Repression of Violations

By J.F. Thomson
Secretary, Human Rights Commission, Australia

Introduction

In this paper, for the purposes of this seminar, I take it that the greater part of international humanitarian law is contained in the four Geneva Conventions of 12 August 1949 and in Protocol I additional to those Conventions.[1]

The means of enforcement of international law have always been the subject of debate, both at the philosophical level,[2] and at the practical level.[3] Since it is impossible to put aside entirely the philosophical or jurisprudential aspect, because it has pervaded thinking on, and approaches to, finding pragmatic solutions, I shall try to sum it up, as briefly as possible.

Austin, it will be recalled, held that "international law" was not true law. While it resembled or was analogous to positive law, it lacked certain essential elements of positive law, and therefore amounted only to positive morality. There were several reasons for Austin's taking that view, but the one most relevant to the topic of this paper was the apparent absence of a means of compelling obedience to the rules of international law.[4] The reasoning underlying this conclusion need not be drawn out here. I should, however, call attention to Starke's proposition[5] that ". . . war used to be, in a sense, the ultimate sanction by which international law was enforced . . .", and remark only that, in the circumstances in which it becomes necessary for international humanitarian law to be enforced, that "ultimate sanction" will have been overtaken by the event of war itself.

In his short analysis of some of the problems raised by Austin, Professor Hart has proposed, in effect abandoning the question whether the definition of "law"

---

1. Other relevant treaties are the Geneva Protocol of 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare; and the 1954 Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict. The Hague Regulations annexed to Convention No IV of The Hague of 1907 respecting the Law and Customs of War on Land may also be said to be relevant, although there are views to the effect that Hague Law, which is concerned principally with the conduct of warfare between opposing armed forces, should be distinguished from Geneva Law, which is said to be principally concerned with humanitarian purposes (see Pictet, *Humanitarian Law and the Protection of War Victims*, (1975), 16–17, 33; and Baxter, "Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law" (1975) 16 Harvard Int Law J 1,2.
2. Austin J, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* (1965), Lectures I and IV.
3. Starke, JG, *An Introduction to International Law* (1977), 30 et seq.
4. Austin, op cit (Lecture I), 27, 28; (Lecture VI) 350 et seq; see also Lawrence, TJ, *Public International Law*, (1913).
5. Op cit, 31.
6. Austin, op cit, Introduction by Hart, HLA, xiii (emphasis added).

requires that a sanction be "annexed" to every law, that, instead, it should be "a defining characteristic of a *legal system* that it should provide for sanction"?

This is, indeed, what the system of international humanitarian law does, in two main ways. Before going into those ways in greater detail, I think it worth noting briefly certain other means, operating outside the international humanitarian law system, by which adherence to its principles may be brought about.

Extra-systemic means of enforcement

One such extra-systemic form of compulsion, described by Professor Röling as a "weak form of enforcement",[7] is the influence of public opinion — the "mobilization of shame".[8] A recent example of this was the wave of public outrage in the United States (and elsewhere) that led to the trial by the United States authorities of Lieutenant Calley. Of course, that trial was by the domestic or national court-martial system but, as Röling points out, every field of "international law relies heavily on national law".[9]

Associated with public opinion as a means of enforcement is the role of the press and other forms of the media. Again, it was media publicity given to violations that helped "mobilize the shame" of the American people which gave rise to the Calley trial.

An obvious difficulty is that, in time of war or other armed conflict, the capacity of the media to find out about serious violations is inhibited, both by the nature of the events and by the evident tendency of governments party to a conflict to keep secret any information contrary to their interests. In that respect, the capacity for influence of public opinion is to some degree weakened, but its potential as a factor in repressing breaches should not be too readily put to one side; and that potential would be enhanced and complemented by the operation of the International Fact Finding Commission provided for by Article 90 of Protocol I. Provision for that Commission is one of the ways of enforcement built in to the system of international humanitarian law as manifest in the Geneva Conventions and Additional Protocol I.

