

# Operationalizing International Humanitarian Law: A Decision-Making Process Model for Assessing State Practice

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## Abstract

A methodological challenge confronting scholars of international law (IL) and international relations (IR) is operationalizing customary international law and state practice. This challenge is compounded when the subject has given rise to extensive and diverse primary source material, as is the case with international humanitarian law (IHL). This article develops a comprehensive research model that examines state practice of IHL as a decision-making process and employs diverse primary source material involving multiple levels and types of government agencies, officials, military practitioners and non-state actors. One of the advantages of the process perspective is that it helps to organize the large body of IHL primary source material that often goes overlooked and underutilized. This paper offers an alternative to prevailing methodologies and advances an approach that is both exploratory and structured. This 'foundational' perspective, I argue, can potentially serve as a bridge between the two disciplines and may provide the raw material for interdisciplinary dialogue and theory development. Finally, this article introduces the argument that both disciplines would benefit from including a historical perspective when writing on this controversial and emotive subject.

**Keywords:** customary international law, international humanitarian law, legal process, international relations, state practice

## 1. Introduction & Clarifying Terms

The subject of international humanitarian law (IHL) contains multiple opportunities for accessing and gathering historical and contemporary examples of primary source material. However, a review of the literature reveals the absence of a consistent and coherent model for examining this material. Specifically, the subject of state practice is under-operationalized for research purposes. The aim of this paper is to provide a common methodological framework for researching and disseminating primary source material relating to IHL. Two salient shortcomings in the literature influenced this paper's development. First, the literature contains an overemphasis on treaty rule analysis, often failing to include examples of state practice. Second, a portion of the literature is advocacy driven, often ignoring examples of negative state practice. The decision-making process model advanced in this paper addresses these limitations and provides an inclusive framework for assessing IHL.

This article emerged from the author's experience researching historical and contemporary U.S. practice with IHL, specifically issues surrounding enforcement, reciprocity and reprisals. It has also, however, been informed by conflicting theories and disciplinary debates between scholars of International Law (IL) and International Relations (IR). In particular, the author has considered the interdisciplinary imbalance that places an emphasis on IR theory, often leaving IL methodology perspectives and theories underutilized. Jeffrey Dunoff and Mark Pollack's recent collection, *Interdisciplinary Perspectives on International Law and International Relations*<sup>1</sup>, is the most extensive work to date which addresses the empirical and theoretical interaction between IL and IR. The authors conclude that a majority of the interdisciplinary work has involved the application of IR as a "discipline to IL as a subject."<sup>2</sup> In turn, the authors recommend that IR scholars make greater use of law-making process approaches that take into consideration the dynamics of customary international law. Applying this

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<sup>1</sup> J. Dunoff & M. Pollack (Eds.). (2013). *Interdisciplinary Perspectives on International Law*. New York: Cambridge University Press.

<sup>2</sup> *Ibid* p. 649, emphasis in original.

recommendation to international humanitarian law (a subject of shared interest between both disciplines), this paper seeks to foster discussion and to maximize the collection and organization of the large volume of primary source material that often goes underutilized.

Three terms are often used to describe the constraints and acceptable practices exhibited during times of war: law (s) of war, law (s) of armed conflict, and international humanitarian law. For consistency, international humanitarian law (IHL) is used throughout this paper to describe the body of rules and customs that regulate behavior during times of armed conflict. IHL is comprised of three broad categories: rules concerning weapons, rules concerning warfare (including rules pertaining to permissible tactics and targeting), and humanitarian rules governing the treatment of victims of conflict.<sup>3</sup> Furthermore, IHL is divided into two types: conventional treaty law (often referred to as positive law) and customary law. Conventional treaty law consists of codified rules found in multinational treaties.

A significant portion of the academic literature on IHL examines the subject from a treaty rule-based perspective. This is not surprising considering that treaties are the end product of an often extensive and well-publicized multinational diplomatic negotiation process. However, problems arise when IHL analysis is limited solely to treaty rules and fails to consider examples of state practice. When analysis is restricted to treaty rules an incomplete and potentially misleading view results. The danger associated with such limited analysis is well articulated by Adams Roberts and Richard Guelff who conclude that “any work concerning the laws of war which is limited to international agreements risks distorting not only the form but also the substance of the law.”<sup>4</sup>

