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ANNIKA TALMAR

Ensuring respect for International Humanitarian Law 70 years after the adoption of the Geneva Conventions of 1949

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INTRODUCTION

"War is in no way a relationship of man with man but a relationship between States, in which individuals are only enemies by accident, not as men, but as soldiers"
Jean-Jacques Rousseau, The Social Contract, 1762

A. Introduction to the problem

International humanitarian law (IHL) is designed to protect these "enemies by accident", to differentiate between men and soldiers. It is a branch of public international law that aims to limit the effects of armed conflict; it protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. Most of the written rules of IHL are found in the 1949 Geneva Conventions (Conventions) and their 1977 Additional Protocols (Protocols/AP).

Modern development of IHL has been a notable success. Its rules are among the most detailed in international law and its principal treaties enjoy almost universal acceptance. Nevertheless, serious violations of IHL occur in armed conflicts all over the world. There is a striking contrast between the richness of the normative order and the behavior of men.[1] This leads to the conclusion that compliance is the major challenge facing humanitarian law today, rather than its very existence or the adequacy of its provisions.[2] Compliance to IHL, in turn, is a multifaceted phenomenon, in that it includes compliance by the States that signed the treaties *vis-à-vis* their own people and the enemy fighters, compliance by armed groups involved in a conflict, and even compliance by the international community as a whole.

The weakest part of international law has always been the methods for ensuring compliance, and "nowhere is this weakness more apparent than in IHL", Greenwood holds.[3] Despite well developed and articulated norms and rules for the regulation of armed conflicts, the implementation and enforcement of these rules lacks sufficient development and is carried out selectively.[4]

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1 William Bradford, "A behavioralist Theory of Compliance with the Laws of War", 11 *International Legal Theory* (2005) 1–33, p 6.

2 Maria Teresa Dutli, "National Implementation measures of international humanitarian law: some practical aspects", 1 *Yearbook of International Humanitarian Law* (1998) 245–261, p 245.

3 Christopher Greenwood,"Ensuring Compliance with the law of armed conflict" – William E. Butler (ed), *Control over compliance with International Law* (Dordrecht/Boston: Martinus Nijhoff Publishers, 1991) 195–204, p 195.

4 Umesh Kadam, "Implementation of international humanitarian law: problems and prospects" – Naorem Sanajaoba (ed), *Manual of International Humanitarian Laws* (Regency: New Delhi, 2004) 379–396, p 379.

Implementation is a manifestation of the *pacta sunt servanda* principle, meaning to turn rules into action, i.e. applying international rules applicable in armed conflict or in preparation for such conflict. Implementation measures range from disseminating and teaching the text of the Conventions to adopting national criminal legislation to punish those that violate the law. Every State party to the Conventions is obligated to take such measures. However, a comparison of what is required and what has been done reveals that although valuable work has been accomplished, many of the agreed measures for implementation remain to be taken. This is a serious problem, and undoubtedly one of the main reasons why humanitarian law is often disregarded in many armed conflicts.[5]

Enforcement, as compared to implementation, is a retrospective response to the violation of norms, which presupposes failure in the primary endeavor of legal prescription to establish and maintain whatever normative standards may be in question. It involves at least some degree of sanctioning for violations and is truly the "soft underbelly" of this field of law. So much so, that the selective enforcement of international law and the limited range of available enforcement mechanisms has been said to detract from the legitimacy of international law as a legal regime.[6]

One of the reasons why this problem persist is the ambiguity of the law. It is well established that the Conventions and Protocols need to be implemented and enforced, but what exactly does that mean; which of the more than 800 Articles need additional action by States in order to become effective in armed conflict? There has been some academic dispute over Common Article 1 (CA 1) to the Conventions, which states that States should respect and ensure respect for the Conventions in all circumstances. Some authors think that CA 1 incorporates every conceivable implementation and enforcement measure, which in turn has considerably distorted the scope of the CA 1 itself as well as the understanding of the concrete measures in other Articles. In addition, the Conventions are silent on the separation of implementation and enforcement measures, a distinction that I believe is important. It will be demonstrated in the next chapters that these two sets of measures have a different temporal and material scope and understanding which measures bring results in which circumstances, can help guarantee the aims of IHL.

Given the evident persistence of both international and non-international armed conflicts throughout the world, the continued relevance of IHL cannot be denied. Both the number of armed conflicts and the number of parties fighting

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5 Dieter Fleck, "Implementing International Humanitarian Law: Problems and Priorities" – Naorem Sanajaoba (ed), *Manual of International Humanitarian Laws* (Regency: New Delhi, 2004) 348–362, p 355.

6 Hilaire McCoubrey, *International Humanitarian Law, Modern Developments in the limitation of Warfare* (Ashgate, Dartmouth, 1998), pp 57–58; Hilary Charlesworth, *et al*, „International law and national law: fluid states" – Hilary Charlesworth (ed), *The fluid state: international law and national legal systems* (Federation Press, 2005) 1–17, p 10.

have grown exponentially, however the inability to explain and predict compliance with IHL remains.[7]

In the 1980s, the topic of national implementation was often discussed at international conferences and in scholarly articles. This was due to the major breakthrough of adopting the two additional Protocols to the Conventions. After this period, however, the importance of implementation gradually diminished in academic literature. Focus shifted to enforcement measures, international criminal adjudication and the opportunities offered by counter terrorism laws.

I argue that after 70 years of adopting the Geneva Conventions time has come to revisit the "roots" of modern IHL; the text of the Conventions and Protocols, the myriad of implementation measures available but not fully used and the fundamental preventative ideas the drafters had in mind. IHL gives us a vast array of measures to take before resorting to international criminal adjudication. Roberts has cleverly pointed out that "The near-exclusive preoccupation of lawyers with major international trials reduces the numerous strands in the rope of implementation to one single strand, which is liable to break under the strain."[8] This thesis explores what are the other strands that make up the rope of compliance with IHL.

Other authors have suggested that international criminal justice provides minimal general deterrence of future violations of IHL.[9] Or that "enforcement actions have been so fragmentary, decentralized and sporadic that it remains impossible, *rebus sic stantibus*, to speak of an effective system of coercive enforcement of international rules."[10] If respect for the rules cannot, in general, be acheived through punishment, one has to ask what are the options left for States to ensure the effectiveness of IHL. This too illustrates the need to differentiate between measures of implementation and enforcement.

There is some hope that implementation issues will be given more thought in the coming years. In 2016, and 2018 respectively, the International Committee of the Red Cross (ICRC) released new commentaries on the First and Second Geneva Conventions, after more than a 60-years wait. This should spark some academic debate on the importance and durability of the Conventions. So far hardly any commentators have picked up on these developments, which is why this thesis is timely and adds to the discussion. The few articles published and

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[7] George H. Aldrich, "Compliance with the law, problems and prospects" – H. Fox & M.A. Meyer (eds), *Armed Conflict and the new Law: Ensuring Compliance* (London: British Institute of International and Comparative Law, 1993) 3–13, p 3.

[8] Adam Roberts, "Implementation of the laws of war in the late 20th century conflicts", 29 *Security Dialogue* (1998) 137–150, p 382.

[9] Chris Jenks, "Moral Touchstone, Not General Deterrence: The Role of International Criminal Justice in Fostering Compliance with International Humanitarian Law", 96 *International Review of the Red Cross* (2005) 776–784, p 776.

[10] Benedetto Conforti, *International Law and the Role of Domestic Legal Systems* (Martinus Nijhoff Publishers, 1993), p 7.

seminars held are addressed in this thesis. For example, right after the commentary to the First Convention was published, the ICRC hosted a high-level panel, which asked whether the "erosion of respect for IHL" was real or perceived and how could the gap between the development of IHL and the situation on the ground be bridged.[11]

This thesis thus serves a purpose of drawing attention to prevention and implementation in the field of IHL, as well as illustrating where this branch of law is currently positioned against other intertwined areas of public international law. The approach taken is uncommon in this day and age in concentrating mostly on preventive activities rather than enforcement, which has been in the centre of academic literature for the past decades. I ask whether the improper implementation of national measures, which are mostly preventive in nature, could lead to serious infringements on international level.

In addition, all three groups of measures – preventive, monitoring and repressive – are brought together here while the majority of previous authors choose to focus on one group only. This is complemented by a thorough analysis of the scope of CA 1. The latter is seen as a basis of States' obligation to ensure respect for the Conventions, therefore analysing these elements together gives the thesis additional value.

The novelty also lies in the fact that the thesis addresses the difference between implementation and enforcement measures foreseen under IHL, and outlines that their temporal scope, relevant actors covered, and desired results are divergent. Enforcement is a retroactive response that presupposes some level of failure in implementation. This element has not been studied in detail previously. The thesis also emphasises the importance of national implementation measures, i.e. those domestic legislative and administrative measures necessary to facilitate compliance with the law, as opposed to measures taken on the international level. National implementation is something that has not received enough attention in past decades. Focus should be on raising awareness on IHL and its full incorporation in national doctrines and handbooks, in reality it is on dealing with the consequences.

B. Research aim and questions

The **purpose** of this thesis is to assess what are the reasons leading to continuous violations of IHL and how to enchance compliance with this body of law.

The **research aims** to establish whether (and to which extent) the implementation and enforcement measures available under IHL have been used by States to prevent violations and foster deterrence. Both prevention and deterrence are

[11] ICRC, "Is the law of armed conflict in crisis and how to recommit to its respect?", 3.06.2016, <www.icrc.org/en/document/law-armed-conflict-crisis-and-how-recommit-its-respect> (1.11.2019).

important aims, however, more needs to be done to bring focus back on prevention to ensure that we do not need to eventually resort to adjudication. In connection to this, it could be asked whether the evidenced underuse of national implementation measures could have led to major violations on international level. The Conventions offer a variety of specific measures to be taken and also call for their respect in all circumstances. However, the scope of the duty to respect and ensure respect for the Conventions as enshrined in CA 1 is unclear and debatable as it leaves open what kind of legal or moral obligations States actually have.

Therefore, it is necessary to establish what the correct interpretation of CA 1 is, i.e. is it to be understood restrictively or extensively. As a natural sequel, the existing implementation measures in the Conventions and Protocols as well as those stemming from customary law and other fields of law, have to be outlined and systemized. This analysis is followed by enquiring whether the dissemination and teaching obligations that parties to a conflict have could prove decisive in fostering wider respect for the Conventions.

Furthermore, it is necessary to ask if, and which of, the reporting, monitoring and repressive measures enshrined in the legal texts have been used in practice, or should be used with more frequency in the future. Finally, the reasons why relevant actors choose to comply with IHL are analysed. This is a complex issue that has not received enough attention in academic dispute and calls for some multidisciplinary insight.

To achieve these research aims, the following **research questions** are posed:

1) What are the current and inherent challenges in applying IHL that lead to its continuous violations?
2) What is the scope of CA 1? What legal and/or moral obligations does it bring to States regarding their own subjects and regarding other States and non-state actors?
3) What is the difference between implementation and enforcement and how can understanding this help foster compliance?
4) To what extent can teaching and disseminating influence the behaviour of warring parties and help ensure respect for the Conventions?
5) Which are the monitoring and reporting mechanisms available in the Conventions that are not properly implemented and could be used more effectively?
6) Can it be demonstrated that the fear of international adjudication has provided a general deterrent effect and lead to less violations of the law?
7) Are the Conventions capable of accommodating the modern-day conflict and actors, or is a revision urgently needed?

C. Structure of the dissertation

The thesis is structured to allow for an in-depth discussion on the way the implementation measures could foster greater compliance, and why repressive measures are usually not the most effective ones. The work is divided into five chapters that form a logical cycle from the prevention to the repression activities. The first chapter is meant for setting the scene, by briefly reminding the reader of the sources of IHL and the conditions of its applicability. To emphasise understanding why national implementation measures are so important and why IHL deserves such attention, this chapter also asks how international law interacts with national law, and explains the special character and weaknesses of IHL. This latter part answers the question why IHL has been continuously violated in practice.

The second chapter concerns with analysing the scope of CA 1. It asks what the historical background of this Article is, how different authors see the legal or moral obligations it entails and whether it has been used in State practice and case law. This is vital for understanding what, why and how needs to be implemented and setting the foundation for further discussions.

The last three chapters are themed prevention, supervision and repression. This is a logical method to organise IHL implementation and enforcement measures, which are roughly divided into those that can be taken before, during, and after a conflict. The chapter on prevention will focus on the difference between implementation and enforcement measures as well as on what implementation actually covers; specifically, the dissemination and instruction obligations. Here I find answers to how understanding the difference between implementation and enforcement can lead to better compliance and how teaching and disseminating influence the behaviour of the belligerents.

The supervision chapter will address reporting and monitoring, Protecting Powers, fact-finding, and enquiry. I ask which are the monitoring and reporting mechanisms available in the Conventions, have they been used in practice and what could be the reasons for their misuse. The role of the EU in implementing IHL will also be addressed in this chapter, since it is of continuous importance on the international arena.

In the last chapter, I will demonstrate the importance of enforcement of IHL. I ask what are the factors influencing the behaviour of armed groups and what kind of deterrent effect international adjudication may have. The role of the UN in enforcing the law is discussed here.

Ways of fostering better compliance are analysed and proposed throughout the thesis under various headings. When considering different implementation measures, I explained what improvements commentators offer and some positive examples they give. Similarly, the continuous adequacy of the Conventions was outlined in different chapters and more thoroughly in the Conclusions.

Where relevant I also included Estonian specific examples of national implementation measures taken. I dedicated my master's thesis to this topic and carefully analysed a full set on measures obligatory for States parties. In this PhD thesis I took a more theoretical approach and focused less on concrete country

specific examples. However, I briefly analysed how teaching and training are carried out in the armed forces and to the civil society in Estonia. In addition, I looked at the national regulation of grave breaches, as well as protection of the emblem and personnel on the Red Cross.

D. Theses set forth for the defence

The main hypothesis set forth in this thesis is that the Conventions and Protocols are fit for modern day purposes and no revision should be foreseen at this point. To support this hypothesis, I also test the following ones:

Existing law is unclear on what needs to be implemented and what measures are available for States to enforce the law. CA 1 holds that States should respect and ensure respect for the Conventions in all circumstances. However, since it is not clear what the scope of this Article is, the extent of the obligation as well as concrete measures in other Articles remain ambiguous.

The Conventions offer a vast array of implementation measures that can and should be used before resorting to international criminal adjudication. The latter does not have a sufficient deterrent effect to outweigh the fundamental preventative ideas proposed by the drafters of the Conventions.

Lack of proper teaching and disseminating of IHL among armed forces and civilian population influences behaviour and may lead to violations on and off the battlefield.

The treaty-based monitoring and reporting mechanisms are not properly implemented at this stage, but there are no legal obstacles for doing so in the future.

E. Description of the applied methodology

Although this study is rooted in the field of IHL, it also touches upon national law, human rights law (HRL) and international criminal law. Links are also frequently made to sociology, international relations and military theories. These disciplines help to understand why combatants choose to comply with the law and what are the different factors influencing their behaviour. They also clarify why States are reluctant to implement some of the measures foreseen in the Conventions, for example the monitoring and reporting obligations that have a peer-review character. The **research methods** used in this work are mainly doctrinal and historical. Doctrinal research is based on the study of current positive law or the "black letter law" as laid down in rules, principles, concepts, doctrines, case law, and annotations in literature.[12] This method was mostly used in the beginning of this work, where it is important to set the scene and find out exactly what the main rules of IHL mean. As the work progresses the epistemological nature of

[12] Paul Chynoweth, "Legal research"– Andrew Knight & Les Ruddock (eds), *Advanced research methods in the built environment* (Wiley-Blackwell, 2008) 28–38, p 29.

the research changes from the internal enquiry of the meaning of the law, to that of external enquiry into the law as social entity.[13] This means interdisciplinary research that aims to evaluate the effectiveness of legislation in achieving particular social goals and an examination of the extent to which it is being complied with. In analysing the characteristics of armed groups and the reasons for their behaviour, organizational and behavioural theory literature was used. The two major studies by the ICRC discussed in this work, as well as works by military lawyers and officers, enabled to answer the question on what works in training and how the characteristics of armed groups might contribute to violations.

Historical method was used to find out how a certain article or institute has developed over time. This is not only important to interpret CA 1, but also the interplay between historical events and the development of specific implementation measures. To achieve these goals, I used literature dating back to the beginning of the 20th century and the *travaux préparatoires* of the Conventions.

When addressing a concrete implementation or enforcement obligation, I found out where its roots are in both customary international law and in the text of the Conventions. This revealed how an obligation came to be and what were the difficulties in codifying it in the 1949 Conventions or 1977 Protocols. That background information proved quite indicative of the chances of an obligation being complied with. If an obligation was the result of harduous negotiations and significantly watered down compared to the original wording offered, it was less likely to be applied in practice. I then looked at case law and state practise to find out how the scope of an obligation has been understood and applied in practise. Academic articles on the topic were a major source of analysis and comparison. I compared how the discourse has changed over the past decades, and how various authors saw the same problem. For example, there are tens of different interpretations of what implementation is and which measures it encompasses. In some instances, I drew comparisons with instruments from other fields of law, notably the HRL.

Other elements of the traditional legal method and interpretation catalogue were used whenever appropriate. The grammatical interpretation was used to clarify the meaning of the text of CA 1, supplemented by systematic and teleological interpretation techniques. Throughout the thesis the catalogue served as a valuable tool for a comprehensive understanding of any given article in the Conventions.

As this work is doctrinal in nature, empirical research was mainly left out of the scope. It was used indirectly by summarizing studies where empirical research was used, such as the ICRC studies on the roots of restraints in war. Some Estonian specific examples on concrete implementation measures were also given throughout the thesis.

The sources used in this thesis are wide-ranging. Scholarly books and articles, mainly written in English or French, form the bulk of the literature. In addition, the decisions of national and international courts, UN resolutions, EU documents,

[13] *Ibid*, p 30.

interviews, and online resources were all used to answer the research questions posed. It is not uncommon in IHL that a few prominent authors are cited more than others. Thus, the works of professors Kalshoven, Sassoli, Greenwood and Fleck stand out in this rather confined group of authors.

Among others, I have benefitted from using the Peace Palace Library resources in The Hague, the Georgetown University Law Centre in Washington, the Helsinki University Law School and the ICRC Brussels headquarters library. During the many years of writing this thesis, I have attended numerous summer schools and moot courts, as well as conferences on IHL which have also provided valuable insights and additional sources. All online resources used were last accessed on 1 November 2019.

F. Overview of the existing legal research on the topic of the dissertation

Analysis of the literature available revealed that academic dispute on this topic has mostly focused on enforcement measures, the role of international criminal courts and individual criminal responsibility, and counterterrorism responses for the past decades. The creation of the International Criminal Court set the stage for shifting the focus from implementation to enforcement, and the prevalence of international criminal law over IHL. There is a handful of authors, and most notably the ICRC, who have emphasised the importance of implementation measures available in the Conventions. For example, Drzewicki in 1989, Dutli in 1998 and Kadam in 2004 wrote about national implementation measures, analysing the existing measures and their effectiveness much like it is done in this thesis.[14] They listed the various implementation measures available in the Conventions and asked whether measures from other fields of law could be used. After that period, however, implementation as a whole has not been in the centre of discussions.

There has also been some periodic debate on the scope of CA 1. Kalshoven started this discussion in 1999 and was answered by Chazournes and Condorelli in 2000. Ten years later, Zych and Focarelli revived this discussion by offering some new insights and warning against too extensive interpretation.[15] These

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[14] Dutli, "National Implementation measures", *supra nota* 2; Kadam, "Implementation of international humanitarian law", *supra nota* 4; Krzysztof Drzewicki, „National Legislation as a measure for implementation of international humanitarian law" – Fritz Kalshoven & Yves Sandoz (eds), Implementation of International Humanitarian Law. Research Papers by participants in the 1986 Session of the Centre for Studies and Research in International Law and International Relations of the Hague Academy of International Law (1989) 109–131.

[15] Frits Kalshoven, "The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit", 2 *Yearbook of International Humanitarian Law* (1999) 3–61; Tomasz Zych, "The Scope of the Obligation to Respect and to Ensure Respect for International Humanitarian Law", 27 *Windsor Yearbook of Access to Justice* (2009) 251–270; Laurence Boisson de Chazournes & Luigi Condorelli, "Common Article 1 of the Geneva

examples nevertheless remain modest in the vast pool of literature on international law.

More recently there are somewhat more references to the prevention and implementation elements of IHL. The December 2015 issue of the *International Review of the Red Cross* was themed Generating respect for law and was aimed at "taking stock of the lessons learnt in the field of influencing behaviour and developing strategies for enhanced respect for the law and, more generally, to recall the importance of taking preventive measures."[16] As such, this was quite a unique issue of the *Review*. In 2018, the Roots of Restraint in War study was published. This is an update of the 2004 study, which investigates how formal and informal norms condition the behaviour of soldiers and fighters depending on the kind of armed organization to which they belong.[17] Finally, the 2019 December International Conference of the Red Cross and Red Crescent will discuss a resolution titled "A road map for better national implementation of international humanitarian law." This is a part of long ang ongoing efforts of the ICRC and many likeminded governments to remind the international community of their obligations and try to advocate for a voluntary reporting system, as will be seen below. It is also worth noting the encouraging words of the President of the ICRC delivered recently: "International humanitarian law does not ask the impossible. States were not carried away by lofty ideals when they negotiated the treaties. They knew the realities of war and they set out inherently pragmatic rules to protect and respect human life and dignity."[18]

All in all, a shift towards taking prevention seriously can be noticed in the literature of the past five years. This thesis is thus timely and adds to the debate in offering a comprehensive approach on implementation measures. The ideas and suggestions put forward here are more far-reaching than the ones of ICRC in their latest resolutions. There seems to be quite a discord between what is legally possible and what is feasible in current political circumstances.

Conventions Revisited: Protecting Collective Interests", 837 *International Review of the Red Cross* (2000). <www.icrc.org/eng/resources/documents/article/other/57jqcp.htm>; Carlo Focarelli, "Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?", 21 *European Journal of International Law* (2010) 125–171.

16 Vincent Bernard, "Time to take prevention seriously: editorial", 96 *The International Review of the Red Cross* (2014) 689–696.

17 The Roots of Restraint in War (ICRC, 2018), <www.icrc.org/en/publication/roots-restraint-war> (1.11.2019).

18 Peter Maurer, „Briefing by ICRC President to UN Security Council on The promotion and strengthening of the rule of law in the maintenance of international peace and security", <www.icrc.org/en/document/geneva-conventions-are-all-us> (1.11.2019); ICRC, Bringing IHL Home: A road map for better national implementation of international humanitarian law, 33rd International Conference of the Red Cross and Red Crescent, Geneva, 9–12 December 2019, Background document, <rcrcconference.org/app/uploads/2019/06/Background-document-33IC-report-vFinal_en.pdf> (1.11.2019).

1. SETTING THE SCENE

Humanitarian law tries to humanize an area which is *per se* inhumane. Implementing and enforcing law in such circumstances is one of the greatest tasks a legal order has to cope with.[19] Violations of IHL have been committed by parties to nearly every armed conflict, however, both published reports and internal findings show that the protective provisions of IHL have prevented or reduced great suffering in many cases.[20]

IHL is a compromise between military and humanitarian requirements, as Greenwood notes. "Its rules comply with both military necessity and the dictates of humanity. Considerations of military necessity cannot, therefore, justify departing from the rules of humanitarian law in armed conflicts to seek a military advantage using forbidden means."[21] On the other hand, it should not be assumed that humanitarian law and military requirements will necessarily be opposed to one another. "On the contrary, most rules of humanitarian law reflect good military practice, and adherence by armed forces to those rules is likely to reinforce discipline and good order within the forces concerned."[22]

In other words, IHL is a very specific field of public international law. To understand why its implementation and enforcement is so difficult, some historical context will be provided in this introductory chapter, followed by analysis of IHLs current and inherent challenges. This will answer the first set of research questions I posed, namely why is the law still constantly violated.

1.1. A brief history and definition of International Humanitarian Law

The origins of humanitarian law date back to ancient history. The concept of rules regulating war is recognizable in every culture, religion, and tradition. In all historical periods, leaders set up rules and taboos that determine what is allowed and what is forbidden in military activities.[23] Some rules, which imposed restrictions on the conduct of war, the means of warfare, and their application,

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[19] Silja Vöneky, "Implementation and Enforcement of International Humanitarian Law" – Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, Oxford University Press, 2013) 648–660, p 648.

[20] *Ibid*, 649.

[21] Christopher Greenwood, "Historical development and legal basis" – Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press, 2008) 1–44, p 38.

[22] *Ibid*, p 38.

[23] Francoise Bouchet-Saulnier, *The practical guide to humanitarian law* (3rd edn, Rowman & Littlefield Publishers, 2014), p 310.

can be traced back to the Sumerians, the Code of Hammurabi, ancient India, Islam, Bushi-Do, etc.[24]

The development of rules of war resulted from the slow accretion of practical, and *ad hoc*, agreements made between the participants in particular wars. Dating roughly from the discovery of the New World, attention began to focus gradually on the regulation of war rather than on the reasons for its occurrence, or its "justness." In time, this was reflected in a contractual approach to the codification of certain rules, particularly applicable to weapons, and military practices.[25]

The origins of contemporary humanitarian law go back to the efforts codifying the laws and customs of war, which started in the second half of the 19th century. Soviet professor Trainin notes that between 1815 and 1910 there were 148 different international meetings to codify the laws and customs of war.[26] IHL thus developed in the bosom of classical public international law and was cast in its mold. In consequence, IHL was formulated as a purely inter-state and contractual (or reciprocal) set of legal rules.[27] Early developments in the laws of war reflect an objective acknowledgement that "civilized" States needed to observe practical restraints on a reciprocal basis in order to guarantee their mutual survival.[28]

Of the rich history of the development, two events (or rather persons) deserve particular attention. Namely, Francis Lieber and Henry Dunant. On behalf of US President Lincoln, Lieber prepared a manual of the battlefield in 1861 which was first put into effect in 1863 in the American Civil War. The Lieber Code is the origin of what has come to be known as the "Hague Law". Dunant, on the other hand, after witnessing the horrors on the battlefield of Solferino (1859), launched the establishment of the International Committee of the Red Cross (ICRC).[29]

After the events of the Second World War, it became unthinkable to ignore the caps in humanitarian law concerning the protection of civilians as witnessed

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[24] Greenwood, "Historical development and legal basis", *supra nota* 21, p 16.

[25] Elizabeth Chadwick, "It's War, Jim, but not as we know it: A 'reality-check' for international laws of war?", 39 *Crime, law & social change* (2003) 233–262, p 237.

[26] I.P. Trainin, "Questions of Guerrilla Warfare in the Law of War", 40 *American Journal of International Law* (1946) 534–562, pp 534, 536.

[27] Georges Abi-Saab, „The specificities of humanitarian law" – Christophe Swiniarski (ed), *Studies and essays on International humanitarian law and Red Cross Principles in honour of Jean Pictet* (Martinus Nijhoff Publishers, 1984) 265–280, p 265. See for example: Geneva Convention for the amelioration of the condition of the wounded in armies in the Field, 22.12.1864, in force 22.06.1965, 22 Stat. 940, T.S. No. 377; Declaration of St. Petersburg Renouncing the use in time of war of explosive projectiles under 400 grammes, 29.11.1986, in force 11.12.1868, 138 Parry'd T.S. 297; Hague Convention No II with Respect to the laws and customs of war on land, 29.07.1899, in force 4.09.1900, 32 Stat. 1803, T.S. No. 403

[28] Chadwick, "It's war Jim", *supra nota* 25, p 239.

[29] Greenwood, "Historical development and legal basis", *supra nota* 21, pp 21–22. (Henry Dunant was a Genevese merchant, who published a book "A memory of Solferino" after witnessing the plight of 40000 Austrian, French, and Italian soldiers wounded on the battlefield of Solferino. In 1863 the ICRC was founded in Geneva on his initiative, which has played a central role in the development and implementation of the rules of humanitarian law).

in practice. Consequently, a more ambitious phase of codification of humanitarian law got underway. The four Conventions adopted in Geneva on 12 August 1949 were the fruit of this recodification. The 1977 Protocols unified protection with reference to notion of civilian victims of conflict, without mention of enemy nationality.[30] Of the four conventions that resulted from the 1949 Conference, three substituted those already in force whereas the fourth was an entirely new Convention on the protection of civilians in time of war.[31]

What is IHL as we know it today? In the broadest terms, IHL frames the coexistence of armed actors and humanitarian ones in situations of conflict. It refers to international rules that attempt to "mitigate the human suffering caused by war".[32] It is of relatively recent origin and the term itself does not appear in the Conventions of 1949. Therefore, one has to look at academic sources to define exactly what IHL means and encompasses.

According to Gasser, IHL – also called the "law of armed conflict" and previously known as the "law of war" – is a special branch of law governing situations of armed conflict. IHL seeks to mitigate the effects of war, first in that it limits the choice of means and methods of conducting military operations, and secondly in that it obliges the belligerents to spare persons who do not or no longer participate in hostilities.[33] The purpose of IHL in not to prevent war. Girod holds that, "quite prosaically, IHL seeks to preserve an oasis of humanity in battle until resort to armed force is no longer a means of settling differences between States."[34]

Schindler points out that the previously unknown term "international humanitarian law" was introduced by the ICRC in the early 1950s. This largely replaced the terms "law of war" and "law of armed conflicts" while blurring the distinction

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[30] Bouchet-Saulnier, *The practical guide*, *supra nota* 23, p 312. Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 12.08.1949, in force 7.12.1978, 1125 UNTS 3; Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 12.08.1949, in force 7.12.1978, 1125 UNTS 609.

[31] ICRC, What treaties make up IHL? What is customary IHL? <www.icrc.org/en/document/what-treaties-make-ihl-what-customary-ihl> (1.11.2019). Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12.08.1949, in force 21.10.1950, 75 UNTS 31; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12.08.1949, in force 21.10.1950, 75 UNTS 85; Convention (III) relative to the Treatment of Prisoners of War, 12.08.1949, in force 21.10.1950, 75 UNTS 135; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12.08.1949, in force 21.10.1950, 75 UNTS 287.

[32] Frits Kalshoven & Liesbeth Zegveld, *Constraints on the Waging of War* (Geneva: ICRC, 2001), p 12.

[33] Hans-Peter Gasser, "International Humanitarian Law" – Naorem Sanajaoba (ed), *Manual of International Humanitarian Laws* (Regency: New Delhi, 2004) 204–311, p 204.

[34] Christophe Girod, *Storm in the desert: the International committee of the Red Cross and the Gulf War 1990–1991* (Geneva: ICRC, 2003), pp 26–27.

between the law applicable in armed conflicts and the law of human rights and giving rise to occasional confusion between these two branches of international law.[35]

Greenwood holds that "IHL comprises all those rules of international law, which are designed to regulate the treatment of the individual – civilian or military, wounded or active – in international armed conflicts." While the term is generally used in connection with the Conventions and the APs, it also applies to the rules governing methods and means of warfare and the government of occupied territory, for example, which are contained in earlier agreements such as the Hague Conventions of 1907. It also includes a number of rules of customary international law. IHL thus includes most of what used to be known as the laws of war.[36]

Bouchet similarly states that the term IHL refers to a special branch of public international law concerning the "law of armed conflict" or the "law of war." It is an ancient law, established progressively through the practice of States and codified through treaties they adopted.[37] He thinks that the term IHL should be preferred as it places more emphasis on the humanitarian goals of the law or armed conflict. Solis further holds that the conflation of LOAC/IHL terminology reflects a desire of humanitarian-oriented groups and NGOs to avoid phrases like "law of war" in favour of more pacific terms, perhaps in the hope that battlefield actions may someday follow that description.[38]

Darcy thinks that "the contemporary use of different nomenclature reveals slightly diverging emphases as to the law's purpose, although there is common agreement that the principal aim of these laws is to minimize suffering occurring during wartime".[39]

For military purposes, Colonel F. de Mulinen has suggested that the military should stay with the term "law of war", the whole concept of war being the basis of the existence of the military. Members of the armed forces relate very well to "war" and they know "law". Therefore, the concept of "law of war" is easier to refer to than "humanitarian law" which may seem alien to the military mind.[40]

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[35] Dietrich Schindler, "Significance of the Geneva Conventions for the Contemporary World" – Naorem Sanajaoba (ed), *Manual of International Humanitarian Laws* (Regency: New Delhi, 2004) 42–55, p 44. (The annual report of 1953 of the ICRC was the first one to use the term IHL).

[36] Greenwood, "Historical development and legal basis", *supra nota* 21, p 11; Michael H. Hoffman, "Emerging combatants, war crimes and the future of international humanitarian law", 34 *Crime, Law and Social Change* (2000) 99–110, p 100.

[37] Bouchet-Saulnier, *The practical guide*, *supra nota* 23, p 307.

[38] Gary D. Solis, *The Law of armed Conflict* (Cambridge University Press, 2010) p 23.

[39] Shane Darcy, *Judges, Law and War: The Judicial Development of IHL* (Cambridge University Press, 2014), p 5. *Prosecutor v. Duško Tadic*, Case No IT-94-1-T, ICTY, Judgement of the Appeals Chamber, 15.07.1999, para 96.

[40] Diane Guillemette, "Legal advisers in armed forces" – Fritz Kalshoven & Yves Sandoz (eds), *Implementation of International Humanitarian Law. Research Papers by participants*

As can be seen, some lack of clarity remains on the different terms used. In the context of this thesis the more narrow meaning of IHL is used. When speaking about implementation or enforcement of IHL, only the Conventions and Protocols are focused on, as a general rule. If other legal instruments are analyzed, a reference is made to them separately. The terms "law of war" and "law of armed conflict" are used as synonyms for IHL to allow for more variety in the text.

The fact that IHL deals with war does not mean that it lays open to doubt the general prohibition of war.[41] Again, IHL is meant to alleviate suffering during armed conflicts, not to solve them; this is the role of the UN and the international community.[42]

This is confirmed in the Preamble of AP I: "The High Contracting Parties … expressing their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations". It is interesting to note from a teleological point of view that in 1949 the International Law Commission (ILC) refused to engage in codification of the laws of war because "public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations (UN) for maintaining peace".[43]

Use of force is prohibited under Article 2(4) of the UN Charter. UN member States may resort to force only in the exercise of their inherent right of individual or collective self-defence (Article 51) or as part of military sanctions authorized by the UNSC (Articles 42–48). IHL applies with equal force to all the parties in an armed conflict irrespective of which party was responsible for starting that conflict.[44] Under *ius ad bellum*, the parties to an international armed conflict are never equal because one side has necessarily violated that law, although it is often controversial which side has done so. Conversely, under *ius in bello*, both sides have to always comply with exactly the same rules.[45]

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in the 1986 Session of the Centre for Studies and Research in International Law and International Relations of the Hague Academy of International Law (1989) 133–151, p 133.

41 Gasser, "International Humanitarian Law", *supra nota* 33, p 205.

42 Yves Sandoz, "Discours d'ouverture: la pertinence de la catégorisation des conflits armés: une réelle différence dans la protection des personnes touchées?" – *Armed conflicts and Parties to Armed Conflicts under IHL: Confronting Legal Categories to Contemporary Realities* (10th Brugges Colloquium 22–23.10.2009), p 11.

43 Yearbook of the International Law Commission (A/CN.4/SER.A/1949), p 281.

44 Greenwood, "Historical development and legal basis", *supra nota* 21, p 1.

45 Marco Sassoli, „Ius ad bellum and Ius in bello: the separation between the legality of the use of force and humanitarian rules to be respected in warfare: crucial or outdated?" – Michael Schmitt & Jelena Pejic (eds), *International law and armed conflict: exploring the faultlines: essays in honour of Yoram Dinstein* (Leiden: Martinus Nijhoff, 2007) 241–264, p 246

1.2. Sources of International Humanitarian Law

The Statute of the International Court of Justice (ICJ), Article 38 identifies four sources of international law:

(a) Treaties between States;
(b) Customary international law derived from the practice of States;
(c) General principles of law recognized by civilised nations; and,
(d) Judicial decisions and the writings of "the most highly qualified publicists" (as subsidiary means for the determination of rules of international law).[46]

The treaty law relevant to IHL consists primarily of the law of Geneva, aimed at the protection of victims of armed conflict, and the law of Hague, aimed at the actual conduct of hostilities. The 1864 Geneva Conventions for the Amelioration of the Condition of the Wounded in Armies in the Field defined the legal status on medical personnel. This marks the beginning of the development of what has become known as Geneva law. The Hague law consists of various declarations and conventions signed in the Hague, Netherlands in 1899, 1907, 1954, 1957, 1970, 1973.[47] The distinction between these two branches of law has become rather theoretical, however focus is on the Geneva law in this thesis.

The most important written rules of IHL can be found in the following treaties:

The 1949 Four Geneva Conventions on Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (I); Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (II); Treatment of Prisoners of War (III); Protection of Civilian Persons in Time of War (IV). The 1977 Two Protocols additional to the four 1949 Geneva Conventions, strengthening protection for victims of international (Additional Protocol I) and non-international (Additional Protocol II) armed conflicts. The 2005 Protocol additional to the Geneva Conventions, and relating to the Adoption of an Additional Distinctive Emblem (Additional Protocol III). The 1956 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.[48]

Unless the treaty or its provisions have become custom, however, conventional law binds only its signatories.[49] For the Hague and Geneva Conventions of the last 100 years or so, it has been said in connection to international customary law that the drafters of these instruments were keenly aware that they did not start from scratch, but were handling an already existing body of law.[50]

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[46] Statute of the International Court of Justice, 26.7.1945, in force 24.10.1945, 1 UNTS xvi.

[47] Oonagh E. Fitzgerald, "Implementation of international humanitarian and related international law in Canada" – Oonagh E. Fitzgerald (ed), *The Globalized Rule of Law: Relationships between International and Domestic Law* (Irwin Law: 2006) 625–639, p 627.

[48] References to these acts are provided elsewhere in this thesis.

[49] Vienna Convention on the Law of Treaties, Articles 26 and 38.

[50] Abi-Saab, „The specificities of humanitarian law", *supra nota* 27, p 274.

Therefore, the gradual development of IHL means that customary law plays an equally important role here.[51] Customary international law reflects certain practices that States follow in a repeated and consistent manner (State practice) and that they accept as law (*opinio juris*). Defined by the ICJ as "evidence of a general practice accepted as law", customary law is one of the oldest sources of international law. Failure to respect such custom is therefore a violation of law. Customary law plays a very important role in the law of armed conflict because, among other things, it regulates interactions and confrontations between States on the one hand and non-state actors on the other, even where written rules are not applicable.[52]

There is, however, another side to this phenomenon. As customary law originates from standards of behavior recognized and accepted as legitimate and beneficial, so called precedents, it can also develop "negative" precedents. This means that repeated acts violating the law may result in the progressive erosion of international law if they are not denounced openly. "The conduct of both State and non-state actors may therefore result in either the strengthening or weakening of IHL and principles. It is the duty of humanitarian actors to defend humanitarian customs through their actions and to denounce any failure to respect them."[53]

The 1949 Conventions reiterate the fact that persons and situations not covered by the Conventions remain covered by international customary law. This principle is found in all four Conventions and AP I. Commonly known as the "Martens Clause", developed by the Baltic-Russian professor Friedrich von Martens (1845–1909), it states that

> [I]n cases not covered by the Conventions and AP I or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.[54]

It is thus established that international customary law is as binding on States as the international conventions to which they are parties. Many authors believe that the four 1949 Conventions – as well as most provisions of the 1977 Protocols – have gained the status of customary international law. This means that even States

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51 Hoffman, "Emerging combatants", *supra nota* 36, p 100–101.

52 Bouchet-Saulnier, *The practical guide*, *supra nota* 23, p 91; Christopher Greenwood, Sources of International Law: An Introduction, <legal.un.org/avl/pdf/ls/greenwood_outline.pdf> (1.11.2019)

53 Bouchet-Saulnier, *The practical guide*, *supra nota* 23, p 91.

54 GC I 63, GC II 62, GC III 142, GC IV 158 and AP I 1.2 Greenwood, "Historical development and legal basis", *supra nota* 21, p 34; "What is not clear is whether the Martens Clause goes further and introduces into humanitarian law a rule that all weapons and means of warfare are to be judged against the standard of the "public conscience" even if their use does not contravene the specific rules of customary international law such as the unnecessary suffering principle."

that have not ratified them must abide by their rules.[55] Note, however, that some authors are not entirely convinced that all provisions of the Conventions and Protocols now enjoy the status of customary law. This goes especially for the massive study and compendium recently completed and published by the ICRC of customary IHL that gives customary law status to almost all the norms of IHL.[56]

Fleck is one of the authors to take issue with this. He stated recently that there is "a very strong development to apply all the rules to non-international armed conflicts by way of customary law. The ICRCs' customary law study is a book of '7 kilos'. But governments do not actually think so. Just think of how many objections States had when drafting AP II. Moreover customary law comprises State practice and *opinio iuris*. Actual State practice", he adds, "not legal literature."[57]

Why is it important to ask whether the provisions of the universally applicable Conventions have attained the status of customary international law? Firstly, because an international tribunal may sometimes be able to apply rules of customary international law even though it lacks the competence to apply the provisions of a multilateral treaty (as evidenced in the Military and Paramilitary activities in and against Nicaragua Case). Secondly, in many States treaties do not form part of national legislation and cannot be applied by national courts, whereas national courts can and do apply rules of customary international law.[58] This could prove a difficult task in domestic implementation of IHL as most of the cases on IHL are indeed tried by domestic courts.

1.3. When does International Humanitarian Law apply?

The answer to this question can be found in Common Article 2 to the Conventions:

> [t]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party…

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[55] Bouchet-Saulnier, *The practical guide*, *supra nota* 23, p 92. Some cases where this has also been established include the *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, ICJ Reports (1986) 14 and the *Prosecutor v. Duško Tadic*, Case No IT-94-1-T, ICTY, Judgement of the Appeals Chamber, 15.07.1999.

[56] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law, infra nota* 182.

[57] A speech by Dr. Dieter Fleck at a seminar „New Perspectives on the Law of Non-International Armed Conflict", T.M.C. Asser Instituut, The Hague (2012). Attended by the author.

[58] Greenwood, "Historical development and legal basis", *supra nota* 21, p 28.

However, the 1949 Conventions famously do not define armed conflict – despite the fact the Conventions are limited to application in war and armed conflict. Pictet's Commentary says, with respect to this omission, that in reality the Convention becomes applicable as from the actual opening of hostilities, and a formal declaration of war is no longer needed.[59]

O'Connell takes issue with this interpretation and claims that since 1949, States have not treated minor engagements of their armed forces as armed conflicts to which IHL applies. Partsch holds that certain situations mentioned in Article 1 of AP II involving international violence similar to internal disturbances and tensions "should also be excluded from the concept of armed conflict as this term is used in Art. 1 of the first Protocol". Greenwood has also observed that "many isolated incidents, such as border clashes and naval incidents, are not treated as armed conflicts" and that it "may well be, therefore, that only when fighting reaches a level of intensity which exceeds that of such isolated clashes will it be treated as an armed conflict to which the rules of international humanitarian law apply".[60]

The 2016 updated Commentary affirms that an armed conflict can arise when one State unilaterally uses armed force against another State, even if the latter does not or cannot respond by military means. The simple fact that a State resorts to the use of armed force against another suffices to qualify the situation as an armed conflict within the meaning of the Conventions.[61]

More noteworthy is that, while continuing to be applicable to international armed conflicts, the four Conventions have a Common Article 3 that renders them also applicable "in the case of armed conflict not of an international character, occurring in the territory of one of the contracting parties".[62]

Under international law, only lawful combatants engaged in situations of armed conflict may claim the right to kill. This makes the definition of armed conflict one of the most critical definitions in all of international law. Certain

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[59] Jean Pictet (ed), *Commentary to the Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field* (Geneva, ICRC, 1952) [Pictet's Commentary]; Mary Ellen O'Connell, "Saving lives through a definition of international armed conflict" – *Armed conflicts and Parties to Armed Conflicts under IHL: Confronting Legal Categories to Contemporary Realities* (10th Brugges Colloquium 22–23.10.2009) 19–27, p 24.

[60] Greenwood, "Historical development and legal basis", *supra nota* 21, pp 25–26.

[61] Lindsey Cameron, Bruno Demeyere, Jean-Marie Henckaerts, Eve La Haye & Heike Niebergall-Lackner, "The updated Commentary on the First Geneva Convention – a new tool for generating respect for international humanitarian law", 97 *International Review of the Red Cross* (2015) 1209–1226.

[62] Steven Kuan-Tsyh Yu, „The development and implementation of international humanitarian law", 11 *Chinese Yearbook of International Law and Affairs* (1993) 1–19, pp 7–8. However, the threshold for the application of Article 3 is so high, that is only been applied in a handful of conflicts.

international legal rules also depend on whether an armed conflict is an international armed conflict (IAC) or a non-international conflict (NIAC).[63]

In 1995, the International Criminal Tribunal for Yugoslavia (ICTY) clarified the definition of armed conflict for both IAC and NIAC. The test for determining the existence of an armed conflict was set out by the Appeals Chamber in the Tadic Jurisdiction Decision:

> [A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[64]

Thus, it is now accepted that armed conflict, as a factual condition of hostilities, is a sufficient trigger for the application of the humanitarian laws of armed conflict. Therefore, Article 2 of the GCs should really read as if it said "even if the state of war is not recognized by one or both of them". In practice in most conflicts since 1949, neither side has admitted that it was in a state of war, yet they have treated the Conventions as applicable.[65]

1.4. International Humanitarian Law as part of national law

No country can be compelled to conclude a treaty. This principle has been clearly stated in Articles 51 and 52 of the Vienna Convention of 1969. When concluding a treaty, the State expresses its free will and implies that its internal law either is already in compliance with that treaty, or is soon to be revised in a way which would bring it into compliance with it. *Tertium non datur*.[66]

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[63] O'Connell, "Saving lives", *supra nota* 59, pp 20–21. Hersch Lauterpacht, *International Law: A Treatise (Oppenheim's International Law)*, vol II (7th edn, London, 1952), p 202. Christopher Greenwood, „War, terrorism and International law", 56 *Current Legal Problems* (2003), 505–530.

[64] *Prosecutor v. Duško Tadic*, Case No IT-94-1-T, ICTY, Decision of the Defence motion for interlocutory appeal on jurisdiciton, 8.10.1995, para 70; O'Connell, "Saving lives", *supra nota* 59, p 25.

[65] Greenwood, "Historical development and legal basis", *supra nota* 21, p 41; McCoubrey, *International Humanitarian Law, supra nota* 6, p 61.

[66] Karl Josef Partsch, "International humanitarian law as part of national law" – Michael Bothe (ed), *National implementation of international humanitarian law: proceedings of an international colloquium held at Bad Homburg*, June 17–19, 1988 (Martinus Nijhoff Publishers,

States do enjoy considerable discretion to determine how to internally organize their institutions so as to ensure compliance. International law does not generally require, for example, that domestic courts must have jurisdiction to enforce international law. However, if a provision of international law prescribes a certain behaviour, "no feature of the domestic legal system can be invoked as a justification for non-compliance". More pressing domestic priorities are not valid justifications for non-compliance under international law.[67]

In general, the constitutions of States contain a list of treaties, which need approval by parliament or any other form of legal acceptance.[68] Two elements appear in nearly all of these lists. First, whether a treaty imposes financial burdens, and second, whether it defines in any way the rights and duties of individuals. The Conventions fulfill both of these criteria.[69] However, this does not give an answer to how the Conventions become applicable on national level.

Partsch has analyzed the EU member States, and came to the conclusion that not even two States have identical provisions regarding the implementation of international law on the national level.[70] However, there are generally two ways the States choose to do this. The essence of the monist approach is that a treaty may, without legislation, become part of domestic law once it has been concluded in accordance with the constitution and has entered into force for the State. When legislation is not needed such treaties are commonly described as "self-executing".[71] Under the dualist approach, the constitution of the State accords no special status to treaties; the rights and obligations created by them have no effect in domestic law unless legislation is in force to give effect to them. When the legislation is specifically made for this purpose, the rights and obligations are then said to be "incorporated" into domestic law.[72]

1990), p 11. Vienna Convention on the Law of Treaties, 23.5.1969, in force 27.01.1980, 1155 UNTS 331.

67 Mattias Kumm, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis", 15 *The European Journal of International Law* (2014), pp 910–911.

68 *Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne* (Juura, 2007), para 65 and commentaries.

69 Partsch, "International humanitarian law", *supra nota* 66, p 11.

70 *Ibid*, p 2.

71 Anthony Aust, *Modern treaty law and practice* (Cambridge University Press, 2000), p 183. David Feldman, „Monism, Dualism and Constitutional Legitimacy", 20 *Australian Yearbook of International Law* (1999) 105–126, p 105. John Mark Keyes & Ruth Sullivan, "A Legislative Perspective on the Interaction of International and Domestic Law" – Oonagh E. Fitzgerald, *The Globalized Rule of Law* (Irwin Law, 2006), p 311, 313.

72 Fatima Shaheed, *Using international law in domestic courts* (Oxford: Hart Publishing, 2005), p 55; Jennifer Schense & Donald K. Piragoff, "Commonalities and differences in the implementation of the Rome Statute" – Matthias Neuner (ed), *National Legislation incorporating international crimes* (Berliner Wissenschafts-Verlag GmbH, 2003) 239–255, pp 247–248. In the US for example only self-executing treaties have the force of law without Congressional legislation to make them part of municipal law; Feldman, "Monism, Dualism", *supra nota* 8, p 108.

The distinction between self-executing and non-self-executing international rules gives rise to serious flaws in the implementation of international law by domestic legal operators and national courts. Two issues need to be differentiated according to Conforti. First, the formal validity of the agreement under municipal law. Once that has been resolved and the agreement is interpreted and applied to a concrete situation, the content of the agreement must be addressed. This involves asking if, and when, the agreement or some of its provisions may be relied upon by any interested person and directly applied by domestic legal operator, or if an intervening act of integration by a public authority is required before the agreement is applied.[73] In this sense, one cannot really claim that a whole treaty is self-executing (say the Conventions in a monist country). We have to look at the individual provision and ask if it requires additional action by the State. This will be dealt with in later chapters of this thesis.

Many provisions of IHL do require legislative measures for implementation (one list available enumerates at least 108 provisions of the Conventions); insofar as those measures have not yet been taken, they should be drawn up when ratification is decided on or as soon as possible thereafter. This is especially true for the obligation to prosecute grave breaches.[74] Yet again, some standards in international law (*jus cogens*) are regarded as sufficiently important to make it proper to enforce them without the need for national agreement, and notwithstanding any agreement to the contrary.[75]

This introduction serves to draw attention to differences in application to better understand the scope of States' obligations under IHL. It is not unequivocally understandable how the Conventions become a part of national law and what needs to be done by a State to truly incorporate the spirit of the Conventions. This is especially true for the issue of punishing the perpetrators of grave breaches of the Conventions. Every State Party has a slightly different system for regulating this, yet for the purposes of deterrent effect, consistency is of the utmost importance. Bothe provides an additional word of caution, in saying that the transplantation of legal regulations from one legal system to another is like an organ transplantation: the transplanted element may be rejected by the new environment and not work well.[76] This is why this thesis focuses on which

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[73] Benedetto Conforti, *International Law, supra nota* 10, p 25.

[74] Krzysztof Drzewicki, "Reporting mechanism for supervision of national legislation implementing international humanitarian law" – Astrid J.M. Delissen & Gerard J. Tanja (eds), *Humanitarian Law of armed Conflict: Challenges Ahead*. Essays in honour of Frits Kalshoven (Martinus Nijhoff publishers, 1991) 545–567, p 560; Fleck, "Implementing International Humanitarian Law", *supra nota* 5, p 349.

[75] Feldman, "Monism, Dualism", *supra nota* 8, p 107. Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press, 2008), pp 510–511. Greenwood, "Historical development and legal basis", *supra nota* 21, p 39.

[76] Michael Bothe, „The role of national law in the Implementation of International Humanitarian Law" – Christoph Swinarski (ed), *Studies and Essays on International Humanitarian Law in Honour of Jean Pictet* (Geneva: ICRC, 1984) 301–321, p 311.

measures need to be implemented and exactly how this has to be carried out on national lavel.

1.5. Current and inherent challenges in the application of IHL

The previous discussion is but one aspect that illustrates the different nature of IHL. Indeed, much of these questions would not arise in domestic legal setting or other fields of international law. Why then, and how, is IHL different and what implications does this difference have on its applicability? Literature on this topic usually multiplies just before and after the adoption of new international treaties, or when there is a shift towards a "new" type of conflict that seems to be unresolvable by "old" laws. Let us now try to list the things that are "incorrect" in IHL, that make it less applicable in practice.

Many authors admit that the first obstacle to the adoption of all the measures just described may be a lack of awareness. The dependence of IHL on national measures of implementation is a fact which so far has only been partly recognized. Bothe says that he knows from his own experience that negotiators at Geneva were not fully aware of the whole complexity of the process of national implementation required by the Conventions and the Protocols. Thus, there are reasons for doubt that State administrations, who have to draft the necessary laws or to adopt the relevant administrative rules, are in all cases aware of the problems they are facing.[77]

1.5.1. Inherent challenges and the special character of humanitarian treaties

Humanitarian law has certain characteristics which differentiate it from the other branches of international law. One of the unusual features of humanitarian law is that, unlike most rules of international law, it binds not only the State and its organs, but also the individual. Abi-Saab explains why this body of law is different:

> The exacting and absolute character of the rules, their tendency towards universal application and their reach for the individual level make for their *jus cogens* character and for their extensive teleological interpretation. These substantive characteristics translate in legal terms the will of the drafters of the Geneva Conventions to attach to these rules, albeit through conventional means, the attributes of a higher legislation. The predominance of the object and

[77] *Ibid*, p 307.

> purposes of humanitarian law /…/ greatly stretches expectations and largely explains the constant strains and frustrations at the level of implementation.[78]

So, if the special legal characteristic of the Conventions and Protocols ultimately derives from their object and purposes, they in turn command the teleological interpretation of those instruments in the light of their object and purposes; an interpretation which "provides continuous drive towards perfecting the content and expanding the ambit of humanitarian protection."[79]

In some instances, it is accepted that the non-execution of a treaty by one party may ultimately release the other party from its obligations, or justify the annulment of the treaty, much like a contract under municipal law. This, however, does not apply to the Conventions, because whatever the circumstances may be, they remain valid and are not subject to reciprocity. As Pictet says "the mind absolutely rejects the idea that a belligerent should, for instance, deliberately ill-treat or kill prisoners because the adversary has been guilty of such crimes."[80]

When the predecessors of the current Conventions where adopted, they contained the so called *si omnes* clause (or a general participation clause) as a result of their reciprocal character. The Sick and Wounded Convention of 1906 provides that its "provisions shall cease to be obligatory if one of the belligerent Powers should not be a signatory to the Convention". That meant that if even one party to a conflict was not party to the instrument, the instrument did not apply to relations between all parties to the conflict, i.e. even between those who were parties to the instrument.[81]

A radical departure from this classical model was taken by the 1949 Conventions, which brought them much closer both to the level of universal international legislation on the one hand, and to that of the protected individual on the other. The Conventions reflect a constant endeavour to extend their application to the widest possible circle of States and conflictual situations, and to reduce to a minimum the legal grounds for avoiding such an application. The *si omnes* clause was thus refuted by Common Article 2, which is to apply in all circumstances regardless of considerations of reciprocity.

In fact, the obligations have an *erga omnes* character, and there should be common interest in their application. This means that each State party to the Conventions has a *locus standi* to protest against violations of the Conventions and to demand their immediate cessation, even if it is not directly concerned, i.e. even if these violations are not committed against it or against its citizens or their interests. The legal explanation of this has been clearly formulated by the ICJ in

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[78] McCoubrey, *International Humanitarian Law, supra nota* 6, p 282; Abi-Saab, „The specificities of humanitarian law", *supra nota* 27, p 280. A case may be made out that at least the fundamental humanitarian principles of the *jus in bello* have the quality of *jus cogens*.

[79] *Ibid*, p 273.

[80] Jean Pictet, *Humanitarian law and the protection of war victims* (Leyden-Geneva: Brill, 1975), p 21.

[81] Abi-Saab, "The specificities of humanitarian law", *supra nota* 27, p 266.

its judgment in the Barcelona Traction, Light and Power Company, Limited case, where it states that: "…an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."[82]

Finally, one of the peculiarities of international law is that its legal rules are not implemented and enforced through a central body or hierarchical institutions. In this respect, it differs fundamentally from domestic law. This will be discussed in more detail in the following chapters. The special character of the treaties leads to many challenges in their application. Some of the challenges are inherent to the difficulty in trying to regulate war with rules, and some are more recent, stemming from problems only found in modern day conflicts.

Although there are both old and new controversies on the substantive rules, including some claims that IHL is no longer adequate for the reality of contemporary armed conflicts, there is near unanimity among States and scholars that the main challenge is effective implementation on the ground, during armed conflicts.[83]

Aldrich agrees that by the end of the twentieth century inadequate compliance had become the most evident defect of IHL. After the expansion of the substantive law by means of the two Protocols of 1977, non-compliance with the law became a far more significant problem than the limitations of the substantive law itself.[84] Nevertheless, the law still remains imperfect in the promotion of compliance; and one must look towards interpretation, analogy, other fields of law, and State practice to find measures for this aim.

It is difficult to draw up a complete list of problems encountered in the implementation of IHL, but for Sandoz it seems possible to identify three broad categories. These are: ignorance of the law, rejection of the law on political grounds, and rejection of the law on military grounds.[85] Ignorance of the law is apparently the least difficult problem to solve, in that it does not result from a desire not to implement the law.[86]

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[82] *Ibid*, pp 267–270; *Barcelona Traction, Light and Power Company Limited* (Belgium v Spain), Second Phase, Judgment, ICJ Reports (1970) 3, para 33. See also ICTY, *Kupreškić* Trial Judgment, 2000, para. 519 ("norms of international humanitarian law do not pose synallagmatic obligations, i.e. obligations of a State *vis-à-vis* another State. Rather … they lay down obligations towards the international community as a whole")

[83] Marco Sassoli, „The implementation of international humanitarian law: current and inherent challenges", 10 *Yearbook of International Humanitarian Law* (2007) 45–73, p 47.

[84] George H. Aldrich, "Improving Compliance with the laws applicable in armed conflict: a work in progress" – Lal Chand Vohrah *et al* (eds), *Man's inhumanity to man. Essays on International Law in Honour of Antonio Cassese* (Martinus Nijhoff Publishers, 2003) 1–10, p 1.

[85] Yves Sandoz, "International humanitarian law in the twenty-first century", 6 *Yearbook of International Humanitatian Law* (2003) 3–40, p 9.

[86] *Ibid*, p 10.

Kalshoven offers three difficulties in ensuring respect. Firstly, there is an inherent violence in conflicts – a factor not conductive to an attitude of respect for obligations of international law. Secondly, there is a great mass of people who may find themselves directly involved in situations requiring application of rules of humanitarian law (not only the army, but police officers, doctors and civilians alike). Thirdly, the set of humanitarian rules applicable in internal armed conflicts has remained far below the level of development of the law applicable in international armed conflicts.[87]

Fleck also lists three problems inherent to humanitarian law. Firstly, in time of peace no one wants to think about the kind of situation where this body of law is put into practice. The second problem is actual documented practice: the applicable rules have largely been violated during armed conflicts, thus creating a general consensus that such violations cannot be successfully sanctioned, and that humanitarian protection cannot stand the test of reality. Finally, he thinks that there is a consensus on humanitarian law evolving only armed conflicts have ended, i.e. when the need for measures of implementation seems most remote.[88] Bothe adds that the Conventions are drafted in the legal language of diplomats and lawyers but meant to be applied by soldiers on the ground.[89]

Thus, there are problems that arise out of the environment where IHL has to be applied; out of the perception of the general public and out of the content of the law itself. These are indeed inherent to the very idea of IHL. We cannot change the environment where IHL is applied, i.e. an armed conflict. However, we could do something about IHL's perception by the public. This is something the ICRC is working on a daily basis. The *inter arma silent leges* adage has to be rooted out if IHL is to be better respected in the future. Despite the complexity and incompleteness of the law, there are many measures to overcome these issues. Think about the numerous educational programs mentioned throughout this work. The ICRC's database of national implementation measures, the vast commentaries to the Conventions, the military manuals of States and non-state groups, the statute of the ICC etc.

1.5.2. Current challenges

It is clear that we are currently going through times in which IHL is called to prove the purpose of its existence. The World has considerably changed in the last 40–70 years, and this does not make the application of IHL easier in any sense. The period between the end of the Cold War and present day has caused a very intense, almost revolutionary development of Humanitarian Law. The

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87 Frits Kalshoven, „Implementation and enforcement of International Humanitarian Law" – Frits Kalshoven (ed), *Reflections on the Law of War: collected essays*. 17 *International humanitarian law series* (Martinus Nijhoff Publishers, 2007) 593–620, p 598.

88 Fleck, "Implementing International Humanitarian Law", *supra nota* 5, p 348.

89 Bothe, „The role of national law", *supra nota* 76, p 301.

establishment of the *ad hoc* Tribunals, together with the establishment of the ICC, are only a few of the efforts to enforce humanitarian law since Nuremberg and Tokyo, with the added characteristic of being continuously tried in practice.[90]

There are some considerations that help to explain why, arising from the conflicts of the 1980s and 1990s, the subject of implementation and enforcement of the laws of war has been so central and such a difficult an issue. For example, the scale and frequency of serious infractions of existing rules has been greater than in earlier decades.[91] Most of the conflicts have also been non-international armed conflicts, where training may be limited and the difference between a soldier and a civilian not always an easy distinction to make. The diversity of such conflicts, and those party to them, makes it very difficult to formulate standard approaches or plans of action for increasing respect for humanitarian law.[92] Another characteristic is the protracted nature of contemporary armed conflicts. As such, they have long-term consequences on civilians who are unable to live their lives normally, often for decades. It also reduces the possibilities to build a secure future in the aftermath of a conflict.[93]

In many of the atrocities of recent years, it has not been a serious problem to establish what the law is, or even what the facts of the particular case are. The most critical issue has been that States and non-state bodies persistently violate those laws, and then refuse to investigate and punish those responsible.[94] Sassoli points out that there are particular difficulties in obtaining respect for IHL in asymmetric warfare. The equality of belligerents before IHL is challenged in discourse and reality and it is very difficult to engage non-state armed groups.[95] The abovementioned challenge of perception by the public is also mentioned in Sassoli's works. IHL seems to *overpromise and underdeliver* and the credibility gap between the law and reality is growing. A very important observation in my opinion.

Not infrequently, a party to a non-international armed conflict will deny the applicability of humanitarian law, making it difficult to engage in a discussion on

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[90] Philip Spoerri, „Contemporary Challenges to International Humanitarian Law" – Stelios Perrakis & Maria-Daniella Marouda (eds), *Armed Conflicts and International Humanitarian Law 150 Years after Solferino: Acquis and Prospects* (European Centre for Research and Training on Human Rights and Humanitarian Action, 2009) 3–18, p 37.

[91] E.g. Iraq's use of chemical weapons during the Iran-Iraq war; Somali factions' attacks on civilians 1992–1994; systematic attacks on civilian populations in the conflicts in former Yugoslavia from 1991; Genocidal practices in Rwanda in 1994.

[92] Roberts, "Implementation", *supra nota* 8, p 360; Michelle Mack, *Increasing Respect for International Humanitarian Law in Non-international Armed conflicts* (ICRC, 2008), p 11.

[93] Annyssa Bellal, 70th Anniversary of the 1949 Geneva Conventions United Nations Security Council Briefing on upholding IHL Scheduled to take place on the 13th of August 2019, <www.geneva-academy.ch/joomlatools-files/docman-files/70th%20anniversary%20of%20the%201949%20Geneva%20Conventions_long%20version.pdf> (1.11.2019)

[94] Adam Roberts, "The Laws of War: Problems of Implementation in Contemporary Conflicts", 6 *Duke Journal of Comparative and International Law* (1995) 11–78, p 13.

[95] Sassoli, „The implementation", *supra nota* 83, p 65.

respect for the law. Most internal armed conflicts are fought by private groups which lack a clear command structure, are not trained in the conduct of hostilities, and not familiar with the principles and rules of IHL. No fundamental change can be expected in this respect.[96]

A recent challenge for IHL has been the tendency of States to label all acts of warfare committed by organized armed groups in the course of armed conflict as "terrorist". "Although it is generally agreed that parties to an international armed conflict may, under IHL, lawfully attack each other's military objectives, States have been much more reluctant to recognize that the same principle applies in non-international armed conflicts", states Spoerri. "What is being overlooked here is that a crucial difference between IHL and the legal regime governing terrorism is the fact that IHL is based on the premise that certain acts of violence – against military objectives – are not prohibited. Any act of "terrorism" is, however, by definition, prohibited and criminal."[97]

In the last decades many authors are also concerned about emerging threats and how IHL can cope with these. For example, the ICRC holds regular expert seminars on emerging threats and new forms of warfare, such as chemical weapons, drones, cyber warfare etc. On the occasion of the seventieth anniversary of the Conventions, the president of the ICRC noted that in today's battlefields, some particularly challenging developments have emerged. Namely, the armed actors and civilians are intermingling, and individuals are changing from fighters at night to civilians by day. Asymmetric warfare is becoming a predominant conflict environment, and distinctions between weapons, dual use goods, as well as military and civilian activities is blurring. More importantly, humanitarian action is increasingly criminalized as strategic support for the enemy.[98]

This puts a heavy burden on the application of the IHL. However, as explained in the subsequent paragraphs, there are many ways to overcome this burden. If one understands the inherent deficiencies of IHL, it is easier to design proper implementation measures. It might make sense not to look at IHL in isolation and consider other measures, national and regional legal frameworks, soft law and policy guidance, to give a few examples.

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96 Schindler, "Significance of the Geneva Conventions", *supra nota* 35, p 49; Peter Maurer, "Changing world, unchanged protection? 70 years of the Geneva Conventions", <www.icrc.org/en/document/changing-world-unchanged-protection-70-years-geneva-conventions> (1.11.2019).

97 Spoerri, „Contemporary Challenges", *supra nota* 90, p 5.

98 Maurer, "Changing world", *supra nota* 96; Gentian Zyberi, "Enforcement of International Humanitarian Law" – Gerd Oberleitner (ed), *Human Rights Institutions, Tribunals and Courts: Legacy and Promise* (Springer, 2018), <www.researchgate.net/publication/324416043_G_Zyberi_'Enforcement_of_International_Humanitarian_Law'_in_Gerd_Oberleitner_ed_Human_Rights_Institutions_Tribunals_and_Courts_Legacy_and_Promise_Springer_forthcoming_2018> (1.11.2019).

1.5.3. Legitimacy of international law

In this introductory chapter, I want to touch briefly on the subject of legitimacy in international law. Legitimacy could be described as the quality of a rule, which derives from a perception on the part of those to whom it is addressed that it has come into being in accordance with right process.[99] This will provide a background to the debate of the scope of CA 1, as well as shed light on reasons why armed groups should, and choose to, comply with humanitarian law.

Why should some rules, unsupported by an effective structure of coercion comparable to a national police force, elicit compliance – even against self-interest of States or armed groups? Perhaps finding an answer to this question can help us find a key to better compliance with IHL. While legitimacy is certainly not the only reason for compliance, as will be seen further in this work, it provides an interesting nuance to the discussion and helps untangle the issue of non-compliance.

What is clear is that some rules seem to exert more pull to compliance than others. Each rule has an inherent pull power that could be called its index of legitimacy. For example, the rule that makes it illegal for one State to infiltrate spies into another State in the guise of diplomats is formally acknowledged by almost every State, yet it enjoys such a low degree of legitimacy as to exert virtually no pull towards compliance. As Schachter observes, "some 'laws', though enacted properly, have so low a degree of probable compliance that they are treated as 'dead letters' and some treaties, while properly concluded, are considered 'scraps of paper'."[100] What I want to show here is that although some provisions of the Conventions and Protocols have never been used in practice, they are not a "dead letter" and can still be used in modern day conflicts.

The famous sociologist Weber's works stressed process legitimacy. He hypothesized that rules tend to achieve compliance when they, themselves, comply with secondary rules about how and by whom rules are to be made and interpreted. In his view, a sovereign's command is more likely to be obeyed if the subject perceives both the rule and the ruler as legitimate.[101] How could this fit in the context of non-state actors and their views on the 1949 Conventions? Do they feel any push to comply because they perceive IHL legitimate? The People of War project analysed these questions to a certain extent and could provide some answers.[102] Maybe if legitimacy can be studied, it can also be deliberately nourished. This will be dealt with in later chapters of this thesis.

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[99] Thomas Franck, „Legitimacy in the International legal system", 82 *The American Journal of International Law* (1988) 705–759, p 706.

[100] Oscar Schachter, „Towards a Theory of International Obligation", 8 *Virginia Journal of International Law* (1968) 300–322, p 311.

[101] Franck, „Legitimacy", *supra nota* 99, p 709.

[102] *The people on war report: ICRC Worldwide Consultation on the Rules of War* (ICRC, Greenberg Research Inc, 1999). [People on war]

The other side of the coin, textual determination, is the ability of the text to convey a clear message, to appear transparent in the sense that one can see through the language to the meaning. Obviously, rules with a clearly detectable meaning have a better chance to exert compliance, as those addressed will know precisely what is expected of them, which is a necessary first step towards compliance.[103] Again, narrowing this down to an individual actor on the battlefield is important.

It follows that indeterminacy has costs. Indeterminate normative standards not only make it harder to know what conformity is expected, but also make it easier to justify noncompliance. To be legitimate, a rule must communicate what conduct is permitted and what conduct is out of bounds.[104] Do the rules of IHL, especially CA 1, communicate this, or are they indeterminate, thus making non-compliance relatively easy? In the next chapter I will analyse whether CA 1 goes further than *pacta sunt servanda*, i.e. is the meaning stretched so far that compliance becomes difficult.

Franck is convinced that greater clarity conduces to compliance. Nevertheless, "clarity" is far from identical with simplicity. For example, a rule can appear unambiguous at first glance, but it does not send a simple message as to its meaning in such a way as to promote compliance. This is because a literal reading of the law will produce absurd obligations at the margins of its application.[105]

Rogers warns that for a military lawyer, such clarity is of utmost importance. A military lawyer should see that the "rules being negotiated are capable of being understood, accepted by those to whom they apply, and implemented in practice." Treaty texts sometimes contain emotive and politicized language, loose drafting, or provisions which may not be understood if they are not considered in the context of other provisions, or provisions which are inconsistent with those of previous treaties, or which lead to uncertainty or whose meaning is downright obscure.[106] I argue that CA 1 is an example of such provision. It has to be read with other provisions and previous treaties. Standing alone it is indeterminate and doesn't communicate clearly what kind of action is expected.

1.5.4. Interplay with human rights law

There is a strong and sometimes confusing link between another field of law and IHL, namely the human rights law. This is something that will only be briefly touched upon, since the matter is quite complicated, and one could open a Pandora's Box by discussing the overlaps and differences of these two bodies of laws.

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[103] Franck, „Legitimacy", *supra nota* 99, p 713.

[104] *Ibid*, p 714.

[105] *Ibid*, p 721.

[106] A.P.V. Rogers, *Law on the battlefield* (2nd edn, Manchester University Press, 2004), pp 239–240.

Meron writes that it has become common in some quarters to conflate human rights and the law of war. Nevertheless, significant differences remain. Unlike HRL, the law of war theoretically allows the killing and wounding of innocent people not participating in armed conflict. As long as the rules of the game are observed, it is permissible to cause suffering and even death.[107]

Greenwood adds that HRL is designed to operate primarily in normal peacetime conditions, and within the framework of the legal relationship between a State and its citizens. IHL, by contrast, is chiefly concerned with the abnormal conditions of armed conflict and the relationship between a State and the citizens of its adversary. However, it is now clear that human rights treaties are, in principle, capable of application in armed conflicts.[108]

HRL treaties catalogue a number of rights that can be claimed by individuals against their own governmental authorities, while IHL treaties mainly list duties incumbent upon parties to a conflict in relation to the conduct of hostilities and in relation to the treatment of specific categories of protected persons.[109]

HRL was designed from its inception to protect those who lack protection in their own countries, irregardless to if it is a time of war or not. The apparatus that has developed to protect the individual when violations of these basic rights occur or to improve the existing system was constructed for peacetime. Nevertheless, situations can exist in which a group of individuals needs the protection afforded by both systems simultaneously.[110]

For example, in the conflict in Nicaragua the Inter-American Commission of Human Rights found that the participation of both the UNHCR and ICRC was necessary because questions of human rights, IHL, and the international law of refugees were involved. This demonstrates the intimate link between the three systems and the institutions charged with the implementation of these rights.[111]

Solis agrees that with HRL and IHL the overlaps are still very blurry. Traditionally, HRL and law of war were viewed as separate systems of protection. The two have different subject matters and different roots. HRL is premised on the principle that citizens hold individual rights that their State is bound to respect; IHL imposes obligations on the individual. HRL largely consists of general principles; IHL is a series of specific provisions. HRL enunciates State responsibilities; IHL specifies individual responsibilities as well as State responsibilities. In HRL, rights are given to all; IHL links many of its protections to nationality or

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[107] Theodor Meron, "The humanization of humanitarian law", 94 *American Journal of International Law* (2000) 239–278, p 240.

[108] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports (1996) 226, para 25; Greenwood, "Historical development and legal basis", *supra nota* 21, p 12.

[109] *Ibid*.

[110] César Sepùlveda, "Interrelationships in the Implementation and Enforcement of International Humanitarian Law and Human Rights Law", 33 *American University Law Review* (1983–1984) 117–124, p 118.

[111] *Ibid*, p 121.

specific statuses, such as combatants. HRL allows for State derogation, IHL does not.[112]

This comparison is important, since many authors hold that human rights mechanisms may be successfully used as tools for better implementation of humanitarian law and that no convincing argument would exclude that compliance with a specific branch of international law might be ensured by resort to lawful measures developed within other branches of law.[113]

The human rights treaty monitoring bodies favour a strict interpretation of their mandates and confine themselves to applying the conventions they were set up to monitor. They generally do not incorporate IHL in their work.[114] Despite these issues, judicial human rights mechanisms, and in particular the Inter-American Court of Human Rights and the European Court of Human Rights, have provided a considerable boost to the implementation of IHL even though they do not formally apply it.[115]

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[112] Solis, *The Law of armed Conflict*, *supra nota* 38, pp 22, 26. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports (2004) 131. Gentian Zyberi, „The development and interpretation of International human rights and humanitarian law rules and principles through the case-law of the International Court of Justice", 25 *Netherlands Quarterly of Human Rights* (2007) 117–139, p 121.

[113] Dieter Fleck, "Individual and state responsibility for violations of the *ius in bello*: an imperfect balance" – Heintschel von Heinegg & Volker Epping (eds), *International Humanitarian Law Facing New Challenges* (Springer, Berlin, Heidelberg, 2007) 171–206, p 178.

[114] Toni Pfanner, "Various mechanisms and approaches for implementing international humanitarian law and protecting and assisting war victims", 91 *International Review of the Red Cross* (2009) 279–328, p 310.

[115] *Ibid*, p 313.

2. COMMON ARTICLE 1: EXTENDING THE SCOPE OF IMPLEMENTATION BEYOND *PACTA SUNT SERVANDA*?

It is a general principle of IHL that States are obliged to respect and to ensure respect for IHL. According to one interpretation, which by force of repetition appears to have become dominant, States are required to ensure that IHL is respected not only by their own armed forces and within their respective jurisdictions, but universally by all around the world. Some writers have sought in this interpretation an overarching obligation that conveniently fills any gaps in existing rules of IHL.[116]

However, other authors have deemed the undertaking to ensure respect by others to be a norm surrounded by uncertainty. A study of both the origin and practice of this obligation in therefore necessary.

