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## Implementation of the Laws of War in Late-Twentieth-Century Conflicts

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**T**HE QUESTION OF HOW TO RESPOND to violations of the laws of armed conflict has been a key issue in international relations and in the politics of many countries in the 1980s and 1990s. In a development that involves risks as well as advantages, States have increasingly looked to international institutions, especially the United Nations, to address questions of enforcement. The main arguments of this paper are that:

- The formal mechanisms of implementation provided for in the treaties have for the most part not been effective;
- The United Nations has assumed a more important role in implementation than in any previous period and has been allocated further such roles in various treaties;
- Despite the growth of the UN's role, States and alliances remain essential, if flawed, agencies of implementation and enforcement; and
- Enforcement of this body of law can take many and varied forms: international trials are only one of them, and not necessarily the most effective.

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The body of law under discussion here has increasingly come to be termed “international humanitarian law.” This is a fashionable but flawed contemporary reincarnation of the older term “laws of war,” which continues to have merits, and which I have preferred in this paper. To imply that the ethical basis and underlying character of the law is exclusively humanitarian and international may be attractive to some, but it may also dent the credibility of the law among those in governments and armed forces who have to implement it.

Because the focus here is on responses to violations, a critically important aspect of implementation is not discussed, namely, the regular internal processes by which States—in peacetime as much as in war—bring their own law, policy, and practice into line with the laws of war, educate the public on their content, and train their armed forces accordingly. Rather, the focus here is what happens when there are violations.

Five considerations help to explain why, arising from the conflicts of the 1980s and 1990s, the subject of implementation and enforcement of the laws of war has been so central and difficult an issue in international diplomacy.

First, the scale and frequency of serious infractions of existing rules have been greater than in earlier decades. There have been violations of basic rules by many belligerents, State and non-State, including:

- Iraq’s use of chemical weapons during the Iran-Iraq War (1980-1988), and its wanton destruction of property and mistreatment of prisoners following its seizure of Kuwait (1990-1991);
- Somali factions’ persistent interference with relief efforts and attacks on civilians, especially in 1992-1994;
- Systematic attacks on civilian populations and cruelty to detainees in the conflicts in former Yugoslavia that started in June 1991;
  - Genocidal practices in Rwanda in 1994; and
  - The widespread use of antipersonnel land mines in ways which conflict with fundamental principles of the laws of war and cause huge casualties (mainly of civilians) during and especially after wars.

Second, some (but not all) of the atrocities of the 1980s and 1990s have been in conflicts with at least some element of civil war. Such wars are often more bitter than international wars: they frequently involve deliberate targeting of civilians and a winner-takes-all mentality. Getting parties in such wars to act in any kind of disciplined manner has always been difficult.

The rules formally and indisputably applicable to civil wars are relatively few. They include the 1948 Genocide Convention; the 1949 Geneva Conventions, common Article 3; and the 1977 Additional Protocol II. Two major agreements on land mines, neither of them yet in force at the time of writing, also encompass civil war situations as well as international war. These are the 1996 Amended Protocol II of the 1981 Convention on Specific Conventional Weapons, which places restrictions on the use of land-mines,<sup>1</sup> and the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction.<sup>2</sup>

These rules applicable to internal conflicts, although they seek to prohibit many of the atrocities of the type that have occurred, are more limited than those for international armed conflicts. Various attempts have been made to get over this problem. In the cases of former Yugoslavia and Rwanda, the UN Security Council has proclaimed or implied the applicability of a wide range of rules of humanitarian law, thus seeking to reduce somewhat the significance of the question of whether a particular conflict, or aspects thereof, is to be deemed internal or international. However, the main difficulty in many civil wars is not so much one of extending the range of applicable rules but rather (as discussed next) of getting parties to observe even the most minimal restraints.

Third, in many of the atrocities of recent years (and other cases could be added to the litany of frightfulness) it has not been a serious problem to establish what the law is, or even what the facts of the particular case are. Nor has the critical issue generally been whether in individual cases a State (or non-State) party concerned has acceded to particular treaties or has indicated adherence in some other way, or is bound anyway, with or without its explicit consent, by basic customary rules. The most critical issue—which affects many key international decisions yet to be made, including over Bosnia—has been what to do when, despite the existence of rules and the clearest possible warnings that they must be implemented, States and non-State bodies persistently violate them and then refuse to investigate and punish those responsible.

Fourth, from the time of the Iran-Iraq War the UN Security Council has acquired a major role in the implementation of the laws of war. Although the United Nations as a wartime alliance had been involved in war crimes issues, this expanded role was not foreseen in the UN Charter, and it has involved moving into uncharted territory. In the 1990s the Security Council has been particularly preoccupied with war crimes in conflicts involving Iraq, Yugoslavia, Somalia, and Rwanda. In addition, several arms control and laws-of-war treaties have progressively increased the UN's roles in enforcement matters.

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Fifth, the UN, and the Western powers in particular, have faced harsh choices about the extent to which they should pursue the war crimes issue in the post-ceasefire phase of two major conflicts, namely the Gulf in 1991, and Bosnia and Herzegovina in 1995. They faced similar issues in Somalia in 1993-1994, when the question was posed in the form of what to do about General Mohammed Farah Aideed, and in many other conflicts. The role that legal prosecution for war crimes, and the pursuit of compensation for victims, can and should have in the larger process of peacemaking has proved to be as tangled an issue in the 1990s as in previous eras.

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There is nothing new in recognizing that the problem of implementation of the laws of war is both important and difficult.<sup>3</sup> However, with rare exceptions it has not been the subject of a vigorous tradition of thought. Many lawyers, and others, like to think of enforcement exclusively in terms of criminal trial after a violation. However, implementation may take many other legal, administrative, or military forms.

Analysis of the question of implementation can benefit from a more descriptive approach, looking systematically at the many difficulties, and opportunities, that have been encountered in applying the laws of war. Such an approach employs the methodologies not only of law but also of history, politics, international relations, and strategic studies.<sup>4</sup> The major single-author work along such lines, Geoffrey Best's examination of whether or not the body of law governing armed conflicts has worked well since the Second World War, reaches pessimistic conclusions. He draws a picture of a body of law with an impressive and admirable superstructure built on insecure foundations, of which perhaps the shakiest is the central, critical distinction between the soldier and the civilian. The law's impact has been much less than had been hoped. Sometimes, indeed, it has been little more than an instrument of propaganda warfare.<sup>5</sup> My own conclusions, only slightly less pessimistic than those of Professor Best, are more narrowly concentrated on the question of implementation in the wake of violations, and they reflect developments up to the end of January 1998.<sup>6</sup>

### **The Various Forms and Mechanisms of Implementation**

What induces parties to armed conflicts to observe certain rules of restraint? The 1992 German triservice military manual lists no less than thirteen factors,

mainly treaty based, that “can induce the parties to a conflict to counteract disobedience of the law applicable in armed conflicts and thus to enforce observance of international humanitarian law”: consideration for public opinion, reciprocal interests of the parties to the conflict, maintenance of discipline, fear of reprisals, penal and disciplinary measures, fear of payment of compensation, activities of protecting powers, international fact-finding, the activities of the International Committee of the Red Cross (ICRC), diplomatic activities, national implementing measures, dissemination of humanitarian law, and the personal conviction and responsibility of the individual.<sup>7</sup>

While this list is admirably broad, it is not complete. It does not describe the wide range of “national implementing measures” that may be attempted, especially national commissions of inquiry (discussed further below). Moreover, it does not include as distinct factors either the implementation roles of the United Nations, or the possibility that violations could lead to multilateral military action being initiated against the violators. Events in Somalia in late 1992, and in Bosnia and Herzegovina in 1995, confirm that multilateral military action may be triggered by violations, and may be among the many ways in which the UN and other multilateral bodies can get involved in enforcement.

*Some Provisions of International Legal Agreements.* The 1899 and 1907 Hague Conventions on Land War, and the Regulations annexed to them, are imprecise on the matter of ensuring compliance. Article 1 of the 1899 and 1907 Hague Conventions requires the powers to issue instructions to their land forces in conformity with the Regulations. Article 3 of the 1907 Convention says that a belligerent party violating the Regulations “shall, if the case demands, be liable to pay compensation.” In addition, Article 56 of the 1899 and 1907 Hague Regulations makes a vague reference to legal proceedings in the event of violation of its rules about certain types of public property.<sup>8</sup> Nothing more is said about how these or other provisions are to be enforced. The many striking omissions regarding enforcement exposed the Hague system to the accusation that it was based on unduly optimistic assumptions.

