States' entitlement to take action to enforce international humanitarian law

by Dr. Kamen Sachariew

I. Introduction

The ultimate purpose of dissemination of and compliance with international humanitarian law (IHL) is to mitigate the effects of armed conflict and provide the best possible protection for its victims. At the same time, IHL fosters wider acceptance of the ideals of humanity and peace between peoples. The relationship between IHL, the struggle for peace and the prohibition of the use of force is becoming ever clearer as the realization grows that lasting peace, development and peaceful international co-operation can be achieved only on the basis of compliance with international law and respect for human life and dignity.

However, violations of those fundamental rules of international humanitarian law, of that self-same prohibition of the use of force, are common practice in numerous armed conflicts today. Moreover the development of first-strike nuclear capability and "Star Wars" weapons is setting the scene for their total disregard.

In these circumstances, the question as to which States can take steps to ensure the implementation of IHL, and when and how they may do so, is becoming more urgent and significant with every passing day.

It must be noted that States do not have sole responsibility for implementing the rules of IHL; an important role is also played by international governmental and non-governmental organizations, the International Red Cross and Red Crescent Movement including the ICRC, and other international and national relief societies as well as many dedicated individuals around the world. However, as members of the international community and parties to the Geneva Conventions, States have a particular political and legal responsibility for the implementation of IHL.

States can act primarily on three levels to ensure that their obligations under IHL are fulfilled: in their own national legislation, as part of the international community and within the framework of the implementation and sanction systems provided by the Geneva Conventions and their Additional Protocols.

II. Internal means of enforcement of international humanitarian law

Every State has an obligation to take whatever national legislative or other steps are necessary to prevent and punish violations of the rules applicable to armed conflict. This obligation arises from the principle that all treaty and customary law obligations must be fulfilled in good faith; it is specifically reinforced by the provisions of the Geneva Conventions and their Additional Protocols (cf. First Convention Arts. 1, 45, 47, 49 and 54; and Protocol I Arts. 80, 84, 86 and 87). Of particular significance is the obligation created by Art. 1 common to the four Geneva Conventions and Additional Protocol I "to respect and to ensure respect" for the Conventions and Protocols "in all circumstances". An important aspect of this obligation is the use of national law to ensure that international humanitarian law is observed by all persons within the national jurisdiction of the State concerned.[1] With sufficient willingness on the part of the national authorities, violations of IHL can in this way be very effectively and quickly counteracted. However, it is not enough to rely on such methods when particularly grave violations are being systematically committed—as often happens in cases of military aggression—with the support or at least toleration of the State concerned. Such serious violations which threaten world peace can be punished by the international community as international crimes.

[1] See Michael Bothe, "The role of national law in the implementation of international humanitarian law" in *Studies and essays on international humanitarian law and Red Cross principles, in Honour of Jean Pictet* (hereafter *Studies and Essays in honour of Jean Pictet*), Geneva/The Hague 1984, p. 301 et seq. See also L. Condorelli and L. Boisson de Chazournes, "Quelques remarques à propos de l'obligation des Etats de 'respecter et faire respecter' le droit international humanitaire 'en toutes circonstances'", *ibid.*, pp. 24-25.

III. Enforcement measures for the prevention of international crimes

The Charter of the United Nations, by virtue of the prohibition on the use of force, already sets out a group of legal obligations whose violation qualifies as a threat to peace. A collective security system was established to guard against failure to comply with them. It has been increasingly recognized that the fundamental principles of modern international law create a particular system of obligations. These principles are not based upon bilateral legal relationships; rather, they give rise to obligations which every State must fulfil *vis-à-vis* all other States. The existence of such *erga omnes* norms was confirmed in the well-known ruling of the International Court of Justice in the Barcelona Traction case.[2] Parallel to the notion of *erga omnes*, the concept of international crimes was evolved to correspond to State responsibility for particularly grave breaches of this kind of obligation. In Art. 19, para. 2 of the UN International Law Commission's (ILC) draft articles on State responsibility, these are defined as being a breach of an obligation "so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole."[3]

Among the examples mentioned in Art. 19, para. 3, crimes of particular gravity for IHL are those crimes constituting "a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being" (para. 3 (c). In the light of the provisions of Protocol I additional to the Geneva Conventions, especially Arts. 55, 56 and 85, para. 3 (c), the crimes against the human environment mentioned in Art. 19, para 3 (d) of the ILC draft also assume increased importance. These draft provisions do not, of course, deal with the criminal responsibility of individuals who are found guilty of such violations, but rather with the responsibility under international law of the States in whose name such crimes have been committed.

From our point of view, the most interesting feature is that crimes under international law are not only a bilateral matter between culprit

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[2] International Court of Justice (ICJ) *Reports* 1970, p. 30 et seq., para. 33-34.

