

### Part III: Contrasting the Past and the Present

*“As Saul journeyed, he came near Damascus, and suddenly a light shone around him from heaven. Then he fell to the ground, and heard a voice saying to him, “Saul, Saul, why are you persecuting Me?”*

*Acts 9, 3–4 (NKJV)*

This episode from the Bible describes the moment when Saul’s life changes. He recognises the Lord and starts to preach the word of Christ in the synagogues. Later, he will be called Paul and become one of the central figures of early Christianity. The story of his conversion has become a metaphor for radical betterment. In my introduction I have inversed this process and asked the question: Did Russia turn from Paul to Saul in terms of IHL? That is, from advancing the law to avoiding the law?

The first part of this thesis dealt with Russia’s historical role, while the second part zoomed in on its current practice. The following (and last) part will merge Russia’s history and its present conduct.<sup>1908</sup> We will take two steps back to look at the bigger picture before us.

As a *first* step, I will contrast Russia’s historical and contemporary role. At first sight, the difference is staggering. In many aspects, Russia now holds the very opposite position; IHL has fallen out of favour. However, I am fully aware that a comparison spanning a period of 150 years bears the risk of being simplistic. Therefore, I will take a *second* step back and focus on three factors that might explain why the Russian attitude has changed so radically. For not only has Russia evolved over time. The laws of war have changed. Warfare itself has changed, and with it, Russia’s attitude towards IHL.

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1908 In the following, I will not use cross-references when referring to my findings above, so as not to overburden the text with footnotes. Rather, I will only use citations when I introduce new ideas or use verbatim quotes.

## 1. *O tempora, o mores* – contrasting Russia's approach to IHL

Russia has radically changed its position on IHL in numerous respects. First of all, this concerns its role in diplomatic relations. Russia once initiated the St Petersburg Declaration and the Hague Conferences of 1899 and 1907 that led to the first comprehensive code of warfare. Russia's most renowned diplomat, Fyodor Martens, was also an expert on the laws of war and managed to instil his knowledge into the discussions. Russia adopted IHL as a trademark in international relations and competed with the ICRC and Switzerland for the leading role in humanitarian affairs.

Today, Russia blocks numerous initiatives in the regulation of weapons. It did not sign any of the major treaties that innovated IHL after 1991, let alone initiate a treaty-making process. For instance, Russia never signed the treaties prohibiting anti-personnel mines and cluster munitions. It also strongly opposes the regulation of nuclear weapons, autonomous weapons systems, and white phosphorous. This cannot but appear like historical irony. The driving force behind the first-ever weapons treaty, the St Petersburg Declaration of 1868, is now leading the opposition against any further regulation. The fate of the Martens Clause serves to illustrate this change of heart. The ingenious Russian invention once allowed for a compromise between strong and weak countries at the First 1899 Hague Conference. The Clause acted as a fall-back rule that closed possible lacunas with the "laws of humanity, and the dictates of the public conscience."<sup>1909</sup> While the Clause has become a corner stone of IHL, Russia explicitly dismantled its own legacy in the ICJ *Nuclear Weapons Advisory Opinion* declaring that "today the 'Martens clause' may formally be considered inapplicable."<sup>1910</sup>

Secondly, Moscow neglects the implementation of IHL. This is exemplified by the poor State of its domestic war crimes legislation. Russia once contributed greatly to the development of international criminal law. It penalised misconduct in war as early as 1868.<sup>1911</sup> The Soviet Union pioneered in this field by prosecuting Nazi war criminals as early as 1943.

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1909 See for this above at p 56.

1910 Letter from the Ambassador of the Russian Federation, together with Written Comments of the Government of the Russian Federation (19 June 1995) 13.

1911 Esakov (n 702) 372. The author quotes Art 267 and Art 273–275 of the Войнский устав 'О наказаниях' [Military Law 'On Punishments'] of 1868 that provided punishment for imposing an unauthorised indemnity on residents of localities occupied by the army, robbing dead or wounded soldiers, and pillaging.

Furthermore, the Soviet Union contributed immensely and helped to lay a milestone in ICL. Soviet scholars like Aron Traynin shaped the contemporary debates on international crimes. Today, international criminal law still remains a hot topic in Russian academic circles, but the discourse stops at the wall of the ivory tower. While the Russian Criminal Code contains provisions on war crimes, they are both dogmatically deficient and *de facto* a dead letter. The lack of a single conviction for war crimes under Art 356 CCRF effectively sanctioned the widespread IHL violations during the two Chechen Wars. Recently, Moscow withdrew its signature from the ICC Statute, shattering any hope that scholars and activists may have harboured of improving this faulty system.

Thirdly, and most importantly, Russia's *volte-face* is illustrated by its behaviour in recent wars. Rules of IHL that Russia had once fought for are now neglected, ignored, or evaded by denying the facts. Belligerent occupation provides a good example. Protecting the occupied territories had once constituted a central pillar of Martens' "favourite child," the Brussels Declaration of 1874. While the Declaration never achieved binding status, the Russian Empire *voluntarily* imposed these obligations on its own Army during the Russo-Turkish War (1877–1878). On the whole, the Tsar's Army kept these promises and respected the obligations in occupied Bulgaria and Turkey. In 1899, Russia initiated the First Hague Peace Conference where the rules on occupation were finally cast into a binding treaty. Finally, in 1949 the Soviet Union supported the ICRC's efforts to adopt a strong civilian convention that further reinforced the existing protection in occupation. It is safe to say that Russia has done more than any other State to carve out the rules in occupied territories.

Today, there are five different situations with Russian involvement that qualify as occupation under IHL. Crimea is the most obvious example. Transnistria, Abkhazia, South Ossetia, and Donbas are at least partially occupied.<sup>1912</sup> Moscow does not recognise its role as an occupant in *any* of these cases. Applying IHL is out of question. Rather, the Russian discourse closely links the term "occupation" to the barbaric crimes of the Nazis during the Second World War which makes it an insult rather than a legal classification. It goes without saying that the atrocities committed by the Nazis against the Soviet people were particularly brutal. From a historical angle, it is understandable that occupation carries such an enor-

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1912 I have not discussed the example of Donbas under the angle of occupation, but the context resembles Transnistria, Abkhazia, and South Ossetia. For a case study of proxy occupation in Donbas see Gilder (n 1078).

mous emotional burden. Nevertheless, the Hague Regulations conceived occupation as a neutral legal term. It remains a common occurrence in war and does not represent an “anomaly.”<sup>1913</sup> The Russian approach, however, has completely sidelined this framework. What Martens conceived as a neutral, clear definition in the 1899 Hague Regulations has become an emotionally charged insult that can never apply to Russia. The decision of the Constitutional Court on ‘Law on Cultural Objects’ (1998) illustrates this. The Court ruled that the Soviets were not bound by the framework of occupation when establishing control over Germany at the end of the Second World War, because the Germans had forgone these rights as citizens of an “aggressor” State.<sup>1914</sup>

The protection of non-combatants against the conduct of hostilities is another instance where Russia abandoned rules that it once helped to create. In 1868, the Tsar initiated the St Petersburg Conference that broke with the principle of an unfettered war. It enshrined the principles of humanity, proportionality, and the prohibition of unnecessary suffering in its preamble. This sowed the seed from which would sprout the entire framework of the conduct of hostilities. Implicitly, the St Petersburg preamble condemned violence against civilians, since it stated that the “*only* legitimate aim in war is to weaken the *military* forces of the enemy.” The Hague Regulations elaborated on this protection. Finally, in 1949, the Soviet Union was the driving force behind the Fourth Geneva Convention that exclusively applied to civilians, as well as the introduction of Common Article 3 that extended the protection of civilians to non-international armed conflicts.