Academic dispute over the scope and exact meaning of CA 1 has been an interesting one. Kalshoven started this complex work with a comprehensive article published in 1999.[117] Since then, every other peace written is either in sharp contrast or agrees with the professors' findings. Kalshoven is one of the keenest adversaries to the broad interpretation theory discussed below. In fact, in approximately ten years after his article, he remained the only author defending the narrow scope of CA 1. More recently however, commentators have shifted back to this narrow interpretation, and begun to ask whether the scope of the article has been stretched unreasonably far. A lot was hoped for from the fresh commentaries to the Conventions published in March 2016, but they did not fulfil the expectations placed upon them, as will be discussed later.[118]

The New commentary to the First Convention states: "Acts or omissions which amount to breaches of the Conventions entail the international responsibility of a High Contracting Party, provided those acts or omissions are attributable to that Party according to the rules on State responsibility." /…/ "As far as this principle is concerned, CA 1 does not add anything new to what is already provided for by general international law."[119] This could be the end of the story, but is far from it.

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[116] Zych, "The Scope of the Obligation", *supra nota* 15, p 252.

[117] Kalshoven, "The Undertaking", *supra nota* 15.

[118] The American Society of International Law meeting held in Washington in March–April 2016 held a special workshop on the new Commentaries that I participated in. The Commentaries had been published just days before the Conference and were a hot topic. The authors of the Commentaries were present (Jean-Marie Henckaerts) but their comments were as controversial as the Commentaries.

[119] ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2nd edn, ICRC, 2016) [New Commentary], para 144.

On the contrary, a variety of questions, especially concerning the terms "ensure respect" and "in all circumstances", remain unresolved. Focarelli points out that it is unclear whether CA 1 provides for an obligation or rather a discretionary power to take measures against transgressor States, and – assuming that an extensive approach should be taken – what specific measures contracting States are bound to take.[120]

> Equally unclear is the role that State practice is supposed to play, and how to match such an extensive approach with more restrictive positions adopted in respect of other human rights treaties, which use expressions similar to "respect and ensure respect". Nor is it clear what CA 1 adds to other specific provisions found in the 1949 Conventions requiring (or authorizing) States to take certain measures to tackle breaches of the Conventions. If third States really have an obligation to react, and yet generally do not abide by this obligation, it remains obscure how far a broad interpretation of CA 1 is sensible. Finally, even assuming that third States may take measures against transgressors in accordance with the obligations *erga omnes* doctrine, it is difficult to see what role Article 1 in itself would play.[121]

Where does the difficulty in understanding the scope of CA 1 and with this the broader question of implementation and enforcement of IHL lie then? It has been established that parties to armed conflict bear the primary responsibility for respecting international obligations. But, as the wording of CA 1 seems to suggest, do others, not directly involved in a given conflict, also have a role to play? Is there anything third parties can undertake to bring about compliance with humanitarian law by belligerents? Do they even bear (co-)responsibility for the observance of humanitarian law by parties to an armed conflict?[122]

There is no easy answer to these questions and the analysis to reach a conclusion must be a thorough one. First, some historical background is provided to understand how and why this Article made it to the Conventions. Then some context is given by touching upon rules of treaty interpretation and the role of the *travaux préparatoires*. Finally, the Article is broken down in three elements each of which will be analysed through the said interpretation rules and subsequent State practice. This will answer the research question on the correct interpretation of CA 1 and its connection to other articles that bring about obligations to different parties. The whole thesis is concerned with better compliance with the rules of IHL, therefore it important to see what opportunities the CA 1 presents, or is it, in fact, a "soap bubble".

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[120] Focarelli, "Common Article 1", *supra nota* 15, p 129.

[121] *Ibid*, p 129.

[122] Hans-Peter Gasser, "Ensuring respect for the Geneva Conventions and Protocols: the role of third States and the United Nations" – H. Fox & M.A. Meyer (eds), *Armed Conflict and the new Law: Ensuring Compliance* (London: British Institute of International and Comparative Law, 1993) 15–49, p 17.

2.1. A brief history of Common Article 1

The Conventions of 1864 and 1906 had no similar provision. The 1864 Convention (Article 8) merely said: "The implementing of the present Convention shall be ensured by the Commanders-in-Chief of the belligerent armies, following the instructions of their respective Governments, and in accordance with the general principles set forth in this Convention". The 1906 Convention (Article 25) reproduced this provision in approximately the same terms.[123]

At the 1929 Diplomatic Conference, two conventions were adopted. The Amelioration of the Condition of the Sick and Wounded in Armies in the Field replaced the earlier conventions of 1864 and 1906. The second one, the convention relative to the Treatment of Prisoners of War was the first convention devoted exclusively to that subject. Both of these conventions contained the following article:

> The provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances.
>
> If, in time of war, a belligerent is not a party to the Convention, its provisions shall, nevertheless, be binding as between all the belligerents who are parties thereto.[124]

Therefore, it was in 1929 that the need for making the provision more explicit was first felt. The idea, according to the Commentators of the 1949 texts, was to give a more formal character to the mutual undertaking by insisting on its character as a general obligation. It was desired to avoid the possibility of a belligerent State finding some pretext for evading its obligation to apply the whole or part of the Convention.[125]

The diplomatic conference of 1949 for adopting the four Conventions took place under extremely difficult political circumstances. Many countries had just overcome the horrors of the Second World War, and getting them to one table to discuss a binding set of rules was not an easy task. In fact, in some cases it proved impossible.[126] This aspect has to be kept in mind throughout the rest of the analysis.

The course of the 1949 conference was chiefly determined by three factors, as Best explains: the texts of the agenda before it, the relative strengths of the States'

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[123] Geneva Convention for the amelioration of the condition of the wounded in armies in the Field, 22.12.1864, in force 22.06.1965, 22 Stat. 940, T.S. No. 377; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 6.07.1906, in force 9.08.1907.

[124] Convention relative to the Treatment of Prisoners of War, 27.07.1929, in force 19.06.1931, Articles 25 and 82.

[125] Pictet's Commentary, *supra nota* 59, para 25.

[126] Geoffrey Best, *War and Law since 1945* (Oxford University Press, 1994), p 98. Germany was not allowed to take part at all; Japan only participated as an observer.

delegations attending it (59 in total), and the instructions given to them by their respective governments. What went on at the conference was by no means coextensive with what came out of it, a fact that is reiterated by the proponents of the narrow interpretation of the scope of CA 1.[127]

The famous words to "ensure respect" were added to the texts in 1949. The provision has been called unusual, since it reaffirms that contracting States are bound to respect their treaty obligations (*pacta sunt servanda*) and adds a corollary of ensuring respect for the Conventions.

Draft CA 1 fell within the purview of the Joint Committee of the Conference and should have been the first provision to be considered but was postponed since the delegates wanted to discuss this in connection with the Preamble that had proven somewhat complicated.[128] Later, the Preambles of the Conventions were referred to separate committees and the CA to the Special Committee without discussion. In the Special Committee only a few delegates spoke on the issue. Mr Maresca of Italy famously stated that the terms "undertake to ensure respect" lacked clarity and that "[a]ccording to the manner in which they were construed, they were either redundant, or introduced a new concept into international law." Mr Castberg of Norway and Mr Yingling of US explained that "the object of this Article was to ensure respect of the Conventions by the population as a whole".[129] Mr Pillout of the ICRC thereupon said that the draft article submitted to the Stockholm Conference had "emphasized that the Contracting parties should not confine themselves to applying the Convention themselves, but should do all in their power to see that the basic humanitarian principles of the Conventions were universally applied."[130] The article was adopted without further discussion or modification.

The difference between the 1929 and the 1949 Conventions lies in three aspects: 1) the obligation to "ensure respect" was first introduced in 1949; 2) the obligation to "respect in all circumstances" was moved to the first article (as compared to Articles 25 and 82 of the 1929 Conventions); 3) the 1949 Conventions use an active voice (the High Contracting Parties undertake to respect and to ensure respect) while 1929 Conventions use a passive voice (shall be respected by the High Contracting Parties). These differences have given some commentators grounds to support their broad interpretation of CA 1.

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[127] *Ibid*, p 99.

[128] Frits Kalshoven, „Chapter 31: the Undertaking to Respect and Ensure Respect in All Circumstances: from Tiny Seed to Ripening Fruit" – Frits Kalshoven (ed), *Reflections on the Law of War: collected essays*. 17 *International humanitarian law series* (Martinus Nijhoff Publishers, 2007) 665–728, p 683; *The Final Record of the Diplomatic Conference of Geneva of 1949,* <www.loc.gov/rr/frd/Military_Law/RC-Fin-Rec_Dipl-Conf-1949.html> Vol IIB, p 9.

[129] *The Final Record of the Diplomatic Conference of Geneva of 1949,* <www.loc.gov/rr/frd/Military_Law/RC-Fin-Rec_Dipl-Conf-1949.html> Vol IIB, p 53: 9th meeting, 25 May 1949.

[130] *Ibid.*

2.2. Treaty interpretation, legal meaning of the *travaux préparatoires*

We come now to one of the most decisive questions of understanding CA 1. What did the delegates of the 1949 Geneva Conference actually mean when adding "to respect and ensure respect" to the text of the Conventions? What significance did this clause have then, and how has it developed to this day? There is a plethora of questions concerning the historical interpretation, scope, evolution and other aspects of this clause as illustrated below. Let us first turn to the significance and forms of treaty interpretation as a way of introduction.

"There are few aspects of international law more important than the interpretation of treaties. A very large proportion indeed of practical problems and disputes have this question at the core of the matter,"[131] Sir Jennings stated in 1967. Similarly, Linderfalk holds that in the practice of modern international law, disputes as to the meaning of specific treaty provisions are a quite frequent occurrence.[132] Aust, the most renowned author in this field also points out that "Most disputes submitted to international adjudication involve some problem of treaty interpretation. Just as the interpretation of legislation is the constant concern of any government lawyer, treaty interpretation forms a significant part of the day-to-day work of a foreign ministry legal adviser."[133]

It is true that applying the legal method is mostly about interpretation. We need to understand what the lawmakers mean by specific provisions before we can apply any of them. CA 1 is certainly in the heart of such endeavours of interpretation since a lot is depending on the result.

2.2.1. Means of interpretation relevant to the Geneva Conventions

Interpretation is by no means an easy job, as it is "to some extent an art, not an exact science".[134] Nevertheless, in a process of interpretation there is a fundamental distinction to be made between the legally correct and incorrect interpretation result. The correctness of the result is determined by reference to the rules of interpretation laid down in the 1969 Vienna Convention on the Law of Treaties (VCLT), Articles 31–33.[135] The result is correct when it can be successfully defended as being in accordance with these provisions, and incorrect when

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[131] Robert Yewdall Jennings, "General Course on Principles of International Law", 121 *Recueil des Cours* (Leiden/Boston: Brill/Nijhoff, 1967) 323–619, p 544. He was also a judge at the ICJ in 1982–1995.

[132] Ulf Linderfalk, "Is the hierarchical structure of articles 31 and 32 of the Vienna Convention real or not? Interpreting the rules of interpretation", 54 *Netherlands International Law Review* (2007) 133–154, p 134.

[133] Aust, *Modern treaty law, supra nota* 71, p 184.

[134] Anthony Aust opens his chapter on interpretation with an epigraph that interpretation is "to some extent an art, not an exact science", *ibid*, p 184.

[135] Vienna Convention on the Law of Treaties, 23.5.1969, in force 27.01.1980, 1155 UNTS 331.

it cannot be so defended.[136] To remain correct and objective in art is a real challenge.

On the other hand, it is the method of interpretation which dictates which results a rule will have. "Many instances of alleged breaches of treaties may be recast as differences of interpretation, and this means that interpretation is not a mere technical device, but a political matter of the utmost importance", even continuing the politics of negotiation after treaty's entry into force. "It may eventually depend on which interpretative method is applied; whether a State (or any other actor) can be accused of an internationally wrongful act, or whether it will be regarded as having stayed faithful to its commitments."[137] This statement is extremely important in the context of CA 1 since it literally depends on its interpretation whether or not States can be held responsible for violating their obligation to "ensure respect" for the Conventions.

Moving on to the "official" rules on interpretation of treaties, it is interesting to note that they are themselves laid down in a treaty.[138] The 1969 Vienna Convention of the Law of Treaties (VCLT) provides a general rule of interpretation in the section Interpretation of Treaties, Article 31:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>   (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>   (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
>   (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>   (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>   (c) Any relevant rules of international law applicable in the relations between the parties.
> 4. A special meaning shall be given to a term if it is established that the parties so intended.[139]

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[136] Linderfalk, "Is the hierarchical structure", *supra nota* 132, p 134.

[137] Jan Klabbers, "International legal histories: the declining importance of Travaux Préparatoires in treaty interpretation?", 50 *Netherlands International Law Review* (2003) 267–288, p 274. He cites Shabtai Rosenne, Breach of Treaty (Cambridge, Grotius 1985) p 121.

[138] Linderfalk, "Is the hierarchical structure", *supra nota* 132, p 134. According to what is generally assumed, Arts. 31–33 are reflective of customary international law.

[139] Vienna Convention on the Law of Treaties, 23.5.1969, in force 27.01.1980, 1155 UNTS 331, Art 31.

For our purposes the next article is equally important. Article 32 enlists the supplementary means of interpretation:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> (a) Leaves the meaning ambiguous or obscure; or
> (b) Leads to a result which is manifestly absurd or unreasonable.

Both points (a) and (b) can be used in the context of establishing the correct meaning on CA 1. As will be seen below, many commentators point out that the meaning of the article is in fact ambiguous and could lead to an unreasonable result.[140] Note that subsequent practice, which will also be analysed, falls within Article 31 and thus bears considerable weight.

In the Celebici case, the ICTY's Appeals Chamber recalled that the judges could depart from the letter of the law in order to respect the spirit of the Conventions. The judges drew on the VCLT in affirming that a treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[141]

Therefore, a text must first be so construed as to give effect to its "normal", "natural", "ordinary" or "usual" meaning. But this position is not really a rule of interpretation at all, Aust believes. It assumes what was to be proved: that the expression has a certain meaning instead of another one. However, already the ascertainment of "normal" requires interpretation and the very emergence of a dispute proves this.[142]

Gardiner also hesitates and states that while the object of treaty interpretation is to give "ordinary" meaning to the terms of the treaty almost any word has more than one meaning. The word "meaning" itself, has at least sixteen different meanings.[143]

Villiger holds that a term may have a number of ordinary meanings, which may even change over time. In other words, that particular ordinary meaning will be established which is the common intention of the parties.[144] Furthermore, the

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[140] See for example Focarelli's explanation on how all States should do all that is within their power to bring the perpetrator States to a halt.

[141] *Mucić et al* (the Celebići case), Case No IT-96-21, ICTY, Judgment of the Appeals Chamber, 20.02.2001.

[142] Anthony Aust, *Modern treaty law and practice* (2nd edn, Cambridge University Press, 2007), p 292.

[143] Richard Gardiner, *Treaty Interpretation* (2nd edn, Oxford University Press, 2015), p 161; Georg Schwarzenberger, „Myths and Realities of Treaty Interpretation: Articles 27–29 of the Vienna Draft Convention on the Law of Treaties", 22 *Current Legal Problems* (1969) 205–227.

[144] Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, 2009), p 31.

ordinary meaning to be given to the terms of the treaty depends of its context. Treaty terms are not drafted in isolation, and their meaning is to be determined by considering the entire treaty text.

It appears that academic views on the use of supplementary means of interpretation are biased. Some believe that they are of great value, others that they can only be used in extreme cases. For example, Aust believes that Article 31 is limited to the primary purpose for interpreting a treaty: "an elucidation of the meaning of the text, not a fresh investigation as to the supposed intentions of the parties." He even goes on to say that the *travaux* are by their nature less authentic than the other elements, being often incomplete and misleading. However, Aust admits that in certain circumstances, recourse may be had to supplementary elements to "confirm" the meaning resulting from the application of Article 31.[145] One may also look at other treaties on the same subject matter adopted either before or after the one in question. It would be legitimate to assume that the parties to a treaty did not intend that it would be incompatible with customary international law.[146] This will be important in the subsequent discussions in this chapter, as many IHL rules have acquired a customary law status and the words "ensure respect" are used in many human rights instruments.

On the other side of the argument we find Sir Hersch Lauterpacht, who regards the *travaux préparatoires* not as mere evidence, but as an integral part of the treaty, "*un element fondamental, peut-être le plus important, en matière d'interprétation des traités*". The text of a treaty is little more than signs on paper for him; those signs only acquire meaning when read in light of their drafting history, if only because there is really no such thing as words having an ordinary meaning.[147]

This distinction is important, since the two opposing views on the scope of CA 1 give different weight to different means of interpretation. The proponents of the narrow scope rely heavily on the *travaux,* and the subjective teleological arguments, while the broad scope proponents base their reasoning on the subsequent practice and the object and purpose side. Paradoxically, the latter could be used to prove the point of either side.

In considering the subsequent practice, Zych adds that Article 31(3)(b) sets a very high standard since it requires that *all* parties to a treaty, if not actually engaged in the subsequent practice, must at least accept it or acquiesce to it. Any contrary State practice is therefore fatal to an argument based on this article. In the case of interpreting CA 1, such contrary State practice clearly exists.[148]

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[145] Aust, *Modern treaty law and practice*, *supra nota* 142, p 245.

[146] *Ibid*, p 248.

[147] Klabbers, *International legal*, *supra nota* 137, p 277.

[148] Zych, "The Scope of the Obligation", supra *nota* 116, p 256.

2.2.2. Role of the *travaux préparatoires* in interpreting the scope of Common Article 1

Before moving forward with the interpretation of the notorious words "respect" and "ensure respect" an inquiry into the significance of the *travaux préparatoires* is needed. In the introduction a glimpse was given into the drafting history of the Conventions, now we turn to the legal significance of the *travaux* according to legal literature and the VCLT.

The preparatory work of a treaty, in the sense of VCLT article 32, means all those representations produced in the preparation for the establishing of the treaty as definite.[149] It is not clear what the preparatory work actually contains, but one can think of all sorts of different documents that could be useful and taken into account, such as meeting minutes, declarations of agreement or disagreement, instructions to negotiators. In our case, the final records of the 1949 Diplomatic Conference can be used as an evidence of the *travaux*.[150]

When judged by the wording of Articles 31 and 32, the relationship between the primary and the supplementary means of interpretation is hierarchical, Linderfalk believes. Consequently, in any situation where a process of interpretation is required to determine the correct meaning of a treaty provision, primary means of interpretation shall first be resorted to. Supplementary means shall be used at a second stage of the interpretation process, when it has become evident that the correct meaning cannot be clarified using the primary means only.[151]

This traditional understanding of the relationship between primary and supplementary means of interpretation has not gone unchallenged. In international law literature, as well as in the practice of international courts, voices have occasionally been raised claiming for the preparatory work of a treaty a more prominent role in the interpretation process.[152] In fact, even in a situation where using the primary means of interpretation leads to a result that is perfectly clear, a contrary result achieved using the *travaux préparatoires* may still be given priority according to some authors. As stated by the eminent Judge Schwebel,

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[149] Linderfalk, "Is the hierarchical structure", *supra nota* 132, point 245.

[150] Available for the author at the Peace Palace Library in the Hague.

[151] Linderfalk, "Is the hierarchical structure", *supra nota* 132, points 135–136.

[152] *Ibid*, point 136; Klabbers, *International legal*, *supra nota* 137; Stephen M. Schwebel, "May Preparatory Work be Used to Correct Rather Than Confirm the "Clear" Meaning of a Treaty Provision?" – Jerzy Makarczyk, (ed), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (The Hague, Kluwer Law International 1996) 541–547; See, e.g., the dissenting opinion delivered by judge Schwebel in the Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain), ICJ, Judgment of 15 February 1995, Jurisdiction and Admissiblity, available at the Court's webpage: <www.icj-cij.org>.

"the hierarchical structure of Articles 31 and 32 of the Vienna Convention ... is unreal".[153]

Klabbers is also of the opinion that differentiating between primary and supplementary means of interpretation is not necessary, as "both approaches are based on the same assumption concerning interpretation: interpretation is not so much about finding the objective meaning of a text, but is about finding the intentions of the authors."[154] "Indeed, although the *travaux préparatoires* might merely constitute evidence, the International Law Commission was wise enough to underline that there was little point in excluding possibly relevant evidence".[155]

In addition, as duly noted already in 1961, it would hardly be an exaggeration to say that in almost every case involving the interpretation of a treaty one or both of the parties seeks to invoke the preparatory work.[156] An argument without paying due regard to a treaty's drafting history is an incomplete argument.

The ILC's approach to this provision proposes that if the interpreter finds that the preparatory work suggests a meaning which was not the one which would be first choice after applying the general rule, and which would not have immediately struck the interpreter as within the obvious range of interpretative options, the interpreter will have to reconsider the position.[157] In the case of CA 1 such "immediate struck" does not happen at all, the provision is just too vague. This is why one needs to turn to the preparatory work, as is done in every scholarly article on the topic.

A treaty's preparatory work and, other means of interpretation mentioned in Article 32, play different roles, according to various methods of interpretation. Thus, the subjective method regularly emphasises the *travaux preparatoires* of a treaty in order to establish the "real" intentions of the drafters. The textual and the contextual methods, concentrating of the written text, have traditionally regarded these means as supplementary. The teleological method, on the other hand, seeks a treaty's object and purpose in all materials available and does not, therefore, distinguish between primary and secondary means of interpretation.[158]

Kalshoven holds that a good example of this ambivalence towards *travaux préparatoires* (ignore them yet invoke them) is the treatment of the *travaux préparatoires* of the 1923 Convention of Lausanne by the Permanent Court of International Justice in the Lotus case. While concluding that "there is no

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153 Schwebel, "May preparatory", *supra nota* 152, p 543.

154 Klabbers, *International legal*, *supra nota* 137, p 277.

155 *Ibid*, p 278.

156 Lord McNair, *The Law of Treaties* (2nd edn, Oxford University Press, 1961), p 412.

157 Gardiner, *Treaty Interpretation*, *supra nota* 143, p 309.

158 Villiger, *Commentary*, *supra nota* 144, point 1; Shaheed, *Using international law*, *supra nota* 72, p 131.

occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself", the Court nonetheless discussed some of the drafting history, before rejecting the recourse to the *travaux préparatoires*.[159]

2.2.3. Good faith, object and purpose and other relevant means of interpretation

Generally, treaties are considered living instruments capable of being applied to modern, changing conditions. Even where treaties use outdated concepts, they may be brought up to date by applying them in accordance with current trends, as illustrated by other treaties. Exceptionally, the subject-matter of a treaty may require an interpretation located in a particular historical context.[160] Thus, many authors use other (and especially human rights) treaties to argue for or against the broad interpretation of CA 1. This is sometimes a slippery slope, because of the different basis of the two fields of law.

On the other hand, it is not infrequently argued that all interpretation simply aims at arriving at what is in accordance with equity or good faith. As we have seen, Article 31 of the Vienna Convention, too, begins with a reference to good faith. However, this seems to restate the problem rather than solve it. Now it is "good faith" which needs to be given content – a matter of subjective preference. Therefore, some have held that the good faith merely refers back to subjective consent and the object and purpose test.[161] In addition, as Article 32 states, there are other supplementary means of implementation that may be used to establish the correct meaning of a provision.

Sub-paragraph (b) of Article 31 provides that, together with the context, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation shall be taken into account. Aust thinks that this is a crucial element in the interpretation of any treaty, and reference to practice is well established in the jurisprudence of international tribunals. However precise a text appears to be, the way in which it is actually applied by the parties is usually a good indication of what they understand it to mean.[162]

Different authors have provided different subsequent practice to prove their arguments on the content of CA 1 ranging from statements at human rights related conferences to UNSC Resolutions. We will get to these in the next subparagraphs, but it will be stated in passing here that there is no easy way to actually prove whether States (and/or courts) have acted in a certain way because they believe in their obligation of *pacta sunt servanda* or the broad interpretation of CA 1. As

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[159] Klabbers, *International legal*, *supra nota* 137, pp 281–282; the *Case of the SS Lotus*, PCIJ Series A, No. 10 (1927), p 16.

[160] Shaheed, *Using international law*, *supra nota* 72, p 93.

[161] Aust, *Modern treaty law and practice*, *supra nota* 142, p 293; Villiger, *Commentary*, *supra nota* 144, point 6.

[162] Aust, *Modern treaty law and practice*, *supra nota* 142, p 241.

Gardiner points out, statements and record of a position taken with regard to a treaty provision need to be linked to something actually done, unless they are in a form which itself amounts to an official act or committed policy that is being implemented.[163]

In many instances, judicial decisions are also regarded as evidence of the law. A coherent body of previous jurisprudence will have important consequences in any given case. Their value, however, stops short of precedent as it is understood in the common law tradition.[164] Nevertheless, the practice of courts, such as the ICJ itself, has been to seek jurisprudential continuity and consistency within their own case law, perhaps to the point of constituting precedent.[165]

Fenrick holds that "judicial decisions affect the development of the law of armed conflict, insofar as they address legal lacunae (treaty negotiators can and do accept gaps in the law, judges cannot), as they add flesh to the bare bones of treaty provisions or to skeletal legal concepts such as military necessity of proportionality, and as they identify and give legitimacy to new legal developments such as emergent custom."[166]

The object and purpose of the Conventions, both in 1949 and today, is the protection of civilians and reduction of suffering during armed conflicts. Subsequent practice, however, lacks clarity at first sight. Brollowski states that many diplomatic statements speak for an interpretation from which obligations of third States can be derived under CA 1 and gives the Teheran Conference as an example.[167] Sure, these and many more documents have reiterated the need to respect and ensure respect for the Conventions, but this in itself says nothing about how this clause should be interpreted and what the scope of the obligation is.

There is also an argument of in *dubio mitius*: "[i]f the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties."[168] This is a good argument to avoid stretching the meaning of CA 1 to unreasonable limits and stick with the narrow interpretation.

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[163] Gardiner, *Treaty Interpretation*, *supra nota* 143, pp 226, 227.

[164] James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press, 2012), p 37. *Prosecutor v. Zoran Kupreskic and others*, Case No IT-95-16-T, ICTY Judgment of the Trial Chamber, 14.01.2000, para 541.

[165] Darcy, *Judges, Law and War, supra nota* 39, p 26.

[166] *Ibid*, p 65, citing William Fenrick, "The Development of the Law of Armed Conflict through the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia", 3 *Journal of Conflict and Security Law*, (1998) 197–232, p 197.

[167] Hanna Brollowski, "The responsibility to Protect and Common Article 1 of the 1949 Geneva Conventions and Obligations of Third States" – Julia Hoffmann & André Nollkaemper (eds), *Responsibility to Protect: from principle to practice* (Amsterdam University Press, 2012) 93–110, p 96.

[168] Sir Robert Jennings & Sir Arthur Watts (eds), *Oppenheim's International Law* (9th ed London: Longman, 1996), vol. 1 at 1278.

We therefore have the good faith, the object and purpose, the subsequent practice, the in *dubio mitius,* and many other means of interpretation in our hands when analysing the scope of CA 1. All of these should be considered to arrive at a correct result, as much as such result is achievable. Can using the object and purpose method from article 31 lead to exactly the same conclusion as the *travaux* argument from article 32? If the latter would be completely opposing the former, it would probably have to be abandoned. However, is it the object and purpose of the Conventions to confer legal obligations to enforce IHL to third States?

2.2.4. ICRC commentaries to the Conventions

In national law, a lawyer would first turn to the official commentaries of a legal act for advice on correct interpretation. For example, Estonian lawyers are particularly conscious of the commentaries to the Constitution,[169] which are occasionally used in courts to prove a particular case. However, these commentaries are the views of academics and do not have any legal force on their own. They can only be used as supplementary means of interpretation, as *"travaux supplémentaires"*.

Soon after the 1949 Conference, article-by-article commentaries to the Conventions were produced under the editorship of Pictet. It is interesting to note that in the foreword to these books the authors establish that although the Commentary is published by the ICRC, it is the personal work of its authors (and thus does not provide an official interpretation of the text).[170] The much-awaited new commentaries to the first Convention were published in 2016, and in 2018 to the second Convention.

2.2.4.1. The 1952 Commentaries on Common Article 1

The ICRC Commentaries to the Conventions and to the Protocols have exerted considerable influence on the interpretation of CA 1. Focarelli thinks that their analysis is thus helpful not only to grasp the meaning of these provisions, but also to understand subsequent misunderstandings.[171]

Professor Kalshoven believes that the Commentaries have taken a much too eminent role. As for the clause "to respect", the Commentary states: "By undertaking at the very outset to respect the clauses of the Convention, the Contracting

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[169] *Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne* (Juura, 2007).

[170] The Committee, moreover, whenever called upon for an opinion on a provision of an international Convention, always takes care to emphasize that only the participant States are qualified, through consultation between themselves, to give an official and, as it were, authentic interpretation of an intergovernmental treaty. The English translations of these, which I take as a basis for further discussion, were published in 1952 (Convention I), 1958 (Convention IV) and 1960 (Conventions II and III).

[171] Focarelli, "Common Article 1", *supra nota* 15, p 133.

Parties draw attention to the special character of that instrument". And that "The motive of the Convention is such a lofty one, so universally recognized as an imperative call of civilization…"[172] Kalshoven wittily points out that rather than writing a legal comment on the terms, the authors are attempting to draw a picture of a better world, and are themselves "lofty" about the Convention as a whole. He also, rightly, concludes that neither the non-reciprocal character nor the obligations *erga omnes* can be derived in law or logic from the mere undertaking to "respect" the Conventions divorced from its qualifying words "in all circumstances".[173]

The Contracting Parties do not undertake merely to respect the Convention, but also to ensure respect for it. The Commentaries state that "The use of the words 'and to ensure respect' was, however, deliberate: they were intended to emphasize and strengthen the responsibility of the Contracting Parties." /…/ It follows, therefore, that in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention".[174]

Kalshoven is not satisfied with this thinking. "It follows therefore" …. from what he asks? "That the drafting history of Article 1 cannot have been the authors' source of inspiration is obvious: more than anyone else they must have been aware how weak was the basis in the records for an attempt to interpret any part of the Article as a binding treaty provision. This makes it plausible that they did not bother about past history and found their inspiration in their own minds."[175] A legally binding obligation to bring another State back to an attitude of respect did not exist before the Diplomatic Conference, and could not be deduced in any manner from the deliberations at the Conference.

Focarelli also points out that the paragraph is highly ambiguous about the exact legal meaning of the term "ensure respect". The words "may" and "should" allow the reader to think that CA 1 merely empowers, and indeed encourages, rather than obliges contracting States to take measures against transgressor States. This reading, however, is inconsistent with the term "undertake". To make matters even more complicated, the expression "may, and should" was used on Article 1 common to the First, the Second, and the Fourth Conventions, whereas in respect of the Third Convention only "should" ("doit" in the French version) was used.[176]

The authors of the Commentary go on to say that the provision adopted in 1949 has the effect of strengthening the same provision in the 1929 Convention, due to its prominent position and to its actual wording. "It is not an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral

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[172] Pictet's Commentary, *supra nota* 59, point 25.

[173] Kalshoven, "Chapter 31", *supra nota* 128, p 695; Focarelli, "Common Article 1", *supra nota* 15, p 164.

[174] Pictet's Commentary, *supra nota* 59, point 26.

[175] Kalshoven, "Chapter 31", *supra nota* 128, p 697.

[176] Focarelli, "Common Article 1", *supra nota* 15, p 134.

engagements, solemnly contracted before the world as represented by the other Contracting Parties."[177]

The words "in all circumstances" mean, in short, that the application of the Convention is not dependent on the character of the conflict. Whether a war is "just" or "unjust", whether it is a war of aggression or of resistance to aggression, the protection and care due to the wounded and sick are in no way affected. The commentators finish by bluntly stating that "In view of the preceding considerations and of the fact that the provisions for the repression of violations have been considerably strengthened, it is evident that Article 1 is no mere stylistic clause, but is deliberately invested with imperative force, and must be obeyed to the letter".[178] Kalshoven thinks that this is exaggerated, and that such force is inherent in its character as a binding treaty provision but applies solely to its meaning as such, not to interpretations placed upon it without support in history or logic. He thinks that "respect" should be viewed together with "respect in all circumstances" that is respect under each and every factual condition, whether favourable or adverse, i.e. respect in the face of arguments of necessity or negative reciprocity.[179]

2.2.4.2. The 2016 Commentaries on Common Article 1

If the late professor Kalshoven would be able to comment on the authors' introductory remarks on the new 2016 Commentaries, it would greatly add to his sorrows. For Henckaerts concludes that:

> The main aim of the updated Commentaries is to give people an understanding of the law as it is interpreted today, so that it is applied effectively in today's armed conflicts. /…/ The experience gained in applying and interpreting the Conventions over the last six decades has generated a detailed understanding of how they operate in armed conflicts all over the world and in contexts very different to those that led to their adoption. With this, the new Commentaries go far beyond their first editions from the 1950s, which were largely based on the preparatory work for the Conventions and on the experience of the Second World War.[180]

The Commentaries are in fact not so different from the Pictet Commentaries. They are based on research that includes an analysis of State practice in the application and interpretation of the treaties, e.g. in military manuals, national legislation or official statements; interpretations and clarifications provided in case law and

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[177] Pictet's Commentary, *supra nota* 59, point 25.

[178] *Ibid*, point 27. The Contracting Parties are no longer merely required to take the necessary legislative action to prevent or repress violations. They are under obligation to search for, and prosecute, guilty parties, and cannot evade their responsibility.

[179] Kalshoven, "Chapter 31", *supra nota* 128, p 700.

[180] *New Commentary, supra nota* 119, foreword.

scholarly writings. "As such, it is not the final word but a solid basis for further discussion about the implementation, clarification and development of IHL".[181]

The commentators admit that the interpretation of CA 1, and in particular the expression "ensure respect", has raised a variety of questions over the last decades. "In general, two approaches have been taken. One approach advocates that under Article 1 States have undertaken to adopt all measures necessary to ensure respect for the Conventions only by their organs and private individuals within their own jurisdictions. The other, reflecting the prevailing view today and supported by the ICRC, is that Article 1 requires in addition that States ensure respect for the Conventions by other States and non-State Parties. This view was already expressed in Pictet's 1952 Commentary, and developments in customary international law have since confirmed this view."[182]

The difference in the 1952 Commentaries is that there is a specific section provided covering the obligation to ensure respect by others. By way of answering the academic debate on this issue, the commentary states that:

> The obligation to ensure respect also has an external dimension related to ensuring respect for the Conventions by others that are Party to a conflict. Accordingly, States, whether neutral, allied or enemy, must do everything reasonably in their power to ensure respect for the Conventions by others that are Party to a conflict.
>
> This duty to ensure respect by others comprises both a negative and a positive obligation. Under the negative obligation, High Contracting Parties may neither encourage, nor aid or assist in violations of the Conventions by Parties to a conflict. Under the positive obligation, they must do everything reasonably in their power to prevent and bring such violations to an end. This external dimension of the obligation to ensure respect for the Conventions goes beyond the principle of *pacta sunt servanda*.[183]

This external side, as well as the positive and negative obligations, will be discussed in the next sub-paragraphs.

While the 1952 Pictet Commentary stated that CA 1 was not applicable in non-international armed conflicts the updated Commentary, based on developments over the last six decades, concludes that it is. This interpretation corresponds with the fundamental nature of Common Article 3, which has been qualified by the ICJ as a "minimum yardstick" in the event of any armed conflict.

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[181] Cameron, *et al*, "The updated", *supra nota* 61, p 1212.

[182] For such developments they cite *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, ICJ Reports (1986) 14, para 220, and Jean-Marie Henckaerts & Louise Doswald-Beck, *ICRC Study on Customary International Humanitarian Law* (Cambridge University Press, 2005), Rule 144.

[183] *New Commentary, supra nota* 119, points 153, 154.

2.3. The scope of "Undertake To respect" and „in all circumstances"

2.3.1. Undertake to respect

Any discussion on how to improve and strengthen measures promoting respect for IHL during armed conflicts must begin with a reflection on the obligation contained in CA 1.[184]

"To respect" means that the State is under an obligation to do everything it can to ensure that the rules in question are respected by its organs, as well as by all others under its jurisdiction. "To ensure respect" disputably means that States, whether engaged in a conflict or not, must take all possible steps to ensure that the rules are respected by all, and in particular by parties to conflict.[185]

The Commentary of 2016 states: "The duty to respect the Geneva Conventions reaffirms the general principle of the law of treaties '*pacta sunt servanda*' as codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'"[186]

Kalshoven holds that this first paragraph is more or less accidental and is a product of a debate about a different issue. Namely, the *si omnes* clause was about to be abolished from the new texts and, therefore it was necessary to confirm that the contracting States were obliged to respect the provisions of the Convention in all circumstances, except when a belligerent Party is not a party to the Convention.[187] He regrets that the optical effect of this good idea was that the sentence in the first paragraph came to stand out as a thing apart and, hence, could also be believed to have a distinct meaning of its own.

Focarelli concludes that "the term 'respect' is thus deemed to refer to obligations of States both to respect (themselves) and ensure respect (within their jurisdiction) for the Conventions, while the expression 'ensure respect' is reserved for measures taken against other contracting States failing to comply with the Conventions. What is striking in this reading is that the term 'respect' is also given an 'ensure-respect' meaning, while the term 'ensure respect' is given a radically different meaning."[188]

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[184] Knut Dörman, "Dissemination and monitoring compliance of international humanitarian law" – Wolff Heintsechel von Heinegg & Volker Epping (eds), *International humanitarian law facing new challenges: Symposium in honor of Knut Ipsen* (Berlin, Springer 2007) 227–247, p 244.

[185] Boisson de Chazournes & Condorelli, "Common Article 1", *supra nota* 15.

[186] *New Commentary, supra nota* 119, point 143.

[187] Kalshoven, "Chapter 31", *supra nota* 128, p 670. It certainly did not mean that „in all circumstances" could cover civil war as well. States were not ready for that; Zych, "The Scope of the Obligation", supra *nota* 15, pp 252–253. Focarelli, "Common Article 1", *supra nota* 15, p 130.

[188] *Ibid*, p 137.

Recently the ICTY has itself taken an even clearer stance on the issue, by rejecting what it termed the "*tu quoque* principle", namely the argument based on the allegedly reciprocal nature of obligations created by the humanitarian law of armed conflict. Rebutting this argument, the Tribunal stressed that "… the bulk of this body of law lays down absolute obligations, namely obligations that are unconditional or in other words not based on reciprocity". The Tribunal added: "This concept is already encapsulated in CA 1 of the 1949 Geneva Conventions …"[189] From the fact that such fundamental rules may not be infringed in any circumstances, it follows that the SC cannot request States to implement sanctions in violation of humanitarian law.[190]

These recent developments in international practice as to the circumstances in which respect for IHL is required must not overshadow the general scope of the principle embodied in CA 1. None of the legally recognized means apt to "remedy" the illegality of violations of international law, for example self-defence, recourse to countermeasures, consent of the victim, or state of necessity can be claimed as circumstances precluding wrongfulness in this particular field.[191]

2.3.2. In all circumstances

The last part of the CA 1 has been largely left unattended. Only a few authors merit this with analysis. The term "in all circumstances" was crucial in Article 25(1) of the 1929 Wounded and Sick Convention and in Article 82(1) of the 1929 Prisoners of War Convention and has been understood to mean that the application of the Convention does not depend on the character of the conflict. In other words, that the obligation "to ensure respect" is unconditional and not constrained by the requirement of reciprocity.[192]

This phrase was originally linked to the abolishment of the so-called *si omnes* clause, a provision contained in the 1906 Geneva Convention and in the 1907 Hague Conventions, to the effect that the Conventions were only applicable if all of the belligerents in a given conflict were party to it. In 1929, the drafters felt that the participation of a State not party to the Conventions in a conflict should no longer affect the binding nature of the Conventions on those belligerents who were party to the Conventions.[193] The Commentary to the 1929 Wounded and Sick Convention, published by the ICRC in 1930, specified that the term "in all circumstances" in Article 25(1) was intended to mean that the Convention had a

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[189] *Prosecutor v. Zoran Kupreskic and others*, Case No IT-95-16-T, ICTY Judgment of the Trial Chamber, 14.01.2000.

[190] As these obligations stem from "intransgressible" norms that may never be justifiably contravened.

[191] Boisson de Chazournes & Condorelli, "Common Article 1", *supra nota* 15.

[192] Tonkin, "Common Article I", *supra nota* 254, p 782. Dörmann, "Common Article 1", *supra nota* 206, p 710.

[193] *New Commentary, supra nota* 119, p 184.

"caractère d'obligation générale" and applied both in time of peace and war, in the case of those of its provisions which are applicable both in peace and in war. It was excluded that this "character as a general obligation" also covered civil wars, because "the obligation between the States is international", although it would have been highly desirable had it been so.[194]

It may therefore be said, that the words "in all circumstances" do not relate to civil war. However, the reason for this is no longer the one that was given by the commentator. The reason today is that the States have bound themselves explicitly in the case of non-international conflicts. Disregarding the provisions applicable in peacetime and Article 3, the words "in all circumstances" mean that, as soon as one of the conditions of application for which Article 2 provides is present, no Power bound by the Convention can offer any valid pretext, legal or other, for not respecting the Convention in all its parts.[195]

The undertaking to respect and to ensure respect "in all circumstances" thus reaffirms the strict separation of *jus ad bellum* and *jus in bello* as one of the basic safeguards for compliance with the Conventions. In other words, the application of the Conventions does not depend on the legal justification for the conflict under the *jus ad bellum*, the protection and care due to the wounded and sick are in no way affected.[196]

Accordingly, self-defence against an armed attack (Article 51 of the UN Charter) does not preclude the wrongfulness of violations of the Conventions, nor does the fact that the High Contracting Parties are acting on the basis of a UNSC mandate. The Conventions must also be observed regardless of actual capacity.[197]

Focarelli is one of the few authors who has discussed the words "all circumstances". He wonders if the clause could mean that the application of the Conventions must be ensured in six different cases:

1) Also when the enemy is not party to the convention – as a way to overcome the effects of the *si omnes* clause. However, the Conventions already apply "in all circumstances" under Article 2(3), without any need for CA 1.
2) Also in time of peace – specifically requiring contracting States to take implementing measures before the war breaks out. The most logical interpretation according to Focarelli.
3) Also in internal conflicts – not quite, he feels. There are indisputably different rules applying to the two types of conflict and Article 1 fails to specify which of them, as opposed to others, extend to internal conflicts.
4) Regardless of military necessity – since the end of the Second World War, it has been generally accepted that military necessity has no all-embracing scope anymore, it being relevant only when specific provisions expressly provide for its "justifying" effect.

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[194] Focarelli, "Common Article 1", *supra nota* 15, p 131; Pictet's Commentary, *supra nota* 59.

[195] Pictet's Commentary, *supra nota* 59, p 27.

[196] *New Commentary, supra nota* 119, p 186.

[197] *Ibid.*

5) Regardless of reciprocity – the stance taken in the commentaries. Focarelli feels that "reciprocity cannot easily be got rid of in absolute terms since it remains, for fear of symmetrical breaches, the basic reason why States are expected to (and ultimately hopefully do) fulfil their obligations."
6) Regardless of being an aggressor – unclear if so or not.[198]

In sum, the term may be understood in a variety of legal meanings and cannot be given an "absolute", all-pervasive scope. His analysis is thus quite pessimistic and gives reason to believe that the clause "in all circumstances" might be redundant in CA 1. "In all circumstances" entails many different obligations that are covered by other articles of the Conventions, just like "ensure respect". On the other hand, the explanations given in the Commentaries to the Conventions illustrate that there is substance in the clause.

2.4. The scope of "Undertake to ensure respect"

2.4.1. Historical background

In contrast to the obligation to respect, the obligation to ensure respect is not that easily defined, and has been subject to two very different interpretations. According to one school of thought, which takes a broad view of the obligation, States are required to take all appropriate measures to ensure that IHL is observed universally, including by other States and by non-state actors operating in other States.[199] Within this school, some authors believe that all appropriate measures only mean the measures available in the Conventions themselves, and others believe that all measures imaginable (even the use of force) should be used. The competing (narrow) school holds that the obligation to ensure respect applies only in respect of the State's own population and groups controlled by the State. According to this view, there is no legal obligation to ensure respect for IHL by other States, or by foreign non-state actors – only a moral obligation to do so.[200]

Article 25 of the 1929 Geneva Convention on the Amelioration of the Condition of the Wounded and Sick in Armies in the Field and Article 82 of the 1929 Geneva Convention on the Treatment of Prisoners of War established that both texts "shall be respected by the High Contracting Parties in all circumstances". These provisions have been read as imposing, for the first time, the obligation to abide by the rules of the Conventions regardless of the behaviour of other parties (the *si omnes* nature was abolished and replaced with the principle of non-reciprocity).

The phrase "to ensure respect", however, does not emerge in any written text until just before the Stockholm Conference of August 1948, convened to prepare

198 Focarelli, "Common Article 1", *supra nota* 15, p 162.

199 Zych, "The Scope of the Obligation", *supra nota* 15, p 253.

200 *Ibid*, p 254.

the text of the Conventions. At the time, the ICRC had been involved in conflicts of non-international character (notably the Spanish Civil war) and was more and more concerned about the application of IHL to such situations. This is why Pilloud (the ICRC staff lawyer charged with the development of the general provisions of the Conventions) tried to push for a provision that would engage not only the governments, but the totality of the population they represent (by including "in the name of the people", "we the peoples" or something similar).[201] The clause turned up in the draft texts for revised Conventions the ICRC submitted in May 1948 to the Stockholm Conference. (*The contracting Parties undertake, in the name of their peoples, to respect and to ensure respect for the Conventions in all circumstances*)

When the ICRC submitted the revised text it added a series of remarks to all of the articles. For CA 1 under the newly added "ensure respect" clause, it stated that "The ICRC believes it necessary to stress that if the system of protection of the Convention is to be effective, the High Contracting Parties cannot confine themselves to implementing the Convention. They must also do everything in their power to ensure that the humanitarian principles on which the Convention is founded shall be *universally* applied".[202] A formal declaration stating that the two undertakings are subscribed to by Governments in the name of their peoples did not make it to the final text of the Conventions.

Kalshoven wonders what did the authors mean by "universally" as used in the comment to the second element; and how did it relate to the notion of the "peoples" as used in the third? He is convinced that the authors used "universally" in the sense of "by all concerned" or "the whole population" – a notion which they hoped would encompass "all parties" to such a conflict, and that the ICRC was determined to create a recognition that basic rules of humanitarian law must be respected in internal armed conflict as well as international.[203] At the Stockholm Conference not a word was spoken about the phrase "to ensure respect" and the phrase "in the name of their peoples" was simply omitted. All possible past meanings of the term "respected … in all circumstances" were covered by other specific provisions.[204]

Focarelli is likewise convinced that a strong trend existed to make the Conventions applicable also in internal conflicts, and hence in the contracting States' domestic sphere. He therefore believes that "universally" meant "by all concerned" or "the whole population".[205]

Dörmann and Serralvo are not convinced by Kalshovens' arguments. Firstly, they think that draft Article 2 presented to the Stockholm Conference already dealt with the issue of civil war and non-reciprocity and since CA 1 was supposed

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[201] Kalshoven, "Chapter 31", *supra nota* 128, p 675.

[202] ICRC, *Draft Revised or New Conventions for the Protection of War Victims* (ICRC, Geneva, 1948), p 5.

[203] *Ibid*, p 131; Kalshoven, "Chapter 31", *supra nota* 128, p 677.

[204] Kalshoven, "The Undertaking to Respect and Ensure Respect", *supra nota* 15, p 14.

[205] Focarelli, "Common Article 1", *supra nota* 15, p 131.

to enlarge the scope compared to the 1929 text, it cannot mean anything else but an obligation to ensure respect universally. And, they add, "universally" cannot be restricted to national level already by definition.[206]

The *travaux préparatoires* of the 1949 Diplomatic Conference show that there was very little discussion on the issue of CA 1. Only Italy, Norway, the United States, the ICRC and France took the floor during the deliberations at the Special Committee.[207]

Pilloud, on behalf of the ICRC, pointed out that in submitting its proposals to the Stockholm Conference the ICRC emphasized that the Contracting Parties should not confine themselves to applying the Conventions themselves, but should do all in their power to see that the basic humanitarian principles of the Conventions were universally applied.[208]

It is thus unlikely, Dörmann and Serralvo argue, that delegates had a narrow understanding of the undertaking to ensure respect. I can agree with this as far as the delegates actually paid attention to the clause and understood what it might mean for the future of the law. In the light of present discussions, it is reasonable to presume that they did not. What I do not agree with is the next conclusion that the authors arrive to. They state that the delegates "chose a broad formulation that accommodates an external scope, be it in terms of an entitlement or a duty". This argument is completely undemonstrated in their text. Ensuring respect for the Conventions is certainly a noble cause and something that every State should be committed to, but reading a concrete obligation to do something in such a vague wording, is too much. As will be demonstrated below, it makes a significant difference whether the States undersigned to an entitlement or a duty.

Things did not go much better in the conferences held in the 1970s. Kalshoven even states that "the Diplomatic Conference of 1974–1977 failed utterly in fulfilling the expectation that it might shed light on the interpretation of these terms." /…/ "The delegates who negotiated Protocol II shied away from incorporating the text of CA 1 in this first humanitarian law treaty written exclusively for situations of internal armed conflict."[209]

The comment on the phrase "to ensure respect" in the Commentaries to the Protocols states that:

> Finally, and most importantly, the Diplomatic Conference fully understood and wished to impose this duty on each Party to the Conventions, and therefore reaffirmed it in the Protocol as a general principle, adding in particular to the

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[206] Knut Dörmann and Jose Serralvo, "Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations", 96 *International Review of the Red Cross* (2014) 707–736.

[207] *The Final Record of the Diplomatic Conference of Geneva of 1949,* vol 2, section B, p 53, <www.loc.gov/rr/frd/Military_Law/RC-Fin-Rec_Dipl-Conf-1949.html>

[208] *Ibid.*

[209] Kalshoven, "Chapter 31", *supra nota* 128, p 712, 713.

already existing implementation measures those of Article 7 (meetings) and 89 (Co-operation).[210]

"It may be evident from the earlier discussion of the work of the Diplomatic Conference that the (incontestable) reiteration and (merely technical) reaffirmation of the text of CA 1 in Protocol I cannot seriously be claimed to express anything like a full understanding and wish of that Conference with respect to a text they were simply repeating verbatim. There was, moreover, no-one at the Conference who ever ventured to suggest that the text contained a "duty" for States to do what the ICRC wishes them to do." Kalshoven points out that no one at the Conferences ever discussed the text of the Article in terms even remotely resembling the ICRC interpretation, let alone that they qualified it as an obligation, as the ICRC now openly does.[211]

2.4.2. Practice – when has Common Article 1 been invoked by States and International Tribunals?

The first opportunity to test the new CA 1 came in 1968 in Tehran, where the UN International Conference on Human Rights reminded States party to the Conventions of their responsibility to "take steps to ensure respect of these humanitarian rules in all circumstances by other States, even if they are not themselves directly involved in an armed conflict." Although the Resolution XXIII was adopted by sixty-seven votes to none, with two abstentions, it is not absolutely clear whether the term "responsibility" referred to a legal obligation or something less.[212]

It must be noted that the Teheran Conference was dealing with human rights in armed conflicts, and was a bold undertaking in the sense of actively entering in the field of IHL as Kalshoven points out.[213] He further holds that this text is far from suggesting that States Parties to the 1949 Conventions are under a firm legal obligation to ensure respect for their provisions by other States. "Fail to appreciate", "responsibility" instead of duty, "take steps": these are all very cautious formulations. Even so, the text does provide a useful reminder that States not

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[210] Pictet's Commentary, *supra nota* 59, points 44, 45. Nothing in article 7 suggests that there is an obligation on the parties to request the convening of a meeting whereas article 89 clearly provides for an obligation of contracting states to take measures, whether individual or collective, in co-operation with the United Nations and in conformity with the UN Charter when a 'serious violation' of the Conventions or of the Protocol occurs.

[211] Kalshoven, "Chapter 31", *supra nota* 128, p 718.

[212] International Conference on Human Rights, Resolution XXIII: Human Rights in Armed Conflict, A/CONF. 32/41, Teheran, 12.05.1968.

[213] Kalshoven, "The Undertaking to Respect and Ensure Respect", *supra nota* 117, p 18.

directly involved in an armed conflict are nonetheless entitled to "take steps to ensure" that their colleagues respect the rules they voluntarily accepted as law.[214]

Focarelli is also not convinced: "This text is often relied upon – unconvincingly indeed, given its sheer legal weight – as proof that post-1949 practice supports the notion that CA 1 provides an obligation on each contracting State to take all measures in its power to induce each other contracting State to compliance".[215]

The ICJ has taken stance on the issue in a couple of cases thereafter. In the *Nicaragua* case, the Court considered that even though the United States was not a party to the NIAC, it had an obligation to ensure respect for the Conventions in all circumstances.[216] However, as Zych points out, the Court did not suggest that the United States should have made use of its influence in order to ensure or promote respect for IHL by the contras. The United States' only obligation, in view of the Court, was not to encourage such violations.[217]

In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court underscored that "every State party to [the Fourth Geneva Convention], whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with".[218]

The Court again framed these obligations in negative terms, stating that "[a]ll States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction." In addition to these obligations, all States Parties to the Fourth Geneva Convention had also "the duty to ensure compliance by Israel with international humanitarian law as embodied in that Convention." Interestingly, the Court did not specify what (if anything) this duty entailed beyond the negative obligations not to recognize and not to assist.[219]

The often cited *Genocide case* also gives an idea of the Courts interpretation: "The ordinary meaning of the word "undertake" is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties … It is not merely hortatory or purposive. The undertaking is unqualified … and it is not to be read merely as an introduction to later express

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214 Kalshoven, "Chapter 31", *supra nota* 128, p 708.

215 Focarelli, "Common Article 1", *supra nota* 15, p 135.

216 *Nicaragua, supra nota* 182, para 220. Not quite, as Zych points out: The United States' only obligation, in view of the Court, was not to encourage such violations.

217 Zych, "The Scope of the Obligation", supra *nota* 15, p 266.

218 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, ICJ Reports (2004) 136, para 158. Here too the Court did not specify what this duty entailed anything beyond the negative obligations not to recognize and not to assist. There is no indication that the Court has positive obligations in mind.

219 Zych, "The Scope of the Obligation", supra *nota* 15, p 266.

references to legislation, prosecution and extradition."[220] Some authors think that those features support the conclusion that Article 1, in particular its undertaking to prevent, creates obligations distinct from those which appear in the subsequent Articles.

Others think that the case demonstrates that the Court can be quite liberal and progressive in its interpretation of treaty provisions of a humanitarian character and that it is not in principle opposed to recognizing an obligation to make best efforts (similar to the second sentence of rule 144), despite the inherent vagueness of such an obligation, if it considers it to have a rational basis in the text of the treaty.[221]

Both the General Assembly (GA) and the Security Council (SC) of the UN have referred to the obligation under Article 1, as for example concerning the Arab territories occupied by Israel, and in concerning the uprising of the Palestinian people.[222] The SC has also called upon third States to ensure compliance in Bosnia and Herzegovina and Rwanda.[223]

In its judgment on 14 January 2000, the ICTY stressed that "[as] a consequence of their absolute character, these norms of international humanitarian law do not pose synallagmatic obligations, i.e. obligations of a State *vis-à-vis* another State. Rather (…) they lay down obligations towards the international community as a whole, with the consequence that each and every member of the international community has a legal interest "in their observance and consequently a legal entitlement to demand respect for such obligation."[224]

In the case of the armed conflict in Libya in 2011, countries from all over the world condemned indiscriminate attacks causing death among the civilian population, and urged the Libyan government to respect IHL. In February 2011 the European Union approved a package of sanctions against Libyan leaders, including an arms embargo and a travel ban.[225]

More recently, in the conflicts of Yemen and Ukraine the parties have been reminded to "uphold international humanitarian law", including taking steps to

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[220] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, para 162.

[221] Zych, "The Scope of the Obligation", supra *nota* 15, p 268.

[222] Umesh Palwankar, "Measures available to states for fulfilling their obligation to ensure respect for international humanitarian law", 34 *International review of the Red Cross* (1994) 9–25; Dörmann, "Common Article 1", *supra nota* 206, p 717; Chazournes & Condorelli, "Common Article 1", *supra nota* 15.

[223] SC RES 764, 13.07.1992 on Bosnia and Herzegovina; SC RES 955, 8.11.1994 on Rwanda.

[224] *Prosecutor v. Zoran Kupreskic and others*, Case No IT-95-16-T, ICTY Judgment of the Trial Chamber, 14.01.2000.

[225] Dörmann, "Common Article 1", *supra nota* 206, p 721.

protect civilians.[226] Nevertheless, all of these examples emanate from international courts, the UN or the EU bodies. Finding a case where a State has formally declared that it engages in some implementation or enforcement activity due to its obligations under CA 1, proves very difficult.

Almost all authors finish their inquiries by pointing out that State practice is scarce, and that legal theory still has to develop arguments for asserting an unconditional obligation of all States not involved in an armed conflict to discourage belligerent parties from violating humanitarian law.[227] Once articulated in State practice, the full potential of Article 1 will be exploited.

2.4.3. Customary International law

As established in the first chapter, treaty law is not the only source one needs to look at when examining IHL. Customary international law also deals with the obligation to "ensure respect". There are two Rules in the Customary International Humanitarian Law Study that are important for our purposes.

The Study was commanded by Recommendation II of the Intergovernmental Group of Experts for the Protection of War Victims who met in Geneva in January 1995. The group proposed that: "The ICRC be invited to prepare, with the assistance of experts in IHL representing various geographical regions and different legal systems, and in consultation with experts from governments and international organisations, a report on customary rules of IHL applicable in international and noninternational armed conflicts, and to circulate the report to States and competent international bodies." The 26th International Conference of the Red Cross and Red Crescent endorsed this recommendation, and officially mandated the ICRC to prepare such a report, the results of which were presented in a 3-volume, 5066-page book published in 2005.[228]

Rule 139 provides: "Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control."

The rule is subject to three clarifications: 1) States are only obliged to ensure respect for IHL by such persons when they are in fact directing or controlling them; 2) the obligation of States is limited to ensuring that the instructions themselves are compatible with their international obligations; 3) the obligation to ensure respect for IHL on the part of the population must be understood as an

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[226] UN Information Centre in Yemen, Issue 117, 2018 <sanaa.sites.unicnetwork.org/files/2018/10/May-2018-newsletter-UNIC-Sanaaa.pdf> (1.11.2019).

[227] Gasser, "Ensuring Respect", *supra nota* 33, p 28.

[228] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law, supra nota* 182, p xxxiii; 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Resolution 1, International humanitarian law: From law to action; Report on the follow-up to the International Conference for the Protection of War Victims, *International Review of the Red Cross*, No. 310, 1996, p 58.

obligation to ensure respect for IHL within the State's own jurisdiction, and not on the part of their nationals wherever they may be.[229]

Rule 144 of the ICRC Customary Law Study provides that "States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law" and bases its reasoning on CA 1. "Must exert their influence" is an obligation that even the proponents of the narrow view of the meaning of CA 1 could probably accept.[230]

The first good example of the use of CA 1 as customary international law is the aforementioned *Nicaragua* case. Since the US did not agree to the jurisdiction of the Court, the Court saw itself forced to base its argumentation solely on customary international law and found CA 1 to be one of such norms. The Court found in its verdict that the United States was "in breach of its obligations under customary international law not to use force against another State", "not to intervene in its affairs", and "not to violate its sovereignty". The Courts ruling on this has been widely used by the proponents of the wide scope of CA 1. However, there is also a view that the Court did not say that States Parties to the Conventions are under an obligation to ensure that other States respect their rules of humanitarian law, despite what many gather from this ruling.

What the Court said was: "[T]here is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to "respect" the Conventions and even "to ensure respect" for them "in all circumstances", since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation *not to encourage persons* or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions."[231]

There is considerable distance between the negative duty to refrain from encouraging people on your side to disregard the law and a positive duty to induce people on the other side of the fence to respect the law, Kalshoven concludes.[232] He is straightforward in saying that "This is a typical instance of the Court wanting to see customary law and therefore finding it, without adducing any proof for its finding".[233]

Other authors take issue with the ICRC's and the Court's broad interpretation of customary law norms. For example, Zych rightly states that in view of the general recognition (even by the proponents of the broad interpretation) that

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[229] Zych, "The Scope of the Obligation", supra *nota* 15, p 270; Henckaerts & Doswald-Beck, *Customary International Humanitarian Law, supra nota* 182.

[230] *Ibid.*

[231] Zych, "The Scope of the Obligation", supra *nota* 15, p 265; *Nicaragua, supra nota* 182, para 220.

[232] Kalshoven, "Chapter 31", *supra nota* 128, p 721 (two judges dissented).

[233] *Ibid.*

evidence of State practice is lacking, it is "surprising to find that the authors of the recent ICRC Study on Customary International Humanitarian Law present the broad interpretation as an established rule of customary IHL and claim that evidence in support of it is 'overwhelming.'"[234]

The commentary to the Customary Law study asserts that "State practice shows an overwhelming use of (i) diplomatic protest and (ii) collective measures through which States exert their influence, to the degree possible, to try to stop violations of [IHL]."[235] Unfortunately, the ICRC has made it very difficult to verify its claim, since it does not actually provide a list of such overwhelming incidents.

In fact, even ICRC officials have admitted that such evidence was insufficient, or at least inconclusive. Gasser, writing in his personal capacity, stated not so long ago that it was "difficult to draw conclusions from the practice of governments" and that no "clear" or "hard" evidence of State practice had emerged in this area.[236]

These comments bring us to the issue of *opinio juris*, the second element of establishing customary international law, of which there is scarcely any mention in the commentary to rule 144. When considering this issue, it is important to keep in mind that rule 144 comprises two separate norms. The first sentence of rule 144 sets out a prohibition on encouraging violations of IHL by parties to an armed conflict, while the second sentence refers to a positive obligation of States to exert their influence to the degree possible to stop such violations. This distinction is important because, as stated in the introduction to the Study, the manner of assessing the existence of a customary rule "may well differ depending on whether the rule involved contains a prohibition, an obligation or merely a right to behave in a certain manner."[237] In case of a right, it may be sufficient to show that States do not object when others act in a certain way. Prohibitions, on the other hand, require positive evidence of *opinio juris*, particularly where the underlying State practice consists primarily of abstentions (i.e. compliance with the prohibition). Positive evidence of *opinio juris* is even more important in the context of obligations in order to distinguish the underlying State practice from mere courtesy or comity.[238]

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[234] Zych, "The Scope of the Obligation", supra *nota* 15, p 260. Rule 144 reads: States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law.

[235] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law, supra nota* 182.

[236] Gasser, "Ensuring Respect, *supra nota* 33, p 31; Kalshoven points to a similar personal experience with Dr Yves Sandoz and Cornelio Sommarunga in Kalshoven, "Chapter 31", *supra nota* 128, p 726.

[237] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law, supra nota* 182.

[238] *Ibid*.

Furthermore, as noted in the Study, "[o]pinio juris plays an [especially] important role … where the practice is ambiguous, in order to decide whether or not that practice counts towards the formation of custom." The commentary to rule 144 shows no indication of these basic rules having been followed. The methodology actually employed with regards to rule 144 is more appropriate for establishing the existence of a customary right, rather than a prohibition or obligation. The authors of the Study appear to have admitted any State practice whether or not supported by evidence of *opinio juris*.[239]

Scobbie, for instance, has observed that there appears to be a divergence between the "classic" approach to assessing the existence of customary international law as described in the introduction to the Study and "the less stringent methodology which actually appears to have been employed" in the context of particular rules.[240]

It remains, however, that the second sentence of rule 144 is terribly vague, which makes it unlikely for States to be found in violation of it, so long as they at least refrain from encouraging violations of IHL.[241]

In fact, the only sure way to violate the second sentence of rule 144 might be to violate the first. As Sassòli and Bouvier have noted, "it is only certain that a State violates [common] Article 1 … if it encourages or assists violations by another State." This view is consistent with international jurisprudence, which so far has not extended the duty to ensure universal respect for IHL beyond the duty not to encourage violations of IHL by others.[242]

2.4.4. The extensive and restrictive approach to interpreting Article 1 of the Geneva Conventions

In this section I set out to establish whether there is an obligation for a State Party to ensure respect for the Conventions by all entities falling under its jurisdiction (organs of the State, armed forces, etc.), or does CA 1 imply a legal obligation to take measures to ensure respect by other States and even non-state actors. Two of the major schools of thought on this question are summarised as follows:

The first point of view is that CA 1 does not entail any obligation for States to ensure respect for IHL by other States. This is not what the drafters of the Conventions had intended. Rather, the term "respect" was held to refer to the States own organs, whereas "ensure respect" was held to refer to their duty to ensure respect within their own field of jurisdiction (by civilians for example), through

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239 Zych, "The Scope of the Obligation", supra *nota* 15, p 261–262.

240 Iain Scobbie, "The Approach to Customary International Law" – Elizabeth Wilmshurst & Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press, 2007) 15–49, p 25.

241 Zych, "The Scope of the Obligation", supra *nota* 15, p 264.

242 *Ibid*, p 265; Marco Sassòli & Antoine Bouvier (eds), *How Does Law Protect in War?* (Geneva: ICRC, 1999), p 231.

measures such as legislation etc. This school also admits that there might be a moral obligation for States to do this and there is certainly a right to take lawful unilateral measures if the States wish to do so.

Those holding the opposite view, point out that evolving practice and international *opinio juris* have shown that such an obligation now exists. In particular, they cite the 1993 Conference for the Protection of War Victims and the role of Customary International Law.

These approaches have been titled restrictive and extensive respectively. The restrictive approach may also be termed "individual-compliance", implying that under Article 1 contracting States have undertaken to adopt all measures necessary to ensure respect for the Conventions within their jurisdiction by their organs and private individuals. The extensive approach is "state-compliance" in character, meaning that under Article 1 contracting States have also undertaken to adopt all measures necessary to ensure respect for the Conventions against other contracting States which fail to comply with them.[243]

According to Bugnion, the *travaux préparatoires* to the Conventions are not conclusive when it comes to construing the scope of CA 1. He asserts that both the internal and external aspects of the duty to ensure respect were put forward and that the Diplomatic Conference of 1949 did not find it necessary to decide between them. The formulation retained would permit both interpretations. Kalshoven has gone one step further by stating that nothing in the *travaux préparatoires* justifies an interpretation of CA 1 whereby third States have an international legal obligation to ensure respect for the Conventions in conflicts to which they are not a party.[244]

Let us now turn to the arguments of both of these groups. I argue that the intention of the High Contracting Parties, coupled with their subsequent practice, calls for a narrow interpretation of that obligation. In this sub-chapter the general views of the proponents of each group are analysed, whereas the next sub-chapter deals more specifically with possible active measures to be taken and outlines some concrete obligations proposed.

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[243] See, e.g., Focarelli, "Common Article 1", *supra nota* 15, p 127; Gasser, "Ensuring Respect, *supra nota* 33, p 25; Luigi Condorelli & Laurence Boisson de Chazoumes, „Quelques remarques à propos de l'obligation des Etats de 'respecter et faire respecter' le droit international humanitaire len toutes circonstances" – Christophe Swinarski (ed), *Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet* (Geneva-The Hague: Martinus Nijhoff, 1984) 17–36, p 24. ICRC 2016 commentary also cites that this is the prevailing view „Developments in customary International law have since confirmed this view", but only cites its own controversial customary law study and the *Nicaragua case*.

[244] Dörmann, "Common Article 1", *supra nota* 206, p 712, François Bugnion, *Le Comité International de la Croix Rouge et la protection des victimes de la guerre* (ICRC, Geneva, 2000), pp 1080–1081.

2.4.4.1. The extensive approach

According to this interpretation, States are required to take all appropriate measures to ensure that IHL is observed universally, including by other States and by non-state actors operating in other States.[245] Many proponents of this approach are closely affiliated with the ICRC and are concentrated mainly on HRL in their research. Their good will is of course understandable, but from a purely legal point of view, this issue must be analysed objectively.

Pfanner sets out that the undertaking in Article 1 to "ensure respect for" IHL means that the Contracting Parties are obliged to help bring about compliance with the Conventions whenever they are applicable, even in conflicts in which those parties are not involved. "This provision thus reinforces the responsibility of each contracting State, which besides regulating its own conduct must act by all appropriate means to ensure that humanitarian law is observed by all other States."[246] Breslin similarly states without further ado that "the duty to ensure respect for the Conventions goes beyond the actions of a State's own armed forces is clear from scholarly work, judicial decisions, the modus operandi of the Security Council in maintaining peace and security, and the policy of regional powers such as the EU."[247] According to Serralvo and Dörmann CA 1 goes beyond an entitlement for third States to take steps to ensure respect for IHL. It establishes not only a right to take action, but also an international legal obligation to do so.[248] The words "ensure respect" imply an active duty and the term "undertake" suggests a genuine obligation.[249] The latter also introduces an internal and external element of the duty:

> However, CA 1 goes one step further by introducing an undertaking to ensure respect in all circumstances, which, in turn, consists of an internal and an external component. The internal component implies that each High Contracting Party to the Conventions must ensure that the Conventions are respected at all times not only by its armed forces and its civilian and military authorities, but also by the population as a whole. The external component postulates that third States not involved in a given armed conflict – and also regional and international organizations – have a duty to take action in order to safeguard compliance with the Conventions, and arguably with the whole body of IHL, by the parties to the conflict.[250]

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[245] Zych, "The Scope of the Obligation", supra *nota* 116, p 251.

[246] Toni Pfanner, "Various mechanisms and approaches for implementing international humanitarian law and protecting and assisting war victims", 91 *International Review of the Red Cross* (2009) 279–328, p 305.

[247] Andrea Breslin, "Ensuring Respect: The European Union's Guidelines on promoting compliance with international humanitarian law", 43 *Israel Law Review* (2010) 381–413, p 387.

[248] Dörmann, "Common Article 1", *supra nota* 206, p 723 and as compared with article 48 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts.

[249] *Nicaragua, supra nota* 182, para 220.

[250] Dörmann, "Common Article 1", *supra nota* 206, pp 708–709.

"It is reasonable to assume", they continue, "that CA 1 goes beyond the mere obligation to respect the Conventions at the domestic level. What can be deduced from a joint analysis of the *travaux préparatoires* and the subsequent application of CA 1 for over sixty years, is that CA 1 creates and unprecedented legal obligation for each State to ensure respect towards the international community as a whole".[251]

Chazournes goes even further in her analysis. She first states that CA 1 also emphasizes the non-reciprocal nature and absolute character of this fundamental obligation, which obliges States to react to violations of IHL regardless of the circumstances, so as to ensure respect for the aforementioned principles. Here she actually proposes means by which to enforce this obligation: meetings of the High Contracting Parties, Protecting Powers, grave breaches system, International Fact-Finding Commission, diplomatic action, public denunciation and action in the framework of the UN.[252] Note that all of these measures are listed under other, substantial articles of the Conventions. She then adds that the obligation should be interpreted in an even broader sense, so as to include the search for a peaceful resolution of a conflict based on the respect for humanitarian principles as a "post-conflict peace-building" measure to consolidate peace and prevent any recurrence of gross violations of humanitarian principles.[253]

The authors offer different lines of argumentation for their approaches. For example, Tonkin agrees that one could perhaps argue that CA 1 was intended to be an aspirational statement rather than an independent obligation carrying real legal weight, but remains that the use of the word "undertake" in CA 1 goes against this interpretation. As the ICJ explained in the Genocide case, in relation to the obligation to prevent and punish genocide in Article 1 of the Genocide Convention, the ordinary meaning of the word "undertake" is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties. It is not merely hortatory or purposive.[254]

The Wall case is another example mentioned. Pfanner believes that "Before the ICJ's Wall opinion, the legal scope of the obligation to 'ensure respect for' international humanitarian law was disputed, particularly with regard to whether the obligation binds only the parties to a conflict or whether it also implies a duty (and, if so, what duty) for third States. At the least, States should "not […]

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[251] *Ibid*, p 711; Roberts, "Implementation of the laws", *supra nota* 8, p 142.

[252] Laurence Boisson de Chazournes, "The Collective Responsibility of States to Ensure Respect for Humanitarian Principles" – Arie Bloed, *et al* (eds), *Monitoring human rights in Europe: comparing international procedures and mechanisms* (Dordrecht: Martinus Nijhoff, 1993) 247–260, pp 249–250.

[253] *Ibid*, p 260.

[254] Hannah Tonkin, "Common Article I: A minimum yardstick for regulating private military and security companies", 22 *Leiden Journal of International L*aw (2009) 779–799, p 783.

encourage persons or groups engaged in [conflict] to act in violation of the provisions of Article 3 common to the four Geneva Conventions'."[255]

However, this reasoning has not gone entirely unchallenged. Considering Israel's actions in the occupied Palestinian territory under the Fourth Geneva Convention, the Court noted that all States party to the Convention have an obligation "to ensure compliance by Israel with international humanitarian law as embodied in that Convention". In his dissenting opinion, Judge Kooijmans disagreed with the majority's conclusion that CA 1 imposes obligations on States to take action in relation to other States. While emphasizing that he "certainly" was "not in favour of a restricted interpretation of Article 1, such as may have been envisaged in 1949", he argued that the drafters only intended CA 1 to impose an obligation on each contracting State "to ensure respect for the Conventions by its people" rather than by other States, and in any case he failed to see what kind of positive action might be expected from third States "apart from diplomatic démarches".[256]

Two other cases have proven helpful for the proponents of the broad interpretation. In its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, the ICJ noted that "a great many rules of humanitarian law applicable in armed conflict are so fundamental" that "these fundamental rules are to be observed by all States whether or not they have ratified the Conventions that contain them".[257] The same Court, in its earlier decision on merits in the landmark Nicaragua Case, had asserted that the obligation referred to in CA 1 forms part of customary international law.[258] This, in fact, does not say anything about the substance of the obligation in CA 1. It is clear that such fundamental norms exist that all States must adhere to, but this does not lead to a logical conclusion that States are under an obligation to force other States to respect such rules, nor that these obligations stem solely from CA 1.

The proponents of the broad approach admit that there was no mention to this obligation in the drafting history of the Conventions, but overcome this loophole easily. Tonkin states for example, that "the original intent of the drafters is never conclusive as to the current status of a legal norm, since modern treaty interpretation also relies heavily on the subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".[259] She provides the Wall case as an example of "a general trend towards a broad and dynamic interpretation of CA 1".

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[255] Pfanner, "Various mechanisms", *supra nota* 246, p 305; *Nicaragua, supra nota* 182, para 220. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports (2004) 131.

[256] Tonkin, "Common Article I", *supra nota* 254, p 786.

[257] *Nuclear Weapons, supra nota* 108, para 79; Chazournes & Condorelli, "Common Article 1", *supra nota* 15.

[258] *Nicaragua, supra nota* 182, para 220.

[259] Tonkin, "Common Article I", *supra nota* 254, p 784.

"The scope of the duty to 'ensure respect' has evolved considerably since the drafting of this article and has come to encompass much more than the original drafters explicitly included", Breslin reaffirms Tonkin's findings. "While third party responsibility may not have been originally envisaged, it has been said that the article nonetheless provides a 'nucleus for a system of collective responsibility'." While the legal obligation may be clear, Breslin argues, the scope of the duty and the measures available to third States to ensure respect are less certain. "It is evident that ensuring respect entails a duty to refrain from encouraging or assisting others to violate the rules contained in the Conventions, it is less clear at what point a legal duty to undertake positive action may come into play".[260]

While it is usually acknowledged that consistent practice is sparse, some authors nevertheless hold that general acquiescence, lack of objections, and confidentiality of measures are, on balance, strongly supportive of this broader interpretation, and even capable of outweighing possible different interpretations deriving from the drafting history of the Conventions.[261]

2.4.4.2. The restrictive approach

The proponents of this approach hold that the extensive approach has become dominant, just by way of repetition and that some writers have sought in this interpretation an overarching obligation that conveniently fills any gaps in existing rules of IHL. It has been argued, for instance, that the obligation to respect and to ensure respect for IHL even requires States to regulate their arms exports so as to prevent violations of IHL by other actors.[262]

Proponents of the broad interpretation have turned a blind eye on Kalshoven's pointed critique. According to David, the obligation to ensure universal respect for IHL cannot be of a merely moral order, since the language of CA 1 is prescriptive, not hortatory. This argument misses the point in that Kalshoven clearly recognises that CA 1 expresses a legal obligation; what he disputes is the claim that this obligation is universal in scope. In other words, the dispute is not over the nature (legal or moral) of the obligation to ensure respect, but rather over the scope of the legal obligation.[263]

Other proponents of the broad interpretation dismiss Kalshoven's critique as a "minor consideration" and argue that the subsequent practice of States confirms

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[260] Breslin, "Ensuring Respect", *supra nota* 247, p 386.

