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State responsibility for violations of international humanitarian law

by

MARCO SASSÒLI

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

The implementation of international humanitarian law may therefore be understood from the viewpoint of both layers. For a branch of law that applies in a fundamentally anarchic, illegal and often lawless situation such as armed conflicts, the focus of implementing mechanisms is and must always be on prevention. The International Committee of the Red Cross (ICRC), the traditional implementing mechanism of international humanitarian law, acts as a neutral intermediary between States and as an institutionalized representative of

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the victims of war. At both levels it prevents and addresses violations, *inter alia*, by substituting itself for belligerents who fail to fulfil their humanitarian duties.¹ Its approach is victim-oriented rather than violation-oriented.² Nevertheless, in a legal system violations, once they occur, must also have legal consequences. Violations are committed by individuals. International humanitarian law is one of the few branches of international law attributing violations to individuals and prescribing sanctions against such individuals. This approach, typical for the second layer of public international law, has made enormous progress in recent years.

Although international humanitarian law has increasingly been implemented against and for the benefit of individuals, it is also part of the first layer in that it is implemented between States. In this traditional structure, violations are attributed to States and measures to stop, repress and redress them must therefore be directed against the State responsible for the violations. The inter-State consequences of violations are laid down in the rules on State responsibility. This article will try to show how those rules apply to violations of international humanitarian law.

The Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted in 2001

Now is an appropriate time to enquire into State responsibility for violations of international humanitarian law because last year the International Law Commission (ILC) finally adopted, as a crowning achievement of 45 years of work, the “Draft Articles on Responsibility of States for internationally wrongful acts” (hereinafter: Draft Articles).³ This codification of the so-called secondary rules of international law applies to violations of all primary rules, except

¹ For those modes of action, see P. Bonard, *Modes of Action Used by Humanitarian Players*, ICRC, Geneva, 1999.

² M. Sassòli, “The victim-oriented approach of international humanitarian law and of the International Committee of the Red Cross (ICRC)”, *Victims*, Nouvelles Etudes Pénales, Vol. 7, 1988, pp. 147-180.

³ United Nations, International Law Commission, *Report on the Work of its Fifty-third Session (23 April-1 June and 2 July-10 August 2001)*, General Assembly, Official Records, Fifty-fifth Session, Supplement No. 10 (A/56/10), available at: <<http://www.un.org/law/ilc/reports/2001/2001report.htm>> (hereinafter: *Report*), pp. 29-365. The UN General Assembly took note of the Draft Articles in Resolution A/RES/56/83 of 12 December 2001.

“where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law”.⁴ In examining State responsibility, it will therefore be important to determine for which rules laid down in the Draft Articles international humanitarian law foresees a *lex specialis*.

The Draft Articles and their Commentary, also adopted by the ILC, frequently refer to international humanitarian law as an example for or as an exception to rules contained in the Draft Articles. A review and discussion of these references provide a better understanding of the definition and consequences of violations of international humanitarian law at the inter-State level which, despite the recent progress of international criminal law, remain crucial for ensuring respect for war victims as long as the international community continues to consist of sovereign States and as long as the international community has not achieved the form of an institutionalized world State in which the corporate veil — and concomitant responsibility — of the State no longer matter. For the time being, harmonizing international humanitarian law with secondary concepts common to international law as a whole is a way of perfecting it.⁵

International humanitarian law, a “self-contained system”?

Before any analysis of the Draft Articles in terms of the implementation of international humanitarian law, it is necessary to determine whether the ILC is correct in its assumption that those articles, as a matter of principle, apply to this branch of law. Is not international humanitarian law instead a “self-contained system” which may be implemented only according to its own rules? The International Court of Justice (ICJ) has used the concept of a “self-contained system”, which enumerates a limited number of possible reactions to violations, in the context of the law of diplomatic relations. It stated that

⁴ Draft Article 55.

⁵ For a previous, albeit sometimes confusing, attempt, see T. Kamenov, “The origin of State and entity responsibility for violations of international humanitarian law in armed

conflicts”, F. Kalshoven and Y. Sandoz (eds), *Implementation of International Humanitarian Law*, Dordrecht, Martinus Nijhoff Publishers, 1989, in particular p. 170.

“diplomatic law itself provides the necessary means of defense against, and sanction for, illicit activities by members of diplomatic or consular missions”.⁶ The ILC has abandoned this concept even for the law of diplomatic relations, limiting it to the rule that “[a] State taking countermeasures is not relieved from fulfilling its obligation [...] to respect the inviolability of diplomatic or consular agents, premises, archives and documents”.⁷ In this respect, diplomatic and humanitarian law are similar. They must guarantee a minimum of intercourse between States, independently of the rest of their relations. We shall see that countermeasures consisting of conduct affecting war victims are also largely prohibited. It does not, however, follow from that prohibition that international humanitarian law can be implemented only by the mechanisms it explicitly provides for. First, we shall see that a great many of those mechanisms spell out in detail or modify general rules on State responsibility and can be understood only within that framework. Second, it will be apparent that international tribunals have applied general rules on State responsibility in order to attribute or not to attribute certain violations of international humanitarian law to a given State.⁸ To hold that international humanitarian law may be implemented only by its own mechanisms would leave it as a branch of law of a less compulsory character and with large gaps.

Attribution

To fall under the inter-State rules belonging to the traditional layer of international law, violations must consist of conduct attributable to a State. If they do not, these violations may still give rise to individual criminal responsibility and it is this second possible attribution that differentiates international humanitarian law from most other branches of international law.

⁶ *United States Diplomatic and Consular Staff in Tehran*, ICJ Reports 1980, p. 3, at p. 38, para. 83, and p. 40, para. 86.

⁷ Draft Article 50(2)(b).

⁸ See notes 19 and 20 below.

Conduct of members of armed forces

The first issue arising in this context is whether a State is responsible for all conduct of its armed forces. Draft Article 7 reads: "The conduct of an organ of a State [...] shall be considered an act of the State under international law if the organ, person [...] acts in that capacity, even if it exceeds its authority or contravenes instructions." Under Article 3 of the Hague Convention No. IV⁹ and Article 91 of Protocol I¹⁰ a party to the conflict "shall be responsible for all acts by persons forming part of its armed forces".¹¹ The three provisions clearly cover acts committed contrary to orders or instructions. Under the said Draft Article, a State is, however, responsible only for the conduct of members of its armed forces acting in that capacity. This limitation may exclude all acts committed as a private person, such as theft or sexual assaults by a soldier during leave in an occupied territory. In its Commentary, the ILC simply considers that the international humanitarian law rule exemplifies the Draft Article.¹² Previously, commenting on the corresponding Draft Article adopted in its first reading, the ILC still considered the international humanitarian law provision as an exception to the general rule, as *lex specialis*, by which States assumed responsibility for conduct by members of their armed forces, even if committed in their capacity as private individuals.¹³ In this author's opinion, the latter view, unanimously

⁹ Convention (IV) respecting the Laws and Customs of War on Land (hereinafter: Hague Convention No. IV) and its Annex: Regulations concerning the Laws and Customs of War on Land (hereinafter: Hague Regulations), The Hague, 18 October 1907, reproduced in Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, 3rd edition, New York, 1918, pp. 100-132.

¹⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977, 1125 UNTS 3-434 (hereinafter: Protocol I).

¹¹ For the broad meaning of armed forces, see Art. 43 of Protocol I, and for its consequences in terms of attribution, see F. Kalshoven, "State responsibility for warlike acts of the armed forces", *International and Comparative Law Quarterly*, Vol. 40, 1991, pp. 847-848; and Kamenov, *op. cit.* (note 5), pp. 174-176.

¹² *Report, op.cit.* (note 3), p. 101 (para. 4 on Draft Art. 10).

¹³ *Yearbook of the ILC 1975*, Vol. II, p. 69 (para. 26 on Draft Art. 10).

supported by pertinent scholarly writings¹⁴ and a judicial opinion,¹⁵ is correct. The *travaux préparatoires* of Article 3 of Hague Convention No. IV indicate the desire to modify the previous rule under which a State was not responsible for unauthorized acts of soldiers without officers in command. The only reservation made exemplifies the fear that a State should not become an insurer for all damage provoked by its troops.¹⁶ Indeed, in addition to the subjective element of being attributable to a State, those acts must fulfil the objective element of responsibility of being unlawful,¹⁷ in the sense that they violate specific provisions of international humanitarian law. Absolute responsibility for such acts is also justified by the fact that soldiers are a particular category of State organs, over which the State exercises much stricter control than over other officials. Those who do not want to consider Article 3 of Hague Convention No. IV as *lex specialis* in relation to Draft Article 7 may consider that at least in wartime and with regard to acts governed by international humanitarian law, members of the armed forces are always on duty and never act in a purely private capacity. As private persons, they would never have entered into contact with enemy nationals or acted on enemy territory.