[3] *Yearbook of the International Law Commission (YBILC)*, 1976, Vol. II, p. 75. Regarding the ILC's work in the area of international crimes, see M. Spinedi, *International crimes of State in the UN Work on Codification of State responsibility*, Florence 1984, p. 4 et seq. and p. 90 et seq.

and victim. A legal interest also existes between the offending State and all States in the international community which must be considered as "injured States" within the meaning of Art. 5 Part 2 of the ILC draft.[4] The ILC has not thus far held a sufficiently wide-ranging discussion of the legal consequences of international crimes. Above all it has not yet reached a general agreement on how and by what means States which are not directly involved can react. The prevailing view, however, seems to be that such States should react mainly within the UN system.[5] The direct victims of an international crime are deemed entitled to additional, more extensive remedies within the framework of collective and individual self-defence. Generally speaking, there are two reference points (the United Nations and the direct victims of the crime); these serve to co-ordinate the reactions of the international community in order to prevent chaos in international relations. It is important to stress that the reactions of the victim and those of the international community under Art. 51 of the UN Charter are closely linked and must be in keeping with the fundamental principles of international law and the rules of responsibility under international law.

The concept of international crimes does bring with it the possibility of imposing collective sanctions, but this aspect, although not to be underestimated, is not the main source of its potential strength as a means of combating the most serious violations of international law which constitute a threat to peace. This strength derives far more from the fact that the concept expresses the determination of the international community *as a whole* (and not merely certain groups of countries)[6] to combat them. The fact that co-ordinated action is possible and necessary in today's divided world was shown, for example, in the resolution on the Iran-Iraq war unanimously adopted by the UN Security Council.[7] The effective repression of acts generally acknowledged as crimes likewise ultimately depends on co-ordinated and determined action by

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[4] The text can be found in A/CN.4/L.390, add. 1, p. 3.

[5] In his commentary on Article 14 (international crimes) of the second part of the draft instrument on codification, W. Riphagen points out that "an individual State which is considered to be injured *only* by virtue of Art. 5(e) [on international crimes — K.S.] enjoys this status as a member of the international community as a whole and should exercise its new rights and obligations within the framework of the *organized* community of States". W. Riphagen, Sixth Report, A/CN.4/389, p. 26, para. 10.

[6] See the ILC's deliberations, in particular Sinclair A/CN.4/SR.1890, pp. 9-10; Flitan, *ibid.* SR.1892, p. 3. On distinguishing between directly and indirectly concerned States, see also B. Graefrath, "Völkerrechtliche Verantwortlichkeit für internationale Verbrechen", in *Probleme des Völkerrechts 1985*, p. 89 et seq.

[7] For example, Security Council resolutions 548 of 31.10.1983 and 598 of 20.7.1987.

the international community and full use of the already existing legal possibilities. This has been demonstrated by the fruitless attempts to impose effective sanctions against the crime of apartheid or the violations committed in the territories occupied by Israel.[8]

IV. The system for the enforcement of the Geneva Conventions and Additional Protocol I

A further level on which States can combat violations of international humanitarian law is provided by the implementation and sanction system existing under the Geneva Conventions and Additional Protocol I. Experts in international law have for some time been discussing which States party to those instruments can take action against their violations and how they can do so. This is but one aspect of a wider problem—determining which are the injured States and what means of remedy are at their disposal under multilateral treaties.

1. Setting the problem within the context of the theory of State responsibility

The general principle of State responsibility is that claims and entitlements within the framework of international responsibility arise only for that State whose rights have been violated by a breach of a legal obligation. This presupposes the existence of a legal relationship between the offending State and the injured State. Under bilateral agreements there is normally no problem in determining the injured State. However, under multilateral agreements, where a legal relationship exists between several States, it is not always so easy to determine the State or States which are concerned by a violation of the agreement and are therefore entitled to make claims and take measures against the offending State. This is because the character of obligations under multilateral agreements can vary greatly according to whether one is dealing with a treaty establishing an international organization, a raw materials agreement, a regional peace settlement or treaties such as the Vienna Convention on the Law of Treaties. In discussions among international law experts and within the UN International Law Commission itself, the prevailing view seems to be that with multilateral

[8] See the many UN General Assembly resolutions on the apartheid policies of the South African government, for example resolutions 39/50 A and 39/72 A of 13.9.1984; or, on the Middle East, resolution 39/146 A of 14.12.1984 and Security Council resolution 592 of 8.12.1986.

agreements it is possible to distinguish between two basic types of obligations—bilateral and multilateral.[9]

A bilateral structure of obligations may be found in multilateral agreements which are basically instruments for establishing bilateral relations between a number of different States. Though binding for any number of States, their provisions in fact take effect between pairs of States. Examples frequently given of such treaties are the Conventions governing diplomatic and consular relations and the Vienna Convention on the Law of Treaties.

