

# COMMENTARY

## WHO OWNS THE RULES OF WAR IN TODAY'S POST-POST-COLD WAR?

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### ABSTRACT

Professor Gabriella Blum's *The Paradox of Power* observes that international humanitarian law (IHL) has been in a long-term evolution toward putting the principle of "humanitarianism" and civilian protection at its normative and legal center. The Lecture (on which this essay is a commentary) identifies several reasons for this, in particular (within and across liberal democratic societies) social acceptance of IHL as law but also as socially internalized norms that give IHL broad moral legitimacy.

Accepting *The Paradox of Power's* main propositions as correct, this Commentary extends its account in several ways. First, *The Paradox of Power's* combination of norms, law, and legitimacy can be understood as constituting (at least in the case of liberal democratic societies) not just an "ethics of war," but a "public ethics of war"—a "public" ethics being necessary for a liberal democratic state to sustain public legitimacy in fighting a conflict. Second, the question can be posed whether the long-run trend toward putting civilian protection at the center of IHL is likely to continue. International politics appears to be shifting from the post-Cold War to a "post-post-Cold War" whose features include a resurgence of Great Power geopolitics, particularly Russia and China challenging the political status quo long underwritten by the United States, and the resurgence of claims—again particularly by Russia and China—for sovereignty and its prerogatives in

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international law and politics, in ways thought by many to have been in decline since 1990.

These developments raise questions as to what these and other sovereigns regard as the substance of IHL as it emerged in the post-Cold War. From the standpoint of the evolution of IHL, there are reasons to question whether the processes by which IHL has been made and evolved from 1990 forward, as well as whether non-sovereign actors, such as NGOs, that have played an important role in debates over the evolution of IHL can, will, or should continue in this way. In a post-post-Cold War characterized by increased risks of interstate Great Power war and by a possible resurgence of strong claims that sovereigns, through their sovereign consent, make international law, including IHL, an increasingly important question runs to the actors and processes by which IHL evolves. This is to ask, in the post-post-Cold War, “who owns the rules of war”?

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#### I. INTRODUCTION

My thanks to the *Houston Law Review* and the University of Houston Law Center for inviting me to be a commentator at the 23rd Annual Frankel Lecture and to give some remarks on Professor Gabriella Blum’s lecture, *The Paradox of Power*. It is a privilege for me to be here with all of you, and a privilege to be on this program with two such distinguished scholars and intellectuals, Professor Blum and Professor Ian Hurd. I have followed each of them and their work over many years and have always found great

profit in it.

Professor Blum, I will add, has been a dear friend of mine for a long time, as well as someone whose intellectual development I have watched with great admiration over the years. I have been privileged to watch her emerge as a major thinker and scholar on the laws and ethics of war. Her writings on combatants and non-combatants, especially, have impacted my own thinking in many ways. I have welcomed the opportunity to go back and re-read some of Professor Blum's earlier work in preparation for serving as a commentator today, and I have been impressed once again with how forward-looking her work has proven itself to be.<sup>1</sup>

Professor Blum's lecture, *The Paradox of Power*, considers the long-run evolution of international humanitarian law (IHL), also known as "*jus in bello*."<sup>2</sup> This is the body of legal rules governing the conduct of hostilities in armed conflict.<sup>3</sup> The long-run evolution of IHL means, for our purposes, the last 50 years or so. The evolution of IHL under discussion here does not cover the whole of the post-World War II period; it does not run all the way back to 1945,

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1. See, e.g., Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 69 (2010).

2. Gabriella Blum, *The Paradox of Power: The Changing Norms of the Modern Battlefield*, 56 HOUS. L. REV. 745, 751–52 (2019); see also Antoine Bouvier, *Assessing the Relationship Between Jus in Bello and Jus ad Bellum: An "Orthodox" View*, 100 AM. SOC'Y OF INT'L L. 109, 110 (2006).

3. A note on terminology: although IHL and *jus in bello* are not strictly identical, this Commentary will treat them as equivalent. Further, as *The Paradox of Power* points out, the United States Department of Defense prefers the term "law of armed conflict" (LOAC) rather than IHL; this Commentary will treat IHL and LOAC as equivalent, and will use the term IHL, as Professor Blum does. Blum, *supra* note 2. *Jus in bello* (or IHL) is distinguished from the body of international law known as "*jus ad bellum*," which addresses the lawful resort to force in international law (rather than the lawfulness of a party's conduct of hostilities in armed conflict, whether that party's resort to force was lawful as a matter of *jus ad bellum* or not). Ryan Goodman, *Controlling the Recourse to War by Modifying Jus in Bello*, 12 Y.B. INT'L HUMANITARIAN L. 53, 56 (2009). Taken together, *jus in bello* and *jus ad bellum* comprise the principal categories of the "law of war." See generally Christopher Greenwood, *The Relationship Between Jus ad Bellum and Jus in Bello*, 9 REV. INT'L STUD. 221, 225 (1983). IHL as used in this Commentary is distinct from, however, though intertwined with, international human rights law (IHRL) and international criminal law (ICL). Overall, however, this Commentary strives to use these and other terms in broad and non-technical ways, with their scope shown by the context of the Commentary's discussion.

(except with regards to some specific events such as the Nuremberg Trials<sup>4</sup> and the 1949 Geneva Conventions<sup>5</sup>). The relevant period of time reaches back to the 1970s; specifically, the negotiation and eventual entry into force of the treaty constituted the most important development in the substantive law of IHL since the 1949 Geneva Conventions—Additional Protocol I of 1977 (AP I).<sup>6</sup> The (rough) time periods most relevant to this Commentary are, the 1970s to 1990, or the “late-Cold War”; 1990 to the early 2010s or the “post-Cold War”; and the period from late 2000s or early 2010s to the present, or the “post-post-Cold War.”<sup>7</sup>

Over this 50-year period, according to *The Paradox of Power*, IHL gradually moved away from being perceived as a state-centric body of international law with civilians as (at most) its beneficiaries.<sup>8</sup> It gradually evolved to take “humanity” or humanitarian ob-

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4. Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 59 Stat. 1544, 1547, 82 U.N.T.S. 279. Transcripts of the Nuremberg Trials are published as 1–42 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946 (1947–49) (trial of twenty-two top-ranking Nazi officials) and 1–15 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, OCTOBER 1946–APRIL 1949 (1946–49) (trials of numerous lower-ranking Nazi officials); see also TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 159–217 (1949).

5. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

6. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]. Along with the AP I, though much less consequential or comprehensive, Additional Protocol II of 1977 (AP II) lays out the legal rules applicable (in non-technical terms) to certain internal armed conflicts such as civil wars. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1, June 8 1977, 1125 U.N.T.S. 609.

7. “Post-post-Cold War” is a clumsy term, but something is needed to refer to whatever comes after the post-Cold War, and this seems to me more accurate than some other terms in use, notably the “New Cold War,” which carries too many background assumptions about the international political situation today. See e.g., Robert D. Kaplan, *A New Cold War Has Begun*, FOREIGN POLY (Jan. 7, 2019, 6:27 PM), <https://foreignpolicy.com/2019/01/07/a-new-cold-war-has-begun/>. For historical contrast on the long-debated question of a “new cold war,” see also *A New Cold War?*, ECONOMIST (Apr. 15, 1999), <https://www.economist.com/leaders/1999/04/15/a-new-cold-war> [<https://perma.cc/F724-G2PA>]. Additionally, this Commentary does not take a position on when, or over what period of years, this assumed transition from the post-Cold War to the post-post-Cold War took (or is taking) place.

8. Blum, *supra* note 2, at 752–54. For this Commentary’s non-technical purposes, the terms noncombatant and civilian are used interchangeably, and they are taken here to

ligation as its core value and fundamental legal principle: the protection of civilians in war. It has done so by locating IHL within the broad normative (ethics and law) paradigm of universal human rights which, not coincidentally, has gradually risen over this same period to become the “apex” universal value of the international system of public international law and public international organizations (principally, the United Nations and its organs). *The Paradox of Power* is importantly right about the evolution of IHL over time; the arc of history of the last 50 years *has* bent toward making civilian protection the legal core of IHL. Moreover, I agree with Professor Blum that the main drivers of this historical trend are those to which *The Paradox of Power* points: law, technology, and norms.

This broad historical trend is most easily discerned by adopting the high-altitude perspective that *The Paradox of Power* takes; it is the only way to discern the long-run and major conceptual shifts in IHL over time. Five decades is a long time in international law and international politics, however, and the years between 1970 and 2019 have seen many large and consequential changes. The Cold War ended (peacefully!); but weapons of war and military technologies have changed enormously, most notably illustrated by the increase in precision of weapons; the introduction of a new battlefield environment, cyberspace;<sup>9</sup> and the adoption of global communications technologies, such as the Internet, along with many other new technologies, which have changed the social perception of the world for billions of people. Moreover, this same period has seen sizable reductions in absolute global poverty,<sup>10</sup> most importantly in China.<sup>11</sup> Given the scope of changes large and small, it would be easy to lose sight of how IHL has gradually evolved over the past fifty years in a mass of historical and legal detail. *The Paradox of Power*'s forest-over-trees approach to the evolution of IHL allows it to identify long-run trends that might

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include the IHL concept of “civilian objects.” See AP I, *supra* note 6, art. 48; 2 INT'L COMM. RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 29–32 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

9. Blum, *supra* note 2, at 775–76.

10. See *World Bank Forecasts Global Poverty to Fall Below 10% for First Time; Major Hurdles Remain in Goal to End Poverty by 2030*, WORLD BANK (Oct. 4, 2015), <http://www.worldbank.org/en/news/press-release/2015/10/04/world-bank-forecasts-global-poverty-to-fall-below-10-for-first-time-major-hurdles-remain-in-goal-to-end-poverty-by-2030> [<https://perma.cc/3EDC-PP2W>].

