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International Humanitarian Law 2.0

How to Update the Law of War to Address New Challenges on Today's Battlefields?

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Program International Law

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On Reforming International Humanitarian Law

In the words of the president of the ICRC, Peter Maurer, «the normative legal framework [has never] been so strong and comprehensive», referring to contemporary international humanitarian law during his speech on the occasion of the launch of the updated Commentaries on the First Geneva Convention in April 2016.[1] At the same time, however, he pointed to the fact that «[n]ot enough countries, not enough armies, not enough armed groups, are abiding by those fundamental human values enshrined in the Geneva Conventions.» Similar concerns were also expressed by the Swiss Federal Department of Foreign Affairs (FDFA): «The main problem in contemporary armed conflicts is not the lack of norms but rather the widespread flouting of those that already exist.»[2] Both of these statements set out that an essential issue of international humanitarian law (IHL) is its poor observation and implementation. However, both statements also leave open the question of whether contemporary international humanitarian law, if observed, suffices without any additional rules.

The fundament of the rules of the conduct of warfare and the treatment of people hors de combat, were laid out over one and a half centuries ago with the adoption of the Geneva Convention in 1864. Since then, the ius in bello has been steadily advanced and adapted to contemporary developments in warfare. The most important milestones in this evolution were, among others, The Hague Conventions of 1899 and 1907, and the Geneva Conventions of 1949 with their additional protocols in 1977 and 2005. Looking into its development, particularly its milestones, it becomes clear that international humanitarian law is not exempt from development, but rather like other fields of law, is constantly changing while adjusting to new social realities. As an example, one could think of the development from the first Geneva Convention and the Martens clause to the conventions after WWII, but particularly at the insight that these conventions do not cover civil wars. For precisely

Also in the 21st century, there are many situations as well as technological and sociological developments that pose a challenge to IHL.

1 'Launch of updated Commentaries on the First Geneva Convention: Speech given by ICRC President', <https://www.icrc.org/en/document/speech-icrc-president-updated-commentaries-first-geneva-convention> (last accessed 9 May 2017).

2 Federal Department of Foreign Affairs (FDFA), 'Swiss/ICRC Initiative on Strengthening Compliance with International Humanitarian Law (IHL)–Factsheet', <https://www.eda.admin.ch/ dam/eda/en/documents/aussenpolitik/voelkerrecht/factsheet-compliance-icrc_EN.pdf> (last accessed 9 May 2017), 1.

this reason additional protocols were added in the 1970s to cover the issues of non-international conflict too. Yet also in the 21st century, there are many situations as well as technological and sociological developments that pose a challenge to IHL. In the current complex world, there are more internal than international conflicts or even a mix thereof, e.g. in Syria, where the distinctions between combatants, helpers and civilians is highly blurred, and atrocities occur with an unknown frequency, as can be seen from daily news dispatches from around the world. Hence, closely interconnected with compliance with IHL are the roles of actors. Classic IHL distinguishes between combatants and non-combatants. Yet, in contemporary conflicts this distinction appears in need of further refinement regarding the role various actors play in conflict.

Against this background, *foraus* – Swiss Forum on Foreign Policy launched «IHL 2.0», a call for ideas on future developments of international humanitarian law. From over a dozen submissions, *foraus* together with various external experts chose the most original and thought-provoking ideas and invited their authors to develop their ideas into concrete policy advices.

The intention behind all these submissions is to enhance and develop lacunae in IHL as well as to raise awareness of the struggles and challenges with regard to the enforcement and the respect for IHL.

Two main strands of ideas emerged: The first concerns specific actors in conflicts, whereas the second relates to structural challenges of humanitarian law, particularly regarding compliance.

The first contribution *Not a Target: Ensuring the Protection of Aid Workers* points to the challenge that today most conflicts are fought between governments and armed groups within a State's territory. This, again, impedes the enforcement of IHL and, in particular, the protection of aid agencies. To change this, the author proposes a standardization of legal protection of humanitarians as well as an independent body to monitor this.

The author of the second contribution addresses the topic of attacks against news providers in conflict. In order to bring to attention the need for enhanced protection of journalists in conflict zones, the paper introduces the *Swiss Initiative for the Protection of News Providers Covering Armed Conflicts,* composed of a «legal memorandum of understanding… pointing out the law applicable to journalists during armed conflicts», and a «tailor-made training course for both military personnel and journalists… on legal and practical aspects relevant to the general protection of news providers in regions of armed conflict.»

Together with the fourth and fifth, the third approach submits concepts on how to improve compliance of IHL on the structural level. In pursuit of respect for IHL by all actors in non-international armed conflicts, the proposal *Rules and Realities: Reducing the Discrepancies with Regard to International Humanitarian Law* suggests not only to ensure to hear all non-participating actors in peace-conferences but, additionally, to conclude particular agreements to enable «the establishment of specific and realistic sets of rules applicable to a particular conflict situation» and in this way to increase «the likelihood of compliance with jointly agreed humanitarian norms.»

Based on the assumption that public opinion is a central factor regarding the compliance with IHL, the fourth proposal entitled *An Imperfect but Pragmatic Law: Encouraging War Criminals?* advances the idea of classifying and weighing certain IHL violations as well as, highlighting «positive attitudes and trends towards a better respect for IHL».

Altogether, the intention behind all these submissions is to enhance and develop lacunae in IHL as well as to raise awareness of the struggles and challenges with regard to the enforcement and the respect for IHL. Additionally, in a somewhat provocative way, each proposal aims at sparking interest and a discussion about the current state and future of IHL, which again, should serve the strengthening of its core idea to limit the use of violence and to minimize suffering in war and conflict.

Geneva and Zurich, September 2017

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1. Not a Target: Ensuring the Protection of Aid Workers

Melanie Sauter

Summary

Violence against aid workers has become a major concern for most humanitarian agencies. At the same time, compliance with and respect for international humanitarian law (IHL) is deteriorating. Irregular warfare, meaning governments fighting armed groups mostly in their own territory, has become the norm. These modern wars pose a challenge to the enforcement of international law. The prevailing culture of impunity stimulates non-compliance with IHL for all conflict parties. As long as they are being targeted, aid agencies cannot effectively operate and help the most vulnerable. This is why the law protecting humanitarians needs to be standardized and better reporting and monitoring mechanisms are required.

1.1 Introduction

Violence against aid workers has become an increasing challenge for humanitarian organizations in conflict regions. In 2016, there were 199 major attacks against aid workers, of whom 73 were killed, 63 wounded, and 63 kidnapped.[1] The same year, cases of gang rape in South Sudan and deliberate attacks against medical centres and convoys in Syria drew significant media attention.

The protection of aid workers is a pressing issue, not only in the humanitarian scene, but also in the international political arena. In May 2016, the United Nations (UN) Security Council adopted a resolution condemning attacks against health workers and facilities.[2] Only a few months earlier, Action against Hunger started a campaign calling for a Special Rapporteur mandated by the UN to safeguard aid workers.[3] In December 2016 the UN General Assembly adopted a resolution urging all to respect the law and better protect humanitarian personnel.[4]

Enforcing the legal framework is the responsibility of respective governments. Yet, some governments are unwilling or unable to provide this protection.

Enforcing the legal framework that protects aid workers continues to be a major challenge because it is the responsibility of respective governments.[5] Yet, some governments are unwilling or unable to provide this protection. When governments are on the side of the attacker they will always lack political will to hold themselves accountable. In order to better assure the safety of humanitarian aid workers, better reporting and monitoring mechanisms are needed. Only then will the laws have a deterrent effect and improve the safety of aid workers.

1 Humanitarian Outcomes, 'Aid Worker Security Database' (2017) <https://aidworkersecurity.org/incidents> accessed 9 August 2017.

2 UNSC Res 2286 (3 May 2016) On Protection of the Wounded and Sick, Medical Personnel and Humanitarian Personnel in Armed Conflict. S/RES/2286 (2016).

3 Action Contre La Faim (2015), 'Ensuring the Protection Aid Workers: Why a Special Mandate Holder is Necessary.' Discussion Paper <http://www.actioncontrelafaim.org/en/content/ensuring-protection-aid-workers-why-special-mandate-holder-necessary> accessed 9 May 2017.

4 UNGA Res 71/129 (8 December 2016) Safety and security of humanitarian personnel and protection of United Nations personnel A/RES/71/129.

5 UNSC Res 1894 (11 November 2009) On the Protection of Civilians in Armed Conflict. S/RES/1894 (2009).

1.2 Why humanitarians are being attacked

Relief workers are targeted for numerous reasons. With a rising number of asymmetrical conflicts, the nature of warfare is changing. Traditional command chains are treated with disregard. Civilians, including humanitarian personnel, are used as human shields. Violence may occur in or around areas in which aid is distributed, such as refugee camps or health centres. These places are sometimes used by rebels to merge with the civilian population. As a consequence, government troops may not be able or willing to differentiate between civilian refugees and rebels.

Irregular wars are characterized by a high degree of criminality. Chaotic situations may benefit groups that can take advantage of the prevailing instability. Humanitarian organizations, on the other hand, aim to enhance stability. The conflicting objectives can provoke violence. Aid agencies may also compete with rebels for the loyalty of the civilian population. Providing alternative sources of public goods, such as healthcare, is a strategy of opposition groups to gather popular support.

Critics claim that humanitarian aid has become more politicized in recent years. When rebels perceive aid workers to be biased and a government tool, they are more likely to become hostile. In Afghanistan, for example, violence against western aid workers was connected with the general anti-west notions of the Taliban fighters.

Financial incentives also motivate attacks. Insurgencies are expensive and even ideological fighters need a basic income. The kidnapping of international personnel and subsequent ransom demands serve as a lucrative income. Skills needed from doctors or other specialized workers also motivate abductions of professional staff.

Perpetrators have a number of reasons as to why to attack aid workers. To understand these dynamics and to improve the security of aid workers, it is vital to keep track of each incident.

1.3 Different Legal Frameworks and Weak Judicial Systems

Aid workers generally enjoy a somewhat privileged status in international law. However, this status is greatly determined by organizational affiliation, nationality, and whether they are operating in an on-going armed conflict.

In non-conflict settings, aid agencies and their staff are usually subject to domestic criminal law plus universal Human Rights treaties. Domestic law greatly varies among countries and usually does not protect aid workers in specific terms. This can be highly problematic as domestic law may even discriminate against aid workers. In Syria for example, offering medical treatment to anyone who is part of the opposition is considered to be material support of the resistance.

Prosecution by domestic courts may always fall short during humanitarian emergencies due to non-functioning judicial systems.

