

## IMPROVING MECHANISMS FOR THE IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW

By

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*The problem of respect for the law is not primarily related to the adequacy of the rules themselves, but is mainly the result of a lack of political will on the part of the Parties to armed conflicts to adhere to the law.<sup>1</sup>*

### Introduction

Although war is a phenomenon which exist from time immemorial and regulating the relationship between communities, societies and modern States, the law responding to it took shape from the second half of the 19<sup>th</sup> century following the recommendation by Geneva Businessman, Henry Dunant. The idea conceived by Henry Dunant was the establishment of an organisation sanctioned by international agreement inviolable in character to provide care and assistance to the wounded and sick. This suggestion followed Dunant's witnessing the battle of Solferino involving French forces, Italian Forces and Austrian forces in 1859. Since then, a number of international legal instruments have been adopted expanding the scope and operation of the law applicable to armed conflict situations as well as the persons and objected protected by the law. These international legal instruments however, largely were adopted pursuant to observations and experiences after major wars such as the need to protect prisoners of war after First World War, the need to protect civilian population after Second World War, the need to protect the natural environment and the requirement of observing minimum rules in non-international armed conflicts as well as the prohibition of certain means and methods of warfare. These wars have served as stepping stone in the development of rules applicable to armed conflict situations.

Notwithstanding the progress made, International Humanitarian Law ('IHL') continues to suffer violation in many international and non-international armed conflicts including by the most developed States.<sup>2</sup> The two major conflicts in the 1990s (in the former Yugoslavia and Rwanda), the conflict between Eritrea and Ethiopia, Allied forces in Afghanistan and Iraq, the Lord's Resistance Army in Uganda, civil wars Syria, Yemen and fight against the Islamic State and its affiliates such as the Boko Haram in Nigeria are typical examples of the growing challenges being suffered by IHL.

The changing nature of warfare in both international and non-international armed conflict in the recent past is significantly undermining the efficacy of IHL. Serious violations occur in situations where armed groups and other non-state actors consider their successes to be premised on not respecting the law thereby adopting methods of warfare inimical to the philosophy and purpose of IHL. Typical examples of this can be seen in Al-Shabab in Somalia, and Boko Haram in Nigeria. In these situations, there has been deliberate targeting of civilian population, terrorizing the civilian populations, rape, torture and other acts amounting to war crimes, crimes against humanity and genocide.

Recent conflicts have witnessed the involvement of new actors; fragmentation in weak or failed States; growing overlap between political and private aims; an increasingly sophisticated technology employed by both States and non-state actors; asymmetrical warfare; an uncontrolled availability of large quantities and categories of weapons; outsourcing of military functions to private security companies, involvement of military in humanitarian work and increasing involvement of civilians in armed

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<sup>1</sup>Jacob Kellenberger, 'Striving to Improve Respect for International Humanitarian Law', in Iihl (ed.), *Strengthening Measures for the Respect and Implementation of International Humanitarian Law and Other Rules Protecting Human Dignity in Armed Conflict: Challenges and Prospects* (Sanremo: IIHL, 2004), p. 19

<sup>2</sup> Such as the treatment of prisoners by the United States forces in Abu Graib prison in Iraq.

conflict.<sup>3</sup> These new phenomenon continue to complicate the nature of armed conflict and the response of the law, their recurring nature works to validate the assertion that “past wars are among the causes of new wars”.<sup>4</sup>

War has been prohibited by both international<sup>5</sup> and domestic law but this prohibition is yet to result to ending the occurrences of war and war continues to be a sad reality necessarily warranting the continued existence of IHL.

IHL being unique in its rules, compassionate and humane in its operation is aimed at protecting victims of war by ensuring the observance of its fundamental principles of necessity, distinction, proportionality, precaution and above all, that of humanity. IHL balances the concept of military necessity and the protection of war victims in that while recognising the right of belligerent to wage war, neutralise opponents, and destroy objects equally requires respect and consideration for humanity. It protects civilian population during armed conflicts, persons deprived of their liberty, sick, and wounded as well as those under military occupation. It comes into play “when rules and structures are breaking down” and “when humanitarian standards are in jeopardy”.<sup>6</sup> IHL was specifically designed to fit into this inhumane and illegal situation, to bring into being precisely defined rules balancing military needs with respect for humanity.

The success of IHL rests on the extent to which its rules are implemented in armed conflict situations. In this light, several international legal instruments notably, the four Geneva Conventions and their Additional Protocols and The Hague Regulations have provided for mechanisms designed to ensure that IHL functions as intended and provide the needed protection to war victims.

