INCREASING RESPECT FOR INTERNATIONAL HUMANITARIAN LAW IN NON-INTERNATIONAL ARMED CONFLICTS

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FOREWORD

The most widely prevalent type of armed conflict today is non-international in nature. It involves hostilities between government armed forces and organized non-State armed groups or is carried on among members of such groups themselves. A defining feature of non-international armed conflict is that it is usually waged by persons familiar with each other's political and economic history, social organization, culture and customs. Unfortunately, it is characterized also by the extreme brutality that so often accompanies fighting among those with a common or shared background.

International humanitarian law (IHL) provides the normative framework against which the behaviour of parties to non-international armed conflicts must be assessed. As far back as 1949, States agreed, in Article 3 common to the four Geneva Conventions, to abide by certain minimum standards in such wars. The provisions of common Article 3 bind all parties to non-international armed conflicts, including organized non-State armed groups. Common Article 3, which is said to reflect elementary considerations of humanity, has since been supplemented by a number of other treaty provisions, and by customary humanitarian law governing the conduct of parties to non-international armed conflicts.

Drafting laws is just the first step in ensuring protection for those who do not take part in hostilities, such as civilians, or those who no longer do so, such as wounded or sick members of the armed forces and armed groups. The real challenge has always been to make the rules known to the opposing sides and to ensure that they are applied. This publication aims to provide States and armed groups, as well as humanitarian and other actors working with parties to non-international armed conflicts, with suggestions for ways in which the law could be better implemented.

One should have no illusions that there are any legal tools or policy arguments that can avail in those instances when the law is being systematically flouted, if the political will to abide by it is lacking. The many different causes of non-international armed conflicts, and the diversity of the participants, also means that those hoping to assist the parties involved in respecting the law must bring to their task patience, wisdom and knowledge. Experience has shown, however, that where the requisite conditions exist, certain legal tools and policy arguments may help to persuade conflicting parties to better comply with the rules.

This publication sets out a range of legal tools and policy arguments that the International Committee of the Red Cross (ICRC), and others, have employed with both States and organized armed groups to improve their compliance with the law. We recommend them to a wider audience not because they have always worked but because — under appropriate conditions — some, or all of them, can and should be tried. In addition to its own continuing endeavours to increase respect for the law — by applying the strategies outlined in this text — the ICRC remains firmly committed to further exploring ways in which persons affected by non-international armed conflicts can be better protected.

Dr Jakob Kellenberger
President
International Committee of the Red Cross

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ICRC mandate: Promotion and faithful application of IHL

Article 3 common to the four Geneva Conventions of 1949 provides that, in non-international armed conflicts, "an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict." By making this formal offer of services, the ICRC declares itself available for carrying out the tasks assigned to it under humanitarian law.

The ICRC's efforts in non-international armed conflicts are guided by its institutional mission: to protect the lives and dignity of victims of armed conflict and to endeavour to prevent suffering by promoting and strengthening humanitarian law. IHL is an essential tool in discharging this mission. If respected by the parties to a conflict, this body of law provides essential protection for those who are affected by situations of armed conflict.

Within the ICRC's broad role in armed conflicts — "to ensure the protection of and assistance to military and civilian victims of such events"[1] — respect for IHL is crucial. This is affirmed by the Statutes of the International Red Cross and Red Crescent Movement, which describe the ICRC's mandate as working for "the faithful application of international humanitarian law"[2] and towards "the understanding and dissemination of international humanitarian law."[3]

1 Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross and Red Crescent in Geneva in October 1986, Article 5(2)(d).

2 *Id.*, Article 5(2)(c).

3 *Id.*, Article 5(2)(g).

INTRODUCTION

Most armed conflicts today are non-international in nature. They take place within the borders of States, and are waged between a State and organized non-State armed group(s) or among such groups themselves.

The daily life of many civilians caught up in these situations is ruled by fear or the threat of destruction and extreme suffering. The deliberate targeting of civilians, the destruction of civilian property and looting, the forced displacement of populations, the use of civilians as human shields, the destruction of infrastructure vital to civilian populations, rape and other forms of sexual violence, torture, indiscriminate attacks: these and other acts of violence are unfortunately all too common in non-international armed conflicts throughout the world.

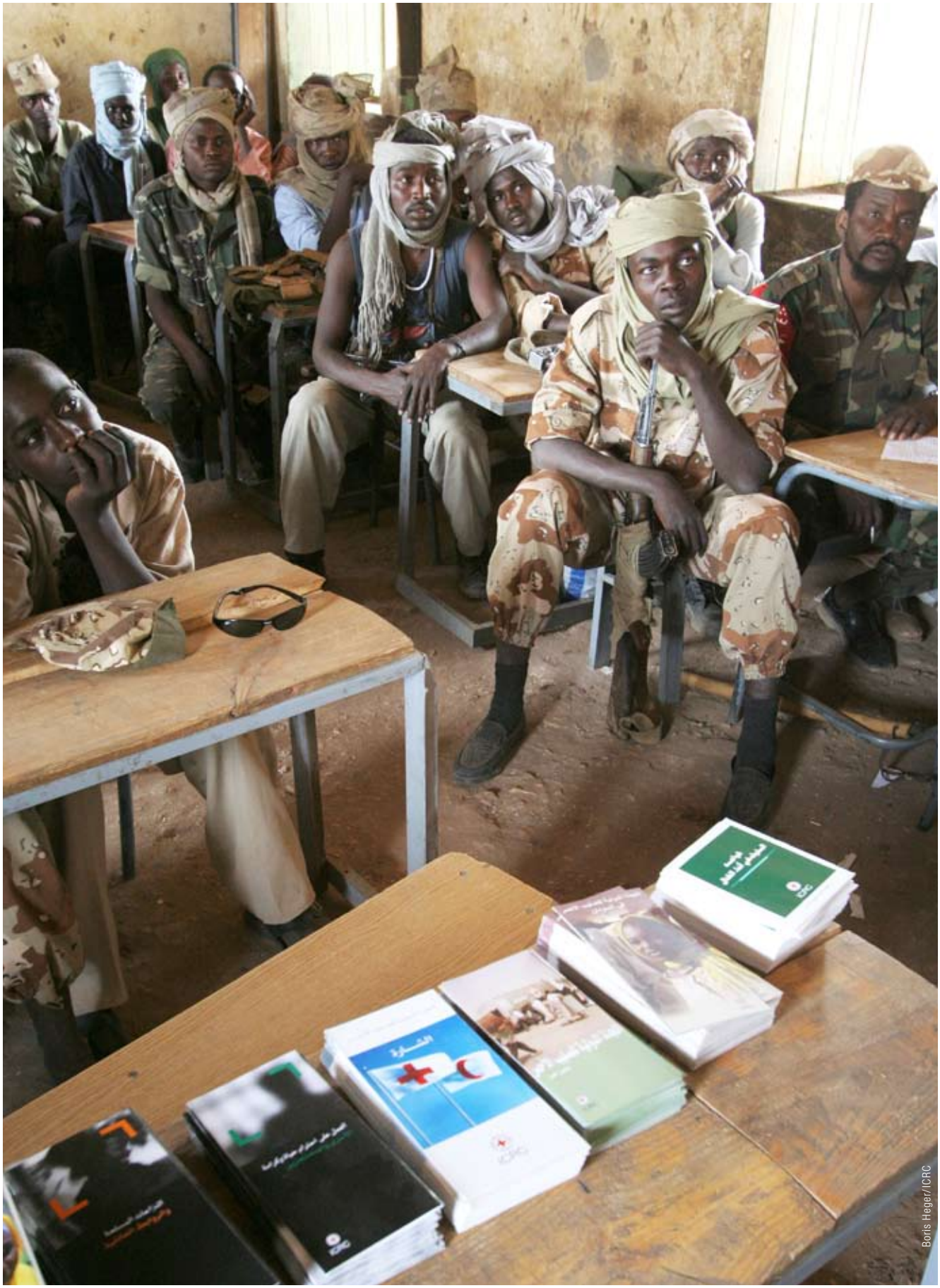
International humanitarian law (IHL) is a body of law that provides essential protection for those directly affected by an armed conflict, if it is respected by the parties to that conflict. Where IHL is not respected, human suffering increases and the consequences of the conflict become more difficult to repair.

