

IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW

INTRODUCTION

The law of armed conflicts is valid — and meaningful — only to the extent that it is implemented. Pacta sunt servanda. This axiom should be engraved in the conscience of mankind. Undeviating compliance with it should go without saying, since what is at stake is no less than the protection of victims of armed conflict and the limitation of the violent effects of war.

Yet it must be acknowledged, in sorry repetition, that this is not always the case. First of all, international humanitarian law (IHL), which is a compromise between military and humanitarian imperatives, is often respected only when it overlaps with State interests. Secondly, the violence inherent in situations of conflict is not particularly conducive to meticulous respect for the principles and rules of IHL.

This does not mean that the progress made to date in the area of IHL is not commendable. No less than 100 States are now party to Additional Protocol I and 99 to Additional Protocol II. Moreover, the dissemination of IHL has become a standard practice and, in many cases, a recognized field of study, particularly among military and government personnel and National Red Cross and Red Crescent staff.

Despite these achievements, however, the implementation of IHL continues to be impeded by indifference, scepticism and ignorance. It is therefore important to determine how IHL's extensive legal resources can be used more effectively to overcome such obstacles, and how the relevant preventive measures and monitoring mechanisms can be brought to bear to ensure its more widespread implementation.

The International Review of the Red Cross attempts to answer these important questions in the present and next issue in a series of articles focusing on various aspects of the implementation of IHL. The Review first deals with preventive measures, namely the measures taken by States at the national level in peacetime, i.e. before the provi-

sions of IHL come into practical effect. Then it takes a look at monitoring mechanisms, in particular the International Fact-Finding Commission. Lastly, it examines the means for repressing breaches of IHL.

The implementation of IHL depends primarily on the initiative, goodwill — or good faith — of each State. The lawmakers have accomplished the difficult task of striking an acceptable balance between the principle of State sovereignty and humanitarian needs. In the first article of the series (pp. 105-133), **Professor Gérard Niyungeko** reviews the rules of law that protect State sovereignty. Only brief mention is made of provisions that cannot be regarded as major obstacles to implementation, such as the possibility of denouncing the Conventions (in practice, humanitarian obligations have so far never been denounced) and the option of formulating reservations thereto. Closer scrutiny is given to the rules which delay or hamper implementation, which provide for the agreement or consent of the State, which reserve State security, which leave the State a wide margin of judgement and which reserve to the State certain exclusive powers, in particular with respect to the repression of breaches.

In order to paint a balanced picture, Professor Niyungeko then turns to the rules that may be considered as direct or indirect derogations from the principle of State sovereignty. Under IHL the obligation not only to respect but also to ensure respect for the Geneva Conventions and their Additional Protocols is binding both for States party to a conflict and for third States. The same principle applies to obligations undertaken by States to accept a monitoring mechanism in the form of a Protecting Power, to refrain from taking reprisals against protected persons and property and not to absolve themselves or any other State party of any liability in respect of breaches of IHL.

In conclusion, the author finds that, despite the various “concessions” made to IHL, the principle of State sovereignty still places many obstacles in the way of implementation, particularly in the event of non-international armed conflicts, for which IHL provides no monitoring mechanism.

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Respect for IHL by States depends largely on their adoption of adequate national legislation, incorporating the provisions of the IHL treaties, or their enactment of legislative, administrative or practical

measures to ensure full application of IHL. Resolution V of the 25th International Conference of the Red Cross appropriately reaffirms the duty of States to adopt national measures of implementation, to exchange information on those measures through the depositary State and to keep the ICRC informed of any legislative or other measures taken in respect of IHL, and requests the ICRC to gather and assess this information. It also invites National Red Cross and Red Crescent Societies to assist and co-operate in these efforts.

The ICRC, whose role in this respect is crucial, has spared no effort to remind States of their duty and to assist them in discharging their obligations. In 1988 and again in 1989 it wrote to that effect to the States party to the Geneva Conventions and also to the National Societies. The replies, as explained in the ICRC's **Interim Report** (see pp. 134-139) show that too little has been done to adopt national legislation and practical measures for implementation. In addition, few opinions or suggestions have been offered as to how the ICRC might more effectively support States in their efforts to implement IHL. The ICRC therefore wrote again on 18 January 1991 to the recipients of the first letter to ask for further information enabling it to compile a comprehensive and well-documented report for submission to the forthcoming International Conference of the Red Cross and Red Crescent in November 1991.

Progress has undoubtedly been made towards better implementation of IHL, but much still remains to be achieved.

Various aspects of implementation at the national level are discussed by **Dieter Fleck** (Federal Republic of Germany) in his article on the problems and priorities of implementing IHL (see pp. 140-153). He points out that implementation is hindered by lack of motivation in peacetime, lack of knowledge and the complexity of the rules of law. He therefore considers that, although traditional legislative measures are important, greater emphasis should be placed on organizational and structural measures to be taken both in peacetime (such as setting up medical establishments and units in safe areas) and in wartime, the training of qualified personnel and the dissemination of IHL. He then gives a comprehensive overview of the measures taken by governmental authorities in Germany, and highlights the active role played by the German Red Cross.