De facto agents

The second attribution issue, which is of specific importance to international humanitarian law, raises the question as to the

¹⁴ A. W. Freeman, "Responsibility of States for unlawful acts of their armed forces", *Collected Courses of the Hague Academy of International Law*, Vol. 88, 1955-II, pp. 333-339; R. Bierzanek, "The responsibility of States in armed conflicts", *Polish Yearbook of International Law*, Vol. 11, 1981-1982, pp. 96-98; L. Condorelli, "L'imputation à l'Etat d'un fait internationalement illicite: Solutions classiques et nouvelles tendances", *Collected Courses of the Hague Academy of International Law*, 189, 1984-VI, pp. 146-148, the three of them with further references; and Kalshoven, *op. cit.* (note 11), pp. 837-838, 853; Y. Sandoz, "Unlawful damage in armed conflicts and redress under international humanitarian law",

International Review of the Red Cross, No. 228, 1982, pp. 136-137; Kamenov, *op. cit.* (note 5), pp. 174-176; and S. Boelaert-Suominen, "Iraqi war reparations and the laws of war: A discussion of the current work of the United Nations Compensation Commission with specific reference to environmental damage during warfare", *Austrian Journal of Public International Law*, Vol. 50, 1996, pp. 296-297.

¹⁵ M. Huber in the *Arbital Award on British Claims in the Spanish Zone of Morocco*, *UNRIAA*, Vol. II, p. 645.

¹⁶ Freeman, *op. cit.* (note 14), pp. 336-343; and Sandoz, *op. cit.* (note 14), p. 137.

¹⁷ Draft Article 2.

conditions under which an armed group, fighting against governmental armed forces, can be considered as the *de facto* agent of a foreign State. The latter would entail the consequence that its conduct could be attributed to that State and that the law of international armed conflicts would therefore apply. Draft Article 8 reads: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct". The ILC writes, "[I]t is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it".¹⁸ This is true for the appreciation of the facts, while the applicable legal standard provided for by the secondary rule of attribution must be the same in all cases.

Such attribution was an issue in the *Nicaragua* case decided by the International Court of Justice (ICJ). The Court required a rather high degree of *effective control* for such an attribution when it wrote, concerning US responsibility for the contras fighting against the Nicaraguan government, that US "participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of (...) targets, and the planning of the whole of its operation, is still insufficient in itself (...) for the purpose of attributing to the United States the acts committed by the contras (...). For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed".¹⁹

¹⁸ Report, *op. cit.* (note 3), p. 107 (para. 5 on Art. 8).

¹⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986, p. 14, para. 115. The much less restrictive standard applied by the ICJ in its Order of 8 April 1993 in the case *Application of the Convention on the Prevention and*

Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), ICJ Reports 1993, p. 3, para. 52 is, in our view, due to the specific primary obligation to prevent the crime of genocide (*ibid.*, paras 44-45), and is not a development of the secondary rule, as argued by Boelaert-Suominen, *op. cit.* (note 14), p. 297.

It is well known that in the *Tadic* case, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) held that this test, applied by the ICJ, was unconvincing because it was contrary to the very logic of State responsibility and at variance with State and judicial practice. Contrary to what some authors suggested, the ICTY considered that the criterion for ascertaining State responsibility and that necessary to make international humanitarian law governing international armed conflicts applicable are the same. In the view of the Tribunal, when responsibility for a military organization is in question, *overall control* exercised by a foreign State over that particular organization is sufficient to render the foreign State responsible for all acts committed by that organization and consequently makes international humanitarian law governing international armed conflicts applicable.²⁰

The ILC is of the opinion that the legal issues and the factual situation brought to light in the *Tadic* case differ from those the ICJ had faced in the *Nicaragua* case, in the sense that the ICTY's mandate was to address issues of individual criminal responsibility, not State responsibility.²¹ With all due respect, this author disagrees. The ILC writes that the question in the *Tadic* case concerned not responsibility but the applicable rules of international humanitarian law. This is true. The preliminary underlying issue in the *Tadic* case was, however, the same as that decided in the *Nicaragua* case. Indeed, before individual responsibility can be established in a given case, the rules according to which an individual should have acted must be clarified. International humanitarian law governing international armed conflicts could apply to acts which Mr Tadic, a Bosnian Serb, committed against Bosnian Muslims in the course of a conflict with the Bosnian government only if those acts could be legally considered as acts of another State, namely the Federal Republic of Yugoslavia.

²⁰ Case IT-94-1, *Prosecutor v. Tadic*, 1999, paras 116-144; and M. Sassöli and L. Olson, "Case Report, Judgment, *The Prosecutor v. Dusko Tadic*, Case No. IT-94-A, ICTY Appeals Chamber, 15 July 1999", *American Journal of International Law*, Vol. 94, 2000, p. 575. See also our critique, M. Sassöli and L. Olson, "The

decision of the ICTY Appeals Chamber in the *Tadic* Case: New horizons for international humanitarian and criminal law?", *International Review of the Red Cross*, No. 839, 2000, pp. 737-742.

²¹ *Report, op. cit.* (note 3), pp. 106-107 (para. 5 on Art. 8).

Some would argue that this standard has recently been further lowered when the UN Security Council acquiesced in US self-defence against Afghanistan in reaction to the terrorist attacks of 11 September 2001 committed by the non-State Al Qaeda group harboured by the Taliban, the then *de facto* government of Afghanistan.²² It may be that special rules of attribution apply with regard to the use of force. Otherwise, such use by the US against Afghanistan (and not simply against Al Qaeda targets in Afghanistan) could be justified by the right of self-defence against an armed attack only if the armed attack by Al Qaeda could be attributed to Afghanistan. Such attribution was apparently made by the US simply because Afghanistan harboured and supported the group, and independently of whether that State had overall control over the group. It remains to be seen whether this indicates a development, applicable to all primary rules, of the secondary rule and whether the purported new rule is meant to apply to all States and future similar cases — this claim is indispensable for it to be a *legal* rule.

Levée en masse

Another provision adopted by the ILC on attribution is Draft Article 9 on “Conduct carried out in the absence or default of the official authorities”. This particular provision, according to the Commentary, owes something to an old-fashioned international humanitarian law institution known as the “*levée en masse*”, i.e. the rule that civilians spontaneously taking up arms on the approach of the enemy and in the absence of regular forces have combatant status and a right to participate directly in hostilities.²³ The provision makes it clear that a State is responsible for the conduct, for example violations of international humanitarian law, of such civilians.

²² See in particular UN Security Council Resolutions 1368 (2001) and 1373 (2001). For some preliminary thoughts on those events from the standpoint of the rules of attribution, see L. Condorelli, “Les attentats du 11 septembre et leurs suites: Où va le droit international?”, *Revue générale de droit international public*, Vol. 105, 2001, pp. 838-839.

²³ Art. 4(A)(6) of Convention III (note 33) and Art. 2 of the Hague Regulations.

Conduct in the exercise of governmental authority

In an environment marked by privatization and deregulation, even in the fields of defence, security and prisons, it may be useful to mention Draft Article 5 under which a State is responsible for private entities or individuals “empowered by the law of that State to exercise elements of the governmental authority”. As examples, the ILC mentions private security firms contracted to act as prison guards and in that capacity exercising powers of detention and discipline, or to whom airlines may have delegated certain powers in relation to immigration control.²⁴

Insurrectional movements

An additional provision attributing the conduct of non-State entities or individuals to a State is Draft Article 10 on “Conduct of an insurrectional or other movement”. This provision states that such conduct is attributable to the State if the movement becomes the new government of the State, or to a new State if the group succeeds in establishing a new State. For the rules governing State responsibility, as for international humanitarian law, the legitimacy or illegitimacy of the insurrection is of no importance but “[r]ather, the focus must be on the particular conduct in question, and on its lawfulness or otherwise under the applicable rules of international law”.²⁵ Furthermore, the ILC considers that for defining the types of groups encompassed by the term “insurrectional movement” the threshold for the application of the laws of armed conflict contained in Protocol II may be taken as a guide.²⁶ In this author’s view this should, however, not mean that a State is not responsible for violations of Article 3 common to the Geneva Conventions, which is equally applicable in non-international armed conflicts but has a lower threshold of application, if such violations have been committed by an armed group which later becomes the new government of that State but was not covered by Protocol II at the time of the violation.

