

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

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

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## I. INTRODUCTION

Intuitively, the laws of international armed conflict (hereafter International Humanitarian Law, or IHL) are meant to regulate inter-state action. As such, their very existence is puzzling: why would opponents bent on destroying each other's capabilities commit to and obey rules designed to limit their choice of targets, weapons and tactics?

Traditionally, answers to this question have been of two kinds. On the one hand, moralists regard IHL as being inspired by morality.<sup>1</sup> On the other, realists explain the evolution of the law on utilitarian grounds and compliance with it

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<sup>1</sup> The question of the morality of the laws of war is most intimately connected with the “just war” theory, see MICHAEL WALZER, *JUST AND UNJUST WARS* 127-132 (1<sup>st</sup> ed., 1977); See also, e.g., LARRY MAY, *WAR CRIMES AND JUST WAR* 3-8 (2007); On the moral approaches to law, see Gabriella Blum, *The Laws of War and the Lesser Evil*, 35 *YALE J. INT’L L.* 1, 39 (2010) (“From a deontological stance, the actions proscribed by strict IHL rules [...] are inherently repugnant, a violation of a moral imperative in the Kantian sense, independent of any cost-benefit calculation in any particular instance”).

as being elicited by the threat of reciprocal retaliation.<sup>2</sup> We contend that both answers address only part of the dynamics of warfare and are therefore only partially convincing. Morality was obviously an important factor in the promotion of IHL, especially by non-state actors. But it is difficult to reconcile morality with a law that is strictly reliant on state consent and based on state practice, often not reflecting the aspiration to strive for just war during battle, but rather the primacy of military necessity.<sup>3</sup> Nor can morality explain the codification process of IHL, which was dominated by military experts and government officials keen on promoting national interests.<sup>4</sup>

The prevailing “retaliatory” explanation of IHL makes more intuitive sense at first blush. The tit-for-tat scenario can be modeled as an indefinitely iterated Prisoner’s Dilemma and illustrated by real-life examples such as the trench warfare of WWI,<sup>5</sup> or specific stories concerning the treatment of prisoners of war during the two World Wars.<sup>6</sup> However, this explanation, too, does not

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<sup>2</sup> ERIC A. POSNER & ALAN O. SYKES, *ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW* 190-197 (2013) (suggesting that laws of war are possible in the first place and would be respected only under conditions of *symmetry*, namely when the rules give advantage to neither side, and *reciprocity*, namely the ability of the opponent to retaliate to prior violations). *See also* Eric A. Posner, *Human Rights, the Laws of War, and Reciprocity* 6 *LAW & ETHICS OF HUMAN RIGHTS* 147 (2012), Eric A. Posner, *A Theory of the Laws of War*, 70 *U. CHI. L. REV.* 297 (2003).

<sup>3</sup> Until very recently, and some argue even now, morality was subject to military necessity. On this tension between morality and international legal doctrine, see David Luban, *Military Lawyers and The Two Cultures Problem*, *LEIDEN JOURNAL OF INTERNATIONAL LAW* (forthcoming, 2012) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2054832](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2054832), and *see* discussion, *infra*, part II(4).

<sup>4</sup> In his speech at the Hague Peace Conference of 1899, Fedor Martens observed that “[t]hose who have caused the idea of humanity to progress in the practice of war are not so much the philanthropists and publicists as the great captains ... who have seen war with their own eyes”, *see* JAMES BROWN SCOTT, *THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES* 506 (1920) (hereinafter “proceedings”); GEOFFREY BEST, *HUMANITY IN WARFARE* 147 (1980) (“The law of war could not be developed at all without the assent of the generals and the admirals, and these were years ... when their power and influence were very great”). Best describes the Hague Peace Conferences as “conferences supposedly about peace, but much more obviously concerned with war” (see pp. 139-141); PERCY BORDWELL, *THE LAW OF WAR BETWEEN BELLIGERENTS* 112 (1908) (“it is fortunate that the [Brussels Declaration of 1874] was so largely the work of military men.”). Instructions for the government of armies of the United States in the field, April 24, 1863 [hereinafter “The Lieber code”] were also initiated by the military, *see* JOHN FABIAN WITT, *LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* 188 (2012). For further criticism of the moralist explanation *see* Posner & Sykes, *supra* note 2, 191-192.

<sup>5</sup> *See* ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

<sup>6</sup> One famous example began with the tying up by British commandos of numerous German soldiers they had surprised for the duration of their operation. In retaliation, Hitler ordered that all British prisoners of war in Germany be tied up, upon which the British government

withstand close scrutiny as the main explanation for the continued efficacy of IHL. To be effective, reciprocity requires that each side should have ample information confirming the opponent's intention and ability to comply with the law indefinitely. This condition is rarely met during combat. The noise of the battlefield typically induces adversaries to interpret their enemy's mistakes as intentional violations of the law and prompts them to retaliate in kind. More seriously, the shadow of the future is often quite narrow. For combatants actually involved in combat, each battle may well be their last; for their commanders, it may be crucial to eventual victory. This is especially true during the closing phase of a war: the losing side, with its back to the wall, cannot be expected to obey laws that guarantee its defeat; and the winning side, on the cusp of victory, is unlikely to be worried about reprisals for its own breaches of the law.<sup>7</sup> With such an endgame to be anticipated, cooperation based on an iterated Prisoner's Dilemma game will quickly unravel.

Moreover, it need be pointed out that the retaliatory tit-for-tat explanation misses many aspects of the dynamics of war that reflect coordination games such as Chicken or Battle of the Sexes rather than Prisoner's Dilemma. The Prisoner's Dilemma story cannot explain the codification process of IHL during the second half of the nineteenth century, which was characterized by pressure emanating from the *stronger* European nations to clarify the law, in particular the law of occupation. As in the classic Battle of the Sexes game, the weaker countries were far less eager to accept a law that would benefit their more powerful enemies, but they preferred *some law* that would constrain any future invader or occupier rather than *no law*.<sup>8</sup> As will be explained in this Article, other wartime situations reflect the Chicken game, where some parties have a dominant preference to abide by IHL regardless of their opponent's

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ordered German prisoners of war to be shackled, *see* ALFRED DE ZAYAS, THE WEHRMACHT WAR CRIMES BUREAU, 108 (1989). *See also* ALEXANDER GILLESPIE, A HISTORY OF THE LAWS OF WAR VOLUME 1: THE CUSTOMS AND LAW OF WAR WITH REGARDS TO COMBATANTS AND CAPTIVES, 146, 173 (2011) (detailing instances of reciprocal violations of the laws of war).

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

<sup>8</sup> Indeed, it was the reluctance of the latter group that delayed the adoption of a comprehensive treaty on IHL between 1874 and 1899, *see* EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 39-41, 45-46 (2nd Ed., 2012). Note that the law on occupation violates Posner's and Sykes's symmetry condition (*supra* note 2, *id.*), yet it was endorsed because the parties to the convention were engaged in a Battle of the Sexes game rather than in a Prisoner's Dilemma game. Similarly, the symmetry condition cannot explain initiatives of the *more powerful* armies to ban harmful weapons or types of ammunition that they had exclusively, such as the exploding bullets banned in 1868 (*see infra* note 76 and accompanying text).

choice.<sup>9</sup> In these scenarios, IHL serves as an effective tool to promote parties' self-interest. In this Article we argue that this self-interest, which is independent of the opponent's attitude toward compliance, is what explains the evolution and nature of IHL. This self-interest was met by the weaker states' gratitude for being granted *some* protection against evil rather than none.

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

In the Article we explain why a codified, specifically designed IHL is necessary for resolving hierarchical governance challenges more than horizontal relations between armies. We believe that this intricate internal dimension of warfare, which is largely missed by the traditional accounts of IHL and often disregarded by scholars of international law, provides an important key to an understanding of IHL's development and resilience since the mid nineteenth century. This Article looks beyond the veil of sovereignty and examines the interplay between the various domestic actors whose interests are implicated by war. Our rationale is informed by the observation that states engaged in armed conflict are not unitary actors, but rather complex institutions that include internal chains of command within the echelons of power, accountable to a civilian government and ultimately to the public.

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<sup>9</sup> See Part V, on asymmetric warfare.

To explain this counterintuitive hypothesis, we must begin by prying open the black box of “the state,” and examine the complex interaction between the civilian and military apparatuses seething beneath the veil of sovereignty.<sup>10</sup> Such an examination will reveal that the prevalent assumption that IHL is designed only to regulate inter-state relations is too simplistic. The map of the battlefield may show one state fighting another, but there are other less visible and more complex intra-state battles raging simultaneously between different domestic actors, each seeking to control the conduct of the army and shape the outcome of the war. As scholars of political science have long observed, controlling the armed forces, especially during war, is one of the most acute challenges to any government. In democracies, “[t]he most basic political question is how to . . . reconcile a military strong enough to do anything the civilians ask, with a military subordinate enough to do only what civilians authorize.”<sup>11</sup> This question leads to “an ineluctable and potentially dangerous tension between military force and constitutional government [which] makes for a vexing dilemma. Although raising and deploying armed forces may be indispensable for sustaining a secure environment for constitutionalist politics, creating a safe place . . . for military institutions [is] among the most troublesome challenges of a constitutionalist order.”<sup>12</sup> There is conflict not only between the high command of the armed forces and the civilian government that seeks to control it. Recourse to force creates conflicts between civil society and elected officials, between elected officials and military commanders, and between those commanders and combat soldiers. IHL is an external tool that is designed to address many of these internal conflicts.

These diverse conflicts can all be framed as principal-agent (P-A) conflicts, situations in which each “principal” (the public, elected officials, high command, respectively) necessarily employs an “agent” (elected officials, high command, combat soldiers, respectively) to further its goals and secure its

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<sup>10</sup> This is true not only in the IHL context. Like any complex organization, states promote policies preferred by those domestic actors who are more politically effective than their competitors. Hence, theories that are based on the assumption that somehow “the state” can have unitary preferences risk being unrealistic. Compare Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV 167 (1999) (focusing on the influence of interest groups on the shaping of international norms), with JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 4-5 (2005) (“we give the state the starring role in our drama [...] our theory of international law assumes that states act rationally to maximize their interests”); ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS* 121 (2008) (“Our basic rational choice assumptions imply that states will only enter into agreements when doing so makes them (or, at least, their policy makers) better off”).

<sup>11</sup> PETER D. FEAVER, *ARMED SERVANTS, AGENCY, OVERSIGHT, AND CIVIL MILITARY RELATIONS* 2 (2003).

<sup>12</sup> Mark E. Brandon, *War and the American Constitutional Order* in *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY* 11, 13 (MARK TUSHNET ed., 2005).

interests. The delegation of authority to engage in combat exposes the principal to the risk that the agent might act in its own interest rather than that of its principal.<sup>13</sup> “Agency costs” tend to be high during war.<sup>14</sup> The principals want to win the war, but they are also aware that it will be necessary to reestablish peace afterwards. The principals therefore fear that their agents might act too aggressively, undermining the principals’ long-term goals. Conversely, the military may have similar concerns when it is the civilian government that weighs only short-term at the expense of long-term interests, while soldiers, as mentioned above, are primarily concerned about their own survival during each engagement. “Agency slack” is high due to the opportunities for the agents to shirk with impunity during combat.

The principal can employ several measures to reduce such “agency costs” by, for example, monitoring the agent or imposing penalties for violations. But the high command’s ability to control low-ranking combatants is limited by incomplete information. The civilian government suffers not only from incomplete information, but also from lack of adequate expertise to assess it and a limited ability to restrain the military, if necessary.<sup>15</sup> When we carefully observe the multilevel dynamics of the battlefield we notice that societies and commanders invest considerable effort in managing the delicate interface within the echelons of military power. Soldiers should be motivated to risk their lives when fighting the enemy but, at the same time, to maintain discipline.<sup>16</sup> Soldiers determined to confront the enemy yet fearing for their

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<sup>13</sup> In this context, the military is no different from any other bureaucracy which may be framed as an agent of political principals. See generally KENNETH A. SHEPSLE & MARK S. BONCHEK, ANALYZING POLITICS: RATIONALITY, BEHAVIOR AND INSTITUTIONS 360-370 (1997); McNollGast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989).

<sup>14</sup> See FEAVER, *supra* note 11, at 4, 68. See also BRANDON, *supra* note 12, at 21, 22.

<sup>15</sup> One famous example is Israel’s first (1982) Lebanon War, during the course of which the Israeli Prime Minister was surprised to learn from an American envoy that the IDF had just invaded Beirut. It turned out that the IDF Chief-of-Staff and the Minister of Defense had decided to defy the PM’s clear orders: Shlomo Nakdimon, *Begin’s legacy / ‘Yehiel, it ends today*, HA’ARETZ (Feb.22, 2012, 4:51 PM) <http://www.haaretz.com/weekend/magazine/begin-s-legacy-yehiel-it-ends-today-1.414173>

<sup>16</sup> In the trench warfare of WWI, soldiers on both sides tacitly cooperated to lower their respective risks, and defied their respective commanding officers who tried to force them to fight. As Axelrod notes, “The soldiers became experts at defeating the monitoring system” (AXELROD, *supra* note 5, at 81-82). In the post WWII era several Western armies coached their soldiers to fear and hate the enemy out of their belief that portraying adversaries as evil and malicious created feelings that make killing easier, see DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY 4, 9-15, 28-29 (1995); RICHARD HOLMES, ACTS OF WAR: THE BEHAVIOR OF MEN IN BATTLE (1986). This approach sought to prevent the recurrence of the behavior of Allied soldiers during the two World Wars, most of whom balked at firing at the enemy even when attacked. See also

lives might be tempted to protect themselves at the cost of unnecessary harm to enemy combatants and civilians. Some military manuals reflect this by suggesting that breaches of IHL “have almost invariably been shown to have been the deeds of subordinates who have acted through ignorance or excess of zeal; they have more and more rarely been deliberate acts.”<sup>17</sup> Similarly, some manuals note that law is needed “to place a curb on the inflamed passions of the . . . soldiers.”<sup>18</sup> Empirical evidence collected from international armed conflicts around the world between the years 1900 and 1991 corroborates those statements. The data shows that most violations are perpetrated by low-ranking soldiers facing enemy combatants or foreign civilians. Indirectly, then, improving control of the military agent is the key to reducing the risk of unnecessary harm to civilians and combatants.<sup>19</sup> Small wonder that army commanders have long been promulgating military manuals to discipline their soldiers, since well before the rules became legally binding under international law. As Martens, the Russian architect of the laws of war, noted:

“The great captains . . . [b]eing obliged to place a curb on the inflamed passions of their soldiers . . . inaugurated a discipline in their armies, which was the source of the regulation of the usages of war.”<sup>20</sup>

Famously, Helmut von Moltke, the chief of staff of the Prussian Army, played down the value of international law for the regulation of warfare, though he emphasized that internal law, as well as “religious and moral education,” was the key to ensuring that “the gradual progress in morality [is] reflected in the waging of war.”<sup>21</sup>

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JOANNA BOURKE, AN INTIMATE HISTORY OF KILLING: FACE-TO-FACE KILLING IN TWENTIETH-CENTURY WARFARE 61-62 (1999).

<sup>17</sup> British War Office, *Manual of Military Law* (1914), p. 244, para. 52.

<sup>18</sup> Martens, in *proceedings*, *supra* note 4, *id.*

<sup>19</sup> James Morrow, *When Do States Follow the Laws of War?*, 101 AM. POL. SCI. REV. 559, 569 (2007); *See also* James D. Morrow & Hyeran Jo, *Compliance with the Laws of War: Dataset and Coding Rules*, 23 CONFLICT MANAGEMENT AND PEACE SCIENCE, 91, 106-109 (2006) (the treatment of civilians is the issue with the lowest level of compliance, whereas the rules concerning chemical and biological weapons have the best record of compliance) available at [http://sitemaker.umich.edu/jdmorrow/data\\_sets](http://sitemaker.umich.edu/jdmorrow/data_sets) (link to Compliance with the Laws of War) (last visited Sep 29<sup>th</sup>, 2012).