11. SUSAN L. SHIRK, CHINA: FRAGILE SUPERPOWER 15–19 (2008) (detailing China's remarkable economic growth and reduction in absolute poverty numbers); *The World Bank in China: Overview*, <https://www.worldbank.org/en/country/china/overview> [<https://perma.cc/3PW8-EAUW>] (last updated Sep. 26, 2018) (“Since initiating market reforms in 1978, China . . . has lifted 800 million people out of poverty.”).

otherwise be lost to view.

This Commentary accepts the main claims of *The Paradox of Power* about the past evolution of IHL. It asks a further question, however: To what extent are the broad trends in IHL that *The Paradox of Power* describes about the past likely to continue into the future? It is quite possible, of course, that they will continue into the future on essentially the same trend-lines of the past several decades. This Commentary suggests, however, that this might not turn out to be the case. Without putting much confidence in prognostications and futurology, there appear to be major movements in the world of international politics, law, institutions, and governance that might shift (or may be shifting even now) at least some basic assumptions on which both *jus in bello* and *jus ad bellum* rest.

If at least some fundamental changes are underway today, they are changes occurring in the sphere of international politics.<sup>12</sup> This makes the forest-not-trees approach to the evolution of IHL all the more important because in such a situation considering the law of IHL alone is not enough. There has to be consideration of the “sphere” of international politics, where law and the actors that shape its evolution are embedded. For this reason, this Commentary follows Professor Blum’s example by also adopting a high-altitude perspective—one that takes notice not only of strictly le-

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12. It is difficult to find a term that captures the idea of a “space” in which international politics, institutions, governance, diplomacy, and law take place. The problem is to find a metaphor that conveys the correct sense that there is such a thing as “international politics” consisting of a conceptual, notional “place” (or zone, space, sphere, or world) in which the transactions of international politics take place. International politics, or any of these metaphorical variations, is more than simply the sum of the activities and transactions of international actors such as sovereign states; there is a “locus,” metaphorical but identifiable, of these activities. At the same time, it is important not to reify or rely too heavily on metaphors invoking a physical place to represent an abstraction. The term that this Commentary studiously avoids is “international community.” This term has been used and overused, since 1990 at least. See e.g., G.M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY (1993); Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT’L L. 529 (1998). The term “international community” is overloaded with usually unstated normative assumptions about the world of international politics. A “community” is much more than a “sphere” (or another similar term) of international politics—terms for international politics that at least try to be neutral in their assumptions about which actors have legitimate authority to act on behalf of other international actors. The idea of an “international community” deliberately invokes social bonds of community, typically bearing unstated assumptions about authority and legitimacy in a social sense, and not a merely political one. The legitimacy of these assumptions is often precisely the issues at stake in international disputes. Talking about the “international community” too often assumes the conclusion as to who has legal, political, and moral authority to decide, act, bind, and enforce.

gal aspects of IHL but also the broader environment of international politics. Consistent with this approach (which I believe is consistent with Professor Blum's approach), we examine certain political and institutional issues that are part of the mechanisms by which IHL evolves, rather than detailed legal rules or legal regimes of the law of war.<sup>13</sup>

This Commentary consists of three basic discussions. First this Commentary examines the most important claim of *The Paradox of Power*—the gradual rise of the principle of humanity to become the fundamental legal norm underlying IHL. This involves, however, understanding *The Paradox of Power* as an “ethics of war” and, specifically, a “public” ethics of war, which I believe is an important feature of Professor Blum's general methodology incorporating both law and ethics.<sup>14</sup>

Second, this Commentary explores general shifts in the conception of international politics, law, institutions, and actors that (arguably) took place during the period of the “post-Cold War” up to the present day. The focus here is about a fundamental political and legal process question: “who owns the rules of war?” The question is intended to identify the actors in the international sphere that have “ownership” of the processes that underlie the evolution of substantive IHL.

Third and finally, this Commentary asks whether the actors and processes that emerged and took center stage in the evolution of IHL in the post-Cold War period will continue to be the ones that “own the rules of war” in the post-post-Cold War—the present day and beyond. How might possible changes in the actors and processes in the post-post-Cold War affect the future evolution of IHL?

## II. THE IHL PRINCIPLE OF HUMANITY, *PRIMUS INTER PARES*

*The Paradox of Power* argues that IHL has gradually evolved to put the interests and protection of civilians or noncombatants—those not taking part in hostilities—at the center of the IHL.<sup>15</sup> IHL has gradually moved to make the principle of “humanity” the central concern of *jus in bello*.<sup>16</sup> This can be seen by looking at the long run of IHL development and IHL's trends. The substantive law of

13. See Blum, *supra* note 2, at 762–63.

14. *Id.* at 779–81 (describing how the “CNN Effect” and corresponding uses of social media shape the public's perception on the ethics of war and thus influence battlefield strategy).

15. *Id.* at 780–81.

16. *Id.* at 751–52 (citing Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 245, 249, 279 (2000)).

IHL—the rules of war—starts with a concern for limiting the harms of armed conflict, particularly with regards to civilians. Other fundamental principles of IHL (for example, military necessity; discrimination in targeting to distinguish between combatants and civilians; proportionality in balancing military necessities and anticipated civilian harms in targeting; and taking feasible precautions in attacks for the protection of civilians) do not disappear.<sup>17</sup> But the principle of humanity has come to be something like *primus inter pares* among these fundamental principles of IHL.<sup>18</sup>

In my view, *The Paradox of Power*'s claim about the evolution of IHL is quite correct. This might lead to a very short comment on *The Paradox of Power*: “I agree with Professor Blum, so we’re done here.” But rather than fully agree with Professor Blum and close this discussion, I want to take the opportunity afforded by this Commentary to ask the question of what the future might bring in the evolution of IHL. What is the future of IHL, if we assume that certain kinds of fundamental changes are, in fact, underway in the sphere of international politics?

It bears reiterating that this is not to dispute the claims of *The Paradox of Power* concerning IHL’s gradual consolidation around the principle of humanity and civilian protection. Nor is it to dispute, as *The Paradox of Power* says, that a core reason for the gradual consolidation of IHL around the principle of “humanity” is the rise over the last few decades of the norms and values of international human rights as the universal values and paradigms in international law; indeed, this new humanity-centered paradigm has become the “apex” value of international law and organizations.<sup>19</sup> The rise of this universal paradigm of international human rights has been accompanied by a rising perception that IHL ought to be considered a special case of international human rights law (IHRL).<sup>20</sup> An older conception of *jus in bello* saw rules for the

17. See generally *Fundamental Principles of IHL*, INT’L COMM. RED CROSS, <https://casebook.icrc.org/glossary/fundamental-principles-ihl> [<https://perma.cc/ECC6-L6GU>] (last visited Mar. 3, 2019).

18. *Primus inter pares* (“first among equals”) is my term for the relationship among these fundamental principles of IHL, not a phrase taken from *The Paradox of Power*. But I think it captures an important part of the relationship.

19. Blum, *supra* note 2, at 760–61. See generally Meron, *supra* note 16.

20. See generally MICHAEL WALZER, *JUST AND UNJUST WARS* 13–16 (1977) (arguing that the rules of *jus in bello* arise morally from an individual’s human rights, specifically the right to life). IHL in that case can be viewed as a special body of law within the broader category of IHRL. It can be seen as falling within IHLR whether or not one takes that view that IHL, as *lex specialis*, substitutes for the full body of human rights law in armed conflicts and sets it aside completely, or instead sees IHL as a specialized body of law within

protection of civilians as a kind of beneficial and benevolent protection conferred indirectly on civilians as a result of direct relations among sovereigns in armed conflict.<sup>21</sup> Today's conception, in contrast, puts the human rights of civilians at the moral and legal center of *jus in bello*.

Between 1990 and today, there have been many claims made about the legal and moral content of IHL—generally tending toward the expansion of IHL. There are claims, for example, about the proper legal interpretation and construction of the existing rules of IHL, and many claims as well that IHL has evolved new substantive legal rules. Claims of supposedly new substantive rules of IHL are often framed under rubrics of customary international law (CIL).<sup>22</sup> CIL arguments are sometimes framed within IHL itself, but sometimes they are framed through interpretations of IHL that draw upon concepts found in IHRL that are *also* claimed to constitute CIL.

