

The Impact of the Law of Armed Conflict on General International Law

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REPORT

The purpose of the workshop was put forward as being to remedy the gap in the discussion created by the acute specialisation manifest in IHL that means that general international lawyers are more hesitant to engage with it. General international law is understood here as general rules of international law that are not specific to any one substantive area, and international humanitarian law (IHL; also the law of armed conflict (LOAC)) as either a set of rules limiting the humanitarian consequences of armed conflict, or (perhaps *and*) the regulation of the conduct of hostilities.

A number of overarching themes arose during the discussions, some of which were:

- The relationship between IHL and international human rights law (IHRL), and their commensurability in terms of formation and interpretation.
- The growth of obligations imposed upon states, both in LOAC and general international law and the impact of one upon the other.
- The gradual loss of control over the formation of LOAC norms experienced by states and the possible existence of a similar loss of control elsewhere in general international law.
- The nature of and relationship between primary and secondary rules of international law.
- Whether IHL and other areas of international law (particularly IHRL) should be compartmentalised.
- The power of non-state bodies in the creation of international norms, especially international jurisprudence.
- The approach of international law to the regulation of lacunas.

Session 1 - Identification and formation of international legal norms

- **The influence of LOAC on the determination of customary international human rights norms binding upon armed groups (Dr. Katharine Fortin, Utrecht University)**
- **The Nature of Rights and Obligations under International Humanitarian Law (Dr. Lawrence Hill-Cawthorne)**

Dr Fortin's paper engaged with the question of methodology in the determination of customary IHRL norms, and the influence of IHL on this process. The influence is possible due to the general consensus that IHL binds non-state armed groups (NSAGs) while IHRL does not.

Therefore, IHL may provide technical insight into whether IHRL norms are capable of binding NSAGs. Though the ICRC study of customary IHL avoided the question of NSAG practice influence the development of customary IHL, the International Criminal Tribunal for the Former Yugoslavia (ICTY) has drawn on NSAG practice to determine the normative content of customary rules, suggesting that the possibility of informing such norms with non-state practice should not be disregarded *per se*. If NSAGs are included in the formation of such norms, they may be encouraged to take ownership of them, and abide by them. Problems identified with this approach include the lack of commonality between NSAGs, their sometimes transitory nature, the absence of their consent, and the absence of clear intention from states that NSAGs be bound by IHRL norms.

During the Q&A it was discussed whether state control of NSAGs during armed conflict changed the character of the practice of such groups in terms of the formation of customary law, to which it was argued that such groups produced actual state practice by virtue of being controlled by a state. It also emerged that the different motivations of NSAGs makes a difference in terms of their legal personality and therefore the power of their practice for norm formation; other commentators agreed that NSAG practice becomes more influential as groups become more state-like. Some commentators were perplexed by the outcome that IHL would bind NSAGs implicitly and in their entirety, whereas with IHRL norms it could be picked and chosen which would bind NSAGs. In response it was suggested that this situation arose out of the threshold nature of IHL, triggering the entire corpus, whereas IHRL can be built norm-by-norm.

Dr Hill-Cawthorne's paper considered how the literature on the nature and form of rights and obligations in general international law plays out in IHL, considering whether rules are prohibitive, whether they create rights for states or individuals, whether they are rules *erga omnes* or *jus cogens*. The main focus of the presentation was whether IHL creates rights that are enforceable by individuals when violated by states. Historically it has been held that no such rights exist in IHL, but this has been changing over time, in some opinions. The answer to this question has implications for the relationship between IHRL and IHL and the degree to which these separate areas of law are capable of harmonious interpretation; if the rights and obligations are different for each area of law, then it would suggest not. Further, the settlement of IHL claims in general may be stymied by the existence of individual claims that also need to be settled; here the influence of general law is apparent as the same is the case within investment law. As to the current situation, there is growing practice in support of individually enforceable rights in IHL, but custom appears still to be crystallising. The outcome of this process has implications for our understanding of the nature of IHL (whether it is permissive or prohibitive) and the nature of the role it plays in armed conflicts.