However, the relative paucity of formal provisions in the Hague Conventions and Regulations did not mean that there was no implementation system at all. The central assumption, of which the above-summarized provisions are a mere reflection, was of a responsibility on States to ensure that the rules were observed and offenders brought to justice. This assumption has many weaknesses, of which the most obvious—easy to identify but hard to remedy—is that most governments have been, quite understandably, reluctant

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to prosecute their own servants in cases where their violations of the laws of war were carried out while pursuing government policy. It is this problem above all which has sustained an unbroken series of calls for some diminution of national sovereignty so far as the punishment of war crimes and crimes against humanity is concerned.

In the post-1945 period there have been many efforts to devise formal international legal provisions regarding implementation. Many of those that have been adopted in treaty form have in practice been ignored or sidestepped. For example, the system outlined in the 1949 Geneva Conventions of using the institution of Protecting Powers to supervise and implement the Conventions' provisions has not been widely used; and States have observed unevenly their duty to ensure that all those suspected of grave breaches are tried.

There have also been problems with the body established under the 1977 Geneva Protocol I with the specific purpose of investigating violations. Article 90 of that treaty provides for the establishment on a permanent basis, with periodic elections, of an International Fact-Finding Commission 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 International Humanitarian Fact-Finding Commission was duly set up in June 1991, and became operational in July 1992. Yet not a single one of the numerous problems between then and now has been referred to it. In the delicate words of its president, the Commission has been trying "to draw the international community's attention to its availability."<sup>9</sup> It has tried in vain for well over five years.

The relevance of the Fact-Finding Commission is called into question by the development, explored further below, that in the years since the Commission was established the UN Security Council has developed *ad hoc* mechanisms for investigating and taking action regarding violations, most notably in connection with the wars in the former Yugoslavia and Rwanda. For a variety of perfectly good reasons, States prefer these *ad hoc* arrangements to the ones they negotiated so laboriously at Geneva.

Other formal legal provisions regarding implementation have been the basis for a wide range of subsequent practice that has gone further than was envisaged when the provisions were originally concluded. Although the ICRC's role is limited in certain obvious ways and it has consistently refused to

assist prosecutions by providing evidence, some aspects of its role as a body with important rights of initiative, and duties to oversee some aspects of implementation, have built upon what is in the conventions. It has, for example, made a number of public statements about violations.<sup>10</sup> Even more significantly, the modest treaty provisions for the UN to have a role in implementation, summarized later in this paper, have been accompanied by an increase in UN practice.

One much-publicized legal basis of the increased interest of States and international bodies in enforcement has been the interpretation placed on the words of common Article 1 of the 1949 Geneva Conventions. This article calls on States "to ensure respect for the present Convention in all circumstances." This provision has been widely seen as implying a universal obligation of States (and therefore of regional and global international organizations as well) to see to implementation wherever problems arose.<sup>11</sup> However, the evidence is compelling that Article 1 was not originally intended to mean this.<sup>12</sup> Whatever the original intention behind it, the interpretation of common Article 1 as implying a duty to promote implementation generally has helped to bring the question of implementation of the laws of war more centrally into the discourse of States and the activities of international organizations. States are indeed at liberty to interpret, or rather reinterpret, their obligations under Article 1 in this way.

*Criminal Trials.* Trials are commonly seen as the major mode of securing implementation of the laws of war. The main conventions since 1945 provide for them as one key mode of enforcement. Trials, particularly before specially constituted international war crimes tribunals, are the focus of practically all public discussion of the war crimes issue. The international tribunals at Nuremberg, Tokyo, and now The Hague and Arusha, are sometimes seen as the main means of bringing offenders to book; while at the same time they are criticized by their detractors on various grounds, not least because their very establishment is deemed to show how selective, even biased, the international community is in handling this issue.

The overwhelming majority of legal cases in connection with the laws of war have in fact been in national, not international, courts.<sup>13</sup> Such trials often attract less attention than international ones, even when they are major events involving large numbers of suspects, as with the trials of former officials of the deposed Dergue military junta that have been held in Ethiopia since December 1994.<sup>14</sup> Many national trials may not appear to be about war crimes cases at all but rather about violations of national law or military discipline, but they are

nonetheless based on the same standards as those of international law governing armed conflict.

Formal legal cases, whether national or international, have some inherent limitations. The use of trial procedures is dependent on the potential defendants being, or being forcibly brought, within a jurisdiction which is prepared to see them prosecuted: this is by no means always possible. In addition, the use of legal procedures against a few individuals to deal with transgressions of norms is often debatable in cases in which offenses are committed in what is perceived as a public cause, and in which large numbers of people are involved in the offenses in different ways and at different levels of authority. Even in apparently quite simple episodes unrelated to war there is often extreme reluctance to establish individual responsibility: hence, the shocking failure in the United Kingdom to find any individual responsible for what was authoritatively viewed as the criminal negligence that caused the March 1987 Zeebrugge ferry disaster.

*Human Rights Law, and the Right to Individual Redress.* In the past, one of the many side effects of the inter-State character of the laws of war was a complete absence of formal procedures for individual legal redress. If violations occurred, it was for governments to take action: the individual may have been the object of the law but was not in any meaningful sense its subject. This situation has begun to change. Under several national and regional legal systems, including those of Israel, Japan, the United States, and Europe, there has been a growing tendency for individuals to bring issues arising from armed conflicts and occupations before the courts. This is mainly, but not exclusively, because of the development of human rights law.<sup>15</sup>

Various international human rights instruments allow scope for individual redress, whether through a right of individual petition or complaint, or through the right to bring cases. Some have involved the right to life. Although the right to life is inevitably subject to certain limitations in times of war and insurgency, its existence can potentially provide a basis for those whose rights have been undermined (or their surviving relatives) to argue that an armed force acted recklessly, granted its obligations. This was the basis of the claims, in the case of *McCann and Others v. The United Kingdom*, which followed the British Special Air Service killing of three Irish suspects in Gibraltar on 6 March 1988. The European Court of Human Rights, in its judgment delivered on 27 September 1995, found that there had been a breach of the European Convention on Human Rights, Article 2, on the right to life; however, it dismissed the applicants' claim for damages because the three people killed had been preparing

an explosion. The British government, in its instant and touchy reaction to this judgment, showed itself notably hostile to the whole idea of UK military actions in a long and difficult conflict being subject to European court decisions.<sup>16</sup>

**Compensation.** The inherent limitations of, and sensitivities surrounding, trials and certain other court procedures may help to explain the occasional recourse to one other means of responding to violations: compensation. Compensation for violations of the laws of war is an ancient institution, and as noted above, it was reflected in the provisions of the 1907 Hague Convention on land war. It frequently merges into the broader concept of war reparations—i.e., charges imposed on the losing side in a war, usually linked to that side's alleged responsibility for the outbreak of the war in the first place. In such form, reparations are of course linked more to *jus ad bellum* (the law governing resort to armed force) than to *jus in bello* (the law applicable in armed conflict). One possible attraction of arrangements for compensation and reparations is that they can be arranged in State-to-State negotiations and do not leave the eventual outcome to the numerous hazards associated with criminal court proceedings. In the aftermath of the 1990-1991 Gulf conflict, the United Nations Compensation Commission (whose work is briefly outlined later in this paper) has pursued the path of compensation on an astonishing and unprecedented scale. Neither in the Iraqi case nor more generally are reparations and compensation necessarily an alternative to war crimes trials. Both paths can be pursued simultaneously, as they were in respect of Germany (disastrously) in the 1919 Treaty of Versailles at the end of the First World War.

**National Commissions of Inquiry.** Although many treaties and manuals on the subject recognize that the laws of war are implemented not transnationally but by individual countries, they seldom set out in detail the exact mechanisms by which such implementation is to be achieved. It is in fact through government decisions, laws, courts and courts-martial, commissions of inquiry, military manuals, rules of engagement, and training and educational systems that the provisions of international law have a bearing on the conduct of armed forces and individuals.

National commissions of inquiry are nowhere mentioned in the treaties on the laws of war, and very seldom in legal texts on this branch of law.<sup>17</sup> Yet they have in fact been one of the principal means of trying to bring practice into conformity with law. Three examples indicate possible roles of such inquiries.

