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DILEMMAS OVER INDIVIDUAL AND STATE RESPONSIBILITY FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

ABSTRACT

This paper attempts an explanation to some of the complex legal issues surrounding the whole concept of responsibility for violations of international humanitarian law. The arguments here are based on reflections on the draft articles on the responsibility of states for the violations of international humanitarian law adopted by the international law commission as well as opinions of experts on the subject, treaties, conventions, international jurisprudence, and internationally recognized principles and customs that govern conduct in armed conflicts so as to limit human suffering particularly of non combatants.

1. Introduction

Over the past years, the world has witnessed and continue to witness what can be termed a systematic, if not institutionalised violation of international humanitarian law; that is of the Geneva Conventions of 1949 and other international humanitarian law instruments. The force of international humanitarian law lies in the simplicity of its essence, namely, human compassion and its universality. States have a responsibility of applying it and ensuring its application. That undertaking is spelled out in very simple language in article one, which requires states to, “respect and ensure respect” for the convention. No state party can claim that its duty on this point is somehow

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unclear or that the passage of time has lessened these obligations. There are issues worthy of consideration during inquiry into the applicability of Geneva law and other laws of armed conflict to protection of civilians. Among these are whether the 1949 Geneva conventions and the 1977 protocols\(^2\) thereto and other laws of armed conflict are generally applicable; if so, what portions of the Geneva law and other laws of armed conflict are applicable; who is protected by such law; what sort of protection pertains; what sort of sanctions are possible; and who bears the responsibility for what?

Responsibility in the sense of coercive imposition of norms and penalisation of violations is an important but ultimately secondary office of any system of law. It is secondary in character because the question of enforcement and responsibility can only arise when there has already been failure in the pursuit, if the primary purpose of law is maintaining defined normative standards of behaviour in the society to this, its primary functions is the effective and impartial protection of victims of armed conflicts rather than the punishment of war crimes and other violations after they have been committed and there has “ex hypothesis” been a serious failure in performance of the protective imperative.

In securing effective humanitarian protection therefore, a primary emphasis must be placed upon dissemination training and pressure towards positive implementations rather than upon “negative” enforcement after the harm has been done. This said, international humanitarian law is as much subject to violations as any other law and where this happens, adequate and effective means of enforcement became vitally important. In this context two distinct categories of violations may be suggested to exist; although these are not terms of art, they might usefully be described as “particular and institutionalised violations”.

The later would focus upon delinquent states rather than individuals, subject always to the vital Caveat established by the international military tribunal at Nuremberg and the international military tribunal (Far east) at Tokyo in 1945 that such states are brought to this condition by criminal individuals who may be held personally responsible (liable) for the consequences of their actions, omissions and decisions.\(^3\)


\(^3\) Among these additional instruments are the Universal Declaration of Human Rights now regarded by many commentators as having acquired the status of customary international law and at a minimum as identifying and clarifying the basic human rights norms referred to in obligations set forth in article 55 of the charter of the United Nations.
Such institutional violations could manifestly include the adoption of polices and directions which are inherently criminal in concept or implementation, but might also include a culpable failure to provide possible and appropriate programmes of dissemination and training in humanitarian law, leading often calculatively to a culture in which serious violations are routinely committed and encouraged. Such training condition is in fact required by the 1945 Geneva Convention Art. 144.4

Under international law, both civil and criminal sanctions are available against any state or individual who violates the laws of war.5 Every violation of the law of war is a war crime6 over which there is universal jurisdiction7 and responsibility. There is no immunity for the violation of the law of war even if committed by a head of state, diplomat or any other state officials.8 Further, any form of domestic immunity, amnesty, asylum, pardon, statute of limitation or other impunity under domestic law is not binding at the international level or in any domestic legal processes.

Those responsible can include military or civilian leaders who knew or should have known that their subordinates or others under their control had committed, were about to commit or were committing violations of humanitarian law; had an opportunity to act and failed to take reasonable corrective action under the circumstances.9 Complicitous behaviour is also sanctionable10 and

4 Draft articles on responsibility of states for internationally wrongful acts adopted in 2001 by the International Law Commission (ILC) this codification of the so called secondary rules of international law applies to violations of all primary rules. except where and to the extent that the conditions for the existence of an international wrongful act or the content or implementation of the international responsibility of the state are governed by the special rules of international law.


6 See: e.g. id at 74- 75, 95- 103, Passim.


9 See: e.g. id at 21, 75- 76, 78, 80- 81, 108.

10 See: e.g. id at 22- 23, 32- 41, 43- 45, 49- 52, 60- 72, PASSIM.
superior orders are not a defence if the recipient knew the orders were illegal or if they were manifestly illegal.

2. Reflections on the Concept of Responsibility as seen by The International Law Commission

At the international law commissions (ILC) twenty-second session in 1970, the special rapporteur presented a second report entitled “the origins of international Responsibility.”\(^{11}\) Which examined the following general rules governing the topic as a whole;

- The principle of internationally wrongful acts as a source of responsibility.
- The essential condition for the existence of internationally wrongful acts and,
  - The capacity to commit such acts.