What can be done to bridge this gap between good intentions as embodied by the law and the reality of suffering? What can be done to influence the behaviour of warring parties? What are the challenges? What strategies or approaches have proven successful? What lessons can be learnt from practice?

In its field operations, the International Committee of the Red Cross (ICRC) seeks to alleviate and prevent human suffering by — among other means — urging parties to armed conflicts to act in accordance with humanitarian law. This includes regular confidential dialogue with, and representations to, both States and armed groups.

This publication is based on ICRC practice in non-international armed conflicts. It summarizes some of the considerable challenges the ICRC has faced and the lessons it has learnt in its efforts to increase respect for IHL. It also includes an overview of the dissemination activities, the legal tools, and the methods of persuasion that the ICRC has used for improving compliance with humanitarian law.

The "parties" referred to throughout are States or organized non-State armed groups that are party to non-international armed conflicts and therefore bound by international humanitarian law.



Boris Heger/ICRC

INTERNATIONAL HUMANITARIAN LAW IN NON-INTERNATIONAL ARMED CONFLICTS

What rules of IHL are applicable in non-international armed conflicts?

The rules of IHL applicable in situations of non-international armed conflict are found in both treaty and customary law.

Common Article 3 of the 1949 Geneva Conventions specifically applies in the case of conflicts "not of an international character." This means armed conflicts between governments and organized armed groups, or those that take place among such groups themselves. Common Article 3 does not define "armed conflict." However, several criteria have been developed through practice, such as the following:

- The parties to the conflict have to be identifiable, i.e. they must have a minimum of organization and structure, and a chain of command.

- The armed conflict must have a minimum level of intensity. The parties would usually have recourse to their armed forces or to military means. The duration of the violence is another element that has to be taken into consideration.

Therefore, common Article 3 does not apply to situations of internal disturbances and tensions, such as riots and other isolated and sporadic acts of violence.

It is also important to note that common Article 3 expressly states that its application does not affect the legal status of the parties to a conflict.

Common Article 3, which is sometimes referred to as a "treaty in miniature," stipulates the minimum protection that must be afforded to all those who are not, or who are no longer, taking an active part in hostilities (e.g. civilians, members of armed forces of the parties to the conflict who have been captured, are wounded, or have surrendered). It provides for humane and non-discriminatory treatment for all such persons, in particular by prohibiting acts of violence to life and person (specifically murder, mutilation, cruel treatment and torture), the taking of hostages, and outrages upon personal dignity, in particular humiliating and degrading treatment. It prohibits also the passing of sentences and the carrying out of executions without judgment being pronounced by a regularly constituted court providing all judicial guarantees recognized as indispensable. Finally, it imposes an obligation on the parties to collect the wounded and sick and to care for them.


Dominic Sansoni/ICRC

As affirmed by the International Court of Justice in 1986, the provisions of common Article 3 reflect customary international law and represent a minimum standard from which the parties to any type of armed conflict must not depart.[4]

[4] See *Military and Paramilitary Activities In and Against Nicaragua*, 1986 I.C.J. Reports p.114, paras 218 and 219.

Common Article 3

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

   To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

   (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

   (b) taking of hostages;

   (c) outrages upon personal dignity, in particular humiliating and degrading treatment;

   (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Protocol II additional to the four Geneva Conventions, adopted on 8 June 1977, was specifically enacted to apply to certain situations of non-international armed conflict; it strengthened protection beyond the minimum standards contained in common Article 3. Additional Protocol II applies only where it has been ratified by the State. Its scope is more restricted than that of common Article 3: it applies only to conflicts between a State's armed force and "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol" (Article 1, para. 1, of Additional Protocol II).

Like common Article 3, Additional Protocol II provides for the humane and non-discriminatory treatment of all those who are not, or who are no longer, taking a direct part in hostilities. It expands the protection provided by common Article 3, by including prohibitions on collective punishment, acts of terrorism, rape, enforced prostitution and indecent assault, slavery and pillage. It sets out specific provisions and protections for certain categories of persons such as children, persons deprived of liberty for reasons related to the conflict, persons prosecuted for criminal offences related to the conflict, persons who are wounded, sick and shipwrecked, medical and religious personnel, and the civilian population (attacks on civilian populations, starvation as a method of combat, and forced displacement are all prohibited).

A number of **other treaties of humanitarian law** also apply to situations of non-international armed conflict. Among them are the following: the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996 (amended Protocol II to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (CCW)); Protocols I, III, IV and V of the CCW, through paragraph 6 of Article 1 of the CCW, as adopted on 21 December 2001; the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954; and the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999.

Although the existence of so many provisions and treaties may appear to be sufficient, the treaty rules applicable in non-international armed conflicts are, in fact, rudimentary compared to those applicable in international armed conflicts. Not only are there fewer of these treaty rules, but they are also less detailed and, in the case of Additional Protocol II, their application is dependent on the specific situations described above.

The rules of **customary international humanitarian law**, however, fill some important gaps in the regulation of non-international armed conflicts.[5] First, many of the provisions of Additional Protocol II are now considered to be part of customary international law and, thus, binding on all parties to non-international armed conflicts. These rules include the prohibition of attacks on civilians, the obligation to respect and protect medical and religious personnel, medical units and transports, the prohibition of starvation, the prohibition of attacks on objects indispensable to the survival of the civilian population, the obligation to respect the fundamental guarantees of persons who are not taking a direct part, or who have ceased to take a direct part, in hostilities, the obligation to search for and respect and protect the wounded, sick and shipwrecked, the obligation to search for and collect the dead, the obligation to protect persons deprived of their liberty, the prohibition of the forced movement of civilians, and specific protection for women and children.

[5] For more information on customary law, and for a complete description of the rules of IHL applicable in non-international armed conflict as a matter of customary law, see the ICRC study on customary international humanitarian law: Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law,* Volume I: Rules, Cambridge University Press, Cambridge, 2005.

Customary international humanitarian law also goes beyond the rudimentary provisions of common Article 3 and Additional Protocol II. Practice has created a substantial number of additional customary rules relating to the conduct of hostilities (e.g. the distinction between civilian objects and military objectives, the prohibition of indiscriminate attacks and attacks in violation of the principle of proportionality), rules on specifically protected persons and objects (e.g. humanitarian relief personnel and objects, journalists, and protected zones), and rules on specific methods of warfare (e.g. prohibitions of denial of quarter and perfidy).

However, IHL is not the only body of law that guarantees protection for persons in situations of non-international armed conflict. The provisions of **international human rights law** — particularly, non-derogable human rights — are complementary to IHL and also protect those who are vulnerable in such situations. Moreover, **domestic law** — in the State in which a conflict is taking place — often provides additional protections and limits on behaviour, and may provide a framework of safeguards that have to be respected in situations of non-international armed conflict.

Who is bound by humanitarian law in non-international armed conflicts?

All parties to non-international armed conflicts — whether State actors or armed groups — are bound by the relevant rules of IHL.