<sup>20</sup> *Proceedings*, *supra* note 4, *id.*

<sup>21</sup> Helmut von Moltke, the Elder, “On the Nature of War” December 11, 1880, in *DIE ZERSTORUNG DER DEUTSCHEN POLITIK: DOKUMENTE 1871-1933*, 29-31 (Harry Pross ed., Richard S. Levy trans., 1959) available at <http://www.h-net.org/~german/gtext/kaiserreich/moltke.html> (“I wholly agree with the principle . . . that the gradual progress in morality must also be reflected in the waging of war. But . . . Every law requires an authority to oversee and administer its execution, and just this force is lacking for the observation of international agreements. What third state would take up arms because one or both of two warring powers had violated the law of war [*loi de guerre*]? An earthly judge is lacking. In this matter success is to be expected only from the religious and moral



Not all armed forces, however, enjoyed the discipline of the Prussian Army of 1880. Many of them soon discovered that during armed conflicts, domestic mechanisms of control tend to fail. In this Article we submit that the most effective way for principals to overcome these constraints and secure their interests, especially in times of war, is to outsource part of their regulatory function to foreign and international actors, including even the enemy. That outsourcing operates to rein in the agents by invoking shared norms. Even though it may be costly, and reciprocity is not assured, principals who are worried about agency slack that could prove disastrous to long-term national interests are likely to prefer that the military conflict be regulated by international norms. Hence, our basic argument is that IHL reflects the attempts of domestic principals to create an effective means of monitoring and disciplining their agents.

Reliance on IHL and IHL-based institutions can reduce the agency costs prevalent in war. IHL provides several benefits over purely domestic rules such as military manuals and domestic prescriptions. First, by committing to international norms, domestic principals can tie their own hands in domestic bargaining and thereby preempt domestic opposition, such as a politically powerful military. Second, IHL can overcome monitoring and enforcement difficulties because the law can be interpreted and enforced by actors other than national principals. If the military agent breaches IHL, the victims (civilians and combatants on the enemy side), as well as neutral third countries and actors, such as the International Committee of the Red Cross (ICRC), can invoke the shared system of norms, and bring the information about violations to the attention of the principals.<sup>22</sup> This “fire alarm” mechanism can then be used by the principals to restrain their agents.<sup>23</sup> Finally, third-party enforcement can prove an effective and credible threat to agents that might otherwise disregard their principals’ commands.

Hence, we hypothesize that *ex ante* (before actual fighting) demand for IHL will be strong under the following cumulative conditions: (1) there is a likelihood that the principals’ goals may differ from those of their military

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

<sup>22</sup> Indeed, a major task undertaken by the ICRC, for example, is codifying and creating a shared interpretation of IHL, as evidenced in the commentaries to the 1949 Geneva Conventions and the Additional Protocols of 1977, as well as the restatement of customary law in JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005).

<sup>23</sup> McNollgast *The Political Origins of the Administrative Procedure Act*, 15 J. LAW ECON. & ORG. 180 (1999) (on the role of administrative law as providing a fire alarm to the legislature when the executive deviates from its mandate).

agents; (2) the costs to the respective principals of unilaterally monitoring their agents and enforcing compliance are relatively high; and (3) the agency costs are likely to be offset through reliance on information or enforcement provided by the opponent or by third parties, through the use of tools provided by international law.<sup>24</sup> The costs of externalizing the monitoring functions to the enemy (or to third parties, like the ICRC) could be substantial, and so the principals will rely on IHL whenever the P-A costs are expected to be higher than the costs of complying with IHL. If risk-averse principals anticipate *ex ante* that those conditions will eventually materialize, they have a strong incentive to invest in defining IHL.

At the same time, however, the principals will seek to retain sufficient discretionary space to enable them to violate the law with impunity should any of the three conditions not materialize during actual battle. Hence, the norms they prefer will be “optimally imperfect,”<sup>25</sup> namely fairly detailed primary norms coupled with escape clauses and weaker, vaguer secondary norms that address the consequences for violation of the primary norms.

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

## II. A PRINCIPAL-AGENT THEORY OF IHL

The theory of the P-A relationship is well known and requires only succinct reiteration:<sup>26</sup> Agency costs arise whenever one party to any social

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<sup>24</sup> Of course, there are significant costs involved in forming international law. Such costs may be negligible when several principals share the agency problem.

<sup>25</sup> On the concept of optimally imperfect international norms that provide room for decision-makers and informed interest groups to escape the obligation to comply with those norms, see GEORGE W. DOWNS & DAVID M. ROCKE, OPTIMAL IMPERFECTION? DOMESTIC UNCERTAINTY AND INSTITUTIONS IN INTERNATIONAL RELATIONS 4 (1997).

<sup>26</sup> For a general description of Principal – Agent theory, see Eric Posner, *Agency Models in Law and Economics* (2000) University of Chicago Law School, John M. Olin Law and Economics Working Paper No. 92. Available at <http://dx.doi.org/10.2139/ssrn.204872>; Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 309 (1976); Steven Shavell,

interaction (the principal) delegates authority to another party to that interaction (the agent) to act on the principal's behalf, and the principal is unable to ensure that the agent is acting in the principal's best interest. There may be several reasons why principals cannot control their agents effectively. The agent may have more information about the issue at hand (such as in a client-lawyer relationship); the agent may be operating in a location where the principal cannot monitor its actions; or the principal may be barred from intervening in the agent's actions or disciplining it by some external constraint like a law or regulation. P-A relationships are also extant in government activity, at various levels: between the voters and elected officials, between the legislature and the executive,<sup>27</sup> between the executive and the bureaucracy, etc.<sup>28</sup> In all of these relationships, the principals are concerned about the possibility that various agents might defy the principal's wishes and instead promote their own.

Because of the special character of the armed forces, as perhaps the strongest and most specialized of all bureaucracies, the political branches have even stronger reason to suspect that the military agent will deviate from its commands.<sup>29</sup> Like any bureaucracy, the military agent seeks to maintain its

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*Risk Sharing and Incentives in the Principal and Agent Relationship*, 10 BELL J. ECON. 55, 66 (1979).

<sup>27</sup> Barry R. Weingast, *The Congressional-Bureaucratic System: A Principal Agent Perspective (with Applications to the SEC)*, 44 PUB. CHOICE 147, 155-57 (1984); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 768 (1983). Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy? Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making*, 12 J.L. ECON. & ORG. 119, 163 (1996) (arguing that the interactions between the President and Congress can create more or less autonomy for agencies). Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 249 (1987).

<sup>28</sup> See Mark Atlas, *Safe and Sound Judgment*, 35 LAW AND SOCIETY REVIEW 699 (2001) (analyzing the delegation of environmental regulation from the federal government to states); Tracey E. George & Albert H. Yoon, *The Federal Court System: A Principal-Agent Perspective*, 47 ST. LOUIS U. L.J. 819, 820-22 (2003) (analyzing the federal courts system as a principal-agent model).

<sup>29</sup> Some political scientists have used the principal-agent framework to analyze civil-military relations, see, e.g. DEBORAH AVANT, *POLITICAL INSTITUTIONS AND MILITARY CHANGE: LESSONS FROM PERIPHERAL WARS* (1994); RISA BROOKS, *SHAPING STRATEGY: THE CIVIL MILITARY POLITICS OF STRATEGIC ASSESSMENT* (2008). The major work in this field is by FEAVER, *supra* note 10. In law there have been almost no attempts to use the principal-agent paradigm to analyze civil-military relations. One exception is Ziv Bohrer's work in which he examines the defense of superior order doctrine in criminal law from the perspective of P-A relations. As he demonstrates, the inherent conflict of interest between the principals and the army manifests itself in several types of situations that call for a set of responses. Ziv Bohrer, *The Superior Orders Defense—A Principal-Agent Analysis*, 41 GEORGIA J. INT'L & COMPARATIVE L. (2012, forthcoming).

discretion vis-à-vis its principals. As Feaver puts it, “regardless of what the military agent is asked to do, he would like to do it with the minimum of civilian interference and oversight.”<sup>30</sup> The challenge of controlling the military agent is particularly acute during armed conflicts, where the traditional domestic modes of controlling agents are inadequate. This Part outlines the theory for the function of IHL from a P-A perspective. It elaborates on the three conditions that create the demand for IHL: (1) the potential conflict of interest between the principals and their agents; (2) the high costs of unilateral monitoring and constraint of agents; and (3) the promise of reliance on third parties, including enemies, when invoking IHL. This Part concludes with an assessment of the relationships between the different motivations for IHL: morality, reciprocity and governance.

(1) *A Potential Conflict of Interest between Principals and Agents during Warfare*

War gives rise to clashes between the divergent interests and goals of the relevant actors – civil society, the political branches (hereinafter referred to collectively as “government”, although obviously there are internal tensions also within the legislative and executive branches), and the army (and, of course, tensions throughout the army’s echelons).<sup>31</sup>

There may be several sources of such clashes: the government may have longer-term or wider concerns than those of the army, which is focused on winning the battle at minimum expense in terms of personnel and equipment.<sup>32</sup> The government may be interested, for example, in its future relations with foreign civilians whom it will govern when the fighting is over, or in its long-term relations with other governments, while the army may play down such concerns. On the other hand, governments – particularly democratic governments that may fear losing the forthcoming elections – may adopt short-term goals, whereas the army, which is a repeat player in different arenas, might wish to maintain its own reputation in anticipation of future conflicts. There may also be clashes between the high command of the army and the lower ranks: in the past, both governments and armies have shown little respect for their own soldiers, exposing them to unnecessary risks,<sup>33</sup> while soldiers

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<sup>30</sup> FEAVER, *supra* note 11, at 64.

<sup>31</sup> *Id.*, at 57.

<sup>32</sup> *Id.*, at 63 and sources cited there.

<sup>33</sup> Among the notable examples are the Napoleonic wars (CHARLES ESDAILE, *NAPOLEON'S WARS: AN INTERNATIONAL HISTORY, 1803-1815, 472-485* (2007)) and the trench warfare of World War I, *see* ADAM HOCHSCHILD, *TO END ALL WARS : A STORY OF LOYALTY AND REBELLION, 1914-1918* (2011).

have sought ways to reduce their own exposure to risk in battle at the expense of the other side's civilians and soldiers, thereby potentially harming their own national interests. All of these are potential sources of conflicts of interest between principals and agents. Conflicts can also arise due to different assessments of the consequences of certain strategies.<sup>34</sup> For example, during both World Wars, the conduct of submarine warfare proved a bone of contention among the German government, foreign office, and navy. The government was concerned about the possible entry of the United States to the war, whereas the navy played down this worry and pressed for indiscriminate attacks on British merchant ships.<sup>35</sup> Below we describe in general terms the features of the most common conflict of interest, that between the elected government as the principal and the armed forces as the agent. Other, more specific, P-A conflicts will be described later in this Article.

Not all states and armies face the same P-A problems. Much depends on the relative strength of the army and its prospective role in future battles. Generally, we can expect higher agency costs to be associated with stronger armies, which may be expected to invade foreign territories and engage foreign populations. As Fedor Martens observed: "Discipline was all the more necessary in case of invasion of a hostile territory."<sup>36</sup>

By contrast, relatively weaker armed forces are not expected to invade other countries, therefore conflicts of interest with their principals over the management of foreign occupied territories are less likely, limiting the effectiveness of foreign civilians as a fire alarm.<sup>37</sup> Moreover, in the case of a weaker state fighting for its survival the interests of the government and the army become equally short-termed and thus aligned. This leads to the counterintuitive hypothesis – tested and proved below – that stronger armies have a greater interest in IHL and are more committed to complying with it, whereas weak states evince less interest in IHL and display less commitment to its observance.<sup>38</sup>

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

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<sup>34</sup> Armed forces are known to inflate the extent of national security threats, *see* FEATHER, *supra* note 11, at 63. *See also* ALLISON GRAHAM, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* (1971).

<sup>35</sup> DANIEL PATRICK O'CONNELL, *THE INFLUENCE OF LAW ON SEA POWER*, 46, 49 (1975).

<sup>36</sup> *Proceedings, supra* note 4, *id.*

<sup>37</sup> Until recently, weaker armies could perhaps engage in battle with enemy combatants, but could not harm the enemy's civilians in the rear.

<sup>38</sup> IHL itself is a result of a "Battle of the Sexes" game of draftsmanship: the weaker states opt for some law rather than none (*see supra* text accompanying note 8).

interests should lead to a limited demand for norms regulating the P-A relationship. Such an alignment of interests may explain the pervasive disregard of IHL during the greater portion of the two World Wars.<sup>39</sup> For this reason, as we argue below,<sup>40</sup> state executives seek optimally imperfect norms that enable them to dodge the law with impunity when they deem it necessary.

(2) *Inadequate Domestic Mechanisms for Controlling the Agents*

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

Theoretically, principals can try to overcome these two problems by relying on three domestic mechanisms, which we term here: the market response, the bureaucratic response, and the domestic law response. The market response relies on the gathering and dissemination of information by private actors such as the news media, civil society activists, or even the victims themselves, uploading their smart phone pictures to the internet.<sup>41</sup> The freedoms of speech and of the media usually yield at least some information to constrain the army.<sup>42</sup> Granted, to the extent that these actors have the means to monitor the army and report on its activities, the market response may serve as an effective fire alarm by providing timely and reliable information to the

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<sup>39</sup> GILLESPIE, *supra* note 6, at 169; MORTON W. ROYSE, AERIAL BOMBARDMENT AND THE INTERNATIONAL REGULATION OF WARFARE 131-32 (1928); Chris Af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War* 35 HARVARD INT'L L.J 49, 80-82 (1994). JAMES OWEN, NUREMBURG: EVIL ON TRIAL 55 (1966).

<sup>40</sup> See *infra* text accompanying note 62.

<sup>41</sup> Feaver thinks that “the most prominent fire alarm on defense policy is the news media”, but he acknowledges the weakness of the media, among others citing that the media is silent during war so as not to play into the hands of the enemy, see FEAVER, *supra* note 11, at 80, 83.

<sup>42</sup> YORAM PERRY, *The Media and the Military: From Collusion to Collision*, in DEMOCRATIC SOCIETIES AND THEIR ARMED FORCES: ISRAEL IN A COMPARATIVE CONTEXT 184 (Stuart A. Cohen ed., 2000) (claiming that the Israeli media has moved from cooperating with the government to criticizing it).

uninformed government (e.g., the information about Abu-Ghraib).<sup>43</sup> But media access can be restricted easily by the combatants, and the quality of the information provided may be low or distorted by the lack of clear markers distinguishing between lawful and unlawful action. The media provide useful fire alarms only in egregious cases. Most importantly, media coverage has only an ex-post effect, when it is already too late, whereas principals desirous of controlling their military agents require a set of *ex ante* restraints. Lastly, as Feaver notes, governments dread media reports that expose their own shortcomings and inability to tame the army, and hence prefer to obtain private information about their agents' performance,<sup>44</sup> which is exactly the kind of information that the ICRC provides.<sup>45</sup>

Alternatively, the bureaucratic response may consist of setting up competing military agencies that have a vested interest in checking and balancing each other. In his study of the relationship between civilians and the armed forces in the U.S., Feaver described the various bureaucratic ways in which the civilian principal controls its military agents by dividing the structure of the U.S. armed forces, creating interagency rivalries that allow civilians more control.<sup>46</sup> An informal bureaucratic response can be found in Israel, a country where army generals retire relatively early to go into political life, and as a result the army is almost always overseen by civilian leaders with a strong military background.<sup>47</sup> The weaknesses of this response are the potential collusion of the various agents,<sup>48</sup> or the opposite worry that the different agents may hobble each other and undermine the collective effort. Finally, while bureaucratic responses may be efficient in reducing the gaps between the government and the army, they do not necessarily mitigate the agency costs incurred by the citizens.

Finally, the domestic law response consists of domestic statutes and military codes ("military manuals"). Those codes regulate the behavior of the agents, impose checks on them, or otherwise enforce compliance with the principal's goals through domestic legal institutions (such as courts and

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<sup>43</sup> Seymour Hersch, *Torture of Abu Ghraib*, *The New Yorker* (May 10<sup>th</sup> 2004).

