Legal Studies (2025), 1–18
doi:10.1017/lst.2025.10080

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Inter-war interactions in the development of the protection of civilians: a historical perspective

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(Received 29 October 2024; revised 24 July 2025; Accepted 28 July 2025)

Abstract

According to the dominant narrative in international humanitarian law, the 1949 Geneva Convention on Civilians is part of the discipline's humanitarian progress, driven by the International Committee of the Red Cross, in response to atrocities committed during World War II. This paper argues that historical research enables a more nuanced historical account which challenges when, how and by whom the protection of civilians was developed. It demonstrates that the Convention's protection regime was shaped by the efforts of a variety of non-state actors during the inter-war years. In particular, it focuses on attempts by the International Committee of the Red Cross, International Law Association and International Committee of Military Medicine and Pharmacy to advance the law independently and in cooperation in relation to 'enemy civilians' and safety zones after World War I. However, it suggests that these actors were to some extent inhibited by conceptual limitations and self-restraint, which ultimately led to some of the weaknesses in the protection regime under the 1949 'Civilian Convention'. The paper thus reveals the struggle over the conceptualisation of individuals who are today considered civilians in the inter-war years which is embedded in the text of the adopted treaty.

Keywords: international law; international humanitarian law; Geneva Convention 1949; civilians; history

Introduction

The fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War[1] (GC IV) is commonly seen as a milestone in the development of international humanitarian law (IHL). It is celebrated as the main protection regime for innocent and vulnerable civilians in international armed conflicts and thus part of the discipline's humanitarian progress. The dominant narrative about the treaty's history emphasises that it was adopted following the initiative or norm entrepreneurship of the International Committee of the Red Cross (ICRC) in response to atrocities committed during World War II (WWII).[2] It usually combines a doctrinal analysis with sweeping statements and commonly

[†]I would like to thank Neville Wylie for the provision of archival materials, and Satwant Kaur for her comments on an earlier draft. Any errors remain my own. For the purpose of open access, the author has applied a Creative Commons Attribution (CC BY) licence to any Author Accepted Manuscript version arising from this submission.

[1](Geneva, 12 August 1949).

[2]G Best *War and Law since 1945* (Oxford: Clarendon Press, 1994) p 115; K Nabulsi 'Evolving conceptions of civilians and belligerents: one hundred years after the Hague Peace Conferences' in S Chesterman (ed) *Civilians in War* (London: Lynne Rienner, 2001) p 11; B van Dijk *Preparing for War: The Making of the Geneva Conventions* (Oxford: Oxford University Press, 2022) pp 1–4.

known historical facts about the suffering of innocent victims during this war; it can be found, for example, in the often believed to be authoritative ICRC commentaries and scholarship.[3] This paper challenges this prevailing historical account by examining in more depth how, when and by whom the protection of civilians under GC IV was shaped.

Historical narratives in IHL tend to have a utilitarian purpose confirming the legitimacy and significance of the law itself. The history is frequently told as a tale of either universal and long-standing principles, such as the distinction between combatants and civilians, or humanitarian progress in which the law evolves to protect an ever-expanding range of war victims. As a result, the understanding of the law itself is sometimes anachronistic, interpreting provisions adopted in the past through present-day concepts and principles. This includes the reading of the contemporary concept of 'civilians', as comprising innocent and vulnerable persons who are not combatants, into GC IV.[4] The engagement with history in the discipline is thus often limited and self-serving,[5] despite international law's recent 'turn to history'.[6] It also tends to be self-referential, tracing continuities and changes in treaties or customary international law, and primarily relying on the *travaux préparatoires* or legal commentaries for additional insights into the evolution of the law.[7] Occasionally, the historical account is extended to failed attempts at law-making, since these may be regarded as predecessors of a later adopted treaty, such as the so-called Tokyo Draft from 1934 upon which GC IV is commonly seen to have been based.[8] The narrative moves beyond state-centrism in this regard, emphasising the influence and role of the ICRC in the development of IHL.[9] The ICRC is not only deemed to be the guardian of the law, but also the driving force behind many of the treaties which form the conventional legal framework.

This established narrative is, however, arguably one of the 'one-dimensional popular memories of IHL's past' that historians like Boyd van Dijk have questioned.[10] It glosses over the complexity of the actual law-making process. Some recent scholarship has adopted more critical approaches to researching the development of IHL, drawing on a range of different perspectives and disciplines.[11] Van Dijk notes that the contextual approach of historians is especially advantageous having 'endowed the study of IHL with a much greater sense "of being grounded and located in time"'.[12] Historical studies based on, for example, archival and biographical research have significantly enhanced our understanding of the dynamics behind the law-making process; the perspective, role and influence of delegations as well as individual delegates; and the political motivations and reasons behind the adoption of certain rules and

[3]See eg JS Pictet (ed) *The Geneva Conventions of 12 August 1949, Commentary IV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958) pp 6–9; J-M Henckaerts 'History and Sources' in B Saul and D Akande (eds) *The Oxford Guide to International Humanitarian Law* (Oxford: Oxford University Press, 2020) p 5; GD Solis *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge: Cambridge University Press, 3rd edn, 2022) p 76; E Crawford and A Pert *International Humanitarian Law* (Cambridge: Cambridge University Press, 2nd edn, 2020) p 15.

[4]See eg *Prosecutor v Delalić et al*, Judgment (16 November 1998) IT-96-21-T, para 275.

[5]A Alexander 'A short history of international humanitarian law' (2015) 26 European Journal of International Law 109; P Wilson 'Law wars: academia and the manufacture of international humanitarian law' (2024) 26 Journal of the History of International Law 383.

[6]See T Skouteris 'The turn to history in international law' (*Oxford Bibliographies*, 27 June 2017), available at https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0154.xml.

[7]See eg Crawford and Pert, above n 3, chs 1 and 6.

[8]E Salmón 'Who is a protected civilian?' in A Clapham et al (eds) *The 1949 Geneva Conventions: A Commentary* (Oxford: Oxford University Press, 2015) p 1140; Henckaerts, above n 3, p 5.

[9]See eg A Durand *History of the International Committee of the Red Cross: From Sarajevo to Hiroshima* (Geneva: Henry Dunant Institute, 1984); F Bugnion 'The International Committee of the Red Cross and the development of international humanitarian law' (2004) 5 Chicago Journal of International Law 191.

[10]B van Dijk 'What is IHL history now?' (2022) 104:920-921 International Review of the Red Cross 1621 at 1631.

[11]See eg K Nabulsi *Traditions of War: Occupation, Resistance and the Law* (Oxford: Oxford University Press, 1999); H Kinsella *The Image before the Weapon: A Critical History of the Distinction Between Combatant and Civilian* (Ithaca: Cornell University Press, 2011); T Inal *Looting and Rape in Wartime: Law and Change in International Relations* (Philadelphia: University of Pennsylvania Press, 2013).

[12]van Dijk, above n 10, at 1629–1630.

https://doi.org/10.1017/lst.2025.10080 Published online by Cambridge University Press

treaties.[13] Some myths surrounding the role of the ICRC in laying the foundation for modern IHL in the nineteenth century,[14] and the minor significance of World War I (WWI) in the development of the law[15] have already been challenged. This research has benefited from significant improvements in archival accessibility in the last few decades.[16] Yet, questions about, for example, the nature, objective and reliability of the archives remain. It is in this regard, in particular, that lawyers can learn from historians in thinking through and addressing the methodological issues that arise when researching these fragmentary sources of knowledge.[17]

This paper contributes to these alternative historical accounts by examining the influence of a variety of efforts by non-state actors during the inter-war years, and illuminating their interactions and cooperation in the law-making process. This enables a more in-depth analysis of the struggle that took place over the conceptualisation and protection of individuals who are today known as civilians, and thus provides insights into diverse perspectives on understanding war, and which conceptualisations and rules have become part of the law. It is argued here that the concept of civilians as we know it today was not introduced in GC IV. A doctrinal reading of the treaty already reveals that its main protection regime is designed for non-nationals in the power of a party to the armed conflict, and that only Part II provides a small number of safeguards against the consequences of warfare for the entire population.[18] However, adopting a historical approach, this paper suggests that the narrow scope of the treaty is not only the result of a political struggle between states which pursued their own political interests in the wake of WWII and during the onset of the Cold War, as has been shown by some recent scholarship.[19] Instead, by contextualising the drafting and text of the 1949 treaty in relation to the inter-war years, it suggests that some of the shortcomings of GC IV can be partly explained by the conceptual limitations and self-restraints of non-state actors involved in promoting the development of the law after WWI.

