

Workshop Report¹: The Challenges in the Implementation of International Humanitarian Law

23 September 2013 14:00-17:00
Club Prince Albert

Overview

On the 23rd of September 2013, the Society organised a workshop on the topic *Challenges in the Implementation of International Humanitarian Law*. The aim of this workshop was to provide us with the right questions to ask in the questionnaire which will be prepared for the Society's 20th Congress in 2015 on the same topic. This questionnaire will be sent out all over the world in order to get a general picture of what is going on in the implementation of IHL on a national level. With three excellent speakers on the subject and numerous specialist participants, this workshop produced a fruitful debate in which many interesting topics were discussed.

It was stressed in the introductory speech already that implementation is key: it does not matter how well the rules are written if there is no one to implement them and obey them.

The workshop's program consisted of three renowned individual speakers. First up was Prof. Dr. M. Bothe, Professor Emeritus of Public Law at Goethe University Frankfurt. He was followed by Mr. S. Kolanowski, Senior Legal Advisor at the ICRC Brussels Delegation to the EU and NATO. Last but not least was our third speaker, Lt. Col. Ph. Van Gyseghem, Legal Advisor at the Directorate-General Legal Support and Mediation, Ministry of Defence, Belgium. Each speaker gave a fifteen minute speech about the current challenges the implementation of IHL faces. Afterwards, a debate unfolded between all three speakers with active participation by the audience.

As this workshop was conducted under the Chatham house rule, this report will give a detailed discourse of what has been said but will not reveal the identity of the participant who did so.

¹ Report written by Ms. Laura De Schryver, LL.M., KU Leuven & Ms. Nicolette Pavlovics, Juris Doctor, Tulane University Law School (Volunteer collaborators at the *International Society for Military Law and the Law of War* at the time of the workshop).

Workshop Content

Imperfect Implementation

The greatest problem with IHL does not lie in the fact that there are insufficient rules, but that their implementation is lacking or defective. This is sadly illustrated by situations like the ongoing conflict in Syria. There are three facets to implementation: prevention, control, and repression, and all three aspects face serious challenges. States have to translate their international law obligations into concrete action, as it is them who have the primary responsibility for implementation by adopting national laws, regulations and other measures.

Even though several implementation mechanisms are available (such as the International Humanitarian Factfinding Commission, the Protecting Powers, and the inquiry procedure), most of them have not been used recently, and some of them never at all. One of the participants noted that this is not because the mechanisms would not be useful. But why then? The ICRC's official reason is that the successful use of these mechanisms depends on the agreement and cooperation of the states and parties concerned. Particularly, as one participant pointed out, all of these procedures require agreement in each particular case. An inquiry cannot be effectively conducted without consent. This is a problem indeed, although not the only one, but we need to ask why the governments would not give the consent to cooperation. Clearly, in order to sufficiently report on the implementation status of IHL in a certain country, access to the information is necessary. But how can we persuade states to share more information on how they implement IHL? One way to convince states to cooperate and give their consent would be through political pressure from other states and perhaps international actors and NGO's.

In addition, there's also the challenge in the denial of states that IHL is applicable to the situation in the first place, in particular in the case of NIACs. All too often, they claim that what is going on is not an armed conflict, but merely a police operation or riot control. Yet in some of these cases, the military is used and the situation turns out to be something that could very well be called an armed conflict, to which IHL would be applicable.

Progress Through International Criminal Law

In terms of repression, fortunately, big progress has been made, thanks to the developments in international criminal law. The ICTY, ICTR and ICC have done a good job, but they are not perfect either. One problem with international criminal law is that it operates very slowly. The facts of the case, which happened on the battlefield, need to be proven beyond a reasonable doubt, and this takes time. As one participant pointed out, the criminal court system is slow and deliberate—as it well should be to ensure proper carriage of justice. It was therefore an understandable move of the ICC to start off with the Lubanga case on child soldiers, since this was relatively easy to prove. When the Court then tried to go get the “big guys” in other African countries, it was confronted with massive political resistance. Another downside is that the ICC

appears to be a selective African court, which upsets many in Africa and harms the Court's credibility. Many feel it is nonetheless very important to signal that violations of IHL will not be tolerated, and that there is an effective criminal mechanism in place to hold perpetrators to account. On the other hand, one participant argued that criminal law does not necessarily deter, and therefore the greatest value of the ICTY can be said to be its contribution to the shaping of an international legal conscience.