<sup>44</sup> FEAVER, *supra* note 11, at 83.

<sup>45</sup> *See infra* notes 178 and accompanying text.

<sup>46</sup> FEAVER, *supra* note 11, at 81.

<sup>47</sup> On this phenomenon and its effects, see YORAM PERI, *GENERALS IN THE CABINET ROOM: HOW THE MILITARY SHAPES ISRAELI POLICY* (2006); MOSHE LISSAK, *Paradoxes of Israeli Civil-Military Relations: An Introduction*, in *ISRAELI SOCIETY AND ITS DEFENSE ESTABLISHMENT* 1-12 (Moshe Lissak ed., 1984).

<sup>48</sup> Especially when the head of the executive has no military background, as happened in the case of the IDF's invasion of Beirut, *see supra* note 15.

disciplinary tribunals), which expound and enforce such obligations.<sup>49</sup> In the context of armed conflicts, this response suffers from serious deficiencies relative to norms that are based on international law. First, experience suggests – as evidenced most recently in the aftermath of 9/11<sup>50</sup> – that in times of actual or perceived threat, domestic measures fail to accomplish their anticipated functions. Second, domestic norms are not shared across nations, and therefore victims and third parties may not be aware of them, limiting opportunities to invoke them against the agent. By contrast, universal norms and global institutions are more accessible to victims and third parties and therefore more likely to trigger the latter's responses. Third, domestic law does not impose similar constraints on the enemy. Other things being equal, even powerful armies would prefer universal restraints that also burden their opponents to unilateral ones. Fourth, recourse to international law may be preferable to state executives because they enjoy a greater degree of freedom from their respective legislatures when they represent their state in international bargaining over the contents of the law.<sup>51</sup> They can more effectively tie their own (and their military's) hands through an international treaty, which cannot be repealed unilaterally.<sup>52</sup> Moreover, international treaties leave room for discretion where

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<sup>49</sup> The first military manuals that are known date to the Byzantine Empire in the sixth century AD. By the eighteenth century most European powers had manuals addressing military tactics and behavior in battle (*see infra* note 99 and accompanying texts). The earliest example of a statute is the Mutiny Act of 1689 which protected the British Parliament from the king. *See* NORMAN DAVIES, *THE ISLES: A HISTORY* (1999).

<sup>50</sup> *See e.g.* JACK L. GOLDSMITH, *THE TERROR PRESIDENCY* at 183 (2009) (claiming that: “The President’s control over the military and intelligence agencies, his ability to act in secret, and his power to self-interpret legal limits on his authority create extraordinary opportunities for abuse. Presidents throughout American history have used the threat of war or emergency to expand presidential powers in ways that later seemed unrelated or unnecessary to the crisis”). *See also* JACK L. GOLDSMITH, *POWER AND CONSTRAINT* at 3-18 (2012) (describing how U.S. constitutional arrangements fell apart and presidential power was enhanced in the post 9-11 phase).

<sup>51</sup> Anne-Marie Slaughter, *Government Networks: The Heart of the Liberal Democratic Order*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 199, 217 (Gregory H. Fox & Brad R. Roth eds., 2000); *Id.*, *Agencies on the Loose? Holding Government Networks Accountable*, in *TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS* 521 (George A. Berman et. al. eds., 2001); Eyal Benvenisti, *Exit and Voice in the Age of Globalization* 98 *MICH. L. REV.* 167 (1999); Amichai Cohen, *Terrorism related adjudication*, in *RETHINKING THE LAWS OF WAR IN AN AGE OF TERRORISM* 167 (Amichai Cohen & Christopher Ford, eds., 2012) (domestic norms empower domestic enforcement institutions (courts, commissions of inquiry), which might narrow the executive’s discretion beyond a level that it deems optimal).

<sup>52</sup> Andrew Moravcsik, *The Origin of Human Rights Regimes: Democratic Delegation in Post War Europe*, 54 *INT. ORG.* 217 (2000); Robert Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 *INT’L ORG.* 427 (1988).



the executive deems fit.<sup>53</sup> In vibrant democracies whose political branches have different preferences, or when majorities are cyclical or unstable, the ability to converge on norms to control the state's executive and military agents may be limited. The executive may then prevail by invoking authority based on international law.<sup>54</sup>

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

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

### (3) *IHL as an Optimal Response to Principal-Agent Problems*

Thus far we have argued that for governments as principals, the costs of creating domestic control mechanisms over their agents are high: the private market cannot be relied upon; bureaucratic mechanisms may break down under the stress of law; and domestic legal institutions may not be as effective as international ones. IHL, in contrast, can at times be an effective – in fact, the most effective – tool for parties to military conflict to mitigate the costs associated with the P-A problems identified above. We explain the effectiveness of IHL as a tool for reducing agency costs from the perspective of

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<sup>53</sup> Downs & Rocke, *supra* note 25.

<sup>54</sup> John Fabian Witt describes an early example where Alexander Hamilton invoked IHL as a source of federal authority over the member states of the union, *see* John Fabian Witt, *The Dismal History of the Laws of War*, 1 UC IRVINE LAW REV. 895, 905-906 (2011).

the different principals (civil society, governments and militaries), and also why the same norms can benefit agents vis-à-vis their principals. International law is often used by domestic actors to stabilize their interrelationships and remove areas of regulation from domestic contestation.<sup>55</sup> The international regulation of armed conflict is yet another example of this practice, perhaps the most counterintuitive of them all.

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

(a) *Third Parties as Fire Alarms*

The use of third parties as fire alarms is an effective solution to the information asymmetry between the principal and agent. The victims of IHL violations are, by definition, the best informed actors that can report on violations committed against them. Naturally, the victims may not always be trusted, as they have an interest in exaggerating their damages. On the other hand, victims have an interest in providing accurate information about violations, because baseless accusations will deprive them of credibility. Moreover, even false alarms may be preferable to none, as they require the military to provide information which otherwise would have remained secret in order to counter the accusation.<sup>56</sup> More important are neutral states and international organizations like the ICRC, which can credibly monitor compliance and inform the principal of violations committed by its agents during military operations. Because IHL rules are universal, they can be referenced by actors regardless of their nationality. Because many of the IHL rules are clear, at least at their core, they provide information that can be

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<sup>55</sup> Examples include the adoption of regional human rights regimes, such as the European Convention on Human Rights (*see, e.g.*, Moravcsik, *supra* note 52) and the international trade law (*e.g.*, Robert O. Keohane, Stephen Macedo & Andrew Moravcsik, *Democracy-Enhancing Multilateralism*, 63 INT. ORG. 1 (2009)).

<sup>56</sup> For example, following accusations against Israel concerning operation “Cast Lead” in Gaza (2008-09), the IDF provided detailed information about its actions. *See Gaza Operations Investigation* (The State of Israel, January 2010) available at: [http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Gaza\\_Operation\\_Investigations\\_Update\\_Jan\\_2010.htm](http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Gaza_Operation_Investigations_Update_Jan_2010.htm)

assessed by persons who possess no military expertise, and little legal expertise—for the complaint to be communicated from the victim to the principal, it is sufficient that the complainant believes that the law was violated, regardless of whether there was, in fact, a violation. This is why the noise of war which undermines reciprocity does not diminish the value of fire alarms: the question of intentionality, which is crucial to reciprocity, is less relevant to a principal interested in whether its army is following the rules in practice.

The value of IHL as a fire alarm is reflected in the growing demand for it in areas where the affected population or third parties can sound the alarm bells for the principal to hear. If there were only a low likelihood that external actors would react to violations, IHL would not be an effective alarm and the demand for it would decrease. Similarly, if information about what transpired in the fighting zone were unlikely to reach the principals directly or through third parties, this fire alarm mechanism would be ineffective. Hence, principals whose armies may occupy foreign territories, where the local population is expected to react to violations and generate effective alarms, will have a greater demand for IHL norms than principals whose armies may only invade sparsely populated countries or regions where the population lacks effective means of invoking the law as a reliable alarm.<sup>57</sup> For similar reasons, demand will differ with respect to different arenas of combat. IHL will be in high demand in land warfare (other than in desert or arctic areas) because the victims and witnesses can sound the alarm bells, but in low demand in naval warfare where those who are affected have a low probability of survival and few witnesses are likely to be found.

(b) *IHL as a Credible Threat Against Agents*

International norms also provide for a credible threat by the principal against the agent.<sup>58</sup> Under the domestic law response outlined above, the threat of sanctions against violators might be discounted by the agent. Furthermore, the principal might hesitate to prosecute its own combatants to avoid undermining morale and suffering associated political costs. However, relying on third parties that can invoke IHL resolves these potential problems. One

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<sup>57</sup> In ancient traditions where the enemy was regarded as barbaric, or in Chinese culture, which posited China itself as the “central kingdom,” there was no such respect for other cultures, hence information originating from the enemy’s side would have had little impact. THE CHINESE WORLD ORDER: TRADITIONAL CHINA’S FOREIGN RELATIONS 2-3 (John King Fairbank ed., 1968). SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 168-169 (1996).

<sup>58</sup> Feaver *supra* note 11, at 85 (claiming that threats of punishment are an important part of civilian control over the military).

such third party could be the enemy, who is entitled to try prisoners of war for war crimes committed during the fighting.<sup>59</sup> Another is the courts of third countries exercising universal jurisdiction, or international tribunals. The credibility of the threat depends, of course, on the availability of such courts and on the willingness of the respective prosecutors and those behind them to actually indict violators. The availability of such may, in turn, strengthen the resolve of domestic institutions – courts, for example – to enforce the law.<sup>60</sup>

There may be tensions, however, between the “fire alarm” and “credible threat” functions of IHL. The fire alarm mechanism is focused on providing information to the principals, but does not necessarily trigger enforcement action by third parties.<sup>61</sup> In this sense, the “fire alarm” function of IHL is optimally imperfect:<sup>62</sup> for state executives, it is optimal to have *ex ante* constraints on combatants who cannot predict whether their violations will be prosecuted or ignored. Unable to predict their principal’s reaction to their violations of IHL, these combatants are likely to balance their aversion toward assuming physical risk (which might prompt them to kill unnecessarily) against their aversion to the risk of sanctions. The principals, however, retain their discretion and may decide ultimately to forgo the sanctions against their agents. The “credible threat” mechanism is different in this sense. The threat is “credible” because its exercise is in the hands of third parties who are beyond the principal’s control. Hence, principals will opt for the “credible threat” mechanism only if the fire alarm function is not sufficiently effective to deter the agents, and if deterring them is more important to the principal than losing its discretion over enforcement action. Obviously, the “credible threat” function constrains the principals, too, and limits their ability to issue instructions to disobey IHL. This might prove too costly for some principals.<sup>63</sup> The costs (to principals) associated with the credible threat mechanism explain the stunted

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<sup>59</sup> For example, the British Manual of Military Law of 1914 (*supra* note 17, at p. 302, para. 441), mentions only this sanction for violating the provisions of the manual.

<sup>60</sup> Amichai Cohen, *Domestic Courts and Sovereignty in THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY, SUBSIDIARITY* 265 (TOMER BROUDE & YUVAL SHANY, eds., 2008).

<sup>61</sup> Not all IHL violations trigger enforceable legal consequences, and enforceable violations must find prosecutors willing to prosecute and courts willing to adjudicate them.

<sup>62</sup> In the sense of Downs & Rocke, *supra* note 25.

<sup>63</sup> Interestingly, some armies have sought to overcome this tension by insisting that obedience to superiors’ orders come before obedience to the law, and therefore soldiers be immune from prosecution by the enemy if they “commit [...] violations of the recognized rules of warfare as are ordered by their Government or by their commander” (the British Manual of Military Law of 1914, *supra* note 17, at p. 302, para. 443).

development of international criminal law (ICL) over the years as opposed to the significantly more elaborate development of IHL.<sup>64</sup>

(c) *IHL as Legal Handcuffs*

War is a time when desperate actors are tempted to break the law. Whereas domestic law is relatively less resistant to pressures to modify it through the exercise of emergency powers or judicial deference, IHL may prove more resilient. For the same reason, IHL will also be useful to military and civilian agents who are worried that principals may, at the height of battle, adopt shortsighted goals that deviate from the long-term national interest.<sup>65</sup> IHL can therefore be seen as reflecting a pact between the civilian principals and the military agents which cannot be changed by politicians on a whim. Following the same logic, IHL may constrain citizens who have lost their tempers and demand harsh responses against a ruthless enemy. IHL serves here as an outside constraint on civilian principals, which politicians and the army can invoke to deflect criticism. This phenomenon is particularly relevant to contemporary conflicts involving non-state actors.<sup>66</sup>

(4) *The Relationships Between Morality, Reciprocity and Governance as Motivations for IHL*

The above analysis suggests that the demand for IHL by both principals and agents does not necessarily depend on the attitude of the enemy or on moral concerns. The principals may have an interest that is based on reciprocity or morality, or they may have other motivations. The point, however, is that without the challenges of governance presented during war, there would be little demand for IHL to enable principals to control their respective agents. In fact, the analysis suggests that compliance with IHL is self-enforcing because the military that fails to implement IHL within its echelons of command exposes itself to governance failures and potential defeat. This self-interest is met by the weaker states' gratitude for being granted *some* protection against evil rather than none.

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<sup>64</sup> For the conditions that led to the growing impact of international criminal law in recent years, see *infra* note 205 and accompanying text.

<sup>65</sup> On the tensions within the U.S. Administration after September 11, 2001, between the President who sought more discretion and the military which insisted on adherence to IHL constraints, see GOLDSMITH, *THE TERROR PRESIDENCY* *supra* note 50; Charles J. Dunlap Jr., *A Tale of Two Judges: A Judge Advocate's Reflections on Judge Gonzales's Apologia*, 42 *TEXAS TECH LAW REVIEW* 893 (2010); David Luban, *Law fare and Legal Ethics at Guantanamo*, 60 *STAN. L. REV.* 1981, 2001 (2008).

<sup>66</sup> On this see Part V *infra*.

Considerations of morality and reciprocity, to the extent that they exist, obviously add strength to an actor's commitment to comply with IHL. Principals will more easily be able to convince their military agents to comply with IHL when they can show that it is widely regarded as a legitimate, shared body of norms. For that purpose, it would probably suffice to show that other, similarly situated militaries (but not the enemy) are committed to following the same rules. In this context it may be more important to demonstrate that *allies* comply with the law, rather than enemies. This likely motivated the introduction of the so-called *si-omnes* (conditionality) clause in the 1899 and 1907 Hague Conventions. That provision conditioned the applicability of IHL obligations on a mutual commitment to the convention by all parties engaged in a conflict.<sup>67</sup> The clause was not crucial in a strictly legal sense because "the Rules basically codified principles that had long been widely recognized,"<sup>68</sup> and hence were obligatory on all states as customary international law.<sup>69</sup> The Brussels Declaration of 1874, military manuals of that period, and contemporaneous treatises on military law completely ignored the requirement,<sup>70</sup> as did the military practice that crystallized between 1867 and 1874.<sup>71</sup> The introduction of the conditionality clause was designed both to add strength to the commitments and to enhance the legitimacy of the conventions in the eyes of governments and armies. But it was not the reason for compliance with the law.<sup>72</sup>

Finally, as the more specific discussion below will demonstrate, many wartime dynamics do not reflect the Prisoner's Dilemma game that raises reciprocity concerns. In those more prevalent game situations, such as Battle of the Sexes and Chicken, IHL is required to ensure effective governance, which is in the actor's best interests.

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<sup>67</sup> Hague Conventions Relative to the Laws and Customs of War, art 2, July 29, 1899, available at <http://www.icrc.org/ihl.nsf/FULL/150?OpenDocument>; Hague Convention (IV) Relative to the Laws and Customs of War, art 2, Oct 18, 1907, available at <http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument>.

<sup>68</sup> STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS – A GENERAL HISTORY 187 (2005).

<sup>69</sup> BORDWELL, *supra* note 4; WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 41, 42 (2d ed., 1920) (referring to "the unwritten military rules and principles of law").

<sup>70</sup> BORDWELL, *supra* note 4 (who does not mention reciprocity or the *si-omnes* clause at all); Winthrop, *supra* note 69 (same).