Customary international law (CIL), on the other hand, is non-codified, often consisting of emerging trends based on state behavior. As defined by the U.S. government, CIL is the “general and consistent practice of states which is followed by them from a sense of legal obligation [*opinio juris*].”<sup>5</sup> From a conceptual and research perspective there is considerable vagueness and overlap in the source material comprising state practice and *opinio juris*. In addition, there exists “ongoing debate among scholars and jurists on how to weigh the importance of state practice and *opinio juris*.”<sup>6</sup> Conceptual and evidentiary difficulty particularly lies in attempts to determine *opinio juris*, the “psychological” element of CIL.<sup>7</sup> Arguably, when considering state practice, as opposed to *opinio juris*, there is greater evidentiary clarity due to the availability of documented primary source material. In turn, there is less need to make interpretive decisions concerning intent. Finally, the largest study to date on customary IHL (discussed in greater detail below) found that separating state practice from *opinio juris* to be difficult and largely theoretical.<sup>8</sup>

It is outside the scope of the present work to evaluate the conceptual differences between the two elements that comprise CIL. Furthermore, this paper does not advance arguments concerning the customary status of specific IHL rules. Instead, the present focus is on creating a methodology model that can aid in researching and organizing primary source material that potentially relates to both state practice and *opinio juris*. From a research perspective, CIL is conceptually vague, complex, and, because of its dynamic nature, in need of constant updating of source material. Thus, the challenge facing the scholar researching IHL is to operationalize the subject into a more clear, delineable and observable phenomenon. To address this challenge, an expansive view, or what Michael Byers refers to as the ‘inclusive approach’, to state practice is adopted.<sup>9</sup>

## 2. Sources of Customary International Humanitarian Law: The ICRC Study

In 2005 The ICRC published the report, *Customary International Humanitarian Law* (henceforth The ICRC

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<sup>3</sup> Delupis, I.D. (2000). *The Law of War*. New York: Cambridge University Press.

<sup>4</sup> Roberts, A. & Guelff, R. (2000). *Documents on the Laws of War*. New York: Oxford University Press. p. 7.

<sup>5</sup> *Restatement (Third) of Foreign Relations Law of the United States* (1987) § 102 (2).

<sup>6</sup> Price, R. (2004). Emerging customary norm and anti-personnel landmines. In C. Rues-Smit, (Ed.), *The Politics of International Law*, New York: Cambridge University Press. pp. 106-130.

<sup>7</sup> Goldsmith, J. L. & Posner, E. A. (1999). A theory of customary international law. *The University of Chicago Law Review*, 66, pp. 1113-1177.

<sup>8</sup> Henckaerts, J.M. & Doswald-Beck, L. (2005). *Customary International Humanitarian Law*. New York: Cambridge University Press, p. xlv.

<sup>9</sup> Byers, M. (1999). *Custom, Power and the Power of Rules: International Relations and Customary International Law*. New York: Cambridge University Press.

Study).<sup>10</sup> At over 5,000 pages, The ICRC Study is unprecedented in both size and scope. The central part of the work, Volume 1, contains 161 proposed rules that cover the full range of IHL. Volume II provides the background material for each rule contained in Volume 1. Though an important addition to the literature, The ICRC Study has been criticized on a number of grounds including: (1) failure to consider negative state practice,<sup>11</sup> (2) lack of historical context and advocacy bias that ignores contradictory examples,<sup>12</sup> (3) non-transparency in selection of state practice and (4) the failure to acknowledge the U.S. as a persistent objector to Additional Protocol I to the 1949 Geneva Convention.<sup>13</sup> Many of the authors who offer these critiques, however, accept that the methodology employed by the ICRC to assess state practice is, in fact, sound. According to The ICRC Study, state practice consists of both physical and verbal acts. Physical acts include battlefield behavior, use of certain weapons, and treatment of individuals.<sup>14</sup> Verbal acts, on the other hand, are more extensive and include military manuals, national legislation, diplomatic protests, and opinions of official legal advisors.<sup>15</sup>

For the purpose of this paper, the most important critique of The ICRC Study is that it failed to employ, in an objective and systematic manner, the methodology that it endorsed. The influence of The ICRC Study on the present work is fittingly summarized by George H. Aldrich: “I believe it is a very important study, but I think its importance rests on its being used as a basis for further work and as a spur to such works, rather than on its conclusions.”<sup>16</sup> With this in mind, the sources of state practice utilized in the research model below is borrowed heavily from The ICRC Study with additions from Ian Brownlie’s *Principles of Public International Law*<sup>17</sup> and the author’s research on IHL. Together, these sources comprise the raw material of state practice and are listed in Table 1.