This article analyses the existing implementation mechanisms and their weaknesses, providing suggestions for their improvement as well as other possible mechanisms the law should take into consideration in future treaties.

## **Mechanisms for the Implementation of IHL**

Generally, implementation is said to encompass “all measures that must be taken to ensure that the rules of law are fully respected”.<sup>7</sup> In the context of IHL, implementation refers to such measures designed to monitor and ensure observance and compliance with its rules.<sup>8</sup> Series of mechanisms for the implementation of IHL exist, however, most of them have not recorded much achievements while some of have been described as “inherently insufficient and in some cases even counter-productive.”<sup>9</sup> Numerous challenges continue to exist. Some of these stemmed from the difficulty of concluding any international agreement imposing stricter obligations on the part of States. Consequently, the end result and final outcomes of international conventions sometimes are weak or vague, rarely would a strong mechanism finds its way into an international instrument.

The greatest weakness lies in the fact that IHL operates in an anarchic international society; there is no central authority with power to enforce its provisions.<sup>10</sup> The entire system of implementation is

<sup>3</sup>Kellenberger, 'Striving to Improve Respect for International Humanitarian Law'. p. 18

<sup>4</sup>Ibid. p. 17

<sup>5</sup> See Art. 2(4) of the United Nations Charter.

<sup>6</sup>Maria Teresa Dutli, 'The Importance of National Implementation of International Humanitarian Law', in Iihl (ed.), *Strengthening Measures for the Respect and Implementation of International Humanitarian Law and Other Rules Protecting Human Dignity in Armed Conflict: Challenges and Prospects* (Sanremo: IIHL, 2004).p. 187.

<sup>7</sup>Commonwealth Secretariat, *1999 Meeting of Commonwealth Law Ministers and Senior Officials: Port of Spain, Trinidad and Tobago, 3-7 May 1999 : Memoranda* (Commonwealth Secretariat, 2001).

<sup>8</sup>Alexandre Faite and Umesh Kadam, 'Implementation of International Humanitarian Law in Japan: The Icrc Perspectives', <[http://www.adh-geneva.ch/RULAC/pdf\\_state/ICRC-perspective.pdf](http://www.adh-geneva.ch/RULAC/pdf_state/ICRC-perspective.pdf)>, accessed 17 January 2012.

<sup>9</sup>Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War* (2nd edn., 1; Geneva: ICRC, 2006). p. 271

<sup>10</sup>Rüdiger Wolfrum and Dieter Fleck, 'Enforcement of International Humanitarian Law ', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (2nd edn.; Oxford: Oxford University Press, 2008), 675-722.at p. 675

voluntary in nature and relies on the goodwill of parties.<sup>11</sup> Similarly, most of its implementation mechanisms are normative; while they impose obligations, they failed to prescribe sanctions in the event of non-compliance.<sup>12</sup>

Notwithstanding the current state of the law, the failure to agree on stronger mechanisms should not be an obstacle to improving the existing ones. States and relevant actors acting in good faith and with sincerity of purpose could positively transform the existing mechanisms. This comes in the light of the view that the biggest problem is not the rules but the lack of respect for them.<sup>13</sup> That even where no mechanisms exist, States should be guided by the general principles of IHL and the famous Marten's clause.

Broadly speaking, mechanisms for IHL implementation are both general and specific. They are general because the international laws governing other aspects such as state responsibility are applicable and specific because express provisions in IHL treaties have prescribed measures for its implementation. The mechanisms are for the prevention, control and suppression of IHL violation. The operation of the mechanisms is in three phases: during peacetime, during armed conflicts and after armed conflict situations. The sections below consider the existing mechanisms.

### 1. Obligation to Respect and Ensure Respect

The first and most important mechanism is the obligation flowing from article 1 common to the Geneva Conventions; obligation to respect and ensure respect. This obligation encompasses two aspects: the obligation to respect which requires the good faith implementation of IHL by the parties and the obligation to ensure respect which relates to the States' actions with respect IHL violations, or potential violations by the conflicting parties. The obligation to respect is equally in two folds; obligation not to encourage a party to armed conflict to violate IHL and obligation not to take any action which would assist in such violations.<sup>14</sup> These apply in all circumstances,<sup>15</sup> in both international and non-international armed conflicts.