In the Q&A, one commenter brought the issue back to the state-level and the way in which individual states incorporate international law and that there is a question, linked to the existence of IHL rights, of their applicability. It was also pointed out that there is an important distinction to be made between the existence of an actual right in IHL and a *mechanism* by which a state may be held accountable for a breach of IHL. It was pointed out that there is a danger in identifying individual rights in IHL as it will force individuals to do the work of holding states to account. It was asked whether IHL was generally conceived of as permissive or prohibitive; while all appeared to accept that the IHL on *international* armed conflicts (IACs) was both, there was lively disagreement over whether the same was the case for the IHL on *non-international* armed conflicts (NIAC). It was asked whether there might be a distinction in terms of rights arising out of breaches of IHL that constitute war crimes and those that are 'less serious'; it was suggested that this problem highlights the problem of reliance on treaties alone.

Session 2 - *Treaty interpretation*

- **Common Article 1: A Case Study in the Evolution of International Humanitarian Law (Prof. Michael N. Schmitt, Naval War College and University of Exeter)**
- **Applying the rules of treaty interpretation in general international law to the Geneva Conventions: experiences from the ICRC Commentaries Updating' Project (Ms. Elvina Pothelet, ICRC)**
- **The Impact of International Humanitarian Law on the Expansion and Development of the Principle of Systemic Integration (Mr. Vito Todeschini, Aarhus University)**

Professor Schmitt's presentation considered how IHL had evolved, through the prism of common Article 1 of the 1949 Geneva Conventions. This particular rule is contentious, specifically the degree to which it should be interpreted to prevent states from supplying arms to other states that are likely to violate IHL. The most recent 2016 commentary by the ICRC provided the rule with such an external dimension. Another question concerns the application of this norm to NIACs; the Geneva Conventions were conceived of as applicable to IACs only, but for common Article 3, as confirmed by the original Pictet commentary. Consideration of state practice produces lots of practice contrary to the assertion that common Article contains an external dimension, as many states have undertaken arms deals with states known to breach IHL. Furthermore, there is no agreement among states as to an interpretation of common Article 1. The nature of the evolution of common Article 1 reflects a general trend within international law towards the imposition upon states of obligations in the face of violations by other states (e.g. R2P, due diligence, state responsibility and IHRL).

Questions were raised by commentators as to the method by which the conclusions in the presentation were reached, though the conclusion itself had support. In response specific information was given as to the applicability of common Article 1 to the arms trade between states. It was discussed the degree to which those present are willing to accept, in principle, that states may be held responsible for the acts of other states. It was suggested that the paper had highlighted a danger of interpreting IHL through an IHRL viewpoint and the need to avoid developing treaty law through the use of a purposive approach, as the dominant intention, when common Article 1 was drafted, was for it not to have an external element.

Elvina Pothelet's presentation emphasised the experience of treaty interpretation as undertaken by the ICRC in drafting the new commentaries to the Geneva Conventions, and considered how this experience could inform general international law. The focus was on the process adopted by the ICRC for the commentaries, which was distinct from the normative emphasis that characterised the ICRC study of customary IHL. The ICRC used Article 31(3) of the Vienna Convention on the Law of Treaties (VCLT), and specifically Article 31(3)(c), which allows recourse to other relevant rules of international law applicable in the relations between the parties. Ultimately it was found that Article 31(3)(c) was of limited utility for many provisions so instead Article 32 VCLT was used, which provides 'supplementary means of interpretation'. Supplementary means used included state practice that did not meet the criteria for use under Article 31(3)(b) VCLT, the practice of non-state bodies (like human rights bodies and tribunals), and the doctrine of highly qualified publicists. The was required in order to make the updated commentaries as relevant as possible for the modern battlefield.

A comment was made to the effect that the ICRC has a tendency to draw on a wide variety of sources, which has resulted in it receiving criticism in the past and that as such it would be good if more could be done to reveal the peer-review process. Another commentator questioned the

use of practice by non-state bodies and groups, as these actors may be using supplementary means of interpretation of the Convention but their practice is there treated as supplementary means; rather than sources of interpretation, these are in fact interpretations. The suggestion was made that the ICRC must provide more arguments in support when the practice of other actors is put forward. It was suggested that recourse to Article 32 VCLT is only available when a meaning produced under Article 31 VCLT is *obscure* or *ambiguous*—it is not available simply to produce a meaning that could not be found under Article 31.

