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The Evolution of International Humanitarian Law

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International humanitarian law (IHL) is primarily directed at promoting humane standards of behaviour in situations of armed conflict, a time when human security is most at risk. IHL consists of numerous rules and principles governing parties to armed conflict, requiring, for example, that combatants distinguish between military and civilian targets; that civilians not be the deliberate target of operations; and that methods of warfare causing unnecessary suffering be avoided. It also contains detailed rules requiring that civilians, prisoners of war, and the sick and wounded within a party's power be treated humanely.

The context in which IHL must be applied is changing dramatically. There has been a marked rise in violent internal armed conflicts – wars fought between factions entirely within a state's borders. In these new conflicts, civilians are increasingly in the line of fire or even deliberately targeted for appalling violence. IHL has correspondingly evolved and adapted to a changing world, both in response to the altered nature of conflict, and also due to the emergence of a people-centred approach to security.

While this area of international law has traditionally developed slowly and incrementally, in the last decade it has undergone revolutionary change. IHL has been invigorated by a synergy between the groundbreaking jurisprudence of the ad hoc tribunals, the development of the International Criminal Court (ICC) Statute, and national initiatives. IHL has entered into an unprecedented period in which texts from only a few years ago have already been overtaken by developments. Thus, it has been observed that IHL as a body of law has recently “come of age.”¹

Nevertheless, while important gains have clearly been made, there still remains considerable resistance to developments in this area, as many states remain very hesitant about IHL. The traditional concern is that IHL should not become a means of interfering with national sovereignty, a concern that has increased because so many conflicts are now internal. This concern has been manifested in resistance not only to the development of new principles or rules, but even to modest commitments to promote compliance, such as providing access to monitors or providing information on national IHL activities. In addition, military powers and states engaged in conflict have sought to preserve a great deal of flexibility in their military practices.

Even more problematically, actual compliance with IHL in many of today's conflicts is abysmal, with massive violations of even the most basic rules being commonplace. The problems of enforcement and the means of promoting compliance will, therefore, also be discussed below.

EXPANDING THE REACH OF HUMANITARIAN LAW

IHL has been around for quite some time, reflected both in customary law and in important treaties such as the Hague Conventions of 1899 and 1907, the Geneva Conventions of 1949, and the Additional Protocols thereto of 1977. The resulting body of law has been valuable in promoting humane standards of behaviour, but it focuses on a classical concept of international armed conflict, namely conflict between regular armed forces of different states. The greatest challenge for human security today is the regulation of *noninternational*, or internal, armed conflicts.

In contrast to international armed conflicts, where states have perceived a reciprocity of interest in establishing basic rules, internal armed conflicts have often been regarded as a matter for domestic discretion, providing governments with the maximum latitude in fighting rebels. Many states have been more inclined to look after their own interests than community concerns or humanitarian demands. Obtaining any acknowledgement at all of rules applicable in internal armed conflict has, therefore, been a slow and difficult struggle. Even where treaty provisions provided some grudging recognition of the most elementary rules applicable in internal armed conflict, these provisions did not provide for individual criminal responsibility for serious violations.² At the start of the 1990s, it was still received wisdom that violations in internal armed conflicts were not "war crimes," i.e. that they did not give rise to criminal liability.

The recent recognition of the concept of war crimes in internal armed conflicts is one of the most profound but least heralded results of the ascendancy of human security as an international priority. Over the last few years, several developments have prompted the international community to insist that vital humanitarian concerns not be overshadowed by narrow sovereignty concerns. The increasing prevalence, scale, and cruelty of internal armed conflicts effectively demanded a response if IHL is to remain relevant in today's world. Internal armed conflicts have not only eclipsed international conflicts in number, but they have also given rise to the most shocking atrocities, with civilians being terrorized and persecuted by reason of their race or ethnicity. At the same time, many states have become more willing to focus on the security of individual human beings, and to take firmer steps to promote basic standards of decency. The work of the ad hoc tribunals has also accelerated developments, by interpreting and applying IHL and breathing life into these doctrines.