Obligation to ensure respect involves the exercise of due diligence by third States with respect to violations or potential violations. The responsibility of ensuring the protection of victims of war and moderating means and method of warfare is on the States parties to the Geneva Conventions and their protocols. Although this obligation arose from States' consent as expressed in the treaties, the Geneva Conventions have been held to have acquired the status of customary law, applicable irrespective of treaty obligations.<sup>16</sup> States parties are obliged to, not only respect, implement and comply with the rules but to also to ensure respect and compliance of third States found violating the rules.<sup>17</sup> The obligation to respect and ensure respect is fundamental and central to the implementation of IHL and it is customary in nature.<sup>18</sup>

As strong as this obligation is, the major problem of IHL implementation stemmed from the States themselves especially those involved in armed conflict.<sup>19</sup> This implementation mechanism is decentralised

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<sup>11</sup>Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Oxford-Portland-Oregon: Hart Publishing, 2008). p. 284

<sup>12</sup>Ibid. p. 285

<sup>13</sup>Kellenberger, 'Striving to Improve Respect for International Humanitarian Law'. p. 19

<sup>14</sup>Ibid.p. 21

<sup>15</sup>Michel Veuthey, 'Implementing International Humanitarian Law: Old and New Ways', in B.G Ramcharan (ed.), *Human Rights Protection in the Field* (Leiden: Martinus Nijhoff Publishers, 2006). p. 90

<sup>16</sup> See for example *Eritrea/Ethiopia Claims Commission, Partial Award-Prisoners of War, Ethiopia's Claim 4*, The Permanent Court of Arbitration (2003) para. 32

<sup>17</sup> See Geneva Conventions, common art. 1

<sup>18</sup>*Case concerning the military and paramilitary activities in and against Nicaragua* (Nicaragua v. United States of America), International Court of Justice, (Merits) ICJ Report vol. 14, Para. 220. The ICJ reaffirmed the importance of common article 1 in its Advisory Opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *International Court of Justice, Advisory Opinion (2006) 43 ILM 1009*, para. 158:

<sup>19</sup>Marco Sassòli, 'Possible New Mechanisms Enhancing Compliance with International Humanitarian Law', in Iihl (ed.), *Strengthening Measures for the Respect and Implementation of International Humanitarian Law and Other Rules Protecting Human Dignity in Armed Conflict: Challenges and Prospects* (Sanremo: IHL, 2004).p. 57.

and hence counter-productive.<sup>20</sup> Lack of political will to implement or enforce the treaties regarding the obligation to respect is the major problem on the part of States.<sup>21</sup> Similarly, where violation is taking place, third States often react differently; either by taking sides on political grounds or by taking a stand on the basis of their understanding of the reason for the conflict, States rarely act in repressing the violations.<sup>22</sup>

The effectiveness of this mechanism largely depends on the willingness of the States. States must be willing to act in good faith and must strive to shun political interest in favour of humanitarian protection. States must refrain from mixing *ius ad bellum* with *ius in bello* issues when human lives are at stake. Furthermore, because the central problem is the lack of political will, a monitoring mechanism should be established which should require States to periodically report to an international monitoring body on their respect and implementation.<sup>23</sup> The logic here is to create political will because States do not want to be ridiculed. If the reporting becomes mandatory similar to other human rights treaties, States would either have to report violation or be subjected to questioning by the treaty monitoring body.<sup>24</sup> Armed groups should equally be empowered through a protocol to report. This, not only binds such groups but equally will serve as an opportunity to compel States to respond to such groups submissions.<sup>25</sup>

## 2. Dissemination

The identical provision of articles 47/48/127/144 of the Geneva Conventions is to the effect that the High Contracting Parties have agreed to disseminate the provisions of the conventions as widely as possible in their State and to also include the provisions in both military and civilians' trainings in order to make the rules known to both the armed forces and the populations.