The special protection of aid workers under IHL may give the impression that aid workers are better and more universally protected in conflict settings. However, as required by the Geneva Conventions, States are primarily responsible for bringing violators to justice. Thus, with a weak local judiciary system, the protection may not transform into actual prosecution of perpetrators.

Humanitarian agencies usually operate either in conflict settings, health emergencies or provide relief after natural disasters. Inherently, these operations always take place when a country is unable

to manage the humanitarian needs of its own population, indicating a weak or fragile government. Thus, prosecution by domestic courts may always fall short during humanitarian emergencies due to non-functioning judicial systems.

1.3.1 Who are aid workers?

Aid workers always have the status of civilians because they are non-combatants that are not official representatives of either conflict party. The Geneva Conventions (1949, Article 3), describe civilians as «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 …» Although aid workers may serve actively in conflicts, the crucial distinction is that they do not carry weapons.

Defining the term aid worker was avoided for some time as the focus was laid on defining the action of humanitarian assistance. According to the OECD, humanitarian action «saves lives, alleviates suffering and maintains human dignity following conflict, shocks and natural disasters.»[6] However, it remains unclear who is entitled to deliver such assistance.

The Aid Work Security Database gives a more specific but non-universal definition of aid workers as: «the employees and associated personnel of not-for-profit aid agencies … that provide material and technical assistance in humanitarian relief contexts. This includes both emergency relief and multi-mandated … organizations … and does not include UN peacekeeping personnel, human rights workers, election monitors or purely political, religious, or advocacy organizations.»[7]

The definition of the personnel is decisive and problematic at the same time. The status of missionary agencies as well as private contractors, such as security firms, remains controversial. Are, for example, private suppliers of aid agencies to be equally protected as aid workers? What about security staff protecting aid workers?

1.3.2 How and when does IHL protect aid workers?

The rules on paper are explicit: Attacks against humanitarians are forbidden. Wars have rules and protecting those who seek to provide humanitarian assistance is vital. Regrettably, there has been a decline in respect for international law and humanitarian principles.

Wars have rules and protecting those who seek to provide humanitarian assistance is vital.

The legal system protecting humanitarians in conflicts is rooted in the protection of civilians in armed conflicts as described in The Hague and Geneva conventions and their additional protocols, commonly referred to as IHL.[8] These conventions do not mention humanitarians specifically, as they only address the legal protection of civilians. Only with the 1998 Rome statute were intentional attacks against humanitarian personnel institutionalized as war crimes.[9]

In any active conflict, IHL applies as the decisive legal framework. Although it applies to every con-

6 Organization for economic co-operation and development (OECD), Development cooperation directorate, development finance statistics (2017).

7 Humanitarian Outcomes (2017) <https://aidworkersecurity.org> accessed 9 May 2017.

8 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977), 1125 UNTS 3, art 48; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977) 1125 UNTS 609, art 13.

9 Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, art 8(2)(b)(iii) and(e)(iii).

flict, not every situation in a conflict is subject to IHL. Only if an action is connected to the conflict itself, for example when a member of an armed group attacks an aid worker, may IHL be applied. Some crimes may be committed because the fragile conflict situation simply offers convenient opportunities. When neither perpetrator nor victim belong to one of the conflict parties, IHL assumes violence as being unrelated to the conflict. Humanitarians operate in a grey zone: If there was no conflict, there would be no need for humanitarian assistance in the first place, making violence against aid workers not feasible. IHL does not give a clear answer to this puzzle.

United Nations personnel and affiliates are offered exceptional legal protection.[10] Furthermore, under the First Geneva Convention, the Red Cross (and its variations) emblem enjoys special legal status.[11] IHL also provides more protection for some groups of aid workers, such as medical staff. The ambiguous legal reality makes the institutional affiliation of aid workers pivotal, creating a hierarchy among the humanitarian system. The lack of a uniform and internationally accepted definition of what constitutes a humanitarian aid worker is likely a reason why standardizing their protection has long been neglected.

Therefore, the humanitarian community should deal with the question of who is a humanitarian to eventually pave the way for modifying the legal body as to protect the status of all aid workers in a non-discriminatory manner.

The ambiguous legal reality makes the institutional affiliation of aid workers pivotal, creating a hierarchy among the humanitarian system.

1.4 Really a mounting trend? The pitfall of unreliable data

Information concerning violence against aid workers is patchy, and consequently no comprehensive dataset exists. Attacks on health care workers are among the most extensively reported. The World Health Organization (WHO) recognized the problem of underreported attacks and started its own data gathering programme. However, they neither managed to standardize reporting procedures nor bring the various humanitarian actors together. Meanwhile, more than ten other independent organizations are simultaneously gathering their own data on attacks against health care.[12] Some of them are limited to the countries in which they operate, others, such as Amnesty International, are working with a more holistic approach. The numbers provided show great discrepancies among all actors.

Humanitarian Outcomes manages the only existing international database on attacks against all humanitarian personnel.[13] Its data, depicted in the two graphs, show increasing trends for all attack types and a striking peak on attacks against domestic aid workers.[14] Information is either collected through

10 Convention on the Safety of United Nations and Associated Personnel (adopted 9 December 1994) 2051 UNTS 363; Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel (concluded on 8 December 2005) 2689 UNTS 59.

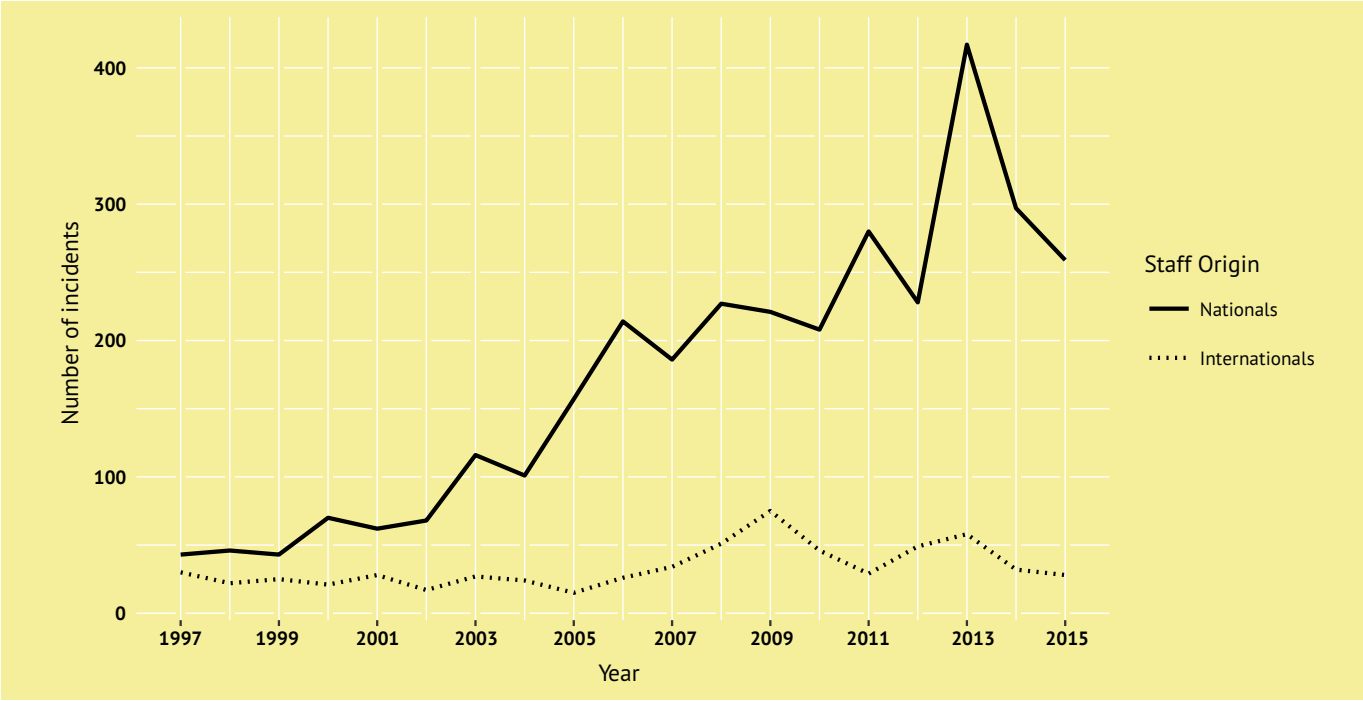
11 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I) (concluded 12 August 1949) 75 UNTS 31.

12 Amongst others: Safeguarding Health in Conflict Coalition, Center for Strategic and International Studies, PLOS Medicine, Merlin, Médecins Sans Frontières International, Afghanistan Analyst Network, Pack Health Worker Team, Amnesty International, Violations Documentation Center in Syria, Human Rights Watch, Physicians for Human Rights.

13 Humanitarian Outcomes (2017), < https://aidworkersecurity.org > last accessed 9 May 2017.

14 International Committee for the Red Cross (2011): 'Health Care in Danger: A Sixteen-Country Study. Report.' <https://www.icrc.org/eng/resources/documents/report/hcid-report-2011-08-10.htm> accessed> last accessed 9 May 2017.

Affected Staff, domestics vs. internationals origin



systematic media filtering or voluntarily provided by aid organizations yet without standardized procedure. The data only captures serious events, such as deaths, serious injuries and kidnappings for a prolonged period. Demand for the dataset is high as it gets cited in almost every publication or report related to the security issue of humanitarians.

However, inferences based on these statistics can be misleading because of issues concerning the quantity and quality of the data. Concerns of quantity highlight the lack of control variables as well as the non-comprehensive coverage. A rise of attacks may merely reflect the higher absolute number of aid staff deployed. In addition, aid agencies typically send more national personnel into the field. Furthermore, other mechanisms like the severity of a conflict, general violence against civilians, behaviour of aid workers, and so on might provoke more attacks. With the voluntary reporting procedure, the information is subject to the goodwill of the respective agency to share its data - leading to severe gaps in coverage.

Only with a sound evidence base will it be possible to prepare effective response to the problem and establish a reliable early warning system.

Another neglected issue concerns gender based violence. The gender of victims is underreported, and rape is not an available reporting option. Concerned women from the humanitarian sector founded the Humanitarian Women's Network (HWN). Their internal survey among female humanitarians found that over fifty percent of respondents experienced some sort of sexual assault during their work.