Table 1. Sources of Customary International Humanitarian Law

Policy statements	Opinions of official legal advisers
Executive decisions	Official protests
Treaty reservations	Threatened use of weapons
Statements of treaty interpretation	Military communiqués during conflict
<i>travaux préparatoires</i>	Rules of engagement
Legislative hearings	Memoires
Military manuals	Diplomatic correspondence
Instructions to armed forces	National case law and legislation
Confirmed battlefield violations	

As is evident, such an extensive amount of source material is challenging to collect and organize. Furthermore, the way in which primary source material is organized implies and gives meaning to how IHL develops and is interpreted. By solely examining the end product (codified treaty rules) one fails to address the underlying dynamics that shape and influence the practice of IHL. Whereas the ICRC study simply lists material considered

<sup>10</sup> Henckaerts & Doswalk-Beck, *supra* note 8.

<sup>11</sup> See, e.g. (2006, November 3). Joint letter from John Bellinger III, Legal Adviser, U.S. Department of State, and William J. Haynes, General Counsel, U.S. Department of Defense to Dr. Jakob Kellenberger, President, International Committee of the Red Cross, Regarding Customary International Law Study. [http://www.icrc.org/eng/assets/files/other/irrc\\_866\\_bellinger.pdf](http://www.icrc.org/eng/assets/files/other/irrc_866_bellinger.pdf)

<sup>12</sup> Parks. W.H. (2005). The ICRC customary law study: a preliminary assessment. *Proceedings of the American Society of International Law*, p. 208.

<sup>13</sup> Scoobie. I. (2007). The approach to customary international law in the study. In E. Wilmschurst & S. Breau (Eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (pp. 15 – 49). New York: Cambridge University Press.

<sup>14</sup> Henckaerts & Doswalk-Beck, *supra* note 8, p. xxxviii.

<sup>15</sup> *Ibid.*, p. xxxviii – xlii.

<sup>16</sup> Aldrich, G. (2005). Customary international humanitarian law. *The British Yearbook of International Law*, 76, pp. 525-32.

<sup>17</sup> Brownlie, I. (1990). *Principles of Public International Law*. New York: Oxford University Press.

to reflect state practice, this paper advances a more nuanced model that permits source material delineation and organization. The model developed below considers IHL as a dynamic decision-making process that includes the creation, dissemination and application of source material.

### 3. International Humanitarian Law as a Decision-Making Process

The decision-making process model of state practice is conceptually influenced by the International Law as Process (ILP) approach to international law, which was, in turn, influenced by the policy-oriented approach developed by Myers McDougal & Harold Lasswell (commonly referred to as the New Haven School of International Law)<sup>18</sup>. The ILP perspective rejects the view that international law consists solely of neutral ‘rules’ that exist to be “impartially applied”.<sup>19</sup> In contrast, according to ILP, international law operates in a dynamic manner that permits development and change. Furthermore, the process approach assumes that multiple actors and stakeholders, including both state and non-state actors, influence decision-making. For example, state-affiliated decision-makers can fall within a conceptual hierarchy that includes political and military leaders, legislators, diplomats, legal experts, military practitioners and soldiers. Non-state decision-making influence, on the other hand, is predominately found in the special status and role of the ICRC, a unique, hybrid NGO that substantially influences IHL by arranging conferences, drafting treaty provisions, and applying pressure on governments to apply and adhere to IHL.<sup>20</sup>

The model below focuses primarily on U.S. state practice post-World War II. The U.S. is an excellent case study for several reasons. First, primary source material is readily available through considerable holdings at national and presidential archives and is often updated through declassification policy. Second, it has actively participated in IHL treaty-making resulting in detailed records. Third, the U.S. has established an extensive military training regime that is regularly updated. Finally, the U.S. has had to address questions regarding the application of and adherence to IHL as it has regularly engaged in numerous armed conflicts. The decision-making process model that follows allows for the organization and dissemination of source material and permits multiple interpretations. Though divided into four categories, source material may overlap into more than one category depending on interpretive choices.