The adoption by the Security Council of the Statute of the International Criminal Tribunal for Rwanda (ICTR), which recognized jurisdiction over war crimes in internal armed conflicts, was a major step forward. The jurisprudence subsequent to the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) continued this momentum, holding that the most well-established prohibitions from international armed conflicts might now be regarded as applicable in internal conflicts. This process of extension was continued with the adoption of the ICC Statute. Despite initial opposition from a determined minority of states, Canada and other like-minded states insisted on recognition of war crimes in internal armed conflicts.³ In the result, the ICC Statute recognizes a significant list of well-established prohibitions from international armed conflict as also being applicable in noninternational armed conflicts.

This process of "blurring" the legal differences between international and internal armed conflict must continue, as there is still a gap in the extent of regulation of the two types of conflict. The different treatment is the product of the historical development of this area of law, but there is no compelling moral reason for the distinction to remain as extensive as it is. Future efforts of the international community will likely be aimed at further narrowing these differences, and a study of customary international law by the International Committee of the Red Cross, expected to be completed in the near future, may help advance this process. At present, however, resistance from cautious states remains strong.

Another important development in recent years is the clear affirmation that crimes against humanity are punishable not only when

committed in armed conflict, but also during internal disturbances or peacetime. This issue was still being debated only a few years ago, and indeed the ICTY Statute adopted in 1993 restricted its jurisdiction over crimes against humanity to those committed during an armed conflict. Only one year later, however, the ICTR Statute was adopted, recognizing crimes against humanity without any such restriction. Jurisprudence of the ICTY has affirmed that crimes against humanity can occur even in the absence of armed conflict. This issue was hotly contested during the ICC negotiations, but eventually agreement was reached on a Canadian-proposed definition of crimes against humanity, affirming that there is no requirement of armed conflict.

Other steps are being taken to expand the scope of IHL to apply to more people in more situations. In 1999, on the fiftieth anniversary of the Geneva Conventions, the UN secretary-general announced that United Nation's (UN) forces engaged as combatants would be bound by fundamental rules of international humanitarian law,⁴ removing any ambiguity over the legal nature and status of UN forces under UN command. The ICC Statute, adopted in 1998, affirmed that the principle of command responsibility includes not only military commanders but also civilian leaders and other persons in authority. The definitions of crimes in the ICC Statute, and in particular the definition of crimes against humanity, clearly encompass nonstate actors. Moreover, discussions are underway to identify any possible remaining gaps in human rights and humanitarian law protection and to identify "fundamental standards of humanity" applicable in all situations – including internal violence, disturbances, tensions, and public emergency – from which no derogation is permitted. These discussions have highlighted the interplay between IHL and international human rights law and the gradual process of cross-fertilization and convergence between these bodies of law.

BUILDING NEW NORMS: PROTECTING THE VULNERABLE

As has been graphically demonstrated in recent conflicts, civilians are not only suffering as a result of armed conflict, but they also have become the deliberate targets of war. The last decade has seen considerable advances in responding to the specific problems of vulnerable groups, which had not been adequately addressed under previously existing general rules.

For example, women have been particularly targeted for rape and other forms of sexual violence by combatants as a form of intimidation

and torture, and as a means of terrorizing a population. In the last decade, important strides have been taken to overcome the traditional hesitance to recognize and deal with such atrocities. A 1992 report by a commission of experts appointed to investigate war crimes in the former Yugoslavia was precedent-setting. It not only investigated and documented accounts of rape and other forms of sexual violence, but it analyzed evidence pointing to a policy of rape. Rape was recognized as a crime against humanity in the ICTY Statute and then identified both as a crime against humanity and as a war crime in the ICTR Statute. In 1998, Canada was instrumental in ensuring the inclusion of a detailed list of sexual and gender-based crimes in the ICC Statute, including not only rape but also sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and persecution on the basis of gender.

Children are especially vulnerable during armed conflict. They are recruited as under-age soldiers, or are murdered because they might be so recruited. Children are forced into sexual and domestic slavery, and are used as human shields. Increasing recognition of the effects of war on children has led to several important initiatives. In 1998, the ICC Statute was adopted, recognizing as a war crime the conscription or enlistment of children under the age of fifteen years into armed forces or using them to participate actively in hostilities. On 21 January 2000, a draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict was concluded, raising the minimum age levels – the age of conscription at eighteen, voluntary recruitment above fifteen, and the use of children in conflict situations at eighteen.

