Click on "CHAPTER BIBLIOGRAPHY" or "SPECIFIC BIBLIOGRAPHY" to see content

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I. Problems in the implementation of international law in general and international humanitarian law specifically

Introductory text

The general mechanisms of international law to ensure respect and to sanction violations are even less satisfactory and efficient regarding International Humanitarian Law (IHL) than they are for the implementation of other branches of international law. In armed conflicts, they are inherently insufficient and in some cases even counter-productive.

In a society made up of sovereign States, enforcement is traditionally decentralized, which therefore gives an essential role to the State that has been or may be the victim of a violation. Other States may choose to support the injured State, according to their interests – which should include the general interest of every member of that society to have its legal system respected.

This decentralized structure of implementation is particularly inappropriate for the IHL applicable to armed conflicts, for the following reasons. First, it would be truly astonishing if disputes arising out of violations of IHL were to be settled peacefully, at least in international armed conflicts. Indeed, IHL applies between two States because they are engaged in an armed conflict, which proves that they are unable to settle their disputes peacefully.

Second, a State can be directly injured by a violation of IHL committed by another State only in international armed conflicts.[1] In such conflicts the injured State has the most unfriendly relationship imaginable with the violating State: armed conflict. It therefore lacks the many means of preventing or reacting to a violation of international law that usually ensure that international law is respected. In traditional international law, the use of force was the most extreme reaction available to the injured State. Today it is basically outlawed except in reaction to a prohibited use of force. In addition, a State injured by a violation of IHL logically no longer has the option to react by using force because such a violation can occur only in an armed conflict, namely, where the two States are already using force. The only reaction still available to the injured State

within the traditional structure of law enforcement in international society would be an additional use of force consisting of a violation of IHL itself. While such reciprocity or fear of such reprisals may contribute to respect for IHL, reprisals have themselves been largely outlawed because they lead to a vicious circle, a “competition of barbarism”, and hurt the innocent, precisely those whom IHL wants to protect.

Third, in the face of an armed conflict between two States, third States may have two reactions. They can take sides for reasons which are either purely political or, if related to international law, derive from jus ad bellum. They will therefore help the victim of the aggression, independently of who violates the jus in bello. Other third States may choose not to take sides. As neutrals they can help ensure respect for IHL, but they will always take care to ensure that their engagement for respect for IHL will not affect their basic choice not to take sides.

This traditional decentralized method of implementing international law is today supplemented – and tends to be partially superseded – by the more centralized enforcement mechanisms provided for in the UN Charter. The UN enforcement mechanisms can be criticized as frail and politicized, but come closest to what one could wish to have as an international law enforcement system. However, besides being weak, driven by power more than by the rule of law and frequently applying double standards, this system is inherently inappropriate for the implementation of IHL. One of its supreme goals is to maintain or restore peace, that is, to stop armed conflicts, while IHL applies to armed conflicts. Hence, the UN has an obligation to give precedence to respect for jus ad bellum over respect for jus in bello. It cannot possibly respect the principle of equality of the belligerents before jus in bello. It cannot apply IHL impartially. Furthermore, the most extreme enforcement measure of the UN system, namely the use of force, is itself an armed conflict to which IHL must apply. Similarly, economic sanctions, which constitute the next strongest measure under the UN Charter, should be considered with care when used as a measure to ensure respect for IHL, as they often provoke indiscriminate human suffering.

Given the shortcomings of the general enforcement mechanisms, IHL had to provide many specific mechanisms of its own and adapt general mechanisms to the specific needs of victims of armed conflicts. Far earlier than other branches of international law, it had to overcome one of the axioms of the traditional international society and provide enforcement measures directed against the individuals violating it, and not only against the State responsible for those violations. For this reason, and also in order to take advantage of the relatively more efficient and organized national law enforcement systems, IHL had to make sure that its rules were known and integrated into national legislation. It recognized that the International Committee of the Red Cross, an external independent and impartial body that had already promoted its codification, had a particular role to play in its implementation. IHL also adapts the traditional mechanism of good offices through the codification of the Protecting Power system. Lastly, it specifies that the obligations it sets forth are obligations erga omnes by obliging every State Party to ensure respect by other States Parties – without specifying what that means.

The specific mechanisms established by IHL nevertheless remain embedded in the general mechanisms. They can only be understood within the general framework as developments or correctives of the general mechanisms. IHL is certainly not a self-contained system.[2] General mechanisms remain available alongside specific ones, for instance the methods for the peaceful settlement of disputes and the measures provided by the law of State responsibility – except those specifically excluded by IHL,[3] those incompatible with its purpose and aim and those general international law permits only as a reaction to certain kinds of violations.[4]

However, even the general and the specific mechanisms taken together cannot guarantee a minimum of respect for the individual in a situation of armed conflict. This can only be achieved through education, when everyone understands that in armed conflicts, even one's worst enemy is a human being who deserves respect.

FOOTNOTES

- [1] Legally, however, for the purpose of triggering the rules of State responsibility and taking the counter-measures it foresees, every other State party to the treaties of International Humanitarian Law might be considered as injured by its violations. This may be seen as resulting from the specific provision in Art. 1 common to the Conventions and Protocol I. See however the much more limited concept of injured State adopted by the International Law Commission in Art. 42 of the Draft Articles on State Responsibility [See International Law Commission, Articles on State Responsibility [Part A., Arts 42 and 48]].
- [2] As are, according to the International Court of Justice, the rules on diplomatic and consular relations (See Case on United States Diplomatic and Consular Staff in Tehran, Judgement of 24 May 1980, ICJ Reports 1980, pp. 4 ff., paras 83-87).
- [3] Thus, International Humanitarian Law prohibits reprisals against protected persons.
- [4] Thus the use of force is under the UN Charter a lawful reaction, in the form of individual or collective self-defence, only to an armed aggression and not to any other violation of international law.

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II. Measures to be taken in peacetime

Introductory text

Just as the preparations for the military and economic aspects of a possible armed conflict are made in peacetime, so must the groundwork for the humanitarian aspects, in particular respect for IHL, be laid before war breaks out. Soldiers – whatever their rank or responsibilities – need to be properly instructed in peacetime, i.e. not only by informing them of and explaining the rules but also by integrating the latter into routine training and manoeuvres in order to instil automatic reflexes. Without such training, the often very detailed rules of IHL regulating the various problems appearing in armed conflicts – and their delicate interplay with International Human Rights Law – will never be respected in armed conflicts.

Similarly, the whole population must have a basic understanding of IHL in order to realize that even in armed conflicts, certain rules apply independently of who is right and who is wrong, protecting even the worst enemy. Once an armed conflict, with all the hatred it feeds on and stirs, has broken out, it is often too late to teach this message. Thus, police forces, civil servants, politicians, diplomats, judges, lawyers, journalists, students who will fulfil those tasks in the future, and the public at large must know the limits constraining everyone’s actions in armed conflicts, the rights everyone may claim in armed conflicts, and how international and national news about armed conflicts has to be written, read and treated from a humanitarian perspective. [5]

Preparatory measures also include translating IHL instruments into national languages. Furthermore, if a constitutional system requires rules of international treaties to be transformed by national legislation into the law of the land for those rules to be applicable, such legislation must obviously already be adopted in peacetime.

In every constitutional system, moreover, implementing legislation is necessary to enable the national law enforcement system to apply the many non-self-executing rules of IHL. Owing not only to the length of any legislative process and the other priorities pressing upon a parliament when a war breaks out but also because courts have to be able to sanction war crimes in foreign conflicts and the misuses of the emblem in peacetime, such legislation must be adopted as soon as the State becomes a party to the relevant

instrument.[6]

Finally, certain practical measures must be taken by States for them to be able to respect IHL. Qualified personnel and legal advisors have to be trained in peacetime so as to be operational in wartime.[7] Combatants and certain other persons need identity cards or tags to be identifiable,[8] and these can obviously not be produced only when a conflict breaks out. Military objectives have to be separated, as far as possible, from protected objects and persons.[9] It is evident that a hospital, for example, cannot be whisked away from army barracks or a weapons factory when an armed conflict breaks out.

