# Scrutiny

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## Introduction

"The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances".

It is with these words that each of the four Geneva Conventions of 12 August 1949 lays forth the fundamental duty of the Contracting Parties to respect their commitments (Article 1 common to all four Conventions).

The object of monitoring procedures is to help ensure that the norms of international humanitarian law[1] are respected. It must be stressed that monitoring is only one of the factors which impel the Parties to discharge their legal obligations. There are many other factors, which are not stipulated in law. Yet there is reason to believe that respect is better ensured if the officials, members of the armed forces and so forth know that a means exists of checking on behaviour incompatible with humanitarian law. They must consequently feel that they are under observation — this is the first purpose of the monitoring procedures. The second comes into play if an instrument of humanitarian law is alleged to have been violated. The facts will then be ascertained by means of the monitoring procedures.

### 1. *The factors of respect for humanitarian law*

Is international humanitarian law in fact respected? Or is it not a series of pious hopes which are dashed by the realities of modern war? The answer is twofold. The first reply is clearly affirmative: yes — humanitarian law is a reality and its provisions are respected far more often than some people would like to admit. It would be wrong not to recognize what is in fact the normal state of affairs. The second reply is evidently the one the reader expects: there are too many situations in which humanitarian law is not respected, in which even the most fundamental provisions of the Geneva Conventions and their Protocols are simply flouted, with known consequences for the victims and especially the civilian population.

The reasons which lead a belligerent to respect or to violate the law are little

1. "International Humanitarian Law applicable in armed conflicts" is taken to mean international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict. The expression "international humanitarian law applicable in armed conflicts" is often abbreviated to "international humanitarian law" or "humanitarian law".
2. See Bothe, M, "International Obligations, Means to Secure Performance" in Bernhardt (ed). *Encyclopedia of Public International Law*, Vol 1 (1981) 101; Falk, R, "On Identifying and Solving the Problem of Compliance with International Law", Proc ASIL 1964, 1-9; Baxter, R, "Forces for Compliance with the Law of War", ibid, 82; Gerber, F, *Lehrbuch des Volkerrechts*, Vol 2: *Kriegsrecht*, 229–32.

known. Hardly any empirical research has been carried out on this subject. On the basis of what others have written[2] and of our own observations, it can be said that:

Humanitarian law is frequently — perhaps normally — respected automatically, on impulse and without constraint. It is a *question of routine*. This routine may have different origins:

1. A rule of humanitarian law is regarded as the expression of a generally accepted ethical and religious conviction. (''One does not maltreat a harmless human being who asks for mercy''.)
2. A rule is often spontaneously regarded, without question, as just and reasonable. (''The medical personnel must be allowed to do their work''.)
3. Respect for the rules of humanitarian law is considered as a guarantee for the maintenance of discipline among the troops. (''A unit which is given to torture, looting and rape will soon get out of control''.)

The respect of rules can also be explained as the *result of a cost-benefit analysis:*

4. It is normally in the interest of a party to the conflict to maintain, in a conflict, a minimum degree of respect for the rules. In other words, the fear of retaliation is a strong incentive to abide by the rules. (''If I bomb town A, then the enemy will pay me back in kind by destroying our town B''.)
5. A belligerent may decide to present a favourable image to world opinion in the countries which are supporting his cause without being involved in the conflict.

However, the fear of retortion or reprisals is more likely to influence the armed forces as a whole, or large troop formations, and not so much the individual combatant.

For the individual:

6. The mere fear of possibly having to stand trial for war crimes, either by the law courts of his own country or, in the event of capture, by those of the adversary, can be an inducement to respect the law.

Not only *knowledge* of the law itself, but also the *motivation* to respect humanitarian law must be developed, both among the decision-makers and among combatants themselves. This is precisely the purpose of giving the armed forces the instruction in humanitarian law which the parties to the Conventions and Protocols have solemnly undertaken to provide.[3] Their failure to do so could well result in the reduction or even disappearance of any motivation to respect even the most elementary principles of humanity, which every normal human being considers natural.

## 2. *Purpose of this study*

Scrutiny, according to Webster, means ''a searching look'', ''a close watch''.