[261] Condorelli & Boisson de Chazournes, "Quelques Remarques", *supra nota* 243, pp 26–29.

[262] Zych, "The Scope of the Obligation", supra *nota* 15, p 252; Maya Brehm, "The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law", 12 *Journal of Conflict and Security Law* (2007) 359–387, p 359.

[263] Zych, "The Scope of the Obligation", supra *nota* 15, p 255; Eric David, *Principes de droit des conflits armés* (3rd edn, Brussels: Bruylant, 2002), para 3.14.

their interpretation of the obligation to ensure respect.[264] They do recognize that little State practice is available, but assume this is because States prefer to act discretely.

As said in the previous subparagraphs, the VCLT (Article 31(3)(b)) provide that in interpreting a treaty account must be taken of "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." Article 31(3)(b) sets a very high standard; it requires that *all* parties to a treaty, if not actually engaged in the subsequent practice, must at least accept it or acquiesce to it.[265] Any contrary State practice would therefore be fatal to this argument as Zych concludes, pointing out examples of such contrary State practice.

Zych puts forward a sound argument about States not having acquiesced to the broad interpretation. In Brownlie's words, acquiescence is "the absence of protest when this might reasonably be expected".[266] A practice that is engaged in discreetly or secretly on a bilateral level, as is alleged to be the case here, would not be known to the generality of States and would not afford them an opportunity to protest.[267]

The existence of State practice must always be established. Indeed, if the obligation to ensure respect for IHL were in fact universally accepted, each and every armed conflict would elicit some kind of response by each and every State. A much more likely explanation is that States simply do not subscribe to the broad interpretation.[268] As illustrated in the "customary law" section of this Chapter, it is mostly case law that the authors cite, not specific conduct of States on the basis on CA 1.

Focarelly points out that the 1949 Conventions require contracting States to "ensure" that a certain result be attained in numerous provisions unequivocally referring to an "individual-compliance" meaning. This treatment of the term "ensure" throughout the Conventions exclusively limited to an "individual-compliance" meaning militates against a "state-compliance" meaning to be attached

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[264] Zych, "The Scope of the Obligation", supra *nota* 15, p 256; Chazournes & Condorelli, "Common Article 1", *supra nota* 15. Cassese adds that since 1950 „few States took action [to ensure universal compliance with IHL], and always at the bilateral level: they sent diplomatic notes, or undertook diplomatic démarches, vis-à-vis belligerents grossly violating the Conventions. As these actions were never made public, one cannot gauge their importance and establish whether they had any follow-up." Antonio Cassese, *International Law* (2nd edn, Oxford University Press, 2004), p 20.

[265] Zych, "The Scope of the Obligation", supra *nota* 15, p 256, Aust, *Modern treaty law and practice*, *supra nota* 142, p 241.

[266] Brownlie, *Principles of Public International Law*, *supra nota* 75, p 152.

[267] Zych, "The Scope of the Obligation", supra *nota* 15, p 257.

[268] *Ibid*, p 258.

to CA 1. The Conventions themselves provide for certain mechanisms to be activated against transgressor contracting States, but they never in this connection use the term "ensure".[269]

He concludes that appeals to the "state-compliance" meaning of CA 1 by international bodies are invariably contained in recommendations and, should they be contained in binding resolutions, such as those adopted by the UNSC under Article 41 of the UN Charter, contracting States would be bound to take action on the basis (and to the extent) of these resolutions rather than of CA 1.[270]

Expressions similar to "ensure respect" in human rights treaties, in other provisions of the Conventions themselves, and in military manuals have been given an exclusive "individual-compliance" meaning. Measures, the adoption of which is expressly required or authorized by other provisions of the Conventions, have been redundantly linked to Article 1.[271] Also, if third States really have an obligation to react, and yet generally they do not abide by it, it remains obscure how far a broad interpretation of CA 1 is sensible.[272]

Focarelli points out an interesting nuance. While the Commentary to the Third Convention refers only to "should", the Commentaries to the First, Second, and Fourth Conventions refer to „may, and should". The text thus refers to either a simple recommendation ("should") or to both a recommendation („should") and a discretionary power („may"). This question is of great importance. If the term "ensure respect" is to be understood in terms of an obligation, it would follow that all contracting States are legally bound to take all measures in their power against transgressor States. That is, in each instance of alleged breach of the Conventions each contracting State would violate the Conventions if it failed to take all measures in its power capable of inducing the transgressor to compliance. It would follow that for each single breach of the Conventions a potentially large number of contracting States may be held responsible for a violation of CA 1.[273] This interpretation would be in sharp contrast with the principle of effectiveness mentioned above.

In conclusion Kalhsoven states: The primary legal obligation arising from CA 1 is for States Parties to impose respect for the applicable rules of international humanitarian law, "in all circumstances", on their armed forces, including armed groups under their control, and on their populations: for the implementation of this obligation they can be held legally responsible. No such legal liability attaches to their moral duty to endeavour to ensure respect by their peers.[274]

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[269] Focarelli, "Common Article 1", *supra nota* 15, p 143. e.g. Arts 15(1), 17(1)(3), 19(1)(2), 34(1), 35(2), 45, and 48 of the First Convention.

[270] *Ibid*, p 157.

[271] *Ibid,* p 125.

[272] *Ibid*, p 129.

[273] *Ibid*, pp 146–147.

[274] Kalshoven, "Chapter 31", *supra nota* 128, p 727.

In sum, either measures supposedly envisaged in CA 1 against other contracting States are already detailed in other provisions of the Conventions, in which case Article 1 is legally redundant, or they are not specifically envisaged, but then it seems hardly possible to determine which of them fall within the scope of the undertaking to "ensure respect". It should also be considered that measures governed by other provisions usually relate to discretionary powers to take *per se* lawful measures, as opposed to obligations provided for in relation to measures to be taken to induce compliance by individuals. It is hardly plausible that CA 1 may transform an express discretionary power into an obligation, thereby causing a change in meaning of other provisions of the same Conventions.[275]

2.4.5. Does the obligation to ensure respect imply the taking of active measures?

According to one school of thought, States do not have a legal obligation to take active measures to ensure respect for the Conventions, but are at the very least required to have "clean hands".[276] The second school of thought holds that States have a legal obligation not only to have clean hands, but also to take active measures to bring a stop to violations (recalling of an ambassador, economic sanctions etc.). This is also the view taken by the members of the ILC, for whom violations of IHL are prejudicial to the whole International Community, due to the fact that this body of law contains *erga omnes* obligations.[277]

What exactly does the obligation to have clean hands entail? This principle prohibits States from helping a third State commit violations or inciting it to do so. One point of view could be that it simply requires that a State do nothing to help or encourage another State to commit violations (the "closed eyes" interpretation). This is in contrast with the more widely held view, which is that the principle of clean hands entails certain specific responsibilities which go somewhat beyond this (e.g. States should abstain from supplying certain types of arms, especially where they are being used to commit violations).[278]

There are, as in many chapters of this thesis, supporters to both of these views. As expected, professor Kalshoven takes issue with the broad interpretation, arguing that the drafters did not intend CA 1 to impose an obligation on third States to take action to ensure that States party to the conflict ensure respect for IHL. Instead, the provision was intended to oblige States party to the conflict to

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[275] Focarelli, "Common Article 1", *supra nota* 15, p 154.

[276] Draft articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission* (2001), vol. II, A/CN.4/SER.A/2001/Add.1, Art 16.

[277] Rule 144 of the Customary Law study.

[278] „The states' obligation to "respect and ensure respect" for International Humanitarian Law: from law to practice", Working Group chaired by Mr. Gert-Jan van Hegelsom – *Improving compliance with International Humanitarian Law: Proceedings of the 30th Bruges Colloquium* (Brugge, 2004) 67–78. [Hegelsom], p 70.

ensure respect for the Conventions by their own populations, as well as by their agents and officials.[279]

Basing his arguments on the work of the International Law Commission's Draft articles on Responsibility of States for Internationally Wrongful Acts, Professor Momtaz also holds that CA 1 contains the obligation for the High Contracting Parties to abstain from helping parties to a conflict commit violations of IHL.[280] The ILC dedicated Article 16 of its draft statutes to that obligation. According to this Article, "a State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so". Nevertheless, State's responsibility would be engaged if the latter does so "with knowledge of the circumstances of the internationally wrongful act". In other words, the State which assists another one must know for a fact that its action will facilitate the commission of an internationally wrongful act.[281] He admits that States probably have a right to take active measures. The difference between a legal obligation and an inherent right to act in a certain way is immense, though. Many authors and commentators seem to have overlooked this.

According to the general regime of State responsibility then third States are under an obligation not to knowingly aid or assist in the commission of IHL violations. They also must refrain from recognizing as lawful any situation created by a serious breach of peremptory norms of IHL. These obligations can be considered negative duties, and even if CA 1 did not exist, they would flow from other norms of international law.

Professor Momtaz points out that it is as yet unclear whether CA 1 implies that States have a legal obligation to take measures to ensure respect for IHL, or whether it simply gives them the right to take measures. "Even though the Resolution XXIII adopted in the Conference of Teheran on Human Rights in 1968 and the Declaration of the 1993 Geneva Conference on protection of war victims refer to States' "responsibility" in this field, are we allowed to talk about a State "obligation"? The question still remains".[282]

Focarelli sees a double regime: "while there is undisputedly an obligation to 'respect' (meaning an obligation of contracting States to comply themselves and to do everything in their power to comply with the Protocol), the term 'ensure respect' is understood in recommendatory terms when (and only when) referring to action taken against transgressor States."[283]

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[279] Tonkin, "Common Article I", *supra nota* 254, pp 783–784.

[280] Djamchid Momtaz, "L'engagement des Etats à "faire respecter" le droit international humanitaire par les parties aux conflits armés" – *Improving compliance with International Humanitarian Law: Proceedings of the 30th Bruges Colloquium* (Brugge, 2004) 27–34, p 32.

[281] *Ibid*, p 32.

[282] *Ibid*, p 34.

[283] Focarelli, "Common Article 1", *supra nota* 15, p 136.

According to Devillard, a general obligation of prevention incumbent on third States can be excluded, but an obligation to prevent IHL violations would be triggered in situations where the risk of such violations can be reasonably foreseen.[284]

On the other hand, Dörmann conveniently concludes that taking into consideration both the drafting history of CA 1 and the subsequent practice of States, international tribunals and intergovernmental organizations, States not party to an armed conflict have a legal obligation to ensure respect for the Conventions, and for applicable IHL more broadly, through taking positive steps.[285] He holds that States also have an international legal obligation to actively prevent IHL violations. According to him, States have to take appropriate measures to put an end to ongoing IHL violations based on rule 144 and AP I Article 89.

Gasser also refers to preventing further breaches from happening and acting when parties to an armed conflict are about to violate their humanitarian obligations. However, he points out that a brief look at the behaviour of governments leaves no doubt that they do not feel themselves to be under a legal obligation to act if humanitarian law is being flouted by a party to an armed conflict. If third parties actually do act, they do so if and when they feel that a demarche is also in their own interest or if public pressure at home is such that to act seems wiser than to run counter to public opinion.[286]

Tonkin points out that in Resolution 60/147 of 2005 the UNGA considered the scope of the obligation to ensure respect for IHL and concluded that it entails, *inter alia*, a duty to take positive measures to prevent violations, to investigate violations and punish perpetrators, and to provide victims with access to justice and effective remedies. The resolution emphasizes that these basic principles 'do not entail new international or domestic legal obligations', but simply 'identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations'.[287] Admittedly, this can also be understood as a confirmation to the point made on the obligations being written in specific Articles that need to be implemented at any rate.

At the annual Brugges Colloquium of IHL in 2003, this issue was addressed. It was generally accepted that States have an obligation under CA 1 to abstain from any act that might encourage or support a party to a conflict to violate IHL.[288]

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[284] Alexandre Devillard, "L'obligation de faire respecter le droit international humanitaire: l'article 1 commun aux Conventions de Genève et à leur Premier Protocole Additionnel, fondement d'un droit international humanitaire de cooperation?", 75 *Revue Québécoise de Droit International* (2007) 75–129, p 96.

[285] Dörmann, "Common Article 1", *supra nota* 206, p 722. Dörman, "Dissemination and monitoring compliance", *supra nota* 184, pp 244, 245.

[286] Gasser, "Ensuring Respect, *supra nota* 33, pp 31–32.

[287] Tonkin, "Common Article I", *supra nota* 254, p 785; GA RES 60/147, 16.12.2005.

[288] For instance by supplying prohibited weapons to a belligerent or financial, economic or military assistance to a party to a conflict violating basic tenets of international humanitarian law, or by buying looted goods, mineral resources or works of art where the proceeds from the sale would help to finance an armed conflict.

It was also generally accepted that international organizations and third States not involved in an armed conflict have a responsibility under CA 1 to *bring their influence* to bear on parties to an armed conflict in order to induce them to comply with IHL or to *desist* from any behaviour that violates the law. This responsibility was understood to be an obligation to take action, not as an obligation to reach a specific result. While some experts considered the duty to take appropriate action to be a moral responsibility, the great majority considered it a legal obligation.[289]

According to the 2016 Commentary to the Conventions, the obligation to ensure respect also has an external dimension related to ensuring respect for the Conventions by others that are Party to a conflict. Accordingly, States, whether neutral, allied or enemy, must do everything reasonably in their power to ensure respect for the Conventions by others that are Party to a conflict.[290] It is unclear if this is a legal obligation and if so, what does it entail? What happens if States do not comply?

The Commentary lists both negative and positive obligations. Under negative obligations, in particular, they may neither encourage nor aid or assist in violations of the Conventions. CA 1 does not tolerate that a State would knowingly contribute to violations of the Conventions by a Party to a conflict, whatever its intentions may be.[291]

It goes on to say that this obligation is not limited to stopping ongoing violations, but includes an obligation to prevent violations when there is a foreseeable risk that they will be committed, and to prevent further violations in case they have already occurred.[292] Unlike the negative obligation described above, it is an obligation of means, i.e. the High Contracting Parties are not responsible for a possible failure of their efforts as long as they have done everything reasonably in their power to bring the violations to an end.[293]

The commentators agree that the precise content of this positive obligation is difficult to determine in the abstract, yet this difficulty is "not sufficient in itself to deny the existence of such an obligation. CA 1 is a living provision which must be interpreted in the overall context of the Conventions and, where applicable, the Protocols, and the international legal order as a whole. Its content will be further concretized and operationalized in the decades ahead."[294]

It is thus concluded, similar to professor Momtaz, that "the question still remains…". States certainly have a right to take active measures against a transgressor State, envisaged in other articles of the Conventions and Protocols. They also have to "bring their influence", "take measures to prevent", "act in cooperation" and other similar formulations that seem to be used quite often in literature.

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[289] Hegelsom, *supra nota* 278, p 70.

[290] *New Commentary, supra nota* 119, point 153.

[291] *Ibid*, point 159.

[292] *Ibid*, point 164.

[293] Providing the *Crime of Genocide* case as an example.

[294] *New Commentary, supra nota* 119, point 172.

As for a legal obligation I still hold that all obligations envisaged by substantive Articles of the Conventions and Protocols, must be respected and carried out in good faith regardless of CA 1.

In short, the need for greater compliance cannot automatically and logically generate obligations *erga omnes* solely because a higher degree of compliance is believed to follow. As mentioned, even when an obligation is proved *erga omnes*, this obligation does not necessarily entail a commitment of all States to take all possible and imaginable measures capable of inducing transgressor States to compliance.[295]

If all 196 contracting States have an obligation to take all positive measures in their power to respond to one State which has breached the Conventions, then all those which do not react turn out to be in breach of CA 1. Since contracting States generally do not react, one should conclude that there are 195 or so breaches of Article 1 for any breach of the Conventions, a very extreme construction which is far from being supported by State practice.[296]

Let us consider for a moment, whether the presumable obligation in CA 1 would be one of result or due diligence. The obligation of result is an obligation to 'succeed', while the obligation of diligent conduct is an obligation to 'make every effort'[297] Here, Dörmann and Serralvo take a step back and are not as rigid as some authors (e.g. Azzam) by stating that a State not party to a specific armed conflict cannot be said to be under an obligation to reach a particular outcome – for example, the cessation of all IHL violations by a belligerent – with regard to that conflict. "On the contrary, third States can only be under an obligation to exercise due diligence in choosing appropriate measures to induce belligerents to comply with the law. /…/ If they fail to do so, they might incur international responsibility."[298]

For Dörmann, it is clear that this obligation, being one of due diligence, only arises in cases which the prospective inobservance of IHL is marked by a certain degree of predictability. Under international law, due diligence obligations involving the need to prevent a particular event can only be triggered if the event is question is actually foreseeable.[299] Failing to take measures will give rise to the international responsibility of the third State only when its conduct cannot be deemed diligent. What needs to be proved is the inconsistency between the State's actual conduct and the conduct demanded by the "due diligence standard"[300]

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[295] Focarelli, "Common Article 1", *supra nota* 15, p 167; Momtaz, "L'engagement des Etats", *supra nota* 280.

[296] *Ibid*, p 171.

[297] Dörmann, "Common Article 1", *supra nota* 206, p 724 citing Riccardo Pisillo-Mazzeschi, "The Due Diligence Rule and the Nature of the International Responsibility of States", 35 *German Yearbook of International Law* (1992) 9–51, pp. 47–48.

[298] Dörmann, "Common Article 1", *supra nota* 206, p 724.

[299] *Ibid*, p 730.

[300] *Ibid*, p 726.

The ICJ has assessed the due diligence rule in the context of the Genocide convention, stating that States are obliged to use "all means reasonably available to them" and that a State incurs responsibility only if it has "manifestly failed to take all measures to prevent genocide which were within its power". As with any obligation of due diligence, it can only be assessed *in concreto*. Thus, only a case-by-case analysis can reveal whether a State has actually violated CA 1.[301]

It seems that ultimately States are still free to choose measures they deem appropriate to induce compliance; and they are responsible only when it can be said that they have manifestly failed to take any measures or have knowingly aided in the commission of violations.

2.5. The actual scope of Common Article 1 and possible measures available to States to ensure respect for the Conventions

What, then, is the actual scope of CA 1 and can it be used on its own, without any specifying articles? At the outset, it is hard to see that an unqualified obligation under CA 1 would take precedence over a specific and express provision found in the Conventions. Every right or obligation the different authors read into CA 1 is already covered by other articles in the Conventions. As it should be. Specific provisions of both the Conventions and Protocol I are supposed to operate in their own right and not in combination with CA 1.

Focarelli reaches a conclusion that Article 1 is not in itself a "quasi-constitutional" rule; it is not even an "ordinary" rule having a meaningful autonomous legal content. "It is a generic reminder of an obvious obligation to abide by the Geneva Conventions and of the fact that all contracting States are expected to see to it that all others abide by the Conventions, more specifically a reminder of obligations already set out in other rules – included in the Conventions and/or customary in character – along with a recommendation to remain active in the effort by lawful measures to induce all contracting States to abide by the Conventions."[302] If certain special consequences of the breach of humanitarian law are provided for by current international law, this is not because of Article 1, but rather because it is provided for by another source.

Zych concludes that under CA 1, States are required to ensure respect for IHL only on the part of their own organs and such other persons as may be acting under their effective control. "With respect to persons acting on their instructions but outside their effective control, it could be argued that States are required to

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[301] *Ibid,* p 725 citing Robert P. Barnidge, "The Due Diligence Principle under International Law", 8 *International Community Law Review* (2006) 81–121, p. 118: "While general principles can, and should, be sketched in the abstract, here, as elsewhere, the assessment under the due diligence rule is necessarily specific to particular facts and circumstances."

[302] Focarelli, "Common Article 1", *supra nota* 15, p 170.

ensure that such persons are willing and able to execute their instructions in compliance with IHL. It is submitted that reading anything more into CA 1 is unsupported by IHL and is unlikely to garner the support of States in the near future."[303]

Sandoz reaches a similar conclusion: "It seems clear [on the basis of the findings of the inquiry] that the most that can be done is to take diplomatic measures or publicly denounce violations. It would be improper, and probably dangerous, to impose non-military sanctions (and still more obviously, to impose military sanctions or any form of intervention). Therefore, one must not interpret this as merely an obligation in terms of means without any attendant obligation as regards effects. In practice, States parties to the Conventions have not really implemented this provision, at any rate publicly, and do not really try to monitor the extent to which it is observed."[304]

Gasser argues that a third party State has at least an obligation to examine a situation involving a breach of humanitarian law by a belligerent, and to consider in good faith whether action should be taken. It is, however, obvious that a State always remains free to choose among differing courses of action if a decision to act has to be taken.[305]

Despite a number of avenues open for States to ensure respect for the Conventions, decided action of third States has indeed been scarce.[306] Although Article 1 throws the doors wide open to action in support of compliance with the law, States have rarely ventured beyond discreet representations behind the scenes.[307] That could be seen as proof of the indeterminacy on the rule and a fact that States probably do not feel obligated to act as a result of CA 1.

Some examples that do exist refer to serious violations of IHL and may therefore be interpreted as expressions not of a general obligation to ensure universal respect for IHL, but of the obligation to address serious violations of IHL, as codified in Article 89 of Protocol I for instance. It is also worth noting that a recent attempt to insert similar language into a resolution of the Human Rights Council was rejected.[308] When human rights treaties contain similar provisions to "ensure respect", they are never understood to imply that contracting States must (or may) take measures against other contracting States beyond what is expressly provided for by all other provisions of the treaty.[309]

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303 Zych, "The Scope of the Obligation", *supra nota* 15, p 270.

304 Yves Sandoz, "Implementing International Humanitarian Law" – *International Dimensions of Humanitarian Law* (Henry Dunant Institute, UNESCO, Martinus Nijhoff, Paris/Geneva/ Dordrecht/Boston/London, 1988) 259–282, p 266.

305 Gasser, "Ensuring Respect, *supra nota* 33, p 32.

306 Brollowski, "The responsibility to Protect", *supra nota* 167, p 102.

307 Pfanner, "Various mechanisms", *supra nota* 246, p 306.

308 Zych, "The Scope of the Obligation", supra *nota* 15, p 255, Human Rights Council, Protection of the human rights of civilians in armed conflict, UN Doc A/HRC/9/L.21, 19.12.2008.

309 Focarelli, "Common Article 1", *supra nota* 15, p 142.

The United States State Department Legal Adviser recently reiterated in a public speech that the Government does not share the expansive interpretation of CA 1, whereby States are required to take steps *vis-à-vis* not only their partners, but all States and non-state actors engaged in armed conflict.[310] There is thus at least one powerful persistent objector for this emerging interpretation.

In sum, either measures supposedly envisaged in CA 1 against other contracting States are already detailed in other *ad hoc* provisions of the Conventions, in which case Article 1 is legally redundant, or they are not specifically envisaged, but then it seems hardly possible to determine which of them fall within the scope of the undertaking to "ensure respect".[311]

Measures that all contracting States are supposed to take against transgressors include meetings under Article 7 and co-operation under Article 89 of Protocol I, with the obvious limitation on the use of force. This is all that could be said about the "respect and ensure respect" clause that is not subject to legal uncertainty.

When the supporters of the broad interpretation sufficiently establish that there is an obligation to ensure respect, and to do it through active measures, they usually do not provide a list of available means for such end or indicate that the measures themselves are self-evident and do not need further discussion. Those that do cite the means available under other Articles of the Conventions or list of couple that reappear in every text.

Article 1 is not equipped with an Annex or other supplementary document detailing the accurate steps to be taken by States to fulfil their obligation to "respect and ensure respect". While all 329 Articles of the four Conventions collectively work towards the achievement of this overall goal, each provision must be accorded its autonomous meaning.[312]

Kessler points out that under the assumption that "ensuring respect" of a rule means making someone respect it, there are four means of enforcement: (1) repressive action against any violation of the Conventions, (2) help by one State to enable another State to fulfil its duties under the Conventions, (3) control, and (4) prevention.[313] Enforcement activities will be discussed in detail in the next chapters of this thesis.

Other authors write that States may, for instance, convene meetings of the High Contracting Parties in application of Article 7 of Protocol I; resort to the Protecting Powers institution and its substitutes; enforce the system of repression of grave breaches (in particular those calling for the greatest measure of mutual

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[310] Oona Hathaway & Zachary Manfredi, „The State Department Adviser Signals a Middle Road on Common Article 1", <www.justsecurity.org/30560/state-department-adviser-signals-middle-road-common-article-1/> (1.11.2019).

[311] Focarelli, "Common Article 1", *supra nota* 15, p 154.

[312] The opposite case would be counterintuitive with the *effect utile* principle.

[313] Birgit Kessler, "The Duty to 'Ensure Respect' under Common Article 1 of the Geneva Conventions: Its Implications on International and Non-International Armed Conflicts", 44 *German Yearbook of International Law* (2001) 498–516, p 499.

assistance in criminal matters); or call upon the International Fact-Finding Commission established under Article 90 of Protocol I.[314] All of these measures have "their own" substantial article in the Conventions or Protocols.

Pfanner states that the said undertaking encompasses a wide range of means, in addition to those expressly provided for by IHL. These include diplomatic, confidential or public approaches, and public appeals. She admits that the scope of this obligation can only be assessed case by case, depending on factors such as the appropriateness of the various means available, and the nature of the relationship between third States and the warring parties.[315]

Dörmann lists 1) measures aimed at exerting diplomatic pressure: protests to the corresponding ambassador, public denunciations, pressure through intermediaries, and referral to the International Fact Finding Commission or ICC; 2) coercive measures taken by the State itself, such as retorsion, and 3) measures taken in cooperation with an international organization.[316]

Focarelli also categorizes diplomatic, coercive and co-operation measures, and points out that the variety of measures theoretically consistent with the term "ensure respect" is virtually unlimited. His list of measures include steps independent of a prior breach; loose measures against breaches such as a mere commitment, to 'consider seriously' the adoption of measures or to 'exert some kind of influence'; verbal protests; the denial of selling weapons; criminal jurisdiction over persons accused of breaching the Conventions; retorsions; countermeasures, and even to armed intervention (theoretically).[317]

Professors Boisson de Chazournes and Condorelli, who are proponents of the broad interpretation, outline (in an article on CA 1) that under Chapter VII a wide array of measures may be undertaken, ranging from so-called peaceful measures, such as economic sanctions, to military action. "The Security Council has resorted to all means at its disposal to promote respect for humanitarian principles, going as far as euphemistically authorizing States to "use all necessary means" (up to and including armed force) to help implement its decisions, for instance to guarantee the safe conduct of humanitarian aid operations and dispatch of such aid".[318] Again, this blurring of *jus in bello* and *jus ad bellum* is not welcomed. Armed intervention may only be decided within the context of the UN, and in full respect of the UN Charter. The rules on the resort to armed force govern the legality of any use of force, even if it is meant to end serious violations of IHL. The content of CA 1 is not part of *jus ad bellum,* and thus cannot serve as a legal basis for the use of force.[319]

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[314] Chazournes & Luigi Condorelli, "Common Article 1", *supra nota* 15.

[315] Pfanner, "Various mechanisms", *supra nota* 246, p 305.

[316] Dörmann, "Common Article 1", *supra nota* 206, pp 725–726.

[317] Focarelli, "Common Article 1", *supra nota* 15, pp 144–145.

[318] Boisson de Chazournes & Condorelli, "Common Article 1", *supra nota* 15.

[319] Dörmann, "Common Article 1", *supra nota* 206, p 726. Article 53 of UN Charter: "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council".

Some authors hold that a further step was taken in June 1999 when the SC gave its *ex post* facto political blessing to NATO air raids intended to put an end to violations of humanitarian law. The legality of such action has been, and still is, hotly debated, some seeing it as prohibited by international law although morally justified, while others consider that a legal basis already exists or is emerging, justifying the use of force as *an ultima ratio* when required to ensure respect for humanitarian principles in a situation of humanitarian concern.[320]

Vöneky states that the obligation to ensure respect for IHL in all circumstances entails using all possibilities of diplomatic action, resorting to the protecting powers institution and its substitutes, enforcing the system of prosecution and extradition of war criminals, calling upon the Fact-Finding Commission or using the naming and shaming of parties that breach the *jus in bello*. It is debatable whether it is convincing that CA1 and Article 1, para 1, AP I additionally obliges all parties of the GC and the AP I to take all possible steps at all times to ensure that these rules applicable in armed conflicts are respected by all other States. This interpretation would mean that CA 1 imposes a universal obligation for States and international organizations that does not derive from other provisions of the Conventions.[321]

Whereas CA 1 deals with obligations of States, it leaves States full discretion in deciding on what specific measures should be taken in accordance with international law. It is also important to note that CA 1 does not offer any claims. Under Article 42 DARS, too, only the "injured State" is entitled to claim reparation. Article 42 (b) (ii) DARS now provides that a State is only considered injured if the breach is "of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation".[322]

In conclusion, it seems that standing alone CA 1 is certainly not the catch all clause one would hope it to be. We need to look for implementation and enforcement measures in other Articles to discover the full potential of the Conventions and Protocols. Once again, this proves the need for deeper analysis of the "old" texts and see how we can adapt them to modern day circumstances.

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[320] Antonio Cassese, "Ex iniuria ius oritus". Are we moving towards international legitimation of forcible humanitarian counter-measures in the world community", 10 *European Journal of International L*aw (1999) 23–30; Vera Gowlland-Debbas, "The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenace", 11 *European Journal of International Law* (2000) 361–383, pp 363, 374.

[321] Vöneky, "Implementation and Enforcement", *supra nota* 19, p 651.

[322] Dieter Fleck, "Individual and state responsibility for violations of the *ius in bello*: an imperfect balance" – Heintschel von Heinegg & Volker Epping (eds), *International Humanitarian Law Facing New Challenges* (Springer, Berlin, Heidelberg, 2007) 171–206, p 200.

3. ENSURING RESPECT THROUGH PREVENTION

The goal of ensuring that the requirements of international law are observed when a conflict breaks out will be better served by prevention than cure, by measures designed to prevent violations from occurring than by the application of sanctions after violations have taken place.[323] In other words, retroactive measures against violations of IHL "cannot replace preventive action to ensure compliance, and will not be convincing without due consideration of what had been done in the past to implement relevant rules."[324] For example, the prosecution of individuals guilty of wartime atrocities cannot bring the dead back to life, or restore the material resources destroyed by parties to an armed conflict.[325]

Although the principles and basic rules of humanitarian law represent fundamental values that have received almost universal acceptance, peacetime efforts to implement them at the national level are nonetheless insufficient.[326] Few States have placed a high priority on compliance with this obligation until they have become involved in a conflict. By then, time and resources are generally inadequate. This is a view shared by most authors writing on IHL.

One of the most important requirements of prevention is the duty to provide proper instruction to members of the armed forces, and to disseminate the principles of the law amongst the population as a whole.[327] This has been outlined clearly in all Conventions and Protocols. It has become clear during the past centuries that this cannot be done through the classic one-way dissemination approach – but rather through understanding the complexity of factors influencing behaviour.[328]

This chapter is dedicated to the myriad of prevention activities that are available for States under the Conventions in particular, as well as deriving from other sources. I start by outlining the differences between implementation and enforcement measures, and prove that this understanding helps to create respect for the law. Some activities, such as dissemination and instruction, will be given a prominent role in the discussion. The goal of this chapter is to find an aswer to the question whether preventive measures taken in peacetime could be the most effective tools to ensure compliance with the law.

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323 Greenwood, "Ensuring Compliance", *supra nota* 3, p 202.

324 Fleck, "Individual and state responsibility", *supra nota* 322, p 206.

325 Chadwick, "It's war Jim", *supra nota* 25, p 246.

326 Ray Murphy, "United Nations military operations and international humanitarian law: what rules apply to peacekeepers?", 14 *Criminal Law Forum* (2003) 153–194, p 188.

327 *Ibid*, pp 199–200.

328 Vincent Bernard, "Time to take prevention seriously: editorial", 96 *The International Review of the Red Cross* (2014) 689–696, 696.

3.1. What is implementation of international humanitarian law?

In accordance with the *pacta sunt servanda* principle, every treaty in force is binding upon the parties to it, and must be performed by them in good faith. Every State is itself responsible for performing a treaty and ensuring any required domestic effects. In addition, there exists a general international obligation to ensure that internal law will not form obstacles to the proper observance and application of treaty provisions.[329] By not implementing their international obligations, States themselves contribute to impunity. Therefore, they should consider it to be within their national interest to observe and promote the principles of IHL.[330]

The major treaties in the field since 1949 contain an unprecedented range of provisions about dissemination, instruction to armed forces, humanitarian and monitoring tasks during armed conflicts, and repressing breaches. What, however, does this obligation to implement imply exactly, and how should it be interpreted in the modern environment? Roberts warns that the difficulty members of the international community face in attempting to ensure that rules are implemented, and to restore their effectiveness after they have been violated, should not be underestimated. There is no strong central authority capable of enforcing the full range of rules that States and non-state bodies are obliged to follow.[331]

Implementation is the major challenge facing IHL today. The problem of translating States' legal obligations into action is common to all areas of international law. Berman regrets that there is a particularly acute contrast between humanitarian laws' highly developed rules, many of which enjoy nearly universal acceptance, and the repeated violations of those rules in conflicts around the world.[332] Kalshoven also states that: "it is an irony and commentary on the present state of international law that the Geneva Conventions of 1949 have been ratified by more States than any other treaty in the world including the UN Charter. Yet the failure of States to implement the provisions of the Geneva Conventions has served to render these provisions irrelevant to most victims of international and internal armed conflicts."[333]

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[329] Drzewicki, „National Legislation", *supra nota* 14, p 109.

[330] Daniel Thürer, *International Humanitarian Law, Theory, Practice, Context* (Brill, Nijhoff, 2011), p 425.

[331] Roberts, "The Laws of War", *supra nota* 94, pp 12, 28.

[332] Paul Berman, "The ICRC's advisory service on international humanitarian law: the challenge of national implementation", *International review of the Red Cross* (1996), <www.icrc.org/eng/resources/documents/article/other/57jn57.htm> (1.11.2019).

[333] Christina M. Cerna, „Human rights in armed conflict: implementation of international humanitarian law norms by regional intergovernmental human rights bodies"– *Implementation of International Humanitarian Law. Research Papers by participants in the 1986 Session of the Centre for Studies and Research in International Law and International Relations of the Hague Academy of International Law* (1989) 31–67, p 31.

Thürer has put it similarly: "given their relative lack of effectiveness, we must face the fact that the implementation of all theoretically imposed obligations is still far from assured."[334] Implementation of IHL depends largely on the political willingness of States, despite the fact that the Conventions contain a monitoring mechanism for States parties that are not directly involved.[335]

Other authors are equally pessimistic. Kadam notes: "the situation is not entirely satisfactory. Whatever mechanisms are at the disposal for ensuring adequate implementation of international humanitarian law – unilateral, bilateral or international – there are many weaknesses and shortcomings in almost all of them."[336] Sivakumaran concludes that both implementation and enforcement mechanisms of IHL have proven insufficient for carrying out their task.[337]

The international community has tried to counter the increased destruction and cruelty of warfare in the twentieth century by creating more extensive and detailed treaty law. However, the fact that this law is for the most part unknown, or where it is known not sincerely believed in, has led to serious difficulty in application.[338] The aim, then, has to be effective application, not more lawmaking; only the former is valuable for the victim.

3.1.1. Definition

The ICRC itself gives a rather short definition of what implementation of IHL means – turning the rules into action – and reaffirms that it is first and foremost the responsibility of States that are party to the Conventions and their Protocols. It positions that this responsibility is set forth, notably, in Article 1 common to the four Conventions, which requires States to respect and ensure respect for the Conventions in all circumstances.[339] I would not risk constructing all obligations on a single Article as explained elsewhere in this work, but one can imagine this as a starting point.

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[334] Thürer, *International Humanitarian Law, supra nota* 330, p 394.

[335] See e.g. *Nicaragua, supra nota* 182. This mechanism consists of a system of Protecting Powers and the ICRC's mandate for the purpose of guaranteeing compliance. Nevertheless, he states that in the matter of compliance the situation has improved and gives the War crimes tribunals, *ad hoc* tribunals, the ICC and ICJ as examples.

[336] Kadam, "Implementation of international humanitarian law", *supra nota* 4, p 391.

[337] Sandesh Sivakumaran, *The law of non-international armed conflict* (Oxford University Press, 2012), p 473.

[338] Louise Doswald-Beck, "Implementation of International Humanitarian Law in Future Wars", 71 *Naval War College International Law Studies* (1999) 39–76, p 45.

[339] ICRC, International Humanitarian Law: answers to your questions, <www.icrc.org/eng/assets/files/other/icrc-002-0703.pdf> (1.11.2019).

Roberts states that the term "implementation" is used to refer to the many ways in which States, including belligerents in an armed conflict, generally apply, and sometimes fail to apply, the international rules applicable in armed conflict.[340]

Goldstein writes that "implementation" generally means observance of a body of law or its enforcement in case of violations.[341] It can be realized by drafting and disseminating rules of conduct, by diplomatic interventions aimed at affecting the governmental and belligerents' actions, or by State and non-state reactions to violations of humanitarian norms and rules.[342] It can be noted that instead of defining what implementation is, many authors outline how it can be carried out and how the different measures are to be categorized. This is analysed thoroughly in sub-chapter 3.2.

Most importantly, Bothe notes "implementation means interpretation. The text of the Protocols will have to be transformed into elements, which will be used as guidelines for concrete decisions. This transformation thus unfolds, clarifies, develops the original text. Where this original text is unclear, open to differing interpretations, it is quite possible to 'solve' these uncertainties in the process of this transformation and give the Protocols the meaning one wants them to have."[343]

This quote perfectly illustrates why discussion on implementation is necessary. It might seem evident that the Conventions and Protocols list different measures for implementation, and what is left for a State is simply to follow these rules. The purpose of this study, however, is to prove that IHL has failed on many levels precisely because the necessity and modalities of implementation are far from obvious and unambiguous.

Why talk about implementation and enforcement separately, are they not synonyms under international law? According to my reading, Mendez, Pfanner, Lavoyer, Sassoli, Roberts and Vöneky write about implementation and enforcement as the same phenomenon. In contrast, McCoubrey, Rogers, McCormack, Sivakumaran, Greenwood and Draper make a clear distinction between the two, and have separate lists of action. A good example of how diversified this topic is in the literature is provided in the following passages.

Draper lists measures of implementation as protecting powers, dissemination and instruction, legal advisors and use of qualified persons; and enforcement measures as taking of hostages, reprisals, trial of war criminals, compensation, and the international fact-finding commission. Greenwood writes that methods for securing compliance are divided into implementation and dissemination on

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340 Roberts, "The Laws of War", *supra nota* 94, p 14.

341 Bohunka O. Goldstein, „Implementation of International Humanitarian Law by Diplomacy, Official and Non-governmental" – John Carey, William V. Dunlap & R. John Pritchard (eds), *International Humanitarian Law*: *vol 1* (Ardsley: Transnational Publishers, 2003) 161–179, p 163.

342 *Ibid*, p 164.

343 Bothe, „The role of national law", *supra nota* 76, p 310.

the one hand, and enforcement, i.e. diplomatic recourse, reprisals, prosecution of war crimes, hostage taking, and claims for compensation, on the other.[344]

Roberts draws an equal sign between implementation and enforcement, and lists criminal trials, HRL, and the right to individual redress, compensation, national commissions of inquiry, other acts of individual countries, regional organizations and alliances, and reprisals by an adversary. Quénivet speaks about international criminal law as a means of enforcement of IHL, but also lists traditional means to enforce IHL such as reprisals, State responsibility, protecting powers and individual liability; he keeps national implementation separate. Pfanner has all possible measures under the heading of various mechanisms and approaches for implementing IHL and protecting and assisting war victims.[345]

Bothe speaks about application of the law, which consists of implementing the body of law, making it work in practice, and ensuring its respect. Sassoli puts all three levels of measures under the heading of implementation mechanisms, and lists preventive measures taken in peacetime, those ensuring respect during armed conflicts, and those repressing violations. Fleck has 13 enforcement measures, of which implementation is just one. The ICRC handbook on Customary International Humanitarian Law only lists belligerent reprisals as a means of enforcement.[346]

I believe that implementation and enforcement are two separate phenomena, and should be given their individual meanings. Implementation mostly means prevention and enforcement mostly means repression. Implementation measures are the first steps to be taken by a State or a non-State actor after ratifying a Convention or accepting to be bound by it. The next sub-chapters will clarify what implementation is and what measures are expected to be taken as well as assess which of these are considered most effective.

3.1.2. The significance of domestic legislation

In 1984 Bothe stated that the process of national implementation of IHL has so far not been given much attention by lawyers, political scientists or sociologists. "We thus know relatively little about it and more research is certainly needed on this question".[347] Since then, a number of authors have dealt with the issue, however focused mainly on criminal law, involving armed groups and recently, but more narrowly, the interpretation of CA 1. The real "watchdog" of national

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[344] GIAD Draper, „The implementation of the Geneva Conventions of 1949 and the additional protocols of 1978" – *The implementation and enforcement of the Geneva conventions of 1949 and of the two additional protocols of 1978*, *Collected Courses of the Hague Academy of International Law* (Brill/Nijhoff, Leiden/Boston, 1979) 9–31, pp 9–10.

[345] Pfanner, "Various mechanisms", *supra nota* 246.

[346] Henckaerts & Doswald-Beck, *Customary International Humanitarian Law, supra nota* 182.

[347] Bothe, „The role of national law", *supra nota* 76, p 307.

implementation measures has been the ICRC, who manages an extensive database on legislative and administrative measures. The promotion of national implementation measures has been a long-standing concern of the ICRC, and has frequently been included on the agendas of International Conferences of the Red Cross and Red Crescent.[348] For example, five regional seminars were organized in 2003 to examine how to improve compliance with IHL by reviewing those means, the possibilities for making them more effective and the advisability of seeking new means.[349]

"From the vantage point of an international lawyer, the obligation to implement rules and principles of IHL rests squarely on the State, in its quality as a subject of international law."[350] While a number of international mechanisms have been developed to promote compliance with humanitarian law, States themselves have the primary responsibility for implementation. Vöneky states that the relative weakness of international measures to secure the performance of obligations under humanitarian law calls for national implementing efforts, among which legislative measures, education programmes, and military manuals are of particular importance.[351]

Domestic legislation thus constitutes a crucial part of the whole set of rules provided for ensuring the proper implementation of humanitarian law. Therefore, the final goal is to achieve the entire conformity of national legislation in all countries with IHL; a conformity that, for purposes of anticipation, should be reached in peacetime.[352]

In some of their provisions the instruments of IHL specify an explicit duty to adopt appropriate legislation, and in others this obligation is merely implied. Even in the latter case, the freedom of choice of measures to be taken does not release States Parties from achieving accurate adherence to its rules as a specified result.[353]

In particular, these measures are needed to ensure that all individuals, both civilian and military, are familiar with the rules of IHL; that the structures, administrative arrangements and personnel required for the application of humanitarian law are in place; and that violations of humanitarian law are prevented or, when necessary, punished.[354] It is usually through their governmental decisions,

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[348] Following the adoption at a resolution on „National measures to implement international humanitarian law" of the 25th International Conference (1986), the ICRC wrote to States in 1988 and again in 1991 concerning the adoption of such measures. The responses were unfortunately very few.

[349] Sandoz, "International humanitarian law", *supra nota* 85, p 25.

[350] Frits Kalshoven, „Instructions to Armed Forces" – Frits Kalshoven (ed), *Reflections on the Law of War: collected essays.* 17 *International humanitarian law series* (Martinus Nijhoff Publishers, 2007) 621–629, p 621.

[351] Vöneky, "Implementation and Enforcement", *supra nota* 19, p 698.

[352] Drzewicki, „National Legislation", *supra nota* 14, p 109.

[353] Drzewicki, "Reporting mechanism", *supra nota* 74, p 550.

[354] *Ibid*, p 246.

laws, courts, commissions of inquiry, military manuals, rules of engagement, the recruitment and/or training of personnel, the production of identity cards and other documents, the setting up of special structures, and training and educational systems, that the provisions of international law have a bearing on the conduct of armed forces and individuals. Interestingly, the overwhelming majority of legal cases in connection with the laws of war have been heard in national, not international courts.[355]

Conforti speaks about the importance of domestic legal operators. "Only through what we could term 'domestic legal operators' can we describe the binding character of international law or, better still, its ability to be implemented in a concrete and stable fashion." He believes that compliance with international law relies not so much on enforcement mechanisms available at the international level, but rather on the determination of 'domestic legal operators' such as public servants and judges to use the mechanism provided by municipal law.[356] Therefore, when national legislation is amended to reflect the requirements of IHL, it also serves a purpose of translating the text of the relevant international treaties into something understandable for the members of the administrative apparatus.[357]

Some of the measures indicated require legislation, while others may, depending on the legal system concerned, be implemented through regulations or administrative provisions. A number of obligations require legislative or administrative action that can realistically be undertaken only in peacetime.[358] From a purely legal point of view, all these national measures outlined in the Conventions are essential to ensure respect for humanitarian law; there should be no order of importance, as they are interdependent.[359] In reality, States are more inclined to implement some rules than others. For example, protection of the emblem is widely regulated in internal laws, whereas regulating the creation of protected zones is rather an exceptional national measure taken.

In addition, as some authors have pointed out, compliance with the entire spirit of the Conventions and the Protocols requires taking account in planning law of the duty not to site military objectives in the middle of concentrations of the civilian population. It is difficult to determine how many States make any real effort to comply with these obligations.[360]

If States were generally diligent in complying with their obligations on the national level, the need for measures on the international level would be greatly reduced. Practice shows, however, that much remains to be desired in this

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355 Roberts, "The Laws of War", *supra nota* 94, p 19.

356 Conforti, *International Law and the Role of Domestic Legal Systems*, *supra nota* 73, pp 8–9.

357 Bothe, „The role of national law", *supra nota* 76, p 305.

358 Berman, "The ICRC's advisory service", *supra nota* 332.

359 Dutli, "National Implementation measures", *supra nota* 2, p 248.

360 Greenwood,"Ensuring Compliance", *supra nota* 3, p 200.

respect.[361] For example, Doswald-Beck regretted in 1998 that "more than fifty years after the Geneva Conventions entered into force most countries have still not carried out their obligation to provide for compulsory universal jurisdiction over grave breaches."[362] Fleck also notes that "a comparison of what is required and what has been done reveals that although valuable work has been accomplished in numerous countries, many agreed measures of implementation remain to be taken. This is a serious problem and undoubtedly one of the main reasons why humanitarian law is disregarded in armed conflicts."[363] This is my point exactly – it is the core national implementation measures, such as teaching IHL, protecting the emblem, and criminalizing grave breaches, that helps ensure respect for the law in conflict situations.

As said, there is no order of importance between the national implementation measures, they are interdependent, and should all be given due consideration. However, many authors emphasize some aspects that are more important than others. I would call them the *sine qua non* rules, a foundation on which to build the rest. Two types of national measures are particularly important, namely the adoption of national laws to ensure that the treaties are applied, and measures relating to dissemination and training.[364] A key requisite for effective implementation of IHL is making sure that domestic legal systems contain norms and procedures for punishing those who commit grave breaches of the law: to prosecute alleged perpetrators, or to bring them before their courts, or to extradite them (*aut dedere aut judicare*).[365]

States are under a duty to punish certain acts, but these provisions are not in in themselves capable of being the basis of a criminal judgment, and they need to be supplemented by some kind of criminal statute.[366] Criminal legislation is the most important example of implementing non-self-executing provisions of the Conventions and Protocols. States must scrutinize their criminal law in order to ascertain that it allows criminal prosecution and punishment for any grave breach States are supposed to sanction. This applies to substantive law, as well as to

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[361] Kalshoven, „Implementation and enforcement", *supra nota* 87, p 610. Doswald-Beck, "Implementation", *supra nota* 338, pp 62–63

[362] Doswald-Beck, "Implementation", *supra nota* 338, p 46.

[363] Fleck, "Implementing International Humanitarian Law", *supra nota* 5, p 355.

[364] Pfanner, "Various mechanisms", *supra nota* 246, p 282; Articles 48, 49, 128, 145 and 84 of AP I require that the High Contracting Parties „communicate to one another, as soon as possible, through the depositary and, as appropriate, through the Protecting Powers", their official translations of the treaty in question and „the laws and regulations which they may adopt to ensure application". The "laws and regulations" to be adopted and communicated are all the legislative acts to be performed by the various authorities invested with the powers to issue primary and secondary legislation that have a connection with the application of these instruments.

[365] Thürer, *International Humanitarian Law, supra nota* 330, p 426.

[366] Bothe, „The role of national law", *supra nota* 76, p 303.

procedural law. Where there is no applicable provision of national law, new legislation must be enacted.[367]

Another duty that must be anchored in domestic law is protecting the emblems of humanitarian organizations, such as the Red Cross – and for that matter the organizations and their workers themselves. Still, many States and non-state actors are not aware of the protection that must be granted to humanitarian workers, and the fact that the Red Cross symbol is exclusively reserved for humanitarian aid providers.[368]

As has frequently been the case, the absence of proper legislation may essentially reduce the efficiency of humanitarian law, and even make its rules a dead letter, particularly when preventive and repressive action against violations is inoperative. Such a risk was manifestly demonstrated in the Case of Public Prosecutor v Managing Director of N.V. Zwitsersche Waschinrichting concerning the abuse of the Red Cross emblem and Swiss national flag in the absence of executor municipal provisions.[369]

In this case a Dutch company, Swiss Laundry, decorated its cars and advertising material with a white cross on a red field that looked "almost equal" to the Red Cross emblem – and identical to the Swiss arms. The Cantonal Court of the Hague held that, apart from the fact that alleged resemblance to the Red Cross emblem could not be admitted, the use of the Swiss national emblem could only be punished in virtue of a Dutch law enacted in fulfilment of Article 28 of the Geneva Convention. Article 28 produced no direct effect in the national sphere and no such law had been passed.[370]

Another highly important means of inducing lasting compliance with humanitarian law may be to spread knowledge of the law, to encourage commitment to it in all sections of society, and to train the armed forces and the police.[371]

The implementing measures required in peacetime to back up the obligation to spread knowledge of the Conventions and the Protocols thereto "as widely as possible" are the training of qualified staff, the deployment of legal advisers in armed forces, emphasis on the duty of commanders, and special instruction for the military and authorities who may be called upon to assume relevant responsibilities.[372]

The Protocols clarified some measures in connection to this. Namely, the greater degree of responsibility assigned to commanders. Under Article 87, commanders are required "to prevent and, where necessary, to suppress and report to competent authorities breaches of the Conventions and of this Protocol". This is

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[367] *Ibid*, p 305.

[368] Thürer, *International Humanitarian Law, supra nota* 330, p 426.

[369] Drzewicki, „National Legislation", *supra nota* 14, p 111.

[370] Public Prosecutor v Managing Director of N.V. Zwitsersche Waschinrichting, Holland, Cantonal Court of the Hague, June 30, 1934.

[371] Thürer, *International Humanitarian Law, supra nota* 330, p 426.

[372] Pfanner, "Various mechanisms", *supra nota* 246, p 283.

a just and heavy responsibility, but one which is not sufficiently well known, and is therefore neither duly observed not complied with.[373]

It should be emphasized that an obligation for legislative implementation is already violated by a simple failure to enact appropriate internal rules, but also when such avoidant conduct leads to a failure to observe the substantive provisions of a treaty.[374] In addition, all of the clauses in the Conventions and Protocols, that use the term "a State must endeavor" are not self-executing and need a special legislation.[375] Drzewicki even holds that the duty to adopt or supplement the relevant legislation is widely assumed to be more than an international obligation of conduct, it is also an international obligation of result, i.e. an obligation requiring the achievement of a specified result as an outcome of a required conduct.[376]

Translating the text of the Conventions and Protocols into domestic legislation is not just a matter of taste. It provides legal certainty, it helps the domestic legal operators easily apply the rules, and it gives a signal to other States that one is committed to ensuring respect for the law. States should, therefore, be proactive in analysing what needs to be done and keep their internal regulations up to date with the development of international law.

3.1.3. Why differentiate between implementation and enforcement?

For the sake of proving some central arguments in this thesis, it is important to differentiate between implementation and enforcement of IHL. I believe that although this difference might seem fragile or superfluous at first glance, it is nevertheless crucial. Lengthy reading of literature on IHL proves that not many authors concern themselves with this separation and start substantial discussions without outlining what exactly they mean by either implementation or enforcement. In fact, many other words are used to denote the wide array of measures falling under both of these categories, as illustrated above. The Conventions themselves are silent on the matter.

I will now try to explain why differentiating between these two categories is necessary. Merriam Webster's Dictionary defines the verb "implement" as "to begin to do or use (something, such as a plan): to make (something) active or

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[373] Rene Kosirnik, „The 1977 protocols: a landmark in the development of international humanitarian law" – Naorem Sanajaoba (ed), *Manual of International Humanitarian Laws* (Regency: New Delhi, 2004) 68–88, p 73.

[374] *Young, James and Webster* v *United Kingdom,* Apps Nos 7601/76, 7806/77, EHRR, Judgment, 13.08.1981; Drzewicki, „National Legislation", *supra nota* 14, p 110.

[375] Bothe, „The role of national law", *supra nota* 76, p 305. Problematically there is a group of non-participating countries which are currently or were recently involved in an active or latent armed conflict; Kosirnik, "The 1977 protocols", *supra nota* 373, p 77.

[376] Drzewicki, "Reporting mechanism", *supra nota* 74, p 550; 2 *Yearbook of the International Law Commission* 2 (New York, 1979) para 88, at 77, 80.

effective" and more precisely as "carry out, accomplish; especially: to give practical effect to and ensure of actual fulfilment by concrete measures". Whereas the verb "enforce" means: "to make (a law, rule, etc.) active or effective: to make sure that people do what is required by (a law, rule, etc.)" or "to urge with energy, constrain, compel".[377]

The verb "implement" thus feels as something preceding to other activities; giving an impulse to carrying out plans; taking measures to achieve something. The verb "enforce", while also making something effective, seems to entail some element of urge or compulsion. In laymen's terms, implementation could mean putting something in the plans (laws), while enforcement could be making sure the plans (laws) are followed.

In all fairness, the Dictionary lists words synonymous with implement as: *administer, apply, execute, enforce*. Still, even in ordinary language these two words have a different connotation, as explained above. In legal language these words become specific terms, and should thus be even more carefully analysed.

One of the few authors writing about the difference we are concerned about is McCoubrey, who in 1998 wrote that "while the implementation and enforcement of law are often seen as essentially coterminous processes, and the two do to a degree overlap, in the sense that both are ultimately concerned with the maintenance of legal norms, a major distinction must be drawn between the two processes". Namely, enforcement is a *retrospective* response to the violation of norms, a secondary office of law, which presupposes failure in the primary endeavour to establish and maintain whatever normative standards may be in question. The processes of implementation, on the other hand, means measures to ensure the observance of law *in prospect*, rather than penalisation of violations.[378]

Zyberi holds that the notion of enforcement should be distinguished from that of implementation, which is much broader, in that enforcement involves at least some degree of sanctioning for violations of IHL, which could encompass individual criminal responsibility or State responsibility and liability for reparations.[379]

Goldstein writes that "implementation" generally means observance of a body of law or its enforcement in case of violations. Verma believes that if the expression "implementation" is interpreted to mean observance and enforcement, then in case of default of observance of that body of law, such an interpretation will undoubtedly cause maximum strain. Strictly speaking, the term "implementation" includes preventive, mitigatory and compensatory measures.[380]

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[377] The Merriam Webster Online Dictionary, <www.merriam-webster.com/> (1.11.2019).

[378] McCoubrey, *International Humanitarian Law, supra nota* 78, pp 57–58.

[379] Zyberi, "Enforcement", *supra nota* 98.

[380] Dharma Pratap Verma, „Role of distinct bodies in promoting respect for international humanitarian law with particular attention to the Independent Commission on International Humanitarian Issues" – Fritz Kalshoven & Yves Sandoz (eds), *Implementation of International Humanitarian Law. Research Papers by participants in the 1986 Session of the Centre for Studies and Research in International Law and International Relations of the Hague Academy of International Law* (1989) 409–439, pp 410–411.

In a somewhat different view, Morrison defines "enforcement actions" or "enforcement measures" as any action, which would itself be a violation of international law, if taken without either some special "justification" or without the contemporaneous consent or acquiescence of the target State.[381]

Draper writes that by implementation he means those devices, institutions and rules designed to monitor and ensure IHLs observance. By enforcement, in contrast the collection of mechanisms and rules available to the law of war to secure the restoration of observance when that law has been violated.[382] Enforcement action is used when compliance with the obligation has been supplanted by violation of it, whether by acts of commission or of omission.[383]

Drzewicki is under the impression that there is a gradual shift from humanitarian law's traditional focus on enforcement towards implementation, and sees it as a commendable tendency; so do I. He describes this as a process of departing from measures of coercive nature taken in reciprocal interaction to restore observance of humanitarian law. In lieu of enforcement, measures for positive implementation are being developed as a set of means and mechanisms aimed at proper *bona fidae* application of humanitarian law.[384]

Therefore, a retrospective and a sanctioning element are inherent to the term enforcement, which is of high value to our discussion. In focusing solely on enforcement activities, we are omitting a crucial element in the respect for law – prevention. Almost every article written on IHL begins or ends by emphasizing the importance of prevention and preparation in peacetime, because taking action in retrospect might be a deterrent, but does not bring back those who have perished in war. Other authors have outlined that there is some element of denial or dissent in enforcement. Judge Ranganath Misra points out that on account of the fact that there is a total lack of enforcement machinery in IHL, consent cannot be the enforcement machinery. The law takes the idea of making it obligatory and enforceable. Enforceability and consent do not go together.[385] Indeed, if a State or non-state actor would voluntarily take all necessary implementation measures,

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[381] Fred L. Morrison, „The role of regional organizations in the enforcement of international law" – Jost Delbrück (ed), *Allocation of law enforcement authority in the international system: proceedings of an international symposium of the Kiel institute of international law*. March 23–25 (Berlin: Duncker & Humblot, 1994) 39–56, p 44.

[382] Draper, „The implementation of the Geneva Conventions", *supra nota* 344, p 9.

[383] *Ibid*, p 20.

[384] Krzysztof Drzewicki, „The possible shape of a reporting system for international humanitarian law: topis to be addressed" – Michael Bothe (ed), *Towards a better implementation of International Humanitarian Law, Proceedings of an Expert Meeting Organised by the Advisory Committee on International Humanitarian Law of the German Red Cross, Frankfurt/ Main*, 28–30 May 1999 (Berlin: Berlin Verlag Arno Spitz, 2001) 73–81, p 75, citing Draper 1979 and Aldrich 1991.

[385] Nilendra Kumar, "Military Law Mechanism for International Humanitarian Law" – V.S. Mani (ed), *Handbook of international humanitarian law in South Asia* (New Delhi; Toronto: Oxford University Press, 2007) 223–232, p 227 citing Ranganath Misra, former chief justice of India, Key note address at the seminar on IHL, New Dehli, 28.08.2006.

there would be nothing to enforce. If they do not take these measures, then enforcement comes into play.

3.2. What and how needs to be implemented?

The answer to this question seems easy and "treaty based" at first glance, but is actually far from it. Sure, the Conventions offer an indicative list of actions, but almost every author and judge offers a different categorization, some additional measures from other treaties or even different fields of law. Not to mention that they use different terms to describe the phenomenon. The object of discussion of this thesis has been termed: "implementation", "enforcement" (meaning both the same or a different thing), "means of putting IHL into effect", "mechanisms to ensure compliance", "ensuring respect", "ensuring proper application", "taking measures of execution", etc. It can be argued that using a different term is just a matter of taste, but the content of the articles and approaches the authors have vary greatly as well. It is not just a question of naming the issue differently; it is a question of diverse understanding even among legal scholars, not to mention military leaders and men on the battlefield. Various authors find a different number of implementation measures even in the plain text of the Conventions, categorize them differently, divide some to implementation and others to enforcement measures and so on. Note that "national" implementation measures are a separate, narrower category within the broad concept of implementation of IHL.

How can implementation be carried out in practice? There is no simple answer to this question. The ICRC has provided some concrete guidance in various information kits, fact sheets, model laws, and manuals on national implementation. It also has a graphic overview of every single Article in the Conventions that needs domestic implementation, as well as Guidelines for Assessing the Compatibility between National Law and Obligations under Treaties of International Humanitarian Law.[386] The table is provided in the annex to this thesis.

Fleck rightly notes that the great complexity and technical nature of various IHL measures may hinder proper implementation.[387] This calls for careful analysis and further research, rather than new lawmaking.

Thürer explains that a lawyer trained in domestic law thinks of legal process as a "three-step" model: legislation, application (by administrative authorities and courts), and enforcement (by the police and by using military means). But the procedures and mechanisms best suited to implement law in the international sphere are generally quite different from those in the domestic sphere.[388]

Although the way States and other international actors, in general, habitually observe the law is similar to the way citizens within a State conduct themselves –

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[386] ICRC, National implementation of IHL: documentation. <www.icrc.org/en/war-and-law/ihl-domestic-law/documentation> (1.11.2019).

[387] Fleck, "Implementing International Humanitarian Law", *supra nota* 5, p 359.

[388] Thürer, *International Humanitarian Law, supra nota* 330, p 422.

there are large differences in the methods, style and culture of legal processes. In addition, the terminology is different: talk of "legislation", "application" and "enforcement" may sound odd in connection with international law; after all, there is no World parliament or administrative machinery, no comprehensive and compulsory judiciary system, and no police force to enforce international law.[389]

Professor Keyes, an expert on legislative drafting, writes that the following questions should be considered when determining how to implement international obligations:

- What result does the agreement require to be implemented?
- Does it say how the result is to be achieved?
- Does implementation require legal action?
- What existing powers are there to take this action?
- Are any new laws needed and, if so, what kind (statutes or delegated legislation)?
- Are any administrative powers needed?[390]

It is highly doubtful that all governments have taken time to analyse the Conventions and Protocols in such depth. Reasons for this are known – the Conventions are old and might not reflect the reality of modern conflict, there are other priorities during peacetime, etc. However, as the majority of authors cited in this work suggest, if national implementation would be perfectly or even satisfactorily executed, the need for international measures (or enforcement as such) would diminish.

All three branches of the governments are involved in this difficult task. "Convincing efforts to implement international humanitarian law and ensure compliance with its rules must combine activities at various levels of decision-making. The highest degree of influence and responsibility in this respect lies with the executive branch. In comparison, the influence of courts and tribunals is rather limited, even if the role of criminal jurisdiction with respect to war crimes committed in international and non-international armed conflicts is progressively growing", Fleck writes. It should be borne in mind that the requirements of fair trial and the duration of criminal procedure will generally exclude the possibility of using prosecution as a tool for enforcing compliance with IHL in ongoing conflicts.[391]

The executive branch is called to cooperate in this respect, not only with legislative and judicative branches, but also with civil society. Fleck also emphasises that those responsible for implementation should not limit their activities to technical aspects of treaty application, but should take a generalist

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[389] *Ibid*, p 422–423.

[390] Keyes & Sullivan, „A Legislative Perspective", *supra nota* 71, p 329.

[391] Fleck, "Individual and state responsibility", *supra nota* 322, p 177.

approach and develop convincing policies that have to go far beyond specific provisions of humanitarian protection.[392]

As may be evident, implementation of a State's obligations under IHL is "a matter of immediate concern when that State is actually involved in an armed conflict. This applies to its primary obligations (to keep prisoners alive, not mount attacks against the civilian population or civilian objects, etc)" as much as to those of a secondary nature where the national measures of application fall. "Yet, for these national measures to have their full effect in time of armed conflict, they must have already been prepared in time of peace."[393]

"It is painfully obvious", the ever pessimistic (or rather realistic) professor Kalshoven notes, "that quite a few developed States which have no such excuse [of developing States], are equally inclined to regard the taking of measures for the implementation of the law of armed conflict as a job that can be postponed till such time as the need becomes really acute. In either case, it is necessary constantly to remind States of their obligations in this regard."[394] This thesis can be considered as one example of such reminder.

3.2.1. Treaty based national implementation measures

The Conventions and Protocols provide for a number of national implementation measures, the following of which are listed as imperative (there are more than 80 altogether):

- To prepare translations of the Conventions and Protocols in national languages (CA 48/49/128/145 and 84 of AP I)
- To spread knowledge of the texts of the Conventions and Protocols as widely as possible, both among the armed forces and more generally (CA 47/48/127/144, and 87 AP I, 19 AP II)
- To repress all violations of the Conventions and Protocols, and in particular to adopt national legislation providing for the punishment of war crimes (CA 49-50/50-51/129-132/146-149, 85-91 of AP I)
- To ensure that persons and places protected by the Conventions and Protocols are properly identified, located and protected. (GC I, 40,41; GC II, 42 and annex; GC III, 17, 70-71 and 120 and Annex IV; GC IV, 20, 106-107, Annex III; 53, 56, 58, 79 of AP I)
- To adopt rules to prevent the misuse of the red cross or red crescent emblem and other signs and emblems provided for in the Conventions and Protocols (GC I 44 and 53-54; GC II 43-45)

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[392] *Ibid*, p 177.

[393] Kalshoven, „Implementation and enforcement", *supra nota* 87, p 599.

[394] Kalshoven, „Instructions to Armed Forces", *supra nota* 350, p 621.

- To ensure that fundamental and procedural guarantees are observed in times of armed conflict (GC III 5, 15-17, 41, 82-90, 95-108; GC IV 31-33, 35, 37, 43, 64-78, 99-101, 117-126; 11, 44-45, 75-77 of AP I; 4-6 of AP II)
- To provide for the appointment and training of persons qualified in IHL, including legal advisers within the armed forces (6 and 82 of AP I)
- To provide for the establishment and/or regulation of National Red Cross and Red Crescent Societies and other voluntary aid societies, civil defence organizations and national information bureaux (GC I, 26, 44; GC III, 122-124, GC IV, 63, 136-141; 81, 61-67 of AP I; 18 of AP II)
- To take IHL into account in selecting the location of military sites, and in the development and adoption of weapons and military tactics (36, 56, 58 of AP I)
- To provide, as necessary, for the establishment of hospital zones, neutral zones, security zones and demilitarized zones (GC I 23 and annex; IV 14 and 15; 60 and annex I of AP I).[395]

The outlined Articles are really the basic guarantees of IHL, which can be incorporated in domestic laws without much difficulty. The last two are generally more burdensome to carry out, but at the same token will yield the best protection for those not taking part in hostilities. When States are encouraged to take stock and provide an overview of their duties under IHL, it is usually these ten measures that should be reported on. There are many more in other IHL related treaties, such as the Hague Convention for the Protection of Cultural Property, the statute of the ICC, and so on, but this thesis in mostly concerned with the obligations in the Conventions and Protocols.

Neither Common Article 3 nor Protocol II expressly provide implementation mechanisms. Pfanner claims that all attempts to create such mechanisms, let alone a real system of legal supervision, were thwarted by the "internal affairs" reflex. Besides the humanitarian right of initiative enshrined in Article 3, only an obligation to disseminate the Protocol remains in its Article 19.[396]

With regard to the existing mechanisms, there are only a few which can be used during a non-international armed conflict. The mechanisms contained in the Conventions and in the Protocols, including the enquiry procedure, the International Fact-Finding Commission, the system of the Protecting Powers, meetings of the High Contracting Parties, cooperation with the UN, and even – with the exception of Article 18 of Protocol II – the role of the ICRC, were mainly or exclusively designed for international armed conflicts. "One may reason by analogy, but that does not solve the legal uncertainty and the problem of a lacking international legal basis for action."[397] In practice, however, the ICRC has been

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[395] Dutli, "National Implementation measures", *supra nota* 2, p 246.

[396] Pfanner, "Various mechanisms", *supra nota* 246, p 299.

[397] Jan Wouters, "Improving compliance with IHL during non-international armed conflicts: a global perspective" – *Improving compliance with International Humanitarian Law, Proceedings of the Bruges Colloquium*, 11th–12th September 2003 (Bruges, 2004), 113–120, p 113.

able to do a lot in non-international conflicts; in fact, mostly in non-international conflicts.

Many argue that, under the terms of Article 1 ("in all circumstances", i.e. whenever IHL is applicable) and pursuant to Article 3 common to the Conventions, the obligation to ensure respect applies to both international and non-international conflicts.[398] This is also the stance the ICJ took in the Nicaragua case. However, we do not know what ensuring respect actually means.

3.2.2. Additional implementation measures

The ICRC table is not a complete or closed list of activities to be taken on national level. However, with these measures, it is more or less certain who should be responsible for their execution and what kind of legislative and administrative action is expected from a State. Different authors, however, propose dozens of additional lists and duties to ensure respect for IHL.

Mikos-Skuza finds seven formal mechanisms that are foreseen in the Conventions and Protocols in order to ensure respect for IHL. They are:
1. Meetings of States Parties;
2. The mechanism of Protecting Powers and their Substitutes;
3. Supervision by the ICRC;
4. Monitoring by other impartial humanitarian organizations;
5. Cooperation with the UN;
6. The enquiry procedure;
7. Recourse to the International Humanitarian Fact-Finding Commission (IHFFC).[399]

Pfanner, in his work from 2009, lists various mechanisms and approaches for implementing IHL and protecting and assisting war victims that perfectly illustrate how national implementation measures are only a small part of the larger picture:
1. Mechanisms originating in IHL
   - National implementation measures
   - Punishment for breaches
   - Enquiry procedure
   - The international fact-finding commission
   - Protecting powers
   - Reparations
   - The ICRC

[398] Palwankar, "Measures available", *supra nota* 222.

[399] Elzbieta Mikos-Skuza, „How can existing IHL mechanisms be better used?" – *Improving compliance with International Humanitarian Law, Proceedings of the 30th Bruges Colloquium*, 11th–12th September 2003 (Bruges, 2004), 35–42, pp 36–37.

    - Operations during an armed conflict
    - Protection and assistance
    - Co-operation with the National Red Cross or Red Crescent Society
  - Implementation in non-international armed conflicts
    - Special agreements and unilateral declarations
    - The right of humanitarian initiative
  - The responsibility of the international community
2. Protecting war victims through human rights treaty bodies
3. Protecting war victims through the UN system
  - The UNSC
    - Protection of the civilian population
  - The General Assembly
    - The Human Rights Council
    - The Economic and Social Council
  - The Secretary-General and the UN agencies
  - The International Court of Justice
4. Activities of regional organizations
5. Activities of governmental and non-governmental organizations.[400]

Kalshoven modestly lists (in a chapter titled Implementation and Enforcement of International Humanitarian Law) a few national and international measures.

The national measures include:
- Instructions for the armed forces. The Lieber Instructions of 1863 as the first example of such. And Article 80(2) AP I as a contemporary example;[401]
- Effective system of discipline, AP I 43(1) (including failure to act and duty of commanders);
- Dissemination;
- Repression of violations.

The international measures include:
- Reprisals;
- Fact-finding;
- Supervision (Protecting Powers);
- Role of the International Community of States (art 89 of AP I).[402]

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[400] Pfanner, "Various mechanisms", *supra nota* 246.

[401] Kalshoven, „Implementation and enforcement", *supra nota* 87, p 600. The High Contracting Parties and the Parties to the conflict shall give orders and instructions to ensure observance of the Conventions and this Protocol and shall supervise their execution. To be effective, such instructions must address each of the various branches of the armed forces separately, and for each branch they must deal with the diverse situation this branch is trained to deal with.

[402] *Ibid*, p 614.

There are some authors that see implementation as something that is eventually mostly in the hands of the individual belligerents themselves (implementation in the wake of violations), and therefore have a different approach to measures available. Roberts, for example, states that there is nothing new in recognizing that the problem of implementation of the laws of war is both important and difficult. "However, with rare exceptions it has not been the subject of a vigorous tradition of thought. Many lawyers, and others, like to think of enforcement exclusively in terms of criminal trial after a violation. However, implementation may take many other legal, administrative, or military forms".[403] For example, implementation can be effected through training, education and planning, drafting of codes of conduct, actions of third party States, non-governmental bodies, and international organizations.[404]

Rogers has yet another different approach when he lists practice and legal mechanisms under implementation. By practice, he means everyday phenomena affecting battlefield efficacy of the law of war – command influence, reciprocity, prohibition of hostage taking and the Nuremberg principles. Under legal mechanisms, he lists belligerent reprisals, training and dissemination, international assistance (protecting powers), international co-operation, fact-finding and inquiries, ICRC, compensation. He keeps enforcement separate and talks about criminal responsibility and the ICC.[405]

According to Yves Sandoz the legal means of putting IHL into effect come under three headings:

1) Means of prevention: to be used before the need to protect victims becomes a reality, and intended to ensure that these protective provisions are correctly applied when the time comes.
2) Means of control: constant supervision to ensure that protective provisions are properly observed.
3) Means of repression: penalties as an integral part of any legal system should be a valuable deterrent.[406]

Professor Sassoli has broadly the same approach: 1) preventive measures to be taken in peace-time, 2) those ensuring respect during armed conflicts, and 3) those repressing violations. In his words significant process has been made with respect to the first category, in particular national legislation, training and dissemination, during recent years, *inter alia*, thanks to the advisory services offered to States by the ICRC and to the impetus given to national legislation by the Statute of the ICC.[407] Clear success is still lacking in the second category according to him, though it is the crucial test for the war victims.

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[403] Roberts, "Implementation", *supra nota* 251, p 362.

[404] Roberts, "The Laws of War", *supra nota* 94, p 14.

[405] Rogers, *Law on the battlefield*, *supra nota* 106.

[406] Sandoz, "Implementing International Humanitarian Law", *supra nota* 304, p 259.

[407] Sassoli, „The implementation", *supra nota* 83, p 47.

The ICRC's Advisory Service lists key articles requiring the adoption of national implementation measures and broadly divides these in three categories: 1) to ensure that both civilians and the military personnel are familiar with the rules of humanitarian law; 2) to ensure that the structures, administrative arrangements and personnel required for compliance with the law are in place; 3) to ensure that violations of humanitarian law are prevented, and punished when they do occur.[408]

Thürer differentiates between international and national measures (of compliance):

a) On the international level there are Protective Powers and fact-finding mechanisms, which are largely underused or obsolete.[409]
b) Internally there is the duty of States to incorporate the norms of humanitarian law in their domestic legal systems.
c) Compliance can also be brought about by mixed procedures, i.e. through the interplay of international mechanisms and domestic legal systems.[410]

This differentiation deserves credit, but is altogether not a good basis for further discussion if we want to go into some level of detail.

Lavoyer further distinguishes between mechanisms that are a) internal to the parties of the conflict; b) responses to the other side and, c) activities of entities external to the conflict. This distinction helps to illustrate the difference between implementation and enforcement again. Note also that Lavoyer speaks about non-judicial enforcement measures separately.[411] But a further distinction is made between obligations in peacetime (national legislation, dissemination, legal advisers in armed forces, translations) and additional obligations during armed conflict (duty of military commanders, responsibility of superiors, collective responsibility of States, repression of war crimes, protecting powers, Fact Finding).[412] This latter distinction is again, to some extent, followed by this thesis. However, it would be wrong to state that implementation measures are only those taken during peacetime and enforcement measures those taken during armed conflict.

Sandoz provides ample examples and has the most clear-cut distinction between prevention, control, and repression in his work from 1988:

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[408] ICRC fact sheet, Implementing International Humanitarian Law: form Law to Action, <www.icrc.org/en/document/implementing-international-humanitarian-law-law-action> (1.11.2019).

[409] Thürer, *International Humanitarian Law, supra nota* 330, p 425.

[410] *Ibid*, 427. E.g. the UN Human Rights Council established a "UN Fact-finding Mission on the Gaza Conflict".

