Chapter 28
Instructions for the Armed Forces*

1 Introduction

From the vantage point of the international lawyer, the obligation to implement the rules and principles of the international law of armed conflict rests squarely on the State, in its quality as a subject of international law. To discharge its duties in this respect, a variety of means are at its disposal, such as: measures of a legislative order, including instructions for the armed forces; programmes for the dissemination of knowledge of the law; recruitment and training of qualified personnel, inter alia as legal advisers to or in the armed forces; establishment and maintenance of a disciplinary system suitable to enforce compliance with the applicable rules of international humanitarian law; and, last but not least, repression of violations.

The need for a State to implement its obligations under the international law of armed conflict assumes real urgency once it is actually involved in such a conflict. This applies to its primary obligations (to keep prisoners alive, not to mount attacks against the civilian population or civilian objects, etc.) as much as to those of a secondary nature; and in the latter category fall the national measures of application. Yet for these measures to have their full effect in time of armed conflict they must have been prepared in time of peace. The treaties in force recognize this in a number of places.

The requirement of peacetime preparation for what often may be perceived as a rather far-fetched eventuality may be expected to receive scant attention in those developing States whose legislative and executive branches are more than fully occupied with the many pressing problems arising from their recently acquired independence. It is painfully obvious, however, that quite a few developed States which have no such excuse, are equally inclined to regard the taking of measures for the implementation of the law of armed conflict as a job that can be postponed till such time as the need becomes really acute. In either case, it is necessary constantly to remind States of their obligations in this regard.

The focus of this paper is primarily on instructions for the armed forces, as a means to bring the abstract rules and principles of the international law of armed conflict to bear on the concrete events of war by influencing the behaviour of those many individuals who, as members of the armed forces, may be required to cope with the variegated reality of the conduct of war.

2 Practice and Law

How widely these realities may differ need not be explained to the members of this society, many of whom are experienced professional soldiers. Take the diverse theatres of war, land, sea, air, and space; the types of engagement, from hand-to-hand combat to the missile attack on an invisible target; the differences in environment: day or night; clear or fog; desert, jungle or the streets of an old city; the open ocean or an enclosed sea like the Persian Gulf. Military tactics must be adapted to every new situation and military behaviour adjusted accordingly.

As if all this were not enough, matters are complicated further when, as so often happens, the character of the situation remains unclear: is it an armed conflict and, if so, an international or internal one? Is one's State a party to the conflict, or is it neutral? Again, do certain acts of violence represent (lawful or unlawful) acts of war, or are they criminal acts of terrorism, committed outside the scope of the law of armed conflict?

The question may be asked whether the law cannot be adapted to this multifaceted reality: could it not, like military tactics, be made to reflect the needs of the various types of situation? Sure enough, as recently as the 1970s, at the drafting stage of the Additional Protocols, hopes were entertained in some quarters that it would prove possible to couch the rules in these instruments in unambiguous language, readily applicable by the military.

It needs little reflection, though, to realize that no set of internationally agreed rules for the conduct of armed conflict could ever be devised that would provide ready-made solutions for each and every concrete instance that may arise in practice. As any other body of law, the international law of armed conflict can do no more than provide generalized, more or less abstract rules of conduct which focus on select features of possible situations. Even so, it is quite possible for given rules to be eminently suitable for direct application by the military, if not at the level of the private soldier, then at least at that of responsible command. Whether this is in effect the case with respect to this or the other rule may be a matter of some controversy, though.

3 Rules of Treaty Law as Model Instructions?

One way to decide the issue is for a State to lay down what it regards as the applicable rules of international law in instructions for the armed forces. An early and rightly famous example is provided by the Instructions for the Government