State opinio juris and international humanitarian law pluralism

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State *Opinio Juris* and International Humanitarian Law Pluralism

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I. INTRODUCTION

International Humanitarian Law (IHL) has developed largely through a pluralistic process.[1] Its earliest codifications were inspired in no small part by religious and moral thinking.[2] Secular academic writers soon joined the process, making central contributions that are still cited as authoritative centuries later.[3] All the while, States published and refined military manuals and articles of war to instruct their armed forces in rules for the conduct of warfare.[4] By the late nineteenth century, States began to codify accepted expressions of IHL that accounted broadly for military custom, as well as notions of humanity, in a budding corpus of positive international law.[5] The compounded horrors of new weapons and industrial-scale battlefields fueled this and further codification.[6] While the twentieth century saw treaties take pride of place among IHL sources, customary international law, judgments of military and international tribunals, military legal

1. LESLIE GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 26–64 (3d ed. 2008); Christopher Greenwood, *Historical Development and Legal Basis*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 1, 15–35 (Dieter Fleck ed., 2d ed. 2008); *see generally* GEOFFREY BEST, HUMANITY IN WARFARE (1980).

2. *See generally* G.I.A.D. Draper, *The Interaction of Christianity and Chivalry in the Historical Development of the Law of War*, 5 INTERNATIONAL REVIEW OF THE RED CROSS 3 (1965).

3. *See generally* M. H. KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES (Michael Hurst ed., 1965).

4. The paradigmatic example is the Lieber Code approved by President Lincoln for use by the Union Army during the U.S. Civil War. Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, Apr. 24, 1863, *reprinted in* THE LAWS OF ARMED CONFLICTS 3 (Dietrich Schindler & Jiri Toman eds., 2004); Rick Beard, *The Lieber Codes*, NEW YORK TIMES (Apr. 24, 2013), http://opinionator.blogs.nytimes.com/2013/04/24/the-lieber-codes/.

5. *E.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940, 129 Consol. T.S. 361; The Hague Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Respecting the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 187 Consol. T.S. 429.

6. This dynamic was represented most notably by the work of Henri Dunant. *See* PIERRE BOISSIER, HISTORY OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS: FROM SOLFERINO TO TSUSHIMA 19–25 (1985) (describing the gruesome aftermath of the Battle of Solferino that Dunant described in a book that was to inspire the creation of the International Red Cross).

doctrine, and humanitarian and academic commentary also helped to shape the content and evolution of IHL.[7]

Pluralism, however useful at accounting for diverse interests, has not come without cost. Despite prolonged attention and development, IHL exhibits a high degree of ambiguity. Few legal disciplines rival the indeterminacy of IHL. As Sir Hersch Lauterpacht, then Whewell Professor of International Law at the University of Cambridge and later judge on the International Court of Justice, famously observed, "if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law."[8] Confronted with a cacophony of inputs—private and public, military and civilian, domestic and international—the IHL lawyer frequently finds clarity and consensus elusive. Sorting IHL noise from notes requires considerable legal, military, and political experience. The content and operation of even cardinal IHL principles such as distinction remain subject to voluble debate.

While a measure of its indeterminacy is surely attributable to IHL's pluralistic process of development, an equal measure must be traced to the unique and peculiar purpose of IHL. IHL is a body of law that countenances intentional killing and deprivation of liberty on a grand scale in pursuit of national interests, which may not be benign. It expressly allows for the deaths of innocents and destruction of their property to achieve military aims, while imposing obligations and requiring precautions that can expose combatants to tangibly greater danger. Yet, IHL also humanizes bloody battlefields. When respected, it can save lives and ensure humane treatment, preserving a degree of humanity in both the victims and victors of war.

In light of these competing dynamics, the interpretation and development of IHL must be handled delicately. A highly reactive body of law, IHL has seen evolutionary and even revolutionary changes instituted by States following armed conflicts—the classic example being adoption of the four Geneva Conventions in the aftermath of the Second World War.[9]

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7. *See generally* GEOFFREY BEST, WAR AND LAW SINCE 1945 (1994).

8. Hersch Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRITISH YEARBOOK OF INTERNATIONAL LAW 360, 382 (1952).

9. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6

Those with the expertise and experience to fully appreciate the fragile IHL balance between military necessity and humanity that provides its foundational *raison d'etre* have been the key drivers of this process of change.[10] Historically, States, and their military representatives in particular, have played this critical role in shaping the contours of IHL. To be sure, proposals by academics and non-governmental organizations have fostered significant enhancements of IHL. But this has occurred only after deliberate and studied consideration and acceptance by government experts and States uniquely positioned to evaluate the operational and even strategic costs of legal innovation. The result was an IHL reasonably assured to reflect the best achievable balance of military necessity and humanity—an IHL at once acceptable to the States and armed forces charged with its implementation and to the advocates for war's inevitable victims.

While the IHL dialogue remains vigorous, continuation of its pluralistic nature appears in doubt. In particular, a void of State participation, especially with respect to *opinio juris*, has formed. One no longer finds regular State expressions of IHL *opinio juris*. Nor does one regularly find comprehensive and considered responses by States to the proposals and pronouncements of non-State IHL participants. In many respects, as this article will demonstrate, the guns of State IHL *opinio juris* have fallen silent.

Meanwhile, non-State IHL actors have been undeterred, even emboldened. The IHL contributions of the international legal academy have been particularly voluminous. Some are of exceptional quality. However, academia has also incentivized the production of decidedly unconventional IHL perspectives. While useful to illustrate or deconstruct normative architecture, many such efforts not only eschew rigorous legal analysis, but also display insensitivity to the realities of battle in favor of interpretive creativity or innovation. Indeed, many authors and pundits

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U.S.T. 3217, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

10. *See* Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance,* 50 VIRGINIA JOURNAL OF INTERNATIONAL LAW 795, 806–22 (2010) [hereinafter Schmitt, *Military Necessity*] (describing the discourse among States and military leaders, humanitarian NGOs, and nascent international courts and tribunals in shaping IHL's response to military necessity concerns).

boldly masquerade legal innovations as accepted understandings of IHL.[11] Even more troubling is the fact that many scholars lacking the appropriate education or experiential background have responded to the fact that IHL is a topic *au courant* by claiming IHL expert status. Their work product misstates basic principles and rules with distressing frequency, and they are too often set forth in an ad hominem manner. All of these contributions, from the superb to the sub-standard, exert informal but real pressure on the shape of IHL.

Further complicating the IHL process, while helping to drown out what little State *opinio juris* one finds today, are the burgeoning efforts of humanitarian advocacy groups. These organizations and their members have long performed the valuable role of counterweight, urging States not to lead the law unduly askew in the pursuit of narrow national interests. Yet, assertions of law by humanitarian groups must be considered with some degree of care as their work in explicating IHL understandably (and often appropriately) reflects the legal causes and policies of their constituencies. Additionally, where they stand with respect to IHL depends on where they sit; what they observe and conclude about the battlefield and its law is always a function of their perceived mandates. Humanitarian activists working exclusively to alleviate the suffering of civilians and other protected persons will inevitably appreciate IHL differently than, for instance, soldiers charged with winning a battle or State policy-makers responsible for leading a nation to victory.

Other non-State entities also indirectly, but effectively, shape IHL. Foremost among these is the International Committee of the Red Cross (ICRC). The ICRC is undoubtedly the most influential single body in the field; indeed, few organizations or States field the IHL expertise or experience of its impressive Legal Division. However, in assessing issues arising from the military necessity-humanity balance, the ICRC unsurprisingly (and again often appropriately) tends to resolve grey areas in favor of humanitarian considerations, much as militaries usually do vis-à-vis military necessity. The United Nations Human Rights Council has also now included IHL matters within its portfolio. Although the Council's efforts have sometimes reflected a misunderstanding of IHL and

11. Of particular note is the IHL blogosphere that has recently materialized. It serves to conveniently highlight emerging issues and provides a first glimpse of IHL analysis. However, bloggers are frequently unable to offer the depth or expertise called for by complex IHL issues.

inappropriately conflated IHL and human rights law,[12] more recent work has proved quite sophisticated and well measured.[13] And, of course, the growing number of international tribunals—standing, ad hoc, and bifurcated—that also pronounce on the scope and meaning of IHL, often in confounding prolixity, must be added to this complex admixture of non-State influences on IHL content and vector.

In the face of these and other influences, it is essential to recall that States, *and only States*, "make" IHL.[14] They alone enjoy legal competency to interpret international law beyond the confines of a particular case. States do so either through treaty or through "general practice accepted as law," the latter component known as customary international law.[15] As will be explained, expressions of *opinio juris* operate as the fulcrum around which new customary humanitarian law norms crystallize, as well as a basis for the contextual interpretation and development of existing treaty and customary IHL principles and rules.

Expressions of *opinio juris* are a tool by which States regulate the emergence, interpretation, and evolution of legal norms. Effectively employed, they may maximize achievement and protection of States' perceived national interests. By failing regularly to offer such expressions, States risk unintended Grotian Moments, that is, "radical developments in which new rules and doctrines of customary international law emerge with

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12. *See, e.g.*, Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Rep. of the U.N. Fact-Finding Mission on the Gaza Conflict*, ¶ 284, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009) ("A convergence between human rights protections and humanitarian law protections is also in operation. The rules contained in Article 75 of Additional Protocol I (AP I), which reflect customary law, define a series of fundamental guarantees and protections, such as the prohibitions against torture, murder and inhuman conditions of detention, recognized also under human rights law.").

13. *See generally* Human Rights Council, *Rep. of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, U.N. Doc. A/HRC/25/59 (Mar. 10, 2014) (by Ben Emmerson) [hereinafter *Emmerson Report*]; Human Rights Council, *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/HRC/23/47 (Apr. 9, 2013) (by Christof Heyns) [hereinafter *Heyns Report*].

14. *But see, e.g.*, Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 YALE JOURNAL OF INTERNATIONAL LAW 107, 109 (2012) ("[I]t is worth questioning whether nonstate armed groups can and should be given a role in the creation of the international law that governs conflicts to which they are parties.").

15. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993; *see generally* THE NATURE OF CUSTOMARY LAW: LEGAL, HISTORICAL AND PHILOSOPHICAL PERSPECTIVES (Amanda Perreau-Saussine & James Bernard Murphy eds., 2009).

unusual rapidity and acceptance."[16] Such episodes do not necessarily create "bad" law, nor do they always run contrary to States' interests or intentions, but they often represent brief periods when States' ability to reason objectively is at its nadir. They are therefore a suboptimal time for States to engage in activities that amount to norm formation and development.

This article sets forth thoughts regarding the performance of States, particularly the United States, in this informal process of meta-norm formation and evolution. The objective is to identify recent tendencies in the process that might foreshadow how IHL is likely to develop absent a reversal of current trends. Our examination suggests that non-State actors are outpacing and, in some cases displacing, State action in both quantitative and qualitative terms. States seem reticent to offer expressions of *opinio juris*, often for good reasons. We argue that such reticence comes at a cost—diminished influence on the content and application of IHL. In our view, States have underestimated this cost and must act to resume their intended role in the process.

II. *OPINIO JURIS*

State assessments of international law have long held a critical place in the law of nations. More than mere commentary, States' expressions of the perceived extent and content of their international legal obligations are key constitutive elements of international law. In particular, expressions of *opinio juris*, when combined with evidence of general State practice, form the basis of binding customary law.[17] Like treaties and general principles of law, customary law is a primary component of international law.[18] Absent meaningful and regular expressions of *opinio juris* by States, prospective customary law founders and extant customary law stagnates.

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16. MICHAEL P. SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS 1 (2013). The attacks of 9/11 undoubtedly generated one such moment for *jus ad bellum*.

17. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993; *see also* 1 OPPENHEIM'S INTERNATIONAL LAW 26 (Robert Jennings & Arthur Watts eds., 9th ed. 1996) [hereinafter OPPENHEIM] ("[T]he formulation in the [ICJ] Statute serves to emphasize that the substance of [international custom] of international law is to be found in the practice of states.").

18. *See* Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993 (stating that the International Court of Justice should consult customary international law when resolving disputes).

Opinio juris also animates the interpretation and application of IHL treaties.[19] As noted in Article 31(3) of the Vienna Convention on the Law of Treaties, "[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" is a relevant consideration when interpreting a treaty's provisions.[20] *Opinio juris* serves as the vessel through which said agreement is revealed.[21] Moreover, when the context in which treaty provisions apply changes, subsequent expressions of *opinio juris* as to their application in the new environment, combined with corresponding State practice in their implementation, are the mechanisms by which treaty law remains relevant.[22]

Expressions of *opinio juris* are especially meaningful with respect to emerging domains of State interaction not anticipated when the present law emerged in the form of either treaty or customary law.[23] For instance, few such domains rival cyberspace conflict in this regard.[24] It is understandable, therefore, that scholars and non-State organizations lavish attention on the question of how international law regulates cyber operations.[25] States,

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19. *See* Yoram Dinstein, *The Interaction between Customary International Law and Treaties*, 322 RECUEIL DES COURS 243 (2006) (discussing the relationship between treaties and customary international law).

20. Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331.

21. *Id.*

22. *See generally id.*

23. *See id.* art. 38 ("Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.").