²⁴ *Report, op. cit.* (note 3), p. 92 (para. 2 on Art. 5).

²⁵ *Ibid.*, p. 116 (para. 11 on Art. 10).

²⁶ *Ibid.*, p. 115 (para. 9 on Art. 10) and Art. 1(1) of Protocol Additional to the Geneva

Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, of 8 June 1977, 1125 UNTS 609–699 (hereinafter: Protocol II).

While the ILC was not concerned with the responsibility of subjects of international law other than States, it recalls that: “A further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces”.²⁷ Indeed, international humanitarian law implicitly confers upon parties to non-international armed conflicts — whether they ultimately succeed or not — the functional international legal personality necessary to exercise the rights and obligations laid down by it.²⁸ It is useful to recall that violations of international humanitarian law by such parties entail their international legal responsibility; this is of particular importance with regard to the corresponding rights and duties of third States in the event of such violations.

Lack of due diligence

This chapter would not be complete if it did not mention a cause of responsibility considered by the ILC, and probably rightly so, to derive from the primary rules.²⁹ Private entities or individuals may violate international humanitarian law even if their conduct cannot be attributed to a State.³⁰ In relation to such conduct, a State may have an obligation to exercise due diligence in order to prevent conduct contrary to international law and to prosecute and punish it if it occurs.³¹ This is not the place to analyse which rules of international

²⁷ *Report, op. cit.* (note 3), p. 118 (para. 16 on Art. 10).

²⁸ See P. Guggenheim, *Traité de droit international public*, Vol. II, 1st ed., Geneva, Georg, 1954, p. 314; C. Zorgbibe, *La guerre civile*, Paris, PUF, 1975, pp. 187-189; and the Constitutional Court of Colombia in Case No. C-225/95, partly reproduced in M. Sassòli and A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1361, para. 14.

²⁹ *Report, op. cit.* (note 3), p. 70 (para. 4 on Art. 2); and *Report of the International Law Commission on the Work of its Fifty-first Session*, UN Doc. A/54/10, para. 420 (available at: <http://www.un.org/law/ilc/reports/1999/english/99repfra.htm>).

³⁰ *Prosecutor v. Jean-Paul Akayesu*, International Criminal Tribunal for Rwanda, Appeals Chamber, Judgment of 1 June 2001, paras 432-445, available at: <http://www.ictt.org>.

³¹ For references, see *Yearbook of the ILC 1975*, Vol. 2, p. 87; L. Condorelli, *op. cit.* (note 14), pp. 105-116; R. Pisillo-Mazzeschi, “The due diligence rule and the nature of the international responsibility of States”, *German Yearbook of International Law*, Vol. 35, 1992, pp. 9-51, and by the same author, “*Due diligence*” e *Responsabilità internazionale degli stati*, Giuffrè, Milan, 1989.

humanitarian law request what degree of diligence from States in relation to violations of international humanitarian law by private players. Suffice it to say that some rules explicitly or implicitly request such diligence.³² It is suggested that violations of the obligations to take preventive measures already in peacetime, for example to disseminate international humanitarian law,³³ and to prosecute grave breaches³⁴ could also imply responsibility for conduct by private players that is facilitated by such omissions. Finally, the obligation to “ensure respect” laid down in Article 1 common to the Conventions could also be seen as establishing a standard of due diligence with regard to private players if the latter find themselves under the jurisdiction of a State, or even with regard to breaches of international humanitarian law by States and non-State actors abroad which could be influenced by a State.³⁵

Aid or assistance in violations of international humanitarian law

Draft Article 16 holds a State responsible for aiding or assisting another State in committing a violation of international law if the aiding State is bound by the respective rule and acts with knowledge of the circumstances of the violation. The ILC clarifies that a State assisting another State normally does not have to assume the risk that such aid is used to commit internationally unlawful acts and that

³² For example, Art. 13(2) of Convention III (note 33) and Art. 43 of the Hague Regulations.

³³ Arts 47/48/127/144 respectively of the four Geneva Conventions (Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949, 75 UNTS 31–83 [hereinafter: Convention I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of 12 August 1949, 75 UNTS 85–133 [hereinafter: Convention II]; Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949, 75 UNTS 135–285 [hereinafter: Convention III]; Geneva Convention relative to the Protection of Civilian Persons in Time of War,

of 12 August 1949, 75 UNTS 287–417 [hereinafter: Convention IV]); and Arts 83 and 87(2) of Protocol I and Art. 19 of Protocol II.

³⁴ Arts 50/51/130/147 respectively of the Conventions, and Arts 11(4), 85 and 86 of Protocol I.

³⁵ Kamenov, *op. cit.* (note 5), pp. 179–182, qualifies such responsibility as “semi-direct”; and N. Levrat, “Les conséquences de l’engagement pris par le H.P.C. de ‘faire respecter’ les conventions humanitaires”, in Kalshoven and Sandoz, *op. cit.* (note 5), pp. 274–291, considers that this obligation of conduct has to be fulfilled by the mechanisms foreseen by IHL. For the inter-State aspect of the responsibility to “ensure respect”, see the text after note 78.

to be unlawful the aid must be given with a view to facilitating the commission of the violation and must actually do so.³⁶ Violations of international humanitarian law are often committed with weapons provided by third States. As long as the use of those particular weapons is not prohibited a State providing them is not responsible for violations of international humanitarian law committed by the receiving State with such weapons. However, once it knows that the receiving State systematically commits violations of international humanitarian law with certain weapons, the aiding State has to deny further transfers thereof, even if those weapons could also be used lawfully. Indeed, once the violations are known, ongoing assistance is necessarily given with a view to facilitating further violations. Such a strict standard may not be that of the ILC in its Commentary, but it is supported by the special obligation, under international humanitarian law, of the third State not only *not* to assist in violations, but also to “ensure respect” for the rules of international humanitarian law by all other States.³⁷ A State providing assistance, knowing that the latter is used for violations, is certainly not complying with that specific obligation.

Circumstances precluding the wrongfulness of violations of international humanitarian law?

The ILC codifies six circumstances precluding the wrongfulness of an otherwise unlawful act: consent, self-defence, countermeasures, *force majeure*, distress and necessity.³⁸ However, it also specifies that no such circumstance can preclude the wrongfulness of a violation of peremptory norms of international law. The ICJ, the ICTY and the ILC consider that the basic rules of international humanitarian law

³⁶ *Report, op. cit.* (note 3), p. 156 (para. 3 on Art. 16).

³⁷ See notes 78-80 below.

³⁸ Draft Articles 20-25. We shall deal here with consent, self-defence, distress and necessity. For countermeasures, see the text after note 88. As for *force majeure*, if an irresistible force or an unforeseen event beyond the control of a State makes it materially impossible for that State to comply with IHL (see the definition in Draft Article 23), in our

view no unlawful act occurs (e.g. if a military aircraft in distress crashes on civilians). In the same sense, see L. Condorelli and L. Boisson De Chazournes, “Quelques remarques à propos de l’obligation des États de ‘respecter et faire respecter’ le droit international humanitaire en toutes circonstances”, *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC, Martinus Nijhoff Publishers, The Hague, 1984, p. 22.

are peremptory.³⁹ It would be beyond the scope of this article to analyse which rules of international humanitarian law are basic enough to belong to *jus cogens*. Some eminent writers suggest that all rules of international humanitarian law are peremptory.⁴⁰ At least from the standpoint of the concept of *jus cogens* under the law of treaties,⁴¹ international humanitarian law itself supports this view when it prohibits separate agreements that adversely affect the situation of protected persons.⁴² It would be difficult to find rules of international humanitarian law that do not directly or indirectly protect rights of protected persons in international armed conflicts. In both international and non-international armed conflicts, those rules furthermore protect “basic rights of the human person” which are classic examples for *jus cogens*.⁴³

Consent

As for consent as a circumstance precluding wrongfulness, the international humanitarian law treaties themselves stipulate that no State may absolve itself or another State of any responsibility incurred in respect of grave breaches.⁴⁴ This confirms that a State cannot consent to a violation of the rules of international humanitarian law that protect victims’ rights.⁴⁵

Self-defence

The ILC Commentary clarifies that “as to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct”.⁴⁶ This is a necessary consequence of the absolute separation

³⁹ See notes 71-74 below.