Draft articles were submitted in respect of these fundamental rules. The commission’s discussions of the report. led to a series of conclusions as to the:

- Method.
- Substance and
- Terminology essential for the continuation of its work.

It should therefore be noted that the international responsibility of the state is made up of a set of legal situations which result from the breach of any international obligations, whether imposed by the rules governing one particular matter or by those governing another.

Under the general plan adopted by the commission, the *origin of the international responsibility*, formed the subject of PART I of the draft which was concerned with determining on what grounds and under what circumstances a state could be held to have committed an internationally wrongful act, which as such is the source of international Responsibility.

PART II, dealt with the *context, forms and degrees of international responsibility*, that is to say, with determination of the consequences that an internationally wrongful act of a state may have under international law in different cases. (Reparative and punitive Consequences of an internationally wrongful act, relationship between these types of consequences, material forms which reparations and sanctions may take.

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\(^{11}\) See: The International Law Commissions Annual Report 1970.
PART III concerns the implementations (mise en œuvre) of international responsibility and the settlement of disputes.

According to ICRC experts on humanitarian law, public international law can be described as being composed of two layers: the first is the traditional layer consisting of the law regulating coexistence and cooperation between the members of the international society – essentially the States; and the second is a new layer consisting of the law of the community of six billion human beings. Although international humanitarian law came into being as part of the traditional layer, i.e. as a law regulating belligerent inter-State relations, it has today become nearly irrelevant unless understood within the second layer, namely as a law protecting war victims against States and all others who wage war.

The implementation of international humanitarian law may therefore be understood from the viewpoint of both layers. For a branch of law that applies in a fundamentally anarchic, illegal and often lawless situation such as armed conflicts; the focus of implementing mechanisms is and must always be on prevention. The International Committee of the Red Cross (ICRC), the traditional implementing mechanism of international humanitarian law, acts as a neutral intermediary between States and as an institutionalised representative of the victims of war. At both levels it prevents and addresses violations, *inter alia*, by substituting itself for belligerents who fail to fulfil their humanitarian duties. Its approach is victim-oriented rather than violation oriented. Nevertheless, in a legal system violations, once they occur, must also have legal consequences. Violations are committed by individuals.

International humanitarian law is one of the few branches of international law attributing violations to individuals and prescribing sanctions against such individuals. This approach, typical for the second layer of public international law, has made enormous progress in recent years. Although international humanitarian law has increasingly been implemented against and for the benefit of individuals, it is also part of the first layer in that it is implemented between States. In this traditional structure, violations are attributed to States and measures to stop, repress and redress them must therefore be directed against the State responsible for the violations. The inter-State consequences of violations are laid down in the rules on State responsibility. This article will try to show how those rules apply to violations of international humanitarian law.

In the year 2000 the International Law Commission (ILC) finally adopted, as a crowning achievement of 45 years of work, the “Draft Articles on Responsibility of States for internationally wrongful acts” (hereafter: Draft
This codification of the so-called secondary rules of international law applies to violations of all primary rules, except “where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law”\textsuperscript{13} In examining State responsibility, it will therefore be important to determine for which rules laid down in the Draft Articles international humanitarian law foresees a \textit{lex specialis}. The Draft Articles and their Commentary, also adopted by the ILC, frequently refer to international humanitarian law as an example for or as an exception to rules contained in the Draft Articles.

A review and discussion of these references provide a better understanding of the definition and consequences of violations of international humanitarian law at the inter-State level which, despite the recent progress of international criminal law, remain crucial for ensuring respect for war victims as long as the international community continues to consist of sovereign States and as long as the international community has not achieved the form of an institutionalised world State in which the corporate veil – and concomitant responsibility – of the State no longer matter. For the time being, harmonizing international humanitarian law with secondary concepts common to international law as a whole is a way of perfecting it.\textsuperscript{14}

3. The State versus the Individual - the Bottom Line

This has been a subject of contention amongst jurists, politicians and human rights experts for decades. In fact the question is as old as international humanitarian law itself. However, to fall under the inter-State rules belonging to the traditional layer of international law, violations must consist of conduct attributable to a State. If they do not, these violations may still give rise to individual criminal responsibility and it is this second possible attribution that


\textsuperscript{13} Draft Article 55.

differentiates international humanitarian law from most other branches of international law.

a) Conduct of Members of Armed Forces and the Issue of Responsibility

Even though experts still sharply disagree on this subject, the draft articles on the responsibility of states for internationally wrongful acts throws some light on the subject. The first issue arising in this context is whether a State is responsible for all conduct of its armed forces. Draft Article 7 reads: “The conduct of an organ of a State shall be considered an act of the State under international law if the organ, person acts in that capacity, even if it exceeds its authority or contravenes instructions.” Under Article 3 of the Hague Convention No. IV and Article 91 of Protocol I a party to the conflict “shall be responsible for all acts by persons forming part of its armed forces”. The three provisions clearly cover acts committed contrary to orders or instructions. Under the said Draft Article, a State is, however, responsible only for the conduct of members of its armed forces acting in that capacity. This limitation may exclude all acts committed as a private person, such as theft or sexual assaults by a soldier during leave in an occupied territory. In its Commentary, the ILC simply considers that the international humanitarian law rule exemplifies the Draft Article. Previously, commenting on the corresponding Draft Article adopted in its first reading, the ILC still considered the international humanitarian law provision as an exception to the general rule, as lex specialis, by which States assumed responsibility for conduct by members of their armed forces, even if committed in their capacity as private individuals. In this author’s opinion, the latter view, unanimously supported by pertinent scholarly writings and a


