

# Law Promotion Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War

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## Abstract

*The International Committee of the Red Cross casts itself as both a unique protector of individual victims of war and a special guardian of the body of international humanitarian law. It manages and reconciles these two roles through a complex, unconventional strategy that includes secret communications with warring parties, ambiguity in conveying its legal views to them, and, at times, a complete avoidance of legal arguments when persuading actors to follow international rules. This modus operandi not only challenges some standard views about the methods used by actors seeking to convince law violators to comply with norms; it also opens the door to a richer theoretical understanding of legal argumentation in that process of persuasion. The resulting construct consists of a matrix of inputs that determine how a persuading entity will deploy legal arguments and outputs that convey the dimensions of the resulting argumentation. Both the theory and the ICRC's work suggest that entities concerned with compliance would often do best to settle for a target to act consistently with a norm rather than to internalize it. They also raise difficult moral questions about whether compliance with international law is the optimal goal if it has adverse consequences for the values an institution seeks to uphold.*

On a Geneva hillside with a spectacular view of the French Alps, a universe away from the world's wars and torture chambers, sit the headquarters of the International Committee of the Red Cross, the 148-year old Swiss non-governmental organization founded by Henri Dunant to aid the victims of armed conflict worldwide. With its staff of over 12,000 and operations in 80 countries, many beyond the reach and interest of

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foreign and UN diplomats, the ICRC scarcely resembles even the most global of international NGOs. Indeed, with a large secretariat and field missions, it has as much in common with a foreign ministry as with an NGO.

The ICRC is also a major player in international law: the Third Geneva Convention requires that states give it access to prisoners of war;<sup>1</sup> it conducts hundreds of confidential visits and authors numerous reports to monitor compliance by armies, security forces, and non-state armed groups with international humanitarian law (IHL); it educates these targets about implementing IHL through legislation, military manuals, and training; it issues public interpretations of the law; and it actively supports new rules in many areas. The ICRC thus regards itself as the ‘promoter and guardian of international humanitarian law’.<sup>2</sup>

These dual functions – helping victims of war and promoting respect for law – may sound completely in harmony.<sup>3</sup> After all, human rights NGOs typically operate by invoking the facts and law to violators and galvanizing attention, all for the sake of both helping the victims and promoting respect for the law. Not so for the ICRC. It rarely identifies any party, state or non-state, by name as violating international humanitarian law, including by keeping its application of the law secret; it leaves its legal position on many key issues ambiguous, sometimes even from the target of its discussions; and at times it avoids legal discourse – law talk – entirely when persuading parties to follow legal rules. As it is thus often impossible to know the ICRC’s legal characterization in specific cases, its self-professed role as an authoritative interpreter of and voice for international humanitarian law seems undermined. This tension within the work of the ICRC, and the ICRC’s approach to it, should interest scholars and practitioners of IHL seeking to encourage warriors to follow it.

Equally important, beyond the world of IHL, the methods used by this institution invite us to look anew at the way states, international organizations, NGOs, and others promote observance of international law.<sup>4</sup> For the ICRC believes it can reconcile its two roles by encouraging the armed actors to conform their behaviour to the rules, regardless of the arguments it uses or the reasons for the target’s ultimate compliance. That strategy in turn suggests the need to examine in detail the place of legal argumentation in the compliance process. Although some theoretical approaches to compliance rightly emphasize the centrality of persuasion by key actors, our understanding of the role of legal norms in that process of communication is not well developed. At the same time, if the ICRC is

<sup>1</sup> Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug. 1949, Art. 126, 75 UNTS 135 (hereinafter Geneva Convention III).

<sup>2</sup> ‘What is the ICRC’s role in Ensuring Respect for Humanitarian Law?’, 1 Jan. 2004, available at: <http://icrc.org/web/eng/siteeng0.nsf/htmlall/5kzmkm?opendocument> (last accessed 10 Nov. 2010); see also D. Rieff, *A Bed for the Night: Humanitarianism in Crisis* (2002), at 19 (‘custodian of the laws of war’).

<sup>3</sup> For the ICRC’s formal position see ‘The International Committee of the Red Cross (ICRC): Its Missions and Work’, reprinted in 874 *Int’l Rev Red Cross* (2009) 399, at 401 (hereinafter ICRC Mission Statement) (‘These two lines [helping victims and law promotion] are inextricably linked because the first operates within the framework provided by the second, and the second draws on the experience of the first and facilitates the ICRC’s response to the needs identified.’).

<sup>4</sup> The concept of compliance (including its shortcomings) is dissected later in this article. For now, I use ‘comply’, ‘observe’, and ‘follow’ interchangeably.

actually choosing protection of victims over guardianship of IHL rather than reconciling these two functions, then we confront a situation where a critical enforcer of the law (in a loose sense) appears ready to sacrifice promoting that law for the sake of other values.

The work of the ICRC in effect pries open the process of persuasion in international law by raising two questions: for those actors seeking to persuade others to follow international law, what place and forms do they assign to legal argumentation? And what factors account for such decisions? The ICRC's methods show that a compliance strategy can invoke a range of law, along several dimensions, and that the choices regarding the argumentation to use are highly contextual. This practice contrasts with static or unidimensional approaches to the modalities of persuasion and the role of law assumed by most approaches to compliance. I thus seek to provide a deeper examination of the role of legal argumentation in the compliance process. My approach is inductive, to appraise one organization's strategies and suggest their generalizability to all law promotion.

This article, then, has two purposes: to elaborate on the generally unexplored methodology of the ICRC for encouraging observance of international law; and to place this strategy within a broader theory about the role of legal argumentation in promoting such compliance. To do so, section 1 offers an overview of the key functions of the ICRC; section 2 examines its basic *modus operandi*; and section 3 examines its critical method of seeking compliance, namely, the confidential communications with governments and non-state actors. Section 4 then places this strategy within the current debates over compliance with international law and offers a new framework for understanding the role of legal argumentation in that process. Section 5 addresses the dilemmas that arise when compliance with a norm conflicts with other values, pointing to future areas of inquiry regarding both the actual and desired resolution of those dilemmas by compliance-interested institutions.

## A Word on Research Method

The portrait of the ICRC painted below results from the author's one-year service as an in-house consultant on international law in the Legal Division of the ICRC in Geneva. The analysis benefited from the author's own work assignments, observation of the work of numerous others within the ICRC, and numerous interviews with officials of the ICRC.<sup>5</sup>

<sup>5</sup> The author interviewed the following officials within the ICRC: Olivier Bangerter, Adviser, Relations with Armed and Security Forces, Department of Communications; Marie Dos Anjos Gussing, Deputy Director, Department of Operations; Lise Boudreault, Chief of Multilateral Diplomacy and Humanitarian Coordination Unit, Department of Operations; Daniel DuVillard, Head of Operations for the Horn of Africa, Department of Operations; Pascal Hundt, Head of Delegation to Jordan; Jakob Kellenberger, President; Alexandre Liebeskind, Personal Adviser to the President; Claudia McGoldrick, Diplomatic Adviser to the President; Carol Pittet, Head of Detention Section, Delegation to Iraq; Laurent Saugy, Head of Protection, Delegation to Iraq; Juan Pedro Schaerer, Head of Delegation to Iraq; Dominik Stillhart, Deputy Director, Department of Operations; Martin Thalmann, Deputy Head of Delegation to Iraq; Sylvie Van Lammeren, Legal Adviser, Delegation to Iraq; Andreas Wigger, Head of Protection Division, Department of Operations; Timothy Yates, Adviser, Relations with Armed and Security Forces, Department of Communication; and Ameer Zemmali, Adviser on Islamic Law, Delegation to Jordan; as well as former delegate Marco Kirschbaum, Executive Director, NGO Management School.

As part of my work for the ICRC, I was included as a full participant in countless meetings within the Legal Division – some discussing highly sensitive operational issues – and freely interacted with my Legal Division colleagues, who shared details of their work with me.<sup>6</sup> Fellow staff shared many internal documents with me, and I was able to see almost any document which I knew existed. My access to the institution enabled me to arrange interviews with a wide range of officials, from the President of the ICRC to delegates in the field. Once informed that their comments would not be attributed to them by name and that specific country situations would not be mentioned in a way that would harm ICRC operations, most officials seemed very candid, and indeed critical of the ICRC in many respects.<sup>7</sup> Most interviewees, including senior officials of the ICRC, stated that they welcomed the idea of a publication on the role of law in the institution's work.

At the same time, the author faced certain limitations in his research, including the absence of the same access to internal documents and communications as that enjoyed by regular staff. The situation was symptomatic of what David Forsythe, in his path-breaking book on the institution, called the ICRC's 'irrational and sometimes dysfunctional tendency toward secrecy'.<sup>8</sup> Interviews helped fill out the picture, but I do not claim to have the same complete image of the ICRC as a regular staff member might.

Many of the situations encountered in my regular work or discussed freely with me by interviewees remain highly sensitive, where revelation of a compliance problem by a state could affect ICRC operations. Consistently with my confidentiality pledge, I do not mention confidential country situations by name and I do not quote internal ICRC documents.<sup>9</sup>

## 1 The ICRC's Self-Described Mandates

### A A Brief Primer on the ICRC's Structure and Mandate

The ICRC describes itself, quite simply, as 'an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them

<sup>6</sup> These were: Daniel Cahen, Legal Adviser; Laurent Colassis, Deputy Head of Legal Division; Knut Doermann, Head of Legal Division; Cordula Droege, Legal Adviser; Olivier Durr, Legal Adviser; Tristan Ferraro, Legal Adviser; Robin Geiss, Legal Adviser; Laurent Gisel, Legal Adviser; Jean-Marie Henckaerts, Legal Adviser; Kathleen Lawand, Head of Operational Unit, Legal Division; Nils Melzer, Legal Adviser; Stephane Ojeda, Legal Adviser; Jelena Pejic, Legal Adviser; Toni Pfanner, Editor-in-Chief, *International Review of the Red Cross*; Jean-François Quéguinier, Head of Thematic Unit, Legal Division; Thomas de Saint Maurice, Legal Adviser; and Sylvain Vité, Legal Adviser; as well as Philip Spoerri, Director of the Department of International Law and Cooperation Within the Movement; and Brigitte Troyon, Deputy Director of that Department.

<sup>7</sup> Thus the footnotes use James Bond-like coded identification for quotations or ideas from interviewees.

<sup>8</sup> D. P. Forsythe, *The Humanitarians: The International Committee of the Red Cross* (2005), at p. xi.

<sup>9</sup> Many aspects of the ICRC's work in particular countries are not confidential, as the ICRC freely discusses them in its public communications, independent media have covered them, or historians have examined them.

with assistance'.<sup>10</sup> Protection and assistance lie at the core of the ICRC's operations on behalf of victims. Protection work typically involves visiting people deprived of their liberty – in international and civil conflicts as well as for security and criminal detention – and recommending methods to improve their treatment; intervening during hostilities on behalf of civilian victims; and restoring family links between people separated by war. Assistance entails the provision of humanitarian aid to various categories of victims, usually in coordination with other humanitarian-oriented actors.

Legally, the ICRC is a private association under the Swiss Civil Code, but over the years various treaties, notably the Geneva Conventions and Protocols, have granted it special status to aid the victims of armed conflict. The ICRC is, indeed, formally a committee, currently composed of 16 Swiss citizens.<sup>11</sup> The committee works at different levels, including plenary meetings, a presidency, and a directorate composed of a director-general and the heads of departments.<sup>12</sup> Although all members of the Committee are Swiss, the staff of the ICRC has long had non-Swiss in its employ, especially as local staff; today the ICRC has about 1,400 expatriate staff, some 800 of whom work in Geneva; nearly 60 per cent of the expatriates are non-Swiss.<sup>13</sup> The ICRC works closely with national Red Cross and Red Crescent Societies and the International Federation of Red Cross and Red Crescent Societies, which coordinates activities of the national societies.<sup>14</sup> Together these three entities represent the so-called International Red Cross and Red Crescent Movement.<sup>15</sup> Although the ICRC participates with the (often government-controlled) national societies and Federation in its assistance function, it acts essentially alone with respect to protection.<sup>16</sup> This unique role for the ICRC in the more politically and legally sensitive area stems not only from its special recognition in international law, but from its reputation of independence, neutrality, and impartiality in the eyes of parties to conflicts and other actors.<sup>17</sup>

<sup>10</sup> ICRC Mission Statement, *supra* note 3, at 400.

<sup>11</sup> See Statutes of the International Committee of the Red Cross, arts. 2, 7, 8 May 2003, available at: [www.icrc.org/web/eng/siteeng0.nsf/html/icrc-statutes-080503](http://www.icrc.org/web/eng/siteeng0.nsf/html/icrc-statutes-080503) (last accessed 19 Nov. 2010).

<sup>12</sup> For the evolution of the current structure see Forsythe, *supra* note 8, at 201–241.

<sup>13</sup> 'Working for the ICRC: a Range of Profiles and Missions', 1 Jan. 2009, available at: <http://icrc.org/web/eng/siteeng0.nsf/html/5R4J73> (last accessed 19 Nov. 2010); communication from ICRC lawyer (regarding percentage of non-Swiss staff).

<sup>14</sup> The Red Crescent emblem was adopted by national societies not wishing to use a cross. In 2005, states recognized a third emblem, the Red Crystal, permitting the entry into the Federation of the Israeli Magen David Adom (which will use the crystal with the Star of David within it). See Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 Dec. 2005, available at: [www.unhcr.org/refworld/docid/43de21774.html](http://www.unhcr.org/refworld/docid/43de21774.html) (last accessed 19 Nov. 2010).

<sup>15</sup> Statutes of the International Red Cross and Red Crescent Movement, 1986, arts. 1, 8 (hereinafter Statutes of the Movement), available at: [www.icrc.org/eng/assets/files/other/statutes-en-a5.pdf](http://www.icrc.org/eng/assets/files/other/statutes-en-a5.pdf) (last accessed 19 Nov. 2010). The statutes are adopted by a conference of representatives of the three components and the states parties to the Geneva Conventions.

<sup>16</sup> See *ibid.*, art. 5(2)(c) and (d).

<sup>17</sup> *Ibid.*, preamble. On these principles see F. Terry, *Condemned to Repeat? The Paradox of Humanitarian Action* (2001), at 19–26; Terry, 'Reflections on the ICRC's Practice of Neutrality: "Looking with just One Eye"', 88 *Avenue de la Paix* (2009) 22.

The ICRC thus represents a *sui generis* entity in the international legal process. Its status under Swiss law as a private association makes it akin to an NGO. The role of states in the Movement and the international conferences that guide some of the ICRC's work, the funding by governments, and the ICRC's image through its delegations resemble the workings of an international organization. Its close ties to Switzerland – its location, the nationality of Committee members and senior staff, and frequent contacts with the Swiss Foreign Ministry<sup>18</sup> – give it a profile unique among international organizations and NGOs; and the ICRC clearly benefits from Switzerland's reputation of neutrality in international affairs. Governments and armed groups suspicious of the motives of NGOs based in the United Kingdom, the United States, or France will be less likely to attack the motives of the ICRC.

The scope of and mandate for protection and assistance have grown significantly since Henri Dunant, repulsed by the lack of treatment of wounded soldiers at the 1859 Battle of Solferino, created the International Committee for the Relief of Wounded in the Event of War in 1863.<sup>19</sup> Under the 1949 Geneva Conventions and 1977 Additional Protocol I, states are obligated to allow the ICRC to visit prisoners of war and civilian detainees in international armed conflicts;<sup>20</sup> the Conventions and Additional Protocol I also permit the ICRC to carry out any other humanitarian initiatives with the consent of the parties.<sup>21</sup> With respect to non-international armed conflicts, Common Article 3 provides that the ICRC may offer its services to the parties, which it frequently does.<sup>22</sup>

Beyond these treaty-based authorities, the ICRC frequently assists people in situations not amounting to armed conflict. This broad power of initiative flows through the Statutes of the Movement, which define the ICRC's role to include 'endeavour[ing] . . . to ensure the protection of . . . military and civilian victims [of armed conflict or internal strife]' and allow it to 'take any humanitarian initiative . . . within its role as a specifically neutral and independent institution' and 'consider any question requiring examination by such an institution'.<sup>23</sup> This significant grant of authority, while not legally binding on states – which must consent to the ICRC's involvement – has permitted the ICRC to visit detainees in countries not experiencing war and work in states and on issues where human rights law, not IHL, is the governing legal framework. These efforts have included visits to detainees in South Africa under apartheid,

<sup>18</sup> See Forsythe, *supra* note 8, at 202–227; C. Moorehead, *Dunant's Dream: War, Switzerland and the History of the Red Cross* (1998), at 371–470.

<sup>19</sup> See generally Forsythe, *supra* note 8, at 15–29; F. Buignion, *The International Committee of the Red Cross and the Protection of War Victims* (2003), at 11–28.

<sup>20</sup> See *supra* note 1; Geneva Convention Relative to the Protection of Civilian Persons in Times of War, Art. 143, 12 Aug. 1949, 1175 UNTS 287 (hereinafter Geneva Convention IV); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Art. 81, 8 June 1977, 1125 UNTS 3 (hereinafter Additional Protocol I).

<sup>21</sup> See, e.g., Additional Protocol I, *supra* note 20, Art. 81.

<sup>22</sup> See Geneva Convention IV, *supra* note 20, Art. 3(2). See also Statutes of the Movement, *supra* note 15, art. 5(2)(c).

<sup>23</sup> Statutes of the Movement, *supra* note 15, art. 5(2)(d), 5(3). For the closest the Statutes come to recognition of the ICRC's guardian role see *ibid.*, art. 5(2)(c), (g).