⁴⁰ Condorelli and Boisson de Chazournes, *op. cit.* (note 38), pp. 33-34.

⁴¹ Art. 53 of the Vienna Convention on the Law of Treaties, UNTS, Vol. 1155, p. 331.

⁴² Arts 6/6/6 and 7, respectively, of the four Conventions.

⁴³ *Barcelona Traction, Light and Power Company, Limited, Second Phase*, ICJ Reports 1970, p. 3, at p. 32, para. 34.

⁴⁴ Arts 51/52/131 and 148, respectively, of the four Conventions.

⁴⁵ Condorelli and Boisson De Chazournes, *op. cit.* (note 38), pp. 22-23, base this conclusion on the obligation to respect IHL “in all circumstances” foreseen in Article 1 common to the four Conventions.

⁴⁶ *Report*, *op. cit.* (note 3), p. 178 (para. 3 on Art. 21).

between *jus ad bellum* on the legality of the use of force and *jus in bello*, to which international humanitarian law belongs, governing the manner in which such force may be used.⁴⁷ From this perspective, it is regrettable and astonishing that the ICJ concluded in the *Nuclear Weapons Advisory Opinion* that it could not “reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake”.⁴⁸ Indeed, if the use of nuclear weapons normally violates international humanitarian law, as implied in the said Opinion of the ICJ, it does so even in an extreme circumstance of self-defence.⁴⁹

Necessity

Draft Article 25 restricts necessity as a circumstance precluding wrongfulness to cases in which a conduct is “the only way for the State to safeguard an essential interest against a grave and imminent peril” and does not impair another essential interest. It does, however, preclude invocation of necessity if the international obligation in question excludes that possibility. The ILC Commentary mentions as an example that “certain humanitarian conventions applicable to armed conflict expressly exclude reliance on military necessity. Others while not explicitly excluding necessity are intended to apply in abnormal situations of peril for the responsible State and plainly engage its essential interests. In such a case the non-availability of the plea of necessity emerges clearly from the object and the purpose of

⁴⁷ See Protocol I, preambular para. 5; the US Military Tribunal at Nuremberg in the case of *Wilhelm List et al.*, The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. VIII, pp. 34-76. See for this case and other references Sassòli and Bouvier, *op. cit.* (note 28), pp. 83-87, 665, 681 and 682; C. Greenwood, “The relationship between *jus ad bellum* and *jus in bello*”, *Review of International Studies*, Vol. 9, 1983, pp. 221-234; R. Kolb, “Origin of the twin terms *jus ad bellum*/*jus in bello*”,

International Review of the Red Cross, No. 320, 1997, pp. 553-562; H. Meyrowitz, *Le principe de l'égalité des belligérants devant le droit de la guerre*, Pedone, Paris, 1970.

⁴⁸ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, July 8, 1996, ICJ Reports 1996, p. 226, para. 97.

⁴⁹ Draft Article 50(1)(c) in addition explicitly prohibits countermeasures affecting “obligations of a humanitarian character prohibiting reprisals” (see note 93 below).

the rule.”⁵⁰ Indeed, international humanitarian law is a law that was made for armed conflicts, which are by definition emergency situations. It therefore implicitly excludes the defence claim of necessity, except where explicitly stated otherwise in some of its rules.⁵¹ This was most categorically stated by the ILC in its commentary on the corresponding Article 33 adopted at its first reading, some of which deserves to be quoted:

“The rules of humanitarian law relating to the conduct of military operations were adopted in full awareness of the fact that ‘military necessity’ was the very criterion of that conduct. The representatives of States who formulated those rules intended, by so doing, to impose certain limits on States (...). And they surely did not intend to allow necessity of war to destroy retrospectively what they had achieved with such difficulty. They were also fully aware that compliance with the restrictions they were providing for might hinder the success of a military operation, but if they had wished to allow those restrictions only in cases where they would not hinder the success of a military operation, they would have said so expressly – or, more probably would have abandoned their task as being of relatively little value. The purpose of the humanitarian law conventions was to subordinate, in some fields, the interests of a belligerent to a higher interest.”⁵²

The ILC correctly points out that considerations of military necessity “are taken into account in the context of the formulation and interpretation of the primary obligations” of international humanitarian law, either as the underlying criterion for many of its substantive rules or explicitly mentioned in the terms of some other rules.⁵³ It may be added that military necessity is also a prohibitive

⁵⁰ *Report, op. cit.* (note 3), pp. 204-205 (paras 19 and 21 on Art. 25). Similarly Boelaert-Suominen, *op. cit.* (note 14), p. 301, with further references. For a view advocating a (strictly limited) general exception for cases of military necessity, see H. McCoubrey, “The nature of the modern doctrine of military necessity”, *The Military Law and Law of War Review*, Vol. 30, 1991, pp. 216-242.

⁵¹ See, for example, Art. 33(2) of Convention I, Arts 49(2) and (5), 53, 55(3) and 108(2) of Convention IV, and Art. 54(5) of Protocol I.

⁵² “Report of the International Law Commission on the work of its thirty-second session”, *Yearbook of the International Law Commission*, 1980, Vol. II, Part Two, p. 46, para. 28.

⁵³ *Report, op. cit.* (note 3), p. 206 (para. 20 on Art. 25).

principle of international humanitarian law, which excludes any conduct conducive to damage or suffering which is not necessary to obtain a military advantage.⁵⁴

Distress

In this author's view, considerations similar to those set forth in relation to necessity must apply to distress. In the case of distress, contrary to necessity, the peril affects the individual and not the State. Draft Article 24 precludes wrongfulness if the individual performing an act has no other reasonable way of saving his life or the lives of other persons entrusted to his care. The situation of distress may, however, not be due to the conduct of the State invoking it and the act in question may not be likely to create a comparable or greater peril. It is suggested that individuals are by definition as much in distress when engaged in armed conflicts as States are in a state of necessity. The rules of international humanitarian law must be presumed to take this into account.⁵⁵ To consider, for example that a State is not responsible if its soldiers injure civilians to save their own lives would be leaving little space for that law. Concerning one of the violations for which necessity or distress have been invoked as circumstances precluding wrongfulness,⁵⁶ i.e. torture, it must be recalled that the latter violates *jus cogens*, and that treaty law relating to this offence explicitly bars such justification.⁵⁷

⁵⁴ G. Venturini, *Necessità e proporzionalità nell'uso della forza militare in diritto internazionale*, Giuffrè, Milan, 1988, pp. 127-165; W. V. O'Brien, "The meaning of military necessity in international law", *World Polity*, Vol. 1, 1957, pp. 138-163; Art. 23(1)(e) and (g) of the Hague Regulations, and Art. 35(2) of Protocol I.

⁵⁵ Without further explanation, Condorelli and Boisson de Chazournes, *op. cit.* (note 38), p. 22, consider that distress precludes the wrongfulness of violations of IHL.

⁵⁶ See the former practice of the Israeli High Court of Justice and the Landau Enquiry Commission on "moderate physical pressure"

against Palestinians under interrogation, which is contrary to Articles 31, 32 and 147 of Convention IV and which has fortunately been abandoned in the case *Wa'al Al Kaaqua et al. v. The State of Israel*. See Sassòli and Bouvier, *op. cit.* (note 28), pp. 824-829. See, however, more recently H. Morris, "Israel court ruling confirms denial of prisoners' rights", *Financial Times*, 8 April 2002.

⁵⁷ Art. 2(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, 1465 UNTS 112.

Legal consequences of violations of international humanitarian law

Part Two of the Draft Articles deals with the substance of State responsibility, that is to say obligations arising for the responsible State from its responsibility. The responsible State must cease the unlawful conduct and make full reparation, which includes restitution, compensation or satisfaction. Article 3 of the Hague Convention No. IV⁵⁸ and Article 91 of Protocol I specifically mention only financial compensation. However, since under those provisions such compensation has to be paid only “if the case demands”, it may be seen, as in general international law, as subsidiary to “*restitutio in integrum*”.⁵⁹ In addition, the Draft Articles remind us that the obligation to make reparation also applies in cases of violations of international humanitarian law governing non-international armed conflicts, which are not covered by the aforementioned treaty rules.

