

**Integrating Legal Pluralism to ICRC's Task of Enhancing Compliance with
International Humanitarian Law**

by

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Abstract

The latest public reports by the International Committee of the Red Cross demonstrate its increased operational tendency granting importance to diversity and contextualization in the multiple contexts where the humanitarian institution operates. These reports call for the use of imagination and creativity to face challenges not yet overcome though recognized at least a decade back -notably the recurrent record of non-compliance with the law of armed conflict while the numbers of victims of war grow at a worrying pace. This thesis explores whether the predominant positivist legal character within the ICRC -typical of the western legal tradition- contributes or instead constitutes an obstacle to the current operational trends. It is argued here that complementing the marked positivist view of law at the ICRC with pluralist perspectives would help ease the tension and bridge the gap that it is argued exists at the ICRC between the legal and the operational minds. The ground is ripe for the integration of positivist and pluralist approaches at the ICRC, since a pluralist vision of law is in line with the pragmatic operational perspectives at the ICRC. A pluralist vision would entail open appeal to the moral ingredient of law in an inclusive and non-hierarchical dialogue which would integrate the diversity of actors at war as active participants in the legal enterprise. Moving forward to an inclusive and participative law-making process in a global context marked by a multiplicity of legal communities, religious dynamics and non-state conflicts may help improve adherence to and compliance with the law of armed conflict by rendering it more legitimate and meaningful in the mind of actors. Bridging the gap between the operational and legal minds at the ICRC could serve the operational objective to protect victims of armed conflict as well as the legal one to improve respect of the law.

Résumé

Dans ses rapports les plus récents destinés au public, le Comité International de la Croix-Rouge (CICR) expose sa tendance opérationnelle croissante et l'importance qu'il accorde à la diversité et à la contextualisation des multiples contextes où l'institution humanitaire exerce ses activités. Le CICR fait appel dans ces rapports à l'imagination et à la créativité pour venir à bout des difficultés qui ne sont toujours pas résolues, même si elles ont été mises en lumière il y a une décennie déjà au moins, notamment le non-respect répété du droit international humanitaire (DIH) alors que le nombre de victimes de guerre augmente à un rythme alarmant. Cette thèse cherche à définir si la position prédominante au sein du CICR, à savoir le positivisme juridique, attitude typique de la tradition juridique occidentale, favorise les tendances opérationnelles actuelles ou, plutôt, y constitue un obstacle. L'on avance ici que le fait d'étoffer la vision positiviste marquée du droit au sein du CICR d'optiques pluralistes contribuerait à apaiser les tensions et à combler le fossé qui, croit-on, existe au sein du CICR entre les perspectives juridique et opérationnelle. Il est temps d'intégrer les approches positivistes et pluralistes au CICR, puisque la vision pluraliste du droit correspond à l'optique opérationnelle pragmatique du CICR. Une vision pluraliste signifierait un recours ouvert au volet moral du droit dans le cadre d'un dialogue inclusif et non hiérarchisé, qui favoriserait l'intégration des divers acteurs en guerre comme participants actifs à l'entreprise juridique. L'orientation vers un processus législatif axé sur la participation dans un contexte international marqué par la multiplicité des collectivités juridiques, des dynamiques religieuses et des conflits non étatiques pourrait améliorer l'adhésion et la conformité au DIH en le rendant plus légitime et riche de sens dans l'esprit des acteurs concernés. L'écart comblé entre la vision opérationnelle et la vision juridique au sein du CICR pourrait servir l'objectif opérationnel de protéger les victimes de conflits armés, et l'objectif juridique d'améliorer le respect du droit.

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I feel special gratitude towards the International Committee of the Red Cross for the opportunity it gave me to be one of its delegates in various corners of the world for several years till 2008 when I stopped working to engage in this academic project. The questions that inspired my thesis originated in my field experiences as delegate for the ICRC, which also made me think of law differently. I wrote this thesis in full independence from the ICRC. The ideas contained herein are my own. To ensure respect of the confidentiality agreement which I am bound to with the ICRC, I restricted the use of ICRC sources to documents made available to the general public by the ICRC and nothing contained herein is of confidential character. Wherever my views and those of the ICRC may coincide, this would be a natural coincidence since I share ICRC's principles and ideals for the protection of victims of armed conflict and violence.

For Ana Camila

and in memory of my loving parents

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Abbreviations

IHL – International Humanitarian Law

ICRC – International Committee of the Red Cross

Introduction

The formalization of the contemporary law of armed conflict, otherwise called International Humanitarian Law (IHL), flourished in the twentieth century. Its main instruments were universally ratified, journalists referred to the Geneva Conventions with familiarity, treaties developing concrete aspects of the law multiplied, universities all over the world incorporated the teaching of this law, plenty of books and articles on the law of armed conflict were published, the guardian of IHL, the International Committee of the Red Cross (ICRC), gained wide support and respect. Yet, a brief glance at the conflicts of the twentieth century and of the few years of the century that just begins attack our eyes with images of horror, devastation and barbarity at war, resulting either from violations of the law or the impossibility of containing the effects of war. Violations of the law of armed conflict are by no means exceptional. Despite the Geneva Conventions, civilians are directly targeted in conflict; arms carriers use sexual violence against women and men in Congo; humanitarian workers are kidnapped in Darfur, Eastern Sudan, Afghanistan; millions of civilians remain displaced in Somalia, Colombia, Yemen, Chad, Congo. The task of persuading actors at war to respect International Humanitarian Law becomes more complex as belligerents are not merely elusive, they are often divided into tribes, they are loosely run, or are completely apart from state structures. Take the case of Afghanistan as one example. Defining who holds authority in Afghanistan is not a matter that state doctrine can fully answer. To insist on the argument that it is the responsibility of governments to ensure respect of the law of armed conflict and to protect innocent civilians does not fully grasp the reality of this type of

contexts, including their legal reality. For a Pashtun, all Afghans have to live under different laws: “the laws of their tribe, or of the Taliban, or of the government.”¹ Other than the ratification of International Humanitarian Law instruments by the government, there are no clear grounds to ascertain the place of this law in the mind of the variety of actors at war in Afghanistan, nor its place in the various legal layers that coexist in tension within its territory. How to persuade this variety of actors to respect the law of armed conflict is the crucial question. A question for which there possibly is neither a final nor clear cut answer. Even the International Committee of the Red Cross has not succeeded yet in its effort to improve compliance with IHL despite its wide success to bring help to victims of armed conflict and other types of violence for over a century.² This is the question that I address in this thesis in light of legal pluralism.

There is no ambition here to provide a magic solution to the crucial question of how to improve compliance with IHL. The aim here is to explore a different legal avenue to try to make International Humanitarian Law at least more meaningful to a wider and more inclusive legal community around it, which may help to grow adherence to this law. After several years of work as delegate for the ICRC, here I bring my personal insight of the organization in touch with legal pluralism and other perspectives to law, in contrast with legal positivism. The ICRC is clearly opening up to new approaches to its work; the connections made here between ICRC’s practice and a new approach to law could contribute

¹ Sharifullah Sahak, “A Pashtun writes,” At War, Notes From the Front Lines, *The International Herald Tribune* (Kabul, August 27, 2010).

² In 2009 alone, the ICRC assisted 4.6 million internally displaced people, to give just one example of the numbers involved in one single year. *ICRC Assists Record Numbers of IDP’s in 2009*. ICRC News Release 9 June 2010.

to prepare a theoretical framework for ICRC's practical endeavours to integrate non-state actors and actors from non-western legal perspectives in its legal efforts. This thesis does not stop on the concepts and contents of the Geneva Conventions or other International Humanitarian Law instruments. Instead, it first focuses on the internal functioning of the ICRC and its relations with actors at war from my personal perspective. It highlights the underlying argument that law, including the law of armed conflict, is an ongoing process, alive in human interactions, and when it is acted upon, beyond the static formal law contained in the text of the Geneva Conventions, along Lon Fuller's vision of law in various of his writings, mainly in his book "The Morality of Law" and in his article "Human Interaction and the Law."³ This thesis therefore presents the ICRC and International Humanitarian Law as concrete and current examples which illustrate well the practical relevance and the importance of Fuller's vision of law today.

My general argument is that there is a tension between the operational and the legal minds at the ICRC which has an impact on compliance with the law of armed conflict, requiring the ICRC to explore new avenues to engage actors at war in a genuine dialogue inclusive of the actors' perspectives and understanding of the law beyond the signing of treaties and agreements. The thesis is structured in three chapters: the first dives into ICRC's field and legal work and identifies a disconnect between its operational and legal approaches, which it is argued originates in ICRC's positivist vision of law. The chapter describes how as a result of the pragmatism and contextualization characteristic of ICRC's operational work, a

³ Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964); *Anatomy of the Law* (Westport, Conn: Greenwood Press, 1976); "Human Interaction and the Law" (1969) 14 *American Journal of Jurisprudence* 5; "Positivism and Fidelity to Law – A Reply to Professor Hart" (1957) 71 *Harvard Law Review* 593; "The Law's Precarious Hold on Life" (1969) 3 *Georgia Law Review* 530; "Mediation – Its Forms and Functions" (1971) 44 *Southern California Law Review* 314.

pluralist tendency spontaneously appears at the ICRC. Nevertheless, while ICRC's field inspired operational work leads to recognition of diversity and pluralism, its legal work is guided by a predominantly positivist approach with enacted law and the State at the heart of its efforts. It is argued that legal positivism reflects in a legal discourse by the ICRC which objectifies the law, and treats it as an entity with its own existence and reputation. While the positivist vision of law has resulted in a success story with respect to the work of implementation of IHL at state and army levels, this is not mirrored in the battle-field where state conflicts are the lesser, and actors are often opposed to state orders. That the ICRC's operational approach be pluralist is relevant, since the operational side of the ICRC is the driving force of its humanitarian work. The current pluralist tendency by the operations at the ICRC can influence the legal minds to look at law from the perspective of legal pluralism.

The second chapter argues that the positivist heritage, despite its remarkable accomplishments, like the universal ratification of the main IHL instruments, leaves out actors and perspectives who do not match well with the positivist western perspective. It elaborates the central argument to the thesis which is how the positivist legal approach by the ICRC can hinder true dialogue with certain actors at war because of its insufficient persuasiveness and inclusiveness of different perspectives, leading to weak adherence to the law of armed conflict by some actors; instead, ICRC's pluralist operational trends contain the germ of a more modern legal vision conducive to enhancing adherence to the law. This underlines the interest that the pluralist operational vision has for legal purposes, and the practical relevance of the theory of legal pluralism for ICRC's operational and legal minds.

The third chapter elaborates how the legal vision of pluralist scholars, concretely of Lon Fuller, not only help understand the tensions between the operational and legal minds within the ICRC in a new light, but are in line with the creativity of ICRC's operational minds who search to build genuine dialogue with actors at war. The chapter argues that Fuller's vision of law as a constant process enlightens ICRC's legal task and suggests ways to integrate his pluralist vision in concrete actions at the ICRC to complement the non-negligible traditional positivist approach to law. The aim is to unfold an additional perspective for the ICRC to enhance adherence to the law of armed conflict, by suggesting the integration of Fuller's pluralist ideas in ICRC's task of implementation of the law of armed conflict in a style inclusive of new or even different voices.

Chapter 1

Disconnect between the operational and legal minds at the ICRC

The work of the ICRC entails numerous activities ranging from visits to people deprived of freedom, provision of water to communities affected by conflict, logistics across borders to deliver food to destitute displaced civilians, re-establishment of family links, exhumation and identification of human remains, support to victims of rape, to humanitarian diplomacy, public communication, funds-raising, incorporation of international treaties in national legislations, spreading knowledge of International Humanitarian Law to the armed forces and the police, dissemination of international humanitarian law principles to the population at large. This is a very incomplete list of a multi-task enterprise which, according to the aims pursued, will be grouped here in two main areas of work, “operational and legal, which exist in parallel”⁴ and around which this thesis evolves.⁵ ICRC’s operational work relates to all efforts that allow access as well as delivery of help to victims of conflict, be it through material relief or through concrete actions aiming to stop, alleviate or prevent their suffering. The legal work relates to the activities of promotion, development and implementation of International Humanitarian Law.

⁴ Cornelio Sommarruga, . *Improving Respect for International Humanitarian Law: a Major Challenge for the ICRC, Official Statement by the President of the International Committee of the Red Cross, Fourth George Seward Lecture, International Bar Association, Geneva, 3 June 1994.*

⁵ There are activities where these two aspects may overlap or interact. Also, there are departments at the ICRC which offer services to the operational and legal aspects of its work -like media and communications, which can be integrated for the purposes of the analysis as services to either aspect of ICRC’s work.

The latest public ICRC reports portray its increased operational tendency towards diversity and pluralism, by granting a place to religions and context dynamics when exploring and analysing avenues for action in the multiple violent environments where it operates.⁶ These reports call for the use of imagination and creativity to face dated challenges not yet overcome, notably the worrying and reiterated lack of compliance with the law of armed conflict despite the wide ratification of the Geneva Conventions and other international humanitarian law instruments.⁷ The question explored in this chapter is whether legal positivism, characteristic of the legal aspects of ICRC's work, is in line with the current operational approach, or if it constitutes an obstacle for the accomplishment of the creative operational vision.⁸ It is argued here that, even if inspired by the same humanitarian purpose and despite the transversal dialogue that exists within the organization, there remains a point of disconnect between the operational and legal approaches at the ICRC.⁹ It is suggested that this disconnect originates in the positivist vision of law embedded in the mind of ICRC's legal professionals, not in lack of cohesion and communion of interests between the operational and legal minds. The first section describes how ICRC's field inspired operational work led it to contextualize its approach and adopt a diverse and pluralist trend in its policy along the lines of legal pluralism. The second section describes how, on the

⁶ Jean-Daniel Tauxe, *Faire Mieux Accepter le Comité International de la Croix-Rouge*, *Revue Internationale de la Croix-Rouge* No. 833 (1999) 55 – 61; Pierre Kraehenbuehl, *Overview of the ICRC's Operations in ICRC's Annual Report 2009* at 2, <http://www.icrc.org/web/eng/siteeng0.nsf/html/appeals-overview-181108>.

⁷ Jakob Kellenberger, *Current Challenges Faced by the International Committee of the Red Cross and International Humanitarian Law*, *Official Statement, The Ninth Hauser Lecture, New York University School of Law*, 5 March 2008 at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/ihl-challenges>; *Sixty Years of the Geneva Conventions and the Decades Ahead*, *Official Statement at a conference organized by the Swiss Federal Department of Foreign Affairs in cooperation with the ICRC*, Geneva, 9 November 2009 at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/geneva-conventions-statement>.

⁸ Rene Provost, "Pluralismo Jurídico y Pluralismo Cultural en la Regulación de Conflictos Armados" (Bogotá, 2008) III No. 10 *Revista Elementos de Juicio* 97. For Provost legal positivism can be an obstacle to incorporate the legal normativity derived from human agency in the particular context of the law of armed conflict.

⁹ David Forsythe's different suggestion is that there is rather a 'split' between the Operations and Legal at the ICRC. David P. Forsythe, *The Humanitarians* (Cambridge: Cambridge University Press, 2005) at 260.

contrary, the classic legal work at the ICRC reflects a predominantly positivist approach to law, with enacted law and the State at the heart of its legal efforts,¹⁰ though occasionally influenced by the operational pluralism in the preventive implementation of the law.

1.1 ICRC's operational trend towards diversity and pluralism

1.1.1 Field inspired operational work

A brief look at how the ICRC functions evidences the constant influence that context, as experienced by its field delegates, has on policy at the ICRC.¹¹ In the operational side of its work the ICRC is not only close to conflict, it actually *is* in the middle of conflict. Its immediate presence and proximity to victims in the field is unmatched by any other humanitarian organisation. The ICRC “maintains a permanent presence in over 60 countries and conducts operations in about 80”.¹² This presence is not limited to capitals or central cities. In many cases ICRC delegates are also located in remote places enduring extreme living conditions, be it due to security concerns, isolation and/or material limitations and constraints. These places may be so remote and hard to reach that often ICRC delegates may have to jump on a horse or a canoe to access places where the local population of the respective countries would not go to, even in peace time, or where the state authorities may not even be present on permanent, neither temporary basis.¹³ The risk of reaching such

¹⁰ Provost *supra* note 8.

¹¹ This was consistently the case throughout my experience as ICRC delegate for seven years covering places like Rwanda, Uzbekistan, Kyrgystan, Kazakstan, Tajikistan, Guinea, Macedonia, Serbia, Bosnia & Herzegovina, Croatia, Kosovo, Israel and Occupied Palestinian Territories, Peru, Ecuador.

¹² See “*The ICRC Worldwide*” in www.icrc.org.

¹³ In the Colombian jungle for example. *ICRC Annual Report on Colombia* (2009).

remoteness to access victims of conflict, while also having Delegations, Missions and Offices in capital cities or towns close to government and official authorities, results in a privileged perspective for the ICRC. Its staff can observe the diversity of worlds globally and within particular contexts. Through its field operations, the ICRC enjoys both a macro as well as a microscopic perspective at many levels of the social echelons.¹⁴ This physical proximity in the field feeds the internal reflection from the bottom with delegates and local field officers, up to the top of the ICRC hierarchy in Geneva. Experiences in the field circulate accurately through rigorous reporting, analysis and internal dialogue. The flow of field observations on the ground is the basis to determine policies for global humanitarian action, since the field staff propose concrete objectives and actions to the hierarchy periodically through a predefined transversal process of planning for results.¹⁵ Even if it is the hierarchy who has the last word in the end, and who has a full global picture, there is a clear space for delegates in the field to exercise influence and inform the process. Such process not only serves the purposes of professionalism and accountability, it enhances internal coherence and anchors decisions around concrete facts and real needs on the ground. While this field based operational approach was institutionalized at the ICRC through the adoption of professional tools for planning for results typical of private enterprises and multinationals in the 1990's,¹⁶ pragmatism based "on the assumption that the person closest to the problem knew the problem best"¹⁷ has been ICRC's practice since its conception. Needs define ICRC's course

¹⁴ This privilege has not been gained freely, but through persistent work and due to ICRC's professionalism, consistency and neutrality overtime. Sadly, it has cost the well-being and life of some of its delegates at times.

¹⁵ *ICRC Annual Report 2009*. See particularly "Strategic Management Model."

¹⁶ *Ibid.* See "Result-based Management" at 14, 15.

¹⁷ Forsythe, *supra* note 9 at 193; see also Jacques Freymond, "Humanitarian Policy and Pragmatism: Some Case Studies of the Red Cross" (1976) 11 *Government and Opposition* 408 at 413.

of action even “without any legal basis” for the choice of action.¹⁸ And even if there is legal basis for action, for example in case of violations of the law, “ICRC’s recommendations are generally based more on a reasoned response to the immediate needs observed than on legal concepts.”¹⁹ Close and permanent contact with the reality on the ground to assess the humanitarian needs is the privilege of the operational staff mostly. It would be hard to find a legal staff by their side in the extreme and hard-to-reach spots or in the battle field. Therefore, the field perspective has mostly an operational focus, reach, and ultimately impact. This means that the priority is to understand the context through observation and dialogue with a variety of actors, with a view to well assess the humanitarian needs, and determine the best course of action to bring help to the victims of conflict and alleviate their suffering. This operational focus persists up to the Director of Operations in Geneva in a circular dialogue, bottom-up as well as top-down. The Director of Operations is the face who describes the humanitarian landscape and sets the vision and general strategy of ICRC’s humanitarian work worldwide through policies contained in public and annual reports. He²⁰ does not act or decide alone of course. ICRC’s “Assembly is the supreme governing body. It oversees all the ICRC’s activities. It formulates policy, defines general objectives and institutional strategy.”²¹ Therefore the Director of Operations works in synergy and under a variety of superior organs and bodies. In addition to the Assembly, he is under the President, the Director General, the Council of Delegates and is member of ICRC’s executive body, the Directorate. Further, there are various other Directions at the same level as the Operations,

¹⁸ Jacques Moreillon, “Humanitarian Law, the ICRC, and Promoting the Geneva Conventions” (1981-1982) 31 *The American University Law Review* 819 at 821, article introduced by Raymond I. Geraldson “What is International Humanitarian Law: The Role of the ICRC” at 821.

¹⁹ Alain Aeschlimann, *Protection of Detainees: ICRC Action Behind Bars*, *International Review of the Red Cross* No. 87 (2005) 83 at 107.

²⁰ There has never been a female occupying this post.

²¹ See *ICRC Structure* at www.icrc.org.

including the Direction of International Law and Cooperation. Yet, the Director of Operations is the central figure leading the heart of ICRC's action on a daily basis, and ICRC's good will has been built on the operational success to access and bring aid to victims of armed conflict and other forms of violence. Therefore, the humanitarian views by the Direction of Operations not only matter; they are fundamental for the ICRC. When the ICRC is at work, the whole machine turns around the Operations with eyes wide-open to the reality on the ground.²²

1.1.2 Field reality pulls ICRC's current operational policy towards diverse perspectives, including morality

The reality that ICRC delegates find on the ground is more diverse and complex than was contemplated in the Geneva Conventions. While the Conventions turn around conflicts between states or at least where one of the parties is a state actor, the reality in the combat field does not always turn around states or its forces. Quite the contrary, what ICRC delegates find in the field is a multiplicity of contexts where state power is fragmented,²³ where the aim of the warring parties is not always to maintain the integrity of a state or to take political power over but rather the predominance of ethnic or religious control over territory and resources.²⁴ Key concepts at the heart of the law of armed conflict, such as the

²² I reached this conclusion after several years as ICRC delegate; see also *supra* note 13 'Strategic Management Model'. The whole vision outlined in this comprehensive report, particularly the section on strategy, illustrates well the centrality of the operational action at the ICRC.

²³ Aeschliman, *supra* note 19, "In crisis situations, dysfunction in the official chains of command or problems in the supervision of subordinates regularly come to light, often requiring all echelons of the civil and, if need be, military hierarchy to be contacted, informed and convinced of the soundness of the ICRC's recommendations. Sometimes a State disintegrates into several factions with a direct or indirect influence on the situation and treatment of detainees: it then becomes crucial to be able to contact and discuss with them."