24. Michael N. Schmitt & Liis Vihul, *The Emergence of Legal Norms for Cyber Conflict*, *in* BINARY BULLETS: THE ETHICS OF CYBERWARFARE (Fritz Allhoff et al., 2015) (forthcoming).

25. *E.g.*, MARCO ROSCINI, CYBER OPERATIONS AND THE USE OF FORCE IN INTERNATIONAL LAW (2014); NATO COOP. CYBER DEF. CTR. OF EXCELLENCE, PEACETIME REGIME FOR ACTIVITIES IN CYBERSPACE: INTERNATIONAL LAW, INTERNATIONAL RELATIONS, AND DIPLOMACY (Katarina Ziolkowski ed., 2013); Eric Talbot Jensen, *Computer Attacks on Critical National Infrastructure: A Use of Force Invoking the Right of Self-Defense*, 38 STANFORD JOURNAL OF INTERNATIONAL LAW 207 (2002); Eric Talbot Jensen, *Unexpected Consequences from Knock-On Effects: A Different Standard for Computer Network Operations?*, 18 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 1145 (2003); Michael N. Schmitt, *Rewired Warfare: Rethinking the Law of Cyber Attack,* 96 INTERNATIONAL REVIEW OF THE RED CROSS (forthcoming) [hereinafter Schmitt, *Rewired Warfare*], *available at* http:// papers.ssrn.com/sol3/papers.cfm?abstract_id=2472800; Michael N. Schmitt, *The Law of Cyber Warfare:* Quo Vadis*?*, 25 STANFORD LAW & POLICY REVIEW 269 (2014); Scott

unfortunately, seem to be falling behind. This reflects a broad trend that has been underway with respect to IHL generally for some time.[26]

III. *OPINIO JURIS* AVERSION

While there are frequently valid reasons for States' failure to offer clear, unequivocal indications of the practices they have undertaken or refrained from (or express their views on the actions of other States) out of a sense of international legal obligation,[27] risks attend inaction. Of greatest significance is the risk of legal vacuums left to be filled by actors who lack the de jure authority but not willingness to do so.

This willingness is especially evident with regard to IHL. Over recent decades, there has been a flurry of activity by non-State actors seeking to advance views of how IHL is to be interpreted and applied, and how it should develop.[28] Efforts by humanitarian and other non-governmental organizations, international tribunals, and academics have proved tremendously influential in this fecund normative environment,[29] one in which States have largely remained mute.[30] A brief examination of some of the more noteworthy instances illustrates the nature of this dynamic and presages how events may unfold if States do not engage proactively in the

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Shackelford, *From Nuclear War to Net War: Analogizing Cyber Attacks in International Law*, 27 BERKELEY JOURNAL OF INTERNATIONAL LAW 192 (2009).

26. *See, e.g.*, Roberts & Sivakumaran, *supra* note 14, at 108 (describing how States are "particularly hostile" to granting non-State actors any lawmaking power in international law); Schmitt, *Military Necessity*, *supra* note 10, at 811–14 (describing various States' apprehension regarding the adoption number of treaties adopted by international law).

27. *See, e.g.*, Sean Watts, *Reviving* Opinio Juris *and Law of Armed Conflict Pluralism,* JUST SECURITY (Oct. 10, 2013), http://justsecurity.org/1870/reviving-opinio-juris-law-armed-conflict-pluralism-2/ [hereinafter Watts, *Reviving* Opinio Juris] (explaining how an official of the federal government always prefaces his or her remarks with a "*pro forma* reminder that nothing [he or] she will say necessarily reflects the views" of his or her agency or the U.S. government on any international matters).

28. *See, e.g.*, Schmitt, *Military Necessity*, *supra* note 10, at 822 ("Nongovernmental organizations (NGOs) have increasingly moved from oversight and advocacy of human right into the field of international humanitarian law. In particular, a number of prominent organizations have begun to issue reports on IHL compliance during armed conflicts.").

29. *See, e.g.*, *id.* at 816–37 (describing how NGOs, international tribunals, and academic writings have influenced the development of international law).

30. *See, e.g.*, Watts, *Reviving* Opinio Juris, *supra* note 27 (describing how States' lack of participation in the dialogue regarding law of armed conflict is in contrast to the thriving commentary of non-States).

application of IHL to new means and methods of warfare during armed conflict.

The ICRC has led a number of recent efforts to clarify and progressively develop IHL.[31] More than a private humanitarian relief organization, the ICRC has long held a special place in the field.[32] It is commonly referred to as the "guardian of international humanitarian law."[33] Reflecting its mandate "to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof,"[34] the ICRC has recently published two highly influential studies and is in the process of producing a third.[35] Each has been, or is likely soon to be, viewed as a dependable expression of customary IHL, relied on by jurists and IHL practitioners, including State legal advisers.[36] Yet, as this Section will illustrate, the studies have provoked no serious response on the part of States and States have launched no comparable efforts of their own.

In 1995, the ICRC commissioned its Legal Division to conduct a large-scale study to codify "customary rules of IHL applicable in international and non-international armed conflicts."[37] Carried out over a span of ten

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31. *See* Yves Sandoz, *The International Committee of the Red Cross as Guardian of International Humanitarian Law,* ICRC RESOURCE CENTRE (Dec. 31, 1998) https://www.icrc.org/eng/resources/documents/misc/about-the-icrc-311298.htm ("In short, [the ICRC] has made a very direct contribution to the process of codification, during which its proposals were examined, and which has led to regular revision and extension of international humanitarian law . . . .").

32. *Id.*; s*ee generally* BOISSIER, *supra* note 6; ANDRÉ DURAND, HISTORY OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS: FROM SARAJEVO TO HIROSHIMA (1984); CAROLINE MOOREHEAD, DUNANT'S DREAM: WAR, SWITZERLAND AND THE HISTORY OF THE RED CROSS (1998).

33. Sandoz, *supra* note 31.

34. Statutes of the International Committee of the Red Cross art. 4(g), Oct. 3 2013, http://www.icrc.org/eng/resources/documents/misc/icrc-statutes-080503.htm.

35. 31st International Conference of the Red Cross and Red Crescent, Geneva, Nov. 28–Dec. 1, 2011, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 3, 31IC/11/5.1.2 (Oct. 2011) [hereinafter *ICRC Challenges*].

36. *See infra* note 41 and accompanying text; *cf.* Michael N. Schmitt, *The Law of Targeting*, *in* PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 131, 168 (Elizabeth Wilmshurst & Susan Breau eds., 2007) [hereinafter Schmitt, *Law of Targeting*] (discussing the acceptance by States of general targeting Rules set forth in the Study "as a correct enunciation" of targeting norms).

37. 26th International Conference of the Red Cross and Red Crescent, Geneva, Dec. 3–7, 1995, *International Humanitarian Law: From Law to Action-Report on the Follow-up to the International Conference on the Protection of War Victims*, Annex II, *in* 78 INTERNATIONAL RE-

years in consultation with over 150 legal experts, the resulting *Customary International Humanitarian Law* study (the Study) includes three volumes of work, running to well over 3,000 pages.[38] The Study is a work of breathtaking breadth and depth, one deeply rooted in a conscientious effort to discern State practice and *opinio juris* applicable to armed conflict.[39] It has been profoundly influential and is regularly cited by courts and commentators as authoritative on a number of points relating to the state of customary IHL.[40]

Considering the importance of the topics addressed, the comprehensiveness of its coverage, and the fact that the ICRC regularly informed States of its work, one might have expected the Study to rouse strong reactions from States, either in the form of approval or detailed disagreement therewith.[41] It did not. On the contrary, most States remained silent, thereby begging the question of whether the majority of States are of the view that the ICRC "got it right."

The United States was one of only a few States to respond to the Study. Shortly after publication, the Legal Adviser to the U.S. State Department

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VIEW OF THE RED CROSS 58, 84 (1996) [hereinafter ICRC, *From Law to Action*].

38. 1 INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter 1 CUSTOMARY IHL STUDY]; 2 INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter 2 CUSTOMARY IHL STUDY]; 3 INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter 3 CUSTOMARY IHL STUDY]; *see also* Jean-Marie Henckaerts, *Customary International Humanitarian Law: A Response to US Comments*, 89 INTERNATIONAL REVIEW OF THE RED CROSS 473, 474 (2007) [hereinafter Henckaerts, *Response*]. Volume I of the Study features 161 Rules and accompanying commentary. 1 CUSTOMARY IHL STUDY. Volumes II and III compile an impressive catalogue of support for the Study's rules and commentary. 2 CUSTOMARY IHL STUDY; 3 CUSTOMARY IHL STUDY. An online database supplements these volumes, regularly updating its sourcing and citations. *Customary IHL: Practice*, ICRC, http://www.icrc.org/customary-ihl/eng/docs/v2 (last visited Apr. 30, 2015).

39. Yoram Dinstein, *The ICRC Customary International Humanitarian Law Study*, 36 ISRAEL YEARBOOK ON HUMAN RIGHTS 1, 1 (2006).

40. *See, e.g.*, *id.*

41. The Study provoked significant commentary from jurists and academic commentators. *See generally id.*; George H. Aldrich, *Customary International Humanitarian Law—An Interpretation on Behalf of the International Committee of the Red Cross*, 76 BRITISH YEARBOOK OF INTERNATIONAL LAW 503 (2005). Chatham House conducted a year-long study on the Study that resulted in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Elizabeth Wilmshurst & Susan Breau eds., 2007).

and the General Counsel to the U.S. Department of Defense published a joint 22-page response to the ICRC President.[42] The letter, which purports only to review "a cross-section" of the Study, objects chiefly to the methodology used to identify customary international law, in particular alleging the Study affords too much weight to thin or selective samples of State practice.[43] The Legal Adviser and General Counsel also take issue with the Study's approach to *opinio juris*, noting that only "positive evidence . . . that States consider themselves legally obligated" can satisfy the *opinio juris* element of customary international law.[44]

Several of the letter's criticisms are compelling, especially with respect to the Study's reliance on non-binding instruments, such as United Nations General Assembly Resolutions and the ICRC's own prior work on IHL.[45] Overall, though, the letter lacks the thoroughness and heft expected of a response to such a significant and influential work. Indeed, only four pages of the letter provide general remarks,[46] with the remainder devoted to comments on just four rules: respect and protection of humanitarian relief personnel; protection of the environment; expanding bullets; and universal jurisdiction.[47] Many experts in the field were surprised the United States would issue such a letter and select only four relatively peripheral topics to address, while avoiding such core issues as the law governing attacks or detention.[48]

To be fair, the U.S. letter notes that the Study's length precluded a full review so soon after publication. The letter states, "The United States will continue its review and expects to provide additional comments or otherwise make its views known in due course."[49] Yet in the intervening eight years, the United States has offered no further official comment on

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42. John B. Bellinger III & William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study* Customary International Humanitarian Law, 89 INTERNATIONAL REVIEW OF THE RED CROSS 443 (2007).

43. *Id.* at 444–45.

44. *Id.* at 447.

45. *E.g.*, *id.* at 457.

46. *See id.* at 443–46 (listing general marks about methodological concerns and international law principles).

47. *Id.* at 448–71

48. *See, e.g.*, Noura Erakat, *The U.S. v. the Red Cross: Customary International Humanitarian Law and Universal Jurisdiction*, 41 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 225, 226 (2013) (comparing and contrasting the approach taken by the Red Cross and the approach favored in the U.S. response).

49. Bellinger & Haynes, *supra* note 42, at 444.

the Study and no such effort appears to be underway. Meanwhile, the Study continues to grow in influence, in great part because it remains the sole comprehensive work dedicated to discerning customary IHL available to jurists, scholars, and even State practitioners and legal advisors.[50] While the ICRC may lack the de jure competency to express *opinio juris*, in the absence of State action in that regard, the organization has de facto filled the void.

Between 2003 and 2008, the ICRC conducted a second major project aimed at developing and clarifying the legal consequences of civilian presence on the battlefield.[51] A succession of conflicts in the Balkans during the 1990s led to an infusion of civilians onto the battlefield, both participants from the region (e.g., armed groups of civilians) and civilian contractors associated with foreign armed forces.[52] Subsequent armed conflicts in Afghanistan and Iraq continued and even accelerated these trends.[53] In response, the ICRC decided in 2003 to examine the parameters of an important exception to the requirement that armed forces distinguish between civilians and combatants and only direct violence at the latter.[54] The exception provides that civilians lose their protection from attack for such time as they directly participate in hostilities.[55]

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50. *See generally* Schmitt, *Law of Targeting*, *supra* note 36, at 134–35.

51. Nils Melzer, Int'l Comm. of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 991, 991 (2008) [hereinafter *DPH Guidance*].

52. *See, e.g.*, Trevor A. Keck, *Not All Civilians Are Created Equal: The Principle of Distinction, the Question of Direct Participation in Hostilities and Evolving Restraints on the Use of Force in Warfare*, 211 MILITARY LAW REVIEW 115, 123–25 (2012) (discussing the increase in civilian casualties in the 1990s as well as the difficulties posed by humanitarian efforts during the Balkan wars).

53. *See, e.g.*, *id.* at 126–27 (citing Afghanistan for exemplifying the increase in civilian presence on the battlefield).

54. *Civilian "Direct Participation in Hostilities": Overview*, ICRC (Oct. 29, 2010), https://www.icrc.org/eng/war-and-law/contemporary-challenges-for-ihl/participation-hostilities/overview-direct-participation.htm.

55. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 13(3), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]. The notion of direct participation is widely viewed as customary in nature. For instance, the United States is a party to neither instrument, having ratified neither, but the concept appears in DEP'T OF THE NAVY ET AL., NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL

Participation in hostilities by civilians has long presented a host of humanitarian and tactical challenges.[56] Civilian fighters frequently fail to distinguish themselves visually from the surrounding civilian population,[57] a practice that frustrates the ability of armed forces to honor the foundational IHL principle of distinction.[58] Civilian fighters also regularly shift back and forth between peaceful activities and participation in hostilities—the so-called, "farmer-by-day-fighter-by-night" or "revolving door" dilemma—thereby raising the question of when such individuals may be attacked.[59] Although the challenge of how to deal with civilians on the battlefield was certainly not new in 2003,[60] the ICRC recognized the need to clarify the underlying law and accordingly convened a group of international law experts to consider the matter.[61] In 2008, the ICRC published the *Interpretive Guidance on the Notion of Direct Participation* (the *Guidance*) setting forth its views on the subject.[62]

The *Guidance*, and the process that produced it, examined the legal regime governing civilian direct participation in hostilities through the lens of the widely ratified 1977 Additional Protocols I and II (AP I for international armed conflict (IAC)[63] and AP II for non-international armed

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OPERATIONS, 8-3 (2007) [hereinafter NWP 1-14M]. *See also* 1 CUSTOMARY IHL STUDY, *supra* note 38, r. 6 (detailing civilians' loss of protection from attack). History can also be used to establish custom. *See* Keck, *supra* note 52, at 117 (stating that "the obligation to distinguish between combatants and non-combatants" has been recognized as early as the 5th century B.C.E.).

56. *See, e.g.*, HUM. RTS. WATCH, "BETWEEN A DRONE AND AL-QAEDA": THE CIVILIAN COST OF US TARGETED KILLINGS IN YEMEN 80–81 (2013) [hereinafter CIVILIAN COST] (discussing civilian casualties resulting from US targeted killings in Yemen).

57. This article uses the term "fighter" in lieu of "combatant" because combatancy is a concept involving issues of detention and belligerent immunity and has only derivative significance in the law of targeting. Moreover, the law of non-international armed conflict (NIAC) does not include a concept of combatancy. *Cf.* MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY 4 (2006) [hereinafter NIAC MANUAL] (employing the term "fighters" as opposed to "combatants" to avoid confusion with international law of armed conflict).

58. AP I, *supra* note 55, art. 48; *DPH Guidance*, *supra* note 51, at 993.

59. *DPH Guidance*, *supra* note 51, at 1034–36.

60. *See id.* at 993 (noting that there has been "[a] continuous shift of the conduct of hostilities into civilian population centres" in recent decades).

61. *Id.* at 991–92.

62. *Id.* at 1034–37.

63. AP I, *supra* note 55, art. 1(4).

conflict (NIAC))[64] to the 1949 Geneva Conventions.[65] Articles in each of the Protocols provide: "Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."[66] Though undoubtedly an important concession to the realities of combat, and although all of the experts involved in the project agreed that the provisions accurately restated customary law,[67] these two brief articles have been exceptionally difficult to interpret and implement in practice.[68] The range of activities that constitute direct participation in hostilities and the temporal aspect of the exception were especially unclear to many Parties to the Protocols.[69] Of course, the same problems attend their interpretation and implementation in their customary guise for non-Parties to the Protocols such as the United States, Pakistan, India, and Israel.[70] Although the *Guidance* proposes understandings and interpretive glosses for both

64. AP II, *supra* note 55, art. 1(1).

65. AP I, *supra* note 55; AP II, *supra* note 55. A number of militarily significant States have not ratified the Protocols including, *inter alia*, India, Indonesia, Iran, Israel, Malaysia, Pakistan, Singapore, Turkey, and the United States. On the U.S. position vis-à-vis particular provisions thereof, *see generally* George Cadwalader Jr., *The Rules Governing the Conduct of Hostilities in Additional Protocol I to the Geneva Conventions of 1949: A Review of the Relevant United States References*, *in* 14 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 133 (Michael N. Schmitt & Louise Arimatsu eds., 2011).

66. AP I, *supra* note 55, art. 51(3); AP II, *supra* note 55, art. 13(3).

67. In remarks in 1987, the Deputy Legal Adviser to the State Department, Michael J. Matheson, stated, "We . . . support the principle . . . that immunity [is] not be extended to civilians who are taking part in hostilities." Michael J. Matheson, Deputy Legal Advisor, U.S. Dep't of State, The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Convention, Remarks at the 6th Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law (Jan. 2, 1987), *in* 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 419, 426 (1987).

68. *See id.* at 510 (noting Lieutenant Colonel Burrus M. Carnahan's statement that "[t]he main problem in interpreting these provisions is how much civilians must participate in the war effort before the Protocol no longer protects them" and that "[t]he standard of the Protocol . . . furnishes little clarification").

69. *See* 1 CUSTOMARY IHL STUDY, *supra* note 38, r. 6 ("It is fair to conclude . . . that outside the few uncontested examples . . . in particular use of weapons or other means to commit acts of violence against human or material enemy forces, a clear and uniform definition of direct participation in hostilities has not been developed in State practice.").

70. See, for instance, discussion of the subject by the Israeli Supreme Court in HCJ 769/02 Pub. Comm. against Torture in Isr. v. Gov't of Isr. (2) IsrLR 459, 488–92 [2006], the holding of which is also summarized in Mark E. Wojcik, *Introductory Note to the Public Committee Against Torture in Israel v. The Government of Israel*, 46 INTERNATIONAL LEGAL MATERIALS 373 (2007).

issues,[71] the ICRC was unable to secure unanimity thereon among the experts it had convened.[72] In fact, a group of notable experts withdrew from the project altogether in its final months.[73]

Expert dissent notwithstanding, the *Guidance*, as with the *Customary International Humanitarian Law* study before it, has been a markedly influential cynosure. For instance, it has found its way into military training for a number of NATO States and has affected the content of NATO rules of engagement in Afghanistan.[74] Despite these important practical effects, the *Guidance* has not attracted any definitive and comprehensive reaction from States. The scarcity of sovereign responses is especially curious and concerning with respect to States thought to disagree with aspects of the *Guidance*.

The United States has long embraced, albeit not publically by means of an expression of *opinio juris*, an understanding of direct participation and its consequences somewhat at odds with the *Guidance*. As an example, the *Guidance* asserts that there must be a direct causal link between the act in question and the harm caused to the enemy.[75] If an intervening event is required to effect harm, the civilian in question generally has not taken

71. *DPH Guidance*, *supra* note 51, at 1012–37 (describing what constitutes direct participation in hostilities and the temporal scope of losing protection due to direct participation in hostilities).

72. *Id.* at 992.

73. For a published discussion on the points of contention by individuals who participated in the project, and an ICRC response thereto, see generally Bill Boothby, *"And for Such Time As": The Time Dimension to Direct Participation in Hostilities*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 741 (2010); Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 831 (2010) [hereinafter Melzer, *Response*]; W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 769 (2010) [hereinafter Parks, *Part IX*]; Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 697 (2010) [hereinafter Schmitt, *Elements*]; Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 641 (2010).

74. *Cf.* Schmitt, *Elements, supra* note 73, at 699–32 (providing examples of how direct participation in hostilities influences military performance and conflicts in countries such as Iraq and Afghanistan).

75. *DPH Guidance*, *supra* note 51, at 995–96.

direct part in hostilities and retains protection from attack.[76] Most often cited in expert discussions as an example of how this approach would be implemented is the ICRC's characterization of assembly and storage of an improvised explosive device (IED) as *in*direct participation.[77] The contrary view is that the nexus between such activities and the subsequent IED attack renders those individuals engaging in the assembly and storage targetable as *direct* participants.[78] Although this position has not been expressed in the form of *opinio juris*, there is State practice in both Afghanistan and Iraq to suggest this is the U.S. position.[79]

Similar disagreement revolves around the issue of *when* civilians who participate in hostilities may be targeted. The *Guidance* states that the "for such time" language in the rules is limited to periods in which the civilian in question is actually engaging in "[m]easures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution."[80] It goes on to provide that "the 'revolving door' of civilian protection is an integral part, not a malfunction, of IHL."[81] In other words, the *Guidance* argues the "for such time" language should be interpreted literally as meaning that unless a civilian is then preparing the specific act, conducting it, or returning from that act, he or she is not targetable.[82] U.S. practice is not in accord.[83] From a military operational perspective, it seems irrational to prohibit targeting a civilian who has, perhaps on several occasions, conducted attacks on U.S. forces, and is likely to do so at some point in the future, merely because he or she has managed to return home following an operation and is not yet in the process of preparing a specific future attack.[84] Unfortunately, the United States has offered no clear expressions

76. *Id.* at 1022–23.

77. *Id.* at 1021–22.

78. *See* Watkin, *supra* note 73, at 681 ("To limit direct participation to persons who place or detonate explosives is an artificial division of what is fundamentally a group activity.").

79. *Cf. id.* (explaining that the approach in the *Guidance* is impracticable in situations such as the insurgencies in Iraq and Afghanistan).

80. *DPH Guidance*, *supra* note 51, at 1031.

81. *Id.* at 1035.

82. *See id.* at 1007–08 (indicating that the "determination remains subject to all feasible precautions and to the presumption of protection in case of doubt").

83. *Cf.* Matheson, *supra* note 67, at 420 (describing the U.S. policy to follow international guidance only when it is elevated to customary law status).

84. *See* Melzer, *Response*, *supra* note 73, at 879 ("[Air Commodore] Boothby contends that the [*Guidance*'s] interpretation of the temporal scope of direct participation in hostili-

of *opinio juris* on the matter to accompany their practice.[85] In this void, the ICRC view is increasingly gaining traction.[86]

The issue of how to treat groups of civilian fighters, as distinct from individuals, also remains a point of contention. In the *Guidance*, the ICRC helpfully assimilates organized armed groups not meeting the requirements of combatant status to the armed forces for targeting purposes.[87] In other words, members of such groups may be targeted even when they are not directly participating in the hostilities.[88] And because they are targetable in the first place, any incidental harm to them caused during an attack on other persons or places would not qualify as collateral damage for the purposes of the proportionality and precautions in attack analyses.[89]

However, the *Guidance* restricts exposure to lawful targeting to those members having a "continuous combat function" in the group.[90] The parameters of the notion are roughly analogous to those of direct participation. By the *Guidance*'s approach, the "for such time" limitation does not apply to individuals who have a continuous combat function in an organized armed group; they may be attacked at any time irrespective of whether they are engaging in hostilities at the moment.[91] But for those members of the group who do not have such a function, the paradigmatic case being a cook who accompanies the fighters, the basic direct participation in hostilities rule for individuals applies such that they may only be attacked while so participating.[92]

The ICRC acceptance of the concept of a targetable organized armed group goes a long way towards meeting the long-standing U.S. concerns

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ties, and of the ensuing loss of protection, is too restrictive to make [] sense on the modern battlefield."(internal quotations omitted)).

85. *Cf.* Bellinger & Haynes, *supra* note 42, at 446–47 (describing U.S. opposition to existence of *opinio juris* necessary to elevate principles in ICRC study to customary law).

86. *See* Melzer, *Response*, *supra* note 73, at 909–13 (identifying recent agreement of several States—including Israel—with some principles set forth in the DPH Guidance despite U.S. reservation).

87. *DPH Guidance*, *supra* note 51, at 1006–09.

88. *Id.*

89. *See* AP I, *supra* note 55, arts. 51(5)(b), 57(2)(a)(iii), 57(2)(b) (describing generally precautions in attacks required under the protocol for civilians).

90. *DPH Guidance*, *supra* note 51, at 1007–08.

91. *See id.* at 1007 (observing that individual membership in an organized armed group is contingent on a continuous combat function).

92. *See id.* ("[U]nder IHL, the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities . . . .").

regarding the "revolving door."[93] Nevertheless, U.S. State practice neither limits targeting of a group's members to those with a continuous combat function nor requires harm to other members of the group to be considered in the proportionality or precautions in attack analysis when those with a continuous combat function are attacked.[94] On the contrary, such individuals would be treated analogously to members of the armed forces, that is, susceptible to lawful targeting based on mere membership in a group that has an express purpose of participating in the hostilities.[95] Given the importance of the issue vis-à-vis counterterrorist and counterinsurgency operations, one would have expected the United States to have staked out a firm position thereon. It has not, at least not in a manner that would constitute a clear expression of *opinio juris* on this important matter.[96]

States' interests in actively addressing the direct participation question are not limited to resolving interpretive challenges for purposes of targeting. The issue now appears to bear on other important IHL questions such as the use of civilian contractors to perform military functions more generally and whether civilian participation in hostilities constitutes an international war crime.[97] This trend, unsupported by the ICRC and most serious IHL experts, is counter-normative.[98] But more active State *opinio*

93. *See generally* W. Parks Hays, *Air War and the Law of War*, 32 AIR FORCE LAW REVIEW 1 (1990).

94. *See id.* at 118–31 (discussing the historical development of the concept of the "revolving door" and the United States' disagreement with it).