What is the legacy of these promises today? At times Russian troops did behave in an extremely disciplined manner in order to avoid civilian casualties. In Crimea this respectful behaviour earned them the nickname

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1913 Dinstein (n 984) 1. Dinstein argues that belligerent occupation is not an “anomaly or even an aberration”, but “when an international armed conflict breaks out, armies tend to be on the move on the ground whenever they have an opportunity to do so.”

1914 Постановление Конституционного Суда Российской Федерации по делу о проверке конституционности Федерального закона, 15.04.1998, ‘О культурных ценностях, перемещенных в Союз ССР в результате Второй мировой войны и находящихся на территории Российской Федерации’ [Ruling of the Constitutional Court of the Russian Federation Concerning the Constitutionality of Federal Law, 15 April 1998, ‘On Cultural Objects Relocated to the USSR as a Result of the Second World War Currently Located on the Territory of the Russian Federation’] para 4.

“polite people” by those sympathetic to the annexation.<sup>1915</sup> The majority of conflicts with Russian participation, however, saw a high civilian death toll. In the Chechen Wars, for example, Moscow denied the application of IHL for over ten years which adversely affected its soldiers' behaviour on the ground: civilian suffering was tremendous, and tens of thousands of civilians died in indiscriminate aerial bombings or artillery shelling. Today in Syria, we witness a Russo-Syrian bombardment campaign that deliberately attacks hospitals. In Georgia and Syria, Russia also used cluster munitions in densely populated areas in an indiscriminate way.

From these examples a more fundamental turnaround can be evinced. Russia used to advance, cite, and adhere to IHL in an almost ostentatious manner. In the 19<sup>th</sup> century, Russia displayed remarkable efforts in taking the law from the books and applying it on the battlefield. It issued a military manual – a revolutionary step at the time.<sup>1916</sup> Both in the Russo-Turkish War and the Russo-Japanese War, the Empire undertook enormous efforts to protect captured and wounded enemy combatants. It shaped good practice such as the communication of name and rank of POWs and wounded soldiers to the enemy power through a central agency. Most importantly, it took *pride* in its adherence to the laws of war. Today, this has changed dramatically. Moscow evades the application of IHL in numerous ways. By outmanoeuvring the threshold of application (Chapter III “The Paintbrush”), by outsourcing warfare (Chapter IV “The Apprentice”), or by simply denying facts that may point to IHL violations (Chapter V “The Sledgehammer”). While Russia still cites the rules in abstract resolutions and with regards to third countries,<sup>1917</sup> it has successfully “showcased” IHL. The laws of war have become rules that apply *in abstracto* or in relation to other nations, but do not restrict Russian conduct in war. Chapters III, IV, and V, illustrated in great detail how Russia has attempted to evade the application of IHL using a toolbox of factual denial, outsourcing, and legal loopholes.

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1915 Galeotti, *Russian Political War* (n 1458) 73.

1916 There are few examples of earlier military manuals. One is the Lieber Code (1863) to the Union Forces of the US. Today, most countries have elaborated a military manual that explains their stance on the laws of war.

1917 See, for example, the Russian statements regarding the indiscriminate use of cluster munitions in South Sudan (n 1854), the application of the framework of occupation to the US in Syria and to Israel in the Golan Heights (n 1203 and 1204), or the Russian support to UN Security Council Resolution 2286 (2016) (n 1808).

Yet, it is not all black and white. In certain aspects Russia did not change. During the Soviet period especially, certain fault lines appeared that are still visible today. The Soviets already displayed a tendency to deny facts in order to evade the law. In the Afghan War (1979–1989) they never recognised the application of IHL to the Red Army. In other conflicts like Hungary (1956) they rejected the application of IHL with a mix of peculiar legal arguments and factual denial. While the Soviets favoured the development of international criminal law, it was out of the question to apply this framework to their own acts. This double standard culminated at Nuremberg where the Soviet prosecutor accused the Nazis of the massacre of Katyn – the most notorious war crime committed by the Soviets themselves.

Most importantly, Russia's resistance regarding external oversight stretches from Tsarist times to the present day. Russia has always objected to any meaningful external compliance mechanism. In the early days of IHL this can be seen from its sceptical attitude towards the ICRC. The Tsars harboured distrust for the Swiss organisation and tried to break its humanitarian monopoly on several occasions. At the Hague Conference of 1899, for example, Russia attempted to subordinate the Geneva Conventions to the Hague Law. Tensions with the ICRC flared up after the October revolution and relations reached an all-time low after the Second World War. David Forsythe, author of a comprehensive study on the ICRC, argues that the Soviets never cooperated with the organisation in a meaningful way throughout the Cold War.<sup>1918</sup> Russia's reluctance towards external oversight was not confined to the ICRC. The Soviets understood, better than most other imperial powers, that they could accept virtually any text as long as it did not infringe upon their sovereign discretion to refuse outside supervision.<sup>1919</sup> While they advanced the law, they slowed down its enforcement. At the 1949 Conference, the Soviets obstructed any meaningful enforcement initiative such as the proposal to strengthen the role of the Protecting Powers.

This freedom-loving, sovereignty-centric spirit still prevails in modern-day Russia. In the past years, Moscow has been eliminating all remaining compliance mechanisms one by one. In 2015, it stalled the talks about a universal periodic review mechanism that would have obliged States to report on their IHL compliance at regular intervals. In 2016, it withdrew its signature from the ICC Statute. In 2019, it left the IHFFC. It has become

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1918 Forsythe (n 522) 53.

1919 van Dijk (n 507) 234.

clear that Russia's current sovereignty-centric conception of international law excludes any external compliance mechanism.

There is, however, one important difference between Russia's resistance to external oversight in the past and today. Of course, Tsarist Russia insisted on a strong concept of sovereignty – as did virtually all States in the late Westphalian system. However, this did not affect IHL because the law was held in high regard *internally*. As I have shown above, this Russian enthusiasm has long cooled. Given the current lack of intrinsic motivation to respect and advance IHL, the absence of an external compliance mechanism is painfully obvious.

To conclude, the contrast is stark. While the façade of IHL already began to fissure in Soviet times, the cracks have widened. When comparing Russia's attitude during Tsarist times and today we find little common ground except the long-standing resistance to external oversight. In all other areas, Russia's enthusiasm for IHL has withered.

2. *Looking behind the obvious – why has Russia changed?*

Having said that, my comparison would remain simplistic if it stopped here. Russia's turnaround is more than a historical fun-fact. The reasons behind it are as interesting as the phenomenon itself. If Saul had simply told his followers that he stopped hunting down Christians to become one himself, people would not have believed him. What made him credible, was his reason – he had received a sign from God on the road to Damascus. He was blinded before he converted. So, let me rephrase the question. Yes, Russia's attitude towards IHL changed. But can we identify the reasons that led to this changed behaviour? In the following, I offer three explanations as to why Russia's humanitarian fervour has faded: The changed character of IHL, the radical changes in warfare, and the resulting lack of benefits that IHL has to offer to a State like Russia today.

2.1 *O tempora, o leges* – IHL as a victim of its own success?

“Herr, die Not ist groß!  
Die ich rief, die Geister  
Werd’ ich nun nicht los.”

“Wrong I was in calling  
Spirits, I avow,  
For I find them galling,  
Cannot rule them now.”

Johann Wolfgang von Goethe, ‘Der Zauberlehrling’ (1797)<sup>1920</sup>

Russia started promoting IHL when it was still in its infancy. At the time of the St Petersburg Declaration in 1868, IHL treaty law consisted of only ten Articles: the provisions of the 1864 Geneva Convention that protected wounded soldiers. Up until 1949, the Geneva Conventions mostly dealt with combatants and did not protect civilians *per se* apart from the regime of occupation.<sup>1921</sup> In addition, IHL only applied to inter-State armed conflicts.