This undertaken includes but not limited to the following:

- i. Training the armed forces: this involves including IHL rules in the military manuals, rules of engagement, military practical, regular training, as well as the inclusion of human rights law;<sup>26</sup>
- ii. Training the police;
- iii. Inclusion of IHL into the university curriculum;
- iv. Dissemination in civil society and to persons such as journalists, politicians, diplomats and judges.<sup>27</sup>

Dissemination in civil society is essential considering for example the role of civil society organisation in the conclusion of special agreements with armed groups under article 3 common to the Geneva Conventions.<sup>28</sup> Similarly, if civil society is sensitized as they were in human rights law, effective advocacy on the need for respecting IHL principles will be ensured. Furthermore, since obligation for respecting IHL is not only on governments but also individuals including rebel fighters, dissemination of the rules in the larger society in peacetime could positively contribute to respecting the rules by the

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<sup>20</sup>Sassòli and Bouvier, *How Does Law Protect in War*.p. 271

<sup>21</sup>Sassòli, 'Possible New Mechanisms Enhancing Compliance with International Humanitarian Law '.p. 57

<sup>22</sup>Sassòli and Bouvier, *How Does Law Protect in War*.p. 272

<sup>23</sup>Sassòli, 'Possible New Mechanisms Enhancing Compliance with International Humanitarian Law '.p. 58

<sup>24</sup>Ibid.

<sup>25</sup>Ibid.

<sup>26</sup>Sassòli and Bouvier, *How Does Law Protect in War*.at p. 276

<sup>27</sup>Kolb and Hyde, *An Introduction to the International Law of Armed Conflicts* at p. 286

<sup>28</sup>Dieter Fleck, 'Priorities and Open Challenges to Improve Implementation and Enforcement of Humanitarian Protection', in Iihl (ed.), *Strengthening Measures for the Respect and Implementation of International Humanitarian Law and Other Rules Protecting Human Dignity in Armed Conflict: Challenges and Prospects* (Sanremo: IIHL, 2004.) at p. 71

population and ensuring compliance during hostility.<sup>29</sup> Wider knowledge will equally assist in holding government accountable in the event of violation.<sup>30</sup>

If the state has put this measure in peacetime, it will be relatively easy to control violations in war situation. If the entire population knows the rules, such knowledge may influence the behaviour of armed groups, may minimize child recruitment and may assist the population to know their roles during armed conflicts. However, the major weakness here is the lack of a monitoring body that can investigate the extent to which this obligation has been implemented. The fact that ICRC oversees the implementation, such a body is not in the position to coerce or compel a State, it can only persuade or advise and its observations are not always known by the public.

Other steps required to be taken by States include:

- i. Translating IHL rules into local languages for better understanding.<sup>31</sup>
- ii. Incorporating IHL treaties into domestic laws where such is required by the Constitution of a State.<sup>32</sup>
- iii. Enacting domestic legislation on IHL rules such that will provide for penal sanctions where IHL is violated and the use of emblem and distinctive signs to avoid misuse or abuse.<sup>33</sup>

Providing for penal sanctions is specifically required regarding grave breaches.<sup>34</sup> The obligations for enacting domestic legislation arises out of the general obligation of States parties to take necessary measures for the execution of IHL.<sup>35</sup> National legislation is also particularly important in the enforcement of such provisions in the Geneva Conventions or Protocol I which are not self-executing.<sup>36</sup>

- iv. Training of qualified personnel under article 6 and 82 of Protocol I.<sup>37</sup>

Similar to other normative obligations on the State parties, there is no mechanism for ensuring compliance at the international level and States don't seem to be interested in being subjected to scrutiny on the measures they have put in place or for the implementation of their obligations. When it was proposed that there should be an obligation on States to report to an international commission on the application of national measures such proposal was rejected.<sup>38</sup> To make the law effective, the ICRC, whose role it is to ensure monitoring of the implementation of IHL, should devise appropriate ways of engaging States authorities in disseminating IHL knowledge. The ICRC should reinforce its existing mechanisms and vigorously conduct national and international trainings for military personnel, relevant government officials, civil society and non-governmental organisations.

### 3. International Committee of the Red Cross

<sup>29</sup>Maria Teresa Dutli, 'The Importance of National Implementation of International Humanitarian Law', *ibid.* at p. 189

<sup>30</sup>International Committee of the Red Cross, 'Improving Compliance with International Humanitarian Law: Icr Expert Seminars', (Geneva, October, 2003).p. 6

<sup>31</sup>See Geneva Conventions, common arts. 48/49/128/145, and Protocol I arts. 80 and 84

<sup>32</sup>See Protocol I, art. 80

<sup>33</sup>Sassòli and Bouvier, *How Does Law Protect in War.* at p. 278-9. See also Geneva Convention I arts. 53–54; Geneva Convention II, art. 43–45

<sup>34</sup>For the grave breaches provisions see Geneva Conventions, arts. 50/51/130/147,; Protocol I arts. 11(4) and 85.