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1. Dissemination

GC I-IV, Arts 47/48/127/144 respectively;P I, Arts 83, 87(2) and 89; P II, Art. 19

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a. **training of police forces**

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2. Translation (if necessary)

3. Transformation (if necessary) into domestic legislation

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4. Legislation for application

Introductory text

In monist constitutional systems (most countries with the exception of those with an English constitutional tradition, Germany and Italy), IHL treaty rules are immediately applicable by judges and the administration. Specific national implementing legislation is thus not necessary. In all constitutional systems this is also the case for customary rules. However, this direct application is only possible for "self-executing" provisions of international treaties, i.e. rules that are sufficiently precise to provide a remedy in a given case. For all other IHL rules, and in dualist constitutional systems, national legislation must be adopted to make the rules operational.[10]

Even in countries in which the description of grave breaches in IHL instruments is considered to be sufficiently precise, no one can be punished for such behaviour by national courts unless the penalties have been stipulated in national legislation – otherwise the principle nulla poena sine lege would be violated. Furthermore, only national legislation can integrate those rules into the very different traditions of penal law concerning, for example, the elements of crime, defences, and inchoate or group criminality. Only national legislation determines which courts, military or civil, are competent to try violations and which national prosecutor and judge can effectively enforce the State's obligation to apply universal jurisdiction over war criminals, to extradite them or to provide mutual assistance in such criminal matters, including to international tribunals.[11]

IHL prescribes who may use the emblem of the red cross, the red crescent or the red crystal in peacetime

and in wartime, on which objects and in which circumstances, with the permission and under the control of the competent authority. Only national legislation can prescribe who this competent authority is and provide the necessary details.[12]

More generally, where IHL prescribes an obligation for the State to act, only national legislation can clarify who in the State, in a federal State or within a central administration, has to act. Without such a clarification, the international obligation will remain a dead letter – and will therefore be violated when it becomes applicable. National legislation is therefore the cornerstone of implementation of IHL.

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a. **self-executing and non-self-executing norms of IHL**

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- United States, Hamdan v. Rumsfeld

a. **particular fields to be covered** aa) penal sanctions GC I-IV, Arts 49/50/129/146 respectively

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bb)use of the emblem GC I, Arts 44 and 54; P III, Art. 6(1) [CIHL, Rule 141]

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- Cameroon, Law on the Protection of the Emblem and the Name “Red Cross”
- Ghana, National Legislation Concerning the Emblem
- United Kingdom, Misuse of the Emblem
- Burkina Faso, Law on the Use and Protection of the Red Cross and Red Crescent Emblems in Burkina Faso, 2003

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cc) composition of armed forces

5. Training of qualified personnel

P I, Arts 6 and 82 [CIHL, Rule 141]

CASES AND DOCUMENTS

- Australia/Afghanistan, Inquiry into the Conduct of Australian Defence Forces
- Israel, Report of the Winograd Commission [Paras 26-33]
- Afghanistan, Assessment of ISAF Strategy

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6. Practical measures

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Footnotes

- [5] The obligation to disseminate IHL is prescribed in GC I-IV, Arts 47/48/127/144; P I, Arts 83 and 87(2); P II, Art. 19
- [6] See infra, Introductory Text, II. Measures to be taken in peacetime, 4. Legislation for application
- [7] See P I, Arts 6 and 82
- [8] See GC I, Arts 16, 17(1), 27, 40, and 41; GC II, Arts 19, 20, and 42; GC III, Arts 4(A)(4) and 17(3); GC IV, Arts 20(3) and 24(3); P I, Arts 18 and 79(3)
- [9] See GC I, Art. 19(2); GC IV, Art. 18(5); P I, Arts 12(4), 56(5) and 58(a) and (b)
- [10] P I, Art. 80(1). GC I-IV, Arts 48/49/128/145 respectively and P I, Art. 84 prescribe that such legislation must be communicated to the other parties.
- [11] The adoption of national legislation to repress war crimes and to establish universal jurisdiction over them is prescribed by GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146 and P I, Art. 85.
- [12] Such legislation [See ICRC, Model Law Concerning the Emblem] is prescribed by GC I, Arts 42, 44, 53 and 54 and by GC II, Arts 44 and 45

III. Respect by the Parties to the Conflict

1. Respect

[CIHL, Rule 139]

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2009, pp. 251-270.

2. Supervision of their agents

[CIHL, Rule 139]

CASES AND DOCUMENTS

- Democratic Republic of the Congo, Conflict in the Kivus [Part III, paras 54-60]
- ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo [Paras 246-250]
- Autonomous Weapon Systems

3. Role of domestic courts

National courts largely contribute to defining IHL concepts. In order to apply IHL to a particular situation, they may indeed need to interpret its relevant concepts, insofar as the latter are not sufficiently self-explanatory. As the nature of armed conflicts and the situations that the courts have to handle evolve over time, it has become increasingly necessary to clarify or adapt IHL norms and rules. The clarifications developed in national case law also serve foreign courts confronted with similar situations. Likewise, however, they may lead to undesirable interpretations spreading around the world. Nevertheless, domestic courts can, in interpreting IHL norms, ensure that the national authorities respect IHL: they may declare government legislation or policies to be in contradiction with IHL and hence repeal them or ask that they be repealed. In many constitutional systems this presupposes that the IHL rules are first integrated into domestic legislation.

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- Romania, Voluntary Report
- Israel, Ayub v. Minister of Defence
- Israel, Al Nawar v. Minister of Defence
- Israel, Cheikh Obeid et al. v. Ministry of Security
- Israel, Cases Concerning Deportation Orders
- Israel, Ajuri v. IDF Commander
- Israel, Evacuation of Bodies in Jenin
- Israel, The Rafah Case
- Israel, The Targeted Killings Case
- Israel, Power Cuts in Gaza
- Israel, Detention of Unlawful Combatants
- South Africa, AZAPO v. Republic of South Africa
- The Netherlands, Responsibility of International Organizations

- United States, Habeas Corpus for Guantanamo Detainees
- United States, Public curiosity
- United States of America, Holder v. Humanitarian Law Project
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4. Enquiries (spontaneously or following complaints)

CASES AND DOCUMENTS

- Australia/Afghanistan, Inquiry into the Conduct of Australian Defence Forces
- Switzerland Acting as Protecting Power in World War II
- United Kingdom/Germany, Sinking of the Tübingen in the Adriatic
- Israel, The Targeted Killings Case [Para. 40]
- Israel, Human Rights Committee's Report on Beit Hanoun [Paras 67-75]
- Israel, Report of the Winograd Commission [Para. 46]
- ECHR, Isayeva v. Russia [Paras 30-98, 168, 182]
- Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 140-148]
- Somalia: Deeply Flawed Rape Inquiry
- ECHR, Al-Skeini et al. v. UK
- Afghanistan, Attack on Kunduz Trauma Centre
- Libya, NATO Intervention 2011
- United States, The US Plan to Mitigate Civilian Harm in Armed Conflicts

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5. Appointment of Protecting Powers

GC I-IV, Arts 8/8/8/9 respectively; P I, Art. 5

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IV. Scrutiny by Protecting Powers and the ICRC

1. The Protecting Power

Introductory text

Under international law, foreigners enjoy diplomatic protection by their home country. When such diplomatic protection is not possible because there are no diplomatic relations between the country of residence and the home country, the latter may appoint another State – a protecting power – to protect its interests and those of its nationals in the third State. This appointment is only valid if the three States concerned agree. IHL has taken advantage of this traditional institution of the law of diplomatic relations,[13] it has clarified and added to it for the purpose of implementing its rules, by prescribing that IHL "shall be applied with the co-operation and under the scrutiny of the Protecting Powers".[14] In an armed conflict such Protecting Powers must obviously be chosen from among neutral States or other States not parties to the conflict.