- On Northern Ireland in 1972, Lord Gardiner's minority report (which was accepted by the Government) to the Parker Committee report on the

interrogation methods used there was an interesting example of asserting the wider relevance, even in an internal conflict, of certain international legal standards, including some from the main body of the four 1949 Geneva Conventions.<sup>18</sup>

- Following the massacres of Palestinians at Sabra and Shatilla camps in Beirut in September 1982, it was an Israeli official report which helped establish the facts surrounding these events and reminded Israel that certain well-established standards had to apply not only to the actions of the Israel Defence Forces but also to those locally based paramilitary forces operating in conjunction with them.<sup>19</sup>

- In Canada, a wide range of actions followed violations of basic norms (including norms of the law of war) by Canadian forces while on UN-authorized operations in Somalia in 1992–1993. In 1993–1994 there were numerous courts-martial of Canadian soldiers involved in the Somalia operations; there was a military Board of Inquiry into these events. An entire battalion-sized force, the Canadian Airborne Regiment, was disbanded on 5 March 1995, principally because some of its members had been involved in crimes in Somalia. Finally, there was an official Commission of Inquiry, which issued a highly critical report in 1997.<sup>20</sup>

Commissions of inquiry have their limitations. They naturally tend to reflect national preoccupations and perspectives. Curiously, in all these three cases the terms of reference of the inquiry did not specifically identify violation of international treaties as a question to be addressed. For whatever reasons, the issue was often framed in terms of violations of ethical standards, of institutional procedures, and of national law. Such concerns often overlap with those of the laws governing armed conflict, and certainly they did so in these instances.

In societies emerging from periods of civil war or dictatorship, there are many possible variations on the commission of inquiry format: for example, the wide variety of truth and reconciliation commissions, or such other forms of coping with the past as opening of official files, in countries as different as former East Germany, South Africa, Argentina, and Chile.<sup>21</sup> Despite the variety of their formats and their undoubted limitations, there are merits in what might be termed the “commission of inquiry approach”: it enables national perspectives to be understood, it allows for more extensive and at the same time nuanced attributions of responsibility than is the case with criminal procedures, and above all it can open the way to critically important changes in government policy and social attitudes.

*Controls Over Careers of Individuals.* There have been many examples of the use of administrative methods of various kinds, not necessarily involving criminal trials, to punish or limit the influence of those who have been involved in war crimes or related acts. In occupied Germany after 1945, the Allies rapidly lost enthusiasm for criminal prosecutions, and thousands of cases were not pursued: the “denazification programme” was a preferred if still flawed administrative substitute. Within many armed forces, an individual who has been involved in questionable practices may suffer a blighted career or may be denied the honors which would otherwise be due. A typical case was the decision announced in Buenos Aires on 27 January 1998 to strip Captain Alfredo Astiz of his rank of retired captain, his uniform and his navy pension: he had been an officer in Argentina’s “dirty war” in the 1970s who had continued to defend the horrors of that period.

*Other Acts of Individual Countries, Regional Organizations and Alliances.* Even where efforts are made to get international enforcement following a systematic pattern of violations by one or more unrepentant belligerents—to get a foreign State or armed force to comply with the rules—the actions of individual governments and regional bodies have often been important and have often taken a form other than trials.

*Diplomatic and Economic Pressures.* From the late 1980s onwards member States of the European Community made protests to Israel regarding its policies in the occupied territories, and suspended or delayed ratification of trade agreements.<sup>22</sup>

*Formation of a Military Coalition Against the Offending State.* Sometimes illegal conduct by a belligerent, including the commission of atrocities, may contribute to the formation of an international military coalition against the offending State, and it may influence the coalition’s willingness to use force. Such conduct has been a significant element in the building of many coalitions, including the anti-Axis alliance in the Second World War, the international coalition against Iraq in 1990-1991, the multinational intervention in Somalia in December 1992, and the decision by NATO and the UN to initiate Operation DELIBERATE FORCE in Bosnia-Herzegovina on 30 August 1995. Even the possibility that such a process of illegal conduct may assist coalition building is almost entirely neglected in the legal literature, except in the rather specialized context of discussions of “humanitarian intervention.” The way in which violations can assist coalition building constitutes a little-recognized but important link between *jus in bello* and *jus ad bellum*.

*Reprisals by an Adversary.* A reprisal may be defined as a coercive retaliatory measure, normally contrary to international law, taken in retaliation by one party to a conflict with the specific purpose of making an adversary desist from particular actions violating international law. It may be intended, for example, to make the adversary abandon an unlawful practice of warfare.<sup>23</sup>

On occasion the threat or actuality of reprisals can be an important means of inducing restraint and securing implementation of the laws of war. There is evidence that fear of reprisals played some part in the non-use of chemical weapons by various belligerents in the Second World War;<sup>24</sup> and by Iraq in the 1991 Gulf War.<sup>25</sup> Thus the threat of retaliation in kind has in many cases helped to buttress the 1925 Geneva Protocol regime. It has only been where that threat was absent, because the victim State lacked any capacity to threaten retaliation in kind, that chemical weapons have been employed.

A threat of reprisals was implicit in the reservations made by States when they originally acceded to the 1925 Geneva Protocol prohibiting use of gas and bacteriological methods of warfare. At least thirty States parties (including many major powers, not least all five that became permanent members of the UN Security Council) specified that the Protocol would cease to be binding in regard to any enemy State whose armed forces fail to respect the prohibitions laid down in the Protocol.

This more or less explicit reliance on reprisals as one basis of the 1925 Geneva Protocol regime is under challenge. This is partly because of general doubts about their utility. It is also because the adoption in 1972 of the Biological Weapons Convention, prohibiting possession (not just use) of biological weapons, undermined the credibility of threats of retaliation in kind, as did the ongoing negotiations which led eventually to the 1993 Chemical Weapons Convention. This helps to explain why since 1972 eleven of the thirty-plus States that had made reservations safeguarding this right of reprisal have withdrawn these reservations.<sup>26</sup> In 1991 two other States, Canada and the United Kingdom, made more qualified and limited withdrawals of their reservations, retracting them only insofar as they relate to recourse to bacteriological methods of warfare.<sup>27</sup>

Despite their utility, reprisals can sometimes be little more than a fig leaf thinly disguising States' resort to unrestrained warfare. They have been heavily criticized. In international legal agreements there has been a strong tendency to limit or even prohibit their use. The 1977 Additional Protocol I prohibits certain types of reprisal.<sup>28</sup> At ratification of this agreement, a number of States made declarations which, in interpreting some of its provisions, appeared to keep open the possibility of reprisals. The clearest such cases are Italy's in 1986,

Germany's in 1991, and the United Kingdom's in 1998. Italy's long statement of interpretation included the following: "Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means admissible under international law in order to prevent any further violation." Germany's declaration on this point was virtually identical. The UK statement regarding Articles 51-55 asserted in considerable detail a qualified right of reprisal.<sup>29</sup> Thus, the institution of the reprisal, although by no means generally accepted in international society, is not yet dead. If it were to fall completely into disuse, the question would inevitably be raised as to what the sanction underlying the laws of war is to be, if it is not reprisals by belligerent States.

### The Implementation Roles of the United Nations

The United Nations has developed, or been given, a wide range of roles in implementation of the laws of war.<sup>30</sup> These include General Assembly and Security Council resolutions; monitoring and investigative work by the Secretary-General and by other UN bodies; decisions of the International Court of Justice; authorization of certain uses of force to repress violations; the creation of the international tribunals for former Yugoslavia and Rwanda; and work aimed at the creation of an International Criminal Court. The travails of the main UN bodies in passing an unending stream of resolutions critical of Israeli conduct in the occupied territories are evidence that these are not easy issues for the UN to grasp.

*Treaty Provisions for UN Involvement in Implementation.* There was reference to the UN in several laws of war treaties concluded before 1980, always in connection with the problem of implementation.<sup>31</sup> Subsequent treaties in the laws of war and related fields add to the UN's involvement in this difficult area.

*The 1993 Chemical Weapons Convention* is first and foremost a prohibition of manufacture and possession of such weapons, not just of use, and thus belongs more in the category of arms control than laws of war.<sup>32</sup> This treaty has been seen as overcoming a perceived weakness of the 1925 Geneva Protocol, namely, that it prohibited use but not possession. However, there is a risk that the Chemical Weapons Convention could actually weaken the prohibition on the use of chemical weapons. This is because it leaves some uncertainty about the sanction that would be employed in the event of violations. Instead of relying on the threat of retaliation, Article XII of the 1993 treaty provides for

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the application of collective measures by States Parties, including, in cases of particular gravity, bringing the issue to the attention of the UN General Assembly and Security Council. Whether this will prove effective in practice remains to be seen.