<sup>35</sup>See Protocol I, art. 80

<sup>36</sup>Toni Pfanner, 'Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims', *IRRC*, 91/874 (2009).at p. 282

<sup>37</sup>Sassòli and Bouvier, *How Does Law Protect in War.*at p. 279

<sup>38</sup>Pfanner, 'Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims', (at p.283)

The International Committee of the Red Cross (ICRC) is an independent, neutral intermediary and impartial humanitarian international organisation. It has mandate under the Geneva Conventions to monitor respect and compliance of IHL by belligerents and armed groups. The ICRC does among others, visit and interview prisoners of war<sup>39</sup> and civilian internees without witnesses,<sup>40</sup> provide relief to war victims,<sup>41</sup> offer its services especially in non-international armed conflicts<sup>42</sup> and its good offices to facilitate the institution of hospital<sup>43</sup> and safety zones<sup>44</sup> as well as search for missing persons.<sup>45</sup> ICRC is an important mechanism in the implementation of IHL. The major obstacle however, is that the findings of ICRC are not public. It cannot testify in court against a violating party. The ICRC considers its continued neutrality can only be ensured if its findings remain confidential. Although there is logic to that especially in the light of international anarchical system but equally, the knowledge that ICRC findings can be made public could deter some violations by a party. States do not want to have their image dented and do not want to be seen to be violating rules they willingly have accepted. The ICRC should consider under extreme circumstances, the possibility of making public findings which seriously are incompatible with the spirit and purpose of IHL.

Although the ICRC has been undertaking an excellent job, an identified area where IHL violations mostly occur in recent conflicts is non-international armed conflicts. The ICRC's role needs to be "reinforced and accepted by all parties to today's armed conflicts, Government and Non-State Actors" alike.<sup>46</sup> The ICRC should continue to vigorously pursue the conclusion of special agreements with armed groups as well as encouraging them to issue unilateral declarations or develop and abide by their internal code of conduct which ensures respect for IHL.

#### 4. Cooperation with the United Nations

Another important mechanism of ensuring respect for IHL in armed conflicts is that the High Contracting Parties to Protocol I have undertaken to act jointly or individually in cooperation with the United Nations in situations of serious violation of IHL.<sup>47</sup> The United Nations Security Council has the mandate of maintaining international peace and security under the United Nations Charter and is empowered to act on behalf of member States when the necessity for doing so arises in the context of international peace and security. While it is not difficult to point instances where the United Nations or its Security Council appeared to be powerless in executing its responsibilities, there were instances where the Council had demonstrated its capacity to ensure the repression of international crimes and prevent impunity. The establishment of the two *ad hoc* tribunals in the 1990s: the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda, the United Nations through the Security Council has played important role regarding the repression of IHL violations. There is however, an interplay of international politics in the operation of international law.

The Security Council is however a political body and sometimes acts in accordance with the political interests of its members notably the permanent five. The existence of veto power on the part of the permanent five greatly undermines the capacity of the Security Council to act if the issue at stake is incompatible with the political interest of any of the five members. Unfortunately, also, despites Security

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<sup>39</sup> Geneva Convention III, art. 126

<sup>40</sup> Geneva Convention III, art. 143

<sup>41</sup> Geneva Convention III, arts. 59 and 61

<sup>42</sup> Geneva Conventions art. 9/9/9/10 and common art. 3

<sup>43</sup> Geneva Convention I, art. 23.

<sup>44</sup> Geneva Convention IV, art. 14

<sup>45</sup> Geneva Convention III, art. 123; Geneva Convention IV, art. 140.

<sup>46</sup> Veuthey, 'Implementing International Humanitarian Law: Old and New Ways'.at p. 98

<sup>47</sup> Protocol I, art. 89

Council's role in maintaining international peace and security, there were situations where forces of the United Nations have been alleged to have committed serious violations of IHL; rape.

To be effective, the UN must undergo legal and political reforms. The exercise of veto on fundamental humanitarian issues of concern to the global world is inconsistent with the legal and moral obligations of the United Nations. The United Nations must consistently ensure that mechanisms are in place to monitor its forces and provide for individual reporting system in the event of a violation. The original idea of the United Nations having and maintaining its standing forces must be realised. The idea of States contributing forces on occasional basis must be jettisoned, the United Nations must function as intended in this context for responsibility to be apportioned and appropriate redress mechanisms be put in place. Members of the UN should individually and collectively continue to support the UN with adequate resources in accomplishing its role of maintaining international peace and security. Similarly, UN forces should be adequately empowered to not only prevent and suppress IHL violation but to also arrest and surrender persons alleged to have committed serious violations to the appropriate repressing mechanisms.<sup>48</sup>

