline Macy Elkins, May 2012

personnel to guard 'hastily constructed' detention camps, and the acknowledgement that 'it was virtually impossible to give them the required training'.[46]

In Malaya and Kenya, deficient military training correlated with brutality and violations of IHL and IHRL, but there were additional legal issues at stake. UK authorities systematically opposed the extension of IHL to colonial conflicts, Common Article 3 was widely ignored in conflicts between Western powers and their colonial territories (Bennett judges that it became binding as customary IHL between the mid-1970s and the late 1980s),[47] and Bennett considers the ECHR, which the UK ratified in 1951 shortly before the Kenyan Emergency, was binding only on paper,[48] with the right of individual petition decades away, and debates on its extraterritorial effect further into the future. The ECHR entered into force in October 1953. Bennett notes a gap in legal protection for the worst excesses of the Kenyan Emergency, which he dates from October 1952 to June 1953.[49]

The initial hypothesis is strengthened by these examples: throughout the 1950s, the UK remains at the periphery of IHL, and UK state practice fails to acknowledge IHL's applicability to colonial violence, and the importance of training in IHL. Hypotheses from chapter 3 are also strengthened: specifically, that flaws in training merely correlate with violations of international law in British military detention. Further patterns emerge: of concealed and destroyed archives, and of a durable resistance to investigations into past atrocities. Duffy's research on the Hanslope documents reveals another institutional response: that of the government's 'sophisticated propaganda machine', pathologising men from the Kikuyu ethnic group as irredeemably violent, asserting that torture was 'necessary', and that Kenyan survivors' testimony had no value.[50] Variants of these discursive responses have continued in investigations into torture and other abuses in Aden, Northern Ireland, and Iraq.[51]

G.H. Heaton, report of the former Commissioner of Prisons in Kenya, July 1956, excerpted in *Ndiki Mutua and Ors* (n 44) para 127

Bennett (n 18) 80

ibid.

ibid.

Aoife Duffy, 'Legacies of British Colonial Violence: Viewing Kenyan Detention Camps through the Hanslope Disclosure' (2015) 33 Law and History Review 489, 490, 496, 528; Owen Boycott, 'Court Hears of Policy to Discredit Abuse Claims during Mau Mau Uprising' *The Guardian* (28 February 2017)

See below and 6.4.3

In contrast to Kenya, where ICRC outreach was blocked, the High Commissioner in Aden permitted ICRC intervention and allowed limited reforms. The Bowen Report from 1967 led to an amended Joint Directive on Military Interrogation in Internal Operations Overseas, which paraphrases most of Common Article 3.[52] Bennett argues that this 'brought reputational benefits', making concessions to the ICRC's confidential good offices while attempting to undermine public allegations of torture by Amnesty International.[53] Yet the Aden case study shows 'forced wall standing, enforced nakedness, and beatings',[54] similar to inhumane treatment suffered by Baha Mousa and those detained with him.[55] Detainees who alleged torture were dismissed with racist generalisations,[56] a more blatant variant of the tendency to dismiss the bulk of evidence from Iraqi witnesses in the Al-Sweady Inquiry.[57]

The UK resisted the application of IHL to the Troubles in Northern Ireland (1968-1998), but did allow the ICRC to visit detainees.[58] It was in this context that the UK signed Additional Protocols I and II, but delayed ratification until 1998, four years after the Provisional IRA's ceasefire.[59] Haines argues, applying Article 1(2) of Additional Protocol II, that the violence reached the threshold of a NIAC between 1971 and 1974, especially during 1972.[60] On 30 January 1972, 14 civilians were shot and killed by soldiers at a demonstration in Derry/Londonderry, in what became known as the Bloody Sunday atrocity. A report into the killings was published in 2010,[61] but it does not address training given to troops in applicable law.

Like Kenya, Malaya and Aden, the UK's actions in Northern Ireland show violations of prohibitions shared between IHRL and IHL, in particular the prohibition of torture and inhuman or degrading treatment or punishment in Article 3 of the ECHR, and of 'cruel treatment and torture', 'humiliating and degrading treatment' in Common Article 3 (1)(a)

Michael O'Boyle, 'Torture and Emergency Powers under the European Convention on Human Rights: *Ireland v. the United Kingdom*' (1977) 71 American Journal of International Law 674

Huw Bennett, '"Detainees Are Always One's Achilles Heel": The Struggle over the Scrutiny of Detention and Interrogation in Aden, 1963–1967' (2016) 23 War in History 457, 464, 487

ibid., 486

6.4.2

ibid., 484

6.4.3

Steven Haines, 'Northern Ireland: 1968-1998' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012)

ibid., 131

ibid., 134, 143

Report of the Bloody Sunday Inquiry (2010); Nevin T. Aiken, 'The Bloody Sunday Inquiry: Transitional Justice and Postconflict Reconciliation in Northern Ireland' (2015) 14 Journal of Human Rights 101

and (c) of the Four Geneva Conventions. Internment without charge or trial had been used intermittently since the Civil Authorities (Special Powers) Act (Northern Ireland) 1922, and was used again from 1971 to gather intelligence about the provisional Irish Republican Army (IRA), and for preventive detention.[62] There were five notorious interrogation techniques (hooding for interrogation and solitary confinement, subjection to continuous noise, the deprivation of food and of sleep, and wall-standing – a stress position). Boyle reports that the Compton Committee, which was commissioned by the UK government and reported in 1971, considered them separately, identifying them as physical ill-treatment but not brutality.[63] These concepts have no reference to international law, and neglected mental suffering. The majority in the 1972 report of the UK-established Parker Committee considered that the techniques could be lawful if proper safeguards were in place to prevent them being used excessively.[64] The European Commission of Human Rights considered the techniques in combination to be 'inhuman treatment', in violation of Article 3 ECHR.[65] The European Court of Human Rights found them to be inhuman and degrading treatment, but not to cause 'suffering of the particular intensity and cruelty implied by the word torture'.[66] In March 1972, Edward Heath PM announced to Parliament that these techniques would be discontinued.[67] In 2014, Irish documentary-makers discovered archival evidence that showed the UK government was aware of the severe, lasting suffering that these techniques could cause; and that this awareness was withheld from the original case before the European Commission and then Court of Human Rights. Subsequently, the Irish government sought to reopen the case, and at the time of writing, the Belfast High Court has reserved judgment following judicial review hearings in February 2017.[68]

There is an additional fragment from archival research for this thesis which should not go unmentioned. During the Falklands War, British soldiers forced Argentinian prisoners of war to move unstable napalm (a weapon held by Argentinian forces). An investigation

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O'Boyle (n 52) 674
ibid., 676
ibid., 678
ibid., 695
Ireland v. United Kingdom (1978) (Application No. 5310/71)18 January 1978, para 167
O'Boyle (n 52) 679
'RTÉ Investigations Unit: The Torture Files' (4 June 2014); BBC News, 'Bid to Reopen NI "Torture" Case' (2 December 2014); 'Hooded Men: Judgment Reserved in "Torture" Hearing (17 February 2017)

showed that the soldiers should have been aware of their obligations under the Third Geneva Convention, but their training was deficient in this respect.[69]

6.3 Patterns of Violations and Institutional Response

Historical research reveals recurrent patterns of violation and institutional response; with findings emerging from the research data and confirming existing hypotheses. There are recurrent violations of those norms shared between IHL and IHRL. IHL prohibits 'torture and inhuman treatment' as a grave breach in IAC,[70] with 'torture of all kinds, whether physical or mental', prohibited by AP I;[71] and 'cruel treatment and torture', 'humiliating and degrading treatment' in NIAC;[72] while IHRL prohibits torture and cruel, inhuman or degrading treatment or punishment.[73] British torture and inhuman treatment featured remarkably similar techniques: the 'five techniques' from *Ireland v. UK* were present in Kenya and Aden, so they were not new during the Troubles in Northern Ireland. Sexual abuse and beatings occurred in British detention during the Mau Mau insurgency, and in Aden, detainees were also exposed to extremes of temperature by being forced to sit near an air-conditioning unit.[74] The same patterns of brutality recur in the Baha Mousa case, where detainees were forced to sit near a generator.[75] The recurrence of similar techniques casts doubt on the consensus since the Baha Mousa Public Inquiry that there had been a mere loss of institutional memory in relation to the prohibition of the 'five techniques'.[76] 6.4 below reveals continued violations of these norms, but others too: the drowning of looters, and the killing of the wounded, to cite just two examples.[77] Historical research reminds us that recent violations have antecedents, and that deficits in IHL training do not fully explain proven brutality. This finding supports the note of caution built in chapter 3 about failures in IHL training merely coinciding with violations, and conversely, about IHL training's capacity to prevent violations.

HL Deb 15 December 1993 vol 550 cc1379-403
GC I, art 50; GC II, art 51; GC III, art 130; GC IV, art 147; AP I, arts 11, 85
AP I, art 75(2)(a)(ii)
CA3(1)(a),(c)
CAT art 1; ICCPR, art 7; ECHR, art 3; ACHR, art 5(2)
Bennett (n 53) 486
6.4.2
Baha Mousa Public Inquiry Report (2011), Part XVIII, Summary, para 32, 118
6.4.1, 6.4.4

The history of the British Army's training in IHL reveals trends in the UK's approach to IHL's applicability, standard-setting and implementation. In the years before and immediately after the UK's ratification of the Four Geneva Conventions, IHL training was delayed or slight; but archival gaps and concealed records yield more questions than precision about its full implementation. The delayed implementation of the IHL training obligation has a context: colonial self-interest was the reason why the UK resisted the development and application of the IHL of NIAC; and the choice to maintain a nuclear deterrent was why, according to Draper, it chose not to implement the IHL training obligation (lest those receiving dissemination were aware of the incompatibility of nuclear strikes and the principle of distinction).[78]

Arguments about international law's applicability to the actions of the armed forces recur in a different form in early twenty-first century conflicts. After a consistent rejection of the extraterritorial effect of the ECHR, the UK eventually conceded that it could apply extraterritorially to British military detention, where state agents had authority and control over a detainee.[79] Prior to that, the MoD opposed IHRL litigation involving the actions of the armed forces overseas on the basis of a stringent separation of IHRL and IHL, regardless of the prohibition of torture and ill-treatment in both branches of law; and a rejection of extraterritorial jurisdiction over the actions of combat troops abroad. Those preferring a separation between IHL and IHRL emphasise the technical, kinetic focus of IHL and the military lawyers' insistence that IHRL is designed for peacetime and democracy. Military and political leaders in the UK have preferred a simple or strong interpretation of the maxim *lex specialis derogat legi generali*, assuming that IHL is *lex specialis* at least in IAC, and that it can oust the application of IHRL. Only since *Hassan v. UK* has the government argued that IHL can modify IHRL if it does not displace it. [80] The judgment of the Grand Chamber in *Hassan* and that of the UK Supreme Court in *Al-Waheed and Serdar Mohammed* (which applied *Hassan* to authorise detention in NIAC)[81] show that the two fields can be mutually influencing, while recent scholarship argues for either IHL or IHRL providing the dominant interpretation in different factual contexts.[82] Nowak's account is different. He argues that for the prohibitions on torture and other ill-

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Draper (n 31)

Al-Skeini and Others v. the United Kingdom (2011) ECHR 1093, para 137

Hassan v. The United Kingdom (2014) ECHR 936, para 87

Al-Waheed v Ministry of Defence; Serdar Mohammed v Ministry of Defence [2017] UKSC 2 (UK Supreme Court), paras 60, 134-136, 164, 224

Daragh Murray, *Practitioners' Guide to Human Rights Law in Armed Conflict* (Elizabeth Wilmshurst and others eds, Oxford University Press 2016)

treatment, IHRL is the more specific branch of law, and should set the contours of interpretation of IHL's prohibitions on torture and other ill-treatment.[83] The ongoing resistance to the extraterritorial effect of IHRL is a potential cause of uncertainty on deployments, particularly in rapidly-changing situations, where rules on the use of force may shift between a conduct of hostilities paradigm to one based on law enforcement.[84]

There are other recurrent patterns of institutional response concerning investigations. Bennett shows that witnesses to torture of Kenyan detainees were mistrusted as a group, and this recurred in Aden, with racist generalisations.[85] This tendency returns in the Al-Sweady Inquiry, where Iraqi witnesses are *prima facie* mistrusted on almost all their evidence, including in relation to their treatment in British military custody. Some had lied about their reasons for being present at the Battle of Danny Boy.[86] Also in Aden, it was asserted that investigations were affecting interrogators' morale;[87] an aspect of the rhetoric that the armed forces are 'under legal siege' by human rights litigation and the possibility of criminal prosecution, explored in 7.5 below. There is also a lack of understanding of IHRL's prohibition on the intentional infliction of severe mental pain and suffering, evident in the Compton Committee report into the 'five techniques'.[88] This recurs in the Al-Sweady Inquiry, and in the MoD's initial unwillingness to reform (as recommended by the Baha Mousa Public Inquiry) 'harshing', in which interrogators sought to intimidate while seeking intelligence, into 'challenge direct', which the Court of Appeal decided had sufficient safeguards to prevent inhuman and degrading treatment or punishment.[89] Applicable in IAC only, Article 17 of the Third Geneva Convention provides that prisoners of war who refuse to answer questions 'may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.' This provision is more expansive than the prohibition in IHRL, and should not be neglected in military training.

Manfred Nowak, 'Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' in Andrew Clapham and Paola Gaeta (eds), *Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2013)

Murray (n 82)

Bennett (n 18), (n 53)

6.4.3

Bennett (n 53)

O'Boyle (n 52)

R (Haider Ali Hussein) v Secretary of State for Defence [2014] EWCA Civ 1087

6.4 Court-Martial Prosecutions and Public Inquiries

6.4.1 Camp Breadbasket

The Camp Breadbasket case is evidence of the causal role of a brutalising military culture in violations of international law; and a culture of secrecy and destroyed evidence when a court-martial was pending. It is also evidence of deficits in understanding and willingness to comply; specifically, the failure to recognise and to challenge an unlawful order; and of discourse about Iraqi civilian looters, and violations committed through an assumed right to punish. In May 2003, two weeks after IAC hostilities were declared to have ended, but while a belligerent occupation was in place in Iraq,[90] an order was given to round up looters at the humanitarian aid depot nicknamed Camp Breadbasket, and to 'work them hard' to deter them from coming back and stealing more aid. More than 70 soldiers failed either to recognise or to challenge this unlawful order, because none of them wanted to be a 'grass'.[91] The looters were stripped naked and forced to simulate sexual acts;[92] and up to 20 men were made to carry milk containers on their heads and run with them, while British soldiers beat them on the legs.[93] One man was hoisted on the forks of a forklift truck. Implausibly, the soldier found guilty at court-martial for 'disgraceful conduct of a cruel kind' maintained that he did this to move the man away from the heat of the sun.[94] Trophy photographs were taken of these so-called 'punishments',[95] but none of the soldiers present reported the abuse they witnessed. The chain of command sought to dismiss the significance of this, seeing those responsible as a 'few bad apples' or the violence as a result of deficits in training.[96]

Following court-martial proceedings, three soldiers were sentenced to short prison terms, but the impact of this was lessened by a statement by the Chief of Staff, General Sir Mike Jackson, that the sexual abuse of detainees was 'not a grave breach.'[97] The sexual degradation to which the looters were subjected while they were in the control of British

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GC IV, art 6

Audrey Gillan, 'Four Guilty, but Questions Remain' *The Guardian* (24 February 2005) <http://www.theguardian.com/uk/2005/feb/24/iraq.military>

Julia Welland, 'Militarised Violences, Basic Training, and the Myths of Asexuality and Discipline' (2013) 39 Review of International Studies 881

Gillan (n 91)

ibid.

BBC News, 'Iraq Abuse Case Soldiers Jailed' 25 February 2005

Welland (n 92) 882

Audrey Gillan, 'Soldiers in Iraq Abuse Case Sent to Prison' *The Guardian* (26 February 2005) <http://www.theguardian.com/uk/2005/feb/26/iraq.military>

troops amounted to 'inhuman treatment' prohibited by Article 147 of the Fourth Geneva Convention, while the hoisting of an Iraqi man on the forks of a forklift truck[98] might have been prosecuted as the grave breach of wilfully causing great suffering or serious injury to body or health also prohibited by Article 147 of the Fourth Geneva Convention, or a wilful act seriously endangering physical or mental health or integrity - a grave breach in Article 11(4) of Additional Protocol I.

General Sir Mike Jackson's remark suggests that senior officers lacked a sufficient understanding of IHL's prohibition of grave breaches and other serious violations of IHL. This bears on whether they would have the ability to exercise command responsibility to prevent, suppress and report grave breaches as required by Article 86 of Additional Protocol I; and of whether the chain of command sufficiently understands IHL to be able to train subordinates. The possibility emerges that senior officers recognise violations of IHL relating to the conduct of hostilities, but did not perceive the sexual abuse of looters as a matter for IHL. This selectivity, defining IHL so narrowly that some of its specific prohibitions are not recognised, raises questions about the quality of IHL training and about military culture. Welland locates the Camp Breadbasket incident on a 'continuum traced back' to training, and the myths of an 'asexual and disciplined' military masculinity.[99] As 7.4 below notes, prohibitions on sexual abuse are implicit and *passim* in newly-reformed LOAC training in the British Army, suggesting that a taboo on discussing international or domestic legal prohibitions on sexual abuse and humiliation remains. Were these abuses perceived as a human rights issue than one of IHL? The question of institutional perception where IHRL ends and IHL begins recurs in the following sections, and in 7.5 below.

6.4.2 *R v. Payne* and the Baha Mousa Public Inquiry

26-year-old Iraqi civilian Baha Mousa spent 36 hours in British military custody from 14-15 September 2003. He was hooded with a hessian sack and forced to adopt painful and exhausting stress positions. He was also beaten, and was found to have stopped breathing. A *post mortem* revealed 93 'external injuries',[100] including fractures to his ribs and nose, and concluded that he had died from positional asphyxia; a cause of death that implicates

BBC News (n 95)
ibid.
Report of the Baha Mousa Public Inquiry (2011) Part XVIII, Summary, para 1

both the beatings and the forced stress positions. The nine other men detained with Baha Mousa sustained injuries which were 'physical and/or mental, some of them serious.'[101] One of them reported that he 'was kicked repeatedly to the kidney area, abdomen, ribs and genitals whenever his arms dropped, and he had his eyes gouged.'[102] If the detainees fell asleep, Corporal Payne would kick or punch them until they cried out; a sadistic game he called the 'choir'.[103] For Simpson, the proceedings that followed Baha Mousa's death were extraordinarily broad, including prosecutions under the Army Act 1955, the International Criminal Court Act 2001, human rights litigation which began to set the scope of the extraterritorial effect of the ECHR,[104] a settlement by the UK government to Baha Mousa's family, and finally a public inquiry into Baha Mousa's death.[105]

Seven members of the British Army's Queen's Lancashire Regiment were prosecuted at a court-martial; the first prosecutions under the International Criminal Court Act 2001.[106] Three senior officers were charged with negligently performing a duty, a charge relating to the IHL doctrine of command responsibility; while the remaining four were charged with manslaughter, inhuman treatment, assault and battery.[107] One of the defendants, Corporal Donald Payne, was convicted of inhuman treatment in violation of the laws of war, following a guilty plea. He admitted using stress positions, hooding and handcuffing the detainees, including Baha Mousa, near a generator in the heat of a temporary detention facility.[108] He was acquitted of manslaughter and perverting the course of justice.[109] No-one was convicted of murder in relation to Baha Mousa's death. The Judge Advocate observed that there was insufficient evidence to charge other personnel who had been guarding the detainees, because there had been a 'more or less obvious closing of ranks'.[110] This slim finding emphasises the importance of military culture not only in IHL violations, but in their concealment.

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ibid.
ibid., para 30
ibid., paras 24, 53, 78
Al-Skeini and Others v. the United Kingdom (2011) ECHR 1093
Gerry Simpson, 'The Death of Baha Mousa' (2007) 8 Melbourne Journal of International Law 1, 2
Asser Institute, International Crimes Database, *R v. Payne*, Summary, at: http://www.internationalcrimesdatabase.org/Case/811
Nathan Rasiah, 'The Court-Martial of Corporal Payne and Others and the Future Landscape of International Criminal Justice' (2009) 7 Journal of International Criminal Justice 177, 180
R v Payne, H DEP 2007/411, General Court Martial held at Military Court Centre Bulford, Sentencing Hearing Transcript, 30 April 2007, 15
Asser Institute (n 106)
R v. Payne, Judge Advocate's Ruling on the Submission of No Case, 13 February 2007, para 25

The Baha Mousa Public Inquiry was established in 2008 under the Inquiries Act 2005, and reported in September 2011. It found that deficient IHL training contributed to the inhumane treatment of the detainees, and to Baha Mousa's death. The Inquiry found a gap in doctrine, and a failure to 'instil... lasting knowledge'[111] of the prohibition of the 'five techniques' (hooding, wall-standing or stress positions, subjection to white noise, deprivation of sleep, deprivation of adequate food) in the case of *Ireland v. UK,*[112] At Sandhurst, the training was longer, but still 'at a level of broad generality and there is no indication that it covered the prohibition on the five techniques.'[113] A causal thread was drawn between the brutalising effects of conduct-after-capture training, in which personnel experienced simulations of the torture and ill-treatment they might face as prisoners of war, without sufficient emphasis that these techniques were prohibited and must not be re-enacted upon Iraqi prisoners of war and civilian internees.[114] Soldiers received 40 minutes of annual training in IHL, much of it based on a Cold War-era video, which was 'somewhat perfunctory',[115] and offered little training for the asymmetric warfare they faced in Iraq. Witnesses reported forgetting the IHL they had been taught. Of the 30 witnesses who had attended the Army Staff Course, only three 'gave evidence indicating they specifically remembered' the prohibition of the 'five techniques'.[116]

Testimony revealed differing understandings among soldiers of what constitutes 'humane treatment',[117] although all witnesses agreed that detainees must be treated 'humanely'.[118] The hurried nature of training prior to Operation Telic 2 was also noted, suggesting that training of short duration can contribute to violations of IHL.[119] In particular, witnesses to the Inquiry had inconsistent understandings of whether or not sight deprivation was permitted through blindfolding or hooding;[120] and there was evidence of '[u]nauthorised and informal' training on Conduct After Capture.[121] Training in interrogation 'included

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Report, Part XVIII (n 100) para 305

Ireland v. United Kingdom, ECtHR (Application No. 5310/71), Judgment, 18 January 1978; Report of the Baha Mousa Public Inquiry, Summary, para 302, 205, Part I, I.81

Report, Part XVIII (n 100) para 300

Report, Part VI, paras 6.360-6.361

Report, Part XVIII (n 100) para 310

ibid., para 305

ibid., paragraph 302

Report, Part I, paragraph 1.81

Report, Part XVIII, paragraph 332

ibid., paragraph 316, 338

ibid., paragraph 323

direct insults and permitted racist and homophobic abuse…also included the use of indirect threats to instil fear.'[122]

The Baha Mousa Inquiry Report was comprehensive, but a finding of inadequate IHL training can become a neat veneer for the horror of violations, suggesting that brutality has a bureaucratic solution. This invests IHL training with too much explanatory power, and neglects the conundrum between training, prevention and compliance. First, the 'perfunctory' training given before these soldiers' deployment did repeat the duty to treat detainees humanely,[123] and humane treatment cannot be construed to include repeated beatings. Second, evidence of the absence of the prohibition of the 'five techniques' in training materials does not explain the presence of those techniques in institutional memory, and does not account for the historical continuities between abuses by British troops in Kenya, Aden, Northern Ireland and then Iraq.[124] If the prohibition was simply lost to institutional memory, then why did the techniques remain? The Report's reasoning on conduct after capture training provides an incomplete account. Sir Peter Gibson's Detainee Inquiry Report found that the intelligence services also had not been trained in the prohibition of the 'five techniques'.[125] It is implausible that there would have been two unrelated yet blameless gaps in institutional memory and training. Third, implying the causality of insufficient IHL training skews the historical record. Deficient IHL training was part of the causal context, as at My Lai and Abu Ghraib.[126] Multiple witnesses stated that unlawful orders were given: to deprive the detainees of sleep, and to make them stay in stress positions; while an Army lawyer, Nicholas Mercer, who witnessed maltreatment, voiced his concerns and was silenced.[127] These orders, and the response to Mercer's concerns, show not merely a gap in training, but an authorisation of some of the treatment suffered by Baha Mousa and his fellow detainees. Military medical personnel, chaplains and the chain of command all failed to respond lawfully to the evidence of torture and inhumane treatment of detainees,[128] suggesting failures in training and military culture. Fourth and finally, depicting these failures as gaps in doctrine or training is historically misleading. Bennett shows that there was active opposition within

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ibid., paragraph 317

Nicholas Mercer, Statement to the Baha Mousa Public Inquiry, 2009 (citing the Soldier's Guide to LOAC, JSP 381)

6.2, 6.3

Sir Peter Gibson, 'The Report of the Detainee Inquiry' (2013) 49-53

6.1

Andrew Williams, *A Very British Killing: The Death of Baha Mousa* (Jonathan Cape 2012) 257-258

Timothy Wood, *Detainee Abuse During Op TELIC: 'A Few Rotten Apples'?* (Palgrave 2015)

the Army to the 1972 ban on the 'five techniques'; and that Ministers 'naïve[ly]' failed to oversee military doctrine to check the ban was included. [129] A Major who testified to the Inquiry believed that the conditioning techniques were lawful, a Private had been subjected to stress positions as punishment in his basic training, and a former Territorial Army officer believed he might not have the right to intervene when he witnessed violations against Baha Mousa.[130] These statements depict broader failings in military culture relevant to the prevention of IHL violations.