Means of enforcement operating within the system of international humanitarian law

1. *International Fact-Finding Commission*

During the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (the Conference) held in Geneva from 1974–1977, proposals were put forward by Denmark, Sweden, Norway and New Zealand for the establishment of a permanent International Enquiry Commission, and by other States for somewhat comparable bodies with varying degrees of power to investigate alleged violations of the Conventions and Protocol I.[10]

---

7. Röling BVA, "Aspects of the Criminal Responsibility for Violations of the Laws of War", in Cassese, A (ed), *The New Humanitarian Law of Armed Conflict* (1979), 199.
8. Ibid, 200.
9. Ibid, 201.
10. See Conf doc CDDH/SR45, 309; and generally 309 et seq.

The USA was, in general terms, in favour of establishing such a commission. The USSR and other Soviet bloc countries were, on the other hand, opposed to the proposal at the outset, principally on the basis that the operations of such a commission as that proposed would affect national sovereignty.

In 1976 Suckow was pessimistic about the prospects of the proposals, saying that "a meaningful compromise (would) require the virtues of a Solomon".[11]

In the event, the compromise reached provides for a body which has no power of legal enforcement. Article 90 contemplates that an International Fact-Finding Commission (IFFC) will be set up when no fewer than 20 Parties have declared their acceptance of the competence of the Commission to enquire into allegations by another party with respect to grave breaches or other serious violations of the Conventions and Protocol I. The Commission, in other cases, would be able to institute an enquiry only with the consent of all Parties concerned.

As envisaged by Article 90, the IFFC, once established, would be competent only to enquire into facts. (In this respect, the IFFC is akin to the category of International Commissions of Inquiry provided for by Part III of the Hague Convention of 1907 for the Pacific Settlement of International Disputes. As interpreted by Bar-Yaacov,[12] those commissions are confined to a finding of facts in their reports, which may not have the character of an arbitral award; the parties, moreover, "have complete freedom as to the effect to be given to a finding".)

Bothe points out that the IFFC has not even power to issue a formal judgment on whether the facts constitute a grave breach or serious violation (the competence of the Commission does not extend to breaches other than grave breaches or other serious violations: Article 90.2(c) (i)). Pointing out that the second main function of the IFFC is to "facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and (Protocol I)", the author asks: how can that second function be carried through without a legal appreciation of the facts established?[13]

Quite apart from this difficulty, adverted to by Bothe and his co-authors, there is the question of the ultimate effectiveness of the IFFC in carrying out the "good offices" side of its functions. Article 90.5 provides that the IFFC is to report on its findings of fact to the Parties with appropriate recommendations; it may not, however, report its findings publicly, unless all the Parties to the conflict have requested it to do so (Article 90.5(c)).

Bothe records that the provision as to publicity was "one of the most controversial of the whole article". The form chosen — "the most restrictive" — is, according to the author, "based on the assessment that good offices may be successful only by applying silent diplomacy and by avoiding hurting any sensibility of States Parties".[14] The potential for influence through public opinion informed by a report by the IFFC would seem, therefore, to be substantially diminished. It should be noted, however, that a Party receiving a report from the IFFC adverse to another Party is not restrained by Protocol I from making public

11. "Humanitarian Law Conference: A Progress Report" (1976) 16 Int Com Jur Rev 51, 55.
12. *The Handling of International Disputes by Means of Inquiry* (1974).
13. Bothe, M.Partsch KJ and Solf WA, *New Rules for Victims of Armed Conflicts*, (1982), 544.
14. Ibid, 545.

the findings of the IFFC. Unfortunately, in determining whether it should make a declaration of acceptance in terms of Article 90, a Party will no doubt be influenced by this latter consideration, along with the other no less persuasive disincentive in Article 90.7 that the administrative expenses of the IFFC are to be met both by voluntary contributions and by compulsory contributions from Parties that have made declarations.

In the long run, it seems unlikely that the IFFC will develop as a major force in repressing violations, either through its "good offices" function in relation to the Parties to an armed conflict, or by providing a means of informing popular opinion in a way that might lead to public condemnation and an accompanying "mobilization of shame" against an offending Party.

That brings me to the second of the two main ways in which the system of international humanitarian law provides for sanctions — the principle of universal jurisdiction in relation to dealing with grave breaches.