UN personnel and humanitarian aid workers are another group that is frequently-targeted, often as part of a deliberate effort to undermine peacebuilding efforts. The international community has taken some steps to respond to this problem, for example, by adopting the Convention on the Safety of UN and Associated Personnel, which provides protection in certain operations for UN personnel and persons deployed by humanitarian nongovernmental organizations under agreement with the UN. Further measures to protect humanitarian aid workers are necessary, in order to broaden the protective coverage for both UN and non-UN humanitarian personnel, including locally-engaged staff.

Recent initiatives to ban or otherwise limit certain weapons are another essential means to protect civilians and promote human security. The Ottawa Convention prohibiting antipersonnel mines is an obvious example. A new challenge is to address the proliferation of small arms and light weapons, especially because of the clear link with child

soldiers: as weapons become smaller and lighter, ever younger children are being recruited and conscripted to fight. The UN is currently holding a series of preparatory meetings on small arms and light weapons, culminating in an international conference in 2001.

Not only are civilians extremely vulnerable in armed conflict situations, but civilian property is as well. In 1999, a Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict was adopted. Building on the ICC Statute, the Second Protocol specifically defines serious violations which result in individual criminal responsibility, such as theft, pillage or misappropriation of protected cultural property, whether occurring in international or internal armed conflict.

PROMOTING COMPLIANCE

As the previous sections have indicated, the building of new norms in IHL – both to enhance protection of vulnerable groups and to expand the reach of IHL – has been and continues to be a vital endeavour. But the critical failure, and therefore the critical front for progress, has been the *implementation* of those norms.

Several factors, flowing from the changed nature of armed conflict, have exacerbated this breakdown in compliance. In traditional state-to-state conflict, which involved professional armies under military discipline, adherence to IHL (and particularly the distinction between military and civilian targets) was consistent with the prevailing military logic. However, the new circumstances of today's conflicts commonly feature failed or failing states and bitter internecine struggles. Fighting is carried out by insurgent groups with weak chains of command, ineffective military discipline, and minimal awareness of or interest in IHL. Moreover, civilians are commonly perceived as primary targets, whether for reasons of ethnic hatred or in order to spread terror. In such circumstances, the application of IHL is under even greater strain than in traditional interstate conflict situations. Thus, even as the norms have grown stronger, actual compliance has become weaker. Media reports on any particular day attest to persistent and massive violations of even the most basic rules. Promoting compliance is literally a matter of life and death.

One method of promoting compliance, in which there has been some progress, is the effort to ensure that violators will be held accountable for their actions. The ad hoc tribunals created by the Security Council for the former Yugoslavia (1993) and Rwanda (1994) were an important innovation in dealing with those who commit the most serious violations of IHL.

The creation of these tribunals initially met with considerable pessimism and cynicism about their potential impact. Some feared that the pursuit of war criminals could hamper peace efforts; others were confident that the tribunals would never get the support necessary to apprehend and prosecute perpetrators. Even the strongest supporters had cautious expectations. However, the tribunals have garnered the international support necessary to ensure the arrest and surrender of many suspects. They have completed important cases and have issued groundbreaking decisions on IHL and international criminal law issues not addressed since Nuremberg. The tribunals also have demonstrated that international criminal justice can be a reality, and that it will not interfere with peace efforts. In fact, the work of the tribunals has been helpful in isolating extremists and preventing historic revisionism, thus facilitating real and lasting peace.

WAR CRIMES TRIBUNALS

The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have had very different experiences in gaining custody of indictees. When Louise Arbour assumed the post of chief prosecutor in 1996, there were few accused in the ICTY's detention unit, and few prospects for more. Arbour successfully pressed the international community, including the United Nations (UN) Stabilization Force (SFOR), to arrest accused individuals. Arrests by SFOR in 1997 triggered voluntary surrenders, and since that time a steady stream of indictees has been transferred to the ICTY. While the most senior leaders (such as Milosevic, Karadzic, and Mladic) are still at large due to lack of cooperation from certain countries such as the Federal Republic of Yugoslavia, the number of senior officials in custody has risen dramatically.

Since its creation, the ICTR has enjoyed greater success in obtaining custody over high-ranking leaders indicted for the most serious crimes. Many of the top officials involved in the genocide fled to other African countries, as well as elsewhere. These accused have been transferred to the ICTR from states such as Cameroon, Kenya, England, France, Denmark, Belgium, and the United States. The tribunal now has the vast majority of its publicly-indicted accused in custody.

