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Introductory text

In conformity with the traditional structure of international law, violations are considered to have been committed by States and measures to stop and repress them therefore must be directed against the State responsible for the violation. Such measures can be foreseen in IHL itself, in the general international law of State responsibility, or under the UN Charter, the “constitution” of organized international society.

In IHL, Article 1 common to the four Geneva Conventions provides that “[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” Common Article 1 therefore has many links with the law on State responsibility for internationally wrongful acts and both should be considered together when dealing with violations of IHL. For instance, when it comes to the addressees of common Article 1, following the law of State responsibility, the article should be understood as creating an obligation to respect and ensure respect for IHL not only by State organs as defined by the internal law of the State but also by other persons or groups acting on its behalf, such as volunteer and militia forces within the meaning of Article 4A(2) of the Third Convention, other armed groups under the requisite control of the State, and in certain cases private military and security companies whose services are contracted by the State. [1] In addition, common Article 1 confirms that the Geneva Conventions create obligations *erga omnes partes*, i.e. obligations towards all of the other High Contracting Parties. Concretely speaking, Article 48(1)(b) of the 2001 Draft Articles on State Responsibility will be useful in implementing such *erga omnes* obligations, as it considers that any State is entitled to invoke the responsibility of a State in

breach of *erga omnes* obligations.

Yet, during armed conflict, violations of IHL can also be committed by non-State parties to an armed conflict, and common Article 1 has been interpreted to mean that High Contracting Parties to the Geneva Conventions (therefore States) also bear responsibility to ensure respect for the rules applicable in non-international armed conflict, including by non-State armed groups.

Before violations can be repressed, they have, of course, to be ascertained. The Geneva Conventions provide that an enquiry must be instituted into alleged violations if requested by a party to the armed conflict. [2] However, the procedure has to be agreed on between the parties. Experience shows that such an agreement is difficult to reach once the alleged violation has occurred – in particular between parties fighting an armed conflict against each other. Art. 90 of Protocol I therefore constitutes an important step forward, as it establishes the International Humanitarian Fact-Finding Commission [3] and its procedure. The Commission is competent to enquire into alleged violations of one party at the request of another party if both parties agree on its competence, either on an *ad hoc* basis or by virtue of a general declaration. [4] The Commission has declared its readiness to act in non-international armed conflicts as well, if the parties concerned agree. In conformity with the traditional approach of IHL, the enquiry is based on an agreement between the parties, and the result will only be made public with their consent. This may be one of the reasons why the Commission has never been mandated by States to conduct an enquiry, although more than 70 States have made a general declaration accepting its competence and although it regularly offers its services when relevant, as it did e.g. when Doctors without borders announced seeking an investigation into the destruction of its trauma centre of Kunduz, Afghanistan. [5] States have always preferred to impose enquiries through the UN system, which produces a published report, or to establish *ad hoc* commissions of enquiry, but the results have not been much more convincing. Outside of its treaty mandate however, the Commission concluded an enquiry regarding the death of one paramedic and the injury of two members of the Organization for Security and Cooperation in Europe (OSCE) Special Monitoring Mission to Ukraine that occurred in Ukraine in April 2017, pursuant to a request by OSCE. [6]

In the event of a dispute, all means afforded by international law for the peaceful settlement of disputes are available. A conciliation procedure involving the Protecting Powers is foreseen, but needs the agreement of the parties. [7] The Protecting Power system itself is an institutionalization of good offices. The general problem, however, is that a peaceful settlement of disputes on points of IHL between parties who prove by their participation in an armed conflict that they have been unable to settle their disputes in respect of jus ad bellum peacefully would be an astonishing occurrence and only rarely succeeds. Therefore, the use of coercive measures which can only be taken through the UN system seems more promising, but risks mixing jus ad bellum and jus in bello. Such a mix-up is natural for the UN, as its main role is to ensure respect for jus ad bellum, but it jeopardizes the autonomy, neutrality and impartiality required for the application of IHL.