Whether or not all these claims to new legal rules (or functionally new rules through interpretation and construction of IHL) are accepted as law, they generally run in the direction of establishing additional legal constraints on how parties to a conflict are permitted to fight. To be sure, not all of them are rules of constraint. Some of the most consequential and controversial give special permissions that differentiate among types of parties to a conflict. Perhaps the most notable among these are the special rules of AP I, Article 44(3), which protect the combatant status even of fighters (typically members of a non-state armed group) who do not wear uniforms or otherwise distinguish themselves from civilians, but instead conceal themselves up to the point of launching an attack, by comingling with civilians as a method of hostility.<sup>23</sup> This rule introduced by AP I appears on its face to lessen the protections afforded civilians. But the general trend of the rules (or

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IHRL that in some way is to be integrated with general human rights law, according to the circumstances of the armed conflict. Either is compatible with the idea that the root normative source of IHL is ultimately human rights, in both a moral and legal sense, and that a core normative issue (perhaps *the* core issue) of IHL is how the individual human right to life is to be given effect in the special circumstances of armed conflict.

21. See ROBERT KOLB & RICHARD HYDE, AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS 221–26 (2008) (crediting the increase in civilian protection to the International Committee of the Red Cross and the Geneva Convention IV).

22. FRANÇOISE BOUCHET-SAULNIER, THE PRACTICAL GUIDE TO HUMANITARIAN LAW 65–66 (Laura Brav ed., trans. 2002) (“Customary international law reflects certain practices that states follow in a repeated and consistent manner and that they accept as law (*opinio juris*).”).

23. AP I, *supra* note 6, art. 44(3); see generally Toni Pfanner, *Military Uniforms and the Law of War*, 86 INT'L REV. RED CROSS 93, 118–21 (2004).

claimed rules) introduced from AP I and beyond is to favor civilian protection.

Indeed, these claims about new customary rules or new interpretations of existing IHL might be thought of to be so sweeping so as to amount to an assertion that the IHL principle of humanity is not just “first among equals,” but that it is *the* fundamental principle of IHL, standing alone and above any other principles of IHL. The embrace by some actors in the post-Cold War international sphere of this much broader understanding of the principle of humanity arose in part because (especially as the human rights paradigm took hold in the post-Cold War period) the principle of humanity could be seen as the expression in IHL of the right to life of civilians.<sup>24</sup> This view of the principle of humanity in IHL leaves it far more unconstrained by other fundamental principles of IHL, particularly the principle of military necessity, than the *primus inter pares* view that I take to be the claim in *The Paradox of Power*.

Many of these new, more sweeping ideas of IHL’s supposed constraints on how parties fight arose in the period of the post-Cold War. The end of the post-Cold War period perhaps portends a shift in actors and processes that politically underlie the evolution of IHL. Who those actors are and what those processes turn out to be raise questions as to whether all the rules and interpretations that arose in the post-Cold War will survive. The principle of humanity as *primus inter pares* with other IHL principles compared with the principle of humanity in a “strong” sense—as in standing above the rest of IHL’s other principles—might well be tested in the future evolution of IHL. The kinds of changes this Commentary assumes for purposes of discussion are underway in the sphere of international politics involve deep shifts in the configuration of power, in two ways in particular.

The first shift is the relative decline of U.S. hegemony: its power, authority, legitimacy, and willingness to act in global affairs, on the one hand.<sup>25</sup> The second shift is the relative rise of new

24. See David P. Forsythe, *Human Rights in a Post-Cold War World*, 15 FLETCHER F. WORLD AFF. 55, 61 (1991); William I. Hitchcock, *The Rise and Fall of Human Rights? Searching for a Narrative from the Cold War to the 9/11 Era*, 37 HUM. RTS. Q. 80, 94 (2015) (“[E]ither human rights boomed in the 1970s because of the [C]old [W]ar or in spite of it.”). See generally International Covenant on Civil and Political Rights, art. 6, Dec. 19, 1966, 999 U.N.T.S. 171, 174 (“Every human being has the inherent right to life.”).

25. See Michael Cox, *Is the United States in Decline—Again? An Essay*, 83 INT’L AFF. 643, 645 (2007) (attributing potential decline to rising debt, the Vietnam War, and a complex global economy); Christopher Layne, *US Decline*, in US FOREIGN POLICY 420 (Michael Cox & Doug Stokes, eds., 2d ed. 2012) (concluding the United States lost its economic hegemon status and is still losing its military influence); Nick Bryant, *The Decline of US*

Great Powers, China and Russia especially, and a reassertion by these and other newly assertive Great Powers of the prerogatives of sovereignty in the sphere of international politics, institutions, governance, and law, on the other hand.<sup>26</sup> These assumptions might turn out to be correct to one degree or another, or they might turn out to be wrong. To the extent these assumptions (and the others raised below) prove true, they might portend large changes in IHL's future evolution as different political actors, with potentially different concerns and views about IHL, gain greater voice and influence; in other words, as this Commentary puts it, if these different actors gain potentially greater "ownership" of the rules of war.

Changes in the sphere of international politics assumed in this Commentary thus include: shifts in the global, long-run balance of power; a diminished global role for the United States; a retreat by the United States away from its traditional role as guarantor of last resort of (at least rough) global security and economic stability; shifts toward a multipolar world of jostling and competitive Great Powers; a shift of focus away from the (apparently never-ending) wars of the United States and its allies against non-state adversaries; changes toward a world with new weapons and military systems developing from emerging technologies such as artificial intelligence (AI) and cybertechnologies; and shifts in global political conditions toward a world of increased risks of serious interstate war, including the possibility of conflicts between Great Powers with near-peer capabilities in emerging technologies.<sup>27</sup>

This is a long and scary list of "fundamental" changes (possibly) underway in the international political sphere. The topics on this list have many differences between them, including the extent to which one or another might constitute a "fundamental change"

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*Power?*, BBC (July 10, 2015), <https://www.bbc.com/news/world-us-canada-33440287> [<https://perma.cc/727M-MXT9>].

26. Cox, *supra* note 25, at 651; Shirk, *supra* note 11, at 4; Ronald Steel, Opinion, *A Superpower Is Reborn*, N.Y. TIMES (Aug. 24, 2008), <https://www.nytimes.com/2008/08/24/opinion/24steel.html> [<https://perma.cc/LPN9-D93V>].

27. See Kenneth Anderson, *What Are the Implications of Emerging Technologies in AI-Driven Robotics and Automation for Globalization?*, LAWFARE (Apr. 9, 2017, 2:51 PM), <https://www.lawfareblog.com/what-are-implications-emerging-technologies-ai-driven-robotics-and-automation-globalization> [<https://perma.cc/47M3-5Z9J>] (discussing AI technology as "driving globalization forward in both economic and political senses"). Regarding a retreat by the United States from its global "guarantor of last resort" role, see Kenneth Anderson, *United Nations Collective Security and the United States Security Guarantee in an Age of Rising Multipolarity: The Security Council as the Talking Shop of the Nations*, 10 CHI. J. INT'L L. 1, 55–90 (2009).

and what a fundamental change even means in the sphere of international politics. It is hard to state exactly what kinds of changes in the sphere of international politics are deep and broad enough that it would make sense to talk about a change of kind in international relations and international politics rather than a mere change of degree. There are a variety of terms being used today to describe these changes and what they might be changing. We can talk, for example, of changes to the so-called “international system” or “international rules-based system” underwritten by the United States since 1945 or changes in international political conditions that have prevailed during the post-Cold War.<sup>28</sup>

However characterized, the broadly shared assumption is that at least some important changes are underway and are defining the post-post-Cold War era. It might have some important differences from the post-Cold War in terms of international politics, governance, global security, and law. Such differences, if they come to pass, have implications for the future of IHL—both its substance and how it is made.

### III. *THE PARADOX OF POWER* AND ITS INTENDED AUDIENCE: THE ACCEPTANCE OF IHL’S LEGITIMACY BY LIBERAL DEMOCRACIES AND THEIR MEMBERS

*The Paradox of Power* looks at the trajectory of IHL, not just as formal law, but also as a system of normative compliance and general legitimacy. One striking feature of *The Paradox of Power* is that it looks at IHL as a whole normative system, one that is dependent on a broadly shared sense of its legitimacy.<sup>29</sup> But it does so with respect to a particular audience, which is the world’s liberal democracies, considered both as states and as societies—rather than addressing itself to authoritarian or other non-democracies.<sup>30</sup> Even without trying to set strict criteria for which among

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28. One reason this Commentary finds it relevant to extrapolate from these assumptions about the post-post-Cold War world (rather than some more positive and cheerful set of assumptions) is that there is a strongly expressed view in the scholarly and public policy literature that something like this shift is indeed underway, however exactly it is characterized. See, e.g., Michiel Foulon, *Trade and Security in US Grand Strategy vis-à-vis China*, in AMERICAN HEGEMONY AND THE RISE OF EMERGING POWERS: COOPERATION OR CONFLICT 43, 55–57 (Salvador Santino F. Regilme Jr. & James Parisot, eds., 2018) (attributing American decline to economic crises and “reduced military posture”); Layne, *supra* note 25.

29. See Blum, *supra* note 2, at 751–52.

30. See ROD HAGUE & MARTIN HARROP, COMPARATIVE GOVERNMENT AND POLITICS: AN INTRODUCTION 259 (7th ed. 2007) (“The gradual implementation of the rule of law and due process is an accomplishment of liberal politics, providing a basis for distinguishing liberal from illiberal democracies, and both from authoritarian regimes.”); Mitchell Dean,

the world's nearly 200 countries are liberal democracies, this condition would seem to limit considerably the audience to which it is addressed.