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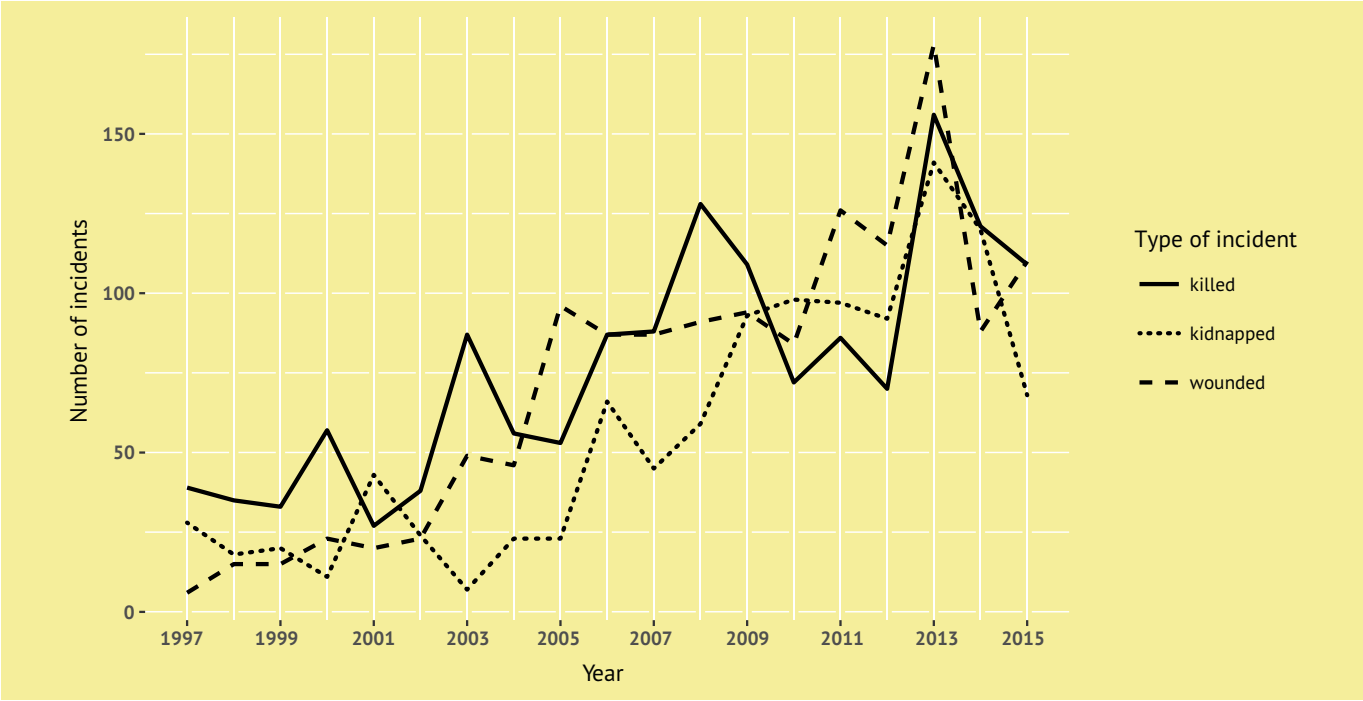
On the quality side, the pitfalls are due to a lack of reporting and recording in the data-gathering process. Firstly, reliability is affected because the reporting process for aid agencies is not standardized.

Killed, wounded or kidnapped?



The varying wealth of information provided reflects that some agencies take their reporting duties more seriously than others. Secondly, researchers gather information about unreported incidents through media reports. Yet, in conflict affected countries, journalists might not be able to name perpetrators and numbers or origins of victims because media is controlled by the government. Cross-referencing with data from other institutions sheds light on the massive discrepancies. For example, in a 16-country case study, the ICRC found more than twice as many attacks against medical personnel than indicated by the database of Humanitarian Outcomes.[15]

The speech shows Switzerland's devotion and commitment to improve the protection for humanitarians.

1.5 The way forward: Better reporting mechanisms

A centralized monitoring and oversight entity should gather this highly-desired data and contribute to the improvement of our knowledge and understanding about the actual situation on the ground. Why is a comprehensive and accurate dataset so important? Only with a sound evidence base will it be possible to prepare effective response to the problem and establish a reliable early warning system. Furthermore, the more reliable the evidence, the harder it will be for governments to sustain impunity for perpetrators.

Other actors urged the UN to take action, for example by creating a special rapporteur or agency. This seems less suitable because of the highly-politicized nature of the UN itself. Negotiations with member states can be arduous, and cultural sensitivities, such as gender based issues, might not get passed.

In June 2017, the International NGO Safety Organisation launched the Conflict & Humanitarian Data Centre initiative.[16] It aims to build a global database with reports about all sorts of security incidents.

15 Ibid.

16 The initiative is co-funded by the UK, German and Dutch Governments.

Staff of registered organizations can file reports directly into the database and cross-verify entries of others. While this initiative is notable, key challenges about the quality of the data remain as self-reports may still be biased and not standardized.

The international community should tackle the problem with more tangible measures. It is not enough when organizations only self-report incidents. High quality data includes pictures, testimonies of eye-witnesses and forensics. Self-reporting from field staff is hardly sufficient to build the case and ensure the quality of the data. This is why trained experts should investigate each incident. Affected governments that are going through a humanitarian crisis in their territory should be consolidated. The accuracy of the data as well as compliance with IHL depends heavily on their cooperation. Better data and evidence helps to build the case about each incident and place the issue on the international agenda.

1.6 The role of Switzerland

Switzerland has a longstanding humanitarian tradition. With Geneva as a hub for humanitarian organizations, Switzerland is one of the world's most important centres of international cooperation.

In October 2016 federal councillor and foreign minister Didier Burkhalter delivered his opening speech for the Centre of Competence on Humanitarian Negotiation in Geneva[17] *stressing that «Switzerland will never accept the bombings of hospitals or of humanitarian convoys as a new normal ... And this is why we remain committed to helping ensure that there will be no impunity for the most serious crimes under international law.»*[18]

The speech shows Switzerland's devotion and commitment to improve the protection for humanitarians.

Switzerland should take a leading role in this issue in order to move from promises to tangible actions. First, negotiations about defining who constitutes a humanitarian should be pursued. This would pave the way to harmonize the law in a non-discriminatory manner for all humanitarians. This needs strong cooperation between the ICRC and UN member states. Switzerland with its longstanding tradition in humanitarian diplomacy could act as an intermediary in bringing these actors together.

Second, field staff and experts should decide on how to standardize reporting procedures and how to grant a team of expert investigators access to the incident side. As Frontline Negotiations focus lies on the exchange and analysis of experiences within the humanitarian field, the centre has the capacity to connect various humanitarian actors and would provide an ideal platform for this discussion. Eventually, a new or already existing data initiative could be mandated to administer a database.

1.7 Conclusion

The rising trend in violence against aid workers shows that respect for IHL is declining. Problematically, there is no clear definition of humanitarian aid workers and the legal system protects aid workers in a hierarchical manner by offering more specific protection to certain groups of humanitarians.

17 The centre is a joint venture between the ICRC, the UN's Refugee Agency (UNHCR), the World Food Programme (WFP) and the Centre for Humanitarian Dialogue and officially supported by the Swiss Federal Department of Foreign Affairs.

18 Didier Burkhalter, '«Translating a beautiful vision into a necessary reality» - Opening of the Centre of Competence on Humanitarian Negotiation in Geneva' (Address by Federal Councillor Didier Burkhalter at the opening of the Centre of Competence on Humanitarian Negotiation in Geneva [Geneva, 25 December 2016]), <https://www.admin.ch/gov/en/start/documentation/speeches/speeches-given-by-federal-councillors.msg-id-64242.html> last accessed 9 May 2017.

In addition, better reporting and monitoring mechanisms should be implemented in order to press for compliance with IHL and its justice mechanisms.

Ultimately, experts from law and ethics should first draw an internationally recognized definition of «humanitarian aid worker». In a second step, reporting procedures of incidents on violence against aid workers should be standardized. This requires opening up a dialogue between humanitarian actors and bringing them to the same negotiation table. More concretely, the following practical reforms are recommended:

- Humanitarian actors and legal experts should draw a universal definition for the term «humanitarian». This would pave the way to harmonize the law protecting aid workers in a non-discriminatory manner with equal protection for all.
- The humanitarian community should make an effort to standardize reporting procedures on incidents of violence against aid workers. The data gathering mechanism should go beyond self-reports from affected organizations or evidence based purely on media reports. An expert team should investigate each incident.
- Frontline Negotiations or any other established actor from within the humanitarian community could serve as a platform for negotiations.
- Switzerland, with its longstanding humanitarian tradition, should take a leading role in that endeavour and coordinate negotiations among key humanitarian actors.

Better evidence will help to keep the issue on the multilateral agenda and raise awareness among key decision makers.

2. Swiss Initiative for the Protection of News Providers Covering Armed Conflicts*

Nina Burri

Summary

Since the start of the digitalization of the media, the picture of war reporters in the news has shifted dramatically. Reports are no longer full of cheerleading stories of embedded journalists. Instead, stories of attacks on war reporters, of kidnappings and injuries prevail. As a consequence, the number of journalists killed in conflict zones is higher than ever.

Even though the legal framework regarding the protection of news providers in armed conflict is rather complex, it states a clear rule: News providers are to be treated as civilians, no matter what they say or report. Yet, examples of recent state practice show that the protection of news providers is too often tied to the content of their reporting.

To foster awareness for this important issue, the author proposes a new and twofold initiative: First, a legal memorandum of understanding is to be outlined pointing out the law applicable to journalists during armed conflicts. Second, a tailor-made training course for both military personnel and journalists should offer coherent training on legal and practical aspects relevant to the general protection of news providers in regions of armed conflict.

* This paper is based on the PhD-thesis of the author entitled *Bravery or Bravado? The Protection of News Providers in Armed Conflict,* which was published in 2015 with Brill/Nijhoff. In case of further interest check the websites of UNESCO, the Committee to Protect Journalists or the International News Safety Institute. Sources and events have been considered until August 2017.

2.1 Do you remeber?

In late summer 2014 fighters from the so-called Islamic State produced two videos depicting the executions of captured American journalists James Foley and Steven Sotloff. The videos then quickly circulated around the internet and shocked the world.[1]

Since then, reports on arrested, attacked and kidnapped reporters and bloggers in Syria, Ukraine and elsewhere regularly conquered the news. These stories are not seldom incidents of violence against news providers. On the contrary, they are examples of a subtle and worrying trend. Starting at the cusp of the millennium, all sorts of news providers (e.g. reporters, bloggers, filmmakers, etc.) have become a regular target of military operations. Statistics from the last 20 years show a sharp increase in the number of journalists killed while covering armed conflict. According to the Committee to Protect Journalists 75 percent of journalists killed in the year 2016 alone were journalists reporting on war.[2] In many cases the attackers remain unknown. Yet in most cases it is evident that the victims were deliberately targeted because they were filming or re-

1 Image available at: Nina Golgowski, 'Terrorist in ISIS execution video of Steven Sotloff appears to be the same killer of James Foley', New York Daily News (New York, 2 September 2014) <http://www.nydailynews.com/news/national/terrorist-latest-isis-execution-appears-foley-killer-article-1.1925125> accessed 9 May 2017.

