

# The penal repression of violations of international humanitarian law applicable in non-international armed conflicts

by Denise Plattner

## 1. Introduction

At a time when non-international armed conflicts are increasing in number, it may be interesting to examine the implementation of international humanitarian law (IHL) applicable in these conflicts. To ensure its respect in international armed conflict, this law provides for the penal repression of certain violations. Used with discernment, especially for preventive purposes, this is undoubtedly an effective measure. There is good reason, therefore, also in view of the work of the International Law Commission (ILC) on a draft code of crimes against the peace and security of mankind,<sup>1</sup> to see whether penal repression of the violations of international humanitarian law applicable in non-international armed conflicts should be promoted.

An appropriate answer cannot be given without first reviewing the mechanisms for repression of violations of IHL applicable in international armed conflicts so as to grasp their legal, theoretical and practical implications.

---

<sup>1</sup> Cf. *Report of the International Law Commission at the forty-fourth session of the United Nations General Assembly*, document A/44/10. It must be noted that the first draft of the provision relating to war crimes contained in this document deals only with international armed conflicts; assimilated to them are conflicts in terms of Art. 1, para. 4, of Additional Protocol I.

## 2. The penal repression of violations of international humanitarian law applicable in international armed conflicts

In the traditional sense, international law is the law between States. Sanctions are effected only within the sphere of international relations and in accordance with the rules governing those relations.

In this respect IHL is an exception, as it provides for individual penal responsibility of the State agent guilty of certain violations. Hence, in a situation of international armed conflict, failure to comply with the rules of conduct laid down by IHL entails a series of legal consequences prescribed by international law and designed to bring the guilty party to judgment. These legal consequences constitute an almost foolproof system for the penal repression of certain violations of IHL.

Firstly, it must be pointed out that not all violations of IHL involve international penal liability. The Geneva Conventions of 1949 and Additional Protocol I of 1977 list the acts which according to them incur penal sanctions. Qualified as “grave breaches”, they come within the category of war crimes.<sup>2</sup>

In listing these grave breaches the IHL instruments specify the forms of conduct involving international penal responsibility. They thereby follow the lines of penal law, making a veritable indictment of acts that constitute war crimes. According to the First, Second, Third and Fourth Geneva Conventions (Articles 50, 51, 130 and 147 respectively), the following acts constitute grave breaches of IHL:

### *a) Breaches specified in all four Geneva Conventions:*

- wilful killing,
- torture,
- inhuman treatment,
- biological experiments,
- wilfully causing great suffering,
- causing serious injury to body or health,
- destruction and appropriation of property not justified by military necessity (with the exception of Art. 130 of the Third Convention).

---

<sup>2</sup> Cf. Art. 85, para. 1, of Additional Protocol I, which assimilates grave breaches to war crimes.

***b) Breaches specified in both the Third and Fourth Geneva Conventions:***

- compelling a prisoner of war or a civilian protected by the Fourth Geneva Convention to serve in the armed forces of the hostile Power,
- wilfully depriving a prisoner of war or a civilian protected by the Fourth Geneva Convention of the right to fair and regular trial, prescribed in the Third and Fourth Geneva Conventions.

***c) Breaches specified in the Fourth Geneva Convention:***

- unlawful deportation or transfer,
- unlawful confinement,
- taking of hostages.

The acts listed above constitute grave breaches only if they are committed against persons to whom the legal definition of protected persons in the terms of any one of the Geneva Conventions applies. To qualify as a protected person requires having the nationality at least of a foreign State, if not of an enemy State. This point must be borne in mind by anyone wishing to transpose to non-international armed conflicts the IHL system applicable in international armed conflicts.

Under Article 85 of Additional Protocol I, to which 97 States are party,<sup>3</sup> grave breaches are:

***a) The following acts, when committed wilfully and causing death or serious injury to body or health:***

- making the civilian population the object of attack,
- launching an indiscriminate attack, or an attack against works or installations containing dangerous forces in the knowledge that such an attack will cause excessive damage to civilian objects in relation to the military advantage anticipated,
- making non-defended localities and demilitarized zones the object of attack,
- making a person the object of attack in the knowledge that he is *hors de combat*,
- making perfidious use of the protective emblem of the red cross or red crescent.