²⁴ Tauxe, *supra* note 6 at 55 – 61.

distinction between combatants and civilians, are often inapplicable in practice, since civilians turn into fighters and the perceived enemy is not only the combatants, but often also the population,²⁵ despite any legal insistence on the academic distinction. This complexity in the field matters, since it is precisely in it that lays the main challenge for the ICRC: how to change the “deliberate, widespread and systematic violations”²⁶ of the laws of armed conflict by the multiplicity of actors into better compliance with the law. In my experience, ICRC officials were often timid to look beyond the Geneva Conventions, and more recently the Rome Statute, when the question is compliance with the law. Not always though.

To address this challenge back in 1999, Jean-Daniel Tauxe, then ICRC’s Director of Operations, suggested to appeal to ethical arguments, more concretely to “universally accepted ethical rules,” to address the changing faces of conflict in the XXth century.²⁷ He argued that it would be “a mistake to believe that the mere invocation of law would suffice.”²⁸ Even if in his language Tauxe seems to separate ethics from law, his mere suggestion to resort to ethics and include it in the equation in the context of armed conflict, illustrates his intuition that norms (other than formal international humanitarian law as traditionally understood at the ICRC, i.e. treaty and customary law) do matter. His approach reflected the characteristic operational insight and focus to try to find means to access and help victims of conflict in contexts that did not fit classic interstate war-fare dynamics. Suggesting an appeal to ethics was possibly received with some reserve at the time.²⁹ Even if

²⁵ Tauxe, *supra* note 6, see also Marco Sassoli, “Implementation of International Humanitarian Law” (2007) 10 Yearbook of International Humanitarian Law at 46.

²⁶ Sassoli *ibid* at 49.

²⁷ Tauxe, *supra* note 6.

²⁸ Own translation of text in French by Tauxe *supra* note 6 at 55-61.

²⁹ Forsythe, *supra* note 9.

ethics does not oppose to secularism and vice-versa -ICRC being a secular institution-, the “universally accepted ethical rules”³⁰ that Tauxe referred to are no other than the humanist principles of ICRC’s western and Christian heritage, a heritage the ICRC seemed partly divorced from in its public discourse.³¹ Appealing to ethical arguments would unpack this past. Ethics outside of secularism is nothing other than the morality found in the religions of the world. The ICRC often made clear that morality was neither an issue nor the argument for its actions and for IHL.³² Instead the ICRC appeared married to a rationalist and material line in its discourse just like most democratic states in Europe, with formal law, concretely the Geneva Conventions and state practice, as the central tool and source of its authority and work. Some lawyers at the ICRC may have found Tauxe’s appeal to ethics a risky or unconvincing avenue, since the predominant view in the modern western legal tradition rejects including morality in law.³³ The more operational minds on the contrary, like Tauxe, would be more open to add morality to law: “The list of arguments used by the ICRC varies perceptibly depending on the environment in question and those with whom it has to speak. The main arguments used are of a legal or moral nature.”³⁴ Tauxe’s choice of the word ‘ethics’, despite its apparent neutrality, would have lead to morality and religion when the context was neither western nor secular, as many violent contexts were then and remain so today. Religion, the source of morality for many in the world, became indifferent in western

³⁰ Ives Sandoz, *The International Committee of the Red Cross as Guardian of International Humanitarian Law* (1998) at 6. “Principles of humanity (meaning empathy with the vulnerable and those in distress).”

³¹ References to Christianity are not explicit in the ICRC. On the contrary the ICRC portrays itself as a secular institution. A thorough study of its discourse, which is beyond the scope of this thesis, would possibly find many traces of Christianity, for example with the frequent use of words like compassion and suffering.

³² Michele Porretti, “The Roots of Behaviour in War and Influence Strategies” (2007) in *Protecting Human Dignity in Armed Conflict, Speeches and Proceedings of the Conference on Occasion of the 140th Anniversary of the Netherlands Red Cross, The Hague*.

³³ H.L.A. Hart “Positivism and the Separation of Law and Morals” (1957) 71 *Harvard Law Review* 593; *The Concept of Law*, (Oxford: Oxford University Press, 1961).

³⁴ Aeschliman *supra* note 19 at 114.

legal reasoning from the start of the Twentieth century other than as part of its history.³⁵ Against this background, Tauxe's operational ideas a decade ago were a courageous and creative perspective inclusive of normative spheres not expressed explicitly in formal law but to be found elsewhere in the sphere of morality, or more precisely implicitly in the law. While Tauxe's suggestion refers to ethical values, arguably with a monistic approach, rather than a pluralistic one, his innovation was to bring ethics and morality explicitly to the table. ICRC's elusiveness from religion arguably did not let Tauxe's ideas resonate hard enough though. Instead, a legalistic line which granted greater weight to "a politico-legal conception"³⁶ of humanitarian norms, rather than a moral one, remained the predominant fashion at the ICRC. This is the view supported by the interpretation of the majority results in the survey "People on War" conducted under ICRC's auspices in 14 countries affected by conflict. Yet, the same survey showed heterogeneous results, diverging conclusions and dissenting views on the question,³⁷ granting a place to morality as an ingredient influencing behaviour at war in a few but crucial countries at war like Israel and the Philipines.³⁸ Despite the 'politico-legal conception' preferred, morality widens its place in the law of armed conflict and in ICRC's discourse under the guise of the "principle of humanity,"³⁹ even if the ICRC does not explicitly use the word morality in its public discourse.

³⁵ Carolyn Evans, "The Double Edged Sword: Religious Influences on International Humanitarian Law" (2005) 6 Melbourne Journal of International Law 1.

³⁶ Daniel Munoz-Rojas, et al. *Universalism or Cultural Relativism in Social Representations of International Humanitarian Law: A Cross-cultural Study on War-torn Societies* at 21.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Jean Pictet, *Red Cross Principles* (Geneva: ICRC, 1956).

In the Overview of Operations of 2009,⁴⁰ Pierre Kraehenbuehl, the current Director of Operations, continued the trend stated by Tauxe a decade earlier, though without any express appeal to ethics, nor to morality. In the introduction to said official overview, Kraehenbuehl provides an analysis of humanitarian action and describes conflicts along the same lines as Tauxe, placing greater emphasis on the religious ingredient as part of the reality found in the field. Kraehenbuehl admits that “today's conflicts... may also have tribal, ethnic or religious dimensions, and may be characterized by the coexistence of political and non-political players.” He mentions that often there is “a juxtaposition of a weak State, collapsing infrastructure and open hostilities among a mix of politically driven players and criminal groups.” He describes that “there were few wars between States in 2008” except for Georgia and Eritrea and Djibouti and adds that in the conflicts of today there is a “marked influence of armed groups” which are often fragmented and constantly changing command. He states that confrontations often result in acts of terrorism or counterterrorism.⁴¹ In other words, the picture of the armed conflict situation that Kraehenbuehl presents is one of frequent irrelevance of state structures and organs, and of inexistent or undefined hierarchies and command, just as Tauxe had observed.

This reality led the operations to a humanitarian policy consequent to the plurality of contexts in conflict. Kraehenbuehl therefore insists on the need to engage in dialogue with diverse actors, to accept the diversity found in the field and leave any preconceptions in order to genuinely understand it. That is precisely why he highlights as an accomplishment the “networking efforts, which consist of engaging in dialogue with a wide range of actors”

⁴⁰ Kraehenbuehl, *supra* note 6.

⁴¹ *Ibid* at 2.

including “diverse protagonists throughout the Muslim world.” He admits it is a challenge to clearly understand “the diversity of situations in which [the ICRC] works and their specific nature.” Proximity to victims by ICRC delegates for him entails “genuine receptiveness and understanding of realities and vulnerabilities” in addition to the physical closeness that ICRC's dated presence in the field provides. To him “this means accepting diversity and being able to interact without preconceived ideas or notions.” There is no evidence to suggest that the freshness of his invitation travels as far as welcoming new notions about law, like an open inclusion of morality in the legal equation, neither does he indicate clearly any express intention to reform the legalistic side of its work. But Kraehenbuehl does not limit the scope of his proposal to the operational tasks, leaving the door open to extend such creativity beyond the operations with the potential to influence even the legalistic line with a new perspective. His words are not merely descriptive of context, but an indication of where the ICRC is heading to. The Overview of Operations is a serious document addressed to the donors to whom the ICRC is accountable and the basis to collect donations. This overview is the presentation of what the whole machine of the ICRC views, intends to do, and is doing. The fact that ICRC's operational approach denotes a clear pluralist vision matters: given the driving force that the operations represents at the ICRC, it prepares the ground and influences the legal minds to look at law from added angles and perspectives.

1.1.3 A legal pluralist trend applied by the operations

Pluralism in general terms is the vision of diversity or plurality as opposed to uniformity. Plurality of principles, plurality of interactions, plurality of reasons for behaviour, plurality of

powers, plurality of ethnic and religious traditions, plurality of practices, opinions, values, laws, attitudes, theories. The recollection of the views of the world by ICRC field delegates, as much as the overview of ICRC's operations just referred to above illustrate well a pluralist perspective. ICRC's attention and responsiveness to diverse contexts, the way it encourages inclusive dialogue in the field with diverse actors in addition to the state, its recognition of the different cultural and religious traditions, even its constant assertions of what the law of armed conflict is amidst a long list of threats and dissents it sees coming from the contexts where it operates, are all manifestations of a pluralist approach. This pluralism manifests after the events in ICRC practice, not necessarily with any *a priori* theoretical awareness in the mind of delegates or ICRC officials. First there is observation of context by the field delegates, then actions in response to the needs, then their experience impacts humanitarian policy. As a result of ICRC's pragmatism and contextualization, the pluralist tendency spontaneously appears overtime in the operations during and after the events. ICRC's operational approach and policy reflect features found not only in pluralism generally, but more concretely in the theory of legal pluralism. This is a paradox, since in the legal side of its work the ICRC is at the other end of the theoretical thread with a legal positivist approach.⁴²

Legal pluralism is a perspective to look at law which purports not merely to define what law is, but rather to recognize the diverse spheres where law is made, in addition to the law

⁴² Categorizations can lead to inaccurate generalizations and misconceptions. Yet, they allow us to analyze. Here I have opted for two categories, positivism and legal pluralism. Yet, some may argue that positivism allows a legal pluralist perspective within its logic. This is a theoretical question which merits elaboration but which is out of the scope of this thesis. Here I argue that positivism is not inclusive for it is mostly state-centred, while legal pluralism is inclusive of other perspectives and normativities.

emanating from the state,⁴³ and even amidst conflict or dissent.⁴⁴ From a legal pluralist perspective law is not static; it is a living enterprise, constantly in the making.⁴⁵ It is a theory with many shades and with its own diverging and evolving tendencies, though extending on them is beyond the scope of this thesis. Jeremy Webber wraps up the various themes in legal pluralism literature in four main features. These are briefly: (i) a “careful reading of context” to identify “what the participants in a social context take to be obligatory,” (ii) a recognition of the plurality of varying normative traditions rooted in the history of the different contexts, (iii) the presumption, by some, that the practices in a specific tradition are better suited to the particular context than norms found elsewhere, and (iv) the de-central place of the state.⁴⁶ Webber adds his own theme, which is identifying the mechanisms for resolution of dissent in a reality of “diversity of insight and disagreement.”⁴⁷ Another relevant legal pluralist for the issues addressed here, and for the ICRC with respect to its current concern about the lack of respect of the law of armed conflict, is Lon Fuller. He opposes to the separation between law and morals,⁴⁸ and looks at the continuous processes how laws originate and bind, shedding light on why and how the laws are adhered to and respected.⁴⁹ His views are particularly crucial to the question of compliance with the law of armed conflict and will be elaborated in the next chapters.

⁴³ John Griffiths, “What is Legal Pluralism” (1986) 24 *Journal of Legal Pluralism* 1 – 56. “By ‘legal pluralism’ I mean the presence in a social field of more than one legal order.”

⁴⁴ Ibid. Also Jeremy Webber, “Legal pluralism and Human Agency” (2006) 44 *No. 1 Osgoode Hall Law Journal* 167 - 198. His theory is a legal pluralist conception that “takes human disagreement seriously.”

⁴⁵ Fuller, *The Morality of Law*, *supra* note 3.

⁴⁶ Webber, *supra* note 44 at 173.

⁴⁷ Ibid at 181, 197. This way he downplays the importance granted to “the individual’s consensual adherence to norms” that Critical Legal pluralists profess.

⁴⁸ Fuller, *The Morality of Law* *supra* note 3.

⁴⁹ Fuller, “Human Interaction and the Law” *supra* note 3 at 5.

There are no grounds to affirm that there is a conscious operational will at the ICRC to head towards legal pluralism, and there is no literature evidencing any express discussions or in-house reflexions about legal pluralism. This is not surprising since legal pluralism is not really in the radar of international humanitarian law workers and lawyers, except for a few scholars, or when connected to the cultural relativism debate in human rights scenarios and tangentially in cases before international tribunals.⁵⁰ The expression legal pluralism is even hard to find in legal dictionaries, let alone in ICRC's doctrine.⁵¹ It is not a concept that outstands or is talked about in the day to day work at the ICRC. Nevertheless, while conceptualizing legal pluralism is rather the task of legal theorists, it appears well mirrored in the operational minds at the ICRC, with some practical reflections on its work. Free from legal conceptualizations and theoretical baggage, the operations opened the door to new perspectives and allowed the germ of legal pluralism to manifest spontaneously in concrete actions. Legal pluralism is a theory that began by describing what happens in a diverse reality,⁵² which goes well with ICRC's field-based operational approach.

ICRC operational delegates work not only with official authorities and law, but also with unofficial authorities and norms, in recognition of the plurality of authorities and normative spheres in a legal pluralist fashion. ICRC's pragmatism and focus on the needs of the victims of conflict has led it on occasions to act outside of the mandate conferred to it by the states parties to the Geneva Conventions as guardian of IHL, or in absence of other treaties or state

⁵⁰ Rene Provost, "The International Committee of the Red Widget? The Diversity Debate and International Humanitarian Law" (2007) 40 Israel L. Rev 614, also "Pluralismo Juridico" supra note 8; see Henry Steiner & Philip Alston, "Universalism and Cultural Relativism" in Henry J. Steiner & Philip Alston, eds., *International Human Rights in Context: Law Politics, Morals*, 3rd ed. (New York: Oxford University Press, 2000) at 517.

⁵¹ See Marion Harroff-Tavel on cultural diversity *

⁵² It originated in the observations by anthropologists like Geertz. Clifford Geertz, "Local Law: Fact and Knowledge in Comparative Perspective" in *Local Knowledge: Further Essays in Interpretative Anthropology* 3rd edn (Basic Books, 1983) 167.

practice conferring on it a concrete right to act.⁵³ While this by no means entails acting against states or formal law, it does imply that the ICRC can ground its actions on other spheres, like morality, rather than on a legal mandate enacted in formal laws or treaties exclusively. One of ICRC's main operational activities for example is the program of visits to detainees or people deprived of freedom. From the start, ICRC visits to prisoners of war started even before the Convention on the protection of prisoners of war was negotiated.⁵⁴ Today, some of the persons visited by the ICRC are detained following situations of internal violence which do not amount to armed conflict, that is situations outside the scope of international humanitarian law; yet ICRC delegates may be granted access to these detainees, a right that the ICRC has gained through negotiations overtime, based on humanitarian, not legalistic considerations. Similarly, when ICRC delegates have been kidnapped, the ICRC has not simply appealed to the legal obligation of the warring parties to respect the life of humanitarian workers in light of international humanitarian law provisions. Instead, it has also appealed to the sentiment of humanity and to the religious laws of the captors.⁵⁵ For example, in one of the news releases issued by the ICRC during the unfortunate abduction of delegates in the Philippines in 2009, the President of the ICRC stated that no religious laws justify harming humanitarian workers, with no express mention of IHL in the text of the news release. ICRC's efforts led to the release of the delegates. While it would be inaccurate to link this particular press release to the liberation of the delegates, it does illustrate that the ICRC was ready to appeal to the moral and religious laws of the captors.

⁵³ For example, the ICRC started visiting detainees before the Convention for the Protection of Prisoners of War, and it visits people detained in internal violence situations.

⁵⁴ Forsythe, *supra* note 9. *

⁵⁵ Jakob Kellenberger quoted in *ICRC President Calls for Hostages to Remain Unharmful*, News Release 61/09 Manila/Geneva, 27 March 2009, "...All they were doing was helping people in need in your area. There is no ideology or religious law that could justify killing them." Also in News Release of 20 December 2009 "I appeal today to the sense of humanity of the abductors..." The delegates were all released at different stages fortunately.

ICRC's presence in countries throughout the world is established with due respect of official state authorities, by way of memorandums of understanding to formalize its presence in addition to the mandate conferred to it by the Geneva Conventions. Nevertheless, the nature of its work for the victims leads the ICRC inevitably to engage in dialogue with informal authorities and non-official actors outside of the state sphere, thereby de-centring the place of the state. ICRC's deference for state authorities does not imply ignorance of the many layers of authority that the ICRC may encounter in a given territory, including authorities parallel to the state, or against it. If the victims of conflict are in need, ICRC delegates engage in negotiations with the informal authorities who de-facto have the power to allow access to the victims, to improve their conditions or to put an end to their suffering. If ICRC delegates need to access territories which are under the control, total or partial, of guerrilla fighters or warring tribes, the delegates would engage in dialogue with the fighters and would try to influence whoever exercises authority to help and protect the victims of conflict. It is not unusual for a field delegate to end-up disseminating the basic rules of international humanitarian law in such dialogue, though the priority is gaining trust to access the victims of conflict and to provide them with support.

It is difficult to find an organization other than the ICRC with as much reach and real access to the diversity of actors at war. There are countless examples of contacts by the ICRC with non official actors: the ICRC has engaged in dialogue to visit detainees "held by numerous armed movements such as the TPLF (Tigray People's Liberation Front) in Ethiopia, the RPF (Rwanda Patriotic Front) in Rwanda, the SPLA/M (Sudanese People's Liberation

Army/Movement) in Southern Sudan, UNITA (National Union for the Total Independence of Angola), the LTTE (Liberation Tigers of Tamil Eelam) in Sri Lanka, the FARC (Colombian Revolutionary Armed Forces) in Colombia, the main Kurdish parties and de facto authorities in Iraqi Kurdistan, de facto authorities in Abkhazia and in Nagorny Karabakh, the Palestinian Authority.”⁵⁶ Equally, one factor that the ICRC takes in consideration during its visits to detainees held by the official authorities, is the existence of informal de-facto authorities parallel to the official prison authorities, which may take the form of prison gangs, elected representatives for the detainees, or other. The means how such informal authority appears is not the subject here, nor is it necessarily a question for ICRC delegates to resolve. The point is that delegates will deal with both the informal and the official prison authorities in order to protect the life and dignity of the detainees and to assess their conditions of detention and improve them when they fall below the minimum standards of detention. In these cases, the ICRC would assess “the detainees’ internal organization (political disputes, gangs, internal reprisals, cooperation with the authorities”⁵⁷ and would intervene at the detainee’s level, exclusively or in addition to the official level of authority, to put an end to any abuse by detainees on fellow inmates for example. If dealing with inter-detainees issues at the level of the official authorities could entail sanctions by the authorities or reprisals against fellow inmates, the ICRC delegates may opt not to address those issues with the formal prison authorities. In general, the ICRC does not inform the authorities of any events unless the victims so consent.⁵⁸ Another case of dialogue with non-state actors is the first aid training by the ICRC to Taliban fighters, even amidst criticism from the official Afghan authorities in Kandahar. While this ICRC training was based on the legal protection granted to all wounded

⁵⁶ Aeschliman, *supra* note 18 at 90.

⁵⁷ Aeschliman, *supra* note 18 at 115.

⁵⁸ See general protection approach in *ICRC Annual Report 2009*.

in the battle field under the Geneva Conventions, it shows that the ICRC is ready to interact with whoever is needed for the benefit of the victims despite governmental opposing views.⁵⁹ Such trainings to the Taliban provide clear opportunities of dialogue with one of the most elusive fighters. A further example of how the ICRC is ready to engage in dialogue with non-official authorities, is its willingness to visit detainees who are held illegally by whichever authorities, state or not, in secrete places of detention. A last example of potential contacts with non-official authorities by the ICRC is the current inclusion by the ICRC of urban violence as possible scenarios for ICRC action in places like Brazil and Mexico. To expanding its work to urban violence would entail dialogue by the ICRC with de-facto leaders of gangs in control of urban territory.

Certain contexts have also pushed the ICRC towards recognition of plural authorities and traditions which function not necessarily against the official authorities, but which may also function with it, or above it. This is the case of non-secular states, or failed states with tribal fragmentations, or states where the conflict is fuelled by religion for example. To better understand those contexts, to gain access to victims, and to improve the perception of the ICRC in those places, the ICRC engages in dialogue with the religious and tribal leaders. Traditionally, contact with actors at war by the ICRC has an operational focus, i.e. to access, to gain trust, to create secure conditions for delegates to work for the victims of war. The operations may be moving the dialogue with Muslim religious leaders to a different level though: under the leadership of Andreas Wigger, Deputy Director of Operations, the ICRC promotes meetings with Muslim religious leaders and experts on Islamic law, “the aim being

⁵⁹ Frank Jordans, *Red Cross Under Fire for Teaching First Aid to Taliban*, Associated Press news, Geneva, May 26, 2010. The local government publicly opposed to these trainings to the Taliban on poor grounds, saying that they do “not deserve to be treated like humans.”

to lay the foundations for greater mutual understanding, dispel existing misconceptions and find common ground for protecting human dignity in situations of armed conflict”, as well as “to understand both the substance of Islamic tradition and the methodology for establishing obligations towards victims of war.”⁶⁰ This approach brings reflexions about law to the table in order to understand better the Islamic legal tradition, pulling the legal approach and the legal professionals towards diversity. The initiative of this type of dialogue with religious -as opposed to state-actors only, illustrates the crucial influence that the operations can have on the legal minds at the ICRC. The next section will first describe ICRC’s classic legal approach before elaborating further about the interaction between the operational and legal minds.

