40th Round Table on Current Issues of International Humanitarian Law

"The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives"

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Difficulties and opportunities to increase respect for IHL: specificities of the Additional Protocols

1. Introduction

In order to answer the question of what specific challenges and opportunities regarding the implementation and enforcement of international humanitarian law (IHL) arise from the two Protocols Additional to the 1949 Geneva Conventions of 1977, I will mention the difficulties regarding the monitoring of the respect of the rules on the conduct of hostilities codified therein, certain characteristics of Additional Protocol II (AP II), and the implementation mechanisms created by the Additional Protocols.

As a preliminary point, I would like to stress that the adoption of the two Additional Protocols in 1977 has been a remarkable advance for IHL, at the very least because of the great detail some of their provisions have provided compared with the pre-existing law. This, I believe, is also a welcome contribution to increase their respect. In fact, more precise rules are easier to implement and to enforce in practice and give rise to less controversies, especially given that IHL is not a body of law designed to be interpreted only by courts, but rather to be applied on the battlefield by soldiers.

2. Difficulties in assessing compliance with the rules on the conduct of hostilities

One of the greatest progresses, if not the greatest progress, brought about by the Additional Protocols has been the codification of the rules on the protection of the civilian population against the effects of hostilities. This is all the more remarkable as it occurred following the horrors of the Second World War, after which one could have doubted whether any customary rules protecting the civilian population from aerial bombardments existed.

[*] I would like to thank Ms Alessandra Spadaro, Ph.D. student at the Graduate Institute of International and Development Studies and research assistant at the University of Geneva, to have formulated this contribution based upon my oral presentation at the Roundtable.

However, external bodies, such as the ICRC or fact-finding commissions, but also public opinion and the media, face particular difficulties in assessing whether those rules on the conduct of hostilities, and namely the principles of distinction, proportionality, and precautions, have been violated. Although the Additional Protocols have overcome the traditional distinction between Geneva Law (protecting war victims, mainly in the power of the enemy) and Hague Law (regulating the employment of means and methods of warfare), it remains considerably easier to determine violations of Geneva Law (e.g. whether a detainee has been mistreated or tortured), than of Hague Law, to which the rules on the conduct of hostilities belong. For instance, in order to establish whether the destruction of a school and the killing of children during an aerial bombardment amounts to a violation of IHL, it is necessary to know who else was in the building at the time of the attack, whether the building was a military objective, as well as the plans of the attacker and of the defender.

When it comes to precautionary measures, one might think that the mere occurrence of civilian casualties necessarily implies that the precautions taken were insufficient. However, this is incorrect, because to assess whether the principle of precautions was respected, one should know which precautionary measures were taken, which other precautionary measures were feasible but were not taken, and why the measures taken have failed. Additionally, one should always keep in mind that, while facts are established *ex post,* the lawfulness of an attack depends not on the results, but rather on an *ex ante* evaluation by the party conducting the attack.

The already difficult process of conducting an inquiry into whether IHL rules on the conduct of hostilities were violated is further complicated by the fact that the attacker's plans are often considered military secrets. While it is natural that the belligerents do not wish to disclose their military strategy because the enemy could take advantage of this information, more transparency would be needed with respect to military plans, especially those regarding operations that have been concluded for a long time. Indeed, as we have seen, disclosing this information is fundamental for *ex post facto* monitoring purposes by external organs. Additionally, this is crucial information for the public opinion, which is often led to believe that, if an incident in which civilian casualties have occurred cannot be otherwise explained, a violation of IHL has occurred, while this is not necessarily the case. Without transparency, we can at best rely on the conclusions of internal investigations conducted by the military on certain incidents. However, their results will convince neither sceptics nor the adversary, thus undermining the credibility of IHL and the willingness to respect it. Few are those who are willing to respect IHL even if they think that no one else respects IHL.