<sup>71</sup> TOMAS ERSKINE HOLLAND, A LECTURE ON THE BRUSSELS CONFERENCE OF 1874 8-9 (1876) (referring to the *modus vivendi* which was accepted in Europe at the time of the Franco-Prussian war of 1870-71).

<sup>72</sup> Fedor Martens explained at the time that a solemn, mutual undertaking was necessary to signify the existence of an international or at least a European society of states, which acts like a "mutual insurance association against the abuses of force in time of war", *see* Proceedings, *supra* note 4 at 518.

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

The above hypotheses can be tested through an analysis of the evolution of the collective efforts to codify and develop IHL. In this Part we explore the timing of the rise of formal IHL, which we explain through the P-A prism. While almost all societies have sought to regulate the conduct of war, the emergence of a regime based on formal international law is a phenomenon of modern times.<sup>73</sup> The effort was designed not simply to codify the law, but also to modify it to ensure effective control of agents. The origins of contemporary IHL related to land warfare can be traced to the second half of the nineteenth century, in particular to the formative period of 1863-1874. It was then that the modern law on armed conflict was defined, though its formal codification had to wait until 1899. Following the introduction of the so-called Lieber Code of 1863 to the Union Army,<sup>74</sup> efforts to define international rules for land warfare started with the first Geneva Convention of 1864 concerning the treatment of dead and wounded soldiers.<sup>75</sup> Those efforts continued with the Saint Petersburg Declaration of 1868,<sup>76</sup> the first international undertaking to prohibit the use of a certain type of ammunition (exploding bullets). That sort of rulemaking culminated in the 1874 Brussels Declaration,<sup>77</sup> the first comprehensive document outlining the rules of warfare on land and of occupation.

Why was there this sudden burst of interest in the 1860s in regulating warfare on land in a collective manner through international instruments? What explains the formulation of elaborate rules concerning warfare on land as opposed to the scanty treatment of naval warfare? Several explanations for this development of the law have been offered, such as the demise of natural law and the emergence of voluntary law,<sup>78</sup> or the realist explanation for the rise of reciprocal relationships among military powers.<sup>79</sup> All such explanations are

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<sup>73</sup> Of course, the conduct during warfare has been subject to unilateral and bilateral norms since biblical times, but none had the form and contents of the law that developed since the second half of the nineteenth century.

<sup>74</sup> General Orders No. 100, "Instructions for the Government of the Armies of the United States in the Field", available at [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp) (last visited Sep. 29, 2012).

<sup>75</sup> Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug 22, 1864, available at <http://www.icrc.org/ihl.nsf/FULL/120?OpenDocument>.

<sup>76</sup> St. Petersburg Declaration, Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, 29 November / 11 December, 1868, available at <http://www.icrc.org/ihl.nsf/FULL/130?OpenDocument>.

<sup>77</sup> Brussels Declaration concerning the Laws and Customs of War, Aug, 27, 1874, available at <http://www.icrc.org/ihl.nsf/FULL/135?OpenDocument>.

<sup>78</sup> Neff, *supra* note 68, at 169.

<sup>79</sup> Posner & Sykes *supra* note 2, and other sources cited there..

unable to account for the specific contents of the laws of war; they can explain neither why these developments occurred at that historical juncture, nor why the process found its expression in international rather than domestic law (e.g., military manuals for the respective armies).

By contrast, the P-A prism resolves both issues. This Part suggests that it was only during the 1860's that international law became an effective tool for regulating P-A relations. A more elaborate historical examination is beyond the scope of this Article, but we believe that the bird's eye view that we provide here is sufficiently robust to support our contention that the evolution of IHL in the mid-nineteenth century is a story of principals seeking ways to enhance their control over their military agents, and negotiating the contours of the law not only with foreign governments, but also with their own armies and constituencies. Although we provide some proof below that actors within certain states consciously followed this train of thought, our theory does not require us to prove that the principals consciously sought IHL as a means of controlling their agents. For our purposes it is sufficient to demonstrate that IHL suited their interest in controlling their respective agents.<sup>80</sup>

Recall the three conditions for the efficacy of IHL: (1) a conflict of interest between some principals and their agents; (2) the lack of effective alternatives to IHL for monitoring, assessing, and punishing the agent; and (3) the availability to the principal by victims or third parties of information or enforcement measures to close the agency gap. We argue that at that pivotal moment in history, three domestic governance challenges intensified. First, due to universal conscription, the army's high command faced an increasing need to discipline inexperienced soldiers. Second, the increasing size of the armies made governments aware of the need to control them more effectively, since chains of command had become longer, and larger armed forces potentially posed a serious threat to existing regimes. Third, citizens had become concerned about the way their sons-turned-soldiers were treated by the government and the army. Public opinion – not necessarily seeking world peace, but certainly seeking more protection of the soldiers – had become a force for elites to reckon with.<sup>81</sup> These developments led to a complex and

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<sup>80</sup> Cf. GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR*, 7 (1976) (“the economic approach does not assume that economic units are necessarily conscious of their efforts to maximize or can verbalize or otherwise describe ... reasons for the systematic pattern of their behavior.”)

<sup>81</sup> John Fisher, *The Impact of Military Service on the British Foreign Office and Diplomatic and Consular Services 1914-8*, 34 *THE INTERNATIONAL HISTORY REVIEW* 431 (2012). Geoffrey Best summarized the attitudes of key political leaders during the 1899 conference as follows: “[e]ven if the great powers were not able or willing to do anything concretely to reduce the chances of armed conflict, their rulers felt it desirable to pretend otherwise.”



multidirectional interplay between “principals” and “agents”: citizens, government, and the army’s high command all sought ways to enhance their domination over their political and military agents. Such governance challenges could not be overcome solely by traditional domestic mechanisms. At the same time, on the supply side, the communication revolution provided governments and civil society with external sources of information from the battlefields and the occupied territories, sometimes through third parties, which the governments could use to satisfy the growing demand for restraints. In other words, it was only during the 1860s that governments could begin to rely on international law as an alternative tool for controlling their own militaries. The result was a turn to international law to solve these governance problems and to empower specific domestic actors in relation to others.

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

(1) *An Intensifying Conflict of Interest Between Principals and Agents*

From the inception of the sovereign state, civilian governments have developed domestic mechanisms to control their armed forces and avert potential threats to their authority. The move away from small professional armies towards reliance on large numbers of conscripts and on officers not belonging to the aristocracy<sup>82</sup> required an elaborate and effective disciplinary system.<sup>83</sup> This became clear after the French Revolution, as both the French National Assembly and army generals sought to regulate the army’s use of

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Geoffrey Best, *supra* note 4, at 140. JAMES Q. WHITMAN, *THE VERDICT OF BATTLE* (2012) (exploring the transformation of warfare from “pitched battles” controlled by monarchs to wars involving republics that “degenerated into more chaotic violence” (*id.*, at 235)).

<sup>82</sup> MICHAEL HOWARD, *WAR IN EUROPEAN HISTORY* 107 (2009).

<sup>83</sup> On the effect of mandatory conscription on war in general, see JOHN KEEGAN, *A HISTORY OF WARFARE* 359 (1993). During the Thirty Years War in Europe the largest armies numbered some tens of thousands of men. By Napoleon’s time, each rival was deploying about 100,000 men, and by the battles of the Italian war of independence (1859) and the Franco-Prussian War (1870) that number increased to about 150,000. In the battle of the Marne (September 1914), the combined Anglo-French force amounted to over one million, against which the Germans deployed close to 1.5 million. Almost half a million soldiers were killed, wounded or reported missing in action during this single battle, which lasted just over a week, *see id.* at 360. *See also* Samuel Finer, *State and National-Building in Europe: The Role of the Military*, in *THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE* 84 (CHARLES TILLY ed., 1975).

force.<sup>84</sup> The need for discipline in combat also intensified due to technological innovations that enabled swift maneuvers over great distances, in which commanders could no longer maintain direct eye-contact with all their troops.<sup>85</sup> As a result, the supreme command had to delegate decision-making power to field commanders.<sup>86</sup>

Toward the mid-nineteenth century, European states moved towards universal conscription.<sup>87</sup> Once mandatory military service was introduced to cover all segments of society and produced a “citizens’ army,” which encompassed more than the poor peasantry,<sup>88</sup> civil society became a significant political actor with an interest in the way the military treated its “cheap supply” of soldiers. Citizens became fearful that reckless executives would be ready to sacrifice the lives of soldiers cheaply.<sup>89</sup> Fedor Martens, a rising Russian international jurist and the self-proclaimed initiator of the Brussels Conference of 1874, explained the sudden urge to convene the European powers:

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<sup>84</sup> BEST, *supra* note 4, at 78, 80 (1980) (In 1792 the French national assembly declared that it would provide just and fair treatment for prisoners. Pillaging was prohibited and compensation was awarded for requisitioned property). *See also* Wolfgang Kruse, *Revolutionary France and the Meanings of Levée en masse*, in *WAR IN AN AGE OF REVOLUTION, 1775-1815*, 298 (ROGER CHICKERING & STIG FÖRSTER eds., 2010).

<sup>85</sup> MARTIN VAN CREVELD, *COMMAND IN WAR* 108-109 (1985) (stressing that the greater size of armies made command much more difficult, and gave local units far more independence). In this respect, the telegraph – although very important as a tool for mobilizing troops and keeping senior commanders in touch with each other – made little difference. The telegraph operated only where there were lines – and that was not at the front, where in any case they were easily cut and disrupted. Hence, “[t]he telegraph had an influence at headquarters level, but corps and divisions, not to mention formations further down the ladder, still remained entirely dependent on messengers and optical and acoustic signals”, *see id.* at 108.

<sup>86</sup> ELIOT A. COHEN, *SUPREME COMMAND: SOLDIERS, STATESMEN AND LEADERSHIP IN WARTIME* (2002) (describing how political leaders from Lincoln to Rumsfeld struggled with the correct amount of delegation to their armed forces)

<sup>87</sup> HOWARD, *supra* note 82, at 87; Jan Lucassen and Erik-Jan Zürcher, *Conscription and Resistance: The Historical Context*, 43 *INTERNATIONAL REVIEW OF SOCIAL HISTORY* 405 (1998).

<sup>88</sup> In France an unequal system of conscription continued until the Franco-Prussian War of 1870. Russia introduced universal conscription on the modern pattern in 1874. Both the Confederate Congress and the U.S. Congress passed acts in 1862 requiring or authorizing universal conscription, Britain introduced conscription for the first time in 1916 (*see* LARRY H. ADDINGTON, *THE PATTERNS OF WAR SINCE THE EIGHTEENTH CENTURY* 102 (1984)).

<sup>89</sup> Fisher, *supra* note 81. Geoffrey Best summarized the attitudes of key political leaders during the 1899 conference as follows: “[e]ven if the great powers were not able or willing to do anything concretely to reduce the chances of armed conflict, their rulers felt it desirable to pretend otherwise.” BEST, *supra* note 4, at 140. Best’s account of this period focuses on the dialectic between the humanitarian sentiments of the peace movement and the nationalism and militarism of key political and army figures: *id.*, at 128-147.

"At the very moment when obligatory military service is on the way of being introduced, the need to settle, in [international] law, the rights and duties of troops has become an absolute imperative."<sup>90</sup>

Not everyone was equally eager to confront this challenge. The British government "saw no practical necessity for such a scheme [a multilateral convention on IHL]" and agreed to send a low-level military delegation to Brussels only when it received assurances from all participants that naval matters would not be discussed.<sup>91</sup> Britain, which had not introduced the draft, was engaged mainly in naval warfare, and may have felt secure about the efficacy of its internal democratic mechanisms for controlling its army. In contrast, Russia, with the largest standing army, promoted IHL enthusiastically.<sup>92</sup>

## (2) *The Need to Move Away From Unilateral Constraints*

Initially, governments and armies relied upon internal codes to discipline their soldiers. The most famous military manual, the so-called Lieber Code, was issued by President Abraham Lincoln on April 24<sup>th</sup> 1863,<sup>93</sup> to resolve internal governance problems that he and Henry Halleck, the General-In-Chief, had identified.<sup>94</sup> The troops were by and large unprofessional and there was a danger they might excessively harm and antagonize civilians.<sup>95</sup> In addition, the

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<sup>90</sup> Quoted by KARMA NABULSI, *TRADITIONS OF WAR?, THE MODERN LAWS OF WAR FROM 1874 TO 1949*, 7 (2005).

<sup>91</sup> BORDWELL, *supra* note 4, at 102, citing Lord Derby in Parliament Papers 1874.

<sup>92</sup> On the system of recruitment in Britain, see Bordwell, *supra* note 4 at 102; on Russia, see Walter M. Pintner, *The Burden of Defense in Imperial Russia 1725-1914*, *RUSSIAN REVIEW* 43 (1984), 231.

<sup>93</sup> General Orders No. 100, "Instructions for the Government of the Armies of the United States in the Field", available at [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp) (last visited Sep. 29, 2012).

<sup>94</sup> The code was not intended to ensure ethical fighting. It was actually criticized for sanctioning excessively harmful practices (Jochnick & Normand, *supra* note 39, at 66). As Burrus Carnahan explains, from the U.S. War Department's point of view, the Lieber Code was primarily a response to the expansion of the United States Army during the Civil War, see Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 *AM. J. INT'L L.* 213, 214 (1998). Witt argues that the code was also designed to legitimize the participation of freed slaves on the Union side and protect them, Witt, *supra* note 4, at 240-44.

<sup>95</sup> BORDWELL, *supra* note 4, at 73, (citing BRIGADIER-GENERAL GEORGE B. DAVIS, *THE ELEMENTS OF INTERNATIONAL LAW* 499-500 (1903) stating that "the need of a positive code of instructions was severely felt during the early part of the Civil War in the United States. During the first two years of that war the Federal Government had succeeded in placing in the field armies of unexampled size, composed in great part of men taken from civil pursuits most of whom were unfamiliar with military affairs, and utterly unacquainted with the

governance of the newly occupied southern states proved quite problematic for commanders untrained in civilian affairs.<sup>96</sup> The code addressed these concerns by restricting participation in combat to those subject to the commanders' control and discipline, defining the permitted conduct in warfare, and providing authority and guidance for the effective government of newly captured localities. From the perspective of the President and the military, the Code promised one further benefit: because it was a military code based on the authority of international law, it held back Congress from undesired intervention.<sup>97</sup>

Following the U.S., several European nations adopted codes to regulate the conduct of their armies during hostilities. Thomas Erskine Holland, whom the British Government entrusted in 1904 with the task of compiling a "handbook" "for the information of H.M. land forces,"<sup>98</sup> referred to "the example set by the United States in 1863," and emphasized that those instructions were, "of course, authoritative only for the troops of the nation by which they are issued, and differ considerably one from another."<sup>99</sup>

But such unilateral codes failed to address the growing concerns of the citizens. It was during the closing years of the eighteenth and the first half of the nineteenth century that democracy began to take root on the European continent. A variety of regimes provided more avenues for the people to voice their concerns, even if they were not necessarily democratic in the modern sense. This stronger interest coincided with a communication revolution that had consequences no less dramatic than the "CNN effect" of a century later.

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usages of war [...] questions of considerable intricacy and difficulty were constantly arising [...] Conflicting decisions and rulings were of frequent occurrence in different armies, and at times in different parts of the same field of operation and great harm not infrequently resulted before these decisions could be reversed by competent authority." See also Witt, *supra* note 54, at 905 (the influence of the militia and volunteer tradition in U.S. history "badly undercut the influence of professionals", as exemplified in the occupation of Florida and during the Mexican War).

<sup>96</sup> Robert J. Futrell, *Federal Military Government in the South, 1861-1865*, 15 *MILITARY AFFAIRS* 181 (1951).

<sup>97</sup> Futrell cites a letter from Halleck to Lieber where Halleck expresses the fear that Congress might circumscribe military power too narrowly, *see id.* at 187.

<sup>98</sup> Holland explained that the British government, which "had preferred in such matters to 'trust to the good sense of the British Officer,' was at last induced to alter its policy" and issue the handbook. HOLLAND, *THE LAWS OF WAR ON LAND* 2 (1908).