Argentina and Chile during their military regimes, and numerous countries today, such as Jordan, Cambodia, and Haiti.<sup>24</sup>

The breadth of the ICRC's mandate under the Statutes of the Movement is not without controversy within the institution. Some delegates and senior officials welcome the opportunity for the ICRC to become a player in the implementation of human rights law, whether regarding detention, fair trial guarantees, or non-refoulement. They believe that the needs of victims need to be examined broadly and that the ICRC should take advantage of its unique access to those in need of protection. Others, especially within delegations, recoil at this move into the human rights field, arguing that it detracts from the fundamental purpose of the ICRC, risks perceptions that the ICRC is interfering in a state's internal affairs (and thus is no different from other NGOs), overlaps with the work of human rights NGOs, and thereby 'dilutes [delegations'] identity to stakeholders'.<sup>25</sup> In recent years, lawyers in the ICRC have increasingly delved into human rights issues, prompting the hiring of human rights specialists. For the purposes of the discussion below, I will focus on the ICRC's work with respect to IHL, though much of the discussion applies to its strategies regarding enforcement of human rights law.

## **B The ICRC's Priorities for International Humanitarian Law: Modes of Action and Entry Points**

As much as the ICRC is known internationally for its humanitarian field work, its second self-professed role – as 'promoter and guardian' of IHL – is of particular interest to legal scholars. The ICRC carries out that function in two broad modes, each of which entails a variety of entry points into the process of encouraging compliance with that law.<sup>26</sup>

### *1 Global Compliance Questions*

First, the ICRC undertakes a global, non-country-specific set of activities aimed at the development, interpretation, and promotion of IHL. It seeks to influence a variety of actors, including states, international organizations, and non-state actors, to take IHL more seriously and, equally important, to take the ICRC's interpretations of IHL more seriously, in the belief that such awareness of the law will promote observance of it when conflicts arise. The institution acts through three entry points.

<sup>24</sup> See *ICRC Annual Report 2009*. For the Legal Division's unofficial position on this issue see Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict', 40 *Israel L Rev* (2007) 310. See also Address by Dr Jakob Kellenberger, 27th Annual Round Table on Current Problems of International Humanitarian Law, San Remo, Italy, 6 Sept. 2003, available at: [www.icrc.org/eng/resources/documents/misc/5rfgaz.htm](http://www.icrc.org/eng/resources/documents/misc/5rfgaz.htm) (last accessed 19 Nov. 2010).

<sup>25</sup> Interviews with ICRC officials N and S. See also M. Ignatiff, *The Warrior's Honor: Ethnic War and the Modern Conscience* (1997), at 118–163.

<sup>26</sup> See generally Planer, 'Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims', 874 *Int'l Rev Red Cross* (2009) 279, at 290–299.

First, the ICRC has authored, or participated closely in the preparation of, interpretive documents on IHL, each with different legal valences. Most of these documents are primarily addressed at experts in IHL and human rights law. Although the documents are not tailored to particular country situations, the ICRC often prepares them with certain states in mind. Thus, its proposal for procedural safeguards for detainees and its elaboration of the notion of direct participation in hostilities (DPH) were sparked by ICRC concerns over US use of military force against suspected terrorists, although the ICRC had longstanding reservations about Israeli policies toward suspected Palestinian fighters.<sup>27</sup>

The second entry point for general compliance policy is engagement in what the ICRC calls humanitarian diplomacy in multilateral fora. This process involves lobbying international institutions whose work includes issues of relevance to the ICRC in order to advance its agendas. Some of the multilateral diplomacy work is targeted at country situations, e.g., where a regional organization is involved with an armed conflict and ICRC input would be useful. But much of the work is non-country-specific.<sup>28</sup> The audience extends beyond the specialists in IHL to diplomats in states and international organizations. The process aims both to impart expertise where it is lacking – common among international organizations when it comes to IHL – and to convince decision-makers to take into account the ICRC's interpretation of the law or its operational needs. The ICRC relies on a variety of friendly states to inject its views in fora open only to states.<sup>29</sup>

The ICRC has thus followed closely UN debates about protection of civilians in armed conflict and offered views reflected in UN resolutions and documents.<sup>30</sup> As some states on the Human Rights Council have pushed for that body to discuss IHL issues, the ICRC has emphasized the distinction between IHL and human rights in an effort to prevent the Council's often politicized approach to human rights implementation from eroding respect for IHL. It monitors debates in New York concerning the Responsibility to Protect (R2P) adopted by states in 2005 out of concern that the developing world's suspicions about R2P's notion of protection – which includes UN action to assist people abused by their governments<sup>31</sup> – do not spill over into hostility to the ICRC's humanitarian protection. And the ICRC joins in the preparation of treaties or

<sup>27</sup> See Pejic, 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence', 858 *Int'l Rev Red Cross* (2005) 375; ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009) (hereinafter *DPH Interpretive Guidance*). For other examples see Montreux Document on Private Military and Security Companies, in Letter Dated 2 October 2008 from the Permanent Representative of Switzerland to the United Nations Addressed to the Secretary-General, 6 Oct. 2008, UN Doc. A/63/467-S/2008/636; J.-M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law* (2005).

<sup>28</sup> For the work of the Multilateral Diplomacy and Humanitarian Coordination unit see *ICRC Annual Report 2009*, *supra* note 24, at 60–61.

<sup>29</sup> Interview with ICRC official H.

<sup>30</sup> See, e.g., SC Res 1882 (2009); GA Res 63/125, 15 Jan. 2009. See also UN Secretary-General, 'Report of the Secretary-General on the Protection of Civilians in Armed Conflict', 29 May 2009, at paras. 41–45, UN Doc. S/2009/277 (commending the ICRC).

<sup>31</sup> See 2005 World Summit Outcome, GA Res 60/1, 16 Sept. 2005, at paras. 138–139.



encourages their ratification, as with the Ottawa Mines Convention, the ICC Statute, and the Oslo Cluster Munitions Convention.

The final point of entry in the non-country-specific context is the ICRC's general communication strategy to raise overall awareness of IHL. The Communication Department develops curricula for IHL at various levels of education, runs the ICRC web site, and organizes commemorations on significant anniversaries. This strategy casts the widest net of all, to legislators, educators, civil society, and ordinary citizens. IHL is explained at a very basic level, with focus on the most elementary rules.<sup>32</sup>

## 2 Country-specific Interventions

More important to the immediate needs of victims of armed conflict are the ICRC's interventions in individual situations to promote respect for IHL rules. Here the Red Cross uses three entry points. The last of these, unique to the ICRC, is particularly important to the analysis below.

First, the ICRC targets governments to ratify various IHL treaties and to enact implementing legislation. One of the main mantras of the ICRC is the need for universal ratification of major IHL treaties – a goal achieved with the Geneva Conventions but not with the Additional Protocols and other treaties.<sup>33</sup> The ICRC thus offers so-called advisory services, overseen by lawyers within the Legal Division, entailing hands-on consultation with and assistance to foreign ministries, legislatures, and other domestic decision-makers.<sup>34</sup>

Officially, the ICRC seems to assume that ratification and domestic legislation are necessary for compliance with the rules of IHL.<sup>35</sup> Indeed, officials point to situations where their task of convincing a state to comply was aided once a domestic law was passed requiring military personnel to follow IHL and containing sanctions for breaches.<sup>36</sup> As a practical matter, however, it devotes few resources to this process – a handful of lawyers in Geneva and the field – suggesting that the institution realizes that such a legal framework forms only a small part of the process leading to compliance. Indeed, the ICRC's numerous interventions where the state is not a party to the relevant treaties – in particular Protocols I and II – suggests that the institution views party status and domestic law as not even *necessary* for compliance.

<sup>32</sup> See, e.g., ICRC, *The Basics of International Humanitarian Law* (2010); ICRC, *International Humanitarian Law: A Universal Code* (2009), video available at: [www.icrc.org/web/eng/siteeng0.nsf/html/f00981](http://www.icrc.org/web/eng/siteeng0.nsf/html/f00981) (last accessed 19 Nov. 2010).

<sup>33</sup> See ICRC, *State Parties to the Following International Humanitarian Law and Other Related Treaties as of 4-Aug-2010*, available at: [www.icrc.org/IHL.nsf/%28SPF%29/party\\_main\\_treaties/\\$File/IHL\\_and\\_other\\_related\\_Treaties.pdf](http://www.icrc.org/IHL.nsf/%28SPF%29/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf) (last accessed 19 Nov. 2010).

<sup>34</sup> See *Advisory service on international humanitarian law*, available at: [www.icrc.org/eng/what-we-do/building-respect-ihl/advisory-service/index.jsp](http://www.icrc.org/eng/what-we-do/building-respect-ihl/advisory-service/index.jsp) (last accessed 21 Nov. 2010).

<sup>35</sup> ICRC *Annual Report 2009*, *supra* note 24, at 62 ('If IHL is to be fully respected, it is of paramount importance that States accede to the relevant international instruments'). Legal Division lawyers advising countries on domestic implementation generally assume that such implementation is necessary for compliance.

<sup>36</sup> Interviews with ICRC officials and delegates M, F, D, and J.

A second entry point is the education and training of participants in armed conflicts. Here, the focus is on translating the norms of IHL (regardless of the state's ratification status or domestic law) into doctrine, operational policies, and rules of engagement.<sup>37</sup> The ICRC helps prepare military manuals and organizes educational programmes for various levels of the military. Having recognized the need for contact with non-state armed groups, for at least a decade it has attempted to teach them about IHL as well.<sup>38</sup> Such an initiative presents special challenges because the groups typically operate clandestinely, often have unusual hierarchical structures, and may prove unfamiliar with or suspicious about IHL (e.g., seeing it as a tool of states against rebel groups).<sup>39</sup>

The first two compliance strategies, then, aim to create a general culture of respect for IHL within states and armed groups. They are primarily anticipatory and preventive, rather than reactive. Although those involved know of IHL violations within some of the countries, the goal of the advisory services and the training programmes is focused not on addressing those breaches, but rather on improving the structures within states and non-state actors so that compliance can come more easily.

The third country-specific entry point is quite distinct from the other two, in that it involves communication between the ICRC and those involved in armed conflicts (or other situations in which the ICRC plays a role, such as security detentions) about their past or current conduct. The ICRC engages in a highly confidential dialogue with targets in an attempt to rectify violations of IHL and human rights law. This process proceeds in a number of steps: gathering of information on the relevant conduct, reports to authorities responsible for the violations, and then a process of follow-up utilizing numerous strategies.

This last situation-specific entry point most directly challenges our understanding of the role of legal argumentation in the compliance process. For here the ICRC demonstrates that a strategy of compliance transcends the public, law-laden advocacy utilized with the three entry points on global compliance questions and the first two entry points on country-specific issues. Here the ICRC learns of the plight of victims of IHL violations and engages in its confidential conversation to improve their situation, a dialogue where law is not always front and centre and where the tension between the institution's protection and guardian functions becomes most acute. During that dialogue, the ICRC must make a series of decisions regarding the role of international legal argumentation. What sources of law should be mentioned? Should violations be identified as such? Which interlocutors on the other side are in the best position to respond to various legal arguments? Should the confidential overtures extend beyond the target state or non-state actor? Should the ICRC ever make its legal views known publicly?

<sup>37</sup> Interview with former ICRC official I ('translation [of the law] into reality').

<sup>38</sup> ICRC, *Armed Groups and the ICRC: A challenging but necessary dialogue*, 21 Aug. 2009 (on file with author); interview and email with ICRC official C.

<sup>39</sup> Regarding an effort to explain the consistency of IHL with Sharia to Muslim religious scholars with ties to armed groups in Iraq, Lebanon, and Afghanistan see, e.g., *Iran: Dialogue on Islam and International Humanitarian Law in Qom*, 1 Dec. 2006, available at: [www.icrc.org/eng/resources/documents/event/ihl-islam-event-011206.htm](http://www.icrc.org/eng/resources/documents/event/ihl-islam-event-011206.htm) (last accessed 19 Nov. 2010); interviews with ICRC official G and ICRC field officer E. In another instance, the ICRC brought in experts from a country seen as friendly by the target of its interventions in order to explain IHL: interview with ICRC official M.

## 2 ICRC Communications over Compliance: The *Modus Operandi*

The ICRC's strategy for confidential communications is unique among states, international organizations, and NGOs. Its general approach to addressing violations is spelled out in ICRC doctrine – confidential internal ICRC policy adopted at a high level within the institution that guides the work of headquarters and delegations on the myriad policy issues that the ICRC routinely faces. Doctrinal coverage ranges from general matters such as the ICRC's mission to detailed topics such as relations with host states, the dissemination of reports on visits to detention facilities, invocation of human rights law, and the death penalty. Although the bulk of ICRC doctrine is confidential, the organization has released public versions of some doctrines.<sup>40</sup> Among the most significant is that describing the ICRC's basic *modus operandi* regarding violations. Doctrine 15, entitled 'Action by the ICRC in the Event of Violations of International Humanitarian Law or of Other Fundamental Rules Protecting Persons in Situations of Violence',<sup>41</sup> was originally drafted in 1981 in part to respond to the chorus of criticism surrounding the ICRC's silence during World War II despite its knowledge of many details of the Holocaust. Doctrine and practice point to essentially four steps in the ICRC's country-specific communications:

*Phase 1: Reminder of Obligations.* When an international armed conflict breaks out, the ICRC deposits a confidential *aide-memoire* with the warring parties (including non-state actors) reminding them of their core obligations under IHL, whether Geneva Law or Hague Law. These memoranda were given, for instance, to the NATO states participating in the Kosovo war, to those involved in Iraq and Afghanistan, and to Israel, Lebanon, and non-state groups at the beginning of the 2006 Lebanon and 2009 Gaza wars. When internal hostilities reach a certain threshold, such memoranda will be sent to the government and insurgent forces as well. This initial response to armed conflict is not completely proactive in the sense of the other two entry points noted earlier, insofar as conflict has started; however, it is not reactive in that the ICRC acts before it has any detailed information regarding IHL violations.<sup>42</sup>

*Phase 2: Bilateral Confidential Memoranda and Discussions.* Once a conflict is under way, or in non-conflict situations where the ICRC is invited by government to operate, the ICRC gathers information on the situation of victims. Its primary method is personal contact between delegation members and victims through visits to prisons, war zones, refugee camps, hospitals, and other venues. The ICRC also gets evidence from other organizations in place, but often verifies this information. Once it can gather a fuller picture of the compliance problems, the ICRC typically submits a detailed report to the states or armed groups, either during the conflict or after. The ICRC's report to

<sup>40</sup> The ICRC has stated its hope to have public versions of all doctrines, though the culture of the institution suggests that this will be a difficult task.

<sup>41</sup> Reprinted at 858 *Int'l Rev Red Cross* (2005) 393 (hereinafter Doctrine 15).

<sup>42</sup> Doctrine 15 thus does not include Phase 1, as these memoranda are issued before violations are suspected or established. See also Pfanner, *supra* note 26, at 292–293.

Israel on the Gaza war was not submitted until nearly six months after the hostilities ended.<sup>43</sup> In 2007, the ICRC issued a report, later leaked to the *New York Review of Books*, on CIA detention and interrogation practices of so-called high value detainees during the years before their transfer to Guantanamo.<sup>44</sup>

The ICRC hopes that its confidential reports will lead to a dialogue with states and armed groups to improve the plight of victims. The prospects for such discussions vary significantly across targets. Some are willing to sit down with ICRC officials to consider solutions to violations; others are not interested in follow-up. Interlocutors range from senior governmental officials and leaders of insurgent forces to those running detention facilities; some – American and Israeli in particular – are aided by impressive legal staff; most are not. Doctrine 15 characterizes this process as the ‘principle [*sic*] mode of action’.<sup>45</sup>

*Phase 3: Mobilization of other actors.* If the ICRC believes that confidential dialogue is not improving the situation of victims, it can cultivate other actors who may have influence on the parties. These so-called mobilization efforts will focus on governments friendly with the target state or armed group (including those giving them funds), but could also include international organizations or NGOs. The ICRC will typically not share the full details of its findings with the other entities, but it may point out, for instance, that a particular prison is experiencing significant problems.<sup>46</sup>

*Phase 4: Public criticism.* In some situations, the ICRC will abandon confidentiality and issue a public statement of censure. Doctrine 15 identifies two forms of such criticism – a public expression of concern over the quality of its dialogue with the target state or group; and a ‘public condemnation of specific violations of international humanitarian law’.<sup>47</sup> As discussed below, the ICRC’s actual practice is more nuanced than that suggested in the doctrine.

The four phases of action are carried out primarily at the level of country delegations, which include sub-delegations outside a national capital. Delegation heads seek Geneva’s approval for overall strategy as well as the content of written communications (typically vetted by the Legal Division). Officials in Geneva, including the President, will become involved in high-level diplomacy, e.g., if the delegation believes that a meeting with the head of state of the target country would be useful.<sup>48</sup> The ICRC has a long tradition of acting as a bottom-up and consensus-driven organization, with the head of delegation’s judgement on the strategy generally

<sup>43</sup> ‘Operational update: ICRC Activities in Israel, the Occupied and Autonomous Territories: April–June 2009’, 27 July 2009, available at: [www.icrc.org/eng/resources/documents/update/israel-update-290709.htm](http://www.icrc.org/eng/resources/documents/update/israel-update-290709.htm) (last accessed 19 Nov. 2010).

<sup>44</sup> *ICRC Report on the Treatment of Fourteen ‘High Value’ Detainees in CIA Custody* (Feb. 2007) (hereinafter Report on CIA Activities), available at: [www.nybooks.com/icrc-report.pdf](http://www.nybooks.com/icrc-report.pdf) (last accessed 19 Nov. 2010).

<sup>45</sup> Doctrine 15, *supra* note 41, at para. 2.2.