2 See the websites of the Committee to Protect Journalists (www.cpj.org) and Reporters Without Borders (www.rsf.org) for overviews of such data.

porting. However, the risks for journalists reporting on war include more than murder. Dangers range from kidnapping, arrest, threats and harassment to other restrictions on their work, such as denial of access to the battlefield, confiscation of equipment or censorship. Consequently, journalists say that they have never felt more unsafe while doing their jobs than today.[3] Overall, these risks have reached a level prompting most journalists to stay away from conflict zones. Reporting is no longer worth the personal price they pay.

Starting at the cusp of the millennium, all sorts of news providers (e.g. reporters, bloggers, filmmakers, etc.) have become a regular target of military operations.

At the same time, the digitalization of the media has led to an immense acceleration of the news cycle and produced participatory opportunities for a wide range of actors in the news production. In today's wars, parties to a conflict fight each other not only on the actual battlefield. Alongside information operations targeted at influencing traditional media, they also stage an immense propaganda power play on all available digital channels, such as Twitter, Facebook or YouTube.[4] These factors combined lead to a constant flood of information towards an audience which is left overwhelmed and confused, not knowing which information can be trusted and which not.

These factors combined lead to a constant flood of information towards an audience which is left overwhelmed and confused, not knowing which information can be trusted and which not.

2.2 Why should we care?

War coverage goes beyond mere entertainment of the audience. It is the basis for global awareness and consciousness about a conflict and as such an essential condition for a sustainable democracy. As the so-called 'fourth power' in the state, media investigates official behaviour and functions, therefore acts as a control system representing the vigilant citizens. Media shapes public opinion, which is ultimately reflected in politics. As representatives of the media, journalists thus have a role within society that reaches beyond their personal status. They bear witness for the wider public: they are messengers and shapers of information, and ultimately guardians of the society's right to information. Therefore, whenever a journalist or their work is attacked, society is indirectly attacked as well. From a legal point of view, the protection of news providers during armed conflict is rather comprehensive.

From a legal point of view, the protection of news providers during armed conflict is rather comprehensive.

International humanitarian law offers only two rules directly addressing the protection of journalists.[5] Yet, one of these rules includes the pivotal imperative of classification within the dichotomy of international humanitarian law. Namely, Art. 79 of Additional Protocol I to the Geneva

3 Lisa Clifford, 'Under Threat – The Changing State of Media Safety', International News Safety Institute (London 2016) <http://newssafety.org/underthreat/#> last accessed 9 May 2017.

4 Such a digitally orchestrated propaganda took place during Operation Pillar of Defense. For a detailed analysis of the propaganda race, see the PhD-thesis of the author of this brief: Nina Burri, Bravery or Bravado? The Protection of News Providers in Armed Conflict (Brill/Nijhoff 2015) 51 ff, 66 ff.

5 Article 79 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1997, entered into force 7 December 1978) 1126 UNTS 3 (AP I) on journalists engaged in dangerous professional missions; Article 4 (a) (4) Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GC III) on war correspondents travelling with the armed forces.

Conventions classifies news providers as *civilians* protected from targeting, as long as they do not participate in hostilities. This rule is of customary law nature and applies in both international and non-international armed conflicts. Therefore, it is clear that a journalist loses his or her protection when picking up a gun and directing it towards the armed forces of a party to a conflict.[6]

But can a journalist also directly participate in hostilities merely by reporting? The answer to this question is clear: No.

But can a journalist also directly participate in hostilities merely by reporting? The answer to this question is clear: No. Academia and military experts developed a wide range of tools to refine the notion of «direct participation in hostilities». When applying these tools to all sorts of reporting, it becomes clear that in general, the nature of reporting itself makes it impossible to fall under the definition of «direct participation in hostilities». This stems from the fact that one core criteria of the definition of «direct participation in hostilities» is its necessary causation of harm to the enemy (or to one party to a conflict). This means that the act of participation itself must directly lead to harm of a specifically military nature (death, injury or destruction of persons or objects protected against direct attack) or be likely to inflict such harm. It is evident that reporting or aggressive speech itself can never directly cause harm of that nature. To materialize such harm, a second step is always necessary. Therefore, reporting cannot fall under the notion of «direct participation in hostilities».[7] Accordingly, parties to an international or non-international armed conflict must treat news providers the same way as any other civilian.

States have an obligation to respect and ensure respect for the human rights of news providers, also during armed conflict.

In addition to the few rules found in international humanitarian law, non-derogatory human rights norms offer news providers a safety net guaranteeing their rights to life, to personal liberty, to physical and psychological integrity, to a fair trial and prohibiting their arbitrary detention.[8] In addition, in case of any unclear or incomplete norms of international humanitarian law or human rights law, international criminal law treaties and the case law of the international criminal tribunals can be used for interpretative guidance.[9]

States have an obligation to respect and ensure respect for the human rights of news providers, also during armed conflict. This encompasses a positive duty on States to ensure that persons are protected from any acts that would impair the enjoyment of their rights. States must therefore take effective measures or exercise due diligence to prevent any harm caused by private persons or entities. This obligation is particularly important in relation to threats and attacks against journalists committed by non-State actors.

6 This brief, solely focuses on the protection of news providers, stemmed from international law. National legislation might state other offences and rights for news providers.

7 For a detailed analysis and examples, see above fn 4, 166-186.

8 Furthermore, a number of global and regional human rights treaties offer additional legal foundations for the protection of the work of news providers. For instance, the right to free expression, the right to information or the right to truth, which encompass news providers' rights to collect and receive information and to access the conflict zone. Yet, these rights can be subject to severe restrictions, especially because states have the possibility to derogate from them during states of emergency.

9 E.g. for an interpretation of the rules on the protection of media facilities.

2.3 Recent Development on the Multilateral Level

Facing the increased number of attacks against journalists, the international community has started to react, albeit slowly. In 2007, the United Nations Security Council issued its resolution 1738, reiterating to member states their obligations to protect journalist in armed conflict. In 2011, UNESCO started the so-called *UN Plan of Action for the Safety of Journalists and the Issue of Impunity* – a process aimed at fostering an international framework for the protection of journalists.[10] In 2012, the UN Security Council finally added attacks against journalists to its list of ‹ongoing and emerging concerns of the protection of civilians in armed conflict›. Since these developments, the safety of journalists and the issue of impunity for crimes against them is a regular topic on the agenda of these UN bodies.[11] However, as the numbers of journalists killed or attacked illustrate, these initiatives have so far not led to a significant improvement of the situation.

2.4 Alarming Recent State Practice

At first sight, the initiatives on an international level promise a raised awareness of states on the issue of safety of journalists. Nevertheless, it seems as if state practice is not consistent on this matter. The armed forces of Israel and the United States only recently offered alarming examples of this trend: In summer 2012, during operation Pillar of Defense, spokesperson Mark Regev of the Israeli Defense Forces (IDF) officially labelled unwelcomed reporters of Al-Aqsa TV – unlike reporters of the BBC or Al Jazeera – as illegitimate journalists.[12] The Israeli government asserted that some of the journalists do, in fact, carry cameras, but that they are paid by a terrorist organization and serving the goals of a terrorist organization.[13] According to Avital Leibovich, another IDF spokesperson, any media linked with Islamic Jihad and Hamas were in fact terrorists. For Leibovich, such journalists are no different from their colleagues who fire rockets aimed at Israeli cities and therefore cannot enjoy the rights and protection afforded to legitimate journalists.[14]

In the summer of 2015, the US Army published a new Law of War Manual. In this manual, it introduced a new, legally not existing, broad and poorly defined category of «unprivileged belligerents» which gives US military commanders the purported right to detain journalists without charge. After immense outrage and pressure by US media, the Pentagon adapted twice the relevant passages of the Manual.[15] Nonetheless, the adapted version of the Manual still includes a major flaw regarding the protection of news providers. Namely paragraph 5.8.3.2. of the manual mention – although hidden in a footnote – that the media can be a legitimate

10 UN Plan of Action on the Safety of Journalists and the Issue of Impunity (12 April 2012) UN Doc CI-12/CONF.202/6.

11 See UNSC Res 1738 (23 December 2006) UN Doc S/RES/1738; UNSC Res 2222 (27 May 2015) UN Doc S/RES/2222; UNGA Res 68/163 (18 December 2013) UN Doc A/RES/68/163; UNGA Res 70/162 (17 December 2015) UN Doc A/RES/70/162; UNHRC Res 21/12 (27 September 2012) UN Doc A/HRC/21/L.6; UNHRC Res 27/5 (25 September 2014) UN Doc A/HRC/27/L.7; UNHRC Res 33/L.6 (26 September 2016) UN Doc A/HRC/33/L.6.

12 ‘Israeli government spokesman Mark Regev defending the air strikes that hit a building housing local and foreign journalists in Gaza’, Al Jazeera English (Doha, 19 November 2012), <https://www.youtube.com/watch?v=JU0MLpX2iGw> accessed 9 May 2017.

13 Evidently, this approach must be read in the context of the Israeli counter terrorism policy. Nevertheless, it has a reflex on the interpretation of international humanitarian law. Check e.g. Human Rights Watch, Unlawful Israeli Attacks on Palestinian Media (New York 2012), <https://www.hrw.org/news/2012/12/20/israel/gaza-unlawful-israeli-attacks-palestinian-media> last accessed 9 May 2017.

14 Israel Defence Force, ‘How Hamas and Islamic Jihad Use Journalism as a Cover for Terrorism’, (Blog of the IDF, 29 November 2012), accessed 9 May 2017.

15 See e.g. ‘The Pentagon’s Dangerous Views on the Wartime Press’, The New York Times (New York, 10 August 2015) < https://www.nytimes.com/2015/08/10/opinion/the-pentagons-dangerous-views-on-the-wartime-press.html > last accessed 9 May 2017.

military target if it is used to incite crimes.[16] The practice of the IDF and the US Army in these examples are not in accordance with the general reading of the notion of «direct participation in hostilities» in international humanitarian law. As parties to the Geneva Conventions and bound by the customary rules of international humanitarian law, the United States and Israel have a legal obligation to protect news providers, even when they report about a conflict in a manner with which the parties do not agree.

Admittedly, the US and Israel are not the worst offenders with regards to the fulfilment of their obligations under international humanitarian law. It must be acknowledged that both states undertake serious efforts to fulfil their duties too. Nevertheless, the naming and shaming of a flawed interpretation of international humanitarian law is essential.

Every state practice not in accordance with treaty obligations erodes the protection of news providers in times of armed conflict.