Since the end of the Second World War we have witnessed what Theodor Meron called the “humanization” of the laws of war. This process is “driven to a large extent by human rights and the principles of humanity.”<sup>1922</sup> This change is already evident from the semantics of the legal framework. Before 1949, States referred to IHL as “laws and customs of war.”<sup>1923</sup> The term international *humanitarian* law was only introduced to describe the Four Geneva Conventions of 1949. Over time, it became the trademark for the entire framework applicable in armed conflict.<sup>1924</sup> The new name set the tone for the ensuing substantial changes. Today, the humanisation of IHL manifests itself in five aspects.

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1920 Taken from Johann Wolfgang von Goethe’s famous poem ‘Der Zauberlehrling’ [The Sourcer’s Apprentice]. Translation by Paul Dyrsen (1878).

1921 Robert Heinsch, ‘The International Committee of the Red Cross and the Geneva Conventions of 1949’ in Robin Geiss, Andreas Zimmermann and Stefanie Haumer (eds), *Humanizing the Laws of War: the Red Cross and the Development of International Humanitarian Law* (Cambridge University Press 2017) 31.

1922 Theodor Meron, ‘The Humanization of Humanitarian Law’ (2000) 94 *American Journal of International Law* 239, 239.

1923 See e.g. the terminology used in the Hague Regulations (1907): “Regulations concerning the *Laws and Customs* of War on Land” (emphasis added).

1924 Meron, ‘The Humanization of Humanitarian Law’ (n 1923) 239. In Russia, scholars and practitioners mainly use *Международное гуманитарное право* [international humanitarian law] although *Право вооруженных конфликтов* is sometimes used synonymously. The US, Israel, and the UK, for example, continue to use the term law of armed conflict (LOAC).



Firstly, human rights law and IHL have converged. While both remain separate fields, they apply at the same time and mutually influence each other.<sup>1925</sup> In addition, IHL has borrowed substantial rules from human rights law. The adoption of the UDHR in 1948 greatly influenced the rules of the 1949 Geneva Conventions. From 1949 onwards, we see parallel protections in IHL and IHRL such as the prohibition of torture and cruel, inhuman, or degrading treatment and punishment, arbitrary arrest and detention, and fair trial rights.<sup>1926</sup> The ICTY has explicitly recognised this influence of the “impetuous development and propagation” of human rights on IHL after the Second World War.<sup>1927</sup>

Secondly, the delegates at the Diplomatic Conference of 1949 extended the scope of IHL. Until then, it applied only to inter-State conflicts. After the introduction of Common Article 3, IHL regulated internal conflicts as well. Since most of today’s wars are NIACs, this represented a monumental leap forward. However, it also meant assimilating IHL to human rights law, because both fields now regulated internal situations that were formerly under the impermeable umbrella of State sovereignty. This “growing measure of convergence in [...] personal and territorial applicability” of human rights and IHL changed the perception of the law.<sup>1928</sup>

Thirdly, there is a growing trend to deduce individual rights from IHL norms. Initially, IHL represented classic inter-State law that conferred neither rights nor obligations onto individuals. After the Second World War, IHL was “drawn [...] in the direction of human rights law.”<sup>1929</sup> The wording of the Geneva Conventions of 1949 and their *travaux préparatoires* suggest that they confer rights on individuals.<sup>1930</sup> In recent times, we have started to see more evidence for individual rights in IHL.<sup>1931</sup> Under Art 75 of the Rome Statute, for example, the ICC can award reparations to

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1925 See Cordula Droegge, ‘The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict’ (2007) 40 *Israel Law Review* 310.

1926 Meron, ‘The Humanization of Humanitarian Law’ (n 1923) 245, 266–273.

1927 ICTY, *The Prosecutor v Duško Tadić* (IT-94–1-T), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 97.

1928 Meron, ‘The Humanization of Humanitarian Law’ (n 1923) 245.

1929 *ibid* 244.

1930 Hill-Cawthorne (n 822) 1200.

1931 This development is not linear. Rather, it oscillated between an individual rights-based and a State-centric approach throughout the history of IHL. However, we can identify a trend towards a rights-based approach in recent years, see *ibid* 1211–1212.

individuals for violations of IHL. In addition, we increasingly see how classic human rights law mechanisms take part in enforcing IHL.<sup>1932</sup> The ECtHR, for instance, has rendered ground-breaking judgments regarding situations of armed conflict, e.g. the Chechen Wars, and even applied IHL *expressis verbis* in its later case law.<sup>1933</sup>

Fourthly, *non*-governmental actors play an increasingly important role in interpreting and developing IHL. While States used to be the “Masters of the Treaties” and their interpretation, today international organisations, NGOs, and civil society movements contribute to interpreting and developing IHL. NGOs like Human Rights Watch and Amnesty International, which originally emerged out of the international human rights movement, frequently accuse States of violating IHL.<sup>1934</sup> Furthermore, the ICRC Customary Study had a tremendous effect on the expansion of IHL in NIACs. While the study is based on State practice (*consuetudo*) and *opinio iuris*, the codification itself was not a State-driven initiative. At times, States felt uneasy and criticised the ICRC’s methodology.<sup>1935</sup> Finally, even organs that were established by States themselves went on to develop IHL at an unforeseen level. The ICTY – an organ created by the UN Security Council – did not only apply but also developed IHL in crucial aspects. It went beyond the strict letter of the treaties, for example, by creating the category “internationalised armed conflicts” or by expanding the scope of protected persons under Art 4 GC IV.<sup>1936</sup>

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1932 See Émilie Max, ‘Implementing International Humanitarian Law Through Human Rights Mechanisms: Opportunity or Utopia?’ (Geneva Academy of International Humanitarian Law and Human Rights 2019).

1933 See e.g. ECtHR, *Chigarov and Others v Armenia*, No 13216/05, 16 June 2015, para 96, where the Court pronounced itself on the question of belligerent occupation; see also ECtHR, *Hassan v United Kingdom*, No 29750/09, 16 September 2014, para 110; for the Chechen cases see p 204.

1934 See Human Rights Watch, ‘Up in Flames – Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia’ (n 1180).

1935 The US, for example, has voiced its criticism. While it reiterated “its appreciation for the ICRC’s continued efforts in this important area”, it criticised the methodology of the study and challenged the customary status of certain rules, see John B Bellinger III and William J Haynes II, ‘A US Government Response to the International Committee of the Red Cross Study *Customary International Humanitarian Law*’ (2007) 89 *International Review of the Red Cross* 443.

1936 For internationalised armed conflicts see ICTY, *The Prosecutor v Duško Tadić* (IT-94-1-T), Appeals Chamber Judgment, 15 July 1999, para 131; for the scope of Art 4 GC IV see ICTY, *The Prosecutor v Duško Tadić* (IT-94-1-T), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 70; for a detailed analysis of the *Tadić* Appeals Chamber judgment see

Fifthly, despite the chronic lack of enforcement mechanisms, IHL developed some gritty compliance mechanisms after the Second World War. After the Nuremberg Trials, individual criminal liability became an “explicit part of the law.”<sup>1937</sup> The ICTY, ICTR, ICC as well as domestic courts prosecuting war crimes became the torchbearers of criminal accountability for IHL violations.<sup>1938</sup> Furthermore, the ICRC has become increasingly influential. During the Second World War, its headquarters were housed in the small Villa Moynier on Lake Geneva. Today it is the biggest humanitarian actor outside the UN with a budget of 2 billion Dollars and nearly 20 000 employees in more than 80 countries.<sup>1939</sup> Most importantly, IHL has received help from “outside.” The UN Security Council, the General Assembly, and other UN institutions make frequent reference to IHL.<sup>1940</sup> Russia, for example, has had to face allegations for occupying Crimea in the General Assembly and justify its bombing campaign of Syrian hospitals in the Security Council.<sup>1941</sup> In addition, the number of humanitarian actors has exploded. Today, the public is sensitised to IHL violations that will be “shamed” by various NGOs that reach a wide audience.