[411] Jean-Philippe Lavoyer, „Implementation of IHL and the role of the International Committee of the Red Cross" – John Carey, William V. Dunlap & R. John Pritchard (eds), *International Humanitarian Law: vol 1* (Ardsley: Transnational Publishers, 2003) 213–225, pp 215–217.

[412] *Ibid*.

Prevention activities in his view are:

1) Respect for the law by the States concerned, reiterating the *pacta sunt servanda* in the Conventions.[413]
2) General dissemination of the Conventions and Protocols.[414]
3) Special instruction for the authorities directly concerned.
4) Duties of commanders. AP I art 87.
5) Training qualified personnel. AP I art 6.
6) Legal advisers in the armed forces.
7) Communication of translations of the Conventions and Protocols and laws of application.

Control measures are:

1) Obligation on parties to the conflict to put an end to all breaches.
   - General obligation.
   - Obligations on military commanders – are under an obligation to prevent, suppress and to report to competent authorities breaches of the Conventions.
   - Obligation on the High Contracting Parties to ensure respect for IHL.[415] What it actually means still has to be defined.
2) Protecting powers.

And finally, repression measures:

- General obligation – the Parties to the Conventions, although not under the obligation of putting an end to violations of the Conventions, are under the obligation of suppressing those violations known as grave breaches and considered as war crimes.[416]
- Responsibility of superiors and duty of commanders – AP I, art 86, 87.
- Mutual assistance in criminal matters – AP I, art 88.

Some additional means that do not fall under these categories are international enquiry, co-operation with the UN, and role of the media.

Other works use similar categorization and it seems a reasonable course. The chapters of this thesis roughly follow the same pattern. To put it differently, we talk about actions taken to prevent violations, to control and monitor the actors involved and to repress or put an end to violations. It is tempting to divide the measures to those taken before, during and after hostilities, but this does not work

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[413] Sandoz, "Implementing International Humanitarian Law", *supra nota* 304, p 262. E.g. in art 80 AP I, the wording goes so far as to tell the State how it must assume a responsibility, already made clear beyond doubt by the text.

[414] *Ibid*, p 263.

[415] This was one of the main subjects of an enquiry by the Centre d'études de droit International médical in Liège and the Committee on International Medical and Humanitarian Law of the International Law Association.

[416] Sandoz, "Implementing International Humanitarian Law", *supra nota* 304, p 275.

out well. For example, teaching, training and marking medical personnel will take place both before and during the conflict. Criminalizing grave breaches will have to be done before the conflict, but the actual proceedings and convictions will take place after the conflict, and so on.

3.3. Dissemination and instruction

3.3.1. Characterisation and legal basis

Dissemination must be seen as one of the most important part of implementing IHL. The importance of dissemination goes hand in hand with the argument of distinction between implementation and enforcement. I strongly believe, and am supported by many authors, that the lack of dissemination activities leads to a significant amount of breaches of IHL. This is why dissemination is dealt with separately and in somewhat larger extent than other specific implementation measures. Dissemination of the law of Geneva among the civilian population, the police, and the armed forces is of overriding importance and "might even deprive the defence of superior orders of much of its importance."[417] Better to disseminate and afford training so that violations are averted than to emphasise unduly the objective of punishing the perpetrators of serious breaches of the law. Effective implementation is thus dependent on dissemination of the law. The observance of IHL can only be expected if all authorities, armed forces, and peoples are made familiar with its contents.[418]

What does dissemination mean though? The Red Cross has defined dissemination as spreading knowledge of IHL, of the Movement in general and the ICRC in particular, of the Fundamental Principles which guide the activities of the components of the Movement, and of those activities themselves. Its main objectives are to limit violations of the law and human suffering on the one hand, and to facilitate humanitarian action on the other.[419]

Another definition reads: "activities which seek to promote rules of behaviour intended to mitigate certain consequences of violence and conflict which are held to be unacceptable by the community of States party to the humanitarian law

[417] Frits Kalshoven, „The Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts " – Frits Kalshoven (ed), *Reflections on the Law of War: collected essays.* 17 *International humanitarian law series* (Martinus Nijhoff Publishers, 2007) 33–99, p 90.

[418] Rüdiger Wolfrum & Dieter Fleck, "Enforcement of International Humanitarian Law" – Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press, 2008) 675–722, p 722.

[419] *Answers to your questions* (ICRC, Geneva, Switzerland 1995). Not defined in the latest version of the brochure <www.icrc.org/eng/assets/files/other/icrc-002-0703.pdf> (1.11.2019).

treaties".[420] Alternatively, dissemination "refers to the very large number and wide range of activities designed to promote the Red Cross spirit and institutions, together with instruction on proper behaviour in the event of conflict, which the Movement has been conducting since its inception."[421]

Respect for international law is, to a large extent, based on voluntary compliance by the relevant actors and is not enforceable in a traditional way. This voluntary compliance presupposes that the relevant actor knows the law, that he accepts it as a standard of his action, and that compliance with the law becomes part of his working routine. This is called the internalization of norms. The first indispensable method for achieving this is dissemination.[422]

The importance of dissemination has long been recognized. Although no reference to dissemination or education was made in the 1864 Geneva Convention, in 1869, Moynier, one of the founders of the ICRC, noted to the Second International Conference of the Red Cross: "[i]f the Convention is to be implemented, its spirit must be introduced into the customs of soldiers and of the population as a whole. Its principles must be popularized through extensive propaganda."[423]

The preface of the Oxford manual of 1880, largely also drafted by Moynier, reads in relevant part:

> … it is not sufficient for sovereigns to promulgate new laws. It is essential, too, that they make these laws known among all people, so that when a war is declared, the men called upon to take up arms to defend the causes of the belligerent States, may be thoroughly impregnated with the special rights and duties attached to the execution of such a command.[424]

Moynier's call seems to rest on two ideas: firstly, that the law must be known and understood, in order to be respected; and secondly, that there needs to be a proactive approach towards making the law known. This explains the quite unusual obligation for an international set of rules that IHL contains regarding its own dissemination. In legal terms, the importance of dissemination of IHL was first formally recognized in the 1906 Geneva Convention. The Conventions of 1949 contain a more elaborate obligation for States (Common Article 47/48/127/144),

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[420] Edith Beriswyl & Alain Aeschlimann, "Reflections on a dissemination operation in Burundi – Declaration for standards of humanitarian conduct: Appeal for a minimum of humanity in a situation of internal violence", 37 *International Review Of the Red Cross* (1997).

[421] Edith Baeriswyl, "Teaching young people to respect human dignity", 37 *International Review Of the Red Cross* (1997).

[422] Bothe, „The role of national law", *supra nota* 76, p 303.

[423] William Dunlap, „Dissemination and International Humanitarian Law in Modern Social Conflict" – John Carey, William V. Dunlap & R. John Pritchard (eds), *International Humanitarian Law*: *vol 1* (Ardsley: Transnational Publishers, 2003) 15–26, pp 17–18; Sivakumaran, *The law of non-international armed conflict*, *supra nota* 337, p 430.

[424] The laws of war on land, 9.09.1880, in force 9.09.1880. Available at <ihl-databases.icrc.org/ihl/INTRO/140?OpenDocument> (1.11.2019).

which is reiterated and developed in the Protocols. It was also found to be a customary rule of IHL.[425]

Despite this clear obligation, war crimes trials at the conclusion of the Second World War disclosed that the governments of certain belligerent States had done little to bring the existence or the content of the law of war to the attention of their armed forces. Draper holds that the general ignorance on this subject, not excluding that of lawyers, contributed to the widespread and gross war criminality committed by members of armed, para-military and police forces. "Where there is a prevailing ignorance about the legal restraints operative in the conduct of war, the system of discipline imposed by orders from superiors to subordinates meets no obstacles to compliance, however criminal the nature of the order."[426]

The dissemination and instruction provision is a valuable and necessary part of the implementation process. If carried out in good faith by the States, it would limit the number of military commanders and subordinates who would be in a position to claim with any conviction that they did not know the order they issued or received was criminal.[427]

Article 47 of GC I stipulates: The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains. Therefore, first and foremost, dissemination is the responsibility and the task of governments.[428] Upon the commencement of a non-international armed conflict, however, the obligation also vests in the armed group.[429]

"The conspicuous improvements over the text of 1929 are the express reference to times of peace besides times of war, and the indication of the ultimate purpose of dissemination, which is knowledge of the principles of humanitarian law among the entire population." In the earlier texts, the inclusion of the study of the various Conventions in programmes of civil instruction was also qualified by the words "if possible". Article 83(1) of the Protocol contains the undertaking of the contracting States "to encourage the study thereof by the civilian population". Moreover, on top of the general obligation laid down in Article 83(1), paragraph 2 provides specifically that: Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the

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425 Bernard, "Time to take prevention seriously", *supra nota* 328, pp 691–692.

426 Draper, „The implementation of the Geneva Conventions", *supra nota* 344, p 20.

427 *Ibid*, p 21.

428 Art 47/48/127/144 and AP 83.

429 Sivakumaran, *The law of non-international armed conflict*, *supra nota* 337, p 432; Frits Kalshoven, "The Netherlands and International Humanitarian Law Applicable in Armed Conflicts" – Frits Kalshoven (ed), *Reflections on the Law of War: collected essays*. 17 *International humanitarian law series* (Martinus Nijhoff Publishers, 2007) 275–320, p 273.

application of the Conventions and this Protocol shall be fully acquainted with the text thereof.[430]

Given that Common Article 3 is an integral part of the Conventions, the obligation to disseminate the law extends to that Article. AP II provides that the Protocol "shall be disseminated as widely as possible". The importance of dissemination is also evidenced by SC Resolution 1894 (2009), which calls for "the widest possible dissemination of information" on humanitarian norms.[431] Since the obligations mentioned above apply to the "parties to the conflict", the obligation of dissemination applies to States as well as non-state armed groups.

Peacetime teaching is clearly of particular importance. If teaching only starts during an armed conflict in the heat of an ongoing battle, it is often too late to influence the behaviour of soldiers. They must be aware of what is required from them before a conflict starts. In addition, States which provide troops for peacekeeping or peace-enforcement operations conducted by the UN, regional organizations or under their auspices should ensure that the military personnel belonging to their contingent are instructed in the provisions of the law.[432]

The updated Commentary states that in order to be effective, IHL must not be taught as an abstract and separate set of legal norms, but must be integrated into all military activity, training and instruction. "Such integration should aim to inspire and influence the military culture and its underlying values, in order to ensure that legal considerations and principles of IHL are incorporated, as much as possible, into military doctrine and decision-making."[433]

There are thus several dimensions to this obligation to disseminate IHL. First, it is primarily a responsibility of States, though Red Cross and Red Crescent actors also have a support role to play in promoting the law and assisting States in their efforts to do so. In reality, it is often the ICRC that carries out many of the dissemination activities, both to the military and civil societies. Second, unlike many other rules of IHL, it is also applicable in peacetime. Indeed, dissemination efforts are more likely to be successful when there is sufficient time and calm to expose different actors in society to IHL and humanitarian principles, so that real norm integration can take place.[434] Third, non-state actors are also the addressees of these rules.

At the end of the day, systematic instruction to members of the armed forces, and gradually to the adult population, may do more to ensure observance of those instruments than the trial and punishment of those who have violated them.

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[430] Kalshoven, „Implementation and enforcement", *supra nota* 87, p 606.

[431] SC Res 1894, 11.11.2009.

[432] Dörman, "Dissemination and monitoring compliance", *supra nota* 184, p 229.

[433] Cameron, *et al*, "The updated", *supra nota* 61.

[434] Sandoz, "Implementing International Humanitarian Law", *supra nota* 304, p 263.

"Instruction works at a time ahead of violation. Punishment operates when implementation has failed. In the case of death penalties, which may be imposed for all "grave breaches", it is the irremovable seal upon the failure to implement".[435]

However, how does one effectively engage in the promotion, education and integration of IHL among the military and civilian population? While the 1949 Conventions specify the material, temporal and personal scope of the obligation to disseminate, they do not elaborate on the methods that have to be used to translate the legal obligation into actual respect and compliance by individuals.[436] This will be discussed in the next paragraphs.

3.3.2. Teaching humanitarian law to armed forces and non-state actors

3.3.2.1. On the necessity of teaching

The rules of war, no matter how perfect and comprehensive they may be, will have no practical effect if they are not known by the armed forces. Moreover, there is a high risk that the rules will be wrongly interpreted because of their complexity or inadequate training.[437] Over the years, many war crimes have been committed that involve the ill-treatment of detainees. Often abuses have been carried out at a low level, by inexperienced or poorly trained soldiers who have not been adequately supervised by experienced officers.[438]

Everyone involved in a conflict must be aware that violations carry disciplinary or penal consequences and realize that persistent breaches may lead to an escalation of the conflict. In this regard, compliance with humanitarian law is in the interest of every individual party to an armed conflict.[439]

The armed forces, in particular those of developed, highly industrialized States, have become complex and sophisticated organizations with a high degree of specialization for their various branches. Due to this, the job of translating the law into meaningful instructions has become commensurately more difficult.[440] Yet, those who do not know the rules cannot respect them. This also applies to those who wrongly think that the rules do not apply to them; to those who think that the situation they are confronted with is so new that the "old" law cannot be applied; and to those who think that in exceptional circumstances the rules do not have to be complied with. None of these people will respect the rules; this is why relentless dissemination efforts are crucial.[441]

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435 Draper, „The implementation of the Geneva Conventions", *supra nota* 344, p 30.

436 Bernard, "Time to take prevention seriously", *supra nota* 328, pp 691–692.

437 Guillemette, "Legal advisers in armed forces", *supra nota* 40, p 133.

438 Rogers, *Law on the battlefield*, *supra nota* 106, p 348.

439 Vöneky, "Implementation and Enforcement", *supra nota* 19, p 649.

440 Kalshoven, „Instructions to Armed Forces", *supra nota* 350, p 625.

441 Sassoli, „The implementation", *supra nota* 83, p 50.

IHL is largely made up of obligations with which armed and fighting forces must comply, and therefore these obligations must form an integral part of their regular instruction and practical training. Yet despite their importance, the rules of war often feature only marginally in the military instruction programmes of most States.[442] I know from experience that IHL is often taught for a mere 45 minutes in the course of the 8 to 11 months basic training in the Estonian armed forces. The situation gets only slightly better for the officer level training, and has improved somewhat in the last 10 years.

Review of literature reveals that academics are convinced that law observance is seriously impeded if the existence and content of the law is not brought to the attention of those required to observe it. Kumar thus holds that greater significance should be attached to imparting education to members of the armed forces, rather than adopting coercive methods for law compliance. An educated soldier is less prone to commit breach of the Conventions than a soldier who is ignorant to them.[443]

Roger, who has been teaching law of war to armed forces for decades, believes that once the personnel get to know the details they are universally in favour. They can see the sense in it and the benefits to humankind if it is properly applied. However, many are worried about the lack of enforcement measures if the enemy fail to comply and need reassurance on that score.[444]

Roberts too believes that good training and the setting of high standards and sound examples in peacetime will be followed through into battle. There is an old military saying which goes "train hard, fight easy"; perhaps "train hard, fight easy and legally" would be more to the point.[445]

Empirical studies have also shown that training increases restraint on the battlefield. But not just any training. Bell has found that intensity matters: data from Afghanistan and Iraq suggest that US military units led by officers with more intensive training in norms of restraint engaged in less violence against civilians. Research done for the Roots of Restraint study indicates that higher levels of IHL training result in greater adoption of norms of restraint by combatants in the Australian and Philippine armies.[446]

However, training intensity is only part of the story: evidence from the militaries shows that mixed training methods, combining IHL briefings, classroom discussions, case-study reviews, and practical field exercises, are the most effective in inculcating norms of restraint in combatants.[447]

A survey published in 1999 of individuals in States that had experienced armed conflict, carried out for the ICRC, found that some 39 per cent of persons

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[442] Pfanner, "Various mechanisms", *supra nota* 246, p 283.

[443] Kumar, "Military Law Mechanism", *supra nota* 385, p 224.

[444] Rogers, *Law on the battlefield*, *supra nota* 106, p 347.

[445] Roberts, „Training the Armed Forces", *supra nota* 451, p 365.

[446] The Roots of Restraint in War (ICRC, 2018),
<www.icrc.org/en/publication/roots-restraint-war> (1.11.2019).

[447] *Ibid.*

had heard of the Conventions, but of these, only 60 per cent had knowledge of their content. This figure needs to be improved.[448]

At least two sets of questions arise from these statements. First, how can this all-important internalization be achieved? Second, to what extent, and by whom, is this requirement met and what liabilities may arise where training is either inadequate, or even contrary to the requirements of humanitarian norms?

3.3.2.2. How is this to be carried out?

How does one achieve conformity with rules by armed forces and armed groups? First, training must be tailored to suit the level in the hierarchy, and the degree of responsibility, of the target groups. People who bear weapons must internalize not only the message about obeying the rules, but also the message about sanctions that will follow for failing to do so.[449]

Dissemination usually takes place through orders, courses of instructions, commentaries or manuals. However, dissemination should not be limited to handing out written copies of texts. Means of communication with which fighters are familiar should be utilized, e.g. norms could be presented pictorially, through radio, text messages etc. Furthermore, dissemination is not the same as instruction. Instruction allows individuals to ask questions, engage in dialogue, and resolve misunderstandings with a knowledgeable entity. Instruction may take the form of education and training. The breadth and depth of the instruction afforded will vary according to the level, mandate, and nature of the individuals being engaged.[450]

Roberts believes that the favourable reaction of officers towards IHL has more to do with the straightforward nature of the law, and the realization that there is absolutely nothing in its provisions that any reasonable sailor, soldier or airman could not apply in a conflict situation.[451] Hoffman has a similar line on argumentation: "Anyone who has trained armed forces in the law of war knows that this audience is best persuaded by showing that such rules are founded in military pragmatism, not in legal abstractions."[452]

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[448] Sivakumaran, *The law of non-international armed conflict*, *supra nota* 337, p 434; *The people on war report: ICRC Worldwide Consultation on the Rules of War* (ICRC, Greenberg Research Inc, 1999). [People on war]

[449] Anne-Marie La Rosa & Carolin Wuerzner, "Armed groups, sanctions and the implementation of international humanitarian law", 90 *International Review of the Red Cross* (2008) 327–341, p 333.

[450] Sivakumaran, *The law of non-international armed conflict*, *supra nota* 337, p 435 and Rule 142.

[451] David Lloyd Roberts, „Training the Armed Forces to respect international humanitarian law", 37 *International Review of the Red Cross* 363–378, p 376.

[452] Hoffman, "Emerging combatants", *supra nota* 36, p 105.

Fleck writes that the emphasis must be put on practical teaching. Soldiers should be instructed, using examples, in how to deal with the problems of and the issues involved in international law. The soldier must be taught to bring his conduct into line with IHL in every situation.[453]

O'Connell believes that soldiers can execute their job best if they have clear rules. Speaking about existing discussions or difficulties of IHL or human rights only overcomplicates the message. Similarly, if we change too frequently the determination of the situation on the ground and the related rules, the soldier will lose confidence in the rules to apply. Soldiers need firm rules. If you give them too much freedom of choice, the situation will turn into chaos.[454]

La Rosa holds that the troops must undergo training which allows them to absorb fully the rules and principles of humanitarian law, as well as other obligations connected with the service, so that they become a natural reaction. Bearers of weapons must not have to weigh up the pros and cons in the heat of the action, and their instinctive reactions must be in keeping with the law.[455]

Similarly, Corn warns against relying exclusively on classroom education on IHL, which will rarely produce effective understanding and commitment to the law. Soldiers do not learn to perform their battle tasks by classroom instruction; they learn by doing. The same goes for IHL, the teaching of which must be integrated into the same training and development process used to produce proficiency in the battle task. "The threat of a potential criminal sanction for violating IHL is not a substitute for training integration, and will likely provide little deterrence when soldiers confront in extreme situations involving pressures to act in violation of the law. In contrast, when IHL compliance has been integrated into all aspects of training battle tasks, that compliance will become increasingly instinctive and automatic, like the execution of the task itself."[456]

Indeed, stand-alone courses on IHL may be of marginal utility. Given a choice between following a direct order and following a course of action based on the loose recollection of an IHL course, there is no competition. "If the execution of a given order would blatantly violate one of the cardinal LOAC principles, the decision of an officer or soldier to openly question it to his or her superior is more likely to depend on morality learned as a child than on a mandatory legal course, although the latter will be given greater weight if it has been delivered by a figure of authority from the soldier's own chain of command," Carswell holds.[457]

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[453] Greenwood, "Historical development", *supra nota* 21, p 40.

[454] O'Connell, "Saving lives through", *supra nota* 59, p 125.

[455] Anne-Marie La Rosa, "Sanctions as a means of obtaining greater respect for humanitarian law: a review of their effectiveness", 90 *International Review of the Red Cross* (2008) 221–247, p 238.

[456] Geoffrey S. Corn, „Contemplating the true nature of the notion of "responsibility" in responsible command", 96 *International Review of the Red Cross* (2014) 901–917, p 914.

[457] Andrew J. Carswell, „Converting treaties into tactics on military operations", 96 *International Review of the Red Cross* (2014), 919–942, p 924.

In other words, the law should be presented and discussed "strategically," in a manner that is relevant and adapted to the context, and as part of a deliberate plan of engagement with the parties. This is necessary if parties are to develop a positive attitude towards the law, the first step towards respecting it.[458]

In the US, the instructors educating troops on IHL are called the JAG (judge advocate general) officers. Their training role is extensive. Before deployment, all troops receive training from JAG officers that includes sessions on the legal limits to the use of force. These sessions may be tailored to the specific types of functions the troops will be performing, and include training in the specific rules of engagement for the particular operation.[459]

Training continues during deployment, and includes "training exercises" that incorporate specific, realistic scenarios designed to teach the limits on the use of force in the actual circumstances troops are likely to face.[460] Nevertheless, especially in light of abuses at Abu Ghraib, Guantanamo, and other detention sites, neither the presence of JAG officers on the field nor the various organizational reforms have been entirely successful at stopping unlawful behaviour.[461]

It has become clear that IHL training needs to take place in a context which facilitates the development of conscience, with input from education theory, social and organizational psychology, and perhaps military ethics. The ICRC's first Roots of Behaviour in War Study showed that knowledge of the law and attitudes consistent with a risk of violations can occur together. Bates believes that this finding creates a conundrum, possibly even a paradox, between IHL training and compliance. Historical reflection and social psychology show that the aims of basic training (desensitization, breaking down a soldier's inculcated reluctance to kill, unit cohesion and obedience to the command chain) are antagonistic to many of the aims of IHL training.[462]

Draper holds that the 1949 Conventions are defective on the dissemination issue. Namely, they do not have a monitoring device in them, i.e. that the required instruction is being given, adequately, to those for whom it is required. The system of discipline and training in the armed forces of States makes the giving of the instruction required by the Conventions relatively simple to implement, and any excuse for failure to do so less easy to justify.[463]

Greenwood also suggests that the UN could follow the example of the ICRC in reviewing the steps taken by States to comply with their dissemination obligations: the need to report to an international body on its activities may spur a State

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458 Mack, *Increasing Respect, supra nota* 92.

459 Laura Dickinson, "Military lawyers on the battlefield: an empirical account of international law compliance", 104 *American Journal of International Law* (2010) 1–28, p 11.

460 *Ibid*, p 12.

461 *Ibid*, p 12. The JAG culture was deliberately undermined during the Georg W Bush administration.

462 Elizabeth Stubbins Bates, „Towards effective military training in international humanitarian law", 96 *International Review of the Red Cross* (2014) 795–816, p 797.

463 Draper, „The implementation of the Geneva Conventions", *supra nota* 344, p 22.

into giving these activities a higher priority. He adds that the UN could offer sponsorship for IHL training courses run by the ICRC.[464]

I believe that some oversight and obligatory reporting mechanism should be devised for the instruction on IHL given to armed forces. A lot of work has been done, and still underway, but given that there is wide agreement on training being the most important prerogative for adherence to IHL, it is only logical that it is somehow controlled and guided.

3.3.2.3. The legal adviser

The commanding officer must ensure that his subordinates are aware of their rights and duties under international law. He is obliged to prevent, and where necessary to suppress or to report to competent authorities, breaches of international law. He is supported in these tasks by a legal adviser.[465]

In fact, the law of armed conflict requires the employment of legal advisers to advise military commanders on the application of the Conventions and Protocol I.[466] It also requires the employment of legal advisers on the part of national liberation movements. The Customary International Humanitarian Law study posits that the employment of legal advisers is a norm of customary international law for States in respect of international and non-international armed conflicts alike.[467]

Such advisers are employed both to ensure that IHL provisions are not overlooked, but also to participate in general dissemination activities.[468] The military lawyer can participate not only as a negotiator in international conferences, as a writer of military manuals or as an instructor on the law of war, but also as a legal adviser to a commander or his staff or as a prosecutor in war crimes proceedings. In all these areas, he can make a useful contribution to the understanding and implementation of the law.[469]

For instance, Protocol I includes a number of wide restraints upon battle conduct, e.g., as to lawful targetry, means and methods of combat, and precautions in attacks. This introduces the legal adviser to an advisory role affecting combat operations, strategical planning and operational directives. The commander is placed in an awkward position if advice is requested and ignored. To

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464 Greenwood,"Ensuring Compliance", *supra nota* 3, p 202.

465 Greenwood, "Historical development", *supra nota* 21, p 40.

466 Article 82 of Additional Protocol I.

467 Sivakumaran, *The law of non-international armed conflict*, *supra nota* 337, p 437. They have certainly been used in non-international armed conflicts as Sivakumaran points out, for instance during the 2011 violence in Libya, 1954–62 Algerian war of independence, 1988 El Salvador.

468 Kumar, "Military Law Mechanism", *supra nota* 385, p 224.

469 Rogers, *Law on the battlefield*, *supra nota* 106, p 364.

meet the difficulties of certain States, the Article does not require such advisers to be qualified lawyers.[470]

Dickinson calls these advisers the compliance unit within the military. They ensure that commanders and troops obey the rules of engagement, which are the rules that operationalize the law of armed conflict in a given war or occupation. The core public value undergirding this body of law is the principle that the use of force, even in an armed conflict, should be limited. Thus, military lawyers are essential to inculcating this public value into military culture.[471]

For example, in the Vietnam War the existence of legal norms did not prevent US troops from committing widespread atrocities at My Lai and elsewhere. After My Lai, a high-level army investigation blamed the military for failure both to train troops adequately in war crimes law, and to provide procedures for reporting abuses. In response, the US military strengthened its internal codes of conduct by making military lawyers become more involved in operational decision-making. Such actions helped institutionalize the authority and role of these lawyers in the military bureaucracy and deepened the militaries commitment to the law of war.[472]

The judge advocates carefully translate their legal advice into operational terms, making it clear to commanders that the lawyers' job is not to say NO, but rather to help their commanders achieve the objectives of the mission. Their job is to give an alternative course of action that would accomplish the goal without the legal concerns.[473]

The 2019 International Conference of the Red Cross and Red Crescent, is expected to adopt a resolution titled "Bringing IHL home", specifically drafted to serve as a roadmap for better national implementation. This resolution further encourages States to make every effort to integrate IHL into military training and all levels of military planning and decision-making, thereby ensuring that IHL is fully integrated into the military ethos. It also recalls the importance of the availability within States' armed forces of legal advisers to advise commanders, at the appropriate level, on the application of IHL, including to non-international armed conflicts.[474]

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[470] Draper, „The implementation of the Geneva Conventions", *supra nota* 344, p 24.

[471] Dickinson, "Military lawyers", *supra nota* 459, p 15.

[472] *Ibid*, p 10.

[473] *Ibid*, p 20.

[474] ICRC, Bringing IHL Home: A road map for better national implementation of international humanitarian law, 33rd International Conference of the Red Cross and Red Crescent, Geneva, 9–12 December 2019, Draft elements of resolution, <rcrcconference.org/app/uploads/2019/05/Bringing-IHL-home.pdf> (1.11.2019).
The conference will take place after this thesis is submitted for publication.

3.3.2.4. Military manuals

As mentioned previously, the relative weakness of international measures to secure the performance of obligations under humanitarian law calls for national implementing efforts, among which military manuals are of particular importance. These manuals are important because they are translating humanitarian rules into the military sphere, and may support its application in daily practice.[475] The military manuals of States have proven important in the creation and development of IHL. They are referred to frequently in judgments of international courts and tribunals, and are used as evidence of State practice and *opinio juris* in identifying customary norms.[476]

Rogers marks that commanders and staff officers require manuals which are written in clear straightforward and non-legal language, while junior officers probably need a pamphlet explaining the basic principles of the laws of war. Soldiers and junior non-commissioned officers do not need a manual at all, a brief summary being all that is required. Rules of engagement cards may well suffice.[477]

The translation of the provisions into more down to earth words, adapted to the everyday life of the members of the armed forces, might help the law of war expert not to sink into a legalist approach in the realization of such booklets. Rather, they would need to sort out some of the most important principles of the Conventions and Protocols and adapt them into more practical terms adjusted to the army's own development and needs.[478]

Non-state armed groups also draw up codes of conduct and issue internal regulations on issues pertaining to the law of armed conflict. Sivakumaran provides ample evidence for this ranging from the conflicts in El Salvador, to Sudan, Sierra Leone and Uganda.[479]

In order for codes of conduct and internal regulations to constitute a useful means of enforcement, they need to be consistent with international standards. Many regulations are indeed consistent, with some reportedly being of a higher standard than that required by the law of armed conflict. However, consistency with international standards cannot be assumed, and some regulations even violate international standards.[480] In this regard, it is advisable that such manuals be submitted to the ICRC for peer-review where possible.

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[475] Wolfrum & Fleck, "Enforcement", *supra nota* 418, pp 721–722.

[476] Sivakumaran, *The law of non-international armed conflict*, *supra nota* 337, p 438. Citing for example *Prosecutor v. Stanislav Galić*, Case No IT-98-29-A, ICTY, Judgement of the Appeals Chamber, 30.11.2006.

[477] Rogers, *Law on the battlefield*, *supra nota* 106, p 152.

[478] Guillemette, "Legal advisers in armed forces", *supra nota* 40, p 143.

[479] Sivakumaran, *The law of non-international armed conflict*, *supra nota* 337, p 441. (The code of conduct of the Taliban in 2009).

[480] *Ibid.*

3.3.3. Teaching humanitarian law to civil societies

Both during armed conflicts and in time of peace, dissemination of IHL is prompted by the hope that knowledge of the law will encourage respect for, and empathy with, other human beings in distress.[481] As the Conventions contain provisions that address people whose actions are not attributable to the State and everyone could become subject to prosecution for grave breaches of the Conventions, it is important that the general population have knowledge of the rules therein.

Educating the public has two major purposes: the medium- and long-term goals of promoting peace and reconciliation, and, in times of emergency, the immediate and short-term goals of promoting humanitarian aid and protecting the interests and the lives of Red Cross personnel on humanitarian missions.[482]

In Article 47 of the Conventions, the obligation to include the study of the Conventions in programmes of civil instruction is qualified by the insertion of "if possible", owing to concerns expressed during the negotiations that constitutional limitations in federal States could prevent a State Party from prescribing general public education programmes. Other concerns include overburdened curricula, limited financial means, and lack of interest among the target audiences or an apprehension of being misunderstood as preparing for armed conflict.[483]

Under Article 83 of Protocol I, the possibility of the authorities maintaining their uninterested posture is reduced by the language adopted. The contracting States no longer undertake to do something "if possible"; henceforth, their undertaking will be "to encourage the study thereof by the civilian population." Under the terms of this provision, they will be required to adopt a policy of active promotion – as indeed they should have done under the old provision.[484]

Kalshoven takes issue with the inadequateness of the civilian instruction. In the Netherlands, he argues, the central authorities do not fix these programmes in detail, but leave it to the discretion of each educational institution. "This being the case the Dutch central authorities found in this situation a convenient excuse to spend no effort whatsoever on the dissemination of the Conventions at school or university level". He goes on to say that "it seems slightly ridiculous that the obligation to ensure civil instruction would be permitted to yield to the sacrosanct autonomy of federative States or educational institutions."[485] To be honest, this

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[481] Johanna van Sambeek & Mireille Hector, „Disseminating IHL at the domestic level: the experiences of the Netherlands Red Cross" – *Making the voice of humanity heard: essays on humanitarian assistance and international humanitarian law in honour of HRH Princess Margriet of the Netherlands* (Leiden/Boston: Nijhoff, 2004) 385–398, p 385.

[482] Dunlap, „Dissemination", *supra nota* 423, p 18.

[483] *New Commentary, supra nota* 119, Article 47.

[484] Kalshoven, "The Netherlands", *supra nota* 429, p 320.

[485] *Ibid*, p 319. Henckaerts & Doswald-Beck, *Customary International Humanitarian Law, supra nota* 182, rule 143; ICRC, „Practice Relating to Rule 143. Dissemination of International Humanitarian Law among the Civilian Population", <ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule143> (1.11.2019).

was the situation decades ago, and a lot has improved after that. It is true that in many countries, such education is left completely in the hands of individual schools, and no central obligation is foreseen. However, more and more countries are seeing the need for such education, and considerable programmes for dissemination among the civilian population have been developed.[486]

The ICRC has a crucial role to play here. Although the promotion of IHL in academic circles is a relatively new activity for the ICRC, it has made rapid progress since the mid 1990s. Today, the organization is following up on university-related activities in some 130 countries around the world. Overseen and harmonized by the ICRC headquarters in Geneva but implemented primarily by operational and regional delegations in the field, the ICRC's programmes targeting university professors and students are notable for their variety and diversity.[487]

Whatever the causes of violent conflict, formal education has an important part to play in strengthening or rebuilding social cohesion in the wake of violence. A wide spectrum of educational initiatives, often grouped under the heading of "peace education", contribute to the strengthening or rebuilding of social cohesion.[488] The Exploring Humanitarian Law project, initiated by the ICRC, aims at designing learning modules focused on humanitarian law and related ethical issues, and introducing them into existing educational programmes for 13–18-year-olds around the world. This is a valuable task the ICRC has taken upon itself. The project has been translated into a great number of languages, and has been implemented in all parts of the world. It could be considered one of the best preventative activities available – building a society that is inherently anti-violence and educated in humanitarian issues.

Humanitarian law education does not explore violent conflict in the same way as history courses. It encourages the examination of war from a humanitarian perspective and the exploration of the fundamental ethical issues war raises. By focusing on the shared experience of violence, suffering and the devastation from war, and the need for minimal protection of life and human dignity, education in humanitarian law can help rebuild or strengthen social cohesion. It can exert an indirect pacifying effect in situations of acute social and political tension and help to cultivate individual responsibility and solidarity.[489]

In addition, IHL should be taught to journalists. The press can play a significant role, for good or ill, in informing the attitudes of the general public to issues arising from the implementation, or failure thereof, of IHL. War correspondents are also to be properly marked and protected to enable them to do this difficult

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[486] V.T. Nathan, "Dissemination of international humanitarian law – a return to the roots", 6 *Dissemination* (1987).

[487] Antoine A. Bouvier & Katie E. Sams, "Teaching international humanitarian law in universities: the contribution of the International Committee of the Red Cross", 5 *Yearbook of International Humanitarian Law* (2002) 381–393, p 381.

[488] Sobhi Tawil, „Learning to live together: Exploring humanitarian law: armed conflict and education for social cohesion", 31 *Prospects* (2001) 293–306, p 297.

[489] *Ibid*, p 298.

job. Unfortunately, the atrocities committed against journalists are very well known.[490]

Better knowledge means higher effectiveness of action and of status analysis, better supervision of authorities and better protection of the victims of a conflict by journalists, non-governmental organisations and other social institutions. Knowledge of IHL means a broadening of thought, shift of perspective, and new approaches to news reporting. IHL-aware media can function as more effective observers of law violations, they can inform the public respectively thus contributing to the enhancement of social control over authorities and eventually enforcing law-abiding behaviour of States in the international arena.[491]

The International Institute of Humanitarian Law at San Remo conducts international training courses for members of armed forces and academics regularly, and the ICRC itself holds annual Summer Schools. These courses involve instruction by international experts in the field, and are directed at persons with relevant qualifications of previous study, who may themselves be hoped to engage in disseminatory work.[492] The Henry Dunant Institute, established in 1965, is a major research centre, and publishes papers and other materials for the study and advancement of IHL. The Geneva Academy offers a one-year full-time postgraduate degree in IHL and human rights.[493] The Raoul Wallenberg Institute in Sweden has a two-year programme that provides students with in-depth knowledge in HRL and humanitarian law.[494] Tens of universities in Europe offer comprehensive human rights and humanitarian law courses.

3.3.4. Dissemination and promotion of IHL by the ICRC

The ICRC has made it an institutional dogma that increased awareness of IHL ensures increased respect for the observance of the law. Throughout the 150-year history of the organization, the ICRC has relentlessly worked for more effective dissemination of the law – particularly to the armed forces of parties to conflicts around the world – because of its fundamental belief in the inextricable link

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[490] McCoubrey, *International Humanitarian Law, supra nota* 78, p 72.

[491] Stavros Papadopoulos, „Dissemination of International humanitarian law in the media and civic community" – Stelios Perrakis & Maria-Daniella Marouda (eds), *Armed Conflicts and International Humanitarian Law 150 Years after Solferino: Acquis and Prospects* (European Centre for Research and Training on Human Rights and Humanitarian Action, 2009) 595–604, p 596.

[492] McCoubrey, *International Humanitarian Law, supra nota* 78, p 74; I have participated in the annual ICRC Warsaw Summer Course on IHL organised jointly with the Polish Red Cross Society in Warsaw.

[493] Geneva Academy, LLM in International Humanitarian Law and Human Rights, <www.geneva-academy.ch/masters/ll-m/overview> (1.11.2019).

[494] Raoul Wallenberg Institute, Master's Programme in International Human Rights Law, <rwi.lu.se/what-we-do/academic-activities/masters-programme-in-international-human-rights-law/> (1.11.2019).

between understanding and implementation.[495] I wholeheartedly share this line of thought.

Dissemination and training activities are a large part of the ICRC's efforts to make the rules of humanitarian law known and to build a foundation for discussions concerning respect for the law.[496] The ICRC's strategy is carried out on three levels: awareness-building, promotion of humanitarian law through teaching and training, and the integration of humanitarian law into official, legal, educational and operational curricula.

Throughout the years, the ICRC has published a number of reference publications with the aim of assisting armed forces in incorporating the applicable law into military strategy, operations and tactics.[497] It also organizes annual workshops for senior military officers to discuss the legal framework applicable to modern military operations, and is regularly invited to provide the humanitarian perspective in training scenarios and military exercises of armed forces around the globe.

As mentioned in the historical part of this thesis, the dissemination obligation is a relatively recent one, but an awareness of its importance is older than the Red Cross Movement itself. The movement is "actually a product of perhaps the most effective instance of dissemination in the history of the humanitarian movement," Dunlap states. In A Memory of Solferino, Dunant recounted the horrors he had seen on the battlefield and persuaded the political and military leaders of his age that such suffering was unnecessary and cruel and that something needed to be done. Four years after the battle, the Red Cross was formed, and a year later the Geneva Convention for the Amelioration of the Wounded in Armies in the Field was adopted.[498]

"The ICRC today undertakes a global, non-country-specific set of activities aimed at the development, interpretation, and promotion of IHL. It seeks to influence a variety of actors, including States, international organizations, and non-state actors, to take IHL more seriously and, equally important, to take the ICRC's interpretations of IHL more seriously, in the belief that such awareness of the law will promote observance of it when conflicts arise."[499]

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[495] Timothy McCormack, „The importance of Effective Multilateral enforcement of International humanitarinan law" – Liesbeth Lijnzaad, Johanna van Sambeek & Bahia Tahzib-Lie, *Making the voice of humanity heard: essays on humanitarian assistance and international humanitarian law in honour of HRH Princess Margriet of the Netherlands* (Leiden/Boston: Nijhoff, 2004) 319–338, pp 337–338.

[496] Mack, *Increasing Respect, supra nota* 92.

[497] See, for instance, *ICRC, Handbook on International Rules Governing Military Operations* (Geneva, 2013), available at:
<www.icrc.org/eng/resources/documents/publication/p0431.htm> (1.11.2019).

[498] Dunlap, „Dissemination", *supra nota* 423, p 17.

[499] Steven R. Ratner, "Law Promotion Beyond Law Talk: the Red Cross, Persuasion, and the Laws of War", 22 *European Journal of International Law* (2011) 459–506, p 465. Annual Report 2009, <www.icrc.org/en/doc/resources/documents/annual-report/icrc-annual-report-2009.htm> (1.11.2019). "If IHL is to be fully respected, it is of paramount importance that States accede to the relevant international instruments".

The ICRC's efforts at dissemination used to be directed at helping States promote compliance with IHL and encouraging States to meet their obligations. More recently, ICRC has invested heavily in the promotion of the Red Cross principles and the protection of ICRC delegates and operations in crisis areas. Dissemination has always been important in times of conflict, but it is only recently that the ICRC has begun structuring dissemination as an integral part of a humanitarian aid action from the very beginning.[500] The dissemination activities they undertake range from diplomacy to operational dissemination. They can take the form of developing IHL, bringing the principles of humanitarian law to the military forces and general populations (lawyers, medical personnel, civil defence personnel, educators) or even educational efforts that are directly related to specific humanitarian aid operations.[501]

While the fundamental objective of dissemination remains consistent – to limit the suffering of victims and prevent violations of the law – there is an aim specific to each situation as it arises. Before the conflict action needs to be taken to prevent the emergence of violence and a situation deteriorating to armed conflict. During the conflict, there is a need for action to limit the spread of violence and promoting acceptance of the Red Cross itself. After the conflict action needs to be taken to prevent any breakdown of the peace process.[502]

At one of the more recent conferences of the ICRC a 4-year action plan for the implementation of IHL was adopted. In the recitals of this document there are a couple of strong-worded points. Namely the Conference "*requests* all members of the International Conference to make every possible effort to ensure that all actors concerned implement, as appropriate, the Action Plan" and "*requests* the members of the International Conference to report to the 32nd International Conference in 2015 on the follow-up to their pledges". The actions called for include improving the incorporation and repression of serious violations of IHL. At the Conference of 2015, it was again recommended that there is a need to continue an inclusive, State-driven intergovernmental process based on the principle of consensus and to find agreement on features and functions of a potential forum of States. However, the report of this conference only mentions the previous 4-year action plan once and in connection to progress made regarding responsible arms transfers.[503]

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[500] Dunlap, „Dissemination", *supra nota* 423, p 19.

[501] ICRC, "International Committee of the Red Cross: Prevention policy (Adopted by the Assembly of the ICRC on 18 September 2008)", 91 *International Review of the Red Cross* (2009) 415–430.

[502] Dunlap, „Dissemination", *supra nota* 423, p 25–26.

[503] Resolution 1, Strengthening legal protection for victims of armed conflicts, 31st International Conference of the Red Cross and Red Crescent, 2011, <www.icrc.org/en/doc/resources/documents/resolution/31-international-conference-resolution-1-2011.htm> (1.11.2019); Power of Humanity, 32nd International Conference of the Red Cross and Red Crescent, Geneva 8–10.12.2015, final report 32IC/15/11.

In a separate development, the ICRC and the Government of Switzerland conducted a major consultation process on Strengthening Compliance with International Humanitarian Law, established inter alia "to enhance and ensure the effectiveness of mechanisms of compliance with international humanitarian law". This process is hoped to lead to voluntary State reporting and/or thematic discussions at meetings of States.[504] The next conference discussing this issue will convene in 2019. Unfortunately, there is a group of blocking States (including Russia, Cuba, Venezuela, the MENA countries), who are seriously hindering the creation of any new measures.[505]

The 2019 Conference will work towards the adoption of five resolutions, one of which is of particular importance. This resolution is titled "Bringing IHL home: A road map for better national implementation of international law". It recalls that domestic implementation of international obligations plays a central role in fulfilling the obligation to respect IHL and recognizes the positive impact that the socialization of IHL in military practice can have on battlefield behaviour, in particular through training tailored to the profile of the audience.[506] The ICRC once more outlines that focusing only on violations of the law risks delegitimizing it over time and overlooks the many situations where the law is effectively respected. This is why the ICRC believes that there is a need for a more balanced discourse, one which gives more visibility to examples of IHL being respected.

3.3.5. Dissemination in Estonia

Teaching and dissemination of humanitarian law is not regulated by law in Estonia. Fulfilling this obligation, which at first glance seems simple, has not been easy in practice. Dissemination of the law is rather problematic and patchy, and often finds a cold reception. The Estonian Red Cross has made some efforts in disseminating among the civilian population and has compiled summary booklets on the Conventions. Teaching IHL to the armed forces in not entirely satisfactory and lacks consistency. I conducted a study among the conscripts to Estonian armed forces in the context of my bachelor's thesis in 2006, and was able to interview many non-commissioned officers to find out what is being done in practice. The basic principles of IHL are usually taught to these conscripts in a 45-minute lecture, not giving them a chance to internalize the rules.[507]

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[504] *Ibid*; Bates, „Towards effective military training", *supra nota* 462, p 798.

[505] The Conference will take place in December 2019.

[506] ICRC, Bringing IHL Home: A road map for better national implementation of international humanitarian law, 33rd International Conference of the Red Cross and Red Crescent, Geneva, 9–12 December 2019, Background document, <rcrcconference.org/app/uploads/2019/06/Background-document-33IC-report-vFinal_en.pdf> (1.11.2019).

[507] Interviews conducted with the non-commissioned officers in the Estonian defence forces in 2006 and 2008. Powerpoint slides of the course „International Humanitarian Law" of the Support Command, on file with author.

If a conscript decides to continue his military career after the mandatory service, he can enrol in the Estonian Military Academy to become a non-commissioned officer or an officer. The education starts from vocational training that provides the graduate with a vocational education degree in military leadership and a master sergeant's rank. The Academy has issued a book called "The soldier's manual", which contains, on two pages, the basic minimum concepts of IHL (how to take prisoners of war and objects not to be attacked).[508] On this level, a thorough introduction to IHL is not yet given.

The basic officer training course is the first level of military higher education, and provides the knowledge and skills necessary to perform the duties of both wartime and peacetime platoon leaders and company commanders (depending on the specifics of the arms of service/weapon class).[509] The second level master's programme enables the continuation of speciality studies started during applied higher education, whereby the students acquire the knowledge and skills necessary for service as staff officers of an infantry battalion or a brigade or as wartime battalion commanders (or equivalent posts).

The first level training called "Military leadership for land force", offers a course on "The law of armed conflict" for 2 European Credit Points (ECTS) and the master's level a course on international law and IHL for 4 ECTSs but also a course on the use of force in international relations (3 ECTS).[510] This is a welcome development as it is reassuring that at least on the higher levels of military education IHL is given sufficient attention.

IHL is also included in the pre-mission training for all those serving in the missions in various conflict areas around the World. Estonia has general Rules of Engagement and mission specific ROEs, but most of this information is classified and cannot be used in this thesis. There is no single handbook on IHL. Legal advisors on military operations are employed at the Ministry of Defence and Headquarters of the Estonian Defence Forces, although there is no legal basis for the appointment of such advisors.

The problems in teaching IHL to armed forces are manifold. In addition to the inherent challenges mentioned in other parts of this thesis, there is always the lack of resources. The training cycles have time constraints, it is difficult to find people who are thoroughly familiar with and trained in IHL, and there is no common curriculum for teaching.

Lack of knowledge on IHL can lead to the loss of many lives and, also, to unintentionally becoming a criminal for some combatants. The principles of IHL must already be integrated into the training of conscripts, not to mention higher

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[508] KVÜÕA Lahingukool, Sõduri Käsiraamat (Soldier's handbook), Võru 2015, <www.ksk.edu.ee/wp-content/uploads/2011/01/S6duri_K2siraamat_2015_web.pdf> (1.11.2019).

[509] Estonian Military Academy, First Level of Higher Education, <www.ksk.edu.ee/en/military-education/first-level-of-higher-education/> (1.11.2019).

[510] Military leadership for the land force, course curriculum, Estonian Military Academy, <www.kvak.ee/files/2019/05/Sõjaväeline-juhtimine-maaväes-magistriõpe.pdf> (1.11.2019).

rank officers, especially in light of Estonia's membership in NATO and frequent foreign missions. It is necessary to provide the privates with simpler reference booklets that would be available to them at any time, while the higher-ranking officers should have reference books and integrated training activities. Training videos, computer simulations for battle situations and other innovative teaching methods should be used to make the study of IHL more interesting.[511]

In addition, the laws foresee rights and obligations for the police and a variety of actors involved in civil protection.[512] These people can play an important and unexpected role in ensuring social order in the event of armed conflict. The subject of teaching and dissemination is therefore extremely important and should concern everyone.[513]

In the field of distribution to the civilian population, most of the work is done by universities. All three major universities in Estonia, University of Tartu, University of Tallinn and TalTech have courses on IHL, at TalTech even for 6 ECTSs.[514]

On the other hand, there is the "Exploring Humanitarian Law" program, initiated by the ICRC and carried out by Ministry of Education and Research, which teaches high school students IHL. On December 11, 2007, the first teacher training seminar was held. The primary purpose of the curriculum is to develop a sense of responsibility in young people to show respect for life and human dignity. The teaching pack addresses historical as well as contemporary events to give students an idea of how humanitarian law can reduce the plagues of war and the suffering of non-combatants. The topic is opened to the student through discussions and memories of those involved in the armed conflict. It is a major initiative of the ICRC that I was able to help edit into the Estonian language and realities.[515]

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[511] Dietmar Klenner, "Training in international humanitarian law", *International Review of the Red Cross* (2000), <www.icrc.org/en/doc/resources/documents/article/other/57jqq8.htm> (1.11.2019).

[512] Red Cross Designation and Emblem Act, 05.04.2006, entry into force 01.06.2006 – RT I 2006, 18, 141, §§ 12, 15.

[513] International Committee of the Red Cross, „Implementation of International Humanitarian Law: Estonia". Report (1998), on file with author, p 11.

[514] University of Tartu, Faculty of Law, oigus.ut.ee/et/sisseastumine/oppekava-oppetooga-tallinnas; University of Tallinn, School of Governance, Law and Society, <www.tlu.ee/en/yti>; TalTech, School of Business and Governance,
<www.ttu.ee/studying/tut_admission/programmes-in-taltech/> (1.11.2019).

[515] Aire Koik, „Seminaril tutvustatakse humanitaarõigust",
<www.hm.ee/et/uudised/seminaril-tutvustatakse-humanitaaroigust
https://www.icrc.org/en/document/exploring-humanitarian-law> (1.11.2019); Estonian Red Cross, "Avastades Humanitaarõigust", <www.redcross.ee/et/trykised.html> (1.11.2019).

3.4. The role of the ICRC

The ICRC is a model humanitarian organization, and one of the primary mechanisms assisting implementation of the laws of war. Its history of involvement in armed conflicts by assisting wounded soldiers soon expanded to protecting prisoners of war, and helping civilians or other non-combatants caught in conflict. Determination and devotion to the cause have earned the ICRC a unique mandate in the field of IHL.[516] The ICRC is often said to be the only implementation mechanism operating in practice, especially when it concerns the war victims.[517]

The organization was originally set up as a private association under Swiss law. The Committee proper is composed of 15 to 25 co-opted members, who must be Swiss nationals. The fact that international treaties confer specific tasks upon the ICRC has led to widespread recognition of the organization's international legal personality. This trend was confirmed in 1990 when the UNGA granted the ICRC observer status, which allows the ICRC to participate actively in the work of the UN and that of other international organizations.[518]

In the Simic case, the ICTY acknowledged the specific role of the ICRC in the implementation of IHL by upholding its immunity from the obligation to testify, even before international tribunals, in the interests of its ability to perform that role.[519]

As the above international mechanisms for implementing and enforcing IHL are patchy, it is worth dwelling at greater length on the role assigned to the ICRC in the implementation of this body of law. There are a hundred or so references to the ICRC in the 1949 Conventions and the Protocols thereto, and most of them are instructions to act.

According to its establishing statute, its principle mandate is "to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law" and "to endeavour at all times – as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife – to ensure the protection of and assistance to military and civilian victims of such events and of their direct results".[520]

One of the top priorities of the ICRC's diplomacy is to ensure that newly independent States become bound by the 1949 Conventions and other IHL instruments. For example, in September 1996, the ICRC President travelled to the Baltic States to discuss IHL implementation with the highest State authorities of

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[516] Goldstein, „Implementation of International Humanitarian Law", *supra nota* 341, p 165.

[517] Bouvier & Katie E. Sams, "Teaching international humanitarian", *supra nota* 487, p 383; Pfanner, "Various mechanisms", *supra nota* 246, p 290.

[518] Lavoyer, „Implementation of IHL", *supra nota* 411, p 221.

[519] *Simić et al*, Case No IT-95-9, ICTY, Decision on the Prosecution Motion under Rule 73 for a Ruling concerning the Testimony of a Witness (Trial Chamber), 27.07.1999, paras. 47, 72.

[520] Article 5(2)(c)–(d), Statutes of the International Red Cross and Red Crescent Movement.

Estonia, Latvia and Lithuania.[521] This activity is not among the most pressing issues anymore, for understandable reasons. Nevertheless, the ICRC has established an almost universal acceptance of the Conventions (for the Protocols, the work is still underway), and can also work with non-state actors in this regard.

Mandated by States to prepare possible developments in the law, the ICRC draws its expertise from the experience acquired in the field, in the midst of armed conflicts. Since the ICRC is working in the very context where the Geneva law is applicable, it can therefore provide possible proposals which are both feasible and sensible.[522] The ICRC Commentaries on the Conventions and Protocols have been cited on innumerable occasions, so frequently that they are almost treated as authoritative. This can prove problematic, as some of its contents are still open to question.[523]

Apart from its role within the system of Protecting Powers and their Substitutes, the ICRC has a very broad mandate "to work for the faithful application of International Humanitarian Law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law" (Article 5.2 c of the Statutes of the Movement and Article 4.1 c of the Statutes of the ICRC). There is no doubt that the ICRC does a great deal to monitor the application of IHL and in practice – as mentioned above – is the only body supervising the respect for IHL provisions. Unfortunately, his role is potentially in contradiction with its *modus operandi* of confidentiality and neutrality and with its primary purpose of providing impartial assistance and protection to victims of armed conflicts.[524]

The various aspects of its mandate are the practical expression of what is often referred to as the ICRC's role as guardian of IHL. However, as Pfanner notes, it is not the guarantor of humanitarian law. That role must be performed by the High Contracting Parties, in accordance with their obligations under the Conventions.[525] In the next sections, some of the most important implementation measures associated with the role of ICRC will be analysed.

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[521] ICRC, Annual Report 2006, <library.icrc.org/library/docs/RA_CICR/RA_1996_ENG.pdf> (1.11.2019) Kyiv, regional delegation (Estonia, Latvia, Lithuania, Belarus, Moldova, Ukraine.

[522] Cornelio Sommarunga, „Effective implementation of International humanitarian law in changing circumstances", 91 *American Society of International Law Proceedings* (1997) 519–522, p 519.

[523] Sivakumaran, *The law of non-international armed conflict*, *supra nota* 337, p 468.

[524] Mikos-Skuza, „How can existing IHL mechanisms be better used?", *supra nota* 399, p 36.

[525] Pfanner, "Various mechanisms", *supra nota* 246, p 291.

3.4.1. Protection of the emblem

In connection with the ICRC's activities, protection must be granted to the red cross/red crescent emblem. The red cross/red crescent emblem is the symbol of impartial humanitarian assistance offered to those in distress. It is often the only means of protection available to persons trying to attenuate the suffering of the victims of armed conflict and the only guarantee that help will reach those victims in time.[526]

In 1863, the International Committee for Relief to the Wounded, which was the direct predecessor of ICRC, introduced the common distinctive protection symbol for medical personnel in the field, namely a white armlet bearing a red cross, honouring the history of neutrality of Switzerland and of its own Swiss organizers by reversing the Swiss flag's colours. To avoid religious discomfort, the symbols of red crescent and red lion and sun were later adopted for use outside the Christian World.[527] Today the red crystal is also codified by Additional Protocol III, and the red lion and sun symbol has fallen out of use.

Various articles in the Conventions and Protocols foresee specific obligations for States. For example, all medical transport must be marked with a clearly visible emblem; the same goes for medical personnel, equipment, units and establishments. Articles 53 and 54 of GC 1 obligate States to take measures necessary for the prevention and repression, at all times, of the abuses of the use of the emblems. Article 38 AP I prohibits the improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions or by this Protocol. In addition, Article 85 specifies that the perfidious use of the distinctive emblem is a grave breach. This calls for concrete action by the States on domestic level. For example, every State Party has to enact disciplinary and criminal sanctions to punish those in breach of the obligations. Clearly, some purely administrative and organizational matters, such as having a sufficient stock of emblems, knowing exactly which establishments to mark, and the like, must already be taken in peace time.

Misuse of the emblem usually takes three main forms:

- Imitation of the emblem and its use by unauthorized organizations;
- Misuse of the emblem by doctors, pharmacies or commercial films;
- Perfidious use of the emblem that jeopardizes the safety of medical services.[528]

States have a duty to adopt national legislation imposing penalties for such acts. In particular, it is important to draw up legal provisions defining the emblem itself, the persons and objects it protects, lawful and unlawful use, and the persons who are authorized to use the emblem. In addition, an authority responsible for

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[526] Dutli, "National Implementation measures", *supra nota* 2, p 250.

[527] François Bugnion, *Towards a Comprehensive Solution to the Question of the Emblem* (4th edn, Geneva: International Committee of the Red Cross, 2005), pp 7, 12.

[528] Dutli, "National Implementation measures", *supra nota* 2, p 250.

monitoring respect for the emblem and for reporting misuse must be designated. Dissemination and promoting knowledge is an inherent part of these obligations.

In Estonia, the Red Cross Designation and Emblem Act was passed 05.04.2006 and entered into force 01.06.2006.[529] The Act provides the domestic procedures for the use of the designation and emblem of the Red Cross and of other international designations and emblems, which convey the same meaning, and the liability that attaches to misuse of such designations and emblems. It rightly differentiates between the protective and indicative uses of the emblem. Punishments that are more stringent are foreseen for misuses during armed conflict, and in connection with the protective use of the emblem. For example, Article 13 of the Red Cross Act states that "The misuse of the designation or the emblem of the Red Cross or other designations and emblems specified in section 4 of this Act or the use of a misleadingly similar designation or emblem, where such use does not occur during an armed conflict or in a state of war and may be related to the protective use of the designation or the emblem of the Red Cross or other designations and emblems specified in section 4 of this Act, is punishable by a fine of up to 300 fine units or by detention." Whereas, the grave breach provision in AP 1 Article 83 in matched by Article 105 of the Penal Code stipulating: "Exploitative abuse of an emblem or name of the red cross, red crescent or red lion and Sun or red crystal, or of a distinctive mark of a structure containing a camp of prisoners of war, a cultural monument, civil defence object or dangerous forces, or of the flag of truce, is punishable by a pecuniary punishment or up to three years' imprisonment." This distinction is a necessary and well-balanced one and illustrates the importance of this implementation measure. It is one important thing every State can do, to lay the groundwork for adequate protection for those that need it.

Protection of medical and religious personnel

Protection of the emblem and personnel are in principle two sides of the same coin. However, the latter is of utmost importance in conflict situations.

Medical personnel require special respect and protection in the event of an armed conflict. They should be given assistance needed to fulfil their responsibilities and should not be forced to perform tasks that are incompatible with their humanitarian mission.[530] The first condition for ensuring protection is the identification of such personnel.[531]

Medical personnel and religious personnel accompanying the armed forces shall wear, on their left hand, a distinctive waterproof bandage, issued and marked by the military authorities. In addition, they must be issued a special identification card, which is made of waterproof material and fits in a pocket (examples of such

[529] Red Cross Designation Act, *supra nota* 512.

[530] Article 16, AP I.

[531] Articles 40, 41, GC I; Art 42, 43 GC II; Art 20, GC IV. Article 15, AP I I; Art 9, AP II.

cards are provided in the annexes to the Conventions and Protocols). It is important to note that the wristband must indeed be marked by the military authorities, otherwise it will not have the necessary legal status.[532] This means that, for example, civilian hospitals or the Red Cross cannot issue such badges.

Similarly, both stationary and mobile medical units must be respected and protected at all times. Each Party to the conflict shall endeavour to ensure that they are recognizable and, with the agreement of the authority concerned, identified by a distinctive sign.

In Estonia, identification has been enshrined in the Red Cross Designation and Emblem Act. Article 6 (1) provides that the designation or the emblem is used protectively during an armed conflict or in a state of war to mark certain persons or property in a way that shows them to belong to persons or property protected under international law. Thus, all groups protected by the Conventions are covered. Under Article 102 of the Penal Code, attacks against protected persons are prohibited; Article 106 also prohibits attacks against non-military objects, which could be considered to cover objects marked with the emblem although not directly stating that.

In Estonia, the practical importance of this duty is revealed in the identification of medical and religious personnel within the framework of foreign aid and military missions.

3.4.2. National committees, national societies, and the Advisory Service

National committees

A number of States have established national committees or working groups on IHL bringing together national authorities, experts, and in some cases organizations such as the National Red Cross or Red Crescent Society. The role and composition of these committees vary from country to country, but their general objective is supporting governments on matters relating to this body of law. While there is no legal obligation to establish such committees, experts on IHL find that they are valuable means of promoting national implementation.[533]

In practice, in countries where they have been established, they have proved to be useful and appropriate means for facilitating the process of adoption of national legislation.[534] Such committees only have an advisory role; none of them possesses decision-making or judicial powers. The bodies are usually comprised of ministries of Foreign Affairs, Defence and Justice and serve as valuable channels for dialogue between government officials and National Red Cross or Red

[532] Pictet's Commentary, *supra nota* 59, p 311.

[533] Berman, "The ICRC's advisory service", *supra nota* 332.

[534] Dutli, "National Implementation measures", *supra nota* 2, p 252.

Crescent Societies.[535] In 2018, the ICRC listed a total of 112 such committees, unfortunately one has not been established in Estonia.[536] In Finland, for example, the Finnish National Committee for International Humanitarian Law was established in 1993 and, among other things, is tasked to monitor new developments in IHL and assess their implications for Finland. This is a sensible idea, as it helps the government to assess which national implementation measures have to be taken or strengthened as the field of humanitarian law develops.

National Societies

Establishing National Red Cross Societies is governed by Article 26 of the First Convention and Article 2 (2) of the Statutes of the International Red Cross and Red Crescent Movement.[537] According to the ICRC there are currently 191 such societies, which help educate the population on relevant issues, aid governments with disaster relief and help ensure respect for the Red Cross emblem and to cooperate within the entire Red Cross movement. National societies are thus given a rather large role. In peacetime, they should be active in many areas and encourage citizen involvement, and in wartime, act decisively together with state authorities and ICRC to assist victims.

The National Red Cross was established in Estonia as early as 1919, on the basis of the 1864 and 1906 Conventions.[538] The current definition can be found in the Red Cross Act Article 5: "The Estonian Red Cross is a voluntary association which participates in the Red Cross Movement on behalf of Estonia and which has been admitted to the Red Cross Movement according to the Constitution of the International Federation of Red Cross and Red Crescent Societies."

The Red Cross activities are mainly focused on crisis preparedness, first aid and youth work. In cooperation with the societies from neighbouring countries, work is being carried out on rising tuberculosis awareness, preparation of crisis management units; as well as the organization of first aid training, donation, dissemination of the principles of social work and humanitarian law. Several campaigns and fundraising events have been organized, and camps, trainings, information materials have been issued and assistance has been sent abroad.[539]

In 2019–2020 the Red Cross is involved in the BALTPREP project. The objective of the BALTPREP project is to enhance regional preparedness and

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[535] *Ibid*, p 260.

[536] ICRC, Table of National Committees and other national bodies on international humanitarian law, 12 September 2018, <www.icrc.org/en/document/table-national-committees-and-other-national-bodies-international-humanitarian-law> (1.11.2019).

[537] Statutes of the International Red Cross and Red Crescent Movement, Adopted by the 25th International Conference of the Red Cross at Geneva in 1986, amended in 1995 and 2006, <www.icrc.org/en/doc/assets/files/other/statutes-en-a5.pdf> (1.11.2019).

[538] Statute of the Estonian Red Cross Society, <www.redcross.ee/pdf/EPR_pohikiri.pdf> (1.11.2019).

[539] *Ibid*.

response capacities in the Baltic Sea region to enable more effective and timely response to major accidents and disasters in the region. It improves and optimizes the quality and interoperability of the Red Cross regional response capacity for major accidents, and strengthens the collaboration between Red Cross National Societies and civil protection authorities within the Baltic Sea Region. The project includes: Finland, Denmark, Germany, Estonia, Latvia, Lithuania and Poland.[540]

The work of the Estonian Red Cross is in line with international obligations and is sufficiently organized. However, the Society fulfils a role of promoting overall health rather than implementing humanitarian law. ICRC sees national societies as performing almost all of the tasks discussed in this thesis, as this is where experts who can advise governments should work. The Estonian Red Cross probably does not have such importance today. A good example for comparison would be the Finnish and Polish Red Cross Societies, which have a very prominent role in the societies there and are able to help and educate national societies in neighbouring countries.[541] In conclusion, the role of the Estonian National Society should be increased, its scope and participation in the processes of implementation of humanitarian law extended.

The Advisory Service

The 1993 Conference for the Protection of War Victims called for the convening of an Intergovernmental Group of Experts to study practical means of promoting full respect for and compliance with humanitarian law.[542] The Group of Experts met in Geneva in January 1995 and put forward a series of recommendations aimed at reinforcing respect for humanitarian law. These recommendations included the proposal that the ICRC should increase its technical assistance to States.[543]

The ICRC responded quickly to the expert's recommendations. By the time of the 26th International Conference of the Red Cross and Red Crescent in December 1995, it was able to report the establishment of a new unit within its Legal Division, the Advisory Service on IHL, aimed at providing specialist legal advice to governments on national implementation.[544]

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[540] Finnish Red Cross, Baltprep – Baltic Sea region preparedness and response capacity, <www.redcross.fi/baltprep> (1.11.2019).

[541] International Federation of Red Cross and Red Crescent Societies, Partnership in profile 2002–2003, Polish Red Cross, <www.ifrc.org/docs/profiles/plprofile.pdf> (1.11.2019); The Finnish Red Cross, Punainen Risti, Apu Suomesta maailmalle, <www.redcross.fi/en_GB/> (1.11.2019).

[542] Berman, "The ICRC's advisory service", *supra nota* 332.

[543] Dutli, "National Implementation measures", *supra nota* 2, p 252.

[544] Berman, "The ICRC's advisory service", *supra nota* 332; Maria Teresa Dutli, „The ICRC Advisory Service on International Humanitarian Law" – Michael Bothe (ed), *Towards a better implementation of IHL. Proceedings of an Expert Meeting Organised by the Advisory Committee on International Humanitarian Law of the German Red Cross. Frankfurt/Main, May 28–30, 1999* (Berlin: Berlin Verlag Arno Spitz 2001) 59–67, p 59.

The Advisory Service is intended to supplement governments' own resources by raising awareness of the need for implementing measures, providing specialist advice, and promoting the exchange of information between governments themselves.[545] Their work encompasses advice on all legal and administrative measures, which States must take in order to comply with their obligations under IHL. It focuses in particular on those measures which all States are obliged or advised to take, regardless of whether they are currently parties to a conflict.[546]

The Advisory Service has a number of means of pursuing its objective. Initial bilateral contacts between the Service and the relevant government authorities may be made through the local ICRC delegation, the National Red Cross or Red Crescent Society or the State's diplomatic mission in Geneva. This may lead to bilateral discussions aimed at explaining the need to adopt implementing measures or providing more detailed advice.[547]

The experts also recommended that the ICRC "collect, assemble and transmit" information on different implementation measures. To this end, the Advisory Service established a Documentation Centre at ICRC headquarters in 1995.[548] They manage a large database on national implementation measures reported to them by the States, or collected by the Service itself. The database can be searched both by the State and by topic. The aim of the Service is also to provide technical assistance, which might entail supporting translation of the humanitarian instruments into different languages, carrying out studies of compatibility of the national law from the standpoint of humanitarian law, and giving *ad hoc* legal advice on legislation and regulations.[549] Estonia has communicated a total of six legislative acts to the service, such as the Penal Code, Protection of War Craves Act and the Red Cross Designation and Emblem Act.

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[545] *Ibid*; Goldstein, „Implementation of International Humanitarian Law", *supra nota* 341, p 168.

[546] Dutli, „The ICRC Advisory Service", *supra nota* 544, p 61.

[547] Berman, "The ICRC's advisory service", *supra nota* 332; Pfanner, "Various mechanisms", *supra nota* 246, p 292.

[548] Berman, "The ICRC's advisory service", *supra nota* 332. The Centre, which is open to government officials, National Societies, interested institutions and researchers, seeks to make available a wide range of legal material relevant to national implementation. This includes national constitutions, legislation and regulations; national and international case-law; translations of the Geneva Conventions and their Additional Protocols; articles, commentaries and reference works; military manuals and details of national dissemination programmes

[549] Dutli, „The ICRC Advisory Service", *supra nota* 544, p 62.

3.4.3. Action during armed conflicts

For international armed conflicts the legal basis for ICRC action is regulated (among other provisions) by Common Articles 9, 10, 126 and 143. In non-international armed conflicts by Article 81, AP I.

Article 5, paragraph 2(c) of the Statutes of the International Red Cross and Red Crescent Movement prescribes three categories of duties for the ICRC in armed conflicts: 1) to undertake the tasks incumbent upon it under the Conventions, 2) to work for the faithful application of IHL applicable in armed conflicts and 3) to take cognizance of any complaints based on alleged breaches of that law.[550]

The ICRC has a right, under Article 126 of the Third convention and Article 143 of the Forth, to visit all places where POWs and civilian detainees are held. For example, in the eight-year war between Iran and Iraq, the ICRC was permitted to visit and record the names of some prisoners and to assist in the exchange of a few sick and wounded prisoners.[551] More recently, the ICRC helped evacuate over 35000 civilians and fighters from East Aleppo.[552]

Such access has to be negotiated with the authorities and has to take account of military interests. Once the ICRC has access, its treaty-based right of initiative authorizes it to undertake any humanitarian activity, with the consent of the parties to the conflict concerned.[553] The scope of action is wide – requesting a temporary cease-fire to allow evacuation of the wounded, repatriation of wounded prisoners of war, creation of hospital and safety zones, protection of hospitals, and organization of relief convoys through front lines.

If the law is being violated, the ICRC attempts to persuade the authority concerned – the government and/or armed opposition group – that it should correct its behaviour. As a rule, the ICRC endeavours to build a constructive relationship with all those involved in the conflict. The concrete findings emanating from visits and missions are not usually available to the general public. However, if all its confidential representations fail to produce the desired results, the ICRC reserves the right to publicly denounce violations of humanitarian law.[554]

Another activity based on humanitarian law is that of its Central Tracing Agency (CTA), which gives moral and practical support to people of concern for the ICRC and to their families. It helps to trace the wounded and dead, detainees,

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[550] Best, *War and law, supra nota* 126, Declaration on the Rules of international humanitarian law governing the conduct of hostilities in non-international armed conflicts, San Remo, 7.04.1990. IRRC, No. 278, September–October, 1990, pp 404–408.

[551] Aldrich, "Compliance with the law", *supra nota* 7, p 12.

[552] ICRC, „SARC and ICRC finalise evacuation of some 35,000 people from devastated Aleppo neighbourhoods", 22.12.2016, <www.icrc.org/en/document/sarc-and-icrc-finalise-evacuation-some-35000-people-devastated-aleppo-neighbourhoods> (1.11.2019).

[553] Art 9, GC I–III, Art 10 GC IV, but also common article 3.

[554] Lavoyer, „Implementation of IHL", *supra nota* 411, p 220.

civilians isolated in enemy-controlled territory, displaced people and refugees and unaccompanied children, and to reunite people with their families.[555]

All authors writing on IHL agree that it has done a splendid job, making it far more difficult for prisoners to disappear into the "night and fog" and achieving a great deal by its quiet diplomacy. Without its activities, the catalogue of violations would undoubtedly be far greater.[556] When faced with the dilemma of either remaining silent and being able to help the victims, or speaking out and not being able to alleviate their sufferings, the ICRC chooses the first approach.[557]

It is clear then that in international conflicts, the ICRC has traditionally drawn the parties' attention in a formal manner to the essential rules of IHL. It also has direct access to especially vulnerable people, a *sine qua non* in protection work.[558] In the case of an international armed conflict, most victims have the status of protected persons and States are under specific obligations both towards them and towards the ICRC, whereas the law applicable to internal conflicts does not impose those same constraints on the belligerents.[559] Over the years, the ICRC has sought to develop the IHL of non-international armed conflict on numerous occasions, usually being ahead of the willingness of States in this regard.[560]

The Common Article 3 provision may be considered to be a fairly weak basis for ICRC action. However, the Pictet's Commentary considers it to be "of great moral and practical value" and to reflect a reduced version of the equivalent provision in the law of international armed conflict. It should be noted in this regard that the 1929 Geneva Convention on Prisoners of War "did not give the Committee any more definite basis of action; it was nevertheless sufficient during [the Second World] war to permit eleven thousand camp visits, to relieve millions of prisoners, and to transport and issue supplies worth 3,400 million Swiss francs in the camps".[561]

Therefore, the ICRC's work is often carried out without a firm basis in the rules of IHL. Even limited *ad hoc* agreements often make it possible to save human lives or alleviate suffering during a conflict.[562] It could be said that the organization often makes its case for IHL compliance, in what is best regarded as non-legal terms. The ICRC's alternatives to "law talk" include a vast array of different arguments. For example, it could argue that changed behaviour will reduce the suffering of innocent victims of the conflict; will improve the target's domestic

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[555] Pfanner, "Various mechanisms", *supra nota* 246, p 294.

[556] Greenwood,"Ensuring Compliance", *supra nota* 3, p 198.

[557] Jakob Kellenberger, "Speaking out or remaining silent", 85 *International Review of the Red Cross* (2004) 593–610.

[558] Art 126 GC III and Art 143 GC IV. This also includes a real right of supervision. E.g. Afganistan (2002); Iraq (2003); Lebanon-Gaza-Israel (2006/2009)

[559] Pfanner, "Various mechanisms", *supra nota* 246, p 292.

[560] Sivakumaran, *The law of non-international armed conflict*, *supra nota* 337, p 468.

[561] *Ibid*, p 469.

[562] *Nicaragua, supra nota* 182, para 243.

or international reputation; will improve the efficiency, discipline, or internal functioning of the target's armed or security forces; or is demanded by the customs and mores of the society.[563] This is a good illustration of the multifaceted and multidisciplinary approach that should be taken towards implementation.

The ICRC truly is the guardian of IHL, and works relentlessly towards its implementation. This can also be witnessed in many other paragraphs of this thesis, from the commentaries to the Conventions to contributing to the enforcement mechanisms. As an attestation to the main argument of this thesis, the ICRC now focuses heavily on prevention activities and dialogue with armed groups, as well as making sure that the required national implementation measures are in place in every State.

[563] Ratner, "Law Promotion Beyond Law Talk", *supra nota* 499, p 478. Hugo Slim & Deborah Mancini-Griffoli, *Interpreting Violence: Anti-civilian Thinking and Practice and how to Argue Against it More Effectively* (Geneva: Centre for humanitarian dialogue, 2007) 24–28.

4. ENSURING RESPECT THROUGH MECHANISMS AND BODIES OF SUPERVISION

As illustrated, there are many means, methods, and bodies that are designed to ensure compliance with IHL. In this chapter, the focus will be on supervision mechanisms, i.e. those that are designed to ensure that before, during and after an armed conflict the provisions of IHL are properly observed. While we are not lacking in such mechanisms, there is a huge gap between what is prescribed by international law and the reality of armed conflicts. In fact, for many years the international community has relied almost entirely on one supervision method – the monitoring function of ICRC. Here I test one of the hypotheses put forward in the introduction. I argue that there are enough treaty based measures to enable a proper monitoring and supervision system, but the measures are just not used in practice. Being codified in the Conventions, they are in principle obligatory and there should be no legal obstacles in using them.