6.4.3 The Al-Sweady Public Inquiry

The Al-Sweady Public Inquiry was established in 2009 under the Inquiries Act 2005,[131] and reported in December 2014. It investigated disputed allegations that British military personnel murdered and tortured up to 20 Iraqi detainees following the Battle of Danny Boy in 2004.[132] It was the outcome of prolonged and stayed judicial review proceedings into disputed facts following the Battle of Danny Boy in al-Majar, Iraq on 14 May 2004. The uncle of one of the deceased (Mr Al-Sweady) alleged that his nephew may have been taken alive from the battlefield, subsequently to die in British military custody at Camp Abu Naji, raising a possible violation of Article 2 of the ECHR; while the five other claimants alleged violations of Articles 3 and 5 of the ECHR in British military custody at Camp Abu Naji and at the Divisional Temporary Detention Centre at Shaibah.[133] The judgments of the Administrative Court strongly criticise the Secretary of State for Defence for his failure to honour his disclosure obligations (the Court found this 'disturbing' and attitudinal), [134] and his concession that he could not be confident the required materials could be disclosed;[135] the earlier misuse of public interest immunity (PII) certificates to resist the disclosure of redacted information on the 'limits of tactical questioning';[136] and the consequent waste of court time and resources; while a Colonel

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[129] Huw Bennett, 'The Baha Mousa Tragedy: British Army Detention and Interrogation from Iraq to Afghanistan' (2014) 16 The British Journal of Politics & International Relations 211, 214-215
Huw Bennett, 'Baha Mousa and the British Army in Iraq' in Paul Dixon (ed), *The British Approach to Counterinsurgency* (Palgrave Macmillan 2012) 195, 194, 199
HC Deb, 25 November 2009, col 81WS
HC Deb, 17 December 2014, col 1407
R (on the Application of Al-Sweady and Others) v The Secretary of State for Defence [2009] EWHC 2387 (Admin) paras 2-5, 8
ibid., paras 2, 8-14, 30-44, 46-51, 65-67
ibid., paras 29-34
R (on the Application of Al-Sweady and Others) v The Secretary of State for Defence [2009] EWHC 1689 (Admin) paras 7-11

from the Royal Military Police, who was in charge of investigating the allegations, is also criticised for disclosure failures and unreliable evidence.[137]

After witnesses were examined in the Inquiry proceedings, it was clear that some of the Iraqi participants had lied about their reasons for presence on the battlefield, while military witnesses gave inconsistent evidence. Counsel for the Iraqi Core Participants at the Al-Sweady Inquiry withdrew their allegations of murder following greater but still incomplete disclosure by the MoD in the course of the Inquiry, and an error in disclosure by their own solicitor.[138] A junior solicitor for the Iraqi Core Participants had shredded one original Arabic document which was evidence that some of the Iraqi detainees were members of an armed group fighting the British occupation;[139] actions that led to an unsuccessful prosecution of three solicitors and the firm Leigh Day before the Solicitors Disciplinary Tribunal.[140] The document in translation was provided to the Inquiry. The Chair accepted the withdrawal of the allegations of unlawful killing by British troops.[141] This was a boon to the military establishment (the Defence Secretary called the report an 'incontrovertible' rejection of 'completely baseless allegations').[142]

There are three arguments in what follows: one, an apparent lack of even-handedness in the Inquiry's sifting of evidence from Iraqi and military witnesses; two, the trivialising of findings that nine detainees had suffered 'ill-treatment', a term used expressly without reference to international law concepts;[143] and three, assumptions that asserted reforms to IHL training since the Baha Mousa Public Inquiry had been implemented and were sufficient to prevent future violations.

The Report suggests a presumption of honour and honesty among military witnesses, and a presumption of exaggeration and dishonesty among Iraqi witnesses. These presumptions raise a possibility of 'epistemic injustice': 'a wrong done to someone specifically in their capacity as knower.'[144] Epistemic injustice has two elements:

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ibid., paras 55-60

Report of the Al-Sweady Public Inquiry (2014, hereinafter 'Report') Chairman's Statement, 3

Witness Statement of Anna Jennifer Crowther to the Al-Sweady Public Inquiry 2014

Owen Bowcott, 'Law Firm Leigh Day Cleared over Iraq Murder Compensation Claims' *The Guardian* (9 June 2017)

Report, Executive Summary

HC Deb 17 December 2014, col 1407

Report, Vol I, Part I, para 1.28, cf. paras 1.29-1.30

Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford University Press 2009)

'testimonial injustice' ('when prejudice causes a hearer to give a deflated level of credibility to a speaker's word') and 'hermeneutic injustice' (where a concept is not shared by the speaker and hearer, perhaps because it has not yet been developed by the time the interaction takes place).[145] Testimonial injustice is relevant to the apparent lack of even-handedness in the Inquiry's treatment of military and Iraqi witnesses. Hermeneutic injustice does not quite fit the Inquiry's trivialising of 'ill-treatment' by British Army personnel.

Inconsistent accounts by military witnesses are viewed as good faith mistakes of recollection, or at the very least not deliberate lies.[146] Only if a military witness was a whistle-blower for ill-treatment does the Inquiry Chair treat their evidence as dishonest and self-aggrandising.[147] Soldiers' ill-treatment of detainees is found to be 'unintentional',[148] while Iraqi witnesses as a group are tarnished by the withdrawal of allegations by their counsel, and as a result, the Inquiry Chairman considered it unnecessary to inquire into each of the injuries visible on the corpses of those killed.[149] Detainees reported hearing a succession of screams, chairs being dragged and smelling blood. These corroborated allegations are dismissed as 'falsehoods' and 'active collusion',[150] in a section of the report that does not explain why the allegations should be so viewed. The Chair emphasises that the soldiers were acting in self-defence, against a 'deadly… ambush' deliberately 'planned' by the Iraqi fighters.[151] In addition to a conflation of 'is' (the finding that some Iraqi detainees and those killed were members of an armed group) and 'ought' (the inference that all their evidence, even on unrelated points, must be dishonest), there is an 'othering' of Iraqi detainees, which is partly gendered and racist. While military witnesses' testimony is *prima facie* trusted, and expert evidence presented as 'unchallenged',[152] Iraqi witnesses' allegations must be corroborated (e.g. by photographic evidence-where the detainees are clothed- from medical examinations, and if not so corroborated, the allegations or experiences are rejected.[153] Where Iraqi witnesses are cast as 'overwhelmed' or emotional and therefore

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ibid.
Report, Vol. I, Part I, para 2.445, Executive Summary, para 154
Executive Summary, paras 83-84
ibid., paras 566, 601, 603
ibid., para 301
Report, Vol. I Part II, para 3.484
Executive Summary, para 741
Chairman's Statement, 3
Report, Vol I, Part II

'exaggerat[ing]' their testimony, [154] rather than the 'deliberate lies' applied to some other witnesses,[155] there is an implicit gendering as to their epistemic reliability vis-à-vis the soldiers whose testimony is trusted, without the need for additional corroboration. Racist generalisations were also part of the institutional response to abuses against detainees in Aden.[156]

Yet there is nuance: the case of Mahdi Al-Behadili is an important example of epistemic justice, where the Chairman allows for subjectivity and does not consider that a detainee was lying: he accepts that Mr Al-Behadili's nose may have been fractured, in view of photographic evidence,[157] and gives weight to the lawyers for the Iraqi Core Participants' submission that the detainees' 'disorientation and shock' might have affected how they spoke about their experience of being transported into vehicles after the battle.[158] In addition, several of the Iraqi Core Participants did lie on a number of points, suggesting that they deserved less credibility as a result. This limits the evidence of testimonial injustice in relation to these individuals. One detainee fabricated the death of his sister on the battlefield, when she did not die; while another alleged he had travelled to the battlefield to buy yoghurt for a wedding, when no stall selling yoghurt was located there.

However, the Report contains too much assertion to be persuasive. The Chair repeatedly states that he has 'no doubt' and is 'quite sure' that for example no bodies were mutilated,[159] despite being unwilling to examine post mortem evidence on the aetiology of each injury suffered.[160] Yet the Chair dismisses as preconceived,[161] or 'plainly inaccurate and untrue'[162] the post mortem evidence collected in Iraq, which suggested evidence of torture and mutilation. Two Iraqi doctors who had examined the bodies were cross-examined at the Inquiry, and the Chair concluded that they 'were so caught up in the emotional turmoil and hostility' towards the British Army that they included false information in death certificates.[163]

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ibid.
ibid.
6.2
Report, Vol I, Part II, para 2.1113
ibid., paras 2.1136-2.1137
Executive Summary, paras 302, 304, 305
ibid., para 301
ibid., para 312
ibid., para 308
ibid., para 313

The second argument concerns the Inquiry's apparent minimising of nine findings of 'actual or possible'[164] 'ill-treatment'. This occurs at conceptual and factual levels. The Chair explained that he did not have the power to determine whether any instance of ill-treatment met the threshold of Article 3 ECHR,[165] but this does not prevent him from expressing doubt that individual 'trivial' instances would be insufficient for a violation of that Article.[166] The Inquiry's concept of 'ill-treatment' appears without reference to the 'torture and inhuman treatment', 'cruel treatment', or 'humiliating and degrading treatment' prohibited in the IHL of IAC[167] and NIAC,[168] nor the cruel, inhuman or degrading treatment or punishment (to use the formulation in Article 7 ICCPR) prohibited by international human rights law (IHRL). This is not quite hermeneutic injustice in Fricker's sense, because the concepts do exist, but are not shared between the Inquiry Report and international treaties. Fricker's idea of hermeneutic injustice is closer to a blameless, circumstantial ignorance of concepts not yet defined or regulated by law. In using extra-legal terminology, the Inquiry Chair removes these instances of 'ill-treatment' from the framing of international law violations; a decision which is redundant, given the undertakings by the Attorney General and others that no prosecutions would follow as a result of testimony before the Inquiry.[169]

As to the facts, interrogators were shown to have free rein to intimidate blindfolded witnesses, by striking a tent peg on the desk, and threatening the safety of the detainees' relatives.[170] In one instance, a 'clip round the ear' of one detainee is considered insignificant, while a detainee being repeatedly punched and kicked in the head, shins and ribs is considered to be merely 'ill-treatment',[171] and an incident that one military witness thought not worth reporting.[172] Threats to a blindfolded detainee are similarly categorised, with no recognition that the intentional infliction of severe mental pain and suffering is prohibited as torture in Article 1 of CAT, and the fear (possibly of imminent death) of that detainee might have satisfied that definition if the allegations had been considered by a court with full knowledge of the relevant treaties and case law. Just as problematic is the incoherent apologism that any ill-treatment when the detainees were transported from

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ibid., para 735
Report, Vol I, Part I, para 1.28
ibid., paras 1.29-1.30
GC I, art 51; GC II, art 51; GC III, art 130; GC IV, art 147; AP I, art 75(2)(a)(ii)
CA3(1)(a),(c)
Report, Vol I Part 1, paras 1.144 *et seq.*
Witness M004 to the Al-Sweady Public Inquiry
Report, Vol I Part I, para. 2.553
ibid., para 2.562 *et seq*

the battlefield to their detention camp must have been 'unintentional',[173] involving merely 'firm, robust handling' such as the recurrent over-tightening of plastic handcuffs, and the reported denial of water during such transport.

This hermeneutic injustice may be caused by the Inquiry team's lack of expertise in IHL and IHRL. The Counsel to the Inquiry is a construction lawyer, while the Chair is a retired barrister and judge with expertise in criminal law, and judicial service in the Technology and Construction Court, and administrative experience on judicial welfare.[174] The choice of a non-expert in IHL and IHRL raises questions about the conceptual rigour valued by the Secretary of State in relation to inquiries on compliance with international law in armed conflict.

The third argument concerns the Inquiry's swift acceptance of assertions that IHL training had been reformed following the Baha Mousa Public Inquiry, and that those reforms would be sufficient to prevent similar violations. There is a brief concession in the Al-Sweady Report's recommendations that some of the reforms are 'in the process of being implemented'.[175] The only recommendations relating to training refer to the dating and archiving of training documents.[176] Yet the IHL training was deficient before the Battle of Danny Boy. A training document had instructed soldiers 'never [to] offer any comforts' to detainees being transported from the battlefield to their holding facility, but soldiers interpreted this to refuse water and to taunt those requesting it.[177] Simple phrasing in training documents can be misconstrued.[178] The findings relating to 'ill-treatment' also show failings in training, particularly one Private's view that the arguable stress positions, kicks and hits to a detainee's head that he witnessed were not worth reporting.[179] Barely highlighted in the Report is the admission by several soldiers that they shot at what appeared to be twitching dead or dying bodies in a ditch.[180] The failure to instil IHL's

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Report, Vol I, Parts I and II (multiple instances)
Atkin Chambers, Door Tenants, Sir Thayne Forbes QC
Executive Summary, para 708; 7.3
ibid., paras 717-719
Patrick O'Connor QC and others (2014), 'The Al-Sweady Inquiry: Closing Written Submissions for the Iraqi Core Participants' para 260
Peter Rowe, *Legal Accountability and Britain's Wars: 2000 - 2015* (Routledge 2016) Kindle ed., loc. 6898

Report, Vol I Part I, para 2.562
O'Connor and others (n 177), para 328

prohibitions on despoiling or mutilating the dead[181] and on targeting the wounded is not considered in the Inquiry report.

6.4.4 R v. Blackman

Alexander Blackman, a former Royal Marine Sergeant, shot at close range a wounded insurgent in Helmand Province, Afghanistan on 15 September 2011. A court-martial convicted him of murder in November 2013,[182] and sentenced him the following month.[183] At the time of the offence, there was a non-international armed conflict in Afghanistan, and Blackman's actions violated Common Article 3 of the Four Geneva Conventions, which prohibits 'violence to life and person, in particular murder…' of those who are *hors de combat*, such as the wounded. Subsequently, the Court Martial Appeal Court, relying on psychiatric evidence, confirmed the murder conviction but reduced Blackman's sentence from a mandatory life term to that of 8 years;[184] and then reduced the murder conviction to that of manslaughter on the grounds of diminished responsibility.[185] He was released in late April 2017, the sentencing remarks confirming that Blackman still had 'significant responsibility', at a 'medium' level, for the deliberate killing of the wounded insurgent.[186]

Blackman's case gives the following three insights. First, the facts of the case strengthen the distinction between cognitive and volitional aspects of norm internalisation in IHL training, confirming the finding of the ICRC Roots of Behaviour in War Study that moral disengagement can be present even in fighters with a good knowledge of IHL. Blackman was filmed acknowledging that he had violated the 'Geneva Convention' (*sic.*) at the time of the crime.[187] The evidence at trial confirms the role of moral disengagement, false reciprocity, dehumanisation of the victim, attempted justification of and refusal to report violations of IHL explored in chapter 3.[188] Second, the extensive campaign to overturn

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ICRC Customary IHL Study, rule 133

Asser Institute, International Crimes Database, *R v. Alexander Wayne Blackman a.k.a. Marine A*, Summary

R v. Sergeant Alexander Wayne Blackman, General Court Martial held at Military Court Centre Bulford, 2012CM00442, Sentencing Remarks, HHJ Jeff Blackett, 6 December 2013

R v Alexander Wayne Blackman, Secretary of State for Defence intervening Court of Appeal (Criminal Division) [2014] EWCA Crim 1029

R v Alexander Wayne Blackman (Court of Appeal (Criminal Division)) [2017] EWCA 190

R v Alexander Wayne Blackman (Court of Appeal (Criminal Division)), Sentencing Remarks [2017] EWCA 325, para 10

Audio recording, BBC Radio 4 *Today*, 9 November 2013

3.1, 3.3

Blackman's conviction, to reduce his sentence and to free him is consistent with the rhetoric of 'legal siege' explored in chapter 7 below: a rhetoric which resists both criminal and civil accountability for violations committed by the armed forces, and which is antagonistic to military IHL training and compliance.[189] There is nuance here, as a 'legal siege' rhetoric is the extra-legal context of the campaign to free Blackman. Other arguments identifying leadership failings at the time of the crime and analysing psychiatric evidence are subtler. They detract attention from the IHL violation committed, but are relevant evidence, with the latter ultimately successful in reducing the murder conviction to that of manslaughter. Third, the case is evidence of an uneasy relationship in military justice between crimes under international and domestic criminal law. While only the sentencing remarks and not the court-martial judgment are publicly available, Blackman's murder conviction was explicitly linked to his violation of IHL, i.e. murder as a war crime,[190] but Blackman was not prosecuted pursuant to the International Criminal Court Act 2001. The Armed Forces Act 2006 s.42 criminalises acts committed by the armed forces which would be offences if committed in England and Wales. Manslaughter on the grounds of diminished responsibility (the conviction which stands after appeal) is an offence unknown to international law (either IHL or international criminal law). This new conviction removes IHL as the context, and puts domestic law first.

As to the first of these insights: Blackman and his unit were on patrol as part of the United Nations Assistance Mission in Afghanistan (UNAMA) in Helmand.[191] There had been clashes between British forces and insurgents earlier that day. An Apache helicopter lawfully targeted, killed and injured several insurgents, who were found by Blackman and his colleagues.[192] Blackman disarmed one wounded insurgent and ordered the men under his command to cease giving first aid, with recorded statements indicating that the Marines did not think him worth saving: evidence of dehumanisation and moral disengagement. In sharp contrast to this evidence, Blackman maintained at trial that he believed the insurgent to be dead before he shot him. The men under Blackman's command moved the wounded insurgent 'in a robust manner … causing him additional

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7.5
Asser Institute Summary (n 182)
ibid.
ibid.

pain',[193] out of sight of the Persistent Ground Surveillance System (PGSS), and Blackman shot him at close range with 9mm pistol.[194]

The conviction was obtained on the basis of video and audio recordings from Blackman and his colleagues' helmet cameras, data retrieved by chance in investigations for another case. Video footage showed Blackman telling his colleagues: 'Obviously this doesn't go anywhere fellas. I just broke the Geneva Convention (*sic.*).' There is subtle laughter by Blackman's colleague, identified only as Marine B ('Yeah, roge.') in response.[195] Blackman, through his own voice, shows understanding of IHL, but an explicit rejection of its normativity (confirming the distinction between cognitive and volitional norm internalisation built in chapter 3); confidence that his colleagues will not report him (they did not: evidence of unit cohesion being prized more than IHL compliance); and an attempted justification through false reciprocity. The footage includes Blackman saying '[S]huffle off this mortal coil, you c***. It's nothing you wouldn't do to us.'[196] He assumed that if their roles were reversed, the wounded Afghan fighter would kill him too.[197] This is a discourse of false reciprocity; one which seeks to justify a violation of IHL. Although Blackman understood the prohibition on killing a wounded enemy fighter, it is uncertain if he understood that perceptions of reciprocity are irrelevant to a soldier's obligation to comply with IHL.[198]

The second insight focuses on the implications of the rhetoric that surrounds the Blackman case, and the arguments made at trial. '[V]ociferous' campaigns against the Marines' trial,[199] against the lifting of the anonymity order, at Blackman's sentencing, first and second appeals have made several overlapping arguments: i) that Blackman's prosecution was designed to deflect from operational failings, including a failure by the Brigade Commander to challenge the 'overly aggressive' unit culture, and to respond to signs of 'moral regression, psychological strain and fatigue' among members of

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R v. Blackman, Sentencing Remarks, (n 183) 1

Asser Institute Summary (n 182); Damien Gayle, 'Royal Marine's Life Term for Murdering Injured Taliban Fighter "A Fix-Up"' *The Guardian*, 11 September 2015

Audio recording, BBC Radio 4 *Today*, 9 November 2013

Steven Morris and Richard Norton-Taylor, 'Marine who murdered Taliban prisoner loses fight to remain anonymous' *The Guardian*, 5 December 2013

R v Alexander Wayne Blackman, Secretary of State for Defence Intervening Court of Appeal (Criminal Division) [2014] EWCA Crim 1029

ICRC Customary IHL Study, Rule 140: 'The obligation to respect and ensure respect… does not depend on reciprocity.'

R v. Blackman, Sentencing Remarks (n 183)

Blackman's unit;[200] ii) that mitigating factors such as combat stress disorder[201] (later rediagnosed as an adjustment disorder)[202] were only considered at sentencing, and not at trial;[203] and, iii) above all, that the prosecution should not have been brought, and Blackman should not have been imprisoned.[204] Arguments i) and ii) give a compassionate context to Blackman's crime, thus deflecting from the gravity of the IHL violation. Military spokesmen supporting these arguments invoke military loyalty (acknowledging that the 'coin of courage' had been spent) and the rule of law (Blackman's prosecution was justified because he did not show an 'honest belief' in the lawfulness of his actions).[205] Argument iii) lacks this subtlety. The idea that Blackman should never have been prosecuted or sentenced is premised on a military loyalty that suppresses the rule of law. This is consistent with the idea that the 'armed forces are under legal siege';[206] a rhetoric which is resistant to civil and criminal accountability for violations of IHL and IHRL, and could undermine military training that emphasises IHL compliance.[207]

The third insight is the uneasy relationship in military justice between international and domestic crimes, and the questionable reliance on domestic criminal law in a case which could have been prosecuted as a war crime. Blackman's conviction was reduced to that of manslaughter on the basis of diminished responsibility by the Court of Appeal in March 2017.[208] At the original trial, Blackman's defence team did not submit evidence relating to the defendant's mental state at the time of the crime. Three subsequent psychiatric assessments concluded that he was suffering from an adjustment disorder brought on by combat stress at the time of the crime. His statements on the helmet camera footage should, the psychiatrists argued, be understood in the light of the adjustment disorder. The helmet camera data and the psychiatric evidence were considered sequentially, with the latter deemed to negate the logical conclusions of the former.[209] It is an unpersuasive judgment because it seems to conflate correlation with causation: the presence of a mental health condition with diminished responsibility. Section 52 of the Coroners and Justice

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Royal Naval Command, (2014) 'Operation Telemeter - Internal Review', Executive Summary, 5

R v Alexander Wayne Blackman, Secretary of State for Defence Intervening Court of Appeal (Criminal Division) [2014] EWCA Crim 1029

R v Blackman (Court of Appeal (Criminal Division)) [2017] EWCA 190

BBC Radio 4 *Today*, 11 September 2015

Petition, Free Sergeant Alexander Blackman, at: https://petition.parliament.uk/petitions/108570 (debated in Parliament 16 September 2015)

Major Streatfield, BBC Radio 4 *Today*, 9 November 2013

HL Deb 14 July 2005, vol 672, col 1236 *per* Baron Boyce of Pimlico

7.5

R v Blackman (Court of Appeal (Criminal Division)) [2017] EWCA 190

ibid.

Act 2009 defines diminished responsibility: the defendant had an abnormality of mental functioning (unusual, considered abnormal), from a recognised medical condition, which affected his ability to understand his actions, exercise self-control and/or form a rational judgment. Adjustment disorders are common in the general population and among military personnel,[210] and the helmet camera data indicate Blackman's ability to reason and understand his actions. Blackman was able to recall his IHL training, so it seems unlikely he had lost self-control at the time of the crime.

The partial defence of diminished responsibility is not known to international criminal law, so the choice to prosecute him under domestic law without reference to international law deflects from Blackman's violation of IHL. Grady and Cooper present a slightly different picture: if Blackman had been prosecuted under the ICC Act 2001, s. 56(1) of that Act provides that the 'principles of the law of England and Wales' would have applied to the prosecution.[211] It follows that such a prosecution *might* have enabled him to plead diminished responsibility. However, this does not detract from the uneasy relationship between international and domestic criminal law; nor from the questionable choice not to charge Blackman with murder as a war crime.