While the fight against impunity with the activities of the ICC, ICTY and ICTR is proving to be quite successful, in the field of reparation and compensation not much progress has been made. The ICC does have a fund for compensation, which is an important step but it remains to be developed. If new mechanisms for IHL implementation were to be created, the matter of compensation would have to be left out for obvious political reasons, as it would mean the deathblow to the system. How would reparation for victims then have to be implemented? A few suggestions have been made. The first is international arbitration. Secondly, the ICC fund could be developed further into a true working mechanism. Third, there is the possibility for reparation to be given through national proceedings. However, the recent International Court of Justice decision in *Germany v. Italy* severely restricted this option by foreclosing the possibility to pursue litigation in the victim country.

Lessons to be Learned from Other Areas of Law

There was significant discussion of how IHL could benefit from what human rights law has accomplished, for example if it would get the chance to use human rights procedures. However, it is important to keep in mind how IHL might be affected by the current shortcomings of the Human Rights Council, such as its problems of political selectivity.

The recent events in Libya are a very good account of how it could ideally work out. In this particular situation, the inquiry commission established by the Human Rights Council had the cooperation of the authorities on the ground, who had a political reason to cooperate! This is not always the case, particularly in IHL situations.

On the subject of institutional development the Geneva Conventions legal regime also has something to learn from other modern international treaties. For example, environmental treaties, the Chemical Weapons Convention, the Convention on the Protection of Cultural Property in Armed Conflict, etc. all have a conference of the parties (COP) which regularly reviews the functioning of the treaty system, and which has the power to establish bodies responsible for the better implementation of the treaty. The treaty regime of the Geneva Conventions would greatly benefit if it had a similar, regularly organised COP.

Regarding the International Humanitarian Fact Finding Commission, a number of participants seemed to agree that the problem is that the members of the commission (“15 poor guys”) do not have enough political support. It was suggested that this may be the reason the Human Rights Council has shown resistance in the past to work with the IHFFC, despite the potential complementary roles of the two institutions. However, the integration of the IHFFC into a conference of the parties could give it the necessary political support and legitimacy.

Swiss- ICRC initiative

The Swiss-ICRC initiative to increase compliance with IHL (intended to implement Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent of late 2011) has also singled out implementation as a major issue in IHL. The initiative has led to a consultation process which, as far as implementation is concerned, concentrates on the following issues: (1) a regular Meeting of States; (2) a reporting system; (3) fact-finding.

Regular meetings of States would offer a framework for dialogue between States on their implementation of IHL.

The reason why it is a slow process is because it needs the support of a significant majority of States, something that cannot be reached overnight. There is however a strong general support for a regular dialogue like this. Initial meetings have been encouraging and the next meeting of the parties is scheduled for the summer of 2014.

A workshop participant drew the attention of the workshop to existing experience with Meetings of the member States of the Geneva Conventions convened by Switzerland. One of them related to the situation in the occupied Palestinian territory. Some participants seemed to feel that the failure of that meeting had been due to the highly political and polarizing nature of its subject matter. As one participant put it, this was “the danger of starting with the most difficult problem first.” Other participants felt that there was no way around politics in these types of meetings but that it was still better to have people sit down and talk about the issues than to fight on the battlefield.

Those present at the workshop discussed many ideas of what could be accomplished by such a meeting of states and how it could fulfill the role of a Conference of the Parties. Participants agreed on the importance of an early warning system in order to have knowledge about a conflict before it even begins. Although, the UN has previously tried without success to implement such an early warning system, a COP may be a more promising mechanism to achieve this.

One of the speakers remarked that on many occasions, the establishment of national committees to advise and assist governments in the implementation of IHL has been recommended. Many such committees have been established in recent years. Currently, there are 103 such committees. Maybe the international community should consider making such a committee an obligation. However it is important to acknowledge that Decree N° 2989 of 2 June 2004 created Syria's national committee on IHL, demonstrating that the mere existence of such a committee does not automatically offer the answer to all challenges.