There are two sides to this coin. From the victim’s perspective, the increased protection is to be welcomed. From a State perspective, however, IHL has become more intrusive, rigid, and restrictive – in other words, a

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Claus Krefß, ‘Friedenssicherungs- und Konfliktvölkerrecht auf der Schwelle zur Postmoderne’ [1996] EuGRZ 638.

1937 George Aldrich, ‘Individuals as Subjects of International Humanitarian Law’ in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Kluwer Law International 1996) 853.

1938 See the recent special edition of the International Criminal Law Review that analyses this development, its advantages, and its challenges: ‘Special Issue: National Prosecutions of International Crimes: Sentencing Practices and (Negotiated) Punishments’ (2019) 19.

1939 ICRC, ‘Where Does Your Money Go’ <<https://www.icrc.org/en/support-us/where-does-your-money-go>>.

1940 Hans-Peter Gasser, ‘The United Nations and International Humanitarian Law: The International Committee of the Red Cross and the United Nations’ Involvement in the Implementation of International Humanitarian Law – International Symposium on the Occasion of the Fiftieth Anniversary of the United Nations’ (ICRC 1995).

1941 UN General Assembly Resolution 71/205, UN Doc A/RES/71/205 (1 February 2017) 2; UN General Assembly Resolution 72/190, UN Doc A/RES/72/190 (19 December 2017) 2; UN General Assembly Resolution 73/263, UN Doc A/RES/73/263 (22 December 2018) 2; UN Security Council, 8589<sup>th</sup> meeting, UN Doc S/PV.8589 (30 July 2019).

framework very different from Russia's "golden age" in the 19<sup>th</sup> century. Stricter norms always bear the risk of non-compliance, or as Theodor Meron puts it: "Humanization may have triumphed, but mostly rhetorically."<sup>1942</sup> This development is exemplified by belligerent occupation. The framework was once a bone of contention and prevented consensus at the Brussels Conference in 1874. Today, too, occupation sparks heated debates. However, the common fear in 1874 and the challenges today could not be more different. In 1874 the delegates of smaller States feared that invading armies, seeking to benefit from the powers that the law granted to occupants, would declare occupation *prematurely* without actually controlling the area. At that time, occupation was considered an *advantage* to the occupant. When the rules for occupation grew stricter and it became more of a "burden than a boon" States shifted to avoiding the application of Art 42 HR.<sup>1943</sup>

The irony of this development is, of course, that it was Russia that sowed the seed of humanisation. Moscow had itself insisted on the ideal of "humanity" in the St Petersburg Declaration. In the words of Minister of War Dmitry Milyutin, humanity was the "one principle on which we all agree."<sup>1944</sup> Furthermore, Russia enshrined "humanity" as a safety net in the Martens Clause and the Soviet Union fought for the humanisation of internal armed conflicts. It seems, however, that the rapid development after the Second World War took States aback much like Goethe's "Sorcerer's Apprentice" whom I have quoted above. While Moscow contributed very little to the development of IHL after 1949, IHL evolved, nonetheless. Today, IHL belongs to the civil society as much as it belongs to the military. It is stricter, more codified, and it has increasingly merged with human rights law, from which Russia has grown equally estranged.<sup>1945</sup> It seems that Moscow called the "Spirits" of humanity, but "cannot rule them now."

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1942 Meron, 'The Humanization of Humanitarian Law' (n 1923) 276.

1943 Benvenisti (n 990) 43.

1944 von Martens (n 44) 451.

1945 For Russia's difficult relationship with the ECtHR see n 1205 and Bowring, 'Russian Cases in the ECtHR and the Question of Implementation' (n 836); Mälksoo, *Russian Approaches to International Law* (n 6) 121; for Russia's attitude towards human rights law in general, see Anna Lukina, 'Russia and International Human Rights Law: A View from the Past' in P Sean Morris (ed), *Russian Discourses on International Law: Sociological and Philosophical Phenomenon* (Routledge 2018).

## 2.2 *O tempora, o bella* – IHL as a victim of “new wars”?

Not only has IHL changed dramatically since the middle of the 19<sup>th</sup> century. Warfare itself is entirely different. A battlefield in Syria looks nothing like the battlefield of Solferino. Is Russia’s change of heart a reaction to the challenges posed by “new wars?”<sup>1946</sup> Is it harder to adhere to IHL today, than it was in the 19<sup>th</sup> century?

Thousands of pages have been written about war’s ever-changing nature. The following description cannot do justice to the detailed works of political scientists, historians, and jurists on this issue.<sup>1947</sup> However, we cannot completely ignore war’s changing nature, because it is the very thing IHL sets out to regulate.

Between 1868 and 1991 warfare evolved dramatically. The essential changes are obvious: first of all, wars are no longer exclusively a State affair. The State monopoly of violence has been broken (“de-statisation”).<sup>1948</sup> The main actors of current wars feature militias, paramilitaries, criminal gangs, and loosely organised rebel factions fighting against or alongside well-structured armies.<sup>1949</sup> Secondly, fighting has taken an asymmetric shape (“asymetrisation”).<sup>1950</sup> In Clausewitzian times the decisive battle [*Entscheidungsschlacht*] between two armies marked the culmination of a war.<sup>1951</sup> Today, large battles have disappeared, and front lines have vanished. Current wars are often fought between unequal opponents which means that the weaker belligerent has an interest in avoiding large bat-

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1946 For the term “new wars” see Mary Kaldor and Basker Vashee, ‘New Wars – Restructuring the Global Military Sector’; Herfried Münkler, *Die neuen Kriege* (6th edn, Rowohlt Taschenbuch Verlag 2015); Mary Kaldor, *New & Old Wars: Organized Violence in a Global Era* (Third edition, Stanford University Press 2012); the term new wars has attracted considerable criticism. On the one hand, it is true that elements of new wars can also be found in old wars and that there is no clear line separating these two kinds of conflict. On the other hand, the distinction between new and old wars is a useful tool to highlight the disjunction between many of the assumptions on which IHL rests and contemporary armed conflicts, see Nicolas Lamp, ‘Conceptions of War and Paradigms of Compliance: The “New War” Challenge to International Humanitarian Law’ (2011) 16 *Journal of Conflict and Security Law* 225, 227.

1947 See e.g. Münkler (n 1947); Christine Chinkin and Mary Kaldor, *International Law and New Wars* (Cambridge University Press 2017); Kaldor (n 1947); Lamp (n 1947).

1948 Münkler (n 1947) 10.

1949 Lamp (n 1947) 227.

1950 Münkler (n 1947) 11.

1951 Carl von Clausewitz, *Vom Kriege* (Werner Hahlweg ed, Dümmler 1980) 453.

tle-style clashes. Instead of combatants, violence is increasingly directed against civilians that make up 90 percent of the victims in current wars.<sup>1952</sup> Finally, new wars tend to drag on longer because State armies have lost the ability to start and end a war at any given moment (“autonomisation”).<sup>1953</sup> The number of belligerents has exploded, for example in Syria where hundreds of armed groups appeared, dissolved, and frequently changed their allegiance. This decentralised command structure and the absence of a decisive battle inflicting a crushing defeat leads to protracted conflicts, increasingly blurring the lines between war and peace.