<sup>46</sup> Interviews with ICRC official B and delegate F.

<sup>47</sup> Doctrine 15, *supra* note 41, at paras 3.2, 3.3.

<sup>48</sup> Interview with ICRC officials B, G, and Q.

receiving deference in Geneva, particularly concerning tactics that could affect the safety of staff.<sup>49</sup>

### 3 The ICRC's Modalities of Legal Argumentation: Secrecy, Ambiguity, and Avoidance

With the key processes of communication regarding country-specific compliance problems elaborated, I now describe and analyse the role of international law in that conversation. This analysis will lay the groundwork for the theoretical implications that follow.

As an institution that defines its mission in terms of both humanitarian protection and compliance with IHL, the ICRC routinely invokes international law during its communications with governments and armed groups. It reiterates the basic legal rules for the parties, cites provisions of the Geneva Conventions and Protocols or human rights law in response to violations, and engages in dialogue to rectify those violations, during which delegations or the headquarters explain those obligations.<sup>50</sup> In the context of conduct of hostilities, communications could address targeting of a civilian object as defined in Additional Protocol I,<sup>51</sup> or the required precautions before attacking a target.<sup>52</sup> With respect to protection of persons off the battlefield, the topics include an occupying power's duties toward civilian detainees under Geneva Convention IV<sup>53</sup> or denial of POW status.<sup>54</sup> Messages between Geneva and the delegations make frequent reference to legal arguments to use with a government or non-state group. One section of the Legal Division, staffed by lawyers with field experience, serves as a liaison with the delegations and staff working with them in Geneva.<sup>55</sup> Moreover, the ICRC requires new delegates to receive basic training in IHL and operates a week-long advanced course for delegates moving into positions of greater responsibility. International law is, in short, as one senior official stated, 'a tool to protect life and dignity', known in its basic contours by operational personnel.<sup>56</sup>

Yet the work of the ICRC during its communications reveals that international law is only that – a tool. From the perspective of operational personnel, compliance with the law, whether by the direct target of the communications or by other indirect targets, is not an end in itself. The result is a rather elaborate strategy to manage its communications to advance both of its key goals but also, if necessary, make choices

<sup>49</sup> Interview with ICRC officials B, G, R, and Q, and delegate A. On rare occasions, delegation heads have been overruled.

<sup>50</sup> Numerous staff note that the current ICRC president, while not a lawyer, is particularly interested in arguing in terms of IHL.

<sup>51</sup> See Additional Protocol I, *supra* note 20, Art. 52.

<sup>52</sup> *Ibid.*, Arts 57–58.

<sup>53</sup> See, e.g., Geneva Convention IV, *supra* note 20, Art. 5.

<sup>54</sup> Geneva Convention III, *supra* note 1, Art. 4. See also Doermann, 'The Legal Situation of "Unlawful/unprivileged Combatants"', 849 *Int'l Rev Red. Cross* (2003) 45.

<sup>55</sup> The Legal Division also sends lawyers to delegations where complex legal issues arise most frequently, e.g., the United States, Afghanistan, Iraq (based in Amman), and Israel.

<sup>56</sup> Interviews with ICRC officials N and R.

between them. And that strategy shines light on the place of legal argumentation in the compliance process more generally. Three aspects of that strategy are at the core of that balancing.

### *A Secrecy: Managing Knowledge of the ICRC's Legal Views by the Public*

ICRC doctrine and practice treat confidentiality as the baseline for communications with governments and armed groups. As one ICRC official put it, confidentiality is the 'price we have to pay' for access to victims.<sup>57</sup> The most obvious consequences of this strategy are that those outside the ICRC's channel of communications generally will not know (1) the facts of the particular conduct of the state or armed group, including the type of abuses, their location, their perpetrators, or their victims; or (2) the ICRC's opinion as to whether that conduct violates IHL or other legal norms. Although the ICRC adopts public positions that discuss its interpretation of IHL issues,<sup>58</sup> these interpretations generally do not apply the law to specific fact situations.

The ICRC's reluctance to share with the public its interpretation of the law as applied to facts stands in sharp contrast to the work of many NGOs, for which revelation of the facts and application of the law to them is the *modus operandi*. This secrecy undercuts the ICRC's guardian function insofar as a particularly authoritative interpreter of a body of international law is refraining from telling the world its view of the law in specific cases.<sup>59</sup> The situation is analogous to a detailed elaboration of the law by a court without applying its interpretation to the facts of a case.<sup>60</sup> For states, NGOs, and domestic constituencies seeking guidance on whether a state is violating IHL, the ICRC, whose views would be most helpful, is normally a black box. Such a stance seems particularly corrosive of respect for the law insofar as much of IHL contains open-textured provisions, e.g., the principle of proportionality,<sup>61</sup> for which real case law would be extremely helpful – and indeed, if done with care, would further bolster the reputation of the ICRC.

The ICRC staff realizes this dilemma. One response is a policy to make confidentiality less than absolute. Rather, confidentiality, like the law itself, is a tool calibrated

<sup>57</sup> Interview with former ICRC official I. See also Kellenberger, 'Speaking out or Remaining Silent in Humanitarian Work', 855 *Int'l Rev Red Cross* (2004) 593.

<sup>58</sup> See, e.g., *DPH Interpretive Guidance*, *supra* note 27; 'Phosphorous Weapons: The ICRC's View', 17 Jan. 2009, available at: [www.icrc.org/eng/resources/documents/interview/weapons-interview-170109.htm](http://www.icrc.org/eng/resources/documents/interview/weapons-interview-170109.htm) (last accessed 19 Nov. 2010) (legal interpretation following Israel's use, but without application to the facts).

<sup>59</sup> For scepticism about the ICRC's interpretations see Sassòli, 'The Approach of the Eritrea–Ethiopia Claims Commission Towards the Treatment of Protected Persons in International Humanitarian Law', in A. de Guttry, H.H.G. Post, and G. Venturini (eds), *The 1990–2000 War between Eritrea and Ethiopia: An International Legal Perspective* (2009), at 341, 344.

<sup>60</sup> See generally W.M. Reisman and A.R. Willard (eds), *International Incidents: The Law that Counts in World Politics* (1988).

<sup>61</sup> See Additional Protocol I, *supra* note 20, Art. 51(5)(b).



to match operational needs.<sup>62</sup> Delegates report that, while confidentiality is often crucial for access, the parties may be more motivated to grant access due to trust in the even-handedness and experience of the ICRC.<sup>63</sup> Historically, the ICRC has often worked publicly in the protection area, notably during and after World War I, where its reports on POW camps were distributed widely to quell rumours about mistreatment of prisoners.<sup>64</sup> Today, the ICRC has a communications infrastructure to inform the world – up to a point – of its activities. Even in the area of protection, its public annual report gives a general sense of its field operations, including whether it has access to different categories of detainees.<sup>65</sup> These notify governments, including donors, of the range of the ICRC's activities, though not of its views on violations. Moreover, the ICRC may, with the consent of the parties, share information. With respect to conditions of confinement in prisons, states may provide aid in remedying the situation.<sup>66</sup>

Even without a state's permission to go public, the ICRC's confidentiality has its limits. First, as mentioned earlier, ICRC doctrine allows for so-called mobilization and denunciation. With mobilization, it may not be necessary for the ICRC to share its legal characterization of the conduct but simply alert interlocutors to the problem it has discovered. Denunciation, the public identification of violations and violators of IHL, would apprise the public of the ICRC's legal position.<sup>67</sup>

Secondly, formal denunciation does not exhaust the modes of public expression of the ICRC's factual findings and legal appraisals. The organization has issued statements of concern during a conflict that identify violations but conspicuously avoid identifying the violator.<sup>68</sup> It can also make statements that effectively blame one side and urge better behaviour without formally condemning it. Thus, with respect to prisoners at Guantanamo, the ICRC has publicly identified its legal concerns on numerous occasions.<sup>69</sup> During Sri Lanka's 2009 final offensive against the Tamil Tigers, the ICRC publicly restated basic IHL obligations of the two sides, adding, 'The ICRC has proposed to the authorities that it help evacuate any remaining civilians from the area'.<sup>70</sup> And during the 2008–2009 Gaza war, it repeatedly noted the duty of Israel

<sup>62</sup> See Statutes of the Movement, *supra* note 15, preamble (core principles include humanity, impartiality, and neutrality, but not confidentiality); see also Wortel, 'Humanitarians and Their Moral Stance in War: The Underlying Values', 876 *Int'l Rev Red Cross* (2009) 779.

<sup>63</sup> Interviews with ICRC delegates K and D (ICRC experience in looking after Iraqi and Iranian prisoners during the Iran–Iraq War gave it great credibility in the region).

<sup>64</sup> Buignon, *supra* note 19, at 92–95; for one example see *Rapport de Mme Schazmann et Dr Roger Steinmetz sur leurs visites aux prisonniers de guerre en Grèce, à Salonique et Macedoine et en Serbie, Janvier 1920*.

<sup>65</sup> See, e.g., *ICRC Annual Report 2009*, *supra* note 24.

<sup>66</sup> Interview with ICRC delegate J.

<sup>67</sup> Doctrine 15, *supra* note 41.

<sup>68</sup> See, e.g., 'Sri Lanka: Vanni Hospital Shelled', 1 Feb. 2009, available at: [www.icrc.org/eng/resources/documents/news-release/sri-lanka-news-010209.htm](http://www.icrc.org/eng/resources/documents/news-release/sri-lanka-news-010209.htm) (last accessed 19 Nov. 2010).

<sup>69</sup> 'US Detention Related to the Fight against Terrorism – the Role of the ICRC', 4 Mar. 2009, available at: [www.icrc.org/eng/resources/documents/misc/united-states-detention-240209.htm](http://www.icrc.org/eng/resources/documents/misc/united-states-detention-240209.htm) (last accessed 19 Nov. 2010). See also Lewis, 'Red Cross criticizes indefinite detention in Guantanamo Bay', *NY Times*, 10 Oct. 2003 (public rejection of US view on framework regarding detentions).

<sup>70</sup> See 'Sri Lanka: ICRC Makes Urgent Appeal for Wounded to be Given Medical Care', 18 May 2009, available at: [www.icrc.org/eng/resources/documents/news-release/sri-lanka-news-180509.htm](http://www.icrc.org/eng/resources/documents/news-release/sri-lanka-news-180509.htm) (last accessed 19 Nov. 2010) (emphasis added).

and Hamas not to target civilians, though focusing on Israel.<sup>71</sup> After ICRC delegates found the survivors of a Palestinian family denied medical aid due to Israel's blocking of ambulances, it issued a *de facto* denunciation, though it was not approved through the internal channels required for one.<sup>72</sup>

The result is thus a spectrum of approaches to confidentiality. In each episode, the ICRC's determination regarding dissemination of its opinions is driven by an internal judgement as to what will be most effective for the victims.<sup>73</sup> Generally, it continues to tilt in favour of fairly strict confidentiality, out of a belief that it is necessary for access; public criticism (or even the threat to speak out publicly) is viewed as not aiding the victims but risking withdrawal of cooperation by the state or armed group, or, worse, ouster of or harm to ICRC staff.<sup>74</sup> Officials making those calculations do not explicitly consider the effects of maintaining confidentiality on the ICRC's role as guardian of IHL.<sup>75</sup> In effect, in those frequent situations where confidentiality is preserved, the tension between the ICRC's protection and guardian roles remains, and outsiders interested in the ICRC's views must settle for an incomplete set of ICRC interpretations.

### ***B Ambiguity: Managing Knowledge of the ICRC's Legal Views by Targets of Communications***

Even if the ICRC keeps most of its legal interpretations secret from outsiders, if it shares them with the parties it is at least fulfilling part of the notion of guardian of IHL by telling them what they must or must not do. And in most situations, the ICRC does indeed share its legal views with the parties. Reports and demarches are often replete with references to the Geneva Conventions, Protocols, and customary international law. Yet the ICRC does not always convey those views; it sometimes deliberately keeps its position on legal matters ambiguous. Two examples demonstrate this complex process.

#### *1 Classification of Conflicts*

IHL generally recognizes two sorts of armed conflicts – international and non-international. The former, defined in Common Article 2 of the Geneva Conventions, consist uniquely of those between states; the latter, recognized but not defined in Common Article 3, comprise armed conflicts on the territory of one state, but between a state

<sup>71</sup> See, e.g., Press Conference of the ICRC President in Jerusalem, 14 Jan. 2009, available at: [www.icrc.org/eng/resources/documents/press-briefing/palestine-press-briefing-140109.htm](http://www.icrc.org/eng/resources/documents/press-briefing/palestine-press-briefing-140109.htm) (last accessed 19 Nov. 2010).

<sup>72</sup> 'Gaza: ICRC Demands Urgent Access to Wounded as Israeli Army Fails to Assist Wounded Palestinians', 8 Jan. 2009, available at: [www.icrc.org/eng/resources/documents/news-release/palestine-news-080109.htm](http://www.icrc.org/eng/resources/documents/news-release/palestine-news-080109.htm) (last accessed 19 Nov. 2010) ('the Israeli military failed to meet its obligation under international humanitarian law to care for and evacuate the wounded'); interviews with ICRC officials B and O; for other examples see Kellenberger, *supra* note 57.

<sup>73</sup> Interviews with numerous officials; see also Pfanner, *supra* note 26, at 296; Kellenberger, *supra* note 57.

<sup>74</sup> Kellenberger, *supra* note 57, at 602 ('the ICRC's experience of the mobilizing effect of public appeals has not necessarily been convincing'); interviews with ICRC officials Q and G. On internal debates over going public regarding atrocities in Bosnia see Rieff, *supra* note 2, at 148–149.

<sup>75</sup> Interview with ICRC official S.

and an armed group or between or among two or more armed groups.<sup>76</sup> The level of violence needed to trigger an armed conflict is subject to some interpretation.<sup>77</sup> As a matter of doctrine and policy, the ICRC evaluates violence around the world to see whether it rises to the level of either form of armed conflict.<sup>78</sup> Through coordination between delegations and operational personnel and lawyers in Geneva, the ICRC makes numerous such determinations, typically drafted by members of the Legal Division. Such a process of 'qualification', as the ICRC terms it, is essential because the parties' IHL obligations are triggered only if they are engaged in an armed conflict and vary depending upon the type of conflict.

With its delegations worldwide and experienced pool of lawyers, the ICRC is particularly suited to making these factual and legal determinations, and its views would be very helpful to governments and NGOs. The ICRC's position on the intensity of the fighting needed to trigger the application of the Conventions (especially in the case of non-international armed conflicts) and the status of conflicts that cross the line between international and non-international armed conflicts (e.g., foreign involvement in internal conflicts, or conflicts between a state and foreign insurgents) could serve as a reference point for governmental and NGO responses. At times, the existence of an armed conflict is obvious, and the ICRC will state so clearly in its public reports.<sup>79</sup> Yet in other situations, the ICRC will not offer its view publicly and, most significantly, will not even share such a finding with the relevant targets.

## 2 Occupation of Territory

The occupation of foreign territory by a state triggers special obligations under the Fourth Geneva Convention as well as the 1907 Hague Regulations. These include numerous requirements to govern the territory adequately, maintain order, and take decent care of the civilians living there.<sup>80</sup> Such duties begin, in the words of the Hague Regulations, when a territory 'is actually placed under the authority of the hostile army' and when 'the authority of the legitimate power [has] in fact passed into the

<sup>76</sup> See 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?', ICRC Opinion Paper, Mar. 2008, available at: [www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm](http://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm) (last accessed 19 Nov. 2010).

<sup>77</sup> *Ibid.*; see also S.R. Ratner, J.S. Abrams, and J.L. Bischoff, *Accountability for Human Rights Abuses in International Law: Beyond the Nuremberg Legacy* (3rd edn, 2009), at 98–101.

<sup>78</sup> The doctrine on qualification is confidential. See also Pfanner, *supra* note 26, at 293.

<sup>79</sup> See, e.g., *ICRC Annual Report 2009*, *supra* note 24, at 271 ('The effects of the international armed conflict between Georgia and the Russian Federation in August 2008 continued to be felt'); 'Sri Lanka: ICRC reiterates concern for civilians cut off by the fighting', 4 Mar. 2009, available at: [www.icrc.org/eng/resources/documents/interview/sri-lanka-interview-040309.htm](http://www.icrc.org/eng/resources/documents/interview/sri-lanka-interview-040309.htm) (last accessed 19 Nov. 2010) (discussing humanitarian relief '[w]ith the support of the parties to the conflict'). The Geneva-based Academy of International Humanitarian Law and Human Rights maintains a database of conflicts worldwide, available at: [www.adh-geneva.ch/RULAC/qualification\\_of\\_armed\\_conflict.php](http://www.adh-geneva.ch/RULAC/qualification_of_armed_conflict.php) (last accessed 19 Nov. 2010).

<sup>80</sup> See generally Geneva Convention IV, *supra* note 20, Arts 47–78; Convention (IV) Respecting the Laws and Customs of War on Land, 18 Oct. 1907, Annex, Arts 42–56, 1 Bevans 631 (hereinafter Hague Regulations).

hands of the occupant'.<sup>81</sup> These obligations are far more extensive than those to civilians in territory not under occupation.<sup>82</sup>

As with judgements about the existence of conflict, determinations of occupation require a fact-intensive inquiry, in particular of the relationship of the foreign army to the sovereign power and population. If the sovereign has consented to the presence of the foreign army (and not merely offered no resistance to it), then an occupation is not in effect.<sup>83</sup> And, as with qualifications of the existence of conflict, the ICRC is well positioned in both its fact-gathering capacity and legal expertise. It will at times make its opinion public, as with the Occupied Palestinian Territories and Iraq from 2003–2004 (the status of which as occupied was never controversial). Yet in a number of highly significant, ongoing situations where the military forces of one state are present in the territory of another, the ICRC has not stated either publicly or to the parties whether that presence amounts to an occupation.