A number of participants reiterated the responsibility of individual states to ensure compliance with IHL. Still in many cases governments do not give clear guidelines to their national committees. Therefore, it would be good for states and their national committees to have a benchmark set: something they can aim to achieve. Ideally, the commissions would be able to receive feedback as well. Nonetheless, a participant mentioned, from his own experience as a manager, that when you have an indicator, this will increase your output, even if there is no authority to check up on you. A COP may be able to play a role in setting key performance indicators for governments or national committees in this area. There would also be an opportunity for NGOs to provide evaluation or grading to states based on these benchmarks.

Specific responsibilities for countries not directly involved in the armed conflict

One of the participants quoted Ms. Carla Del Ponte, who as a member of the *Independent International Commission of Inquiry on the Syrian Arab Republic*, said that she “believes there is an emerging norm that arms transfers should not be undertaken where there is a real risk that they will be used in the commission of violations of IHL.”

But is there indeed such an *emerging norm*? We can refer here to Art. 6 § 3 of the Arms Trade Treaty, recently adopted by the UN General Assembly in April 2013, which states that “a State Party shall not authorize any transfer of conventional arms covered under the treaty if it has knowledge at the time of authorization that the arms would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions, attacks directed against civilian objects or civilians protected as such, or other war crimes” and Art. 7 of that same treaty, stating “if export is not prohibited under article 6, each exporting State Party shall assess *inter alia* the potential that the arms could be used to commit or facilitate a serious violation of IHL and consider whether measures could be undertaken to mitigate the risks and if an overriding risk remains at stake the State Party shall not authorize the export.”

Ms. Del Ponte also said that States that fund and support the Syrian armed opposition must ensure that those armed groups that benefit from their money and their arms, conduct their hostilities in line with IHL, and she explained that in practice it means that they do not use those arms to target civilians, that they do not torture when they detain, and that they do not execute those they capture. Similarly, she said, Russia and Iran must use their leverage to pressure the Syrian government to conduct their attacks proportionally and observe the distinction between civilians and those who are directly participating in hostilities. Civilians who are in areas that the government views as sympathetic to the opposition should not be targeted for their geographic proximity, their sectarian affiliation, or their political beliefs

But IHL compliance does not only apply to States: it is also necessary to address the issue of compliance by non-state actors!

Non-state Actors

Non-state actors present a whole set of distinct issues when it comes to the enforcement of IHL. The workshop group discussed the fact that certain IHL enforcement mechanisms such as protecting powers might be difficult to apply to non-international armed conflict, whereas others like the IHFFC could be more easily adapted (by extending the power the Commission has pursuant to article 90 to non-international armed conflicts).

How do we deal with armed opposition groups unknowing about the law? Ignorance might not be an excuse, but it definitely is a real problem, as the majority of the current conflicts in the world are intra-state conflicts. This does not mean that there are no non-state actors who respect IHL. Some larger and better-organized groups such as the FARC and the Taliban have their own military manuals, which they expect their members to obey (although these manuals do not always reflect IHL properly). However when the groups get smaller or more fragmented, such as for example the current situation in Syria with several independent groups, this instantly becomes significantly more difficult. The ICRC did have some dissemination activities with these groups, in an attempt to make them realize the importance of respecting IHL, but there's still a large disregard to it. There is also the work of the organization Geneva Call, which educates approximately 80 armed groups on IHL, and encourages them to sign a so-called deed of commitment. For example they have had significant success regarding the non-use of antipersonnel mines.

Workshop participants generally seemed to feel that it was important to find some way to involve non-state armed groups in order to improve their compliance with IHL. The idea was also suggested to give some sort of status to armed groups in MOPs, COPs, etc. such as an observer status.