The phenomena of de-statisation, asymetrisation, and autonomisation pose serious challenges to IHL. Firstly, de-statisation undermines IHL’s inherent compliance mechanism – reciprocity. The laws of war are designed to apply *equally* to *all* belligerents. Each party will benefit from the other party’s observance. This reliable mechanism jams if a conflict involves a myriad of different actors that do not find themselves on equal footing. Members of armed groups, for instance, may be prosecuted for participating in hostilities, whereas regular soldiers enjoy combatant immunity. This inequality of belligerents creates a severe challenge for compliance.<sup>1954</sup>

Secondly, “asymmetric” wars do not sit well with IHL, a field of law originally tailored to inter-State conflicts. IHL relies on a hierarchical structure to implement the rules. Armed groups in asymmetric wars often lack such effective disciplinary systems.<sup>1955</sup> Furthermore, asymetrisation challenges the fundamental distinction of (legitimate) military targets and (protected) civilian persons and objects under IHL. Wars are not fought out in the open, but using guerrilla tactics where fighters blend in among the civilian population, do not distinguish themselves, use civilians as human shields, or even intentionally target them as a means of warfare.

Finally, the application of IHL is built on the dichotomy between war and peace. Naturally, the laws of war only regulate armed conflict. This threshold of application may be called the Achilles’ heel of IHL and make the law vulnerable to evasion tactics as we have seen above.<sup>1956</sup> Therefore, “autonomised” wars that blur the lines between war and peace further expose IHL’s weakness and undermine the law’s very foundation,

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1952 Rens Steenhard, ‘The Body Counts: Civilian Casualties in War’ (*Peace Palace Library*, 10 May 2012) <<https://www.peacepalacelibrary.nl/2012/05/the-body-counts-civilian-casualties-in-war/>>; Münkler (n 1947) 11.

1953 Münkler (n 1947) 24.

1954 Lamp (n 1947) 234.

1955 *ibid* 261.

1956 See p 212.

Like all major military powers, Russia had to adapt to the trends of de-statisation, asymetrisation, and autonomisation. While the Russian Army needed time to learn from the flawed campaigns in Afghanistan and Chechnya, the Russo-Georgian War (2008) marked a watershed in Russian military strategy. Russian forces operated alongside local militias and auxiliaries, in a politically choreographed operation designed to provide a degree of deniability.<sup>1957</sup> Since then, we can clearly identify that Moscow follows an “adaptive use of force” according to which it uses overt military confrontation as a last resort.<sup>1958</sup> Before resorting to large-scale open violence, Russia will use proxy actors and covert special forces that blur the lines between war and peace.<sup>1959</sup> Given the above, this form of waging war inevitably challenges the effectiveness of IHL.

Some even argue that Russia embraced the changing nature of warfare more quickly and more thoroughly than other military powers. They claim that Moscow developed a novel doctrine of “hybrid warfare.”<sup>1960</sup> Is this true, and if so, how special is Moscow in this respect? Can the alleged doctrine of hybrid warfare explain its turnaround regarding IHL?

The debate about Russia’s strategy of hybrid warfare was sparked by an article published by the Russian Chief of Staff General Valery Gerasimov in 2013. Gerasimov claimed that “new challenges require us to rethink the forms and ways of waging hostilities.” He spoke of the increased importance of non-military means in military operations and stressed the need to carry out military operations only as a last resort. If possible, open force should be used covertly:

*“The focus of the methods applied in conflict has shifted towards an ample use of political, informational, humanitarian, and other non-military means [...] All this is supplemented by military means of a hidden character including actions of informational conflict and actions of the special forces.*

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1957 Galeotti, *Russian Political War* (n 1458) 46.

1958 Jonsson (n 1784) 154.

1959 Gergely Tóth, ‘Legal Challenges in Hybrid Warfare Theory and Practice: Is There a Place for Legal Norms at All?’ in Sergey Sayapin and Evhen Tsybulenko (eds), *The Use of Force against Ukraine and International Law: Jus Ad Bellum, Jus In Bello, Jus Post Bellum* (TMC Asser Press 2018) 181–182.

1960 See Galeotti, *Russian Political War* (n 1458) 2, 27–28, who used to speak of a doctrine of hybrid warfare, but changed his view in his most recent book. He now speaks of “political war”.



*The open use of armed force [...] is only used at a certain stage in order to achieve the final success in the conflict.*<sup>1961</sup>

Gerasimov published his article in reaction to the role of the West in the aftermath of the Arab Spring in Libya and Syria (2011). After Russia's intervention in Ukraine (2014), however, Western commentators re-interpreted it as evidence that Russia has switched from conventional war to hybrid warfare.<sup>1962</sup>

The term "hybrid warfare" was originally coined by Frank Hoffman who defined it as a range of "different modes of warfare including conventional capabilities, irregular tactics and formations, terrorist acts including indiscriminate violence and coercion, and criminal disorder" conducted by States or armed groups.<sup>1963</sup> Such warfare is "hybrid" because it resorts to dubious, sometimes lawless actors and methods, as well as regular troops.

One feature of hybrid warfare is operating below the enemy's reaction threshold.<sup>1964</sup> In legal terms, this may affect *ius ad bellum*, for example by outmanoeuvring the obligation under Art 5 North Atlantic Treaty to assist another NATO member in case of an armed attack; or by undercutting the threshold of self-defence according to Art 51 UN Charter. It may also concern *ius in bello*, for example by circumventing the threshold of application of IHL. Aurel Sari argues that IHL makes an easy victim in hybrid conflicts:

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1961 B.B. Герасимов [V.V. Gerasimov], 'Новые вызовы требуют переосмыслить формы и способы ведения боевых действий [New Challenges Demand to Rethink the Forms and Methods of the Conduct of Hostilities]' (2013) 8 Военно-промышленный Курьер [Military Industrial Courier] 2, 2.

1962 See Mark Galeotti, 'I'm Sorry for Creating the 'Gerasimov Doctrine' (Foreign Policy, 5 March 2018) <<https://foreignpolicy.com/2018/03/05/im-sorry-for-creating-the-gerasimov-doctrine/>>; AJC Selhorst, 'Russia's Perception Warfare: The Development of Gerasimov's Doctrine in Estonia and Georgia and Its Application in Ukraine' (2016) 22 Militaire Spectator 148, 148, Selhorst called Gerasimov the "architect of Russia's asymmetrical warfare"; see also Galeotti, *Russian Political War* (n 1458) 27–28.

1963 When Hoffman created the notion of hybrid warfare, he did not refer to Russia. Rather, he coined the term against the backdrop of the wars in Iraq (2003) and Lebanon (2006), Frank G Hoffman, 'Conflict in the 21st Century: The Rise of Hybrid Wars' (Potomac Institute for Policy Studies 2007) 36; James N Mattis and Frank Hoffman, 'Future Warfare: The Rise of Hybrid Wars' (2005) 131 United States Naval Institute Proceedings Magazine 18.

1964 Aurel Sari, 'Legal Aspects of Hybrid Warfare' (*Lawfare*, 2 October 2015) <<https://www.lawfareblog.com/legal-aspects-hybrid-warfare/>>; see also Tóth (n 1960), who argues that there is "no longer any real distinction between war and peace."



*“Hybrid warfare, at least of the type practiced by Russia, is [...] designed to operate ‘under our reaction threshold.’ [...] Consider the dividing lines between intervention, use of force, armed attack or between situations of internal disturbances and tensions, non-international armed conflicts or international armed conflicts. Or consider the distinction between overall control and effective control, or between combatant and non-combatant.”*<sup>1965</sup>

Can this alleged “Gerasimov doctrine”<sup>1966</sup> explain Russia’s reluctance to apply IHL? When Gerasimov speaks of “military means of a hidden character” it reminds us of Russia’s outsourcing to Wagner, Cossacks, and the SOM as described in Chapter IV. When Aurel Sari speaks of “operating under our reaction-threshold” we think of Russia’s attempts to evade the application of IHL in Chechnya or Ukraine as described in Chapter III. In this sense, my case studies provide evidence of what the literature terms “hybrid warfare.”