---

<sup>3</sup> Status on 31 August 1990.

***b) The following acts, when they are committed wilfully and in violation of the Conventions or the Protocol:***

- the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory,
- any unjustifiable delay in the repatriation of prisoners of war or civilians,
- practices of *apartheid* and other inhuman and degrading practices based on racial discrimination,
- attacking and causing large-scale destruction of clearly recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and which are under special protection.

***c) Acts constituting grave breaches of the Geneva Conventions, when committed against:***

- persons in the power of an adverse Party, protected under Articles 44, 45 and 73 of the Protocol,
- the wounded, sick or aliens belonging to the adverse Party who are protected by the Protocol,
- medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by the Protocol.

The war crimes listed in the Geneva Conventions and Additional Protocol I include almost all the acts qualified as such in previous legal instruments, particularly in the one which served as the basis for the London Agreement of 8 August 1945 on the trial of leading Nazi war criminals.<sup>4</sup>

International penal responsibility is inconceivable without an obligation for the States party to the said IHL treaties to bring the authors of acts constituting grave breaches before their own courts.

For this purpose the Geneva Conventions make it mandatory to enact national legislation providing for “*effective penal sanctions*” (Articles 49, 50, 129 and 146 of the First, Second, Third and Fourth Geneva Conventions respectively). Thus, whereas the legal norm is established by specifying offences comprehensively enough to satisfy

---

<sup>4</sup> Yves Sandoz, “Penal Aspects of International Humanitarian Law”, in *International Criminal Law*, vol. I, *Crimes*, Chérif Bassiouni, ed., New York, 1986, pp. 209-232, at p. 225 ff.

the principle *nullum crimen sine lege*, the choice of sanctions is left to the States, which can set up a penal system in line with their own national legislation. They must, however, duly act on their competence in this respect so that the mechanism of international penal responsibility can be fully brought into play.

Whilst the obligation to provide for penal sanctions must be fulfilled by States on becoming party to the said instruments, they are under an obligation to repress a war crime from the time that it is committed. Furthermore, the States must supply each other with all information needed for the prosecution of grave breaches, give mutual legal assistance, respond favourably to requests for extradition, or, if their national legislation does not allow extradition, they must bring the perpetrator before their own courts.

On this subject, international humanitarian law has two notable characteristics. Firstly, it creates universal legal competence in that States are entitled by IHL to prosecute an alien national on their territory who has committed a war crime against alien nationals in other countries. Secondly, it renders mandatory the exercise of this competence to prosecute and bring to trial, since the Conventions stipulate that “*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*” (Articles 49, 50, 129 and 146 of the First, Second, Third and Fourth Geneva Conventions respectively; the underlinings are the author’s).

This universal competence must not, however, be confused with repression, which remains a national competence; the international element is essentially normative.

Under the Geneva Conventions, persons accused of grave breaches “*shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*” (Article 146 of the Fourth Geneva Convention; see also Articles 50, 51 and 130 of the First, Second and Third Geneva Conventions respectively). This protection applies to all accused persons, regardless of their status or the time of their trial.<sup>5</sup> It shows, if need be, the scope and autonomy of the procedure laid down by IHL for the punishment of war criminals.

---

<sup>5</sup> Commentary published under the general editorship of Jean S. Pictet, IV, Geneva Convention relative to the Protection of Civilian Persons in Time of War, ICRC, Geneva, 1958, p. 595.

### 3. The penal repression of violations of international humanitarian law applicable in non-international armed conflicts

The international humanitarian law applicable in non-international armed conflicts can be found under Article 3 common to all four Geneva Conventions of 1949 and in Additional Protocol II of 1977, to which 87 States are party.<sup>6</sup>

Since Additional Protocol II comprises only twenty-eight provisions, ten of which are final provisions, the body of rules concerning this category of conflicts is relatively slight. However, these rules reflect the essential provisions of IHL applicable in international armed conflicts. The differences, for example the absence of any prisoner-of-war status which would confer immunity on those fighting against the established government, sometimes stem from *de facto*, but also from *de jure* characteristics of non-international armed conflicts.