#### 3.1 Law Creation

##### 3.1.1 Records of the Treaty Conference (*Travaux Préparatoires*)

The official records of a treaty conference (*travaux préparatoires*) serve as an important resource regarding individual nations’ positions as they developed throughout the negotiation process. Often referred to as the “Final Report”, the conference negotiation history is often extensive. For example, the *travaux préparatoires* for the 1949 Geneva Conventions are over 2000 pages in length<sup>21</sup> while the negotiation history for the 1977 Additional Protocols (I & II) to the 1949 Geneva Conventions extend over 8000 pages in 17 Volumes.<sup>22</sup> In addition to official *travaux préparatoires*, reports and minutes of meetings between government experts and diplomats negotiating IHL questions are useful tools for capturing state practice. Primary source material at the treaty stage is readily accessible and features prominently in the IHL literature.<sup>23</sup>

##### 3.1.2 Diplomatic Correspondence

During treaty conferences where IHL is established, extensive official communications take place between diplomats and their respective nations, between state coalitions, and between states and the ICRC. Oftentimes, these take the form of classified cables and communiqués. These documents help reveal how an individual state negotiates, makes concessions, and establishes unified positions on and interpretations of IHL. Locating these official papers involves the use of archives and/or document declassification. For example, in the U.S., the

<sup>18</sup> Lasswell, H. & McDougal, M. (1992). *Jurisprudence for a Free Society: Studies in Law, Science and Policy*. New Haven, CT: New Haven Press.

<sup>19</sup> Higgins, R. (1994) *Problems and Process: International Law and How We Use It*. New York: Oxford University Press. p. 2.

<sup>20</sup> Finnemore, M. & Sikkink, K. (1998). International norm dynamics and political change. *International Organization*. 52, pp. 887-91.

<sup>21</sup> *Final Record of the Diplomatic Conference of Geneva of 1949*, Geneva (1949).

<sup>22</sup> *Official records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-1977).

<sup>23</sup> The US Library of Congress facilitates an on-line web page dedicated to military legal resources that include, among other items, negotiating history, drafts and the Conference of Government Experts relating to the Geneva Conventions. See: [http://www.loc.gov/tr/frd/Military\\_Law/Geneva-Conventions\\_materials.html](http://www.loc.gov/tr/frd/Military_Law/Geneva-Conventions_materials.html)

National Archive and Records Administration (NARA) holds in its collection 100's of State Department diplomatic cables containing proposed rule revisions, individual state positions, and voting records from the diplomatic conferences (1974 – 1977) that culminated in the 1977 Additional Protocol to the 1949 Geneva Convention.<sup>24</sup> In England, the National Archives (Kew) contain similar communiques from the Foreign and Commonwealth Office (FCO) and the Ministry of Defence (MOD) which highlight negotiation positions and draft provisions, including NATO consultation on specific IHL rules.<sup>25</sup>

### 3.1.3 Domestic Executive-Level Agency Decision-Making

In the U.S., inter/intra domestic federal agencies actively engage in IHL decision-making. This decision-making process can be seen in memoranda, reports, and position papers that argue and interpret the legal, policy, and military implications of treaty rules under negotiation. These documents provide a wealth of information and reveal how individual agencies (e.g. Department of State, Department of Defense and National Security Council) interpret draft rules provided by the ICRC. Locating source material at this stage involves consulting archival finding aids. In the U.S., NARA utilizes numbered record groups based on document provenance.<sup>26</sup> For example, State Department documents relating to ICRC draft rules can be found in NARA Record Group (RG) 43: International Conferences, Commissions, and Expositions, RG 59: General Records of the Department of State, RG 353: Interdepartmental and Intradepartmental Committees, and RG 383 U.S. Arms Control and Disarmament Agency. Department of Defense and military RG location is even more complex and requires an examination of at least 15 different document locators at NARA. Furthermore, this does not include national security related documents which are located at individual presidential archives.

### 3.1.4 Post-Conference Publications

Although this research model emphasizes primary source material created at the time of the event, incorporating post-conference publications written by participants helps to fill lacuna in the historical record. Scholarly articles, reports, and memoirs provide useful information, especially in cases where individual committee minutes are unavailable. The ICRC's strict confidentiality policy (only ICRC general archives prior to 1965 are open to researchers) often necessitates the use of secondary source material to clarify individual state positions. For example, Frits Kalshoven, who acted as Rapporteur for a number of committees that addressed the controversial issue of reprisals during the 1974-1977 Diplomatic Conferences, published a series of articles that provide a rare picture of the behind-the-scenes workings of the ICRC conferences.<sup>27</sup> Furthermore, U.S. Delegates George Aldrich and Richard R. Baxter subsequently published articles relating their experiences at the diplomatic conference that provide valuable insight into the position of the U.S. and other delegations.<sup>28</sup>