Because, ultimately, every state practice not in accordance with treaty obligations erodes the protection of news providers in times of armed conflict.

Because of the rather complex legal background, the steady changes of media, technology and unclear state practice, there is a need for clarification.

2.5 Still a Need for Clarification and Rising Awareness

While the legal background of the protection for news providers appears rather complex, the result of its correct interpretation is very simple: News providers are to be treated as civilians as long as they do not participate in hostilities. And news providing itself can hardly ever be a form of direct participation in hostilities.

Because of the rather complex legal background, the steady changes of media, technology and unclear state practice, there is a need for clarification. In order to ensure that future state practice will not further water down the protection of news providers and to remind non-state actors of these fundamental rules it is essential to foster awareness of these legal rules protecting news providers during armed conflict.

2.6 Swiss Initiative for the Protection of News Providers Covering Armed Conflict

Therefore, a so-called Swiss Initiative for the Protection of News Providers Covering Armed Conflict, consisting of two instruments, shall be launched in the international forum. The final goal of this Initiative shall be to raise awareness about applicable rules for the protection of journalists.

In a first step, a legal memorandum of understanding is to be outlined pointing out the (already existing) applicable law to journalists during armed conflicts. Such a memorandum of understanding would highlight the specific rules and core principles of international humanitarian law applicable to journalists as well as more recent concepts of human rights law and international criminal law which aid interpretation where international humanitari-

16 The passage is based upon the errant argumentation of several authors, who conflate the protection of journalists as civilians and media installations as military objectives. The exact passage reads «Whether the media constitutes a legitimate target group is a debatable issue. If the media is used to incite crimes, as in Rwanda, then it is a legitimate target. If it is merely disseminating propaganda to generate support for the war effort, it is not a legitimate target.» US Department of Defence, 'Department of Defence Law of War Manual' (Washington December 2016), accessed August 2017, para 5.8.3.2.

an law is unclear or incomplete.[17] In addition, the memorandum would pinpoint the duties of the parties to a conflict with regards to journalists. The government of Switzerland – preferably together with other states, such as for instance Austria and Sweden – should sponsor the framing process of the memorandum and later call state parties to the Geneva Conventions to sign it. Such a memorandum of understanding would not have the character of an international treaty. As a tool of soft law, it would offer the chance to also include non-state actors' participation, and therefore widen its range of application.

In a first step, a legal memorandum of understanding is to be outlined pointing out the (already existing) applicable law to journalists during armed conflicts.

In a second step, a tailor made regular training course for both military personnel (Public Information Officers, Media & Information Operation Officers) and journalists covering armed conflicts should offer coherent and relevant legal training on the applicable law on the one hand and practical aspects, such as access to a conflict zone and digital safety, on the other. This course should not only cover the legal background of international humanitarian law, but also transmit knowledge on how to tackle very practical problems, such as how to disguise digital footprints or how to behave in a hostile environment. The course could take place at venue such as the International Institute for Humanitarian Law in San Remo, Italy. This institute has a rich experience in organizing educational courses for military personnel and persons working in the context of armed conflicts. Even though there is a wide interest in such courses, most of the journalists interested come from developing countries and cannot afford the expenses. Therefore, potential participants need the possibility to receive scholarships. In order to guarantee a successful outcome and participation of a wide range of involved actors, it is therefore pertinent to secure enough funding.[18]

In a second step, a tailor made regular training course for both military personnel and journalists covering armed conflicts should offer coherent and relevant legal training on the applicable law.

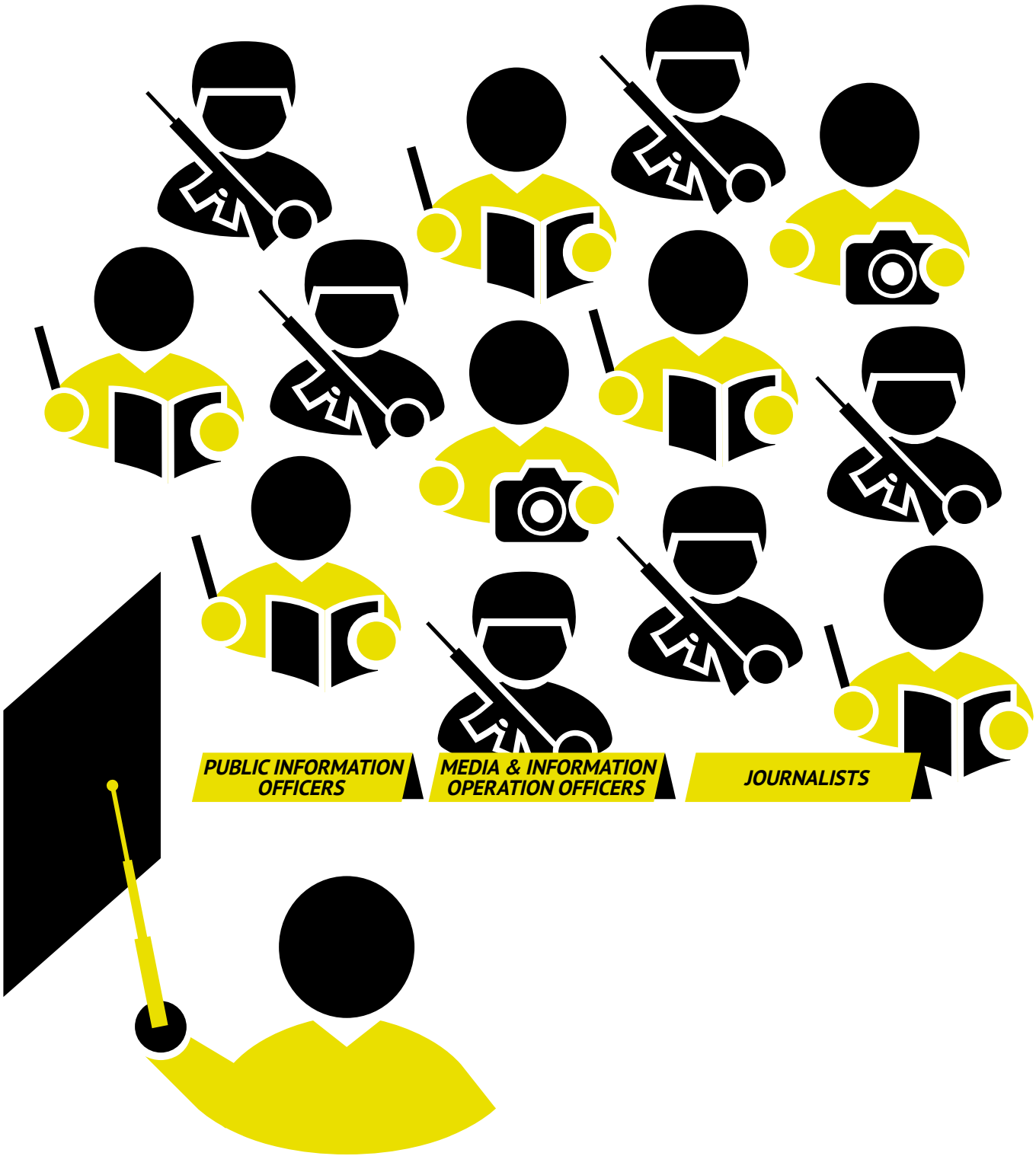
2.7 Action is Needed

In conclusion, in light of the numbers of journalists killed and attacked, action is needed. Independent sources who witness and report on the behaviour of parties to a conflict are essential for a truthful record of history. This is more necessary than ever in the face of the contemporary pressure of various actors trying to destabilize the worth of truth.

In order to hold perpetrators accountable, the public needs to know when rules of international humanitarian law are being broken. In that sense, effective war coverage is the basis for the public›s awareness of a conflict and ultimately for the respect of the rules of international humanitarian law.

17 Such a memorandum would cover a range of topics relevant to the protection, e.g. the norms protecting the person, the norms protecting their work (as far as non-derogatory), the protection of media entities, the treatment of journalists as spies and their role as witnesses before international tribunals.

18 There are already a few courses in place which deal with training of journalist for hostile environments. Yet, the demand is higher than current offers and, more important, none of these courses offers an introduction to the legal background of the rights and duties of journalists when working in a conflict environment.


PUBLIC INFORMATION OFFICERS
MEDIA & INFORMATION OPERATION OFFICERS
JOURNALISTS

3. Rules and Realities: Reducing the Discrepancies with Regard to International Humanitarian Law

Thomas Kuhn

Summary

The most effective way of assuring the respect for international humanitarian law is the development of the applicable rules by those actors ultimately bound by them. Therefore, in times of a dominant pattern of non-international armed conflicts the prevailing state monopoly with regard to the law making process needs to be challenged. One possible way of taking the realities and positions of non-state actors into account is to allow them to voice their points of view in key international humanitarian conferences either through participation as observers or through the representation by a neutral NGO. In addition, the conclusion of special agreements between belligerent parties would enable the establishment of specific and realistic sets of rules applicable to a particular conflict situation thereby increasing the likelihood of compliance with jointly agreed humanitarian norms. Overall, it is argued that the international humanitarian law regime needs to become more flexible in order to function effectively in the context of more and more heterogeneous conflict situations.

3.1 The link between inopportune law making and deficient compliance – Armed non-state actors' absence from the development of international humanitarian law

The recurring disrespect of rules of war by armed non-state groups is currently a key challenge of international humanitarian law. One of the manifold underlying reasons for deficient compliance is the absence of non-state actors from the development of international humanitarian law.

As the legal regime of public international law is characterized by a lack of effective vertical enforcement mechanisms, the best way of ensuring compliance with the law is to jointly establish the applicable rules among those actors ultimately bound by them. This rationale however does not hold with regard to the rules of international humanitarian law in the context of today's dominant pattern of non-international armed conflicts.

In fact, the prevalent rules of international humanitarian law have been exclusively created among states based on a symmetrical understanding of warfare which does not live up to the current realities of predominantly asymmetrical conflicts involving a variety of heterogeneous non-state actors. In this spirit, the non-state groups' absence from the processes establishing the rules of war explains a lack of identification with the latter, which aggravates the problem of deficient compliance with humanitarian norms.

Another issue raised by the exclusion of armed non-state groups from the development of international humanitarian law is that their realities and expectations towards the law are not sufficiently taken into account. This is problematic as any legal system can only be effective if all relevant actors have the realistic ability to obey its rules and obligations. In

addition, the lack of compliance with the rules of international humanitarian law by non-state actors is accentuated by the reasoning that the latter may simply be unwilling to consider themselves bound to international obligations agreed to by political structures of which they were not part.[1]

Under the current circumstances armed conflicts are therefore governed by a system in which armed non-state groups are sought to respect the laws to which they have not adhered or consented to without even benefitting from the same basic legal protections and privileges as the lawful combatants of official armed forces. Maintaining such a state centred legal framework that neither takes into account the positions of all the belligerent parties involved nor the prevailing realities on the ground is likely to result in a continuous failure to ensure the respect for some of the most important rules of international humanitarian law.