At the same time, we should not ascribe Russia’s reluctance to apply IHL entirely to hybrid warfare. Firstly, there is no agreed definition and the term lacks contours.<sup>1967</sup> Russian security expert Michael Kofman writes sarcastically that “if you torture hybrid warfare long enough it will tell you anything, and torture it we have.”<sup>1968</sup> For this very reason, recent scholarship has started to abandon the term, because it is too vague and does not help in truly understanding Russia’s military strategy.<sup>1969</sup>

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1965 Sari (n 1965).

1966 Mark Galeotti, ‘I’m Sorry for Creating the ‘Gerasimov Doctrine’ (Foreign Policy, 5 March 2018) <<https://foreignpolicy.com/2018/03/05/im-sorry-for-creating-the-gerasimov-doctrine/>>.

1967 Frank Hoffman calls a conflict hybrid, because the warring parties resort to different *military* means – conventional and non-conventional. Other authors, however, have broadened the term to encompass military and *non-military* means. According to their reasoning, hybrid warfare would include anything from an open assault to a media misinformation campaign, see e.g. Heidi Reisinger and Alexandr Golts, ‘Russia’s Hybrid Warfare’ (2014) 105 Research Papers of the NATO Defense College 1, 3.

1968 Michael Kofman, ‘Russian Hybrid Warfare and Other Dark Arts’ (*War on the Rocks*, 11 March 2016) <<https://warontherocks.com/2016/03/russian-hybrid-warfare-and-other-dark-arts/>>.

1969 Jonsson (n 1784) 9. The author either wishes to return to Frank Hoffman’s original definition of hybrid warfare or suggests abandoning the concept completely.

Rather, the “doctrine” of hybrid warfare is misleading – simply, because it is not a “doctrine.”<sup>1970</sup> Moscow has *not* given up on conventional warfare. On the contrary, it still places great emphasis on conventional military tactics beyond the hybrid. The mere fact that its recent exercises *Zapad* (2017) and *Vostok* (2018) involved hundreds of thousands of soldiers show that conventional war remains a sturdy pillar of the Russian defence strategy.<sup>1971</sup> We also see evidence for this in recent conflicts. In Georgia, Russian troops fought openly, and Moscow even recognised the state of war. In Syria the Russian Air Force bombed rebel strongholds while cameras broadcast the images in the evening news. Even eastern Ukraine is not a “typical” example of hybrid warfare, if there even is such a thing. In the later stages it became a classic conflict that was decided by Russian boots on the ground and artillery fire. It was a conventional war as much as it was a hybrid war.<sup>1972</sup>

To sum up, IHL faces enormous challenges in new wars. Changes in warfare are as visible in Syria, Ukraine, and Georgia as they are in Afghanistan, Iraq, and the Democratic Republic of Congo. In the 19<sup>th</sup> century, war was conceived as a “duel” between States.<sup>1973</sup> Today, it resembles a pub brawl. Such an environment takes its toll on the effectiveness of IHL, because it calls into question both the grounds of application and the reasons for compliance.

While this is a global trend, Moscow has readily adapted to the changes. On the one hand, we should resist the reflex to ascribe Moscow’s bad IHL record entirely to a novel strategy of hybrid warfare. On the other hand, Russia has reacted to the changing nature of warfare and brought its military strategy in line with the *zeitgeist*. Now, it clearly follows a strategy of “adaptive use of force” and prefers to use proxies to its own soldiers.

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1970 Galeotti, *Russian Political War* (n 1458) 27. I fully agree with Ruslan Pukhov who argues that hybrid warfare has become a “propaganda term” that simply refers to a real or perceived threat from Russia, see Руслан Пухов [Ruslan Pukhov], ‘Миф о “гибридной войне” [The Myth of Hybrid War]’ (*Nezavisimaya Gazeta*, 1 June 2015) <<http://svop.ru/main/15547/>>.

1971 Galeotti, *Russian Political War* (n 1455) 47. Around 70 000 soldiers participated in the *Zapad* exercise (2017). Between 150 000 and 300 000 soldiers participated in the *Vostok* exercise (2018).

1972 Galeotti, *Armies of Russia’s War in Ukraine* (n 785) 63.

1973 For the influence of this concept on IHL see Robert A Nye, ‘The Duel of Honour and the Origins of the Rules for Arms, Warfare and Arbitration in the Hague Conferences’ in Maartje Abbenhuis, Christopher Ernest Barber and Annalise R Higgins (eds), *War, Peace and International Order? The Legacies of the Hague Conferences of 1899 and 1907* (Routledge 2017).

It tries to “blur the line between war and peace” and thereby undercut the threshold of application of IHL.<sup>1974</sup> Given the above, these changes in military strategy were bound to affect the respect for the laws of war.

### 2.3 *Do ut des* – does IHL lack an incentive for compliance for Russia?

The previous two sections dealt with the evolution of IHL and warfare itself. The current section will ask a final, simple, but crucial question: What can Russia *expect* from IHL in this changed environment? States’ rational expectations are essential for compliance with the law. The effectiveness of international law depends by and large on the acceptance of the utility of the rules. Acceptance may derive from self-interest, for example from a desire to be accepted into an international organisation. It may also derive from reciprocity, or even from a belief in shared norms.<sup>1975</sup> To rephrase the question: why should a State like Russia prefer a world with IHL to a world without IHL?<sup>1976</sup>

It is worth recalling Russia’s motives for promoting IHL during the 19<sup>th</sup> and early 20<sup>th</sup> century. I have discussed this issue above at page 61 and identified the following five reasons:

- 1) Idealism: The Tsars and central elements of their governments embraced the humanitarian *zeitgeist* of the 19<sup>th</sup> century. Saving Europe from an unfettered war was part of their “curious missionary ambition.”<sup>1977</sup> In addition, outstanding jurists and diplomats like Martens managed to translate this vague humanitarianism into solid laws.
- 2) Diplomatic pride: IHL became a Russian trademark in diplomatic circles and enhanced Russia’s standing on the international stage.
- 3) Military strategy: Russia had the biggest land army in Europe but lagged behind in military technology. Thus, it hoped to preserve this numeric advantage and protect its combatants.
- 4) Economic interest: Russia wanted to avoid an all-out total war to save money and rather focus on economic growth.
- 5) Russian ingenuity: Russia saw the advantage of promoting restrictions for everyone instead of lagging behind alone. In other words, it consid-

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1974 Jonsson (n 1784) 154.

1975 Chinkin and Kaldor (n 1948) 124.

1976 Tanisha M Fazal, *(Kein) Recht im Krieg? Nicht intendierte Folgen der völkerrechtlichen Regelung bewaffneter Konflikte* (Hamburger Edition 2019) 79–91.

1977 Eyffinger (n 80) 19.

ered mutual limitation by means of international law a useful tool to secure its own interests.