1.2. ICRC’s legal positivist approach disconnected from the operational pluralist approach

1.2.1 ICRC’s legal positivist approach and origin

In the legal side of its work the ICRC has a legal positivist approach placing the state at the heart of its legal activities. Legal positivism is the school of thought that H.L.A. Hart developed and clarified, around the crucial question of the separation and distinction between law and morals.⁶¹ Legal positivism is clearly not reduced to such distinction; instead, there is

⁶⁰ Andreas Wigger, *Encountering Perceptions in Parts of the Muslim World Impact on ICRC’s ability to be Effective*, International Review of the Red Cross 87 (2005); *also *Conference on IHL and Islam in Iran*. ICRC interview 28 November 2006, <http://www.icrc.org/web/eng/siteeng0.nsf/html/islam-ihl-interview-281106>.

⁶¹ Hart, *supra* note 33.

a multiplicity of theories within it. In general terms, the shared search for clarity and certainty in legal positivism resulted in a formalistic approach to law, with a focus on the law of the state and law-making within state structures, detached from morality and from the individual agency of the persons subject to state rule. Legal positivism as portrayed by Hart is one which treats “law as datum projecting itself into human experience and not as an object of human striving.”⁶² While Hart’s positivist vision of the law is arguably the predominant view of law in many Western countries, this vision is not unanimously embraced. Hart’s “lack of interest in [...] contextualization marks a certain limit to the insights provided by his legal and political philosophy.”⁶³ His focus on a purely conceptual and analytical approach to law results in the exclusion of moral and historical contexts which are not only pivotal for legal purposes,⁶⁴ but also inseparable from law for other legal theorists, among other reasons because “legal reasoning is a species of moral reasoning.”⁶⁵ Along the lines of legal positivism, the ICRC focuses on state authorities, formal instruments, state practice, transmission of knowledge of law upon state subjects, and it also separates law and morals.⁶⁶ ICRC is not alone in this approach. Legal positivism is at the origin of international law in general. While legal positivism is in itself an umbrella for a multiplicity of theories, its main feature as a theory that “studies the legal system as it is,”⁶⁷ objectively, as a fact, results in a “tendency to focus on concrete manifestations of the law (rules, legal officials, state-mandated coercion).”⁶⁸ Under legal positivism’s “fixation on the material”⁶⁹

⁶² Fuller, *Fidelity to Law* *supra* note 3 at 646.

⁶³ Nicola Lacey, “Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller debate” (2008) 83 New York University Law Review 1059 at 1062.

⁶⁴ *Ibid.*

⁶⁵ *Ibid* at 1071. See also Leslie Green, “Positivism and the Inseparability of Law and Morals” 83 NYU L. Rev. 1035 (2008).

⁶⁶ Fuller, *supra* note 3.

⁶⁷ Seana C. Sugrue, *The Somatic State: Dialectics of Law’s Morality* (D.C.L. Thesis, McGill, 2000) at 55.

⁶⁸ *Ibid.*

law is to be found where it manifests materially: in the enacted law, through the state practice, by the state officials, at the institutions with an official legal mandate. Unlike legal pluralists who see law as an enterprise in constant making, a legal positivist looks at the final product rather than its making. It focuses on the law “at the point where it emerges from the institutional processes that brought it into being,”⁷⁰ i.e. the customary law formed by the state practice, the ratified treaties, the enacted legislation, regardless of the “human effort”⁷¹ that leads to its existence. The positivist vision of the law, by focusing on authorities, would then leave out ordinary citizens, the people who hold no authority, groups who act outside of state structures, like the increasing number of non-state actors in armed conflict and the religious leaders when conflicts are fuelled by religion. The focus on state authorities and formality would further exclude religious norms, since the legal positivist position is to separate law and morality.⁷² For positivists, the validity of law lies in its enactment by an existing political authority rather than on satisfying moral requirements.⁷³

From the start, the ICRC paid respect to states and to the law revolving around states. The whole machinery of the contemporary law of armed conflict originated in agreements by the states about the conduct of hostilities by their armies. The fact that the law of armed conflict has developed into multiple additional instruments, for example to include non-state actors in internal armed conflicts, did not change the state-centred approach, including in ICRC’s legal work as guardian of the law of armed conflict. This role as guardian is based on the mandate granted to the ICRC by the states parties to the Geneva Conventions, which appears

⁶⁹ Ibid.

⁷⁰ Fuller, *Anatomy of the Law* *supra* note 3.

⁷¹ Ibid.

⁷² Hart, *The Concept of Law* *supra* note 33.

⁷³ Ibid at 185. Stephen Guest ed. *Positivism Today* (Aldershot: Dartmouth 1996) at ix and 38.

“formally recognized in the Status of the International Red Cross and Red Crescent Movement [...] adopted both by the components of the Movement and by the States parties to the Geneva Conventions.”⁷⁴ On the basis of this state mandate the ICRC devotes significant human and financial resources to promoting the ratification and development of treaties at state level and monitors respect of the law of armed conflict. When explaining its mandate and its role as guardian of IHL, the ICRC focuses mostly on the actions it can take to deliver results based on the ‘mandate’ conferred by the states and on its role as ‘guardian’ of the law, but little is said of the actual meaning of these words. Their meaning matters here because the choice of words in the Geneva Conventions and in ICRC’s discourse confirms the firm place of states and legal positivism right at the centre of ICRC’s legal nature and vision. To say that the ICRC is mandated by the states is equivalent to say that it acts as agent of the states, that its authority derives from the states. Even if the ICRC had the original drive and initiative to build on the humanitarian ideals of Henry Dunant, and even if the ICRC is today the leader in the development of IHL, it is true that the states did confer the authority to the ICRC, without which the ICRC would not have been able to become the institution it is today. Not only did the ICRC gain support from a powerful block of states to start, it still remains largely funded by the same states. The point here is not to question ICRC’s independence and neutrality, because they lay not on its mandate but on its *modus operandi* and guiding principles. The point is to illustrate the weight of positivism in ICRC’s origin and in its role.

The object of ICRC’s mandate, i.e. the authority conferred by the states to the ICRC, is precisely to act as guardian of IHL. The object of ICRC’s protection is the concrete

⁷⁴ Sandoz, *supra* note 30.

manifestation of the law of armed conflict, namely the Geneva Conventions and related instruments. In addition to the central role of the state, the importance given to the protection of the end product that the Geneva Conventions represent further illustrates ICRC's roots in a positivist vision of law. Such vision continues to reflect in ICRC's legal discourse and in certain public documents where the law is contained and objectified as a "factum,"⁷⁵ which would not be done under a legal pluralist approach where law is instead perceived as a process. For example, the ICRC's Ives Sandoz explained that one aspect of ICRC's role of guardian of International Humanitarian Law consists in "defending [this law] against legal developments that disregard its existence or might tend to weaken it."⁷⁶ Also, during the celebration of the 60 years of the Geneva Conventions, the president of the ICRC, Jakob Kellenberger, stated that "IHL has withstood" the tests of time, challenges and threats "with its reputation intact."⁷⁷ The use of such phrases in ICRC's discourse then and in the past⁷⁸ objectify the law, and treat the law as an entity with its own existence and reputation. The challenges that under legal positivism constitute a threat to the law, or to the law's reputation, would not be perceived as threats under a legal pluralist perspective which focuses on the human involvement in the process of creation of the law and the aspirations aimed with the law, to be developed in the subsequent chapters.

1.2.2 Legal positivism reflected in ICRC's legal tasks

⁷⁵ Fuller, *Morality of Law* *supra* note 3.

⁷⁶ Sandoz, *supra* note 30 at 2.

⁷⁷ Jakob Kellenberger, *Sixty Years of the Geneva Conventions and the Decades Ahead*, Official Statement at a conference organized by the Swiss Federal Department of Foreign Affairs in cooperation with the ICRC, Geneva, 9 November 2009.

⁷⁸ Philip Spoerri, *Law of War Stands Tough Test of Time*, Official Statement 30th Anniversary of the 1977 Protocols Additional to the Geneva Conventions. 1 June 2007.

ICRC's legal endeavours as guardian of IHL are usually referred to as 'implementation of the law of armed conflict.' According to Marco Sassoli, 'Implementation' involves three levels of work: preventive measures before conflicts erupt, ensuring respect of the law during conflicts, and repression of violations of the law.⁷⁹

Implementation activities aim to promote the universal ratification of humanitarian treaties and the adoption by States of legislative, administrative and practical measures and mechanisms to give effect to these instruments at national level. It is also important to ascertain that proposals to develop domestic laws do not undermine existing IHL norms. Implementation activities also aim to foster compliance with IHL during armed conflicts and to ensure that national authorities, international organizations, the armed forces and other bearers of weapons correctly understand the law applicable in such situations.⁸⁰

Other than participating in the process leading to the creation of the International Criminal Court and the incorporation of the Rome Statute in national legislations, the ICRC does not get involved in the last level of implementation which is repression for violations of the law. Its delegates cannot even be called to testify about the countless violations of IHL they witness in the field.⁸¹ Therefore, implementation of IHL by the ICRC refers to the first two levels exclusively,⁸² i.e. prevention and ensuring respect during conflict.

⁷⁹ Marco Sassoli, "Implementation of International Humanitarian Law" (2007) 10 Yearbook of International Humanitarian Law 46.

⁸⁰ *Annual Report supra* note 15.

⁸¹ *Prosecutor v. Kupreskic*, [2000] ICTY, Rona, Gabor. *The ICRC Privilege Not to Testify: Confidentiality in Action* (2004) *.

⁸² *Supra* note 86.

In terms of prevention activities for the implementation of the law,⁸³ the task has been a total success, and a success understood also in legal positivist terms, because almost all preventive activities by the ICRC revolve around the state, state authorities and official legislation. Unlike the bottom-up approach and contextualization characteristic of the operations, the prevention activities for implementation of IHL have mostly a top-down approach with activities conducted in relative homogeneity with the state at the heart, rather than the field. The guidelines, structure of the program and analysis are transmitted from the ICRC in Geneva across armies, police, legislatures, and governments of the countries where it works through specialized delegates to the armed forces, the police and regional legal advisors. The ICRC and National IHL Commissions constituted under ICRC's auspices lobby for and follow up the adoption of national legislation to incorporate IHL treaties locally. ICRC and outside expert lawyers, professors, and personalities of influence on government meet regularly with ICRC to discuss about IHL, often leading to crucial proposals for the development and improvement of the Geneva Conventions, or the adoption of new treaties by the states. The ICRC also is present as observer at the United Nations, and is present in multilateral negotiations by states. ICRC's legal experts reflect and write on specific IHL questions constantly. The latest legal achievement was the Customary Law Study, which again focuses on the practice by states, limiting the vision of customary law in a positivist fashion much questioned today.⁸⁴ This is the world of legal positivism in the end where the state is the protagonist.

⁸³ In ICRC's jargon, there is a clear separation between the preventive activities of dissemination of the ICRC and basic IHL rules (*pre-diss*) and preventive activities of implementation of the law (*pre-imp*).

⁸⁴ Clapham suggests for example that the practice of non-state actors should be debated to ascertain if and how it contributes to form custom. See Clapham *infra* note 113. Also, in *Prosecutor v. Dusko Tadic*, [1995] ICTY at parag. 104, the Tribunal refers to the customary adherence of parties to the conflict, even non-state actors.

The preventive legal work by the ICRC therefore has had for decades a very official face, and very official interlocutors. The professionals in charge of this task are located either in Geneva, or in the capital cities where the main delegations or the regional delegations are based. Unlike the field and operational delegates who are in close contact with the people in the middle of conflict, the legal professionals are close to the influential political circles, governments and academia. Delegates to the armed forces and police may be a relative exception. They are usually former army and police officers, knowledgeable in IHL as well as army and police culture. Given the hierarchical culture and structure of these forces, delegates to the police and to the army would go close to the troops occasionally, but again they deal with those up in the chain of command at a central level. The commanders are the ones who according to ICRC studies are able to influence the behaviour of troops through orders and codes of conduct.⁸⁵ Still, armies are only the State side of the coin during armed conflict.⁸⁶ To reach the field and other actors at war, or wider audiences, the ICRC appeals not to the legal professionals or army experts, but to the field officers and field delegates, that is the operations, and to one of its services (communications for media campaigns, dissemination tools or educational programs for example). It is often the operation's and communication's professionals, not the legal, who may end up promoting the Geneva Conventions in the remoteness of the field through sessions of dissemination where the message is passed in simple and comprehensible terms to reach the non-influential circles and non-official sectors; but they do so mostly on the side, since the operations immediate

⁸⁵ Spoerri, *supra* note 78. See also, *The People on War Report : ICRC Worldwide Consultation on the Rules of War* (2000); *The Roots of Behavior at War: Understanding and Preventing IHL Violations* (2004).

⁸⁶ The Police forces sometimes end up engaged in situations of violence that go beyond the threshold of re-establishment of order and rule of law in cases of internal violence, and may end up, though rarely, supporting the armed forces during internal armed conflicts. ICRC promotes rules for the adequate use of force, rather than IHL, to them.

interest is to promote the ICRC itself for better perception and therefore better security for its delegates and greater access to victims. ICRC's operational and communications professionals are therefore intertwined in the preventive task of promotion of IHL through dissemination efforts, while the legal expertise is devoted to state and official spheres. The field work requires pragmatism to function in the variety of spheres it encounters. Initiatives to move beyond the official and legalistic spheres appear to originate in the operations and the field.

Operational and field mingling with the legal task of ICRC's role gives preventive activities a touch of legal pluralism occasionally. Since 2005, the ICRC brought together experts of Islamic Law and of International Humanitarian Law to debates about Islam and IHL under ICRC's operational leadership.⁸⁷ What outstands of these debates is the interest by the ICRC "to understand both the substance of Islamic tradition and the methodology for establishing obligations towards victims of war"⁸⁸ under Islam. This is a change since the usual theme before was to transmit knowledge about contemporary IHL rather than dive into a different legal tradition. Previous efforts concentrated on identifying how IHL was mirrored in the history of other traditions, to pass on the basic rules of international humanitarian law using any traces of similar rules in said history, with standard and pre-established dissemination tools. ICRC's approach in the debates Islam not only recognizes the existence of a different legal tradition rooted in religion, it further enquires about the methods of creation of obligations in said tradition, an enquiry at the heart of Fuller's legal pluralist theory;⁸⁹ this is

⁸⁷ Under the leadership of Operations' Andreas Wigger. Wigger, *supra* note 60.

⁸⁸ *Ibid.*

⁸⁹ Fuller, *The Morality of Law* *supra* note 3. See also Jutta Brunnee & Stephen Toope, "An Interactional Theory of International Legal Obligation" (2008) Cambridge University Press, Forthcoming; U Toronto, Legal Studies

a further illustration of the operation's connection with legal pluralism and a practical reason for the ICRC to dive into the theory. Another example of the operational pluralist influence in preventive activities was an isolated experiment by delegates in Burundi in 1993. The population of Burundi at the time was reticent to discuss official instruments and were sceptical of the capacity of the state to contain ethnic atrocities. On the other hand, the people of Burundi had insisted on their specificity and local traditions, rejecting "imported" solutions. The delegates opted creatively to bring the population together on various occasions in a process of dialogue which allowed them to reach their own conclusions and consensus on the norms by means of a declaration signed by all in the community. This isolated exercise in Burundi

was not designed to be imposed from outside but to attract support from within. This meant taking into account the complexity of the local situation – elements such as the extreme fragmentation of the military, political and social hierarchy, the juxtaposition of traditional patterns of thought with Western ideas, and an explosive mix of political, social, economic and other problems. The line followed was essentially to initiate dialogue around a minimum shared humanitarian standard, on the one hand among Burundians themselves, and on the other between Burundians and the ICRC.⁹⁰

According to public ICRC reports of this experiment, the initial "moral adherence" by leaders from the various groups involved or affected by conflict allowed the process to take

Research Paper No. 08-16. <http://ssrn.com/abstract=1162882>, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000-2001) 39 Colum. J. Transnat'l L. 19. Also, Rene Provost, "Asymmetrical Reciprocity and Compliance with the Laws of War" (not published, read in 2010) and Webber *supra* note 44.

⁹⁰ Edith Baeriswyl, Alain Aeschlimann, *Reflexions sur une Action de Diffusion au Burundi*, International Review of the Red Cross 87 No. 826 (1997) 429.

place. This creative operational experiment contrary to the usual standard practice remained an isolated case though; and a case remarkably close to what a legal pluralist approach could suggest for the Burundi context at the time.

1.2.3 The legal task to implement IHL *during* armed conflict

Who is in charge at the ICRC of the legal task to implement IHL *during* armed conflict is a crucial question since the carry out the task during conflict means ensuring respect of the rules of war. This is the legal task closest to the victims of conflict and the actors in the battle field, and arguably the most important task for the ICRC as guardian of IHL. The success in the delivery of this task has immediate impact in the reduction of numbers of victims of war. From the victim's perspective for example, it is better protection to be spared from rape, injury, displacement or attack, than to receive ICRC's material assistance. Yet, ensuring respect of the law is the task least accomplished at the ICRC, a task that clearly does not fall on its shoulders alone. This imbalance is dangerous in terms of the perception of the ICRC after so many years of presence and work worldwide in conflict zones. The universal success of ICRC's preventive effort to get the Geneva Conventions ratified is not mirrored in this second stage of implementation of the law of armed conflict. While the ICRC has amply succeeded in the formal incorporation of treaties into national legislations, in the adherence of a variety of IHL treaties by states, and in the transmission of knowledge about the rules contained in said treaties, ensuring respect and of the law by arms carriers is the most challenging legal enterprise that the ICRC is engaged in now.

Implementing the law of armed conflict during armed conflict is intimately tied to one aspect of ICRC's work for the protection of victims of war, as described in ICRC's Overview of Operations for 2009:

In order to preserve the lives, security, dignity and physical and mental well-being of people adversely affected by armed conflict and other situations of violence, the ICRC has adopted a protection approach that aims to ensure that the authorities and other players involved fulfil their obligations and uphold the rights of individuals protected by law. It also tries to prevent and/or put an end to actual or probable violations of IHL and other bodies of law protecting people in such situations. The protection approach focuses both on the causes or circumstances of violations, targeting those responsible and those who can influence them, and on the consequences of the violations.⁹¹

These protection activities which fall within the operational tasks of ICRC's work, unite the two main aspects of ICRC's role, namely to protect victims of war and to act as guardian of the law of armed conflict. During a visit to persons in detention for example, ICRC delegates check if the detainees are treated humanely, if they have the minimum basic needs like food, hygiene and health covered, they trace the movements of detainees. The delegate's mere presence is often effective enough to prevent or alleviate the detainee's suffering. The ICRC's action for detainees is two-fold. It does not only have the right to visit and assist the detainees according to its conditions, the ICRC also reminds the detaining authorities of their

⁹¹ *Annual Report supra* note 15 at 14.

obligations under the law. When it comes to these reminders, even if expressed by the operations, the ICRC still denotes a state-centred positivist tone in its discourse:

The ICRC's field operations are clearly part of its function as guardian of international humanitarian law, because their purpose is to ensure that its rules are applied in practice'...

'By what right may the ICRC remind the parties to an armed conflict of their obligations –to lecture them, so to speak? That right is conferred on it by international humanitarian law itself, and hence by all the States that drew up and adopted that law.'⁹²

Under legal positivism, respect of the law is a question of enforcement and punishment. In other words, a matter for the police to resolve. A closer look at how ICRC's operational side deals with this task shows that in fact the ICRC acts like a police, spotting infringements of the law and reminding respect of the law. In doing so, the ICRC appears like a 'soft' police, because it only counts with the force of discreet persuasion to ensure respect of the law. Its reminders to 'encourage' respect of the law are confidential in most cases, sometimes public through press releases without pointing fingers at the parties, simply reminding of their obligations, and very exceptionally there are denunciations. This *modus operandi* is the core of ICRC's 'protection' work.

ICRC seeks to ensure that all the parties to a conflict and all authorities provide individuals and groups with the full respect and protection that are due to them under IHL and other fundamental rules protecting persons in situations of violence. In

⁹² Sandoz, *supra* note 30 at 9.

response to violations of these rules, the ICRC endeavours, as much as possible through constructive and confidential dialogue, to encourage the authorities concerned to take corrective action and to prevent any recurrence. Delegations monitor the situation and the treatment of the civilian population and people deprived of their freedom, discuss their findings with the authorities concerned, recommend measures and conduct follow-up activities.⁹³

The actual protection work, performed by protection and field delegates, consists in documenting the violations of the law to present accurate and well grounded interventions before the respective authorities. The legal professionals contribute to their task in the manner of a legal adviser: they identify which conventions or instruments apply depending on how they qualify a conflict; they specify the provisions that can be invoked to demand respect of the law. In other words, the work of the legal professionals here is secondary, similar to that of an in-house lawyer for a company. The legal professional is limited to stating what the law is for a particular situation. The actual role to try to ensure respect of the law is not a task directly on the lawyers' shoulders. The question is if they could do any more than they do. It is argued here that from a pluralist perspective, the role of the lawyer may expand to additional horizons. If the vision of the law was not a positivist one, but a legal pluralist one, the lawyers would be looking not only at what the law is, or what law applies, but at the process of creation of the law and the essential question of how law is perceived as binding precisely by those actors whose behaviour we seek to alter, in order to enhance their adherence to the law, and therefore respect to it during conflict. This is the extra sphere

⁹³ *ICRC Annual Report 2009* at 16.

where a legal pluralist vision would look at all along, but particularly as events occur during conflict, in order to achieve compliance with the law.