### **5. International Fact-Finding Commission**

This mechanism was established pursuant to article 90 of Additional Protocol I (AP I). The Commission is composed of experts ready to assist in the efforts to improving compliance with IHL, "both through fact finding as well as by assisting with reconciliation efforts through its 'good offices' function."<sup>49</sup> Presently, the formal competence of the Commission "extends only to situations of international armed conflict", it has however expressed its willingness to extend such services to situations of non-international armed conflicts.<sup>50</sup>

The major weakness of this mechanism is that consent of the parties to the conflict is required before it can act. Since its establishment in 1991 and despite the commitment and willingness of the Commission to offer its expertise and to act, no single case has yet been referred to it. The reason is largely due to the fact that parties to conflicts are unwilling to consent to such investigation.<sup>51</sup> Addressing this problem requires the improvement of the Commission's institutional and other means.<sup>52</sup> In this regard, the Security Council could use its power to authorise the Commission to act and can also mandate the State involved to cooperate with such investigation similar to what it did in Sudan. Alternatively, the Commission could formulate procedural rules under its powers which will provide for the submission of an optional declaration or the conclusion of a special agreement with States recognising the competence of the Commission to act in the event of international or internal armed conflict.

Furthermore, in internal armed conflict, the ICRC or any other competent organisation could facilitate the conclusion of a special agreement between the state and the armed group for the implementation of IHL and a provision recognising the competence of the Commission to investigate violation could be incorporated. This will not only help ensure compliance but will also have a fundamental impact in the minds of those prosecuting the war that failure to comply means risking prosecution for war crimes or crimes against humanity.

### **6. Meeting of the High Contracting Parties**

This is under article 7 of AP I and is meant to provide a platform upon which problems associated with the implementation of the Conventions and Protocols can be discussed by States parties. The depositary may call for this meeting once a state party requested. The weakness is the States may be so politically inclined and may not initiate. However, Switzerland being the depositary and a State party can

<sup>48</sup>Veuthey, 'Implementing International Humanitarian Law: Old and New Ways'. at p. 101.

<sup>49</sup>International Committee of the Red Cross, 'Improving Compliance with International Humanitarian Law: Irc Expert Seminars'. at p. 10

<sup>50</sup>Kellenberger, 'Striving to Improve Respect for International Humanitarian Law'. at p. 22

<sup>51</sup>*Ibid.*

<sup>52</sup>Dieter Fleck, 'Priorities and Open Challenges to Improve Implementation and Enforcement of Humanitarian Protection', *ibid.* at p. 70

take such initiative on its own. Switzerland has once voiced out its position during one of such meetings regarding violations by Israel.<sup>53</sup> If this mechanism works, there will be an opportunity to consider issues or problems associated with violations by a State(s) and sanctions may be imposed on such State(s).

### **7. National Committees for The Implementation of International Humanitarian Law**

The purpose of national committees “is to advise and assist the government in implementing and spreading knowledge of IHL”.<sup>54</sup> The ICRC and other international actors such as the Intergovernmental Group of Experts for the Protection of War Victims have advocated for the setting up of these committees and at present there are several of them operating in the territory of member States.<sup>55</sup>

The major weakness is that there is no obligation on the member states to establish it.<sup>56</sup> While States should continue to be encouraged, the mechanism effectiveness depends on being in a position “to evaluate existing national law in the light of the obligations created” under the various IHL instruments; being able to make useful “recommendations for further implementation”; being in a position to monitor the application of the law, and in cases of non-compliance being in a position to ensure that such is remedied.<sup>57</sup> For the committee to be effective, the depository and the ICRC should continue to engage and facilitate member States to establish such permanent standing committees and not on *ad hoc* basis.<sup>58</sup> The ICRC should work closely with the membership to build their capacity and to monitor their responses to IHL issues similar to the functions being served by the UNHCR working with governmental authorities in the context of refugee protection.

### **8. ICRC Advisory Service on IHL**

This mechanism is aimed at encouraging and supporting States and national committees in the implementation of IHL.<sup>59</sup> The Service utilises lawyers and local experts through a decentralized network and deals with issues beyond the legal field to include generating political will.<sup>60</sup> It has the capacity to respond to different and specific requirements of States political and legal systems.<sup>61</sup>

The weakness however, like other mechanism is, there is no obligation on States to accept the Advisory Service’s recommendations. Similarly, ICRC’s role in conflicts and its policy of non-disclosure does not provide the opportunity for this mechanism to expose violating States. The Service should continue to engage States constructively through regular interaction and training.