*The 1994 Convention on the Safety of UN and Associated Personnel* (again, only to a limited extent a laws of war agreement) covers not only peacekeeping troops but also humanitarian workers with, for example, a nongovernmental organization (NGO) or a specialized agency, provided they are part of an operation under UN authority and control. It involves the UN as well as its member States in all aspects of the implementation of the convention, "particularly in any case where the host State is unable itself to take the required measures."<sup>33</sup>

*The 1996 Amended Protocol II* (on land mines), annexed to the 1981 Convention on Specific Conventional Weapons, makes brief reference to the United Nations in its Article 14, which deals with compliance. Also in Article 12 it obliges parties to provide protection for, *inter alia*, UN fact-finding missions.<sup>34</sup>

*The 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*, which is a laws of war treaty to the extent that it institutes a complete prohibition on use of this class of weapon, again involves the UN extensively in compliance issues, mainly in the detailed provisions of Articles 6-8 and 11-12.<sup>35</sup>

These treaty provisions place a heavy burden on the UN, especially the Security Council. Whether UN bodies will be able to respond effectively remains to be seen, especially in view of their well-known weaknesses in getting prompt agreement on controversial issues, and then getting any agreement that is reached effectively implemented. In any case, the importance of these treaty provisions should not be exaggerated. Much of the actual increase of UN action in relation to the laws of war has not arisen because of them, but because of a general tendency of States to look to UN bodies for interpretation, monitoring and enforcement.

***The International Court of Justice.*** The International Court of Justice (ICJ) at The Hague has long had certain limited roles in respect of implementation of the laws of war. There are specific references to the ICJ in the 1948 Genocide Convention<sup>36</sup> and the 1954 Hague Cultural Property Convention.<sup>37</sup> However, the Court's Statute, with its built-in limitations on what type of cases may be brought to it and by whom, is likely to allow it to look only at a minority of issues concerning the laws of war.

Many cases brought before it have involved key laws of war matters: for example, the *Corfu Channel Case* in 1949;<sup>38</sup> *Nicaragua v. USA* in 1986;<sup>39</sup> and the 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*.<sup>40</sup> The first two cases involved the principle that a State laying mines at sea is obliged to give notification of their location in order to protect the security of peaceful shipping. The third case led to an opinion which, though cautious, did clarify, or publicize, the dubious legality of almost any actual use of nuclear weapons.

Many cases have involved issues analogous, and potentially relevant, to laws of war problems. The *United States Diplomatic and Consular Staff in Tehran* case concerned the treatment of individuals under the protection of international law in an emergency situation.<sup>41</sup> The *Frontier Dispute (Burkina Faso/Mali)* case raised the question of interim measures of protection.<sup>42</sup> The 1971 Advisory Opinion on *Namibia* involved several germane matters, including the use of a sanction: termination of a League/UN mandate as a response to failures to observe certain rules of restraint.<sup>43</sup>

In Bosnia and Herzegovina's action against the Federal Republic of Yugoslavia (Serbia and Montenegro), *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the ICJ has been asked to declare Yugoslavia in violation of a wide range of legal provisions. In September 1993 the Court ordered interim measures, requiring Yugoslavia to do all in its power to prevent genocide. Any effect of this order was limited. This case is currently proceeding slowly.

In many of these cases on which it has reached decisions, the ICJ has performed a useful service by clarifying the content of the laws of war and their application to particular and often complex circumstances, and by publicizing fundamental principles which should inform the policy making of States in matters relating to the use of force. However, there are limits to what the ICJ can be expected to achieve. Many States are reluctant to let cases concerning their own survival be settled by a distant conclave in The Hague. There are doubts about the capacity of the court to reach satisfactory conclusions on contentious factual matters. In an emergency situation, aggrieved States may also worry about the slowness of some (but certainly not all) of its proceedings. When it is asked to comment in a general way on complex issues which are bones of contention among statesmen and lawyers—as in the nuclear weapons case—the Court's decision may not be found universally persuasive. Above all, the ICJ is not a criminal court, and its unavoidable lack of capacity to try individuals for violations is one of the considerations that has fed the growing demand for the establishment of an International Criminal Court.

**UN Attempts to Secure Implementation in Some Conflicts of the 1990s**

Since the early 1980s the UN Security Council has had a particularly important role in implementation matters. It has issued countless pleas to belligerents to observe the laws of war, investigated violations (Iran-Iraq War), authorized a military intervention one of whose purposes was to restore respect for humanitarian law (Somalia), authorized a major use of force in response to attacks on “safe areas” (Bosnia-Herzegovina), and set up international tribunals (former Yugoslavia and Rwanda).

This deep involvement of the UN in implementation raises an issue of wider significance: that international law is commonly said to be weak law because it lacks any central enforcement mechanism. The UN Security Council has been increasingly seen as potentially constituting just such a mechanism—and at least as much for implementation of the laws of war as of any other area of law.

Yet the UN’s involvement in implementation has been extremely selective. The UN Security Council has not sought to secure implementation of the law in all conflicts whose termination it has assisted. For example, the long war in Mozambique after independence in 1975 involved many atrocities, yet the peace settlement of 1992 was not made contingent on legal trials of those involved. Likewise the settlement in Cambodia under the 1991 Paris agreements did not involve any systematic accounting for past crimes, although these had been on a vast scale. The peace accords in Guatemala in 1994-1996, although they did include a “commitment against impunity” (which had distinctly limited impact), did not establish any specific mechanism for punishing the crimes committed in the decades-long civil war.<sup>44</sup>

In three conflicts in the 1990s—those involving Kuwait, former Yugoslavia, and Rwanda—the United Nations became heavily involved in attempts to secure implementation of the laws of war, and some striking innovations resulted. A brief examination of these cases may suggest some strengths and weaknesses of the UN’s approaches to the problems of implementation.

***The Conflict Over Kuwait, 1990-1991.*** After Iraq occupied Kuwait in 1990, Security Council Resolution 674 of 29 October 1990 invited States to collect information on Iraqi violations of international humanitarian law. However, with the suspension of military activities on 28 February 1991 the coalition governments suddenly became quiet on the subject of the responsibility of Saddam Hussein and colleagues for major war crimes. This was despite the fact that Iraq had added to its crimes the torture of coalition prisoners of war and the wanton despoilation of Kuwait. The Security Council passed many

resolutions on the cease-fire, reparations, and the dismantling of Iraq's capability for chemical warfare; one of these, Resolution 687 of 3 April 1991, is its longest ever. Yet nothing was said on the subject of personal responsibility for war crimes. Similarly, in less than three months after the cessation of hostilities some sixty-four thousand Iraqi prisoners of war were repatriated without any attempt to sift out those suspected of war crimes—a process which might have delayed repatriation by years.

There were genuine difficulties in pursuing the war crimes issue. First and foremost, Saddam Hussein would have been difficult to arrest even had the coalition military action had more offensive-minded goals. After the end of hostilities, it would have been awkward to call for his arrest as a war criminal while at the same time negotiating cease-fire terms with his government. Further, outside powers were reluctant to press for trials if local powers would not join them in doing this. There were hazards in limiting trials to the conflict of 1990-1991, as the Iraqi regime had engaged in criminal activities externally and internally both before and after that episode.

However, the failure to take any action against the Iraqi leaders exposed a serious problem regarding the laws of war, namely, the difficulty of securing enforcement even after clear evidence of violations. The Pentagon ended its *Final Report* pointedly: "A strategy should be developed to respond to Iraqi violations of the law of war, to make clear that a price will be paid for such violations, and to deter future violators."<sup>45</sup> The United States did prepare a little-noted war crimes report in 1992, which was issued without fanfare by the UN in March 1993.<sup>46</sup> The net outcome is that Iraqi leaders might face trial if they show their faces in Western States—but not necessarily in, say, Amman, as in the case of Hussein Kamel in 1995-1996.<sup>47</sup>

The UN has gone down another path, which was also signposted in the laws of war: compensation. The United Nations Compensation Commission, set up under the terms of Security Council resolution 692 of 20 May 1991, is based on the principle that Iraq is internationally responsible for its unlawful acts, mainly under the *jus ad bellum*, but not excluding considerations of *jus in bello*.<sup>48</sup> By the January 1997 deadline, 2.6 million claims had been filed for a total of approximately U.S. \$250 billion. Initially, the only funds available to the Compensation Commission came from the partial liquidation of Iraq's assets abroad.<sup>49</sup> Then, under the "food for oil" program agreed with Iraq in a memorandum signed on 20 May 1996 and implemented in 1997, 30 percent of the proceeds from Iraqi oil sales went to the compensation fund. By the end of 1997 the UN Compensation Commission had paid out \$726 million in partial or complete payment of several hundred thousand claims.<sup>50</sup>

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The approach of seeking financial redress on the basis of State responsibility has some obvious advantages: matters can be settled in negotiations between States, sometimes fairly quickly. However, as the case of Iraq suggests, to hold a country as a whole liable for the costs of a war is intensely problematic. It is likely to involve a whole population in paying for offenses committed by a minority among them. The process of payment may drag out for decades and cause dangerous political resentments against those imposing the penalties. If submitting a few individuals to trial and punishment seems dangerously selective when a larger number may be responsible, punishing the whole population over a long period is open to the accusation of being indiscriminate.