States are explicitly bound by the treaties to which they are party and by applicable customary law. In addition, Article 1 common to the four Geneva Conventions requires that States Parties must, in all circumstances, not only "respect," but also "ensure respect" for humanitarian law.

Although only States may formally ratify or become party to the various international treaties, armed groups party to a non-international armed conflict also must comply with common Article 3, customary IHL, and, where applicable, Additional Protocol II. The extensive practice of international courts and tribunals and other international bodies affirms this obligation.

As a matter of customary law binding on both States and armed groups, the obligation to "respect" and "ensure respect" for international humanitarian law extends to ensuring respect by other persons or groups acting in fact on their instructions, or under their direction or control.[6]

States not party to an armed conflict are required by common Article 1 to neither encourage a party to violate IHL nor to take action that would assist in such violations. Furthermore, common Article 1 is generally interpreted as requiring States not party to an armed conflict to endeavour — by means of positive action — to ensure respect for IHL by parties to a conflict. This means taking appropriate steps — unilaterally or collectively — against parties to a conflict who are violating IHL and, particularly, intervening with States or armed groups over whom they might have some influence. This is not an obligation to reach a specific result, but rather an "obligation of means" to take all possible appropriate measures in an attempt to prevent or end violations of IHL.

[6] See ICRC study, *op.cit.*, Rule 139.

SPECIFIC CHALLENGES

Actors who seek to engage with the parties to non-international armed conflicts, to improve their compliance with IHL, may face a number of specific challenges.

Diversity of conflicts and parties

Non-international armed conflicts differ enormously. They range from those that resemble conventional warfare, similar to international armed conflicts, to others that are essentially unstructured. This diversity, in conflicts and in those party to them, makes it very difficult to formulate standard approaches or plans of action for increasing respect for humanitarian law.

The parties — whether States or organized armed groups — also vary widely in character. Depth of knowledge of the law, motives for taking part in an armed conflict, interest in or need for international recognition or political legitimacy: these and other factors will affect the prospects for engaging with a party to increase its respect for the law. Willingness to discuss the law and the conflict, or to allow third parties (e.g. the ICRC, other humanitarian actors, United Nations (UN) bodies, neutral third States) to get involved, will also differ in degree.

Organized armed groups, in particular, are extremely diverse. They range from those that are highly centralized (with a strong hierarchy, effective chain of command, communication capabilities, etc.) to those that are decentralized (with semi-autonomous or splinter factions operating under an ill-defined leadership structure). Groups may also differ in the extent of their territorial control, their capacity to train members, and the disciplinary or punitive measures that are taken against members who violate humanitarian law.

The efforts of humanitarian actors or organizations that seek to engage with the parties to a non-international armed conflict — to increase respect for the law — will be affected by a number of other factors as well. These include the degree of access to the territory in which a conflict is taking place, the availability of reliable information concerning the conflict, as well as the level and quality of contact with the leadership of the parties.

Any attempt to engage with the parties to a non-international armed conflict, to increase respect for the law, must take these and other relevant factors into consideration.

Denial of applicability of humanitarian law

Not infrequently, a party to a non-international armed conflict — either a State or an armed group — will deny the applicability of humanitarian law, making it difficult to engage in a discussion on respect for the law.

Governmental authorities, for example, might disagree that a particular situation qualifies as an armed conflict. They might claim instead that it is a situation of "tension" or mere banditry and does not amount to non-international armed conflict. On this basis, a State might attempt to hinder or block contact with an armed group or access to the geographical area under its control. A State might also be reluctant to permit any negotiations or engagement that, in its view, would grant "legitimacy" to the armed group.

Non-State groups might also deny the applicability of humanitarian law by refusing to recognize a body of law created by States, or by claiming that they cannot be bound by obligations ratified by the government against whom they are fighting. In such cases, the law will seldom be a relevant frame of reference, especially for groups whose actions are shaped by a strong ideology.

Lack of political will to implement humanitarian law

Any actor attempting to increase respect for the law might face another significant challenge: a party may not have enough political will, or none at all, to comply with the provisions of humanitarian law. The strength of political will in a particular situation is likely to be difficult to ascertain, but a thorough understanding of the context, as well as good contacts and dialogue with appropriate figures in the leadership of the party, will help.

Even within one party, the attitudes of different factions might differ. For example, the military wing of a party might recognize the importance of respecting the law, while its political representatives neither concede the applicability of humanitarian law nor support the implementation of its provisions. The reverse is also possible.

Where the objective of a party to a non-international armed conflict is itself contrary to the principles, rules and spirit of humanitarian law there will be no political will to implement the law. Consider, for example, parties who perform certain acts as part of a widespread or systematic attack against a specific civilian population, or parties who are interested only in seizing control of economic resources or wealth. In such cases, violations of IHL are the means by which objectives are pursued.


Boris Heger/ICRC

Security and access

Security threats in non-international armed conflicts are common, especially in conflicts that are unstructured or where the parties to the conflict are unable to provide effective security guarantees. Threats to security or lack of security guarantees can prevent access to certain areas or to the parties to the conflict. This will present a general obstacle to dialogue on any subject, including humanitarian law.

Ignorance of the law

In many non-international armed conflicts, bearers of arms with little or no training in IHL are directly involved in the fighting. This ignorance of the law significantly impedes efforts to increase respect for IHL and to regulate the behaviour of the parties to conflicts. Indeed, there is little likelihood that a body of law will be observed unless those whose duty it is to respect and apply it are instructed and trained to respect its obligations.

LESSONS LEARNT

The ICRC's long experience in situations of non-international armed conflict confirms that IHL — if respected — helps prevent and alleviate suffering by providing a framework of behaviour to which the parties must conform. A number of experiences drawn from ICRC practice are included in this section.

This is followed by a description of legal tools that can be relied on, as appropriate, to improve compliance with the law. These tools are inter-related and mutually supportive.

Present the law "strategically"

Merely making the parties to an armed conflict aware of the law or of their specific obligations is not enough to ensure compliance.

The law should be presented and discussed "strategically," in a manner that is relevant and adapted to the context, and as part of a deliberate plan of engagement with the parties. This is necessary if parties are to develop a positive attitude towards the law, a first step towards respecting it.

Although it should always be presented accurately and without compromising existing provisions, presentations of the law should not be theoretical or "academic." The law should be discussed in terms that are concrete and operational. Discussions of the law should also be persuasive and relevant to the circumstances. It is especially important to bear in mind the motivation and the perceptions of the parties to a conflict.

The legal complexity of a dialogue must also be in keeping with the level of knowledge and competence of those with whom it is being conducted.

Understand and adapt to the unique characteristics of the conflict and the parties

Given the great diversity of armed conflicts and parties, there is no uniform approach to the problem of lack of respect for humanitarian law. Any effort to increase respect for the law will be more effective if it takes into account the unique characteristics of a specific situation.

This is especially true regarding the parties themselves. It will be particularly helpful to know and to understand a party's motivations and interests in order to explain why it is in the party's interest to comply with the law (see "Increasing Respect through 'Strategic Argumentation,'" p. 30).

Only by devoting time and resources to learning about the conflict and the parties will it be possible to assess what approaches might be most effective or promising.

Work in the context of a long-term process of engagement

Attempts to influence the behaviour of parties to a non-international armed conflict will be most effective in the context of a process of engagement and relationship with each party to the conflict.

A long-term process of engagement will provide opportunities for negotiating access, for developing good contacts with appropriately placed persons, and for gaining reliable information about the circumstances surrounding the conflict; it will also provide opportunities for acquiring insights into the characteristics of a party, on the basis of which the law can be discussed "strategically." In addition, it will, over time, lead to opportunities for addressing issues of the party's political will and capacity, and its compliance.