Indeed, this limitation might be thought to make it rather too easy to reach a cheerful conclusion regarding the evolution of IHL. Is this focus on reasoned arguments directed to liberal democracies justified? My initial thought was no, but the justification for this narrowed focus became apparent as I gained a better understanding of the underlying nature of Professor Blum's project. Liberal democratic societies are, in an important sense, the *only* audience for the kind of normative reasoning that *The Paradox of Power* undertakes.

In the first place, the underlying purpose of *The Paradox of Power* is not to issue, so to speak, a "report card" on the historical successes and failures of IHL, one that considers all parties and their behaviors, saints and sinners alike, liberal democracies and despotisms together. Professor Blum proposes, rather, to assess the legitimacy of IHL; its historical, and likely future, direction; and what we might call its "sticking power."<sup>31</sup> While there are forms of argument that can and should be directed toward authoritarian and despotic regimes, they are not necessarily the ones most important to maintaining the legitimacy of IHL in liberal democratic societies. In these societies, a broad sense of the moral and political legitimacy of IHL that runs widely across society (among both elites and non-elites, though in possibly different ways) is important because helps provide a commitment to IHL over the long term and indeed across generations.

This general, diffuse, long-run social sense of the legitimacy of IHL is important to IHL's sticking power (not just as a moral ideal, but as concrete rule of law) and to further IHL's evolution toward the centrality of civilian protection.<sup>32</sup> The world's liberal democracies are the societies in which the general sense of IHL's normative legitimacy matters most and the places where such arguments likely have the greatest purchase. The evolution of IHL in the direction of greater civilian protection, in conjunction with the reality of the requirements for fighting wars, needs to have the greatest investment from "good guy states" rather than "bad guy

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*Liberal Government and Authoritarianism*, 31 *ECON. & SOC'Y* 37, 41 (2002) (comparing liberalism's priority of individual liberty and an accountable government with authoritarianism's willingness to overstep these interests).

31. See generally Blum, *supra* note 2, at 763–64 (explaining IHL's impact on wartime conduct and predicting its future effect on public perception about how warfare should be conducted).

32. *Id.* at 776–77; *cf. id.* at 782 (explaining how the populist turn may have an adverse effect on wartime constraints).

states.” This “buy-in” requires a general sense of assent from the members—the general public and their leaders—of liberal democracies.

To be sure, there will be arguments over what are good guy states and what are bad guy states. There will also be a question about the sticking power of legal rules and interpretations that are generally endorsed by the good guys (by the world’s liberal democracies, though not necessarily by the United States in every case) that the bad guys are disinclined to go along with. And it might be more difficult for particular rules to stick if the bad guys agree to certain rules but then, in the event of actual conflict, break the supposedly agreed-upon rules.

Considering the long arc of the history of IHL with regard to the world’s liberal democracies, Blum discerns certain general trends: (1) greater restraint in the conduct of war;<sup>33</sup> (2) greater protections in law and in actual fact for civilians; (3) greater legitimacy accorded certain fundamental IHL norms, notably in the treatment of civilians;<sup>34</sup> (4) internalization by militaries of the need to invest in the development of more precise weapons;<sup>35</sup> and (5) innovations in the planning and conduct of military operations, enabled partly through technological advances but also through increased attention to the planning and execution of military operations, with the legal standards of feasible “precautions in conducting attacks” in mind.<sup>36</sup> Perhaps most important, Blum discerns (6) a general internalization of a norm of “humanity” in the conduct of armed conflict, at least among the good guys and their democratic societies.<sup>37</sup>

*The Paradox of Power* attributes this generally positive evolution of IHL to three principal factors: first, the independent effect of IHL as “law” on the behavior of states;<sup>38</sup> second, the development of new weapons technologies enabling greater precision and, hence, greater discrimination in targeting in the IHL sense;<sup>39</sup> and third, the internalization and acceptance by liberal democracies of fundamental “norms,” which are broader than IHL legal rules, notably the primacy of “humanity” as underlying IHL and, hence, as being the fundamental moral guide to the evolution of

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33. *Id.* at 776.

34. *Id.* at 767–68.

35. *Id.* at 770–71.

36. *Id.* at 746, 753–54.

37. *Id.* at 752, 761.

38. *Id.* at 752, 756.

39. *Id.* at 770–71.

IHL in the future.<sup>40</sup>

Blum's overall assessment of the history of the internalization of moral norms of IHL into the broad values of liberal democratic societies is generally correct, as I have indicated. There are many variations and disagreements over how to interpret various aspects of those norms within and among democratic societies insofar as they are instantiated as actual legal rules. But seen from our high-altitude perspective, Blum is correct in her description of how liberal democracies and their members view the fundamental values of IHL; they have made the core of them their own.

#### IV. A "PUBLIC" ETHICS OF WAR THROUGH CATEGORIES OF LAW

Fundamental to *The Paradox of Power* is the idea that the development of IHL by liberal democracies requires that those societies internalize among their members a belief in the legitimacy of the overall moral project of IHL.<sup>41</sup> Fundamental, however, to internalizing a belief in IHL's deep moral legitimacy is a willingness to put it into the public sphere of liberal democracies—which is to say, undertaking to argue and persuade members of a society to embrace the legitimacy of IHL's broad motivating moral principles.

This is much more than just accepting the legal requirements of the "law" of IHL. It is part of what I understand Professor Blum to intend in distinguishing "law" from "norms." Her essential point in the distinction is that the legitimacy that is a feature of norms is more than just repeated legal obedience.<sup>42</sup> There is an irreducible psychological component to legitimacy that is more than simply repeated behavior; it has conscious and unconscious aspects that can't be reduced (in my view, at least) to outward behavior alone. The reasons for the repeated obedience include certain feelings about the "rightness" of the behavior and the "rightness" of adherence to the norm. Mere obedience, even repeated, is insufficient to constitute legitimacy. It seems to me that Professor Blum invokes something like this distinction here with regards to "law" and "norms" of IHL.

This brings us back to what I would describe as Professor Blum's commitment to a "public ethics of war" and not merely an

40. *Id.* at 752, 761.

41. *Id.* at 761–64.

42. *Id.* at 761–64 (explaining the continued legitimacy and recognition of IHL even among those states not subject to the jurisdiction of regional human rights courts); *cf. id.* at 760 (discussing the increasingly strict interpretation of the rules of distinction and proportionality by international humanitarian organizations).

“ethics of war.” This commitment is a prominent feature of *The Paradox of Power*, even if not described quite that way. It arises here because Blum deploys “law” and “norms” reflective of law to inform both the method and substance of her thinking.<sup>43</sup> Law as a general matter (with some important exceptions usually related to national security) has to be public in order to be counted as “the rule of law,” at least in the understanding of liberal democracies. But even if this is a public ethics of war on account of its invocation of “law,” we might still ask, why does it matter that it is public, and anyway, what does “public” here mean?

One reason it matters is that Professor Blum’s ethical discourse is directed to leaders as well as citizens and ordinary members of liberal democracies. Norms and law do matter to both leaders and citizens of the world’s liberal democracies; this is part of what she means by the necessity of legitimacy in sustaining IHL over the long run. Moreover, *The Paradox of Power* observes that the practice of war by liberal democracies is difficult to sustain as a matter of broad public support for a given conflict, unless the way in which a liberal democracy’s military forces conduct themselves in the conflict is perceived as “legitimate” among that society’s elites, on the one hand, and by its broad public, on the other.<sup>44</sup> It is not the only condition, but it is an important one. Over the long run, national security in today’s liberal democracies requires a general, even if diffuse, legitimacy, as perceived in society of the ends, means, and methods of conducting war. The general, diffuse legitimacy of IHL is an important part of that. As Professor Blum says, both law and norms have an essential role to play—and she is right to say that they are not the same thing.

Defending the legitimacy of the conduct today of a democratic society’s armed forces requires public expressions of the laws and norms at issue, often in multiple venues and manners. These expressions involve the conceptual and philosophical work that a scholar like Blum performs. It is a performance of “public” ethics because it articulates intellectual and moral frameworks that, with sufficient argument and debate, help establish the terms on which norms and legal rules of war can be considered legitimate.

The public ethics of war is expressed at one extreme through the scholar who helps articulate morally and legally defensible frameworks—public, yes, even if not always widely read in its scholarly form by the public because it is simply too difficult for broad public consumption. At the other end of the spectrum is the

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43. *Id.* at 749.

44. *Id.* at 762–64, 781–82.

public articulation and defense by government officials of a government's understanding of its norms and rules for the conduct of armed conflict and national security actions, which are a vital part of accountability.<sup>45</sup> The difficulty, and resulting public dissatisfaction,<sup>46</sup> with such official statements is that the secrecy legitimately required for national security also forecloses the opportunity to divulge, argue, or defend the basis for a policy. In between these two lies broad and open public debate—agreement and disagreement.