It would be inaccurate to say that the legal professionals disregard context and changing dynamics. In fact, the ICRC has supported and engaged in numerous efforts designed precisely to adapt the law to changing environments: redefining the notion of participation in hostilities, the evolution of the four Geneva Conventions after the events, the Customary Law Study⁹⁴ aiming to find answers to what is not specified expressly, holding meetings worldwide to address the challenges to IHL. While these efforts result in a more developed law with added instruments, such elaborate development has not mirrored in increased adherence and compliance. If the means to prevent further suffering may be found in the law, a positivist vision of the law has its limits, since it does not necessarily lead to genuine adherence to the law. On this precise point, asked about “what needs to happen in order to limit the impact of armed conflict on civilians and stop their suffering,” Charlotte Lindsey, the ICRC Deputy Director of Communications insisted on the positivist vision: “what is needed is better implementation of this law”, meaning adoption of “legislative, regulatory and practical measures necessary to incorporate IHL into domestic law and practice.”⁹⁵ The ICRC’s survey “People on War”⁹⁶ also suggests the power of formal law to influence behaviour at war. This conclusion may be applied accurately to certain contexts. Insistence in formal law is by no means futile, quite the contrary, the law does constitute ICRC’s main ally, second to the respect and trust it has gained through the concrete help it has brought to

⁹⁴Jean-Marie Henckaerts, *Customary International Humanitarian Law Study Vol I Rules* (Cambridge: Cambridge University Press, 2005).

⁹⁵ Lindsay, Charlotte. *ICRC poll shows rules of armed conflict enjoy broad support but are considered to have limited impact*, Interview. ICRC website 10.08.09.

⁹⁶ *People on War Report* *supra* note 84. Also, Munoz-Rojas, *Cross-cultural Study* *supra* note 36.

victims for over a century. Nevertheless, the universal application of the conclusions in said reports may be questionable, particularly taking consideration of the many contexts where there exist a plurality of worlds and visions. Possibly time and experience has shown to the ICRC the power that formal laws confer, when other tools may have failed. The power of formal law is undeniable. But the reading of the results in the referred survey could be more nuanced if contextualized in a pluralist fashion. For instance, the survey used representative samples from the various contexts, without prior consideration of legal processes and understandings in each context. The survey uses language with a predetermined definition when there may be disagreement on their meaning in the varied locations used as samples. This was for example the case of the central distinction between combatants and civilians, terms used in the survey even if the terms are difficult to apply in practice. A nuanced lecture of the answers obtained during the survey, by introducing the different conceptions of some of the words used, would possibly lead to other results, or at least to additional and differentiated conclusions. An important conclusion from the original survey was that law, rather than morality, is the better argument to pull compliance in the majority of places. This conclusion is biased in the sense that the question is charged with the positivist position that law and morality are separated, which is not even the unanimous position in the western legal tradition, let alone in other legal traditions. There is a missing connection in the survey, which is how IHL is interpreted, and understood in practice, which is what gives meaning to this law in the mind of the person who applies it. The researchers did admit that there was a

clear pointer to cultural differences at the time of applying the law.⁹⁷ The appreciation of contexts by the operations at the ICRC leads to a similar conclusion.⁹⁸

Another practical illustration of the positivist influence was the scope of the costly and important exercise to codify customary international law.⁹⁹ Inevitably, the scope of the study leaves out a large number of actors at war since custom in International Law is the custom of the states. When the description of the reality in conflict is one where the state is no longer the central player, then its practice may be partly irrelevant, or at least insufficient. If formally the state practice creates obligations under international law, the obligation created by the practice of a failed, fragmented, or diverse state may pass the tests of theoretical argumentation, but not the test of practice by actors be it state or not, in the same territory.¹⁰⁰ This is not to underestimate the importance of the customary law study. It was in fact of such importance that certain states, notably the United States, ensured to make commentaries contrary to the study to avoid any doubt about the non-binding effect of the argued customs on them, in the style of a persistent objector.¹⁰¹ The question of whether or not non-state actors could also object has not been addressed. The aim here is simply to highlight that in practice a positivist vision of law is disconnected from the field reality presented by the operations. A legal positivist frame, which is by definition based on state structures and hierarchy, and which is indifferent to the cultural and religious dimensions that characterize

⁹⁷ Munoz-Rojas Ibid at 15.

⁹⁸ But, *ICRC Prevention Policy* (Geneva: ICRC 2010). In the recently issued ICRC's Prevention Policy of 2010, there is mention that the ICRC intends to contextualize its prevention activities. Nevertheless, when the policy refers to concrete actions, these actions still seem a continuation of previous strategies.

⁹⁹ Ives Sandoz in introduction to Customary Study, Henckaerts, *supra* note 93.

¹⁰⁰ Clapham *supra* note 84. The Study does not take into consideration the practice of non-state actors in any case.

¹⁰¹ John B. Bellinger III and William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study Customary International Law*, *International Review of the Red Cross* No. 866 Vol. 89 (2007) at 443.

conflicts, would not fit well the reality as described by ICRC's Director of Operations. In addition, how the ICRC projects itself on legal terms, i.e. with a typically Western vision of the law which is neither unanimous in the West nor necessarily shared or well received everywhere, may have an impact on how it is perceived. A positivist approach to law could constitute an obstacle to the 'quality of the dialogue' with influential actors at war when the actors may have a very different legal perspective or tradition. A pluralist vision along the lines of Jeremy Webber, who intersects well pluralism and positivism by granting weight to the role of institutions to bring closure to irreconcilable differences,¹⁰² lends itself to give sense to the coexistence of both visions at the ICRC. The disconnect in ICRC's discourse, with diversity pulling in one direction, but anchored in positivism is not unbridgeable. The fact that the ICRC accommodates a pluralist operational approach as well as a positivist legal one illustrates the existence of diversity and plurality even within the institution. Kraehenbuehl's express call to "accepting diversity and being able to interact without preconceived ideas or notions"¹⁰³ compels the legal minds.

¹⁰² Webber, *supra* note 44.

¹⁰³ Kraehenbuehl, *supra* note 6.

Chapter 2

The limits of a legal positivist approach to enhance adherence to the law of armed conflict

In my first days as delegate for the ICRC in Rwanda in 2001, a soldier surprised me by asking what it would take for the ICRC to leave his country. His simple and straight forward question confronted me with an irony I had not foreseen: ICRC's mere presence could represent the simultaneous existence of both hope and despair. When such irony is present over time and the fact that year after year the same challenge of improving compliance with IHL remains, suspicion is born, or disillusionment, in the heart and minds of some victims of war who see ICRC delegates come and go, and come back, for decades under the flag of humanitarianism and the Geneva Conventions. The persons protected under the Geneva Conventions and beneficiaries of ICRC's work are not just victims of war; they are often victims of *violations* to the law of armed conflict, or even -as in the Rwandan case after the 1994 genocide, also the accused perpetrators of said violations.¹⁰⁴ Increased violations of the law of armed conflict result in increased support to victims and actors at war by the ICRC. In face of said violations, the tendency by the ICRC has been to insist on respect of the law of armed conflict, invoking the relevant provisions of International Humanitarian Law to be respected. Further, the ICRC invests significant resources on the promotion of the law of armed conflict at many levels, and on its implementation, specifically at state and army levels

¹⁰⁴ ICRC brings support with impartiality to all victims. In Rwanda it has a large detention program. Most of the population in places of detention was accused of genocide.

with a top down and formal approach evocative of legal positivism. Promoting IHL as an ICRC delegate means informing of the laws of armed conflict and calling for respect of the law. Implementing, in brief, means turning the international laws into local laws or military codes of conduct. I participated in these efforts addressed to varied target audiences in different countries. While these audiences at times treat ICRC delegates as partners,¹⁰⁵ like is the case with most armies and governments, on occasions the audiences appear as mere receivers of information, not fully engaged, occasionally confrontational, threatening or sceptical, even if they have sufficient knowledge of the law. When calling for respect of IHL, an ICRC delegate can feel like selling a product, not always with persuasive arguments. The main argument is that IHL must be respected because it is the law.¹⁰⁶ While law provides a strong argument for ICRC's presence, it is not always enough of an argument to get the product sold. The formalism and clarity about the law, typical of the positivist approach of my own legal background, undoubtedly puts a delegate in a strong bargaining position. It provides a safe way to evade difficult discussions by limiting their content to what the law says. ICRC delegates are indeed often exposed to the darkest side of humanity and the horrors of war when open dialogue beyond the text of legal provisions may not always be the most practical or easiest path. Yet, dialogue may be the path where a formal and hierarchical approach to law does not persuade. I do not deny that a formal and official approach to law can work very well at many levels, particularly at state and army levels. Military culture indeed cherishes obedience to superior orders, respect of the hierarchy and service to the

¹⁰⁵ David Kennedy, "Modern War and Modern Law" (2006) 12 International Legal Theory 55.

¹⁰⁶ *International Humanitarian Law: A Universal Code* an ICRC video. In this recent video this statement is used to persuade actors to respect IHL.

state. But what about the levels where such positivist discourse does not resonate in the minds of the audience?¹⁰⁷

The previous chapter argued that the ICRC has a predominantly legal positivist approach to law which puts its legal minds in disconnect with the more open and pluralist operational minds. This chapter argues that said disconnect between the operational and legal minds points at a new angle and perspective to look at compliance with the law of armed conflict at the ICRC. This chapter elaborates how a traditional positivist legal approach by the ICRC can hinder true dialogue with certain actors at war because of its insufficient persuasiveness and inclusiveness of different perspectives, leading to weak adherence to the law of armed conflict by some actors; instead, the pluralist trends already reflected in ICRC's pluralist operational approach contains the germ of a more modern legal vision conducive to enhancing adherence to the law through a process of genuine dialogue. There the interest that the pluralist operational vision by the ICRC may have for legal purposes, and the practical relevance of the theory of legal pluralism for ICRC's operational as well as legal aims.

2.1. Legal positivism: a non-inclusive approach to IHL

This section argues that the current reach and success of a legal positivist approach to IHL is limited since it leaves out some actors at war and is often indifferent to other perspectives to law in diverse contexts. The first sub-section identifies changing trends towards legal

¹⁰⁷ Added to the records of non-compliance with IHL, I believe not to be alone on this conclusion that the current approach does not suffice. In addition to the non-compliance statistics for example, a lawyer based in South East Asia expressed during an IHL training at the HPCR in Harvard in 2009, that the expectation after the training was to take back home an argument to persuade actors at war to respect IHL, argument which was not found yet in the traditional ICRC's legal discourse.

pluralism in international law, and currently emerging trends at the ICRC, which are more inclusive of actors and perspectives left out of the legal process when it was exclusively inspired in legal positivism. The second sub-section argues that the legal positivist approach to IHL and the ICRC are deeply rooted in Western legal culture. From examples in comparative law literature and field experience, it is suggested that said approach and legal heritage have not integrated processes and ways of thinking about law in other legal perspectives, reinforcing the alien nature of IHL and the ICRC from other's perspectives. To end, the third sub-section questions whether there is unanimity about the place of legal positivism in Western legal culture and introduces the different Western view which treats law as a process of interaction and not as a final end-product, with a view to examine the question of compliance with the law of armed conflict from both perspectives.

2.1.1 ICRC's legal approach: signs of an emerging transition in line with changing trends.

During my years of work at the ICRC I participated in ICRC's efforts to improve compliance with the law of armed conflict either through sessions of dissemination of the ICRC and the basic rules of IHL, or in close support to the delegates to the armed forces. No matter where the mission took place, the institution insisted in its legal communications and work that implementation mechanisms need to be put in place for governments to ensure respect of IHL, that there is lack of political will to respect the rules, that violations must be sanctioned, that the law should be reinforced, that combatants must be taught the rules of war and ordered to respect them, that this is the responsibility of states. In house, ICRC lawyers work

hard to explain how specific provisions must be interpreted, to clarify what the rules contained in treaties or custom say; they organise meetings with officials from all over the world, with academics, with army legal advisors; they engage in legislative efforts, in drafting of new treaties; they offer advice -for ICRC's internal purposes- on what type of armed conflict takes place, they state what specific provisions are being violated to remind the parties to the conflict to respect them. These legal efforts deployed with relative uniformity are reminiscent of state sovereignty, official hierarchy, coercion and punishment, formality, in other words positivism. A positivism which until recently seemed somehow immune to the complexity of contexts around the world, contexts which now shape ICRC's operational work and which in fact have originated new legal pluralist trends in international law, concretely in human rights.

If within the legal side of ICRC the influence of legal pluralist trends only just begins,¹⁰⁸ changes of perspective to include pluralist views in international law are not that new. Legal pluralism generated, and still does, important debates in international human rights;¹⁰⁹ the New Haven School of International Law questioned the positivist approach of international relations scholars;¹¹⁰ legal scholars are expressly incorporating legal pluralist theories to examine humanitarian law issues;¹¹¹ Dutch scholars debate and write about the importance of pluralism and legal sociology in an interconnected world;¹¹² others, without express commitment to legal pluralism are making practical suggestions which challenge the central

¹⁰⁸ *ICRC Prevention Policy*, *supra* note 98.

¹⁰⁹ Steiner *supra* note 50; also An-Naim, Abdulahi, "Abdulahi An-Naim" in William Twining, ed., *Human Rights: Southern Voices* (Cambridge: Cambridge University Press, 2009) 53.

¹¹⁰ Paul Schiff Berman, "A Pluralist Approach to International Law" (2007) 4 *Yale Journal of International Law* 32.

¹¹¹ Provost *supra* note 8, Brunnee & Toope *supra* note 89.

¹¹² Roger Cotterrell, *Living Law: Studies in Legal and Social Theory* (Burlington: Ashgate, 2008) at 331.

role of the state which positivism ensured.¹¹³ While positivism may have succeeded widely with modern lawyers,¹¹⁴ including ICRC's lawyers, these trends show how positivism needs to be complemented with fresher pluralist views, particularly in a world of globalization,¹¹⁵ where a multiplicity of contexts are in tension and where the state is becoming just one more player, and its ways just one amongst many. The question is how the ICRC's legal minds are also adapting to said changing reality. In addition to current legal trends, the institutional landscape within the ICRC appears to open the doors for change in ICRC's legal perspective too.

In 2004, the ICRC prepared a document which served as the starting point for discussions during the Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law.¹¹⁶ Both the document and the meeting constituted an acknowledgement of the insufficiency of previous efforts to enhance compliance with the law of armed conflict and invited to reflect on new 'strategies for influencing parties to non-international armed conflicts'.¹¹⁷ While most of the proposals to address said challenges turned around states, including the responsibilities of third states, there were innovative suggestions for discussion in ICRC's document, among others: to grant immunity or reduction of punishment to non-

¹¹³ Andrew Clapham, "The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement," Geneva Academy of International Humanitarian Law and Human Rights. Ownership of Norms Project – Toward a Better Protection of Civilians in Armed Conflicts, Draft for Comment, February 2010. <http://ssrn.com/abstract=1569636>. Also Marco Sassoli, "Possible Legal Mechanisms to Improve Compliance by Armed Groups with International Humanitarian Law and International Human Rights Law" <http://www.armedgroups.org/index.php?option=content&task=view&id=4>.

¹¹⁴ Michel Villey, *La Formation de la Pense Juridique Moderne*, Paris, Presses Universitaires de France, 2003 at 392. "Tel est le positivisme actuel: dictature du fait scientifique (...) adoration par le juriste des institutions établies, renoncement, désormais total, à la recherche de la justice"

¹¹⁵ Berman, *supra* note 110 at 301 – 329.

¹¹⁶ ICRC, *Improving Compliance with International Humanitarian Law, Background paper prepared for the Informal High Level Expert Meeting on Current Challenges to International Humanitarian Law*, Cambridge, June 25-27, 2004. International Humanitarian Law Research Initiative, Program on Humanitarian Policy and Conflict Research at Harvard University, found online at www.icrc.org

¹¹⁷ *Ibid* at 4.

state actors for mere acts of participation in hostilities as opposed to also violations of the law during hostilities; to engage in special agreements with belligerents to give them ‘the opportunity to expressly commit themselves to treaty provisions’¹¹⁸ which non-state actors may not feel bound to; to encourage unilateral declarations by non-state actors of their commitment to international humanitarian law along the lines of the ‘declarations of intent’ that Geneva Call has promoted with respect to land mines; to encourage the non-state actors ‘to adopt an internal code of conduct.’ The same points presented by the ICRC for discussion in the meeting of experts appeared with more detail in an ICRC publication of 2008 where the ICRC explains the isolated occasions when non-state actors were directly involved in the legal process.¹¹⁹ As will be examined in the third chapter, those occasions remain punctual and are not yet part of a well developed and structured implementation program at the ICRC. Nevertheless, the meeting of experts and this publication are of particular interest because they illustrate an emerging change of approach at the ICRC which is trying to generate ownership of IHL by non-state actors as part of its recent efforts to address the challenge of non-compliance with the law of armed conflict. The adoption of codes of conduct is already part of ICRC’s traditional efforts with the regular armed forces of states parties to the Geneva Conventions. An extension of the traditional efforts with the armed forces to non regular arms carriers would by itself distance the ICRC from the state centred positivist approach to international humanitarian law and bring it closer to legal pluralism by treating individuals and non-state actors as law-making actors in recognition of their own legal perspectives and different interests independent of the state where they are located.¹²⁰ Traditionally, ICRC

¹¹⁸ Ibid.

¹¹⁹ ICRC report *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts* (2008).

¹²⁰ Webber. *supra* note 44.

delegates insisted to non-state actors that IHL had to be respected because the Geneva Conventions had been ratified by their state, therefore it was the law for them. To highlight now that they too can express their consent to IHL in agreements or unilateral declarations or in their own codes of conduct brings non-state actors to a different level as agents whose opinion and consent matters. This is definitely a change in ICRC's typically positivist discourse.

For decades now, many people in many places have been targets of the efforts of promotion and implementation of the law by the ICRC. The language of positivism does not necessarily resonate equally or at all to all of them, even if the principle of humanity might. There is no question here of the value of IHL, neither of its merits, nor its detailed content. I do not reject or question a positivist approach either. The clarity it provides and the accomplishments it allowed in terms of engaging states around the Geneva Conventions leading to their universal ratification is a remarkable success. Instead the focus here is on what is left out of said process. If there is a critique here of legal positivism it is simply that its current reach and success is limited. A more open approach to law could lead to wider adherence to the law, to more inclusion. The challenge posed by non-compliance with the law of armed conflict is already pulling legal efforts in previously unexplored directions. The Geneva Academy of International Humanitarian Law is engaged in a project to increase ownership of norms by non-state actors in recognition of the centrality of individuals rather than states in international law, even for the creation of customary rules;¹²¹ scholars are calling for reciprocity as the possible key to pull compliance from non-state actors even in asymmetric

¹²¹ ICRC *supra* note 116.

conflicts¹²² with the consequence of placing non-state actors at the same level of state actors; Geneva Call is engaged in obtaining formal agreements from non-state actors to restrain from using land-mines,¹²³ and it could expand its reach to other areas where compliance with IHL is crucial, for example to get non-state actors to agree on the non-recruitment of child soldiers.¹²⁴ At the ICRC, the reality on the ground has allowed its operational creativity to flourish, at times in unpredictable ways, mainly by opening up to dialogue with Muslim religious leaders.¹²⁵ Whether there is a conscious effort by the institution or not towards pluralism,¹²⁶ the emerging trends create new spaces of law making and dialogue around the understanding of the law by others rather than the ICRC merely transmitting knowledge and information on IHL or reminding parties to respect this law. The openness of the operational minds at the ICRC and the emerging legal trends are challenging the more conventional ways of legal positivism by decentring the place of the state. These trends invite lawyers to look at the contexts and people with whom the ICRC works, beyond the western positivist perspective whose state-centred features and hierarchical means of communicating limit its reach.

The traditional view of international relations which “generally emphasized bilateral and multilateral treaties between and among states,” with the understanding that “law was deemed to reside only in the acts of official, state-sanctioned entities” and “an exclusive function of state-sovereignty”¹²⁷ has switched to the recognition by legal scholars of the

¹²² Provost, *supra* note 89.

¹²³ See *Anti-Personnel Mines and Armed Non-State Actors*, www.GenevaCall.org.

¹²⁴ A possibility Clapham envisions. Clapham *supra* note 113.

¹²⁵ Wigger, *supra* note 60.

¹²⁶ It does not appear from any public documents that there exists an explicit intention by the ICRC in this direction.

¹²⁷ Paul S. Berman, *From International Law to Law and Globalization* (2005) 43 Colum. J. Transnat'l L. 485.

creation of norms by the process of ‘interplay of plural voices, many of which are not associated with the state’.¹²⁸ This approach seems the appropriate one at war, where state dynamics changed with the increased involvement of non-state actors, be it private military companies, belligerents not belonging to a state army, at times terrorists, or even civilians, who do not fight for the interest of any state. Rather than common interests and objectives, now there may be conflicting interests and visions about the law that a pluralist vision of the law can accommodate in recognition of differences¹²⁹ and the multiplicity of actors.

2.1.2. IHL as part of Western legal culture and ICRC’s ‘ethnocentricity’.

In addition to non-state actors who have not participated in the drafting and ratification of the Geneva Conventions, the law of armed conflict may still not be sufficiently integrated in the local community as a whole. IHL as it stands today is perceived in some places as a product of western “legal culture.”¹³⁰ Despite the argued equality of all recognized states, international law, including IHL, was the enterprise of mostly European powers and ‘civilized nations’ countries.¹³¹ ICRC founders first looked for the support of the heads of state of influential European countries. The result is a law with a historical heritage that defines it, including the positivist approach typical of Western lawyers. The uniform implementation of IHL worldwide by the ICRC reflects the assumption of the universality of the Western positivist ways, not just of the substance of the law. Yet the contexts where war takes place often function according to traditional and religious laws which not only differ

¹²⁸ Berman, *supra* note 108.

¹²⁹ Webber, *supra* note 44 at 167.

¹³⁰ Mario Prost, *Unitas Multiplex: Les Unites du Droit International et la Politique de la Fragmentation*, These McGill University 2008 at 240. *Infra* note 135.