The Protecting Powers are mentioned in more than 80 provisions of the Conventions and Protocol I, in connection with the following tasks: visits to protected persons, consent for certain extraordinary measures concerning protected persons, the provision of information about certain other measures, supervision of relief missions and evacuations, reception of applications by protected persons, assistance in judicial proceedings against protected persons, transmission of information, documents and relief goods, and the offering of good offices. Most of these tasks are parallel to those of the ICRC. This duplication is intended, as it should lead to increased supervision of respect for IHL.

IHL obliges parties to international armed conflicts to designate Protecting Powers.[15] However, in practice, such designation is the main problem. Basically, all three States concerned must agree with the designation. According to the Conventions, if no Protecting Powers can thus be appointed, a detaining or occupying power can ask a third State bilaterally to act as a substitute Protecting Power. If even this does not work, the offer of a humanitarian organization such as the ICRC to act as a humanitarian substitute for a Protecting Power must be accepted. Protocol I has fleshed out the appointment procedure.[16] Nevertheless, in conformity with the cooperation-oriented approach needed for the implementation of IHL, no Protecting Power can act efficiently – and a neutral State will in any case be unwilling to act – without the consent of both belligerents.

Although Protocol I clarifies that the designation and acceptance of Protecting Powers do not affect the legal status of the parties or of any territory[17] and that the maintenance of diplomatic relations is no obstacle to the designation of Protecting Powers,[18] Protecting Powers have been designated in only five of the numerous armed conflicts that have broken out since World War II.[19] Even there, they played a limited role. In an international legal order marked by the idea – or at least the ideal – of collective security, where at least one side in an armed conflict is considered (or at least labelled) an outlaw, neutrality becomes an increasingly obsolete concept and neutral States willing and likely to be designated as Protecting Powers increasingly rare.

The ICRC, for its part, has no interest in acting as a substitute Protecting Power, as it can fulfil most of the latter's functions in its own right, without giving the impression that it represents only one State and not all the victims. For one of the rare functions which IHL confers only upon the Protecting Powers and not also upon the ICRC, that of being notified of and providing assistance in judicial proceedings against protected persons, the ICRC has managed to be recognized as a de facto substitute when there is no Protecting Power.

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- Switzerland Acting as Protecting Power in World War II

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b**. the system for appointing Protecting Powers** P I, Art. 5(1) and (2)

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- United States Military Tribunal at Nuremberg, The Ministries Case
- ICRC, Iran/Iraq Memoranda

a. **the possible substitute for the Protecting Power** GC I-IV, Arts 10/10/10/11 respectively; P I, Art. 5(3)-(7)
b. **the tasks of the Protecting Power** GC III, Arts 126(1); GC IV, Arts 76 and 143 GC III, Arts 71(1) and 72(3) GC III, Arts 65(2) and 73(3); GC IV, Arts 23(3), 55(4), 59(4) and 61; P I, Arts 11(6) and 70(3) P I, Art. 78 GC III, Arts 78(2); GC IV, Arts 30, 52 and 102 GC III, Arts 105(2); GC IV, Arts 42, 71, 72, 74; P I, Art. 45 GC IV, Arts 39 and 98 GC I, Arts 16 and 48; GC II, Arts 19 and 49; GC III, Arts 23(3), 62(1), 63(3), 66(1), 68(1), 69, 75(1), 77(1), 120(1), 122(3) and 128; GC IV, Arts 83 and 137; P I, Arts 33, 45 and 60 GC III, Arts 56(3), 60(4), 79(4), 81(6), 96(5), 100(1), 101, 104(1) and 107(1); GC IV, Arts 35, 42, 49(4), 71, 72, 74, 75, 96, 98, 105, 108, 111, 123(5), 129 and 145 GC I-III, common Art. 11; GC IV, Art. 12 GC I, Art. 23; GC IV, Art. 14

CASES AND DOCUMENTS

- Switzerland Acting as Protecting Power in World War II
- United Kingdom/Germany, Sinking of the Tübingen in the Adriatic
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aa) visits to protected persons

bb) reception of applications by protected persons

CASES AND DOCUMENTS

- British Policy Towards German Shipwrecked

cc) transmission of information and objects

dd) assistance in judicial proceedings

CASES AND DOCUMENTS

- Malaysia, Osman v. Prosecutor
- South Africa, S. v. Petane

2. The International Committee of the Red Cross (ICRC)

(*See infra*, The International Committee of the Red Cross (ICRC) and the Law)

Footnotes

- [13] Now codified in Art. 45 and 46 of the Vienna Convention on Diplomatic Relations of 1961.
- [14] See GC I-III, common Art. 8; GC IV, Art. 9. P I, Art. 5 has developed this system.
- [15] See P I, Art. 5(1)
- [16] See P I, Art. 5(2)-(4)
- [17] See P I, Art. 5(5)
- [18] See P I, Art. 5(6)
- [19] The Suez Crisis pitting Egypt against France and the United Kingdom in 1956; the conflict in Bizerte between France and Tunisia in 1961; the crisis in Goa between India and Portugal in 1961; the conflict between India and Pakistan in 1971; and the Falkland/Malvinas war between the United Kingdom and Argentina in 1982.

V. The obligation to ensure respect (Common Article 1)

Introductory text

Under Article 1 common to the Conventions and Protocol I, States undertake not only to respect (this is the principle pacta sunt servanda), but also to ensure respect for IHL. The International Court of Justice has recognized that this principle is part of customary international law and applies also to the law of non-international armed conflicts.[20] Under this principle, not only is the State directly affected by a violation concerned by and entitled to take measures to stop it, all other States not only may, but must take measures.[21] The obligations under IHL are therefore certainly obligations erga omnes.

The question is, however, which measures each State thus entitled and obliged may take under the law of State responsibility. The rules adopted on this question by the International Law Commission (ILC) recall that in case of a breach of an obligation owed to the whole international community, all States have the right to demand its cessation and, if necessary, guarantees of non-repetition, as well as reparation in the interest of the beneficiaries of the obligation breached.[22] As for counter-measures by these States, the ILC estimates that their lawfulness remains “uncertain”,[23] and it simply allows for “lawful” measures against the responsible State, without concluding when these measures are lawful.[24] Can each State take individually all the measures it would have the right to take as an injured State in the case of a “bilateral” violation? Can we even consider, under the special rule of Art. 1 common to the Conventions,[25] each State as injured by each violation of IHL? Or is there a need for coordination among the States entitled to take measures by

common Art. 1? Even Art. 89 of Protocol I provides no clear answer when it stipulates that in the face of violations States have “to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter”.

Arguably, under common Art. 1, a State injured by a violation[26] can take all measures to ensure respect afforded under general international law, so long as they are compatible with general international law (which excludes the use of force based on IHL)[27] and not excluded by IHL (such as reprisals against protected persons).[28] Even without admitting such counter-measures, it is clear that a State can – and therefore must – react to all breaches of IHL by retaliatory measures that do not violate its international obligations. No State is obliged to receive representations from another State, to conclude treaties with it, to support a State within an international organization or to purchase weapons from it. State practice is unfortunately not rich enough to determine the upper limits of how a State may or must “ensure respect”. As for the lower threshold, it is only certain that a State violates common Art. 1 if it encourages or promotes violations by another State[29] or dissident forces. The rules on State responsibility for internationally wrongful acts provide that a State must not recognize as legal a situation created by a grave breach of an imperative norm such as IHL, nor provide aid or assistance to maintain the situation.[30] Although absolute indifference also clearly violates the text of the provision, unfortunately it is common practice. Considering the number of States concerned by common Art. 1, and the number of cases to which it applies, we can say that it is the most frequently violated provision of IHL.

