

Yearbook of International Humanitarian Law

Volume 22

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Editors

Yearbook of International Humanitarian Law 2019



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Cover illustration: 25 kms from Ruweishid. Jordanian Red Crescent Camp for refugees fleeing the war in Iraq. An ICRC tracing service is also in place. A few tents have collapsed during a storm the day before
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Editorial

The year 2019 marks the 70th anniversary of the four Geneva Conventions. The four Conventions represent an outstanding step forward in the development of international humanitarian law. While the First and the Third Geneva Convention could build on pre-existing law, the Second and the Fourth Convention created new protection regimes. In particular, the creation of Common Article 3 of the Conventions and the Fourth Geneva Convention relative to the Protection of Civilian Persons in Times of War represents a watershed moment of legal reform. Nearly universally ratified, the Conventions continue to set the standard for humanitarian treatment in times of war together with the three Additional Protocols of 1977 and 2005, respectively.

Yet, law reform is not confined to single watershed moments in the conclusion of new treaties but constantly unfolds over time. Interpretation adapts international agreements to new challenges. On the basis of subsequent practice, it allows to keep legal obligations in line with changing practices of states and—to some extent—other actors. Systematic interpretation gives room to integrate input from other legal regimes and thereby further the development of a treaty. Moreover, customary international law may allow the creation of new rules where the momentum for the conclusion of a new treaty cannot be reached.

Academic debates are an important part of these processes. They help to identify where change took place or where it may become necessary, and they contribute to defining the limits for change. After all, international humanitarian law, like all law, is exposed to various claims by different actors that may pursue diverging or even opposed political interests. Changes in the way wars are waged as well as technological developments or the rise of new actors constantly change battlefield realities. In light of these dynamics, it is a continuous challenge to assess whether humanitarian rules still remain adequate or whether law reform is needed and if so, through which channels it should be brought about. The Geneva Conventions and the debates surrounding them provide ample proof for these processes, and the present volume of the Yearbook of International Humanitarian Law focuses on pertinent examples.

One example for changing battlefield tactics lies in a shift to urban warfare and the corresponding increase of sieges in recent conflicts. In her contribution “Evolution of the International Humanitarian Law Provisions on Sieges”, *Agnieszka Szpak* analyzes the development over time of the pertinent legal rules and highlights the role of both customary international law and United Nations Security Council Resolutions as instruments to prompt such a development. The impact of international criminal law on the interpretation of international humanitarian law is dealt with in the contribution by *Harmen van der Wilt* “Towards a Better Understanding of the Concept of ‘Indiscriminate Attack’—How International Criminal Law Can Be of Assistance”. He starts from the observation that in relation to the means and methods of warfare and the protection of civilians Additional Protocol I closed a protection gap but that enforcement remains problematic because of complex *mens rea* issues. As a redress, he suggests borrowing from international criminal law doctrine and its differentiation between several categories of *mens rea*.

The spread of non-international armed conflicts after the end of the Cold War challenged the Geneva Conventions and Additional Protocol II not least because of their limited outreach. A remedy was seen to lie in a turn to customary international law. The contributions by *Marten Zwanenburg* and *Joshua Joseph Niyo* analyze specific challenges arising in the context of these conflicts. In his contribution “Double Trouble: The ‘Cumulative Approach’ and the ‘Support-Based Approach’ in the Relationship Between Non-State Armed Groups”, *Zwanenburg* addresses the highly controversial question under which circumstances a non-international armed conflict exists and who are the parties to such a conflict. He engages with the diverging approaches put forward by the International Committee of the Red Cross and supports the so-called cumulative approach. *Joshua Joseph Niyo* demonstrates how international human rights law can contribute to change, development, and specification of international humanitarian law. In his contribution “The Rebel with the Magnifying Glass: Armed Non-State Actors, the Right to Life and the Requirement to Investigate in Armed Conflict”, he analyzes how both legal regimes can mutually re-enforce each other and focuses, in particular, on the right to life and investigation duties.

While compliance with international humanitarian law has always been seen as its quintessential Achilles’ heel, recent conflicts have even worsened the overall perception. For some years now, armed conflicts seem to be characterized by a systematic and strategically motivated disregard for the rules of international humanitarian law. Thus, many debates on occasion of the 70th anniversary of the Geneva Conventions addressed the particular challenges stemming from non-compliance. Against this backdrop, *Jann Kleffner* provides us with “A Bird’s-Eye View on Compliance with the Law of Armed Conflict 70 Years After the Adoption of the Geneva Conventions”. He maps the various existent compliance mechanisms and makes a plea for contextualizing compliance as well as moderating expectations as to what can be achieved. To underpin his argument, he zooms in on three specific challenges: the prevalence of non-international armed conflicts, the culture of repression and the individualisation of victimhood based on the human rights paradigm. Subsequently, *Ioana Cismas* and *Ezequiel Heffes* look

into the role that religious leaders may play in the enhancement of compliance with international humanitarian law. In their contribution “Not the Usual Suspects: Religious Leaders as Influencers of International Humanitarian Law Compliance”, they make a case for engaging with societal actors which may contribute to inducing compliance. In particular, they analyze what makes religious leaders influential among their constituencies and how compliance can benefit from this influence.

In the second part of the Yearbook, *Aniel de Beer* and *Martha Bradley* analyze the 2018 decision of the International Criminal Court’s Appeals Chamber in *Prosecutor v Jean-Pierre Bemba Gombo*. Their contribution “Appellate Deference Versus the *De Novo* Analysis of Evidence: The Decision of the Appeals Chamber in *Prosecutor v Jean-Pierre Bemba Gombo*” focuses on the International Criminal Court’s procedural and evidentiary law issues and criticizes that the Appeals Chamber has analyzed the evidence of the case *de novo* in order to arrive at a conclusion different from the one reached by the Trial Chamber. The Yearbook closes with its “Year in Review 2019” in which *Kilian Roithmaier*, *Taylor Woodcock* and *Eve Dima* report on events which were particularly relevant for international humanitarian law and international criminal law in the year 2019.

The year 2019 also marks change for this Yearbook. *Kilian Roithmaier*, who has acted as Editorial Assistant for Volume 21 (2018) and Volume 22 (2019), will leave the T.M.C. Asser Institute. Thanks are due for his diligent support. Also *Christophe Paulussen* will move on to tackle new tasks. *Christophe Paulussen* worked first as Assistant Managing Editor (Volumes 15 (2012)—17 (2014)) and then as Managing Editor (Volumes 18 (2015)—22 (2019)) for the Yearbook. We are grateful to him for the rigour, patience, and perseverance with which he cared for the Yearbook and handled authors, reviewers, and editors. We are glad that he will continue to care for the Yearbook as member of the Board of Advisors from Volume 23 (2020) onward.

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