Multilateral obligations, on the other hand, are basically such as can only be met simultaneously *vis-à-vis* all other Parties to the agreement. The resulting relationship in law exists between each State party to the agreement and all other States party to it. Examples are multilateral disarmament treaties, human rights conventions and environmental protection agreements, etc.

These differences in the type of obligations created by multilateral treaties result in differences in the system of responsibility, and the answer to the question of which States can react to the violation of an agreement, and the means whereby they can do so vary according to the type of obligations created by the multilateral treaty in question. Generally speaking, bilateral obligations give rise to a bilateral relationship of responsibility. Thus, when multilateral obligations are violated, the rights of all States party to the agreement are affected and they can all take part—in different ways—in the process of enforcing the violated provision.[10]

2. The type of obligation created by the Geneva Conventions and their Additional Protocols

The four Geneva Conventions of 1949 and their Additional Protocols of 1977 have seldom received detailed attention in general analyses of the type of obligations created by multilateral agreements. However, in the legal understanding of States and in specialized litera-

[9] See, for example, B. Simma, *Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge*, West Berlin 1972; S. Graefrath, "Zur Bedeutung der grundlegenden Prinzipien für die Struktur des allgemeinen Völkerrechts" in *Probleme einer Strukturtheorie des Rechts*, East Berlin 1985, p. 180 et seq.; K. Sachariew, *Die Rechtsstellung der betroffenen Staaten bei Verletzungen multilateraler Verträge*, East Berlin 1986, particularly pp. 32-44 and 58-82.

[10] The ILC attempted to make a distinction between different degrees of injury in Art. 5 of the second part of the draft instrument to codify rules on State responsibility. See the text in A/CN.4/L.390, add. 1, p. 3.

ture on international humanitarian law, it is rightly taken for granted that the obligations created by the Geneva Conventions and their Additional Protocols are of a multilateral nature.[11] This is expressed in Jean Pictet's Commentary on Art. 1 common to the four Geneva Conventions: "It is not an engagement concluded on the basis of reciprocity ... It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations *vis-à-vis* itself and at the same time *vis-à-vis* the others."[12] In the years since the Geneva Conventions came into force, this interpretation of the structure of obligations under international humanitarian law has been repeatedly confirmed by the international community. Examples are Resolution XXIII unanimously adopted by the International Conference on Human Rights in Tehran on 12 May 1968 and the intentional usage of the phrase "to respect and ensure respect" in Art. 1 of 1977 Additional Protocol I.[13]

The multilateral relationship in law which thus exists between every State party to the Conventions and all other parties entitles each and every one of them to demand that all others meet their obligations and help to ensure that those obligations are met.[14] This right exists for all States party to the Conventions and not only for the parties to a conflict: "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".[15]

This general right to help ensure respect for the Conventions is set out not only in Art. 1 but also in a number of other enforcement provisions. Perhaps the most obvious example is Art. 89 of Additional Protocol I. Entitled "Co-operation", it states that "In situations of

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[11] See G. Abi-Saab, "The specificities of humanitarian law" in *Studies and essays in honour of Jean Pictet*, *op. cit.*, p. 270; L. Condorelli and L. Boisson de Chazournes, *op. cit., supra* note 1, pp. 26-29; T. Meron, "The Geneva Conventions as customary law", 81 *AJIL* 1987, p. 355.

[12] J. Pictet, *Commentary on the First Geneva Convention of August 12, 1949*, Geneva 1952, p. 25.

[13] See *Commentary on the Additional Protocols of 8 June 1977*, ICRC, Geneva 1987, Art. 1, Protocol I, p. 36, para. 43; see also Bothe/Partsch/Solf, *New rules for victims of armed conflicts*, The Hague/London/Boston 1982, pp. 38 and 43.

[14] The ICRC has frequently reminded States of their duty under Art. 1 of the Conventions and Protocols. See the ICRC's "Appeal for a humanitarian mobilization" in *International Review of the Red Cross*, No. 244, January-February 1985, p. 31. See also Y. Sandoz, "Appel du CICR dans le cadre du conflit entre l'Iran et l'Irak", *Annuaire français du droit international (XXIX)*, 1983, p. 161.

[15] J. Pictet, *Commentary on the First Geneva Convention*, *op. cit.*, p. 26.

serious violations of the Conventions or 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". The right (and duty) of every Contracting Party not only scrupulously to fulfil its own obligations but also, using means permitted under international law, to monitor compliance by the other Parties and to take action to enforce it is fully in keeping with the nature and purpose of international humanitarian law—the noble ideal of protection for the human person, human dignity and human life. Just like the victim of armed aggression, the victim of grave violations of international humanitarian law must not be forsaken and needs not only individual but also collective ways and means of countering serious violations of international law.[16]

Determining that obligations under international humanitarian law are multilateral in nature and that in the event of breach of obligation, all Contracting Parties are to be considered as injured and entitled to seek redress does not, however, mean that all problems related to the enforcement of IHL are solved. The questions remain, for example, as to what measures are admissible and whether all Contracting Parties (other than the offending State) are equally concerned, in a legal sense, by the violations or whether there are varying degrees of being concerned and therefore of entitlement to take action.