Non-state actors may simply be unwilling to consider themselves bound to international obligations agreed to by political structures of which they were not part.

3.2 Replacing the existing state monopoly in law making with consensus and increased ownership of relevant rules

In line with the before-mentioned, and in order to tackle the issue of deficient compliance with international humanitarian law, especially by non-state actors, it is important to challenge the existing state monopoly in relation to the development of the rules applicable in times of war. In fact, the essence of international humanitarian law is the obligation to be applied by every belligerent based on an understanding of the aspirations and dilemmas of all the parties to a conflict.[2] In the name of the overall respect for international humanitarian law, armed non-state actors should therefore be better included in the norm creation process allowing them to shape the development of the rules applicable in non-international armed conflicts.

In fact, the essence of international humanitarian law is the obligation to be applied by every belligerent based on an understanding of the aspirations and dilemmas of all the parties to a conflict.

Only a consensus based approach among all relevant actors ensures a more realistic legal regime encouraging a reciprocal application of relevant rules. It allows belligerents to jointly identify common issues of concern and fosters a dialogue among all the actors directly affected by the rules of international humanitarian law. Especially in the predominant context of non-international armed conflicts involving actors with large differences in terms of military clout, it is important to prevent a deliberate disregard of international humanitarian law by the militarily weaker non-state groups due to an inadequate set of rules or a lack of identification with the latter. Therefore, allowing these actors to take part in the development of the applicable norms constitutes an effective way of preventing a situation of so-called negative reciprocity in which the violation of international humanitarian law by one belligerent provokes dangerous in-kind reprisal by opposing parties potentially leading

1 International Committee of the Red Cross, 'Improving Compliance with International Humanitarian Law' (2004) <https://www.icrc.org/eng/assets/files/other/improving_compliance_with_international_ humanitarian_law.pdf> accessed 9 May 2017.

2 Marco Sassoli, 'Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law' (2010) 1 Journal of International Humanitarian Legal Studies 5.

to the mutual disregard of the laws of war by all parties involved in a conflict.

In addition to facilitating the establishment of a realistic set of rules adapted to the prevalent realities on the ground and supporting a sense of reciprocity among belligerent actors in the application of the law, the participation of armed non-state groups in the development of international humanitarian law would also strongly increase their ownership of the relevant rules and obligations. As the ability to identify oneself with applicable norms constitutes a key underlying factor fostering the overall compliance with any legal regime, this could undoubtedly incentivise armed groups to play by the rules. While armed non-state groups already have the possibility to commit themselves to follow certain rules of international humanitarian law through a so-called deed of commitment, involving them in a more consensual process of establishing applicable rules would undoubtedly constitute the most effective way of ensuring an increased ownership of the law. Instead of simply agreeing to a set of already established rules among states, non-state actors would have the possibility to have an actual impact on the development of international humanitarian law. This would clearly help a stronger identification with the rules of war and likely lead to an increased compliance with the latter.

As the ability to identify oneself with applicable norms constitutes a key underlying factor fostering the overall compliance with any legal regime, this could undoubtedly incentivise armed groups to play by the rules.

Allowing for a certain form of participation of non-state groups in humanitarian conferences would actually constitute a promising way of implementing an increased identification with international humanitarian law.

3.3 A platform for participation – The importance of international diplomatic conferences

International diplomatic conferences such as the International Conference of the Red Cross and Red Crescent constitute the most important events on the humanitarian agenda when it comes to discussions and dialogue about current challenges as well as the future development of international humanitarian law. These conferences are the key international gatherings for an exchange of ideas between government officials, policy makers and humanitarian actors. They therefore represent the ideal forum for interested armed non-state groups to discuss their deliberations on international humanitarian law and the applicability of the latter in non-international armed conflicts. However, mostly due to the fear of boosting the legitimacy of armed groups through their inclusion in diplomatic conferences, states have been very reluctant to allow non-state actors to participate in these events.

Despite the concerns of governments, allowing for a certain form of participation of non-state groups in humanitarian conferences would actually constitute a promising way of implementing an increased identification with the political processes responsible for the development of international humanitarian law. This in turn would help foster the ownership of the legal regime by those non-state actors who are willing to participate and contribute to the law-making process.

3.4 Observer status or representation by a neutral NGO – Possible ways for the inclusion of non-state groups in international diplomatic conferences

As the direct participation in the formal discussions may be too politically controversial, it would be conceivable to grant interested non-state groups an observer status at humanitarian conferences. This would allow them to follow the official discussions and give them the opportunity to exchange their views and concerns in informal discussions and meetings in the framework of the larger conference. Should the attendance by representatives of interested armed non-state groups at international diplomatic conferences be deemed unacceptable by governments, the groups' views should nevertheless be collected and voiced in order to better understand the opinions and constraints of all relevant actors involved in prevalent or even former conflict situations. In this spirit, it would be conceivable to have a neutral NGO from the humanitarian sector acting as a representative of armed groups at diplomatic conferences. Having an organisation that gathers and expresses the positions and opinions of non-state groups would solve the problem of the politically controversial direct participation by representatives of armed groups. In addition, it is worth noting that in previous meetings of armed non-state groups, organized by Geneva Call, the various groups coming from very diverse cultural and political backgrounds have found a common agenda and raised similar concerns with regard to the application of international humanitarian law.[3]

The various groups coming from very diverse cultural and political backgrounds have found a common agenda and raised similar concerns with regard to the application of international humanitarian law.

Accordingly, having a specialized NGO with a broad network of interested non-state actors willing to perform the role as an impartial representative for armed non-state groups at international humanitarian conferences would give considerable weight to the oftentimes similar positions of non-state actors. Undoubtedly, this would decisively shape the further development of the rules governing non-international armed conflicts and contribute to enhanced dialogue among states and non-state groups who show an express interest in humanitarian law and the adequate development of the latter. Of course, it is unrealistic to expect large numbers of representatives of non-state groups participating in diplomatic conferences for a variety of reasons. However, in the name of a more inclusive legal regime adapted to current realities, more efforts from both states as well as non-state actors should be undertaken to include interested armed groups in these fundamental international fora on humanitarian law.

3.5 Increasing compliance with international humanitarian law through special agreements among belligerent parties

Another way to implement an enhanced involvement of non-state groups in the development of the law is the elaboration of special agreements among belligerent parties. This is an opportunity expressly foreseen in Article 3 common to the four Geneva Conventions of 1949 and allows parties to a non-international conflict to explicitly commit to the compliance with international humanitarian norms. Before analysing the advantages and possi-

3 Ibid.

ble downsides of negotiating such a special agreement it must be said that this constitutes a particularly promising way of effectively engaging armed groups disposing of a certain degree of internal organisation and a functioning chain of command. Mainly due to reasons of internal enforcement special agreements involving armed groups with loose internal organisational structures are rather unlikely to lead to an actual implementation of the jointly agreed terms of the agreement.

States may be very reluctant to elaborate special agreements with armed non-state opponents by virtue of their fear to legitimize the latter's existence. However such agreements entail certain advantages compared to other legal tools designed to increase compliance with the law such as unilateral declarations or deeds of commitment.

States may be very reluctant to elaborate special agreements with armed non-state opponents by virtue of their fear to legitimize the latter's existence.

Especially with regard to situations in which the legal characterization of the respective opposition remains uncertain, special agreements are a helpful tool to assure the respect for certain important humanitarian rules.[4] For example, it is very common that there is no agreement as to whether certain animosities between a state and an armed non-state group fulfil the threshold to constitute a non-international armed conflict. In these instances, special agreements among opposing parties can prevent a situation of legal uncertainty and allow for a better protection of victims and civilians through the express joint intention to respect certain humanitarian standards.

In fact, special agreements allow parties to a conflict to focus on a specific and thus potentially limited set of rules deemed to be of utmost importance in the context of a particular conflict situation.

Moreover, in case of violations of the provisions contained in a special agreement perpetrators including armed non-state groups could effectively be held accountable for the disrespect of mutually agreed rules. This is of particular importance when considering the fact that both state actors as well as armed-groups generally have a strong interest in portraying a good image of themselves among the populations living within a state or a group's territorial control. Accordingly, belligerents entering a special agreement with opposing parties have a strong incentive to actually follow the jointly established set of rules.

Another major asset of special agreements including armed non-state actors can also legitimately be considered as their most important flaw. In fact, special agreements allow parties to a conflict to focus on a specific and thus potentially limited set of rules deemed to be of utmost importance in the context of a particular conflict situation.[5] By doing so, the obligations entailed in a special agreement may be below the parties' usual legal obligations arising from relevant international treaty or customary law. However, this can be averted by making clear that the limited scope of the special agreement does not preclude the adhering parties from respecting other applicable norms not mentioned in the agreement.[6] In addition, Article 3

4 Michelle Mack and Jelena Pejic, 'Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts' 2008 <https://www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf> accessed 9 May 2017.

5 Ibid.

6 Ibid.

common to the four Geneva Conventions of 1949 unmistakably states that the conclusion of special agreements do not affect the legal status and therefore obligations of the parties to a conflict.

Accordingly, the conclusion of special agreements would foster the establishment of more realistic parallel legal regimes containing specific and mutually agreed rules adapted to the realities of a conflict and its parties involved. In this spirit, the current realities of non-international armed conflicts have illustrated that the heterogeneity of today's conflicts and belligerent parties involved require a much more flexible and individually tailored approach to the development of the norms applicable in a specific conflict situation. Thus, it can be already beneficial to have a limited but specific set of rules that is actually complied with by all the belligerent parties to a conflict instead of a theoretical but hardly enforceable general obligation to respect all the rules applicable in times of a non-international armed conflict. Additionally, as mentioned before, special agreements would not alter states' and non-state actors' obligation to respect both the existing treaty law as well as customary international humanitarian law. Rather they should be seen as a valuable tool for belligerents to expressly commit to comply with certain rules that are deemed to be of primordial concern to all the parties involved. In case of violations of applicable humanitarian norms not contained in a special agreement, the latter in no way precludes existing ways of enforcement or engagement with perpetrators be they official governments or armed non-state groups.

It can be already beneficial to have a limited but specific set of rules that is actually complied instead of a theoretical but hardly enforceable general obligation.