The purpose of this study is to analyse the various institutions and procedures destined to monitor respect for international humanitarian law, and specifically

3. First Convention, Article 47 Second Convention, Article 48; Third Convention, Article 127; Fourth Convention, Article 144; Protocol I, Article 83 and Protocol II Article 19.

the Geneva Conventions of 12 August 1949 and their (First) Additional Protocol of June 1977, relating to the Protection of Victims of International Armed Conflicts. To save time, this study will be confined to the law governing international armed conflicts, and will thus not take into consideration the problems posed by monitoring in non-international armed conflicts.

Scrutiny is only one element of the complex system to ensure the implementation of and respect for humanitarian law by means of preventive or repressive measures. The purpose of this study is solely to analyse the methods whereby respect for the commitments undertaken by the parties to the Conventions and Protocol I can be *verified.* In other words, an account will be given of the formalized procedures for *monitoring* the belligerents' conduct, and for fact-finding (obtaining proof) in the event of alleged violations.

## Methods of monitoring the implementation of international humanitarian law

In the course of fact-finding, any monitoring procedure helps to promote respect for the law. Monitoring should ultimately rectify a situation which is contrary to the law: the illicit behaviour is stopped, the culprit is punished, the victim is given compensation, etc. Thus monitoring, in the sense of fact-finding, is an indispensable part of any procedure for the imposition of sanctions, and all penal proceedings worthy of the name include a fact-finding phase.

In the context of international humanitarian law, namely war, any form of monitoring activity encounters substantial obstacles. For instance, in order to verify the facts of an alleged violation, it is necessary to investigate on the spot; this may require the consent of the adversary — who is often the object of the investigation. If the violation is continuing, the facts can be verified, but what about a single breach, the consequence of a single act? In such cases the truth has to be ascertained *ex post facto,* with all the difficulties involved. These difficulties are particularly great if the allegation concerns the violation of rules protecting the civilian population against the effects of hostilities (for instance a military operation against civilians), or of those restricting the belligerents' choice of methods and means of warfare (for example the use of napalm or gas). It is evident here that the law of The Hague was not given a new lease of life without giving rise to acute monitoring problems.

Recourse to retaliatory measures, the self-help approach so "popular" among belligerents, raises another particular problem in this context. It must be recalled that an *act of reprisal,* which is itself a breach of humanitarian law, is intended to stop the enemy's non-compliance with the law. For a reprisal to be justified, it must be established, inter alia, that the enemy's conduct is in actual fact contrary to the law, that a breach of the law has actually occurred. There can therefore be no doubt that an obligation does exist to verify the facts before resorting to reprisals. International law, however, knows no procedures in this connection. The responsibility lies entirely with the authorities of the State which is a party to the conflict and which considers an offence to have been committed against it. It will thus be mainly by means of internal proceedings that facts will be corroborated and judged before any retaliatory measure is decided. The other contracting parties to humanitarian law treaties retain a right, however, to intervene by approaching a party to the conflict who is in the wrong, as part of

their obligation to "ensure respect" for the obligations devolving from international law.[4]

After these opening remarks, a review will now be given of the diverse institutionalized methods of monitoring the implementation and observance of humanitarian law.

### 1. *The duty of Protecting Powers*

The duty to supervise compliance with the Geneva Conventions and their Additional Protocol on international armed conflicts lies first and foremost with the Protecting Powers. The relevant provision in the four Conventions states that these treaties shall be applied "with the co-operation and under the scrutiny of the Protecting Powers whose duty is to safeguard the interests of the parties to the conflict".[5]

A Protecting Power is therefore a third State entrusted by one of the parties to a conflict with the duty of safeguarding its interests and protecting its nationals from the other party with which it no longer maintains normal relations.[6] The many tasks of Protecting Powers may be divided into two main categories: *liaison* and *scrutiny*.[7] We shall concern ourselves with the latter category, because it is directly linked to compliance with the Conventions. A Protecting Power verifies that the State to which it is accredited respects international humanitarian law. Each government must permit the discharge of this essential task of all Protecting Powers. In the event of a violation, the Protecting Power, depending on circumstances, intervenes with the authorities concerned or refers the matter to the party that designated it, which then decides on any action to be taken. The Protecting Power may open a formal investigation, if commissioned to do so, only with the consent of the party to which it is accredited. If a party to a conflict has not designated any Protecting Power, it must find a substitute to assume the functions incumbent upon such Powers.[8] In practice, these duties fall solely upon the ICRC, which, however, discharges merely the humanitarian tasks.