On the latter point, there are clear differences within multilateral agreements under which multilateral obligations are created. When human rights accords are violated, for instance, the States party to the accord are equally concerned—except when persons who are not nationals of the offending State are the object of the violations—since the human rights obligations are, so to speak, inwardly oriented, i.e. they are primarily associated with the relationship between the State and its citizens. When a State observes the provisions of a human rights accord, it simultaneously meets its obligations towards all the other States party to that accord. By the same token, the rights of all States party to the accord are usually concerned in equal measure by human rights violations.

3. Multilateral obligations and armed conflict

A somewhat different situation exists when obligations under international humanitarian law are violated. Although these are also obliga-

[16] See K. Obradović, "Que faire face aux violations du droit humanitaire?" in *Studies and essays in honour of Jean Pictet, op. cit.*, pp. 488-490.

tions towards all Contracting Parties and do not depend on strict reciprocity, they are not first and foremost for the benefit of a State's own inhabitants, but relate above all to protected persons and objects belonging to the other Party to an armed conflict. In the event of violation, the other Party would in any case be individually and directly concerned. Apart from obligations to be met in peacetime, a general injury in international humanitarian law can only result from or accompany an individual injury. Unlike the obligations arising out of human rights accords or the prohibition of nuclear tests, all Parties can be wronged only by a specific violation committed against a specific Party. In such a case, they are concerned not only because of the common interest which all States have in the observance of humanitarian rules but also because of the violation of one Party's specific, individual rights. The fact that one Party can be particularly wronged underlines the crucial role played by the Parties to a conflict in the implementation of international humanitarian law. Most of the provisions of the Geneva Conventions and their Additional Protocols are addressed to Parties to a conflict;[17] these provisions must be implemented either by or towards those Parties, and violations are also usually directed against a Party to a conflict or a specific neutral State. Thus Art. 13 of the First and Second Geneva Conventions specifies that the said Conventions apply to various categories of wounded, sick and shipwrecked people who *belong to the Parties to the conflict*, as does Art. 4 of the Third Convention. The protection provided by the Fourth Convention is not confined to nationals of the occupying power, but primarily covers the civilian population in the territory under occupation (Art. 4). However the extended applicability under Art. 13 of the Fourth Convention likewise refers to "the whole of the populations of the *countries in conflict*" (author's italics).

For their implementation by neutral States, the Conventions also apply first and foremost to protected persons from Parties to a conflict (Art. 4, First Convention; Art. 5, Second Convention; Art. 4 B [2], Third Convention). Consequently a violation committed by a neutral State would likewise directly concern one of the said Parties to a conflict.

To widen protection for the victims of armed conflict, the participants in the 1974-77 Diplomatic Conference formulated broader definitions of protected persons (Art. 8 [a] and [b], Art. 9 [1] and Art. 49 [2] of Protocol I). Nevertheless, armed conflict "between two or more of

[17] J. Pictet, *Commentary on the First Geneva Convention, op. cit.*, p. 406.

the High Contracting Parties" remains, under Art. 1[3] of Protocol I and Art. 2 common to the four Geneva Conventions, the principal sphere of applicability.

This particular characteristic of the Geneva Conventions and their Additional Protocols is also reflected in the provisions governing their entry into force. They came into force six months after *only* two instruments of ratification had been deposited.

It is true that this low number of ratifications required for a multilateral treaty to come into force was rather unusual, but it was so arranged for humanitarian reasons and to accelerate the ratification process.[18] It was possible only because these treaties are essentially implemented between the Parties to an armed conflict. In this respect, the Conventions and Protocols clearly differ from human rights conventions (particularly the 1966 UN Covenants) which are also universal in nature and born of humanitarian considerations; they are not, however, to be implemented only between two parties to a conflict and a minimum of two ratifications would therefore not be acceptable as a basis for their entry into force.

It is thus evident that the obligations created by the Geneva Conventions and their Additional Protocols are particularly complex in structure. On the one hand, because of these instruments' importance for the protection of human life and dignity and their capacity to promote peace, each State party to them has obligations *vis-à-vis* the international community as a whole (i.e. the other Parties). All States party to these instruments have the right and duty to ensure respect for international humanitarian law. On the other hand, apart from the provisions to be implemented in peacetime, the obligations stemming from these instruments are mainly applicable to armed conflicts between two or more States party to them. It follows that a State which becomes involved in a conflict (as a Party to the conflict, a neutral State, a protecting power, etc.) will have a particular legal status in that it will have specific rights and duties. This is true above all of the States party to the conflict themselves. These States bear the primary responsibility for implementing IHL. They are also the ones most often directly concerned by any violations.