6.5 Theory-Testing: Does the Case Study Solve the Conundrum?

The analysis in this thesis' early chapters can be grouped into five theoretical categories, of which the first four are tested in this critical case study. The categories are as follows: the IHL training obligation is laconically-phrased, delegated to state discretion, and until recently was assumed to prevent violations, but state practice is not subject to transparent oversight and monitoring; ii) an explanatory gap between communicated norm and subsequent behaviour; iii) the gulf between cognitive and volitional norm internalisation; or between understanding, knowledge and recall of IHL, and willingness to comply; iv) the problem of how to build restraint in trained killers; and v) linked to this, how to implement contested norms in complex deployments. This retrospective chapter in the critical case study illustrates the problems flowing from i)-iv), but does not yield much on category v). In addition, the chapter yields several emergent findings, to

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ibid., para 70

Kate Grady and Penny Cooper, 'Case Comment – Homicide: *R v. Blackman*' (2017) 7 Criminal Law Review 557, 560

build additional theory on the relationship between IHL training, prevention and compliance; and on state attitudes to IHL and IHRL that are specific to the UK context.

As to i), the discretionary IHL training obligation was asserted in Parliament to have been implemented but in reality, its implementation was delayed. Parliamentary scrutiny was absent, and in the absence of transparent monitoring of state practice in IHL, these delays were discovered by one contemporaneous expert,[212] and subsequently through archival research. Research on this point yielded additional contextual findings about the UK's attitude towards IHL: and in particular its unwillingness to permit IHL's applicability to, or ICRC visits to detainees in colonial wars. Historic assumptions that IHL training prevents violations continue to the present day in the UK context, where asserted reforms to IHL training following the Baha Mousa Public Inquiry Report are assumed to be sufficient to prevent future, similar violations. This neglects the inductive findings in 6.3 about recurrent patterns of violation of the prohibitions of torture and inhuman treatment. The long 'pedigree' of violations against detainees adds weight to a scepticism that the prohibition on the five techniques was merely forgotten or an inadvertent gap in institutional knowledge for both the armed forces and intelligence agencies by the time of the death of Baha Mousa in 2003. This historical research dispels the simple apologist narrative that has emerged as an unintended result of the Baha Mousa Public Inquiry Report; that regrettable gaps in doctrine and training were the sole cause of the death of Baha Mousa, and that these gaps have been swiftly resolved through reforms to training, without more scrutiny of these reforms. Chapter 7 returns to this theme. Deficits in training and omissions in institutional memory provide only a partial causal explanation for violations, but a convenient one; as training documents can be reformed and broader problems of prevention and compliance; accountability and monitoring marginalised.

As to ii), the critical case study continues to explain the relationship between communicated norm and subsequent behaviour. In the Camp Breadbasket case, both IHL training and military culture failed significantly to prevent and recognise grave breaches. In the Baha Mousa case, the simplistic communication of a duty to treat detainees humanely was insufficient to overcome unlawful orders, failures of command responsibility and failures to report witnessed violations. IHL training occurred, but marginally compared to the requirements of the situation. The closing submissions to the

[212] Letter from Draper (n 31)

Al-Sweady Public Inquiry reveal that instructions not to give comforts to detainees in transit meant that they were deprived of water. The Blackman case exemplifies social psychological research on moral disengagement and discourse about law and enemy forces which shows that IHL violations are still possible when the violator has a good knowledge that his action is prohibited in IHL. This was an example of wilful disregard for IHL norms which had been communicated clearly in training.

The Blackman case is a persuasive example of the distinction between understanding, knowledge and recall of IHL; and subsequent willingness to comply. The case study continues to show the role of military culture, moral disengagement and discourse about law and enemy forces, as causal factors for IHL violations, alongside deficits in IHL training. The case study is a cautionary tale about inattention to both understanding of IHL and about willingness to comply. Where the chain of command lacks knowledge of grave breaches, as in the Camp Breadbasket incident, there has been a failure to integrate
IHL's laconic norms of prevention. Where enemy fighters and civilians are dehumanised, with punishment beatings or stress positions authorised, and violations left unreported, IHL training is insufficient to prevent violations and ensure compliance.

iv) All of the cases discussed in 6.4 shed light on the problem of how to build restraint in trained killers, or the dilemma between the 'spirit of the bayonet'[213] (basic training designed to overcome recruits' unwillingness to kill) and IHL compliance. Of course, the lawful targeting of combatants or civilians directly participating in hostilities is compliant with IHL, and these incidents do not appear before courts-martial or public inquiries. It is where violations are alleged or demonstrated that the brutality of conduct-after-capture training, or punishment beatings given to recruits become causally relevant to the abuses of Baha Mousa and those detained with him, and the unthinking acceptance of physical punishments as a means to deter looting at Camp Breadbasket. These experiences cause either confusion or a sense that IHL violations are implicitly authorised.

v) The failings in training and the violations perpetrated did not focus on IHL's indeterminate norms, or norms about which states disagree, but on clear prohibitions on torture, inhuman treatment, other grave breaches such as those perpetrated against looters,

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Yorkshire Television, *Four Hours in My Lai*, transcribed interview with an ex-Sergeant 2nd Platoon, 1988 (LHArch)

and the wilful killing of a fighter who was wounded. This case study does not therefore investigate a causal pathway between IHL's indeterminate or contested norms and subsequent IHL training, prevention and compliance.

Points i)-v) were explored deductively in this chapter, but the following inductive findings have also emerged: There were recurrent assertions that the IHL training obligation had been implemented, and that reforms were in place or in progress. 7.3 below considers a recent example of this. 6.2 and 6.4 reveal recurrent patterns of violation, particularly in the prohibitions shared between IHL and IHRL. There were also recurrent patterns of institutional response when alleged violations come to light. These range from outright denial to non-disclosure, to a lack of even-handedness, with military witnesses' testimony trusted while others' is viewed with suspicion. 7.2 and 7.5 continue this theme with examples of *ad hominem* attacks on those seeking accountability and their lawyers, assertions that investigations, prosecutions and civil suits will harm morale or otherwise endanger operational effectiveness.

Finally, the Al-Sweady Public Inquiry in particular neglects international law prohibitions on severe mental pain and suffering. This reflects the MoD's ambivalence about the interrogation technique that used to be known as 'harshing'. In the closing months of the Baha Mousa Public Inquiry, the MoD sought legal advice and slightly modified its 2010 interrogation policy. In a partially redacted document shared with the Inquiry,[214] the MoD sought to retain some aspects of the 'loud harsh' (shouting, but without threats of violence, coercion or direct physical contact; insults, humiliation, degradation, or the 'berating' of the 'drill sergeant; the frequency and duration of shouting was redacted); and the 'cynical/sarcastic harsh' (a similar approach, using sarcasm and intended for use against 'self-important' detainees, but with 'particular care' taken not to insult a detainee).[215] These lists beg several questions, not least how it is possible to be cynical or sarcastic with a 'self-important' detainee without insulting his or her self-importance; and how it is possible to shout at a detainee for an indeterminate time without causing fear, coercion or even an implied threat of violence. The document shared with the Baha Mousa Public Inquiry sanitises the potential infliction of mental pain and suffering, with a suggestion that 'harsh' is not the appropriate term; and while it acknowledges risks which

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Letter from Natalie Wirth, Director of Judicial Engagement Policy, Ministry of Defence to the Baha Mousa Public Inquiry, 7 March 2011, MIV012736

ibid.

might be mitigated by training, the document also suggests that the 'harsh' approach has helped secure the release of hostages in Iraq. This suggestion is not backed up by specificities.

In a challenge relating to the lawfulness of these policies in Afghanistan, the Divisional Court held that the modified policies were lawful, and the Court of Appeal agreed that there were sufficient safeguards in training and in the policy itself for 'challenge direct' to fall short of the prohibition on torture/inhuman treatment in Common Article 3 of the Four Geneva Conventions (applicable in non-international armed conflicts) and the prohibition of coercion, threatening or insulting conduct, or unpleasant or disadvantageous behaviour as prohibited by Article 17 of the Third Geneva Convention.[216] Hegemonic assumptions are implicit in the assumption that 'harshing' or 'challenge direct' can yield intelligence of value, and might be equally present in the Court of Appeal's judgment in *Hussein*, that policies allowing shouting (but not insults, coercion or threats) for an indeterminate period of time would only be a 'short, sharp shock'; phrasing that implies a right to 'shock' or to punish. While the judgment of the Court of Appeal that even the prohibition on unpleasant or disadvantageous behaviour must have a minimum threshold is in line with jurisprudence on a minimal threshold for ill-treatment in human rights law, the threshold for this conduct in the Third Geneva Convention might be passed by 'challenge direct', given that IHL is more stringent and specific on the treatment of detainees than IHRL.

6.6 Conclusion

Archival research suggests that, despite Parliamentary assertions to the contrary and the inclusion of IHL in military manuals, the UK armed forces conducted little or no IHL training at least until the early 1960s. Concerns that the ICRC might visit detainees in Kenya led to the UK rejecting the applicability of IHL to decolonisation conflicts. Subsequently, the UK resisted the applicability of the IHL of NIAC, and of AP I (under Article 1(4)) by protesting that the Troubles in Northern Ireland were not an armed conflict. Delayed ratification of IHL treaties was followed by even more delayed implementation of the IHL training obligation. From the 1950s to the current decade, there have been recurrent patterns of assertion (that IHL dissemination and training take

[216] *R (Haider Ali Hussein) v Secretary of State for Defence* [2014] EWCA Civ 1087, paragraphs 57-60.

place, or have been reformed); violation (especially of the prohibitions on torture and inhuman treatment); and institutional response (including denial of alleged violations, arguments that either IHL or IHRL should not apply, racist language, testimonial injustice, and assertions that investigations harm the Army's morale and operational effectiveness).

The Camp Breadbasket case shows the interaction of flaws in IHL training with unlawful orders, discourse about Iraqi civilian looters, and violations committed in revenge or assumed punishment. It is also evidence of ignorance of IHL in the chain of command, where one officer interviewed failed to understand that troops' acts were a grave breach of the Four Geneva Conventions. Camp Breadbasket is an example of the sexual abuse of civilians by the British Army; a trend found in earlier and later cases. The Baha Mousa Public Inquiry was a comprehensive investigation into the operational and training context behind the death of an Iraqi civilian in British military custody; but its conclusions in relation to IHL training tempt the reader to assume that mere doctrinal gaps and failures of institutional memory were the cause of the fatal injuries suffered by Baha Mousa. Deficient IHL training and the failure to include the prohibition on the 'five techniques' in institutional memory were part of the causal context; but there is no doubt that Baha Mousa was beaten to death, that unlawful orders were given, and witnessed maltreatment ignored. Basic training and conduct-after-capture training had normalised brutality, while a single discrete IHL training session was insufficient to prevent some troops from violating IHL. In addition, there had been inadequate IHL dissemination to military medical personnel, chaplains and the chain of command.

The Al-Sweady Public Inquiry is anomalous. It finds evidence of 'ill-treatment' by British troops against Iraqi detainees, but trivialises this; with an apparent failure to understand that the definition of torture in CAT Article 1 explicitly includes mental pain and suffering. While some witnesses to the Inquiry did lie, alleging they were civilians and not armed group fighters, the Inquiry seems biased against the testimony of Iraqi witnesses as a group, and biased in favour of military witnesses. In the Al-Sweady Inquiry (and subsequently, as chapter 7 will show) reforms to IHL training following the Baha Mousa Public Inquiry are assumed to be a panacea for future violations. Finally, the case of *R v. Blackman* is an example of the distinction between understanding of IHL and willingness to comply; and of discourse about law and enemy forces as causal factors for

an IHL violation. It is also an example of a sharply politicised trial, and of an uneasy

relationship between IHL violations and domestic criminal law, as the offence of manslaughter by diminished responsibility (to which Blackman's conviction was reduced on appeal) does not exist in international criminal law or IHL.

Chapter 7. Towards a Solution? Belated Reforms to the British Army's IHL Training in a Time of 'Legal Siege'

7.1 Introduction

The case study now moves from chapter 6's largely retrospective approach to a critical analysis of current UK state practice on IHL training, prevention and compliance. Since MoDREC's decision to block the proposed qualitative research which would have tested soldiers' and officers' understanding of IHL,[1] it was necessary to explore the UK's approach to IHL at a Ministerial and Army level. To this end, Chapter 7 analyses recent and ongoing investigations, probes delays in implementing reforms to IHL training following the Baha Mousa Public Inquiry, and analyses recent and current training materials obtained by FOI requests, to see to what extent these solve the flaws in IHL training identified in chapter 6. There follows an inductive section, building new theory and making predictions for the Army's future practice in IHL training, prevention and compliance.

More specifically, section 7.2 offers context on the ICC Preliminary Examination into allegations of war crimes by British forces in Iraq; and the first critical account of MoD-based inquiries: the Iraq Historic Allegations Team (IHAT), the Iraq Fatality Investigations (IFI), the Systemic Issues Working Group (SIWG), and briefly, Operation Northmoor, into alleged violations of international law in Afghanistan. At first sight, there was the discrepancy between a) government assurances in Hansard,[2] before the Defence Select Committee,[3] and to the Al-Sweady Public Inquiry[4] that the reforms to military training in international law had been 'implemented' or 'addressed'; and b) the subsequent decision by MoDREC in the summer of 2014 to block the proposed qualitative research for this project on the basis that the new Operational Law Training Directive had not been implemented.
7.3 asks how, when and why was IHL training reformed; with

1.5
HC 27 March 2014, col 32WS
UK Armed Forces Personnel and the Legal Framework for Future Operations: Government Response to the Committee's Twelfth Report of Session 2013–14 (Defence Select Committee HC 2014, 931) Annex, Government Response to the Committee's Twelfth Report of Session 2013–14, (2014) HC548, para 9
Ben Sanders, Jeremy Johnson QC and Melanie Cumberland, The Al-Sweady Inquiry: Closing Submissions on Behalf of the Ministry of Defence, 11 April 2014, para 1096

what oversight; and if these reforms are now fully implemented, revealing a nuanced picture of gradual reforms. 7.4 evaluates the Operational Law Training Directive of February 2014, and the instructional and assessment materials for the Military Annual Training Tests (MATT 7) in the Law of Armed Conflict; closing with a reflection on materials unavailable because of security classification or insufficient data recording within the MoD. 7.5 is an inductive section, building new theory on limited transparency, and the risks of an anti-accountability, anti-IHRL 'legal siege' rhetoric for future IHL training, prevention and compliance. 7.5 begins to sketch a narrative arc between a state's approach to accountability for alleged violations of IHL and the prevention of future violations. 7.6 concludes Part III, by gathering the findings of the case study as a whole.

7.2 Recent and Ongoing Investigations

ICC Preliminary Examination

The ICC Office of the Prosecutor (OTP) has twice opened preliminary examinations into war crimes allegedly committed by the UK in Iraq. In 2006, evidence suggested 'a reasonable basis for an estimated 4 to 12 victims of wilful killing' and 'less than 20' 'victims of inhuman treatment'.[5] This small number of victims did not pass the additional threshold of gravity in Article 8(1) of the Rome Statute: there was no evidence, according to the then Prosecutor, that war crimes had been 'committed as part of a plan or policy or as part of a large-scale commission of such crimes'; nor would the allegations pass the 'general gravity threshold' in Article 53(1)(b).[6] The OTP reopened its preliminary examination on 13 May 2014,[7] following the receipt of many additional allegations, including a detailed brief from Public Interest Lawyers and the European Center for Constitutional and Human Rights.[8] In 2016, the OTP was in the process of sifting 831

ICC Office of the Prosecutor (OTP), Letter to Senders re. Iraq, 9 February 2006, 8

ibid.

ICC, 'Prosecutor of the International Criminal Court, Fatou Bensouda, Re-Opens the Preliminary Examination of the Situation in Iraq' <http://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-iraq-13-05-2014>

European Center for Constitutional and Human Rights (ECCHR) and Public Interest Lawyers (PIL), 'Communication to the Office of the Prosecutor of the International Criminal Court: The Responsibility of Officials of the United Kingdom for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008' 10 January 2014

'victim accounts' relating to 2350 allegations of torture and inhuman treatment in British military detention in Iraq from March 2003-July 2009.[9]

The preliminary examination is still ongoing. If at a later stage, the OTP decides that it has subject-matter jurisdiction to proceed with an investigation, the case must still pass an admissibility threshold. Under the principle of complementarity in Article 17 of the Rome Statute, a case is inadmissible unless 'the State is unwilling or unable genuinely to carry out the investigation or prosecution'.[10] There are three disjunctive criteria for determining a State's unwillingness genuinely to investigate: a) national proceedings or a national decision have the 'purpose of shielding' a potential defendant from criminal responsibility for a crime in the ICC's substantive jurisdiction; b) 'unjustified delay'; c) a lack of independence or impartiality in the proceedings, or proceedings 'conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice'.[11] In the event that the subject-matter jurisdiction is established, the OTP will scrutinise the Iraq Historic Allegations Team (IHAT) to ensure that none of the three disjunctive criteria of unwillingness is met.

Iraq Historic Allegations Team

IHAT was set up by the MoD in 2010 and closed in 2017. It investigated allegations of unlawful killing and of torture and other ill-treatment by British troops in Iraq, with the possibility of prosecution (by referral to the Director of Service Prosecutions (DSP)) where criminal offences have been committed. The MoD asserted that IHAT satisfied not only the investigatory obligations in the jurisprudence of the ECtHR on Articles 2 and 3 of the ECHR, but was also a genuine investigation by the UK which might preclude a full ICC investigation under the complementarity rule in Article 17 of the Rome Statute. IHAT also studied whether any of the findings of the Baha Mousa Public Inquiry Report should lead to the prosecution of service personnel.[12]

There are five arguments. First, the case law which led to the establishment of IHAT showed a prior lack of independence in the investigations; and prolonged delays in deciding which cases should be referred for prosecution; which raise allegations suitable

[9] ICC OTP, 'Report on Preliminary Examination Activities' (2016) paras 89-90
[10] Rome Statute, Article 17(1)(a)
[11] Rome Statute, Article 17(2)(a)-(c)
[12] IHAT webpage, at: https://www.gov.uk/government/groups/iraq-historic-allegations-team-ihat

for a coroner's-style investigation, which raise systemic issues, and which should be dismissed. IHAT was established during judicial review proceedings in which a public inquiry was sought into alleged violations of Article 3 of the ECHR (the prohibition of torture and inhuman or degrading treatment or punishment).[13] In a subsequent test case, it was acknowledged that these allegations raised systemic issues, including about military training in international law.[14] Initially, the MoD appointed the Royal Military Police (RMP) to oversee the investigations, but replaced the RMP with the Military Provost (Navy) following a judgment of the Court of Appeal that to involve the RMP (which had been involved in detention operations in Iraq) made IHAT insufficiently independent to fulfil Article 3's investigatory obligations.[15] The lack of independence meant that it was 'no longer tenable' for the Secretary of State to wait for the outcome of IHAT's investigations before establishing a public inquiry into alleged torture and ill-treatment.[16] When the case was remitted to the Divisional Court, these changes were found to fulfil the independence criterion.[17] IHAT's caseload had expanded to investigations of unlawful killing (alleged violations of Article 2 ECHR) as well as torture and inhuman or degrading treatment or punishment. The Court noted its concern on 'recurring slippage' (delays) in and the inadequate resources devoted to IHAT's work,[18] but dismissed the claimants' call for a public inquiry into alleged Article 2 violations.[19] Instead, the Court ruled that an inquisitorial process, modelled on a coroner's inquest, should be held to investigate the lawfulness of each death where IHAT had decided there would be no criminal prosecution. The narrative reports produced by each inquiry could study, unlike IHAT, the quality of the military training given.[20] This IFI, discussed below, was established to provide this inquisitorial process.

In 2015, the Divisional Court found that IHAT had completed only 19 investigations from its original caseload of 53 allegations of unlawful killing, of which one had resulted in

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R (Ali Zaki Mousa and Others) v Secretary of State for Defence and Legal Services Commission [2010] EWHC 1823 (Admin)

R (Ali Zaki Mousa and Others) v Secretary of State for Defence and Legal Services Commission [2010] [2010] EWHC 3304 (Admin), paras 11, 113

R (on the application of Ali Zaki Mousa) v Secretary of State for Defence and Anr [2011] EWCA Civ 1334, paras 24-34, 36

ibid., para 43

R (Ali Zaki Mousa and Others) v Secretary of State for Defence [2013] EWHC 1412 (Admin), paras 108-

ibid., para 187

ibid., para 211

ibid., paras 192, 222

referral to the DSP.[21] There had been five investigations (each involving multiple victims), with one referral to the DSP – charges were not brought; and three of these were ongoing at the time of the judgment, each involving allegations of rape and serious sexual assault in British military custody.[22] Following the very substantial increase in caseload from clients represented by Public Interest Lawyers in November 2014, IHAT initiated a pre-investigation screening process to sift out cases where a reasonable person would not think a service offence had been committed; and began to set up a 'problem profile' to consider ill-treatment cases in groups, with the exception of allegations of rape and serious sexual assault, which were to be investigated individually.[23] The Designated Judge considered the lack of progress on the investigations ordered by the Divisional Court in 2013 'deeply disappointing', with the overall situation for IHAT 'bleak'.[24]

By 2016, the Secretary of State's continued delays and disregard of court orders are strongly criticised.[25] Four test cases, where allegations were added to IHAT's caseload over a decade after the relevant events occurred, were selected to study the effect of delay on investigatory obligations under Articles 2 and 3 of the ECHR. Of these, the two relating to Article 2 were so delayed that evidence relating to the death was no longer available, meaning that an investigatory obligation no longer existed; whereas the two credible allegations of torture or inhuman or degrading treatment or punishment led to an ongoing investigatory obligation, to be discharged by an IHAT investigation.[26]

Second, as noted on IHAT's MoD webpage, of the 'more than 3390' investigations received by IHAT,[27] 1666 were rejected, and a further 696 were either recently closed or about to be closed.[28] By February 2017, media reports suggested the remaining 1050 cases had been reduced to fewer than 250,[29] prior to IHAT's hurried closure in June 2017. These numbers raise *prima facie* questions about the quality of the evidence supplied to

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Al-Saadoon and Ors v The Secretary of State for Defence and Ors [2015] EWHC 1769 (Admin), para 23

ibid., para 24

ibid., para 28

ibid., para 35

Al-Saadoon and Ors v The Secretary of State for Defence and Ors [2016] EWHC 773 (Admin), paras 15, 24, 26-27, 30, 37

ibid., paras 204-255

[27] Defence Select Committee, *Who Guards the Guardians? MoD Support for Former and Serving Personnel* (HC 2016-2017 109) reports a total of 3368 allegations. There is no explanation for this discrepancy.

IHAT webpage (n 12). There is no indication when the page was last updated.

Owen Boycott, 'Phil Shiner: Iraq Human Rights Lawyer Struck off over Misconduct' *The Guardian* (2 February 2017)

IHAT,[30] the reasons for such rapid rejection of alleged violations of IHL and IHRL, and the quality of the pre-investigation screening process. A succession of Quarterly Reports into IHAT's work refer to circumstances outside the control of IHAT preventing travel by IHAT investigators to interview Iraqi witnesses. This scheme, known as Operation MENSA, allows 'vulnerable or intimidated complainants' or witnesses to be interviewed in a third country in the Middle East, but the authorities in that third country were unwilling to allow an expansion of the programme or increased frequency in the visits.[31] There were no Operation MENSA deployments at all in the period prior to the 23 November 2016 Quarterly Update, nor in the period before the 25 July 2016 Quarterly Update.[32] Yet this period correlates with the greatest number of investigations dismissed. This raises questions as to the depth of investigation each case receives, and whether cases are dismissed without witnesses being interviewed to check any uncertainties in the raw material of their translated witness statements. The quality of the evidence supplied to IHAT is reportedly poor, with the author of the Review of IHAT describing it as 'sparse, often inaccurate as to identities, dates, times etc.', with some statements 'unsigned'.[33] As such, these are not full witness statements, and necessitate more resources and rigour, rather than less, to determine the evidence within these documents.

Third, there was a tendency to group allegations for subsequent referral or rejection. The Deputy Head of IHAT decided on 19 September 2016 and 24 October 2016 to discontinue investigations on 68 and then 489 'lower-level allegations of ill-treatment' (where this term and the true severity of the allegations was left undefined, much as it was in the Al-Sweady Public Inquiry Report).[34] These gradations of wrongdoing are not found in IHL or IHRL's substantive prohibitions, or the obligations to 'repress' grave breaches in the IHL of IAC, and to investigate and prosecute some violations of IHRL, including torture. This raises questions about the conceptual quality and evidential thresholds used in the pre-investigation screening process.