¹³¹ *Ibid.* at 5.

from Western perspectives, but which demonstrate the lack of convergence of thought and often opposed understanding of law. One illustration is the Western importance granted to the universal ratification of the Geneva Conventions, which rests on the binding effect of agreements under the principle of *pacta sunt servanda*. A treaty is basically a contract between states. Beyond the fact that pacts in principle only bind the parties, grounding the law on treaties may not translate well in the legal perspectives of other cultures, since the sanctity of contracts typical of the Western perspective since Roman Law may not be mirrored everywhere. This contractual concept is for example of lesser strength in legal traditions like the Japanese, where “a contract is often regarded as a sort of tentative agreement,”¹³² which is changeable, the breach of which is not necessarily such a big deal.

Treaties are the main product of international law under a purely Western positivist perspective. As Fuller pointed out, referring to arguably one of the most influential positivists, Hart, positivism focuses on law as a final product excluding integration of the action of others in the process, or the action of those subject to the rules.¹³³ But “laws do not operate automatically”. “Laws do not exist”¹³⁴ as such. They exist when a person acts on them. An agreement alone does not suffice. Laws require the involvement by the actors, with understanding of what they are getting engaged in. The signature of an agreement or the unilateral declaration by non-state actors to abide by the rules of international humanitarian law would be a step ahead, but insufficient if in such general terms. Added to the agreement, dialogue to clarify the understanding by the actors of what said rules are is crucial. Real

¹³² Yosiyuki Noda, “The Character of the Japanese People and Their Conception of Law,” in *The Western Idea Of Law* ed. by J.C. Smith and David N. Weisstab, London, Toronto, Sydney, Singapore, Durban, Butterworths, 1993 at 91 – 95.

¹³³ Fuller, *Fidelity to Law*, *supra* note 3 at 646.

¹³⁴ Walter Robert, *Law, Language and Communication* (Springfield: Charles Thomas Publisher, 1972) at 217.

involvement of the parties reflected in mutual expressions of their understanding and commitments would add weight to the binding force of agreements and unilateral declarations. The involvement of states, NGO's, even the media around the Geneva Conventions particularly since 9/11, including when the interpretations of the law may not coincide with ICRC's, demonstrates how it is when people discuss their understanding of the law and act on it that the law becomes more alive. But if actors do not feel sufficiently involved, or feel that the instruments are being imposed on them, or believe that the law of armed conflict is a tool of war or an extension of war as David Kennedy calls "lawfare,"¹³⁵ those actors would not appropriate the law despite any signature or ratification, for they may even perceive it as an instrument of Western imperialism, as the law of the other, the law of the *muzungu*,¹³⁶ a law which could turn against them. With respect to the prosecution of serious violations of IHL for example, some African audiences protested that the International Criminal Court was a Court against Africans in the belief that serious violations of IHL by developed countries would not fall under the jurisdiction of the Court. In addition, reparation may matter more in African contexts than punishment.

The fact that ICRC's traditional implementation efforts mainly mean incorporating the Geneva Conventions and other IHL instruments into national legislations, serve as further argument for those who may feel foreign to the instruments. What is incorporated in the national laws is the Western creation, without integration of the receiver's law. This means that the dialogue around the Geneva Conventions goes one way only. Even those who adhere to the Geneva Conventions may see it as a Western product, without that being

¹³⁵ Kennedy *supra* note 105 at 55.

¹³⁶ African expression used in the Great Lakes region meaning 'the white,' 'the stranger.'

necessarily a negative origin, just a fact. That there are provisions in the Geneva Conventions which mirror rules of war of ancient civilizations is a different story. While there may be similarity in the content of some provisions with ancient local rules, as much as there may be lots of differences, the point is that the ownership of contemporary IHL originates and is perceived as western,¹³⁷ and that integration of the law of armed conflict with local laws does not depend on the content of the law. This is particularly the case in Islamic traditions. That the origin be Western is not an issue. The issue is that its incorporation in national laws does not necessarily pay respect to the local legal traditions and ways of the receiver's country. With respect to human rights for example, Islamic scholars call for an understanding of how Islamic legal tradition functions if international human rights rules are to be preserved.

While the UN Universal Declaration of Human Rights and succeeding documents built upon an important body of universal doctrine, there has been mounting volume of criticism of these norms on the basis that they incorporate Western-oriented ideas and that, especially at the time of the Universal Declaration, sufficient note was not taken of other traditions, especially the Islamic. In the contemporary world, when the Islamic influence is so powerful, there is danger that if sufficient heed not be paid to Islamic attitudes and modes of thought, the Universal Declaration and human rights

¹³⁷ Ramesh Thakur, *Global Norms and IHL an Asian Perspective*, International Review of the Red Cross No. 841 (2001) 19. Also, in some of my exchanges with interlocutors in the field, the point was made that while the Geneva Conventions originated in Europe, the values which inspire IHL are not the ownership of the West. There was a clear, not exclusive distinction between contemporary IHL and humanitarian values. During a moot court I organized in Central Asia, some Kazakh students complained publicly at the condescending origin of IHL, concretely the tone in the Marten's clause, which for them implied that Europeans perceived Asians and others as 'uncivilized.'

doctrine in general may run into rough water. If these are to be preserved and built upon, more understanding of Islamic legal tradition is important.¹³⁸

The words by C.G. Weeramantry, do not focus on the content of rights, but on the difference of perspectives between the Western and Islamic legal traditions. His suggestion is to promote understanding of the ‘attitudes and modes of thought’ of the different traditions ‘to build upon’ the western doctrine of human rights. His suggestion extends to international humanitarian law. Likewise, the Islamic scholar Abdullahi An-Na’im argues that

“human rights standards will only be plausible to a given constituency if members believe that they are sanctioned by their own cultural traditions. Legitimacy can mainly be attained by dialogue and struggle internal to that culture. Dialogue between cultures is also important in order to achieve an overlapping consensus.”¹³⁹

Both An-Na’im and Weeramantry point to the question of how legitimate is a law that does not integrate the local legal way of thinking and legal particularities. Both call for dialogue between the traditions. An-Na’im further suggests the need for an internal local struggle to appropriate the law. The search for legitimacy entails more than merely looking for the content of the law to equal the content of the local laws. Legitimacy should also entail participation in the process of creation of the laws, aspiring towards shared values, in addition to the signing of agreements around the content of the law. In

¹³⁸ C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective*, New York: St. Martin’s Press, 1988 at 168.

¹³⁹ William Twining in *Human Rights, Southern Voices*, by Francis Deng, Abdullahi An-Na’im, Yash Ghai, Upendra Baxi, Edited by William Twining, Cambridge: Cambridge University Press, 2009 at 55.

fact, in diverse societies, there may be disagreement in principle or in content, as An-Na'Im's choice of words 'struggle internal to that culture' suggests; yet when 'disagreement is taken seriously'¹⁴⁰ through dialogue and a participatory and inclusive process, then the ground is laid for legitimacy and adherence. This is why the efforts by the ICRC to look for traces of ancient laws that mirror IHL can fail the purpose. In so far as groups of people, be it under state structures or not, feel alien to the process, legitimacy is lost. Looking for examples of ancient rules that say the same as contemporary treaties alone does not per se change IHL's alien nature for those who have not been part of the process of creation of the current rules.¹⁴¹ Incorporation of treaties in the national legislation of states may serve the purpose of participating in the process but barely and only partially, at times rather artificially. Process considerations escape the eye of international lawyers with a predominantly positivist western background, because the question may appear as irrelevant to them. The law and the style of implementation they promote is their own. Arguably, had IHL been the result of some Asian endeavour in one of many Asian styles for example, it would feel as alien to today's ICRC even if the Asian version had exactly the same content of contemporary IHL. The Geneva Conventions are a product of the Western legal tradition. The ICRC not only is part of this tradition and culture, it is also perceived as such in some African, Central Asian, and Middle Eastern contexts for example.¹⁴² In this sense the ICRC is an 'ethnocentric'¹⁴³ institution, which is not objectionable, except, if it became what An Na-Im calls 'rigid ethnocentricity' which 'breeds intolerance and hostility to societies and

¹⁴⁰ Lacey, *supra* note 63; An-Na'Im *supra* note 109 at 84.

¹⁴¹ Provost, *supra* note 50 .

¹⁴² This is my conclusion after listening to interlocutors and people during missions in these places.

¹⁴³ Along the terms of the word as used by An-Na'Im *supra* note 109 at 90.

persons that do not conform to our models and expectations’.¹⁴⁴ For what concerns the vision of law by ICRC legal minds, the presence of a more varied selection of delegates at the ICRC may impact its legal fabric with time. From the operational viewpoint the ICRC does project more openness with the new faces of delegates from diverse origins. Further, the close contact to local communities does allow institutional introspection. There is nothing wrong with admitting ICRC’s Western origin and heritage. There are reasons for pride rather than shame in such origin. The point is that it is a necessity to recognize one’s uniqueness or difference to see the uniqueness in the other.¹⁴⁵ By recognizing difference, a whole new legal dimension opens up: to different perspectives to law, to different ways of thinking, to real dialogue. To insist on portraying a universal vision of the institution and the law at this stage can create an obstacle to interaction and “cross-cultural dialogue” which legal hegemony prevent.¹⁴⁶ Twining provides a summary of the origin and heritage that western lawyers carry, legal positivism being just an angle within it:

‘Nearly all Western modern normative jurisprudence is either secular or explicitly Christian. Post-Enlightenment secularism has deep historical roots in the intellectual traditions of Western Christianity. Even those theories that claim universality have proceeded with only tangential reference to, and in almost complete ignorance of, the religious and moral beliefs, values, and traditions of the rest of humankind. When differing cultural values are discussed, even the agenda of issues tends to have a stereotypically Western bias. When such issues as the relationship between law and

¹⁴⁴ Ibid at 82.

¹⁴⁵ Along the same lines, James Boyd White, *Justice as Translation* (Chicago: Chicago University Press, 2005).

¹⁴⁶ Words borrowed from An-Na’Im *supra* note 109.

morals (positivism), multi-culturalism, religious toleration, and cultural relativism have been discussed, the enquiries and debates take place largely within the framework of Western traditions of thought, often with explicit or implicit reference either to Western societies or to international relations as perceived from Western points of view. A genuinely cosmopolitan general jurisprudence will need to do better than that.¹⁴⁷

Twining's invitation if addressed to the ICRC, would imply diving into the legal perspective of others and admitting that legal issues could be looked at from others' perspectives. Rather than referring to the incorporation of the Geneva Conventions into national legislations and transmission of IHL knowledge, use of words like integration, participation, process, might be more appropriate and conducive to a two way dialogue. Such dialogue in other words would require 'one to discover both the value of the other's language and the limits of one's own,'¹⁴⁸ for 'Western law cannot be projected into contexts where the underlying social practices that sustain Western law are not present'.¹⁴⁹ That these practices not be the same is not necessarily an obstacle, maybe it is simply a matter of perspective and ways of expressing the legal reasoning.

The method of systematic relativism, applied in the jungles of politics, frequently demonstrates that what appear to be bitter differences of opinion on practical matters

¹⁴⁷ William Twining, *General Jurisprudence: Understanding Law from a Global Perspective*, Cambridge: Cambridge University Press, 2009 at 125, 126.

¹⁴⁸ Boyd White *supra* note 144 at 257.

¹⁴⁹ A citation of Lon Fuller from 'The Law's Precarious Hold on Life' by Roderick A. Macdonald in "Legislation and Governance", Willem Witteveen, & Wibren Van der Burg, eds. *Rediscovering Fuller: Essays on Implicit Design* (Amsterdam: Amsterdam University Press, 2006) at 289.

are actually differences of terminology or perspective. Rational argument in this situation becomes possible only when, through some emotional shift, one party comes to accept the postulates and definitions of his adversary and to talk in the same system, or when a third party [...] is found who can talk to each of the disputants in his own system and thus offer each a practical solution which is what he wanted all along and was convinced his adversary did not want, but which, as a matter of fact, his adversary does not object to if only it is phrased the proper way.¹⁵⁰

For actors to be able to communicate their understandings, a legal perspective that is conducive to dialogue rather than the impositions that come with a hierarchical state centred approach seems to be the most appropriate.

2.1.3. The separation of morality and law in legal positivism in contrast with other legal perspectives

On the crucial question of the place of morality in IHL from a positivist perspective, this approach proves to be not only distant from other legal perspectives in the world, but also an obstacle for mutual legal understanding. A particular feature of the predominant positivist view of law is the separation between law and morals.¹⁵¹ This perspective while not denying some relation between law and morals, characterizes morality as accidental, not necessary for the existence and validity of law. Yet, in other legal traditions, morality may be an important

¹⁵⁰ Felix Cohen, The Relativity of Philosophical Systems and the Method of Systematic Relativism, in Legal Conscience: Selected Papers of Felix S. Cohen, ed Lucy Kramer Cohen (Shoe String Press: 1970) found in The Western Idea of Law (London: Butterworths, 1983) at 96.

¹⁵¹ Hart *supra* note 33, Fuller *supra* note 3.

legal source either based on religion or the ethical culture. In the Islamic tradition for example, the Koran is the law of highest degree, even referred to as the Constitution of Saudi Arabia;¹⁵² and those in charge of interpreting the Koran, i.e. the law, in the Muslim world are religious leaders. These interpretations by religious leaders in the end become the law which is built not in one act, but through consensus amongst the religious authorities. Their declarations interpreting the law become the legal source *Ijma*.¹⁵³ This process of creation of the law in Islam through the interpretations of the Koran by religious leaders not only shows the place of morality in law from their perspective, but also illustrates how in Islam there may be multiple ways of interpreting the law, interpretations which can change ‘in proportion to the extent of the knowledge and experience which man acquires through the ages.’¹⁵⁴ Therefore one of the current objectives by the ICRC to tell what the right interpretation of the law of armed conflict is¹⁵⁵ would be a futile effort with the Islamic tradition for whom ICRC’s interpretation would be of no authoritative value, and which could be changed anyway. In Islam what matters would rather be the religious authorities’ consensus of the interpretation of the Koran about the application of IHL instruments, subject to changes overtime.

Morality may also serve as a reason to violate the law or to violate rights of individuals in certain legal traditions. Conversely, morality can also be a basis for argument to persuade respect of the law. In the case of violations of the law in the Islamic tradition, An Na-Im affirms that ‘even when motivated by selfish ends, human rights violators normally seek to

¹⁵²Weeramantry *supra* note 138 at 44.

¹⁵³ Ibid. at 39.

¹⁵⁴ Weeramantry, *supra* note 138.

¹⁵⁵ Kraehenbuehl, *supra* note 6.

rationalize their behaviour as consistent with, or conducive to, some morally sanctioned purpose'.¹⁵⁶ The same conclusion would be extensive with respect to violations of international humanitarian law, where actors either find a moral purpose, or blind moral boundaries when acting contrary to the law.¹⁵⁷ An-Na'im admits that said effort to rationalize behaviour on moral purposes may be 'purely cynical', but it would not occur unless there was 'reason to believe that [the] claim of moral sanction [would be] plausible' to the audience. In these cases, the best reasoning on moral basis from authoritative religious leaders could be of persuasive value, there the need to bring morality to the table for legal discussion.

In a different context, in China, rights are placed below ethics. Claims based on 'rights' 'would be regarded as disruptive violations of ethical rules'. Harmony matters more than individual justice according to the 'dominant Confucian view of morality and law' in China.¹⁵⁸ The point is not to underline the cultural relativity of moral claims, but to highlight that if morality plays an important role and has a clear place in other legal traditions, a legal approach which disregards morality may not resonate well in those traditions if the aim is to engage in persuasive dialogue to enhance respect of the law and adherence to it.

2.2 The place of legal positivism within the Western legal perspective

¹⁵⁶ An-Naim, *supra* note 109 at 79.

¹⁵⁷ Johnathan Glover, *Humanity a Moral History of the Twentieth Century* (New Haven: Yale University Press, 2001).

¹⁵⁸ Stanely Lubman, "Mao and Mediation: Politics and Dispute Resolution in Communist China," in Smith & Weisstub, eds. *The Western Idea of Law* (London, Toronto: Butterworths, 1983) at 97.

This section questions the place of legal positivism in Western legal culture, first by stating that there is no unanimity about one of its key features, the separation between law and morals, and second by introducing the different Western view which treats law as a process of interaction and not as a final end-product. The section ends by briefly examining the question of compliance with the law from both perspectives, to illustrate how Fuller's process oriented approach lends itself to fill the gaps where legal positivism cannot.

2.2.1 The separation, or not, of law and morals

The predominant positivist view led by H.L.A. Hart insisted on the separation between law and morals. His views have largely influenced the Western legal perspective including IHL. Under such positivist approach to International humanitarian law, morality was taken out of the debate by separating it from law.¹⁵⁹ The ICRC is embedded in Western thought and rationality, where a positivist vision of law with no privileged place for morality in its discourse fits nicely. Yet, even within the western rational tradition, despite this separatist legal positivist vision, 'the precepts of religion, consciously or unconsciously, have [...] guide[d] the administration of justice',¹⁶⁰ as Lord Denning affirmed. Hart's predominant positivist view 'that the foundations of a legal system are not to be found in any moral or justificatory theory'¹⁶¹ is by no means the unanimous view even in the Western tradition.

¹⁵⁹ Porretti *supra* note 32.

¹⁶⁰ Lord Denning, "The Changing Law: The Influence of Religion," in *The Western Idea of Law*, J.C. Smith & David N. Weissstub, (London, Toronto: Butterworths, 1983) at 393.

¹⁶¹ H.L.A. Hart, Law in the "Perspective of Philosophy: 1776 – 1976," 51 *New York University Law Review* (1976) 538 – 551 in *The Western Idea of Law*.

Lon Fuller, who considered himself a critic of positivism,¹⁶² is one of the most influential Western scholars representative of the lack of unanimity on this issue in the Western legal perspective and a direct critic to Hart's views, in the 'resonant'¹⁶³ Hart and Fuller debate. For now it suffices to mention two key aspects which distinguish Fuller from legal positivists (the next chapter devotes greater length to his legal vision). First, Fuller does not concentrate on the content of the law, or the end result which usually appears in the formal enactment of the law or in treaties. He would not look at which provision of which convention regulates or does not regulate a concrete situation. Fuller would look at the process how understanding and agreement around those provisions was reached and continues to be built. Second, Fuller would look at 'the human purposes served by law'.¹⁶⁴ He had an 'ethically integrated view of the activity of law'.¹⁶⁵ He tried to "restore a sense of ethical focus and direction" to the law, not at all looking for universal principles, but in recognition of the human tendency "to aim at some good".¹⁶⁶ The prevalent positivist scholars in Fuller's time tried to treat law like a physical science. In doing so, they 'exiled from jurisprudential discourse reference to any term that seemed to reflect moral or ethical value'.¹⁶⁷ Fuller instead insisted that 'it was impossible to separate the legal from their ethical aspects without destroying their essential character'.¹⁶⁸ Not only did he not separate law from its ethical component, for him ethical principles gave law its direction.¹⁶⁹ How those principles appear, is for Fuller a matter of context and time. According to Fuller, "Law is deeply connected with the practices and conventions of the community in which it is situated". The place of morality in law is still

¹⁶² Fuller, *The Morality of Law*, *supra* note 3 at 154.

¹⁶³ Lacey *supra* note 63.

¹⁶⁴ Peter R. Teachout, "Uncreated Conscience" in *infra* note 180 at 240.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid* at 239.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid* at 243.

¹⁶⁹ *Ibid.*

open to debate, with a clear convergence on this issue between the non-separatist western views with other legal traditions of the world.¹⁷⁰

2.2.2. Hierarchical positivist views versus process oriented theories

The limits of legal positivism are not exclusive to the global context. Different views about morality and law within the Western legal tradition are one of many tensions within western post-liberal societies. The hierarchical positivist view is also in tension with process oriented Western legal theories .

‘What is ultimately at issue is... the positive character of law itself: whether or not significant reliance will be placed upon made and articulated rules as opposed to immanent and implicit custom. And behind this conflict of types of law lies a more general antagonism between forms of social life-one for which order is a spontaneous by product of interaction; another for which it represents authority imposed from above or outside’.¹⁷¹

Lon Fuller’s Western interactional theory of law, in antagonism to positivism, is gaining clear ground internationally since its focus on social interactions and process is well suited to overcome the obstacles that positivism failed to respond to in a globalized arena. For Fuller, law is not ‘sustained’ by the imposition of laws from an authority above,¹⁷² and enacted law does not stand on its own. For Fuller ‘the existence of enacted law as an effectively

¹⁷⁰ Evans *supra* note 35.

¹⁷¹ Roberto M. Unger, *Law in Modern Society*, (New York: The Free Press, 1976) at192-203.

¹⁷² Fuller, *Human Interaction and the Law*, *supra* note 3 at 5.

functioning system depends upon the establishment of stable interactional expectancies’¹⁷³ overtime. His views can be transported to war situations. He specifically refers to ‘fighting as a social relation since it involves communication’. Not the most pacific ways of communicating, but nevertheless a means. “While enemies may have difficulty bargaining with words, they can, and often do, profitably half-bargain with deeds. Paradoxically the tacit restraints of customary law between enemies are more likely to develop during active warfare than during hostile stalemate of relations; fighting one another is itself in this sense a ‘social’ relation since it involves communication.”¹⁷⁴

2.2.3. Compliance with the law of armed conflict from the perspective of law as process

In armed conflict situations the hierarchy typical of relations of authority within a state are even less applicable, either because conflict is among equals, i.e. states in international armed conflicts, or because state structures may be challenged or have collapsed in internal armed conflicts. In such situations, especially when the lack of compliance with the law of armed conflict is so wide, the scope of the question of compliance gains additional dimensions and angles to examine beyond obedience to the law in terms of respect of authority. This implies an examination of how law is understood in theoretical terms, even if the ultimate practical aim is to enhance respect of the law contained in the Geneva Conventions and other instruments by state and non-state actors.

¹⁷³ Ibid at 24.