<sup>99</sup> *Id.* In Appendix I Holland mentions French, Italian and German codes, the confidential instructions to Prussian officers issued in 1870, and military manuals issued by The Netherlands (1871), France (1877), Serbia (1878), Argentina (1881), Spain (1893), Germany (1902), and Russia (1904). BORDWELL, *supra* note 4, added to the list army regulations issued in Spain (1882), Italy (1896), Switzerland (1904), Portugal (undated) and Columbia (undated). The protocols of the Brussels Projects (1874) include references to the Austrian or Prussian military codes (session of 5 August) and the Italian code (session of 22 August).

The inventions of the telegraph, the popular press and the railways “revolutionized the way Europeans . . . thought about war.”<sup>100</sup> From the Crimean War (1853-56) onward,<sup>101</sup> journalists brought home the harsh realities of the battlefields of Europe and the public reacted with furor. Governments lost their exclusive hold on information about battles and casualties.<sup>102</sup>

As a result, citizens had both reason and opportunity to voice their opinions on the use of the military. Henry Dunant was certainly not the first civilian to witness atrocities. Yet in the mid-nineteenth century he was able to raise the awareness of a receptive civil society. Two other members of the Geneva precursor of the Red Cross, Gustave Moynier and Louis Appia, could in 1867 make the point that governments have a parental obligation to take care of soldiers they conscript.<sup>103</sup> This worry coincided with the growing peace movement in Europe which was opposed to wars and their harsh consequences.<sup>104</sup>

From a P-A perspective, we identify a growing gap between the citizens – the principals in this case – and the executive-agent, working to advance its own goals. Citizens, obviously, could not close the agency gap by themselves, and could not prevail on their governments to do so. But they could rely on trusted non-state agents like the press, civil society activists or medical personnel to inform the public of breaches. Hence followed civil society’s increased demand for non-military rules to protect soldiers on the battlefield.

European governments also felt the need to impose more robust disciplinary measures beyond those provided by internal army restrictions. In many countries the military posed a covert or overt threat of a coup d’état and overthrow of the civilian regime, especially if the regime was a weak form of democracy. This threat materialized in several instances in Central and South America,<sup>105</sup> and was evident in French politics through the late nineteenth and early twentieth century, as evidenced by the events surrounding the Boulanger affair of 1889.<sup>106</sup>

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<sup>100</sup> JOHN F. HUTCHINSON, *CHAMPIONS OF CHARITY* 26 (1996). On the growing effectiveness of the widely circulated cheap popular press since the 1860s as a means of influencing and voicing public opinion, see BEST, *supra* note 4, at 138.

<sup>101</sup> WILLIAM RUSSELL, *SPECIAL CORRESPONDENT OF THE TIMES* (Roger Hudson ed., 1995).

<sup>102</sup> Thomas Longmore’s speech 1866, see HUTCHINSON, *supra* note 100, at 27.

<sup>103</sup> G. MONIER & L. APPIA, *HELP FOR THE SICK AND WOUNDED* 50-51 (1870). Trans. by John Furlley of *La guerre et la charité*, 1867, cited by HUTCHINSON, *supra* note 100, at 27-28.

<sup>104</sup> BARBARA W. TUCHMAN, *THE PROUD TOWER: A PORTRAIT OF THE WORLD BEFORE THE WAR, 1890-1914*, chapter 5 (1960). BEST, *supra* note 4, at 147.

<sup>105</sup> ROBERT HOLDEN, *ARMIES WITHOUT NATIONS: PUBLIC VIOLENCE AND STATE FORMATION IN CENTRAL AMERICA 1821-1960* (2004).

<sup>106</sup> WILLIAM IRVINE, *THE BOULANGER AFFAIR RECONSIDERED: ROYALISM, BOULANGISM, AND THE ORIGINS OF THE RADICAL RIGHT IN FRANCE* 73-124 (1989).

Moreover, and more importantly, in the 1860's European powers started to worry about their relations with foreign populations. With the rise of nationalism in Europe, prospective occupiers worried about potentially rebellious communities who would actively resist their rule, like the Spanish guerillas who fought Napoleon or the French *francs-tireurs* who refused to end the war against the Prussians in 1870-71. Such governments sought norms that would restrain their own soldiers in their interaction with those civilians, thereby hopefully reducing the opposition of the latter. For similar reasons, these governments were worried that excesses by an unruly army might "make . . . the return to peace unnecessarily difficult."<sup>107</sup>

Governments were also concerned about the reaction of neutral powers to military aggression. There is evidence suggesting that governments and their military high commands sought to avoid causing any harm to neutral powers lest they join the enemy, or to forestall complaints that neutrals might raise.<sup>108</sup> Finally, the wrath of global civil society – informed by the media revolution of that time – was also something to be reckoned with. As the British military manual of 1914 observed, "it is in the interest of a belligerent to prevent his opponent having any justifiable occasion for complaint, because no Power, and especially no Power engaged in a national war, can afford to be wholly regardless of the public opinion of the world."<sup>109</sup>

### (3) *The Internationalization of Governance*

By resorting to international law to reduce domestic agency costs, governments obtained several benefits. As explained above, they were able to rely on victims and observers to act as effective fire alarms which would relay information about violations, and might even independently prosecute violators. At the same time, governments could assuage public concerns and

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<sup>107</sup> Article 16 of the Lieber Code captures the longer-term concerns that motivate moderation during combat: "Military necessity does not admit of cruelty -- that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. . . . [I]n general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult." (emphasis added), *see supra* note 4.

<sup>108</sup> For example, during the Franco-Prussian war of 1870-71, Prussia communicated alleged French violations to neutral states, *see* The British Manual of Military Law of 1914, *supra* note 17, at para. 439. This concern was captured most clearly in the 1818 instructions of the King of Prussia to his generals (Military Instructions of the King of Prussia to his Generals, 66 (Foster trans., 1818)) ("When war is carried on in a neutral country, . . . the object of attention then is to rival the enemy in the confidence and friendship of the inhabitants. To attain this end, the most exact discipline must be observed, marauding and every kind of plunder strictly forbidden and its commission punished with exemplary severity.").

<sup>109</sup> The British Manual of Military Law of 1914, *supra* note 17, at p.301, para. 437.

demonstrate to their citizens and to foreign public opinion that they respected the lives of their soldiers by conferring with potential enemies. Moreover, IHL became a tool for bestowing legitimacy on practices that might be regarded as repugnant.<sup>110</sup> Specifically, the law of occupation, which required the occupier to protect the authority and resources of the ousted regime, functioned as a check against indigenous challenges to that regime.<sup>111</sup>

Civil society activists such as Henry Dunant and his colleagues also realized that their best strategy was to seek clear universal norms that could be invoked by non-state “informants” against violators. The universal rules cut across political boundaries and empowered civil society activists vis-à-vis their respective governments. Their first victory was the Geneva Convention of 1864, which delineated the law on the treatment of the dead, wounded and POWs (without defining who was entitled to POW status).<sup>112</sup> The convention did not impose onerous duties on governments or armies. Quite the contrary: they were required merely to allow voluntary Red Cross associations access to the battlefield to treat wounded or captured soldiers and dispose of the dead. The Prussian army complied with the 1864 convention as early as its war with Austria in 1866, providing treatment also to enemy combatants without demanding reciprocity.<sup>113</sup>

The success of that convention led to further efforts to develop the law, which included conferences in Paris (1867) and Geneva (1868).<sup>114</sup> However, these efforts failed to produce binding texts. They were stunted by the governments’ responses. In what seems to have been a reaction to the aroused interest of civil society in regulating warfare, several European principals met in 1868 in St. Petersburg. The Declaration they adopted<sup>115</sup> hortatorily invokes the lofty goals shaped by “the progress of civilization” and stipulates that what “[s]tates should endeavor to accomplish during war is to weaken the military forces of the enemy [and for that] purpose it is sufficient to disable the greatest possible number of men” rather than “uselessly aggravate the sufferings of disabled men, or render their death inevitable.”<sup>116</sup> No doubt, the rhetoric was

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<sup>110</sup> Jochnick & Normand, *supra* note 39.

<sup>111</sup> Because the occupier had to maintain local laws and assume responsibility over government property, the Hague Regulations of 1907 constituted “a pact between state elites, promising reciprocal guarantees of political continuity, and thus, at least to a certain extent, rendering the decision to resort to arms less profound.” BENVENISTI, *supra* note 8, at 71.

<sup>112</sup> 1864 Geneva Convention, *supra* note 75.

<sup>113</sup> Pierre Boissier, *Henry Dunant*, 14 INT REV RED CROSS 395, 412 (1974). HUTCHINSON, *supra* note 100, at 74-75.

<sup>114</sup> See *Protocoles des Conférences internationales tenues à Genève, octobre 1868* 20 NOUVEAU RECUEIL GÉNÉRAL DE TRAITÉS 400-434, and Holland, *supra* note 70, at 9).

<sup>115</sup> Saint Petersburg Declaration, *supra* note 76.

<sup>116</sup> *Id.*

impressive and probably effective in disarming the grassroots opposition, even if the operative paragraph was quite limited, and prohibited the use of only one specific type of ammunition (bullets weighing below 400 grams that explode on impact with human flesh and cause certain and painful death). The main practical advantage to governments from this agreement was better control of the use of ammunition by their own armed forces.<sup>117</sup> Painful and unnecessary death was hard to justify at a time when reports from the bloody battlefields that awaited young conscripts stirred up public opinion.

The 1874 Brussels Declaration – the product of yet another conference convened at Russia's initiative – can also be seen as a direct outcome of changing political realities due to universal conscription and governments' growing attention to public opinion. These concerns are reflected in the speech of Fedor Martens, at the time a rising Russian international jurist and the self-proclaimed initiator of the conference, who associated the “absolute imperative” to set rules based on international law with the transition of many European powers to obligatory military service.<sup>118</sup>

#### (4) *The Limits of IHL as a Mechanism of Governance*

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

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<sup>117</sup> The *travaux* of this Declaration reveal that it sought to address a problem of governance *within* the respective armies, rather than the need to regulate inter-state relations: The prohibited bullets were effective when used against nonhuman targets, but the governments did not trust their soldiers to simply follow the orders that limited the use of these projectiles to nonhuman targets. *Protocols of the military conference at St. Petersburg (1868)*, 18 NOUVEAU RECUEIL GÉNÉRAL DE TRAITÉS 451, 458-64, (1873).

<sup>118</sup> (“at the very moment when obligatory military service is on the way of being introduced, the need to settle, in law is on the way of being introduced, the need to settle, in law, the rights and duties of troops has become an absolute imperative.”) Quoted by KARMA NABULSI, *TRADITIONS OF WAR?, THE MODERN LAWS OF WAR FROM 1874 TO 1949*, 7 (2005). The British government “saw no practical necessity for such a scheme [a multilateral convention on IHL]” and agreed to send a low-level military delegation to Brussels only when it received assurances from all participants that naval matters would not be discussed (BORDWELL, *supra* note 69, at 102, citing Lord Derby in Parliament Papers 1874). Britain, at the time, had not introduced the draft, was engaged mainly in naval warfare, and may have felt secure about the efficacy of its internal democratic mechanisms for controlling its army.



(a) *IHL and Naval Warfare*

The laws of war discussed thus far relate to war on land. The story of the laws of war at sea, with regard to both their evolution and content, is strikingly different. This contrast raises a puzzle: If IHL is based on some notion of morality, there should be little difference between the rules of each theater of war. If IHL is based on reciprocity, we would also anticipate similar rules to be applied at sea. But that is not the case. Were it not for a group of committed scholars who pieced together the San Remo Manual on International Law Applicable to Armed Conflicts at Sea,<sup>119</sup> as late as 1994, it would have been difficult to locate a coherent set of norms concerning naval warfare.<sup>120</sup> Most conspicuously, the law on naval warfare never developed sufficiently to offer strong protection for civilians at sea. As Roach pointed out, of the nine conventions adopted in The Hague in 1899 and 1907 concerning naval warfare, none addressed the question of which vessels were immune from attack.<sup>121</sup> During World War II, “enemy merchant vessels were widely regarded as legitimate military targets subject to destruction on sight.”<sup>122</sup> The process of overhauling IHL during the 1970s, which culminated in the Additional Protocols of 1977, omitted sea warfare altogether. Ronzitti explains that the major powers had little interest in such regulation.<sup>123</sup> Consequently, “[c]urrent

<sup>119</sup> San Remo Manual on International Law Applicable to Armed Conflicts at Sea, June 12, 1994, available at <http://www.icrc.org/ihl.nsf/full/560?opendocument>.

<sup>120</sup> On the law of war at sea, see O’CONNELL, *supra* note 35; J. Ashley Roach, *The Law of Naval Warfare at the Turn of Two Centuries*, 94 AM. J. INT’L L. 64 (2000); Howard Levie, *Means and Methods of Combat at Sea* 14 SYRACUSE J. INT’L L. & COM. 727 (1987-1988) (arguing that the Additional Protocol I to the Geneva Conventions does not apply to naval warfare); Vaughan Lowe, *Impact of the Law of the Sea on Naval Warfare* 14 SYRACUSE J. INT’L L. & COM. 657 (1987-1988), who writes that “[t]here is, perhaps, no area of the public international law of war in such urgent need of revision as the law of war at sea. In no other area are there such a complex set of ‘classical’ rules and so much uncertainty as to the extent to which those rules remain binding. Since the outlawing of war and of the use of force, there has been a marked reluctance to use the traditional terminology of the laws of war and neutrality. This has led to the abandonment in recent times of any clear conceptual framework, either in state practice or in academic writing, for the analysis of the rights and duties regulating hostilities at sea.”

<sup>121</sup> Roach, *supra* note 120, at 69. The only treaty adopted at the first Hague Peace Conference of 1899 concerning naval warfare adapted to maritime warfare the principles of the 1864 Geneva Convention concerning the treatment of the dead and wounded, *see* Hague Convention (III) Relative to the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, July 29, 1899, available at <http://www.icrc.org/ihl.nsf/FULL/155?OpenDocument>.

<sup>122</sup> Roach, *supra* note 120, at 70.

<sup>123</sup> Natalino Ronzitti, *Naval Warfare*, Max Planck Encyclopedia of Public International Law (2012) available at [www.mpepil.com](http://www.mpepil.com)

treaty law does not comprehensively identify which persons at sea should be entitled to protected status.”<sup>124</sup>

We submit that the only way to explain the different path taken with respect to naval warfare is either the low P-A costs of controlling the navy or the inability of IHL to reduce such costs. The P-A problem during fighting at sea was not as acute as on land, sea warfare was effectively controlled by the commanders of the navy vessels, and individual sailors had only limited ability to deviate from orders and inflict harm unilaterally. Governments were able to control the actions of their navy commanders by domestic means such as prize courts<sup>125</sup> or criminal sanctions.<sup>126</sup> Moreover, at sea, the “fire alarm” function of IHL would not work well since only a few survivors were expected to return to report violations.

During the nineteenth century, IHL concerning naval warfare only developed in two areas: where P-A conflicts could arise and the law was easily enforceable, or where civilian victims could serve as fire alarms. The first norm abolished “privateering,” namely the authorization of private ships to attack foreign shipping during wartime. During the seventeenth and eighteenth centuries private looting of enemy ships had been the norm.<sup>127</sup> The British navy, for example, had an elaborate system of dividing the loot between private sailors and navy officers.<sup>128</sup> This practice, which incentivized private sailors to raid enemy ships, created agency slack, as the private actors could abuse their mandate while seeking to increase their gains. Modern fleets no longer needed private assistance and could enforce the prohibition unilaterally. The practice was prohibited in the 1856 Paris Declaration Respecting Maritime Law.<sup>129</sup>

The other set of norms relates not to warfare at sea, but to attacks on targets on land which affect civilians who could function as a fire alarm, as effectively as in the context of the law on land warfare. The law that developed restricted

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<sup>124</sup> Roach, *supra* note 120, at 73, 74.