### 3 *Why Such Ambiguity?*

The decisions of the ICRC to refrain from sharing legal interpretations with those whom it is persuading to follow IHL seem more at odds with the role of guardian of IHL than confidentiality, for at least the latter can be justified as creating a setting without public embarrassment, which could improve behaviour. In the case of ambiguity, if the parties are not even told the ICRC's interpretation, the prospects for convincing them – let alone influencing others who might care about the ICRC's views – to follow the relevant norms seems all the more difficult. Yet, as with the decisions to hide its legal views from the public, the decision to withhold them from the most affected actors stems from a humanitarian motivation. With respect to the two issues above, the ICRC worries that states may react adversely enough to the ICRC's opinions that they will withhold cooperation from it.<sup>84</sup> In the case of the threshold for armed conflict, states have domestic and foreign policy-related political motives for denying the existence of a conflict, particularly a civil war. The government will often want to maintain its official line that an opposition group is merely a criminal band, or that fighting is only at the level of skirmishes.<sup>85</sup> Ironically, international law creates incentives in the opposite direction – i.e., toward acceptance of an armed conflict – as the government has more discretion *vis-à-vis* civilians and combatants under IHL during a civil war than under human rights law.<sup>86</sup> Although the

<sup>81</sup> *Ibid.*, Arts 42–43.

<sup>82</sup> See generally Geneva Convention IV, *supra* note 20, Arts 13–34.

<sup>83</sup> See Ratner, 'Foreign Occupation and International Territorial Administration: The Challenges of Convergence', 16 *EJIL* (2005) 695, at 698.

<sup>84</sup> Interviews with members of the ICRC Legal Division and official G.

<sup>85</sup> See A. Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (2010), at 55–59; ICRC, *Increasing Respect for International Humanitarian Law in Non-international Armed Conflicts* (2008) (hereinafter *Increasing Respect*), at 11, available at: [www.icrc.org/eng/resources/documents/publication/p0923.htm](http://www.icrc.org/eng/resources/documents/publication/p0923.htm) (last accessed 19 Nov. 2010).

<sup>86</sup> See Ratner, *supra* note 83; Doswald-Beck and Vité, 'International Humanitarian Law and Human Rights Law', 293 *Int'l Rev Red Cross* (1993) 94; Droegge, 'Elective affinities? Human Rights and Humanitarian Law', 871 *Int'l Rev Red Cross* (2008) 501.

government could simply disagree with the ICRC's legal view, the ICRC is sometimes concerned that even the assertion of its opinion could harm the prospects for future visits to detainees.

These worries are magnified in the case of occupation, where a state will generally wish to deny strongly that it is occupying another state,<sup>87</sup> as an occupant holds a pariah status in international affairs.<sup>88</sup> In addition, because of the increased legal duties on an occupant compared with a state deploying forces with the consent of the sovereign, the ICRC may withhold its views for fear that the state will mistrust or, at the extreme, expel an ICRC presence.<sup>89</sup> Rather than telling the state that it is legally an occupier, the ICRC presents it with a generic set of expectations for the treatment of civilians, combining both IHL and human rights obligations, even though those obligations may lack the precision of a state's duties to maintain order in an occupied territory. The state does not know whether the ICRC regards it as an occupant – and will typically have an incentive not to ask. The source and extent of the occupant's obligations remain ambiguous.

The two examples above do not exhaust the possibilities for ambiguity. ICRC confidential reports on detainee treatment sometimes refuse to classify abuses as torture but instead use the looser term ill-treatment.<sup>90</sup> And although lawyers might agree that a party has committed war crimes, delegations will not mention individual responsibility or the possibility of prosecutions – although in other situations raising the prospect of trials by the International Criminal Court or a foreign court may be useful.<sup>91</sup> As an internal institutional matter, the Legal Division is generally more inclined to avoid ambiguity, even as the final decision rests with delegations.<sup>92</sup>

### C Avoidance: Managing the Need for Legal Argumentation

Beyond the questions of public communications and the precision of its private legal positions, the ICRC engages in a process of decision-making on whether to invoke international law at all. For despite its stated goal of promoting IHL and the historic centrality of IHL to the institution, the ICRC often avoids IHL arguments entirely. In some cases, the organization still makes its claims within the legal paradigm by

<sup>87</sup> See, e.g., *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georg. v. Russ.), Request for the Indication of Provisional Measures [2008] ICJ Rep 353, at 372–373 (Order of 15 Oct.) (Russia denying status as occupant in Georgia).

<sup>88</sup> On the legal posture of occupation *per se*, compare Ben-Naftali, Gross, and Michaeli, 'Illegal Occupation: The Framing of the Occupied Palestinian Territory' 23 *Berkley J Int'l L* (2005) 551 with Y. Dinstein, *The International Law of Belligerent Occupation* (2009), at 1–3.

<sup>89</sup> Interviews with members of the Legal Division.

<sup>90</sup> Interview with ICRC official T. On the other hand, two of the ICRC's most famous leaked reports identify the treatment as torture. See 'Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation', Feb. 2004, at para. 59, available at: [www.globalsecurity.org/military/library/report/2004/icrc\\_report\\_iraq\\_feb2004.pdf](http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.pdf) [www.globalsecurity.org/military/library/report/2004/icrc\\_report\\_iraq\\_feb2004.pdf](http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.pdf) (last accessed 21 Nov. 2009); Report on CIA Activities, *supra* note 44, at 26.

<sup>91</sup> Interviews with ICRC officials T and B.

<sup>92</sup> Interviews with members of the Legal Division, ICRC officials G and O, and delegate J.

arguing in terms of domestic law. A conversation based on domestic law may prove more successful than one based on international law, as suggested by scholars arguing that prospects for compliance improve when international law is brought home through domestic legislation.<sup>93</sup>

But the organization often makes its case for IHL compliance in what is best regarded as non-legal terms. The ICRC's alternatives to law talk include principally: (a) humanitarian arguments, i.e., that changed behaviour will reduce the suffering of innocent victims of the conflict; (b) political arguments, i.e., that changed behaviour will improve the target's domestic or international reputation; (c) economic arguments, i.e., that changed behaviour will lead to additional sources of foreign or domestic revenue; (d) pragmatic arguments, i.e., that changed behaviour will improve the efficiency, discipline, or internal functioning of the target's armed or security forces; (e) moral arguments, i.e., that changed behaviour is the morally right (either permissible or obligatory) way to respond in the sense of the way a decent military or security force should act; and (f) customary arguments, i.e., that changed behaviour is demanded by the customs and mores of the society.<sup>94</sup>

Recourse to non-legal argumentation may take two forms – one where those six arguments are offered as *reasons to comply* with an IHL norm, and one where they simply *replace* any discussion of the norm. The ICRC does both, but only the latter challenges its role as guardian of the law. It is one thing to give a party material or other reasons for complying with the law – this represents the bread and butter of many law compliance strategies, on the assumption that much law is not internalized fully in the sense of a legal obligation.<sup>95</sup> It is quite another to give a party reasons to act a certain way without regard to whether it would then be following a rule.

The process of choosing between legal arguments and these six alternatives, as well as choosing among the six, and deciding which of the two permutations thereof to use is one of the most challenging tasks within the ICRC's communication function. For many years, the ICRC left these matters to delegates, who would, it hoped, learn through experience the sorts of arguments that worked best with different audiences. As a general matter, delegates have been more willing than headquarters (where most of the lawyers sit) to adopt non-legal argumentation.<sup>96</sup> Recently, the ICRC has attempted a more systematic approach, beginning with the commissioning of a report by two former officials entitled *The Roots of Behavior in War: Understanding and*

<sup>93</sup> See, e.g., Koh, 'Bringing International Law Home', 35 *Houston L Rev* (1998) 623; interviews with ICRC official M and delegate J. See also *supra* notes 35–36 (belief by delegations that army's respect for national law justifies a significant effort by the ICRC at implementation of obligations in that form).

<sup>94</sup> For another useful grouping see H. Slim and D. Mancini-Griffoli, *Interpreting Violence: Anti-civilian Thinking and Practice and how to Argue Against it More Effectively* (2007), at 24–28.

<sup>95</sup> See, e.g., J. Raz, *The Authority of Law* (1983), at 30 ('We need to establish first that the law claims that the existence of legal rules is a reason for conforming behavior. This should not be confused with the false claim that the law requires conformity motivated by recognition of the binding force, the validity of the law. It is a truism that the law accepts conformity for other reasons (convenience, prudence, etc.)'); see also H.L.A. Hart, *The Concept of Law* (1961), at 111.

<sup>96</sup> Interview with ICRC officials C and S.



*Preventing IHL Violations.*<sup>97</sup> The study examined the causes of violations by focusing on the psychology of fighters who commit atrocities; it emphasized the process of moral disengagement they experience, due to a sense of conformity to a group and unquestioning obedience to authority, compounded by the trauma of armed conflict. It then considered the place for the ICRC in preventing such behaviour.

In the end, the *Roots of Behaviour* proposed a very law-centric policy course for the ICRC: '[w]e need to treat IHL as a legal political matter rather than as a moral one, and to focus communication activities more on the norms than on their underlying values because the idea that the bearer of weapons is morally autonomous is inappropriate'.<sup>98</sup> It urged that IHL norms be incorporated in 'training, orders, and sanction' as the most effective method of preventing violations – 'to influence behavior [rather] than attitudes'.<sup>99</sup> This law-oriented approach to prevention, in particular through training of commanders, had always been a part of the ICRC's *modus operandi*.<sup>100</sup>

Yet within the ICRC, certain officials questioned this law-centric strategy. Indeed, as that report was being prepared, the institution, recognizing the need for creative strategies to promote observance of IHL in civil wars, was conducting an exhaustive study on that issue, including experts' meetings and public consultations. In 2005, the ICRC approved a lengthy policy document that included a toolbox of approaches for the organization, a study of best practices, and operational guidelines for delegations.<sup>101</sup> Although it reiterated the importance of integrating the law into training, military codes of conduct, unilateral declarations, and cease-fire agreements, the document recognized what delegations had long practised – the need to offer what it called 'strategic argumentation'.<sup>102</sup> The ICRC offered ideas for persuading parties how compliance with the law was in their own interests, as it could improve military discipline, encourage reciprocal conduct by the enemy, promote a side's reputation, appeal to a side's moral values, and advance the prospects for long-term peace. While the document emphasized that strategic argumentation 'should not lead to setting aside respect for IHL in favor of pragmatic concerns or opportunistic outcomes' – perhaps the hand of ICRC lawyers at work – it stressed the need to understand the motivations, perceptions, and legal knowledge of the parties.<sup>103</sup>

<sup>97</sup> For a summary public version see [www.icrc.org/eng/resources/documents/publication/p0853.htm](http://www.icrc.org/eng/resources/documents/publication/p0853.htm) (last accessed 19 Nov. 2010); see also Muñoz-Rojas and Frésard, 'The Roots of Behaviour in War: Understanding and Preventing IHL Violations', 853 *Int'l Rev Red Cross* (2004) 189.

<sup>98</sup> *Ibid.*, at 202.

<sup>99</sup> *Ibid.*, at 203, 205.

<sup>100</sup> See, e.g., ICRC, *Integrating the Law* (2007), at 40–43, available at: [www.icrc.org/eng/resources/documents/publication/p0900.htm](http://www.icrc.org/eng/resources/documents/publication/p0900.htm) (last accessed 19 Nov. 2010).

<sup>101</sup> For a public summary of the still-confidential document see *Increasing Respect*, *supra* note 85.

<sup>102</sup> *Ibid.*, at 30.

<sup>103</sup> *Ibid.*, at 13, 30–31; see also *Armed Groups and the ICRC*, *supra* note 38, at 9 (when armed groups see IHL as favouring states and not binding them, 'the ICRC emphasizes the advantages all sides gain by observing rules'). As one ICRC official put it, 'an ineffectual argument is not as bad as an insulting argument': interview with ICRC official C.

Since then, ICRC personnel have completed detailed guidelines for dialogue with state armed forces and non-state armed groups relying on these contextual factors.<sup>104</sup> That project, led by several assigned staff with extensive field experience, includes evaluation of experiences of delegates working in civil wars. However, the inculcation of these ideas into decision-making in Geneva and the delegations remains a work in progress. Staff continue to have different perspectives on the priorities to be given to legal vs. others sorts of arguments, not all of them falling along the lines of headquarters/field or lawyers/operational staff.

Although the ICRC's institutional thinking on these questions is still evolving, it has clearly recognized the limitations of legal argumentation. Officials talk about a need for an appreciation of the target audience; one spoke of an 'opportunistic evaluation' as to whether invocation of law will add to their powers of persuasion.<sup>105</sup> They noted various situations where ICRC delegates will not merely argue for compliance based on humanitarian, political, economic, pragmatic, or moral grounds, but in fact refrain from invoking the law. In particular, alternative argumentation is critical when interlocutors (a) are ignorant of, or might be confused by, the law's contents;<sup>106</sup> or (b) see the law as a creation or tool of their enemy (as is common among rebel groups, who do not become parties to IHL treaties).<sup>107</sup> Their very non-legal rejection of IHL can demand a non-legal response.<sup>108</sup>

As a result, one witnesses a spectrum of dialogues with regard to their legal component. At one end may be exchanges with the US Department of Defense or Israel Defence Forces, each staffed with legions of highly skilled lawyers; at the other may be conversations with the Lord's Resistance Army, a Sudanese rebel group, or elements of the Taliban. But the division between audiences receptive to legal arguments and those suspicious of them need not fall along state/non-state lines as, for example, some armies (e.g., the Central African Republic) lack significant knowledge of IHL while other armed groups (like the Tamil Tigers) knew a significant amount, even if they flouted it.<sup>109</sup> Moreover, the ICRC may refrain from discussing a legal rule – or the desired behaviour required by it – because a party is completely committed to violating it. Instead, the ICRC will focus on other IHL rules as a step towards a dialogue on the more important concern.<sup>110</sup>

<sup>104</sup> The so-called Guiding Framework is confidential. For some public allusions to it see Remarks of Olivier Bangerter at the 32nd Roundtable of the Institute for International Humanitarian Law, San Remo, Italy, 11–13 Sept. 2009, available at: [www.iihl.org/Default.aspx?pageid=page12035](http://www.iihl.org/Default.aspx?pageid=page12035) (last accessed 19 Nov. 2010).

<sup>105</sup> Interview with ICRC official B.

<sup>106</sup> These can arise due to basic linguistic concerns, e.g., the use in Arabic of one adjective (*insani*) for both humanitarian and human.

<sup>107</sup> Interviews with ICRC officials B, O, and U.

<sup>108</sup> But not invariably. See *supra* note 39 (use of friendly intermediaries to explain the law).

<sup>109</sup> Interviews with ICRC officials Q, B, and C and delegates A, K, and D.

<sup>110</sup> See Bangerter, 'The ICRC and Non-State Armed Groups', in Geneva Call (ed.), *Exploring Criteria & Conditions for Engaging Armed Non-State Actors to Respect Humanitarian Law & Human Rights Law* (2008), at 74, 81. The ICRC may also refrain from discussing the law when it is clear that its interlocutor agrees with it on the law and facts, and the key to assisting victims is finding resources or strategies to meet the obligations: interview with ICRC delegate K.

In a sense, this pattern is not surprising. Most international institutions, through their leaders and bureaucrats, routinely make the best arguments they can to advance their agendas. Those arguments sometimes include a legal component, but often that legal case is only permissive – that international law does not preclude the action that the organization is about to undertake.<sup>111</sup> We would be surprised if most of the statements of the UN Secretary-General, or the Director-General of the World Health Organization, were based on arguments that the law required certain action by the organization or its members. At the same time, for those institutions the mandates of which consist of determinations of state compliance with rules – e.g., the UN Human Rights Committee or the European Court of Human Rights – we would be equally surprised if their conclusions included anything other than legal arguments. We might well regard it as *ultra vires* if they ruled against a party based on legal arguments and then, in addition, proffered reasons why it should comply; and it would be worse if they told the losing party that it must correct a certain course of action simply because it would benefit the party politically, or because morality demanded it. The uniqueness of the ICRC case is that it has an explicit mandate to promote compliance with a body of law,<sup>112</sup> and yet frequently chooses to make precisely those sorts of non-legal arguments to the parties.

Effectively, then, the ICRC resolves the tensions between its humanitarian protection and legal guarantor functions arising in the course of responses to IHL violations in favour of the former; or, to state the relationship somewhat more subtly, by viewing its guarantor function as advanced through the success of its humanitarian protection efforts – and not vice versa. Its strategies suggest that it cares what the targets of its communication do, regardless of why they do it, and does whatever is needed to persuade them to do so, taking into account their motivations for compliance and non-compliance. As discussed in section 4, this openness to a range of approaches to legal argumentation requires integration into our understanding of compliance strategies.

## D Appraisal of Effectiveness

The effectiveness of the ICRC's bilateral communications in inducing compliance with IHL is extraordinarily difficult to gauge.<sup>113</sup> As an initial matter, that process is just one of the entry points used by the ICRC, along with the other methods discussed in section 2. All of them – general and situation-specific, preventive and responsive – are employed together (even if their coordination is an ongoing bureaucratic challenge), making isolation of the effects of one impossible. Moreover, ICRC interventions may have a delayed

<sup>111</sup> See Higgins, 'The Place of International Law in the Settlement of Disputes by the Security Council', 64 *AJIL* (1970) 1, at 16 ('political operation within the law').

<sup>112</sup> See Statutes of the Movement, *supra* note 15, art. 5(2)(c).