The ILC stresses that such obligations may also exist towards persons or entities other than States, for example in the case of “human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a State”. The Draft Articles do not deal with such rights “which may accrue directly to [private] persons”, but recognize the possibility.⁶⁰ Whether and to what extent private persons are entitled to invoke responsibility on their own account depends on each applicable primary rule.⁶¹ War victims are certainly beneficiaries of international humanitarian law obligations. However, for international armed conflicts many of the latter are still formulated as obligations between States. The obligation to pay compensation for violations laid down in international humanitarian law was traditionally seen as an obligation to pay compensation to the injured State,⁶² i.e. the State to which the individual injured persons belonged and to which they

⁵⁸ See note 9.

⁵⁹ Draft Article 36(1).

⁶⁰ *Report, op. cit.* (note 3), p. 214 (para. 3 on Art. 28).

⁶¹ Draft Article 33(2) and *Report, op. cit.* (note 3), pp. 234-235 (para. 4 on Art. 33).

⁶² Cf. J. S. Pictet (ed.), *Commentary, III, Geneva Convention Relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960, p. 630; Y. Sandoz, C. Swinarski and B. Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC/Nijhoff, Geneva,

had to refer their claim. This view is strongly influenced by the traditional view of diplomatic protection under which the national State of an injured foreigner is deemed to be presenting its own claim and not that of its national.⁶³ At least in international humanitarian law this construction is not always correct, as many rules are formulated in a human rights-like manner as entitlements of war victims. In such cases the only problem is procedural, i.e. that the injured individuals have no standing in the usual procedures for the settlement of disputes. Substantively they do have, however, an entitlement under international law. Their national State and even every third State⁶⁴ may present it at the international level in their favour. They themselves may present it before national courts whenever international law is directly applicable in a given legal system and the rules concerned are self-executing, or whenever domestic law provides them with a private right of action.⁶⁵ Historically, former belligerents sometimes established arbitral tribunals or special courts to adjudicate such claims brought by former enemy individuals against them.⁶⁶ Too often, however, they waived reparation for violations in peace treaties and other agreements,⁶⁷ a practice which would today violate an explicit prohibition of international humanitarian law.⁶⁸

1987, p. 1056; *Report on the Protection of War Victims*, prepared by the ICRC, Geneva, June 1993, 4.3., reproduced in Sassòli and Bouvier, *op. cit.* (note 28), p. 457; *Contra*, based on an analysis of the *travaux préparatoires* of Art. 3 of Hague Convention No. IV, Kalshoven, *op. cit.* (note 11), pp. 830-832; and Boelaert-Suominen (note 14), pp. 294-295.

⁶³ *Case concerning the Factory of Chorzów, Claim for Indemnity, Merits*, PCIJ, Series A, No. 17, pp. 27-28.

⁶⁴ See text below, after note 97, on Draft Article 48(2)(b).

⁶⁵ See the decisions of US courts in the cases *Handel v. Artukovic*, US District Court for the Central District of California, 601 F. Supp. 1421, 1985, partly reproduced in Sassòli and Bouvier, *op. cit.* (note 28), pp. 714-719, and *Kadic et al. v. Karadzic*, International Legal Materials 34 (6), 1995,

pp. 1595-1614; partly reproduced in Sassòli and Bouvier, *op. cit.* (note 28), pp. 1274-1251 as well as a decision of the Supreme Court of India in the case *People's Union for Civil Liberties v. Union of India*, S.C. 1203-1208, partly reproduced in Sassòli and Bouvier, *op. cit.* (note 28), pp. 1399-1401.

⁶⁶ See the Mixed Arbitral Tribunals established under Art. 304 of the Treaty of Versailles and the claims commissions established by the US, the UK and France in their respective occupation zones in Germany after World War II (Freeman, *op. cit.* [note 14], pp. 375-389).

⁶⁷ Kalshoven, *op. cit.* (note 11), pp. 835-837; Boelaert-Suominen, *op. cit.* (note 14), pp. 295; and Kamenov, *op. cit.* (note 5), pp. 172-173 and 218.

⁶⁸ See note 42.

Violations of international humanitarian law as serious breaches of peremptory norms

This is not the proper place to discuss the concept of international crimes of States, which was first adopted and finally, after very extensive discussion, abandoned by the ILC.⁶⁹ What survives of such a qualitative distinction between different violations of international law in the Draft Articles is the category of serious breaches of peremptory norms.⁷⁰ The ILC considers that in the light of the ICJ's description, in the *Nuclear Weapons Advisory Opinion*, of the basic rules of international humanitarian law applicable in armed conflict as "intransgressible"⁷¹ in character, "it would also seem justified to treat these as peremptory".⁷² While this author agrees with this qualification, he submits as a note of caution that the ICJ itself left the question as to whether the rules of international humanitarian law it applied were part of *jus cogens* explicitly open.⁷³ It may on the other hand be added that the ILC in its draft adopted after its first reading considered serious breaches of international humanitarian law on a widespread scale to be uncontroversial examples for "international crimes of States".⁷⁴

Serious breaches of peremptory norms have particular consequences, only some of which the ILC was able to agree upon.⁷⁵ Those mentioned in the Draft Articles concern the rights and obligations of third States in the event of such breaches and will be discussed below in the context of implementation of a State's responsibility with regard to violations.⁷⁶

⁶⁹ For a recent bibliography, see N. Jørgensen, *The Responsibility of States for International Crimes*, Oxford University Press, Oxford, 2000, pp. 299-314.

⁷⁰ Draft Articles 40 and 41.

⁷¹ *Nuclear Weapons Advisory Opinion*, *op. cit.* (note 48), p. 226, at p. 257, para. 79.

⁷² *Report, op. cit.* (note 3), p. 284 (para. 5 on Art. 40). See also "Report of the International Law Commission on the work of its thirty-second session", *Yearbook of the International Law Commission* 1980, Vol. II, Part Two, p. 46, para. 28; and *The Prosecutor v. Zoran Kupreskic and others*, ICTY Trial Chamber, Judgment, The Hague, 14 January 2000,

Case No. IT-95-16-T, para. 520; Levrat, *op. cit.* (note 35), pp. 270-273, and notes 40-43 above.

⁷³ *Nuclear Weapons Advisory Opinion*, *op. cit.* (note 48), para. 83.

⁷⁴ Condorelli and Boisson de Chazournes, *op. cit.* (note 38), pp. 33-34; and Draft Art. 19(3)(c) as adopted on first reading by the ILC, *Yearbook of the ILC* 1976, Vol. II, Part Two, p. 95.

⁷⁵ Hence the saving clause in Draft Article 41(3) concerning further consequences which such serious breaches may entail under international law.

⁷⁶ See text before note 110 and before note 120.

Implementation of State responsibility for violations of international humanitarian law

One of the most difficult, delicate and yet rarely analysed questions of international humanitarian law is what other States may or must do when a State violates international humanitarian law. Some argue that at least as regards the implementation of State responsibility, international humanitarian law is a self-contained system.⁷⁷ However, we shall see that the mechanisms for the implementation of international humanitarian law, too, are embedded in those of general international law on State responsibility and can be better understood within that framework. In addition, it will be shown that one mechanism provided for by international humanitarian law, Article 89 of Protocol I, is so vague that all the general mechanisms can be seen as its application.

The obligation to “ensure respect” for international humanitarian law

Under Article 1 common to the four Geneva Conventions and Protocol I, all States undertake to “ensure respect” for their provisions “in all circumstances”. This Article is today unanimously understood as referring to violations by other States.⁷⁸ The ICJ has decided in the *Nicaragua* case that it gives specific expression to a “general principle of humanitarian law” and that it also applies to the law of non-international armed conflicts.⁷⁹ The UN Security Council, the UN General Assembly and an overwhelming majority

⁷⁷ See in this sense Levrat, *op. cit.* (note 35), pp. 281-291; and Kamenov, *op. cit.* (note 5), p. 170.

⁷⁸ Cf. Pictet, *op. cit.* (note 62), p. 18; M. Bothe, K.J. Partsch and W.A. Solf, *New Rules for Victims of Armed Conflicts*, Nijhoff, The Hague/Boston/London, 1982, p. 43; Condorelli and Boisson de Chazournes, *op. cit.* (note 38), pp. 26-35; L. Condorelli and L. Boisson de Chazournes, “Common Article 1 of the Geneva Conventions revisited: Protecting collective interests”, *International Review of the Red Cross*, No. 837, 2000, pp. 67-87;

Levrat, *op. cit.* (note 35), pp. 263-296; U. Palwankar, “Measures available to States for fulfilling their obligations to ensure respect for international humanitarian law”, *International Review of the Red Cross*, No. 298, 1994, pp. 9-25.