The paper is thus concerned with endeavours which were not immediately part of the official treaty-making procedure leading to GC IV, yet which were intended to develop IHL during the first half of the twentieth century. These social processes of shaping the law need to be examined to reveal which ideas, assumptions, and biases enter the realm of law-making and, as a result, are embedded in the rules and regulation. Who introduces them into the process, and what makes them persuasive or influential? Why are other ways of viewing social phenomena, persons and relations discarded? For this purpose, the paper draws on the records, official statements and publications of certain non-state actors, as well as some archival materials of the ICRC to uncover how individuals affected by armed conflicts were understood in these actors' individual and cooperative attempts to protect civilians. It reveals a network of shifting understandings in the interactions between these actors, and highlights personal influences, motivations and professional tendencies in their argumentations. It thus moves beyond considering the law-making process as being driven by the ICRC as a humanitarian norm entrepreneur, and involving actors who are mechanic representatives of states. Focusing on the protection of so-called 'enemy civilians' in the first section, and the creation of safety zones and localities in the second section, it shows that legal concepts, rules and regulations that we find in the treaty law today are informed by and reflect these historical processes and dynamics.

[13]See eg G Ben-Nun *The Fourth Geneva Convention for Civilians: The History of International Humanitarian Law* (London: IB Tauris, 2020); G Mantilla *Lawmaking under Pressure: International Humanitarian Law and Internal Armed Conflict* (Ithaca: Cornell University Press, 2020); van Dijk, above n 2; see also van Dijk, above n 10.

[14]E Benvenisti and D Lustig 'Revisiting the memory of Solferino: knowledge production and the laws of war' in A Bianchi and M Hirsch (eds) *International Law's Invisible Frames: Social Cognition and Knowledge Production in International Legal Processes* (Oxford: Oxford University Press, 2021).

[15]N Wylie and L Cameron 'The impact of World War I on the law governing the treatment of prisoners of war and the making of the humanitarian subject' (2019) 29 European Journal of International Law 1327.

[16]van Dijk, above n 10, at 1623.

[17]Ibid generally; MT King 'Working with/in the archive' in S Gunn and L Faire (eds) *Research Methods for History* (Edinburgh: Edinburgh University Press, 2nd edn, 2016).

[18]See eg Salmón, above n 8.

[19]See eg van Dijk, above n 2; Mantilla, above n 13.

https://doi.org/10.1017/lst.2025.10080 Published online by Cambridge University Press

1. The ICRC's and International Law Association's work on the protection of 'enemy civilians'

While the received history of GC IV often focuses on WWII as a breaking point, the suffering of civilians had already reached unprecedented levels during WWI. Virtually every state across the globe involved in the war adopted policies and measures against so-called enemy nationals, ie subjects of the opposing belligerent state(s). They ranged from economic measures to the restriction of their liberty through house arrest and internment.[20] Furthermore, civilians themselves became directly or indirectly targets of attack, for example as workers in the military industry and supporters of the war effort, and in the bombardment of towns to break the national morale.[21] International law, at the time, was largely silent on these matters. The 1907 Hague Regulations on the Laws and Customs of War on Land provided some rudimentary safeguards especially for the population of occupied territory.[22] However, protection in relation to the conduct of hostilities was confined to the prohibition of attacks on undefended towns.[23] Moreover, under these limited provisions, individuals were perceived as inhabitants of particular locations or the population of an occupied state; a legal status for all individuals who were not combatants with distinct privileges and protections did not exist.[24] The lacuna in the legal framework at the time is epitomised in the observation of the special commission set up under the ICRC to study this gap in the early 1920s noting that '[l]e "civil" est totalement inconnu dans le droit international'.[25] Any attempt at developing the law thus had to grapple with the issue of conceptualising these individuals as war victims in need of protection.

By acknowledging that GC IV is largely based on the Draft International Convention on the Condition and Protection of Civilians of Enemy Nationality Who Are on Territory Belonging to or Occupied by a Belligerent, also known as the 'Tokyo Draft', adopted by the ICRC as a non-binding instrument at its 1934 conference in Tokyo, the conventional narrative implies the origins of the 1949 treaty in the inter-war years. Yet, it fails to perceive this instrument as more than just a document which served as a working draft during the post-WWII treaty-making process. It also focuses on the ICRC as a norm entrepreneur, and thus initiator behind the development of IHL, which introduced new protections for war victims and facilitated the adoption of treaties. The history of the Tokyo Draft itself as the outcome of a prolonged, political process, in which the ICRC did not play the only role, is thus overlooked.

Despite lacking an official mandate beyond the treatment and care for wounded and sick soldiers, the ICRC already dedicated some of its work to the relief of civilian internees alongside prisoners of war (POWs) during WWI.[26] From the early 1920s onwards, it commenced the study of protecting civilians under a permanent, multilateral regime. The special commission that it had formed for this purpose did not take long before encountering its limits in pursuing the task independently. Even Dr Frédéric Ferrière, who had led the civilian division of the International Prisoner of War Agency in the recent war, and is sometimes seen as the forefather of the civilian protection regime,[27] admitted his lack of knowledge regarding the existing international legal situation and advised the consultation of experts outside of the organisation on this point.[28] Julien Lescaze, a member of the 'civilian commission' and himself a lawyer, took it upon himself to seek assistance for achieving a better understanding of the legal

[20]DL Caglioti *War and Citizenship: Enemy Aliens and National Belonging from the French Revolution to the First World War* (Cambridge: Cambridge University Press, 2021).

[21]A Alexander 'The genesis of the civilian' (2007) 20 Leiden Journal of International Law 359.

[22]Annex to Convention (IV): Regulations Respecting the Laws and Customs of War on Land (The Hague, 18 October 1907) s III.

[23]Ibid, Art 25.

[24]S Landefeld *Individuals in International Humanitarian Law: A Historical Analysis* (Oxford: Hart Publishing, 2025) ch 3.

[25]*Question des civils évacués et déportés* (1923) Archives du Comité International de la Croix-Rouge (AICRC) CR.119.

[26]See eg G Ador 'Egalité de traitement pour les prisonniers de guerre militaires ou civils' (1915) 46:181 Bulletin International des Sociétes de la Croix-Rouge 5.

[27]Durand, above n 9, p 84.

[28]Letter from Ferrière to Lescaze (6 November 1923), AICRC CR.119.

https://doi.org/10.1017/lst.2025.10080 Published online by Cambridge University Press

framework and its possible development as one of the commission's first steps.[29] He thus sent enquiries to the Institut de Droit International (IDI), Institut international de bibliographie, l'Academie de droit international and the International Law Association (ILA), the last of which was quick to respond.[30]

Indeed, the ILA had itself adopted the question of civilian POWs as part of its study of the treatment of POWs more widely in 1920.[31] The notion of civilian POWs may appear jarring and counter-intuitive today at a time when civilians are usually seen as the opposite of combatants, and thus as innocent bystanders who should be shielded from suffering any consequences or adverse treatment as a result of warfare. However, during WWI, civilians who were linked by their nationality to the enemy state were perceived and treated as a threat to the security of the state in the territory in which they were, not least because of the widespread use of mandatory military service and the prevalent notion of 'total war'.[32] Internment was adopted as a common security measure against these 'enemy civilians' and some states, consequently, included provisions on civilian POWs in their bilateral agreements on POWs.[33]

Despite this available state practice on regulating civilian POWs, the ILA considered the subject to be of such a delicate nature that it temporarily excluded them from the scope of its study.[34] The enquiry it received from the ICRC, and the Committee's approval of the ILA's report on military POWs may have been conducive for the latter's return to the civilian question, leading to its Draft Regulations for the Treatment of Civilian Prisoners of War in 1924.[35] The adopted instrument defined civilian POWs as 'persons belonging to an enemy State'.[36] While its preamble rejected the internment of all civilians as a general principle, it recognised that military considerations may require this measure against some enemy nationals. Women, children and men beyond the age of bearing arms, on the other hand, should be returned to their country of nationality. The deliberations and reports leading to this instrument thus reveal an appreciation of the complexity of persons generally described as civilians. However, the Draft's narrow focus on only some of them and their specific form of treatment prevented an engagement with the suffering of civilians more generally. It failed to consider how individuals excluded from the proposed rules were still potentially affected by war, and how international law could develop to protect them.

The ILA's engagement with the protection of civilians in this respect already shows certain limitations in the development of the law by legal experts. It was marked by a reliance on established law and reasoning by analogy which informed and restricted the envisaged safeguards.[37] Instead of conceptualising civilians as a distinct category of protected persons, the drafters merely applied existing rules and protections previously proposed for military POWs to civilian persons in a similar situation. This conceptual and regulatory approach was arguably strongly influenced by the drafters' embeddedness in the legal framework of the time, which understood individuals under international law in accordance with their nationality, as well as in relation to belligerent relations in inter-state hostilities.[38] Indeed, some of the members of the committee in charge of preparing the draft rules had participated in the creation of bilateral agreements on the issue, and the commission for enquiries into war crimes.[39] The

[29]Letter from Girardet to Lescaze (23 November 1923); Letter from Lescaze to Dr Ferrière (11 March 1924), AICRC CR.119.