A long-term perspective also includes essential "follow-up" initiatives. This is especially true where it has been possible to secure a commitment from the party to comply with the law (see "Tools of 'Express Commitment,'" p. 27). The parties should be encouraged and helped to put their commitments into practice. The ICRC does this through an ongoing process of confidential bilateral dialogue and representations, which includes reminding the party of its obligations and commitments, monitoring and reporting, as well as training and capacity-building.

Guntar Primagotama/ICRC

INCREASING RESPECT BY MAKING THE RULES KNOWN

Dissemination and training activities are part of the ICRC's efforts to make the rules of humanitarian law known and to build a foundation for discussions concerning respect for the law. These activities are aimed, in particular, at those individuals or groups whose actions and behaviour can affect victims of armed conflicts or who can facilitate ICRC action. They include armed forces, police, security forces and others bearing arms, as well as decision-makers and opinion-leaders at the local and the international level.

The ICRC's strategy is carried out on three levels: awareness-building, promotion of humanitarian law through teaching and training, and the integration of humanitarian law into official, legal, educational and operational curricula. The ultimate aim is to influence attitudes and behaviour so as to improve protection for civilians and other victims of armed conflict, to facilitate access to these victims, and to improve security for humanitarian personnel.

The ICRC encourages the parties to armed conflicts to fulfil their duty to integrate IHL into their doctrine, training, and rules of engagement, and assists them where necessary. This duty stems from the obligation of all parties to respect and ensure respect for IHL. The duty to train members in IHL is recognized, in customary law, as binding both States and armed groups party to non-international armed conflicts.[7]

In treaty law, the duty of States to provide instruction in IHL to their armed forces is found in Articles 47/48/127/144, respectively, of the four Geneva Conventions, and in Article 83 of Protocol I additional to the four Geneva Conventions. This treaty obligation is applicable both in peacetime and in times of international armed conflict. Specific to non-international armed conflicts, Additional Protocol II requires, in Article 19, that the Protocol "shall be disseminated as widely as possible."

It is important also to promote and teach IHL to the civilian population. As provided for in the four Geneva Conventions (Articles 47/48/127/144) and in Additional Protocol I (Article 83), the teaching of humanitarian law to the civilian population should be undertaken even in peacetime.

The ICRC's role in reminding parties of their legal obligations

When an armed conflict breaks out, it is important to formally inform all parties — States and armed groups — of the legal characterization of the situation and to remind them of the applicable rules, that is, of their obligations under humanitarian law.

The ICRC most often makes this communication by way of a letter or memorandum submitted directly to the parties to a conflict, in a bilateral and confidential manner. Where contact with one or more of the parties is not possible, it could be done through a public press release.

The ICRC sends its communication at the beginning of a conflict, or during a conflict if a particular situation warrants it. This provides a basis for beginning a dialogue to encourage compliance with the law. Without this preliminary communication, it will be considerably more difficult to invoke specific protective rules later, after violations have occurred.

[7] See ICRC study, *op. cit.*, Rule 142.

INCREASING RESPECT THROUGH LEGAL TOOLS

The following are a number of legal tools that have been used by the ICRC and other humanitarian actors in their efforts to improve compliance with humanitarian law by parties to non-international armed conflicts.

It must be recognized that such tools do not themselves guarantee increased respect, but they nevertheless provide a basis on which legal representations can be made and on which accountability can be required.

1. SPECIAL AGREEMENTS

Special agreements between the parties to non-international armed conflicts enable the parties to make an explicit commitment to comply with humanitarian law.

Because they are based on the mutual consent of the parties — and make clear that the parties have the same IHL obligations — special agreements might also provide added incentive to comply.

Common Article 3 explicitly states that concluding a special agreement will in no way affect the legal status of the parties to a conflict.

Basic description

As provided for in common Article 3, special agreements enable the parties to non-international armed conflicts (either between a State and armed group(s) or among armed groups) to make an explicit commitment to comply with humanitarian law.

A special agreement might either create new legal obligations by going beyond the provisions of IHL already applicable in the specific circumstances (a "constitutive" agreement), or it might simply restate the law that is already binding on the parties, independent of the agreement (a "declaratory" agreement). It may also be limited to specific rules that are particularly relevant to an ongoing conflict; in that case, it should be made clear that the limited scope of the agreement is without prejudice to other applicable rules not mentioned in the agreement.

Parties should be encouraged to include both treaty and customary rules in a special agreement; the ICRC study, *Customary International Humanitarian Law*, may be of use in determining what rules fall into the latter category.

Utility

A special agreement can provide a plain statement of the law applicable in the context — or of an expanded set of provisions of IHL beyond the law that is already applicable — and secure a clear commitment from the parties to uphold that law.

A special agreement will provide an important basis for follow-up interventions to address violations of the law. The fact that an identifiable leader for each party has signed a special agreement, thereby taking on responsibility to ensure that the agreement is

adhered to, will not only provide a contact person and reference point for future representations, but also send a clear signal to his forces. Furthermore, given that a special agreement is very likely to be made public, a wide range of actors in the international community will be aware of it and may be able to help in holding the parties to their commitments.

The benefits of a special agreement go beyond the formal terms in the document. That the parties to a conflict have been brought together to negotiate the agreement may itself be of value. Also, unlike the unilateral forms of express commitment made by an individual party (see "Unilateral Declarations," p. 19, and "Inclusion of Humanitarian Law in Codes of Conduct for Armed Groups," p. 22), special agreements — based on mutual consent and commitment, which clearly allots equal IHL obligations to all parties — can provide added incentive to comply.

A special agreement can also be helpful when the legal characterization of a conflict appears uncertain or when the parties to the conflict disagree about it. A special agreement does not necessarily require the parties to agree on the issue; provisions of humanitarian law are agreed upon, and come into effect, through the express commitment contained in the agreement.

Limitations / Obstacles

Examples of special agreements are less common in practice than some other legal tools. One explanation is that States might be concerned that entering into such an agreement will grant a degree of legitimacy to an armed group. However, common Article 3 makes it clear that concluding a special agreement in no way affects the legal status of the parties to the conflict.

In practice, special agreements could be more successfully attempted when a conflict is either seemingly intractable and/or taking place on more or less equal terms between the State and armed group(s), i.e. when an armed group exercises significant territorial control, has an effective chain of command, etc.

An additional obstacle to the conclusion of a special agreement might be the unwillingness of the parties to commit themselves to a broader range of legal obligations than would otherwise be the case.

Practice

Sometimes, the parties to a non-international armed conflict are approached directly by a third party, who suggests and helps to negotiate the terms of a special agreement.

In 1992, for example, at the invitation of the ICRC, the various parties to the conflict within the Republic of Bosnia and Herzegovina (BiH) concluded a special agreement. While the agreement was of limited impact in terms of preventing violations of the law, its contents are instructive. The text of the agreement began with a commitment by the parties to respect and to ensure respect for the provisions of common Article 3, which was quoted in full. The parties also agreed to bring into force additional provisions concerning the protection of the wounded, sick and shipwrecked, of hospitals and other medical units, of the civilian population; these additional provisions also covered the treatment of captured fighters, the conduct of hostilities, assistance to the civilian population, and respect for the Red Cross. Specific articles of the Geneva Conventions or their Additional Protocols, where relevant, were cited.

