

How to develop international humanitarian law in the future?

Outline of an intervention by Marco Sassòli, professor of international law at the University of Geneva, Switzerland, at the Fourth 'Silent leges inter arma?' Conference - Bruges, Belgium, 30 September 2021

Overview

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Challenging some current assumptions

- IHL rules must be developed by consensus
- States do not want to adopt new IHL rules
- As States do not want any new development of IHL, normative needs must be met by claiming to interpret or determine existing law
- If IHL was reopened, States would weaken it
- UN involvement would politicize IHL
- If the ICRC engaged in strong advocacy in favor of new IHL rules, it would jeopardize its operational dialogue with major powers
- More and more detailed rules offer better protection
- IHL is mainly applied in the field, during armed conflicts, and not by courts

Possible future additional ways to develop IHL

- Experience made in other branches
 - ILO core labour standards
 - The Paris Agreement on Climate Change
- Features of a possible new way of developing IHL
 - Adopt a declaration on core obligations and principles of IHL
 - States and armed groups undertake to specify them, in conformity with their interpretation of their existing IHL treaty and customary law obligations, into detailed rules they undertake to comply with, and make those rules public
 - Each State and armed group could create a mechanism commenting on the rules adopted, including on whether any deviation from existing IHL rules is based upon objective justifications, and their implementation
 - At a second stage, each mechanism could make an annual report public, which could then be discussed in a kind of periodic peer review
 - At a third stage, such review may show sufficient support for some new rules and for changing some existing rules
- Start with mechanisms enhancing the respect of some rules

The elephant in the room of development of IHL: armed non-State actors

- The larger problem: engaging them to comply with IHL
 - Ways to enforce respect of IHL by armed groups
 - Allow armed groups to commit themselves in special agreements and unilateral commitments
 - Dissemination and training
 - Provide advisory services
 - Monitor respect
 - Obstacles
- Involving armed non-State actors in the development of IHL
 - Will increase their willingness to comply
 - Will ensure that the rules of IHL of NIACs are realistic
 - Examples of rules that are unrealistic for armed non-State actors
 - Possible solutions
 - Practical and conceptual difficulties of involving them that must be overcome
- The main challenge remains enforcement