The system appears flawless and yet it has never functioned in other than exceptional circumstances.[9] It is not for us to analyse the reasons why.[10] All we can do is conclude that the system of supervision by Protecting Powers does not perhaps correspond to today's political realities. The Protecting Powers' share in ensuring compliance with international humanitarian law is insignificant.

The question arises whether the innovations of Protocol I will in fact enhance

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4. See, for example, the first Article common to the Geneva Conventions.
5. Articles 8; 8; 8; and 9 respectively common to the Geneva Conventions; see also Article 5.1 of Protocol I.
6. See the definition of the task of Protecting Powers in Article 5 (1) of Protocol I: "Protecting Powers shall have the duty of safeguarding the interests of the Parties to the conflict".
7. Bugnion, F, "Le droit humanitaire applicable aux conflicts armés internationaux: le probleme du controle", (1977) 8 Annales et Int 29; Abi-Saab, G, "The Implementation of Humanitarian Law" in Cassesse, A (ed), *The New Humanitarian Law of Armed Conflict*, 310.
8. Articles 10; 10; 10; and 11 respectively common to the Geneva Conventions.
9. And, in part, in the Suez (1956) and Goa (1961) conflicts, the Indo-Pakistan (1971) conflict and the Falklands/Malvinas (1982) conflict.
10. See, inter alia, Abi-Saab, op cit, 323 et seq; and Bugnion, op cit, 46.

the efficiency of the system. Article 5 of Protocol I goes further than the provisions of 1949 in that it stipulates conditions designed to facilitate the appointment of a Protecting Power by the parties to a conflict. After reiterating the duty of each party to a conflict to designate a Protecting Power and also to authorize such a Power to act on its own territory, Article 5 lays down a procedure for the selection of such Powers, should the parties to the conflict fail in their obligation to do so spontaneously. The ICRC may act as an intermediary and offer its good offices to the parties to the conflict to help them choose a Protecting Power acceptable to all concerned.[11]

If, notwithstanding this procedure, attempts to find a Protecting Power fail, Article 5 provides that the tasks entrusted to Protecting Powers be assumed by a substitute. Despite the broadness of its wording, paragraph 4 of Article 5 refers mainly to the ICRC. This paragraph gave rise to ample discussion during the Diplomatic Conference on the Reaffirmation and Development of Internatioanl Humanitarian Law (1974–1977) and has been much commented upon since.[12] The crux of the matter was whether the ICRC should automatically assume the role of a substitute when a Protecting Power could not be appointed by a party to a conflict. Article 5 solves the problem by providing that the activity of a substitute be subject to consent by the parties to the conflict. The ICRC fully approves of this apparently restrictive solution. Its representative at the Diplomatic Conference affirmed that the ICRC would not consider intervening without the consent of all the parties to the conflict, thus discountenancing any idea of automatic action.[13] The ICRC attitude was not understood by all. And yet the explanation it gave seems convincing enough: it is simply inconceivable that work done against the will of one (and possibly even both) of the parties involved should yield satisfactory results, in other words that it should lead to an improvement in the situation of human beings caught in the turmoil of an armed conflict. The ICRC's position was prompted by purely practical considerations. It remains ready to accept the task if so requested by all concerned parties. Others also rejected the possibility of an automatic procedure by arguing the principle of national sovereignty. The experience of certain unproductive investigations carried out under the auspices of the United Nations without the consent of the country involved provides evidence in support of the ICRC's position. Article 5 therefore proposes an essentially pragmatic solution, taking account of political realities.

Two further provisions of Article 5 are meant to answer political objections and thereby remove obstacles to the designation of a Protecting Power:

1. Recourse to the help of a Protecting Power does not affect the legal status of the parties to the conflict or of any territory.[14] This provision has a declaratory value that is extremely useful in our present context.

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11. See Article 5.3.

12. Bothe, M, Partsch, KJ, and Solf, WA, *New Rules for Victims of Armed Conflicts*, Commentary on Article 5; Abi-Saab, op cit, 337 et seq; Bugnion, op cit, 30 et seq; Forsythe, DP, "Who Guards the Guardians: Third Parties and the Law of Armed Conflict", (1976) 70 AJIL 41.