This raises the question of whether the multilateral and complex nature of the obligations under this body of law also has effects on the methods used to enforce it, that is, whether the degree varies to which the Parties are entitled to take action in the event of violation.

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[18] *Commentary on the Additional Protocols*, Protocol I, Art. 95, p. 1080, para. 3730.

4. Differences in the Parties' entitlement to take enforcement measures

Examination of the provisions in the Geneva Conventions and Additional Protocol I for their enforcement and sanctions in the event of violation reveals that there are indeed several measures which only certain States may take; others, however, are open to all States party to those instruments, though even here the State particularly concerned by the violation may play a more prominent role.

Among the former group of measures is the *conciliation procedure* (Art. 11 of the First, Second and Third Geneva Conventions and Art. 12 of the Fourth Convention). This procedure can be initiated either at the invitation of one of the Parties to the conflict or one of the protecting powers. The *enquiry procedure* (Art. 52 of the First Convention, Art. 53 of the Second Convention, Art. 132 of the Third Convention and Art. 149 of the Fourth Convention) can be initiated only at the request of a Party to the conflict. It is significant that the 1949 Diplomatic Conference explicitly assigned this right to the Parties to a conflict[19] despite the fact that at the 1948 International Conference of the Red Cross in Stockholm the relevant draft provision (draft Art. 41) granted *any High Contracting Party* the right to demand an official enquiry.[20] The focus on the Parties to the conflict is reinforced in para. 3 of the corresponding article in the Conventions as they are required, once the violation has been established, to put an end to it and repress it with the least possible delay.

The entitlement to initiate an enquiry through an International Fact-Finding Commission is expressed somewhat differently in Art. 90 of Additional Protocol I. An enquiry may be requested by any Contracting Party which has recognized *ipso facto* and without special agreement the Commission's competence. However, this may be done only in relation to another Contracting Party which has accepted the same obligation (Art. 90 para. 2 [a]). Otherwise, an enquiry into alleged violations can be instituted only by a Party to the conflict with the consent of the other Party or Parties concerned (Art. 90 para. 2 [d]). This is sometimes taken as an indication that paras. 2a may be interpreted more broadly and that application for an enquiry is not open only to Parties to a conflict.[21] When one looks at the development of

[19] See J. Pictet, *Commentary on the First Geneva Convention*, p. 377.

[20] *Ibid.*, p. 375.

[21] See also L. Condorelli and L. Boisson de Chazournes, *op. cit. supra* note 1, p. 31; and *Commentary on the Additional Protocols*, Protocol I, Art. 90, p. 1046, para. 3626.

Art. 90, however, it becomes clear that in both cases (paras. 2a and 2d) States have tended to view the Parties to the conflict as primarily entitled to take such a measure. The discussion has centred on whether the consent of both sides is necessary and whether the Commission can act on its own initiative or at the request of a protecting power.[22]

Prominence is also given to the Parties to a conflict and other specifically involved States in Art. 91 of Additional Protocol I («Responsibility»). This article chiefly sets out the obligation of a Party guilty of violation to pay compensation. Compensation can be paid only to States which have suffered damages in connection with violations of the Conventions and Protocols and therefore qualify as particularly concerned. In the ICRC's Commentary on Art. 91, such States are defined as normally being Parties to the conflict and, in exceptional circumstances, certain neutral countries.[23] At the same time it should be pointed out that responsibility for violations of the Geneva Conventions and their Protocols within the meaning of Art. 91 (and in spite of the somewhat narrow wording of the Article and Commentary)[24] can in no way be interpreted as a solely material liability *vis-à-vis* the States particularly concerned (Parties to the conflict). The article's second sentence emphasizes the responsibility of the violating State for all acts committed by persons forming part of its armed forces. This responsibility refers not only to the entitlement of the States concerned to compensation but also to the entire range of rights granted by the Conventions and Protocols.[25]

5. Means of enforcement open to all States party to the Geneva Conventions and Additional Protocols

It is the measures open to all States party to these instruments which highlight the multilateral nature of the provisions of the Conventions

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[22] For details on the development of Art. 90, see the *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (CDDH)*, Bern 1978, vol. IX, p. 194 et seq., particularly (Canada) p. 210, para. 18; the proposed amendment introduced by Japan (CDDH/I/316), *ibid.*, SR.56, p. 194, para. 20 and the "explanations of vote", *ibid.*, SR.73, p. 435 et seq., particularly p. 444. See also B. Graefrath, "Die Untersuchungskommission im Ergänzungsprotokoll zu den Genfer Konventionen" in *Wissenschaftliche Zeitschrift der Humoldt-Universität zu Berlin*, 1981/1, p. 9 et seq.

[23] *Commentary on the Additional Protocols*, Protocol I, Art. 91, p. 1056, para. 3656.