Fourth, IHAT's quarterly updates and periodically-released tables of work completed lack transparency as to the methodology and reasoning employed in the sifting of

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Sir David Calvert-Smith, 'Review of Iraq Historic Allegations Team' (Attorney-General's Office and Ministry of Defence 2016) 12-13

Al-Saadoon and Ors v The Secretary of State for Defence and Ors [2016] EWHC 773 (Admin), para 259

IHAT, Quarterly Updates, November 2016, July 2016

Review of IHAT (n 30) 12-13

IHAT, Work Completed, December 2016

allegations. The Quarterly Reports present numerical information on the number of cases received, in the pre-investigation, investigation stages, being closed and terminated, for each of 22 caseloads (11 relating to unlawful killings and 11 relating to torture or other ill-treatment).[35] These data are thin, and do not include any contextual information, such as the name of the alleged victims, or the substance of what is alleged. IHAT's obscure methodology and limited transparency are problematic: observers are encouraged simply to trust in the rigour of IHAT's investigations. There is no reference to media reports in September 2016 that three service personnel, two of them serving, were to face manslaughter charges for the death by drowning of teenager Said Shabram in 2003.[36]

As to the Work Completed as at December 2016, in some cases, it is clear that conflicting witness statements are the reason for investigations being stopped.[37] In others, the involvement of other Coalition troops is the reason, e.g. a death of a prisoner of war in a US-controlled camp, or Danish involvement in the death of an Iraqi civilian.[38] In two cases, Public Interest Lawyers was reportedly unable or unwilling to provide further information to IHAT investigators, so cases were discontinued.[39] In still others, allegations made at the Al-Sweady Public Inquiry are rejected because the Inquiry found that the deceased either had not died, or were directly participating in hostilities when they were targeted and killed.[40] These decisions may be justified, but others lack transparency in their reporting, e.g. it was alleged that Ali Alwan Sadoun Abdullah Al Sbehawi was unlawfully killed by British troops, but IHAT rejected the case, concluding that the evidential sufficiency test was not met for a prosecution of murder or manslaughter to take place.[41] There is no reasoning to justify the failure to reach the evidential sufficiency threshold in relation to allegations that a soldier had subjected an Iraqi person to a 'mock execution'.[42] A referral to the RAF Police was made in relation to a trainer who allegedly recommended hooding and blindfolding detainees, and restraining them with collar and rope.[43] There are no further updates on that investigation.

IHAT Quarterly Update, July-September 2016

Robert Mendick, 'Anger as Three Soldiers Warned They Face Prosecution over Iraqi Teenager's Death' *The Telegraph*, 17 September 2016

IHAT Work Completed, December 2016, investigation 96

ibid., investigations 83, 377

ibid., investigations 133, 134

ibid., investigations 124, 176, 586-594, 627-645

ibid., investigation 148

ibid., investigation 106

ibid., investigation 105

Fifth and finally, following a Review of IHAT's work in 2016,[44] the MoD announced that IHAT's pending case load would be reduced to 60 cases by the middle of 2016, with IHAT's closure predicted for 2019. In February 2017, its closure was brought forward to later in 2017, with the same target of 60 remaining cases for summer 2017 (later modified to a target of 20 remaining cases by the official closure of IHAT on 30 June 2017).[45] There is no reasoning expressed behind these targets, nor as to the merits of remaining cases which are to be closed. These data suggest political pressures to hasten the closure of IHAT; pressures unrelated to the substance of allegations. The Secretary of State for Defence repeated assertions that greeted IHAT's establishment[46] when he announced its closure: that the majority of claims are false and the investigations harm service personnel.[47] The announcement that IHAT would close followed and appeared to depend upon Shiner's striking-off by the SDT,[48] for a range of offences, including dishonesty. Disciplinary proceedings against his firm Public Interest Lawyers and unsuccessful proceedings against Leigh Day were begun after the Secretary of State for Defence passed a "dossier" to the Solicitors Regulation Authority.[49] The proven dishonesty of one solicitor does not remove international law obligations to investigate and prosecute serious violations of IHRL and IHL. The Defence Subcommittee questions the premise that allegations of unlawful killing and torture should be investigated (by opposing the obligation to investigate allegations and soldiers' welfare needs),[50] instead of delving into the quality of those investigations.

Iraq Fatality Investigations

The IFI was established in 2014 to implement the order of the Divisional Court in *Ali Zaki Mousa No. 2*, that there be 'inquisitorial inquiries modelled on coronial inquests'.[51] The IFI aim to fulfil Article 2 ECHR obligations to bereaved relatives.[52] The investigations are extra-statutory, and separate from ongoing civil suits, applications for judicial review, criminal investigations or proceedings. The Terms of Reference prohibit

Review of IHAT (n 30)
Ministry of Defence News, 'IHAT to Close at the End of June' 5 April 2017
HC 1 March 2010, col 93W
Who Guards the Guardians? (n 27); 'Discredited Iraq War Probe to Be Shut down' *Sky News* (10 February 2017)
Solicitors Regulation Authority, 'News Release - Professor Phil Shiner and the Solicitors Disciplinary Tribunal' 2 February 2017
Who Guards the Guardians? (n 27) para 23
ibid.
R (Ali Zaki Mousa and Others) No 2 v Secretary of State for Defence [2013] EWHC 2941 (Admin)
Al-Skeini and Others v the United Kingdom [2011] ECHR 1093, para 174

the Inspector, Sir George Newman, from inquiring into civil or criminal liability.[53] At the start of each case, he requests assurances from the DSP, the Prosecutor of the ICC, and the Attorney-General (if necessary also the counterparts to the Attorney-General in Scotland and Northern Ireland) that soldiers' witness statements will not be used to incriminate them, nor to facilitate subsequent prosecutions.[54] Cases are referred to the IFI if IHAT and the DSP decide there will not be a prosecution, or if a court-martial has been terminated or has resulted in a not guilty verdict. Soldier witnesses are granted anonymity, but the IFI has the capacity to compel a witness.[55] The relatives of the deceased may suggest questions for the Inspector to ask witnesses.[56] The first two reports of the Inspector, Sir George Newman, followed the early termination of court-martial proceedings, and focus on the deaths of Nadheem Abdullah and Hassan Abbas Said.[57] At this writing, the IFI has released six reports, into the deaths of Nadheem Abdullah and Hassan Abbas Said,[58] Muhammad Salim,[59] Ahmed Ali,[60] Ali Salam Naser,[61] and Captain Abdul Hussan Taleb Hassan.[62]

Three general analyses emerge. One, the reports are qualitative and wide-ranging, with detailed Appendices that consider the training materials and/or forensic data relevant to each case. The Inspector is required to look into the 'immediate and surrounding circumstances' of each death investigated, and to produce a 'narrative account'.[63] None of the criticisms relating to limited transparency and thin, quantitative data from the analysis of IHAT above applies to the IFI. Two, the tone of each report is even-handed and nuanced, with no loaded language suggesting that military or Iraqi witnesses as a group should be trusted or mistrusted as a group. Therefore, the criticisms of the Al-Sweady Public Inquiry in 6.4.3 do not apply to the IFI. Three, '[i]f circumstances demand', the Inspector's terms of reference allow him to inquire into the 'instructions,

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IFI, FAQ <http://www.iraq-judicial-investigations.org/faqs.aspx>
ibid.
IFI <http://www.iraq-judicial-investigations.org/index.aspx>
ibid.
HC 27 March 2014, col 30WS
Sir George Newman, 'The Iraq Fatality Investigations: Consolidated Report into the Death of Nadheem Abdullah and the Death of Hassan Abbas Said' (2015) Cm 9023
Newman, 'Iraq Fatality Investigations: Report into the Death of Muhammad Abdul Ridha Salim' (2016) Cm 9238
Newman, 'Iraq Fatality Investigations: Report into the Death of Ahmed Jabbar Kareem Ali' (2016) Cm 9324
Newman, 'Iraq Fatality Investigations: Report into the Death of Ali Salam Naser' (2017) Cm 9410
Newman, 'Iraq Fatality Investigations: Report into the Death of Captain Abdul Hussan Taleb Hassan' (2017) Cm 9409
IFI, Terms of Reference, reproduced in an Annex to each completed report

training, and supervision' received by service personnel whose involvement is alleged in each death,[64] and as such, the IFI can include contextual analysis. However, such substantive inquiries are limited by the MoD's retention of secret files at Swadlingcote (see 7.5 below), the destruction of others, and search terms or tools which yield either no relevant materials or 'disproportionate' results, so that the MoD claims the workload would be too onerous to permit disclosure.[65]

The IFI Reports yield the following findings relevant to training and international law: (i) The Card Alpha of ROE for deployments other than IAC[66] shows that IHRL (and specifically the ECHR and UN standards on the use of force and firearms by law enforcement officials)[67] influenced the ROE in Iraq. '[N]o more force …than absolutely necessary' must be used, with 'firearms … only… used as a last resort', and, while the soldier's right of self-defence remains, he 'may only open fire against a person… committing or about to commit an act likely to endanger human life' where opening fire is the only available action to prevent this.[68]

The consolidated report into the deaths of Nadheem Abdullah and Hassan Abbas Said shows an over-reliance on the institutional memory from operations in Northern Ireland about the use of force that can be used at a vehicle checkpoint: in particular, the peacekeeping role in Northern Ireland differed from the 'warfighting' role that soldiers could anticipate in Iraq.[69] There were time-pressured, possibly contradictory training sessions on LOAC (in this instance, the IHL of international armed conflict) and the Card Alpha (relevant to peacekeeping missions and the use of minimal force).[70] 'Courageous restraint' (whereby soldiers are required to show restraint when they approach a potential security threat, instead of firing immediately in self-defence), and the 'ladder of response' (whereby an increasing level of force can be used if a threat remains and warnings are not heeded) are identified as complex issues requiring reflection and the development of further training.[71] Yet the Inspector concluded that deficits in training (both in LOAC and

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ibid.

First Witness Statement of David Hogan-Hern to the IFI, 17 February 2015, paras 13, 15-16; Ian Cobain, 'Ministry of Defence Holds 66,000 Files in Breach of 30-Year Rule' *The Guardian* (6 October 2013)

Report into the death of Captain Hassan (n 62) Appendix 3: Card Alpha – Guidance for Opening Fire for Service Personnel Authorised to Carry Arms and Ammunition on Duty, 55-56

ECHR, Article 2(2); Basic Principles on the Use of Force and Firearms by Law Enforcement Officials 1990

Report into the death of Captain Hassan (n 62) 55

Consolidated Report (n 58) 17.34

ibid., 17.13-17.16

ibid., 17.9-17.11

in relation to vehicle checkpoints) did not cause the death of Nadheem Abdullah,[72] who died from blows to the left side of his head, inflicted by British soldiers after he failed to stop at a checkpoint.[73]

The report into the death of Muhammad Salim makes no recommendations relating to IHL training, but the Appendices include a copy of the ROE for Iraq dated July 2003, which integrates Hague Convention IV and the Fourth Geneva Convention 1949. The 'use of minimum force' is authorised at numerous points in the ROE, including against those planning 'hostile act(s)' against British forces.[74] Restraint of detainees and internees at the point of arrest should also have occurred using only the authorised 'minimum force levels', and humane treatment is required, but not further specified.[75]

The report into the death of Ahmed Jabbar Kareem Ali found that soldiers who detained four looters then forced them into the Shatt al Basra canal on 8 May 2003. When Mr Ali went under the water and did not reappear, the soldiers left without trying to rescue him. The Inspector found that their actions caused Mr Ali's death, and that soldiers had not been 'trained in policing methods' nor how to deal with looters; and that the attempted punishment of looters through soaking them in water was commonplace within the Battlegroup.[76] As at September 2017, the second part of the report into the death of Ahmed Ali is still awaited. It will report on the practice of "wetting" looters, the flaws in training that may have contributed, and the extent to which the chain of command in the UK knew about this apparently broader practice of "wetting" looters.

The inquiry into Captain Hassan's death noted that the soldiers who shot him inside his car had not seen a published Guidance for the Use of Warning Shots, as this was produced a week after their pre-deployment training.[77] There are no findings on the IHL training received by the soldiers involved.

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ibid., 17.35
ibid.
Report into the death of Muhammad Salim (n 59) Appendix 8
ibid.
Report into the death of Ahmed Ali (n 60)
Report into the death of Captain Hassan (n 62) 4.56-.457

Systemic Issues Working Group

The Systemic Issues Working Group (SIWG) is an MoD body.[78] It has no inherent investigatory capacity. Its task is to review reports from IHAT investigations, 'judicial proceedings (e.g. public inquiries)', and (as and when they become available) reports from investigations into operations in Afghanistan,[79] with a view to 'identifying, reviewing, and correcting' what it terms 'systemic issues'.[80] The SIWG's working definition is:

> …areas where its doctrine, policy or training has been insufficient to prevent practices or individual conduct that breach its obligations under domestic and/or international law.[81]

and:

> …shortcomings of doctrine, policy, training, or supervision that result in unintentional breaches … *inter alia* situations where an individual has complied with policy and training, but these have been flawed; where policies issued at different levels have been contradictory, leaving individuals unable to determine whether their actions are correct; and where supervision has been insufficient to identify and address such confusion, or failure to understand and apply training correctly. Deliberate acts by individuals in knowing contravention of the law and of doctrine, policy or training are not systemic issues, and are punishable through the Service Justice System. [82]

This definition appears comprehensive, but can be questioned. It implies too glib a distinction between 'unintentional breaches' where policy, training or supervision is flawed, and 'deliberate acts… in knowing contravention' of law, training etc. It is possible for training and supervision to be flawed and for deliberate, knowing wrongdoing to coincide. The definition implies that deliberate criminal acts occur without a relevant, systemic organisational culture. This ignores the serious deliberate offences perpetrated against Baha Mousa and those detained with him; scholars' research on the findings of the Baha Mousa Public Inquiry;[83] and the research on military culture's relevance to the

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Ministry of Defence, 'Systemic Issues Identified from Investigations into Military Operations Overseas: July 2014' 2

Ministry of Defence, 'Systemic Issues Identified from Service Police and Other Investigations into Military Operations Overseas: September 2016' 1

ibid.

ibid.

ibid., n1

Huw Bennett, 'Baha Mousa and the British Army in Iraq' in Paul Dixon (ed), *The British Approach to Counterinsurgency* (Palgrave Macmillan 2012); Gerry Simpson, 'The Death of Baha Mousa' (2007) 8

development of soldiers' understanding of and willingness to comply with applicable law.[84] Focusing on training as simple teaching also ignores the role of training in addressing soldiers' willingness to comply with IHL in the heat of battle, when traumatised or angry by enemy attacks on soldiers' colleagues.[85] The reference to 'deliberate acts by individuals' recalls the now-discredited[86] rhetoric that 'a few bad apples' were responsible for violations in Iraq. The distinction is too glib in practical terms too. Flaws in 'doctrine, policy or training' might emerge from a court-martial prosecution of an individual for deliberate, knowing acts.[87]

Of the first three reports from the SIWG, released annually from 2014-2016, the first reviewed three reports of IHAT investigations, synthesising 19 possible 'gaps in doctrine, policy and training'.[88] The morally neutral term 'gaps' implies blameless omissions, blameless violations, and easy bureaucratic solutions. Yet the first SIWG report is wide-ranging and details a number of safeguards and reforms to military training and the specialised training of interrogators and Army medics. These are useful data both on the reforms implemented since the death of Baha Mousa, and on the SIWG's views as to the sufficiency of these reforms. For example, the first systemic issue (related to the fourth about pre-deployment assessments and a probationary first tour) was that interrogators should practise their reformed training. As a result, interrogators now have 'development exercises', and can gain experience through a 3 year 'extended posting'. They may attend training courses with the police and other government departments, and their interrogation courses are reviewed annually, with six-monthly inspections.[89] The second recommendation was that military training must ensure that captured persons must not be 'humiliated or verbally abused such that they feel physically threatened.'[90] As the judicial review in the *Hussein* case confirmed that the Challenging Approach did not violate

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Melbourne Journal of International Law 340; Andrew Williams, *A Very British Killing: The Death of Baha Mousa* (Jonathan Cape 2012); 6.4.2

Andrew M. Bell, 'Military Culture and Restraint toward Civilians in War: Examining the Ugandan Civil Wars' (2016) 25 Security Studies 488; David Lloyd Roberts, 'Teaching the Law of Armed Conflict to Armed Forces: Personal Reflections' (2006) 82 International Law Studies (Naval War College) 121; 3.2,

3, 3.5

3.5, 6.4.3

Timothy Wood, *Detainee Abuse During Op TELIC: 'A Few Rotten Apples'?* (Palgrave 2015); Timothy Wood, '"A Few Rotten Apples": A Review of Alleged Detainee Abuse by British Personnel in Iraq Following the Al Sweady Inquiry. Is There Still a Case to Answer?' (2016) 21 Journal of Conflict and Security Law 277

6.4.4

Systemic Issues, July 2014 (n 78)

ibid., Issue A1

ibid., Issue A2

Article 3 ECHR,[91] and as the MoD's Interrogation and Tactical Questioning policies and training have been amended, the SIWG believed this issue had been addressed.[92] Other systemic issues are less precise, implying a fundamental problem left uncorrected by new policy documents and instructions: e.g. 'clarity' is needed in interrogators' training in what is permitted and prohibited.[93] There follows analysis of reforms on preventing each of the 'five techniques',[94] and the need to prevent assaults on detainees.[95] The SIWG believes that changes to Tactical Questioning and Interrogation courses, including their legal briefings are both necessary and sufficient to prevent these. At one point, the SIWG infers that '[f]ailure to adhere to these prohibitions would require wilful disobedience by a large number of complicit individuals… including failures of leadership and failures of the inspection regime.'[96] Yet the existence of policy and training documents and an inspection system does not preclude failures of leadership and wilful disobedience.

In its subsequent report, the SIWG considers further instances of blindfolding (three of them in the Al-Sweady Public Inquiry), and one additional IHAT case where a detainee was denied water. In both instances, the SIWG considered the implementation of training reforms to be adequate to declare these cases 'resolved', implying that there would be no recurrence.[97] This ignores the potential tension between a regiment's institutional memory and the newly-implemented training reforms.[98] There is also a concerning path dependence in the SIWG's analysis. The SIWG considers 'resolved' the instances of blindfolding and the need to ensure that personnel understand 'recognised norms' (and not misunderstand what is required to maintain the 'shock of capture') because Sir Thayne Forbes declined to make recommendations on these issues in the Al-Sweady Public Inquiry, believing the MoD to have fully implemented the reforms required by the Baha Mousa Public Inquiry.[99] At the time of the first SIWG report in 2014, not all the reforms to IHL training were fully implemented.[100] A similar dependence on other investigations

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Hussein v Secretary of State for Defence [2013] EWHC 95 (Admin); *R (Haider Ali Hussein) v Secretary of State for Defence* [2014] EWCA Civ 1087

Systemic Issues, July 2014 (n 78) Issue A2

ibid., Issues A3, A5

ibid., Issues B6-8, B10-11

ibid., Issues B9, B12

ibid., Issue B11

Ministry of Defence, 'Systemic Issues Identified from Investigations into Military Operations Overseas: July 2015, Issues 9, 12, p.4

Victoria Nolan, *Military Leadership and Counterinsurgency: The British Army and Small War Strategy Since World War II* (I.B. Tauris 2011); Sergio Catignani, 'Coping with Knowledge: Organizational Learning in the British Army?' (2014) 37 Journal of Strategic Studies 30

Systemic Issues, July 2015 (n 97) Issues 9, 15, pp.4-5

7.3

is found in relation to issue 42, the 'need to ensure that those responsible for guarding captured persons are appropriately trained'.[101] The SIWG agreed that this issue should be reconsidered if further instances of assault on detainees arise, but reasons that 'changes to doctrine, training and monitoring arrangements have been implemented since 2003… and the Army Inspector's two inspections have verified their implementation.'[102]

There are encouraging aspects to the analysis: the recognition that military culture might risk 'inappropriate conduct', with reference to what it called a 'wall of silence' in the Baha Mousa Inquiry, and what the IFI termed 'self-serving' attitudes by those called to give statements in relation to the death of Nadheem Abdullah. The 'need to ensure that armed forces culture does not perpetuate inappropriate conduct' was retained for further consideration by the SIWG if similar situations are brought to its attention;[103] and was considered once more, in relation to the failure to act on an email to the Royal Air Force legal advisers that training in 2004 had recommended hooding, blindfolding and restraining prisoners using collar and rope. While the training has since been reformed, the failure to follow up on reported deficits in training was retained as a possible systemic issue.[104]

Despite the weakness in the SIWG's definition of 'systemic issues' and the lack of institutional independence from the MoD, the Systemic Issues Reports yield useful data on a range of policy and training reforms, and on the MoD's attitudes to the identification of systemic issues. The SIWG also shows some early awareness of the risks that military culture may perpetuate what it calls 'inappropriate [unlawful] culture'. Yet the tendency to assume an issue is resolved because of the absence of recommendations by the Al-Sweady Public Inquiry or because reforms have taken place ignores much of the research on IHL training and compliance. There is insufficient awareness of the gulf between training for understanding and training to promote a willingness to comply. The SIWG reports are not quite a missed opportunity, but they have significant shortcomings.

Systemic Issues, July 2015 (n 97) Issue 42, 10
ibid.
ibid.
Systemic Issues, September 2016 (n 79) paras 15-16

Operation Northmoor

Operation Northmoor was a brief investigation into several hundred claims of torture and other ill-treatment in British military custody in Afghanistan.[105] It was led by the RMP from October 2015, with the MoD announcing in July 2017 that the RMP 'had found no evidence of criminal behaviour by the Armed Forces in Afghanistan to date' and that 'over 90% of the 675 allegations made' had been discontinued.[106] Like IHAT, there is no transparent discussion on the methodology for discontinuing hundreds of investigations.

Operation Northmoor's launch was accompanied by a blog post on the MoD website, from the Armed Forces Minister, noting the government's manifesto commitment to 'ensure our armed forces overseas are not subject to persistent and sometimes ludicrous legal claims'.[107] In early 2017, the chair of the Defence Subcommittee, Johnny Mercer MP, had spoken of his disgust at the existence of an inquiry into troops' actions in Afghanistan, and called for Operation Northmoor to close.[108] In July 2017, the Royal Military Police was said to be investigating members of the Special Air Service (SAS) for the alleged murder of civilians and subsequent fabrication of evidence to suggest that the victims were Taliban insurgents.[109] Aside from this report, and the MoD's statement that 'less than 10' (we do not know how many) investigations remain, there is no further information available in the public domain about the status of the investigations, and how many, if at all, have been referred to the Service Prosecution Authority. The lack of transparency about Operation Northmoor means that this investigation cannot be the topic of research or other independent evaluation. It also means that the 'legal siege' rhetoric studied in 7.5 below is left unchallenged by facts relating to current investigations. MoD statements on Operation Northmoor are themselves examples of 'legal siege' rhetoric, and the Defence Subcommittee appears to encourage the MoD to close pending investigations. This is surprising, when Parliamentary scrutiny might be used to improve transparency.

Robert Mendick et al, 'Exclusive: Now British Troops Face Mass Criminal Investigation over Taliban Claims' *The Telegraph*, 21 September 2016

Ministry of Defence News, Defence in the Media, 3 July 2017

Minister of State for the Armed Forces, Penny Mordaunt MP, cited in MoD, Defence in the Media: 25 October 2015

Mendick et al (n 105)

Greg Wilford, 'SAS Soldiers "Suspected" of Covering up Potential War Crimes against Civilians' (*The Independent* 2 July 2017)

However, there was a single document which is a caveat to this general lack of transparency: a table of investigations released in 2014 as part of the MoD's weekly updates of materials released pursuant to FOI requests. This table details 36 allegations of 'mistreatment' of Afghan nationals by British troops.[110] The table covers incidents from March 2010 until January 2014, and includes the court-martial against Alexander Blackman and colleagues for the murder of a wounded insurgent in September 2011.[111] Of the other cases, one soldier was found guilty of assault occasioning actual bodily harm for stabbing an Afghan boy whose family refused medical treatment.[112] Three more soldiers were prosecuted at a court-martial for two incidents involving the sexual touching of Afghan children.[113] These were not apparently prosecuted as sexual assaults, nor as offences against children. One soldier pleaded guilty to two charges of conduct to the prejudice of good order and service discipline; while a second soldier pleaded guilty to a racially aggravated offence likely to cause harassment, alarm or distress. A third soldier was cleared of failing to perform a duty.[114] In a single other case, an airman was referred to the chain of command and fined for an incident of threatening behaviour and disobedience to lawful commands, by pointing his gun at a local civilian driver.[115]

This document has similar flaws in transparency to IHAT's pithy quarterly releases. In particular, it raises concerns as to the methodology used in deciding that there was insufficient evidence for a case to be referred to the Service Prosecuting Authority. References to 'insufficient evidence', '[a]fter carefully considering the case the Independent Service Prosecuting Authority decided not to prosecute', and 'no realistic prospect of conviction' appear in all other cases except for those where a complainant withdrew his allegations. There is no further detail as to the reasoning used, and the conceptual gap between the facts alleged and the finding of 'insufficient evidence' or a similar decision is startling. In several cases, minor injuries incurred at the point of capture lead to a finding of 'insufficient evidence'.[116] This raises the possibility (but not more) that charging decisions are less likely for minor assaults or what IHAT would consider 'lower-level ill-treatment'. This would be consistent with the trend in the Al-

[110] Investigations into allegations of UK Forces Mistreatment of Afghan Nationals (2014) released in response to an unattributed FOI request in 2014.