14. See Official Records of the Diplomatic Conference on the Re-affirmation and Development of International Humanitarian Law applicable in Armed Conflicts (1974–1977), vol VIII, CDDH/I/SR 17 para 26.

14. Article 5.5.

2. The maintenance of diplomatic relations between the parties to a conflict or the entrusting of the protection of a party's interests to a third State in accordance with the rules of international law concerning diplomatic relations (''Vienna mandate'') is no obstacle to the designation of Protecting Powers for the purpose of discharging the tasks laid down in the Geneva Conventions (''Geneva mandate'').[15]

From a theoretical point of view, both rules seem unorthodox. Practice has shown, however, that diplomatic relations between two countries in conflict may continue without diplomatic staff in fact being able to provide protection to their own nationals. In such cases the activity of a Protecting Power is as necessary as if diplomatic relations were actually severed. It may also happen that a party to a conflict charges a third State with the ''Vienna mandate'' without requesting it to provide the protection laid down in the Geneva Conventions or accepts, solely within those limits, the activity of a Protecting Power designated by its enemy.[16] Admittedly, this position does not take into account the indivisibility of tasks entrusted to a Protecting Power — but it is a political reality. The activity of a Protecting Power (or a substitute) entrusted with the ''Geneva mandate'' thus becomes indispensable because it is otherwise discharged by no one. It is hoped that this innovation will, inter alia, facilitate the work of the ICRC.

In brief, Protocol I has changed neither the tasks of Protecting Powers nor the conditions of application of the system. It has, however, stipulated conditions that facilitate the appointment of such Powers by making the system more operational than it was before 1977. Although the new procedure, too, presupposes a minimum common ground and a certain degree of confidence between the parties in conflict, it is to be hoped that the formalization of the procedure for the appointment of Protecting Powers will increase the chances of an agreement on the subject. Moreover, the mere fact of re-affirming the role of Protecting Powers gives impetus to the institution; it will also lead to a more efficient scrutiny of compliance with international humanitarian law.

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

One of the novelties of Protocol I is the introduction into international humanitarian law of the International Fact-Finding Commission (Article 90).[17]

Paragraph 2 (c) of Article 90 defines the function of the Commission as follows:

''The Commission shall be competent to:

(i) enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol;

(ii) facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol.''

The Fact-Finding Commission is specifically entrusted with a task fundamental to any form of scrutiny, namely the establishment of facts. Its mandate

15. Article 5.6.

16. See Forsythe, op cit, 47, for the problems caused during the 1971 Indo-Pakistan conflict.

17. See Bothe, Partsch and Solf, op cit, Commentary on Article 90.

further provides that it may offer its good offices to solve differences between parties to a conflict in order to ensure respect for Humanitarian Law.

A closer examination of Article 90 reveals, however, the narrow limits imposed upon the Commission's activities. The Commission is indeed charged with establishing the facts, but it is not competent to draw any legal conclusions. It may not qualify the facts it has investigated. Moreover, its competence is restricted to investigating facts that might constitute a "*grave breach*" as defined in the Conventions[18] and Protocol I[19] or "other serious violations" of these instruments.

The Commission's competence is not automatic, since the majority of the States represented at the Diplomatic Conference considered unacceptable the initial proposal to submit the parties to Protocol I to the binding jurisdiction of the Commission.[20] The system adopted is based on the example provided by paragraph 2 of Article 36 of the Statute of the International Court of Justice, which leaves it to the State parties to recogize as compulsory, *ipso facto* and without special agreement, the jurisdiction of the Court. A party to Protocol I that is prepared to accept the binding jurisdiction of the Commission must therefore make a special declaration to that effect when it ratifies the Protocol or at any other moment. A State may also make an ad hoc declaration, agreeing to submit itself to an investigation requested by another party to the conflict.

The initial proposal to grant the Commission binding jurisdiction was rejected. The Commission remains an institution whose activity is limited to a restricted number of States. To date, 6 States out of 27 parties to Protocol I have deposited their declarations with the depositary State, i.e. a proportion of only 2 out of 9. The Commission becomes operational only after receiving the twentieth declaration.