The specific reasons behind the reluctance of using other mechanisms differs from case to case, but there are at least two reasons of a more general nature. The first one is that the system as a whole has been devised for international armed conflicts, while most of the conflicts after the Second World War were non-international armed conflicts in which no supervision mechanisms (except the right of the ICRC to offer its services) are applicable under IHL provisions. The second reason is that IHL belongs to traditional interstate international law; therefore, its implementation is left to States. This needs a great deal of international cooperation and coordination as well as some flexibility of sovereignity. Unfortunately, this cooperation-oriented approach is still lacking.[564]

4.1. Supervision mechanisms

Most of the existing monitoring compliance mechanisms are rather weak, or have not been used in practice. This led the ICRC to conduct a series of regional expert meetings in 2003 on the subject "Improving Compliance with International Humanitarian Law". Proposals for new measures or mechanisms for improving respect for IHL included a system of either *ad hoc* or periodic reporting and the institution of an individual complaints mechanisms; the creation of a committee of States or of independent IHL experts to serve as a "Diplomatic Forum" for addressing situations of humanitarian law violations; and the establishment of an Office of a High Commissioner for IHL that could be created as a "treaty body" to the Conventions and Protocols.[565]

Participants nonetheless expressed some concern that the general international atmosphere was not conductive to the establishment of new mechanisms. Despite

[564] Mikos-Skuza, „How can existing IHL mechanisms be better used?", *supra nota* 399, p 35.

[565] Dörman, "Dissemination and monitoring compliance", *supra nota* 184, p 242.

the rather limited effectiveness of existing mechanisms, a majority of the participants felt that they were not defective, but rather suffered from lack of political will by States to use them.[566]

Sandoz believes that monitoring the compliance of States with norms of international law, as a form of preventive diplomacy, is a major way of making international law more effective. The role and significance of enforcement mechanisms, such as international arbitration, will increase, but the most effective instruments for promoting the effectiveness of international law are the various implementing, monitoring, or supervisory machinery and procedures.[567]

During the drafting of the 1977 Protocols, the ICRC itself put forward various ideas for international supervision of parties involved in a conflict. Among the avenues suggested were potential roles for existing international and regional organizations, the establishment of an international commission on humanitarian law or the creation of an international court on IHL.[568] Certain mechanisms of the UN could have a specific competence to deal with IHL (e.g. a specific subsidiary body of the Human Rights Council), a High Commissioner of IHL could exercise functions similar to those of the bodies for implementation of human rights, or a limited inter-state body could supervise the application of IHL, whether treaty- or resolution-based.[569] The idea of setting up a body for the purpose of monitoring the application of IHL in armed conflicts or of entrusting this task to an existing body has been mooted on various occasions, however it was rejected by the 1974–1977 Diplomatic Conference.[570]

More recently, the idea was also rejected at the 2015 Geneva International Conference of the Red Cross and Red Crescent, where after four years of extensive consultations, States were unable to agree on a new mechanism proposed by the ICRC and the government of Switzerland to strengthen compliance with IHL.[571] The new mechanism would have involved setting up an annual meeting of states party to the Geneva Conventions, which would serve as a non-politicized forum for them to share best practices and technical expertise.[572] Even if consensus has not yet been found, all States reaffirmed that IHL remains the appropriate international legal framework for regulating the conduct of parties to armed conflict, and reiterated their willingness to work towards improving its implementation. Other mechanisms, such as the Universal Periodic Review (UPR), have proved to be feasible for sensitive matters on respect for human rights

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566 *Ibid*, p 242.

567 Sandoz, "Implementing International Humanitarian Law", *supra nota* 304, p 275.

568 Pfanner, "Various mechanisms", *supra nota* 246, p 306.

569 *Ibid*, p 306.

570 *Ibid*.

571 ICRC, „No agreement by States on mechanism to strengthen compliance with rules of war", 10.12.2015, <www.icrc.org/en/document/no-agreement-states-mechanism-strengthen-compliance-rules-war> (1.11.2019).

572 *Ibid.*

norms. Recognizing the benefits of peer-pressure is an important way forward to ensure respect for IHL.[573]

The current consultation process has no decision-making power, but a meeting of States has been supported as a "central pillar" of compliance initiatives, and "most States" agree that voluntary reporting on national practice in IHL, and a separate process for thematic discussion, "should be established". A fact-finding function might be "added over time if there is State agreement".[574]

4.1.1. Reporting and monitoring

Executive provisions of the Conventions create both individual and collective responsibility of all parties, thereto for ensuring their implementation. Thus, once implementation is found unsatisfactory, the responsibility of States parties extend to examining its improvements.[575] To find implementation unsatisfactory a reporting and/or monitoring mechanism has to be in place.

However, proposals to introduce an obligation for States to report to an international commission on the way national measures are applied have been rejected on many occasions.[576] Drzewicki, nevertheless, holds that there is a prevailing view that potentials of extra-conventional instruments should be used, and that an essential aspect of a proposed arrangement would be that it has an exclusively voluntary character.[577]

Sound arguments in favour of the reporting system stem from failures in implementing the law. With regard specifically to international law and its implementation within domestic legal systems, a failure in question seems to result from a set of complex and wide-ranging issues, which have accumulated in the course of decades.[578] This was discussed in depth in the first chapter of this thesis.

IHL has traditionally been a noticeably inter-state body of law, where checks and balances have been provided by common interests of belligerent States, rather than by international community considerations and international mechanisms of

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[573] Bellal, "70th Anniversary", *supra nota* 93.

[574] ICRC and Government of Switzerland, Third Meeting of States on Strengthening Compliance with International Humanitarian Law (IHL), 30 June–1 July 2014, Chairs' Conclusions. Available at <www.icrc.org/eng/assets/files/2014/chairs-conclusions-third-meeting-of-states-06-2014.pdf> (1.11.2019).

[575] Drzewicki, „The possible shape", *supra nota* 384, p 74.

[576] Pfanner, "Various mechanisms", *supra nota* 246, p 283. See "Follow-up to the International Conference for the Protection of war victims, (Geneva, 30 August-1 September 1995)", *International Review of the Red Cross* (1995) 4–38. It included an ICRC proposal of a reporting system and the setting up of an international committee of experts on IHL 'to examine the reports and advise States on any matters regarding the implementation of IHL' (pp 25–27).

[577] Drzewicki, „The possible shape", *supra nota* 384, p 76.

[578] *Ibid*, p 74.

monitoring and supervision. With the formation of the ICRC in 1863, the foundation of a semi-official and semi-international monitoring mechanism was created.[579] The 1949 Conventions and their AP I refer to the ICRC and give it the status of a protecting and partly monitoring body with respect to international (normally inter-state) armed conflicts. In particular, the delegates of the ICRC, under Article 126, paragraph 4, of Convention III of 1949, have the same right as representatives of Protecting Powers "to go to all places where prisoners of war may be", and to be able to "interview prisoners of war without witnesses".[580]

4.1.1.1. Legal basis and historical background of the reporting mechanism

As said, preference for a kind of reporting obligation by States Parties has been proposed and discussed on several occasions. Surprisingly, strong opposition on the part of some governments has ensured that such a solution, though worded as a modest obligation, had to be abandoned. However, instruments of IHL contain provisions revealing certain elements of a reporting-like duty. For example, States Parties have to communicate to one another, through the depositary, their official translation of the Conventions and Protocols as well as the laws and regulations adopted to ensure their application. In practice, States largely ignored their duty to transmit the texts of required instruments, and the depositary has been unable to undertake any corrective measures against conduct of States failing to fulfil the obligations in question.[581]

Drzewicki believes that there is ample practical evidence that in a majority of States the degree of conformity of the existing national legislation implementing IHL is highly unsatisfactory. To alleviate this, IHL needs to be effectively integrated into domestic legal systems, and such integration must be monitored on an international level.[582] A first basis for such an arrangement exists in the Resolution V of the 25th International Conference of the Red Cross (31.10.1986), which states in the preambular part that the "…very applicability of international humanitarian law depends largely upon the adoption of appropriate national legislation".[583]

Resolution V, paragraph 1 urges the Governments to fulfil their obligation to adopt or supplement the relevant national legislation, as well as to inform one

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[579] Allan Rosas, "International Monitoring Mechanisms in Situations of Armed Conflicts" – Arie Bloed (ed), *Monitoring Human Rights in Europe, Comparing International Procedures and Mechanisms* (Martinus Nijhoff Publishers, 1993), p 222.

[580] *Ibid*, p 222.

[581] Drzewicki, "Reporting mechanism", *supra nota* 74, p 548; Drzewicki, „National Legislation", *supra nota* 14, pp 115–116.

[582] Drzewicki, "Reporting mechanism", *supra nota* 74, p 551.

[583] Kalshoven, „Implementation and enforcement", *supra nota* 87, p 595; National measures to implement international humanitarian law, Resolution V, 25th International Conference of the Red Cross, Geneva, 23–31 October 1986.

another of the measures taken or under consideration for this purpose. It is specified in paragraph 3 that both Governments and National Societies are to assume the position of report-senders on domestic legislation. It is important to note that implementation was not intended to mean the application process of IHL. Otherwise, Resolution V would have intruded in the sensitive issue of violations, and thus have most likely been met with a strong opposition.[584]

With the adoption of this Resolution, a fundamental breakthrough was achieved for the potential strengthening of the national legislative dimension of implementation of IHL. The Resolution gave ICRC a wide mandate for arrangement of national reporting with an international procedure for regular assessment of legislative information, although its potential remains "dormant" and has brought modest results.[585] Even if States submit reports on domestic implementation voluntarily, such data is not really comparable as there is a lack of consistency and big differences in scope. Also, there is no review mechanism for the assessment of data submitted. Any further attempt to develop such mechanism should thus establish a concrete scope and review (possibly even infringement) procedures.

In 1995, the meeting of Intergovernmental Group of Experts for the Protection of War Victims also discussed the issue and tried to take it further with a Dutch proposal. The proposal to establish a reporting system and an appropriate international review body was unacceptable for some governments. The experts finally adopted Recommendation VI, which provides for some elements of reporting. According to this, States "make every effort to participate in the fullest possible exchange of information on the measures that they have taken to implement their obligations under IHL instruments".[586]

Spieker holds that since there is an alarming degree of failure in enacting national legislation, an urgent need to remedy this has become self-evident. However, Resolution V and Recommendation VI constitute merely dormant opportunities according to her. "One may assume that there is a wide consensus about an imperative necessity to ensure compatibility of national legislation with IHL. If so, there should also be a conductive climate for making the reporting mechanism a viable arrangement through a constructive dialogue".[587]

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[584] Drzewicki, "Reporting mechanism", *supra nota* 74, p 553.

[585] *Ibid*, p 547.

[586] Drzewicki, „The possible shape", *supra nota* 384, p 77. Meeting of the intergovernmental group of experts for the Protection of War Victims, Geneva, 23–27 January 1995: Recommendations, *International Review of the Red Cross* (1995), <www.icrc.org/en/doc/resources/documents/article/other/57jmbm.htm> (1.11.2019).

[587] Heike Spieker, "The Possible Shape of a Reporting System for IHL – Composition and Status of an Evaluating Body" – Michael Bothe (ed), *Towards a better implementation of IHL. Proceedings of an Expert Meeting Organised by the Advisory Committee on International Humanitarian Law of the German Red Cross. Frankfurt/Main, May 28–30, 1999* (Berlin: Berlin Verlag Arno Spitz 2001) 83–103, p 83.

A further attempt to establish a reporting system on a specific field – dissemination – was made during the 1974–1977 diplomatic conference. Drafting Article 83 of AP I on reporting was difficult. Following a proposal of the Conference of Government Experts, the ICRC added a provision on regular reporting about dissemination not only to the depositary, but also to the ICRC. This provision, which "imposed only a very modest obligation" was met with surprisingly strong opposition. As far as paragraph 3 was concerned, some delegations found that "the compulsory submission of reports conflicted with the sovereignty of the High Contracting Parties"; others emphasized that it "placed excessive unilateral obligations on the High Contracting Parties" and even "constitutes some sort of unacceptable control over States".[588] Ultimately, paragraph 3 of Article 83 was deleted because of its mandatory formulation.

Again, at the expert meeting on occupied territories (1998) two noteworthy suggestions emerged. First, the call for regular meetings of the Contracting Parties, which may make it possible to take up the idea of a reporting mechanism once again. Second, the invitation to quickly ratify the Statute of the ICC, the entry into force and implementation of which will substantially improve the effectiveness of IHL.[589]

The 2015 conference discussed this issue further. A resolution on strengthening compliance with IHL was adopted after a heated debate. The idea behind this resolution is the creation of a Forum of States to exchange information on implementation of IHL. The EU countries are strong supporters of this Forum, but, under the leadership of Russia, the result achieved at this conference was mediocre. The only thing that was agreed upon was to continue biannual consultations for the possible Forum and refer the issue to the 2019 ICRC conference.[590] The latter conference will take place in December and is discussing, among others, a draft resolution titled "Bringing IHL home", which once again addresses the issue of reporting, but in a wording that is sadly watered down even more than the previous one.[591]

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[588] Drzewicki, „National Legislation", *supra nota* 14, pp 115–116. The proposed art 72 para 3 should have read: „The High Contracting Parties shall report to the depositary of the Conventions and to the International Committee of the Red Cross at intervals of four years on the measures they have taken in accordance with their obligations Under this article". Was ultimately deleted. (Ukraine, Bulgaria)

[589] Lucius Caflisch, „The implementation of international humanitarian law: experiences and perspectives" – Michael Bothe (ed), *Towards a better implementation of IHL. Proceedings of an Expert Meeting Organised by the Advisory Committee on International Humanitarian Law of the German Red Cross. Frankfurt/Main, May 28–30, 1999* (Berlin: Berlin Verlag Arno Spitz 2001) 121–128, p 126.

[590] Strengthening compliance with international humanitarian law, resolution 32IC/15/R2 of the 32nd International Conference of the Red Cross and Red Crescent.

[591] Bringing IHL Home, *supra nota* 474.

4.1.1.2. Scope of the mechanism. What needs to be reported?

One of the most crucial elements of the reporting system is the identification of substantive scope of reporting. In the absence of explicitly formulated treaty-duty to adopt national legislative instruments, it is very hard to point out which provisions actually need such action. A possible selection criterion would be the non-self-executing provisions of the Conventions. Thus, the substantive content of reports would be those provisions of humanitarian law, which require legislative action, because they are not formulated in a sufficiently precise and complete way to be directly applicable by domestic bodies. However, such a statement defines only a point of departure for a precise identification of provisions, calling for domestic legislative implementation.[592]

In particular, focus should be centred on legislation to implement provisions regarding repression of violations of humanitarian law; provisions concerning protection of personnel and emblems of Red Cross and similar; provisions related to dissemination; provisions concerning states of emergency and other executive provisions. An extensive list of topics in this regard was drafted by the ICRC in 1988 titled "Measures of Implementation (Indicative List)".[593]

Another question is whether States will exclusively or primarily report on the adoption of national implementation measures, or if they will additionally or primarily report on their compliance with substantive obligations under IHL. In addition, should a reporting system be regarded as efficient when reports by States are written and submitted to the respective organ, or should these reports be evaluated? What, then, could the reaction be to an established non-compliance by a State of its implementation and/or substantive duties?[594]

Within the concept of IHL, the applicability of implementation and enforcement obligations as primary peacetime activities is the general rule, and the applicability and application of substantive duties is the exception. Substantive rules are those that protect certain groups of persons. It follows that reports on implementation and enforcement measures are considerably less sensitive than reports on compliance with substantive obligations. On the other hand, the latter would be much more helpful for peer scrutiny and avoiding violations of the law.

A reporting system on peace-time obligations under IHL would, however, help to create a consciousness and culture of implementation of obligations. States simply do not have a sufficient knowledge of the degree, extent or possible ways of national implementation. Spieker believes that this is the reason for a

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[592] Drzewicki, „The possible shape", *supra nota* 384, p 77; Drzewicki, "Reporting mechanism", *supra nota* 74, p 560.

[593] "Respect for International Humanitarian Law: National Measures to Implement the Geneva Conventions and their Additional Protocols in Peacetime", 28 *International Review of the Red Cross* (1988) 130–140.

[594] Spieker, "The Possible Shape", *supra nota* 587, p 84.

considerably high rate of non-implementation, not the lack of political will to implement.[595]

One option would be to focus on a specific topic in each reporting-cycle. This is done in many EU working group formats (i.e. reporting on the progress made on bringing national laws in conformity with EU standards). Examples could include prosecution of war crimes, protection of the emblem, legal advisers in armed forces, qualified personnel in IHL, dissemination, location and identification of protected objects, and national bodies dealing with implementation of IHL.[596] Such international dialogue would most likely result in a higher level of national implementation, as a peer-review process is designed ultimately to improve the situation not pass judgment.

As said, it is the purpose of any reporting system not only to furnish some sort of information to an international control body, but also to lead to an internal and integrated discussion process. This process is to enable respective national authorities to assess States' compliance with international law obligations.[597]

4.1.1.3. Possible shape of reporting mechanism. How the reporting should be done?

The peace-time obligations of national implementation and enforcement are permanent duties, and could therefore be reported regularly in a set time-frame, and a non-permanent evaluating body would likely be sufficient for their review.[598] In consequence, States would submit their reports to a non-permanent evaluating body, which would, after its initial evaluation (and maybe a follow-up) provide transparency and publicity in a plenary organ, serving the further purpose of improving the implementation of IHL at the national level.[599]

On the other hand, there is the theoretical possibility of national reports on a State's actual behaviour in international and non-international armed conflicts, i.e. on the compliance with substantive duties of the Conventions and Protocols. In this case, *ad hoc* reporting would be needed. The main purpose of reports on such an *ad hoc* basis would be to assure compliance with the substantive humanitarian law obligations by the State in question. For this, a formal type of monitoring mechanism and evaluating body would be needed, one which would be in the position to draw conclusions from established non-compliances.[600] It would

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595 *Ibid*, p 87.

596 *Ibid*, p 97.

597 *Ibid*, p 85. (Set the national process in motion, that is compel states to verify their legal practice on a permanent basis)

598 *Ibid*, p 89.

599 Spieker, "The Possible Shape", *supra nota* 587, p 90.

600 Drzewicki, „National Legislation", *supra nota* 14, p 120.

then be for next cycles to request further legislative information to fulfil gaps and omissions of earlier reports.[601]

Experience of HRL treaty-based bodies has demonstrated that an effective impact on domestic legislation may best be exerted through a regular reporting, expertise in assessment of conformity of national legislation with international treaty obligations, and an interaction between a report-sender and report-recipient. For IHL, a specialized body (Commission of Experts) should be established to deal with substantive assessment of submitted reports. This could also offer advisory legal services and draft model legislative acts. Within the context of IHL, the ICRC has effectively assumed such role and tried to help States and non-state actors in their efforts.

Spieker holds that the reporting system should comprise a plenary organ (the International Red Cross Conference) and a separate evaluating body. The evaluation of State reports should possibly include an encouragement of the reporting State to improve any possible deficits in implementation, enforcement and criminal prosecution measures. The body of initial evaluation could consist of independent experts, governmental experts, ICRC staff and national societies as observers.[602]

If the ICRC Conference were the final recipient of these reports, it would be logical to have a reporting period of 4–5 years. It is conceivable that the Conference would decide upon the basic principles of the reporting system as a demonstration of consensus, whereas the Assembly of the ICRC would be responsible for the enactment of more detailed guidelines for the procedures.

After reporting, a systematization of information collection and the evaluation dialogue could be foreseen by an expert group. As a result, conclusions and recommendations could be adopted by the Committee, which are then first sent to the State for comments, and then rendered public. A public document on the caps in implementation could be a powerful tool to foster compliance.[603] As said, a similar process is used in many other fields of law and has proven very useful. For example, there are the Universal Periodic Reviews by the UN on the situation of human rights issues described in the next sub-chapter.

Luigi Condorelli and Laurence Boisson de Chazournes have suggested solutions that are more comprehensive. Having accepted that implementation of the obligation to "nationalize", IHL deserves the greatest attention – they attribute particular significance to an opportunity for the ICRC to conceive and programme a constant and generalized verification of States' performance of their duty to take internal legislative actions. They further suggest that as a follow-up to such

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[601] The partial reporting might not work in every case though. For example, the International Committee on Economic, Social and Cultural Rights under the UN system finally changed its arrangements from partial reporting towards a comprehensive reporting.

[602] Spieker, "The Possible Shape", *supra nota* 587, p 99.

[603] *Ibid.*

verification procedures the ICRC might exert appropriate pressures on each State to remedy the possible defects of its own legal order.[604]

4.1.1.4. Examples

It took some time for the ICRC to reflect upon a more concrete *modus operandi* to be adopted for following up Resolution V. After a year and a half, the ICRC contacted, by letters of 28 April 1988, the States Parties to the Conventions and the National Societies. The letters contained a request to submit the relevant information on national legislative measures to implement IHL and replies were requested within six months. The ICRC reported that by 30 June 1989 only twenty-six replies from States Parties and fifteen from the National Societies were received. The preliminary examination of the replies by the ICRC indicated quite poor quality compared with what had been requested.[605]

A couple of examples on reporting can be given here. The 1963 to 1969 procedure of repression of violations of the Conventions and the 1977 to 1981 reporting on the use of the emblem. The legal basis of the former was Resolution VI stemmed from the ICRC Council of Delegates. Only 49 reports were submitted, and no particular follow-up actions were taken. In the latter case, the ICRC initiated consultations of all National Societies, received 55 answers, and extended its activities to a follow-up action offering both comments on the existing legislation and a series of detailed guidelines on regulations that should be adopted by States.[606]

States can choose to voluntarily send the ICRC a periodic overview of their implementing actions. In 1998, Estonia submitted a report on all implementation measures foreseen in the Conventions (from the legal point of view). This gave the country a good overview of where the caps are and what needs to be improved.[607] A public seminar was organized at the Ministry of Foreign Affairs to introduce the report and draw attention on the importance of IHL. The report served as a basis for an academic follow up study that I conducted 10 years later and published as a master's thesis. However, the 1998 report remains the first, and only one, on implementing IHL in Estonia to this day, and is very hard to retrieve from any public source. It seems, therefore, that submitting these reports depends largely on the enthusiasm of some government officials.

A more recent and agreeable example is the voluntary report by the UK from 2019, led by the UK National Committee on International Humanitarian Law. It

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[604] Drzewicki, „National Legislation", *supra nota* 14, pp 113–114.

[605] Drzewicki, "Reporting mechanism", *supra nota* 74, p 555.

[606] Drzewicki, „National Legislation", *supra nota* 14, p 119.

[607] ICRC, „Implementation of International Humanitarian Law: Estonia". Report (1998); Välisministerium, seminar „Rahvusvahelise humanitaarõiguse rakendamine Eesti Vabariigis", 28.09.1998, <vm.ee/et/uudised/valisministeriumis-toimub-seminar-rahvusvahelise-humanitaarõiguse-rakendamine-eesti> (1.11.2019).

comes in the form of a colourful booklet – which looks more like a commercial material than an official report – but is a very welcome contribution nevertheless. "The report is in the form of a short questionnaire, divided into five sections: (i) general 3 domestic implementation, (ii) dissemination and training, and access to legal advice, (iii) violations of IHL under national criminal law, (iv) protections, and (v) means and methods of warfare. The question and answer format seeks to provide a record of the UK's implementation in an accessible way to anyone with an interest in IHL matters."[608] By submitting this report, the UK has illustrated its commitment to ensuring respect for IHL, and hopefully will encourage other States to follow its lead.

As an interesting analogue, the UN Human Rights Council has introduced a Universal Periodic Review (UPR) system. This mechanism provides for a review of the human rights situation in each of the 192 UN Member States. However, with the GA Resolution 60/251, IHL was also clearly incorporated into the UPR machinery. Depending on the expertise of States, and the efforts and attention paid to IHL, the review of compliance with IHL under the UPR mechanism will become more comprehensive, adding another opportunity to address shortcomings concerning IHL enforcement on the part of States.[609]

IHL has been touched upon on several occasions in the review process in cases where the country in question was involved in an armed conflict.[610] At the 74th session of the Human Rights Council the following countries were reviewed: Angola, Bolivia, Bosnia and Herzegovina, Egypt, El Salvador, Fiji, Iraq, Kazakhstan, Madagascar and the Gambia.[611] This system could also be explored further to further monitoring and reporting of IHL.

4.1.1.5. Possible improvements

Although the proposed mechanism is to be of a legally non-binding character, it should nevertheless be clear that it can be placed in close proximity to the already established obligation of States. On the one hand, States are under the obligation to enact necessary legislation and, on the other, to communicate to one another

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608 United Kingdom Government, Foreign and Commonwealth Office, Voluntary Report on the Implementation of International Humanitarian Law at Domestic Level, 2019, <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/784696/Voluntary_Report_on_the_Implementation_of_International_Humanitarian_Law_at_Domestic_Level.pdf> (1.11.2019).

609 Zyberi, "Enforcement", *supra nota* 98.

610 Pfanner, "Various mechanisms", *supra nota* 246, p 320. See for example the UPR process outcome on Israel, Cape Verde, Colombia and Uzbekistan, available at <www.reliefweb.int/rw/rwb.nsf/db900sid/VDUX-7QBUCS?OpenDocument> (1.11.2019).

611 Agenda of the seventy-fourth session of the General Assembly, Adopted by the General Assembly at its 2nd plenary meeting, on 20 September 2019, A/74/251

the texts of relevant legal instruments. Neither obligation has been supplemented by any special rule enabling the supervision of their effective realization.[612]

Dutli stated in 1999 that there are many States which have no legislation or inadequate legislation in this regard. At that time, she held (supported by the ICRC) that it is premature to establish a reporting system, even if it is on a voluntary basis. Many States would have no concrete information to submit to such a system, and there is a risk that only those States which already have a high level of implementation would submit reports.[613] While this might have been the case 20 years ago, it should not hinder the aspirations to establish a reporting system today. The major consultation processes of the last decade prove that the idea of a reporting system is not premature anymore, and definitely not because of the lack of information, which by now is abundant. Most States agree to some type of reporting system, but there are unfortunately a few big powers against it.

Writing in 1999, Bothe proposed the creation of an International Humanitarian Law Implementation Information Exchange System (IIES) that would still be non-confrontational. The purpose must be to ensure a smooth functioning of IHL in the difficult moment of application, i.e. in times of armed conflict, by preparing a normative, political and even cultural support system for that application already in peacetime. The creation of a reporting or similar system would be part of modernizing the relatively old treaty regime of the Conventions, bringing that regime in line with the current constitution of the international system.[614]

According to Caflisch, a treaty system could be set up under which each contracting State would be required to report in regular intervals on implementation on the domestic level, so as to make it possible to detect, abate and, possibly, sanction non-compliance. Under the system, contracting States might also present alleged cases of non-compliance before a treaty organ to obtain a condemnation and, possibly, some form of redress. Treaty bodies could further be entrusted with the competence to proceed to announced or even unannounced inspections.[615] This kind of system would truly contribute to better implementation of IHL, but is still quite hard to achieve.

However, success is not absolutely beyond reach as is illustrated by similar cases in other fields of international law. For example, the creation of ICC that was unsuccessfully promoted by the International Law Commission for years or

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[612] Drzewicki, „National Legislation", *supra nota* 14, p 121.

[613] Maria Teresa Dutli, „The ICRC Advisory Service on International Humanitarian Law" – Michael Bothe (ed), *Towards a better implementation of IHL. Proceedings of an Expert Meeting Organised by the Advisory Committee on International Humanitarian Law of the German Red Cross. Frankfurt/Main, May 28–30, 1999* (Berlin: Berlin Verlag Arno Spitz 2001) 59–67, p 67.

[614] Michael Bothe, "Where do we go from here? An attempt at a Summary" – Michael Bothe (ed), *Towards a better implementation of IHL. Proceedings of an Expert Meeting Organised by the Advisory Committee on International Humanitarian Law of the German Red Cross. Frankfurt/Main, May 28–30, 1999* (Berlin: Berlin Verlag Arno Spitz 2001) 129–135, p 129.

[615] Caflisch, „The implementation of international humanitarian law", *supra nota* 589, p 121.

the Ottawa Process that managed to ban anti-personnel mines despite it looking impossible and undesirable at first.[616] With sufficient perseverance and fortunate timing, the proponents of the reporting system could well succeed. This will be seen very shortly at the next ICRC Conferences.

4.1.2. Protecting Powers

Upon the outbreak of an international armed conflict, it is not uncommon for the warring States to suspend or terminate diplomatic contact. In such situations, "Protecting Powers" may be appointed to safeguard the interests of one State in the other, and to serve as an intermediary between the two States.[617]

A Protecting Power is traditionally a neutral State mandated by a belligerent State to protect its interests and those of its nationals', *vis-à-vis* an enemy State. Its role is twofold: it can conduct relief and protection operations in aid of victims, and can at the same time supervise the belligerents' compliance with their legal undertakings.[618] According to Article 5, paragraph 1, of AP I it is the duty of the parties to a conflict "to secure the supervision and implementation of the Conventions and of this Protocol by the application of the system of Protecting Powers". The Conventions also provide for the possibility of a conciliation procedure also involving the Protecting Powers, if there is disagreement between the belligerent States as to the application of interpretation of the Conventions.[619]

4.1.2.1. Historical background

Analogues of this institute date back to the 16th century, when only the great Powers had the financial means to maintain embassies and in order to make sure that their nationals were given protection, smaller States agreed to entrust this task to other States.[620]

Protecting Powers played an important part in applying these Conventions during the First World War, by virtue of an international custom recognized to varying extents. Their task was by no means always easy, and States wanted to see the institution mentioned in a Convention. Therefore, a new framework for the implementation of humanitarian norms, called "control" (changed to "scrutiny" in 1949) emerged in the context of prisoners of war. According to Abi-Saab, "It

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616 *Ibid*, p 127.

617 Sivakumaran, *The law of non-international armed conflict*, *supra nota* 337, p 457.

618 Pfanner, "Various mechanisms", *supra nota* 246, p 287; and the conflict between France and Tunisia over Bizerte (1961).

619 Art 11 of GC I–III and Art 12 of GC IV.

620 Sandoz, "Implementing International Humanitarian Law", *supra nota* 304, p 266; *New Commentary, supra nota* 119, point 1018. Although it is not specifically mentioned in the Hague Conventions.

was a preventive/corrective technique aiming at establishing an early warning system of potential violations. The third party, through periodic verifications, could draw the attention of the detaining power to situations where the treatment of the prisoners of war fell below the prescribed standards. /…/ The encouraging results of this new technique led to its codification in the 1929 Geneva Prisoners of War Convention, where both the role of the Protecting Powers and the ICRC were recognized".[621]

However, the article only recognized "a possibility of collaboration" between Protecting Parties, and thus did not go very far. The choice of delegates of the Protecting Power was subject to the consent of the Detaining Power. Although the article was widely applied during the Second World War, it proved imperfect on several respects. There were no treaty-based provisions authorizing the Protecting Powers to act on behalf of enemy civilians or take action in occupied territory.[622] When the conflict spread, the few States remaining neutral had to agree to act as Protecting Powers for more than one country, including adverse Parties. They thus tended to become a kind of arbitrator, a role that was not originally envisaged. In such conflicts the lack of Protecting Powers was cruelly felt by civilians in enemy hands.[623]

The above mentioned difficulties prompted the ICRC, when it initiated preparations for the adoption of new Conventions in the aftermath of the Second World War, to direct its focus to three points: the extension to all the Conventions of the principle of supervision by the Protecting Power; arrangements for the replacement of Protecting Powers no longer able to act; and making supervision obligatory.[624] Achieving all of these objectives proved a difficult task.

4.1.2.2. Legal basis

Originally, the duties of the Protecting Power were to act as agent for the appointing power and to deal with complaints. Nowadays the duties are laid down in the GCs and AP I, including general supervisory duties. Only the Wounded Convention allows the activities of the protecting power to be restricted. This is because that convention is primarily concerned with battlefield activities, where there may be valid security reasons for restricting the activities of agents of the protecting power.[625]

The legal basis of today's Protecting Powers system derives from Article 8 of Convention I and Article 5 of Protocol I.

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621 Abi-Saab, „The specificities of humanitarian law", *supra nota* 27, pp 277–278.

622 *New Commentary, supra nota* 119, point 1022.

623 Sandoz, "Implementing International Humanitarian Law", *supra nota* 304, p 267.

624 *New Commentary, supra nota* 127, pp 91–92.

625 Rogers, *Law on the battlefield*, *supra nota* 106, p 353.

Article 8 GC I provides in relevant part:

> The present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers. The said delegates shall be subject to the approval of the Power with which they are to carry out their duties.[626]

An alternative for such Powers is provided in Common Article 10/10/10/11:

> If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to the provisions of this Article, the offer of the services of a humanitarian organization, such as the ICRC, to assume the humanitarian functions performed by Protecting Powers under the present Convention.

At the 1974–1977 Conference, an attempt was made to make the Protecting Power system both mandatory and default proof. As it stands now, Article 5 requires that the parties to an armed conflict have the duty, from the very beginning of the conflict, to ensure the supervision and implementation of the Conventions and Protocol I by applying the system of Protecting Powers. In addition, the Protocol lays down detailed procedures to facilitate the designation and acceptance of Protecting Powers. If all these fail, the ICRC or any other organization may offer to act as a substitute, which the belligerent parties "shall accept without delay."[627] Improvement was envisaged by a considerably longer Article 5 of Protocol I, however.

Nevertheless, the new article has been called both "the triumph of sovereignty" and a "story of initial success and ultimate failure".[628] The opening words of paragraph I display the former:

> It is the duty of the Parties to a conflict from the beginning of that conflict to secure the supervision and implementation of the Conventions and of this Protocol by the application of the system of Protecting Powers, including 'inter alia' the designation and acceptance of those Powers, in accordance with the following paragraphs. Protecting Powers shall have the duty of safeguarding the interests of the Parties to the conflict.

The crucial words "in accordance with the following paragraphs" display the latter. In the other paragraphs of the Article, we find the need for the consent of both of the belligerents and, in paragraph 3, of the proposed Protecting Power. In

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[626] *Ibid*. It continues with two other paragraphs not of a particular relevance to our case.

[627] Kuan-Tsyh Yu, „The development", *supra nota* 62, p 12; Jean Pictet (ed), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Geneva, 1987).

[628] Draper, „The implementation of the Geneva Conventions", *supra nota* 344, p 18.

a case where the ICRC may make an offer to act, as a substitute, in the absence of a Protecting Power, it must be accepted without delay by the Parties to the conflict. Moreover, the ICRC made it clear during the conference that it could not promise that it would always be in position to make such an offer. The UN for its part made it clear that it would not be willing to act as an international standing Protecting Power.[629]

Sandoz notes that the rather complicated series or provisions contained in this article has never been used; in practice this role has been taken over by the ICRC. Exactly on what grounds has not been clearly established.[630] The question remains as to the effect of Article 5 of the Protocol upon the existing provisions of the Protecting Powers in the Conventions. For States Parties to the Protocol and the Conventions, the former "supplements" the latter. Only States Parties to the Conventions may become Parties to the Protocol. The effect may be that in relation to the role of the ICRC as a substitute for a Protecting Power, any advance made by the Conventions in Common Articles 10/10/10/11, paragraph 3, is negatived by Article 5 (4) of the Protocol, controlling the role of the ICRC as a substitute.[631]

Therefore, in theory the system as it stands now is obligatory. However, the delegates of the Protecting Powers "shall be subject to the approval of the Power with which they are to carry out their duties" and the impossibility of agreement on this point cannot be ruled out.

4.1.2.3. The main elements and purpose of the system

Arguably, the most effective deterrent to the commission of war crimes in international armed conflicts is the presence of observers who can scrutinize the performance of the parties to the conflict, complain to a party about perceived violations of legal norms, and report such violations to the aggrieved party.[632]

As established, the parties to the conflict have the duty to appoint Protecting Powers, which safeguard their interests and has to implement humanitarian law by supervision, inspection, assistance, and transmissions. It has the right to inspect prisoner-of-war camps, to assist in judicial proceedings, to deliver notes to the belligerents, and to render good offices. Through a Protecting Power, a kind of neutral supervision is created, even though the Protecting Power is obliged to advocate the interests of the party to the conflict that it represents.[633]

Kalshoven believes that "A close scrutiny of the provisions of the Geneva Conventions shows that the supervised implementation of a large part of their humanitarian provisions devolves upon the Protecting Power. Without it, the

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629 *Ibid*, p 18.

630 Sandoz, "Implementing International Humanitarian Law", *supra nota* 304, p 274.

631 Draper, „The implementation of the Geneva Conventions", *supra nota* 344, p 18.

632 Aldrich, "Compliance with the law", *supra nota* 7, p 6.

633 Vöneky, "Implementation and Enforcement", *supra nota* 19, p 686.

monitoring system for implementation is largely threadbare and implementation is left to the good faith of the belligerent and the force of reciprocity."

However, there are at least two factors that have weakened the system. First, neutrality is neither widespread nor appreciated anymore. The number of neutral States willing to act as Protecting Powers and are acceptable to one or other belligerent is limited. Second, the functioning of the system requires a threefold consensus by the three States concerned, each of which can bring its sovereignty to prevent the system from being effective.[634]

The "co-operation and scrutiny" of the Protecting Powers has in practice assumed the character of management of interests and mediation. For example, when their delegates become aware that prisoners of war are suffering from bad housing conditions or lack of food, it is their job to seek an improvement of the situation. On the other hand, it is not the task of Protecting Powers to act as a public prosecutor, investigating and exposing violations of the Conventions. Kalshoven wittily points out that if they would embark on such a course of action, they would soon find themselves discharged of their functions.[635]

The Protecting Power is also given significant oversight functions with respect to relief shipments for prisoners of war, the conduct of judicial proceedings involving prisoners of war, and the resolution of any disputes between the Parties to the conflict. Cassesse holds that although the Protecting Power aims to protect the interests of the parties, it is also a mechanism that may be activated in order to contribute to the enforcement of IHL.[636] As such, the system has elements of both implementation and enforcement.

In reality, the ICRC has carried out this role in most conflicts. Its representatives have carried out various humanitarian and monitoring tasks provided for in the Conventions; even in cases where protecting powers have been appointed to look after certain interests of the belligerents.[637] In fact, some authors find that the option of employing Protecting Powers cannot realistically be considered functional today (if ever), and notwithstanding the potential role of other humanitarian organizations, the reference to the ICRC is crucial.[638]

One difference between the mode of acting of a Protecting Power and a substitute such as the ICRC is that, while the former is obliged to safeguard in particular the interests of the Party to the conflict it represents, the emphasis in respect of the substitute is on its impartiality. For an organization like the ICRC, it is evident that it will focus first and foremost on the interests of the victims of the conflict.[639]

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634 Kalshoven, „Implementation and enforcement", *supra nota* 87, p 615.

635 *Ibid.*

636 Antonio Cassese, „On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law", 9 *European Journal of International Law* (1998) 2–17, p 4.

637 Roberts, "The Laws of War", *supra nota* 94, p 33.

638 Brollowski, "The responsibility to Protect", *supra nota* 167, p 99.

639 Kalshoven, „Implementation and enforcement", *supra nota* 87, p 617.

4.1.2.4. Examples

As said, although the 1929 provision did not place any obligations on the High Contracting Parties, it proved extremely useful during the Second World War, when most of the belligerents called upon the services of a Protecting Power. Switzerland, for instance, performed this function simultaneously for up to 35 States.[640] Earlier, in the Winter War between Finland and the USSR, a Finnish request for such appointment was refused by its opponent.[641]

Shortly after the end of the Second World War, Switzerland unilaterally renounced its safeguarding of German interests in view of the disappearance of the Reich Government. Similarly, Switzerland refused to safeguard certain Japanese interests because it no longer enjoyed free communication with the Japanese Government, which was controlled by the Allied Powers at the time. These two examples show that, at least in Swiss practice, a Protecting Power's purpose depends on having a mandate from a government.[642]

Protocol I was negotiated soon after the end of the war in Vietnam, and its provisions were certainly influenced by experiences of that war. The US tried its best during the Vietnam War to convince North Vietnam to accept a Protecting Power. At the beginning of 1966, the US even obtained the consent of Egypt to serve in that capacity, although Vietnam would not agree.[643]

In practice, the various formal provisions for the role of Protecting Powers have been of little use after the Second World War, because States in conflict with each other have almost always been unwilling or unable to agree on the appointment of such powers. This might also result from a fear that the designation of a Protecting Power will be seen as recognition of the other Party or unwillingness to admit that an armed conflict exists. Yet, there have been some cases in practice where they were used, for example, in the 1971 Indian-Pakistan War and in the 1982 Falklands War.[644] However, their neutrality has been said to be "at best questionable", as they were generally picked by only one party and focused on securing political interests rather than on the protection of individuals.

The Protecting Power system does not apply to non-international armed conflicts in the strict sense. Conceivably it could apply, as a neutral State may be able to carry out the role on behalf of the armed group. The parties could also be persuaded to accept some form of international intervention. There is one ancient instance of this in practice. During the Boer war (1899–1902), at the request of

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[640] Brollowski, "The responsibility to Protect", *supra nota* 167, p 98. Protecting Powers were mentioned in the 1929 Convention and used during WW II.

[641] Yu, „The development", *supra nota* 62, p 16; Ingrid Detter De Lupis, *The Law of War* (London: Cambridge University Press, 1987), p 323.

[642] *New Commentary, supra nota* 119, point 1052.

[643] Aldrich, "Compliance with the law", *supra nota* 7, p 10.

[644] Roberts, "The Laws of War", *supra nota* 94, p 32. Sandoz, "Implementing International Humanitarian Law", *supra nota* 304, p 271.

the British Government, the US Consul in Pretoria took charge of Britain's interests in the Transvaal Republic and Orange Free State.[645]

In addition, Common Article 3(2) expressly refers to the right of "an impartial humanitarian body, such as the ICRC to offer its services to the Parties to the conflict". AP II Article 18 also refers to relief actions for the civilian population but, while referring to national relief societies and national Red Cross and Red Crescent organizations, avoids mentioning the ICRC.[646] Despite these shortcomings in treaty law, the ICRC has been able to carry out humanitarian activities, including certain monitoring functions, in a number of non-international armed conflicts as well as situations of internal disturbances and tensions.[647]

4.1.2.5. Potential improvements

A Protecting Power has no formal sanctions with which to require compliance, but its supervision can help to prevent violations and the threat of publicity, which its presence creates, can be a powerful informal weapon.[648]

Increased use of the Protecting Power system would undoubtedly lead to a greater degree of compliance with the law, if only because many violations seem to be the product of neglect rather than deliberate State policy and are thus less likely to occur if there is some form of outside scrutiny.[649] Just like the reporting mechanism mentioned in the previous sub-chapter.

However, the institution has, at best, played a marginal role as a monitoring and supervisory mechanism. In practice, the Protecting Powers system has not been used in recent years. Instead, the ICRC has come to be recognized as a substitute for the Protecting Power.[650]

Indeed, the contrast between the law and practice is striking. The Protecting Powers system was designed to be a 'crucial part of the law', and '[t]he cornerstone of the system of implementation'.[651] Since the Second World War, this system has very rarely been set in motion, leading Pfanner to believe that the chances of its being used successfully in future are slim, given the politically

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[645] Sivakumaran, *The law of non-international armed conflict*, *supra nota* 337, p 458.

[646] For political reasons, it was not possible at the 1974–1977 Geneva Diplomatic Conference to include express references to the ICRC.

[647] ICRC, Protection of Victims of Non-International Armed Conflicts (Report V submitted to the Conference of Government Experts on the Reaffirmation and Development of IHL Applicabe in Armed Conflicts, Geneva 1971, <www.loc.gov/rr/frd/Military_Law/pdf/RC-conference_Vol-1.pdf> (1.11.2019).

[648] Greenwood,"Ensuring Compliance", *supra nota* 3, p 197.

[649] *Ibid*, p 203.

[650] By 1982, it had been used four times: Suez 1956, Goa 1961, India and Pakistan 1971–1972, Falklands-Malvinas 1982. Cassese, „On the Current Trends", *supra nota* 636, p 4.

[651] Sivakumaran, *The law of non-international armed conflict*, *supra nota* 337, p 457; Abi-Saab, „The specificities of humanitarian law", *supra nota* 27, p 311.

delicate role a State would have to play to discharge its responsibilities as a Protecting Power.[652] Seemingly, practice since 1949 has evolved to the point of considering the appointment of Protecting Powers as optional in nature. This does not preclude, however, that Protecting Powers may still be appointed in future international armed conflicts on the basis of Article 8.[653]

Whenever an international armed conflict occurs, the parties involved should be pressed to designate protecting powers, as required by the Conventions and Protocol I. Refusal to agree to a protecting power should be treated as a serious violation of the Conventions.[654] This should be done hand in hand with the reporting and monitoring obligation of States.

4.1.3. Fact-Finding and enquiry

As a conflict gets under way, the opposing propaganda machines start working at full capacity and allegations of misconduct will emerge. It is a well-known adage that the first victim of war is the truth.[655] To remedy this, the Conventions also provide for the possibility of an enquiry procedure concerning alleged violations of the Conventions.[656] However, the manner of the enquiry, including the possible choice of an umpire, must be agreed between the interested parties. This procedure has apparently never been used. The ICRC has in some instances been asked by one of the parties to a conflict to investigate allegations of breaches but consent from the other party has been lacking.[657]

Bothe holds that certainty about actual facts is a first step in ensuring compliance with an obligation and describes the course of fact-finding procedure by a common scheme: initiation (suspicion/unilateral claim, routine); determination of a mandate; taking evidence (problem of access and reliability); evaluating evidence; statements of facts (report, judgment); reaction.[658]

Fact-finding in a narrow sense, also called "inquiry", may constitute a specific separate or self-contained procedure. However, it serves a purpose to settle disputes and create trust in another actor's behaviour as well. Where fact-finding is used within the context of measures taken to monitor and ensure compliance with

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652 Pfanner, "Various mechanisms", *supra nota* 246, p 287.

653 Cameron, *et al*, "The updated", *supra nota* 61, p 1223.

654 Aldrich, "Compliance with the law", *supra nota* 7, pp 8–9.

655 Rogers, *Law on the battlefield*, *supra nota* 106, p 354.

656 Articles 52/53/132/149. The provision draws upon Art 30 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field 1929.

657 Rosas, "International Monitoring Mechanisms", *supra nota* 579, pp 227–228; Pictet, *Humanitarian law, supra nota* 80.

658 Michael Bothe, „Fact-finding as a means of ensuring respect for international humanitarian law" – Wolff Heintsechel von Heinegg & Volker Epping (eds), *International humanitarian law facing new challenges: Symposium in honor of Knut Ipsen* (Berlin, Springer 2007) 249–267, p 249.

a treaty regime (so-called "verification") its purpose is to detect violations, deter violations and to create confidence.[659]

Fact-finding as a self-contained procedure has to be distinguished from procedures for ascertaining facts that are part of other dispute settlement procedures, in particular international conciliation or judicial proceedings.[660] Greenwood rightly points out that fact-finding should not be seen as a form of international adjudication or arbitration, in which a tribunal investigates, hears arguments, and then gives a judgment that binds the parties. In addition, he suggests that it would be more accurate to see fact-finding missions as part of the diplomatic process, rather than adjudicatory.[661]

Nevertheless, States may also create permanent bodies to ascertain relevant facts. A body of this type is the International Humanitarian Fact-Finding Commission (IHFFC) established pursuant to Article 90 of AP I.

4.1.3.1. Legal basis

Article 52, Convention I provides:

> At the request of a Party to the conflict, an enquiry shall be instituted in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.
>
> If agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.
>
> Once the violation has been established, the Parties to the conflict shall put an end to it, and shall repress it with the least possible delay.[662]

The special rules in Articles 52/53/132 and 149 therefore provide for the creation of an enquiry procedure upon the request of one party to a conflict. Although the ICRC Commentary has always seen this provision as binding, the enquiry procedure provided in the Conventions has never been used successfully, principally due to the lack of automaticity in bringing the fact-finding procedure into force.[663]

The general provision of IHL in article 52 GC I is not a very strongly phased provision, nor one that is likely to overcome the very considerable obstacles in the way of such procedures in the heated exigencies of actual armed conflict. A provision that is much more detailed is now found in article 90 of 1977 AP I.[664]

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659 *Ibid*, p 250.

660 *Ibid*, p 254.

661 Greenwood,"Ensuring Compliance", *supra nota* 3, p 199.

662 *New Commentary, supra nota* 119, Art 52.

663 Sivakumaran, *The law of non-international armed conflict*, *supra nota* 337, p 459. Vöneky, "Implementation and Enforcement", *supra nota* 19, p 689.

664 McCoubrey, *International Humanitarian Law, supra nota* 78, p 287.

At the 1974–1977 Geneva Diplomatic Conference a permanent International Enquiry Commission was proposed to investigate alleged violations of the Conventions. After lengthy discussions it proved possible to form such a commission, designated the International Fact-Finding Commission. The price that had to be paid for this novelty, which many States viewed with suspicion, was that the applicability of Art 90, as a "miniature convention", was made dependent on separate acts of State consent.[665] The aim of the article was to systematize the enquiry process and to help prevent polemics and violence from escalating during a conflict.

4.1.3.2. Historical background

The concept of an enquiry procedure as a means to resolve diverging views among States was not new in 1949. It was introduced into a multilateral treaty for the first time with the adoption of the 1899 Hague Convention (I). The procedure was later considerably developed when the Convention was amended in 1907. In this latter version, the Hague Convention recommends the establishment of an "International Commission of Enquiry" to facilitate the solution of disputes of an international nature that may arise from "a difference of opinion on points of facts". Such Commission must be instituted by special agreement between the States concerned, and its conclusions must be limited to a statement of facts, leaving to these States "entire freedom as to the effect to be given to the statement".[666] This body is created *ad hoc,* and both parties have to agree beforehand.

When the Protocols were negotiated in 1974–1977, apart from dissemination, the attention of the negotiators of the Protocols concentrated on two traditional instruments already found in the Conventions: The Protecting Powers and inquiry. The negotiators wanted to improve the situation by eliminating the need to establish the inquiry body *ad hoc* by a special compromise, a need which might account for the non-use of the inquiry procedure found in the Conventions since 1929.[667]

Thus, it was proposed to create a standing commission. The proposals which were made, however, went far beyond what is now in Article 90. It was proposed to create a body with obligatory monitoring functions which it could even trigger on its own initiative.[668] This was bitterly opposed by a number of delegations.

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[665] Official records of the diplomatic conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts, Geneva (1974–1977), vol III (Bern, 1978), pp 338–340; John A. Roach, "The international fact-finding commission: article 90 of protocol I additional to the 1949 Geneva Conventions", 31 *International Review of the Red Cross* (1991) 167–189.

[666] *New Commentary, supra nota* 119, point 3032.

[667] Bothe, „Fact-finding", *supra nota* 658, p 263.

[668] Sylvain Vite, *Les procédures internationales d'établissement des faits dans la mise en œuvre du droit international humanitaire* (Brussels: Bruylant, 1999), pp 187 et seq.

Even a general obligation to accept an inquiry initiated at the request of a State party was not acceptable. The compromise was to adopt a copy of the optional clause of Article 36 of the Statute of ICC.[669]

4.1.3.3. Role of different bodies

There are four different types of institutions or bodies engaged in ascertaining facts: States; organs established in common by two or more States; inter-governmental organizations and non-governmental organizations.

A State where relevant facts have taken place can start a unilateral fact-finding, often in a post conflict situation, as part of a process of re-establishing normalcy. Whether this clarification process leads to any criminal prosecution is a question which varies from case to case (examples include the commissions of truth in Sierra Leone, Guatemala and El Salvador).[670]

Secondly, fact-finding can be used as a means of dispute settlement between States. A procedure for ascertaining facts is created on the basis of an agreement between the parties to a dispute. If there is a preceding agreement providing for such a procedure, it is possible for one party to unilaterally trigger the process. If not, there must be an *ad hoc* agreement between the parties. The result of such "inquiry" procedures is usually a statement of the facts.[671]

The ICRC can perform certain fact-finding role within the context of its protection activities. And GCs III and IV provide for specific enquiries to be carried out by the Detaining Powers in cases of prisoners of war or civilian detainees killed or injured in special circumstances.[672]

Fact-finding by the ICRC serves two purposes – firstly, it is needed to assess the needs of different kinds of victims. In this respect, it is an important preliminary measure for relief operations. Secondly, it is part of the activities of the ICRC to ensure compliance with IHL. It is only where access is consistently denied or where violations observed by the ICRC are not stopped that the ICRC goes public and uses the general transparency as a means to induce compliance.[673] The ICRC has been hesitant to become actively involved in enquiry procedures, fearing that its impartiality may be jeopardized.

The role of different bodies varies greatly. The ICJ states in a legally binding way violations of international law and awards damages for these violations (e.g. in the Nicaragua and Congo cases after an extensive fact-finding). The ICC has

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669 Bothe, „Fact-finding", *supra nota* 658, p 263; Michael Bothe, Karl Josef Partsch & Waldemar A. Solf, "Methods and Means of Warfare Combatant and Prisoner-of-War Status" – Michael Bothe (ed), *New Rules for Victims of Armed Conflicts* (Martinus Nijhoff Publishers, 1982) 209–307, p 240.

670 Bothe, „Fact-finding", *supra nota* 658, p 251.

671 *Ibid*, p 252.

672 Arts 121/131. A report on the enquiry should be forwarded to the Protecting Powers.

673 Bothe, „Fact-finding", *supra nota* 658, p 260.

its own procedure of investigation which is in the hands of the Office of the Prosecutor. The SC can trigger an array of measures after fact-finding relating to violations of IHL. Fact finding is indeed a major tool for a better implementation and enforcement of IHL, yet it has become multifaceted and complex.

4.1.3.4. The permanent Fact-Finding Commission

According to the Conventions the International Fact-Finding Commission shall be established when not less than 20 High Contracting Parties have agreed to accept the competence of the Commission by issuing a special declaration in accordance with paragraph 2 of article 90. The twentieth declaration was made in 1990 and the fifteen members of the Commission were elected in 1992.[674] The Commission met subsequently to adopt its Rules of Procedure. As of 2019, 76 States had accepted the competences of the Commission. No formal request for an enquiry was made for decades. Instead, the UNSC has established *ad hoc* mechanisms for investigating and taking action regarding violations. Some authors have thus argued that the SC has seemingly become the master of collective security, and apparently is about to take over, step by step, the responsibility for the administration of humanitarian law.[675]

The creation of the Fact-Finding Commission has been applauded, and a lot was hoped from to come from it. Aldrich writes: "I cannot stress too strongly the potential importance of this development for the improvement of compliance with international humanitarian law."[676] Roger too holds that "One might have thought that the commission would be welcomed by the parties to a conflict anxious to establish their innocence in respect of the accusations levelled against them" but, so far as the author is aware, "its services have never been called upon despite its having taken a pro-active role in recent years in offering its good offices to parties where it seemed to the president of the commission that it could provide a useful service."[677]

The major innovation made by the procedure to be followed by that Commission is that it has to enquire into any allegation of a grave breach or other serious violation of the Conventions or of Protocol I, with or without the agreement of

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[674] Rosas, "International Monitoring Mechanisms", *supra nota* 579, p 229.

[675] Erich Kussbach, „The International Humanitarian Fact-Finding Commission", 43 *International and Comparative Law Quarterly* (1994) 174–185. Brollowski, "The responsibility to Protect", *supra nota* 167, p 100.

[676] Aldrich, "Compliance with the law", *supra nota* 7, p 13.

[677] Rogers, *Law on the battlefield*, *supra nota* 106, p 354. Neither the inquiry procedure established by the Geneva Conventions nor the IHFFC had not been used until recently. (ICRC tried after the Israel and Arab States conflict in 1993 on CA 52/53/132/149).

the accused Party.[678] The Commission will be automatically competent to conduct enquiries only when both the requesting State and the State against which the allegation has been made have issued declarations recognizing, *ipso facto* and without special agreement, the competence of the Commission. On the other hand, the requesting State does not have to be a party to an armed conflict, but can be any High Contracting Party which has recognized the Commission's competence.[679] Article 90 does not recognize a right for the Commission to undertake an enquiry on its own initiative.

A further condition for the competence of the Commission is that it is asked to enquire into "any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol". There must, therefore, be a *prima facie* case for at least a "serious violation", which is not required under the enquiry procedures provided for by the Conventions. The requirement of previous declarations of acceptance does not apply if the parties to an international armed conflict agree otherwise.[680]

The Commission's mandate is thus two-fold. First, it has the competence to enquire into alleged grave breaches or other serious violations of the Conventions or Protocol I. The Commission will have to determine the meaning of the term for itself, since neither of the instruments mention a category of "serious violations". It may be able to draw on the term in the context of international criminal law, for example the idea in the Tadić Decision "that a serious violation of IHL constitutes 'a breach of a rule protecting important values, and the breach must involve grave consequences for the victim'. However, a certain care needs to be taken, for what is a serious violation for the purposes of an international criminal tribunal may be too high a threshold for a serious violation for the purposes of the Commission."[681]

"The second aspect of the Commission's mandate is to use its good offices to facilitate the restoration of respect for the Conventions and Protocol I. In this context, good offices refers to 'the communication of conclusions on the points of fact, comments on the possibilities of a friendly settlement, written and oral observations by States concerned', and the like. This aspect of the Commission's work is equally important as its undertaking of enquiries."[682]

What kind of conclusions would the Commission be able to make? It is a fact-finding body, not a conciliation commission, let alone an arbitration tribunal or

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[678] Sandoz, "Implementing International Humanitarian Law", *supra nota* 304, p 278. The phrase „grave breach" has a precise meaning and designates breaches that are listed, whereas the phrase „serious violation" is to be understood as having its usual meaning, which the Commission is left to determine.

[679] Michael Bothe, Karl Josef Partsch & Waldemar A. Solf, "Civilian Population" – Michael Bothe (ed), *New Rules for Victims of Armed Conflicts* (Martinus Nijhoff Publishers, 1982) 309–547, p 543.

[680] Rosas, "International Monitoring Mechanisms", *supra nota* 579, p 230.

[681] Sivakumaran, *The law of non-international armed conflict*, *supra nota* 337, p 459.

[682] *Ibid*, p 460; Bothe, „Fact-finding", *supra nota* 658, p 253.

international court. However, the right to "include such recommendations as it may deem appropriate" in the report as well as its competence to "facilitate, through its good offices, the restoration of an attitude of respect", may give the Commission a mediatory role.[683]

The result of the Commission's work is a statement of facts. However, the Conventions also clarify that there is a further purpose for the fact-finding procedure – to ensure respect for IHL (*when such violation has been established the belligerents shall put an end to and repress it as promptly as possible*).[684] Article 90 is less explicit but also seems to lead towards a result beyond the actual statement of the facts. Paragraph 5(a) reads: "The Commission shall submit to the Parties a report of the findings of fact of the Chamber, with such recommendations as it may deem appropriate".

The result thus stops short of a statement of the law. Once the facts are stated, the parties can agree on what follows. If the ICJ has jurisdiction in the case, one party can still go to the ICJ for a declaration of the law and an award of damages. But this is highly improbable. The facts being ascertained will as a rule facilitate an agreement among the parties on the question of just compensation.[685]

The report of the Commission shall not be made public, unless all the parties to the conflict have requested the Commission to publish the report. This can be seen as a serious shortcoming, since publicity could be one of the few tools available to give effect to the findings and recommendations of the Commission.[686]

While potentially quite important, the fact that since its establishment in 1991 this mechanism has only been used once shows that States are reluctant to accept the IFFC's authority or consent to its investigation of serious violations of IHL. However, the first use of this mechanism to investigate an explosion involving personnel and a vehicle of the OSCE's Special Monitoring Mission (SMM) in Eastern Ukraine shows that the Commission can be used effectively to enquire into situations potentially involving IHL violations.[687]

Could the Commission instigate enquiries also in non-international armed conflicts, given the consent of all the parties to the conflict? As the Commission is established under Article 90 of AP I and no mention is made to it in AP II, enquiries or other activities possibly undertaken by the Commission would, strictly speaking, constitute extra-conventional activities. However, the possibility of *ad hoc* agreements under paragraph 2(d) seems to apply to entities other than States as well (since it does not speak of High Contracting Parties but of "Parties concerned").[688]

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683 Bothe, Partsch & Solf, "Civilian Population", *supra nota* 679, p 544.

684 Bothe, „Fact-finding", *supra nota* 658, p 253. Geneva Conventions of 1929, Art 30. Similar language in the 1949 conventions.

685 *Ibid*, p 264.

686 Pfanner, "Various mechanisms", *supra nota* 246, p 286 same argument (confidentiality in not really an appropriate way for an international commission to work)

687 Zyberi, "Enforcement", *supra nota* 98.

688 Sivakumaran, *The law of non-international armed conflict*, *supra nota* 337, p 460.

As to whether or not a complaint could be initiated by a non-state armed group, the ICRC Commentary takes the view that '[t]here is no doubt that only States are competent to submit a request for an enquiry to the Commission'.[689]

"This would be quite unfortunate both as a matter of law and as a matter of practice. As a matter of law, it is one-sided, disadvantageous to the armed group, and goes against ideas of equality of obligation, albeit obligations in relation to enforcement of the law. It also goes against the language of the provision itself. Whereas Article 90(2)(a) refers solely to High Contracting Parties in recognizing the competence of the Commission in advance, thereby limiting such recognition to States alone, Article 90(2)(c) refers to *ad hoc* requests and *ad hoc* consent on the part of parties to the conflict, thus including non-states parties. In practice, the Commission has been approached by a number of non-state armed groups."[690] Accordingly, any party to a non-international armed conflict should be able to initiate an enquiry, States and non-state armed groups alike; however, both parties will have to consent to the process.

4.1.3.5. Possible improvements

There remains a considerable potential for the IHFFC, in particular in cases where the States concerned want to retain a control of the procedure which either the SC or the ICC Prosecutor might take away.

On one hand, the Commission has no right to initiate a fact-finding mission *motu proprio*. On the other hand, it may "facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol" (Art 90 (2)(b)(ii)). "Article 90 does not say that it can do so only within the framework of an ongoing procedure initiated by a State against another State. The Commission is able to offer its good offices without being asked to do so, while the State to whom they are offered is of course free to refuse them. The good offices clause, thus, is the key which opens the door for a proactive role of the Commission".[691]

Rosas, an original member of the Commission, takes its role a step further. He suggests that "reference to the UN in Article 89 AP I might inspire the organization to call upon parties to armed conflicts to make use of the International Humanitarian Fact-Finding Commission. And refusal to comply with such a request might be considered by the UN in considering the need for further action, including, at least in theory, determination that a situation constitutes a "threat to the peace" within the meaning of article 39 of the Charter."[692]

"In principle, the /.../ Commission can undertake an enquiry only if all the parties concerned have given their consent, but there is nothing to prevent a third State from requesting an enquiry by the Commission into a grave breach or

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689 Commentary to AP I, p 3618.

690 Sivakumaran, *The law of non-international armed conflict*, *supra nota* 337, p 460.

691 Bothe, „Fact-finding", *supra nota* 658, p 265.

692 Rosas, "International Monitoring Mechanisms", *supra nota* 579, pp 233–234.

serious violation of humanitarian law committed by a party to a conflict, provided that the party concerned has also recognized the Commission's competence." Pfanner believes that this possibility arises out of the obligation to "ensure respect for" the law of armed conflict.[693]

Sivakumaran holds that the Commission could and should be utilized.[694] As said, the Commission has now been used for the first time. In May 2017, it was announced on the Commission's website that it would lead an independent forensic investigation in Ukraine, following the explosion of an Organization for Security and Cooperation in Europe's (OSCE) vehicle. The Executive Summary of the report of the investigation was published in September 2018.[695]

The investigation team concluded that the anti-tank mine was not specifically aimed at that particular vehicle. This was determined because the road was not on the SMM's usual route and the patrol was unplanned. Moreover, there was little opportunity to lay mines immediately before the patrol, given that the road was used frequently by other vehicles as well. Nonetheless, the report considered any laying of anti-vehicle mines on that road as a violation of IHL because of the potentially indiscriminate damage caused by these weapons.[696]

Competence-wise, Article 90 AP I does not prohibit the Commission to make suggestions to international bodies to use its competences in specific situations. Even if the Commission does not have the right of initiative, its Rules of Procedure explicitly state in the preamble that it can "take all appropriate initiatives as necessary in cooperation with other international bodies, in particular the UN, with the purpose of carrying out its functions in the interest of the victims of armed conflict". Moreover, nothing in the text of Article 90 AP I prevents the Commission from gathering and analysing information and allegations on specific incidents that could lead to IHL violations, with the possibility of approaching the relevant States and calling upon their consent to start an enquiry.[697]

4.2. Implementation of IHL in the EU

This sub-chapter is dedicated to the specifics of implementing IHL in the EU. Measures taken at the EU level could be separated by topic and included under other chapters of this thesis, but keeping them in one chapter gives a more coherent

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693 Pfanner, "Various mechanisms", *supra nota* 246, p 286; Success is not guaranteed though – a belligerent State accused of violating the law of armed conflicts is hardly likely to assist the fact-finding body mandated to determine the truth of such an accusation.

694 Sivakumaran, *The law of non-international armed conflict*, *supra nota* 337, p 461.

695 Cristina Azzarello & Matthieu Niederhauser, "The Independent Humanitarian Fact-Finding Commission: Has the 'Sleeping Beauty' Awoken?", available at <blogs.icrc.org/law-and-policy/2018/01/09/the-independent-humanitarian-fact-finding-commission-has-the-sleeping-beauty-awoken/> (1.11.2019).

696 *Ibid*.

697 *Ibid*.

overview. In addition, EU action in this field does resemble reporting and monitoring the most. Many fields in the EU require periodic overviews, peer-reviews, standardizing and infringement procedures, this transferred to how the IHL related activities are seen as well. The EU is also very active in sanctioning people and regimes that violate (mostly) HRL and IHL.

4.2.1. IHL in the EU legislation

IHL is not mentioned as such in any of the EU's constitutive texts. In EU practice, it is generally subsumed under the HRL. The Union's international action in the field of human rights is based on a mix of instruments, both in its Common Foreign and Security Policy (CSFP) and its external relations covered by the EC Treaty.

The Lisbon treaty, which amends the two treaties that form the constitutional basis of the EU, contains quite a few articles on humanitarian aid, human rights and fundamental freedoms, but no mention is made to IHL. The treaty elaborates a great deal more on the common security and defence policy but IHL is certainly not an issue of discussion.[698]

A few decades ago, when the EU was not yet a major actor in ensuring compliance with IHL, its actions were described as being "more political than legal". It was criticized for treating IHL as a subset of HRL and not giving it the prominent place it deserves, for being more consistent in terms of urging respect for IHL in relation to international rather than non-international armed conflicts, and for scant reference in EU practice to humanitarian law as a separate field of international law.[699]

Back in 2001, Desgagne pessimistically noted that humanitarian law has not been consistently invoked, or its violations condemned by the EU, since the European political co-operation has been formally established after the Single European Act of 1986. "EU practice in the field of humanitarian law is mostly 'declaratory practice'. The EU has no military forces of its own and is only beginning to formulate a defense policy, hence its own conduct with regard to humanitarian law rules is rarely directly challenged. In most cases, the EU institutions are examining, noting, commenting on or condemning the behaviour of parties involved in armed conflicts." He admitted, however, that humanitarian law has some bearing on the conduct of EU institutions. Measures of enforcement, such as embargoes, bans and sanctions, either at the request of the SC or on its own initiative, require actions by the EU or the EC. The EU also provides financial support for several institutions and initiatives in the field of humanitarian law or closely related to it.[700]

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[698] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ 2007 No C 306, 13.12.2007.

[699] Breslin, "Ensuring Respect", *supra nota* 247, p 382.

[700] Richard Desgagné, "European Union practice in the field of international humanitarian law: an overview" – Vincent Kronenberger (ed), *The European Union and the International Legal Order*: *Discord or Harmony* (TMC Asser Press, 2001) 455–477, pp 456–457.

He also rightly noted that the EU plays a more active role in humanitarian assistance, individual accountability, the ban on anti-personnel landmines and the arms trade. Generally speaking, it appears that the EU's practice considers IHL as a subset of HRL and does not give it the prominent place which it deserves.[701]

In 2003, the European Commission published a Communication on the relationship between the EU and the UN, which explored possibilities for more concerted action between the EU and the various organs and bodies of the UN, such as the SC, the GA, and so forth. Wouters noted that this is a welcomed step, and added that, in light of the development and implementation of the EU Security Doctrine, there is a lot of important work to do on exploring ways to more effectively encourage and ensure respect for IHL.[702]

The EU made a joint pledge at the 30th Conference of the Red Cross and Red Crescent in 2007, which indicated that public dissemination and training, supported by effective enforcement, were crucial for improved compliance with IHL, and in particular pledged to pursue efforts to train military and civilian personnel involved in EU crisis management operations.[703]

In 2010 Breslin argued that in the past decade, the EU had adopted and revised policy specifically relating to IHL, no longer treating it as a subset of human rights but rather as a separate set of norms, and increasingly issued statements concerning humanitarian norms in relation to non-international armed conflicts.[704] "The EU is no longer limited to "declaratory practice" in relation to the field of IHL but also engages in civilian and military operations during armed conflicts, has become involved with training third party armed forces, and in one instance has set up an international fact-finding mission to investigate violations of IHL. The practice of the EU in relation to IHL has become more engaged and applied and this appears likely to increase, although certain inconsistencies remain".[705] I do not fully share this enthusiasm having worked on a daily basis at the EU Council working parties. IHL is rarely a topic of discussion, even in connection with sanctions. Today the sanctions regime is mostly used in connection with the use of force and/or an illegal annexation followed thereafter and very rarely have sanctions been imposed specifically citing IHL as a basis for the decision.

This shows that the development of IHL on EU level has not been quick nor easy. It clearly lags behind the highly developed human rights system, but is showing some positive trends in recent years. For example, a Council working party on public international law (COJUR) now publishes annual reports on the EU guidelines on promoting compliance with IHL (two so far). The reports cover statements and demarches made by the EU, cooperation with international organizations, restrictive measures, arms exports, crisis management and international

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701 *Ibid*, p 455.

702 Wouters, "Improving complianc", *supra nota* 397, pp 115–116.

703 Resolution 1: Together for Humanity. ICRC 30th International Conference, Geneva, 26–30 November 2007, <www.ifrc.org/Global/Publications/ic-r1.pdf> (1.11.2019).

704 Breslin, "Ensuring Respect", *supra nota* 247, p 382.

705 *Ibid*, p 382–383.

criminal mechanisms and as such has to be applauded as a welcome development.[706]

The EU can represent and fulfil some of the duties of the Member States where appropriate, and take initiatives to ensure respect for IHL in its own capacity in addition, in accordance with its policy and values.[707] For example in the field of civil protection, the EU is moving towards a common scheme that could better utilize the resources of individual countries. This EU Civil Protection Mechanism aims at strengthening cooperation between the EU Member States in the field of civil protection, with a view to improving prevention, preparedness and response to disasters.[708] Although agreement on this mechanism was quite difficult to achieve, such initiatives could be envisioned on other fields of IHL. The EU should act in a coordinated way and try to influence the development of IHL globally.

4.2.2. The EU Guidelines on Promoting Compliance with International Humanitarian Law

The report of COJUR working party states that as a major global actor, the EU is strongly committed to promoting respect for IHL as part of its wider commitment, laid down in its founding Treaties, to advancing respect for human dignity and for the principles of international law.[709]

The Guidelines on Promoting Compliance with International Humanitarian Law were first adopted in 2005 to provide a visible and practical sign of the EU's commitment to IHL and were widely welcomed. An updated version of the Guidelines was adopted by the 2958th Foreign Affairs Council on 8th December 2009. The Council reaffirmed its support for the promotion and protection of IHL and to this end adopted an updated version of the Guidelines. Breslin regrets that although the publication of the Council Conclusions coincided with the 60th Anniversary of the Conventions, they contain no substantive improvements or additions.[710]

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[706] Working party on public international law (COJUR) report on the EU guidelines on promoting compliance with international humanitarian law, July 2017–December 2018, <www.consilium.europa.eu/media/40345/ihl-2019-report-june-update-en.pdf> (1.11.2019).

[707] Breslin, "Ensuring Respect", *supra nota* 247, p 391.

[708] European Commission, EU Civil Protection Mechanism, <ec.europa.eu/echo/what/civil-protection/mechanism_en> (1.11.2019).

[709] Working party on public international law (COJUR) report on the EU guidelines on promoting compliance with international humanitarian law, July 2016–June 2017, <www.consilium.europa.eu/media/34129/ihl-report-april-2018.pdf>; This commitment to promoting IHL was expressly affirmed in the European Union's most recent Global Strategy adopted in 2016. EEAS, "A Global Strategy for the European Union's Foreign and Security Policy", <eeas.europa.eu/headquarters/headquarters-Homepage/17304/global-strategy-european-unions-foreign-and-security-policy-june-2016_en> (1.11.2019).

[710] Breslin, "Ensuring Respect", *supra nota* 247, p 411.

Since their adoption, the EU has continued actively to promote respect for IHL through the various means at its disposal. Many of these activities are already regularly reported in the various publications and communications issued by the responsible institutions. However, there has remained scope for presenting a more systematic and transparent overview of the implementation of the Guidelines as a whole including to facilitate the Council's assessment of the work carried out by the Union in this field. To achieve these objectives, and as described above, the COJUR prepared a first annual report on the action taken by the EU to implement the Guidelines on the period 2016–2017, published in 2018.[711]

The purpose of the Guidelines is to set out operational tools for the EU and its institutions and bodies to promote compliance with IHL. They are addressed to all those taking action within the framework of the EU to the extent that the matters raised fall within their areas of responsibility and competence. They are complementary to other Common Positions already adopted within the EU in relation to matters such as human rights, torture and the protection of civilians.[712]

The Guidelines are in line with the commitment of the EU and its Member States to IHL, and aim to address compliance with IHL by third States, and, as appropriate, non-state actors operating in third States. Whilst the same commitment extends to measures taken by the EU and its Member States to ensure compliance with IHL in their own conduct, including by their own forces, such measures are not covered by these Guidelines.[713] The latter issues are dealt with in other fora, including the Military Committee as far as EU missions are concerned.[714]

In 2009 Wrange wrote that while Article 15 (b) of the Guidelines stipulates that "whenever relevant, EU Heads of Mission, and appropriate EU representatives, including Heads of EU Civilian Operations, Commanders of EU Military Operations and EU Special Representatives, should include an assessment of the IHL situation in their reports about a given State or conflict" there is yet no dedicated reporting system for monitoring the promotion of IHL or implementation of the EU Guidelines."[715] The COJUR annual reports now serve as a reporting system on the implementation of the EU guidelines, but the guidelines do not include all the implementation and enforcement measures described in this thesis. In this regard, individual Member States are still responsible for reporting. Some information about compliance with IHL is subsumed into the annual human

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[711] COJUR report, *supra nota* 709.

[712] Updated EU guidelines on the promotion of compliance with international humanitarian law, OJ 2009 No C 303, 15.12.2009.

[713] *Ibid*.

[714] Pal Wrange, "EU guidelines on promoting compliance with international humanitarian law", 78 *Nordic Journal of International Law* (2009) 541–552, p 545.