## 3.2 Ratification

### 3.2.1 Domestic Executive-Level Decision-Making

A corollary to treaty creation, post-signing treaty ratification decisions involve inter-agency and executive-level decision-making. In the U.S., this often includes legal opinions submitted by the Department of State, Department of Defense, and the Joint Chiefs of Staff (among other executive-level agencies and groups). Analysis of these records often reveals inter-agency tensions over IHL treaties and specific treaty rule interpretation. In addition to the aforementioned NARA document locators, the archives at presidential libraries contain documents that reveal national security and executive-level decision-making. For example, the decision by the Reagan Administration to not submit Additional Protocol I for ratification was preceded by numerous

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<sup>24</sup> Many of these documents are available online and can be located through the NARA Access to Archival Databases (AAD): <http://aad.archives.gov/aad/>

<sup>25</sup> Though these documents are not available online they can be located through the National Archive catalog and are available for viewing at the National Archives, Kew: <http://discovery.nationalarchives.gov.uk/SearchUI>

<sup>26</sup> See: <http://www.archives.gov/research/guide-fed-records/index-numeric/concept.html>

<sup>27</sup> Kalshoven, F. (1977). Reprisals in the CDDG. In R. J. Akkerman, P.J. van Krieken, C. O. Pannenberg & BVA Röling (Eds.), *Declarations of Principles - A Quest for Universal Peace* (pp. 195 – 216). Leiden, Netherlands: Nijhoff Publishing; Kalshoven, F. (2007). *Reflections on the Laws of War: Collected Essays*. Leiden, Netherlands: Nijhoff Publishing.

<sup>28</sup> Aldrich, G. (1991). Prospects for United States ratification of Additional Protocol I to The 1949 Geneva Conventions. *The American Journal of International Law*, 85, pp. 1-20; Baxter, R. R. (1977). Humanitarian law or humanitarian politics? The 1974 Diplomatic Conference on Humanitarian Law. *Harvard International Law Journal*, 78, pp. 1-26.

inter-agency and White House staff reports and memoranda.<sup>29</sup> In England, similar interagency decision-making and debate between FCO and MOD accompanied the decision to add a treaty reservation to the 1977 Additional Protocols on the subject of reprisals.

### 3.2.2 Legislative Decision-Making

In the U.S., legislative decision-making relating to IHL treaties often includes special sessions, hearings, and reports from Congressional working groups including the House Committee on Foreign Affairs/Armed Services, the Senate Committee on Foreign Relations, and other legislative groups and hearings. Reports from these meetings can help clarify official government position and may reveal, among other things, differences between political party affiliates. At the ratification stage treaty reservations or interpretative statements may also be discussed and approved. Many of these documents are available on-line and through the Library of Congress Online Catalog.

### 3.3 Dissemination

Dissemination involves incorporating IHL rules into military doctrine and includes the related concepts of implementation, promulgation and training. State practice is reflected in the numerous field manuals, pamphlets, regulations, training circulars, and training films that are produced by governments to train their military. Reisman and Leitzau refer to the dissemination of IHL as “an essential component in the international lawmaking process,” and, “a necessary step if law is to be transformed from an exercise in theory to a matter of practice.”<sup>30</sup> Furthermore, dissemination is clearly required by the 1949 Geneva Conventions.<sup>31</sup> To date, the most extensive comparative analysis of military training is The ICRC Study.<sup>32</sup> As primary source material indicating state practice, training materials are important because they are able to capture and illustrate changes in training emphasis over time.

### 3.4 Application & Adherence

#### 3.4.1 Application

The application of IHL to armed conflict can be viewed from different perspectives. The initial application often involves executive-level decisions and the formal announcement that a specific treaty or treaty rule is applicable. This can be triggered by the acknowledgment that the conflict has become international in scope or through the official recognition of a belligerent.<sup>33</sup> Source material can take the form of official policy pronouncements (and protests) or documentation of behind-the-scenes decision-making including legal memoranda and reports addressing the overall legal status of the conflict, the status of combatants and prisoners, or the use (or threatened use) of specific weapons.