16 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977, 1125 UNTS3-434 (hereafter: Protocol I).


judicial opinion, is correct. The travaux préparatoires of Article 3 of Hague Convention No. IV indicate the desire to modify the previous rule under which a State was not responsible for unauthorized acts of soldiers without officers in command. The only reservation made exemplifies the fear that a State should not become an insurer for all damage provoked by its troops. Indeed, in addition to the subjective element of being attributable to a State, those acts must fulfill the objective element of responsibility of being unlawful, in the sense that they violate specific provisions of international humanitarian law. Absolute responsibility for such acts is also justified by the fact that soldiers are a particular category of State organs, over which the State exercises much stricter control than over other officials. Those who do not want to consider Article 3 of Hague Convention No. IV as lex specialis in relation to Draft Article 7 may consider that at least in wartime and with regard to acts governed by international humanitarian law, members of the armed forces are always on duty and never act in a purely private capacity. As private persons, they would never have entered into contact with enemy nationals or acted on enemy territory.

b) Illegal Armed Groups, Liberation Movements and the Issue of Responsibility under International Humanitarian Law

For close to halve a century now, this has been a point of contention between the Israeli government and the Palestinian authority which according to the Israeli government has failed to control the numerous armed factions operating in the occupied Palestinian territory and inside Israel. The second attribution issue, which is of specific importance to international humanitarian law, raises the question as to the conditions under which an armed group, fighting against governmental armed forces, can be considered as the de facto agent of a foreign State. The latter would entail the consequence that its conduct


23 Draft Article 2.
could be attributed to that State and that the law of international armed conflicts would therefore apply. Draft Article 8 reads: “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct”.

The ILC writes,” it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it”.24 This is true for the appreciation of the facts, while the applicable legal standard provided for by the secondary rule of attribution must be the same in all cases. Such attribution was an issue in the Nicaragua case decided by the International Court of Justice (ICJ). The Court required a rather high degree of effective control for such an attribution when it wrote, concerning US responsibility for the contras fighting against the Nicaraguan government, that US “participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of targets, and the planning of the whole of its operation, is still insufficient in itself for the purpose of attributing to the United States the acts committed by the contras For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed”.25

Some would argue that this standard has recently been further lowered when the UN Security Council acquiesced in US self-defence against Afghanistan in reaction to the terrorist attacks of 11 September 2001 committed by the non-State Al Qaeda group harboured by the Taliban, the then de facto government of Afghanistan.26 It may be that special rules of attribution apply with regard to the use of force. Otherwise, such use by the US against Afghanistan (and not simply against Al Qaeda targets in Afghanistan) could be justified by the right of self-defence against an armed attack only if the armed attack by Al Qaeda could be

attributed to Afghanistan. Such attribution was apparently made by the US simply because Afghanistan harboured and supported the group, and independently of whether that State had overall control over the group. It remains to be seen whether this indicates a development, applicable to all primary rules, of the secondary rule and whether the purported new rule is meant to apply to all States and future similar cases – this claim is indispensable for it to be a legal rule.

c) Levée en masse

The idea of war is as old as human history so too is the phenomenon of civilians taking p arms against constituted armed enemies. The idea of responsibility for violation of international humanitarian law in this context has been a bon of contention amongst experts. A glaring example is the recent actions of Iraqi civilians putting up fierce armed resistance against advancing allied forces during the second gulf war. Another provision adopted by the ILC on attribution is Draft Article 9 on “Conduct carried out in the absence or default of the official authorities”. This particular provision, according to the Commentary, owes something to an old-fashioned international humanitarian law institution known as the “levée en masse”, i.e. the rule that civilians spontaneously taking up arms on the approach of the enemy and in the absence of regular forces have combatant status and a right to participate directly in hostilities. The provision makes it clear that a State is responsible for the conduct, for example violations of international humanitarian law, of such civilians.

d) Conduct in the Exercise of Governmental Authority

The indictment and subsequent trial of Yugoslav president Slobodan Milošević for war crimes and crimes against humanity after the Kosovo war marked an important turning point in the history of applicability of international humanitarian law and the deeply rooted disagreement over state and individual responsibility. In an environment marked by privatisation and deregulation, even in the fields of defence, security and prisons, it may be useful to mention Draft Article 5 under which a State is responsible for private entities or individuals “empowered by the law of that State to exercise elements of the governmental authority”.

e) Insurrectional Movements

An additional provision attributing the conduct of non-State entities or individuals to a State is Draft Article 10 on “Conduct of an insurrectional or other movement”. This provision states that such conduct is attributable to the