The giving of public reasons (subject to public democratic debate) underlying a liberal democracy's moral and legal framework for the conduct of war is a first step toward public legitimacy. But in the issues of IHL, the legitimacy of a regime of legal rules for armed conflict requires an articulation of the permissions it grants by resorting to lethal force in addition to the constraints it imposes. The most fundamental, defining permission of the law of war is its conferral of the lawful combatant's exemption from legal liability for acts that otherwise would constitute murder or similarly serious crimes.<sup>47</sup> The most fundamental, defining constraint of IHL is the prohibition against the direct targeting of civilians.<sup>48</sup> Neither of these is strictly a "norm" in Blum's sense; they are legal rules, as found, for example, in AP I, Article 51(2).<sup>49</sup> But they point toward larger, more general norms of IHL. Norms both depend upon and foment the general social legitimacy of IHL in a liberal democratic society. Insofar, however, that liberal democracies

45. See e.g., *Attorney General Eric Holder Speaks at Northwestern University School of Law*, U. S. DEP'T OF JUST. (Mar. 5, 2012), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law> [<https://perma.cc/2Z4Z-WR BX>] (defending the Obama administration's targeted killing policy). Holder's speech, as well as the speeches of other senior officials and senior lawyers of the second Obama administration term, are analyzed as a kind of "public diplomacy" in KENNETH ANDERSON & BENJAMIN WITTES, *SPEAKING THE LAW: THE OBAMA ADMINISTRATION'S ADDRESSES ON NATIONAL SECURITY LAW* (2015).

46. See e.g., Press Release, Am. Civil Liberties Union, ACLU Comment on Eric Holder Speech on Targeted Killing Program (Mar. 5, 2012), <https://www.aclu.org/news/aclu-comment-eric-holder-speech-targeted-killing-program> [<https://perma.cc/7RPZ-RKSW>] (rejecting Holder's speech).

47. See *Rule 3. Definition of Combatants*, ICRC IHL DATABASE, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule3](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule3) [<https://perma.cc/MQD3-HQNX>] (last visited Mar. 3, 2019) ("All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel.").

48. See *Rule 5. Definition of Civilians*, ICRC IHL DATABASE, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter1\\_rule5](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule5) [<https://perma.cc/YN9S-8JT9>] (last visited Mar. 3, 2019) ("Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians.").

49. As Article 51(2) says: "The civilian population as such, as well as individual civilians, shall not be the object of attack." The legal rule is categorical and admits of no exceptions. It is a specific legal rule that points to a much larger moral and legal norm of IHL about the human rights of civilians, even in armed conflict. See AP I, *supra* note 6, art. 51(2).

send their sons and daughters into harm's way in war, while also almost always entailing risks to civilians, the sense of IHL's legitimacy is coupled with the understanding that IHL necessarily provides a measure of *both* permission and constraint. This strengthens the sense that *The Paradox of Power* sees the rise of the principle of humanity in IHL as tied to a first-among-equals conception of the fundamental principles of IHL, rather than this principle of humanity gradually becoming untethered by other constraining principles such as the legitimate requirements of military necessity.

Put differently, an evolution of IHL toward an understanding of the principle of humanity as standing above and supplanting other fundamental principles of IHL—untethered and unconstrained in its demand that parties to a conflict create no civilian harms—will not necessarily be regarded as legitimate even by liberal democratic societies, or at least the ones in which there is a serious possibility of engaging in war. An ethics of war consisting only of constraint is unlikely, at least in my view, to maintain long term legitimacy within the liberal democracies that accept the possibility of engaging in serious armed conflict.

In today's world, normative frameworks of both *jus in bello* and *jus ad bellum* must evolve and adapt to changing circumstances, but their long run legitimacy rests in part on the articulation of a public ethics of war that is argued and justified within the public sphere of liberal democracy. It requires public reasons that offer a principled account of the norms that permit and constrain the use of force and the conduct of hostilities. The broad internalization of the legitimacy of IHL by liberal democratic society, accepted as norms and law, requires that they be articulated publicly—and that they be available for debate, persuasion, acceptance, or even rejection based on their force of reason.

Lastly, however, it bears noting that not all ethics of war are public in the sense described above. Consider the articulation of a private ethics of war that addresses only an individual's private and personal moral evaluation of whether it is permissible to fight in a given conflict. This might have great value in the case of an individual; for a religious believer, for example, it might be a private ethics by which to evaluate the justness of a cause in deciding whether to fight. The stakes for an individual believer might be very high—at the most extreme, one's soul in the judgment of a God who makes it a mortal sin knowingly to fight on the unjust

side.<sup>50</sup>

A private ethics of war, in its strongest form, focuses on an individual and that person's decision to fight. This is not, however, the most important ethics of war. The most important assertions of an ethics of war are those that are *public*, not private. These are the kind that Professor Blum invokes through her use of the categories of the law of war. Decisions, rationales, permissions, and constraints in war are public because they are social.<sup>51</sup> A public ethics of war, and the most important expressions of the ethics of war, are always and necessarily social because war is an inherently and irreducibly social activity.

#### V. SOVEREIGN STATES AND THE PROCESSES OF IHL EVOLUTION

The end of the Cold War unleashed immense energies and enthusiasm for international political idealism as well as hopes for new forms of global governance. These hopes were largely conceived around liberal internationalism as the ideal of global governance. "Liberal internationalism," according to Francis Fukuyama's useful definition, meant gradually displacing the anarchy and lawlessness of individual sovereign states in international politics with global governance based upon the rule of international law, policed and enforced by international organizations under the U.N. system.<sup>52</sup> This meant the diminution of the prerogatives of sovereign states and a concomitant increase in the power and authority of the U.N.'s public international organs, including the ability to enforce international law against individual sovereigns.

The political climate in the 1990s, specifically after the end of the Cold War, the fall of the Soviet Union, and the First Gulf War, led to international NGOs becoming increasingly active in international venues and as a presence in the global media, engaging with all these matters and more. The NGOs were particularly visible in the fields of human rights, IHL, and ICL.<sup>53</sup>

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50. See, e.g., Jerry Herda, *Is Killing Enemy on Battlefield a Sin?*, CATH. HERALD (Sept. 19, 2013), <https://catholicherald.org/special-sections/myfaith/is-killing-enemy-on-battlefield-a-sin/> [<https://perma.cc/5JAD-CCLH>] (distinguishing between justified killing and murder).

51. See Blum, *supra* note 2, at 776–81 (reviewing the effect of social and cultural norms on the law of war).

52. FRANCIS FUKUYAMA, *AFTER THE NEOCONS: AMERICA AT THE CROSSROADS* 7 (2006) (setting out liberal internationalism as one of four leading paradigms of American foreign policy, and characterizing "liberal internationalists" as those who "hope to transcend power politics altogether and move to an international order based on [international] law and institutions").

53. Elsewhere I have written at length about the specific political and social processes

Throughout this period, international human rights were gradually overtaking even the traditional goal of world peace as the “apex value,” so to speak, of international organizations, international politics, and international law.<sup>54</sup> NGOs provided intellectual and political leadership within the sphere of international politics on all these fronts. International NGOs emerged in the 1990s as actors able to lead and set the global agenda—despite their lack of sovereign status—on some important issues of human rights, including issues related to IHL. They claimed for themselves and the issues they championed a moral legitimacy grounded in claims of universal human rights. Moreover, compared to the “universal” grounds of human rights, the authority of sovereign states seemed merely parochial rather than morally universal, partial rather than morally impartial, and self-interested rather than morally disinterested (or, rather, interested on behalf of everyone equally). Since the leadership of the U.N. in this same period was coming to see itself as an instrument for pursuing the “universal” values of all peoples of the world, it had reasons to see international NGOs as a natural ally. International NGOs would mobilize global public opinion and transnational people-power on issues framed as matters of universal human rights, and the U.N. and its officials would provide the venue and institutional framework. The 1990s success of the International Campaign to Ban Landmines is a prime example.<sup>55</sup>

What each of these actors, the institutional U.N. and international NGOs sought from each other was, however, more than just an ally and political support. The institutional U.N. sought to overcome the limitations of authority conferred by sovereign states; the institutional U.N. sought a governance role above and beyond that delegated by sovereign member-states, but it lacked any obvious alternative grounds of legitimacy for that authority. The U.N. and

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that led to the rise of international NGOs as actors undergirding claims to the governance legitimacy of the U.N., particularly as these claims expanded in the 1990s. See Kenneth Anderson, “Accountability” as “Legitimacy”: *Global Governance, Global Civil Society and the United Nations*, 36 BROOK. J. INT’L L. 841, 846–51 (2011); see also *International Criminal Law*, INT’L JUST. RESOURCE CTR., <https://ijrcenter.org/international-criminal-law/> [https://perma.cc/K7WR-4G4A] (last visited Mar. 3, 2019).

54. See KENNETH ANDERSON, *LIVING WITH THE UN: AMERICAN RESPONSIBILITIES AND INTERNATIONAL ORDER* 218 (2012).

55. For example, the International Campaign to Ban Landmines was the first time NGOs banded together through the use of the internet and emerging technologies to gain support and momentum to eventually forge a treaty banning landmines. The success of the project, with non-sovereign actors at its core, did not go unnoticed by Secretary General Kofi Anan and his advisors, who in those years actively sought a source of legitimacy for the institutional U.N. that did not “run through” sovereign, member-states of the U.N. See Anderson, *supra* note 53, at 854.

its leading officials saw in the international NGOs a source of legitimacy on the basis of NGOs as “representing” the peoples of the world—distinct from, and often in opposition to, the sovereign states that governed those same peoples. Unsurprisingly, international NGOs were happy to provide that legitimacy and act as though they were the representatives of the world’s people. The U.N.’s view of NGOs as the representatives of the world’s peoples provided it with an alternative path to governance legitimacy, one not dependent on the authority of sovereign states. The U.N. and its officials reciprocated by conferring important legitimacy on the NGOs; they had implicit backing by organs of the U.N. to have some recognized, legitimate role in global governance as representatives (functionally if not in formal international law) of the world’s peoples. NGOs were both the recipient of legitimacy *from* the U.N. and grantor of legitimacy *to* the U.N., as representatives of the world’s peoples.