As a means of remedying the inadequate implementation of IHL, the author proposes setting long-term priorities, for example with respect to the identification of works and installations containing dangerous forces, the establishment of medical and security zones and the setting up of tracing services.

In view of the many problems attached to implementation and the great complexity and technical nature of various implementation measures, the author recommends that plans of action and lists of priorities be established through long-term joint efforts and continued international co-operation.

Marc Offermans (Belgium) in turn outlines what his country has done to promote implementation, focusing on the role of the Belgian Interdepartmental Commission for Humanitarian Law (see pp. 154-166). Set up in 1987 for the purpose of “drawing up a complete inventory of the measures to be taken” and “following up and co-ordinating the finalization of the texts required by the competent Ministries”, the Commission stimulates the action of the Ministries concerned and monitors the application of the measures adopted. The author retraces the Commission’s origins and describes its composition, tasks, working methods, working procedure and achievements so far.

Emphasis is also placed on the need to appoint qualified personnel and legal advisers to the armed forces and to promote dissemination of IHL, a field in which the Belgium Red Cross plays a key role.

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The second major theme dealt with in this issue of the Review is the establishment of the International Fact-Finding Commission provided for in Article 90 of Additional Protocol I to “enquire into any facts alleged to be a grave breach as defined in the Conventions and [the said] Protocol or other serious violation of the Conventions or of [the said] Protocol” and to “facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and [the said] Protocol”.

Captain J. Ashley Roach (United States of America) reviews in his article various other fact-finding mechanisms, then discusses the unique nature of the Commission provided for in Article 90, incorporating into his legal analysis numerous comments and suggestions (pp. 167-189). He describes in particular the role of the depositary State, the qualifications required of the candidates for election as members of the Commission and the electoral procedure itself. He then comments on the paragraphs of Article 90 relating to the Commission’s organization (election of the President, rules of procedure) and competence.

The author also explains the role of the Chamber of seven members set up to conduct enquiries and make ensuing recommendations. Lastly he touches on the Commission's internal rules and on various administrative and financial matters.

In her contribution on the same subject (pp. 190-207), **Françoise Krill** (ICRC) describes the establishment of the Commission as a major advance for IHL: "The advantage of making it a standard practice to institute an enquiry is that such enquiries are not subject to the prior consent of the Parties concerned. Acceptance of the Commission's competence is given in principle, in peacetime, before there is any need to conduct an enquiry. Moreover, the fact that the Commission is a permanent institution is a considerable deterrent for Parties to a conflict which might be tempted to commit breaches of IHL".

After reviewing the Commission's origins and describing how it works, the author concentrates on the ICRC's fact-finding role in general and in relation to Article 90. Although no such role is provided for in the Geneva Conventions, the ICRC has been asked on several occasions to take part in fact-finding efforts. A proposal was made at the Diplomatic Conference of 1974-1977 to entrust the ICRC with the task of administering the Commission. The ICRC indicated its willingness to accept that task provided it were precisely defined and clearly differentiated from its traditional protection and assistance activities.

The proposal was ultimately rejected by States in order to maintain a clear distinction between the respective mandates of the ICRC and the Commission and to avoid placing the ICRC in a position that might hamper the discharge of its duties. In the final analysis it is the complementary of the two bodies that is essential.

Now that at least (and meanwhile more than) twenty States have agreed to accept the competence of the Commission as provided for in Article 90 (see table, p. 210), the procedure for its establishment may begin. The **depository State** (see p. 208) has already announced various steps taken to that effect, in particular the convening of a meeting for representatives of the States that have accepted the terms of Article 90 in order to elect the Commission's fifteen members.

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The Review will conclude this series of articles on the implementation of IHL in the next issue by examining the means of repressing

breaches of the law.¹ It trusts that the series will provide readers with useful reference material, particularly in view of the forthcoming 26th International Conference of the Red Cross and Red Crescent, where these matters of undeniable importance will be discussed.

The Review

¹ For further information, see the report of the Regional Seminar on the Implementation of IHL, organized in Sofia in September 1990 by the ICRC in co-operation with the Bulgarian Red Cross and the International Institute of Humanitarian Law (pp. 223-233). This Seminar gave representatives and experts of eleven European countries a useful opportunity to exchange views and share experience in this field. See also the article on the XVth Round Table of the International Institute of Humanitarian Law (San Remo, 4-8 September 1990) in *IRRC*, No. 280, January-February 1991, pp. 57-68, from p. 61-62, and the book review on the International Symposium on the National Implementation of International Humanitarian Law (Bad Homburg, 17-19 June 1988), p. 238.