[24] This opinion is shared by L. Condorelli/L. Boisson de Chazournes, *op. cit.*, pp. 34-35.

[25] This view is supported by F. Kalshoven, *Constraints on the Waging of War*, ICRC, Geneva 1987, p. 130.

and Protocols. The prime example is the provision for individual criminal prosecution of war criminals—the linchpin of the sanctions structure. Under the Geneva Conventions (Art. 49, 50, 129 and 146 respectively of the First, Second, Third and Fourth Convention) *every Contracting Party* has the right and duty to bring suspected war criminals, regardless of their nationality, before its own courts. This provision underscores the responsibility of the entire international community in combating grave breaches of international humanitarian law. Here it is possible for each member of that community to fulfil its responsibility individually. But neither the Geneva Conventions nor their Additional Protocols rule out the possibility of assigning the task to an international criminal court. At the same time, the State on whose territory a suspected war criminal is found can also extradite him in accordance with the principle *aut dedere aut judicare*. It cannot, however, extradite him indiscriminately to any other State party to these instruments, but only to one which is "a Party concerned" in a particular way by the violation in question and can provide sufficient incriminating evidence against him. Article 88 (2) of Additional Protocol I emphasises the particular status of the State on whose territory the alleged offence has occurred. Both this State and the State which can present sufficient incriminating evidence are normally considered to be specifically concerned, either as a Party to the conflict or as a State whose citizens have been victims of the violation. This also emphasises the particular role of these States in the individual prosecution of war criminals.

Among the measures open to all Contracting Parties are the meetings between Parties provided for in Art. 7 of Protocol I and the joint action laid down in Art. 89.

Investigatory meetings such as those provided for in Article 7 are a specific means of enforcing multilateral treaties which may be found in many branches of international law.[26] They are explicitly described in the Commentary on Art. 7 as a "method of improving the application of this instrument" and linked with Art. 1 and Art. 80 ("Measures for execution").[27] In our consideration of the subject, it is particularly significant that every State party to the Protocol—not only the Parties

[26] Such meetings are provided for in Art. VIII of the Treaty on the Non-Proliferation of Nuclear Weapons and Art. VIII of the Convention on the Prevention of Military or any Other Hostile Use of Environmental Modification Techniques, among many other treaties.

[27] See *Commentary on the Additional Protocols*, Protocol I, Art. 7, p. 104, para. 264.

to the conflict or the protecting powers—is entitled to initiate the procedure. This increases the interest of each Party in the implementation of the Conventions and Protocols. The procedure is confined to "general problems concerning the application of the Conventions and Protocols". Individual violations and situations governed by other provisions would therefore not come within the purview of such meetings.[28] However, failure to comply with international humanitarian law would unquestionably be regarded as a "general problem". The issue of better general prevention and repression of violations therefore certainly belongs to the range of subjects which can be dealt with at such meetings.

The fact that serious violations of the Conventions and Protocols concern all the States party to those instruments becomes even clearer in Art. 89 of Protocol I, which states that in situations of serious violations the Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.

The subject and content of this provision are in many ways linked to important problems of enforcing multilateral treaties which give rise to obligations of a multilateral nature. The key question here is how the Contracting Parties as a whole, and especially those not directly concerned by a grave violation, can react to such violations.

Under general international law, certain restrictions exist on the taking of countermeasures: legality, advance notice and proportionality. In addition, international humanitarian law lays down particular prohibitions on reprisals. These apply both to the State directly concerned and to the international community as a whole. One of these is the prohibition on reprisals against protected persons and objects, an express provision of the Conventions and Protocols.[29]

A significant fact for our analysis is that the prohibition on taking measures against protected persons and objects—even when those measures are a reaction to violations committed by the other side—is closely linked to the multilateral character of humanitarian obligations.[30] Such reprisals are prohibited because when the injured State in turn suspends the same obligation as the one originally violated, or

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[28] *Idem*, p. 106, para. 274.

[29] *Idem*, pp. 982-987 and the bibliography on p. 973.

[30] This view is supported by J. Pictet, *Commentary on the First Geneva Convention, op. cit.*, p. 345 et seq.; J. de Preux, "The Geneva Conventions and Reciprocity", in *International Review of the Red Cross*, No. 244, January-February 1985, p. 25 et seq.; L. Condorelli and L. Boisson de Chazournes, *op. cit.*, pp. 19-22; G. Abi-Saab, *op. cit.*, (footnote 11), pp. 267 and 280.

another associated obligation, innocent people become the victims of inhuman treatment and the injury done to protected persons and objects becomes even greater.[31] This also applies *mutatis mutandis* to other multilateral norms creating multilateral obligations which do not represent the sum of the Parties' individual interests but, in the words of the International Court of Justice, are the expression of the common consent of the Parties,[32] such as the obligations of States in the area of human rights and environmental protection.[33]

Experts in international law disagree about whether, in addition to the prohibition of reprisals which is equally binding for all Parties, there are other principles guiding the use of countermeasures which particularly apply to States indirectly concerned. We are dealing here above all with the relationship between the treaty-based enforcement system and the countermeasures under general (customary) law, and between collective and individual measures.