A second type of conflict application arises during armed conflict and may occur in response to violations (suspected, accused or actual) or in response to pressure from allies or the ICRC. These may include the threatened use of weapons or other forms of retaliation in response to enemy violations. Though recent attention has focused on the controversial U.S. post September 11, 2001 “Global War on Terror” detainee policy,<sup>34</sup> similar IHL decision-making debates occurred in other post-World War II U.S. conflicts and include the controversy over forced versus non-forced prisoner reparation during the Korean War,<sup>35</sup> the decision to apply to the 1949

<sup>29</sup> The author has located and secured the release of multiple documents relating to this decision through the Ronald Reagan Presidential Library (Case# F10-046). The document locator can be viewed at: <http://www.reagan.utexas.edu/archives/textual/topics/GENEVAPROTOCOLS.htm>

<sup>30</sup> Reisman, W.M. & Leitzau, W.K. (1992). Moving international law from theory to practice: The role of military training manuals in effectuating the law of armed conflict. In H.B. Robertson (Ed.), *The Law of Naval Operations*. Newport, RI: Naval War College Press.

<sup>31</sup> Article 126 of Geneva Convention III (1949): The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to their entire population.

<sup>32</sup> Ongoing updates to the ICRC Study being conducted between the British Red Cross and the ICRC at the Lauterpacht Centre for International Law, University of Cambridge, has led to extensive additions to source material indicating state practice. See: <http://www.lcil.cam.ac.uk/projects/customary-international-humanitarian-law-project>

<sup>33</sup> Bill, B. (2000). *Law of War Workshop Deskbook*. Charlottesville, VA: The Judge Advocate’s School, U.S. Army.

<sup>34</sup> See, e.g., K.J. Greenberg & J.L. Dratel (Eds.), (2005). *The Torture Papers*. New York: Cambridge University Press.

<sup>35</sup> Hermes, W.G. (1966). *Truce Tent and Fighting Front*. Washington DC: Office of the Chief of Military History United States Army.

Geneva Conventions early in U.S. involvement in Vietnam,<sup>36</sup> and threatened use of weapons and treatment of prisoners during the 1990-1991 Gulf War.<sup>37</sup>

In addition to internal memoranda and policy statements, another important primary source is the official military directives authorizing, and setting parameters for, the use of force. These directives (often referred to as Rules of Engagement) contain elements of IHL and provide essential source material. Official military histories are also helpful in locating specific documents. For U.S. foreign policy decisions and diplomatic history the Department of State historical series, Foreign Relations of the United States (FRUS), is useful as a primary source location tool. Another example of source material at the application stage can be found in firsthand accounts of decision-makers (memoires and diaries). For example, the 2010 publication of Michael Scharf and Paul Williams' *Shaping Foreign Policy in Times of Crisis*<sup>38</sup> provides unprecedented insight into the workings of the Department of State Office of the Legal Adviser. And though U.S. courts have historically veered away from interpreting IHL, contemporary decisions such as *Hamdan v. Rumsfeld*<sup>39</sup> provide judicial insight into the application stage of the decision-making process.

### 3.4.2 Adherence

Establishing state practice of non-adherence to IHL is a highly controversial, inherently politicized and widely contested subject. A contemporary IHL scholar or historian would, in fact, be hard pressed to provide an example of an armed conflict where IHL violations have *not* occurred. One research challenge in this case is determining whether violations are isolated occurrences at the battlefield level or whether they are part of a broader policy or systemic practice. Another challenge involves the overreliance on secondary accounts that assume independent verification. In general, there are inherent problems when attempting to conduct empirical and objective research on the subject of non-adherence to IHL. The 'fog of war' needs to be considered where basic facts are difficult to ascertain. Perpetrators often conceal violations and adversaries may promote embellished or exaggerated rumors of violations or, conversely, may downplay or deny violations<sup>40</sup>. Furthermore, transparent democracies, by their nature, will arguably be exposed to incidences of non-adherence before non-democracies will be. As it stands, much of the state practice source material reflecting IHL non-adherence relies on the work of investigative journalists, personal memoirs and diaries, and NGO's working to ensure respect for IHL.

## 4. Discussion

### 4.1 International Relations

International humanitarian law is more than the application of treaty rules. Rather, it is a dynamic decision-making process involving multiple actors, with different degrees of authority. Within the scholarly field of international relations the theory most compatible with this view is constructivism. Jutta Brunnée and Stephen Toopego go so far as to state that constructivism can "help provide a more coherent account of customary international law...than other IR theories and even than international law itself."<sup>41</sup> With its focus on ideas, interests, institutions and norms, coupled with the acknowledged role that non-state actors have on influencing state behavior, constructivism is well placed to appreciate a research model that considers IHL as a decision-making process with varied examples of primary source material.