The International Fact-Finding Commission provided for by Protocol I can hardly meet the expectations expressed at the outset of the revision of international humanitarian law, but it does reflect conditions of the world today, and, as these change constantly, there is no reason to lose hope. The next step will be to achieve acceptance of what may seem an obvious fact: namely that an enquiry into an alleged violation of an obligation freely undertaken by ratification of the relevant legal instrument is by definition not a breach of State sovereignty. The acceptance of this idea will certainly lead to the broadening of the Commission's basis for action.

### 3. *Enquiry as laid down in the Geneva Conventions*

"At the request of a Party to the conflict, an enquiry shall be instituted . . . concerning any alleged violation of the Convention".[21] An ad hoc commission of enquiry should be set up by the parties concerned who will lay down the enquiry procedure. Although the mandate of a commission of enquiry such as this one seems broad, if not limitless (it will be able to make a statement, for example, on

18. First Convention, Article 50; Second Convention, Article 51; Third Convention, Article 130; and Fourth Convention, Article 147.

20. For the background and the discussion in the CDDH, see Bothe, Partsch and Solf, op cit, Commentary on Article 90, paragraphs 2.3.-5.

21. First Convention, Article 52; see also Article 53, Second Convention; Third Convention, Article 132; and Fourth Convention, Article 149.

the facts and on legal issues), its constitutional base is weak. Indeed, an agreement must be reached each time between the party which feels wronged and the party which it alleges has commited a violation: and this is to occur not in the normal conditions of peacetime but during a conflict, under the threat of recriminations. It is not surprising that no attempt to come to an agreement on an enquiry within the meaning of the 1949 Conventions has been successful to date.

It seems useful to stress that the new Article 90 of Protocol I,[22] which establishes the International Fact-Finding Commission, does not replace the commission of enquiry within the meaning of the Conventions. The respective articles of the four Conventions remain intact and can provide the basis for an ad hoc procedure of enquiry independent of the somewhat rigid institution of the Fact-Finding Commission laid down in Protocol I.

### 4. *Enquiry by United Nations bodies*

Back in 1968 the United Nations General Assembly set up the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population in the Occupied Territories and commissioned it to check that the international law applicable to the situation of occupation which characterized the conflict in the Middle East was respected.[23] In keeping with the terminology used by the United Nations since the International Conference on Human Rights in Teheran in 1968, the terms of reference of the Committee speak of "human rights" a term to which "applicable in armed conflicts" should be added. The aim of the Committee is, therefore, to enquire into the observance of humanitarian law by a party to an armed conflict, in the case in point, the State of Israel. It is true that the resolution establishing it also referred to the "essential and inalienable" human rights of the population of the occupied territories, that is to say, to rights guaranteed independently of any instrument of humanitarian law.[24]

It is not for us to analyze the activity of this Committee. However, it should be pointed out that the value of the results of its enquiry have been called in question, since the Committee has never been allowed to visit any territory occupied by Israel and to carry out its enquiry in places where a good number of the alleged violations were said to have taken place. Israel in fact rejected any co-operation with the Committee, reproaching it, among other things, for its lack of neutrality and impartiality. This criticism is not entirely unfounded given both the political nature of the body which drew up the Committee's mandate and its composition (it is made up of States and not of public figures chosen for their qualifications and acting in a personal capacity).[25] It is a matter for conjecture whether a different Israeli attitude might not have made possible a satisfactory scrutiny procedure from the results of which, when all is said and done, Israel as well could have benefited. An impartial enquiry, together with all the guarantees

22. See the above section, pp 349–50.

23. Resolution 2443 (XXIII) of 19 December 1968 (for the most recent report of the Committee to the General Assembly, see A/37/485 of 20 October, 1982.)

24. See A/37/485 (above fn 23), paragraph 21 c).

25. In this context, see Cassese, Background paper, United Nations Seminar on Violation of Human Rights in the Palestinian and other Arab territories occupied by Israel, 1982 (HR/Geneva/1982/BP 2).

of procedure, might have developed into a sizeable contribution to measures guaranteeing the observance of international humanitarian law. Time will show whether the United Nations efforts in this area will pay off.