An opinion widely found in Western literature on international law is that multilateral obligations and the fact that all Parties are concerned when a violation is committed mean that every State can take any measure which is legal under *general international law* and does not constitute a prohibited reprisal.[34]

In my opinion, the Geneva Conventions and their Additional Protocols leave no doubt that the multilateral obligations structure in no way implies that the Parties automatically have uniform claims and entitlements. The status of an individual State directly concerned by a violation is in marked contrast to that of the other Contracting Parties which are indirectly concerned by the violation. They are concerned solely because of the multilateral nature of the violated provision and because of the injury to the common interests of the Parties *as a whole*, that is, an injury to that *community*. The reactions of those States,

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[31] See the position taken by the German Democratic Republic at the 1974-77 Diplomatic Conference, CDDH/I/SR.47, Vol. IX, p. 71, para. 23, and that of Norway, *ibid.*, p. 75, para. 44.

It should, however, be pointed out that the degree of reciprocity in the so-called "Law of Geneva" and "Law of The Hague" can vary, although there is "a clear tendency" in international humanitarian law as a whole to eliminate considerations of reciprocity.

[32] See "Reservations to the Convention on Genocide", Advisory Opinion: ICJ *Reports* 1951, p. 23.

[33] See K. Sachariew, *op. cit. supra* note 9, p. 93; in the same vein, Art. 11, Part. II of the ILC draft articles on State responsibility, A/CN.4/389, p. 21.

[34] See, as one example among many, M. Hanz, *Zur völkerrechtlichen Aktivlegitimation zum Schuzte der Menschenrechte, Europarecht — Völkerrecht*, Vol. 8, Munich 1985, particularly p. 45 et seq.

which are concerned only in their capacity as members of the above-mentioned community, must—in accordance with the nature of the violated obligation—be based above all on the procedures laid down in the said instruments and on collectively decided action.[35] For the application of the Conventions and Protocol I, this first means that indirectly concerned States must take action within the framework of the measures set out in those instruments. Article 89 of Protocol I and the other relevant enforcement provisions offer these States a wide range of possibilities, at the same time indicating certain limits.

Among the measures which may be taken individually or jointly by indirectly concerned States are, under Article 89, diplomatic and legal action against the offending State,[36] provided that it is in accordance with the United Nations Charter, or other special action of a humanitarian nature taken at the recommendation of a "meeting of the High Contracting Parties" (Art. 7, Protocol I)[37] or in conjunction with the competent UN bodies. One such action to which every State is, of course, entitled is the criminal prosecution or extradition of individuals who have committed grave violations of international humanitarian law and the right, under Art. 35, para. 1 and 2 of the UN Charter, to bring to the attention of the Security Council or the General Assembly any violation of international humanitarian law likely to endanger peace. One measure which is extremely effective from the humanitarian point of view and can be taken either individually or collectively by States is support for the work of the ICRC and other neutral aid organizations.[38] This is especially important on the rare occasions when the ICRC makes a public appeal for such support.[39]

Conversely, it is doubtful whether individual States can apply economic or other sanctions against those guilty of violations of the Conventions and Protocols. It would seem necessary that there be a

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[35] See K. Sachariew, *op. cit.* (footnote 9), p. 99 et seq. and p. 103 et seq.; see also W. Riphagen's commentary in Art. 11, Part II of the ILC draft articles on State responsibility, *op. cit. supra* note 33, p. 23, para. 5.

[36] The 1972 conference of government experts drew up a draft article expressly providing for the use of such measures. This draft was not, however, considered at the Diplomatic Conference. See the *Report on the work of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, ICRC, Geneva 1972, pp. 184-185. "Diplomatic or legal measures" are also mentioned in para. 46, p. 37 of the section dealing with Art. 1 of Protocol I in the *Commentary on the Additional Protocols, op. cit.*

[37] This view is supported by K. Obradović, *op. cit. supra* note 16, p. 490.

[38] *Ibid.*, p. 491 et seq.