*The Former Yugoslavia Since 1991.* The international community could scarcely have faced a more difficult challenge than seeing to the implementation and enforcement of the laws of war in the conflicts that raged in Croatia and Bosnia-Herzegovina in 1991-1995. These wars being about attempts at creating States out of ethnically complex republics, a principal purpose of certain belligerents was to achieve an object which itself necessarily involves violations of the laws of war: expulsions of populations and their replacement by other populations. Major States and international organizations had only limited involvement, and therefore only limited means of exerting pressure on the belligerents.

From early on, outside bodies, including particularly the UN Security Council, asserted the applicability of rules governing international armed conflict and pressed belligerents to comply with their obligations under humanitarian law.<sup>51</sup> This pattern of activity constituted a moral escalator on which entreaties had to be followed by action of some kind. Thus the London Conference on the former Yugoslavia of 26-27 August 1992—a joint EC and UN initiative—decided to “take all possible legal action to bring to account those responsible for committing or ordering grave breaches of international humanitarian law.” Security Council Resolution 780 of 6 October 1992 asked the Secretary-General to establish an impartial Commission of Experts to examine evidence of grave breaches of international humanitarian law. Then in decisions of February and May 1993 the Council set up the International Tribunal for the Former Yugoslavia.

The process was influenced by the political and moral pressure, strong in many countries, to do *something* about Yugoslavia, and by lack of agreement as to what else could be done. At that time in 1993 the international community was conspicuously unable to agree on any major intervention or other decisive action, and the Tribunal was one of the few options left. The pressure to

establish it was reinforced by the fact that the local States and non-State entities could not be trusted to put their criminals on trial; indeed in some cases they were headed by criminals.

The Tribunal, under the guidance of Judge Antonio Cassese as President, made significant progress in establishing itself and embarking on its difficult task. Particular care was given to drawing up Rules of Procedure and Evidence, dealing as they do with sensitive matters on which national systems offer very different models. The first contested trial, that of Duško Tadić, a Bosnian Serb, started in The Hague in May 1996. On 7 May 1997 he was found guilty of crimes against humanity (on six counts) and of violations of the laws of war (on five counts). On 14 July 1997 he was sentenced to imprisonment for twenty years. An appeal is pending. Tadić was not a remotely senior figure in the Bosnian Serb hierarchy; the case confirmed that there is bound to be an element of happenstance as to who can actually be brought to The Hague for trial.

It was obvious from the start that achievement of the goals for which the Tribunal was established might be blocked by several factors, including: (1) the probable need, in efforts to end the war, to deal politically with the very people who might be wanted for war crimes; (2) the difficulty of getting suspects arrested and brought to The Hague; and (3) the difficulty of getting witnesses to give evidence and of ensuring their safety both before and after. Thus, the Tribunal could only hope to operate effectively if there were political changes in the region favorable to its operation or if sufficient pressure were exerted on the States and other political entities in the region to induce them to cooperate.

In 1993 the Security Council had sought to justify the setting up of the Tribunal largely in terms of its short and medium-term effects, in relation to the ongoing conflict and the restoration of peace:

[T]he establishment of an international tribunal would bring about the achievement of the aim of putting an end to such crimes and of taking effective measures to bring to justice the persons responsible for them, and would contribute to the restoration and maintenance of peace.<sup>52</sup>

These arguments are serious. In particular, the argument that peace requires that justice be done contains persuasive elements. If all Serbs, or Croats, are deemed equally guilty in an undifferentiated way, that is a recipe for unending conflict. Attaching guilt to individuals can help lay the foundations for reconciliation and political reconstruction. However, there is reason to doubt whether the existence of the International Criminal Tribunal achieved the first

aim outlined by the Security Council, namely, the ending of such crimes during the war; also, the contribution of the Tribunal to the second aim, the restoration of peace, has proved problematical.

A major question raised sharply by events in Yugoslavia is: should UN peacekeeping forces gather information about war crimes and arrest suspects? A similar question arose for the personnel of the Office of the High Commissioner for Refugees (UNHCR) and other agencies, for UN Human Rights Action Teams, and for European Union monitors.<sup>53</sup> In the case of UNPROFOR (the UN peacekeeping force that witnessed many atrocities in Croatia and in Bosnia), insofar as a clear answer emerged, it appears to have been that information on violations may be recorded and passed on, including by some national contingents through their own national authorities. However, it was not a formal part of the UNPROFOR mandate to arrest suspected war criminals and hand them over for possible trial. Sometimes UN peacekeepers were passive onlookers at atrocities. This was particularly so at Srebrenica at the time of its capture by Bosnian Serb forces in July 1995. There was ample evidence that UNPROFOR in general, and the Dutch forces who had the misfortune to be in place at the time, knew of atrocities committed against Muslim men and did little. There have also been press suggestions that the governments of Britain, the United States, and the Netherlands sought to play down the massacre.<sup>54</sup>

One means of dealing with violations of the laws of war in the former Yugoslavia was the threat and use of force by NATO in conjunction with the UN. Several NATO military operations were specifically justified as responses to attacks on civilians, including the two major attacks on the market place in Sarajevo: the first such attack, on 5 February 1994, led to the creation of the Sarajevo exclusion zone; the second, on 28 August 1995, led to NATO's bombing campaign, Operation DELIBERATE FORCE. This NATO campaign was also influenced crucially by the Srebrenica massacre of July 1995, which strongly increased the pressure on Western governments to take effective action. The bombing appears to have played a part in inducing the Bosnian Serbs to accept peace terms they had earlier rejected. Operation DELIBERATE FORCE, NATO's first major application of force, has not been much discussed as a case of responding to violations of the laws of war, but in large measure it was exactly that.

The Dayton Accords, concluded on 20-21 November 1995, appear to ensure in numerous provisions that peace is not bought at the price of forgetting war crimes. The General Framework Agreement mentions "the obligation of all Parties to cooperate in the investigation and prosecution of war

crimes and other violations of international humanitarian law."<sup>55</sup> The military agreement requires the parties to "cooperate fully" with the International Tribunal.<sup>56</sup> The constitution of Bosnia and Herzegovina specifies that "no person who is under indictment by the Tribunal and who has failed to comply with an order to appear before the Tribunal, may stand as a candidate or hold any appointive, elective or other public office in the territory of Bosnia and Herzegovina."<sup>57</sup> The UN International Police Task Force (IPTF) established under Dayton has a responsibility to provide information to the International Tribunal.<sup>58</sup>

After the Dayton Accords were signed in Paris, implementation of the laws of war continued to be problematical in former Yugoslavia. There was a campaign, not very effective except in the Serb world and in some countries particularly sympathetic to Serbia, to cast doubt on the legitimacy and impartiality of the Tribunal. Serbs in particular seized on various happenings as supposed evidence of the bad faith of the Tribunal. Antonio Cassese, President of the Tribunal, at least twice informed the UN Security Council of the refusal of the Republika Srpska and the Federal Republic of Yugoslavia (Serbia and Montenegro) to cooperate with the Tribunal.<sup>59</sup> The Federal Republic of Yugoslavia did permit the Tribunal to establish an office in Belgrade, and by 1997 was offering it some very limited cooperation. In 1997 Croatia handed over a few suspects for trial.

Since Dayton, the main problems of implementation of legal norms have concerned attempts to secure return of refugees (attempts which have had very little success) and efforts to get those indicted of war crimes arrested. In 1995 and 1996 there was a succession of contradictory statements from spokesmen for the NATO-led Implementation Force (IFOR) as to whether it was or was not part of the force's duty to search for and arrest suspected war criminals, a question touched upon, but not answered unambiguously, in the UN Security Council resolution on IFOR of December 1995.<sup>60</sup> International arrest warrants for Radovan Karadžić and Ratko Mladić were issued by the Tribunal on 11 July 1996, pointedly addressed to "all States and to the Implementation Force (IFOR)." In summer 1997 two other suspects were arrested by international forces in former Yugoslavia: one by UNTAES (United Nations Transitional Administration for Eastern Slavonia) on 27 June, and one by British troops in the Stabilization Force (SFOR), which was the continuation of IFOR, on 10 July. At the time of the latter arrest, another suspect was shot dead. Three more indictees were arrested by SFOR in December 1997 and January 1998.