6.4.4

ibid., FOI Serial No 1, incident of 10 March 2010

ibid., FOI Serial No 21, incident of 12 December 2011

ibid.

ibid., FOI Serial No 36, incident of 26 January 2014

ibid., FOI Serial Nos 5,10, 11-13, 15

Sweady Public Inquiry to marginalise such findings, but it is not proven in this table of investigations.

In other more serious cases, there is no explanation for a decision not to prosecute. One soldier was reported for murder, having shot a local civilian several times while on sangar (lookout) duties. The stated outcome of investigation was: 'After carefully considering the case the Independent [SPA] decided not to prosecute', with no details on the reasons behind that decision.[117] In a further case, soldiers were referred to the SPA for the war crime of outrages upon personal dignity, for cutting off the fingers of enemy fighters killed in action, purportedly for forensic examination. The same outcome of allegedly careful consideration and a decision not to prosecute is stated.[118] Such a case raises issues either of deliberate IHL violations, and/or serious flaws in training and supervision, yet there is no contextual information available. There are significant flaws in transparency in this partial release of information on investigations on Afghanistan, and questions as to the methodology used by the SPA.

The lack of transparency in relation to each of these internal investigations raises questions about the government's understanding and willingness to comply with IHL's obligations to repress grave breaches, and to 'respect and ensure respect' for the Four Geneva Conventions 'in all circumstances'; its willingness to investigate alleged violations of Articles 2 and 3 of the ECHR, and to conduct a genuine investigation into alleged war crimes under the Rome Statute.

7.3 'Addressed' versus 'Implemented': Belated Reforms to IHL Training

The Baha Mousa Public Inquiry Report issued 73 recommendations, of which Recommendations 47-58 are highly relevant to IHL training, while Recommendations 59-66 and 67-69 relate to training on tactical questioning and interrogation, and training on survive, evade, resist and extract (SERE);[119] both of which bear on future prevention and compliance with IHL. The Report recommended that training on the handling of

ibid., FOI Serial Number 3, incident of 18 June 2010
ibid., FOI Serial No 8, incident of 21 March 2011
Baha Mousa Public Inquiry Report, Part XVII

Captured Persons (CPERS) be both practical and theoretical, conveying prohibitions and good practice; 'woven into the full range' of military training (an unacknowledged paraphrase of the ICRC's integration), and simulation exercises should not stop when a detainee is captured.[120]

Inconsistencies were to be removed from training materials; with the MATT 7 DVD amended and reviewed to ensure that the prohibition on the 'five techniques' is communicated as applying in all contexts, not merely interrogation.[121] The prisoner handling DVD used in training was to be amended to clarify the prohibition of the 'five techniques' and sight deprivation; and service personnel should receive guidance on differentiating between prohibited stress positions and the legitimate use of force to effect a search or arrest.[122] Both MATT 7 and mission-specific training should be amended to include information on the risks of positional asphyxia when a detainee is restrained.[123] Better recording was needed of those who receive annual IHL training throughout the armed forces, and training should be up-to-date in 'content… style and means of delivery', with 'different media', an avoidance of the 'stale and routine', and a balance between consistent delivery of training year-on-year, and 'some variety'.[124] References to maintaining the 'shock of capture' were to be removed from general training, with 'calm, neutral and professional' or 'firm, fair and efficient' preferred.[125]

To supplement MATT 7 training on LOAC, MATT 6 on Values and Standards 'should include discussion and role play scenarios' and 'avoid any risk of complacency' by including instances where UK forces have violated IHL.[126] The recommendations on tactical questioning and interrogation required an ongoing review of training materials, the removal of a hint of the then-under-review 'harsh' approach; the removal of the ambiguous word 'conditioning', and a preference for the removal of terminology relating to 'maintain[ing]' or 'prolong[ing] the shock of capture'.[127] SERE training materials should include a reiterated prohibition on the five techniques, a reminder to comply with MATT 7 training, and a warning that the training demonstrates violations of IHL which

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ibid., Recommendations 47-48
ibid., Recommendations 49-50
ibid., Recommendations 51-52
ibid., Recommendation 53
ibid., Recommendations 54-56
ibid., Recommendation 57
ibid., Recommendation 58

ibid., Recommendations 59-66

must not be perpetrated by UK forces.[128] SERE training must never involve the demonstration of 'any of the prohibited five techniques… conduct after capture or resistance to interrogation training'.[129] The latter two forms of training demonstrate violations of IHL in order to prepare troops for such conduct from enemy forces, and the Baha Mousa Public Inquiry Report found that troops receiving such training might believe the unlawful conduct to which they were exposed was permitted by IHL.

In its Closing Submissions to the Baha Mousa Public Inquiry, the MoD noted that some improvements to military training were under way. MATT 7 and MATT 6 training were being adapted, with a Royal Navy training package based on MATT 7 in development; DVDs had been updated, and scenario-based training for MATT 6 was being developed.[130] The MoD noted, following the Army Inspector's report of 2010, that further improvements were required, including 'whether unit commanders are in practice delivering the training', and on adequate recording of 'how many' soldiers undertake it.[131] The MoD accepted the need for further improvements in Tactical Questioning training.[132]

In total, the MoD accepted 71 of the 73 recommendations in the Baha Mousa Public Inquiry Report, initially accepting 72. When the Report was published, the then Defence Secretary acknowledged the 'shocking displays of brutality' from British service personnel, and that 'violent and cowardly abuse and assaults' as identified in the Report were the cause of Baha Mousa's death, with deficits in training as part of the context.[133] He accepted all the Report's recommendations with the exception of 'a blanket ban … on certain verbal and non-physical techniques'.[134] By the time of the Report's publication, the MoD had renamed and adapted the 'harsh' approach to tactical questioning to 'challenge direct' and 'challenge indirect', which the Court of Appeal found to have adequate safeguards to be lawful under Article 3 ECHR.[135] Subsequently, the Minister for the Armed Forces announced that Recommendation 44 (of external inspection of

ibid., Recommendation 67
ibid., Recommendation 69
Baha Mousa Public Inquiry, Closing Submissions of the Ministry of Defence in Module 4, para 17
ibid., para 18
ibid., para 20
HC Deb 8 September 2011, col 571
ibid., col. 572

R (Haider Ali Hussein) v Secretary of State for Defence [2014] EWCA Civ 1087; 6.5

military detention facilities, perhaps by Her Majesty's Inspector of Prisons) would also be rejected.[136]

There was a succession of statements before and after the Baha Mousa Public Inquiry Report's publication to indicate that reforms to IHL training were in progress or complete. None of them addressed individual recommendations relating to IHL training; these were blanket assertions. In March 2014, it was asserted that the MoD had 'taken action to consider and address all the accepted recommendations in the report.'[137] In a Government Response to a Defence Select Committee report shortly thereafter, the recommendations were said to have been 'implemented'.[138] In the MoD's Closing Submissions to the Al-Sweady Public Inquiry, the term 'implemented' is used again, with Recommendation 44 described as 'accepted and implemented', because consideration was given to the recommendation, but it 'did not lead to any policy change'.[139]

At first sight, there is a discrepancy between these assurances that training reforms were implemented and the summer 2014 decision by MoDREC to block the proposed surveys and interviews for this thesis on the basis that the February 2014 Operational Law Training Directive had *not* been implemented.[140] It was not until April 2015 that the Operational Law Training Directive had been fully negotiated with the chain of command and introduced without amendment into the MATT 7 instructional materials for 2015-2016.[141] While some aspects of the British Army's reforms to IHL training and some specific recommendations from the Baha Mousa Public Inquiry may have been fully implemented at the time of the Government's assurances to Parliament, the Defence Select Committee and the Al-Sweady Public Inquiry, these statements do not specify which recommendations had been so implemented. The use of the terms 'implemented' and 'addressed' interchangeably suggests some ambiguity. 'To implement' refers to putting a decision or plan into action, or fulfilling an undertaking; while 'to address' refers to 'think[ing] about and begin[ning] to deal with' a particular issue.[142] In the case of the Operational Law Training Directive 2014 itself (which is both broader and narrower in scope than the recommendations of the Baha Mousa Public Inquiry), 'implemented' was

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HC 27 March 2014, col 32WS
ibid.
Annex, Government Response to the Defence Select Committee (n 3) para 9
Sanders et al (n 4) paras 1096-1097
1.5
7.4.2, email communication with ALS, 8 April 2015, 14 May 2015 (on file with the author)
Oxford English Dictionary, 'implement' (v.); 'address' (v.)

inaccurate in spring 2014, when the document merely existed, and had not been negotiated with the chain of command prior to its implementation in MATT 7. These government assurances show little understanding that implementation is a continuum, worthy of theoretical study in its own right.[143]

This case study research has revealed a more nuanced position: minimal improvements to IHL training, prevention and compliance from 2004-2011, with more substantive (but still gradual) reforms from 2011-2015. The Aitken Report acknowledged that in 2004, pre-deployment training on detainee handling was improved, to include a specific prohibition on hooding.[144] In 2005, and again in 2007, two editions of a confidential Ministry of Defence Policy on Tactical Questioning and Interrogation: Support to Operations were produced.[145] Soldiers who completed conduct after capture (CAC) training before 2003-4 had to be 'revalidat[ed]' before they could conduct interrogation and tactical questioning.[146] In 2006, an Operational Law Branch was established, *inter alia* 'to improve the quality of legal advice in training' and to 'review… all material taught in both the adaptive foundation and on pre-deployment training.'[147] This led to the introduction of the first MATT, also in 2006;[148] but as 7.4.2 below notes, the instructional materials remained dated, and the testing materials elliptical and lacking in comprehensiveness. In 2010, the Army Inspectorate Review found 'no evidence to suggest that pre-deployment and in-theatre training are failing to prepare forces to carry out detainee handling';[149] but the materials used for these trainings remain inaccessible to independent research or Parliamentary scrutiny.[150] The period prior to 2011 features reactive, minimal improvements, and assertions from internal reports that all is now well with the British Army's IHL training.

Alexander Betts and Phil Orchard (eds), *Implementation and World Politics: How International Norms Change Practice* (Oxford University Press 2014)

Sir Robert Aitken, 'The Aitken Report: An Investigation into Cases of Deliberate Abuse and Unlawful Killing in Iraq' (British Army 2008) para 20

Ministry of Defence Policy on Tactical Questioning and Interrogation: Support to Operations, 2nd edition, 31 January 2007, cited in Aitken (n 144) para 21

ibid.

ibid., para 31

Defence Information Note (2006), establishing the Military Annual Training Test in the Law of Armed Conflict, cited in Aitken Report (n 144) para 25

Army Inspectorate Review into the Implementation of Policy, Training and Conduct of Detainee Handling (Army Inspectorate Review), 15 July 2010

7.4.3

These assertions on reformed IHL training are not dissimilar to the assertions before Parliament in the late 1950s and 1960s that the UK was implementing its obligations to disseminate the Four Geneva Conventions and integrate them into military training; assertions that Draper found unpersuasive.[151] The gradual reforms from 2011-2015 are more substantive, echoing Bennett's findings that the MoD did not begin substantive reforms to doctrine and training until the Baha Mousa Public Inquiry was under way.[152] The Consolidated Guidance to Intelligence Officers and Service Personnel was published in November 2011,[153] just after the Baha Mousa Public Inquiry Report. The 2nd edition of JDP 1-10 (2011) refers to the prohibition of the five techniques in all operations, implementing one of the recommendations of the Baha Mousa Public Inquiry. Issue 5 (2013) of the MATT 7 included audio-visual instruction on detainee handling that was a marked improvement on previous iterations. As 7.4.2 below will explore, this material alone implemented several but not all of the recommendations from the Baha Mousa Public Inquiry. Further turning-points include the Operational Law Training Directive of February 2014, its implementation in a comprehensively expanded MATT 7 in 2015,[154] and the 3rd edition of JDP 1-10 on CPERS, also in 2015. This document includes valuable personnel screening tools as a technique to prevent torture and inhuman treatment in British military detention; shows awareness of the risks of ill-treatment from racist epithets and moral disengagement; and urges command responsibility and an obligation to report instances of ill-treatment.[155]

Implementing reforms to the British Army's IHL training was far more gradual than the MoD's assertions to Parliament and public inquiries might suggest. The gradualism does raise questions: why did it take almost 12 years after the death of Baha Mousa fully to implement an ambitious pro-compliance approach to IHL training? The assertions that all accepted reforms from the Baha Mousa Public Inquiry had been 'implemented' were *prima facie* misleading, although many of them had been 'addressed'. The lack of specificity in these assurances speaks to a lack of transparency at the MoD about IHL

Letter from Gerald Draper to Mr Reid of the BRCS, 15 July 1961 (LHArch); 6.2

Huw Bennett, 'The Baha Mousa Tragedy: British Army Detention and Interrogation from Iraq to Afghanistan' (2014) 16 The British Journal of Politics and International Relations 211, 213, 226

Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees, November 2011

7.4.1, 7.4.2

Joint Doctrine Publication (JDP) 1-10 Captured Persons (CPERS) (3rd ed, 2015) paras 521-523, Annex 5A; paras 520, 504

training, and a willingness to rely on bald statements instead of precision. There is a lack of awareness that Parliamentary scrutiny and independent research might benefit the quality of these belated reforms. The following section delves into the gradual reforms to IHL training following the death of Baha Mousa, and the much more comprehensive recent changes to IHL training with the Operational Law Training Directive, and its implementation in MATT 7.

7.4 Analysis of Training Materials

Summary of Current LOAC Training

The UK armed forces' LOAC training policy is set by the Development Concepts and Doctrine Centre (DCDC), at the Defence Academy in Shrivenham;[156] with individual services detailing the knowledge that their personnel are expected to achieve. All recruits to the armed forces receive training in LOAC in Phase 1 of their training, and will receive continuation training in Phase 2 if their 'overall course length exceeds 6 months'.[157] New recruits to the British Army are trained in the law of armed conflict once during the 14-week phase 1 of initial, generalist training. This takes place at Individual Training Centre (ITC) Catterick, Army Training Centre (ATR) Pirbright, ATR Winchester, ATR Grantham (for recruits to the Reserves), and the Army Foundation College Harrogate (for recruits aged 16-17.5).[158] As infantry recruits progress to Phase 2, they may receive special-to-arms individual training in the LOAC relating to the weapons systems they will use, e.g. in the Royal Regiment of Artillery or the Royal Corps of Signals. At the Royal Military Academy Sandhurst (RMAS), there is a longer course for officer cadets. The LOAC training at RMAS is based on MATT 7, and there is a pass rate (not necessarily a first-time pass rate) of 100% for the LOAC module.[159] At RMAS, the final practical exercise, Operation Broadsword, incorporates IHL,[160] and the role of the ICRC in humanitarian assistance. It is established practice to allow a representative of the ICRC to attend as an observer, and to debrief officer cadets on their compliance with IHL.[161]

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[156] Ministry of Defence, 'Joint Service Publication (JSP) 898: Defence Direction and Guidance on Education, Training and Skills' 48

ibid., 49

British Army Training website, at: http://www.army.mod.uk/training_education/24432.aspx

Army Secretariat, reply to FOI request, 27 June 2014

Aitken Report (n 144) 30

ICRC, 'United Kingdom: future British Army officers learn about the ICRC' 16 November 2012, at: https://www.icrc.org/eng/resources/documents/feature/2012/11-16-united-kingdom-sandhurst-ihl.htm

Sandhurst also hosts a five-week course for officers in the Reserves, and a longer course for medics, lawyers and padres. The Head of ALS also asserted that judgemental training incorporates IHL, but there are no corroborating documentary sources available.[162]

Continuation training is the responsibility of each service: annual training is now mandated for the Royal Navy as part of Core Maritime Skill (CMS) 7,[163] while Hansard records from 2005 suggest this was not required then.[164] There is a train-the-trainers model in the Royal Navy and the Royal Marines, whereby the Command Team of each unit receives training from legal advisers, and are then expected to pass on their knowledge of LOAC to the Ship's Company via CMS 7.[165] Members of the Royal Air Force (RAF) receive continuation training in LOAC as part of Individual Reinforcement Training (IRT) (referred to as Common Core Skills Training in 2014)[166] and of the Generic Education and Training Requirement for those progressing through the ranks.[167] In the Army, soldiers and officers must receive LOAC training once annually, and pass all nine MATT each year, of which the seventh focuses on operational law (see 7.4.2 below). Continuation training in the Royal Marines is also based on the MATT, and includes LOAC.[168] This continuation training, in which individuals are assessed, is classroom-based; but there may also be collective training involving practical exercises, where whole units are assessed on their knowledge, including of IHL. This collective training is 'designed to identify and fix any systemic knowledge gaps at each level of command.'[169]

Each service sets its own policy for the knowledge of LOAC expected at junior and senior levels. The Operational Law Training Directive 2014 sets these criteria in 'formal training statements' for 'generic soldier' and 'officer'. ALS run training courses on LOAC in the Defence Academy's Joint Officers Tactical Awareness Course (JOTAC), and the Command, Leadership and Management course (CLM) at the Joint Services Command and Staff College. LOAC training for more senior officers, such as on the Advanced

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[162] Major-General Susan Ridge, 'From Suez to Syria: Modern Armed Conflicts and the Evolution of International Humanitarian Law' (panel discussion, Foreign and Commonwealth Office, 6 June 2017)

JSP 898 (n 156) 49

HL Deb 22 March 2005, col WA23

HC 10 December 2014, col 217077W

ibid.

JSP 898 (n 156)

[168] Assessment Plan for HM Forces Serviceperson (Public Services): Royal Marines Rifleman, Army Combat Infantryman and Royal Air Force Regiment Gunner, Annex A, 26 May 2016

Email correspondence from ALS, 31 October 2014 (on file with the author)

Command and Staff Course (ACSC) is arranged on a tri-service basis and integrated into the postgraduate-level syllabus, which is developed by King's College London. Until recently, LOAC and military ethics were taught together; risking consequentialist or just war theory arguments infecting officers' understanding of IHL.[170]

Pre-deployment and mission-specific training must include LOAC for all 'those deploying to a theatre in which LOAC may apply'.[171] This will be specific to the conflict and 'the nature of the operation', so the training is developed by Joint Force Command, and delivered by lawyers for each service.[172] Pre-deployment training is based on the ROE for each mission. The training materials are not publicly available as a result; and this also means that the MoD's classification of particular conflicts as either international or non-international armed conflicts is inaccessible to researchers. This is a significant limitation in the available dataset on the British Army's training in IHL, as 7.4.3 notes.

7.4.1 The Operational Law Training Directive 2014

Prior to the Operational Law Training Directive of February 2014, the British Army's approach to IHL training was perfunctory and time-limited. The Individual Training Directive (Army) 6, in versions from 1998 and 2003, provided that one period of 40 minutes annually should be devoted to knowledge of LOAC;[173] while 23.5 periods of 40 minutes, over 15 hours was devoted to weapons training. The training time devoted to learning about LOAC was half that given to learning about the risks of substance misuse.[174] In 1998, this annual training comprised a pamphlet on LOAC, supplemented by a 'brief explanation of the different roles of the soldier in peace support operations'.[175] Field exercises using scenarios which incorporated LOAC were a possibility for mission-specific/pre-deployment training.[176] In 2003, the annual training had expanded from the pamphlet, also to include an Aide-Mémoire in Annex B to the pamphlet on LOAC, a 15 minute film and 24 slide PowerPoint lecture.[177] Both Directives evidence a train-the-

[170] Defence Academy of the United Kingdom, Advanced Command and Staff Course (ACSC) http://www.da.mod.uk/Courses/Course-Details/Course/137 Discussion with Prof. Sir Adam Roberts, ISMLLW UK Meeting, May 2015

JSP 898 (n 156) 50

ibid.

Individual Training Directive (Army) (ITD (A)) 6 – The Law of Armed Conflict (LOAC) 1998, para 8; ITD(A) 6 LOAC 2003, para 7

ITD(A) 1998, 5-6

ITD(A) 6 LOAC 1998, para 8

ibid.

ITD(A) 6 LOAC 2003, paras 7, 13

trainers model, with Army lawyers available to provide advice and guidance, and non-lawyer officers (warrant officers, senior non-commissioned officers) training soldiers and junior non-commissioned officers within their unit.[178] As these officers would have been trained in brief annual sessions at earlier stages in their career, it is questionable whether their knowledge had sufficient depth to impart it to soldiers in their command. The train-the-trainers model would have been consistent with the narration of pamphlets and PowerPoint slides; and a passive, non-reflective form of learning. A pseudonymous former officer opined that the content of LOAC training was often boring, the train-the-trainers model unhelpful, and LOAC training somewhat resented. Trainers would be 'reading out a badly-scripted PowerPoint…half-heartedly as if the entire thing is a tiresome imposition standing between them and tea and toast.'[179]

A passive mode of learning is evident elsewhere in these Individual Training Directives. Personnel must merely 'attend' the LOAC training once a year, with their attendance recorded.[180] The training objectives similarly favoured passive learning. Instructors should '[d]escribe the effect of the Law of Armed Conflict on military operations'; 'formative and summative assessment' is mentioned briefly alongside 'an appropriate instructional environment' and resources under the 'conditions' for the training to take place, but the 1998 and 2003 Directives provide no centralised instruction on how to design these assessments, nor to ensure that they take place.[181] It is suggested that these Directives did not provide for assessment or evaluation, and merely mandated attendance at a brief annual LOAC training session.

Both these Directives were disclosed to the Baha Mousa Public Inquiry, and the 2003 Directive has an Annex with an unattributed, undated (approximately mid-2005) internal Army document about LOAC training reforms. Implicit in this document is the suggestion that the first deployment of troops to Iraq in Operation Telic did not receive pre-deployment training in LOAC, because such training is stated to have begun in the second phase, or Operational Telic 2.[182] The document has no identified author, but he or she does not know whether in-theatre guidance was given on LOAC in Operation Telic

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ITD(A) 6 LOAC 1998, para 10; ITD(A) 6 LOAC 2003, para 9

'Lawyers to Right of Them, Lawyers to Left of Them', *The Economist*, 9 August 2014, comment by Camberley4PQ (a pseudonym for a former Army lawyer)

ITD(A) 6 LOAC 1998, paras 5, 17; ITD(A) 6 LOAC 2003, paras 4, 16

ITD(A) 6 LOAC 1998, 2-6-1; ITD(A) 6 LOAC 2003, 2-6-1.

'Trg (*sic.*) Policy/Theatre Guidance on Handling of Prisoners', annexed to ITD(A) 6 LOAC 2003

1.[183] The author refers to a review of the Individual Training Directive on LOAC, and the future intention to test troops' knowledge of LOAC. Test papers were to be trialled in September-December of the year the document was written, and introduced in April 2006.[184] This would have been the beginning of the first MATT in LOAC. Despite the intention to introduce testing, there was little comprehensive reform of the content, duration or learning style encouraged by these Individual Training Directives. The training received by troops in the years following the death of Baha Mousa was inadequate, lacking an appropriate priority in the curriculum.

The Operational Law Training Directive, written in February 2014, is remarkable in its scope and commitment to LOAC training, and has several advantages. It is far broader than the Individual Training Directives that preceded it, and does not focus merely on individual continuation training (MATT 7). The 2014 Directive is relevant to all training sites that provide 'individual, collective or mission specific training'.[185] Only the specialist education of ALS officers is outside its scope.[186] There is emphasis on the 'command responsibility' to ensure that operational law training is implemented in accordance with the Directive, and the chain of command must ensure the completion and auditing of MATT 7.[187] The aim is to make LOAC part of general training, so it 'seeps in' and becomes 'second nature'.[188] This statement of ethos, the only citable part of an otherwise off-the-record meeting, is almost made out in the Directive itself, but the modalities for what a constructivist would term norm internalisation,[189] and what the ICRC would consider a slim version of 'integration',[190] are only partly achieved.