There is, of course, a problem of circularity here: a mutual admiration society of two, the NGOs and the U.N., in which each lacked a certain legitimacy for the role it sought in the post-Cold War period, and which each claims to resolve by granting legitimacy to the other. The institutional U.N. sought to elevate the U.N.’s own ideological claims to governance by treating NGOs as the locus of the legitimate representation of the world’s peoples, giving consent to the governance role of the U.N. The NGOs, for their part, elevated their own self-conception by treating themselves, and inviting the U.N. and the rest of the world to treat them, not merely as international NGOs—particular activist organizations representing, not whole populations or peoples of the world, but instead merely their own political agendas—but instead as something called “global civil society” which, whatever else it meant, offered an ideological argument to bolster NGO claims to “represent” the peoples of the world on at least some matters.<sup>56</sup> In the later years of the 1990s and later, the inflated claims made for global civil society came under challenge, at least insofar as such terms overtly meant claims of NGOs to represent the peoples of the world—a challenge succinctly summed up by the question, “who elected the NGOs?”—and international NGOs tempered claims to “represent” the world’s peoples, though without giving up their claims to an augmented role in governance processes at the U.N.

This is a way of describing the evolution of ideals of global

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56. See Anderson, *supra* note 53, at 858.

governance focused on two actors: the institutional U.N. and international NGOs. But, important as it is for understanding certain features of U.N. processes even today, it leaves out a key actor, or class of actors—sovereign states. After all, the ascent of the authority of international organizations (the institutional U.N.) as supranational governance bodies would necessarily mean a concomitant decline in the power and authority of States, both inside their own borders and with respect to their own populations, as well as in the wider globalized world.<sup>57</sup> In the early post-Cold War years of the 1990s, the most relevant categories of sovereign states for these purposes could be roughly broken into three: the United States as global hegemon; the world's liberal democracies, whose governance model seemed vindicated and the model to be established everywhere; and states, particularly Russia and China, which were being urged by advocates of both liberal democracy as the internal model for states and liberal internationalism as the model for global governance, to reform themselves politically and economically as market-based, liberal democratic societies.

The focus of this Commentary with respect to sovereigns and sovereignty today in processes of global governance is, for reasons that are likely obvious, on Russia and China. In today's terms, they constitute the challenge to the post-Cold War order that, in terms of global security, at least, seek to challenge the international political understandings that emerged in the 1990s and beyond, with the tacit or explicit authority of the United States, in its unique post-Cold War role. They also present the most important challenge, implicitly or explicitly, in practical political terms, to the processes and substance of the evolution of IHL. They are plainly, at this date, "revisionist powers," emerging or re-emerging Great Powers seeking to revise at least parts of the post-Cold War order.

Understanding how Russia or China might challenge, not just parts of the post-Cold War global security order, but additionally processes and substance in the evolution of IHL that emerged in post-Cold War period requires saying something about their international political position in the years after the end of the Cold War. This discussion is necessarily a matter of thumbnail sketches of complex political positions and debates. It starts with Russia and then considers, more briefly, China.

The Russian Federation, emerging from the wreckage of the

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57. See *id.* at 863. See, e.g., Antonio F. Perez, *Who Killed Sovereignty? Or: Changing Norms Concerning Sovereignty in International Law*, 14 WIS. INT'L L. J. 463, 470–72 (1995).

Soviet Union, found itself throughout the 1990s politically prostrate and weak with regards to international politics, even as it struggled with adopting a stable internal political model—whether liberal democracy or some form of authoritarianism. It needed the economic and political goodwill of the Western liberal democracies to stay afloat in a new, post-Cold War world. It found itself under pressure to affirm liberal democracy internally and, externally, a model of international governance the levers of which, in political effect, were firmly in the hands of the Cold War’s winners, the United States and its allies, particularly its NATO allies.

Russia strove on the international stage to maintain appearances of mattering politically; after all, it had nuclear weapons and a permanent, veto-bearing seat on the Security Council. But it was, in effect, too weak to object to political actions favored by the United States and its allies; and it was not really in a position to contest (even on matters where it might have strong views) legal positions emerging in international venues challenging the prerogatives of sovereignty, and legal positions emerging regarding IHL. By the 2000s, and especially by the 2010s, internal Russian politics had resolved itself in favor of internal authoritarianism, and an external opposition to important aspects of the post-Cold War security order. The role of Russia in the world today, however exactly one describes it, is a long way from the 1990s, but it is also a long way from the early period of Putin rule, in which Putin himself entertained the possibility of Russian membership (in some form) in NATO.<sup>58</sup>

Geopolitically, Russia today is set against U.S. global hegemony and NATO’s de facto claims of status quo hegemony in what Russia regards as its “near abroad,” an area believed by the political and military leadership in Russia to properly constitute a regional Russian hegemony.<sup>59</sup> (It includes, not surprisingly, Georgia and Ukraine, or at least parts of them). Russia is also challenging the global hegemony of the United States in areas far outside of the near abroad. Russia’s intervention in the Syrian conflict on the side of the Assad regime, against the policies of the United States and its NATO allies, which early on called for Bashar al-Assad’s downfall, put Russia squarely at the center of a key dispute with

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58. Gianpaulo Coletti, *Putin Considered Joining NATO*, UKDJ (Apr. 25, 2018), <https://ukdefencejournal.org.uk/putin-considered-joining-nato/> [<https://perma.cc/R67F-NXD8>].

59. Erika Dailey, *Human Rights and the Russian Armed Forces in the ‘Near Abroad’*, 5 HELSINKI MONITOR, no. 1, 1994, at 11, 11.

implications for global security.<sup>60</sup> This is so, notwithstanding that the situation has been (from the standpoint of U.S. policy and that of its allies) confused from the beginning. The war features multiple warring parties representing everything from Iran to ISIS, and inconsistent, if not flat-out contradictory, political goals on the part of the United States and its allies (defeating ISIS, bringing down Assad, countering Iran, and so on).<sup>61</sup>

Russia has played multiple roles in the Syrian conflict as well: protector of the Assad regime in the United Nations, including the Security Council; negotiator and broker over the Assad regime's chemical weapons;<sup>62</sup> active participant in the conflict(s) as, in effect, the Assad regime's air force against the rebels and rebel-held towns;<sup>63</sup> sometimes-on, sometimes-off ally of the United States and the coalition against ISIS,<sup>64</sup> and more. Whatever Russia's exact political calculations (probably shifting over the years, in any case) with regards to its intervention in the Syrian conflict, Russia is again an un-ignorable player in the global politics of war and peace, in ways and places far beyond Russia's own borders, and in opposition (most of the time) to the United States and its allies. In at least some ways, it is Russia reasserting itself as a Great Power, a power whose status is cemented, in part, by its challenge to U.S. hegemony and its expression in the post-Cold War era.

Along with the geopolitical challenge to the United States and its allies, however, Russia also represents an important challenge to the hopes and dreams of liberal internationalist global governance—at least insofar as liberal internationalism, as an ideal and ideology of governance, stands for a diminishing of sovereign power in international politics, in favor of governance through international institutions. Russia's view is, on the surface at least,

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60. Eric Engle, *A New Cold War? Cold Peace. Russia, Ukraine, and NATO*, 59 ST. LOUIS U. L. J. 97, 168–70 (2014).

61. *Id.*

62. Patrick Wintour, *Syria: Western Nations Seek to Bypass Russian Veto at UN*, GUARDIAN (Apr. 24, 2018), <https://www.theguardian.com/world/2018/apr/24/syria-western-nations-may-look-to-bypass-russian-veto-at-un> [<https://perma.cc/QFB4-D5PG>].

63. Titwane & Int'l Crisis Grp., *Surviving in Syria's 'Forgotten Province'*, ATLANTIC (Apr. 2, 2018, 12:00 AM), <https://www.theatlantic.com/international/archive/2018/08/idlib-rebels-assad-syria/565160/> [<https://perma.cc/7DZ9-VGFD>].