27 Art. 4(A)(6) of Convention III (note 33) and Art. 2 of the Hague Regulations.
State if the movement becomes the new government of the State, or to a new State if the group succeeds in establishing a new State. For the rules governing State responsibility, as for international humanitarian law, the legitimacy or illegitimacy of the insurrection is of no importance but “rather, the focus must be on the particular conduct in question, and on its lawfulness or otherwise under the applicable rules of international law”. Furthermore, the ILC considers that for defining the types of groups encompassed by the term “insurrectional movement” the threshold for the application of the laws of armed conflict contained in Protocol II may be taken as a guide.28 In this author’s view this should, however, not mean that a State is not responsible for violations of Article 3 common to the Geneva Conventions, which is equally applicable in non-international armed conflicts but has a lower threshold of application, if such violations have been committed by an armed group which later becomes the new government of that State but was not covered by Protocol II at the time of the violation.

While the ILC was not concerned with the responsibility of subjects of international law other than States, it recalls that: “A further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces”. Indeed, international humanitarian law implicitly confers upon parties to non-international armed conflicts whether they ultimately succeed or not the functional international legal personality necessary to exercise the rights and obligations laid down by it.29 It is useful to recall that violations of international humanitarian law by such parties entail their international legal responsibility; this is of particular importance with regard to the corresponding rights and duties of third States in the event of such violations.

f) Lack of Due Diligence

This chapter would not be complete if it did not mention a cause of responsibility considered by the ILC, and probably rightly so, to derive from the primary rules.30 Private entities or individuals may violate international

28 Ibid., p. 115 (Para. 9 on Art. 10) and Art. 1(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, of 8 June 1977, 1125 UNTS 609–699 (hereafter: Protocol II).
humanitarian law even if their conduct cannot be attributed to a State. In relation to such conduct, a State may have an obligation to exercise due diligence in order to prevent conduct contrary to international law and to prosecute and punish it if it occurs. This is not the place to analyse which rules of international humanitarian law request what degree of diligence from States in relation to violations of international humanitarian law by private players. Suffice it to say that some rules explicitly or implicitly request such diligence. It is suggested that violations of the obligations to take preventive measures already in peacetime, for example to disseminate international humanitarian law, and to prosecute grave breaches could also imply responsibility for conduct by private players that is facilitated by such omissions. Finally, the obligation to “ensure respect” laid down in Article 1 common to the Conventions could also be seen as establishing a standard of due diligence with regard to private players if the latter find themselves under the jurisdiction of a State, or even with regard to breaches of international humanitarian law by States and non-State actors abroad which could be influenced by a State.

4. Circumstances precluding the wrongfulness of violations of international humanitarian law

The ILC codifies six circumstances precluding the wrongfulness of an otherwise unlawful act: consent, self-defence, countermeasures, force majeure,


34 Kamenov, op. cit. (note 5), pp. 179-182, qualifies such responsibility as “semi-direct”; and N. Levrat, “Les conséquences de l’engagemenmpri par le H.P.C. de “faire respecter les conventions humanitaires”, in Kalshoven and Sandoz, op. cit. (note 5), pp. 274-291, considers that this obligation of conduct has to be fulfilled by the mechanisms foreseen by IHL. For the inter-State aspect of the responsibility to “ensure respect”. See the text after note 79.
distress and necessity. However, it also specifies that no such circumstance can preclude the wrongfulness of a violation of peremptory norms of international law. The ICJ, the ICTY and the ILC consider that the basic rules of international humanitarian law are peremptory. It would be beyond the scope of this article to analyse which rules of international humanitarian law are basic enough to belong to jure cogens. Some eminent writers suggest that all rules of international humanitarian law are peremptory. At least from the standpoint of the concept of jure cogens under the law of treaties, international humanitarian law itself supports this view when it prohibits separate agreements that adversely affect the situation of protected persons. It would be difficult to find rules of international humanitarian law that do not directly or indirectly protect rights of protected persons in international armed conflicts. In both international and non-international armed conflicts, those rules furthermore protect “basic rights of the human person” which are classic examples for jure cogens.35

a) Consent

As for consent as a circumstance precluding wrongfulness, the international humanitarian law treaties themselves stipulate that no State may absolve itself or another State of any responsibility incurred in respect of grave breaches. This confirms that a State cannot consent to a violation of the rules of international humanitarian law that protect victims’ rights.

b) Self-defence

The ILC Commentary clarifies that “as to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct”. This is a necessary consequence of the absolute separation between jure ad bellum on the legality of the use of force and jure in bello, to which international humanitarian law belongs, governing the manner in which such force may be used.36 From this perspective, it is regrettable and astonishing that the ICJ concluded in the Nuclear Weapons

35 Barcelona Traction, Light and Power Company, Limited, Second Phase, ICJ Reports 1970, p. 3, at p. 32, para. 34.44 Arts 51/52/131 and 148, respectively, of the four Conventions.
Advisory Opinion that it could not “reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake”. Indeed, if the use of nuclear weapons normally violates international humanitarian law, as implied in the said Opinion of the ICJ, it does so even in an extreme circumstance of self-defence.

