



**Canadian Council on International Law**  
**Conseil canadien de droit international**

**Panel 3C - 150 Years of the Laws of War**

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**Moderator:** Ellen Policinski, Editor of the International Review of the Red Cross, International Committee of the Red Cross

**Speakers:**

François Bugnion, Member of the Governing Board, International Committee of the Red Cross

Marco Sassòli, Professor of International Law, University of Geneva

Lieutenant Colonel Paul Frost, Director of International and Operational Law, Office of the Judge Advocate General

**Rapporteur:** Sara Eve Levac, LL.M.

Structured as a four-part Q&A, the panel on the 150 years of international humanitarian law (IHL) looked back on the evolution of the law of armed conflict, from when Henry Dunant discovered wounded combatants left on the battlefield in Solferino up until today when warfare can be broadcasted in real time. Through this look at history, the panel demystified the legal challenges of modern warfare and discussed how IHL is still relevant in today's armed conflicts.

**1. Which single development since 1864 has changed IHL the most?**

The panelists identified the 1949 *Geneva Conventions* and the 1977 *Additional Protocols* as the most important developments in the past 150 years.

First, the 1949 *Geneva Conventions* are the basis of humanitarian protection. They defined the protection allowed to the wounded, sick and shipwrecked, to prisoners of war and to civilians. The *Geneva Conventions* are the bedrock upon which protection has been developed up until today. Common Article 3 of the *Geneva Conventions*, which applies in situations of non-international armed conflict, is also immensely important. Its drafting and inclusion in the *Geneva Conventions* was a consequence of the Spanish Civil War. Common Article 3 may be regarded as the most important provision in IHL since 1949, as armed conflicts are now mostly non-international in nature.

Second, the 1977 *Additional Protocols* codify some norms that can be considered part of customary international law (for example: distinction and proportionality). On the other hand, they strike a balance between military necessity in the conduct of armed conflicts and humanitarian protection. The *Additional Protocols* also extended protection to new categories of victims and conflicts. They were adopted in the context of decolonization and reflected the reality of the armed conflicts in this period. In this sense, the 1977 *Additional Protocols* legitimized IHL for newly independent States.

On a final note, although no updates have been adopted to the 1949 *Geneva Conventions* and to the 1977 *Additional Protocols* in the past forty years, IHL is still highly relevant. Never has this body of law been as widely known as today. IHL is now well disseminated. Military personnel receive better IHL training today. Academics devote their career to the study of this body of law and publications on the subject have flourished. International criminal tribunals created in the past 25 years now have jurisdiction over violations of IHL.

## **2. Are we at a low point for the respect of IHL?**

According to the panelists, this is a false impression. IHL is not more readily ignored today than in the past. There were a plethora of IHL violations during, for example, World War II, the Armenian and Rwandan genocides and under the Khmer Rouge regime. The misconception may be attributable to two factors. First, IHL violations are more widely reported than instances of IHL compliance. Reports also often characterize civilian casualties as war crimes while it is not necessarily the case. This amplifies the feeling that IHL violations are the norm in modern warfare. Second, the misconception may be due to our world's interconnectedness. In the past, violations of the law of armed conflict occurred in secrecy, behind closed doors. Nowadays, information on violations of IHL is more readily available because of how easily social and conventional media can be accessed.

One thing to emphasize is that the erroneous perception that IHL is widely ignored can lead to more violations. The challenges of enforcing IHL could lead to more violations as well. Current institutions that have criminal jurisdiction over violations of IHL, such as national courts and international criminal tribunals, can have a limited reach, whether it be because of limited resources or jurisdiction. If parties to an armed conflict are convinced that IHL is not being complied with or that there will be no consequences to IHL violations, they may be enticed not to respect it.

It is then crucial to report on IHL compliance, to show that it is the norm rather than the exception. There have already been some initiatives in that sense, such as the "*IHL in action*" online database which compiles instances where parties to armed conflicts have followed the rules of international humanitarian law.

## **3. Has the "war on terror" created a new global battlefield that the existing framework of IHL cannot adequately address?**

Spreading terror is not a new phenomenon. During the Crusades, assassinations were used in Western Syria as a means to remind people to keep their distance. The conditions leading up to World War I are another example that shows that this tactic is not a novelty. What is new, however, is the emergence of an international network capable of conducting attacks on a global scale.

Nonetheless, IHL is capable of addressing the novel challenges of modern warfare, as it is an adaptable legal framework. For example, one need only look at Article 36 of *Additional Protocol I* - which asks that a party determine if the use of a new weapon would be prohibited under IHL before employing it<sup>1</sup> - to see that the current body of IHL is sufficiently flexible to regulate any new means and methods of warfare. In addition, IHL has overarching principles (e.g. proportionality, precaution, distinction) which can apply to the full range of armed conflicts.

With regard to the application of IHL in the context of the war on terror, it must first be recalled that IHL only applies in situations of armed conflict. To trigger the application of this body of law, organized armed groups must be present. Consequently, a single person unaffiliated with an armed group conducting an attack would not give rise to the application of IHL. Secondly, respect for IHL is not subject to reciprocity. Therefore, any response to a terror attack needs to respect the laws of war. Finally, IHL applies between parties to an armed conflict. A party should thus refrain from branding another as an outlaw. Such discourse may lead to violations of IHL. Indeed, the belligerent branded as an outlaw might conclude that there is no expectation that it will apply the law of armed conflicts.

#### **4. Are today's wars, fought largely by proxy, a new phenomenon?**

They are not a new phenomenon. The Cold War is an illustration of this. Although there is an increasing diversity of actors taking part in armed conflicts today (private military security contractors, States, non-State actors, etc.), each of these actors needs to comply with the rules of IHL. Even if wars can be fought by proxy, the panel underlined that it is not necessarily because a non-State armed group is supported by another State that the legal regime of international armed conflicts will automatically apply – what matters is whether there exists a relationship of overall control between the supporting State and its proxy, and that the latter is fighting against another State or State-controlled actor.

Common Article 1 of the *Geneva Conventions* provides that parties “undertake to respect and ensure respect”<sup>2</sup> of IHL. This creates an obligation of due diligence which is of particular interest if a war is fought by proxy. For example, a State must ensure that the private military security contractors it hired respect the rules of IHL. This due diligence obligation also raises questions as to how to practically ensure that IHL is complied with. For example, in advise and assist missions where local forces or groups are trained by the armed forces of a State, how can trainers

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<sup>1</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, June 8, 1977, 1125 UNTS 3, art. 36.

<sup>2</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 75 UNTS 31 (12 August 1949), art. 1; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 75 UNTS 85 (12 August 1949), art. 1; *Geneva Convention Relative to the Treatment of Prisoners of War*, 75 UNTS 135 (12 August 1949), art. 1; *Geneva Convention Relative to the Protection of Civilian Persons in the Time of War*, 75 UNTS 287 (12 August 1949), art. 1.

ensure that the trainees will comply with the rules of IHL? What should the trainers do when a violation is reported?