<sup>113</sup> I refer here to effectiveness at creating compliance with particular IHL rules, rather than the effectiveness of IHL rules in advancing humanitarian goals. On this distinction generally see Jacobson and Weiss, 'A Framework for Analysis', in E.B. Weiss and H.K. Jacobson (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (1998), at 1, 4–5.

effect on compliance by the targeted actors, affect the compliance of other actors, or produce unanticipated or indirect results on norm-conforming behaviour.<sup>114</sup>

Setting aside these methodological obstacles, we might establish a metric for success by comparing compliance by targets with IHL norms in the presence of the ICRC compared with its absence. Here the ICRC can point to many instances where its responses appear to have been the proximate cause of improvement in the situations of victims and compliance by the state or armed group with IHL obligations. These include informing families of the fate of missing relatives and reuniting families, establishing communication between detainees and their relatives, delivery of medical care to conflict zones, and improvement in the conditions of prisoners.<sup>115</sup> Delegates and victims have many stories suggesting the indispensable role of the ICRC due to its often unique access to victims.<sup>116</sup> Officials believe sincerely that the proper combination of secrecy, ambiguity, and avoidance – along with the selective sharing of some of its information – leads to improvement in the lives of individual victims and gradual systemic compliance.<sup>117</sup> Governments and armed groups are generally at least willing to meet ICRC delegates and hear their concerns. At the same time, delegates know that governments can use the presence of an ICRC delegation as a public fig leaf to argue that their practices conform to IHL.<sup>118</sup> The added value of the ICRC's presence, controlling for all other factors, seems impossible to determine in any robust sense.

Isolating the effect of the amount of law talk raises the same concerns. Some highly legalized dialogues have shown results; others have resulted in a stand-off, as the ICRC's interlocutors deploy their legal skills to argue that the law is subject to multiple interpretations, and that they and the ICRC should respectfully agree to disagree.<sup>119</sup> Both outcomes seem to have resulted from meetings between the ICRC and the United States over detention. Dialogues based on non-legal modes of argumentation have also proved successful at helping victims, but we lack a rigorous comparison with the effectiveness of legal argumentation.<sup>120</sup>

If the metric is switched to a comparison with the work of other actors – states and NGOs – evaluation becomes even harder. States can exert more pressure than the ICRC on violators in certain instances, and with better results. Israel, for example, is likely to treat a confidential entreaty from the United States more seriously than one from the ICRC, although it will react to one from the ICRC more seriously than one

<sup>114</sup> See generally Howse and Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters', 1 *Global Policy* (2010) 127.

<sup>115</sup> See generally ICRC *Annual Report 2009*, *supra* note 24.

<sup>116</sup> See, e.g., 'ICRC Detention Visits: Ex-detainees Share Their Experiences', 31 Dec. 2005, available at: [www.icrc.org/eng/resources/documents/misc/detention\\_testimonies\\_040713.htm](http://www.icrc.org/eng/resources/documents/misc/detention_testimonies_040713.htm) (last accessed 19 Nov. 2010); 'Aline: "Many former detainees speak of a moral debt to the ICRC. . ."', 25 May 2005, available at: [www.icrc.org/eng/resources/documents/misc/rwanda-testimony-250505.htm](http://www.icrc.org/eng/resources/documents/misc/rwanda-testimony-250505.htm) (last accessed 19 Nov. 2010).

<sup>117</sup> See, e.g., 'ICRC: on the Frontline for the Humane Treatment of Persons Deprived of Liberty', 15 June 2004, available at: [www.icrc.org/eng/resources/documents/misc/5zygtf.htm](http://www.icrc.org/eng/resources/documents/misc/5zygtf.htm) [www.icrc.org/eng/resources/documents/misc/5zygtf.htm](http://www.icrc.org/eng/resources/documents/misc/5zygtf.htm) (last accessed 19 Nov. 2010).

<sup>118</sup> Interview with former ICRC official I.

<sup>119</sup> Interviews with ICRC officials B, G, and P and delegate K.

<sup>120</sup> Interview with ICRC officials C and M and delegate K.

from the UN. And human rights NGOs can point to instances – acknowledged by ICRC delegates<sup>121</sup> – where the public shaming of a state pushed it to act where private communications failed. Yet again, this comparison seems impervious to robust testing.

In the end, the confidentiality that undergirds the ICRC's work makes it most resistant to assessments of its success, leaving us mostly with stories from delegates or victims. The camps, prisons, and theatres of operations it visits; the warriors, detainees, and civilian victims it sees; the legal and other arguments it uses; and the behaviour of states and non-state actors before and after ICRC overtures are mostly hidden from outside scrutiny. Governments rarely acknowledge that their actions result from ICRC interventions.<sup>122</sup> While we may know if the ICRC has consulted with a country over the text of a law implementing the ICC Statute, outsiders cannot witness its most important victim-centred operations. The growth of the institution over time, including its significant support from donor governments, suggests that its reputation as the central NGO in the protection of victims of armed conflict is secure.<sup>123</sup> It is difficult to gauge, however, whether that support reflects any international consensus on the ICRC's success regarding IHL or rather is based on a desire – from empathy, guilt, or self-interest – to fund, and be seen as funding, the ICRC's humanitarian work.

## 4 Accounting for Legal Argumentation in the Compliance Process

### *A The ICRC and the Compliance Landscape*

The ICRC's navigation of the waters between its humanitarian protection and law guardian functions is not merely a story of one organization's attempt to reconcile two facets of its identity. Rather, its seemingly unconventional approach to addressing violations of international law – one where the law is not routinely invoked but rather used or downplayed as needed – calls for a re-appraisal of our understanding of the methods by which to achieve compliance with the law. The investment of a major institution in such a strategy, out of a belief that it does indeed promote observance of IHL – even if only partly right – means that the compliance process is more complex than our current theories suggest. Most obviously, it highlights the alternatives to 'naming and shaming' used by states, international organizations, and NGOs in fields from human rights to non-proliferation.<sup>124</sup> But, more profoundly, it offers an opportunity to identify a new set of factors that clarify the role of law and legal argumentation in the compliance process.

To recap very briefly, several decades of scholarship within international law and relations have established a set of frameworks for understanding the reasons for and

<sup>121</sup> Interview with ICRC delegate F.

<sup>122</sup> My research methodology did not include interviews with governmental officials who interact with the ICRC; but such officials are generally unwilling to share the contents of those interactions.

<sup>123</sup> Interview with ICRC official Q.

<sup>124</sup> See Hafner-Burton, 'Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem', 62 *Int'l Org* (2008), 689.

mechanisms by which states follow international law. Setting aside realism or neo-realism, which essentially deny that international law can influence behaviour, the basic approaches remain institutionalist, norm-centred, liberal, and constructivist.<sup>125</sup> In essence, institutionalists say that law influence states because it is embedded in regimes that alter the incentives of states over time.<sup>126</sup> Norm-centred theories common to much international legal thinking argue that legal norms induce certain behaviour because of internal characteristics that cause states to treat them seriously.<sup>127</sup> Liberal theorists pin the compliance process on the internal make-up and dynamics of states, suggesting, for instance, that democracies are likely to engage in the international legal process differently from (and more productively than) autocratic regimes.<sup>128</sup> And constructivist theories reverse the causation question completely, asserting that a state's identity and interests are created in part by international law.<sup>129</sup> Several conceptions cross these lines, e.g., a managerial theory that examines treaty-compliance bodies,<sup>130</sup> norm internalization approaches that scrutinize the effect of norms on domestic institutions,<sup>131</sup> a framework emphasizing intermediaries and mediation,<sup>132</sup> a rational choice theory,<sup>133</sup> and a sociological perspective based on state 'acculturation' to norms.<sup>134</sup>

The focus on compliance as the *problematique* has shortcomings. Rule compliance may not result in an effective regime if the rules are weak at advancing the regime's goals.<sup>135</sup> And the four frameworks differ significantly about the relationship among law, actors, and behaviour, such that it is not even clear that they are explaining the same phenomenon.<sup>136</sup> Much current thinking on compliance assumes or promotes an impoverished view of the influence of international rules on behaviour.<sup>137</sup> In the

<sup>125</sup> See Ratner, 'Does International Law Matter in Preventing Ethnic Conflict?', 32 *NYU J Int'l L and Politics* (2000) 591, at 648–651; Raustiala and Slaughter, 'International Law, International Relations, and Compliance', in W. Carlsnaes, T. Risse, and B.A. Simmons (eds), *The Handbook of International Relations* (2002), at 538.

<sup>126</sup> See R.O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (1984).

<sup>127</sup> See T.M. Franck, *The Power of Legitimacy Among Nations* (1990).

<sup>128</sup> See, e.g., Slaughter, 'International Law in a World of Liberal States', 6 *EJIL* (1995) 503. For an effective critique see Alvarez, 'Do Liberal States Behave Better?', 12 *EJIL* (2001) 183.

<sup>129</sup> See, e.g., Ruggie, 'What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge', 52 *Int'l Org* (1998) 885; Finnemore and Sikkink, 'International Norm Dynamics and Political Change', 52 *Int'l Org* (1998) 887.

<sup>130</sup> See A. and A. Chayes, *The New Sovereignty* (1995).

<sup>131</sup> Koh, *supra* note 93; B.A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (2009).

<sup>132</sup> See Ratner, *supra* note 125, at 668–693. For a perspective from sociology see Carruthers and Halliday, 'Negotiating Globalization: Global Scripts and Intermediation in the Construction of Asian Insolvency Regimes', 31 *Law & Social Inquiry* (2006) 521.

<sup>133</sup> See A. Guzman, *How International Law Works: A Rational Choice Theory* (2008).

<sup>134</sup> See Goodman and Jinks, 'How to Influence States: Socialization and International Human Rights Law', 54 *Duke LJ* (2004) 621.

<sup>135</sup> Weiss and Jacobson, *supra* note 113.

<sup>136</sup> Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law', 19 *Michigan J Int'l L* (1998) 345.

<sup>137</sup> See this critique in Howse and Teitel, *supra* note 114.



analysis that follows, I recognize – indeed embrace – the many ways that law influences actors.

The work of the ICRC in inducing compliance can be assessed from the vantage point of most of these theories, an unsurprising conclusion as each offers something in understanding that influence. I will not attempt here to apply each approach to the ICRC or choose among them for their explanatory power. Rather, I will use the ICRC's *modus operandi* to highlight where the practice is ahead of the theory – where a set of interactions and decisions taken by an entity promoting compliance are beyond the purview of existing theory. While certain aspects of the ICRC's *modus operandi* may seem unique to that institution, the use of such methods (and the possibility that they actually achieve positive results regarding compliance) suggests a need for new elements in current theory.

### **B Prologue: Compliance beyond States**

Before considering the persuasion process in detail, one encounters a threshold shortcoming of the dominant models. All four seek to answer questions about why states comply with international law. Even if they disaggregate the state into components (liberalism) or emphasize the role of non-state actors like norm entrepreneurs in disseminating law (constructivism), in the end, they are concerned with the state in two senses – as the engine and the target of compliance.<sup>138</sup> This locus of attention seems based on two assumptions about the international legal process.

The first assumption is that states remain the dominant actors in prescribing international law and in creating mechanisms for compliance. A theory that helps us understand how to prescribe law that states will obey and to construct institutions to foster that compliance is surely helpful to scholars and practitioners. That assumption is not incorrect – states still are the major participants – but it neglects the part of non-state actors in prescription and enforcement processes. Non-state actors, to the extent that they are considered at all, are generally lumped into categories like corporations or NGOs, which grease the wheels of state action by mobilizing states to create new norms and enforce them. They are always behind the scenes, but never themselves making the law, enforcing it, or becoming its target.

Yet the dominance of states generally does not mean that only states or international organizations foster compliance and that they promote it only with regard to other states. Non-state actors (including the ICRC) develop and implement soft law, which may have as significant an impact upon state behaviour as hard law, and may indeed have a transformative effect upon numerous international actors, state and non-state alike. Corporations, for instance, may create regimes of governance for themselves the dynamics of which would benefit from theoretical insights

<sup>138</sup> See, e.g., the title of Goodman and Jinks' article, *supra* note 134; Guzman, *supra* note 133, at 9 ('book explains how international law is able to affect state behavior'); Haas, 'Choosing to Comply: Theorizing from International Relations and Comparative Politics', in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000), at 43, 45 ('Compliance is a matter of state choice').

<sup>139</sup> See generally J. Braithwaite and P. Drahos, *Global Business Regulation* (2000), at 488–494.

on compliance.<sup>139</sup> So the predominance of states in the governance of international affairs cannot itself justify limiting theories to compliance by states.

The second assumption seems to be that states are the key or even sole bearer of so-called international legal personality and that non-state actors are not or cannot be the bearer of duties in international law. If non-state actors like armed groups lack duties, then why discuss compliance with them? But this assumption is, of course, simply wrong. Beyond the clear recognition in practice and doctrine that individuals and corporations have *rights* under international law that they can enforce through human rights courts and international arbitration, respectively,<sup>140</sup> the strongest evidence of the *duties* of non-state entities comes from international humanitarian law itself. At least since the advent of Common Article 3 (1949), IHL has recognized that armed groups have legal duties.<sup>141</sup> I have argued that corporations bear duties under both international human rights law and international environmental law,<sup>142</sup> and international actors have devoted significant efforts to devising regimes for encouraging corporate compliance with norms.<sup>143</sup> Indeed, the same so-called puzzle that drives the need for compliance theory – why comply in the absence of mandatory enforcement – applies equally to non-state actors as holders of duties. So any compliance theory that ignores those actors as targets is simply missing an important set of duty-holders.

The work of the ICRC with armed groups shows that compliance theory must address violations and compliance by non-state actors. Its contacts with insurgent groups in the Middle East, Africa, Sri Lanka, and Colombia highlight not only the capacity for non-state groups to harm human dignity, but also the possibility for those actors seeking compliance to engage with them and attempt creative strategies.

Two theories are so state-centric that reconstructing them to consider compliance by non-state actors seems formidable. First, institutionalism focuses on regimes of states, each with interests that they seek to advance. Although Keohane speaks about international actors, states are the alpha and omega of most regimes, in which they make the rules for each other.<sup>144</sup> States might create regimes regulating non-state

<sup>140</sup> See, e.g., Wagner, 'Non-State Actors', in *Max Planck Encyclopedia of Public International Law*, at paras 20–25, available at: [www.mpepil.org](http://www.mpepil.org) (last accessed 19 Nov. 2010).

<sup>141</sup> See, e.g., *Decision on Challenge to Jurisdiction: Lomé Accord Amnesty*, Case No. SCSL-2004-15-AR72(e), Special Court for Sierra Leone, Appeals Chamber, 13 Mar. 2004, at para. 47; Sassòli, 'Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law', 1 *J Int'l Humanitarian Studies* (2010) 5.

<sup>142</sup> See Ratner, 'Corporations and Human Rights: A Theory of Responsibility', 111 *Yale LJ* (2001) 443; Ratner, 'Business', in D. Bodansky, J. Brunnee, and E. Hey (eds), *Oxford Handbook of International Environmental Law* (2007), at 807.

<sup>143</sup> See, e.g., Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Human Rights Council, 7 Apr. 2008, UN Doc. A/HRC/8/5.

<sup>144</sup> Keohane, *supra* note 126, at 97 ('[i]nternational regimes help states deal with all of these problems [of market failure]'). See also Keohane, 'The Demand for International Regimes', in S. Krasner (ed.), *International Regimes* (1983), at 141, 148. For a regime approach integrating non-state actors see M.W. Zacher with B.A. Sutton, *Governing Global Networks: International Regimes for Transportation and Communications* (1996); see also Abbott, 'Enriching Rational Choice Institutionalism for the Study of International Law', *U Illinois L Rev* (2008) 5, at 24–26.

actors like corporations or transnational criminals, but those actors remain passive players. The theory is not so much wrong for its insights on how to influence non-state actors – since states can surely influence them, with or without regimes – as incomplete. Secondly, liberalism's examination of the state's internal make-up yields a set of descriptions and prescriptions about the interaction of liberal states with each other and with so-called non-liberal states.<sup>145</sup> While the identity and interests of non-state actors as independent of the state are central, the theory nonetheless focuses on getting states, rather than those independent actors, to act in a certain way. Yet liberal theory's insights may yet have something to offer our understanding of non-state actors. For just as states may be more or less liberal, based on their capacity to promote individual freedom, so non-state actors, and even armed groups, may also be. Charter 77 was a liberal non-state group; the Lord's Resistance Army has proved quite illiberal.

On the other hand, norm-centred and constructivist theories seem more amenable to appraising the effect of law on non-state actors. Because norm-centred theories focus on the internal characteristics of law rather than its targets, their basic insights can be applied to compliance by state and non-state actors. And the creation of identities of international actors through processes of norm absorption as described by constructivists is not confined to states. Those hybrid theories building upon them, whether sociological or based on intermediaries, seem to translate well for understanding compliance by non-state actors.<sup>146</sup>

In the end, as international practice expands the universe of legal duty-holders, current approaches to compliance need to broaden their ambit to consider how and why these actors comply. Their structures and hierarchies will be more diverse than those of states, but are not impervious to analysis. Issues of capacity to commit and implement norms endemic to most theories of compliance can be extended to the non-state context. Although each theory need not develop a sub-branch for non-state actors, it can contemplate how to extend the core of its insights to other duty-holders.

### *C Legal Argumentation and the Persuasive Process*

The most important theoretical implication of the ICRC's work is the need for approaches to compliance to appreciate the modalities and nuances of the communications between the initiators and the targets of compliance.

#### *1 Theoretical Shortcomings*

Current understandings of compliance fall into two camps with regard to the role of persuasion. *Static theories* examine the relationship between the entity seeking compliance and the violating entity, focusing on fixed traits of the parties or the norms, without much regard to that actually communicated between actors. These factors

<sup>145</sup> Slaughter, *supra* note 128 (a 'world of liberal states').

