

Improving Compliance with International Humanitarian Law during Non-International Armed Conflicts: Some Reflections

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Compliance has always been the Achilles heel of international humanitarian law (IHL). That is *a fortiori* the case in non-international armed conflicts, where there is a problem not only in terms of the substantive coverage by IHL norms but also in terms of the availability of mechanisms to ensure compliance, especially ones that can be used during a conflict. It is therefore a considerable challenge to examine the question of how the existing IHL mechanisms and bodies can be used in non-international armed conflicts.

First of all, with regard to the **existing mechanisms in international treaty law**, there are only a few which can be used during a non-international armed conflict. As is known, the mechanisms contained in the Geneva Conventions and in the Additional Protocols, including the enquiry procedure, the International Fact-Finding Commission, the system of the Protecting Powers, meetings of the High Contracting Parties, cooperation with the United Nations, and even, with the exception of Article 18 of Additional Protocol II, the role of the ICRC, were mainly or exclusively designed for international armed conflicts. Moreover, they were laid down in treaty provisions which, in their vast majority, do not apply in today's internal conflicts. In other words, there is a structural problem in the sense that the IHL treaty law framework is not designed for those mechanisms or bodies to be used in internal conflicts. One may reason by analogy, but that does not solve the legal uncertainty and the problem of a lacking international legal basis for action.

Regardless of the applicability of the existing IHL mechanisms, there is also the problem of the **lack of incentives for armed groups** to apply IHL and to recognise and have recourse to the IHL mechanisms and bodies available. As has been suggested in other ICRC seminars, such incentives have to be invented or created, through the granting of a reduced combatant-like status, or through more political strategic incentives, such as the prospect of being granted amnesty, as is, for example, referred to in Article 6(5) of Additional Protocol II.

The points made above highlight what in my view is the main lacuna: in internal conflicts the problem is not just one of non-compliance with IHL rules, it is also the **lack of an up-to-date treaty framework** providing for mechanisms to ensure compliance that have at least a chance of being used, and designating specific bodies, be it the ICRC, the International Fact-Finding Commission, or any other new body, with compliance-related tasks. This state of affairs is, however, linked to many other problems, relating to, for example, the legal status of armed groups fighting internal conflicts, the substantive scope of IHL norms and so on. In the end one comes to the debate on the revision of Additional Protocol II, an idea which has been very widely debated and which may, if implemented, turn out to be a Pandora's box.

In terms of using the **existing bodies and mechanisms**, I would like to share some thoughts on how they could be used, directly or indirectly, during non-international armed conflicts. I will adopt the same approach taken by M. Deyra in his intervention, i.e. the non-legal approach, whereby I will stress the importance of non-IHL mechanisms, and especially diplomatic and political instruments. If even the existing IHL mechanisms are rarely or never used, a lack of political will or strong feelings about national sovereignty are often cited as reasons for that. Therefore often the first thing to do is to mobilise the diplomatic and political machinery to induce the parties to an internal conflict to abide by IHL norms. Concerted bilateral and multilateral efforts, through the UN, through the EU and other regional organisations, can be effective in my view. They can be seen as a first step, following the failure of which these organisations or individual states could have recourse to more coercive measures such as retorsions and non-forcible reprisals.

In terms of IHL bodies or mechanisms this could, for instance, mean exhorting the parties to the conflict to give unlimited access to the ICRC. It could also mean exhorting a state to accept an investigation by the International Fact-Finding Commission through a public assertion by states having accepted the Commission's competence that they intend to approach the Commission concerning an ongoing internal conflict. But even without applying pressure in favour of the existing mechanisms being used, states and international organisations can have a great impact on the degree of compliance with IHL in internal conflicts. In fact, their actions can be seen as a kind of existing mechanism in itself. Below, I will highlight the somewhat unexplored potential for action by the UN Security Council or by regional organisations such as the EU.

In terms of the **Security Council**, it could strongly promote respect for IHL through a more extensive use of Chapter VII of the UN Charter. We know what it has already done in the past, where it has called for the substantive norms of IHL to be respected. It could also oblige states to give access to the ICRC or to other organs. The Security Council has mandated fact-finding in the past, but unfortunately not by the International Fact-Finding Commission itself. Of course it is also possible, at least in theory, with the entry into force of the Rome Statute, for the Security Council to refer alleged violations of IHL in an internal conflict to the International Criminal Court or to threaten to do so.

The possibilities that exist for **action through the EU** deserve some strategic reflection. This is especially the case now that the EU is developing its instruments for civilian and military crisis management. A first option is for the EU to activate the full potential of the political and diplomatic machinery that it has at its disposal. This includes the whole tool kit of positive incentives it can offer such as development aid, access to the internal market and technical and economic assistance (such as foreseen in the Stability Pact for South-Eastern Europe). Additionally, the EU could apply economic sanctions, preferably of the smart kind, against political regimes or non-state actors, and leaders of armed groups in internal conflicts. It could also help to enforce the rules through military interventions. This is no longer theory, the EU having embarked upon its first military crisis management operations recently, including *Concordia* in FYROM and *Artemis* in the DRC. The EU also has an important role to play in supporting and upholding the International Criminal Court, a role that it has so far endorsed.

The question I come to is: have we sufficiently explored and given thought to the full potential of these bilateral and multilateral instruments and regional organisations, especially as far as the interlinking of these organisations such as the EU and the United Nations is concerned? I am doubtful that this is the case. In my view, we are still in the early stages, and it is very much to be welcomed that the European Commission has recently published a Communication on the relationship between the EU and the UN (dated 10th September 2003), and which explores possibilities for more concerted action between the EU and the various organs and bodies of the UN, such as the Security Council, the General Assembly and so forth. In light of the development and implementation of the EU Security Doctrine, there is a lot of important work to do on exploring ways to more effectively encourage and ensure respect for IHL.

Coming to a close then, the question I ask myself is: what about the existing IHL mechanisms and bodies? I may have hinted that a revision of the IHL treaties would be desirable, but I do not think that we have to re-invent the wheel, nor that we need to create many new organs or bodies. Instead, we have to **re-vitalize and re-invigorate** those that already exist. The current *acquis* has to be preserved and reinforced. If the revision of the treaties is too risky or delicate, one of the most fruitful ways forward in view of getting the IHL machinery out of the box is to resort to concerted action and pressure by both states and international organisations in view of inducing parties to a non-international armed conflict to use them. Together their action can be very effective before and during a conflict, but also outside the context of a specific ongoing conflict.

Referring once again to the EU, it could consider adopting an **EU Common Position** in which the Member States agree to collectively accept the competence of the International Fact-Finding Commission. With the exception of France, all current EU Member States have already accepted its competence, although the same can only be said of five out of the ten countries that will be joining the EU in May 2004. Similarly, the EU could affirm its intention to use its bilateral and multilateral contacts to encourage third states to do the same, by means of certain incentives where appropriate. The EU could also ask the International Fact-Finding Commission to carry out certain studies. If the Commission, as a permanent body with great expertise, is not used in the field right now, it is time at least to use that expertise. For instance, it could be asked to carry out the task of doing studies and preparing recommendations with regard to earlier armed conflicts, or, to the extent that information is available, with regard to ongoing armed conflicts.