[39] See footnote 14.

collective decision within the UN framework or the community of States party to those instruments to do so.[40] On no account should the ideals involved in the enforcement of international humanitarian law be misused as a pretext for one-sided, politically motivated action. As we have already seen, the multilateral character of the obligations offers no justification for such unilateral "sanctions".[41] On the contrary, multilateral obligations require collective action by the contracting Parties as a whole or collectively agreed action by the individual Parties. The requirement, in the event of a violation, "to act ... in co-operation with the United Nations and in conformity with the United Nations Charter" (Art. 89, Protocol I) is a clear allusion to the primarily institutional and collective nature of the action which can be taken by indirectly concerned States. The discussions at the Diplomatic Conference indicated that this provision was felt to be a restriction on the possibilities for indirectly concerned States to react to violations.[42] This is confirmed in the position taken by the Syrian representative. The Syrian delegation (one of the proponents of Art. 89) felt that the measures under Art. 89 are restricted to the action provided for by the UN Charter and can be taken only with the consent of the UN General Assembly or Security Council.[43] I, too, regard this passage of the text as a safeguard against abuse and interference. In this respeect, Art. 89 of Protocol I is related not only to Art. 56 of the UN Charter but also to the enforcement systems in other multilateral treaties with similar safeguarding provisions.[44]

V. The standpoint and practice of States

Establishing State practice regarding collective sanctions and other measures open to indireclty concerned States is an extremely complicated affair. Examples of neutral States taking public action to counter violations of international humanitarian law are very rare. Neutral

[40] See Y. Sandoz, *op. cit. supra* note 14, p. 167.

[41] This view is not shared by L. Condorelli and L. Boisson de Chazournes, *op. cit. supra* note 1, p. 32.

[42] See Indonesian statement in the *Official Records* of the 1974-1977 Diplomatic Conference, *op. cit. supra* note 22, Vol. IX, SR.73, p. 447.

[43] *Ibid.*, Vol. VI, p. 348, para. 53.

[44] Such as the enforcement measures under Art. XXII of the 1980 Convention on the Conservation of Antarctic Marine Living Resources which can be taken with regard to other States and must be "consistent with the Charter of the United Nations".

States, when they do act, usually confine themselves to confidential diplomatic moves, which can only be inferred from other indications.[45]

Important information in this connection is contained in the replies sent by governments to the ICRC's 1972 "Questionnaire concerning measures intended to reinforce the implementation of the Geneva Conventions".[46] Of particular significance for us are the replies to Question 2: "Can and should the States party to the Geneva Conventions exercise supervision collectively, pursuant to Art. 1 common to those Conventions? If so, what procedure might be envisaged?"

Although the term used is "supervision", the questionnaire clearly also dealt with steps which the Contracting Parties can take in the event of violation.

A wide spectrum of views is revealed. It ranges from a categorical rejection (Argentina, Brazil) of any action by States not involved in the conflict to unreserved acceptance (Belgium and Jordan for example) of action taken collectively or individually by the Contracting States.

Nevertheless, the majority of States felt that under Article 1 the Parties are entitled to take individual or collective, diplomatic or other political steps to bring about compliance by the Parties to a conflict with the rules of international humanitarian law and to invoke the competent UN bodies. Several States (Sweden for example) felt that the methods available to the Parties for the enforcement of the Geneva Conventions were the expression of the Parties' collective interest. It was therefore considered most suitable to have organized or institutionalized mechanisms for the implementation of measures (Finland, Spain). Norway and Switzerland emphasized the special role played by the UN and the ICRC respectively.

Thus, to judge by the views expressed and the practice of States, although there is a general tendency to recognize a collective responsibility on the part of the international community for enforcing international humanitarian law, a rather restricted interpretation is placed on the resultant rights of indirectly concerned States to take action, and

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[45] Switzerland and Austria, for instance, are believed to have appealed belligerents in the Gulf war to respect the Geneva Conventions. See M. Veuthey, "Pour une politique humanitaire" in *Studies and essays in honour of Jean Pictet*, op. cit. p. 1002.

Several other examples are given by A. Cassese, "Remarks on the present legal regulation of crimes of States" in *Le droit international à l'heure de sa codification. Etudes en honneur de R. Ago*, Milan 1987, Vol. III, p. 60 et seq.

[46] *Questionnaire concerning measures intended to reinforce the implementation of the Geneva Conventions of August 12, 1949, replies sent by governments*, ICRC, Geneva 1973, p. 19 et seq.

such action is taken only in exceptional cases. States evidently have more confidence in measures adopted by collective decision (within the framework of the UN).

VI. Conclusion

Present-day international law offers many interlinked possibilities for States to take part in the important task of enforcing international humanitarian law. A sound basis exists at various levels for combating violations thereof—by treating them as international crimes, by repressing them via internal legislation, and by taking action within the framework of the executory provisions and sanctions laid down by the Geneva Conventions and their Additional Protocols.

At the same time it must be observed that these legal mechanisms for the enforcement of international humanitarian law are no panacea. They have many weak points and are often unable to prevent grave violations. But we must face the fact that a perfect enforcement system —whether for humanitarian or any other branch of international law—is not possible.

Significant improvement in the implementation of international humanitarian law will be possible only if the international community manages to bring about a profound change in international relations, radically reducing the use of force to resolve conflict and ultimately eliminating recourse to force altogether. A key prerequisite for such an achievement will be an international security system which includes humanitarian guarantees.

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