2. *Universal penal jurisdiction in relation to grave breaches*

Röling asserts[15] that the "laws of war are strengthened, during a war, by the threat of reprisals, by public condemnation of violations, and by the prospect of prosecutions and punishment after the war". The public condemnation aspect has been touched on above; the question of reprisals is being dealt with in another paper. It is to the prospect of trial and punishment as a means of sanction in the system of international humanitarian law that I now turn.

As mentioned earlier, Röling has pointed out that international law relies heavily on national law: "One of the means (for assuring that international rules are sanctioned by national courts) is to . . . impose . . . the duty to apply universally . . . national penal provisions: the principle of universality, that is the universal application of national law".[16]

Violations of the laws of war are war crimes.[17] There was formerly, however, no established system of punishment and until 1949 there was no requirement arising out of an international convention that a State exercise universal jurisdiction for the purpose of trying and punishing the violators.[18] In 1949, the Geneva Conventions went a considerable way towards remedying that deficiency by placing Parties under an obligation to search for and try persons alleged to have committed, or ordered the commission of, certain atrocious war crimes called, in the Conventions, "grave breaches".[19]

"Grave breaches" are defined in each of the Conventions'[20] and include acts committed against persons or property protected by the Conventions and involving: wilful killing; torture or inhuman treatment, including biological

15. Ibid, 200.

16. Ibid, 201.

17. See Draper, GIAD, *The Red Cross Conventions*, (1958), 20.

18. Ibid.

19. First Convention; Article 49; Second Convention, Article 50; Third Convention, Article 129; Fourth Convention, Article 146.

20. Articles 50; 51; 130; and 147 respectively, although the Articles are not in identical forms.

21. See the Articles referred to in fn 19 above.

experiments; wilfully depriving a prisoner of war of a fair and regular trial; unlawful deportation of a protected person; and extensive, unjustified and wanton destruction of property.

Two things should be particularly noted. First, the universal penal jurisdiction is not made compulsory in relation to all violations. Only "grave breaches", i.e. the more heinous infractions of the Conventions, attract the universal jurisdiction provisions: parties are required, however, to "take measures necessary for the suppression of all (other) acts contrary to the provisions of the (Conventions)".

Second, criminal responsibility is placed only on those committing, or ordering to be committed, a grave breach of the Conventions. No penal responsibility attaches to those who have *omitted* to act to prevent the commission of a grave breach. I shall return later to this second point but, in the meantime, it may be useful to outline the scheme established by the conventions in relation to the repression of infractions.

3. *Repression of grave breaches*

The scheme of the Conventions, in relation to the repression of grave breaches, is briefly as follows. Each party undertakes to enact legislation so as to enable the imposition of effective penal sanctions on any persons, whatever their nationality, alleged to have committed or ordered the commission of a "grave breach" of any of the Conventions, within the meaning of the Convention concerned. Parties are required to search for such persons and to bring them before the courts, subject to certain safeguards of trial and defence.[22] The Conventions also require that national courts have conferred on them, by national legislation, penal jurisdiction that is of universal application in respect of all violators of the grave breaches provisions who are brought before them. By virtue of an Article common to each Convention, no party may absolve itself or any other party of liability incurred with respect to grave breaches of the conventions.[23]

Writing in 1958, Draper expressed the view that, in the Articles relating to grave breaches and universal penal jurisdiction, the Conventions had "made a contribution to the law of war the dimensions of which (could not) yet be fully determined".[24] Those dimensions have not, even now, been fully ascertained, but it is clear that, in two relatively short Articles, 86 and 87, Protocol I has considerably added to them. Before moving to a discussion of those Articles, which deal respectively with "Failure to Act" and "Duty of Commanders", it is worthwhile, I think, to outline briefly what may be described, in this regard, as the "linking" Article of Protocol I — Article 85 — "Repression of Breaches . . .".

4. *Protocol I: Article 85 — repression of breaches*

Article 85 of Protocol I is concerned with breaches of the Protocol and their repression. The Article was adopted by consensus in Plenary (delegations spoke

22. Ibid.

23. Articles 51; 52; 131 and 148 respectively.

24. Op cit, 105.

of a "delicately balanced consensus"[25]) but not all delegations were satisfied with it: some because it did not go far enough in listing what are to be grave breaches; others because it was said to be imprecise or would lead to difficulties with regard to national law.