Other United Nations bodies have also undertaken enquiries concerning the observance of international commitments by a party to an armed conflict. A case in point is the International Labour Organization which has carried out enquiries in territories occupied by Israel with the full co-operation of the Israeli authorities.[26] The ILO of course carried out its enquiry according to the terms of its own mandate, but the situation of workers is also protected by the Geneva law.[27] The ILO's activity therefore had a direct effect on the observance of a specific part of international humanitarian law.

### 5. *International Court of Justice*

The International Court of Justice is competent to give a ruling in disputes between States concerning the application of any of the Geneva Conventions or of their Protocol I. Any Party which has been wronged by a violation may appeal to the Court which will only be able to exercise jurisdiction with the consent of the adverse party State (Article 36 of the Court's Statute). Whether a State other than the wronged State could submit a case of breach of the Geneva Conventions to the Court is a question which would call for a more detailed examination.

It is perhaps useful at this point to recall that Resolution I of the 1949 Diplomatic Conference recommends that parties to the Conventions submit disputes on the interpretation or application of the Conventions to the International Court of Justice. To date Pakistan is the only country to have done so. It did so during its conflict with India in 1971.[28]

Legal proceedings at the Court in The Hague would in a way be the final step of the procedure for ensuring respect for the law. These proceedings would provoke or even require a strict checking of the facts and would thus be included in the list of measures for scrutiny of the application of the Conventions and Protocols. It is greatly to be regretted that parties to armed conflicts have not appealed to the Court in The Hague more often.

### 6. *Joint actions by States Parties*

Article 7 of Protocol I invites the depositary State to convene a meeting of the High Contracting Parties, upon the approval of the majority of the said parties, "to consider general problems concerning the application of the Conventions and of the Protocol". The actual text as well as its history are very clear about the aim of such meetings: general problems are to be discussed concerning the application of the Conventions and Protocol and not a concrete case of application or violation of humanitarian law by a State. It seems to us that this new institution does after all belong to the list of methods and procedures for checking of the observance of the law. A constant or repeated breach of the same article by several States, but in different contexts, can create a generalized

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26. See Cassese, Background paper, 30 et seq.

27. See, in particular, Fourth Convention, Articles 39 and 40.

28. *Trial of Pakistani Prisoners of War* case (Pakistan v India), ICJ Rep 1973 p 328.

problem of application. In this connection, the mere possibility of requesting a meeting as laid down in Article 7 can have a salutary effect and encourage general respect for the provisions of international humanitarian law.

In a somewhat different context, but with a similar aim, the parties to the Protocol have undertaken "to act . . . in co-operation with the United Nations" in situations of serious violations of the Conventions and of the Protocol (Article 89 of Protocol I).

### 7. *Activities of non-governmental organizations*

The aim of a number of non-governmental international organizations is to promote respect for human rights. Some of these organizations have also undertaken to exercise their activity in situations covered by the Geneva Conventions (for example the International Commission of Jurists and Amnesty International). The reports published, in particular by these two organizations, exposing violations committed in armed conflict may help influence public opinion. The activity of non-governmental organizations may be able to promote respect for humanitarian law by the belligerents. Their independence of any State power guarantees them considerable freedom of action and at the same time creates the conditions necessary for judgments free of any political influence — advantages which have to go hand in hand with impartiality and a keen sense of responsibility.

### 8. *Pro memoria: scrutiny on a national level*

Every party to an international treaty must first of all take all necessary measures to enable them to respect their commitments. These measures are mainly internal. The Geneva Conventions and Protocol I lay very specific obligations on the contracting parties in this area. We shall discuss those which directly relate to monitoring of implementation.

The articles of the Conventions and Protocol I relative to the suppression of violations require States to make their legal systems available for the reporting and suppression of any violation of these texts. Clearly the mere existence of this system acts as a check on agents responsible for seeing that humanitarian law is respected.

In the armed forces, commanders of all ranks are responsible for ensuring that the Conventions and the Protocol are duly respected.[29] They themselves will ensure that members of the units under their command respect these obligations. The legal advisers who will be assigned to military commanders "at the appropriate level" will assist them in this task.[30]

When faced with allegations of serious or gross violations of international humanitarian law, the authorities concerned may decide to set up their own (internal) commission of enquiry to clarify the facts, to determine the reasons and to define the responsibilities. This enquiry will complement the activity of normal justice which has to determine individual responsibilities.