Are these reasons still valid today? Let's address them one by one, starting with idealism. The humanitarian spirit of the 19<sup>th</sup> century was tied to leading figures in the Russian government: Alexander II "the Liberator," Alexander III "the Peacemaker," and Nicolas II, eager to fill their shoes. The Romanovs possessed a "curious missionary ambition."<sup>1978</sup> In addition, people like Martens – who had a similar, albeit more concrete vision of humanity – provided the legal know-how and the diplomatic skills to advance law-making. Such prominent figures are absent from Russian politics today. It is a commonplace that Vladimir Putin, who has led the country since 1999 is anything but an idealist. Nor is there a strong desire for an idealist among the Russian population. The woes of the 90s – crime, unemployment, secession wars, and plummeting life expectancy – fostered a yearning for stability among the Russian people.<sup>1979</sup> In the eyes of many, Putin kept his promise to prevent the further disintegration of Russia and make its voice heard.<sup>1980</sup>

Even if Russia were steered by a more idealistic leader, IHL would not make the most humane "bumper sticker" in today's world. We live in the era of human rights, where IHL is often regarded as too pragmatic, too permissive, and too lenient towards the military. Critics argue that IHL "introduces a hierarchy of lives" and "legalizes killing."<sup>1981</sup> Others see it as a framework that allows States "to conduct wars relatively uninhibited by humanitarian constraints."<sup>1982</sup> I do not share this criticism and I have described at page 390 how IHL has been "humanised" over the years. Yet, despite these changes, IHL *does* remain more pragmatic than human rights law which is considered the more humane framework. At the same time, human rights is a field in which Russia has never managed to shine. It can hardly be "considered to have been a global leader or katechon" in this

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1978 *ibid.*

1979 Krastev and Holmes (n 1902) 184–188.

1980 See e.g. Vladimir Putin's speech in the State Duma (16 August 1999): "Russia has been a great power for centuries and remains so. It has always had and still has legitimate zones of interest [...] we should not drop our guard in this respect, neither should we allow our opinion to be ignored." Quoted from 'Vladimir Putin: The rebuilding of 'Soviet' Russia' (BBC, 28 March 2014) <<https://www.bbc.com/news/magazine-26769481>>.

1981 Chinkin and Kaldor (n 1948) 255–256.

1982 af Jochnick and Normand (n 13) 95.

sphere.<sup>1983</sup> With such a bleak record, even fully embracing IHL would do little to polish Russia's oxidised image as a "humanitarian" power.

Secondly, we might consider whether Russia's former pride in IHL, and its adoption of IHL as a method for distinction in diplomatic circles still carry influence in Russia today. Today as in the 19<sup>th</sup> century, Russia remains a power very concerned with its status.<sup>1984</sup> Yet, Moscow's humanitarian trademark has long faded. The world has forgotten about Russia's historical achievements in the development of IHL. In addition, IHL itself does not bear the most humane trademark anymore, as I have just described. For these reasons, Moscow seeks diplomatic recognition elsewhere. The only prominent exception are Moscow's aid programmes, e.g. in Syria or Ukraine. In this respect, Russia uses highly publicised relief operations to enhance its international status, win "hearts and minds", and sway public opinion in its favour.

At the same time, Russia's current standing in international relations does not depend on its humanitarian image anymore. What does Moscow need to prove? As one of the victorious powers of the Second World War, Russia is a permanent member in the UN Security Council. It is *the* central power in current conflicts like Syria and Ukraine. It is crucial to de-escalation in North Korea, Iran, and Venezuela. The phrase "there can be no solution without Russia" became a commonplace the West needed to get used to. Obama's clumsy assumption that Russia only represents a "regional power" seems to have only increased Russian ambitions.<sup>1985</sup> Today, Moscow has its place at the negotiation table thanks to its influence in the post-war UN system and its determination to create facts on the ground. It does not need to go down the humanitarian alley to be perceived as a key actor on the international stage.

Thirdly, IHL has lost some of the military perks that it could offer to Imperial Russia in the 19<sup>th</sup> century. Admittedly, Russia still has a large army of around one million soldiers, a third of them ground forces.<sup>1986</sup> Thus, it has a vested interest in a protective framework for its combatants. IHL could offer that. However, Moscow is not the military giant it used

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1983 Mälksoo, *Russian Approaches to International Law* (n 6) 159; see also Lukina (n 1946), who argues that for political, historical, and ideological reasons Russia can only conform to the modern human rights "canon" to a certain extent.

1984 Anne L Clunan, 'Russia's Pursuit of Great-Power Status and Security' in Roger E Kanet (ed), *Routledge Handbook of Russian Security* (Routledge/Taylor & Francis Group 2019) 4–5.

1985 Galeotti, *Russian Political War* (n 1458) 17.

1986 *ibid* 21.

to be in the 19<sup>th</sup> century. Its population of 145 million is dwarfed by the NATO countries (937 million) and China's (1.39 billion) both of which have highly modernised armies.<sup>1987</sup> Compared to NATO, Moscow finds itself both outgunned and outnumbered. In addition, Russia struggles with an ageing population and will suffer from a lack of conscripts in the long run.<sup>1988</sup> Furthermore, the sheer size of the army is much less important than it was 150 years ago, as the world has moved beyond land warfare to a certain extent. While it remains an important component, the air force, unmanned drones, and cyber-capabilities have become similarly decisive tools. Therefore, the classic protection offered to POWs and wounded combatants – once a major incentive for Russia to promote IHL – are of limited relevance today.

Fourthly, what about the financial perks of IHL? Unfettered wars, protracted conflicts, and a global arms race cost money, a fact as true in 1868 as it is today. Once, the Imperial Minister of Finance, Sergey Witte, dreamt of a de-mobilised Europe that would “thrive in an unprecedented way and guide the best part of the globe.”<sup>1989</sup> Today, however, Russia does not seek to reduce military spending. On the contrary, defence has been made a national priority. From 2000 to 2009, the defence budget grew by almost seven percent every year.<sup>1990</sup> Russia has launched the ambitious State Armament Programmes GPV-2020 and GPV-2027 which set out to modernise the entirety of Russia's weapons and equipment.<sup>1991</sup> In 2018, Russia spent 61.4 billion dollars on its military, amounting to 4 percent of its GDP.<sup>1992</sup> In relation to its GDP, Russia thus spends far more than an average NATO State and even outspends the US.<sup>1993</sup> In terms of nuclear weapons especially, Russia remains a superpower. Moscow still owns the

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1987 See <<https://www.worlddata.info/alliances/nato-north-atlantic-treaty-organization.php>>.

1988 Galeotti, *Russian Political War* (n 1458) 20.

1989 Dillon (n 171) 276.

1990 Susanne Oxenstierna, ‘Russia's Economy and Military Expenditures’ in Roger E Kanet (ed), *Routledge Handbook of Russian Security* (Routledge/Taylor & Francis Group 2019) 100.

1991 GVP stands for *Государственная программа вооружения* [State Armament Programme], for details see Jennifer G Mathers, ‘The Rebuilding of Russian Military Capabilities’ in Roger E Kanet (ed), *Routledge Handbook of Russian Security* (Routledge/Taylor & Francis Group 2019) 149; Oxenstierna (n 1991) 101–102.

1992 SIPRI, ‘Yearbook 2019’ (2019) 7.

1993 Galeotti, *Russian Political War* (n 1458) 19.

largest arsenal with 6 500 nuclear warheads.<sup>1994</sup> Both Russia and the US have embarked on a “path of strategic nuclear renewal” and launched extensive and expensive programmes to replace and modernise their nuclear capabilities.<sup>1995</sup> While Putin recently seems to have slowed down his military build-up to address the root causes of Russia’s slowing economy, the defence budget is expected to grow at a moderate pace in the future.<sup>1996</sup> While IHL might still be a “money-saver” today, saving money on the military is clearly not a priority in modern-day Russia.