3. Achievements and challenges specific to Additional Protocol II

The adoption of AP II providing much more detailed rules applicable to non-international armed conflicts (NIACs) than Article 3 common to the Geneva Conventions which was previously the only IHL rule applicable in NIACs in itself represented a great advance for IHL. Unfortunately, sovereignty concerns prevented states from formulating the provisions of AP II so that it is clear that they address both states and armed non-state actors directly. The formulation of its prohibitions in the passive tense inevitably diminishes the sense of ownership by the armed groups Protocol II is equally addressed to.

Article 1 AP II defines the scope of application of AP II and provides for a high threshold to be met for the Protocol to apply.[1] Most scholars find it regrettable that the application AP II is thus restricted to a smaller number of NIACs.[2] However, I believe that this is a reasonable and necessary requirement. In fact, it would be unrealistic for organized armed groups to comply, not simply with the basic rules of Common Article 3 (CA3), but also with some of the more detailed rules of the Protocol, without having control over territory as required by Article 1 AP II.

Moreover, while the fact that the rules of AP II are less numerous and detailed than those of Additional Protocol I (AP I) can be explained by the sovereignty concerns that animated the negotiation of the two Protocols, I believe that this is also a natural and welcome characteristic of AP II. As a matter of fact, it would be impossible for non-state actors to comply with some of the rules of AP I, and one should always remember that unrealistic rules do not protect anyone.

To a certain extent, one could say that AP II is even more realistic than CA3, having regards to the obligations of armed groups parties to a conflict. This is the case for judicial guarantees. According to CA3, "the passing of sentences and the carrying out of executions without previous judgment pronounced by a *regularly constituted court*, affording all the judicial guarantees which are recognized as indispensable by civilized peoples" (emphasis added).[3] However, given that for a court to be regularly constituted it must be based on the law and that laws are traditionally a state prerogative, it may be very difficult for armed

[1] Article 1(1) AP II reads: "This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of applications, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

[2] See e.g. N. Quénivet, 'Applicability Test of Additional Protocol II and Common Article 3 for Crimes in Internal Conflict', in D. Jinks, J.N. Maogoto, S. Solomon (Eds.), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies. International and Domestic Aspects* (Asser Press, 2014), 31-60, at 35.

[3] Article 3(1)(c) Common to the 1949 Geneva Conventions.

groups to comply with this provision. On the contrary, Article 6(2) AP II provides that "No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by *a court offering the essential guarantees of independence and impartiality*" (emphasis added). Complying with the requirement of having a court that is independent and impartial is far more realistic for an armed group. In fact, for a state court to be independent, it needs to be independent from the executive and legislative branches of that state, not from the state itself. Similarly, for a court established by an armed group, the court simply needs to be independent from the executive, military branch of that armed group, while it may and must have a link with that party to the conflict: otherwise its decisions will not be complied with.

Another important feature of AP II, which unfortunately is the only implementation measure included therein, is Article 19, which provides that the Protocol must be disseminated as widely as possible. Training of fighters is absolutely essential to ensure respect for IHL, as an important part of training and dissemination of IHL is making those engaged in an armed conflict understand that it is possible for them to achieve their military aims while respecting the rules. However, IHL training of armed groups is rendered more difficult by the fact that all armed groups are considered as terrorist groups by the governments against which they fight and many have even been so classified by the international community. As a consequence, supporting "terrorists", including by training them, is criminalized in some jurisdictions.[4] In my view, the criminalization of IHL training of armed groups is at odds with IHL, provided of course that one should check whether the so-called IHL training is not just disguised support to the armed group, and that a humanitarian impartial body is really just trying to ensure the respect for IHL.