95. *Cf.* 1 CUSTOMARY IHL STUDY, *supra* note 38, r. 6 (noting that the United States rejects a strict interpretation of the rule requiring the classification of an individual as a civilian when his status is in doubt and acknowledges a combatant's discretion in making such a classification).

96. *Cf.* Bellinger & Haynes, *supra* note 42, at 443–44 ("[T]he United States is not in a position to accept without further analysis that the [ICRC's] conclusions that particular rules related to the laws and customs of war in fact reflect customary international law.").

97. *See, e.g.*, Mark David "Max" Maxwell & Sean Watts, *'Unlawful Enemy Combatant': Legal Status, Theory of Culpability, or Neither?*, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 19, 20 (2007) (asserting that the classification of civilians as 'unlawful enemy combatants' confuses the distinct issues of legal status and culpability). *But see* David B. Rivkin, Jr. & Lee A. Casey, *The Use of Military Commissions in the War on Terror*, 24 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 123, 131 (2006) (stating that the United States' stance that unlawful combatants are subject "to trial and punishment by military tribunals" is not universally favored).

98. *See* 1 CUSTOMARY IHL STUDY, *supra* note 38, r. 6 (stressing that a careful assessment of a civilian should be undertaken in determining his status and that attacks against civilians cannot be based on the civilian merely appearing dubious).

juris on the direct participation question in general, and responses to the *Guidance* in particular, would greatly clarify matters.

A further incentive for States to respond actively to the G*uidance* can be found in a controversial provision on the resort to lethal force. The *Guidance* asserts that "the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances."[99] Restated, attackers must resort to capture or other non-lethal means when feasible in the circumstances. As an example,

> an unarmed civilian sitting in a restaurant using a radio or mobile phone to transmit tactical targeting intelligence to an attacking air force would probably be regarded as directly participating in hostilities. Should the restaurant in question be situated within an area firmly controlled by the opposing party, however, it may be possible to neutralize the military threat posed by that civilian through capture or other non-lethal means without additional risk to the operating forces or the surrounding civilian population.[100]

The approach attracted significant pushback and criticism from numerous prominent IHL scholars.[101] Indeed, the "least harm" provision prompted several experts to withdraw from the project.[102] Moreover, the provision is at odds with many States' practice vis-à-vis conducting attacks and crafting rules of engagement.[103] While it is common for States to require their forces to capture when possible, such instructions are motivated by the operational need to acquire actionable intelligence, not by any sense that they are legally obligated to do so.[104] Yet, the *Guidance*'s

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99. *DPH Guidance*, *supra* note 51, at 1040.

100. *Id.* at 1043.

101. *See* Parks, *Part IX*, *supra* note 73, at 783–85 (detailing various experts' objections to the "General Restraints on the Use of Force in Direct Attack" section in the DPH Guidance).

102. *Id.* at 784–85.

103. *See id.* at 795–96 (noting that the ICRC requested the advice of senior military lawyers from the United States, United Kingdom, Israel, and Canada who disagreed with the provision on resort to lethal force and were ignored by the ICRC).

104. *See* Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUROPEAN JOURNAL OF INTERNATIONAL LAW 819, 824–25 (2013) (acknowledging that critics of the least harm provision contend that States commonly require their forces to capture, instead of kill, based on "pragmatic strategic and policy choices, not legal obligations").

discussion appears to have spawned a movement to entrench the least-harmful-means requirement in contemporary IHL understandings[105] and has sparked a lively academic debate.[106] Meanwhile, State input on the issue has been negligible.[107] It is worth considering whether States might have preempted the brouhaha with a more active and deliberate response to the *Guidance* in the form of an expression of *opinio juris*.

Finally with respect to ICRC efforts to develop IHL, a long-term project is underway within the ICRC Legal Division to produce updates to the 1949 Geneva Convention Commentaries (the *Commentaries*).[108] Originally published in the decade following the Conventions' entry into force,[109] the current edition of the *Commentaries* includes a volume addressing each of the four Conventions in significant detail, compiling essential historical perspective and details of diplomatic processes that

105. *See, e.g.*, *id.* at 819 (arguing that "the use of force should instead be governed by a least-restrictive-means" analysis in certain well-specified and narrow circumstances).

106. *Compare* Geoffrey Corn et al., *Belligerent Targeting and the Invalidity of a Least Harmful Means Rule*, 89 INTERNATIONAL LAW STUDIES 536, 540 (2013) (offering a comprehensive rebuttal of the least harmful means interpretation), *and* Michael N. Schmitt, *Wound, Capture, or Kill: A Reply to Ryan Goodman's 'The Power to Kill or Capture Enemy Combatants'*, 24 EUROPEAN JOURNAL OF INTERNATIONAL LAW 855, 855 (2013) [hereinafter Schmitt, *Reply to Ryan Goodman*] (arguing that, even under narrow circumstances, there is no obligation under the extant international humanitarian law to wound rather than kill enemy combatants nor to capture rather than kill), *with* Ryan Goodman, *The Power to Kill or Capture Enemy Combatants: A Rejoinder to Michael N. Schmitt*, 24 EUROPEAN JOURNAL OF INTERNATIONAL LAW 863, 863–66 (2013) (addressing the author's points of agreement and disagreement with Michael N. Schmitt's assertion that there exists no obligation under international humanitarian law to capture rather than kill enemy combatants), *and* Jens David Ohlin, *The Duty to Capture*, 97 MINNESOTA LAW REVIEW 1268, 1272 (2013) (examining four potential reasons why the duty to capture might be thought to apply to targeted killings).

107. *See* Schmitt, *Reply to Ryan Goodman*, *supra* note 106, at 857 ("[S]ituations presenting a viable possibility of wounding instead of killing are so rare that it is counter-intuitive to conclude that states intended the 'method' language to extend to such circumstances . . . [M]ost states, non-state organizations dealing with IHL, and scholars do not interpret the provision in this manner. For them, neither killing nor capture constitutes a specific method of warfare, although certain tactics designed to kill or capture do.").

108. Jean-Marie Henckaerts, *Bringing the Commentaries on the Geneva Conventions and Their Additional Protocols into the Twenty-First Century*, 94 INTERNATIONAL REVIEW OF THE RED CROSS 1551, 1554 (2012) [hereinafter Henckaerts, *Twenty-First Century*].

109. *See id.* at 1552 ("[T]he International Committee of the Red Cross (ICRC) proceeded to write a detailed Commentary on each of their provisions. This led to the publication between 1952 and 1960 of a Commentary on each of the four Geneva Conventions . . . .").

produced the Conventions.[110] In 1987, the ICRC added a volume of similar commentary on the 1977 Protocols.[111] Altogether, the five volumes run to nearly 3,900 pages with commentary and doctrinal analysis of each of the articles of the four Conventions and their first two Additional Protocols.[112] The revised *Commentaries* will retain the format of their predecessors while significantly updating them with respect to interpretive developments and State practice.[113] They are expected to occupy a staff of full-time ICRC legal researchers and part-time external contributors through the year 2019.[114]

Also known as Pictet's Commentaries, after their lead editor Jean Pictet,[115] the *Commentaries*, together with the 1987 commentary on the Additional Protocols by Yves Sandoz et al., have been leading sources of clarification and background on the Conventions and Protocols for decades.[116] It is difficult to overstate their influential and nearly

110. *E.g.*, ICRC, COMMENTARY: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA (Jean S. Pictet ed., A.P. de Heney trans., 1960) [hereinafter COMMENTARY: GC II].

111. *See generally* ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS].

112. *See generally* ICRC, COMMENTARY: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD (Jean S. Pictet ed., 1952); ICRC, COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (Jean S. Pictet ed., 1958); COMMENTARY: GC II, *supra* note 110; ICRC, COMMENTARY: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (Jean S. Pictet ed., 1960) [hereinafter COMMENTARY: GC III]; COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 111.

113. *See* Henckaerts, *Twenty-First Century*, *supra* note 108, at 1554 ("The update will preserve the format of the existing Commentaries . . . [and] will provide many references to practice, case law, and academic literature, which should facilitate further research and reading.").

114. *See id.* at 1554–55 (discussing the drafting process of the update to the *Commentaries*).

115. *See*, *e.g.*, W. Hays Parks, *Pictet's Commentaries*, *in* STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOR OF JEAN PICTET 495, 497 (Christophe Swinarski ed., 1984) (noting that "Pictet's 'Commentaries'—as they always are referred to—not only are of value because they are accessible; they are reliable").

116. *See* Henckaerts, *Twenty-First Century*, *supra* note 108, at 1553 (stating that "[o]ver the years, the ICRC Commentaries have come to be recognised as essential and well-respected interpretations of the Geneva Conventions and their Additional Protocols").

authoritative status. For instance, despite a clear disclaimer by the ICRC to the contrary, the United States Supreme Court recently cited the *Commentaries* as "the official commentaries" to the Geneva Conventions.[117] It is reasonable to expect that the forthcoming revised *Commentaries* will enjoy similarly influential and revered status as de facto "official" expositions on the ambiguities of the Conventions and their Protocols. At present, no State or collection of like-minded State legal advisors appears resolved or resourced to match this ICRC effort.[118]

Alongside the work of the ICRC, international criminal tribunals increasingly contribute to the development of IHL.[119] None has expounded on this body of law more actively or profusely than the International Criminal Tribunal for Former Yugoslavia (ICTY).[120] More than a criminal adjudicative body, the ICTY has enthusiastically embraced a law declaration function.[121] Since its earliest cases, the ICTY has offered exhaustive elaborations on perennially hazy IHL topics such as the

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117. Hamdan v. Rumsfeld, 548 U.S. 557, 631 (2006). The *Commentaries'* editors were careful to observe that

> the Commentary is the personal work of its authors. The Committee moreover, whenever called upon for an opinion on a provision of an international Convention, always takes care to emphasize that only the participant States are qualified, through consultation between themselves, to give an official and, as it were, authentic interpretation of an intergovernmental treaty.

COMMENTARY: GC III, *supra* note 110.

118. *See generally* Henckaerts, *Twenty-First Century*, *supra* note 108.

119. *See* Henckaerts, *Response*, *supra* note 38, at 486 (2007) (discussing the contribution to IHL from the courts in the former Yugoslavia, Rwanda, and Sierra Leone).

120. *See* Allison Marston Danner, *When Courts Make Law: How The International Criminal Tribunals Recast the Laws of War*, 59 VANDERBILT LAW REVIEW 1, 26 (2006) (stating that "the laws of war had developed faster since the beginning of the atrocities in the former Yugoslavia than in the forty-five years after the Nuremburg Tribunals" (citing Theodor Meron, Editorial Comment, *War Crimes Law Comes of Age*, 92 AMERICAN JOURNAL OF INTERNATIONAL LAW 462, 463 (1998))); INT'L HUMAN. L. CLINIC, EMORY U. SCH. OF L., OPERATIONAL LAW EXPERTS ROUNDTABLE ON THE *GOTOVINA* JUDGMENT: MILITARY OPERATIONS, BATTLEFIELD REALITY AND THE JUDGMENT'S IMPACT ON EFFECTIVE IMPLEMENTATION AND ENFORCEMENT OF INTERNATIONAL HUMANITARIAN LAW 13 (2012) [hereinafter ROUNDTABLE], *available at* http://ssrn.com/abstract=1994414 (noting that "[i]ndeed, one of the mandates of the tribunal [ICTY] is the progressive development of IHL").

121. *See* Danner, *supra* note 120, at 25–26 ("During the period of the [International Criminal Tribunal for the Former Yugoslavia's (ICTY)] greatest political weakness, its judges issued a surprising series of decisions that effected a fundamental transformation in the laws of war.").

threshold of armed conflict, the distinction between international and non-international armed conflict, and the range of persons protected by the Geneva Conventions.[122]

As an example, in *Prosecutor v. Gotovina,* an ICTY Trial Chamber issued a 1,377-page judgment that included highly controversial conclusions with respect to States' obligations when conducting attacks.[123] Based on those conclusions, the Chamber convicted two Croatian generals of war crimes related to artillery bombardments of urban areas.[124] Among other questionable findings, it concluded that shell craters located more than 200 meters from pre-planned military objectives in an urban area proved a criminal violation of the IHL principle of distinction.[125] The ICTY's Appeals Chamber reversed the convictions and rejected many of the Trial Chamber's characterizations of the principle.[126] The judgments set off a flurry of exchanges between respected IHL commentators concerning the relative merits of the Trial and Appeals Chambers' judgments.[127] States,

122. *See, e.g.*, Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶¶ 68–145 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) (describing both when victims become protected persons under Art. 2, and when an internal armed conflict reaches the level of international armed conflict through the control of armed forces by a foreign power).

123. *See* ROUNDTABLE, *supra* note 120, at 4 ("Precisely because it is the only judgment addressing complex operational targeting considerations, the *Gotovina* case has the potential to be a great beacon for international law by adding significant definition to the legal paradigm that governs such targeting operations . . . . [H]owever, . . . the legal analysis as presently conceived is flawed on multiple levels and therefore fails to achieve those goals."); *see generally* Prosecutor v. Gotovina, Case No. IT-06-90-T, Trial Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011).

124. *Gotovina*, Case No. IT-06-90-T, ¶ 2588.

125. *Id.* ¶ 1899.

126. Prosecutor v. Gotovina, Case No. IT-06-90-A, Appeals Chamber Judgment, ¶¶ 83–87 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012).