[30]*Commission des 'civils' – procès verbal* (28 November 1923), AICRC CR.119 No 1.

[31]ILA 'Third day's proceedings' (1920) 29 ILA Reports of Conferences 247.

[32]Caglioti, above n 20.

[33]See eg Agreement between Great Britain and Germany Concerning Combatant and Civilian Prisoners of War (The Hague, 2 July 1917); Agreement between the British and German Governments Concerning Combatant Prisoners of War and Civilians (The Hague, 14 July 1918); regarding agreements between the US and Germany, as well as Austria and Italy see F Ferrière 'Projet d'une Convention internationale réglant la situation des civils tombés à la guerre au pouvoir de l'ennemi' (1923) 5:54 International Review of the Red Cross 560, 571.

[34]ILA 'Second Day's Proceedings: Treatment of Prisoners of War' (1921) 30 ILA Reports of Conferences 188, 193, 220–21 and 236.

[35]ILA 'Report of the Prisoners of War Committee' (1924) 33 ILA Reports of Conferences 227 at 227–28.

[36]Ibid, at 229.

[37]See eg ibid, at 238.

[38]See S Landefeld 'The changing significance of nationality for the protection of civilians in the hands of a party to an international armed conflict' (2023) 28 Journal of Conflict and Security Law 501.

[39]ILA, above n 35, at 237.

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committee also included military experts, some with legal qualifications, who had been involved in the British War Office and POW work during WWI,[40] which possibly strengthened the military perspective.

As a professional association of international lawyers, however, the ILA lacked the necessary authority to initiate change in the legal framework itself. It referred the question to the League of Nations[41] and voiced its willingness to work with any diplomatic conference of states intended for the development of the law;[42] yet, without any results. Recognising that the ILA's aim resembled the ICRC's, 'to awake public opinion and Government interests', it noted 'that the voice of these two important bodies … might be heard in harmony in regard to the question'.[43] It is, therefore, unsurprising that the ILA seized the ICRC's invitation to contribute expert knowledge to its 'civilian commission'. With its history in international law-making reaching back to the second half of the nineteenth century, and its engagement with governments through national Red Cross societies, the ICRC was better placed to initiate diplomatic conferences organised by the Swiss government, and to gauge and shape state interests in developing the law.

The ICRC's own efforts increasingly followed the ILA's narrow pursuit to enhance the treatment of civilian internees. Following its initial enquiry to establish a general understanding of the legal framework in 1923, the ICRC sent a representative to the ILA's 1924 Conference at which the Draft Regulations for civilian POWs were adopted.[44] It also repeatedly referred to the Association's work during the discussion of the situation of civilians in the hands of the enemy at its own conferences.[45] The two organisations partly disagreed on the appropriate approach. While the ILA favoured the adoption of detailed rules regulating the treatment of civilian internees, the ICRC preferred the formulation of some general principles.[46] Nevertheless, it is noticeable that, as the work of the 'civilian commission' progressed, the ICRC limited its focus more in line with the ILA's engagement with civilian POWs.

In 1921, the ICRC had still envisaged the regulation and protection of civilian internees, as well as deportees, evacuees and refugees,[47] thus acknowledging the wider effects of warfare on civilians. Yet, subsequent declarations and the work of the 'civilian commission' increasingly narrowed the scope of the civilian question to only address their treatment in the hands of the enemy, and primarily their internment. It observed that the situation of civilians is intimately related to that concerning POWs and that some of the provisions in the ICRC's 1925 draft convention on POWs could be adopted by analogy or extension to enemy civilians.[48] A proposal by the president of the 'civilian commission', Edmond Boissier, to consider a more general protection for civilians based on the rights of 'non-combatants', as opposed to the rights of combatants, was not followed.[49] Moreover, although the 'civilian commission' had identified civilians in occupied territories as another category of victims of war, it noted that the ILA's non-engagement with this question was probably due to the existing, albeit rudimentary and unsatisfactory, rules under the 1907 Hague Regulations.[50]

[40]Ibid, at 227–28 and 237.

[41]ILA 'Report of the Codification Committee' (1926) 34 ILA Reports of Conferences 374 at 374–76.

[42]AK Kuhn 'Report of the Stockholm Conference of the International Law Association, 1925' (1925) Proceedings of the American Branch of the International Law Association 22 at 25.

[43]ILA, above n 34, at 206.

[44]ILA, above n 35, at 242–43.

[45]*Memorandum concernant le problème des prisonniers civils et l'élaboration éventuelle d'un projet d'une Convention internationale règlant la situation des civils tombés à la guerre au pouvoir de l'ennemi* (1925), AICRC CR.119/7; *Procès-verbaux des commissions: Commission I: examen du rapport general du Comité international* (ICRC Library, CI_1925_001_FRE_001); *Annexe au rapport général du Comité international de la Croix-Rouge: la situation des non-combattants tombés au pouvoir de l'ennemi* (ICRC Library, CI_1925_016_FRE_016_HD_Su) p 3.

[46]ILA, above n 35, at 242–43; see also ICRC *Onzième Conférence internationale de la Croix-Rouge* (Geneva: Imprimerie ATAR, 1923) p 184.

[47]ICRC *Dixième Conférence internationale de la Croix-Rouge* (Geneva: Imprimerie Albert Renaud, 1921) pp 218–219.

[48]*Annexe au Rapport*, above n 45, pp 4–5.

[49]*Commission des civils – Séance du 23 juin 1931*, AICRC CR.119.

[50]*Memorandum* (1925), above n 45.

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The gradual narrowing of the ICRC's project is likely not only a result of its consideration of the ILA's work on civilian POWs. The Committee itself also considered bilateral agreements and the existing legal framework in more detail, not least informed by Lescaze's study of the matter, to extract general principles upon which a draft text could be formulated.[51] More importantly, its approach was the result of political obstacles,[52] and consequently characterised by self-restraint. It appears to be closely linked to the organisation's own self-perception, experience with states during armed conflicts, as well as states' responses to its endeavours to develop the law. Giovanni Mantilla, for example, suggests that 'a series of early organizational challenges provoked (or reinforced) the ICRC's reluctance to confront prevailing sovereignty norms' and thus its conservatism.[53] Rather than providing a neutral safety net for humanitarian subjects, regulating the treatment of civilians was seen as a delicate question, directly linked to state sovereignty and the national (security) interests of states. It was regarded as more closely related to the conduct of hostilities, entailing political and military considerations,[54] than the humanitarian treatment the ICRC provided for soldiers in vulnerable positions. It was repeatedly emphasised that developing the protection of civilians in occupied territory, in particular, would require amending the Hague Regulations at a diplomatic conference, and thus fell outside of the ICRC's mandate.[55] The Committee's hesitancy was further heightened by the expected and indeed received opposition from states, especially the French government and national Red Cross. Fearing that the taking of more concrete steps towards a convention on civilians might jeopardise its more advanced work on POWs, the ICRC decided to postpone any further efforts until after the 1929 diplomatic conference at which a POW convention was adopted.[56]

Although this self-restraint was to some extent overcome with the adoption of the Tokyo Draft, the instrument still reflects some of the earlier limitations. Its main focus is the treatment of civilian internees, and it merely requires the application of the treatment of POWs by analogy to them.[57] Regarding civilians in occupied territory, it calls for the observation of the Hague Regulations, expanding the latter's protections only slightly.[58] Generally, it fundamentally relies on a conceptualisation of protected individuals as enemy nationals. The ICRC took the deliberate step to limit its study of civilians in occupied territory to those of enemy nationality, leaving neutral nationals to the side.[59] As a result, the Tokyo Draft differed from the Hague Regulations which regulated the treatment of the civilian population in occupied territory without reference to nationality. The 1907 Hague Peace Conference had even adopted a separate convention providing specific safeguards for neutral nationals.[60] Furthermore, consistent with the ICRC's role in addressing narrowly circumscribed categories of persons in specific situations, the instrument refrains from protecting even enemy nationals more generally. By declaring that they 'shall receive the treatment to which aliens are ordinarily entitled, except for measures of control or security which may be ordered, and subject to the provisions' stipulated for occupied

[51]Ibid.

[52]N Wylie and S Landefeld 'Prisoners of war, civilians and the post-World-War I development of international humanitarian law' in R Kowner and I Rachamimov (eds) *Out of Line, Out of Place: A Global and Local History of World War I Internments* (Ithaca: Cornell University Press, 2022).

[53]Mantilla, above n 13, p 30.