In conclusion, common Art. 1 indicates in legal terms the moral idea formulated by the starets in Dostoyevsky’s Brothers Karamazov that “every single one of us is [...] responsible for all without exception in this world”, that we are “responsible to all men, for all and everything, for all human transgressions – both of the world at large and of individuals”;[31] in IHL, this means that it is the shared responsibility of all States and of all human beings to grant a minimum of humanity to victims of armed conflicts.

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- European Union Guidelines on Promoting Compliance with International Humanitarian Law
- ICRC, Protection of War Victims
- UN, Guidelines on the Right to a Remedy and Reparation for Violations of International Humanitarian Law and Human Rights Law
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1. Scope

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- ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part A., para. 158]
- ICRC, International Humanitarian Law and the challenges of contemporary armed conflicts in 2015 [paras 274, 278, 285]

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2. Aim

3. Obligations of non-belligerents

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- European Union Guidelines on Promoting Compliance with International Humanitarian Law
- ICRC, The Challenges of Contemporary Armed Conflicts [Part A.]
- International Law Commission, Articles on State Responsibility [Part A., Arts 16, 40, 41, 48 and 55]
- ICJ, Nicaragua v. United States [Paras 116, 255 and 256]
- ICRC, International Humanitarian Law and the challenges of contemporary armed conflicts in 2015 [para. 276]

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- First Periodical Meeting, Chairman's Report

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- [20] See ICJ, Nicaragua v. United States [Paras 115, 216, 255, and 256]
- [21] ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part A., paras 158 and 159]
- [22] See Art. 48 of the Articles on State Responsibility and its commentary

- [23] Ibid, Commentary of Art. 54
- [24] Ibid, Art. 54
- [25] Ibid, Art. 55, “lex specialis”
- [26] Ibid, Arts 28-41
- [27] Ibid, Art. 50(1)(a)
- [28] Ibid, Art. 50(1)(c)
- [29] See ICJ, Nicaragua v. United States [Paras 115, 216, 255, and 256]
- [30] See International Law Commission, Articles on State Responsibility [Part A., Arts 40 and 41]
- [31] See DOSTOYEVSKY Fyodor, The Brothers Karamazov, Translated by Julius Katzer, Progress Publishers, vol. 1, 1980, p. 250

VI. Role of National Red Cross or Red Crescent Societies

Introductory text

The implementation of IHL is one of the key objectives of the International Red Cross and Red Crescent Movement. National Societies are particularly well placed to promote implementation within their own countries. The Movement’s Statutes recognize their role in cooperating with their governments to ensure respect for IHL and to protect the red cross, red crescent and red crystal emblems. National Societies’ contacts with national authorities and other interested bodies, and, in many cases, their own expertise on national and international law give them a key part to play in this field.

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Action by National Societies

National Societies can take a range of measures contributing to the implementation of IHL. These include:

1. Adherence to IHL instruments

Discussing adherence to IHL treaties with national authorities.

2. National legislation

Making national authorities aware of the need for IHL implementing legislation. Drafting national legislation and/or commenting on the national authorities' draft legislation.

3. Protection of the emblem

Promoting legislation to protect the emblem. Monitoring use of the emblem.

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Suggested reading:

- ICRC, *Study on the Use of the Emblems: Operational and Commercial and Other Non-Operational Issues*, Geneva, ICRC, 2011, 331 pp.

4. Dissemination of IHL

The Society's own dissemination activities. Reminding national authorities of their obligation to spread knowledge of IHL. Providing national authorities with advice and materials on dissemination.

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Suggested reading:

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5. Armed forces legal advisors and qualified personnel

Contributing to the training of advisors and personnel.

6. Medical assistance for conflict victims

In times of armed conflict, whether international or non-international, National Societies can play an important role in the implementation of IHL. As auxiliaries to the military medical services,[32] National Societies contribute significantly to the care of the wounded and sick. National Societies of neutral countries[33] also play a role in this field, either when they render assistance to a party to the conflict or when they serve under the auspices of the ICRC.

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- Ivory Coast, National Interministerial Commission [Arts 3 and 4]
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- [32] See GC I, Art. 26; See also Wounded and Sick
- [33] See GC I, Art. 27

VII. Role of Non-Governmental Organizations (NGOs)

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- HOFMANN Claudia, *Reasoning with Rebels: International NGOs' Approaches to Engaging Armed Groups*, Berlin, Stiftung Wissenschaft und Politik (SWP), 2012, 28 pp.

1. Humanitarian assistance for conflict victims

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- UN, Secretary-General’s Reports on the Protection of Civilians in Armed Conflict [Part A., paras 53-56]

a. **rights and obligations of NGOs under IHL**

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- First Periodical Meeting, Chairman’s Report [Part II.1]

aa) impartiality of humanitarian action

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- Iraq, Use of Force by United States Forces in Occupied Iraq
- Federal Republic of Yugoslavia, NATO Intervention [Part A.]
- Case Study, Armed Conflicts in the Great Lakes Region [Part I. F.1 and 2.B.]
- United States, Status and Treatment of Detainees Held in Guantanamo Naval Base [Part I.]
- Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea [Part 2.A. and 2.D.]
- Russian Federation, Chechnya, Operation Samashki
- The Conflict in Western Sahara [Parts A. and B.]
- Georgia/Russia, Human Rights Watch’s Report on the Conflict in South Ossetia

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VIII. The United Nations

Introductory text

The primary objective of the United Nations (UN) being to prevent war, not to regulate the conduct of hostilities, IHL would appear to be of little relevance. To fulfil this objective, however, the UN Charter allows the Security Council, for instance, to authorize the use of force;[34] in such situations IHL applies. The establishment of the ad hoc tribunals for the former Yugoslavia and Rwanda demonstrates that the UN Security Council in fact regards violations of IHL as breaches of or threats to international peace and security.

Under the Charter, the main aim of the UN in the face of an armed conflict should be to stop it and to resolve the underlying dispute. To do this, it has to take sides, for example against the aggressor; this seriously hampers its ability to contribute to the enforcement of IHL and, at least theoretically, to provide humanitarian assistance, as the former has to be enforced independently of any consideration of jus ad bellum and the latter has to be provided according to the needs of the victims and independently of the causes of the conflict.

Moreover, the UN’s principal judicial organ, the International Court of Justice (ICJ), can be called on to interpret IHL. Indeed, the ICJ has dealt with some contentious or advisory cases raising IHL issues. IHL issues have been assessed in the ICJ’s Advisory Opinions on the legality of the threat or use of nuclear weapons and on the legal consequences of the construction of a wall in the occupied Palestinian Territory. The famous Nicaragua and Congo v. Uganda cases also consider questions of IHL in depth. Another example is the judgement in the Arrest Warrant case between the Democratic Republic of the Congo and Belgium, which considers the scope of universal jurisdiction in the prosecution of war criminals.

The Conventions do not refer to the UN.[35] Likewise, the UN Charter makes no mention of IHL: UN purposes and principles[36] are expressed in human rights terms.[37] By tradition, the UN referred to IHL as "human rights in armed conflict".[38]

Conceptually, the UN cannot be considered a "party" to a conflict or a "Power" as understood by the Conventions.[39] In practice, however, peacekeeping and peace-enforcement operations can be involved, with or against the will of the UN, in hostilities with the same characteristics and humanitarian problems to be solved by IHL as traditional armed conflicts. Still, many issues remain controversial: does IHL apply to such operations and, if so, what degree of intensity of hostilities triggers its applicability? When is it the law of international and when the law of non-international armed conflicts that applies? Is IHL binding on the UN or on the contributing States?