64. See Ryan Browne, *Russia Hindering Fight Against ISIS in Syria, Says Coalition Official*, CNN (Jan. 8, 2018), <https://www.cnn.com/2018/01/08/politics/us-russia-hindering-isis-fight-syria/index.html> [<https://perma.cc/X3FX-D5GM>]; Tom O'Connor, *U.S. and Russia Begin Last Battles Against ISIS in Syria as Threat of Conflict Between Them Rises*, NEWSWEEK (Sept. 11, 2018, 3:52 AM), <https://www.newsweek.com/us-russia-begin-final-missions-defeat-isis-syria-threat-conflict-rises-1116465> [<https://perma.cc/7DJQ-P3US>].

strongly in favor of international law—but it is a view of international law that might best be understood as sovereign-centric and insistent on sovereign prerogatives. This is particularly true on a very broad reading of the principle of “non-interference” in a state’s internal affairs and on matters of human rights in its internal society. The emphasis on international law being a body of law that lies in the hands of sovereign states strongly suggests, though evidence in practice is still lacking, that Russia would likely tend to be unfavorable, generally and on principle, toward international advocacy NGOs in the international system.<sup>65</sup>

Perhaps some evidence of Russia’s views over the long run can be seen in the fact that Russia under Putin has largely been purged internally of foreign NGOs.<sup>66</sup> These foreign NGOs often worked in partnership with local Russian NGOs on such issues of human rights, but the Putin regime has put great pressures on local NGOs, as well as shutting down independent media and press over the last decade.<sup>67</sup> There are reasons, in other words, to wonder whether Russia is likely to be favorable to international actors and processes that purport to be formally or informally involved in the formation of international law unless they are, in the most traditional sense, either sovereign states or international organizations and their organs acting as conveners of negotiations and discussions of sovereigns.

Likewise, there are reasons to wonder whether Russia accepts some widely-held understandings and interpretations of IHL that largely emerged in the post-Cold War period and particularly in the 1990s. These might well include understandings and interpretations of AP I’s rules of targeting. For example: Russia’s targeting practices in its air operations in Syria might certainly raise questions as to what it thinks is lawful with respect to principles of discrimination, proportionality, and precautions in attack. While

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65. See generally Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks*, 118 HARV. L. REV. 1255, 1264 (2005) (book review) (describing NGOs and their involvement in global governance).

66. Lisa Cornish, *NGOs, Syria, and China: Insights into Russia’s Foreign Politics*, DEVEX (Apr. 17, 2018), <https://www.devex.com/news/ngos-syria-and-china-insights-into-russia-s-foreign-politics-92537> [<https://perma.cc/33JE-QY4Y>]; Ivy Mungcal, *Is Russia Clamping Down on Foreign-funded NGOs?*, DEVEX (July 3, 2012), <https://www.devex.com/news/is-russia-clamping-down-on-foreign-funded-ngos-78595> [<https://perma.cc/MUN6-A6EP>].

67. Jonathan Becker, *Lessons from Russia: A Neo-Authoritarian Media System*, 19 EUR. J. COMM. 139, 147–51 (2004), <https://journals.sagepub.com/doi/pdf/10.1177/0267323104042908> [<https://perma.cc/U8MV-HZ6N>]; Taedong Lee et al., *Media Independence and Trust in NGOs: The Case of Postcommunist Countries*, 41 NONPROFIT & VOLUNTARY SECTOR Q. 8, 15–16 (2012).

it is true that the United States, most notably, has neither signed onto AP I as a treaty nor accepted the widest and strongest limitations on targeting that have gained traction as the best or most authoritative interpretations of IHL's targeting law,<sup>68</sup> as *The Paradox of Power* notes, U.S. practice brings it close to the views of its allies, even if as mere policy and not law.<sup>69</sup> It is unclear what Russia's formal views of such core areas of IHL are today or will be in conflicts into the future.

There are two main possibilities here with regards to the future: One is that Russia has genuine, good faith objections to the status of some (or many) legal rules, constructions, or interpretations of treaty rules, or to the legal status of some (or many) supposed rules of customary law in IHL. Insofar as its view is (or might turn out to be, if ever made the subject of public statement by the Russian government) that only states make international law, whether treaty law or CIL. Moreover, international law comes into force (on this view) only by the express assent of states, (which seemingly would present a challenge to some of the CIL rules of IHL that have supposedly come to be law during the post-Cold War period). Russia, it might say, was prostrate, weak, and ignored as a sovereign in the post-Cold War era in which international NGOs were most active in promoting supposedly authoritative and binding views of IHL, especially in the 1990s. Particularly with regard to supposed rules of IHL that are not simply the plain language of a treaty—customary law, and interpretations and constructions of treaty or customary law—Russia might, in fact, turn out over time to have very different views.

The second possibility is, simply put, the “bad faith” option. Russia might be happy to go along, on the diplomatic surface, with nearly anything that, during the post-Cold War, was announced as new rules of IHL. And it might be happy to go along with ever more constraining rules of IHL into the future as well; Russia might be willing, for example, to accept and sign newly negotiated IHL weapons conventions (though possibly not). It might be willing to go along publicly, however, because it will decide whether or not to honor the rules when the relevant moment arises in armed conflict.

Moreover, Russia might turn out to be only too happy if negotiations resulting in the development of new law of IHL commits potential adversaries (such as the United States or NATO states)

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68. See 2 SEAN D. MURPHY, UNITED STATES PRACTICE IN INTERNATIONAL LAW 259 n.55 (2005).

69. See Blum, *supra* note 2, at 746.

to restrictions on how they conduct hostilities, in the name of increased civilian protection under the principle of humanity. Russia's reason, however, is that it will insincerely and in bad faith make promises—and then break them when convenient, though presumably with as much ambiguity as it can muster as to what in fact occurred. Promising in bad faith and then breaking the promise, of course, has always been a possibility with many sovereigns taking part in IHL treaty negotiations over the long history of IHL. States such as the United States and its allies have always had to take the possibility of bad faith into account in the negotiation of new IHL rules.<sup>70</sup>

The difficulty is that the attention of the United States and its allies in the post-Cold War international environment has been directed not so much toward those not-so-friendly actors (if not actual adversaries) like Russia, but toward those that took the vanguard role in the evolution and catalyzation of IHL and other areas of international politics—i.e., international NGOs, international organizations and their officials, “global public opinion,” and other (mostly) non-sovereign actors.

Though the post-Cold War has given way to the post-post-Cold War, these non-sovereign actors continue to regard themselves (and largely continue to be regarded) as the essential interlocutors with regard to sovereign states such as the United States in these debates over the evolution of IHL.<sup>71</sup> They still largely frame the agenda of IHL's evolution; sovereigns such as the United States are largely reactive, particularly in what might be called “public diplomacy”—the kind of diplomacy that arises from a liberal democratic county engaging in developing and articulating a “public ethics of war.”<sup>72</sup> It is difficult for the United States or its allies to address either of these two possibilities for Russian behavior with respect to IHL's evolution: Russia's (possibly) good faith objections to some of the content of IHL; and the (all too real) concern that Russia might agree to one thing or another in bad faith, in order to induce the United States and others to constrain themselves to their detriment.

These suggestions about possible future directions of the processes and actors by which IHL evolves are variations of the basic

70. See generally Barry O'Neill, What Does it Mean for Nations to “Negotiate in Good Faith”? 2–3, 11 (Mar. 2001) (draft) (on file with the Center for International Security and Cooperation at Stanford University) (detailing several examples of alleged bad faith in international bargaining), <http://www.sscnet.ucla.edu/polisci/faculty/boneill/goodfaith5.pdf> [<https://perma.cc/JF6P-8RWH>].

71. Philippe Ryfman, *Non-governmental Organizations: An Indispensable Player of Humanitarian Aid*, 89 INT'L REV. RED CROSS 21, 44–45 (2007).

72. See *supra* note 45 and accompanying text.

question of this Commentary: Who owns the rules of war? Whose views matter? Who sets the agendas of international debates over the evolution of IHL? And who are properly the interlocutors—the parties with which it matters that the United States and its allies engage in these international processes?

As Russia has reasserted itself on the world stage as a Great Power, showing itself interested in challenging the security hegemony of the United States and the status quo peace that it has enabled, the question eventually can't be avoided: do the processes and interlocutors in the evolution of IHL need to change in order to focus more directly the attention of the United States and its allies away from NGOs and other non-sovereign actors and toward their potential sovereign adversaries?

Much the same could be said of China as has been said of Russia, so the discussion will be much briefer. China was largely silent on these kinds of topics in the post-Cold War period. It was digesting the economic benefits of membership in the WTO and focused on internal reform and economic growth during the 1990s and even beyond.<sup>73</sup> The past decade or so, by contrast, has seen China looking to play a far more visible and dynamic role in the world, both globally and with regard to its own region. The points of challenge to U.S. hegemony are parallel in a sense to the challenge that Russia poses, except that China is far more powerful.

Most importantly, China's claims to vast areas of the oceans in the eastern Pacific are a direct challenge to the long-standing status quo that the United States has underwritten. The challenge is especially strong because, in many of the actual disputes over waters and islands with other states in the region, the United States does not necessarily have a view on their merits, except that any disputes must be settled peacefully, without resort to armed force (Taiwan is a different situation for the United States, if not for China, however).<sup>74</sup>

As noted with regard to Russia, it is hard to say with any confidence what China's views of the substance of IHL are on such important topics such as, for example, targeting law. It has neither a track record in armed conflict since the end of the Cold War<sup>75</sup> nor a detailed official expression of its views (at least not in publicly available sources in English). The optimistic view is that it views

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73. Franklin Allen et al., *Law, Finance, and Economic Growth in China*, 77 J. FIN. ECON. 57, 64, 77 (2005).