It is very important that both the ICTY and the ICTR prosecute high-placed individuals to demonstrate that the murders, rapes, and other serious crimes could not have taken place on the scale and with the ferocity that they did without support and guidance from the very top of the command structure.

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The success of the tribunals has given impetus to the creation of a permanent ICC, which will serve a similar function but on a standing basis. The statute of the ICC was adopted in July 1998 and will enter into force once sixty states ratify it. The work of the tribunals and the efforts to create an ICC have already helped generate a global "expectation of justice." The willingness of the international community to establish international proceedings in response to serious violations of humanitarian law has prompted national systems to take more seriously their primary obligation to deal with these crimes within their jurisdiction. This expectation of justice has also led to concrete steps to establish accountability in situations as diverse as Cambodia, Sierra Leone, and East Timor.

Although it is hoped that criminal investigation and prosecution of the most serious violations will ultimately have a significant deterrent effect, this will only occur once there is greater consistency and immediacy in the application of criminal justice. Moreover, it cannot be a complete solution, as respect for IHL will ultimately depend on its acceptance by combatants. Thus, many other means must be employed to promote compliance with IHL. These include ratification, implementation, and dissemination of IHL instruments; training and education of military personnel and other potential combatants and fostering of cultures of military discipline; enhanced humanitarian access to populations in need; and greater scrutiny and monitoring of conduct, including thorough fact-finding missions. Political and public vigilance is also indispensable to ensure that violations are denounced and that pressure is brought to promote compliance. It is only through a variety of such means that greater compliance with IHL will be reached.

Great strides have been made in expanding the reach of IHL, building new norms to protect the vulnerable, and enforcing the norms of IHL, but much work remains to be done. The evolution of IHL is of pivotal importance in protecting human security, since that security is so often torn away in times of conflict. At the same time, however, efforts to advance IHL cannot take place in a vacuum. They must complement a variety of other measures to protect human security, such as preventative action, conflict management, and measures addressing the root causes of conflict. Indeed, we must recognize that creating conditions where IHL is respected is a distant second choice to creating conditions where IHL is not needed at all. Wherever conflicts erupt, however, the application of IHL will remain a critical humanitarian imperative. We must, therefore, work to bolster compliance with IHL and to ensure its continued relevance in today's armed conflicts.

NOTES

- 1 Theodor Meron, *War Crimes Law Comes of Age* (Clarendon Press: Oxford, 1998), esp. 296–304.
- 2 A short list of elementary rules applicable in internal conflicts was recognized in common article 3 of the *Geneva Conventions* of 1949 and modestly expanded by *Additional Protocol II* of 1977. However, *Additional Protocol II* was still far more rudimentary than *Additional Protocol I*, which applied to international armed conflicts. Moreover, the provisions applicable to internal armed conflict did not contain any concept of punishable crimes, unlike the provisions governing international armed conflict.
- 3 For example, Lloyd Axworthy, minister of Foreign Affairs, noting that civilians are bearing the brunt of the increasing brutality of internal armed conflicts, argued that “it would be short-sighted to create a Court that does not reflect this reality.” Statement of Lloyd Axworthy, Minister of Foreign Affairs, to the Diplomatic Conference, 15 June 1998.
- 4 United Nations, Kofi Annan, *Observance by United Nations Forces of International Humanitarian Law* (ST/SGB/1993/13), 6 August 1999.

REFERENCES

- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*. Oslo, 18 September 1997.
- Geneva Conventions of 1949 and The Additional Protocols of 1977*. 12 August 1949 and 8 June 1977.
- Meron, Theodor. “International Criminalization of Internal Atrocities.” *American Journal of International Law* 89, no. 1 (January 1995).
- Meron, Theodor. *War Crimes Law Comes of Age*. Oxford: Clarendon Press, 1998.
- Robinson, Darryl and Herman von Hebel. “War Crimes in Internal Armed Conflict.” *Yearbook of International Humanitarian Law* vol. 2 (1999).
- Statute of the International Criminal Court*. Rome, 17 July 1998.
- United Nations. Annan, Kofi. *Observance by United Nations Forces of International Humanitarian Law*. Secretary General’s Bulletin (ST/SGB/1999/13), 6 August 1999.