Despite the various procedures on a national and international level, the

29. See Article 87 of Protocol 1.

30. Article 82 of Protocol I.

necessity for which is undisputed, it is, in the last analysis, the individual members of the armed forces who are responsible first and foremost for observance of humanitarian law. After adequate instruction, each combatant and each commander in his area of responsibility will see that his comrades and subordinates respect this law. Thus, everyone is a link in the chain which will ensure the full application of the Geneva Conventions and Protocol I.

## The ICRC and supervision

It should right away be made clear that the mandate of the ICRC is not that of a judicial body. Its activities are clearly centred on the immediate needs of the victims of man-made disasters. Its principal mandate is usually summarized as: protection and assistance. Supervision of respect for international humanitarian law only devolves upon it indirectly.

It is, however, undeniable that its protection activities carry important elements of supervision of the respect of obligations by parties to a conflict. For example, one object of a visit to a place of detention is to check that the pertinent provisions of the Geneva Conventions are being respected. It is also obvious that scrupulous respect for the Geneva Conventions is a constitutive and essential element of effective protection. ICRC action in protecting war victims is thus necessarily and organically linked to checking that humanitarian law is respected.

The ICRC, nevertheless, also carries out activities that arise directly from a supervisory role. These are dealt with in section (b) below. Section (a) deals with the legal bases of ICRC action in international armed conflicts solely from the point of view of checking that humanitarian law is being respected.

### 1. *The legal bases for ICRC supervisory activity*

First of all, the ICRC has its specific mandates under the Conventions. Its principal sources are Article 126 of the Third Convention relative to the treatment of prisoners of war and Article 143 of the Fourth Convention relative to the protection of civilian persons in time of war. On the basis of these two provisions, ICRC delegates have the right to visit all places of detention, indeed all places where there are protected persons. In law, this right of visit does not depend on the agreement of the Detaining or Occupying Power. The ICRC has an absolute right of access, except when precluded by imperative military necessity. An authority which improperly forbids delegates access to the above-mentioned places would directly violate its obligations under the Conventions. It goes without saying that a refusal by one party to the conflict does not release the other party from its obligations since the legal basis of ICRC activity is not subject to conditions of reciprocity.

The ICRC is not limited to carrying out the tasks expressly attributed to it. It has the general right to take humanitarian initiative which allows it, in an international armed conflict, to undertake any humanitarian activity to protect and assist "protected persons" subject to the agreement of the party concerned.[31]

31. First Convention, Article 9; Second Convention, Article 9; Third Convention, Article 9; Fourth Convention, Article 10.

This right of humanitarian initiative is the ICRC's "open sesame!"[32] It also allows the ICRC to adapt its activity to the demands of different situations, particularly to the specific needs of protected persons. The general scope of this right makes it particularly valuable. Nevertheless, the agreement of the interested party is indispensable to any proposal for action that goes beyond the specific mandates of the ICRC. The ICRC thus has an unlimited right to take the initiative and to make proposals, but not an unlimited right to take action. A general right to take action would be utopian in the present state of the international community. It would be blocked by the conception that States have of their own sovereignty.

The ICRC may also be given the role of substitute for the Protecting Power.[33] Its tasks would then be those of a Protecting Power with one important qualification: while the Protecting Power is the agent of the power which conferred on it the mandate of safeguarding its interests in relation to the other party to the conflict, the ICRC could not confine itself to this role; it would represent the whole community of States parties to the Conventions charged by them, for a given conflict, with safeguarding the interests of protected persons and, thus, with ensuring that the Conventions were respected.

To date, the ICRC has never, in a formal sense, substituted for a Protecting Power as no party to a conflict has ever requested it to do so. Its usual activity, based on its specific mandate under the Conventions and complemented by its right of humanitarian initiative, however, includes *de facto* the more important tasks of a substitute.

Note in this context Article 81 of Protocol I, entitled "Activities of the Red Cross and other humanitarian organizations". The first paragraph of this article obliges parties to a conflict to support ICRC activities assigned to it by the Conventions "in order to ensure protection and assistance to the victims of conflicts". While not creating any new obligations for parties to a conflict towards the ICRC (in the sense of a specific treaty mandate), this article usefully reaffirms the position of the ICRC in the implementation of the Conventions and the Protocol.