127. *See, e.g.*, Prosecutor v. Gotovina, Case No. IT 06-90-A, Application and Proposed *Amicus Curiae* Brief concerning the 15 April 2011 Trial Chamber Judgment and Requesting that the Appeals Chamber Reconsider the Findings of Unlawful Artillery Attacks During Operation Storm, Conclusion (Int'l Crim. Trib. for the Former Yugoslavia Jan. 12, 2012) ("[A]ny judgment that is interpreted as attenuating this symmetry risks undermining the efficacy of international humanitarian law and the ultimate humanitarian objectives of the law."); Geoffrey S. Corn & Lt. Col. Gary P. Corn, *The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens*, 47 TEXAS INTERNATIONAL LAW JOURNAL 337, 339 (2012) (discussing the effect of Gotovina on the "interrelationship between law and military doctrine"); ROUNDTABLE, *supra* note 120, at 2 (criticizing the "potential flaws in the Trial Chamber's application of IHL; and . . . potential institutional concerns and second-order effects resulting from these flaws").

however, were conspicuously absent from this important targeting and international criminal law dialogue.[128] Even States that frequently participate in armed conflict, and that would therefore be specially affected by the targeting standards at issue, declined to weigh in officially.[129]

This was not always the case. The ICTY's early IHL work provoked meaningful State involvement.[130] For example, in 1995 the U.S. Department of State filed an amicus curiae brief in the Tribunal's first case, *Tadić*.[131] The brief outlined U.S. legal views on the threshold of armed conflict, characterization of armed conflicts as either IAC or NIAC, availability of the grave breaches enforcement regime in NIAC, and nature and content of the laws and customs of war.[132] The brief continues to serve as a reliable expression of *opinio juris*.[133] Yet, since its filing, the United States has not participated meaningfully and substantively in other war crimes cases, nor has it offered a similarly thorough or reasoned reaction to a judgment of any international criminal tribunal.[134] The reasons for this inactivity are unclear, but the growing list of States party to the International Criminal Court and that Court's expanding caseload suggest that militarily active States would be well-advised to engage in the development of IHL through war crimes tribunals, lest they find themselves governed on the battlefield by legal norms developed in isolation by jurists.

The IHL advocacy efforts of NGOs are of similarly worthy note. For instance, Human Rights Watch (HRW), one of the most sophisticated of

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128. *See generally* Corn & Corn, *supra* note 127; ROUNDTABLE, *supra* note 120.

129. *E.g.*, Jamila Trindle, *Acquitted in Court, Still Blacklisted by the U.S.*, FOREIGN POLICY (Jan. 10, 2014), http://www.foreignpolicy.com/articles/2014/01/10/acquitted-in-court-still-blacklisted-by-the-u-s.

130. *See* Danner, *supra* note 120, at 21–22 (noting that the Representative of Venezuela issued a report expressing the view that the Tribunal would not be empowered with setting the norms of International Law while Canada argued for more specifics in what fell under ICTY jurisdiction).

131. Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of The Prosecutor of the Tribunal v. Dusan Tadić (July 27, 1995) [hereinafter U.S. *Tadić* Amicus], *available at* http://www.state.gov/documents/organization/65825.pdf.

132. *See id.* at 27–37 (arguing that the Tribunal had jurisdiction over grave breaches, violations of customs of war, and crimes against humanity because the alleged offenses did occur during an international armed conflict).

133. *See* Watts, *Reviving* Opinio Juris, *supra* note 27 (observing the brief's contribution to a "more pluralistic, balanced, and active LOAC dialogue").

134. *Id.*

NGOs dealing with IHL, regularly issues reports on ongoing or recent conflicts.[135] The organization also takes strong advocacy positions on IHL-related matters.[136] An example is its 2013 *Losing Humanity* report, which argued, *inter alia*, that autonomous weapon systems are unlawful per se under IHL.[137] Although individual scholars protested at such an overbroad (and incorrect) statement,[138] no State has addressed the various IHL matters the organization raised head on.[139] Instead, the United States issued a Department of Defense Directive that places certain policy limitations on the systems without offering meaningful comment on the relevant legal issues.[140] Such failure to engage the topic cedes control of the legal discourse to organizations such as HRW and the chapeau organization in the campaign against autonomous systems, Stop Killer Robots.[141]

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135. *E.g.*, HUM. RTS. WATCH, TURNING A BLIND EYE: IMPUNITY FOR LAWS-OF-WAR VIOLATIONS DURING THE GAZA WAR (2010), *available at* http://www.hrw.org/node/89575.

136. *See*, *e.g.*, HUM. RTS. WATCH, LOSING HUMANITY: THE CASE AGAINST KILLER ROBOTS 1–2 (2012) [hereinafter LOSING HUMANITY], *available at* http://www.hrw.org/sites/default/files/reports/arms1112ForUpload_0_0.pdf (advocating for a ban on fully autonomous weapons); HUM. RTS. WATCH, TIME FOR JUSTICE: ENDING IMPUNITY FOR KILLINGS AND DISAPPEARANCES IN 1990S TURKEY 61–63 (2012), *available at* http://www.hrw.org/sites/default/files/reports/turkey0912ForUpload.pdf (recommending further steps the Turkish government needs to take to combat impunity in Turkey).

137. LOSING HUMANITY, *supra* note 136, at 1.

138. *See*, *e.g.*, Kenneth Anderson et al., *Adapting the Law of Armed Conflict to Autonomous Weapon Systems*, 90 INTERNATIONAL LAW STUDIES 386, 387 (2014) (suggesting prohibiting autonomous weapons would be "misguided"); Marco Sassóli, *Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to Be Clarified*, 90 INTERNATIONAL LAW STUDIES 308, 309–10 (2014) (contending that an autonomous weapon can reasonable comply with IHL); Michael N. Schmitt, *Autonomous Weapon Systems: A Reply to the Critics,* HARVARD NATIONAL SECURITY JOURNAL FEATURES (Feb. 2013) at 1–3 (arguing *Losing Humanity* "obfuscates the on-going legal debate over autonomous weapon systems").

139. *See* Matthew Waxman & Kenneth Anderson, *Don't Ban Armed Robots in the U.S.*, NEW REPUBLIC (Oct. 17, 2013), http://www.newrepublic.com/article/115229/armed-robots-banning-autonomous-weapon-systems-isnt-answer (arguing that States should engage in cooperative development of common standards and best practices within a law of war framework).

140. *See* U.S. DEP'T OF DEF., DIRECTIVE NO. 3000.09, AUTONOMY IN WEAPONS SYSTEMS (2012), *available at* http://www.dtic.mil/whs/directives/corres/pdf/300009p.pdf (setting broad limitations and guidelines regarding the use of autonomous weapons systems).

141. CAMPAIGN TO STOP KILLER ROBOTS, http://www.stopkillerrobots.org/ (last visited Apr. 18, 2015).

United Nations bodies have also entered the fray in various instances, including appointments by the Human Rights Council of Special Rapporteurs on countering terrorism (Mr. Ben Emmerson) and extrajudicial, summary, or arbitrary executions (Mr. Christof Heyns).[142] Both have issued reports on drone operations, including IHL issues, marked by a high degree of sophistication and normative detail.[143] Although the United States is actively involved in drone operations, it has issued no comprehensive statement on the legal questions surrounding drone strikes. Instead, the government's limited comments tend to be made, as will be discussed, in speeches by senior government officials at academic and professional gatherings or found in internal memoranda not intended to be made public.[144]

Finally, scholars and other IHL experts have convened and collaborated with increasing frequency to produce legal manuals devoted to restating customary and treaty IHL, and in many cases clarifying difficulties concerning its application and operation.[145] Topics covered by these manuals include the law of naval warfare, non-international armed conflict

142. *See Drone Attacks: UN Experts Express Concern About the Potential Illegal Use of Armed Drones*, U.N. HUMAN RIGHTS: OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS (Oct. 25, 2013), http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13905 (explaining involvement of Emmerson and Heyns as U.N. Special Rapporteurs and noting their roles). The most recent mandates for the Special Rapporteurs are, respectively, Human Rights Council Res. 22/8, Protection of Human Rights and Fundamental Freedoms While Countering Terrorism: Mandate of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, 22nd Sess., Mar. 21, 2013, A/HRC/RES/22/8 (Apr. 9, 2013), and Human Rights Council Res. 26/12, Mandate of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, 26th Sess., June 20, 2014, A/HRC/26/L.23 (June 20, 2014).

143. *Emmerson Report*, *supra* note 13, at 5; *Heyns Report, supra* note 13, at 8.

144. *E.g.*, Harold Honhgu Koh, Legal Adviser, U.S. Dep't of State, The Obama Administration and International Law, Remarks at the Annual Meeting of the American Society of International Law (Mar. 25, 2010) [hereinafter Koh, American Society Remarks], *available at* http://www.state.gov/s/l/releases/remarks/139119.htm.

145. *E.g.*, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald-Beck ed., 1995) [hereinafter SAN REMO MANUAL]; PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIV., HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE (2009) [hereinafter HPCR MANUAL]; NIAC MANUAL; *see also* PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIV., COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE (2010).

law, and the law of air and missile warfare.[146] Each is widely cited in legal literature and has influenced practice in its respective field.[147] And each appears to have responded to concerns that participating experts harbored regarding the failure of States to provide legal practitioners sufficiently granular guidance on troublesome IHL issues.[148] Although these manuals were not intended to supplant the role of States in IHL interpretation and development, they are, to a degree, having exactly that effect.

In sum, it is clear that States have not kept pace with an ever-increasing flow of non-State international legal commentary; the volume and frequency of the latter drowns out what little comment and reaction States have offered. It is no exaggeration to say that jurists, NGOs, scholars and other non-State actors presently have greater influence on the interpretation and development of IHL than do States. The roles of the respective communities have, unfortunately, been reversed—the pluralistic process of formation and development that has long guaranteed the efficacy and relevance of IHL is in peril.

IV. THE ROLE OF STATES

Notwithstanding their recent reserve with respect to *opinio juris*, States and their legal agents still enjoy unique relevance in the formation and interpretation of international law generally and IHL in particular. As the primary authors and subjects of IHL, States have authority to actively shape its content and direction, through both direct means, such as treaty formation and State practice, and indirect means, such as positions proffered in litigation, legal publications, public statements of legal intent, and diplomatic communications resorting to law.[149]

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146. *See generally* HPCR MANUAL, *supra* note 145; NIAC MANUAL *supra* note 57; SAN REMO MANUAL *supra* note 145.

147. *See, e.g.*, Wolff Heintschel von Heinegg, *The Current State of the Law of Naval Warfare: A Fresh Look at the* San Remo Manual, 82 INTERNATIONAL LAW STUDIES 269, 269 (2006) (analyzing the influence of the *San Remo Manual* on current policies and addressing the manual's shortcomings); *see also Symposium: The 2009 Air and Missile Warfare Manual: A Critical Analysis*, 47 TEXAS INTERNATIONAL LAW JOURNAL 261, 261–79 (2012) (discussing in detail the Manual on International Law Applicable to Air and Missile Warfare).

148. HPCR MANUAL *supra* note 145, foreword; NIAC MANUAL *supra* note 57, preface; SAN REMO MANUAL *supra* note 145, introductory note.

149. *See* 1 OPPENHEIM, *supra* note 17, at 26 ("[Custom may be] evidenced by such internal matters as [States'] domestic legislation, judicial decisions, diplomatic despatches, internal government memoranda, and ministerial statements in Parliaments and else-

Even as scholars challenge State-centric understandings of international law, near universal respect endures for the special role of sovereigns in the formation of international law.[150] To co-opt and modify a common observation with respect to Originalism in American constitutional interpretation, everyone is a sovereigntist sometimes.[151] What distinguishes dyed-in-the-wool international law sovereigntists from non-sovereigntists is probably not acceptance of the legitimacy of State input, but rather attitudes toward non-State actors' international legal contributions. Few international lawyers contest that State expressions of *opinio juris* constitute legitimate sources of law and a principled form of international legal interpretation.[152] Disagreements seem instead to concern the effect that absence of State *opinio juris* has on an international norm.[153] And while there is surely value in the balanced pluralism that results from having both State and non-State contributions to the interpretation and development of international law, State input has always been singularly significant, particularly when armed conflict is the issue.[154] State *opinio juris* remains the critical bellwether for the degree of consensus, acceptance, and therefore effectiveness and legitimacy of any international legal rule.

In addition to formal authority, States possess unique competency, facility, and access with respect to the contextual ingredients of international law.[155] IHL is illustrative. Many commentators grasp the harsh

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where.").

150. *See*, *e.g.*, Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law?*, 4 EUROPEAN JOURNAL OF INTERNATIONAL LAW 447, 448 (1993) (mentioning the importance of State structure in the future development of international law while prognosticating the end of a traditional model of sovereignty for States).

151. David A. Strauss, *The Living Constitution*, The RECORD ONLINE (ALUMNI MAGAZINE) (Fall 2010), http://www.law.uchicago.edu/alumni/magazine/fall10/strauss ("[A]s a matter of rhetoric, everyone is an originalist sometimes . . . .").

152. *See* Eric Engle, *U.N. Packing the State's Reputation? A Response to Professor Brewster's "Unpacking the State's Reputation"*, 114 PENNSYLVANIA STATE LAW REVIEW PENN STATIM 34, 37 (2010) (operating under the assumption that international law is enforced by States).