When a violation occurs, not just the injured State, which is the direct victim, but – under common Article 1

and the general rules on State responsibility [8] – every State may and indeed must take measures to restore respect. Those measures must themselves conform to IHL and to the UN Charter [9] and must be taken in cooperation with the UN as the frail embryo of a centralized international law enforcement system. [10] Cooperation between all States, however, does not mean that no reaction to violations is possible in the absence of a consensus.

In keeping with the rules of the law of State responsibility, IHL recalls the general obligation to pay compensation. [11] According to a majority of writers and court decisions, this implies, in conformity with the traditional structure of international law, that the State responsible for the violation has to compensate the State injured by the violation; it does not confer a right to compensation on the individual victims of violations. This traditional implementation structure is at variance with internal armed conflicts, as in such cases victims of violations are often nationals of the State concerned. Thus, for a growing number of violations, International Human Rights Law requires that the State make reparation directly to the beneficiary of the rule.

For the rest, IHL prescribes some changes to the general rules on State responsibility (or makes clear that certain of its exceptions apply in this branch). It holds the State strictly responsible for all acts committed by members of its armed forces; [12] it prohibits reprisals against protected persons and goods and the civilian population, [13] reciprocity in the application of IHL treaties being excluded by the general rules; and it makes clear that, as the rules of IHL are mostly *jus cogens*, States may not agree to waive the rights of protected persons [14] nor may the latter renounce their rights. [15] Finally, as IHL is intended for application in armed conflicts, which are by definition emergency situations, and as many armed conflicts are fought in self-defence, while the same IHL must apply to both sides, necessity (except where explicitly stated otherwise in some of its rules [16]) and self-defence are not circumstances precluding the wrongfulness of IHL violations. [17]

Furthermore, in contrast to the rules of State responsibility, the rules concerning the international responsibility of non-State armed groups is still an unchartered area, although such groups must also be responsible for violating IHL rules addressed to them. Arguably, if unlawful conduct can be attributed to a non-State armed group, the legal consequences of the group's responsibility may be very similar to the consequences that apply to States. However, the operationalization and invocation of such legal consequences may differ significantly from procedures applicable to States in order to account for the inherently temporary and unstable nature of non-State armed groups. Besides, the standard of attribution according to which a foreign State bears responsibility for the conduct of a non-State armed group remains controversial. While the International Criminal Tribunal for the former Yugoslavia and the International Committee of the Red Cross are of the opinion that overall control is sufficient, the majority opinion as expressed by the International Court of Justice considers that effective control is necessary to make IHL violations committed by an armed group attributable to a foreign State [Footnote to the case should be added here or the case should be listed below].

Finally, regarding the use of Private and Military Security Companies (PMSCs) the Montreux Document [18] recalls that contracting States retain their IHL obligations even if they contract out certain of their activities. However, the question of when a State bears responsibility for PMSC conduct remains open. Here several situations may occur. A State will be responsible for the conduct of such a PMSC, if the latter is completely dependent on it, and therefore one of its *de facto* organs for example, or if the State delegates elements of governmental authority to the PMSC. The same will be true if the PMSC acts pursuant to instructions from a State or under its direction or control. Here again, it is still to be clarified, if the overall control standard is sufficient (then, the State would be responsible for conduct incidental to the execution of the contract) or if the effective control test is necessary (but such a control rarely exists in practice and would anyhow be very difficult to prove). In any case, even if the conduct of a PMSC is not attributable to a State, that State may have due diligence obligations concerning a PMSC that acted under its jurisdiction or, under Common Article 1, for acts of a PMSC it hires.

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c) applicability of the general rules on State responsibility

[CIHL, Rule 149]

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aa) but strict responsibility for armed forces

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bb) but necessity is not a circumstance precluding wrongfulness

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cc) but self-defence is not a circumstance precluding wrongfulness

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dd) but no reciprocity

[CIHL, Rule 140]

Quotation

Article 60. Termination or suspension of the operation
of a treaty as a consequence of its breach

[...]