An additional problem is presented by the fact that some of these groups are designated as terrorist organizations. The panel and participants did seem to generally agree on the fact that labeling a group as terrorists, which is also impliedly a political decision, runs counter to the goal of increasing compliance with IHL. Referring to the 2010 Holder case in the US, it was noted that there is a difference between the EU style of branding groups as terrorists and the US style. In this case, an organization was convicted under the US Patriot Act for providing material support to terrorist groups because they wanted to advise them on humanitarian law matters. The finding in the case was based on the principle that any assistance could help to legitimate the terrorist organization and free up its resources for terrorist activities. In the EU, on the other hand, the designation of a group as a terrorist organization has implications for the members' movement and assets but does not apply to the dissemination of IHL to that group. A number of participants indicated that the US terrorist designation had not affected their work because they had not planned to engage in IHL training with any of these groups. However one participant pointed out that the US legislation also affects the dissemination of humanitarian aid particularly in cooperative efforts between the American Red Cross and other Red Cross organizations

Non-state actors should have an incentive to follow the rules of IHL. It was pointed out that frequently there is an inherent contradiction in the situation where states want to punish rebels for taking up arms against the government but also want to have them comply with IHL. Also, if they could already be punished or jailed for taking up the weapons against their government, what incentive do they have left to follow IHL? Another participant picked up on the question of how to give incentives to the non-state actors to obey the rules of IHL and pointed out that there is only very limited research available on what is the incentive for any actor to do anything, not only non-state actors but also states themselves. This research would not be a purely legal one, but more of a sociological/psychological research.

The debate then came to the point of why non-state actors are bound by IHL. Several theories were mentioned. This is relevant in terms of trying to convince non-state actors to obey IHL rules. For example under the Chemical Weapons Convention it would be hard to argue that Syria, when it has to declare which chemical weapons it possesses, would also have to declare which chemical weapons and how many are in the hands of the several rebel groups. It could however be made to declare which weapons it previously possessed and now doesn't anymore (because they came under rebel control). It is worth noting that this would more or less come down to the same thing in terms of knowing which and how many weapons are present in Syria.

A number of participants also pointed out that while there are significant differences in the black letter IHL applicable to international and non-international armed conflict, in practice there are few distinctions on the operational level. The differences in rules of engagement come mostly from politics, and commanders on the ground are restrained by their own ideas about the objectives of the mission rather than an analysis of whether it is an international armed conflict.

Red light example

During the debate, one of the participants mentioned an excellent example of a red light. When pedestrians are walking at night on a deserted street with no car in sight and come across a red light, 80% will still stop to wait for the light to turn green before crossing the street. Even though there is no incentive to do so (there are no cars coming, no one sees him, no police officers near to fine him for not obeying traffic rules etc.), most people will still stop at a red traffic light. People follow the light even when a cost-benefit analysis would not require them to do so because most people have internalized the rule that one has to stop when the light turns red. This is what we should be striving to achieve in International Humanitarian Law: respecting IHL should be a moral obligation that we have internalized. Soldiers should not be convinced that they should respect IHL merely because it is “a rule” which will have consequences if broken, they should do so because it is a moral value they have internalized. Ultimately it is the state’s responsibility to transfer this moral apprehension to the individual actors.

According to one of the participants, it is nonsense that “criminal law deters.” Related to this: you don’t stop at the red light because you are afraid to get convicted for traffic offences, but you do so for other reasons. And this is exactly what should be done for IHL: the shaping of a “*legal conscience*” should be one of the fundamental aims in order to improve compliance with IHL. One way to do this might be to use morals and norms already existing in a society as a way to educate people and incorporate IHL into those community norms (without just talking about the black letter law of the Geneva Conventions).

Miscellaneous

Some other interesting resources were mentioned during the workshop:

- The EU Guidelines on Improving Compliance with IHL adopted in 2005, are intended to ensure respect for IHL and clarify the meaning of these IHL obligations. It encourages the EU’s use of tools like public denunciations, agreements signed with states, and policies on arms export.
- The 2004 ICRC study on the roots of behavior in war.
- The 2008 ICRC publication on increasing respect for IHL in non-international armed conflict.

Conclusion

The closing remarks to the workshop were given by BGen. J.P. Spijk, the President of the International Society for Military Law and the Law of War, who gave a nice overview of what had been said, and concluded that a lot of work remains to be done in the field of implementation of international humanitarian law. Or, in the words of one of the workshop speakers, it is up to us to decide whether the glass is half full or half empty.