The provisions applying specifically to non-international armed conflicts contain no other obligation relative to the implementation of IHL other than that of dissemination, which is laid down in Article 19 of Protocol II.

Consequently, IHL applicable to non-international armed conflicts does not provide for international penal responsibility of persons guilty of violations. Thus to examine the advantages and difficulties involved in organizing the international penal repression of violations of IHL applicable in non-international armed conflicts is to enter the realm of *lex ferenda*.

Our projection is limited, however, by the body of law currently in force, i.e. IHL applicable in international armed conflicts.

Certain aspects of the plan to set up an international court of justice, a plan linked to the draft code of crimes against the peace and security of mankind, do in fact go beyond the scope of international humanitarian law alone. This holds true for IHL as a whole, though we have chosen to concentrate here on IHL applicable in non-international conflicts.

This part of IHL is still at times considered a poor relation of the law of armed conflicts. Respect for it would doubtless be enhanced by making violations of the rules of IHL applicable in non-international armed conflicts subject to penal sanctions under international law. The attribution of international penal responsibility to persons guilty of

---

<sup>6</sup> Status on 31 August 1990.

violating the rules applicable to internal armed conflicts would thus not only have a dissuasive effect, but would also stimulate all other measures conducive to respect for IHL.

It would serve no purpose, however, to ignore the objections that would be raised against the institution of such a responsibility.

The IHL treaties comprise two categories of rules which can be distinguished according to a time factor. The first kind apply as soon as the IHL treaty comes into force in the State concerned (under Article 23, para. 2, of Additional Protocol II, six months after the deposit of its instruments of ratification or accession). These rules require the State to take a certain number of preparatory measures in peacetime to ensure that IHL is respected in the event of an armed conflict. The other rules lay down a code of conduct to be observed when an armed conflict actually breaks out. Unlike the former, these are substantive rules.

As we saw in the previous chapter, the international penal repression of war crimes takes the form of a series of obligations vis-à-vis the States party. Those obligations relating to the adoption of appropriate penal legislation must be implemented as soon as the treaty enters into force. Those concerning repression must be fulfilled by every State from the moment a war crime is committed, whether or not it is a party to the conflict.

In the case of IHL applicable in non-international armed conflicts, the responsibility for taking preventive measures rests with the State party to the relevant treaties and, in practice, its organs. Problems arise when a non-international armed conflict breaks out and concern the repression of IHL violations. It is difficult to conceive of IHL giving insurgents the authority to prosecute and try the authors of violations. However, to attribute legal competence solely to the government in power could open the way to abuse. One solution would be to authorize the repression of violations only after the end of hostilities. This would have obvious advantages as regards respect for the basic legal guarantees and compliance with the IHL stipulation that trials be conducted by an independent and impartial court. The trial of war criminals *after* the hostilities was moreover proposed by the ICRC quite some time ago, when the Geneva Conventions of 1949 were being drawn up.<sup>7</sup>

---

<sup>7</sup> *Commentary published under the general editorship of Jean S. Pictet, III, Geneva Convention relative to the Treatment of Prisoners of War, ICRC, Geneva, 1960, pp. 625-626.*

To suspend the effects of individual international responsibility until the end of hostilities would also help to dispel fears that such responsibility implies recognition of the insurgents as having international personality. This fear is certainly unjustified. Firstly, international penal responsibility entails sanctions not only for acts committed by organs of the State, but also for criminal offences by individuals. Secondly, according to legal doctrine insurgents are bound by IHL applicable in non-international armed conflicts not as a "party", but as individuals.<sup>8</sup> Hence, individual international responsibility for violations of IHL applicable in non-international armed conflicts does not necessarily imply that the rebel "party" is also responsible. It has, however, been said that the responsibility of the State could be involved even though the rebel government does not become the new government, if, either before or after, the State was negligent in preventing or repressing illegal activities.<sup>9</sup> From this point of view the State could be held responsible for a violation of IHL applicable in non-international armed conflicts on grounds of having failed to prevent or repress the said violation. This would be in perfect agreement with our proposed construction.