74. MICHAEL MCDEVITT, *THE SOUTH CHINA SEA: ASSESSING U.S. POLICY AND OPTIONS FOR THE FUTURE* 9–10 (2014), [https://www.cna.org/cna\\_files/pdf/iop-2014-u-009109.pdf](https://www.cna.org/cna_files/pdf/iop-2014-u-009109.pdf) [<https://perma.cc/8LC9-K7HV>].

75. That is, actual state practice.

the substantive rules of IHL more or less as they have been expressed by, for example, the International Committee of the Red Cross (ICRC). The case for believing that China is willing to go along with IHL interpretations and custom as developed in the post-Cold War by NGOs and other non-sovereign actors is perhaps bolstered by the fact that one of the two tracks for China engaging in large-scale conflict is, essentially, naval warfare on open ocean (where there are relatively few civilians), rather than the (mostly) land warfare of the kind that would ensue in a Russia–NATO conflict.<sup>76</sup>

China has not expressed strong public views on the substance of IHL, at least with regards to developments that might be viewed as over-reaching in substance and which emerged during the post-Cold War. As with Russia, it has not, thus far, challenged the diplomatic and international organization processes and actors in the formation and evolution of IHL, including the roles played today by non-sovereign actors. Perhaps these issues will not arise. On the other hand, its security challenge to U.S. dominance in the eastern Pacific is premised on advanced weaponry, including weapons based on artificial intelligence and robotics technologies, cyberweapons, and other areas of emerging technologies.<sup>77</sup> The application of IHL to many of these areas, such as autonomous weapon systems (AWS), for example, is unsettled and, moreover, some of these are matters on which non-sovereign actors, such as activist NGOs, have expressed strong views. In such areas as AWS it is not clear how China views the roles that have developed in the post-Cold War for non-sovereign actors.

Even if it is true that neither China nor Russia think there is a reason to object to the actors and processes that have developed

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76. See Yann-huei (Billy) Song, *China and the Military Use of the Ocean*, 21 OCEAN DEV. & INT'L L. 213, 227–29 (1990). The other track, however, is a Chinese invasion of Taiwan, in which all the IHL issues pertaining to hostilities on land, missiles and aerial bombardment, and urban warfare would be central. See J. Michael Cole, *A Chinese Invasion of Taiwan: What Happens? Who Wins?*, NAT'L INT.: THE BUZZ (Jan. 2, 2019), <https://national-interest.org/blog/buzz/chinese-invasion-taiwan-what-happens-who-wins-40327> [<https://perma.cc/GU6D-E7RE>].

77. See Ryan Hass & Zach Balin, *US-China Relations in the Age of Artificial Intelligence*, BROOKINGS (Jan. 10, 2019), <https://www.brookings.edu/research/us-china-relations-in-the-age-of-artificial-intelligence/> [<https://perma.cc/2LRZ-SPVB>]; Daniel Holl, *New US Intelligence Strategy Focuses on Cyber Threats and Artificial Intelligence*, EPOCH TIMES (Jan. 24, 2019), [https://www.theepochtimes.com/new-us-intelligence-strategy-focuses-on-cyber-threats-and-artificial-intelligence\\_2778123.html](https://www.theepochtimes.com/new-us-intelligence-strategy-focuses-on-cyber-threats-and-artificial-intelligence_2778123.html) [<https://perma.cc/8BUH-6MRQ>]; *America's New Attitude Towards China Is Changing the Countries' Relationship*, ECONOMIST (Oct. 18, 2018), <https://www.economist.com/briefing/2018/10/18/americas-new-attitude-towards-china-is-changing-the-countries-relationship> [<https://perma.cc/N4PN-HE9H>].

for the evolution of IHL during the post-Cold War,<sup>78</sup> that does not make it necessarily less of an issue for the United States and other liberal democracies. As noted, China (and Russia) might think the NGOs, which work in large part through public opinion and the mobilization of constituencies both in and across the world's liberal democracies, will cause the liberal democracies to accept greater constraints on their activities than China or Russia would accept, either in good or bad faith. Since the "law" at issue consists in large part of claims of customary law or claims of authoritative interpretations of IHL, China and Russia need not see themselves as bound, because these claims arose without their explicit sovereign consent in the post-Cold War period. Yet this potentially leaves the liberal democracies, and the United States most importantly, in the position of accepting *de facto* new constraints on their conduct of hostilities because they do care about public opinion (as they should)—without having even a formal (though possibly insincere) promise of reciprocity by their most threatening potential adversaries.

In such a case, and if the government of a liberal democracy such as the United States believed that some particular constraint was an unjustified concession to the principle of humanity at the expense of military necessity in the conduct of hostilities, then such a government needs to be willing to engage publicly in making a principled defense of its views on the rules and interpretation of IHL.<sup>79</sup>

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78. Insofar as that means objecting to the expanded role and perception of the legitimacy of international NGOs in the processes by which important areas of international law, including IHL that emerged in that period, especially during the 1990s.

79. A good example (though too far afield to take up in this Commentary) of an issue on which the essential "interlocutory stance" or the "attentional stance" of the liberal democracies (and the United States most of all) needs to shift is "autonomous weapon systems" (AWS) and how international law should apply to them. The liberal democracies need to shift *away* from attending to, and legitimating the role of, activist international NGOs, and *toward* engaging with and, as necessary, confronting Russia and China—the United States and its allies' likely adversaries in state-to-state conflict. AWS have been the subject of international diplomatic discussions since 2014. Paul Scharre, author of the leading analysis of AWS in international politics and security, correctly says that the "fact that the [AWS] issue's framing has been dominated by NGOs campaigning to ban 'killer robots' affects the debate." PAUL SCHARRE, *ARMY OF NONE: AUTONOMOUS WEAPONS AND THE FUTURE OF WAR* 350 (2018). Quite so. But the framing of the international debate over AWS to date has been dominated by NGOs in no small part because the states which this Commentary has loosely called the "good guy" states, starting with the United States, have been willing to allow the NGOs to do so. The current international diplomatic debate over AWS is a good example of a continuation of how the evolution of IHL has proceeded through the post-Cold War. Circumstances of the post-post-Cold War, however, might urge that the United States and its "good guy" allies insist that the focus, and the legitimate framing of the issue and policy alternatives, be shifted back to debates among Great Power states who might become

## VI. CONCLUSION

Drawing the discussion in this Commentary back to its opening sections and its discussion of how *The Paradox of Power* offers not just ethics of war but, through its invocation of law and public norms, a “public ethics of war.” The world’s liberal democracies must maintain the ability to engage in potentially large-scale conflicts with adversary Great Powers—and perhaps even to be able to deter them by being visibly prepared to wage war, if necessary, against emerging and re-emerging sovereigns, Russia and China most notably, that possess the latest technologies and weaponry. The United States and the “good guy” states will need to have established, in advance, their own public understandings of what can be defended as morally and legally acceptable under IHL in such conflicts. Which is to say, understandings not just of legal constraints aimed at civilian protection—but also of what measures of military necessity are lawfully available to them. Legitimacy matters, as *The Paradox of Power* so correctly tells us,<sup>80</sup> and legitimacy in liberal democracies in regard to *jus in bello* comes from the public articulation and defense of the balance between military necessity and humanity as fundamental principles. This describes the need for liberal democracies to articulate and debate, evolve and embrace, a genuinely public ethics of war.

The evolution of IHL within the larger historical context, I have suggested, gives reasons to be cautious about believing that the actors and processes in the evolution of the substance of IHL will, as the world moves into the post-post-Cold War, be able to continue in the way it developed in the post-Cold War period that began in 1990. This Commentary has suggested that the United States and other liberal democracies, faced with the challenge of Russia and China as authoritarian sovereigns, need to take account of shifting geopolitics and the requirements of military necessity in case of armed conflict with them. It matters that the good guys have the military tools and a legal regime that permits them to win. Winning matters, and so does military necessity.

This is a mere truism, of course, but it bears stating because, since the good guy states won the Cold War, a fundamental assumption has been that the United States and its allies could not lose an interstate war. Alas, among the new conditions characterizing the post-post-Cold War is the possibility that, at some point down the road, the United States and its liberal democratic allies

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adversaries in conflicts in which AWS of one kind or another could turn out to be militarily pivotal.

80. See Blum, *supra* note 2, at 777.

could lose a major war—and lose in part because they failed to defend in advance, both to potential adversaries and to their own publics, the moral legitimacy of the balance they strike between the principles of humanity and military necessity.

Members of liberal democracies will not regard as legitimate a public ethics of war that does not embrace the principle of humanity. But they embrace it as *primus inter pares*, not as the principle of humanity elevated above other IHL principles: elevated, perhaps, but *also* exposed to the vicissitudes of international politics and Great Power geopolitics, and, thus, vulnerable, naked, and alone. Those publics will not regard as legitimate a public ethics of war that does not accept the legitimacy of military necessity; but in any case, a principle of humanity untethered from other fundamental principles of IHL will not long survive on its own.

Taking account of these shifting conditions of the post-post-Cold war requires that the United States and the rest of the world's liberal democracies re-orient their thinking—their sense of who they fundamentally address and regard as their interlocutors—in the evolution of IHL. This is to say, the world's liberal democracies—on which *The Paradox of Power* is quite right to focus—need to take “ownership,” once again, of the laws of war.