### **9. Repression: Criminal Courts and Tribunals and the Implementation of IHL**

Several articles in IHL treaties seek to ensure that violators are held accountable especially the grave breaches which provides for the trial and punishment of violators irrespective of their nationality or the place where the crimes were committed.<sup>62</sup> Through this, the concept of universal jurisdiction has been recognized and promoted.

The establishment of *ad hoc* tribunals (ICTY and ICTR) for the prosecution of war criminals has played a tremendous role in the enforcement of IHL norms. Indeed, a critical development after the Nuremberg.<sup>63</sup> Through their roles the notions of individual criminal responsibility, war crimes, crimes

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<sup>53</sup>Veuthey, 'Implementing International Humanitarian Law: Old and New Ways'.at p. 97

<sup>54</sup>International Committee of the Red Cross, 'National Committees for the Implementation of International Humanitarian Law', <[http://www.icrc.org/eng/assets/files/other/national\\_committees.pdf](http://www.icrc.org/eng/assets/files/other/national_committees.pdf)>, accessed 13 December, 2016

<sup>55</sup>Ibid.

<sup>56</sup>Ibid.at p. 1

<sup>57</sup>Ibid.

<sup>58</sup>Dutli, 'The Importance of National Implementation of International Humanitarian Law'.at p. 194

<sup>59</sup>Ibid.

<sup>60</sup>Ibid.

<sup>61</sup>Ibid.

<sup>62</sup> See Geneva Conventions, common arts. 49/50/129/146

<sup>63</sup>Dutli, 'The Importance of National Implementation of International Humanitarian Law'.at p. 192



against humanity and genocide have been firmly entrenched. The tribunals have equally served as catalyst in enabling other States to prosecute war criminals emanating from those conflicts in their domestic courts. This for example has been done in Denmark, France, Germany, and Switzerland.<sup>64</sup> The successes of the tribunals might have also played a role in convincing the international community of the importance of such institutions in ensuring respect of IHL at the international level which may have led to the establishment of the International Criminal Court.<sup>65</sup>

However, the major weaknesses of the *ad hoc* tribunals are that they have geographical and time limitations coupled with the fact that it takes a long time to finally dispose a case. Although a permanent International Criminal Court has been established, and its mere existence could help in preventing the commission of serious violation of IHL in future conflicts, its procedure is selective and its system is still primitive.<sup>66</sup> The ICC is also a treaty based institution applicable only on the State parties. To address impunity, two approaches need to be adopted:

1. The utilisation of universal jurisdiction by States to prosecute those who have committed international crimes;
2. The Security Council needs to be proactive. With the referral of two situations to the ICC; Sudan and Libya, the Security Council could do more if only its political considerations and interests could give way to the effective protection of human lives. The Security Council legitimacy could be enhanced for example where it promptly acts in situations where serious IHL or human rights violations are reported irrespective of the political or diplomatic relationship between a permanent member and the State involved.

Since ICC's jurisdiction is on complimentary basis, States should be encouraged to enact appropriate legislations dealing with same issues and to remove all obstacles capable of preventing effective adjudication. Similarly, States should as a matter of special interest and in furtherance to their obligation under article 80 AP I continue to update their legislations on penal sanctions to include such developments on related crimes as may have taken place at the international level or in the courts of other member states. This will ensure that the principle of legality is respected in all circumstances. This may also send strong signals to would-be violators that respecting the law would be the only option. Until there is an end to impunity, violations of the law will continue to occur.<sup>67</sup>

## 10. Other Suggestions

Although there is relatively appreciable level of confidence in the existing mechanisms if they can be improved upon and abide by, it is worth mentioning that some other suggestions for the establishment of new ones were made. Some of the proposals include the following:

1. Developing a system which will have either *ad hoc* or periodic reporting power as well as the institution of an individual complaints procedure.<sup>68</sup> Individual complaint procedure will be helpful in internal conflicts especially where the State is the violator and where international organisations may be denied access hence no effective investigation can be conducted.<sup>69</sup> Individual complaint procedure will fill this gap.
2. In the several conferences organised by the ICRC for example in Pretoria, Mexico City, Bruges and Kuala Lumpur participants have shown great enthusiasm for regional cooperation.<sup>70</sup> This is because compliance

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<sup>64</sup>Ibid.