In addition to its comprehensive substantive commitments, the BiH agreement included a number of other provisions. First, its terms stipulated that the agreement neither affected the legal status of the

parties, nor prejudiced the international law of armed conflict in force. Secondly, the agreement included a commitment to disseminate both IHL and the terms of the agreement itself. Furthermore, specific provisions were made as to the implementation of the agreement; they included a commitment to conduct inquiries into alleged violations of IHL and to take the necessary steps to put an end to the violations and punish those responsible, as well as to appoint liaison officers and provide security guarantees to the ICRC.

Among other examples of special agreements are a 1962 agreement in Yemen and a 1967 agreement in Nigeria, both negotiated by the ICRC and both containing commitments to abide by the 1949 Geneva Conventions.

Some agreements between the parties to a non-international armed conflict refer to both IHL and human rights law and are therefore not common Article 3 agreements in the strict sense. For example, the San José Agreement on Human Rights, concluded between the government of El Salvador and the *Frente Farabundo Martí para la Liberación Nacional* (FMLN) in 1990, included commitments to comply with common Article 3 and Additional Protocol II, and with various human rights norms as well. The Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law concluded between the government of the Philippines and the National Democratic Front of the Philippines (NDFP) in 1998 is another example.

Commitments made in special agreements have provided a basis for follow-up interventions with parties to a conflict, either concerning respect for IHL in general or related to a specific issue or operational objective. For example, the ICRC referred to the 1992 BiH agreement, asking the parties to put their commitments into effect and to allow the ICRC to provide relief and protection to the victims of the conflict. Similarly, the ICRC based its representations on the 1998 special agreement in the Philippines. Other humanitarian actors have also based various actions on special agreements, such as the UN observer mission in El Salvador (ONUSAL) that referred to the 1990 agreement in El Salvador.

There are examples of conflicts where attempts to negotiate a special agreement did not result in one comprehensive document, but in several separate agreements. This was the case in Tajikistan, for example, where negotiations took place under the auspices of the UN between 1995 and 1997. The ICRC attended the meetings as an observer and used this forum to express its humanitarian concerns.

Contents of special agreements

A special agreement could contain some of the following: first, an accurate and straightforward statement of the applicable IHL provisions, both treaty and customary; second, a commitment by the parties to respect and ensure respect for these provisions of IHL; third, words to the effect that the agreement does not change the legal status of the parties to the conflict; fourth, the responsibility of the parties to disseminate IHL and the terms of the special agreement itself; and, finally, provisions for the implementation of the special agreement.

Security guarantees and assurances concerning humanitarian work in the areas under the parties' control could be included as well, if appropriate.

In the case of a special agreement that contains some, but not all of the relevant provisions of IHL, it should be made clear whenever possible, in the agreement itself, that this limited scope is without prejudice to other applicable rules not mentioned in the agreement.

2. UNILATERAL DECLARATIONS

Armed groups party to non-international armed conflicts may make a unilateral declaration (or "declaration of intention") in which they state their commitment to comply with international humanitarian law.

Some armed groups take the initiative themselves and declare their commitment through public statements. At other times, the ICRC or another humanitarian actor or organization initiates, negotiates and/or receives the declarations.

Basic description

Although it is clear that all parties to non-international armed conflicts are legally bound by IHL, armed groups cannot ratify or formally become party to IHL treaties; only States can do so. As a result, armed groups may consider themselves technically not bound by the international obligations specified in treaty law. Furthermore, the lack of express commitment by an armed group may hamper efforts to disseminate the rules and encourage compliance.

Thus, a unilateral declaration's main purpose is to provide armed groups with an opportunity to express their commitment to abide by the rules of IHL.

It should be emphasized that armed groups remain bound by the provisions and rules of IHL applicable in a specific conflict — including common Article 3, customary IHL and, where applicable, Additional Protocol II — regardless of whether they make a unilateral declaration.

While there is no standard practice for dealing with it, a unilateral declaration should be acknowledged and its implementation encouraged. It can later be used as a basis for follow-up activities. The ICRC has cited unilateral declarations while making representations concerning violations of humanitarian law or offers of support for dissemination activities.

Utility

Unilateral declarations provide armed groups with an opportunity to explicitly express their commitment to abide by the rules of humanitarian law. This gives the hierarchy of an armed group an opportunity to assume responsibility for ensuring that its members respect the law. Furthermore, unilateral declarations can be useful to an armed group's leadership for disseminating IHL to the group's members.

As with the other forms of "express commitment" (see p. 27), the significance of a universal declaration is not merely that it has been made. The process of negotiating such a declaration can be helpful in the ongoing engagement and dialogue with an armed group. Unilateral declarations, after they have been made, can provide valuable leverage in follow-up efforts to encourage compliance with the law.

Limitations / Obstacles

It is sometimes suggested that unilateral declarations are made by armed groups for political reasons and, therefore, that there is little chance that the commitments they contain will be successfully implemented. It is also sometimes feared that by accepting such declarations, the ICRC or other humanitarian actors might be instrumentalized in an armed group's attempt to gain political legitimacy.

While this might be the case, political considerations often also drive States to ratify treaties or enter into other commitments. This does not stop the international community from accepting such commitments or from attempting to hold States to them.

As regards armed groups, practice indicates that, even if its motivation appears to be political, one may nonetheless be able to capitalize on the express commitment made by an armed group.

Concerns have sometimes been raised about the legal impact of unilateral declarations; it has even been said that encouraging such declarations might call into question whether the law is at all binding. This is not so: armed groups' IHL obligations, which are applicable independently of any declaration, remain unchanged, even if an armed group submits an incomplete declaration or ultimately refuses to make any declaration whatsoever. Nonetheless, every effort should be made to ensure that unilateral declarations contain all existing obligations. If a declaration contains only some of the applicable rules, the terms of the declaration should, whenever possible, indicate that this is without prejudice to other applicable rules not mentioned.

Practice

There is a long history of armed groups making unilateral declarations of their intention to comply with provisions of IHL.

The contents of unilateral declarations may refer to common Article 3 (e.g. in 1956 by the *Front de Libération Nationale* (FLN) in Algeria) or to both common Article 3 and Additional Protocol II (e.g. in 1988 by the FMLN in El Salvador, in 1991 by the NDFP in the Philippines). Declarations may also state the provisions of IHL to which the armed group is committing itself, without reference to specific treaty provisions (e.g. *Ejército de Liberación Nacional* (ELN) in Colombia in 1995).

Besides the unilateral declarations made at the initiative of armed groups themselves, the ICRC or other actors have themselves sometimes asked armed groups for a written declaration of their willingness to comply with IHL. ICRC requests are usually bilateral and confidential, whereas other actors and organizations sometimes make their requests publicly. The ICRC or other organizations have made such requests in Colombia, Indonesia, Liberia, and Sudan, among other countries. Geneva Call is a non-governmental organization that encourages armed groups to sign a "Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action."

On receiving a unilateral declaration, the ICRC will usually acknowledge it and then encourage the group to take all measures necessary for implementing the commitments it contains. This was the case, for example, in September 1987 when the *Coordinadora Guerrillera Simon Bolivar* (CGSB) — an umbrella organization including several armed groups party to the conflict in Colombia — declared its intention to respect IHL; it was also the case with unilateral declarations received from the NDFP in the Philippines in both 1991 and 1996.

In addition, the ICRC will use unilateral declarations as the basis for follow-up interventions, either to discuss allegations of violations of the law or to provide a general reminder to a group of the commitment it has made to adhere to IHL. Such interventions with armed groups occurred in Angola, Colombia, Nicaragua, Rwanda, South Africa, Sri Lanka, and other countries.

Contents of unilateral declarations

The terms of a unilateral declaration may, *inter alia*, contain an accurate and straightforward statement of the IHL provisions applicable in the specific conflict, as well as an express commitment by the armed group to respect and ensure respect for these provisions of IHL, which could be both treaty and customary norms.