153. *See* Ross E. Schreiber, *Ascertaining* Opinio Juris *of States Concerning Norms Involving the Prevention of International Terrorism: A Focus on U.N. Process*, 16 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 309, 312 (1998) (detailing the difficult task of deducing *opinio juris*).

154. *See id.* (detailing the particular confusions that arise when trying to deduce international norms without State *opinio juris*, particularly in armed, nuclear conflict).

155. *See* Ingrid Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*, 85 NOTRE DAME LAW REVIEW 101, 110 (2010) (bolstering an argument by stating that international law relies on a State's domestic laws and that a State actor's courts applying

consequences of armed conflict.[156] Yet, few outside the ambit of States' defense ministries and armed forces fully appreciate the operational challenges, demands, and limitations of combat so essential to fairly striking the delicate balance between military necessity and humanity that infuses IHL and informs its interpretation and evolution.[157] Even commentators with a military or military legal background can find that their IHL experiential base has become dated or passé.[158] There is truly no adequate substitute for the active input of IHL professionals immersed in States' current operations and legal deliberation.

The dearth of contextual IHL custom and States' viewpoints is often unavoidable. States frequently shield their battlefield conduct and decision making from public view for rational operational reasons.[159] And although they may acquire information concerning the practices of adversaries and other States by employing intelligence, surveillance, and reconnaissance (ISR) assets, that information is typically classified and therefore unavailable to non-State actors. States do regularly share some classified information amongst themselves, the paradigmatic examples being "five-eyes" sharing[160] and the sharing of classified material among NATO allies,[161] but, because release would reveal certain "sources and methods" of collection, non-State actors seldom see such material, for better or worse, except when it is leaked.[162] The practical effect of this restricted

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the State's own law is "normatively superior").

156. *See, e.g.*, Ariel Zemach, *Taking War Seriously: Applying the Law of War to Hostilities Within an Occupied Territory*, 38 GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 645, 646–47 (describing the human costs of war in Iraq and the Gaza Strip).

157. *See id.* at 675–76 (assessing the intricacies present in balancing human rights with the demands of wartime).

158. *See* Olivier Bangerter, *Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not*, 93 INTERNATIONAL REVIEW OF THE RED CROSS 353, 370 (2011) ("[I]t is questionable how far knowledge of the content of IHL by many commanders and fighters really extends beyond some basic notions.").

159. *See*, *e.g.*, Laura K. Donohue, *The Shadow of State Secrets*, 159 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 77, 88–91 (2010) (discussing frequency and challenges of State military secrets).

160. *See* Paul Farrell, *History of 5-Eyes–Explainer*, THE GUARDIAN (Dec. 2, 2013), http://www.theguardian.com/world/2013/dec/02/history-of-5-eyes-explainer (delineating the history of the five-eyes partnership, involving intelligence sharing between the U.S., U.K., Canada, Australia, and New Zealand).

161. *See generally* Alasdair Roberts, *Entangling Allies: NATO's Security of Information Policy and the Entrenchment of State Secrets*, 36 CORNELL INTERNATIONAL LAW JOURNAL 329 (2003).

162. *See* Afsheen John Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher*

informational environment is to stymy non-State efforts to discern State practices, thereby rendering the former's input to the IHL interpretation and development process, through no fault of their own, somewhat suspect.

Additionally, the reluctance of States to express *opinio juris* on particular topics of international law is in some senses understandable. A number of considerations recommend the increasingly prevalent wait-and-see approach. A State may conclude that too little is known about the implications of an emerging area of warfare to commit to any particular international regulatory doctrine or regime or to admit publicly to the existence of international norms bearing on the matter at all. It is also possible that State reticence is less the product of calculated caution rather than political impasse deriving from domestic political considerations. In many municipal legal systems, constitutional and statutory arrangements spread authority over international law matters among several agencies and even branches of government, frustrating coordination and consensus.[163] Interagency friction or disagreement may prevent government-level consensus, especially with respect to new or emerging legal debates.

Absence of expressed State *opinio juris* may even be explained as evidence of *opinio juris* itself.[164] In such a case, the State may intend its silence as an implied expression of the view that no relevant IHL norm exists.[165] Restated, although a State may undertake a continuous course of practice on the battlefield, that same State may assiduously refrain from accompanying expressions of *opinio juris* so as to preclude any purported crystallization of a customary norm. This might be the case, for example, when it imposes self-defense limits on the use of force in rules of

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Care for CIA-Targeted Killing, 2011 UNIVERSITY OF ILLINOIS LAW REVIEW 1201, 1216–18, 1236 (2011) (detailing the relationship between the government's interest in preventing disclosure of sources and methods and the public's interest especially in the judicial context).

163. For example, the U.S. Constitution vests authority over international law to each of the branches of the federal government. *See* U.S. CONST. art. I, § 8, cl. 10 (enumerating the U.S. Congress's power to "define and punish offenses against the law of Nations"); *id.* art. II, § 2, cl. 2 (requiring Senate advice and consent for treaty ratification); *id.* (enumerating the U.S. President's power "to make Treaties"); *id.* art. III, § 2, cl. 1 (extending the judicial power to "all Cases, in Law and Equity, arising under . . . Treaties").

164. *But see* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 437 (2006) ("It is impossible to make any presumptions about the *opinio juris* on the basis of such silence as a matter of *general rule*.").

165. *Contra id.*

engagement in situations in which status-based targeting is lawful or when it affords treatment to detainees in excess of what IHL would otherwise require.

On balance, however, the various rationales for State restraint on matters of *opinio juris* are overrated. State silence has not proved effective at stemming IHL's development, which appears to occur with or without active State involvement.[166] Plainly, the failure of States to produce or interpret specific rules of conduct for emerging areas of warfare has not counseled silence on the part of non-State legal actors.[167] They have aggressively stepped in to cultivate IHL in response to the vacuum left by States.[168] Rather than preserve operational and legal flexibility, State silence may simply cede significant initiative and power over IHL to non-State actors.

Two international legal controversies demonstrate how State delay, ambiguity, or silence with respect to *opinio juris* risks the imposition of very real costs. Soon after the al Qaeda terrorist attacks of September 11, 2001, the United States launched military operations in Afghanistan "in order to prevent any future acts of international terrorism against the United States."[169] U.S. armed forces soon captured individuals believed to be affiliated with al Qaeda or organizations that were said to have supported or harbored al Qaeda, such as Afghanistan's de facto Taliban government.[170] By early 2002, U.S. armed forces and intelligence agencies had transferred over 150 suspected high-level leaders or valuable fighters to the U.S. military base at Guantanamo Bay, Cuba.[171]

Questions concerning the legal status of the Guantanamo detainees quickly arose.[172] Some speculated the detainees might qualify as prisoners

166. *See* 1 CUSTOMARY IHL STUDY *supra* note 38, xlv–xlvi (stating that a State omission or abstention *may* be construed to support *opinion juris*).

167. *See supra* Section III.

168. *Id.*

169. Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)).

170. *See* 1 CTR. FOR LAW & MILITARY OPERATIONS, U.S. ARMY, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME I: MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001–1 MAY 2003), at 53 (2004) (describing legal issues concerning enemy personnel detained in Afghanistan in late 2001).

171. *See* Katharine Q. Seelye, *Troops Arrive at Base in Cuba to Build Jails*, NEW YORK TIMES (Jan. 7, 2002), http://www.nytimes.com/2002/01/07/us/a-nation-challenged-the-prisoners-troops-arrive-at-base-in-cuba-to-build-jails.html (detailing the number of prisoners present in Cuba in 2002 as over 300).

172. Bryan Bender, *Red Cross Disputes US Stance on Detainees*, BOSTON GLOBE, Feb. 9,

of war, entitled to the protections of the Third Geneva Convention of 1949.[173] Others contended that both al-Qaeda and Taliban members were extra-legal persons and unlawful combatants, entitled to no specific international legal protections.[174] The U.S. government did little to quell or resolve debate.[175] Its public position on the matter was vague, especially as to the underlying legal reasoning upon which its actions were purportedly based.[176]

This is not to say the government had ignored the issue of the detainees' international legal status. As public and political debate swirled, a parallel, albeit cloistered, legal debate took place within and between several U.S. executive branch agencies.[177] The various positions broadly emulated those that had surfaced in public debate within the broader legal community.[178] However, at the time, the government neither publically proffered a comprehensively-reasoned legal analysis of its detention policy, nor provided any clear statement setting forth its views on U.S. legal obligations regarding the Guantanamo detainees' status and treatment.[179]

In early 2002, President Bush ultimately settled the internal executive branch debate on the detainees' legal status.[180] However, the full legal bases

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2002, at Al; *Agency Differs with U.S. over P.O.W.'s*, NEW YORK TIMES (Feb. 9, 2002), http://www.nytimes.com/2002/02/09/international/09DETA.html .

173. Bender, *supra* note 172, at A1.

174. *E.g.*, Sean D. Murphy, *Decision Not to Regard Persons Detained in Afghanistan as POWs*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 475, 476–77 (2002).

175. *See* Kim Lane Scheppele, *Law in A Time of Emergency: States of Exception and the Temptations of 9/11*, 6 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW 1001, 1030–34 (2004) (describing the ways in which the Bush Administration approached handling the legal status of terrorists captured and detained post-9/11).

176. *Id.*

177. *See generally* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter THE TORTURE PAPERS]. The Papers are a compilation of dozens of U.S. government legal memoranda and investigations related to detainee policies in the Global War on Terrorism. *See generally id.*

178. *Id.*

179. *See* Murphy, *supra* note 174, at 477 (describing the Bush administration's changing stance on the status and treatment of Guantanamo detainees under the Geneva Convention).

180. Memorandum from President George W. Bush for Vice President, et al., Humane Treatment of Taliban and Al Qaeda Detainees (Feb. 7, 2002) [hereinafter Memo. from President Bush], *available at* http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf; *see also* Katharine Q. Seelye, *In Shift, Bush Says Geneva Rules Fit Taliban Captives*, NEW YORK TIMES (Feb. 8, 2002), http://www.nytimes.com/2002/02/08/world/nation-challenged-captives-shift-bush-says-geneva-rules-fit-taliban-captives.html

for the government's ultimate position remained classified.[181] The Bush administration appeared satisfied to justify its determinations of the detainees' legal status with short summary fact sheets.[182] In fact, the full legal reasoning analyzing the detainees' status was never made public through any officially approved expression of *opinio juris*—it was instead leaked.[183] As the unauthorized release of photos depicting prisoner abuse at the Abu Ghraib military detention facility in Iraq took place in April 2004,[184] news outlets also began to receive and publish leaked copies of executive branch legal documents and memoranda addressing the Guantanamo detainees' legal status and the justifications for their indefinite detention.[185] The leaked memoranda fueled intense debate, litigation, and resentment, both in the United States and abroad.[186] They also inspired international lawyers to aggressively rebut the legal reasoning contained therein.[187] The U.S. executive branch quickly lost the initiative regarding characterization of the detainees' status under IHL to the judicial branch, Congress, and even the non-State international law community.

To be sure, not all of the negative fallout of the affair is attributable to absence of effective *opinio juris*. Substantive deficiencies in the legal analyses of the memoranda supporting the policies are chiefly to blame.[188] The marginalization of seasoned professional legal expertise within the

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(reporting that the decision to apply of the Geneva Convention to Taliban captives ended an "internal legal debate").

181. *A Guide to the Memos on Torture*, NEW YORK TIMES, http://www.nytimes.com/ref/international/24MEMO-GUIDE.html?_r=0 (last visited Apr. 28, 2015).

182. Fact Sheet, White House Press Office, Status of Detainees at Guantanamo (Feb. 7, 2002), *available at* http://www.presidency.ucsb.edu/ws/?pid=79402; *see also*, Press Release, Dep't of Def., DoD News Briefing: Secretary Rumsfeld and Gen. Myers (Feb. 12, 2002), *available at* http://www.defense.gov/ transcripts/transcript.aspx?transcriptid=2636 (demonstrating Secretary Rumsfeld's failure to expand on the Administration's reasoning when questioned).

183. Memo. from President Bush, *supra* note 180.

184. *See* Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER (May 10, 2004), *available at* http://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib (breaking the story of prisoner abuse by military personnel).

185. *See generally* THE TORTURE PAPERS, *supra* note 177.

186. *See*, *e.g.*, Arthur H. Garrison, *The Bush Administration and The Office of Legal Counsel (OLC) Torture Memos: A Content Analysis of the Response in the Academic Legal Community*, 11 CARDOZO PUBLIC LAW, POLICY AND ETHICS JOURNAL 1, 11–12, 6–26 (2012) (discussing the academic community's moral indignation).

187. *Id.* at 6.

188. *Id.* at 6–7.

executive branch likewise contributed.[189] Yet, a more vigorous and public approach to *opinio juris* could have prevented much of the costly fallout. If U.S. executive branch officials felt it necessary to abandon long-settled principles with respect to the classification and treatment of persons detained in armed conflict, an active and public campaign of timely and tightly-reasoned *opinio juris* would surely have been a more effective way to develop international norms better suited to the modern security needs of States than secretive, unilaterally constructed memoranda. If the laws-of-war were indeed "quaint" and "obsolete" in some respects,[190] a carefully managed campaign of *opinio juris* that marshaled the full expertise and resources of the U.S. government's legal community would surely have proved more successful in updating them in both the long and short term.