<sup>146</sup> See Capie, 'Influencing Armed Groups: Are there Lessons to be Drawn from Socialization Literature?', in Geneva Call (ed.), *supra* note 110, at 86 (applying socialization literature to armed non-state actors).

include relative power of the actors (institutionalism),<sup>147</sup> the extent to which they are repeat players or in one-off games (rational choice),<sup>148</sup> or the internal makeup of a state (liberalism).<sup>149</sup> Even theories that put norms front and centre rely fundamentally on fixed features of the norm in question, whether its pedigree<sup>150</sup> or the effect of its violation on the reputation of parties.<sup>151</sup> These theories view the communication process as essentially a side-show – that it cannot influence the decisions of actors to comply or not comply, for those are determined by other phenomena.

*Dynamic theories*, on the other hand, focus on the micro-process of interaction and communication between the two entities. Constructivists identify a process whereby norm entrepreneurs persuade key domestic actors to endorse an emerging international norm, leading to what they call a ‘norm cascade’ that alters the identity of states.<sup>152</sup> Others describe a different process, social influence, wherein the target’s acceptance of the new norm is based on the target’s desire to maintain or enhance its position within a socially relevant group through an evaluation of the costs and benefits of conformity with the norm.<sup>153</sup> Those examining dynamics within states have refined our understanding of the translation of international norms by and for domestic actors.<sup>154</sup> Beyond these theories, policy-oriented jurisprudence’s fundamental insight that law is a process of communication recognizes that compliance depends on communication and persuasion.<sup>155</sup>

However, not even the dynamic theories amply address the invocation of *legal* norms during the conversation about compliance. They do not explain the choices behind, or consequences of, the persuading entity’s invocation of the law and the difference between such a dialogue and one that does not invoke the law. Thus, for example, much of the constructivist literature on norm cascades fails to differentiate between norms that are socially desirable and those that are legally required. The paradigmatic cases, whether the anti-slavery movement, women’s rights, or the ban on landmines, generally concern social norms that were not, during the norm cascade, accepted as international law.<sup>156</sup>

Moreover, the literature on the role of law in persuasion in non-international settings is generally confined to the courtroom context. But in this micro-universe, the

<sup>147</sup> See generally Keohane, *supra* note 126.

<sup>148</sup> See generally Guzman, *supra* note 133, at 32, 41.

<sup>149</sup> See generally Slaughter, *supra* note 128.

<sup>150</sup> See Franck, *supra* note 127; see also Brunnee and Toope, ‘International Law and Constructivism: Elements of an Interactional Theory of International Law’, 39 *Columbia J Transnat’l L* (2000) 19, at 72–73 (Fullerian view that law persuades based on ‘internal process values’).

<sup>151</sup> See Guzman, *supra* note 133.

<sup>152</sup> See, e.g., Lutz and Sikkink, ‘International Human Rights Law in Practice: The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America’, 2 *Chicago J Int’l L* (2001) 1.

<sup>153</sup> See generally Johnston, ‘Treating International Institutions as Social Environments’, 45 *Int’l Studies Q* (2001) 487; Goodman and Jinks, *supra* note 134; Carruthers and Haliday, *supra* note 132, at 546–548.

<sup>154</sup> See generally Koh, *supra* note 93; Simmons, *supra* note 131.

<sup>155</sup> Reisman, ‘International Law-Making: A Process of Communication’, 75 *Am Soc Int’l L Proceedings* (1981) 101.

<sup>156</sup> See generally Finnemore and Sikkink, *supra* note 129. See also Finnemore, ‘Are Legal Norms Distinctive?’, 32 *NYU J Int’l L and Politics* (2000) 699.

dialogue is exclusively retrospective in focus and the targets of arguments are judges and juries operating in a rarified atmosphere far from political realities.<sup>157</sup> While a sympathetic defendant or victim in a criminal case may influence those decision-makers as much as the law, legal arguments are still central to – indeed, the *raison d'être* of – that venue. The need for a strategy of communication to differentiate between the courtroom setting of judging the past according to a legal script and other venues oriented toward future behaviour is an idea as old as Aristotle.<sup>158</sup>

## 2 Determinants of a Communications Strategy

How, then, does an entity seeking to persuade another to comply with international law decide on the deployment of legal norms? In an earlier article, I introduced the concept of the normative intermediary to describe an agent of an international organization or states seeking compliance with a norm who intervenes directly in a dispute between global actors by inducing the targets to follow the norm through the deployment of certain independent powers. In that description, I drew upon mediation theory to suggest that the intermediary's prospects for successful persuasion depend upon four factors: (a) the nature of the dispute, in terms of both the parties' underlying claims and the severity of the legal violations; (b) the nature of the parties, in terms of their cohesiveness, internal form of organization, and the relations between them; (c) the traits of the intermediary himself or herself, in terms of knowledge, status, impartiality, and leverage; and (d) the communication process between the intermediary and the parties, in terms of the depth and timing of the former's involvement.<sup>159</sup> I described the first two factors as exogenous, as beyond the control of the intermediary, and the second two as endogenous because they were, broadly speaking, within his control.

The work of the ICRC suggests that these four factors are relevant not only to an individual normative intermediary – in that case, the OSCE High Commissioner on National Minorities – intervening in a legal dispute between two parties, but more broadly to all interactions between one party seeking to persuade another party to comply with legal norms. These parties include states, international organizations, NGOs, and other non-state actors. At the same time, a more nuanced distinction is needed among these factors than the endogenous/exogenous divide. In particular, although all four factors are independent variables compared with a dependent variable of effective outcomes, the first three are the critical variables in determining the last – the communications strategy – which is our focus here. Thus, to attempt a successful outcome regarding compliance, the persuading entity must base the contours of its communication strategy on three factors – the nature of the *dispute*, the nature of the *parties*, and the nature (or its sense) of *its own identity*.

<sup>157</sup> See, e.g., Reinard, 'Persuasion in the Legal Setting', in J.P. Dillard and M. Pfau (eds), *The Persuasion Handbook: Developments in Theory and Practice* (2002), at 543; D.C. Gibson, *The Role of Communication in the Practice of Law* (1991); R.D. Rieke, M.O. Sillars, and T.R. Peterson, *Argumentation and Critical Decision Making* (7th edn, 2009), at 207–224.

<sup>158</sup> Aristotle, *On Rhetoric: A Theory of Civic Discourse*, Bk I., ch. 3 (trans. G.A. Kennedy, 2nd edn, 2007) (distinguishing between deliberative, judicial, and epideictic rhetoric).

<sup>159</sup> Ratner, *supra* note 125, at 668–684.

Whether these factors actually determine the success of these interactions, or rather are regarded by the persuading entity as determinative of that success, is a critical question. I make the second claim, one clearly supported by the ICRC's work.<sup>160</sup> The goal here is thus not to suggest, let alone prove, that certain forms of persuasion result in or promote compliance by targets, and thus in that sense does not challenge existing theories. As noted above, it seems impossible to know the effectiveness of the ICRC's interventions, let alone the effectiveness of each mode of legal argumentation. Rather, I seek to identify the variables that institutions that pursue compliance through persuasion take into account out of a *bona fide* belief that it will be effective – based on at least anecdotal evidence that it sometimes is effective.

To give a sense of these factors, we can examine them with respect to the work of the ICRC. First, the *nature of the dispute* is an armed conflict or a situation the government regards as a security threat. Here, prospects for successful persuasion already face a significant barrier, one long recognized by international organizations seeking to resolve disputes before they become violent. For the ICRC, the threshold of an exceptional situation has – legally (in the case of actual armed conflict) and on the ground – already been crossed. The operation of persuasion where the parties themselves have abandoned rational discourse to address major differences creates a key hurdle for actors seeking compliance with law.<sup>161</sup> Moreover, during warfare, observance of the law is less urgent than victory or the welfare of a state's or armed group's fighters. Thus, for example, reciprocity (e.g., with respect to treatment of prisoners) is likely to influence a party as much as or more than legal obligations.<sup>162</sup> This dynamic does not translate, for the ICRC at least, into the defeatism of *inter armes silent leges* – on the contrary – but realism about the effectiveness of legal argumentation alone, especially in situations of perceived existential threats to the state.<sup>163</sup> Beyond the dispute's setting within an armed conflict, the ICRC faces a set of micro-disputes with its targets, each with its own causes and dynamics. Thus, a war may raise disputes over the treatment of prisoners, targeting policies, and treatment of civilians. The absence of armed conflict or a perceived internal security threat will necessitate an alternative communications strategy, as seen in the ICRC's preventive work during peacetime.

Secondly, the ICRC interposes itself with a variety of armed *actors*, state and non-state. They may be well organized or poorly disciplined; and they may have a variety of relationships both with the population under their control and with outside actors (with whom their reputation may be quite important). With respect to the law in particular, as noted earlier, actors may be more or less familiar with international norms. Beyond their substantive knowledge of the law, each actor may have its own perception of authority – in the sense of those entities and processes it views as legitimate

<sup>160</sup> I appreciate this clarification from Michael Barnett. The transparency of the OSCE High Commissioner's work made evaluation of the success of its interventions less difficult, although that one case permitted only a hypothesis regarding the four factors relevant to successful persuasion.

<sup>161</sup> See O. Gross and F. D. Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (2006), at 106–109.

<sup>162</sup> I appreciate this insight from Eyal Benvenisti.

<sup>163</sup> Interview with ICRC official P.



makers of rules – that will affect its receptivity to legal as compared to other arguments.<sup>164</sup> Those perceptions may include views on the authority of IHL,<sup>165</sup> but they may equally include perceptions of the ICRC itself. Thus, while some non-state armed groups still see the ICRC as a Western entity, others welcome the chance to speak to an international body that is not preoccupied with getting them to surrender.<sup>166</sup> The ICRC's reputation endows it with the sort of authority described by Bruce Lincoln, whereby they 'command not just the attention but the confidence, respect, and trust of their audience, or . . . [can] make audiences act *as if* this were so'.<sup>167</sup> Beyond these predispositional factors, targets have varying perspectives on each micro-dispute, perhaps aware of some code of honour regarding civilians but unwilling to recognize norms regarding prisoners. Lastly, each entity, state or non-state, will be comprised of individuals within a hierarchy who are susceptible to diverse forms of argumentation.<sup>168</sup> In an army, generals need to be approached differently from lawyers. Broadly speaking, as Ian Johnstone has noted with respect to debates within the Security Council, the ICRC must decide whether its interlocutors are part of the same interpretive community such that legal argumentation is possible.<sup>169</sup>

Thirdly, regarding the *traits of the persuader*, the ICRC has defined its identity in terms of its neutrality and impartiality, whether its connection with Switzerland and Geneva, or the internationalization of its staff. In addition, it possesses a special competence with respect to the substance of the IHL,<sup>170</sup> diplomatic skills, and the modalities of protection and assistance (e.g., in interviewing detainees, sharing information with authorities, and reuniting families). It is also quite conscious to differentiate itself from other NGOs.<sup>171</sup>

At the same time, this third factor is less fixed than the other two. It can change as the first two inputs transform and the institution adjusts to various new realities.<sup>172</sup> Equally important, with respect to the output – the persuading entity's communications

<sup>164</sup> I appreciate this insight from Monica Hakimi.

<sup>165</sup> One interlocutor noted that Israel preferred to have a dialogue with the ICRC based on legal argumentation because of Judaism's engagement with law, preferring such argumentation over moral arguments: interview with ICRC official B.

<sup>166</sup> Interviews with ICRC official C.

<sup>167</sup> B. Lincoln, *Authority: Construction and Corrosion* (1994), at 4.

<sup>168</sup> See A. Bellal and S. Casey-Maslen, *Ownership of Norms by Non-State Actors: Policies and Programs: A Review of Practice* (unpublished paper prepared for the Workshop on Armed Non-State Actors and International Norms: Towards a better protection of civilians in armed conflicts, Geneva Academy of International Humanitarian Law and Human Rights, Feb. 2010) (cited with author's permission), at 26–29; interview with ICRC official P. And each such official may have different abilities to make the state or non-state actor comply: interview with ICRC delegate F (on need to identify who is in charge).

<sup>169</sup> See Johnstone, 'Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit', 102 *AJIL* (2008) 275, at 281.

<sup>170</sup> One official called IHL the ICRC's 'identity trademark': interview with ICRC official G.

<sup>171</sup> One senior official noted that while some NGOs were only action-oriented and others were only advocacy-oriented, the ICRC was both: interview with ICRC official N (adding that the ICRC is 'first and foremost an action organization', but that it had a 'higher ambition' to advocate on behalf of IHL as a result of its 'special mandate').

<sup>172</sup> I appreciate this point from Greg Shaffer.

strategy – that strategy not only *results* from its identity, but helps *determine* it.<sup>173</sup> After the ICRC's silence during the Holocaust, the institution engaged in internal deliberation (both ethical and political) that effectively altered its identity by opening the door to public denunciations of serious IHL violations.<sup>174</sup> At the same time, were the ICRC to choose a radically new set of tactics, e.g., through frequent public condemnations, or consideration of *jus ad bellum* in its assessments, it would, in essence, no longer be the ICRC.

In the end, the choice of the persuading entity's communication strategy reflects both a rationalist calculation of its likely success – based on the first two factors – and the entity's sense of its own identity and role.<sup>175</sup> This simultaneous operation of both rationalist and identity-based factors extends to states, international organizations, and other non-state actors seeking to persuade others to observe the law.

### 3 Deployment of Legal Norms: Four Dimensions of the Communications Process

The construct above identifies the choice of persuasive strategies (the dependent variable) to be used by the entity seeking compliance. These three elements will thus affect all aspects of the intervention, including its timing and the degree of involvement. My focus here, however, remains the legal content of that strategy. Here I posit that the entity's deployment of legal norms involves choices about four core elements of legal argumentation – its publicity, density, directness, and tone.

#### (a) The publicity of legal argumentation

First, the persuader must make a judgement as to the exposure it wishes to place on its entreaties with the party. At one extreme are private communications, ranging from meetings with a small number of actors (e.g., a head of state or the chief of an armed group) to ones with a large group (e.g., of prison administrators). At the other end are public statements, whether bland dissemination of law and legal interpretations or the classic naming and shaming strategy after violations. Between them are methods of notifying actors beyond the target of the compliance issue and seeking their assistance.

#### (b) The density of legal argumentation

The persuading entity must also choose the amount of law to invoke. Many treaties are dense with rules, each of which can be interpreted in great detail, and the persuader will need to determine the ideal quantity for a situation. Such a decision entails at least two facets. First, it must set *priorities* among norms, as certain violations are more grievous than others, or the prospects for achieving compliance with some norms are greater than with others.<sup>176</sup> A communication should not be clouded by the invocation of too many norms, whether multiple provisions of treaties or customary

<sup>173</sup> See Barnett, 'Evolution Without Progress? Humanitarianism in a World of Hurt', 63 *Int'l Org* (2009) 621 (changing identity of humanitarian NGOs).

<sup>174</sup> See the text at note 41 *supra* (on Doctrine 15).

<sup>175</sup> I appreciate this point from Michael Barnett.

<sup>176</sup> See, e.g., Bangerter, *supra* note 110.

law, even if *de jure* the conduct might violate all of them. Secondly, it must gauge the extent to which its legal *interpretation* of those provisions is important to the compliance process. A communication process should thus not be overcome by dense interpretation when simplicity would be more effective. Urging an entity to comply may, then, require more or less elaboration of the legal norm at issue.

### (c) The directness of legal argumentation

The persuader must also decide how central law will be to the argument for compliance. Three options are possible, where X is the behaviour required by the law.<sup>177</sup> First, the persuader can invoke law *directly*, as in 'Please do X because it is the law'. Such a plea seeks foremost to base compliance on a need felt by the target to meet a legal obligation. Secondly, the persuader can use law *indirectly*, as in 'Please do X because it is the law, and compliance with the law is [humanitarian, moral, efficient, required or authorized by religious law, etc.]'. Here, a desire to comply with law as such is seen as insufficient to alter the target's behaviour, so the persuader explains the benefits (or at least lack of harms) of compliance or the harms from non-compliance. Thirdly, the persuader can use law *furtively*, by simply removing the reference to law, as in 'Please do X because it is [humanitarian, moral, efficient, required or authorized by religious law, etc.]'. While still seeking compliance, the persuader does not argue in legal terms at all.<sup>178</sup>

### (d) The tone of legal argumentation

Lastly, the persuading entity must choose the best tone for the legal claims, namely, the extent to which it is confrontational in presenting the compliance shortcomings of the target. At one end, it may remind the target of the content of the law, without linking the target to actual violations or the need to change behaviour. In the middle, it may identify specific violations, but in a more educative than accusatory manner. At the other end, the persuader may strongly criticize the party for a violation. If both public and private communications are used, the tone could vary across them, with a more confrontational manner in private and a more conciliatory mode in public.

## 4 The Choices of the ICRC in Context

The dynamic described above is, then, essentially, as follows: the type of conflict, the traits of the targets involved, and the traits of the persuading entity jointly – the inputs – determine the persuasive strategy – the output – to be adopted. The legal content of that strategy involves four institutional choices – about (a) the publicity of the discourse; (b) the amount of law to invoke; (c) the directness of the invocation of law; and (d) the tone of the invocation of the law. Building on the earlier analysis

<sup>177</sup> This simplified rubric views law as simply imposing obligations. Where the law provides for the other Hohfeldian forms, directness might be viewed differently.

<sup>178</sup> Cf. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', 95 *AJIL* (2001) 757 (distinguishing between prescriptive laws and normative rules).

of the ICRC, we can now see how the key features of its strategy – secrecy, ambiguity, and avoidance – map onto the four dimensions of the communications process, as determined by the three inputs.