A problem intrinsic to the law of NIAC is the absence of rewards or incentives for the respect of IHL. In fact, the absence of combatant status and immunity in NIAC implies that members of an armed group can, and probably will, be prosecuted for the sole reason of having participated in hostilities against the state, even if they complied with IHL at all times. In domestic law, killing soldiers or civilians are both murder. However, AP II tries to alleviate this problem, as Article 6(5) AP II encourages "authorities in power (…) to grant the broadest possible amnesty to persons who have participated in the armed conflict (…)." Two remarks are necessary with respect to this provision. First, at the end of a conflict, the phrase "authorities in power" might also refer to the rebels, if the armed opposition group has succeeded in topping the former government against which they fought. Second, the amnesty would, of course, not cover serious violations of IHL, but simply the mere participation in hostilities (which constitutes a crime for armed non-state actors in all domestic legislations).

[4] See e.g. Section 2339B, title 18 of the United States Code (USC), 2339B (a)(1), Antiterrorism and Effective Death Penalty Act of 1996, and the US Supreme Court in *Holder v Humanitarian Law Project*, 561 U.S. 1 (2010), 130 S.Ct. 2705, 2720 and 2725.

4. Implementation mechanisms under the Additional Protocols

Unfortunately, as already mentioned, the only implementation mechanism in NIACs under AP II is dissemination. Even the right of initiative of the ICRC in NIACs is only mentioned in CA3, which remains applicable in all NIACs, but is not repeated in AP II. I do not think that the Additional Protocols have strengthened the ICRC, which in any case maintains its prerogatives under the 1949 Geneva Conventions, including the right to visit prisoners of war and protected civilians in international armed conflicts (IACs) and the right of initiative in both IACs and NIACs.[5] As we know, a treaty body or even a regular meeting of High Contracting Parties, were not foreseen in the Additional Protocols and are still opposed by states today.

With respect to IACs, Article 5 AP I has enhanced the mechanism for the appointment of Protecting Powers, a system which allows a third state to act as an intermediary representing one of the belligerent states *vis-à-vis* the adversary in order to cooperate in the implementation of IHL and to monitor compliance. The adoption of more detailed rules regarding the appointment of Protecting Powers, however, has not resulted in an increase in the use of this mechanism, nor even stopped its decline, as proved by the fact that between 1949 (when the Geneva Conventions were adopted) and 1977 (year of the adoption of the Additional Protocols) Protecting Powers were appointed only in four occasions, and since 1977 only one such appointment has been made[6] - while most belligerents were represented by protecting powers during World War II.

It is also important to acknowledge that AP I has contributed to the spectacular development of International Criminal Law, thanks to the progress made in the regulation of grave breaches, which now also include battlefield crimes.[7]

With respect to the implementation of IHL, however, the greatest novelty contained in AP I is the creation of the International Humanitarian Fact-Finding Commission (IHFFC or the Commission). As already mentioned, serious fact-finding by an impartial, independent and trustworthy body is essential for ensuring better respect for IHL and to strengthen its

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[5] Article 126 of Convention (III) relative to the Treatment of Prisoners of War (Geneva, 12 August 1949); Articles 76(6) and 143 of Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949); Common Articles 3 and 9,9,9 and 10, respectively, of the 1949 Geneva Conventions.

[6] Switzerland and Brazil were appointed as Protecting Powers in the Falklands/Malvinas conflict between Argentina and the United Kingdom in 1982 (but technically not under the scheme of IHL but under that of the Vienna Convention on Diplomatic Relations). For the other cases in which this mechanism was used see ICRC, *Commentary of 2016*, Article 8 of Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949), at para. 1115. Available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=1BA7CE908060F31EC1257F7D0035D639

[7] See Part V, Section II (Repression of breaches of the Conventions and of this Protocol) of AP I (Articles 85 ff.).

credibility when this is jeopardized by the wrong perception that it is continuously violated (which weakens IHL and leads to further violations).

