Chapter 46

The Dynamic but Complex Relationship between International Penal Law and International Humanitarian Law

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Introduction

International humanitarian law has been defined as “international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of Parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by the conflict”. 1 Throughout its history international humanitarian law – or the law of war, as it is also known – has been criticized mostly for the weakness of the means of enforcing it. This reality has even raised the question of whether we can even call it law. In an oft-quoted warning, Hersch Lauterpacht told lawyers involved in developing this law to work “with a feeling of humility springing from the knowledge that if international law is in some ways at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law”. 2

Though this obvious flaw has much to do with the reality of an international system based on the sovereignty of each State, it has always posed a challenge to the defenders of humanitarian law. Among the possible means of boosting the law’s implementation and authority, at both the national and international levels, penal sanctions have always seemed promising. The present article will study this possibility and, in particular, recent and important developments in international penal justice, while examining certain difficulties inherent to penal sanctions and the dilemmas faced by humanitarian organizations, in particular the ICRC.

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I. Historical background

A. The origins of international humanitarian law

The beginnings of modern international humanitarian law are found in the mid-nineteenth century. War has naturally existed as long as homo sapiens has walked the earth. As Geoffrey Best has written, “an inclination towards restraints and prohibitions in war (is) a normal aspiration, more or less as old as war itself”. Since ancient times there have been numerous rules – sometimes customary – ensuring the protection of people affected by war and setting limits to the means of warfare used, though rules intended to alleviate suffering caused by war were either religious in nature or introduced in ad hoc bilateral treaties.

What constituted an innovation from the mid-1800s on was the goal of codifying a body of rules valid for the whole of mankind, to do this in the form of multilateral treaties open to signature by all States (though at that time, universality was still a relative concept given the distinction between what those States considered the “civilized nations” and the rest of the world).

Four documents may be viewed as belonging to the texts that gave birth to the era of modern international humanitarian law:

- the 1856 Paris Declaration Respecting Maritime Law;
- the 1863 Instructions for the Government of Armies of the United States in the Field;
- the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field; and
- the St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight.

The Paris Declaration is important because, even if its subject matter – harmonization of rules governing the capture of property at sea – was relatively limited, it appears to have been “the first open-ended multilateral treaty which, according to its terms, was open to accession by other states”.

The 1863 Instructions were drawn up by Francis Lieber at the request of President Abraham Lincoln during the US Civil War and then signed into law by Lincoln. They represent “the first attempt to codify the laws of war”.

The original Geneva Convention, adopted following publication of Henry

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4 This text does not deal with the historical background to international humanitarian law. Among many fine publications on the subject, readers are referred to the useful summary presented in Chapters 1 to 4 (pp.23-97) of the recent book by: Harouel-Bureloup, Véronique, Traité de droit humanitaire, Presse Universitaire de France, Paris, 2005.
7 See Schindler and Toman, op. cit. footnote 3, p.3.