

INFOCUS - THE COMPANION TO INTERNATIONAL HUMANITARIAN LAW. A PRACTICAL APPROACH TO THE DISSEMINATION OF INTERNATIONAL HUMANITARIAN LAW



The Companion to International Humanitarian Law, edited by Dražan Djukić and Niccolò Pons, aims to contribute to the debate concerning the practical dissemination and the application of International Humanitarian Law (IHL). With its seven essays and 265 substantive entries written by 98 experts in the humanitarian field, the volume draws attention to the challenges and mechanisms enhancing IHL implementation by practitioners. This concept note explains the importance of the proper dissemination of IHL for the purpose of strengthening its implementation and contextualizes the edited volume in this framework, by briefly describing its contents.



MINUSMA Peacekeepers, during Operation Military 'FRELANA' to protect civilians and their property. This operation took place from 11 to 12 July 2017 in the south-west of the city of Gao in Mali, about 150 kilometers on the national road 16. This zone faces enormous insecurity. During this operation, the peacekeepers were able to discuss with the civilian population and have several important information in order to protect the civilian populations. Photo: MINUSMA / Harandane Dicko

Moving one-step backward, IHL is a set of international rules, which establish what is permissible and impermissible during international and non-international armed conflicts. According to the well-known jurisdictional decision by the Appeals Chamber of the Yugoslavia Tribunal in the Tadić case, “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”^[1] Armed conflicts are therefore extraordinary situations of violence that differ from internal disturbances and tensions, such as post-electoral violence or situations of unrest, to which only human rights law and domestic law apply.

The main purpose of IHL is therefore to strike a balance between two competing forces. The military necessity of each belligerent party to weaken the opponent's military capabilities, on the one hand, and the principle of humanity on the battlefield, on the other, whose aim is to limit the suffering of those who do not or no longer participate in the

hostilities. Considering that armed conflicts are, by their very nature, exceptional situations that affect greatly the life of people, and that a discrete field of law was specifically developed to tackle such situations, it is all the more important to ensure that IHL norms be actionable. In other words, they must be put in practice in the most effective way to the benefit of those involved in or otherwise affected by hostilities.

When it comes to transforming IHL norms into action, one can make a distinction between the applicability of norms and their application. The former refers to the quality of being relevant or appropriate to a given situation, while the latter concerns the action of putting something into operation. To put it with an example, the drafting and adoption of rules and their inclusion into a treaty banning certain weapons or methods of warfare are certainly applicable to armed conflict. Their application, however, will be contingent upon two distinct but equally necessary processes. First, the treaty must undergo ratification by the respective States Party and incorporation into their own national legal system (legislative application process). Second, the norms contained in the treaty, together with its procedures and mechanisms, must be disseminated to armed forces, military and civilian decision-makers, other individuals involved in the process of applying such rules, armed groups, as well as to the civilian population more generally (practical application process). Likewise, when international tribunals, such as the International Criminal Court, the ICTY or the ICTR deliver a decision that develops a new interpretation of IHL, or strengthen or change an existing one, a similar process of dissemination and operationalization must take place. Decisions and judgments of courts of law on matters of IHL have an impact that goes well beyond the one in the criminal proceedings to which they belong. The legal advisers working with national armies, the legislators, academics, organizations involved in IHL will duly incorporate such findings in a variety of ways to disseminate them and ensure their application. In practice, a new interpretation on an IHL aspect can affect military manuals, rules of engagement for military personnel, national laws, and they may be taken into account to devise new legal training programmes for soldiers, military personnel and non-State actors.

The process of dissemination and application of IHL norms exemplified above is not just reflective of best practices or reasonable expectations when it comes to determining what is lawful and unlawful in times of war. It is most notably enshrined in the customary obligation of States to disseminate IHL as widely as possible. According to Articles 47, 48, 127 and 144 common to the four Geneva Conventions of 1949:

“The High Contracting Parties undertake in time of peace as in time of war, to disseminate the text of the present Convention[s] as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the

entire population.”

The 1977 Additional Protocol I, applicable to international armed conflict, uses a similar wording in its Article 83, while Article 19 of Additional Protocol II, applicable to non-international armed conflict only, is less expansive yet clear: “[t]his Protocol shall be disseminated as widely as possible.” The common denominator of these provisions is that they establish a legal obligation to disseminate IHL across all four Geneva Conventions and their Additional Protocols, both in time of war and in time of peace. Moreover, the implementation of such obligation lies with all States as it has crystallized a norm of customary law.^[2] Its rationale is that “knowledge of the law is an essential condition for its effective implementation.”^[3]

Nevertheless, while IHL is a relatively simple, intuitive and dynamic field of law, it is not necessarily straightforward when it is brought into action. Certain concepts may appear clear on paper, but when applied to a concrete scenario, they might generate uncertainties, raise moral objections and draw blurred lines.^[4] This is why a more accessible, practical and interactive approach should be increasingly developed when bringing IHL from a normative level into action.