If a declaration is issue-specific rather than a commitment to adhere to the full range of applicable IHL, then it could refer only to provisions of IHL related to that issue. If possible, such narrow declarations should include a clarification that this is without prejudice to other applicable rules not mentioned in the declaration.

It may also be helpful to include in a unilateral declaration a commitment by the armed group to disseminate both IHL and the terms of the unilateral declaration. If appropriate, security guarantees and assurances concerning humanitarian work in the areas under the armed group's control could be included as well.

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3. INCLUSION OF HUMANITARIAN LAW IN CODES OF CONDUCT FOR ARMED GROUPS

By adopting and distributing a code of conduct that is consistent with IHL, the hierarchy of an armed group sets up a mechanism that enables its members to respect this law.

Such indication of commitment to adhere to the rules of IHL, although less public than a declaration of intention or a special agreement, can nonetheless lead to better implementation of IHL norms by an armed group. It can also have a direct impact on its members' training in IHL and on the dissemination of the law.

Basic description

Codes of conduct that are consistent with IHL provide a concrete mechanism for enabling persons to respect the law. The fundamental rules of IHL should be presented in a form that is easy to understand by the members of the armed group. The code of conduct should also contain a description of the means necessary to implement IHL, including internal sanctions.

Similar mechanisms are common in State practice (through doctrine, military manuals, etc.). Although less well-known, there are instances of armed groups that have taken the initiative to develop codes of conduct, or that have agreed to distribute a code of conduct provided by the ICRC or another actor.

Utility

In addition to serving as a form of express commitment to the law (see p. 27), on the basis of which interventions can be made concerning compliance, this legal tool can have a direct impact on the dissemination of the rules and on the training of armed group members.

The fact that the hierarchy of an armed group initiates or agrees to a code of conduct indicates a degree of ownership and of commitment to ensure respect for the law. This is likely to influence the behaviour of members of the armed group more than something they may perceive as having been imposed on them from the "outside".

Discussions with the hierarchy of an armed group — either on the development of a code of conduct or on including IHL in a code that already exists — can be helpful in the process of engagement with the group. The period of negotiations and discussions concerning a code of conduct can be used to inform the armed group's leadership about IHL, and also to gain an understanding of the political will and the attitudes of the armed group regarding adherence to the law.

If an armed group has made a unilateral declaration (see p. 19), the development of a code of conduct that includes IHL can be suggested as a logical "next step." By offering assistance in developing a code of conduct or in including IHL in a code that already exists, one can also help the group to put its unilateral declaration commitments into action.

Limitations / Obstacles

One obstacle to successful negotiations concerning a code of conduct will be insufficient contacts with an armed group as a whole, or with the appropriate members of its hierarchy. For example, contacts that are confined to the political representatives of a group

— and don't take into account the operational or military authorities responsible for the adoption and distribution of codes of conduct — might limit the scope of negotiations.

Furthermore, an armed group might lack the necessary control and organization to be effective in putting a code of conduct into place.

Practice

Actors often call for armed groups to develop or adopt codes of conduct or "rules of engagement" for their members. Whereas the ICRC most often does so bilaterally and confidentially, other actors might make such calls publicly.

Armed groups have developed internal codes of conduct at their own initiative at one time or another in Algeria, Colombia, El Salvador, Côte d'Ivoire, Liberia, Nepal, the Philippines, Sierra Leone, Sri Lanka, and other countries. Codes of conduct vary in the way they reflect IHL, sometimes referring only to local traditions or cultural norms. Nevertheless, where contact and dialogue have been possible, codes of conduct have provided a basis for discussing the law. In some cases (e.g. in Colombia, El Salvador and Nicaragua), the ICRC or other actors have offered to review and comment on existing codes of conduct.

Armed groups have sometimes distributed codes of conduct received from the ICRC or another actor. In the mid-1990s, following discussions with the ICRC, the Sudan Allied Forces (SAF) distributed a 10-point code of conduct consistent with IHL. The discussions concerning the code of conduct also led to dissemination sessions and IHL training for the members of the SAF.

Thomas Pizer/ICRC

4. INCLUSION OF HUMANITARIAN LAW IN CEASEFIRE OR PEACE AGREEMENTS

The inclusion of IHL commitments in ceasefire or peace agreements entered into by parties to non-international armed conflicts helps to ensure respect for IHL provisions that continue to apply or come into force after the cessation of hostilities.

Additionally, the inclusion of IHL commitments in a ceasefire agreement can also be useful if hostilities are renewed, to remind the parties of their obligations under this law.

Basic description

Ceasefire and peace agreements frequently contain references to humanitarian law. To clearly understand the significance of these references, it is necessary to distinguish between the two types of agreements.

Through ceasefire agreements, the parties to a conflict agree to suspend hostilities — often, but not always, in order to facilitate peace negotiations. In addition, ceasefire agreements frequently contain commitments by the parties to implement specific IHL obligations or to refrain from violating IHL.

Peace agreements, by contrast, are usually entered into with the expectation that a conflict is over and that hostilities will not resume. References to IHL in peace agreements commonly pertain to the provisions of the law that continue to apply — or come into force — after the cessation of hostilities (see below), and are accompanied by a commitment by the parties to fulfil these post-conflict obligations.

In either case, every effort should be made to ensure that humanitarian law is accurately expressed in such agreements.

Utility

As ceasefire agreements do not necessarily guarantee the end of hostilities, the suspension of hostilities might be an opportunity to remind the parties of their obligations under IHL and secure a commitment to compliance, should hostilities be taken up again. These commitments can then provide a basis for future interventions to encourage compliance with the law if the conflict continues.

In peace agreements, a precise statement of the provisions of IHL that continue to apply — or come into force — after the cessation of hostilities will facilitate interventions to ensure the fulfilment of these obligations.

Limitations / Obstacles

Ceasefire agreements and peace agreements in non-international armed conflicts are negotiated between the parties (States and armed groups), usually by third States or neutral intermediaries. The ability of humanitarian agencies or organizations to influence the design and the contents of such agreements can be limited. It must be stressed that humanitarian obligations should not be overlooked or negotiated away for the sake of achieving political objectives.

Practice — Ceasefire agreements

Ceasefire agreements sometimes include a general commitment by the parties to ensure respect for IHL, as was the case in a 1999 ceasefire agreement between the parties to the conflict in the Democratic Republic of the Congo.

Ceasefire agreements will often specifically enumerate the various acts, violations of humanitarian law, from which the parties pledge to abstain. For example, in a 2002 agreement, the parties to the conflict in Angola agreed to guarantee the protection of persons and their property and not to conduct forced movements of the civilian population, commit acts of violence against the civilian population or destroy property. A 2002 ceasefire agreement between the parties to the conflict in Sri Lanka included a commitment to abstain from torture and intimidation. Instances of the commitment to refrain from acts of violence include the following: the 2002 Cessation of Hostilities Framework Agreement between the government of Indonesia and the Free Aceh Movement (GAM), and the 2002 Agreement of Cessation of Hostilities between the government of Sudan and the Sudan People's Liberation Movement/Army (SPLM/A).

In addition to specific IHL provisions, ceasefire agreements often include commitments by the parties to permit unimpeded movement of humanitarian assistance or access by humanitarian agencies. Such agreements have been signed in Guinea-Bissau, Liberia, Sudan, and other countries.

The ICRC and other actors, although not directly involved in negotiating the agreements themselves, have used the provisions in ceasefire agreements to remind parties of their IHL obligations, to encourage compliance with the law, or to negotiate for access. Some instances of this are the representations made on the basis of the 1999 ceasefire agreement in the Democratic Republic of the Congo, and on the basis of the 2002 agreement on cessation of hostilities between the government of Indonesia and GAM.