[54]See eg *Séance de la IVe Commission* (29 August 1923) AICRC CR.119; *Memorandum* (1925), above n 45.

[55]Letter from Girardet to Lescaze (23 November 1923) AICRC CR.119; *Commission des 'civils'*, above n 30; *Memorandum* (1925), above n 45; ICRC, above n 46, p 184.

[56]Wylie and Landefeld, above n 52, pp 248–251; van Dijk, above n 2, pp 61–63.

[57]Draft International Convention on the Condition and Protection of Civilians of Enemy Nationality Who Are on Territory Belonging to or Occupied by a Belligerent (Tokyo, 29 October 1934), reprinted in D Schindler and J Toman (eds) *Laws of Armed Conflict: A Collection of Conventions, Resolutions, and Other Documents* (Leiden: Martinus Nijhoff, 4th edn, 2004) (Tokyo Draft), Art 17.

[58]Ibid, Arts 18–19.

[59]*Commission des civils – Séance du 4 mai 1931*, AICRC CR.119.

[60]Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (The Hague, 18 October 1907), ch III.

https://doi.org/10.1017/lst.2025.10080 Published online by Cambridge University Press

territory,[61] it shows a deference towards existing international law regulating the treatment of aliens. This is despite the fact that the laws of peace generally ceased to apply at times of war.

The protection regime of GC IV goes significantly beyond the scope of the ILA's proposed rules for civilian POWs and even the Tokyo Draft. It stipulates safeguards for individuals other than civilian internees in belligerent territory, as well as more detailed regulations for the relationship between an occupying power and the civilian population. Certain provisions are more clearly a response to some of the atrocities that were committed during WWII.[62] Nonetheless, some of the conceptual constraints of the inter-war years can still be seen in the main protection regime of GC IV today. While the treaty is celebrated as filling the lacuna regarding the protection of civilians and is often called the 'Civilian Convention', its scope of application *ratione personae* and the form of protection are limited. The status of protected persons under Article 4 GC IV is primarily confined to enemy nationals, and the treaty regulates security measures which were commonly taken against them. This is despite the adverse treatment and suffering which individuals other than enemy nationals experienced during WWII.[63] The conceptualisation of civilians in need of protection is thus still informed by the inter-war approaches of the ILA and ICRC. Civilian protected persons were not perceived and protected as the opposite of combatants, as it is commonly believed today, but rather by analogy to combatants in vulnerable situations. The regulation of internment, in particular, resembles the protection of POWs.

The use of the Tokyo Draft as a working draft during the post-WWII law-making process may imply a clear line of descent of the conceptual limitations from the inter-war period to the 1949 treaty. In its Report of the 1946 Preliminary Conference of National Red Cross Societies, the ICRC recorded its preference for a single convention for both civilians and POWs.[64] It still considered 'the question whether the rules for internment and the status of Civilian Internees should be dealt with simply by reference to the provisions made for Prisoners of War, applied by analogy, or whether it would be better to draw up rules relating to Civilian Internees only'.[65] At the 1947 Conference of Government Experts, the ICRC proposed the former approach with only additional clauses being stipulated for 'special questions relating to civilians'.[66] The focus of the deliberations mirrored the inter-war developments. While the draft convention contained a provision guaranteeing all other non-nationals 'treatment at least as favourable', the primary intended beneficiaries were enemy nationals.[67] Not only was Part I entitled 'Protection of Civilian Enemy Aliens in Time of War', the draft also comprised a separate chapter on 'Rules concerning Civilian War Internees'.[68] Van Dijk further notes that the responsible post-1945 drafting team under the ICRC Legal Division received support from members of the inter-war 'civilian commission'.[69]

However, it is important to emphasise that this development was not predetermined or inevitable. Throughout the inter-war years, the ICRC showed a deference towards not only the expertise of military professionals and lawyers, but also international law. This included respect for the traditional notions of state sovereignty, including reciprocity and states' *domaine réservé*. The drafting process of GC IV reveals that this deference was exploited by states which wished to limit the scope of the treaty's protections.[70] More humanitarian proposals were brought forward which would have comprised a

[61]Tokyo Draft, Art 6.

[62]eg GC IV, Art 32.

[63]B van Dijk 'Human rights in war: on the entangled foundations of the 1949 Geneva Conventions' (2018) 112 American Journal of International Law 553 at 563.

[64]*Report on the Work of the Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of Various Problems Relative to the Red Cross* (ICRC 1947) pp 92–93.

[65]Ibid, p 94.

[66]*Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims* (ICRC 1947) p 295.

[67]Ibid, pp 272–275.

[68]Ibid, pp 272, 294–296 and 306–329.

[69]van Dijk, above n 2, p 69.

[70]See eg *Final Record of the Diplomatic Conference of Geneva of 1949*, vol II(A) (Bern: Federal Political Department, 1950) pp 626 and 794.

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wider category of war victims,[71] albeit still not conceptualising civilians or the civilian population as a whole. Yet, van Dijk observes that the ICRC (again) deliberately adopted a cautious approach by focusing only on enemy civilians, inter alia 'arguing that covering the state's own nationals would be ineffective since "reciprocity was [not] granted"'.[72] The narrow framing of the status of protected persons and reliance on peacetime laws for all other non-nationals was deliberately chosen by states which intended to confine their obligations under the new regime.[73]

2. The Monaco Movement, ILA and ICRC, and the notion of safety zones and localities

The interaction between non-state actors and its importance in shaping safeguards for civilians are even more apparent in relation to the protection against consequences of warfare. The ICRC voiced some initial concern about the suffering of civilians from hostilities immediately after WWI, as can be seen in its letter to the League of Nations in 1920.[74] Although the *International Review of the Red Cross* shows the Committee's extensive engagement with the evolving means of warfare, its efforts were mainly of a more practical nature focusing, for example, on the development of technical protective measures against chemical warfare for towns and their populations.[75] Believing that such technical means would be insufficient, it decided to also consult legal experts on possible juridical measures to protect the civilian population against bombardment in 1930.[76] However, the conclusion of the consultation was pessimistic, suggesting that only an absolute prohibition of aerial warfare could provide effective protection for the civilian population.[77] Although the ICRC noted that it did not consider its work on the matter completed,[78] and adopted a resolution at its 1934 ICRC Conference proclaiming that it would continue to study means to legally protect the civilian population from aerial warfare,[79] no further steps were taken.

Other attempts to regulate aerial bombardment more generally were also unsuccessful. The main inter-war effort that is still known today is the adoption of the non-binding 1923 Hague Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare (Hague Draft Rules).[80] While the proposal was the result of an initiative by six major states, it was notably drafted by a commission constituted of international lawyers and military experts. Some commentators argue that the text was not adopted as a treaty due to the idealism of the international lawyers involved,[81] yet others suggest that the collaboration between the legal and military experts was more equal and productive.[82] Indeed,

[71] *Report – Government Experts*, above n 66, p 275; *Final Record of the Diplomatic Conference of Geneva of 1949*, vol I (Federal Political Department 1950) p 114.

[72] van Dijk, above n 2, p 70.

[73] See further Landefeld, above n 38.

[74] ICRC 'Limitation de la guerre – Lettre du Comité International de la Croix-Rouge à l'Assemblée de la Société des Nations' (1920) 2:24 International Review of the Red Cross 1348.

[75] B Holmes 'The *IRRC* and the protection of civilians, c. 1919–1939' (2018) 100:907/908/909 International Review of the Red Cross 115.

[76] M Liais 'La protection des populations civiles contre les bombardements' (1931) 39(2) Das Rote Kreuz 34 at 34; 'Consultations juridiques (Deux cent quatre-vingt-treixième circulaire aux Comités centraux)' (1930) 12:143 International Review of the Red Cross 1010.

[77] 'Protection juridique des populations civiles contre les dangers de la guerre aero-chimique' (1931) 13:156 International Review of the Red Cross 1101 at 1112. For an overview of the different problems envisaged by the jurists see also SH Brown 'La protection de la population civile contre les dangers de la guerre aero-chimique par des instruments diplomatiques' (1931) 13:153 International Review of the Red Cross 688.

[78] 'Protection juridique', above n 77, at 1106.

[79] ICRC *Quinzième Conférence internationale de la Croix-Rouge* (Tokyo: Kokusai Shuppan Insatsusha, 1934) p 261.

[80] Reprinted in Schindler and Toman, above n 57.

[81] See eg FE Quindry 'Aerial bombardment of civilian and military objectives' (1931) 2 The Journal of Air Law 474; WH Parks 'Air war and the law of war' (1990) 32 Air Force Law Review 1 at 31; C Jochnick and R Normand 'The legitimation of violence: a critical history of the laws of war' (1994) 35 Harvard International Law Journal 49 at 83–84.