[715] Updated EU guidelines, *supra nota* 712. Special attention should be given to information that indicates that serious violations of IHL may have been committed. Where feasible, such reports should also include an analysis and suggestions of possible measures to be taken by the EU.

rights reports, although to merge assessment of the two in this way could somewhat limit the impact of the IHL-specific critique contained in the report, and also limit the visibility and exposure on issues pertaining only to IHL.[716] This should be of interest not only because of the content of the Guidelines – which are more political than legal – but also because they supply an example of the importance of expertise and bureaucratic factors in the implementation of international law.[717]

Two important observations have to me made here. Firstly, the Guidelines supply tools that the EU can use *if it so wishes*, EU action to enhance compliance can never be expected or even less mandatory, it is a political organization.[718] Secondly, the Guidelines do not state that it is the duty of each State to ensure compliance by or in third States, as would a broad interpretation of CA 1 of the Conventions. It is acknowledged in the Guidelines that, as all EU Member States are Parties to the Conventions and Protocols, they are already obliged to ensure compliance with IHL in their own conduct. As such, the focus is on external promotion in the sphere of the foreign policy and external action of the EU, although some means of action provided for, such as dissemination and training, may have an internal element.[719]

4.2.3. Means of action at the disposal of the EU to foster compliance with IHL

It is clear that the EU, as a powerful economic actor, has developed many instruments "between words and wars" to ensure respect for international law, but the implementation of these instruments in a productive and just manner is a complex process.[720] In 2009, the ICRC conducted an overview of the implementation of the IHL Guidelines based on public documents, available at the public register of the Council, the Commission and the European Parliament's respective websites. The mapping exercise had shown that there were more than 300 references to IHL in EU documents since the adoption of the Guidelines in December 2005 to January 2009, and out of these 200 references were found in Council documents.[721] IHL was referred to most commonly in the context of the fight against terrorism (49), followed by respect of IHL and repression of violations in Sudan/ Darfur (26), the Israeli-Lebanon conflict and the Gaza Strip (24), ICC and the international tribunals (22) as well as respect for IHL in the Democratic Republic of Congo (13). For the European Commission, 70 documents were found and

716 Breslin, "Ensuring Respect", *supra nota* 247, p 412.

717 Wrange, "EU guidelines", *supra nota* 714, pp 541–542.

718 *Ibid*, p 545.

719 Breslin, "Ensuring Respect", *supra nota* 247, p 398.

720 *Ibid*, p 404.

721 Wrange, "EU guidelines", *supra nota* 714, p 550.

demarches/public statements about specific conflicts (34), followed by cooperation with other international bodies (28) and political dialogue (21) are by far the most commonly referred to.[722]

Many of these documents are issued at the level of the Head of State and Government, where the European Council often refers to compliance with IHL in the public Conclusions that it issues at the end of its meetings. Similarly, the Foreign Affairs Council regularly deliberates on situations of conflict around the world and underlines the need to respect IHL in the Conclusions issued at the end of its meeting.[723]

EU practice has been relatively consistent in urging respect for humanitarian law in conflicts that have obviously been international conflicts. It has maintained the applicability of the Fourth Geneva Convention to the territories occupied by Israel. It called on parties to respect IHL in the context of the first Gulf War between Iraq and Iran; it condemned alleged violations by Iraq in the second Gulf War.[724] More recently, it has condemned the wide scale violations of human rights in the conflict in Ukraine. The EU Delegation raised IHL-related issues in various formats and fora in Kyiv, most notably in the context of the annual Human Rights Dialogue, in which IHL is one topic of discussion. The EU is also the biggest contributor to the OSCE Special Monitoring Mission to Ukraine.[725]

In non-international conflicts, the trend has rather been to urge respect for human rights (not respect for IHL), even though humanitarian law vocabulary is sometimes used. However, in some instances humanitarian law has also been cited. For example, the indiscriminate use of landmines in Afghanistan – among other motives – prompted the EU to call for the respect of humanitarian law.[726] The EU also issued a declaration by the Presidency on behalf of the EU on the bombings of civilian targets by the Sudanese air force,[727] and a Presidency statement on behalf of the EU on the bombing of the Temple of Tooth and Kandy.[728]

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[722] *Ibid*, p 550.

[723] For example, in the Council conclusions on Syria of 17 October 2016, the EU condemned "the continued systematic, widespread and gross violations and abuses of human rights and all violations of international humanitarian law by all parties, particularly the Syrian regime and its allies". Draft Council conclusions on an EU strategy for Syria, ST 7651 2017 INIT, 03.04.2017.

[724] Declaration on the Iran-Iraq Conflict, the Hague, 25.05.1986, EFP Bull., Doc. No. 86/087. Statement in the Third Committee of the UNGA SCConcerning the Report by the ECOSOC, agenda item 12, 26 November, 1990 EFP Bull., Doc. No. 90/438.

[725] EEAS, „EU increases support for the OSCE Special Monitoring Mission to Ukraine", 19.06.2015, <eeas.europa.eu/headquarters/headquarters-homepage_pt/6351/EU%20increases%20support%20for%20the%20OSCE%20Special%20Monitoring%20Mission%20to%20Ukraine> (1.11.2019).

[726] EFP Bull, Doc No 96/338), 18.11.1996.

[727] Declaration by the Presidency on behalf of the European Union on the bombings of civilian targets by the Sudanese air force, 7705/00 (Presse 106), P 46/00, 5.05.2000.

[728] EFP Bull Doc No 96/113, 9.02.1998.

Dialogue, statements, initiatives and demarches are only a few ways for the EU to contribute. It has a complex political and diplomatic machinery at its disposal. This includes the whole tool kit of positive incentives it can offer, such as development aid, humanitarian funding to ensure humanitarian access and wider dissemination, access to the internal market and technical and economic assistance. Additionally, the EU could apply economic sanctions against political regimes or non-state actors, and leaders of armed groups in internal conflicts. Nevertheless, it can also contribute via crisis-management operations and even control of exports of military technology and equipment.[729] The full potential of these bilateral and multilateral instruments has not been sufficiently explored.

The EU also has an important role to play in supporting and upholding the ICC. It has provided over 40 M EUR to the ICC since its creation and organized seminars to foster closer cooperation between States and the Court. The Union is also active as a member or observer in a range of international organizations and bodies and in this capacity frequently intervenes on matters of IHL. At the annual humanitarian debate in UNGA in December, the EU Delegation delivers a statement on behalf of the EU and its Member States which always includes strong language on IHL.

The European Commission's Humanitarian Aid and Civil Protection department (ECHO) also promotes the global respect of IHL and humanitarian principles. ECHO supports five types of concrete activities for the dissemination and implementation of IHL ranging from IHL advocacy to increasing the capacities of humanitarian workers in advocating for IHL.[730]

Direct funding is probably the most visible way in which the EU contributes as it provides billions of euros to conflict zones. A most recent example is a pledge to allocate 6 billion euros to help the people in need in Syria in 2017.[731] The EU also funds training in IHL of both military personnel and humanitarian actors and finances large-scale information campaigns to raise awareness of IHL in the wider public.[732] Violations of IHL heavily impact and hamper the EU's humanitarian investments in meeting the needs of the affected populations and

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[729] Examples include a military operation EUNAVFOR ATALANTA, which protects humanitarian aid shipments and fights piracy off the Somali coast; EUTM Mali to restore constitutional and democratic order, the authority of rule of law and human rights and neutralize organized crime and terrorist threats in Mali, and EUCAP SAHEL MALI and EUCAP SAHEL NIGER to give advice and training to support the Nigerien authorities' efforts to strengthen their security capabilities. EEAS, "CSDP structure, instruments, and agencies", <eeas.europa.eu/headquarters/headquarters-homepage/5392/csdp-structure-instruments-and-agencies_ar> (1.11.2019).

[730] DG Echo, „International humanitarian law", <ec.europa.eu/echo/what/humanitarian-aid/international-humanitarian-law_en> (1.11.2019).

[731] „Supporting the Future of Syria and the region Brussels conference", <ec.europa.eu/echo/news/commissioner-stylianides-announces-6-billion-syria-conference-brussels_en> (1.11.2019).

[732] DG Echo, "Factsheet: IHL", <ec.europa.eu/echo/files/aid/countries/factsheets/thematic/ihl_en.pdf> (1.11.2019).

imperil the security of the EU's humanitarian partners. Strengthening compliance with IHL is thus a key concern for the EU as a reference humanitarian donor.

The ICRC is a key partner to the EU in delivering humanitarian response and in upholding respect for IHL and the humanitarian principles. The ICRC is regularly invited to speak in informal sessions of Council working groups and at the PSC. The EU funding to the ICRC includes dedicated funding for IHL dissemination in Afghanistan and Ukraine.[733]

The implementation of the EU's Common Security and Defence Policy (CSDP) involves the deployment of military or civilian missions for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the UN Charter. EU-led military operations and missions are conducted in accordance with the basic legal framework as laid down in the Council Decision and relevant international law (in particular IHL and IHRL).[734]

The EU, as such, is not a party to humanitarian law treaties – but the question arises as to whether it is bound by them. Does customary law bind it? These are fundamental questions for the implementation of humanitarian law. The ICRC has in fact attempted to persuade EU to include references to IHL in the sections of the treaty dealing with foreign and security policy. These efforts were unfortunately unsuccessful.[735]

The EU and its Member States accept that if EU-led forces become a party to an armed conflict, IHL will fully apply to them. In that case, the EU is arguably bound by customary IHL, while its Member States' forces also remain bound by their IHL treaty obligations. However, this has not been the case so far, and will probably remain the exception. EU policy is that IHL does not necessarily apply in all EU military operations (because the Union did not become a party to an armed conflict), nor is it necessarily considered the most appropriate standard as a matter of policy in all EU military operations (when not applicable as a matter of law). Rather, in most operations the EU looks to HRL as a more appropriate standard.[736]

During 2016–2017, the EU conducted 15 civilian and military crisis management operations within the framework of the CSDP. By promoting security and deterring conflict, they contribute by their nature to preventing situations in which violations of IHL can occur.

Some authors believe that the EU could consider adopting an EU Common Position, in which the Member States agree to collectively accept the competence

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[733] COJUR report, *supra nota* 709.

[734] EEAS, European Union Concept for EU-led Military Operations and Missions, 17107/14, 19.12.2014.

[735] Doswald-Beck, "Implementation", *supra nota* 338, pp 61–62.

[736] Frederik Naert, „Observance of international humanitarian law by forces under the command of the European Union", 95 *International Review of the Red Cross* (2013), 637–643, p 639; Marco Sassòli & Djemila Carron, "EU Law and International Humanitarian Law" – Dennis Patterson & Anna Södersten (eds), *A Companion to European Union Law and International Law* (John Wiley & Sons, 2016) 413–426, p 413.

of the International Fact-Finding Commission. Similarly, the EU could affirm its intention to use its bilateral and multilateral contacts to encourage third States to do the same, by means of certain incentives. The EU could also ask the International Fact-Finding Commission to carry out certain studies. For instance, it could be asked to carry out the task of doing studies and preparing recommendations with regard to earlier armed conflicts, or, to the extent that information is available, with regard to ongoing armed conflicts.[737] I believe this could prove extremely useful if used correctly, and systematically. The EU is used to applying different monitoring and control mechanisms that could be expanded to IHL mechanisms.

The European Court of Human Rights plays a significant role in the enforcement of IHL, despite the fact that IHL violations as such do not fall into the scope of the European Convention on Human Rights (ECHR). The enforcement of IHL through the case law of the ECtHR involves both individual applications, as well as inter-state cases. Some of the inter-state cases relating to armed conflict are Cyprus v. Turkey, Georgia v. Russian Federation, and Ukraine v. Russian Federation. There have been also a number of cases relating to the activity of European States' military forces abroad, including cases concerning the ISAF operation in Afghanistan and the international military operations in Iraq.[738]

4.2.4. EU sanctions

The EU is also able to apply sanctions against those who violate the rules of IHL. Sanctions, or restrictive measures (the two terms are used interchangeably), have been frequently imposed by the EU in recent years, either on an autonomous EU basis or implementing binding Resolutions of the UNSC. Restrictive measures imposed by the EU may target governments of third countries, or non-state entities and individuals. They may comprise arms embargoes, other specific or general trade restrictions (import and export bans), financial restrictions, restrictions on admission (visa or travel bans), or other measures.[739] When deciding on restrictive measures, it is important to consider which measure or package of measures is most appropriate in order to promote the desired outcome.[740]

The EU applies sanctions or restrictive measures in pursuit of the specific objectives of the Common Foreign and Security Policy (CFSP), namely to strengthen the security of the Union in all ways, to promote international cooperation – to develop and consolidate democracy and the rule of law and respect for

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[737] Wouters, "Improving complianc", *supra nota* 397, p 116.

[738] Zyberi, "Enforcement", *supra nota* 98.

[739] Wrange, "EU guidelines", *supra nota* 714, p 548; EEAS, „Sanctions or restrictive measures", <eeas.europa.eu/archives/docs/cfsp/sanctions/docs/index_en.pdf> (1.11.2019).

[740] Francesco Giumelli, „How EU sanctions work: A new narrative", *Chaillot Papers* No 129 (2013), <www.iss.europa.eu/sites/default/files/EUISSFiles/Chaillot_129.pdf> (1.11.2019).

human rights and fundamental freedoms.[741] When the EU implements UNSC Resolutions it adheres to the terms of those Resolutions, but it may also decide to apply further restrictive measures. The EU will implement UN restrictive measures as quickly as possible.[742]

It is important to note that the legal basis of such sanctions is however not the IHL, but the EU community laws. It could be argued, therefore, that it is not implementation of IHL in the strict sense. The legal basis for sanctions will depend on the exact nature of the restrictive measures, and the areas or targets covered by them. Where Community action is required, a Common Position must be adopted under Article 15 of the Treaty establishing the EU by unanimity.[743]

If the Common Position provides for the reduction or interruption of economic relations with a third country, implementation at Community level is governed by Article 301, and, where financial restrictions are concerned, Article 60 of the Treaty establishing the European Community. Where restrictive measures target persons, groups, and entities, which are not directly linked to the regime of a third country, Articles 60, 301 and 308 of the Treaty establishing the European Community have been relied upon. In such cases, adoption of the Regulation by the Council requires unanimity and prior consultation of the European Parliament.

The EU maintained 25 sanctions regimes during 2016–2017. A number of these were specifically aimed at preventing or repressing violations of IHL, including by targeting individuals engaged in such violations. By taking measures dealing with situations of armed conflict, including through arms embargoes, many sanctions measures seek to prevent the situations in which violation of IHL can occur.[744] This can thus be a powerful tool to implement IHL, and should be further developed.

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[741] EEAS, „Sanctions or restrictive measures“, *supra nota* 739.

[742] *Ibid*.

[743] Council of the European Union, Guidelines on the implementation and evaluation of restrictive measures (sanctions), 5664/18, 4.05.2018

[744] EEAS, European Restrictive measures (sanctions) in force, <eeas.europa.eu/sites/eeas/files/restrictive_measures-2017-04-26-clean.pdf> (1.11.2019).

5. ENSURING RESPECT THROUGH ENFORCEMENT MEASURES

It is now time to flip the coin, from implementation to enforcement. This chapter focuses on the enforcement measures that armed groups, States, or the international community can take to condemn and stop violations of IHL. As described earlier, enforcement in the context of this thesis is generally understood as something repressive, a measure that has an element of compulsion in it.

The primary function of the law is not to punish war criminals, but to protect victims of armed conflicts by preventing war crimes from being committed. Before any question about war crimes trials or other enforcement action can arise, failure in that primary endeavour must be presupposed. In this sense, "enforcement" is a secondary office of the laws of armed conflict.[745]

One of the major points of difference between international law and domestic law is the absence of a systematic regime for the enforcement of international law. Nowhere has this absence been more pronounced than in IHL. "In no case", Skillen argues, "has the absence of a systematic enforcement regime contributed more to a lack of respect for the legitimacy of the law than has been the case with IHL".[746] What are the repressive measures that are available to States and how effective have they been? Are new measures necessary due to the changing nature of conflicts? This chapter will focus on repression of violations and armed groups' compliance with the law as well as the role of UN in ensuring compliance with the law.

Practice confirms that serious violations of humanitarian law are not considered an internal affair of a State, and the community of States can intervene through its co-operative organs if need be. Apart from this, however, enforcement of IHL often lies with individual members of the international community, which have recourse to different interstate and domestic enforcement methods. Retaliation, reprisals, and self-defence are regarded as classic forms of enforcement of international law obligations.[747] One could also name demands to ensure State responsibility, compensation, punishment of individuals, or sanctions directed against the property or assets of individuals.[748]

Furthermore, Humanitarian law cannot be considered a "self-contained system" which, in the words of the ICJ, enumerates a limited number of possible reactions to violations in the context of the law of diplomatic relations.[749] Therefore,

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[745] McCoubrey, *International Humanitarian Law, supra nota* 78, p 279.

[746] Geoffrey J. Skillen, "Enforcement of International Humanitarian Law" – Helen Durham & Timothy L.H. McCormack (eds), *The changing Face of Conflict and the Efficacy of International Humanitarian Law* (Kluwer Law International, 1999) 205–211, p 205.

[747] Wolfrum & Fleck, "Enforcement", *supra nota* 418, p 685.

[748] SC RES 841, 16.06.1993 in the case of military leaders of Haiti.

[749] Dieter Fleck, „International humanitarian law after September 11: challenges and the need to respond", 6 *Yearbook of International Humanitarian Law* (2003) 41–71, p 63. *United States diplomatic and Consular Staff in Tehran* (United States of America v. Iran), Judgment, ICJ Reports (1980) 3 at 38, para 83 and p 40, para 86.

measures from other fields of law can also be used to bring an illegal action to a halt or to punish the perpetrators.

5.1. What is enforcement of international humanitarian law?

As said, enforcement measures differ from implementation measures in their content and prospective aims. This chapter will first provide an overview of what enforcement means in the context of IHL, and then analyse some specific measures in more detail. As mentioned previously, drawing the line between monitoring and enforcement measures is not always easy. Supervision and enforcement are analysed in separate chapters of this thesis, but I admit that the distinction is not clear. For example, Zyberi holds that "Enforcement involves a variety of measures aimed at ensuring observance of IHL through international monitoring, assigning responsibility for serious violations through courts or other mechanisms and providing reparations for serious IHL violations to affected individuals or States. When considering the enforcement process, it is possible to categorize that in terms of judicial and non-judicial enforcement; in terms of the law of international responsibility, as responsibility of States, international organizations, individuals, or non-state actors; and, in terms of the levels or layers of enforcement, the domestic, the regional, and the international ones."[750]

The 1899 and 1907 Hague Conventions on Land War, and the Regulations annexed to them, are imprecise on the matter of ensuring compliance. Article 1 of the 1899 and 1907 Hague Conventions requires the powers to issue instructions to their land forces in conformity with the Regulations. Article 3 of the 1907 Convention says that a belligerent party violating the Regulations "shall, if the case demands, be liable to pay compensation." Additionally, Article 56 of the 1899 and 1907 Hague Regulations makes a vague reference to legal proceedings in the event of violation of its rules about certain types of public property. Nothing more is said about how these, or other provisions, are to be enforced. Roberts holds that the many striking omissions regarding enforcement exposed the Hague system to the accusation that it was based on unduly optimistic assumptions.[751]

With the Conventions and other instruments emerging after the Second World War, many efforts have been made to draw up formal provisions regarding implementation and enforcement. However, many of those that have been adopted in treaty form have, in practice, been ignored or sidestepped – and States have observed unevenly their duty to ensure that all those suspected of grave breaches are tried.[752] This is why so many authors are sceptical on the issue of enforcement, and hold that the proliferation of international legal norms has not led either to

[750] Zyberi, "Enforcement", *supra nota* 98.

[751] Roberts, "Implementation", *supra nota* 251, p 363.

[752] *Ibid*, p 364.

corresponding developments in international judicial decision-making, or to corresponding procedures for the coercive enforcement of international rules. If anything, there has been a regression in this respect.[753]

Conforti and Dunworth take this scepticism the furthest, by indicating that even the few institutional enforcement mechanisms created following the Second World War, including the UN collective system, have not lived up to the high expectations they generated at the outset. These actions have been so fragmentary, decentralized and sporadic that it remains impossible, *rebus sic stantibus*, to speak of an effective system of coercive enforcement of international rules.[754]

Several authors hold that IHL shares a critical weakness with international law in general, which makes it fundamentally different from domestic law: the lack of a central enforcement body and the resulting lack of effective implementation.[755] This weakness is even said to detract from the legitimacy of international law as a legal regime. To a large degree, States have reserved the function of ascertainment and enforcement of international law to themselves, a fact that blurs the distinction between legislation and adjudication.[756]

Indeed, who should bear the role of an international police force or a prosecutor that has powers to instruct individual States on how they should act in times of war, and how they should punish the wrongdoers? If a State, or even more difficult a non-state actor, simply does not abide by the rules under IHL or customary law, which course of action are other States allowed to take? This is the central and defining question connected to enforcement that also differentiates it from implementation. What can be done to bring a wrongdoer back to a lawful conduct, to restore respect for IHL?

Again, there are almost as many interpretations and catalogues on the concept of enforcement as there are authors writing on the subject of IHL. Traditional textbooks on the law of armed conflict generally list the following methods of enforcement: diplomatic recourse (including complaints, mediation, and commissions of inquiry); reprisals; the prosecution of war crimes; hostage-taking and claims for compensation.[757]

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[753] Conforti, *International Law and the Role of Domestic Legal Systems*, *supra nota* 73, p 5.

[754] *Ibid*, p 7. In conclusion, international law displays an increasing disparity between its growing normative content and its lack of enforcement mechanisms.

[755] Wolfrum & Fleck, "Enforcement", *supra nota* 418, p 675; Frits Kalshoven, „Belligerent reprisals revisited" – Frits Kalshoven (ed), *Reflections on the Law of War: collected essays.* 17 *International humanitarian law series* (Martinus Nijhoff Publishers, 2007) 759–792, p 759. Breslin, "Ensuring Respect", *supra nota* 247, p 383; Tristan Ferraro, „Enforcement of Occupation Law in Domestic Courts: Issues and Opportunities", *Israel Law Review* 41 (2008) 331–357, pp 331, 332.

[756] Hilary Charlesworth, *et al*, „International law and national law: fluid states" – Hilary Charlesworth (ed), *The fluid state: international law and national legal systems* (Federation Press, 2005) 1–17, pp 11–12.

[757] Greenwood,"Ensuring Compliance", *supra nota* 3, p 196.

Kalshoven notes that IHL has never been totally devoid of means for the promotion of compliance and gives the examples of State responsibility and individual liability for war crimes; supervision by outside powers; and dissemination of knowledge of the law.[758]

For Cassese, various means are available for enforcing IHL. Firstly, there is the traditional, but controversial, method of reprisals, whereby a belligerent employs illegal means of warfare in response to violations of the laws of war by its adversary.[759] Secondly, he lists specific mechanisms agreed upon by the parties to a conflict, such as the designation of a Protecting Power; the utilization of fact-finding mechanisms, such as the "Fact Finding Commission", and criminal jurisdiction – prosecution and punishment by national or international tribunals of individuals accused of being responsible for violations of IHL.

Hoffmann finds that the modalities for enforcing the rules of IHL have expanded over the generations. Even before the modern treaty based IHL system, States were responsible for assuring that their armed forces implemented rules for behaviour in combat, and punished infractions. He believes that self-regulation continues to be the most fundamental form of State compliance with IHL, with training and military discipline at the core of these efforts.[760]

Today, other enforcement mechanisms are developing, e.g. humanitarian intervention that has been employed with mixed results in Bosnia, Kosovo and East Timor. Such intervention remains under discussion as a possible tool to prevent other war crimes in the future. On occasion, governments are also willing to impose economic boycotts on States that are in flagrant violation of their obligations under IHL.[761]

Palwankar classifies legally permissible measures available to third parties into four broad categories: measures to exert diplomatic pressure; coercive measures that States may take themselves; measures which States may take in co-operation with international organizations and assistance action undertaken in conformity with IHL.[762] Note that these are enforcement measures available for third States, and do not include punishing of grave breaches for example. One could think of external and internal enforcement measures in this sense.

Zyberi holds that IHL treaties have established four mechanisms for the enforcement of IHL, namely the Protecting Powers; the ICRC; the *ad hoc* fact-finding commissions under the GCs, and a standing International Fact-finding Commission. He does admit however, that the Protecting Powers system has been used only five times, the *ad hoc* fact finding commissions have never been used, and the standing International Fact-Finding Commission has only been used once

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[758] Kalshoven, „Belligerent reprisals revisited", *supra nota* 755, p 759.

[759] Cassese, „On the Current Trends", *supra nota* 636, p 3.

[760] Hoffman, "Emerging combatants", *supra nota* 36, p 103.

[761] *Ibid*, p 103.

[762] Palwankar, "Measures available", *supra nota* 222.

so far. "This situation provides a very bleak picture of the effectiveness of three IHL treaty-based mechanisms."[763]

Appropriate measures to ensure compliance with IHL are not confined to those specifically provided for in this particular branch of law itself. State responsibility, and also the individual responsibility of fighters in armed conflicts, are based on a much broader concept of responsibility. In fact, all available means and mechanisms to ensure compliance with the law may be used, including action by the SC under Chapter VII of the UN Charter, human rights mechanisms, international criminal tribunals, and public opinion.[764]

Non-governmental organizations are also engaged in this work. Human rights organizations investigate war crimes aggressively, and pressure wrongdoers by making their findings known to the public. Some journalists have acquired substantial insight into the nature of war crimes. Academics are also beginning to turn their awareness toward the humanitarian challenge of war crimes. If States are resolute in drawing on all of these efforts, legal tools, and institutional resources, then much can be done to curb war crimes and advance the development of IHL in some circumstances. And sometimes, says Hoffmann, State depredations can be brought to an end by decisive targeting of military and economic pressure points – in other words, by waging war against wrongdoers.[765]

There are some common elements that can be derived from the aforementioned. It seems to me that punishment of grave breaches, reprisals, and measures under the UN framework are mentioned more often than others. These three elements will be given some more thought in the current chapter, after briefly stopping on one important aspect in the general concept of enforcement. Namely, there is an alarming new development emerging whereby some authors have started to hint that the general obligation to "ensure respect" for the Conventions could in principle also extend to the use of force. It is usually specifically pointed out that respect must be ensured by all lawful means, but there is an evident tendency to stretch this obligation even further. It is worthwhile to repeat that the only instrument of international law authorizing the use of force is the UN Charter. Armed intervention undertaken unilaterally, i.e. without any reference to a treaty or custom, by a State or a group of States, is not permitted under public international law. "It would indeed be unthinkable", as Sandoz puts it, "to see international humanitarian law, whose philosophy it is not to link its application to *jus ad bellum*, itself become a pretext for armed intervention".[766]

IHL applies equally to all parties in an armed conflict situation, and independently of considerations relating to the legality of the use of force. In fact, if it were to be conceded that IHL does permit the use of armed force in order to put an end to violations of this law, then it could also be argued that any use of armed

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[763] Zyberi, "Enforcement", *supra nota* 98.

[764] Fleck, „International humanitarian law after September 11", *supra nota* 749, p 63.

[765] Hoffman, "Emerging combatants", *supra nota* 36, p 104.

[766] Palwankar, "Measures available", *supra nota* 222, citing Yves Sandoz, *Annals of International Medical Law*, No. 33, 1986, p 47.

force which abides by IHL to the letter is thereby "legal" under that law, independently of the provisions of the Charter. This would be absurd, which is precisely one of the reasons why IHL cannot – and must not – in any way be connected with the legality of the use of force.[767]

The use of force cannot be justified without Security Council's approval. The Charter of the UN is "the bedrock of International Law and Order, and the bending of its rules will quickly result in chaos."[768] Even more so, the use of force can never be justified on the basis of CA 1 on its own, this being a question for *jus ad bellum*. No recent international practice or evolving customary law proves that there has been a re-interpreting of the UN Charter. The only case in which State practice has been in contradiction with the UN Charter is the "humanitarian Intervention" by NATO in Kosovo, which was clearly an exception. Another consideration that has to be taken into account is that the UN Charter cannot be compared to other treaties: it is what Kelsen termed a "Grundnorm" or the Constitution of the International Community. Therefore, one should not remove or attack this foundation without having an alternative system to replace it with.[769]

5.2. Repression of violations

"The many failures to find effective means of implementation in respect of violations of the laws of war, coupled with a high level of rhetoric on the subject, have had deeply damaging effects. They have contributed to a widespread view that the laws of war are virtually a dead letter, and can be ignored with impunity".[770]

Rosas rightfully holds that we have not reached the stage where principles of decency will be respected simply because it is the decent thing to do. An effective legal system cannot do away with the notions of sanctions and punishment.[771] This brings us to the next level of enforcement of IHL – criminal jurisdiction, i.e. enforcement through the prosecution and punishment by national or international tribunals of individuals accused of being responsible for violations of IHL.[772]

The ICC now has jurisdiction over war crimes listed in the Conventions. For this reason, many authors write about the need to incorporate the Rome statute into national law, instead of incorporating the Conventions. The ICRC has compiled a useful comparative table on War Crimes under the Rome Statute of the ICC and their sources in IHL. The table aims, on the one hand, to identify the origin of the terms used in the Statute's definitions of war crimes and, on the

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[767] *Ibid*. See also ICRC, "Report on the Protection of War Victims", *International Review of the Red Cross* 296 (1993), at 3.1.3.

[768] Hegelsom, *supra nota* 278, p 73.

[769] *Ibid*, p 74.

[770] Roberts, "The Laws of War", *supra nota* 94, p 77.

[771] Rosas, "International Monitoring Mechanisms", *supra nota* 579, p 245.

[772] Cassese, „On the Current Trends", *supra nota* 636, p 4.

other, to highlight the differences in wording and content between those definitions and obligations arising under IHL instruments.[773]

The approach which a State takes to implementation of the Rome Statute will depend on the nature of that State's legal system. Once ratified, in some monist States, treaties occupy a position in the hierarchy of national law on par with constitutions. For other States, however, constitutions are supreme, and implementation of conflicting treaty obligations may require constitutional amendments or, at the least, reinterpretation of key provisions.[774]

In common law States, treaties do not, as a general rule, become part of the domestic or national law until implementing or enabling legislation is enacted. This means that a State cannot prosecute an individual alleged to have committed violations of treaty rules of IHL unless it has adopted enabling legislation establishing these offences under domestic law.[775]

In many civil law States, the treaties to which the State is a party form an integral part of the State's national law. While this may provide the theoretical framework for direct enforcement, in practice, prosecutions of violations of IHL treaties are likely to be brought only where the State's criminal and/or military law specifically includes these offences. Ordinarily, this will be required in order to satisfy requirements for clarity and certainty in the law, and to ensure that the penalties for any such offences may be known to the public.[776]

In States which have not adopted any of the preceding approaches, conduct constituting a grave breach will have to be charged as an ordinary criminal offence. Such an approach will not permit prosecution of all grave breaches. For example, a grave breach such as unjustifiable delay in the repatriation of prisoners of war or civilians could not be prosecuted unless there are specific humanitarian law type offences in the military or ordinary criminal code.[777] In many cases the prosecution of sexual violence in armed conflicts was regulated on national level only in early 2000s.[778] The issue of human shields also used to be improperly legislated in domestic law, leaving only the possibility of prosecuting this as an "ordinary crime".

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[773] ICRC Advisory Service, War Crimes under the Rome Statute of the International Criminal Court and their sources in International Humanitarian Law. Comparative Table. <www.icrc.org/en/document/war-crimes-under-rome-statute-international-criminal-court-and-their-source-international> (1.11.2019).

[774] Schense and Piragoff, "Commonalities and differences", *supra nota* 72, pp 247–248.

[775] Anna Segall, „Punishment of War Crimes at the National Level: obligations under IHL and the complementarity principle established by the ICC" – Matthias Neuner (ed), *National Legislation incorporating international crimes*, *Approaches of Civil and Common Law Countries* (Berliner Wissenschafts-Verlag, 2003), p 265.

[776] *Ibid.*

[777] *Ibid*, p 267.

[778] Annika Talmar, „Criminalizing sexual violence in armed conflicts", University of Helsinki, master's thesis (2008).

Paradoxically, the Rome Statute does not explicitly require States Parties to prosecute and punish crimes under the Court's jurisdiction, as the Conventions do. However, this is assumed, as the complementarity mechanism provided for in the Statute depends on the ability of a State to try such crimes domestically. It is therefore essential for States Parties to the Rome Statute to adapt their criminal legislation to the Statute so that they are able to try crimes under the Court's jurisdiction domestically when necessary.[779]

I believe that "writing" the relevant offences into national legislation is a crucial measure for inducing compliance with IHL. It goes hand in hand with the obligation to teach and disseminate. The latter obligation is much easier to be fulfilled if the crimes and sanctions for them are clearly listed in a national legislative act and everyone can be certain which acts are punishable.

5.2.1. Definition of grave breaches and war crimes

It is important to note that there are different categories of violations of IHL. Not every infringement entails a possibility for international adjudication. The most serious breaches of the Conventions and Protocols are the "grave breaches" expressly listed in the Conventions and Protocol I. These include wilful killing; torture or inhumane treatment; wilfully causing great suffering or serious injury to body or health; attacks on the civilian population and indiscriminate attacks; attacks on works and installations containing dangerous forces and non-defended localities; perfidious use of the protected emblems; unlawful population transfers; unjustified delay in repatriation of prisoners of war or protected civilians; attacks on historic monuments or places of worship; and denial of judicial guarantees.[780]

Each of the four Conventions has an Article describing grave breaches appropriate to the category of protected individual in that particular convention. The grave breaches for the four Conventions overlap to a large extent. In addition, grave breaches are a closed category. If the offence is not specified in the Conventions, it is not a grave breach. Grave breach offences that are specified in all four Conventions are wilful killing, torture or inhuman treatment, and wilfully using great suffering or serious injury. Similar obligations were later imposed by the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.[781]

While Protocol I of 1977 was promulgated, it improved the system of third-party supervision by creating new items of "grave breaches", including, *inter alia*:

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[779] ICRC, Advisory Service on International Humanitarian Law, Implementing IHL: Participation of the American States in International Humanitarian Law Treaties and their National Implementation. 2016–2017 report. <www.icrc.org/en/publication/ihl-participation-american-states-ihl-treaties-national-implementation-2016-2017> (1.11.2019).

[780] Fred L. Borch & Gary D. Solis, *Geneva Conventions* (New York: Kaplan Publishing, 2010), pp 25–26.

[781] Yu, „The development", *supra nota* 627, p 14.

(a) wilfully launching indiscriminate attacks with the knowledge that such attacks will cause excessive loss of life, injury to civilians or damage to civilian objects;
(b) unjustifiably delaying in the expatriation of prisoners of war or civilians;
(c) practicing apartheid and other inhumane and degrading practices involving outrages upon personal dignity based on racial discrimination, when committed willfully and in violation of the Conventions and Protocol I;
(d) making grave breaches of the said Conventions and Protocol "war crimes."

A more noteworthy improvement made by Protocol I was the establishment of the principle of respondent superior (Articles 51(4), 57(2), 85(4) and (5)). In this connection, the Protocol requires State Parties and Parties to armed conflict to impose a duty on military commanders to prevent and, where necessary, to repress and report to competent authorities breaches of the Conventions and of Protocol I. To facilitate the implementation of this complicated responsibility, the Protocol requires the said States Parties to make legal advisors available to the commanders at the appropriate level.[782]

Superiors shall only issue orders which are in conformity with international law. A superior officer who issues an order contrary to international law exposes not only himself but also the subordinate obeying to the risk of being prosecuted (Article 86 AP I). Military commanders are the enforcers of the internal disciplinary system of their army and have the duty to prevent breaches of the law of war and to ensure that members of the armed forces under their command are aware of their obligations under the Conventions and Protocol I.[783]

Grave breaches are regarded as war crimes. However, the notion of war crimes is somewhat broader than that of grave breaches because it also covers other serious violations of the rules of IHL, either customary or treaty-based, regardless of whether such violations are committed in situations of international or of non-international armed conflict.[784]

The war crimes provisions of the Rome Statute clarify this issue and are divided into four "segments". The first division or distinction is between war crimes committed in international armed conflict and those committed in non-international armed conflict. In international armed conflict, there are two separate provisions:

- Article 8(2)(a) refers to "grave breaches of the Geneva Conventions of 12 August 1949" (and lists eight specific acts which constitute war crimes).
- Article 8(2)(b) refers to "other serious violations of the laws and customs applicable in international armed conflict" (and lists 26 specific acts which constitute war crimes).

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[782] *Ibid*, p 15. ICRC, Advisory Service on International Humanitarian Law, „Command responsibility and failure to act", <www.icrc.org/en/doc/assets/files/2014/command-responsibility-icrc-eng.pdf> (1.11.2019).

[783] Guillemette, "Legal advisers in armed forces", *supra nota* 40, p 136.

[784] Art 85 of AP I.

War crimes in non-international armed conflict are similarly divided into two:

- Article 8(2)(c) covers "serious violations of Article 3 common to the Geneva Conventions of 12 August 1949" and lists four acts which, if committed against persons taking no active part in hostilities, constitute war crimes.
- Article 8(2)(e) refers to "other serious violations of the laws and customs applicable in armed conflicts not of an international character" (and lists 12 acts which constitute war crimes).

It is important to remember that the term "war crime", as defined in the Rome Statute, does not cover all violations of IHL, which give rise to individual criminal responsibility.[785]

The advantage of this approach is its clarity and transparency, which is of the utmost importance for criminal law. The disadvantage is the creation of the category of "other" breaches, which involves the violation of all the remaining provisions of the Conventions, which then seem to be less serious. In this case, judicial recourse may exist at national levels, but these are not specified in the Conventions, and the recourse will therefore depend on each different national system of justice.[786]

5.2.2. Repressive measures at national level

States Parties to the Conventions and Protocol I must enact laws to repress the most serious violations of these instruments, those which are defined as grave breaches. In addition, States Parties to the Conventions and Protocol I must suppress all violations. The obligation to suppress violations does not require criminal legislation to be adopted, but leaves it to States to adopt such legislative, administrative or disciplinary measures as may be necessary.[787] As said in many parts of this work, action on national level is often the most effective in preventing further violations of IHL.

It is well known that the International Military Tribunals at Nuremberg and Tokyo raised a new standard that imposed personal criminal responsibility upon individuals found guilty of serious violations of the law of war. This lead the drafters of the 1949 Conventions to realize that to effectively enforce the requirements and prohibitions of the Conventions, there had to be a means of imposing

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[785] Segall, „Punishment of War Crimes", *supra nota* 776, p 259.

[786] Bouchet-Saulnier, *The practical guide*, *supra nota* 23, p 593.

[787] Segall, „Punishment of War Crimes", *supra nota* 776, p 261. Other treaties include: the 1954 Hague Cultural Property Convention and its Second Protocol; the 1972 Biological Weapons Convention, the 1976 Environmental Modification Techniques Convention, Amended Protocol II to the 1980 Conventional Weapons Convention, the 1993 Chemical Weapons Convention, and the 1997 Ottawa convention.

criminal penalties on individuals. The solution was Common Article 49/50/129/146.[788]

The Conventions introduced a State's twofold obligation to establish penal sanctions and prosecute offenders. Each contracting Party is obliged not only to ensure that its legislation stipulates "effective penal sanctions for persons committing or ordering to be committed any of the grave breaches", but also to "search for such persons and to bring them, regardless of their nationality, before its own courts", unless it prefers to hand them over for trial to another contracting Party (*aut dedere aut judicare)*.[789]

Therefore, the jurisdiction provided by the Conventions is universal, in that those suspected of being responsible for grave breaches come under the criminal jurisdiction of all States parties. In addition, Article 88 of Protocol I requires that States parties provide mutual assistance with regard to criminal proceedings brought in respect of grave breaches to the Conventions or to Protocol I, including cooperation in the matter of extradition.[790] For States that are party to Protocol I, the obligation to repress grave breaches extends to those grave breaches, which result from a failure to act when under a duty to do so.[791]

The extent to which such extradition is possible is regulated by the domestic law of the home State. Normally, the State interested in prosecution will most likely be either the injured state, or the home state of the accused.[792] The State where the offender belongs to has the main opportunity and, therefore, the first duty to punish. The aim of the punishment is twofold: to secure the effectiveness of international law of war, and to maintain the discipline of the troops.[793] Punishment of violations at national level immediately upon outbreak of a conflict is particularly important if a negative spiral of violations of the law is to be avoided.

In Estonia, extradition and mutual assistance in criminal matters as well as cooperation with the ICC is comprehensively regulated by the Code of Criminal Procedure. For example paragraph 433 provides that "International cooperation in criminal proceedings comprises extradition of persons to foreign states, mutual assistance between states in criminal matters, execution of the judgments of foreign courts, taking over and transfer of criminal proceedings commenced, cooperation with the International Criminal Court and Eurojust and extradition to Member States of the European Union."[794]

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[788] Solis, *Geneva Conventions*, *supra nota* 780, p 21.

[789] Yu, „The development", *supra nota* 627, p 14; Dutli, "National Implementation measures", *supra nota* 2, p 248; Wolfrum & Fleck, "Enforcement", *supra nota* 418, p 693.

[790] Cassese, „On the Current Trends", *supra nota* 636, p 5.

[791] Segall, „Punishment of War Crimes", *supra nota* 776, p 262.

[792] Vöneky, "Implementation and Enforcement", *supra nota* 19, p 665.

[793] *Ibid*, p 668; McCoubrey, *International Humanitarian Law, supra nota* 78, p 284.

[794] Code of Criminal Procedure, 12.02.2003, entry into force 01.07.2004 – RT I 2003, 27, 166.

Individual criminal responsibility is also in the heart of the Rome Statute and differentiates the ICC from other existing courts, such as the ICJ, which addresses State violations of law. State responsibility has been reaffirmed, and further developed by the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, without affecting the *lex specialis* character of relevant provisions of humanitarian law.[795]

There are those that do not see individual criminal responsibility as a golden ticket. Fleck states that "it is not only the *lex specialis* character of international humanitarian law, but even more so the particular deficiencies of law application in international armed conflicts, non-international armed conflicts and internal disturbances which makes the exercise of individual and international responsibility a complex, difficult and often hopeless task." The provisions are still not systematic, and there are many competing interests at play.[796]

Cassese and Kleffner believe respectively that "the principal problem with the enforcement of IHL through the prosecution and punishment of individuals is that the implementation of this method ultimately hinges on, and depends upon, the goodwill of States".[797] And that "although criminal prosecutions of individual perpetrators have gathered much attention over the last decades, the framework of individual responsibility remains limited." While it addresses the responsibility of the individual, the violations are still based on the collective entities of States and armed groups.[798]

It was the establishment of the ICC that prompted numerous States into adopting national pieces of legislation implementing IHL provisions relating to war crimes; before that the initial enthusiasm was not followed by massive legislation as hoped.[799]

Until very recently, the accepted wisdom was that neither Common Article 3 (which is not among the grave breaches provisions of the Conventions) nor Protocol II (which contains no provisions on grave breaches) provided a basis for universal jurisdiction, and that they constituted, at least on the international plane, an uncertain basis for individual criminal responsibility.[800]

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[795] Fleck, "Individual and state responsibility", *supra nota* 322, p 171. Draft articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission* (2001), vol. II, A/CN.4/SER.A/2001/Add.1.

[796] Fleck, "Individual and state responsibility", *supra nota* 322, p 173.

[797] Cassese, „On the Current Trends", *supra nota* 636, p 4.

[798] Jann K. Kleffner, „Improving Compliance with International Humanitarian Law through the Establishment of an Individual Complaints Procedure", 15 *Leiden Journal of International Law* (2002) 237–250, pp 237–238.

[799] Noelle Quenivet & Shilan Shan-Davis, "Confronting the challenges of international law and armed conflict in the 21st century" – Noelle Quenivet & Shilan Shan-Davis (eds), *International law and armed conflict: challenges in the 21st Century* (The Hague: T.M.C. Asser Press, 2010) 3–30, p 4; Cassese, „On the Current Trends", *supra nota* 636, p 5.

[800] Theodor Meron, "International Criminalization of Internal Atrocities", 89 *American Journal of International Law* (1995) 554–577, p 559.

Protocol II is silent on sanctions, responsibility or third-party supervision, but it may rely for its implementation upon application of the Article 3 language common to the Conventions of 1949, i.e., an impartial humanitarian body, such as the ICRC, may offer its services to the parties to the conflict. In so doing, however, the non-intervention injunction of Article 3 of the Protocol should be taken into account.[801]

"Those who reject Common Article 3 and AP II as basis for individual criminal responsibility tend to confuse criminality with jurisdiction and penalties. The question of what actions constitute crimes must be distinguished from the question of jurisdiction to try those crimes. Failure to distinguish between substantive criminality and jurisdiction has weakened the penal aspects of the law of war", holds Meron.[802] Regarding the Conventions there is no doubt that certain acts constitute crimes, even if the scale of penalties or jurisdiction is not established.

Individual criminal responsibility is thus a tricky method of enforcement. On one hand, it holds great potential for immediate punishment, deterrence and State involvement. On the other, it is too dependent on State's will and the standard of its judicial system.

In order to respect their obligations under IHL, States must incorporate punishment for international crimes into their domestic criminal law. From a legislative perspective, incorporating punishments into domestic law for violations of IHL raises two problems: the definition of the criminal offence (the method of criminalization), and the form and the place in which it is to be introduced into the legal system.[803] This was touched upon briefly in the first chapter of this thesis.

In accordance with Article 49, para 4, GC 1, States are not entirely free in organizing this legal procedure. Minimum standards of international law, as stated in Articles 99–108 GC III and Article 75 AP I, must be respected.

The ICRC Advisory Service has developed an information kit for National Enforcement of International Humanitarian Law. The kit deals with obligations in terms of penal repression; methods of incorporating punishment into criminal law; Universal Jurisdiction over war crimes; Command responsibility and failure to act; Criminal procedure; Judicial guarantees and safeguards; and Cooperation in extradition and judicial assistance in criminal matters.[804] All this must be taken into account when adopting domestic legislation and other administrative acts. As ICRC's database for national implementation demonstrates that this has been done with varying degrees of success.

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[801] Yu, „The development", *supra nota* 627, p 18.

[802] Meron, „International Criminalization", *supra nota* 800, p 561.

[803] ICRC, Advisory Service on International Humanitarian Law, „Methods of incorporating punishment into criminal law", <www.icrc.org/en/doc/assets/files/2014/methods-of-incorporating-punishment-into-criminal-law-icr-eng.pdf> (1.11.2019).

[804] ICRC, Advisory Service on International Humanitarian Law, „Obligations in terms of penal repression", <www.icrc.org/en/doc/assets/files/2014/obligations-in-terms-of-penal-repression-icrc-eng.pdf> (1.11.2019).

States party to the Rome Statute have additional obligations. They must amend their national laws and adapt procedures to enable them to co-operate with the Court (for example, arrest and surrender of suspects, collecting and preserving evidence, enforcing fines, forfeitures and penalties). Privileges and immunities also have to be granted to the Court and its officers.[805] These vital contributions of States to the respect of IHL should be peer-reviewed by other states, and the ICRC to gradually develop common standards for all.

5.2.3. Repressive measures on the international level

The primary duty for the maintenance of norms of IHL and its enforcement against personnel who violate it therefore rests upon States through their systems of criminal law and military discipline. The question of international jurisdiction arises only at the point where a State cannot, or will not, undertake municipal enforcement, or where the circumstances otherwise dictate that this is the only viable way of proceeding.[806]

The reality of warfare has proven that the described obligatory national measures have failed on numerous occasions. The reasons for this might be various. Sometimes the home States of the perpetrators have simply ceased to exist, or changed so dramatically that prosecution is impossible. At other times States are unwilling to prosecute, or there is a dispute that calls for international fact finding and prosecution. Be that as it may, any discussion of international enforcement action should be predicated upon an assumption of the prior failure of municipal measures of enforcement.[807] This is only logical and similar to a point previously mentioned – as it would not make sense to start enforcing before implementing, it would not be wise to turn to international measures before exhausting the national ones. Humanitarian law and most domestic systems give us a vast array of measures to take before resorting to international criminal adjudication.

Today, when faced with allegations of violations of IHL, the international community has a few options if criminal prosecutions are desired. Where national infrastructure has collapsed, international resources could be made available to assist with the prosecution of the alleged offenders in domestic courts. Additional *ad hoc* international tribunals or mixed international criminal tribunals, similar to those established for the former Yugoslavia and Rwanda, could be established. In cases where this is possible, the case could be referred to the ICC. International law norms for the punishment of war crimes have evolved along with the development of IHL. They are understood primarily as a means of enforcement of the

[805] Segall, „Punishment of War Crimes“, *supra nota* 776, pp 257–258.

[806] McCoubrey, *International Humanitarian Law, supra nota* 78, p 297.

[807] *Ibid*, p 309.

latter. Unfortunately, this development has limped along behind the developmental pace of rules on warfare.[808]

Some proposals were made for punishment of war crimes already in the 1929 Conventions, and by the Commission established at the Paris Peace Conferences for investigating responsibility for the war's outbreak and mandated to establish a criminal court. Unfortunately, the Second World War started before a system of prosecution was put in place.[809]

After the war, as is well known, the International Military Tribunals of Nuremberg and Tokyo were established, and successfully conducted trials and imposed penalties against a number of German and Japanese actors having committed crimes against peace, war crimes, and crimes against humanity. They saw a comprehensive application of the law of war's criminal enforcement.[810] These tribunals, and the circumstances leading to their creation, must be seen as something exceptional, and the whole system of IHL enforcement should not be based on this precedent.

Since 1993, the World has witnessed the establishment of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, of the Special Court for Sierra Leone, of the Extraordinary Chambers in the Courts of Cambodia, and other hybrid mechanisms in East Timor, Bosnia-Herzegovina, Kosovo, and more recently Lebanon and Guatemala. Mendez thus concludes that there is a clear historical trend in breaking impunity and fostering accountability.[811] Other authors hold, on the contrary, that national interests have outweighed the willingness to comply with IHL, and that War Crimes trials have only been convened when national political will has so dictated. Trials have only taken place where defeat and criminality coincided.[812]

The most promising step in building long-term respect for the rule of law has arguably been the establishment of the permanent International Criminal Court. Moynier, one of Dunant's co-founders of the ICRC, published the first known draft statute for an international criminal court and became a leading advocate of the need to supplement a purely national approach to the enforcement of the law of war.[813] Nevertheless, the international community took 130 years to respond to his call with the entry into force of the Rome Statute for the ICC on 1st July 2002.[814]

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[808] Vöneky, "Implementation and Enforcement", *supra nota* 19, p 662. Wolfrum & Fleck, "Enforcement", *supra nota* 418, p 678.

[809] *Ibid*, p 680.

[810] Yves Beigbeder, "The Pioneers: The Nuremberg and Tokyo Military Trials" – Yves Beigbeder (ed) *International Criminal Tribunals* (London: Palgrave Macmillan, 2011) 20–48.

[811] Juan E. Mendez, „Preventing, implementing and enforcing IHL", 39 *Studies in Transnational Legal Policy* (2008) 89–99, p 92.

[812] Skillen, "Enforcement", *supra nota* 746, p 208.

[813] McCormack, „The importance", *supra nota* 495, p 322.

[814] *Ibid*, p 321.

The jurisdiction of the ICC, which is complementary to national criminal jurisdictions, is limited to the most serious crimes of concern to the international community as a whole (Article 5 ICC Statute). But, the fact that a number of States have not ratified the Rome Statute indicates a double standard in the implementation of international criminal law. There is another issue that lessens the initial euphoria on the potential benefits of the ICC. The court has only tried a handful of cases, and the proceedings before it are enormously time-consuming and elaborate.[815] Therefore, it is not the magical solve-all-solution that it was perhaps hoped to be. As indicated in many other subparagraphs, I believe that States should do everything in their power to avoid the escalation of an issue to the ICC in the first place. If a case is brought before the ICC, the State has already failed in its obligation to respect and ensure respect for IHL.

The ICJ has also played a role in helping to enforce IHL. Claims based on violations of rules or principles of international law of human rights and/or IHL brought before the ICJ from 1991 were present in over 20 contentious cases. A recent finding of the Court has been that violations of human rights and humanitarian law norms create an individual right to reparation on the part of the affected individual, *vis-a-vis* the State.[816] This seems to be a new development, as generally the right to reparation had been only acknowledged in respect of States, given the nature of the jurisdiction of the ICJ.

All that said, it is probably true that we cannot (yet) speak about a comprehensive international judiciary, at least if understood as a complete and hierarchical judicial system covering the globe. Nonetheless, over the past decades, in large part because of the proliferation of criminal institutions supported by the international community, the general public has to a certain extent come to expect enforcement of the laws of war at the international level.[817] International criminal institutions are, therefore, increasingly assessed, in practice, against this expectation.

5.2.4. Sanctions and reparations

Another enforcement mechanism to explore is that of sanctions and reparations. Sanctions express the sentiment that certain actions will not be tolerated. They punish wrongful conduct, serve as a warning to those considering similar action,

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[815] According to the ICC webpage only 6 cases have been closed to date, ICC, Cases, <www.icc-cpi.int/Pages/cases.aspx> (1.11.2019).

[816] Zyberi, „The development and interpretation“, *supra nota* 112, p 119, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports (2004) 131, paras 151–153.

[817] Guido Acquaviva, „International criminal courts and tribunals as actors of general deterrence? Perceptions and misperceptions“, 96 *International Review of the Red Cross* (2014) 784–794, p 786.

and send a message to victims.[818] To be clear, sanctions in the context of this subparagraph mean mostly punitive actions that are taken against bearers of weapons, especially members of non-state armed groups. My argument here is that scorn and sanctions by a group that a fighter belongs to are powerful measures to improve compliance (especially if coupled with thorough dissemination). In fact, the dissemination obligation is essential for the effectiveness of sanctions, because it is the means of informing and educating people about what a serious violation is, and the consequences which it entails.[819] When disciplinary sanction is taken right after a violation has occurred, it underlines the prohibition and has great effect on both the perpetrator and the bystanders. Criminal sanctions, naturally taken with a delay, might have somewhat smaller effect, but still reaffirm that the conflict is not an excuse for violations.

Sanctioning wrongful conduct also allows the armed group to distinguish itself from groups that intend to terrorize, engage in ethnic cleansing, and the like. If it is important for the group to be recognized by the international community and improve their image, they are much more likely to adhere to norms. Furthermore, sanctioning wrongful conduct on the part of members of the armed group allows superiors to demonstrate that they condemned violations of the law, thus satisfying their obligations under the principle of command responsibility.[820]

Sanctions used by armed groups can take different forms, for example: disciplinary sanctions, including reprimands, warnings, confiscation of weapons, demotion, and dismissal from the group; financial sanctions; imprisonment and house arrest; corporal punishment, such as drill exercises or beatings; and criminal sanctions, including capital punishment.[821] Some of these measures risk violating IHL themselves, and must be carefully tailored for each case.

Whether or not such sanctions are effective in preventing violations has been a question of debate. La Rosa has drawn up a comprehensive list of elements which determine the effectiveness of sanctions. Of that list, a few merit particular attention. First of all, any message about the imposition of sanctions must be accompanied by measures intended to improve adherence to the rules and respect for them, as well as dissemination about such rules and sanctions. Secondly, the very idea of sanctions must incorporate prevention of a repetition of the crime and be based on a pragmatic and realistic approach. Thirdly, sanctions must lead the perpetrators to recognize their responsibility in the violation of humanitarian

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[818] Sivakumaran, *The law of non-international armed conflict*, *supra nota* 337, p 445.

[819] La Rosa, "Sanctions", *supra nota* 455, p 227.

[820] Sivakumaran, *The law of non-international armed conflict*, *supra nota* 337, p 446; La Rosa & Wuerzner, "Armed groups", *supra nota* 449, p 331.

[821] Olivier Bangerter, „Measures armed groups can take to improve respect for IHL" – *Proceedings of the Roundtable on Nonstate Actors and International Humanitarian Law: Organized Armed Groups – A Challenge for the 21st Century* (International Institute of Humanitarian Law, 2010) 187–212, p 207.

law and thus help to enable the society to be aware of the impact of certain events, which have affected it.[822]

On the other hand, it has been rightly assessed that "adopting an exclusively penal approach to unlawful behavior and sanctions makes it fairly illusory to expect sanctions to have a dissuasive impact". The idea, which must be borne in mind, is a system of constraints at each stage of the process prior to the commission of the crime.[823] The preventive capacity of purely penal sanctions has been seen to be more "random", as compared to an approach that takes into account all the factors that can result in the sanctions producing the anticipated effects to the full.[824]

Another form of sanctions are those rising on the international level against a State or an armed group by another State or the international community. Article 41 of the UN Charter authorizes the SC to decide on "measures not involving the use of armed force… to give effect to its decisions… These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." International embargoes against Rhodesia, Libya, Haiti, Iraq, and Yugoslavia were enacted under this provision. Alternatively, sanctions can be ordered by a regional organization, as the EU did in the Yugoslav case and more recently on a continuous basis against Russia. They can also be imposed unilaterally by one country against another, for example the US trade embargo against Cuba.[825]

On the occasion of the armed conflict in Libya in 2011, countries from all over the world condemned indiscriminate attacks causing death among the civilian population and urged the Libyan government to respect IHL; in February 2011 the EU approved a package of sanctions against Libyan leaders, including an arms embargo and a travel ban.[826] International sanctions were imposed during the Ukrainian crisis by a large number of countries against Russia and Crimea, following the Russian military intervention in Ukraine. The sanctions were imposed by the United States, the European Union and other countries and international organisations against individuals, businesses and officials from Russia and Ukraine.[827]

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[822] La Rosa, "Sanctions", *supra nota* 455, pp 242–247. ICRC, Advisory Service on International Humanitarian Law, „Elements to render sanctions more effective", <www.icrc.org/en/doc/assets/files/2014/elements-to-render-sanctions-more-effective-icrc-eng..pdf> (1.11.2019).

[823] La Rosa, "Sanctions", *supra nota* 455, p 226.

[824] La Rosa & Wuerzner, "Armed groups", *supra nota* 449, pp 340–341.

[825] Amnesty International, The US Embargo against Cuba: its impact on economic and social rights, <www.amnesty.org/en/documents/amr25/007/2009/en/> (1.11.2019).

[826] Dörmann, "Common Article 1", *supra nota* 206, p 721.

[827] European Council, „EU restrictive measures in response to the crisis in Ukraine", <www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/> (1.11.2019).

Reparations

What happens when perpetrators are brought to justice and "guilt" is established under national or international law? A party to a conflict, which does not comply with the provisions of IHL, shall be liable to make reparations, and shall be responsible for all acts committed by persons forming part of its armed forces. The forms of reparation include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. The obligation to compensate can be traced to Article 91 AP I.[828] Sanctions can also include an order for reparations.

The principle of reparations effectively requires the State concerned to take financial responsibility for damages caused by its wrongful conduct. In practice, the losing party may be obliged under peace treaty to pay the victor a lump sum, by way of reparation for financial losses suffered by the victorious side because of the war.[829] This has been the case in "traditional" inter-state wars, but will be different and not as clear-cut when it comes to armed conflicts that involve other actors than States.

This obligation applies equally to each party to the conflict, whether aggressor or defender. Compensation must be paid only if violation of IHL causes compensable damages (personal injuries, material and property damage, etc). A general obligation to compensate for violation of law has not yet been accepted under international law.[830]

In 1929 the Permanent Court of International Justice (PCIJ) stated that, "It is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law."[831] Regrettably, for a long time victims of violations of IHL themselves could hardly claim compensation on the basis of provisions of IHL instruments, due to lack of specific enforcement mechanisms. As Zegveld notes, although at the international level more channels are available to victims to claim compensation, a general remedy does not exist.[832] Fleck also noted that "still today, the right to individual reparation mainly rests within municipal legal orders and there are no other remedies for individual victims, except under national law. An international legal regime of individual reparations could strengthen democratic developments and have deterrent effects for some perpetrators."[833]

Such a remedy was finally made available under Articles 75 and 79 of the Statute of the ICC, which provide for reparations and the establishment of a Trust

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[828] Vöneky, "Implementation and Enforcement", *supra nota* 19, p 683. Wolfrum & Fleck, "Enforcement", *supra nota* 418, p 707;

[829] Yu, „The development", *supra nota* 627, p 13

[830] Wolfrum & Fleck, "Enforcement", *supra nota* 418, p 707.

[831] *Factory at Chorzow* (Germany vs Poland), Judgment, PCIJ Series A, No 17 (1928), p 27.

[832] Liesbeth Zegveld, "Remedies for victims of violations of international humanitarian law", 85 *International Review of the Red Cross* (2003) 497–527, p 507.

[833] Fleck, "Individual and state responsibility", *supra nota* 322, p 197.

Fund for victims of violations. In addition, the ICJ's findings in the advisory opinion on the Wall case paved the way towards a better protection for individuals under the framework of international law in general, and to the possibility of awarding reparations directly to the affected natural and legal persons in particular.[834]

The UN Commission on Human Rights has thereafter prepared "Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international HRL and serious violations of international humanitarian law", adopted by the General Assembly in December 2005.[835] According to these guidelines, States shall, if they have not already done so, make available adequate, effective, prompt and appropriate remedies, including reparation, and ensure that their domestic law provides at least the same level of protection for victims as that required by their international obligations. It is hard to tell if, and how, these guidelines have been implemented in practice.

Kleffner provides another interesting measure for improving compliance with IHL – the establishment of an Individual Complaints Procedure.[836] He holds that providing individuals with the possibility to submit complaints to an international judicial or quasi-judicial mechanism, which could determine their claims to be victims of violations of IHL committed by parties to an armed conflict, would be one additional means for improving compliance with IHL.[837] The individual complaints procedure has not been significantly discussed within the context of IHL, and the Hague Appeal that advocated for such procedure has unfortunately not had a lasting impact.

5.2.5. Belligerent reprisals

In his chapter on implementation and non-judicial enforcement of IHL Sivakumaran differentiates between internal mechanisms (e.g. dissemination, instruction, sanctions) and a second category of enforcement measures that are carried out by one party as a response to violations committed by the other side. According to him, such enforcement measures primarily take the form of belligerent reprisals. A belligerent reprisal is "an act in breach of a rule of the law of armed conflict, directed by one belligerent party against the other with a view to inducing the latter party to stop violating that or another rule of this branch of

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[834] Zyberi, „The development and interpretation", *supra nota* 112, p 119 128–129. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports (2004) 131.

[835] GA RES 60/147, 16.12.2005.

[836] The Hague Agenda for Peace and Justice in the 21st Century, outcome of The Hague Appeal for Peace Conference May 11–15, 1999, <promotingpeace.org/2007/4/hague.html> (1.11.2019); Kleffner, „Improving compliance", *supra nota* 798, p 239.

[837] *Ibid,* p 238.

international law". He warns that if the act were not undertaken with such a view in mind it would be unlawful.[838]

Roberts defines a reprisal as "a retaliatory measure, normally contrary to international law, taken by one party to a conflict with the specific purpose of making an opponent desist from particular actions violating international law. It might be intended, for example, to make the adversary abandon an unlawful practice of warfare".[839]

Fleck holds that reprisals are, "quite controversially, a means of enforcement of IHL that constitute violations or grave breaches of that same law, and may result in disciplinary or criminal proceedings. The use of reprisals should cause an adversary who is contravening international law to cease that violation. They are permissible only in exceptional cases and for the purpose of enforcing compliance with international law."[840] More importantly, the decision to take retaliatory measures lies at the political level, i.e. a military leader does not have the right to decide on the use of them.

Reprisals are thus exceptionally justified in the light of a prior unlawful act committed by the State at which they are directed. Thus the International Law Commission, which uses the term "countermeasures" to designate such acts, considers the initial illegality to constitute a circumstance which precludes the illegality of the response.[841]

The lawfulness of the measures themselves, notably with regard to their content and implementation, is determined not only in terms of the limits dictated by the demands of civilization and humanity, but also in terms of their aim. Palwankar also warns that the aim is neither to punish (we are concerned with counter-measures, not sanctions) nor to seek compensation, but solely to oblige the State which is responsible for violating the law to stop doing so, by inflicting damage upon it, and to deter it from repeating the same offence in the future.[842]

5.2.5.1. Under which circumstances is the use of reprisals allowed?

As said, reprisals are permissible only in exceptional cases and for the purpose of enforcing compliance with international law. They are countermeasures that justify the infringement of the rights of a subject of international law, which itself is violating the law. This justification is given if, and only if, certain conditions are met: reprisals are aimed to stop the ongoing unlawful conduct; they are necessary and proportional in regard to the ongoing unlawful conduct and the caused damage and they must end if the unlawful conduct of the adversary ends.[843]

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[838] Sivakumaran, *The law of non-international armed conflict*, *supra nota* 337, p 448–449.

[839] Roberts, "The Laws of War", *supra nota* 94, p 19.

[840] Wolfrum & Fleck, "Enforcement", *supra nota* 418, p 690.

[841] *Ibid.*

[842] Palwankar, "Measures available", *supra nota* 222.

[843] Vöneky, "Implementation and Enforcement", *supra nota* 19, p 660.

According to the Kupreškić Trial Chamber, the use of reprisals has the following restrictions:

(a) they must be a last resort in attempts to impose compliance and may be exercised only after a prior warning has been given;
(b) there is an obligation to take special precautions before implementing them;
(c) the principle of proportionality must be adhered to and;
(d) the "elementary considerations of humanity" must be taken into account.[844]

In establishing the lawfulness of a reprisal, two norms have usually been applied by the courts: subsidiarity, and proportionality. Subsidiarity means that recourse to belligerent reprisals is an exceptional measure which must be regarded as an ultimate remedy, after other available means of a less exceptional character have failed. And proportionality generally means proportionality to the preceding illegality, not to such future illegal acts as the reprisal may prevent. It also means the absence of obvious disproportionality.[845]

As the purpose of a belligerent reprisal is to compel the other party to the conflict to observe the law, it is evident that a prior violation of the law of armed conflict must have occurred. The enforcement function of the doctrine also means that, "if one party to an armed conflict breaches the law but then expresses regret, declares that it will not be repeated, and takes measures to punish those immediately responsible, then any action taken by another party in response to the original unlawful act cannot be justified as a reprisal".[846] The Martić Trial Chamber has suggested that "[r]eprisals are … drastic and exceptional measures employed by one belligerent for the *sole* purpose of seeking compliance with the law of armed conflict by the opposite party".[847]

Sivakumaran submits that the latter overstates the point. "While reprisals must be undertaken to enforce compliance with the law on the part of the opposing party", he says, "they may be taken also for other reasons, for example to satisfy public pressure, or a particular domestic constituency. /…/ These other reasons do not render unlawful the use of belligerent reprisals. The relevant test should be whether the employment of belligerent reprisals was for the primary purpose of seeking compliance with the law by the opposing party."[848] In my view, this is a risky statement and contradicts the definition of reprisals. Reprisals are not

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[844] *Prosecutor v. Zoran Kupreskic and others*, Case No IT-95-16-T, ICTY Judgment of the Trial Chamber, 14.01.2000, p 535. Henckaerts & Doswald-Beck, *Customary International Humanitarian Law, supra nota* 182, rules 515–518.

[845] Frits Kalshoven, *Belligerent Reprisals* (Martinus Nijhoff Publishers, 2005), p 341.

[846] *Ibid.*

[847] *Prosecutor v. Milan Martić*, Case No IT-95-11-T, ICTY Judgment of the Trial Chamber, 12.06.2007, p 465.

[848] Sivakumaran, *The law of non-international armed conflict*, *supra nota* 337, p 455; Shane Darcy, "The Evolution of the Law of Belligerent Reprisals", 175 *Military Law Review* (2003) 184–251, p 191.

sanctions, nor criminal jurisdiction measures. They may, additionally, satisfy public pressure, but their primary aim is to put an end to violations, nothing more.

5.2.5.2. Prohibited belligerent reprisals

The Conventions prohibit reprisals against protected persons. This was discussed at the conference of 1974–1977 and, as a result, reprisals were banned by Protocol I in relation to the wounded, sick and shipwrecked. Even before that, in 1970, the UN General Assembly had re-affirmed that civilian population, or individual members thereof, should not be the objects of reprisals.[849]

The Hague Convention on Cultural Property protects cultural property from belligerent reprisals. The Amended Mines Protocol prohibits the use of certain mines as a belligerent reprisal against civilians and civilian objects. The result of the various restrictions is that, unless a reservation has been made, States parties to Protocol I are limited in their use of belligerent reprisals essentially to combatants only.[850]

Kalshoven points out that reprisals against civilians in a situation of internal armed conflict was left unregulated in 1977, and warns that the state of customary international law with regard to reprisals against the civilian population and civilian objects continues to be a matter of considerable controversy.[851] Other authors note that the extent to which the law of non-international armed conflict prohibits the use of belligerent reprisals is not clear. It is even difficult to conclude that Common Article 3 prohibits belligerent reprisals against civilians in the conduct of hostilities. As no general prohibition of belligerent reprisals has so far been achieved, it remains to be seen whether any norms regulate the recourse to such belligerent reprisals which have not been prohibited.[852]

An example of belligerent reprisals being used is the armed conflict between Iran and Iraq, where both sides openly and frequently resorted to reprisal bombardments directed against the enemy civilian population. However, their activities clearly failed to bring about a change in the other party's behaviour.[853]

Roger calls belligerent reprisals a relic from the past, a rather blunt enforcement weapon. While customary law permitted the taking of reprisals to redress illegitimate acts by the enemy, the concept has been narrowed down to combatants and military objectives, which are lawful targets.[854] Consequently, reprisals as a method of enforcement have lost a lot of significance.

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[849] Yu, „The development", *supra nota* 627, p 13.

[850] Sivakumaran, *The law of non-international armed conflict*, *supra nota* 337, p 449.

[851] Kalshoven, „Belligerent reprisals revisited", *supra nota* 755, p 767.

[852] Kalshoven, *Belligerent Reprisals*, *supra nota* 845, p 339.

[853] Kalshoven, „Belligerent reprisals revisited", *supra nota* 755, p 768. (An earlier, well-known example is provided by the long series of such bombardments, carried out by belligerent parties during the course of WWII).

[854] Rogers, *Law on the battlefield*, *supra nota* 106, p 351.

McCoubrey shares this pessimism, and holds that resorting to belligerent reprisals remains an unfortunate means by which to enforce the law. Such responses to gross illegality may be inevitable, but are nevertheless not to be encouraged. "They are increasingly restricted, especially so far as key humanitarian norms are concerned, and it is to be hoped that in time, modes of response which do not involve the perpetration of proportionate illegalities will entirely supplant them."[855]

There are few authors that still believe that in the absence of impartial monitoring mechanisms, the sole device to put pressure on an enemy to comply with the law is the institution of belligerent reprisals.[856] In practice, the institution is outdated and cannot be realistically said to contribute to enforcing IHL. This inevitably leads to the conclusion that other existing rules, especially the prevention measures, must be made more effective.

5.2.6. Deterrence

It is important in this context to briefly stop on the issue of deterrence, a crucial element in the success of international judgements. Roberts has noted that "a critical weakness that has seriously affected understanding and implementation of the laws of war is the almost complete divorce between two important schools of thought about security matters in the post–1945 period." On the one hand, theorists of deterrence have shown little interest in the laws of war; on the other, proponents of IHL have had little to say about deterrence of any kind. "For proponents of the laws of war to neglect the question of deterrence is to risk consigning themselves to a position of doctrinal purity and practical irrelevance."[857]

Deterrence, as an aim of criminal law, means discouraging future crime by effectively punishing crimes already committed. Since at least Beccaria, criminal policy generally has assumed that punishment – if certain and prompt – can deter the general public from committing crimes.[858] General deterrence, more specifically, is understood as the theory that criminally punishing an offender for violating the law dissuades others from similar violations. Seeing other criminals being punished for not respecting IHL should therefore deter members of armed groups from committing violations. However, some authors have suggested that international criminal justice provides minimal general deterrence of future violations of IHL.[859]

The first international courts were primarily punitive in their nature, and general deterrence was not a primary goal of the architects of the *ad hoc* tribunals. Not until the 1998 Rome Statute did the international community formally

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[855] McCoubrey, *International Humanitarian Law, supra nota* 78, p 308.

[856] Aldrich, "Compliance with the law", *supra nota* 7, p 8.

[857] Roberts, "The Laws of War", *supra nota* 94, p 77–78.

[858] Acquaviva, „International criminal courts", *supra nota* 817, p 785.

[859] Jenks, "Moral touchstone", *supra nota* 9, p 776.

embrace the idea that international criminal justice provided general deterrence. Indeed, general deterrence is even said to be "the most important goal of the ICC". The former president of the ICC claimed that "[b]y putting potential perpetrators on notice that they may be tried before the Court, the ICC is intended to contribute to the deterrence of these crimes".[860]

While providing general deterrence is a challenge for any criminal justice system, the challenge is much greater in the international context, given the limited jurisdiction of the ICC and the *ad hoc* tribunals. They have limited mandates and resources, which understandably results in prosecuting only the most serious offenders. By definition, international criminal justice cannot offer anything close to certainty of punishment.[861]

It has even been argued that claims on international courts and tribunals deterring future violations assume an inconsistent burden that the processes cannot bear, in essence setting international criminal justice up for failure. The limited number of proceedings, the length of time required, the dense opinions generated, and the relatively light sentences all wear down whatever limited general deterrence international criminal justice might otherwise provide.[862] Bluntly stated, thousands of pages of multiple Tadić decisions have not factored into any armed-groups' members' decision-making on whether to comply with IHL.[863] For international criminal justice to generally deter IHL violations there would need to be exponentially more cases and easily understandable judgments issued closer in time to the original IHL violations.

Of course, it should not be decisive whether the influence stems directly from a judicial decision, or, for instance, from a military manual that was amended following such a decision. Effectiveness can be defined as the ability to induce a change away from the *status quo* in a desired direction, even if the result is less than full compliance. "The effectiveness of international criminal courts and tribunals in regard to general deterrence should therefore be assessed in a more holistic way", Acquaviva believes: as the ability to foster behavioral changes and reinforce the legal ban on prohibited conduct, even when it is "mediated" by other legal and social instruments and does not directly flow from the text of an ICTY or ICC judgment."[864]

Ultimately, the interests of justice and the interests of peace cannot and should not be divorced. Justice is an important component of the prevention of future

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[860] *Ibid*, p 780.

[861] *Ibid*, p 781.

[862] Philipp Kastner, "Armed Conflicts and Referrals to the International Criminal Court: From Measuring Impact to Emerging Legal Obligations", 12 *Journal of International Criminal Justice* (2014) 471–490, p 472.

[863] Jenks, "Moral touchstone", *supra nota* 9, p 777.

[864] Acquaviva, „International criminal courts", *supra nota* 817, p 792.

crimes. It is only through justice and through enforcement of the law that long-term respect for the rule of law can be built.[865]

In conclusion, many authors still believe that the most effective means of enforcing IHL remains the prosecution and punishment of offenders within national or international criminal jurisdictions.[866] Or to put it differently – that a truly effective enforcement regime must involve domestic trials,[867] and that a clear preference has become apparent for, whenever possible, a national rather than an international system.[868]

One of the fundamental problems of international justice might be that it is not yet systematic, and there are still too many ways to escape it. This in turn shows the importance of the complementarity approach: the need to foster accountability at both the domestic and the international levels, so that they ultimately reinforce each other.[869] Whichever system is chosen, accountability for such crimes must be comprehensive, balanced and holistic, meaning that policies and practices must address the need to discover and disclose the truth, to bring perpetrators to justice, to offer reparations to the victims, and to promote deep reform in the institutions through which State power is exercised.[870]

5.2.7. National measures taken in Estonia

Introducing national rules on criminal liability for violations of IHL helps to ensure respect for this body of law, but is also part of the concept of legal certainty. Everyone must be able to foresee with sufficient certainty what legal consequences one or another act will bring.[871] The Estonian Penal Code is sufficiently clear on criminalizing the majority of international crimes. War crimes are dealt with separately in Division IV of Chapter Eight titled „Offences against humanity and international security". It contains 21 Articles that should cover all war crimes under the Conventions. Some very detailed or repeating descriptions in the Protocols find their place within other provisions of the Code. There is also a special „rescue clause" in case a specific crime should not be covered in the division. Article 94 (1) states that „offences committed in war time which are not provided for in this Division are punishable on the basis of other provisions of

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865 Mendez, „Preventing", *supra nota* 811, p 97. (Yugoslavia, Sierra Lione, Rwanda, Cambodia, East Timor, Kosovo, Darfur etc)

866 Cassese, „On the Current Trends", *supra nota* 636, p 17.

867 McCormack, „The importance", *supra nota* 495, p 320.

868 La Rosa, "Sanctions", *supra nota* 455, p 229.

869 Mendez, „Preventing", *supra nota* 811, p 99. Situations such as Uganda and Colombia are showing us new ways in which this may be done

870 *Ibid*, p 90.