The Tribunal may in the long run have some part in the restoration of battered norms. In this respect its impact may be general as much as in former

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Yugoslavia. It could have an important educational and moral role, and the fact that its proceedings are being televised could reinforce that. The Tribunal merits support, but at the same time there is a need for understanding of the inherent difficulties of the tasks with which it is entrusted.

*The International Tribunal for Rwanda.* The acts of genocide in Rwanda in the first half of 1994 required a response from the UN Security Council. It failed to secure the cooperation of States to take effective action to stop the killings, but in November 1994 it took steps to establish the International Tribunal for Rwanda.<sup>61</sup> It too was established against a background of a failure of the international community to do anything more decisive. Nonetheless, this was the first time that an international criminal tribunal had been established in respect of an essentially non-international situation. The adoption by the UN Security Council of the Statute for this tribunal (which, in contrast to the tribunal on Yugoslavia, is predicated on the assumption that the conflict in Rwanda is non-international) provides some legal reinforcement to the claim that failure to observe certain basic humanitarian rules is an international offense even in civil wars. The government of Rwanda, despite reservations and difficulties, is offering some collaboration with the Tribunal, which is located in Arusha in Tanzania. The first trials began in 1997, but the tribunal has been beset by difficulties. As with the Yugoslav Tribunal, only a few indictees have been brought into custody. The organization of the Tribunal was severely criticized in a UN report in February 1997: a second report one year later, while noting significant improvements, also pointed to remaining weaknesses. The continuing bitter conflicts in the Great Lakes region, including Hutu-Tutsi killings within Rwanda, do not suggest that the Tribunal has yet had a significant effect in reducing the horrors.

### Twelve General Issues and Conclusions

In 1993 Sir Frank Berman, Legal Adviser to the UK Foreign and Commonwealth Office, wrote in a useful study of the problems of compliance: "It seems to many that the problem is not to discover what the law is, or how to apply it to the particular case, or even whether the existing rule is 'satisfactory' or not, but rather how to secure or compel compliance with the law at all."<sup>62</sup> If this diagnosis is accepted, it becomes necessary to put forward some thoughts about why the implementation problem is so difficult, how implementation works on the occasions when it does, and what the results have been, or may be in the future, of new efforts—through the UN and international criminal

tribunals—to overcome previous problems of implementation. The twelve points below attempt to draw some lessons from the hesitant and incomplete transition from a largely State-based system of implementation to one which also encompasses a wide range of UN-based elements. Their underlying theme is that implementation of the laws of war is not only a narrow humanitarian/legal matter, but is also a key aspect of the conduct of international relations and the management of national and international security policies.

*First*, there are historical errors and political dangers in a picture of “international humanitarian law” as coming out of Geneva, as a gospel that needs merely to be disseminated and applied in the rest of the world, or as a body of law that can progressively bring the use of force under control. Such perceptions of the law may have contributed to some of its disastrous failures in the 1980s and 1990s. The term “laws of war” is preferable to “international humanitarian law.” There is a need to place more emphasis on the idea that this body of law is intensely practical—that it represents, at least in part, a set of professional military standards and bargains among States; that its origins are as much military as diplomatic; and that its implementation can have consequences which are for the most part compatible with the interests of those applying it.

*Second*, some of the formal provisions in treaties on the laws of war for securing compliance with their terms have not worked well. Cases in point are the provisions for Protecting Powers (which have been little used) and the establishment of the International Fact-Finding Commission (used not at all). As was envisaged in some treaties, trials, whether before national or international tribunals, are an important means of implementing the laws of war. However, they are by no means the only such means, and attention should not be centered exclusively on this form of enforcement. The near-exclusive preoccupation of lawyers with major international trials reduces the numerous strands in the rope of implementation to one single strand, which is liable to break under the strain. The two international tribunals established in respect of former Yugoslavia and Rwanda may yet have a deterrent impact, but they have experienced difficulties, and remain crucially dependent on the cooperation of States. They have not replaced national trials of various kinds, which have continued in parallel with the two international tribunals.

*Third*, some other formal provisions regarding implementation have worked better, especially those providing for assistance by the ICRC. However, the ICRC’s role is necessarily a limited one owing to requirements of confidentiality, impartiality, and neutrality, and it can do little or nothing to assist political, judicial, and military responses to violations.

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*Fourth*, some formal and informal procedures, and methods of inducing compliance and responding to violations, have developed that were only foreseen to a limited extent in earlier treaties. Many such developments have been assisted by extensive media coverage of crises and conflicts involving laws of war issues.

In particular, and *fifth*, actions by international organizations, coalitions, and alliances have become an increasingly significant factor in the implementation process. Since the 1980s the United Nations (especially the Security Council) has acquired a key role in a wide range of attempts to secure observance and enforcement of the laws of war. This role, still in its infancy, has run into many difficulties, but it offers certain advantages over a State-based system of implementation.

*Sixth*, several UN-authorized military interventions have had as part of their formal justification the persistence of violations of humanitarian law in the country concerned. There are strong and legitimate worries, particularly in some postcolonial States, that the increased diplomatic attention to the implementation of international humanitarian standards could have the unintended effect of providing a basis for external intervention, and even a new form of colonialism.

In some countries and regions, *seventh*, there is a growing tendency for individuals to bring cases, often based on human rights law but in which the law of armed conflict may also be relevant, before either national or international courts and institutions.

Relatedly, and *eighth*, the idea of an International Criminal Court, as a main means of securing implementation of the laws of war as well as of certain other international rules, is making progress at the UN. However, its establishment and operation depend on State compliance. For better or for worse, and whatever their formal positions on the proposal, some States can be expected in one way or another to seek to delay action on the proposed court and to circumscribe its powers of investigation, arrest, and prosecution, in order to prevent their own military or political leaders from being exposed to the risk of trial. Further, there is a risk, to which the ICRC has drawn attention, that States might use the existence of such a court as an excuse for not carrying out their existing obligations to ensure that all who commit grave breaches are put on trial, regardless of nationality.<sup>63</sup>

Indeed, *ninth*, and again for better or for worse, we live in a world of States. In most cases the laws of war, like other parts of international law, are implemented through national mechanisms of various kinds: deliberations in government departments, national laws, manuals of military law, rules of

engagement, government-established commissions of inquiry, national courts, courts-martial, and administrative controls over military institutions and over careers. The State-based system of implementation also encompasses the practice of engaging in reprisals against States perceived to be violating the law. In one way or another, the continuing if diminished relevance of reprisals has been emphasized by a number of States in their reservations to laws of war treaties.

*Tenth*, the State-based system of implementation suffers from certain built-in flaws: States are reluctant to take firm action against their own nationals, and their tendency to rely on military self-help against foreign States perceived as violating fundamental norms can degenerate into uncontrolled war. Thus, the search for improved systems of implementation (whether to supplement or replace those of States) is bound to continue in the twenty-first century.

Despite (*eleventh*) the many ongoing attempts to strengthen the means of formal international legal redress against major war crimes committed by a State, there remains a strong case for viewing the laws of war as having thus far consisted principally of a set of internationally approved national professional military standards, backed up by national military and civil legal systems, rather than as a system of international criminal justice. As in the 1990-1991 Gulf conflict, there can be powerful reasons for a State or coalition to apply the laws of war even in the absence of reciprocity by the adversary.

*Twelfth*, and finally, a critical intellectual weakness which has seriously affected understanding and implementation of the laws of war is the almost complete divorce between two important schools of thought about security matters in the post-1945 period. On the one hand, theorists of deterrence (a concept not limited to its most extreme form, nuclear deterrence) have shown little interest in the laws of war. On the other hand, proponents of international humanitarian law have had little to say about deterrence of any kind, nuclear or conventional. In an age in which major powers have become more deeply involved than ever in implementation of the laws of war but do not seem to be doing particularly well at it, we can no longer afford the luxury of this self-inflicted weakness. The separation between deterrence and the laws of war will not disappear entirely, but it could be reduced if there were more open acceptance that even rules of restraint need to be backed up with threats of severe consequences; that the tribunals established in respect of former Yugoslavia and Rwanda are envisaged as having a deterrent purpose; that deterring violations of humanitarian norms is already a function of much international political and military action; that effective international use of

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force in an alliance or UN context requires common understandings of the legal rules on how force is employed; and that public support for a military action may depend on confidence that it not only has sound strategic and political aims, but also is in conformity with the international law governing the conduct of armed conflict.

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### Notes

A version of this article is also appearing in two parts in 29 SECURITY DIALOGUE, no. 2 (June 1998), and no. 3 (Sept. 1998).

1. Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and other Devices (Protocol II), as amended, May 3, 1996, arts. 1 (2), 3–12, 35 I.L.M. 1209 (1996). For more details, see *infra*, text at n. 34.

2. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, opened for signature Dec. 3, 1997, art. 1, 36 I.L.M. 1507 (1997) [hereinafter Mine Convention]. (For more details, see *infra*, text at n. 35.)

3. See, e.g., Draper, *Implementation of International Law in Armed Conflicts*, INTL AFF., Jan. 1972, at 46–59. This useful survey looks particularly at three mechanisms—the Protecting Power system, reprisals, and penal processes.

4. Two English-language edited collections taking this broad historical approach to the subject are RESTRAINTS ON WAR: STUDIES IN THE LIMITATION OF ARMED CONFLICT (Howard ed., 1979); and THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD (Howard et al. eds., 1994).

5. BEST, WAR AND LAW SINCE 1945 (1994).

6. The present survey is a distillation, substantially updated, of my contribution to a study commissioned by the European Commission Humanitarian Office. That two-volume study looked at the role, and problems, of law in humanitarian crises generally, including problems of implementing existing rules of “international humanitarian law.” See Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, in I EUROPEAN COMMISSION, LAW IN HUMANITARIAN CRISES (How Can International Humanitarian Law be Made Effective in Armed Conflicts?) 13 (1995). The same paper was also published at 6 DUKE J. COMP. & INT’L L. 11 (1995).

7. Federal Ministry of Defence of the Federal Republic of Germany, HUMANITARIAN LAW IN ARMED CONFLICTS: MANUAL, para. 1202 (August 1992) [hereinafter GERMAN MANUAL]. This is the English translation of ZDv 15/2 HUMANITÄRES VÖLKERRECHT IN BEWAFFNETEN KONFLIKTEN: HANDBUCH, issued in August 1992. Rüdiger Wolfrum discusses the same thirteen factors in his chapter *Enforcement of International Humanitarian Law*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 517 (Fleck ed., 1995). In his survey, Wolfrum does briefly refer to the possibility of military intervention by States not party to the original conflict; and also to certain implementation roles of the UN (pp. 526 and 546-7).

8. The full texts of the Hague Conventions and other pre-1989 laws of war agreements cited in this paper may be found in THE LAWS OF ARMED CONFLICTS (Schindler & Toman eds., 3d ed. 1988); and DOCUMENTS ON THE LAWS OF WAR (Roberts & Guelff eds., 2d ed. 1989).

9. From an account by the President, Erich Kussbach, *The International Humanitarian Fact-Finding Commission*, 43 INT’L & COMP. L.Q. 185 (1994).

10. The circumstances in which the ICRC was prepared to make public statements about violations was outlined in *Action by the International Committee of the Red Cross in the Event of Breaches of International Humanitarian Law*, INT'L REV. RED CROSS, March–April 1981, at 76.

11. For such expositions of Article 1, see Condorelli and Boisson de Chazournes, *Quelques remarques à propos de l'obligation des Etats de 'respecter et faire respecter' le droit internationale humanitaire 'en toutes circonstances'*, in *ÉTUDES ET ESSAIS SUR LE DROIT INTERNATIONAL HUMANITAIRE ET SUR LES PRINCIPES DE LA CROIX-ROUGE* 17 (Swinarski ed., 1984); and Gasser, *Ensuring Respect for the Geneva Conventions and Protocols: The Role of Third States and the United Nations*, in *EFFECTING COMPLIANCE* 24 (Fox & Meyer eds., 1993). Dr. Gasser, then Legal Adviser, ICRC, was writing in a personal capacity.

12. I owe this point to Prof. Frits Kalshoven, who kindly made available the preliminary results of his careful researches on the drafting history of common Article 1.

13. See Rüdiger Wolfrum's excellent chapter, *The Decentralized Prosecution of International Offences Through National Courts*, in *WAR CRIMES IN INTERNATIONAL LAW* 233 (Dinstein & Tabory eds., 1996).

14. For an account of the trial of 44 former Dergue members which began in Addis Ababa on 13 December 1994, see Ryle, *An African Nuremberg*, THE NEW YORKER, October 2, 1995, at 50. The charges included genocide and crimes against humanity. On 13 February 1997, a further 5,198 individuals, of whom 2,246 were already in detention, were charged with genocide, war crimes and other offenses. THE GUARDIAN, February 14, 1997, at 17.

15. Some of the evidence for this proposition is in Roberts, *The Applicability of Human Rights Law During Military Occupations*, 13 REV. OF INT'L STUD., January 1987, at 39; and Cerna, *Human Rights in Armed Conflict: Implementation of International Humanitarian Law Norms by Regional Intergovernmental Human Rights Bodies*, IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW (Kalshoven & Sandoz eds., 1989).

16. For the facts of the case, see 38 Y.B. OF THE EUR. CONV. ON HUM. RTS. (1997), especially the judgment at 308–14. On the UK government reaction, see, e.g., the main front-page story, *Tory Anger as European Court Condemns Gibraltar Killings*, THE INDEPENDENT, Sept. 28, 1995, at 1.

17. Commissions of inquiry are, for example, entirely neglected in NATIONAL IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW: PROCEEDINGS OF AN INTERNATIONAL COLLOQUIUM HELD AT BAD HOMBURG, June 17–19, 1988 (Bothe ed., 1990).

18. Report of the Committee of Privy Counsellors Appointed to Consider Authorized Procedures for the Interrogation of Persons Suspected of Terrorism, Cmnd. 4901, at 1–2 & 11–23 (H.M.S.O., 1972).

19. Kahan et al., FINAL REPORT OF THE COMMISSION OF INQUIRY INTO THE EVENTS AT THE REFUGEE CAMPS IN BEIRUT (Government of Israel, 1983), reprinted in 22 I.L.M. 473 (1983).

20. The Canadian Commission of Inquiry reported in June 1997 after being refused a request to extend its hearings. See DISHONoured LEGACY: THE LESSONS OF THE SOMALIA AFFAIR, Report of the Commission of Inquiry into the Deployment of Canadian Forces in Somalia (1997). See also the huge compilation, INFORMATION LEGACY: A COMPENDIUM OF SOURCE MATERIAL FROM THE COMMISSION OF INQUIRY INTO THE DEPLOYMENT OF CANADIAN FORCES TO SOMALIA, CD-ROM (Government of Canada, 1997). This source contains the Report of the Commission of Inquiry, Research Studies, Hearings Transcripts, 11,500 Evidentiary Exhibits, Transcripts of the courts-martial, and other materials.

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21. For a discussion of the dilemmas involved, see Pion-Berlin, *To Prosecute or to Pardon? Human Rights Decisions in the Latin American Southern Cone*, 16 HUM. RTS. Q. 105 (1994), at 130. On truth commissions, see also Hayner, *Fifteen Truth Commissions, 1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597 (1994); Ensalaco, *Truth Commissions for Chile and El Salvador: A Report and Assessment*, 16 HUM. RTS. Q. 656 (1994).

22. Kuttab, *Avenues Open for Defence of Human Rights in the Israeli-Occupied Territories*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES: TWO DECADES OF ISRAELI OCCUPATION OF THE WEST BANK AND GAZA STRIP 501 (Playfair ed., 1992).

23. For a skeptical survey, see KALSHOVEN, BELLIGERENT REPRISALS (1971). For the definition of reprisals I have also drawn on the 1992 GERMAN MANUAL, *supra* note 7, para. 476; and on the slightly revised version of the same paragraph in Fleck, *supra* note 7, at 204.

24. A useful and judicious discussion of the many factors involved in non-use of gas in the Second World War is SPIERS, CHEMICAL WARFARE 62 (1986). He also stresses the attitudes of political leaders, and the non-assimilation of gas weapons by military commanders.

25. Explored further in Adam Roberts, *The Laws of War in the 1990-91 Gulf Conflict*, INT'L SEC., Winter 1993/94, at 134, 163-4.

26. Between 1972 and 1997 eleven states withdrew their reservations to the 1925 Geneva Protocol, presumably because of their apparent inconsistency with the 1972 Biological Weapons Convention or the 1993 Chemical Weapons Convention: Ireland (1972); Australia (1986); New Zealand (1989); Czechoslovakia (1990); Romania, Chile, Bulgaria (1991); the Netherlands (1995); South Africa, France (1996); and Belgium (1997). Source: Communication to the author from French Foreign Ministry, acting as Depositary, September 1997.

27. Original English texts of the partial withdrawals of reservations to the 1925 Geneva Protocol by Canada (August 1991) and the United Kingdom (November 1991) supplied by the Department of Foreign Affairs and Trade in Ottawa, and the Foreign and Commonwealth Office in London, September and December 1997.