In keeping with the right to humanitarian assistance during periods of armed conflict enshrined in the Conventions,[40] many UN organizations engaged in humanitarian work, such as UNHCR, UNICEF and WHO, try to distance themselves from the UN's political undertaking to maintain international peace and security. These organizations are nevertheless ruled by their Member States, which are not and should not be neutral and impartial in armed conflicts.

Despite those limitations, the unique structure of the UN system provides it with the opportunity to play a significant role in implementing IHL – as codifier, executor and subject. Today, the UN Security Council, the UN General Assembly, and the UN Human Rights Council increasingly refer in detail to IHL in their discussions and resolutions. The UN Secretary-General publishes regular reports on the protection of civilians in armed conflicts and his Special Representative on Children and Armed Conflict reports on violations falling within his/her mandate.

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- including in non-international armed conflicts

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3. IHL as human rights in armed conflicts

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5. UN military forces and IHL

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a. **UNforces as addressees of and protected by IHL**

Introductory text

Since the inception of UN peace-keeping operations, whether, when and which part of IHL applies to such operations has been a point of debate. Classic peace-keeping operations were based on the consent of the parties and were independent and impartial. As from the early 1990s, some peace-keeping operations were given the power to use force beyond self-defence, for example in defence of their mandate. Many recent

peace operations have been authorized under Chapter VII of the UN Charter and have a broad mandate to use force. The applicability of IHL to such operations has therefore gained increasing importance.

The UN may be bound by IHL either because its internal law says so, because it has undertaken to be so bound, or because customary law applies equally to States and international organizations. Respect for human rights is one of the UN's purposes, and IHL can be seen as guaranteeing these rights in armed conflicts. The question is whether the rules of the UN Charter on respect for human rights are equally addressed to the organization itself. In addition, the relevant provisions in the Charter are vague. As for IHL, the UN Secretary-General's Bulletin on Observance by United Nations Forces of IHL includes and summarizes many – but not all – rules of IHL and requests that UN forces comply with them when engaged as combatants in armed conflicts.[41] Are the missing rules (inter alia those on combatant status and treatment of protected persons in occupied territories) never binding on UN forces? When are UN forces engaged in an armed conflict as combatants? These two questions remain subject to controversy.

The UN is not able to become a party to IHL treaties and there are a good number of rules which could not be respected by an international organization but only by a State having a territory, laws and tribunals. When it comes to customary law, the majority view is that the UN is a subject of international law and as such is bound by the same rules as States if it engages in the same activities as States. The real question is, however, whether it is bound by precisely the same customary obligations as States. The UN long insisted that it was bound only by the "principles and spirit" of IHL. This formulation has changed over time to become the "principles and rules" of IHL, but as the UN denies that it is bound by many of the detailed rules of IHL, doubt has been expressed whether it is bound by customary IHL, which flows from the behaviour and opinio juris of its subjects.

Even if and insofar as the UN is not bound by IHL, those who actually act for it may be bound as individuals (by criminalized rules of IHL) or because they are organs of (contributing) States which are bound. States contributing troops are parties to IHL treaties, but they would certainly not like to be parties to an armed conflict and it is doubtful whether and when an operation can also be attributed to them if the UN has command and control. If the operation cannot be attributed to contributing States, under IHL they are still bound to "ensure respect" for IHL obligations.[42] UN member States have the same obligation and are in addition responsible for activities they entrusted their organization to perform, if such delegation circumvented their own obligations in respect of those activities.[43] If the UN authorized an operation to use force, the additional question arises whether, in what circumstances and how far the mandate given by the UN Security Council prevails, under Article 103 of the UN Charter, over the IHL obligations of member States or contributing States.

Other challenges to the applicability of IHL to peace operations relate to the mandate and purpose of such operations. Peace is certainly a noble reason for conducting hostilities. However, according to the fundamental distinction and complete separation between jus ad bellum and jus in bello, this should not

matter for the applicability of IHL. Nevertheless, in debates about when IHL fully applies to UN forces, some argue that this depends on the mandate of such forces. More generally, underlying the reluctance of the UN to be bound by the full corpus of IHL rules, there is also the idea that UN forces, which represent international legality and the international community, and which enforce international law, cannot be bound by the same rules as their enemies.

Even if IHL could as such fully apply to the UN (or to contributing States in respect of the conduct of their contingents), it would only do so if and when the UN (or the respective contingent) is engaged in an armed conflict. For this, it is not sufficient for UN forces to be deployed on a territory where others are fighting an armed conflict. This raises the general issue of the material field of application of IHL. In addition, can a peace operation conducted on the territory of a State with the consent of its government be classified as a non-international armed conflict directed at an armed group fighting against that government, or does the IHL of international armed conflicts apply?

One of the main practical reasons for the reluctance of contributing and member States to recognize that IHL applies to peace forces is that they correctly perceive that if IHL (of international armed conflicts) applied to hostilities between those forces and armed forces opposed to them, both would be combatants and therefore lawful targets of attacks. Contributing States obviously hope that their forces will not be attacked. Even when recognizing the applicability of IHL, those States therefore argue that members of their forces are not combatants, but civilians.[44]

Finally, when a territory is placed under the authority of UN forces or a UN administration, the question arises whether the rules of IHL on occupied territories apply. They certainly do not when UN forces are present with the consent of the sovereign power of the territory in question. Beyond that, it is doubtful that a UN presence, if not consented to by the territorial State, can ever be classified as military occupation.

Quotation

"The conduct of a State organ does not lose that quality because that conduct is, for example, coordinated by an international organization, or is even authorized by it."

[**Source**: A/CN.4/507/Add.2, International Law Commission, 52nd session, Geneva, 1 May-9 June, 10 July 18 August 2000, Third report on State Responsibility. Presented by M. James Crawford, Special Rapporteur, para. 267, available on http://www.un.org]

(*See also*Quotation, IHL and Human Rights, I. Fields of application, 1. Material fields of application: complementarity, b) Human rights apply at all times)

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bb) which rules are binding?

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- the "principles and spirit" of IHL
- the UN Secretary-General's Guidelines
- the 1994 Convention on the Safety of United Nations and Associated Personnel and its relationship with IHL

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cc) existence of an armed conflict?

- is the conflict international or non-international?
- the necessary threshold of violence different for IHL of international and of non-international armed conflicts
- irrelevance of the legal basis and the mandate of the international forces

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dd) who are the parties to the conflict?

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ee) are the members of the international force combatants?

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ff) the distinction between hostilities and police operations

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a. **UN forces as an IHL implementing mechanism**

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- UN, Review of Peace Operations
- UN, UN Forces in Somalia
- Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993
- Case Study, Armed Conflicts in the Great Lakes Region [Part I.B. and Part III.D.]
- UN, A Multinational Force to Facilitate Humanitarian Aid
- Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea [Part 1.B.3]
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6. Respect for IHL and economic sanctions

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Footnotes

- [34] UN Charter, Chapter VII
- [35] But see P I, Art. 89 (concerning cooperation of States Parties with the UN); GC I-IV, Arts 64/63/143/159respectively; P I, Art. 101; P II, Art. 27 (regarding ratification, accession, denunciation, and registration of the Conventions and Protocols)
- [36] UN Charter, Art. 24(2)
- [37] UN Charter, Arts 1(3) and 55(c)
- [38] UNGA Res. 2444 (XXIII) of 19 Dec. 1968
- [39] Certain provisions of the Conventions could literally not even apply to or be applied by the UN, e.g., GC IV, Art. 49(6) (prohibiting an occupying power to transfer “its own population” into an occupied territory), or GC I-IV, Arts 49/50/129/146 respectively and P I, Art. 85(1) (relating to the repression of grave breaches).
- [40] See GC IV, Art. 142; P I, Art. 81
- [41] See UN, Guidelines for UN Forces
- [42] See GC I-IV, common Art. 1 and P I. *See also supra*, V. The obligation to ensure respect (common Article 1)
- [43] See Draft Article 28 on the Responsibility of International Organizations, ILC, Report of the International Law Commission on the Work of its 58th Session, 1 May-9 June, 3 July-11 August 2006, UN Doc A/61/10, ch. VII
- [44] See The International Criminal Court [Part A., Art. 8(2)(b)(iii) and 8(2)(e)(iii)]