⁷⁹ *Military and Paramilitary Activities*, *op. cit.* (note 19), para. 220. See on the latter aspect specifically B. Kessler, *Die Durchsetzung der Genfer Abkommen von 1949 in nicht-internationalen bewaffneten Konflikten auf Grundlage ihres gemeinsamen Art. 1*, Duncker und Humblot, Berlin, 2001.

of the States party to the Fourth Geneva Convention have furthermore applied this principle in calling on third States to react to Israeli violations of that Convention in the territories it occupies.⁸⁰ It is, however, not clear what measures which States may take in accordance with which procedure. It may therefore be useful to analyse these questions from the point of view of the rules on State responsibility, together with the possible reactions by a State that has been individually and directly injured by violations of international humanitarian law. In this author's view common Article 1 in some respects applies the general rules on State responsibility, in other respects establishes a special secondary rule, and is also a primary rule to which the rules on State responsibility apply.

The first step must be to determine when a State may be considered injured by a violation of international humanitarian law. Only then is it possible to explain how such an injured State may react and what, if any, measures are available to other States.

Which States are injured by violations of international humanitarian law?

Under Draft Article 42, a "State is entitled as an injured State to invoke the responsibility of another State" if the obligation breached is owed to "that State individually". If the obligation breached is owed to a group of States or to the international community⁸¹ as a whole, only specially affected States may invoke it unless the

⁸⁰ Cf. Security Council Resolution 681 (1990), operative para. 5; UN General Assembly Resolutions ES-10/2 of 5 May 1997, ES-10/3 of 30 July 1997, ES-10/4 of 19 November 1997, ES-10/6 of 24 February 1999 and the Report of the Chairman of an Experts' meeting held on the Fourth Geneva Convention in Geneva, 27-29 October, 1998 (all of them reproduced in Sassòli and Bouvier, *op. cit.* [note 28], pp. 852-868), and recently the Declaration adopted by a Conference of the High Contracting Parties to the Fourth Geneva Convention convened on the basis of common Article 1 in Geneva, 5 December 2001, available

at: <<http://www.eda.admin.ch/eda/e/home/foreign/hupol/4gc.html>>, in which 114 States Parties participated.

⁸¹ The Rapporteur, J. Crawford, stressed that "the international community includes entities in addition to States: for example, the European Union, the International Committee of the Red Cross, the United Nations itself" (International Law Commission, Fifty-third Session, *Fourth report on State Responsibility*, UN Doc. A/CN.4/517, para. 36, available at: <<http://www.un.org/law/ilc/archives/statfra.htm>>).

breach “is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation”. International humanitarian law treaties do not fall within this category reserved for interdependent obligations, for example the category of disarmament treaties or particular regimes. The sole fact that many international humanitarian law obligations are integral in the sense that they can only either be respected vis-à-vis all States or violated vis-à-vis all States does not make them come within this exception. It therefore seems that only the adverse party in an international armed conflict, the State on the territory of which a violation of international humanitarian law has occurred or the national State of the victims can be considered as “injured”.

Some may object that common Article 1 implies that every State is individually injured by every violation of international humanitarian law, especially if it is interpreted in the light of Article 89 of Protocol I, which allows third States to act also individually.⁸² They may as well add that, unless such an interpretation is adopted, the most frequent violations in today’s world, i.e. those of the law of non-international armed conflicts, do not *legally* injure anyone. Proponents of this interpretation may even invoke the ILC, which writes that “for a State to invoke responsibility on its own account it should have a specific right to do so, e.g. a right of action specifically conferred by a treaty, or it must be considered an injured State”.⁸³ Common Article 1 can be seen as conferring such a *right* of action when it goes further by laying down an *obligation* to “ensure respect”. While the “right of action under the treaty” seems to be an alternative to the entitlement of an “injured State”, a footnote added by the ILC to the former describing it as a *lex specialis* in relation to Draft Article 42 (defining the injured State) might lead to the conclusion that a State having a right of action is an injured State.⁸⁴ Common Article 1 would thus be

⁸² See in this sense Levrat, *op. cit.* (note 35), pp. 274-275, who wrote, however, at a time when the ILC was still advocating a much wider concept of “injured State” and who considers that the injured State may only

resort to measures provided for in IHL. For Art. 89 of Protocol I, see text after note 104.

⁸³ Report, *op. cit.* (note 3), p. 295 (para. 2 on Art. 42).

⁸⁴ *Ibid.*, note 703.

lex specialis on the definition of the injured State, similarly to Article 386 of the Treaty of Versailles and Article 33 of the European Convention of Human Rights mentioned by the ILC.

This author does not think that common Article 1 makes all States injured States. The treaty rules mentioned by the ILC concern only a State's standing before a Court⁸⁵ and do not necessarily imply that any State with such a standing is also injured in all other respects. Furthermore, in the second reading the ILC explicitly abandoned the approach it had held during the first reading, which included among the injured States any other State bound by a rule protecting human rights or all States in the case of an international crime.⁸⁶ As a compensation, it introduced a special rule on "invocation of responsibility by a State other than an injured State" meant to cover such cases.⁸⁷ Common Article 1 should in this author's view be seen as a forerunner codifying such a possibility for all States to invoke State responsibility for reasons of community interest, rather than as a *lex specialis* universally bilateralizing violations of international humanitarian law. The rules described below concerning possible claims which may be made by such "other States" appear to be more appropriate, for example in situations of violations of international humanitarian law governing non-international armed conflict, as they are centred on the rights of the beneficiaries of the rule rather than on those of the claiming State.

Countermeasures

The injured State, as previously defined, may invoke the responsibility of the State violating international humanitarian law and demand that the responsible State comply with its obligations arising from its responsibility.⁸⁸ It may also take countermeasures in order to induce the violating State to comply with its primary and sec-

⁸⁵ *The S.S. Wimbledon*, PCIJ, Series A, No. 1, p. 7, for the Treaty of Versailles.

⁸⁶ *Yearbook of the ILC* 1985, Vol. II, Part Two, p. 25 (First reading Draft Art. 40 (2)(e)(iii) and (3)). Even under those rules, differences in the entitlement of directly injured States and of only legally injured

States were suggested (see K. Sachariew, "States' entitlement to take action to enforce international humanitarian law", *International Review of the Red Cross*, No. 270, 1989, pp. 180, 184-188).

⁸⁷ See text after note 97.

⁸⁸ See text after note 57.

ondary obligations. “Countermeasures” are the modern term used for reprisals, at least outside the context of international armed conflicts.⁸⁹ Such countermeasures may consist of the non-performance, for the time being, of international obligations of the injured State towards the responsible State.⁹⁰ They must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.⁹¹ As soon as the responsible State complies with its obligations, the countermeasures must then be terminated.⁹²

Draft Article 50(1)(c) explicitly states that countermeasures may not affect “obligations of a humanitarian character prohibiting reprisals”. The ILC comments that this provision “reflects the basic prohibition of reprisals against individuals, which exists in international humanitarian law. In particular, under the 1929 [*sic*] Hague and 1949 Geneva Conventions and Additional Protocol I of 1977, reprisals are prohibited against defined classes of protected persons, and these prohibitions are very widely accepted.”⁹³ As for obligations of international humanitarian law not covered by those prohibitions of reprisals, they may not be affected by countermeasures contrary to obligations for the protection of fundamental rights.⁹⁴ In this author’s view, they may likewise not be affected by countermeasures against violations of rules of international law other than those of international humanitarian law. When the original violation is one of “*jus ad bellum*” this limitation is a necessary consequence of the fundamental distinction and separation between *jus ad bellum* and *jus in bello*.⁹⁵ If any rules of international humanitarian law could be violated as a countermeasure against an act of aggression, those rules would be meaningless. Once it is, however, admitted that even the most egregious violation of international law, i.e. aggression, cannot justify violations of international humanitarian law as a countermeasure, it is suggested that no

⁸⁹ Report, *op. cit.* (note 3), p. 325 (para. 3 before Art. 49).

⁹⁰ Draft Article 49.

⁹¹ Draft Article 51.

⁹² Draft Article 53.