Moreover, while lawyers may find questions regarding the interpretation of certain concepts or provisions of IHL fascinating, the real challenge relating to the implementation of IHL on the ground in today's conflicts is not how a certain provision is interpreted, but whether it is applied at all. Precisely facts, not legal theories, are often the object of dispute, and thus need to be established. For instance, the parties to the conflict in Syria do not have divergent interpretations of the prohibition to use chemical weapons, but disagreement exists as to whether chemical weapons have in fact been used and by whom.[8]

Under Article 90 AP I, the IHFFC has no routine monitoring powers but can only start an enquiry into allegations of serious IHL violations in an IAC between states which have accepted its jurisdiction *ex ante* or *ad hoc*. Although a declaration accepting the Commission's jurisdiction *ex ante* has so far been made by 76 states,[9] the IHFFC has never been triggered under its treaty mandate, for a number of reasons.

First, it must be triggered through the consent of both belligerents, which is incredibly difficult to secure during an armed conflict. Today, however, there arguably exists an IAC between two states that have accepted the jurisdiction of the IHFFC *ex ante*: Russia and Ukraine. The Commission could potentially be asked by Ukraine (Russia denies the existence of an IAC) to establish the facts relating to this conflict, including whether it is in fact an IAC by virtue of the alleged overall control exercised by the Russian Federation over the Ukrainian insurgent forces. Nevertheless, not even Ukraine has seized the IHFFC, perhaps because it would inevitably equally enquire into Ukrainian conduct.

Second, it has no mandate in NIACs. The IHFFC has indicated its willingness to work in NIACs, but again, this would only be possible if the consent of both parties was obtained.

Third, unlike in the case of *ad hoc* enquiries set up by the United Nations, the IHFFC is not linked to any international body that could follow up on its findings and recommendations. Finally, states, in my view, simply dislike automatisms, preferring *ad hoc* mechanisms over which they have a greater degree of control.

Outside its treaty mandate, the Commission has however recently concluded its first enquiry. The IHFFC was asked by the Organization for Security and Co-operation in Europe (OSCE) to look into an incident that occurred in Ukraine in April 2017, in which one

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[8] See e.g. *Report of the OPCW Fact-Finding Mission in Syria Regarding an Alleged Incident in Khan Shaykhun, Syrian Arab Republic, April 2017*, S/1510/2010, 29 June 2017.
Available at: https://www.opcw.org/fileadmin/OPCW/Fact_Finding_Mission/s-1510-2017_e_.pdf

[9] According to the IHFFC website, http://www.ihffc.org/index.asp?Language=EN&page=home

paramedic died and two members of the OSCE Special Monitoring Mission to Ukraine were injured. Such a request by the OSCE would certainly not have been possible if all parties had not consented to this mandate. Although the final report is confidential, a redacted summary of it has been made available to the public online.[10] The summary of the report shows that the Commission has not limited itself to establishing that OSCE Mission members were not the intended targets of the attack object of its investigation, but it has also noted that, since the road on which the anti-tank mine that caused the incident was positioned was frequently used by civilian traffic, the placing of the mine in that location constituted a violation of IHL because of its predictable indiscriminate effects.[11] For this, the Commission is to be praised.

Under Article 90 AP I, the reports of the IHFFC are confidential (unless the parties to the conflict request otherwise), which, in my view, is no longer realistic, considering the interest of the public opinion in knowing whether allegations regarding serious IHL violations are true or not and the importance of establishing such facts for the credibility of IHL, mentioned above. Therefore, I welcome the fact that the IHFFC and the OSCE have managed to overcome this shortcoming at least partially by making the summary of the report regarding the OSCE Mission to Ukraine public.

5. Conclusion

In conclusion, contrary to their substantive rules, the implementation mechanisms of the Additional Protocols did not constitute a break-through, but they offer some opportunities, while the nature of the substantive rules also implies some particular challenges for implementation and monitoring by outside bodies.

[10] *Executive Summary of the Report of the Independent Forensic Investigation in relation to the Incident affecting an OSCE Special Monitoring Mission to Ukraine (SMM) Patrol on 23 April 2017*. Available at: http://www.osce.org/home/338361?download=true

[11] *Ibid.*