[82] D Traven *Law and Sentiment in International Politics: Ethics, Emotions, and the Evolution of the Laws of War* (Cambridge: Cambridge University Press, 2021) p 225; C Wilke and H Doutaghi 'Legal technologies: conceptualizing the legacy of the 1923 *Hague Rules of Aerial Warfare*' (2024) 37 Leiden Journal of International Law 88 at 95.

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international legal scholarship during the inter-war years was generally not characterised by an abundance of interest and confidence in IHL. Rather, the relative silence regarding this area of law was caused, on the one hand, by a belief in the ineffectiveness of international law in regulating wars given the experience of WWI, and, on the other, the fear that it may undermine the project for peace.[83]

The paucity of regulations in this regard continued in the immediate aftermath of WWII with the main protection regime of GC IV focusing on civilians in the hands of a belligerent or occupying power. Only Part II of the treaty provides some safeguards against the consequences of war for the civilian population, yet without regulating the conduct of hostilities, including aerial warfare. The absence of such provisions is due to a number of powerful states being reluctant to address means and methods of warfare, not least because of its implications regarding their own practices during WWII, and in light of the associated delicate question of nuclear warfare.[84] Recent scholarship which draws on archival research into the attitudes and interests of some of the states involved, including the UK and the US, additionally suggests an unwillingness to adopt any rules which may limit their future warfare.[85] The failure of GC IV to address the suffering of civilians from the actual conduct of hostilities is thus primarily the result of political interests and manoeuvres, rather than conceptual limitations.

The only safeguards provided are the discretionary establishment of hospital and safety zones and localities, as well as neutralised zones.[86] In his historical study of the 1949 Geneva Conventions, Geoffrey Best notes that the ICRC had 'for many years cherished this idea' of what are sometimes referred to as '"Geneva Zones", i.e. clearly designated areas of exclusively non-military and Red Cross interest'.[87] The non-adoption of *binding* obligations in this regard is also the result of state interests protecting the treaty parties' sovereignty in relation to the protection of their own population and their assessment of the most suitable measures for their national and territorial circumstances. The prominence of designated zones which are immune from attack and limits in their design, on the other hand, are related to endeavours of different non-state actors during the inter-war years, in which the ICRC did not play a leading role.

The initiative for this development came from a different humanitarian actor than the ICRC. At its 1933 congress, the International Committee of Military Medicine and Pharmacy (ICMMP) declared that more effective measures were required to protect the civilian population from future warfare. It created a commission consisting of medical personnel and international lawyers to study the advancement of the law 'vers l'humanisation de la guerre'.[88] The introduction to the commission's report notes the underlying belief that medical doctors and jurists were joined in their constant humanitarian convictions which are part of these humanitarian professions, whereas military personnel and diplomats were involved in the making of war and were informed by ardent patriotism.[89] Yet, the respective views of the two participating professions also influenced the proposed rules in the so-called Monaco Draft. In his study of the project, René Clémens suggests that it is thanks to the involvement of the international lawyers that the adopted text includes a variety of protections for civilians, since some medical experts were initially reluctant to move beyond questions relating to health.[90] It is notable that one of the legal experts in this medico-juridical commission was Albert de Geouffre de La Pradelle, who had also been a

[83]See eg JL Kunz 'Plus de lois de la guerre?' (1934) 41 Revue générale de droit international public 22; Pictet, above n 3; A Alexander 'The "good war": preparations for a war against civilians' (2019) 15 Law, Culture and the Humanities 227.

[84]Best, above n 2, p 109.

[85]G Mantilla 'The origins and evolution of the 1949 Geneva Conventions and the 1977 Additional Protocols' in M Evangelista and N Tannenwald (eds) *Do the Geneva Conventions Matter?* (Oxford: Oxford University Press, 2017); O Barsalou 'Preparing for war: the USA and the making of the 1949 Geneva Conventions on the Laws of War' (2018) 23 Journal of Conflict and Security Law 49; van Dijk, above n 2.

[86]GC IV, Arts 14–15.

[87]Best, above n 2, p 116.

[88]*Vers l'humanisation de la guerre: Compte rendue des travaux de la Commission réunie par S.A.S. le Prince de Monaco (Février 1934) – Délibérations et Conclusions* (1934) p 13.

[89]Ibid, p 11.

[90]R Clémens *Le projet de Monaco: le droit et la guerre, villes sanitaires et villes de sécurité, assistance sanitaire internationale* (Paris: Libraire du Recueil Sirey, 1937) pp 31–32.

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member of the committee behind the 1923 Hague Draft Rules. Van Dijk argues that the legacy of his involvement in the former 'can be easily discovered in the final text agreed upon by the participants' in Monaco.[91]

The Monaco Draft comprises a range of different rules on the conduct of warfare, including the creation of security towns for the protection of the population therein,[92] as well as a more general declaration that '[t]he civil population shall be left out of any form of hostilities'.[93] It combines the notion of undefended towns in the Hague Regulations with some of the regulations proposed in the Hague Draft Rules, as well as the creation of safety zones. The draft convention also includes a system of sanctions for violations of the law.[94] While the Monaco Draft has received little consideration in contemporary scholarship on IHL,[95] it led to an increase in attention being accorded to the protection of civilians from the consequences of war during the inter-war years. The Monaco Draft was in fact submitted to the Belgian government with the intention to convene a diplomatic conference, which, however, was not realised.[96] Van Dijk notes the lack of support by other states, including opposition by the Dutch government still 'considering themselves the exclusive guardians of these rules of war', and generally rising international tensions at the time as possible reasons for this outcome.[97]

Undeterred by the political environment, the ICMMP and some of its members, notably Colonel Voncken and de La Pradelle, continued to advocate for the Monaco Draft among governments and other scientific and professional bodies.[98] It was notably the French branch of the ILA, under the presidency of de La Pradelle, that initiated the Association's study of the 'protection of civilian populations against new engines of war' at its 1936 conference. In his introduction to the subject, de La Pradelle emphasised the importance of the Monaco Draft and submitted it to the Association for consideration. He noted that the efforts of the ICMMP had given rise to a movement of ideas; yet, 'technicians' were now needed to develop international law accordingly.[99] He himself later chaired the drafting committee behind the Draft Convention for the Protection of Civilian Populations against New Engines of War adopted at the 1938 ILA conference.[100] Kornelius Jansma, a leading member in the ILA's work on the issue, noted that its efforts regarding safety zones would be 'analogous to the Red Cross',[101] which had started to consider these measures, as will be further discussed below. As part of its process, the 1936 conference adopted a resolution recommending to the Executive Committee of the Association to institute a special commission for the study of the matter in cooperation with the ICRC and the 'Humanitarian Movement of Monaco',[102] likely referring to the ICMMP as the architect behind the Monaco Draft.

The ILA's 1938 Draft Convention included safety zones as one of the proposed measures. While the Monaco Draft seems to have been inspirational for the ILA's initial engagement with this issue, the Draft Convention was based on a different conceptualisation of protected persons. Whereas the 1934 instrument

[91]van Dijk, above n 2, p 214.

[92]'First draft Convention adopted in Monaco (Sanitary cities and localities), 27 July 1934' (ICRC) Pt IV Art 6, available at https://ihl-databases.icrc.org/en/ihl-treaties/monaco-draft-conv-1934.

[93]Ibid, Art 1.

[94]Ibid, Pt V.

[95]For exceptions see M Kleinfeld 'Too difficult to protect: a history of the 1934 Monaco Draft and the problem of territory for international humanitarian law' (2015) 33 Environment and Planning D: Society and Space 592; van Dijk, above n 63, at 553.

[96]*Report Concerning Hospital and Safety Localities and Zones* (ICRC Library, CEG_1947_LOCSAN_RAP_ENG) p 1; J Voncken 'La revision des grandes conventions humanitaires' (1938) 12:21 Revue de droit international 357 at 360.

[97]van Dijk, above n 2, p 215.

[98]'IVme Session de l'Office International de Documentation de Médecine et de Pharmacie Militaires et VIIIme Congrès International de Médecine et de Pharmacie Militaires – Rapport de M. le Médecin Lieutenant-Colonel Louët' (6 February 1936) Annexe au Journal de Monaco 1; J de La Pradelle 'L'Association pour la protection inetrnationale de l'humanité' (1936) 10:17 Revue de droit international 344; 'Congrès d'Etudes Internationales – Paris, 30 September – 7 October 1937' (1937) Revue de droit international 598 at 602–603.

[99]ILA 'Protection of Civil Populations against New Engines of War' (1936) 39 ILA Reports of Conferences 251 at 262–263.

[100]ILA 'Protection of Civilian Populations against New Engines of War' (1938) 40 ILA Reports of Conferences 37 at 37.

[101]ILA, above n 99, at 267.

[102]Ibid, at 282.