### 2. *ICRC tasks relative to supervision*

As mentioned, all ICRC action on behalf of victims of armed conflicts includes an element of supervision. Each time that an ICRC delegate in carrying out his work is confronted with a breach of the Conventions or Protocols, he will react. Having established the facts, he will intervene with the authorities concerned in order to have the violation stopped and its repetition prevented. In ICRC practice, these interventions are confidential. This type of activity is one of indirect supervision in the sense that the supervision is a secondary effect of ICRC action to aid the conflict victim.

The ICRC has, nevertheless, also been led to assume tasks more specifically related to supervision. It has not sought them. The Committee has taken them on

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32. "Le fer de lance de l'action du CICR", Bugnion, op cit, 38.

33. See Article 11; 11; 11; and 12 respectively common to the Conventions, Article 5 of Protocol I and above p 348. Bugnion, op cit, 41 et seq; Abi-Saab, op cit, 318 et seq, 325 et seq, 337 et seq.

because the system for supervision of the Geneva Conventions has remained largely inoperative; the ICRC filled the void.

The ICRC has drawn up guidelines[34] for its action in the event of breaches of international humanitarian law. These guidelines define four situations, each linked to breaches of humanitarian law, which could necessitate steps being taken by the ICRC:

(1) ICRC delegates themselves are witnesses to cases of non-respect;
(2) A complaint alleging a violation is laid before the ICRC;
(3)A request for an enquiry (enquiry in the sense of the Geneva Conventions) is made to the ICRC;
(4) ICRC delegates are invited to go and witness the result of a violation.

The instructions given to delegates are based on the interests of the victims. They make it clear that the ICRC is not and does not wish to be a judicial institution. The ICRC is thus not prepared to carry out an enquiry in the sense of the Geneva Conventions.[35] At the most, it would participate in the selection of persons outside the Committee to constitute the commission. This very restrictive attitude is dictated by the fact that such an enquiry would not be compatible with ICRC neutrality, this principle being the sine qua non of its activity on behalf of victims on both sides of a conflict.

The Committee transmits complaints regarding alleged breaches of humanitarian law only in certain cases, without taking sides.

The most delicate problems arise in situations where the delegate himself is witness to a violation (e.g. unacceptable conditions of hygiene in a place of detention or contact with a detainee who shows signs of serious ill-treatment), or sees or learns from a reliable source the effects of a violation on "protected persons" (e.g. execution of hostages or the bombardment of a civilian built-up area). The second situation in particular can pose serious problems in establishing the facts. The ICRC restricts itself to acting if the facts are clear (and, of course, if the facts constitute a breach of a rule of humanitarian law). The ICRC does not itself undertake an enquiry if the known facts do not allow irrefutable conclusions to be drawn.

Special problems are posed for ICRC supervision activity regarding the use of prohibited weapons (e.g. gas) and, more generally, the breach of the rules of law applicable to military operations (e.g. no survivors on the battlefield or bombardment of a refugee camp). The integration of the "Hague law" into Protocol I — which brings it within the competence of the ICRC, at least as far as its international implementation is concerned — has put the ICRC into a new position. It would be premature to state that all the problems have been satisfactorily solved.

## Conclusion

The supervision of the respect for law is a crucial problem. Though this is true for any legal regulations, the problem is of profound importance in international

34. "Action by the International Committee of the Red Cross in the event of breaches of international humanitarian law", in International Review of the Red Cross, March-April 1981.

35. First Convention, Article 52; Second Convention, Article 53; Third Convention, Article 132; Fourth Convention, Article 149; and see above, p 351.

humanitarian law. More than in other fields of international law, humanitarian law has credibility difficulties. Many people — both lawyers and non-lawyers — see it merely as an expression of wishful thinking. These critics are convinced that no provisions of humanitarian law can stand up to military necessity (*Kriegsraison*). Only success, that is to say, respect for the law, during military operations or behind the front, will convince the sceptics. Effective supervision procedures, taken seriously by the parties to the conflict, by all the parties to the Geneva Conventions and by institutions such as the ICRC, could ensure respect of the law. Such procedures would have a repressive effect in deterring potential perpetrators. Reinforcing supervision thus directly contributes to respect for the life, dignity and health of those who have to suffer the effects of war.