c) Necessity

Draft Article 25 restricts necessity as a circumstance precluding wrongfulness to cases in which a conduct is “the only way for the State to safeguard an essential interest against a grave and imminent peril” and does not impair another essential interest. It does, however, preclude invocation of necessity if the international obligation in question excludes that possibility. The ILC Commentary mentions as an example that “certain humanitarian conventions applicable to armed conflict expressly exclude reliance on military necessity. Others while not explicitly excluding necessity are intended to apply in abnormal situations of peril for the responsible State and plainly engage its essential interests. In such a case the non-availability of the plea of necessity emerges clearly from the object and the purpose of the rule.” Indeed, international humanitarian law is a law that was made for armed conflicts, which are by definition emergency situations. It therefore implicitly excludes the defence claim of necessity, except where explicitly stated otherwise in some of its rules.37 This was most categorically stated by the ILC in its commentary on the corresponding Article 33 adopted at its first reading, some of which deserves to be quoted:

“The rules of humanitarian law relating to the conduct of military operations were adopted in full awareness of the fact that ‘military necessity’ was the very criterion of that conduct. The representatives of States who formulated those rules intended, by so doing, to impose certain limits on States. And they surely did not intend to allow necessity of war to destroy retrospectively what they had achieved with such difficulty. They were also fully aware that compliance with the restrictions they were providing for might hinder the success of a military operation, but if they had wished to allow those restrictions only in cases where they would not hinder the success of a military operation, they would have said so expressly – or, more probably would have abandoned their task as being of relatively little value. The purpose of the humanitarian law conventions was to subordinate, in some fields, the interests of a belligerent to a higher interest.”38 The ILC correctly points out that considerations of military

37 See, for example, Art. 33(2) of Convention I, Arts 49(2) and (5), 53, 55(3) and 108(2) of Convention IV, and Art. 54(5) of Protocol I.

necessity “are taken into account in the context of the formulation and interpretation of the primary obligations” of international humanitarian law, either as the underlying criterion for many of its substantive rules or explicitly mentioned in the terms of some other rules. It may be added that military necessity is also a prohibitive principle of international humanitarian law, which excludes any conduct conducive to damage or suffering which is not necessary to obtain a military advantage.39

d) Distress

In this author’s view, considerations similar to those set forth in relation to necessity must apply to distress. In the case of distress, contrary to necessity, the peril affects the individual and not the State. Draft Article 24 precludes wrongfulness if the individual performing an act has no other reasonable way of saving his life or the lives of other persons entrusted to his care. The situation of distress may, however, not be due to the conduct of the State invoking it and the act in question may not be likely to create a comparable or greater peril. It is suggested that individuals are by definition as much in distress when engaged in armed conflicts as States are in a state of necessity. The rules of international humanitarian law must be presumed to take this into account.40 To consider, for example that a State is not responsible if its soldiers injure civilians to save their own lives would be leaving little space for that law. Concerning one of the violations for which necessity or distress have been invoked as circumstances precluding wrongfulness, i.e. torture, it must be recalled that the latter violates jus cogens, and that treaty law relating to this offence explicitly bars such justification.41

5. Legal consequences of violations of international humanitarian law

Part Two of the Draft Articles deals with the substance of State responsibility, that is to say obligations arising for the responsible State from its responsibility. The responsible State must cease the unlawful conduct and

40 Without further explanation, Condorelli and Boisson de Chazournes, op. cit. (note 38), p. 22, consider that distress precludes the wrongfulness of violations of IHL.
41 57 Art, 2(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, 1465 UNTS 112.
make full reparation, which includes restitution, compensation or satisfaction. Article 3 of the Hague Convention No. IV and Article 91 of Protocol I specifically mention only financial compensation. However, since under those provisions such compensation has to be paid only “if the case demands”, it may be seen, as in general international law, as subsidiary to “restitutio in integrum”. In addition, the Draft Articles remind us that the obligation to make reparation also applies in cases of violations of international humanitarian law governing non-international armed conflicts, which are not covered by the aforementioned treaty rules. The ILC stresses that such obligations may also exist towards persons or entities other than States, for example in the case of “human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a State”. The Draft Articles do not deal with such rights “which may accrue directly to (private) persons”, but recognize the possibility. Whether and to what extent private persons are entitled to invoke responsibility on their own account depends on each applicable primary rule. War victims are certainly beneficiaries of international humanitarian law obligations. However, for international armed conflicts many of the latter are still formulated as obligations between States. The obligation to pay compensation for violations laid down in international humanitarian law was traditionally seen as an obligation to pay compensation to the injured State, i.e. the State to which the individual injured persons belonged and to which they had to refer their claim.