Another difficulty lies in the fact that persons who take up arms against the established government are subjects of common law. If the obligation to try authors of IHL violations takes effect only at the end of the conflict, the insurgent who has not respected IHL is in a better position than the one prosecuted for simply fighting against the established government. This disparity is so shocking that one wonders whether the introduction of a system of international penal repression in non-international armed conflicts is compatible with the legal situation of captured insurgents as it stands today. This objection could possibly be seen in a different light by taking into account the way governments proceed when faced with a situation of internal armed conflict. Most of the time it seems that instead of condemning the insurgents they intern them,<sup>10</sup> and the internal armed conflict usually

---

<sup>8</sup> Cf. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of August 12, 1949*, ed. by Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, ICRC, Geneva, 1987, p. 1345, para. 4444; Georges Abi-Saab, "Non-international armed conflicts", in *The International Dimensions of Humanitarian Law*, UNESCO, Paris, 1988, pp. 217-239, at p. 231.

<sup>9</sup> On this subject see the opinion of Mr. Roberto Ago, special rapporteur, in his report on the responsibility of States, *Yearbook of the International Law Commission*, 1972, vol. II, p. 130, para. 156.

<sup>10</sup> Cf. Michel Veuthey, *Guérilla et droit humanitaire*, Geneva, 1983, p. 217.



ends with a national reconciliation which includes an amnesty in favour of those who have fought.

By requiring that non-international conflicts must have ended before penal repression is implemented, IHL could avoid it being confined to persons belonging to the enemy camp. The risk would nonetheless remain of only those who fought for the lost cause being prosecuted, and seems to be inherent in any mechanism creating an international penal responsibility for acts committed in situations of armed conflict, as long as repressive measures are applied by national organs. This risk has prompted the main criticisms of the system set up by the Geneva Conventions to govern international armed conflicts, which is accused at times of favouring the justice shown by the victor to the vanquished. Although this objection cannot be overlooked, attention must be drawn to the fact that the only other alternative, as the problem stands, would be to eliminate international penal responsibility for violations of IHL.

As mentioned above, IHL applicable in international armed conflicts creates universal legal competence for the repression of war crimes. In the event of a non-international armed conflict, States not party to it would most probably be little inclined to exercise this competence for fear of being accused of interfering in the internal affairs of the State in which the conflict has broken out, even though compliance with IHL can never constitute an unfriendly act towards another State. In actual fact, States not party to the conflict should, too, repress violations of IHL and prosecute both insurgents and members of government armed forces accordingly.

In the light of these considerations, a universal competence which comes into play only at the end of an internal armed conflict would seem more acceptable and more likely to be put into actual effect. Some third States might, it is true, be tempted to prosecute only former insurgents, or, conversely, only members of the government armed forces. This danger nevertheless also exists in the event of an international armed conflict, when States may be more assiduous in prosecuting the war criminals of one belligerent only, most probably the one defeated.

The question arises in this connection whether international penal responsibility must necessarily go hand in hand with universal competence to punish violations. The answer would seem to be affirmative,<sup>11</sup> for both political and legal reasons. In the absence of an obligation to

---

<sup>11</sup> Chérif Bassiouni, "Characteristics of International Law Conventions", in *International Criminal Law*, vol. 1, *Crimes*, op. cit., pp. 1-3, at p. 7.

prosecute or extradite (*aut dedere aut judicare*)<sup>12</sup> to give effect to this universal competence, the fact that the person suspected of a violation is outside the State authorized to prosecute him by virtue of the principle of territoriality would prevent that State from implementing its international penal responsibility. Moreover, the fact that such universal competence exists is evidence that the State's interest in repressing violations stems from international and not domestic law.<sup>13</sup>

We have seen that the Geneva Conventions give procedural guarantees to persons charged with grave breaches of IHL applicable in international armed conflicts. A similar type of protection should also be provided for persons wanted for violations committed during an internal armed conflict. For the sake of consistency, such guarantees should be those provided in non-international armed conflicts rather than those of the Third Geneva Convention. The legal protection of a person prosecuted for violations committed during a non-international armed conflict should not, however, differ from the protection granted by IHL to a person wanted for acts perpetrated during an international armed conflict.