Secrecy concerns the degree of *publicity* in the process (factor a). The ICRC's choice to keep the legal discussions out of the public realm reflects its assessment that states and non-state combatants are especially hostile to public criticism of their policies during armed conflict or domestic emergency. It also reflects the ICRC's self-image as defined by discretion – a particularly Swiss attribute that has kept its banks a safe haven for despots and victims alike.<sup>179</sup> Part of that identity includes a differentiation from other NGOs, which may be publicizing the same violations, and the need to act independently of (but complementarily to) them.<sup>180</sup> The ICRC's step from complete confidentiality to mobilization of other actors reflects a choice that the parties will respond to the influence of those actors. To the extent that the ICRC abandons secrecy completely, it seems to believe that a party is capable of acting positively in reaction to public criticism; its public statements regarding Guantanamo may be one example.<sup>181</sup> It may also think that the target will not improve, but that aspects of its own identity – such as its guardian function – demand a public statement; the ICRC's statements to Iran and Iraq during their long war represent an example.<sup>182</sup> When the ICRC engages in a wholly public strategy, as with its dissemination of the law or interpretive guidance, it does so because the tensions of an ongoing war are missing, its audience extends beyond states experiencing armed conflict, and such an educative role enhances its self-image as the font of wisdom of IHL.

Ambiguity – keeping the legal conclusions from the parties – concerns the *density* of law (factor b) and, to a certain extent, the *tone* to adopt (factor d). In these situations, the institution glosses over certain legal issues or adopts a more conciliatory tone in the course of invoking the law. That choice takes hold when it concludes that the party will react negatively to even private characterizations of the legal situation. In the case of occupation, that threat arises not merely from the additional obligations of the law of occupation, but from the party's reaction to the label of occupier. The ICRC also knows that some states and armed groups respond better than others to fairly sophisticated legal arguments. And the institution's self-image as a problem-solver rather than solely a promoter of IHL allows it to pivot from explaining the full legal situation to emphasizing only certain aspects of it, or to educating about avoiding future violations rather than pointing the finger at existing violations. The preference of the Legal Division for delegations to take a legal position with the parties shows, however, that the institution is not of one mind on the balance between the protection

<sup>179</sup> See Forsythe, *supra* note 8, at 237–241.

<sup>180</sup> Interview with ICRC official L (impression among ICRC staff that NGOs are 'sanctimonious').

<sup>181</sup> See *supra* note 69.

<sup>182</sup> See ICRC, Iran/Iraq Memoranda, reprinted in M. Sassoli and A. Bouvier (eds), *How Does Law Protect in War: Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (2nd edn, 2006), ii, at 1529. For other examples see Pfanner, *supra* note 26, at 296.

and guardian roles.<sup>183</sup> When the ICRC opts for detailed elaboration of the law, e.g., publicly in the case of its guidance on direct participation in hostilities or privately in reminding Israel of its duties as occupier, it may be speaking to an audience not in the heat of armed conflict, or the parties may welcome such discussion, or it wants to demonstrate its own expertise (or a combination of these).

Finally, avoidance concerns the *directness* of law in an argument to change behaviour (factor c). It represents the third option noted above – the furtive use of law – regarding legal argumentation. Here the institution has examined the features of the conflict(s) and of the parties and determined that law talk will not advance the goal of law compliance. As discussed above, this determination stems from the unique features of the conflict – who is fighting whom, and over what – as well as of the interlocutor in terms of personal background, placement within the power structure, and other factors. Although the ICRC professes agnosticism over the cause of armed conflict, insisting on the separation of *jus ad bellum* from *jus in bello*,<sup>184</sup> its awareness of the reasons for the conflict may lead to a preference for non-legal arguments. As for the traits of the institution, non-legal argumentation is the ultimate fallback of an organization that sees itself as fundamentally pragmatic about its humanitarianism. The three factors also explain a decision to use the law directly or indirectly (rather than furtively) – directly in a reminder to all states or to warring parties of their obligations under IHL; and indirectly in the mobilization of arguments to explain the advantages of such compliance.

Although this basic mapping provides a sense of the influence of the three inputs on the four dimensions of argumentation, the relationships between each of the inputs and outputs are quite complex. The ICRC has sensibly (though perhaps to the disappointment of IR theorists) crafted a framework of relevant considerations, rather than any kind of algorithm for effective action.<sup>185</sup> Instead of attempting to construct here an overly complex – and potentially practically useless – theoretical matrix of causation, we might consider two stylized situations that would confront the ICRC (that is, holding the variable of the persuading entity's traits constant). In the first, a highly trained, disciplined military familiar with the ICRC is in the midst of a serious but not existential conflict, with sporadic violations of IHL; it is both sophisticated and disinclined to reject viscerally all claims of law violation (e.g., some version of the United States in Iraq). Here, the ICRC is likely to deploy a private, detailed, direct, and somewhat confrontational discourse. In the second, a rebel group, somewhat undisciplined and fighting for its existence while committing its own abuses, is legally ignorant and

<sup>183</sup> See *supra* text at note 92. See also interview with ICRC official N (fear among delegates that human rights discourse 'dilutes their identity to stakeholders').

<sup>184</sup> For one of countless statements from the ICRC see Pfanner, Editorial, 864 *Int'l Rev Red Cross* (2004) 817; for an academic defence see Sloane, 'The Cost of Conflation: The Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War', 34 *Yale J Int'l L* (2008) 47; for a contrary view see Ratner, 'Revising the Geneva Conventions to Regulate Force by and Against Terrorists', 1 *Israel Defense Forces L Rev* (2003) 7.

<sup>185</sup> See *supra* note 104 and accompanying text.

suspicious of IHL and the ICRC (e.g., some version of the Taliban in Afghanistan).<sup>186</sup> In this case, the ICRC is likely to deploy a private, relatively simple, indirect or furtive, and non-confrontational approach. If we shift one variable, the nature of the compliance dispute, to a pattern of serious IHL violations, the balance might shift from private to public discourse. Moreover, if we vary the identity of the persuading entity, to be a human rights NGO that sees its identity quite differently, a new set of strategies will be deployed, one likely to be public, dense, direct, and confrontational.

The ICRC's deployment of persuasive strategies along these four dimensions, and its generalizability to other entities, echoes Johnstone's conclusions regarding law talk in a very different entity, the UN Security Council. Like the governments making their case in the Council's chamber, the ICRC aims for a balance between the constraining argumentation provided by law and the perspectives and opportunity offered by non-legal argumentation.<sup>187</sup> However, unlike the 'sacred drama' of the Council's deliberations,<sup>188</sup> where diplomats have a predictable audience, the community with which the ICRC's arguments must resonate extends well beyond the experts associated with an epistemic or interpretive community.<sup>189</sup> Indeed, it is constantly in flux due to the diversity of actors to be persuaded and of situations facing the persuading entity. As a result, the ICRC must continually adjust its forms of argumentation. For a general theory of the role of legal argumentation, we must recognize that the persuading entity's audience or community extends far beyond professional experts.

### 5 *And What of the Norms?*

One might ask where the norms themselves fit into these choices of argumentation. Should the traits of the norms themselves be an independent variable along with the traits of the dispute, the parties, and the persuading entity? Norm-centred theories of compliance would insist on it. Norms themselves vary in numerous ways. Four central differentiating features are (1) their coverage in terms of the particular conduct regulated; (2) their Hohfeldian terms and correlatives;<sup>190</sup> (3) their hardness and softness, as defined along several dimensions (the precision of expected content, authority of the prescribing entity, and associated enforcement mechanisms);<sup>191</sup> (4) their

<sup>186</sup> I do not mean to suggest that all of these traits match up in all cases. A highly trained armed force might nonetheless prove hostile to IHL arguments; an armed group fighting for its existence might be open to such discourse.

<sup>187</sup> Johnstone, *supra* note 169, at 282. See also Abbott, *et al.*, 'The Concept of Legalization', 54 *Int'l Org* (2000) 401, at 409–410 (uniqueness of international legal discourse).

<sup>188</sup> C.C. O'Brien, *United Nations, Sacred Drama* (1968), at 9 (UN 'has no role except a role; it plays the part of what men take it for. Its Council Chambers and Assembly Hall are stage sets for a continuous dramatisation of world history') (emphasis in original).

<sup>189</sup> See Haas, 'Epistemic Communities and International Policy Coordination', 46 *Int'l Org* (1992) 1; Johnstone, 'Security Council Deliberations: The Power of Better Argument', 14 *EJIL* (2003) 437, at 440–451.

<sup>190</sup> W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (1919).

<sup>191</sup> See Abbott, 'The Many Faces of International Legalization', 92 *Proceedings Am Soc Int'l L* (1998) 57, at 59; Reisman, 'The Concept and Functions of Soft Law in International Politics', in E. Bello and B. Ajibola (eds), *Essays in Honor of Judge Taslim Olawale Elias* (1992), i, at 135, 135–136.



overall legitimacy, whether under Franck's criteria, Fullerian internal morality, or the centrality of the norm to a particular regime or international law generally.<sup>192</sup> Some observers have suggested that certain IHL norms are more ripe for so-called ownership than others, perhaps because of a greater consensus on their contribution to protection of victims (one of the considerations in factor (d)) as well as the minimal impact of compliance on a group's military operations.<sup>193</sup> One NGO has asked non-state armed groups to commit to the non-use of anti-personnel mines specifically.<sup>194</sup>

Yet just as my earlier work on the OSCE High Commissioner suggested that the hard law/soft law divide can matter little to normative intermediaries as well as their targets,<sup>195</sup> even tentative patterns connecting these four features of norms to the publicity, density, directness, and tone of the legal argumentation are difficult to identify. To take but one example, the norm against torture can be differentiated from other norms along the above lines insofar as (a) it addresses a particularly significant harm to civilian well-being; (b) it is a formal duty in Hohfeldian terms; (c) it is hard in most respects (though weak in some enforcement); and (d) it is, by most accounts, so legitimate and central to human rights and international law as to represent *jus cogens*.<sup>196</sup> Yet a persuasive strategy to induce an entity not to torture may be more or less public, more or less dense, more or less direct, and more or less confrontational, depending on the three key factors noted earlier – the nature of the dispute, the nature of the parties, and the traits of the persuading entity.<sup>197</sup> I would not go so far as to say that the traits of the norm are irrelevant to the prospects for actual compliance with it, and thus will not question Franck's insight to that effect, if only because cross-cultural suspicions by the target are likely to be less for norms with a high index of legitimacy. But it is quite difficult to see how any of its internal features predict the way that entities seek compliance with it *will actually invoke it* as part of the persuasive process.

One possible connection worth considering is that between a norm's specificity (a component of its hardness – dimension (c) above) and the tone of legal argumentation used. If a norm is open-textured and subject to significant interpretive discretion, the compliance-interested entity may well prove reluctant to accuse a party of violating it. Consider Additional Protocol I's prohibition on attacks expected to cause civilian harm 'excessive in relation to the concrete and direct military advantage

<sup>192</sup> See Franck, *supra* note 127; Brunnee and Toope, *supra* note 150.

<sup>193</sup> Bellal and Casey-Maslen, *supra* note 168, at 22–26. See also Capie, *supra* note 146, at 91 ('simpler' norms easier to internalize). Cf. Brandt, 'Utilitarianism and the Rules of War', in M. Cohen, T. Nagel, and T. Scanlon (eds), *War and Moral Responsibility* (1974), at 25 (moral rules of war derived from their effect on party's ability to wage war).

<sup>194</sup> See Geneva Call, *Non-State Actor Mine Action and Compliance to the Deed of Commitment Banning Anti-Personnel Landmines: January 2008–June 2010*, available at: [www.genevacall.org/resources/research/f-research/2001-2010/gc-2010PR](http://www.genevacall.org/resources/research/f-research/2001-2010/gc-2010PR) (last accessed 19 Nov. 2010).

<sup>195</sup> Ratner, *supra* note 125, at 661–668.

<sup>196</sup> *Prosecutor v. Furundzija*, ICTY Case No. IT-95-17/1-T10, Trial Chamber Judgment, 10 Dec. 1998, at paras 153–156, available at: [www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf](http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf) (last accessed 19 Nov. 2010). See also de Wet, 'The Prohibition of Torture as an International Norm of *jus cogens* and Its Implications for National and Customary Law', 15 *EJIL* (2004) 97.

<sup>197</sup> See Forsythe, *supra* note 8, at 152–153 (ICRC response to US and Israeli interrogation practices).

anticipated'.<sup>198</sup> Where the norm is susceptible to many interpretations and, equally important, the ICRC may lack access to key facts (notably the intended target of the attack and its military significance), a conversation centred on proportionality's application to a specific episode could prove frustrating. Similarly, an evaluation of a state's rules of engagement for their consistency with that prohibition may not go very far.<sup>199</sup> On the other hand, because the ICRC sees itself as an authoritative interpreter of IHL, it might develop its own interpretation of proportionality over time and present it to the parties to a conflict; and in some instances it may have enough facts to make a legal appraisal of an attack. Moreover, where civilian casualties are great, it can decide that invocation of proportionality is useful for framing its dialogue, even if not for declaring the action unlawful.<sup>200</sup> Thus even open-textured norms may merit invocation, though in a less confrontational tone.

### C Appraising Institutional Choices: Settling for Compliance

The process described above shows that international actors concerned with promoting observance of a legal norm will choose a form of argumentation based on an assessment of what seems to work based on the legal dispute and relevant parties and their own identity. Although the ICRC's particular mix of secrecy, ambiguity, and avoidance is unconventional compared with many other actors (and particularly with human rights NGOs), the three factors that determine the form of argumentation and the four aspects of that argumentation are generalizable to all actors engaged in encouraging compliance. The framework applies to a human rights body with its public, law-laden argumentation as it does to a state with other foreign policy goals and forms of argumentation to match them.

Institutions will certainly vary in the extent to which they adjust the forms of argumentation over time and across targets. The ICRC is constantly making such choices, but a monitoring body like the Human Rights Committee has less room for manoeuvre, whether because it must release its opinions publicly or because its identity entails the issuance of explicit legal determinations. Human rights NGOs may choose a middle path, remaining public but fine-tuning the density, directness, and tone of arguments. One important implication of this study is that each organization should be prepared to examine these parameters, including through scrutiny of its own identity, just as the ICRC has. An NGO may discover, after such an inquiry, that its strategies emphasizing law talk (including stretches of the law well beyond *lex lata*) require adjustment.

These very choices show that the invocation of international law (and, *a fortiori*, its public invocation) does not represent the exclusive or even dominant method for

<sup>198</sup> Additional Protocol I, *supra* note 20, Art. 51(5)(b). See also International Criminal Tribunal for the Former Yugoslavia, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 8 June 2000, 39 *ILM* (2000) 1257, at 1271–1273; Fenrick, 'The Law Applicable to Targeting and Proportionality after Operation Allied Force: A View from the Outside', 3 *Yrbk Int'l Humanitarian L* (2000) 53.

<sup>199</sup> I appreciate this point from Toni Pfanner.

<sup>200</sup> See, e.g., Press conference of the ICRC president in Jerusalem, *supra* note 71.

achieving law compliance. That is, achieving *compliance with law* does not necessitate a conversation *laden with law*. Legal argumentation may assist the task, but it can equally undermine it. As Harold Koh has synthesized the scholarship on the influence of law on behaviour, the relationship between norms and behaviour that matches those norms forms a spectrum from (a) coincidence, or matching by chance, to (b) conformity, or matching only when convenient and with little sense of obligation, to (c) compliance, matching to gain incentives or avoid punishment, to (d) obedience, matching due to a target's internal acceptance of the norm as part of its value system.<sup>201</sup> Obedience as he identifies it could entail an internal acceptance of the *content* of the norm, or an internal acceptance of the *bindingness* of the norm such that it must be followed regardless of its content,<sup>202</sup> but either way it entails a process distinct from compliance or conformity.

Koh directs his inquiry to obedience as it represents for him the highest form of respect for – and thus the seriousness of – law.<sup>203</sup> But the modes of argumentation adopted by institutions seeking to promote law show that they are more than willing to settle for compliance given the hurdles associated with obedience. That is, the choices that persuading entities make regarding the modes of legal argumentation are *choices about how to achieve behaviour consistent with the law* – about respect for law in the broadest sense of the term. They are not seeking to persuade a target to internalize a norm, though they are not opposed to it when that is feasible. Although scholars can usefully identify reasons why entities may follow legal norms, the mode of argumentation adopted by a persuading entity is based on a much more basic question – how will its use of the law promote compliance in this case, given this conflict, these actors, and this institution?

This conclusion about the limitations of a focus on obedience is consistent with other theoretical insights about the influence of law on behaviour. IR scholars recognize that obedience is too much to expect of states and other actors, as well as hard to observe or measure.<sup>204</sup> Institutional scholars, for their part, do not regard obedience or internalization as essential to effective regimes. And the literature on socialization identifies distinct processes of social influence aimed at conformity (b) and compliance (c).<sup>205</sup> In the domestic context, Raz has pointed out that the best law can really expect of individuals is compliance in the sense used by Koh (though Raz uses the term conformity for the same idea).<sup>206</sup>

<sup>201</sup> Koh, 'Why Do Nations Obey International Law?', 106 *Yale LJ* (1997) 2599, at 2600–2601, n.3. Koh relies on Kelman's 'Compliance, Identification, and Internalization: Three Processes of Attitude Change', 2 *J Conflict Res* (1958) 51, although Kelman defined his terms somewhat differently.

<sup>202</sup> See Hart, *supra* note 95, at 112–114 (adopting the latter understanding, as obedience by a judge requires only internal acceptance of the rule of recognition).