Finally, what does “Russian ingenuity” mean in the 21<sup>st</sup> century? In the 19<sup>th</sup> century, Russia managed to solve internal problems and promote external interests by means of international law, notably by promoting IHL and global disarmament. Today, Russia is not absent from the stage of international law, but it follows a different script. It promotes a traditionalist reading of international law that revolves around State sovereignty.<sup>1997</sup> In his 2007 Munich speech, Putin stressed the importance of the principle of sovereignty enshrined in the UN Charter and warned of a world with “one master, one sovereign” hinting at the US and Western interventionist strategies.<sup>1998</sup> The current Russian ‘Foreign Policy Conception’ (2016) vehemently insists on the principle of sovereignty and aims to counter

*“attempts by some States to arbitrarily interpret [...] principles such as the non-use of force [...] respect for sovereignty and territorial integrity of States.”*<sup>1999</sup>

Similarly, the Russo-Chinese Joint Declaration on International Law (2016) identifies sovereign equality as “crucial for the stability of international relations.”<sup>2000</sup> The recent constitutional reforms (2020) introduced

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1994 SIPRI (n 1993) 11.

1995 *ibid* 1, 10.

1996 Oxenstierna (n 1991) 106.

1997 Mälksoo, *Russian Approaches to International Law* (n 6) 177.

1998 Vladimir Putin, Speech at the Munich Conference on Security Policy (10 February 2007). The speech is available in English at <<http://en.kremlin.ru/events/president/transcripts/24034>>.

1999 Para 26(b) of Foreign Policy Concept of the Russian Federation (approved by President of the Russian Federation Vladimir Putin on 30 November 2016); an English translation is available at <[https://www.mid.ru/en/foreign\\_policy/official\\_documents/-/asset\\_publisher/CptlCk6BZ29/content/id/2542248](https://www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/CptlCk6BZ29/content/id/2542248)>; for details on the current Foreign Policy Concept and the role of Foreign Policy Concepts in Russia see Butler (n 829).

2000 The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law (25 June 2016) para 2. Available at

a clause that urges Russia to “take measures to prevent the interference in the internal affairs of the State.”<sup>2001</sup>

Admittedly, the call for sovereignty has always been a pillar in Russian/Soviet legal thinking, but it did not prevent Russia from agreeing to limitations on warfare.<sup>2002</sup> Today, however, Moscow’s call echoes even louder, amplified in an age of multilateralism. Anne Clunan argues that Russia harbours the hope that with the US decline, “sovereignty will automatically harden [...] and Russia’s status as a great power will be assured.”<sup>2003</sup> To Moscow, this call for sovereignty represents a counter-model to the Western concept based on human rights and multilateralism. Moscow feels betrayed by the “idealist rhetoric” which it sees as a pretext to push through Western realist motives.<sup>2004</sup> IHL, too, is perceived as a possible source of Western interventionism, rather than a way of realising Russian interests in today’s world.

In sum, none of the motives that led Russia to promote IHL exist in the same way as they did in the 19<sup>th</sup> century. In today’s Russia, there are no reasons on the horizon that could substitute them. Naturally, this absence of intrinsic motivation to develop, advance, and promote IHL will lead to a decline of the law’s standing. After all, international law, too, follows the principle that the Romans applied to their Gods: *do ut des* – I shall make a sacrifice to you, but what will you give me in return? Given Russia’s current course in world politics, it has little incentive to offer a sacrifice on the altar of IHL. Rather, it sacrifices IHL on the altar of sovereignty.

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<[https://www.mid.ru/en/foreign\\_policy/position\\_word\\_order/-/asset\\_publisher/6S4RuXfeYIKr/content/id/2331698](https://www.mid.ru/en/foreign_policy/position_word_order/-/asset_publisher/6S4RuXfeYIKr/content/id/2331698)>.

2001 See Art 79 of the modified Constitution.

2002 Under the Tsars, i.e. in the late Westphalian era, sovereignty naturally played a key role. The Soviet Union continued to promote a strong (albeit peculiar) concept of sovereignty. For an analysis of the Soviet concept of sovereignty and its exceptions see Bowring, *Law, Rights and Ideology in Russia* (n 548) 77–95.

2003 Clunan (n 1985) 12.

2004 Mälksoo, *Russian Approaches to International Law* (n 6) 176.



## Final Conclusion

Russia has undergone a transformation from Paul to Saul. Its extreme change of heart and the reasons behind it led me to write this thesis. In doing so I wanted to tell *both* sides of this story and reconcile the Western with the Russian narrative.

On the one hand, the West has largely forgotten about Russia's humanitarian achievements of the 19<sup>th</sup> and early 20<sup>th</sup> century. Of course, a handful of distinguished experts in this field have done much more than I could ever do to unearth this truth.<sup>2005</sup> However, mainstream opinion remains unchanged. It does not regard Russia as a nation that *makes* international law but rather one that *breaks* international law. Instead, Western States, the ICRC, and a large part of scholarly literature have co-authored the following narrative: Modern-day IHL was started by Henry Dunant, advanced by the ICRC, Switzerland, and other like-minded Western States, until it culminated in the adoption of the 1949 Geneva Conventions.

This storyline is at best a one-sided tale and falls silent on an important aspect. Before 1949, the most comprehensive documents of the IHL were not "Geneva law" but "Hague law." The latter was advanced neither by ICRC nor by most Western States but by *Russia*. After the ground-breaking achievement of the 1864 Geneva Convention, it took almost 90 years until an ICRC-driven process added new fundamental rules to IHL.<sup>2006</sup> Even at the 1949 Conference, this initiative only succeeded thanks to support from the Soviet Union. While the ICRC has done extremely valuable humanitarian work ever since its creation in 1863, it was a handful of States – above all the Russian Empire – that pushed for the further development of IHL in the 19<sup>th</sup> and early 20<sup>th</sup> century. I hope that the first Part of the thesis convinced the reader that Russia's humanitarian commitment in this era was indeed remarkable.

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2005 See e.g. Holquist (n 117); Mälksoo, *Russian Approaches to International Law* (n 6); Mälksoo, 'FF Martens and His Time' (n 90); Hirsch (n 475); van Dijk (n 507).

2006 Of course, there were minor additions. In 1906, the ICRC succeeded in updating the 1864 Convention on the Wounded and Sick. In 1929, the ICRC initiated the Convention relative to the Treatment of Prisoners of War that supplemented the existing Hague Regulations of 1907. Only the Geneva Conventions of 1949, however, added a whole set of new substantial rules to IHL.

On the other hand, we find the mainstream Russian narrative. It either focusses on the past, while completely ignoring the shortcomings in the present, or it falls completely silent on IHL. In the second Part of this thesis, I have described many instances where Russia broke the law. It is telling, however, that there is virtually no example where Russia directly *challenged* the law by providing legal counterarguments. It prefers to avoid, evade, or deny it. Russian politicians and the military reduce IHL to an empty shell that may be solemnly endorsed in abstract declarations or turned into a diplomatic weapon to be fired against third countries – but that may not restrict Russia's sovereignty or its conduct on the battlefield.

By merging these two contradictory narratives I have shown that Russia has come a long way from *advancing* the law to *avoiding* the law. The contrast is striking, more than for any other country in the world. Russia is often called a country of the extremes just like the biblical character Saul himself. This holds equally true for its attitude towards IHL. Through its radical change, however, Russia may serve as a barometer that indicates the changes in its surroundings. After all, the nature of warfare and the protective scope of IHL have evolved radically over the past 150 years. This change of weather flung the needle of the Russian barometer from one extreme into the other.

In conclusion, it hurts to see that IHL has lost one of its most fervent advocates. While Russia's change of heart is undoubtedly linked to the evolution of warfare and the humanisation of IHL, this cannot excuse today's attitude of evasion, avoidance, and obstinate denial. As in other fields of international law, Russia uses IHL as "a language in which it is possible to lie."<sup>2007</sup> This attitude not only damages Russia's own legacy, but erodes an essential field of international law.

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2007 Mälksöo, *Russian Approaches to International Law* (n 6) 191.