¹⁷⁴ Ibid at 31

Fuller's vision of law as a constant process can free ICRC of the limits of legal positivism and unfold new opportunities for ICRC legal action with the aim of enhancing adherence to the law of armed conflict. This would require integration of legal pluralist ideas in search of practical avenues for concrete legal action towards compliance with IHL. "There is considerable variation in perspective depending upon whether the lawyer is acting as advocate, negotiator, preventive-law analyst manager, counsellor, rhetorical analyst".¹⁷⁵ In addressing the issue of compliance with the law of armed conflict I believe that the lawyer must move beyond its role as legal adviser knowledgeable of the technicalities and details of the Geneva Conventions and engage in a more general inquiry of the understanding of law, more concretely of international law, with a new perspective inclusive of the views of those with whom the ICRC interacts daily.

If we accept Fuller's view of law as process, one concrete application of his perspective would be that adherence and compliance can be viewed as two ends of the same rope in said law-making process. Real adherence, it is argued, is a pre-requisite for achieving compliance with the law of armed conflict. But, from a positive perspective, compliance is a word charged with other meanings. It can be associated to obedience and respect of the law in a hierarchical state centred manner; in this sense, to comply with the law is to obey the law; from a positive perspective a key question would be 'why is the law *obeyed* to?' In principle, non-compliance with the law does not challenge the law directly since respect of the law is not meant to define the law as such. Non-obedience constitutes a violation of the law, an event foreseen –at least theoretically- in most national legal systems as a situation that triggers application of law enforcement rules, officials and bodies. From a positivist

¹⁷⁵Robert *supra* note 131 at 216.

perspective, the question of compliance is clearly looked at from the practical viewpoint of the institutions and bodies responsible for law enforcement and from the perspective of punishment for violations of the law. This way of looking at the question of why people obey the law is then tied to the vision of law as a means of power and authority, obedience being the sign of respect to or fear of authority. Outside of national jurisdictions, further questions arise about compliance: Is an enforcing body outside of the states required? What about rejection of the law through deliberate and self-interested violations by actors? Does such rejection constitute a challenge to the law itself? What about the psychological impact of war which may lead fighters and combatants to violate the law? What about unintentional violations due to technical miscalculations in the use of weapons, negligence, poor training, etc? These and more angles illustrate the complexity of the question of compliance. The suggestion here is to limit the analysis to just one of the many possible reasons for the disregard of the law of armed conflict, trying to use the light that Fuller's vision offers.

The argument is that if the process of creation, promotion and implementation of IHL is only inspired in a positivist approach to law, the result would be -in certain contexts and circles- an IHL with intrinsically insufficient room to develop real adherence to it because positivism does not allow inclusion of others, with their perspectives. 'Why look at adherence?' Some would ask, 'if the law is the law, and the rule is to obey the law whether we like it or not', 'the Geneva Conventions have been universally ratified, even if we do not adhere to all of its provisions'. Tax, immigration, conservative family laws are examples of laws with arguably no unanimous adherence. Yet, those who do not abide by these laws have to endure the full consequences for their violations, be it legal prosecution, deportation, annulment of a

prohibited marital union, while the law changes in consideration of their views. But, in the case of the law of armed conflict -other than the ICRC, and occasionally the national bodies of the states in conflict- there are few bodies engaged in or in charge of the effort of ensuring respect of IHL; to say that 'the law is the law and therefore must be respected' does not sufficiently persuade, or force, actors to respect the law despite any International Tribunal. Contrary to regular situations at national levels where the processes of law creation and enforcement mechanisms are relatively settled since dated times, and where one may do without enquiring about adherence to the law, in armed conflict situations the question is crucial and inevitable. The arguable power of the enacted/ratified law alone does not suffice. Short of enforcement mechanisms, the minimum required is that at least there be a shared will and understanding around the law of armed conflict, which cannot be built by imposition or without communication of the understandings. Fuller suggests that through genuine dialogue in a participatory process, some sort of real adherence to the law of armed conflict beyond the ratification of the Geneva Conventions can emerge where said adherence is not yet in process or not firmly consolidated. The suggestion is that adherence is the pre-requisite for full commitment to the law contained in treaties, and is, therefore, a determinant factor for compliance with the law. The universal ratification of the Geneva Conventions which we claim and agree is a success, does not necessarily mean complete adherence to the law of armed conflict; the success remains formal to some extent, since in practice there is wide non-compliance with IHL. In consequence, to promote respect of the law based on said universal ratifications or on the power of treaties and state practice alone does not stand. Instead of promoting further developments of provisions, reinforcing the process of adherence might serve the ultimate purpose of enhancing respect with the law of armed

conflict. This means, looking at ‘the process of law’ rather than ‘law as an end result,’ along Fuller’s reasoning. Genuine dialogue is not only at the heart of Fuller’s vision. It is also the central innovative proposal by ICRC’s operational minds.¹⁷⁶ The task now is to enquire how genuine dialogue can be pursued in concrete legal actions by the ICRC from a pluralist legal perspective.

¹⁷⁶ Kraehenbuel, Operational Report *supra* note 6.

Chapter 3

The force of inclusive genuine dialogue to build adherence to the law of armed conflict

Non-compliance with the law of armed conflict appears to challenge not IHL or the ICRC, but the vision of law by international humanitarian lawyers, including within the ICRC. Indeed, tensions exist at the ICRC as argued in the first chapter, with the operational minds bringing in a pluralist approach well rooted in its field work and heading towards the construction of genuine dialogue with actors at war, while the legal minds are predominantly inspired by the legal positivist heritage which can hinder dialogue with some of the actors. Said positivist heritage, despite its remarkable accomplishments, like the universal ratification of the main IHL instruments, among many other successes, leaves out actors and perspectives who do not match well with the positivist western perspective as argued in the second chapter. The legal vision of pluralist scholars, concretely the ideas of Lon Fuller, not only help understand the tensions between the operational and legal minds within the ICRC in a new light, in addition they are in line with the creativity of ICRC's operational minds who search to build genuine dialogue with actors at war. This chapter aims to elaborate how Fuller's vision enlightens ICRC's legal task and it suggests ways to integrate his pluralist vision in concrete actions at the ICRC to complement its non-negligible traditional positivist approach to law. Fuller envisions law as a constant process, view which unfolds a different perspective for the ICRC to enhance adherence to the law of armed conflict. This would require the integration of Fuller's pluralist ideas in ICRC's work of implementation of the

law of armed conflict in a new style of dialogue receptive and inclusive of new or even different voices.

There is no ambition here to present a full account of Fuller's vision of law. He was 'an eclectic thinker who drew from sources of many disciplines'¹⁷⁷ and he did not produce a systematic or a 'comprehensive account of his views'.¹⁷⁸ He focused on the practice of law and did not aim to define concepts, so his views are at times better identified in their interpretation by other scholars. This chapter is inspired in direct as well as indirect sources on Fuller, where some of his ideas, or the interpretation of his ideas, bring light to the question of how ICRC's legal efforts could enhance adherence to the law of armed conflict.

There may be scepticism in the mind of legal practitioners, including at the ICRC, about the practical usefulness of legal theory; a question which is entirely a different debate, though of some relevance here, as this thesis in fact suggests bringing in some legal theory, concretely legal pluralism, to the current task of enhancing compliance with the law of armed conflict by the ICRC. By theorizing the legal practitioner at the ICRC can unveil new paths for action which a purely 'managerial'¹⁷⁹ or technical approach to the legal task could blind. The scepticism about the practical use of theory seems like a lesser challenge when the theory brought in is Fuller's. He was a legal practitioner himself, and his whole vision of law was not disconnected from the actual practice of law which adds legitimacy to his approach. His

¹⁷⁷ Kenneth I. Winston, "Three Models for the Study of Law" in *infra* note 180 at 69.

¹⁷⁸ *Ibid.*

¹⁷⁹ See generally Martti Koskenniemi, "The Fate of Public International Law: Between Technique and Politics" (2007) 70 *The Modern Law Review* 1.

ideas were inspired by his own practice.¹⁸⁰ Fuller did not purely theorize about the idea or concept of law, but about the practice of law. He observed his legal practice and answered very concrete and pragmatic questions about law, such as ‘what is the role of the lawyer and the role of law.’¹⁸¹ His pragmatism is reflected in a recurrent word throughout his writings: *purpose*. From the same practical perspective he observes how law is a ‘purposeful enterprise’.¹⁸² For Fuller, law is a construction of social order through interactions and mutual understandings.¹⁸³ The task of the lawyer, that is the purpose of the lawyer, is to enable said interactions by creating a framework for the realization of the human purposes, and this is done through real dialogue between the actors involved in the process.

The first section below examines ways to integrate Fuller’s understanding of how laws are adhered to in ICRC’s legal minds, to complement the more traditional legal positivist approach. If we follow this reasoning, our initial questions would be what is the ultimate purpose of the ICRC in the promotion and implementation of IHL? What is the purpose of the ICRC lawyer engaged in the task? If Fuller suggests that dialogue is the means, how can there be dialogue when there is armed conflict? These are the questions addressed in this chapter, before concluding what a genuine dialogue with actors at war would entail.

3.1. How Lon Fuller’s vision of law enlightens ICRC’s legal task

¹⁸⁰ Generally Willem Witteveen & Wibren Van der Burg, eds. *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press, 1999).

¹⁸¹ David Luban, “Rediscovering Fuller’s Legal Ethics” in *supra* note 180 at 203

¹⁸² Fuller, *The Morality of Law* *supra* note 3.

¹⁸³ Fuller, “Human Interaction and the Law” *supra* note 3.

Fuller's ideas touch precisely on the issue at the heart of ICRC's main challenge, at least from a legal view point: compliance. Fuller looks at the continuous processes how laws originate and bind, 'how the laws are adhered to and respected'¹⁸⁴ i.e. complied with, questions which are remarkably close and in direct relation with ICRC's current concern of how to improve compliance with the law of armed conflict. Like the operational minds at the ICRC, Fuller pays particular attention to context, since for him 'law and its social environment stand in a relation of reciprocal influence'.¹⁸⁵ In addition, his conclusions are in line with the current ICRC's operational vision which invites to engage in genuine dialogue with the diversity of actors at war. On the contrary, as he was a critic of positivism, the intuition here is that Fuller's views are not integrated in ICRC's legal positivist minds. This section explores how some of his views could be integrated by ICRC's legal minds to complement the more traditional legal positivist approach to law by the ICRC.

3.1.1 The law of armed conflict as an unfinished business

Fuller conceives law as a never-ending process, always in the making: "Law is the enterprise of subjecting human conduct to the governance of rules. Unlike most modern theories of law, this view treats law as an activity and regards a legal system as the product of a sustained purposive effort".¹⁸⁶ For Fuller, positivist scholars who focus on the state and find 'the essence of law in a pyramidal structure of power,' only see the 'institutional framework' but

¹⁸⁴ Ibid at 5.

¹⁸⁵ Ibid at 27.

¹⁸⁶ Fuller, *The Morality of Law* *supra* note 3 at 106.

fail to see the ‘purposive activity necessary to create and maintain a system of legal rules.’¹⁸⁷

As suggested in the first chapter, ICRC’s legal efforts have mostly focused on the institutional implementation of the law of armed conflict, with few exceptions. While the large scale integration of IHL in the national legislations, the ratification of IHL instruments, the many studies of punctual IHL developments, the solid programs for integration of IHL in the training and doctrine of armies worldwide provide sufficient material for lengthy writings, the legal efforts with respect to non-official actors are punctual, few, in the records but not part of a continuous program. This is because traditionally ICRC’s legal efforts have been directed mainly towards state structures and institutionalized armies, as Fuller argues that a positivist approach would do. The institutional framework is the structure where the legal activity takes place, but is not the legal activity itself. The structure itself does not make the law alone; it is the persons living inside the structure who through their interactions participate in the making of the law. By focusing on the institutional structure mostly, the ICRC did not include non-state actors enough. A vision of law that sees law as the interaction between actors would inevitably include even the non-institutional ones, if the aim is to build real adherence to the law. In the case of the ICRC, this would imply that its implementation efforts, towards the incorporation of international humanitarian law instruments in local laws should necessarily expand to include every actor who plays a role during armed conflict. In addition, the style of implementation of IHL locally at the level of non-state actors should be adapted to the specificity of the actors. Likewise, even in the case of official actors, if they are reticent to open-up to a positivist or a too ‘western’ approach to law, the ICRC would

¹⁸⁷ Ibid at 110. “Since the emergence of the national state, however, a long line of legal philosophers running from Hobbes through Austin to Kelsen and Somlo have seen the essence of law in a pyramidal structure of state power. This view abstracts from the purposive activity necessary to create and maintain a system of legal rules, contenting itself with a description of the institutional framework within which this activity is assumed to take place”.

need to take note of those differences, listen, and adapt its discourse and approach to integrate the opposing views in the legal dialogue. The ICRC is already in privileged dialogue with most actors at war worldwide, but mostly to gain access and assess the humanitarian concerns, i.e. for protection purposes as described in the first chapter. The type of dialogue that is suggested here is an inclusive normative dialogue, for the making of the law through the interaction of actors, as opposed to an informative reminder of IHL and state laws without a real exchange about their understandings of the bindingness of the law upon them. In other words, all actors should be made part of the legal process to build a sense of ‘obligation’¹⁸⁸ towards the law in their own minds.

Fuller insists first, that law is not a fact, or a finished product, but a constant process; second, that actors participate in the enterprise, therefore law is not necessarily a manifestation of state power or hierarchy; third, that there is a purpose to law. Aspects which are all interlinked. They may appear innovative for someone with a predominantly positivist mind for whom ‘law must be treated as a manifested fact of social authority or power, to be studied for what it does, and not for what it is trying to do or become.’¹⁸⁹ Fuller’s view of law as a ‘purposeful enterprise’ and Hart’s as a ‘manifested fact of social power’ are not necessarily exclusive, they are two different and complementary perspectives,¹⁹⁰ though Fuller’s has not been the preferred one by international lawyers. In light of Fuller, the fact that the law of armed conflict is not fully complied with for example, does not necessarily mean that IHL is challenged, but that it is possibly still in the early stages of its making with respect to some actors despite the well developed formal instruments widely ratified. “To speak of a legal

¹⁸⁸ Bruneau & Toope *supra* note 88.

¹⁸⁹ Fuller, *The Morality of Law*, *supra* note 3 at 145.

¹⁹⁰ Witteveen, *supra* note 180 at 30.

system as an “enterprise” implies that it may be carried on with varying degrees of success. This would mean that the existence of a legal system is a matter of degree”.¹⁹¹ While from a positivist perspective one may say that the law is or is not,¹⁹² from Fuller’s viewpoint, that the enterprise of law-making be an unfinished business is not a threat; “of course, both rules of law and legal systems can and do half exist. This condition results when the purposive effort necessary to bring them into full being has been, as it were, only half successful.”¹⁹³ This seems to be the case of the law of armed conflict, widely accepted formally, yet not fully adhered to by a significant number of actors as the increasing numbers of victims demonstrates. In addition, no matter how developed the law may be formally, the engagement of actors is what makes the law thrive. Fuller insists that “law be viewed as a purposeful enterprise, dependent for its success on the energy, insight, intelligence, and conscientiousness of those who conduct it, and fated, because of this dependence, to fall always somewhat short of a full attainment of its goals.”¹⁹⁴ If Fuller is right, this means that as long as the ICRC does not succeed in engaging relevant actors in the enterprise, then the law is bound to fail, at least with respect to them. His views would imply that ICRC’s task ahead is a permanent one. So long as there is war, or at least until the purposive effort amongst actors is solid enough, the ICRC as guardian of IHL, would have to invest efforts in engaging all actors in a non-hierarchical manner, i.e. dictating what the law states, but in a refreshed style. So far, given the institutional and state-centred approach by ICRC legal minds, the style is very much a hierarchical one when it comes to ICRC’s legal efforts and non-state actors have been excluded of the process of law-making including when it comes to

¹⁹¹ Fuller, *The Morality of Law*, *supra* note 3 at 122.

¹⁹² Ibid at 123. “It is truly outstanding to what an extent there runs through modern thinking in legal philosophy the assumption that law is like a piece of inert matter-it is there or not there”

¹⁹³ Ibid at 122.

¹⁹⁴ Ibid.

customary law as seen in the previous chapter. While a state-centred approach would still be needed, because institutions do facilitate interaction between actors and allow closure of insurmountable differences among other reasons,¹⁹⁵ to fully engage actors they should be treated in their own right as legal agents, even if they act against states. There is no suggestion here that these actors are above the law, simply that they should be brought within the legal enterprise if the will is to get them to adhere to the law of armed conflict. The argument that engaging all actors in a legal dialogue would legitimize even those which states treat as illegal does not stand, since the law of armed conflict already covers said actors. This means that they are already formally treated by states as actors responsible before the Geneva Conventions, formally bound particularly by the minimum humanitarian standards contained in article 3 common to the Geneva Conventions. The issue is that actors, be it state or non-state, would not feel bound to respect the law of armed conflict if they did not get the chance to appropriate the rules as their own due to their lack of participation in the process of creation of the law.¹⁹⁶ The question for the ICRC now is how to proceed in the effort of engaging all actors in the legal process, a question that the ICRC is indeed addressing actively. Added to the many years of concern about the challenge of non-compliance with IHL, the ICRC is currently exploring ways to include non-state actors.¹⁹⁷ The law of armed conflict remains an unfinished business with respect to those who have been consistently left out of the legal enterprise.

¹⁹⁵ Webber, *supra* note 44.

¹⁹⁶ Clapham *supra* note 113; also Brunnee & Toope, *supra* note 88.

¹⁹⁷ Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts, 2008, Improving Compliance with International Humanitarian Law, Background Paper prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law, Cambridge, June 25-27, 2004. Both at www.icrc.org.

3.1.2. The mediating role of the ICRC to engage actors in the legal enterprise

Engaging non-state actors in the process of making of the law of armed conflict, and even some states not fully integrated in the legal community depending from whose perspective, intrinsically carries many obstacles. Dealing with some actors at war is not merely dangerous or materially burdensome; at times, contacts with them can also be illegal. This is illustrated in the recent decision by the US Supreme Court ruling that providing legal training to rebel or separatist groups, who have been designated as terrorists, amounts to providing them with support to further their criminal aims, which is a crime under US law.¹⁹⁸

In *Holder v. Humanitarian Law Project*, the plaintiffs challenged unsuccessfully the constitutionality of the US Antiterrorist Act under which it is a crime to knowingly provide support to organisations designated as terrorist by the US State Department. The plaintiffs wanted to provide training in international law to the Kurdistan Workers Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE), both designated as terrorist organizations by the US State Department. More concretely, the plaintiffs wanted to train both organisations on ways to present claims before the United Nations, an otherwise legitimate and legal mechanism. They presented a Constitutional challenge to the definition of ‘material support’ which had been expressly construed to include training. The plaintiffs claimed such inclusion was in violation of the “Due Process Clause” in the Fifth Amendment, since training the organizations on international law did not imply intent to further their terrorist aims, and therefore short of intent there should not be crime. The Court stated that the prohibition was clear; to simply provide material support, including legal training, with knowledge of the

¹⁹⁸ *Holder, Attorney General v. Humanitarian Law Project*, US Supreme Court, 21 June 2010.

designation of the organizations as terrorist organizations, sufficed for the conduct to constitute a crime. The Court confirmed the line of US Congress by clarifying that provision of legal or advocacy support, in case of terrorist organizations, amounts to support of their terrorist activities. The Court not only stated the clarity rather than the vagueness of the legal prohibition, it further confirmed the Government's reasoning that the conduct of terrorist organizations cannot be divided in lawful and criminal, since what may appear as legal in the end contributes to the criminal aims.¹⁹⁹

Training is not synonym of dialogue -training being the conduct under scrutiny in the referred case, and dialogue being what this thesis suggests. Yet, training is clearly one, amongst many other ways, through which the ICRC has initiated dialogue with state and non-state actors, be it about IHL or first aid. The point is that many rebel groups are labelled as terrorists, regardless of their political aims. That this be done often quite rightly given that they may use terrorism as a tool of war is beyond the point here. The issue is that opening lines of dialogue with some of these actors, even by legitimate non-profit organizations or ordinary individuals, may be a costly, illegal or a suicidal enterprise. Contacts with actors at war even for legal reasons, or with no apparent illegal motif, can amount to participation or support to the actors in the view of state authorities and their judiciaries and police. It would be very hard to draw the line between sympathy, support and belonging to the group from the regular authority's perspective with security concerns in mind. Let alone the material feasibility of initiating dialogue for anyone who has no sympathy or who has gained no trust from the actors in question for obvious personal security concerns. Such attempts could turn deadly. Thus, access to actors at war can be not only difficult geographically, it can be

¹⁹⁹Ibid at 23–28.

extremely dangerous, illegal, and it could cost you your life. These are all difficulties which the ICRC and its delegates have endured, managed and overcome over the years through legal arrangements²⁰⁰ and through persuasive dialogue directly with the actors for protection purposes.

At the present moment, the ICRC not only has material access, it also has the trust of many non-state actors, the legitimacy acquired over time through its work, and the support from the States who condone ICRC's dialogue with all actors at war.²⁰¹ Contacts by the ICRC do not amount to sympathy neither to support of any actor. Its high standards of professionalism, autonomy and discretion have put the ICRC in a suited place for the task. The ICRC has widely disseminated its principle of neutrality and has committed to its confidential modus operandi despite wide criticism.²⁰² The result is a trustworthy organization with privileged access at all levels worldwide as described in the first chapter. It would be difficult to conceive any other organization, not even Geneva Call, Human Rights Watch, or other NGO's, who would, at this point, be in a position to engage actors at war worldwide with such proximity, neutrality and efficiency in the legal enterprise. Further, there are no reasons to explain why, other than a legal positivist way of thinking, the ICRC would not engage all actors in the legal process more systematically. If it engages the military, the police, and even the academia, why not engage in the process the actors of whom respect of the law is demanded?

²⁰⁰ Rona Gabor, *The ICRC Privilege Not to Testify: Confidentiality in Action*, ICRC (2004).