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envisaged a humanitarian safeguard which would shield everyone located in the zone from attack, the ILA's provision was intended for only a limited number of civilians who were designated as 'non-combatants *par excellence*'.[103] These individuals were seen as not being able to participate in the hostilities due to their age or infirmity, also comprising 'expectant mothers or mothers who are suckling infants'.[104] De La Pradelle, who had participated in the preparation of the Monaco Draft, criticised this discriminatory approach, preferring the more inclusive – and thus humanitarian – scope of the 1934 Draft instead.[105]

In comparison to the deliberations of the commission behind the Monaco Draft, the perception and argumentation of the members of the ILA appear to have been more informed by the existing laws of war, which considered individuals who did not qualify as combatants as potential participants in warfare.[106] Given the uncertainties and disagreements at the time over the position of individuals in relation to warfare and the war effort in the context of total war, the proposed safety zones were only intended for those categories of civilians which may have been regarded as being vulnerable and outside of hostilities without any doubt. The relation of security zones to undefended towns, rather than the notion of *lieux de Genève*, was also emphasised. Moreover, the reasoning behind the draft was partly explained in terms of military necessity as a long-standing principle of IHL. Instead of placing undue faith in the constraining power of the law, the members implicitly and openly appealed not only to humanitarian considerations, but more importantly states' self-interest by emphasising that the use of force against these limited categories of persons was unnecessary.[107]

Nevertheless, the resolution on the Draft Convention was only adopted with a compromise provision stating that the 'Conference, without committing itself to any of the detailed provisions of the draft convention presented by the Committee …, approves of the idea in general principle',[108] indicating the lack of support from all participating members. Some of the international lawyers continued to exercise the discipline's prevalent self-restraint in relation to the laws of war during the inter-war years. Indeed, the rapporteur of the Committee on the protection of the civilian population noted that the ILA's Council had discouraged the discussion of the subject.[109] Some members were concerned that the proposed rules would undermine the professional association's previous endorsement for the Kellogg-Briand-Pact, and thus the prohibition of war.[110] The effectiveness of any such protection regime was also doubted, with some suggesting that war was the opposite of law and could not be regulated.[111] Others, conversely, believed that the Draft did not go far enough and should instead also regulate the effects of economic warfare on the civilian population.[112] With this limited internal approval, no steps were taken to promote the development of the law among states. The ICMMP, however, endorsed the Draft Convention.[113]

The Monaco Draft was also brought to the attention of the ICRC, and discussed at its 1934 conference in Tokyo upon the proposal of the Belgian Government. One of the Belgian governmental representatives at the conference was notably Colonel Voncken, who was also a member of the ICMMP. The ICRC decided to study hospital and sanitary towns and localities for both military wounded and sick persons, as well as the civilian population in consultation with experts, including members of the ICMMP.[114]

[103]Ibid, at 267 and 255–256.

[104]Draft Convention for the Protection of Civilian Populations against New Engines of War (3 September 1938) (1938 ILA Draft Convention) reprinted in Schindler and Toman, above n 57, Art 12.

[105]ILA, above n 100, at 80–81.

[106]Landefeld, above n 24, ch 3.

[107]ILA, above n 99, at 255–256 and 280.

[108]ILA, above n 100, at 86.

[109]ILA, above n 99, at 264.

[110]Ibid, at 275–277; ILA, above n 100, at 70 and 84–85.

[111]ILA, above n 99, at 272 and 279; ILA, above n 100, at 62 and 69.

[112]ILA, above n 100, at 61 and 68.

[113]van Dijk, above n 2, p 217.

[114]Notably Colonel Voncken and de La Pradelle; 'Projet de création de villes et localités sanitaires' (1936) 18:214 International Review of the Red Cross 863; 'Commission d'experts réunie en vue d'élaborer un projet de convention pour la création de localité et zones sanitaires' (1938) 20:238 International Review of the Red Cross 929.

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Given that the project raised numerous questions which were of an essentially military nature, it later also believed the contribution of military experts to be necessary.[115] However, the ICRC's self-restraint proved even more crippling in this context than in relation to the protection of civilians in the hands of the enemy state. Civilian safety zones were later excluded from the project, which instead focused exclusively on hospital towns and localities for the protection of wounded and sick combatants as being more closely related to the Geneva Conventions in existence at the time, and the aims of the Red Cross.[116] While it suggested that it may return to the protection of civilians at a later stage,[117] the 1938 Draft Convention on the matter was confined to military hospital towns and localities. The ICRC was again concerned that the new development in relation to civilians might encroach upon its legal and practical achievements in the protection of soldiers, especially if state support would not be forthcoming if they were included.[118] At the 1938 ICRC Conference, the national Red Cross societies merely adopted an unanimous resolution appealing to states, 'in all areas where civilian lives are liable to be endangered by any military operations, to arrange for the evacuation of women and children into zones of immunity under Red Cross protection'.[119]

The confines of the ICRC's mandate were, however, not only self-imposed but also perceived by other actors. In its referral of the Monaco Draft to the ICRC in 1935, the ICMMP had noted that only some of the instrument's provisions were of relevance to the former, suggesting that the protection of civilians in particular was not.[120] During the consultations, members of the ICMMP, nevertheless, emphasised the humanitarian nature of such protection, noting the desirability of their inclusion in the ICRC's project.[121] The ICRC, on the other hand, seemed to reinforce the distinction that is today commonly known, albeit debated,[122] between the so-called 'Hague Law' and 'Geneva Law' throughout this process. The protection of civilians was notably still seen as being part of the Hague Regulations and related developments. As such, the situation of civilians generally was perceived as falling under the states' sovereign prerogative over the conduct of hostilities. While the outbreak of WWII prevented the consideration of the ICRC's proposal for military hospital towns at a diplomatic conference, the Committee's hesitant, indeed reluctant, attitude had already inhibited any possible development for the protection of civilians in advance.

These limitations in the ICRC's attitude were not only apparent in relation to these new zones of refuge. Provisions for immune localities or institutions, such as military hospitals, had existed since the first Geneva Convention in 1864. Parallel to the consideration of hospital towns and localities, the ICRC was also revisiting the 1929 Geneva Convention for the Amelioration of the Condition of Wounded and Sick Armies in the Field with a view to interpreting, revising or extending the treaty. The ICMMP participated in the deliberations of this project as well given its medical expertise, and again advocated the expansion of the Convention to civilian war victims and hospitals in light of the evolving extent of warfare.[123] It had already envisaged this development in 1933 and included a relevant provision in the

[115]'Projet de création de villes sanitaires' (1937) 19:220 International Review of the Red Cross 401 at 401; 'Rapport du Comité international de la Croix-Rouge sur le project d'une convention relative à la creation de villes et localités sanitaires' (1938) 20:236 International Review of the Red Cross 681 at 683.

[116]'Rapport du Comité' (1938), above n 115, at 683–684.

[117]'Projet de création' (1937), above n 115, at 406.

[118]'Rapport du Comité' (1938), above n 115, at 708; *Report on the Proposed Convention for the Establishment of Hospital Towns and Areas* (ICRC Library, CI_1938_DOC15_ENG) pp 14 and 28; see also van Dijk, above n 2, pp 215–226.

[119]ICRC *Sixteenth International Red Cross Conference* (ICRC 1938) p 103.

[120]'Rapport de Lieutenant-Colonel Louët', above n 98, p 6; 'Rapport du Comité' (1938), above n 115, p 682.

[121]'Congrès convoqué par la Commission d'études medico-juridiques Monaco, 10–12 février 1936' (1936) 18:207 International Review of the Red Cross 213 at 214.

[122]See eg Y Dinstein *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 4th edn, 2022); Alexander, above n 5; A Quintin *The Nature of International Humanitarian Law: A Permissive or Restrictive Regime?* (Cheltenham: Edward Elgar, 2020) ch 4.

[123]'Rapport relative à l'interprétation, la revision et l'extension de la Convention de Genève du 27 juillet 1929' (1938) 20:231 International Review of the Red Cross 193 at 200–201.