⁹³ Report, *op. cit.* (note 3), p. 336 (para. 8

on Art. 50), and Arts 46/47/13 (3)/33 (3), respectively of the four Conventions and Arts 20, 51(6), 52(1), 53(c), 54(4), 55(2) and 56(4) of Protocol I.

⁹⁴ Draft Article 50(1)(b).

⁹⁵ See note 47 above.

other violation of the law of peace may be met by countermeasures violating international humanitarian law. If this is true, even violations of international humanitarian law not prohibited by way of reprisals may be justified only as countermeasures in reaction to violations of international humanitarian law .

As for countermeasures against violations of international humanitarian law, it is important to notice that under Draft Article 50(1)(a) and (b) countermeasures may consist neither of the threat or use of force, nor of violations of fundamental human rights. In this context the ILC refers to General Comment 8 (1997) of the Committee on Economic, Social and Cultural Rights on the effect of economic sanctions on civilian populations and especially on children. The ILC quotes the Committee's text by stating that whatever the circumstances, such sanctions should always take full account of economic, social and cultural rights and that "it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of a country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country".⁹⁶ The ILC also draws an analogy from Article 54(1) of Protocol I which "stipulates unconditionally that '[s]tarvation of civilians as a method of warfare is prohibited'".⁹⁷

Action that may be taken by other States

- Invocation of responsibility by any State

Under Draft Article 48(1), any State other than an injured State is entitled to invoke the responsibility of another State if the obligation breached is owed to the international community as a whole. As evidenced by common Article 1, the rules of international humanitarian law belong to such obligations *erga omnes*.⁹⁸ "Any State" may (and — under common Article 1 — must), therefore, in the event

⁹⁶ Report, *op. cit.* (note 3), p. 335 (para. 7 on Art. 50) and UN Doc. E/C.12/1997/8, 5 December 1997, para. 4.

⁹⁷ Report, *op. cit.* (note 3), p. 335 (para. 7 on Art. 50).

⁹⁸ Condorelli and Boisson de Chazournes (note 38), p. 29; M. Ragazzi, *The Concept of International Obligations Erga Omnes*, Clarendon, Oxford, 1997, pp. 152-153; Kamenov, *op. cit.* (note 5), p. 206.

of international humanitarian law violations, claim cessation from the responsible State as well as “reparation (...) in the interest of the injured State or of the beneficiaries of the obligation breached”.⁹⁹ Those beneficiaries will often be the individual war victims. The term “any State” was “intended to avoid any implication that these States have to act together or in unison”.¹⁰⁰ For common Article 1 it is thus made clear that third States do not have to act together or in coordination when they invoke the responsibility of a State violating international humanitarian law.¹⁰¹ If there is disagreement on whether a given act constitutes a violation, those qualifying it as a violation have an obligation to act individually.

- Admissibility of countermeasures in the interest of the community?

The most difficult issue under both the law of State responsibility and international humanitarian law is whether “States other than the injured State” may (or — under common Article 1 — must) resort to countermeasures. While the Rapporteur wanted to admit collective countermeasures in the case of gross and well attested breaches of such community obligations,¹⁰² and although the Drafting Committee adopted an article in 2000 permitting any State to take countermeasures in the interest of the beneficiaries in the case of serious breaches of peremptory norms,¹⁰³ the ILC itself adopted only a saving clause. Under Draft Article 54, the chapter on countermeasures “does not prejudice the right of any State [other than the injured State] to take lawful measures against [the responsible] State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached”. In its Commentary, the ILC reviews various precedents to conclude that “the current state of international law on countermeasures taken in

⁹⁹ Draft Article 48(2).

¹⁰⁰ *Report, op. cit.* (note 3), p. 320 (para. 4 on Art. 48).

¹⁰¹ *Contra*, Sachariew, *op. cit.* (note 86), pp. 180, 194-195.

¹⁰² International Law Commission, Fifty-second Session, J. Crawford, *Third Report on State Responsibility*, UN Doc. A/CN.4/507/Add. 4, para. 406, available at:

<http://www.un.org/law/ilc/archives/statfra.htm>.

¹⁰³ See ILC, Fifty-second Session, State Responsibility, *Draft Articles Provisionally Adopted by the Drafting Committee on Second Reading*, UN Doc. A/CN.4/L.600, Art. 54(2), available at: <http://www.un.org/law/ilc/archives/statfra.htm>.

the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present there appears to be no clearly recognized entitlement (...) to take countermeasures in the collective interest.” Consequently the ILC “leaves the resolution of the matter to the further development of international law”.¹⁰⁴

- Cooperation in the event of serious violations

The question that arises here is whether Article 89 of Protocol I provides, as a *lex specialis*, more precise guidance to third States. It reads: “In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.” The *travaux préparatoires* are not helpful in understanding this rule, as it was mainly discussed in relation with the prohibition of reprisals, a problem it clearly no longer deals with. Several delegations, including its sponsors, called it confusing.¹⁰⁵ The reference to the UN Charter was apparently meant to rule out the use of force. Some commentators consider that the article “opened the door to enforcement of international humanitarian law within the UN framework”,¹⁰⁶ while others maintain that it does not add anything to Article 56 of the UN Charter.¹⁰⁷ The latter indeed contains *mutatis mutandis* the same obligation, but for the *promotion* of higher standards of living, full employment, economic and social progress and development, solutions of international economic, social, health and related problems, cultural and educational cooperation, and in particular universal respect for human rights. It is suggested that Article 89 of Protocol I goes further because it does not deal with promotion, but with reacting to *violations*. In this context the obligation to act, including individually, is of importance, in particular when read in conjunction with the obligation to “ensure respect”, even if such action has,

¹⁰⁴ Report, *op. cit.* (note 3), p. 355 (para. 6 on Art. 54).

¹⁰⁵ Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva (1974-1977), Berne, 1978, Vol. III, p. 304

(proposal by Syria), Vol. VI, p. 80 (Spain), 345-349 (discussion), 371 (France), 374-375 (Indonesia), 376-377 (Italy), 382 (Peru).

¹⁰⁶ Condorelli and Boisson de Chazournes, “Common Article 1”, *op. cit.* (note 78), p. 78.

¹⁰⁷ Sandoz, Swinarski and Zimmermann, *op. cit.* (note 62), p. 1053.

and rightly so, to be undertaken in cooperation with the UN and obviously in full respect for the UN Charter.¹⁰⁸ Although the sponsors of the article at the Diplomatic Conference deemed that action “could not be undertaken without the consent of the [UN] General Assembly or the Security Council”,¹⁰⁹ the wording of the provision does not support this opinion. It is furthermore not supported by the views of the ILC on Draft Article 41(1).

Article 89 corresponds to Draft Article 41(1) on State responsibility which expresses a similar idea, stipulating that “States shall cooperate to bring to an end through lawful means any serious breach” of an obligation arising under a peremptory norm of general international law. The ILC Comments do not add much, explaining that “[b]ecause of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what form this cooperation should take”, nor “what measures States should take in order to bring an end to serious breaches”.¹¹⁰ However, the ILC abandons the proposal of its Drafting Committee to allow for coordinated countermeasures.¹¹¹ It mentions: “[C]ooperation could be organized in the framework of a competent international organization, in particular the United Nations. Yet paragraph 1 also envisages the possibility of non-institutionalized cooperation.”¹¹² As an example of such non-institutionalized cooperation in the case of serious breaches of international humanitarian law, mention may be made of the Conference of the High Contracting Parties to the Fourth Geneva Convention held in Geneva on 5 December 2001 on the basis of common Article 1, in which 114 States Parties participated.¹¹³ As for

¹⁰⁸ G. Gaja, “*Jus cogens* beyond the Vienna Convention”, *Collected Courses of the Hague Academy of International Law* 172, 1981-III, p. 299, implies that Art. 89 constitutes a legal basis for countermeasures. Condorelli and Boisson de Chazournes, *op. cit.* (note 38), pp. 31-32, seem to suggest, without further explanation, that Art. 89 refers exclusively to coordinated measures through the institutionalized mechanisms of the UN. They do not rule out, however, the possibility of individual countermeasures, as do Sachariew, *op. cit.* (note 86),

pp. 180 and 192-194, and Kamenov, *op. cit.* (note 5), pp. 210-211.

¹⁰⁹ *Official Records* (note 105), Vol. VI, p. 347 (Syria).