²⁰¹ Based on its neutrality principle and the confidential modus operandi, which the ICRC has widely disseminated since its inception. See *The Fundamental Principles Extract from XXVIth International Conference of the Red Cross and Red Crescent*, ICRC, 1 January 2005; Jean-Pictet, *Red Cross Principles* (Geneva: ICRC, 1962).

²⁰² Dominik Stilhart, *Confidentiality: Key to the ICRC's Work but Not Unconditional*, Interview ICRC (2008).

In my experience as delegate for the ICRC I did find another group of persons who had as close, or even closer contact, with actors at war as the ICRC: the religious leaders. They can be present on permanent basis where the state forces may not reach, be it remotely in the jungles of Latin America, in prisons in Africa, or alongside displaced communities providing them with clothes, or health care, and at times close to the higher levels of command too. The Putumayo for example, is a region plagued with armed conflict, in the territory of Colombia along the border with Ecuador. State presence there has been scarce, mostly for military operations rather than to establish permanent institutions. If the ICRC needs to enquire about the environment, security and humanitarian situation in this inaccessible region, the ICRC delegate could possibly find a very accurate and detailed picture of the situation and concerns by appealing to the representatives of the Vatican's Ecumenical Council in the area. Or if the ICRC searches to understand the situation in the jungles of Peru where remnants of Shining Path allegedly hide, and where no one reaches, the ICRC delegate would be able to get a closer look of the reality by engaging in dialogue with Evangelical missionaries who live in the jungle, or with catholic priests who live in near-by villages and who have been present and close to the people in these areas for years. It is not accidental that the ICRC has increased its dialogue with religious leaders over the years, including in the Muslim world as illustrated in earlier chapters.²⁰³ Such dialogue is useful and can provide better insight about the reality and humanitarian concerns in inaccessible places on the ground. But the business of religious leaders is not at all the same as the ICRC's. While religious leaders may have secure access to often elusive actors at war, and have their trust, they are concerned with the individual morality of the actors, or may have their own partial views and biased interests, or

²⁰³ Wigger, *supra* note 60, Kraehenbuehl, *supra* note 6.

their commitment to the law may be questionable at times, in extreme cases to the point of participating directly in conflict. In 2006, catholic Reverend Seromba was found guilty of genocide by the International Criminal Tribunal for Rwanda, as were catholic two nuns in 2001 by Belgian Courts.²⁰⁴ The possible bias of religious leaders is relevant here for they could not play a neutral mediating role for legal purposes despite their immediate access to non-state actors. The participation of religious leaders in the enterprise of making the law could end up being crucial and inevitable though, as actors during armed conflict or as influential members of the communities in or amidst conflict.

The mediating role, so close to ICRC's nature, to facilitate a framework of legal interaction clearly remains with the ICRC. It has taken ICRC over a century to build its reputation and establish its field presence. Its legitimacy is unquestionable. The ICRC already acts as neutral intermediary between actors at war for protection purposes and its contact with all actors is almost as close as it can get. It would take too long before others prepare as solid grounds to start the legal dialogue at the level here suggested, though this does by no means imply that others should not be included in the task if there is a will or opportunity. A monopoly of the legal enterprise would be contrary to the inclusive interaction that is suggested here. Simply, as facts stand, there is no dispute about ICRC's role as guardian of IHL, a role gained formally in the Geneva Conventions and also in practice through its persuasive humanitarian work and unique embed in the field.

3.1.3. Inclusion of non-state actors in the legal enterprise

²⁰⁴ Sukdher Chhatbar, *Catholic Priest Guilty in Rwanda Genocide*, Nairobi, 13 December 2006, The Associated Press, published on line by the Washington Post, www.washingtonpost.com last seen 27 July 2010-07-27 at 12:36.

The inclusion of non-state actors in the legal enterprise has been minimal until very recently, compared to ICRC's several programs targeting state actors and official bodies. Nevertheless, this trend is changing. Current ICRC's efforts to improve compliance with IHL pull it to include non-state actors as legal agents away from the predominant state-centred approach characteristic of the recent past. While the ICRC has for years had solid and steady programs for the incorporation of the law in national legislations through its Advisory Services (for the integration of IHL by the armed forces under the FAS program, for the teaching of IHL at universities, for the promotion of humanitarian values at schools through its work with the Ministries of Education or Exploring IHL program), efforts with respect to non-state actors at war have been punctual. These efforts are not part of a programmatic investment which would entail clearly defined strategies, objectives and desired impact, as has been the case for the legal implementation when ICRC targets are state or official actors. Not that the ICRC has not made any efforts on this front. Simply, the approach has been fuzzy, occasional, sparing, arguably because the place of non-state actors for the purposes of the legal enterprise was not as crucial in the legal positivist minds within the ICRC at the time, even if these actors were the crucial interlocutors of the operational and field staff for protection purposes. The challenge of non-compliance with the law of armed conflict, as well as the reality on the ground perceived by the operational minds as described in the first chapter, is forcing a change from an exclusively positivist approach to law, to include the pluralist legal views.

At the present moment, the ICRC is searching for ways to let the commitment of non-state actors to IHL to flourish by granting weight to their consent and recalling the few historical occasions when their legal agency was recognized and encouraged by the ICRC or others through bilateral agreements for example.²⁰⁵ The occasions when the ICRC brokered such agreements are few. In 1992, the parties to the conflict in Bosnia and Herzegovina agreed to respect the main IHL provisions, notably article 3 common to the four Geneva Conventions, at ICRC's invitation. Signature of the agreement did not result in respect of its content by the parties despite their formal commitment.²⁰⁶ The ICRC also negotiated two special agreements stating formal commitments to respect the 1949 Geneva Conventions in Yemen and Nigeria in the sixties.²⁰⁷ The ICRC also participated as observer in 'attempts to negotiate a special agreement' in Tajikistan 'under the auspices of the UN between 1995 and 1997'.²⁰⁸ The ICRC, or others, have 'sometimes asked armed groups for a written declaration of their willingness to comply with IHL',²⁰⁹ or has asked some groups 'bilaterally and confidentially',²¹⁰ to adopt codes of conduct. In the 1990's, the Sudan Allied Forces 'distributed a code of conduct consistent with IHL'.²¹¹ These have been important efforts, yet there is a big gap between them and the systematic, programmatic and steady efforts and dialogue with the armed forces worldwide over the years. As argued throughout this thesis, this gap is the result of the predominant legal positivist approach which can be blind to the role of non-state actors as agents makers of the law on the side of the states. Till recently, any attempts to include non-state actors meant the transfer of information of their state's law and

²⁰⁵ Supra note 197.

²⁰⁶ Ibid at 17.

²⁰⁷ Ibid.

²⁰⁸ Ibid at 18.

²⁰⁹ Ibid at 20.

²¹⁰ Ibid at 23.

²¹¹ Ibid.

of the law of armed conflict upon them, rather than actual inclusion of the actors in the legal process, and their own interpretations and expressions of the law, in a true dialogical process. Contacts focused mostly on the humanitarian situation and concerns, with dissemination of ICRC's principles and *modus operandi*. The legal job is only half accomplished with respect to non-state actors with 'acculturation'²¹² ahead of the task of persuasion.

Inclusion, dialogue, persuasion, participation are words evocative of democratic ways. In this sense, it could be said that Fuller did have a democratic view of law. But the most accurate way of qualifying Fuller's view is 'interactionism'.²¹³ Interactionism in Fuller consists in the 'establishment of stable interactional expectancies'²¹⁴ which are spelled out by actors: communicated. It is these communications of their own understandings and expectations, which end-up compelling actors to respect their obligations.²¹⁵ The question for ICRC legal minds would be if actors have been given the space of communicating their understandings, and if not, then, which would be the adequate ways to create such opportunity. As suggested earlier, ICRC's approach has been mainly to inform some actors of what the law is, and now there are intentions to also inform them of how the law should be interpreted.²¹⁶ Said efforts and intentions alone do not serve the purpose. Rather than interactions, they can be perceived as impositions and the result could be the disengagement of the actors. In light of Fuller, inclusion means allowing the actors to express their own commitments from their own

²¹² Asher Alkoby, *Theories of Compliance with International Law and the Challenge of Cultural Difference*. Vol 4 J. Int'l L & Int'l Rel. 151, 2008. There are two main models of compliance by international relations and international law theorists: The rationalist model, under which 'penalties and incentives' are the key to compliance, and the constructivists, for whom persuasion and acculturation are the keys. This is the international relations theory closer to Fuller's approach. Dissemination and transmission of information are forms of acculturation.

²¹³ Witteveen, *supra* note 180 at 33.

²¹⁴ Fuller, *Human interaction and the law* *supra* note 3.

²¹⁵ Brunee & Toope, *supra* note 88.

²¹⁶ Kraehenbuehl report *supra* note 6.

perspective. “The ideal at the heart of legal ethics, for Fuller, is that of ‘tolerant partisanship’, which would educate the lawyer into including in his [art] perspectives other than his own.”²¹⁷ “Even if a man is answerable only to his own conscience, he will answer more responsibly if he is compelled to articulate the principles on which he acts.”²¹⁸ The negotiation and signature of bilateral agreements and the unilateral declaration on whatever form by non-state actors are a step forward as the ICRC has identified.²¹⁹

From an ‘interactionist’ perspective, the signing of agreements alone does not suffice to pull compliance, as the Bosnia and Herzegovina case illustrated. Despite a signed agreement to respect IHL, the parties committed serious violations of the law contrary to their own agreement. The signature of a contract is simply a point in a continuous legal effort, not the culmination or the exhaustion of the legal effort. Preformatted unilateral declarations or bilateral agreements can fail or not change much to the current state of affairs, except if they were ‘mutually constructed’.²²⁰ An interaction, in Fuller’s style, requires creating opportunities for all involved to give their views and question the other’s views. ‘If there is no real opportunity for negotiations... then one really has not created a contract at all, but has merely acted in the form of contract.’²²¹ If one does not listen to the actor’s views, one also loses the opportunity to challenge their views. This reasoning implies in the case of the law of armed conflict, that as long as an actor is not truly engaged in negotiations about the understanding and creation of the law, there is no law in the mind of the actor, therefore no commitment to the law by him to pull his compliance. This does not mean that the law does

²¹⁷ Witteveen *supra* note at 180 at 42.

²¹⁸ Fuller *supra* note 3.

²¹⁹ *Supra* note 197.

²²⁰ Brunee & Toope *supra* note 88 at 15.

²²¹ Brunee & Toope, *supra* note 88 at 15. Also Fuller, *The Morality of Law*, *supra* note 3.

not exist or that the actor would be exempt from the full force of law if the legal community opted to activate enforcement mechanisms. What it means is that there would be no real adherence to pull compliance. Rather than providing a preformatted contract, or stating what the law is or how it should be interpreted, the mediating task entails facilitating a framework for the interaction of the parties around their understanding of the law, so that all can appropriate at least some terms of the law, and express their mutual commitments about the rules which guide their behaviour during armed conflict. The codes of conduct developed by the armed groups at their own initiative and referring to local norms and cultural ways²²² might be more compelling to them initially than the expression of IHL in technical ways or in western legal jargon, or if the entire Geneva Conventions were copy-pasted to the agreement.²²³ If genuine dialogue is facilitated and the actors refuse to engage in the lines of legal communication open to them, the full force of legal sanctions would be inevitable, their disengagement from the legal process constituting a potential aggravating circumstance in case of prosecutions, and confirmation of the illegal status of the actors who refuse to join the legal effort. To facilitate a framework of interaction is of course very different from ICRC's operational dialogue to facilitate humanitarian actions, be it the repatriation of prisoners, or interventions to protect civilians in punctual cases, or passage of aid, or the assessment of the humanitarian and security situation. The suggestion is also very different to a political dialogue towards a peace process, though IHL could be ancillary to such dialogue. The scope of ICRC's business clearly is armed conflict as well as IHL's. While law can ultimately help to bring more peaceful interactions, the suggestion here is limited to the 'interactional',²²⁴

²²² *Supra* note 197 at 23.

²²³ Marco Sassoli, *Possible Legal Mechanisms to Improve Compliance by Armed Groups with International Humanitarian Law and International Human Rights* also *supra* note 79.

²²⁴ Bruneau & Toope, *supra* note 88.

regulation of armed conflict, that is, a dialogue about the understanding of the law by all concerned with genuine expressions of said understandings. Further, the dialogue suggested here is not about the technicalities of the Geneva Conventions necessarily or exclusively, but also about the purpose of the law of armed conflict and the understanding of this law by the participants to armed conflict themselves which would require actors to apply their own ‘judgement and insight’²²⁵ about their own actions and expectations, and it would require the ICRC to initially listen to their voices. As Gerald Postema points out interpreting Fuller, no external resource can encourage compliance unless it is ‘rooted deeply in the social interaction of the communities it purports to serve.’²²⁶ This approach neither questions the content of IHL nor does it empty IHL of its content. In light of Fuller, for the content of the law to commit, it has to be integrated by the actors in a dialogical process, among other requirements contained in his internal morality of law or his procedural criteria, beyond and additional to the signature of formal instruments, agreements or declarations. This does not imply that IHL is devoid of content, what happens is that its content in formal instruments alone does not stand on solid enough and legitimate grounds until all relevant actors are genuinely included as agents in the legal process. In other words, in light of Fuller the idea would not be to renegotiate every provision contained in the Geneva Conventions, but simply to integrate actors who have been left out of the process through dialogue, and continue the legal process with them too as has been done with most state actors. The law of armed conflict is constantly being interpreted and clarified by the ICRC, by actors, by criminal

²²⁵ For Fuller law requires judgement and insight. *The Morality of Law*, supra note 3.

²²⁶ Witteveen, supra note 180 at 43 citing Gerald Postema ‘reconstructs Fuller’s reasoning to show that sanctions, or authority, or other external resources available to officials are unable to adequately motivate compliance with the norms; law has to be congruent with and integrated into ordinary social practices in order to facilitate self-directed social interaction. The contrast between managerial direction and legislation makes it clear that it is a fundamental mistake to see law simply as ‘a one-way projection of authority. Authority is compatible with law, concludes Postema, when it is ‘rooted deeply in the social interaction of the communities it purports to serve.’”

tribunals, by academics. There is no danger in any of this to the progress that has resulted day by day during over a century of efforts, initiated by Henry Dunant and then under ICRC's leadership, both constituting IHL's 'norm entrepreneurs.' What happens, as Fuller states, is that the law is not static, it is not a datum, or a final product, it is an enterprise always in the making, an unfinished business, with a clear direction set by the aspirations reflected in humanitarian values and ideals. To think that the interpretation of law, and the law itself cannot evolve, be modified or even subject to question by actors is contrary to the reality of IHL itself. IHL has evolved with time, as much as war has changed. This does not mean abandoning what has been accomplished but building on it. As Fuller said, law is not 'ossified.'²²⁷ In light of him, what remains unchanged and gives IHL its direction are the ideals it aspires to,²²⁸ as well as the minimum behaviour below which no human being would receive another human being's approval²²⁹ without both losing their humanity. In IHL and during armed conflict, the morality of aspiration²³⁰ and the morality of duty²³¹ are clearly placed at two very distant extremes of the same cord.

ICRC's mediating role could allow the legal enterprise to flourish through the involvement of non-state actors at a new legal level in a refreshed non-positivist style, engaging actors previously left out, listening to their perspectives with ears wide open, and with trust in the force of values and ideals rooted in the humanity principle at the heart of ICRC's origin; a role that the ICRC legal minds have yet to embrace fully in line with open tendencies at other

²²⁷ Fuller, *Morality of Law*, *supra* note 3 at 60.

²²⁸ The Morality of Aspiration for Fuller, *supra* note 3; the principles and values which inspire IHL and ICRC's work.

²²⁹ The Morality of Duty for Fuller, *supra* note 3.

²³⁰ *Ibid.*

²³¹ *Ibid.*

departments within the ICRC. The role of ICRC lawyers from Fuller's viewpoint would be as facilitators of genuine dialogue around the law of armed conflict and its aspirations, as facilitators of the interaction of actors in armed conflict with the purpose of genuine dialogue around their understandings. This is different and additional to giving technical legal advice, or clarifying the interpretation of the law at a distance from headquarters or the regional delegations. Such endeavour would require proximity to actors in the field by the legal minds, on the side of operational delegates and of local staff who have for years delivered the responsibility to disseminate ICRC's principles and ways of work, and even some IHL, in the field. ICRC legal minds are well placed to facilitate the interaction because, added to their expertise, they can bring the dialogue about the law to a new level, since they do not have the 'bias' or interests that legal advisors -to the armies or to the belligerents-, state officials or other actors may have. A military legal adviser for example, in an extreme situation, may enquire how to 'kill' without violating the law, or in the worst cases, how to 'kill' beyond the legal allowed and get away with it even using the law as a war tool to their advantage;²³² instead, the ICRC lawyer, from Fuller's perspective would be a facilitator of the construction of the legal design by the actors, by encouraging the expansion of the legal community around IHL and its aspirations beyond the interest of the states, and promoting a dialogue related to the law not only about the immediate protection or operational concerns by the ICRC. It is unknown whether ICRC legal minds have already stepped foot in the jungles in conflict or in the field of combat. Free of the bias of lawyers who advise the parties to the conflict, be it legally or in questionable terms, the ICRC lawyer can mediate in the legal enterprise guarding the original purpose or aspirations of the law of armed conflict in mind. While the operational minds seek to protect the victims from the concrete and immediate

²³² Kennedy, *supra* note 105.

impact of conflict, the legal minds would seek to enhance real adherence to the law by a wider inclusion of actors at war in genuine dialogue around the law, which would hopefully result in a reduction of the impact of conflict on those who are not part of it.

One of the main difficulties in the law of armed conflict is the lack of institutions in charge of its compliance, other than the ICRC of course.²³³ ICRC argues, in its reminders to the parties to the conflict, that it is their duty to respect IHL. At the same time, it is the responsibility of the states to ensure respect of IHL. So we can find for example a state who is both party bound by the law, but also responsible to make it respected, and in both cases *vis-a-vis* the party against which it fights. The role of the ICRC here is crucial. Short of government or institution free of the bias²³⁴ due to its engagement in the conflict, the ICRC's lawyer traditional role as guardian of IHL gains further weight, to facilitate the 'sound and stable framework for their interactions with one another' ... 'as a guardian of the integrity of the system'.²³⁵ Providing technical advice in concrete cases is just one aspect of the task, and very similar to the task of the military's in-house legal advisors, or the government advisor. To focus on the bigger picture of the process of law making, as architects in the legal enterprise, would bring the legal minds even closer to Henry Dunant's original purpose and ideals²³⁶ and closer to the battle field.

3.2 Law's moral purpose

²³³ Webber *supra* note 46. Institutions matter even in a pluralist approach.

²³⁴ Word borrowed from IRs theory.

²³⁵ Fuller, The Morality of Law *supra* note 3 at 210.

²³⁶ Henry Dunant, *A Memory of Solferino* (Geneva: ICRC, 1986).

3.2.1 Law as a *purposeful* enterprise

There are three aspects to Fuller's vision of law contained notably in "The Morality of Law" which are of particular relevance here. First, he suggests eight criteria of legality, otherwise called by him 'the internal morality of law', which are necessary to ensure law's efficacy and legitimacy;²³⁷ second, his insistence on the communicating force of law; and third, the place of the morality of law and of human nature throughout the legal processes of communication. Brunnee & Toope develop their 'interactional theory' based on the first two aspects of Fuller's thought, notably the respect of the eight criteria of legality, some of which are remarkably close to what is otherwise called the general principles of law by civil law professors, but not all.

Legal norms must be general, prohibiting, requiring or permitting certain conduct. They must also be promulgated, and therefore accessible to the public, enabling citizens to know what the law requires. Law should not be retroactive, but prospective, enabling citizens to take the law into account in their decision-making. Citizens must also be able to understand what is permitted, prohibited or required by law –the law must be clear. Law should avoid contradiction, not requiring or permitting and prohibiting at the same time. Law must be realistic and not demand the impossible. Its requirements of citizens must remain relatively constant. Finally, there should be congruence between legal norms and the actions of officials.²³⁸

²³⁷ Fuller, *The Morality of Law*, *supra* note 3. Brunnee & Toope, *supra* note 88 at 16 (on legitimacy).

²³⁸ Brunnee & Toope, *Ibid* at 16, citing Colleen Murphy, 'Lon Fuller and the Moral Value of the Rule of Law' (2005) 24 *Law and Philosophy* 239; Fuller, *The Morality of Law* *supra* note 3.

If the process of creation and development of the law of armed conflict respects these criteria of legality, the path to building legal obligations in the minds of actors would be drawn. These criteria, tied to the communicating role of law, imply a participatory interaction of the actors in the process of law making. Criteria which could contribute to ICRC's overall legal task *vis-a-vis* the various actors previously left out of the process; for example, to map out the targets and examine the aspects of a refreshed implementation effort in light of the criteria, as a guiding tool rather than a tight belt. Let's take for example the non-retroactive criteria: in light of Fuller, the ICRC is heading in the right direction by suggesting the inclusion of a clause about the general application of IHL²³⁹ in 'issue-specific'²⁴⁰ agreements to be signed by non-state actors, even if that remained only a formal manoeuvre. This inevitable precaution would allow the legal community to deal with possible arguments against the retroactive and general application of the law of armed conflict to non-state actors. There is a clear risk in accepting that there was no law if there was no prior adherence to the law, because this would entail that IHL would be applied retroactively to actors who were not previously part of the process. As stated earlier, the interest in light of Fuller is rather that the actors newly integrated in the process develop their adherence to the law and are join the legal community by engaging in a dialogical process about the law. This may be one of the cases where in light of Fuller 'granting retroactive effect to legal rules not only becomes tolerable, but may actually be essential to advance the cause of legality'.²⁴¹ The

²³⁹ *Supra* note 117 at 21 'narrow declarations should include a clarification that this is without prejudice to other applicable rules not mentioned in the declaration.'

²⁴⁰ *Ibid* at 21.