This view is strongly influenced by the traditional view of diplomatic protection under which the national State of an injured foreigner is deemed to be presenting its own claim and not that of its national. At least in international humanitarian law this construction is not always correct, as many rules are formulated in a human rights-like manner as entitlements of war victims. In such cases the only problem is procedural, i.e. that the injured individuals have no standing in the usual procedures for the settlement of disputes. Substantively they do have, however, an entitlement under international law. Their national State and even every third State may present it at the international level in their favour. They themselves may present it before national courts whenever international law is directly applicable in a given legal system and the rules concerned are self-executing, or whenever domestic law provides them with a private right of action. Historically, former belligerents sometimes established arbitral tribunals or special courts to adjudicate such claims brought by former enemy individuals against them. Too often, however, they waived reparation for violations in peace treaties and other agreements, a practice which would today violate an explicit prohibition of international humanitarian law.
6. Implementation of State Responsibility for Violations of International Humanitarian Law

One of the most difficult, delicate and yet rarely analysed questions of international humanitarian law is what other States may or must do when a Stat violates international humanitarian law. Some argue that at least as regards the implementation of State responsibility, international humanitarian law is a self-contained system. However, we shall see that the mechanisms for the implementation of international humanitarian law, too, are embedded in those of general international law on State responsibility and can be better understood within that framework. In addition, it will be shown that one mechanism provided for by international humanitarian law, Article 89 of Protocol I, is so vague that all the general mechanisms can be seen as its application.

a) The Obligation to “Ensure Respect” for International Humanitarian Law

Under Article 1 common to the four Geneva Conventions and Protocol I, all States undertake to “ensure respect” for their provisions “in all circumstances”. This Article is today unanimously understood as referring to violations by other States. The ICJ has decided in the 
Nicaragua
 case that it gives specific expression to a “general principle of humanitarian law” and that it also applies to the law of non-international armed conflicts. The UN Security Council, the UN General Assembly and an overwhelming majority of the States party to the Fourth Geneva Convention have furthermore applied this principle in calling on third States to react to Israeli violations of that Convention in the territories it occupies. It is, however, not clear what measures which States may take in accordance with which procedure. It may therefore be useful to analyse these questions from the point of view of the rules on State responsibility, together with the possible reactions by a State that has been individually and directly injured by violations of international humanitarian law. In this author’s view common Article 1 in some respects applies the general rules on State

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responsibility, in other respects establishes a special secondary rule, and is also a primary rule to which the rules on State responsibility apply. The first step must be to determine when a State may be considered injured by a violation of international humanitarian law. Only then is it possible to explain how such an injured State may react and what, if any, measures are available to other States.

b) Countermeasures

The injured State, as previously defined, may invoke the responsibility of the State violating international humanitarian law and demand that the responsible State comply with its obligations arising from its responsibility. It may also take countermeasures in order to induce the violating State to comply with its primary and secondary obligations. “Countermeasures” are the modern term used for reprisals, at least outside the context of international armed conflicts. Such countermeasures may consist of the non-performance, for the time being, of international obligations of the injured State towards the responsible State. They must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question. As soon as the responsible State complies with its obligations, the countermeasures must then be terminated.

Draft Article 50(1)(c) explicitly states that countermeasures may not affect “obligations of a humanitarian character prohibiting reprisals”. The ILC comments that this provision “reflects the basic prohibition of reprisals against individuals, which exists in international humanitarian law. In particular, under the 1929 (sic!) Hague and 1949 Geneva Conventions and Additional Protocol I of 1977, reprisals are prohibited against defined classes of protected persons, and these prohibitions are very widely accepted.” As for obligations of international humanitarian law not covered by those prohibitions of reprisals, they may not be affected by countermeasures contrary to obligations for the protection of fundamental rights. In this author’s view, they may likewise not be affected by countermeasures against violations of rules of international law other than those of international humanitarian law. When the original violation is one of “jus ad bellum” this limitation is a necessary consequence of the fundamental distinction and separation between jus ad bellum and jus in bello. If any rules of international humanitarian law could be violated as a countermeasure against an act of aggression, those rules would be meaningless. Once it is, however, admitted that even the most egregious violation of international law, i.e. aggression, cannot justify violations of international humanitarian law as a countermeasure, it is suggested that no other violation of the law of peace may be met by countermeasures violating international humanitarian law. If this is true, even violations of international humanitarian law not prohibited by way of
reprisals may be justified only as countermeasures in reaction to violations of international humanitarian law. As for countermeasures against violations of international humanitarian law, it is important to notice that under Draft Article 50(1)(a) and (b) countermeasures may consist neither of the threat or use of force, nor of violations of fundamental human rights. In this context the ILC refers to General Comment 8 (1997) of the Committee on Economic, Social and Cultural Rights on the effect of economic sanctions on civilian populations and especially on children. The ILC quotes the Committee’s text by stating that whatever the circumstances, such sanctions should always take full account of economic, social and cultural rights and that “it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of a country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country”. The ILC also draws an analogy from Article 54(1) of Protocol I which “stipulates unconditionally that ‘starvation of civilians as a method of warfare is prohibited’”.

c) Action that May be Taken by other States

Invocation of responsibility by any State. Under Draft Article 48(1), any State other than an injured State is entitled to invoke the responsibility of another State if the obligation breached is owed to the international community as a whole. As evidenced by common Article 1, the rules of international humanitarian law belong to such obligations erga omnes. “Any State” may (and – under common Article 1 – must), therefore, in the event of international humanitarian law violations, claim cessation from the responsible State as well as “reparation in the interest of the injured State or of the beneficiaries of the obligation breached”. Those beneficiaries will often be the individual war victims. The term “any State” was “intended to avoid any implication that these States have to act together or in unison”. For common Article 1 it is thus made clear that third States do not have to act together or in coordination when they invoke the responsibility of a State violating international humanitarian law. If there is disagreement on whether a given act constitutes a violation, those qualifying it as a violation have an obligation to act individually.