871 *Tallinna Ringkonnakohtu taotlus tunnistada asjaõigusseaduse rakendamise seaduse § 13[1] lõike 2 laused 3 ja 5 kehtetuks*, Supreme Court of Estonia, constitutional review case No 3-4-1-16-05, Constitutional Review Chamber, judgment, 15.12.2005, point 20.

the Special Part of this Code".[872] States should always make sure that war crimes under international are also regarded as such under domestic law, as they are punishable by more severe penalties and may, in certain cases, be subject to retroactivity.

Article 13 of the Constitution and Article 2 of the Penal Code provide that no one shall be convicted or punished for an act which was not an offence pursuant to the law applicable at the time of the commission of the act. However, non-retroactivity in international criminal law is not as absolute as in domestic law. War crimes, crimes against humanity and genocide are also punishable if the acts were criminalized under international law at the time when they were committed, but not under national criminal law.[873] In a 2003 judgment, the Supreme Court of Estonia found in a case against Vladimir Penart that the *nullum crimen sine lege* principle is not violated if the offense was prohibited by international law at the time when the offense was committed, but the domestic provision was adopted after the offense.[874] This perfectly illustrates the need for many of the domestic implementation measures. A State should notify its citizens as soon as possible in a language they understand which offences constitute war crimes, and that the principle of non-retroactivity of criminal law may not apply.[875]

Common Articles 49, 50, 129 and 146 of the Conventions provide for universal jurisdiction for serious infringements. On this basis each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.[876] It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned. The principle of universality is laid down in Article 8 of the Penal Code in Estonia. It states that regardless of the law of the place of commission of an act, the penal law of Estonia shall apply to any acts committed outside the territory of Estonia if punishability of the act arises from an international obligation binding on Estonia.

The Code of Criminal Procedure further specifies the conditions of extradition and cooperation with the ICC.[877]

A person committing a war crime will not be released from liability solely because he was executing superior orders, as was said before. This principle

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[872] Rain Liivoja & René Värk, „Rahvusvahelise Kriminaalkohtu Rooma statuudi rakendamine Eesti õigussüteemis", 7 *Riigikogu Toimetised* (2006), No 13, p 168.

[873] Rain Liivoja, René Värk & Merri Kastemäe, „Implementation of the Rome Statute in Estonia", XVI *Finnish Yearbook of International Law* (2005) 79–101, p 89.

[874] *Ibid*., p 90; *Kriminaalasi Vladimir Penarti süüdistuses KrK § 61[1] lg 1 järgi*, Supreme Court of Estonia, criminal case No 3-1-1-140-03, Criminal Chamber, judgment, 18.12.2003, point 10.

[875] Cassese, *International Law, supra nota* 264, pp 147–148.

[876] *Ibid*, p 284.

[877] Code of Criminal Procedure, 12.02.2003, entry into force 01.07.2004 – RT I 2003, 27, 166

became particularly important during the Nuremberg Process after World War II, as it proved to be one of the most common excuses for committing appalling war crimes.[878] If the perpetrator knew, or should have known, that the command given to him was unlawful, he and the commanding officer shall both be liable for the offense committed. Failure to comply with an unlawful order is regulated in Estonia by Articles 27–29 of the Internal Regulations of the Defence Forces and, indirectly, by § 433 of the Penal Code, which stipulates the punishment for failure to comply with a lawful order of a commander.[879] The Penal Code could, however, spell out the content of the obligation more accurately, as it does not make it clear that the execution of the order may be a war crime. The Articles in the Internal Regulations are interesting to analyse. Article 27 states that: "An order is 'void' if it calls for committing an offence. A void order cannot be given, and may not be executed". Article 28 states that: "An order is 'prohibited' if it is against the law. A prohibited order must be executed" (sic!).[880] I think this overly complicates matters, and leaves the soldier utterly confused as what he has to do when receiving an order that is vague. He cannot realistically be expected to know the difference between an order that is simply against the law or constituting an offence. The concept of superior orders should, therefore, be significantly clarified in Estonian domestic law.

Failure to act is a close concept to superior orders and means that a superior is not absolved from penal or disciplinary responsibility for a breach committed by his subordinate, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[881] This is not directly regulated domestically in Estonia.

In addition, there are a few more points to keep in mind. First, war crimes and crimes against humanity have no statute of limitations under international law and, naturally, States must bring their laws in line with this principle.[882] Article 81 (2) of the Penal Code states that "Crimes of aggression, crimes of genocide, crimes against humanity, war crimes and criminal offences for which life imprisonment is prescribed do not expire". There is no contradiction between national and international law here. Second, States must provide each other with every assistance in connection with criminal cases brought against serious violations and, third, provide for a procedure under which victims of violations of

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878 *Ibid*, pp. 203–205; Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (New York: Oxford University Press, 2005), p 37.

879 Internal regulations of the armed forces, <www.mil.ee/UserFiles/sisu/kaitsevagi/organisatsioon/%C3%B5igusaktid/Kaitsev%C3%A4e%20sisem%C3%A4%C3%A4rustik.pdf> (1.11.2019).

880 *Ibid*. In Estonian the words used are *tühine* and *keelatud*

881 AP I 86 (2)

882 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, New York, 26.11.1968, in force 11.11.1970, 754 UNTS 73

humanitarian law may seek compensation for the damage caused.[883] Once again, all these obligations can only work through national mechanisms. Assistance in criminal cases is provided for in the Code of Criminal Procedure, but the compensation mechanism has not been regulated. It has been an object of major national debate for some years now, in light of the Country's soviet past.

5.3. Armed groups compliance with IHL

It has been long recognized that engaging armed non-state actors on compliance with international norms is a critical element in any effort to strengthen the protection of civilians. According to a recent study, at least five different UN organs and agencies have drafted policies or guidelines on engagement with armed non-state actors (UNOCHA, DPKO the UNSG, UNICEF and UNHCR). However, how armed non-state actors understand international humanitarian norms, how they value them, or to what extent they have the necessary capacity to actually implement these norms are issues which are yet to be understood. Academic research has shown that if one strives for better implementation of IHL, humanitarian norms must be reflected in the local norms and values of armed groups, i.e. increase their ownership of international law.[884]

Today's armed conflicts no longer fit the traditional model of one State fighting against another. More often than not they are armed groups' struggles against each other, or a particular host State. Concerns on the applicability and accuracy of the Conventions in regulating these "new" types of conflicts are thus well founded. It is extremely difficult to influence armed groups to abide by the rules drawn up in Geneva decades ago. It was established earlier that the Conventions must be universally respected, but why should armed groups bother? Why should they take this body of law as a starting point, and how can they be held responsible for violations of IHL? It is important to link the rather theoretical discussions in previous chapters to this very practical issue. What needs to be asked is whether there are measures of implementation and enforcement that actually help foster compliance amongst armed groups. Academic discussion has increasingly focused on this topic in recent years. Especially on the individual's role in making a decision to either comply or not. After all, States do not make decisions, people do.

At the outset, it is submitted that, contrary to general belief, fear of criminal repression is not the most effective means to induce compliance by armed groups. Enforcement in its stricter punitive sense is not the key. It is not legalization, i.e. creating more stringent rules or regulating more aspects of humanitarian law either. It is rather a set of perplexing multidisciplinary preventive measures that should be carefully analysed to reach better results in the future.

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[883] AP I, Articles 89 and 91.

[884] Bellal, "70th Anniversary", *supra nota* 93.

Stephens suggests that identification of the underlying values implicit in the corpus of IHL can have a more sustained impact on behaviour than merely relying upon "the law" and potential prosecutions for its violation.[885] Many other authors reach the same conclusion, sometimes even asking whether increased formalization actually inversely correlates with observance of the normative principles underlying regimes.[886] This subchapter asks what the other factors influencing compliance besides law and prosecution are and how the existing measures can be better used.

5.3.1. Characteristics and organizational culture of armed groups

For the purposes of this discussion, it is important to define what a combatant is. Simply put, "combatant" is the legal status of an individual who has the right to engage in hostilities during an international armed conflict. The definition is found in article 43 of AP 1. It states that "Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities." However, in recent literature that definition is not fully adhered to. When talking about members of armed groups, authors mean both members of regular State armies and other fighting groups that pass the threshold of being under relevant control and are sufficiently organized.

There are specific characteristics that both combatants and members of armed groups have that influence their decision to either respect the law or not. Normally, combatants are under strict hierarchical and structured State control, whereas armed groups range from very loosely connected fighters to groups that resemble State armies by any measurement. Naturally, differences in their reasoning and organisational culture occur and everything said in this subchapter should be read with this caveat in mind.

Various constraints are involved in identifying armed groups that can be influenced by the discourse of compliance with the law. For instance, for IHL to be applicable the armed groups must at the very least be operating in a context of non-international armed conflict. To qualify as an armed group a minimum degree of organization, such as a command structure and the capacity to sustain military operations is necessary.[887] This level of organization is particularly relevant for our purposes, for a group that is very loosely organized may well be

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[885] Dale Stephens, „Behaviour in war: The place of law, moral inquiry and selfidentity", 96 *International Review of the Red Cross* (2014) 751–773, p 753. Laurie R. Blank & David Kaye, „Direct participation: Law school clinics and international humanitarian law", 96 *International Review of the Red Cross* (2014) 943–968.

[886] Bradford, "A behavioralist Theory", *supra nota* 1, p 2.

[887] La Rosa & Wuerzner, "Armed groups", *supra nota* 449, p 329.

unable to familiarize its members with IHL and establish mechanisms to ensure compliance.[888]

Understanding this structure is important for humanitarian organizations in two ways. First, it helps to identify key decision-makers within a group. Second, organizational structure can indicate the levels of influence that leaders have at their disposal. Centralized armed groups rely on clearly established rules and values, which are likely to be communicated to the members through indoctrination and training. Decentralized and community-embedded armed groups do not always have written codes of conduct, drawing instead on shared values and traditions.[889]

Centralized non-state armed groups share many of the structural characteristics of State armies, including a prominent hierarchy, elaborate doctrine and strict discipline. However, they do not benefit from State resources and infrastructure, creating greater challenges for leaders to communicate with, and monitor the behaviour of, field commanders and their units.[890] All armed groups capable of launching operations have structures of one kind or other – one or more leaders and degrees of organization which need to be identified. They have their own objectives, strategies, diasporas, links with crime, sources of finance, codes of conduct and the like.[891]

Dickinson has done extensive research on organizational theory linked to armed groups, and concludes that the literature holds tremendous promise and could meaningfully reshape compliance debates. She regrets that a sustained commitment to qualitative analysis of the actual mechanisms by which compliance occurs is still missing and scholars have spent too little time trying to tease out these factors. "After all", she says, "few would dispute that compliance occurs not so much because of fears of enforcement but because of combined psychological, sociological, and institutional factors that make obeying the law habitual, legitimate, socially acceptable, convenient, normal, and so on".[892]

One interesting takeaway from Dickinson's work is the suggestion that organizational culture can actually be affected by external forces, including laws, norms, values, and aspirational targets. It follows that defining international law

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888 *Ibid*, p 329.

889 The Roots of Restraint in War, *supra nota* 446.

890 Recent examples of centralized groups include the Communist Party of Nepal (Maoist), which fought the Nepalese government from 1996 to 2006; the Liberation Tigers of Tamil Eelam (LTTE), which fought the Sri Lankan government from the late 1970s to 2009; the Moro National Liberation Front (MNLF) in the Philippines; and the Islamic State group in Iraq and Syria. Maurer, "Changing world", *supra nota* 96.

891 Daniel Muńoz-Rojas & Jean-Jacques Frésard, „The roots of behaviour in war: Understanding and preventing IHL violations", 86 *International Review of the Red Cross* (2004) 189–206, p 202.

892 Dickinson, "Military lawyers", *supra nota* 459, p 2.

norms may have a real impact on institutions even absent mechanisms of enforcement. Furthermore, training regimens can have lasting effects on institutional culture by changing the normative space within the institution.[893]

The ICRC's recent studies on the roots of behaviour and roots of restraint in war also emphasise that a detailed understanding of the inner workings of armed groups is a prerequisite for identifying the sources of authority, the beliefs, the traditions and the people steering their behaviour towards violence or restraint.[894]

Some rather universal characteristics can be used to describe members of armed forces. First, they are subject to group conformity phenomena such as depersonalization, loss of independence and a high degree of conformity. They are also subject to a process of shifting individual responsibility from themselves to their superiors in the chain of command. When they take part in hostilities and go through traumatizing experiences they might be caught in a spiral of violence and perpetrate violations of IHL themselves.[895]

Hoffmann sees armed groups in the darkest of shades stating that though studies of these groups are limited, it is clear that they are capable of extreme brutality. They tend to be composed of uneducated individuals with few prospects in a stable environment. Many of them may prefer a life lived in the midst of lawlessness and chaos. It is improbable that they would pay much attention to criminal law in a country at peace, let alone IHL in a country at war.[896]

He admits that we need to find ways to persuade them to comply with humanitarian norms, although some of them live in isolation from the world and have no reference group beyond their own armed band.[897] Others are motivated by ideological hostility to the western world, and probably view the modern international legal system as a western construct that has no legitimacy.

It seems therefore, that if the structure and motives of armed groups would be better understood, much could be accomplished in improving compliance with IHL.

5.3.2. Why armed groups decide to respect the law, or not?

International law scholarship "remains locked in a raging debate about the extent to which States do or do not comply with international legal norms. For years, this debate lacked empirical data altogether. After all, even when we speak of domestic law, few would dispute that compliance occurs not so much because of fears of enforcement, but because of combined psychological, sociological, and

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893 *Ibid*, p 7.

894 The Roots of Restraint, *supra nota* 446.

895 Muńoz-Rojas & Frésard, „The roots", *supra nota* 891, p 194.

896 Hoffman, "Emerging combatants", *supra nota* 36, p 107.

897 *Ibid*, p 108.

institutional factors that make obeying the law habitual, legitimate, socially acceptable, convenient, normal, and so on."[898] It is therefore surprising that scholars have spent so little time trying to figure out what these factors are as they debate the compliance question in the international arena.

Do armed groups choose to comply with IHL because they are aware of the age old norms it contains and are afraid of sanctions that follow, or is it something else? Bangerter holds that the decision to respect the law or not is far from automatic, regardless of whether it is taken by an armed group or a State. It follows that respect for IHL can only be encouraged if the reasons used by armed groups to justify respect or lack of it are understood and if the arguments in favour of respect take those reasons into account.[899]

There are a few authors that have recently drawn attention to these reasons. In addition, the ICRC commissioned a study and a follow-up to get to the roots of this phenomenon. The results of the original study were published in 2004 titled The Roots of Behaviour in War (RBW). The aim of the study was to identify factors, which were crucial in affecting the behaviour of bearers of weapons in armed conflicts.[900] It indicated three parameters that determine the behaviour of fighters:

1) their position within a group, which leads them to behave in conformity with what the group expects of them;
2) their position in a hierarchical structure which leads them to obey authority (because they perceive it as legitimate or as a coercive force, or a mixture of the two);
3) the process of moral disengagement favoured by the war situation, which authorises recourse to violence against those defined as being the enemy.[901]

It also attempted to divide the causes of IHL violations into five broad categories: (1) the encouragement to crime that is part of the nature of war, (2) the definition of war aims, (3) reasons of opportunity, (4) psycho-sociological reasons and, finally, (5) reasons connected with the individual.[902] Bangerter outlines three reasons for non-compliance: the group's objective; the military advantage, and what it is that IHL represents according to the group. Among the reasons for respecting the law, two considerations weigh particularly heavily: their self-image and the military advantage.[903] It is thus vital to understand the rationale

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[898] Dickinson, "Military lawyers", *supra nota* 459, p 1. Her approach seeks on-the-ground empirical data to create a more nuanced understanding of how international law actually operates in shaping decisions and affecting policy.

[899] Olivier Bangerter, „Reasons why armed groups choose to respect international humanitarian law or not", 93 *International Review of The Red Cross* (2011) 353–384, p 353.

[900] La Rosa, "Sanctions", *supra nota* 455, p 222. Muńoz-Rojas & Frésard, „The roots", *supra nota* 891.

[901] *Ibid,* p 203.

[902] *Ibid*, p 189.

[903] Bangerter, „Reasons why", *supra nota* 899, p 353.

leading to respect or non-respect in order to persuade armed groups to comply with the rules.

Bangenter holds that "the mere existence of a body of law is not enough to ensure that it is applied; it would be naive to hope that armed groups could be won over by the mere existence of international law."[904] In fact, the RBW study outlines: "Knowledge does not suffice to induce a favourable attitude towards a norm or to the institution responsible for its promotion. Moreover, a favourable attitude – or indeed sincere adherence – to a norm does not mean that combatants will conform to it in a real-life situation."[905]

Besides (or rather instead of) relevant legal considerations, other factors seem to carry greater weight. For example, the personal conviction and sense of moral responsibility of the individuals involved, expressed in the form of the principle of chivalry, are quite important for ensuring compliance with IHL. As Gill has noted, chivalry and martial honour have always been part of the "code of the warrior" and have played a significant role in the development of the law of war.[906]

Most armed groups see their aim as beneficial for their country or their ethnic group, and attach some importance to being recognized by the international community. It therefore seems logical for the protection of that same population to be included in their objectives.[907] Similarly, avoiding violations of IHL may help to convey a positive image of the group, which might be very important to them.

A notion connected to the previous one is the support the population provides for the survival of the group. The groups we are talking about are usually not self-sufficient and financially secured groups. They often depend on what the local people can supply and this is a very effective argument in favour of showing respect for people in general.[908]

Another reason for compliance with IHL is paradoxically the military advantage it actually gives to the group. The morale of their fighters, support of the people, effective use of military resources, weakening of the enemy, and impact on long-term victory are factors where genuine respect for IHL will give a decisive advantage.[909] It is clear that the lack of discipline could lead to violations that are detrimental to the group's military performance.

The importance of group compliance and organizational structure has been briefly mentioned already. I am convinced that compliance is best achieved

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[904] *Ibid*, p 354.

[905] Muńoz-Rojas & Frésard, „The roots", *supra nota* 891, p 196.

[906] Zyberi, "Enforcement", *supra nota* 98; Vöneky, "Implementation and Enforcement", *supra nota* 19, p 653.

[907] Bangerter, „Reasons why", *supra nota* 899, pp 358, 360, 362. La Rosa, "Sanctions", *supra nota* 455, p 236.

[908] Bangerter, „Reasons why", *supra nota* 899, p 364; La Rosa, "Sanctions", *supra nota* 455, p 236.

[909] Bangerter, „Reasons why", *supra nota* 899, p 361–362. Bernard, "Time to take prevention seriously", *supra nota* 328, p 696.

through influencing cultural norms and organizational structures, rather than new rules and enforcement by international courts. Indeed, reforms aimed at structure and culture may well run deeper and last longer than other possible efforts to induce greater compliance.[910] Social psychology studies also show that the mutual reinforcement of two phenomena (obedience to authority and conformity to the group) ensures an extremely high degree of submission to orders (explicit or implicit).[911]

The abovementioned were some of the reasons why armed groups have decided to abide by the customary and treaty based rules. On the other hand, there are many reasons why they choose not to respect the law. Some of these reasons are not as straightforward as one might expect. One unpredicted cause of violations stemmes from interpreting the terms of IHL. Many armed groups that attack civilians (as defined by IHL) do so not because they want to attack civilians but because their definition of protected persons is different.[912] In this context the need for proper dissemination and instruction become even more evident.

Furthermore, while the findings of the RBW study indicate that there is an understanding of scope of the general norms (such as the fact that certain kinds of behavior are prohibited in time of war or that civilians must not be attacked), it is not the same with regard to their application. When the combatants interviewed are asked to refer to more specific situations which confront them with a dilemma (e.g. can we attack civilians who are helping the enemy?) serious cracks begin to appear.[913]

In addition, it is fully conceivable for the belligerents to know that an act is illegal but to consider it legitimate. If the enemy is guilty of violations of IHL, combatants will argue that they are justified in not respecting it either. This is why legitimacy was touched upon in the previous chapters of this work. It is an important link and maybe even the key to foster greater compliance. The "secret" formula for adhering to IHL during armed conflicts might therefore lie in a delicate balance between group compliance, the perceived legitimacy of the group's aims and the perceived legitimacy of the humanitarian norms.

Having analysed all these possible issues, the study somewhat surprisingly concludes that there is a need to treat IHL as a legal and political matter rather than as a moral one, and focus communication activities more on the norms than on their underlying values because the idea that the bearer of weapons is morally autonomous is inappropriate.[914]

One of the main conclusions of the study is that the rigorous training of combatants, strict orders concerning proper conduct, and effective sanctions in the event of failure to obey those orders are prerequisites for obtaining greater respect

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[910] Dickinson, "Military lawyers", *supra nota* 459, p 28.

[911] Muńoz-Rojas & Frésard, „The roots", *supra nota* 891, p 195.

[912] Bangerter, „Reasons why", *supra nota* 899, p 382. There are older examples, especially the Viet Cong in South Vietnam (1965) and to a more limited extent the FMLN in El Salvador.

[913] Muńoz-Rojas & Frésard, „The roots", *supra nota* 891, pp 199–197.

[914] *Ibid*, p 203.

for humanitarian law from weapon bearers. Without a normative frame of reference, "those who have been victims of war are drawn into a cycle of vengeance which leads them to pay less and less heed to the application of IHL. On the other hand, if the acknowledgement of such principles is firmly rooted, attitudes encouraging people to seek the protection offered by the norms tend to become predominant."[915]

This approach has been widely criticized by other authors. Stephens, for example, says that despite the richness of its interdisciplinary methodology, the study was surprisingly formal and narrow in its conclusions. "The central message from this study is that strict compliance with the law, backed up by a regime of effective disciplinary action, is the critical focus necessary to ensure that soldiers and other "bearers of arms" act correctly. The implication from these conclusions is that soldiers cannot be trusted to exercise any kind of applied judgment regarding underlying values and that only a strong reliance on "the law", and a strict regime of enforcement, will ensure that behaviour is effectively conditioned."[916]

Given the time that has passed since the publication of this important work, some have wondered whether it was opportune to ask if the conclusions made by the authors are "durable", in the sense that they should remain the exclusive focus of compliance strategies relating to IHL instruction and practice. An update of the project titled The Roots of Restraint in War was published in 2018. This report explores restraint, defined as behaviour that indicates deliberate actions to limit the use of violence. The most common violations witnessed today include attacks on non-combatants, disproportionate attacks, the use of indiscriminate weaponry, forced displacement, sexual violence, and attacks on health-care infrastructure and personnel.[917]

This study and the ICRC's experience suggest that across all types of armed groups, an exclusive focus on the law is not as effective at influencing behaviour as a combination of the law and the values underpinning it. Linking the law to local norms and values gives it greater traction.[918]

Thus, it is here that this study differs with the Roots of Behaviour in War conclusions, which opposed invoking moral values, arguing them to be relativist and unreliable, and instead advocated for a formalistic adherence to orders, discipline and hierarchy. This research demonstrates that the "integration approach" has considerable ongoing validity in seeking to shape the behaviour of combatants towards civilians, but it needs to be fully tailored to the audience, taught with intensity and tested under duress.[919]

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[915] *Ibid*, p 192.

[916] Stephens, „Behaviour in war", *supra nota* 885, p 752.

[917] The Roots of Restraint in War, *supra nota* 446.

[918] *Ibid.*

[919] *Ibid.*

The research found that there is a need for both the law and the values underpinning it, with the emphasis of each influence dependent on the target audience. The role of law is vital in setting the standards, but ensuring that the values it represents are internalized seems to be a more durable way of promoting restraint. The internalization of norms beyond IHL-based punishments is all the more necessary in decentralized counter-insurgency warfare, where units operate far from commander oversight and the legal enforcement mechanisms of higher command. There is no substitute for honour.[920]

5.3.3. Ways to foster compliance and monitor compliance

What are the options for a State or the international community if, after all the above, armed groups still violate IHL? This body of law, unlike HRL, applies to non-state actors and armed groups, but there are much fewer enforcement mechanisms devised for them. Sassoli proposes four ways in which we may hold armed groups responsible for violating international law: 1) through State responsibility i.e. one tries to attribute them to a State (The ICTY has used this approach in the Tadic case); 2) through individual criminal responsibility, which has also been successfully employed by international tribunals; 3) to hold the armed group or non-state actor directly responsible itself;[921] 4) to impute individual criminal responsibility to the members of an armed group for any IHL violations it commits, on the sole basis of membership.[922]

It has been held that attempts to influence the behaviour of parties to a non-international armed conflict will be most effective in the context of a process of engagement and relationship with each party to the conflict. A long-term process of engagement will provide opportunities for negotiating access, for developing good contacts with appropriately placed persons, and for gaining reliable information about the circumstances surrounding the conflict.[923]

When an armed conflict breaks out, it is important to formally inform all parties of the legal characterization of the situation and to remind them of the applicable rules, that is, of their obligations under humanitarian law. The ICRC most often makes this communication by way of a letter or memorandum submitted directly to the parties to a conflict, in a bilateral and confidential manner.[924]

First of all, one might wonder, what are the problems with regards to compliance in internal conflicts? What armed groups are doing that we want them to stop? In majority of times the problem lies in the distinction that has to be made between military objects and the civilian population, since the methods of non-state actors often include the targeting of civilians and indiscriminate attacks. The

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920 *Ibid*, citing the words of British historian John Keegan.

921 Sassoli, "Legal Mechanisms", *supra nota* 957, p 97–98.

922 *Ibid*, p 100.

923 Mack, *Increasing Respect, supra nota* 92.

924 *Ibid*.

treatment of detainees is also a problem, since basic humanitarian guarantees are not always available.[925] These issues, however, are deeply rooted in customary law and ignorance of the law can therefore not be an excuse for non-compliance.

There are a large variety of measures that can be used in non-international armed conflict to induce compliance by the actors. In part, they have also been discussed in previous sections of this work, but some are inherent specifically to NIACs. Some of them include: The role of the ICRC (Common Article 3), supported by the international community and action through the UN system; direct diplomatic pressure and special agreements; IHL education and dissemination; individual criminal responsibility; regional and international conventions and Contributions by NGOs.[926]

5.3.3.1. Teaching and training

In order for the law of non-international armed conflict to be applied, it must first be understood. Accordingly, one of the most important aspects of the implementation of the law is dissemination of, education about, and training on, the law. This is as true for members of the armed forces as it is members of armed groups and civilians.[927]

Article 19, Protocol II briefly notes that the Protocol shall be disseminated as widely as possible. The choice of means is left to the Contracting Party or to the parties to the conflict. This obligation thus extends to armed groups with a minimum degree of organization as described above. There is no mechanism in Protocol II designed to guarantee its application such as that of Protecting Powers or their substitute. Therefore, dissemination is *a fortiori* an essential measure of application.[928]

However, IHL training of armed groups is rendered more difficult by the fact that most armed groups are considered as terrorist groups by the governments against which they fight. As a consequence, supporting "terrorists", including by training them, is criminalized in some jurisdictions.[929]

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[925] David Kaye, „Improving compliance with IHL during non-international armed conflicts: a global perspective" – *Improving compliance with International Humanitarian Law: Proceedings of the Bruges Colloquium* (Brugge, 2004) 121–128, p 123.

[926] Michel Veuthey, „Improving compliance with IHL during non-international armed conflicts: a global responsibility" – *Improving compliance with International Humanitarian Law: Proceedings of the Bruges Colloquium* (Brugge, 2004) 139–148, p 139.

[927] Sivakumaran, *The law of non-international armed conflict*, *supra nota* 337.

[928] Jean Pictet (ed), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Geneva, 1987), section on dissemination.

[929] Marco Sassòli, "The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives" – 40th Round Table on Current Issues of International Humanitarian Law, 7–9.09.2017 San Remo, <www.iihl.org/wp-content/uploads/2017/11/Sassoli-REV.pdf> In Sassolis view, the criminalization of IHL training of armed groups is at odds with IHL, provided of course that one should check whether the socalled IHL training is not just

Bangerter wonders to what extent the content of the law really is known, despite the prevalence of an IHL-related discourse among armed groups. He admits that some of the violations are the result of a lack of in-depth knowledge, concealed beneath a surface of basic notions.[930] Obviously, few groups have access to lawyers who are well versed in IHL; in most cases, their knowledge derives from hearsay and reading matter of varying quality. "Ignorance of the workings of international justice is equally prevalent, which casts some doubt on the dissuasive impact often attributed to international tribunals such as the ICC."[931]

There has been a lot of discussion on how the obligation in Article 19 AP II can be executed in practice. Teaching armed groups is obviously not the same as teaching regular armed forces. However, we should not underestimate the importance of dissemination and education with respect to non-state actors and armed groups in non-international armed conflict. Sure, the distinction between combatants and civilians as well as humane treatment of detainees are part of customary law, but how would non-state actors know anything more detailed about IHL given the chaotic circumstances on the ground that force them to take up arms? In some way the ICRC or another trusted person or entity must get to the groups and spread knowledge on IHL. This, as has been said, is only possible if the group has a minimum degree of control and organization.

The ICRC's first study holds that if combatants are to respect IHL, the rules must be translated into specific mechanisms and care must be taken to ensure that practical means are set in place to make this respect effective. In other words, it is necessary to opt for an integrative approach.[932] The study shows that combatants who affirm that they have developed a relationship of trust with the ICRC on an individual basis are more favourable to the application of the norms of IHL.[933]

La Rosa gathers, in her article about sanctions, that the dissemination of the rules is a key element not only of the fighters' sensitization to sanctions, but also of their compliance with the process. The message about sanctions must be clearly spread: everyone who takes part in a conflict, irrespective of allegiance, will be held to account for any criminal acts they have committed. Here too, the ICRC inevitably plays the role of the messenger.[934] Second, the content of humanitarian law must be made accessible; it should be summarized in simple

disguised support to the armed group, and that a humanitarian impartial body is really just trying to ensure the respect for IHL.

930 Bangerter, „Reasons why", *supra nota* 899, p 369.

931 *Ibid*, p 370. Ignorance is not a legally valid defence; it is, however, a major cause of violations, particularly in the complex sphere of the conduct of hostilities.

932 Muńoz-Rojas & Frésard, „The roots", *supra nota* 891, pp 203–204.

933 *Ibid*, p 201.

934 La Rosa, "Sanctions", *supra nota* 455, p 235–236.

rules, which could be included in codes of conduct. Some armed groups have in fact stated that they follow this practice.[935]

By adopting and distributing a code of conduct that is consistent with IHL, the hierarchy of an armed group sets up a mechanism that enables its members to respect this law. Such indication of commitment can also have a direct impact on its members' training in IHL and on the dissemination of the law. Where contact and dialogue with the ICRC have been possible, codes of conduct have provided a basis for discussing the law. In some cases (e.g. in Colombia, El Salvador and Nicaragua), the ICRC or other actors have offered to review and comment on existing codes of conduct.[936]

Rogers, on the other hand (being a long-time military lawyer) holds that the most important factor in ensuring compliance is the beneficial controlling influence of commanders. It is hard to imagine that this could differ for non-state armed groups. "Military leaders have long recognized that it is necessary to issue orders to those under their command, not only for the effective conduct of military operations, but also to ensure certain standards of behavior and conduct in action. These orders can do much to ensure that the law of war is complied with. Effective enforcement is also achieved because breaches of these orders can be dealt with under national disciplinary regulations."[937]

Corn provides another interesting and even beneficial aspect for the members of armed groups. Namely, command responsibility contributes to the effectiveness of the unit. Although it is not without exception, in general history demonstrates that IHL compliance almost inevitably produces strategic benefit, while widespread (and even isolated) non-compliance produces strategic disadvantage. Indeed, were this not the case, it is unlikely that so many States would agree to bind themselves to the constraints inherent in IHL treaty obligations.[938] All of this applies to armed groups as well, taking their specificities into account.

5.3.3.2. Special agreements and unilateral declarations

After making the rules known, the next level of fostering greater compliance for IHL is creating a sense of ownership of the rules among armed groups. One way of achieving this is by involving them in the development of the law, Sassoli holds. It should be possible to do a preliminary research on what is realistic for non-state actors in order to secure better compliance later. "One could also

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[935] La Rosa & Wuerzner, "Armed groups", *supra nota* 449, p 333. Examples of armed groups that have developed internal codes of conduct are the United Self Defence Forces of Colombia (AUC), the African National Congress (ANC) in South Africa, the Revolutionary United Front (RUF) in Sierra Leone, and the Sudan People's Liberation Movement (SPLM) in Sudan.

[936] Mack, *Increasing Respect, supra nota* 92.

[937] Rogers, *Law on the battlefield*, *supra nota* 106, p 348.

[938] Corn, „Contemplating the true nature, *supra nota* 456, p 907.

include these actors in the preparatory meetings or even the diplomatic conferences that are organised for the negotiation of new treaties."[939]

As far as customary law is concerned, armed groups have already been involved in the development and reaffirmation of the law, because customary law is based on the behaviour of the subjects of a rule and IHL implicitly confers a limited international legal personality to armed groups involved in armed conflicts.[940]

Armed groups cannot formally adhere to Article 3 common to the Conventions. Two alternative possibilities can therefore be envisaged for these groups to be involved. First, special agreements may be concluded on the basis of Common Article 3 bringing into force other provisions of the Conventions. In practice, special agreements are successfully concluded when the conflict is both seemingly intractable and more "equal" in terms of the fighting between the State and armed groups.[941]

The second way of giving armed groups an opportunity to express their commitment to comply with IHL is that of unilateral declarations. These are a powerful means of conveying information to combatants, despite the risk that they could be misused by criminal organizations for political purposes.[942]

Common Article 3 of the Conventions foresees that the "Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention." This means that both States and armed groups – or exclusively armed groups if no State is involved in the conflict – should endeavour to bring into force other provisions of the GCs.

In this process it is possible for the parties to the conflict to agree upon specific rules that might not otherwise apply. This is a unique opportunity for armed groups to have some input on what their concrete rights and obligations will be (and express their views as to what commitments they are factually prepared to undertake), thus applying the principle of equality of belligerents. Moreover, in some cases the parties will be able to agree upon enforcement mechanisms, a possibility that they do not usually have.[943]

As said, because they are based on the mutual consent of the parties – and make clear that the parties have the same IHL obligations – special agreements

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[939] This has already happened in the past, some national liberation movements having participated in the 1974–1977 diplomatic conference leading to the adoption of the Additional Protocols to the Geneva Conventions.

[940] Marco Sassòli, "Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law", 1 *Journal of International Humanitarian Legal Studies* (2010) 5–51, p 13.

[941] See for instance: the Palestinian Liberation Organisation (1989 declaration on adherence to the GCs <www.icrc.org/ihl.nsf/Pays?ReadForm&c=PS>; the Liberation Tigers of the Tamil Eelam (Sri Lanka/1988), in the 30 *Israeli Yearbook on Human Rights* (2000), p 213.

[942] Article 96(3) of Additional Protocol I.

[943] Ezequiel Heffes & Marcos D. Kotlik, „Special agreements as a means of enhancing compliance with IHL in non-international armed conflicts: An inquiry into the governing legal regime", 96 *International Review of the Red Cross* (2014) 1195–1224, p 1200.

might also provide added incentive to comply. A special agreement provides an important basis for follow-up interventions to address violations of the law. The fact that an identifiable leader for each party has signed a special agreement, thereby taking on responsibility to ensure that the agreement is adhered to, will on one hand provide a contact person and reference point for future representations, and on the other send a clear signal to his forces. This person might even become an interlocutor, an advocate of IHL within the group, if only to guarantee the group a minimum level of credibility vis-à-vis the outside world.[944] Furthermore, given that a special agreement is likely to be made public, a range of actors in the international community will be aware of it and may be able to help in holding the parties to their commitments.

In sum, one of the main advantages of special agreements, understood as tools for enhancing compliance with IHL, stems from the fact that they serve the purpose of clarifying the obligations that the parties to the conflict undertake.[945]

5.3.3.3. Unilateral declarations

On the other hand, armed groups can also come forward with unilateral declarations, also called formal acceptance. For example, Protocol I provides that national liberation movements can formally accept its provisions. Surprisingly, there is a long history of general or partial declarations of intent. The primary function of a unilateral declaration is to provide armed groups with an opportunity to express their consent to be bound by the rules of humanitarian law. This provides the hierarchy with an opportunity to take ownership of ensuring respect for the law by their troops or fighters. This too can lead to better accountability and compliance by the armed group, through providing a clear basis for follow-up, as well as dissemination to its members.[946]

These declarations provide the answer to a paradox of humanitarian law. For although armed groups cannot be party to treaties of humanitarian law, it is nevertheless their responsibility to respect and to ensure respect for that body of law in all circumstances. The declarations are a way for these groups to demonstrate and confirm that they are prepared to be bound by IHL. This was in fact noted at the 27th International Conference of the Red Cross and Red Crescent convened in 1999, and it was on this basis that the Geneva Call organization invited armed groups to sign a declaration of adherence to the rules enshrined in

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944 Mack, *Increasing Respect, supra nota* 92.

945 Heffes & Kotlik, "Special agreements", *supra nota* 943, p 1208.

946 Pfanner, "Various mechanisms", *supra nota* 246, p 300. See for example: Cessation of Hostilities Framework Agreement between Government of the Republic of Indonesia and the Free Aceh Movement, 9 December 2002 (Indonesia Agreement), available at: <peacemaker.un.org/indonesia-cessationhostilities2002>; Humanitarian Ceasefire Agreement on the Conflict in Darfur, 2 April 2004, available at: <peacemaker.un.org/sudan-darfur-humanitarian2004>; Sivakumaran, *The law of non-international armed conflict*, *supra nota* 337, Sassoli, "Legal Mechanisms", *supra nota* 957, p 99.

the Ottawa Convention on anti-personnel mines. To date, over fifty armed groups have reportedly agreed to ban anti-personnel mines through this mechanism, and the results in the field have been conclusive.[947]

Moreover, commitments have been made that bring into force the Conventions as a whole, and which have included a commitment to treat captured fighters as prisoners of war. Such a commitment may also be included in a ceasefire agreement. The conduct of the party can then be judged against their commitments, by various actors such as UN human rights mechanisms or non-governmental organizations.[948] Bilateral agreements between the State and the non-state armed group are also concluded. Prisoners of war and the wounded and sick can be exchanged pursuant to such agreements.[949]

Allowing armed groups that are party to non-international armed conflict the opportunity to make a unilateral declaration stating their commitment to comply with IHL can be a useful tool for ensuring compliance in actual practice. It should be borne in mind, however, that such statements could be issued for purely political purposes.[950]

It should be emphasized that armed groups remain bound by the provisions and rules of IHL applicable in a specific conflict – including Common Article 3, customary IHL and, where applicable, Protocol II – regardless of whether they make a unilateral declaration.[951]

Members of armed groups party to non-international armed conflicts have little legal incentive to adhere to IHL, given the fact that they are likely, eventually, to face domestic criminal prosecution and serious penalties for having taken part in the conflict, even if they comply with IHL. Therefore, AP II, Article 6 foresees the possibility of granting an amnesty to persons who have merely participated in the armed conflict. This might help to provide armed group members with a legal incentive to comply with IHL. Amnesties may also help to facilitate peace negotiations or enable a process of post conflict national reconciliation. It must be remembered that amnesties may not be granted for war crimes or other crimes under international law.

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947 La Rosa & Wuerzner, "Armed groups", *supra nota* 449, p 332; Sivakumaran, *The law of non-international armed conflict*, *supra nota* 337, p 432;

948 Bosnia and Herzegovina, Agreement No. 1 of May 22, 1992, <casebook.icrc.org/case-study/former-yugoslavia-special-agreements-between-parties-conflicts> (1.11.2019).

949 Sivakumaran, *The law of non-international armed conflict*, *supra nota* 337, p 442, e.g. Exchange of Prisoners Agreement between the Republic of Croatia and the Armed Forces of the SFRY, 6 November 1991.

950 La Rosa & Wuerzner, "Armed groups", *supra nota* 449, p 331.

951 Mack, *Increasing Respect, supra nota* 92.

5.3.3.4. Monitoring respect for International Humanitarian Law by armed groups

Is it possible to charge non-state actors with violations of the GC and AP I? Yes, although not directly. Under international criminal law, both organizations are criminal groups, and their members are criminals. Like any other criminals, they may be prosecuted under the criminal law of the States in which they commit terrorist acts, or by a military tribunal. While in military custody, they remain protected by Common Article 3. They also remain criminals.[952]

"Although disciplinary measures are not sufficient to remedy serious violations of IHL, they are necessary and useful inasmuch as they enable the leaders of a group to react in a timely way to violations. These measures can take various forms, such as a note to file, a warning, demotion or dismissal. They can also involve the assignment of extra duty or the withdrawal of the soldier's weapons or uniform. In practice, they sometimes also include imprisonment and corporal punishment, including capital punishment", La Rosa & Wuerzner note.[953]

In the case of imposing sanctions by the State it must first be capable of duly conducting proceedings and willing to do so. Second, the State must establish procedures in which all of the parties can have confidence, i.e. guarantee equal and individualized treatment for all, irrespective of what group they belong to. Only then can armed groups overcome natural reluctance to hand over their members to the government.[954]

The Roots of Restraint study showed that the threat of punishment under domestic and military law exerts a much greater influence than that of punishment under IHL *per se*. This finding confirms the importance of integrating IHL norms into domestic law, standard operating procedures and rules of engagement. However, although the threat of punishment under internal military law had a strong influence on soldiers, particularly officers, this influence was surpassed by the socializing effect of informal norms and of "army values".[955]

Once the armed groups have attained a sense of ownership of the rules, monitoring becomes a necessary aspect of ensuring compliance. One idea on this matter is to let the groups report on their own respect for the rules, and have an expert body examine them. Such internal "bureaucratic" incentives have shown some results with Hamas (in the Israeli-Palestinian conflict).[956]

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[952] Solis, *Geneva Conventions*, *supra nota* 780, p 42.

[953] La Rosa & Wuerzner, "Armed groups", *supra nota* 449, p 334.

[954] *Ibid*, p 335.

[955] The Roots of Restraint in War, *supra nota* 446.

[956] Marco Sassoli, "Legal Mechanisms to Improve Compliance with International Humanitarian Law by Armed Groups?" – *Improving compliance with International Humanitarian Law, Proceedings of the 30th Bruges Colloquium*, 11th–12th September 2003 (Bruges, 2004) 97–104, p 100.

Another possibility is for armed groups to create their own verification mechanism in the same way as some multinational companies have done concerning their compliance with Human Rights.[957] The likelihood of this happening is low.

5.4. The role of UN and counterterrorism measures in implementing and enforcing IHL

In recent decades many implementation measures have increasingly been carried out by the ICRC, the UN, and other international and non-governmental organizations. The organizations have taken a leading role even concerning the tasks that are in principle left for the States, offering assistance and guidance or influencing public opinion and pressing for diplomatic measures to be taken.

Human rights, environment, economic development and humanitarian relief are examples of a few areas where national or international NGOs have gained significant authority. Amnesty International, Doctors without Borders, and Greenpeace, for instance, are frequently a source of official information or are partners to governmental actors in setting new international standards.[958] They utilize a variety of methods to bring about normative change, e.g. intensive advocacy and dissemination of information to mobilize public opinion; mobilizing support for a legislative venture and lobbying relevant governmental representatives.

Two fascinating examples include the International Campaign to Ban Landmines (ICBL) and the NGO Coalition for an ICC. The former was launched in 1992 by 16 NGOs, but grew to bring together 1300 advocate groups and resulted in the International Treaty Banning Antipersonnel Landmines in 1997. Concerning the ICC, somewhat surprisingly in 1989 Trinidad and Tobago proposed to the UNGA the idea of finally codifying the Nuremberg principles, and establishing a permanent international criminal tribunal. This expanded to some 800 NGOs coming together from all over the world. The adoption of the ICC statute in 1998 will remain a milestone of NGOs' increasing influence on international treaty making.[959]

In addition, regional organizations may carry out monitoring and fact-finding missions not only in peacetime, but also to further the respect for human rights and humanitarian principles in situations of armed conflict.[960]

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[957] *Ibid*.

[958] Goldstein, „Implementation of International Humanitarian Law", *supra nota* 341, p 175; see also Ann Marie Clark, „Non-Governmental Organizations and Their influence on International Society", 48 *Journal of International Affairs* (1995) 507–525.

[959] Goldstein, „Implementation of International Humanitarian Law", *supra nota* 341, p 177.

[960] E.g. Inter-American Commission on Human Rights, the Conference on Security and Cooperation in Europe (CSCE). NGOs: Amnesty International, International Commission of Jurists, International Helsinki Federation for Human Rights.

Also, some of the major human rights conventions contain clauses for public emergency regimes that enable monitoring and "conclusion drawing". The International Covenant on Civil and Political Rights of 1966, European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), European Social Charter of 1961 and the American Convention on Human Rights are good examples. The courts and commissions acting under such conventions are competent to perform their functions in relation to situations of public emergencies. The body of law the observance of which they are monitoring may, in theory at least, include IHL applicable in armed conflicts. However, with the exception of the European Court of Human Rights and the UN Security Council, no legally binding decisions can emanate from these bodies.

The Inter-American Court and Commission on Human Rights has also become a forum for the enforcement of IHL due to the number of cases presented and reports prepared that concern States in which internal armed conflicts exist.[961] The same goes for other regional human rights bodies of which there is an impressive amount.

If regional organizations monitor compliance with IHL, there is bound to be a positive impact on its implementation, but the essentially political nature of these organizations may be reflected in their operations and may sometimes jeopardize the work of humanitarian agencies that must be conducted with impartiality and remain untainted by political considerations.[962]

These examples prove that a vast array of different stakeholders are involved in the implementation and enforcement actions of IHL. Without a doubt the two major actors remain the UN and the ICRC.

5.4.1. The role of the UN

The United Nations system was designed carefully to make war illegal and unnecessary, so the Charter itself does not even mention the concept of war. If force is used or threatened against the territorial integrity or political independence of any State contrary to the Charter, there are two possible military options permitted in response, i.e., self-defence and police or enforcement action.[963] As such, it could be said that the UN is more concerned with enforcement compared to the ICRC that covers mostly implementation action. However, the UN has also taken a more preemptive and educational role recently.

Dörmann noted in 2007 that during the last 15 years or so the UN has become a very important actor in the field of international humanitarian law. He mentions

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[961] Zyberi, "Enforcement", *supra nota* 98. Dinah Shelton, "Humanitarian Law in the Inter-American Human Rights System" – Erika de Wet & Jan Kleffner (eds), *Convergence and Conflicts of Human Rights and International Humanitarian Law in Military Operations* (Pretoria University Law Press, 2014) 365–394, p 392.

[962] Pfanner, "Various mechanisms", *supra nota* 246, p 326.

[963] Murphy, "United Nations military operations", *supra nota* 326, p 161.

just a few examples that include appeals by the SC to respect IHL; establishment of *ad hoc* criminal tribunals; sending of fact-finding missions; the attention given to the protection of the civilian population in situations of armed conflict; and action by the GA.[964]

Palwankar even goes on to say that "any effective attempt by a State to ensure respect for international humanitarian law, especially in the event of massive violations, would be difficult, if not impossible, without the political support of the community of States, and the UN is one of the most widely used vehicles for such support in the contemporary world."[965] IHL gives a legal basis for this in Article 89 of Protocol I: "In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter". This is a significant change compared to the text of the Conventions. Formally, this provision does not allow them to act in situations other than international armed conflicts, but as will be seen from proceeding discussions, this has not prevented action in any way.

It is not entirely clear what "in situations of serious violations" means, as it was not elaborated at the Conferences preparing the 1977 Protocols. The Commentary to the Protocols gives three categories that could qualify (note that grave breaches is not the same as serious violations):

- isolated instances of conduct, not included amongst the grave breaches, but nevertheless of a serious nature;
- conduct which is not included amongst the grave breaches, but which takes on a serious nature because of the frequency of the individual acts committed or because of the systematic repetition thereof or because of circumstances;
- "global" violations, for example, acts whereby a particular situation, a territory or a whole category of persons or objects is withdrawn from the application of the Conventions or the Protocol.

And one category that does certainly not qualify: [the Article] "is not concerned with situations where the wrongful conduct remains rare and isolated, so that other mechanisms expressly established for prevention, supervision and repression are to be adequate."[966]

The Commentary goes on to say that the UN actions may therefore consist of issuing an appeal to respect humanitarian law, setting up enquiries on compliance with the Conventions and the Protocol and "even, where appropriate, of coercive actions which may include the use of armed force." United Nations actions may also take the form of assistance in terms of material or personnel given to Protecting Powers, their substitutes, or to humanitarian organizations.[967]

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964 Dörman, "Dissemination and monitoring compliance", *supra nota* 184, p 245.

965 Palwankar, "Measures available", *supra nota* 222.

966 Pictet's Commentary, *supra nota* 59, points 3592, 3593.

967 *Ibid*, points 1035, 3597.

It is therefore clear that IHL enforcement action by or with the UN should only legally be used when a violation has taken place, as it is serious and cannot be remedied by other mechanisms. A central argument of this thesis is that usually other remedies do exist, and turning to the UN coercive system should be seen as a last resort.

There are some issues in the Commentary that call for scrutiny. The commentaries to the Protocols date back to 1977 and could not, at this time, take into account the practice that actually followed. In practice, the UN has not cited the Protocols as a legal basis for action; if anything, they cite CA 1. Usually the Resolutions just mention breaches of human rights and humanitarian law and prescribe measures under Articles 41 and 42 of the Charter. The UN does not differentiate between grave breaches and serious violations as neatly separated by the Commentary.

The kind of violations that bring about measures under the Charter are "violations on such a scale that a continuation of them would constitute a threat to international peace and security". If the violations of IHL are on such a scale (within the meaning of Article 39 of the UN Charter), it is up to the UNSC to take note of the fact, to make recommendations and, if it deems necessary, to decide on measures to be taken under Articles 41 and 42 of the Charter. The use of force can then be envisaged. The purpose of such measures is not essentially to enforce humanitarian law, but to terminate a situation that is a threat to international peace and security. In this case, the legal basis is not to be found in humanitarian law.[968]

In other words, the use of force can be resorted to with the primary goal of restoring or maintaining international peace and security. And, secondly, it can be done only on the basis of the UN Charter and not of IHL. The lawfulness of the use of force in such circumstances is strictly limited to this goal, and cannot be derived from any rule or provision of IHL, not even Article 89 of Protocol I. "For international humanitarian law starts off from the premise that any armed conflict results in human suffering, and proceeds to elaborate a body of rules meant precisely to alleviate this very suffering. It would indeed be logically and legally indefensible to deduce that that same law itself allows, even in extreme cases, for the use of armed force."[969]

Fact-finding

The Security Council can, and has, mandated fact-finding – but unfortunately not by the International Fact-Finding Commission itself.[970] Fact-finding missions have been sent by the UN to a number of trouble-spots over the past 50 years, on a pragmatic, occasional, case-by-case basis in the field of human rights and humanitarian law. The institutions of Working Groups, Special Rapporteurs,

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968 Pfanner, "Various mechanisms", *supra nota* 246, p 306.

969 Palwankar, "Measures available", *supra nota* 222.

970 Wouters, "Improving complianc", *supra nota* 397, p 115.

Special Representatives and Independent Experts established by the UN Commission on Human Rights have become an increasingly important tool, but are mostly concerned with HRL.[971]

As said, the legal basis for such missions has not been IHL and the International Fact-Finding Commission provided therein. On 9 December 1988, the GA requested the Special Committee on the Charter of the UN and on the Strengthening of the Role of the Organization to consider proposals concerning fact-finding activities by the UN. As a result, the Committee submitted a draft Declaration to the GA that adopted it on 9 December 1991.[972]

The declaration that defines and institutionalizes the use of such missions states that it is not only a tool to gather information, but also to signal concern over a potentially explosive situation. It states that fact-finding should be "comprehensive, objective and impartial". It should be used at the earliest possible stage to prevent disputes. Fact-finding missions may be undertaken with the consent of the "receiving State". Nations, however, are asked to receive and cooperate with these missions. Refusals to do so should be explained.[973]

These international investigative bodies have been tasked with inspecting allegations of violations of international human rights, IHL or international criminal law and making recommendations for corrective action based on their factual and legal findings.[974] They assist in ensuring accountability for serious violations, which is fundamental in order to deter future violations, promote compliance with the law and provide avenues of justice and redress for victims.

These activities, of course, may also lead the SC or the GA to denounce breaches and, as far as the SC is concerned, even to resort to bringing enforcement measures.

Peace-keeping

Peace-keeping is a further way for the UN to maintain peace and security and help countries to transition from conflict to peaceful settlement. Peace keeping also facilitates political process, protects civilians, and assists in the disarmament

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[971] Rosas, "International Monitoring Mechanisms", *supra nota* 579, p 235. As the examples of Cambodia, El Salvador, Somalia and the former Yugoslavia demonstrate, there may also be a more or less permanent UN mission, including peacekeeping and police forces, to monitor activities and provide assistance and protection.

[972] Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security, <legal.un.org/avl/ha/ga_46-59/ga_46-59.html> (1.11.2019).

[973] OHCHR, Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice (2015) <www.ohchr.org/Documents/Publications/CoI_Guidance_and_Practice.pdf> (1.11.2019).

[974] *Ibid*, Examples include: The Commission of Inquiry for Côte d'Ivoire (2011); Commission of Inquiry on the Syrian Arab Republic (2011); The International Commission of Inquiry on East Timor (1999).

and restoring the rule of law.[975] I will not elaborate on this complex issue but will note briefly the significance and main problems connected to it.

None of the existing Conventions or Protocols addresses the specific issues of UN forces, or forces acting on their authority, in situations of armed conflict. It could be said that this situation leaves military forces acting under the control of the UN somewhat in limbo. However, the *Institut de Droit International* has confirmed that the rules of the "law of armed conflict" apply as of right and they must be complied with in every circumstance by UN forces engaged in hostilities.[976] Therefore, although originally there was some doubt about the applicability of humanitarian law to UN forces, it is now generally accepted that UN forces are bound by humanitarian law, whether performing duties of a peacekeeping or enforcement nature.[977] Unfortunately, these forces have been known to engage in conduct that is contrary to humanitarian law.[978]

Secondly, the fact that military and humanitarian operations coexist within peacekeeping forces is not unproblematic. Military operations go beyond purely humanitarian objectives and encompass political aims, whereas humanitarian action, by its very nature, can never be coercive. The use of force inevitably transforms a humanitarian action into a military one, and a threat of force to facilitate a humanitarian operation may be enough to jeopardize that very operation.[979]

Since 1948, when the UN established its first peacekeeping operation in the Middle East (the UN Truce Supervision Organization), there have been over 70 UN peacekeeping operations around the world. Most are deployed in Africa, but they are also used in the Middle East, Europe, Asia and the Americas. Since the 1990s, the number of missions and of deployed personnel has increased, while mission mandates have become more robust and multifaceted. According to the UN Department of Peacekeeping Operations there were over 110000 peacekeepers deployed in 2018.[980] Recent studies have concluded that peacekeeping does fulfil its purpose. The missions reduce both the amount of violence during a conflict and the duration of the conflict; they help contain the conflict from spreading to neighbours, and reduce the risk of it recurring.[981]

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[975] UN, „Principles of Peacekeeping", <peacekeeping.un.org/en/principles-of-peacekeeping> (1.11.2019).

[976] Murphy, "United Nations military operations", *supra nota* 326, p 162.

[977] *Ibid*, p 154. This is not just a practical necessity, but may arise from obligations of states "to respect and ensure respect" for the Geneva Conventions and Protocols "in all circumstances".

[978] *Ibid*, p 159.

[979] Pfanner, "Various mechanisms", *supra nota* 246, p 318.

[980] Zyberi, "Enforcement", *supra nota* 98.

[981] European Parliament, „EU-UN cooperation in peacekeeping and crisis management", briefing, <www.europarl.europa.eu/RegData/etudes/BRIE/2015/572783/EPRS_BRI(2015)572783_EN.pdf> (1.11.2019).

Enforcement through the Security Council

The UNSC has acquired a major role in the implementation of the laws of war.[982] As every armed conflict, which is covered by IHL, is *prima facie* a situation falling under Article 39 of UN Charter, the Security Council Competence on Chapter VII can and has to be an enforcement mechanism in regard to the rules of humanitarian law. Since 1989, this coercive competence of the SC has come to practical existence,[983] or as Rosas puts it, "has surfaced after a rather long beauty sleep".[984] It has authority under Chapter VII of the UN Charter, to respond to threats to or breaches of the peace or against an act of aggression. Under Article 41, the UNSC can undertake different measures not involving the use of force, whereas under Article 42 it can authorize military action.[985]

Whereas the system established under IHL rests essentially on the consent of the parties to a conflict, particularly in internal conflicts, the measures authorized by Chapter VII of the Charter require no consent and can be imposed. The SC does not remain within the framework of IHL, and often combines aspects of *jus ad bellum* (direct or indirect interventions in current military operations) and of *jus in bello* (initiatives to protect war victims). Again, in doing so, especially where force is used to impose these measures, the SC is implementing the UN Charter and not humanitarian law, which does not admit of any interference in a conflict.[986]

The Council helps to implement and enforce IHL *inter alia* by stressing the responsibility of all parties of a conflict to obey these rules, and by reiterating that both HRL and IHL has to be obeyed. Among the most common measures not involving the use of armed force are those measures that are known as sanctions, discussed in a previous sub-chapter. "Sanctions can be imposed on any combination of States, groups or individuals. The range of sanctions has included comprehensive economic and trade sanctions and more targeted measures such as arms embargoes, no-fly zones, travel bans, financial or diplomatic restrictions".[987] Article 41 also includes measures such as the creation of post-conflict international tribunals or the creation of a fund to pay compensation for damage resulting from a breach.[988]

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[982] Spoerri, „Contemporary Challenges", *supra nota* 90, pp 40–43.

[983] Vöneky, "Implementation and Enforcement", *supra nota* 19, p 656; Marco Roscini, „The UN Security Council and the enforcement of International humanitarian law", 43 *Israel Law Review* (2010) 330–359.

[984] Rosas, "International Monitoring Mechanisms", *supra nota* 579, p 246.

[985] SC RES 1970, 26.02.2011; SC RES 1973, 17.03.2011.

[986] Pfanner, "Various mechanisms", *supra nota* 246, p 315.

[987] UN, „Sanctions Committee information",
<www.un.org/securitycouncil/sanctions/information> (1.11.2019). Zyberi, "Enforcement", *supra nota* 98.

[988] Charter of the United Nations and Statute of the International Court of Justice, 1 UNTS 16, 24.10.1945, Art 41. International embargoes against Rhodesia, Libya, Haiti, Iraq, and Yugoslavia were enacted under this provision, UN, "Repertoire of the Practice of the Security

The UNSC has powers that allow it to pursue a degree of individual accountability for serious violations of IHL. Thus, in 1993 and 1994 respectively, the UNSC established the *ad hoc* tribunals for the former Yugoslavia and for Rwanda, in order to investigate and prosecute serious violations of IHL (now subsumed under the International Residual Mechanism for Criminal Tribunals).[989] It also has the authority to refer to the ICC situations where serious violations of IHL are being committed. So far, there have been two SC referrals, namely Sudan (Darfur) in 2005, and Libya in 2011.[990]

The list of actions in Article 41 of the Charter is indicative, and does not limit the SCs' choice of means for achieving the desired objective or restoring and keeping the peace. In its practice, the SC has been primarily concerned with the effects of international conflicts and frequently calls upon the belligerents to respect humanitarian law (examples include the Iran/Iraq conflict, the territories occupied by Israel, the invasion of Kuwait, Ethiopia/Eritrea, Iraq, Georgia, etc). It has, however, increasingly addressed non-international armed conflicts (such as Somalia, Rwanda, Liberia, Afghanistan).[991]

The SC has, furthermore, called for recognition of the applicability of the Fourth Geneva Convention; for prisoners of war to be released and repatriated; for unrestricted access and safe passage to be given to aid deliveries; for travel bans and asset freezes for those responsible for violations; for a commission of enquiry to be set up;[992] or for a situation to be referred to the ICC, even if the State concerned is not a party to the Rome Statute.[993]

However, it can also set up UN Protection Forces, protected towns and humanitarian corridors, a compensation system for the victims of armed attacks or even a reporting system related to IHL.[994] More recently, it has adopted resolutions on particular thematic issues, notably child soldiers, the protection of civilians in armed conflict, and sexual violence against civilians in armed conflict. Sanctions have also been imposed on high-level officials for violations of IHL.[995]

Council", <www.un.org/en/sc/repertoire/actions.shtml#rel3> (1.11.2019); Vöneky, "Implementation and Enforcement", *supra nota* 19, p 657; Pfanner, "Various mechanisms", *supra nota* 246, p 314.

[989] SC RES 808, 22.02.1993; SC RES 955, 8.11.1994.

[990] International Criminal Court, „How does the ICC work?", <how-the-icc-works.aba-icc.org/> (1.11.2019).

[991] Pfanner, "Various mechanisms", *supra nota* 246, p 315.

[992] SC RES 1564, 18.09.2004 on Sudan.

[993] For example: SC RES 827, 25.05.1993 for the former Yugoslavia; SC RES 935, 1.07.1994 for Rwanda, and SC RES 1593, 31.03.2005 on Sudan. The legal basis is under Article 13(b) of the Rome Statute.

[994] Pfanner, "Various mechanisms", *supra nota* 246, p 317; Monitoring and Reporting Mechanism on Children Affected by Armed Conflict, set up under SC RES 1612, 26.07.2005.

[995] Sivakumaran, *The law of non-international armed conflict*, *supra nota* 337, p 466; Goldstein, „Implementation of International Humanitarian Law", *supra nota* 341, p 174.

Therefore, as long as the SC remains within the broad framework of the UN Charter, it is not limited to the instruments made available to it by IHL and can innovate. It can take wide-ranging decisions and even create new mechanisms, as long as it acts in accordance with the purposes and principles of the Charter and does not violate the norms of *jus cogens*. The main check on the SC's decisions is, however, the possibility that States may disregard its decisions: without the Member States' support, the resolutions are mere wishful thinking.[996]

As Roscini has noted, the privileged position of the SC, which has exclusive competence to take coercive measures involving the use of armed force and whose decisions are binding on all UN Member States, makes it potentially "a formidable instrument against serious violations of IHL, which can at least partly remedy the lack of enforcing mechanisms in the treaties on the laws of war, where compliance is mainly based on the goodwill of the States parties".[997]

Enforcement through the General Assembly

The GA has also utilized IHL in different ways, for example calling on parties to non-international armed conflicts to respect the law, and condemning violations of the law. It has called on States not parties to IHL instruments to consider becoming parties to them, and called on States parties to instruments to disseminate them.[998]

The UN Charter gives the GA the power to initiate studies and make recommendations to promote the development and codification of international law. Since the end of the 1970s, the General Assembly began to cite, although inconsistently, the Conventions and the Protocols in numerous resolutions and other decisions it adopted.

Starting with the 1968 Proclamation of Teheran, the UNGA has reminded parties to an armed conflict of their IHL obligations, issuing several resolutions on "Respect for Human Rights in Armed Conflict". In these resolutions the GA did not confine itself to listing the principles to be observed in such situations. It also paved the way for resolutions calling for compliance with IHL in general, as well as in specific situations. The broad functions and powers of the GA allow it to discuss and make recommendations on all matters that fall within the purview of the UN, subject to the prerogatives of the SC.[999]

More recently, in 2005, the UNGA has adopted the responsibility to protect doctrine (R2P), which requires States to protect their populations from mass atrocity crimes, including war crimes.[1000] This doctrine is based on the primary responsibility of States to protect their populations from mass atrocity crimes, including war crimes, and a subsidiary responsibility on the part of the organized

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996 *Ibid*.

997 Roscini, "The UN Security Council", *supra nota* 983, p 358.

998 Sivakumaran, *The law of non-international armed conflict*, *supra nota* 337, p 466.

999 GA RES 2444 (XXIII), 19.12.1968.

1000 GA RES 60/1, 24.10.2005, paras 138–140.

international community to assist States in this duty.[1001] At this stage the situations in Myanmar, Burundi and Mali are under scrutiny. As the year 2020 marks the 15 year anniversary of the doctrine, efforts are being made to include the R2P on the agenda of the GA as a permanent item, and furthermore to mandate the Permanent Secretary to compile an annual report on R2P.[1002]

The normative contribution of the GA comes also through the work of its subsidiary body, the International Law Commission, on the codification and progressive development of international law, which has been mentioned in several parts of this thesis. The ILC has worked on the "Formulation of the Nürnberg Principles", "Draft code of offences against the peace and security of mankind", and many other aspects of international law more recently.[1003]

The operational aspect of the mandate of the UNGA is carried out mainly through its subsidiary organ, the Human Rights Council, an inter-governmental body within the United Nations system responsible for strengthening the promotion and protection of human rights and for addressing situations of human rights violations and making recommendations on them.[1004]

The UN Secretary-General obviously plays a key role in the implementation of humanitarian law, as he takes care of the practical arrangements for and the follow-up to the actions of the other non-judicial UN bodies, and may bring matters to the attention of the SC on his own initiative. Acting under his authority, the UN High Commissioner for Human Rights is responsible for the UN's activities in the human rights sphere.[1005]

Enforcement through the International Court of Justice

The ICJ's position as one of the main organs of the UN and its principal judicial organ makes its role quite important.[1006] This institutional role is also reflected in requests for advisory opinions on IHL-related issues by the GA. Some of the aspects of the work of the Court which are relevant to the enforcement of IHL are State responsibility for violations of IHL; reparations due to States, legal entities, and individuals; and indication of provisional measures of protection in armed conflict situations.[1007] This is elaborated further under the chapter of grave breaches.

[1001] UN Office on Genocide Prevention and the Responsibility to Protect, <www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml> (1.11.2019).

[1002] Ministry of Foreign Affairs of Estonia, Internal report of a meeting of experts on R2P in Brussels 23.10.2019, on hold with author

[1003] International Law Commission, <legal.un.org/ilc/> (1.11.2019).

[1004] United Nations Human Rights Council, <www.ohchr.org/en/hrbodies/hrc/pages/home.aspx> (1.11.2019).

[1005] Pfanner, "Various mechanisms", *supra nota* 246, p 321.

[1006] Zyberi, "Enforcement", *supra nota* 98.

[1007] *Ibid.*

The courts contribution through its jurisprudence and its advisory opinions is something very important for our purposes. Namely, it may be called upon to settle a dispute between States concerning the application of IHL if both States have accepted the Court's jurisdiction.[1008]

States may also, through the SC and/or the GA, request the ICJ to give an advisory opinion on whether an established fact – namely an alleged violation of IHL by a State or States party involved in a conflict – actually constitutes a breach of an international commitment undertaken by that State or those States.[1009] In principle, therefore, the ICJ could be asked if a State is in violation of its obligations under CA 1 and define exactly what that obligation entails.

5.4.2. Counterterrorism responses

In the beginning of this thesis we briefly talked about the relationship of IHL with HRL. There is another field of law that is very frequently mentioned in connection with IHL, namely the laws on counter terrorism. Counterterrorism responses, combined with a robust counterterrorism discourse, have significantly contributed to a blurring of the lines between armed conflict and terrorism, with potentially adverse effects on IHL. There appears to be a growing tendency among States to consider any act of violence carried out by a non-State armed group as being "terrorist" by definition, even when such acts are in fact lawful under IHL.[1010] In part, this might be a result of the longstanding concern of States that recognizing the existence of an armed conflict in their territory would "legitimize" the non-State armed groups involved. In part, it can be because these is considerable confusion between the law-enforcement and military approaches to terrorism itself.[1011]

While the legal frameworks governing terrorism and IHL may have some common ground, these two regimes remain fundamentally different (like IHL and HRL). They have distinct rationales, objectives and structures. For example, in legal terms, armed conflict is a situation in which certain acts of violence are considered lawful and others are unlawful, while any act of violence designated as "terrorist" is always unlawful.[1012]

[1008] Pfanner, "Various mechanisms", *supra nota* 246, p 324.

[1009] Kadam, "Implementation of international humanitarian law", *supra nota* 4, p 394.

[1010] ICRC, „International humanitarian law and the challenges of contemporary armed conflicts", Document prepared by the ICRC for the 32nd International Conference of the Red Cross and Red Crescent, Geneva, 8–10.12.2015, 97 *International Review of the Red Cross* (2015) 1427–1502, p 1445.

[1011] Rene Värk, Riikide enesekaitse ja kollektiivse julgeolekusüsteemi võimalikkusest terroristlike mitteriiklike rühmituste kontekstis", 29 *Dissertationes Iuridicae Universitatis Tartuensis* (2011).

[1012] ICRC, „International humanitarian law", *supra nota* 1010, p 1445.

In principle, terrorists are subject to national criminal law. Before September 11 this was also true for terrorist groups which used significant and sustained armed violence. However, even before that, it became clear that global non-state terrorist organizations existed. For example, the Security Council decided in 1999, by way of Resolution 1267, to establish a Committee supervising the implementation by States of the sanctions imposed by the SC on individuals and entities belonging or related to the Taliban, Bin Laden and the Al-Qaida organization.[1013]

The question, then, has become if these global non-state terrorist organizations are and can be regulated under the IHL regime. There appears to be at least two options. First, some authors believe that if we accept that transnational terrorism remains outside the classical typology of international armed conflicts, but cannot be adequately dealt with if qualified as a non-international armed conflict, since it is not confined to the territory of one State, then we have to admit that IHL provisions need to be altered and cannot be applied to the fight against terrorism.[1014]

Second, if we accept that terrorism is not a "new phenomenon", but it has always existed and was in the minds of the legislators when drafting the Conventions, then: a) if acts of terror are committed during an armed conflict, relevant IHL provisions will apply, or b) if they are committed during peace, HRL and all relevant anti-terrorism provisions will apply.

Marouda proposes an intermediate position. Namely, "the armed conflicts representing all these challenges, are not a new phenomenon in IHL but the institutional framework of IHL needs reinforcement so as to incorporate new actors, 'the rise of the rest' but also armed conflicts crossing borders."[1015]

Sassoli rightfully holds that international law does not prohibit non-international armed conflicts; internal law does. *Ius ad bellum* for non-international armed conflicts does exist in national legislation. As the monopoly on the use of force for State organs is inherent in the very concept of the Westphalian State, we may assume that the national legislation of all States prohibits anyone under their jurisdiction to wage an armed conflict against governmental forces or, except State organs acting in said capacity, anyone else.[1016]

Sandoz further holds that we must "dig in our heels" – IHL must defend its most fundamental provisions, just as a healthy body defends itself against a virus.

[1013] Hans-Joachim Heintze, "Do Non-State Actors Challenge International Humanitarian Law?" – Wolff Heintsechel von Heinegg & Volker Epping (eds), *International humanitarian law facing new challenges: Symposium in honor of Knut Ipsen* (Berlin, Springer 2007) 163–168, p 165.

[1014] Maria-Daniella Marouda, „Application of IHL in contemporary armed conflicts: is it "Simply" a question of facts" – Stelios Perrakis & Maria-Daniella Marouda (eds), *Armed Conflicts and International Humanitarian Law 150 Years after Solferino: Acquis and Prospects* (European Centre for Research and Training on Human Rights and Humanitarian Action, 2009) 201–244, p 242.

[1015] *Ibid*.

[1016] Sassoli, „Ius ad bellum and Ius in bello", *supra nota* 45, p 255.

It is a mistake to impose the burden of the debate on terrorism on this branch of law, especially when this debate should centre on cooperation between law enforcement agencies and on addressing the problems that provide the fertile soil in which terrorism can grow.[1017]

I agree that terrorist acts are crimes under domestic law and under the existing international and regional conventions on terrorism, and they may, provided the requisite criteria are met, qualify as war crimes or as crimes against humanity. Thus, as opposed to some other areas of international law, "terrorism" – although not universally defined as such – is abundantly regulated.[1018]

The legal framework of the fight against terrorism has been developed step by step by the UN, since the 1990's with sanctions against some States (Libya, Sudan), and later against groups such as the Taliban or Al-Qaida. In the aftermath of the attacks of 11 September, the SC adopted resolution 1368 recognizing the existence of "threats to international peace and security caused by terrorist acts", and resolution 1373 of 28 September 2001 that created a "counter-terrorism committee" within the SC, to be assisted by an executive directorate of the counter-terrorism committee in charge of monitoring the measures adopted by the SC.[1019]

The "United Nations Global Counter-Terrorism Strategy" was adopted on 8 September 2006, and a special Office of counter-terrorism was created in 2017. The international counter-terrorism framework also includes a vast network of approximately twenty multilateral instruments, conventions and protocols, with a universal dimension, which incriminate "acts of terrorism". This framework is completed at regional level. Thus, on 4 July 2018, the Council of Europe adopted a 2018–2022 strategy relating to counter-terrorism centred on three lines of action: prevention, prosecution and protection. The European Union has ratified the Council of Europe Convention on the Prevention of Terrorism (CETS No.196) and its Additional Protocol (CETS No.217) that entered in force for the EU on 1st of October 2018.[1020]

[1017] Sandoz, "Implementing International Humanitarian Law", *supra nota* 304, p 342.

[1018] Spoerri, „Contemporary Challenges", *supra nota* 90, p 4.

[1019] National Consultative Commission on Human Rights (CNCDH), „Statement of opinion on the impact of counter-terrorism legislation on humanitarian action", <www.cncdh.fr/fr/publications/statement-opinion-impact-counter-terrorism-legislation-humanitarian-action> (1.11.2019).

[1020] *Ibid*.

CONCLUSIONS

What can be concluded from this study is the fact that there are sufficient implementation and enforcement measures foreseen in the Treaties, and the texts provide sufficient flexibility to take the new realities of warfare into account. The texts are the result of long and arduous diplomatic debates and can be implemented at any moment with sufficient political will.

Constant violations of IHL can lead to a perception that the principles are never respected or that they are not relevant anymore, an opinion that is heard incessantly from sceptics. In the past century, the laws of war have been substantially revised every 25–30 years by major new treaties. By that standard, we should be due for another international conference leading to the promulgation of new rules and the revision of existing ones.[1021] This in itself is not sufficient to justify the automatic initiation of new developments in this area of law. Anyone conscious of World's politics in 2019 knows that the climate is not favourable for a treaty drafting exercise. Because conferences often make decisions by consensus and try to fashion generally acceptable texts, even a few stubborn governments may prevent the adoption of more enlightened provisions.[1022]

On the other hand, it would be wrong – and indeed dangerous – to believe that IHL is always and only violated and is therefore useless. The focus on violations risks to de-legitimize the law over time and to miss those thousands of situations where the law is effectively respected: the civilians spared, the detained treated humanely.[1023] The latest session of the UNGA had a high-level side event to celebrate 70 years of the Geneva Conventions. The president of the ICRC outlined some positive examples of implementation that prove the endurance of the Conventions to this day.[1024] For example, tens of thousands of detainees have remained connected with their families; armed forces are investing in reducing civilian death and injury; the death toll from anti-personnel landmines has drastically declined, and non-State armed groups have made commitments against the recruitment of children in hostilities and against sexual violence.[1025]

As noted, most authors share the view that no formal process for revising the laws of war is currently appropriate, despite flaws, gaps, and ambiguities in existing law. What needs to be changed is our attitude towards implementation of the law, not the law itself. Even those authors who emphasize specific problems with contemporary applications of the laws of war argue principally in

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[1021] Wippman & Evangelista, *New wars, new laws?*, *supra nota* 1021, p 6.

[1022] Meron, „International Criminalization", *supra nota* 800, p 555; Hegelsom, *supra nota* 278, p 76.

[1023] Maurer, "Changing world", *supra nota* 96.

[1024] Peter Maurer, „The endurance of the Geneva Conventions shows us what is possible", Remarks to high-level side event: "70 years of the Geneva Conventions: Investing in humanity through multilateralism", 23.09.2019, <www.icrc.org/en/document/endurance-geneva-conventions-shows-us-what-possible> (1.11.2019).