Article 85 links relevant parts of the Conventions and Protocol I by providing, in part, that the provisions of the Conventions that relate to the repression of grave breaches, as supplemented by the Protocol, apply to the repression of grave breaches of the Protocol.

It also lists certain acts that are grave breaches of Protocol I. In this respect, Article 85 has to be read along with Article 11. 4 of that Protocol. Article 11 is concerned principally with the protection of the physical or mental health and integrity of persons in the power of an adverse party. Certain activities, such as medical experiments and physical mutilations, are prohibited unless justified in terms of generally accepted medical standards and other criteria set out in Article 11. Paragraph 4 of Article 11 provides that any violation of the prohibitions contained in the Article, amounting to a wilful act or omission that seriously endangers the health of a person covered by the Article, is to be a grave breach of Protocol I.

In addition to the grave breaches defined in Article 11, Article 85 categorizes certain other wilful acts as grave breaches of Protocol I. These include: acts defined as grave breaches in the Conventions if committed against prisoners of war and certain others protected by Articles 44, 45 and 73 of Protocol I; acts done wilfully in violation of the Protocol that cause death or serious injury to bodily health and also involve making the civilian population the object of attack; and certain other acts that, although not causing death or injury, are in violation of the Conventions or Protocol I, such as transferring part of the population of an occupied territory outside that territory or practising *apartheid* and associated degrading practices based on racial discrimination.

By paragraph 5 of Article 85, grave breaches of the Conventions and Protocol I are to be regarded as war crimes.

Articles 86 and 87 are complementary or correlative to Article 85. In Röling's view,[26] they "belong to the most important provisions of (Protocol I)"; their importance derives from what he describes as "an enormous extension of criminal responsibility in comparison with the provisions of the Conventions".

I noted above that the relevant Articles of the Conventions placed criminal responsibility only on persons who commit, or order to be committed, a grave breach of the Conventions. As Röling points out, however, the Conventions do not cover the case of authorities who tolerate the commission of grave breaches, or who, knowing that grave breaches are being committed, do nothing to stop that criminal activity. Articles 86 and 87 together overturn this situation.

5. *Articles 86 — failure to act; and 87 — duty of commanders*

Article 86 comprises two paragraphs only. Paragraph 1 requires High Contracting Parties and parties to the conflict to repress grave breaches, and take

25. Bothe, Partsch and Solf, op cit, 513; see also Conf docs CDDH/I/SR.64, para 6, CDDH/SR44 annex and CDDH/SR 58, para 91.

26. Op cit, 219.

measures necessary to suppress all other breaches, resulting from a failure to act when under a duty to do so. Bothe states[27] that this paragraph makes clear that "failure to act", i.e. an omission, may itself be a grave breach. This has evident implications for the operation of those provisions of the Conventions that relate generally to the repression of war crimes, such as the requirement to search for and try offenders.

Paragraph 2 of Article 86 is said by Bothe[28] to be based on the *Yamashita* case.[29] It will be recalled that Yamashita was tried and sentenced to death by a United States court in the Philippines, on the basis that he had not brought an end to the consistent committing of atrocities by troops under his command. Article 86.2 is to the effect that superior authority is not absolved from penal responsibility merely because a breach is committed by a subordinate, if the superior authority knew, or should have concluded in the circumstances, that the breach was being or about to be committed, but did not take all feasible measures to prevent or repress its commission.

Article 87 is addressed to Governments, which are required to ensure that their military commanders are instructed to prevent and suppress breaches, and to make certain that their subordinates are aware of their obligations under the Conventions and Protocol I. Commanders are to be required, once they become aware that a breach has been or is about to be committed, to initiate such steps as are necessary to prevent such a breach or to take disciplinary or penal action against the offenders. There is a duty on Governments to ensure that their military commanders comply with the requirements of Article 87. While it may be true, as Röling asserts,[30] that the provisions of Protocol I do not create new law on the point of responsibility for omission, but merely codify the rules applied at the Tokyo and Nuremberg trials, the combined effect of Articles 86 and 87 is to strike at a major source of consistent criminality on the part of armed forces in time of war.