Admissibility of countermeasures in the interest of the community. The most difficult issue under both the law of State responsibility and international humanitarian law is whether “States other than the injured State” may (or – under common Article 1 – must) resort to countermeasures. While the Rapporteur wanted to admit collective countermeasures in the case of gross and well attested breaches of such community obligations, and although the Drafting Committee adopted an article in 2000 permitting any State to take
countermeasures in the interest of the beneficiaries in the case of serious breaches of peremptory norms, the ILC itself adopted only a saving clause. Under Draft Article 54, the chapter on countermeasures “does not prejudice the right of any State (other than the injured State) to take lawful measures against the responsible State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached”. In its Commentary, the ILC reviews various precedents to conclude that “the current state of international law on countermeasures taken in the general or collective interest is uncertain”. State practice is sparse and involves a limited number of States.

Cooperation in the event of serious violations. The question that arises here is whether Article 89 of Protocol I provides, as a *lex specialis*, more precise guidance to third States. It reads: “In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.” The ILC Comments do not add much, explaining that “because of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what form this cooperation should take”, nor “what measures States should take in order to bring an end to serious breaches”. However, the ILC abandons the proposal of its Drafting Committee to allow for coordinated countermeasures. It mentions: “Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. Yet paragraph 1 also envisages the possibility of non-institutionalised cooperation.”44 What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches.” The ILC concludes that “paragraph 1 seeks to strengthen existing mechanisms of cooperation, on the basis that all States are called upon to make an appropriate response”.

Institutionalised reaction. Furthermore, both Draft Article 41(1) and Article 89 of Protocol I mainly call for an institutionalised reaction through the UN. In recent years, the latter has indeed reacted with measures under Chapter VII of the UN Charter to such violations. Such measures may be considered as an implementation of State responsibility, but do not fall under the Draft Articles. Normally a State is not responsible for the conduct of an international organization to which it belongs, or for its conduct as member of an organ of an international

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organization. However, the question that arises is whether States, having an
obligation under common Article 1 and Article 89 of Protocol I to act under certain
circumstances through an international organization, do not violate that obligation
if in their capacity as members of organs thereof, for example as members of the
UN Security Council, they hinder that organization from taking action.

*Attitude towards situations created by serious violations.* The second
paragraph of Draft Article 41 is important in the event of violations of
international humanitarian law which amount to serious breaches of an
obligation arising under a peremptory norm of general international law. It reads:
“No State shall recognize as lawful a situation created by a serious breach, or
render aid or assistance in maintaining that situation”. Such an obligation is not
only of importance in relation to the establishment of settlements in occupied
territories contrary to Article 49(6) of the Fourth Geneva Convention and the
commerce in goods produced in such settlements, but applies equally to the
import of diamonds enabling parties to perpetuate non-international armed
conflicts in which international humanitarian law is systematically disregarded
and which, contrary to international humanitarian law, are fought with the
participation of large numbers of children.

7. Conclusion

As earlier noted, violations of international humanitarian law do not
appear to relate to flaws in its provision, but rather to the interpretation and or
application of those provisions. The interpretation problems seem to originate
from political and / or legal considerations. In particular these problems can be
ascribed to the following:

- The political will or good faith often lacks with regards to the
application or implementation of international humanitarian law, or with regards
to ensuring respect for international humanitarian law.

- The problem of proportionality often causes security considerations of
a military nature to override the safety considerations for and protection of the
civilian population caught up in an armed conflict;

- Owing to political and or legal considerations (e.g. a denial that an
armed conflict exists) international humanitarian law is interpreted in such a
manner as to deny its application thereof to certain situations of armed conflict.
It is thus subject to considerations of political expediency, as a result of which it
is applied selectively and subjectively, thus weakening it. The violations become
particularly dangerous often leading to excesses, when supported by historical,
ideological and/or religious arguments.
States are less and less the sole players on the international scene, and even much less so in armed conflicts. Rules on State responsibility, in particular as codified by the ILC, are exclusively addressed to States individually and as members of the international society. Their possible impact on better respect for international humanitarian law should therefore not be overestimated, especially not when compared to the preventive and repressive mechanisms directed at individuals. The Draft Articles and their Commentary do clarify, however, many important questions concerning implementation of international humanitarian law and may therefore help to improve the protection of war victims by States, for in the harsh reality of many present-day conflicts States continue to play a major direct or indirect role, particularly if they are not allowed to hide behind the smokescreen labels of “globalisation”, “failed States” or “uncontrolled elements”. They are responsible, under the general rules on attribution of unlawful acts, much more often than they would wish. Furthermore, violations do have consequences, not only humanitarian consequences for the victims but also legal consequences for the responsible State.