3.6 The advantage of elaborating a «framework special agreement» serving as a basis for specific regulations among belligerent parties

While the establishment of bi- or multilateral special agreements among belligerent parties can be in the interest of both state armies as well as non-state groups the negotiation of such agreements in the context of hostilities can be a very challenging endeavour. Therefore, government officials, policy makers and other actors from the humanitarian sector together with interested armed non-state groups could venture to elaborate a form of general non-binding framework document serving as a reference for specific agreements tailored to particular non-international armed conflicts. Such a framework agreement would ideally focus on certain fundamental humanitarian standards and include the oftentimes shared realities of non-state groups. Having such a non-binding guiding document could potentially stimulate the conclusion of specific agreements and simplify the difficult negotiations among opposing parties.

3.7 Adapting the law and its development to prevailing realities – Concluding deliberations

It has been established that in order to have a positive impact and fulfil its main purposes the hardly enforceable legal regime of international humanitarian law needs to better include armed non-state groups and their realities in the development of rules applicable in times of non-international armed conflicts. There can be no doubt that all parties to ongoing conflicts should continuously be urged to

respect the entirety of existing treaty and customary rules. Nevertheless, it might be necessary to address the prevailing heterogeneity of conflicts with more flexibility and pragmatism with regard to the development of international humanitarian law.

It might be necessary to address the prevailing heterogeneity of conflicts with more flexibility and pragmatism with regard to the development of international humanitarian law.

Undoubtedly, the successful enhanced engagement with armed non-state groups fostering compliance with international humanitarian law is first and foremost dependent on a group's willingness to commit to participate in the establishment of the rules applicable in times of conflict. In contexts in which the disrespect of humanitarian norms is a deliberate tactical or even ideological choice, the involvement of armed non-state actors is unlikely to lead to an increased compliance with international humanitarian law. Therefore, the direct engagement with armed groups seems to be more promising if the latter have certain territorial or political aspirations. In fact, armed groups such as national liberation movements which consider armed conflict as a necessary means to achieve their ultimate political aspirations are strongly dependent on popular support. Accordingly, these groups have a strong incentive to commit to certain realistically attainable humanitarian rules, which makes them most prone to be included in the development of applicable rules of war, for example, through the conclusion of special agreements.

The framework of international humanitarian law should become less static and state-centred.

In line with the before-mentioned, and when reflecting on the potential practical application of the suggested increased involvement of non-state groups in the development of international humanitarian law, both the ongoing civil war in South Sudan as well as the prevailing conflict in Ukraine would constitute promising situations in which an enhanced engagement with armed groups in the form of a special agreement could have a potentially beneficial impact on compliance with humanitarian norms. Moreover, an express joint commitment by Hamas and other well organized Palestinian armed groups together with the Israeli armed forces could possess the potential for an increased respect of fundamental rules of international humanitarian law that have been repeatedly violated by both sides in the context of the long-lasting Israeli-Palestinian animosities.

In summation, in the name of a better respect for international humanitarian law and an enhanced protection of civilians and other victims of war, the framework of international humanitarian law should become less static and state-centred. Instead, armed non-state groups willing to take part in the development of the law and to commit to the respect of humanitarian norms should be taken more seriously by providing opportunities for them to shape the rules applicable in a particular conflict situation.

4. An Imperfect but Pragmatic Law: Incentivizing War Criminals?

Ryan Humbert

«Even if it had only served to save one single life, international humanitarian law and all the efforts from which it was born and maintained would still have been worth it.» (Jean Pictet)

Summary

Aware of the urgent need to improve international humanitarian law (IHL) and convinced of the necessity to improve the enforcement tool that is the public opinion, this policy paper proposes both (1) the introduction of a better classification and weighing of the existing defined IHL violations, and (2) a formal way of taking positive attitudes and trends towards a better respect of IHL into account. This would shift the actual system towards a system in which violations of IHL are better defined and classified as well as weighed by positive actions, making it possible to have a clear «IHL ranking» based on an actor's global attitude towards IHL.

4.1 Introduction: Strengthening IHL by setting priorities

As a consequence of the conflict opposing the Republican Armed Forces of Colombia (FARC) and the government of Colombia, the people of Colombia have suffered countless losses in terms of human lives and its development. On Tuesday, 2 October 2016, these same people were asked to vote on whether to put an end to this conflict by forgiving the members of the armed group. Even though, ultimately, the peopled voted against ending the conflict through forgiveness, this vote proves that sometimes humanity requires the adoption of pragmatic solutions, as well as abandonment of some expectations in order to face an imperfect situation and favour the bigger picture.

In IHL, the bigger picture is measured in terms of civilians' and fighters' lives. It is therefore paramount to be willing to lower some expectations the law might have given in order to preserve what is most important, human lives. Accordingly, there might be a need to be more tolerant regarding minor problems in order to prevent the most serious ones.

As a legal order, the law of armed conflicts neither has an international court of its own nor some sort of international police to enforce its provisions. Therefore, there is a necessity for international actors to adapt, and to leave aside idealism, in order to propose concrete and pragmatic solutions which would truly address the atrocities happening throughout the world. Whereas its environmental counterpart found pragmatic and adapted ways of dealing with the emission of greenhouse gases, such as allowing States to acquire and sell the right to pollute,[1] IHL, in turn, needs to find its own specific, adapted and unique way of enforcing its provisions.

It is therefore paramount to be willing to lower some expectations the law might have given in order to preserve what is most important, human lives.

1 Treaty on Substances that Deplete the Ozone Layer (Montreal Protocol) (adopted 22 March 1985, entry into force 22 September 1988) 1513 UNTS 293, art 5.

4.2 How to improve respect for IHL? Focus on the efficient mechanisms

When it comes to IHL, unrealistic expectations do not protect victims of armed conflicts. It is therefore critical to take into account IHL's specificities by establishing specific mechanisms that work realistically in order to enforce this unique legal order, while keeping in mind that non-international armed conflicts (NIAC) represent the overwhelming majority of armed conflicts and cannot be left out of any attempt to improve respect for IHL.[2]

It appears that neither usual mechanisms, such as a specific international tribunal, nor conventional mechanisms seem to work.[3] The mechanisms of Protecting Powers as well as the Fact-finding Commission, both foreseen as the main enforcement mechanisms for IHL, were relative failures. It therefore seems irrational to attempt adding other such mechanisms or trying to further enhance them. The reason for this is that these outdated mechanisms were either seen as legitimizing the opponent, as for the Protecting Powers system or seen as too idealistic in the case of the Fact-Finding Commission whose competence was not even agreed on once by parties to the AP I since its establishment on the 20th of November 1990. On the contrary, there are three main efficient tools that bring people towards the respect of IHL and which could be applied in order to improve respect of IHL.[4] These are (A) indirect mechanisms, meaning the indirect application of IHL through existing courts and tools coming from Human Rights Law and International Criminal Law, (B) reciprocity, and (C) public opinion.

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A. Indirect mechanisms

Would it be optimal to try and address IHL enforcement through indirect mechanisms? These are the regional courts of human rights, the International Criminal Court and the widely-accepted interpretation of the universal jurisdiction allowing for States to prosecute crimes which took place on their soil, which were committed by their nationals, or which were committed against their nationals.

The answer is that addressing these institutions in order to improve respect for IHL is not a good idea because these are well established mechanisms whose efficiency relies mainly on the number of ratifying States. Swiss authorities, however, have little, if any, influence in determining the number of ratifying States. Furthermore, time is needed in order to see how efficient these mechanisms can become along with increasing ratifications. Also, International Criminal Law's (ICL) means of enforcement[5] are only competent for grave breaches of IHL, excluding the numerous violations which do not reach this category. Another reason is that

These are (A) indirect mechanisms, meaning the indirect application of IHL through existing courts and tools coming from Human Rights Law and International Criminal Law, (B) reciprocity, and (C) public opinion.

2 An emphasis is put on the necessity to also address NIAC since only very few rules apply to this type of conflicts as compared with International Armed Conflicts (IAC).

3 Ryan Humbert, 'Quelle est l'efficacité des moyens de contrôle du droit humanitaire?' (2016) IYAH <http://iyah.ch/blog/2016/07/03/ryanhumbert-droitint/> accessed 9 May 2017.

4 Ibid.

5 The International Criminal Court, Universal Jurisdiction and the International Tribunals.

the scope of jurisdiction of human rights law (HRL) mechanisms is regionally limited. Finally, none of these two legal orders has a specific focus on IHL. Indeed, IHL has been created for a purpose and has its own specificities, whereas Human Rights Law judges and means of enforcement are not necessarily qualified in IHL matters and, therefore, cannot fully defend its interests properly.

Human Rights Law judges and means of enforcement are not necessarily qualified in IHL matters.

B. Reciprocity

In our context, reciprocity as a means to ensure respect of IHL can be described by the fact that a State or non-State actor takes into account other States' and non-State actors' attitudes in order to adapt its own attitude towards them. If a specific State is respectful of IHL regarding another State, the latter will tend to be more respectful of it as well. This is an effect resulting from an already existing attitude towards the law. Therefore, it can only be addressed indirectly by IHL's promoters.

Public opinion is an effective mechanism which is not sufficiently relied on by the actual system.

C. Public opinion

Public opinion is an effective mechanism which is not sufficiently relied on by the actual system for the following reasons. Growing along with the improvements in broadcasting technologies, public opinion has always been highly valued by IHL actors (State or non-State armed group) in the context of armed conflicts where legitimacy and recognition are major concerns due to the either religious or political origin of most conflicts. According to one author, some belligerents would go as far as bombing their own population in order to lead the public to believe that it was their opponents who made the attack, thus, undermining their legitimacy.[6] This shows the incredibly high value placed upon public opinion. However, much work and infrastructure is still needed in order to make the most out of this highly promising tool regarding respect for IHL. Indeed, violations of IHL are constantly reported, whereas positive actions are not adequately put forward. There will likely never be a newspaper headline stating: «In Syria, an armed group is getting rid of its weapons with indiscriminate effects in order to be more compliant with the laws of war». Because of this phenomenon, States end up being easily condemned by the media and by public opinion. Allowing actors to have a broader role to play in shaping their public image is essential in order to foster improvement. Only by allowing IHL actors to influence public opinion and by placing an emphasis on positive actions, will the system show a real understanding of the importance of this enforcement tool.[7]

4.3 Softening public opinion in order to improve respect for IHL: Tolerance and flexibility as enforcement tools

Can public tolerance and flexibility towards IHL actors enhance respect for IHL? If an actor feels like it is too seriously condemned by the international community and that anything it might correct or alter in order to change would still not be sufficient to get rid of its image as a «pariah actor», it loses a decisive incentive to improve. Going towards a more

6 Roy W. Gutman, 'Les violations du droit international humanitaire sous le feu des projecteurs: le rôle des médias' (1998. Revue internationale de la Croix-Rouge 667-675.