In this framework, the Companion to International Humanitarian Law discusses different mechanisms to foster the implementation of IHL. Etienne Kuster’s opening essay explains the challenges and opportunities of disseminating IHL through academia. Academic circles are a powerful forum to implement the obligation to disseminate IHL as they can directly intervene on future generations of decision-makers, on the one hand, and can already interact with today’s military and civilian personnel involved in armed conflict-related activities. In the second essay, Andrew Carswell and Jonathan Somer discuss ways of engaging State armed forces and non-State armed groups to increase respect for humanitarian rules on the battlefield. In accordance with its Geneva Conventions-based mandate, the ICRC engages with all parties to an armed conflict, whether they are State armed forces or non-State armed groups, concerning their IHL obligations. In particular, in non-international armed conflict where IHL is necessarily more rudimentary, engaging with all parties whether State authorities or armed groups, can enhance the range of rules applicable to the conflict. In fact, both parties can agree to voluntarily apply more protective provisions (borrowed from the legal framework applicable to international armed conflict) on condition of reciprocity, that is to say that the opposing party does the same. This mutual agreement as to an enhanced application of IHL goes to the ultimate benefit of civilians who do not or no longer take part in hostilities. In the next contribution, Azra Kuci and Jelena Plamenac give an insight on an underexplored area, that of legislative measures at the national and international level in the field of IHL. Law making is the primary mechanism leading to the correct application of IHL. At the same time, however, the legislative power can become a distortive tool when States incorporate

international provisions from treaties into their respective legislation by modifying the standards into a more favourable one for the State itself, for example by considering members of armed groups automatically as terrorists or by loosening the criteria to identify a military objective. This essay therefore highlights the dangerous distortions arising out of an opportunistic law-making process by States.

The subsequent set of pieces focus on how judicial and quasi-judicial bodies can affect IHL implementation. Robert Heinsch examines the advantages and challenges of the International Humanitarian Fact-Finding Commission envisaged in Article 90 of the 1977 Additional Protocol I. This body, which activated its mandate in 1991, was relied upon only recently for the first time in the context of the armed conflict in Eastern Ukraine. The author reflects on the reasons of States' reluctance around this body as well as on the perspectives for the revival of a theoretically very relevant tool to implement IHL. Théo Boutruche discusses the contribution of the various United Nations Commissions of Inquiry to the implementation and clarification of IHL. Nowadays, such commissions of inquiry or mechanisms are becoming increasingly popular^[5]

in lieu of establishing special tribunals, for the simple reason that there are not the right conditions within the United Nations Security Council to set up institutions akin to the ICTY and ICTR, seen in the 90s. As such, it is important to understand how these new types of institutions, which are often mandated to apply IHL, can contribute to its interpretation and dissemination. Finally, Damien Scalia and Marie-Laurence Hebert-Dolbec, on the one hand, and Alessandra Spadaro, on the other, scrutinize the role of the European Court for Human Rights (ECtHR) and of international criminal tribunals and courts in interpreting, developing and applying IHL. The ECtHR has increasingly applied IHL in its decisions in order to interpret the human rights obligations of States. In so doing, it has embarked in complex inter-disciplinary analysis as to the interaction between international human rights law and IHL on very controversial issues, primarily deprivation of liberty and conduct of hostilities. As to international criminal tribunals, it is readily understandable how important their dissemination role is, given their binding power to enforce verdicts and sentences for war crimes, which therefore contributes immensely to shaping the details of IHL.

The second and most unique part of the volume collects 265 alphabetical entries, from 1 to 6 pages long, covering the vast majority of IHL concepts and notions. The entries explain all major IHL treaties; the fundamental principles of IHL; the types of armed conflicts; the categories of protected persons and objects; the various aspects governing situations of occupation; war crimes with corresponding jurisprudence; aspects of conduct of hostilities; types of weapons, methods of warfare, always with a primary focus on IHL. In addition, the editors have chosen to insert entries dealing with concepts that either do not find direct foundation in IHL or are under-regulated, among many: refugees, stateless persons, drones, terrorists, transitional justice, economic warfare, animals, and environment.

Accordingly, this second part of the Companion to International Humanitarian Law seeks to provide those who use IHL daily, in their professional or personal capacity, with an accessible resource to quickly familiarize themselves with IHL issues, while being sufficiently comprehensive and thorough to allow more demanding users to conduct further research. By creating a link between the academic knowledge of experts and researchers in IHL and the practical and direct experience of those working in war zones, the volume represents an effective instrument for achieving the functional implementation of IHL.

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^[1] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY, Appeals Chamber, 2 October 1995, para. 70.

^[2] Rule 143 of the ICRC Customary IHL Study.

^[3] 2016 ICRC Commentary to Article 47 Geneva Convention I, para. 2750.

^[4] Think for example of the rules governing conduct of hostilities, specifically the right to target combatants and civilians taking direct part in hostilities without all precautions normally applicable in time of peace under international human rights law. Or, the right to deprive combatants of their liberty without a due process of law and until the end of hostilities, on the sole basis that combatants may be interned as prisoners of war to avoid that they re-join their

army and keep fighting.

[5] Such bodies take different names, mandate and structure and nowadays deal or have dealt with situations of armed conflict in Yemen, Myanmar, Burundi, Syria, the Occupied Palestinian Territories, South Sudan, Eritrea, Libya, Democratic People's Republic of Korea, the 2009 and 2014 Gaza conflict (see <https://www.ohchr.org/en/hrbodies/hrc/iicisyria/pages/independentinternationalcommission.aspx>).