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Monaco Draft.[124] The matter was taken up even more ardently by the International Hospital Association at its congress in 1935.[125] Nevertheless, in what Margo Kleinfeld calls an 'unconventional tally',[126] the proposal was rejected in the commission set up by the ICRC despite strong expressions in favour of it. Instead, the commission decided on a more limited extension, stating that the humanitarian principles contained in the Convention equally apply to the civilian population, and that the protection of medical personnel and hospitals would not cease when they treated civilians.[127] The ICRC was again wary that expanding immunity to civilian hospitals, or including civilians who were *unprotected* under the law at the time within military hospitals might undermine or weaken the protection it had achieved for combatants.[128] Its resolution on the revision of the Geneva Convention adopted at the 1938 ICRC Conference indeed noted 'that in the course of the debate, several delegations remarked that it would be advisable to eliminate from the draft revised Convention any reference to the civilian population, whose protection as a whole should be dealt with in a separate Convention'.[129] In her study of the 1938 ICRC Conference and the surrounding diplomacy, Rebecca Gill notes that 'when it came to a sovereign state's jurisdiction over its own civilians, or an occupying state's policies towards an occupied people – where the benefits of reciprocity were less apparent – the right of the ICRC to intervene was severely curtailed', partly by its own 'cautious legalism'.[130]

Throughout these efforts, an active engagement with each other's progress and, indeed, close cooperation took place between the different non-state actors. Given the ICMMP's pioneering work on safety zones for civilians, it sent its Draft to the other organisations and offered its assistance in related projects.[131] Both the ILA and the ICRC invited its experts to attend their proceedings. In return, the ILA was represented by members of its drafting committee for the protection of civilian populations at the Conférence de Médicine Militaire in 1938.[132] Some individual experts, both lawyers and medical experts, were themselves members of more than one organisation. Additional, especially archival, research into the work of these actors may enhance our understanding of this cooperation even further in the future.

The available records and reports already show that these actors were brought together by their humanitarian interests. Yet, their institutional identities and the settings of their efforts influenced their perspectives and decisions differently. Removed from the gaze and influence of states, other than the presiding Mayor of Monaco, the medico-juridical commission preparing the Monaco Draft may have been able to pursue its humanitarian interests unhindered. Unlike the ICRC, it was not bound by an institutional history in the laws of war and the latter's self-restraint arising from its experience with states in the negotiation of international agreements and the practice of war. The epistemic community of international lawyers, on the other hand, largely abstained from considering this area of law. The IDI, which had been actively involved in fostering the law prior to the war, not least by adopting the 1880 Oxford Manual on the Laws of War on Land, did not include it on its inter-war agenda.[133] The ILA also did not engage with any matters related to warfare for some time following its adoption of the draft regulations on civilian POWs. As noted above, this silence may be explained by both cynicism and idealism. While some lawyers may

[124]Monaco Draft, Pt IV Art 5.

[125]Voncken, above n 96, at 363; 'Rapport relative à l'interprétation', above n 123, at 232.

[126]Kleinfeld, above n 95, at 600.

[127]'Rapport relative à l'interprétation', above n 123, at 200-201.

[128]'Rapport sur la protection des hôpitaux civils en cas de bombardement présenté aux Sociétés nationales de la Croix-Rouge par le Comité international de la Croix-Rouge' (1937) 19:224 International Review of the Red Cross 725, esp at 730–731.

[129]ICRC, above n 119, p 103.

[130]R Gill 'The 1938 International Committee of the Red Cross Conference: humanitarian diplomacy and the cultures of appeasement in Britain' in N Wylie et al (eds) *The Red Cross Movement: Myths, Practices and Turning Points* (Manchester: Manchester University Press, 2020) p 225.

[131]See eg 'Projet de création' (1936), above n 114, at 584; 'Congrès convoqué', above n 121, at 215–216.

[132]ILA, above n 100, at 57.

[133]JL Kunz 'The chaotic status of the laws of war and the urgent necessity for their revision' (1951) 45 American Journal of International Law 37 at 39.

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have questioned the viability of law in the face of war, others were concerned that any attempts at regulating warfare might undermine the peace project, and thus the Kellogg-Briand-Pact.[134]

It, therefore, required a congress of military doctors and pharmacists to trigger a movement towards the establishment of protective zones for wounded and sick military personnel as well as civilians. Since the intended diplomatic conference under the patronage of the Belgian government was abandoned, van Dijk suggests that '[b]y mid-1935, the ICMMP was left with little choice but to seek support from other international organizations, the most prominent of which was the ICRC'.[135] The ICRC brought not only experience from the field, similar to the military doctors, but also the practice of engaging with states on the development of the law. As the above discussion of the protection of civilians in the power of the enemy has shown, the ICRC was able to explore the willingness of states to engage in a formal law-making process required to adopt a binding agreement in its direct contact with the Swiss, Dutch and Belgian governments, and indirectly through national Red Cross societies. As a result of this, however, it was also acutely aware of the political environment within which any protection regime and regulations had to be negotiated and implemented in practice. Its restraint in relation to civilians may be seen as an attempt to protect its own institutional interests, guarding the previously achieved protection for combatants in vulnerable situations, and military medical personnel and institutions. The ICRC's identity and understanding of the legal framework appears to have prevented its pursuance of the creation of sanctuaries for civilians under the law.

The respective efforts of these non-state actors were, furthermore, shaped by certain conceptual limitations. The categories of persons intended as the beneficiaries of the protective zone are drawn differently in the proposals. This can be seen as a reflection of the fact that no clear, generally agreed understanding of civilians existed at the time. Unlike today, when everyone who is not a combatant is considered a civilian and presumed to be 'innocent' and in need of protection, the notion of 'civilians' as war victims had only started to emerge during WWI.[136] Yet, the absence of a concept of civilians under international law itself was not directly addressed in the various deliberations. It may come as no surprise that only those actors involving lawyers resorted to a definition of civilians in their draft instruments. Accordingly, the Monaco Draft defines the civilian population as including 'all persons who are not enlisted in the army'.[137] The 1938 ILA Draft Convention, on the other hand, stipulates that the civilian population comprised 'all those not enlisted in any branch of the combatant services nor for the time being employed or occupied in any belligerent establishment as defined in Article 2'.[138] However, these definitions appear to have been intended for the regulation of hostilities rather than security zones. Indeed, the ILA's draft regulation for safety zones was limited to individuals perceived as non-combatants per excellence, as mentioned above. The intermittent declarations by the ICRC also show a greater concern for women and children than the civilian population generally. The connotations which are today commonly associated with the concept of civilians, namely harmlessness, innocence, non-participation and vulnerability,[139] were not yet necessarily attached to everyone who was not a combatant during the inter-war period.

The failure to create a shared understanding of civilians in this respect continued to influence the drafting of GC IV, which similarly abstains from creating a protection regime for all civilians. Hospital and safety zones are exclusively designed for 'wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven', whereas neutralised zones are for individuals who do not take an active part in the hostilities, including civilians who fulfil this requirement, but also

[134]See eg ILA, above n 99, at 272 and 275–77; ILA, above n 100, at 70 and 84–85.
[135]van Dijk, above n 2, p 215.
[136]Alexander, above n 21.
[137]Monaco Draft, Pt IV Art 2.
[138]1938 ILA Draft Convention, Art 1.
[139]R Sutton *The Humanitarian Civilian: How the Idea of Distinction Circulates Within and Beyond International Humanitarian Law* (Oxford: Oxford University Press, 2021) p 133.

https://doi.org/10.1017/lst.2025.10080 Published online by Cambridge University Press

wounded and sick soldiers and non-combatants in the armed forces.[140] As Helen Kinsella remarks regarding the former, 'in each case, the defining characteristics of harmlessness are dependency and vulnerability', since they are likened to combatants in vulnerable positions.[141] Unlike for combatants protected under the first three 1949 Geneva Conventions, however, these characteristics are perceived as being 'essential' to 'children, women, and old people'.[142] The more humanitarian conceptualisation of safety zones for all civilians located therein, as proposed by the Monaco Draft, was not considered in the drafting process. This was despite the Monegasque delegate's repeated, unsuccessful attempts to draw attention to the Monaco Draft and to permit the ICMMP to participate in the negotiations.[143] He also criticised the exclusionary categories of beneficiaries envisaged in the provision for hospital and safety zones.[144] While a connection may be assumed in terms of this delegation's proprietary interest in the Monaco Draft, it is noteworthy that the particular delegate was Paul de Geouffre de La Pradelle, the son of Albert de La Pradelle, who had been involved in the various inter-war efforts on safety zones. However, instead of adopting the Monaco Draft's inclusive approach, GC IV's protective zones are more aligned with the ICRC's traditional mandate and humanitarian objective to protect *certain* categories of individuals who are deemed to be particularly vulnerable.

Given the ICRC's reluctance during the inter-war years, its promotion of sanctuaries for civilians in the post-1945 law-making process required a change in attitude. Some signs of this may have already been visible before the outbreak of WWII. The Committee drew attention to the practical realisation of safety zones for civilians in Spain and China at its 1938 Conference,[145] and during the work of its commission on hospital zones involving military experts, jurists and members of the ICMMP in the same year.[146] Some of the members of this commission participated in the negotiation of GC IV and expressed themselves in favour of such zones more than a decade later.[147] Jean Pictet, one of the ICRC's most influential legal experts during and after WWII, also promoted safety zones for the protection of civilians given the shortcomings of the Hague Regulations.[148] The ICRC itself created such zones in Jerusalem in 1948,[149] and appropriated the idea more fully during the preparatory stages and drafting of the post-war treaties. It reframed the protection of vulnerable civilians as falling within its competence, being aligned to the humanitarian principles which it believed underpinned all of the Geneva Conventions.[150] Subsequent narratives have primarily focused on the ICRC's contribution to developing safety zones. For example, François Bugnion, during his time as the ICRC's Director for International Law and Cooperation, albeit writing in his personal capacity, attributed the adoption of a provision on neutralised zones under GC IV to the initiatives, practice and influence of the Committee. He merely alluded to other inter-war drafts 'under the auspices of associations of military doctors and the ICRC',[151] without seemingly according them much importance.