The decision-making process model can also be used to address important compliance questions including: Why do states comply with international law? How can non-state actors influence state compliance? Furthermore, the source material outlined in this model would be helpful in refining or supporting existing research. For example, the process model provides additional material for constructivist research on the role of NGO's in facilitating the internationalization of norms.<sup>42</sup> Furthermore, the process model can provide an important research tool when assessing how IHL norms advance, remain stable, or regress. The same source material could potentially address

<sup>36</sup> Prugh, G. S. (1974). *Law at War: Vietnam 1964 – 1973*. Washington DC: Department of the Army.

<sup>37</sup> Adam Roberts, A. (1993). Law of war in the 1990 – 1991 Gulf Conflict. *International Security*, 18, no. 3, pp. 134 – 181.

<sup>38</sup> Scharf, M. & Williams, P. (2010). *Shaping Foreign Policy in Times of Crisis*. New York: Cambridge University Press (2010).

<sup>39</sup> 548 U.S. 557 (2006)

<sup>40</sup> For a discussion of the difficulties of quantifying IHL compliance see Morrow, J. (2014) *Order within Anarchy*. New York: Cambridge University Press, p. 151.

<sup>41</sup> Brunnée, J. & Toopego, S. (2013). Constructivism and International Law. In J. Dunoff & M. Pollack (Eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*. New York: Cambridge University Press.

<sup>42</sup> Finnemore, M. & Sikkink, K. (1998). International norm dynamics and political change. *International Organization*, 52, pp. 887-91.

core realist concepts including the primacy of state power, the emphasis on security interests over norms, the focus on state sovereignty, and the concept of compliance through coercion (threatened or actual).

#### 4.2 Historical Perspective

A portion of the IHL literature is either implicitly or explicitly geared toward humanitarian advocacy. This is not surprising when one considers the subject matter and the populations that have been, and continue to be, directly impacted by compliance or noncompliance with IHL. The emphasis on advocacy, however, conflicts with the historical perspective. In Peter Novick's seminal work on objectivity in historical research, *That Noble Dream*, the objective and detached position of the researcher is described as follows: "The objective historian's role is that of a neutral, or disinterested, judge; it must never degenerate into that of advocate or, even worse, propagandist."<sup>43</sup>

A related tendency is to view IHL primarily through the lens of its codified success. The second half of the 20<sup>th</sup> century witnessed the proliferation of IHL treaties in addition to the creation of human rights instruments. If conclusions are based solely or largely on codification there is cause for optimism at the successful efforts to alleviate human suffering through international law. In the context of IHL, the result can be a narrative that presents IHL in an overly optimistic light and either ignores negative examples of state practice or, worse yet, chooses to emphasize only positive examples of state practice. This is reminiscent of Herbert Butterfields "Whig Interpretation of History" where history is presented as the inevitable march towards advancement and improvement.<sup>44</sup>

A narrative of IHL progress does not, however, necessarily stand up to examples of state practice. For example, focusing solely on recent 21<sup>st</sup> century state practice of the U.S. we witness long established IHL rules being questioned as policy or veering towards non-adherence. The most well-known and discussed example is U.S. policy relating to detainee treatment and the indefinite detention of prisoners at Guantanamo Bay, Cuba. Other recent examples have opened legal grey areas arguably long considered resolved including assassination (targeted killing)<sup>45</sup> and mercenaries (private military contractors).<sup>46</sup> On the other hand, the recent policy decision by the U.S. to no longer produce or acquire antipersonnel land mines, and to take steps to sign the Ottawa Convention,<sup>47</sup> illustrates positive practice. The onus of responsibility is on the scholar to include a balanced consideration that includes examples of both negative and positive state practice.

#### 5. Limitations

The decision-making process model was developed and applied specifically to the United States. Thus, generalizability proves a serious limitation. Arguably, replication to other states will be limited to transparent nations with open source archives. In addition, liberal states participate more actively in negotiating international agreements than totalitarian and undemocratic states.<sup>48</sup> For example, liberal states possess disaggregated political and decision-making institutions (executive, administrative, legislative, and judicial)<sup>49</sup> thus producing a greater 'paper trail' of primary source material. A potential research bias therefore exists to focus solely on the practice of liberal and transparent nations while ignoring the very states that are arguably most prone to violating IHL.