<sup>125</sup> C.D. Allin, *English and German Prize Courts and Prize Law*, 2 MINN. L. REV. 22, 23 (1918).

<sup>126</sup> The British Navy in the eighteenth century applied strict discipline by criminally indicting any deviation from the manual listing the tactics to be used in sea warfare: BARBARA TUCHMAN, *THE FIRST SALUTE: A VIEW OF THE AMERICAN REVOLUTION* (1988) at 120-125.

<sup>127</sup> PETER BRADLEY, *BRITISH MARITIME ENTERPRISE IN THE NEW WORLD: FROM THE LATE FIFTEENTH TO THE MID-EIGHTEENTH CENTURY* 26-27, 125-137 (1999).

<sup>128</sup> TUCHMAN, *supra* note 126, at 113-114.

<sup>129</sup> Paris Declaration Respecting Maritime Law, April 16, 1856, available at <http://www.icrc.org/ihl.nsf/INTRO/105?OpenDocument>.

the use of the blockade. In 1907 another convention was adopted relating to the protection of civilians on land from bombardment from the sea.<sup>130</sup>

(b) *The Law on Neutrality*

Whereas the law concerning naval warfare is not very elaborate, the opposite is the case as regards the law on neutrality at sea. Carefully detailed rules determine the rights of belligerents to visit neutral ports. This contrasts also with the law on neutrality on land, which is not nearly as elaborate. This double contrast demonstrates the preoccupation of the drafters with the challenge of governance, which is different at sea than on land.

Principals of all warring sides shared a strong interest in respecting the interests of neutrals.<sup>131</sup> Once the allocation of territorial jurisdictions in Europe stabilized, the laws on neutrality prohibited the use of a neutral territory by any of the belligerents.<sup>132</sup> The likelihood that an army would violate this prohibition on its own initiative was limited. Hence governments did not require an elaborate code of neutrality on land. Neutrality at sea was altogether a different matter. Here the worry was that military vessels might inadvertently violate or be wrongly accused of having violated a foreign state's neutrality while visiting its ports. Vessels were expected to be on their own at sea, sometimes unable to communicate with their principals. The principals left very little to the captains' discretion. The entry of warships to, their presence in, and exit from neutral ports were regulated through rules of an extraordinarily high resolution.<sup>133</sup>

(c) *The Law on Internal Armed Conflict*

Our explanation also serves to explain why the law on internal armed conflicts remained underdeveloped until the second half of the twentieth

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<sup>130</sup> Hague Convention (IX) concerning Bombardment by Naval Forces in Time of War, Oct 18, 1907, available at <http://www.icrc.org/ihl.nsf/FULL/220?OpenDocument>.

<sup>131</sup> See *supra* text to note 22.

<sup>132</sup> Hague convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, articles 2, 5 Oct 18, 1907, available at <http://www.icrc.org/ihl.nsf/FULL/200?OpenDocument>.

<sup>133</sup> Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, Oct 18, 1907, available at <http://www.icrc.org/ihl.nsf/FULL/240?OpenDocument>. These rules were carefully observed. In 1939 Germany was willing to sacrifice the *Graf Spee* rather than flout art. 16 of that convention which required the ship to wait at the neutral port at least twenty four hours after a British ship left that port. In the meantime the British battleships closed in on the German warship, waiting for it to leave the port: according to another rule, the German vessel was not entitled to stay in a neutral port more than 72 hours. The German commander scuttled the ship to minimize casualties among its troops. On this, see O'CONNELL, *supra* note 35.

century. First, the P-A problem is less acute in the typical internal armed conflict because there are only marginal differences between the goals of principals and those of their respective militaries. Both actors view the enemy as illegitimate rebels whose forces should be crushed, often by ruthless tactics aimed at instilling awe and discouraging further opposition to the government.<sup>134</sup> The affected population is not regarded as a credible source of information (and any such information could only serve to tarnish the state's reputation abroad), and there is no external actor who could pose a credible threat to the violators. The relatively recent developments in the law of internal armed conflicts were not motivated by the principals seeking to improve their control of their agents. Rather, they have been imposed on governments by foreign actors, mainly through norms enunciated by international criminal tribunals.<sup>135</sup> In Part V below we develop this issue in more detail.

#### IV. SPECIFIC NORMS AND INSTITUTIONS

We have explained the motivations of several principals to use IHL to constrain their respective agents, as well as how that function influenced the development of IHL. In this Part, we explain how specific IHL norms and institutions close the agency gap. The specific norms are designed to increase discipline within the fighting force by restricting access to the battlefield, to reduce the temptation of combatants to deviate from orders, and to limit the ability of low-level soldiers to implicate the principals in strategic blunders. The institutions generate information about violations and promote accountability within the military.

##### (1) *Norms*

The prevailing view of IHL asserts that the law's basic goals are the distinction between combatants and non-combatants (exposing only combatant to direct attack), and the avoidance of unnecessary suffering to combatants. But these two principles remained under-developed and lacked specificity at least

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<sup>134</sup> DAVID BELL, *THE FIRST TOTAL WAR: NAPOLEON'S EUROPE AND THE BIRTH OF WAR AS WE KNOW IT* 156 (2007).

<sup>135</sup> On the lawmaking functions of international criminal courts, see Milan Kuhli and Klaus Günther, *Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals*, 12 GERMAN LAW JOURNAL 1261-1278 (2011), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1360>; Allison M. Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV 1 (2006).

during the formative stages of the codification of IHL.<sup>136</sup> In contrast, the norms that did receive close attention in the formative stages of codification were only tangentially related to those basic goals. Instead, as we argue in this section, these norms sought to limit agency slack.

(a) *Regulating Access to the Battlefield: The privilege to participate in hostilities*

The Lieber Code states that the protections of POW status apply only to soldiers<sup>137</sup> or to "Partisans."<sup>138</sup> These protections are not afforded to "Men or squads of men . . . who commit hostilities . . . without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war."<sup>139</sup> The prevailing distinction between combatants and noncombatants is commonly explained by the need to protect civilians: if combatants fail to distinguish themselves from their civilian population, the other party may be forced or tempted to target the civilian population, for fear that it is harboring soldiers.<sup>140</sup>

<sup>136</sup> The targeting of civilians was not expressly forbidden before the Hague conference of 1899, and was actually quite common: ALEXANDER GILLESPIE, *A HISTORY OF THE LAWS OF WAR VOLUME II: THE CUSTOMS AND LAWS OF WAR WITH REGARDS TO CIVILIANS IN TIMES OF CONFLICT* 14-16 (2011). Even after WWI the British Air Ministry objected to any legal actions against German pilots that used indiscriminate bombing during the war (*id.*, at 20). Starvation of civilians as part of legitimate siege warfare was actually expressly allowed in the Lieber code and was not regarded as a war crime by the Nuremberg Tribunal (see the famous *High Command Trial*, United States of America vs. Wilhelm von Leeb et al., U.S. Military Tribunal Nuremberg, Judgment of 27 October 1948). See also Lieber Code, *supra* note 4, Arts. 17, 18.

<sup>137</sup> Lieber Code, *supra* note 4, Art. 49.

<sup>138</sup> "Partisans," according to the Lieber code, are soldiers armed and wearing the uniform of their army, but belonging to a corps which acts in detachment from the main body for the purpose of making inroads into the territory occupied by the enemy. If captured they are entitled to all the privileges of the prisoner of war, see Lieber Code, *supra* note 4, at article 81. During and after WWII, privileged status was further restricted, to include only those resistance fighters who belong to a party to the conflict, see the Geneva Convention Relative to the Treatment of Prisoners of War Art. 4, Aug. 12, 1949, available at <http://www.icrc.org/ihl.nsf/FULL/375>; ANTONIO CASSESE, *INTERNATIONAL LAW* 402 (2nd ed., 2005).

<sup>139</sup> Lieber code, *supra* note 4, Art. 82.

<sup>140</sup> Article 44(3) of the first additional protocol to the Geneva Conventions states: In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. (*Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 UNTS 3). The ICRC commentaries regarding this article state that: "...the 'ratio legis' of this provision is given by the clause

This explanation is both logically flawed and historically inaccurate. It would be strange to assume that the law was designed to force one party to protect its own civilians; IHL was not designed to interfere in the way a state treated its own population. Moreover, the rules requiring soldiers to wear uniform and be subject to the commands of a belligerent date back to a relatively early stage in the evolution of IHL, when the protection of civilians – as a matter of positive law – was still relatively weak.<sup>141</sup> And non-uniformed individuals were entitled to take up arms to confront advancing troops even if they do not distinguish themselves from non-combatants,<sup>142</sup> obviously endangering their civilians in the most likely situations where civilians could become in the line of fire. If not to protect civilians, for what purpose, then, were soldiers required to be identifiable? Most probably, the soldiers' mark of privileged status – like the prohibition on “privateering”<sup>143</sup> – was aimed at preventing the participation in combat of irregular, unruly fighters, who could not be properly controlled by their commanders. Men fighting “without commission” were those not subject to the army's chain of command, “wildcards” more dangerous than they were beneficial.<sup>144</sup> Francis Lieber was well aware of such dangers: at the start of the U.S. Civil War the Confederates passed the Partisan Rangers Act (1862), which facilitated the involvement of soldiers without uniform acting behind Union lines. As it turned out, however, those “partisan rangers” behaved like common criminals. In one recorded incident, a group entered the town of Lawrence, Kansas, and killed 150 men

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which states that it is 'in order to promote the protection of the civilian population from the effects of hostilities' that combatants are obliged to distinguish themselves. Since the adversary is obliged at all times to make a distinction between the civilian population and combatants, in order to ensure respect for and protection of the civilian population (Article 48 -- 'Basic rule '), such a distinction must be made possible. If, for example, the invader is confronted during his advance (the problem of occupation will be examined in the second sentence) by a combined resistance of regular forces presenting identifiable military targets, and the harassment of guerrilla forces which are indistinguishable from the civilian population, it is more or less certain that the security of this population will end up by being seriously threatened". COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949. Sandoz Y et al (eds.) (1987) at 527.

<sup>141</sup> *Supra* note 135

<sup>142</sup> The *levée en masse* situation. See The Brussels Declaration, *supra* note 76, Article 10 ("he population of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 9, shall be regarded as belligerents if they respect the laws and customs of war").

<sup>143</sup> See *supra* text accompanying note 127.

<sup>144</sup> For a similar reason it was considered at the time a violation of IHL to employ soldiers from the colonies, see e.g., The British Manual of Military Law of 1914, *supra* note 17, at p. 242, para. 38.

and boys in an act of senseless violence. Davis, the Confederate President, quickly repealed the law.<sup>145</sup>

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

(b) *The Status of Prisoners of War*

The law on prisoners of war (POW) stipulates that those who possess combatant status and have fallen into the hands of the enemy<sup>146</sup> must be protected from violence and treated humanely at all times.<sup>147</sup> Today this rule is generally understood as designed to protect captured combatants from unnecessary suffering. We identify a different motive. In analyzing the institution of POW's, it is necessary to differentiate between the *status* of POW's as individuals who should be immune from harm once they have laid down their arms (*hors de combat*), and the way POW's should be treated by the detaining army (e.g., where they should be detained, could they communicate with their families, etc.). The P-A prism can explain why the regulation of these two issues developed separately, and why these issues were not similarly respected. As it happens, whereas the norms concerning POW status developed early on and have been generally well respected, the situation is quite different with respect to the treatment of POW's in custody.

The norms regarding the treatment of POW's took long to mature and were often abused.<sup>148</sup> Resisted by governments throughout the nineteenth century, they became part of the Geneva Law only in 1929, with the adoption of the Geneva Convention relating to the treatment of Prisoners of War.<sup>149</sup> In contrast, the law concerning the status of POW's as immune from violence once *hors de combat* was recognized at the Brussels Conference of 1874<sup>150</sup> and

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<sup>145</sup> GILLESPIE, *supra* note 6, at 62.

<sup>146</sup> Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 138, *id.*

<sup>147</sup> *Id.*, Art. 13

<sup>148</sup> GILLESPIE, *supra* note 6, e.g. at 149.

<sup>149</sup> Geneva Convention Relative to the Treatment of Prisoners of War, July. 27, 1929, available at <http://www.icrc.org/ihl.nsf/FULL/305?OpenDocument>.

<sup>150</sup> *Supra* note 77.

codified in the Hague regulations of 1899 and 1907.<sup>151</sup> The norms regarding the status of POW's have generally been respected in many, though certainly not all, conflicts.

We posit that the P-A analysis can account for that discrepancy between the two types of norms concerning POW's. The definition of POW as a status is designed to restrain the potential captor in the battlefield. In earlier times, captors were free to negotiate ransom with their captives on pain of death.<sup>152</sup> This gave combatants the perverse incentive of seeking private gain rather than following the commander's orders. Such a tradeoff was both unnecessary and problematic in an army of conscripts. When war became a national enterprise, the need arose for a clear stipulation that all enemy soldiers who surrendered would be kept alive and transferred to the centralized control of the state. These are the origins of rules on POW status. This was reflected in the Paris conference in 1867, where the parties "agreed that wounded soldiers needed protection against robbery and gratuitous injury (for example, by looters)."<sup>153</sup> Traces of this rationale can also be found in the texts that define POW status. Article 23 of the 1874 Brussels Declaration (as well as Article 4 of the 1899 Hague Convention) emphasizes what is now self-evident, but was at the time an innovation:

"[POW's] are in the power of the hostile Government, but not in that of the individuals or corps who captured them. . . . All their personal belongings except arms shall remain their property."<sup>154</sup>

The main interest of principals in establishing the institution of POW's was to control their own soldiers during combat, lest they deviate from orders and, instead of rushing forward, engage in capturing and ransoming enemy combatants. But once POW's were removed from the battlefield, the principals' interest in regulating the way they were treated waned. Indeed, the treatment of POW's is one of the rare instances where the only incentive to comply with the law is reciprocity. In fact, the many failures to observe these norms, such as ordering POW's killed on the battlefield or torturing them in captivity, may indicate that reciprocity on its own, absent an additional P-A motivation, is often not sufficient enough an incentive to ensure compliance with IHL.

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<sup>151</sup> 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 art. 23(c), Oct 18, 1907, available at <http://www.icrc.org/ihl.nsf/full/195>

<sup>152</sup> Like the concept of "privateering," *supra* note 127.

<sup>153</sup> Hutchinson, *supra* note 100, at 80 (describing the informal agreement reached in the 1867 Paris conference).

<sup>154</sup> *Supra* note 77.



(c) *The Prohibition on Taking Booty*

The same rationale that led to the creation of the POW regime – to minimize private incentives in combat, rather than to reduce harm to the enemy – also explains the evolution of norms first regulating, and later prohibiting, pillaging.<sup>155</sup> Several ancient traditions did not prohibit looting, but rather regarded it as a legitimate reward.<sup>156</sup> Obviously, the loot provided an incentive for fighters to join the fighting force and engage in combat with determination. But it was also a potential source of conflict, both within the fighting force and between soldier and principals, who wanted their share, as well. Therefore complex rules – naturally wholly internal – had to be developed to provide effective incentives while minimizing tensions.

With the turn to an army based on conscripts, there was no longer a need to provide private incentives to increase the size of the force. However, with huge armies now consisting of mostly poor and undisciplined soldiers, the regulation of looting became a formidable task. Moreover, the reliance of the large army on local resources grew dramatically. A large army of occupation was expected to feed its men and horses on the resources of the occupied population, and thus had to secure their continued availability. As a result, looting and pillaging were strictly prohibited.<sup>157</sup> More accurately, *personal* looting was prohibited, whereas *organized* looting, otherwise known as the “requisitioning” of private property, was recognized as lawful.<sup>158</sup> As long as organized looting followed the rules, no P-A problems would arise.

(d) *The Prohibition on the Use of Certain Weapons and Types of Ammunition*

Intuitively, the prohibition on the use of certain weapons can have only one goal: to prevent unnecessary suffering of combatants. But beyond moral

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<sup>155</sup> Gillespie explains the evolution of strict norms in several ancient traditions as “necessary for two reasons. First so that equity would be achieved among the victors and each would get their ‘just’ reward... Secondly, so that troops would continue fighting through a conflict, and not stop for private pillaging, allowing the enemy to regroup”, GILLESPIE, *supra* note 141, at 211.