[1025] *Ibid.*

favour of particular interpretations of existing law, rather than for codified changes to it.[1026] Sassoli holds that he is not aware of many concrete proposals by those labelling the Conventions 'outdated' as to which provisions of IHL treaties should be amended with what new wording. "If scholars and politicians say that IHL is not adequate without immediately adding which rules are adequate in what situation, this has catastrophic results in the field".[1027]

Sandoz holds that there is a powerful temptation to explain violations of the law in terms of its inadequacies. However, this explanation is illusory, and the basic rules of IHL remain perfectly relevant. He agrees that certain provisions could be improved somewhat, but the effort that this would require would be completely disproportionate to the results for which one might hope.[1028]

Dörmann writes that despite the emergence of new actors of violence, and new means and methods of warfare, IHL continues to "provide an adequate framework to attenuate the effects of armed conflict and to establish a judicious balance between the principles of humanity and military necessity".[1029] Solis adds that "the 1949 Conventions have shown themselves to be remarkably resilient and adaptable to emerging warfare modalities; hardly perfect, but equal to previously unforeseeable circumstances."[1030] Fitzgerald even states that IHL has never been stronger. It may be true that IHL develops slowly, but progress is inexorable.[1031]

The ICRC too is convinced that the existing provisions of IHL form an adequate basis to meet the challenges raised by modern conflicts,[1032] and the Geneva Academy of IHL and human rights that there is no need to reinvent the wheel. Creating new ways to implement IHL using existing mechanisms is possible.[1033]

Finally, Gasser holds that recent conflicts have "not revealed major lacunae or loopholes in the *jus in bello*. It appears that all types of behaviour by belligerents, which public opinion rightly condemns as unacceptable by any standard of human decency, are in fact already prohibited by international humanitarian law."[1034]

1026 Wippman & Evangelista, *New wars, new laws?*, *supra nota* 1021, p 13; Zyberi, "Enforcement", *supra nota* 98; Sassoli, „The implementation", *supra nota* 83.

1027 Sassoli, „The implementation", *supra nota* 83, p 71.

1028 Sandoz, "International humanitarian law", *supra nota* 349, p 24.

1029 Dörmann, "Common Article 1", *supra nota* 206, p 708.

1030 Solis, *Geneva Conventions*, *supra nota* 780, pp 42, 45.

1031 Fitzgerald, "Implementation of international humanitarian", *supra nota* 47, p 637–638.

1032 Dörman, "Dissemination and monitoring compliance", *supra nota* 184, p 247; Pfanner, "Various mechanisms", *supra nota* 246, pp 279–280; International humanitarian law and the challenges of contemporary armed conflicts: Document prepared by the ICRC for the 30th International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 26–30 November 2007, p 721.

1033 Bellal, "70th Anniversary", *supra nota* 93.

1034 Gasser, "Ensuring Respect", *supra nota* 33, p 16.

Implementation is a major challenge for IHL. There is an enormous contrast between the very carefully crafted and widely accepted rules of humanitarian law and the continuous daily violation of these rules. Undeniably, after more than a hundred years of lawmaking, the goal should not be new law, but the effective implementation of existing norms.

The purpose of this study was to establish how to ensure better respect for IHL and to demonstrate that IHL has failed on many levels, because the necessity and modalities of implementation are not obvious nor unambiguous. Take for example the interpretation of CA 1, the meaning of which is far from clear. It may eventually depend on which interpretative method is applied and whether a State (or any other actor) can be accused of an internationally wrongful act, or whether it will be regarded as having stayed faithful to its commitments.

Of the three categories of measures analysed, enforcement measures have received most criticism. Several traditional measures are now banned, international criminal law functions very slowly, the collective security system yields results, but at a very high price, both in human life and financially. As it is established that enforcement measures are lacking or ineffective, there might not be much choice other than to focus on preventive action. By teaching and disseminating humanitarian law, one can contribute to the growth of a society where violations are less common.

The discourse of prevention and national implementation needs more attention. There should be no doubt that the very applicability of humanitarian law largely depends on the effective integration of its rules into domestic law. The States should ask what they themselves can do to reduce the number of violations. For example, it would be appropriate to review national training programs, military rules and manuals, consider humanitarian law when urban planning, and approach prevention in an interdisciplinary way. Dialogue with non-state actors is inevitable, and must be at the heart of preventive action. The Protocols that recently celebrated their 40th anniversary provide for this possibility.

Thus, there are problems that arise out of the environment where IHL has to be applied; out of the perception of the general public and out of the content of the law itself. And, these are indeed inherent to the very idea of IHL. We definitely cannot change the environment where IHL is applied, an armed conflict is and armed conflict and looks more or less the same throughout the centuries. But there is something we could do about the perception of the public. This is something the ICRC is working on a daily basis. The *inter arma silent leges* adage has to be eradicated if IHL is to be respected better in the future. And with the complexity and incompleteness of the law, one could also envisage measures to overcome these issues. Think about the numerous educational programs mentioned throughout this work. The ICRC's database of national implementation measures, the vast commentaries to the Conventions, the military manuals of States and non-state groups, the statute of the ICC etc.

To answer the research questions set out for this thesis we start with outlining the actual scope of CA 1 to the Conventions. It is concluded that the Article serves

as a generic reminder of an obvious obligation to abide by the Conventions, more specifically a reminder of obligations already set out in other rules.

States are required to ensure respect for IHL only on the part of their own organs and such other persons as may be acting under their effective control. With respect to persons acting on their instructions but outside their effective control, it could be argued that States are required to ensure that such persons are willing and able to execute their instructions in compliance with IHL. It seems clear on the basis of the findings of the analysis that the most that can be done is to take diplomatic measures or publicly denounce violations. It would be improper, and probably dangerous, to impose military sanctions or any form of intervention.[1035]

The few examples that exist on States using the CA 1, refer to serious violations of IHL, and may therefore be interpreted as expressions not of a general obligation to ensure universal respect for IHL but of the obligation to address serious violations of IHL, as codified in Article 89 of Protocol I for instance. It is also worth noting that a recent attempt to insert similar language into a resolution of the Human Rights Council was rejected.[1036] When human rights treaties contain similar provisions to "ensure respect", they are never understood to imply that contracting States must (or may) take measures against other contracting States beyond what is expressly provided for by all other provisions of the treaty.[1037]

What a State can and should do to ensure respect for IHL by another State or non-State actors remains debatable. Besides calling on other States to stay within the limits of IHL, publicly condemning violations, and recalling diplomatic staff or severing diplomatic relations, States must ensure they do not become complicit in committing war crimes by knowingly and actively supporting a party to the conflict.[1038]

Moving forward to the reporting and monitoring measures available in the Conventions, it has to be admitted that Protecting Powers system has been used only five times, the *ad hoc* fact finding commissions have never been used, and the standing International Fact-Finding Commission has only been used once so far. This situation provides a very bleak picture of the effectiveness of those three treaty-based mechanisms.[1039]

To overcome the lack of respect for IHL, many have thought about new, additional mechanisms of implementation. One of the proposals made is to set up a monitoring system along the lines of systems that exist in other branches of international law, such as environmental protection, labour law and disarmament. A periodic reporting system might involve some bureaucratic work and have little impact on the situation in the field, unless the reports were verified by a body of

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1035 Sandoz, "Implementing International Humanitarian Law", *supra nota* 304, p 266.

1036 Zych, "The Scope of the Obligation", supra *nota* 116, p 255.

1037 Focarelli, "Common Article 1", *supra nota* 121, p 142.

1038 Zyberi, "Enforcement", *supra nota* 98.

1039 *Ibid.*

experts authorized to carry out on-the-spot inspections. Nevertheless, the usefulness of such system is often reiterated. States have previously bound themselves to much stringent provisions than periodic reporting of IHL related activities.

A mandatory reporting system could be introduced in the future in order to get an overview of the state of implementation of humanitarian law, and to assess the situation in the countries. In a globalized world, no conflict could be considered interstate anymore. If the internal rules and violations of States were exposed to the scrutiny of international community, it would surely contribute to compliance. There is nothing inconceivable in creating a similar system to European Union's infringement procedure. The inquiry system could also be set in motion as often as needed. The first inquiry by the International Humanitarian Fact Finding Commission has just been published and will certainly prove useful in the future. As a logical extension, the use of the institution of the protecting powers or the assignment of the ICRC for these purposes would be recommended.

There is also the idea of appointing a High Commissioner for International Humanitarian Law on the model of the United Nations High Commissioner for Human Rights, or setting up some form of intergovernmental committee, bringing together a small group of States particularly concerned about IHL and ready to accept special responsibility for its implementation. A similar kind of cooperation already took place in the form of the ICRC-Swiss initiative on strengthening compliance with IHL.[1040]

States should be prepared to submit major differences of opinion on the interpretation or application of IHL to the ICJ, using either contentious proceedings or the advisory procedure. On the other hand, the real challenge relating to the implementation of IHL on the ground in today's conflicts is not how a certain provision is interpreted, but whether it is applied at all. It is facts, not legal theories, are often the object of dispute, and thus need to be established.[1041] This is why the fact-finding system should be quickly beefed up and put to maximum use.

There are many useful measures developed on the EU level, which could be broadened to cover IHL violations. For example, recently focus has been on tracking the financing of terrorism, i.e. obstructing the cash flow to such organizations to hinder their ability to commit atrocities. In the field of IHL it could be investigated how non-governmental armed groups acquire weapons and other equipment.

If sanctions are used within an armed group there are a few elements to be taken into account to guarantee their effectiveness. Any message about the imposition of sanctions must be accompanied by measures intended to improve adherence to the rules and respect for them, as well as dissemination about such rules and sanctions. They must incorporate prevention of a repetition of the crime,

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[1040] Jelena Pejic, „Strengthening compliance with IHL: The ICRC-Swiss initiative", 98 *International Review of the Red Cross* (2016) 315–330.

[1041] Sassòli, "The Additional Protocols", *supra nota* 929.

and must lead the perpetrators to recognize their responsibility in the violation of humanitarian law.[1042]

The liability of parties to the conflict to pay compensation for violations of IHL committed by persons forming part of their armed forces could provide for an obligation to compensate not only for States but also individuals. Obligations of parties to the conflict could thus be construed as being mirrored by rights of individuals for which IHL envisages a cause of action in case they are violated. This could prove a very powerful deterrent, if properly disseminated among the possible perpetrators.

At the 70th anniversary of the Geneva Conventions States were called upon to do more. That included ratifying all IHL-related treaties; strengthening military doctrine, rules of engagement and practice; ensuring military training socializes the rules and principles of IHL; developing national legislation which is compatible with international obligations; and more.[1043] In addition, there is now a UN Peacebuilding Fund available for countries emerging from a conflict or in a significant risk of lapsing into a conflict. As a way to implement IHL, one could imagine some kind of conditionality between the behaviour of the parties to the conflict and the financial aid they may receive through the fund, of course without prejudicing the civilian population.[1044]

Next, when it comes to the question of why some rules elicit more compliance than others, it is concluded that, contrary to general belief, fear of criminal repression is not the most effective means to induce compliance by armed groups. Enforcement in its stricter punitive sense is not the key, it is still too slow, too far from the battlefield and too sporadic to offer real deterrence. It is not legalization, i.e. creating more stringent rules or regulating more aspects of humanitarian law either. It is rather a set of perplexing multidisciplinary preventive measures that should be carefully analysed to reach better results in the future. More emphasis should be put on the idea that the law is intensely practical and represents a set of deals between professional soldiers and bargains among States.[1045]

"The greatest impediment to more effective legal regulation of war is not a demonstrable pattern of noncompliance, but rather the ongoing incapacity to explain and predict this pattern and offer policy-relevant guidance to the legal architects charged with making those modifications necessary to enhance compliance", Bradford believes.[1046] Crafting the most effective IHL regime is not merely a matter of codification of proper rules and institutions, although these are vital steps: it is to the selection and training of the right people to administer,

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1042 La Rosa, "Sanctions", *supra nota* 455, pp 242–247.

1043 Peter Maurer, „The Geneva Conventions are for All of Us", Briefing by ICRC President to UN Security Council on "The promotion and strengthening of the rule of law in the maintenance of international peace and security", 13.08.2019, <www.icrc.org/en/document/geneva-conventions-are-all-us> (1.11.2019).

1044 Bellal, "70th Anniversary", *supra nota* 93.

1045 Roberts, "The Laws of War", *supra nota* 331, p 71.

1046 Bradford, "A behavioralist Theory", *supra nota* 1.

interpret, and implement the normative content of the rules and institutions. After all, only individuals can exercise choice to comply with the rules.

To reiterate once more – if we are asking whether the Conventions need to be updated – the answer is negative. In substance, IHL has grown stronger, not weaker, over the past decades. A range of new international treaties have been ratified by States, international courts and tribunals produce judgments on the basis of IHL, States and non-state armed actors have been trained in this body of law, and IHL is integrated into States' domestic legal orders more than ever before.

It is true that the legal mechanisms of application have been met with varying degrees of success. Even where one or other of those mechanisms has not worked, we have to acknowledge that their role would have been even more limited if other – non-legal – factors had not made the warring parties aware of the need to comply with certain humanitarian limitations. It is not the text of the Conventions, but the whole spirit of this branch of law, that guarantees the effectiveness.[1047] Therefore, what needs to be advanced, is identifying and strengthening the values inherent to IHL rather than relying on the enforcement measures *sensu stricto*. 70 years after the adoption of the Geneva Conventions, these values have not changed.

[1047] Stephens, „Behaviour in war", *supra nota* 885, p 753; Blank & Kaye, „Direct participation", *supra nota* 885.

LIST OF ABBREVIATIONS

CFSP	Common Foreign and Security Policy
CSDP	Common Security and Defence Policy
COJUR	Council Working Group on Public International Law
ECHO	European Commission's Humanitarian Aid and Civil Protection department
ECHR	European Convention on Human Rights
HRL	Human Rights Law
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHFFC	International Humanitarian Fact-Finding Commission
IHL	International Humanitarian Law
ILC	International Law Commission
JAG	Judge Advocate General
LOAC	Law of Armed Conflict
NGO	Non-Governmental Organization
NIAC	Non-International Armed Conflict
OSCE	Organization for Security and Cooperation in Europe
POW	Prisoner of War
PSC	Political and Security Committee
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties

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ANNEX 1

Key articles requiring the adoption of IHL national implementation measures

	1949 Geneva Conventions				1977 Protocols		1954 Hague Conv.	1999 Protocol
	First	**Second**	**Third**	**Fourth**	**I**	**II**		
Translation	48	49	41, 128	99, 145	84		26	37
Dissemination & training	47	48	41, 127	99, 144	80, 82–83, 87	19	7, 25	30
Violations								
General provisions	49–54	50–53	129–132	146–149	85–91		28	15–21
War crimes	49–50	50–51	129–130	146–147	11, 85–90			
Compensation					91			
Protection								
Fundamental guarantees		3, 12	3, 13–17	3, 27–34	11, 75–77	4–5,7		
Judicial and disciplinary guarantees; rights of prisoners and detainees	3	3	3, 5, 17, 82–90, 95–108, 129	3, 5, 31–35, 43, 64–78, 99–100, 117–126	44–45, 75	6		
Medicinal and religious personnel	40, 41	42		20	15–16, 18	10, 12		
Medicinal transports and facilities	19, 36, 39, 42–43	22, 24–27, 38–39, 41, 43		18, 21–22	12, 18, 21–23	12		
Cultural property					53	16	3, 6, 10, 12	5
Dangerous forces					56	15		
Identity cards	27, 40, 41, Annex II	42, Annex	17, Annex IV	20	18, 66–67, 78–79, Annexes I&II			
Capture and internment cards			70, Annex IV	106, Annex III				
Use/misuse of emblems and symbols	144, 53–54	44–45			18, 37–38, 66, 85, Annex I	12	6, 10, 12, 17	

	1949 Geneva Conventions				1977 Protocols		1954 Hague Conv.	1999 Protocol
	First	**Second**	**Third**	**Fourth**	**I**	**II**		
Experts and advisers								
Qualified persons					6		7, 25	
Legal advisers					82			
Organizations								
National Societies	26			63	81	18		
Civil defence				63	61–67			
Information bureaux			122–124	136–141				
Mixed medical commissions			112, Annex II					
Military planning								
Weapons/tactics					36			
Military sites					57–58			8
Protected zones and localities	23, Annex I			14, 15	59–60, Annex I			

Source: ICRC, Advisory Service, “Implementing International Humanitarian Law: from Law to Action”

RESÜMEE

Rahvusvahelise humanitaarõiguse riigisisene rakendamine

Aktuaalseid probleeme

Rahvusvaheline humanitaarõigus on õigusharu, mille eesmärk on leevendada sõja põhjustatud kannatusi, piirata relvakonflikti poolte julmust ja halastamatust ning tagada esmane kaitse neile, keda konflikt kõige otsesemalt mõjutab.

Sõjapidamine eksisteerib paraku aegade hämarusest saadik. Võib öelda, et see on üks vanimaid kollektiivse tegevuse vorme. Seega on üsna loomulik, et sajandite jooksul on tekkinud muljet avaldav kogus seadusi, mis sellist tegevust reguleerivad.[1048] Ainuüksi aastatel 1815–1910 toimus sõjaseaduste ja -tavade kodifitseerimiseks 148 rahvusvahelist ametlikku koosolekut.[1049] Genfi 1949. aasta konventsioonid, 1977. aasta protokollid[1050] ja lugematud muud sõjapidamise vahendeid ja viise reguleerivad õigusaktid lisavad kindlasti veel paarsada kodifitseerimisteemalist koosviibimist.

Traditsiooniliselt oli sõjapidamine vaid poliitika jätkamine teiste vahenditega suveräänsete riikide vahel. Kuivõrd sõda oli rahvusvaheline ettevõtmine, nähti sõjaseadusi, mis hiljem nimetati humanitaarõiguseks, rahvusvahelise õiguse haruna. Sellele vaatamata on humanitaarõigus unikaalne režiim seetõttu, et olles küll adresseeritud riikidele, on selle eesmärgiks vähendada inimeste kannatusi ja kaitsta seega indiviidi.[1051] Sõja eesmärk peab olema vaenlase relvajõududest jagusaamine, mitte rahva hävitamine.[1052]

Ühest küljest on rahvusvahelise humanitaarõiguse areng olnud vaieldamatu edulugu. Selle normid on rahvusvahelise õiguse ühed detailseimad ning selle peamiseid lepingulisi aluseid aktsepteerib pea iga olemasolev riik. Teisest küljest

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[1048] G. I. A. D. Draper. Humanitarianism in the Modern Law of Armed Conflicts. – Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons convention. M. A. Meyer (Ed.). London: BICCL 1989, lk 3.

[1049] I. P. Trainin. Questions of Guerrilla Warfare in the Law of War. – American Journal of International Law 1946 (40) 3, lk 534, 536.

[1050] 12. augusti 1949. a Genfi (I) konventsioon haavatud ja haigete sõjaväelaste olukorra parandamise kohta maismaal. – RT 1999, 17, 107; 12. augusti 1949. a Genfi (II) konventsioon haavatud, haigete ja merehädas sõjaväelaste olukorra parandamise kohta merel. – RT 1999, 18, 116; sõjavangide kohtlemise 12. augusti 1949. a Genfi (III) konventsioon. – RT 1999, 19, 117; tsiviilisikute sõjaaegse kaitse 12. augusti 1949 Genfi (IV) konventsioon. – RT 1999, 20, 120; 12. augusti 1949. a Genfi konventsioonide 8. juuni 1977. a (I) lisaprotokoll rahvusvaheliste relvakonfliktide ohvrite kaitse kohta. – RT II 1999, 21, 121; 12. augusti 1949. a Genfi konventsioonide 8. juuni 1977. a (II) lisaprotokoll siseriiklike relvakonfliktide ohvrite kaitse kohta. – RT 1999, 21, 122.

[1051] N. Quenivet, S. Shan-Davis. Confronting the Challenges of International Law and Armed Conflict in the 21st Century. – International Law and Armed Conflict: Challenges in the 21st Century. N. Quenivet, S. Shan-Davis (Eds.). The Hague: T.M.C. Asser Press 2010, lk 3.

[1052] H.-P. Gasser. International Humanitarian Law. – Manual of International Humanitarian Laws. N. Sanajaoba (Ed.). New Delhi: Regency 2004, lk 204.

aga tasub vaid meenutada hiljutisi relvakonflikte, kui selgub, et humanitaarõiguse rikkumised on igapäevased kõikjal maailmas. Paljud autorid peavad humanitaarõigust üheks rahvusvahelise õiguse nõrgaks haruks.[1053] Sellel on hästi arenenud ja selgesti sõnastatud normid relvastatud konfliktide reguleerimiseks, kuid kokkulepitu rakendamise ja jõustamise puhul ei ole areng kaugeltki samal tasemel. Sellest võib järeldada, et reeglitest kinnipidamine ja nende rakendamine, mitte adekvaatsete reeglite puudumine, on tänase humanitaarõiguse suurim probleem.[1054]

Genfi konventsioonides on üle 600 artikli. Millised neist nõuavad riikidelt edasist tööd, millised on meetmed, mida tuleb rakendama asuda? Küsimus tundub esmapilgul lihtne ja vastus lepingupõhine, kuid akadeemilises kirjanduses esineb siiski pea sama palju tõlgendusi kui autoreid. Nimelt valib iga autor konventsioonidest välja oma kataloogi kõige olulisemaid meetmeid, kategoriseerib need erinevalt ning kombineerib vajadusel ka teiste õigusharude meetmetega. Teoorias on seega võimalik, et uus riik või rahvusvaheline rühmitus, kes on otsustanud Genfi konventsioone heas usus täita, on üsna raskes olukorras, otsustamaks, mida, millal ja kuidas täita. Käesolevas artiklis on eristatud kolme kategooriat: ennetavad, järelevalve- ja jõustamismeetmed. Tuleb aga tähele panna, et see jaotus on mõnevõrra tinglik, sest mõned meetmed ei allu ühesele kategoriseerimisele ja võivad kuuluda kahe eri kategooria alla.

Kuigi Genfi konventsioonid on, nagu öeldud, pea universaalselt aktsepteeritud, oleks väär oletada, et kui leping on riigi jaoks rahvusvahelisel tasandil jõustunud, on ta sellega jõustunud ka riigi sees, s.t saanud selle riigi õiguse osaks. Rahvusvaheliste lepingute riigisisese kehtivuse all peetakse silmas lepingu normide vahetut toimimist siseõiguse sfääris. See on võimalik, kui lepingu normid ühel või teisel moel kanduvad siseõigusesse ehk muutuvad riigi õigussüsteemi osaks. Kuidas seda tehakse, sõltub konkreetsest riigist ja üldistest teooriatest siseriikliku ja rahvusvahelise õiguse vahekorra kohta (monistlik ja dualistlik lähenemine).[1055] Olenemata rahvusvahelise õiguse riigisisesest staatusest, on riik rahvusvahelise õiguse normi rikkumise eest – mis avaldub muuhulgas rahvusvahelise normi riigisiseses kohaldamata jätmises – rahvusvahelise

[1053] U. Kadam. Implementation of International Humanitarian Law: Problems and prospects. – Manual of International Humanitarian Laws. N. Sanajaoba (Ed.). New Delhi: Regency 2004, lk 379.

[1054] M. T. Dutli. National Implementation Measures of International Humanitarian Law: Some practical aspects. – Yearbook of International Humanitarian Law 1998 (1), lk 245; P. Berman. The ICRC's Advisory Service on International Humanitarian Law: The challenge of national implementation. – International Review of the Red Cross 1996 (78). Arvutivõrgus: www.icrc.org/eng/resources/documents/article/other/57jn57.htm (14.09.2017).

[1055] A. Aust. Modern Treaty Law and Practice. Cambridge University Press 2000, lk 143.

õiguse alusel igal juhul vastutav.[1056] Ükski riik ei saa vabandada oma rahvusvahelisest õigusest tuleneva kohustuse rikkumist riigisisese õiguse puudujääkidega.[1057]

Tuleks rõhutada, et rahvusvahelise õiguse siseriikliku rakendamise kohustust rikutakse juba lihtsalt asjakohaste riigisiseste eeskirjade kehtestamata jätmisega, kuid veelgi enam juhul, kui selline tegevusetus toob kaasa lepingu sisuliste sätete rikkumise.[1058]

Käesoleva artikli eesmärk on näidata, et just riigisisene rakendamine võib olla rahvusvahelise humanitaarõiguse reeglitest kinnipidamise garantiiks rahvusvahelisel tasandil. Pärast Genfi konventsioonide 1977. aasta lisaprotokollide vastuvõtmist oli riigisisene rakendamine akadeemilises diskussioonis olulisel kohal, kuid asendus sajandivahetusel pea täielikult rahvusvahelise kriminaalõiguse, terrorismi, humanitaarabi ja teiste spetsiifiliste meetmete diskursusega. Fookus kandus ennetavalt tegevuselt karistamisele. Tegelikkuses pakuvad olemasolevad õigusaktid piisavalt ennetavaid vahendeid, selleks et nende heas usus (või heas poliitilises tahtes) rakendamisega paljusid humanitaarõiguse rikkumisi ära hoida saaks. Seetõttu on aeg-ajalt paslik vaadata tagasi sellele, millised võimalused humanitaarõiguse tõhusamaks järgimiseks on ette nähtud Genfi konventsioonides ja nende lisaprotokollides endis ning mida riigid saaksid iga päev teha, et rikkumisi vähendada.

Mõned küsimused, millele autor vastust otsib, on näiteks, kuidas tegelikult riikide kohustus humanitaarõigust austada riigisisesesse õigusesse üle võtta ning milliseid olemasolevaid mehhanisme saaks paremini kasutada. Millised võimalused on riikidel väljaspool oma jurisdiktsiooni jõustamismeetmete võtmiseks ja kas need sisalduvad Genfi konventsioonides või ka teiste õigusharude tekstides? Kas Genfi konventsioonid vajavad uuendamist või saab neid tõlgendamise teel kohandada ka tänapäevastele konfliktidele?

On lootust, et debatt rakendusprobleemide üle saab lähiaastatel sisse uue hoo. 2016. aasta märtsis avaldas ICRC 60-aastase vahe järel Genfi konventsioonide uued kommentaarid, mis kinnitavad vana, kuid sisaldavad ka mõndagi uut riigi- ja kohtupraktikast.[1059]

[1056] H. Vallikivi. Välislepingud Eesti õigussüsteemis: 1992. a. põhiseaduse alusel jõustatud välislepingute siseriiklik kehtivus ja kohaldatavus. Tallinn: Õiguskirjastus 2001, lk 20.

[1057] Rahvusvaheliste lepingute õiguse Viini konventsioon, art 26, 27. – RT II 1993, 13, 16; A. Cassese. International Law. 2. ed. Oxford University Press 2005, lk 217.

[1058] K. Drzewicki. National Legislation as a Measure for Implementation of International Humanitarian Law. –Implementation of International Humanitarian Law. Research Papers by participants in the 1986 Session of the Centre for Studies and Research in International Law and International Relations of the Hague Academy of International Law. F. Kalshoven, Y. Sandoz (Eds.). Dordrecht 1989, lk 110.

[1059] Updated Commentary on the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Arvutivõrgus: https://ihl-databases.icrc.org/ihl/full/GCi-commentary (17.09.2017).

1. Ennetavad meetmed

Eesmärki tagada rahvusvahelise õiguse normide järgimine tulevastes konfliktides saab kindlasti paremini saavutada ennetades kui tagajärgedega tegeledes.[1060] Olemasoleva õigusraamistiku asjakohasuse hindamiseks tuleks seega kõigepealt vaadelda nõudeid, mis on kehtestatud seoses riikide kohustusega rikkumisi ennetada, ehk teha teatavaid ettevalmistusi enne konflikti puhkemist. Käesoleva artikli eesmärgiks ongi illustreerida asjaolu, et ennetusmeetmed peaksid olema tähelepanu keskpunktis. Humanitaarõiguse kontekstis võiks väita, et just ennetavad meetmed moodustavad õiguse rakendamise (ingl *implementation*), karistuslikud ja muud meetmed, mis tulevad kasutusele konflikti ajal või selle järel, aga õiguse jõustamise (ingl *enforcement*). Artikli autor on veendunud, et humanitaarõiguse rakendamise ja jõustamise mõisteid tuleb teineteisest eristada, olgugi et erinevus võib esmapilgul tunduda habras või üleliigne.

Pikaajaline humanitaarõiguse allikatega töötamine annab alust väita, et autorid kasutavad rakendamise ja jõustamise, aga ka paljusid muid lähedasi mõisteid kattuvate või vastupidistena ega selgita erinevusi enne sisuliste teemade juurde asumist.[1061] Üks autoritest, kes eristamise vajadusele viitab, on professor McCoubrey, kes tunnistab, et kuigi mõisted kattuvad eesmärgi osas – tagada õiguslike normide kehtivus –, on kahe protsessi vahel siiski oluline erinevus. Nimelt on jõustamine tagasiulatuvaks vastuseks normide rikkumisele, mis eeldab seega seaduse esmaste püüdluste ebaõnnestumist (kehtestada ja säilitada mistahes normatiivseid standardeid) ning näib sisaldavat ka mingit jõu või sunni elementi. Rakendusprotsess on teisest küljest meetmed, mis tagavad seaduste järgimise n-ö ettevaatavalt. Ta viitab õigustatult sellele, et konfliktiohvrite jaoks on palju kasulikum ettevaatavate/ärahoidvate meetmete võtmine kui kurjategijate karistamine pärast tarbetuid kannatusi.[1062] Seega viitab McCoubrey jõustamise retrospektiivsele elemendile, mis on käesolevas arutelus väga tähtis. Keskendudes ainult jõustamistoimingutele, jätame me tähelepanuta ennetuse olulise rolli. Püüdes järgimist saavutada karistamise kaudu, oleme lahingu tegelikult juba kaotanud.

[1060] C. Greenwood. Ensuring Compliance with the Law of Armed Conflict. – Control over Compliance with International Law. W. E. Butler (Ed.). Martinus Nijhoff Publishers 1990, lk 202; L. Doswald-Beck. Implementation of International Humanitarian Law in Future Wars. – The Law of Armed Conflict into the New Millennium. M. N. Schmitt, L. C. Green (Eds.). Naval War College International Law Studies, Vol. 71. Newport 1999, lk 45.

[1061] Inglise keeles on verbi „rakendama" ehk *implement* tähendust kirjeldatud järgmiselt: „to begin to do or use (something, such as a plan): to make (something) active or effective", „carry out, accomplish; especially: to give practical effect to and ensure of actual fulfilment by concrete measures". Verb „jõustama" ehk *enforce* aga tähendab „to make (a law, rule, etc.) active or effective: to make sure that people do what is required by (a law, rule, etc.)", „to urge with energy, constrain, compel". Vt The Merriam-Webster Online Dictionary. Arvutivõrgus: www.merriam-webster.com (14.09.2017).

[1062] H. McCoubrey. International Humanitarian Law: Modern Developments in the limitation of Warfare. Dartmouth: Ashgate 1998, lk 57–58.

Õiguslikult ei ole rakendamismeetmete vahel hierarhiat, need on üksteisest sõltumatud ja peaksid kõik olema sama tähtsad. Sellele vaatamata on kirjanduses esile tõstetud mõned reeglid, mis moodustavad rakendamise *sine qua non* kogumi.

Esimene selline nõue on, et riigisiseses õiguses oleks tehtud vajalikud muudatused, mis võimaldavad humanitaarõiguse normide tundmist ja rikkumiste eest karistamist; et normid oleksid riigisiseselt inkorporeeritud. Riigid on kohustatud teatavaid tegusid karistama, kuid asjakohased rahvusvahelise õiguse sätted ise ei saa olla aluseks süüdimõistva otsuse tegemisel, neid tuleb täiendada karistusõiguslike normidega. Seega sõltub humanitaarõiguse toimimine suures osas riigisisestest sammudest.[1063] Eestis on karistusseadustiku 8. peatükis sätestatud inimsuse ja rahvusvahelise julgeoleku vastased süüteod, sh sõjasüüteod on eraldi jaos välja toodud. Vajaliku riigisisese õigusliku baasi olemasolu on ennetav meede, sätete alusel karistamine aga juba jõustamismeede, millest tuleb juttu käesoleva artikli kolmandas alapeatükis.

Teine kohustus, mis peab olema riigisisesesse õiguses juurutatud, on humanitaarorganisatsioonide embleemide ning nende töötajate ja transpordivahendite kaitse, neile erilise staatuse tagamine, nende märgistamine, finantseerimine jne. Seda üsna loogilist kohustust on praktikas kahjuks laialdaselt rikutud. Iga riik peab tagama, et tema alamad teaksid ja austaksid igas olukorras Punase Risti, tsiviilkaitse, kultuuriväärtuse, ohtliku rajatise või muu asjakohaselt tähistatu erilist staatust. Mitteriiklike rühmituste puhul on nimetatud kohustuste järgimine osutunud äärmiselt muret tekitavaks ning paljud autorid murravad pead selle üle, kuidas selliste rühmitustega läbirääkimised tulemuslikumad oleksid.[1064]

Riigid peavad samuti korraldama ja koordineerima oma sisemisi poliitilisi ja haldusstruktuure selliselt, et saavutada humanitaarõiguse nõuete maksimaalne mõju.[1065] Lõppeesmärk peaks olema kõikides riikides kogu riigisisese õiguse vastavus rahvusvahelisele humanitaarõigusele, mis on saavutatud juba rahuajal.[1066] Koordineerimise all on muu hulgas mõeldud seda, et oleks vajadusel tagatud võimalikult kiire erikaitse tsoonide loomine, et humanitaarõiguse nõudeid võetaks arvesse sõjaliste objektide linnaruumi paigutamisel ning sõjalise taktika valikul.[1067]

[1063] M. Bothe. The Role of National Law in the Implementation of International Humanitarian Law. – Studies and Essays on International Humanitarian Law in Honour of Jean Pictet. C. Swinarski (Ed.). Geneva: ICRC 1984, lk 303.

[1064] D. Thürer. International Humanitarian Law: Theory, Practice, Context. Brill, Nijhoff 2011, lk 426; M. Bothe (viide 16), lk 306; P. McIlreavy. Enough is enough. It's time to protect aid workers. – The Guardian, 23.09.2016. Arvutivõrgus: www.theguardian.com/global-development-professionals-network/2016/sep/23/enough-is-enough-its-time-to-protect-aid-workers (17.09.2017).

[1065] D. Thürer (viide 17), lk 426; T. Pfanner. Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims. – International Review of the Red Cross 2009 (91), lk 283.

[1066] K. Drzewicki (viide 11), lk 109.

[1067] M. T. Dutli (viide 7), lk 246.

Õiguskuulekuse üheks eelduseks on siduvate õigusnormide tundmine. Kõikide sõjaõiguse normide detailset tundmist saab ilmselt eeldada üksnes relvajõudude õigusnõuandjatelt, kuid selleks, et tagada kasvõi minimaalne austus selliste igaühte puudutavate reeglite vastu, on mõistlik teha maksimaalseid pingutusi.[1068]

Genfi konventsioonide ühised artiklid 48/49/128/145 kohustavad riike edastama üksteisele konventsioonide ja nende rakendamise seaduste ja määruste ametlikud tõlked. Tõlkimisnõue on üks selgemaid nõudeid, mis eeldab aktiivset riigisisest tegevust. Teine samalaadne kohustus on toodud Genfi konventsioonide ühisartiklites 47/48/127/144, mille kohaselt riikidel on kohustus nii rahu- kui ka sõjaajal levitada konventsioonide teksti oma territooriumil, esmajoones näha ette humanitaarõiguse põhimõtete õpetamine sõjaväelistes ja võimaluse korral ka tsiviilõppeprogrammides. Eesmärgiks oleks see, et sõjaõiguse põhimõtteid teab kogu elanikkond, eriti relvajõud, meditsiinipersonal ja vaimulikud.[1069]

Artikli autor on veendunud, et õpetamine ja levitamine on kaks kõige olulisemat elementi Genfi konventsioonide järgimise tagamisel. Kui relvajõud ja mitteriiklikud rühmitused seadusi ei tea ega internaliseeri, ei ole riikide edasisel tegevusel rikkumist vähendamisel tulemusi. Viimaste aastate uuringud näitavad, et rahvusvahelisel kriminaalõigusel ei ole olnud sellist hoiatavat mõju, mida loodeti, seega ei saa lootma jääda ainult võimaliku karistuse karmusele.

Austus humanitaarõiguse vastu põhineb suures osas vabatahtlikkusel. Nii relvajõudude kui ka mitteriiklike rühmituste liikmed teevad iga päev otsuseid, kas norme täita või mitte. Selline vabatahtlikkus eeldab, et isik teab õiguse sisu, aktsepteerib seda oma tegevuse alusena ning õiguskuulekus saab tema rutiinse töö osaks. Seda nimetatakse normide internaliseerimiseks, mille saavutamise esimene vahend ongi humanitaarõiguse levitamine.[1070] Riikide ametlikes relvajõududes on sellise eesmärgi saavutamine üldiselt lihtsam ning reguleeritud kindlates käsiraamatutes, sisereeglites ja ka käsuliini abil. Tänapäeval on konfliktide puhul aga valdavalt tegemist mitteriiklike rühmitustega. Just sellistele rühmitustele humanitaarõiguse õpetamine ning normide internaliseerimine peaks olema akadeemilise diskussiooni fookuses. Mitmed autorid küsivadki selle järele, miks teevad selliste rühmituste liikmed üldse otsuse õigust järgida ning mida saaks teha, et õiguskuulekus oleks laiemalt levinud. Lähenedes probleemile interdistsiplinaarselt, mitme eri õigusharu, psühholoogia, organisatsioonikultuuri ja muude teaduste kaudu, on jõutud järeldusele, et olukord ei ole lootusetu ning

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[1068] L. C. Green. The Contemporary Law of Armed Conflict. 2. ed. Manchester University Press 2000, lk 279; F. de Mulinen. The Law of War and the Armed Forces. – International Review of the Red Cross 1995 (35). Arvutivõrgus: www.icrc.org/eng/resources/documents/article/other/57jmeb.htm (14.09.2017).

[1069] A. Talmar. Rahvusvahelise humanitaarõiguse riigisisene rakendamine. Magistritöö. Tallinn: Tartu Ülikool 2008, lk 24; C. Greenwood (viide 13), lk 202.

[1070] M. Bothe (viide 16), lk 303.

eksisteerib mitu viisi selliste rühmituste käitumise mõjutamiseks. Tuhandete inimelude päästmise kontekstis väärib probleem kindlasti sügavamat uurimist.[1071]

Õpetamiskohustusega kaasnevad meetmed on ka kvalifitseeritud töötajate väljaõpe, õigusnõustajate lähetamine relvajõududesse, rõhu asetamine ülemate vastutusele ning sõjaväe ja selliste muude ametiisikute eriväljaõpe, kes võivad humanitaarõiguse tagajateks osutuda.[1072] Kuigi paljud riigid ja riiklikud Punase Risti seltsid on õpetamisega seoses teinud väga head tööd, on selge, et eelnimetatud kohustuste täitmine ei ole riikide jaoks prioriteetne enne konflikti sattumist. Konflikti ajal aga ei ole enam üldjuhul piisavalt aega ja ressursse.[1073]

2. Järelevalvemeetmed

Järelevalvemeetmed on artikli käsituses sellised meetmed, mille eesmärk on tagada, et relvastatud konflikti ajal järgitakse humanitaarõiguse sätteid nõuetekohaselt. Kuigi sellised meetmed on konventsioonides selgelt sätestatud, eksisteerib õiguse ja relvakonflikti reaalsuse vahel suur lõhe. Tegelikult on rahvusvaheline üldsus juba aastaid tuginenud peaaegu täielikult ühele, Rahvusvahelise Punase Risti Komitee (ICRC) järelevalvefunktsioonile. Rahvusvahelise Punase Risti Komitee moodustamisega 1863. aastal loodi poolametlik ja poolrahvusvaheline järelevalvemehhanism.[1074] Konventsioonid ja lisaprotokollid viitavad Rahvusvahelisele Punase Risti Komiteele ja annavad sellele rahvusvahelistes (tavaliselt riikidevahelistes) relvastatud konfliktides kaitse- ja osaliselt järelevalveorgani staatuse.

Vastumeelsus teiste mehhanismide kasutamise suhtes on igal konkreetsel juhul erinev, kuid on vähemalt kaks üldisemat laadi põhjust. Esiteks on järelevalvesüsteem tervikuna välja töötatud rahvusvaheliste relvastatud konfliktide jaoks, kuid enamik pärast Teist maailmasõda tekkinud konflikte on olnud riigisisesed konfliktid. Teiseks on humanitaarõiguse rakendamine üksikute riikide pädevuses ja vajab seega pidevat rahvusvahelisel tasandil koostööd ja kooskõlastamist, milleks poliitiline kliima pole alati soodne.[1075]

Esimene võimalik järelevalvemeetod on juurdlus (ingl *fact-finding*). Esimese Genfi konventsiooni artikkel 52 sätestab, et konfliktiosalise nõudmise korral tuleb konventsiooni iga oletatava rikkumise kohta korraldada juurdlus, mille korra määravad asjaomased pooled. Konventsiooniga oli varem ette nähtud, et

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[1071] O. Bangerter. Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not. – International Review of the Red Cross 2011 (93), lk 353–384.

[1072] T. Pfanner (viide 18), lk 283.

[1073] C. Greenwood (viide 13), lk 199–200.

[1074] A. Rosas. International Monitoring Mechanisms in Situations of Armed Conflicts. – Monitoring Human Rights in Europe, Comparing International Procedures and Mechanisms. A. Bloed, L. Leicht, M. Nowak, A. Rosas (Eds.). Martinus Nijhoff Publishers 1993, lk 222.

[1075] E. Mikos-Skuza. How Can Existing IHL Mechanisms Be Better Used? – Improving Compliance with International Humanitarian Law. Proceedings of the Bruges Colloquium, September 11–12, 2003. Brugges, Brussels: College of Europe, ICRC, 2004, lk 35.

juurdluse algatamist palutakse kaitsva riigi kaudu.[1076] Esimese lisaprotokolliga juurdluste korraldamine institutsionaliseeriti ja loodi rahvusvaheline uurimiskomisjon, mis koosneb 15 liikmest ja mille ülesanne on humanitaarõiguse rakendamisele kaasaaitamine ning selle vastu austuse suurendamine. Tõele au andes tuleb öelda, et uurimiskomisjoni ei ole kuigi palju kasutatud, kuid see on endiselt toimiv üksus ja paljud autorid ei ole loobunud ideest, et see on kasulik.[1077]

Faktide tuvastamine mängib humanitaarõiguse rakendamisel olulist rolli ning võib aidata ka individuaalse kriminaalvastutuse kindakstegemisel ja isikute süüdimõistmisel. On hea meel tõdeda, et rahvusvaheline uurimiskomisjon on viimaks ometi alustanud tööd ja teinud OSCE tellimuse alusel 2017. aasta mais kohtuekspertiisi Ida-Ukrainas. See annab alust loota, et riigid kasutavad komisjoni teenuseid ka edaspidi ning komisjon ei ole vaid teoreetiline jäänuk 1970. aastatest.[1078]

Teiseks järelevalvemeetmeks on võetud rakendusmeetmetest ning konflikti ajal humanitaarõiguse järgimisest ettekandmine. ICRC on aastaid pidanud andmebaasi, kuhu riigid saavad sisestada kommentaare ja õigusaktide tõlkeid, mis on riigis konventsioonide rakendamiseks loodud.[1079] See on siiski pigem vabatahtlik süsteem ja riigid täidavad andmebaasi väga erineva intensiivsusega, mistõttu ei ole andmed ka omavahel võrreldavad. Lisaks sellele ei sisalda ICRC andmebaas tegelikult mingit analüüsi või tagasisidesüsteemi, s.t et kui riigid ei anna aru piisavalt või ilmneb aruannete sisust, et võetud rakendusmeetmed on ebakorrektsed, ei ole nähtud ette võimalusi olukorra parandamiseks.

Idee luua püsiv organ, mille eesmärk on jälgida rahvusvahelise humanitaarõiguse rakendamist relvastatud konfliktides, on olnud mitu korda diplomaatilistel konverentsidel arutlusel, kuid on alati tagasi lükatud.[1080] Hiljuti, aastal 2014, tehti veel üks katse regulaarset aruandlussüsteemi luua. Genfi konventsioonid on selles mõttes erilised, et ei näe ette liikmesriikide regulaarseid kohtumisi ega foorumit

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[1076] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Commentary of 1952. Arvutivõrgus: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=7F7849F767A4D99CC12563CD004224A7 (10.10.2017).

[1077] International Humanitarian Fact-Finding Commissioni koduleht: www.ihffc.org/index.asp?Language=EN&page=home (10.10.2017).

[1078] Dr Elżbieta Mikos-Skuza, rahvusvahelise uurimiskomisjoni asejuht, kinnitas seda hiljutises vestluses autoriga. Komisjoni esimene aruanne on valmis ja kättesaadav OSCE kanalite kaudu.

[1079] Establishing a dedicated IHL compliance system. Opening speech, Peter Maurer, President of the ICRC. Third Meeting of States on Strengthening Compliance with International Humanitarian Law, Geneva, 30 June – 1 July 2014. Arvutivõrgus: www.icrc.org/eng/resources/documents/statement/2014/06-30-compliance-ihl-maurer.htm (10.10.2017).

[1080] Y. Sandoz. Implementing International Humanitarian Law. UNESCO International Dimensions of Humanitarian Law. Geneva: Henry Dunant Institute 1988, lk 275; F. Kalshoven. Reflections on the Law of War: Collected essays. International Humanitarian Law Series. Leiden, Boston: Martinus Nijhoff Publishers 2007, lk 595.

probleemide arutamiseks. Šveitsi riigi abiga korraldas ICRC ulatusliku konsulteerimise ja pakkus 2014. aastal välja iga-aastase riikide kohtumise ja ka poolkohustusliku aruandlussüsteemi. Paraku ei jõudnud ICRC 31. konverentsil osalenud riigid kokkuleppele ja aruandlus jäi endiselt lõppresolutsioonist välja. Siiski tundub, et oleme jõudnud väga lähedale sellele, et mõnel järgneval ICRC konverentsil aruandlussüsteemi loomises kokkuleppele jõutakse. Sellise organi ja pigem kohustusliku aruandluse poole peaks autori hinnangul kindlasti püüdlema.

Perioodiline aruandlus on oluline tööriist riigisisesel tasandil vastavuse suurendamiseks. See looks võimaluse hinnata iseenda arengut, saada häid näiteid teistelt riikidelt ja tuvastada valdkondi, kus võimekust on võimalik tõsta.[1081] Sealjuures peaks aruandlus olema nii vormiline kui ka sisuline. See tähendab, et esiteks tuleks ette kanda kõikidest sätetest, mis on riigisiseselt kehtestatud nende regulatsioonide ülevõtmiseks, mis ei ole vahetult kohaldatavad ja iserakenduvad ning vajavad riikidelt seadusandlikku sekkumist.[1082] Näiteks saab riik ICRC abiga kõiki huvitatud osapooli teavitada sellest, et on karistusseadustikku sisse viinud karistuse Punase Risti sümboli väärkohaldamise kohta ning edastada ka sellekohase tõlke või lühikokkuvõtte. Teiseks peaks ette kandma ka tegelikust käitumisest konfliktiolukorras, see tähendab konventsioonide ja protokollide sisuliste kohustustega kooskõlast ehk sätete rakendamisest.[1083] Mõlemal juhul oleks vaja ka formaalselt hindamise ja tagasiside andmise mehhanismi (võib-olla ka järelkontrolli) ja selleks määratud hindavat asutust. Aruandluskohustust ei saa pidada täidetuks lihtsalt aruande esitamise faktiga.

Professor Sassoli teoretiseerib ka võimaluse üle, kus mitteriiklikud rühmitused annavad aru reeglitest kinnipidamisest. Kui rühmitus on reeglid omaks võtnud ja seda ka näiteks deklaratsiooniga väljendanud, ei ole selline asi võimatu (näitena võib tuua Hamasi Iisraeli-Palestiina konflikti puhul).[1084]

Inimõigusaktide puhul on monitoorimine ja raporteerimine täiesti tavapärased. ÜRO kontekstis näiteks monitooritakse riikide käitumise vastavust kuuele

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[1081] Establishing a dedicated IHL compliance system (viide 32).

[1082] K. Drzewicki. Reporting Mechanism for Supervision of National Legislation Implementing International Humanitarian Law. – Humanitarian Law of Armed Conflict: Challenges Ahead. Essays in honour of Frits Kalshoven. A. J. M. Delissen, G. J. Tanja (Eds.). Martinus Nijhoff Publishers 1991, lk 547, 561.

[1083] H. Spieker. The Possible Shape of a Reporting System for IHL – Composition and Status of an Evaluating Body. – Towards a better implementation of IHL. Proceedings of an Expert Meeting Organised by the Advisory Committee on International Humanitarian Law of the German Red Cross. Frankfurt/Main, May 28–30, 1999. M. Bothe (Ed.). Berlin: Berlin Verlag Arno Spitz 2001, lk 84.

[1084] M. Sassoli. Legal Mechanisms to Improve Compliance with International Humanitarian Law by Armed Groups. Improving compliance with IHL Improving Compliance with International Humanitarian Law. Proceedings of the Bruges Colloquium, September 11–12, 2003. Brugges, Brussels: College of Europe, ICRC 2004, lk 97–104.

põhilisele inimõiguslepingule.[1085] Euroopa Liidu kontekstis on vastavuse kontrollimine veelgi levinum. Kui riigid on milleski ametlikult kokku leppinud, siis seda tuleb ka täita ja kontrollida. Näiteid võiks tuua keskkonnaõigusest ekspordikontrollini. Vastavuse tagamine kindlustatakse rikkumismenetlusega. Tõsi, Euroopa Liit on kahtlemata hoopis teistsugune struktuur, kuid hea tahtmise korral ei ole võimatu ette kujutada, et ka rahvusvaheline üldsus oleks teatud laadi rikkumismenetlusega nõus. Riik ei annaks oma suveräänsusest sellega otseselt midagi ära, vaid allutaks ennast vastastikusele kontrollile, mis aitab kindlustada humanitaarõiguse rikkumiste selge vähendamise.

Kolmanda meetmena võib välja tuua kaitsva riigi institutsiooni. Rahvusvahelise relvastatud konflikti puhkemise korral ei ole sõdivate riikide puhul haruldane diplomaatiliste suhete peatamine või lõpetamine. Sellisteks puhkudeks loob Genfi konventsioonide esimene protokoll kaitsva riigi institutsiooni. Konfliktiosalised on kohustatud tagama järelevalve konventsioonide üle ning nende täitmise, kasutades selleks kaitsvate riikide süsteemi, mis hõlmab muu hulgas kaitsvate riikide määramise ja heakskiitmise.[1086]

Kaitsev riik on konfliktiosalise riigi poolt volitatud neutraalne riik, selleks et kaitsta riigi enda ja selle kodanike huve vaenlase riigi ees. Kaitsva riigi roll on kahetine: ta võib ohvrite abistamiseks korraldada abistamis- ja kaitseoperatsioone ning samal ajal jälgida, kas sõdivad pooled täidavad oma õiguslikke kohustusi.[1087] Konventsioonid näevad ette võimaluse lepitusmenetluseks, milleks saab samuti kaitsvat riiki kasutada, kui sõdivate riikide vahel on arusaamatus konventsioonide tõlgendamise või kohaldamise küsimuses.[1088]

Teise maailmasõja ajal osutus nimetatud süsteem väga kasulikuks, kui enamik sõdivatest riikidest palus kaitsva riigi teenust. Näiteks täitis Šveits seda funktsiooni korraga kuni 35 riigi jaoks.[1089] Talvesõja ajal aga keeldus NSVL Soome palvest kaitsva riigi määramiseks.[1090]

Kaitsva riigi kasutuses ei ole ametlikke sanktsioone, millega humanitaarõigusest kinnipidamist nõuda, kuid kaitsva riigi järelevalve võib aidata rikkumisi ära hoida ja leitud rikkumiste avalikustamisega ähvardamine võib olla oluline

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[1085] Monitoring and Reporting on Violations of International Law. Harvard Humanitarian Initiative. Arvutivõrgus: http://atha.se/content/monitoring-and-reporting-violations-international-law (17.09.2017); Monitoring and Reporting Mechanism on Children Affected by Armed Conflict, set up under Security Council Resolution 1612 (2005). S/Res/1612 (2005) http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1612%20%282005%29&Lang=E&Area=UNDOC.

[1086] 12. augusti 1949. a Genfi konventsioonide 8. juuni 1977 (I) lisaprotokoll rahvusvaheliste relvakonfliktide ohvrite kaitse kohta, art 5; S. Sivakumaran. The law of Non-international Armed Conflict. Oxford University Press 2012, lk 457.

[1087] T. Pfanner (viide 18), lk 287.

[1088] Genfi I–III konventsiooni art 11 ja IV konventsiooni art 12.

[1089] H. Brollowski. The responsibility to Protect and Common Article 1 of the 1949 Geneva Conventions and Obligations of Third States – Responsibility to Protect: from principle to practice. J. Hoffmann, A. Nollkaemper (eds), Amsterdam University Press 2012, lk 98.

[1090] I. D. De Lupis. The Law of War. London: Cambridge University Press 1987, lk 323.

mitteametlik relv.[1091] Kaitsva riigi institutsiooni kasutamine tooks kaasa kahtlemata suurema õiguskuulekuse kasvõi sellepärast, et paljud rikkumised sünnivad pigem hooletusest kui tahtlikest poliitilistest otsustest.[1092]

ICRC veebileht kirjeldab paraku viimase aja pessimistlikke suundumusi, tõdedes, et „[p]raktikas ei ole kaitsva riigi institutsiooni viimastel aastatel kasutatud. Selle asemel on ICRC-d tunnistatud kui kaitsva riigi asendajat“[1093]. ICRC töötab siiski edasi kui ICRC ja seda ei saa konventsioonide mõttes pidada kaitsvaks riigiks, kes peab definitsiooni järgi olema riik. Siinkohal nendivad paljud autorid, et seaduse ja praktika vahel on väga suured käärid. Pidi ju kaitsvate riikide süsteem olema õiguse „kriitilise tähtsusega“ osa ning lausa „rakendussüsteemi nurgakivi“.[1094] Pfanner nendib, et alates Teisest maailmasõjast on süsteemi väga harva kasutatud ning selle tulevikuväljavaated ei ole head, arvestades poliitiliselt delikaatset rolli, mida riik peab täitma oma kohustuste täitmiseks.[1095] Autori arvates peaks rahvusvahelise relvakonflikti puhkemisel konflikti pooltele avaldama survet kaitsvate riikide määramiseks vastavalt konventsioonidele. Keeldumist tuleks aga pidada konventsioonide raskeks rikkumiseks.[1096]

Lisaks nimetatud kolmele järelevalvemeetmele on pakutud veel mitut võimalust, mis kahtlemata vääriksid kaalumist. Näiteks rahvusvahelise humanitaarõiguse komisjoni loomine või rahvusvahelise humanitaarõiguse kohtu loomine.[1097] Mõnel ÜRO organil võiks olla spetsiifiline pädevus tegeleda rahvusvahelise humanitaarõigusega (nt Inimõiguste Nõukogu abiorgan), humanitaarõiguse kõrge esindaja võiks täita samalaadseid funktsioone nagu inimõiguste vastavad organid, samuti võiks piiratud riikidevaheline organ jälgida rahvusvahelise humanitaarõiguse kohaldamist, olenemata sellest, kas organ on loodud lepingu või resolutsiooni alusel.[1098]

Enamik olemasolevatest järelevalvemehhanismidest on üsna nõrgad või neid pole praktikas kasutatud. See viis Rahvusvahelise Punase Risti Komitee mõtteni korraldada aastal 2003 mitu piirkondlikku ekspertide kohtumist rahvusvahelise humanitaarõiguse järgimise parandamise teemal. Kogutud ideed uute meetmete või mehhanismide jaoks hõlmasid kas *ad hoc* ehk teatud konkreetse konflikti korral loodud või perioodilise aruandluse süsteemi ning individuaalsete kaebuste esitamise mehhanismide loomist; riikidest või sõltumatutest rahvusvahelise humanitaarõiguse ekspertidest koosneva diplomaatilise foorumi loomist; rahvusvahelise humanitaarõiguse voliniku ametikoha loomist Genfi konventsioonide ja

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1091 C. Greenwood (viide 13), lk 197.

1092 Samas, lk 203.

1093 Arvutivõrgus: https://casebook.icrc.org/glossary/protecting-powers (22.10.2017).

1094 S. Sivakumaran (viide 39), lk 457.

1095 T. Pfanner (viide 18), lk 287.

1096 G. H. Aldrich. Improving Compliance with the Laws Applicable in Armed Conflict: A work in progress. – Man's Inhumanity to Man. Essays on International Law in Honour of Antonio Casses. L. C. Vohrah et al. (Eds.). Martinus Nijhoff Publishers 2003, lk 8–9.

1097 T. Pfanner (viide 18), lk 306.

1098 Samas.

nende lisaprotokollide lepingulise organina.[1099] Humanitaarõigus areneb ja täieneb pidevalt ning uute meetmete väljakujunemine on kahtlemata protsessi loomulik osa.

3. Jõustamismeetmed

Nüüd pöördume mündi teise poole juurde, milleks on riikidele ja rahvusvahelisele üldsusele kättesaadavad jõustamismeetmed. Nagu öeldud, erinevad jõustamismeetmed (mis hõlmavad karistusmeetmeid) rakendusmeetmetest sisu ja eesmärkide poolest. Siinkohal tuleb veel eristada kahte kategooriat meetmeid – neid, mida riigid ise saavad rakendada oma kodanike rikkumiste karistamiseks, ja neid, mille kaudu riigid saavad survestada teisi riike humanitaarõiguse rikkumisi lõpetama.

Esiteks on riigid Genfi konventsioonide ja nende esimese lisaprotokolli järgi kohustatud kehtestama humanitaarõiguse raskete rikkumiste karistamiseks riigisisesed normid. Rahvusvahelise Kriminaalkohtu Rooma statuut toob küllaltki pika nimekirja tegudest, mis on sõjakuriteod. See laiendab sisuliselt juba Nürnbergi tribunali ajal väljakujunenud sõjakuritegude mõistet veel kõikide konventsioonide raskete rikkumistega.[1100] Sõjakuritegu on laiem mõiste kui raske rikkumine, sest sõjakuritegu võib olla ka tegu, mis konventsioonide järgi ei ole raske rikkumine või ei sisaldu üldse Genfi konventsioonides, vaid tavaõiguses või muudes õigusaktides. Humanitaarõiguse rikkumise eest kriminaalvastutust ette nägevate normide riigisisene kehtestamine aitab kindlustada austust rahvusvahelise humanitaarõiguse vastu, samas moodustab see osa õiguskindluse põhimõttest. Riigisisese kriminaliseerimise kohustust on riigid paraku järginud pehmelt öeldes ebaühtlaselt.[1101]

Lisaks sellele on üksikisikute ja gruppide vastutusele võtmiseks olemas rahvusvaheline kriminaalõiguse süsteem, mis koosneb tribunalidest, erikohtutest ja Rahvusvahelisest Kriminaalkohtust. Rahvusvahelise õigusega kursis olijad aga teavad, kui pikaajalised sealsed protsessid on. Selliste kohtute töö on kindlasti aidanud õigust tõlgendada ja edasi arendada, kuid ei avalda kurjategijatele heidutavat mõju piisavalt kiiresti. Kohtuprotsessid toimuvad aastaid pärast kuritegude toimepanemist ning tavaliselt mõistetakse süüdi vaid üksikud kõrgemad isikud.

[1099] K. Dörman. Dissemination and Monitoring Compliance of International Humanitarian Law. – International Humanitarian Law Facing New Challenges: Symposium in honor of Knut Ipsen. W. Heintsechel, V. Epping (Eds.). Berlin: Springer 2007, lk 242.

[1100] L. C. Green. The Contemporary Law of Armed Conflict. 3. ed. Manchester University Press 2008, lk 295. Rasked rikkumised on toodud konventsioonide ühistes art-tes 50, 51, 130 ja 147 ning esimese lisaprotokolli art-tes 11, 85 ja 86 – neid peetakse sõjakuritegudeks.

[1101] A. Roberts. Implementation of the Laws of War in Late-Twentieth-Century Conflicts. – The Law of Armed Conflict into the Next Millennium. M. N. Scmitt, L. C. Green (Eds.). Newport: Naval War College 1998, lk 364.

Teise kategooria meetmeid ei ole aga üheselt lihtne välja tuua. Traditsioonilised relvakonfliktiõiguse õpikud loetlevad järgmised meetmed: diplomaatilised püüdlused (sh ametlikud kaebused, vahendus, uurimiskomisjonid), repressaalid, retorsioonid, sõjakuritegude eest vastutusele võtmine, isegi pantvangide võtmine ja hüvitisnõuded.[1102]

Kohtunik Cassese loetleb humanitaarõiguse jõustamise meetoditena esiteks vastuolulised repressaalid (mis on tänaseks suuresti keelatud), teiseks spetsiifilised mehhanismid, mis on konfliktipoolte vahel kokku lepitud. Need on näiteks kaitsva riigi määramine, uurimiskomisjon ja kriminaaljurisdiktsioon: riigisiseste või rahvusvaheliste kohtute poolt humanitaarõiguse rikkumises süüdi mõistetud üksikisikute karistamine.[1103] See on hea näide, kuidas järelevalve- ja karistuslikke meetmeid ei ole alati kerge teineteisest eraldada.

Eristatud on ka järgmist nelja meetodit: diplomaatiline surve (protestid, avalik hukkamõist, rahvusvaheline uurimiskomisjon); sunnimeetmed (retorsioonid: nt diplomaatide väljasaatmine, lepingute sõlmimisest keeldumine, kaubanduslike eeliste peatamine; repressaalid: impordikontrollid, investeeringute keelud, varade külmutamine, lennuliikluse peatamine); meetmed, mis võetakse koostöös ÜRO ja teiste rahvusvaheliste organisatsioonidega ning kaitsva riigi institutsiooni rakendamine.[1104]

Mõnevõrra erinevalt määratleb Morrison jõustamismeetmed mistahes meetmena, mis iseenesest oleks rahvusvahelise õiguse rikkumine, kui seda võetakse ilma mingi erilise põhjenduseta või ilma sihtriigi nõusolekuta. Seega ei tohiks ÜRO põhikirja VI peatüki alusel võetud meetmed tavaliselt olla jõustamismeetmed, sest nende kasutamine võib olla ebasõbralik, kuid ei ole iseenesest õigusvastane. Seevastu VII peatüki alusel tehtavad otsused sisaldavad sageli meetmeid, mis nõuavad sellist põhjendust, et vältida ebaseaduslikkust.[1105]

Mõne autori hinnangul ei ole aga humanitaarõiguse jõustamise mehhanisme tarvis otsida üksnes humanitaarõiguse enda aktidest, vaid kasutada võib kõiki olemasolevaid meetmeid, sh ÜRO põhikirja VII peatükki, inimõigusalaseid

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[1102] C. Greenwood (viide 13), lk 196; F. Kalshoven (viide 33), lk 759; D. Fleck. The Handbook of International Humanitarian Law. 3. ed. Oxford University Press 2013, lk 685; U. Palwankar. Measures Available to States for Fulfilling Their Obligation to Ensure Respect for International Humanitarian Law. Arvutivõrgus: www.icrc.org/eng/resources/documents/article/other/57jmaw.htm (24.09.2017).

[1103] A. Cassese. On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law. – European Journal of International Law 1998 (9) 1, lk 3.

[1104] U. Palwankar (viide 55).

[1105] F. L. Morrison. The Role of Regional Organizations in the Enforcement of International Law, in Allocation of Law Enforcement Authority in the International System. – Proceedings of an international symposium of the Kiel institute of international law. J. Delbrück (Ed.). Berlin: Duncker and Humblot 1995, lk 44. Ühinenud Rahvaste Organisatsiooni põhikiri ning Rahvusvahelise Kohtu statuut. – RT 1996, 24, 95.

meetmeid, rahvusvahelisi tribunale või avaliku arvamuse survet.[1106] Humanitaarõigust ei saa vaadelda kui iseseisvat ja eraldiasuvat süsteemi.

Jõustamise kontekstis on tekkinud muret tekitav uus suundumus. Mõned autorid on hakanud vihjama, et üldine kohustus tagada Genfi konventsioonide järgimine (ingl *ensure respect*) võib põhimõtteliselt hõlmata ka jõu kasutamist. Tavaliselt on küll märgitud, et austus konventsioonide vastu peab olema tagatud kõikvõimalike seaduslike vahenditega, kuid on selge tendents laiendada seda kohustust veelgi. Konventsioonide esimese ühisartikli laiema tõlgenduse eestkõnelejad on viidanud kõigile olemasolevatele meetmetele, mida riikidel oleks õigus võtta kolmanda osalise õiguskuulekusele sundimiseks.[1107] Siinkohal on vaja korrata, et ainus rahvusvahelise õiguse dokument, mis lubab jõu kasutamist, on ÜRO põhikiri. Oleks tõepoolest mõeldamatu, et humanitaarõigus, mis tugineb eeldusele, et selle rakendamine ei ole sõltuvuses *ius ad bellum*'ist, saab ise relvastatud sekkumise ettekäändeks.[1108]

Ühepoolselt, s.t ilma igasuguse viiteta lepingule või tavaõigusele, riigi või riikide grupi poolt algatatav relvastatud sekkumine ei ole rahvusvahelise õiguse järgi lubatud ning mitte ükski relvastatud sekkumine ei saa tugineda humanitaarõigusele, eriti veel Genfi konventsioonide esimesele ühisartiklile.[1109] Jõu kasutamist ei saa õigustada ilma ÜRO Julgeolekunõukogu nõusolekuta. Ükski hiljutine rahvusvaheline praktika ega arenev tavaõiguse norm ei tõenda, et ÜRO harta tõlgendust oleks muudetud. Ainus juhtum, kus praktika on olnud vastuolus ÜRO hartaga, on NATO nn humanitaarne interventsioon Kosovos, mis on selge erand.[1110]

Rahvusvaheline humanitaarõigus kehtib võrdselt kõigi relvastatud konflikti osaliste suhtes ja sõltumatult jõu kasutamise seaduslikkuse kaalutlustest. Kui tunnistada, et rahvusvaheline humanitaarõigus lubab relvajõu kasutamist, et lõpetada õigusrikkumine, siis võiks ka väita, et igasugune relvajõu kasutamine, mis järgib humanitaarõiguse sätteid täht-tähelt, on õiguspärane. See oleks mõistagi absurdne, mis on just üks põhjustest, miks rahvusvahelist humanitaarõigust ei tohi mingil juhul seostada jõu kasutamise õiguspärasusega.[1111]

Veel üks vastuoluline arenev kontseptsioon on 2005. aastal ÜRO Peaassamblee resolutsioonis kokku lepitud kohustus kaitsta (ingl *responsibility to protect*).

[1106] D. Fleck. International Humanitarian Law after September 11: Challenges and the need to respond. – Yearbook of International Humanitarian Law 2003 (6), lk 63. Peatükiga VII on rahvusvahelise rahu ja julgeoleku säilitamiseks või taastamiseks ÜRO Julgeolekunõukogule antud kompetents kasutada sunnimeetmeid.

[1107] T. Pfanner (viide 18), lk 305.

[1108] U. Palwankar (viide 55).

[1109] The states' obligation to "respect and ensure respect" for International Humanitarian Law: from law to practice. Working Group chaired by G.-J. van Hegelsom. Improving Compliance with International Humanitarian Law. Proceedings of the Bruges Colloquium, September 11–12, 2003. Brugges, Brussels: College of Europe, ICRC, 2004, lk 72.

[1110] Samas, lk 74.

[1111] U. Palwankar (viide 55).

Selle järgi võtsid riigid endale kohustuse kaitsta elanikkonda nelja kuriteo eest: genotsiid, etniline puhastus, inimsusvastased kuriteod ja sõjakuriteod. Lisaks nõustuti, et kui riik ei suuda või ei soovi seda kohustust täita, on rahvusvahelisel kogukonnal rikkumiste peatamiseks ja ennetamiseks abistamiskohustus. Kui ka seeläbi ei õnnestu nimetatud nelja kuriteo toimepanemist vältida, lasub ülejäänud maailma riikidel kohustus reageerida, sh vajadusel jõudu kasutades. Jõudu võib kasutada vaid ÜRO Julgeolekunõukogu loal.[1112]

Ükskõik, kuidas jõustamismeetmeid klassifitseerida, on paljud autorid jõustamise küsimuses skeptilised ja leiavad, et rahvusvaheliste õigusnormide arvu suurenemine viimase 80 aasta jooksul ei ole toonud kaasa samasugust arengut rahvusvaheliste kohtuotsuste puhul, samuti pole loodud protseduure rahvusvaheliste õigusnormide sunniviisiliseks jõustamiseks.[1113]

Conforti ja Dunworth on järeldustes kõige skeptilisemad, viidates, et isegi need vähesed institutsioonilised jõustamismehhanismid, mis on pärast Teist maailmasõda loodud (sh ÜRO kollektiivne süsteem), ei ole täitnud neile pandud ootusi. Meetmed on olnud nii killustatud, detsentraliseeritud ja juhuslikud, et *rebus sic stantibus* ei ole võimalik rääkida rahvusvaheliste reeglite jõustamise tõhusast süsteemist.[1114]

Iseseisvate jõustamismehhanismide puudumine viib rahvusvahelise õiguse valikulise jõustamiseni.[1115] Selline jõustamine ja piiratud jõustamismehhanismid on olnud aluseks isegi rahvusvahelise õiguse legitiimsuse kahtluse alla seadmisele. Riigid on rahvusvahelise õiguse kindlakstegemise ja täitmise ülesande suures osas reserveerinud endale. Nagu märkis Martti Koskenniemi, „see seab ohtu seadusandliku ja täitevvõimu eristamise, mis on nii raskelt saavutatud ja õiguse identiteedi jaoks nii oluline“[1116].

Seega on leitud, et rahvusvaheline humanitaarõigus jagab rahvusvahelise õiguse üldist kriitilist nõrkust, milleks on keskse jõustamisorgani puudumine ja sellest tulenev tõhusa rakendamise puudumine.[1117] Tõepoolest, kui riik või veelgi enam mitteriiklik rühmitus keeldub rahvusvahelise humanitaarõiguse või tavaõiguse reegleid täitmast, siis kes saab teda seaduskuulekusele sundida? See on jõustamisega seotud keskne ja määrav küsimus, mis eristab seda ka rakendamisest.

[1112] L. Lipre-Järma. Sõjaline sekkumine Liibüasse võib mõjutada riigisisestesse konfliktidesse sekkumise põhimõtteid. – Diplomaatia, nr 110, oktoober 2012. Arvutivõrgus: www.diplomaatia.ee/artikkel/kohustus-kaitsta (24.09.2017).

[1113] B. Conforti. International Law and the Role of Domestic Legal Systems. Martinus Nijhoff Publishers 1993, lk 5.

[1114] Samas, lk 7: „In conclusion, international law displays an increasing disparity between its growing normative content and its lack of enforcement mechanisms.“

[1115] T. Dunworth. International Law and National Law. – The Fluid State: International Law and National Legal Systems. H. Charlesworth (Ed.). Sydney: The Federation Press 2005, lk 11–12.

[1116] M. Koskenniemi. From Apology to Utopia. Cambridge University Press 1989.

[1117] D. Fleck (viide 55), lk 675; F. Kalshoven (viide 33), lk 759; A. Breslin. Ensuring Respect: The European Union's Guidelines on Promoting Compliance with International Humanitarian Law. – Israel Law Review 2010 (43) 2, lk 383.

4. Kokkuvõte

Artikli piiratud mahu tõttu on väga raske analüüsida humanitaarõiguse päevakajalisi probleeme kogu nende ulatuses. Siinkohal on sobiv viidata artikli autori samateemalisele doktoritöö käsikirjale[1118], kus on kõigi kolme kategooria meetmed – ennetavad, järelevalve ja jõustamismeetmed – ning Genfi konventsioonide esimese ühisartikli ulatus põhjalikult lahti kirjutatud.

Mida võib aga ka põgusast ülevaatest järeldada, on asjaolu, et humanitaarõiguse rakendamiseks ja jõustamiseks on küllaldaselt meetmeid aluslepingutes endis. Nendeni on jõutud pikkade diplomaatiliste vaidluste järel ning neid on võimalik igal hetkel piisava poliitilise tahte korral rakendada.

Rakendamine on rahvusvahelise humanitaarõiguse peamine proovikivi. Paul Berman ICRC-st avaldab kahetsust, et humanitaarõiguse väga peenelt väljatöötatud ning pea universaalselt aktsepteeritud reeglite ja nende igapäevase rikkumise vahel on väga suur kontrast.[1119] Tõepoolest, pärast rohkem kui sadat aastat humanitaarõiguse loomet ei tohiks eesmärgiks olla uus seadus, vaid olemasolevate normide tõhus rakendamine.

Kui riigid kasutaksid kõiki neid jõupingutusi, õiguslikke vahendeid ja institutsionaalseid ressursse, millele on artiklis viidatud, saaks sõjakuritegude takistamiseks ja rahvusvahelise humanitaarõiguse edasiarendamiseks palju ära teha.[1120]

Kolmest väljatoodud kategooriast on just jõustamismeetmetesse suhtutud kõige skeptilisemalt. Mitu traditsiooniliselt lubatud meedet on tänaseks keelatud, rahvusvaheline kriminaalõigus toimib aeglaselt, kollektiivne julgeolekusüsteem annab küll tulemusi, kuid selle eest tuleb maksta väga kõrget hinda nii inimeludes kui ka rahaliselt. Kui jõustamismeetmed puuduvad või on ebaefektiivsed, ei jäägi ehk palju muud üle kui keskenduda ennetustegevusele. Humanitaarõiguse õpetamise ja levitamise teel saab aidata kaasa sellise ühiskonna kasvamisele, kus rikkumised on juba iseenesest harvemad.

Ennetamise ja riigisisese rakendamise diskursus vajab laiemat tähelepanu. Riigid peaksid küsima, mida nad ise saaksid selleks teha, et rikkumisi vähendada. Näiteks saaks üle vaadata riiklikud õppeprogrammid, sõjapidamise reeglid ja käsiraamatud, arvestada humanitaarõiguse vajadustega linnaplaneerimisel, läheneda rikkumiste ennetamisele interdistsiplinaarselt. Ka dialoog mitteriiklike rühmitustega on vältimatu ja peab olema ennetustegevuse keskmes. Selleks annavad muuhulgas võimaluse konventsioonide lisaprotokollid, mille jõustumisest möödub käesoleval aastal 40 aastat.[1121]

[1118] Autori valduses.

[1119] P. Berman (viide 7).

[1120] J. Hoffmann (viide 42), lk 104.

[1121] Brugge rahvusvahelise humanitaarõiguse tunnustatud kollokvium keskendus sel aastal just dialoogile humanitaarabi organisatsioonide ja mitteriiklike rühmituste vahel ning võimalustele, mida protokollid ennetamiseks ja rakendamiseks pakuvad. Arvutivõrgus: http://www.coe-icrc.eu/en (25.10.2017).

Humanitaarõiguse rakendamise meetmetest ülevaate saamiseks ja riikide olukorra hindamiseks võiks tulevikus kehtestada kohustusliku aruandlussüsteemi. Globaliseerunud maailmas ei ole sisuliselt ükski konflikt enam riigi siseasi, vaid mõjutab kõike ümbritsevat. Mustvalgelt kirja pandud ja teiste riikide ette toodud sisereeglid ja rikkumised aitaksid ehk õiguskuulekusele kaasa. Mõeldamatu ei ole ka miski Euroopa Liidu rikkumismenetluse sarnane. Aruandlusega käsikäes saaks tõhustada ka rahvusvahelise uurimiskomisjoni tööd ning kasutada seda tänapäeva konfliktides nii tihti kui vaja. Loogilise jätkuna kuulub siia ka kaitsva riigi institutsiooni kasutamine või kaitsva riigi volituse andmine ICRC-le.

Resümee on muutmata kujul artiklina avaldatud ajakirjas Juridica. Annika Talmar, "Rahvusvahelise humanitaarõiguse riigisisene rakendamine. Aktuaalseid probleeme", 25 *Juridica* (2017) 479–489.

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