¹¹⁰ *Report, op. cit.* (note 3), pp. 286-287 (para. 2 on Art. 41).

¹¹¹ See note 103 above.

¹¹² *Report, op. cit.* (note 3), pp. 286-287 (para. 2 on Art. 41).

¹¹³ For the legal basis of the Conference and its final Declaration, see note 80 above.

the means of cooperation, the ILC stresses that they must be lawful and that the choice “will depend on the circumstances of the given situation. It is, however, made clear that the obligation to cooperate applies to States whether or not they are individually affected by the serious breach. What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches.” The ILC concludes that “[p]aragraph 1 seeks to strengthen existing mechanisms of cooperation, on the basis that all States are called upon to make an appropriate response”.¹¹⁴

- Reaction not consisting of countermeasures

Neither Draft Articles 41 and 54 nor common Article 1 and Article 89 of Protocol I therefore clarify whether third States may take countermeasures against serious violations of international humanitarian law. This conclusion should, however, not be misunderstood. Countermeasures consist of conduct contrary to international obligations. But States may exercise myriad forms of pressure on other States that do not involve breaches of international obligations. Except for specific treaty obligations, no State is obliged to financially support another State, to buy weapons from that State,¹¹⁵ to vote for that State in international institutions, to receive officials from that State or to conclude treaties with that State. Therefore nothing hinders a State from reacting in such a way to violations of international humanitarian law, and common Article 1 prescribes such conduct. The only difficulty is to bring such measures to bear only upon those who decide to violate or to perform international humanitarian law obligations, and not upon the rest of the population.¹¹⁶

- Institutionalized reaction

Furthermore, both Draft Article 41(1) and Article 89 of Protocol I mainly call for an institutionalized reaction through the United Nations to serious violations of international humanitarian law. In recent years, the latter has indeed reacted with measures under

¹¹⁴ *Report, op. cit.* (note 3), pp. 286-287 (paras 2 and 3 on Art. 41).

¹¹⁵ See, for example, the reaction of Switzerland to recent violations of IHL by

Israel, “Rüstungskoooperation mit Israel unter Druck”, *Neue Zürcher Zeitung*, 10 April 2002, p. 13.

¹¹⁶ See on this issue notes 96 and 97 above.

Chapter VII of the UN Charter to such violations.¹¹⁷ Such measures may be considered as an implementation of State responsibility, but do not fall under the Draft Articles.¹¹⁸

Normally a State is not responsible for the conduct of an international organization to which it belongs, or for its conduct as member of an organ of an international organization.¹¹⁹ However, the question that arises is whether States, having an obligation under common Article 1 and Article 89 of Protocol I to act under certain circumstances through an international organization, do not violate that obligation if in their capacity as members of organs thereof, for example as members of the UN Security Council, they hinder that organization from taking action.

- Attitude towards situations created by serious violations

The second paragraph of Draft Article 41 is important in the event of violations of international humanitarian law which amount to serious breaches of an obligation arising under a peremptory norm of general international law. It reads: "No State shall recognize as lawful a situation created by a serious breach (...), or render aid or assistance in maintaining that situation". Such an obligation is not only of importance in relation to the establishment of settlements in occupied territories contrary to Article 49(6) of the Fourth Geneva Convention and the commerce in goods produced in such settlements,¹²⁰ but applies equally to the import of diamonds enabling parties to perpetuate non-international armed conflicts in which international humanitarian law is systematically disregarded and

¹¹⁷ Condorelli and Boisson de Chazournes, "Common Article 1", *op. cit.* (note 78), pp. 77-82.

¹¹⁸ Report, *op. cit.* (note 3), p. 350 (para. 2 on Art. 54) and Draft Articles 57 and 59.

¹¹⁹ See the Resolution adopted by the Institut de droit international on 1 September 1995 in *Annuaire de l'Institut de droit international 1996*, Vol. 66-II, p. 448, Art. 6; Reports by R. Higgins in *Annuaire de l'Institut de droit international 1995*, Vol. 66-I, pp. 281-283 and 410-413; and after thorough analysis of pos-

sible legal grounds for such responsibility, P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, Bruylant, Brussels, 1998, pp. 430-520. More nuanced is I. Shihata, *Annuaire de l'Institut de droit international 1995*, *loc. cit.*, pp. 291 and 312, as well as K. Zemanek, *ibid.*, p. 327.

¹²⁰ See calls in UN General Assembly Resolutions ES-10/2 of 5 May 1997, operative para. 7, and ES-10/6 of 24 February 1999, operative paras 3 and 4.

which, contrary to international humanitarian law, are fought with the participation of large numbers of children.¹²¹

- Precise rights and obligations of third States

The reader may be left feeling frustrated once again for failing, as in other writings on the subject, to receive clear indications about the measures third States may and must take when violations of international humanitarian law occur. This author submits that no clearer indications could be gained from intensive legal research. The answer cannot be more precise because the treaties themselves are not more precise, and because the practice which creates custom varies tremendously. Some would even qualify the latter as so selective that it cannot create legal rules, which must evidently be the same for all similar situations. Moreover, that practice is often unknown. Political and legal considerations, as well as those pertaining to *jus ad bellum* and *jus in bello*, are inevitably intermingled, and even in abstract statements States do not want to restrict their freedom in responding to future cases where the balance of power, economic and political interests and sometimes also humanitarian expediency may suggest different reactions. Common Article 1 and Article 89 of Protocol I together indicate, however, a framework of what States must do and what they may not do to ensure respect for international humanitarian law. If only every State in the world would systematically and regardless of all other considerations invoke the responsibility of the responsible State as soon as it deems a violation of international humanitarian law to have occurred, and would claim cessation and reparation in the interest of the victims, as it may under Draft Article 48(2) and must under common Article 1, then much would be gained.

¹²¹ See “Kimberley process reaches an agreement on control system in the fight against conflict diamonds, US Congress at the same time accepts clean diamonds act”, available at: <http://www.conflictdiamonds.com/pages/Interface/newsframe.html>, and the measures taken by Switzerland regarding trade in rough diamonds, available at: http://www.eda.admin.ch/sub_ecfin/f/home/docus/diaman.html.

Conclusion

States are less and less the sole players on the international scene, and even much less so in armed conflicts. Rules on State responsibility, in particular as codified by the ILC, are exclusively addressed to States individually and as members of the international society. Their possible impact on better respect for international humanitarian law should therefore not be overestimated, especially not when compared to the preventive and repressive mechanisms directed at individuals. The Draft Articles and their Commentary do clarify, however, many important questions concerning implementation of international humanitarian law and may therefore help to improve the protection of war victims by States, for in the harsh reality of many present-day conflicts States continue to play a major direct or indirect role, particularly if they are not allowed to hide behind the smoke-screen labels of “globalization”, “failed States” or “uncontrolled elements”. They are responsible, under the general rules on attribution of unlawful acts, much more often than they would wish. Furthermore, violations do have consequences, not only humanitarian consequences for the victims but also legal consequences for the responsible State. Finally, through the combined mechanisms of international humanitarian law and of the general rules on State responsibility, all other States are able and are obliged to act when violations occur. Ideally, they should do so through universal and regional institutions, an aspect perhaps neglected by the ILC. Recent events show, however, a certain return to unilateralism once a situation really matters. The Draft Articles on State responsibility, applied to international humanitarian law violations, remind us that all States can react lawfully and clarify to a certain extent what States should do. This may be the most important message of the foregoing analysis. Although there unquestionably has to be the necessary political will, the need to respect and ensure respect for international humanitarian law is not a matter of politics, but rather a matter of law.



Résumé

La responsabilité de l'état pour des violations du droit international humanitaire

par MARCO SASSÒLI

La Commission du droit international a adopté en 2001 les projets d'articles sur la responsabilité des États pour fait internationalement illicite. L'auteur examine et analyse ces articles et les commentaires formulés par la Commission concernant la responsabilité des États pour des violations du droit international humanitaire. Cet examen clarifie de nombreuses questions relatives à l'imputation de violations à des États ou à d'autres acteurs, aux circonstances telles que la nécessité qui sont parfois invoquées pour justifier les violations et, en particulier, aux conséquences pour un État des infractions commises. Quant à la mise en application de la responsabilité pour des violations du droit international humanitaire, la lecture combinée des dispositions de cette branche du droit et des projets d'articles permet de mieux établir comment des États tiers peuvent et doivent réagir aux violations des Conventions de Genève et de leurs Protocoles additionnels.