²⁴¹ Fuller, *The Morality of Law* *supra* note 3 at 53. "We are to appraise retroactive laws intelligently; we must place them in the context of a system of rules that are generally prospective. Curiously, in this context situations can arise in which granting retroactive effect to legal rules not only becomes tolerable, but may actually be essential to advance the cause of legality. Like every other human undertaking, the effort to meet the often complex demands of the internal morality of law may suffer various kinds of shipwreck. It is when things go

positivist approach with its formal ways and Fuller's 'interactionist' approach are not exclusive but complementary. Therefore, inclusion of actors in the legal process should not imply the abandonment of the understandings that have resulted of over a century of negotiations contained in contemporary IHL instruments.

In their theory about creating a sense of obligation in international law, Brunne & Toope state that respect of Fuller's "internal morality of law", that is these criteria for legality, allows a sense of obligation amongst international actors to flourish. According to Fuller, these criteria constitute a variety of natural law, because they are the natural laws of 'the enterprise of subjecting human conduct to the governance of rules.'²⁴² Natural laws being like the basic laws of carpentry. But these laws are 'terrestrial' not given by God. They 'do not exhaust the whole of man's moral life,'²⁴³ just as they do not exhaust the morality in law.

"What I have called the internal morality of law is in this sense a procedural version of natural law" as opposed to substantive. "We are concerned, not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be."²⁴⁴

The internal morality of law is the procedural rules that the law must respect to be able to deliver on its purpose, purpose which may coincide with the substantive aims of the law or

wrong that the retroactive statute often becomes indispensable as a curative measure; though the proper movement of law is forward in time, we sometimes have to stop and turn about to pick up the pieces.'

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Ibid at 96-97.

the external morality of law in the direction of goodness or justice. That the ultimate purpose be not fully accomplished does not mean that it is not already present in the law. Judgement and value are ingredients throughout the legal enterprise that Fuller envisions.²⁴⁵

Brunee & Toope neglect, in my view, the third aspect of Fuller's thoughts about the crucial place of the morality of aspiration. In their writings on the Interactional Theory of International Law, they had international law as a whole in mind, not particularly the law of armed conflict. When looking closely at the law of armed conflict, its origins, its aims, its evolution, the morality of aspiration appears particularly relevant (not that it is not relevant in law as a whole and in whatever field). Fuller made a distinction between the morality of duty and the morality of aspiration, to put on the side of duty the minimum that men must abide to, which can be stated in prohibitions or commands, in the style of the Ten Commandments. On the side of aspiration, Fuller places what men must aim at for the 'fullest realization of human powers'. In other words, the morality of duty is the minimum concrete rules that men must respect, while the morality of aspiration is the ideals that men should aim at. These two moralities are not separated from each other; they are two ends of the same vertical rope in a 'continuous process of mutual adjustment.'²⁴⁶ They are both present in law, including the internal morality of law on which Brunne & Toope focus. Fuller's distinction of the two moralities seems crucial in times of war. He specified that his 'morality of duty ... is essentially a morality for the in-group. It presupposes men in living contact with one another, either through an explicit reciprocity or through relations of tacit reciprocity embodied in the

²⁴⁵ Witteveen, *supra* note 180 at 37-38 quoting Dyzenhaus 'Fuller's novelty derives from his attacks on the insulation thesis. By showing that participants in the legal processes can legitimately influence the moral foundations of the legal order, he 'brings morality firmly within the reach law.'

²⁴⁶ Wibren van der Burg, "The Morality of Aspiration" in *supra* note 180 at 179.

forms of an organized society.²⁴⁷ What when, instead of an organized society, there is chaos, like would be the case during most armed conflicts or at war? In contexts at war, added to the diversity of actors which by itself generates multiple tensions, the lines of communication may be broken or simply do not exist, differences and divisions are magnified. One can hardly refer to a moral community in times of armed conflict, even within the political borders that define the territory of one same state.

‘Who are embraced in the moral community, the community within which men owe duties to one another and can meaningfully share their aspirations? In plain straightforward modern jargon the question is, Who shall count as a member of the in-group?’²⁴⁸

This is possibly one of the issues at the heart of *Holder v. Humanitarian Law Project* explained earlier.²⁴⁹ The result of this decision by the US Supreme Court is that rebel groups who are classified as terrorists are excluded from the moral community. The facts of this case did not explicitly refer to dialogue about the law with terrorist organizations but to the provision of legal training to them. The question is whether one can include all actors during armed conflict as actors bound to respect the law, like is demanded of the FARC in Colombia, yet, exclude them from the moral community on the grounds of terrorism. Here it is crucial to insist that Fuller did not search to divide between right or wrong, which would be moralizing; instead he sought ‘to bridge extremes’ through law.²⁵⁰ If there is no moral

²⁴⁷ Fuller, *The Morality of Law* *supra* note 3 at 182.

²⁴⁸ *Ibid* at 181.

²⁴⁹ *Holder v Humanitarian Law Project*.

²⁵⁰ *Supra* note 248.

community, it is the aspiration, says Fuller, to integrate a community and to expand the one that exists to include actors not yet part of it. This is done through interaction and genuine communication with them. For Fuller the ultimate purpose of law is precisely to facilitate communication. Nevertheless, it remains a very delicate issue to resolve whether and how to engage in a dialogue with all actors at war, even the ones who commit atrocities or who engage in acts of terrorism. Would it have been possible or effective to reason with the Nazis for example? These are not easy questions to answer either from a moral or practical perspective, except if we look closely at the ideals behind the task. The ICRC has partly overcome this dilemma since its foundation with the lasting principles at the heart of its action. It was through ideals that Henry Dunant persuaded and since then ICRC's delegates witness the devastating consequences of armed conflict. ICRC's neutrality, humanity and impartiality principles provide delegates with tools to overcome their own internal obstacles, or moral dilemmas, when engaging even with the perpetrators of violations of the law with a view to help victims of war. When the ICRC looks for traces of rules in ancient civilizations which might mirror the contemporary law of armed conflict, what it finds is evidence of a common aspiration in humanity throughout its history towards humanitarian values and ideals. It is this common aspiration which grants the law of armed conflict legitimacy. In light of Fuller's morality of aspiration, the more inclusion in the legal community, despite any differences, the better for humanity. With humanitarian ideals and values as a starting point of the legal discussion, dialogue could integrate both the technicalities as well as the purpose of IHL. Fuller might have shared ICRC's belief in the possibility of Henry Dunant's initiative, and he certainly shared ICRC's persuasive operational approach which searches to establish genuine dialogue. For Fuller dialogue shapes 'commitments' beyond the 'struggle

to survive conditions of scarcity and violence'. The 'tacit cooperation' of actors is 'required for a good workable legal system', which can only be reached through law's aspiration: dialogue.

If I were asked, then to discern one central indisputable principle of what may be called substantive natural law –Natural Law with capital letters-I would find it in the injunction: Open up, maintain and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel, and desire. In this matter the morality of aspiration offers more than good counsel and the challenge of excellence. It here speaks with the imperious voice we are accustomed to hear from the morality of duty, can be heard across the boundaries and through the barriers that now separate men from one another.²⁵¹

Willingness by the actors to engage in a legal dialogue may in itself constitute evidence of their desire to participate in the legal community around IHL and of the possibility of their real engagement in the process. Their unwillingness to participate in dialogue could, on the contrary, have an impact on how the law of armed conflict is construed with respect to them by their counterparts at war and by criminal tribunals or by the International Criminal Court in case of prosecutions. If the ICRC were to engage in a solid effort of implementation of the law of armed conflict along Fuller's lines, i.e. with wide efforts to genuinely include, the picture of who is truly in the legal community around IHL would appear more clearly. This would in itself be a step ahead and an accomplishment for the purposes of the legal enterprise in the direction of adherence to the law. A concrete action by the ICRC would be to extend the invitation to all actors it considers are left out of the process or whose adherence is

²⁵¹ Fuller, *The Morality of Law* *supra* note 3 at 186.

perceived as weak, a task the ICRC is well placed to deliver and which it has delivered thoroughly with respect to the armed forces worldwide.

The difficulty would remain of how to deal with those actors who are not ready to participate in the legal dialogue, and how to restrain the use of force against them by legitimate actors without falling into what Kennedy calls ‘lawfare’. One example would be the use of force or detention without due restraint against actors who refuse to join the legal community, at the heart of the legal debate around the war on terror or Guantanamo. For Kennedy, ‘lawfare’ is the use of IHL as another tool of war, that is, the instrumentalization of the law of armed conflict to gain military advantages or evade liability through ingenious interpretations of the law. This type of questions may fall out of an approach which focuses exclusively on the inner morality of law or the procedural criteria. For Fuller the acceptance of the internal morality of law is necessary yet not sufficient in the pursuit of justice.²⁵² Justice is ‘violated when an attempt is made to express blind hatreds through legal rules’... Fuller recognizes the limits of his internal morality of law, in ways of particular relevance in armed conflict contexts. First he asks “Who are embraced in the moral community,” “Who shall count as a member of the in-group?”²⁵³ Second, he points to the underlying aspirations which set the ground for the interpretation of the law by actors at war.

At war, divisions between communities united artificially by state boundaries flourish. War may itself be the statement of a non-community. For Fuller, the solution is not in the morality of duty, a morality for the ‘in-group’, which ‘presupposes men living in contact with one

²⁵² Ibid at 168.

²⁵³ Ibid at 181.

another, either through an explicit reciprocity or through relations of tacit reciprocity embodied in the forms of an organized society.’²⁵⁴ Fuller explicitly suggests that ‘resolution can, however, be obtained from the morality of aspiration. This reiterates the earlier statement that Bruneel & Toope neglect an important aspect of Fuller’s theory -the morality of aspiration-, particularly when their views are transported to a divided international society, despite any globalization, or at least when transported to war, an important reality covered by international law.

The ICRC seems to be in line with Fuller about the need to build community. The ICRC has worked successfully on different fronts based on its principles and humanitarian values. These values are its persuasive strength. First, it has tried over the years to create a community around certain ideas and values. Its efforts of dissemination while not sufficient to truly engage actors at war do create a humanitarian community who shares the Red Cross principles. There is a national society of the Red Cross²⁵⁵ in almost every country in the world. The constitution of these societies and the desire to belong by some is a breathtaking reality. Societies like the Israeli one could have opted to act on their own when it perceived it did not receive the treatment of other national societies of the Red Cross who were allowed to use the emblem with a Red Crescent or a Lion. Instead, and despite heated controversy, the Israeli national society insisted and waited; today it still belongs to the Red Cross Movement and since quite recently acts with its different emblem, which was officially recognized in 2005 by the Movement.²⁵⁶ The ICRC is also engaged in a wide public

²⁵⁴ Ibid at 182.

²⁵⁵ With whatever emblem be used.

²⁵⁶ *Protocol III Additional to the Geneva Conventions, 2005*. (For the adoption of an Additional Distinctive Emblem).

communication campaign ‘Our World Your Move’ which invites all to participate in the Movement. Nevertheless, such ‘community creating’ is not yet present at the levels of the legal enterprise outside of the state level. Further, the legal discourse as described in the first chapter has been clearly positivist, stating the law, attempting to interpret it, referring to it as a fact. Again, not the most persuasive of arguments to engage certain actors. Should the ICRC engage in a legal dialogue with actors who today are reticent to participate in this community, it could increase its persuasiveness by appealing to its real strength: its values. While the aim or the reality may not be ‘to include everyone in the moral community’, the aspiration should be ‘to enlarge that community at every opportunity and to include within it ultimately, if we can all men of good will.’²⁵⁷

3.2.2. The moral purpose of the legal interaction

Fuller’s ideas on morality, reflected mainly in his ‘morality of aspiration’ and in his reflections on human nature and on the purposeful dimension of human interaction, point to the moral aspirations of dialogue, i.e. of legal interaction, beyond the criteria of legality. For Fuller, who was highly influenced by Aristoteles,²⁵⁸ the purpose of law is not simply to facilitate human interaction, but an interaction that aims at some good. In other words, law serves a purpose: to facilitate interaction between actors, but not just any interaction. For Fuller all human activity has a purpose that aims at some good. If law facilitates that interaction, that interaction itself must aim at some good too. The fulfilment of all criteria of legality therefore would not suffice, since the aims of the law also matter. In his critique of

²⁵⁷ Fuller *The Morality of Law* *supra* note 3 at 183.

²⁵⁸ Macdonald, “Legislation and Governance” *supra* note 180 at 279.

Hart,²⁵⁹ Fuller points both to the internal morality of law (criteria of legality, morality of duty) and to the morality of aspiration (justice). Had the Nazi regime met all the legality criteria, which it did not, that Nazi regime could not possibly have claimed to be called law the way Fuller understood it. The point can be made inversely, i.e. if the aim is evil, then the criteria of legality cannot be met, which proves the point from which ever view one looks at it. Fuller did not define what the ‘good’ is, that is clear. He did not have an agenda as Brunne & Toope point out.²⁶⁰ But as Teachout affirms, there was a clear aspiration towards goodness in law according to Fuller.²⁶¹ If a ‘law’ aspired towards evil, like the Nazi regime did, that could not possibly have been called law, but an aberration of law, even if all the legality criteria had been met. The internal morality facilitates the efficacy of the purposeful activity of law, but it does not cover the whole of what law is about and its ultimate purpose. As Witteveen explains:

“Why is positivism’s characteristic attempt to detach itself from legal practice in order to describe law as it is rather than as it ought to be, so damnable? While Fuller adduces many arguments, his main point is that it is both impossible and unproductive to attempt a too strict separation of is and ought, and that in a well functioning practice there can be no neat division between law as it is and as it should be”..... “The positivist distinction between law and a good law is plausible enough, yet misleading when human purpose has been left out of the picture”²⁶²

²⁵⁹ Fuller, *Fidelity to Law* *supra* note 3.

²⁶⁰ Brunnee & Toope, *supra* note 88.

²⁶¹ Teachout, “Uncreated Conscience” *supra* note 180 at 229.

²⁶² Witteveen, *supra* note 180 at 25.

“In the field of purposive human activity, which includes both steam engines and the law, value and being are not to different things, but two aspects of an integral reality”²⁶³. “The task of legal philosophy is not to provide pure statements about “valid” law, nor to engage in metaphysical speculation, but “to give a profitable and satisfying *direction* to the application of human energies in the law””²⁶⁴

A sense of purpose is therefore a theme that Fuller does not abandon at any point while expressing his views. He inquires about the purpose of the actors in their interactions, the purpose of the law by allowing the interaction, the ultimate purpose of law in the direction it aspires to, the human purpose, and the purpose of lawyers whose task is to facilitate the interaction with consideration of all of these purposes. In my limited understanding of Fuller, the morality of aspiration, the substantive morality of law, and the internal morality of law meet with no clear cut line being drawn between them, given their direction towards goodness. That he specifically separated the analysis of the internal and external morality of law for the purpose of elucidating his thoughts, does not imply that for him the morality of aspiration is not as crucial as the internal morality of law to bringing legitimacy to the law. Brunee & Toope do well in bringing Fuller’s criteria of legality to the radar of international lawyers, yet, in my view they do not do justice to Fuller’s purposive vision of law by neglecting the crucial place of the morality of aspiration for Fuller.

²⁶³ Ibid at 26. (The cited article is *The Law in Quest of Itself*, Chicago Foundation Press, 1940).

²⁶⁴ Ibid.

The place of morality, and the moral purpose of law, is tightly tied to the view of individuals by Fuller, as responsible moral agents.²⁶⁵

“An observance of the demands of legal morality can serve the broader aims of human life generally. This lies in the view of man implicit in the internal morality of law. I have repeatedly observed that legal morality can be said to be neutral over a wide range of ethical issues. It cannot be neutral in its view of man himself. To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults.”²⁶⁶

Skinner, seems to disagree with Fuller. He ‘proposes that instead of telling men to be good, we condition them to be good’.²⁶⁷ Could we conclude that Fuller believed in the natural tendency to goodness in man? It seems so. His whole theory seems to trust that in the end the whole purpose of law, as well as the purpose of humanity is guided by a tendency towards goodness, or at least that is the tendency of those men who are ready to communicate. When at war, this vision can appear naive. The facts during armed conflict almost suggest an opposite tendency. Regardless of the justness or not of going to war, at war the most horrendous acts happen, guided by persons who outside the war may be highly regarded

²⁶⁵Ibid at 37-38. “Fuller emphasizes that law is ultimately not the province of officials but ‘the work of its everyday participants, a continuous effort to construct and sustain a common institutional framework to meet the exigencies of social life in accordance with certain ideals of ‘fair and decent government... Like Winston, Dyzenhaus stresses Fuller’s attachment to individual liberty and his democratic orientation, which together shape his conception of the moral nature of law.”

²⁶⁶ Fuller, *The Morality of Law* *supra* note 3 at 162.

²⁶⁷ Ibid at 164.

morally in their own societies. Are Fuller's suggestions too optimistic for armed conflict situations? Or isn't the law of armed conflict, as well as the law in general, already in agreement with Fuller's view of man? Man is treated as a responsible agent and it is because of this reason that persons can be criminalized for their conduct if in contravention of legal prohibitions amounting to crimes. Where men not considered as capable agents by law, they could not be prosecuted or they would be exempted from criminal responsibility due to lack of intent, fault or legal capacity,²⁶⁸ or they would not even be able to engage in contracts. 'The specific morality of law articulates and holds before us a view of man's nature that is indispensable to law and morality alike',²⁶⁹ as if law was inconceivable without this view of man.

The question now is what is the ultimate purpose of the ICRC legal mind in their relationship with actors in armed conflict? "Lawyers can write the contract, [which is what ICRC does more or else, drafting of treaties, uniform implementations, codification of custom, etc...] but if they, rather than the parties, create the agreement"²⁷⁰ there should be no expectations on the fulfilment of the agreement. Fuller says that the lawyer "sees to it that the parties have reached common ground as well as common language"²⁷¹ which are the basis to genuine dialogue, and to the closure to this thesis in the conclusion which follows.

²⁶⁸ Ibid at 167.

²⁶⁹ Ibid at 168.

²⁷⁰ Luban, "Rediscovering Fuller's Legal Ethics" in *supra* note 180 at 205.

²⁷¹ Ibid at 206.

Conclusion

The ICRC has engaged in dialogue with actors at war since its conception and brought help to victims of war successfully; it yet has to deliver results on its efforts to improve compliance with the law of armed conflict. This thesis has suggested the need to widen the legal community around IHL through genuine dialogue inclusive of different perspectives and in recognition of the legal agency of non-state actors along Lon Fuller's pluralist vision of law, to complement the traditional positivist approach in the implementation of the law of armed conflict. To generate meaningful legal exchange, lawyers may have to step back with awareness of their own legal culture and recognise the diversity and legitimacy of perspectives from actors of other legal communities.²⁷² This way a real integration of the views from the different minds involved in the legal process would occur. Genuine legal dialogue then means "legal hearing" as James Boyd White suggests.²⁷³ The legal communities in places in conflict, as well as the way they express their law, constitute integral part of the reality and context which ICRC's operational minds witness each day in the field. Adapting the implementation of IHL to said contexts requires further understanding and integration of their legal culture and ways. The language of legal pluralism allows such genuine dialogue to evolve since this legal theory is built around the understanding that there exist diverse perspectives. Legal pluralism can complement the language of legal positivism where it may be perceived by some non-western audiences as an imperialist legal tool.²⁷⁴

²⁷² James Boyd White, *Justice as Translation* (Chicago: Chicago University Press, 1990) at 9-12.

²⁷³ Ibid at 34.

²⁷⁴ Ibid. "The sense that our language-whether we mean by this English, or economics, or law-is the language into which all others can be translated presents the dangers of linguistic imperialism familiar to us from the

The result would be awareness of the ways we communicate the law and the legal language in which we function at the ICRC, in “recognition that all ways of talking, including its own, may be subject to criticism and change.”²⁷⁵ This is precisely what law is about according to Fuller: the communicating of mutual understandings overtime. “Law is a ‘culture of argument,’ a way of expressing and communicating which requires respect of the language in which each party communicates.”²⁷⁶ “It requires us to create a frame that includes both the self and the other, both familiar and strange” while “asserting ourselves²⁷⁷ through our convictions and ideals. In its work of implementation of IHL to date, the ICRC has tried to incorporate IHL instruments into local laws; it still has to integrate the receiver’s legal ways into IHL. There remain enormous difficulties to accomplish this task, like the impossibility to measure adequately the impact of ICRC’s work and the uneven stages of legal development in the places where the ICRC operates. The universal ratification of the Geneva Conventions would be a perfect measure would the rule of law reign equally in all contexts. Implementation matters when legislations and local laws are applied, when there exist real mechanisms at local levels. Implementation presupposes equal legal development, which does not really exist. There are not only unequal combatants. There are unequal legal systems, all measured with the same rule now. The legal positivist approach presupposes an equality of scenarios that does not exist in the field. The current measure of success in the work of national implementation of IHL is the number of local laws enacted. This uni-dimensional perspective leaves out other measures like how much the conventions influence

experience of many colonial countries- the imposition, say, of English law on the Hindus or the Burmese or the insistence that all that really needs to be said in Indonesia can be said in Dutch” at 31.

²⁷⁵ Ibid. at 24, 33, and “Can we find or create voices that are more fully our own, speaking to audiences more fully recognized as the minds and people they actually are?” at 12.

²⁷⁶ Ibid.

²⁷⁷ Ibid. at 1-42 “The art of the simultaneous affirmation of oneself and recognition of the other.”

actions and behaviour, or how much the behaviour of actors really impacts the community.²⁷⁸

For example, under IHL displacement may not be the most serious violation of the law. Yet, the suffering caused over generations may be as devastating as a serious violation of IHL.

The ICRC is definitely engaged in a challenging legal enterprise, though, like the law of armed conflict, the ICRC stands on the solid grounds of its principles and ideals around *humanity*. Those ideals, which many in the world aspire to, give the ICRC persuasiveness and access to engage in genuine dialogue with its diverse audiences.

²⁷⁸ Ibid. at 69. Boyd suggests using multidimensional aspects to measure impact accurately.

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