<sup>156</sup> As Napoleon advised his brother Joseph, when he was made King of Naples, in 1806, “The security of your dominion depends on how you behave in the conquered province. Burn down a dozen places which are not willing to submit themselves. Of course, not after you first looted them, my soldiers must not be allowed to go away with their hands empty.” *Id.*, at 247.

<sup>157</sup> Art. 28 of the Hague Regulations, *supra* note 148.

<sup>158</sup> On the requisitioning of private property by the army of occupation *see infra* note 169 and accompanying text. Also, as part of the peace treaty, the losing side would pay reparations to the victor. Most famously, under the Versailles treaty of 1919, Germany was to pay reparations of 132 Billion Gold Marks (HENRY KISSINGER, *DIPLOMACY* 257 (1995)).

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

The prohibition contained in the first-ever multilateral treaty on the conduct of hostilities – the Saint Petersburg Declaration of 1868 – related to the use of bullets that explode on impact with human flesh, causing certain and painful death and disfiguring the corpse.<sup>159</sup> The *travaux* of this Declaration reveal that it sought to address a problem of governance within the *stronger* European armies, rather than the need to regulate inter-state relations. The prohibited bullets were quite effective when used against nonhuman targets, such as cases of ammunition, but there was little military gain in using them against soldiers. It was hard to justify gruesome pictures of affected soldiers to a concerned public.<sup>160</sup> Obviously, it was possible to simply order the troops to use such bullets against nonhuman targets only, but governments did not trust low-ranking soldiers.<sup>161</sup> At the same time, they felt that they could trust commanders of artillery units to use such projectiles properly. Hence the Declaration prohibits only projectiles weighing less than 400 grams, namely those that could be loaded into rifles.

Poisoning can be an effective way to incapacitate an enemy combatant. Nonetheless, it has been prohibited by IHL even before the Brussels Declaration of 1874.<sup>162</sup> At the time the use of poison was perceived as dishonorable.<sup>163</sup> Immanuel Kant sheds light on the matter, suggesting that nations at war must refrain from “such acts of war as shall make mutual trust impossible during some future time of peace,” specifically referring to poisoning as one of the “dishonorable stratagems” that must be “absolutely prohibited.”<sup>164</sup> In other words, beyond moral condemnation of such a method

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<sup>159</sup> *Supra*, note 76.

<sup>160</sup> On the communication revolution of the time *see supra*, text to notes 99-100.

<sup>161</sup> *See* Protocols of the military conference at St. Petersburg (1868), *supra* note 116. The protocols reflect a debate dominated by the powerful European states, whereas the relative weaker state representatives rarely venture to intervene.

<sup>162</sup> Brussels declaration, *supra* note 76, Art. 13 (a).

<sup>163</sup> ALEXANDER GILLESPIE, *A HISTORY OF THE LAWS OF WAR VOLUME III: THE CUSTOMS AND LAWS OF WAR WITH REGARDS TO ARMS CONTROL* 88-90 (2011).

<sup>164</sup> Immanuel Kant, *To Perpetual Peace: A Philosophical Sketch* (1795) in IMMANUEL KANT: *TO PERPETUAL PEACE AND OTHER ESSAYS* 107, 110 (T. Humphrey Ed., 1983).

of warfare, the more realist concern was the potentially long-term reputational effects of using such weapons. Poison was readily available to soldiers and its use would not always be apparent to commanders. Soldiers might have been tempted to use poison to avoid confrontation or otherwise reduce their risks. Therefore, the prohibition of the use of poison resolved a potential tension between governments and their soldiers. In our terminology, principals worried about the long-term implications of using poison sought to secure their military agents' compliance through a clear IHL prohibition.

(e) *The Law of Occupation*

The aim to control the military agent resonates in many if not most nineteenth century norms governing the occupation of enemy territory. As Napoleon discovered in Spain, occupation poses complex governance challenges for the occupying forces. Not only do they need to control an adversarial population, they must also make sure their own forces do not treat the communities under their control too harshly. The need for international law to govern occupation and minimize what we call agency costs was felt by the U.S. General Scott in the Mexican War of 1848, by Abraham Lincoln in 1863, and by the Prussian army in occupied France in 1870.<sup>165</sup> The law of occupation that developed during the nineteenth century is tailored to these very ends: it sets forth what an occupier is and is not permitted to do, regulating the treatment of locals who dare to challenge the occupier and thereby providing tools for the local population and third parties to assess compliance with these restraints.<sup>166</sup>

For example, whereas individual soldiers are prohibited from pillaging and destroying property,<sup>167</sup> the organized exploitation of private property is approved and regulated. The regime of organized exploitation of private property reflects not morality, but the evolving needs of the army of occupation. The Brussels Declaration of 1874 permitted occupying armies to rely heavily on resources of the occupied population to sustain the war effort. When requisitioning private property, the occupant was expected to issue a receipt, so that dispossessed owners would be able to claim a refund from their own government (at the time, the defeated government was expected to compensate the victor).<sup>168</sup> With the modernization of military logistics in the

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<sup>165</sup> See Witt, *supra* note 4 at 123-24; on Scott's use of international law to resolve governance problems, *see also infra* text to notes 191-92.

<sup>166</sup> BENVENISTI, *supra* note 8, at 71.

<sup>167</sup> Hague Regulations, *supra* note 148, Art. 47.

<sup>168</sup> Brussels Declaration, *supra* note 77, Arts. 41, 42 (stating that "[f]or every contribution, a receipt shall be given to the person furnishing it.").

late nineteenth century, allowing armies to rely more on their own resources, nations agreed (in the 1899 Hague Regulations) to the stipulation that the occupier would pay compensation “as far as possible” instead of issuing receipts. Only in the 1907 Regulations did actual reimbursement become the norm.<sup>169</sup> The deliberations during the respective conferences on the limits of requisitioning reflect the strong interest of the potential occupying forces in norms that would facilitate their military rule without regard to morality or reciprocity.

Another key example is the norms that define the authority of the occupier to modify existing legislation. Occupiers were expected to maintain the institutional *status quo* and abide by existing legislation “unless absolutely prevented.”<sup>170</sup> This regime resolves three problems of governance. First, it reduces the discretion of occupying forces and ensures consistency in the way they treat the various areas under their control, thereby increasing the ability of their principal to control its agents’ actions.<sup>171</sup> Second, the norms assigning authority to the occupier seek to regularize life under occupation. Third, the maintenance of the *status quo* resolves a P-A problem for the ousted government, which may be worried that local elements will exploit the opportunity to seize power or otherwise make its resumption of authority difficult. In this latter sense, Article 43 of the Hague Regulations constituted a pact between state elites that had nothing to do with morality or reciprocity.<sup>172</sup> As in the other IHL norms which received detailed attention during the formative stage of codification in the second half of the nineteenth century, the law of occupation had little to do with protecting civilians or minimizing harm to combatants. It was all about controlling the military agents.

## (2) Institutions

The fire alarm mechanism of IHL has been considerably enhanced through the establishment of mechanisms that communicate information between the governments engaged in hostilities. The following outlines the traditional institutions that developed in an era of inter-state warfare. All of them reduce

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<sup>169</sup> The 1899 Hague Regulations (*supra* note 148) introduced actual payment of compensation as the primary substitute (Art. 52: “The contributions in kind shall, as far as possible, be paid for in ready money; if not, their receipt shall be acknowledged”), and the 1907 version (*supra* note 148) made sure actual compensation was the occupant’s obligation (Art. 52: “Contributions in kind shall as far as is possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible”). Hague Regulations, *supra* note 148.

<sup>170</sup> Hague Regulations, *supra* note 148, Art. 43.

<sup>171</sup> See *supra* note 95 and accompanying text.

<sup>172</sup> Benvenisti, *supra* note 8 at 70-71.

information gaps within the army. Additional institutions developed in recent years to address asymmetric warfare and will be discussed in Part V.

(a) *Information-Generating Institutions*

The first of such institutions is the “protecting power.” A protecting power is a neutral state that has agreed to look after the interests of another state engaged in hostilities with a third state.<sup>173</sup> The protecting power’s main task is to facilitate the exchange of information from the state it represents (and its population under occupation, to which it has the right of access)<sup>174</sup> to the government of the opposite side. This information is not disseminated publicly. That government can therefore rely on the protecting power to provide information from the battlefield or occupied territory that its own army may be hesitant to reveal.

The most effective information-generating institution is the ICRC. The ICRC’s access to hostility zones and occupied areas, which is secured by IHL,<sup>175</sup> enables it to obtain information about the behavior of combatants and occupiers. Over its many years of existence, the ICRC has developed a strategy for communicating this information in the most effective way. This strategy was explained in a 2005 document,<sup>176</sup> where the ICRC stresses that its principal mode of operation is “bilateral and confidential representations.”<sup>177</sup> Its primary role is to communicate information about violations to the fighting party itself, obviously under the assumption that such violations betray a lack of discipline within the army rather than an intention to breach the law. Only if the state does not respond to the communication will the ICRC start mobilizing other states or regional organizations to persuade the violator to observe the law. These contacts are also confidential, and extended only to states that provide assurances that they will keep the communications confidential. It is only when these two methods fail that the ICRC might turn to public condemnation. In his comprehensive analysis, Steven Ratner posited secrecy and confidentiality as the core modality of the ICRC’s operations.<sup>178</sup>

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<sup>173</sup> Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, art. 9, Aug 12, 1949, available at <http://www.icrc.org/ihl.nsf/full/380>.

<sup>174</sup> *Id.*, Article 30.

<sup>175</sup> *Id.*, Article 11.

<sup>176</sup> *Action by the International Committee of the Red Cross in the Event of Violations of International Humanitarian Law or Other Fundamental Rules Protecting Persons in Situations of Violence*, 87 INT’L REV. RED CROSS 393 (2005).

<sup>177</sup> *Id.* at 395.

<sup>178</sup> Steven Ratner, *Law Promotion Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War* 22 EURO, J, INT’L LAW 459 (2011).

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

(b) "*Military Necessity*"

As David Luban recently clarified, the entrenched doctrine of military necessity has been accorded several interpretations.<sup>179</sup> Initially, some states (notably Germany) regarded the necessities of war (*Kriegsraison*) as enjoying precedence over the rules of war. Therefore, IHL applied only until it became too dangerous to be complied with.<sup>180</sup> This extreme view was later rejected in favor of a meaning that endorses "military necessity" as part of the law.<sup>181</sup> In Luban's words, according to this second meaning, whereas IHL:

"[g]overn[s] . . . war everywhere, by decreeing which rules will bend to military necessity and which will not", it "remains overwhelmingly slanted in favor of militaries, and grants them enormous latitude."<sup>182</sup>

As Yoram Dinstein emphasizes, in assessing the exercise of discretion in *ex post* proceedings, the "appraisal of the circumstances . . . must be based on the combat situation as it appeared to the commander at the time of action."<sup>183</sup>

This "enormous latitude," to be reviewed *ex post*, taking into account the information that the commander had at the time of action, provides a useful escape clause for agents (governments and commanders alike) who wish to evade responsibility. But the principals are the main beneficiaries of this "optimally imperfect" doctrine.<sup>184</sup> They are the ones who enjoy the enormous latitude in deciding how to react to information they receive about their agents'

<sup>179</sup> Luban, *supra* note 3.

<sup>180</sup> See also Yoram Dinstein, *Military Necessity*, in Max Planck Encyclopedia of International Law; Carnahan, *supra* note 94 at 217-218 (referring to the Lieber Code's definition of military necessity as "a license to mischief").

<sup>181</sup> For example, the prohibition of "indiscriminate attacks" refers to attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated", see Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art.51(5)(B), June 8, 1977, 1125 U.N.T.S. 3 (hereinafter AP-I or the Additional Protocol), available at <http://www.icrc.org/ihl.nsf/full/470?opendocument>.

<sup>182</sup> Luban, *supra* note 3, at 43.

<sup>183</sup> Dinstein, *supra* note 180.

<sup>184</sup> On the optimally imperfect nature of IHL, see *supra* text accompanying note 24.

breaches of the law. The doctrine also shields them to some extent from having sanctions imposed on them or their agents by third parties. If the main goal of IHL is to deter the agent without restricting the principal's options too severely, the traditional doctrine on "military necessity" is eminently suitable for the purpose.

Indirectly, the doctrine on "military necessity" creates an incentive for armies to collect information and keep records so that their discretion does not betray recklessness towards compliance with IHL.<sup>185</sup> By forcing military commanders to gather as much information as possible regarding a specific incident, record this information, and make it available to the civilian authorities, the doctrine seeks to close the information gap and thereby reduce agency slack.<sup>186</sup>

### (c) Reprisals

The doctrine of reprisal states that when one party to a conflict violates an IHL norm, the other party is allowed to respond in kind, subject to certain conditions.<sup>187</sup> In recent decades, the doctrine has fallen out of favor, and most commentators consider its use to be allowed only under very narrow circumstances.<sup>188</sup> Reprisals are usually described as an embodiment of the reciprocal nature of IHL, and their demise is attributed to the rise of morality in IHL. Neither of these explanations is entirely convincing. It has always been problematic to justify reprisals on moral arguments.<sup>189</sup> And although it is possible that the voice of morality has become louder in recent years, the need to find an answer to asymmetric conflicts has become more acute where non-state actors flout IHL systematically. Indeed, if the reason for the doctrine is the reciprocal nature of IHL, we would have expected it to thrive under

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<sup>185</sup> Gregory McNeal, *The U.S. Practice of Collateral Damage Estimation and Mitigation*, (Social Science Research Network, working paper no. 16, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1819583](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1819583) (explaining the procedure used by U.S. armed forces in Afghanistan in targeted killings operations in order to limit collateral damage).

<sup>186</sup> For a procedural interpretation of the norm of proportionality, see Amichai Cohen, *The Principle of Proportionality in the Context of Operation Cast Lead: Institutional Perspectives*, 35 RUTGERS LAW RECORD (2009).

<sup>187</sup> YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 220 (1<sup>st</sup> ed., 2004).

<sup>188</sup> HENCKAERTS & DOSWALD-BECK, *supra* note 22, at 514. Additional Protocol I, *supra* note 181, Art. 51(6).

<sup>189</sup> Michael Walzer argues that there is some moral justification for reprisals against soldiers, but not against civilians. WALZER, *supra* note 1, at 215. It is not clear, however, why reprisals were common practice in the nineteenth century, and what exactly brought about the demise of the phenomenon in the twentieth century.

contemporary conditions when most wars are asymmetric, and regular armies are sorely tempted to react harshly to their opponents' violations. However, regular armies rarely invoke reprisals as a justification for their reactions.

The doctrine of reprisal, we submit, is specifically designed to respond to P-A problems because of the procedures it sets forth: it allows retaliation only after an advance warning has been communicated to the enemy (i.e., fire alarm mechanism), and only after retaliation has been approved by the highest echelons of the retaliating army.<sup>190</sup> As a result, P-A costs are minimized on both sides. That reprisals are governed by international norms also enables both the government and the army to deflect pressure from their respective principals (citizens and government) to respond too aggressively against an opponent. We find such reliance on the law already during the American Civil War, by General Halleck as General-in-Chief when he invoked the limits on reprisals to rebuff public calls for harsher retaliation measures against the Confederates.<sup>191</sup>

At the same time, the right to resort to reprisal offers a convenient escape clause for governments who seek to deviate from the rules by citing violations by the opponent. Thereby the doctrine also contributes to the "optimal imperfection" of IHL.

In asymmetric warfare conducted by and against non-state actors, acts of reprisal against the non-state actor, which in fact harm civilians, have little informational value because they are unlikely to reduce the information gap within the enemy army. The principals of the non-state power have no qualms about flouting IHL. Nor will the non-state enemy resort to the process of reprisals to warn its regular opponent of violations by its fighters. We submit that the ineffectiveness of reprisals as a means of communication is likely the reason for their falling out of favor.<sup>192</sup>

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<sup>190</sup> See "conditions for reprisal action" UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, 421, para. 16, 17 (2004) ("reasonable notice must be given that reprisals will be taken...; It must be publicized; ... [it] must only be authorize at the highest level of government."), available at <http://www.mod.uk/NR/rdonlyres/82702E75-9A14-4EF5-B414-49B0D7A27816/0/JSP3832004Edition.pdf>; See also DIETER FLECK, *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 233 (2nd Ed., 2008) ("reprisals shall be authorized by the highest political level").