<sup>203</sup> See, e.g., Koh, *supra* note 201, at 2645.

<sup>204</sup> I appreciate the latter point from Kal Raustiala.

<sup>205</sup> See Johnston, *supra* note 153, at 499 (identifying these other processes as 'social influence'). My use of the term compliance includes Koh's conformity.

<sup>206</sup> J. Raz, *Practical Reasons and Norms* (1990), at 178–182; see also *ibid.*, at 72–73 (on reasons for following rules).

Indeed, as the ICRC demonstrates, even institutions that place a priority on – indeed, that make one of their defining missions – the implementation of specific bodies of international law are prepared to forego obedience for compliance. For them, avoidance of law talk can be just another means to that end. If a state or armed group observes the rules because it has become convinced of the advantages of observance, rather than accepted the rule in its heart, the ICRC is prepared to call its work a success. Moreover, even those groups that adopt a wholly different *modus operandi* on legal argumentation, such as large international human rights NGOs with their public, detailed, direct, and confrontational approach, seem prepared, at least based on my interactions with them, to settle for compliance. Unlike the ICRC, they believe that such law talk is necessary or the best path to compliance, as well as central to their identity – but they, too, do not insist on obedience.

For lawyers, a persuasive process oriented toward compliance might represent a poor substitute for the *rule* of law. From the perspective of improving the behaviour of relevant actors, internal acceptance of the rule, either its substance or its bindingness, should remain the long-term goal. The ICRC itself recognizes this aim through its work on implementation of law, in particular the emphasis on the need for armed forces and groups to develop codes of conduct with sanctions that will bind both current and future warriors.<sup>207</sup> With internalization, entities seeking respect for rules can divert resources elsewhere rather than repeatedly engage with the same targets. In addition, for standards the customary international law status of which is questioned, obedience, in the sense of acceptance of the rule because it is law, adds that magical ingredient – *opinio juris* – that turns practice into custom.<sup>208</sup> Even consistent compliance does not achieve this end.

Yet in the end international lawyers should not object to compliance compared with obedience. In the case of IHL, given the obstacles to internalization during armed conflict, the gravity of the violations and thus the urgency of terminating them, and the actors with whom ICRC delegates interact – not typically lawyers in foreign ministries or legislatures – compliance sounds hard enough. We thus return to the reconciliation of the ICRC's roles as humanitarian protector and guardian of IHL. By seeking compliance rather than obedience, it can resolve its internal dilemma between its guardian role and its humanitarian role, though not in the rather simplistic way suggested in its official doctrine.<sup>209</sup> Rather, the institution interprets its role as guardian of international humanitarian law as one in which it seeks to address the behaviour of actors, and not their words or internal thoughts. Beyond the ICRC, Raz's insight regarding the realistic goals of a legal system seems even more compelling at the international level; and sophisticated international actors comprehend that their goal of furthering law compliance can be undercut if they make the target's legal obligations too prominent during the persuasion process. Legal scholars obsessed with the ideal of internalization are missing the true picture of advocacy in the international arena,

<sup>207</sup> See, e.g., *Increasing Respect*, *supra* note 101, at 22–23; interview with ICRC official P.

<sup>208</sup> See, e.g., *North Sea Continental Shelf Cases (Ger/Den & Neth)* [1969] ICJ Rep 3, at para. 77 (3 Feb.).

<sup>209</sup> See ICRC Mission Statement, *supra* note 3.

where actors concerned with norms argue – and settle – for action merely in conformity with them.

## 5 Beyond Compliance

The reconciliation of the ICRC's two roles may not, however, work out as discussed above. At times humanitarian protection may actually undermine IHL. One example is a decision by the ICRC not to press a state or rebel group into following the rules because it needs that state's or group's permission for access to victims to provide them with food or medicine. Another takes place when the ICRC accepts the body of an executed hostage to return to his family from a group (such as the FARC in Colombia) that refuses to accept the impermissibility of hostage-taking.<sup>210</sup> A third is when the ICRC interacts with the Israeli military to enable Palestinians on one side of the West Bank barrier to gain access to their lands on the other side despite the ICRC's view that parts of the barrier are illegal.<sup>211</sup>

This dilemma is part of a larger problem where global actors are caught between a legal duty, responsibility, or desire to promote compliance with legal norms and other important values. Another example, outside the IHL context, is the challenge to the United Nations and its members from humanitarian intervention not authorized by UN organs. Here the Charter-based duty to prevent aggression<sup>212</sup> runs up against the moral imperative of saving the lives of a population tormented by its government – a dilemma eloquently stated by former Secretary-General Kofi Annan.<sup>213</sup> This conflict can also arise where the value competing with the legal norm that the actor wishes to enforce is itself also expressed in a legal norm. It thus extends to decision-making within the World Trade Organization on the balance between a treaty-based mandate to promote global trade and the values – and norms – of environmental protection and human rights.<sup>214</sup> And it arises every time a government must choose whether to try to persuade a state (like China) to protect human rights when such a push might undercut its cooperation on equally significant issues (like the situation on the Korean peninsula or climate change). These institutional choices raise two critical questions for those following the compliance process.

<sup>210</sup> Interviews with ICRC official U and delegate A. In addition, the ICRC has used different arguments with the FARC concerning the need to release military vs. civilian hostages.

<sup>211</sup> See *ICRC Annual Report 2009*, *supra* note 24, at 367. The ICRC has debated internally whether it should play any role in facilitating the transfer of detainees from Guantanamo, in particular regarding issues of non-refoulement.

<sup>212</sup> UN Charter, Art. 1.

<sup>213</sup> Annan, Secretary-General's Address to the General Assembly, 20 Sept. 2009, UN Doc. SG/SM/7136, GA 9596.

<sup>214</sup> See generally J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003).

### *A Why Push Compliance?: The Descriptive Question*

First, we need to understand better the processes by which global actors make choices between pressing for norm compliance and advancing other values when those goals do not meet. To date, international law has addressed these decisions narrowly through the lens of so-called fragmentation of international law, i.e., the perceived threat to the coherence and unity of international law from the proliferation of norms and tribunals.<sup>215</sup> Thus, multiple decision-making bodies may be opining on the same norm or norms; and each must decide the weight to give to the norms it was established to interpret and uphold compared to norms in other fields. Institutions and scholars are developing strategies to aid in these decisions, some seeking to overcome apparent tensions across norms and institutions and others embracing them.<sup>216</sup>

Yet the choice to promote or ignore law compliance when other values are at stake demands more than guidance to international tribunals. The problems of humanitarian intervention or trade and the environment raise more fundamental concerns about the necessity of compliance. Yet approaches to compliance have excluded from their purview the extent to which institutions in fact balance the promotion of legal compliance with the need to advance certain internationally accepted values. They ask why states (but only states) comply and, based on those reasons, they offer ideas to diplomats for treaty design or to institutions for enforcement strategies.<sup>217</sup> But they forget about situations where the institution might choose not to promote the norm. Many international lawyers have a ready answer for these cases, at least where only one of the values is expressed in terms of a legal duty on particular targets (such as the duty on states not to use force) or a legal duty on the institution itself (such as the duty to prevent aggression). They would say that compliance with the legal duty – the target's or the institution's – is the optimal value. But the world and its institutions do not work according to these lofty prescriptions.

We thus need to develop a framework to explain how global institutions currently undertake this decision-making. In the case of unauthorized humanitarian intervention, the UN's members have tried to overcome the dilemma through the Responsibility to Protect, which urges states to protect their own populations and reminds the Security Council of its responsibilities, thereby hoping that the problem of unapproved intervention will simply not arise.<sup>218</sup> This coping strategy between law compliance (Article 2(4)) and other values (promoting human dignity) needs to be mapped out along with other strategies. Those seeking to understand compliance must move beyond the question of why actors comply with rules to ask why entities promote the rules – or at times refrain from doing so.

<sup>215</sup> See, e.g., International Law Commission, 'Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, finalized by M. Koskenniemi, 13 Apr. 2006, at para. 15, UN Doc. A/CN.4/L.682.

<sup>216</sup> Compare Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003) (calling for cross-regime harmonization) with Ratner, 'Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law', 102 *AJIL* (2008) 475 (accepting diversity across institutions).

<sup>217</sup> See, e.g., Raustiala, 'Form and Substance in International Agreements', 99 *AJIL* (2005) 581.

<sup>218</sup> 2005 World Summit Outcome, *supra* note 31.



## B Why Push Compliance? The Normative Question

A much harder inquiry lurks right behind the descriptive question, namely to what extent institutions *should* sacrifice promotion of law observance for other values. In the ICRC, this fundamental ethical issue gnaws at delegates who must decide among the institution's competing objectives and do not delude themselves into thinking they can always be reconciled.

That question moves beyond law and international relations theory to the domain of philosophy, moral and political. Ethics starts with fewer normative assumptions than international law about the desirability of compliance and with less concern than international relations about the possibilities of achieving it. Although much of international law can be defended from an ethical point of view,<sup>219</sup> ethics contemplates the ways in which respect for law can conflict with other values. Some philosophers respond to any tensions by rejecting some parts of international law as unjust;<sup>220</sup> a handful of others actually contemplate the processes by which institutions might balance their duties to the law with their duties to justice.<sup>221</sup> It may be somewhat unfair to ask legal theory, with its axiomatic attachment to law compliance and obedience, for a theory of the justice of legal compliance. But we must recognize when law compliance is the wrong goal. Some norms can and must be ignored in individual circumstances – a reality recognized even in international law<sup>222</sup> – while others need to be replaced entirely.

For the Red Cross and other actors, the great normative compliance question is essentially one of dirty hands.<sup>223</sup> Michael Walzer once defined the problem as arising when a governmental act 'may be exactly the right thing to do in utilitarian terms and yet leave the man who does it guilty of a moral wrong'.<sup>224</sup> While the ICRC is not a government or a person, and is not itself abusing individuals, the parallels are apparent. We can thus inquire whether, when the ICRC acts on its humanitarian imperative to save as many lives as possible through access to victims – the utilitarian course – it creates a moral wrong if, for example, it then refuses to address an episode of torture – an act clearly illegal under IHL – of which it is aware. The same question arises for states deciding whether to promote human rights by raising Chinese violations with that government. These scenarios are part of a large debate in philosophy regarding the

<sup>219</sup> For attempts see Hurrell, 'International Law and the Making and Unmaking of Boundaries', in A. Buchanan and M. Moore (eds), *States, Nations, and Borders: The Ethics of Making Boundaries* (2003), at 275, 277–278; Ratner, 'Is International Law Impartial?', 11 *Legal Theory* (2005) 39.

<sup>220</sup> See, e.g., Barry, 'Statism and Nationalism: A Cosmopolitan Critique', in *Global Justice* (Nomos XLI, 1999) 12; Pogge, 'Recognized and Violated by International Law: The Human Rights of the Global Poor', 18 *Leiden J Int'l L* (2005) 717.

<sup>221</sup> See generally A. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (2004).

<sup>222</sup> See International Law Commission, Draft Articles on Responsibility of States, Art. 25 (defence of necessity).

<sup>223</sup> I appreciate this point from Don Herzog.

<sup>224</sup> Walzer, 'Political Action: The Problem of Dirty Hands', in Cohen *et al.* (eds), *supra* note 193, at 62, 63.

basis for and scope of moral responsibilities of international institutions.<sup>225</sup> Though this article is not the place for a detailed response, I would hazard to take a few tentative steps forward.

First, the fact that the ICRC is not itself torturing when it ignores the torture victim does not allow us to resolve the dilemma easily. From a utilitarian perspective, if the ICRC devotes attention to the torture victim, this may lead to an improvement in his welfare, so one must at least take into account his resultant increased utility. Moreover, the ICRC might also have (a) a deontologically grounded moral duty to promote IHL rules, or (b) a deontologically grounded moral duty not to ignore the known torture victim. I do not think the ICRC has the first such moral duty, even if it has a legal duty under its constitutive instruments,<sup>226</sup> but certainly the second moral duty seems quite reasonable. It involves a duty to protect the vulnerable, wherever located.<sup>227</sup>

Secondly, even assuming that the ICRC has such a moral duty to the torture victim, it also has such duties to many others in need, notably civilians suffering from armed conflict, including those to whom the torturing government controls access. It is difficult to claim that its duty to the starving internally displaced person – one that stems from its founding documents<sup>228</sup> – is less important than its duty to the known torture victim, although that case could be made on the gravity of the harm or perhaps the ICRC's clear knowledge of the fate of this one victim. Given the likelihood that it will be able to help more people if it gets access by not pressing the case of the torture victim (and, added to that, the possibility that advocacy on his behalf may not aid him in the end), a utilitarian logic of asking how it can do the most good for the most people, even if the torture victim languishes unaided, seems justified.<sup>229</sup> The ICRC's choice seems more akin to triage at a hospital – or, perhaps, bribing the electricity company to keep the hospital open during a power outage – than some invidious preference for the ends over the means.<sup>230</sup>

Thus, although institutions which see themselves as protecting the welfare of multiple constituencies should be aware of who suffers from their choices regarding allocation of resources, I am not convinced that it is immoral for them to make those choices or that they have committed a moral wrong toward those who do not benefit from their choice. Indeed, when the ICRC publicly denounces a violation of IHL, it does

<sup>225</sup> For a review of different principles of allocating such responsibilities see Barry, 'Global Justice: Aims, Arrangements, and Responsibilities', in T. Erskine (ed.), *Can Institutions Have Responsibilities?* (2003), at 218. See generally O'Neill, 'Who Can Endeavour Peace?', in D. Copp (ed.) *Nuclear Weapons, Deterrence, and Disarmament* (1986), at 41, 61–67 (capacity of institutions to reflect ethically).

<sup>226</sup> See Statutes of the Movement, *supra* note 15, arts. 5(2)(c), 5(2)(g).

<sup>227</sup> See, e.g., R.E. Goodin, *Protecting the Vulnerable* (1985). Cf. Nagel, 'The Problem of Global Justice', 33 *Philosophy & Public Affairs* (2005) 113, at 118–119 (accepting such duties, but not as duties of justice).

<sup>228</sup> See *supra* notes 23–24 and accompanying text. As two senior ICRC officials put it, the ICRC's unique mandate (compared to those of NGOs) places a 'huge responsibility' and a 'moral responsibility' on it if it fails to aid victims: interviews with ICRC officials Q and O.

<sup>229</sup> See Miller, 'Distributing Responsibilities', 9 *J Political Philosophy* (2001) 453, at 461–462, 468 (capacity to improve welfare as a basis for assigning responsibilities).

<sup>230</sup> Indeed, the possibility that other NGOs might act on more deontological grounds by condemning all abuses may ease the moral dilemma for the ICRC. I appreciate this insight from Antony Duff.

so in part as a statement of principle – out of a sense of duty to uphold the norm that is violated – but fundamentally because it believes, based on utilitarian thinking, that such action will ultimately protect victims more than will a confidential approach.

Thirdly, if the ICRC, acting on a utilitarian calculation, refuses to defend IHL in the face of known torture, it comes at a cost not merely for the torture victim, but for the institution itself. If, at a certain point, an entity whose mission includes promotion of a body of law consistently places that goal second to another value – one we clearly accept as superior (in this case, providing relief to many war victims) – that entity no longer stands for promotion of that body of law, and that body of law suffers. The institution's identity also changes as a result. In the case of the ICRC, if it consistently chooses a particular set of victims over another, or always acts in a utilitarian way, the targets of its action will know what they can get away with, and that the ICRC no longer stands for certain principles.

Fourthly, and nevertheless, in some cases, a decision not to promote a norm can be desirable for public order and human rights in the long run. Certain norms should die from desuetude, whether only from lack of compliance by those to whom they apply or from lack of advocacy by those charged with promoting compliance (though the ban on torture is not among them). Thus, even if I am wrong in endorsing a utilitarian calculation, and even if the institution that makes such choices can have dirty hands when it does so, the choice to forbear from promoting compliance cannot create dirty hands in every instance.

## 6 Conclusion

The *modus operandi* of the International Committee of the Red Cross presents international lawyers with a new data set and ultimately a novel constellation of considerations for evaluating the ways international actors persuade others to follow international rules, in particular the role of legal argumentation in that process. It offers a compelling counter-narrative to international law's emphasis on inducing compliance through identification of violations via detailed interpretation of rules, followed by procedures for correction of them – whether through pronouncements of states and international organizations, naming and shaming by NGOs, or formal rulings by international tribunals. Instead, depending upon the actors involved, the nature of their dispute, and the entity seeking to persuade them to comply, an alternative set of processes may promote law compliance. This dynamic is characterized by a range of publicity, thickness, directness, and tone, including secret, ambiguous, law-avoiding, and non-confrontational methods. We discover yet a further dimension to Richard Baxter's observance of the 'infinite variety' of international law.<sup>231</sup> It may not seek the sort of law observance linked with internalization of norms and a narrow notion of the rule of law; but it offers other avenues for success, in particular given the hurdles to internalization during wars or emergencies. It also shapes the identity of the actors promoting persuasion.

<sup>231</sup> Baxter, 'International Law in "Her Infinite Variety"', 29 *Int'l & Comp LQ* (1980) 551.

Nonetheless, persuading to comply with the law is not always the best course of action for law-interested institutions. Those actors live in a world of constant dilemmas, including dirty hands, and the promotion of law above all can prove destructive of both public order and human dignity.<sup>232</sup> Those actors neither will nor should choose to enforce legal duties consistently, even when they themselves have a legal duty to do so. International lawyers are part of the decision-making process of institutions facing such choices. They and others deploying the strategies of compliance must, in the end, be willing to engage with its ethics too.

<sup>232</sup> See Annan, *supra* note 213 (asking whether deployment of non-Security Council-authorized force to save Rwandans in 1994 would have been morally justifiable).