<sup>65</sup>Ibid.

<sup>66</sup>Dieter Fleck, 'Priorities and Open Challenges to Improve Implementation and Enforcement of Humanitarian Protection', *ibid.* at p. 72

<sup>67</sup>Maria Teresa Dutli, 'The Importance of National Implementation of International Humanitarian Law', *ibid.* at p. 188

<sup>68</sup>Jacob Kellenberger, 'Striving to Improve Respect for International Humanitarian Law', *ibid.* at p. 23

<sup>69</sup>Dieter Fleck, 'Priorities and Open Challenges to Improve Implementation and Enforcement of Humanitarian Protection', *ibid.* at p. 73

<sup>70</sup> See for example International Committee of the Red Cross, 'Improving Compliance with International Humanitarian Law: Icr Expert Seminars '.

will be best ensured if considered collectively or at regional level.<sup>71</sup> Regional cooperation is important as it will collectively mobilise necessary political will, military and financial means required to prevent, or repress IHL violations. Regional organisations such as the African Union, European Union, ECOWAS, SADC, EAC should be encouraged to have monitoring and compliance of IHL functions in their areas with mechanisms to ensure the detection of early warning signs and be properly equipped to act.

3. Similarly, it was suggested that a committee of States or of independent IHL experts be established “to serve as a ‘*Diplomatic Forum*’ for addressing situations of humanitarian law violations” as well as creation of the office of a High Commissioner for IHL.<sup>72</sup> The High Commissioner should be empowered in the same way the counterpart in human rights has been. This will create an enabling environment for the United Nations to effectively discharge its obligation through monitoring, evaluating and responding to situations in good time.
4. Another mechanism that members States should ensure due diligence in their sale of arms to States and armed groups. States should enact appropriate legislations to ensure the scrutiny of all intended sales of armaments. The purpose is to ensure that arms are not sold to a State or armed groups with a record of IHL violation. This will assist the state in ensuring that their export trading is not in breach of their obligations under any IHL instruments.<sup>73</sup> The adoption of the Arms Trade Treaty (ATT) in this light is a welcome development.
5. Another option is for the human rights treaty bodies to continue to look into the issues of IHL violations within their human rights treaty mandates such as for example addressing violation of right to life, deprivation of liberty etc. in the context of armed conflict.
6. States could also exert diplomatic pressure on violating States and could make public denunciation of violations through the individual or collective actions of other States, regional or international organisations.<sup>74</sup>
7. Another way is to engage the services of media<sup>75</sup> and other local and non-governmental organisations in disseminating IHL rules.
8. *Ad hoc* independent monitors may be agreed upon by parties to a conflict.<sup>76</sup> In internal conflict, efforts should gear toward engaging armed groups through the conclusion of special agreements under common article 3 and encouraging them to issue unilateral declarations where special agreement is not possible. Where situations permit spiritual leaders<sup>77</sup> in the society could be utilised in disseminating IHL.

If States could observe their obligations in good faith, certainly problems of IHL violations will significantly reduce.

## Conclusion

Numerous mechanisms for the enforcement of the rule of IHL exist. Regrettably some of these mechanisms are ineffective, redundant, or counterproductive. The respect for IHL is fundamental in conflict situations for several reasons including the need to protect persons who do not or no longer directly participate in armed conflict and to ensure that even in the most extreme circumstances such as war, the observance of the rule of law is equally important if not a fundamental requirement. The existing mechanisms need to be appropriately reinforced, States must respect the obligations they have undertaken under the various IHL treaties and international legal instruments and armed groups must be encouraged

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<sup>71</sup>Ibid.

<sup>72</sup>Kellenberger, 'Striving to Improve Respect for International Humanitarian Law'. at p. 23

<sup>73</sup>International Committee of the Red Cross, 'Improving Compliance with International Humanitarian Law: Irc Expert Seminars'. at p. 7

<sup>74</sup>Ibid.

<sup>75</sup>Roy W. Gutman, 'Spotlight on Violations of International Humanitarian Law. The Role of the Media', *IRRC*, 38/325 (1998). pp. 619–625

<sup>76</sup>Veuthey, 'Implementing International Humanitarian Law: Old and New Ways'. at p. 95

<sup>77</sup>Ibid.

and properly informed about IHL rules. Violations of IHL by any belligerent is certainly of no advantage to such a belligerent. Rather it dented the image and recognition which such a belligerent might have had before the violatio