28. Explicit prohibitions on reprisals are contained in Protocol Additional to the Geneva Conventions of 12 August 1949, and Relative to the Protection of Victims of International Armed Conflicts, June 10, 1977, arts. 51(6), 52(1), 53(c), 54(4), 55(2), & 56(4), 16 I.L.M. 1391 (1977), 72 AM. J. INT'L L. 457 (1978). For a succinct discussion of the background, see KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 102-4 (1987).

29. Text of Italy's statements of interpretation (made in 1986) and of Germany's declarations (1991) supplied to the author by the Swiss Federal Department for Foreign Affairs, July-Sept. 1988 and July 1997. The Italian statement can also be found in Schindler & Toman, *supra* note 8, at 712-13; and Roberts & Guelff, *supra* note 8, at 465. Text of UK statement at ratification in 1998 supplied by Foreign and Commonwealth Office, London, Feb. 1998.

30. See esp. Schwebel, *The Roles of the Security Council and the International Court of Justice in the Application of International Humanitarian Law*, 27 N.Y.U. J. INT'L L. (1995); and THE UNITED NATIONS AND INTERNATIONAL HUMANITARIAN LAW: ACTES DU COLLOQUE INTERNATIONAL A L'OCCASION DU CINQUANTIÈME ANNIVERSAIRE DE L' ONU, (Cordorelli et al. eds., 1996).

31. Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the U.N. General Assembly, Dec. 9, 1948, art. VIII, 78 U.N.T.S. 277, 45 AM. J. INT'L L. (Supp.) 7 (1951); Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques, Dec. 10, 1976, art. V, 31 U.S.T. 333, 1108 U.N.T.S. 152; Protocol I, *supra* note 28, art. 89.

32. The Chemical Weapons Convention [Convention on the Prohibition of the Development, Production and Stockpiling of Chemical Weapons and on Their Destruction, 32 I.L.M. 800 (1993)] entered into force on 29 April 1997, six months after the 65th ratification. As of 31 December 1997, 106 States (including all five permanent members of the Security Council) had become parties. UN World Wide Web site accessed on Jan. 12, 1998, <http://www.un.org>.

33. Convention on the Safety of United Nations and Associated Personnel, arts. 1(b) & 7(3), approved by U.N.G.A. Res. 49/59, Dec. 9, 1994, U.N. Doc. A/RES/49/59, Feb. 17, 1995, 34 I.L.M. 482 (1995). On the UN role in implementation, see also Article 12. The Convention will enter into force thirty days after the twenty-second instrument of ratification, accession, etc. has been received by the Depositary. As of 31 December 1997, sixteen States had notified consent to be bound. UN World Wide Web site, *supra* note 32.

34. Amended Protocol II, Conventional Weapons Convention, *supra* note 1. This protocol also seeks to establish special protection for a wide range of ICRC and other humanitarian missions. It will enter into force six months after the twentieth acceptance (i.e., notification of consent to be bound by it) has been received by the Depositary. As of 31 December 1997, twelve States had notified consent to be bound. UN World Wide Web site, *supra* note 32.

35. Mine Convention, *supra* note 2. The Convention was signed by over a hundred States and, as of 31 December 1997, three States had ratified, etc.

36. Genocide Convention, *supra* note 31, art. IX. This provides, remarkably, that disputes as to the interpretation, application, or fulfillment of the Convention, including those relating to the responsibility of a State for genocide, shall be submitted to the ICJ at the request of any party to a dispute. Many States, on accession or ratification, made reservations about this article's granting of jurisdiction to the ICJ.

37. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, Annexed Regulations, arts. 4(2) & 14(7), 249 U.N.T.S. 240. Here, the ICJ's role is modest: to appoint a Commissioner-General for Cultural Property, or a chief arbitrator, in the event that the parties concerned are not able to agree upon a choice for either of these posts.

38. Corfu Channel (U.K. v. Alb.), 1947-8 I.C.J. 15; 1949 I.C.J. 4, 244.

39. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

40. Legality of the Threat or Use of Nuclear Weapons (Advisory Op.), 1996 I.C.J. 4 (July 8), 35 I.L.M. 809 (1996).

41. United States Diplomatic and Consular Staff in Teheran (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

42. Frontier Dispute (Burkina Faso/Mali), 1986 I.C.J. 554 (Dec. 22).

43. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Op.), 1971 I.C.J. 16 (June 21).

44. The Commitment Against Impunity was Section III of the Global Human Rights Accord of 29 March 1994. This accord was the second of thirteen between January 1994 and December 1996 that collectively constituted the Guatemala peace accords. On 18 December 1996, the Guatemalan Congress passed a sweeping amnesty law exempting soldiers and guerrillas from prosecution for killings, kidnappings, and acts of torture committed during the conflict.

45. DEP'T OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS, app. 0, at 36 (1992), *reprinted in* 31 I.L.M. 612 (1992).

46. Report on Iraqi War Crimes (Desert Shield/Desert Storm) (Unclassified Version) 6-7, 11-19 (prepared under the auspices of the Secretary of the Army, January 8, 1992). This

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document was submitted to the UN fourteen months later, and circulated the same day as UN Doc. S/25441, March 19, 1993.

47. Lt. Gen. Hussein Kamel, a senior Iraqi leader implicated as a war criminal, defected to Amman in August 1995. There were not many calls for him to be tried for war crimes. He returned to Iraq in February 1996 and was murdered, presumably on account of his defection.

48. On 26 June 1992, the UNCC Governing Council decided that members of the Coalition Armed forces who had been prisoners of war, and suffered mistreatment in violation of international humanitarian law, were eligible for compensation. On 10 November 1994, the Governing Council decided in favor of compensation in cases in this category. UN Docs. S/AC.26/1992/11 of June 26, 1992 and S/AC.26/1994/4 of Dec. 15, 1994, at 9–10. To date, about 10 individuals in this category have each received an award of \$2,500.

49. For a useful early discussion with much reference to past cases of reparations, see Bederman, *The United Nations Compensation Commission and the Tradition of International Claims Settlement*, 27 N.Y.U. J. INT'L L. & POL. 1 (1994). See also Greenwood, *State Responsibility and Civil Liability for Environmental Damage Caused by Military Operations*, in PROTECTION OF THE ENVIRONMENT DURING ARMED CONFLICT (69 International Law Studies, Grunawalt et al. eds., 1996), esp. pp. 404–10.

50. Information supplied by United Nations Compensation Commission, Geneva, in a letter to the author, Dec. 8, 1997; supplemented by phone and fax, Jan. 12, 1998.

51. For example, S.C. Res. 764 of July 13, 1992, and 771 of Aug. 13, 1992.

52. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, May 3, 1993, para. 26, *reprinted in* 32 I.L.M. 1159 (1993).

53. Following the Croatian government's crushing of the rebel Serb Republic of Krajina in August 1995, European Union monitors compiled a report accusing the Croat government of being "largely responsible" for a campaign of atrocities carried out against Serb civilians in the Krajina. Human rights abuses by Croatian soldiers were also described in a report by a UN Human Rights Action Team. Both reports were leaked to The Guardian newspaper. Borger, *EU Accuses Croatia of Atrocities*, THE GUARDIAN, Sept. 30, 1995, at 10.

54. Sweeney, *UN Cover-up of Srebrenica Massacre*, THE OBSERVER, Sept. 10, 1995, at 19.

55. General Framework Agreement for Peace in Bosnia and Herzegovina, initialed at Dayton, Nov. 20, 1995, art. IX, U.N. Doc. S/1995/999, annex, 35 I.L.M. 75 (1996).

56. *Id.*, annex 1-A, Agreement on the Military Aspects of the Peace Settlement, art. X; and annex 6, Agreement on Human Rights, art. XIII(4).

57. *Id.*, annex 4, Constitution of Bosnia and Herzegovina, art. IX(1).

58. *Id.*, annex 11, Agreement on International Police Task Force, art. VI.

59. Letters from Antonio Cassese to UN Security Council, May 22 and July 11, 1996.

60. S.C. Res. 1031, Dec. 15, 1995, at paras. 4, 5, 14 and 15.

61. S.C. Res. 955, Nov. 8, 1994, adopting the Statute of the International Tribunal for Rwanda. Rwanda, a non-permanent member of the Security Council, was the only country to vote against the resolution. China abstained. The other thirteen members supported the resolution.

62. Berman, *Preface*, in Fox & Meyer, *supra* note 11, at xii.

63. Statement of the ICRC before the Preparatory Committee for the Establishment of an International Criminal Court, United Nations, New York, Aug. 4–15, 1997, at 2.