Particularly in the case of what Röling describes as "system criminality" (crimes committed in the national interest and in accordance with general official policy, such as giving no quarter or terrorizing populations),[31] but also in the case of crimes committed regularly by individual members of the armed forces of a party, consistent criminality in time of war frequently stems from an official attitude which "permits, tolerates and condones violations of the laws of war".[32]

It is this root source, "conspicuous indifference", as Röling puts it, that is attacked by the Tokyo and Nuremberg rules, and the value of codification in Articles 86 and 87, it is suggested, is that Article 1 of the four Conventions and Article 1.1. of Protocol I are brought into play. Those Articles together require Parties to respect and ensure respect for the Conventions and Protocol I *in all circumstances*. As Draper has pointed out in another but related context,[33] these

27. Bothe, Partsch and Solf, op cit, 524.
28. Ibid, 525.
29. (1946) 4 LRTWC 1.
30. Op cit, 208.
31. Ibid, 203.
32. Ibid, 204.
33. Op cit, 8.

last three words mean that the Conventions and Protocol must be respected in peace as well as in war and, once the conditions for their application have been satisfied, "no Party . . . can legitimately advance any pretext for their non-observance".

Conclusion

I have outlined above, in somewhat attenuated form, the machinery operating within the system of international humanitarian law for the repression of violations. In providing for sanctions, international humanitarian law would seem to satisfy Hart's particular criterion of a legal system mentioned above. A remaining question is whether the machinery is effective. Unfortunately, this question is, in time of peace, frequently put aside as being abstract because, in peace, the problems that international humanitarian law addresses are abstruse, remote, irrelevant. In time of war, however, they harden, become real, immediate. For the prisoner of war, there is nothing abstract about the prospect of torture or biological experimentation; for the civilian, there is nothing remote about the possibility of enslavement or enforced transfer to another country. While in time of peace these notions may seem overly dramatic, almost fanciful, recent history evidences their reality. For this reason, the enforcement of international humanitarian law has to be made effective. Perhaps, therefore, the more important and useful question is — how?

I do not pretend to have the complete answer to this question. I would, however, propose for consideration a possible means of helping ensure effectiveness of enforcement that would seem to be worth exploring.

In his book on *State and Class — A Sociology of International Affairs*, Pettman predicates the existence, in something more than a nominal sense, of a contemporary world society having as one of its characteristics a common body of ideas and values. In the the field of human rights generally, Pettman posits a "moral universalism" involving globally shared norms (many of which have been codified in international instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political rights, the four Geneva Conventions and Protocol I). Pettman notes,[34] in effect, that there are antecedents for this concept (such as the Platonic idea, transmitted by Grotius) of "an over-arching body of ultimate values that all might apprehend if they could only be brought to recognize them".

Consistent with my propositions, somewhat briefly set out above under the heading "extra-systemic means of enforcement", Pettman asserts[35] that, in relation to the enforcement of human rights generally, "publicity is a weapon of sorts and a number of non-government groups . . . have used the device of selective and open testimony to win change . . . And mobilizing some sense of public opinion may make it possible in certain cases to exploit global interdependencies to humane ends".

My personal view is that an effective way of constraining governments and their armed forces to observe the requirements and proscriptions of international

34. Pettman, R, *State and Class: A Sociology of International Affairs*, (1979), 52.

35. Ibid, 86 et seq.

humanitarian law in time of war is to ensure that the value system of the world society — to the extent that one may exist or be developing — incorporates the values reflected by the precepts of international humanitarian law. The development of globally shared norms in relation to international humanitarian law should go far towards creating a climate of international public opinion such that no government, party to a conflict, will dare allow serious infractions to take place or go unpunished. At best, of course, (and feasibly) the inculcation of these values into the international public mind may in itself reduce by a significant degree the incidence of serious infractions by members of armed forces.

On the basis of this proposition (which, by reason of its brevity, I fear sounds somewhat facile and perhaps a little ingenuous), I suggest that amongst the most vital provisions of Protocol I is that relating to dissemination — Article 83. That article requires High Contracting Parties, in time of peace as well as of armed conflict, to disseminate the Conventions and the Protocol as widely as possible in their countries and to include a study of these instruments in programs of military instruction, and to encourage study of them by the civilian population.