First: how is the training delivered? While there is much to commend in the range of norms that both soldiers and officers are expected to understand (these are set out in Operational Performance Statements in the Annexes to the 2014 Directive and discussed below),[191] the Directive selects a standardised, scripted approach for individual, continuation training, where (if an ALS lawyer is unavailable to deliver the training) non-lawyer officers read out verbatim notes to support PowerPoint slides: MATT 7 must be

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ibid.
ibid.
Operational Law Training Directive (OpLaw TD) February 2014, para 6
ibid.
ibid., paras 3, 9f)
Meeting, ALS, October 2014
1.4, 5.4
3.4
OpLaw TD, para 7, Annex A-D

shown in full and the script followed to ensure that the training objectives are met.'[192] Standardised delivery of training materials is an important safeguard against variation in the content delivered between training sites, but this scripting reinforces the British Army's primary reliance on a dissemination model of instruction. MATT 7, under the Directive, also retains the train-the-trainer model from previous Individual Training Directives.[193] Scripting and the training delivery by non-lawyers carries risks in relation to complex and often misunderstood IHL concepts. While much of the material for individual training is delivered visually, in PowerPoint slides and video format, literacy concerns may still be relevant to the development of soldiers' conceptual understanding, especially as IHL terms are polysyllabic. Literacy concerns are widespread in the armed forces, with many standard-entry recruits having few school qualifications and often experiencing unease in classroom settings. The UK House of Commons Defence Select Committee report found that the minimum literacy standard for armed forces recruits was that of a seven to eight-year-old child, yet of those recruited to the Army in 2012, 39% had an 11-year old's level of literacy. Only 3.5% were assessed to be at the minimum entry level.[194] With this in mind, scripting LOAC training suggests that complex concepts such as the IHL principle of proportionality will be heard but perhaps not understood by troops whose experiences of formal education has led to literacy difficulties or an unease in classroom settings.

The 2014 Directive's provision for collective training is more practical, better suited to soldiers with literacy difficulties, and encourages a more active form of learning, with informal evaluation of the training's effectiveness built in. Collective training '(both foundation and mission specific) [should] be structured to provide opportunities to confirm participants' understanding' and the unit's correct application of operational law.[195] Collective training is also the Directive's best attempt at the ICRC's 'integration'. Operational law scenarios should form part of collective training exercises 'whenever possible', and especially to practise and evaluate units' understanding and compliance with the law relating to CPERS.[196] While pre-deployment training is not the responsibility

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ibid., para 10
ibid.
Defence Committee, *The Armed Forces Covenant in Action? Part 4: Education of Service Personnel* (2013-2014)
17
OpLaw TD, para 8
ibid., para 9(g)

of ALS' Operational Law Branch, the 2014 Directive recommends that this training also include 'confirmatory exercises' about operational law.[197]

Second, what is trained? The Directive has comprehensive aims for LOAC knowledge. These are detailed in Operational Performance Statements and Formal Training Statements in the Annexes, and differentiated approximately by 'generic soldier' and 'generic officer'.[198] These are the objectives on which initial and continuation (MATT 7) training will be based.[199] Advice should be sought from Army lawyers about the relevant operational law issues in special-to-arms (weapons) training.[200] There is much to be commended about the breadth of knowledge in these Operational Performance Statements. There are 22 categories of required knowledge, with a significant majority of each category's constituent elements applicable to both soldiers and officers.

The difference between IAC and NIAC must be understood, alongside the principles of military necessity, humanity, distinction and proportionality.[201] Both soldiers and officers must be able to identify military objectives and civilian objects; to act appropriately to all categories of persons (combatants, civilians, refugees); to understand and respond accordingly to civilians directly participating in hostilities and the concept of *levée en masse*.[202] Both soldiers and officers must be able to identify and abide by prohibitions on certain weapons, and understand perfidy and ruses, and the prohibition on using civilian shields.[203] They must understand and comply with rules on target identification, precautions and warnings before an attack and determine responsibility for ending an attack which might be indiscriminate. Civilian objects, cultural property, medical facilities, and work and installations containing dangerous forces must all be recognised and protected.[204] Rules on a range of protective emblems, white flags, truce and surrender must all be understood, and their misuse identified.[205] Soldiers and officers must both know how to differentiate a military objective and a civilian object, limiting attacks to

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ibid., para 12(a)(3)
ibid., Annexes A-D
ibid., para 12(a)(1)-(2)
ibid., para 12(e)
Operational Performance Statements and Formal Training Statements, categories 1-3
ibid., categories 4-5
ibid., categories 6
ibid., categories 7-8
ibid., category 9

military objectives only. LOAC protections must be given to civilians, medical and religious personnel.[206]

Rules relating to protected persons, including the wounded, sick, shipwrecked, and CPERS (prisoners of war, civilian internees, and other detainees) must be understood; and each of the five techniques are set out as prohibitions which must be understood. Soldiers and officers must both identify correct questioning and handover procedures for CPERS, and report abuse or death 'to the chain of command and Service Police' without delay.[207] These training requirements implement several recommendations of the Baha Mousa Public Inquiry. As such, they are reactive, and dependent upon the findings of one Inquiry, but the comprehensive training requirements in the Operational Law Training Directive dispel any concerns about selectivity in these reactive reforms.

There is an important progressive step towards linking military training in IHL with other laconic norms of prevention: individual and professional, criminal and command responsibilities must all be understood, including some basic international criminal law. Personnel must understand that they have the responsibility to intervene if a LOAC violation is in progress, and to recognise and report LOAC violations, war crimes, crimes against humanity and genocide.[208] Soldiers and officers must be able to identify an unlawful order, and to know that they must follow lawful orders while not following unlawful orders.[209] Warrant Officers and above must be able to '[r]ecognise what action should be taken in response to an unlawful command'. The training requirements to identify and act upon command responsibility are sensibly greater for officers than soldiers, who must also 'issue lawful orders, … [a]pply command responsibility for the actions of subordinates… [and i]nterpret state accountability for LOAC violations.'[210] Knowledge requirements on the use of force and ROE follow.[211]

Knowledge of human rights 'principles' applicable in armed conflict is also stipulated, but the knowledge required is imprecise and general. Soldiers and officers must recognise the framework of human rights law, to whom it applies, the 'implications of breaching

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ibid., categories 10, 13
ibid., categories 11-12
ibid., categories 13-14
ibid.
Training Performance Statement (Officer), para 15
ibid., categories 16-18

basic human rights principles', and must 'carry out the process of reporting human rights violations.[212] There is very little precision here: do 'basic human rights principles' refer only to civil and political rights, or to economic, social and cultural rights as well? If only the former, how are the 'basic … principles' identified? Only the Convention on the Rights of the Child is included in the Formal Training Statements: there is no mention of the ECHR, the HRA, nor the obligation in Article 10 of CAT to train anyone from 'civil or military' law enforcement, or anyone who would have custody of a detainee in the prohibitions therein. The UK is not yet a state party to the International Convention for the Protection of All Persons from Enforced Disappearance (CED), and enforced disappearance is absent from the Directive.

Yet, in a contrast of tone and substance to public statements by MoD officials and some military spokespeople, the co-applicability of IHL and IHRL is recognised as possible, particularly in non-international armed conflicts, but the parameters for co-applicability have not been fully settled.[213] Although this is far from an acceptance that IHRL always applies alongside IHL in armed conflicts (whether IAC or NIAC), this nuanced approach is more knowledgeable and less politicised than the opinions stated from Ministerial sources, and is a considerable advance on the position that IHL should apply alone in armed conflict, as a *lex specialis* that ousts any other branch of international law.[214] The comprehensive ambitions for LOAC knowledge and this nuanced approach to IHRL applicable in armed conflict begins to suggest that ALS is a distinct community of practice from those who hold the view that the armed forces are under 'legal siege', or that operational effectiveness is somehow undermined by the co-applicability of IHL and IHRL.[215]

The remaining categories require soldiers and officers to integrate their Values and Standards (MATT 6) knowledge and conduct with their LOAC knowledge, although how this integration will take place is not detailed in the Directive. For officer training courses, the Directive provides a requirement to understand the legal framework and offences

ibid., category 19
OpLaw TD, Annexes, 99, n 33
6.4.1
7.5

applicable to deployed operations, and to undertake military aid to government and civilian entities.[216]

The Directive implies by omission that LOAC consists of the law of IAC and belligerent occupation. It is silent on the law of NIAC, except for the requirement that soldiers and officers 'identify the difference' between IAC and NIAC;[217] and one reference to Additional Protocol II, which appears as part of a non-exhaustive list of LOAC treaties.[218] At first sight, this looks like a lack of precision; but on a second, contextual reading, it promotes IHL compliance. As the IHL of IAC offers more detailed protections than the IHL of NIAC, it speaks to the ambitions of the Directive's authors for comprehensive IHL training. Questions of conflict classification are the domain of pre-deployment, mission-specific training. The MoD will decide on the classification of a conflict, and will decide upon the customary IHL to apply as part of confidential ROE. The ROE will then be communicated in pre-deployment and in-theatre training. This leaves open the possibility that selected norms from the IHL of IAC will be applied to a NIAC as customary IHL, improving the protections granted to non-combatants as compared to treaty law alone. However, pre-deployment training materials are classified owing to their reliance on the ROE,[219] so this remains an unproven possibility only.

Third, what is the scope for recording and evaluating the training? Here, the findings are more critical. Each Training Delivery Authority should use the Operational Deployability Record (ODR) to record soldiers' and officers' LOAC training attendance, completion and test results.[220] Training sites must give annual reports on the training conducted to the Director of Operational Law at ALS, for the purposes of internal evaluation. This is supplemented by an external evaluation, using the 'Army SMART Evaluation Policy'.[221] The ODR's testing and training records will not yield data on the effectiveness of military instruction for each category of LOAC norm. This will be thin data only; a human resources approach to IHL training. Such an approach may help resolve the Systemic Issue flagged by the SIWG that some individuals might miss the relevant training,[222] but it will do little more. The procedures for internal evaluation also cannot establish an

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Training Performance Statement (Officer), categories 20-22
Formal Training Statements, category 2.2
Formal Training Statement (Soldier), n32
7.4.3
OpLaw TD, para 19
ibid., para 20, n22
SIWG, July 2015, Issue 52

individual soldier's learning norm-by-norm, or category-by-category; a problem that recurs in the recording of data from MATT 7. External evaluation is not external in the sense of an independent or transparent audit of the Army's IHL training.

Fourth, what of the timing of the Directive's publication and its subsequent implementation? The Directive is a belated response to the recommendations of the Baha Mousa Public Inquiry. There was a fourteen-month 'transition',[223] between the Directive's appearance and its full implementation in MATT 7,[224] during which time, ALS negotiated its implementation with the chain of command. Despite this lengthy period of negotiation, the Directive was implemented without amendment from its February 2014 version. The need for this negotiation exemplifies the limited power of the ALS to decide upon and ensure the swift implementation of necessary reforms to IHL training. More importantly for the UK's IHL compliance, it took 11 years and 7 months from the death of Baha Mousa in British military custody until the implementation of comprehensive reforms to the British Army's IHL training into annual continuation training.

Looking forward, the Operational Law Training Directive 2014 is ambitious in its commitment for comprehensive instruction in IHL. In its linkage of command responsibility and the recognition of unlawful orders, the Directive just begins to connect training and prevention. The Operational Law Training Directive successfully moves beyond the Army's limited and perfunctory approach to IHL training, and as such it represents a valuable step towards soldiers' and officers' understanding of IHL. Yet a dissemination model is retained for individual training, with practical scenarios in collective training attempting a slim sense of the ICRC's 'integration'. Observers cannot know whether understanding will be sufficient, and detailed knowledge retained unless data collection and evaluation processes are improved. As might be expected in a policy document, there are no references to insights from social psychology and compliance theory. No predictions can be made from the Directive alone as to the volitional aspects of soldiers' and officers' future compliance with IHL.

OpLaw TD, para 21

Email correspondence with ALS, 8 April 2015, 14 May 2015 (on file with the author)

7.4.2 Military Annual Training Tests on the Law of Armed Conflict

The MATT on LOAC has evolved from a perfunctory approach to initial and annual instruction and assessment in 2006-2011, not much improved from the training before Operation Telic in 2003; to a progressively more ambitious set of classroom-based and multimedia resources. The current MATT 7 integrates the requirements of the Operational Law Training Directive, includes relevant IHRL norms in the Modules on CPERS and the Use of Force, and now includes Investigations and Accountability.[225] Each year, all personnel must pass the first three Modules, while staff in deployable roles (including Reserves warned for operations) must also pass the fourth, on the Use of Force.[226] Soldiers receive almost three hours of training across MATT 7's four Modules.[227] These latest reforms to IHL training offer a comprehensive approach to classroom-based instruction, with video and e-learning tools to help soldiers who struggle with literacy or classroom-based instruction; while the emphasis on command responsibility and obeying only lawful orders begins to connect IHL training, prevention and compliance. The continuation of a train-the-trainers model offers unit 'ownership' of the materials, so that soldiers are trained by an officer they know, but runs the risk that that an officer merely reads the script, without clarifying misunderstandings on substantive IHL.

In 2006, LOAC training was combined with Values and Standards, Substance Misuse and Equality and Diversity awareness, with LOAC taught in a 22-minute video and tested in 10 multiple choice questions. [228] This was the first time LOAC knowledge was tested. [229] In 2008, LOAC was given its own MATT, but many of the multiple-choice questions reflected policy and not law, e.g. 'What is the main reason why you should always treat the local population humanely?' was correctly answered by 'It will help to win the battle for hearts and minds.' There is no reference to binding IHL, nor to the specific duties involved in 'treat[ing]' them 'humanely'.[230] The past papers broach the issues of unlawful orders and the prohibition on ordering that there be no survivors, but the multiple-choice

HC 21 March 2016, col 31271W

ibid., MATT 7 Issue 8 (2016) 3.2.1-3.2.11; MATT 7 issue 9 (2017), 3.2.1-3.2.11 (all MATT materials obtained by FOI request)

MATT 7 (2015-2017) Operational Law Policy Statement, 1.1, para 13

MATT 6 Answer Bank, April 2006

MoD, Aitken Review – Measures to Prevent Abuse on Operations since 2003 -Updated, submitted to the Baha Mousa Public Inquiry, 17 February 2010, 3

MATT 7 Operational Law Answer Bank 2008, q 23

format does not test depth of understanding or the ability to apply knowledge in diverse operational circumstances. Discursive, or scenario-based training and testing would be more helpful to teach these skills. The multiple-choice questions in 2009 and 2011 might have misled soldiers, for example a question about the purpose of LOAC included three wrong answers, of which the first, that LOAC is intended to 'Make war-fighting more difficult'[231] might be chosen by soldiers influenced by 'legal siege' rhetoric; while a 2011 question implied that ROE or the presence of medical personnel could authorise hooding prisoners.[232] In 2012, test papers included a useful gauge of soldiers' and officers' understanding of command responsibility and their duty to report violations, and a question to elicit misunderstandings of reciprocity.[233] Norm-by-norm data collection would have allowed units to track soldiers' misunderstanding.

The March 2013 Policy Update for the Military Annual Training Tests was the second turning point towards genuine, comprehensive improvements to annual training.[234] The Policy Update explains that from 1 April 2013, significantly updated DVD instructional materials are available,[235] including audio-visual material on CPERS and increased precision in the lecture materials for LOAC.[236] The 2013 lecture on CPERS precisely defines prohibited stress positions ('painful, extremely uncomfortable or exhausting to maintain'), the prohibition of hooding ('at any time and for any purpose'), and required humane treatment ('all CPERS must be protected from assault, abuse, and any other humiliating or degrading treatment')[237] to reflect the recommendations of the Baha Mousa Public Inquiry Report, but not quite to attain the standards in Article 17 of the Third Geneva Convention, in which prisoners of war who refuse to answer questions 'may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.'[238] The definition of 'humane treatment' does not expressly prohibit sexually degrading acts, perhaps reflecting an unwillingness to acknowledge the abuses perpetrated in Kenya, Iraq and elsewhere. Physical vulnerability is acknowledged more readily: '…some CPERS may be vulnerable persons, and special rules may apply

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MATT 7 Operational Law Answer Bank 2009, Year 2, q 1
MATT 7 Operational Law Answer Bank 2011
MATT 7 Operational Law Answer Bank 2012, q 7, 5
Military Annual Training Tests (MATTs) Policy Update, DTrg(A)/TrgPolPlans/25/1, 27 March 2013 (obtained by FOI request)
ibid., para 1
MATT 7 (2013) LOAC
MATT 7 (2013) CPERS
GC III, art 17

to them.'[239] The script on CPERS in the 2015 MATT 7 explains the risks for positional asphyxia and the need for medics to be available.[240] While this implements the recommendations of the Baha Mousa Public Inquiry, it sits uneasily with the clear definition and prohibition of stress positions in the audio-visual materials on captured persons from 2013 onwards, as there should be no risk of positional asphyxia from stress positions if stress positions are never used. The prohibition on verbal abuse is briefly acknowledged: 'CPERS must not be abused either physically or verbally….'[241]

Reciprocity features in relation to CPERS' nutrition and medical treatment. CPERS should have three meals a day; soldiers can ration detainees' water or food if that also applies to UK forces ('If you are on rations, then so are they.') [242] In the audio-visual materials, an actor playing a soldier is overheard saying (at the point of capture) 'D'you want some water?'[243] This instruction considerably improves the direction prior to 2004 to refrain from giving comforts to detainees, which was interpreted after the Battle of Danny Boy to permit the refusal of water.[244] If captured persons are more seriously injured than British personnel, 'they get treated first'. They should receive 'equivalent' medical treatment for British personnel and CPERS: 'it is about parity.'

Troops are reminded of their obligations to 'seek out ICRC' and give detainees the right to complain,[245] to protect POW from insults and public curiosity, [246] and of individual and command responsibility for IHL violations. [247] From 2016 onwards, training on CPERS has a practical component for individual and collective training. A CPERS Handling Drill must be included in basic and continuation training for all ranks, in mission-specific (pre-deployment) training and in-theatre training for troops who miss the pre-deployment training.[248] This is 'integration' in the ICRC's sense, and provides practical learning opportunities alongside the classroom-based approach in MATT 7.

MATT 7 (2013) CPERS audio-visual materials
MATT 7 (2015) CPERS PowerPoint
ibid.
ibid.
ibid.
6.4.3
MATT 7 (2013) CPERS
GC III, art 13
MATT 7 (2013) CPERS
Army Briefing Note, Introduction of the Captured Persons (CPERS) Handling Drill and Mandated Unit CPERS Appointments, 11 December 2015

The LOAC Module for the 2015 MATT 7 reflects the Operational Law Training Directive 2014. It is ambitious and scripted, using complex terminology, so the trainer (whether lawyer or not) may not be sure that individual service personnel understand all the terms of art. The script covers the distinction between IAC and NIAC; military necessity, humanity, distinction and proportionality in more detail than previous versions.[249] The train-the-trainers model will continue in most units, with ALS officers scripting the lecture material and non-lawyers delivering it verbatim.[250] This offers standardised training, limiting variation between training sites, but points of misunderstanding or gaps in knowledge may not be shared with ALS by those delivering the training. Non-lawyer trainers may not have sufficient knowledge of every aspect of MATT 7 to clarify when soldiers and officers under their command ask questions, but the instructors are 'encouraged to add emphasis' to the compulsory script 'with examples from practical experience.'[251]

The Module on the Use of Force is partly classed 'Official Sensitive', including those on the content of the Card Alpha carried by soldiers.[252] The unclassified sections explain 'offensive force' (governed by LOAC and ROE) and force in 'self-defence' (a soldier can open fire if he has an 'honest belief' that there is an 'imminent threat' to human life, [253] but 'once the threat stops, you must stop').[254] The legal basis for 'self-defence' is unspecified: it could be the standards governing peacekeeping missions,[255] domestic criminal law, or Art 2(2)(a) of the ECHR. The Module on the Use of Force does not teach soldiers how to differentiate between situations in which LOAC targeting applies and those in which self-defence rules apply.

Finally, the Module on Investigations and Accountability was apparently created for structural reasons, to move material already present in an over-long LOAC Module.[256] However, it has substantive impact beyond this, training troops in IHL's norms of prevention,[257] and clarifying the ICC's jurisdiction and that of national courts. The

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MATT 7 (2015), paras 3.1.6-3.1.7
MATT 7 Operational Law Policy Statement, 1.1, para 10
MATT 7 (2015), para 2.3
ibid., Operational Law, Policy Statement, 1.1, para 4
MATT 7 (2015) Use of Force, 3.2.4
ibid., 3.2.6
Daniel S. Blocq, 'The Fog of UN Peacekeeping: Ethical Issues Regarding the Use of Force to Protect Civilians in UN Operations' (2006) 5 Journal of Military Ethics 201
Email correspondence with ALS, 11 May 2017 (on file with the author)
4.3

Module emphasises the obligation to disobey unlawful orders (first asking for 'clarification or explanation'),[258] to intervene to end a war crime being committed by UK personnel ('if you judge it safe to do so')[259] and to report war crimes by UK personnel (reassuring soldiers that there should be no repercussions for doing so).[260] Ranks above lance corporal have command responsibility to ensure that subordinates understand their LOAC obligations; to report, and if necessary, stop war crimes committed by their subordinates. Module 2 begins to correct the view that only 'other' armed forces and armed groups commit violations of IHL; as recommended by the Baha Mousa Public Inquiry.[261] Briefly, it also addresses the risk of violations perpetrated through a sense of false reciprocity ('You are never allowed to breach the law just because the enemy has done so'),[262] although this can and should be emphasised to a greater extent in MATT 7.

7.4.3 A Note on Unavailable or Restricted Materials

Although FOI requests yielded past papers and recent policy documents, lectures and audio-visual materials for MATT 7, and a full version of the Operational Law Training Directive, there is much left inaccessible to the researcher. First, there are no data on pre-deployment training in IHL and mission-specific training following deployment, as these would integrate LOAC and classified ROE.

Second, there was a single redaction in the Use of Force lecture slides from the FOI copies of MATT 7 from 2014 and 2015, apparently because of an error in a lecture slide which implied that the proportionality calculus was set as a 'number of estimated civilian casualties and estimated damage to civilian objects'.[263] The correct phrasing, intended for inclusion in MATT 7 for 2016 was:

> The Targeting Directive adds specific policy constraints on WHAT effect the commander can have on a target: such constraints include limitations for collateral damage including civilian casualties.[264]

MATT 7 issue 9 (2017) 3.2.4
ibid.
ibid., 3.2.5
Bennett (2014) (n 152)
ibid., 3.2.3
Letter from the Army Secretariat to the author, 18 November 2015
ibid. (capitalisation in original)

This text implies a qualitative standard, or qualitative policy constraints perhaps underpinned with a numerical limitation on estimated civilian casualties. However, as the Targeting Directive is itself classified, it is impossible for a non-military researcher to parse the significance of this difference.

Third, even the ambitious Operational Law Training Directive and MATT 7 from 2015 onwards can illustrate only the *intended* understanding of IHL from those designing the training, not the depth of understanding of service personnel following these terminologically complex presentations. The ODR, which records serving personnel's record on the MATT, is inaccessible to researchers for good data protection reasons, and no data exist on how many new recruits have to retake MATT 7 during their Phase 1 training.[265] The Army Secretariat offered alternative data, the total volume of those starting and finishing Phase 1 Army training, but this is not informative as to the number of recruits who might fail, retake, and fail again the LOAC component of their training.

Fourth, as noted above, the ODR provides only pass/fail data for the nine MATT, so it is not fit for purpose as a norm-by-norm evaluation of soldiers' and officers' understanding of the training given.

Fifth (a related point), while a select few MATT 7 questions might gauge the volitional aspects of troops' internalisation of IHL, there are no centrally collected data on how troops respond, for example, to questions about disobeying an unlawful order.

Sixth, there is no publicly-available audit of personnel's understanding following practical exercises or simulations which integrate IHL.

Seventh and finally, while these documentary sources have provided 'thick' data as to the intended scope and content of the British Army's IHL training, and of its evolution from a perfunctory annual requirement to a genuinely comprehensive attempt at improving the Army's knowledge of IHL, this cannot substitute for in person (or *in vivo*) qualitative data from surveys and interviews, especially on the effect of the current climate of mistrust of lawyers, investigations and litigation on the Army's record in Iraq and Afghanistan. Without qualitative data, a researcher can neither prove or rule out troops' resentment of

[265]Letter from the Army Secretariat to the author, 30 January 2017

IHL or IHL training, any measurable effect of 'legal siege' rhetoric on their norm internalisation; nor of justification of violations even in the presence of a good understanding of IHL, a risk noted by the first ICRC Roots of Behaviour in War Study. MoD concerns that qualitative research may yield dated findings (where they relate to an older iteration of the MATT) or that soldiers might unintentionally reveal classified ROE training instead of LOAC training suggest fear on the part of an institution and a preference for secrecy, when these insights are needed to assess the British Army's current training in IHL.