IX. Implementation in time of non-international armed conflict

Introductory text

Only two specific implementing mechanisms are provided for by the treaty rules of IHL applicable in non-international armed conflicts: (i) the obligation to disseminate IHL “as widely as possible”[45] and (ii) the right of the ICRC to offer its services.[46] The first mechanism has the same meaning as in international armed conflicts. The second means that in such conflicts the ICRC has no right to undertake its usual activities in the fields of scrutiny, protection and assistance; it may only offer these services to each party to the conflict and then initiate them with each party that has accepted its offer. This right of initiative clearly implies that such an offer is never interference in the internal affairs of the State concerned, nor is the ICRC’s

undertaking of activities in respect of a party accepting such an offer an unlawful intervention. Furthermore, such an offer – as any other measure of implementation of the IHL of non-international armed conflicts – cannot be construed to confer any legal status on any party to a conflict.[47]

Even though they are not specifically prescribed by the IHL of non-international armed conflicts, if the preparatory measures that the IHL of international armed conflicts directs to be taken already in peacetime are actually taken, they will also have a beneficial influence on respect for the IHL of non-international armed conflicts. For instance, building hospitals away from possible military objectives, properly restricting the use of the red cross, red crescent or red crystal emblem, and instructing combatants to wear identity tags will necessarily have the same effects in international and non-international armed conflicts. In practice, armed forces train their members in peacetime in view of international armed conflicts. If such training is properly accomplished, all soldiers will have the same reflexes in a non-international armed conflict. Indeed, at the lower levels of the military hierarchy, the rules of behaviour are exactly the same.

Within their national legislation, some States have explicitly laid down that the same rules of IHL apply in both kinds of conflicts. Other States prescribe specific rules for non-international armed conflicts. Where penal legislation on war crimes exists, it is often limited to violations of the IHL of international armed conflicts, while legislation on the use of the emblem usually covers both. As a minimum requirement, States with a legal system in which international treaties are not part of the law of the land have to adopt legislation to transform the rules of the IHL of non-international armed conflicts into national law in order to make them binding on individuals, including rebels. Furthermore, for the same purpose, all States must adopt implementing legislation for the presumably rather few rules of Art. 3 common to the Conventions and of Protocol II which they consider not to be self-executing. Indeed, States have the international responsibility to ensure that individuals under their jurisdiction respect the basic rules of behaviour laid down in those rules.

Since the ICJ has decided that the principle laid down in Art. 1 common to the Conventions and Protocol I also applies to non-international armed conflicts,[48] third States have the right and the obligation to ensure that not only government forces in a State confronted with a non-international armed conflict, but also non-governmental and anti-governmental forces respect the IHL of non-international armed conflicts.

The repression of violations of the IHL of non-international armed conflicts is expressly prescribed in neither Art. 3 common to the Conventions nor Protocol II. It is, however, one of the traditional means available to a State for ensuring compliance with its corresponding international obligations. Punishment will often, but not always, be possible under the ordinary rules of penal law. However, the principle of universal jurisdiction will not necessarily operate without specific legislation.

The establishment of universal jurisdiction and the criminalization of serious violations not falling under ordinary penal law are, however, achieved when national legislation assimilates violations of both the law of international armed conflicts and the law of non-international armed conflicts. Otherwise, repression under a regime similar to that applicable to grave breaches of the law of international armed conflicts can be

accomplished by several legal constructions. First, some authors and States claim that – contrary to their textual and systematic interpretation – the detailed provisions on grave breaches provided for by the Conventions also apply to violations of the law of non-international armed conflicts. Second, recent developments, such as the reactions of the international community to violations of the IHL of non-international armed conflicts in the former Yugoslavia and Rwanda and the ICC Statute, prompt most authors, judicial decisions and – implicitly – the statutes of both international ad hoc tribunals to consider that customary international law criminalizes serious violations of the IHL of non-international armed conflicts. Such an understanding signifies permission, if not an obligation, to apply the principle of universal jurisdiction. Third, a violation of the IHL of non-international armed conflicts may often simultaneously be an act criminalized by other rules of customary or treaty-based international law, such as crimes against humanity, genocide, torture or terrorism.

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2. Other preventive measures

[CIHL, Rules 139, 140 and 141]

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7. Other mechanisms foreseen for international armed conflicts

8. Necessity and ways to engage non-State armed groups

Introductory text

As mentioned above, the IHL of non-international armed conflicts is equally binding on non-State armed groups.[49] The legal mechanisms for its implementation are, however, still mainly geared toward States. Ways might be explored as to how armed groups could be involved in the development, interpretation and operationalization of the law. While an explicit acceptance is not necessary for them to be bound, armed groups should be encouraged to accept IHL formally, inter alia to foster a sense of ownership. Getting a commitment from insurgents is an important step as it places the onus on the members and leaders who undertook the commitment to become advocates of IHL within the group. Common Art. 3 encourages parties to non-international armed conflicts, including armed groups, to conclude agreements putting all or parts of the IHL of international armed conflicts into force. Armed groups also frequently make unilateral declarations in which they undertake to respect IHL. In this respect it may be sometimes more beneficial to negotiate a code of conduct than to obtain a declaration promising compliance with all of international law. Respect for the rules should then be rewarded, which is not yet the case in the present IHL of non-international armed conflicts. A citizen who is, for example, involved in an internal armed conflict against the government will be prosecuted for treason and murder once captured by government forces even if he kills only soldiers and complies with IHL. In addition, acts that are committed in an armed conflict and are not prohibited under IHL should never fall under any definition of terrorism.

Armed groups should equally be offered advisory services. It remains unclear, for instance, how and whether insurgents can legislate and establish tribunals, although they will have to do so to obtain compliance from their members, punish those who do not comply or require certain conduct from those who are under their de facto control. Respect for IHL must also be monitored. Under common Art. 3 of the Conventions, the ICRC may offer its services to insurgents. If they accept, the ICRC can monitor their compliance in exactly the same way as it monitors States Parties involved in international or non-international armed conflicts.

As for punishing violations, international criminal law is as applicable to insurgents as to government armed forces. Insurgent groups are responsible for violations committed by their members. Their responsibility to the international community has already been demonstrated by sanctions imposed on them by the Security Council. Understanding how humanitarian organizations react and how they should react to violations of IHL by insurgents is another area deserving of exploration.

There are two main objections to attempting to engage all insurgents. First, some argue that it encourages them to continue fighting. While a world without insurgents would be a better world, they are as real as armed conflicts. They will not disappear if we ignore them. Others believe that some, but not all insurgents should be engaged. However, it is important to engage all armed groups that are parties to genuine armed conflicts, a concept that is admittedly not very clearly defined in IHL. Beyond the need to clarify this concept, it is difficult to articulate a universally acceptable distinction between “good” and “bad” insurgents. Their

willingness to comply with legal restraints will be revealed by the outcome of the process and therefore cannot be a precondition to it. From a humanitarian point of view, any distinction between insurgents would mean that those in need of the greatest protection would be deprived of efforts aimed at their protection. In addition, once certain groups are excluded from efforts to be engaged, it becomes more difficult to convince governments fighting against the other groups to tolerate such engagement.