IHL applicable in international armed conflicts distinguishes between breaches qualified as grave and entailing international penal responsibility, and other violations of IHL. The same system could exist for the international penal repression of violations of IHL applicable in non-international armed conflicts.

Violations entailing international penal repression should then be specified on the basis of the list of grave breaches of IHL applicable in international armed conflicts. Only those breaches which are tantamount to a violation of the code of conduct laid down by IHL for non-international armed conflicts should be taken over. It is evident, however, that almost all the breaches common to the four Geneva Conventions can be included. Naturally, when defining the said violations, only the relevant material elements of grave breaches of IHL applicable to international armed conflicts should be taken into account; the element conferring the status of protected person under the four Geneva Conventions should be disregarded.

---

<sup>12</sup> On this subject, see Kamen Sachariew, "States' entitlement to take action to enforce international humanitarian law", in *International Review of the Red Cross*, No. 270, May-June 1989, pp. 177-195, at pp. 179-180.

<sup>13</sup> The International Court of Justice, in its judgment of 27 June 1986 concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), considered that the observance of rules of conduct laid down by Art. 1 was likewise mandatory in non-international armed conflicts (cf. *Reports of Judgments, Advisory Opinions and Orders*, 1986, p. 129, para. 255).

## 4. Prospects and conclusions

The rules establishing international individual responsibility for violations of IHL applicable in non-international armed conflicts are yet to be made. At present, failure to punish a person guilty of violating this law does not directly contravene a norm of international law. The various duties which stem from the obligation to respect and ensure respect for IHL laid down in Article 1 common to all the Geneva Conventions.<sup>14</sup> can, however, help to establish such a norm. These duties consist in a general obligation to take steps at national level to promote respect for IHL during armed conflicts and performance of the duties specifically listed by IHL applicable in international armed conflicts.<sup>15</sup>

The only obligation explicitly stipulated in IHL applicable in non-international armed conflicts is that the law must be disseminated (Article 19 of Protocol II). However, this is no reason for States not to be obliged to include in their legislation the “laws and customs of war”, as the hallowed phrase goes, along with the sanctions applicable if the latter are violated.

Moreover, it is difficult to conceive of having different sanctions for substantially identical offences, according to whether the armed conflict is international or not. The States’ international obligations to repress the most serious violations of international human rights law<sup>16</sup> can also help to repress violations of IHL, insofar as the rules arising from these two branches of international law condemn the same behaviour.

Whilst the mechanism of international penal repression does create individual responsibility stemming not from national but from international law, the ultimate purpose of repression must be borne in mind. Its main interest as regards respect for IHL lies in its dissuasive and hence preventive capacity.

In this respect the action taken by the national authorities, legislative or administrative, is of prime importance.

---

<sup>14</sup> Yves Sandoz, “Implementing international humanitarian law”, in *The International Dimensions of Humanitarian Law*, UNESCO, 1988. pp. 259-282, at pp. 261-262.

<sup>15</sup> For a description of these duties, see in particular Sandoz, *op. cit.*

<sup>16</sup> In this respect the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, of 10 December 1984, is of particular interest.

The creation of international individual responsibility for violations of IHL applicable in non-international armed conflicts must, if that responsibility is not to remain a dead letter or lead to abuse, be teamed with national measures to implement IHL. International law and domestic legislation will then, by bringing their mutual influence to bear, be able to improve the mechanisms designed to ensure respect for IHL in times of armed conflict, as well as the effectiveness of its rules.

**Denise Plattner**

---

**Denise Plattner**, born in 1952 in Geneva, has a postgraduate degree in law (specializing in public law) from the University of Geneva (1977). After obtaining her law degree in 1974, she was an assistance in the Department of Constitutional Law at the Faculty of Law in Geneva. She joined the International Committee of the Red Cross in Geneva in 1978 as a legal delegate in the Operations Department, and carried out several missions with ICRC delegations. Since 1987, she has been a member of the ICRC Legal Division.