7.5 Theory-Building: New Insights from the Case Study on Training, Prevention and Compliance

Limited Transparency

6.2 demonstrated gaps in the archive in relation to historic training in IHL,[266] 6.4.3 showed the MoD's sharply limited disclosure at the judicial review that preceded the Al-Sweady Public Inquiry,[267] while this chapter has demonstrated the MoD's institutional culture of limited transparency. IHAT's closure leaves questions unanswered about investigations that were grouped together and swiftly dismissed. Prior to this, IHAT's quarterly releases relied on minimal descriptive detail, and numbered ciphers were given to cases, making it difficult to trace allegations from earlier judicial review and civil proceedings and subsequent IHAT decisions.

While the IFI seeks and includes contextual detail on IHL training where it is available, the Deputy Head of the MoD's Disclosure Coordination Unit (DCU) cited workload concerns, disproportionate search results, and a history of retained hard copy archives (while others are destroyed if not deemed worthy of preservation) as reasons for paltry disclosure on specific pre-deployment training received by two regiments in 2003.[268] None of the search terms outlined in the witness statement referred to training in IHL or LOAC; some of the disproportionate search results were triggered by broader search terms relating to pre-deployment training. With such ineptly broad search terms, it is not

[266] Huw Bennett, *Fighting the Mau Mau: The British Army and Counter-Insurgency in the Kenya Emergency* (Cambridge University Press 2012) 82, n 92

R (on the Application of Al-Sweady and Others) v The Secretary of State for Defence [2009] EWHC 2387 (Admin), 2 October 2009 paras 2, 8-14, 30-44, 46-51, 65-67

First Witness Statement of David Hogan-Hern to the IFI (n 65)

surprising that the search results were large in number. This witness statement is further evidence of the MoD's enduring habit of limited transparency.

More than 66,000 files are thought to have been retained in breach of the 30-year rule at an archives site in Swadlingcote, Derbyshire; far more than the trove of documents belatedly released by the FCO in the 2011 Hanslope Disclosure.[269] The SIWG has similarly obscure methodologies, and the substance of investigations in Operation Northmoor were almost entirely concealed.

There was a *prima facie* contradiction between assertions to Parliament that IHL training had been reformed, and ASAC/MoDREC's decision in August 2014 to block qualitative research because the implementation of these reforms was incomplete. 7.3 found that the government's frequent assertions that IHL training had been reformed hid a more nuanced reality, of *de minimis* improvements to IHL training from 2006-2013, and greater attention to reform from 2013-2016. There was also a failing of Parliamentary oversight of reforms to IHL training and their implementation. On the contrary, the Defence Subcommittee takes the Baha Mousa Inquiry's finding of doctrinal gaps in relation to the prohibited five techniques at face value, implying that that was the sole cause of violations,[270] and that all reforms to training had been implemented. It called on the MoD to ensure that no service personnel are investigated by the IHAT, the ECtHR or the ICC for violations of international law committed when IHL training was flawed, and (in an approach that ignores the obligation to disobey unlawful orders) where personnel were 'unwittingly, at risk' of violating international law.[271]

Limited transparency and a lack of objective Parliamentary scrutiny make for an apologist narrative, in which training reforms are assumed to prevent future violations, and other causes of IHL violations are ignored. When reforms to IHL training are offered as an easy panacea, or a pretext to discontinue ongoing investigations, the conundrum between training, prevention and compliance becomes more apparent. Essentially, IHL training is forced to do greater explanatory and exculpatory work than it can.

Cobain (n 65); 6.2
Who Guards the Guardians? (n 27)
ibid., 42, 22

The MoD's record is more nuanced in relation to academic research. There are multiple gaps in the archival records on the existence and quality of IHL training. This may derive in part from instructions to destroy out-of-date training materials, which appear in each introduction to MATT 7.[272] While this removes the risk that outdated materials will be used in training, it also means that the quality of IHL training is lost to the archive. A welter of materials has been shared as part of FOI requests, but these do not include pre-deployment training materials, because the ROE on which they rely are classified. The decision to block qualitative research means that the perspective of soldiers and officers on their IHL training is lost to research, and the Army's own data collection processes do not record soldiers' and officers' understanding norm-by-norm, nor their willingness to comply with IHL. Where the scope for academic research is limited through bureaucracy or redaction, the perspective of the sub-state actor is lost and valuable compliance insights postponed. A resistance to transparency is a common trait in states' approaches to IHL. Indeed, transparency is obligatory in IHRL, but conspicuously absent in IHL.[273]

'Legal Siege' Discourse and its Implications

The Former Chief of the Defence Staff Admiral Lord Boyce spoke in the House of Lords in 2005 about the armed forces being 'under legal siege', not only from law but also from 'political correctness'.[274] He claimed that the chain of command was undermined by 'tortuous rules not relevant to fighting', and that officers' 'instinct to be daring and innovative is being buried under the threat of liabilities…'[275] The context of the remark seems to be a response to human rights lawyers, or in Lord Boyce's words: 'those who have no concept of what is required to fight and win;'[276] while the 'tortuous rules not relevant to fighting' are implicitly IHRL.

'Legal siege' rhetoric, and the related assertion that litigation against the armed forces causes uncertainty on operations or a 'fog of law',[277] are distinctively British ideas. They

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MATT 7 (2015), 1.1

Orna Ben-Naftali and Roy Peled, 'How Much Secrecy Does Warfare Need?' and Steven Ratner, 'Behind the Flag of Dunant: Secrecy and the Compliance Mission of the International Committee of the Red Cross' both in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (Cambridge University Press 2013)

HL Deb 14 July 2005, vol 672, col 1236

ibid.

ibid.

Thomas Tugendhat and Laura Croft, 'The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power' (Policy Exchange 2013); Jonathan Ekins, Jonathan Morgan and Thomas Tugendhat,

oppose civilian investigation and adjudication of the conduct of the armed forces and/or decisions made by the MoD, resisting accountability in international and domestic law.[278] They derive from political discomfort with the 'juridification'[279] of the military caused by the extraterritorial effect of the ECHR, and the availability of civil litigation under the Human Rights Act 1998 to challenge actions by the armed forces. Resistance to legal accountability remains, whether claimants are bereaved family members of service personnel,[280] or foreign fighters previously detained by British troops.[281] But 'legal siege', 'legal encirclement'[282] and the 'fog of law' are related to broader trends in states' responses to calls for accountability for international law violations, including 'Lawfare'.[283] As Vennesson and Rajkovic argue, states and 'transnational advocates' engage in a 'coercive language game', with states 'turn[ing] the table' on human rights advocates.[284] 'Legal siege' discourse also carries risks for soldiers' and officers' willingness to comply with IHL (the volitional, group aspect of norm internalisation), as it casts international legal processes as the enemy of operational effectiveness. In turn, this could limit troops' willingness to report violations they witness.

These approaches are characterised by overblown causal assertions, chiefly that the availability of civilian adjudication adversely affects operational effectiveness;[285] and by an institutional shock that this civilian adjudication is available.[286] Much of the discourse

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'Clearing the Fog of Law: Saving Our Armed Forces from Defeat by Judicial Diktat' (Policy Exchange 2015)

Tugendhat and Croft, (n 277) 11, n12, 12, recommending the repeal of the Crown Proceedings (Armed Forces) Act 1987 in relation to Crown Immunity

Anthony Forster, 'British Judicial Engagement and the Juridification of the Armed Forces' (2012) 88 International Affairs 283

Smith and Others v Ministry of Defence and other appeals [2013] UKSC 41 (Supreme Court of the United Kingdom)

Al-Waheed v Ministry of Defence; Serdar Mohammed v Ministry of Defence [2017] UKSC 2 (UK Supreme Court)

Christopher Waters, 'Is the Military Legally Encircled?' (2008) 8 Defence Studies 26

Charles Dunlap, 'Lawfare Today: A Perspective' (2008) 3 Yale Journal of International Affairs 146; Charles Dunlap, 'Does Lawfare Need an Apologia?' (Case Western University School of Law Frederick K. Cox International Law Center War Crimes Research Symposium 'Lawfare', 10 September 2010) Lisa Hajjar, 'Lawfare and Armed Conflicts: A Comparative Analysis of Israeli and US Targeted Killing Policies' (Issam Fares Institute for Public Policy and International Affairs, American University of Beirut, 2013); David Luban, 'Carl Schmitt and the Critique of Lawfare' (2011) 43 Case Western Reserve Journal of International Law 457; Christopher Waters, 'Beyond Lawfare: Juridical Oversight of Western Militaries' (2008) 46 Alberta Law Review 885; Stanley Cohen, *States of Denial: Knowing About Atrocities and Suffering* (Polity Press 2001)

Pascal Vennesson and Nikolas M. Rajkovic, 'The Transnational Politics of Warfare Accountability: Human Rights Watch versus the Israel Defense Forces' (2012) 26 International Relations 409

Tugendhat and Croft (n 277); HL WS 169, 10 October 2016, but cf. Lutz Oette and Elizabeth Stubbins Bates (2017), 'The Government's Proposed Derogation from the ECHR: Written Evidence submitted to the Joint Committee on Human Rights (Centre for Human Rights Law, SOAS, University of London)

Forster (n 287)

occurs in Parliament, on the occasion of the launch of the Al-Sweady Public Inquiry Report,[287] or when the then-government announced its intention to derogate from the ECHR in future significant military deployments.[288] Political partiality and poor reasoning also feature in the two reports on the 'fog of law' from the think tank Policy Exchange. The first of these objects to the abandonment of the common law doctrine of combat immunity, so that the Crown might be sued by service personnel for negligence or for damage to property or persons in armed conflict;[289] and secondly, to the eroded 'primacy' of LOAC given its co-applicability with IHRL. The authors argue that the latter 'constrains the ability of commanders to react…' [290]and affects soldiers' morale, but their premise is that members of the armed forces, and the Ministry of Defence as a whole, *should* be immune from accountability in civilian courts, because litigation against the MoD '…weaken[s] the defence of the realm… also a moral threat to the culture and ethos of the military'.[291] They call for legislation to remove the MoD from liability for corporate manslaughter, and to reinstate combat immunity.[292]

The second report blames judges for litigation against the British armed forces and calls for a wholesale derogation from the European Convention on Human Rights,[293] with no awareness of non-derogable rights in the ECHR. This call was subsequently endorsed by government policy,[294] with a planned inquiry into this policy by the Joint Committee on Human Rights prematurely concluded when Parliament was dissolved before the general election of 8 June 2017. 'Fog of law' discourse places the blame on lawyers and litigants for soldiers' confusion, without considering recent fundamental deficiencies in IHL training. In a similar way, Forster argues that 'juridification' has now led judges to arbitrate on issues previously based on trust,'[295] and that any 'rights-based culture' causes instability and flux, notwithstanding the necessary changes prompted by the Baha Mousa Public Inquiry. [296]

HC Deb 17 December 2014, col 1407
HL WS 169, 10 October 2016
Tugendhat and Croft (n 285) 11, n12
ibid.
ibid.
ibid., 12
Ekins, Morgan and Tugendhat (n 277)
HL WS 169, 10 October 2016
Forster (n 279) 295
ibid., 299, 295

Others question the veracity of these protests. For Waters, 'legal encirclement' is 'fear-mongering' and a 'failure of leadership' by the military, because 'warfighting' has received only 'light touch' intervention from civilian courts.[297] As Hampson notes, media reports consistent with 'legal siege' rhetoric 'conflate several objections to investigations', and the first Policy Exchange report on the 'fog of law' appears to object 'to any form of legal accountability.'[298] Wicks, Ziegler and Hodson conclude that government statements to the media about human rights cases (before domestic courts and at the ECtHR) are 'often misleading, uninformed and one-sided … alienat[ing] large sectors of the public from …judicial decision-making.'[299] Rowe sees the expansion of civilian jurisdiction to include the armed forces as a logical and principled application of the rule of law.[300] Similarly, Bennett concludes that 'juridification is happening because the old model of internal self-governance has been proven inadequate'.[301] The Defence Select Committee concluded that there was no evidence of the misuse of domestic or international law through litigation.[302]

'Legal siege' is related to but distinct from 'lawfare', or: 'the strategy of using – or misusing law', for good or ill;[303] or for specific anti-American ends.[304] Luban defines lawfare in its dominant, pejorative sense: 'accusations by non-state actors of war crimes by a powerful, modern army'.[305] Lawfare usually refers to dishonest allegations,[306] to maximise the pejorative connotation. In lawfare, but not in most UK accounts of 'legal siege' and 'fog of law', there are accusations of cowardice, or even perfidy-by-litigation: that non-state armed groups (including those designated as terrorists) use legal arguments instead of kinetic force. 'Lawfare', 'legal siege' and the 'fog of law' are related but distinct. All respond to the civilianisation or humanization of IHL,[307] to its dissemination

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Waters (n 282), 42-43

Françoise Hampson, 'An Investigation of Alleged Violations of The Law of Armed Conflict' (2016) 46 Israel Yearbook on Human Rights 1, 2, 4

Katja S. Ziegler, Elizabeth Wicks and Loveday Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (Hart Publishing 2015), chapter 25

Forster (n 279) 295, n 66

Bennett (n 152) 223

Defence Select Committee, *UK Armed Forces Personnel and the Legal Framework for Future Operations* (HC 2014-12, 931) paras 14-17

Dunlap (2008) (n 283)

Charles J. Dunlap Jr, 'Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts' (2001), cited in Luban (n 283), n3

Luban (n 283) 457

Michael N. Schmitt and Wolff Heintshel von Heinegg (eds), *The Implementation and Enforcement of International Humanitarian Law* (Ashgate 2012), xii

Theodor Meron, 'The Humanization of International Humanitarian Law' (2000) 94 American Journal of International Law 239

in the media and in civilian courts. All three express or imply counter-accusations to those who allege war crimes or torts against armed forces. However, while 'legal siege' rhetoric casts blame on foreign-born applicants, it does not make allegations of perfidy-by-litigation, but instead seeks to remove the availability of legal proceedings against the armed forces.

'Legal siege' reflects some aspects of Cohen's work on states of denial,[308] although this is a better account of the MoD's overall discursive approach to violations from Northern Ireland onwards. There is a combination of 'partial acknowledgement' (where some claims are settled, including in relation to the death of Baha Mousa), 'spatial isolation' (assertions that the armed forces as a whole are honourable, and there have been only a few 'bad apples'), 'self-correction' (assertions that reforms to training are all-solving and swiftly in place),[309] and also 'denial of the victim' (where assertions are made that the vast majority of claims are false).[310] However, 'legal siege' has a more targeted, anti-law message than Cohen's concept of denial. 'Legal siege' has the following possible consequences:

First, 'legal siege' might risk false dissemination, leading to mistaken perceptions about international law among soldiers and officers. In particular, it gives the impression that the prohibitions cast as 'human rights' are not (or should not be) applicable in armed conflict. The misleading impression is that the only international law alleged to have been violated is IHRL, and not IHL, whereas some norms (including the prohibition on torture and inhuman treatment as variously defined) are shared between these two branches of law. A strong separation of 'LOAC' and IHRL in this way risks defining applicable IHL as the conduct of hostilities only. The rhetoric can affect understanding, knowledge and recall of IHL.

Recent reforms notwithstanding, there is empirical evidence that soldiers and officers hold false perceptions about international law. Major W.G.L. Mackinlay found that commanders in all three forces, but especially the Army, had misconceptions about the International Criminal Court Act 2001 and its putative detrimental influence on

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Cohen (n 283)
ibid., 113-116
ibid., 109-112

operations.[311] These misconceptions were consistent with a further finding in Mackinlay's sample that commanding officers thought their existing international law training was inadequate. Perceptions about international law are part of the barracks culture in which IHL is taught and IHL norms internalised. However, legal discourse can be harnessed for compliance, instead of against it. If, *per* Stieger,[312] international criminal law can have an 'educative effect', potentially deterring and preventing future violations, then accountability mechanisms, including domestic litigation, prosecution and public inquiries have the potential to disseminate IHL and to serve as 'general deterrence'. These teachable moments are missed when legal siege rhetoric distracts citizens and soldiers from IHL compliance.

Second, even though 'legal siege' is primarily directed against IHRL, it *could* risk alienating soldiers and officers from all international law, including IHL. If law is cast as the enemy of morale or operational effectiveness, troops may not listen to legal norms communicated in their training. While this is a prediction without data to support it, there is strong explanatory force in the argument that recurrent failures in accountability and recurrent resistance to international law within any military force begets failures of prevention by undermining the legitimacy of the law being trained. Social learning theory and communities of practice can help explain the risk posed by 'legal siege' rhetoric to soldiers' and officers' willingness to comply. If investigations, civil litigation and public inquiries are deemed illegitimate, it is less likely that troops will report violations they witness. A discourse of justification might be a consequence of 'legal siege' and 'fog of law' rhetoric.[313] If soldiers see all law as an impediment to their safety, they might seek to justify unlawful orders, obeying authority; or submit to group pressures to violate the law. If commanders believe 'legal siege' rhetoric, they may take less seriously their duty to prevent, suppress and report breaches of IHL.

Third, the discourse of 'legal siege' and *ad hominem* responses to human rights lawyers operate as a silencing technique, casting litigation and public inquiries as threats to troops' safety and morale, while marginalising findings of ill-treatment or unlawful killings. It

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W. G. L. Mackinlay, 'Perceptions and Misconceptions: How are International and UK Law Perceived to Affect Military Commanders and Their Subordinates on Operations?' (2007) 7 Defence Studies 111

Dominick Stieger, 'A Steady Race towards Better Compliance with International Humanitarian Law? The ICTR 1995–2012' (2014) 14 International Criminal Law Review 969

Daniel Muñoz-Rojas and Jean-Jacques Frésard, 'The Roots of Behaviour in War: Understanding and Preventing IHL Violations' (2004) 86 International Review of the Red Cross 189

silences the horror of the violations that have been proven, and distracts attention from them. The rhetoric is also found when investigations are prematurely stopped.[314] The quality of Parliamentary scrutiny is undermined, as 'legal siege' and related assertions dominate. In the debate to mark the conclusion of the Al-Sweady Public Inquiry, lawyers were likened to a 'firing squad'.[315]

The involvement of the MoD in passing a 'dossier' to the SRA is a concerning trend with the executive attempting to influence professional disciplinary proceedings against claimant lawyers.[316] Government briefings against individual lawyers might have a chilling effect on the representation of clients suing the armed forces, and government action could be inconsistent with the UN Basic Principles on the Role of Lawyers.[317] During the proceedings against Leigh Day, there were allegations that the SRA used the MoD's interest in these cases to lobby the government for reforms.[318]

However, there are caveats. As Waters notes, '[i]t is difficult to know how widely the legal encirclement view is shared by officers or enlisted personnel.'[319] There are no data to prove that it affects norm internalisation as this section has hypothesised. Just because 'legal siege' discourse exists, it does not mean that all soldiers and officers think alike and agree without knowledge or nuance. Nonetheless, 'legal siege' rhetoric is one mechanism by which state responses to accountability processes might affect IHL training, the prevention of violations and compliance with IHL in armed conflict.

7.6 Conclusion to Part III

Findings

The case study illustrates the conundrum between IHL training, prevention and compliance, and offers new insights. Chapter 6's archival research revealed delayed implementation of the IHL training obligation, amid assertions that military IHL training was taking place. The UK resisted both the ICRC's involvement and the applicability of

MoD, 'Defence in the Media: 17 March 2017

HC Deb 17 December 2014, col 1407

[316] MoD, 'Defence in the Media: 17 March 2017; Owen Bowcott, 'Law Firm Leigh Day Cleared over Iraq Murder Compensation Claims' *The Guardian* (9 June 2017)

Jonathan Goldsmith, 'Unprotected by the State' *Law Society Gazette* (9 March 2015)

John Hyde, 'SRA Used Leigh Day Case to Lobby Government for Reforms, Tribunal Hears' *Law Society Gazette* (5 May 2017); 7.2

Waters (n 282)

IHL to conflicts in Kenya, Malaya, Aden and Northern Ireland. This led both to delays in the development of the law of NIAC, and to the UK's own delayed ratification of Additional Protocols I and II. From the 1950s, there were recurrent patterns of assertion in relation to military IHL training, of violations against detainees (especially in the prohibitions shared between IHL and IHRL), and of institutional resistance to investigations into those violations. Case law and public inquiries strengthened the findings in chapter 3 about the multi-causal nature of IHL violations, and of the causal role of military culture, moral disengagement and discourse about law and enemy forces in those violations. Deficient IHL training was relevant to the Camp Breadbasket and Baha Mousa cases, but testimonial injustice was a feature of the Al-Sweady Public Inquiry, despite findings of 'ill-treatment'. The Blackman case corroborates the distinction between understanding of IHL and willingness to comply; because Blackman knew that his actions were a violation of the Geneva Conventions, yet attempted to justify his actions and expected his colleagues not to share what they had witnessed.

Chapter 7 offers the first academic study of IHAT, the IFI, the SIWG and Operation Northmoor. Findings include limited transparency and the hurried closure of both IHAT and Operation Northmoor, but wide-ranging, contextual analysis by the IFI's account *inter alia* of the training given on the use of force. The SIWG inquires specifically into 'gaps' in training, but only as part of a flawed dichotomy between intentional IHL violations, and 'unintentional violations' caused by 'flawed' training or doctrine.[320] The rush to close by the hundreds pending investigations at IHAT and Operation Northmoor means that the prevalence of violations in Iraq and Afghanistan is unknown, with facts suppressed. As we do not know the extent of the violations, we cannot fully audit the training reforms needed fully to ensure troops understand IHL, and the change in military culture that is needed to address their willingness to comply.

As explored in 7.3, while the MoD repeatedly asserted to Parliament and public inquiries that the reforms to IHL training had been 'implemented' or 'addressed', in reality, these reforms were delayed, and were still in progress at the time of these assertions. Assertions as to reformed training mirror the earlier Parliamentary assertions that IHL training was taking place; assertions that Draper found to be misleading. [321] However, 7.4's analysis

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Systemic Issues: September 2016 (n 79)

Letter from Gerald Draper to Mr Reid of the BRCS, 15 July 1961 (received by Captain Liddell Hart on August 1961, LHArch)

of the Operational Law Training Directive and MATT 7 show that Draper's concerns are, finally, moot. The training materials aim for comprehensive instruction in IHL, with ambitious targets for troops' understanding. The multimedia and lecture materials on CPERS scrupulously implement the recommendations of the Baha Mousa Public Inquiry, and the new restructured Module on Investigations and Accountability explains and emphasises sanctions including prosecution for IHL violations, and goes some way towards instilling a duty to intervene and report violations witnessed. Yet there is insufficient attention to individual and social psychology; to the role of military culture, discourse about law and enemy forces; and the risk of violations committed in revenge or pursuant to false understandings of reciprocity. The training does not provide safeguards against each of Bandura's mechanisms for moral disengagement. It is detailed chalk-and-talk, a good faith comprehensive dissemination, which just begins to close the gap between IHL training, prevention and compliance. The new training materials only tentatively integrate IHL in the ICRC's sense, and they certainly fall short of the ICRC's broad, interdisciplinary approach to prevention. There is no information available on the extent to which IHL is integrated into practical or scenario-based training, merely a stated commitment that this is part of the ethos and requirements of the Operational Law Training Directive 2014. It is an open question to what extent IHL's inevitable terminological complexity is understood by soldiers who may struggle with literacy. Data collection systems are inadequate, with a failure to track norm-by-norm understanding as revealed by MATT 7 test results.[322] If these data were available, they would enable ALS to predict future areas of difficulty, to compare and audit specific training sites, and if necessary, to amend or rephrase training materials.

Predictions for Future Practice

There is a narrative arc between accountability processes, states' responses to them, and their willingness to emphasise reforms to IHL training as a panacea. Just as the MoD marginalised or resisted investigations into alleged violations, it asserted that proven IHL violations (such as the beatings and inhumane treatment that killed Baha Mousa) were caused by deficits in IHL training, and that reforms to that training would prevent similar violations in the future.[323] These assertions were accepted without question or scrutiny by

7.4.2

7.3

the Defence Subcommittee,[324] yet they force IHL training to explain and absolve more than is possible; neglecting the conundrum between IHL training, prevention and compliance. In the British Army case study, limited transparency, a perception that some norms are exclusively matters of 'human rights', and resistance to civilian adjudication of the armed forces are three durable preoccupations which are likely to continue.