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aa) indirectly, through States

bb) indirectly, through individual criminal responsibility

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cc) directly, against the armed group

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bb) increase their sense of ownership of IHL

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ee) reward the respect of IHL

d**. Monitor the respect for IHL by armed group**

e**. Responsibility of armed groups for violations**

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aa) criminal responsibility

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cc) international law responsibility

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a. **Dilemmas involved**

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aa) does engaging armed groups encourage their use of violence? bb) should only some armed groups be engaged?

Footnotes

- [45] See P II, Art. 19
- [46] See GC I-IV, common Art. 3(2)
- [47] See GC I-IV, common Art. 3(4)
- [48] See ICJ, Nicaragua v. United States [Para. 255]
- [49] See *supra*, Internal Armed conflicts, VIII. Who is bound by the law of non-international armed conflicts?

X. Factors contributing to violations of International Humanitarian Law

(*See also supra*, Fundamentals of IHL, B. International Humanitarian Law as a Branch of Public International Law, I.International Humanitarian Law: at the vanishing point of international law, 4. Application of International Humanitarian Law by and in failed States)

Introductory text

First, it is a distinctive feature of social rules that – contrary to the laws of physics – they can be and are actually violated.

Second, violations of IHL mostly consist of violent acts committed in situations already marked by violence: armed conflicts. This is not the place to explain the reasons for violence, a field in which much would appear to be unexplained. Suffice it to mention that violence seems to be inherent in the human condition and results from various complex factors, both objective (historical, cultural, educational and economic) and subjective. However, violence is never inevitable, not even when all factors leading to violence exist. No one is immune from violating IHL, but no one is ever put in a situation where he or she has to violate IHL. In addition, violence is contagious and may render further violence banal. Armed conflicts are marked by plenty of instances of legal and illegal violence which can and do contaminate those who have not yet resorted to violence.

Third, armed conflicts are situations where the primary international legal and social regime – peace – is overruled, in other words jus ad bellum has been violated. It is not astonishing that human beings, having experienced the failure of the primary international legal regime, will not necessarily respect the subsidiary regime applicable to such a situation of failure, namely IHL. Lack of respect for the international rules regulating jus ad bellum, and more so jus in bello, will be reflected in situations of armed conflict and in the behaviour of every human being. Another aspect of this is that an armed conflict is an exceptional experience for every human being, even the best-trained soldiers. Prohibited acts usually become commonplace. Human beings are killed, and property is destroyed, with society's approval. In such circumstances, it is also easy to violate other rules of human behaviour – committing acts which remain prohibited even in armed conflicts by IHL.

Fourth, many of those fighting in and suffering from armed conflicts are continuously exposed to death,

injury, fear, hate, cries, cadavers, dirt, cold, heat, hunger, thirst, exhaustion, weariness, physical tension, uncertainty, arbitrariness and lack of love. In other words, they are deprived of nearly everything which makes human life civilized; they live continuously in a kind of folly in which traditional references no longer exist. Is it astonishing under these circumstances that they commit inhumane and uncivilized acts?

Fifth, modern weapons make it possible for human beings to be killed from a great distance, without singling them out as individuals or even seeing them. Moreover, those weapons are launched according to a “division of labour” that waters down responsibility. Those two factors end up damping certain ethical reflexes. To take but one example, it is unlikely that the pilots who bombed Coventry, Dresden or Hiroshima would have slit the throats of or poured petrol over tens of thousands of women and children. That being said, recent genocidal conflicts have shown that as soon as inter-ethnic hatred has been triggered, good fathers are capable of raping, slitting the throats of and hacking to pieces their neighbours while looking them straight in the eye.

Sixth, most of those fighting in contemporary armed conflicts lived, before the conflict, in an environment of injustice and denial of the most fundamental civil and political, social, economic and cultural rights. This environment often contributed to the outbreak of the conflict. Is it surprising that individuals raised without a proper education, in an atmosphere of street violence, organized crime, misery, racism, perhaps in one of the ever-growing megalopolises where all social structures have collapsed, violate IHL once they are given a weapon and told to fight an “enemy”?

Seventh, the public at large and those who are likely to be protagonists in armed conflicts are often not instructed and trained in IHL. It may be objected that the basic moral principles of IHL are self-evident, but the detailed rules are not always self-explanatory. In particular, it is not obvious that basic moral principles also apply precisely in an armed conflict, where most other rules of social behaviour are suspended, and where fighters are trained to do the opposite: to kill and destroy.

Eighth, knowledge of the rules of IHL is a necessary but not sufficient condition to ensure their respect. They also have to be accepted and implemented. It has to be understood that they are the law accepted by States. It has to be understood that the numerous justifications for violating IHL that may be put forward, for instance, “state of necessity”, “self-defence”, the “sense of having suffered an injustice”, “strategic interests”, the desire to spare friendly forces, or any aim, however noble, cannot be and are not accepted grounds for violating IHL.

Furthermore, it has to be stressed that the rules of IHL can be and often are respected. Scepticism is the first step towards the worst atrocities. Indeed, if we want the public at large to respect these rules, it must become as politically incorrect to be sceptical about IHL as it has fortunately become politically incorrect to be sceptical about gender and racial equality.

Ninth, while respect for IHL is impossible without a minimum of discipline and organization, it is also impossible in the climate of blind obedience that is so commonplace in regular armies and in armed groups who identify their cause with a leader. Indoctrination creates situations in which “the cause” becomes more important than any (other) human value.

Tenth, despite the explanations of sociologists and international lawyers, our societies are still profoundly impregnated with the idea that rules are only valid if their violations are punished. The widespread, nearly generalized impunity met by violations of IHL therefore has a terribly corrupting effect, including on those accepting the rules, who are left with the impression that they are the only ones who comply with them.

Eleventh, IHL will be violated as long as there are cultures, ideologies and ideas excluding others, characterizing them as less human because of their nationality, race, ethnic group, religion, culture or economic condition.

Twelfth, in today’s increasingly asymmetric conflicts, both sides are convinced that they cannot win without violating or at least “reinterpreting” IHL. How can the necessary intelligence information about terrorist networks be obtained by humanely treating those who are supposed to have such information? Is not demoralization of the civilian population through terrorist acts the only chance for many groups labelled as “terrorist” to overcome their enemy, which is far superior in equipment, technology and often manpower? In our view, both these calculations are wrong. Inhumane treatment of suspected “terrorists” will only help recruit others and put democratic States on the same moral level as the terrorists. Terrorist attacks only strengthen the determination of the public in democracies to stand behind their governments and to favour military solutions rather than to eradicate the root causes of terrorism (but this may be precisely what the terrorists aim for, because it guarantees them continued support from their constituencies).

Furthermore, in asymmetric conflicts, most rules of IHL are in fact addressed to one side only. Only one side has prisoners, only one side has an air force and only one side could possibly use the civilian population as shields. Beyond that, the very philosophy of IHL – that the only legitimate aim is to weaken the military forces of the enemy – is challenged by such conflicts. That aim is beside the point in asymmetric wars. One side often has no military forces and most of the military forces of the other side are outside the reach of their enemy. One of the strongest arguments used to convince belligerents to respect IHL is that they can achieve victory while respecting IHL and that IHL will even make victory easier, because it ensures that they concentrate on what is decisive, the military potential of the enemy. This argument is not fully true in asymmetric conflicts. Finally, the weaker side in an asymmetric conflict often lacks the necessary structures of authority, hierarchy, communication between superiors and subordinates and processes of accountability, all of which are needed to enforce IHL. Legally, one may obviously consider that such groups do not possess the minimum structure of organization required to be a party to an armed conflict, and that IHL therefore does not apply to such conflicts. In practice, this would, however, mean that IHL does not apply at all to asymmetric conflicts, not even to the more organized government side.