Vito Todeschini presented a paper on the relationship between IHL and systemic integration, the function by which international law norms are connected, arising out of the Article 31(3)(c) VCLT imperative to take account of other international obligations between states when interpreting treaties. Within IHL specifically, systemic integration has been used to draw on norms of IHRL when interpreting IHL treaties. It was proposed that the invocation of *lex specialis* by the International Court of Justice (ICJ) when discussing the IHL-IHRL relationship in the *Nuclear Weapons* advisory opinion was in fact an example of systemic integration. The use of systemic integration by courts dealing with IHL matters has the result of adding to the case law on systemic integration from other bodies (e.g. the WTO) and consolidating the principle as a principle of interpretation.

One questioner suggested that if the argument would be strengthened by consideration of cases in which systemic integration has not been used. The suggestion was made that systemic integration has in fact not been used in a systematic manner, contrary to the assertion of the paper. It was suggested that a key danger of the use of systemic integration in terms of IHL and IHRL is the use of IHL vocabulary to interpret IHRL but without engaging IHL principles.

Session 3 - *State responsibility and due diligence*

- **International Humanitarian Law as the Basis of the Law of International Responsibility regarding Obligations *Erga Omnes* and *Erga Omnes Partes* (Dr. Marco Longobardo, University of Rome ‘Sapienza’ and University of Messina)**
- **The relationship between the law on State responsibility and the scope, content and application of international humanitarian law (Mr. Remy Jorritsma, Max Planck Institute Luxembourg for Procedural Law)**
- **The standard of ‘due diligence’ as a result of interchange between LOAC and general international law (Dr. Antal Berkes, University of Manchester, School of Law)**

Dr Longobardo argued that IHL contains many provisions that have an *erga omnes* character. Such obligations are those that are owed to all states, and which, as a result, all states have an interest in adhering to. An example of an obligation that is owed *erga omnes* is that provided for by common Article 1 of the Geneva Conventions. Furthermore, the punishment by one states of another for war crimes can be seen as a manifestation of the interest of all states to support IHL. Ultimately the suggestion was made that IHL generally has a clear *erga omnes* character that is consequently important for the growth of general international law.

A theme emerged during the Q&A that perhaps there was not consensus as to the treatment of IHL norms as homogeneous, at least in terms of their *erga omnes* character. It was suggested that the paper considered IHL as a bloc, without considering individual norms; this might prove problematic as the *erga omnes* character may vary between norms. Another commentator argued that there are specific examples of IHL norms that are not *erga omnes* which therefore

contradicted the notion that IHL is generally *erga omnes*. It was suggested that there is perhaps a distinction between sets of IHL norms and that those which protect victims may be *erga omnes* whereas those which regulate conduct may not be.

Remy Jorritsma discussed the relationship between the attribution rules in state responsibility with the scope, content and application of IHL rules. Specifically the issue is whether the secondary rules governing attribution can be used to determine the application of the primary rules of IHL, governed by the identification and classification of armed conflict, when there is the involvement of a third state potentially controlling a NSAG. This issue has touched upon cases in front of international tribunals, the jurisprudence of which do not provide a coherent answer. In the *Nicaragua* case the ICJ used ‘effective control’ to determine the state control over a NSAG for purposes of attribution; in the *Tadić* case the ICTY instead required ‘overall control’ for the same purposes; in the *Bosnian Genocide* case the ICJ rejected the use of ‘overall control’ for attribution of state responsibility but utilised it for classifying the armed conflict. The ‘overall control’ test is used by the International Criminal Court to determine the classification of armed conflict but has not stated whether the same test will be used for state responsibility. Irreconcilable views exist which raises the question of whether it is desirable to maintain a rigid distinction between secondary and primary rules. The current situation provided by the *Bosnian Genocide* case has arguably created a responsibility gap in which states are able to claim an IAC exists due to overall control of a NSAG though this does not mean that the acts of that group become attributable to the state.