Finally, there can be no state responsibility without individual involvement and responsibility, but there can be individual responsibility for violations of international humanitarian law without state concern or responsibility. through the combined mechanisms of international humanitarian law and of the general rules on State responsibility, all other States are able and are obliged to act when violations occur. Ideally, they should do so through universal and regional institutions, an aspect perhaps neglected by the ILC. Recent events show, however, a certain return to unilaterlism once a situation really matters. The Draft Articles on State responsibility, applied to international humanitarian law violations, remind us that all States can react lawfully and clarify to a certain extent what States should do. This may be the most important message of the foregoing analysis. Although there unquestionably has to be the necessary political will, the need to respect and ensure respect for international humanitarian law is not a matter of politics, but rather a matter of law.

Original in English

Literature


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DILEME O ODGOVORNOSTI POJEDINCA I DRŽAVE ZA KRŠENJA MEĐUNARODNOG HUMANITARNOG PRAVA

REZIME

Međunarodna humanitarno pravo je jedna od nekoliko grana međunarodnog humanitarnog prava kojim se pojedinima pripisuju kršenja tog prava i propisuju sankcije protiv takvih pojedinaca. Ovakvim pristupom, tipičnim za drugi nivo međunarodnog javnog prava, postignut je veliki napredak poslednjih godina. Mada se međunarodno humanitarno pravo sve više primenjuje protiv i u korist pojedinaca, ono takođe čini prvi nivo na kome se primenjuje među državama. U ovoj tradicionalnoj strukturi kršenja humanitarnog prava se pripisuju državama a mere da se ona zaustave, suzbiju i eliminiru moraju biti namenjene državi koja je takođe odgovorna za kršenja humanitarnog prava. Međudržavne posledice kršenja humanitarnog prava su regulisane pravilima o odgovornosti države. Autor nastoji da pokaže kako se ova pravila primenjuju u sferi kršenja međunarodnog prava.

Danas većina sukoba nije međunarodnog karaktera i ne postoji ništa što bi navelo na to da bi klasifikacija jednog konflikta kao međunarodnog ili unutardržavnog prema
međunarodnom pravu mogla da ima ikakvog uticaja na ponašanje strana koje su u njega umaše. Razmatrajući predloge članova o državnoj odgovornosti autor izražava uverenje da u današnjem svetu ekspanzije i primene međunarodnog humanitarnog prava i posebno u pogledu pripisivanja odgovornosti za kršenje tog prava, treba uzeti u obzir osetljivu ravnotežu između koncepata odgovornosti pojedinca i države.

Uprkos napretku koji je u poslednje vreme postignut u sferi međunarodnog krivičnog prava temeljno ispitivanje posledica kršenja međunarodnog humanitarnog prava ostaje od presudnog značaja kako bi se obezbedilo poštovanje žrtava rata. Same države su sve manje i manje jedini faktori na međunarodnoj sceni, a još manje u oružanim konfliktilima. U ovom članku se opaža da se pravila o odgovornosti države, posebno ona koja je kodificirala Međunarodna pravna komisija (Ženevsko konvencije iz 1949, kao i neki drugi ugovi, konvencije) se isključivo odnose na države pojedinačno i na države kao članice međunarodnog društva. Njihov eventualni uticaj na veće poštovanje međunarodnog humanitarnog prava stoga ne treba precentiti, posebno kada se uporedi sa preventivnim i represivnim mehanizmima koji se primenjuju na pojedince. U ovim međunarodnim konvencijama o odgovornosti država za počinjena dela koja nisu u skladu sa međunarodnim pravom se zaista daje razjašnjenje za mnoga važna pitanja na planu sprovođenja međunarodnog humanitarnog prava i one stoga mogu biti od pomoći državama kako bi se omogućila veća zaštita žrtava rata. Gruba je realnost da u mnogim sadašnjim sukobima države i dalje neposredno ili posredno igraju glavnu ulogu.

Literatura o odvajanju odgovornosti države od odgovornosti pojedinca otkriva nedostatak sistematskog komparativnog istraživanja o karakteristikama odgovornosti ili objašnjenjima o njihovom poreklu i onom do čega ona dovode. U članku se sagledavaju mogućnosti i napori vezani za kodifikaciju i u glavnim crtama se daju prioriteti istraživanja u ovoj sferi. Po autorovom mišljenju naš cilj je trostruk. Jedan je da se povećaju kompetencije Međunarodnog krivičnog suda, Ujedinjenih nacija i drugih legitimnih međunarodnih tela, uključujući regionalne organizacije, da se poveća prostor delovanja međunarodnog humanitarnog prava i ojača njegova primena. Drugi cilj je da se ostvari što je moguće tešnja i šira saradnja sa međunarodnim institucijama sa zadatkom da se odgovornost ne pripisuje samo u slučaju kada se teže ostvarivanje pojedinačnih ciljeva nacionalne politike. I konačno cilj je da se osigura da mere koje se preduzimaju prilikom primene međunarodnog humanitarnog prava budu efikasne i u skladu sa njihovim specifičnim ciljem i da ishod toga bude poboljšanje života velikog broja ljudi kojih se to tiče. Viktimizaciju pojedinaca treba izbaci po svaku cenu, pri čemu propisani lek ne sme biti gori od bolesti.