Taking all these factors into account, it is no small source of astonishment that, as the tens of thousands of prisoners visited every year by the ICRC prove, countless fighters respect their surrendering enemies even after their comrades, wives, and children have been killed by those belonging to the same side as those who surrendered. Equally surprising, countless fighters, police officials and investigators do not resort to torture although they assume that those in their hands must know when an attack will happen, countless oppressed citizens do not plant indiscriminate bombs even though their rulers deny them the most fundamental civil, political, social and economic rights, and countless leaders do not fight with no holds barred, even though they fear they may lose the war or their power and are convinced that they are fighting for a just cause.

Only those who experience armed conflicts through their television sets can think that war inevitably entails violations of the laws of war. Those who actually live through wars know that they are fought by human beings who have the inherent choice to be humane.

A major challenge for the implementation of IHL is nevertheless the widening gap between the law's increased promises of protection and the growing perception that it is not respected in actual conflicts.

This widening gap has negative effects on the implementation of IHL. The perceived gap concerning some rules has a contagious effect on other rules. Sometimes, promises have also served as an alibi for not acting. When they see the gap between promises and the reality they suffer, the victims are frustrated, they no longer believe in the law and, what is worse, those who fight for them are even less likely to comply with IHL. Placing their trust in the promises of the international community, victims may even take wrong decisions, which may be fatal for them. Finally, and most importantly, no fighter, combatant or commander wants to risk his life, freedom and health, and forego the easiest solution or even victory to be the only one who respects IHL if he is convinced (or suspects) that no one else respects IHL, or that IHL is not appropriate for the conflict being fought.

The main way of reducing the gap between promises and reality is to respect IHL as promised. Next, those who claim that IHL as it stands was developed at another time and is not adequate for the new challenges of contemporary conflicts should be clear that they advocate a change in the law and are not suggesting that the existing rules are no longer valid. In some instances, it may also be wise to nuance promises. True, law always lays down, in Kantian categories, a "sollen" (what ought to be) and therefore a promise. When Henry Dunant came back from the battlefield of Solferino, he suggested a promise (by States) that the wounded and sick should be respected, protected and cared for, "to whatever nation they belong". Even today, this promise has not been entirely fulfilled. If Henry Dunant had not advocated that promise because he was not sure that States would actually deliver on it, there would be no Geneva Conventions. Those promises, although never entirely fulfilled, nevertheless clearly influenced reality for the benefit of war victims. We should simply make sure the gap never becomes too wide, mainly by bringing reality closer to our promises, but also by avoiding promises we can never deliver on and which are, moreover, often made by those who cannot deliver.

Another way of reducing the credibility gap and the disadvantages it implies is to have the perceived reality of systematic violations cede precedence to the actual reality of frequent respect. Those who consult the media and NGO reports probably believe that IHL is almost never respected. This feeling that IHL is systematically violated is both inaccurate and extremely dangerous for the credibility of IHL and for war victims. Only a few individuals are ready to respect rules protecting those they perceive as enemies even if they are convinced that their enemies do not respect those rules. This vicious circle of non-respect has to be broken. First by an attitude of respect. Second, States accused – often falsely – of violations should make serious enquiries and make their results public in every instance, in order to convince those who consider them as the enemy of their general willingness to respect IHL and their honest endeavour to ensure its respect by their forces. Third, all involved, but in particular teachers and trainers, should, whenever possible and when it is true, show that IHL is most often respected. This is not an easy task. It is not easy to get the facts of real-life examples of respect. Too much hope cannot be pinned on the media. A world in which they would report even-handedly and proportionately about respect and violations would be an Orwellian world. The fact that public opinion perceives violations as a scandal to be reported and respect as normal is a sign that IHL is profoundly anchored in the public conscience.

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XI. Non-legal factors contributing to respect for International Humanitarian Law

Introductory text

As with all law, if IHL is respected, it is not mainly because of the efficiency of the legal mechanisms set up to ensure respect but because of non-legal factors. In that regard, routine is an important factor contributing to respect. Indeed, once soldiers or civil servants are aware of a regulation and know that their superiors expect it to be followed, they will apply and respect it without further discussion, especially if they have understood that it is possible to do so. For this reason, appropriate and meaningful dissemination of the rules is very important. In all human societies there is a positive predisposition to respect the law. In most cases, if individuals understand that the rules of IHL are the law applicable in armed conflicts accepted by States and the international community, and not simply the philanthropic wishes of professional do-gooders, they will respect them.

Respect for IHL is also largely in the military’s interest. Troops who respect IHL form a disciplined unit, whereas looting and raping lacks military value. In addition, respect for IHL is a question of military efficiency. Attacks on civilians constitute not only war crimes but also a waste of ammunition needed for attacking military objectives. Many rules of IHL on the conduct of hostilities simply implement the tactical principles of economy and proportionality of means.

In a global information society, international and national public opinion increasingly contribute to respect for – but unfortunately sometimes also to violations of – IHL. Belligerents need the sympathy of international and national public opinion as much as they need supplies of ammunition. In non-international armed conflicts the battle for the hearts of the people is even one of the main issues. There is no more effective way to lose public support than television images of atrocities that may, unfortunately, also have been manipulated. Free access to the truth by the media may be hindered or manipulated by belligerents: for instance, enemy atrocities may be sheer fabrications. Some belligerents have even bombed their own population to provoke outside intervention against the enemy. Humanitarian assistance increasingly becomes an excuse not to initiate political solutions. Suffering populations are held hostage to achieve political objectives. Manipulated

or not, some media incite hatred and atrocities by dehumanizing members of specific ethnic groups, depriving them of humanitarian protection; fanatic populations demonstrate against humanitarian assistance being brought to “enemy” populations. Even a freely elected parliament may enact legislation depriving “enemies” or “terrorists” of fundamental judicial guarantees or condone torture for reasons of national security.

Respect for many rules of IHL corresponds to the cultural, ethical and religious imperatives of most societies. All religions contain rules on respect for the earth’s or God’s creatures; many holy books contain specific prohibitions applicable in wartime.[50] One does not have to study the Geneva Conventions and Protocols to know that it is prohibited to kill children and to rape women. When the ICRC studies local and regional traditions, including poetry and proverbs, in an effort to anchor its dissemination work in the culture of the people it targets, it always finds principles and detailed rules of behaviour which run parallel to those of IHL.

Whereas (negative) reciprocity is not a legal argument to discontinue respect for IHL, whatever violations the enemy commits, positive reciprocity certainly plays an important role as a non-legal factor in encouraging belligerents to respect IHL. A soldier, an armed group or a State will also respect IHL in order to incite the enemy to respect it. However, even when a State or a soldier doubts whether the enemy will obey IHL, the other reasons for respecting IHL will not disappear.

Finally, the only rational aim of most armed conflicts is peace.[51] At the conclusion of an armed conflict, territorial, political and economic issues remain to be resolved. However, peace is much more readily restored if it is not also necessary to overcome the hatred between peoples invariably spawned and most certainly exacerbated by violations of IHL.

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1. Routine

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2. Military interest

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a) discipline

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c) tactical principles of economy and proportionality of means

3. Public opinion

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4. Ethical and religious factors

(*See supra*, Fundamentals of IHL, A. Concept and Purpose of International Humanitarian Law, III. International Humanitarian Law and Cultural Relativism)

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6. Return to peace

CASES AND DOCUMENTS

- Nigeria, Operational Code of Conduct

- UN, Resolutions and Conference on Respect for the Fourth Convention
- ICRC, Iran/Iraq Memoranda
- Colombia, Constitutional Conformity of Protocol II [Para. 21]

Footnotes

- [50] *See supra*, Quotations 1-5, Fundamentals of IHL, C. Historical Development of International Humanitarian Law
- [51] If the aim of some fighters is not to win the war, but to “earn” their life (through pillage) by perpetuating the war, this logic no longer works and the respect of IHL is therefore particularly difficult to achieve.