IHL in ceasefire agreements

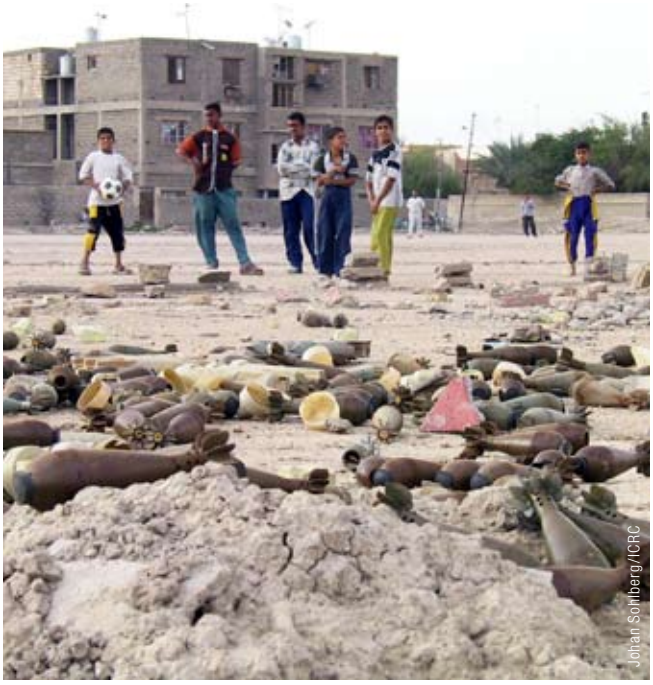
In practice, ceasefire agreements might contain commitments by parties to respect and ensure respect for the provisions of IHL applicable in the specific conflict. In addition to merely listing the various acts and violations to be abstained from, agreements might explicitly refer to specific provisions of relevant IHL treaties and customary international humanitarian law. Ceasefire agreements might also include a commitment regarding the unimpeded movement of humanitarian assistance or access by humanitarian agencies, in particular for providing services that are likely to be needed during the cessation of hostilities.

Practice — Peace agreements

As has already been noted, references to IHL in peace agreements most commonly pertain to the provisions of the law that continue to apply, or that come into force, after the cessation of hostilities, and are accompanied by a commitment by the parties to fulfil their post-conflict obligations. In practice, such commitments have included the following: the release of "prisoners of war" or detainees belonging to the respective parties (e.g. in Angola, Bosnia and Herzegovina, Cambodia, Côte d'Ivoire, Liberia, and Sierra Leone), the duties of the parties towards evacuated, displaced and interned civilians (e.g. in Cambodia), the respective duties of military and civilian authorities to account for missing and dead members of armed formations and civilians (e.g. Rwanda, Bosnia and Herzegovina), and the duty of the parties to report the location of landmines (e.g. Rwanda).

In addition to the post-conflict commitments described above, peace agreements have also included other provisions related to IHL, such as commitments to promote full respect for IHL (e.g. Liberia and Sierra Leone), to train defence and security forces in IHL (e.g. Burundi), and to facilitate humanitarian operations (e.g. Côte d'Ivoire, Liberia, Sierra Leone and Somalia).

Although negotiations concerning peace agreements are usually confidential and involve the relevant parties and a third-party negotiator, other actors are sometimes able to review and comment on the IHL provisions in a draft agreement. For example, the ICRC was able to comment on IHL-related terms during the negotiations for agreements concluded in Sierra Leone, Burundi and Côte d'Ivoire.


Johan Sohlberg/ICRC

IHL in peace agreements

Based on practice, the following post-conflict IHL provisions may be considered for inclusion in the terms of a peace agreement: the release of detained members of the parties to the conflict, the duties of the parties toward evacuated, displaced and interned civilians, the respective duties of military and civilian authorities to account for the missing and dead, the requirement that the parties report the location of landmines.

In addition, it might be helpful if peace agreements included the following IHL-related provisions: promoting full respect for IHL, training in IHL for defence and security forces (especially where members of an armed group are being integrated into national armed forces), and the facilitation of humanitarian operations.

Tools of "Express Commitment"

Four of the legal tools described in this publication — special agreements, unilateral declarations, inclusion of IHL in armed groups' codes of conduct, and references to IHL in ceasefire agreements or peace agreements — share a common feature: they provide a party to a conflict with an opportunity to make an "express commitment" of its willingness or intention to comply with IHL.

Through any of these four tools, the hierarchy of a party to an armed conflict takes an affirmative step: it signs, or agrees with, a statement of the applicable law, thereby taking ownership and making a commitment to ensure respect for the pertinent provisions of IHL. This express commitment is evidence that the party recognizes its obligations under the law.

Any of the tools of express commitment can serve as a useful basis for follow-up action to address violations of the law, providing additional leverage for representations. They can also be used as a basis for disseminating the law.

In addition, any of the tools can have a positive impact on the long-term process of engagement and relationship-building with a party to a conflict. Special agreements, unilateral declarations, ceasefire agreements or peace agreements: any one of these can serve as a starting point for establishing contact and beginning a dialogue. The negotiations or discussions can then provide opportunities to identify a responsible figure, learn more about the party, and carry on a dialogue concerning respect for humanitarian law.

The tools of express commitment, in particular, provide a unique opportunity for armed groups to declare their willingness and commitment to abide by provisions of IHL, given that they cannot formally sign or ratify IHL treaties.

There are no legal consequences for a party that does not make an express commitment when asked to do so. A party to the conflict will be bound by the relevant rules of humanitarian law regardless of whether it agrees to make an express commitment.

In addition to written commitments, parties might make verbal commitments to adhere to the rules of humanitarian law. Although such verbal commitments do not have the same weight as the tools of express commitment mentioned above, they can nonetheless be useful in follow-up representations. Wherever possible, verbal commitments should be recorded — for example, in minutes of meetings — for future reference.

5. GRANTS OF AMNESTY FOR MERE PARTICIPATION IN HOSTILITIES

Members of armed groups party to non-international armed conflicts have little legal incentive to adhere to IHL, given the fact that they are likely, eventually, to face domestic criminal prosecution and serious penalties for having taken part in the conflict, even if they comply with IHL.

Granting amnesty for participation in hostilities may help to provide armed group members with a legal incentive to comply with IHL.

Amnesties may also help to facilitate peace negotiations or enable a process of post-conflict national reconciliation.

It must be remembered that amnesties may not be granted for war crimes or other crimes under international law.

Basic description

Article 6, para. 5, of Additional Protocol II states: "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."

Such an amnesty is intended only for acts of mere participation in hostilities, not for war crimes or other crimes under international law. Thus, it may be granted only to persons taking part in the hostilities who have conducted themselves in accordance with the rules of IHL. This restriction on grants of amnesty is clear from the *travaux préparatoires* of Article 6, para. 5, of Additional Protocol II and is also logically inevitable, given that the underlying objective of IHL is to ensure lawful behaviour by parties to armed conflicts. The same restriction is recognized in customary law: Rule 159 of the ICRC study, *Customary International Humanitarian Law*, states that the authorities must endeavour to grant the broadest possible amnesty, "with the exception of persons suspected of, accused of, or sentenced for, war crimes."

Utility

Two distinct functions may be served by a possible grant of amnesty for mere participation in hostilities.