The expanding use of drones to target terrorists outside active theaters of combat operations is a second instance where the United States appears to prefer to operate under a shroud of legal ambiguity.[191] These operations raise questions from an array of legal regimes—the *jus ad bellum*, sovereignty, human rights, and IHL.[192] With respect to IHL, the core issues are 1) whether the drone operations are being mounted as an aspect of an "armed conflict" such that IHL applies and, if so, 2) whether the individuals attacked qualify as lawful targets, and 3) whether the operations

189. *See*, *e.g.*, Lt. Col. Paul E. Kantwill & Maj. Sean Watts, *Hostile Protected Persons or "Extra-Conventional Persons": How Unlawful Combatants in the War on Terrorism Posed Extraordinary Challenges for Military Attorneys and Commanders*, 28 FORDHAM INTERNATIONAL LAW JOURNAL 681, 682–83 (2005) (discussing the role of judge advocates in giving legal advice to the ranking commander in Iraq at the time of the Abu Ghraib detainee abuses).

190. Draft Memorandum from Alberto Gonzales, White House Counsel, to George W. Bush, Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban (Jan. 25, 2002), *reprinted in* THE TORTURE PAPERS, *supra* note 177, at 118.

191. CIVILIAN COST, *supra* note 56, at 80–81.

192. *Id.* at 26, 80–83; Rotem Giladi, *The* Jus Ad Bellum/Jus in Bello *Distinction and the Law of Occupation*, 41 ISRAEL LAW REVIEW 246, 246–47 (2008) ("Every . . . practitioner of international humanitarian law (IHL) is familiar with the distinction between *jus ad bellum* and *jus in bello* (or IHL). Both are public international law regimes that regulate war but whereas the former regulates the *legality* of the use of force *per se*, the latter concerns the legality of the *manner* in which force is used. The distinction generally means that the rules of *jus in bello* apply irrespective of questions of legality under *jus ad bellum* and that, as a consequence, all belligerents are subject to the same rules of *jus in bello*, whatever their position under *jus ad bellum*.").

comply with IHL rule of proportionality and the requirement to take precautions in attack.[193]

There is no question that the admixture of normative regimes renders linear and compartmentalized legal analysis of the drone program challenging.[194] Indeed, much of the discussion to date has misstated the law and conflated separate and distinct legal regimes.[195] It is a discourse that has been marked by emotive assertions as much as by legal acumen.[196] However, non-State actors have lately started to produce analyses that are sophisticated and convincing.[197] Noteworthy in this regard are recent reports by HRW, Amnesty International, and the two U.N. Special Rapporteurs, all of which, appropriately so, have garnered significant attention in the international law community.[198]

Yet to date, the government, under two very different administrations, has offered no thorough expression of *opinio juris* that draws together the various legal strands in a manner that would convincingly justify the strikes as a matter of international law.[199] Instead, both administrations have resorted to periodic speeches by senior officials who provide only vague glimpses of the U.S. position.[200]

Most often cited is a speech by former Department of State Legal Adviser Harold Koh at the 2010 Annual Meeting of the American Society

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193. AP I, *supra* note 55, arts. 51(5)(b), 57(2)(a)(iii), 57(2)(b); 1 CUSTOMARY IHL STUDY, *supra* note 38, r. 14–24.

194. *See generally* Michael Schmitt, *Narrowing the International Law Divide: The Drone Debate Matures*, 39 YALE JOURNAL OF INTERNATIONAL LAW ONLINE 1, 3 (2014) [hereinafter Schmitt, *Drone Debate*].

195. *Id.* at 3–9.

196. *Id.*

197. *See id.* at 12–13 (describing analysis and comparison of prominent recent reports).

198. *See generally Emmerson Report*, *supra* note 13; *Heyns Report*, *supra* note 13; CIVILIAN COST, *supra* note 56; AMNESTY INT'L, "WILL I BE NEXT?": US DRONE STRIKES IN PAKISTAN (2013) [hereinafter DRONE STRIKES IN PAKISTAN]. For an analysis of the four reports, see generally Schmitt, *Drone Debate*, *supra* note 194.

199. *See, e.g.*, DRONE STRIKES IN PAKISTAN, *supra* note 198, at 49 (describing the refusal of the United States to provide public access to information about its drone program in Pakistan).

200. *See, e.g.*, John B. Bellinger III, Legal Adviser, U.S. Dep't of State, Address at the London School of Economics: Legal Issues in the War on Terrorism (Oct. 31, 2006) [hereinafter Bellinger, War on Terrorism], *available at* http://www.state.gov/s/l/2006/98861.htm (describing the U.S. views on the detention and treatment of terrorists since 9/11).

of International Law.[201] Although heralded at the time as the first full explanation of U.S. legal policy on drone strikes, for experts in the field it was a rather confusing explication.[202] For instance, it was unclear whether the use of force against members of al Qaeda was being justified on the basis of the law of self-defense (a *jus ad bellum* issue), because of U.S. involvement in an armed conflict with the organization (an IHL issue), or on account of both.[203] The speech was likewise unexceptional. An announcement that the United States complies with the principle of distinction and the rule of proportionality hardly constitutes an epiphany.[204] Failure to comply would not only violate IHL, but also amount to a war crime by those involved.[205] And curiously, there is no mention of the requirement to take precautions in attack, which is central to the legality of drone strikes under IHL.[206]

Other noteworthy speeches include those by Koh's predecessor, John Bellinger, at the London School of Economics;[207] John Brennan at Harvard Law School while he was serving as the President's Assistant for Counterterrorism;[208] Attorney General Eric Holder at Northwestern University School of Law;[209] former Defense Department General Counsel

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201. Koh, American Society Remarks, *supra* note 144.

202. *See, e.g.*, COLUMBIA LAW SCH. HUM. RTS. INST., TARGETING OPERATIONS WITH DRONE TECHNOLOGY: HUMANITARIAN LAW IMPLICATIONS 2 (2011) (discussing former Department of State Legal Adviser Harold Koh's explanation of U.S. legal policy on drone strikes and the legality of U.S. practice).

203. Koh, American Society Remarks, *supra* note 144, at 7. Adviser Harold Koh stated, "[a]s I have explained, as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law." *Id.*

204. Koh, American Society Remarks, *supra* note 144, at 7–8.

205. *See* 1 CUSTOMARY IHL STUDY, *supra* note 38, r. 1, 14, 156 (discussing the principle of distinction between civilians and combatants, proportionality in attack, and definition of war crimes, respectively).

206. *See generally* Koh, American Society Remarks, *supra* note 144 (lacking discussion of drone precautionary measures); *see also ICRC Challenges*, *supra* note 35, at 38–39 (discussing required precautions under IHL and its application to drone attacks).

207. Bellinger, War on Terrorism, *supra* note 200.

208. John O. Brennan, Asst. to the President for Homeland Sec. & Counterterrorism, Strengthening Our Security by Adhering to Our Values and Laws, Remarks at the Program on Law and Security at Harvard Law School (Sept. 16, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an.

209. Eric Holder, U.S. Att'y Gen., Remarks at Northwestern University School of

Jeh Johnson at Yale Law School;[210] and the President himself at National Defense University.[211] A brief Fact Sheet was released by the White House contemporaneously with the President's speech.[212] Each of these addressed particular aspects of IHL and other bodies of law governing drone operations, but none offered an analysis robust enough to draw any but the broadest of conclusions as to the U.S. view of the applicable law.[213] Moreover, the speeches not only failed to clearly distinguish the various legal regimes from which the relevant law derives, but left it uncertain whether the positions taken were the product of legal, operational, moral, or policy concerns. Paradoxically, the most comprehensive analysis by the government of the international law issues surrounding drone operations was that offered in an unsigned and undated draft Justice Department White Paper that was leaked to the press in 2013, hardly an exemplar of reliable *opinio juris*.[214]

The vacuity of recent *opinio juris* is particularly surprising given the fact that the law of drone operations is exceedingly emotive and has underpinned widespread and impassioned condemnation of the United States as a "might makes right" State.[215] As a matter of law, the basis for the U.S. operations is arguably sound.[216] Articulating that basis publicly would not only have the immediate effect of tempering the criticism (much

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Law (Mar. 5, 2012), *available at* http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html.

210. Jeh Charles Johnson, Gen. Counsel, U.S. Dep't of Def., National Security Law, Lawyers and Lawyering in the Obama Administration, Address at the Dean's Lecture at Yale Law School (Feb. 22, 2012), *in* 31 YALE LAW AND POLICY REVIEW 141 (2012).

211. President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013), http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university.

212. Fact Sheet: The President's May 23 Speech on Counterterrorism, White House Press Office (May 23, 2013), https://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-president-s-may-23-speech-counterterrorism.

213. *See generally id.*; Bellinger, War on Terrorism, *supra* note 200; Brennan, *supra* note 208; Holder, *supra* note 209; Johnson, *supra* note 210; Obama, *supra* note 211.

214. *See generally* U.S. Dep't of Justice, Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or an Associated Force (Leaked Draft White Paper Nov. 8, 2011), *available at* http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

215. *See generally* CIVILIAN COST, *supra* note 56 (detailing the civilian casualties of U.S. drone policy and recommending changes).

216. *See generally* Michael N. Schmitt, *Extraterritorial Lethal Targeting: Deconstructing the Logic of International Law*, 52 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 77 (2013).

of which is levied on the basis of a lack of legal transparency[217]), but also help preserve the option of conducting drone operations extraterritorially in the future.

Whatever the reason for the U.S. failure to issue an unambiguous expression of *opinio juris*, by now the United States and other countries that conduct such operations have lost control of the debate. Non-State actors are shaping the discussion as they wish, with States merely responding, or more often not responding at all, to the sundry objections they raise.[218] From this reactive stance, it is nearly impossible for States conducting drone strikes to muster sufficient support from other States to redirect the debate. The domestic political costs of supporting the strikes (at least those outside an active battlefield) are simply too high for them.[219] Additionally, the United States has not provided an adequately detailed and reasoned delineation of its legal position that could be assessed and embraced by other States.[220] To employ military terminology, the drone debate and many other currently debated IHL issues are, for the United States especially, "self-inflicted wounds."

Perhaps the most pressing need for an expression of *opinio juris* is with respect to those articles of AP I the United States believes accurately reflect customary law—and those it does not. The instrument was designed to supplement the four 1949 Geneva Conventions, which dealt primarily with

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217. *See, e.g.*, Letter from the American Civil Liberties Union et al. to President Barack Obama (Dec. 4, 2013) [hereinafter Letter to President Obama], *available at* http://justsecurity.org/wp-content/uploads/2013/12/2013-12-04-Coalition-Follow-Up-Letter-to-Obama-on-TK.pdf (calling on the government to "publicly disclose key targeted killing standards and criteria"); MICAH ZENKO, COUNCIL ON FOREIGN RELATIONS, COUNCIL SPECIAL REPORT NO. 65: REFORMING U.S. DRONE STRIKE POLICIES 3 (2013) (stating that the "lack of transparency threatens to limit U.S. freedom of action and risks proliferation of armed drone technology without the requisite normative framework"); *Heyns Report*, *supra* note 13, at 21 (emphasizing to the U.N. the need for greater transparency regarding drone policy for all States).

218. *See*, *e.g.*, Koh, American Society Remarks, *supra* note 144, at 7–8 (responding to criticisms against U.S. targeting practices); Letter to President Obama, *supra* note 217 (noting President Obama's stated intention to limit the use of lethal force).

219. *See* ANTHONY DWORKIN, EUROPEAN COUNCIL ON FOREIGN RELATIONS, DRONES AND TARGETED KILLING: DEFINING A EUROPEAN POSITION 2–4 (2013) (discussing domestic opposition to drone strikes among E.U. member States).

220. *See* Letter to President Obama, *supra* note 217 (asking for a clearer standard for drone strikes); ZENKO, *supra* note 217, at 16–17 (noting that the United States has offered multiple legal justifications for drone strikes).

protections for specified persons and objects.[221] Rules regarding how combat was to occur were the province of the 1907 Regulations annexed to Hague Convention IV.[222] Although a post-World War II tribunal at Nuremberg found that it reflected customary law,[223] the treaty was sparse and clearly in need of expansion in the aftermath of two world wars and numerous post-World War II conflicts such as those in Algeria and Vietnam.[224] AP I, addressed to international armed conflict, was intended to serve that process.[225] In the ensuing two and a half decades, the United States has remained a non-Party.[226] Still, 174 States are Party to the Protocol, including most NATO allies and States with which the United States frequently operates militarily, such as Canada, the United Kingdom, and Australia.[227]

To date, the United States has issued no comprehensive expression of *opinio juris* regarding those provisions of AP I it regards as reflecting customary international law.[228] Although it is clear from U.S. practice, training, and doctrine that certain key provisions, such as the proportionality aspects of Articles 51 and 57, are accepted as customary,[229] little is known beyond that. For instance, does the United States accept the definition of perfidy only with the exclusion of the reference to "capture,"

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221. AP I, *supra* note 55, art. 1(3).

222. Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

223. United States v. von Leeb et al. [High Command Trial], 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 532 (1950).

224. *See* George Aldrich, *New Life for the Laws of War*, 75 AMERICAN JOURNAL OF INTERNATIONAL LAW 764, 764 (1981) (noting that the Additional Protocols were created to address the deficiencies in the Geneva Conventions).