7 Ibid.

flexible and tolerant IHL system in which actors would be given the opportunity to affect their image is essential in order to avoid the phenomenon of «pariah actor» which buries an incentive to respect IHL.

Going towards a more flexible and tolerant IHL system in which actors would be given the opportunity to affect their image is essential in order to avoid the phenomenon of «pariah actor» which buries an incentive to respect IHL.

Showing more tolerance towards perpetrators of IHL violations is also essential in avoiding their exclusion from the international system. History has proven that excluded States tend to be compliant with international law such as IHL. For example, the term «Rogue States[8]» covers both the exclusion at the international level and the lack of respect for international norms under the same definition. It is important to leave the door open for violators of IHL who are willing to change and willing to improve in favour of respecting IHL, instead of entering the vicious circle of perpetual blaming.

There needs to be a properly defined distinction between violations according to their gravity in order for public opinion to criticize violating armed groups on objective criteria.

4.4 The Gathering Document

A. Classifying violations: Legitimacy of the criticism relies on its objectivity

The first step of the process (i) requires help from a neutral, legitimate and highly influential entity such as the ICRC or a hypothetical NGO matching the criteria (NGO 1). Indeed, the purpose of such an initiative relies entirely on people's strong belief that it is driven only by humanity and objectivity. The entity in question would endorse the duty of classifying IHL violations according to their gravity. There could be a scale of 1 to 3 or of 1 to 5, for which number 5 would only include the most serious violations. For instance, looking at the 3rd Geneva Convention, a violation of Article 71, which grants the possibility for prisoners of war to correspond with their family by allowing them to send only one letter per month instead of the two allowed is less important (rank 1) than a violation of Article 26, which ensures that prisoners of war are fed according to minimum requirements (rank 4). Even if people already pay attention to the most serious violations, there needs to be a properly defined distinction between violations according to their gravity in order for public opinion to criticize violating armed groups on objective criteria.

B. Defining positive IHL actions: No more Pariah[9]

The second step of the process (ii) has to be undertaken by the same entity as the first due to their complementarity. The necessary task in the second step is highly innovative and requires the chosen entity to define all the possible types of «positive trends and actions» towards IHL. These positive attitudes would have to be weighed. Returning to the example of Colombia, even if it is still violating IHL at different levels, the peace process it started with the FARC armed group reduced violence in the re-

8 «Rogue States» is a controversial term applied by some international theorists to States they consider threats to the international order.

9 The term Pariah is used as an extension to the widely-used qualification of Pariah State which is used in order to qualify a State which is rejected from the international community because of its behaviour at an international level.

gion, and should therefore be taken into account.[10] With such an innovation, there would be no permanent Pariah armed group, since each actor would have the flexibility to influence its status. Even if it appears difficult, defining possible positive attitudes in a general manner is necessary in order to further encourage actors showing their willingness to improve their situation.

C. Gathering document: What is your IHL score?

The third step (iii) entails balancing the negative and positive points acquired by IHL actors. This would ideally be done by an NGO specifically created for this purpose or another NGO with the required legitimacy and access to data, such as Reporters Without Borders (RSF), for instance. If an IHL actor finds itself below a certain score, it means it has attained a critical level which is not tolerable, and will face severe criticism by the international community. Whereas an actor finding itself above this limit will be relatively tolerated, even if it committed certain violations. In order to avoid an effect of undermining and giving up on the actors finding themselves below the limit, they will always have the opportunity to prove their willingness to change and gain points in order to reach an acceptable level. No motivated and well-intentioned actor would be left out of this system.

No motivated and well-intentioned actor would be left out of this system.

The challenge will not be finding an organisation willing to take charge of the Gathering Document (GD), but rather finding an entity able to provide the information on which it would rely. Indeed, when it comes to positive actions, IHL actors would provide and demonstrate their improvements themselves since it is in their interest. As for taking into account negative actions, IHL actors would very likely refuse access to any organisation gathering such information against them. Therefore, a possible way of dealing with this issue would be establishing an IHL forum that includes the representatives of armed groups reporting on their positive actions and the civil society playing the role of pointing out the negative facts. This would be the source on which NGO 2 would base its work. Alternatively, it would be possible for NGO 2 to rely on information originating from other reporting NGOs and media.

D. Media Relay: Does Armed Group X remain within the newly set limit?

Thanks to the unique legitimacy and influence of the entities involved in steps i-iii, the Gathering Document (GD) would gradually become a reference for any media reporting on armed conflicts. The desired effect would be achieved even if a media outlet only briefly mentioned the GD and whether an actor is within the newly set limit or not.

The Gathering Document (GD) would gradually become a reference for any media reporting on armed conflicts.

E. Example: How can the Gathering Document affect a specific armed group?

Armed Group x (AGx) has violated IHL by forbidding its prisoners of war the monthly minimum of two letters according to Article 71 of the third Geneva Convention (-1) and by starving its prisoners in violation of Article 26 of the same Convention

10 In IHL, trying to put military objectives as far away from civilians and civilian buildings is an obligation.

(-3). However, AGx has since greatly spread IHL knowledge to the people working in its prison environment and ten months have passed since its detention system has last seen problems of that kind (+5). When linking the actions with the clearly defined categories to which they belong in the GD, the resulting IHL score of AGx equals:

IHL Score AGx → (- 3 - 1) + 5 = + 1

Therefore, AGx is above the newly set criteria and will be identified as such by the GD. The press will then use this reference when mentioning AGx, and this will soften public opinion regarding this specific Armed Group. Seeing that its efforts do not go unnoticed and that there is still a way for it not to be permanently condemned by the public opinion, AGx will keep on improving its respect of IHL.

IHL Violations

Minor (- 1)	Violation of the prisoner's right of correspondence (Art 71 GC III)
Medium (- 3)	Violation of the right to be properly fed (Art 26 GC III)
Major (- 5)	War Crime (Art 50 GC I)

IHL Positive Actions

Minor (+ 1)	Public Statement of intent regarding IHL
Medium (+3)	Launching of an IHL teaching program
Major (+ 5)	Efficient measure to provide an IHL respectful prison

The criteria used to weigh positive and negative actions would be based on doctrine and objective criteria such as repetition, impact, broadness, intent, media coverage and public perception. For instance, an isolated action could be considered of minor gravity, whereas the same action being repeated several times could be deemed of medium importance. Leaving as little space for subjectivity as possible, the clear definition of the criteria relies upon the NGO taking care of establishing the GD.

4.5 What is new? Are the innovations sufficient to bring a change?

Regarding the first step (i), several authors have already considered the possibility of further classifying violations of IHL. Indeed, James D. Morrow and Hyeran Jo proposed a thematic and dichotomous division according to the severity of the violation committed.[11] For example, they presented the treatment of civilians as an area which may be subject to both major violations, such as torture or inhumane treatment, as well as minor violations, such as the detention of enemy civilians at the outbreak of war.[12] Although this method showed some interesting features, the classification process used prior to the GD would require much more detailed definitions of IHL violations in order for criticisms regarding IHL violations to be based on objective criteria exclusively. Also, for the reasons mentioned earlier, the entity from which such classification would emanate is pivotal. The classification cannot come from the initiative of individual researchers. When it comes to the ranking itself, the GD would not be the first attempt to rank armed groups ac-

11 James D. Morrow and Jo Hyeran, 'Compliance with the Laws of War: Dataset and Coding Rules' (2006) <http://cmp.sagepub.com/content/23/1/91.abstract> last accessed 9 May 2016.

12 Ibid.

cording to their respect of the law, but it would bring decisive distinctions. For example, the GD presented throughout this essay and the Freedom House 2016's ranking[13] have many important aspects in common in the sense that the latter takes into account general and long term trends, values the importance of objectivity and neutrality and puts forward an actual score for each State depending on whether civilians amongst a State enjoy enough freedom or not.

Unlike the Freedom House ranking, the scope of the GD is not limited to States and does not entirely focus on basic human rights granting freedom. Another important distinction is the absence of a clear definition process in which actions are directly attributed a certain amount of positive or negative points. Finally, this ranking lacks a decisive impact on public opinion through media relay. This requires the contribution of a preeminent and legitimate entity of the domain addressed. In the case of the GD, even if the balancing part (Step C) would have to be executed by another entity for reasons of neutrality concerns, it would still rely on the ICRC's extreme legitimacy and the fact that it took care of the first two steps in order to become a reference.[14]

4.6 Questions & Answers: Feasibility? Efficiency? Morality?

1) Will IHL actors not be tempted to do one positive action in order to neutralise a negative one after? An actor's attitude is evaluated at a systemic level and has to remain constant in its improvements in order to benefit the system. Also, IHL violations are due to lack of infrastructure and incentives to respect it. No actor would gain an incentive to violate IHL only because the system has shown tolerance towards it.
2) Is this policy proposition an attempt to soften the law? The idea here is to soften public opinion, and not the law itself which must always be respected.
3) How can you take into account positive attitudes towards IHL, such as the degree of preparation in an attack for instance? Actors will want their positive actions to be taken into account and will therefore spontaneously report and prove them to the entity in charge. General trends and improvements between different periods are there to serve as a backup.

   In due time, the developments in the field of Artificial Intelligence could support this step by introducing monitoring field robots whose role would be to follow armed groups and to gather information thanks to their skills and to their ability able to record visual and auditory evidence of battle scenes.

A possible way of doing so is by introducing a new set of criteria which would gradually soften public opinion and give new incentives in favour of IHL's respect.

4.7 Conclusion: An urgent need for pragmatism

Convinced that in order for a mechanism to be efficient it has to be adapted to IHL, the best way to address this is through public opinion. Keeping in mind the need for a proposition to be both feasible and efficient, a possible way of doing so is by introducing a new set of criteria which would gradually soften public opinion and give new incentives in favour of IHL's respect.

13 Freedom House, 'Freedom in the World 2016' (2016) <https://freedomhouse.org/sites/default/files/FH_FITW_ Report_2016.pdf> last accessed 9 May 2016.

14 An example of the extreme legitimacy and influence of the ICRC when it comes to developing IHL is given by the fact that its 2005 study on customary IHL has since been used as a worldwide reference.

«Even if it had only served to save one single life, IHL and all the efforts from which it was born and maintained would still have been worth it. » Highlighting the importance to promote and improve IHL, these words pronounced by Jean Pictet -eminent figure of IHL- should be sufficient to drive the Swiss government into making all the possible efforts in order to actualise a project which it deems likely to improve respect for IHL. Let the policy proposition be discussed by Swiss authorities together with other States as well as with the ICRC and Reporters Without Borders in order to quickly put into place a forum including the relevant actors and civil society. This will accelerate the process of mandating two different NGOs able and willing to take care of either step i and ii or step iii.

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