Limited transparency was a feature of the concealed archives at Hanslope and Swadlingcote, and the destruction of materials relating to the Mau Mau rebellion;[325] just as it continues in relation to recent and current MoD investigations on Iraq and Afghanistan.[326] This is likely to continue. For accuracy, old training materials held by units are to be destroyed once they are superseded. This is consistent with gaps in the archive for future researchers. A related phenomenon is the failure of Parliamentary scrutiny where government officials asserted that reforms to IHL training had been 'implemented' and 'addressed' when these processes were on a continuum marked by ongoing negotiations.[327] This failure is predicted to continue unless it is expressly challenged.

While there is evidence of a continued rhetorical separation between IHRL and IHL, there has been a belated but genuine effort to integrate selected prohibitions from IHRL in IHL training, in particular the prohibition on the 'five techniques'.[328] Military instruction on these prohibitions will continue, as a bulwark against the recurrent torture and ill-treatment of detainees that marked UK state practice in IHL and IHRL in the late 20th and early 21st century. For these violations of the prohibition on torture and inhuman treatment, training reforms could constitute a guarantee of non-repetition.[329] Yet in the case study, this idealism is not borne out. Reforms following the Baha Mousa Public Inquiry were belated and reactive, finally correcting a manifest gap in training materials. Limited transparency in recent investigations, and the acceptance of simplistic assertions

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Who Guards the Guardians? (n 27)
6.2, 7.3
7.2
7.3
7.5, 7.4.2
Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, Principle 23 (e)

about the sufficiency of training reforms might prevent the scrutiny of other flaws in training and prevent subsequent reforms.

(iii) 'Legal siege' rhetoric, and its related concepts, are similarly durable; evidence of a lasting institutional suspicion of civilian adjudication of the armed forces, and of the extraterritorial application of the ECHR. The case study exemplifies a government's willingness to emphasise reforms to IHL prevention and compliance activities in response to selected high-profile accountability processes while endorsing an anti-law and anti-accountability rhetoric in Parliament and the media. However comprehensive the new Operational Law Training Directive, soldiers and officers will not understand where IHL converges with and diverges from IHRL. The risk is that service personnel will view all international law as a threat to safety, morale or the futures of their colleagues. If law (including IHL) is the enemy, troops may not listen to its norms.

The effects of this rhetoric on government policy are harder to predict. The Queen's Speech following the general election of 2017 made no reference to earlier announcements that the government intended to derogate from the ECHR before significant future military operations, nor to an intent, previously expressed, to replace the Human Rights Act with a British Bill of Rights.[330] From the IHL perspective, in February 2017, the bill on ratification of the Hague Convention on Cultural Property 1954 received Royal Assent.[331] Thus far, IHL training materials do not reflect the provisions of this Convention. It will take some years before its specific training requirements are fully integrated in initial and continuation training in the armed forces, and an amendment to the Operational Law Training Directive would be needed.

Cabinet Office and Prime Minister's Office, Queen's Speech 201, 21 June 2017
Cultural Property (Armed Conflicts) Act 2017 c6, 23 February 2017

Chapter 8. Conclusion: Solving the Conundrum

8.1 Findings and Contributions

What is the Conundrum between Military Training, Prevention and Compliance in IHL?

IHL should be disseminated as widely as possible, and integrated in military instruction or training,[1] but this is a simply stated norm, delegated to state discretion in a branch of international law that lacks transparent oversight and monitoring. The conundrum between training, prevention and compliance is characterised by: 1) causal uncertainty: deficient IHL training has been implicated in serious violations of IHL, but military culture, moral disengagement and discourse about law and enemy forces may be more powerful causal factors for IHL violations than ignorance of the law; 2) a predictive gap between communicated norm and subsequent behaviour; and 3) a distinction between the cognitive and the volitional – between soldiers' understanding, knowledge and recall of IHL, and their willingness to comply. Moynier's historic conviction that introducing the 'spirit' of IHL 'into the customs of soldiers and of the population as a whole'[2] would serve to prevent violations and ensure compliance is now in doubt. Dissemination is insufficient to create both understanding and willingness to comply with the law. The prevention of violations and compliance with IHL requires two further tasks, which IHL training alone may not achieve. They are: 4) the problem of how to build restraint in trained killers; and 5) how to implement contested norms in complex deployments.

How does a genealogy of the IHL training obligation explain the conundrum between military training, prevention and compliance? First, it reveals the durable assumption (at least from the 1860s-1980s) that dissemination and military instruction would prevent violations and ensure compliance with IHL in future conflicts. Second, it shows that states were willing to agree to laconic formulations of an obligation which was asserted to prevent violations, but they were unwilling to agree to criteria on how to implement the training, nor to a reporting requirement to ensure that dissemination and training was

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GC I, art 47; GC II, art 48; GC III, art 127; GC IV, art 144; AP I, art 83; AP III, art 7; CCW, art 6; CCW Amended Protocol II, art 14(3); CCW Protocol IV, art 4; CCW Protocol V, art 11; HCCP, art 25; Second Protocol to the HCCP, art 30; ICRC Customary IHL Study, rules 142-143

Gustave Moynier, *Compte-rendu des travaux de la Conférence internationale tenue à Berlin du 22 au 27 avril 1869 par les délégués des gouvernements signataires de la Convention de Genève et des sociétés et associations de secours aux militaires blessés et malades* (J.F. Starcke 1869) 74

taking place.[3] As a result, guidance on IHL dissemination and training was confined to non-binding sources, such as the ICRC Commentaries, Resolution 21 to the Diplomatic Conference of Geneva 1974-1977, and a Plan of Action annexed to Resolution 1 of the 27th RCRC in 1999.

Third, the evolution of the obligation in IAC reveals a problematic emphasis on dissemination from the Four Geneva Conventions onwards. The emphasis on disseminating the Conventions and their Additional Protocols 'as widely as possible' infuses an optional quality to the obligation, and implies that the same awareness-raising approach is sufficient for both civic education and military instruction. Yet Additional Protocol I strengthens the obligation with legal advice on IHL training, commanders' obligations to ensure their subordinates' knowledge of IHL, [4] and a requirement on civilian and military authorities to be 'fully acquainted' with Geneva law; [5] and from the 1990s, there is some increased specificity on IHL training on the protection of cultural property and weapons law.

Fourth, a genealogical approach reveals that the reference only to dissemination and not to military instruction in Article 19 of Additional Protocol II was part of the flurry to agree a consensus draft of the Protocol as a whole, and did not reflect the previous substantive debate on the provision.[6] Nor is this Article the last word on a military instruction obligation for NIAC. The armed forces must be instructed in Common Article 3's prohibitions as part of their IHL training, and Amended Protocol II to the CCW and the Second Protocol to the Hague Convention on the Protection of Cultural Property in Armed Conflict clarify that both these regimes apply to IAC and NIAC, their military training obligations included. One difference between IAC and NIAC relates to the temporal scope of the obligation for states as compared to armed groups. Civilian dissemination and military instruction obligations bind states in peace and war; with an obligation on armed groups to disseminate and to train their members in IHL triggered at the outset of a non-international armed conflict.[7]

2.1
AP I art 87(2)
AP I art 83(2)
1.2, 2.3
Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press 2012) 432

What questions are left unanswered by a genealogical analysis? Although the IHL training obligation persists in peace and war, the frequency of IHL training is not set by binding treaty law, and does not appear as a topic for diplomatic debate. A broad reading of treaty law and available databases on state practice and *opinio juris* can assist with this question, applying Lauterpacht's principle of effectiveness to elide the ambiguity in the IHL training obligation.[8] One risk of the laconic formulation of the IHL training obligation, and of the obligation on commanders to ensure IHL knowledge among their subordinates, is that some states might train only their officers and commanders, relying on *ad hoc* instruction through the chain of command.[9] This thesis has argued that where Additional Protocol I is ratified, civilian authorities including at a minimum the Prime Minister, President or equivalent, and office-holders at defence ministries and ministries of foreign affairs, and intelligence agencies, should receive IHL training on a par with the instruction offered to the armed forces. '[C]ivilian authorities' can evolve as the technology of warfare develops, so that the developers of unmanned aerial vehicles (drones) or autonomous and semi-autonomous weapons, and civilian or military operators should also be trained in IHL.[10] A similar principle applies to PMSC, where these are used, although the non-binding Montreux Document sets out IHL training for PMSC as a recommended requirement for contracts.[11]

While a genealogical analysis can set the parameters of IHL training in IAC and NIAC, it does not tell us if there is an obligation to train the armed forces in IHRL. At a minimum, troops should be trained in the norms shared between IHL and IHRL which apply during armed conflict, including the prohibitions on torture and inhuman treatment as variously described in both branches of law. Where a state has ratified CAT and CED, military law enforcement and troops who may have custody of prisoners of war, internees or other detainees should be instructed about these prohibitions and the obligations to prevent, investigate and/or report torture and enforced disappearance.[12] No binding treaty requires the training of military personnel in IHRL in general (IHRL lacks a *general* training obligation, with treaty rules on training in the prohibitions of torture and enforced disappearances only), but policy suggests the wisdom of training peacekeepers and troops

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Hersch Lauterpacht, *The Development of International Law by the International Court* (revised edition, Oxford University Press 1982)

Laurie R. Blank and Gregory P. Noone, 'Law of War Training: Resources for Military and Civilian Leaders' (2nd edition United States Institute for Peace 2013) 18, 24

AP I, art 83(2); 2.4

Montreux Document 2008, Good Practices 3(a), 10, 14 (e), 35, 63

CAT, art 10; CED, art 23

who will be deployed to complex or shifting asymmetric conflicts (akin to the 'three block war')[13] in the differential use of force in law enforcement situations.

Finally, while treaty texts focus on 'instruction', 'study' and being 'fully acquainted' with treaty texts,[14] with only selected treaties using the terminology of 'training',[15] classroom-based instruction is thought insufficient to the task of ensuring compliance with IHL.[16] Collections of state practice suggest an early trend towards combining classroom instruction and practical or scenario-based training in IHL,[17] but there are too few examples of state practice to ground a customary IHL obligation to include practical training as part of the IHL instruction obligation

How can it be solved?

Chapter 3 begins to solve the conundrum's causal uncertainty by demonstrating that that military instruction in IHL is juridically necessary (required by treaties and custom), empirically necessary (barring a coincidental or morally-motivated convergence between soldiers' conduct and the content of IHL where soldiers have no knowledge of IHL)[18] but empirically insufficient to prevent violations and ensure compliance. A range of cases demonstrate that a military culture that discourages the reporting of violations, or encourages unthinking obedience to unlawful orders is consistent with violations; while social psychological research demonstrates that moral disengagement and discourse about law and enemy forces may be more powerful causal factors for IHL violations than ignorance of the law. IHL training alone may be insufficient to build restraint in trained killers. Chapter 3 explains the gap between communicated norm and subsequent behaviour by integrating the fragmented literature on military training in IHL with insights from constructivism (specifically, norm internalisation by individuals and the role of communities of practice). Norm internalisation adds depth to the consensus that IHL training should be repeated, practical and discursive. The aim should be norms that are 'taken-for-granted'[19] by soldiers, officers, and their communities of practice or wider

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Charles Krulak, 'The Strategic Corporal: Leadership in the Three Block War' [1999] Marines Magazine

GC I, art 47; GC II, art 48; GC III, art 127; GC IV, art 144; AP I, art 83; AP III, art 7

HCCP 1954, art 25; Second Protocol to the HCCP, art 30; CCW Protocol V, art 11

ICRC Customary IHL Study, rule 142

Blank and Noone (n 9) 6

Janina Dill, *Legitimate Targets? Social Construction, International Law and US Bombing* (Cambridge University Press 2014) 9

Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 International Organization 887, 895

military culture. The ICRC's two iterations of 'integration' and its 'prevention' policy offer further depth, urging IHL's relevance to all aspects of military training and decision-making, and exploring how to attain adherence to IHL among members of armed forces and armed groups.[20] Standards to build soldiers' understanding and willingness to comply with IHL offer a starting-point for dialogue with states on their practice in IHL training.[21]

The genealogy of the training obligation explored states' willingness to agree to laconic, or simply-phrased norms of prevention without attending to how these norms interact and how they should be implemented. To explain this aspect of the conundrum, chapter 4 articulates where IHL training fits with other laconic norms of prevention, including the obligation to 'respect and ensure respect… in all circumstances'; the provision of military legal advisers; commanders' duties to ensure that their subordinates know IHL; command responsibility *inter alia* to 'prevent', 'suppress' and 'report' IHL violations; and the duty at the very least to clarify and if necessary, to disobey unlawful orders.[22] The chapter argues that a typology of IHL's procedural norms (of prevention, monitoring and enforcement) is overdue, that a greater focus on 'prevention' as a term of art in IHL, and an understanding of how these norms intersect will discourage states from seeing norms of prevention as discrete, discretionary obligations that are peripheral to substantive IHL. This should dissuade states from seeing military instruction as a tick-box requirement, as it is intrinsic to command responsibility, and the duty to disobey unlawful orders. This sketched theory of prevention for IHL is biased towards IAC and Additional Protocol I, but helps to explain the relationship between military training and the prevention of violations.

Seven distinctive aspects of IHL place it at the 'vanishing point'[23] of international law compliance. These distinctive challenges are its contested norms, which present particular difficulties for military training and have high stakes in terms of human lives; questions of conflict classification and applicable law; the co-applicability and convergence of IHL and IHRL; the challenges of interoperability where different states in a coalition differ in their interpretations or ratifications of IHL provisions; a strong disaggregation to soldiers, officers and armed group fighters; misunderstood reciprocity and the risk of violations

3.4
3.5
GC I-GC IV, art 1, AP I, art 1(1); arts 6, 82, 83, 86, 87, ICRC Customary IHL Study, rule 154; 4.3
Hersch Lauterpacht, 'The Problem of the Revision of the Law of War' (1952) 29 British Yearbook of International Law 360, 382; 1.1, 5.3

perpetrated in revenge; and disused or absent monitoring mechanisms (where some states have blocked the establishment of regular meetings of states). Chapter 5 contributes to an evolving body of work on compliance theory in IHL, by suggesting a sliding scale between state- and agent-focused compliance theories, noting the limitations of applying to IHL insights from general compliance theory on treaty ratification, regime type, and norm precision; and recommending a constructivist compliance theory for IHL which takes account of the individual soldier, officer and armed group fighter, and the community of practice in which they are trained. Constructivist accounts allow for norm contestation and flux, and for the potentially diffuse structures of armed groups. A focus on norm internalisation and communities of practice provides an account of the gap between communicated norm and subsequent behaviour, and of discourse about law and enemy forces within armed forces and groups. However, this is not a complete theoretical solution to the conundrum. Social psychological accounts are still needed to explain the role of moral disengagement in violations of IHL.

The critical case study of the British Army's training in IHL confirms aspects of the conundrum, and adds further insights. 1) Deficits in IHL training have been demonstrated: not only the delayed implementation of IHL training, but also a perfunctory approach, and historic failures sufficiently to instruct troops in the prohibitions of torture and inhuman treatment shared between IHL and IHRL. While these failures coincided with recurrent patterns of violations against those detained in British military custody, there is still uncertainty as to the role that these deficits in training have played in proven violations of IHL. Unlawful orders featured in the Camp Breadbasket and Baha Mousa incidents, as did a blatant moral disengagement; an unwillingness to report violations witnessed and to support those who raised concerns. The UK Government's tendency to vaunt recent, comprehensive reforms to IHL training as a panacea for future violations and previously deficient training as the cause of recent violations vests IHL training with greater causal power than it has. 2) There remains a predictive gap between communicated norm and subsequent behaviour. Without qualitative research on the effectiveness of training reforms, and norm-by-norm recording of soldiers' responses to annual tests on the law of armed conflict, training directives and test papers are the only data available. 3) These show what should be trained, and what should, ideally, be understood, but they do not give details on the military culture of units where the training takes place; and on whether there is a discourse about law or enemy forces that might

undermine the training. The *Blackman* case strengthens the distinction between

understanding and willingness to comply, supporting the ICRC Roots of Behaviour in War study's finding that moral disengagement and attempted justification of violations can occur in fighters who understand IHL.

The case study does not solve the perennial challenge of how to build restraint in trained killers, although the emphasis in new training materials on the humane treatment of detainees is a considerable improvement on the perfunctory training of the past. 5) The UK case study also reveals a recurrent resistance to the application of IHL to colonial conflicts, and to the development of the law of NIAC, followed by a resistance to the extraterritorial effect of the ECHR, and domestic prosecutions and litigation affecting the armed forces. The latter has yielded a 'legal siege' rhetoric which risks presenting law as the enemy of morale and operational effectiveness. However, the case study does not offer new insights on the distinct issue of how to implement contested norms in complex or asymmetric deployments. The case study also reveals a durable problem of limited transparency affecting both investigations and academic research; a tendency in military doctrine to conceptualise the prohibition on torture and inhuman treatment as 'human rights' and not both IHL and IHRL, and, linked to 'legal siege' rhetoric, a lack of even-handedness especially in the Al-Sweady Public Inquiry. Finally, it illustrates a narrative continuity between the UK's resistance to investigations, litigation and public inquiries, and a willingness to emphasise reforms to IHL training as a panacea for future violations. This uses the IHL training obligation as a rhetorical tool; a modern variant of the assumption that IHL training prevents violations.

8.2 Limitations and Impact

What is the potential and what are the limits of the proposed solution?

The conundrum has been articulated and explained, with four distinct contributions: a) standards informed by a genealogy of the IHL training obligation and a synthesis of the literature. These might lead to a rubric for states to report publicly to the RCRC meetings on their IHL training; b) a sketched theory of prevention that links the IHL training obligation with four other preventive norms; c) a constructivist compliance theory that takes account of the perspective of soldiers, officers and armed group fighters; and d) a critical case study which confirms several aspects of the conundrum while building new theory.

Yet problematising the relationship between IHL training, prevention and compliance is not in itself a solution. The causal contribution between IHL training and the prevention of violations can never be definitively settled. There is no counterfactual conflict, in which no IHL training takes place, for analytic comparison with those where IHL training does occur, however imperfectly. If a violation has not occurred, we cannot measure if it would have occurred but for training in IHL. Further, the sketched theory of prevention is skewed towards IAC regulated by Additional Protocol I; more theoretical work is needed on NIAC IHL.

Finally, the critical case study is rich, but its dataset is neither saturated nor free of availability bias. Archives are pre-sifted and incomplete; deliberately so given the retained MoD archive at Swadlingcote. IHAT and IFI records have suffered from this lack of transparency. Public inquiry data is not empirically probative: the evidence for each inquiry is trammelled by its own terms of reference, and the analysis is context-dependent; and, in the case of the Al-Sweady Inquiry, epistemically questionable. A dataset that focuses partly on investigations, courts-martial and public inquiries is biased towards those alleged or proven violations which have come to light. This reflects a systemic selectivity, where very few allegations of violations reach the public domain. Because focusing on violations alone causes selection bias, failing to count instances of compliance, [24] the case study triangulates data with plentiful training materials, but these focus on individual (not collective) training, with materials for mission-specific or pre-deployment training unavailable because the ROE on which they are based are classified. The qualitative study blocked by MoDREC in 2014 would have given the perspective of individual soldiers and officers, providing a thicker account of their understanding and willingness to comply with IHL. As for all critical case studies, this is a single case, which aims to provide a first test of theories and to yield new insights. It achieves this, but further, comparative research is needed thoroughly to explain the relationship between military IHL training, prevention and compliance.

Kai Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance' in Walter Carlnaes, Thomas Risse and Beth A. Simmons (eds), *Handbook of International Relations* (SAGE 2002) 540

Impact

Although states' resistance to transparent monitoring of their practice in IHL is a durable problem, there is some scope for the sharing of state practice on IHL dissemination and training at the 33rd Meeting of the RCRC in 2019. At that meeting, the results of the intergovernmental meetings pursuant to Resolution 2 of the 32nd RCRC will be reported.[25] Periodic voluntary meetings of states may be agreed. Also at the 33rd meeting, a range of states, the EU and NATO will report to the ICRC on pledges made at the 32nd Meeting,[26] which included specific commitments on IHL dissemination and training.[27] The standards built in this thesis are the first step towards a collaborative rubric on military training in IHL. They can be developed and reviewed by a roundtable meeting with military and ICRC officials, before the rubric is final. A pre-written reporting instrument would be more informative than a 'tick-box' approach and will be better for states' putative resource constraints than expecting states each to devise their own reporting document.[28] The aim would be to share research on IHL training with States, synthesising insights which are currently scattered in the literature; and for states to share best practice and future innovations on military training

8.3 Further Research

There are three avenues of further research. 1) The theories of prevention and compliance sketched or adapted in this thesis need to be supplemented by research on norms of prevention in Hague law, and in NIAC; and on communities of practice among negotiating states, and among civilian and military authorities who oppose accountability for alleged violations of IHL. 2) The findings of the critical case study can be strengthened or tested by qualitative research on the British Army's training in IHL. Now the Operational Law Training Directive has been implemented, MoDREC's temporal objection to the original research design should be moot. Ideally, this qualitative work

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Jelena Pejic, 'Strengthening Compliance with IHL: The ICRC-Swiss Initiative' (2016) 98 International Review of the Red Cross 315, 329-330

Elzbieta Mikos-Skuza, 'Dissemination of the Conventions, Including in Time of Armed Conflict' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press 2015) 597, 614

See the Pledges on IHL Dissemination or Training from Austria, Canada, Denmark, France, Japan, New Zealand, Norway, Spain, the EU and NATO (32nd International Conference of the Red Cross and the Red Crescent, December 2015)

Elizabeth Stubbins Bates, 'Towards Effective Military Training in International Humanitarian Law' (2014) 96 International Review of the Red Cross 795, 816

could form part of a comparative study on military training in IHL, drawing on the theoretical insights built in this thesis, and broadening the research questions to include the relationship between accountability processes and subsequent IHL training. 3) A further research project could consider the technological advances that challenge existing approaches to IHL training, including the implications of neuro-enhancement among soldiers,[29] and the programming of autonomous weapons.[30]

Military training in IHL, once assumed to prevent violations, instead makes a nuanced, variable and contingent contribution to compliance. It is dependent upon instruction and practical training, norm internalisation by individuals and groups, and a recognition that understanding, knowledge and recall of IHL are insufficient for future compliance unless there is also adherence or willingness to comply. IHL training is one component of the duty in Common Article 1 to 'respect and ensure respect' for Geneva law 'in all circumstances', of the duty to resist unlawful orders, and of command responsibility to prevent, suppress and report violations. Military training in IHL is neither a panacea for past breaches, nor a sufficient tool to prevent future violations.

[29] Adam Henschke, '"Supersoldiers": Ethical Concerns in Human Enhancement Technologies' Humanitarian Law and Policy (2017)

Jens David Ohlin, 'The Combatant's Stance: Autonomous Weapons on the Battlefield' (2016) 92 International Law Studies (Blue Book) 1

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Appendix

Table of Abbreviations

AP I	First Additional Protocol 1977
AP II	Second Additional Protocol 1977
AP III	Third Additional Protocol 2005
ALS	Army Legal Services
BRCArch	British Red Cross Archive
BRCS	British Red Cross Society
CA1	Common Article 1, Four Geneva Conventions 1949
CA3	Common Article 3, Four Geneva Conventions 1949
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984
CCW	Convention on Certain Conventional Weapons 1980
CED	International Convention for the Protection of All Persons from Enforced Disappearance 2006
CPERS	Captured Persons
DPH	Direct Participation in Hostilities
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms 1950
ECtHR	European Court of Human Rights
FCO	Foreign and Commonwealth Office
FOI	Freedom of Information
GC I	First Geneva Convention 1949
GC II	Second Geneva Convention 1949
GC III	Third Geneva Convention 1949
GC IV	Fourth Geneva Convention 1949
HCCP	Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954
HRA	Human Rights Act 1998
IAC	International Armed Conflict
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights 1966

ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IFI	Iraq Fatality Investigations
IHAP	Iraq Historic Allegations Panel
IHAPT	Iraq Historic Allegations Prosecution Team
IHAT	Iraq Historic Allegations Team
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
ISMLLW	International Society of Military Law and the Laws of War
ITD	Individual Training Directive
JDN	Joint Doctrine Note
JDP	Joint Doctrine Publication
JSP	Joint Service Publication
LHArch	Liddell Hart Archive, King's College London
LOAC	Law of Armed Conflict
MATT	Military Annual Training Tests
MoD	Ministry of Defence
MoDREC	Ministry of Defence Research Ethics Committee
NIAC	Non-international Armed Conflict
OPT	Office of the Prosecutor, International Criminal Court
ORDCG	Official Records of the Diplomatic Conference of Geneva
PMSC	Private Military and Security Companies
RCRC	International Conference of the Red Cross and Red Crescent
RMP	Royal Military Police
ROE	Rules of Engagement
SIWG	Systemic Issues Working Group

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