<sup>191</sup> BEST, *supra* note 4, at 169.

<sup>192</sup> It is not clear whether all reprisals against civilians are always prohibited. Article 51(6) of Additional Protocol 1 indeed prohibits such acts, but it is arguable whether it customary, i.e., obligatory on states which did not join the first additional protocol (e.g., the U.S., Israel) or which attached a specific reservation to this article (e.g., the UK), see HENCKAERTS & DOSWALD BECK, *supra* note 22, at p. 514. However, it is almost unthinkable that any state would actually use reprisals against civilians in the modern world.



#### V. ASYMMETRIC WARFARE AND PRINCIPAL-AGENT RELATIONS: WHAT ROLE FOR IHL?

Asymmetric warfare poses acute governance challenges. Frustration with the inability to target defined military targets and achieve clear “victory” against an enemy that abuses the law’s protection often leads both principals and agents to break the law. Some principals realize sooner or later that such deterioration may be counterproductive, and may adopt what has recently been called counterinsurgency strategies.<sup>193</sup> As will be suggested in this Part, IHL can assist the principals in promoting this policy. At the same time, other principals fail to appreciate this concern out of the hope that extreme measures will break the back of their opponents. In these latter cases, while principals have little need for IHL, other forces – foreign states and global public opinion – resort to IHL for a variety of moral and utilitarian reasons. The hope of these latter actors is to deter both principals and agents through external enforcement measures that are based on IHL, such as war crime adjudication. Through such indirect enforcement of IHL, third parties seek to enhance the resolve of the agents to defy manifestly unlawful orders issued by their principals.

The first reported use of international law as part of a counterinsurgency operation took place during the U.S.-Mexico War in 1847 when General Scott issued General Order no. 20.<sup>194</sup> The Order authorized him to try both American soldiers and Mexican fighters for violations of his instructions in military commissions. The success of Scott’s law-based strategy in effectively reducing strife in the area under his control can be compared to the experience of another general in another area who faced severe challenges to his authority until he adopted Scott’s methods.<sup>195</sup>

In the twentieth century it was the massacre committed by U.S. troops in the village of My Lai in 1969 which led to the strict adoption of IHL by the U.S. Army.<sup>196</sup> Canada followed suit after Canadian forces were involved in

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<sup>193</sup> E.g. Field Manual 3-24 COUNTERINSURGENCY (US Department of the Army, 2006), available at:

[http://usacac.leavenworth.army.mil/CAC2/COIN/repository/FM\\_3-24.pdf](http://usacac.leavenworth.army.mil/CAC2/COIN/repository/FM_3-24.pdf)

<sup>194</sup> Erika Myers, *Conquering Peace: Military Commissions as a Warfare Strategy in the Mexican War*, 35 AM J CRIM L 201 (2008); David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT’L L 5 (2005). See also Witt, *supra* note 4 at 123-24.

<sup>195</sup> Myers, *supra* note 194, at 226.

<sup>196</sup> The Peers Report that investigated the events leading up to the My Lai massacre in Vietnam cited the lack of proper training in the law of war as one of the factors that created an environment conducive to violations, see Stephen A. Myrow, *Waging War on the Advice of Counsel: The Role of Operational Law in the Gulf War* 7 USAFA J. LEG. STUD. 131, 133 (1996 / 1997). See also Major Jeffrey F. Addicott & Major William A. Hudson, Jr., *The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons* 139 MIL. L. REV. 153,

atrocities during the short-term occupation of Somalia in 1992.<sup>197</sup> What is common to these measures is the adoption of institutions that provide a “credible threat” to military agents that is based on domestic institutions (rather than on external actors). Since the available external threats are limited for armies as strong as the U.S. military, the leadership must develop effective internal constraints. These constraints are also optimally imperfect because they offer the principals at least some opportunities to forego sanctions when they do not need the cover of IHL. Reliance on *internal* institutions and procedures to ensure compliance with IHL is therefore the optimal solution for government and military agents engaged in asymmetric warfare. Here we mention three of these enforcement institutions rather briefly.

(1) *Operational Legal Advisors*

Since the Gulf War in 1991, the presence of legal advisors embedded in front units and involved in operational decisions has become routine in the U.S., UK, NATO, and Israeli armed forces.<sup>198</sup> Legal operational advice constitutes the most important internal monitoring device available to the government and the army’s high command to control the behavior of the armed forces. Operational legal advisors are not only required to approve activities, but also inculcate the norms and internalize international law into military practice. Observing the emergence of legal operational advice in the IDF, Amichai Cohen has pointed out that “the presence of operational legal advisers has enabled the military to ‘internalize’ IHL, with all that the term implies with respect to the assimilation of that body of law into the *modus operandi* of the armed forces themselves. Thanks to them, IHL has been transformed from an

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162-165 (1993) (discussing the findings of the Peers Report concerning lack of training in the law).

<sup>197</sup> Following the recommendations of the Somalia Commission of Inquiry Report, see Kenneth W. Watkin, *The Operational Lawyer: An Essential Resource for the Modern Commander*, available at <http://www.forces.gc.ca/jag/publications/oplaw-loiop/opLaw-loiop-watkin-eng.pdf>

<sup>198</sup> During the Gulf War in 1991, the selection of targets in the Coalition’s air campaign was constantly monitored and reviewed by officers of the U.S. Judge Advocate General Corps. During the NATO attack on Serbia in 1999, Canadian lawyers examined every sortie, and during the invasion of Iraq in 2003, American and British legal advisors accompanied the attacking ground forces. Michael W. Lewis, *The Role of Aerial Bombardment In the 1991 Gulf War* 97 AM. J. INT’L L. 481 (2003). See also United States Department of Defense, Final Report to the Congress on the Conduct of the Persian Gulf War, Appendix O: The Role of the Law of War, (April 10, 1992) 31 I.L.M. 617 (1992).

‘external’ constraint on military action to an intrinsic facet of the military’s own operational code.’<sup>199</sup>

It is noteworthy that there is no obligation under international law to embed operational legal advisors with the troops or have them approve individual missions. The only obligation is to “ensure that legal advisers are available, *when necessary*, to advise military commanders *at the appropriate level*” on IHL.<sup>200</sup> Nevertheless, as indicated above, several armies have voluntarily adopted even more stringent legal review than IHL actually demands, after having experienced serious agency costs relating to violations of the law by their subordinates.<sup>201</sup>

## (2) Domestic Review by Independent Actors

In many liberal democracies, domestic institutions responsible for investigating violations of IHL have undergone major reforms in recent years. Courts have started to exercise review over security measures and even over military practices,<sup>202</sup> commissions of inquiry have sprouted in many jurisdictions, and an IHL-based obligation to review and investigate possible violations of IHL by independent agents has crystallized.<sup>203</sup> In other words,

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<sup>199</sup> Amichai Cohen, *Legal Operational Advice in the Israeli Defense Forces: The International Law Department and the Changing Nature of International Humanitarian Law* 26 CONN. J. INT’L LAW 367 (2011). See also Galia Rivlin, *Constitutions Beyond Borders: The Overlooked Practical Aspects of the Extraterritorial Question* 30 BOSTON U. INT’L L. J. 135 (2012) (interviewing Israeli military officials, state attorneys and judges concerning Israeli policies in the Occupied Territories.); Laura Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 Am. J. Int’l. L. 1 (2010).

<sup>200</sup> Article 82 of the additional protocol declares: “The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.” The additional protocol, *supra* note 181, Art. 82.

<sup>201</sup> On the evolution of operational legal advice, see Dickinson, *supra* note 199.

<sup>202</sup> Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT’L L. 241 (2008).

<sup>203</sup> E.g., the Israeli Kahan commission, Commission of Inquiry for Investigation of the Events in the Beirut Refugee Camps (1983), English version: THE BEIRUT MASSACRE: THE COMPLETE KAHAN COMMISSION REPORT (1983); The British Seville Inquiry concerning the events of Bloody Sunday, available at <http://webarchive.nationalarchives.gov.uk/20101103103930/http://bloody-sunday-inquiry.org>; The Chilcot Commission established by the UK government to investigate the involvement of the UK in the Second Gulf War, available at <http://www.iraquiry.org.uk/about.aspx>; the enquiry conducted by the Dutch Institute for War Documentation into the responsibility of Netherlands forces for the Srebrenica massacre of 1995 in Bosnia and Herzegovina

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

### (3) *The Rise of International Criminal Adjudication*

What motivated the rise of international criminal adjudication (ICL) was the realization of third parties that the *principals* were no longer reliable. The rise of genocidal regimes made it necessary to deter the principals and the agents that obey their orders. ICL constitutes a reminder to the military agents of their obligation to disobey their principals if they are given illegal commands.<sup>204</sup> Obviously, ICL can also be a way for government to pre-commit themselves and their troops.<sup>205</sup> Furthermore, the principle of “complementarity”<sup>206</sup> according to which states may avoid prosecution abroad if they themselves make genuine efforts to prosecute violators provides an incentive to strengthen domestic reviewing institutions that can enforce domestic compliance with IHL.

## VI. NORMATIVE IMPLICATIONS

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

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

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[http://www.srebrenica-project.com/index.php?option=com\\_content&view=article&id=140:niod-report&catid=12:2009-01-25-02-01-02](http://www.srebrenica-project.com/index.php?option=com_content&view=article&id=140:niod-report&catid=12:2009-01-25-02-01-02). For a description of these reforms and their implications, see Michael N. Schmitt, *Investigating Violations of International Law in Armed Conflicts* 2 HARVARD NAT’L SECURITY J. 31 (2011); Amichai Cohen & Yuval Shany, *Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts* 14 YB. INT’L HUM. L. 37 (2012).

<sup>204</sup> Rome Statute of the International Criminal Court, UN Doc. AF/CONF. 183/9, art. 33 (17 July, 1998). Bohrer *supra* note 29.

<sup>205</sup> Cf. Beth Simmons and Allison Danner, *Credible Commitments and the International Criminal Court*, 64 INTERNATIONAL ORGANIZATION 225, 234 (2010) (claiming that governments tied their hands by joining the ICC, in order to create credible commitments to their domestic constituencies).

<sup>206</sup> The principle of complementarity appears in article 17 of the ICC Rome Statute, *supra* note 204. According to this principle – the court would only act if the relevant state is “unwilling and unable” to investigate the crime.

combatants as much as possible against the scourge of war. Indeed, governments and armies have often tried and sometimes succeeded in convincing their citizens and global public opinion that the sole purpose of the law they have drafted and complied with is to promote a common morality. This public relations campaign began in 1868 with the first solemn declaration to the effect that war was meant solely to weaken, not kill, the enemy.<sup>207</sup> It has continued ever since. Our analysis demonstrates that although IHL has promoted moral concerns, these came as an afterthought, when it comported with the interest of maintaining control throughout the echelons of authority.

As a tool for regulating P-A relations, IHL is indirectly protective of civilians' interests and partially promotes morality in warfare. IHL directs governments or armies not to harm citizens excessively, nor expose their family members serving in the army to unnecessary suffering and death without being able to surrender. As we saw above, the evidence suggests that most violations are perpetrated by low-level soldiers and better controls could eliminate much harm.<sup>208</sup> Even when IHL's function is the reduction of agency costs, it can indirectly contribute to the reduction of human suffering, because it seeks to restrain soldiers who at the height of battle might lose their tempers.

However, IHL responds to citizens' goals only partially (and indirectly), because the IHL-making process itself is also subject to the P-A problem. International bargaining over the drafting of treaties is usually dominated by agents of the citizens (governments and armies), while civil society has had considerable difficulty expressing its views.<sup>209</sup> Civil society has encountered difficulties in repeating the unique success of Dunant and his colleagues in 1864, after which governments and armies took the lead in regulating warfare. In recent years only a handful of civil society initiatives – to prohibit the use of certain types of weapons and ammunition, such as antipersonnel mines<sup>210</sup> and cluster bombs<sup>211</sup> – matured into treaties. The Rome Statute of the International Criminal Court was also achieved through heavy civil society involvement,<sup>212</sup> but the criminal law's emphasis on strict *actus reus* and *mens rea* requirements leave out violations of IHL that do not amount to war crimes. It is therefore not

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<sup>207</sup> St. Petersburg Declaration, *supra* note 76.

<sup>208</sup> Morrow, *supra* note 19, *id.*

<sup>209</sup> See *supra* note 9 and accompanying text.

<sup>210</sup> Oslo Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, September 18, 1997, available at <http://untreaty.un.org/cod/avl/ha/cpusptam/cpusptam.html>.

<sup>211</sup> Convention on Cluster Munitions, May 30, 2008, available at <http://www.icrc.org/ihl.nsf/FULL/620?OpenDocument>.

<sup>212</sup> Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22 (1999).

surprising that the IHL to which governments and armies subscribe – and which is reflected in international criminal law – grants priority to military necessity over humanitarian concerns.<sup>213</sup> Their version of the law is less than perfectly aligned with limited human suffering, as naked state interests often overshadow humanitarian concerns.

Our observation about the function of IHL therefore suggests that the law does not fully reflect the interests of all stakeholders, as the more diffuse citizen body has not had ample opportunity to weigh in on the drafting process of the law or its implementation. The story we tell adds weight to David Luban's call for the "civilianization of the laws of war"<sup>214</sup> and supports the lawmaking function of international courts, which Theodor Meron has characterized as "the humanization of humanitarian law."<sup>215</sup> Our analysis authorizes, indeed requires, the judicious interpreter – a domestic or international judge applying IHL – to adopt a critical attitude toward the law, and to take into account the interests of the underrepresented principals in the process of construing it.<sup>216</sup>

## VII. CONCLUSION

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

Due to the limited space and general claim of the Article, we have been able to provide only a bird's-eye view of the evolution of IHL. We believe,

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<sup>213</sup> Luban, *supra* note 3.

<sup>214</sup> *Id.*

<sup>215</sup> Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000).

<sup>216</sup> For a domestic analogy to this method of interpretation, see e.g. William N. Eskridge, *Politics without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988); William N. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PENN. L. REV. 1479 (1987); William N. Eskridge & Phillip R. Frickey, *Supreme Court 1993 Term – Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994); William N. Eskridge & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001); William N. Eskridge & John Ferejohn, *Structuring Lawmaking to Reduce Cognitive Bias: A Critical View*, 87 CORNELL L. REV. 616 (2002).

however, that our account is sufficiently robust to support the contention that the evolution of IHL is a story of principals seeking ways to enhance their domination over their military agents, and negotiating the contours of the law not only with foreign governments but also with their own armies. Our summary account leaves space for a much needed, more elaborate historical examination of the motivations of the different actors who contributed to the evolution of IHL. We believe that attention to the P-A dimension of warfare and the need to regulate it will provide more data that will further bolster our general claim.

By many accounts, IHL is presented as imposing restrictions on states engaged in combat. A state fighting an asymmetric war is regarded as having to “fight with one hand tied behind its back.”<sup>217</sup> But if our analysis is correct, the opposite is often true: as a practical matter, IHL *enhances* the ability of states to amass huge armies, because it lowers the costs of controlling them. It thus renders the decision to go to war less risky than otherwise.<sup>218</sup> Therefore, although at times compliance with the law may prove costly in the short run, in the long run states with massive armies are its greatest beneficiaries.

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<sup>217</sup> Justice Aharon Barak, at HCJ 5100/94 THE PUBLIC COMMITTEE AGAINST TORTURE IN ISRAEL 53(4) PD 817 (Israel Supreme Court, 1999).

<sup>218</sup> A similar argument is raised with respect to the law of occupation, viewed as “a pact between state elites, promising reciprocal guarantees of political continuity, and thus, at least to a certain extent, rendering the decision to resort to arms less profound”, BENVENISTI, *supra* note 8, at 71.