The first is directly linked to the main issue of improving compliance with humanitarian law by parties to non-international armed conflicts. Members of armed groups party to such conflicts have little legal incentive to adhere to IHL, given the fact that unless they prevail in the conflict they are likely to face domestic criminal prosecution and maximum penalties for having participated in the conflict, even if they comply with IHL. A grant of amnesty for mere participation in hostilities — which is comparable to the position of a combatant entitled to prisoner-of-war status in international armed conflict (such persons cannot be tried by the enemy for mere participation in hostilities) — if offered during the armed conflict itself, could serve to encourage better compliance with IHL by members of armed groups.

The second function, although not directly related to improving compliance with humanitarian law, is that the granting of amnesties may also help to facilitate peace negotiations or contribute to post-conflict

national reconciliation. Indeed, most amnesties for acts committed by members of parties to non-international armed conflicts, as found in peace agreements or post-conflict national legislation, have this secondary intent.

Limitations / Obstacles

Amnesties for acts of mere participation in hostilities are likely to be a realistic option only in a limited number of non-international armed conflicts.

Negotiations concerning an amnesty should be approached with great sensitivity to the political context and to the attitudes of the parties involved.

Under international law, grants of amnesty may not include war crimes or other crimes under international law.

Practice

Since the adoption of Additional Protocol II, many States have granted amnesty to persons who have taken part in a non-international armed conflict. Most of these amnesties are found in peace agreements or in post-conflict national legislation.

Their main purpose has been to facilitate peace negotiations or to contribute to post-conflict national reconciliation. Although the subject is beyond the scope of this publication, the impermissibility of amnesties for war crimes or other crimes under international law must be underscored.

For example, the international community very publicly criticized an impermissible amnesty provision contained in the 1999 Lomé Peace Agreement between the government of Sierra Leone and the Revolutionary United Front (RUF). The terms of the agreement granted an absolute and free pardon "to all combatants and collaborators in respect of anything done by them in pursuit of their objectives." The UN Secretary-General's Special Representative for Sierra Leone was instructed to add, along with his signature on behalf of the UN, a disclaimer stating that the amnesty provision "shall not apply to international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law."[8] The UN Secretary-General later reaffirmed that "the granting of amnesties to those who committed serious violations of international humanitarian and criminal law is not acceptable. The experience of Sierra Leone has confirmed that such amnesties do not bring about lasting peace and reconciliation."[9]

The war in Algeria is one of the earliest examples of amnesties granted with a view to encouraging better compliance with IHL. In 1958, following the ICRC's representations to the French government concerning places of detention, special camps were created for combatants of the *Armée de libération nationale* (ALN) who carried arms openly. Detained ALN members were not prosecuted for having participated in the hostilities, unless they were suspected of having committed atrocities. This approach to members of an armed group resembles an amnesty: it achieves the same result by removing the threat of prosecution for those who participate in hostilities in compliance with the law.

Amnesties aimed at encouraging better respect for humanitarian law continue to be suggested in several non-international armed conflicts taking place throughout the world today.

[8] UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, paras 22-24.

[9] UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/2001/331, 30 March 2001, para. 10.

INCREASING RESPECT THROUGH "STRATEGIC ARGUMENTATION"

It is reasonable to conclude that attempts to explain why it is in a party's interest to comply with the law might be effective in encouraging compliance. Such "strategic argumentation" will have a greater likelihood of success than simply stating the law and admonishing a party to comply.

To be effective, any strategic argumentation will have to be adapted to the characteristics of both the party and the conflict. Thus, wherever possible, arguments have to be based on a sound understanding of the motivations and interests of the party to the conflict, facilitated by good contacts and a process of engagement with the party.

Strategic argumentation should be used carefully, as it carries a risk of backlash. It should not lead to setting aside respect for IHL in favour of pragmatic concerns or opportunistic outcomes. Furthermore, strategic argumentation should be employed with discretion and with an awareness of the political sensitivity of some arguments.

The following examples of strategic argumentation have been used in dialogue and engagement with parties to non-international armed conflicts.

Military efficacy and discipline

Parties to a conflict should be made aware that the provisions of IHL were originally developed by military commanders who took into consideration the necessary balance between military needs and the dictates of humanity. The rules were designed in part to preserve military interests. Members of armed forces (and, in particular, armed groups) might be receptive to the argument that the law was crafted by those who understood the usefulness of these principles in armed conflict.

It has been successfully put to commanders of parties to a conflict that it is in their interest to have well-disciplined troops who obey the command structure and do not indulge in behaviour that violates the law.

Further, it can be argued that following the rules of IHL will provide some practical benefits. For example, it has been suggested to a party that if it treats its prisoners well, people might surrender to it more easily.

Arguments of military efficacy and discipline might be helpful in persuading one party to respect the law unilaterally, regardless of how its adversary behaves.

Reciprocal respect and mutual interest

Although the obligation to respect IHL is not based on reciprocity — a party is required to comply with its obligations regardless of the conduct of the other side — it can nonetheless be argued, as a point of pragmatism, that it is in the common interest of both parties to a conflict to adhere to the rules of IHL.

Parties to a non-international armed conflict can, for example, be reminded that if they treat enemy detainees humanely, it is more likely that their own members who are being held by the other side will be treated in a similar manner.

Reputation

Most parties to an armed conflict are concerned about their reputation — among their constituency, their allies, and internationally — and thus it is sometimes helpful to explain how adherence to IHL can improve their image or public standing. At the local level, this is particularly true where a party is dependent upon, or seeks to win, the support of the civilian population.

In addition, a reputation for being law-abiding might help a party gain the "moral high ground" and might also lead to political gains.

Appealing to core values

The fundamental principles of humanitarian law are often mirrored in the values, ethics or morality of local cultures and traditions. Pointing out how certain rules or principles found in IHL also exist within the culture of a party to a conflict can help lead to increased compliance.

Long-term interests

There are a number of different long-term strategic arguments that might help persuade parties to a conflict to adhere to humanitarian law.

First, it can be argued that, although violations might yield a short-term advantage, the consequences in the long run could be self-defeating (including long-term damage to reputation, loss of support, or even ostracism by the population). Examples could be given of parties to a conflict who have acted lawlessly and been sanctioned afterwards, or who have suffered from national or international criticism and condemnation. Examples of the reverse case can also be given, of parties who have complied with IHL and benefited as a result.

Secondly, it can be pointed out that the legitimacy of a party's power in the future — either in government or in the opposition — might be weakened if it accedes to lawlessness. A party's actions during the conflict could have an effect on the perceptions of those whom it seeks to govern after the conflict.

Thirdly, adherence to IHL will help facilitate post-conflict national reconciliation and a return to peace, which are likely long-term goals of most parties to non-international armed conflicts.

Criminal prosecution

Having in mind significant recent developments in international criminal justice and in the repression of war crimes, parties to a conflict should be made aware of the possibility of prosecution for serious violations of IHL. The creation of the ad hoc tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), and of the International Criminal Court (ICC), has strengthened the framework for prosecuting war crimes in non-international armed conflicts.

Economy

Parties to a conflict might respond to the economic argument that adherence to IHL could save resources. For example, compliance with IHL might limit needless destruction to infrastructure or personal property.

FINAL REMARKS

This publication seeks to contribute to a better understanding of the ways in which one can effectively engage with parties to non-international armed conflicts to increase respect for international humanitarian law.

The lessons, the legal tools, and the means of persuasion described here have, at various times and in different conflicts, been used by the ICRC or other actors in their efforts to increase respect for international humanitarian law. It is hoped that the contents of this publication could serve to inform and assist others who might be contemplating a similar endeavour.

MISSION

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance. It directs and coordinates the international relief activities conducted by the Movement in situations of conflict. It also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the International Red Cross and Red Crescent Movement.

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