225. *Id.*

226. *Treaties and States Party to Such Treaties*: *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977*, ICRC, https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties &xp_treatySelected=470 (last visited Apr. 8, 2015) [hereinafter *ICRC Additional Protocol Parties*].

227. *Id.*

228. *See generally* Theodor Meron et al., *Customary Law and Additional Protocol I to the Geneva Conventions for Protection of War Victims: Future Directions in Light of the U.S. Decision Not to Ratify, Panel Discussion*, *in* 81 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 26 (1987).

229. *Cf.* Koh, American Society Remarks, *supra* note 144 (discussing the rigorous implementation of proportionality and distinction throughout the planning and execution of lethal operations in the Obama Administration).

as is sometimes asserted?[230] Does it continue to take the position that the provisions on the environment do not reflect customary law? Is the U.S. position on military objectives that "war-sustaining" objects are included, as appears to be the case from the Navy/Marine Corps/Coast Guard manual, but which has been criticized as a distortion of the law?[231] What is the current U.S. position regarding combatant status for those members of a militia group belonging to a Party to the conflict, but who do not wear distinguishing attire or symbols when conducting an attack?[232]

When trying to discern the U.S. legal position with respect to these and other unsettled issues, scholars and practitioners turn to three sources. The first two are internal Department of Defense memoranda, one to the Chairman of the Joint Chiefs of Staff,[233] the other to an Assistant General Counsel.[234] Both cover the same ground and are distinguished by their brevity and restatement of the obvious.[235] The third is a speech by the then Deputy Legal Adviser of the State Department at an academic conference in 1987 that was reprinted in the *American University Journal of International Law and Policy*.[236] To provide guidance to its judge advocates, the U.S. Army has reprinted the second memorandum and a summary of the article in its current 2014 *Law of Armed Conflict Documentary Supplement*.[237]

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230. *See* AP I, *supra* note 55, art. 37 (stating the prohibition of perfidy elements).

231. NWP 1-14M, *supra* note 55, ¶ 8.2; YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 95–96 (2d ed. 2010).

232. *See* AP I, *supra* note 55, art. 44 (reciting the rule under the Protocol Additional to the Geneva Conventions).

233. Memorandum to the Chairman of the Joint Chiefs of Staff on Protocols I and II–Humanitarian Law during Armed Conflict, Office of the Ass't Sec'y of Def., (Nov. 7, 1977) [hereinafter Memorandum to the Chairman] (on file with author).

234. Memorandum from W. Hays Parks et al. to Mr. John H. McNeill, Ass't Gen. Counsel, Office of the Sec'y of Def. (May 9, 1986), *in* U.S. ARMY JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., LAW OF ARMED CONFLICT DOCUMENTARY SUPPLEMENT 234–35 (William J. Johnson ed., 2014) [hereinafter Memorandum to John H. McNeil].

235. *Compare* Memorandum to the Chairman, *supra* note 233, *with* Memorandum to John H. McNeil, *supra* note 234, at 234–35 (listing the provisions of the 1977 Protocols Additional to the Geneva Conventions that were already part of customary international law).

236. Matheson, *supra* note 67; *see also* Abraham D. Sofaer, Legal Adviser, U.S. Dep't of State, Remarks on the Position of the United States on Current Law of War Agreements (Jan. 22, 1987), *in* 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 460, 467–68 (1987) (discussing why the Joint Chiefs of Staff found AP I to be "militarily unacceptable").

237. U.S. ARMY JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., LAW OF ARMED CONFLICT DOCUMENTARY SUPPLEMENT 232–35 (William J. Johnson ed., 2014).

This lack of *opinio juris* is problematic. U.S. forces have been at war over a decade with little official guidance as to those aspects of AP I, the most comprehensive conduct of hostilities treaty, the United States believes are customary in nature.[238] Moreover, in both of its major conflicts, U.S. troops operated alongside forces subject to the Protocol and in many cases commanded those troops in combat, thereby raising important questions of legal interoperability.[239]

Finally, especially illustrative of the U.S. reluctance to set forth its IHL positions openly is the tortured process to produce a Department of Defense (DoD) Law of War Manual.[240] Although military manuals are not themselves expressions of *opinio juris* because they are often based in part on operational and policy concerns, they serve as useful evidence thereof.[241] Presently, the Army Manual dates from 1956,[242] the Navy/Marine Corps/ Coast Guard Manual is a 2007 product,[243] and the Air Force no longer has a manual in force.[244] In 1996, the Army Judge Advocate General's sensible

238. *See* Cadwalader, *supra* note 65, at 135 ("Unfortunately, there is no single authoritative reference detailing those provisions of AP I the US accepts as an accurate restatement of customary international law or other legal obligations, or that it follows as a matter of policy during armed conflict.").

239. The U.S. has not ratified AP I, but many States that have assisted the U.S. in armed conflicts over the past decade have ratified AP I. *ICRC Additional Protocol Parties*, *supra* note 226.

240. *See* W. Hays Parks, Update on the DOD Law of War Manual, Address before the American Bar Association Standing Committee on National Security, at 6 (Nov. 30 2012) [hereinafter Parks, Update on the DOD Law of War Manual], *available at* http://www.lawfareblog.com/wp-content/uploads/2012/12/Parks.Manual.pdf (detailing the failure of the 2010 draft of the manual); Robert Chesney, *Hays Parks on the Demise of the DOD War Manual*, LAWFARE (Dec. 8 2012), http://www.lawfareblog.com/2012/12/hays-parks-on-the-demise-of-the-dod-law-of-war-manual/ ("The effort to publish that manual now appears to be dead in the water, for better or worse, and the speech Hays gave at last week's meeting is something of a post-mortem providing his view as to why things stalled."); Edwin Williamson & Hays Parks, *Where is the Law of War Manual?*, 18 WEEKLY. STANDARD (July 22, 2013), http://www.weeklystandard.com/articles/where-law-war-manual_739267.html?nopager=1 (discussing both the fourteen year process of drafting the manual as well as the sudden thirty month delay in approving the manual); Cadwalader, *supra* note 65, at 156 (stating that "the author of this paper has been informed that the Manual remains under review and its release date is uncertain").

241. *See* Cadwalader, *supra* note 65, at 160–68 (interpreting AP I in light of the Army Field Manual and the Navy/Marine Corps/Coast Guard Manual).

242. DEP'T OF THE ARMY, FIELD MANUAL 27-10: THE LAW OF LAND WARFARE (1956) [hereinafter FM 27-10].

243. *See generally* NWP 1-14M, *supra* note 55.

244. The Air Force manual has been rescinded. DEP'T OF THE AIR FORCE, JUDGE

proposal that a manual be produced for all four DoD services was accepted.[245] It took nearly a decade and a half to produce a draft,[246] a particularly unfortunate pace given that two major wars replete with extraordinarily complex legal issues were underway for much of the period. Acceptance of the draft appears to have become the victim of interagency disagreement.[247]

As a result, the Army operates armed with a manual that is 58 years old and the Air Force "flies and fights" without any comprehensive published legal guidance.[248] In the absence of formal guidance, U.S. forces are sometimes forced to train, operate, and render legal advice based on documents issued by non-State actors, including some of those mentioned *supra*.[249] The situation is regrettable not only for its failure to support serving military lawyers and commanders, but also as yet another example of U.S. retreat from active IHL *opinio juris*.

Clearly, the absence of authoritative State *opinio juris* impoverishes IHL discussions, debates, and deliberations, both descriptive and normative. Whatever one's opinion of the substantive quality or correctness of a State's particular expression of *opinio juris*, State legal opinions provide indispensable control samples for meaningful analysis and critique. The efforts of, inter alia, legal practitioners, judges, government legal advisers, scholars, commanders, humanitarian workers, members of the media, and policy makers inexorably suffer when States fail to clarify and update their views on the content, interpretation, and future direction of IHL.

ADVOCATE GEN., AIR FORCE PAMPHLET 110-34, COMMANDER'S HANDBOOK ON THE LAW OF ARMED CONFLICT (1980).

245. Williamson & Parks, *supra* note 240.

246. *See id.* (remarking that the Department of Defense (DoD) working group spent fourteen years to produce the first draft of the manual).

247. *See id.* (explaining major policy disagreements among Departments of State, Justice, and Defense); *see also* Parks, Update on the DOD Law of War Manual, *supra* note 240 (indicating consensus of the agencies involved after the first draft of the manual was produced in 2010 has since ended). *But see* Letter from Robert S. Taylor, Acting General Counsel, Dep't of Def. to Editor of The Weekly Standard (July 18, 2013), *available at* http://www.lawfareblog.com/wp-content/uploads/2013/07/Letter-to-The-Weekly-Standard_18Jul2013.pdf (responding to the Williamson and Parks article *supra* note 240 and emphasizing that experts are still working cooperatively and diligently to produce the final version of the manual).

248. *See* FM 27-10, *supra* note 242 (dating from July 1956); *see* DEP'T OF THE AIR FORCE, *supra* note 244 (noting the Army Manual was written in 1956 and the Air Force manual has been rescinded).

249. *E.g.*, *Emmerson Report*, *supra* note 13.

V. CONCLUSION

This has been an article about process, not substance. It is meant to be neither polemical nor Manichean. It offers no comment on any position that has been asserted by non-State actors or States with respect to the interpretation of extant IHL or its apparent evolutionary vector. Instead, we simply lament the fact that States, perhaps without even realizing they have been doing so, are ceding control over the content, interpretation, and development of IHL to others. Greater sensitivity on the part of States to the centrality of expressing *opinio juris* to law formation and interpretation appears merited.

The reluctance of States and their legal representatives to communicate and commit to clear views on IHL matters vitiates legal discourse, degrading the functioning and development of a critical aspect of the international legal system. Scholars, commentators, advocates, judges, and even States' own diplomats and legal advisors are by now accustomed to resorting to speculation to resolve ambiguity concerning any number of State views on IHL. Paradoxically, in the absence of State views, such speculation can become, over time, the law. Unless the trend is reversed, States stand in peril of losing sway over debates that may significantly and adversely impact their freedom of action on the battlefield, or even place their civilian population at increased risk.

In our view, a number of important and emerging legal issues related to armed conflict, such as cyber operations, are now ripe for expressions of *opinio juris* by States, including the United States. This should be unsurprising since the existing IHL principle or rules, treaty or customary, were crafted or crystallized before the issues ripened. Accordingly, State expressions of *opinio juris* take on added importance as new technologies and methods of warfare are developed and fielded.

The question is, of course, whether the unfortunate tendency of States to shy away from expressions of *opinio juris* will continue to plague IHL? It is a question of seminal importance in light of new forms and means of warfare. Of these, the emergence of cyberspace as a pervasive aspect of conflict[250] presents the most pressing demand for *opinio juris*. Indeed, States'

250. *See, e.g.*, DEP'T OF DEFENSE, STRATEGY FOR OPERATING IN CYBERSPACE 2–4 (J2011) [hereinafter STRATEGY FOR OPERATING IN CYBERSPACE], *available at* http://www.defense.gov/news/d20110714cyber.pdf (describing various threats and potential vulnerabilities posed by malicious cyber attacks that could affect military, public, and pri-

armed forces have been quick to embrace cyberspace as a domain of military operations.[251] Yet, States will be assuming grave risks if the trend of refraining from offering clear expressions of *opinio juris* regarding IHL endures. This is especially so with respect to cyber operations because such operations are typically classified. Thus, there will often be no visible State practice from which to draw even inferences of *opinio juris*. As non-State actors engage in activities that take the place of State expressions of *opinio juris* in the development and interpretation of IHL cyber norms, they may well be operating on partial or faulty information as to actual State practice.

Whether to announce doctrinal details and clarifications, preserve flexibility through confirmation of ambiguity, or simply reject or confirm the existence of particular norms, such expressions of *opinio juris* manage important State legal and operational interests. Therefore, State legal agencies and agents, particularly Ministries and Departments of Defense, must be equipped, organized, and empowered to participate actively in the interpretation and development of IHL. States, and specially affected States in particular, must make responses to emerging IHL scholarship, investigations and jurisprudence a regular facet of their *opinio juris*. Reinvigorating *opinio juris* would do more than satisfy international law sovereigntists. It would foster the restoration of the pluralistic IHL dialogue that formerly tested, updated, and enriched the balance between military necessity and humanitarian considerations that necessarily underpins IHL.

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vate interests); JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3–13, INFORMATION OPERATIONS vii (2012) [hereinafter INFORMATION OPERATIONS], *available at* http://www.dtic.mil/doctrine/new_pubs/jp3_13.pdf ("The nation's state and non-state adversaries are equally aware of the significance of this new technology, and will use information-related capabilities . . . to gain advantages in the information environment, just as they would use more traditional military technologies to gain advantages in other operational environments.").

251. *See, e.g.*, STRATEGY FOR OPERATING IN CYBERSPACE, *supra* note 250, at 5 ("Though the networks and systems that make up cyberspace are man-made, often privately owned, and primarily civilian in use, treating cyberspace as a domain is a critical organizing concept for DoD's national security missions. This allows DoD to organize, train, and equip for cyberspace as we do in air, land, maritime, and space to support national security interests."); *see generally* INFORMATION OPERATIONS, *supra* note 250.