1. A material breach of a multilateral treaty by one of the parties entitles:
    a. the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
        i. in the relations between themselves and the defaulting State; or
        ii. as between all the parties;
    b. a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
    c. any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.
2. A material breach of a treaty, for the purposes of this article, consists in:
    a. a repudiation of the treaty not sanctioned by the present Convention; or
    b. the violation of a provision essential to the accomplishment of the object or purpose of the treaty.
    [...]
3. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

[**Source**: Vienna Convention on the Law of Treaties, U.K.T.S. 58 (1980), Cmnd. 7964]

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ee) admissibility of reprisals

[CIHL, Rules 145-147]

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- United Kingdom and Australia, Applicability of Protocol I (Part C.)
- United States, President Rejects Protocol I
- Germany/United Kingdom, Shackling of Prisoners of War
- Israel, Cheikh Obeid et al. v. Ministry of Security

- no reprisals against the civilian population

(*See supra*, Conduct of Hostilities, II. The protection of the civilian population against the effects of hostilities, 6. Prohibited attacks, d. attacks against the civilian population (or civilian objects) by way of reprisals))
P I, Arts 51(6), 52(1), 53(c), 54(4), 55(2) and 56(4)

- no reprisals against protected persons:

GC I-IV, Arts 46/47/13(3)/33(3) respectively; P I, Art. 20 [CIHL, Rules 146 and 147]

- conditions for reprisals where they are admissible:

[CIHL, Rule 145]

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- United Kingdom and Australia, Applicability of Protocol I (Part C.)
- ICTY, The Prosecutor v. Martic (Part B., Paras. 464-468)

- aimed at compelling the enemy to cease violations
- necessity – proportionality
- preceded by a formal warning
- decided at the highest level

ff) IHL obligations are erga omnes obligations

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- ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory (Part A., paras 155-157)

Footnotes

- [1] ICRC Commentary to Article 1 common to the four Geneva Conventions, para. 177
- [2] See GC I-IV, Arts 52/53/132/149 respectively
- [3] See Commission’s web page: http://www.ihffc.org
- [4] As of December 2010, 71 States Parties have made such a declaration comparable to the optional clause of compulsory jurisdiction under Art. 36(2) of the Statute of the International Court of Justice.
- [5] See Afghanistan, Attack on Kunduz Trauma Centre.
- [6] See Executive Summary of the Report of the Independent Forensic Investigation in relation to the Incident affecting an OSCE Special Monitoring Mission to Ukraine (SMM) Patrol on 23 April 2017.
- [7] See GC I-GC III, common Art. 11; GC IV, Art. 12
- [8] See supra for nuances, Implementation Mechanisms V. The Obligation to Ensure Respect(Common Article I, with references to the Articles on State Responsibility, adopted by the International Law Commission, see International Law Commission, Articles on State Responsibility
- [9] See notes 360 and 361 above
- [10] See P I, Art. 89, which is analogous to Art. 56 of the UN Charter
- [11] See Hague Convention IV, Art. 3; P I, Art. 91
- [12] See Hague Convention IV, Art. 3; P I, Art. 91
- [13] See GC I-IV, Arts 46/47/13(3)/33(3) respectively; P I, Arts 20, 51(6), 52(1), 53(c), 54(4), 55(2) and 56(4)
- [14] See GC I-III, Art. 6; GC IV, Art. 7
- [15] See GC I-III, Art. 7; GC IV, Art. 8
- [16] See, e.g., GC I, Art. 33(2); GC IV, Arts 49(2) and (5), 53, 55(3), and 108(2); P I, Art. 54(5)
- [17] See International Law Commission, Articles on State Responsibility (Part A., Arts 21, 26 and para. 3 of the commentary of Art. 21; Art. 25(2)(a) and para. 19 of the commentary of Art. 25)

- [18] See The Montreux Document on Private Military and Security Companies.