In the Q&A it was asked how this issue impacts upon general international law, as it seems rather limited to IHL. In response it was suggested that this has implications for the law on torture, genocide and piracy, which do not require an armed conflict. A commentator suggested that while the use of the ‘overall control’ test may be welcomed, it required a leap of faith in order to be convincingly the correct test to use and that therefore more argument in favour of its use was necessary. It was suggested that this issue demonstrates that the distinction between primary and secondary rules can be problematic and that it perhaps falls down in IHL, so this could be further emphasised by the paper.

The paper presented by Dr Berkes considered due diligence as an obligation that has arisen through the interaction of IHL and general international law. This is as a result of the fact that IHL obligations are not simply duties of conduct but also of result. The ICRC commentary of 2016 has specified that many provisions of IHL have an external element; they comprise the negative duty not to encourage or assist IHL violations by NSAGs and a positive duty to do everything possible to prevent and halt violations. These obligations vary not through the economic capabilities of states but through their respective military capabilities. In terms of an impact upon general international law, IHL has contributed to the growth of due diligence as a concept applicable generally, in particular with regard to the subjective variation of obligations.

During the Q&A it was asserted that the vital distinction between responsible command and command responsibility. The former arises out of IHL and provides that there is an obligation upon commanders to do everything to make sure their troops comply with IHL, whereas the latter comes from international criminal law and imposes a due diligence obligation upon commanders by considering what they ‘should have known’, which goes further than that of IHL.

Session 4 - *Sovereignty and non-intervention*

- **Practical limitations to the applicability of Common Article 3 and Additional Protocol II (Prof. Françoise Hampson, University of Essex)**
- **The impact of the development of IHL on (the law of) State sovereignty (Mr. Rogier Bartels, International Criminal Court)**

Professor Hampson spent time considering the possible factors that may limit the application of IHL to NIACs. It was asserted that there are a great many NIACs but that very few states are inclined to recognise them as such. This may be because states would view such recognition as an imposition upon their sovereignty, which if it, is must have political rather than legal motivations, as all states have ratified common Article 3 of the Geneva Conventions and none have made reservations. The most likely answer appears to be that states are reluctant to acknowledge that they are facing an adversary that is sufficiently organised. Such reluctance is hard to fathom in light of the growth of IHRL as the determination of a NIAC provides states with a more permissive legal environment in which to undertake military actions. This same reluctance does not appear to apply when states intervene in a third state, therefore it seems that this is very much a political issue couched in legal language.

It was suggested that the paper only briefly touched upon Additional Protocol II and instead focused on common Article 3 and that the advent of the Protocol has brought a great deal of law on the conduct of hostilities into that which historically dealt with the protection of victims. Much has since been held to be customary international law and this may provide a reason as to why states would be reluctant to recognise a situation as NIAC. It was also suggested that states may wish to avoid a snowball effect by which a conflict intensifies further. It was asked how this issue impacts upon general international law, to which it was suggested that it relates to general concerns about sovereignty if indeed sovereignty concerns motivate states to deny NIAC, though in the absence of this there is little link to general international law.

Rogier Bartels presented a paper on the relationship between the development of IHL and the law of state sovereignty, conceived of as a state's equality with other states and its full jurisdiction over its own internal affairs. It was contended that IHL (or the law of war) has always been shaped by sovereignty, and that sovereignty provided a reason to provide a limit to what was permissible during warfare even prior to the Treaty of Westphalia. Nonetheless, as to internal conflicts, it was still held that states had absolute sovereignty over what occurred within their territory. Over time this absolute sovereignty was limited by the emergence of rules governing internal conflict, though the limited nature of common Article 3 is testament to the desire of states to limit factors that they saw as benefiting their NSAG adversaries. This has changed with the adoption of Additional Protocol II, the assertion of much customary international law applicable in NIACs by the ICTY and the determination of a great deal of customary international law by the ICRC study. Sovereignty seems to have been eaten into to allow IHL become more encompassing which is likely attributable to the growth of IHRL.