Although domestic courts are considered as a source, the role of international courts and tribunals in shaping and interpreting IHL at the domestic level, and the role that these courts can potentially play in IHL enforcement and compliance, is not included. Though a promising avenue for future source material, there currently exist

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<sup>43</sup> Novick, P. (1998). *That Noble Dream*. New York: Cambridge University Press, p. 2.

<sup>44</sup> Butterfield, H. (1931). *The Whig Interpretation of History*. New York: W.W. Norton.

<sup>45</sup> See e.g. Finkelstein, C., Ohlin, J.D. & Altman, A. (2012). (Eds.), *Targeted Killing: Law and Morality in an Asymmetrical World*. New York: Oxford University Press.

<sup>46</sup> Doswald-Beck, L. (2007). Private military companies under international humanitarian law. In S. Chesterman & C. Lenhardt (Eds.), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*. New York: Oxford University Press, pp. 115 – 138.

<sup>47</sup> Gladstone, R. (2014, June 27). U.S. lays groundwork to reduce land mines and join global treaty. *New York Times*. [www.nytimes.com/2014/06/28/us/us-to-cut-its-land-mine-stockpile.html](http://www.nytimes.com/2014/06/28/us/us-to-cut-its-land-mine-stockpile.html)

<sup>48</sup> Slaughter, A.M. (1995). International law in a world of liberal states. *European Journal of International Law*, 6, no. 4, pp. 503-38.

<sup>49</sup> *Ibid*, p. 71.



conceptual and methodological difficulties in pursuing this potential contribution to state practice.<sup>50</sup> Finally, a research avenue not explored in this article is the role that interviewing decision-makers and stakeholders may have in ascertaining IHL state practice. For example, Steven Ratner's important work on the ICRC, facilitated through his insider status to this usually secretive organization, included access to committee meetings and interviews with numerous ICRC officials.<sup>51</sup> While an insightful and significant addition to the IHL literature, this work stands as an exception. Future research should, however, consider the possibility of exploring past and present decision-makers and practitioners of IHL for primary source interviews.

## 6. Conclusion

From the perspective of a scholar conducting research on the subject of state practice of IHL, applying the proposed model involves both opportunities and challenges. In addition to the standard literature review, the decision-making process model involves the collection of extensive original source material through archival research and government declassification programs. The model proposed in this paper turns for inspiration to historians in archives and investigative journalists who are working on government declassification, a largely foreign research milieu to both IL and IR scholars. However, this 'outsider' perspective works as an advantage because the research model proposed exists apart from the interdisciplinary divide and debate between (and within) international law and international relations. In turn, this research model can potentially act as a methodology bridge between the two disciplines, thus providing the raw material for interdisciplinary dialogue and theory development.

International customary law and normative arguments are, by their nature, premised on both historical and contemporary practice because both make statements about change over time. The IR/IL literature, however, is largely void of a discussion concerning what role, if any, the historical perspective and objectivity should play when writing about IHL. This gap has become more glaring as contemporary state practice calls into question long established assumptions. The decision-making model proposed in this paper helps to address these discrepancies while opening an avenue for interdisciplinary dialogue on this important subject.

This article set out to provide a common methodological framework for gathering and organizing primary source material reflecting state practice of IHL. In creating a decision-making process model containing varied source material I have sought to convey and advance what Martha Finnemore and Stephen Toope refer to as a "richer view of international law."<sup>52</sup> The model developed is both inclusive and dynamic. Furthermore, though influenced by the process approach to international law, it is not tied to theoretical assumptions that could limit its applicability. Therefore, the decision-making process model can be utilized by both IL and IR scholars, creating a common research design bridging both disciplines.

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<sup>50</sup> Conant, L. (2013). Whose Agents? The interpretation of international law in national courts. In J. Dunoff & M. Pollack (Eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*. New York: Cambridge University Press.

<sup>51</sup> Ratner, S. (2011). Law promotion beyond law talk: The Red Cross, persuasion, and the laws of war. *The European Journal of International Law*, 22, no. 2, pp. 459-506.

<sup>52</sup> Finnemore, M. & Toope, S. (2001). Alternatives to "Legalization": Richer views of law and politics. *International Organization*, 55, no. 5, pp. 743-758.