Some of the ICRC's self-restraints of the inter-war period appear to have continued to play a role in its limited approach to protecting civilians from the consequences of war after WWII. In its advocacy, the ICRC filtered the history of efforts to create protective zones for civilians through the organisation's lens. While it acknowledged, besides the idea of *lieux de Genève*, the 1934 Monaco Draft and cooperation

[140]GC IV, Arts 14–15.

[141]Kinsella, above n 11, p 122.

[142]Ibid.

[143]*Final Record*, vol II(A), above n 70, pp 15–17, 31–33 and 626.

[144]*Conférence diplomatique 1949: sténogrammes de la Commission III, tome I* (27 April 1949) (ICRC Library, CD_1949_COMM3_CR03) pp 116–117.

[145]ICRC, above n 119, p 82.

[146]'Rapport du Comité international de la Croix-Rouge sur le projet de convention pour la création de localités et zones sanitaires en temps de guerre, adopté par la commission d'experts réunie à Genève les 21 et 22 octobre 1938' (1939) 21:243 International Review of the Red Cross 161 at 170.

[147]Notably Erik Castrén from Finland and Major-General Schepers from the Netherlands.

[148]van Dijk, above n 2, p 217.

[149]Pictet, above n 3, p 123.

[150]See eg *Report Concerning Hospital Zones*, above n 96, p 5.

[151]Bugnion, above n 9, at 205.

https://doi.org/10.1017/lst.2025.10080 Published online by Cambridge University Press

between the ICMMP and ICRC as an initial step in the notion's development, it submitted its own 1938 draft on hospital zones as a foundation for the drafting process,[152] despite the instrument's limited consideration of civilians. The ICMMP itself was not admitted as an observer or expert organisation during the negotiations in 1949. It remains subject to speculations whether its involvement might have influenced the deliberation and conceptualisation of safety zones for civilians. The non-consideration of the Monaco Draft at the Diplomatic Conference, however, may have not only been the result of the ICRC's self-referential approach and the absence of the ICMMP. It may have also been a strategic choice since the instrument's additional restrictions on aerial warfare and stringent provisions on sanctions would have raised undesirable issues. Ultimately, the safety zones for civilians under GC IV are again modelled on the protection for combatants in vulnerable situations rather than a distinct safeguard for civilians.

Conclusion

GC IV is the outcome of a prolonged process of attempts to address the suffering of civilians in time of war under international law. During the post-WWII treaty-making procedure, the ICRC portrayed the new 'Civilian Convention' as a continuation of its earlier work in the form of the Tokyo Draft and its proposals regarding hospital zones and towns. Yet, the development of the 1949 protections was arguably not only – indeed, in parts not primarily – driven by the ICRC. A variety of actors, including humanitarian actors, international lawyers, military experts and medical personnel, promoted different proposals throughout the inter-war years. The complex web of their interactions played a significant role in driving forward the consideration and development of safeguards for civilians under IHL. These various actors inspired each other and cooperated based on their respective expertise, thus demonstrating an openness to learn and benefit from the knowledge, skills and experience of others in their common endeavours.

International lawyers played an important part in providing relevant knowledge and drafting feasible rules which could serve as the basis for the negotiation and adoption of an international convention. As experts, they were consulted by humanitarian actors and took part in committees created for the discussion of possible legal developments. While this may seem unsurprising to international lawyers today, it constituted a significant shift from the law-making processes before WWI. For example, little attention was paid to the work of the epistemic community of international lawyers, such as the IDI's Oxford Manual, at the 1899 and 1907 Hague Peace Conferences. International lawyers themselves were often absent and later still only played a subordinate role in the negotiation of instruments at diplomatic conferences.[153] During the inter-war years, the ICRC, in particular, despite being universally seen as the guardian of IHL today, regularly sought assistance and expertise from international lawyers (and military experts) in its studies of how the legal framework might be advanced to protect civilians.

Understanding the complex situation of civilians in armed conflicts arguably requires these different perspectives. Only a combination of humanitarian idealism, military expertise and pragmatism, and a legal appreciation of designing rules and regulations which fit within the existing legal framework may possibly achieve an effective system of protection. Cooperation between the actors may, furthermore, be necessary to take advantage of not only their expertise and skills, but also spheres of influence. As Ben Holmes observes, the Red Cross 'Movement's attempts to build networks of expertise in the interwar period' demonstrate 'that efforts to solve the problems of civilian protection must go beyond the powers of humanitarian actors alone'.[154] However, this study suggests that innovation and progress towards an inclusive protection regime may also be stifled in the process.

[152]*Report Concerning Hospital Zones*, above n 96, pp 1–2; *Report – Preliminary Conference*, above n 64, p 65; *Report – Government Experts*, above n 66, pp 26–27; *Final Record*, vol II(A), above n 70, pp 15 and 627.

[153]Landefeld, above n 24, ch 3.

[154]Holmes, above n 75, at 140–141.

https://doi.org/10.1017/lst.2025.10080 Published online by Cambridge University Press

The inter-war interactions of the ICRC, ILA and ICMMP highlight the significance of the actors' institutional identities and interests, as well as conceptual constraints in developing international law. They shed light on possible alternative approaches to protecting civilians which were not followed through in the creation of conventional law. This also provides a more in-depth understanding of the role of the ICRC in the law-making process, which somewhat challenges the conventional narrative about its norm entrepreneurship and humanitarian progress in the adoption of GC IV. While the Committee is today commonly seen as a humanitarian actor that is striving for the protection of war victims, historical, archival research by other scholars[155] and this study emphasise its pragmatism in finding a balance between its humanitarian goals and adapting to state interests. At the same time, however, this paper shows that the perception and approach of international lawyers also had their limits, which may have had a constraining effect on the conceptual development of the law. Their proposals were strongly rooted in the existing legal framework, sometimes leading to myopia in the discernment of lacunae and argumentations by analogy. Moreover, the epistemic community of international lawyers was suffering from some self-restraint of its own kind, fearing that the regulation of warfare might undermine its project for peace. A revolution of the law based on a wider understanding of civilians was thus not achieved.

GC IV only provides protections for narrowly circumscribed categories of persons in specific situations, rather than a comprehensive protection regime for civilians. The reasons for this cannot only be found in the experience of WWII and the state delegations' interests at the 1949 Diplomatic Conference. A doctrinal interpretation of GC IV itself, and possibly a reading of the immediate *travaux préparatoires* fail to appreciate the struggle that took place over conceptualising individuals in armed conflicts and designing safeguards for them long before the treaty was adopted. The digitalisation of an increasing number of sources, including material related to the drafting history of the 1949 Geneva Conventions from the ICRC Archives,[156] has greatly enhanced the availability of documents and thus facilitated historical research into the development of IHL. However, further (archival) research into the proceedings of some of the non-state actors and the personal views of key individuals involved in several of the processes considered in this paper would be required for a more systematic and complete understanding of the degree and purpose of their cooperation. Given the incomplete collection of minutes of meetings, correspondence, personal reflections and other insights into the interactions between different actors during the inter-war years, this paper does not claim to provide a conclusive historical account of the law-making process.

This paper does, however, highlight that the making of IHL is not just the domain of states, nor of the ICRC. Different perspectives come together in the gradual development of possible rules and regulations. The varying ideas and formulations are vying for persuasiveness and influence. As such, the paper serves as a reminder that the protections under GC IV are rooted in different ways of seeing civilians compared to the prevalent views today, which suggest that everyone who is not a combatant is automatically an innocent and vulnerable victim. It invites us to rethink the received historical narrative and understanding of GC IV, and to reconsider how the complex history of the treaty has become embedded in its text.

[155]See eg Mantilla, above n 13; van Dijk, above n 2.

[156]'Drafting History of the 1949 Geneva Conventions' (*ICRC blog*, 12 August 2017), available at https://blogs.icrc.org/cross-files/drafting-history-1949-geneva-conventions/.

Cite this article: S Landefeld 'Inter-war interactions in the development of the protection of civilians: a historical perspective.' (2025) *Legal Studies* 1–18. https://doi.org/10.1017/lst.2025.10080