In the Q&A it was suggested that there is a need to define the scope of sovereignty, as limitations on sovereignty appeared to be equated to constraints on state behaviour. It was asked whether such an approach was the correct one to take, or whether the distinction was in fact purely semantic. It was also asked whether there is anything unique to the understanding of sovereignty within IHL that might not apply elsewhere in general international law. In response it was suggested that writers on the subject of sovereignty generally relate sovereignty to war and that fighting appears to have acted as a trigger for questions of sovereignty to arise. Another

commentator suggested that many of the limitations of state sovereignty discussed were consensual and that there should more properly be considered to be expressions of sovereignty.

Session 5 - Armed conflict in the 21st century

- **Non-State armed groups as key actors in modern armed conflicts (Prof. Charles Garraway, University of Essex)**
- **De-militarization of cyberspace: Impact of the (non-)development of cyber international humanitarian law on general international law (Dr. Kubo Mačák, University of Exeter)**

The presentation of Professor Garraway focused on the position of NSAGs within the development of the legal regulation of NIACs. This has become a pressing question as the dividing line between armed conflict and operations short of armed conflict has become increasingly irrelevant in the modern battlespace. This is evident in the conflict in Syria, in which it is not exactly clear at which point the situation changed from an internal disturbance to a NIAC. Additionally, there is the increasing influence of IHRL in armed conflicts: the law of peace influencing the law of violence. The growth of IHL has historically occurred between states and the ICRC accepted that NSAG practice could not be used to discern rules of customary IHL. There is a growing trend among NSAGs not to seek to become states and therefore to take part in the international community, but to reject the international system. This trend is not helped by the general tendency to refer to NSAGs as terrorists and to criminalise them—this produces the situation that NSAGS are not incentivised to abide by international law. A related question is the extent to which states still make the law; in 1977 states purposefully did not introduce law on the conduct of hostilities into IHL applicable in NIACs, but since then it has been included through the actions of bodies like international tribunals and the ICRC. The question is whether states are losing control of the process.

In the Q&A it was suggested that a key difference needs to be made between conflicts under common Article 3 and those under Additional Protocol II as the distinct character of the latter may make it possible to consider NSAGs in a different light (more akin to state armed forces with the concordant combatant status). A further distinction must be made between NSAGs being told that they will not be prosecuted for their actions and that what they are doing is legal. It was suggested that states are indeed losing control over the process of IHL and that they are very concerned about it; the tendency was evident in this conference as many presenters had referred to international jurisprudence as producing norms of customary international law. This trend was recognised by another commentator who pointed to the inclusion of national liberation movements in norm creation (e.g. the Convention Against Torture). A further comment was made to the effect that inaction by states in the face of violations of international norms has encouraged other entities to become involved in norm creation (e.g. the Ottawa Convention).

Dr Mačák presented on the emerging issue of the growth of IHL for the regulation of cyberspace. This discussion was framed within three limitations: it is a new area, which states are reluctant to take a position; this absence of states has resulted in non-state actors taking a leading role in the creation of non-binding norms; and there has been a move against international lawyers applying old legal frameworks to this new field. A systemic dimension to the regulation of cyberspace can be identified, in that it has been viewed through the optics of IHL rather than the law of peace, though there has been debate about the applicability of IHL to such operations. This has resulted in normative fragmentation as regulation has shifted to general international law, causing IHL concerns to migrate to general international law, e.g. the geographical scope, the need for the

organisation of online groups, the notion of attack and calculations of proportionality. The risk of this migration is that protections provided by international law may be reduced due to the vastly distinct teleologies of international law and IHL.

It was suggested during the Q&A that perhaps a better approach to the regulation of cyberspace would be bottom up, rather than from top down (i.e. the focus on IHL) as this may reduce the thresholds of IHL's application. Another participant responded at length with an explanation of the context of the drafting of the Tallinn Manual and why there was an emphasis on IHL; in the Tallinn Manual 2.0 this has been altered to avoid IHL becoming the dominant paradigm. It was suggested that this entire issue raises the question of how general international law or law in general deals with lacuna; does law abhor a vacuum and therefore seek to apply other law by analogy, or is it able abide the continued existence of a lacuna to avoid the knee-jerk adoption of unsuitable frameworks.